

Anticorruption Reform in Rule of Law Programs

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Summary

The inclusion of anticorruption issues in the reform of Rule of Law programs has seen noticeable development during the last decades. This has been linked closely with the legal and judicial reforms waves developed within the same period.

While corruption has always been known to be a problem undermining the effectiveness of judicial and legal systems, the first wave of reform in rule of law programs, which took place in the 1970s to early 1990s, focused mainly on modernizing and improving the independence of the judicial branch of government and not directly on combating corruption.

From the 1960s through the 1970s and 1980s corruption was considered an internal political problem and it was reform of rule of law programs was opposed by governments in recipient countries. This, among other reasons, restrained international agencies and donors from including anticorruption measures directly rule of law programs. Instead problems of corruption were only addressed indirectly through different actions taken toward modernizing or strengthening the institutional capacity of state run legal organizations.

It was not until the 1990s that controlling corruption came to be considered an essential element of nearly all of the World Bank and other major donors' legal activities as well as a main topic in scholars' papers. Since then, anticorruption issues have become a core component included in most of the judicial reform programs performed around the world.

One of the main issues discussed in this paper is the question of how broad the horizon of reform should be in order to assess and reshape the way in which corruption is conceptualized and treated. Research on reforms in rule of law programs has shown a certain degree of failure in improving integrity and reducing corruption within the judiciary in many developing countries. Hence, research suggests the need to rethink or restyle previous approaches. The paper thus includes an analysis of how to improve diagnosis of corruption. Furthermore the paper includes a discussion on the effects of involving civil society with regards to corruption issues, the influence informal networks have on judiciaries and the important role played by free and responsible media.

1 Introduction

1. This paper underscores some of the key findings of the last two decades of international efforts at promoting the rule of law in countries that are in the process of becoming democracies ("democratizing countries") and transition economies. It explores the intricate link between legal and judicial reform and anticorruption efforts.

2. Over the last twenty to thirty years rule of law programs have undergone a significant shift in approach to combating corruption. Prior to the mid 1990s, donors and IFIs (International Financial Institutions) were reluctant to confront recipient countries on corruption issues, but instead addressed the problem from a governance perspective, focusing programs on administrative reforms, the modernization or professionalization of the judiciary and the reinforcement of judicial independence. As a result, however, of the recent anticorruption movement rule of law programs have expanded their focus to include specific anticorruption goals and tools. This paper reviews how the approach to anticorruption in rule of law programs has evolved and provides some suggestions of the areas in which future efforts will need to be focused if real progress against corruption in the judicial and legal sectors is to be made. In particular, the involvement of civil society, the promotion of a free and responsible media and better diagnosis of the corruption problem are all areas that are emerging as central to both rule of law and the reduction of corruption. The paper also provides a brief background to the emerging evidence on 'state capture' and how a better understanding of informal institutions and networks will help design reforms that shape the way judiciaries behave.

2 Rule of Law and the Development Agenda: A Theoretical Evolution

3. 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, increasing the independence of judicial systems, and court modernization.

4. A first wave of legal and judicial reform took place in the 1960s. Guided by an unconfirmed premise that law could be the engine of social change, a movement led by prominent United States based legal scholars, 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 basis of this movement was to move towards a more policy oriented judicial system. The target audience for these programs was the policymaking elite in law schools throughout Latin America and some parts of Sub-Saharan Africa.

5. In the mid 1970s, a change in the underlying economic paradigm, in particular globalization and the failed attempt by donors to transplant western concepts of legal and institutional reforms on developing countries, led the "law and development" promoters to abandon their efforts (Trubek and Galanter 1974; Trubek 2003).

6. A second wave of legal and judicial reform efforts emerged in the late 1980s. In the mid-1980s, the Washington consensus revived faith in the development potential of the law. The idea

of a direct relationship between a functional legal system 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).

7. Rule of law as a development strategy has been conceptualized progressively along two main axis: economic development and political democratization.

8. The economic development argument was anchored on the first axis in the belief that investments in certain countries would be more appealing if property right laws were clearly determined, consistently applied and effectively enforced. This argument was part of a wider 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 theory gained wider acceptance (North 1990.) The study continues in a convincing manner to argue the effects of interconnection between rule of law and economic growth.

9. On the second axis, the importance of rule of law in promoting democracy has also generated substantial support. Access to a legal and judicial system to enforce individual and property laws has become a human right and an essential prerequisite for the sustainability of a functioning market economy. Without a functional legal sector any individual in a democracy can be threatened. Data supporting this connection has lead to rule of law programs becoming an integral part of the development agenda for the World Bank and most other international donors.

10. Needless to say, globalization and a large increase in transnational trade favored this view. Although business opportunities are the primary factor considered by foreign investors when deciding overseas investments, the legal and judicial systems, including the enforcement of property right laws, the delivery of public goods and the transparency of the flow of information within the host country are important secondary factors (Hewko 2002).

11. Since the late 1980s, as a result of the evidence supporting the importance of rule of law in the overall development agenda, 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.) 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 rule of law in developing countries and transition economies (Santiso 2003a.) The promotion of rule of law during the last two decades has thus generated important lessons, some of them learned, others not.

3 Anticorruption and Rule of Law

12. There are two distinct periods that have shaped rule of law programs. The first wave of reforms, which took place during the 1970s, 80s and early 1990s, focused on modernizing and improving the independence of the judicial branch of government. Combating corruption was not an explicit goal, but a secondary and unstated goal in overall the objectives of improving governance and institutions. In the mid 1990s, however, there was a significant change of approach. The public acknowledgment by donors and IFI’s that corruption itself was one of the

single largest problems faced by developing countries, led to the shift of focus of rule of law programs to include specific anticorruption goals and activities. This transition to a more direct approach to fighting corruption in the law received greater attention at both international and national levels within the legal and judicial sector. This process, however, has been a gradual one and much work related to finding effective solutions to judicial corruption remains to be done. Nevertheless, the fact that the issue is now openly being discussed and debated is in itself a positive step.

13. This section provides a brief background to the two periods and the accompanying changes in attitudes and approaches to anticorruption reform. It aims to provide a context for discussion for the following sections in which some of the reform strategies for combating corruption in the judicial and legal sector that emerged from both of these periods are presented.

Past Approach to Anticorruption

14. While corruption has always been known to be a problem undermining the effectiveness of the judicial and legal systems, the inclusion of specific anticorruption remedies in rule of law reform programs have only been included recently. There were at least three 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 domains of such 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, were explicitly prohibited from interfering in the political affairs of their members and could only support projects directly linked to economic development.

15. Secondly, at that time, corruption was not yet unanimously considered an obstacle to development. Moreover, before the democratic wave of the 1980s, a strand of development literature argued that some types of corruption could indeed stimulate development. While this argument evolved in the context of authoritarian regimes or administrations promoting import-substitution policies, it generated doubt about the real impact of corruption. (Leff, 1979; Huntington, 1964). These considerations kept many donors from joining anticorruption efforts during the first decade of “rule of law” programs. It took almost a decade for corruption to become accepted widely as a critical issue for democratic consolidation and economic development.

16. Thirdly, the involvement of donors in anticorruption efforts was opposed by governments in recipient countries. The main reasons were that these governments felt that this was interference in domestic affairs and leaders in recipient countries were reluctant to open their own behavior to scrutiny.

17. External reformers therefore had little choice but to address the problem of corruption indirectly through programs aimed at modernizing or strengthening the institutional capacity of legal organizations run by the State. The goals of these programs were to improve transparency, reduce discretion, minimize procedural delays and decrease the level of political influence. In this regard, reforming the administrative and personnel processes of the judiciary was a major focal point. In particular improved case tracking, more accurate and transparent record-keeping, and simplifying and standardizing complicated and inconsistent administrative procedures were changes all thought to reduce the level of discretion held by judicial members. This indirect approach allowed the World Bank to pursue anticorruption objectives while remaining within the boundaries of its restrictive mandate (Santiso, 2000).

Current Approach to Anticorruption

18. In the course of the 1990s, however, the anticorruption movement took off. Donors, IFIs and anticorruption NGOs all started discussing the problem of corruption and its negative impact on development goals openly. A large body of theoretical and empirical findings demonstrated the negative impact of corruption on both economic growth and democratic processes. On top of this, at the 1996 World Bank annual meeting, President Wolfensohn declared that corruption was one of the single largest impediments to development. Since then, controlling corruption has become an essential element of nearly all the activities of the Bank and other major donors and a core component of all judicial reform programs.

19. This inflection in approach also paralleled a general rejection of the ‘one size fits all’ strategy to development. With the promotion of tailored and locally-owned reform efforts rule of law programs were also broadened. In particular, the incorporation of non-state actors, such as civil society and the media, in judicial reform programs was a significant deviation from the previous period, where reforms were focused almost exclusively on state institutions. Also, understanding the local context through diagnostic tools became a critical component to developing more effective and better targeted reforms.

4 Addressing Corruption Indirectly: Modernization, Professionalization and Judicial Independence

20. The following two sections provide a description of the types of rule of law programs that evolved as a result of the thinking outlined above. The list is not exhaustive, but rather a representative account of how corruption was understood and conceptualized as part of the reform agenda. This first section describes some of the reforms that were primarily aimed at improving transparency or efficiency, but which were also felt to contribute to deterring or detecting corruption. These reforms were particularly popular during the period when donors were unwilling to openly confront recipient countries with corruption issues. The second session looks at the reform efforts that were introduced in more recent times in response to the anticorruption movement.

Independence of the Judiciary

21. An independent judiciary is fundamental to the overall integrity of the rule of law. It is characterized by a situation where judges make decisions on legal cases without regard to political considerations or sympathies, and without the undue influence or pressure by other branches of government. Furthermore, the decisions of these judges should be enforced truthfully and in full, regardless of their impact on government. Moreover, the independence of the judges entails that they should be protected from reprisals. The promotion of an impartial authority to oversee government, adjudicate disputes and enforce contracts dates back to the Enlightenment movement of the 18th Century.

22. More 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). In a study by Feld and Voigt (2002) a strong correlation between judicial independence and economic growth was found, although the causal direction of such correlation remains uncertain.

23. As a result of this and other evidence supporting the importance of judicial independence to economic and other development goals, judicial independence has become a key objective in the rule of law programs of most donors and IFIs.

24. In many countries the independence of the courts has been impeded by the undue influence of actors from the executive or legislative branches of government. When the level of this influence is significant the consequences for a society can be particularly damaging. While formal mechanisms may be in place to ensure the separation of powers between the different branches of government, this may not be enough. Informal patronage networks, a closed culture, poor personnel and administrative processes and weak oversight of the judicial appointment process can all lead to a degradation of judicial independence. For this reason a large bulk of research and effort has been directed towards understanding which types of reforms can address this problem.

25. The politicization of the judicial system is thought to be one of the main causes of the loss of independence of the judiciaries and of the increased levels of corruption. Sometimes judges are appointed by different political parties, or as a result of a delicate bargaining process between or amongst political parties. Those parties, or partisan factions, responsible for the appointment expect the passive acquiescence, active cooperation and even total allegiance of the appointed judge. The deference of judges to their political godfathers can be reflected in various ways, the most common is the acceptance of suggested legal outcomes leading to pre-determined decisions or the speeding up (or slowing down) of certain cases.

26. Politicization of the judiciary is particularly prominent in Latin America. Impatient governments wanting to capture the administration of justice and neutralize the accountability functions of the court regularly interfere in the administration of judicial appointments. This has had the negative effect of undermining judicial trustworthiness and social legitimacy (Gargarella et al, 2003). Indeed, Latin America has been characterized by both the “politicization of the judiciary” and the “judicialization of politics” (Vianna et al., 1999). For some countries, the interference in appointments by incoming governments has contributed to pliant judiciaries, or “politically addicted” automatic majorities (such as in the case of Argentina in the 1990s (Santiso 2003a)).

27. Reforms aimed at removing these and other types of political influence have focused on the implementation of external monitoring or appointment mechanisms. Several Latin American countries and some Eastern European countries have more recently moved from a political appointment procedure, usually by the Ministry of Justice, to an allegedly more independent and pluralist mechanism governed by “judicial councils”. The membership of these councils usually includes judges, members of parliament, bar associations, and, at times, legal and paralegal non government organizations and renowned academic scholars.

28. Unfortunately, these institutional reforms have neither automatically nor necessarily improved the situation. As Hammergren (2002a) aptly points out, the main problem was not always related to the independence of the judiciary, but rather to its institutionalization. At least in Latin America, where judicial councils were widely adopted *de jure* or ‘in the books’, the formal insulation of judges from other branches of government has not per se led to substantial changes, as the underlying logics of patronage and clientelism have tended to endure. In Argentina, for example, the creation of a judicial council, and the powers with which it has been endowed, has been hampered by lack of political will. While formally established in 1994, the council only started to function in 1998 due to its mandate and powers being contested by the judicial hierarchy, in particular the Supreme Court.

29. The experience with judicial councils regarding implications for anticorruption reform are, nonetheless, important. The creation of these councils, and more importantly, the debates over their composition and function – in particular whether or not they should administer the judicial budget – has shed light on the influence informal relationships and patronage networks have on judicial governance. Understanding these dynamics is essential for deciphering how such social-economic networks interact with the judiciary (Cartier Bresson 1997). Also, assigning the appointment of judges to one single body has led to some benefits increasing the transparency of the selection process. While this may not necessarily mean a proportional increase in the quality of judges, the added competition to the appointment process “eliminated many of the under-the-table machinations that went before” (Hammergren 2002a).

30. Moreover, while the judiciary is expected to be politically independent, it nevertheless remains a critical political actor. Neither the government nor political parties can be blamed solely for undermining judicial independence. The judiciary inserts itself into the broader and complex web of social networks that overlay official governance structures. These networks are nourished by kin, clan, 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).

31. The study of the informal structures that drive judicial behavior has therefore gained significant interest by reformers seeking better ways to improve independence and reduce corruption. This and the related issue of ‘state capture’ are discussed in more detail in the following section.

Professionalization of the Judiciary

32. Judicial independence is also thought to be improved by implementing reforms aimed at ‘professionalizing’ the judicial sector. Low motivation and poor training were seen as major contributors to the low levels of integrity that fueled both political and administrative corruption within the judiciary. Reforms therefore started to target the professional skills and ethical standards of judicial staff, including judges. This tended to not only improve the ability of judicial staff to discharge their duties, but also to enhance a sense of responsibility, self-esteem and create a better “esprit de corps.” In countries where corruption is prevalent and external scrutiny of the judiciary lacking, generating both a collegial and ethical environment was thought to be a key means to improving overall levels of integrity.

33. Codes of conduct and formal disciplinary systems enforcing standards in a fair and consistent way were amongst the more popular initiatives believed to enhance judicial integrity and credibility. Unfortunately, these types of codes have had limited success. They are often met with high levels of cynicism by non-judicial actors who see them as either replicating existing criminal laws or as not having been adopted in practice and therefore lacking impact (Hammergreen, 2004: 13). These codes can also lead to increased confusion if adequate consultation with stakeholders is not undertaken. Nevertheless, developing codes or standards may be a useful process, if for no other reason than to start a dialogue on corruption and ethical conduct that is critical to further reforms.

34. Other professionalization strategies included providing adequate work-space and sufficient resources, including means of transportation, information services, and protection. Such

benefits work to empower judges and improve the motivation of the legal and paralegal profession.

35. In Latin America, USAID sponsored the creation of a range of judicial and legal training initiatives. These included the establishment of more than fourteen judicial schools and sponsored training programs for members of the judiciary in eighteen countries (Sarles 2001). The main rationale behind the programs was that a professional judicial career and continuous training of legal and paralegal staff were necessary not only for enforcing new substantive laws (which were drafted in the framework of these projects), but also to empower the judiciary, which was usually the weakest branch of the government.

Accountability through Performance

36. 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). Without accountability corruption and other unethical acts are more likely to flourish. For this reason, mechanisms to monitor and measure the performance of judicial staff are required to balance out the increased powers judiciaries enjoy with independence.

37. The paradox of independence and autonomy is best illustrated by the case of the Brazilian judiciary. As a result of the 1988 constitution the judiciary was granted unprecedented levels of independence. The courts were given total control over their administrative, personnel and disciplinary affairs, as well as near total control over their budget. The democratic constitution clearly succeeded in isolating the judiciary from political interference. However, the central question was not whether the judiciary lacked independence, but rather whether it had become too autonomous, lacking effective mechanisms of external accountability and control. The key challenge resided in finding the most adequate balance between independence and accountability. The paradox was, however, that excessive independence made it particularly difficult to reform the judiciary.

38. Setting transparent performance indicators to guide and monitor the performance of judicial staff members, in particular judges, can enhance accountability and counter the negative impact of increased independence. Furthermore performance indicators pertaining to timelines, consistency with similar cases and substantive laws are also thought to reduce opportunities for corruption within the judiciary. Moreover, when these performance indicators are used to determine promotion, compensation, and salary increase, the incentive for improved judicial behavior should be even greater.

39. Unfortunately, establishing an effective set of indicators is a difficult task, both in terms of design and implementation. In particular, adopting performance measures that can openly be scrutinized by external parties usually meets considerable resistance by the judicial hierarchy. However, without external monitoring the use of a performance system may have little impact. The closed nature of many court systems (particularly amongst senior judicial members or particularly within senior judicial ranks) tends to cover up performance issues of colleagues. Indeed performance indicators managed solely by the judicial hierarchy can contribute to building patronage networks, with careers of lower level judges being held hostage by higher level judges responsible for the management of promotions and appointments.

40. It is not surprising that the judicial hierarchy tends to oppose the implementation of performance management systems as it undermines its discretionary powers. As Hammengren

(2002a) emphasizes, judges usually interpret monitoring judicial performance as a threat to their fiercely defended independence. Indeed, the rejection of the legal principle of *stare decisis* - 'stand by what has been decided' - by many judicial systems in Latin America, such as in Argentina or Brazil, provides individual judges with greater scope for arbitrary decisions on a case-by-case basis (Santiso 2003b.) This gives individual judges extraordinary power to shape judicial decisions that can have a significant impact on the polity and the economy.

41. In many countries, higher-level courts, in particular Supreme Courts, have fiercely resisted any encroachment on 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 protection of its administrative, personnel and disciplinary affairs and appeals to the principle of the separation of powers enshrined in the 1988 Constitution.

42. In light of this resistance, reformers are attempting to conceptualize judicial performance in a way that cannot be challenged as undermining judicial independence. At this point in time, there is no definitive conclusion as to how this should be done. However, the involvement of civil society in designing, implementing and monitoring judicial performance is thought to be a crucial component. Potentially, this not only circumvents the issue of 'jurisdictional encroachment' that the involvement of the executive and legislative brings, but also generates a greater sense of legitimacy and faith in the effectiveness of the court system among citizens who rely on it to safeguard their own interests.

Case Management and Procedural Law

43. 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).

44. These situations occur because of the absence of effective case control systems and case tracking mechanisms. In this type of context, 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 standards through quality control techniques is therefore essential to identifying irregularities, deterring tampering, and providing efficiency-enhancing incentives.

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

Technology

46. Traditional judicial reforms have also endeavored to modernize the technological infrastructure of judicial institutions. Gaps in information systems and legal inconsistencies have been identified as major sources contributing to excessive levels of discretion. The lack of sufficient record-keeping, case-tracking, file-management, docketing, and administrative follow-up all contribute to corruption. Without proper infrastructure members of the judiciary who

decide to engage in corrupt behavior can do so knowing that it is unlikely that their actions are will be reviewed or questioned.

47. The implementation of information technology (IT) to store and manage judicial information in a systematic and consistent manner allows for better retrieval and monitoring of data. In particular, job performance, and actions or omissions of specific judges in specific cases can be more easily reviewed by internal and external parties when accessible via computer. The implementation of IT systems has also been seen as a solution for simplifying administrative procedures and improving transparency in case-tracking.

Budgetary Allocations and Remuneration

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

49. For a long time, improving the remuneration of judicial officials was a primary objective of reformers. There were two main arguments for doing this. Firstly, it was argued that the lower the salaries, the greater the temptation to receive or solicit money unlawfully. And secondly, it was believed that higher pay tended 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 (see discussion below), better salaries have not reduced or prevented corruption.

5 Specific Anticorruption Measures

50. When, in the second half of the 1990s, corruption explicitly became recognized as an obstacle to development by international financial institutions, reformers attempted to broaden their original approach to judicial reform by incorporating specific anticorruption components into their programs. This new phase, or wave, in development thinking provided an opportunity to empower judges with techniques directed at fighting the corruption occurring within and without the judiciary. The following section provides just some of the tools and ideas modern day reformers have started to implement. Unfortunately, the practical experience and evidence of these specific reforms successfully reducing corruption is limited (Kaufman, 2003). It is still early days, yet the experience thus far can provide a starting point and important momentum for the development of further reforms.

Special Investigative Techniques – a Global Approach to Corruption

51. The changes in strategy occurred simultaneously with other anticorruption efforts taking place in developed countries. From the mid 1990s onwards, the legal framework for fighting corruption changed drastically. 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 anticorruption non-governmental

organizations (NGOs), the private sector, and, more remarkably, the international banking industry.

52. The international anticorruption 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 level institutions with mandates to curb and prevent corruption. The proliferation of independent anticorruption agencies, anti-money laundering agencies and financial intelligence units around the developing and developed world was an example of this response.

53. This trend reflects a move from the traditional emphasis on controlling “petty” corruption within specific countries or regions, to curbing “grand” corruption at an international level. 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 cases of grand corruption usually involve several jurisdictions with different legal systems in operation. In addition, this kind of cases are always surrounded by specific provisions on banking secrecy, corporate secrecy, off-shore management of assets, corporate vehicles and other similar structures created to preserve anonymity. Despite their legal uses, such structures have also been used for concealing the proceeds of major corruption.

54. This new global dimension of anticorruption has increased the flow of information considerably among law enforcement officials and judges. Unfortunately, due to a lack of awareness that this type of information even existed, it has often been under-utilized by officials of developing countries. Reformers realized that better dissemination of information and education strategies at the national and local level were needed if the progress made at the global level were to be integrated into the efforts of the individual country.

55. As a result of this, rule-of-law programs have recently included training judges, prosecutors and administrative staff in the new domain of international anticorruption, in particular building awareness of the new set of institutions and resources now available to the legal and judicial sector. Emphasis has also been placed on improving the exchange of information and experiences between countries as well as establishing a network of law enforcement agencies, at both the national and international level, cooperating to curb corruption.

56. The rationale is that bringing together local and transnational perspectives and investigative techniques broadens the scope of activities on rule of law issues and increases the level of success in deterring corruption. The essence of these new projects is collaboration and appropriate exchanges of information with foreign peers regarding specific topics including the obtainment of bank records, understanding of privacy and secrecy laws both internal and external to a jurisdiction, tax disclosures, confiscation measures, and systems to collect and seize evidence abroad.

Controls over Illicit Enrichment

57. Another common measure supported by rule-of-law reforms to deter and detect corruption is the disclosure of assets and liabilities of members of the judiciary upon appointment and annually thereafter. This is usually coupled with the implementation of laws that shift the burden of proof for unexplained enrichment from the accuser onto the suspected official (as is the case in Singapore anticorruption laws). This forces corrupt officials to justify their levels of wealth and standard of living and makes concealing corrupt enrichment a more difficult and risky

act. Some countries even confiscate goods and money if public officials cannot satisfactorily explain their origin. However, these sets of measures are, as would be expected, particularly difficult to implement and monitor.

58. Controls over illicit enrichment are enforced either through criminal provisions or as part of an administrative process. Legal enforcement, however, has two drawbacks; firstly, prosecutions regarding illicit enrichment are usually challenged constitutionally on the basis that the reversal of the burden of proof violates the defendant's right not to be compelled to declare against him or herself. Secondly, criminal charges of illicit enrichment are seriously undermined by international cooperation procedures. All mutual legal assistance treaties allow refusal of cooperation on dual criminality grounds – the conduct under investigation must be a criminal offence in both the requesting and the requested jurisdictions. In a situation where one country or jurisdiction does not have criminalized illicit enrichment laws (such as in Europe and USA), prosecutions for illicit gains will rarely obtain cooperation.

59. This has been a point of discussion in the on-going negotiations of the United Nations Convention Against Corruption. During the Fifth Session, delegates agreed to recommend the criminalization of illicit enrichment subject 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 relaxed the dual criminality principle, making cooperation voluntary to the requested party in cases in which the principle is not met.

6 Broadening the Reform Horizon – The Way Ahead

60. 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).

61. Although some reforms in specific countries and sectors were successful, an overall examination of judicial reform over the last twenty to thirty years does not show impressive results (Kaufmann, 2003). Even with the newly emerging anticorruption movement, judiciaries and legal bodies are resisting the pressure to reform. Of course the fact that corruption within such a closed and traditional sector is being talked about at all is a significant step towards improvement.

62. However, the lack of success in improving integrity and reducing corruption, points to the need to rethink or reshape previous approaches. While past reforms have brought some benefits to the judicial sector such as efficiency, transparency and independence, the impact on reducing corruption has been limited. This section provides a brief introduction to some of the reform approaches and issues the World Bank believes are reshaping the way anticorruption should be conceptualized in rule of law programs. In particular, improved diagnosis of corruption, the involvement of civil society, understanding how informal networks influence the judiciaries and the role of a free and responsible media are all emerging as critical issues in anticorruption efforts.

Measuring Corruption through Diagnostic Surveys

63. Having abandoned the idea of “one size fits all”, anticorruption reformers confronted another commonly held belief, namely the notion that corruption could not be measured. Economists previously claimed that the secret nature of corruption impeded assessing its costs. For decades, this belief impeded the possibility of measuring corruption.

64. In 1997, however, “diagnostic surveys” were used to measure corruption and assess its impact. Since then, a range of different approaches to diagnostic surveys has emerged. These surveys are designed to obtain information on specific themes relating to corruption. While these surveys do not measure corruption directly, the use of proxy measures such as perception, institutional risk or samples of experiences, is believed to provide accurate gauges of real levels of corruption. This means, of course, that the survey measurements are too imprecise for any type of strict economic analysis or econometric test, but are good enough for detecting problems, making comparisons across countries, and designing policy responses.

65. The data obtained from surveys can help inform and shape the design, implementation and sustainability of reforms in the judicial and legal sector. The information obtained can be used to pinpoint nodes and risks of corruption, and, to some extent, the causes of corruption. Based on this reformers can avoid past mistakes resulting from incorrect identification of problems. Moreover, surveys build awareness. When political will or the influence of civil society is low, galvanizing support for reform via awareness-raising is particularly advantageous. In addition, surveying different actors is a powerful tool for recognizing informal centers of power that may work as potential leverage points for wider level reforms. Surveys can also identify or create potential partners outside the judiciary and legal sectors who are able to provide valuable and influential assistance in designing reforms and/or act as external monitors of reform.

66. The choice of survey methodology influences the credibility, accuracy and adequacy of the diagnoses obtained. In order to be as effective as possible, diagnostic work should include an assessment of the current situation, in particular of the weaknesses and strengths of the system, stakeholder perceptions of the magnitude of the problem of corruption. Furthermore the development of a future model of the judicial and legal sector on which reforms can be based should be considered. The formulation of this and other ideas relevant to the diagnostic and design stage can be facilitated by drawing on comparative experiences and international best practices.

67. The survey should also be carried out by an independent body that will resist political interference. It is important that the results of the survey are perceived as credible by all of the reform stakeholders. As the issue of corruption within the judiciary can be confrontational, the presentation of survey outcomes not obtained through credible methodology will generate skepticism which may in turn undermine the overall benefits of the survey process.

Participation of Civil Society

68. Once priority areas have been identified through the diagnostic work, civil society should be involved in designing and implementing judicial reforms.

69. Since anticorruption reforms imply breaking established coalitions and diluting pre-existing networks, building new pro-reform coalitions within civil society is essential. While the involvement of multiple actors tends to slow down the pace of reform, and at times dilute reform proposals, the involvement in the design process of civil society actors automatically broadens

the consensus required for implementation, which greatly facilitates the implementation process. As users, these actors have incentives for making reforms happen and seeing the process through to fruition.

70. Civil society and nongovernmental organizations (NGOs) can also promote public awareness of the revised legal system and provide a common understanding of the informal and formal rules. A better understanding of the legal system empowers citizens to seek support from the justice system and pressure judiciary members to reduce the gap between formal and informal laws.

71. Civil society can also play a valuable role in monitoring judicial performance. In conjunction with government monitoring organizations, such as Ombudsman offices or anticorruption agencies, NGOs (including think tanks and universities) can serve as community watchdogs and apply pressure to the system if officials seem to be enjoying legal immunity. They can also review enforcement mechanisms, compile statistics on and evaluations of judicial performance, and make this information available to the public. Some NGOs can also support the judiciary in designing merit-based judicial appointment and evaluation systems, and in providing alternative dispute resolution mechanisms.

72. At the international level NGOs provide an invaluable source of pressure for ratifying and implementing conventions, transnational laws, and international laws. When creating judicial integrity encouraging international, national, and local organizations, including bar associations, to help prevent and eliminate corruption of the judicial system are important elements. Furthermore, bar associations should provide strong and effective professional sanctions against any misconduct by members of the legal profession.

Access to Information and Culture of Transparency

73. The media plays a key role in increasing public awareness of, and encouraging public participation in, the process of exposing, preventing, and eliminating corruption in the judicial system. The media can help foster a culture of intolerance to corruption in the judicial system. The judiciary should therefore formulate proposals aimed at keeping the public, including the media, informed and educated concerning the operation of the judicial system. This may include recording judicial decisions and opening them to public scrutiny. Public pressure for removing immunity and prosecuting corrupt officials would undoubtedly mount if the media provided sufficient evidence of incidences of such misdemeanors.

74. For these reasons, reform projects have incorporated training modules for investigative journalists in several countries. These programs are aimed at improving both the investigative skills of journalists and their understanding of the role responsible journalism can have in fighting corruption.

75. The effectiveness of the media, however, not only depends on its cadre of journalists, but also on its 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’ or ‘access to public information laws’. These legal remedies are not only based on the right to access government information, but also the right to be informed about public matters or to access government information. Access to official information in Sweden is exemplary in this regard. In Latin America, many judiciaries have had to express their opinion on the extent of these rights. In many cases, their intervention has forced governments to release classified information and produce transparent accounts of their finances.

76. In turn, all these actions have progressively contributed to creating a culture of transparency where timely access to accurate official information has become a right. In practical terms, this means that citizens are provided with the necessary information for performing their oversight responsibilities and promoting democratic accountability.

State Capture and Informal Networks

77. Current assumptions about the functioning of the law (Kennedy 2003; Trubek 2003) and the way informal institutions and networks interact in shaping policy in developing countries, are increasingly being questioned. The evidence on ‘state capture’, gathered by the World Bank Institute (Hellman, J. et al 2000, Hellman and Kaufmann 2001, Kaufmann 2003) has generated some skepticism about the underlying premise of rule of law programs, in particular the importance of understanding how influential informal mechanisms really are over the judiciary.

78. 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 the world, it is worth questioning the sense of advocating the application of “laws” that have been purchased by private groups.

79. The data obtained through studies on state capture and other indicators of governance and institutional quality provide new insights for rethinking anticorruption 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 fact that current focus of anticorruption initiatives is exclusively on the state bureaucracy should be revisited. A better understanding of the role played by the private sector in such settings must be reached.

80. 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 studying the institution of “influence”, others have proposed examining how influence flows through corruption networks composed of public and private actors (Cartier 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 Montesino and Kuchma used to tape or videotape meetings where corrupt practices took place. In the case of Montesino, the prosecutor recorded over 720 videotapes (some of them available at several Peruvian websites). In the case of Kuchma, 1000 hours of audio recording have been accumulated.¹

81. 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 sources of 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.

82. This type of networks is not usually exposed to problems related to collective-action, as 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

¹ Some audio files are available at <http://www.wcfia.harvard.edu/melnichenko>.

2003). It is clear from the tapes of both cases that the integration of economic and social life within these networks – developed upon principles of mutual aid and reciprocity – makes individuals act “collectively”. Public servants, including allegedly independent auditors, controllers and even judges, are regularly moved from one position to another – even from one branch to another – according to political opportunity. They usually receive informal compensations, such as fellowships for family members, additional jobs, or simply money taken from special slush funds. The distance between personal and institutional agendas is striking: no-one in the videos appears to feel constrained in performing the institutional role they are supposed to perform. On the contrary, constraints are produced by the rules of the informal institutions that regulate the network – such as friendship, subordination, economic speculation and fear.

83. These informal networks constitute a powerful mechanism of resource exchange. They are, in fact, comparable to a “future market” of favors and information: contributions to political campaigns, employment of relative. A judicial decision or an executive decree can be a future source 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 fueled and the networks running in a cohesive fashion (Cartier Bresson 1997).

84. The evidence revealed by these 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 this type of relationships is the next stage of anticorruption policy.

7 Conclusion

85. This paper has provided an overview of the anticorruption reforms of the last two decades, and, more substantially, has made explicit the assumptions addressed at different stages of this complex enterprise. After twenty years, it is widely recognized that some of the underlying assumptions must be revisited. Aid practitioners are becoming increasingly aware of the complexities of the law. Consequently, the traditional formalistic approach to how the law functions is receding. 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.

86. Aid practitioners have learned that institutions do not operate in a vacuum. As a consequence, donors are moving away from the initial narrow 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 an incentive-oriented fashion, which allows both for consensus to emerge and reciprocal checks and balances to be strengthened among actors.

87. These findings do not necessarily mean that previous attempts at rule-of-law reform have been fruitless. They do signal that, as with all human enterprise, anticorruption reform is a continuous learning curve. The different sections developed in this paper have shown how each new wave of reform was informed by the lessons learned in the previous stage. Indeed, anticorruption reform is now about to cross another threshold, as experts are advocating new issues, such as the mechanics of influence, the functioning of informal corruption networks, the dynamics of clientelism and patronage, and the ability of civil society to invoke change. These issues must be better understood for anticorruption reform to succeed.

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