

Judicial Corruption in Developing Countries: Its Causes and Economic Consequences



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Judicial Corruption in Developing Countries: Its Causes and Economic Consequences*_ /

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Abstract

This paper reviews the most recent literature related to economic causes of corruption within the public sector in general and particularly within the court systems in developing countries. It shows the need to generate public policies based on sound and scientific principles that can be accepted by civil societies and the public sector at the same time. An earlier version of this summary paper appeared as an Essay in Public Policy, Hoover Institution Press, 1999

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I. THE MAIN CAUSES OF CORRUPTION WITHIN THE JUDICIARIES IN DEVELOPING COUNTRIES

The field known as law and economics of development focuses its attention on the effects that well-functioning legal and judicial systems have on economic efficiency and development. Adam Smith states in his *Lectures on Jurisprudence* that a factor that "greatly retarded commerce was the imperfection of the law and the uncertainty in its application" (Smith, 528). Entrenched corrupt practices within the public sector (i.e., official systemic corruption) hamper the clear definition and enforcement of laws, and therefore, as Smith (1978) stated, commerce is impeded. A scientific approach to the analysis of corruption is a necessary requirement in the fight against any social ill. Corruption is no exception. Systemic corruption deals with the use of public office for private benefit that is entrenched in such a way that, without it, an organization or institution cannot function as a supplier of a good or service. The probability of detecting corruption decreases as corruption becomes more systemic. Therefore, as corruption becomes more systemic, enforcement measures of the traditional kind affecting the expected punishment of committing illicit acts become less effective and other preventive measures, such as organizational changes (e.g., reducing procedural complexities in the provision of public services), salary increases, and other measures, become much more effective. The growth and decline of systemic corruption is also subject to laws of human behavior. We must better define those laws before implementing public policy. For this purpose we must

- Formulate a policy claim (e.g., administrations with high concentrations of organizational power in the hands of few public officials with no external auditing systems are prone to corrupt behavior)
- Formulate a logical explanation of a policy claim (e.g., why higher concentrations of organizational power and corrupt behavior go hand in hand)
- Gather information to support or disprove the claim
- Design public policies based on the findings

In this context, in order to design public policies in the fight against corruption, it is necessary to build a data base with quantitative and qualitative information related to all the factors thought to be related to certain types of systemic corrupt behavior (embezzlement, bribery, extortion, fraud, etc.). For example, the World Bank is currently assembling a data base of judicial systems worldwide (Buscaglia and Dakolias 1999) that covers those factors associated to relative successes in the fight for an efficient judiciary.

International experience shows that specific macropolicy actions are associated with the reduction in the perceived corruption in countries ranging from Uganda to Singapore, from Hong Kong to Chile (Kaufmann 1994). These actions include lowering tariffs and other trade barriers; unifying market exchange and interest rates; eliminating enterprise subsidies; minimizing enterprise regulation, licensing requirements, and other barriers to market entry; privatizing while demonopolizing government assets; enhancing transparency in the enforcement of banking, auditing, and accounting standards; and improving tax and budget administration. Other institutional reforms that hamper corrupt practices include civil service reform, legal and judicial

reforms, and the strengthening and expansion of civil and political liberties. Finally, there are the microorganizational reforms, such as improving administrative procedures to avoid discretionary decision making and the duplication of functions, while introducing performance standards for all employees (related to time and production); determining salaries on the basis of performance standards; reducing the degree of organizational power of each individual in an organization; reducing procedural complexity; and making norms, internal rules, and laws well known among officials and users (Buscaglia and Gonzalez Asis 1999).

II. SEQUENCING THE DESIGN OF ANTICORRUPTION POLICIES

The following steps are recommended in the design of anticorruption policies:

1. Perform a diagnostic analysis within a country identifying, within a priority list, the main institutional areas where systemic corruption arises. This identification must be conducted through surveys of users of government services, businesses, or taxpayers. The survey should be applied to each government institution (e.g., customs, judiciary, tax agencies, and others).
2. Once a priority list of areas subject to systemic corruption is derived, develop a data base for each of these institutions containing objective and subjective measures of corruption (e.g., reports of corruption, indictments related to fraud, embezzlement, extortion, or bribery in that agency, prices charged by the agency) and other variables that are thought to explain corruption. Gather information on procedural times in the provision of government services; users' perceptions of efficiency, effectiveness, corruption, and access related to that agency; procedural complexity in the provision of services; and so on.
3. Conduct a statistical analysis clearly identifying the factors causing corruption in a specific government agency. Identify whether any of the economic, institutional, and organizational factors mentioned above are related to corruption.
4. Once the diagnostic and identification stages are complete, civil society should become involved in implementing and monitoring the anticorruption policies. The action plan should be developed through consensus between civil society and government and contain problems, solutions, deadlines for implementation of solutions, and expected results.

This approach has been applied at the judicial and municipal levels in many countries with significant results (Buscaglia and Dakolias 1999). Those cases used the following steps: First, a survey was conducted of those users applying for specific permits from their local government (county office, in Venezuela). Those users were interviewed just after finishing the application procedure and were asked to rank the efficiency, effectiveness, level of access, quality of information received, and corruption in the administrative procedure used to obtain construction and industrial license permits. Next, numerical and qualitative data were gathered to identify those variables affecting the public's responses to the survey by applying statistical analyses. The results of this diagnostic study were then shared with representatives of civil society and local government at a workshop. In this workshop, representatives of civil society and local government could agree or disagree with the results.

Once the civil society and the government agreed on the nature of the problems, a technical empirical study conducted by the interdisciplinary team focused on how to reduce corruption and increase efficiency in those areas (e.g., issue of permits) covered by the diagnostic study. This technical study, which identified the mechanisms to reduce corruption and increase efficiency/effectiveness, was later discussed, understood, and accepted by members of the civil society and local government. Civil society was able to devise mechanisms for monitoring the implementation of reforms with deadlines included. The results of implementing these reforms must be measured months after the implementation stage has been completed through another survey of users applying for those same types of permits. The actual results were then compared with the expected results, previously defined as goals by civil society groups. Those experiences show that the implementation of any anticorruption campaign must be based on sound multidisciplinary scientific principles applied by researchers, practitioners, and civil society. Only a multidisciplinary approach specifying methodology, data, a scientific analysis of what works and what does not work, and, finally, a well-specified sequencing of policy steps as mentioned above can establish a solid policy consensus in the fight against systemic corruption.

Scholars have already recognized the advantages of going beyond the analysis of the impacts of corruption on economic growth and investment, and some have stated the urgent need to isolate the structural features that create corrupt incentives (Rose-Ackerman 1997; Langseth and Stolpe, 2001). But only general situations within which corruption may arise have been identified in the literature. These situations are neither overlapping nor exhaustive. A rigorous analysis, however, of the corruption-enhancing factors within the courts has been unexplored in the literature. The need to develop an empirically testable anticorruption policy in the courts is necessary to incorporate the study of corruption into the mainstream of social science.

The empirical frameworks first introduced by Buscaglia (1997a) to Ecuador and Venezuela and by Buscaglia and Dakolias (1999) to Ecuador and Chile explain the yearly changes in the reports of corruption within first-instance courts dealing with commercial cases. That work shows that specific organizational structures and behavioral patterns within the courts in developing countries make them prone to the uncontrollable spread of systemic corrupt practices. For example, their work finds that the typical Latin American court provides internal organizational incentives toward corruption. A legal and economic analysis of corruption should be able to detect why the use of public office for private benefit becomes the norm. In theory, most developing countries possess a criminal code punishing corrupt practices and external auditing systems within the courts for monitoring case and cash flows. Even if they function properly, however, those two mechanisms would not be enough to counter the presence of systemic corruption in the application of the law. Other dimensions need to be addressed.

Specific and identifiable patterns in the administrative organization of the courts, coupled with a tremendous degree of legal discretion and procedural complexities, allow judges and court personnel to extract additional illicit fees for services rendered. Buscaglia (1997a) also finds that those characteristics fostering corrupt practices are compounded by the lack of alternative mechanisms to resolve disputes, thus giving the official court system a virtual monopoly. More specifically, according to Buscaglia (1998) and Buscaglia and Dakolias (1999), corrupt practices are enhanced by (1) internal organizational roles concentrated in the hands of a few decision makers within the court (e.g., judges concentrating a larger number of administrative and

jurisdictional roles within their domain); (2) the number and complexity of the procedural steps coupled with a lack of procedural transparency followed within the courts; (3) great uncertainty related to the prevailing doctrines, laws, and regulations (e.g., increasing inconsistencies in the application of jurisprudence by the courts due to, among other factors, the lack of a legal data base and defective information systems within the courts); (4) few alternative sources of dispute resolution; and, finally, (5) the presence of organized crime groups (e.g., drug cartels), that, according to Gambetta (1993), demand corrupt practices from government officials.

These five factors associated with corrupt practices provide a clear guideline for public policy making. Developing countries such as Chile and Uganda that have enacted a simple procedural code while introducing alternative dispute resolutions have witnessed a reduction in the reports of court-related corruption. Moreover, the success stories of Singapore and Costa Rica show that corruption has been reduced by creating specialized administrative offices supporting the courts in matters related to court notifications, budget and personnel management, cash and case flows. These administrative support offices that were shared by many courts have decentralized administrative decision making while reducing the previously high and unmonitored concentration of organizational tasks in the hands of judges (Buscaglia 1997a).

III. CORRUPTION AND ITS LONG-TERM IMPACT ON EFFICIENCY AND EQUITY

Some scholars have observed that official corruption generates immediate positive results for the individual citizen or organization who is willing and able to pay the bribe (Rosenn 1984). For example, Rose-Ackerman (1997) accepts that "payoffs to those who manage queues can be efficient since they give officials incentives both to work quickly and favor those who value their time highly." She further states that, in some restricted cases, widely accepted illegal payoffs need to be legalized (Rose-Ackerman 1997). This statement, however, disregards the effects that present entrenched corruption has on people's perception of social equity and on long-term efficiency. The widespread effects of corruption on the overall social system have a pernicious effect on efficiency in the long run. To understand this effect, an economic theory of ethics needs to be applied to the understanding of the long-term effects of corruption on efficiency.

The average individual's perception of how equitable a social system is has a pronounced effect on that individual's incentives to engage in productive activities (Buscaglia 1997a). The literature has delved into many of the negative impacts that corruption has on the efficient allocation of resources. Yet previous work does not pay attention to the effects that corruption has on the individual's perception of how equitable a social system is. First, in all developing countries, a vast majority of the population is not able to offer illicit payoffs to government officials, even when they are willing to do so (Buscaglia 1997a), and, second, legalizing illicit payoffs may have no impact on social behavior in societies where most social interactions are ruled not by modern laws but by multiple layers of customary and religious codes of behavior.

A significant impact of corruption on future efficiency is the effect that official corrupt practices have on the average citizen's perception of social equity. Homans (1974) shows that, in any human group, the relative status given to any member is determined by the "group's perception" of the member's contribution to the relevant social domain. Homans further states that changes in the relative wealth-related status of an individual member without a perceived change in his social contribution will face open hostility by the other members of society (e.g., envy may generate retaliation and destruction of social wealth). Therefore, within Homans's view, in cases of corrupt practices, a "socially unjustified" increase in the wealth-related status of those who offer and accept bribes represents a violation of the average citizen's notion of what constitutes an "equitable hierarchy" of status within society.

Homans's theory of ethics can be applied to the understanding of the effects of official systemic corruption on efficiency over time. Those members of society who are neither able nor willing to supply illicit incentives will be excluded from the provision of any "public good" (e.g., court services). In this case, even though corruption may remove red tape for those who are able and willing to pay the bribe, the provision of public services becomes inequitable in the perception of all of those who are excluded from the system due to their inability or unwillingness to become part of a corrupt transaction. This sense of inequity has a long-term effect on social interaction. Systemic official corruption promotes an inequitable social system where the allocation of resources is perceived to be weakly correlated to generally accepted rights and obligations. Buscaglia (1997a) shows that a "perceived" inequitable allocation of resources hampers the

incentives to generate wealth by those who are excluded from the provision of basic public goods. The average citizen, who cannot receive a public service due to his inability to pay the illegal fee, ceases to demand the public good from the official system (Buscaglia 1997a). On many occasions, the higher price imposed by corrupt activities within the public sector forces citizens to seek alternative community-based mechanisms to obtain the public service (e.g., alternative dispute resolution mechanisms such as neighborhood councils). These community-based alternative private mechanisms, however, do not have the capacity to generate precedents in certain legal disputes affecting all society (e.g., human rights violations or constitutional issues) like the state's court system does. Hernando de Soto's account of these community-based institutions in Peru attests to the loss in a country's production capabilities owing to the high transaction costs of access to public services (de Soto 1989).

One may initially think that, by eliminating bureaucratic red tape, the payment of a bribe can also enhance economic efficiency. This is a fallacy, however, because corruption may benefit the individual who is able and willing to supply the bribe. As described above, however, the social environment is negatively affected by diminishing economic productivity over time because of the general perception that the allocation of resources is determined more by corrupt practices and less by productivity and, therefore, is inherently inequitable. This creates an environment where individuals, in order to obtain public services, may need to start seeking illicit transfers of wealth to the increasing exclusion of productive activities. In this respect, present corruption decreases future productivity, thereby reducing efficiency over time

IV. CORRUPTION AND INSTITUTIONAL INERTIA

When designing anticorruption policies within the legal and judicial domains, we must take into account not only the costs and benefits to society of eradicating corruption in general but also the changes in present and future individual benefits and costs as perceived by public officials whose illicit rents will tend to diminish due to anticorruption public policies. Previous studies argue that institutional inertia in enacting reforms stems from the long-term nature of the benefits of reform in the reformers' mind, such as enhanced job opportunities and professional prestige (Buscaglia, Dakolias, and Ratliff 1995). These benefits cannot be directly captured in the short term by potential reformers within the government. Contrast the long-term nature of these benefits with the short-term nature of the main costs of reform, notably, a perceived decrease in state officials' illicit income. This asymmetry between short-term costs and long-term benefits tends to block policy initiatives related to public sector reforms. Reform sequencing, then, must ensure that short-term benefits compensate for the loss of rents faced by public officers responsible for implementing the changes. In turn, reform proposals generating longer-term benefits to the members of the court systems need to be implemented in later stages of the reform process (Buscaglia, Ratliff, and Dakolias 1996).

For example, previous studies of judicial reforms in Latin America argue that the institutional inertia in enacting reform stems from the long-term nature of the benefits of reform, such as increasing job stability, judicial independence, and professional prestige. Contrast the long-term nature of those benefits with the short-term nature of the main costs of judicial reform to reformers (e.g., explicit payoffs and other informal inducements provided to court officers). This contrast between short-term costs and long-term benefits has proven to block judicial reforms and explains why court reforms, which eventually would benefit most segments of society, are often resisted and delayed (Buscaglia, Dakolias, and Ratliff 1995). In this context, court reforms promoting uniformity, transparency, and accountability in the process of enforcing laws would necessarily diminish the court personnel's capacity to seek extra income through bribes. Reform sequencing, then, must ensure that short-term benefits to reformers compensate for the loss of illicit rents previously received by court officers responsible for implementing the changes. That is, initial reforms should focus on the public officials' short-term benefits. In turn, court reform proposals generating longer-term benefits need to be implemented in the later stages of the reform process.

Additional forces also enhance the anticorruption initiative. We usually observe that periods of institutional crisis come hand in hand with a general consensus among public officials to reform the public sector. For example, within the judiciary, a public sector crisis begins at the point where backlogs, delays, and payoffs increase the public's cost of accessing the system. When costs become too high, people restrict their demand for court services to the point where the capacity of judges and court personnel to justify their positions and to extract illicit payments from the public will diminish. At that point court officials increasingly embrace reforms in order to keep their jobs in the midst of public outcry (Buscaglia, Dakolias, and Ratliff 1996, 35). At this point, the public agency would likely be willing to conduct deeper reforms during a crisis as long as reform proposals contain sources of short-term benefits, such as higher salaries, institutional independence, and increased budgets.

It comes as no surprise, then, that those developing countries undertaking judicial reforms have all experienced a deep crisis in their court system, including Costa Rica, Chile, Ecuador, Hungary, and Singapore (Buscaglia and Dakolias 1999). In each of these five countries, additional short-term benefits guaranteed the political support of key magistrates who were willing to discuss judicial reform proposals only after a deep crisis threatened their jobs (Buscaglia and Ratliff 1997). Those benefits included generous early retirement packages, promotions for judges and support staff, new buildings, and expanded budgets.

Nevertheless, to ensure lasting anticorruption reforms, short-term benefits must be channeled through permanent institutional mechanisms capable of sustaining reform. The best institutional scenario is one in which public sector reforms are the by-product of a consensus involving the legislatures, the judiciary, bar associations, and civil society. Keep in mind, however, that legislatures are sometimes opposed to restructuring the courts in particular and other public institutions in general from which many of the members of the legislature also extract illicit rents.

This essay has provided a review of the most recent literature related to the economic causes of entrenched corruption within the public sector in general and particularly within the court systems in developing countries. This study stresses the need to develop scientific explanations of corruption containing objective and well-defined indicators of corrupt activities. Along these lines, this essay proposes that the joint effects of organizational, procedural, legal, and economic variables are able to explain the occurrence of corruption within the courts in developing countries.

Additionally, this essay describes how equity considerations by individuals affect long-term efficiency. Social psychologists could shed more light in future studies linking the impact of corruption on equity and efficiency. Finally, in order to understand and neutralize institutional inertia during anticorruption reforms, all future studies must incorporate the identification of those costs and benefits that are relevant to those who reform public sector institutions and are responsible for implementing new anticorruption policies.

The main question to be asked in the development of any anticorruption public policy approach is how to generate public policies based on sound and scientific principles that at the same time can be accepted and adopted by civil society and the public sector alike? The answer to this question is a necessary condition to developing a still absent international public policy consensus in the fight against corruption.

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