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Problem 2: Fostering openness and integrity in the Judiciary
Online Conference – June 20th, 2017

What tools and tactics can be used to increase transparency in order to identify corruption in the judiciary? What strategies can secure judicial independence and reduce undue political influence? How can judicial oversight mechanisms be strengthened?

THE PROBLEM

According to Transparency International's Global Corruption Barometer, over 80% of citizens surveyed in Mexico perceive the judiciary to be corrupt or extremely corrupt.[1] For ordinary citizens, this corruption spans the spectrum from routine bribes to elite impunity. Of people who interacted in the last twelves months with the judiciary, 15% reported paying a bribe simply to file cases or ensure they were reviewed by a court.[2] On the other end of the spectrum, the public broadly understands that the wealthy and well-connected are nearly immune from punishment. A study looking at impunity of political officials found that of 42 Mexican governors suspected of corruption since 2000, only 17 were investigated and just three were jailed.[3]

Corruption in judicial bodies – electoral, civil or criminal – weakens legal protections and the integrity of the legal process, it subverts sanctioning of offenders, and it undermines the public's faith in the judicial system and government. Experts agree that securing integrity in the judiciary requires striking "the right balance between independence and accountability."[4] In practice, this means securing **political independence and preventing undue influence,** while at the same time establishing robust **oversight mechanisms** to guard against bribery and to ensure fair and equitable application of law. Any solutions to combating corruption in the judiciary must consider how to increase oversight and openness while also enabling judges to have the autonomy to carry out their

[1] International Bar Association & Basel Institute on Governance, "The International Bar Association's Judicial Integrity Initiative: Judicial Systems and Corruption" (May 2016), 52.
[2] Transparencia Mexicana, "Índice Nacional de Corrupción y Buen Gobierno" (2010), 11.
[3] Casar, María Amparo. "México: Anatomía de la corrupción." (2015).
[4] International Bar Association & Basel Institute on Governance, 6.

responsibilities efficiently. But developing such solutions demands, first, addressing the immediate problem**: opacity and lack of key information** – especially about the decision-making process in judicial bodies.

BACKGROUND

To understand the context of Mexico's judicial system, it is helpful to bear in mind several characteristics. First, Mexico follows a civil law tradition, which means it has "comprehensive, continuously updated legal codes that specify all matters capable of being brought before a court, the applicable procedure, and the appropriate punishment for each offense."[5] In civil law, judges play a significant role in investigating cases. This is in contrast to common law jurisdictions, where that role falls to the police and prosecutors. Mexico's civil law specifies the rules governing different types of courts and tribunals (civil, electoral, administrative, etc.). As Mexico is a federation, there are both federal and state levels for each of these types of courts.

The country's judicial system has been on a permanent reform process since the late nineties with the objective of improving access, transparency, fairness, and efficiency of different judiciary bodies. For example, in 1994 and 1997 significant changes were introduced to reshape the governance structure, including removing the capacity of the President to appoint Supreme Court judges directly and developing a specific body for managing and supervising the judicial branch known as the Judiciary's Council (Consejo de la Judicatura)[6]. In 2008, a major reform on the procedural criminal laws was approved, introducing for the first time oral trials and other measures intended to increase openness and fairness in the criminal justice systems across the country. Furthermore, the first law on Access to Information in 2002 and its subsequent amendments have increased transparency obligations, both in federal and state courts.

Additionally, topic-specific reforms that only apply to certain types of courts and tribunals have been introduced. For instance, in 2016 Mexico enacted the creation of a new specialized administrative court on anti-corruption[7] which will review serious cases of

[5] The Robbins Religious and Civil Law Collection, School of Law (Boalt Hall), "The Common Law and Civil Law Traditions" (2010).
[6] Pedro Salazar Ugarte, "El Poder Judicial" (July 1st, 1999).
[7] This court is not part of the Judicial branch. It is an autonomous jurisdictional body within the Executive Branch.

corruption that are not included in Mexico's penal code. This new court is one of the key components of Mexico's most recent anti-corruption reform.

PROBLEM OVERVIEW

Impunity in the Mexican judicial system is one of the most prominent symptoms of corruption. A study by the Inter-American Commission on Human Rights found that **98% of crimes in Mexico "fail to result [in] convictions."**[8] As one Mexican scholar characterizes it, in Mexico's judiciary, "impunity has become the rule and prosecution and punishment the exception."[9] The prevalence of corruption practices resulting in high impunity within Mexico's justice system has undermined the performance and fairness of the judiciary.

While the spectrum of corruption practices in the judiciary is broad and varies according to the level of court or tribunal, **bribery** is one of most common forms. In a report published by the International Bar Association's Judicial Integrity Initiative (JII), 82% of survey respondents reported believing there is a high incidence of bribery in the Mexican judicial system, while **55% reported paying a bribe** to the judiciary.[10] While judges are often the recipients of bribes, JII also identifies prosecutors, court staff, regulatory authorities and expert witnesses as perceived to be involved in bribery. Additional common forms of judicial corruption include **impartial appointment of judges to cases, undue political influence, misuse of funds, and impropriety in interactions between judges and intermediaries.**

One of the core causes of corruption is the **lack of transparency in the judicial system**. The **judicial decision-making process is very opaque**; in criminal trials, judges typically examine all evidence in a closed session and deliver their verdict in writing, often without detailed explanation. While some view the insulation of judges from review and critique to be beneficial to a judicial system, too much insulation can breed corruption. As Gabriel Ferreyra, a Mexican litigator and US-based criminal law professor, puts it, "It is precisely because judges exert judicial independence when it comes to their duties that corrupt acts can occur."[11]

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[8] Monica Ortiz Uribe, Mexico's Justice System Battles Its Own Reputation to Build Trust (June 12, 2016).
[9] Gabriel Ferreyra, The Michoacanazo: A Case-Study of Wrongdoing in the Mexican Federal Judiciary (2015), 29.
[10] International Bar Association & Basel Institute on Governance, 52.
[11] Ferreyra, 19.

Aside from the lack of transparency enshrined in judicial processes, there is also a **lack of data needed to detect and prevent corruption in the judiciary**. The full extent of the problem of judicial corruption in Mexico is unknown because it is extremely difficult to measure: no official or unofficial data exists on the topic, and any reported data would likely be underreported as corrupt behaviors happen in secret.[12] Nonetheless, judicial corruption is widely understood to be a problem by Mexican legal officials and the Mexican public. Survey responses from public officials in the Mexican Federal Judiciary, scholars, and attorneys suggest that up to 10% are actually corrupt,[13] and a 2007 Gallup poll indicates that 58% of Mexicans do not have confidence in Mexico's judicial system.[14]

Mexico's ambitious judicial reforms proposed in 2008 have demonstrated the Mexican government's understanding that judicial corruption is an important problem to address, but public confidence in the effectiveness of those reforms is low. While a majority of judges, prosecutors, and public defenders believe the reforms have had positive results[15] the majority of ordinary Mexicans believe the reforms will not be effective.[16] Corrupt judges continue to lack accountability; for most judges, punishment for corrupt behavior is limited to simple, private reprimands.[17] Moreover, a study by the Latin American Initiative on Open Data assessed that the Mexican government continues to struggle with sharing judicial information publicly, including the use of proprietary formats and the lack of policies on data disclosure.[18]

Moving forward, it is clear that there is crucial need for more transparency in order to prevent against corrupt acts and secure the independence of the judiciary. Innovative methods and tools to prevent judicial corruption, as well as a comparative examination of how other countries, especially civil law jurisdictions, where judges have investigatory power, is urgent to identify opportunities for reform.

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[12] Ibid.
[13] Ibid.
[14] David Shirk, "Justice Reform in Mexico: Change and Challenges in the Judicial Sector" (2010), 4.
[15] Nancy G. Cortés, Octavio Rodríguez Ferreira and David A. Shirk, Perspectives on Mexico's Criminal Justice System: What Do Its Operators Think? (2016), viii.
[16] Enrique Krauze, Mexico's Dubious Reforms (Sept. 9, 2014).
[17] Patrick Corcoran, Mexico Judicial Reforms Go Easy on Corrupt Judges (Feb. 16, 2012).
[18] Sandra Elena, Datos abiertos para una justicia abierta: un análisis de caso de los Poderes Judiciales de Brasil, Costa Rica, México y Perú (2015).

GUIDING QUESTIONS

1. What tools and tactics can be used to increase transparency in order to identify corruption in the judiciary?
    a. Detection: What types of data can be used to identify corruption in judicial processes?
    b. Prevention: What types of data can be used to prevent judges and court personnel from engaging in corrupt acts such as bribes?
    c. From Openness to Use: How can we create incentives for journalists, the public, watchdogs and others to engage with and analyze judicial data?

2. What strategies can secure judicial independence and reduce undue political influence?
    a. Appointments: What information or data can be opened to foster accountability in the appointment of judges and court personnel?
    b. Assignments: What mechanisms are used to assign cases impartially within tribunals and courts?
    c. Interactions: What mechanisms or rules can be developed or strengthened to regulate interactions between judges, court personnel and lawyers?

3. How can judicial oversight mechanisms be strengthened?
    a. Oversight from “Above”: What should be done to improve formal oversight mechanisms? Can civic initiatives complement them and how?
    b. Oversight from “Below”: How can citizens be involved in monitoring and improving integrity in the judiciary?

POTENTIAL SOLUTIONS

Access to judiciary system data: The World Bank has published a guide documenting best practices regarding access to information and transparency in the judiciary in Latin American countries. Examples of initiatives adopted by governments include:

- Internal operation/administrative aspects such as
    - Management of funds (e.g. Chile's Public Procurement Law)
    - Appointment of judges (e.g. Colombia's participation process in the election of Constitutional Tribunal Justices.)
    - Assets and income disclosure statements (e.g. Argentina's Public Ethics Law)
    - Meetings of high level officials
    - Statistics (cases filed, pending and completed over a period of time; duration of cases; number of sentences per subject; budget and costs; number of staff) (e.g. Costa Rica's Statistics on the work of the Judiciary/ Annual Statistical Report)
- Jurisdictional functions such as
    - Publicity of sentences and access to case files (Argentina's "Court Rulings within Citizens Reach" program)
    - Internal working of courts (e.g. Costa Rica's publication of the minutes of the Court Plenum and the Superior Council, and information on disciplinary proceedings against judges)
    - Civil participation (e.g. Argentina's use of *amici curiae* in supreme court cases)

e-Justice initiatives: Several European countries have taken the lead on using online "e-Justice" platforms to increase transparency, access and efficiency of their judicial institutions. Turkey's National Judiciary Informatics System (UYAP) consolidates information across all judiciary institutions in one portal for citizens, lawyers, administrators and staff to access. The system has nearly 2M users and has resulted in an annual savings of approximately 100M USD. Italy's Portale Servizi Telematici (PST) allows users to file, process and track civil cases entirely electronically, reducing citizen time and expenses related to accessing court. Italy reports having 6M daily users, resulting in a savings of 55M Euros and an increase of 25% of legal acts to court.

Open data on the performance of courts and judges: A recent initiative by Transparency International Lithuania, in collaboration with the National Courts Administration (NCA), allows users to explore data about the performance of Lithuanian courts and judges. According to TI Lithuania "all the data, which has been standardised, is provided by the NCA. Users can see the averages for performance-based indicators that the NCA uses to assess the different courts (local, regional, administrative and upper) and the judges working in them. The site also provides detailed data on individual courts and judges, including their ranking. A user can pick any judge and then compare her or his performance against other judges; the same can be done for a court. Such comparisons can be done over time, permitting a user to observe trends across the data dating back to 2009."[19]

Transparency International Slovakia also launched a new platform which gathers information from different sources about the country's judiciary. It includes information about courts, hearings, decrees, proceedings and selection procedures and allows users to search this information through different filters. All information has been scraped by TI-Slovakia from the Ministry of Justice.

[19] Transparency International Lithuania, Open Data to Fight Corruption – Case study: Lithuania's Judiciary (2016), 5.