



Corruption risks in the criminal justice chain and tools for assessment Chapter 1: Introduction

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This is the introduction to a forthcoming U4 Issue. In January 2015, we will release the other chapters one by one.

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Corruption risks in the criminal justice chain and tools for assessment

Chapter 1: Introduction

This is part one of a six-part issue paper examining tools for assessment of corruption risks in criminal investigation, prosecution, trials, and detention.

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Criminal justice, the bright essence of majesty.

– The Laws of Manu, ca. 200 BCE

Justice being taken away, then, what are kingdoms but great robberies?

– Augustine of Hippo, *The City of God*, ca. 420 CE

Few responsibilities are as central to governing as enforcing laws against murder, theft, and other offenses that violate the safety of citizens or the security of their property – and few can be so thoroughly subverted by corruption as law enforcement. When criminals pay police to “look the other way”, or prosecutors to dismiss their cases, or judges to find them not guilty, or prison officials to let them roam free, the very essence of the criminal justice system has been destroyed. For how can the term “justice” apply to a system where justice itself is for sale? The consequences of failing to keep corruption from distorting the system are severe, for governments that cannot justly enforce their criminal laws forfeit their “bright essence of majesty,” becoming nothing more than “great robberies.”

Preventing corruption from affecting law enforcement is especially important for developing countries. “A functioning law and justice system is essential for . . . maintaining social order,” observes the United Nations Development Programme (2012, 56). A system that fails to deliver justice threatens the social order, making the challenge of development all the greater. This issue paper is meant to help developing countries identify and prevent corruption in the investigation, arrest, pretrial detention, prosecution, trial, and incarceration of those suspected of violating criminal law. It provides policymakers in developing nations, their citizens, and U4’s partners in the donor community with an overview of where corruption is most likely to arise in each stage of the criminal justice process and the tools available to measure corruption along the criminal justice chain.

The four chapters that follow, published separately, identify common corruption risks at the main stages of the criminal justice chain: investigation, prosecution, trial, and detention. Each chapter provides a summary of the principal decision makers involved, the tasks they perform, the tools available to assess corruption risks at that stage, and, where possible, an evaluation of the usefulness of these assessment tools. Some basic risk management approaches are presented, but the emphasis is on analysis and assessment of problems. For a list of questions that guided the development of the chapters, see Annex 1.

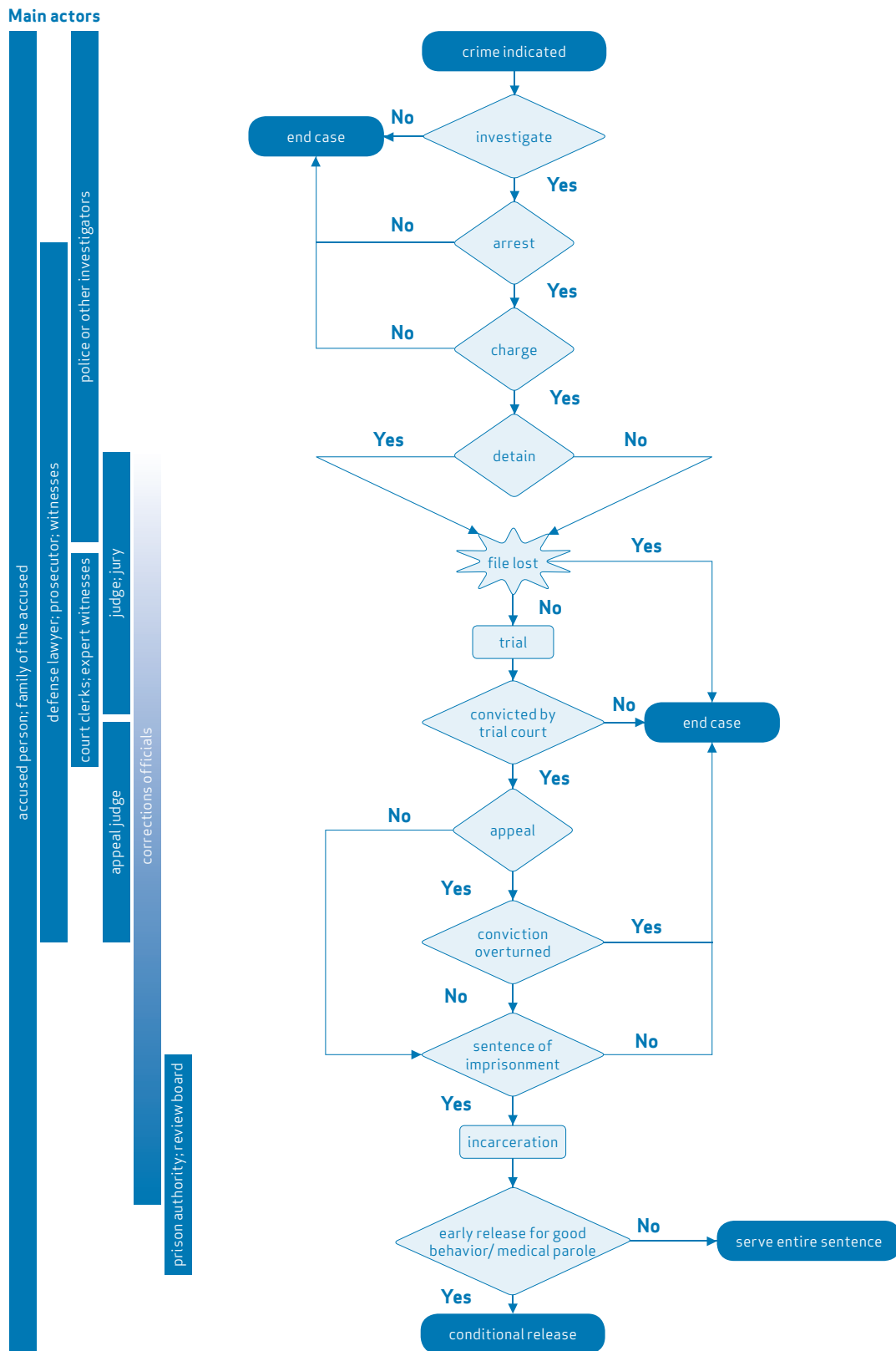
1. Common decision points in the criminal justice chain

Due to history, culture, religion, and colonial heritage, the criminal justice systems of developing states display a bewildering variety of institutional arrangements, the divide between common and civil law being only one of many. Despite this diversity, all perform the same basic functions, and a corruption risk assessment by function thus allows for a common approach across countries. Figure 1 illustrates these functions, from the opening of an investigation all the way to incarceration, diagramming for each stage when and how a case can terminate short of incarceration.

As the figure shows, the criminal justice process begins when, through direct observation or reports by victims or witnesses, the police or other investigators learn of a possible violation of penal law. The first step in the process is the decision whether to investigate. If, for whatever reason, that decision is “no,” the case ends. If, however, an investigation is opened, then a series of decisions confront investigators, prosecutors, judges, and corrections officials, beginning with whether there is sufficient evidence to warrant the arrest of one or more suspects.

Arrest in itself is rarely enough to warrant bringing a suspect to trial. A decision must be made whether or not to indict, or lay formal charges, based on the facts gathered at the time of the arrest, perhaps supplemented by pre- or post-arrest investigation. Again, as the figure illustrates, a decision not to charge ends the case, while an indictment or formal charge leads to the next decision point in the system: whether to hold the suspect in jail pending trial or release him or her on bail. In either case, a trial or formal proceeding follows, where a judge, jury, or some combination decides whether the suspect committed the acts he or she is accused of, and if so, whether those acts constitute a violation of law. If the suspect is convicted of one or more crimes, a judge will decide what punishment to impose: probation, a fine, or imprisonment. In the event incarceration is ordered, the prison system will take custody of the defendant for the duration of the sentence.

Each of these decision points is shown as a diamond-shaped box in Figure 1. No matter the system, they have one thing in common: at each point, those with the power to decide whether to advance or end the case are subject to few constraints on the exercise of their power. The reason is simple: overseeing or monitoring their decisions is expensive, time-consuming, and sometimes not even possible. Police on patrol can demand a bribe in lieu of arresting an individual; if the suspect has committed a crime, he or she will have no incentive to complain. If no crime has been committed and the threatened arrest is merely a shakedown, the innocent person will still face the challenge of persuading a reviewing body to believe his or her story over the officers’ denial. Similar factors are at work with the decision to charge, to hold without bail, to convict, to sentence, to incarcerate: those with the power to decide are subject to little oversight. As the chapters that follow explain, even where formal oversight mechanisms exist, they can be corrupted.



2. Common risks across countries and institutions

Only recently have policymakers in developing countries and their development partners turned their attention to corruption in the criminal justice system. Hence, much of what is known about corruption at the different stages in the process comes from developed country experiences. The chapters that follow thus draw heavily on the learning from wealthier countries, but as the analyses show, corruption risks in developing countries are often similar if not identical. Where circumstances particular to developing countries could give rise to different types or levels of risk, they are noted. The authors hope that this paper will stimulate more analysis of the corruption risks specific to developing nations' criminal justice systems.

The developed country experience shows that many forms of corruption are common across all stages of the process. Bribery is the most often reported. There is an ever-present risk that individual police officers, prosecutors, judges, or corrections officials will put their decisions up for sale, and the chapters identify the factors – low pay, poor morale, weak leadership – that exacerbate this risk. The developed country experience also shows that the risk of corruption grows as the threat of incarceration grows. As the individual moves through the criminal justice process, he or she faces increasing likelihood of losing freedom, and the motive to corrupt becomes all the stronger.

Not only individuals but entire organizations and even the state may be corrupted, and the chapters describe the conditions that heighten this risk. Political interference – as when the ruling party pressures enforcers to prosecute certain individuals or groups, such as those associated with the opposition, and to ignore violations by others – is one such condition. Organizational corruption can also arise from the enforcement of laws against gambling, personal drug use, and other vices. A lack of consensus that such “victimless” crimes cause harm, coupled with the enormous profits they generate, creates a risk that whole police departments or prosecution agencies will be paid to look the other way.

One risk found in all justice sector institutions is favoritism, bias, or discrimination in the selection, promotion, and discharge of employees. Individuals may be hired as police or corrections officers because of their race or ethnicity. Senior officers, judges, and prosecutors may be selected because of their political leanings or party affiliation. Pressure in the form of the threat of termination or denial of promotion may be used to bias their decisions. It is thus critical in any assessment to determine whether the procedures by which individuals working in the system are selected, promoted, and disciplined have been corrupted.

The focus on the appointment and removal of criminal justice personnel highlights an issue critical to the operation of the criminal justice system: freedom from improper influence. All systems contain provisions to insulate those who work in them, particularly judges and prosecutors, from pressure by the powerful or from the passions of the moment. For however difficult it may be to specify what constitutes a “just” result in a particular case, the laws of all countries recognize that decisions regarding charges or adjudication of guilt or innocence must be in accordance with the law – not with the dictates of politics or popular sentiment.

At the same time, the argument of “improper influence” has sometimes been used to shield justice operators from scrutiny and thus from accountability for their actions. Especially with decisions involving whether to charge an individual with a crime or to convict or acquit, prosecutors and judges have argued that permitting another entity to review these decisions could allow that entity to exercise inappropriate influence over the outcomes. The dilemma has traditionally been resolved by placing the accountability agent within the entity being overseen. Oversight of judicial decisions has thus been realized through appeal to a higher court, and the actions of prosecutors and police have been subject to review by internal affairs units within each agency. But as the chapters that follow explain, the risks of corruption increase when internal review is the only oversight method. Thus policymakers have recognized the need to augment internal review with external review, such as civilian oversight of the police, a judicial council, citizen advisory committees, or parliamentary hearings.

3. Risks excluded from the discussion

This issue paper is about the risks of corruption particular to the criminal justice system. It does not consider other risks that may affect agencies in the criminal justice system simply because they are in the public sector. Examples of these generic risks are those associated with the purchase of vehicles, computer hardware and software, and other goods and services that criminal justice agencies need for their daily operations. Another risk excluded from the discussion is the embezzlement of funds and property by personnel within police departments, prosecution services, courts, or prison systems in the course of their day-to-day operations. There are a number of tools for assessing risks associated with procurement and other generic corruption risks in the public sector (see, for example, Fazekas and Tóth 2014; Heggstad and Frøystad 2011; Martini 2012).

Most of those employed in the criminal justice system are career government employees. As a result, they are typically subject to the many rules of government employment: conflict of interest laws, asset disclosure reporting, freedom of information legislation, whistleblower protection regulations, and audits by internal and external agencies. The risks that arise from absence of such rules or noncompliance with them are excluded from the analysis as well, but it is of course true that where compliance with these rules is weak, the risk of corruption is all the greater.

A risk particular to the justice sector that is, nonetheless, excluded from our analysis is what is sometimes termed “noble corruption.” These are actions that corrupt the system’s means to achieve its (worthy) ends. The fabrication of evidence to convict a suspect who is surely guilty is the perhaps the most widely recognized example, but there are other instances as well in which a suspect’s rights are violated out of a desire to keep the streets safe or, more recently, to prevent acts of terror.

Excluding these forms of corruption is not meant to suggest that bribery, extortion, and other forms of venal corruption are more harmful or more deserving of attention. Rather, the exclusions arise from the need to focus on specific topics given the limitations of space.

4. Country-level assessments

A variety of indexes that compare levels of corruption across countries or rate the quality of different nations' legal or justice systems contain data that can be useful for developing an assessment of risks in the criminal justice system. Afrobarometer asked citizens in 34 African states how often they had to bribe a police officer to “avoid a problem . . . like passing a check point or paying a fine or being arrested.” The Bertelsmann Transformation Index rates countries on how independent their courts are and whether prosecutors face constraints to charging public officials with a crime. The American Bar Association's Judicial Reform Index includes an evaluation of the effectiveness of judicial ethics codes and the mechanisms available to citizens to register complaints of judicial misconduct.

Listed below are country-level measures with data particularly useful for developing corruption risk assessments of the criminal justice system. They include surveys based on either direct experience or perceptions and expert assessments. As none of them focus particularly on corruption in the justice sector, they cannot replace a sector-focused risk assessment. Taken together, however, they can help identify areas particularly vulnerable to corruption, and strengths and weaknesses in the institutional framework.

Experience and perception-based surveys of corruption in the justice sector

- Globalbarometer Surveys for Africa, Asia, Latin America, and the Middle East, Globalbarometer network in collaboration with many regional institutions, <http://bit.ly/1znPz9r/>
- Bertelsmann Transformation Index, Bertelsmann Foundation, <http://bit.ly/1wx2Xuu/>
- Doing Business project, World Bank, <http://bit.ly/1IYtE4S/>
- Enterprise Surveys, World Bank, <http://bit.ly/1vPSc3k/>
- Countries at the Crossroads (2004–2012), Freedom House, <http://bit.ly/1rZmIUJ/>
- Global Corruption Barometer, Transparency International, <http://bit.ly/1frwIA1/>
- Global Integrity Report, Global Integrity, <http://bit.ly/1zUkytV/>
- Vera-Altus Justice Indicators Project, Vera Institute of Justice, <http://bit.ly/1vPSSWu/>
- World Governance Assessment, Overseas Development Institute, <http://bit.ly/1vlDYUo/>

Expert assessments of the justice sector

- Detention Procedure Assessment Tool, American Bar Association, <http://bit.ly/1vlDYUo/>
- Judicial Reform Index, American Bar Association, <http://bit.ly/1vPT73V/>
- Prosecutorial Reform Index, American Bar Association, <http://bit.ly/1zUleiS/>
- Rule of Law Index, World Justice Project, <http://bit.ly/1e1OyIP/>
- European Commission for the Efficiency of Justice, Council of Europe, <http://bit.ly/1znSoYh/>

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Heggstad, K., and M. Frøystad. *The Basics of Integrity in Procurement*. U4 Issue 2011:10. Bergen, Norway: U4 Anti-Corruption Resource Centre.

Martini, M. 2012. *Overview of Integrity Assessment Tools*. U4 Expert Answer 340. Bergen, Norway: U4 Anti-Corruption Resource Centre.

United Nations Development Programme. 2012. *Governance for Peace: Securing the Social Contract*. New York.

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police, prosecution, trial, detention,
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