Institutional Modularity in Anti-corruption Enforcement

South American Experiences

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Enforcement is the central challenge in anti-corruption law. Ironically, in many societies the problem is that there are too many enforcement agencies rather than too few, mainly because those agencies' actions are poorly coordinated. Solving this problem is difficult because there are both pros and cons associated with encouraging coordination across anti-corruption enforcement agencies, and the balance among the competing considerations depends heavily on the context. Moreover, changes in the structure of an anti-corruption enforcement regime often implicate deep questions of constitutional design. Nonetheless, given the threat that corruption poses to effective governance, solving this problem ought to be a high priority.

Beyond Integrated Anti-Corruption Enforcement

In the early years of the twentieth century, Brazil's anti-corruption agencies developed an intriguing response to this conundrum. They embraced what I and my co-authors, Guillermo Jorge and Maíra Machado, call *institutional modularity*, an institutional design in which agencies are able but not required to coordinate with one another. It is unclear though whether this approach is viable outside of Brazil. That is the topic of the article we contributed to World Comparative Law's Special Issue on corruption.

Once upon a time, international best practices called for integrated anti-corruption enforcement. In this model, a single agency is responsible for each stage in the enforcement process, that is to say, monitoring, investigation, adjudication (which includes prosecution, defense and decisionmaking), imposition of sanctions, and publicity. In many countries, however, anti-corruption law is characterized by *institutional multiplicity*. This means that multiple institutions in the same legal system have the authority to respond to a case of corruption. For instance, in many legal systems, the same corrupt act may be subject to administrative, civil, or criminal sanctions, and several distinct institutions, both local and foreign, may enforce those sanctions.

The implications of institutional multiplicity depend on the extent to which agencies with overlapping authority coordinate their activities, or in other words, work together to achieve common objectives. Coordination has both advantages and disadvantages. It can ensure that defendants are not subject to double jeopardy and disproportionate sanctions; it can avoid inefficient duplication of effort; it by definition implies that agencies have found a way to reconcile conflicting objectives; and, it can ensure that tasks are allocated to the agencies with greatest capacity to complete them successfully. At the same time, coordination can entail costly negotiation and dialogue; it can blur lines of accountability; and it can stifle experimentation and competition, which can be particularly troubling when enforcement agencies themselves run the risk of being captured or corrupted.

Institutional Modularity

Institutional modularity allows agencies to choose between coordination and independence on a case-by-case basis rather than making an all-or-nothing choice. So, for example, in a modular system, civil, administrative, and criminal agencies can operate independently for most purposes but combine to form multi-agency task forces to undertake particularly complex operations.

We call this kind of system a modular one because for any given function it relies on multiple functionally interchangeable units (modules) that are capable of operating either independently or in combination with one another. In the business context, modular organizational design has been recognized as a way of capturing the benefits of coordination while reducing communication costs and preserving flexibility. In principle, modularity should have the same implications in public sector organizations such as anti-corruption enforcement agencies.

Institutional modularity in Brazilian anti-corruption law has been well-documented, in our own previous work as well as in an important study by Lindsay Carson and Mariana Prado. And Brazilian anti-corruption enforcement has been successful along many dimensions. Over the past two decades, Brazilian anti-corruption agencies have managed to successfully prosecute several high-profile cases involving powerful actors. This led us to wonder whether the Brazilian model had been adopted by neighboring countries in South America.

Our article summarizes the results of separate studies of anti-corruption enforcement in six South American countries: Argentina, Bolivia, Brazil, Colombia, Paraguay, and Peru. Each study involved documentary research, formal interviews and informal conversations with public officials and law enforcement authorities. The studies were completed in 2015. The aim was to capture not just the formal rules governing enforcement but also the informal norms and practices. Crucially, rather than focusing on a single anti-corruption agency we aimed to cover all of the institutions involved in enforcing anti-corruption norms. For practical reasons though, we only covered institutions operating at the national level. This is an important limitation because in many countries subnational institutions played critical roles in anti-corruption enforcement.

One of the most striking revelations from this project was the extent of institutional multiplicity. The sheer number of agencies that play a role in enforcing anti-corruption norms in these countries was staggering. Also noteworthy was the fact that some of the agencies fell outside the conventional tripartite division of powers. These are the key findings of our comparative assessment:

- In most countries, the most prominent anti-corruption agency was the *Ministerio Público / Ministério Público*, the body charged with public prosecutions. This was typically an autonomous agency, independent of the executive, judiciary or legislature.
- Auditors general or co*ntralorías/controladorias*, bodies charged with overseeing fiscal management of public bodies and state-owned enterprises, also played a prominent role in anti-corruption investigations. These were typically autonomous agencies.
- Within the executive branch, the relevant agencies invariably included not only the police and a specialized anti-corruption agency, but also a Financial Intelligence Unit (FIU). Individual branches of the government often also had agencies charged with conducting internal audits. In addition, corrupt public servants were typically subject to discipline by administrative bodies. Moreover, regulatory agencies charged with oversight of specific fields, such as public procurement, or oversight of specific markets, such as electricity or water, also played a role in monitoring and investigating corruption.
- In the legislative branch we documented investigative activities not only by legislative committees but also by Special Parliamentary Investigative Committees (SPICs) that could be created ad hoc to investigate specific instances of corruption.
- For the judiciary, in each of our six countries there were multiple courts in which corruption cases could be heard, generally depending on whether the proceedings were criminal, civil, or administrative in nature. There were also examples of countries with specialized courts for cases involving corruption of public officials.
- Finally, our studies also documented the involvement of NGOs and private firms in anti-corruption enforcement. In some cases, NGOs

occupied fairly conventional roles: participation in public hearings, advocacy, publicizing conflicts of interest on the part of enforcement officials. However, we also documented official efforts to enhance the role of NGOs, such as reforms to transparency and access to information laws, partnerships in training programs, and involvement in councils charged with oversight and advice. Meanwhile, in relation to the private sector, we documented nascent trends toward using corporate liability regimes to encourage firms to engage in self-regulation.

Institutional Design and Local Conditions

Although our country studies revealed widespread institutional multiplicity, we found few instances of institutional modularity outside of Brazil. Our search focused on examples of both coordination and *coordination mechanisms*, the latter being defined as any mechanism that enabled coordination among agencies or units performing the same function. Examples of coordination mechanisms include: common databases; interagency task forces, units charged with facilitating interagency coordination; rules on sharing evidence among prosecutors working on civil, criminal, or administrative proceedings; principles such as *ne bis in idem* that determine the priority of decisions in various types of proceedings; and rules for adjusting sanctions to reflect sanctions imposed by other bodies. We found few examples of effective coordination mechanisms of these sorts in Brazil's neighboring countries.

The reasons for the absence of institutional modularity varied from country to country. One country, Peru, had opted for an integrated model of anti-corruption enforcement. In other countries, political factors or resource constraints appeared to hamper coordination. Brazil was unique in having multiple anti-corruption institutions and a depoliticized, meritocratic, relatively well-resourced bureaucracy.

Ultimately, therefore, this project revealed the extent to which design of public institutions is influenced and constrained by local conditions, a lesson that holds beyond the field of anti-corruption law.

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