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Corruption risks in the criminal justice chain and tools for assessment

Chapter 3: Prosecution

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Corruption risks in the criminal justice chain and tools for assessment

Chapter 3: Prosecution

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

Heike Gramckow

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1. Basic activities and responsibilities of prosecution offices

In most countries, the principal responsibilities of prosecutors in the criminal justice system are to provide legal guidance to investigations conducted by the police, to review the results in order to determine whether the evidence is sufficient to support a charge, to file a case in court or request further investigations, and, finally, to prosecute criminal cases in court on behalf of the state. In carrying out these responsibilities, prosecutors are exercising the sovereign power of the state and are expected to represent the best interests of the community, which includes honoring the rights of the accused (Williams and Hsiao 2010). Prosecutors are essential to keeping communities safe and holding citizens, companies, and government officials accountable (Gramckow 2011).

When there is prosecutorial corruption, suspects may be able to flee, evade serious charges, or intimidate witnesses. Conversely, they may be held in pretrial detention for prolonged periods of time, required to pay excessive bail amounts, or charged with more serious crimes than warranted. The consequences can be severe both for communities, in cases where criminals go free as a result of irregularities in prosecutions and trials, and for the accused, if they are wrongfully tried and convicted. Cases of corruption also can damage the reputation of prosecution offices and undermine citizen trust in the justice system as a whole. And they may have serious financial consequences for governments (and thus for taxpayers) if cases have to be retried and/or compensation has to be paid to the wrongfully convicted.

Prosecutors in different countries have different roles and responsibilities in the investigation, prosecution, adjudication, and post-adjudication stages. In some countries, they may conduct their own investigations or have responsibilities for supervising the execution of sentences, which may extend to supervision of prisons (UNODC 2006). They may also represent the state in cases filed against the government, including civil cases involving government-owned companies.

Countries also vary significantly in the degree of flexibility allowed to prosecutors in criminal cases. Prosecutors in most common law countries traditionally have a large margin of discretion to dismiss cases and negotiate charges. In civil law countries, on the other hand, the traditional approach is based on the legality principle, which requires prosecutors to pursue every criminal case brought to them unless the evidence to support the case is insufficient. They have no official authority to decide to drop a case or negotiate charges (Gramckow and Monge, forthcoming). In practice, however, prosecutors in civil law countries have often found ways to adjust charges by omitting lesser violations or multiple offense counts. In both sets of countries, therefore, there is some flexibility. This may be desirable from the standpoint of system efficiency, as well as being in the interests of the accused. But it can also provide opportunities for misconduct or for concealment of corruption.

The chief prosecutor, who may be a career public servant, political appointee, or elected official, is most commonly the one who sets policies on when to pursue prosecution, when to drop a charge or the entire case, when to allow plea negotiations, and when to seek other alternatives, such as deferred prosecution. Having broad scope for discretion means greater control over the prosecutorial workload and flexibility to

adjust decisions depending on resource availability and changing policy needs (Kyprianou 2008). If the policies guiding discretionary decisions are unclear, require little transparency, and allow only limited reviews, however, they may provide opportunities for corruption.

Broad unregulated discretion seems to make the prosecution process in common law systems an easy target for corruption. As indicated above, however, civil law systems also provide corruption opportunities. As legal systems have evolved over time, the traditional differences in the degree of discretion between the two legal systems have become less pronounced. Currently many civil law systems provide rules for limiting charges, and more civil law countries are also allowing negotiations with the defense on charges. On the other hand, discretion in common law countries is increasingly regulated by detailed agency rules. These trends are a reflection of experiences indicating the need for balance. Flexibility may help prosecution agencies manage their resources without compromising justice, but this requires clear and transparent rules for decision making as well as a system for periodic reviews and audits.

The position of the prosecution office in the political system of a country also influences the potential scope, incentives, and opportunities for political capture and corruption. For example, in most countries of the former Soviet block, the procurator general was one of the most powerful government officials, and the prosecutors working in that office dominated the criminal process and decisions. In some post-Soviet states, this system still prevails (Anyshchenko 2010). In such a system, clearly defined agency rules are likely to be limited and decisions nontransparent, with questionable results for accountability.

Internationally, it is now widely recognized that irrespective of their position within the overall government structure, prosecution agencies should have the status of independent institutions in order to insulate prosecutors from undue political and executive branch influence. This helps ensure fair and impartial criminal trials (Gramckow 2011). In some countries, the prosecutor's office is part of the executive branch, often under the Ministry of Justice. In this case the office must comply with guidelines and rules that apply to all agencies of this branch, and it is subject to review by the relevant accountability institutions, such as independent audit and internal review agencies. Where the prosecution service is considered a quasi–judicial branch entity with independent budget, review, and reporting authorities, these administrative functions and similar accountability systems have to be available for the prosecution service. No one institutional system is in itself superior or more or less prone to corruption. Rather, any system requires clear rules and accountability structures to minimize opportunities for corruption in prosecutorial decision making.

2. Common corruption risks and the most common known forms of corruption in prosecution

The wide variation between prosecution agencies in terms of their institutional arrangements and responsibilities means that opportunities for corruption vary significantly across countries. A prosecutor can be bribed or promised other benefits, including promotions. Criminal elements may bring threats against prosecutors and their families, and there may be political pressures or interference in the prosecution process. Such bribery, threats, or political interference can happen at any point of interaction between prosecutors and investigators, suspects, offenders, victims, witnesses, judges, or corrections officers. For example:

- *During the investigation process*, prosecutors may be bribed or pressured to interfere with the investigation of a case. They may try to undermine the investigation by deliberately providing incorrect legal advice to investigators to discredit or delay the investigation. They may collude with investigators to fabricate or hide evidence.
- *During the charging and filing process*, they may delay or accelerate the filing and prosecution of a case. They may alter police records or investigative reports, lose documents, or accept bribes in exchange for dropping or altering charges.
- *During the pretrial phase*, they may inappropriately accept or deny plea offers, falsify evidence to support or drop pretrial detention and bail requirements, rig the jury selection, not disclose exculpatory evidence, intimidate witnesses, or unduly influence other prosecutors and even judges.
- *The selection of a particular prosecutor to handle a case* may also be influenced by corruption to achieve a specific outcome. If no clear, objective, and systematic process exists for case assignment, the head of a prosecution unit or agency may pick a preferred trial attorney who is more inclined to follow instructions or who may have received a share of the bribe.
- *During trial and sentencing*, corruption may take the form of concealing evidence, excluding exculpatory evidence, coercing offenders or witnesses, or making misleading statements in court.

Since systematic studies of prosecutorial corruption are limited, information is not available on the relative frequency of corruption at different stages of the prosecution process. However, studies of wrongful convictions in the United States have indicated that hiding evidence is the most common form of prosecutorial misconduct, and there is a high likelihood that the same holds for corruption (Balko 2013). Similarly, studies in Nigeria and Venezuela have found that corruption most commonly involves prosecutors tampering with evidence, often in concert with the investigating police officer (Buscaglia and Ruiz 2002; on risks during investigation, see chapter 2 of this issue paper). This finding is also supported by a United Nations–financed study that reviewed complex crimes in 64 member countries (Buscaglia and van Dijk 2003).

In most countries, the majority of prosecutors are ethical, but those who are not are likely to be easy to corrupt. They know that their risk of being detected is generally low and that if detected, they are unlikely to face serious punishment. In addition, in most countries prosecutors rightfully have immunity from civil

liability for noncriminal misbehavior. This means that responsibility falls on the agency itself to provide effective systems to detect and pursue willful misconduct.

Since no prosecution system is completely free of corruption, reports of serious corruption cases involving prosecutors come from around the globe (see, for example, Neil 2014; Kutner 2014; Sengupta 1998). Systematic studies of corruption in prosecutors' offices, however, are rare or at least difficult to find. Most international indicators and regularly conducted surveys tend to focus on corruption in the judiciary or police rather than in the prosecution service. There is thus a paucity of data for assessing the scope and trend of corruption in prosecution services.

3. What tools are available to detect and reduce corruption risks in prosecution agencies?

Effective mechanisms to identify and reduce, if not eliminate, corruption risks in prosecution services are similar to those applicable to other government agencies. The starting point is to have publicly available policies that state clearly when, how, and by whom prosecutorial decisions across all functions are to be made: how cases are assigned, when prosecutors may drop charges, offer a plea bargain or not, and so on. Similarly, professional standards and standards for prosecutorial processes should be in place and made public, so that unusual decisions, processes, and delays can be detected easily. Such policies and standards must be reflected in all agency systems, including in case management systems that track assignments and decisions, internal and external review systems, and performance management systems. Having clearly defined policies and standards in place helps prosecutors adhere to them and enables managers and external reviewers to detect deviations.

Good examples of such professional standards and detailed agency policies exist for many larger prosecution agencies in the developed world; see, for example, the guidelines developed by the Office of the Director of Public Prosecutions in New South Wales, Australia (ODPP 2014). International standards and rules are available from professional organizations such as the International Association of Prosecutors and can be adapted to specific national or local contexts.

3.1. Creation of a system of transparent and detailed professional standards, operational and decision-making policies, and operational guidelines

Without clear standards for professional behavior and decision making and explicit case-processing rules, prosecutors and their support staff cannot understand exactly what is expected of them. This makes efforts to identify corruption difficult and vulnerable to subjective interpretation, except in the few cases where there is clear evidence that someone has solicited or accepted a bribe. Detailed standards must set the baseline against which to assess deviations. They thus constitute one set of tools for assessing risk and detecting corruption and other misconduct.

Studies have shown that strict and uniform prosecutorial criteria for archiving or dropping criminal indictments, subject to supervisors' control, reduce the frequency of bribes offered to prosecutors (Buscaglia and Ruiz 2002). Furthermore, professional standards, or codes of ethics, outline what conduct is acceptable under what conditions. They should be made public, as well as being included in staff training and performance reviews. The International Association of Prosecutors (IAP) has adopted *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors*, and this document, available on the IAP's website, provides a basis for creating specific standards for prosecutors' offices worldwide (IAP 1999). IAP members include prosecution agencies on every continent, representing all legal systems and countries at all levels of development, including conflict-prone states. Member agencies of the IAP that have adopted these guidelines also make their expertise available to other member agencies. As a result, IAP standards and similar ones have been widely adopted, but detailed information about their application in practice is not available.

Detailed guidelines and protocols for decision making and operations also set clear expectations and benchmarks. They specify such details as the types of actions and decisions that may be taken; whether, when, how a certain action and decision should be taken; and who should be consulted or review actions. In addition to providing guidance for prosecutorial staff, publication of such guidelines enables others to understand what is expected and thus to observe when decisions or processes, including timelines for different processes, deviate from the norm. This provides a basis for assessments of compliance. Such detailed guidelines for the United Kingdom, for example, can be found on the website of the Crown Prosecution Service (2015).

3.2. Implementation of effective management and internal review systems

Even the most detailed guidelines and standards for prosecutorial processing and decision making are only as good as the systems available to verify compliance and detect deviation from the norm. Reports from the United States, the United Kingdom, New Zealand, and other countries indicate that even where appropriate standards and guidelines exist, the enforcement structures – that is, effective review and reporting systems to ensure compliance and enable early detection of corruption – are underdeveloped (see, for example, Wright and Miller 2010; Ridolfi and Possley 2010; Kutner 2014; HMCPSI 2014).

These experiences also show that regular assessments of general and specific corruption risks throughout the prosecution process, which are needed in order to design new anti-corruption tools and structures, are not commonly conducted. Furthermore, there is no systematic international framework that assists prosecution agencies in creating the policies, processes, and management structures they need to assess corruption risks across all agency functions and develop appropriate prevention, detection, and enforcement mechanisms specific to the agency (Gramckow 2011).

Nevertheless, a number of prosecution units or departments, especially those that handle more serious or politically sensitive cases, have had specific review policies in place for years. Such detailed prosecution

guidelines define precisely who has to review a file and who must be consulted before decisions are made. More complex or sensitive cases may also be handled by a prosecution team to provide for peer review and checks on decision making. In well-managed prosecution agencies – especially those responsible for cases involving large sums of money or very serious crimes, or cases involving organized crime or political crimes – common practices include creating teams to handle cases, requiring senior prosecutor review at every major decision point, and conducting regular assessments of decision-making patterns and the networks staff are engaging with. Well-designed case management systems that track such information are essential. Although there are no published case studies evaluating their use, one well-regarded system is goCase, developed by the United Nations Office on Drugs and Crime (UNODC 2014).

4. Use of existing assessment tools in prosecutors' offices

Comprehensive efforts to assess corruption risks and identify corruption throughout the prosecution process are rare and continue to evolve. Most available reports of comprehensive systems come from common law countries, mainly the United Kingdom, Australia, New Zealand, and the United States, most likely because of the more independent and autonomous structure of prosecution agencies in these countries. Also of interest are reports from the Netherlands, the Organization of American States, and the Council of Europe.

One prominent example is the Public Prosecution Service for Northern Ireland, which conducted a fraud and corruption risk assessment in 2013 and is currently monitoring initial implementation activities. The anti-corruption policy and risk management assessment tool of this agency are available on its website (PPS 2012, 2013). While this assessment did not identify specific adjustments needed to detect corruption risks in all prosecution processes, results from the test period should be helpful in identifying how such a tool can be improved to better meet the needs of the prosecution service.

Another interesting example of stocktaking comes from the Netherlands, a civil law country. There the Court of Audit (Algemene Rekenkamer) conducts a review approximately every five years of the status of integrity systems, including those of the prosecution service, which is part of the Ministry of Justice. The review uses a standard assessment questionnaire, available on the court's website. It focuses on what are considered the key elements of integrity management and policy: code of conduct, policy evaluation, risk analyses, internal controls, integrity audits, registration of reports of violations, registration of violations, registration of investigation protocols, reporting of suspected violations, and registration of disciplinary sanctions. The report on the 2009 audit indicated that the Ministry of Justice had made progress in instituting the desired elements since the initial baseline review conducted in 2004. But it also noted that the implementation of an integrity policy and integrity controls was incomplete and that no risk assessments were being conducted (Algemene Rekenkamer 2010).

The Organization of American States (OAS) from time to time reports on corruption risks in prosecutors' offices as part of its reports on the implementation of the Inter-American
Convention against Corruption in various countries. A recent example is the report on implementation in Panama, which assesses the existence, adequacy, and results of the legal framework. Based on the

evaluation, a number of far-reaching recommendations are made, such as to strengthen the internal oversight body in the Office of the Attorney General (the Control and Oversight Secretariat), guaranteeing it a permanent place in the organizational structure of the institution. Other recommended measures are immediate and tangible, such as to "check the website of the Office of the Attorney General and ensure that all the links in the 'complaints' and 'transparency' sections are working and are constantly updated" (OAS 2013).

The Council of Europe's Group of States Against Corruption (GRECO) is reviewing corruption prevention in the prosecution services of member countries as part of its Fourth Evaluation Round, launched in 2012. These reviews include qualitative assessments of prosecution agencies (and of judges and members of Parliament) based on a questionnaire derived from GRECO's Guiding Principles, as well as on other data, including information received from civil society. In addition, a GRECO evaluation team carries out on-site visits. While the reviews give a helpful overview of integrity systems in these agencies, and some include information on public perceptions of agency corruption, they do not provide quantitative data or detailed reviews of specific agencies. See, for example, an excerpt from the questionnaire used by the Fourth Evaluation Round (Box 1) and the evaluation report on the United Kingdom (GRECO 2012a).

The Council of Europe has also supported some country risk assessments that focus on the prosecution services of selected Eastern Partnership countries, such as Georgia (see Hoppe 2013). However, these assessments are based only on interviews with key counterparts within and outside the prosecution agency and a review of the legal framework; they do not constitute actual reviews of agency operations based on internal files and data.

Experience shows that to obtain a complete picture of risks it is important to go beyond mere legal reviews and look at the actual implementation and available resources, and to draw on internal and well as external sources.

BOX 1. EXCERPT FROM GRECO QUESTIONNAIRE ON CORRUPTION PREVENTION IN RESPECT OF PROSECUTORS

24 Prohibition or restriction of certain activities

24.1 Please provide the text of the relevant rules in English or French and describe the measures in place, if any, prohibiting or restricting the possibility for prosecutors to:

a) act in a particular case in which they have a private interest;
b) accept gifts (including the definition of gifts, possible value thresholds per item/per donor/per year and the procedures for disposing of or returning unacceptable gifts);
c) hold posts/functions or engage in accessory activities outside the courts, whether in the private or public sector, whether remunerated or not;
d) hold financial interests ;
e) be employed in certain posts/functions or engage in other paid or non-paid activities after exercising a prosecutorial function.

24.2 Please describe the specific rules in place, if any, regarding communication outside the official procedures of a prosecutor with a third party who has approached him/her about a case under his/her purview.

24.3 Please describe specific rules in place on the (mis)use of confidential information by prosecutors. Provide the text of the relevant rules in English or French.

25 Declaration of assets, income, liabilities and interests

25.1 Please provide the text of the relevant rules in English or French and describe the measures in place, if any, requiring prosecutors to declare the following:

a) assets and the holding of financial interests ;
b) sources of income (earned income, income from investments, etc.);
c) liabilities (loans from others, debts owed to others, etc.);
d) the acceptance of gifts;
e) the holding of posts and functions or engagement in accessory activities (e.g., consultancy), whether in the private or public sector, whether remunerated or not;
f) offers of remunerated or non-remunerated activities (including employment, consultancies, etc.) and agreements for future such activities;
g) any other interest or relationship that may or does create a conflict of interest.

25.2 Please indicate for each of the items in the previous question:

a) if the information to be declared is also required for prosecutors' family members and/or relatives and who is to be considered a family member/relative for this purpose;
b) when declarations are required and what time period they cover;
c) to whom / what body the information is to be declared;
d) if a register is kept of the declarations – both as regards ad hoc and regular declarations – and, if so, what information is contained in this register;
e) if the declarations are made public and in which way.

25.3 If there are no specific written rules applicable to prosecutors concerning the declarations referred to in question 25.1, please describe whether unwritten rules (conventional rules, standing practices etc.) for this purpose exist and how they are applied.

Source: GRECO 2012b.

5. Conclusions

The development and implementation of sophisticated systems to assess corruption risks and detect or prevent corruption incidents in real time holds great promise for curbing corruption in prosecutions. Well-designed, automated case and document management systems are already being deployed in some developed countries: examples include the increasingly comprehensive control and review systems established in the UK. Such systems, however, require high levels of resources and expertise and are well beyond the reach of most prosecution agencies, especially those in developing countries.

As this chapter shows, attention to corruption risks in the prosecution service is a recent development, and examples of good practices in addressing these risks are limited by and large to experiences in developed countries. But there is still much that less developed countries can take from these efforts.

A basic assessment of corruption risks, followed by appropriate adjustments to policies and processes, can be done with limited resources, with external expert advice if needed. The key factor in the success of such an approach is leadership commitment. Agency leaders need to protect their staff from exposure to corruption opportunities, identify corruption risks in all operations and decision-making processes, and use the results to establish clear policies, guidelines, and performance standards, as well as systems for internal review. They must also take appropriate actions if corruption is detected (Gramckow 2011). Such leadership commitment includes openness to regular audit processes and the willingness to be accountable and transparent by providing information about agency operations and decisions in a manner that does not compromise processes or the rights of persons.

All this points to the prime importance of a system for selection and management of prosecution leadership and staff. In addition to seeking out the best legal minds, the system should place ethics, integrity, character, and "people skills" at the top of the list of qualifications. Investments must be made in training and evaluating all staff, and especially all managers, accordingly.

This is not to downplay the challenges facing prosecution agencies in poorer countries. Prosecutors in developing nations, generally speaking, face higher threats from organized crime and more frequent political interference. The temptation to accept favors and bribes is all the greater when salaries are insufficient. The critical element in any corruption risk reduction program, therefore, is even more important in developing states: a commitment by the service's leadership to take corruption risks in their agency seriously and to develop and implement measures to reduce if not eliminate these risks. Without such commitment, even the best systems, policies, and processes will have little impact on keeping corruption within the organization at bay.

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