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Assessing the Corruption Risks of Proposed Laws:

A Parliamentary Corruption-Proofing Guide



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Developed by the National Democratic Institute (NDI), this global guide on corruption risk analysis is intended for parliamentarians and parliamentary staff.

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Introduction

Parliaments play an especially important role in the fight against corruption. They have the final say on whether proposed legislation becomes law, and the enactment of any new law can increase the risk of corruption. With rare exception, the law will require enforcement. If the power of enforcement is not properly cabined, this power may be used for private ends – the classic definition of corruption. Beyond enforcement risk, there is the possibility that the law itself was written with corrupt intent or meant to benefit some or harm others, thanks to a corrupt bargain. Before approaching any legislation, parliament should be sure to identify and mitigate corruption risks.

European Union Eastern Partnership Countries developed techniques for identifying and mitigating corruption risks in the early 2000s. Various terms a corruption risk analysis (CRA), or “corruption-proofing,” more than a dozen Eastern European and Central Asian countries along with South Korea and Indonesia conduct CRAs on some or all proposed laws, and several more are considering introducing CRAs into their lawmaking process. (See annex one for sources.)

A CRA is only an assessment of risks. It does not by itself alter the contents of a proposed law. Because parliament has the last word on a draft law’s content, it bears the final responsibility if legislation increases corruption. For this reason, all parliaments should make the preparation, circulation and meaningful consideration of a CRA a standard part of their pre-enactment analysis.

This guide is meant to provide a set of guidelines and recommendations toward implementing corruption-proofing measures in legislation. Commissioned by NDI, it suggests how a CRA procedure can be incorporated into the standing rules of parliament and provides a checklist of issues the CRA should consider. Many parliaments already have procedures in place to ensure that bills are carefully studied and their impacts identified before final passage; for example, the standing rules of a parliament may already provide for a budgetary analysis or a regulatory impact analysis (RIA). The CRA is a tool that complements these other measures to ensure that when parliaments seriously consider legislation, they are as fully informed as possible. Sources explaining these other types of analysis are listed in annex two.

In developing the guide, NDI also convened workshops in Thailand and Iraq with legislative staff, executive branch personnel, civil society, experts in legislative drafting and other stakeholders, where participants discussed the ways their countries addressed corruption risks and how parliament’s role could be strengthened. Subsequently, the Secretariat of the House of the Representatives of Thailand created a committee on CRA to produce a guide specific to Thailand’s context. Similarly, in Iraq, this was carried out in the Legislative Directorate in the Council of Representatives. NDI thanks participants for the time and effort they devoted to the project and trusts they will see that many of their ideas are reflected in the final text.

The guide also draws on the original work on corruption-proofing in Eastern European nations sponsored by the European Union and the Council of Europe and the several reports that civil society groups in Moldova and Ukraine have issued on the corruption-proofing experience in their nations.

While primarily written for stakeholders in parliament, the guide can be adapted for use by anti-corruption agencies, executive branch agencies, civil society organizations (CSO) and other groups to detect and highlight the corruption risks that exist in legislative processes.

Integrating Corruption Risk Analysis into Parliamentary Procedures

This guide recommends that in every parliament, before members are asked to cast a final vote on passage of a proposed law, they be assured that:

1. The proposed law has been subjected to a rigorous analysis resulting in a written document (the CRA) that identifies the areas of the proposed law that pose risks of corruption, explains those risks and proposes measures to reduce, if not eliminate, those risks.
2. Legislators and civil society have had a meaningful opportunity to review and consider the CRA.
3. The proposed law has been revised to include measures to reduce, if not eliminate, the risks identified in the CRA.

The path a bill takes from its introduction to consideration and debate and final passage differs significantly from parliament to parliament, and each parliament must decide who should perform the CRA and when it should be performed. The Rules of Procedure of the Zhogorku Kenesh, the Kyrgyz Republic's one-house legislature, assign responsibility for conducting a CRA to an office in parliament's secretariat. By contrast, in Ukraine, primary responsibility lies with the Anticorruption Committee, one of the standing committees of the Verkhovna Rada. In some countries, a CRA is conducted by an executive branch agency, typically an anticorruption agency or ministry of justice; in others, CSOs have a formal role. And in several countries, multiple entities are involved in the CRA process.

A CRA takes time and effort, and resource limitations may dictate that a CRA be performed only on those bills likely to be considered seriously. The stage in which the CRA should be performed will depend upon where in the process a committee or parliament as a whole scrutinizes and debates a bill. First reading in some parliaments is perfunctory, accorded to every bill that is introduced, no matter the likelihood of its approval. In others, second reading is an important stage in the process, and a CRA should be performed before that stage. In other cases, only after second reading do stakeholders decide whether to consider a bill seriously.

As a bill passes through different stages, it will be subject to amendment. If the amendment is made after a first CRA is complete, the initial CRA should be updated or supplemented, or a new CRA should be produced. The rules of the Kyrgyz parliament expressly require the preparation of a new CRA, while Ukraine's rules have been critiqued for requiring that a CRA be conducted just once, in preparation for first reading.

In incorporating a CRA requirement into its rules of procedure, a parliament should ensure that, absent an emergency:

- » No bill should be considered by a committee unless a CRA has been conducted and circulated within a reasonable time before committee consideration of the bill.
- » No bill should be subject to final debate by the full chamber unless a CRA has been conducted (or, if appropriate, a new, updated or supplemented CRA has been produced) and circulated within a reasonable time (at least one week) before final debate begins.

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- » At the same time a CRA is circulated, it should be made public and posted on the parliament's website. The bill's sponsors should then be required to circulate a response to the CRA that identifies the revisions they propose to make to the bill to incorporate measures to reduce, if not eliminate, the risks identified in the CRA. The response should be made public and posted as well. The committee should not consider the bill, nor should the full chamber subject the bill to final debate, until all these steps are taken and a reasonable time has passed.
- » Outside groups or individuals should be invited to comment on the CRA or submit their own.
- » Where an executive agency has already performed a corruption risk assessment for a proposed law, the responsible office or committee of parliament should still conduct its own CRA, subject to the agency's assessment to independent and rigorous review, and include its comments on the agency's assessment in its own CRA.
- » Even in an emergency, a parliament should follow these steps in whatever time frame is possible under the circumstances. Thus, even if an emergency requires that a bill be enacted before a CRA has been conducted and circulated, the CRA should still be conducted and circulated within a set period after enactment (such as 21 days), and the bill's sponsors should still be required to circulate a response.



Checklist of Issues to Cover in a Corruption Risk Analysis

A comprehensive CRA will examine two kinds of corruption risks that a draft law can create:

- 1. Enforcement risks** – or procedural risks – arise from how the law will operate in practice, with special attention to how the law might influence the behavior of the people who are expected to follow, implement or enforce it. For example, a law might provide those charged with its execution the incentive and opportunity to abuse their enforcement power for private gain.
- 2. Substantive risks** arise from the benefits and burdens conferred by the law on particular categories of people or entities. For example, a law might confer suspicious or questionable targeted benefits on certain individuals or entities.

Enforcement and substantive risks are both more likely to occur when a law is drafted with little or no input from outside sources, such as those who have special interest or knowledge in the law's subject or those who are part of the citizenry at large. For that reason, a CRA should also assess whether the proposed law was developed through a transparent and participatory process, one that entailed timely disclosure of the text and adequate public consultation on its provisions.

These three areas – enforcement risk, substantive risk and process – are shown in box one, broken down into a series of questions a CRA should pose about each.

Box 1. Corruption Risk Assessment Checklist

I. Enforcement Risk

Discretion: Do enforcement agents have excessive or undue discretion?

Textual analysis: Does the draft contain ambiguous language? Are all terms defined?

Enforcement: What agency or agencies will be responsible for enforcing the law? Do they have sufficient powers to do so? Are their overlaps in their responsibilities?

Oversight: What agency or agencies will be responsible for overseeing how enforcement agents exercise their discretion?

II. Substantive Risk

Justification: Is there a report accompanying the draft explaining its provisions? Are the benefits to and burdens placed on different groups justified? Are exceptions to general law identified/explained?

III. Process

Transparency: Was the draft made publicly available with sufficient time for review?

Consultations: Were affected individuals/groups consulted?

Enforcement Risk

Those with the power to enforce a law may be tempted to abuse that power to advance their own interests. An example from Iraq illustrates the potential risk: A law gives the Ministry of Health the power to determine whether a healthcare facility is to be classified as a hospital or a clinic. There is a financial advantage to being classified as a hospital, and thus a risk that owners of a smaller facility that lacks an emergency room, overnight accommodations or other services a hospital provides will bribe someone to classify the facility as a hospital.

That, of course, would be corrupt, and if the bribery were detected, then both the facility's owners and the law's enforcer could be sanctioned. A well-known challenge of enforcing anti-bribery laws is that detecting such collusive corruption is difficult. It therefore makes sense to pay attention to how the law is drafted, the sort of discretion it confers on the officials who will implement it, the criteria or standards established for how that discretion should be exercised, and what sort of oversight mechanisms are provided.

In the Iraq example, if the law were drafted in such a way that the Health Ministry had open-ended discretion to make classification decisions without clear criteria or oversight, then the risk of enforcement corruption would be higher. It would be much harder to tell whether a ministry official made an improper decision unless there were direct evidence of bribery or other illegality. A CRA would identify this risk and suggest criteria for reducing it. They might include a requirement that the facility have an emergency room that operates 24 hours a day, seven days a week, that it has the capacity to house a certain number of patients for an extended period, and so forth.

Sometimes the drafters of legislation deliberately choose to give implementing officials broad discretion, but sometimes they grant such discretion inadvertently because they do not write a provision clearly or they use a word with more than one meaning. Topic two (textual analysis) discusses these risks.

Legislators can grant discretion not only through imprecise words, but also through silence – a failure to address the issue at all. Notably, unclear words are visible on the page and detectable by careful reading, but textual silence is obscure or invisible and can be detected only by thinking rigorously through how the law will operate in practice and imagining the tensions or gaps that may arise. One example would be if the agency or agencies that will be responsible for enforcing the law are not specified or their powers and responsibilities not precisely specified. Questions under topic four (enforcement) will reveal these risks.

The more discretion an enforcement authority has, the greater the risk that the authority may abuse it. The questions under topic four ask if there are ways to reduce or channel discretion by changing the terms of the law – in the example discussed above, for example, such measures would include establishing criteria for determining whether a health care facility is a hospital or a clinic.

It is virtually impossible, and almost always impractical, to eliminate all enforcement discretion. From a corruption-reducing perspective, what is critical is whether enforcement authorities are held accountable for the exercise of their discretion. The more discretion vested in an authority, the more attention should be devoted to whom and how it will be held accountable – in other words, to matters like transparency, review and “checks and balances.” The questions posed under the fifth topic (oversight) address these issues.

1. Discretion

To understand why discretion can lead to corruption, consider the following simple examples (Tarna, 2020). Suppose the law on applying for passports provides that in order to be approved, a person must complete a form, provide a photograph and a birth certificate and provide “any other documents that may be required.” Because the law gives the approving official some freedom to require or not require additional documents, it provides discretion – and because there are no evident standards or procedures to channel his or her discretion, it may create a risk of corruption. Another simple example: Suppose the law governing passport applications requires the official to process the application within a certain period of time upon receipt. If the period of time is relatively long (such as one year), and the official has discretion to move quickly or slowly, this may create a risk of corruption. In both of these examples, the official not only has power to issue the passport, but also discretion over the workflow. He or she could manipulate the workflow for private gain, such as by easing the process for applicants who provide bribes or dragging out the process for applicants who decline to do so.

Similarly, consider two versions of a law on drunk driving. One version states that a law enforcement officer “must” administer a breathalyzer test to a driver if there is reason to suspect the driver is drunk and “must” confiscate the driver’s license if the breathalyzer test exceeds a certain level. The other version states that a law enforcement officer “may” administer the test and “may” confiscate the license. Both versions confer power on the law enforcement officer, but the first describes this power as a responsibility or duty to be performed in all cases that meet the standard, while the second provides what seems to be quite broad discretion. Thus, the second version creates more risk of corruption – that is, that the law enforcement officer could manipulate the process for private gain, such as by showing leniency to drivers who provide bribes.

While the focus of this guide is on abuse of discretion for private gain (i.e., corruption), discretion can also lead to other societal ills, such as abuse of discretion for reasons that are racist, sexist or discriminatory in other ways. In the above examples, it is not hard to imagine that a passport officer or law enforcement officer with too much discretion might abuse that power for one of these other reasons.

As in the aforementioned case of the drunk driving law, the Building Control Act, B.E. 2522 (1979) in Thailand contains several provisions where the local competent official is given “power” to take action but is not required to do so. For example, such an official holds the power to order the applicant, owner or occupier of the building to rectify a layout plan, stop construction and demolish the building. There may be some risk that the local competent official could use this discretion in corrupt ways – by acting against the owner’s interests unless a bribe is given, or by taking no action (“looking the other way”) if a bribe is given.

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Determining whether a law provides too much discretion or not enough is more art than science; the answer can vary from circumstance to circumstance and from community to community, depending on the balance they choose to strike among risks and priorities. Policymakers should recognize that laws can be aligned along a spectrum, from those that grant enforcement agents broad discretion to those where their discretion is tightly constrained. At one extreme, a law might simply remove an agency head's discretion to hire a relative, no matter how qualified the person was for the job. That would altogether eliminate one form of corruption: nepotism, the hiring of relatives.

In countries where nepotism is a particular problem, such a law would be preferred on corruption-prevention grounds. It is clear, absolute and easy to apply (except, perhaps, for more remote relationships, such as a brother-in-law or second cousin). An employee either is or is not a relative of the person responsible for the hiring decision, something readily ascertainable not only by an anticorruption agency or personnel commission, but also by the media and civil society.

On the other hand, in smaller countries with a limited number of qualified individuals, such a prohibition has its drawbacks. It could well be that a relative of a state hospital head is a highly qualified surgeon, among the best in the country, and a flat rule prohibiting the hospital head from hiring relatives would deprive the hospital's patients of the surgeon's services – and might prompt the surgeon to seek work in a different jurisdiction altogether, contributing to “brain drain.” In such cases, the law might give the hospital head more discretion by requiring the hospital head to hire “the most qualified individual.”

“Most qualified” puts a limit on the hiring authority's discretion. To be sure, whether a relative would be the “most qualified” candidate is a judgment call, one that will take into account many considerations and one on which reasonable people can differ. But in the case of a medical facility, for example, its head would have to flout the law to hire a relative who had little or no qualifications whatsoever. The law could also impose other limits on discretion;

Box 2. Examples Excess Discretion

Enforcement authority given several options without clear criteria on when each should be exercised:

- » **Ukraine:** *Proposed law stipulates that an agency may suspend or prohibit a company's business in case of violation.”*
- » **Thailand:** *If a building is not built to code, an inspector can fine the builder or require the building be demolished or take no action.*

No guidance on how enforcement power is to be exercised:

- » **Ukraine:** *Law allows for the agency to refuse to grant a permit.*
- » **United States:** *It shall be unlawful...for any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the city and country of San Francisco without having first obtained the consent of the board of supervisors.*

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for example, it could require human resources officials to recuse themselves from the hiring process if a relative is involved.

Striking the right balance between providing little discretion (e.g., a simple, easily observable rule like “no relatives”) and providing more discretion, but in a structured manner (e.g., a more general standard like “most qualified,” a recusal requirement or both) requires a careful assessment of circumstances. If nepotism in public hiring is a major problem, and the pool of applicants for professional jobs reasonably sized, a rule banning public officials from hiring relatives might be appropriate. Perceptions matter, too; if the public perceives nepotism to be a major problem in public hiring, even if it is in fact not, an absolute rule against hiring relatives might be important to promote trust in government.

Public procurement laws offer another example of discretion and how to place reasonable limits on it. Bids received in response to a request for proposals (RFP) often contain errors, ranging from typos, arithmetic mistakes, late submissions or misdirected submissions. While the law could automatically disqualify from consideration any bid containing an error, the interest in having as many bids as possible to choose from is such an important factor in public procurement that national procurement laws typically follow the United Nations model and provide that procurement authorities are allowed to consider bids with “minor deviations” from the RFP, so long as they “do not materially alter or depart from” the terms of the request.

While “minor” and “material” cabin procurement agencies’ discretion somewhat, they still leave them with a great deal of discretion, and the many reports of corruption in public procurement suggest this discretion is too frequently abused. Nigerian lawmakers have taken a step to further reduce discretion in public procurement. Criteria for determining what is or is not material or minor are set forth in authoritative guidelines issued by the Bureau of Public Procurement. Price changes, an unsigned bid, a bid received at the wrong date and time or at the wrong location – common indicia of corruption in procurement – are all declared major, “material” deviations. Procurement authorities are given no discretion when a bidder commits one of these errors; the bidder must be disqualified.

At the same time, the bureau’s guidelines state that arithmetic errors, differences in construction methods, and certain changes in delivery time are to be treated as “minor” and thus not grounds for excluding the bidder. These criteria still leave room for discretion, allowing in addition to those factors listed as minor “any other condition that has little impact on the bid,” but the risks of corruption are significantly reduced.

Discretion in enforcement can be reduced but rarely, if ever, eliminated entirely. In determining the right balance between a rigid enforcement rule and a flexible standard, a critical issue for corruption-proofers is how much oversight those enforcing the law will be subject to, a topic considered below.

2. Textual analysis

The most straightforward element in a CRA is an analysis of proposed law’s text. Are there ambiguous words or phrases that can plausibly convey more than one meaning?

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When a text is ambiguous, the necessary implication is that someone – usually, the official who needs to enforce it or carry it out – can choose which meaning to apply. This means the person has discretion, just as if the law had expressly authorized the person to exercise this power. And discretion, as we have seen above, may create a risk of corruption.

Corruption-proofing analysts should bear in mind that a reading of a law may seem strained or unrealistic, but if someone stands to gain from that reading, there is the risk of a bribe or extra-legal pressure to secure or validate the reading.

Many words are ambiguous to some degree. In English, the term “person” can mean a human being or a legal entity, such as a partnership, corporation or government entity. Similarly, the term “child” can mean someone who has not yet reached adulthood, but it can also mean someone (even an adult) who is someone’s son or daughter. So a person may not be considered a “child” in cases involving juvenile justice laws (the individual may have reached the age of adulthood), but this same person may still be considered a “child” for purposes of inheritance laws (the person remains his or her parents’ child and may be entitled to inherit their property).

With language, some ambiguity may be inevitable and not necessarily problematic. But when the stakes are high, a seemingly harmless level of ambiguity may lead to corruption.

For example, in the United States, a code of government ethics prohibits government officials from receiving gifts, unless such giving is motivated by a family relationship or “personal friendship.” There may be situations where a person in high office accepts a gift from a person and claims the person is a “personal friend,” but the “friendship” may seem corrupt to others. In Thailand, the Safeguard Measure Against Increased Imports Act, B.E. 2550 (2007) contains several terms that are ambiguous, such as “impairment,” “qualified,” “public interest” and “special factors.” Each of these terms could be interpreted in different ways, giving officials discretion over their application and potentially creating risks of corruption.

Sentence structure can also create ambiguity. When an adjective such as “small” appears before a list of nouns (“small handguns, clubs, and knives”), does “small” modify all the nouns in the list or only the first? When a phrase such as “within 50 miles of Bangkok” appears after a list of nouns (“cities, towns and villages within 50 miles of Bangkok”), does the phrase apply to all the nouns on the list or only the last? When a sentence is structured in the passive voice, without identifying the subject of the sentence (“A report shall be submitted”), who is responsible for submitting the report? When the subject of a sentence is identified, but is not a legally accountable person (“Every dog in the park must wear a leash”), who is responsible if the dog does not wear a leash? Box three provides several examples of ambiguous language, including clauses from laws written in Spanish and German, respectively the second and fourth examples.

Ambiguity can also arise when we use a word or expression that is actually broader or narrower than intended. For example, in the United States, there are 50 states, so there is a tendency when drafting a formula grant program to allocate funding among the 50 states. However, in the United States, there are also areas that are not included within any state, such as the District of Columbia, the Commonwealth of Puerto Rico and the territory of Guam, so a grant program that allocates funding only to the 50 states would fail to provide funding to these other areas. Similarly, the aforementioned ambiguity in the use of the term “person” in English-speaking jurisdictions means that a law

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that applies to every “person” (such as a law giving every person the right to vote, or subjecting every person to a military draft) might have the unintended effect of applying to legal entities other than individuals.

Finally, ambiguity can arise when terms are used inconsistently within a single act. Under principles of interpretation common to a range of legal traditions, when a law uses the same term multiple times, it is presumed to have the same meaning each time – and when a law uses two different terms, they are presumed to have different meanings. So, if a law on transportation uses the term “automobile,” it should use that term consistently – and if it also uses the term “vehicle,” it should do so with the understanding that “automobile” and “vehicle” mean two different (though perhaps overlapping) things. Doubt can arise if different words are used to mean the same thing or if the same word is used to mean two different things.

Language issues can be peculiar to each country. In many languages, the connecting word “or” can be ambiguous. In the sentence, “The ministry shall provide a subsidy or a tax reduction to hurricane victims to help them rebuild their homes,” is the ministry to provide either a subsidy or a tax reduction, or must it provide both?

In many countries, a bank is included in the broad category of financial institutions. If the proposed law requires banks to take certain actions, is the term “bank” used instead of “financial institutions”?

Some legislative drafting manuals include a chapter that lists common ways in which ambiguity or vagueness in a text can arise. A good example is the chapter in *Law Drafting Manual: A Guide to The Legislative Process in Albania*, prepared with the support of the European Union’s Assistance Mission to the Justice System. Where no manual or list is available, parliament should see that one is created, widely disseminated and posted on its website. Sources on legislative drafting are included in annex three.

Box 3. Examples of Ambiguous or Unclear Provisions

“The Minister shall establish procedures for any appeal specified in the article.”

» *Must the minister establish a different procedure for each type of appeal or a single procedure for all? Can the minister choose between both options?*

“Clothing and furniture of essential use of the debtor, his spouse or cohabitant, and his children are excluded from being collateral.”

» *Is “essential use” a requirement that qualifies only furniture or both furniture and clothing?*

“The governor shall consult with the administrator, and he shall then...”

» *Is “he” the governor or the administrator?*

“The party representatives have to identify themselves with a letter of attorney.”

» *Must the representatives of each party show a separate letter of attorney, or does a single letter suffice?*

3. Consistency

Another form of discretion can arise when one law is inconsistent with another. When two laws are inconsistent, someone – again, usually the official who needs to enforce it or carry it out – can choose which law to use. Again, this discretion may create a risk of corruption.

A very common type of inconsistency arises when two laws use the same term, but it is not clear whether they have the same meaning. For example, a law on public education may include a very precise definition of the term “school,” while a law on the construction of public buildings may use the term “school” but not define it. Should the law on public buildings be read to include the very precise definition from the law on public education, or should it be read to have a different meaning?

In scrutinizing the bill’s text, a CRA should look for provisions in other laws that might conflict with the draft law. Are references to other laws clear? Is the text consistent with other laws or, as in the example in box four, is there a conflict?

Problems can also arise if words are defined differently in different laws. A CRA should ascertain that all important terms are defined and used consistently throughout the text of the proposed law. The analysis should also ask whether the definitions are consistent with the terms used in other laws. For example, if a proposed tax law would require employers to pay a tax based on the number of full-time employees, is “full-time” defined? Is the definition the same as in the nation’s labor code? If not, will the differing definitions create ambiguity in other statutes where the term “full-time” appears?

Inconsistency can also arise when one act is intended to replace or override another act, but does not do so clearly. For example, the new law may simply state that it applies “without regard to the provisions of any other law” or “notwithstanding any other law to the contrary.” In Thailand, the Act on Ancient Monuments, Antiques, Objects of Art and National Museums, B.E. 2504 (1961) states that “all other laws, by-laws and regulations in so far as they deal with matters provided herein or are contrary hereto or inconsistent herewith shall be replaced by this Act.” This is well-intended, but it can raise complicated questions about whether specific laws are displaced. For example, suppose there is a provision in another law that establishes criminal penalties for trafficking in antiquities, and there is no comparable provision in this act. Is it replaced by this act or not? Language such as “notwithstanding any other law” can be ambiguous, leaving it to the enforcement agent’s discretion whether the new law repeals or

Box 4. Example of Drafting Inconsistency

Article 10 Decree on Asylum Procedures: “Once all statutory requirements for the political status of the refugee are fulfilled, the agency may grant asylum.”

Article 15 Constitution: “Political refugees have a right to asylum.”

Issue: Article 10 Decree reads as if the agency has discretion, contradicting the clear right in the Constitution.

Solution: Article 10 Decree on Asylum Procedures: “Once all statutory requirements for the political status of the refugee are fulfilled, the agency must grant asylum.”

Source: Tilman Hoppe, *Anticorruption Assessment of Laws in South East Europe (Corruption Proofing) 2014*

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supersedes an earlier one. If possible, if one law is intended to repeal other laws, it should clearly identify which ones.

Finally, inconsistency can also arise not only between two laws, but also between a law and another type of legal document, such as a regulation, constitutional provision or international agreement, creating uncertainty about which provision prevails and potentially leading to problematic degrees of discretion and risks of corruption.

4. Enforcement

Albert Einstein once said, “Nothing is more destructive of respect for the government and the law of the land than passing laws which cannot be enforced.” He was speaking about the laws in the United States in the 1920s that prohibited the production, importation and distribution of alcoholic beverages. Because legitimate businesses were no longer allowed to engage in these activities, criminal gangs took over, competing with each other to control markets and causing widespread lawlessness and violence. The law enforcement agencies responsible for enforcing these laws were overwhelmed, as they lacked the resources to confront the gangs and stop the illegal activities. As a result, the local police often colluded with the criminals, reasoning that enforcement would be better handled by the federal law enforcement agencies, which had more resources. Across the country, so many people were sympathetic to ordinary citizens who bent or broke the law – such as people who produced alcohol for individual consumption or doctors who prescribed alcohol for medicinal or therapeutic purposes – that when criminal cases were brought to trial, juries often refused to convict.

This example of alcohol prohibition in the United States highlights how a lack of effective enforcement can lead to corruption and other social ills, such as crime, dishonesty and lack of trust in government, all of which can feed on each other. When there is a lack of effective enforcement, it may be hard to say whether individual actions are “wrong” or merely rational. For example, in a jurisdiction where stop signs, crosswalks or parking regulations are plainly not enforced, people might find it sensible and efficient not to comply. In a jurisdiction where it seems clear that some people successfully avoid paying taxes, others may feel they are justified, on principles of equality and fairness, in not paying taxes themselves.

In short, while many people will follow laws out of a sense of morality or civic duty, others will not, so there needs to be an effective system of incentives and enforcement. Specifically, some government officials must have authority, responsibility and practical capability to monitor, detect and investigate compliance. There must be a fair, effective and consistent system of incentives for those who must conform their conduct to the law; the incentives can be “carrots” (rewarding the desired behavior) or “sticks” (punishing the undesired behavior) or a mix of both.

It is not enough that the government officials have “power” to take action. As discussed above, the power to take action, without other criteria or standards, is simply discretion – and discretion, as always, can lead to corruption. Instead, the government officials must also have a “duty” or “responsibility” to take action so they cannot choose to “look the other way.” In other words, the government officials must themselves have incentives to enforce the law effectively and have oversight bodies that will hold them accountable (a topic discussed below). Finally, the government officials must also have the resources – people, training, assets, money, information, time –

Enforcement Risk

needed to take action effectively. All of these issues should be considered in a corruption risk assessment.

In Thailand, the Act on Ancient Monuments, Objects of Art and National Museums, B.E. 2504 (1961) distributes “powers” to the director-general and local competent officials to protect items important to Thailand’s history and heritage. For example, the director-general has “power” to compel the registration of monuments, to issue permits and to demolish buildings when permit requirements are violated. But the act does not require the director-general to do any of these things, so he appears to have discretion to take no action. A corrupt director-general could decide to take no action unless it is advantageous to him to do so – creating a risk of corruption. In addition, it is unclear on the face of the act whether the director-general has the resources needed to carry out the act effectively. How does the director-general learn about sites that could be considered ancient monuments? Does the director-general have skilled, trained, adequately paid staff who can effectively evaluate whether a site should be designated an ancient monument? Does the director-general have the resources needed to issue permits and demolish buildings? What about the people who need to comply with the act – those who own or control the sites that are deemed ancient monuments? The law generally requires them to provide notice and other information to the director-general and to comply with permit requirements. But some of these responsibilities do not seem to have consequences if they fail to be met. Do the sites’ owners have adequate incentives to comply with their obligations?

a) Enforcement agents’ responsibilities and powers

To reduce corruption risks, the text of the law should specify the agency that will enforce it and the extent of its enforcement powers. Box five provides several examples from Ukraine. An additional example comes from Iraq. A 2012 law subjects anyone smoking in a public place to a fine. But the law does not specify what agency is to enforce the law or how the fine is to be collected.

If a building inspector determines during construction that a contractor is not building in accordance with the local building code, can the inspector order that work be stopped? Can the inspector fine the contractor? Suspend the contractor’s license to do business? Does the law specify the procedures the inspector should follow? Where and how can the contractor challenge a decision? Where either the inspector’s powers or the contractor’s rights to challenge a decision are unclear, the chances of bribery increase.

Where more than one entity is responsible for enforcement, does the law specify the division of authority clearly? Where the law does not specify responsibility

Box 5. Agency’s Powers and Responsibilities Not Specified

A proposed law:

- » Gives the cabinet of ministers power to set registration fees, while the law on administrative services stipulates the amount of fees;
- » Creates a state registry but does not say what agency is responsible; and
- » Directs an agency to oversee designated military organizations, but its powers to do so are not specified.

Source: Institute of Legislative Ideas Analytical Centre, *Methodology for Conduction of Anticorruption Examination of Draft Laws*, Kyive, 2021.

Enforcement Risk

clearly, those subject to its enforcement may collude with officials to see if one agency or the other takes responsibility. This can also be a problem when there are multiple layers of government, such as a law enforcement agency with nationwide jurisdiction and local law enforcement agencies with local jurisdiction. If either the national agency or its local counterpart could potentially handle prosecution, that may create opportunities for corruption. For example, a person who committed an offense might bribe an official at the national level to let the matter be handled at the local level, where penalties might be much more lenient.

b) Feasibility of compliance

There are cases where evenhanded enforcement of a law is impossible, such as where there are simply too many procedures or they are too arcane for compliance. Reportedly, some governments deliberately propose or enact laws that are impossible to comply with to create bribe opportunities for enforcement staff. More commonly, drafters simply don't appreciate the complexity and expense of the complex procedures that the law creates.

Peruvian economist Hernando de Soto famously identified the impossibility of registering a business in Peru without paying bribes. In Brazil, some regulatory schemes are so complex, they require the hiring of a despachante, a specialist in getting around the law. A corruption-proofing analysis should examine compliance issues raised by the law. What does compliance entail? How costly will it be? How will those subject to the law be informed of their obligation?

5. Oversight

Oversight can take many different forms. The two most important elements of effective oversight are 1) that it be performed by at least one credible, impartial reviewer, and 2) that the actor has the power, responsibility and resources to do so effectively.

The framing of accountability and oversight mechanisms is very important to ensure compliance and favor an environment in which people can do their jobs honestly and effectively.

The need for the reviewing person to be credible and impartial is crucial, but often overlooked. In many situations, the reviewing persons who are expected to perform oversight are allied to or engaged in a collaborative relationship with the officials who are expected to enforce the law. Perhaps the officials appoint the reviewing persons (or have the power to remove them), or perhaps the officials and the reviewing persons each have a vested interest in having everything appear to be working fine. If we cannot trust the reviewing persons to be fair and impartial, credible, effective oversight is impossible.

The corruption risk assessment should evaluate the power, responsibility and resources of the oversight bodies in much the same way as it evaluates the enforcement agents. The oversight body must have both the authority and the responsibility to act (i.e., it must not have discretion to take no action and “look the other way” or to conceal or downplay a problem). The oversight body must also have the people, training, assets, money, information and time to do the job effectively. Can they access the relevant documents? Can they interview the relevant witnesses? Do they have the power and resources to make effective use of the results of their oversight – such as to report their findings and recommendations to the government, the parliament or the public or to order reforms?

Enforcement Risk

In Thailand, the Investment Promotion Act, B.E. 2520 (1977) gives broad powers to the Board of Investment, which is defined to include the prime minister and up to 10 competent people whom she or he appoints. The prime minister has the power to dismiss any of these people at will. Thus, on paper at least, the board members are in a closely collaborative relationship with the prime minister by reporting to her or him. The board has broad discretion to pick companies and industries that will receive special benefits and protections.

But on the face of the act, there do not appear to be any mechanisms for oversight. There are no requirements that the board document its decisions or make them public, either individually or in a periodic report. There is no appeal process. There are no provisions requiring or empowering any government or nongovernment oversight body to have access to information or to conduct any sort of review. While there is often an expectation that a minister will provide some degree of monitoring and quality control over the actions of the employees in their ministry (and will hold wrongdoers accountable in some manner), it seems unlikely that the prime minister would hold board members accountable for misconduct. The prime minister appoints all the members of the board, so she or he cannot be expected to be impartial – any misconduct by a board member would likely reflect poorly on the prime minister – so both the prime minister and the board seem to have incentives to avoid any type of oversight and accountability. All of these factors create risks of corruption.

Enforcement risk is reduced when those entrusted with discretion must explain and justify how they exercised their powers to a third party. These enforcers should be rewarded when they exercise their powers wisely, and they should also be sanctioned when they take actions that are not justifiable. The third party can range from a manager in their agency to an internal auditor, a parliamentary committee, a court or even the citizenry. The third party does not need to be limited to one entity alone. A manager might overlook an employee's abuse of his or her enforcement power, where an auditor, a parliamentary committee or a judge might not. The accompanying box lists a range of possible "accountability agents."

Box 6. Accountability Agents

- » Senior management
- » Internal auditors
- » Minister/agency head
- » Cabinet
- » Supreme audit agency
- » Parliament
- » Courts

The text of a proposed law should make it clear what agency or agencies will be responsible for implementing or enforcing the proposed law. A common issue is found in the creation of an "independent" agency. Did the drafter mean this agency was to be free of parliamentary scrutiny? That it not be audited by the supreme audit agency? That its budget requests not be reviewable by the executive before submission to parliament?

Where enforcement or implementation is the responsibility of an existing agency or agencies, the CRA should examine the type of oversight to which the agency or agencies are subject. Does such oversight include internal audit, the supreme audit agency, or reporting to a minister or the cabinet? Must the agency submit periodic reports to parliament and the public? Can civil society exercise oversight through right-to-information legislation?

Enforcement Risk

For agencies already in existence, does parliament follow up on audits? Is there a parliamentary committee responsible for overseeing the agency? Does it hold a hearing on the agency's performance? Where a new agency or enforcement cadre is established, does the law mandate oversight?

Is there judicial review of an enforcement action, or will there be in the future? If so, is it an appropriate and effective remedy? How will it be triggered?

Are sanctions imposed for abuse of the enforcement power, or will they be imposed in the future? Are they imposed by senior management, an ethics or public service commission or a court? Are the sanctions adequate to deter others from similar abuses?

While oversight is often thought of in terms of one formal institution providing a check on another, oversight can be understood in simpler terms. Perhaps the most basic form of oversight is simply to involve more people in the process. Instead of allowing one person to make a purchase with a government credit card, require two people – one to provide written justification that the purchase is a legitimate use of government funds, the other to make the purchase. Each operates to some degree as a check on the other. Instead of allowing one official to decide how to award a series of grants, require a panel of several officials to decide how to award the grants. To reiterate, each operates to some degree as a check on the others. There is still a possibility the officials may conspire among themselves to engage in corruption, but it is harder for a group to sustain a conspiracy than for an individual to accept a bribe. It may be useful, if possible, to structure operations so that the people involved are not in a position to easily coerce or influence each other. (For example, a supervisor may be able to coerce an employee into participating in corruption, and an official who has power to appoint or remove the members of a panel may be able to coerce or influence the panel members.)

Governments can also impose procedural requirements. For example, they can require that government contracts be awarded only with “full and open competition.” In addition, substantive requirements can dictate that government contracts be awarded to the bidder with the lowest price, as long as the bidder's proposal is technically acceptable. Criteria can replace unbounded discretion. For example, the length of a prison term can be based not on the judge's idea of justice, but on “the history of the offender and the gravity of the offense.” Decisions can be documented in writing, and transparency required. The law can mandate that documents be provided to the person affected, reported to a public or private oversight organization, or made available to the public. It can include appeal processes. Public or private oversight organizations can be required to periodically review and audit some or all actions.

Substantive Risk

A CRA should also assess whether a law improperly favors or harms certain individuals or entities. This is one part of the more general scrutiny the draft should undergo during the drafting process. Annex one summarizes the issues such scrutiny should cover with links to sources providing more detail.

6. Justification

The CRA focus of this larger analysis should be on the justification for providing or withholding benefits or for imposing burdens. Are tax benefits given to an identified group or to those meeting certain requirements? Are customs duties forgiven for certain importers and not others? Why? What about requirements for obtaining building permits, operating licenses or other government permissions? Are there excepted individuals or groups?

Examples of where a CRA exposed a substantive risk of corruption include a Ukrainian CRA that uncovered the inclusion of a tax exemption for one company in an unrelated law on leasing of land. Similarly, in Lithuania, a CRA revealed that a draft public-private partnership law for construction of the Vilnius metro would benefit certain companies directly by enabling them to enter partnerships without competition. Other examples are in box seven to the right.

In addition to scrutinizing possible improper benefits or burdens bestowed on certain individuals or entities, a CRA should also consider whether the proposed legislation would weaken the ability of law enforcement and regulatory agencies to investigate, detect and prevent corruption. For example in Moldova, a CRA revealed that a proposed capital liberalization and fiscal stimulus law would allow the registration of property and other assets in the name of another person.

A starting point for the analysis is the report accompanying the proposed law. Best practice is that all laws be accompanied by a report explaining each of its provisions. In the case of an exemption from current law or a provision granting some groups or individuals benefits, the report should explain the rationale. The CRA should assess whether that rationale provides a credible, realistic justification for the provision.

Box 7. Examples Corrupt/Unjustified Benefits

- » Market/pricing rules that benefit certain interests
- » Criteria to qualify for financial benefits – such as limitations on who can bid on a public contract or who is eligible for a subsidy – irrelevant to the matter and/or distorted to favor certain interests
- » Exemptions from obligations for certain individuals or groups without a rationale
- » Legalization of a dominant or monopoly position without justification

Source: Quentin Reed, *Corruption Proofing in Eastern Partnership Countries: Overview and Lessons for Good Practice*, 2017.

Process Risk

Corruption risks are heightened when a law is drafted without the participation of those who are likely to be affected by it, those who are knowledgeable on the subject matter and the citizenry at large. In particular, the drafting process of the law and related consultations should consider the role of gender, as corruption disproportionately affects women and other marginalized groups, especially in relation to access to public services and financial resources.

When drafters do not fully understand the subject of the law or the areas the law will affect, there may be a greater risk of corruption. Other factors that contribute to risk include ambiguous or imprecise language in the text of the law or when corruption infects the drafting process.

Corruption risks are reduced when the drafting process is open, and civil organizations, the media and the interested citizens are afforded meaningful opportunities to comment as the text moves from a first, rough draft to one ready to present to parliament. Only rarely, such as with matters affecting national security or sensitive law-enforcement issues, are there good reasons for confidentiality, and even in these cases, drafters can often make provisions for a confidential review by an independent party.

Accordingly, a corruption-proofing analysis should assess both the overall transparency of the drafting process and whether those likely to be affected by the proposed law were consulted during the process.

Box 8. UN General Assembly Resolution June 2021

The interlinkages between gender and corruption is a developing area of study. The below reflects language from a resolution at the United Nations General Assembly Special Session (UNGASS) against corruption in June 2021 (A/RES/S-32-1). This adoption further acknowledges gendered dimensions of corruption. Nonetheless, a gendered lens is salient to ensure that a law is inclusive and genuinely “corruption proof” for women and men.

“We will improve our understanding of the linkages between gender and corruption, including the ways in which corruption can affect women and men differently, and we will continue to promote gender equality and the empowerment of women, including by mainstreaming it in relevant legislation, policy development, research, projects and programmes, as appropriate and in accordance with the fundamental principles of domestic law.”

7. Transparency

Proposed legislation should, in all but the most exceptional cases, be publicly available with sufficient time for affected parties and interested citizens to review it. These are elements of the generally accepted principles governing the lawmaking process and parliamentary openness shown in the accompanying table.

The CRA should assess whether these principles were followed, asking questions such as: Was the draft made public? At what stage in the process? How long were people given to submit comments? Were their comments made public? Was the draft revised to take account of comments? Was an online public discussion of the draft held?

8. Consultation

Public consultation is the active request of the opinions of interested and affected groups. It is a two-way flow of information that can occur at different stages of the law drafting process and range from a one-time request for information and advice to a continuing dialogue. Consulting the public allows the government to improve the quality of proposed laws by alerting policy makers to concerns and issues not identified through existing evidence or research.

A CRA should assess what individuals or groups are likely to be affected by the proposed law. This is especially important for drafts prepared by executive branch agencies. An agency may be attentive to certain constituencies while ignoring others or citizens at large (regulatory or state capture). Or it may be siloed, focused on its own issues to the exclusion of other conflicting ones.

A CRA should ask whose input was sought during the drafting process. How? At what stage in the drafting process? Are the comments available? Were they considered during the drafting process?

Several countries have developed formal or informal rules governing when and how authorities should consult with the public and interested parties in developing proposed laws or regulations. Box ten contains the guidelines public agencies in the United Kingdom are required to follow when considering new legislation or regulations. Other sources on participation are listed in annex four.

Box 9. Principles of Open Parliament

- Proactively publish information on parliamentary operations -- meeting agendas, bills, debates, and voting records
- Raise awareness of ways citizens can participate in parliamentary work
- Implement consultations and public hearings that give citizens opportunities to provide feedback and demonstrate their interests -- online and in-person
- Strengthen communication between legislators and their constituents
- Improve participation of civil society and citizens in the activities of parliamentary committees

Source: Open Government Partnership

Box 10. Recommended Procedures for Public Consultations

- » Consultations should be clear and concise
- » Consultations should have a purpose
- » Consultations should be informative
- » Consultations are only part of a process of engagement
- » Consultations should last for a proportionate amount of time
- » Consultations should be targeted
- » Consultations should take account of the groups being consulted
- » Consultations should be agreed before publication
- » Consultations should facilitate scrutiny
- » Government responses to consultations should be published in a timely fashion
- » Consultation exercises should not generally be launched during local or national election periods

Source: Cabinet Office, Government of the United Kingdom, Consultation Principles, March 2018.

Conclusion

Corruption is a challenge for every system of government, but stakeholders can meet this challenge through multi-pronged, collective actions and political resolve for reform. This guide explains, in plain terms, how risks of corruption can arise and how “corruption-proofing” of legislation can reduce those risks. CRAs can be a powerful tool for reducing or eliminating risks of corruption, and parliaments should integrate CRAs into their procedures. It is important to recognize that there is more than one way to achieve this goal and that each parliament must have flexibility over how best to achieve it.

As parliaments move forward toward achieving this goal, they are encouraged to use the methodologies and techniques in this guide; they are also encouraged to consult other resources, such as those identified in the annexes.

Box 11. Corruption Risk Assessment Checklist

I. Enforcement Risk

Discretion: Do enforcement agents have excessive or undue discretion?

Textual analysis: Does the draft contain ambiguous language? Are all terms defined?

Enforcement: What agency or agencies will be responsible for enforcing the law? Do they have sufficient powers to do so? Are their overlaps in their responsibilities?

Oversight: What agency or agencies will be responsible for overseeing how enforcement agents exercise their discretion?

II. Substantive Risk

Justification: Is there a report accompanying the draft explaining its provisions? Are the benefits to and burdens placed on different groups justified? Are exceptions to general law identified/explained?

III. Process

Transparency: Was the draft made publicly available with sufficient time for review?

Consultations: Were affected individuals/groups consulted?

Annex One. Sources on Corruption-Proofing or Corruption Risk Assessments

A. Summary of EU and Council of Europe's Corruption Proofing Work

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