Anti-Corruption Policies, Agencies and Judicial Reform

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Presentation by
Martin Kreutner
Director of Federal Bureau for Internal Affairs
Republic of Austria

(Check against delivery)
Mr. Milton Friedman, dean of orthodox free market economists, has been quoted that a decade earlier he would have had three words for countries making the transition from socialism: “privatize, privatize, privatize”. “But I was wrong,” he reportedly continued. “It turns out that the rule of law is probably more basic than privatization.”

Mr Chairman,

Ladies and Gentlemen,

Colleagues and Friends,

Thank you very much for having been invited to address such a distinguished forum of participants. Much gratitude and thanks have already been expressed to the hosts for their professional and dedicated organization of this Global Forum. Thus, I may be allowed to suspend rules of protocol and stick to the restricted time frame of a maximum of ten minutes.

In my presentation I will put emphasis on five main arguments:

1. Corruption is a cultural, a socio-endogenous phenomenon.
2. We do have the means, at least internationally, to tackle this challenge.
3. We regularly apply double standards in our perception of corruption.
4. There is no simple role model or silver bullet for Anti-Corruption Authorities.
5. Judicial Reform is important, but the judiciary is part of society, i.e. it is not immune to corruption per se.

German philosopher Burghard Schmidt in a recent publication on corruption wrote [and I quote]: "To the same extent that corruption breaks economic laws in specific cases, so too does it confirm the entire economic system. It looks after it, stands in for it, defends it, and loves it. Rather than crossing justice it is, in fact, its greatest ally and supporter. A true
system without laws knows no criminality; nor does corruption as political instrument strike through the set of economic values with different values from a different set. Instead, it confirms and justifies the absolute authority of the existing set of economic values. To reiterate, its nose continues to sniff out value and does not stray from the scent.”

(1)

Social or human interaction has to be based upon sets of rules if we do not want to end up in Thomas Hobbes’ bellum omnium contra omnes, i.e. the ‘war of everyone against everyone’. In modern terms, we would state that social order, security, and stability as well as sustainable development are primarily based on the modern concept of Hobbes’ social contract, the ‘rule of law’. Corruption as a specific deviant social behaviour is a phenomenon that has been omnipresent in all societies throughout human history. In other words, corruption is neither an occurrence of modern history nor a notion of the modern nation state. It is, consequently, conceptually broader than the criminal justice framework, and it phenomenologically includes the widest range of potential human interaction. I therefore wonder when corruption is still being dealt with as a by-product of organised crime or equivalent serious crime phenomena, or when the threshold of naming (and blaming) corruptive behaviour tends to start at the prosecutorial level.

We may as well refrain from calling corruption a “victim-less crime”, but rather emphasize that corruption automatically, apodictically, and in any case generates victims at all levels and, thus, may even cause entire social entities to collapse. Corruption is a self-contained sociological phenomenon by and large, that may make any individual of a community or society – including us – both a potential victim and a potential perpetrator. It is also being increasingly viewed not merely as the (reprehensible) privilege or alleged monopoly of the public sector but as – matter-of-factly – a pervasive feature of the overall social matrix, a socio-endogenous phenomenon.

Anti-corruption policies, therefore, are not about conviction, they are about daily behaviour. They are about good governance, the rule of law; and they are about culture, at the end of the day.

(2) What society preferred to treat until very recently almost as a state secret is now a recognized global phenomenon, which can only be fought by closer trans- and international cooperation. Countless international conventions, instruments and mechanisms created in recent years, the United Nations Convention against Corruption, UNCAC, as the key universal instrument at the foremost, are an impressive testimony to this development. Yet, written documents, conferences and political gatherings are one side of the coin, factual behaviour, true political commitment and the realisation of the provisions of such instruments and mechanisms as the UNCAC are the other one. Austria therefore supports the ratification of and the accession to such conventions and instruments by all countries and potential partners. We also stress the importance of the CoSP process and we emphasize the necessity of dedicated monitoring and review mechanisms in regard to the implementation of the UNCAC.

(3) An experience of recent years and current policies that does concern me, though, is the obvious application of double standards in the anti-corruption arena. The ‘developed’ world puts a lot of political and economic pressure on ‘developing countries’ to implement a variety of AC measures and policies. This holds true even more so for the old EU MS in relation to candidate and accessing countries to the Union. Yet, the old and ‘developed’ countries have very often been missing AC policies and strategies themselves, quite regularly so even the implementation of an independent AC body or supporting judicial reform. And to make matters worse, once a country was finally able to join the ‘holy club’, the ‘developed world’, or the European Union, AC issues basically have became a national and low-priority issue again. This development, however, is more than counterproductive.
in the fight against corruption and leads into the wrong direction. And there are already countries - even in Europe and in the European Union - which downgrade their anti-corruption efforts, in one or two cases even abolishing their anti-corruption commissions.

(4) Independent AC Authorities – beside the judiciary, which I will be dealing with in a minute – are at the forefront in the fight against corruption. As Chairman of EPAC, the informal network of the EU’s national Police Oversight and Anti-Corruption Authorities, we have been issuing questionnaires on a yearly basis to the respective AC agencies on matters of their mandates, powers, jurisdiction, area of responsibilities, policies, and other key data. (We have kept doing so and update the compiled data constantly). The outcome was as expected and can be seen at www.epac.at: A bit simplifying, one can say that with – so far – 27 MS to the EU there are, as a matter of fact, “28” different systems and policies on AC authorities. That means that there is no such thing as the best practise or the silver bullet in setting up and successfully running an AC authority. We should accept these differences and rather judge institutions and policies by performance.

In Art 6 on ‘Preventive AC bodies’ as well as in Art 36 on ‘Specialized authorities’ the UNCAC stipulates that these bodies should [and I quote] ‘be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without undue influence.’ [Unquote].

When talking about independence and powers of an AC authority we have to recall that corruption is rather a sociological phenomenon than a criminological one. That means in fighting corruption one has to address all players in the social matrix and has to deal or even confront with the powerful in one way or another. So ‘independence’, a great word indeed, becomes one of the key elements. Let me outline just a few key parameters in regard to ‘independence’:

3 in the framework of a European Union’s AC-Conference we were privileged to host in Vienna in 2004
1. appropriate allocation of resources, personnel and training (UNCAC)
2. appointment of the head figure (and other personnel) on basis of skills, integrity and professionalism
3. Employment terms minimum 5 years or indefinite
4. ability to investigate AC allegations without prior consultation or approval
5. ability to address the media and civil society at all times and at the organisation’s own discretion
6. ability to network with likewise organisations nationally and internationally

(5)
TI’s current Global Corruption Report 2007 on Corruption in the Judiciary states that [and I quote] “It is difficult to overstate the negative impact of a corrupt judiciary. [...] It denies citizens impartial settlements of disputes with neighbours or the authorities. Judicial systems debased by bribery undermine confidence in governance by facilitating corruption across all sectors of government, starting at the helm of power.”[^4] [Unquote].

Yet, - and I keep repeating myself - the judiciary is part of society, it is embedded in the social matrix, its institutions. It is therefore not immune per se to corruptive temptations and phenomenona [I know my argument will be rubbished in certain quarters]. In a variety of countries, also those of the so called first world, though, the judiciary has kept showing a strong reluctance to let apply to its own sphere the (AC) standards and rules that other sectors of society are subject ed to. Continues TI’s current Global Corruption Report: [quote] “A fair judiciary must also be subject to mechanisms that hold it accountable to the people. The challenge is to design appropriate institutional structures and legal culture that uphold the independence, impartiality and integrity of the judiciary.”[^5] [Unquote] The judiciary and judicial reform therefore has much to gain by increasing transparency of their structures, procedures, and operations.

Mr. Chairman, Ladies and Gentleman, let me conclude by emphasizing the following key points:

- It is essential to generally work towards a wider contextualisation of the notion of corruption. Corruption is a most “victimo-generic” phenomenon generating victims at all levels, micro- as well as macro-sociologically and -economically. Corruption is conceptually broader than the criminal justice framework, and it phenomenologically includes the widest range of potential human interaction. We, therefore, have to regard corruption as a cultural, a socio-endogenous phenomenon. We have to take this into account when discussing about reinventing government, building trust in government, enhancing AC policies, supporting AC agencies and judicial reform.

- Independence, sufficient powers, reasonable mandates, and balanced policies are key for the success of AC authorities. Double standards, lack of political will, short time solution, though, are counterproductive and will lead in the wrong direction.

- Generally speaking, the (legal) instruments and mechanisms to fight corruption are at our disposal; one of the most recent and comprehensive ones, the UNCAC, also being one of the most ambitious and achieving agendas. So it is basically up to us all to share efforts, to work on synergies, added value and concrete results rather than to diffract our energies. As at the end of the day, only those things count that have been concretely done and achieved.

Or as Theodore Roosevelt once has said: “It is not the critic who counts, not the man who points out how the strong man stumbles, or where the doer of deeds could have done better. The credit belongs to the man who is actually in the arena … who strives … who spends himself … and who, at the worst, if he fails, at least he fails while daring, so that his place shall never be with those cold and timid souls who know neither victory nor defeat.”

Thank you.
Bibliography


