

Access to information in corruption investigations: a case study from Argentina

Ezequiel Nino¹

Introduction

Corruption in Argentina and, broadly speaking, in Latin America remains a serious structural problem that not only adversely affects the region's economic and democratic development, but also places a direct burden on the population. Corruption has a very strong root in society as a whole. It is very common that ordinary citizens profit from some benefits of corruption activities. They can bribe a police officer if a traffic violation has been committed, pay down the table the cable TV installer in order to access neighbours' hook ups, bribe the tax supervisor in order to be safe from inspections, pay a gas inspector to avoid an infringement report that would cancel the service until it is repaired, suborn the examiner at a drivers' license exam and many other possibilities that people have frequently on its day to day activities. This means that any relevant modification shall come in the shape of educational processes or a change in the perception of impunity of the higher corrupt acts.

To put this situation in context it is important to explain that in Argentina there are two very well differentiated criminal systems: one that prosecutes poor criminals and is quite effective in its own way and one that does not prosecute rich criminals. The convict population, formed almost exclusively by the lower classes, has been increasingly growing over the last years. Almost half of them are prisoners without sentence. On the other end, there are almost no convictions for "white collar" crime, even less for corruption activities and, furthermore, almost nobody is serving a prison sentence for these kinds of crimes. This does not mean that "white collar" crime is less common than crimes committed by the poor (tax evasion, to give one example, is a crime that is committed almost by every tax payer, figures report a rate of around 50% of evasion in earnings tax).

The judiciary plays a very crucial role in this kind of impunity. There are several reasons of their failure on investigating corruption or other "white collar" activities. The Civil Association for Equality and Justice (ACIJ, by its acronym in Spanish), a non governmental organization established in 2002, has undertaken a detailed diagnosis on these issues. Some of the main reasons identified include:

- lack of political will by the judiciary in order to investigate public officers,
- complexity of those cases compared to simpler crimes by poor criminals,
- obstacles carried out by costly teams of defensive lawyers that take advantage of the procedural bureaucracy,
- lack of adequate police forces with resources to investigate these types of crimes,
- inadequacy of the criminal procedure code,
- interference by political powers in the judicial independence and interdependence among them,
- lack of adequate training to judicial staff,

¹ Co-Director, Asociación Civil por la Igualdad y la Justicia (ACIJ), www.acij.org.ar

-little collaboration from state institutions (i.e. registry entities, customs, tax agencies) towards the judiciary,

Role of civil society in ex post corruption control

Given this context, through its role in articulating the demands and concerns of the people, a strong and active civil society is key in the fight against corruption and in holding governments accountable to their populations. Opportunities for civil society to engage around issues of corruption are limited, however, when the public cannot access information related to corruption cases.

The public's right to access information held by public authorities is integral to the protection of human rights as freedom of information provides citizens and civil society with the tools necessary to hold governments, political parties and private interests accountable. Unfortunately, in Argentina but more broadly in Latin America, access to information is limited in cases of corruption of public officials and offices. Even when information is released, it is normally so removed in time from the actual judicial proceedings and so highly technical and lacking in essential information that it is not actually accessible to the public in any meaningful way. The situation is further exacerbated by the culture of impunity which plagues Latin American judicial systems in which magistrates and prosecutors may share ties to each other. Thus without third party access to information, officers of the judiciary are under no pressure to be accountable for their actions.

Also, our CSOs that work on this field have concentrated their efforts in the prevention of corruption acts but have not dedicated attempts to impact on the sanctions of activities already perpetuated. At this point, and given the huge challenge that this issue poses, it is not possible to favour one perspective over the other and this means that both tasks should be undertaken. Working on corruption ex post brings a clear message to the rest of society about the necessity to change impunity and the need for more involvement from other citizens.

In general, judges only have to face pressure by the defendant's lawyers and are not exposed to the public scrutiny. Because corruption has a multitude of indeterminate victims the cases are very different than the ones that have distinctive victims who are in charge of following them. Judges need to understand that corruption has also concrete victims. This is the key point to the project underway: a broader visibility that will change the balances between the parties.

The project undertaken by ACIJ

Since 2007, ACIJ has been working to break the silence around investigations related to corruption crimes in Argentina. ACIJ's work in corruption has garnered much national attention and has brought to debate issues of corruption that had hitherto been absent from public attention. The procedural code of Argentina includes two key rulings related to this theme: the first stating that files in corruption cases are not to be disclosed to third parties, and the second which guarantees the right to solicit and receive copies and reports related to matters constituting 'legitimate interest'. On an international level, Argentina has acceded to treaties, such as the United Nations Convention Against Corruption and the Inter-American Convention Against Corruption, which aim to fight

corruption and promote the participation of civil society in these efforts. The first of the documents foresees explicitly that

“(e)ach State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption”.

Based on the interplay of the two national rulings, along with the interpretations of international treaties, ACIJ made formal request to judges with federal jurisdiction to allow public access to corruption cases. The reasoning behind ACIJ’s actions was a broad interpretation of procedural norms in light of the new anticorruption constitutional block which supports the participation of civil society in the fight against corruption.

ACIJ began by collecting general information and identifying cases related to the investigation of corruption crimes and the courts in charge of the investigations. With the information obtained on more than one hundred active cases, ACIJ and a partner organization (CIPCE, Centro de Investigaciones y Prevención de la Criminalidad Económica) requested access to approximately 100 cases citing the right to information. Most of the first circuit judges denied the petition but one of the Court of Appeals granted access to the files and other one required consultation to the other parties before accepting the request. This means that the CSOs are able to garnish access to around half of the cases requested. Also, because of the discrepancy between both tribunals, the Supreme Court of Argentina will now decide which position it considers correct. This judicial body has prioritized transparency in the judiciary and some of its members have informally discussed the secrecy situation created in the courts that deal with corruption. The Supreme Court has never issued statements on corruption subjects, mainly because the cases do not usually get to that level. This could be a very good opportunity for it to express concerns about the way these files are being handled by first circuit judges.

As a result of one of the Court of Appeals decision, civil society now has access to information in many of these cases. This is a very relevant step forward which has been emphasized by many scholars and journalists among others. It means that the traditional culture of secrecy has started to crack and there is some space to move ahead and advocate with more technical information for better results.

The next step should be to build capacity among civil society organizations on how to best utilize the information in the struggle against corruption. The majority of magistrates in Argentina are uncomfortable with the possibility of citizens accessing information and understanding the ways in which judicial investigations regarding the spending of money from public coffers are handled. If other social actors can not access files to investigate these shortcomings, the dynamics of a culture of power will continue to govern the investigations.

In other words, our work has taken a different path because it has focused on the sanction of corruption criminal activity. Despite the complexity of the situation there is space for impact by civil society and, consequently, for improvements. The point of departure is extremely poor and, thus, any change in the status quo represents a radical transformation.

Lessons and opportunities

This project underway is showing clearly how the system reacts to external actors. Most of the judges had demonstrated a negative stance upon the CSOs request and believe that this kind of monitoring will turn against them. One substitute judge even rejected the petition expressing that the organizations are not judiciary controllers and that they should not take a place that does not belong to them. He also mentioned that these organizations rely on foreign sources of funding which means that they are promoting values that are strange to the culture of Argentina.

Nevertheless, the fact that one of the Court of Appeals approved the petitions presented by the organizations becomes a milestone that may have a very strong impact on how corruption is dealt in Argentina. Gaining access to privileged information about the investigations, examining it and building up some theory about the system flaws is a step that may break the culture of silence that has predominated in the system. With that information, publishing a report and having media coverage is very relevant. This combination allows activists to have a short-term impact (particularly, with the journalist article and upon the denounced actors) and a mid-long term impact (the report builds up technical information that is often used and cited in several formats: by legislators to require information upon other powers of the state, by academics who produce more in-depth studies and by a potential new government with incentives for a change).

In other words, activists must keep in mind that their work should be focused in having different levels of impact: (a) a potential short term change –the most difficult to obtain; (b) a symbolic effect –a contribution to the public debate; (c) a potential long term effect –once the current political situation is modified.

The sanction of corruption activities is a very concrete example of these dynamics. First of all, there are scarce chances that a current officer will be inducted during his or her period. This means that there are better possibilities of obtaining a sentence once there has been a change. In other words, it is very important that civil society denounces corruption during the term of an officer but the formal consequences may be obtained after several years. Given this, there is a need for a law that suspends the time limit for the criminal procedures.

The project also foresees the use of new technologies and applications 2.0. The organizations involved had organized a blog called “Sin Corrupcion” (www.sincorruptcion.wordpress.com). From there, every day there is a different post about our work, findings and different news related to this field. The blog has become a reference for people interested in public affairs in Argentina and has been increasing the visitors over the time. Currently, around two hundred people link the website each day and get involved in some discussions about the issues presented at it. There are judges, prosecutors and judiciary employees that follow regularly the publication. We have included contributions by academics, researchers, other CSOs representatives and journalists. This means that it has been established a direct communication medium between the civil society and relevant actors from inside the dysfunctional system.

Many newspaper articles have been originated by a post in “Sin Corrupcion”. Journalists who follow the blog have written about some of the facts that are part of the initiative and have mentioned that it contains useful information not available through other sources.

Also, “Sin Corrupcion” has a Facebook profile with around 470 “friends” who receive regularly its postings. Recently, we have started a Twitter profile where we send

comments and links to the blog articles. The next step will be to build an interactive charter with information about the most relevant corruption cases that are being investigated by the judiciary. It will include the names of the responsible judge, prosecutor, defendants, situation of the file, accessibility, risks of ending the investigations because of legal timeframes and any other relevant information that could be useful to actors that follow those procedures.

Obstacles and difficulties

The most obvious difficulty encountered is the closeness presented by the own system. This is something predictable because of the previous diagnosis but, in fact, it has shown to be worst than expected. Not only first circuit judges oppose to the original requests but even after the Court of Appeals delivered decisions that open up the files they have been reluctant to permit it by applying informal mechanisms (i.e. declaring that the file is not in the court room, expressing that the authorization is restricted to only one examination, that no photocopies could be taken).

Prosecutors are actors that have also showed to be extremely closed to civil society. In theory, they should not feel so endangered since they are not formally the most responsible officers for the system's failure and but, in practice, they have been one of the most difficult players to work with. Even more, despite the fact that they have the obligation to charge the suspected officers they have responded negatively to the question posed by judges about ACIJ's participation and, for that, taken arguments invoked by the defendants. .

Also, approaches that seem to work less include are related to legislative lobby. The National Congress has its own very complex rules for trying to influence the sanction of a law reform. In general, laws are the result of negotiations between political parties. CSOs that work on these issues do not have yet enough expertise to try to get through these processes.

ACIJ is trying to intervene to try to favour a Criminal Code reform proposal that will take upon some of the United Nations Convention against Corruption provisions. The provision has already been approved by a Congressional Committee but is not being discussed by the whole body. At this moment, we are sending messages by Twitter to many legislators asking them the reasons for the inactivity. Some legislators are responding but the hope is still very limited. As said, these decisions are taken in other tables and CSOs are not invited to them.

Conclusions

Civil society work upon criminal investigations has been a key factor for the reopening of procedures against militaries for crimes against humanity during the 1970s. This historical process that has been highlighted broadly should guide the work of CSOs in Argentina and other countries. These activists have demonstrated that when there is a strong will institutional resistances can be torn down. Also, it shows that justice may be slow but persistence is a virtue that can surpass that obstacle. In developing countries, political situations change frequently which means that civil society should be ready in case one particular context shows closeness to its objectives.

Fighting corruption impunity is key to change the culture of unlawfulness that extends throughout the region with very few exceptions. Without a healthier message

from the justice institutions people will continue to take for granted the example of many public officers who take advantage of their power positions.