Justice Policy Series, Part 3

Accountability for Democratic Renewal

Open Government Partnership Global Report

DEMOCRACY BEYOND THE BALLOT BOX

Open Government Partnership

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About OGP and Justice

The Open Government Partnership (OGP) provides an opportunity for government and civil society reformers to make government more transparent, participatory, inclusive, and accountable. The Partnership includes 77 countries, 106 local governments, and thousands of participating civil society organizations. Each member works with civil society to co-create action plans with concrete commitments across a broad range of issues. All commitments are then monitored by OGP's Independent Reporting Mechanism (IRM). Recently, thanks to increased global activity around justice, many governments and civil society leaders have shown growing interest in linking justice with open government in their action plans and beyond.

This paper is the third and final part of a series on justice released as a part of the Open Government Partnership Global Report. In 2019, OGP released the series' first installment, Access to Justice, which focuses on how open government can help people identify and address their legal needs. The second installment, Open Justice, was released in 2020 and explores ways governments can apply the principles of transparency, civic participation, and accountability to justice sector actors. The series aims to show how open government can make credible improvements to justice systems and other accountability institutions. The aim of this report is to inspire governments to adopt policies and activities suggested here and adapt them for their own national and local context. Working closely with international and domestic partners, the OGP Support Unit will use this research to help OGP members continue to develop and implement strong justice and accountability commitments.

Introduction

Key Takeaways

- **Accountability systems that respond to citizen complaints are crucial to upholding democracy and the rule of law.** Accountability institutions and systems are those that require government actors to justify their actions, act upon criticisms or requirements made of them, and accept sanctions for failure to do so.[1] Among the institutions that serve this accountability function, those that respond to citizen complaints are especially crucial to democracy and rule of law. They allow citizens to ensure that governments act within the bounds of the law and in the public interest.

- **Accountability institutions deliver justice and provide mechanisms for rights protection.** This paper focuses on accountability institutions that can be triggered by citizens. These include courts and other justice sector actors as well as other autonomous agencies such as ombudsmen, audit institutions, and information commissioners. While each of these institutions have different mandates and may be triggered in different situations, they each ensure that citizens' civil, political, and human rights are respected, provide redress for citizens whose rights have been violated, and/or sanction public officials who have not followed the law.

- **Few OGP commitments focus on creating or reforming accountability mechanisms.** Research shows that transparency and civic participation alone do not typically lead to significant changes in social and institutional norms unless they are accompanied by mechanisms to hold officials to account. However, less than 20 percent of OGP commitments focus on ensuring some means of accountability for government action or inaction. This number has declined over the past decade.

- **Governments can improve accountability and justice across a variety of sectors with several familiar and fundamental open government policy tools discussed in this report.** While this report examines different sectors and legal issues, justice delivery can be improved in all of these sectors using foundational open government policy tools. These tools—which are outlined in the recommendations throughout this report—include: clear, regular, and accessible information and communication by accountability institutions; adequate training for officials and civil society groups; the creation or strengthening of internal integrity tools like whistleblower protections; and registers for potential conflicts of interest.

A vendor sits at his stall in the green market in Trizla, a Roma neighborhood in Prilep, North Macedonia. Open government reformers in North Macedonia are working with civil society organizations like L.E.T Station to improve access to justice and legal services for marginalized groups of citizens. Photo by OGP

Zukiswa Kota and the PSAM Office Administrator Bukelwa Makasi goes through their agenda at the Public Service Accountability Monitor office in Grahamstown, South Africa. Photo by OGP

Need for Renewed Democracy

Evidence from numerous data-producing and governance institutions shows a clear and consistent trend of increased autocratization and a decline in the rule of law over the past decade.[2] The pandemic has exacerbated these trends as political leaders in dozens of national and local governments have rolled back democratic safeguards under the guise of public health and safety concerns. However, many governments have not reversed these emergency measures despite the global community's improved understanding of the virus and the resources and policies needed to best manage its effects.

This democratic backsliding threatens the rights and freedoms of civil society and citizens in ways that have direct and serious consequences for citizens' health and safety. For example, in multiple countries, instances of harassment, detention, and threats to journalists have increased during the pandemic.[3] In other cases, authorities used excessive force against and detained citizens who violated social distancing rules, or used social distancing as a pretense to quash dissent. Even in established democracies, governments imposed severe and discriminatory restrictions on minority groups, violating their civil rights.[4]

Backstopping Democracy with Accountability

To reverse these harmful trends and reinforce open government, the global community must work together to renew democracy. Central to this effort is the need for effective and accessible accountability measures to deter and sanction rights violations and other anti-democratic behavior.

Scholars of governance and democracy typically categorize accountability into three subtypes—vertical, horizontal, and diagonal—according to the actors between which it occurs.[5]

- **Vertical accountability refers to the direct relationship between citizens and their elected representatives.** The most common examples of this type of accountability include elections and advocacy through political parties.
- **Horizontal accountability refers to the relationship between the executive branch and the institutions that constrain its power on behalf of citizens.** These institutions include the legislature, judiciary, and other autonomous oversight agencies. This paper focuses on institutions that provide horizontal accountability, and in particular those that allow members of the public to activate their accountability function.
- **Diagonal accountability** refers to the role of non-governmental actors—including civil society organizations, the independent media, and engaged citizens—in providing and amplifying information about the government, thereby holding it accountable.

All three types of accountability are important contributors to robust democratic governance. A recent study of three countries found that these three types of accountability structures can effectively halt democratic erosion by creating pressure for governments to uphold the rule of law.[6] This paper examines reforms that improve the openness and efficacy of horizontal accountability structures that respond to citizen complaints and requests. It refers to these structures as forms of ***citizen-activated*** *horizontal accountability*.[7]

In its discussion of citizen-activated accountability, the paper focuses on both institutions—including judiciaries, legislatures, tribunals, ombudsmen, and others—and mechanisms that prompt these institutions to act. These accountability structures provide a backstop against many of the types of abuses that have increased in recent years by allowing citizens to protect their rights and ensure that government actors act lawfully.[8] For example:

- Open and effective auditing and investigatory agencies can help prevent and punish instances of waste, fraud, and abuse in government spending and ensure that taxation is fair and transparent.
- Oversight mechanisms within accountability institutions like courts and information commissions that allow citizens to appeal rejected or mishandled right to information requests ensure that information is not withheld from the public for political reasons.
- Accountable electoral management can ensure that elections are free and fair by investigating irregularities and allegations of denied voting rights.
- Institutions that allow citizens to monitor policies, programs, and plans that affect the environment can help prevent pollution, environmental degradation, and the worst effects of climate change.
- Accountability institutions also provide a mechanism to which citizens, especially those from vulnerable groups, can turn to protect their most fundamental rights.

The Benefits of Accountability

Accountability as a Component of Justice

In each of these examples and in many others, accountability institutions fulfill an important component of justice. OGP's justice policy research, broadly speaking, has examined mechanisms and reforms that can improve access to and the quality of justice for resolving individuals' personal legal needs in both civil and criminal legal matters.[9] However, in

addition to adjudicating matters that affect one or a few people, the judicial system also provides checks on other state actors on behalf of citizens, a mandate they share with an array of other institutions that exist to provide accountability.[10] These institutions—which include the judiciary, legislature, and other autonomous agencies such as supreme audit institutions, administrative tribunals, ombudsmen, and information commissioners—are the focus of this paper.

Accountability for Efficient Governance

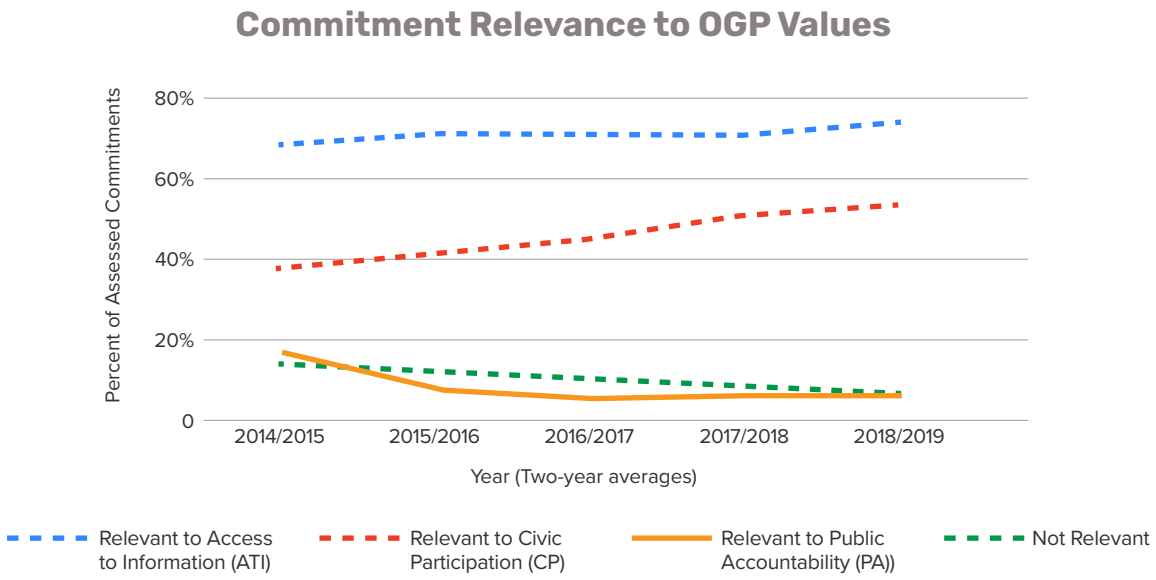
Beyond its instrumental value, strengthening accountability structures can also increase government efficiency when coupled with access to transparent and accurate information.[11] By enabling citizens to file complaints and trigger investigatory processes, governments can enlist citizens in the oversight of public service delivery, elections, environmental management, and more.

The benefits of efficiency also extend beyond government to citizens themselves. Evidence also shows that meaningful community participation in oversight and accountability allows citizens to deliberate on aspects of service delivery and can significantly improve the services themselves.[12] In practical terms, these improvements can create tangible benefits in citizens' lives, including higher quality education and healthcare, access to stable employment, and housing security.

Increasing Accountability Commitments in OGP

This paper seeks to encourage reformers to take measures to strengthen citizen-activated accountability mechanisms in and beyond their OGP action plans. However, the number of OGP commitments focused on strengthening accountability mechanisms is strikingly low (see Figure 1.1).

FIGURE 1.1: **The Number of Commitments that Strengthen Accountability is Declining**



Since 2015, less than 10 percent of all OGP commitments are relevant to public accountability—that is, they create or improve public-facing opportunities to hold officials answerable for their actions. This trend is concerning given the robust evidence that transparency reforms, the goal of most OGP commitments, although valuable, often do not generate increased accountability on their own.[13] The publication of government spending data, for example, may reveal misuse of public funds, but without

effective accountability mechanisms in place, these offenses may go unsanctioned.

This report seeks to reinvigorate accountability reforms in OGP action plans by suggesting particular open government actions that can improve access to and efficacy of accountability institutions. Because approaches are often sectoral, specific to environment or tax, for example, this paper focuses on a few key areas of partner strength and action. Should a reader be inspired to write a similar list of potential OGP reforms for a sector not covered by this report, the authors would invite additional future contributions.

Overview of Chapters: Common Challenges, Common Solutions

This paper contains six chapters which each describe how OGP members can strengthen and improve access to citizen-activated accountability mechanisms in response to a different type of problem or harm. The topics of these six chapters are summarized below.

- **Open government approaches for accountable right to information regimes.** Access to government-held information empowers journalists and citizens to better understand government actors' behavior and to demand accountability for their actions. State actors may reject or mishandle requests for information to avoid revealing information that portray them negatively. This chapter covers reforms that ensure citizens have access to fair, robust, and independent appeals processes in cases where their requests are denied or mishandled.

- **Open government approaches to anti-corruption enforcement.** This chapter focuses on horizontal accountability institutions that citizens may trigger in response to suspected or confirmed cases of fraud, bribery, or embezzlement. Depending on the corrupt activity and the actors involved, these crimes may result in different degrees and types of harm for citizens. The chapter does not focus on these potential harms, but rather on redress mechanisms for the misuse of state funds in general.

- **Open government approaches to environmental justice. All people have a right to live in a clean, safe, and healthy community.** Citizens must have access to a variety of tools and mechanisms to ensure accountability for governments that may make decisions or undertake projects that threaten the environment—or when they allow private companies to do so. This chapter considers the ways in which various citizen-activated accountability mechanisms can work in parallel to improve environmental governance outcomes.

- **Open government and electoral dispute resolution. Free and fair elections are among the most fundamental components of democracy.** Citizens must have access to accountability institutions –including courts, election management bodies, and campaign finance oversight bodies—to seek recourse when state actors deny their access to voting or otherwise interfere with electoral integrity. This chapter discusses barriers to accountability in electoral disputes and suggests open government reforms that can help make electoral administration fairer and more accessible.

- **Open government approaches to tax and fiscal policy. Inequitable taxation can have significant effects on citizens' livelihoods, especially for the poor and working class.** In recent years, citizens in several countries have brought litigation against their governments over unfair taxation practices. This chapter considers several factors that may affect citizens' ability to use courts in this unprecedented way and suggests measures that could make this course of action more accessible.

- **Safeguarding the rights of people with disabilities. Like any public service, accountability mechanisms must be equally accessible for all citizens, including the groups most vulnerable to marginalization.** In many countries, persons with disabilities are one which faces disproportionate obstacles to access government institutions and services. This section highlights some of the ways governments can improve access to various accountability institutions for people with disabilities. Across these and other issues, citizens' ability to activate accountability institutions depends on these institutions' accessibility.

Common Barriers

While each chapter highlights unique considerations and challenges for strengthening accountability in particular areas, the paper also illustrates that many of the most pervasive challenges and their solutions cut across issue areas and accountability institutions. This section summarizes several of these common barriers and solutions.

Standing and Legal Barriers

In many jurisdictions, limitations on who can bring a claim before particular accountability institutions can hinder the delivery of justice. For example, in public finance complaints, the complex criteria by which agency decisions can be challenged in some jurisdictions significantly limit the circumstances under which individuals can challenge an unfair or discriminatory policy. In the case of electoral justice, some jurisdictions have narrow requirements for legal standing, allowing only candidates themselves or individuals directly affected by the irregularity to bring a complaint. This is a severe limit to representation of the public interest which can be remedied by broader justice reforms.

Cost Barriers

The costs, economic and otherwise, of accessing accountability have long been cited as a barrier to individuals seeking to bring a grievance to court. This report describes the way these costs affect individuals' ability to seek redress from courts and other institutions regarding *election integrity issues*, *right to information appeals*, and *claims over the fairness of public finance*. However, the report also indicates that these costs apply not only to courts, but also to other accountability institutions. For example, even when election disputes are resolved through administrative tribunals or other mechanisms rather than courts, petitioners often face high transportation and lodging costs associated with traveling to the relevant institution.

Information and Communication Barriers

In all areas examined here, citizens' ability to seek redress is impeded by a lack of access to clear and understandable information about official procedures and communication from institutions about their case. These barriers arise due to complex, formalistic procedures and/or insufficient efforts to translate legalistic language to more familiar terms. While this has negative consequences for many individuals seeking accountability, they are especially detrimental for persons with disabilities. In many jurisdictions, there is limited access to information about legal rights and procedures in accessible formats, including sign language translation, subtitles, braille, and ensuring that all online text can be read by screen readers and is also available in easy-reading format.

Institutional Barriers

Across several areas, justice and accountability may be impeded by capacity and capability deficits among staff and officials at accountability institutions. For example, in jurisdictions where courts are charged with deciding *right to information* appeals, judges may lack specialized knowledge of the law and policy governing requests for information, hindering their ability to deliver justice in such cases or causing delays in judicial proceedings.

Common Solutions

The research indicates that many of these wide-ranging issues can be addressed in part using some of the most fundamental open government solutions.

Ensure clear, accessible, and transparent communication. Institutions handling all types of complaints must ensure that their communications and procedures are understandable and accessible. This includes translating legislation, policies, judicial decisions and precedent, and legal procedures related to particularly complex topics—such as public finance and climate change litigation—into plain language. It also includes providing reasonable accommodation for persons with disabilities, such as translations for example, in braille and sign language as well as using clear, non-technical language in legal documents to the extent possible.

Provide resources and training for civil society and government officials. Accountability mechanisms in some areas—especially right to information appeals—are often underused by civil society, journalists, and others. A lack of technical or procedural knowledge may hinder or prohibit civil society organizations from successfully lodging appeals. Likewise, in many contexts, access to accountability mechanisms may be too costly. To reduce these barriers, OGP members can raise awareness and provide resources and training among civil society groups for navigating the relevant oversight institutions. In tandem with resources and training for civil society groups, it is important to ensure that officials of all independent oversight institutions are able to make informed decisions. This includes training officials on specific topics or policies, such as familiarizing judges with technical concepts related to climate change, tax and public finance regulations, or election processes. It also includes training to ensure that judges and other officials are attentive to the rights of and special accommodations for persons with disabilities.

Implement internal reporting mechanisms. Integrity tools such as whistleblower protections, gift registers, and registers of actual or perceived conflicts of interest for accountability institution officials are key to maintaining public trust and confidence. In some areas, governments should consider expanding the use of these tools. For example, within climate change litigation, whistleblower protection should extend to scientists, engineers, and private contractors who may be best placed to identify wrongdoing in the course of projects that impact the climate. Separately, ensuring that accountability institutions have financial independence from other government agencies helps to safeguard the autonomy of these institutions in terms of decision making.

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This report would not have been possible without the invaluable contributions of several guest authors.

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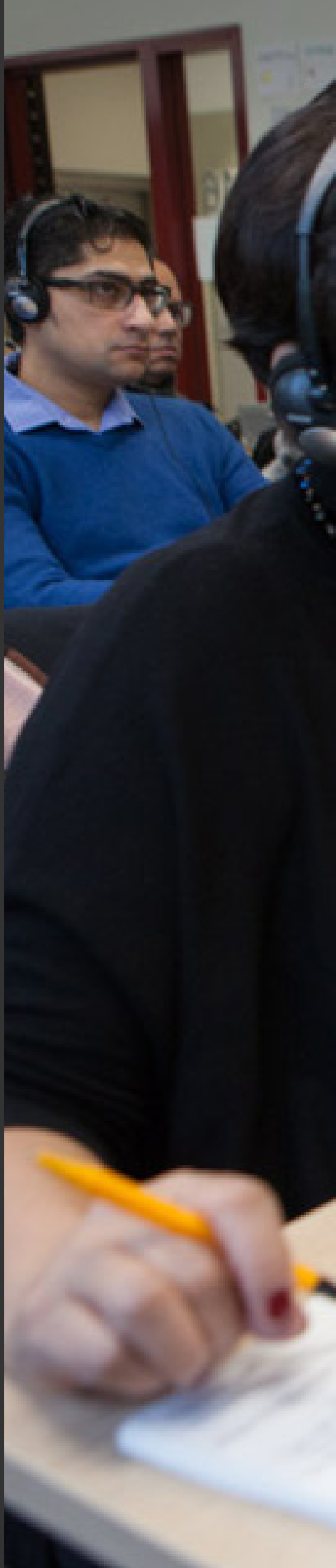
Open Government Approaches for Accountable Right to Information Regimes

By Andrew Ecclestone and Jessica Hickle

The right to access information held by public authorities is a critical component of democracy and a foundational pillar of open government. Access to government-held information inherently improves government transparency which, among other benefits, can enable citizens to participate more meaningfully in setting government priorities and hold government actors accountable for their decisions.

When governments refuse or otherwise mishandle people's requests for information, people need to be able to appeal those decisions to an independent, competent body. Reformers seeking to strengthen these appeal processes need to ensure that: (1) there is a strong legal basis for review of decisions; (2) there are trusted, competent institutions which the public can use to appeal decisions; and (3) people are able to use those institutions. This chapter outlines some of the open government reforms that countries can make to achieve improvements in these three areas.



Civil society members participate in a 2016 data journalism workshop. Photo by OGP

Strengthening the Legal Basis for Appeal

Often conceived of as an element of the right to free expression, since this includes the right to seek and impart information, the key aspect of the right to information is that a person does not have to prove a legal "interest" in the information in order to have a right to request it. The right to information is included both as a component of international agreements and as codified in many countries' domestic legislation.

Internationally, the right to information is enshrined in international agreements and is increasingly seen as part of customary international law—being an essential part of most countries' basic constitutional, administrative, and human rights law. In terms of global agreements, most recently the right to information has been included as part of Sustainable Development Goal (SDG) 16.10.2 which focuses on "increasing the adoption and implementation of constitutional statutory and/or policy guarantees for public access to information." In 2019, UNESCO—which measures progress on SDG 16.10.2— found that 125 countries had enacted right to information (RTI) laws or other similar provisions[1] and most countries' laws guarantee the right to appeal refusals of requests for information, or other issues relating to the processing of requests by government agencies.[2]

In domestic legislation, RTI laws provide that everybody has the legal standing to make requests. Some countries limit the right to seek information under their RTI law to citizens or residents, while others do not place any barriers on who can make requests. While some countries only have a constitutional provision for the right to information, in most countries, the right to access government-held information is also guaranteed and elaborated in greater detail in national legislation.

Formal legislation guaranteeing the right to information is a necessary first step towards ensuring that the public can access government-held information. However, the existence of an RTI law does not on its own guarantee the right to appeal the decisions of RTI institutions.[3] These appeals may relate not just to denied requests, but to fees sought by public authorities for providing information, delays in responding, non-compliance with the requester's preference for the format of the information sought, and transfer of requests from one public authority to another. OGP members can consider expanding their RTI legislation to ensure that it includes the broad right to appeal for any of these reasons.

Legal reform of RTI laws is often a part of OGP action plans. Although OGP generally has a reputation of being a forum to implement executive-led and therefore administrative reforms, this is not necessarily true for legislating RTI. In fact, over one-third of RTI commitments have involved some amount of legal reform, while other commitments involved creating or reforming legislations in only 17 percent of cases. This suggests that OGP can be a useful forum for reformers looking to further strengthen their country's RTI law.

The following are elements of RTI legislation that are essential to ensuring fair and independent appeals processes:

- Explicit recognition that the right to information is derived from Article 19 of the Universal Declaration and the International Covenant on Civil and Political Rights (perhaps with connections to the provisions in a country's constitution);
- Assurances that all people have the right to make requests—that it is not limited by residence or citizenship status;
- Guarantees of the right of requesters to make complaints/bring appeals against the decisions of public authorities that received their request, or who are subject to the proactive publication obligations in the law; and
- Requirements that agencies inform requesters of the relevant appeals procedure when communicating their decision on a request.

Improving Appeals Processes and Institutions

For the right to information to be meaningful, independent oversight institutions must exist to enforce it. Without bodies to which citizens can appeal if their requests are refused or mishandled, public authorities may fail to respond to requests for information or publish information proactively without being held to account. Typically, this accountability occurs through processes by which a requester whose request for information has been refused or otherwise inappropriately handled may appeal that decision to an external body.

In order to ensure that people can appeal a decision on their request, there needs to be at least one competent independent forum where they can challenge that decision. Different governments have different institutional structures for managing and deciding right to information appeals. Broadly speaking, though, all governments tend to adhere to one of three models: (1) judicial review; (2) information commissioner or tribunal with binding decisions; or (3) ombudsman with non-binding decisions.[4] Some governments may have more than one model, allowing different fora to hear different types of appeals.

Regardless of which models a government has adopted, reformers can consider several factors that affect the quality of an appeals process, including the speed of decision-making, the degree of institutional independence, the legal force of decisions, the level of expertise of decision-makers (See Table 2.1). While Table 2.1 presents an outline of the likely strengths and weaknesses of each enforcement model, in practice, these may vary widely depending on the context. Still, it offers a helpful overview of the challenges countries with different models may face.

Some OGP members may be able to use their action plans to establish or develop a different model (See "Lessons from Reformers: Tunisia Creates RTI Oversight Body" for an example). However, members may be more likely to use their action plans to make improvements to the system already in place. As a result, they may draw on the experience of other models, even if it is not their own.

TABLE 2.1: **Aspects of Institutional Competence by Enforcement Models**

	Judicial Review	Information Commissioner or Appeals Tribunal—Binding Decisions	Information Commissioner or Ombudsman—Non-binding Decisions
Speed	Slow*	Fast+	Fast++
Independence	High	High	Potentially strengthened by status as officers of the legislature
Legal Force of Decisions	Strong	Strong	Weakened by lack of order-making power
Institutional Capability and Capacity	Low	Potentially lessened by mandate that extends beyond RTI appeals	Potentially lessened by mandate that extends beyond RTI appeals

* While courts tend to resolve cases slower than other enforcement institutions, this is far from universal. In some countries, for example in several Latin American countries, mechanisms like the *amparo* offer relatively low-cost, speedy resolutions for claims related to constitutional rights.

\+ Decision-making by information commissioners and appeals tribunals tends to be fast relative to courts however their efficiency depends on adequate resourcing and capability.

++ Decision-making by information commissioners and ombudsmen tends to be fast relative to courts however their efficiency depends on adequate resourcing and capability.

LESSONS FROM REFORMERS

Tunisia Creates RTI Oversight Body through OGP Action Plan

[Disclaimer: This commitment is an example of an outstanding reform Tunisia made through OGP before the 2021 political crisis.]

The Tunisian parliament approved the country's law on public access to information in March 2016, guaranteeing Tunisians' right to access government-held information.[5] However, several months into the law's existence, the administration still struggled to effectively enforce the law. Local civil society organizations complained that government agencies took advantage of the lack of clear, systematic procedures for handling requests and appeals. Furthermore, a designated independent agency to manage and adjudicate appeals and application of the law was inconsistent.

Within months, Tunisia took steps to address these challenges through their 2016 OGP action plan. Among other initiatives, the government undertook the creation and staffing of the Authority for Access to Information (AAI), a new independent agency charged with overseeing appeals for denied requests and other complaints. After several delays, the parliament elected nine individuals who would serve as the inaugural officials on the AAI for six years. These officials come from a variety of professional backgrounds and they include two judges, a journalist, a lawyer, a university professor, and a member of civil society. Importantly, the parliament's role in appointing these officials prevented the executive branch from influencing their selection. The decisions of the body are also binding, making it more likely that agencies will comply.[6] With the AAI up and running, citizens now have a grievance mechanism to which to turn if their requests for information are denied or mishandled.

Institutional Capability, Capacity, and Efficiency

Deficits in capacity, capability, and efficiency, which may result from a number of factors, are a significant barrier to the effectiveness of RTI enforcement. In terms of funding challenges, insufficient funding can lead to delays, or worsen existing delays due to backlogs and complex procedures. Depending on the information requested, the requester's need for the information, or ability to use it for participation or accountability purposes, may have passed by the time the appeal institution has reached a decision. Likewise, a lack of funding can lead to reduced capacity as institutions may not have the resources to attract staff members with specialized knowledge of the law and policy governing RTI and the possibilities and limitations of authorities' records and information management systems.

Separately, judges and other non-specialized officials who hear cases on many topics may lack the experience and expertise to make well-informed decisions on RTI cases and to do so efficiently. To improve institutions' capability, capacity, and efficiency, governments can consider the following reforms:

- **Ensure proper training for all officials of oversight bodies.** Conduct training to ensure that officials of all independent oversight bodies—including judges if the court system is used for appeals—are able to make informed decisions in RTI appeals cases. Require all officials to make at least one RTI request per year themselves, so they have direct experience of how public authorities and the enforcement mechanisms treat requesters.
- **Publish fiscal information and data.** Governments should publish data related to budget allocations for RTI oversight bodies, and the oversight bodies should publish independently-audited accounts of finances and performance.

Institutional Integrity and Independence

The institutional, decisional, and financial independence of oversight and enforcement bodies is among the most critical factors in any RTI regime. A key aspect of all RTI laws is to transfer the final decision-making power over whether the information is released to an institution that does not have a conflict of interest—that is not going to find a legal pretext to avoid disclosing information that may be politically inconvenient or embarrassing. Currently, only 35 percent of OGP countries provide financial independence to their independent oversight bodies.[7] In countries where these institutions do not have financial independence from the executive branch, the independence of these institutions' decisions may be weakened.

To protect institutional integrity and independence, OGP members can consider the following measures:

- **Require transparent nominations.** If recruitment occurs via nomination and appointment, the procedure should be fully transparent to reveal the candidate's qualifications vis-à-vis other publicly announced candidates to avoid political favoritism. Consider publicizing interviews of candidates. Allow feedback on candidates from the legal profession and civil society to hear external evidence of a candidate's fitness. Publicize reasons for final appointments.
- **Ensure there are strong integrity tools in place.** Gift registers, registers of actual and perceived conflicts of interest for staff and the heads of enforcement institutions are key to maintaining trust and confidence. Consider instituting procedures and training on raising concerns internally or whistleblowing to another oversight institution (possibly the supreme audit institution for the country) or in extreme cases the media. Finally, governments should ensure that there is a statutory prohibition on judges, Information Commissioners, or Ombudsmen being awarded honors or medals by the government both while they hold office and for at least several years afterwards, if not for life.

- **Guarantee financial independence of oversight bodies.** While oversight bodies may exist as independent or quasi-independent bodies on paper, their ability to make impartial decisions may be hindered if they depend on the executive branch for their funding. In systems where this is the case, governments can consider measures that would give oversight bodies discretion over their use of funds.
- **Require annual public reports to the legislature on the operation of the RTI law.** It is important to facilitate public scrutiny of the operation of the law so that informed debate about possible amendments can be conducted, the performance of the enforcement mechanism and public authorities can be examined and questions asked by legislators, and awareness can be raised of people's rights so that more of the less powerful people in society make use of them.
- **Ensure RTI institutions are subject to accountability.** One way to do this is to make the RTI enforcement mechanism itself subject to the RTI law so that the public, media, civil society, and legislators are able to request information about the operation of the institution. Crucially, countries should, however, be careful that oversight processes do not encroach on the RTI institutions' independence.

Improving Public Access to Institutions

It is not enough for accountability institutions to maintain competent, efficient, and fair internal processes; they must also enable members of the public to access and use them effectively. Several factors contribute to the accessibility of oversight institutions, including the financial cost of lodging a complaint, the cost of legal representation if such advocacy is necessary, and the degree to which navigating the appeals process and associated communications are unnecessarily complex or formalistic. Table 2.2 presents an outline of the strengths and weaknesses in law of each enforcement model in terms of accessibility. While these may vary depending on the particular context and institutional structure in different countries, the table offers an overview of the types of challenges to which institutions in each model may be more susceptible.

TABLE 2.2: **Aspects of Institutional Access by Enforcement Model**

	Judicial Review	Information Commissioner or Appeals Tribunal—Binding Decisions	Information Commissioner or Ombudsman—Non-binding Decisions
Cost	High*	Low	Low
Legal Representation Required	Yes	Not required, but advantageous	No
Complexity	High	Some risk of complexity	Some risk of complexity

* While courts tend to resolve cases slower than other enforcement institutions, this is far from universal. In some countries, for example in several Latin American countries, mechanisms like the *amparo* offer relatively low-cost, speedy resolutions for claims related to constitutional rights.

Financial and Procedural Barriers

Among some OGP members, the financial cost of appealing an RTI request remains a barrier to seeking accountability. Appeals are free of charge and do not require legal assistance in only about half of OGP countries, according to data from the Global Right to Information Rating.[8]

Additionally, in bringing an appeal before the designated institution, individuals may face a variety of procedural challenges that can inhibit their access to justice. In some countries, individuals seeking to lodge a complaint may need to invest time and personal resources to effectively navigate complex or formalist processes. In other cases, especially when appellants are required to use the court system, they may require legal assistance, which is often costly and may be prohibitive for many. To reduce financial and procedural barriers to accountability, OGP members can consider the following reforms:

- **Increase public awareness.** Information commissioners and ombudsmen can tackle the risks of exclusion through mandated education campaigns to raise people's awareness of their rights, especially among groups that have not historically used such information. Institutions should also engage in public reporting on where they have provided these activities and to whom. The focus of these reports needs to be on the outcomes of such exercises rather than process. Officials from these institutions may also conduct drop-in clinics for requesters and appellants in locations around the country to increase user awareness and capability.
- **Expand provision of legal aid.** Expand access to quality legal aid to help citizens make RTI appeals. This may include identifying groups with the greatest difficulties and expanding the provision of legal aid to ensure adequate funding for RTI appeals. Governments can also increase funding to existing legal aid services, and establish new offices and services to reach isolated or underserved communities.
- **Provide training for civil society organizations seeking to file appeals.** RTI appeal mechanisms are often underused by civil society, journalists, and others. Moreover, at both courts and specialized tribunals which tend to be fairly formal in their proceedings and decisions, a lack of technical or procedural knowledge may hinder or prohibit civil society organizations from successfully lodging appeals. To reduce these barriers, OGP members can raise awareness and provide training among civil society groups about how to navigate the relevant oversight institutions.
- **Establish training for legal aid providers.** Fund and launch training programs for legal aid lawyers, paralegals, and pro bono volunteers to improve their legal skills and knowledge to better understand RTI complaints so they can provide high-quality advice.

GOOD TO KNOW

Cross-cutting Considerations: Power and Biases

In the course of making improvements, reformers must consider and contend with biases that they themselves may perpetuate or introduce. All RTI regimes are about power over access to information, with the aim being to transfer the power from the public authorities subject to the law to the public via the enforcement mechanism. However, power operates in a variety of spaces and with a number of different degrees of visibility, and this can give rise to systemic issues that affect people's RTI rights. One useful tool for analyzing power describes these degrees of visibility as: visible, hidden, and invisible.[9] In relation to RTI laws, the law itself is the visible articulation of where the power resides. One of the hidden kinds of power in relation to RTI laws are the internal procedures and guidance developed by public authorities and the enforcement mechanisms to give practical everyday effect to the RTI law. These need to be published in order to make the processes more visible to requesters. Invisible power involves the ways in which people's awareness of their rights and interests are hidden through the adoption of dominating ideologies, values, and forms of behavior by relatively powerless groups—including gender, ethnic, and other minorities—themselves.[10]

Since knowledge of how public authorities work, and create and manage information, are valuable skills for RTI enforcement bodies, it is unsurprising if the people working for Commissioners and Ombudsmen have a background in working for such authorities. This, in turn, creates a risk of bias that these institutions must be conscious of and strive to overcome. It is not that the officials in these institutions do not understand and appreciate the RTI law's requirement for independence, but given their likely career background they are at risk of empathizing more with the constraints and work pressures faced by public authorities than with the needs and difficulties faced by those seeking information.

The profile of the individuals employed by these institutions, and how they interact with requesters and public authorities, can significantly affect who is able to make use of their rights. The successful use of enforcement mechanisms often requires some degree of familiarity with these bodies' often complex and little-known processes. This creates a power advantage for those in society who have sufficient education to understand both the law itself, but also how to negotiate and navigate bureaucracy. Academic research suggests that RTI institutions—whether courts, information commissioners, or ombudsmen—are more frequently accessed by those who are older, with higher levels of education and incomes, and who are male.[11] These issues need to be considered not just in the choice and design of RTI enforcement mechanisms, but subsequently by the mechanisms themselves. Remaining vigilant to actively make themselves accessible to systemically underprivileged people and groups is one key task.

Endnotes

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Open Government Approaches to Anti-Corruption Enforcement

By Jessica Hickle

Countries are more effective at combating corruption when they involve the public in the fight. Laws against corruption can be more effectively enforced when the public helps with prevention, detection, reporting, and correction. Civil society, watchdog organizations, and the private sector can have a multiplier effect when combined with government efforts.

This chapter focuses on how civil society (both as interested individuals and organizations) can help enforce anti-corruption laws. Specifically, civil society can help to prevent, detect, report, and enforce instances of corruption—whether under statutes of bribery, extortion, fraud, embezzlement, abuses of power, or obstruction of justice.

The chapter focuses on public participation in three elements of anti-corruption: (1) Detection, (2) Reporting, and (3) Correction. Other topics such as prevention are dealt with extensively in other OGP documentation and is well beyond the scope of a short chapter emphasizing accountability. In addition, this chapter does not cover issues such as state capture where there is no law against specific acts.

Community member in Kaduna, Nigeria participate in the Eyes and Ears Project, a citizen audit program. Photo by OGP

Detection

Ensuring that the detection of suspicious activity —either by government actors, companies, or intermediaries—is the first step towards guaranteeing the punishment of corrupt actors. This requires that civil society organizations, journalists, and citizens have access to information about practices and transactions by governments and companies and the ability to participate in monitoring and oversight activities. This section lays out a variety of policy tools governments can put in place to ensure that members of the public are able to identify suspicious activities.

Audits and Inspections

As the primary institutions responsible for monitoring public financial management, audit institutions—including supreme audit institutions, sector-level auditing bodies and inspectors, and third-party actors—play an important role in uncovering corruption. Evidence indicates that openness throughout the auditing process can increase the efficiency, accuracy, and completeness, ensuring that all cases of corruption are detected and investigated.[1]

Auditing institutions can engage citizens and civil society at various points throughout their work. Each of these points, outlined below, include opportunities for involvement during audit planning, the completion of the audit itself, and after the audit is published to improve compliance with audit recommendations. For opportunities to participate in any of these activities to be meaningful, citizens must also have access to audit reports and information throughout the auditing cycle.

Access to Audit Information

For citizens and civil society groups to be effective partners in detecting corruption, they must have access to both audit results and information about auditing processes. Auditing institutions can take the following measures to increase accountability for spending:

- Publish all audit reports, data, and information on the use of public funds and institutional performance in accessible formats online.
- Ensure that all reporting is clear, precise, and accessible to a non-technical audience. For example, visual aids—like graphs and diagrams—and the use of simple, concise language can improve the accessibility of these documents to external audiences.
- Hold public hearings and press conferences to allow members of the public to learn more about audit results and disseminate this information among their communities.
- Offer opportunities for members of the public to provide feedback on audit information and publish official responses to these inquiries in a timely manner.
- Create processes through which civil society groups can continue to access information to monitor audited entities to ensure that they comply with audit recommendations.

Citizen Engagement in Auditing Processes

Institutions can also involve members of the public in the planning and administration of audits themselves. Meaningful consultation with civil society and members of the public during this process can enable more comprehensive audit plans and ensure that accountability institutions are responsive to public demand. Likewise, members of the public—as beneficiaries of public services—can contribute valuable information to auditors about the efficacy of these services. For example, Georgia used its OGP action plan to establish a web platform that allows citizens to access audit results and request areas of the budget to be audited in the future.[2] OGP members can consider implementing the following measures within audit institutions for increased citizen participation:

- Host public consultations during audit planning at which members of the public can recommend entities and programs to be audited and create a publicly accessible complaint register that members of the public can use to notify audit institutions of suspected instances of corruption.
- Require audit institutions to publish responses to all concerns raised through engagement mechanisms, informing participants whether their proposal for audit planning has been accepted, and, in the case of rejected proposals, an explanation of why it was rejected.
- Collaborate with members of the public in conducting research and analysis for audits. For example, institutions can provide citizens with scorecards to streamline their assessments of the performance of government entities.
- Consider implementing social audits in which auditors work with community members and CSOs to identify discrepancies between government policies, plans and regulations, and what is actually happening.
- Allow people to trigger more formal audit processes where social audits and/or other informal processes gather evidence of wrongdoing.

LESSONS FROM REFORMERS

Argentina and Peru Promote Transparent and Participatory Auditing Processes

While only a handful of countries have involved their Supreme Audit Institutions (SAIs) in creating and carrying out OGP commitments, recent examples from Argentina and Peru illustrate how countries can use their OGP action plans to make their accountability systems more effective and inclusive.[3]

The Office of the National Auditor General of Argentina (AGN) first became involved in the country's OGP action plans in 2017 when they sought to increase civil society participation in auditing processes.[4] **As a part of the commitment, the AGN's office held workshops and consultations with members of civil society to seek their input on audit design. Building on this, in 2019, Argentina committed to work with civil society to further strengthen citizen-monitoring of auditing agencies' recommendations.**[5]

Similarly, Peru is working to improve accountability in public works by harmonizing three public information systems for the planning, control, and execution of projects via the INFOBRAS platform.[6] **These include the financial administration system, the public investment system, and the electronic system for state contracting. The platform will enable citizens to monitor public work projects and flag any potential issues through reports that the Office of the Comptroller General of the Republic then investigates.**[7]

Official Data Disclosure: Empowering Citizen Watchdogs

In addition to effective auditing processes, governments can also require the proactive disclosure of information by both private companies and state agencies. In particular, open contracting, beneficial ownership transparency, and asset disclosures enable civil society organizations and journalists to monitor financial flows, identify suspicious activity, and report them using the relevant accountability mechanism. This section offers some steps countries can take to improve access to and quality of official data.

Beneficial Ownership Transparency

Anonymous or shell companies are one way for corrupt individuals to hide their illegal business activities. According to the World Bank, roughly 70 percent of the biggest corruption cases between 1980 and 2010 involved anonymous companies.[8] Beneficial ownership transparency requires companies to publish who ultimately controls and profits from all companies. This, together with transparency of property ownership, can help allow members of civil society and the public to detect potential instances of corruption. For example, journalists in Mexico and South Africa have used access to information laws and open data to flag suspected wrongdoing, but their work can only go so far without access to clear evidence on who really owns companies.[9]

Governments can take several important steps to ensure that members of the public can access and monitor company ownership information.

Legal Framework:

- Strengthen the disclosure requirements. Reinforcing underlying legal and regulatory requirements for disclosure of different types of ownership across various legal vehicles is fundamental to more effective, transparent processes.
- Close loopholes, such as by lowering thresholds for ownership and expanding collection of information for various legal vehicles.

Open Register:

- Work with civil society to design a register that is useful and usable.
- Improve the interoperability of information. Applying common standards, such as the Beneficial Ownership Data Standard and linking ownership information with other policy areas, can help to track money and assets across sectors and jurisdictions.

Verification and Monitoring:

- Verify reported data. Once data is submitted, it is essential to verify that the information is accurate and consistent with previously reported data. Agencies should also put mechanisms in place to flag potential irregularities for review.[10]
- Engage citizens in monitoring. This can include informal and formal channels for accountability that enable citizens to actively use ownership data to uncover networks of corruption.

For additional resources and information on beneficial ownership transparency, see OGP's *Global Report*. For recent examples of beneficial ownership transparency commitments, see OGP's recent Fact Sheet.

Open Contracting

Public procurement represents governments' biggest corruption risk. Transparent public contracting, which involves transparency and citizen engagement throughout all phases of the procurement process, can help to reduce these risks. Open contracting data can enable effective oversight of government services by revealing who is getting paid how much to deliver what, as well as how they were selected and whether they delivered on time and with quality.

Open contracting has gained significant momentum among OGP members over the last few years. Still, OGP members can take several steps to improve public access to contracting information and enable citizen monitoring of public procurement.

Information Disclosure:

- Identify and consult stakeholders before developing a contracting platform to understand user demands.
- Consider focusing open contracting reforms at the sector level to target particular high-risk areas such as extractives and health.
- Collect and publish higher quality and machine-readable data, including at municipality and local levels. Use the Open Contracting Data Standard to guide decisions on disclosing data and documents throughout the procurement process.
- Make data interoperable with other systems, such as beneficial ownership registries and government spending data.

Civic Participation and Monitoring:

- Create digital portals that are easy to access and use, which can allow citizens to track all purchases.
- Engage with and support civil monitoring to improve planning, reporting, and implementing government contracts. This will allow for real-time alerts of leakages, irregularities, and breaks in the supply chain.
- Establish clear feedback mechanisms and opportunities for the public to act on the disclosed procurement data, such as by filing complaints, reporting irregularities, or suggesting improvements.

For additional resources and information on open contracting, see OGP's *Global Report* and "A Guide to Open Government and the Coronavirus: Public Procurement."

Asset Disclosure

Asset and interest declarations are widely recognized as a tool to prevent and detect corruption by public officials, including by the United Nations Convention Against Corruption (UNCAC), which requires parties to establish asset disclosure systems.[11] Accordingly, most countries have introduced asset disclosure requirements for public officials to prevent conflicts of interest.[12] However, the number of jurisdictions where comprehensive information about officials' income and assets is publicly available and regularly updated is much smaller. Transparent, complete, and publicly accessible information enables members of the public, civil society, and media to detect irregularities in the data.

OGP members can take several steps to ensure that asset disclosure requirements are sufficiently broad in scope to eliminate reporting loopholes. Additionally, governments should ensure that disclosure information is publicly accessible and usable.

Scope[13]:

- Enforce regular disclosure by all individuals who hold, or who have held, senior public office, as well as their close family members (spouses and children).
- Ensure the scope of reporting applies to all classes of asset (including non-moveable and moveable assets, financial assets, previous employment, and outside interests).

Transparency[14]:

- Publish digitally updated information on disclosures at regular intervals on a single, central platform in open-data format.
- Consult data users (including journalists and CSOs) before, during, and after publication to ensure that the supply of data matches demand and is functionally useful for accountability.
- Use e-declarations to manage the submissions process online. This improves the quality and speed of data collection via forms that use limited-option, multiple-choice questions and do not permit submission until all fields are completed.

LESSONS FROM REFORMERS

Ukraine's Efforts to Empower Citizens to Flag Irregularities and Trigger Investigations

[Disclaimer: This commitment is an example of one of several outstanding reforms Ukraine made before its invasion by Russia.]

In 2014, Ukraine used its OGP action plan to transform the country's asset disclosure system from a paper-based system to a fully digital, unified portal. The new system created unprecedented levels of transparency as members of the public could access comprehensive information about public officials' holdings for the first time. Users could report irregularities in the data through the platform which the government was then legally obligated to investigate. Soon after the platform launched, journalists began publishing investigations of alleged conflicts of interest using information published on the portal. Within two years of the platform's launch, the National Anti-Corruption Bureau, the agency responsible for investigating corruption complaints, opened several probes into unjustified wealth and false statements. This represented a major breakthrough in public accountability in the fight against corruption, and the platform was voted the fourth most successful event of 2016 in a national poll of Ukrainian citizens.

Ukraine later pioneered such a mechanism to foster public accountability in public procurement—another important area for anti-corruption reforms. After the successful launch of the ProZorro e-procurement platform in 2015, Ukraine launched DoZorro in November 2016 as part of its 2016-2018 OGP action plan. DoZorro was set up as a public procurement monitoring platform that enables citizens to submit feedback, including alerts of possible irregularities and reports of violations in the public procurement sector. According to the government, more than 700,000 users visited the website since its launch, flagging nearly 74,000 concerns.[15] In addition, violations were registered in over 30,000 tenders with an estimated value of US$4 billion over three years. Most importantly, the government took concrete steps to act on the citizen feedback, such as by directing appeals to controlling bodies, changing tenders, and initiating formal investigations.[16]

Corporate Responsibility Requirements

Just as transparency and internal control requirements can help to reveal corruption or corruption risks, similar mechanisms can help detect corruption from within the private sector. In many advanced economies, including the United States, the United Kingdom, and Canada, federal agencies regulate the financial sector. These institutions require public companies to disclose any information that may directly or indirectly influence the company's financial performance. These disclosures could include income and cash flows, net revenue, total assets, long-term obligations, compensation and bonuses for high-level managers, payments to foreign entities, and any other risks. Governments should also ensure that companies are subject to rigorous oversight and internal controls, including requirements for regular audits.

Reporting

Once civil society members or citizens have identified suspicious behavior, they must have access to reliable and independent channels to report the allegations to oversight institutions with the authority to investigate the claim and determine whether to take action against any individuals. In addition, governments should ensure protection for whistleblowers within government agencies or private companies who risk facing retaliation by reporting corrupt practices. This section outlines some of the measures and mechanisms OGP members can put in place to ensure that all actors have access to channels to report wrongdoing.

Independent Channels

OGP members can create a variety of channels for reporting corruption at different levels of governments. For example, hotlines and complaint portals for reporting bribery, embezzlement, fraud, and other allegations may sit at the agency or whole-of-government level. Alternatively, local institutions, including police departments may establish complaint boards where citizens can voice their concerns. This section describes several reporting mechanisms that are accessible to citizens in greater detail.

Hotlines and Complaint Portals

Hotlines and complaint portals are two examples of tools governments can implement to facilitate and activate independent reporting channels for corruption. Both tools allow government employees and members of the public to report instances of suspected corruption. These mechanisms may be managed by one of several government agencies which have the authority and the duty to investigate these claims. For example, in the United States, federal employees and members of the public can report bribery, embezzlement, and fraud allegations to the Office of the Inspector General (OIG). The OIG has offices within each federal agency and has the authority to investigate complaints and to refer them to the legislature for correction.

High Level Reporting Mechanisms

High Level Reporting Mechanisms (HLRM) are another channel through which individuals, and specifically companies, may report bribe solicitation, threats of extortion, and other forms of corruption by public officials.[17] HLRMs offer a voluntary, alternative channel for reporting and resolving corruption concerns without or in addition to legal recourse. An HLRM may provide a variety of remedies to an affected company, depending on the complaint, including removing officials whose behavior is concerning, delaying the awarding of a contract, or revising the concerned agencies policies.[18] These mechanisms, which are a relatively recent innovation, are typically mainstreamed across government agencies and sit at a high level within the administration's hierarchy.

OGP members considering creating or adapting an HLRM may consider the following measures to ensure its transparency, fairness, and openness to citizens.

- **Publish information about the HLRM.** The HLRM should have a publicly available website to allow potential users to access information about its procedures, the types of complaints for which it can be used, and instructions on how to submit a complaint. Users should also have the option to submit complaints online via the HLRM website.[19]

The office of the Comptroller General of Peru engages citizens in monitoring the execution of public works projects. Photo by CGR Peru

- **Collect and publish information about HLRM cases and outcomes.** The HLRM should provide regular updates on the number and types of complaints it resolves and the outcomes of these mediations. The HLRM should allow users to provide feedback on its policies and practices, and publish timely responses to these comments.[20]

- **Involve third-party experts in investigation and mediation.** The HLRM can consider engaging experts—including academics and members of civil society—in investigating, mediating, and resolving complaints. This helps to ensure that results are fair and unbiased.[21]

- **Engage civil society in monitoring.** Ensure that oversight mechanisms are in place for the HLRM itself. Establish an advisory group composed of business leaders, members of civil society, and government officials to monitor and evaluate the performance of the HLRM. All evaluations should be made publicly available.[22]

Whistleblower Protections

Public Sector Whistleblowers

Whistleblowers play a crucial role in detecting a wide range of corrupt practices, including bribery, fraud, and embezzlement, within and outside of government agencies. However, when individuals who work with or for government agencies report these activities, they often put themselves at personal and professional risk.[23] OGP members can prevent retaliation and ensure the safety and security of whistleblowers by ensuring that whistleblower protection legislation is sufficiently broad in scope. For example, in 2018, Croatia used its OGP action plan to expand protections for whistleblowers, including by ensuring anonymity for whistleblowers and protection against retaliation in the workplace.[24] In particular, the score of such legislation should extend to the following:

- **Broad individual protections.** Protect anyone who reports wrongdoing. Protections should extend beyond public employees to include private sector workers, citizens, contractors, medical workers, and members of the media.

- **Broad definition of wrongdoing.** The scope of disclosures that fall under whistleblower protections should be broad, extending beyond criminal behavior to include harm to the public interest.
- **Broad retaliation protections.** Protect against all forms of retaliation, not just workplace harassment. Whistleblowers should be protected from direct, indirect, and future consequences as well as civil suits and criminal prosecutions. Women may be more likely to experience retaliation, so additional gender-based protections should be considered.[25]

OGP members should also provide support to whistleblowers, for example, through the following measures:

Anonymous reporting channels. Provide a variety of anonymous reporting channels, such as internal and external hotlines, online portals, or compliance officers to increase access from a diversity of whistleblowers.

- **Access to justice.** Ensure whistleblowers' access to counsel is protected in law and that whistleblowers have access to legal remedies and representation.
- **Ongoing participation.** Provide whistleblowers the choice to participate in subsequent investigations and to be informed of the progress and outcome of investigations.
- **Publish metadata.** Release metadata on whistleblower claims—while protecting whistleblowers' anonymity—to allow members of the public to identify trends and red flags.
- **Allow referral to the legislature.** Ensure that agencies receiving and investigating whistleblower claims have the authority to refer complaints to the legislature for further investigation and to determine sanctions or other next steps.

Private Sector Whistleblowers

Certain types of corruption, including foreign bribery and some types of fraud, may be more likely to be caught by employees of private sector companies rather than regulators. In these cases, potential whistleblowers are more likely to report their allegation internally before turning to external mechanisms, if they do so at all. However, while many countries have made some progress in creating and enforcing whistleblower protection legislation for public sector employees, fewer countries have taken steps to protect private sector whistleblowers.[26] Below are some actions governments can take to improve protections for private sector whistleblowers.

- **Incentives for companies.** Although governments cannot control companies' internal operations, they can create requirements or incentives for companies to implement secure mechanisms for employees to report corruption. For example, some countries have adopted laws to recognize implementation of internal controls, ethics, and compliance programs.[27]
- **Adapt existing legislation.** Governments can adapt whistleblower protection legislation for public sector employees to also include protections for whistleblowers in the private sector. Countries that have adopted this type of legislation include New Zealand, Japan, and South Africa. Importantly, this type of legislation applies to private sector whistleblowers who choose to report their allegation externally after or in place of internal reporting within the company.
- **Criminal sanctions for retaliation.** Governments can also help to protect private sector whistleblowers by creating criminal sanctions for retaliation. For example, Canada's criminal code stipulates that retaliation against whistleblowers is punishable by up to five years' imprisonment.[28]

Correction

Just as public involvement enables more effective detection and reporting of corruption, civil society and members of the public can also play a crucial role in prosecuting and punishing corruption. As litigation represents one of the primary levers for remedying grand corruption, this section focuses on the ways civil society may participate in lawsuits against corrupt actors as plaintiffs or supporting actors in ongoing cases. While in many jurisdictions rules around standing limit who is able to file corruption lawsuits and under what circumstances, in recent years, civil society organizations around the world have used diverse and often creative means to bring and support corruption lawsuits.

This section covers some of the ways civil society groups may engage in civil and criminal litigation against corruption. OGP members can take a variety of measures to ensure that civil society has access to the judicial system and the support they may need to participate in litigation. Some of these measures are outlined below.

- **Establish or strengthen the legal aid authority.** Create an independent legal aid authority that can establish, fund, staff, regulate, and evaluate the legal aid scheme. Consider a multistakeholder approach, bringing in legal professionals, civil society, and representatives from underserved communities. The authority should establish a body that can impartially investigate complaints against legal aid providers and put in place a suitable mechanism for evaluating and improving the quality of services.
- **Expand provision of and access to quality legal aid.** Expand access to quality civil and criminal legal aid to hold the state accountable to respect citizens' rights by giving citizens access to legal help and information. This may include identifying communities or areas with disproportionate legal needs or that traditionally lack access to legal aid, expanding the provision of legal aid for problems that might not have adequate funding, and developing partnerships with civil society organizations offering legal assistance. Increase funding to existing legal aid services, and establish new offices and services to reach isolated or underserved communities.
- **Deepen cooperation to address legal needs.** Launch working groups composed of government and civil society members to identify legal reforms needed to improve justice delivery systems through legal assistance and the courts. Strengthen and institutionalize partnerships, for example between the judicial system, legal aid providers, CSOs, academia, social services, the health-care system, and law enforcement, when appropriate, to better serve underserved communities.
- **Provide training for civil society organizations.** Many civil society groups working to end corruption may be unaware of the levers for legal recourse to fight corruption available in their country. To reduce these barriers, OGP members can raise awareness and provide training among civil society groups about how to navigate the relevant oversight institutions.
- **Establish proper training for lawyers and legal aid providers.** Fund and launch training programs for lawyers, paralegals, and pro bono volunteers to improve their legal skills and knowledge to better understand how to investigate and litigate anti-corruption cases. Providers should be trained on their professional obligations and relevant codes of conduct.
- **Ensure proper training for all officials of oversight bodies.** Conduct training to ensure that officials of all independent oversight bodies are able to make informed decisions in anti-corruption cases.

Nkem Ilo, the Chief Executive Officer at Public and Private Develoment Centre (PPDC), works from her office in Abuja Nigeria, on 01 December, 2021. Nigeria committed to establishing a Beneficial Ownership Registry, a first step to fighting illicit financial flows and to make the information of the real owners of companies in business with the government available. Photo by OGP

Civil Corrections

Despite a few notable exceptions, most recent anti-corruption litigation has involved civil lawsuits, as standing requirements are generally more liberal in civil law than criminal law.[29] In many countries, citizens and civil society groups may bring civil suits against individual public officials, the government, companies, or individuals representing them, or intermediaries of corrupt deals—for example, banks. This section offers more detailed explanations of some of the types of civil law tools available for correcting corruption and the circumstances under which they might be activated.

Redress for Damages

In many countries, citizens who have been directly harmed by instances of corruption—including cases of bribery, extortion, and fraud—may seek damages by acting as plaintiffs in civil lawsuits. In cases where a large group of people have been negatively impacted, a few individuals may also represent the group as part of a class action.[30] Depending on the jurisdiction, citizens may be able to pursue civil litigation against the public authorities or individual public officials. However, this measure is most commonly used to sue companies, individual employees, and other private actors alleged to have perpetrated the crime. If a claim is successful, a court may issue a few types of remedies, including requirements for the guilty party to compensate the victim or return assets gained through the corrupt activity.[31]

While this type of litigation can be effective in certain cases, it also has limitations, depending on the jurisdiction in which it occurs. In several countries—including Spain, South Africa, Colombia, Kenya, India, and others—petitioners can bring civil litigation against corruption in the public interest.[32] However, in other jurisdictions—like the United States, Germany, and others—only individuals who were directly affected by corruption can bring a civil lawsuit. This type of correction cannot be pursued in the public interest. In addition, plaintiffs are responsible for costs associated with their case, making this type of litigation potentially expensive depending on the nature of the claim and the cost of legal representation.[33]

Correction on Behalf of Government

In common law countries, whistleblowers can also bring civil litigation on behalf of the government in cases where a private party discovers that a company is defrauding the government. In the United States, this is called *Qui tam* litigation.[34] If these claims are successful, the court may award the whistleblower—called the *relator*—compensation for their role in these cases. This type of litigation is most often used in cases of contracting fraud against the government.

Criminal Corrections

In many countries, the ability of members of the public and civil society to bring criminal lawsuits is much more limited than civil cases.[35] While citizens and members of civil society may be able to provide information in criminal investigations, file complaints, or call on prosecutors to bring charges, they do not have standing to bring these cases themselves. In these jurisdictions, however, members of the public may be able to join ongoing prosecutions as "friends of the court." In other jurisdictions, rules about standing in criminal prosecutions are more liberal and members of the public may be able to act as "civil parties" or "private prosecutors."

Friends of the Court

While in some countries—including the United States—members of the public and civil society cannot bring criminal lawsuits, they can provide additional information, evidence, or arguments to ongoing cases by filing an *amicus brief*. These briefs, which can be filed in civil as well as criminal cases, can be highly influential in determining the result of the case as they may reveal ideas and information that would not have been presented otherwise.

Civil Party to Prosecution

In some civil law countries, while civil society organizations cannot bring criminal lawsuits, they may have certain rights as a "civil party." These rights apply to anyone who has been a victim of crime and allows citizens and civil society to file a formal complaint with the judiciary, which prompts a formal investigation and judgment by the court. The case study "French Civil Society Pushes for Enforcement in the Bien Mal Acquis Case" offers more detail about how civil society organizations in civil law countries may be able to use this provision to prompt officials to investigate and prosecute corruption.

Correction on Behalf of Government—Private Prosecution

Other countries have more liberal standing requirements for initiating criminal litigation for corruption. In these jurisdictions, citizens and civil society members can bring criminal complaints by acting as "private prosecutors."[36] For example, in Spain any citizen can initiate criminal proceedings as well as non-citizens who have been victims of a crime. In recent years, civil society organizations have used this provision to tackle several high-profile corruption cases. In one notable case filed in 2008, civil society organization the Asociación Pro Derechos Humanos de España (APDHE) filed a complaint against the family of President Teodoro Obiang of Equatorial Guinea for money laundering via Spanish bank Santander. While the case is still pending in Spanish court, the use of private prosecution demonstrates how civil society organizations can demand justice in corruption cases without waiting for government authorities to act.[37]

LESSONS FROM REFORMERS

French Civil Society Pushes for Enforcement Against International Actors

By Richard Messick

In France, victims of a crime have had the right to be a civil party (*partie civile*) to a criminal case since Napoleon's time. Among other powers, that law grants citizens the right to file a complaint directly with the judiciary if they are the victim of a crime which the public prosecutor refuses to investigate. If the complaint is accepted, a formal investigation is immediately opened. In March 2007, three French CSOs used this provision to demand the government to act in response to reports that the leaders of several African countries had hidden stolen assets in France.

Although the *partie civile* law had never been invoked in a corruption case, after leaks to the media showed there was good reason to believe the allegations were well-founded, Transparency International-France relied on it to ask the judiciary to open a formal investigation of the rulers of several African states.

TI-France argued that it was time the law be extended to corruption cases and to permit organizations devoted to combating corruption to be recognized as victims of corruption crimes. France's highest court agreed, the judiciary opened a case and Equatorial Guinea's vice president was convicted of money laundering, fined 30 million euros, given a suspended sentence, and had his French assets confiscated. The case illustrates how civil society may be able to exploit existing legal provisions to prosecute and punish corruption.

Furthermore, the French legislature subsequently wrote the court judgment into law. Today, any association in existence for five years dedicated to fighting corruption and meeting certain requirements set by regulation can bring a criminal complaint for bribery, money laundering, and other corruption crimes directly with the judiciary.[38] Inspired by the French example, a number of other states have followed suit, granting anti-corruption CSOs standing in enacted similar legislation. Examples of countries with similar laws include Benin, where CSOs have acted as civil parties in ten corruption cases since 2018, and Chile, where citizen and CSO complainants provide "procedural surveillance" by ensuring public prosecutors follow the proper procedures and high-profile corrupt officials especially do not escape sanction.[39]

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Open Government Approaches to Environmental Justice

By Joseph Foti

In recent decades, accumulated greenhouse gasses (GHGs) have led to increased climate variability and more frequent extreme weather events, resulting in permanent change to our environment. As these patterns continue over the next century, we must take action to mitigate the worst effects of climate change by seeking less harmful alternatives. At the same time, in areas where we already see the worst effects of climate change, we will need to find ways to adapt.

To guide societies toward these dual goals justly, efficiently, and sustainably, we will need to ensure that the public has access to effective accountability processes to seek remedy and redress for harms as a result of climate change. In the creation of such processes, open government reforms—those that advance transparency, participation, and accountability—will be essential to a just transition to a low greenhouse gas future.

To a large extent, enforcement of existing open government laws will form a solid foundation to ensure that we act justly to avoid the worst consequences of climate change, and adapt in a fair way to those that we cannot avoid. To a lesser but still important extent, additional laws may be needed to ensure that due process and scientifically-informed decisions are being made.

This chapter outlines a few open government approaches that OGP members can take to ensure that members of the public can successfully use justice and accountability mechanisms to safeguard their fundamental rights in the face of climate change. By and large, the possibilities below articulate and enumerate what already exists in current law, ensuring that the legal intent of transparency, participation, and accountability can be more effectively enforced.

Female citizens in Costa Rica work to empower and protect indigenous communities. Photo by OGP


I CARRERA Y
CAMINATA POR LA
SALUD DE LAS
MUJERES
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Seen here are herders in Tarialan, Uvs Province, Mongolia. The United Nations Development Programme (UNDP) supports community centres for Mongolian herder groups -- many herdsmen now develop their own land-use plans, conservation maps and sustainable practices for water, forest and pasture management. Photo by United Nations

International Frameworks for Environmental Justice

Several international and regional agreements explain and reaffirm the essentiality of open government reforms in ensuring environmental justice.

Many regional and domestic initiatives to increase openness in environmental governance have their foundations in the 1992 Rio Declaration, which establishes 27 universal principles for action on the environment.[1] In particular, Principle 10 affirms the 179 signatory countries' commitment to allowing public participation in environmental issues at the relevant levels of government which should be facilitated by access to public information and effective and accessible redress mechanisms.[2]

Building on the Rio Declaration, many countries have committed to concrete action towards achieving Principle 10 through multiple regional conventions and decisions, including the Aarhus Convention for UN Economic Commission for Europe (UNECE), the Escazu Agreement for UN Economic Commission for Latin America and the Caribbean members, and the "Bali Guidelines" (for all UN Environment Programme members).

First, the 1998 UNECE Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (commonly referred to as the Aarhus Convention) establishes three primary rights of the public with regard to the environment.[3] OGP members seeking to enhance the strength of their justice systems in providing a clean and healthy environment may consider accession to one of the conventions, as relevant, or enhancement of their existing participation.

The Aarhus Convention is organized around three pillars: access to information, public participation, and access to justice. Specifically, the convention includes requirements to allow people and organizations to access government documentation by request, as well

as to access proactively published information on state of the environment, pollutant releases and transfers, emergencies, and environmental impact assessment. In addition, members are to work toward open standing for environmental claims under the Convention's Access to Justice. While, at the time of writing (2022), there is no specific standard for access to justice, there is a growing body of case law establishing precedent for how each member state can meet its obligations under the treaty with respect to the third pillar.[4] Supporting robust participation in Aarhus may be an essential channel for OGP members that wish to strengthen justice mechanisms as the European Court of Justice has ruled to deny greenhouse gas emissions data to the public in two important precedent-setting cases *(City of Lyon v. French Deposits and Consignments Fund* and *Flachglas Torgau GmbH v. Federal Republic of Germany).*

Similarly, the Regional Agreement on Access to Information, Public Participation, and Justice in Environmental Matters in Latin America and the Caribbean (known as the Escazu Agreement) came into force in 2021. For more information on the agreement, its significance, and how OGP members can use their action plans to implement its provisions, see "FEATURE: How the Escazu Agreement promotes justice and human rights in Latin America and the Caribbean."

Finally, the UNEP Bali Guidelines, while voluntary, have extensive recommendations and implementation guidance on all three pillars, including robust mechanisms for denial of information, denial of public participation, and harm to the environment. UNEP, the UN Institute for Training and Research and the World Resources Institute, together with member governments and civil society organizations developed the implementation guidance for *Bali Guidelines*[5]. This can serve as a starting point for those OGP members wishing to develop additional actions outside of the framework of the two main conventions but within the framework of the universal *1992 Rio Declaration* signed by all OGP members.

Transparency and Environmental Justice

Right to Information Legislation

All OGP national members have right to information (RTI) laws which allow members of the public to access government records. In many places, citizens, journalists, and civil society groups have used these laws to gain access to important information related to climate policy.[6] In this way, the laws offer an important foundation to ensure transparency in climate policymaking. The existence of RTI as a tool for climate transparency can push officials to take a variety of views into account, base decision-making on the best available evidence, and do so using the highest quality models available. The following are actions governments can take to guarantee the public has access to crucial climate policy information.

- **Access to modeling.** Ensure that RTI laws allow for the public to access assessments of underlying models for decision-making, including scientific data and assumptions, risk, and impact. France took actions as part of its first OGP action plan to make sure that modeling data was available.[7]

- **Scope of coverage.** Ensure that RTI laws allow for the public to access records of decision-making and communications.

- **Timeliness.** For RTI laws to make a difference in decision-making, the public must have access to records within a reasonable time frame—days and weeks, rather than years. Speedy response may reduce the need to appeal to courts.

The next two subsections outline some of the specific types of information that governments should make publicly available or should at least mandate that they are within the scope of information the public can request under the RTI law.

Environmental Assessment and Permitting

Some jurisdictions already have processes in place to ensure that governments and private companies consider the environmental impacts of plans, policies, programs, and projects. Measures that guarantee that these processes are transparent are important to ensure that members of the public have the information necessary to understand the effects of these plans and take actions to challenge them if needed. The following are actions governments can take to ensure transparency in environmental assessment and permitting processes.

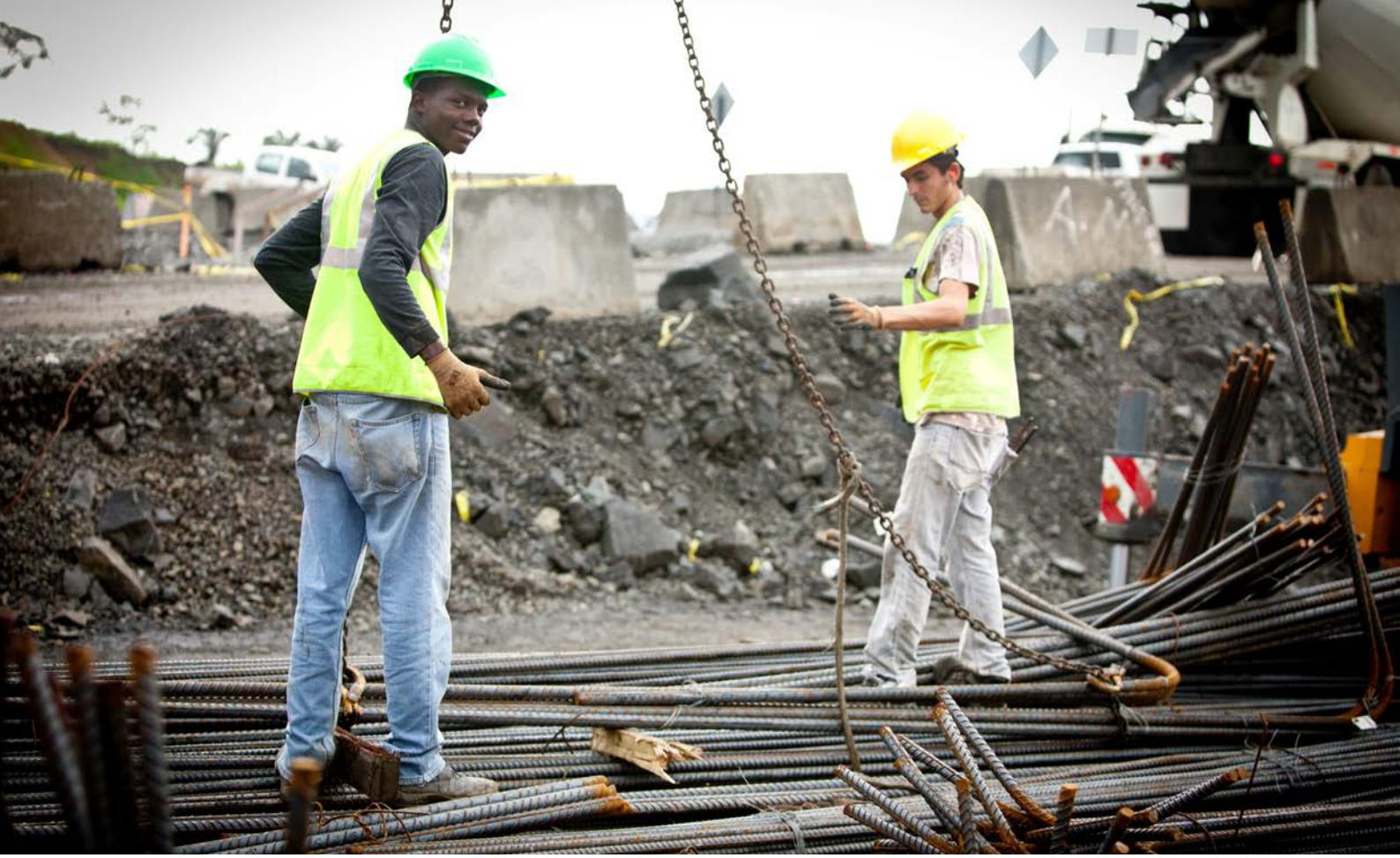
- **Screening.** In many places, environmental impact assessments are stopped before any public disclosures are made due to "findings of no significant impact." These findings may not be disclosed to the public, essentially rendering the initial scoping phase secret.
    - o Best practice involves full disclosure of evaluations of context and intensity as part of a publicly available "finding of no significant impact."
    - o OGP members may also strengthen the quality of such assessments and the powers of public review and oversight by narrowing the types of categorical exclusions -- government activities which, under current rules, do not merit public oversight.[8] Mexico used its first OGP action plan to work to improve access to environmental assessment documents, including in the context of climate change.[9] While the commitment was only partially completed, it illustrates an example of the types of screening countries can implement through their OGP action plans.
- **Impact assessments.** Ensure publicly accessible impact assessments, including the following attributes.
    - o **Timing.** At a minimum, the public should have adequate notice of the intent to take an action. This in turn requires adequate times for openness. Some OGP members give little or no advance ahead of comment periods, make few resources available ahead of time to inform public comments, and provide inadequate timeframes during which the public can provide input.
    - o **Documentation of additional clearances.** Ensure that the public has access to any additional authorization and clearances in accordance with legislation on wildlife, preservation of cultural or historical sites, and other ecosystems protection.
    - o **Cumulative impacts.** Require the disclosure of "past, present, and reasonably foreseeable future actions" as a result of a project or suite of projects. Cumulative impact assessments should take into account all projects in a particular area and necessary climate change adaptation measures as a result of the project.
    - o **Assessments and alternatives.** In assessing the minimal impacts of climate, ensure that alternatives beyond the proposed action and baseline scenario are considered. Ensure that the methods for weighing alternatives and the underlying data are made public.
- **Public consultation.** Ensure that opportunities for the public to give and receive feedback are inclusive. This should include issues such as timing, location, and language of such opportunities. In addition, it should consider State/provincial governments, local governments, industry/large corporations, civil society organizations, universities, farmers and agriculture organizations, small- and medium-sized enterprises, citizen advisory committees, indigenous groups, labor unions, women's groups or associations, and local or family-owned businesses, among others.
- **Alternatives and enhancements.** Ensure that alternatives and enhancements to environmental impact assessments (such as a strategic environmental assessment, human rights impact assessment, or health impact assessment), minimize loopholes and exemptions to undermine transparency, participation, and accountability.

A landscape shot shows the rivers flowing in neighbourhoods around Grahamstown, South Africa. Photo by OGP

Financial Oversight and Funding

Members of the public should also have access to information about the funding of projects that may have environmental impacts and any the source, amount, and use of any financial transfers that occur in the course of enforcement actions.

- **Proactive transparency.** Governments should proactively disclose the state's financial interest in activities that have a major impact on the environment including, for example, mining and other activities in the extractives sector. Governments can also create requirements for companies to publish impact assessments for their projects. These disclosures can be a tool for preventing potential environmental damage.
- **Transparency of settlements.** Where an enforcement action has taken place and a settlement has been reached, departments of justice or their equivalent should ensure that the terms of settlement are proactively published.
- **Transparency on equitable spending of mitigation and adaptation funding.** After rewards for damages in civil cases have been settled, governments can work to publicly account for how fines have been spent, what environmental rehabilitation or restoration has taken place, whether harmed individuals and communities have received their payout, and how much has been spent.



Construction works for the Panama Canal expansion project. Photo by World Bank

Participation and Environmental Justice

Administrative Procedures

Most OGP countries have adopted administrative procedure laws which require transparency, participation, and accountability in the formation of policy and regulation. Administrative procedures law is likely to form the basis of most procedural claims and substantive claims as petitioners may argue that climate-related policy did not adequately take into account scientific and public input. The following are actions governments can take to ensure access to justice on the basis of administrative procedure laws.

- **Fair participation.** Ensure that courts have the competence and jurisdiction to enforce fair and open decision-making processes. For example, in the United States, federal agencies including the Securities and Exchange Commission are required to consult extensively with the public on their proposed regulations. OGP and the World Bank developed extensive guidance on improving transparency, public participation, and accountability (including judicial and administrative review) in *Regulatory Governance in the Open Government Partnership*.[10]

- **Ensuring reasoned response.** Agencies should respond to all concerns raised in public comments, outlining the reasons for their actions in response to the concern. While a growing number of jurisdictions have rules requiring documentation of public participation, many of them continue to lack a legally enforceable requirement for government to publish a written reasoned response to major categories of comment (referred to as the "arbitrary and capricious standard" in some contexts). As a result, major categories of public comment often go unaddressed by government agencies responsible for projects. For example, in the ten Latin America and Caribbean countries surveyed as part of the *Environmental Governance Indicators* report, environmental authorities are less effective at producing comprehensive explanations of agency decisions than in scoping, screening, and assessing impacts.[11]

Management of Land, Air, and Water

In most OGP countries, air, water, and significant portions of land are held in the public trust or are held by the state. Governments should create processes for citizens' input over public trust management.

- **Free, prior, and informed consent.** Create requirements for the government to engage in meaningful consultation with communities inhabiting public lands prior to developing or using the land. Costa Rica has used its OGP action plans to implement ILO 169 on Free, Prior, Informed Consent for Indigenous Peoples.[12]

- **Indigenous and customary law.** Recognize indigenous peoples' collective rights to ancestral land, territory, and resources.[13] OGP members may work to strengthen or establish processes to recognize and formalize customary tenure and communal land rights where possible.

- **Democratizing eminent domain and degazettement.** Continued degradation and downgrading of protected areas such as forests and protected waters is a major contributor to climate change.[14] In other cases, major shifts in land use are sources of conflict around climate, especially around fossil fuel infrastructure (as in the cases of the Dakota Access Pipeline,[15] Keystone XL Pipeline,[16] and Line 3 Pipeline[17] in the United States) or electricity transmission (such as HydroAysén in Chile[18]). In many countries, public lands are privatized or private lands are nationalized or otherwise condemned without due process or public oversight.[19] In cases where such changes in land tenure or change in land use takes place, there are often significant human and environmental consequences, both locally and cumulatively for the environment at large. Often such actions are carried out without adequate public input, and without publicly available equity analysis or evaluation of environmental impacts. Some OGP national members, such as Liberia and Indonesia, have used their OGP action plans to address issues of large scale land degradation and changes in use with decidedly mixed results.[20] At a basic level, greater transparency about land tenure is necessary, although more than transparency will be necessary, with better systems of environmental and social impacts and means of ensuring due process.

Civic Space

In many jurisdictions, individuals and civil society organizations face harassment in response to their advocacy for environmental protection. Governments should protect the rights of these individuals to engage in this type of civic participation.

- **Protect free assembly rights of climate activists.**[21] As protest movements advocating for climate action continue to grow, activists must be able to assemble freely without threat of political retaliation and violence. To do so, governments should provide adequate access to legal services for citizens facing criminal charges for their involvement in protests. (A different, but related issue is ensuring that there are consequences for law enforcement which harasses journalists documenting protests.)

- **Anti-SLAPP legislation.**[22] As climate litigation becomes more common, environmental defenders are being sued for defamation more frequently by extractive and agribusiness companies in lawsuits known as strategic litigation against public participation (SLAPP). Anti-SLAPP laws like the ones enacted in the United States, Canada, Australia, Indonesia, the Philippines, and other countries help ensure the protection of activists litigating for climate protection.

Enforcement Mechanisms and Environmental Justice

Right to Information

For the right to information to be meaningful, independent oversight institutions must exist to enforce it. It is not enough that members of the public can request access to information; they also must have the ability to file a complaint or appeal if their request is denied or mishandled. Specifically, governments should offer multiple channels for citizens to respond to denials for information, including through administrative courts (such as right to information commissions), specialized environmental courts or "green tribunals" (where they exist and have jurisdiction), and regular courts. The establishment and use of such courts should create a net benefit to environmental claims, increasing efficiency, fairness, predictability, and reducing cost. In cases where multiple forums are offered, it is important to reduce the requirements for plaintiffs to "exhaust" all remedies before appeal to prevent such tribunals from becoming roadblocks to justice. Investing in training and capacity building for court officials and "green tribunals" can ensure that these bodies adequately assess whether agencies have met the legal requirements for disclosure consistent with RTI law.

Law and Institutions

Beyond the ability to appeal climate-related information requests, members of the public should also have access to a variety of institutions and procedures by which to seek accountability for harmful or potentially harmful policies and projects.

- **International treaty law.** Ensure that treaties and binding international agreements that are related or applicable to climate change—including the United Nations Framework Convention on Climate Change (UNFCCC) and the European Convention on Human Rights—are enacted as part of national legislation. In addition, this law should establish clear jurisdiction for courts and tribunals to hear cases pertaining to that law. OGP members such as Jordan have used their action plans to establish or strengthen tribunals that can deal with constitutional and supranational law.[23]

- **Non-enforcement claims.** Citizens and communities should have access to processes to challenge the government if it fails to enforce laws related to climate change. Likewise, the law can create public interest standing, granting citizens access to mechanisms to challenge the government if it violates the law.

- **Grievance mechanisms and alternative dispute resolution (ADR).** OGP members can create a central registry and paralegal services to support access to and use of existing grievance mechanisms.[24] Indonesia has strengthened such grievance redress mechanisms for state bodies,[25] and guidance is available for public, private,[26] and international[27] entities seeking to establish these bodies. The Forest Carbon Partnership Facility seeks to establish such grievance mechanisms to ensure appropriate administration of Reduced Emissions from Deforestation and Degradation (REDD+).[28]

- **Reduce legal and practical barriers to dispute resolution.** Governments can empower citizens to use the law to resolve disputes related to natural resources and the environment. According to the World Justice Project's Environmental Governance Index, people do not go to court to resolve environmental disputes most frequently due to lack of information about court procedures, limited remedies or awareness of available remedies, lack of awareness of possible causes of action, or cumbersome and complex procedures.[29] Most of these pertain to barriers of access to information about legal processes, which OGP has a long history of supporting. For example, South Africa has worked to improve access to information about constitutional rights by expanding Community Advice Offices,[30] and North Macedonia created a database where citizens can access information about all forms of legal assistance.[31]

Civic Space

In many jurisdictions, individuals and civil society organizations face harassment in response to their advocacy for environmental protection. Governments should offer mechanisms for redress in cases where their civil and human rights have been violated or threatened. Such measures include:

- **Protection for whistleblowers.** Whistleblower protection should be extended to scientists, engineers, and private contractors who may be best placed to identify wrongdoing in the course of projects that impact the climate. Recent research by the International Bar Association shows that we frequently do not know about the nature and disposition of whistleblower cases around the world, let alone understand whether whistleblowers are adequately protected by those laws.[32] This is important, as the U.S.-based National Whistleblowers Center has documented harassment, intimidation, and inadequate protection of people blowing the whistle on automotive and fossil fuel industry abuses.[33] Twenty-nine OGP countries have legislated or implemented whistleblower protection as part of their action plans.

- **Protections for air, water, and land defenders.** Human rights defenders, including environmental advocates, have been one of the most frequently harassed groups of reformers in OGP countries, especially—but by no means exclusively—in Latin America. All ten of the Latin American and Caribbean countries surveyed as part of the *Environmental Governance Indicators* report perform much worse on guaranteeing rights of environmental defenders as compared to general social and political rights.[34] Such harassment and violence regularly goes uninvestigated and unpunished. Even in countries with a low likelihood of violence against environmental defenders, experts say that it is unlikely that violence would be prosecuted and punished.[35] There are a wide variety of commitments that OGP members can take to protect these individuals as part of their action plans, as detailed in the 2019 Global Report and updated by other organizations.[36] *The Escazu Agreement*, Latin America's first major international treaty focused on access to information, public participation, and access to justice in environmental matters, deals directly with preventing and remedying the issues of harassment and killing of activists and communities. (See FEATURE: Escazú. OGP member Ecuador is using its action plan to pursue implementation of these measures.[37])

Financial Oversight and Funding

In addition to opportunities for members of the public to hold entities accountable for actions that harm the environment and those seeking to protect it, governments should also enforce financial accountability for entities causing harm. A growing number of jurisdictions are seeking to ensure that "polluter pays" principles are being introduced as standards for penalties for climate related pollution. For example, this is critically important in the case of orphan oil and gas wells, estimated at 29 million globally. (The methane leaks from 3.2 million abandoned wells in the United States have an estimated impact equivalent to burning oil.[38]) Establishing liability has several benefits: deterring continued undesirable behavior, reducing subsidies for undesirable behavior, and creating revenue that can be redirected to climate adaptation or other public goods. This can be done by eliminating liability exemptions that have been established through regulation or statute and by extending tort liability for climate damage.

FEATURE

How the Escazu Agreement Promotes Justice and Human Rights in Latin America and the Caribbean

By Joseph Foti, Paulina Ornelas, and Cielo Morales

The Regional Agreement on Access to Information, Public Participation, and Justice in Environmental Matters in Latin America and the Caribbean, or "Escazu Agreement," is an international legal instrument that aims to protect human rights and address climate change and environmental degradation. The treaty supports national-level legislation and implementation to support access to information, public participation, access to justice, and to defend human rights defenders in matters affecting the environment.

The treaty entered into force on April 22, 2021. Of the 24 countries in the region that have signed the Agreement, 12 have ratified it thus far, and five of those 12 countries are part of OGP (Argentina, Ecuador, Mexico, Panama, and Uruguay).

The Escazu Agreement:

- Enshrines the right of every person to a healthy environment and sustainable development;
- Protects people's right of access to environmental information under the principle of maximum disclosure;
- Provides standards for information quality, which should be in a useful and shareable format;
- Puts public participation in the environmental decision-making process at the core of the Agreement, the same way it was at the core of the creation and negotiation process of the Agreement itself;
- Guarantees access to justice and the right to challenge and appeal when information is not delivered; and
- Is the first in the world to include specific provisions on human rights defenders in environmental matters.

In the context of improving justice for public accountability, the Escazu supports governments to establish rights of access to information, participation, and justice. It also contains a number of innovations to ensure that people can protect their right to a clean environment without retaliation.

The Escazu Agreement supports the public's use of justice institutions to hold government accountable for enforcing environmental laws.

OGP stakeholders participate in a brainstorming exercise at the 2016 Global Gathering on Open Government for Climate Action. Photo by United Nations

By signing the Agreement, the executive power of party countries agrees to the standards and guidelines by which they will guarantee the rights set forth in it and, additionally, commits to have an independent oversight mechanism to oversee compliance with the provisions of the Agreement.[39] Specifically, governments must establish right to information mechanisms (if they lack them), publish pollution data and environmental impact assessments, and must receive public comments on major policies and projects that affect the environment. In addition, where there is a denial of information or opportunities for participation, the agreement obligates signatories to establish means by which people can appeal these denials. For this to be fully implemented, justice institutions will need to adjust policies to ensure that people have access to redress and remedy, with minimal cost barriers. Given recent growth in the number of OGP commitments focused on justice and the environment, OGP action plans can serve as a key implementation mechanism for policy innovation.

The Agreement includes groundbreaking provisions to protect human rights defenders. The parties to the Agreement have recognized that people, groups, and organizations often fight for collective environmental rights at the expense of their individual rights. Thus, it is core to the Escazu Agreement, and unprecedented in the international community, that parties to the Agreement shall recognize and protect, among others, the right to life, personal integrity, freedom of expression, freedom of movement, and peaceful assembly of human rights defenders in environmental matters.[40] These provisions set an international precedent and are an example of how to enhance civic space while advancing sustainability goals.

Some OGP countries have already begun to include Escazu implementation in their action plan. One of them is Ecuador's First Open Government Action Plan (2019-2022), which includes a commitment to implement the rights to participation and to access environmental information.[41] Similarly, in its Fourth Open Government Action Plan (2021-2023), Panama has committed to strengthening the National System of Environmental Information based on the Escazu Agreement's standards to foster greater citizen oversight.[42]

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Open Government and Electoral Dispute Resolution

By Uchechi Anyanwu, Alexandra Brown, and Katherine Ellena

Elections are the primary means by which citizens participate in government and hold their elected officials accountable—thus cementing the centrality of elections in the democratic system and underpinning open and accountable governance. Elections are generally considered credible if: (1) the results accurately reflect the will of the voters; and (2) stakeholders perceive the process as credible and accept the results. However, there is a possibility for high-stakes elections to be challenged in courts, with candidates and other election stakeholders disputing either the election process or result, or both. An effective election dispute resolution (EDR) system, therefore, provides a means of resolving these challenges and remedying flaws in the electoral processes. While flaws in the process may not be intentional, officials involved must also be held accountable to voters for the integrity of the election processes they administer.

Polling centers in the Gambia are each comprised of several polling stations, each with a specific voter list. Voters await their turn to cast their ballot at this polling station—a classroom—in Banjul. Photo by IFES

Citizens in Madrid vote to spend the city's budget on the projects they care about. Photo by OGP

At the same time, elections can also involve criminal or otherwise illegal conduct that may impact electoral rights and election results. While this conduct may not be the subject of a formal complaint, credible information regarding such conduct must be effectively investigated and remedied by the relevant authorities in a timely manner to avoid impunity and to deter future violations. EDR procedures should also take into account the time-bound nature of elections. Short timeframes to file and respond to complaints, unfortunately, lead to many election offenders not being held accountable for their actions until long after the conclusion of the election process (and in some cases, after an elected term has concluded), diminishing the power of the vote.[1]

To guarantee the protection of fundamental democratic rights, it is essential to ensure the integrity and legality of every step of the electoral process (what is often referred to as "electoral justice"). EDR is the mechanism or process through which disputes, irregularities (errors in process), and illegalities (violations of the law) are addressed at any point during the electoral cycle (not just after Election Day)—thus protecting electoral rights to vote and ensuring electoral justice is pursued. Globally, various institutions are mandated to play a role in adjudicating electoral disputes, including election management bodies (EMBs), courts, specialized electoral tribunals, campaign finance oversight bodies, local administrations overseeing voter registration, and occasionally legislative bodies. It is common globally for an EMB to have first instance administrative jurisdiction over a range of pre- and post-election disputes and violations, with a right of appeal to the courts. Alleged criminal acts are generally handled by law enforcement and the public prosecutor.

EDR is uniquely challenging, given the need to balance due process with a timely, effective remedy (to allow the election process to move forward). There is both a public and individual interest in the integrity of the election process and result. Ultimately, the failure of any EDR process as an effective accountability mechanism can lead to the public questioning the legitimacy of governments in place, and eroding the democratic process. The following sections examine potential *legal*, *practical*, and *institutional* barriers to effective electoral dispute resolution as an accountability mechanism that protects electoral justice.

Legal Barriers to EDR as an Accountability Mechanism

Two key international principles for EDR relate to potential legal obstacles that can undermine the utility of EDR as an accountability mechanism.[2] The first principle is the requirement for a codified right of redress (which includes clarity around who has legal standing to bring a case, as well as the provision of meaningful remedies) for election complaints and disputes. The second is the need for a clearly defined set of laws and rules to implement EDR.[3] If EDR systems do not meet these principles, voters and candidates with a legitimate grievance against election officials or government may face legal obstacles in seeking and achieving accountability and redress.

Right of Redress and Legal Standing

The provision of a meaningful remedy has been long established, for example, in UK law as a fundamental right. In the 1703 decision *Ashby v. White*, the Chief Justice of England stated: "If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it . . . want of right and want of remedy are reciprocal."[4] The International Covenant on Civil and Political Rights (ICCPR) obliges all states to ensure that: effective remedies are provided for human rights violations; complainants have their claims determined by competent judicial, administrative or legislative authorities; and the competent authorities enforce such remedies.[5] As with other types of litigation outside of election law, legal standing is a basic indicator of accessibility. A lack of standing can be the primary legal obstacle to holding government and other actors accountable under the law.

Election irregularities include a wide range of issues such as candidate or voter eligibility, registration and identification, campaigning, ballot security, and irregular results tabulation, all of which involve the interests or involvement of candidates, political parties, individuals, and the public at large. Legal standing requirements for electoral complaints in different countries vary widely from broad[6] (any person or voter can bring a claim) to narrow[7] (only a candidate or someone directly injured by the irregularity can bring a claim) and can depend on the nature of the irregularity or violation.[8] International good practice for electoral disputes that implicate fundamental rights (including voting and standing for election) generally favors broad standing requirements.[9] This approach prioritizes the interest of maintaining a fair electoral system for all stakeholders, not just the individual claimant. Conversely, strict standing requirements may result in cases being dismissed that might otherwise proceed to a full hearing on the merits.

Along with clear standing requirements, international human rights law clearly recognizes substantive rights to remedies and procedural rights of access to remedies.[10] To support this in election cases, legislators must define the full range of remedies available to EDR bodies depending on the disputed part of the electoral process, and in particular the power to annul an election or parts of an election or to implement other corrective measures, such as a recount. As the UN has observed, these corrective measures should be "in proportion to the alleged infraction and should protect otherwise unaffected election results and validly cast votes."[11]

Inadequate or Complex Rules of Procedures

Complex or ambiguous procedural rules can also present challenges in terms of access to the EDR process. In many jurisdictions, courts or tribunals rely on the rules of administrative or civil procedure, which may not be adequate or appropriate for election proceedings given tight deadlines required by the electoral calendar, and the limited ability of voters or candidates to collect evidence (compared to the ability of the EMB to do so). Rigid administrative or civil procedures can result in lengthy and costly proceedings, or an excessively formalistic approach to EDR, creating little incentive to use the courts to hold the government to account. Lengthy proceedings can also frustrate an effective remedy, where the right to vote or stand for election may become moot if the issue is not resolved quickly.

Conversely, often the institution responsible for resolving many sensitive categories of election disputes (such as nomination disputes or campaign violations) is the EMB operating in a quasi-judicial capacity. As such, traditional court mechanisms that protect due process may be missing, such as rules of evidence and procedure. Vague or overlapping jurisdiction among numerous dispute resolution bodies—such as EMBs, courts, and special tribunals—can also create confusion among stakeholders and open the door to forum shopping. Furthermore, the complexity of the rules for non-lawyers may result in a denial of access to remedies for voters or candidates who may lack the understanding or resources to pursue redress for a legitimate grievance.

Practical Barriers to EDR as an Accountability Mechanism

Accessibility is essential to overall perceptions of fairness and accountability of the electoral process and institutions. Thus, both equal *treatment* by justice institutions and equal *access* to the institutions have been stressed as mandatory to provide justice.[12] An aggrieved party must have the ability to raise an electoral complaint and receive a decision promptly and effectively without unnecessary obstacles. However, EDR procedures are sometimes inaccessible due to distance, cost, or other barriers that can exclude certain groups in the electoral process and ultimately undermine fundamental political and electoral rights.

A Centralized and Costly Process

When it is necessary to travel outside of an election constituency to file a complaint, transportation and lodging costs for witnesses, petitioners, or respondents can sometimes be high (compounded by the need to take time off work or family responsibilities). This challenge may be exacerbated for women, persons with disabilities for whom reasonable accommodations may not exist, or those who do not speak the official language used in the electoral court. Decentralizing EDR systems (for example, via the establishment of temporary or roving judicial benches, or ensuring local EMB offices are mandated to hear complaints or investigate violations in the first instance) is therefore paramount to provide for effective access to justice. In the wake of the coronavirus pandemic, judiciaries and electoral bodies globally have quickly developed and implemented modified rules and procedures. These systems have moved procedures online through increased use of remote and hybrid tools and mechanisms to prevent delays in electoral processes while lessening the risk of COVID-19 virus transmission.[13] These innovations ensure access and transparency and encourage opportunities to adapt how fundamental rights and democratic processes can be promoted and protected. However, these online modalities may pose a problem for those that do not have appropriate access to the internet or digital tools or possess basic digital literacy.

Effective case management systems can support a decentralized model by supporting oversight at the central level and information flow between regions and the capital.[14] Effective case management can also help the central body to quickly assess and allocate additional resources in the event that a high volume of complaints is filed in a specific region.[15] To ensure access to EDR for persons with disabilities or other barriers, EDR bodies could also incorporate accessibility features, such as online or telephone submissions, into these systems.[16] Finally, the filing fee or litigation costs for election complaints or petitions should not be excessive, to avoid undermining or deterring filing of good faith complaints or limit access to a remedy for all.

Delayed Proceedings

As the election process is tightly time-bound, the administration of justice must be extremely efficient to ensure both accountability and redress. Due to the competitive nature of elections, tensions often arise between candidates, agents, or voters during the electoral period, which could escalate to electoral violence. While EDR bodies often provide for clear processes for the adjudication of results petitions, we often observe a gap in addressing campaign violations in a quick manner in practice.

Unequal Access to Evidence

When an individual files a complaint to seek a remedy, he or she will likely face the challenge of substantiating the complaint by a very tight deadline, which increases the likelihood that complaints will be dismissed on procedural grounds or for lack of evidence. Because an electoral process is generally managed by an EMB, the relevant evidence, such as results sheets, rejected ballots, official forms, and voter registry documents, may not be easily obtainable by an individual outside the EMB, or at least not within a short timeframe. The requirement for at least some kind of evidence at the time of filing is not unreasonable, as in the International Foundation for Electoral Systems' (IFES) experience globally, frivolous complaints and false allegations can be common in elections. However, the dismissal of legitimate complaints due to unreasonable evidentiary standards at the filing stage,[17] or because of a failure to shift the burden of proof from the petitioner to the investigative body, violates a fundamental tenet in the fair administration of justice.

Frivolous and Politically-Driven Claims of Irregularities

As mentioned above, malicious or frivolous election claims can delay the investigation, adjudication, and certification of election results. A legal requirement to pay a fee or deposit as a condition for submitting an electoral complaint exists within many EDR systems to deter frivolous, politically driven claims. While fees are a means of preventing frivolous complaints, they may also create a barrier to the dispute process and discourage legitimate complainants from filing. The increase in frivolous claims, despite this deterrent, makes it more necessary to find the balance in addressing these filings without deterring legitimate claims of irregularities. Imposing disciplinary sanctions, such as fines or private or public censure,[18] could help EDR bodies from being flooded with frivolous or malicious complaints, allowing them to direct resources and time to investigating claims with merit.

Institutional Barriers to EDR as an Accountability Mechanism

The competitive and politically sensitive nature of the electoral justice system can place enormous pressures on the administrative and judicial mechanisms involved. As such, any institution dealing with the adjudication and resolution of election disputes must operate with a high degree of transparency, independence, and accountability. Opaque selection mechanisms or unbalanced political interference with the appointments or removal of arbiters or judges, insufficient training, or lack of access for media and observers can lead to flawed or biased decisions (actual or perceived), undermining EDR as an accountability mechanism.

Political Interference

To minimize risks to the independence of EDR bodies, legislators should make certain the method of appointment, selection (and removal) of arbiters, and the enumeration of their EDR mandate ensures effective autonomy in practice. This includes autonomy around budget, staffing, development of procedures, public outreach, and execution of their mandate.[19] Governments can also commit to employing the principle of open justice in EDR proceedings (ensuring courts and tribunals conduct their business publicly to safeguard against judicial bias or interference). This principle helps to hold judges and arbiters accountable for the decisions they make and the administrative, civil, and criminal remedies/sanctions they impose.

Lack of Transparency or Access

Transparency in the EDR process is essential to enhance accountability and deter electoral misconduct. EDR institutions can ensure transparency through regular updates on the number of complaints, notice for upcoming hearings, notification and publication of decisions, and open hearings. The use

of technology—for example, to support effective case management and remote/virtual hearings—can also offer a solution to lingering obstacles to accessible and transparent administration of electoral justice.

Limited Training or Capacity Building

EMBs are not always familiar with their quasi-judicial mandate to resolve election disputes, nor trained to investigate complaints, particularly at the sub-commission level. Conversely, while judges may have received the necessary legal training to hear petitions, they may lack knowledge of the technical aspects of an election, notably on polling and counting procedures and the operational challenges faced by election officials. The lack of knowledge can also stem from the rate at which judges are made aware of new national and international case law developments in electoral matters. These factors can lead to inconsistent decisions in similar cases. When accessed on a continuous basis, election-related tools[20] and programs[21] can enhance the competence of EDR arbiters and improve the consistency of decisions. Improved access to jurisprudence can also support consistency across courts. For example, the judiciary in Kenya has produced a "bench book" on election jurisprudence to provide clarity for judges hearing election cases.

Insufficient Outreach to Stakeholders

Without user-friendly access to laws, regulations, and decisions of EDR bodies or voter education materials on the EDR mechanism, the users—voters, parties, or candidates—are left without clear guidance on where, when, how, and who can file a complaint and what to expect. This lack of understanding can create delays or confusion in filing complaints and limit the use of legal avenues to resolve complaints. The information must not only be available, but accessible and understandable to all stakeholders, inside and outside of the legal profession. Governments, including through EMBs, should provide citizens with the necessary information to understand and access the adjudication system.

Recommendations

To support effective judicial accountability mechanisms in elections, the following recommendations are provided for governments, legislators, EMBs, and the judiciary:

- Ensure broad legal standing is provided in the law for electoral violations and disputes to ensure the effective protection of political and electoral rights, and implement efficient and transparent case management systems to support broad legal standing in practice.
- To minimize risks to the independence of EDR bodies, legislators should ensure the method of appointment, selection (and removal) of arbiters, and the enumeration of their EDR mandate ensures effective transparency and autonomy in practice.
- Ensure meaningful, corrective, and punitive remedies for electoral disputes are set out in the law, and there is clarity and transparency as to when and how these remedies should be applied.
- To support accountability, and to facilitate the provision of an effective remedy, governments, EMBs, or courts should, if mandated, use their regulatory power to adopt special procedures allowing for both expedited and transparent EDR processes. If a sound legal and regulatory framework already exists for these types of disputes, it may still be necessary to address weak infrastructure, limited human and financial resources, or lack of training.
- Ensure the implementation of transparency measures throughout the EDR process.
- Support decentralization of EDR systems and incorporate accessibility features, such as online submissions[22] and hearings, to ensure effective access to justice.
- Provide effective training and continuing education for those responsible for every aspect of the EDR process, including arbiters, judges, lawyers, law-enforcement, and election officials.

LESSONS FROM REFORMERS

Georgia Mobilizes Citizens for Electoral Accountability

After years of civil war, Georgia's 2013 national elections marked the country's first democratic power transfer in an electoral process that international observers hailed as politically mature, transparent, and competitive.[23] On the heels of this transition, Georgia continued to improve their electoral administration through a commitment in its 2014 OGP action plan.

The commitment, led by the Election Administration of Georgia (CEC), launched a set of initiatives to further train officials and staff involved in the administration of elections, including election lawyers, election commission members, and local governments. One example includes the successful addition of electoral law courses to the curricula at 19 major universities, helping to ensure that college graduates begin their careers with knowledge of their rights and electoral system. The CEC also created a legal clinic where university and law school students could participate in debates about election issues. Both programs were well-attended and highly rated among students.[24] These initiatives help to ensure that the country's next generation of lawyers from across the country have the knowledge and resources to safeguard the integrity of future elections.

The commitment also sought to increase voter turnout and accountability in the electoral process through a variety of awareness-raising activities. These activities targeted several groups, including citizens who may be less likely to turn out for elections, such as members of ethnic minorities, youth, and women. For example, the implementation of the Electoral Development Schools program was designed to increase interest in electoral participation. The program succeeded in building interest in elections among students, and several graduates of the program were later hired by civil society organizations to serve as election observers.[25]

The 2014 commitment contributed to electoral accountability by helping to create a generation of citizens who are invested in their country's democratic institutions and able to point out potential irregularities or instances of wrongdoing in electoral administration. However, citizen-awareness cannot guarantee that these potential disputes are adjudicated fairly. In this vein, Georgia has worked outside of their OGP action plans to create a searchable web-based election complaint case management database in Georgian and English. Implementing such measures can assure the public of justice through its institutions and build trust in the overall election process.

Endnotes

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4 92 Eng. Rep. 126 (K.D. 1703).

5 G.A. Res. 2200A (XXI) art. 2(3), International Covenant on Civil and Political Rights [hereinafter ICCPR] (Mar. 23, 1976). The Copenhagen Document, which offers a comprehensive list of criteria for the conduct of democratic elections, also entitles everyone to "... an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity."

6 See, for example, the Israeli Supreme Court held that: "The regularity of the election process is the concern of the entire public and goes beyond the direct concern of the individual injured by government action. . . The voters' rights, therefore, are connected to those of the candidates running for elections."

7 See, for example, "In the United States, general standing principles require that a party bringing suit have a genuine injury in fact that is both fairly traceable to the harm alleged and that can be redressed by the court hearing the case. However, because United States elections are governed by state statute, states often specifically limit standing to electors or candidates in cases that seek to void elections due to vote-counting irregularities." See IFES' Guidelines for Understanding, Adjudicating, and Resolving Disputes in Elections (GUARDE).

8 For example, in Lithuania, an eligible voter, a candidate, a party representative, or an election observer has standing to challenge the results of an election, while in Ethiopia, this right is limited to only candidate and party representatives.

9 The Venice Commission, for instance, provides that standing to bring election complaints "must be granted as widely as possible. It must be open to every elector in the constituency and to every candidate standing for election there to lodge an appeal."

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17 For example, see the requirement for evidence to be recorded in polling station protocols.

18 For example, Rule 11 of the U.S. Federal Rules of Civil Procedure is designed "to deter baseless filings and curb abuses" in federal district courts by permitting a court to impose sanctions on any attorney, law firm, or party that violated the rule or was responsible for its violation. Rule 11 sanctions were imposed in at least two lawsuits challenging the results of the 2020 presidential election.

[19] IFES has developed the Accountability and Autonomy Framework to support independent institutions in balancing autonomy and accountability fundamental to enable independent institutions to fulfill their mandates. In addition, the IFES Executive Curriculum in Electoral Leadership (iEXCEL) is designed to strengthen institutional independence, deliver elections within the context of a crisis, resist the manipulation of elections by political actors, and foster institutional resilience and capacity.

[20] For example, IFES closely works with courts and practitioners worldwide to collect electoral judgments and recently launched an Election Judgment Database, as well as judicial networks.

[21] In close partnership with judges and election officials, IFES also regularly assists with the design and conduct of EDR training programs. For example, IFES recently assisted with the cascade judicial training conducted in Ukraine in 2020 to enhance capacity to resist pressure, strengthen the independence of arbiters, and provide tools for an effective adjudication of election disputes.

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Open Government Approaches to Tax and Fiscal Policy

By Jason Lakin

When we hear the term "justice" in connection with public finance, many of us will likely think about issues like fair taxation or the use of fiscal policy to support low-income communities. Fewer people will think of the "justice system" and its connection to fiscal policy. Yet, justice in this sense is also closely linked to matters of public finance. According to research by the Task Force on Justice, people rank an inability to get access to public services as among their biggest justice problems.[1] In the face of these challenges to access quality services, members of the public in many countries are increasingly turning to courts to seek accountability for unfair or harmful fiscal policy decisions. For citizens to successfully hold decision-makers in the public finance system accountable, the mechanisms that allow citizens to seek justice must be fair and open.

However, accessible justice institutions are only one component of fair and accountable fiscal policy. Greater participation in public finance can also yield substantively fairer decisions, particularly when citizens are able to voice their needs and concerns more effectively. Yet, in some countries, legislation does not offer citizens the opportunity to participate in policy-making in general, or has been construed to exempt fiscal policy from public participation requirements. In addition, mechanisms for participating in tax policy creation and accountability for unjust policy decisions should be underpinned by clear, comprehensive, publicly-available information about these processes. While transparent policies and processes are important in all areas of governance, clear information is especially important in fiscal policy, a topic that is often highly complex and technical.

Participants at the Africa Initiative Ministerial Dinner, 25 November 2019, as part of the 10th Anniversary of the Global Forum on Transparency and Exchange of Information for Tax Purposes.Photo by Hervé Cortinat / OECD

The rest of this chapter suggests some ways in which OGP members can achieve more accountable public finance systems by using open government reforms—transparency, participation, and accountability—to address legal, cost, and other barriers to justice.

Legal Barriers and Solutions

The first challenge to achieving accountability in public finance systems relates to establishing legal entitlements to fair processes. If the law does not establish a right to a fair system of decision-making around claims for government services, for example, then it may be difficult to ensure that these decisions are made in a just manner. Most countries have some form of judicial review that allows claimants to challenge agency decisions, but the criteria by which these decisions can be challenged—and the availability of clear information about these criteria—varies widely. This may mean that it is much harder to challenge agency actions that are unjust or discriminatory in some jurisdictions than in others. One way to address this is to develop legislation on administrative justice, such as the Promotion of Administrative Justice Act in South Africa, or Kenya's Fair Administrative Action Act (FAAA). These laws lay out clearly a wide range of criteria on which citizens can bring claims against an agency, making it easier to challenge unjust actions. For example, the Kenyan FAAA specifies a number of grounds for review of agency determinations, including situations where the agency decision was not linked to the reasons given for it, was disproportionate to the rights affected, or was simply unfair, among numerous others.

These laws, and others that govern specific sectors, may also create opportunities for members of the public to influence policy before it is applied in specific cases. An administratively just system of policy making also must ensure that people affected by policies can participate in their drafting, not only challenge them after the fact. Thus, laws can and do specify the rules for soliciting public feedback (e.g., detailing notice and comment procedures) and even engaging stakeholders in agenda setting before the development of rules and policies (as is the case with negotiated rulemaking for higher education policy in the United States).[2]

Experience suggests that it may be necessary to specify the scope of such laws to ensure that they fully cover decisions related to tax and expenditure decisions. For example, until very recently, the U.S. Treasury successfully avoided fully complying with the Administrative Procedures Act (the American equivalent of the administrative acts mentioned above), dodging requirements for proper notice and comment procedures. After many years, U.S. courts have finally begun to curb this behavior, but tighter language specifying the law's coverage may help other jurisdictions avoid protracted battles to rein in their own finance agencies.[3] Without these specifications, members of the public may be denied the right to participate in public finance decision-making that will ultimately affect the quality of public services they receive.

Legislation that mandates that all government agencies, including treasuries, are covered by general administrative action laws can help ensure that these actors must follow just processes, but it does not entirely prevent the possibility of unjust policy decisions. When these decisions occur, they may require a public interest challenge. Even if a treasury must follow a fair procedure for making a decision, and even if claimants have access to a fair administrative appeal procedure, agencies may still make fundamentally unjust decisions. Tackling these problems requires that specific tax and budget legislation contain clauses that provide broad standing to litigants to sue the government in the public interest. The recent success of Tax Justice Network-Africa in suing the Kenyan government to halt a double tax agreement with Mauritius demonstrates that citizen groups can establish standing in progressive constitutional contexts, but the inclusion of specific clauses in fiscal legislation is still critical, especially in countries with less ambitious constitutions.[4] Nigeria's Fiscal Responsibility Act furnishes an example: the law, which governs overall tax and spending policies, permits any individual to go to court to enforce the act "without having to show any special particular interest."

Construction workers build a new triage and water tank system outside the Handii Clinic in Bong County, Liberia on March 10, 2016. Photo by Dominic Chavez/World Bank

Cost Barriers and Solutions

The barriers to justice from the fiscal system are not only legislative in nature. They also relate to the cost of accessing just systems. It is increasingly common for modern fiscal systems to include an independent tax tribunal that can guarantee procedural and substantive rights to challenge the decisions of the tax authority. However, the right to challenge a tax authority's decision is sometimes undermined by the requirement, as in Uganda, that taxpayers must pay their tax bills, or at least a share of them (30 percent in Uganda) even while they seek relief.[5] Clearly, this requirement weakens the ability of many claimants to seek justice.

Accessing formal justice systems is also expensive because hiring a lawyer is costly. This is not unique to justice in fiscal policy. But the same remedies, such as government commitments to increase funding for legal aid, making it more widely available to those who cannot afford private lawyers are required to advance justice in the fiscal arena.

Barriers to Public Legal Literacy and Potential Solutions

Finally, taking on injustice in fiscal policy requires investments in making the law easier to understand. A simple internet search will reveal that some countries have public, open access databases of legislation and court cases that are trivial to access (e.g., Kenya Law), while in other countries, legislation is only found, if at all, on websites run by third parties. (As an example, readers could try searching for the Nigerian Fiscal Responsibility Act mentioned above and take note of where it is located.) The ability to identify relevant precedents is crucial in enabling citizens and public interest groups to bring their own cases by allowing them to understand past court decisions and precedent related to fiscal policy.

Further steps can be taken to facilitate search and filtering of fiscal policy cases by providing summaries, key findings, and one-click links to precedents and references. Not all of these services necessarily need to be provided by the public sector; in the U.S.,

the company Justia provides free access to court summaries which are paid for through advertising for legal services.[6] Such services can be facilitated and regulated rather than directly provided by government. The courts themselves have a role to play in ensuring that their decisions are written in an accessible style that can be understood by non-lawyers. In Argentina, some courts in Buenos Aires have tried to eliminate the use of jargon, even developing a guide to writing decisions in simple and clear language.[7] Such initiatives, but also improved legal literacy, provided through the education system, or through support to civic groups that carry out literacy programs, could help make courts less foreboding for average citizens.[8] This is especially important in tax and fiscal law, policy, and jurisprudence as these topics are often particularly technical and potentially difficult to understand for the average citizen.

Transparency in the application of tax and expenditure policies is also critical. A significant share of justice issues concerns perceived discrimination or inequity in access to benefits (whether tax exemptions or expenditure policies). This may be the result of the use of discretionary rather than rule-based approaches to granting benefits, a problem that particularly plagues tax incentives.[9] Moreover, in some countries, such as Nigeria, the lack of transparency around tax law creates opportunities for abusive behavior by tax collectors and the proliferation of illegal tax collection by "touts," leading to severe injustices for small traders.[10] Rule-based and transparent application of tax and spending policies could eliminate some conflicts from the beginning, both by reducing actual discretion and discrimination, and by creating or bolstering the perception that these policies are fairly applied.

Recommendations

The following actions could be considered by governments that seek to advance justice in their public finance systems:

- **Develop legislation and regulations that ensure that citizens can challenge decisions taken by agencies about the use of public money.** Such legislation is not a panacea, but it ensures that individuals and public interest organizations have some ground to stand on when challenging public finance decisions, whether these pertain to tax or access to public benefits. Procedural claims can be handled in tax tribunals or administrative courts, but substantive claims should be addressed by providing standing to citizens to challenge, through judicial review, the ways in which agencies have balanced tax policy with other basic constitutional and legal rights.

- **Lower the cost to citizens who wish to challenge their treatment by government agencies.** While there should likely be some costs to challenging government decisions to prevent frivolous procedures, there is a need to balance this objective with the goal of broad access so that those with legitimate claims are not denied redress. Reducing fees and availing low cost legal aid can be part of a strategy to strike this balance. Some jurisdictions may consider adjusting court fees according to the claimant's ability to pay.

- **Provide accessible databases of legislation, judicial decisions, precedents, and summaries of judgements that can facilitate the use of the courts.** Even when jurisprudence might support citizens seeking redress, they often lack access to intelligible, jargon-free information they can use to put together their cases. Governments can directly provide or encourage others to provide such information.

- **Integrate and utilize rules-based approaches to public finance where sensible, such as in the granting of tax exemptions and public benefits, to avoid the impression of, and actual, discrimination.** Rule-based approaches to determining tax burdens and exemptions, and to deciding on access to benefits, exist and can be deployed more widely. Rules are not perfect, but reducing the opacity that surrounds discretionary policies can remove some of the causes of injustice at their source.

LESSONS FROM REFORMERS

Public Interest Litigation Achieves Tax Justice in Kenya

This write-up is adapted and abridged from "Kenya: Pursuing public interest litigation to counter unjust tax policy," a case study by the International Budget Partnership. The full case study is available here.[11]

Kenya offers an example of the way civil society groups can contribute to tax policy reform by activating justice institutions. In 2014, Tax Justice Network Africa (TJNA) sued the government over its recent double taxation avoidance agreement (DTAA) with Mauritius, a well-known tax haven. Experts have linked DTAAs to tax avoidance, evasion, and revenue losses, especially in African countries where revenue leakages due to illicit financial flows are already significant.[12] Adequate tax revenue is essential to governments' ability to provide necessary public services for their citizens, like modern infrastructure, clean water, and public education. When government revenue declines, it's citizens who bear the brunt of the losses.

In their case, TJNA argued that the agreement violated elements of substantive law because it would lead to significant revenue losses and inhibit the government's ability to collect capital gains taxes. Additionally, the agreement violated procedural law since the executive did not adequately consult with parliament or the public before signing the agreement, which is required by the Kenyan constitution. The court decided in favor of TJNA, finding that the agreement had violated procedural law, but dismissing the aspect of the claim that related to substantive law. As a result, the executive signed another similar agreement with Mauritius months later, this time following the process mandated by the constitution.

Still, this example highlights a relatively new application of public interest litigation in challenging unjust or harmful aspects of tax law. It also shows how courts can be empowered to intervene in tax issues.

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Safeguarding the Rights of People with Disabilities

By Jessica Hickle
and Joseph Foti

The World Health Organization estimates that people with disabilities make up 15 percent of the population in most countries. Yet, in many circumstances, they are left out of decision-making and out of opportunities to participate in work, family, and society. According to the International Labour Organization (ILO), this inequity accounts for government loss of between 3 and 7 percent of annual global GDP, and the impacts fall disproportionately on people living in developing countries and women.1 Moreover, intersecting or overlapping inequalities—such as age, gender, sexual orientation, race, or ethnicity—can magnify discrimination and marginalisation expererienced by people with disabilities.

Exclusion may be due to intentional bias or choice on the part of decision makers and the systems they govern, but may also be an unintentional matter of habit, culture, or oversight. Justice institutions can provide a layer of accountability to ensure that everyone is treated fairly.

Men and women at the entrance of a school that teaches people with disabilities in Romania.
Photo by Flore de Préneuf / World Bank

In Buenos Aires, Argentina, the Council of Magistrates launched the Open Justice and Innovation Lab. In partnership with civil society organizations, the Lab was created to foster exchange and collaboration towards designing solutions in the judicial system. Photo by OGP

Reforms to ensure non-discrimination can fall into three complementary and non-exclusive categories.

- **Establishing legal safeguards.** The first is a set of open government reforms that are preventative, ensuring that *upstream* decision-making takes into account the needs of everyone.
- **Designing inclusive governance.** A second set of reforms can ensure that there is non-discrimination against people with disabilities.
- **Resolving disputes.** A third set of actions can help ensure that "reasonable accommodation" is made to ensure that people with disabilities can participate in the cultural, economic, and social activities in their society.

This chapter lays out the basis for these sets of reforms, most especially for use within an OGP context.

Establishing Legal Safeguards

Equal treatment of citizens has its basis in human rights and in enacting legislation. Arguably, all countries which are signatories to major international human rights law have some legal basis for protecting people with disabilities. International and human rights law recognizes the right of access to justice for all people, including in the International Covenant for Civil and Political Rights (ICCPR). Likewise, the Universal Declaration of Human Rights (UDHR) states that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

Domestic Legislation

All countries, however, need enacting legislation. In most countries, this legislation is a mix of cross-cutting legislation and sector-specific legislation. According to a global study by the University of California's Fielding School of Public Health, the majority of countries globally do not have a constitutionally recognized right to equality for people with disabilities.[2] The majority do, however, have specific laws on support for families with children with disabilities, requirements for employers to make reasonable accommodations, and some requirements to make physical space accessible.

Cross-cutting laws can establish standards for rights of access to economic, social, and cultural activities as well as a clear procedure for when those rights are not fulfilled. The earliest examples of such legislation were the United States and Canadian laws on people with disabilities. Ideally, such laws establish a legal standard of "reasonable accommodation" which adapts physical and cultural practices to be more inclusive of individuals with disabilities. (See box, "Approaches to Equal Treatment" which discusses different approaches to fair and equal treatment of all people regardless of ability.)

In addition, *sector-specific approaches* will be needed. The United States Department of Justice lists 11 separate laws beyond the cross-cutting Americans with Disabilities Act. Many European countries have specific requirements for employment quotas and rights to public housing, such as France.[3] According to an OECD study, most OECD countries have recently changed sector-based laws to move from a focus on compensation-based focus to an integration-based approach.[4] This means guaranteeing decent work, housing, and social protection rather than medical treatment of an "illness."

International Law

In the absence of adequate national legislation, individuals and other actors may rely on international law, provided their country is a signatory. Adopted in 2006, the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD) is international law which supports and affirms the right of access to legal justice for people with disabilities.[5] Relevant articles are as follows:

- Article 5, Equality and Non-Discrimination, requires State parties to recognize that all persons with disabilities are equal before and under the law. State parties should also prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
- Article 12, Equal Recognition before the Law, reaffirms persons with disabilities' right to recognition everywhere as persons before the law. It also recognizes persons with disabilities' legal capacity and requires states to take appropriate measures to support persons with disabilities to exercise their legal capacity.
- Article 13, Access to Justice, requires signatories to ensure access to justice for persons with disabilities, including the provision of necessary accommodations, to facilitate their direct and indirect participation in all legal proceedings.

The *Optional Protocol* to the CRPD provides a means of communication to the UN Committee on Persons with Disabilities when an individual feels that a state has violated their rights.[6] Ideally, national systems would address the issue in competent, accessible dispute resolution processes, but in the absence of such institutions, international institutions can reinforce accountability.

The *International Principles and Guidelines on Access to Justice for Persons with Disabilities* offers further recommendations and good practices for implementing Articles 12 and 13 of the CRPD, which specifically create a duty on the part of signatories to create processes to combat discrimination and ensure reasonable accomodation.[7]

ILO Convention No. 111 concerning Discrimination in Respect of Employment and Occupation (1958) provides guidance and standards on discrimination in employment, and is one of the core conventions of the ILO.[8]

GOOD TO KNOW

Approaches to Equal Treatment

All countries rely on a mix of different policies to ensure integration of people with disabilities. Deregner and Quinn (currently chair of the UN Committee on the Rights of Persons with Disabilities and the UN Special Rapporteur on the Rights of Persons with Disabilities, respectively) helpfully explain different legal approaches.[9] These different philosophies will inform which mix of open government approaches are used to help address problems.

- **Welfare or compensation approaches.** Early law on disability may have approached people with disabilities not as full citizens, but objects of charity and health programs, needing protection from the state. Often, these focus almost exclusively on medical and financial interventions.
- **Formal or juridical equality.** In many countries, basic human rights and civil rights legislation provides protection to people with disabilities as equal members of society. Ensuring equal treatment may serve well in many cases, but it does not take into account the facts of disability where some modifications to physical or social structures need to take place to ensure equality.
- **Equality of results.** Another approach requires governments to ensure that there is equality of results, preventing what many laws describe as "discriminatory effect." Ensuring equal results can be an important part of aspirations, but it does not take into account other values such as integration.
- **Equality of opportunity**. This approach is the most flexible, ensuring that people with disabilities are not discriminated against due to social norms or environmental barriers. This has most often been phrased as "reasonable accomodations" in much of the Americas and "adjustments" elsewhere.

Inclusive Government by Design

Institutions — physical and online — are often inaccessible for people with disabilities. Opening government to everyone means taking proactive steps to ensure equality of access to government decision-making and services. Problems may include:

- Lack of physical access to institutions, including justice institutions (police stations, courts, law offices, and other services);
- Inaccessible online services to people with visual or other perceptual differences;
- Inaccessible language impeding understanding for those with intellectual or learning differences[10]; and
- Inadequate practice with regard to representing people in decision-making about their property, work, family, or community.

Governments should ideally address these barriers before a person needs to go to court to challenge this inaccessibility on legal grounds. This *prevention* — which can be universal or targeted — can help minimize discrimination and exclusion.

Universal Approaches to Barrier Removal

Closed decision-making systems are less likely to take into account the views of systematically underrepresented individuals, communities, and organizations, including people with disabilities. To that end, steps to open government decision-making processes will benefit everyone. These are well-covered in other literature in OGP, but they would include:

- **Open meetings rules.** Decisions that affect all citizens, including people with disabilities, should be accessible. People and organizations should have channels to observe, inform, and influence decision-making. This may be especially important at the local level, where decisions about physical, intellectual, cultural, and social accessibility affect peoples' day-to-day lives.
- **Open budgets and spending, including program-based budgeting.** Ensure that disability advocates can track program-based spending at all levels of government. Access to fiscal information, including audits can help people make sure that projects were completed and programs were executed.
- **Legal aid.** Ensure that indigent defendants have adequate legal aid in criminal cases. For non-criminal matters, ensure that people have access to advocates, paralegals, and case workers who can adequately explain their rights and support them in ensuring they get all benefits and opportunities to which they are entitled.
- **Digitization of records and meetings.** Online publication of records and meetings can reduce barriers of cost for attendance and increase reach to disability community members if records are machine-readable for increased accessibility. Importantly, such digitization should not create additional barriers where a person needing immediate assistance cannot obtain human assistance.

Targeted Approaches

Of course, opening meetings and documents will not be enough to ensure equal access. Without intentional efforts and support, typical practice may continue or exacerbate inequality. An added benefit of most of these accessibility improvements benefit everyone in making resources more available to the broader public as in the cases of curb-cuts or close-captioning for television.

- **Involve impacted communities in decision-making.** Consult with disabled persons' organizations (DPOs) to ensure physical access of courts, police stations, prisons, and other facilities. DPOs should also be involved in discussions about proposed new constructions or renovations of justice facilities.
- **Technological and physical adaptations.** Adaptations such as closed captioning or transcription of meetings, ensuring dignified, universal physical access to government buildings can ensure that more people can access not only

government buildings but also better understand government decisions. Ensuring accessibility compliance for all government websites benefits everyone as well.

- **Ensure transparent, accessible regular communications.** In collaboration with DPOs, governments may develop a disability access plan to ensure that all written and verbal communication and information in the justice system is accessible to all parties. This may include translations into braille and sign language as well as using clear, non-technical "plain" language in legal documents to the extent possible. Increasingly, digital services can help make sign-language and other interpretation more accessible, including integrating teletype services into wireless and other ICTS wherever the public interacts with government institutions including courts, police stations, and others.

- **Regularly conduct and publish accessibility audits in collaboration with affected communities and interested parties.** Collaborate with DPOs to perform "disability access audits" of all existing government facilities, including justice facilities. These audits may cover physical and virtual spaces and help to develop plans to ensure accessibility of all facilities. Also evaluate potential informational and communication barriers at various levels of the justice system, including guidelines for engagement at the local level. Without clear guidelines or institutionalized strategies for engaging with people with disabilities, it will be hard to measure to what extent collaboration has been achieved.

- **Make all laws and regulations, including those related to the rights of people with disabilities, freely accessible.** In particular, governments may wish to create clearinghouses, hubs, and hotlines to ensure that people have access to law that affects and protects them. This can be carried out in cooperation with non-governmental and private-sector actors.

- **Ensure people with disabilities have adequate access to participate in the regulation-making process in accordance with the CRPD.** Enact legislation requiring officials across government to set comment periods and publish drafts/ documentation ahead of consultations. Enable citizens to comment on draft regulations (and see other comments) through electronic platforms. Create opportunities for people who lack internet access to participate through community consultation. Publish responses to consultations alongside comments received. Ensure that all platforms are accessible to all parties and all documents are published in plain language. General Comment No. 7 to the CRPD outlines steps countries can take to enable "full and effective participation" by people with disabilities, including children.[11]

Resolving Disputes

Proactive measures will not always be enough to stop discrimination - whether it is intended or not. When it occurs, recourse to courts and other dispute resolution mechanisms may be part of an effective means of addressing unfairness. Actions governments may take to improve public accountability include establishing or expanding a right to due process, enabling legal counsel and support, strengthening justice forums, and reducing costs.

Establishing Due Process for Accountability

- **Ensure legal basis and independent forums for challenging laws and regulations.** Enable citizens to challenge specific actions or decisions by regulatory officials by setting a formal process and independent forum. In some contexts, an alternative to courts, such as a specialized administrative tribunal with independent administrative law judges, may be useful.

- **Review legislative framework to identify legal barriers.** Conduct a comprehensive review of domestic law, regulations, policies, and practice to determine if any are discriminatory towards people with disabilities. Evaluate criminal and non-criminal procedures to ensure that court processes are accessible, and provide support according to each person's needs and will. Build on any previously conducted reviews, and include people with disabilities in the evaluation process.

- **Create broad public interest standing for individuals and organizations to request relief and reasonable accommodation in matters of discrimination and failure to meet accessibility standards.** Individuals who have suffered harm or may be about to suffer harm should be able to seek relief through legal and other channels. While the CPRD establishes the need for such relief, many jurisdictions have yet to establish a legal right to challenge through courts and other dispute resolution mechanisms.

- **Create other means of dispute resolution.** This may include requests to law enforcement or compliance auditors to investigate discrimination or denial of access to government decision-making and services. Where appropriate, agencies may establish alternative dispute resolution mechanisms as alternatives to courts such as negotiations, conciliation, facilitation, mediation, fact finding bodies, minitrials, and arbitration where consistent with the law.

Enabling Legal Counsel and Supports

- **Provide legal aid.** Allow people with disabilities to have access to intermediaries who can assist people with disabilities in participating in the legal system as litigants, witnesses, and jurors. Allow people with disabilities to select their own intermediaries. Create safeguards to avoid abuses and substitute decision-making by intermediaries. Accommodations could include transportation to justice sector facilities and social or health service provision as needed. (See Box "Lessons from Reformers: Improving Access to Justice for Individuals with Limited Decision-Making Capacity in Ireland.")

- **Increase participation of people with disabilities in legal professions.** Require reasonable accommodations for people with disabilities in training programs for all justice sector professions, including law schools. Ensure that legal sector workplaces promote diversity, equity, and inclusion for all employees. OGP members can also consider education outside of formal institutions. For example, they can increase access to grassroots training for local lawyers and legal activists, and ensure that people with disabilities are a part of these processes.

Strengthening Justice Forums

- **Ensure competence of justice institutions and personnel.** Conduct regular training for police officers, judges, prosecutors, and other justice sector officials on accessible communication, reasonable accommodation in the delivery of justice services, and frameworks for understanding and addressing disability, including the social model of disability and the CRPD. Provide training for attorneys on how to best serve clients with disabilities. Ensure people with disabilities participate as trainers in these activities. People with disabilities should be consulted on and included in such interventions.

- **Establish dedicated mechanisms to report and seek justice for instances of discrimination.** Ensure that these mechanisms are accessible to all parties and that employees within them have the proper training to avoid re-victimizing people with disabilities. These mechanisms should make claimants feel safe, ideally by ensuring protection and anonymity to complainants at a minimum.

- **Ensure that forums have adequate, varied, and proportionate powers to grant relief.** This may include giving courts and quasi-judicial organizations power to:

    - Request documentation and testimony,
    - Grant injunctive temporary or relief of an ongoing harm,
    - Mandate additional aids or services and modifications of policies and practices,
    - Mandate adaptation of physical and virtual facilities,
    - Award monetary damages or levy civil penalties, and
    - Require restoration of harms to communities or individuals that have suffered harm as a result of discrimination.

Reducing Costs

In many places, legal services—including legal counsel and litigation or other legal remedy—are financially inaccessible for large swathes of the population. Since people with disabilities experience poverty at higher rates than the general population, such cost barriers are even more acute.[12]

- **Publicly report on the types and severity of cost barriers and legal aid access for people with disabilities.** Track how many people go unrepresented each year at all levels, disaggregated by demographics such as age, gender, and disability status, along with how many people qualify for legal aid and what percentage actually receive these services. This allows for better targeting of legal aid expansion and indicates areas of progress or greater need.
- **Establish, expand, or strengthen the provision of targeted quality legal aid.** Expand access to quality civil and criminal legal aid to hold the state accountable to respect citizens' rights by giving citizens access to legal help and information. Expand the provision of legal aid for problems that might not have adequate funding, and develop partnerships with civil society organizations offering legal assistance. Publish a list of pro bono legal aid providers, their locations, and contact information.
- **Reduce cost burdens to individuals and organizations seeking legal relief.** A number of steps can be taken to reduce cost burdens to individuals seeking justice for discrimination and denial of access. These include:
    - o Removal of loser-pays rules in cases invoking disability law,
    - o Waiving of court fees,
    - o Subsidy and assistance in evidence-gathering and discovery, and
    - o Allowing coverage of lawyer's fees for prevailing parties (other than the government).

Conclusion

Inclusion or exclusion are not matters of medical treatment or welfare alone. Rather, they result from institutional requirements and practices that ensure that all people are included and treated with dignity and respect. To become ever-more integrated and inclusive, societies will need to create the means and mechanisms by which all people can demand fair treatment.

LESSONS FROM REFORMERS

Improving Access to Justice for Individuals with Limited Decision-Making Capacity in Ireland

In 2015, Ireland passed the Assisted Decision-making Act, which places the "will and preferences" of people with impaired mental capacity at the center of decision-making about their well-being.[13] The legislation sought to replace the previous "Wards of Court" system in which appointed individuals have total responsibility for people with mental impairments over highly personal decisions, including their healthcare, property, and legal affairs.[14] Under the new law, which is intended to bring Ireland's legal framework in line with the UN Convention on the Rights of Persons with Disabilities, designated decision-making assistants and co-decision-makers will offer people with mental impairments autonomy and independence over legal and healthcare decisions.[15]

With implementation of the law not yet underway in 2016, Ireland made a commitment through its OGP action plan to create the institutions that would make it a reality for affected individuals. As part of this effort, Ireland created the Decision Support Service (DSS), the agency tasked with rolling out new decision-making support options and committed to allocate 3 million euros for its operation. In 2020, the DSS launched its website, which was designed "to provide straightforward information in an accessible way. It outlines, in plain English, the various arrangements that can be put in place once the Act commences to support people where necessary to make their decisions," according Áine Flynn, the director of the DSS.[16] With this office up and running, Ireland is on its way to ensuring that citizens can access necessary support without losing their autonomy.

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