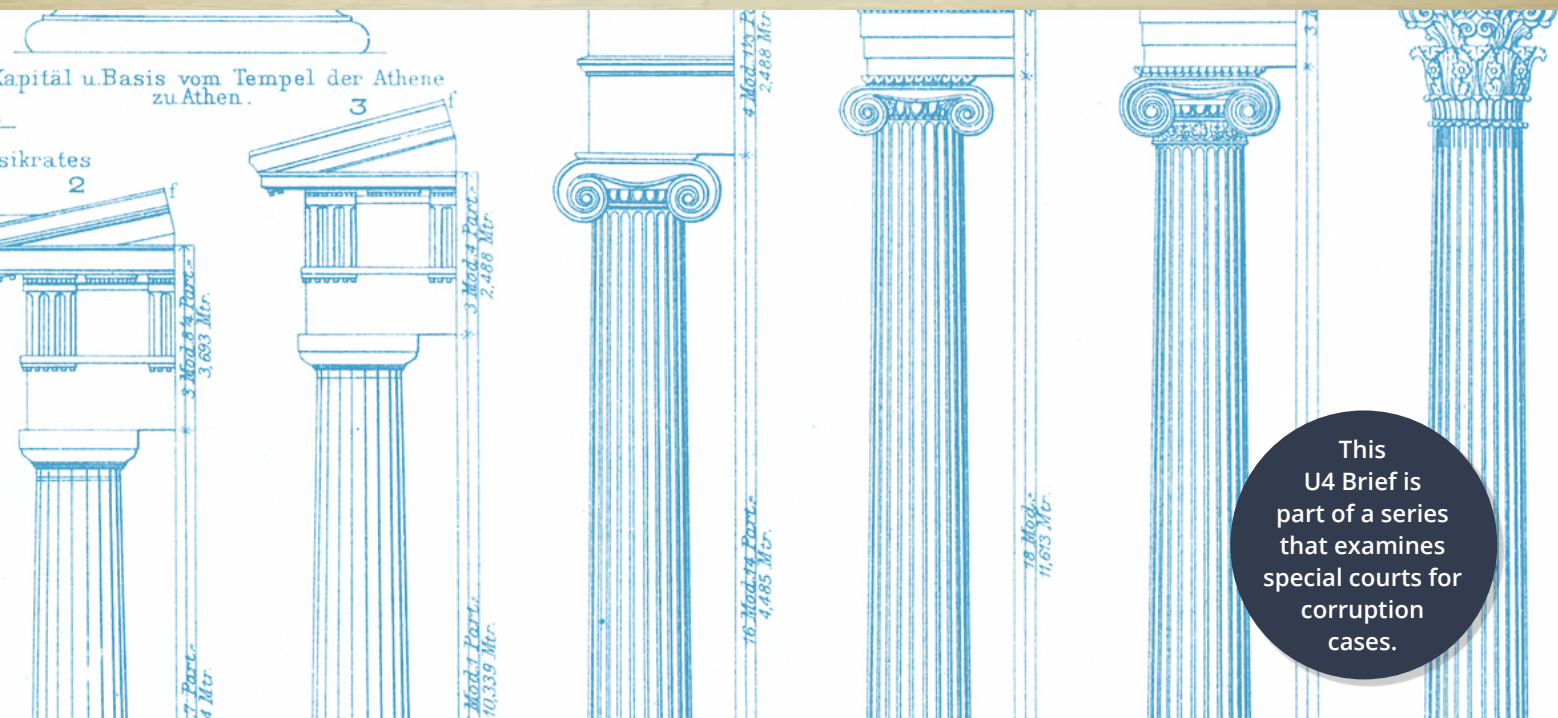


## Specialised anti-corruption courts: Uganda



The Uganda High Court has an Anti-Corruption Division (ACD) with original jurisdiction over all corruption and related cases. The main rationale for its establishment was the speedier resolution of corruption cases, and by that measure the ACD has been successful. Court user meetings at the ACD and joint trainings with prosecutors have improved mutual understanding and the quality of prosecutions. However, a backlog at the Court of Appeal leads to delays and the withdrawal of witnesses, an issue that could be addressed by extending specialisation to the appeals level.

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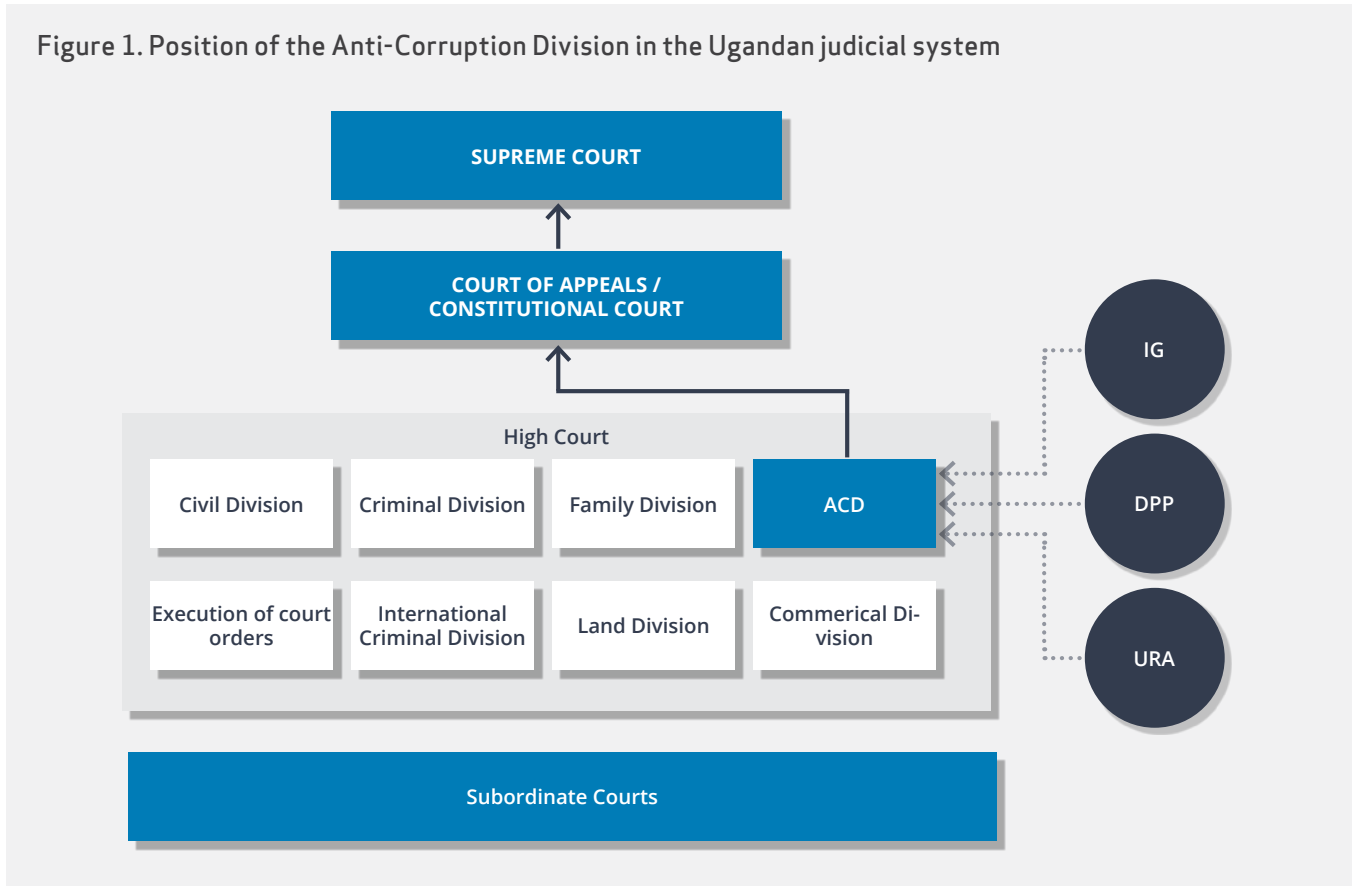
### Background and key features

The principal judge of the Uganda High Court created the Anti-Corruption Division (ACD) as an administrative section of the High Court in 2008, pursuant to the Constitution (Amendment) Act 2005 and the recommendation of an interagency forum. The chief justice formally established the permanent ACD in 2009 by invoking article 133(1)(b) of the Constitution, which states that “the Chief Justice . . . may issue orders and directions to the courts necessary for the proper and efficient administration of justice.”

In the judicial hierarchy, the High Court is situated above the magistrate courts and below the Supreme Court and the Court of Appeal, which also acts as the Constitutional Court (Figure 1). The ACD is one of eight specialised divisions of the High Court. It has original jurisdiction over offences under the 2009 Anti-Corruption Act and can also hear cases under other statutes related to corruption. If a defendant before the ACD has been charged with “any other offence related to” the corruption-related offence, the ACD can also hear the related charge.<sup>1</sup> Cases from the ACD can be appealed to the Court of Appeal, which, however, is not specialised. The ACD is located in the capital city of Kampala, but pursuant to the Judicature Act, it may hear cases in any area of the country designated by the chief justice and the principal judge.

As of 2015, three High Court judges and five magistrates served at the ACD. By design, the ACD is supposed to have six magistrates, a unique feature, as other High Court divisions do not have magistrates.<sup>2</sup> A single adjudicator presides over each trial. The determination of whether a case will be tried by a magistrate or a

Figure 1. Position of the Anti-Corruption Division in the Ugandan judicial system



judge is made by the prosecuting agency in consultation with the registrar of the ACD. It is typically based on the prominence of the defendant and the monetary value of the matter: magistrates may try cases where the amount at issue is not more than 50 million Ugandan shillings. As corruption cases have tended to involve ever larger amounts of money, magistrates have also started taking on bigger cases.

The Inspectorate of Government (IG), the Directorate of Public Prosecutions (DPP), and the Uganda Revenue Authority (URA) may file cases with the ACD. The IG was set up as a department under the president's office in 1988. Since 1995 it has constitutional status as a semi-autonomous institution with powers to arrest, investigate, and prosecute corruption cases involving government officials. In practice it started prosecuting cases in 2000, and by 2015 its 16 prosecutors were submitting approximately 100 cases per year to the ACD.

The DPP has a special anti-corruption unit with about 10 prosecutors who bring cases to the ACD that have been investigated by the police. The DPP typically submits more cases to the ACD than the IG does, owing to the dense network of police and public prosecution offices throughout Uganda. The URA has dispensation from the DPP to prosecute tax-related corruption cases at the ACD. According to ACD data provided in an interview, while the URA submits the fewest cases, it has the highest conviction rate – about 90% of cases prosecuted, followed by the DPP (about 75%) and the IG (about 60%).<sup>3</sup> The overlap in jurisdiction over corruption cases means that

reports are sometimes filed with several investigating agencies simultaneously. According to Human Rights Watch, more systematic coordination is needed to avoid duplication.<sup>4</sup>

## Rationales and performance

### *Efficiency*

The main rationale for setting up the ACD was to increase the speed of resolution of corruption cases through specialisation. When the ACD was established in 2008, the Ugandan judiciary was facing a backlog of hundreds of cases, many of them in the pipeline for years. Between 2009 and July 2015, the ACD received 1,071 cases and resolved 822 of them, resulting in 288 convictions. In August 2015, 300 cases were still pending, the majority of them at magistrate level. According to the ACD's own assessment, corroborated by the IG, the average time elapsed from case filing to verdict at first instance is about a year. However, the majority of defendants appeal, and this process can take several years, leading the prosecuting agencies to call for extending specialisation to the appeals court.

### *Integrity and independence*

Concerns about integrity and independence of the judiciary were not motivating factors in the establishment of the ACD. The ACD is part of the existing court hierarchy and follows its appointment procedures. High Court judges are recommended by the Judicial Service Commission, appointed by the president, and approved by the parliament. They may serve until the mandatory retirement age of 65 unless they are removed for

infirmity, misconduct, or incompetence. As described in article 144 of the Constitution, removal proceedings for a High Court judge require a request for investigation by the Judicial Service Commission or the cabinet, consideration by a special tribunal composed of experienced advocates and/or judges, and approval by the president. The removal mechanism has never been used against an ACD judge.

The principal judge oversees all judges at the High Court, and the head of division oversees the ACD. ACD judges are employed on the same terms as their peers. However, the inclusion of magistrates is unique to the ACD and has generated constitutional challenges, as described below. Magistrates are assigned to their posts by the chief registrar and need a record of “very good behaviour” in order to be appointed to the ACD.

Nonetheless, Ugandan anti-corruption activists and lawyers voice serious concerns about political interference in the prosecution of corruption cases. In a report titled *“Letting the Big Fish Swim”* (2013), Human Rights Watch criticised delayed appointments to senior positions in law enforcement agencies; the small calibre of many corruption cases; acquittals in more high-profile cases, with the exception of cases brought against high-ranking political opponents of the president; and threats against prosecutors and witnesses. Much of this is corroborated in a 2015 report by Transparency International Uganda, which also refers to statements by insiders (a lawyer, a prosecutor, and a magistrate) who suspect that judicial officers of the ACD are accepting bribes to file applications.<sup>5</sup> The extent to which political pressure may be exerted on the ACD (and/or on the prosecutorial agencies) cannot easily be assessed. Highly sensitive cases may not reach the ACD in the first place, or they may be presented so poorly that the judges have no choice but to acquit.

### Expertise

Asked about the benefits of a specialised anti-corruption unit, the director of prosecutions explained, “Firstly, because of the number of cases, but secondly, of course the good thing is the expertise eventually. Because if you are handling two corruption cases a year, you don’t need a specialist there waiting for two cases, but [when] you have 100 cases of corruption a year, you definitely need a specialised team.” While efficiency was the main motive for the establishment of the ACD, special expertise also promotes the speedy resolution of cases, and with specialisation comes more expertise over time. What could be a virtuous circle, however, is unfortunately interrupted by the practice of rotating magistrates after three years to a different court.<sup>6</sup> This leads to scenarios in which “defense lawyers who have practiced for more than 30 years and are well-versed with the anti-corruption court, have to work in front of a magistrate with two years of work experience. These magistrates often fail to fully comprehend the complex nature of embezzlement cases, and to evaluate the respective evidence properly.”<sup>7</sup> While this may be a convenient argument for a defence lawyer, prosecutors also observed the loss of expertise with the transfer of magistrates. Interviewees for this study suggested

that this problem could be addressed by training a pool of specialist magistrates and judges, beyond the six magistrates stipulated by law, allowing for rotation while maintaining a high level of expertise.

### Responsiveness of the ACD

A positive aspect of Uganda’s experience with the ACD and prosecuting agencies is their responsiveness to each other and to other court users.<sup>8</sup> The ACD invites the prosecuting agencies, as well as investigators, banks, and other court users, to quarterly meetings to discuss expectations and challenges faced during trial (without discussing particular cases). Similar issues have been addressed in trainings supported by donor agencies. For example, many of the early cases that the IG submitted were not very strong and ended in acquittals. The conviction rate increased after the ACD explained how evidence should be presented to the court. For their part, prosecutors were able to provide the judges with a better understanding of how challenging it can be to ensure a witness arrives on time and cooperates with the court. As the IG prosecutor stated in an interview, “Over time you realise that the number of cases that are being concluded are many and the rate at which cases are being concluded is equally fast and the services that we get from the ACD are improving on a daily basis. I think the improvement can be attributed to the fact that there are joint trainings involving prosecutors, judges, magistrates, [which have helped] the bench to appreciate facts from the viewpoint of investigators and prosecutors.”

### Challenges and controversies

In addition to the issues raised in the preceding section, Uganda’s experience with the ACD highlights several issues that are likely to be relevant in other contexts as well. These include constitutional challenge, deliberate delays, and the need for more transparency about decisions and data.

#### Constitutional challenge creating backlog

As in other countries with special institutional arrangements for the prosecution and trial of corruption cases, there has been resistance to the design of the ACD, manifested in legal challenges to its existence. In July 2013 advocate David Wesley Tusingwire filed a case with the Constitutional Court, arguing that the chief justice’s grant of unlimited territorial jurisdiction to the ACD magistrates contravened the Constitution. Tusingwire, whose partners were defending some cases at the ACD, also sought to stay all ACD proceedings pending resolution of the constitutional challenge. The ACD ceased operation for the next six months, during which time cases were heard by the regular magistrate courts or filed directly at High Court level. Nonetheless, a backlog of 225 cases accumulated. In December 2013 the Constitutional Court ruled against Tusingwire, upholding the constitutionality of the ACD and its composition.<sup>9</sup> The ACD resumed hearing cases, but 45 cases from that period are still pending in mid-2016. Tusingwire appealed the decision to the Supreme Court and sought an injunction against continued operation of the ACD, but the Supreme Court denied the request in April 2014.

### *High number of references and appeals causing delays*

While the main objective in setting up the ACD was to expedite case resolution, the political economy of the justice system sometimes works against this end. Defendants or their lawyers try to delay the process by challenging the legality of the prosecution, filing complaints against the prosecutors, and submitting references to the Constitutional Court on the legality of the trial; when they are convicted, they appeal. Delay is not only a means to stay out of prison as long as possible, but also a strategy to derail the case, as the likelihood of witnesses dying, disappearing, or losing interest and withdrawing their statements – sometimes under pressure – increases over time. Once the maximum time for a defendant to remain on remand has expired, he or she must be released on bail, but most apply for and are released on bail before the expiry of the mandatory period. Public frustration ensues when defendants are seen out on bail pursuing their lifestyles for prolonged periods of time. It is not uncommon for defendants to jump bail, thus delaying or even ending their prosecution.

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The instruments of complaints, references, and appeals are essential to the rule of law, so law enforcement agencies and the ACD have sought to discourage and mitigate their misuse. An appendix to a Constitutional Court ruling in 2010 stopped references from automatically going to the Constitutional Court and pausing the trial; instead the ACD must first decide whether there is merit in an intended reference.<sup>10</sup> Despite deliberate attempts by accused persons to delay their trials, the ACD has managed to keep the average time to decision at first instance at about one year.

In its report to parliament for the first half of 2015, the IG expressed hope that with the appointment of additional judges to the Court of Appeal, the hearing of appeals from the ACD will be expedited.<sup>11</sup> Some observers suggest that the logic applied at High Court level, that is, clearing the backlog of corruption cases through specialisation, should also be applied at the appeals court level. The registrar of the

ACD recommends, “The indiscriminate release of corruption convicts on bail pending appeal by the court of appeal should be discouraged and instead the practice of fast tracking appeals as is the case at the ACD should be adopted by the court of appeal. [ . . . ] This means that the Supreme Court and the court of appeal should constitute a panel of justices specifically designated to handle both appeals and constitutional petitions arising from corruption cases.”<sup>12</sup>

### *Need for accessible verdicts and case data*

One recommendation by anti-corruption activists, which they believe would improve transparency and allow for legal analysis and learning, is for the ACD to routinely and promptly publish decisions of the anti-corruption court on its Web page. While some cases are well documented on this page, the list does not seem to be exhaustive.<sup>13</sup> Accessibility of all verdicts would enable researchers to establish the average magnitude of cases, the conviction rate, and sentencing trends and allow for a comparison of the investigative and prosecutorial performance of the police, URA, IG, and DPP.

## Lessons learned

In sum, Uganda’s experience with the ACD suggests the following lessons:

- Defendants’ excessive use of legal instruments such as reference and appeal has delayed cases and led to a backlog at the Court of Appeal, which unlike the High Court has no special division for corruption cases. A partial solution is offered by the Supreme Court decision to let the ACD decide whether there is merit in the proposed references. A solution suggested for the backlog at appeals level is to extend specialisation to this level as well.
- The quality of prosecutions has reportedly improved, which is at least partly due to open communication between the ACD and prosecuting agencies in court user meetings and joint trainings. A shared understanding of the constraints and challenges in the criminal justice chain does not necessarily eliminate these challenges, but it can allow for joint adaptation and mitigation strategies.
- The benefit of specialisation as a means of increasing expertise over time is undermined by the high turnover at magistrate level, something that could be addressed by training a bigger pool of magistrates (and judges) than is currently needed.



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*The author thanks the head of the ACD and its magistrates, the DPP, the IG, and Transparency International Uganda for sharing their experiences and insights during semi-structured interviews in August 2015.*

## Endnotes

1. Human Rights Watch, "Letting the Big Fish Swim": Failures to Prosecute High-Level Corruption in Uganda (2013), p. 22, <https://goo.gl/IVmgrR>.
2. Magistrates in Uganda hear minor criminal and civil cases at first instance in the subordinate courts, while judges handle more complex cases in the higher courts. Both are required to have a law degree, but becoming a judge also requires 10 years of prior experience as a lawyer.
3. On Uganda's other public anti-corruption institutions, see, for example, L. Carson, "Institutional Specialization in the Battle against Corruption: Uganda's Anti-Corruption Court," *Public Sphere*, April 2015; and M. Martini, *Uganda: Overview of Corruption and Anti-Corruption*, U4 Expert Answer 379 (2013), <http://goo.gl/ITtOAP>.
4. Human Rights Watch, "Letting the Big Fish Swim."
5. Transparency International Uganda, "As Strong as Its Weakest Link": Stakeholders' Perceptions of the Ugandan Legal and Institutional Anti-Corruption Framework (Kampala, 2015), pp. 28–29.
6. The official policy on transfers is not yet finalised, but the practice of rotation is intended to give a magistrate an opportunity to serve in different courts and regions of the country and also to prevent familiarisation with the local community that may breed corruption.
7. Transparency International Uganda, "As Strong as Its Weakest Link," p. 28.
8. This positive attitude extended to the agencies' responses to this researcher.
9. The ruling can be found on the website of the Uganda Legal Information Institute, <http://www.ulii.org/>.
10. *Atugonza Francis v. Uganda*, Constitutional Reference 31 of 2010. The Constitutional Court held that the trial court must decide whether prima facie there is an issue that requires constitutional interpretation before referring a case to the Constitutional Court.
11. Inspectorate of Government, *Report to Parliament*, January–June 2015, <http://goo.gl/H63bwt>.
12. S. Langa, "Who Follows-up the Billions Lost to Corruption? The Execution of Refund Orders Made by the Anti-Corruption Court of Uganda" (master's thesis, Makerere University School of Law, 2015), pp. 110–11.
13. High Court: Anti-Corruption Division Decisions, on the website of the Uganda Legal Information Institute, <http://goo.gl/tfj8i3>.