

The Role of the Executive

*When a man assumes a public trust, he should consider himself as public property.
Thomas Jefferson, in a remark to Baron von Humboldt, 1807*

The Executive plays a central role in building, maintaining and respecting the country's national integrity system. The Executive is expected to provide the requisite degree of principled, ethical leadership, and exercise oversight over the civil service responsible for executing its policies and programmes. While discharging its considerable responsibilities, the Executive must ensure that –

- it provides clear leadership and political will to maintain clean government;
- its own actions are lawful, transparent and fully accountable;
- the independence of the courts is respected and their judgments complied with; and,
- the watchdog agencies are given the resources and the mandate to discharge their functions without fear or favour.

Leadership

The leadership role of the Executive cannot be overemphasised. Heads of governments are particularly well placed, with excellent media access and exposure, to deliver messages to the public. Being in the media spot-light, they are in a position to role model the conduct to be followed by others. However, the Executive can “lead”, but others will not necessarily “follow”, as witnessed in the case of Tanzania after the election of President Mkapa in 1995, and the difficulties faced by President Obasanjo of Nigeria in 1999–2000.

Observers are not always conscious of the challenge that faces the head of an Executive when elected to lead a government which is, to all intents and purposes, rendered dysfunctional by systemic corruption. Some of the most challenging areas vulnerable to corruption that a leadership faces are public procurement and decision-making processes that may give rise to conflicts of interest.¹

A new Executive in particular comes under scrutiny, both by the public and by the media, examining its performance in terms of whether or not it indulges in extravagance or the appointment of cronies to public positions. The moral tone of an administration is very quickly set. One approach is to hold a “values retreat” for a new cabinet, where Cabinet members can settle and internalise a Code of Conduct for Ministers.² President Obasanjo held such a retreat for his cabinet in May 1999, at Abuja, and in so doing created the country's first code of conduct for ministers.³

Reflecting on Corruption and nepotism and the Ottoman Empire

Because the sultans no longer could control the *devsirme* by setting it against the Turkish notables, the *devsirme* gained control of the sultans and used the government for its own benefit rather than for the benefit of a sultan or his empire. In consequence, corruption and nepotism took hold at all levels of administration. In addition, with the challenge of the notables gone, the *devsirme* class itself broke into countless factions and parties, each working for its own advantage by supporting the candidacy of a particular imperial prince and forming close alliances with corresponding palace factions led by the mothers, sisters, and wives of each prince. After Süleyman, therefore, accession and appointments to positions came less as the result of ability than as a consequence of the political manoeuvrings of the *devsirme*-harem political parties.

- *Encyclopaedia Britannica*

¹ These areas are discussed in later chapters of this Source Book.

² A senior member of the Mandela administration in South Africa has said that the major mistake made in the transition process from apartheid was for the incoming government not to have

had a “values retreat” (conversation with the writer, Pretoria, 1998).

³ The resulting code is in the Best Practice section in the internet version of this Source Book.

Above all, a detailed understanding of conflict of interest is essential for members of the Executive, and throughout the public service. Otherwise, private interests will dominate public decision-making, leading to irrational and self-serving decisions that betray public interest.⁴

Relations with the Judiciary

Perhaps the most significant of the Executive's relationships is that involving the Judiciary. The Judiciary is, and must be, independent of the Executive. This is essential for it to be able to perform its central functions: to hold the Executive to account, and ensure that the Executive rules under the law (i.e. to ensure that the Rule of Law prevails).

Inevitably this process of review can give rise to tensions, as the Judiciary can be sitting quite literally in judgment over the Executive. For its part, the Executive may feel that it has been elected by the people to rule, and the Judiciary merely appointed under the Constitution. However, the Executive has been elected, in essence, by the people to rule under the law, and not as a lawless dictatorship. Thus, when the Judiciary is exercising this function it is doing so as an agency of the people by ensuring that the Executive observes the limits of its democratic mandate. Because some controversial judicial decisions are inevitable, a special responsibility rests with the Executive to protect and respect the standing of the Judiciary. It is generally regarded as improper for members of the Judiciary to make public statements and to enter into public debates. Judges, then, are unable to defend themselves when publicly criticised, let alone vilified. Restraint in these matters is essential. Judges generally have just one opportunity to explain themselves, and that is when they deliver the reasons for their judgments. Thereafter they are dependent on others to come to their defence.

Even more essential is that the Executive respect the independence of the Judiciary and other office-holders who are given powers of independent action. In many countries where the integrity systems are failing to function satisfactorily, much of the blame lies with the Executive in its refusal to accept the concept of judicial and prosecutorial independence. Until they do, their integrity systems are unlikely to function satisfactorily.

Relations with the civil service

Members of the Executive must have a clear understanding of their relationship with public servants, whose role should be to serve the public, not the narrow political interests of the governing party. It is for the Executive to *make* policy (guided, it is true, by advice from civil servants), but it is for civil servants to *execute* it. A Minister is not the Chief Executive Officer of his or her Ministry.⁵

The head of government is in a particularly vulnerable position. It is a simple matter for those in his or her entourage to telephone a civil servant saying, "The President wants..." The civil servant is then left in the unenviable position of having either to contact the President directly to check whether this is so (which he is seldom in a position to do, and even less so where there is systemic corruption), or to risk retribution by ignoring what will generally be an improper, if not necessarily an illegal direction.

Clear lines of communication are essential, and it lies with the head of the Executive branch to ensure that all directions to civil servants are in writing. Telephone calls are conveniently quick, but they leave no paper trail and so they subvert lines of accountability.⁶

4 Conflict of interest is discussed in detail in a separate chapter.

5 A handbook for ministers, providing guidance on these and other matters (including international travel and handling the

press), can be invaluable.

6 Which is why, of course, telephone calls are a preferred route.

Exchange of gifts

Through the ages there have been practices whereby leaders have exchanged gifts – some merely token, others of substantial value. The Executive should role model high standards of ethical conduct in this area, in particular, where excessive gifts or hospitality can easily be taken for attempts to bribe or for favours. Inappropriate behaviour at the top can quickly work its way down the ranks of the public service. It is, however, simplistic to say that Ministers should never receive gifts. Indeed, there can be considerable embarrassment if another government makes a presentation which is then refused by the intended recipient. On occasion, if only for reasons of protocol, a Minister cannot avoid receiving a valuable gift. The real issues become – What the Minister should do with it? And to whom does the gift belong?

Most governments have written rules which clarify what a Minister should or should not accept as a personal benefit. For example, on its transition to multi-party democracy Malawi adopted the following guidelines:

A “casual gift” means any conventional hospitality on a modest scale or an unsolicited gift of modest value offered to a person in recognition or appreciation of his services, or as a gesture of goodwill towards him, and includes any inexpensive seasonal gift offered to staff or associates by public and private bodies or private individuals on festive or other special occasions, which is not in any way connected with the performance of a person’s official duty so as to constitute an offence under Part IV [which governs the corrupt use of official powers].⁷

These rules can be written in plain language which make it absolutely clear that “no Minister or public servant should accept gifts, hospitality or services from anyone which would, or might appear to place him or her under an obligation”. The same principle applies if gifts are offered to a member of their family.⁸ However, even with rules and regulations in place governing gifts and impropriety, sleaze can still surface. For example, some members of the British Parliament accepted payment and gifts from outside sources in return for the discharge of Parliamentary duties. This was accompanied by appointments of private sector personalities (from companies who had financially supported the party in power) to paid positions. In many countries, such conduct would constitute a criminal offence, but in Britain, it does not.⁹

Immunities and Privileges

A regime of immunities and privileges is always necessary to protect the legitimate positions of senior state officers. It would be ineffective for a judge, for example, to be personally liable for damages stemming from an honest mistake of law made during a trial. The effective remedy to these situations lies in the appeal process and clemency privileges. Certainly, it is also contrary to the public interest for senior politicians to be tied up in endless litigation of a private nature, or for a head of that state to be subjected to cross-examination in a witness box, at the whim of any litigant who issues a witness or other summons.¹⁰ In countries where the democratic tradition is not respected, it may be necessary to grant immunity to Parliamentarians simply to enable them to do their job in the face of a corrupt administration. However, it is just as important – perhaps more so – to define these immunities and privileges as narrowly

7 Corrupt Practices Act 1995, section 3.

8 *Ibid.*, para. 126.

9 Legislation has been recommended in the U.K. in the wake of scandals involving Members of Parliament, asking official questions in Parliament on behalf of commercial interests, who have paid them to do so. The cost of researching the questions then falls on the taxpayer, and results in savings to commercial interests, who would otherwise have to pay to have the research done for themselves.

10 Commentators in the USA have pointed to President Clinton

being distracted from major foreign affairs crises at crucial times during the Monica Lewinsky affair. Whether or not this was a desirable state of affairs appears to be guided by the political affiliations of the writers, but it would not be surprising if most outside the country felt that major affairs of state (and which impacted on matters such as the Kosovo crisis) should not have been neglected in favour of dealing with a matter which could have awaited the completion of the President’s term of office.

as possible as they derogate from the principle of equality before the law and undermine the rule of law. Any immunities and privileges granted, must never enable the corrupt to shelter

Long possession of power....

Nearly 2500 years ago, Aristotle observed: It is not easy for a person to do any great harm when his tenure of office is short, whereas long possession begets tyranny.
Aristotle, *Politics* (4th century B.C.) 5.8

behind them out of the reach of enforcement authorities. They must also end when the office-holder leaves office (except, of course, when attached to official acts performed in good faith). If immunity outlasts the length of office, it serves the interests of none but the corrupt.

Aristotle’s maxim that unlimited time in power begets tyranny is a lesson which constitution-makers around the world are starting to take to heart. Thus, limits are being imposed on the length of time Presidents can hold office. It is only logical to assume that the knowledge of a certain future loss of power must instil in an incumbent a realisation that once out of office he or she may be held to account.¹¹

Budgets

The Executive is generally responsible for presenting the budget to the Legislature for its approval. Ideally, a country’s budget -

- i) Should not be a “secret”, developed only within the Ministry of Finance, but should have broad public participation in the budget making process through such mechanisms as public hearings or interaction with the Parliamentary finance committee¹².
- ii) Should not be a “one-off” annual budget, but rather be a multi-year “budget framework”, which sets out the broad parameters of government revenue and spending.
- iii) Should be scrutinised and publicly reported on after the event by an independent Auditor General, who has sufficient resources and independence to audit government accounts. In addition, a Parliamentary oversight committee, such as Public Accounts Committee, should have the capacity to review and act upon the reports of the Auditor General.

This ex-ante and ex-poste budgetary system requires strategic financial planning by the Ministry of Finance, participatory forms of governance, and strong external audit and financial accountability functions. Access to information on the part of civil society in general and the private sector in particular, is essential.

Some indicators for assessing the Executive

- Is there regular consultation with civil society when policy is being developed?
- Are there procedures for the monitoring of assets and life-styles (e.g. disclosure provisions)? (If disclosure provisions exist, are the disclosures checked or subject to random checking? And are they either made to an independent body or made available to the public/media?)
- Are there clear conflict of interest rules? (If so, are these generally observed?)
- Are there registers for (a) gifts and (b) hospitality? (If so, are these kept up-to-date? Do the public/media/political opponents have access to them?)
- Are members of the Executive obliged (by law or by convention) to give reasons for their decisions?
- Are there clear rules against political interference in day-to-day administration i.e. formal rules requiring political independence of civil servants?
- Are transparent methods used to sell government assets?
- Do sales of public assets take place which are seen as unduly favouring those with close links to the ruling party?

11 South Africa, Nigeria and Mozambique are among those who have followed the US example of a two term maximum. This was the case with Namibia’s Independence Constitution, but subsequently the constitution was amended to enable President Nujoma to serve a third term.

12 However, elements of final decisions, such as adjustments to tax rates, must, of necessity, be secret where premature publication could frustrate the intentions of the policymakers.