The TI Source Book 2000

The first version of this Source Book (now translated into over 20 languages) argued the case for a “National Integrity System”, an holistic approach to transparency and accountability and embracing a range of accountability “pillars”, democratic, judicial, media and civil society. The expression has since passed into common usage in development circles, and the argument for an holistic approach to anti-corruption efforts has similarly achieved a widespread consensus. But anti-corruption success stories remain largely elusive.

In part the answers will lie with civil society. If activists remain active, inventive, determined and decisive, the issue can be kept at the forefront of national and international attention even after the battle may appear to have been won. For the potentially corrupt will always be with us, and even those whose National Integrity Systems seem to be in reasonably good shape can find themselves grappling with the unexpected as the determined exploit whatever gaps they can find.

The fight against corruption is not wholly a moral one, in the sense that it is a struggle against the intrinsic “evil” of corruption. Certainly there is a moral element – one which cuts across all major religions and societies throughout the world – but the compelling reason for the struggle is the suffering and deprivation corruption brings to whole societies, and to the world’s most poor. It is concern for the latter, rather than a distaste for the corrupt and their deeds, that rightly drives the global movement against corruption.

This edition of the TI Source Book seeks to combine the ease of the printed word with the immediacy of the Internet. With many initiatives being taken in many different parts of the world, emerging best practice is a rapidly growing area. Readers will find references to the Best Practice documentation, and this is available on the Internet. A summary of the Best Practice material compiled at the time of going to press appears as Part Five of this book.

The Internet version of the Source Book will be kept amended and up-to-date in the light of emerging developments. Additional material is available on the TI web-site, where a searchable bibliography will be found. The TI website is: http://www.transparency.org. Comments on the Source Book are welcome and may be sent by email to: jeremypope1@compuserve.com.

Jeremy Pope, the founding Managing Director of Transparency International (TI) from 1994-98, is now Executive Director of TI's London Office with responsibility for knowledge management. A graduate of the Victoria University of Wellington, he is a barrister and solicitor of the Supreme Court of New Zealand and a (UK) barrister-at-law (Inner Temple). Prior to joining Peter Eigen to launch TI in Berlin, he was counsel to the Commonwealth Secretary-General and Director of the Legal and Constitutional Affairs Division of the Commonwealth Secretariat in London. Previously he had been in private practice in New Zealand.
In retrospect, ages seem to have spirits, which historians identify. But is it possible to identify the spirit of a present age, and if so, what if anything should we do as a result? Talk of the spirit of the age in the twentieth century has often been used by tyrants and bureaucrats to suppress criticism from those who object to their vision of the age. We should remember that individuals create their ages, and that individuals of genius transform them.

Karl Popper

CONFRONTING CORRUPTION:
THE ELEMENTS OF A NATIONAL INTEGRITY SYSTEM

JEREMY POPE
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Source Book 2000
Author’s Note

The first version of this Source Book established the concept of the “national integrity system” in the vocabulary of anti-corruption activists throughout the world. In defining this framework, the Source Book advocates the need to adopt an holistic approach to any anti-corruption reform programme. It also recognises that every society, in whatever stage of development, has evolved a series of institutions and practices that collectively serve as its national integrity system. Few have been consciously developed as such – and most will be in need of repair. Country “Integrity System Audits” are now being developed by Transparency International to this end.

The ultimate goal of establishing a national integrity system is to make corruption a “high risk” and “low return” undertaking. The priority should be to minimise the possibilities for corruption occurring in the first place, but in ways that do not impose unwarranted costs or needless restrictions that might obstruct people from doing their jobs effectively. The quest for integrity ought not to render government dysfunctional.

The first section of the Source Book looks at the challenges and sets out the concept of the national integrity system, providing the framework within which the various approaches to salient issues are discussed.

The second section deals with the institutional “pillars” of the national integrity system, and examines them in terms of their roles and the necessary preconditions of independence and accessibility that enable them to discharge their functions effectively. The “pillars” are not limited to the official structures of the state. They include the media, the private sector and civil society. Any functioning integrity system must be rooted in the broad field of public attitudes and expectations. It has to be able to contend with the activities of the general public (both as a source of condonation of corrupt practices, and as a giver of bribes).

The third section looks at the “tools” – the rules and practices which the “institutional pillars” need to have at their disposal. It discusses not only bureaucratic practices and the enforcement of laws, but also the need for more broadly based reforms. Each institutional “pillar” has critical requirements, and these are discussed in turn.

A fourth section gives a short overview of the lessons learned to date in the global fight against corruption. A fifth section provides a compilation of emerging “best practice”. This is too bulky to permit full text publication in paper form. Instead, it is being made available on the TI web site and on CD-ROM. The compilation is being added to continuously, as best practice continues to evolve.

In addition, a number of specialist studies have been prepared and these, too, are being made available in full on the web. They will be added to progressively as the project proceeds.

As the initiative is rapidly gaining ground, and the concept is being progressively redefined and
applied, this book deals with Transparency International’s “Integrity Pact” only in general terms. Detailed briefings on this particular development are being given through the TI web site.

The book is being placed in full on the TI web site (http://www.transparency.org) where it will be kept under continuous review as a “living” electronic “book”. Those wishing to keep abreast of developments should register with the TI web site so that they are advised by email when changes and additions are made.

The reaction to the first TI Source Book has been so positive, that the task of completely rewriting and further developing the original would have been an intimidating task but for the help received from a number of those active within the TI movement. These include (in no particular order) Angela Gorta, Barbara Hayman, Bertrand de Speville, Charles Sampford, D.J.D. Macdonald, Dani Kaufmann, Denis Fitzgerald, Drew McKay, Frank Vogl, Gerry Parfit, Gesner José de Oliveira Filho, Guy Dehn, Hansjorg Elshorst, Howard Whitton, Inese Volka, Jeffry Tan, Jim Wesherry, John Feneley, John Githongo, Jude Carey, Justice Michael Kirby, K. Gopakumar, Kevin Ford, K.P. Joseph, Kim Barata, Lance Lindblom, Mark Pieth, Michael Hershman, Michael Lippe, Michael Waller, Michael Wiehen, Murray Petrie, Nancy Zucker, Olusegun Obasanjo, Pam Nadarasa, Peter Eigen, Peter Rooke, Petter Langseth, Piers Cain, Pushpa Nair, Richard Allen, Ross Jones, Sir John Robertson and Tunku Aziz. Anne Lyons prepared the index. The staff of the Berlin, Washington and London offices responded to many and varied queries, whether for documents or for experience in the field and Nihal Jayawickrama prepared the “Best Practice” summaries. Shahzrad Sedigh again edited the manuscript and Czeslaw Doniewski exercised infinite patience in putting the final work together. There are others too numerous to list here, and I can only hope that they are adequately acknowledged in the text.

The illustration is by Daniela Bigošová (17) from Spiske Podhradie, who is a student at a High School in Levoca, Slovakia. It was a prize-winning entry in a competition organised by TI-Slovakia for young students to portray “Transparency, morals, ethics – how I see it”. The winning posters are being used as the symbol of the National Programme for the Fight against Corruption in Slovakia.

I must again record my gratitude to Susan Rose-Ackerman, the founder of the recent political-economic literature on corruption, who with infinite patience helped see the original edition through from vague outline to finality. Fritz Heimann has also been a staunch ally throughout.

The Ford Foundation, who have encouraged the project from the outset in 1995, was again instrumental in making this further development possible through its generous financing.

Many have assisted, but I must bear sole responsibility for all expressions of opinion.

Jeremy Pope
London
September 2000
Foreword

by Oscar Arias Sánchez1

I am grateful for the opportunity writing this Foreword affords me to comment on one of the most compelling issues of our time: the need to rally individuals, communities, and nations to the cause of combating corruption. Corruption will always flourish in the obscurity of totalitarianism, authoritarianism, and dictatorships—regimes that limit power to an unaccountable few. By definition, absolutism and dictatorship are bound by fewer ethical exigencies than is democracy.

Under totalitarian regimes, corruption is often directly linked to human rights violations. In Latin America, many dictators justified their governments for years by pointing the finger at corrupt regimes of the recent past. These same dictatorships were often fronts for thieves and embezzlers. And in each of these cases, citizens and journalists were deprived of the legal resources necessary to expose the presumptuousness and corruptness of their government to a competent and credible judicial system. But, at the same time, corruption is best exposed, and best attacked, in a democracy. Corruption can only be examined and eradicated in an environment of pluralism, tolerance, freedom of expression, and individual security—an environment that only democracy can guarantee.

This is not to say, however, that democracy is immune to corruption. Let us not be so ingenious as to believe that corruption only pervades organizations that operate outside the law. Nor is corruption limited to the arena of international espionage. It is undeniable that such criminal activities often invite the talons of corruption. But these talons have also penetrated the power structures of governments from both the developed and developing worlds, from Europe to Latin America. Large private organizations have also taken advantage of a respectability gained from the formal legality of their activities. They violate the public trust by relying on bribery as a standard and accepted business strategy. It is a strategy that wins them an unfair financial advantage. We must also remember the near-constant diversion of public funds to the private bank accounts and estates of government and military officials.

Also common is the misappropriation of foreign aid and donations meant for development and the alleviation of suffering provoked by war or nature; at least a portion of these funds is often dedicated to the financial enrichment of corrupt officials. One of the saddest faces of corruption appears in the poorest countries, where misery and socio-economic inequality abound. And yet, the corruption of public office continues to thrive. In these nations, the bribery of public officials is also a theft from the poor. The immediate effects of corruption include not

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only the further impoverishment of the people, but also the weakening of democratic institutions. When Latin America was ruled predominantly by dictators, the soldiers of democracy aroused public resistance by arguing against the corruption prevalent in the autocratic regimes of the time.

The fall of many Latin American dictatorships was due in large part to the public’s fury over the corruptness of their regimes. But, on occasion, the same people have been so disenchanted with the prevalence of corruption in democratic regimes, that they have even welcomed a new dictatorship. In fact, many of these dictatorships were installed as a result of palace coups or military rebellions hypocritically claiming the corruption of democratic regimes.

A nation emerging from repression may be unaware of the extent of corruption in past regimes that did not permit investigation and public information. At the same time, the novelty of democracy may be overshadowed by scandals exposed by a free press. The lack of transparency in antidemocratic regimes has given citizens the mistaken impression that democracy is fundamentally vulnerable to corruption. Democratic leaders are faced with the responsibility of addressing, and correcting, this misperception.

Democracy must be characterised by transparency, and by dedication to transparency. But the most effective guardianship of transparency must be in the hands of the citizens organised themselves for this purpose. Their organizations must raise awareness and argue for transparency both within and across borders. Powerful financial organizations have globalised corruption as an accepted tool of business; the fight against corruption must be globalised as well. If the people do not act to preserve their democracy, if they lack civic virtue and commitment to their government, then democracy will certainly fall prey to the vulture of corruption.

The majority of nations maintain their commitment to repudiate any attempt to depose a constitutionally legitimate government. Gradually, we are solidifying our internal and external peace. Legitimate governments are now able to initiate the institutional reforms necessary for the modernisation of our societies, and to stimulate human development. Unfortunately, the continued scandals of corruption are discouraging our people.

Expectations of popular uprisings or coups d’etat are about to re-emerge in some countries. Political parties, the traditional strongholds of the democratic system, are being shattered by disrepute, increasingly condemned by the citizens who are distancing themselves from political decision-making. As the political parties are abandoned, democracy runs the risk of becoming an ambivalent and impotent formality.

Modern technological culture places an inordinate value on consumption and the possession of goods. More and more, personal success and prestige are measured by material wealth, rather than by an individual’s contributions to society. This leads our civilisation to an ethical deficiency that can only be remedied through education. We must awaken the spirit of civic duty, especially in the young people. In classrooms and board rooms, we must teach the responsibilities of citizenship and cultivate the dedication to be socially useful. Material wealth must be presented to the young as a value subsidiary to the wealth of citizenship. Social capital must overcome financial capital, for a culture dedicated only to the accumulation of material wealth is fertile ground for the weed of corruption.

In many places, courageous leaders are providing the vision and dedication necessary to channel public demands into organised action, calling out for open, accountable government. Praise and active support must be lent to those who struggle for open and honest government,
often against powerful and established elites. Somehow, they seem powerless Davids fighting against overwhelming Goliaths. But, as have been shown recently in many countries, David’s spirit and will continues to triumph over Goliath’s intimidating might. When citizens call for a more accountable and decent government, they are expressing their anger about corruption, a practice that humiliates the poor by forcing them to bribe minor officials to do their job; that bankrupts the honest trader; that empowers the partnership of unscrupulous captains of commerce and dishonest officials, and spreads like a cancer to infest all that is decent in society.

We must not despair of arresting the cancer of corruption. As much as we speak of the globalisation of corruption, we must also welcome the global tidal wave of public demands for good government. Today, national leaders are beginning to accept that corruption must be discussed on the domestic and international stages. After the end of the Cold War aid flows are more closely watched and humanitarian assistance is now meant to help people, rather than to buy friends—even corrupt ones—in the Third World.

But our most important weapon in the war against corruption will be the growing number of democracies and, consequently, free presses around the world. Without the freedom to ask questions, or to effect change, people are not empowered—they are, instead, caught in a system of superficial democracy. One of the most important freedoms in a democracy is the freedom of the press. When the voice of one man or woman is suppressed, all voices are in danger of being silenced. When even the smallest part of truth is hidden, a great lie may be born.

Every right of citizenship, though guaranteed by law, can be violated by incompetent or corrupt leaders. But the protection and restitution of rights is much more likely where there is a free press to denounce such leaders, and open a debate on their competence. Freedom of the press is the “eternal vigilance” of which Thomas Jefferson spoke—the endless duty to guard our government against corruption.

Our future directions must include a struggle for transparency, truthfulness, and ethics in our political and economic leaders. But let it be clear that corruption is not just the use of political power for personal gain. It is much more than the collusion between public servants and business people in order to gain illegal or immoral advantages. Corruption has many other dimensions that are not subject to legal sanction and which are not always, in every place, subject to the scrutiny of public opinion.

For one thing, there is corruption in the failure of political and governmental leaders to carry out the educational function that falls to them in a democracy. Double talk, telling people only what they want to hear, and not calling things by their name for purely electoral reasons, are practices that corrupt and degrade individuals, societies, and the democratic systems.

But double talk can be heard too in the realm of international relations. And that means corruption in a wider sense. There is a kind of corruption by means of which confidence among nations is weakened.

It is corrupt to gauge the success of a political career on elections won, when those elections are won only by hiding the truth or holding it back until the electorally opportune moment. There is corruption when officials and politicians use the distribution of privileges and sinecures to divest political parties and other organizations of their ethical principles and intellectual vigour. It is corrupt to forget that participation in politics or in government demands preparation, selflessness, the willingness to serve others, and consistency between what is practised and what is preached.
But we must not forget that elected officials are not the only ones guilty of corruption. There are forms of corruption arising from misunderstood loyalty, from extreme acquiescence, and from the opportunism of subordinates. We must ask ourselves about the possible consequences of the corruption found in secrecy and in false loyalty.

It must be recognised that there exists a voter’s responsibility to seek in a future government official honesty, aptitude, capability, veracity, and respect for those attributes. For one who lacks values, but not political ambition, will always be willing to pervert the tools of democracy in his or her thirst for power. Not all destroyed democracies were buried by coups d’état or insurrection.

Voting is a right, but many citizens forget their obligation to exercise that right with responsibility. In the parliamentary elections held in March 1933 in the homeland of Beethoven, Goethe, and Thomas Mann, the National Socialist Party legitimately obtained a crushing majority, thereby opening the door for Adolf Hitler to the most corrupting of powers, absolute power.

In seventeenth-century Mexico, one of that country’s great poets, Sor Juana Ines de la Cruz², asked:

\begin{quote}
Whose is the greater blame in a shared evil?
She who sins for pay, or he who pays for sin?
\end{quote}

The poet meant to expose the hypocrisy of men who scorned the moral character of the women with whom they sinned. I believe her words ring true even today, in a world where sinners often retreat into havens of wealth and power. Corruption requires two parties—the corrupter and the corruptee. When industrialised leaders condone bribery in other nations while condemning bribery at home, they are guilty not only of corruption, but of the application of a double standard for the developed and developing worlds. The existence of this double standard is dangerous to all parties involved—to the rich nations who reserve ethics for the domestic stage, and to the poorer nations whose institutions are subject to a process of corrosion through corruption.

The perpetrators of corruption in developing nations are not always citizens of the Third World. During the past few decades, several industrialised countries have interfered with the political processes of countries in the developing world by supporting, maintaining, and even installing corrupt leaders. Many wealthy nations have followed a double standard in their foreign policy, promoting democracy at home and autocracy abroad. This double standard is also manifest in the tendency of Western nations to ignore the anti-bribery laws of developing countries, even allowing their corporations to make the payment of bribes tax deductible. Such actions blatantly disregard the needs of fragile new democracies to prove the value of the democratic system to people who have lived for years under totalitarianism.

Double talk—another type of double standard—can be heard in the realm of international relations. And that means corruption in a wider sense, a type of corruption that weakens confidence among nations. When governments of powerful states offer moral arguments to justify acts which are in reality dictated by self-interest, they commit an act of corruption. There is corruption when democratic governments, very often declared pacifists, permit their countries’ industries to supply arms to repressive governments that violate human rights or to countries embroiled in civil wars or international conflicts.

² A Mexican nun, not only was she one of the greatest poets and playwrights of her time, she was also the first person in Latin America to argue for the rights of women to receive an education.
Transparency International has taken important steps to combat double standards of corruption. I applaud these actions. But we must still do more. This Source Book will, without question, be an invaluable tool in this further work, helping to build standards and providing civil society no less than policymakers and implementers with a host of examples of best practice that any country will ignore at its peril.

As well as building an alert and empowered civil society, we must fight corruption by educating our children against abuse of power. We must fight corruption by becoming champions of civic virtue, that quality of citizenship that seems to have been lost with the passing of the years. As we approach the new millennium, we need the help and support of every one of us in order to reach this goal. We must remain confident that we can stop the cancer of corruption. As much as we speak of the globalisation of corruption, we must also welcome the global tidal wave of public demands for good government. Today, national leaders are beginning to accept that corruption must be discussed on the domestic and international stages. Since the end of the Cold War, aid flows have been more closely watched and humanitarian assistance is now meant to help people, rather than to buy friends—even corrupt ones—in the developing world.

In the mind of any student of politics, Europe evokes images of the age of Enlightenment—of great philosophical debates about the merits of democracy, the constitution of liberty, and the obligations of citizenry. Let us see the dawn of a new and global enlightenment. Let us work for a renaissance of the ideas that gave birth to our democracies and shaped our governments, for our futures will only be secure by a sustained commitment to these same ideals.

If we can rediscover our passion for liberty, truth and justice, we will realise our dreams and surpass our goals. The hour has arrived for us to live up to our potential and to shun the temptations of corruption. Let us then be true to our history and begin to prepare for the future.

San José
Costa Rica
Preface

by Peter Eigen

Corruption is one of the greatest challenges of our age - a challenge that must and can be confronted. There are no short cuts, and no easy answers. The scourge of corruption will, to some degree or another, always be with us. As we enter a new millennium, we are conscious that corruption, to a greater or lesser extent, poses a threat not only to the environment, human rights, democratic institutions and fundamental rights and freedoms, but it also undermines development and deepens poverty for millions the world over. If it is allowed to continue to provoke irrational governance, one driven by greed rather than by the people’s needs, and to disrupt the development of the private sector, corruption will even deny that most fundamental of human needs - hope.

Fortunately, world-wide concern for improved levels of governance and accountability has never been higher - be it in the public or private sector, or within international or non-governmental organisations. The belief that increased transparency can achieve not only more meaningful levels of accountability, but can do so in a highly cost-effective fashion, is now expressed universally. There is also a widespread recognition that fundamental and enduring changes in attitudes and practices can only be brought about by harnessing the energies of all of the points of a society’s triangle of forces - the state, the private sector and civil society - and not only within countries, but also trans-nationally.

There is also a deepening recognition of the fact that the democratic gains of the past decade stand at risk if the explosion of corruption the world has witnessed is not contained. If large numbers of people in the emerging democracies become disillusioned with the democratic experiment and start to yearn for times of greater certainty, then the chances are that the old and failed remedies will be tried once more, and further impoverish their lives.

A thesis of partnership and coalition-building underpins Transparency International’s approach to containing corruption. As such, this Source Book represents a methodical “drawing together” of the various strands and actors that collectively comprise a nation’s integrity system - an expression first used in the first version of this Source Book but one which has passed quickly into the lexicon of reformers.

By adopting an holistic approach and by co-opting all the principal actors into the process of anti-corruption reform, a country or community can enhance its capacity to curtail corruption to manageable levels. But none of this can be tackled without enlightened and determined

1 Peter Eigen is Chairman of the Board of Directors of Transparency International, the organisation which he founded in 1993.
political leadership, without high levels of public awareness and support, and without a motivated and well-led private sector. In many countries, the most difficult element in the equation is that of developing a vibrant civil society willing and able to play a meaningful role in shaping its environment.

This Source Book should, in large measure, contribute to an empowering of leaders within civil society by providing both a rationale for, and examples of, good practice. TI believes that for too long the role of civil society and the private sector has been understated, and it will be working with its national chapters towards achieving progress in this area. When today’s developed economies were themselves in the stage of evolving, and had features that resembled those of many of today’s third world economies and economies in transition, it was just such action by civil society and the private sector that confronted and successfully contained the corruption that was then threatening their economic development. We believe that history can, and must, repeat itself in this regard.

As anti-corruption efforts evolve, it is important to note that this book, rewritten and fully revised as it is, continues to be a work in progress. Now translated into some 20 different languages, the earlier version has been adapted into various regional and national settings, taking account of differing national, juridical and governmental traditions.

It is our hope that further constructive criticism will lead to further development of the text and to improvement of the models available in the accompanying Best Practice documentation available on the TI web site. This Source Book itself will be placed on the Internet, and regularly revised and updated there.

Berlin
September, 2000
Executive Summary

A major achievement of the past decade has been the shattering of the taboo which for a generation or more had shrouded any discussion of corruption in polite company, least of all in diplomatic circles and in intergovernmental institutions. From this debate has emerged a potentially powerful global coalition, uniting many peoples from the North and South, East and West, industrialised and developing countries and countries in transition. Opinion, expertise and resources have been mobilised. Most accept that the time for talking has past; it is time for action.

At the heart of this coalition lies the recognition that civil society’s involvement is crucial in any country. Governments alone cannot hope to contain corruption. They need, and must win, the support and participation of an active but independent civil society. What else has emerged from this global debate?

Corruption is endemic and everywhere. It is not just a case of public officials abusing their positions, but of people abusing their positions wherever there is easy money to be made.

- Large private companies target public officials to win hefty export contracts.
- Officials of the International Olympic Committee have been “influenced” to choose particular venues to host the Olympic Games.
- Allegations abound in professional sport of match-fixing - soccer referees have been publicly warned against taking bribes.
- “Ghosts” have emerged in many countries, including within the French army.
- Fraudsters pose as religious leaders to conduct huge scams on their followers, particularly in the United States.
- Bogus “charities” and non-governmental organisations are established whose running costs absorb virtually all the funds raised.
- Radio show hosts take secret payments from interests keen to see their products mentioned favourably by credible personalities.¹
- Financial journalists tip the public to buy shares in companies they themselves have already invested in - and then take profits when the prices rise.
- Previously internationally-respected auction houses secretly rig their fees so as to defraud their customers, vendors and purchasers alike.
- A President’s security chief is filmed making a cash pay-off to an opposition politician to buy his defection.²
- Children in Italy are blindfolded to reassure ticket-holders while they draw winning numbers for multi-million dollar lotteries, but are trained to select balls which have been rendered slightly smoother and slightly larger than the rest.³

¹ The Weekend Australian, 4/5 December 1999.
² BBC World Service, 17 September 2000 announcing that Peru’s President Fujimori was to stand down.
There seems to be no end to human ingenuity when it comes to circumventing systems designed to protect the integrity of institutions and processes.

This would be cause enough for concern, but the impact of corruption on poverty has come to the fore. By distorting development decision-making and regulatory frameworks, the poor are denied both the effectiveness of aid flows and the hope of advancement through private sector development. For rich and poor alike, the stakes are high.

Left alone and not contained, corruption is likely to increase - it has been likened to a cancer, and rightly so. Just one example is the country which sacked its Auditor-General when he reported corruption in the Cabinet, and later witnessed the spectacle of a Cabinet Minister being shot and two of his colleagues being sentenced to death for having arranged his murder.4

Corruption can take place where there is a combination of opportunity and inclination. It can be initiated from either side of the transaction: a bribe being offered to an official, or the official requesting (or even extorting) an illicit payment. Those offering bribes may do so either because they want something they are not entitled to, and bribe the official to bend the rules, or because they believe that the official will not give them their entitlements without some inducements being offered. Poverty may feed inclination, but realistic strategies can and have been devised which limit opportunities.

The strategies to contain corruption, therefore, should address both elements. Opportunities can be minimised through systematic reform, and inclination reduced through reversing a “high profit, low risk” scenario into a “low profit, high risk” one, through effective prevention, enforcement and deterrent, accountability mechanisms. Both the bribe “giver” and the bribe “taker” must be addressed.

More than this, to be successful a strategy needs to address not only enforcement and prosecution, but also prevention and community education.

Accountability mechanisms, when designed as part of a national effort to reduce corruption, comprise an “integrity system”. This and the concept of “horizontal accountability”, a way of describing modern systems of government, are discussed in chapter 4 of this Source Book. This system of checks and balances is designed to achieve accountability between the various arms and agencies of government, manage conflicts of interest in the public sector, effectively disperse power, and limit situations conducive to corrupt behaviour.

However, combating corruption is not an end in itself; it is not a blinkered crusade to right all the wrongs of the world. Rather, the struggle against malfeasance is part of the broader goal of creating more effective, fair and efficient government. Reformers are not just concerned with countering corruption per se, but with reversing its negative impact on development and society as a whole. In this way the reforms help to raise standards of living for the poor and greater respect for the human rights of all.

The wise reformer knows that corruption can never be entirely eliminated. Under many real-

4. Western Samoa.
istic conditions, it will simply be too expensive to do so. A single-minded focus on corruption prevention can also have a negative impact on personal freedoms and fundamental human rights. Corrupt programmes and services may be difficult to eliminate entirely; bureaucratic discretion (which often opens the door to corrupt decision-making) may continue to be necessary for effective administration; and stronger enforcement and deterrence is anything but cheap. Thus, the aim is not to achieve complete rectitude, but to realise a fundamental increase in honesty - and so the efficiency and fairness - of government.

So where should anti-corruption efforts begin? The obvious point of entry is to gain an understanding of the underlying causes, loopholes and incentives which feed corrupt practices at any level. If not informed by understanding, any reforms are unlikely to succeed.

Any understanding of corruption begins by dispelling the myth that corruption is a matter of "culture". In most cultural contexts, public gifts are made openly and transparently; the Swiss numbered bank account is not a part of any country's traditional culture; the people who live in societies where corruption is supposedly a "part of the way of life" generally bitterly resent the practice; and, bribes and payoffs are almost invariably illegal and criminal under the laws of the "cultures" involved. No-one has yet identified a sustainable social order in which a society believed that its leaders should prefer to promote their own private interests at the expense of the group. In those countries where popular belief has been that this is the case, the degree of public outrage that has accompanied the fall of such leaders surely indicates their outright rejection of such conduct.

The next step is to ask the question – what are the main types of corruption occurring within the public domain?

The first type is "petty" or "survival" corruption practised by public servants who may be grossly underpaid and depend on small rents from the public to feed their families and pay school fees. There are some who would argue that this type of corruption helps both companies and individuals circumvent government requirements - reducing delays and avoiding burdensome regulations and taxes. This view sees payoffs as nothing more than the "grease" needed to operate in a difficult environment, although surveys are now suggesting that those who identify themselves as "cash cows" waiting to be "milked" may in fact find that the system operates even more slowly, as gate-keeper after gate-keeper exacts his or her dues. Such small-scale corruption may be illusory, and in fact be indicative of much more damaging forms - with lowly-paid civil servants (who may even have purchased their jobs) obliged to generate returns for their supervisors, or to produce revenue for a ruling party. The impact of small bribes, too, can be radically disproportionate, as in the case of the customs officer who, for a few dollars, waves through containers of high-cost dutiable goods.

Small-scale it may be, but if not vigorously attacked, small-scale, facilitating bribes can feed on themselves to produce a corrupt spiral. Frequently too, petty corruption is simply a downwards projection of much more damaging forms of corruption at higher levels. The "grand" corruption of high public officials often involves large, international bribes and "hidden" overseas bank accounts. It is frequently fostered by exporters from countries (in particular, the industrialised countries) which may (knowingly or unknowingly) offer tax breaks for the bribes paid and refuse to regard the trans-border corruption of public officials as being criminal behaviour.

This is not to say that corruption is limited to situations where the rules are either inefficiently restrictive or overly lax. Incentives to make and ask for payoffs occur whenever a government
official has economic power over a private firm or individual. It does not matter whether the power is justified or unjustified. Once a pattern of successful payoffs is institutionalised, corrupt officials have an incentive to raise the size of bribes demanded and to search for alternative ways to extract payments.

Officials may refuse to serve clients unless a bribe is paid. They may design a major procurement project on too large a scale and with too much specialised equipment as a way of generating large bribes and keeping them hidden. They may prefer expensive new infrastructure projects, which can carry large bribes, to lower-priced, labour-intensive projects which do not. They may accept payments to reveal secret information on privatisation projects and to favour insiders. And once paid, a bribe may have to be recouped by a contractor, if not in over-pricing, then in providing lesser value. None of these examples represents the efficient use of pricing mechanisms in the public sector. All of them involve poor public and private choices and risk imposing large costs on society - costs which are often shouldered by those who can least afford to bear the burden.

As such, governments and private citizens should not respond with tolerance. Instead, they must move vigorously to strengthen their national integrity systems. The policy response to combating corruption has several elements common to every society: the reform of substantive programmes; changes in the structure of government and its methods of assuring accountability; changes in moral and ethical attitudes; and, perhaps most importantly, the involvement and support of government, the private business sector, and civil society. The challenge cannot be met simply through institutional and legal responses. Everyone must be involved. The alternative - of doing nothing - is simply not an option. Left uncontained, corruption can only fester and grow. Ultimately it has the capacity to terminally undermine the legitimacy of a government, and ultimately of a state.

This Source Book emphasises accountability measures and attitudinal change over the reform of substantive programmes to reduce corrupt incentives. Why? Because an integral part of the holistic approach to combating corruption is the concept of service delivery - bringing the public service closer to the “customer” (the public) and enhancing its cost-effectiveness through mechanisms of transparency and increased accountability. Accountability measures can often be put into effect relatively quickly and can help create a situation where corruption is no longer tolerated by most officials and citizens. Secondly, the techniques for introducing greater accountability are relatively well-understood and appear to be transferable between nations.

By contrast, substantive policy reform, involving such tasks as reform of the regulatory and tax systems and the elimination of unjustified bribe-generating programmes, is likely to be a more difficult and time consuming task. It is not a “quick win” situation upon which a series of reforms can be built. It is also an undertaking that must be geared to the particular needs and problems of each individual nation state - an undertaking which cannot be fully addressed within the confines of a single generic book.

Successful anti-corruption reform efforts have been all too rare, and the failures numerous. This should not be viewed as discouraging, but rather as a learning process.

Some of the main lessons learned within the pages of this Source Book are that anti-corruption efforts can be derailed by:

- the limits of power at the top (an incoming administration may wish to tackle cor-

ruption effectively but inherits a corrupt bureaucracy that impedes efforts for change);

- an absence of commitment at the top;

- overly ambitious promises leading to unrealistic and unachievable expectations and a loss of public confidence (short-term achievable goals or “quick wins” are often necessary to buoy public support);

- reforms that are "piecemeal" and uncoordinated, so that no-one “owns” them and no-one is committed to see that the reforms are implemented and kept up to date;

- reforms that rely too much upon the law or too much on enforcement (leading to repression, abuses of enforcement power and the emergence of further corruption);

- reforms that “overlook” those at the top and focus only on the “small fry” (if the law is applied unfairly and unevenly, it soon ceases to have any legitimacy or deterrent effect);

- the failure to establish institutional mechanisms that will outlive the leaders of the reforms; and,

- the failure of government to draw civil society and the private sector into the reform process.

The elements of a serious and concerted reform effort must therefore include:

1. a clear commitment by political leaders to combat corruption wherever it occurs and to submit themselves to scrutiny (revisiting the need for immunities and privileges which may shield some from legal process);

2. primary emphasis on prevention of future corruption and on changing systems (rather than indulging in witch-hunts);

3. the adoption of comprehensive anti-corruption legislation implemented by agencies of manifest integrity (including investigators, prosecutors, and adjudicators);

4. the identification of those government activities most prone to corruption and a review of both substantive law and administrative procedures;

5. a programme to ensure that salaries of civil servants and political leaders adequately reflect the responsibilities of their posts and are as comparable as possible with those in the private sector;

6. a study of legal and administrative remedies to be sure that they provide adequate deterrence;

7. the creation of a partnership between government and civil society (including the private sector, professions, religious organisations);

8. making corruption a “high risk” and “low profit” undertaking (i.e. increasing both the risk of being detected and the likelihood of appropriate punishment thereafter);

9. developing a “change management scenario” which minimises the risks to those who may have been involved in “petty” corruption and which wins the support of key political players (whose participation may be crucial) yet which is seen by the public as fair and reasonable in all the circumstances (blanket amnesties can trigger riots in the streets; equally, a blanket imposition of legal penalties can lead into the quicksands of political oblivion).
Bearing all of these points in mind, the development of a coherent, comprehensive strategy must involve an attack on several fronts. Most countries, however, will not be able to do everything at once. Dedicated reformers need to decide where the greatest problems lie and what kinds of policies will be most effective. They also need to recognise the interconnections between different strategies: removing controls on the freedom of the press will have little impact if reporters do not have adequate access to government data, as will anti-corruption laws if law enforcement is weak and corrupt.

This Source Book flags six main areas of reform which can help implement an overall anti-corruption strategy:

- leadership;
- public programmes;
- government reorganisation;
- law enforcement;
- public awareness; and,
- the creation of institutions to prevent corruption.

Important though enforcement undoubtedly is, a strategy that focuses only on enforcement is almost certain to fail and is unlikely to yield a sustained ethical environment that is alien to corruption. Carrots are needed as well as sticks.

The discretionary power of public officials, and the corresponding opportunities for abuse of power, can be reduced through a broad set of reforms targeting the reorganisation and reform of public programmes. These changes will not simply diminish the incentive to pay bribes but also streamline business transactions of all sorts and improve people’s access to public services generally. Reforms may include eliminating corrupt programmes which do not enjoy a strong public policy justification - some programmes may have little to recommend their continuance beyond their ability to produce personal benefits for officials! Another option is to simplify programmes and procedures to make them more efficient. Eliminating, for example, “gatekeepers” who are in a position to collect illegal tolls from users, or streamlining the steps required to gain government approvals, serves to reduce the opportunities for delay and discretion - the breeding ground of corrupt practice.

What are the other options for the reform of specific programmes? When payments by the public would actually help to improve efficiency and would not violate distributive justice norms - one can consider legalising the sale of government services, either on a “user pays” basis or to the highest qualified bidders. Likewise, areas of bureaucratic discretion can be minimised. When discretion must be retained, officials should be given clear, written guidelines on the exercise of their duties. Privatisation of state enterprises can also reduce corrupt opportunities within government (but the process itself must be transparent to avoid becoming ensnared in corruption and any resulting private monopolies well-regulated to prevent abuse). The “monopoly power” of bureaucrats can be reduced by providing rival sources of supply - let people apply for a driver’s licence at any motor vehicle office, or let businesses obtain operating licences from any of several officials or offices. Conversely, police forces can be given overlapping jurisdictions so that no official can guarantee a lawbreaker that he or she will not be arrested. The list of potential reforms to government programmes is a long one...

Quite apart from reforming specific programmes, attention needs to be given to preventing corruption through government reorganisation. This involves changing the way the government actually does business. How can this be achieved? By paying a living wage to civil servants and politicians so that an honest career in government is a reasonable choice for qual-
ified people. By demystifying and depersonalising government - opening up information, informing citizens of their legal rights in dealing with government, publishing staff manuals which are easily accessible to department users and contractors, and minimising face-to-face contact by introducing random elements (such as staff rotation) so that users cannot predict the officials with whom they may be dealing.

The range of options for changing governments’ modi operandi is extensive. A few suggestions include:

• developing and implementing strategies which create a firm ethical basis for public administration;
• opening up government to make most official information accessible to the public, and fostering positive and open relationships between government agencies and the press when the press asks for information and comment;
• developing internal financial management systems that ensure adequate and effective controls over the use of resources;
• establishing other types of internal oversight mechanisms to provide speedy and effective review of contentious decisions;
• assuring the adequacy of judicial review of agency actions;
• making managers at all levels responsible for the activities of their subordinates;
• increasing the effectiveness of supervision to enable superior officers to check and control the work of their staff;
• conducting surprise checks on the work of officers;
• requiring officials at management levels to certify that those they supervise comply with civil service regulations and laws;
• purging payrolls to eliminate “ghosts” and make their reappearance more difficult;
• implementing effective monitoring of the assets, incomes, and liabilities of officials with decision-making powers;
• introducing appropriate restrictions on post-public employment in the private sector;
• providing complaints channels to enable junior officials to complain about their superior’s corruption;
• ensuring that the press is both itself free and free to expose corruption;
• rewarding good behaviour;
• establishing mechanisms for civil society to be involved in a continuous process of government review;
• polling the public periodically on its perceptions of government service delivery;
• establishing an open, genuinely competitive and transparent system of public procurement;
• examining present practice against “best practice” and the rules in place in the most transparent systems;
• ensuring that choices are not captive to departmental advice and interests;
• involving “outsiders” (i.e. independent individuals who are not part of “the system”);
• forcing speedy decision-making in order to eliminate delay during which corruption can take place;
• encouraging professional bodies (accountants, auditors, lawyers) to declare that participation in corrupt activities (including money-laundering) is unprofessional conduct and that corrupt members will be liable to disbarment;
• requiring all gifts, hospitality etc. received by government officials and all political donations to be reported and recorded;
• reviewing and enforcing appropriate “conflict of interest” regulations (including the introduction of ethics programmes and periodic group discussions of real-life ethical dilemmas drawn from their own experiences); and,
• building coalitions of interests in support of corruption prevention, drawing on the private business sector and civil society.

No matter what the options are, reform within public programmes and procedures cannot occur in isolation. Credible legal constraints must exist to back up administrative reform. Yet, in many countries neither the prosecutors nor the judiciary are well-respected, and the underlying laws are weak and ineffective. Several types of reforms need to be considered to strengthen the enforcement of anti-corruption incentives.

Independent investigators, prosecutors, and adjudicators can be established in such a manner that they perform their professional duties in a transparently independent fashion and enforce the Rule of Law against all who breach it. Adequate powers of investigation and prosecution (consistent with international human rights norms) should also be provided for, including access to all government documentation, international mutual legal assistance arrangements with relevant countries, and a re-examination of the laws of evidence and the penalties for corruption to determine if they are appropriate to modern realities.

Transparent mechanisms which lift any immunities which high public officials enjoy by reason of their office can also be integrated into the reform of enforcement measures. So can the development of channels for effective complaint-making, whether internally with the public service or by a member of the public. Procedures for punishing those involved in corruption within the state but who are outside the jurisdiction of the state should also be seriously considered in the anti-corruption reform effort. Civil penalties, black-listing of corrupt firms, extradition arrangements, and other legal provisions which enable the profits of the corrupt to be seized and forfeited, inside or outside the country, are all powerful disincentives for the would-be corrupt.

A common factor to all anti-corruption efforts, whether these efforts involve reforming public programmes, reorganising government, or strengthening enforcement, is that they must enjoy public support. Anti-corruption campaigns cannot succeed unless the public is behind them. If ordinary people and businesses at all levels of society are used to dealing with the state through a system of “payoffs”, it will be difficult to change attitudes. Yet such changes are essential if fundamental change is to occur. People need to understand the seriousness of the corruption problem and what can be done about it - civil society groups (religious leaders, business organisations, professional associations and ad hoc groups), in partnership with government and the private sector, have an important role to play in raising public awareness of the harm done by corruption.

Several steps can be taken. One of the first should be to ascertain what the public perception is regarding existing levels of corruption and where corruption takes place in order to provide a baseline against which the progress of anti-corruption reform can be measured. Secondly, the legal and administrative environment should provide an enabling environment for a free press. The freedom of the press will be aided by several measures, such as passing Freedom of Information laws giving private citizens, including journalists, access to government information (and, it follows, ensuring that government record-keeping is efficient and effective); repealing or revising anti-defamation laws and “insult” laws to ensure that these cannot be used to threaten and fetter the press; ending press and media censorship; raising the professional standards of journalists; ending government discrimination (such as controlled access to newsprint, advertising) of certain media; and, ensuring that state-owned media employees can maintain professional standards of independence and responsibility.
In addition, the environment in which civil society operates should be appropriate to a free and democratic society. Nongovernmental organisations and other civil society institutions should be easy to establish, (subject to concerns for the fraudulent use of the non-profit format) and registration provisions should be simple and inexpensive. Registration of a civil society group should be a right, not a privilege.

A nation that is serious about fighting corruption may also need to establish new institutions or strengthen existing ones to specifically carry out some functions in the anti-corruption mandate. Although a number of different models exist, each must ensure that the institution is adequately staffed and funded. Otherwise, the long list of ineffective anti-corruption showpieces common throughout the world will only get longer. The options include establishing an Independent Commission Against Corruption, such as the one that exists in Hong Kong, with broad investigative and prosecutorial powers and a public education mandate. Such a Commission must be genuinely independent of the country’s rulers but subject to the Rule of Law or it risks becoming a force for repression in its own right. These agencies have, however, been largely failures, usually because of a lack of independence has prevented them from investigating major corrupt figures and they have been starved of resources, either through ignorance of their need for adequate capacity or to trim their sails. It is axiomatic that a law enforcement approach is likely to work only where there is already a functioning and independent judicial system.

Another option is to strengthen the Office of the Auditor-General and the Office of the Ombudsman (and if necessary, to create the Office of Ombudsman - an institution which is uniquely placed to improve the performance of officials whilst at the same time providing a quick and cheap remedy to members of the public). The office-holders must be appointed in a way that ensures the independence and professionalism of the office and reports stemming from these Offices must be given widespread publicity, and the government must act to implement recommendations. Ombudsman offices are being established in many countries and they afford an opportunity to introduce administrative accountability while the judicial system adjusts to its new role, or reduces the inefficiencies and corruption that obstruct its performance of its duties. Establishing an Office of the Contractor General would provide independent oversight of government contracting and performance.

An Elections Commission may be needed to ensure independent and impartial review that does not favour any political party or group. The Commission would require transparency in all aspects of the elections system (except, of course, the casting of individual ballots), foster public participation in the monitoring process to build confidence, and provide for training political party officials to ensure their familiarity with the system and enable them to monitor it professionally. In addition, strengthened legislative mechanisms for accountability such as a Public Accounts Committee is required to ensure public access to oversight proceedings.

In a situation of systemic corruption, more often than not the courts - and with them the Rule of Law - fall into disrepute. Their utility as part of the engine of a reform programme can be highly questionable. These institutions must be prepared to accept much more open criticism than they are accustomed to hearing, and not resort to contempt of court charges to silence their critics, however misguided these may be. The judiciary’s leadership must become a key part of the coalition for change, and make the necessary changes to their own practices. Simply to deny a truth which the populace at large recognise as being true, only confirms the pub-

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5 This has been tried in Jamaica, but although the office has performed well, the political class has shown itself to be unenthusiastic about taking appropriate action to stem political interference in government contracting.
lic’s view that high judicial figures are reluctant to provide a lead and to frankly acknowledge the fact that they have problems. Civil society can help by building coalitions of court users to help overcome the obstacles which would-be judicial reformers face.

Nor can the public interest in containing private sector corruption be ignored. It is, of course, relevant in the context of the private sector’s interface with government as a provider of goods and services. But today the private sector is much more than this. Increasingly, public assets are being privatised and strategic public interests placed under private ownership and control. The public therefore have a greater interest than ever in the achievement of good ethical standards. More than this, in many developing countries the private sector is looked upon as the principle engine for development. Government-led efforts have largely failed, and the theory is that the private sector, through the market-place, may be able to achieve that which governments have not. However, if that market-place is marred by corruption; if it is a market in sleaze and not in the arms-length pricing of goods and services, then that market-place will be unlikely to produce what it should for the benefit of the wider community.

This Source Book is only a stepping stone towards containing corruption - it examines programme reform, government reorganisation, enforcement, institution building and more. What is one to do with all of this information? When a group of individuals in a country seeks to put the reduction of corruption on the policy agenda, how should they actually proceed?

The sources of political power and policy influence will differ from system to system, but there are some suggestions which may be applicable to many differing scenarios.

One way to begin is by establishing a “national integrity working group” which draws together all the stakeholders within government (executive office, public service, investigation, prosecution, judiciary, education, information and key vulnerable departments such as customs, procurement, revenue collection, local government) together with coalition partners from outside government (civil society, religious leaders, private sector, relevant professional bodies - law, auditing, accounting, health and education - and groups representing consumer interests).

This group could:

- Gain agreement that corruption is too important an issue to be dealt with on a party political basis, and win the support of all major political groupings to work to a commonly-agreed objective. Then, analyse the existing framework and identify areas for reform in order to develop an overall plan which includes short-term, medium term and long-term goals (including a public awareness-raising programme), and assign responsibilities for follow-up action and reporting back to the working group.

- Publicise the establishment of the working group and its overall plan and solicit inputs from the wider public. Continue by seeking endorsement of the plan by the political leadership.

- Hold regular meetings of the working group and give appropriate publicity to its work, paying particular attention to achieving some “quick wins” to build public confidence.

- Post the “national action plan” on a web site and generate local media interest in covering the progress made, and the success stories, without simply wallowing in corruption scandals.
• As reform programmes involve various ministries and a variety of actors, have the government appoint an influential Minister as “Minister for Governance” so that there is a political figure who is clearly responsible and who is well placed to keep an eye on the variety of balls that are in the air.

• Work to generate both “top down” and “bottom up” pressures on corrupt elements within and outside the public sector.

• Ensure that all involved appreciate that the task is long-term; and that while there may be some “quick wins” to be had, in countries where the problem is at its greatest, the time-frame cannot be shortened. Many anti-corruption strategies have foundered on a lack of understanding of this simple fact.

But such a scenario presupposes both a readiness and an ability to act on the part of a political leadership. In many countries there is an absence of will, and an attachment to a comfortable - and corrupt - status quo. In such an environment is it naïve to think in terms of starting an anti-corruption movement? This Source Book argues that it is not. Even in such unpromising territory there is likely to be space in which to start informed discussions among opinion-leaders as to how a society wishes to be governed; to identify potential “champions” of reform within the administration and to assure him or her of support; and to develop “islands of integrity”, be it in a single act of procurement, a single privatisation or a single government agency. There are few, if any, administrations that are wholly corrupt, and the elements that are not, or are unwilling to be, can be the bricks and mortar with which to fashion sustainable change.

In the drive to implement anti-corruption reform - with all its processes and procedures, choices and options - it is important to remember that it is a long-term process. It is one which must be openly supported from the top and one in which ethical attitudes and conduct must be nurtured and reinforced at all levels. Initially reform should only tackle issues where it can be most effective or where there is the most added value, bearing in mind the importance of timing and sequencing, and of building the public’s confidence in the transparency and accountability of the State. The anti-corruption campaign must be made the business of all.
Chapter 1

The Challenge of Renovation

To all new truths, or renovation of old truths, it must be as in the Ark between the destroyed and the about-to-be-renovated world. The raven must be sent out before the dove, and ominously controversy must precede peace and the olive wreath.

Samuel Taylor Coleridge

As our newspapers and news broadcasts remind us daily, in many countries today corruption must be confronted as a matter of urgency, and often as a prelude to economic growth. Corruption is detrimental to both social and economic health and well-being whenever and wherever it occurs, regardless of the state of a country’s development. Reports of corruption are increasing daily. This clearly suggests that, despite efforts in many parts of the world to contain it, corruption may actually be increasing. It also demonstrates that it is not something that is exclusively, or even primarily, a problem of developing countries.

Events in Europe and North America have shown all too clearly that corruption is not a topic on which the industrialised countries can moralise to anyone. Nor do the lessons end there. As Susan Rose-Ackerman has shown in the context of Italy, democracy and the free market are not invariably an antidote for corruption. A shift from authoritarian to democratic rule does not necessarily reduce pay-offs. Rather it defines the country’s norms of public behaviour. A country that democratises without also creating and enforcing laws governing conflict of interest, financial enrichment, and bribery risks undermining its fragile new institutions through private wealth seeking. A country that moves to liberalise its economy without a similar reform of the state risks creating severe pressures on officials to share in the new private wealth. In short, the problem of corruption “is trans-systemic; that is, it inheres in all social systems – feudalism, capitalism, communism and socialism.”

Yet if matters are serious in the industrialised countries, they are in crisis in much of the developing world and in countries in transition. In this latter group, countries have made the painful discovery that government-led and government-directed attempts to improve people’s lives through central planning have failed. Even in the “Asian Tigers”, economies which for a time had seemed to defy the laws of gravity to which others appeared subject, opinion-makers have joined the consensus. It is now widely recognised that sus-

1 Quoted in The Writing on the Wall: Peace at the Berlin Wall by Terry Tillman.
2 TI uses a short definition of corruption: “the misuse of entrusted power for private benefit”. In this there are three elements (i) a misuse of power; (ii) a power that is entrusted (i.e. it can be in the private sector just as much as in the public); and (iii) a private benefit (i.e. not necessary personal to the person misuse the power, but including as well members of his or her immediate family and friends).
3 Susan Rose-Ackerman, “Lessons from Italy for Latin America”, Journal of Public and International Affairs, Fall 1998, p. 447 at p. 469. The same lesson can be drawn from events in the People’s Republic of China.
5 Transparency International (TI) had consistently argued, when challenged by those who argued that “a little corruption is not harming Indonesia and her neighbours” that the position was unsustainable. That when the head of the Korean stock exchange was arrested for rigging flotations all could see that corruption could not be contained to the areas where it was “useful”, but that it would spread to infect even the institutions on which the economy depended. TI argued consistently that the “Asian Miracle” was unsustainable.

Are standards falling?
“....there is a broad consensus about the negative state of public confidence in the Federal government and its institutions.”
(Gilman, United States)

CONFRONTING CORRUPTION: THE ELEMENTS OF A NATIONAL INTEGRITY SYSTEM

Tainable development must be private sector led, and government-supported, not government-directed. Corruption strikes at the heart of the market economy, distorting decision-making, and rewarding the corrupt and manipulative rather than the efficient and the productive. Corruption appears to be on the rise despite one of the most sustained international and national attacks on a crisis area that the world has witnessed.

There can be no doubt that corruption is deepening already indefensible levels of extreme poverty. According to a recent report by the National Audit Bureau in China, corruption is absorbing about one fifth of funds set aside by the government to control poverty. The investigation, carried out between 1997 and the first half of 1999, revealed that some 4.3 billion yuan ($519 million) allocated to poverty funds “had been diverted into private accounts, making up 20.4 per cent of the total. Over a quarter of the money stolen was used to buy property or cars, or to finance illegal loans.” As against this, some 42 million Chinese live below the poverty line, set at earnings of just one dollar a day.6

So what has gone wrong? Why is corruption rearing its ugly head in more and more ways?

The answer may lie in two areas, both of which are addressed in this Source Book. The first is a weakening of social values, with the broader public interest and social responsibility being subordinated to the enhancement of material status in the personal ethics of many. The second is a lack of transparency and accountability within public integrity systems. In many countries there is a widespread feeling that the public service has lost its way – that many elements within the public sector are corrupt, as are many of the private sector firms that transact business with them. The public sees officials, and officials seem to see themselves, as existing to serve the political ambitions of higher officials which may result in promotions for themselves. Accountability to the public is mere rhetoric, used when reporting to Parliament or making speeches at the United Nations. This portrait may be unfair to many, but the perception is widely held.

Defining corruption

Defined simply, corruption is the misuse of entrusted power for private benefit.7 Yet it is not so long ago that the word itself was completely taboo in professional and political environments. The word seldom appeared in newspapers and it was rarely mentioned by economists, although political scientists had begun to take an academic interest in it.

Normative statements about corruption require a point of view, a standard of “goodness” and a model of how corruption works in particular instances.8 For the purposes of this Source Book, “corruption” involves behaviour on the part of officials in the public sector, whether politicians or civil servants, in which they improperly and unlawfully enrich themselves, or those close to them, by the misuse of the power entrusted to them.

The Source Book concentrates on administrative rather than political corruption per se, focus-

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6 Poverty Funds Siphoned Off, Agence France Presse, Beijing, 17 July 2000.
7 J.J. Senturia, Encyclopaedia of Social Sciences, Vol. VI (1993) gives the traditional definition: the misuse of public power for private benefit. However, particularly with the advent of privatization and traditional state activities and near or complete monopolies falling into private hands, a broader definition has been adopted by TI and others.
ing on the activities of individuals who, in their positions as public officials – as policy-makers or as administrators – control various activities or decisions.

In the wake of privatisations and the transference into the private sector of tasks previously regarded as those of the state, with near or total monopolies for the supply of public goods in private hands (e.g. water, electricity), the concepts explored in this Source Book include corrupt conduct in the private sector – outside as well as within its interface with the public service – conduct that nonetheless has negative public consequences.

**Administrative corruption**

There are two quite separate categories of administrative corruption: the first occurs where, for example, services or contracts are provided “according-to-rule” and the second, where transactions are “against-the-rule.”

In the first situation, an official is receiving private gain illegally for doing something which he or she is ordinarily required to do by law. In the second situation, the bribe is paid to obtain services which the official is prohibited from providing. “According-to-rule” and “against-the-rule” corruption can occur at all levels of the government hierarchy and range in scale and impact from “grand corruption” to small scale varieties.⁹

In practice, public attitudes can overshadow legal definitions of administrative corruption, and public opinion can define corruption in ways which will override law. If public opinion and legal definitions do not conform, the likelihood is that officials will act in accordance with the public view, and in so doing transgress the law. It is therefore crucial that the public be informed and enlightened as to the damage that corruption can cause.

**How is corruption damaging?**

Corruption is damaging for the simple reason that important decisions are determined by ulterior motives, with no concern for the consequences for the wider community.

Dieter Frisch, former Director-General of Development at the European Commission, has observed that corruption raises the cost of goods and services; it increases the debt of a country (and carries with it recurring debt-servicing costs in the future); it leads to lowering of standards, as sub-standard goods are provided and inappropriate or unnecessary technology is acquired; and it results in project choices being made based more on capital (because it is more rewarding for the perpetrator of corruption) than on manpower, which would be the more useful for development. Frisch points out that when a country increases its indebtedness to carry out projects which are not economically viable, the additional debt does not only include the 10 to 20 per cent extra cost due to corruption; rather the entire investment, all 100 per cent of it, is attributable to dishonest decisions to proceed with unproductive and unnecessary projects.¹⁰

If corruption cannot be brought under control, it can threaten the viability of democratic institutions and market economies. In a corrupt environment, resources will be directed towards

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non-productive areas – the police, the armed forces and other organs of social control and repression – as the elite move to protect themselves, their positions and their material wealth. Laws will be enacted (e.g., the Public Tranquillity Act 1982 in the Sudan) and resources otherwise available for socio-economic development will be diverted into security expenditure. This in turn can cause the withering of democratic institutions as corruption, rather than investment, becomes the major source of financial gain. This undermines the legitimacy of government, and ultimately the legitimacy of the state.

If that is the picture at the macro level, the view at the micro is no less cheering. An Indian commentator in *The Times of India*, writing at the close of the millennium, observed that:

“The lack of transparent rules, properly enforced, is a major reason why talented Indians cannot rise in India. A second reason is the neta-babu raj, which remains intact despite supposed liberalisation. But once talented Indians go to rule-based societies in the west, they take off. In those societies all people play by the same rules, all have freedom to innovate without being strangled by regulations. This, then, is why Indians succeed in countries ruled by whites, and fail in their own. It is the saddest story of the century.”

**Impact on private sector development**

It is a generally held view around the modern world that much of government-led development efforts in the past have been mishandled, and have generated waste rather than development. A strong state is needed, but this needs to be clear in its tasks and its organisation. It needs to provide vital services essential if the private sector is to flourish, but it should not attempt to compete with the private sector, and nor should the state undertake tasks which the private sector can perform more efficiently and more effectively unless there are compelling social reasons for it to do so.

So if development is to be private-sector led, what is the impact of corruption on the environment in which the private sector must operate? First and foremost, it introduces uncertainty: will contracts be honoured? Can disputes be resolved by impartial and competent adjudicators? Can future decisions by officials be predicted with requisite certainty? Where corruption introduces uncertainty, it also increases risk. And as risk escalates, so must greater and faster returns be looked for by investors. Furthermore, corrupt relationships operate to keep newcomers out of the game, thereby inhibiting the growth of the private sector itself.

Corrupt regimes also impose extraordinary management obligations on the private sector, in the Ukraine, for example, in 1994 firms surveyed reported that they spent on average 28 per cent of management time simply on dealing with the government. By 1996 this had risen to 37 per cent. Eliminating unnecessary bureaucratic obstacles, of course, is not done simply to reduce corruption but rather also to induce more businesses to switch to the formal sector and to encourage new productive investment.

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11 See El-Wathig Kameir and Ibrahim Kursany Corruption as the “Fifth” Factor of Production in the Sudan (1985) p.11.
12 The world’s first “criminal state” has yet to emerge, but some observers had thought this likely to be Colombia, under the influence of the drug lords. Recent attempts by courageous reformers to contain corruption have seen this prospect diminish.
14 These figures, obtained by Daniel Kaufmann in 1997, are much higher than figures reported in other countries, ranging from 7 per cent in El Salvador to 15 per cent in Lithuania and Brazil.
Impact on foreign direct investment

One of the most crucial elements for accelerating private sector development is an increasing flow of foreign direct investment (FDI). So what, if any, is the impact of corruption on FDI?

In a recent study, Professor Shang-Jin Wei, a professor at the Kennedy School of Government, Harvard University, examined bilateral investment from 14 traditional source countries into some 45 host countries during the period 1990-91, with startling results. He compares corruption levels with marginal tax rates and concludes that on the scale of zero to ten – as used in the TI Corruption Perceptions Index – a full one point increase in the corruption level is associated with a 16 per cent reduction in the flow of FDI – or approximately equivalent to a three percentage point increase in the marginal rate of tax. In other words, a worsening of a host government’s corruption level from that of Singapore (with a rating of near zero) to that of Mexico (with a rating of 6.75 at the time of the study) incurs a 21 per cent increase in the marginal tax rate on foreigners. That, in turn, is sufficient to eliminate the country’s expectations of FDI almost completely. Wei’s work encourages us to see corruption as being an additional – if unofficial – tax on the private sector. And one to which international investors are sensitive and to which they react very negatively. So the message is clear: for a country to attract optimum levels of FDI it must have corruption and its illicit tax on investors.

But what of the “Tigers” of East Asia?, one might ask. They have significant corruption and yet growth has been phenomenal. Can international investors really be said to be sensitive to corruption in East Asia? Wei concludes that there is no evidence whatsoever to support the proposition that investors are less concerned about corruption in East Asia than they are elsewhere. On China, in particular, he notes that although the size of the annual inflow is large – over 60 per cent of it in each of the last ten years has come from overseas Chinese, notably those in Hong Kong. Thus he concludes that China cannot be regarded as a typical host country. When FDI from the ten largest source countries is examined, and all of them are members of the OECD, their investment is found to constitute a relatively small proportion of the total FDI going into China.

His findings, too, have been confirmed by a survey of private sector leaders undertaken by Control Risks Group in October 1999, which showed that among US investors, a country’s high level of corruption was three times as

17 In his paper, Professor Shang-Jin uses two measures of corruption, both based on survey of respondents. One is that conducted by Business International (a subsidiary of the Economist Intelligence Unit) and the other is Transparency International (TI)’s Corruption Perceptions Index, an average of some seven to ten survey results on corruption. Noting that the two surveys are highly correlated, he takes this as his starting-point and conducts an investigation into the relationship between the marginal rate of tax and its effects on FDI. A one percentage point increase in the marginal tax rate is shown as reducing FDI by about five per cent.
18 In a region such as the Middle East which continually laments the reluctance of large investors to invest at home, or within the region, all of this is cause for reflection. Could it be that concern about levels of corruption eroding profit margins and undermining longer-term stability are at least contributing to the region depleting its own resources by investing them for

Small bribes wreak major damage on Kenya’s road system

MALABA, Kenya – Francis Kuria’s truck shook violently yesterday as it moved down the Trans-Africa Highway from Kenya into this dusty border town. The road was so deeply rutted that the asphalt appeared to be mashed down and squeezed out like puréed corruption. The road damage may be caused by bad construction, but even the best contractor would be challenged to build a highway that could withstand the severely overloaded trucks that regularly travel East Africa’s roads. Transporters said they routinely overload trucks in East Africa, paying off weigh-station clerks who are supposed to be protecting public highways. Kuria, a manager of M.A. Baysus & Sons Ltd., said that until recently he typically overloaded his trucks by 50 per cent.

The result of the corrupt practice is that transporters make huge profits at the expense of the road system, destroying it so thoroughly that Kuria must slow down to walking speed to get through the broken pavement. The economic costs of time lost and vehicles damaged by such roads is incalculable. Two years ago the International Monetary Fund refused to lend any more money to Kenya, partly because corruption had become so blatant it was holding back the nation’s economy. Since then, Kenya has taken action to curb corruption, and overweight trucks are no longer tolerated. “No more overloading,” said Baysus. “I have too many trucks. I can’t risk it. You know why we’re doing this? The IMF has gotten too smart for us.” But corruption is difficult to wipe out overnight. Many people expect a gratuity for doing their job. It’s known as TKK – Toa Kitu Kidogo in Swahili. “Give something small.” As he drives along Africa’s highways, Kuria is often stopped at police roadblocks and asked for gratuities. On this trip, he said he is grateful to have a white foreigner in his truck because the police treat muzungus with deference. “If they see a muzungu, they wave you through,” said Kuria as he glided through a checkpoint. Even in post-colonial Africa, white people often get preferential treatment. Along the highway, the bribery system is well entrenched. Kuria never pays off weigh-station clerks himself. Rather, Baysus sent “clearing agents” to deliver the cash ahead of the truck’s arrival. When Kuria arrived, he would be waved through. Humanitarian organizations and United Nations agencies such as the World Food Programme, which are often funded by international donors, can’t submit bribes to donors for reimbursement. “What do we do instead is to hire clearing agents,” said Joern-Lose, the logistics officer for the World Food Program in the Kenyan port of Mombasa. The clearing agents do their dirty work, and the cost is reported as an administrative fee.

Philadelphia Inquirer, 26 April 2000
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likely to deter them from investing than was a country’s poor record in human rights.\(^{19}\)

**Is corruption always bad?**

Some would argue that corruption can have beneficial effects such as non-violent access to government affairs and administration, when political channels are clogged, or as a means of lessening the potentially crippling tension between the civil servant and the politician by linking them in an easily discerned network of self-interest.\(^ {20}\)

However, counter-arguments are more acceptable. They focus on the fact that corruption leads to economic inefficiency and waste, because of its effect on the allocation of funds, on production, and on consumption. Gains obtained through corruption are unlikely to be transferred to the investment sector as ill-gotten money is either used in conspicuous consumption or is transferred to foreign bank accounts. Such transfers represent a capital leakage from the domestic economy. Furthermore, corruption generates inefficiency in allocation, by permitting the least efficient contractor with the highest ability to bribe to be the recipient of government contracts. In addition, since the cost of bribes is included in the price of the goods produced, demand tends to be reduced, the structure of production becomes biased, and consumption falls below efficiency levels. Thus corruption lowers the general welfare of the populace.\(^ {21}\)

The following points summarise the costs induced by corrupt practices:

- A corrupt act represents a failure to achieve the objectives which government seeks (e.g. corruption in appointments induces inefficiency and waste; corruption in the allocation of scarce university places results in best use not being made of a scarce opportunity, etc.);
- Corruption contaminates the environment in which the private sector has to operate, leading either to quick (and excessive) profit-taking in circumstances of unpredictability, or to inward investment being discouraged, and excluding new potential entrants thus reducing participation and private sector growth;
- Corruption represents a rise in the price of administration (the taxpayer must submit to bribery as well, thereby having to pay several times over for the same service);
- If corruption takes the form of a kickback, it serves to diminish the total amount available for public purposes;
- Corruption exerts a corrupting influence on the administrative apparatus, eroding the courage necessary to adhere to high standards of probity ("morale declines – each man asking himself why he should be the sole custodian of morality");
- Corruption in government, perceived by the people, lowers respect for constituted authority and therefore the legitimacy of government;
- If the elite politicians and senior civil servants are widely believed to be corrupt, the public will see little reason why they, too, should not help themselves;

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19 The survey was conducted by the Industrial Research Bureau (IRB) on behalf of Control Risks. Respondents were asked whether they had held back from an otherwise attractive foreign investment on account of a country’s reputation for corruption, human rights, labour or environmental controversy. European companies ranked corruption (38%) ahead of labour (35%), environment (34%) and human rights (28%). By contrast, US corporations ranked corruption higher (40%), human rights (13%), environment (14%) and labour (16%) all significantly lower. 92% of US corporations “forbid bribes to obtain business” (Europe 85%), and 76% of US corporations forbid “grease payments” (Europe 62%).

20 David Bayley, *The Effects of Corruption in a Developing Nation*, The Western Political Quarterly, p.719, pp. 727 et seq. To be fair, the author advances this thesis in an illustrative fashion, seeking to pose questions rather than answer them definitively, and he presents a list of factors both positive and negative. In addition, for the purposes of the Source Book, all italicised words in the passage quoted have had emphasis added to stress the caution with which the propositions are advanced.

21 David J. Gould and Jos A. Amaro-Reyes, *The Effects of Corruption on Administrative Performance: Illustrations from Developing Countries*, World Bank Staff Working Papers Number 580; Management and Development Series Number 7 [1983]
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- A barrier to development has been an unwillingness at the political level to take unpopular decisions (“a corrupt official or politician is a self-centred individual [unlikely] to jeopardise his prospects for the sake of prosperity for the whole country in the remote future”);
- Corruption results in a substantial loss in productive effort as time and energy are devoted to making contacts to circumvent and outwit the system, rather than to enhancing credentials and strengthening one’s case objectively;
- Corruption, as it represents institutionalised unfairness, inevitably leads to litigation and trumped-up charges with which even the honest official may be blackmailed; and,
- The most ubiquitous form of corruption in some countries – “speed money” or “grease payments” – causes decisions to be weighed in terms of money, not human need.  

What causes corruption?

Poverty, some say, is at the root of the problem. Without poverty there would be no corruption. But even if poverty is an underlying cause, it cannot be the only one. If poverty were the cause of corruption, then it would be hard to explain why rich, wealthy countries are beset by scandals – very few of which involve anyone who might be categorised as being “poor” or in “need.” It would also virtually equate poverty with dishonesty – which is a concept attacked vehemently by a number of critics, who see this alleged linkage as being little short of a blanket defamation of the poor. Nor can it be said that those who manipulate banking systems, producing “non-performing loans” and conducting insider deals with deposits made by an unsuspecting public are exactly poverty-stricken. Corruption is therefore a double-edged sword – it can emerge from wealth and abundance, or it can emerge from the lack of it.

Recent World Bank estimates of the wealth which corrupt African leaders have stashed away in European banks stands at several billion U.S. dollars. None of these leaders can be described as exactly being a victim of poverty. Yet, by plundering national treasuries, these leaders have unquestionably deepened the poverty of their people. Public expenditure decisions are fuelled by private gain and subsidised by massive bribes from firms in industrialised countries with scant regard for the good of the country or its people. Social and economic development is adversely affected. So, rather than as a result of poverty, grand corruption can be seen as a cause of it.

The individuals whose corruption has the most negative impact on a country are relatively few in number and their behaviour may or may not be obvious to the ordinary citizen. However, the petty corruption that people encounter day in and day out in the course of their everyday lives is frequently contributed to by poverty in some shape or form.

In the poorest countries – often those with corrupt elites – there is a manifest failure by government to pay a living wage to public servants. Indeed, frequently the state is wholly unable to afford to do so. Thus, inadequate remuneration for public officials is widely regarded as being a contributing cause of corruption, at least at the petty level if not in the entire system. However, the answer is much more complex than a simple increase in wages.

22 David Bayley, supra at pp. 724 et seq.
The myth of culture

One way to justify bribery is with the “culturally relativistic” argument. It is often suggested in developed countries that corruption is part of the “culture” of many developing countries. The fact that people in a particular country may tolerate demands for small payments in return for official services (e.g., the issuing of permits, licences, etc.) does not necessarily imply that they approve of it; it may simply be that the public “perceive it as the most workable way of obtaining things they want or need...[a] perception that may gradually be undermined by rising prices... or dashed more abruptly if consumers come to believe that the underlying scarcities are artificially contrived or that more desirable alternative processes are really possible.”

Yet, one could ask why there are laws against corruption in all countries, developed or developing, if, in fact, it is “a part of their culture”? Why, too, one might inquire, have the people of the Philippines and Bangladesh mobilised against a well-armed military to bring down corrupt leaders? These events hardly square with a popular acceptance of corruption as “a part of culture.”

Michael Johnston notes that “a full discussion of the implications of corruption in any given system must be constructed in the context of system-specific factors. The existence of ethnic factions among élites, the extent to which kinship norms mean that citizens and/or officials take a different view of patronage practices than does the law, or the exclusion of certain economic interests from decision-making processes, for example, can all be critical parts of the corruption story in specific settings.”

In some cases, corruption may reflect practices introduced into a culture by a foreign power. Indonesia is beset by massive corruption. Yet some writers have argued that this phenomenon originated, not with the Indonesians themselves, but with the Dutch East India Company. The company’s men “were underpaid and exposed to every temptation that was offered by the combination of a weak native organisation, extraordinary opportunities in trade, and an almost complete absence of checks from home or in Java.... Officials became rich by stealing from the company.”

The same writer notes that “corruption was introduced into [the Philippines] during the Spanish colonial period. He also observes that in Singapore, after World War Two, “the British Army officers in charge of local purchases had probably never before been exposed to the type of temptations in money, wine and women...whatever resistance there was in them melted away with mercurial speed.”

The author also notes that Thailand is the only ASEAN country which has not been colonised. “However, freedom from colonial domination does not guarantee that a country will be immune to the disease of corruption. Indeed, in Thailand’s case corruption is an endemic disease which can be traced to the corrupt behaviour of the government officials belonging to the sixteenth century bureaucracy.”

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24 See various examples reported in the TI Newsletters, on www.transparency.de.
25 Michael Johnson, ibid., p. 463
26 Quoted in Jon S. T. Quah, Bureaucratic Corruption in the ASEAN countries: A Comparative Analysis of their Anti-Corruption Strategies, Journal of Southeast Asian Studies, Vol. 13, No.1, pp. 153-177 (1982) at pp. 154-155. The author also comments that “corruption, which was condoned during the colonial era, was viewed in a more critical light during the post-war period”.
But whether colonialism in the past contributed to the growth of corruption or not, there is perceived to be a very strong and corrupt nexus between a number of former colonies and their former European colonial “masters”.

Today, of course, there are significant differences in perceptions and practices between various cultures. What some accept as reasonable and appropriate will differ very widely. These differences, however, may have more to do with how business is conducted (through the giving of presents and of hospitality) than with blatant attempts to “buy” favourable decisions. There is a clear distinction between “reciprocity” and reciprocities classified as bribes.29

In the African context, the suggestion that there is a cultural explanation for lavish gift-giving in return for favours bestowed has been robustly attacked by Olusegun Obasanjo, (prior to his imprisonment as an anti-corruption activist and subsequent election in 1999 as President of Nigeria):

“I shudder at how an integral aspect of our culture could be taken as the basis for rationalising otherwise despicable behaviour. In the African concept of appreciation and hospitality, the gift is usually a token. It is not demanded. The value is usually in the spirit rather than in the material worth. It is usually done in the open, and never in secret. Where it is excessive, it becomes an embarrassment and it is returned. If anything, corruption has perverted and destroyed this aspect of our culture.”30

In the Far East, too, the complaint is that traditional practices have been subverted. “Once, the exchanging of gifts was a laudable social custom emphasising the importance of personal relations in social life. Now, hongtoo and chongji have distorted the practice into institutionalised bribery in the name of goodwill tokens.”31

One conclusion that provides a succinct riposte to apologists for corruption being simply cultural is this: “The public men on whom wealth has descended in a sudden and unimaginable torrent are not heirs to a tradition of comfortable bank balances and public responsibility; they are nouveaux riches tycoons of public administration... Those who happened to be in the right place at the right time”,32

The first myth: poor salaries are the only problem

Poor salaries, below the level of “living wages” lie at the heart of corruption. Increase the salaries and the problem will be cured. Such is the conventional wisdom. However, like most “quick fixes” the evidence is all to the contrary. Yes, the pressures on a public servant to abuse his or her office are greater if they are living near or below the poverty line. However, the evidence is at best unclear whether increasing public sector wages alone can reduce corruption. An in-depth look at country specific data does not support the notion that merely increasing

28 Ibid. at p. 163.
29 See John T. Noonan, Bribes (University of California Press, Berkeley, Los Angeles; 1984). Judge Noonan’s classic study of bribes records that reciprocities classified as bribes were censured, among others, in the ancient kingdoms of Egypt, Mesopotamia and Palestine and, even more harshly, in Cicero’s Rome.
30 In Corruption, Democracy and Human Rights in Africa, the keynote address to the Africa Leadership Forum on Corruption, Democracy and Human Rights in Africa, Cotonou, Benin, 19-21 September 1994. See Ayodele Aderinwale, Corruption, Democracy, and Human Rights in West Africa (IAF Publications, Ibadan, 1995). The same sentiments were later expressed in a letter to the “Financial Times”. Obasanjo was head of the military regime (1976-79) which returned Nigeria to democratic rule, an exercise which foundered on a military coup in 1984. He was subsequently imprisoned by the corrupt dictator Sani Abacha, and was released from prison and elected President in the elections which followed Abacha’s death in 1998.
official salaries to existing staff in corrupt agencies helps.33

Further evidence against this argument is the indisputable fact that most of those involved in “grand” corruption have very much more than they or members of their family will ever need – and yet the misappropriation continues. One African commentator has commented that some of their countries, far from being democracies are, in fact, kleptocracies.34 However, this is not to say that increasing public sector wages is not an important factor in reducing corruption. But, it can only be effective as part of a comprehensive package of civil service reform, where proper compensation and incentives are addressed along with meritocratic recruitment and promotion, replacement of corrupt personnel, and appropriate training.

The second myth: “good governance” is only for developed countries

Defenders of the status quo, and those who feel embarrassed by the corruption in their own country or region, sometimes take refuge in the argument that “good governance” is a stick fashioned in the industrialised countries with which to beat developing countries and countries in transition. The argument implies that “good governance” is a twentieth century concept, fashioned in the industrialised countries to suit their own purposes.

Even a random reading of history shows this to be far wide of the mark. Throughout the centuries, enlightened rulers have sought to establish and maintain systems of government that were fair and just. These have not been confined to Europe, but embrace all regions of the world. The Ts’ in Dynasty in China (221 BC) and the second Muslim Caliph, Umar.1. (634-644), and the Swedish King Charles XII (in 1713), provide just three examples of attempts in various cultures through the ages.35

When the state does not pay its institutions

A major contributor to corrupt practices can be the state itself, principally when it simply fails to pay its bills.

For example, a recent audit in Russia (the first of its kind in 20 years), showed that Primorye’s universities extort money from their students, illegally charge library fees, and force students to contribute large sums to “charitable funds.” At the Far Eastern State Academy of Economics and Management, every one of its 4,500 students contributes $200 per year to a charitable fund, which supposedly pays for unspecified students’ needs. (The sum is nearly five months’ average income in Primorye.) Even those who are supposed to be studying for free pay the sum. Some universities ignore the benefits that orphans and disabled students are supposed to get. Gennady Turmov, rector of the technical university in Primorye, said the government is to blame for failing to fund the colleges and so forcing them to seek money elsewhere.

“The state, which committed itself to financing the universities within the same laws, has not been doing this for a long time, even at a minimal level,” he said. “So the universities have to show miracles of commercial inventiveness.”36

33 See, e.g., Daniel Kaufmann’s contribution “What have we really learned recently” to the Anti-Corruption Discussion Forum, 14 January 2000. The experience of establishing independent revenue collection authorities (in which staff are taken outside the civil service and paid handsomely) also bears this out. 34 John Githongo, a respected Kenyan journalist. 35 Bryan Gilling in his book The Ombudsman in New Zealand (Dunmore Press and Historical Branch, Department of Internal Affairs 1988 pp. 13-15) also lists precedents from the Romans. See also John T. Noonan, Bribes (University of California Press, Berkeley, Los Angeles; 1984) 36 From Zolotoi Rog and Novosti, Feb 29, 2000
The breaking of the taboo

Traditionally the international community has shied away from discussing corruption. Now the topic is out in the open. The taboo has been broken.

Corruption came to the political forefront, most conspicuously, when the leaders of the Americas met at the Summit of the Americas in December 1994. In the Plan of Action adopted by the Summit, governments pledged that they will:

- promote open discussion of the most significant problems facing government and develop priorities for reforms needed to make government operations transparent and accountable;
- ensure proper oversight of government functions by strengthening internal mechanisms, including investigative and enforcement capacity with respect to acts of corruption, and facilitating public access to information necessary for meaningful outside review;
- establish conflict of interest standards for public employees and effective measures against illicit enrichment, including stiff penalties for those who utilise their public position to benefit private interests;
- call on the governments of the world to adopt and enforce measures against bribery in all financial or commercial transactions within the Hemisphere;
- develop mechanisms of co-operation in the judicial and banking areas to make possible rapid and effective response in the international investigation of corruption cases;
- give priority to strengthening government regulations and procurement, tax collection, the administration of justice and the electoral and legislative processes; and,
- develop, with due regard to applicable treaties and national legislation, a hemispheric approach to acts of corruption (in both the public and private sectors) that would include extradition and prosecution of individuals so charged, through negotiation of a new hemispheric agreement or new arrangements within existing frameworks for international co-operation.  

Since then, the member states of the Organisation for Economic Co-operation and Development (OECD) agreed to outlaw the bribing of foreign public officials, and signed the landmark Convention on Combating bribery of Foreign Public Officials in International Business Transactions on 11 December 1997. This, and a range of “soft law” recommendations, is designed to criminalise foreign bribery and to end tax deductibility for bribes paid abroad.

Why an integrity “system”?

These initiatives, and others, do not imply that the reduction of corruption is an end in itself, it is instrumental in reaching the broader goal of more effective, fair, and efficient government. Anti-corruption activists are concerned not just with corruption per se, but rather with its impact on society. Thus, it is important to assess the costs of corruption and understand that it is impossible to eliminate it entirely and all at once. Under many conditions, it will simply be too expensive or too cumbersome and dysfunctional to attempt to reduce corruption

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37 See Building a Global Coalition Against Corruption: Transparency International Report 1995 (Transparency International, Berlin, 1995), pp. 16-17. Efforts are under way (1999) among civil society organisations on all five continents to try to build greater enthusiasm for implementation of these undertakings.

38 The text is available at www.oecd.org/daf/cmis/bribery/20nov.htm.

39 The proof of the intent will be in the performance of the obligations assumed by the member states. By no means all share the same level of enthusiasm for this levelling of the international trade playing-field, and some are attracting fierce criticism as the process of evaluation of implementation proceeds.
The views of a Ugandan...

In my culture, where we have no social insurance whatsoever, you can only guarantee your old age survival through the help and assistance you extended to your relatives and clan members. Our culture was built on social obligations and expectations. For instance if you were employed, culture expected you to help others through your position in society. This was instilled into our minds from childhood. Corruption is defined as including nepotism, tribalism and using your office for self gain etc. But these definitions fall short when put to the test of my culture. If you close your eyes and ears to those in your clan and tribe, the cultural pressures will sooner rather than later bring you face to face with nepotism and tribalism. It is therefore important to start by educating my people to discard those cultural values that lend themselves to corruption. Recently we had a National Coalition Building Workshop bringing together the government anti-corruption agencies, the civil society, the Judiciary, Parliamentary Members, the private sector, and religious and cultural leaders among others. All participants were concerned with the corruption in the country, yet when it came to defining precisely what is corruption in Uganda, different opinions were highlighted. But one thing was clear: that part of the battle against corruption will be fought through redefinition of our norms and value system. Indeed, many even argued for starting a sub-ject on moral and ethics in all our teaching institutions right from primary education. Being corrupt or not to be corrupt has a lot to do with one’s mindset and socialisation right from childhood.

Having said that, Uganda has come out very boldly, and is facing corruption with the same determination that it showed when the AIDS scourge almost engulfed the whole country. Then, everyone in our community came to believe that if we did not do something about AIDS we would literally disappear from the face of the earth; in the same vein Ugandans have come to believe that if we do not deal with corruption in the same way we may never lift ourselves out of our poverty and suffering. With support from our friends from around the world, the anti-corruption agencies in Uganda, like the Inspector General of Government and the Directorate of Ethics and Integrity, are reaching every corner of our society. And like AIDS, corruption has become an agenda for everyone.

Dr. Mohammad Kisubi, contribution of 28 March 2000 to the Utstein internet discussion, “Approaches to Curbing Corruption”.

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altogether – if, indeed, this could ever be achieved. Corruption has existed for as long as humankind, and the most that can be hoped for is to be able to contain corrupt practices within tolerable limits. In some cases, bureaucratic discretion may be necessary for effective administration, and stronger enforcement, and deterrence may be too expensive to undertake. It is also vital to recognise that some anti-corruption policies will have no impact if carried out in isolation.

Furthermore, the broader societal context will condition the impact of various policies. Thus, the aim is not complete rectitude or a one-time cure or remedy, but an increase in the honesty or integrity of government as a whole. To focus on why and where corruption flourishes, and to develop tailor-made systems and procedures to prevent and contain it. This process, itself, must have an internal integrity. It must respect other values, and balance competing interests. It is axiomatic that fundamental human rights norms should be respected, such as guarantees of a fair trial. Inroads into personal privacy must be reasonably justifiable. If the process challenges existing and widely-accepted social conventions and norms, it courts problems.40

An integrity system provides a practical framework of checks and balances for averting the damage which corruption causes to the public interest, and for fostering an environment in which the quality of official decision-making is heightened. The integrity system is discussed in Chapter 4.

The challenge

When we talk about reducing corruption we are really targeting fairer distribution of income which implies reducing the excessive incomes and benefits which officials at present enjoy. Not only is their future income threatened, but also there is the prospect of officials being held to account for past misdeeds. In some countries these elements are sufficiently powerful to derail reform efforts completely if they feel unduly at risk. How should this challenge be approached?

First, the reforms should be treated as being systemic. The reforms are not aimed at people, but at the systems within which they work. There needs to be a clear understanding that the great majority of the public servants have nothing to fear insofar as the past is concerned.

Second, the question of dealing with the past should be addressed openly and without equivocation. The options vary from complete amnesty, which may or may not be acceptable to the wider community; a partial amnesty: only the “big fish” need fear the consequences, (this presupposes that the “big fish” do not have the power to disrupt the reforms); or a process of accounting and taxing that brings the “dirty” money into the open. A third is simply to let the past take care of itself – not embarking on a witch-hunt, but dealing with cases from the past as, if and when they come to the surface. This last option may be an appealing one, but it leaves a cloud of uncertainty and the general public at a loss to understand how the past is being addressed.41

40 One society may feel able to prohibit all civil servants from accepting gifts from anyone and at any time. Another may have a tradition of gift-giving on special occasions which does not challenge the norms protected by an integrity system. If restrictions are regarded by people as being unnecessary, unfair and at odds with their own views of what is right and wrong, the restrictions are likely to be circumvented or simply ignored. Such is the experience of law reformers in all parts of the world. 41 The question of amnesties is discussed later.
Bureaucracies are designed to perform public business. But as soon as a bureaucracy is established, it develops an autonomous spiritual life and comes to regard the public as the enemy.

_Brooks Atkinson, "September 9", Once Around the Sun (1951)_

While corruption is defined as “the misuse of entrusted power for private benefit”, it can also be described as representing non-compliance with the “arm’s-length” principle, under which no personal or family relationship should play any role in economic decision-making, be it by private economic agents or by government officials.

Once the arm’s-length principle has been breached and a distinction made based on relationships, corruption will often follow. Conflict of interest situations and nepotism are examples. The arm’s-length principle is seen as fundamental to the efficient functioning of any organisation.¹

A core, but unstated assumption underlying theoretical work on the role of the public sector is that public sector officials (both policy-makers and civil servants) are knowledgeable, neutral and impersonal in their pursuit of the social welfare.² But are they? What do officials see as the pursuit of the social welfare and what do they, themselves, consider to be “corruption”? And what of their willingness – or otherwise – to take action against it? These questions are all too seldom asked.

In 1994, a major research project in New South Wales, Australia, by the state’s Independent Commission Against Corruption, sought to determine the kinds of conduct public sector employees would judge as corrupt and identify those factors which might hinder employees from taking action against it. A survey was conducted, in which public servant respondents were asked to assess twelve scenarios, in terms of –

- the desirability of the behaviour,
- how harmful it was,
- how justified they considered it to be, and
- what they would do about it.

In addition, respondents were asked to state whether, and how strongly, they agreed or disagreed with twelve attitude statements.³

Individual respondents differed sharply in their views as to what was - or was not – “corrupt”. As the report notes, “it is important for all who are interested in minimising corruption to

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² Ibid.
³ The statements and other details appear in the Best Practice section of the web site version of this Source Book: www.transparency.org.
realise that what any one public sector employee understands as “corrupt” may not be shared by his or her colleagues. This lack of commonality of understanding adds to the difficulty of combating corruption.

The survey showed that a willingness to take action would depend on a number of factors, including the relationship between taking action and how harmful, undesirable or unjustified each scenario was considered to be. Factors which reduced the willingness to take action included -

- the belief that the behaviour was justified in the circumstances;
- the attitude that reporting corruption was futile, as nothing useful would be done about it;
- the belief that the behaviour was not corrupt;
- a fear of both personal and professional retaliation;
- the low relative position within the organisation;
- employees’ perception of their relationships with the perpetrator and the supervisor; and
- concerns about insufficient evidence.4

Clearly, therefore, the starting point for any serious work on containing corruption has to be the personal perspectives of those in positions of trust or authority. As the Australian study demonstrated, this must begin by raising awareness of what constitutes the threshold of acceptable behaviour and the creation of a more informed understanding of the costs of corruption.

A very different survey of the experience of Transparency International chapters, in 1995, suggested that corruption in the public sector takes much the same form and affects the same areas whether one is dealing with a developed country or a developing one. The areas of government activity most vulnerable to corruption were -

- public procurement;
- rezoning of land;
- revenue collection;
- government appointments; and
- local government.

The methodologies, too, were remarkably similar, including -

- cronyism, connections, family members and relatives;
- political corruption through donations to political campaigns, etc.;
- kickbacks on government contracts (and subcontracting consultancies); and
- fraud of all kinds.

Within the public service (including politicians, as well as elected and appointed officials), the following kinds of activities often take place:

- Ministers “sell” their discretionary powers. For example, in New South Wales, Australia, the Minister for Corrective Services was convicted and jailed for selling early releases from prison to drug traffickers;
- officials take percentages on government contracts, which are often paid into foreign bank accounts;5
- officials receive excessive “hospitality” from government contractors and benefits in

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4 Unravelling Corruption: A Public Sector Perspective: Survey of NSW Public Sector Employees’ Understanding of Corruption and their Willingness to Take Action, ICAC Research Report Number 1, Independent Commission Against Corruption (NSW), April 1994

5 The various ways in which this may be done, including circumventing the public procurement rules laid down by international lending institutions, are described in the Grand Corruption: How Business Bribes Damage Developing Countries by George Moody-Stuart (WorldView Publishing, Oxford; 1997). Mr. Moody-Stuart is Chair of the UK chapter of Transparency International. His original manuscript was circulated privately in 1993 and did much to break the taboo in business circles of discussing the problem.
kind, such as scholarships for the education of children at foreign universities;
- officials contract government business to themselves, either through front companies and “partners” or even openly to themselves as “consultants”;
- officials deliberately travel abroad so that they can claim per diem allowances which they set themselves at extravagant levels;
- political parties use the prospect of power, or of its continuation, to levy large rents on international businesses in particular, in return for government contracts (which may be dressed up as a “donation” to a designated “charity” or a “hospital”). For example, in Kenya during the Kenyatta years, the vehicle was the Gatundu Armed Forces Hospital, which was the enforced “beneficiary” of “charitable donations” by all who wished to do business with the regime. Had this hospital really been the ultimate destination for the money, it could have been a major teaching hospital, instead of being a comparatively modest hospital in the former President’s tribal area;
- revenue officials practice extortion by threatening to surcharge taxpayers or importers unless bribes are paid, in which case unjustifiably low assessments are made, or goods are passed for importation without payment of any duty at all. For example, revenue collection in Tanzania slumped dramatically in 1994-95. In Italy, where the practice is also said to be widespread, taxpayers, particularly large companies, accuse the ‘financial police’ of extorting money from them, although the degree of their unwillingness to pay for illicit reductions in their tax bills remains to be tested in criminal prosecutions;
- law enforcement officials extort money for their own benefit by threatening to impose traffic penalties unless bribes are paid (which are frequently somewhat less than the penalty the offence would attract if it went to court);
- providers of public services (e.g., drivers’ licenses, market stall permits, passport control) insist on payments for the services in order to speed up the process or to prevent delays. In Latin America, this practice has become so institutionalised that a whole profession has grown up to “assist” those who wish to transact business with a government department;
- superiors in the public service charge “rents” from their subordinates, requiring them to raise set sums each week or month and to pass these on upwards. In Mexico City, a practice developed whereby a policeman on street duty would be charged rents on his patrol car, his gun and his job, with separate rents going to the different officers responsible for transport, firearms and supervision; and,
- “ghosts” are created to pad payrolls and lists of pensioners, or to create fictitious institutions which, if they existed, would be entitled to state funds. In Uganda complete “ghost schools” were identified in a surprise audit undertaken in the context of a public sector reform project. The Warioba Commission found many instances of this in neighbouring Tanzania. Even France has not been immune. An army paymaster was found to have created fictitious units within the French Army in order to generate private payments.

Corruption, in all its forms, is not unique to any one country. Corruption in China, where bureaucrats have “commercialised their administrative power”, is really no different from that
in Europe, where political parties have taken huge kickbacks for public works projects. (In Italy, the cost of road construction has reportedly dropped by more than twenty percent since the “Clean Hands” assault on corruption.) Slush funds have been established in Swiss bank accounts for illicit political party financing, and suspicions are that these funds have been “leaked” into private pockets. Kickbacks, too, have been paid to political parties for defence procurement. Companies have wined, dined, entertained and bribed officials, especially across international borders, to obtain business illegally and unfairly and, not infrequently, with disastrous consequences.

In Britain, conflict of interest scandals implicated Members of Parliament to the point where public faith in government ministers being “generally trusted to tell the truth” was ranked at a mere 11 percent (with both doctors and teachers rating 84 percent, and television news-readers 72 percent). While most occupational groups had improved their standing over the previous ten year period, the standing of Ministers and politicians generally, already very low, fell even further. Press reaction suggests that public cynicism in Britain has, if anything, grown substantially since 1993, when the poll was taken.9

British politicians have generally fallen from misjudgement rather than criminal deeds10; however, in continental Europe, including Belgium, Italy, Austria, France and Spain, political figures are being actively investigated and prosecuted for criminal breaches of trust. At any given time, numerous political figures are under investigation in the United States. In Australia, ministers have been jailed, and in New Zealand, an Auditor-General, while in office, was alleged to have misappropriated public funds and was imprisoned11. Nevertheless, in a 1995 TI poll, New Zealand still was rated as the least corrupt of the 41 countries included in opinion surveys of business people doing business internationally.

The myth of culture

One lesson is clear: very few are in any position to criticise anyone else on the issue of corruption. Even in Singapore, arguably one of the countries with the least corrupt government, corruption exists, albeit to a very small degree. Hence, the second lesson: corruption affects even the cleanest governments and must be guarded against constantly.

Types of bribery

There is widespread agreement on the situations that are especially amenable to corruption. However, an effective effort to deal with corruption must begin with its root causes. We need to understand the incentives for potential bribers and those injured by the corruption of others. Four broad categories can be distinguished:

Category (1): Bribes may be paid for (a) access to a scarce benefit, or (b) avoidance of a cost.

Category (2): Bribes can be paid for receipt of a benefit (or avoidance of a cost) that is not scarce, but where discretion must be exercised by state officials.

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9 The poll was undertaken by MORI. Journalists fared even worse, halving their standing from 19 percent to 10 percent, illustrating the crisis, too, in the British public media. See Standards in Public Life: First Report of the Committee on Standards in Public Life Vol. 1: Report (HMSO, London, 1995) p. 107. The poll is contained in the Best Practice section of the web site version of this Source Book: www.transparency.org.

10 A former Minister, Jonathan Aitken, was jailed for perjury after he had tried to fabricate evidence to win a defamation case against The Guardian newspaper, which had documented secret meetings with Middle East arms dealers while he was a defence minister. Just what was taking place, and whether the conduct was appropriate, has not been disclosed.

11 TI Newsletter, June 1997.
Category (3): Bribes can be paid, not for a specific public benefit itself, but for services connected with obtaining a benefit (or avoiding a cost), such as speedy service or inside information.

Category (4): Bribes can be paid (a) to prevent others from sharing in a benefit or (b) to impose a cost on someone else.

Category (1) includes any bureaucratic decision where the briber’s gain is someone else’s loss: for example, access to import or export permits; foreign exchange; a government contract or franchise; concessions to develop oil or other minerals; public land allocation; the purchase of a newly privatised firm; access to scarce capital funds under state control; a license to operate a business when the total number of licenses is fixed; access to public services such as public housing; subsidised inputs; or heightened police protection for a business. In all these examples, there may be competition between bribers which can be manipulated or even created by bureaucrats or politicians. If public servants have the discretion to design programmes, they may be able to create scarcity for their own pecuniary benefit or over-allocate resources (a phenomenon known as ‘supply stretching’). \(^{12}\)

Examples of Category (2) include: reducing tax bills or extorting higher payments when no fixed revenue constraint exists; waiving of customs duties and regulations; avoidance of price controls; awarding a license or permit only to those who are deemed to “qualify”; access to open-ended public services (entitlements); receipt of a civil service job; exemption from enforcement of the law (especially for victimless and white collar crime); board approval for a building project; and lax enforcement of safety or environmental standards. Bureaucratic discretion can often lead to the extortion of bribes. Police can pay gangs to threaten businesses, while at the same time accepting bribes from these same businesses for their protection. \(^{13}\) Similarly, politicians can threaten to support laws that will impose costs or promise to provide specialised benefits in return for payoffs.

Category (3) are services related to the first two categories, rather than a benefit per se. For example, inside information on contract specifications (as was the case in Singapore, where a consortium of corporations from exporting countries bribed to obtain privileged information in connection with government contracts - the corporations were subsequently blacklisted by the Government of Singapore). Other aspects include faster service; reduced paperwork; advance notice of police raids; reduced uncertainty; or a favourable audit report that would keep taxes low. Bureaucrats can often generate the conditions that produce such bribes. Officials can introduce delays and impose rigid application requirements. For example, despite tough environmental protection laws in Russia, the condition of the environment suggests that the legal regime is focused more on providing opportunities for officials to extract bribes for non-compliance, than on actually protecting the environment. \(^{14}\)

Category (4), like (1), also includes winners and losers. Examples include cases where one operator of an illegal business might pay law enforcement agencies to raid his competitors. Owners of legal businesses might seek the imposition of excessive regulatory constraints on competitors, or attempt to induce officials to refuse to license a potential competitor. A Queensland Police Commissioner was bribed by illegal gaming interests to furnish a report to his government arguing strongly that the gaming industry should not be legalised.

In Categories (1) and (4), where there are direct losers, the organisation of the potential bribers


\(^{13}\) Ibid.

\(^{14}\) Discussion with private sector corporation active in that country.
may be important in determining the size and prevalence of corruption. If there is only a small number of potential beneficiaries, they may simply share the market monopolistically among themselves, rather than resort to bribery, and then present a united front to public officials. These cases demonstrate that the elimination of corruption is not an end in itself. A policy encouraging the monopolisation of an industry could reduce corruption, but would have few social gains. Instead of flowing in part to public officials, the benefits would flow into the pockets of monopolistic firms. In addition, if these companies are foreign-owned and repatriating profits, or international criminal concerns, the benefits will mostly flow out of the country. Examples like these illustrate how the problem might not be corruption per se, but the monopoly rents that give rise to payoffs.

The extraction of payments from people who are entitled to services but unable to get them (e.g. for the issuing of a driver’s licence) is properly classified as “extortion” (and a crime in most countries), rather than a bribe. The test would be whether both payer and recipient were acting illegally, or whether the payer was an innocent victim of an offence by an official who would otherwise deny the payer his lawful entitlement.15

Corruption and market inefficiency

Some commentators argue that bribery simply represents the operation of market forces within state programmes, and that, given the efficiency of the market, payoffs should be tolerated. Such cases might exist; however, this benign assessment must be treated with scepticism.

First, public programmes may be undermined when public servants allocate scarce resources to the highest bidder. Public housing, for instance, is designed for the poorest families, not those who can pay the most. In addition, the prospect of payoffs can lead officials to create artificial scarcity and red tape. Moreover, where bribes are paid to induce public officials to favour a firm at the expense of competitors, the highest bidder is often not the most efficient organisation in the marketplace; instead, it can be the organisation with the highest monopoly profits resulting from the elimination of competitors.

The illegality of corruption itself introduces costs that will limit the efficiency of bribery. First, because its perpetrators try to keep their illicit dealings secret, the price information that is essential for a well-operating market is not easily available, and may result in price inflexibility. Once an acceptable bribe rate (10% of the contract price) or fee (US$100 to get a driving license) has been set and is known in the relevant community, the price may remain constant, even in the face of changing market conditions over time. Corruption markets may be more influenced by habit and tradition than ordinary private markets. Large shocks may be needed, such as the fall of a corrupt government, to re-adjust bribe payments.

Second, to reduce the risk of detection, entry into the bribery market for both payers and receivers is limited to people who are known and trusted - relatives, close friends, members of the village or tribe. Third, the benefits of corruption are not widely distributed if some refuse to participate. Honest public servants may simply refuse to enter the corrupt marketplace. Fourth, given the illegality of bribes, contracts between beneficiaries and public officials cannot be enforced. Thus, the risk that one side or the other will not perform, will limit the number and type of deals and make it more likely that such transactions will only occur among people who are well known to one another. As a general rule, then, one can reject the claim that corruption allocates resources efficiently.

15 This distinction features in the work on corruption undertaken by the International Chamber of Commerce (ICC).
Transitions to democracy and to a market economy

Corruption thrives in rigid systems with multiple bottlenecks and sources of monopoly power within government. A planned economy, where many prices are below market-clearing levels, provides incentives for payoffs as a way to allocate scarce goods and services. Transactions that would be legal trades in market economies are illegal payoffs in such systems. In addition to selling goods and services to the highest bribe bidders, public servants have incentives to create even more bottlenecks as a way of extracting higher payoffs. Officials might, for example, create delays or introduce costly conditions. The fundamental problem is not simply the existence of controlled prices set below the market-clearing level, but also the monopoly power of state officials who are not threatened with entry by more efficient and lower-priced competitors.  

Throughout the former Soviet bloc, the state of the economy gave officials an incentive to exploit their positions for private gain and gave their customers and clients an incentive to make payoffs. Corruption was common because the formal rigidity of the system was not backed up by an impartial legal system capable of enforcing the rules. Instead, ultimate authority was exercised by superiors in the hierarchy who often had their own reasons for bending or changing the rules on their own authority. Subordinates could not appeal to “the law” as a reason for resisting the demands of their superiors. The system was not only rigid, but also arbitrary. Its requirements and irrationalities turned almost everyone into a law breaker. The widespread complicity of the citizenry in corrupt transactions, became a method of social control. Corruption cases were often used to punish dissidents, not to improve the functioning of the state bureaucracy.

It should be noted, however, that the situation differed from one Eastern country to another. There were complaint mechanisms, both communal and state, as well as mechanisms in trade unions, and certainly in some countries these worked reasonably well, at least when political questions were not involved. Omnipresent state security also covered economic matters and had a deterrent effect. However, one widely prevailing view is to the effect that “the State was stealing from us, and we were taking our own property back again.”

These observations might suggest that the decline of authoritarian governments and centrally planned economies will reduce the incidence of corruption as competitive market forces come to the fore. According to this scenario, illegal payoffs will be converted into legal market prices, and the level of monopoly rents will fall. But such has not been the case. Corruption and lawlessness has been rampant in the emerging market economies of Russia and Eastern Europe and in the new democracies of Latin America.

Stories of America’s 1920 robber barons are invoked to argue that “cowboy capitalism” is just a transitional stage that must be endured on the way to a more stable capitalist stage. The danger, however, is that corruption can become so widespread that it can undermine and destroy the transitional stage itself. Even if corruption is consistent with economic growth under some conditions, this does not imply that it facilitates growth or that it does not have other negative political and social consequences. Moreover, the links between corrupt business and organised crime, and the cross-border arrangements they have made, add entirely new dimensions to the problem and are further reasons to suspect that history is not simply repeating itself.

17 See, for example, Mikhail Stern, Defendant, The USSR vs. Dr. Mikhail Stern (New York: Urizen Books, 1977).
During the transitional period, if prices are permitted to reach market-clearing levels, no one need pay a bribe to get supplies. If, however, pockets of state control remain, they may become the loci of payoffs. Thus, the privatisation process itself, although ultimately reducing corruption by lowering state involvement in the economy, may initially be a source of corrupt activities as investors jockey for position.\(^{18}\)

The basic source of corruption is no longer the rigidity of the system, but the uncertainty surrounding it. The transitional stage lacks both legal legitimacy and institutional strength as a result of fragile and poorly developed administrative and political structures. People operating within these transitional state structures seek certainty, and they may try to achieve it by paying off officials.\(^ {19}\) In the worst case, citizens and business people simply opt out of the legal economy and rely on organised crime to provide protection both from the state and any competitive threat.\(^ {20}\) Corruption may then be merely a device for inducing public officials to look the other way. The state becomes not just weak, but irrelevant as well. The end result of the destructive cycle could be public pressure to limit the role of the market and return the state to a planned economy.\(^ {21}\)

If stability facilitated corruption in the past and instability encourages it in the present, what is to be done? In spite of the dramatic changes in institutional structure that have occurred in transitional societies, an important obstacle remains: the lack of a credible state commitment to the Rule of Law. The response of transitional states to corruption must be both substantive law reform and institutional restructuring. Countries in transition should liberalise their economies by reducing incentives for bribery and eliminating subsidies, trade restrictions, and preferential treatment in government purchasing.

Nevertheless, as transitional states deregulate and decontrol in some areas, they will need to introduce regulations in others. For instance, they may need new laws regulating environmental pollution, worker and consumer health and safety, and financial and securities markets. They may also need new subsidy programmes for needy people unable to survive in a market economy. These new programmes, however, should be designed to keep corruption incentives low. Thus, pollution might be regulated through tradable emissions permits and welfare provided through direct cash payments or voucher systems. Yet, even these programmes can be open to abuse. Simplification and market-based schemes cannot solve all problems; structural and moral reforms must also be part of the solution.


\(^{19}\) Andrei Shleifer and Robert Vishney, 1993, Corruption, Quarterly Journal of Economics 108: 599-617


Developing Responses

What is government itself but the greatest of all reflections upon human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.

James Madison (1751–1836) 4th President of the USA.

Despite the flurry of activities around the globe in the last decade, the would-be reformer of corruption can still be at a loss as to where to begin. History is littered with the pretence of reform - grandiose promises and a conspicuous inability to even try to deliver. An example is the former President of South Korea, Roh Tae Woo. He vowed at his inauguration to be the cleanest President in his country’s history but wound up in prison, facing a host of major corruption charges.¹

In other cases the intentions are genuine: newly elected leaders arrive determined to clean up corruption, but are quickly overwhelmed by the size of the problems facing them. Yet others simply posture, making speeches, signing laws - all in the absence of any expectation that meaningful change will follow.

Some enact reforms, and then privately flout them. Former German Chancellor, Helmut Kohl, made great play of reforms designed to contain the problem of illicit political party funding, only for it to be revealed that his subsequent behaviour was wholly contrary to everything he claimed to believe in.

Time and again, optimistic electorates have returned governments pledged to confront corruption firmly and effectively. Governments have fallen over their inability to counter the phenomenon; others have been elected in the hope that they can do better. Yet, very few can point to enduring progress. For not only must change be achieved, but it must be a change which is sustainable.

An added difficulty in developing countries and countries in transition has been the inherent weakness of government itself. Some have to “invent” government completely, rather than “re-invent” it.

An analysis of the failure of past efforts has identified a number of causes, including the following:

- the limits of power at the top. An incoming head of state may endeavour to address the challenge, but is effectively impeded by the existing corrupt governmental machinery. Witness President Mkapa of Tanzania who, on his election in 1995, publicly declared his assets and those of his spouse, and called on other leaders to follow his example. The Attorney-General issued a public statement which many interpreted

as implying that the President’s actions were “illegal” (in that they were not required by law) and that it would be improper for other leaders to follow suit.

- the absence of commitment at the top. Lower ranking political and administrative figures may wish to effect change but be severely restricted by an absence of commitment at the leadership level;
- reforms tend to overlook those at the top and focus only on the lower political and administrative levels, based on the assumption that those at the top either do not “need” reform or that they would be openly hostile towards anyone who attempted it. As a result, the law is seen as being applied unevenly and unfairly, and soon ceases to be applied at all;
- overly ambitious promises leading to unrealistic and unachievable expectations. Those who promise what they cannot deliver, quickly lose the confidence of those around them;
- reforms lack a specific and achievable focus and so fail to deliver concrete change.
- reforms have taken place piecemeal and in an uncoordinated manner, leading to lack of ownership and commitment to effective implementation;
- reforms have relied too much on the law, which is an uncertain instrument in trying to change the way people behave, or too much on enforcement, which can lead to repression, abuses of power and the emergence of another corrupt regime. If a legal system is not functioning, the problem is more likely to lie in the judicial system (with delays, corruption and uncertainties) rather than in the letter of the law itself. If existing laws are not working, it is hardly likely that a new one will have impact; and
- institutional mechanisms are not implemented. Even where reform efforts are real, there still need to be institutional mechanisms to carry reforms forward after their initial champions have passed from the scene. The classic case is that of Justice Plana in the Philippines who reformed the tax administration, raising its ability to implement tax collection fairly and effectively, but as soon as he was promoted out of his post, the reforms began to unravel.

Reform must also face a host of vested interests: those who have been bending the rules, whether to supplement meagre incomes or to pad well-filled foreign bank accounts, are potentially at risk, and will resist this process.

Many are in positions in which they can derail reforms; some are so powerful, or so determined, that they can resort to violence. The potential dangers to reformers in such countries are real. The changes inherent in a comprehensive and effective overhaul of a country’s integrity system may be considerable, and call for special political and managerial skills. The conduct of Parliament can also be quite outrageous, refusing to remove areas of corruption in which parliamentarians personally benefit. For example, President Obasanjo’s difficulties in 1999/2000, in having anti-corruption legislation enacted in the Nigerian National Assembly, was considered by some observers, at least in part, to be the result of some legislators feeling themselves to be at risk.

The primary, overriding principle of reform is quite simply not to attempt the impossible. To attempt a wholesale purge of the past is often to invite obstruction at best. It is important to define the most promising areas for

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Survey blames red tape for profit woes
U.S. businesses in China largely fail to hit their profit targets and a main reason is onerous government policies, the American Chamber of Commerce said in a survey published on Tuesday. .... Only 13 percent of 112 respondents found China’s costs lower than other markets, despite its low-cost image. Labour, real estate and taxes were seen as driving costs higher.

A major complaint of nearly all companies which surfaced during the survey taken last summer was that China’s legal system was “unpredictable, undependable and confusing,” it said.

The report said that foreign businesses suffered from a lack of information on current laws, which were often interpreted and enforced inconsistently. They also chafed under sudden and secret decrees from ministries which conflicted with known laws, it said.

China’s WTO accession would grant foreign businesses the right of consultation on trade and investment laws, it noted.

Despite repeated anti-graft drives, 72 percent of U.S. firms thought “corruption in China is unacceptably high and most do not believe that corruption in business is decreasing,” it said.

Reuters, March 14, 2000, by Paul Eckert

3 See, e.g. the refusal by the Brazilian Parliament to outlaw nepotism. Nepotism is discussed later.
reform, and focus on them. A few assured “quick wins” can do more than achieve some change; they can also demonstrate to the system and to the public that change is possible and is on its way.

Second, the emphasis should be as “consumer-friendly” as the circumstances allow, to make the process less threatening to the public. There will be those who, realising that the rules have changed, will go along with reforms that prevent future corruption.

**Creating the foundation: an environment of integrity in public life**

What is the public entitled to expect from their leaders? If the leaders of reform are not seen as having integrity themselves, the entire anti-corruption effort can derail and the public commitment to reform falter. But integrity is not an end in itself; rather, it is a path leading to the delivery to the public of the services they are entitled to receive from those who govern them.

The Nolan Committee on Standards in Public Life (U.K. 1995) has suggested that there are seven relevant principles applying to all aspects of public life:

- **Selflessness**: Holders of public office should take decisions solely in terms of the public interest. They should not do so in order to gain financial or other material benefits for themselves, their family, or their friends.
- **Integrity**: Holders of public office should not place themselves under any financial or other obligation to outside individuals or organisations that might influence them in the performance of their official duties.
- **Objectivity**: In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices based on merit.
- **Accountability**: Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.
- **Openness**: Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.
- **Honesty**: Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.
- **Leadership**: Holders of public office should promote and support these principles by leadership and example.

The establishment and maintenance of integrity in public life and public service include a number of elements. These cover: legislation, regulations and codes of conduct; a society whose religious, political and social values expect honesty from politicians and officials; professionalism among officials; a sense of positive elitism and integrity among senior civil servants; and a political leadership which takes both public and private morality seriously.

Together, these various elements establish and foster a tradition of ethical public life and an ethical environment in which politicians and officials are generally assumed to be honest. Within such an environment it is also assumed that the laws and means of detection and investigation are sufficient to make it risky and costly to break the rules, accept bribes or...
become involved in fraud. However, it is vital to bear in mind several crucial points -

- The ethical environment must be owned, enforced, adapted and applied equally and consistently across the public sector;
- The ethical environment must be self-sustaining and integrated; if the ethical environment has potential weak points, new means of accountability must be introduced, or existing means upgraded and reinforced to counter these weaknesses;
- The ethical environment requires political commitment and leadership to inspire confidence and trust, but it should not always be the politicians who have the sole responsibility to own and enforce it; and,
- The ethical environment depends on micro-level changes (the details of reform) in order to deal with the consequences of failure. Failure can result in: weak guidance on standards of conduct or poor compliance with procedures; management indifference or ignorance; aggregated decision-making powers; inadequate financial and management information systems; lax working practices; poor staff relations; sub-organisational autonomy; poor recruitment and training policies; and little or no attempt to control, monitor or police the increasing contact with private sector values, practices, personnel and procedures.

Why vertical accountability fails...

In a democracy, there are two forms of accountability at work: “vertical accountability” by which the electors, the governed, assert control over the governors, and “horizontal accountability” where those who govern (the governors) are accountable to other agencies (the watchdogs).

In principle, the governors and the governed are alike. There is no special group with political power. Political power is vested by the people themselves in chosen representatives, for a limited period of time. If the people are dissatisfied, they can remove those in power, either through the ballot box or through demanding their resignation or punishment.

However, throughout history, mere “vertical accountability” has proved inadequate to the task. If the governors cannot achieve re-election through support of a satisfied populace, they achieve it through a combination of secrecy (so that the electors are unaware of what is transpiring) and the building of systems of patronage. The governors may also indulge in short-term populist acts which may be to the longer-term detriment of the public. Not only will politicians tend to stretch the limits of their power and authority so as to govern with as little opposition as possible, in some cases they will multiply their interventions simply to prove their own importance.

Moreover, the political class which emerges with professional politicians largely share a set of values at odds with the democratic ideal, and their promises in opposition are in stark contrast to their actions on assuming power. For example, in 1997 the Labour Government came to power in the United Kingdom, with strong pledges to end official secrecy. Their subsequent reforms were steadily watered down, to the point where some observers argue that the resulting reforms, far from making the government more transparent, could actually increase areas of secrecy.

5 Ibid., pp. 7, 8.
6 See the discussion by Biancamaria Fontana of the University of Lausanne: The Failures of Human Agency: Accountability in Historical Perspective, June, 1997 (unpublished).
The ancient democracies recognised and struggled with these contradictions. In Athens, in ancient Greece, the People’s Court, formed by a randomly-selected group of citizens sat in judgment on public controversies and had the power to reverse decisions of the legislative body, the People’s Assembly. Similarly, in ancient Rome, the right of the citizen to appeal to the tribune of the plebs against decisions of the magistrates, was seen as a cornerstone of liberty.

Both systems were democratic, as they were exercised by citizens, and were characterized by horizontal accountability, as the popular courts were effectively autonomous and independent political bodies.

By contrast, the ancient Chinese, the later Roman empires and the old European monarchies saw a bureaucratic class emerge that, in its time, served as a buffer between the people and the governors. Where their sensitivities were infringed, they were able to indulge in passive resistance – to question, to delay and to redirect the impact of orders from above, and so exercised a limited form of vertical accountability in a non-democratic environment.

Paradoxically, in the modern state, the bureaucratic class that emerged historically and which often served as a buffer to protect the citizens, has, in large part, itself become part of the problem. It has never been designed to be answerable to the people, and to some extent its upper echelons are themselves dependant on the political class. Yet in many respects the bureaucracies have wrested considerable power from the political élite, including such agencies as central banks, research boards, and commercial regulation. Thus, what started out as a barrier against the actions of despots can now be seen by the public as being itself despotic. In the end, the people feel that their will is disregarded, and the people's elected representatives lament the escape from their own control of a multiplicity of bureaucratic agencies.

In a democratic environment, the chances of vertical accountability succeeding would seem to be most favourable. In theory, those who govern and those who are governed are alike, with the rulers being chosen from among the people for finite terms, and entrusted with power only temporarily. If they govern badly, the people, the governed, can vote them out. If they abuse their powers the people can demand their punishment and/or resignation.

Yet despite this, the concept of vertical accountability has proved inadequate. Politics has become a profession, and as such has acquired its own rules and standards, to which the political class subscribes – those who govern and those contesting for power alike. Transparency vis-à-vis the people is seldom seen as being an advantage to the rulers, who have a vested interest in controlling what the governed know and precisely how what is going on is presented to them (hence the emergence of “spin doctors”).

Those who govern benefit when they can hide behind the technicalities of government and paint a less than accurate picture of their activities.

So it is that vertical accountability fails for several reasons - the people are not adequately informed of the activities of the governed; they have no power to investigate precisely what abuses may have taken place; and the process of elections is only periodic, so that even in free

7 Morgen H. Hansen, *The Athenian Democracy in the Age of Demosthenes*, Oxford, Blackwell, 1991. Ch. 8. Quoted by Biancamaria Fontana, supra. The court could vary from a few hundred citizens to over two thousand, depending on the importance of the matter in issue. Jurors were chosen by lot. The cases were argued by supporters and opponents of the measure in question. People were expected to argue their own case and the employment of professional speakers or advisors was prohibited.

elections an administration is judged on the totality of its performance over time as perceived by an electorate, rather than held to account for specific acts of abuse.

Guarding the guardians— and perpetual vigilance

The example set by leaders and high-ranking public officials is crucial to the achievement and maintenance of an effective national integrity system. But who will guard the guardians?

While the people’s courts in ancient Greece and ancient Rome could manage the task of “horizontal accountability”, the complexity of the modern state renders the formal exercise of popular surveillance unmanageable. There is, of course, a growing role for civil society in assuming this responsibility (aided by an explosion of information), as is discussed later in this Source Book. However, formal surveillance must depend on other mechanisms.

Checks and balances in building horizontal accountability

The objective in any integrity system is to build a system of checks and balances within the framework of agreed fundamental principles (usually enshrined in a written constitution or basic law). In effect, a self-sustaining “virtuous circle” is achieved, in which the principles at risk are all monitored, by themselves and by others.

This is “horizontal accountability”, which differs from “vertical accountability” in that the actors are accountable to each other across a horizontal plane, rather than accountable upwards in a hierarchical structure of diminishing width. In essence it means that no one person or institution is in a position to dominate the rest. As such, it constitutes a denial of the “absolute power” that corrupts “absolutely”, in Lord Acton’s famous maxim.9

However, a self-sustaining circle can be constructed based on integrity or on deceit. Every post-holder is potentially at risk—be it the head of government, a judge, an auditor or a junior official—although some are obviously more vulnerable than others, based on the value of the decisions they make and the processes they control. The challenge is to construct a transparent and accountable system, which has two primary objectives: the first is to prevent fraud from taking place, and the second to make the principal players believe that there is a realistic chance of fraud being detected.

Monitoring corruption cannot be left only to public prosecutors and to the forces of law and order. Action cannot depend solely on detection and criminal prosecution. Rather, action must include a combination of interlocking arrangements. In part, this approach includes improving the transparency of relationships, and to the extent possible, preventing the development of relationships which can lead to corruption. It includes transparency in the financial affairs of key players and the prospect of reviews being conducted by independent institutions which are likely to be outside any particular corruption network.

Although corruption can never be completely monitored, it can be controlled through a combination of ethical codes, decisive legal prosecutions against offenders, organisational change, and institutional reform.

9 “Power tends to corrupt and absolute power corrupts absolutely”. The observation was made in a letter from Lord Acton to Mandell Creighton, 5 April 1887.
Organisational change

Organisational change within the civil service can help minimise the opportunities for corrupt practices. Singapore, for example, began its successful anti-corruption programme in the early 1970s by instructing permanent secretaries (heads of government ministries) to make their officers aware of the government’s serious efforts to eradicate corruption and to advise them to report any cases of corruption.

The permanent secretaries were also requested to take appropriate measures in those departments particularly exposed to corruption. Such measures included:

- improving work methods and procedures to reduce delay;
- increasing the effectiveness of supervision to enable superior officers to check and control the work of their staff;
- rotating officers to ensure that no officer or group of officers remain too long in a single operational unit;
- carrying out surprise checks on the work of their officers;
- making the necessary security arrangements to prevent unauthorised persons from having access to a department’s premises; and
- reviewing the anti-corruption measures taken in three to five years with the aim of introducing further improvements.  

Programme and policy reform

Public programmes that are riddled with corruption can sometimes be reformed by their redesign.  

The first possibility, and often the best option, is programme elimination. Many countries have rules and regulations that, even if honestly administered, serve no broad public purpose. They can and should be discontinued (although this is to beg the question as to whether they were not designed in a complex fashion to create corruption opportunities for those who are administering them). Other programmes might serve a valid function in a well-functioning state, but are not effective where corruption is endemic.

Second, the programme’s basic purpose could be retained, but redesigned to make it simpler and easier to monitor. For example, if economic efficiency is a programme goal, then reforms could introduce legal market-based schemes. But simplification (e.g. reducing the number of steps needed to gain government approvals and payments for goods supplied) will not always reduce corruption if the rules are very rigid. Bureaucratic rigidity frequently breeds illicit behaviour on the part of both public servants and suppliers. Thus, simplicity will only work if it is not excessively arbitrary and if higher officials or independent enforcement officials aggressively pursue anti-corruption measures.

Privatisation (the removal of state-run enterprises to the private sector) can also result in a diminution of opportunities for corrupt practices, simply because private sector accounting methods and the need to operate to a profitable “bottom line” are strong incentives to man-

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agement to implement internal anti-corruption strategies. Some exponents of privatisation go so far as to argue that it is a form of cure for corruption. However, others view it as “taking a sledge-hammer to crack a nut”: there should be sound social, economic and political reasons favouring privatisation, apart from anti-corruption reform, before that path is pursued. In addition, there can also be a danger of creating a monopoly situation in the private sector through privatisation (e.g. of water and other essential public utilities) whereby corruption at the petty level may be eliminated but other abusive practices introduced.

If corruption is the result of a scarcity of programme benefits, the size of the programme could be expanded, perhaps converting it into an entitlement initiative. However, ending scarcity does not necessarily end corruption. Officials will still need to decide who qualifies to benefit from the programmes. Thus, the government would need to articulate clear standards that can be easily evaluated by outsiders. If programme entitlements are clearly specified, both in duration and character, and the state is prepared to uphold these rights, bribes are less likely to be sought or paid. Once again, the reforms must match the country’s capacity.

"Positive silence"

Recent reforms in Bolivia include publicising procedures and costs. All government offices will have to display posters explaining the required paperwork and the exact costs of each transaction, to prevent government employees from demanding bribes.

“Positive silence” is also introduced whereby citizens applying for occupational licences, car registrations or other government certificates will be considered to have had their applications automatically approved if they are not rejected within 15 days. The expression “Come back tomorrow,” is famous in Bolivia. What it really means is “Come back with money.” Under the reforms, if citizens are asked to “come back” they need only wait 15 days to invoke "positive silence".

Involving civil society

Where genuine attempts to combat corruption have been unsuccessful, there has generally been one missing ingredient - the involvement of civil society. The Times of India has observed that: “People’s acceptance of corruption as a fact of life and their general despondency need to be tackled first.”13 Most people in civil society have a fundamental interest in an effective integrity system: the private sector, religious leaders, the press, the professions and, above all, the ordinary citizen who bears the brunt of corruption on a daily basis.

Civil society involvement is crucial to the success of any anti-corruption strategy, and this Source Book gives examples from around the world of ways in which civil society is starting to play a more meaningful role.14

Some of the solutions lie within civil society itself - for example, the need to reverse public apathy or tolerance of corruption. But civil society is also part of the problem. State activities

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12 “Bolivia paves the anti-corruption road”, Miami Herald, 30 September 1998. Posting fees in public places, however, has not worked in Nigeria. The posters are ignored, and although the public know what they should be paying, they continue to be forced to pay extras to officials (conversations with Tom Sawyer, August 2000).


14 Indeed, civil society has done so in the past. See the concluding discussion in the chapter on the role of the private sector. Once anti-bribery legislation was passed in the UK in 1906, a number of its supporters formed an NGO, the Secret Commissions and Bribery Prevention League of which “practically all the leading bankers, merchants and traders” were members. The League monitored implementation of the new law, often bringing prosecutions itself. This, coupled with the stiff sentences the judges gave to the convicted, brought about a discernible change in attitudes. A similar Anti-Bribery League was established in Germany.
do not take place in a vacuum.\footnote{See the discussion of James Coleman, \textit{Foundations of Social Theory} (Cambridge, Mass: Belknap Press, 1990) in Vito Tanzi, \textit{Corruption, Governmental Activities, and Markets} (IMF Working Paper, August 1994).} It is often the general public that is paying the bribes. The point of interface between the private and the public sectors is also often the point at which grand corruption flourishes and the largest bribes are paid.

Thus, any attempt to develop an anti-corruption strategy that fails to involve civil society is neglecting one of the most potentially useful and powerful tools available. Of course, in many countries where corruption is rife, civil society is weak, apathetic or only in the early stages of mobilisation and organisation. These are not reasons to neglect its role, however, as the very involvement of an emerging civil society can, of itself, provide strength and stimulus for the further development of an anti-corruption strategy.

However, this is not to suggest that non-governmental organisations are wholly without their own problems, both of corruption and of credibility. Many have been established simply as a means for accessing funds from development agencies; many conduct their affairs without transparency and with an absence of accountability. Some, indeed, are little more than criminal enterprises dressed in the garb of civil society. Not only do such discreditable organisations engender public distrust of civil society as a whole, but they also arm critics, in powerful positions, who wish to ensure that civil society is disempowered. It is perhaps a good starting point for civil society to first examine the legitimacy and standards of its own key institutions and determine ways of strengthening their own integrity.

Civil society can hardly demand higher standards from those in government than it is prepared to set for itself.
Chapter 4

The National Integrity System

The structure has been erected by architects of consummate skill and fidelity; its foun-
dations are solid; its compartments are beautiful as well as useful; its arrangements
are full of wisdom and order; and its defenses are impregnable from without. It has
been reared for immortality if the work of man may justly aspire to such a title. It may,
nevertheless, perish in an hour by the folly, or corruption or negligence of its only
keepers – the people. Republics are created – by the virtue, public spirit, and intelli-
gence of the citizens. They fall, when the wise are banished from public councils,
because they dare to be honest and the profligate are rewarded, because they flatter
the people, in order to betray them.

Dr. Sachidanand Siha while presiding at the inaugural
session of India’s Constituent Assembly, 9 December 1946.

The case for reform

Corruption undermines democratic development, inhibiting the performance of public institu-
tions and the optimal use of resources. It feeds secrecy and suppression. Ultimately, it denies
development and an increased quality of life to the most vulnerable members of society. While
corruption might, at least in theory, be tamed in an autocratic and dictatorial manner using a
“big stick”, the inexorable decline into corruption and other abuses of power on the part of
totalitarian administrations suggests that this can only be temporary. The promotion of
national integrity across the board is crucial to any process of sustainable reform. By raising
levels of national integrity, corruption can be reduced; and this approach is vital if other
efforts to promote sustainable and equitable development are not to be undermined.

Consequences of corruption

As is well-known, corruption engenders wrong choices. It encourages competition in bribery,
rather than competition in quality and in the price of goods and services. It inhibits the devel-
opment of a healthy marketplace. Above all, it distorts economic and social development, par-
ticularly damaging in developing countries. Too often, corruption means that the world’s poor-
est, who are least able to bear the costs, must pay not only for the corruption of their own
officials, but also for that of companies from developed countries. Moreover, evidence shows
that if corruption is not contained, it will grow, and grow exponentially. Once a pattern of suc-
cessful bribes is institutionalised, corrupt officials have an incentive to demand larger bribes,
engendering a “culture” of illegality that in turn breeds market inefficiency. Once the moral
authority of managers is lost, through corruption at higher levels, their ability to control their
subordinates evaporates.

At the conceptual level, there are many costs associated with corruption. However, it is hardly
surprising that there is little hard evidence on the incidence and magnitude of corruption. Sur-
vveys of business people indicate that the problem varies widely across countries and that even
within countries, some public agencies (for example, customs and tax collection) are more prone to corruption than others. Surveys also indicate that, where corruption is endemic, it imposes a disproportionately high cost on small businesses. Most importantly, the heaviest cost is typically not so much in the bribes themselves, but rather in the underlying economic distortions they trigger and in the undermining of institutions of administration and governance.

The argument is not simply a “moral” or “cultural” one. “Grand corruption”,¹ (the huge bribes and commissions offered or paid by businesses in industrialised countries in their quest for government orders in the developing world and countries of central and eastern Europe), needs to be contained for practical reasons. Faced with the challenge of maintaining or improving standards of living, no country can afford the inefficiency that accompanies corruption. Emerging democracies, in particular, brave considerable political risks if corruption is not contained, as the corrupt can greatly weaken the authority and capacity of the fledgling state.

Curiously, there are still those in the North who believe that bribes speed up the delivery of services from a corrupt administration and who argue that corruption can help grease the wheels of a slow-moving and over-regulated economy. Surveys in Tanzania reveal the opposite: once a person has identified himself as being willing to pay bribes, other gatekeepers appear to be alerted, so that the person is delayed and subjected to additional forms of extortion as he or she proceeds. By way of contrast, those who refuse to pay at the first “gate” are earmarked as non-payers and therefore not worth the time and energy for others to try to exploit. Evidence also indicates that corruption increases the costs of goods and services, promotes unproductive investments, and leads to a decline in the quality of infrastructure services.

Corruption reports unfold in the news media on a daily basis and demonstrate corruption is not exclusively, or even primarily, a problem of developing countries. Recent events in Europe and North America have shown all too clearly that corruption is a topic on which the developed countries have no cause to claim the moral high ground. Developed countries play a major role as “bribe givers” in international business transactions, and they experience domestic corruption, particularly political corruption, as a growing phenomenon.

**The response to the challenge**

Initiatives to improve standards of governance worldwide have until recently overlooked what promises to be the most significant approach of all: the systematic and conscious fashioning of a country’s “National Integrity System”. Even the expression is of recent origin, having emerged from discussions within the Transparency International movement and widely popularised by development agencies.

While the basic concepts and foundations of an integrity system need to be clearly understood, it is equally important that the resulting solutions be grounded in reality and practicality. More than this, the solutions must relate to the other parts of the overall system; hence the need for an holistic approach. Many anti-corruption strategies have failed because they have been too narrowly focused. There are no simple solutions.

**But what is a “National Integrity System”?**

It is generally accepted today that modern government requires accountability. Without it, no

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¹ The expression “grand corruption” was coined by the West Indian-born British businessman George Moody-Stuart, First Chair of TI-UK (the UK National Chapter of Transparency International).
system can function in a way which promotes the public interest rather than the private interests of those in control.

Basically, the task in developing countries and countries in transition, is to move away from a system which is essentially top down: one in which an autocratic ruling elite gives orders which are followed, to a greater or lesser degree, by those down the line. The approach is to move instead to a system of “horizontal accountability”; one in which power is dispersed, where none has a monopoly, and where each is separately accountable.

In such a system, there must be a free press. But the press must respect certain limits imposed by law – for example, avoiding defamatory attacks on individuals. For even a free press is accountable, not only perhaps to a Press Council (which may or may not be a statutory body) but also, and ultimately, to the courts. For their part, the courts are no longer ‘servants’ of the ruling elite, but rather act with independence and enforce the Rule of Law, and the rule under the law. Yet such independence is not absolute – Judges are answerable for their individual decisions through a system of appeals, and each Judge is accountable for his or her integrity and competence to another body, be it a parliament or a judicial services commission. That body, in turn, is accountable elsewhere, and ultimately to the people through the ballot box. So do the strands of accountability link the various elements, or “pillars”, and in such linking they brace and strengthen each other.

Under a system of “horizontal accountability” a “virtuous circle” is perfected: one in which each actor is both a watcher and is watched, is both a monitor and is monitored. A circle avoids, and at the same time answers the age-old question: “Who shall guard the guards?”.

But creating a “virtuous circle” is easier said than done. Age-old traditions and training have to be turned on their heads, and the process is obviously one which is likely to take a generation, if not generations, to perfect. Even then, ultimate perfection will always be elusive.

While the contemporary wave of democracy has held much promise, in practice, democratic gains are being threatened and undermined by some of the very phenomena that were intended as democracy’s victims: corruption, abuse of power and nepotism. Simply to democratise is to introduce a different form of vertical accountability - downwards, rather than upwards. But the need to refashion instrumentalities of governance runs very much deeper than simply moving from a totalitarian system to one in which the people periodically have a voice.

The shift is thus from a system of vertical responsibility - be it the tyrant or the leadership of the one party state - to one of horizontal accountability, whereby a system of agencies of restraint and watch-dogs are designed to check abuses of power by other agencies and branches of government. These include: the courts, independent electoral tribunals, auditors-general, central banks, professional organisations, Parliaments (and Public Accounts Committees), and a free and independent media.

However, the passage of transition is slow and painful. In some societies it has been a question of rehabilitating what was once there before; in others, notably in Eastern Europe, it can be a question of constructing the modern state literally from the ground upwards. There are no institutional memories of times of horizontal accountability, no living memories of how things once were, and could be again.

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2 The origins of horizontal accountability are discussed in Chapter 3.
Such accountability mechanisms, when designed as part of a national effort to reduce corruption, comprise an integrity “system”. This system of checks and balances is designed to achieve accountability between the various arms and agencies of government. The system manages conflicts of interest in the public sector, effectively disperses power and limits situations in which conflicts of interest arise or have a negative impact on the common good. This involves accountability, transparency, prevention and penalty.

An integrity system embodies a comprehensive view of reform, addressing corruption in the public sector through government processes (leadership codes, organisational change, legal reforms, procedural reforms in bureaucracies etc.) and through civil reforms. Even if corruption is endemic, it tends to be the result of systemic failures. The primary emphasis is on reforming and changing systems, rather than on blaming individuals.

Some readers of earlier versions of this Source Book have suggested that it adopts an old-fashioned, “top-down” approach to reform which is out of keeping with contemporary thinking. However, this misses the crucial point. As appears below, the whole edifice of government is sustained and its integrity maintained (or undermined) by a bottom-up process. As is often observed, ‘the fish may rot from the head’, and corruption may filter down through poor leadership examples and practices but, it is public awareness and, where warranted, public outrage, that is a society’s ultimate defence. Where all else fails, the final sanction is revolution. However, the assumption underlying the approach advanced here, is that evolution, not revolution, can be an effective and a preferable route to society participation - through democratic processes and involving the private sector, media, professions, churches and mosques, as well as NGOs. Thus, reform is initiated and sustained not only by politicians and policy makers, but also by members of civil society.

Reform programmes, particularly those in developing countries and countries in transition which have been supported by international or donor agencies, have tended to focus on a single area to the exclusion of others. These are “single pillar” strategies. Frequently the choice has been made of a “pillar” that is relatively “safe”, at the expense of addressing more difficult and more challenging areas. Certainly, a “National Integrity System” reform programme can accommodate a piecemeal approach, but this must be coordinated and within the bounds of an holistic programme which embraces each one of the relevant areas, and their inter-relationships with others.

Underpinning the integrity system approach is the conviction that all of the issues of contemporary concern in the area of governance — capacity development, results orientation, public participation, and the promotion of national integrity — need to be addressed in a holistic fashion. The overall goals should include:

- Public services that are both efficient and effective, and which contribute to sustainable development;
- Government functioning under law, with citizens protected from arbitrariness (including abuses of human rights); and
- Development strategies which yield benefits to the nation as a whole, including its poorest and most vulnerable members, and not just to well-placed elites.
Building a coherent National Integrity System

The Goal

The ultimate goal of establishing a National Integrity System is to make corruption a “high risk” and “low return” undertaking. As such, the system is designed to prevent corruption from occurring in the first place, rather than relying on penalties after the event.

Every country already has a “National Integrity System” of some description in place, however corrupted and however ineffective it may be. The concept helps to focus reformers on the holistic viewpoint. As we shall see, it is not enough to address a single element or “pillar” of the system in isolation to others. For instance, recently considerable work in Kenya has strengthened the operational capabilities of the Office of the Auditor-General. However, although widely featured in the media, the Auditor-General’s highly-professional reports have since been simply ignored, as the rest of the “system” is still effectively dysfunctional.
The Institutional Pillars of the National Integrity System

Picture, if you will, a “National Integrity System” as being rather like a Greek temple: a temple with a roof - the nation’s integrity, supported at either end by a series of pillars, each being an individual element of the National Integrity System. At one end of the temple are the institutional pillars – the Judiciary, the Parliament, the Auditor-General’s Office, the Ombudsman, free media, civil society and the like. At the other end of the temple, the pillars represent the core tools which the institutions must have at their disposal to be effective. For example, the media must have a right of freedom of speech; and civil society the legal space in which to organise itself and conduct its business.

Resting on the roof are three round balls: “quality of life”, “Rule of Law” and “sustainable development”. They are round balls to emphasise that it is crucial that the roof be kept level if these three round balls and the values they encompass are not to roll off.

The “temple” itself is built on and sustained by foundations which comprise public awareness and society’s values. If public awareness is high and values are strong, both will support the “pillars” which rest on them, giving them added strength. On the other hand, if the public is apathetic and not watchful, or if the values are widely lacking, then the foundations will be weak. The “pillars” will be empty and ineffectual, and lack the underpinning necessary if they are to safeguard the nation’s integrity.

The “pillars” are interdependent but may be of differing strengths. If one pillar weakens, an increased load is thrown onto one or more of the others. If several pillars weaken, their load will ultimately tilt, so that the “round balls” of “sustainable development”, “Rule of Law” and “quality of life” will roll off, crash to the ground and the whole edifice collapse into chaos.

The actual “pillars” may and will vary from society to society. Some will be stronger; some will be weaker. But there will always be trade-offs to accommodate this. For instance, in Singapore, a comparative lack of press freedom is compensated for by an intrusive anti-corruption bureau.

While there are variations around the world, the most usual “integrity pillars”\(^3\) of a society which is seeking to govern itself in an accountable fashion include:

- Executive;
- Parliament;
- Judiciary;
- civil service;
- “watchdog” agencies (Public Accounts Committee, Auditor-General, Ombudsman, Police, Anti-Corruption Agency, etc.)
- civil society (including the professions and the private sector);
- mass media;
- international agencies.

\(^3\) The “integrity pillars” were first presented as such by TI’s Ibrahim Seushi in Tanzania. They have since found their way into a growing body of literature.
The “Rules and Practices” Pillars

Complementing each of the National Integrity System institutional “pillars” are core “rules and practices”. These rules and practices comprise the “toolkit” employed by, or underpinning, the various institutions. The absence of core rules and practices are clear indicators of weakness. They are not necessarily confined to any single particular pillar, as the following illustrates:

<table>
<thead>
<tr>
<th>Institutional pillar</th>
<th>Corresponding core rules/practices</th>
</tr>
</thead>
<tbody>
<tr>
<td>Executive</td>
<td>Conflict of interest rules</td>
</tr>
<tr>
<td>Legislature/Parliament</td>
<td>Fair elections</td>
</tr>
<tr>
<td>Public Accounts Committee (of legislature)</td>
<td>Power to question senior officials</td>
</tr>
<tr>
<td>Auditor General</td>
<td>Public reporting</td>
</tr>
<tr>
<td>Public service</td>
<td>Public service ethics</td>
</tr>
<tr>
<td>Judiciary</td>
<td>Independence</td>
</tr>
<tr>
<td>Media</td>
<td>Access to information</td>
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<tr>
<td>Civil society</td>
<td>Freedom of speech</td>
</tr>
<tr>
<td>Ombudsman</td>
<td>Records management</td>
</tr>
<tr>
<td>Anti-corruption/watchdog agencies</td>
<td>Enforceable and enforced laws</td>
</tr>
<tr>
<td>Private sector</td>
<td>Competition policy, including public procurement rules</td>
</tr>
<tr>
<td>International community</td>
<td>Effective mutual legal/judicial assistance</td>
</tr>
</tbody>
</table>

The rules and practices are not, of course, exclusive to the institutional pillar to which they are assigned above. The media must have freedom of expression, but this has been assigned, somewhat pragmatically, to civil society, as it is also a core requirement for civil society. Records are crucial for an Ombudsman, but are also at the heart of accountability and so of prime concern to the watchdog agencies. Some indicators that are also important are subsumed in others in this list: e.g. whistle blower and complaints mechanisms may be regarded as being covered by freedom of speech and public service ethics. In their totality, the institutional pillars in the left-hand column together with the rules and practices in the right-hand column comprise a basic National Integrity System.

Establishing a sound National Integrity System requires the systematic identification of gaps and weaknesses, as well as opportunities for strengthening or augmenting each of these pillars into a coherent framework. If the system is wholly dependent on a single “pillar” such as, perhaps, a “benign dictator”, or only a very few of them, it will be vulnerable to collapse. The system may give the outward appearance of functioning in the short term, for instance in the case of clean-ups conducted by military governments on the overthrow of corrupt civilian regimes, such as that under way in Pakistan. However, the lack of a functioning integrity system ensures progressive decay, unless there is also a timely move toward accountable governance.

The National Integrity System approach unlocks a new form of diagnosis and potential cure for corruption. Instead of looking at separate institutions (e.g. the Judiciary) or separate rules and practices (e.g. the criminal law) and then focusing on stand-alone reform programmes, we start to look at inter-relationships, inter-dependence and combined effectiveness in an holistic approach. For example, what is the benefit of a sound and “clean” Judiciary ready to uphold the Rule of Law, if there is corruption in the police, investigators, prosecutors or the legal profession? The Judges would simply not receive the cases they should hear; they would then sit in splendid isolation - honest, capable, yet able to achieve little.

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4 For example: Independent Commission Against Corruption (ICAC), New South Wales, Australia
The National Integrity Workshop

One of the best mechanisms by which a National Integrity System can be systematically examined and overhauled is through the National Integrity Workshop. This has the overwhelming advantage of bringing together the various stakeholders – officials and interest groups that may otherwise seldom, if ever, meet – and providing a broad ownership of the process, an essential for success.

It must be stressed that this approach was not formulated in western capitals or by donor agencies. It emerged as groups in Uganda and Tanzania began to address their domestic problems, and was the product of interaction within and between both countries.

A National Integrity Workshop takes as its starting points:

- the premise that people living in a country know and understand their problems far better than any outside expert. No outsider can better understand the social dynamics, the history and the political realities that underlie the incidence of corruption in a society, than can its own members. And the expression “members” embraces civil society (including the private sector), no less than government;
- that the issue of integrity transcends the divides of political parties and so should be something upon which all can agree;
- that without the active participation of leaders from all fields of government and civil society, meaningful reforms are unlikely to be achieved; and
- that without the support of civil society, any anti-corruption reform initiative by a government is likely to lack credibility and be unlikely to succeed, let alone be sustainable in the longer term.

The exercise therefore is wholly conceptualised, driven and owned by the local participants. Contributions from outsiders take just two forms: facilitation of the process, as outlined below, and learning themselves so that experience gained can be disseminated for the benefit of similar exercises in other countries. It also involves not just the “stakeholders” from within government as identified from the integrity “pillars”, but also non-governmental organisations, including business groups and professions, the media and political parties from across the political spectrum.

The general pattern has been for a group to be assembled, bringing together people with decision-making powers, and with each of the “pillars” having written a short paper on how corruption presents their particular institution with a challenge, and how they are responding to it. The workshops are further informed both by reports of similar workshops held in other countries (useful for ideas and approaches) and by this Source Book (in some cases translated into a local language). To sharpen the discussions, the facilitators, together with the organisers, formulate a short series of challenging, clearly-focused questions for small groups to consider, along with any additional questions which the participants themselves may suggest.

So it is that, over a period of two or three days, a series of small group discussions take place (maximum 15 people per group), serviced by a facilitator who captures the essence of the discussion. The tasks of each group are to diagnose a particular problem and to prescribe practical solutions that are within the competence of those at the table, for example not calling for across-the-board pay raises for all public servants or for changes to the constitution etc.

Each topic is dealt with in a reporting back session, followed by a short plenary discussion. From the totality of the reporting back and a final “action planning” session, an “action plan”
emerges. Practical measures are identified, responsibilities for follow-up action assigned to people who are present and a time-table for action agreed upon. This, then, forms the basis for a follow-up workshop in perhaps 12 to 18 months’ time, to assess progress, identify obstacles and to refine the action plan in the light of experience and of changing circumstances.

A further feature of national integrity workshops has been the emergence of “integrity pledges” to which all present subscribe. The first, in Tanzania, constituted a challenge to the candidates for the presidency to commit themselves publicly, and in advance, to programmes of reform and to declare their personal assets and those of their spouses publicly upon election. Benjamin Mkapa, in 1995 newly elected as President, subscribed to the pledge and has lived up to it. When he disclosed his assets, it created a tidal wave of interest not only within Tanzania, but throughout sub-Saharan Africa and beyond. Since then, pledges have been widely used, most conspicuously in Papua New Guinea, where in a recent election, various political parties signed pledges live on television. Pledges have served both to place the issue of integrity squarely on the political map and to provide critics with a weapon against those perceived as having breached the pledges. The pledges in Papua New Guinea, for example, are referred to in parliamentary debates.⁵

None of this is to suggest that the process of reform is an easy one, or that quick and sustainable results are immediately achievable. Each society has to own its reforms and be committed to them. There is little evidence to suggest that, in the area of promoting integrity, external actors, whether individual governments or multilateral agencies, can force the pace of sustainable change in any given country. However, outside pressures may be helpful in encouraging an internal debate and building coalitions for reform within a country. For instance, conditions attached to loans by international financial institutions may force the release of information which has previously been kept secret by corrupt government administrations. The withholding of loans by financial institutions to administrations which are likely to misappropriate them, is also helpful as well as sensible.⁶ While these external actions are useful in promoting integrity, the essential dynamic must be an internal one.

Similarly, the role of outside “experts” is the limited one of facilitator. They can inform and provide guidance as to what may have been found to work in other countries, but they cannot prescribe. People know their own societies best. There is a plethora of evidence to show that prescriptions by external “experts” fail to take root and flourish. Rather, such interventions tend to be based on a relatively unsophisticated implanting of approaches taken from one country and applied to another. In the processes described above, there is a clear and effective role for such “experts”, but as mentors, rather than as prescribers; as providers of ideas and concepts, not of solutions as such. Their role has to be contained to ensure that an internal dialogue takes place, and not an intrusive lecture by an external source on how other countries have approached similar problems, which may have little, if any, relevance to the challenges facing the country concerned.

Above all, the reforms must be sustainable. The system must be able to cope with and contain the pressures that are placed upon it by changes of government. This process is likely to be slow, often frustrating and never-ending, as there can be no “perfect solution”. Fresh challenges to

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⁵ The pledges had been prepared and publicised by TI-PNG.
⁶ There are two points here. First, loans are repayable by people, not by governments which change. At the end of the day the debts are expected to be repaid. TI therefore sees International Financial Institutions (IFIs) as having a fiduciary responsibility to ensure, to the extent that they can, that loan moneys are not misappropriated. Second, multilateral institutions have traditionally viewed themselves as extensions of, and being subject to, the dictates of governments. Since governments change and are supposed to be owned by the people and societies they are intended to serve, the true “owners” of the institutions, in TI’s view, are the people themselves. While it is recognised that the governing bodies of the institutions are nominated by governments, the institutions themselves should be infused and informed by an understanding that their (continuing) role is to serve peoples, not the whims of (temporary) political masters.
an integrity system will be made, as new ways are found of circumventing it. Reforms, too, will be needed, as comfortable old assumptions are reappraised and found wanting. For example, in Britain, there has been controversy over whether it is appropriate for senior judges and senior policemen to be members of secret societies, the Masonic Lodges. This has yet to be resolved. Furthermore, in many developed countries there are serious questions now being asked about the financing of political parties and about the activities of political lobbyists.

To achieve reform, a coalition has to be built around a consensus in support of concerted action. It must draw in the various “stakeholders” from civil society no less than from the formal state apparatus, and it must gain their commitment to a concrete action plan. The agreed reform programme must move forward with a very clear vision of how the people would like to see their country governed, not just for the present or the immediate future, but for future generations.

This Source Book is designed to help these processes. It does not attempt to offer easy or off-the-shelf answers. Each country, each society, will need to fashion its own instruments of accountability, relevant and appropriate to their own settings and aspirations. It seeks to learn from experience and to capture information which may not otherwise be readily available. Above all, it is designed to provoke and promote informed discussion, as the process of rebuilding and refurbishing continues.
Chapter 5

Building Political Will

Whatever is morally wrong can never be politically right.

Abraham Lincoln

Perhaps the most elusive of all the lessons we have sought to learn has been the building of political will.

Participatory approaches to fighting corruption, and especially the importance of active involvement by civil society and the media, are now generally accepted as fundamental to any successful anti-corruption reform programme. However, political will is frequently the missing ingredient.

It follows that citizens, as the beneficiary of reforms, should not merely be passive recipients of the outcome of reforms, but should be active advocates for reform and guardians of the process throughout. However, demands for reform will only come from politically conscious citizens who understand their rights and the responsibilities of their representatives, and this in turn demands the raising (and sustaining) of the level of public awareness.¹

It is important to view political will as not simply the “will of politicians” and those overtly in the political life of the nation. Rather we should be looking at leaders in all walks of life - professional groups, the private sector, trade unions, religious institutions and other civil society groups, to name but a few - and seeing how these can be energised in the cause of containing corruption and furthering integrity. The starting-point does not have to be at the highest echelons of power, but unless clear and unambiguous signals of support are emanating from the top, those responsible for administering and enforcing crucial aspects of the country’s national integrity system may well feel inhibited.

Certainly, the process of building political must culminate in energising key figures in political life. A lack of political will should not be surprising in a country where political office is seen as the quick route to acquiring personal riches. As a means of self-service, not public service. As a means of benefiting one’s family and clan rather than the nation as a whole. Indeed, the reasons why people go in to political life in the first place are important issues for public debate.

A principal challenge in assessing political commitment is the ability to distinguish between reform approaches that are superficial and designed only to bolster the image of political leaders, and those which are substantive efforts to create real and sustainable change. Some well-intended regimes have engineered their own destruction through inept or ineffective strate-

¹ A special section of the Internet version of this Source Book is capturing best practice in this area: http://www.transparency.org.
gies, and some exploitative rulers have successfully hidden their motives behind a façade of cosmetic measures.

**Political risk**

Without doubt, political risk is a very real constraint. Because corruption is frequently a systemic problem (as opposed to occasional public servants exploiting opportunities), only comprehensive reforms can be effective in reducing it. But a comprehensive reform package contains inherent unpredictability and risk for leaders. Frequently, within a year or so after a country has implemented price liberalisation, its Prime Minister or Finance Minister, or both, have been involuntarily removed from their jobs. Such possibilities must weigh heavily in the minds of political leaders. This is not necessarily a criticism. Politics is, indeed, “the art of the possible”, and for the good to fail through being overly ambitious may only be to open the door for the less dedicated to return to office.

It is also the case that those who rise to the higher levels of political leadership will, all too frequently, have compromised themselves in a variety of ways - not least in the area of political campaign financing. The developing world is not alone in this being the weakest link of all in a country’s integrity system. Recent scandals in Western European countries, Belgium, France and Germany among them, point to the particular vulnerability of politicians in the area of campaign financing.

So the questions are posed: Can “political will” be consciously created? Or does it emerge in the form of individual champions who may have previously and consciously concealed reformist tendencies as they rose to the top? If it can be created, how can we identify the likely ingredients for building it?

**Bottom up...?**

Raising awareness at the grass-roots level is one starting point. Transparency Mauritius in 1999 published and widely distributed a booklet, *No to Corruption, Yes to Integrity*, that was distributed by a major national newspaper as a free insert so that their message reached a wide cross-section of a highly-literate developing country. World Comics, a Finland-based NGO, promotes the use of comics as a cost-effective medium for education. The National Democratic Institute in Thailand has developed creative educational initiatives which seem to be effective in creating political consciousness at the grass-roots level. These include musical performances, radio drama, street theatre, puppet shows and art contests. The Thai programme has also hosted “village forums”, discussions groups to encourage citizen advocacy.

Surveys, too, and Bangalore-styled “Report Cards” can assist in the process of building an awareness of what is going on and what the costs of maladministration may be. Non-Governmental Organisations (NGOs) can also challenge the political establishment by conducting surveys of the views of political parties on the issue of corruption and ask what, in power, they would be prepared to do about it. These political surveys may have success (as they did in Papua New Guinea) where political parties recognised the need to publicly endorse the need for reform, but equally they may be seen as a threat best ignored (as has happened in Malaysia,
where the ruling coalition remained silent and only opposition parties responded).\textsuperscript{4} Initiatives in Papua New Guinea in this field have, in turn, led to the development of a series of public-private partnership projects aimed at containing corruption.

These are examples of reformers from civil society developing and articulating a specific agenda for reform (e.g. statutory reforms and implementing procedures), and then publicising it widely. In this way the public then have something concrete to rally around, rather than simply to continue with vague and unfocused calls for change.

The task of building political will does not end with a government embarking on a course of reform. It must then be sustained through the often-difficult times that lie ahead. Public expectations must be managed and kept realistic. Systemic corruption, the bane of the people’s lives in many countries, will not disappear overnight. There will still be high-level scandals, as changes in behaviour take time to achieve.

When a government is interested in reducing corruption, the civil society can be an active partner by demanding reforms that have clear and measurable performance goals, monitoring the reform process and making the government accountable. It can reinforce political will by helping to achieve desired results and building public confidence in the processes, thus encouraging political leaders to stay the course.

**Political will and the "watchdog" agencies...?**

Though technically “non-political” in nature, there is a broader political role to be played by the leaders of the official watchdog agencies. In some countries there may be opportunities for the leaders of key agencies to imprint themselves on the political establishment.

In many countries, however, such watchdog leaders must be prepared to pay a price as inadequate institutional protection can render them liable to summary removal. But if a potential loss of position is sufficient to coerce a “watchdog agency” to remain on safe ground, then the agency is self-defined as being “more watch than dog”. The consequences of removal can be personally devastating, and where this occurs it is vital that civil society and the public at large give the person who has been victimised their full support and encouragement.

Two recent incidents illustrate what can occur. In one, the Auditor-General of a small Pacific island state uncovered grave levels of corruption which involved the active participation of a number of cabinet ministers. The Ministers survived the criticism by launching their own attack on the Auditor-General with an inquiry into his use of overseas experts in the conduct of the audits. Driven from office and back in to private practice, he is reported to be a lonely figure, with potential clients afraid to patronise his accountancy firm for fear of being seen by the establishment as being “anti-government”. What role model is the political establishment encouraging? What message is there to successors in office? And should it be any surprise that, in this case, before long a Cabinet Minister was murdered when he tried to halt the corruption of his colleagues?\textsuperscript{5}

A second incident involved the Ombudsman in Vanuatu, who found her appointment not renewed after she had subjected several Cabinet Ministers to embarrassing scrutiny. To the

\textsuperscript{4} This is not to suggest that parties are automatically converted to the cause of containing corruption. Certainly, the Papua New Guinea experience in 1998 has been that after the elections, and despite very public “commitments” to reform programmes, certain political actors continued with malpractices. What TI PNG hopes will emerge from their exercise is a heightened awareness on the part of the voters of the venality of certain politicians. They hope that this will induce the voters themselves to defeat those politicians at the next election.

\textsuperscript{5} The events are discussed in the Chapter on the Auditor-General.
Shooting the messenger in Vanuatu…

The lasting memory of my experiences as (Vanuatu’s first) Ombudsman are those of finding and exposing evidence of corruption, and being vilified and targeted by the leaders of the government in power and their associates. The mudslinging and personal abuse were meant to destroy my credibility and block the way for my office. But I resisted and was able to eventually reintroduce the Ombudsman’s Act from the statute books – although another Act was passed by the government, which I successfully challenged in court.

No one resigned. No one was dismissed. No one was charged. No one was prosecuted. No one was arrested. No one was tried. No one was acquitted. No one was convicted. No one was sentenced to prison.

In my own case in the small South Pacific republic of Vanuatu - despite a Westminster style of democracy since Independence in 1980, and a history of almost universal Church attendance – I encountered all kinds of systematic misconduct and abuse of power, throughout the civil service to the very top of government.

Examples, which were detailed in dozens of public reports, included the illegal sale of passports; the misappropriation of cyclone relief funds; favourable loans from the country’s Development Bank caused by the non-repayment of loans by the government.

You may be asking yourself what was the result of such incendiary information coming into the public domain? Well, apart from one riot in the capital which saw the Provident Fund head office besieged, and numerous outraged letters in the press …nothing happened. No one resigned. No one was dismissed. No one was arrested. No one was prosecuted.

Responses to me as the “Messenger” varied from scathing personal attacks, derogatory and unconstitutional statements about my skin colour, my sex and my former nationality (French), accusations of being a “colonialist”, promises by government ministers on national TV and Radio to remove me from office, abusive attacks on me in Parliament, a death threat, and a successful private member’s bill to remove the Ombudsman’s Act from the statute books – although another Act was eventually reintroduced. Tiny Vanuatu, it would seem, is not so different, perhaps no different, perhaps no better or worse than many other countries, would seem, is not so different, perhaps no different.

The loneliness of the “lone ranger”

Tanzania is frequently cited as one of the countries where political champions have led the fight. However, from the outset, President Mwai Kibaki initially led the fight against corruption as a “one-man show”, without involving other stakeholders and without managing to build his own coalition for reform within his administration. Because he did not build a coalition by using a participative and inclusive approaches, he became more to resemble a “Lone-Ranger”, particularly after the Warioba Commission Report into corruption, commissioned by the President, was released to the public. Several people implicated in the Report were senior politicians, judicial officials, police and government officials, and the Mkapa administration has been criticised for failing to take actions against “big fish”. Although the administration can point to a whole series of actions taken against persons at lower levels, the apparent absence of ethics at the top (other than in the Presidency) has remained palpable.

At the time of writing, President Obasanjo of Nigeria, too, is enduring similar frustrations and obstruction. The populace is loud in their support of his anti-corruption drive, but with many Members of the National Assembly deeply involved in corrupt deals of one kind and another, the President is seen as standing almost alone.

From this we can see that political will seems to turn not only on the political and economic resources available to the champions of reform, but also on their perceived power and ability to muster solid support from both domestic and international constituencies.

Once political will is established at the top, how are leaders to impose ethical conduct on a systemically corrupt system? A public service which may well fudge, if not completely ignore, instructions received from the top? This is a question which has emerged and which awaits a practical answer.

The role of “outsiders” in building political will

It is now widely believed that donors can play a role to build political will in the short term by identifying anti-corruption “champions”, and providing the occasions, and possibly the protection they may need in order to act. This can be done by creating opportunities for political will to emerge, as well as by including anti-corruption strategies on the donors’ political and development agenda. The experiment undertaken in Kenya will be watched to see whether
it succeeds in unlocking a well-spring of political will, or whether it is simply a continuation of the pas-de-deux which the donors and ordinary Kenyans alike have found so frustrating.

The impetus for a reform programme has to be home-grown and home-owned - the initiative to fight corruption must come from within a country, not from outside. There have been many examples of donors trying to impose anti-corruption programmes on countries as pre-conditions for them to receive aid, and none can be regarded as having had the intended consequences.  

On the other hand, the notion that nothing can be done where there is no political will to fight corruption in a country at the leadership level can be very far from the truth. The will to fight corruption can reside in many locations - different branches of government, the political opposition, official watchdog agencies, civil society, international organisations, and both public and private sector institutions. Together they can form a powerful political constituency and provide leadership.

In 1999, The World Bank Institute began to develop an anti-corruption core course, “Towards Collective Action to Improve Governance”, in seven African countries. The course affirms that an inclusive and participatory approach in developing strategies to fight corruption is, indeed, critical to its success.

As a result of this initiative, “country participant teams” have become catalysts in their countries and are now taking concrete steps to address the problem of corruption. For some of the countries (such as Kenya) it was the first time that a full spectrum of stakeholders - government, anti-corruption agencies, the media, the private sector and representatives of civil society - had come together to develop comprehensive strategies for fighting corruption.

Starting afresh and with an empty worksheet, and at the same time building on their and others past experiences, each “country participant team” developed a detailed action plan of institutional reform in areas in which it had been difficult to realise tangible results to date. In all seven countries, the “country participant teams” have initiated meetings with other stakeholders to broaden their country’s anti-corruption coalition. For example, in Ghana, military officials have approached “country team members” expressing a willingness to join the coalition to fight corruption.

The impact of this approach will be watched keenly.
Timing

The key to the building of political will may be timing. And the crucial element in timing would be to choose a moment when changes in leadership or elections are taking place. These are times when active politicians will be keen to see themselves viewed by the public as being “anti-corruption” and on the side of reform. At these times, the winning of the right rhetoric will be at its easiest. Having achieved the right words, the challenge will be to hold the new leaders, or the newly-elected politicians, to their promises.

This will never be an easy task. But there will be the advantages of new players and new people with access to those who govern.

The matter does not end with the right people being placed in charge. That is where the reform processes start. Reform is a long-term process, and cannot be left to one man or women, or relegated to the political leadership alone. All must be involved, from ordinary members of the public to the highest leadership.

Throughout, the news of progress must be carried to a public likely, at least in the initial stages, to be suspicious and wary. They have reason to be. Their support must be won and this will take both time and patience. Careful, credible and correct reporting of progress is essential. Extravagant claims must be avoided, and the focus must be on ways in which people can see, in their daily lives, that things are actually getting better.

Then, a supportive public can generate an environment of expectation and participation which will, in turn, help sustain political will at the top.

As the slogan insists: Nothing Succeeds Like Success.
Chapter 6

An Elected Legislature

Those who talk about the peoples of our day being given up to robbery and similar vices will find that they are all due to the fact that those who ruled them behaved in like manner.

Niccolo Machiavelli, The Discourses, III (29)

An elected national Parliament or Legislature is a fundamental pillar of any integrity system based on democratic accountability. Its task, simply stated, is: to express the sovereign will of the people through their chosen representatives, who, on their behalf, hold the Executive accountable on a day-to-day basis. Likewise, a government gains its legitimacy from its having won a mandate from the people. The way in which this mandate is won is crucial to the quality of that legitimacy, and to the readiness of the citizens at home, and governments abroad, to accept it.

Watchdog, regulator and representative, the modern Parliament is at the centre of the struggle to attain and sustain good governance and to fight corruption. To be fully effective in these roles, Parliament must be comprised of individuals of integrity. If seen as a collection of rogues who have bought, bribed, cajoled and rigged themselves into positions of power, a Parliament forfeits whatever respect it might otherwise have enjoyed, and effectively disables itself from promoting good governance and minimising corruption – even if it wants to do so.

There will always be people trying to enter politics for the wrong reasons, in the pursuit of personal power and self-interest, and devoid of any real commitment to serve the public. These constitute a fundamental challenge to any integrity system, and special attention is needed if they are to be denied the space to achieve their illegitimate ends.

Elected Parliaments are the essence of democracy: indeed, democratisation in itself presents an opportunity to control systemic corruption by opening up the activities of public officials to public scrutiny and accountability. It has been suggested that democracies, more so than any other political system, are better able to deter corruption through institutionalised checks and balances and other meaningful accountability mechanisms. They reduce secrecy, monopoly and discretion. But they do not guarantee honest and clean government, nor do they eliminate all corruption. They can only reduce its extent, significance and pervasiveness.

1 Nor do they necessarily respect the laws they themselves pass with a fanfare and claim that they are to eradicate graft. For example, the Kohl affair in Germany, involved blatant breaches by the former Chancellor, of laws he had himself guided through the Legislature (Reuters, 26 January 2000).

Criminals win at the polls....

It appears that crime and corruption are non-issues for the voters of Bihar. All the underworld dons and scamsters who contested the polls either from behind bars or from hiding, were elected with big margins. For Surendran Singh, Ranjan Tiwary, Dhunmal Singh, Sunil Pandey, Munna Sukla, Zakir Ahmed, Suresh Pasi and Rama Singh, all accused of offences such as murder, kidnapping and extortion, the victory came easily as they did not have to bother personally about their campaign.... Former Minister for Road Construction Illayas Hussain, arrested by the Central Bureau of Investigation in connection with the bitumen scam, too, won by a handsome margin.

The victory of underworld dons is a clear indication that the expectations of the electorate have been changing with the collapse of the government machinery in the State. “It appears that the people have begun to revere criminals,” remarked a senior political leader....

Senior BJP leader Kailashpati Mishra and Samata Party leader Nitish Kumar defended their decision to field criminals on the grounds of their “winnability”....

Cover story, Frontline India, “The criminal background” by Kalyan Chaudhuri, 30 March, 2000

A West Australian MP who used his maiden speech to attack the Parliament’s “inequitable, discriminatory and over-generous” superannuation scheme, triggered reform. However, this still left it open to existing MPs to continue to benefit under the old scheme, a proviso which provoked public indignation. However, Labour MP Alan Carpenter, married with a young family, opted to refuse to benefit from the old scheme, at a personal cost in excess of US$300,000. “It was an easy decision because it’s the right thing to do and I’ve no regrets”, he said.

The Australian, 2 December 1999
However, this discussion pre-supposes that democratic institutions have been established and entrenched. As recent events have shown in the emerging democracies of Eastern Europe, a crucial test is whether the process of transition can be accomplished without corruption flourishing in institutional and ethical "vacuums" to the extent that it effectively aborts the whole experiment. It is therefore important, from the outset, to establish the ground rules necessary to achieve a Parliament with moral authority. This theme is dealt with in a later chapter, in a discussion on free and fair elections.

Corrupt legislatures feed cynicism

How high are the stakes? The continuing rash of corruption scandals in Western Europe, for one, is seen as likely to benefit extremist parties on both the right and the left. The nature of the political system in many continental European countries – with one or two large parties dominating governments for long periods of time – virtually guarantees that these scandals will continue for a number of years. Nationalists – and unreformed communists on the other side of the political spectrum – appear likely to benefit from the tainting of the "insider" parties, because they have for so long been on the "outside." This in turn could translate into significantly increased support for those fringe parties that choose to portray themselves as reformers of a corrupt political system.

Long years of party cooperation and – in the case of Austria – grand coalitions involving the two largest parties have fostered a climate of coziness with business interests, breeding opportunities for corruption... In one EU member country, Austria, Freedom Party Jörg Haider ran a successful political campaign in 1999, in part on an anti-corruption plank.... Haider doubled the Freedom Party’s share of the Austrian vote between 1985 and 1999, in part because of his inclusion of anti-corruption as a campaign platform. While extremist parties will not win elections on this platform alone, the corruption issue will give them a fertile voter base to draw on that dovetails nicely with their anti-EU, anti-outsider rhetoric.

Economic troubles would only serve to magnify the voters’ disgust with the traditional parties and will likely continue to plague large parts of continental Europe in the future. This means that we could easily see nationalist or other extremist parties increase their share of the vote into the 20 to 30 percent range, which is usually enough to win a share of power in parliamentary systems based on proportional representation.²

If corruption could pose such a threat to the “old democracies” (or at least those with proportional representation), the challenge corruption presents to emerging democracies can only be significantly greater.

A failure to separate "powers" between the Legislature and the Executive

A major weakness in the integrity systems of a number of countries – from Africa to Latin America – is simply that elected legislators have too much power. Their role is not confined to legislation and taxation: that is, to the passage of laws and to voting on behalf of the people to grant money to the executive, and then of ensuring that it is properly spent.

Rather, in these countries the legislators are actually and actively concerned with the grant-
ing of contracts and the spending of public funds. With such a confusion of roles – with the “watchdog” becoming the “burglar” – corruption festers and public cynicism abounds.

Where there is a clear separation of roles, and legislators are confined to the tasks of law-making and holding to account, such scandals are relatively seldom to be found. Problems arise with lobbying and with interest groups trying to ensure that legal frameworks are to their liking, but the scandals that are wreaking such havoc in such countries as Colombia and Nigeria are comparatively few.

It would be trite to suggest that the democracies where such a separation exists are immune from corruption problems. Recent experience in Europe makes this plain. However, these tend to involve the executive and party manipulations – inexcusable and undesirable as these undoubtedly are – rather than the more blatant instances of personal self-enrichment. Where self-enrichment has been involved it is usually the case that, within the parliamentary system, an elected Member of Parliament has become a minister or prime minister, and as such, a member of the executive. The abuses have occurred as a consequence of membership of the executive, not of Parliament. The failures have been those of control and accountability of the executive.

The role of political parties

Why do we have political parties? The answer lies in the nature of political power where groups of individuals congregate around particular leaders, with the group dynamic often wedded to particular lines of ideals and values. Political parties exist in any power structure, with differing degrees of visibility. They are simply the vehicle used in most countries to facilitate the electorate’s identification of different political persuasions, and to enable those aligned with a certain persuasion to organise their arguments and present their case to the people. Political parties serve a number of functions, including:

- aggregating the interests of diverse groups in society and articulating their demands, although their demands do not always reflect those of the public who can end up being short-changed in the process;
- serving as a link between the decision-making processes and the public;
- contributing to internal stability and peace by enabling various groups to participate in the political process in an orderly and predictable manner;
- playing a major role in the selection, training, grooming and promotion of generalist politicians; and,
- providing an orderly means for legitimate transfers of power.

Too many political parties, as in the case of newly-emerging democracies, can cause confusion and serve to divide rather than unite a society and thereby retard the processes of mobilisation and integration. Solutions to the problem of too many political parties have included:

3 An inquiry has revealed evidence that Nigeria’s lawmakers had embezzled more than 700m Naira (about $7.2million) in government funds. The report urged the Senate President to resign. Among other things he had helped himself to a “Christmas bonus” of $200,000; had spent $220,000 on furnishing his house; had acquired eight additional cars irregularly, in addition to the 30 official cars he had already acquired; and he had let contracts to a company in which he had an interest at inflated prices. [He was subsequently impeached.] Independent (UK), 3 August 2000.

4 Even within a no-party system (for example, in Uganda) and within a one-party state, such as those of latter-day Eastern and Central Europe or present-day China.

5 This is not to diminish the efforts of national reunification and reconstruction being made by President Museveni in Uganda. There, a decision has been taken to postpone the formal re-introduction of party politics, yet it is an open secret among the populace at large as to where the allegiances of members of the political class lie. It does, however, inhibit them from campaigning as a party.

Source Book 2000

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Colombia Suspends Lawmakers in Anti-Graft Probe

Colombia’s attorney general has suspended two top lawmakers from sitting in Congress and opened an investigation into allegations that they and five others headed a multimillion dollar graft scheme. Attorney General Jaime Bernal said he had also opened an investigation into the role five congressional staffers played in the corruption scandal. According to a list uncovered by government investigators in early March, the Chamber of Representatives spent millions of dollars on over-priced or phantom contracts, including some $49,000 building a new toilet and more than $56,000 ironing out millennium bug problems on New Year’s Eve.

Bernal said in some cases contracts were awarded to friends and relatives of lawmakers and that the Senate was not duly consulted on the most expensive contracts. Congress long has been viewed by ordinary Colombians as a hotbed of corruption. Earlier this month Pastrana said he would hold a nation-wide referendum in July aimed at dissolving Congress immediately and electing new lawmakers.

Reuters, Bogota, 4 February 2000
• the imposition of large financial deposits to limit the number of candidates who can be fielded, although this poses a significant hurdle for parties representing the poor and the dispossessed;
• placement of high thresholds on the number of subscribers required before a new political party can be registered; or,
• the imposition that there be only two parties, one to the left and one to the right. The latter was attempted in Nigeria in 1992 when it was imposed by the then-military regime – but the experiment failed when the military administration objected to the winning candidate and annulled his election as President.

It is also true that political parties can gain a significant and essentially non-democratic grip on public life and political power, acting as agencies of the state and degenerating into self-perpetuating oligarchies. Efforts to avoid this situation have focused on empowering the Electoral Commission to also preside over free and fair elections within party congresses, and separating the functions of a political party from those of a government to avoid a de facto administrative “merger.”

Paying the Piper – Can corruption endanger democracy?

Although political parties are private organisations, and often corporate bodies, who control their own membership and seek a political rather than a financial profit, it is in the public interest that they should be adequately funded and be held accountable, not only through the ballot box but also in terms of their practices and conduct.

Political parties are expensive to run. They need adequate funding for offices, staff, and for communication with the electorate to galvanise their support and deposits to cover election expenses, and to monitor all aspects of the election process to ensure a fair election process.

It is generally considered legitimate for those involved in political activities to raise money from their supporters – at least to some extent. If they have no supporters, they will have no resources and so unwanted and unnecessary political parties will quickly (and beneficially) wither on the vine.

However, small donations from large numbers of individuals are expensive to collect and in most democracies, the principal source of funding for political parties is the private sector. This is particularly critical when a general election is called. The principal reason why an individual or company would agree to fund a political party is the expectation of enjoying the patronage which that political party will offer, whether in the form of appointment to a public office or parastatal institution or the award of lucrative construction, service or supply contracts, if the party is elected to office.

Often, much of the money that finds its way into the coffers of political parties is illicitly acquired or undeclared to tax authorities. In some countries, criminal elements have found it more attractive to run for office when secure in the knowledge that they will enjoy immunity from suit or legal process if they are elected.

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6 For example, the electoral law of 1992 in Ghana.
7 Unfortunately, the latter-day history of democracy is also one of trying to control corruption in election expenses. For example, New Zealand’s original electoral legislation was the Corrupt Practices Prevention Act of 1881.
8 Of course, political parties need more than money. They need energetic and enthusiastic volunteers to organise meetings, campaign in the streets, etc. Where parties are relatively poor, they may well be able to make up in numbers of volunteers what they may lack in funding.
9 Often quoted is an example from Russia where an accused but popular fraudster escaped prosecution on serious fraud charges simply by engineering his election to the State Duma before the trial could begin. See TI Newsletter, December, 1995.
The entry of substantial sums of illicit money also enables political parties to subvert the electoral process by engaging in questionable practices (for example, an advertising blitz). This dependence on the private sector for its funding invariably inhibits even well-intentioned, reform-willing political leaders from pursuing an anti-corruption strategy that would result in their benefactors being immobilised. In a democracy with a relatively free press, this means that governments fail to respond to public exposures of “grand corruption”, thereby generating a dangerous sense of cynicism within the community.

Whatever the fundraising process may be, it is important that it does not distort the political system, skewing the democratic structures in favour of those with access to money. Many countries have implemented mechanisms to monitor this situation, but these mechanisms have often been ineffective. As has been noted, even Germany, with the most generous state funding of political parties in the world, has been wrecked by scandals. An outgoing head of government persistently refused to disclose the identities of those who funded him generously over the years on the grounds of promised confidentiality, feeding speculation as to what the motives of these anonymous benefactors might have been. As we have seen, too, in Italy, the heirs of the discredited Craxi publicly defend his flagrant violations of electoral funding laws as being noble, and being justified by the morality of the platform on which he was standing.

What has been going wrong?

If the funding process is not transparent and political parties are not required to disclose the sources of sizeable donations, then the public is left to draw its own conclusions when it sees those suspected of funding political parties openly benefiting from handsome contracts and other government business. The election process can quickly degenerate into a form of auctioning potential political power. Aspiring parties raise funds from supporters who believe them likely to win, and thereafter well able to repay their supporters’ investments several times over through the award of lucrative government contracts. Individuals do likewise where legislators have ‘executive’ powers in the granting of contracts. Transparency in political donations has become a major issue in virtually every democracy.

In some countries, the costs of political campaigning have become so high that they are above the limits prescribed by law. Therefore, in some, if not many countries, political parties quietly flout the laws in a silent conspiracy to circumvent them. Complaints made to international election observers by political opponents frequently concern this kind of “cheating”, but those complaining generally show no willingness to raise the matter officially!10

The worst scenarios are when election fundraisers target international business. Political parties in Britain, Germany and Australia have been hard pressed to explain why massive sums have been given to them by foreign individuals and corporations.

In Korea, the institutional foundation of the country’s economic dynamism was also a major
source of corruption, creating the collusive economic system that powered its growth. Major Korean business groups who undertook directives for export-led manufacturing activities from the 1960s onwards developed an intimate relationship with state officials in a position to dispense favours to businesses. This combination, of rapid economic growth and endemic, quasi-institutionalised corruption, for a time challenged the otherwise universal belief that corruption is economically dysfunctional.  

**How should public funding for parties be apportioned?**

Treating every party equally is, of course, not an option. It is hardly democratic – or feasible – to fund a very small party to the same extent as one which is a major national institution. There will be a limit to the size of the financial “cake” which a society can afford to invest in its democratic structures. How can this most fairly and effectively be shared out? In some countries, public funds are allocated to parties in proportion to the votes they have won at the preceding election. This enables parties to borrow funds from supporters with a reasonable expectation of knowing (on both sides of the equation) what they may be able to repay.

**Using “real names”**

The Government of South Korea took a unique approach to stamp out not only political corruption but other forms of financial abuse. Decree No. 13957 banned the use of fictitious or “borrowed” names in financial deals. Under the old system, Koreans using fictitious names could easily hide assets, avoid taxation, bribe officials and make illegal campaign contributions. Under the decree, a “real names” accounting system is applied to all financial transactions, including deposits and savings, and stocks and bonds. Effective immediately, those holding assets under false names were required to convert these to real name accounts within two months and those intending to open bank accounts – or to withdraw large sums – had to register their real names by presenting their national identity cards. Failure to do so results in investigation by the tax authorities and penalties of up to 60 per cent of the accounts.

More recently the government of the People’s Republic of China has announced that it intends to enact similar provisions, albeit to improve tax collection.

**Monitoring the propriety of legislators**

Once elected, Legislators must be held accountable for their exercise of power. Managing conflict-of-interest situations and monitoring the assets, income, liabilities and business interests of legislators is essential, as it is for all public officials. However, there are two additional elements which are especially important in the case of legislators. First, as Parliament makes the laws, it frequently falls to legislators to determine matters effecting their own personal interests. The electorate may be less than impressed when they hear legislators arguing in favour of their own privacy, of containing disclosures to levels which the public knows will be ineffective, and of being unenthusiastic about measures designed to ensure ethical behaviour.

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11 Corruptions, Development and Maturity: A Perspective on South Korea, by Dr. Tim Beal and Dr. Sallie Yea, a paper presented to the Fifth AFBE (Asian Forum on Business Education) Conference, Rangsit University, June 1997.
12 The Real Names Law and a detailed description appears in the Best Practice section in Internet version of this Source Book. See also World Law Bulletin, February 1994 (Law Library of Congress).
14 For example, in late 1999 and for some months into 2000, the Nigerian Legislature refused to enact a major anti-corruption measure which was the centre-piece of President Obasanjo’s anti-corruption drive. Although some were concerned with the procedural aspects of the measure, there was a belief – however unfounded – that among those opposing the measure were some doing so to preserve the corrupt status quo, not to advance the quality of democratic practices.
In the Westminster parliamentary tradition the approach has been not to criminalise the unethical actions of legislators but to leave these actions to be dealt with by the Parliaments themselves. Such an approach respects the niceties of the separation of the legislative from the judicial power.

However, this “gentlemen’s agreement” (for male in character the Parliaments have overwhelmingly been) appears to have broken down, and a number of countries now expressly criminalise the bribing of legislators. The prohibition takes the following form in Australia:

73 A. Corruption and bribery of Members of the Parliament.
(1) A member of either House of Parliament who asks for or receives or obtains, or offers or agrees to ask for or receive or obtain, any property or benefit of any kind for himself or any other person, on an understanding that the exercise by him of his duty or authority as such a member will, in any manner, be influenced or affected, is guilty of an offence.
(2) A person who, in order to influence or affect a member of either House of the Parliament in the exercise of his duty or authority as such a member or to induce him to absent himself from the House of which he is a member, any committee of that House or from any committee of both Houses of the Parliament, gives or confers, or promises or offers to give or confer, any property or benefit of any kind to or on the member or any other person is guilty of an offence.
Penalty: Imprisonment for 2 years.

Australian Federal Crimes Act, 1914. This section was added in 1982.

The law and any leadership code merely establishes minimum standards of behaviour. Reluctance on the part of an influential majority in a Legislature to practice transparency should not be seen as a barrier to those with opposing views. Indeed, there may be political mileage to be won by acting voluntarily, and by challenging political opponents to match this honesty and openness with the voters.15

Relationships between Ministers of government and civil servants

One of the most difficult aspects of monitoring the propriety of legislators is the relationship between senior civil servants and their Minister. On the one hand, civil servants are public employees and are there to promote and serve the public interest and not the interests of the Minister and his or her political party. On the other hand, they necessarily have a close working relationship with the Minister, to whom they owe loyalty, and, when the Minister is acting on their advice and promoting policies which they, the civil servants, have developed, there is a very natural affinity between the two. Although Ministers have to give fair consideration and due weight to informed and impartial advice from their civil servants, they must refrain from asking them to do anything which may call into question their political impartiality or give rise to the complaint that public funds are being used to pay for political party interests. Therefore, civil servants should never attend, much less take part in, political party conferences or conferences organised by political parties.16

In addition, one of the functions of the civil servant is to monitor the performance of the Minister in his/her official capacity and, if necessary, initiate action if corruption is in evidence.

15 However, the British experience is that a voluntary register of interests does not, in the end, fulfill the job. Disclosure requirements have to be made mandatory for the system to function as any meaningful form of protection.
16 See, for example, Questions of Procedure for Ministers (Cabinet Office, UK; May 1992) in the Best Practice Section.
For this reason, it is always undesirable for a Minister to have too much freedom in appointing people to his or her immediate staff. A good number of impartial staff who are not necessarily “insiders” will have a stabilising influence on the establishment.

A free debate

An important element in a democratically elected assembly is that its elected members can speak and argue freely, immune from being sued in the courts for defamation. In various Legislatures around the world, scandals have been forced into the open, not by an energetic and investigative media but by principled and courageous legislators.

However, immunities can be abused and there should always be remedies available to those who are not involved in the debates and are unable to defend themselves. For example, the Right of Reply Scheme in the Legislative Council of New South Wales (Australia) provides:

- Any person who has been referred to in the House by name, or in such a way as to be readily identified, may make a submission in writing to the President [of the Council], on any one or more of the following grounds, claiming:
  - that they have been adversely affected:
  - in reputation;
  - in respect of dealings or associations with others;
  - that they have been injured in occupation, trade, office or financial credit; or
  - that their privacy has been unreasonably invaded, and requesting that they should be able to include an appropriate response in the parliamentary record.
- Where a person makes a submission to the President, the President must, as soon as practicable, consider the submission and decide whether:
  - to refer the submission to the Standing Committee on Parliamentary Privileges and Ethics (referred to as “the Committee”) for inquiry and report; or
  - it is inappropriate to be considered by the Committee on the grounds that the subject matter of the submission is trivial, frivolous, vexatious or offensive in character.
- The President must inform the person in writing of the decision.

In some instances, however, immunities may need to be broadened rather than narrowed. For example, in Britain a Member of Parliament was sued by a convicted murderer after criticising the prisoner for starting court proceedings against a sub-postmistress for failing to deliver the Financial Times to the prison library, which was in the MP’s constituency. The case was struck out but the MP was left with legal costs of about $4,000. Had the comments been made in Parliament, and not outside, they would have been absolutely privileged and beyond review in court.18

17 The full text of the resolution appears in the section on Best Practice in the Internet version of this Source Book.
18 The U.K. solution is not to change the law, but to introduce an insurance scheme or offer free advice from government lawyers. The scheme will not help MPs in cases relating to their personal life or conduct, or to court actions which they initiate themselves. Daily Telegraph, 21 February 2000.
Recall of Member by constituents

In an age of increased pressure on accountability, discussion is beginning to focus on whether the voters in a particular constituency should have the right to formally recall their member of Parliament, or at least force a by-election, when he or she has lost the confidence of the constituency.

Not surprisingly, the proposition has enjoyed little support among the political parties, and certainly one could see how, in particular scenarios, this process could be highly destabilising, especially where an administration has a slender majority. A less adventurous proposition was floated in Tanzania where concern was expressed that Members of Parliament were seldom seen in their constituencies. It was proposed that parliamentarians should be obliged to visit their constituencies for the purposes of public consultations with those represented, if a sufficient number of registered voters in the constituency petitioned the Speaker of Parliament.

"Crossing the floor" – Defections by party members

In some Legislatures, members of the Legislature elected to represent a particular party, defect to join another party whether their constituents approve or not. This behaviour seriously diminishes electoral accountability and also feeds corrupt parliamentary practice. Several countries have implemented legislation designed to specifically combat this problem. For example, the practice of defecting to another party was a widespread feature of Indian politics, frequently toppling state governments who had been thought to be stable. More often than not, these defections were engineered by rivals who found it easy to persuade legislators to leave their original parties by offering them large sums of money. By the Constitution (52nd Amendment) Act of 1985, the Indian Parliament banned the practice.

Similarly, the law in Trinidad and Tobago was amended so that anyone who wishes to transfer party loyalties must first resign their seat and then fight a by-election. The 1994 Constitution of Malawi also attempts to constrain the practice by providing that the Speaker declare vacant the seat of any member of a political party who leaves that party and joins another. The same legislation also retains a member’s “absolute right” to exercise a free vote (a vote contrary to party recommendations) without having his or her seat declared vacant.

Crossing the floor is less likely to occur where party lists and proportional representation are employed. In this case, a defecting member should automatically be replaced by the next person on the list, diminishing the potential for corrupt forces to increase the political “weight” of one side over the other. The basic argument is that by crossing over to a party to which the member was not elected, the member has broken the “contract” that existed between Parliament and the electorate. To revive this contract and the level of trust and accountability associated with it, the member must be re-elected to the new party.

21 Section 65 of the 1984 Constitution of Malawi
22 The New Zealand parliamentary reforms which introduced the German system of proportional representation in place of the British system of “first past the post” in 1996, surprisingly failed to close this loophole, and there was public outrage when “List” Members, once sworn in as Members of Parliament, were able to defect to other parties, even to sustain those other parties in office.
Monitoring the assets and liabilities of political parties – By their own members

South Africa is presently undergoing one of the most remarkable transitions in the history of Parliaments around the world. The apartheid state was characterised not just by racism, but by some of the worst financial and non-transparent excesses of one-party rule.

Within a short time after being elected, the ANC introduced codes of conduct – the “Asmal Code”, named after Prof. Kader Asmal, now Minister of Education – an asset declaration for all of its office holders and elected members. In undertaking this novel initiative, the majority party in the South African Parliament effectively positioned itself as a model for the rest of Parliament, and subsequently legislation was enacted covering all Members of Parliament.\(^{23}\)

Enhancing Parliamentary practices and procedures

The inauguration of public accountability through Parliament in South Africa practically demonstrates the worst features of a secretive and highly corrupt form of governance during the apartheid years, and the best features of open government in recent years. Indeed, the progress made has been spectacular.

The South African reform process has centred on rendering the entire parliamentary process as open to the public and the press as possible, and on empowering select committees, particularly the Public Accounts Committee, to hold the Executive accountable. All select committees must meet in public, and if they wish to go into a closed session they must publicly debate the reasons for doing so. Legislators have been empowered to call civil servants to account while the budgetary estimates have been passing through the democratic process – a frightening experience for senior civil servants who were previously accustomed to getting approval literally “on the nod”! Not only does the constitution of the country actually guarantee open, fair and transparent government procurement, it also assures access to information and other rights of due process. In the hands of a newly transparently appointed and high-powered constitutional court, these constitutional provisions can be expected to take a bite out of parliamentary corruption.

Finance committees should ensure that governments present, in a timely fashion, annual comprehensive budgets. These should include disclosure of the amounts to be spent in each department and programme, in addition to reporting on the monies collected and spent. Failure to present budgets in this way facilitates corruption and maladministration in government departments by allowing it to go unchecked.

The following questions are among those that should be asked in the course of parliamentary debates about the government’s budget:

- Who benefits, and why?
- How will they benefit?
- What would be their immediate needs?
- What will their benefits be in the future?
- Who will bear the costs and the risks, and why?
- What costs and risks will there be immediately?
- What costs and benefits will there be in the future?
- Who would be accountable and to whom, and for what will they be accountable?\(^{24}\)

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\(^{24}\) "Controlling Corruption: A Parliamentarian’s Handbook" prepared by the Parliamentary Centre, Canada in conjunction with the EDI of the World Bank and CIDA, at page 33.
The South African experience has shown that by taking the necessary steps towards reforming or enhancing parliamentary practices and procedures, no matter how entrenched corrupt practices have become, the path towards accountability and transparency can restrict corruption in the democratic process to a minimum.

There are various ways in which the Legislature exercises its oversight role. Ministers can be questioned in Parliament, motions may be tabled for debate drawing out explanations for actions, and the parliamentary committees can develop specialist skills and insights in particular areas of administration. In addition, there are various watchdog agencies who are generally accountable to Parliament. The Auditor-General is pre-eminent, but other anti-corruption agencies may be subject to parliamentary, rather than executive, oversight as a means of ensuring their accountability while ensuring their independence.

The Public Accounts Committee of the Legislature

Of all the various Committees, perhaps the most important for present purposes is the Public Accounts Committee.

The requirement that the Executive must seek parliamentary approval for its budgetary spending is the basis for parliamentary oversight. The Executive has to justify the principles, policies and purposes for which the funds are required before its budget is approved, and the right to raise the revenue is granted on behalf of the people. Having granted the Executive the funds, Parliament is then entitled to hold the Executive to account for their proper expenditure. This role is generally performed, not by the whole Parliament, but by a special committee of its members. Thus a “Public Accounts Committee” scrutinises government expenditures with the assistance of the Auditor-General. The reports of the Auditor-General are also handled by this Committee.

Effective oversight is challenging because it requires detailed information about government activities which the Executive or civil servants are not always keen to disclose. It also places the Legislature in an adversarial position vis-à-vis the Executive. Therefore, the Committee’s competence must rise to the level of its adversary. It is also essential that the Committee has the power to call for relevant documents and officials, to administer oaths for the taking of evidence, and, where necessary, to call on the Ministers for questioning.

Evidently, the Chair of the Committee should ideally be a member nominated by the Opposition in Parliament, as is the general practice in the “Westminster” democracies, or at least be a member with an independent mind and disposition.

Public access to the Legislature and participation in policy-making

The hallmark of a democracy is the degree to which a Legislature interacts with the public. If a Legislature is to rationalise competing interests, it is essential that these be given a fair hearing and a reasonable opportunity for interested parties to state their cases. A Legislature should ensure that the public is kept fully informed of proposals it may be considering. Where these proposals affect particular interests or classes of people, it should make sure that the Legislature’s agenda is informed, thereby affording these interest groups an opportunity to comment in time, for their views to be taken into account.

25 The functioning of a Public Accounts Committee is a useful indicator of the health of a legislature and of a democracy. Under the firm leadership of the Hon. Augustine Ruzindana, the Ugandan Parliament’s Public Accounts Committee has uncovered a series of financial scandals and has brought ministerial careers to an end where mismanagement has been exposed.
Modern technology is assisting this process in a number of countries. Some Legislatures are establishing web-sites that are used to post details of proposed legislation in order to enable members of the public who wish to comment on these proposals, e-mail the relevant committee considering the draft law in question.26

Some indicators for assessing the performance of the Legislature as an integrity pillar

- Are there clear and well-understood conflict of interest laws which are an effective barrier to elected members of the legislature using their positions for personal benefit?

- Are there arrangements for the monitoring of the private interests and personal incomes of elected officials and members of their immediate families?

- Do legislators who oppose the government have a reasonable opportunity to express their views in the Legislature? Are debates open to the public?

- Do select committees meet in public? Are their reports made public? Do they make a practice of hearing submissions from members of the public and civil society organisations?

- Are the recommendations of the Public Accounts Committee generally accepted and acted upon by the Executive? Does the Public Accounts Committee have power to call officials (including Ministers) for questioning? As a matter of practice or requirement, is the chair of the Public Accounts Committee chaired by a Member who is independent of the government of the day?

- Is the executive entitled to appoint members in addition to those who have been elected? Are they entitled to vote? If so, are the numbers such that they are likely to distort the broad will of the people as expressed at the polls?

- Are convicted criminals barred from running for election?

- Is the legislature generally ready to lift the immunity enjoyed by one of its members, regardless of the party to which the member belongs, where there are serious grounds for believing that he or she may be guilty of a serious criminal offence?

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26 For example, on the Estonian parliament's web site, every visitor can express his/her opinion in the web site's guest book or send an e-mail directly to a committee. South Africa also provides for direct access to its Committees in this way. The Indian web site is one which lists the personal e-mails of every single member of parliament. The web-site www.polisci.umn.edu/information/parliaments/index.html lists most parliamentary web sites.
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 spotlight, 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 Obansajo 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

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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.¹

**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 follows 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

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¹ Conflict of interest is discussed in detail in a separate chapter.
² Which is why, of course, telephone calls are a preferred route.
⁵ A handbook for ministers, providing guidance on these and other matters (including international travel and handling the press), can be invaluable.
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].

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. 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.

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. 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 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.

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 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.\footnote{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.}

**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 committee.\footnote{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.}

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?
Chapter 8

An Independent Judicial System

An independent, impartial and informed Judiciary holds a central place in the realisation of just, honest, open and accountable government.¹ A Judiciary must be independent of the Executive if it is to perform its constitutional role of reviewing actions taken by the government and public officials to determine whether or not they comply with the standards laid down in the Constitution and with the laws enacted by the Legislature. In emerging democracies they have an additional task of guaranteeing that new laws passed by inexperienced Executive or legislative branches do not violate the constitution or other legal requirements.²

Independence protects the judicial institutions from the Executive and from the Legislature. As such, it lies at the very heart of the separation of powers. Other arms of governance are accountable to the people, but the Judiciary – and the Judiciary alone – is accountable to a higher value and to standards of judicial rectitude.

The concepts of independence and accountability of a Judiciary, within a democracy, actually reinforce each other. Judicial independence relates to the institution – independence is not designed to benefit an individual judge, or even the Judiciary as a body. It is designed to protect the people.

Judicial accountability is not exercised in a vacuum. Judges must operate within rules and in accordance with their oath of office which reigns them back from thinking that they can do anything they like. But, how can individual judges be held accountable without undermining the essential and central concept of judicial independence?

Individual judges are held accountable through the particular manner in which they exercise judicial power and the environment in which they operate.

- Judges sit in courts open to public³;
- They are subject to appeal;
- They are subject to judicial review;
- They are obliged by the law to give reasons for decisions and publish them;
- They are subject to law of bias and perceived bias;

¹ See official communiqué of the Commonwealth Law Ministers Meeting, Mauritius, 1993 (Commonwealth Secretariat, London). This chapter benefits from the writer's attendance at a closed meeting of senior judges from the common law tradition, held in Vienna in April 2000. The judges formed themselves into a judicial integrity "leadership" group and determined to develop coherent national judicial integrity strategies and to share information as these proceeded. The meeting was jointly organised by the United Nations Centre for International Crime Prevention and Transparency International.

² For a discussion of the role of the courts in Brazil, see Brazil: Judicial Institutions at a Crossroads by Luiz Guilherme Migloria, Economic Reform Today, No.4, 1993.

³ In extraordinary situations it has been found necessary to have a "faceless" judge, guarding the judge's identity to protect him or her from retaliation, e.g. by drug traffickers in Colombia.

⁴ Some of the criticism is ill-informed and often goes unanswered because judges traditionally do not get involved in public controversies: sometimes it is simply because the judges have failed to explain their reasons clearly enough.
They are subject to questions in the Legislature;
They are subject to media criticism;
They are subject to removal by the Legislature (or by a supreme judicial council); and
They are accountable to their peers.

Until very recently it was near heresy to raise the question of the accountability of the Judiciary. At best, this was seen as implying that the practice of “judicial elections” was legitimate, whereas most of those in the common law tradition have a repugnance for the notion of judges running for public office and see this as conflicting with their duty to protect the weak and the marginalised. At worst, this was regarded as arguing for the Executive to be given a licence to intrude into the judicial arena in ways that could only be damaging.6

Now, however, the realisation is growing that accountability (but not accountability through the ballot box), far from eroding independence, actually strengthens it. The fact that individual judges can be held to account increases the integrity of the judicial process and helps to protect the judicial power from those who would encroach on it.

But even if the rules of judicial conduct are articulated and accepted, are they enforced? If not, there may be a perception that there is no risk if a judge deviates from them. But how, then, should they be enforced?

• One would not want to give more power to the Executive – whose decisions the courts review. Nor to the Legislature, as that would be to draw judges into the game of politics. Appointment by the elected representatives of the people can emphasise that senior judges are empowered with a mandate from the people and, in the event of a formal impeachment, are removable by them.
• Likewise there is a need to be cautious about individual judges being accountable to a Chief Justice – a judge in Hong Kong was once removed by a Chief Justice only to have his decision reversed by the Privy Council (Hong Kong’s highest court) which pointed out that even a Chief Justice has to comply with the law.
• Peer pressure is important, but independence from colleagues in a collegiate court can also be very important. In an appellate court each judge has to be able to keep his or her mind truly independent of colleagues.
• Fair procedures and due process are needed for judges who are accused of impropriety.
• There is a need for some system for dividing serious misconduct (which may call for removal) from the minor matters (for example, lack of taste, a need for counselling, a lack of understanding and needing a quiet word rather than an open reprimand).

The vulnerabilities of the Judiciary

A primary indicator that corruption is spiralling out of control is a dysfunctional judicial system. Hence, the need for the Rule of Law is absolute. In many countries, surveys suggest that the public regard their judiciaries as hopelessly corrupt. In the Ukraine it is said that fully seventy percent of all court decisions remain unenforced.7

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5 Removal from office relates to the concept of independence, as it touches on security of tenure.
6 For example, in Georgia (where unqualified judges were a problem), the lower court judges were all subjected to written examinations, and the more incompetent of them (about two thirds) were then removed. (Daniel Kaufmann, Aart Kraay and Pablo Zoido-Lobatón, Governance Matters: From Measurement to Action in Finance and Development, June 2000, Vol. 37
7 Controlling Corruption: A Parliamentarian’s Handbook prepared by the Parliamentary Centre, Canada in conjunction with the EDI of the World Bank and CIDA, at p. 44.
Contributing to this parlous state of affairs are lawyers—who demand bribes for the judge, but may well keep them for themselves—and court clerks—who lose files and require money to find them or who withhold bail bonds until bribes have been paid. The Judiciary is therefore vulnerable because those around them are failing in their duties.

But there are, of course, ways in which an Executive will try to influence the Judiciary and these are many and varied. Some are subtle, such as awarding honours or ranking judges in the hierarchy at state occasions. Some may be impossible to guard against, while others are simply blatant—such as providing houses, cars, and privileges to the children of judges.

Perhaps the most blatant abuse by the Executive is the practice of appointing as many of its supporters or sympathisers as possible to the court. The appointment process is therefore a critical one, even though some governments have found that their own supporters develop a remarkable independence of mind once appointed to high office.

To combat this independence, the Executive can manipulate the assignment of cases, perhaps through a compliant Chief Justice, to determine which judge hears a case of importance to the government. It is therefore essential that the task of assigning cases be given not to government servants but to the judges themselves, and that the Chief Justice enjoy the full confidence of his or her peers.

When a particular judge falls from Executive favour, a variety of ploys may be used to try to bring the judge to heel. He or she may be posted to unattractive locations in distant parts of the country; benefits, such as cars and household staff, may be withdrawn; court facilities may be run down to demean the standing of the judges in the eyes of the public and to make their already arduous jobs even more difficult; or there may be a public campaign designed to undermine the public standing of the Judiciary. Such a campaign may be aimed at criticising certain judges or claiming that a mistake was made when they were selected for appointment. In such instances, judges are not in a position to fight back without hopelessly compromising themselves and their judicial office. To minimise the scope for this, responsibility for court administration matters, including budget and postings, should be in the hands of the judges themselves and not left to the government or civil servants.

When it comes to public attacks (and they take place in both well-established and newer democracies), judges must not be, nor consider themselves to be, above public criticism. They cannot claim, at one and the same time, to be guarantors of rights to freedom of speech and yet turn on their critics. Nor should they attempt to muzzle public debate about problems within the Judiciary itself, as has been the case in some countries when the issue of corruption in the judicial process has arisen.

8 For example, in Bangladesh, after TI-Bangladesh had conducted a public survey in which the lower Judiciary emerged extremely poorly, the Magistrates called on the government to take action against the NGO. However, the country’s President, himself a former Chief Justice, entered the debate, stating that if only a part of the survey results reflected reality, the lower Judiciary had very serious problems to deal with.
In Israel, the Supreme Court President has gone so far as to issue a memorandum to judges stating that they may not individually file complaints against those who criticise them, but that these must go through his office so that he can act as a filter. Defenders of free speech, he said, have a responsibility to be consistent. "If we as a court say that criticism is good for a government, it is also good for us. We must be even more open to criticism than others."

Much criticism can hurt, especially those judges who do their very best in difficult, and at times, hazardous situations. Criticism should be restrained, fair and temperate. In particular, politicians should avoid making statements on cases which are before the courts and should not take advantage of their immunity as legislators to attack individual judges or comment on their handling of individual cases.

The government’s Chief Law Officer should consider it his or her solemn duty to defend members of the Judiciary against intemperate and destructive criticism by fellow members or by the government. The head of the Judiciary also has an important role to play in speaking on behalf of all of the judges in those rare cases where a collective stand must be taken.

At the lower level of the court structure, a variety of corrupt means may be used to pervert the justice system. These include influencing the investigation and the decision to prosecute before the case even reaches the court; inducing court officials to lose files, delaying cases or assigning them to corrupt junior judges; corrupting judges themselves (who are often badly paid or who may be susceptible to promises of likely promotion); and bribing opposing lawyers to act against the interests of their clients. A review of court record handling and the introduction of modern tracking methods can go a long way to eliminating much of the petty corruption which plagues the lower courts in many countries.

Clearly, these corrupt practices call for action on several fronts. Those responsible for the investigation and prosecution of cases must impose high standards on their subordinates; court officials should be accountable to the judges for their conduct and subject to sanction by the judges where, for example, files are lost; and, the Judiciary itself must insist on high ethical standards within its own ranks, with complaints being carefully dealt with and, where necessary, inspection teams visiting the lower courts to ensure that they are functioning properly.

The law societies and bar associations must also be encouraged to take stern action against members who behave corruptly. The fact that a system may itself be corrupt does not mean that the lawyers themselves have to become part of such a system.

It is commonly considered unfair for lawyers to be disbarred for extensive periods for having, in effect, tried to practise law in a corrupt environment – one in which they were “obliged” to resort to petty corruption themselves to gain the services to which their client had a lawful right but was being illegally obstructed from obtaining. Most commonly this would be for pro-

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9 Quoted in the Jerusalem Post, 10 December 1999. Since introducing the requirement, the Judge stated that he had not allowed any to proceed.
10 Statements of explanation by members of the Judiciary can themselves create further difficulties, as in the case in Israel where Justice Arbel was sued personally in a civil suit by a person named in it. Stated in Jerusalem Post, 10 December 1999.
11 Delay is a common indicator of levels of corruption. A popular joke in Brazil tells of a woman who applied to the court for permission to have an abortion because she had been raped – by the time the application was granted her son was ten years old!
12 In very serious cases, the use of “integrity testing” may be unavoidable, even in the context of members of the Judiciary. It has been used in this way in areas of the United States and in India where there have been persistent and credible allegations of corruption made against individual judges.
cessing services. This approach needs to be re-examined in view of the damage such tolerance does to the legal system. Although it may, in some situations, be an unavoidable necessity for a client to pay a backhander to the gate-keeper, one questions whether the lawyer need ever professionally be in such a position.

A final point of vulnerability for the judge is after his or her retirement. Judicial pensions tend to be less than generous, and the practice in some countries of “rewarding” selected judges with diplomatic posts on their retiring from office, is clearly one which is open to abuse if not handled in a very transparent fashion.

**Appointments to the Judiciary**

The duty of a judge is to interpret the law and the fundamental principles and assumptions which underlie it. While a judge must be independent in this sense, he or she is not entitled to act in an arbitrary manner. The right to a fair trial before an impartial court is universally recognised as a fundamental human right.

Individuals selected for judicial office must have integrity, ability, and appropriate training and qualifications in the field of law. The selection process should not discriminate against a person on the grounds of race, ethnic origin, sex, religion, political or other opinion, national or social origin, property, birth or status. It is, however, not considered discriminatory to insist that a candidate for judicial office be a national of the country concerned.

The ways in which judges are appointed and subsequently promoted are crucial to their independence. They must not be seen as political appointees, but solely rather for their competence and political neutrality. The public must be confident that judges are chosen on merit and for their individual integrity and ability, and not for partisanship.

Different countries choose varying ways to appoint, re-appoint, or promote the Judiciary. The process can involve the Legislature, Executive, the Judiciary itself, and, in some countries, representatives of the practising legal profession or civil society. In the United States, some jurisdictions go so far as to elect their judges. Election of judges poses a special risk. While it has the attraction of being democratic, it may favour populism over professionalism. This risk can be reduced if the list of candidates is vetted for professionalism and non-partisanship. Still, the prospect of having judges campaign for re-election is particularly unattractive. An individual in court is entitled to a fair trial, and this is hardly assured if the judge has to court popular opinion through the way in which he or she conducts the hearing in order to win re-election.

There are also potential dangers in appointing the Judiciary exclusively by the Legislature, Executive or Judiciary itself. As a general rule, in countries where either of the first two bodies is the formal appointing mechanism, and there is general satisfaction with the calibre and independence of judges, appointments do, in fact, involve some degree of cooperation and consultation between the Judiciary and the authority actually making the appointment. However, if the public feels that the appointment process is still too “clubby,” or, too tainted by political considerations, then a non-legal establishment may need to be introduced. Although individuals from such an establishment may not have the professional assessment ability, they may be able to prevent the more overt types of abuse.

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13 This would be corruption “according-to-rule,” where a person is demanding a bribe in order to perform a duty which he or she is ordinarily required to do by law, as discussed in Chapter 1. It is not to suggest that corruption by a lawyer to obtain benefits “against the rule” could ever be justified from a professional standpoint.
The promotion of judges should be based on objective factors—particularly ability, integrity, and experience. Promotion should be openly seen as a reward for outstanding professional competence, and never as a kickback for dubious decisions favouring the Executive. The selection of judges for promotion should involve the judges themselves and any say that the Executive might have should be minimal. The prospect of promotion as a reward for “being kind” to the Executive ought never to be a realistic one.

**Removal for cause**

The removal of a judge is a serious matter. It cannot be permitted to occur simply at the whim of the government of the day, but rather it should be in accordance with clearly defined and appropriate procedures in which the remaining Judiciary plays a part. It is also essential that the courts have appropriate jurisdiction to hear cases involving allegations of official misconduct. If not, removal of a judge can undermine the concept of judicial independence. Yet, judges must always be accountable, otherwise the power vested in them will be liable to corrupt. A careful balance must be struck. Judges should be subject to removal only in exceptional circumstances, with the grounds for removal to be presented before a body of a judicial character. The involvement of the senior Judiciary itself in policing its own members in a public fashion is generally regarded as the best guarantee of independence.

It is axiomatic that a judge must enjoy personal immunity from civil damages claims for improper acts or omissions in the exercise of judicial functions. This is not to say that the aggrieved person should have no remedy; rather, the remedy is against the state, not the judge. Judges should be subject to removal or suspension only for reasons of incapacity, or behaviour which renders them unfit to discharge their duties.

It is customary to make a clear distinction between the arrangements for the lower courts where run-of-the-mill cases are heard, and the superior courts, where the judges are much fewer in number, have been more carefully selected and who discharge the most important of the judicial functions under the constitution. It is incumbent on the senior judges to use their independence to ensure that justice is done at lower levels in the hierarchy. Lower-court judges are customarily appointed in a much less formal fashion and are more easily removed for just cause. However, neither higher nor lower-court judges are “above the law”. There must be sanctions for those who may be tempted to abuse their positions or display gross professional incompetence.

**Tenure of office and remuneration**

As far as the senior judges are concerned, it is implicit in the concept of judicial independence that provision be made for adequate remuneration, and that a judge’s right to the remuneration not be altered to his or her disadvantage. If judges are not confident that their tenure of office, or their remuneration, is secure, clearly their independence is threatened.

The principle of the “permanency” of the Judiciary, with no removal from office other than for just cause and by due process, and their security of tenure at the age of retirement (as determined by written law), is an important safeguard of the Rule of Law. It is generally desirable that judges must retire when they reach the stipulated retiring age. This reduces the scope for

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14 There have been a number of important international pronouncements on the independence of the Judiciary, several of which appear in the Best Practice Section.

15 In some countries faced with dire economic problems, judges have accepted a reduction in salaries in line with those of all other public servants, but this has usually been done on the basis of the judges “requesting” similar treatment, rather than it being done to them unwillingly.
the Executive to prolong the tenure of hand-picked judges whom they find sympathetic while reducing the temptation, on the part of the judge, to court Executive, or other appointing authority, “approval” for re-appointment as the date of retirement nears.

**Judicial administration**

There is ample scope in most countries for corruption to flourish within the administration of the courts. Corruption ranges from the manipulation of files by court staff to the mismanagement of the assignment of cases.

As a result, there has been a tendency for countries to empower their Judiciary to manage the courts and an operational budget provided by the state. A political figure is formally responsible for the budget – to the Legislature which approved the funds. This approach was endorsed by the fifty independent countries of the Commonwealth in 1993, whose law ministers noted that to provide judiciaries with their own budgets “both bolstered the independence of the courts and placed the Judiciary in a position to maximise the efficiency with which the courts operate.”

**Codes of conduct**

Given that – at least up to the point where impeachment by the Legislature comes into play – judicial independence is best served by individual accountability being handled by the judges themselves (with at most a minority of involvement of others), how can impartiality and integrity be maintained?

One option is to establish formal machinery. The other is for the senior Judiciary to accept the task for itself. The most potent tool would seem to be an appropriate code of conduct. This should be developed by the judges themselves, and provide both for its enforcement and for advice to be given to individual judges when they are in doubt as to whether a particular provision in the code applies to a particular situation. Codes of conduct have been used to reverse such unacceptable practices as when the sons and daughters of judges appear before their parents as lawyers to argue cases. While in a country where there is considerable trust in the Judiciary, such an appearance might not cause any concern, in a country where there is widespread suspicion that there is corruption in the Judiciary, such a practice takes on an altogether different appearance.

**The determined approach in Karnataka**

The approach to promoting judicial integrity in the Indian State of Karnataka with a population of 30 million, is two-fold. From the date of a judge’s appointment (on merit) he or she attends training in ethics, management, transparency, and public expectations.

The new judge declares his or her assets and liabilities (including loans) before taking up the appointment and repeats the declarations every year thereafter. Declarations of assets are made

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16 See Commonwealth Law Ministers' Meeting Communiqué, Mauritius, 15-19 November 1993 (available from Commonwealth Secretariat, Marlborough House, London SW1, United Kingdom). Experience in Latin America has been very negative.

17 The judicial code of conduct in India prohibits judges from presiding over cases in which their relations are appearing as lawyers. The practice had given rise to a series of scandals in the past, particularly in Bombay.
to the High Court Registrar, who maintains computerised files. The disclosures includes family members (wife, son, daughter, and parents if still alive). The Vigilance Commission (the government’s anti-corruption commission) inspects the returns and makes discreet inquiries about the declarations. Members of the public have access to the declarations. The whole procedure is governed not by an act of the Legislature but by the High Court Rules, i.e. made by the judges themselves.

The question of improving conditions of service receives constant attention, and there is a “self improvement scheme” whereby judges at regular intervals attend meetings to interact with each other and to prepare research papers on topics of interest.

At the same time there are checks on the system itself. Cases are allocated to judges on a random basis, and as late in the day as is practicable. When complaints are received, these are checked where they relate to continuing pattern of behaviour, and a registrar has even disguised himself in order to go to a public registry to check on how members of the public were being treated by his own staff – and disciplinary action resulted. As a consequence, reforms have been introduced which streamline the availability of information about cases and files, thus bypassing the lawyers and the court officials who previously had been insisting on payment before they would tell a person the stage his or her case had reached or when it was to be heard in court.

The disposal of old cases was continuously monitored to ensure that the numbers were declining, with incentives being provided for the judges who were making significant progress in clearing backlogs.

Some indicators for assessing the Judiciary

- Do judges have the jurisdiction to review the lawfulness of government decisions? If so, are these powers used? Are decisions respected and complied with by the government? Is there a perception that the Executive gets special treatment, be it hostile or preferential?
- Have the judges adequate access to legal developments in comparable legal systems elsewhere?
- Are members of the legal profession making sufficient use of the courts to protect their clients and to promote just and honest government under the law? If not, is access to the courts as simple as it can be? Are the legal requirements unnecessarily complicated?
- Are appointments to the senior Judiciary made independently of the other arms of government? Are they seen as being influenced by political considerations?
- Are judges free to enter judgments against the government without risking retaliation, such as the loss of their posts, the loss of cars and benefits, transfers to obscure and unattractive parts of the country?
- Are cases brought on for trial without unreasonable delay? If not, are these delays increasing or decreasing? Are judgments given reasonably quickly after court hearings? Are there delays in implementing/executing orders of the court, e.g. issue of summons, service, grant of bail, listing for hearing? Are there delays in delivering judgments?
- Are court filing systems reliable?
- Are the public able to complain effectively about judicial misconduct (other than appeal through the formal court system)?
Other actors in the judicial system

The Judiciary does not stand alone in its need for independence – the independence which enables it to guarantee the Rule of Law. This may be sufficient in the field of administrative and civil law, but in the criminal field there are other actors on which the Judiciary must rely. If investigators and prosecutors are not independent, but are under political control, the criminal process will almost certainly be unable to cope with major corruption cases where these affect the interests of the ruling party. Reform of these situations is far from easy.

For example, an effort to overhaul France’s ancient judicial system, mired in corruption and influence-peddling, recently ran aground. Accused, guilty and innocent alike, can spend long years in jail awaiting trial, with ruinous effects on their families and their lives. The prosecution of a case can be speeded up, slowed or abandoned on the whim of the Minister of Justice, and headline-seeking investigators like to leak confidential details of their inquiries to a media which feels no restraint in naming those being investigated.

Despite opinion polls that said that the great majority of the electorate supported proposed changes, plans by President Chirac to drag the system into an era of independence miscarried. The political consensus in support of the changes (necessary for them to become law) collapsed after the Opposition claimed that amendments they had demanded were being ignored. Deputies worried that too much power was being placed in the hands of judges without sufficient counter-balancing “controls” (in other words, that they were being rendered independent). They were, in effect, frightened of not being able to themselves control the judges.

What was planned was to end the system of appointing prosecutors by the government, but rather to have them appointed by the Higher Council of the Magistrate – a body which would also be reformed to ensure that a majority of seats were held not by the Judiciary but by outsiders. The Ministry of Justice would be stripped of the right to give “instructions” about individual cases to prosecutors – a tradition that has been at the heart of a string of failures to prosecute politicians caught in sleaze scandals. The presumption of innocence would also be strengthened, including a right of immediate access to a lawyer. Magistrates would be rotated to prevent their accumulating excessive clout and a special commission would be established to investigate complaints.

The Chief Law Officer

In the common law system of a number of countries, the Attorney-General is not only a member of the Executive but is also the Chief Law Officer of the state. As the latter, the Attorney-General acts as the “guardian of the public interest” and has extensive powers and discretions with respect to the initiation, prosecution and discontinuance of criminal proceedings. The Attorney-General also has primary responsibility to provide legal advice in matters of public administration and government. The proper performance of these functions is dependent upon impartiality and freedom from party political influences, which can be threatened if the Attorney-General is subject to Cabinet control and the Legislature is effectively dominated by the Executive.

The role of the Attorney-General in upholding the Rule of Law was considered by the fifty


independent countries of the Commonwealth when their Law Ministers met in Mauritius in 1993. Their meeting concluded that the function of the Attorney-General is pivotal in terms of providing advice to government as to the laws governing it; ensuring to the full extent of his or her authority that government takes place within a framework of law; ensuring that government and official agencies adhere to international human rights standards; and scrutinising new or proposed legislation. In supporting the role of the Attorney General or Chief Law Officer, the participants also called for the provision of training and other schemes which would ensure that all public officials had a lively awareness of their own responsibilities in ensuring that the rights of citizens were respected. Most importantly, this included members of the police.

Some indicators for assessing the Chief Law Officer

- Is the Attorney-General’s role as guardian of the public interest understood by the government, the office-holder and the public?
- Do the Attorney-General’s colleagues in government understand the issue of the office’s independence and the vital distinction between the public interest as opposed to political party interest?
- Has the Attorney-General the power to override a decision of the Director of Public Prosecutions? If so, is the Attorney-General required to report the circumstances of the case to the Legislature?
- Is there a legislative statement of the powers, functions and responsibilities of the Attorney-General? If not, is it needed or desirable?
- Where an application by a member of the public to bring court proceedings is of a type which requires the consent of the Attorney-General, is there any formal way in which the Attorney-General must account for refusal to grant consent?

Public prosecutors

The Rule of Law requires that prosecutions on behalf of the state be conducted fairly and reasonably. The commencement of – or refusal to commence – prosecution proceedings ought not to be motivated by improper, and particularly political, considerations, but by the public interest and the need for justice. Unquestionably, one of the most difficult areas of the law is the discretion to prosecute. This issue lies at the very foundation of a system of justice. Clearly, considerations such as possible political advantage or disadvantage, or the race, origin or religion of the suspected person are wholly irrelevant. However, other significant areas which may affect the decision-making process can only be resolved through the exercise of independent judgment. To exercise decision-making fairly and transparently, a public prosecutor should not be subject to direction from any political party or interest group. The office of the public prosecutor can be equated with that of high judicial office; as such, accountability can be brought to bear through provisions which require removal for cause.

Clear guidelines, available to both the legal profession and the wider public, should govern what infringements of the law ought to be taken into account in deciding to prosecute and what should be excluded.

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20 Such a procedure is provided for in the draft bill which appears in the Best Practice compilation in the Internet version of this Source Book.
21 Ibid.
22 Ibid.
Independent prosecutors

On some occasions, public confidence in the fairness and openness of systems of accountability will depend solely on the trust they have in the individuals charged with investigating particularly controversial issues. Moreover, if these issues actually touch on the inner workings of government, or even on the judicial or investigative process itself, those ordinarily charged with the duty of investigation may find themselves in a situation in which they cannot perform their tasks with the trust and support of the public. Such situations can be dealt with by establishing commissions of inquiry.

However, where criminal conduct is suspected, a commission of inquiry can be hamstrung if it is to perform its function while protecting the basic constitutional right of the suspect to a fair trial. The "special prosecutor" – a public office which has been used in the United States with some success (e.g., in exposing the Watergate scandal) – is a possible alternative to a commission of inquiry.

Some legal systems make provision for an independent prosecutor in addition to, and independent of, the public prosecutor. This approach has been found to have merit where allegations and investigations of corruption are made which touch upon the higher echelons of government. In such circumstances, the public may distrust the ability of the administrative machinery of government to investigate itself.

The existence of legislation empowering the appointments of independent prosecutors can be a useful addition to a country’s armoury of investigative and prosecutorial weapons. As such, a growing number of countries are showing interest in this model. However, it must be noted that it is generally too late to wait for events to arise which might warrant the appointment of such a prosecutor. A hurried appointment may result in less than adequate legislation governing the powers of the independent prosecutor. This, in turn, can increase political suspicion that the office’s constitution may be less than what is really needed for a professional and independent discharge of duties. If such an office is needed, it should be established in an atmosphere which is not charged by scandal. The lessons of the actions (and expense) of the public prosecutors appointed during the Clinton presidency in the USA also need to be taken to heart.

Some indicators for assessing prosecutors

- Is the public at large generally convinced that decisions on whether or not to investigate and to prosecute are taken fairly, reasonably, and without being influenced by political considerations or connections?
- Is the office-holder responsible for these decisions operating under published guidelines. If not, would confidence in the office be increased by these being developed and published?
- If guidelines already exist, are they accessible to the public? If not, what are the reasons for the lack of disclosure?

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23 It has been provided for in Nigeria’s new anti-corruption legislation (enacted this year and designed to render the highest elected officials subject to investigation despite their immunity from suit) with the simple requirement that other agencies of government cooperate with the prosecutor. There is no formal guarantee of the investigator being provided with the budget he or she thinks necessary for the task. The provisions thereby avoid the situation which has arisen in the United States, whilst of course meaning that an investigation can still be hampered by its being under-resourced.
The Auditor-General

Quis custodiet ipsos custodes? (Who shall guard the guardians?)

Juvenal (Satores. vi. 347)

Public officials must be held accountable to the public and to the Legislature for their performance and stewardship of public funds and assets. The currency of financial accountability is information, but Ministers and officials are unlikely to always agree with members of the Legislature as to the quantity and quality of information that should be provided.

As such, the Office of the Auditor-General (Comptroller or Supreme Audit Institution) stands at the pinnacle of the financial accountability pyramid. It is therefore crucial that the appointment of the office-holder not be in the gift of the ruling party. If it is, it is a little like asking the burglar to select the watchdog. Indeed, political appointments of Auditor-Generals have been the root cause of many of the problems with integrity systems in various parts of the world.

The Office of the Auditor-General

The Auditor-General is, too, the fulcrum of a country’s integrity system. As the officer responsible for auditing government income and expenditure, the effective Auditor-General acts as a watchdog over financial integrity and the credibility of reported information. The classic description of the role of the Office is that:

The [Auditor-General] audits the Appropriation Accounts on behalf of the House of Commons. He is the external auditor of Government, acting on behalf of the taxpayer, through Parliament, and it is on his investigations that Parliament has to rely for assurances about the accuracy and regularity of Government accounts.\(^1\)

The responsibilities of the Office of the Auditor-General also include:

- ensuring that the Executive complies with the will of the Legislature, as expressed through parliamentary appropriations;
- promoting efficiency and cost effectiveness; and,
- preventing corruption through the development of financial and auditing procedures designed effectively to reduce the incidence of corruption and increase the likelihood of its detection.\(^2\)

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2 The Auditor-General should not, of course, be responsible both for developing financial procedures and then auditing the outcomes. For this to be the case would be to confuse the Auditor-General’s role as an independent body with that of becoming responsible for activities carried on within the Executive.

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Paraguay: Attempts to bring Comptroller-General to trial fail

The lower Chamber of Congress in Paraguay has failed in its attempt to initiate a political trial against the Comptroller General, Daniel Fretes Ventre, on charges of corruption. Fretes, who is responsible for fighting corruption in the country, is being investigated by a criminal tribunal for 18 crimes including inducement to illicit activities, extortion, blackmail, money laundering and covering up. Congress, however, needed the vote of two thirds of the 76 members of the lower chamber (47 votes) in order to formalise the charges. Only 44 votes were cast in favour of the trial, with 25 against and seven abstentions, which effectively ended the process that began last November.

“This is regrettable because the evidence shows that the comptroller used his position for personal gain, he failed to respect the constitution, he extorted and he encouraged subordinates to commit serious crimes”, the opposition member Rafael Filizzola told Reuters.

Reuters, 2 March 2000
The appointment process

The Office of the Auditor-General is of such significance that it warrants special provisions concerning appointment and removal procedures and the protection of the office-holder’s independence from the control of the governing party, politicians, and senior civil servants. Ideally, the issues of selection, accountability and authority should be incorporated into a country’s constitution.

The public perception of the Auditor-General is similar to that of the Ombudsman in that the office is viewed as an independent and fair mechanism for preserving financial accountability. The selection process is therefore an issue of some concern. If the Executive reserves the right to appoint and remove the Auditor-General, without due consultation, and makes appointments based on political influence or patronage, the incumbent can be identified in the public mind as an officer of the government rather than as an external and qualified public auditor.

The appointment process must be based on merit and involve institutions and persons other than simply the party in power. It is arguable whether the accountancy profession should have a say in the matter (although in some countries they are rightly concerned to ensure appointments of high professional calibre), but ideally, the appointment should be confirmed by a substantial majority in Parliament.

Accountability

To be effective, any external auditor must be immune from pressures from the clients or institutions being audited. The Auditor-General’s clients are the Legislature or Parliament, and the public officials entrusted with public expenditure. Unfortunately, the Auditor-General’s office can be particularly vulnerable to pressure from its clients if, as in the majority of cases, the Executive:

- appoints the Auditor-General;
- determines the resources allocated to the Auditor-General’s office;
- determines staffing levels and classifications; and,
- is responsible for overall financial management and administration through the Minister of Finance.

An Auditor-General who is not constitutionally protected can be liable to arbitrary removal at the whim of a disgruntled administration - and most administrations that incur serious criticism for financial mismanagement are more inclined to shoot the messenger than accept responsibility for their misdeeds.

An apparent ambiguity in terms of accountability can be reduced if the office-holder is clearly designated as being an officer of the Legislature, rather than an appendage of the Executive. For example, British legislation now states that “the Comptroller and Auditor-General shall, by virtue of his office, be an officer of the House of Commons [the elected House of Parliament].”

If the role of the Office is to be a properly independent and constitutional one, the Office and its functions should be accountable and subject to periodic reviews by the Legislature (in many countries, through the Public Accounts Committee). It should also have direct access to Par-

“The nation needs a financial watchdog that barks and bites”

“The consequences of giving the job [of Comptroller and Auditor General] to unqualified persons have been disastrous for India…. A strong and effective CAG is the best ally that the government and the people can have to reduce the enormous waste and fraud we see everywhere in the central and state governments. It will be in the interests of the government not to yield to pressure from retiring government officials lining up for the job, but to find a professionally qualified and independent CAG…. The nation needs a financial watchdog which barks and bites. This is the time to look for one. The opportunity should not be lost.”

liament, the Public Expenditure Committee, the Director of Public Prosecutions, and other investigative agencies as needed. In addition, best practice dictates that the Office of the Auditor-General should itself be subject to peer review to ensure quality through external inspection and audit.  

Contracting out to the private sector

In an era when governments around the world are looking at ways of reducing bureaucracy by contracting out to the private sector, there must be a clear understanding of the necessity to preserve the constitutional function performed by the Office of the Auditor-General.

By hiring a number of private sector accountancy and auditing firms to do the job, most, if not all, of the following would be at risk:

- developing and retaining considerable expertise in public sector audit;
- continuity of office (private sector firms would be dependent on the goodwill of those hiring them for the renewal of their contracts);
- a reputation for public integrity sustained over a long period of time;
- a deterrent to aberrations, illegal acts or wasteful decisions on the part of public servants, simply through the knowledge that the Auditor-General can inspect at any time;
- the non-partisan performance of duties; and
- a core public mechanism for keeping the public sector accountable to the Legislature.

Moreover, with audit firms increasingly made to tender for audit work, unease has grown within the audit profession that tendering may harm audit quality. Such concerns have become major problems for the accountancy profession in the United States.  

Unless contracting out is a direct attempt to reduce accountability, such a move would be based on an unspoken belief that the Auditor-General’s office lags behind best practice in the private sector when it comes to auditing commercial organisations. This points to the need to rehabilitate and better equip the office of the Auditor-General. If, however, circumstances dictate that a particular audit would best be conducted externally, constitutional propriety would be met if the Auditor-General maintains jurisdiction but, after consultation with the appropriate Minister, decides to sub-contract a private sector firm to perform the work. It is of critical importance that the Auditor-General be, and remain, the statutory auditor of all public bodies.

Certainly, the notion that a public agency should be free to pick and choose between competing private firms as to which they should be accountable – and for how long – flies in the face of concepts of sustainable accountability. That said, there will be occasions, particularly in countries where auditing resources in the public sector are scarce, where private sector firms will have to play a role.

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4 U.S. Government Auditing Standards (1994) (commonly known as the Yellow Book) is widely used around the world. Published by the US General Accounting Office, it states that “each audit organisation conducting audits in accordance with these standards should … undergo an external quality control review.”


Conflict of interest is an inherent danger in contracting out the functions of the Auditor-General. A private sector auditing firm should be barred from providing other services to a department or ministry being audited, at least for as long as the duration of the audit contract. Indeed, one of the prime arguments used by the private sector is that an external auditor could provide a range of additional financial services which are not presently provided by an Auditor-General. This argument ignores the significance of conflict-of-interest considerations in public sector work.

Perhaps the greatest single factor in the argument against contracting out to the private sector is that the Auditor-General acts as a filter between audited departments, ministries and individuals, and the Legislature. If the Legislature cannot rely on the Auditor-General to single out the most important issues, it would be confronted by a welter of reports emanating from a myriad of different accounting firms. In the face of many individual reports, each with its own claims for the Legislature’s attention, the task for the Legislature of identifying the most important issues would be an extremely taxing and time-consuming one.

In some countries, the modern trend is for government-owned or -controlled companies to be freed from the Auditor-General’s scrutiny by gaining authority to appoint a private sector auditor to conduct an audit under the auspices of its own legislation and beyond the oversight of the Auditor-General. In such a situation, the Executive can truly be described as appointing its own auditor.7

The best that can be said in support of such a practice is that the Executive has the belief that there are efficiency gains to be made, without sustaining a loss in accountability. The worst that can be said is that there is more than a suspicion in many countries that some companies, then subject to Government audit, have seized the opportunity afforded by reductions in Ministerial control to deliberately slip the yoke of the Auditor-General.

Epitaph to an auditor of integrity

Shortly after filing an Annual Report8 which includes the following moving lines, the Auditor General, Su’a Rimoni D. Ah Chong, Controller and Chief of Audit in Samoa, was removed from office. His Report had detailed gross financial mismanagement by senior political figures, none of which were substantially challenged. The grounds for his removal from office were simply that he had, without authorisation, called upon an international auditing firm to assist him in his inquiries:

“The exercise of my functions as Controller and Chief Auditor in a small place like Western Samoa is a burdensome responsibility indeed, the full impact of which I am just now becoming fully aware of. The decisions which I must take, if the purpose of my Office is to be achieved, on matters arising out of my audits affect and will continue to affect many powerful people, some friends, some family members, etc. whose decisions and conduct affecting public moneys and Government properties have been called into question. The one thing that has kept me “unaffected” is my firm belief that the future of our children, our people and our country, depends on making our “governing” system work properly, for one and all, as our Constitution envisaged...Successive governments have such an obligation and duty to our people,

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7 In some countries, this has given rise to complaints about the lowering of professional standards, most notably in the United States. See United States General Accounting Office, Report to Chairman, Legislation and National Security Subcommittee, Committee on Government Operations, House of Representa-


8 Su’a Rimoni D. Ah Chong, Controller and Chief Auditor, Audit Office, Western Samoa, 6 July 1994 in his report to the Legislative Assembly Period 1 January 1993 to 30 June 1994.
and Parliament should ensure Governments are guided along a path towards achieving and sustaining that objective.”

Five years after Ah Chong had been summarily removed from office, a cabinet minister responsible for trying to contain rampant corruption in the same administration which Ah Chong had criticised, was murdered at the instance of two of his former cabinet colleagues, and by the son of one of them.

**Effectiveness**

It is clearly constitutionally anomalous for the Executive to have control over the budget and staffing of the Office of the Auditor-General. If the provision of adequate resources is left to the Executive to determine, the temptation will be to economise. A better approach involves making the necessary financial appropriations through the Legislature.

Some countries (Australia and Britain, for example) have established parliamentary committees to advise the Auditor-General on Parliament’s audit priorities as well as to consider in detail the finances of the Office. Committee members include the Chair of the Public Accounts Committee (which is responsible for considering and reporting on the Auditor-General’s reports) and the Minister of Finance (to ensure that resource “bids” are subjected to the same levels of analysis and evaluation as in other departments). The result is a shared responsibility between the Executive and the Legislature. The argument that this approach infringes upon the convention of the Executive alone preparing and placing proposals for expenditure to Parliament, is countered by the fact that Parliament is simply participating in the process by which advance estimates are determined.

To be fully effective, the Office of the Auditor-General should have relative freedom to manage the department’s budget and to hire and assign competent professional staff. There is usually a qualified and experienced pool of professionals who can be drawn from the private sector, if adequate remuneration is provided. To meet the attractive wage scale offered by the private sector, the trend in best practice is towards uncoupling the Auditor-General’s Office from the overall general public service pay structure, thus permitting the Office “as a statutory or constitutional authority” to determine the terms and conditions of employment. The Office should also be free to diversify its skill base by being able to recruit, on contract, persons from the private sector to positions of leadership. It may, however, not be possible to match private sector pay scales at the top levels. If so, a route which may be worth exploring involves seconding senior private sector staff to the Audit Office through an arrangement with the professional body of the accountancy profession.

The issue of adequate funding also comes into play when ensuring the effectiveness of the Office. At times, the Auditor-General, especially in smaller countries, may require additional outside help to deal with complex situations. Without special budgetary provision to enable the Auditor-General to engage international firms of accountants or other specialists, the Office may be hamstrung in the most serious cases. If starved of necessary resources, the Office can also be prevented from ensuring that it keeps up-to-date with modern accounting prac-

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9 In Australia, for example, salaries of senior staff were less than half those of private sector peers, leading to problems in recruitment and therefore diminishing the effectiveness and efficiency of the Office. See The Auditor General: Ally of the People and Parliament: Report 296 Joint Committee of Public Accounts, Australian Government Printing Service, Canberra, 1989, p.xv.  
10 The suggestion has been made in Australia. See ibid., p.85.
ties and technologies, and is able to conduct efficiency and performance audits. Developed countries tend to devote as much as 50 per cent of the Office’s resources to efficiency audits. The proportions which developing countries can devote is very much lower, and at times negligible. Yet, if these countries are to develop meaningfully, with a minimum of corruption and maladministration of public funds, efficiency audits are fundamental to maximising their limited resources.

Furthermore, the effectiveness of the Auditor-General can also be eroded by legislation which creates quasi-autonomous public bodies beyond the Auditor-General’s domain or by privatising functions that properly belong in the Office. A watchful press, public, and parliamentary opposition must always be on the lookout for any unjustified intrusion into the Auditor-General’s jurisdiction. In addition, legislation governing the fundamental principles of financial management and control and accountability for public funds and property should be strong and up-to-date.

**Relationships with other Agencies**

Increasingly, the Office of the Auditor-General liaises closely with enforcement officials in other government agencies to ensure that skills and insights are shared and that the Office becomes more adept at spotting corruption. Recent developments in enforcement have uncovered failures in the traditional separation of government functions. For example, a number of serious scandals erupted in Germany in mid-1995 when operational changes were implemented which brought both the Office of the Auditor-General and the taxation authorities into a closer working relationship with those government structures responsible for investigating and prosecuting crime. A small team of carefully-selected investigators of the highest integrity, equipped with appropriate powers of investigation, and given both independence from political control and a high level of political support, has proven to be a much-improved method of investigating, and a better deterrent against, large-scale corruption.

**Enforcement**

The enforcement of financially sound procedures and adequate follow-up to reports from the Auditor-General should be essentially proactive. For example, there is little utility in having senior political figures file financial disclosures unless someone, somewhere, is going to analyse the information and check for accuracy and truthfulness. This is not to say that every disclosure must be checked, but there must at least be an awareness of the probability of this occurring and the risk involved in filing false information.

The basis for establishing proper methods of investigation and prevention of corruption begins with institution-building. At the front-line of an institutional integrity system are those civil servants who are also members of professional bodies, such as lawyers, accountants, auditors, researchers and investigators. Apart from being accountable to their direct superiors, these individuals may also be subject to disciplinary action by their professional bodies if they are shown to have conducted their professional duties in an unethical manner. Where professional societies exist, the public service sections of their membership should be fostered and encouraged to debate the ethical and professional issues that can and do arise in the course of public service.11

In addition, civil service professional staff could be made responsible to constitutional office-holders outside their departments. For example, internal accountants and auditors may be made professionally responsible to the Office of the Auditor-General in order to allow them
direct access to this Office when they believe they are being subjected to unprofessional
demands by their departmental superiors. Similarly, departmental lawyers may be profession-
ally responsible to the Attorney-General. This “enforcement” of professional accountability
can halt much corruption quite literally in its tracks. However, another view is that the ana-
logy to the Attorney-General (an Office of the Executive) is, in fact, misleading, and that the
Auditor-General functions best when wholly separated from the Executive, and not as an
adjunct to it.

Eleven recommendations provide a checklist

Recognising the importance of the Supreme Audit Institution, representatives from the coun-
tries in the process of joining the European Union, adopted the following eleven recommen-
dations in October, 1999.¹²

The Legal Framework

Recommendation 1: Supreme Audit Institutions should have a solid, stable and appli-
cable legal base that is laid down in the Constitution and the law and is comple-
mented by regulations, rules and procedures.

Recommendation 2: Supreme Audit Institutions should have the functional, organis-
ational, operational and financial independence required to fulfil their tasks objec-
tively and effectively.

Recommendation 3: Supreme Audit Institutions should have powers and means that
are clearly stated in the Constitution and the law to audit all public funds, resources
and operations (including EU funds and resources), regardless of whether they are
reflected in the national budget and regardless of who receives or manages these pub-
lic funds, resources and operations.

Recommendation 4: Supreme Audit Institutions should undertake the full range of
public-sector external auditing, covering both regularity and performance audits.

Recommendation 5: Supreme Audit Institutions must be able to report freely and
without restriction on the results of their work. Reports may be submitted to Parlia-
ment and should be made public.

Adoption and Implementation of Auditing Standards

Recommendation 6: Supreme Audit Institutions, recognising existing national expe-
rience, should formally adopt, promulgate and disseminate auditing policies and stan-
dards, compliant with INTOSAI Auditing Standards, European Implementing Guide-
lines for INTOSAI Auditing Standards and any relevant public sector auditing stan-
dards issued by IFAC and accepted for application in the EU. Auditing standards
should be applied on a consistent and reliable basis to an SAI’s work to ensure that
audit work is of an acceptable quality and competence. The SAIs should therefore

¹¹ See, for example, the discussion by Professor John Ll. Edwards
on the jurisdiction of a Law Society or Bar Association over an
Attorney-General or a Director of Public Prosecutions when the
officer in question has acted unprofessionally in a professional
Expectations and Accountability”, in Memoranda presented to
the 1993 Meeting of Commonwealth Law Ministers, Grand Baie,

¹² Recommendations concerning the Functioning of Supreme
Audit Institutions in the Context of European Integration (Octo-
ber, 1999) was prepared by a working group comprising dele-
gates of the Supreme Audit Institutions of Albania, Bulgaria,
Croatia, the Czech Republic, Estonia, the European Court of
Auditors, Hungary, Latvia, Romania, Slovenia, Slovakia, and
chaired by the Supreme Chamber of Control of Poland. The
Presidents of the SAIs approved the eleven recommendations
and agreed to give high priority to their use in the future devel-
opment and work of their institutions. It is included in the Best
Practice section on the Internet version of this Source Book:
develop auditing manuals and detailed technical guides to help promote the practical use and achievement of the standards.

Managing an Audit Institution

Recommendation 7: Supreme Audit Institutions should ensure that their human and financial resources are used in the most efficient way to secure the effective exercise of their mandate. To this end, SAI management will need to develop and institute appropriate policies and measures to help guarantee that the SAI is competently organised to deliver high-quality and effective audit work and reports.

Recommendation 8: Supreme Audit Institutions should develop their internal organisation as a supportive structure for the proper conduct of work related to the requirements of the pre-accession period.

Recommendation 9: Supreme Audit Institutions should ensure that their staff are competent, capable and committed to help guarantee that effective audit work is produced in conformity with international standards and good European practices.

Recommendation 10: Supreme Audit Institutions should develop the technical and professional proficiency of their staff through education and training.

Role of an SAI in the Assessment and in Encouraging the Development of Internal (Management) Control

Recommendation 11: Supreme Audit Institutions should focus on the development of high-quality, effective internal (management) control systems in audited entities.

Indicators for assessing the Auditor-General’s Office as an integrity pillar

- Is there security of tenure for the office-holder (is the post constitutionally protected or otherwise guaranteed against political interference)?
- Is the post a non-political appointment?
- Is the post adequately remunerated?
- Is the Office adequately staffed?
- Are reports to the Legislature up-to-date?
- Are Reports made public promptly?
- Are Reports followed up regularly by a Public Accounts Committee of the Legislature or another equivalent body?
- Is action taken on Reports?
- Are there rules requiring annual auditing of financial accounts of state and parastatal institutions by independent auditors, and requiring public disclosure of the results? Is the Auditor-General responsible for the conduct of these audits?
- Is there an assets tracking system to enable periodic evaluation of assets so as to ensure that assets purchased by the state remain in the state’s control until they are properly disposed of?
- Does the Office meet appropriate accounting and auditing standards?
- Does the Office in fact receive what is budgeted for it by the Ministry of Finance or by the Legislature?
Chapter 10

The Ombudsman

No authority more useful and necessary can be granted to those appointed to look after the liberties of the state than that of being able to indict before the people or some magistrate or court such citizens as have committed any offence prejudicial to the freedom of the state.

Niccolo Machiavelli, The Discourses, I (8)

What can the ordinary citizen do when things go wrong? When grievances arise, and complaints about government bureaucracy fall on deaf ears? One option is to turn to the legal system, but even when the legal system is operating in accordance with the law, the courts tend to be slow, expensive, public and far from user-friendly.

However, the courts, too, may be in disarray, perhaps themselves corrupt, and the Rule of Law may be faltering if not actually foundering. How, then, can people be protected when the legal system itself is failing? Many turn to the Ombudsman, however described – styled as Defender of the People (Defensor del Pueblo) in Spain, and as Public Protector in South Africa.¹

What is an Ombudsman?

Although the word “Ombudsman” is Scandinavian in origin, the first Ombudsman actually flourished in China over 2,000 years ago, during the Ts’ in Dynasty (221 BC) and in Korea, too, during the Choseon Dynasty. The Romans also grappled with the problem, but it was the example of the second Muslim Caliph, Umar 1 (634-644) and the concept of Qadi al Qadat (developed in the Muslim world), which influenced the Swedish King, Charles XII. In 1713, fresh from self exile in Turkey, Charles XII created the Office of Highest Ombudsman. The Scandinavians subsequently moulded the Office into its contemporary form. As a result, in modern times the institution was thought to be unique to the needs of Scandinavians, until the 1960s, when New Zealand introduced its first Ombudsman.²

As Sir Guy Powles, New Zealand’s and the common law world’s first Ombudsman later observed, citizens found the Office to be useful in dealing with the powerful engines of authority and the concept quickly spread to the rest of the world.

¹ Large numbers of citizens in the U.K. have opted for the services of the Ombudsman. The Sunday Times (14 August 1994) listed these services as including the Personal Investment Authority Ombudsman, Investment Ombudsman, Insurance Ombudsman, Building Societies Ombudsman, Banking Ombudsman, Inland Revenue Adjudicator and the Estate Agents Ombudsman, as well as others dealing with separate aspects of government administration.


South Korea’s Ombudsman

In the spirit of Shin-moon-go and O-sa (a royal inspector who travels incognito to check on local governments), the Korean government established the Ombudsman of Korea on April 1994. The rationale for its establishment was to meet:

• Increasing public demand for administrative reform
  Complicated, diverse functions of public administration inevitably produced many regulations and restrictions on the daily life of citizens. Additionally, growing public awareness of individual rights has resulted in a growing number of unfulfilled desires and demands for improved public administration and related affairs. Consequently, the number of petitions submitted to such offices as the Presidential Secretariat, the Office of the Prime Minister and the Board of Audit and Inspection (BAI) has increased rapidly.

• Growing distrust of government handling of civil appeals
  Despite the government’s efforts to resolve problems raised by these petitions, very few were settled by the offices to which they were submitted. In fact, more often than not these offices ended up transferring the action to the very agencies that triggered the petition in the first place. This procedure produced little satisfaction and soon sparked widespread public distrust of the government’s procedures for handling complaints.

• The need to restore public confidence
  For the government to continue to carry out effective public administration and regain public confidence, it was imperative that it eliminate outdated rules and unnecessary restrictions to restore the rights of citizens.

• Administrative reforms focused on citizen convenience
  The Ombudsman of Korea was established to protect the rights and interests of the citizens from illegal, unreasonable administrative dispositions of government agencies, and enable the government to carry out fair, efficient administrative reforms.

http://www.ombudsman.go.kr/eng_page/index.htm
Today, the Office of the Ombudsman is found in the constitutions of many countries. It has also proliferated in larger countries so that there are ad hoc “Ombudsman” offices in various sectors – banking, health, insurance to name but a few.\(^3\)

The British and Irish Ombudsman Association works to criteria which eliminates those “Ombudsman” institutions which are really captive to the organisations they are supposed to monitor, rather than being independent of them. It recognises only those offices which meet four criteria:

- independence of the Ombudsman from the organisations the Ombudsman has the power to investigate;
- effectiveness;
- fairness; and,
- public accountability.

It is independence which above all distinguishes recognised Ombudsman schemes from other complaints procedures. Those who head the internal complaints procedures of their own organisations, even if described as Ombudsmen, are not wholly independent and so misuse the expression when it is applied to them. The concept of the “Ombudsman” has become popular with the private sector, and the expression is increasingly found there, but for the purposes of this discussion we are looking at the classic “Ombudsman”, the Ombudsman in the public sector.

The Ombudsman constitutes an Office which independently receives and investigates allegations of maladministration.\(^4\) It does not compete with the courts, or act as a further body to which those unsuccessful in the courts can appeal.\(^5\) Most do not have jurisdiction to investigate the courts themselves. The primary function of the Ombudsman is generally to examine:

(i) a decision, process, recommendation, act of omission or commission which is contrary to law, rules or regulations, or is a departure from established practice or procedure, unless it is bona fide and has valid reason; is perverse, arbitrary or unreasonable, unjust, biased, oppressive or discriminatory; based on irrelevant grounds; or, involves the exercise of powers or the failure or refusal to do so for reasons of corrupt or improper motives such as bribery, jobbery, favouritism, nepotism, and administrative excesses; and,

(ii) neglect, inattention, delay, incompetence, inefficiency and ineptitude in the administration or discharge of duties and responsibilities.\(^6\)

In essence, “The Ombudsman can bring the lamp of scrutiny to otherwise dark places even over the resistance of those who would draw the blinds”.\(^7\)

The institution of Ombudsman gives individuals an opportunity, in addition to existing provisions such as Parliament, the Judiciary, and internal complaints procedures, to place complaints about the practices of government before an independent and expert body. Complaints to the Ombudsman may result in remedial action being taken to resolve maladministration in particular cases, and, in a broader context, help to restore confidence in the integrity of institutions.

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\(^3\) Over the last thirty years, the Ombudsman has emerged from Scandinavia and found its way to more than eighty countries, and in all parts of the world.

\(^4\) A holder of the post in Zambia wrote that “the abuse of authority or maladministration...may take various forms, for example corruption, favouritism, bribes, tribalism, harshness, misleading a member of the public as to his or her rights, failing to give reasons when under a duty to do so, using powers for the wrong reasons, failing to reply to correspondence and causing unreasonable delay in doing desired public acts.” See Annual Report of the Commission for Investigations 1975, Lusaka, Zambia, p.3.

\(^5\) Some Ombudsman offices are barred from receiving complaints that could otherwise go to a court of law. Others make it a condition of receiving a complaint that the complainant waive any right of court proceedings (this to eliminate the possibility of complaints being used to fish for information for later court proceedings and to foster greater elements of co-operation from government departments than might otherwise be forthcoming). The definition comes from the Pakistan legislation establishing the Office.

\(^6\) The quote arises from a landmark Canadian case on the Ombudsman (British Columbia Development Corporation and another v Friedman [1984] 14 DLR 129 at 140).
In view of this role vis-à-vis the individual, the law establishing an Ombudsman often deliberately elects to place a single person, the National Ombudsman, as the representative of the institution in the eyes of the outside world, as a counterbalance to an often faceless bureaucracy.

As a high-profile constitutional institution, the Office is potentially better able to resist improper pressure from the Executive, than are others. It can perform an auditing function to stimulate information flows which reveal and contain the limits of corruption in government. The confidentiality of these procedures gives the Office the added advantage of providing a shield against possible intimidation of informants and complainants.\(^8\)

In many countries, the mandate of the Ombudsman also extends to investigation and inspection of systems of administration to ensure that they restrict corruption to a minimum. Thus, it can recommend improvements to procedures and practices and act as an incentive for public officials to keep their files in order at all times.

The Office has also been found to be extremely adaptable, and has worked well in parliamentary democracies, societies with radically different ethnic and religious backgrounds, and in one-party as well as military states. For instance, when Tanzania introduced a one-party state, the Presidential Commission observed that:

“In a rapidly developing country, it is inevitable that many officials, both of the government and of the ruling party, should be authorised to exercise wide discretionary powers. Decisions taken by such officials can, however, have the most serious consequences for the individual, and the Commission is aware that there is already a good deal of public concern about the danger of abuse of power. We have, therefore given careful thought to the possibility of providing some safeguards for the ordinary citizen.”\(^9\)

The result was the establishment of the Permanent Commission of Enquiry - an Ombudsman. This was a landmark development. For the first time, concern about corruption of leaders in developing countries led a country to establish a leadership code in its Constitution for which the Ombudsman Commission was made responsible for supervising, as well as its traditional Ombudsman role.\(^10\)

Poland created its Ombudsman Office in 1987 to investigate violations by the administration of the law and principles of community life and social justice. Its success has inspired other emerging European democracies to do the same.\(^11\)

**What criteria does an Ombudsman apply when judging official actions?**

When is conduct proper or improper? If a particular government action conflicts with statutes and principles, and does not appear to be justified on other grounds, it cannot, in principle, be regarded as proper conduct. Ideally, an Ombudsman approaches the action broadly and reviews it both in the light of the provisions of the written law, and in the light of unwritten legal principles, as well as, against the standards for good governance.

Investigations of the action in view of the written law include such areas relating to human and constitutional rights, definitions of competence, and provisions governing from procedure and substance. Investigation of the action in view of the unwritten legal principles (developed

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\(^9\) Ibid.

\(^10\) This model was followed by Papua New Guinea, the Solomon Islands and Vanuatu.

\(^11\) Using an Ombudsman to Oversea Public Officials, Nick Manning and D. J. Galligan (PREM Notes, The World Bank, Washington D.C., April 1999)
in case law and legal doctrine) are equally relevant to the lawfulness of government conduct, and include the principles of: equal treatment for equal cases; reasonableness; proportionality between means and end; legal certainty and of legitimate expectations; the requirement to provide reasons for decisions; and, of certain duties of care.

In addition, when reviewing a government action, an Ombudsman also uses standards or guidelines for good governance which contribute to the propriety of the way the Executive authorities act. The standards can be summed up as the imposition of a broad duty of care. These are manifested in certain accepted standards for administrative processes and the conduct of public servants in relation to the public. They include the requirement to act without undue delay; to supply the individual with relevant information; to treat people fairly and respectfully; and, to be unbiased and helpful.

Finally, the Ombudsman sets standards for the government organisation – such as those of coordination, monitoring of progress, protection of the individual’s privacy, and accessibility of the authorities.

**And how does an Ombudsman decide which cases to investigate?**

The Offices of Ombudsman around the world receive many more complaints than they are authorised under their legislation to handle. Hence, they operate within the jurisdiction set out in their legislation. Guidelines for accepting or rejecting complaints commonly include the following questions:

- Is the complaint within the Ombudsman’s jurisdiction at all? (A surprising number are not.)
- Has the person complaining exhausted the other remedies available to them? (The Ombudsman should be a last resort, not a first port of call.) If not, is it reasonable to expect them to have done so?
- Has the complainant sufficient personal interest in the subject matter of the complaint?
- Is the matter already before the courts? If so, is it appropriate for the Ombudsman to become involved?
- On the face of the complaint, does it appear that the person complaining is not acting in good faith?

**Should an Ombudsman have a distinct anti-corruption role?**

A classic Ombudsman is concerned with eliminating “maladministration”, and generally “maladministration” stems from some degrees of corruption in public administration. Therefore, an Ombudsman will need to tackle corruption where it is the cause of malfunction in the administration.

In order to perform its function of improving public administration, the Ombudsman needs to develop a relationship of trust and confidence among those whose standards he or she is responsible for overseeing. It is generally thought inadvisable – if it can be avoided – for the Ombudsman to have an investigative and prosecutorial role. This is to convert the “friendly Ombudsman” into the “feared policeman”, and could, in some environments, render the wider function of the Office less effective.

However, several countries have taken the view that the Ombudsman, with right of access to government files, is in a far better position to investigate and police the administration than are the less expert orthodox police investigators.¹²
A recent development of interest, in the Australian State of New South Wales, has been the appointment of the Ombudsman also to be the Commissioner responsible for the Independent Commission Against Corruption.

Monitoring assets

In some countries, such as Papua New Guinea and Taiwan, the Ombudsman is seen as being in a unique position to review and to monitor declarations of income and assets made by senior public officials. Independent of government, with a high level of public trust and profile, and investigative capacities to examine their contents, the Ombudsman’s Office can be an effective instrument, thereby, avoiding the necessity for establishing other independent mechanisms specifically for monitoring assets. Alternatively, where a large number of applications for information are likely to be disputed, the option of establishing a separate Ombudsman’s Office to handle these has been adopted.

Access to information

In the same way, an Ombudsman’s Office is well placed to handle appeals where officials refuse to provide members of the public with information they are entitled to have. This would fall within the general ambit of an Ombudsman’s work, but as there is usually specific legislation dealing with access to information (where there is any at all), the question arises of who should handle appeals when the legislation is passing through a Parliament. Obviously, the Ombudsman’s Office has advantages because it is accustomed to handling sensitive information.

Feedback on the quality of government services

An Ombudsman can also contribute significantly to the quality of government, by providing feedback as to how the administration is performing its tasks. This is particularly important for government organisations wishing to perform their functions in a customer-friendly manner. Complaints are signals, constituting a valuable source of information for quality assurance. This feedback can be of particular value for government organisations as they often have a monopoly of their own and are rarely exposed to the dynamics in the outside world. Observing the criteria for proper conduct developed through the Office of the Ombudsman can, in short, contribute to the rationality and legitimacy of public administration.

The appointment process

As with many other elements in a system of checks and balances, the process of appointing an Ombudsman is crucial to building and sustaining public confidence in the institution. If the Office is filled with party faithful or pensioned-off officials, chances of success are severely limited.

12 For example, the Office of the Inspector-General of Government in Uganda.
13 The Papua New Guinea model is widely seen as having had positive impact. However, in Taiwan, in order to cope with the implementation of the asset disclosure law, the Control Yuan set up the Department of Asset Disclosure for Public Functionaries in August 1993.
14 Finland is an example.
15 This approach has been adopted, e.g. in New Zealand. Some other countries, where the demand for information is likely to be high, have established the Office of Information Commissioner, along the lines of the Office of Ombudsman, but with a limited mandate.
limited. In some countries, Parliament itself makes the selection and the head of state formally announces the appointment. In others, the appointment is made by the head of state after consultation with the Leader of the Opposition and the Prime Minister (if there is one). Or, in some cases, the appointment is simply made by the Executive without any formal requirement for consultation. The actual mechanics of the process are secondary to the outcome. The Office must be seen by the public as independent, fair, competent, and serving the best interests of the people, and not as a bureaucratic appendage, serving the objectives of the ruling political party.16

One distinguished Ombudsman has noted that:

“However the appointments procedure may be set up, the institutional safeguards for independence will be undermined if there is any possibility of party political considerations leading to bias - or the appearance of bias – in the person appointed. It is equally important to guard against making an appointment that waives or dilutes the necessary professional qualifications. In this respect all that can be done, once a sound selection procedure is enshrined in the law, is to hope that the responsible authority will act wisely. The Ombudsman himself, of course, must endeavour to steer clear of any conduct that could undermine his impartiality or public confidence in him in this regard. He must never use his Office to pursue his own personal interests, for instance in connection with his future career.”17

Term of office

The position of the person appointed Ombudsman needs statutory safeguards to ensure independence. Thus a fixed term of office needs to be laid down, making it impossible for him or her to be dismissed before this term expires. Or, in the event that they can be dismissed prematurely, special procedural and substantive conditions must be enshrined in statutory provisions, to guard against any political or administrative influence that might prejudice the independence of the Ombudsman’s Office.

The status of the Ombudsman must not be subordinate to that of the leadership of the bodies that he is empowered to investigate. Salary is a different matter from formal status. There are many Ombudsman operating in the Commonwealth and elsewhere who have lower salaries than the leadership of jurisdictional bodies, but who are still very effective.

During his or her term of office, an Ombudsman should not hold any other position. This minimises possibilities of conflict of interests, as well as reducing the space for an administration to “show favours” to an obliging office-holder.18

Removal from office

The Ombudsman must feel secure in tenure and not subject to removal at the whim of the Executive. When an Ombudsman has a short-term position or is not otherwise guaranteed tenure of office, the holder of the post may lack the confidence to act as fearlessly and as

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16 One of the most attractive models is provided by the Melanesian state of Papua New Guinea, where the appointment is made by the (non-Executive) President acting in accordance with the advice of a specially-constituted committee comprised of members of the Judiciary, the public service and Parliament (including the Leader of the Opposition).
17 Address by Dr Marten Oosting, President of the International Ombudsman Institute, National Ombudsman for The Netherlands, in “The independent Ombudsman in a democracy, governed by the Rule of Law” given at the Opening Ceremony of the Third Asian Ombudsman Conference, Macau, 4 May 1998
18 For example, the New Zealand legislation provides in the Ombudsmen Acts (1975-1996), Section 4, that “Ombudsmen to hold no other office – An Ombudsman shall not be capable of being a member of Parliament or of a local authority, and shall not, without the approval of the Prime Minister in each particular case, hold any office of trust or profit, other than his office as an Ombudsman, or engage in any occupation for reward outside the duties of his office.”
impartially as required. Ideally, an Ombudsman should have the same assurance of tenure as a superior court judge, removable only through a special procedure.\footnote{19}{In New Zealand, the legislation establishing the Ombudsman (Acts [1975–1996] Section 6, reads "Ombudsmen Removal or suspension from office"), provides: (1) Any Ombudsman may at any time be removed or suspended from his office by the Governor-General [Head of State] upon an address from the House of Representatives, for disability, bankruptcy, neglect of duty, or misconduct; (2) At any time when Parliament is not in session, any Ombudsman may be suspended from his office by the Governor-General [in Council] for disability, bankruptcy, neglect of duty, or misconduct proved to the satisfaction of the Governor-General; but any such suspension shall not continue in force beyond two months after the beginning of the next ensuing session of Parliament.}

If the functions of the Ombudsman are to be conducted credibly, the post-holder must also be shielded from hasty or ill-considered action by those who are the subject of criticism or exposure. It is, however, interesting to note that very few Ombudsman have suffered such a fate.\footnote{20}{Marie-Noelle Ferrieux-Patterson, Vanuatu’s first Ombudsman (appointed by the President in 1994), completed her five-year term in July 1999, having released 68 reports concerning maladministration and corruption on the part of Vanuatu leaders and officials during her term. She applied for re-appointment but, despite her undoubted popularity, she was not re-appointed.}

Best practice suggests that the grounds for removal of an Ombudsman should be similar to those for members of the senior Judiciary. In other words, the office-holder can only be removed due to an inability to perform the duties required by reason of physical or mental incapacity, or misconduct. Usually the Legislature has to be involved in removal procedures. For example, with two-thirds of the Members voting for the establishment (by the Chief Justice) of a tribunal of enquiry.

The post-holder must also enjoy some form of protection after he or she has left office. This is critical where a period in office is of relatively short duration and where the office-holder is expected to resume gainful employment elsewhere in the public or private sector after their period has ended. Unfortunately, some administrations can hound office-holders into their retirement, and to attract able people to the post (and likewise to the post of Auditor-General) it is important that this type of “revenge” is inhibited.

**Resources**

"An Office of the Ombudsman that does not have an adequate budget, is not properly staffed, and is not backed by those who brought it into being amounts to nothing more than a front and a façade."\footnote{21}{Arthur Maloney QC in his 5th report as the Ombudsman of Trinidad and Tobago.}

Even so, a common complaint is that the Office of the Ombudsman is under-funded for the job it has to do. It matters little that the Constitution of a country may actually state that “the Ombudsman shall be provided with a staff adequate for the efficient discharge of (his or her) functions,” as it does in the Constitution of Trinidad and Tobago. Such constitutional requirements are more honoured in the breach.

With a lack of resources to fulfil the mandate of the post, it is often only “the will of the Ombudsman” which sustains the office-holder in the job. This is an undesirable situation and a matter which needs to be seriously addressed in any overhaul of a country’s integrity system. The Ombudsman is uniquely placed to identify gaps and weaknesses in the system and to recommend preventive action. Any failure to equip the Office adequately for this task will, in many instances, prove costly in terms of undetected corruption, inefficiencies, and malpractice. A functioning Ombudsman’s Office should be highly cost-effective, and be recognised as such.

Whether under-funded or not, the Office of the Ombudsman should be responsible for its own budget and not be subordinate for funding to another, larger department. For example, the
Ombudsman in Zimbabwe is largely funded through the Ministry of Justice. The Ombudsman in Barbados has complained that the government refuses to acknowledge the independence of his Office by presenting its annual estimates of expenditure as a sub-head of a ministry, rather than under its own head of expenditure.

Although the question of budgetary allocation and control is a matter for parliamentary and other channels, the Ombudsman ought to be able to authorise travel and other expenditure, within approved limits, in order to conduct expeditious and discreet investigations, without seeking the permission of someone else. As many complaints will concern the slow pace of government administration, the Ombudsman cannot fall prey to the same malady or else the Office may quickly resemble just another inefficient government department. The quality of staff is also important. In some Offices, staff with investigative skills will be needed (in Uganda, serving police officers are seconded into the Office) and relevant training is essential.

Accessibility

The hallmark of the Office of the Ombudsman is that citizens have direct access; they don’t have to go through lawyers or involve their elected representatives. The process is generally free, and can simply be a matter of writing a letter knowing that someone will read it and take notice. However, a special concern, as President Julius Nyrere once observed, is that “we must not forget that the Ombudsman receives complaints only from the most literate, aware or energetic and courageous of our citizens.”

As a consequence, some Ombudsman Offices find it necessary to travel to rural areas in order to make their office more accessible and better known. Certainly, the available evidence indicates that such outreach efforts lead to an increase in the number of complaints against mal-administration made by those in the rural areas. For example, the Office of the Ombudsman in Swaziland did not reach out to the outlying areas. As a result, only 40 complaints were received in three years of operation and the institution was scrapped. In larger countries, decentralisation of the Office is also necessary and other awareness-raising initiatives, including publicity campaigns, paid-for advertising (if the budget allows), newspaper interviews, and “talk-back” radio, are often used to increase accessibility.

In addition, the Ombudsman must win the trust and confidence of the various departments within the government structure in order to operate effectively. These departments should be encouraged to view the Ombudsman as both accessible and as a potential ally - one which can independently vindicate the department and its officials when they are the subject of unjust criticism.

However, a right to complain is not much of a right if the general population are unaware of the right. Public education is an important part of any Ombudsman’s role and should be adequately funded and, where possible, promoted by civil society groups. Education can take the form of “clinics” undertaken as a part of the Ombudsman’s outreach activities. “Doorstep justice” is an important element in building the integrity of the Ombudsman institution.

22 Fortunately, the International Ombudsman Institute (IOI) has become active in arranging attachments for training purposes. An excellent manual is their Guidelines for Investigators of Pacific Ombudsmen – The Dawson File, IOI, Alberta, Canada; the outcome of a Workshop for Investigators of Pacific Ombudsmen, Auckland, New Zealand, April 1993.

23 Concerned at the prospect of losing profile and some influence (and perhaps wishing to control the process), MPs in Britain deny their constituents direct access to the Ombudsman. Instead, complaints must be channelled through elected constituency representatives. This is out of line with best practice, and inevitably raises doubts about the integrity of a process which requires complaints about governmental behaviour to be ciphered through the elected representatives of, as is most often the case, the governing party.

24 Some systems provide for small fees to be paid as a way of “rationing” access to the Ombudsman.

Remedies

If maladministration or corruption has been identified by the Office of the Ombudsman, what happens next? The Office of the Ombudsman operates in the expectation that public officials will undertake the recommended remedial action. Where recommendations are ignored or deferred at the highest levels of public officialdom, a culture of disrespect will be engendered and the Office will lose its effectiveness. Civil society therefore has a clear role in upholding the findings of an Ombudsman and in insisting on implementation.

The Ombudsman is not a court of law and has no power to order action on its findings. This may seem strange, but bear in mind that the Ombudsman does not make a binding determination according to law, as a judge would at the conclusion of a court hearing. Rather, the Ombudsman determines the conclusion of an investigation based on the merits of a particular case. Defining merit is infinitely more vague and intangible. However, the Office is guided by its own previous recommendations and those of colleagues from countries with similar administrative and constitutional arrangements.

If the Ombudsman has powers of determination, rather than simply recommendation, the Office may be obliged to proceed much more formally and cautiously. We could all be back to where we started: complaining about the absence of a remedy that is accessible, speedy and inexpensive. In practice, fears that departments will simply ignore the findings of an Ombudsman are seldom realised, and the general view among Ombudsman Offices around the world is that powers of enforcement would not be helpful. On the other hand, the argument for increased powers of enforcement may be stronger in situations where the Office of the Ombudsman has a specific mandate to investigate corruption. In Uganda, for example, the Office of Inspector-General of Government has uncovered a number of corruption cases, and, having documented these, has forwarded the files to the prosecuting authorities for action, only to see the cases disappear into a void or prosecuted with a distinct lack of vigour. As a consequence, the new (1995) Constitution of Uganda confers powers of prosecution on the Ombudsman. Even so, these new powers do not confer the power of enforcement per se, but rather they allow the Ombudsman to access the criminal courts for adjudication on findings.

Effectiveness

For an Ombudsman to fulfil his or her role, they must be visible to the public, which in turn must have confidence in his/her impartiality and method of operation. Where the government is concerned, decisions made by an Ombudsman are generally not legally enforceable. Where formal power is lacking, respect for the authority of the Ombudsman and the Ombudsman’s decisions is of particular importance, if they are to have any impact at all. That authority is determined in the first instance by the quality of the work itself: a brisk and thorough investigation, well-reasoned decisions, and readable reports.

Quality work is a sine qua non, but not enough by itself. For the Ombudsman to function properly as an independent institution, it makes certain minimal demands on the democracy of which it forms a part. It must have political support (from Parliament, government, administration and the courts); it must be given adequate resources; and the public must be aware of, and understand, the Office and its functions.

In an environment where it is insufficiently recognised that the government exists to serve the people - and where it is not taken for granted that Executive government officials must uphold the Rule of Law, or that government bodies have continuous external accountability – the
existence of an independent Ombudsman will easily be experienced as a threat to existing interests and positions of power within the government. As Dr. Marten Oosting noted:

The Ombudsman will have his work cut out for him in such surroundings, to say the least. Approaching the Ombudsman will pose risks for the general public, while the Ombudsman himself will find it difficult, if not impossible, to perform his investigation, and to find a listening ear in the government for his views and recommendations. This means that the Ombudsman’s role as protector of the public is under pressure, making it hard for him to build up and maintain credibility. Some Ombudsmen do indeed have to work in such circumstances, reliant on the support of those who, like themselves, are dedicated to developing their country as a democracy governed by the Rule of Law. The pressure under which they have to perform their responsibilities may even be such that their personal safety, or that of their family, is at stake. I have great respect for these colleagues’ dedication to performing their task with credibility, while upholding their independence.26

The first international Ombudsman

Although the European Parliament has established its own “regional” Office of Ombudsman, the first moves to translate the concept of Ombudsman into a truly international setting took place in 1999. Then, after discussions among the private sector, interested NGOs and his staff, the World Bank Group President recruited the first appointee to serve as Compliance Adviser/Ombudsman (CAO). The same multi-stakeholder consultation process helped produce Operational Guidelines for the new Office, and continues to serve as a reference group.

The new Office has three basic functions:

• To respond to complaints by individuals, groups, communities or other parties affected or likely to be affected by IFC/MIGA projects. It uses a range of conflict resolution techniques, including mediation and conciliation, to resolve the issues raised. The emphasis is on negotiating settlements which are widely acceptable, and which work.

• To be proactive and preventive through the provision of timely advice to IFC and MIGA managements, and so help head off problems before they develop into a crisis. Advice can be given both in relation to particular projects and in respect of broader environmental and social policies.

• To foster adherence to an approved set of IFC/MIGA policies and procedures. The CAO’s compliance role is to oversee audits and reviews of IFC/MIGA’s social and environmental performance. In so doing, it seeks to build confidence among all stakeholders that projects are planned and implemented to approved standards, within known, monitorable and enforceable guidelines.27

Future developments will be followed with close interest, as the success of the initiative could well lead to the adoption of this approach by other international institutions, and so render them far more accountable than they ever have been in the past.

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26 Address by Dr Marten Oosting, President of the International Ombudsman Institute, National Ombudsman for The Netherlands, in The independent Ombudsman in a democracy governed by the Rule of Law, given at the Opening Ceremony of the Third Asian Ombudsman Conference, Macau, 4 May 1998

27 The first CAO, appointed in mid-1999, is Meg Taylor a Papua New Guinean lawyer with an NGO (Transparency International) and diplomatic background. To find out more about the CAO Office go to www.ifc.org/cao.
Preface
The establishment of the Office of The Ombudsman is to provide a channel for independent investigation of public complaints against administrative conduct, decisions and actions. The essential features of the Office are its independence, flexibility, credibility and accessibility. The mission of The Ombudsman is to redress grievances and address issues arising from maladministration in the public sector by way of recommendatory oversight to bring about improvements in the standard and quality of services and to promote fairness in public administration. It is this prime obligation which demands the performance of the Office and the conduct and integrity of its staff to be of standards no less high than what its seeks on the part of the public sector in pursuit of this mission. This Code of Conduct will be subject to a review on an annual basis.

Introduction
This Code of Conduct applies to The Ombudsman and all his staff. The Code is intended to provide general guidance to all staff who are expected to perform their duties to the highest level of integrity and professionalism. It is important that all efforts made by individual staff should adhere to the mission, vision and values of the Office and contribute towards its established goals and objectives. The Code rests on ten basic principles which all staff should follow. It also sets out specific conduct in areas central to the exercise of The Ombudsman's functions and powers.

The Code in its present form is by no means exhaustive. It should be read in conjunction with The Ombudsman Ordinance, operational policy/procedures/guidelines and office instructions and general circulars that are in force or promulgated from time to time. It is the responsibility of individual staff to familiarise themselves with all of them as appertain to their duties.

Basic Principles
The public are entitled to bring their grievances to The Ombudsman for redress. It is reasonable for them to expect a high quality service from The Ombudsman which is characterised by:

- vigorous pursuit of truth, without fear or favour
- timely response and quality reporting in plain and simple language
- equity and ease of access
- procedural simplicity and fairness
- attending to the public and organizations with courtesy and respect
- absence of prejudgetion, prejudice and private interests
- faithful, diligent and professional discharge of duties and responsibilities
- promotion of fairness in public administration
- advancement of good administrative practices and ethical principles
- efficient and effective use of resources

Compliance with the Law, Instructions and Policies
You are obliged to act in accordance with the provisions of The Ombudsman Ordinance and comply with the Office's administrative and operational policies, procedures, delegations and instructions in relation to complaint and human resource management. You are also subject to Government circulars and regulations, the applications of which are relevant to the efficient and effective operation of this Office.

You are to make yourself fully conversant with the enabling ordinance, manuals, circulars and instructions promulgated from time to time. You should promptly carry out the legitimate instructions of your supervisors and give adequate guidance and support to your subordinates.

Personal Conduct
You are expected to act responsibly, and you will be held responsible for your own acts and omissions.

You should be honest, courteous, just and fair to colleagues, complainants and complainant organizations and treat them with respect. You should conduct yourself in a manner consistent with your position and refrain from engaging in conduct and/or behaviour that might bring discredit or embarrassment to the Office. You must not discriminate against any colleagues, complainants and complainant organizations on grounds of race, nationality, sex, age, marital status, language, health, social status, religion, education, occupation, ability and political beliefs.

The Office has a prior call at all times on your abilities, efforts and attention. You should endeavour to do your utmost to achieve the highest possible standards in the performance of your duties. As a rule, no paid outside work is allowed without prior consent.

You should strive to avoid waste and misuse of resources. You have an obligation to help preserve the environment.

Professional Conduct
You have a duty to maintain a high level of professional competence and ethical practices commensurate with your profession. You should be committed to the work of the Office and be in continuous search for improvements in your performance.

You should discharge your duties and responsibilities with care, diligence and thoroughness in accordance with the relevant legislative provisions as well as policies, procedures, instructions and practices issued by The Ombudsman from time to time with special attention to:

- honesty and integrity
- timeliness, accuracy and completeness
- constructiveness and reasonableness
- impartiality and procedural fairness
- equity and natural justice
- accountability and professionalism
- conflicts of interest
- confidentiality of information

Dress, Demeanour and Appearance
You are expected to maintain professional standards and demeanour and conform to the formality of duties in both dress and appearance.

Information Security and Secrecy Provision
The success and integrity of the Ombudsman system is built on public confidence and trust. Strict confidentiality must be maintained in respect of all information that come to your actual knowledge concerning complaints, complainants, enquiries received and investigations undertaken, in accordance with the secrecy provisions of The Ombudsman Ordinance.

Conflicts of Interest
Conflicts or potential conflicts of interest, which may be seen to improperly influence the impartial exercise of your duties, must be declared at the first available opportunity. You may be relieved of your personal involvement in handling the complaint. General guidance on the definition of conflicts of interest, whether real or potential, and the declaration procedure are set out in the Office's General Circular.

Acceptance of Advantages, Gifts and Benefits
The soliciting and/or acceptance of advantages, gifts and benefits is subject to the prevailing Government circulars/regulations in force. As a general rule, you must not accept any advantage, gift or benefit that might be seen to have an impact on your work or could lead to an actual and apparent conflict between your private interests and your official position.

As a general rule, such offers should be declined unless it would be offensive to refuse. In such a case, you should report them and seek approval from The Ombudsman for their retention.

Media Enquiries and Public Comment
The Office is committed to an open policy for easy access to information by the media subject to the secrecy provision. All media enquiries should be referred to officers tasked with such responsibilities unless you are the officer designated to handle media enquiries in relation to certain specific issues.

You must not disclose any information unless it is normally given to the public seeking that information or it is already knowledge made public by way of its publication in the Office's annual reports, anonymised investigation reports, the monthly "OMBUDS News" and/or through speaking engagements, media interviews or other form of releases.

Breaches of the Code and Other Instructions
The Ombudsman attaches great importance to the full compliance of this Code of Conduct and the basic principles upon which the Code is developed. If a staff member is found to be in contravention of the Code (including any provisions of The Ombudsman Ordinance, regulations and circulars mentioned in this Code), be unsatisfactory in the performance of duties or be involved in behaviour that would bring this Office into disrepute, he/she may be liable to disciplinary actions.
Some indicators for assessing the Office of Ombudsman as an integrity pillar

- Is there an Office of the Ombudsman or a comparable institution?
- Is the public generally aware of the existence of any such Office? If so, is the Office respected by the community?
- Does the Office have adequate budget and is it adequately staffed?
- Is the appointment of an Ombudsman made in a non-partisan manner?
- Is the office-holder protected from arbitrary removal from office by the government of the day?
- Does the Executive respect and act on the reports of the Office?
- Is there ease of access for complainants?
- Can complainants complain anonymously where they believe they might suffer reprisals if their identity is known?
Independent Anti-Corruption Agencies

There are several good protections against temptations, but the surest is cowardice.
Mark Twain, "Pudd'nhead Wilson's New Calendar," Following the Equator, 1897

As the corrupt grow more sophisticated, conventional law enforcement agencies are becoming less able to detect and prosecute complex corruption cases. Furthermore, in a system in which corruption is endemic, conventional law enforcement mechanisms may themselves harbour corrupt officials.

In recent years, governments have sought to bolster detection efforts (or at least to create the impression of their intention of doing so) by introducing "independent" Anti-Corruption Agencies or Commissions. Indeed, the institution has become fashionable. But is it, and can it be, effective?

It is, of course, possible to combine such an Agency with the office of the conventional Ombudsman (as in Uganda and Papua New Guinea). Others would argue that there is a clear distinction between the two roles: that the Ombudsman is there to promote administrative fairness, and that this is best achieved by winning the confidence of the bureaucracy. An Agency or Commission which is also charged with the investigation and prosecution of public servants is more likely to be feared than trusted.

It is important to understand from the outset why it is that the Hong Kong model has proved effective. This is not just because of the quality and determination of its staff, and of the excellent legal framework which has facilitated their work, but because the concepts of prevention and prosecution have both been functions of the Commission. Prevention has not been a last, single line - a draftsman’s after-thought - in the law establishing their responsibilities. Prevention (and the community education and awareness-raising that goes with it) has been a core activity of the Hong Kong model, often informed by the revelations of investigators working on the enforcement side. This enabled the Commission to develop a coherent and coordinated set of strategies, with results that are the envy of many. Those who have tried to copy the model have largely failed because they have lacked both this coherent approach and the resources necessary to carry it through.

Why anti-corruption agencies fail...
Anti-corruption agencies can fail because of:
- Weak political will – vested interests and other pressing concerns overwhelm the leadership
- Lack of resources – there is a lack of appreciation for the cost-benefits of a “clean” administration and of the fact that an effective Agency needs proper funding;
- Political interference – the Agency is not allowed to do its job independently, least of all to investigate officials at the higher and highest levels of government;
- Fear of the consequences – a lack of commitment and a readiness to accommodate the status quo lead to agencies losing independence, resources, or both;
- Unrealistic expectations – fighting systemic corruption is a long-term exercise;
- Excessive reliance on enforcement – the effective preventive capacities of the agencies are not fostered;
- Overlooking the elimination of opportunities – relying on enforcement after the event, corruption levels continue unabated;
- Inadequate laws – without enforceable and effective laws, an Agency is hamstring;
- Being overwhelmed by the past – a new Agency, usually small and needing to settle in, can be overwhelmed by inheriting the total backlog of unfinished business from other enforcement agencies, crippling it from day one;
- Failure to win the involvement of the community – lack of public awareness campaigns, etc.;
- Insufficient accountability – if the Agency is not itself accountable in appropriate ways, it can become an Agency for persecuting government critics;
- Loss of morale – as people lose confidence in the Agency, its staff lose morale;
- The Agency itself becomes corrupt...

Adapted from Bertrand de Speville, “Why do anti-corruption agencies fail”, Vienna, Austria, April, 2000.

1 The usual “model” is the Hong Kong Independent Commission Against Corruption. This Commission serves not only to accept and investigate (but not prosecute) allegations of corruption, but also to run public awareness campaigns and to audit the management systems of individual government departments and agencies, from an anti-corruption perspective.
2 E.g. Zambia.
It is also important from the outset, to assess whether such a new body is necessary, and in particular, whether the costs of running a properly-funded Commission can be assured. An underfunded exercise will be doomed to failure. Some administrations provide their agencies with a “share” of what they recover, although this approach can lead to overzealousness and abuse.

Where should the Agency be positioned?

Success in Singapore owes much to the determination of its former Prime Minister and Head of Government, Lee Kuan Yew. Some writers have pointed to the Agency’s placement in the office of the Prime Minister as being an important factor in its success.

The positioning of the office was also a key factor in Hong Kong’s highly successful onslaught, where it was placed in the office of the Governor, but where at the same time it reports to the Legislature and its separateness from the public service and its autonomy of operation were, and are, reflected in law and practice.

However, whether this particular feature is a model for others to follow depends very largely on whether appropriate accountability mechanisms are in place. Such an Agency can itself be used corruptly by turning it - and its formidable array of special powers - against political opponents. The introduction of any Agency must guard against this possibility. Continuing integrity at the highest levels of government is certainly an asset, but should not be assumed. The worst excesses of “grand corruption” can take place in and around the Office of the President. An Anti-Corruption Agency placed in such an office is hardly in a position to tackle superiors in the Office hierarchy unless it is supported by other accountability mechanisms. Thus, the Agency should be responsible to the Legislature and to the courts, in much the same way as an Ombudsman. Citizens’ advisory committees monitor the daily work of the Hong Kong Independent Commission Against Corruption (ICAC), building added public confidence in the institution.

Conceptualising the framework of an Anti-Corruption Agency

To operate successfully, an Anti-Corruption Agency must possess the following:

- committed political backing at the highest levels of government;
- adequate resources to undertake its mission;
- political and operational independence to investigate even the highest levels of government;
- adequate powers of access to documentation and for the questioning of witnesses;
- “user-friendly” laws (including the criminalisation of “illicit enrichment”); and,
- leadership which is seen as being of the highest integrity.

It is also important that any special powers conferred on an Anti-Corruption Agency conform to international human rights norms, and that the Agency itself operates under the law and is

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3 Singapore’s legislation is found in the Best Practice section of the Internet version of this Source Book: www.transparency.org.

4 Hong Kong started with unusual advantages. It had an expatriate senior public servant as its Governor and head of government, not someone with family and a history of connections in the then-colony. He enjoyed a handsome pension and high status in retirement. He was thus someone uniquely quarantined from most of the pressure points to which a local citizen can become subject. At the time the Commission was established, Hong Kong already had a functioning judicial system, upholding the Rule of Law, and a prosecution service that could be relied upon to exercise discretion to prosecute, and to conduct prosecutions, in a highly professional manner. (It subsequently prosecuted and jalled a director of public prosecutions when he stepped out of line.)

5 Some such Agencies have failed to get started at all because of a reluctance (or refusal?) to make adequate resources available to them.

6 Legislation can provide that the head of the Agency be appointed either by the leaders of the governing and main opposition political parties, or in the same way as a superior court judge. It can also provide that appointments be confirmed by the Parliament or Legislature.
accountable to the courts. In setting the parameters for the establishment of an Anti-Corruption Agency, a government must ask itself if it is creating something that would be acceptable if it were an opposition party. Very often the answer changes with perspective. The search should be for a formula which seems fair and workable to everyone, whether in or out of government. Above all, it should allot appropriate powers of investigation, prosecution and, sometimes most importantly, prevention. It must be such that the Agency will survive changes in power.

The following major considerations raise issues of appointment and accountability and should be borne in mind:

- an Anti-Corruption Commission may not be independent if it can come under political direction and be used as a weapon to attack critics; and,
- the Agency can, itself, become an agency for extortion and corruption.

**Appointing the head of an Anti-Corruption Agency**

From the outset, the shape and independence of an Agency or Commission (however styled) may well be determined by how the officeholder is appointed or removed. If the appointing mechanism ensures consensus support for an appointee through Parliament, rather than government, and an accountability mechanism exists outside government (e.g., a Parliamentary Select Committee on which all major parties are represented), the space for abuse or non-partisan activities can be minimised.

A flaw in many legislative schemes involves giving a President (or any political figure) too much control over the appointment and operations of an Anti-Corruption Agency. The President is the head of the Executive, and members of the Executive can also succumb to temptation. This could place the President in the impossible position of deciding whether or not to prosecute close political colleagues. For example, Tanzania’s legislation provides that all reports be forwarded to the President in confidence, and, as a consequence, the Tanzanian anti-corruption system has not functioned with any real effect and has completely lost public confidence.7 By contrast, surveys of the public in Hong Kong over the years have confirmed a confidence rating of its ICAC among the population of between 98 and 99 per cent - well above that of any other agency of the administration.

It is therefore important that the appointment procedure be one which recognises that the task of the office holder will be to maintain a check on the Executive and, in particular, the political party in power. If the Executive or even the ruling party were to have a free hand in making the appointment, there would be an immediate loss of practical effectiveness and of public confidence. At best, appointees would risk being seen as hand-picked supporters who could be relied upon not to rock the boat. At worst, they would be seen as the party’s “hatchet men”. It follows that the appointment procedure must be one which involves a broader cast of actors than those presently in power.

The precise appointment procedure will vary from country to country, but each should address the issue of whether the proposed mechanism sufficiently insulates the appointment process. It must be one which ensures that an independent person of integrity is likely to be appointed,

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7 Discussions with senior members of the Prevention of Corruption Bureau (Tanzania, 1995–98), revealed that when the late Julius Nyerere was President, the Tanzanian Prevention of Corruption Bureau functioned effectively. The President personally acted on its reports and had the moral authority to require ethical conduct from other leaders. Under Nyerere’s successor, however, the reports were ignored and corruption mushroomed. By the time Benjamin Mkapa was elected as the country’s third President, the Bureau, along with many other institutions, had fallen into disrepair.
and that such a person is adequately protected while in office. The office-holder should also be afforded the same rights of tenure of office as those enjoyed by a superior court judge. Removal from office should never be at the discretion of the powers that be, but only in accordance with a prescribed and open procedure, and only on the grounds of incompetence or misbehaviour.

Checks and balances in designing the framework

It is also worth considering whether the framework should provide for a procedure to deal with the theoretical situation of the Anti-Corruption Agency or Commission finding evidence that a President may have acted corruptly. Although the likelihood of this happening may be remote, lawmakers must look ahead to unpredictable eventualities. They must also reflect on the issue of public distrust if the President is seen as being outside the scope of the Agency’s effective jurisdiction. Even more significantly, a special provision will send the very important signal to the public that the government and Parliament are serious about countering corruption and that no-one is exempt from the Rule of Law. It has also been suggested that the public relations aspect of this provision alone warrants its inclusion.

The head of an Anti-Corruption Agency cannot generally prosecute a President while in office, as he or she is usually immune from suit or legal process under the Constitution. Impeachment proceedings will generally follow the Standing Orders of the Legislature or Parliament, with the Speaker presiding over the proceedings. This immunity gap can be closed if the anti-corruption legislation allows the head of the Anti-Corruption Agency to report the matter in full to the Speaker of the Parliament where:

- there are reasonable grounds to believe that the President has committed an offence against the Act; and
- there is prima facie evidence of this which would be admissible in a court of law.

Thereafter, it would be the responsibility of the Speaker to proceed in accordance with Standing Orders. An alternative is to provide for a Special Prosecutor, along the lines of the United States legislation.

Powers of suspension are rightly written into legislation. Where there is reasonable cause to believe that powers are being misused, it makes sense to be able to suspend officials while investigations are taking place. However, these powers can easily be abused. In one African country, for example, a high profile political figure was kept in jail simply because the regime had not appointed a judge to the Supreme Court. One can imagine a scenario in which the head of an Anti-Corruption Agency might be suspended by some President in the future, simply because he was investigating allegations which might be politically embarrassing. There must always be an appropriate check.

Is there a role for a Cabinet Minister in such a system of checks and balances, and if so, what should it be? For example, an Anti-Corruption Bill in Malawi stated that the Director or Head of the Anti-Corruption Agency “shall be subject to the direction and control of the [relevant] Minister on all matters of policy, but otherwise not be subject to the control or direction of any person in the performance of his professional duties”.

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8 In Nigeria during the recently-ended era of military dictatorship, members of the Supreme Court disqualified themselves from hearing an appeal by Chief Abiola. Abiola was widely believed to have won a democratically-conducted presidential election, in June 1993, which had been aborted by the military regime before the results were announced. The judges disqualified themselves on the grounds that they were plaintiffs suing one of Abiola’s newspapers for defamation. As a result, the court lacked a quorum to hear the case and the military regime failed to make the necessary judicial appointments to enable Abiola’s claim to be determined. Abiola died in prison in July 1998, without his appeal having ever been considered.

9 Section 5 (2).
But what does this actually mean? Where does “policy” end and “professional duties” begin? Would it be a matter of “policy” to decide not to investigate, for example, other Ministers? And why is this provision needed at all? Would it not be better that all instructions from the Minister to the head of the Agency be in writing and tabled in Parliament to ensure that the relationship is transparent? Or that the head of the Agency be equated to the Ombudsman: an independent officer reporting through the elected representatives to the people on a matter of common concern?10

In the customary African model, the report of an Anti-Corruption Agency or Commission investigating the allegedly corrupt conduct of any public official must generally go directly to the President or to the Minister. However, where a Commission has been placed wholly in a President’s Office (without the support of other separate accountability mechanisms), and so reports only to the President, it has generally been conspicuously unsuccessful in tackling high-level corruption.11 In South Africa, where the “Heath Commission” required the approval of the Minister of Justice before it could act on a particular complaint, the working relationship collapsed on a change of Minister in 1999.

The relationship between the Anti-Corruption Agency and the Director of Public Prosecutions (DPP) is also a critical one. What use is evidence if the suspect cannot be prosecuted? Generally a DPP is given, under the Constitution, sole oversight for all prosecutions and is empowered to intervene in any criminal proceedings initiated by any other person or authority. However, in assessing the independence and the likely effectiveness of the Anti-Corruption Agency, the question arises whether, under the Constitution, the DPP enjoys sufficient independence in exercising the discretion to prosecute so as to ensure that there will be little scope for political interference after investigations by the Agency have been completed.

The Agency’s relationship with the public is also critical to success. Some Agencies, such as the highly-successful Hong Kong ICAC, have established formal arrangements whereby public participation in policy formulation is ensured. By providing for such an arrangement, which could take the form of a committee chaired by the Minister of Justice, the anti-corruption framework encourages public accountability.

The relationship with the public is also important in laying the foundation for the “prevention” function of an Anti-Corruption Agency. The framework must provide for the involvement of a wide range of people and interests in the formulation of prevention policies and their execution. In this way, various stakeholders become involved in the prevention process, and their own institutions – both within government and in the private sector – can be mobilised in support of the Agency’s efforts. Another important factor is how the Agency can, in practice, change corrupt practices without expanding its powers beyond its mandate to include enforcement.

It would be misleading to think that all recommendations from an Agency or Commission will always be relevant and practical. It might, therefore, be counterproductive to give an Agency the power to require that specific changes be made. It may be better for the head of the administration to direct departments to cooperate with the Agency, and for the Agency to sit down with a department’s line management and work out practical and acceptable changes to the system under review. Solutions thus worked out together should be implemented by the

10 These topics were debated by 120 MPs in Malawi at a workshop in Zomba in October 1995, at which the overwhelming view was that such an office “belonged” to the Legislature and that the less the Executive (whom it was to watch) had to do with appointments, removals and its operations, the better.
11 For example, Zambia, Tanzania and Uganda (prior to the advent of the Museveni government).
department. If not, the department should owe an explanation to both the head of the administration and to the Agency. There may, for example, be some change of conditions that renders a recommended reform no longer appropriate.

Nevertheless, some countries have found that a public service can ignore an anti-corruption body’s recommendations. What is the answer? Can Parliament, perhaps through the Agency’s annual report or otherwise, be used as a forum in which departments who fail to cooperate can be questioned and held to account for any such failure to revise bad practices?

Another important factor to be considered in establishing the legal framework for an Anti-Corruption Agency or Commission is that adequate powers are given to access documentation and to question witnesses. In some countries, efforts are made to restrict the access of an Agency to information. However, there is no reason, in theory or in practice, why an Agency ought not to enjoy, as the Ombudsman does, all the rights of law enforcement officers and full access to government documents and public servants.

**Should a new law be retrospective?**

A new Anti-Corruption Agency is usually established in a situation where corruption has become out of control. There will be a large number of outstanding cases requiring attention, and at the same time, urgently needed reforms in official practices and procedures. There will also be a sceptical public, unsure as to whether the anti-corruption efforts are genuine. In such circumstances it is easy for a new Agency to be swamped by old cases, and quickly take on the appearance of being just another ineffectual body. How can these dangers be avoided?

It is generally most constructive for the legislative framework to provide that a new Agency or Commission will focus on the future, rather than be forced to deal with outstanding and perhaps crippling caseloads inherited from the police. Such a burdensome state of affairs could quickly overwhelm the new Agency with enforcement obligations at the expense of other essential tasks of prevention and containment. The Hong Kong ICAC, acknowledged as one of the most successful anti-corruption bodies yet to be established, overcame this through legislation which stated that:

> Notwithstanding section 12 (jurisdiction), the Commissioner shall not act as required by paragraphs (a), (b) and (c) of that section in respect of alleged or suspected offences committed before 1 January 1977 except in relation to:
>
> (a) persons not in Hong Kong or against whom a warrant of arrest was outstanding on 5 November 1977; (b) any person who before 5 November 1977 had been interviewed by an officer and to whom allegations had been put that he had committed an offence; and (c) an offence which the Governor considers sufficiently heinous to warrant action.\(^{12}\)

Such legislation leaves existing offences to be dealt with in the ordinary way (by the police) and under the existing law. However, it also allows flexibility with respect to those cases which occurred in the past but which a Head of Government deems in the public interest to be important enough to be investigated by the Commission. Including this kind of provision in the legislative framework helps a Commission begin on a “fresh footing” and allays any possible fears about witch-hunts over past events. It also makes the whole idea of putting the past aside more palatable.

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\(^{12}\) Section 18A, Hong Kong Independent Commission Against Corruption Ordinance (Cap. 204).
Freezing assets, seizing travel documents, protecting informers, professional privilege

It is important that the Anti-Corruption Agency or Commission have the power to freeze those assets which it reasonably suspects may be held on behalf of people under investigation. It should be able to do so prior to getting a court order when speed is of the essence. Without this power, bankers could simply transfer money electronically in a matter of minutes. There should also be a corresponding right of application to the High Court where a third party feels aggrieved.

It is also usual for an Agency to have the power to seize and impound travel documents to prevent a person from fleeing the country, perhaps in emergency cases even to do so temporarily without having to wait for a court order. This is needed as the Agency’s power of arrest generally arises only when there is reasonable cause to believe that an offence has been committed.

It is also customary that the Agency have the power to protect informers. In some cases, informers may be junior government officials who complain about the corrupt activities of their supervisors. (They cannot be expected to complain if they risk losing their jobs or other forms of harassment.)

Not only should there be legislative protection for informers, but physical protection should also be available - extending, where necessary, to safe houses and, in exceptional cases, sanctuaries in other countries.

In the context of protecting all informants, the relevant provisions in Botswana’s legislation read as follows:

45. (1) In any trial in respect of an offence under Part IV, a witness shall not be obliged to disclose the name or address of any informer, or state any matter which might lead to his discovery.
(2) Where any books, documents or papers which are in evidence (contain his name, etc.) the court...shall cause all such passages to be concealed from view or to be obliterated so far as may be necessary...
(3) If in any such proceedings...the court, after full inquiry into the case, is satisfied that the informer wilfully made a material statement which he knew or believed to be false or did not believe to be true, or if in any other proceedings a court is of the opinion that justice cannot be fully done between the parties thereto without disclosure of the name of the informer...the court may permit inquiry and require full disclosure...13

Legislation should also ensure that legal practitioners, accountants and auditors can all be required to disclose certain information about their clients’ affairs notwithstanding professional privilege.

Monitoring assets and incomes of public sector decision-makers

A useful tool for the prevention of corruption, the prime purpose of any Agency or Commission, is a well thought-out, strictly limited and effective system for the monitoring of the assets, income, liabilities and life-styles of certain public decision-makers and public service...
officials. In designing this, particular attention should be paid to respecting legitimate aspects of personal privacy.

Monitoring should be applied to those who hold positions where they transact with the public or are otherwise well-placed to extract bribes, for example, in the area of revenue assessment and collection and of the exercise of discretionary powers. Given that such a system should be implemented effectively, it must be decided whether the Agency should have responsibility for the random policing of income tax returns in respect of the officials whose incomes are being monitored.

Any tax secrecy provisions should not prevail against the exercise of investigative powers, but views may differ as to whether the authorisation to inspect them should come from a court order or simply be given to an investigator by the head of the Agency. If others are to have responsibility for the monitoring processes, the Agency must still be afforded timely access to the disclosures.

Many hope to be able to use monitoring as a barrier to the acquisition of illicitly-acquired wealth, but at best this has not yet been proved. Creating a framework where persons are prosecuted where they make false declarations would only be really effective if they were then subject to a court ordering the forfeiture of the property which had not been declared. The prime value of declarations is that they can identify actual and potential conflicts of interest.

Corruption in public procurement

The use of “commissions” paid to local agents is the most frequent source of corruption in international transactions. Not only does this practice threaten sound decision-making, but also adds to the national debt. Little or no income tax is paid by those receiving the payments. The public loses out in all three respects.

Therefore, legislation establishing an Anti-Corruption Agency or Commission could oblige those tendering for public contracts - and their local and other agents - to make full disclosure of all commissions and performance bonuses paid in respect of their bid and to provide, on request, full details of the services rendered for those commissions. Such disclosures should be made at the time of the bidding and again within six months of the completion or abandonment of a contract.14

Foreign companies

Foreign suppliers often regard themselves as exempt from local laws, knowing that they are beyond the reach of authorities and free to breach the criminal law by paying bribes to public officials. This situation can be resolved, at least in part, by adding a remedying provision to the Act. Such a provision may state that where the Agency has evidence which establishes, on the balance of probabilities, that such a company or its subsidiary has committed an offence against the Act, the Agency can apply to the court for an order excluding that firm or its directors and all other companies associated with it, from undertaking any business with the government for a period of time decided by the courts.

14 These problems are discussed in detail in the chapter on Public Procurement.
Public hearings

The ICAC in New South Wales (Australia), another of the world’s leading Anti-Corruption Agencies, has for some years been empowered to hold public hearings. On these occasions, witnesses are summoned to give evidence and although their evidence cannot be used against them in criminal proceedings, the hearings provide an opportunity to enlighten the public as to precisely what has been taking place. Once illegal and highly questionable patterns of behaviour have been exposed in this way, it is reasonable to expect that those involved are likely to be shamed into changing their ways. In particular, an inquiry into abuses of travel privileges by elected Members of the State Legislature led to greater clarity in procedures and higher standards of conduct by those concerned.\(^\text{15}\)

However, such public hearings have sparked an intense debate and led to a re-examination of the way in which the agency is to work in the future. Public hearings outside the criminal justice system can leave allegations floating and, worse, prevent the trial of the suspects who say justifiably that they could not now have a fair trial. Although the practice may well be abolished in New South Wales, in a country gripped by systemic corruption and anxious to put the past behind it, the approach may have value as a way of exposing to public view and closing down patterns of systemic corrupt practice. If there are to be no subsequent court proceedings (provided, of course, that full and honest disclosure has been made), it would serve as a way of shaming those from the past, and as a means of highlighting practices which were unacceptable and so must be changed.

A few words of caution

An Agency or Commission cannot be expected to fight the country’s corruption on its own. It must have the support of every sector of the community, including the public sector. Government departments and other official agencies, including the police, should be required to provide appropriate assistance. It should vigorously pursue a three-pronged approach of prevention, prosecution and community education in a coordinated manner. Civil society and the private sector must be won over and made allies. Agency personnel can also be expected to develop specialist investigative skills necessary to track down the illicit gains made from corruption. For example, a senior government official, the subject of corruption allegations, was monitored by investigators from his country’s Anti-Corruption Agency while on a holiday out of the country with his family. While away, the official spent large sums on expensive fashions and jewellery and purchased an apartment in the name of a relative. He used credit cards issued by a foreign bank. The investigators traced the balance of the illicit money through the bank which issued the credit cards.\(^\text{16}\) In this regard, cultivating the cooperation of foreign Anti-Corruption Agencies can be especially valuable.

Special care must be taken in appointment procedures, and in guaranteeing security of tenure for those at the top levels of the Agency, to ensure that only those enjoying wide public confidence hold these positions. More than this, particular attention has to be paid to monitoring the performance of officers at all levels within the Agency. However, just as an Anti-Corruption Agency can be susceptible to those at the highest levels of government, it can also be used as a weapon with which to persecute political opponents. Even where the independence of the office is respected and an Agency is able to operate freely, it occupies extremely difficult terrain. Imaginative thought has to be given as to how a powerful and independent anti-corrupt-


tion body can itself be made accountable, and corruption within the organisation minimised. One approach which has worked well in Hong Kong is to establish oversight committees on all aspects of the Agency’s work (with participation from outside the Agency, including civil society and the private sector). A file cannot be closed or an investigation discontinued before one of these committees has been informed and has given its advice.

Unfortunately, Anti-Corruption Agencies have been more often failures than successes. For reasons not yet wholly apparent, they have tended to be much more successful in East Asia - in countries such as Singapore, Malaysia, Taiwan and Hong Kong - than they have been elsewhere. One factor is clear: in each of those countries the Agencies have enjoyed high levels of political and public support. They have also had adequate research abilities, and have adopted both rigorous investigative methods and adventurous programmes of prevention and public education. The comparatively recent introduction of similar Agencies in Botswana and Malawi is being watched with interest.

One may suspect that Anti-Corruption Agencies have been established in other countries with perhaps no real expectation of their ever tackling difficult cases at senior levels of government. They have been staffed and resourced accordingly. Some have done good work in attacking defects in integrity systems, but only at junior levels, however most have had a negligible impact on tackling “grand corruption”. Even when Agencies or Commissions are well-resourced and established under model legislation, to be wholly successful they will still have to rely on other institutions. If the judicial system is weak and unpredictable, then efforts to provide remedies through the courts will be problematic. So where corruption is widespread, an Agency alone will not provide a complete answer but be an important part of a broader national plan of action.

Some indicators for assessing Anti-Corruption Agencies as integrity pillars

- Are the appointing procedures for the head of the Agency such as to ensure that he or she is competent, independent of the party in power, and likely to discharge the Agency’s duties without fear or favour?
- Once appointed, is the head of the Agency independent from political control in the day-to-day conduct of the Agency’s affairs?
- Is the Agency adequately resourced?
- Do other staff enjoy independence from political interference in the discharge of their duties? Are there “no go” areas for investigators?
- Are staff adequately trained?
- Are staff adequately remunerated?
- Is the Office of the President or Prime Minister within the Agency’s jurisdiction? (If so, are the staff confident enough to exercise that jurisdiction should occasion arise?)
- Are staff in sensitive areas subjected to random “integrity tests”?
- Are there arrangements to ensure that the Agency itself cannot become a source of corruption?
- Can the services of staff whose integrity has became doubtful be quickly dispensed with?
- Is the Agency accountable to the Executive, the Legislature, the courts and the public?

17 See Report on Investigation into the Metherell Resignation and Appointment, June 1992 (ICAC, NSW). The office has subse-

quentlly won high standing, both inside the country and internationally, for the professionalism of its work.
Chapter 12

Public Service to Serve the Public

You are never giving, nor can you ever give, enough service.

James R. Cook

The role of the public service

The constitutional and practical role of the public service is to assist the duly constituted Government in formulating policies, carrying out decisions and in administering public services for which they are responsible. Constitutionally, all administrations form part of the state and, subject to the provisions of the constitution, civil servants owe their loyalty to the department in which they serve. Civil servants should administer their organisations recognising:

- the accountability of civil servants to the Minister;
- the duty of all public officers to discharge public functions reasonably and according to the law;
- the duty to comply with the law, including international law and treaty obligations, and to uphold the administration of justice; and,
- ethical standards governing particular professions.

Civil servants should conduct themselves with integrity, impartiality and honesty, and deal with the affairs of the public sympathetically, efficiently, promptly and without bias or maladministration. They should also endeavour to ensure the proper, effective and efficient use of public money.

At the same time, civil servants should always be aware that their Ministers, too, have duties and that they are answerable in a number of ways:

- Ministers are accountable to the elected representatives of the people through the Legislature;
- Ministers have a duty to give the Legislature and the public as full information as possible about their policies, decisions and actions, and not to deceive or knowingly mislead them;
- Ministers have a duty not to use public resources for party political purposes, to uphold the political impartiality of the public service, and not to ask civil servants to act in any way which would conflict with their public service code;
- Ministers have a duty to give fair consideration and due weight to informed and impartial advice from civil servants, as well as to other considerations and advice, in reaching decisions; and,

Basic values and principles governing public administration

1. Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

   a. A high standard of professional ethics must be promoted and maintained.
   b. Efficient, economic and effective use of resources must be promoted.
   c. Public administration must be development-oriented.
   d. Services must be provided impartially, fairly, equitably and without bias.
   e. People’s needs must be responded to, and the public must be encouraged to participate in policy-making.
   f. Public administration must be accountable.
   g. Transparency must be fostered by providing the public with timely, accessible and accurate information.
   h. Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
   i. Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

2. The above principles apply to -

   a. administration in every sphere of government;
   b. organs of state; and
   c. public enterprises.

3. National legislation must ensure the promotion of the values and principles listed in subsection (1).

4. The appointment in public administration of a number of persons on policy considerations is not precluded, but national legislation must regulate these appointments in the public service.

Section 195 of the 1996 Constitution of South Africa
• Ministers have a duty to comply with the law, including international law and treaty obligations, and to uphold the administration of justice (and are answerable to the courts where they exceed or misuse their powers).

The role of a Public Service Commission

To assure the maintenance of a sound public service, many countries provide for Public Service Commissions, whether in their constitutions or in their general law. These institutions, independent of the government of the day, are designed to protect and promote the integrity of public servants. The relevant South African provision reads in part:

Public Service Commission

(1) There is a single Public Service Commission for the Republic.
(2) The Commission is independent and must be impartial, and must exercise its powers and perform its functions without fear, favour or prejudice in the interest of the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service. The Commission must be regulated by national legislation.
(3) Other organs of state, through legislative and other measures, must assist and protect the Commission to ensure the independence, impartiality, dignity and effectiveness of the Commission. No person or organ of state may interfere with the functioning of the Commission.
(4) The powers and functions of the Commission are:
   (a) To promote the values and principles set out in section 195, throughout the public service;
   (b) to investigate, monitor and evaluate the organisation and administration, and the personnel practices, of the public service;
   (c) to propose measures to ensure effective and efficient performance within the public service;
   (d) to give directions aimed at ensuring that personnel procedures relating to recruitment, transfers, promotions and dismissals comply with the values and principles set out in section 195;
   (e) to report in respect of its activities and the performance of its functions, including any finding it may make and directions and advice it may give, and to provide an evaluation of the extent to which the values and principles set out in section 195 are complied with; and
   (f) either of its own accord or on receipt of any complaint -
      (i) to investigate and evaluate the application of personnel and public administration practices, and to report to the relevant executive authority and legislature;
      (ii) to investigate grievances of employees in the public service concerning official acts or omissions, and recommend appropriate remedies;
      (iii) to monitor and investigate adherence to applicable procedures in the public service; and
      (iv) to advise national and provincial organs of state regarding personnel practices in the public service, including those relating to the recruitment, appointment, transfer, discharge and other aspects of the careers of employees in the public service.

2 Section 196 of the Constitution of South Africa
(5) The Commission is accountable to the National Assembly.

(6) to (8) omitted

(9) An Act of Parliament must regulate the procedure for the appointment of commissioners.

(10) A commissioner is appointed for a term of five years, which is renewable for one additional term only, and must be a woman or a man who is -

(a) a South African citizen; and

(b) a fit and proper person with knowledge of, or experience in, administration, management or the provision of public services.

(11) A commissioner may be removed from office only on -

(a) the ground of misconduct, incapacity or incompetence;

(b) a finding to that effect by a committee of the National Assembly or, in the case of a commissioner nominated by the Premier of a province, by a committee of the legislature of that province; and

(c) the adoption by the Assembly or the provincial legislature concerned, of a resolution with a supporting vote of a majority of its members calling for the commissioner's removal from office.

The politicisation of the public service

A public service of competence and integrity is for many a distant destination. Many are struggling in highly corrupt environments to reform public services that have for too long been dominated by politicians. Some public services have been wholly unable to perform one of their key roles – that of acting as a check on the legality of the actions of their political masters.³

Particularly in the developing world, too, many public services have been a home for needy relatives (owing loyalty to connections, not to public service “customers”), or for those who have quite literally “purchased” their posts (and who seek some return on their investment). In some countries, government departments have been characterised as being private fiefdoms for Ministers, where they and their cronies have benefited handsomely without opposition from (and even with the active participation of) their senior officials.

The external threats to an honest and effective public service lie not only at the top but also at the bottom – where the general public may be so accepting of the need to offer gratuities to civil servants, as to perpetuate corrupt practices against the wishes of public service managers.

The public may be won over through imaginative campaigns such as the introduction of “no corruption zones”, but coping with intrusive Ministers can be quite problematic. There is a need for the boundaries to be clearly drawn between the making of policy (which lies in the domain of the Minister) and the implementation of policy (which is the responsibility of the public service). In general, the more a Minister is involved in the day-to-day administration of his or her Ministry, the more likely it is that political considerations overtake good administrative practice.

Even where public service reform has been achieved and aberrations removed, what is to protect a public service against sliding back into a morass of politicisation? And, on the other

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³ The principles of administrative law, and the circumstances in which courts can intervene to review official decisions, can be useful weapons for the senior civil servant to use to dissuade a Minister from insisting on unlawful actions. See the chapter entitled Administrative Law – Judicial Review of Official Actions.
hand, where a change in government takes place after a lengthy period of rule, how can politicians have confidence in senior officials who may have previously worked loyally and effectively for their political opponents?

The professional public service – continuity and the "merit" principle

The major task of the public service is to implement the policies of the government of the day. It does not make policy. Rather, it advises the political arm and it executes the government’s policies according to law.

Political appointees will, of course, be personally committed to the policies of a new government, whereas existing public servants may not be. However, serving officials will often have a wealth of experience in policy-making and execution on which to draw when they advise Ministers, and so be in a far stronger professional position to help new Ministers avoid costly mistakes, and (particularly with their existing networks throughout the public service) be better placed to carry the new policies through effectively. Moreover, a professional public service assures a degree of continuity, thereby reducing the disruption implicit in any change in government. Much of the day-to-day business of government will continue as before, and it is important that this not be needlessly disrupted. A deeply politicised public service such as that in the United States pays a heavy price on a change of administration, particularly where one party has remained in power for a long time.

To achieve professionalism, members of the public service must be politically neutral. This means more than merely behaving impartially as between competing political parties, more than not becoming personally involved in political controversies. It means possessing the ability to serve, loyally and effectively, governments of differing persuasion. It also means that senior public officials must be able to offer “fearless and frank” advice to Ministers and carry news that their political masters may not wish to hear. It also means that, at times, they must be able to hold the line where a Minister gives policy directions which are unlawful – or where a Minister seeks to interfere in administrative matters that are not the Minister’s concern.

Politicisation can also impact on the recruitment and retention of quality staff. Hence appointments to, and promotions within, the public service should generally be on merit. Some would say “should always”, but in a number of countries there is a need to adopt policies of inclusiveness, either to draw marginalised groups into participation in government, as in Nigeria, or, as in South Africa, to help to remedy an era of discrimination.

However, where posts at the top are seen as being reserved for those favoured by politicians of the day – and not available on merit – ambitious individuals may well chose a private sector career rather than one in the public service. Those already in the service may have little incentive to improve their skills, unless, of course, they are planning to leave the public sector for fields which offer greater opportunities for advancement.

Political “neutrality”

The neutrality and professionalism of public servants can be compromised in a number of ways:

- by appointing people with well-known partisan connections who will be clearly unacceptable to a future alternative government;
- by appointing people with well-known commitments to particular policy directions that may render them unacceptable to a future alternative government; and
• by replacing incumbent public servants, particularly on a change of government, when there is no good reason to question their competence and loyalty but simply in order to impose the government’s authority (particularly if the incumbents are dismissed, rather than retained with similar status and remuneration).  

The South African Constitution inhibits politicisation in the following way:

Section 197 Public Service

(1) Within public administration there is a public service for the Republic, which must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day.

(2) The terms and conditions of employment in the public service must be regulated by national legislation. Employees are entitled to a fair pension as regulated by national legislation.

(3) No employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause...

Private sector management styles

The traditional challenges posed by politicisation are made the more complex by the contemporary argument taking place in developed countries as to the appropriate management “style” of a modern public service and, in particular, the degree to which this should copy private sector management models. The debate covers a wide area, but for integrity purposes there is one central question: Should the public sector copy the management styles of the private sector to the extent of equating Cabinets and Ministers with boards of directors, and giving them a free hand in appointing senior management?

Comparisons with the private sector are, at best, misleading. Certainly, some aspects of private sector management are relevant to rendering today’s public services more efficient and effective. However, seldom does a private sector corporation face the wholesale replacement of its entire board of directors, all of whose new members having completely different views on the direction the corporation should be taking and having little experience of running such an enterprise. Yet such dramatic changes at the top are the norm in systems of democratic government.

Changing teams of transient politicians need to be able take effective control of government and this provides the basic rationale for maintaining a politically neutral, professional public service in the modern democratic era.

Professionalism v. politicisation – senior officials on contract

Assuredly, there is a need for “frank and fearless” advice, but equally important is the need for a professional public service, with experience in managing changes in government policy and effectiveness in serving the government of the day. But how are these values to be preserved in a changing employment environment - given that senior public servants are increasingly likely to be working under contract, without the security of permanent tenure, what is needed to protect the service against further politicisation?

Those advocating the values of professionalism against the inroads of politicisation tend to concentrate on the value of public service independence.  

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less” advice compromised if officials have no job security? In practice the situation may not be quite as bleak as it may seem. Much depends on what individual Ministers themselves value. If they are arrogant or insecure, and so require reassurance and flattery, then officials dependent on their goodwill will provide it. However, insecure public servants will face incentives to be independent and objective, to be “frank and fearless”, when they are working for Ministers who are themselves professional, and who recognise the value of robust advice that will avert political problems.

In developed countries, under the influence of “managerialism” (the application of private sector management methods to public administration), emphasis has been placed on the need to make public servants more responsive and accountable to elected Ministers. Thus the concept of permanent tenure has come under sustained attack. At the same time, managerialism has tended to give insufficient attention to nurturing the principles of a non-politicised public service, in particular the principle that appointments and dismissals should be based solely on professional competence and the politically neutral skills appropriate for professional public servants.

This is particularly important in a developing country, or a country in transition, whose public service traditions have been, or are, in disarray. There the balance of the argument is tilted very firmly in favour of professionalisation and away from the manipulations of politicians.

**Striking a balance – the New Zealand model**

In today’s changing world, can the values of a non-politicised service be maintained within the shorter-term appointments and less secure tenure required by the principles of new public management with their requirement for greater accountability and responsiveness from public servants? The experience in New Zealand, which has been at the forefront of public sector innovation, suggests that it can.

Under the (NZ) State Sector Act 1988, final decisions for appointing public sector Chief Executives lie with Cabinet, but the State Services Commissioner has charge of the appointing process, consulting the government on its requirements, convening a panel and making a formal recommendation to Cabinet. After the Chief Executive has been appointed, the State Services Commissioner continues in the role of employer. It is he who reviews and reports on the annual performance of Chief Executives and who has the formal power to seek the removal of under-performing Chief Executives.⁶

The New Zealand experience with its State Services Commissioner demonstrates, such an officer, having his or her main statutory focus on nurturing a professional public service, has a strong incentive to champion the professional neutrality of a non-politicised service if only as a means of maintaining the relevance of his or her own office. The Secretary to the Department of Prime Minister and Cabinet, on the other hand, is primarily concerned with coordinating the policy of the government of the day and has less incentive to view appointments from the broader perspective of the profession as a whole.

A requirement for transparency can further restrict the opportunity for removing incumbent Chief Executives before the end of their contracts. The New Zealand Act allows the dismissal of Chief Executives on the grounds of failure to perform or failure to maintain the required standards of personal behaviour. Examples are posted in the Best Practice section of the Internet version of this Source Book: http://www.transparency.org.
of a Chief Executive by Order in Council on the recommendation of the State Services Commissioner "for just cause or excuse". In any such case, the State Services Commissioner would be called on to specify and justify the reason for removing an incumbent secretary. Its experience suggests that the need to give public reasons in terms of stated professional and institutional criteria is a genuine constraint on governments. If politicisation depends on the relative ease of removing incumbents, requiring public justification may make politicians think twice about change and therefore make them more ready to trust the capacity of incumbents to adjust to new directions.

This experience reaffirms the view that for all countries it is important that there be Public Service Commissions or other institutions which in a fully transparent fashion can protect a professional public service by ensuring recruitment and advancement on merit, and act as a necessary brake on any creeping politicisation.

What civil servants should not do!

In any public service there should be clear rules and procedures which ensure that civil servants understand both their rights and their responsibilities. These should make it clear that:

- Civil servants should not misuse their official position or information acquired in the course of their official duties to further their private interests or those of others. They should not receive benefits of any kind from a third party which might reasonably be seen to compromise their personal judgement or integrity.

- Civil servants should not without authority disclose official information which has been communicated in confidence within the administration, or received in confidence from others. They should not seek to frustrate or influence the policies, decisions or actions of Ministers or the Legislature by the unauthorised, improper or premature disclosure outside the administration of any information to which they have had access as civil servants.

- Civil servants should not seek to frustrate the policies, decisions or actions of the administrations by declining to take, or abstaining from, action which flows from decisions by Ministers or the Legislature. Where a matter cannot be resolved on a basis which the civil servant concerned is able to accept, he or she should either carry out his or her instructions, or resign from the Public service. Civil servants should continue to observe their duties of confidentiality after they have left Crown employment.8

Why good complaints channels make sense

Just as in the private sector, open and effective complaints channels in the public sector serve to raise levels of performance, to identify those responsible for malpractice and to protect bona fide but vulnerable complainants. These are discussed in the chapter on Giving Citizens a Voice.

7 The survey results are published in District Integrity Workshops: Building Integrity to Fight Corruption to Improve Service Delivery, Inspectorate of Government, Uganda (1999)
8 Adapted from the U.K. Civil Service Code, 1996

A survey of public sector workers in Uganda

Even in a very poorly paid public service, employees have a clear view of what corruption is and of its effects. The 1998 Anti-Corruption Survey carried out for the Inspector-General of Government in Uganda included question to service workers on what they considered acceptable conduct. Nearly all (93%) considered regularly requesting bribes from the public to be harmful and (94%) corrupt; only 5% thought it desirable behaviour but some 17% thought it “justifiable”. However, and perhaps ominously, only 6% would report such conduct.7

“Guide to Good Standards of Customer Service”

Serving your customers in a “responsible" manner means dealing with them -

- promptly, without undue delay and in observance of the organisation’s mission, objectives and performance pledges;
- correctly, in accordance with the law or other rules governing their circumstances;
- carefully, by considering all relevant and material facts and factors in the decision making process;
- sensibly, by maintaining a proper balance between the adverse effect of your decision on the legitimate rights and interests of the affected persons and the purpose being pursued by that decision, in particular where discretionary power is to be exercised.

Serving your customers in a “reasonable" manner means -

- treating your customers with respect;
- showing empathy to your customers, listening to them, and understanding their legitimate needs and concerns, giving due consideration to their age, ability to understand complex issues, any physical or mental disabilities, feelings, privacy and convenience;
- seeing to it that your decisions can stand the test of fundamental reasoning and common sense;
- helping your customers by simplifying procedures, forms, providing clear and precise information on the scope and limit of your services and referring cases to the appropriate authorities if necessary.

Serving your customers in a “fair" manner means -

- treating people in similar circumstances in a like and consistent manner;
- giving reasons for your decisions and explaining the likely effects on your customers;
- keeping your customers informed about the progress of matters of their concern;
- informing your customers of any available appeal or complaint channel in respect of your decisions or actions;
- handling such appeals or complaints cautiously, sympathetically and with an open mind;

continues on next page
Serving your customers in an impartial manner means:

- avoiding creation of inequity through rigid application of rules and regulations where a certain degree of flexibility can be exercised;
- changing rules and procedures as and when warranted to keep abreast of changes in circumstances;
- consulting the persons likely to be affected by any change in the rules and procedures or their representatives and giving them adequate notice before changing any rules and procedures;
- having an internal review system so that adverse decisions can be re-examined by someone not involved in the initial decision making process.

Serving your customers in a positive manner means:

- making decisions based on relevant rules and laws and not on arbitrariness or personal preferences;
- avoiding bias by reasons of a person’s race, sex, age, marital status, health, physical appearance, ethnic origin, culture, language, religion, sexual orientation, reputation, social status, political inclinations or personal affections, affiliations or prejudice;
- ensuring priorities are accorded fairly, consistently and with a high degree of transparency.

Citizens’ Charters

A well-organised and well-motivated government agency is likely to have introduced a “Citizen’s Charter” – a pledge of the services it offers and how it will respond to members of the public. These are increasingly being seen as useful tools for engendering an ethos of public service, and they are discussed in the chapter on Giving Citizens a Voice.

“Ten rules of bureaucratic survival”

Perhaps the last word on the public service should go to Sir Anthony Jay (co-author of the highly-acclaimed television comedy series, “Yes, Minister”). Writing in the Daily Telegraph on 17 June 1999, he articulated ten rules for bureaucratic survival. This Source Book is intended as a contribution to those who would like to close off all of them!

- Spread responsibility. Ensure that any wrong decision is taken by more than one person – preferably by a large committee so that it cannot be pinned on you.
- Consult widely. Most opposition comes from colleagues, departments or outside bodies who resent exclusion, so include them all. It takes a lot of time, but time does not have to be authorised by the Treasury.
- Keep it a secret. If people don’t know what you are doing, they don’t know what you are doing wrong. Nothing damages a bureaucratic career more than a public outcry, so secrecy is vital.
- Cover all activities for which you are responsible with rigid rules and procedures. So long as you can show you followed the rules and kept to established practice, you are in the clear. Once you make exceptions, you are in uncharted territory.
- In any situation where there is a possibility of blame, put everything on paper to show the blame is not yours.
- Avoid risk. The rewards for success are immeasurably smaller than the penalties for failure.
- Avoid changes, innovation and hurry. Not just because of the extra work, but because of the opportunities for error once you lose the protection of precedent. Milton Friedman’s first rule of bureaucracy is: “The only feasible way of doing anything is the way it is being done.” And avoid hurry, because, of things are done quickly, they are much more likely to be wrong.

- Avoid measurable standards. If there are objective criteria for your success, people may be able to prove you have failed. By all means impose them on others, but demonstrate how none of them is applicable to you.
- Keep expanding. Put up proposals that require more staff, larger premises and bigger budgets. At the best, this will make you more important and powerful within the system. At the worst, it should at least ensure the avoidance of cuts. Whatever happens, never underspend your budget, or it will be reduced next year.
- Put all duties and responsibilities on to others – your colleagues, other departments, outside bodies, the general public. Wherever else the buck stops, never let it be here.
Some indicators for assessing the public service as an integrity pillar

- Do Ministers respect the independence and professionalism of their senior civil servants? Are they generally expected to provide “frank and fearless” advice to Ministers?
- Are there continuing efforts to streamline bureaucracy to render it more open, efficient and more user friendly towards the public?
- Are “Citizen’s Charters” (or similar undertakings) published to establish the obligations of service providers and the rights of users?
- Are department clients surveyed from time to time to ascertain levels of satisfaction (e.g. through Service Delivery Surveys?)?
- Are civil servants obliged to give reasons for their decisions?
- Is there a clear understanding on both sides that Ministers should not interfere in the day-to-day running of the departments for which they are responsible?
- Are government departments generally accessible to the media? Is information made available regularly without individual requests being first approved by the minister responsible or the departmental head?
- Can members of the public easily discover the identities of those civil servants they are dealing with?
- Are managers held accountable for the corruption/inadequate performance of their subordinates?
- Are there complaints mechanisms (whistleblower protection) for staff in which they have confidence?
- Are there gifts and hospitality registers etc. for civil servants in vulnerable positions?
- Is there a regular rotation of employees in vulnerable positions so as to periodically change their physical/functional assignments?
- Are there periodic publicity campaigns (in local languages) explaining the procedures and the criteria for administrative decisions or processes (granting permits, licences, bank loans, building plots, assessing taxes etc.)?
Local Government

As the world becomes increasingly urbanised, the role of municipal governments becomes correspondingly more important. In many developing countries for instance, the urban population has surpassed the number of rural dwellers. According to a recent United Nations’ estimate the number of Asian cities of more than one million inhabitants will grow from 359 in 1990, to 903 in 2015, which means that their number will have nearly trebled within the space of 25 years.

A citizen’s civic duties and participation in a democratic system, first take place at the city level. A citizen casting his vote in a municipal election is exerting some influence over the way his or her city or community is being managed. Contact with local government, for many citizens, represents their first experience with public administration. Decisions and services relating to city planning, road maintenance, schools, public utilities, policing and administrative services such as licensing and the provision of services, generally fall with the local government. Local governments have greater contact with the public in the course of their daily lives than do national governments, as they are directly responsible for the community’s health, housing, education, waste collection, environment and the basic needs such as sewerage and water.

The National Integrity System covers nation-wide situations. The growing realisation that corruption can sometimes be better fought from the bottom up, rather than from the national level down, has led anti-corruption strategists to target municipalities as a new focus of their work. It is indeed at that level, that the devastating impact of corrupt management can be felt by citizens, and where coalitions of concerned players can be formed around common goals for the creation of more humane and more sustainable living conditions. It is now a widely held view that good city administration can only operate effectively with increased transparency in its decision-making process, and with the greater involvement of civil society.

Increasingly, governments are being encouraged to decentralise their activities, and to follow the philosophy of “subsidiarity”, whereby decisions are devolved to the lowest practical level. There is a paradox here. As more and more responsibilities are being shifted from central to local government, activities are being moved away from corrupt central bureaucracies and placed with institutions which are even less dependable. Local institutions lack numbers, and so often lack the human and material resources essential to ensure...
proper stewardship of the public duties they are increasingly being required to perform.

As is also the case with central governments, many of the tasks which have to be carried out by local governments require cooperation with the private sector. This creates the potential for private interests to intervene and distort the decision-making processes against the best interest of the citizens. The zoning of land, for instance, is an area of local government activity which in many countries poses particular threats to integrity. Land values can increase dramatically when permitted uses are changed. The temptation to bribe councillors and council officials to ease zoning changes through the processes is a considerable problem in many countries, developed and developing alike. At the local level, relationships between the various actors tend to be much closer than at the national level, and as such, the problems of favouritism and nepotism become all the more acute.

Honest, transparent, and effective local management of cities is essential to optimise the living conditions of citizens, and to foster trust in the way in which they are governed. Thus, it is crucial to address corruption and to promote transparency and accountability not just at the national, but also at the city level. As elsewhere, the best way to curb corruption is by creating coalitions and by involving government, the private sector and civil society in anti-corruption initiatives.

Such reforms can only be undertaken after some public awareness raising has taken place as to the need for such changes and the benefits they can yield. The messages must bear directly on the lives of citizens, and the issue of corruption should not be treated simply as a “moral” one. Authorities should be provided with an assessment of who benefits from corruption, what the incentives are for corrupt practices, and how employees are affected by it. In the case of a very demoralised institution, these findings may provide an avenue to deal with the problem, for instance, by having meetings or workshops with employees to discuss them, and even by involving those who may themselves be engaging in corrupt practices.

A “local government integrity system”

When asked to identify the “pillars” in their own local government integrity systems, mayors from several African cities, identified the equivalents, at the local level, of the “pillars” and practices described in this Source Book1, and interestingly, added as a final pillar, the “National Integrity System” itself - as the provider of national judicial and police services, and as a major partner for local administrations. Therefore, in the “municipal integrity system” the National Integrity System is recognised by itself as comprising a “pillar”. It is, of course, augmented by local arrangements for procurement, audit, public access to meetings of elected officials, and so on.

Local government integrity system handbooks and local integrity workshops

There is scope, and seemingly a need, for city-specific “local government integrity system handbooks” to be prepared. This could be an outcome of a local integrity workshop which

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1 See Chapter 4 of this Source Book
2 For more information on the public budget hearing process in Paraguay, contact CADER, Centro de Análisis y Disfusión de Economía Paraguaya, Oliva 1019, Piso 12, Ofic. 22, Asunción, Paraguay: email: cader@vae.cnc.una.py.
would bring together the various pillars of the local integrity system such as the Mayor, City Councillors, the tender board, financial managers, watchdog agencies, religious leaders, community associations, local business associations and the local media, to assess the strengths and weaknesses of the existing integrity system. The forum could also lead to the development of an action plan aimed at improving the municipal integrity system.

The issues which could be discussed in such a workshop could cover, for instance:

- the development of appropriate codes of conduct which apply to the Mayor, Councillors, senior staff and middle management;
- the introduction of declaration of assets and incomes at the higher levels of city management;
- the development of transparent public procurement processes;
- the opening of all meetings to the public;
- the development of transparent procedures for the hiring of staff; and last but not least,
- the encouragement of civil society groups to participate in the development of efficient and honest systems of service delivery.

Change at the local level faces much the same obstruction from vested interests and alliances as it does at the national level. Added obstacles, however, include the need to operate within the framework of the laws and practices of the national administration, the absence of a large number of players in the private sector, and the human and financial resource constraints under which local governments are forced to operate in most countries around the world. None of these obstacles should be underestimated.

However, there are also many advantages at the local level. These include:

- being closer to the people;
- the absence of the vaulting ambitions of politicians on the national stage; and
- the ability of “clean” municipalities to create inward investment ahead of more corrupt (and hence less attractive) neighbours.

For young politicians in particular, there is, too, the appeal of being able to build a strong local following through demonstrably improving people’s lives, rewards that are more noticeable at the grassroots. Given an active civil society in the local setting, and the growing need for municipalities to “market” their areas in order to attract private sector activities, “champions” for reform among Councillors and senior staff should not be hard to find.

For all these reasons, and because major change at the national level is usually so much more problematic and difficult, civil society is increasingly focusing on what it can do to bring about change at the local level. Transparency International chapters in Central and Eastern Europe, too, have begun to focus on this area, devising strategies for building civil society groups “around” municipal institutions.

If sustainable change can be made at the grassroots, the reasoning runs, the case for change at regional and national levels becomes all the more compelling.

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4 Transparency International is initiating a project which will document these initiatives, analysing the ingredients which have made them successful and noting what lessons there may be for other civil society organisations who may wish to emulate them. The results will be posted progressively on the TI web site.
Some indicators for assessing Local government

- Is local government democratically accountable?
- Is it subject to independent audit?
- Are meetings of local bodies required to be held in public unless there are special reasons why they should be held in private, whether by law or by convention? If local bodies have power to close meetings to the public, are the grounds for doing so limited, and must they debate in public the necessity for closing the proceedings before a decision to do so is taken?
- Are local authorities subject to the jurisdiction of an Ombudsman or a similar independent body?
- Are gift and hospitality registers maintained for those in sensitive posts? If so, is there a right of public access to these registers?
Chapter 14

An Independent and Free Media

Power in America today is control of the means of communication.

Theodore White

Without information there is no accountability. Information is power, and the more people who possess it, the more power is distributed. Access to information on the part of the people is fundamental to a nation’s integrity system. Without it, democratic structures cannot operate as they should, and individuals are left unable to enforce their rights – perhaps not even knowing that their rights have been infringed. The principal vehicle for taking information to the public is an independent and free media.¹

Freedom of the Media

The more a society develops open and transparent practices, the more information becomes available within the public domain. However, a deluge of information makes it almost impossible, even for the most diligent citizen, to keep abreast of everything that is going on. The proceedings of the Legislature or Parliament, of public and local authorities, of court rooms, and of public companies may all be open to the public, but no one member of the public can ever hope to attend them all. The most we can hope for is that there is a diligent, professional media which is devoted to sifting through this mass of information on a daily basis, selecting with wisdom and with at least one eye on the public interest, precisely what it is that should concern us – and then conveying this information to us fairly and responsibly. Of course, there will be the inevitable conflict of interest between the media exercising its constitutional function of informing the public, and its desire to attract a wide readership, ample advertising, and a healthy profit margin.

A free media ranks alongside an independent Judiciary, as one of the twin powers that should not be held accountable to politicians. Both serve as powerful counterforces to corruption in public life. Unlike judges, public prosecutors and Attorneys-General, the privately-owned media is not appointed or confirmed in office by politicians. Outside the channels of government-owned media, the media is self-appointed and sustained by a public that sees the privately-owned media’s output as valuable. The media should be, and can be, free of the political patronage entrenched even in the most democratic of societies.

Private media ownership carries with it another danger; that of the mass media conglomerate, a concentration of media ownership in too few hands. This can constitute a threat to democracy itself, where major political parties are almost held to ransom by media proprietors, who wield enormous power through their ability to manipulate the opinion of the electorate, should they choose to do so. This is a menace that calls for strong and principled regulation to restrict

¹ The traditional expression is a “free press”. However, with the rise in importance of the electronic media, and with progressively more people around the world depending on radio and television for their news, the broader expression, “free media”, is now more commonly used.
mergers and take-overs, and countries should ensure that there is always competition in the media market-place. This is increasingly difficult to manage in a globalised world, and particularly in an age of satellite television. However, with the growth of the Internet, the ability to convey news is to some extent being democratised. This can carry another set of problems, but it does mean that global communication is no longer the exclusive preserve of powerful interests.2

The degree to which the media is independent is the degree to which it can perform an effective public watchdog function over the conduct of public officials. Just as the Legislature should keep the Executive under day-to-day scrutiny, so should the media keep both the Legislature and the Executive (along with all others whose posts impinge on the public domain), carefully monitored. As the former editor-in-chief of Time Inc., Henry Grunwald, noted, “even a democratically-elected and benign government can easily be corrupted when its power is not held in check by an independent press.”3

The media has a special role to play “and a particular vulnerability” when it comes to countering corruption.4 Politicians and civil servants may be all the more tempted to abuse their positions for private gain when they are confident that they run no risk of public exposure and humiliation through the media. Politicians, in the pursuit of such comfort, have sought to muzzle the media. Even today, there are many countries that censor the media, have an abundance of restrictive laws, and frequently jail journalists.

Today, as never before, journalism is a dangerous profession, with kidnappings and beatings becoming more common. The instinct to “shoot the messenger” who carries bad news (sometimes literally) is as compelling as ever. Too often, those in power seek to confine the watchdog roles of the media and, in some cases, they clearly do so to exploit their positions of power without fear of exposure. Even in societies that pride themselves on their openness, there are powerful authorities who, on the premise that the media might act “irresponsibly”, support Official Secrets legislation that greatly restricts the right to know and the right to publish. These authorities also sustain punitive libel laws that can be used to intimidate individuals and newspapers from publishing.

It must be recognised, of course, that corruption exists within the journalism profession as well. In Mexico and India, many reporters, for example, earn a stipend from the institutions they cover to supplement their meagre salaries. Journalists in various other countries, such as Indonesia, are also known to accept such pay-offs. This creates a powerful disincentive to explore misdeeds in high places.

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2 A sample of the problems the Internet can give rise to in the context of elections alone is found in Canada. Under Canadian law it is illegal to publish political advertisements anonymously. That is, all advertisements must indicate the author or sponsor and his political affiliations. Under Canadian law, “Every person who sponsors or conducts advertising without identifying the name of the sponsor and indicating that it was authorised by that sponsor is guilty of an offence.” Furthermore, any “third party” political advertising (whether anonymous or not) brought to the attention of a political party’s “official agent” must be counted towards their campaign spending limit, even if they played no official role in the creation of the advertisement. These regulations would include web pages on the Internet, as long as they qualify as advertisements by “directly endorsing or criticising a particular candidate or political party”. Canada also covers a spread of time zones. Although early election results will be broadcast locally in Halifax (in the east), it is illegal to publish them in a way that people in Vancouver (in the west) could get access to them before their polls close. The ban on the last-minute publication of surveys reads: “No person shall broadcast, publish, or disseminate the results of an opinion survey respecting how electors will vote at an election or respecting an election issue that would permit the identification of a political party or candidate from midnight the Friday before polling day until the close of all polling stations.” All of these provisions are challenged by Internet users, especially when web sites can be established outside Canada (e.g., in the USA), and beyond the reach of Canadian law enforcement.

3 In a speech delivered in Moscow, Russia in May 1993.

4 This has been recognised in Uganda and Tanzania, where both governments have been actively supporting the holding of investigative journalism courses organised by Transparency International and the World Bank Institute.

5 The PCC Code may be seen on the TI website, www.transparency.org.
Independence of the media

Independence of the media is a very complex concept. In general terms, it focuses on the notion that journalists should be free from any form of interference in the pursuit and practice of their profession. In reality, the owners of the media intervene daily in the operations of the journalists in their employment. In many countries, the government itself is the largest media owner (often of the leading television and radio stations) - a situation which undermines the very concept of ensuring the genuine independence of the media from the influences of the state.

The rights of journalists in state-owned media enterprises and the degree of freedom they enjoy is sometimes, but not always, stipulated and guaranteed in law. The lack of legislation and regulation in this context is a direct threat to the independence of the media. In the UK, for example, where the BBC is widely seen as operating at arms-length from the government and enjoying more independence than many state-owned media outlets in other countries, the Thatcher government explicitly banned the BBC, along with the private media, from broadcasting direct interviews with leaders of the Irish Republican Army. There is obviously validity to the argument that “a financially dependent media cannot be truly free”.

Efforts should be undertaken to strengthen the independence of the media through the privatisation of existing state-owned or controlled media. At the same time, as noted above, systems must be developed which ensure a diversity of media ownership, so that competition within the media stimulates a wide range of perspectives on public policy issues and acts as a check on the political power of media magnates.

A free, privately-owned media is only possible when there is meaningful competition in the media marketplace. Rivalry in the market makes the corrupt newspaper owner fearful of exposure, just as it serves as a deterrent to the corrupt public office holder. In late 1994, for example, a book publishing company owned by News Corporation (a global enterprise headed by Rupert Murdoch) offered US$4.5 million in advance payments to Congressman Newt Gingrich, then Speaker of the U.S. House of Representatives, for two books. Very swiftly, many media outlets reported the offer and some suggested the possibility that Mr. Murdoch, who had major issues before Washington governmental bodies regarding his television interests, had offered a bribe to the new Republican Party leader. Reporting by the media forced the cancellation of the book deal. However, many countries do not have the same abundance of media owners; rivalry is far less intense and, at times, media “cartels” can be formed to suit the political interests of the day. In some cases, one family “rules” the media in a country. Such an overwhelmingly dominant position means that media magnates need not fear exposure by rivals, and in an age of electronic media, their political power can enable them greatly to influence the outcomes of elections.

Furthermore, many developing countries have very little advertising money available to support the media. As a consequence, the media in these countries is desperately underfunded and, at times, dependent. On the one hand, large advertisers (of which the government is usually among the most prominent) exert enormous control, and on the other, political and business entities have a wide scope to bribe reporters (who tend to be very poorly paid) to write stories that serve their political and business interests. In these types of situations, the media frequently fails to perform its watchdog role. The media privatisation process, just like the

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6 Investigative journalism workshops run over past several years by Transparency International and the World Bank Institute commonly heard of journalists effectively blackmailing the subjects of their stories. They would extract bribes from individuals named, not to file their stories. In cases where stories were prepared and filed, editors would be bribed to drop them.
broader issues of media ownership, must therefore be carefully considered within its social and economic context. Monopolies in the media area are potentially even more dangerous than are monopolies in other areas of economic life.

In numerous instances, governments assert that their democratic institutions are still fragile and their free media inexperienced, and argue that there is merit in continued governmental ownership. This is often the case, but in such circumstances, the state-owned media should not enjoy a monopoly. In countries where governments insist on retaining some measure of control, safeguards or an independent regulator should be in place to stand between the Government and the rights of a free media.

Who should be the guarantor of a free media?

Censorship of the media takes many forms and raises its head in almost all countries. Few have legal systems which guarantee absolute freedom of the media. Amendment 1 to the Constitution of the United States, as tested before the U.S. Supreme Court, comes as close to guaranteeing a society free of censorship as any particular legislative act. The Constitution of Malawi is unique in this regard as it enshrines the concept of the freedom of the media not once, but twice, and in the following terms:

“Every person shall have the right to freedom of expression” and,

“The press shall have the right to report and publish freely, within Malawi and abroad, and to be accorded the fullest possible facilities for access to public information”.

Laws declaring “freedom of expression” require support and enforcement from the courts. An independent judiciary is the handmaiden of a free media. Without an independent judiciary, media freedom is likely to be illusory. A prerequisite for building a free media, therefore, is a legal system that is independent of political influence and has a firm constitutional jurisprudence supporting the concept of a free media. Such jurisprudence can draw strength from Article 19 of the International Covenant on Civil and Political Rights, which states:

“Everyone shall have the right to freedom of opinion and expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

Restrictions on these widely-accepted rights relate to the rights or reputations of private individuals and to matters of national security. Although many journalists would accept that such restrictions are reasonable, they would almost all agree that they must be narrowly interpreted. Thus, the legal and regulatory frameworks should not, for example, provide restrictions on the media that may prevent them from publishing matters simply because these could damage the public reputation of public office holders. To do so would, in fact, undermine freedom of expression. A decision by the European Court on Human Rights held that the politician “inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance”.

However, in many young and fragile democracies the media’s experience is limited and the temptation to be less responsible is significant. Laws which, in essence, provide full scope for...
the media to be irresponsible, may actually damage the growth of these emerging democracies. In this regard, there may be merit in the establishment of Press Councils. Although Press Councils have not generally been very successful, they can be constructed so as to provide an open forum for complaints against the media by the public, to chastise the media when it is irresponsible, and through these means, influence (to a degree) its behaviour.

Press Councils need to be independent and directed by people widely respected for their non-partisan standing and their integrity. These bodies should not have powers of legal sanction, which could enable them to become powerful censors. Rather, they should have the prestige and integrity that give their reports strong moral force. A useful requirement is for the subject of a complaint to be required to publish, in full and unedited, the findings of the Press Council where a complaint against it has been upheld.

A very fine line exists between responsible and irresponsible journalism. As such, time and place are important factors that should influence judgements. Indeed, the moral force of a Press Council is a better way to secure a responsible media, than to provide governments and courts with wide-ranging powers to curb it. Assertions of media irresponsibility often lead to calls for laws and systems that guarantee only a “reasonably” free media. Experience shows that the term “reasonably” is highly subjective, and that acceptance of it in this context can be the first step down a slippery slope towards diverse forms of censorship.

The “reasonably” approach often comes to the fore in matters relating to national security. The Official Secrets Act in the U.K., and similar legislation in other countries, can provide an umbrella for all manner of secret activity by a government. For example, President Nixon attempted, in the early 1970s, to withhold tapes of conversations in the White House from the courts and the Congress on the grounds of national security. Following the eventual publication of the tapes, however, few argued that their publication had been damaging to the nation’s security.

Government officials, conditioned over many decades to label items “confidential,” or “secret,” or “top secret,” build a strong prejudice against public disclosure of information, and frequently seek to prevent disclosure through claims of national security. It is important, when establishing best practices, that the independent judiciary be objective in assessing these claims. It should take the view that all government documentation should be in the public domain and open to public scrutiny, unless there is a forceful and compelling argument, presented by the government, for maintaining secrecy. Secrecy is more often justifiable on the grounds of the legitimate protection of personal privacy or the maintenance of commercial confidentiality, than it is on the (relatively rare) grounds of protecting national security.

The most effective system for guaranteeing freedom of the media is one where the media itself is empowered to make careful judgements on its own. To provide publishers and journalists with freedom is also to burden them with difficult decisions regarding public responsibility. In the 1960s, The New York Times received several thousand pages of documents from a source within the U.S. Department of Defence. These documents, which dealt with the war in Vietnam, became known as the “Pentagon Papers”. The editors of the New York Times, after assuring themselves of the authenticity of the documents, agonised for days over whether or not it was responsible to publish them. They weighed considerations of national security against the public’s right to know. They decided to publish. Their decision was not taken lightly and it emerged that many individuals of experience, in public affairs, the law and the media had different perspectives on the issue. None could claim a monopoly of wisdom, and none claimed that the judgements of journalists were necessarily inferior to those of experts from other professions.
The decision to publish the “Pentagon Papers” was carefully reviewed by the courts, which concluded that the freedom of the media, as expressed in the First Amendment to the U.S. Constitution, was of greater significance in this instance than national security claims made by the U.S. Government. Consistent judgments of this kind by an independent court system can serve, over time, to build a tradition of media freedom. Such a tradition can be fortified by “sunshine laws”, such as the U.S. Freedom of Information Act 1966, which enable every citizen to obtain access to almost all documents of the government.

Through the responsible judgements of editors and journalists, combined with consistent judicial support, a tradition and culture of media freedom develops. This culture is, above all, the most important guarantor of media freedom and of the ability of the media to fully operate as a watchdog over public office holders. The tradition must provide for the media to be tough in its scrutiny of the work of those who enjoy the public trust. The media culture, as is evident in many democracies today, must involve a sense that it is the duty of the media to afflict the comfortable (those holding public office), in order to comfort the afflicted (the public at large).

There is no question that such a culture can, at times, lead to media irresponsibility. This is an inevitable price to pay. An independent, wise judiciary and an effective Press Council, may be able to assist in curbing excesses in such times. Nevertheless, societies should be willing to pay some price for the greater good of securing media freedom. There is merit in accepting the basic spirit, if not the total and literal statement, of the view of Lord McGregor of Durris (Chair of the U.K. Press Complaints Commission) that, “a free society which expects responsible conduct from a free press must go on tolerating some “often shocking” irresponsibility as the price of liberty, because a press which is free to be responsible must also be free to be irresponsible.”

The critical factor on all issues concerned with restricting freedom of the media is that the limits be publicly debated and that they be interpreted by a fully independent judiciary, composed of individuals of the highest integrity.

"Self-censorship"

Perhaps even more ominous is self-censorship, where journalists and editors do not follow up stories that might upset business interests, the proprietors of the newspaper or those close to them. This can cause stories to be ignored or written in ways which are at best unethical. Self-censorship can range from the mundane (stories that are considered important but “dull” and are therefore not reported) to the heights of conflicts of interest with the news organisation (stories are unreported because they impact on advertisers or friends of these in influential positions in the paper).  

Fortunate, indeed, is the editor who has his Board sign off on a statement such as this:

“Time-Warner’s board, its chief executive, and the chief executive of Time Inc. recognise that the financial success of Time Inc.’s magazines is inextricably linked to their credibility. The board and the chief executives hold the Editor-in-Chief of Time Inc. accountable for the editorial quality and integrity of the company’s magazines. To this end, they are committed to upholding the Editor-in-Chief’s unique level of independence.

9 A survey conducted on journalists across the USA by the Pew Research Center for the People. The conclusions of the year 2000 poll were that about 20 percent of the journalists reported criticism or pressure from their bosses after producing or writing a piece that was seen as damaging to their company’s financial interests. Most of those who admitted self-censorship said that they received signals from superiors. The San Jose Mercury News reportedly lost over $1 million in advertising from car dealers after an investigative journalist ran a story on how readers could get better deals for themselves. Colombia Journalism Review, May/June 2000, pp 41 et seq.

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The publications under the Editor-in-Chief’s control are expected to provide readers with synthesis, analysis, review, and commentary. They are also expected to provide unbiased coverage of the myriad interests of advertisers and of Time Warner itself. Editorial independence is essential so that the Editor-in-Chief can produce publications that advance the public interest while delivering a superior return on investment.”

**Principles of a free media**

Governments should embrace a basic set of principles to govern approaches to the media. An example of such principles was set out in the Charter for a Free Press approved by journalists from 34 countries at the Voices of Freedom World Conference on Censorship Problems. United Nations Secretary General, Boutros Boutros-Ghali, declared that “They (the Charter’s principles) deserve the support of everyone pledged to advance and protect democratic institutions”. He added that the provisions, while non-binding, express goals “to which all free nations aspire”.

The Charter reads:

- Censorship, direct or indirect, is unacceptable; thus laws and practices restricting the right of the news media freely to gather and distribute information must be abolished, and government authorities, national and local, must not interfere with the content of print or broadcast news, or restrict access to any news source.
- Independent news media, both print and broadcast, must be allowed to emerge and operate freely in all countries.
- There must be no discrimination by governments in their treatment, economic or otherwise, of the news media within a country. In those countries where government media also exist, the independent media must have the same free access as the official media have to all material and facilities necessary to their publishing or broadcasting operations.
- States must not restrict access to newsprint, printing facilities and distribution systems, operation of news agencies, and availability of broadcast frequencies and facilities.
- Legal, technical and tariff practices by communications authorities which inhibit the distribution of news and restrict the flow of information are condemned.
- Government media must enjoy editorial independence and be open to a diversity of viewpoints. This should be affirmed in both law and practice.
- There should be unrestricted access by the print and broadcast media within a country to outside news and information services, and the public should enjoy similar freedom to receive foreign publications and foreign broadcasts without interference.
- National frontiers must be open to foreign journalists. Quotas must not apply, and applications for visas, press credentials and other documentation requisite for their

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10 Ibid, at page 46.
work should be approved promptly. Foreign journalists should be allowed to travel
freely within a country and have access to both official and unofficial news sources,
and be allowed to import and export freely all necessary professional materials
and equipment.
• Restrictions on the free entry to the field of journalism or over its practice, through
licensing or other certification procedures, must be eliminated.
• Journalists, like all citizens, must be secure in their persons and be given full protec-
tion of law. Journalists working in war zones are recognised as civilians enjoying all
rights and immunities accorded to other civilians.

Media intimidation

Violence against journalists has taken place in scores of countries, and public authorities have
time and again indicated their unwillingness to do anything about it. The only meaningful
antidote to such behaviour is the existence of laws and systems that guarantee a free media.

In Algeria and Colombia, for example, a considerable number of journalists have been mur-
dered in recent years. The murderers have not been found and often the authorities have not
demonstrated great zeal in finding those who were responsible. In 1994, the Inter-American
Press Association General Assembly noted that a high proportion of the political prisoners in
Cuba were serving sentences for “divulging enemy propaganda; in the previous year ten jour-
nalists were murdered in Colombia, four in Mexico, three in Guatemala and one in Brazil”. The
declaration from the conference, held in Toronto, stated in part:

“The withholding of government advertising, spurious lawsuits against the media,
and intimidation by narcotraffickers all have the effect of putting a damper on the
free exercise of journalism.”

Discrimination by governments among different media - providing some journalists with
greater access to governmental information and greater effective independence of action - is
commonplace. It may take the overt form of governments providing preference in the access
to information for journalists working solely for state-owned media or it may take the slightly
more subtle form of exclusively providing advertising to government-owned media, or to
media that adhere to governmental views.

The legal and regulatory powers enjoyed by government authorities are also often used to
intimidate or censor the media. For example, the government can place constraints on media
involving quotas on the import of newsprint and the imposition of special taxes and postal
rates, as well as restricting the broadcast frequencies available to independent electronic
media. This is likely to become an issue of mounting importance as electronic mail and new
information-communications technologies provide new opportunities for people to freely
express their views to wide audiences.

Protection of sources is a core requirement for journalists to freely practise their profession.
Journalists must know that they can print stories without risking fines or imprisonment for
failing to reveal their sources of information. Individuals who provide journalists with
information on an “off-the-record” basis need to have assurances that the journalists they
confide in will not be intimidated by public authorities into revealing their identities. These
assurances are essential if the media is to be an effective counterforce to the abuse of power
by public officials.

13 At its October 16-20, 1994, 50th General Assembly
The licensing of journalists can take many forms and frequently represents a type of intimidation. In some countries, governments seek to regulate the licensing of media enterprises and their employees directly, while elsewhere there may be media trade unions that seek to force restrictive practices on their members. Licensing practices do not serve the public interest. The elimination of media licensing should embrace foreign correspondents; they should always have as much access to information and as much opportunity to practice their profession as do all other local journalists.

Although civil libel actions can be consistent with the notion of a free media, this is patently not the case with regard to criminal libel actions. Within this framework it is important to consider anti-insult laws, which exist in numerous countries unreasonably and oppressively to protect public office holders, even where libel laws (correctly) set lower levels of protection for these officials relative to private citizens.

For example, in recent times numerous governments in Central Europe have introduced legislation which stipulates severe penalties for journalists who publish articles that may be viewed as insulting holders of high governmental office. In some cases the laws make no distinction as to whether media reports are truthful or not. In other words, the fact that a journalist wrote the truth about improper acts by leaders of the government would not be viewed by the courts as a defence in cases where anti-insult laws are applied. These laws amount to forms of intimidation and censorship which can be particularly advantageous to corrupt officials. In this regard, anti-insult laws should be subsumed within libel law.

The courts need to recognise media intimidation for what it really is: a central facet of a culture of corruption and an effort by strong vested interests to perpetuate their corrupt practices. All regulation of the media, in terms of permits, licences and ownership, should be conducted with total transparency, and by regulators who are independent and non-partisan.

**Securing Best Practice**

The burden of ensuring a responsible, independent media must be shouldered primarily by the media itself. Journalists must work hard to build public regard. They must demonstrate their independence, objectivity and professionalism each and every day in order to earn public trust and confidence. At the same time, it is imperative that the owners of the media ensure that journalists are paid wages which encourage independence, rather than dependence.

Numerous national and multi-national media organisations focus on the preservation of the freedom of the media. The Press Foundation of Asia Committee, the Canadian Committee to Protect Journalists, the International Federation of Journalists and the World Press Freedom Committee are but a few of the organisations which should be supported for their efforts to help governments put in place laws and arrangements that correspond with the dictates of the principles of a free media.

Major foundations - the Freedom Forum, the Reuters Foundation, the Knight-Ridder Foundation and numerous others - seek to secure appropriate journalistic training to raise the quality of media output in those countries where journalistic training is limited. In the fight against
corruption, journalists must hone their skills with regard to investigative reporting, understand public accountability systems, the operations of modern business, and, in particular, the recognition of corrupt practices.

Some indicators as to the effectiveness of the media as an integrity pillar

- Are there freedom of information laws and/or do procedures exist to ensure that members of the public can obtain information/documents from public authorities?
- Does the country have an “Official Secrets Act” or something similar - if so, is it used as a tool to effectively secure censorship of the media by government?
- Are libel laws used, in effect, to censor the media and curb the dissemination of information about persons who influence the community?
- Do journalists have to be licensed? If so, is this a device to effectively curb journalistic freedom?
- Is the publicly-owned media independent of government control as to editorial content? If not, is the publicly-owned media in practice relied upon, by the public at large, as a credible news source?
- Does the publicly-owned media routinely carry stories critical of the administration (e.g. quoting opposition politicians etc.)?

Ownership

- Is there competition within the (a) print media, (b) television, (c) radio - and do antimonopoly laws exist to secure competition and, if so, are they enforced?
- Is there a growing independent media sector - including Internet media, informal journals and newsletters, and is this growing?
- Do media entities (print, audio-visual, and other) have to obtain special licences/permits from public authorities? If so, is this a device that is used to censor the media?
- Does the foreign media have the same rights as the domestic media to cover and report stories?
- Are the non-media business interests of media owners (and business that such owners may have with government) public knowledge?

Investigative Journalism

- Are journalists paid a living wage?
- Are individual journalists physically safe if they expose corruption and/or investigate the interests of powerful private and public sector leaders?
- Are criminal libel actions against journalists rare or common?
- Does the (a) print media; and (b) television/radio media; regularly carry articles by investigative journalists?
- Is there a school for the training of journalists, including training in investigative journalism?
Civil Society

Liberty has never come from the government. Liberty has always come from the subjects of it.

Woodrow Wilson

Civil society has never been in the public eye so much as it is today. The political and economic upheavals following the end of the Cold War have profoundly affected the distribution of power. Previously, states had claimed a monopoly on power under the guise of state sovereignty, today that authority is in decline. Now, power is increasingly being claimed or contested by globalised business and by civil society. Around the world, “soft law” in the form of guidelines and recommendations are emerging as a wide-ranging body of global practice, not yet with the force of international law, but which states ignore only at their own peril.

At the national level, free trade has eroded the power of governments to influence the activities of business, who in many industries have the option of taking their business to a more receptive country. Moreover, civil society is frequently challenging the governments’ legitimacy to speak on behalf of the people, and is frequently being used to channel development aid in ways that bypass their officials. Today, NGOs deliver more official development assistance than the entire UN system. In many countries they are delivering essential community services that faltering governments can no longer manage.

On the other hand, governments have now only the appearance of free choice when it comes to setting economic rules. Increasingly, these rules are being set by the markets, enforced with their own power.

At the international level, questions of pollution, of international organised crime, and concentrations of power in the media have rendered borders almost irrelevant. Indeed, when 122 countries agreed to stop using and selling landmines in December 1997, the success was attributed not to the work of government officials, but to the determination of the 1,000 or so non-governmental organisations in 60 countries. At the signing ceremony in Ottawa, Jody Williams, the campaign’s co-ordinator, remarked that NGOs had come into their own on the international stage. “Together,” she said, “we are a superpower.”

But there are limits inherent in the nature of the power of transnational civil society. It works indirectly, by persuading governments or corporate leaders or citizens or consumers. The networks remain powerful only so long as they retain their credibility.

And sometimes civil society gets it very wrong indeed. Humanitarian relief organisations found their credibility badly damaged in 1996 by what turned out to be their exaggerated reports of suffering and death among refugees from Rwanda. To the extent that transnational...
civil society networks provide inaccurate or misleading information (whether deliberately or inadvertently), they undermine their effectiveness. “When transnational civil society forgets that its power is soft, not hard, it not only fails to achieve its immediate objectives but also undermines the moral authority that is its real claim to influence.”

Thanks to the Internet, the importance of proximity and prohibitive costs of communications have been virtually eliminated. International networks can be formed swiftly and vast amounts of information exchanged at little or no expense – “dial locally, act internationally” as Jessica Mathews puts it. Global civil society’s response rate has risen dramatically, especially by human rights groups who within hours of the occurrence of an event galvanise responses from around the world. The growth of international movements has been such that in some areas they have come to dwarf their counterparts within the UN system. Amnesty International, for example, is now better resourced than is the human rights arm of the UN.

At the same time, the trend to decentralise within the sovereign state has rendered central governments still weaker. With decisions being taken at the lowest appropriate level (“subsidiarity” in European Union parlance) a whole range of traditional government functions is increasingly being discharged by regional and local governments, from education and health through to town planning and transportation.

As the authority of governments has been eroded and as there was a perceived shift of power in the direction of global business, so, too, did civil society emerge as a much more potent actor than hitherto. To some, at least, it would appear that civil society is filling at least a part of the power vacuum left as governments have retreated. As representing “the people in the market-place”, civil society is in a position to take a stand against the business practices their various movements consider unacceptable.

The motives behind the activities of various civil society groups, too, can be questionable. Particularly in the aftermath of the street riots in Seattle in 1999 that derailed a meeting of the World Trade Organization, the aims of the various elements represented in the riots illustrate the contradictory nature of civil society: some were protesting to save jobs in their own, developed countries; others were protesting at the exploitation of workers in the developing world.

The scenario is a fascinating one, and it is, as yet, far from being played out.

But, who, and what, is civil society?

For the purposes of this discussion, civil society is referred to as the sum total of those organisations and networks which lie outside the formal state apparatus. It includes the whole gamut of organisations that are traditionally labelled “interest groups” – not just NGOs, but also labour unions, professional associations, chambers of commerce, religions, student groups, cultural societies, sports clubs and informal community groups. As such, it embraces organi-

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7 Transparency International itself is an example of this phenomenon.
8 Bond, supra; p.53.
sations whose objectives are diametrically opposed to each other, such as hunting groups and groups of animal rights activists.9

“Civil society” can be traced back to the works of Cicero and was developed by political theorists over the past 200 years as a domain parallel to, but separate from, the state: a realm in which citizens associate according to their own interests and wishes.10 It is a much broader concept than simply non-governmental organisations (important though these undoubtedly are). Moreover, the causes pursued by elements within civil society are not necessarily noble and in the interests of the public good. If one limits civil society to those actors who pursue high-minded aims, the concept becomes “a theological notion, not a political or sociological one”.11 Many civil society groups are single-minded in the pursuit of their particular cause and have no interest in balancing their aspirations within the wider public good.12

A long line of political commentators have commented on the impact of the civil society participation, on the quality of governance. Alexis De Toqueville credited the strength of democracy in the US to the proliferation and vigour of “a thousand different types” of associations of citizens pursuing a common purpose. A recent study of the relationship between civic participation and governance found that in those civic communities marked by active participation in public affairs, citizens “expect their government to follow high standards, and they willingly obey the rules that they have imposed on themselves.”13

Enhancing the role of civil society in demanding accountability from government “involves the most basic questions about power, transparency, participation and democracy”.14 The top-down and closed structure of state-controlled and autocratic governments in many countries has, in the past, stunted the growth of civil society and permitted public officials to operate in an atmosphere devoid of public accountability or transparency.

The failure of communism and of military dictatorships in Latin America, Asia and Africa to provide effective governance, protect civil liberties and facilitate social and economic development has begun to transform the political and economic landscapes in countries around the world. In the public sector, constitutional governments and multi-party democracies have emerged with the expectation that democracy and deregulated economies will eventually yield various solutions to age-old problems.

Among these emerging democracies however, even those officials genuinely seeking solutions have not always applied the basic principles of democracy. Applying these principles, would, by definition, call for a robust public policy debate, a responsiveness to the demands of citizens, and a receptiveness to the inputs of civil society as solutions are hammered out. Instead, the state has been reluctant to include civil society as a partner. At times, some governments

9 Thomas Carothers in Civil Society in Foreign Policy, Winter 1999-2000, p. 18.
10 Ibid. The article addresses such questions as Has civil society gone global? Does the rise of civil society mean the decline of the State? Does “real civil society” not take money from the state? Is civil society crucial for economic success? Does democracy ensure a strong civil society? Does a strong civil society ensure democracy? All of the writer’s answers are qualified. In the US, a survey shows that non-profits receive twice as much government funding as they do from private giving. In Europe, human rights and environmental groups that take on their governments still receive official funding.
11 Ibid, quoting David Rieff.
12 The National Rifle Association in the USA is cited as an example of a myopic civil society grouping, preoccupied with its own agenda to the exclusion of competing claims and the rights of others. By contrast, Transparency International has always insisted that it is not fighting a “crusade” against corruption, and that efforts to combat corruption must respect other basic societal values and, most importantly, fundamental human rights.
have seen it as a rival, both in terms of power and influence, and in terms of the outside aid it diverts from channels which have traditionally been the exclusive preserve of government. Such governments, in ignoring civil society, have failed to implement mechanisms which would institutionalise accountability and build public trust.

One commentator on the Mexican experience notes that “no one would quarrel with the statement that a pluralistic public policy debate is crucial to the very existence of a democratic process. Developing public policy debate in a society that is gradually building democratic institutions, however is a far more complex issue.”15 Adding to this complexity is the fact that civil society is also in a state of transition. In what has been called “an unprecedented worldwide phenomenon”16 the past two decades have seen a global proliferation of civil society organisations working at the grass-roots and policy level in the developing world, promoting democracy, human rights, development and other objectives.”17

Donors and policy-makers have come to realise that nascent democratic institutions in transitional phases are fragile, and that market forces alone are inadequate to ensure social and economic equity without the countervailing participation of civil society in the decision-making process. Even so, civil society organisations in developing countries often face difficulties in securing adequate funding and access to information while retaining independence and avoiding accusations of being foreign-dominated. However, as people increasingly demand greater participation than that afforded by a voting booth every few years, civil society, in both developing and developed countries, seems likely to occupy a more central place in the scheme of things than it has the past.

And from where, then, does civil society get its legitimacy?

Civil society, in essence, gains its legitimacy from promoting the public interest, hence, its concerns with human rights, the environment, health, education, and, of course, corruption. Its motivation is a special interest, not personal profit. It is characterised by a strong element of voluntary participation: thus people participate because they believe in what they are doing, and not simply for spending another day in the office.

This is seen most sharply when one looks at some of the actors within civil society. Trade Unions, for example, see themselves as acting in the public interest – but not always, for there will inevitably be times when they are pursuing the narrow self-interest of the group they represent. They have, then, one foot in civil society and another out.

The same can be said of the private sector. As yet, there is no consensus on whether the private sector has any place at all within civil society. That members of the private sector are individually accountable to their shareholders, and to them alone has been a traditional response. However, the growth of social accounting and the recognition that business must, in its own enlightened self-interest, see itself as being a part of the community, and as having broader responsibilities than those crudely dictated by a “bottom line”, have led many business leaders to see the role of the private sector as being, at least in part, aligned with civil society. The same can be said of professional organisations, particularly doctors, lawyers, accountants and engineers.

17 There are “tens of thousands” in Latin America and the Caribbean (see “Toward an Inter-American Development Bank (IBD) Strategy for Strengthening Civil Society," Conference of the IDB, Washington DC, September 1994). There are at least 80,000 registered voluntary organisations in Eastern Europe according to the CIVICUS report, supra.
Critics are on firm ground when they ask “who elects civil society?” – for no-one does. Groups form themselves, usually around a charismatic figure. Trade Unions’ members elect their leaders. Public companies’ shareholders elect their directors. There is, however, a particular crisis of legitimacy for NGOs, and they are very much the bread-and-butter of civil society – and often mistaken for being its totality.

Responsible NGOs ensure that they are run democratically and accountably, but it is also true that many NGOs are run in neither fashion. Indeed, many are formed for the sole intent of gaining aid funds from donors for the personal benefit of the NGOs’ founders. Efforts are under way to foster the adoption of codes of conduct and transparent accounting practices by NGOs to help meet responses to these criticisms. However, the driving force behind NGO reforms should be the recognition that civil society is in no position to demand higher standards in public affairs from its governors, than the standards NGOs themselves are prepared to apply to their own.

As Michael Bond concludes in his critique of NGOs, “When they are good they are very good: a catalyst for positive change. But when they are bad, they are self-promoting and irresponsible.”

The role of civil society in countering corruption

Civil society encompasses the expertise and networks needed to address issues of common concern, including corruption. And it has a vested interest in doing so. Most of the corruption in a society involves two principal actors, the government and the private sector. Civil society is typically the major victim. And as power devolves from the centre to local authorities, opportunities for corruption shift downwards towards new actors who are in more direct contact with civil society. This means that the ability of civil society to monitor, detect and reverse the activities of the public officials in their midst is enhanced by proximity and familiarity with local issues. Indeed, this may be the training ground needed to gain the experience and confidence necessary for action at the national level.

Civil society’s response to the problem has, in the past, been fragmented. Lawyers may be policed by laws and bar associations or accountants by their professional bodies, but few within civil society have taken the broader view: to contemplate what the integral parts of their society’s integrity system can and should look like, and to press for relevant reform against a holistic blueprint.

None are without problems. In Australia, for example, free BMWs, cash kickbacks and overseas holidays are said to be just some of the bribes being offered by pathology companies to favoured doctors, according to a leading pathology organisation. The Australian Association of Pathology Practices has been calling for a review of corruption laws to stamp out a culture of “creative fraud” within the industry. Its president, Dr Ben Haagsma, is quoted as saying that although corruption was only a minor problem within the industry, new laws that will make prosecutions easier were needed to encourage doctors to blow the whistle on bribery.

“A dangerous weed…”
Kenyan Cabinet Minister Julius Sunkuli has declared non-governmental organisations to be a ‘dangerous weed which must be weeded out’. Mr Sukuli, of the Office of the President, urged Members of Parliament to refuse to be used by NGOs, saying they were headed by unscrupulous and greedy people out to enrich themselves in the name of democracy.

East Africa News, 22 July 1999

Another horse to back…
Referring to the need to incorporate civil society in governance, one policy analyst observed that “the development business has spent three decades betting on the state and one decade so far gambling on the markets. It’s time to try a third, to hedge those earlier bets through checks and balances on the excess of state centralism and market cruelty.”

The Rise of the Non-Profit Sector, Foreign Affairs, July/August 1994, Vol. 73, No.4.

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18 Bond, supra, p.55.
CONFRONTING CORRUPTION: THE ELEMENTS OF A NATIONAL INTEGRITY SYSTEM

It is also important to note that civil society can be a part of the solution or a part of the problem. For example, the business communities have all too often become inured to paying bribes to public officials to gain business.20 There is a sharp reluctance in many influential quarters to introduce any apparent change in the ground rules that might result in their losing business. The challenge here is to achieve a scenario in which the rules change for all, so that there are no “winners” and no “losers.” The only winner would be society as a whole.

A triangular relationship exists between government, capital and civil society. Corruption can take root in all three parties to the relationship. It is thus both theoretically and in practice impossible for just one of the parties to address the issue of corruption on its own and in isolation from the other two—and it is arguably impossible to tackle the issue effectively without the participation of all three.

Government therefore has a duty to provide a legal and regulatory framework which allows the necessary space for civil society to operate, including, of course, freedom of expression, freedom of association, and freedom to establish non-governmental entities. Laws governing the formal constitution of an NGO and its tax status will vary greatly, but these should be clearly understood, accessible, consistent with international norms, and not needlessly restrictive or cumbersome. Public officials handling any accreditation procedures should clearly understand that the law must be applied even-handedly, without broad discretionary powers. In this context, any requirement to register is best served where decisions are made by a court or other independent body.

In civil society, there are many people who have a fundamental interest in achieving an effective integrity system for their own countries. And, in a number of countries, members of civil society are involved as independent participants on ad hoc oversight boards.21

Sometimes, if the government does not respond to public concerns, civil society can, and will, organise to defend its essential interests. For example, tired of abuses of power by privatised monopolies in New Zealand, a loose-knit group of largely commercial interests has come together to create MUMS (Major Users of Monopoly Services) in the absence of legislation covering monopoly businesses and their accountability. MUMS oversees interests ranging from international airlines and telecommunications activities to pulp-and-paper producers and film production companies.22

Transparency International’s strategy to involve civil society

From its inception, Transparency International (TI) argued that governments could not hope to tame corruption without the help and support of their people – and that the way to build this support is through serious-minded NGOs who were prepared to form cooperative but independent and critical partnerships with their governments. Where there was no such willingness in civil society, then the chances were that the government was not seen as being serious, and that anything it tried would probably fail.

20 See, for example, the many businessmen in Italy who are presently claiming as a defence against the payment of bribes to tax investigators the allegation that the tax officials threatened to over-assess them for tax should they not pay bribes to be under-assessed.
21 A classic example of this occurred in New Zealand where, after a massive nation-wide protest campaign to save Lake Manapouri from inappropriate power development, the New Zealand parliament established, by law, a “Guardians of the Lake” committee. The committee was empowered to provide an independent monitoring of developments, activities and had full rights to consultation. Other examples of how to involve civil society include the Hong Kong Independent Commission Against Corruption, which has an entire department devoted to community relations and advisory committees that incorporate significant involvement by the private sector and other elements of civil society. Neighbourhood Watch schemes are now established features in many countries, with citizens harnessed to provide support to policing efforts. In Australia, workers in some occupations are involved in industry safety inspections and New South Wales consumer groups help to identify hazardous products on sale in the state.

22 The Evening Post (Wellington, NZ) 14 September 1994.
In the intervening years, this approach has come to be endorsed by governments, aid agencies and international institutions, but its impact has necessarily been limited by the fact that in the countries suffering most acutely from corruption, civil society tends to be very weak. A priority for TI has been, therefore, to build capacity at the grassroots level.

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TI has based its approach to fighting corruption on three basic tenets. First, it aims to build broad coalitions against corruption by bringing together groups that are expressly non-partisan and non-confrontational. Consultations draw in other relevant segments of civil society — typically business leaders, journalists, religious figures, academics, existing NGOs with shared aims, members of chambers of commerce and other professional bodies — to test the interests and feasibility of forming a national chapter. In some instances, well-established NGOs of high public standing have amended their constitutions to adopt the TI approaches and then become their country’s national chapter.23

The second basic tenet of TI—and its most important structural feature—is the crucial role of national chapters. Not only are the TI chapters the “owners” of the TI movement24, but they are free to define their own mandates and work programmes. However, they must follow two important rules of conduct: 1) they will not investigate and expose individual cases of corruption as such activity would undermine efforts to build coalitions which promote professional and technical improvements of anti-corruption systems; and 2) they must avoid party politics as partisan activity would damage TI’s credibility.25

As there are no global recipes against corruption, national chapters tailor anti-corruption programmes to the needs of their own regions. In common with other organs of civil society, TI national chapters have to win the confidence of the country’s administration—a task which is even more difficult in countries where NGOs are generally regarded with suspicion by governments because of both their access to external funding and their agendas.

The third element of the TI strategy is to involve civil society in an evolutionary manner. Rather than arguing for dramatic, sweeping programmes that attempt to cleanse the stables in a single onslaught, TI argues for achievable and highly specific plans of action in a step-by-step process towards problem solving.

For example, the prevalence of corruption can dishearten individual firms or even nations from taking the first step to end the practice. When everyone pays bribes, no one wants to be the first to stop and end up empty-handed. To counter this, TI has developed an approach it has called “Islands of Integrity,” where in a specific project, all parties enter into an Integrity Pact (or Anti-Bribery Pact).26

The “Islands of Integrity” approach is also being developed in areas of government activity which are particularly susceptible to corruption (e.g. revenue collection). In such cases, it can be feasible to hive off the department concerned, ring-fence it from other elements in the public service, pay the staff properly, and have officials raise their standards.

TI is also developing the catalytic approach of building “integrity networks.” These involve a small number of individuals encouraging relevant existing NGOs to coalesce around the

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23 E.g. Poder Cuidadano in Argentina.
24 A first priority for TI has been to democratise the movement. All movements generally depend on a small core of committed people to get the movement off the ground, and in this TI has been no exception. The initial group, however, took the strategic decision that it should hand control over to the chapters at the earliest opportunity, as soon as there was a critical mass of national chapters. That stage was reached within five years.
25 These approaches were agreed to by the national chapters at the first annual general meeting of TI, in Quito, Ecuador, May 1994.
26 Integrity Pacts are discussed later, in the context of public procurement.
integrity issue, act collectively to project the issue in a broad and holistic framework, and identify possible steps for action.

Some of the most dramatic work to date has been undertaken by chapters who have undertaken surveys which have highlighted deficiencies in service delivery, and even gone so far as to successfully challenge the prices being paid for goods and services, driving these down and improving services as a consequence. Monitoring privatisations has been accomplished successfully, and in circumstances (e.g. a single bidder for a telephone company) which would have given rise to public suspicions had the chapters not been involved. Others have conducted surveys to document where in the public service the core of the problem really lies, and these have helped to raise public awareness and to elevate the fight against corruption on the national political agenda.

The above few examples highlight the role that civil society can play in strengthening ethical practices — especially where such practices mesh with the private and public sectors. Lessons learned from the above scenarios, and from others too numerous to mention, tend to suggest that the role of the citizen lies more in the field of prevention and information supply, than in the actual enforcement of anti-corruption laws.

In other words, the real role must be for civil society to claim and defend its own core values, and not leave this integral function to those in power.

Some indicators for Civil Society

- Are there restrictions on the ability of civil society to organise itself through the formation of non-government organisations?
- If so, are these reasonably necessary in terms of ensuring accountability by the NGOs? Or do they constitute unjustified obstructions?
- Are there restrictions on the holding of public meetings which act as a barrier to the mobilisation of NGOs?
- If there are requirements for the licensing of meetings (e.g. by local police) are licenses issued as a matter of course where there are unlikely to be problems of maintaining law and order?

Legal profession

- Is the legal profession subject to disciplinary measures?
- Are lawyers who are detected as behaving corruptly likely to lose their right to practise?

Accounting/Auditing profession

- Is the accounting/auditing profession subject to disciplinary measures?
- Are those who are detected as behaving corruptly likely to lose their right to practise?

Medical profession

- Is the medical profession subject to disciplinary measures?
- Are those who are detected as acting corruptly likely to lose their right to practise?
- Are health workers in the public service also permitted to have private fee-paying practices? If so, are there effective procedures to contain potential conflicts of interest?
Chapter 16

The Private Corporate Sector

Having been involved in exporting to various countries in the Middle and Far East and in Africa, I have bribed government ministers and officials of all grades, in the form of cash payments, commissions, introductory fees, new cars, hospital treatment and so on for more than 40 years. If I were not now retired I would continue to do so. That is the way one does business in those places....

We expect people from overseas to conduct their business affairs in this country according to our laws and customs; it is both grossly impertinent and extremely naïve to suggest that we should not then respect their customs and conduct ourselves in their country as they would wish...

John Hembry of Saxmundham, Suffolk, England, Letters to the Editor, Daily Telegraph (UK) 26 June 2000

The private sector has a special role to play in the maintenance of a country’s national integrity – not only where corporations are based, but also in the markets where they choose to operate. Corporations exist to make profits, and if they fail, their employees and those of associated enterprises, suffer along with their shareholders. To make those profits, corporations have to live in the world the way it actually is - and not the world as many of us would like it to be.

Fortunately, the traditional view that corporations exist solely to make profits for their shareholders - all that matters is a profitable bottom line - is giving way to a new sense of a wider corporate responsibility, not only to customers and clients, but also to the communities and societies in which they operate. It also recognises that “people seem happier working for organisations they regard as ethical [and that] in a booming jobs market, that can become a powerful incentive to do the right thing”.

Given the increasing role of the private sector in providing essential goods and services, many of which for generations have been the preserve of government agencies, improved corporate responsibility is a powerful tool in fighting corruption. With the passing of control to the private sector, accountability through Parliaments and Legislatures is, of course, effectively diminished, if not completely lost.

In this process, the private sector is coming to see itself more as a part of civil society than it has in the past. In the pursuit of profit, private sector players are simply self-serving; however, when they address community and society objectives and enter into coalitions with others to pursue a wider public benefit, they are acting as a civil society member. Corporations are increasingly seeking partnerships with relevant non-governmental organisations, and in par-

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1 The Economist, 19 April 2000.
2 A similar distinction applies with, e.g. a Law Society. Where it is defending its members’ fees, it is acting as a trade union; when it pursues the public interest it is not. And trade unions themselves, when addressing their own members’ terms and conditions, are simply unions of workers; but when they are addressing wider issues, they rightly see their place as being side by side with civil society organisations.
ticular with Transparency International. The views of major corporations are increasingly far-
sighted and, in many parts of the world, there are arguably the highest standards of ethical
leadership being demonstrated by business leaders. There is also a challenge here for legal sys-
tems. Courts in a growing number of countries have seen themselves as having an oversight
role – through judicial review – of the legality of public actions. As noted elsewhere, a whole
body of law has been developed to act as a check on the abuse of public power. Similar
jurisprudence is likely to become increasingly relevant for governing at least
some of the activities of the private sector, where these impact on the public
interest to a major degree.

Social Accounting is being increasingly recognised as a necessity, not just a
desirable activity. Standards of corporate governance are being developed to
provide greater protection, not only for corporations and their shareholders,
but for all those who have a stake in the success of the private sector, which
includes just about everyone.³ Legitimising “whistle-blowers” is also being
recognised as important in protecting the public interest. Employees who
raise matters of public concern that arise in the course of their employment,
but which their employers may be trying to hide, must be protected.⁴ Exam-
pies include the health risks of company products, the presence of unsafe sig-
als on railway lines, not to mention the abuse and misuse of public funds.

In parallel, regulatory structures are being developed in many countries, simply to impose
standards and ensure that ordinary people are not being exploited by monopolies and near
monopolies.⁵ The United States has been the leader in this area. Critics of the market econ-
omy should reflect on the fact that in the USA, the Bell Telephone Corporation was broken up
on the insistence of regulators, simply because it had been so successful as to be unduly dom-
ninant. It is a myth that under ‘capitalism’, the market is everything and ‘capitalists’ are free to
do what they wish. For a system of competition to work, it is crucial that dominant positions
are not abused (e.g. aggressively undercutting prices to drive a smaller newcomer to the wall,
as was the case with British Airways and Virgin.) If the market-place is to serve the needs of
all, then it must be effective, efficient and fair – and above all, it cannot be corrupt without
negatively impacting on everyone. As well, actions within the private sector, for better or for
worse, impact on others within the sector. For example, when banks give neutral references
for staff who they are dismissing for reasons of dishonesty, they are taking an easy way out.
However, it is one which can lead to other employers hiring staff who they believe to be hon-
est, but who are, in fact, the very reverse.

The activities of the private sector take place in two quite separate arena: transactions with the
public sector and transactions that lie wholly within the private sector. What in the past have
been traditionally seen as “public sector” activities are now increasingly passing into private
hands. As privatisation proceeds apace in many countries, the importance of checking cor-
rupition in the private sector grows ever more urgent. Activities in both arena need to be pur-
posefully addressed.

Corruption involving public officials

Corruption of public officials is explicitly or implicitly illegal in every country which has a

³ The OECD and World Bank have begun work in this area, and
there have been numerous national and international initia-
tives. A host of NGOs are also involved.

⁴ Whistleblowers are discussed in detail elsewhere: see index.

⁵ The topic is discussed in detail in the chapter on competition
policy.
legal system, therefore it should not be an option for any private sector company. There is no
difference in principle between a large bribe given to a minister or top official ("grand cor-
ruption") and a small bribe given to a junior official ("petty corruption"). However, the prac-
ticalities of working in certain countries may cause some companies to justify the distinction,
describing "petty corruption" as being a “facilitation payment” to obtain what they are enti-
tled to, for example, clearance of goods by customs or the connection of a
telephone line. However, the directors of a company have a specific respon-
sibility for ensuring that the company obeys all relevant laws.

**Corruption wholly within the private sector**

Corruption in the private sector is far from being as clear-cut as public sec-
tor corruption. While some countries have laws explicitly criminalising the
acceptance by employees of “secret commissions” or “kick-backs”, many do not. Yet it is
increasingly recognised that such activities are criminal. The recipients of kick-backs within
the private sector, or who exploit their positions to sell their employers’ goods at a premium
when in short supply, are effectively stealing from their employers.

As formerly publicly-owned utilities pass into the private sector, frequently in monopoly or
near-monopoly situations, the need for individual countries to ensure that any loopholes in
this area are closed, becomes ever more compelling.6

**Private-to-private corruption is widespread**

Private sector bribery is pervasive in all parts of the world and in numerous industry sectors.7
Given our global economy, it is as international in scope as public sector bribery. Foreign bank
accounts are widely used as repositories for private bribes.

The Board of Certified Fraud Examiners asserts that trust, and abuse of it, is the cornerstone
of occupational fraud, and it recommends striking a balance between trusting employees too
much and trusting them too little.

It argues for:

- the ethical tone being set by top management;
- a written code of ethics (something many small firms do not have and who are at
  highest risk);
- the checking of employee references;
- the designation of a responsible person, unconnected to bank reconciliations, as the
  one who receives the company’s unopened bank statements and who looks for
  unusual patterns or disbursements;
- maintaining a “hotline” that facilitates employees reporting malpractices;
- and for creating a positive work environment where employees will not feel an urge
to strike back at their employer because they believe it is treating them unfairly.

The Board predicts a continuing rise in occupational fraud and abuse, arguing that the expan-
sion of the use of computers has drastically changed the speed of transactions and that they

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6 Both the OECD and the International Chamber of Commerce are presently addressing the issue.
7 Views held by Michael Hershman (January 2000), Chairman of 'Decision Strategies, The Fairfax Group International', a busi-
ness investigative and security firm, and also a founder mem-
ber of Transparency International.
do not necessarily create the documents needed to detect fraud and abuse – although computers can, in some circumstances, also be tools for detection. Among the major areas where private sector bribery occurs are the following:

- **Procurement**: Bribery of purchasing agents for private sector projects is just as common as bribery for government projects. Efforts made to bribe buyers for large chains, such as Wal Mart and K-Mart are very common, particularly in connection with Asian suppliers. This is also true in the procurement of high-tech electronic components. There were well-publicised scandals in the USA involving payments made by paint manufacturers to purchasing agents for major automobile companies. Closely allied, and also common, is bribery to obtain sub-contracts on major projects.

- **Distributorships, Licences and Franchises**: The German “Opelgate” scandal, where company officials accepted bribes to award lucrative distributorships, is an example of widespread corruption in the granting of distributorships.

- **Retail Display Space**: Sales representatives of consumer goods manufacturers commonly bribe store managers to provide favourable display space for their products. Likewise there is the bribery of radio disk jockeys by record companies to play their records.

- **Proprietary Technical and Commercial Data**: There are numerous cases of competitors paying a company’s technical and marketing employees to obtain copies of proprietary information such as manufacturing drawings, customer lists, and pricing information.

- **Financial Industry**: Bribery of bank officials to obtain loans or better interest rates have been common, as disclosed in investigations following bank scandals in Japan, Indonesia, as well as the USA’s Savings & Loans crisis. In the securities industry there have been cases of bribes paid by brokers to obtain special allocations of shares in attractive IPOs (initial public offerings).

- **Scrap Disposal**: This is a common area for bribery, often involving organised crime. There are several variations, including bribery of quality control inspectors to reject good products, which can then be purchased as scrap and resold as quality products.

- **Sports**: Recent examples include leading members of the International Olympic Committee accepting “inappropriate gifts”; a boxing organisation that accepted bribes from managers of fighters to grant higher rankings, which then qualify fighters for more lucrative matches; bookmakers who have bribed cricketers to underperform; and football players rigging results.

Internal concealment of bribes can lead to false accounting, false tax declarations and kick-backs to company staff. Furthermore, one of the main principles of competitive tendering is that contracts should be won by those companies offering the best combination of price and quality, with other factors such as delivery or financing terms sometimes being taken into consideration. Corruption is an unacceptable factor which destroys such free and fair competition. It is also the case that corruption in the market-place retards private sector development. New players are effectively excluded, and inefficiencies are rewarded, rather than redressed.

### Fraud and private sector procurement

Fraud, particularly in the area of financial management, is, of course, a long-standing problem for the private sector no less than for the public one. An example is the accountant who warned her superiors that a book-keeper was fiddling the books by raking money from the payments system. The book-keeper was prosecuted and sacked, but the company did nothing...
to improve its management scrutiny. As a result the very same accountant started running identical scams, but for even larger amounts, writing cheques to suppliers who were, in fact, supplying herself.

In another instance, a company secretary started paying his bills with company cheques drawn on the directors’ current accounts. Being careful to use the same wine merchant, travel agent and garage as the board, the swindle went undetected for a long time. Such malpractices are hard to spot, and even harder to stop. Controls are not breached, they are simply circumvented.

However, bribery to obtain contracts is still the most frequent form of fraud in the private sector, and probably more widespread than employers realise. Simply having tenders evaluated by different people at different stages is no real safeguard unless the procedures also prevent people from:

- Carefully selecting who is to tender;
- Drawing up specifications which favour one supplier over another; and
- Sending different specifications to other suppliers.

As procurement moves onto the Internet, so does fraud. However, the Internet’s electronic systems record all the traffic meticulously and there are “data-mining” programmes which can unearth and expose suspicious patterns.

E-trade customer checks recommended in a recent report include:

- Checking the company name, incorporation and registration
- Looking at the last three years’ accounts to check solvency
- Finding out the names and addresses of directors and shareholders
- Checking other positions for conflicts of interest
- Looking for records of court judgments or bankruptcy orders
- Verifying the trading address and registered office
- Checking that the e-mail, billing and delivery addresses match
- Checking that the mailing address is not a service bureau or a post office box
- Locating the customer’s internet service provider.

Procurement frauds range from creating cartels to faking invoices, but the most frequent is the kickback in exchange for a contract. As this is effectively a “refund” on the price (but paid to the employee, not the employer) it drives up the costs of business.

Other points of vulnerability

Private sector companies feel the pressure to bribe, on the grand corruption scale, in three main areas. The first concerns certain countries, particularly in the developing world, where it can be very difficult for anyone to win a major government or parastatal contract without paying a large bribe. This is normally done through a representative who receives a percentage commission when the business is secured. The commission is a generous one, and well able to withstand the payment of the necessary bribe. A company may justify its action not

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8 Procurement Fraud in E-business by Jon Hayton (PricewaterhouseCoopers, London) reported in the Daily Telegraph, 10 July 2000.
only on the ground of ‘business necessity’, but also that it is merely conforming to local prac-
tice. If the local representative is not ‘playing straight’ with the principals, there have been
suggestions that they may inflate the amounts claimed as needed to “buy” a Minister or a head
of government, and then either keep the surplus for themselves or split it with corrupt ele-
ments within the sales staff of the company on whose behalf the bribing is being done. 9

The second point of vulnerability is that off-shore bribery is generally condoned ‘because
everybody does it’. It may even be morally defended on the grounds that the resulting busi-
ness is saving jobs, regardless of the fact that it may be costing jobs elsewhere. The third fac-
tor comes into play when companies, seek to create work by offering very attractive bribes to
decision-makers to approve unneeded purchases or projects.

The first two points discussed above have a sufficient element of truth in them to satisfy the
conscience of the company which is hungry for business and does not con-
sider itself legally bound to reject grand corruption as a tool, particularly
when used indirectly through a representative. Many company directors also
feel entitled to shelter behind their ignorance of the company’s operations,
particularly its foreign operations. While this position is not supported
legally, it is a widespread phenomenon and can lead a director to feel no
responsibility to question the level of an overseas representative’s commis-
sion, even if it seems excessive.

Bribing abroad

If a company resident in Country A bribes an official in Country A, it is committing a crime. If
the same company bribes an official in Country B, it is committing a crime in Country B. Is it
also committing a crime in Country A? If the company is American and therefore subject to the
Foreign Corrupt Practices Act (FCPA), there is no doubt about its criminality.10 But until recently,
if the company was not American and the entire transaction took place outside its own coun-
try and through a third party, it had generally not committed a crime in its own country.

This situation is now changing, and changing radically. Action at the Organization for Eco-
nomic Co-operation and Development (OECD) led to the signing of the OECD Convention on
Combating Bribery of Foreign Public Officials in International Business Transactions.11 As
described elsewhere, the Convention requires signatories to criminalise bribery of foreign pub-
lic officials. It is accompanied by a raft of “soft law” requirements which parallel the “hard
law” of the Convention, including a requirement to end the tax deductibility of bribes as being
a “legitimate business expense”.

The Convention and its “soft law” recommendations are not being left on the shelves of justi-
tice ministries’ law libraries. Rather they are being closely and vigorously monitored to see
that each country’s laws and practices are adequate and effective. Arms control treaties apart,
ever before has there been an international convention which has involved peer reviews, and
teams of signatories entering the territory of others to examine their practices and procedures.

9 Discussions with private sector interests in Tanzania, 1998 and
with those elsewhere.
10 The US Foreign Corrupt Practices Act was passed by the Carter
Administration in 1977 as a response to the political fundrais-
ing corruption revealed in the wake of the Watergate scandal
and the resignation of President Nixon. It was enacted for
domestic reasons, to protect US democratic institutions by
closing a loophole which Nixon fundraisers had exploited.
Although it is argued that the US administrations have not
enforced the Act as determinedly as they might have done
(with just over 50 cases in 25 years and only seven reaching
court), the energetic way in which some US private sector
interests campaigned for its repeal suggests that it has had a
greater effect than some are prepared to concede. Certainly, the
refusal to do so by successive US administrations and the deter-
mined drive they led for an international convention to inter-
nationalise the process, redounds to their credit.
11 The text of the Convention appears in the Best Practice section
of the web site version of this Source Book:
Much is at stake, and the forceful, authoritative forms of peer review provide reason to hope that the Convention will succeed. Certainly, anything less would have failed.

In the meantime, the private sector has to continue to go about its business in an environment in which the rules are in a state of flux.

Directors should understand and accept their responsibility for keeping their companies within the laws of all countries where they operate, and play an active and probing role in ensuring, wherever possible, that the spirit and the letter of the law are observed. It appears that grand corruption in international transactions, which distorts competition and has a restrictive impact on trade, will also offend the rules of the World Trade Organization.

While there is no difference, in principle, between grand and petty corruption, companies may be excused for believing that the difference is more than merely a matter of scale. Grand corruption is intended to influence decision-makers in favour of one company against another, or to favour one project or purchase over the alternatives. By contrast, "grease" or "facilitation" payments to minor officials (to do the work which they are already being paid to do, and to provide services to which the company is legally entitled) are highly undesirable; but it is recognised that, in the real world, companies cannot always be expected to adhere to the strictest principles on very small matters. For example, the American FCPA does not apply to "grease payments", although it certainly does not condone them. Huge shipments of vitally-needed equipment may be stranded at the dockside, with customs officials demanding small payments before they will release them.

This is a complex and contradictory area, and the dilemma will subsist until there are reliable enforcement procedures in the countries concerned. In the meantime, where companies accept, however reluctantly, that on occasions they may be victims of extortion and have little option but to pay, clear rules are needed to guide their staff. All such payments should be recorded, and any payment which is more than a very small one should require authorisation at a senior level to ensure that "grease payments" do not become a gateway for grand corruption. Above all, the companies should make it clear to all staff that these practices are not condoned.

As long as the position of bribes paid in international transactions remains unclear in criminal and civil law, companies’ voluntary codes of conduct will be important to set the tone for all employees and to indicate to third parties the standards to be expected from the company. Company codes vary greatly in strength. The least useful are those which are limited to well-intentioned, but vague expressions of principle. The most effective are those which are specific in their descriptions of what employees are not allowed to do on behalf of the company. The best are those which are not only specific, but also require an annual or six-monthly signature from the chief executive to confirm that they have been observed in every respect.12

However, it must be recognised that the best voluntary code is only as effective as the company’s board of directors is determined to make it. Directors should take responsibility for monitoring the application and observance of company codes, recognising that they can be an effective means of discharging their liability for maintaining the company’s legal and moral

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12 Examples of Company Codes of Conduct can be found in the Best Practice section of the web site version of this Source Book: www.transparency.org.
standards. Large companies should ensure that there are ethics programmes to breathe life and meaning into what are otherwise decorative documents: and these should not be lectures on what to do and what not to do, but involve real life situations and dilemmas, and active discussion among employees as to how these should be resolved. We return to the question of codes below.

It is understandable that, in the present situation of widespread grand corruption and legal uncertainties, many companies seeking international contracts are reluctant to risk losing business to those who continue to pay bribes. All companies, however, can welcome the Anti-Bribery Pacts (or Integrity Pacts) increasingly imposed by certain countries on tenderers for major public contracts. In such Pacts, all the players start on a level playing-field so that the risk of a bribe is greatly reduced.\textsuperscript{13}

There also appears to be considerable scope for international professional associations and federations to include a mandatory anti-corruption clause in their ethics codes, with expulsion from its membership as the sanction for non-observance. When such an association is strong in terms of world-wide membership, its members have relatively little to fear from non-members gaining an unfair advantage from bribery. For example, financial institutions could be expected to support members of an appropriate professional body against non-members.

Finally, private sector companies should recognise that grand corruption is the enemy of high standards and efficiency. When the decision-maker is influenced by a bribe, opportunities are created for sub-standard performers to gain a contract at the expense of those whose product, reputation or skills would make them the likely winners of a fair competition.

**Companies as victims**

One of the most compelling reasons for companies to review their ethical behaviour is likely to be that of self-interest. There is a growing body of evidence which appears to indicate that companies which tolerate corruption abroad by their employees are placing themselves at risk. “Off the books” accounts, secret bank accounts, payment of staff serving prison terms and use of former senior staff as “middlemen” all cultivate an atmosphere in which the bottom-line justifies criminal activity. This is inherently dangerous, and it may be only a matter of time before the company itself finds that it is the victim of similar conduct on the part of its employees.\textsuperscript{14}

In some countries the legal system does not yet permit the prosecution of corporate bodies for criminal actions, based on the premise that only living human beings are capable of forming the necessary intention to commit a crime. The effect of such a prohibition can be to greatly reduce the penalties that can be imposed, and to significantly increase the problems of gaining the necessary proof of guilt: it may be obvious that a company has broken the law, but to successfully prosecute, a prosecutor will have to name specific individuals and prove that they were personally responsible. Even if these can be identified, they may have left the company’s employ, or even the country. In any event, any financial penalties would have to be related to the individual’s ability to pay – not to the company’s, or to the profit that may have flowed to the company as a consequence of the illegal actions. Where a prosecution is successful, a company may be left paying legal costs for an employee, and continuing their salaries while

\textsuperscript{13} See the Best Practice section on the web site version for an example of an Anti-Bribery Pact and the discussion on public procurement elsewhere in this Source Book.

\textsuperscript{14} A number of German firms were involved in scandals in 1995, including kickbacks on construction contracts to build new factories; and at least one overseas sales manager was manipulating exports to his personal benefit.
they serve prison terms, but in reality these penalties may be insignificant when set against the profits being made.

If the company finds itself in court in countries that do prosecute corporate bodies, how best can it defend itself when some of its employees have been violating the law? If the company has kept information about illicit payments to a small number of officials and away from the Board of Directors, whether the Board is aware of it or not, no judicial officer is likely to be impressed by the company management’s claims of innocence. Legal systems increasingly demand that companies have internal compliance procedures in place. In doing so, they are following the lead set by more enlightened corporations.

The USA is assisting in this process. It has developed an excellent model for other countries to consider following - the Federal Sentencing Guidelines of 1991. The Commission which developed these Guidelines was originally established to examine the sentencing of individuals, but its greatest contribution to criminal jurisprudence came when it examined the position of corporations.

Responding to research that showed that the median fine for a corporation averaged only about 20 per cent of the losses that the offences had caused, the Commission decided that sentences should be governed by the kind of company that was involved; in other words, the ‘good corporate citizenship’ of the company should be assessed. This decision is not intended to penalise companies for bad corporate behaviour, but rather to reward the good. If a company is convicted of an offence, a fine would normally be about three times the size of the loss caused. However, where a company can prove that it has an effective ethics program in place, the fine can be reduced by as much as 95 per cent.


The (US) Federal Sentencing Guidelines state that:

The hallmark of an effective program to prevent and detect violations of law is that the organisation exercised due diligence in seeking to prevent and detect criminal conduct by its employees and other agents. The concept of due diligence comprises seven steps:

1. There must be compliance standards and procedures to be followed by employees, etc. that are reasonably capable of reducing the prospect of criminal conduct;
2. There must be a specific individual or individuals assigned with overall responsibility to ensure compliance with (1);
3. The corporation must have taken due care in not delegating substantial discretionary authority to individuals known (or who should have been known) to have a propensity to engage in illicit activities;
4. The corporation must have communications and training programs in place;
5. It must also have taken reasonable steps to achieve compliance with its standards (perhaps including advice lines and protection for whistle-blowers);
6. The standards must have been enforced consistently through appropriate disciplinary mechanisms, including instances where individuals are responsible for a failure to detect an offence; and

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15 The Guidelines approach also shows a way in which to limit one particular area of judicial corruption (corruptly-induced inadequate sentencing). The Guidelines enable the sentencing record of a judge to be monitored where there is doubt as to his or her integrity.

(7) After an offence has been detected, the corporation must have taken all reasonable steps to modify its systems to obviate repetition.

There is considerable interest in these Guidelines and the ways in which they are fostering ethical behaviour and self-policing in the corporate sector in the United States. There is every likelihood that they will also find favour elsewhere, especially since the criminal responsibility of companies is a difficult question in most systems of jurisprudence and the trend is increasingly towards self-regulation.

It has also been suggested that businesses should undertake an audit of how ethical problems are currently being dealt with, to test its behaviour both against external standards and against its own declared values. The European Institute of Business Ethics has developed a “Dilemma Training Device” which helps organisations to address ethical issues, to discuss them and to find ways of using them to attain the objectives of the organisation.

Can ethical companies compete in corrupt market-places?

Can ethical companies compete in corrupt market-places? Is it ethical for them to even try? Are they not courting economic ruin and risking the jobs and livelihoods of their employees? It has been suggested that, in general terms, a business can be ethically justified in working in a culture which has certain unethical features when:
- the features are unavoidable, at least for the time being;
- one is operating for good business and social reasons; and
- one is working to change those unethical features.

This argument points to instances where official complaints by groups of companies have changed the practice of bribery in some countries and proved to be more effective than efforts by individual firms.

The experience of responsible US corporations also suggests that, even in unethical market-places, the fact that a government is dealing with a company known to be ethical can, in itself, be a selling-point. “Deal with us, the corporation is saying, and your own people will know of your integrity.” US sales staff also claim that being able to quote the existence of the USA’s Foreign Corrupt Practices Act, and their company’s policy of compliance, can be enough to sweep any talk of kickbacks and sweeteners from the agenda.

However, it would be simplistic to suggest that, in business, profits go only to those who are ethical. The evidence is plain: large volumes of business are being won by companies through unethical behaviour which, in some sectors, has transformed competition from being one of competitive advantage to one of competitive bribery. It would, therefore, be unrealistic to ignore the impact of the FCPA on responsible American corporations, or their wish to see the same restraint applied to their competitors. It is also the case that large corporations can be in a much better position to be able to walk away from a deal once corruption becomes manifest, than a small company which has invested heavily in the project and has, comparatively, much more to lose.

17 Ibid., p.51.
18 For more information see the web site of European Institute of Business Ethics, Nijenrode University, The Netherlands Business School at www.nyenrode.nl/research_faculty/eibe/products.html
19 Ethical Attitudes to Bribery and Extortion, Lecture given by Jack Mahoney at the University of Hong Kong, 1994.
“Best practice”

Best practice dictates that private sector companies should:

• obey the law in all countries in which they operate;
• ensure that directors are fully aware of their legal liabilities;
• press for clarification or strengthening of the law, if current law places the company at a disadvantage relative to its competitors;
• introduce specific anti-bribery clauses into corporate codes of conduct and ensure that all employees know that these must be observed;
• encourage directors to actively monitor the application and effectiveness of corporate codes of conduct;
• encourage any international professional body to which the directors belong to include a mandatory anti-bribery clause in its code of conduct;
• support a national Anti-Bribery Pact in relation to any major offshore tender where this is offered by a government; and
• press relevant governments, directly or through the company’s relevant commercial or professional body, to support the OECD anti-corruption initiative and to encourage the World Trade Organization to recognise grand corruption as a barrier to fair trade.

Gifts – To whom and for what?

Personal contacts in business, as in other walks of life, frequently find expression in exchanges of gifts and hospitality. However, in business, when potential buyers and potential sellers come together, this can become a question of something rather more meaningful. The question can quickly arise as to whether a gift is appropriate, and perhaps, whether it should be described more bluntly as a bribe. For example, when a sales person works for a performance bonus, or needs to land an order to preserve his or her job, the temptations to use all means available (including presenting “gifts” to clients) can be considerable. It is therefore desirable for companies to have internal policies and rules governing the giving and receiving of gifts.

A draft “Gifts Policy” was developed by a firm of Danish consultants after new management was introduced, who decided that it was in the firm’s best interest to contain practices which they felt were out of hand. In general, “visible gifts”, legal in the country where the work was being carried out, were considered normal business practice and supported by the company, but “invisible gifts” were considered bribes and not supported. The only exception to the latter was “unofficial fees to carry out necessary day-to-day duties in connection with contracted work (obtain permits, visas, telephone subscription, etc.)”. In such a case, however, a note was required to be attached to the expense claim, detailing the efforts made to avoid it.20

Private sector initiatives

The International Chamber of Commerce’s Rules of Conduct to Combat Extortion were first adopted as long ago as 1977. They were revised and brought up to date in 1996 and again, in 1999. The ICC Rules go further than the minimum legal requirements of many countries. If followed, the Rules would induce a sea change in international business behaviour. However, the Rules are still intended “as a method of self-regulation”, and in the hope that “their voluntary

20 The draft code appears in the Best Practice section of the web site version of this Source Book: www.transparency.org.
CONFRONTING CORRUPTION: THE ELEMENTS OF A NATIONAL INTEGRITY SYSTEM

Some issues to consider
The World Economic Forum launched its Initiative on Anti-Corruption Standards for Global Business at a meeting in Davos, in January, 1995. The following were among the issues considered:23

- To what degree is it in the interest of businesses to pursue ethical practices?
- To what degree can countries permit-
ments in which multinational corpora-
tions now operate? Does it make sense to respond to an initiative from the global business community? Can business itself encourage governance? And to what degree must the impe-
tus come from government?
- To what degree is corruption an inhibi-
tion on a country’s development? Some Russian experts are concerned that corruption and crime have risen to the point of seriously discouraging for-
gain investment. Do countries where official corruption is rife have greater difficulty in attracting foreign capital, or are the costs of corruption counter-
balanced by other advantages, for example a low wage structure?
- To what degree can countries permit-
ing wide-scale corruption be expected to respond to an initiative from the global business community? Can busi-
ness affect its political environment by better governing itself?
- Would the articulation of global ethical standard (SA8000) is TI’s partner in this initiative. Progress standards help clarify the complex and changing legal and political environ-
ments in which multinational corpora-
tions now operate? Does it make sense for global business to attempt to lead the effort towards ethical standardisation?

acceptance by business enterprises will not only promote high standards of integrity in business transactions, but will also form a valuable defensive protection to those enterprises which are subjected to attempts at extortion.”21

Firms have been happy to sign up, but none have actually felt obliged to obey the Rules because the voluntary nature of the ICC reduces its ability to police its members and to establish effective monitoring mechanisms. However, the ICC has been responding to criticisms by revisiting its Rules and looking for ways in which they can be made effective. Understandably, the ICC (as an organisation with a voluntary membership and dependent on subscriptions) remains cautious about the external monitoring of corporations’ conduct.

At present Transparency International is undertaking a feasibility study on the development of a private sector “internal integrity management stan-

21 The Rules appear in the “Best Practice” documentation.  
22 Social Accountability International (SAI), a New York based NGO which (as CEP-AA) developed the Social Accountability standard (SA8000) is TI’s partner in this initiative. Progress reports will be posted on the TI website from time to time, as the exercise proceeds.  
23 The World Economic Forum, 53 Chemin des Hauts-Crêts, CH-1223 Colony/Geneva, Switzerland. The points are summarised from a paper prepared for the Forum, Initiative on anti-corrup-
24 This section is based on research undertaken by Thomas F. McInerney of CEP-AA, entitled Effectiveness of Codes of Con-
duct, 21 February 2000, prepared for the Business Integrity Standard Feasibility Committee facilitated by CEP-AA (now SAI) and Transparency International.
One report, *Ethical Concerns and Reputation Risk Management*[^25], focuses on the means chosen to implement business ethical norms, including the types of training they provide, which individuals play the greatest organisational role in promoting business ethics, and whether stakeholders are involved, rather than assessing the effectiveness of such efforts.

The report found that Values and Mission Statements and Codes of Conduct remain the most widely used business ethics practices, with about 80 per cent of companies implementing such programmes. These results represent substantial increases over surveys conducted three years ago when less than 60 per cent reported having codes.

Perhaps the most interesting finding of the report relates to the lack of management systems used to implement codes:

- In 20% of the companies surveyed, the codes were not made available to all employees;
- In 65% of the companies, codes were developed by legal/compliance and corporate secretariats; and
- Human resource personnel were involved in developing codes in only 43% of companies surveyed.

In other words, firms’ senior management have tended to supervise the development of codes, and the codes have had a legal, rather than a behavioral focus.

Some 40 per cent of companies provided training only to selected employees. Of these, less than half related the training to practical application of their codes in realistic situations; and fewer still involved a sharing of participants’ experiences. Not surprisingly, the survey concluded that the average employee in most companies was not nearly as aware of the existence of the code as were senior personnel.

The study also found that fewer than half of the companies surveyed had helplines for raising concerns or hotlines for reporting suspected misconduct – and 60 per cent of those with these facilities, reported no use being made of them. This is hardly surprising when significant numbers of companies provided no protection for callers or for alleged offenders alike.

The report concluded that many business ethics programmes fail to reflect important principles, and that many organisations still grapple with how to make their employees actually “live” their values and codes.

A different report, prepared by KPMG, on fraud among companies in Southern Africa, provides a different perspective on the most effective means of combating fraud.[^26] Of the 540 companies which responded to the survey, 83% indicated that they had experienced an incident of fraud in the prior year. To reduce the possibility of fraud, the majority of companies surveyed indicated that they would review and improve controls (83%) and either establish a corporate code of conduct (46%) or implement a comprehensive ethics program (32%). The relatively low level of interest in implementing corporate codes or ethics programmes suggests that at the very least, such measures are perceived as not being particularly effective when compared to bolstering internal controls.

[^25]: Based on a 1999 study undertaken by Arthur Andersen’s Ethics and Responsible Business Practices Consulting group and the London Business School, which convened an advisory board with members drawn from business, the academic world, and consultancy companies. It oversaw a survey of various approaches to business ethics among 78 UK companies drawn from the FTSE 350, as well as a number of non-listed companies.

[^26]: In the report fraud is defined “loosely” to include “all offences of which a dishonest representation or appropriation is an element.”
In a paper prepared for the 9th International Anti-Corruption Conference in Durban, South Africa, Ronald Berenbeim argued that while codes have become widely instituted in corporations, they have not had the impact which they should have had. Surveys undertaken by his organisation revealed that in nearly 80 per cent of corporations, the board of directors is involved in the drafting of the codes – so they do not “belong” to staff as a whole. He notes that many corporate codes contain virtually identical provisions prohibiting corrupt practices, and argues that internal corporate procedures, which require disclosure and accountability (including whistleblower protections and other means of reporting of violations), are essential to an effective code.

Another somewhat different study prepared for the Business & Society Journal in 1999 concludes that their analysis did not demonstrate that good social performance “leads to” poor financial performance. The study shows that determining precisely what constitutes an “effective” corporate code of conduct is a difficult question to answer. Does “effective” mean “people behaving ethically”, or does it simply mean that no major scandal has erupted? Or does it only mean that a company is staying within the confines of the law?

The OECD, now highly active in the field of corporate governance, conducted a survey of 233 corporate codes of conduct in 1998. The survey was limited to documenting the provision of the codes rather than analysing the accomplishments or effectiveness of the codes. The results of the survey indicated that the majority (82%) of codes covered the conduct of the corporation itself, while comparatively few were codes extended to include the conduct of contractors and sub-contractors (50% and 22% respectively). In terms of the norms articulated in the corporate codes, only 18% referred to international standards explicitly. Only one of the 233 referred to the OECD Guidelines for Multinational Enterprises, and just two cited the OECD Recommendation on Combating Bribery in International Business Transactions (the precursor to the Convention on Combating Bribery of Public Officials in International Business Transactions). Other codes merely referred to “international human rights” or “universal” norms.

In the companies surveyed, the monitoring of codes received relatively little attention. The majority provided for internal corporate monitoring, and some 40 per cent did not mention monitoring at all. Only a quarter provided for corrective action, and very few stated that non-compliance could or would result in termination of a contract or business relationship.

Also in 1998, the London-based Institute of Business Ethics carried out its second survey of the use of codes of business ethics. From the responses, the Institute estimated that 57% of the largest UK companies had codes of conduct, compared with only 18% in 1987. There was wide divergence in approach between communicating codes internally and externally. Nearly all companies (93%) gave their codes some internal communications support. Only one third publicised their codes externally. Fewer than half of the companies with a code provided training of any kind as to the meaning and use of codes, and some 30% did not even furnish copies of the code to their staff. The results confirmed the impression that for many companies, the drafting and introduction of a code are seen as being an end in itself. In addition, the report found that in many firms, management perceived staff as sufficiently steeped in the ethos of the company that little or no instruction on the practical use of the code was needed.

So do corporate codes of conduct work?

Generally speaking, research on corporate codes of conduct is incomplete. The research sug-
gests that codes have, indeed, had some positive influence, but such a broad conclusion still lacks a firm empirical base. The research indicates that the degree to which the code of conduct becomes “embedded”, or a part of the corporate culture, will have some positive effects on employee behaviour. However, determining precisely what “embeddedness” means in terms of organisational structures and managerial leadership, remains elusive. The key determinant in achieving organisational adherence to a code appears to be training, monitoring and enforcement activities - another conclusion still more intuitive than scientific.

Some indicators concerning the effectiveness of the private sector as an integrity pillar

- Are national private sector associations active? Do they take an active interest in developing an honest market-place? Does the national section of the International Chamber of Commerce actively promote the ICC’s code of good business practices?
- Does the private sector take part in a continuing dialogue on competition policy which recognises the benefits for all which a sound policy can bring?
- Do leading companies have codes of conduct? Do these cover corruption and gift-giving? Are the codes well publicised?
- Does the private sector acknowledge that cartels and bidding rings are both illegal and damaging to the development of the private sector?
- Do companies in general obey the law?
- Do major companies have policies on gift-giving? Are these appropriate?
- Do businesses in general avoid bribing to obtain government contracts? If this is a common practice, is it one which is disliked and discouraged? Or is it tolerated and accepted?
- Do leading local companies play an active role in developing ethical business standards?
- Are political office-holders active participants in private sector activities? If so, are conflict of interest situations avoided? Is their involvement transparent?
Chapter 17

International Actors and Mechanisms

*It is better to know some of the questions than all of the answers.*

James Thurber

Many may see corruption mainly as a domestic problem – a policeman trading in parking tickets, a revenue officer trading in reduced tax assessments, local government officials trading in licences for market stalls. Not so apparent, however, is the much deeper international corruption, which usually does not take place as openly and as unashamedly as does petty corruption. But how can “international actors” have so much relevance to a country’s domestic national integrity system as to be a significant part of it?

Part of the answer lies in the fact that a country must on occasions look to other countries, and institutions, for appropriate cooperation or intervention when enforcing its anti-corruption laws. Particularly is this so when it wants to extradite public officials or private sector bribers who have fled abroad, or, to recover the proceeds of corruption hidden off-shore.

Even once a wanted criminal is located abroad, the country that seeks the criminal must consider its options. Even where there is an extradition arrangement in force, the country where the criminal is wanted will generally have to establish to the satisfaction of the foreign administration or courts that the necessary preconditions for the return of the fugitive have been met. These conditions will be prescribed in the formal arrangements between the two countries.

But how are the charges going to be proved? In some cases, all the evidence will be located in the country where the person is wanted. With an increasing number of multi-national offences, how are the police in one country expected to conduct investigations with an international element?

In the past, the answer has been quite simple: frequently they have just given up. National police forces have no legal authority to go into another country and conduct searches or peruse official records. Nor do they have any right to arrest a suspect should they find one. In fact, quite the opposite is true. Countries are generally opposed to foreign police operations taking place on their own territory.

**Mutual international assistance arrangements**

The fight against large-scale, international corruption in particular must involve more than the…

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1 The injunction here is addressed to the donor community as much as anyone else.


**EU agrees to return the spoils of Africa’s corrupt regimes**

The European Union has agreed to return money stolen by corrupt African regimes and hidden away in European bank accounts. Billions of pounds of ill-gotten funds are believed to have been stolen by African regimes. Some of their successors are now trying to recover huge sums from banks for desperately needed development projects. At the request of the Nigerian government, Britain and Switzerland have already frozen hundreds of millions of pounds believed to have been taken by the family of the late dictator Sani Abacha. Swiss judges yesterday laid the first money-laundering charges in connection with some £400 million in 140 different numbered accounts traced to Gen. Abacha. The Geneva state prosecutor, Bernard Bertossa, said one person has been charged regarding “false information given for the opening of a bank account” and further charges were likely. The EU agreed a 130-point action plan at the first Africa-Europe summit in Cairo committing it to the principle that stolen money should be returned to the country of origin and to “take measures to combat corruption.”

*cont. on next page*
successful detection and prosecution of offenders in one’s own country. Why? Because, frequently, the corrupt official has partners in crime in industrialised countries who, as a general rule, consider themselves to be beyond the reach of local authorities. The proceeds of corruption are stashed in bank accounts in industrialised countries, and the techniques of money-laundering (perfected mainly by the accountants, lawyers and bankers who service drug traffickers) are brought in to play. Therefore, deterrence, no less than justice, dictates that a country should try to put itself in a position where it can successfully bring criminal or other proceedings against such persons through international assistance arrangements.

In the arena of international legal assistance, it is also important for law enforcement officials to stay abreast of recent international developments, and abandon the conviction that if moneys have fled the country, there is no one outside the country who can or will help recover them. Increasingly, forms of assistance are now being offered by some banking centres. For example, the Swiss Government will now provide assistance where there is a court finding that moneys have been stolen.

The limits on obtaining international legal assistance

It is not normally possible for a state to provide assistance to another state which would not otherwise be available to its own investigation and prosecution authorities. Thus, special procedures or rights of investigation (such as a compulsory interrogation) may not be available in a foreign country, even if they are at home.

Before most states can extend co-operation, a court or an administration in the country being asked to provide assistance needs to be satisfied “that the standards of justice and penal administration in the requesting state are such that it would be in the interests of justice to surrender a fugitive.” Certain matters of process must also be addressed, including: whether the courts of the country in question have a legitimate claim to jurisdiction over the events which have taken place; whether the investigation or prosecution of the crime is politically motivated; whether the ordinary court process is being used (i.e., not ad hoc military or other special tribunals); whether the offence being prosecuted was actually an offence at the time; and whether the Rule of Law is being observed. A number of countries also require assurances that the death penalty will not be imposed, or that corporal punishment will not be inflicted.

In addition, if a particular case is to warrant the provision of mutual legal assistance, the alleged misconduct must usually be recognised as constituting an offence in both of the countries concerned (the “dual criminality” test), and also be liable to attract punishment of a prescribed level, usually at least one or two years’ imprisonment.

Organisational requirements

Expertise must be developed within the field of international mutual legal assistance. Clearly, there may be a role for a country’s diplomatic service in the making and processing of such requests. Usually, police budgets and the institutional arrangements governing the conduct of foreign relations will not permit investigators to make requests for assistance from a foreign

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3 Banking centres are under increasing pressure from the international community generally, in large part because of concerns about drug trafficking and money-laundering.

country without any form of check. Generally, a “Central Authority” will be needed in each country, a desk in an appropriate department which handles all requests, both inwards and outwards, in order to ensure that the details being provided in support of requests are as required by the relevant laws, both local and foreign. Although such an “Authority” may already exist to service requests made under other treaties, its staff will, in most cases, require a significant level of training if the mutual legal assistance arrangements are to work as quickly and as effectively as they should.

**Mutual assistance and combating money-laundering**

The particular connection between money laundering schemes, under-regulated financial systems, and corruption has moved to the centre of the international community’s attention. This is because the relevance of international actors to a country’s national integrity system is also felt in circumstances when a foreign country has policies and practices which impact negatively on other countries – policies such as allowing tax deductibility for bribes paid abroad, or refusing to regard the corrupting of foreign public officials by their own nationals as constituting a criminal act.

Likewise, a foreign country can, by establishing itself as a “financial centre”, position itself to facilitate the laundering of moneys stolen by public officials in other countries. Such centres have secrecy laws which make it difficult, if not impossible, to trace, the funds, and thereby create a safe haven for corrupt individuals in other countries. The spectre of numbered Swiss banks accounts has loomed large for several decades. More recently, with a proliferation of so-called “off-shore banking centres”, the number of parking places for illicit money has multiplied, but to its credit the Swiss government has made some efforts (not always with the wholehearted support of its banking sector) to remedy some of the more flagrant abuses of the Swiss system, and to demystify its elements. Increasingly, Switzerland is being seen by the corrupt as being a less than completely secure corner in which to hide their illicit wealth.

All countries have bank secrecy laws, so that the legitimate privacy interests of individuals are protected. In many societies people like to keep the amount of their savings and their financial positions personal to themselves. These laws are not designed to enable the bank’s customers to avoid, let alone evade, tax collectors, and the accounts are generally subject to inspection by local revenue authorities.

However, these laws can be ruthlessly exploited by professional advisers to drug traffickers and corrupt high-ranking officials. They capitalise on a long-standing international consensus that it is not for one country to help another to collect its taxation revenue. Tax-haven regimes have exploited this weakness in international cooperation, and even try to block knowledge of the beneficial ownership of accounts. At its extreme, the claim is made that, because e.g. a share register may be “secret” in a tax haven and disclosures of it subject to criminal sanctions, such a register cannot be demanded by the authorities of a second country (where a copy of register details may be) on the grounds that for the individual summoned to do so, would give rise to self-incrimination.⁵

Money laundering methods are not only being used in a phase post delictum (after the crime), but also during, and even before, the bribe-money is actually paid. In order to camouflage the

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⁵ See the proceedings of the Commission of Inquiry into the Cook Islands taxation arrangements (the “winebox” inquiry) conducted by former New Zealand Chief Justice, Sir Ronald Davidson. In that case, witnesses tried to shelter behind off-shore legislation (but were ruled out of order by the Judge). An offshore company claimed the right to appear at the hearing and cross-examine witnesses, but refused to disclose who stood behind the company.
origin and destination of bribe money, the financial flows are directed through countries that do not possess a comprehensive and effective system to detect money laundering and similar illegal transactions. Financial sectors in these countries, are generally inadequately regulated and supervised, their legislation does not guarantee access by judicial authorities to information, and their company law allows the founding of shell companies and trusts, to conceal the true identity of the beneficiaries of transactions and the actual owners of funds. Bearer shares (whereby ownership of company shares passes by delivery of share script, like money) and bearer savings books (and where possession of the account passbook and a numbered access code carry with them ownership of the account), are frequently used.

Since the establishment of the Financial Action Task Force Initiative of the G7 in 1989, a series of international measures has been undertaken to make the “laundering” of funds which have their origins in drug trafficking “or other criminal activities” a criminal offence. As a result, at least forty countries, including nearly all members of the OECD, have implemented legislation and other administrative arrangements to trace the flow of such funds through their banking systems.

These arrangements require commercial banks to report the receipt of deposits, which may have criminal origins, to the Central Bank or to a national criminal intelligence office. In the case of the EU, these arrangements have been embodied in a directive which is binding on all member states. However, there remain countries who have not yet made money-laundering a predicate offence, and so are unable (or unwilling) to provide mutual legal assistance where money-laundering charges are being brought in another country.

Principles have been developed to counter these activities in the context of preventing money-laundering. These principles, however, pursue the much broader agenda of establishing a paper trail for all (including all legitimate) business, and creating “structures of global control” in the financial sector. The principles include:

• “Know Your Customer” – Financial institutions should not do business with unknown customers;
• An obligation to apply increased diligence in unusual circumstances;
• An obligation to keep identification files, and records on the economic background of transactions;
• An obligation to notify suspicious transactions to the competent authorities.

However, money laundering continues, seemingly unabated, not least because there is competition amongst the private banks to attract business, although there is increasing unease in the banking community about the handling of accounts for senior public officials and members of their families. There is a need for additional measures. Possible actions include:

• The revision of “red flag catalogues” to include transactions emanating from regions where corruption is endemic, where personalities involved include clients or beneficiaries holding high public office, and where clients are involved in high-corruption

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6 Expert Group Meeting on Corruption and its Financial Channels, held in Paris in April 1999 at the OECD.
9 FATF 1996 R 11, 14, 12 and 14, 15.
areas of business, such as the arms trade.

- Sensitising financial operators: to encourage financial institutions to apply due diligence. "Integrity tests" can be run, whereby test transactions are conducted to ensure that financial operators are kept attentive, and to identify training needs.
- Identifying non-complying financial institutions and operators: a proactive approach could identify institutions who – be it for reasons of lack of will or for lack of capacity – are failing to comply with the international rules, and sanction them administratively.\(^\text{10}\)

It is not clear whether these legislative and administrative measures to combat money laundering will actually sweep up the proceeds of bribery. Countries who are not party to the present arrangements, and who may be a link (perhaps unknowingly) in the money-laundering chain, must introduce comparable legislation and cough it in such a way that it specifically encompasses the proceeds of bribery. The fact that drug trafficking is now affecting countries in the south which previously had no connection with the trade, confirms that almost any state can find itself used for the purpose of the temporary transfer of both goods and funds.

There is a likelihood that an international convention against transnational bribery will be introduced in the course of the next few years. Work on such a convention has begun at the UN office in Vienna. It would, of course, have much more rapid impact once it is concluded were as many countries as possible already to have enacted facilitating legislation.

**International police cooperation and INTERPOL**

INTERPOL (the International Police Organization), now based in Lyons, France, is popularly regarded as having international powers of law enforcement. This is not so. INTERPOL is first and foremost a communications network which enables national police forces to contact each other quickly, exchange information, and notify each other of wanted persons.

INTERPOL relies on its member countries' police forces to set up National Central Bureaux (NCB) to act as points of reference for international enquiries and provide swift and effective assistance to other police forces. INTERPOL does not provide the assistance itself, though it does provide a liaison service and is currently developing databases which the various NCBx can feed or draw on. The system is not wholly centralised, as the NCBx are free to communicate and liaise directly among themselves.

From time to time, there are complaints from INTERPOL that some of its member countries are inefficient and ineffectual in providing assistance. Clearly, such a state of affairs is intolerable. The first step for any country combating corruption should be to check the efficiency and effectiveness of its NCB. If this link in the chain is weak, then new links forged with other anti-corruption forces will also be weakened.

"Red Notices" and extradition

One of the most conspicuous anti-corruption tools in the INTERPOL process is the “Red Notice”. It is used by police forces to notify INTERPOL headquarters that a suspect is wanted and that, upon apprehension, an application will be made to extradite the suspect to face

\(^{10}\) Mark Pieth, Common Standards to Prevent and Control the Laundering of Corruption Proceeds, UNCICP Experts Meeting, Vienna, 13–14 May 2000.
charges. Once the suspect is apprehended, the normal rules of extradition between the countries in question come into play. If there is no arrangement for extradition - and if an ad hoc arrangement cannot be made - the suspect will be released. It is therefore essential that, in the initial stages of the anti-corruption effort, a country review the adequacy of its extradition arrangements, bearing in mind the effectiveness of denying “safe havens” to wanted criminals.

**International conventions and other arrangements**

Today, it is widely accepted that the internationalisation of crime (including drug trafficking, financial fraud and terrorism) dictates that nation states modify their traditional reluctance to enforce the criminal laws of other countries, and extend mutual legal assistance to each other in appropriate cases. Such co-operation should be provided for by either treaty or by parallel legislation which reflects best international practice, including a compliance with international human rights norms.

Many countries are moving towards the development of formalised international assistance agreements which can further tighten the noose on international corruption. For example, the Council of Europe introduced a framework for mutual legal assistance which was recast into a global setting by the Commonwealth in 1986.

Under the Commonwealth arrangements, procedures are provided which still respect the right of the accused, but greatly ease the task of prosecution authorities in cases where a witness or crucial evidence are in another Commonwealth country. The Commonwealth countries have agreed to assist each other in identifying persons, searching for and seizing evidence, and arranging for witnesses to give evidence either in their own countries or in the country where a trial takes place. In terms of combating corruption, provisions concerning the international freezing, seizing, and forfeiture of the proceeds of crime are incorporated into the arrangements. Commonwealth extradition arrangements were also streamlined under this new system of multi-national assistance. This work was adapted by the United Nations to provide the centrepiece for the 1989 United Nations Convention Against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances.

Since then, under the auspices of the Organisation of American States, the Inter-American Convention Against Corruption was adopted in 1996 and signed by 21 countries to battle against domestic and transnational acts of corruption. This treaty instrument not only facilitates the return of stolen moneys but also declares that corruption offences shall not be regarded as being “political” in character. Therefore those charged with them are subject to extradition to their home countries, without being able to shelter behind the familiar shield of “political persecution”.

Corruption has been identified as an impediment for the enlargement of the European Union, and so has been an added factor in pan-European efforts to tackle corruption. These have resulted in a series of conventions within the Council of Europe, namely the:

- Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, 1990;

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11 “Informal” assistance, such as using immigration laws to deport wanted fugitives is generally unacceptable since it bypasses essential procedural safeguards and is frequently unconstitutional.

12 As an example, the German courts were only prepared to order the extradition and surrender of the fugitive British banker, Nick Leeson, in October 1995 to Singapore, when they were satisfied that he would receive a fair trial, that the Rule of Law prevailed there and that he would not be exposed to what Europeans would regard as cruel and unusual punishment (i.e., flogging), and therefore be in breach of the state’s obligations at international law (i.e. the European Convention on Human Rights).

13 It is fully consistent with international best practice for a requesting country to be asked to meet the costs of a particular request where these have significant resource implications. To do otherwise would deter countries from joining in such arrangements.
• Criminal Law Convention on Corruption 1999;
• Agreement establishing the “Group of States Against Corruption – GRECO” 1998; and
• Civil Law Convention on Corruption 1999

Under the Criminal Law Convention on Corruption, each party agrees to enact a range of measures at the national level to counter corruption in public life, in public administration and in the private sector. Corporations are to be rendered subject to the criminal law and measures introduced to facilitate the gathering of evidence and the confiscation of proceeds. Although these are essentially matters of national law, they will greatly facilitate the enforcement of criminal law internationally. The Criminal Law Convention’s implementation is to be monitored by members of the Group of States Against Corruption (GRECO), who will monitor not only this Convention but also other measures developed by the Council of Europe as part of its action plan against corruption.

The Civil Law Convention on Corruption is a unique attempt to deal with questions relating to the civil law, providing remedies for victims through the civil process. It deals with such questions as compensation for damage and loss sustained by victims; liability (including state liability) for acts of corruption committed by public officials; validity of contracts; protection of employees who report corruption; and the clarity and accuracy of accounts and audits.\(^\text{14}\)

In the US, a conference initiated by Vice-President Al Gore, held in Washington in February, 1999, has established a framework for governments to regularly monitor the implementation of their international obligations. The conference is planned as a biennial event, and is next to be held in The Netherlands in 2001.

**The OECD Convention Against the Bribing of Foreign Public Officials in International Business Transactions**

The industrialised countries have special roles to play in assisting in maintenance of the national integrity in a large number of developing countries and countries in transition. This is particularly so in the context of transnational bribery and in the related field of export credit guarantees. What should their attitude be when their own nationals have been bribing to obtain export orders?

During the 1980s, as business became increasingly global, it became more and more unrealistic to regard the bribery problem as being the preserve of developing countries. US business, in particular, became increasingly restive under the shadow of their country’s Foreign Corrupt Practices Act of 1977. By 1990, the US government was pressing hard within the OECD for other member governments to take comparable action. In May 1994, a non-binding OECD “recommendation”\(^\text{15}\) was reached, which asked for member states to take a series of specific steps to “deter, prevent and combat the bribery of foreign public officials in connection with international business transactions”, and to report back to each other on the “concrete and meaningful steps” which they have taken in reviewing or reforming the following:

- criminal laws, or their application, in respect of the bribery of foreign public officials;
- civil, commercial, administrative laws and regulations governing bribery as an illegal act;

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\(^\text{14}\) The texts of the Conventions may be seen on the Council of Europe's web site: http://conventions.coe.int

\(^\text{15}\) The principle of an OECD Recommendation is that, while it is non-binding, member states report back to each other on the progress they have achieved in implementing its various detailed provisions. It has proved an effective method of disseminating the adoption of various policy measures by member states over the last forty years.
• tax legislation, regulations and practices, in so far as they may indirectly favour bribery;
• company and business accounting requirements and practices in order to secure adequate recording of relevant payments;
• banking, financial and other relevant provisions so that adequate records are kept and made available for inspection or investigation; and,
• laws and regulations relating to public subsidies, licences, government procurement contracts, or other public advantages, so that such advantages could be denied as a sanction for bribery in appropriate cases.

Since then there has been an historic agreement leading to the coming into force of the 1997 OECD Convention Against the Bribing of Foreign Public Officials in International Business Transactions.\(^\text{16}\)

This landmark Convention requires signatory states to criminalise the bribing of foreign public officials, and to provide mutual legal assistance to facilitate inquiries into suspected breaches. As well, the tax deductibility of such bribes (hitherto standard practice in most OECD countries) was to be ended.

In these ways, for the first time the problem of corruption is being addressed on the “supply side”. As well as all member states of the OECD, a growing number of other countries are becoming party to the Convention, so broadening its reach. The Convention is accompanied by a highly intrusive and critical “evaluation” process, designed to ensure that countries do not sign the Convention and then continue to permit their exporters to act in their old, traditional ways. The stakes are obviously extremely high. The Convention applies to the bulk of world trade, and so it is essential that all the major players feel comfortable with the new arrangement. In others words, that they do not fell that they are not conceding advantages to less scrupulous competitors.

Although the response of the major industrial and exporting countries to this initiative will be important as the basis for meaningful action, the reactions of smaller national economies in the south and in the countries in transition, are also crucial. Without a strong matching response from countries where the negative impact of transnational bribery is clearly significant, the impact of the OECD initiative can only be modest. The co-operation of developing countries and the former centrally-planned economies through parallel initiatives is critical to curbing transnational bribery.

The OECD Convention requires criminal legislation to be extended to “extra-territorial” bribery. The US already had specific legislation (the 1977 Foreign Corrupt Practices Act), and other OECD members have begun to amend their legislation. For example, there is a precedent in countries with “civil code” laws (the majority of the EU states) to extend their provisions outside their frontiers. In the case of “common law” countries, such as the UK and Australia, there are also precedents for amending existing legislation to make it a conspiracy to commit an offence which would be criminal in the domestic context, regardless of where in the world the act actually took place.\(^\text{17}\) Australia has now applied this to extra-territorial bribery. However, in both civil code and common law countries, it will be necessary to prove that the offence was also a criminal act in the country where the bribe or act of fraud actually occurred.

\(^{16}\) The Convention is contained in the Best Practice section on the website version of this Source Book. Progress reports on the implementation of the convention can be seen on the OECD Anti-Corruption Unit web site: www.oecd.org/da/fnocorruption

\(^{17}\) E.g. offences committed by paedophiles while abroad.
It is therefore highly desirable that national legislation be introduced, in as many countries as possible, which criminalises bribery planned within national boundaries, but executed elsewhere. Similarly, there is a good case for introducing legislation which specifies that any person offering a bribe to a public official, or his agent, while the official is outside his country, is also committing a criminal act in that country. The anti-bribery legislation of Hong Kong makes explicit provision for this.\(^{18}\)

**Export credit insurance guarantees**

Industrialised countries often provide insurance for their exporters where transactions are large, there is a degree of political risk, and it is in the public interest that these be underwritten by the tax-payer. What, then, should the position be where a contract has been won through corruption, and is thus tainted by illegality?

The German Government, for one, after representations by Transparency International, has introduced a number of systematic changes in the administration of the Hermes Export Credit Insurance scheme which goes a long way toward meeting TI’s demands. Germany has also (jointly with Belgium) introduced a specific proposal at the OECD Working Group to address this issue.

Domestically, the rationale for the changes is the effectiveness of the OECD Convention in Germany. Under existing “General Conditions”, there is no obligation on behalf of the Government to cover insured losses if the payment claim under the export contract has no legal grounds.\(^{19}\) However, after the criminalisation of bribery of foreign officials under the OECD Convention, and if during the claim process it transpires that criminal acts contributed to the winning of the export contract, the contract itself becomes null and void.

To meet this new situation, the existing Hermes rules have been expanded. From the outset, the applicant has to declare that the export contract has not been obtained through a criminal act, in particular through bribery. If the applicant is unable to submit such a declaration, the application will be rejected. If the applicant does submit such a declaration, but the declaration later turns out to be false, this would constitute a violation of the “truthfulness obligation” in the application process, and so result in the lapsing of the Government’s obligations and the forfeiture of the fees already paid.

In cases of insurance coverage of a financial credit, the document stipulating the obligations of the Government will in future contain a clause that the Government will be freed of its obligations vis-à-vis the exporter, if the conclusion of the export contract has been obtained by criminal bribery. A similar clause will be inserted in the rules for revolving insurance coverage.

In all cases, where the Government is freed of its obligations, the fees paid are forfeited. In addition the beneficiary of the insurance coverage must assume that the Government will pass the facts leading to the lapse of the obligations to the State Prosecutors Office, and for repeated violations it will take additional measures.

This approach, if widely implemented beyond Germany, will go some way towards diminishing the role that exporting countries have been playing in activating international “grand corruption”.  

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\(^{18}\) Section 4, para 1, of the Prevention of Bribery Ordinance, Hong Kong.  
\(^{19}\) AGA Ausfuhr-Gewährleistungen Aktuell Report dated 16 March 2000.
World Bank hotline – probing bribes in Argentina

The World Bank is probing allegations that former Argentine government officials took bribes from a firm involved in a project financed by the lending body. The World Bank got an anonymous tip last year, when former Peronist President Carlos Menem was still in power, via a special hotline in Washington for complaints. The caller alleged that government officials had taken bribes in a bidding process for an unspecified World Bank-backed project. “From the time-frame, the alleged occurrence appears to have taken place under the former government,” said senior World Bank official Myrna Alexander. After a preliminary study of the allegation, Alexander said it had been decided that “there is enough substance to warrant an investigation.” Typically, such an investigation by the World Bank could take up to a year, the official said.

Since de la Rúa’s centre-left Alliance took power in December [1999], a new Anti-Corruption Office has started proceedings against former officials very close to Menem. Targets have included his Public Service Secretary Claudia Bello, state pensions chief Victor Alderete and Environment Secretary Maria Julia Alsogaray.

They all deny the charges. The most notorious bribe case in Argentina involved millions allegedly paid by International Business Machines Corp. (IBM) officials in 1993 to win a $250 million deal to install a computer system for state-owned Banco Nacion.

Reuters, 16 March 2000.

The role of donor agencies

For countries in receipt of significant flows of aid, the donors have a special role to play. In the past, some of these agencies were less than scrupulous in the way they went about their business. Just as it was for the private sector, pay-offs to government officials were the norm, and part of the cost of doing business. The international financial institutions, also, were none too fussy about where some of their money went, and saw “corruption” as being a “political” issue, and a hot potato that was fortunately off their particular menu.

These agencies have in the past been very much a part of the problem. True, their motives have been genuine - inspired by a desire to help ordinary people despite the predatory nature of their rulers - though this hardly has applied where aid was used as a lever to win business contracts. However, the actions of the agencies can be seen, in retrospect, as feeding and enlarging the rapacious appetites of those officials who were more interested in becoming rich than in serving their people.

Today, the role of donors has changed. Corruption is high on the political agenda; it features in the discussions that donors have with government leaders at the highest levels. This is new. Until recently, the subject was taboo. Much greater use is being made of non-governmental organisations to deliver assistance to communities, often as a way of circumventing untrustworthy administrations, but not always, let it be said, with NGOs who are any more reliable.

Novel, too, is the fact that donors are having to move away from their traditional (and not always successful) mode of providing “expert” advice, becoming, instead, low-key facilitators and partners in containing corruption. The development banks are actively seeking complaints about corruption in the projects they are financing. The World Bank, for one, now not only maintains a global “hot-line” for this purpose but has created the office of Compliance Advisor/Ombudsman (CAO) to handle complaints and to engender confidence among all stakeholders that projects are planned and implemented within known, monitorable and enforceable guidelines, and to approved standards.

No society is free from corruption, and each has to fine-tune its integrity system continuously to keep the menace in check. Now it is coming to be recognised that only those who live in a particular society can truly appreciate its nuances, and only they are in a position to judge what is possible, and what may or may not be workable. The donors’ role should therefore be limited to facilitating internal discussions and assisting in building internal ownership of well-informed reform programmes. Donors should not attempt to dictate these from outside, or to impose conditionalities that are unrealistic or which are not supported by significant internal actors. This concept of partnership is now being embodied in multi-lateral agreements.

One example is the way in which this new spirit of partnership has been translated into legal language by the European Union and the African, Caribbean and Pacific (ACP) states. Ties with

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20 The Bribe Payers Index, prepared for Transparency International by Gallup International in 1999, showed a widespread belief in emerging markets that aid conditionality was a major “unfair means” used to win or obtain international business.

21 Details on the CAO Office are at www.ifc.org/cao. NGOs participate in the selection of the office-holder. The first is a foundation member of Transparency International–Papua New Guinea.

22 For example, anonymous “hotlines” were suggested to countries in Central and Eastern Europe, where societies still have an abiding distrust of any process of “denunciation” as a legacy from their immediate past.
the ACP countries, governed since 1975 by the Lomé Convention, are a particularly important aspect of the EU’s development cooperation policy and, more widely, of its external action.

After major upheavals on the international stage, socio-economic and political changes in the ACP countries, and the deepening of poverty, a rethinking of cooperation became necessary. The expiration of the Lomé Convention in February 2000, provided an ideal opportunity for a thorough review of the future of EU-ACP relations. The new agreements, signed on 23 June 2000 in Cotonou, Benin, includes the following:

“... Respect for human rights, democratic principles and the rule of law, which underpin the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute the essential elements of this Agreement.

In the context of a political and institutional environment that upholds human rights, democratic principles and the rule of law, good governance is the transparent and accountable management of human, natural, economic and financial resources for the purposes of equitable and sustainable development. It entails clear decision-making procedures at the level of public authorities, transparent and accountable institutions, the primacy of law in the management and distribution of resources and capacity building for elaborating and implementing measures aiming in particular at preventing and combating corruption.”

Donors should also ensure as best as they can, and as many now are, that their aid is untainted by corruption, whether in procurement on their home market, or in the countries of execution. Suppliers who act corruptly to obtain or execute aid projects should be named, shamed and publicly blacklisted. In the field, their own staff should be scrupulous in their conduct. Their agencies, too, should “walk the talk”, and role model the conduct they expect from their beneficiaries. Where institutions are seen as being lax with their own arrangements to curtail corruption by their staff, they are clearly in no position to tell others how they should be behaving.

There is, however, the situation of emergency humanitarian aid. Situations where help is desperately needed and time is short. In such situations, officials in the affected country can be very well placed to extract enormous bribes in order to hasten supplies on their way – to get them cleared through customs, to provide over-flying and landing rights for aircraft, and so on. Humanitarian agencies can be held to ransom by such blackmailers. This is a clear point of vulnerability, and imaginative approaches are still required to find ways and means of circumventing the bottle-necks that create opportunities for such grand corruption.

The international private sector

The international private sector is a further major player. Its primary body, the Paris-based International Chamber of Commerce (ICC), has been pursuing the issue of containing international bribery for 25 years, and has developed its own Rules to combat bribery and extortion. As discussed in the chapter on the private corporate sector, it continues to work to this end with the OECD and other interested parties.

http://europa.eu.int/comm/development/cotonou/index_en.htm
Donors can also be part of the problem: Whaling ‘extortion’ denounced

Japan wields its huge foreign aid budget to coerce developing nations into supporting its whaling interests, even threatening to withdraw aid from small countries unless they vote with Tokyo at the International Whaling Commission (IWC), a former minister from Dominica alleged yesterday.

Atherton Martin, the environment and fisheries minister of the tiny Caribbean island until last month, denounced what he called “Japan’s outright extortion”, and the use of bribes to win Third World countries’ votes for its pro-whaling position.

At the recent Whaling Commission meeting, which rejected the notion of a Pacific whale sanctuary, all the east Caribbean countries and Guinea changed their stance against previous expectations.

The accusations echo charges reported in The Times last week that Japan used foreign aid for vote-buying to secure the election of its candidate for the job of UNESCO Secretary-General last year.

These latest details of Tokyo’s “cheque-book diplomacy” emerged as a Japanese whaling fleet in the north-western Pacific began killing some of the world’s most endangered species. Mr Martin, as an insider, has provided the most telling evidence yet of how Tokyo secures votes in the IWC and other international bodies by using its foreign aid programme to pressure poorer countries—something conservationists have long claimed.

Mr Martin resigned his post on July 4 in disgust after Dominica voted against the establishment of a South Pacific whale sanctuary.

Mr Martin said Japanese officials had visited the Prime Minister and had threatened to withdraw aid for a new fisheries complex if Dominica abstained on the critical sanctuary issue. Japan had given Dominica, which has a population of 70,000, about £4.5 million for fisheries facilities since joining the IWC, and Japan paid its registration fees at the commission, he said. He said five other islands—Grenada, St Vincent, Antigua, St Kitts and Nevis—had also “succumbed to the same extortionary tactics of Japan”.

“They [also] actually buy off with cash the chief fisheries advisers to the governments, and fly them to Japan throughout the year.”

Tokyo rejected Mr Martin’s claims. A senior official said: “It’s utterly without foundation. Japan provides overseas aid to 150 nations, [including] India and Brazil which do not vote with Japan [at the IWC].” The official, who accused Western countries of double standards and sentimentality over whaling, said: “Why are only whales so cute that Japan must be denied access to this sustainable resource?”

The Times (UK), 14 August 2000.

Some indicators for assessing the role of international actors as integrity pillars

- Are there mutual legal assistance arrangements with the most relevant countries? Has there been a recent ‘needs analysis’ for this area of international cooperation? Are any countries refusing to cooperate?
- Are requests for assistance being made, and are they being responded to satisfactorily? If not, are the requests being made in a proper form?
- Are requests being received from abroad? Are these being attended to promptly?
- Are foreign corporations, doing business in the country, aware of the provisions of the OECD Convention Against the Bribing of Foreign Public Officials in International Business Transactions?
- Where relevant, are donor agencies satisfied with the government’s efforts to contain corruption?
- Are donor agencies, if any, adding to problems by their own practices in the country? Or are they providing relevant and effective assistance to strengthen the national integrity system?
Chapter 18

Free and Fair Elections

*Politics, n. A strife of interests masquerading as a contest of principles.*

*Ambrose Bierce, The Devil’s Dictionary, 1911*

A government gains its legitimacy from its having won a mandate from the people to govern. The way in which this mandate is won is crucial to the quality of that legitimacy and to the readiness of all to acknowledge it. Elections that lack legitimacy breed instability and an environment in which corruption can quickly breed.

**An Independent Election Commission**

Such moral authority is immeasurably enhanced if the elected government is seen as being elected according to law and under the watchful eye of an independent Electoral Commission.

At the core of the administration of an election lies the official body responsible for its conduct. While some countries are content to have ordinary civil servants run an election with political party representatives monitoring their conduct, increasingly the trend is in favour of a separate, stand-alone Electoral Commission, which drafts in the staff it needs to run the poll on election days.

Such a Commission should be independent of the government. It can comprise a single person (as has been the case in India with considerable success), or more usually, a group of Commissioners drawn from across the spectrum of politics, civil society and gender. At the core of the Commission’s independence lies the manner in which the Commissioners are appointed. Ideally, these should be approved by the major political parties contesting the election, and certainly by all the political parties represented in the Legislature. The legal basis for the Commission can be contained in a country’s Constitution, or in its general laws.

The important concept is to create distance between the government of the day and any ability to manipulate the administration of the election. The Commission should therefore be responsible for the preparation of the voters’ rolls (and the objection process which follows its publication); the receipt of nominations of candidates and checking their eligibility to stand; the design of the ballot papers; the physical arrangements for the poll; the conduct of the poll itself; the compilation and announcement of the results; the monitoring of the expenditure of the political parties and the individual candidates (to ensure that they comply with the laws in this regard); and the preparation of a public report, accounting for their stewardship and making any recommendations for reforms to the processes. The Commission should also have a public education role, running civic education programmes (ideally in co-operation with civil society groups as this extends the resources available to the Commission), informing voters how to vote and ensuring that they are aware of when and where they should go in order to do so.
Transparency in the elections process

It is widely accepted that elections are generally won or lost before the actual poll takes place. However, the mechanics of the poll itself are wide open to corrupt practices and results can be distorted in a variety of ways:

- voters can be prevented from voting, or intimidated as they go to the polling stations;
- election officials can mis-mark ballot papers for voters with disabilities;
- ballot boxes can be exchanged, before the count, with boxes which have been stuffed in favour of a particular party or candidate;
- counts can take place in secret; the compilation of results can be fraudulent (as in the Philippines, where the last Marcos government used falsifying computer programs);
- and, at the end of the process, a host of minor irregularities (generally unavoidable in an undertaking of such size) can be used as a pretext by a losing ruling party to call the whole election off and order a re-run.

The solution to these various problems is the simple one of transparency. Given that the ballotting must take place in secrecy, there are still vast areas of the poll that can, and should be, open to scrutiny, especially by the contesting candidates and political parties, and also (where they are present) international observers.

These areas include the appointment of members of an independent Election Commission and polling officials. Each party should have a list of proposed appointments prepared well ahead of time to ensure a reasonable opportunity for their competitors to object where known or suspected politically partisan persons are suggested. Obviously, the whole process is assisted where parties propose candidates who cannot reasonably be objected to by their opponents.

The distribution of election materials should also be a completely transparent process. Parties should know the destination and serial numbers of ballot papers. As voting proceeds, the officials in charge of individual polling stations should inform the “poll watchers”, - the party agents appointed by the competing parties to attend the vote in each polling station - as to which papers are, or are not, being used, and in what order. Copies of electoral lists should be made available, with party agents enabled to keep their own check-lists as to who is or is not voting. Where voters need assistance, there should be limits to the number of voters which any one person can assist, unless all of the political parties agree that assistance should be given by polling officials. It may also be necessary to keep the actual design of the ballot paper a secret until the very last minute, in order to minimise the chances of fraud.

At the end of the period of the poll, party agents should know, from what they have seen, precisely how many ballot papers are in the ballot boxes (give or take the odd ballot paper that a voter may have taken away) and their serial numbers. This makes it difficult to even attempt to substitute the boxes. The party agents should then be entitled to be with the ballot boxes from the time polling ends to the time counting begins. They should then be required to certify the accuracy of the count which they have witnessed. A copy of the results of the poll, certified by the officials and the representatives of the other parties, should be given to each agent. In this way, each party is equipped with documentation which enables it to compile its own, independent and accurate assessment of the final result. Even if the documentation is incomplete, it can provide a random check on the official results which can be effective if these have been seriously distorted.

"Investments" In Nigerian Presidential Elections

TI-Nigeria reported that, long before the campaign began in the aborted presidential elections of 1992, some foreign institutions of a largely religious-economic orientation “invested” equity shares in the personal enterprises of some of the people who were to run for the office of the presidency and arranged for them to draw from these “investments” without let or hindrance.

Although evidence linking political “borrowings” with ultimate denunciations of the electoral process is at present slight, those close to the process are convinced that it is one of the reasons why a losing party can, at the last minute, turn on the polling process and condemn it as unfree and unfair - despite all appearances to the contrary. Party leaders, aware that they are failing in their bid for power, cannot turn to their backers and simply say “Sorry, but you backed the wrong horse...” Instead, they cry foul as a way of excusing their failure to win public support and in so doing try to undermine the democratic credentials of the winner.

Thus, corrupt financial backing can not only be abused by the party aspiring for power but can also undermine the very democratic process itself by violating trust in public institutions, a trust that is vital if strong and vibrant democratic practices are to take hold.
As a matter of policy, citizens’ groups should be enabled to observe the processes of their own elections. It is perhaps unfortunate that a need for international observers should be felt in many developing countries, but until the responsibility for monitoring is accepted by a country’s civil society and undertaken in a fully professional and non-partisan manner, there will continue to be a role for them.

In most countries, civil society organisations assuming this responsibility will involve some change to electoral laws to enable the presence of accredited local observers to be present inside polling stations and to observe the count. Where such groups are barred by law from being officially involved in the election processes they can still make their presence felt. Information can be compiled by monitoring electioneering and by questioning voters after they leave polling stations. “Exit surveys” of voters, too, can have a sobering impact on those who might feel tempted to manipulate the results.

The number of people involved in the mechanics of the election process is directly related to the degree of transparency and accountability within the process. The more who are involved, the more difficult it becomes to suppress information and to manipulate figures. Particularly when civil servants are involved who are drawn from a cross-section of a society’s political matrix, the level of basic trust in the process should rise significantly.

Here are some best practice suggestions designed to address problems in the area of elections and campaign funding. They are drawn from a wide range of election observers’ reports of elections in several parts of the world -

- there should be a code of conduct agreed between the parties as to how they will conduct themselves during an election campaign so as to ensure that it is seen as being free and fair;
- the Electoral Commission should, where possible, establish a forum for debate and consultation with and as between the political parties and ensure that the political parties fully understand their rights and responsibilities with regard to all aspects of the election process;
- contributions (in cash or in kind) by private individuals and corporations should be limited to reasonable amounts that would fall short of perceived as “buying” influence. These limits should not extend to volunteer work;
- candidates guilty of false declaration or over-expenditure should forfeit the positions to which they have been elected;
- all parties and candidates should be required to declare their assets and liabilities before the start of the campaign and immediately after the poll;
- paid-for radio and television advertising should be controlled to acceptable levels, if not altogether banned. In addition, the Electoral Commission should determine how much free time on public radio and television should be available to each party during the election campaign;
- election advertising by special interest groups and others not authorised by particular candidates or parties should be banned to stop circumvention of spending limits by supposedly-publicly-minded individuals and groups; and
- all officials of the Election Commission should declare their assets, income and liabilities both before and after every national election;

Monitoring MPs assets starts to bite in Thailand...

When Thailand enacted a new political charter in 1997 even the drafters of the new Constitution never expected that in less than 30 months the setting up of new election and corruption watchdogs would have the country’s notoriously corrupt politicians on the run.

Politicians, viewing the declaration of assets under the new Constitution, in which some, lost little sleep over the new laws, believing that the watchdogs would have a loud bark but not many teeth. Even under the old Constitution there were many bodies empowered to tackle corruption.

This time the new watchdogs, with the clear support of the electorate, are sticking to the spirit of the Constitution by no longer turning a blind eye to corruption.

At first, the electorate was even more sceptical than the politicians of the new charter having any efficacy. Thais hardly raised an eyebrow when campaigning for the first directly-elected Senate descended into the usual mire of vote-buying and mud-slinging.

Initial results showed that the Senate, formerly regarded as a graveyard for retired generals and senior government officials, was still a club for the wives and relatives of senior ministers and bureaucrats.

When the Election Commission failed to endorse the victories of 78 candidates there was widespread disbelief. Among the dumped candidates were the wives and sister of three ministers and two former police chiefs.

Most of the winning candidates came from the well-heeled political elite of Thai society, previously regarded as untouchables, along with monks, the monarchy and the military.

The publishing of the list of disqualified candidates, dubbed the “roll of shame” by an equally incredulous media, is unprecedented in Thai elections.

The Election Commission has ordered new polls for 78 seats in 35 provinces. In earmarking a budget of 400 million baht ($17.3 million) to hold new elections, tentatively set for April 22, the Election Commission has declared that it will hold all polls as necessary to ensure candidates win by fair means.

• campaign periods ought not to be too long - by truncating them the campaigning costs can be reduced, but if they are too short, the ruling party will have advantages over the opposition parties;
• restrictions should be placed on political parties’ and candidates’ expenditures (in both cash and in kind) in the course of an election campaign. Declarations of these expenditures should be publicly available and filed with the Election Commission within two months of the date of the poll together with an audit certificate certified by a qualified auditor. Additionally, political parties should file audited accounts annually detailing income at electorate, regional and national levels;
• anonymous donations and donations through “front” organisations should be banned, and if received, should be passed over to the Electoral Commission to help meet the costs of that office;
• grants from public funds should be made, either in accordance with past election performance, or according to an agreed formula administered by an independent Electoral Commission;

Some indicators of free and fair elections

• Are the elections the responsibility of an independent and fully professional body of high public standing and enjoying public confidence? In particular, are the processes of appointments to the Election Commission such as to command the support of the political parties themselves as well as of the wider public?

• Are parties and candidates acceptably free to campaign for support for their policies? Do all major parties have a reasonable chance to get their message across through the mass media, and particularly any media which is state owned or controlled?

• Are the polling procedures to be rendered more transparent but in ways which do not intrude upon the secrecy of the ballot? Are political parties aware of their own role in checking the various stages of the polling process and thereby playing an essential part in guaranteeing its integrity?

• Do the election laws reflect best international practice in their openness and transparency? Are there effective procedures to ensure that government assets and funds are not used by a government in support of its election campaign?

• What are realistic limits to political party expenditure, both during an election campaign and at other times? Is there effective monitoring of political parties’ income and expenditure?

• If civil society through non-partisan observer groups have a role to play in observing national and other elections, do present electoral laws enable them to do so?

• All in all, does the electoral process (however imperfect it may be and whatever the advantages to the ruling party of its incumbency) offer a means by which public opinion can in fact be expressed in ways which bring about a change in the administration?
Chapter 19

Administrative Law – Judicial Review of Official Actions

Far more has been accomplished for the welfare and progress of mankind by preventing bad actions than by doing good ones.

William Lyon Mackenzie King

In simple terms, the Rule of Law requires that government operate within the confines of the law; and that aggrieved citizens, whose interests have been adversely affected, be entitled to approach an independent court to adjudicate whether or not a particular action taken by, or on behalf of, the state is in accordance with the law. In these instances, the courts examine a particular decision made by an official, or an official body, to determine whether it falls within the authority conferred by law on the decision-maker. In other words, the courts rule as to whether or not the decision is legally valid. In so doing, the judges do not substitute their own discretion and judgement for that of the government. They simply rule whether the government or its officials have acted within the ambit of their lawful authority. Thus, the judges do not “govern” the country and, do not “displace” the government when government decisions are challenged in the courts.

With the increasing dominance of the private sector in many countries, and the emphasis of government activity shifting from direct participation (through government-owned corporations) to regulation (as often as not, of privatised activities), the role of the courts is, if anything, becoming even more important. Decisions of government regulators impact directly on the private sector interests that they are regulating, and the private sector will look to the courts with greater frequency to shield it from excessive or abusive use of regulatory powers. At times the courts will be expected to go further, and actually review the legality of decisions being made in the private sector itself, applying the principles of administrative law (previously applicable only to official institutions), where these decisions impact significantly on the public interest.

What is “administrative law”?

In general terms, administrative law is the law governing the administration of government business. It governs both central and local government and public bodies in their exercise of statutory or other public powers, or when performing public duties. In both civil and common

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1 This has already happened in the sporting area. Before apartheid ended in South Africa, New Zealand rugby officials decided to send a sporting team to the Republic, in defiance of the world-wide boycott of sporting contacts with the racist regime. In a watershed case, this was challenged by two rugby players. They argued successfully that the courts should review the lawfulness of the decision, applying the principles of administrative (public) law, on the grounds that such a tour would have widespread negative effects on New Zealand’s international standing. The tour was cancelled.

law countries in Europe, these types of functions are sometimes called “public law functions” to distinguish them from the “private law functions”, which govern the relationships between individual citizens and some forms of relationships with the state. For example, if a citizen works in a state-owned factory and is injured, he or she would sue as a “private law function”. If residents of the surrounding community were concerned about a decision to enlarge the state-owned factory because of environmental pollution, the legality of the decision may be reviewed by the courts as being a “public law function”.

In terms of administrative review, the basic question asked is not whether a particular decision is “right”, or whether the judge, had he been the minister or the official, would have come to a different decision. The questions are: what the power or discretion which the law has conferred on the official is? And has that power has been exceeded, or otherwise unlawfully exercised? For example, in England, a local authority was given the statutory power to provide wash houses where people could come and do their own laundry. A court decided that this power was not sufficiently broad to permit a local authority to open a full laundry service which was trading for profit.\(^3\)

The Rule of Law in most countries consists of written constitutions under which the government is required to operate. However, there is inevitably a tension between politicians who are generally interested in exercising power and extending their influence, and constitutions which must seek to contain that power in order to protect the citizen from arbitrariness. In the middle of this tug-of-war are the courts. The courts are asked to decide whether a disputed decision is in accordance with the Rule of Law. Of course, this is resented, at times very deeply, by some elected politicians. They see themselves as being elected by the people, and as having their authenticity (and power) derived from an exercise of political will. When confronted with a critical Judiciary they are inclined to ask: Who appointed you? The answer may well be the elected politicians. However, the role of the courts is not to impose the political views of the majority on minorities, but to protect minorities against the exercise of what some call “majority tyranny.” The majority may, in a political system, have a right to make a decision, but that decision must be in conformity with the law.

The formulation of principles of good public administration

The law expects public officials to exercise their administrative functions justly and fairly. The 1994 Constitution of Malawi states that every person shall have the right to:

(a) lawful and procedurally fair administrative action, which is justifiable in relation to reasons given where his or her rights, freedoms, legitimate expectations or interests are affected or threatened; and

(b) be furnished with reasons in writing for administrative action where his or her rights, freedoms, legitimate expectations or interests are threatened, if those interests are known.

In Malawi, not only is good public administration rendered a constitutional rather than just a common law right, it is also made clearly accountable. An unequivocal duty is placed on administrators to provide reasons behind their actions. This last requirement holds the key to

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3 Attorney-General v Fulham Corporation (1921) 1 Ch 440.
good governance; without reasons, decisions can be rendered more difficult to challenge. When reasons are stated – and under the Malawi model they must be – the argument comes out of the shadows and the court can examine the reasons given and judge their legal sufficiency. Given the wide impact administrative decisions can have on broad sections of the community, it is vital that the overall framework exposes public decisions to review as to their legality when citizens are aggrieved or particularly affected by their outcome. Thus, public officials – without exception – must have appropriate training in the principles of good public administration.

A good example of the guiding principles of administrative law can be found in the Lusaka Statement on Government Under the Law (1992) endorsed by both Commonwealth Law Ministers in 1993 and by successive meetings of senior judges in various regions. The statement reads as follows:

An administrative authority, when exercising a discretionary power should:

• pursue only the purposes for which the power has been conferred;
• be without bias and observe objectivity and impartiality, taking into account only factors relevant to the particular case;
• observe the principle of equality before the law by avoiding unfair discrimination;
• maintain a proper balance between any adverse effects which its decision may have on the rights, liberties or interests of persons and the purpose which it pursues;
• take decisions within a time which is reasonable having regard to the matters at stake; and,
• apply any general administrative guidelines in a consistent manner while at the same time taking account of the particular circumstances of each case.

Procedure

• **Availability of guidelines:** Any general administrative guidelines which govern the exercise of a discretionary power should either be made or communicated (in an appropriate manner and to the extent necessary) to the person concerned, at his or her request, whether before or after the taking of an act concerning the person;

• **Right to be heard:** In respect of any administrative act of such a nature as is likely to affect adversely his or her rights, liberties or interests, the person concerned should be entitled to put forward facts and arguments and, in appropriate cases, submit evidence which should be taken into account by the administrative authority; in appropriate cases the person concerned should be informed, in due time and in an appropriate manner, of these rights;

• **Access to information:** Upon request, the person concerned should be informed, before an administrative act is taken and by appropriate means, of all factors relevant to the taking of that act;

• **Statement of reasons:** Where an administrative act is of such a nature as to affect adversely the rights, liberties or interests of a person, the person concerned should be informed of the reasons on which it is based either by stating the reasons in the act itself or, upon request, by communicating them separately to the person concerned within a reasonable time;

• **Indication of remedies:** Where an administrative act is given in writing and which adversely affects the rights, liberties or interests of the person concerned, it should indicate the specific remedies available to the person as well as any time-limits which may be involved.
Review

- An act taken in exercise of a discretionary power should be subject to judicial review by a court or other competent body; however, this does not exclude the possibility of a preliminary review by an administrative authority empowered to decide both on legality and on the merits;

- Where no time limits for the taking of a decision in exercise of a discretionary power have been set by law and the administrative authority does not take its decision within a reasonable time, its failure to do so should be open to review by a competent authority;

- A court or other independent body which controls the exercise of a discretionary power should possess such powers of obtaining information as are necessary for the proper exercise of its functions.

Implementation

In their implementation, the requirements of good and efficient administration, the legitimate interests of third parties, and major public interests should be given due weight. But, where these requirements make it necessary to modify these principles in particular cases or specific areas of public administration, every endeavour should be made to conform with these principles and to achieve the highest possible degree of fairness.

Reasons why a specific decision may be unlawful

A decision may be rendered unlawful in a variety of situations. For example, a statute might give the Minister a very wide discretion, but the question can still arise as to whether or not that discretion was exercised properly. Was it exercised in a manner which promoted the intention and objectives of the statute that created it? Was the power exercised for the purpose for which it was conferred?

However wide a discretion may appear to be on the face of a statute, where administrative law has developed, the courts will try to limit the use of discretionary power to properly reflect the purpose for which it was created. The right questions must have been asked; consultation, where appropriate, must have taken place; and irrelevant considerations must not have been taken into account.

A more contentious situation can occur when a court is asked to upset a decision because it is “irrational.” The courts generally state that administrative powers must be exercised “reasonably” and few would quarrel with that. However, in practice, the courts generally refuse to interfere on the grounds of “reason,” unless a particular decision is outrageous in its defiance of logic or accepted moral standards.4

Another common challenge to an administrative decision is “procedural impropriety.” This usually involves a claim that the people affected by a particular decision were not given an adequate or fair hearing. Precisely what does, and what does not, constitute a “fair hearing” will depend on the circumstances. In some cases, an unfair hearing will occur if lawyers are either not retained and or not allowed to cross-examine witnesses at a public hearing. At the other extreme, a fair hearing may comprise no more than the authority placing an advertise-

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4 Lawyers call this “Wednesbury” unreasonableness, after the name of a celebrated common law case which stated this doctrine: Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223.
ment notifying the public that a particular proposal is under consideration, and that any written representations that may be made, will be taken into account.

An administrative decision can also be questioned on the grounds of its being “fettered”; i.e. when a decision is made automatically, and without any consideration of the unique facts of the case. The courts always support - and at times enforce – a policy of equality of treatment, with like cases being treated alike. However, equality does not overrule equity, and equity demands that each case be treated on its individual merits.

Legal “bias” is another common form of challenge to an administrative position, as is “legitimate expectation”. A good example of legitimate expectation occurred in Britain. A trade union claimed, successfully, that it had a legitimate expectation arising from long-established practice, to be consulted in the future, unless and until, it was given reasons for the withdrawal of this right, and the opportunity to make representations against any change in existing practice.

The concept of “abuse of power” involves the courts looking beyond the ways in which a particular decision was reached, and to examine what the decision actually ought to be. This challenge to administrative law occurs only in the rarest of cases. One example involved a taxpayer who claimed that the revenue authorities had told him that, should he withdraw certain claims for tax deductions, they would not pursue another matter against him. The court decided that had there been a proper agreement to this effect (which in the circumstances there was not), it would have been an abuse of power for the revenue authorities to reopen the other matter. In addition, the concept of “proportionality” is currently being given more consideration as an integral component of an administrative decision. Common law has tended to stress remedies rather than principles, and judges have been reluctant to express basic notions of fairness as being fundamental principles of law. Instead, they opt for pragmatism. However, recent trends signal that judges are becoming more adventurous and are prepared to look at whether a particular decision was “wholly out of proportion” to what was required, as for example, in the case of a local council that banned one member of the public from all local authority meetings because of the way he had behaved at various private gatherings.

**Giving reasons for administrative decisions**

Public officials are generally not compelled by the courts to give reasons for their decisions. However, the courts will sometimes decide that the relevant statute requires that reasons be given, and at times, a requirement to do so may be written into the law. This can occur, for example, where someone is given a right of appeal against a decision and so must be entitled to know the reasons behind the decision in order to support the appeal. There is also the danger that in the absence of information to the contrary, a court may conclude that there are, in fact, no good reasons for a decision, and a decision is not warranted. To challenge this conclusion, the public official must defend the decision. Thus, providing the reasons for decisions is desirable and should be encouraged. If nothing else, the mere act of writing down the facts and the reasons for a certain decision can help an official see the situation more clearly.

**Decision makers must ask themselves......**

It cannot be said too often that “an ounce of prevention is worth a pound of cure”. Every time an official has to make a decision, he or she must ask themselves a series of questions or else

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run the risk of falling foul of the Judiciary through the process of administrative review. These questions are:

- Have I got the power to do what I want to do? Or am I adopting a particular interpretation of my statutory powers in a way which happens to suit me?
- Am I exercising the power for the purpose for which it was given?
- Am I acting for the right reasons? Have I taken into account all relevant information and excluded all irrelevant considerations?
- If I am to give reasons for the exercise of the power, are these reasons correct and will they withstand independent and informed examination by a judge?
- Will I hear and consider the points of view of people likely to be affected by the decision? Have I sufficiently informed them of what is being proposed so as to ensure that they have had a fair opportunity to make representations if they disagree?
- Have I allowed sufficient time for consultations and representations?
- Have I really made up my mind in advance or given that impression without considering the circumstances of the particular case?
- Do I or anyone else involved in making the decision have any conflicting interest which might lead someone to suppose that there is bias involved?
- Are there any grounds for someone to think that I might not be acting fairly? Have I led anyone to suppose that I will be acting differently from the way in which is now intended?
- Has the decision-making power been wrongly delegated? Should I seek legal advice on this point?
- Do I propose to act in a way which a court might regard as an abuse of power or as being generally so unreasonable that it is likely to rule against me?

A review of administrative law is essential to ensure that anti-corruption efforts can have an impact on the highest levels of corruption within a system of governance, and that reform efforts do not bounce off a virtual brick wall of legal ambiguity.

Above all, the citizen must feel that the administrative law fully supports and enforces transparency and accountability in decision-making on the part of all public officials.

**Indicators as to the effectiveness of judicial review as an integrity tool**

- Do courts have the jurisdiction to hear cases in which citizens claim that official decisions have been made unlawfully?
- Is this remedy used?
- Do citizens have confidence in the independence of the judiciary when they are hearing such cases?
- Is there a conscious effort on the part of officials to comply with good administrative practice and make decisions fairly and justly (i.e. seeking the opinions of affected citizens before decisions are taken; affording them an opportunity to be heard; giving due weight to opinions expressed; giving reasons for decisions; staying within the bounds of the powers conferred by law etc.)?
- Are relevant rules and procedures readily available to members of the public?
- Are members of the public aware of their rights?

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7 Adapted from *The Judge over Your Shoulder: Judicial Review of Administrative Decisions*, Cabinet Office/Management and Personnel Office, HMSO (1987), from which much of the material in this section has been drawn.
Public Service Ethics, Monitoring Assets and Integrity Testing

The government either has integrity or it does not. You can’t just have a little integrity. An administration stands or falls with the integrity of the government; any diminution of the integrity of the government means that the government loses the confidence of the public. And without the confidence of the public, democracy cannot work. Then there is no more democracy. That is a frightening picture.

Catherine I. Dales, Minister of the Interior, in an address to the Annual Conference of the Union of Dutch Local Authorities, June 1992.

Increasingly, the need to foster and sustain high levels of ethics in the public sector has come into focus. There is, almost universally, a lurking suspicion in many countries that public servants (both members of the public service and their political masters) have been lining their pockets at the public’s expense, and calls for the monitoring of assets of senior public sector decision-makers in particular, are now heard on all continents. These suspicions are fuelled by scandals with serious moral implications, revealed almost daily, and in developed countries no less than the developing.

In developed countries, pressures on the public service come from varied quarters. Increasing privatisation and the contracting out of traditional government functions; the devolvement of responsibility, including financial responsibility, within public service organisations; greater pressures for openness and more intensive media scrutiny of the public sector; a greater and growing intensity of lobbying by those anxious to capture government business; and an increased willingness on the part of members of the public to complain when the quality of service is poor – all these have contributed to this increase in awareness of the need to take steps to bolster the ethical basis on which the public service functions.

Recent public management reforms involving greater devolution of responsibility for public servants and new forms of delivery of public services, have challenged traditional values in the public service. With more senior staff on contract, and other changes in the public service environment, qualities of loyalty can be more elusive. Ethics may not have changed, but in managing a modern civil service, areas of discretion in many areas have widened.  

In developing countries, and in countries in transition, the problem is all the greater. There, the public service has tended to be dysfunctional to begin with, and not infrequently deeply flawed by systemic corruption. There would be cause enough to justify a proactive approach on the ethical front, even without the additional pressures created by attempts to “modernise”

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1 See An Ethics Framework for the State Sector, August 1999 by the State Services Commission, Wellington, New Zealand
Uncoordinated, unsystematic, unilateral, non-participatory...

A Portuguese Cabinet Secretary has described the state’s traditional response to ethics as being “uncoordinated, unsystematic, unilateral, non-participatory” and as being exploited for partisan political purposes:

Intervention was not coordinated, because no plan was drawn up in advance and no single centre of responsibility for action was designated. Neither the timing of initiatives nor how those initiatives might interact was taken into account, and the various centres of power administered their reforms with no co-ordination between them. Although the department responsible for administrative modernisation was behind most of the initiatives, there can be no doubt that the latter often ran counter to the sensibilities, and at times the methodology, of other government departments. Another characteristic of the authorities’ intervention is that it was not systematic. The measures enacted were taken individually and were unconnected, with no follow-up in the field, all of them, and even those taking the form of laws and standards, were carried out in the hope that public servants would embrace them spontaneously, on their own initiative. It was basically the same for all of the main ideas of administrative modernisation, which, once again, were passed along as ideas of administrative modernisation, and no single centre of responsibility for action was designated. Neither the timing of initiatives nor how those initiatives might interact was taken into account, and the various centres of power administered their reforms with no co-ordination between them. Although the department responsible for administrative modernisation was behind most of the initiatives, there can be no doubt that the latter often ran counter to the sensibilities, and at times the methodology, of other government departments.

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The third feature is that action was unilateral. As the need to do something about ethics became clearer, the political authorities responded by imposing specific measures on particular sectors without consulting the people involved. A good example of this is the Public Service Code of Conduct, which, as a vehicle to convey professional ethics, was equally if not more important than the Public Service Code of Conduct, it would appear that this training focused more on operational procedures than on conduct-related principles of administrative action.

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Why an ethics-based approach?

Integrity can come under pressure in a variety of ways, not only stemming from straightforward corruption but also, and above all, from an improper use of power. And the “improper use of power is a broad concept, one that embraces degeneration, decay and erosion of standards of conduct…[escalating] into fraud and corruption.”

Preventing misconduct is thus as complex as the phenomenon of misconduct itself. Among the integrated mechanisms needed for success are sound ethics management systems. This is as true for the public sector as it is for the private.

Most people would prefer to be, and to be seen to be, honest and respected for their personal integrity by themselves no less than by their family and friends. If this assumption is correct, then it provides the starting point for an ethics management system that has the potential to make serious inroads into ethical misconduct – bearing in mind the fact that transgressions can be as much the result of misunderstandings and misperceptions as of blatant illegality.

An ethics based approach is essentially preventative, and so a much more profitable route than one which relies on the big stick of enforcement and prosecution. A well-motivated public service is much to be preferred to one which operates in fear and apprehension - and where any exercise of personal initiative, however well-intended, invites investigation and possible censure.

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2 e.g. The annual letter to Chief Executives setting out the expectations for the [New Zealand] State Service’s Commission’s Review of Departmental Performance 1997/98 included the expectation that departments would have a customised code of conduct and conflict of interest policy. In particular, the Commission expected to see evidence of:

- a customised code of conduct that addressed the nature of the business;
- development of strategies to inculcate, reinforce and monitor ethical conduct – e.g. plans that address issues of integrity in mission/vision/value statements; human resources strategies; information policies;
- systematic approaches to consultation with the public;
- guidelines for contracting;
- processes for dealing with conflicts of interest;
- effective means of communicating with the public;
- developing clear understandings of statutory and regulatory obligations; and
- developing a shared understanding of what is meant by the public interest in the context of the organisation.

3 Vargas Moniz, Portugal: The Management of Ethics and Conduct in the Public Service, 1995, OECD

Such a course can also deal more appropriately with the position in which public servants can find themselves in some developing countries, where traditional societies expect those in positions of power to use it to promote the interests of their family or clan, rather than the wider public interest.

Two African commentators have noted that much of the research into the causes of administrative corruption on their continent has focused on the persistence of traditional values and customs (usually forms of nepotism) which conflict with the requirements of modern bureaucracies. They observe that African bureaucrats (as in other developing countries) frequently seem to be faced by two sets of values.

Although the public official has been trained in the norms of modern organisations, the weight of tradition is such that even when the bureaucrat himself does not profess a public belief in traditional values, he is still subject to constant pressure to give in to them. For example, in order to avoid accusations of ingratitude, politicians and top civil servants must surround themselves with members of their clan as well as with their more immediate relatives. This situation leads some civil servants to experience difficulty in adjusting to the impersonal, disinterested, legalistic requisites of the modern bureaucracy. Clearly, an ethics-based route is the appropriate one.

It is important, too, that the ethical code is tailored to the conditions of the society it is designed to serve. While it may make sense in a developed country to preclude a public official from engaging in private sector activity, in some developing countries this is wholly unrealistic. Private sector activity of some sort can be a necessity where public sector remuneration is very low. The challenge then becomes one of how to manage effectively a situation where public officials are frequently engaged in private sector activities.

As one writer on Africa has commented:

> Ethical Codes must be of such a nature that leaders are not turned into poverty-stricken missionaries and as poor as Church mice, nor should they be so harsh and impracticable as to frighten would-be leaders from assuming leadership roles.\(^5\)

**The essential features of an effective ethics management system**

Increased concern about corruption and the decline of confidence in public administration has prompted many governments to review their approaches to ethical conduct. To assist these processes, a set of principles has been developed by the OECD to help countries review the institutions, systems and mechanisms they have for promoting public service ethics.\(^7\)

The principles can be adapted to national conditions, and countries can find their own ways to balance the various aspirational and compliance elements so as to arrive at an effective framework that suits their own circumstances. The principles are, of course, not sufficient in themselves but provide a means for integrating ethics management into the broader public management environment.

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1. Ethical standards for public service should be clear.

*Public servants need to know the basic principles and standards they are expected to apply to their work and where the boundaries of acceptable behaviour lie.*

A concise, well-publicised statement of core ethical standards and principles that guide public service, for example in the form of a code of conduct, can accomplish this by creating a shared understanding across government and within the broader community.

[Note 8: The emphasis here is on broad statements of principle. The statement should not be written in detail or resemble legislation, or simply be a list of prohibitions and restrictions. The core values should be the focus. These are higher values than the minimum and minimal thresholds prescribe, for example, by the criminal law. There is scope here for aspirations. Codes of conduct are discussed below, and in the context of the private sector, in the chapter entitled The Private Corporate Sector.]

2. Ethical standards should be reflected in the legal framework.

*The legal framework is the basis for communicating the minimum obligatory standards and principles of behaviour for every public servant. Laws and regulations could state the fundamental values of public service and should provide the framework for guidance, investigation, disciplinary action and prosecution.*

[Note: This is the converse of the above. When legislating, the aspirational aspects of a code can be stated to reinforce the values being protected by the laws and regulations which follow.]

3. Ethical guidance should be available to public servants

*Professional socialization should contribute to the development of the necessary judgement and skills enabling public servants to apply ethical principles in concrete circumstances. Training facilitates ethics awareness and can develop essential skills for ethical analysis and moral reasoning. Impartial advice can help create an environment in which public servants are more willing to confront and resolve ethical tensions and problems. Guidance and internal consultation mechanisms should be made available to help public servants apply basic ethical standards in the workplace.*

[Note: A code without a mentor or an adviser is a rudderless boat adrift on a tempestuous ocean. Public servants need to know where, and to whom to turn, when they are confronted with potential difficulties. These need to be persons in whom they have trust, and in whom they can confide in confidence.]

4. Public servants should know their rights and obligations when exposing wrongdoing.

*Public servants need to know what their rights and obligations are in terms of exposing actual or suspected wrongdoing within the public service. These should include clear rules and procedures for officials to follow, and a formal chain of responsibility.*

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8 The Notes have been inserted by the author and do not form part of the text.
servants also need to know what protection will be available to them in cases of exposing wrongdoing.

[Note: A core value of public service is commitment to the law and to the Rule of Law. This is of higher value than any duty to superiors, colleagues or subordinates, and likewise it overrides any claim to loyalty on the part of the political party in power.

The subject of “whistleblowing” is discussed in the chapter on Giving Citizens a Voice. It should never be necessary, other than in the most exceptional of cases, for a public servant to feel compelled to go outside the system in order to draw attention to wrongdoing. This is an area, too, in which the private sector is taking an increased interest. Although previously, senior managers would prefer not to know about problems, the more progressive managers of today are eager to ensure that staff feel comfortable in raising their concerns, so that matters can be put to rights, or mistaken impressions corrected.

It is therefore important that official channels for complaint be trustworthy (so that staff can use them without feeling exposed to reprisals by more senior staff on whom they may be reporting) and effective (so that staff will use them confident in the belief that their complaints will be taken seriously, and not just ignored).]

5. Political commitment to ethics should reinforce the ethical conduct of public servants

Political leaders are responsible for maintaining a high standard of propriety in the discharge of their official duties. Their commitment is demonstrated by example and by taking action that is only available at the political level, for instance by creating legislative and institutional arrangements that reinforce ethical behaviour and create sanctions against wrongdoing, by providing adequate support and resources for ethics-related activities throughout government and by avoiding the exploitation of ethics rules and laws for political purposes.

[Note: Unless political leaders demonstrate high standards they have no moral authority upon which to draw when they wish to reprimand others who step out of line. It is a truism that “the fish rots from the head”, and experience certainly suggests that where the behaviour of superiors is seen to be incorrect, similar indiscretion is fostered among subordinates. It is important that political leaders clearly articulate their unqualified support for, and insistence upon, high ethical standards.]

6. The decision-making process should be transparent and open to scrutiny

The public has a right to know how public institutions apply the power and resources entrusted to them. Public scrutiny should be facilitated by transparent and democratic processes, oversight by the legislature and access to public information. Transparency should be further enhanced by measures such as disclosure systems and recognition of the role of an active and independent media.

[Note: A corrupt and/or inefficient administration will wish to shield its shortcomings through denying access to information. The provision of channels for information, and rights of access, are important antidotes to this malaise. The greater the transparency, the fewer the shadows.]
7. There should be clear guidelines for interaction between the public and private sectors.

Clear rules defining ethical standards should guide the behaviour of public servants in dealing with the private sector, for example regarding public procurement, outsourcing or public employment conditions. Increasing interaction between the public and private sectors demands that more attention should be placed on public service values and requiring external partners to respect those same values.

[Note: Much of the “grand corruption” that mars today’s administrations around the world takes place on the interface between the public and the private sectors. Special attention is given to this in the chapter entitled Public Procurement: Where the Public and Private Sectors Do Business. The question of respect for shared values is not exclusive to the public service. Leading players in the private sector, too, are increasingly concerned to ensure that its own private sector partners respect and share the core business principles to which they subscribe.]

8. Managers should demonstrate and promote ethical conduct.

An organisational environment where high standards of conduct are encouraged by providing appropriate incentives for ethical behaviour, such as adequate working conditions and effective performance assessment, has a direct impact on the daily practice of public service values and ethical standards. Managers have an important role in this regard by providing consistent leadership and serving as role models in terms of ethics and conduct in their professional relationship with political leaders, other public servants and citizens.

[Note: This principle reflects, in the context of managers, the same concerns as are contained in Principle 5, above.]

9. Management policies, procedures and practices should promote ethical conduct.

Management policies and practices should demonstrate an organisation’s commitment to ethical standards. It is not sufficient for governments to have only rule-based or compliance-based structures. Compliance systems alone can inadvertently encourage some public servants simply to function on the edge of misconduct, arguing that if they are not violating the law they are acting ethically. Government policy should not only delineate the minimal standards below which a government official’s actions will not be tolerated, but also clearly articulate a set of public service values that employees should aspire to.

[Note: This Principle stresses the importance of the aspirational aspects of ethical conduct, and the need to avoid a minimalist, rule-bound approach under which everything which is not expressly forbidden is implicitly allowed.]

10. Public service conditions and management of human resources should promote ethical conduct.

Public service employment conditions, such as career prospects, personal development, adequate remuneration and human resource management policies should create an environment conducive to ethical behaviour. Using basic principles, such as merit, consis-
ently in the daily process of recruitment and promotion helps operationalise integrity in the public service.

[Note: Ethical conduct can be fostered, just as unethical conduct can be contagious. If nepotism, favouritism and the selective application and waiver of rules are taking place, the standards of all can be expected to come under pressure.]

11. Adequate accountability mechanisms should be in place within the public service.

Public servants should be accountable for their actions to their superiors and, more broadly, to the public. Accountability should focus both on compliance with rules and ethical principles and on achievement of results. Accountability mechanisms can be internal to an agency as well as government-wide, or can be provided by civil society. Mechanisms promoting accountability can be designed to provide adequate controls while allowing for appropriately flexible management.

[Note: Corruption and inefficiency flourish in an environment devoid of accountability. In this regard, the Office of Ombudsman has a particularly potent role to play.]

12. Appropriate procedures and sanctions should exist to deal with misconduct.

Mechanisms for the detection and independent investigation of wrongdoing such as corruption are a necessary part of an ethics infrastructure. It is necessary to have reliable procedures and resources for monitoring, reporting and investigating breaches of public service rules, as well as commensurate administrative or disciplinary sanctions to discourage misconduct. Managers should exercise appropriate judgement in using these mechanisms when actions need to be taken.

[Note: Mechanisms need to be fair and trustworthy. They should protect the innocent and the naïve, just as they should detect and publish the culpable. Penalties, where applicable, should be proportionate and should be consistently applied. A sanctions regime which is idiosyncratic and viewed as untrustworthy by staff can seriously undermine efforts to raise and to protect ethical standards generally.]

Creating codes of conduct in the public sector

Codes of conduct in the public sector, as they are in the private sector and in the professions, are playing an ever-increasing part in the development of national integrity systems. They afford a way in which to develop preventive strategies. Obviously, if officials act properly and with understanding from the outset, any problems will be minimised.

However, as we have noted, public sector codes tend to be drafted at the top, by senior public officials or managers, and then passed down to more junior staff. All too seldom are the staff at all levels actively involved in the preparation of a code. The result is not only does the code fail to reflect adequately the situations and aspirations of staff at all levels, but there is also a complete absence of ownership. In some respects, the way a code is prepared is just as important as the code itself.

9 Codes of conduct can cover, for example, Ministers, parliamentarians, the whole of the public service, individual departments or agencies, and a particular profession within the public service. Examples of codes are to be found in the Best Practice section of the Internet version of this Source Book, at http://www.transparency.org. Codes of conduct are also discussed in the chapter, The Private Corporate Sector.
It is also important that a code be aspirational in tone, at least in part, rather than be simply a long list of prohibited actions. This is to give it a positive character, rather than the somewhat forbidding appearance of a criminal statute.

Once a code is finalised, many regard the process as being at an end. However, to be effective, codes should be publicised throughout an organisation and its external stakeholders (including the general public), so that everyone is aware of its contents. More than this, there should be regular training, so that groups of officials come together from time to time to talk through dilemmas drawn from real life.

The interpretation of the code, too, is important. It should protect the staff who comply with it. For this reason, an effective code will generally have designated a source of advice and guidance for staff who have difficulty in determining what their position is. Even if the advice the official is given turns out to be misconceived, where full disclosure of relevant facts has been made and where the advice has been followed, he or she should be regarded as blameless.

**An ‘Office of Government Ethics’ – the US approach**

To be effective, over-all responsibility for public ethics development and training must be vested clearly in a particular agency of government. Frequently this is within the Ministry for Government Administration.

However, in a novel experiment (and in the wake of the Watergate scandal) the United States in 1978 created the Office of Government Ethics (OGE).

The OGE provides policy leadership and direction for the ethics programme in the Executive branch. This system is a decentralised one, with each department or agency having responsibility for the management of its own ethics programme. This responsibility rests with the head of each agency who, in turn, designates a Designated Agency Ethics Official or “DAEO” who is responsible for the day–today management of the ethics programme.

The OGE has issued a uniform set of Standards of Ethical Conduct for Employees of the Executive Branch that apply to all officers and employees in Executive branch agencies and departments. These regulations contain a statement of fourteen general principles that should guide the conduct of Federal employees. Central to these principles is the concept that public service is a public trust. Federal employees must be impartial in their actions and not use public office for private gain. These regulations also contain specific standards that provide detailed guidance in a number of areas: gifts from outside sources, gifts between employees, conflict–ing financial interests, impartiality, seeking employment, misuse of position and outside activities. The rules are enforced through the normal disciplinary process.

The Office has also implemented uniform systems of financial disclosure. These systems, public and confidential, are enforced throughout all agencies and are subject to periodic review by the OGE.

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11 The office was established by the Ethics in Government Act of 1978, as an office within the Office of Personnel Management. It was upgraded in 1989, when Congress established the Office of Government Ethics as a separate agency within the Executive branch. The OGE is administered by a Director who is appointed by the President, with the advice and consent of the Senate, for a five-year term. A complete description of the OGE’s organizational scheme, including the Standards of Conduct, Principles of Ethical Conduct, financial disclosure system descriptions and forms, informal advisory letters and memoranda, training materials and relevant ethics legislation, is available on the Internet at www://usoge.gov.
The OGE maintains a close liaison with the ethics officials at the 129 agency ethics offices throughout the Executive branch through its desk officer system. Each OGE desk officer has a portfolio of client agencies that he or she serves by providing information, advice and programme assistance. The OGE also regularly conducts reviews of agency ethics programmes and makes appropriate recommendations for improvement of financial disclosure systems, counselling and advice, training and other programme matters.

The OGE regularly conducts training workshops for ethics officials both in Washington, DC and in cities throughout the United States. The OGE has established an ethics information centre at its office that makes educational materials available to Executive branch agencies. It has a newsletter and it holds an annual ethics conference to exchange information and build a strong ethics community. An electronic bulletin board provides an abundance of information to the ethics community in a fast, convenient and direct way.

At the same time, individual agencies may supplement the Executive branch-wide standards with limited rules, tailored to meet specific agency needs. Areas addressed in supplemental agency standards include prohibited financial interests, prohibited outside activities and prior approval for outside activities.

In recent years a number of other countries have followed the US lead, including Argentina and South Africa.

The Queensland approach

The Public Service Act 1996 in Queensland underscores the traditional expectation of the state’s Ministers, namely that that professional public servants will be apolitical, and responsive to the Government of the day and sensitive to its programme objectives. A decision to reinforce the “career service” aspects of employment in the Public Service was articulated in 1997, and is supported by employment, deployment and appeals provisions in the Act.

Separately, the framework of values which defines Public Service integrity – professionalism, ethicality (for example, personally disinterested conduct in office), and service to the community – are defined by the Public Sector Ethics Act, enacted in 1994.

Queensland is the only jurisdiction in Australia, and one of few in the world, to have enacted specific legislation for ethical conduct in public management. The Public Sector Ethics Act 1994, and its companion piece, the Whistleblowers Protection Act 1994, are Australia’s first examples of specific ethics legislation which aim to ensure high professional standards in the public sector by requiring Chief Executives of Departments to develop codes, to have them accessible to staff and to the public, to institute training, and to include an implementation statement in the department’s annual report. The legislation clearly acknowledges the necessity for public management to be ethical, professional, and accountable.

The Public Sector Ethics Act explicitly articulates a set of professional expectations – “socialisation” values – which had been in Queensland, until 1988, the subject of convention alone. Both Acts were responses to an explicit demand by employees and managers for greater certainty about what was expected of them in the workplace. This demand was driven by every-

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13 Both are to be found in the Best Practice section of the Internet version of this Source Book: http://www.transparency.org.

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day concerns about fairness, equity, responsiveness, and integrity, and by community expec-
tations that official wrongdoing would be effectively countered by the system itself.

**The Public Sector Ethics Act 1994 (Queensland)**

The Act, as passed, declares five principles to be the basis of “Ethics Obligations”, also speci-
fied by the Act, and required to be the basis of the agency-specific Codes of Conduct which
individual public sector agencies are required to develop, in consultation with affected staff
and the relevant community interests.

The framework values are:

- respect for the law and the system of (parliamentary) government;
- respect for persons;
- integrity;
- diligence; and,
- economy and efficiency.  

The obligation of integrity is expressed in the following terms:

**Integrity**

In recognition that public office involves a public trust, a public official should seek:

(a) to maintain and enhance public confidence in the integrity of public administration;

and

(b) to advance the common good of the community the official serves.

Having regard to [that obligation], a public official:

(a) should not improperly use his or her official powers or position, or allow them to be
improperly used; and

(b) should ensure that any conflict that may arise between the official’s personal inter-
ests and official duties is resolved in favour of the public interest; and

(c) should disclose fraud, corruption, and maladministration of which the official
becomes aware.  

In practice, this obligation requires that officials should, for example, not disclose official
information improperly; should not abuse the powers or resources available to them as offi-
cials; should avoid any conflict between personal interest and official duties; or where a con-
lict cannot be avoided, should resolve such a conflict in favour of the public interest.

The obligation also requires officials to avoid conduct which could undermine public confi-
dence in the government or the system of public administration, for example, failure to dis-
lose to a relevant authority known fraudulent or corrupt conduct, or “maladministration” by
another official.

The obligation of diligence is defined thus:

**Diligence**

In performing his or her official duties, the official should exercise proper diligence, care
and attention, and should seek to achieve high standards of public administration.  

In practice, this obligation requires that officials should, for example, provide “a fair day’s work”,
observe the procedural fairness (“natural justice”) requirements of good administrative decision-

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14 Section 4(2).
15 Section 9.
making, make all reasonable efforts to provide high standards of service to clients, act in accordance with relevant “duty of care” requirements, avoid negligent conduct, provide expert and comprehensive advice to Ministers, and seek to maintain high standards of public administration.

There is, too, the obligation of economy and efficiency:

In performing his or her official duties, a public official should ensure that public resources are not wasted, abused, or used improperly or extravagantly.\(^{17}\)

In practice, this obligation requires that officials should manage all forms of public resources (for example human, material, and financial resources, intellectual property and information) in the interests of safeguarding public assets and revenues and ensuring efficient programmes and service-delivery.

**Chief Executives’ Obligations**

The Ethics Act requires Chief Executives of public sector agencies to ensure that the Act is implemented in their agency, that training in ethics is undertaken, and, of signal importance, that the agency’s “administrative practices and procedures” are consistent with the Act and with the agency’s Code of Conduct.

Failure to do so could result in sanctions under the Chief Executive’s contract of employment, or (potentially) in a private legal action for compensation resulting from breach of statutory duty. Such an action might arise - in an ethics context - where the interests of a citizen or client of the agency suffered damage from the foreseeable and preventable unethical conduct of an employee - for example, in a contract negotiation or tendering process involving the Chief Executive’s agency.

**The Role of the Public Official**

Clearly, the legislation establishes a “role ethic” based on a traditional version of the role of the appointed public official in a system of responsible Parliamentary Government.

The Guidelines issued to Queensland public sector agencies in 1995 went further in reinforcing this traditional view of the appointed official’s responsibility and accountability, and the official’s relationship to delegated power and the community at large. The Guidelines include the following statement:

Public employment involves a position of trust.

The standards of conduct which may be expected of public officials at all levels are therefore a matter for legitimate and continuing concern by the Government of the day, public sector organisations, and the community.

Public officials control, in various ways, the use of financial and other valuable resources provided by the community. The use, and misuse, of those resources raises important questions of professional ethics for administrators.

It is similarly expected that those public officials who control the financial and other resources provided by the community have an ethical obligation to ensure that those resources are used efficiently and appropriately.

\(^{16}\) Section 10. \(^{17}\) Section 11.
Such a traditional view of the role of the public official is not at odds with the modern focus of the public service on customers, efficient service delivery, accountability, and on effective risk assessment and risk management. However, ethical management is more challenging in today’s world.

As the OECD’s Public Management Service (PUMA) observed, the increasing interaction between the public and private sectors is:

... creating more situations where existing rules and guidance on the conduct of public officials may be inadequate, for example in relation to possible conflicts of interest. They also raise more ethical dilemmas for public officials, where guidelines and rules cannot provide all the answers and officials may need to be able to make sound ethical judgements. There are, moreover, concerns that with the blurring of boundaries between the public and private sectors, essential public sector values may be diluted, to the detriment of the public interest.18

Rather than blurring the distinctions which exist, the Queensland Legislature has set down a ‘benchmark’ position in relation to public sector integrity, to highlight what is at issue when public and private sector value systems interact.

The Canadian approach

In Canada, a number of Provinces – and the Federal government – have introduced posts to provide guidance on ethical issues to parliamentarians and senior public officials. These positions are variously titled – “Ethics Commissioner” (Alberta), “Integrity Commissioner” (Ontario); “Conflict of Interest Commissioner” (British Columbia, Saskatchewan, Nova Scotia, New Brunswick, Northwest Territories and Yukon), “Commissioner of Members’ Interests (Newfoundland) or “Ethics Counsellor” (Federal Government).19

These Offices all recognise that, in the area of ethics, there are two major risks when relying wholly on a strictly legalistic system. Firstly, public office holders can often forget what truly ethical conduct actually is in the real world of public life, and instead defend themselves by dwelling on what they understand to be the legal technicalities of words and concepts.

Secondly, rules are often extremely detailed about matters that should be self-evident to anyone with sound moral judgement, leaving the average citizen with the impression that those appointed to public life have no moral sense whatsoever. When this happens, it can do more to corrode public confidence than enhance it.

Canada’s Federal government has taken an approach that assumes that public office holders do want to take ethical actions. It assumes they do want to earn a higher level of respect among citizens. For this reason it has chosen not to take the other major approach to ethics – that is, rigidly codifying ethical behaviour, usually through a series of “Thou shalt not’s.”20

The Canadian approach to building and managing an ethics structure turns on avoiding possibilities for conflict of interest well before the fact. It focuses on working with people, based on the assumption that they do want to do the right thing.

The Federal Ethics Counsellor’s Office deals with potential conflicts of interest and other ethical issues for those most likely to be able to influence critical decisions in the Federal gov-

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18 In a discussion document prepared for PUMA’s November 1997 Seminar on Ethics in the Public Service.
19 For links to relevant web sites see http://www.ontla.on.ca/Library/BPs/offices/o5.htm.
ernment. This covers all members of the Federal Cabinet, including the Prime Minister. It covers their spouses and dependent children; members of Ministers’ political staff; and senior officials in the Federal Public Service. The Office handles the monitoring of the assets, incomes and liabilities of those it oversees.

The Office is also responsible for the Lobbyists Registration Act and the Lobbyists’ Code of Conduct. These are designed to bring a level of openness to lobbying activities and ensure strong professional standards for the people involved in that work.

The Office, of course, does not replace the role of the police, prosecutors and judges when it comes to suspected breaches of the criminal law. Rather it deals with the grey area of situations that could realistically appear wrong to citizens, without ever being illegal.

Its role is designed to provide advice and counsel to those in government, not to act as prosecutor, judge and jury. In practice, the Office works closely with those covered by the Code. They come with questions about how a given asset or interest should be treated, and the Office offers advice. It is also asked by the Prime Minister to investigate and comment on specific issues as and when these arise.

Does this seem to work? The present office-holder believes it does:

“Does this work? I would say it does. The people that I deal with recognise that making the right decisions helps to ensure their long-term political health. They recognise that Canadians expect high standards of conduct and rightly so. They have generally gone out of their way to meet those standards.”

Monitoring of assets, incomes and liabilities

As suspicions of public officials has grown – fed by revelations of the ways some have looted their countries treasuries or suspicions about the origins of funds for the cars they drive – so, too, has grown the belief that the assets, incomes and liabilities of public officials ought to be monitored. In the past, in developed countries it was considered sufficient for cabinet ministers simply to disclose their investments to the head of government on an informal basis. In today’s somewhat more suspicious world, the head of government himself or herself is, as often as not, an object of suspicion. Something more rigorous seems to be called for, and with an independent agency to monitor the position if the returns were not to be open entirely to the public.

In many parts of the world, the argument is heard that one of the key instruments for maintaining integrity in the public service should be the periodic completion, by all those in positions of influence, of returns of their and their immediate family members’ incomes, assets and liabilities.

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20 This section draws on “Ethics and Governance”, Notes for a presentation by Howard R. Wilson, Ethics Counsellor to the Federal Government of Canada, made to the “II Global Forum: Democratic State and Governance in the XXI Century”, Brasilia, Brazil, 29 May 2000.

21 For both, see the Best Practice section on the Internet version of this Source Book: http://www.transparency.org.

22 For example, what of the case where a Cabinet minister makes a representation to a quasi-judicial body, an appointed tribunal, on behalf of a constituent? It could involve, e.g. an application for a broadcasting licence; a pensions appeal; or a claim for refugee status. A tribunal is part of the executive government, not a part of the judiciary. The Canadian Federal Ethics Counsellor pointed to a broader constitutional reason why this would be inappropriate. The members of the tribunal are appointed by Cabinet or by a Minister, and their integrity would be at risk were they to be receiving submissions from those responsible for giving the tribunal members their jobs. “Principles respecting government contacts: Backdoor communications: Principles respecting government contacts with judicial and quasi-judicial bodies”, Notes for a presentation by Howard R. Wilson, Ethics Counsellor, to the 15th Annual Administrative Law Seminar, Ottawa, Ontario, 2 April 1998.

23 Ibid.

Bulgarian parliament approves law to fight corruption among officials.

The parliament on 26 April approved a law that would make public the income, expenses, and property of senior state officials, AP reported, citing BTA.

Under the law, the Chamber of Accountancy, Bulgaria’s central auditing institution, will compile and produce records of the income and expenses of the country’s president, premier, ministers, deputies, senior government and judiciary officials. The records will be made public in the media.

Radio Free Europe, 27 April 2000
Although the disclosure of assets and income will, of course, not be accurately completed by those who are taking bribes, it is thought that the requirement that they formally record their financial positions, lays an important building block for any subsequent prosecution. It would, for example, preclude them from suggesting that any later wealth that had not been disclosed was, in fact, acquired legitimately.

Disclosure, the argument runs, should also extend to a certain post-service period, as a deterrent to the receipt of corrupt payments after retirement. Studies have suggested that it is unlikely that corrupt payments are made more than three years after a person has retired.

But does it work? Sri Lanka is one of a number of countries which has tried to combat corruption through the ordinary criminal law, but found it inadequate. As the Attorney-General of Sri Lanka told Commonwealth Law Ministers in 1990, this approach was found to be “insufficiently comprehensive.” Sri Lanka therefore made it compulsory for all public servants and all those in public office, including politicians, to make a declaration of assets upon assumption of office and from time to time thereafter to make fresh declarations. Once the declarations were made, they were available to the Attorney-General, or to any member of the public on payment of the requisite fee. The question of gifts and hospitality was also controlled.24

Sadly, if public confidence and newspaper headlines in Colombo are anything to go by, the problem is, if anything, more severe than it was ten years ago. It is true that monitoring can be intrusive, and affect the privacy of an individual, especially if it extends beyond public servants to members of their immediate household. There are traditionalists who argue against disclosure rules and prefer to rely on the Westminster tradition of informal, largely unwritten rules. These rules were believed to guide an elite in living up to high ethical standards - standards higher and more flexible than the demands of black-letter rules. However, all the evidence today points to the utter inadequacy of this informal system. Corruption today can only be reduced if it is made a high risk and a low profit undertaking. Informal rules do not work nor do they wash with the public.25

Having accepted the argument in favour of disclosure, several questions follow: To whom should disclosure be made? What matters should be included? How wide should coverage of members of the household be? How often should disclosures be made? What access should the media and members of the public have to these declarations? And, in the case of career civil servants, what levels of seniority must be required to submit to this process? There are no simple answers to any of these questions.

The tricky part of this process is not so much deciding on the categories of assets to be disclosed, and the categories of the officials who should be making disclosure, but rather on deciding the extent to which there should be public access to the declarations. The litmus test must be whatever is needed to achieve public peace of mind - not whatever is wanted by the noisiest of the opponents of disclosure. Nor are matters always as simple as they may seem. A Minister of Finance from Colombia has been quoted as saying that for a politician to make his or her wealth known to the public would be an open invitation to kidnappers to move in and claim the sums disclosed as a ransom.

In Australia, a system whereby officials make written disclosures to the head of their department annually has been seen as being effective. These are not made public. Similar disclosures

are managed by the ethics offices in Canada, referred to above. However, in most countries it has been the practice to introduce wholly sham arrangements for these sorts of disclosures.

In Nigeria, the Code of Conduct Commission was empowered, from 1979 onwards, to require the filing of returns by all public officials. However, they had neither the resources nor the legal powers to actually check the contents of any of these. As a consequence, throughout a prolonged period of looting by public officials, the only prosecutions ever mounted were against public officials who failed to file an annual return – not for filing a false one. In Tanzania, the sleight of the law draftsman’s hand was such that, although the legislation appeared to require the declaration of all property held by a public official, by the time all the exceptions to this requirement had been listed there was virtually nothing left. The legislation, enacted in the dying days of a particularly corrupt presidency, was clearly for public consumption only. During Yeltsin’s presidency in Russia there was a proposal that every single public official, from the President to the street cleaners, should make written declarations to the tax police, arguably the most corrupt arm of the Russian administration. The whole proposal was a logistical impossibility, and not surprisingly came to nothing.

As timid and ineffective are the new rules on disclosures of assets introduced in 1999 for the members of the in-coming European Commission. These were prepared following the abrupt departure of their predecessors amidst a cloud of allegations about nepotism and corruption. Carefully framed, the provision makes the Commissioners judges in their own cause – and they need only declare what they think might at some future time give rise to a conflict of interest. Full disclosure is not required. The resulting declarations displayed on the EU website make most of the Commissioners, and their spouses, look impoverished by any European standards, and it is doubtful whether these declarations would have helped avert the scandals that so engulfed their predecessors. The provision reads:

**Financial interests and assets**

Commissioners must declare any financial interest or asset which might create a conflict of interests in the performance of their duties. On taking up their duties, and whenever there is any change during the term of their office, they shall make, according to the model in the Annex, a declaration of such interests. The declaration shall include any holdings by the Commissioner’s spouse which might entail a conflict of interests. Declarations shall be scrutinised under the authority of the President and with due regard for Members’ areas of responsibility. These declarations shall be made public.

In today’s world, however, increasingly governments are introducing more meaningful public disclosures, Bulgaria and Thailand being just two. South Africa is a third, which has introduced a scheme for the monitoring of all parliamentarians (including Ministers). There, a compromise has been reached in an effort to meet legitimate claims to privacy. Certain disclosures are made openly and publicly; some are made as to the substance of the interest but the actual value is disclosed privately; and the interests of family members are disclosed, but in confidence. The argument for the last is that members of a parliamentarian’s family have a right to privacy, and it should be sufficient for the disclosure to be made on the record, but not on the public record.\(^{26}\)

The development of effective and fair regimes for the monitoring of the incomes, assets and liabilities of senior public officials will be followed closely by anti-corruption activists, for if they can be made to work – and there are obvious difficulties – then they could serve as a valuable tool in restraining abuses of office.

\(^{26}\) For details of the South African arrangements, see the Best Practice section of the Source Book on the TI web site: http://www.transparency.org.
Integrity testing

Unless a corrupt act is exposed, how do we know that an official is corrupt? And more importantly, how can we ensure that these officials are not promoted to positions where they can wreak even more damage? And, in handling allegations of corruption made against officials, how do we ensure that morale is not adversely affected? And that complainants – and innocent parties – are protected. Such allegations are easily made. If they are not based on truth, they can be morally damaging.

A further complication can be where those making allegations have a history of criminal involvement, especially where their complaints are made against the police. This gives such a complainant a low personal credibility. So how can reliable evidence (either of integrity or of corrupt tendencies) be produced, in ways consistent with the constitutional rights of officials as citizens, and in ways in which neither the complainant nor the person complained of is unduly “threatened”?

Integrity testing has now emerged as a particularly useful tool for cleaning up corrupt police forces – and for keeping them clean.

In various parts of the developed world, police corruption scandals have come in cycles. Rampant corruption has been exposed; clean-up measures have been implemented; corrupt police have been prosecuted or dismissed. But within a few years, a bout of fresh scandals has emerged. This, it is now realised, is because whole reform strategies have been misplaced. They have been founded on a belief that getting rid of “rotten apples” in the form of corrupt officers would be sufficient to contain the problem. It is now clear that it is not enough to “clean up” an area of corruption when problems show. Rather, systems must be developed which ensure that there will be no repetitions. It is in the essential field of follow-up and monitoring that integrity testing really comes into its own.

Integrity testing in New York City

Since 1994, the New York City Police Department (NYPD) has been practising a very intensive programme of integrity testing.27

Simply stated, this means that the Internal Affairs Bureau creates scenarios based upon known acts of police corruption, such as the theft of drugs and/or cash from a street level drug dealer, to test the integrity of NYPD officers. The tests are carefully monitored and recorded using audio and video electronic surveillance as well as the placement of numerous “witnesses” at or near the scene.

The NYPD strives to make the scenarios as realistic as possible and they are developed based upon extensive intelligence collection and analysis. All officers are aware that such a programme exists and that their own conduct may be subjected, from time to time, to such tests (although they are not told about the actual number of such tests which has produced a sense

27 The following section benefits from discussions with the London Metropolitan Police anti-corruption unit and with Kevin Ford, a Director of Goldman Sachs and formerly the Deputy Commissioner of Investigation for the City of New York (1994-98). He spent a total of more than 26 years investigating and prosecuting corruption in the United States.
that they are far more frequent than they are in practice).

Integrity tests are administered on both a targeted and a random basis. That is, certain tests are directed or “targeted” at specific officers who are suspected, usually based upon one or more allegations from members of the public, criminals or even other officers, of having committed corrupt acts.\(^{29}\)

In addition, certain tests are directed against officers selected at random based upon the knowledge that they are engaged in work which is susceptible to certain acts of theft or corruption. All of the tests are carefully planned to avoid entrapment, and no officer is “enticed” into committing an act of corruption. The scenario merely creates realistic circumstances in which an officer might choose to engage in a corrupt act.

More than one thousand five hundred (1500) integrity tests are administered each year among a force of 40,000 officers. The data produced by these tests provides reliable, empirical evidence of the rate of corruption among NYPD officers. The results have been both useful and instructive.

The rate of failure (i.e., when the subject engages in a corrupt act) in the “targeted” tests is significant. About 20 per cent of the officers tested on this basis fail the test, are prosecuted and removed from the force. This would seem to validate both the reliability of carefully analysed public complaints and allegations of police corruption and the efficacy of the specific integrity tests employed.

The introduction of the system has also seen the number of reportings of attempts to bribe police officers soar. Where previously offers of bribes may have been laughed off and not taken seriously, they now seem to be reported. No police officer can now know whether or not the offer made to him or her is an “integrity test”, and it is better to be safe and to report the incident than risk treating it as an irrelevance – let alone accept it.

By contrast with the comparatively high number who fail the “targeted” test, only about one per cent of the officers who are subjected to “random” tests fail. This would seem to support the long held view of senior NYPD management that the vast majority of its officers are not corrupt.

In addition to providing valuable empirical evidence about the rate of corruption among police officers, integrity testing has produced very useful lessons about the strengths and weaknesses of the supervision and control of police officers in the field. Such lessons are used to develop better training and more effective policies to insure

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\(^{28}\) There is a pattern of “innocent wives”, of marital “break-ups” and of “matrimonial property settlements” being made at about the time that scandals have broken, which at times seem designed to try to ensure that the ill-gotten gains are seen to be in the hands of an innocent third party, and therefore beyond recovery. Some legal systems will need to review their practices in this area as it is clearly open to abuse. It ought to be possible, or to be made possible, for the proceeds of corruption to be traced and recovered from anyone other than a bona fide purchaser for value.

\(^{29}\) In the United Kingdom, police unions initially objected to random testing on the basis that tests should only be conducted for “causes”. However, they changed their position when it was pointed out that to pass an integrity test should be a positive mark of honour and this would only be possible where the tests were random, and not only targeted at officers who were under suspicion. Otherwise, to have passed an integrity test would be an indication that a serious accusation of corruption had been made against an officer, but that he or she had happened to survive the subsequent “test”. Furthermore, the passing of an integrity test should be one sign (among others) of fitness for possible promotion.
that police services are provided effectively and honestly.\(^{30}\)

There can also be no question that integrity testing is a tremendous deterrent to corrupt activity. The NYPD has seen a dramatic rise in the number of reports by police officers themselves of bribe offers and other corrupt conduct by members of the public and/or other officers since the integrity-testing programme was initiated. Some of this rise is undoubtedly attributable to the fact that NYPD police officers are concerned that their actions may be subject to monitoring and that even the failure to report a corrupt incident could subject them to disciplinary action.

Since then the London Metropolitan Police has initiated a similar programme of integrity testing, and early reports indicate that they are obtaining some of the same benefits.

**Wider uses of integrity testing**

The concept need not be confined to police activities. In some countries hidden television cameras have been used in the ordinary process of criminal investigations to monitor the illicit activities being conducted in the chambers (or private offices) of judges, capturing corrupt transactions between judges and members of the legal profession. The “integrity testing” technique might therefore be developed in the context of judicial integrity testing. It would also seem to have potential for use in other areas where the public sector is engaged in direct transactions with members of the public, particularly in customs.

It would be interesting, too, to see the effect of this same approach in the area of international government procurement contracts. One could arrive at a situation where major international corporations bidding on government contracts in a developing country had to contend with an integrity testing programme, knowing that the payment of any bribe (or even the failure to report the solicitation of a bribe) would subject them to instant exposure as a corrupt company, and to public blacklisting.\(^{31}\) It would seem to be a simple matter to use integrity testing to cull out junior staff who are taking a large number of small bribes. Yet junior officials do not lie at the heart of the corruption problem. It will be more difficult to adapt the methodology to counter those senior officials who are involved in a small number of highly-lucrative transactions.

The possibilities the technique presents for the developing world have yet to be thoroughly explored. However, on face value there would seem to be considerable merit in establishing a system that is known to all officials (be they police, customs or elsewhere in the system), at the very least, as a means for tackling and reducing levels of petty corruption.

**Undercover investigations**

Undercover investigations are closely related to integrity testing, but lack the random element. These investigations are only looking for what is wrong, and not to establish what is going well, and who is honest.

There are a number of risks which must be minimised, and countries should have clear guidelines for these types of investigations. The risks can include:

\(^{30}\) In New Zealand, evidence of an abuse of authority on the part of the Police Commissioner (although not as a result of an integrity test) was being used the very next day in the training of police officers. It was this use that led to publicity of the events and the resignation of the Commissioner in January, 2000.

• harm to undercover employees;
• harm to private individuals and businesses, and the risk of liability of other losses being incurred by the government;\textsuperscript{32}
• invasion of privacy;
• the activity resulting in entrapment (i.e. creating an offence where one would otherwise have been unlikely to occur, such as offering a very large bribe); and
• the propriety of undercover employees or cooperating individuals actively participating in the activity being targeted by the operation.

It is usually thought advisable for those who are likely to be the prosecutor in a case – if there is one – to be involved in the oversight of the investigation. This can ensure that the evidence obtained is both relevant and admissible in court proceedings and of a quality which is likely to bring a conviction.\textsuperscript{33}

\textit{A cautionary note}

Integrity testing has to be developed and conducted very carefully. It is essential, for instance, that the temptation placed in the way of an official is not so great as to tempt even an honest person to succumb. The object is to “test” the integrity of the official, not to render an honest one corrupt through a process of entrapment. More than this, most countries have “agent provocateur” rules in their criminal codes, which act as a judicial check on what is permissible. These rules vary from jurisdiction to jurisdiction, but they obviously have to be borne in mind. It is important to ensure that the degree of temptation is not extreme.

That said, there is no doubt that the New York experience has shown that integrity testing, properly and fairly conducted, is potentially a highly effective weapon for the launching of a campaign to confront systemic corruption in many public agencies.

\textbf{Some indicators as to the effectiveness of an ethics policy in support of a national integrity system}

\textit{Ethics}

\begin{itemize}
\item Is the approach to promoting ethics characterised by participation so that a back-and-forth discussion takes place on professional ethics, with give-and-take between those most affected?
\item Are public service ethics depoliticised, in the sense that the raising of ethical standards is something to which all shades of legitimate political opinion can subscribe and in which they can participate meaningfully?
\item Are there codes of conduct in the public sector?
\item If so, are they built on values from the bottom up, not just from the top down? Are they aspirational in character?
\item Do regular ethics training sessions take place for public servants at all levels? Do these include role playing and the discussion of real-life situations (as opposed to simply being printed hand-outs and/or lectures)?
\end{itemize}

\textsuperscript{32} Paying a bribe to a planning commissioner to rezone land in an inappropriate way may be a means of identifying a corrupt local official, but the consequences for those living in the neighbourhood could be so severe as to make such an approach unwise.

\textsuperscript{33} Conversations with Denis Fitzgerald in Vilnius, Lithuania, during 1998/99 informed much of this and the preceding sections.
Monitoring of assets

- Are there arrangements for the regular monitoring of the assets, incomes and liabilities of public officials in decision-making positions? If so, are these seen as being effective by the general public?
- Are the life-styles of public officials seen by the public as being broadly in line with official salaries?

Integrity testing

- Has the introduction of integrity testing been considered?
- If it has not been introduced, are there valid reasons why it should not be?
Chapter 21

Conflict of Interest, Nepotism and Cronyism

The emergence of a new class of African businessmen who reject or are not keen to partake in the old system of cronyism, nepotism and self-dealing, and who demand openness, fair competition and clean business presents unprecedented opportunities. A key element of this new business constituency sees low corruption as essential to sustained economic growth.

E. Gyimah-Boadi

Given the interplay between the three concepts – conflict of interest, nepotism and cronyism are often rolled together in a single pithy phrase. This is particularly so when the crash of the “Asian Tigers” is being analysed.

What is a conflict of interest?

A conflict of interest arises when a person, as a public sector employee or official, is influenced by personal considerations when doing his or her job. Thus, decisions are made for the wrong reasons. Perceived conflicts of interests, even when the right decisions are being made, can be as damaging to the reputation of an organisation and erode public trust, as an actual conflict of interest. In some countries, the law makes it compulsory for public agencies to have Codes of Ethics which cover these matters. Most countries consider the matter so important, and so fundamental to good administration, that they have a specific conflict of interest law. This can provide that e.g. “a State officer or employee shall not act in his official capacity in any matter wherein he has a direct or indirect personal financial interest that might be expected to impair his objectivity or independence of judgment.”

When does a conflict of interest occur?

Everyone has personal interests and people to whom they are close. It is inevitable that, from time to time, these interests will come into conflict with their work decisions or actions. The following checklist can help individual public servants identify situations where a conflict of interest is likely to arise:

- What would I think if the positions were reversed: If I was one of those applying for a job or a promotion and one of the decision-
Thailand’s new constitutions outlaw conflicts of interest

In terms of substance, specific provisions are included requiring government officials to be politically impartial (Section 70, Chapter IV) and which prohibit a member of the House of Representatives from placing himself or herself in a conflict of interest situation.

Sect 110 (Chapter VI, Part 2) clearly states that a member of the House of Representatives shall not:

1. hold any position or have any duty in any State agency or State enterprise, or hold a position of member of a local assembly, local administrator or local government official or other political official other than Minister;
2. receive any concession from the State, a State agency or State enterprise, or become a partner to a contract of the nature of economic monopoly with the State, a State agency or State enterprise, or become a partner or shareholder in a partnership or company receiving such concession or becoming a party to the contract of that nature;
3. receive any special money or benefit from any State agency or State enterprise apart from that given by the state agency or State enterprise to other persons in the ordinary course of business.

Section 111 states: “A member of the House of Representatives shall not, through the status or position of member of the House of Representatives, interfere or intervene in the recruitment, appointment, reshuffle, transfer, promotion and elevation of the salary scale of a Government official holding a permanent position or receiving salary and not being a political official, an official or employee of a State or receiving salary and not being a political official holding a permanent position and elevation of the salary scale of a Government, appointment, reshuffle, transfer, promotion or position of member of the House of Representatives shall not, through the status or position of member of the House of Representatives, interfere or intervene in the recruitment, appointment, reshuffle, transfer, promotion and elevation of the salary scale of a Government, appointment, reshuffle, transfer, promotion or position of member of the House of Representatives.”

By virtue of section 128 this provision also applies to senators.

1997 Constitution of the Kingdom of Thailand

make-up makers was in the position I am in? Would I think the process was fair?

- Do I, a relative, a friend or an associate stand to gain or lose financially from the organisation’s decision or action in this matter?
- Do I, a relative, a friend or an associate stand to gain or lose my/our reputation because of the organisation’s decision or action?
- Have I contributed in a private capacity in any way to the matter being decided or acted upon?
- Have I received any benefit or hospitality from someone who stands to gain or lose from the organisation’s decision or action?
- Am I a member of any association, club or professional organisation, or do I have particular ties and affiliations with organisations or individuals who stand to gain or lose from the organisation’s consideration of the matter?
- Could there be any personal benefits for me in the future that could cast doubt on my objectivity?
- If I do participate in assessment or decision making, would I be worried if my colleagues and the public became aware of my association or connection?
- Would a fair and reasonable person perceive that I was influenced by personal interest in performing my public duty?
- Am I confident of my ability to act impartially and in the public interest?

What should happen if someone discloses a conflict of interest?

When someone considers they may have a conflict of interest, what should happen then? Clearly, some “conflicts” may be so minor as not to warrant anything more than their being recorded and made known to the others who are participating. For example, a member might hold a small number of shares in a company which are so few that their value could not possibly be affected by the outcome of the particular matter under review. In such a case the others involved in the process may feel comfortable with that person continuing to participate. Where they do not, however, the person should excuse himself or herself from further involvement. The following checklist can be used to assist in assessing a disclosed conflict of interest:

- Is all the relevant information available to ensure proper assessment?
- What is the nature of the relationship or association that could give rise to the conflict?
- Is legal advice needed?
- Is the matter one of great public interest? Is it controversial?
- Could the individual’s involvement in this matter cast doubt on his or her integrity?
- Could the individual’s involvement cast doubt on the organisation’s integrity?
- How would it look to a member of the public or to a potential contractor or supplier to the organisation?
- What is the best option to ensure impartiality and fairness and to protect the public interest?

Although it is important to deal with perceptions of conflicts of interests, neither of these checklists should be seen as automatically disqualifying relationships that no fair and reasonable person would see as giving rise to a conflict of interest.

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Other strategies for an organisation

Other strategies that an organisation can adopt to avoid compromising, or appearing to compromise, its integrity include:

- Keeping full and accurate records of its decision making processes;
- Ensuring openness by making accurate information about the organisation’s processes, decisions and actions publicly available;
- Where there is a risk of perceptions of conflict of interests, ensuring the technical/expert judgement of participants in the decision-making can be substantiated.

What is Nepotism?

Nepotism is a particular type of conflict of interest. Although the expression tends to be used more widely, it strictly applies to a situation in which a person uses his or her public power to obtain a favour – very often a job – for a member of his or her family.

The nepotism prohibition is not a ‘no-relatives’ standard, but it does prohibit a public servant from using or abusing his or her public position to get public jobs for family members. The objective is not to prevent families from working together, but to prevent the possibility that a public servant may show favouritism towards family members, in the exercise of discretionary authority on behalf of the public to hire qualified public employees. As a member of South Africa’s Ombudsman’s Office has said:

“A typical example might be where it is alleged that someone received an improper advantage in that he received, through the intervention of a family member who works for a certain department, contracts which that department puts out. It might be found that no criminal act is involved but unethical behaviour is. Nepotism is not yet classified as criminal in our law, yet it is clearly reprehensible and sufficiently unacceptable to require action on the part of the Ombudsman. Furthermore, the act of nepotism may be a red flag alerting the Ombudsman to the possibility of the official’s perceived need to surround him or herself with those considered to be more than ordinarily capable of being relied upon to act with ‘discretion’.”

Nepotism frequently occurs in the private sector, particularly in the context of promoting family members in family-owned corporations, where it is seen as legitimate. The impact of any preference is ultimately on the bottom line (profit) of the corporation, and the bottom line is family “property”.

In the public sector, however, it means that the most suitable candidate fails to get a post or a promotion, and the public as a whole suffer as a consequence – not to mention the person who, had there been no nepotism, would have won the position. Or it can mean that a less competitive bid wins a government contract at the cost of the tax payers’ money.

4 Chambers Murray Latin-English Dictionary, London, 1983. In a Report to the South African Parliament, the Public Protector (Ombudsman) observed that “the word “nepotism” is defined as favouritism shown to relatives or friends in conferring offices or privileges. It is derived from the word nepote which means nephew, apparently, originally with reference to Popes with illegitimate sons who were called “nephews” (The Concise Oxford Dictionary, ninth edition).”

5 Blanket bans on the hiring of relatives of existing staff members (as opposed to the hiring of relations of staff to positions where one relative is exercising supervision over another) can be held to be in breach of human rights guarantees against discrimination.

Nepotism can cause conflicts in loyalties within an organisation, particularly where one relative is placed in a direct supervisory position over another. Fellow employees are unlikely to feel comfortable with such a situation, and it is one which should be avoided. An example of a legal prohibition reads:

No persons related as father, mother, brother, sister, uncle, aunt, husband, wife, son, daughter, son-in-law, daughter-in-law, niece, or nephew may be placed in a direct supervisory-subordinate relationship.  

Even worse, of course, would be a judge sitting in a case in which he or she had a financial interest, or where a relation or good friend was involved. In a civil case, the parties may be asked (in a case of doubt) whether they are content with the judge hearing the case, after he or she has explained the potential conflict to them. In a criminal case the judge should simply declare his illegibility and not sit.

More marginal, perhaps, is the question which arises when the sons and daughters of judges appear in court before their parents. In some court systems this has caused no complications, but in others it has aroused fierce controversy and given rise to serious allegations of collusion and corruption.

Nepotism primarily involves one or more of the following:

• advocating or participating in, or causing the employment, appointment, reappointment, classification, reclassification, evaluation, promotion, transfer, or discipline of a close family member or domestic partner in a county position, or in an agency over which he or she exercises jurisdiction or control;

• participating in the determination of a close family member’s or domestic partner’s compensation;

• delegating any tasks relating to employment, appointment, reappointment, classification, reclassification, evaluation, promotion, transfer, or discipline of a close family member or domestic partner to a subordinate; and,

• supervising, directly or indirectly, a close family member or domestic partner, or delegating such supervision to a subordinate.

What is Cronyism?

Cronyism is a broader term than nepotism, and covers situations where preferences are given to friends and colleagues. In Britain, cronyism is captured in the expressions “old school tie” or “old boys club”.

Managing these conflicts

It is essential that organisations have clearly stated and well understood policies and procedures as well as written codes of conduct to deal with actual, potential and perceived conflicts of interests, including nepotism and cronyism.

7 State of Indiana, USA: applicable law IC 4-15-7-1.
8 See, for example, the criticism of Lord Hoffman sitting on an appeal in which an organisation with which he had connections, though not financial ones, was involved. Pinochet v R. (House of Lords, UK). Legal folklore also tells of a judge who sat in a case involving his son and who tried to overcome his conflict of interest and show his impartiality by fining his son twice the usual amount – but this, too, was hardly justice being seen to be done!
9 Board of Ethics, King County, USA.
However, the public interest requires that “only the best shall serve the state". There will be occasions where a relative is unquestionably the best qualified person for a particular post, and there must be a balancing of interests. For this reason, nepotism rules should not be an insuperable barrier and mean that well-qualified candidates are invariably disqualified. This was written into the following formulation by the City of Bristol (USA)\textsuperscript{11}:

The City of Bristol is interested in hiring able qualified applicants and will consider any person for employment when they meet qualifications. The City’s goal is to hire the most qualified applicant who is best suited for the position. Members of your family, members of your immediate household or your relatives will be considered for employment, except when:

- their position or your position would exercise supervisory, appointment, grievance adjustment, dismissal or disciplinary authority or influence,
- if you or the employee would audit, verify, receive or be entrusted with City money or City property,
- circumstances would exist making it foreseeable that the interest of the City and you or the employee would be in conflict or question,
- where the City must limit hiring to avoid a conflict of interest with customers, regulatory agencies, or others with whom the City conducts business, or
- where the City must limit hiring to avoid employment discrimination, personnel policy conflicts or related problems.

The City will not knowingly place you in a situation where you are supervised by a member of your family, your immediate household or your relative, or where favouritism, interpersonal conflict, lack of productivity, lack of efficiency, or other unsound employment conditions including those mentioned in this policy may develop. This policy shall not be retroactive, unless any of the above adverse conditions are being practised. In such a case, the City reserves the right to assign the affected employees to different operating levels, pay scales or locations.

Further, policies and procedures should address the need for and the means of disclosing and recording conflicts of interests and determining the appropriate action for minimising their impact on the integrity of an organisation’s operations.

**Avoiding nepotism and cronyism in the making of appointments\textsuperscript{12}**

The question of avoiding nepotism and cronyism in the awarding of public contracts is dealt with in the discussion of public procurement. There, such actions have created little short of mayhem in the management of the affairs of state.

Here, the discussion focuses on appointments to, and within, the public service, although the basic principles also hold good for much of the private sector.

\textsuperscript{11} City of Bristol, Tennessee, USA, Nepotism Policy, September 1996

\textsuperscript{12} This section draws on materials developed by the New South Wales Independent Commission Against Corruption (NSW ICAC), Sydney, Australia. Its assistance in the preparation of these and other materials is gratefully acknowledged.
• Impartiality in all recruitment and selection processes is essential for public sector employees to meet their public duty by acting ethically and in the public interest. Therefore, to avoid perceptions of bias or corruption, a potential applicant should have no direct involvement in any part of the recruitment process for a job for which they may be a candidate. This includes acting as the contact person for potential candidates, framing advertisements or preparing the standard practice for preferred applicants’ referees to be contacted. Each referee should be asked the same questions relating to the selection criteria and all the questions and responses should be documented.

It should be clear to all concerned precisely who is accountable for key decisions throughout the process, and what the values are that will be applied. This should be formally recorded, and all decisions and the reasons for those decisions during a selection process should be documented. As in all other aspects of sound administration, good record keeping increases accountability.

In societies where there are particular pressures from clans or a person’s extended family, it is advisable for those involved in the decision-making processes to formally certify that none of the applicants is a relative or is known to them, or else to excuse themselves from the process entirely.  

• Competition should be fostered. Advertisements should be framed to both adequately reflect the requirements of the job and to maximise the potential field of applicants. Generally, advertisements should be placed to attract the widest potential field possible. Selection criteria should also be reviewed before recruitment action is taken to ensure they adequately reflect the requirements of the position and attract the widest field of applicants.

Only in exceptional circumstances should truly competitive measures be bypassed. Where this is done, the decision-maker must be able to demonstrate clear and unambiguous reasons for appointing directly.

• Openness - The risk of corruption is minimised where there are policies and procedures that promote openness in dealing with conflicts of interests.

An administration that adopts a policy of openness for all its recruitment and selection decisions will avoid sending the wrong message to staff about preferred practices in recruitment and selection. This will also remove the justification for others to act contrary to stated recruitment practices and policies without valid reasons. Openness, however, does not mean breaching confidentiality.

• Integrity - Taking shortcuts can compromise the integrity of the recruitment process. To ensure integrity in recruitment and selection practices, an administration must have clearly stated sanctions for non-compliance with established policies and practices and be seen to use them when necessary.

A number of countries have found that having independent persons involved in the selection process can markedly enhance the integrity of the process. These independent members should not be known to the other committee members. If this is not possible, the extent of the independent member’s affiliation with other committee members should be recorded in writing before interviews are held and form part of the recruitment file.

13 Such a system was developed for a time in Zimbabwe in the early 1980s. This involved a standard form which each member of an appointments board was required to sign, and which included an undertaking that no approaches had been made to the member by any person in connection with the appointment under consideration.
• Appeals - Unsuccessful, but qualified applicants who consider that proper procedures have not been followed, should be able to appeal to an appropriate authority for an independent review of the process and its outcome.\textsuperscript{14}

Conflict of interest issues when staff leave the public sector\textsuperscript{15}

Managing the separation process when a public servant leaves the public service and enters the private sector has become increasingly important when addressing conflict of interest issues.

This is a consequence of several factors. Efficiency reforms have led to “downsizing” and contracting out of certain public sector functions to the private sector. In many administrations fixed term contract employment for senior public officials has been introduced. At the same time there has been a convergence of management practices between the public and the private sectors; the essential qualifications required to work in both are now similar. As a consequence there has been a growing tendency in many countries for public officials not to regard public sector employment as a long-term career, but to consider moving between the public and private sectors in the course of their working lives.

To ensure that public administrators are not tempted by the prospect of jobs after retirement, a sound approach to post public sector employment is required. This both reduces the risk of corruption, and renders much less sensitive any confidential information which the retiring public servant may have and which competing private sector interests may be keen to obtain for themselves.

The type of employment which may be cause for concern is one which has a close or sensitive link with the person’s former position as a public official. If a public official misuses his or her official position to obtain a personal career advantage, whether intentionally or innocently, it adversely affects public confidence in government administration.

There are, perhaps, four main areas in post separation employment that give rise to situations of conflict of interest and that merit consideration:

• Public officials who modify their conduct to improve their post separation employment prospects. Such conduct can involve favouring private interests over public duty; individual public officials “going soft” on their official responsibilities to further personal career interests; an individual acting partially by over-identifying with prospective employers’ interests; or outright bribery, where a public official solicits post separation employment in return for a corrupt performance of duties.

• Former public officials who improperly use confidential government information acquired during the course of official functions for personal benefit, or to benefit another person or organisation. It does not involve the information that becomes part of an individual’s personal skills and knowledge that can be legitimately used to gain other employment.

• Former public officials who seek to influence public officials. This involves former public officials pressuring ex-colleagues or subordinates to act partially by seeking to

\textsuperscript{14} For some case studies, see the NSW ICAC publication Best Practice, Best Person: Integrity in Public Sector Recruitment and Selection on the Commission’s website.
\textsuperscript{15} The discussion in this section is based on a dialogue between the NSW ICAC and public sector employers in that state. The full report is entitled Corruption Prevention Publications: Strategies for Managing Post Separation Employment Issues and may be accessed on the ICAC website.
influence their work or securing favours. This can happen in many ways, such as
through informal contact, ‘jumping the counter’ to obtain government information,
or lobbying.

• Re-employment or re-engagement of retired or redundant public officials. This may
involve:
  (a) senior public servants receiving generous redundancy compensation pay-outs
and re-entering the public service in non-executive positions while keeping
their full redundancy payments;
  (b) public officials leaving public employment only to be re-engaged as consult-
ants or contractors at higher rates of pay to perform essentially the same
work; and
  (c) public officials who decide to go into business and to bid for work from their
former employer after arranging their own redundancies.

The use of codes of conduct is not generally an effective solution in this particular problem
area. The codes cease to have effect when people leave office – the very moment when these
provisions become relevant. This leaves three generally accepted approaches available:

• Each government agency can develop specific post separation policies, relevant to the
degree of risk in this area and the likely impact of those policies on future careers,
e.g. of highly qualified professionals with limited fields in which to work.

• Employment contracts can have specific restrictions written into them. (However,
some countries limit the legal right to restrict future employment, and this can give
rise to difficulties.)

• Enacting legislation is a route that some countries have taken\textsuperscript{16}, but any legislation
should be careful to minimise restrictions and not to impose them on people
unnecessarily.

There is, of course, a need to ensure that restrictions on post separation employment are in
proportion to the risks posed. For this reason, it was the view of public sector managers in the
Australian state of New South Wales that the best approach is not one of blanket prohibitions,
but one of dealing with these matters on a case by case basis. They did not consider that the
level of risk to public sector integrity warranted the degree of hardship and inefficiency that
broadly targeted public sector restrictions may impose. Views, of course, may differ elsewhere,
but these are considerations to keep in mind.

Some legal approaches

Given the complexities of the situations which can arise, the enactment of all-embracing laws
in the area of conflict of interest can be something of a blunt instrument. Thus many coun-
tries have chosen to approach the more detailed aspects of the problem in a diffused, man-
agement-led fashion. In this approach, laws are enacted which deal with the upper levels of
government (for example, as in the 1997 Constitution of Thailand quoted above) and with
basic principles, while the design of appropriate policies is effectively delegated to agencies
and departments, each of which is expected to develop policies appropriate to their own situ-
ations and needs. Even in the implementation of these policies a large measure of common-

\textsuperscript{16} The Canadian legislation is in the Best Practice section on the
internet version of this Source Book: www.transparency.org.
sense is called for, and the services of an Ethics Office can be particularly valuable. Equally clearly, conflict of interest, cronyism and nepotism should be covered in appropriate codes of conduct.

By no means all countries have anti-nepotism laws. Where these are lacking, favouritism shown to a relative on the basis of relationship and other family member issues, tend to be dealt with by legal prohibitions such as those against unwarranted privilege, direct or indirect personal financial interest that might reasonably be expected to impair objectivity and independence of judgement, or the appearance of impropriety.

A typical example of a jurisdiction which does have a law reads:

IC 4-15-7-1, on Nepotism, “No person being related to any member of any state board or commission, or to the head of any state office or department or institution, as father, mother, brother, sister, uncle, aunt, a husband or wife, son or daughter, son-in-law or daughter-in-law, niece or nephew, shall be eligible to any position in any such state board, commission, office or department or institution, as the case may be, nor shall any such relative be entitled to received any compensation for his or her services out of any appropriation provided by law. However, this section shall not apply if such person has been employed in the same position in such office or department or institution for at least twelve (12) consecutive months immediately preceding the appointment of his relative as a board member or head of such office, department or institution. No persons related as father, mother, brother, sister, uncle, aunt, husband, wife, son, daughter, son-in-law, daughter-in-law, niece, or nephew may be placed in a direct supervisory-subordinate relationship.”

An example of such a law being explained in a policy manual is the following:

SUBJECT: PERSONNEL
EFFECTIVE: November 19, 1999

Section: 603.3 Nepotism

1. University system officers and employees shall comply with NDCC § 44-04-09, relating to nepotism. Accordingly, an officer or employee may not, except as permitted by law, serve in a supervisory capacity over, or enter into a personal services contract with, a member of the officer’s or employee’s immediate family.

2. When two or more members of the same immediate family are employed in the same department or institution, the head of the department or institution shall reassign responsibility for performance evaluations, salary recommendations, disciplinary actions and other supervisory authority as necessary in order to comply with NDCC § 44-04-09.

3. “Immediate family” means a parent (by birth or adoption), spouse, son or daughter (by birth or adoption), stepchild, brother or sister by whole or half-blood or adoption, brother-in-law or sister-in-law, or son-in-law or daughter-in-law. Upon offer and acceptance of employment, promotion or transfer to a different department, or upon change in family status implicating this policy, an employee must report in writing any actual or potential conflict with this policy to the employee’s department or institution human resource officer.

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17 Ethics Offices are discussed in the chapter on Public Service Ethics.
18 State of Nebraska, USA.
An example of a corporation’s policy on nepotism reads:

**Statements of Policy**

1. This section sets forth the policy regarding Employment of Relatives (Nepotism) for all permanent and temporary employees at [the corporation].
2. We are committed to hiring and retaining highly qualified persons. At the same time, we recognise that, despite their qualifications, hiring and retaining close relatives of present employees might raise serious questions regarding the objectivity - or appearance of objectivity – of work assignments, performance appraisals and employee treatment. Our employment policies, administered on a case-by-case basis, are based on balancing these concerns.

**Employment Rules**

1. No [corporation] employee may cause the employment, appointment, promotion, reassignment, transfer, or advancement of a family member to a position in which the employee supervises or manages. Family member means an individual who is the spouse, parent, brother, sister, child, mother-in-law, father-in-law, son-in-law, daughter-in-law, grandparent, or grandchild.
2. If an employee and family member work in the same office and one of them becomes a manager with supervisory influence over the other, as described above, a transfer will most likely be arranged. Also, if an employment arrangement may be perceived to violate our guidelines prohibiting family members from having supervisory influence over one another, a transfer may also be arranged. If a transfer is not feasible, the employees will have 30 days to decide which family member will stay employed. If the employees do not make the decision within the allotted period, [the corporation] will make the decision based upon the employment history and job performance of both employees, as well as [the corporation’s] needs.
3. If two current employees marry, or live together in a spousal relationship though unmarried, they may continue in employment, but are subject to the conditions described in this policy.
4. Any waiver requests to this policy must be submitted, in writing, through the supervising vice president to the Director of Human Resources for approval.20

**Some indicators as to the effectiveness of conflict of interest, nepotism and cronyism rules**

- Is there a national law setting out clearly principles which should govern a sound conflict of interest policy?
- Are public appointments made on merit?
- Do government agencies have clear policies in these areas? Are they widely understood by staff and by the public at large?
- Do officials have access to persons who can advise them on ethical issues such as those which arise in this area?
- Are there conflicts between modern governance in these areas and well-established cultural traditions? Is a mechanism provided for the resolution of these conflicts in ways which serve the public interest as a whole?
- Are there clear rules on post-separation employment which act as a check on corrupt practices?

20 The Citadel, Charleston, South Carolina, USA: http://www.citadel.edu/citadel/otherserv/hrres/pneptsm.html
Chapter 22

Public Procurement: Where the Public and Private Sectors Do Business

Residents of Nairobi are facing severe water rationing on top of 12-hour electricity blackouts on six days of the week because of drought. Small businesses cannot function. Residents even find they cannot pay their electricity bills because most post offices have no power. “Islands of power” continue, so that the President’s residence is unaffected, and when the President spoke on television electricity was supplied for the duration of his speech, but when he sat down it was turned off again. Officials blamed the drought, but many Kenyans believe that corruption lies at the root of the crisis. Diplomatic observers query why it is that Kenya should rely on hydro-electric power when it has always been susceptible to drought. “The answer lies in the lucrative business contracts for government officials generated by such large projects,” they say.

“Nairobi’s water is rationed in drought”, Daily Telegraph, 13 July 2000.

Mention the subject of corruption in government and most people will immediately think of bribes paid or received for the award of contracts for goods or services, or - to use the technical term - procurement.¹

Few activities create greater temptations or offer more opportunities for corruption than public sector procurement. Every level of government and every kind of government organisation purchases goods and services, often in quantities and monetary amounts that defy comprehension. Whether this is really the most common form of public corruption may be questionable but without doubt it is alarmingly widespread and almost certainly the most publicised. Hardly a day goes by without the revelation of another major scandal in public procurement somewhere in the world.

It has been the cause of countless dismissals of senior officials, and even the collapse of entire governments. It is the source of astronomical waste in public expenditure, estimated in some cases to run as high as 30 percent or more of total procurement costs. Regrettably, however, it is more talked about than acted upon.

To the non-specialist, the procurement procedures appear complicated, even mystifying. They are often manipulated in a variety of ways, and without great risk of detection. Some would-be corrupters, on either side of transac-


Public procurement - Private profit

The Hungarian government has issued a decree listing the companies from which institutions must make official purchases. “It’s tying our hands and telling us what to do,” remarked bitterly a project co-ordinator for a post-secondary academic institution on condition of anonymity. “We have no control over how money comes in and to whom it goes. We already have enough to do as it is in order to secure funding without being told where to spend our money.”

...What has upset many project co-ordinators and those in charge of procurement for their institutions is that no details were made public of how this list had been compiled. What is more, many of the companies listed are not regarded highly. They are seen by many as offering equipment that is overpriced and of poor quality.

Public procurement doesn’t have a good track record in Hungary. Computers and other equipment were usually purchased from a certain place not after a careful and comparative consideration of product, price, and service, but from where a spouse, family member, or relation of a colleague or friend happen to work....

One of the main reasons for this is because public procurement is traditionally seen by administrators as a shopping spree, with much of this equipment winding up in private hands...

John Horvath, Telepolis magazin der netzkultur, 22 May 1998
tions, often find ready and willing collaborators. Special care is needed, as the people doing the buying (either those carrying out the procurement process or those approving the decisions) are not concerned about protecting their own money, but are spending “government” money.

Such is the importance of public procurement that South Africa accorded it special attention in its 1994 Constitution. Section 187 provides that:

(1) The procurement of goods and services for any level of government shall be regulated by an Act of Parliament and provincial laws, which shall make provision for the appointment of independent and impartial tender boards to deal with such procurements.

(2) The tendering system referred to in subsection (1) shall be fair, public and competitive, and tender boards shall on request give reasons for their decisions to interested parties.

(3) No organ of state and no member of any organ of state or any other person shall improperly interfere with the decisions and operations of the tender boards.

(4) All decisions of any tender board shall be recorded.

Corruption in procurement is sometimes thought to be a phenomenon found only in developing countries with weak governments and poorly paid staffs. The “most developed” countries have amply demonstrated in recent years that corrupt procurement practices can become an integral part of their doing business. Nor is procurement corruption the exclusive domain of the buyer who controls the purse strings: it can just as easily be initiated by the supplier or contractor who makes an unsolicited offer. The real issue, of course, is what can be done about it?

**Principles of fair and efficient procurement**

*Procurement should be economical.* It should result in the best quality of goods and services for the price paid, or the lowest price for the acceptable quality of goods and services; not necessarily the lowest priced goods available; and, not necessarily the absolutely best quality available, but the best combination to meet the particular needs.

“Price” is usually “evaluated price” – meaning that additional factors such as operating costs, availability of spares, servicing facilities are taken into account.

*Contract award decisions should be fair and impartial.* Public funds should not be used to provide favours; standards and specifications must be non-discriminatory; suppliers and contractors should be selected on the basis of their qualifications and the merit of their offers; there should be equal treatment of all in terms of deadlines, confidentiality, and so on.

*The process should be transparent.* Procurement requirements, rules and decision-making criteria should be readily accessible to all potential suppliers and contractors, and preferably announced as part of the invitation to bid. The opening of bids should be public, and all decisions should be fully recorded in writing.

*The procurement process should be efficient.* The procurement rules should reflect the value and complexity of the items to be procured. Procedures for small value purchases should be simple and fast, but as purchase values and complexity increase, more time and more com-
plex rules will be required to ensure that principles are observed. “Decision making” for larger contracts may require committee and review processes, however bureaucratic interventions should be kept to a minimum.

Accountability is essential. Procedures should be systematic and dependable, and records explaining and justifying all decisions and actions, should be kept and maintained.

Competence and integrity in procurement encourages suppliers and contractors to make their best offers and this in turn leads to even better procurement performance. Purchasers who fail to meet high standards of accountability and fairness are quickly identified as poor partners with which to do business.

When a project is funded by an International Financial Institution (IFI), additional requirements usually apply:

- A fair chance must be given for all suppliers/contractors/consultants from all or some other countries, especially for suppliers and contractors: usually donor member countries;
- Suppliers/bidders or contractors from the host country may sometimes be entitled to a preference expressed as a percentage of the contract value (World Bank: 15% for goods contracts, 7.5% for works contract); this is usually announced in the bid invitation;
- For contractors, there is often a requirement of pre-qualification (explained further below);
- For consultants, there is usually a “short list” of those invited to bid (the list to be prepared by the purchaser, not the funding institution). This avoids expensive preparatory efforts by too many consultants when only one can get the contract. The “short list” must have geographic variety (usually no more than two from one country); there may be encouragement for foreign consultants to include consultants from the host country for at least part of the job; and there may also be encouragement for joint ventures involving foreign and local consultancy firms.

When a project is funded by the UN, the “purchaser” is, in most cases, the UN organisation itself. Although the UN basically applies similar procurement standards as those described above, it makes special efforts to procure from countries which are donor countries, but which in the past have received a disproportionately small share of UN procurement, or from countries in which the UN is holding large sums of non-convertible funds.

On the one hand there are principles that it make sense for every purchaser to apply; and on the other hand there are the specific requirements of financial institutions (especially the multilateral development banks) for procurement financed out of their loans and credits.

Clearly, bribery and corruption need not be a necessary part of doing business. Experience shows that much can be done to curb corrupt procurement practices if there is a desire and a will to do so. In order to understand how best to deal with corruption in procurement, it helps to know first how it is practised.2

How corruption poisons procurement

Contracts involve a purchaser and a seller. Each has many ways of corrupting the procurement process, and at any stage.

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2 A checklist prepared by the (Hong Kong) Independent Commission Against Corruption appears in the Best Practice compilation on the Internet version of this Source Book: www.transparency.org.
Before contracts are awarded, the purchaser can:
- tailor specifications to favour particular suppliers;
- restrict information about contracting opportunities;
- claim urgency as an excuse to award to a single contractor without competition;
- breach the confidentiality of suppliers’ offers;
- disqualify potential suppliers through improper prequalification; and
- take bribes.

At the same time, suppliers can:
- collude to fix bid prices;
- promote discriminatory technical standards;
- interfere improperly in the work of evaluators; and
- offer bribes.

The most direct approach is to contrive to have the contract awarded to the desired party through direct negotiations without any competition. Even in procurement systems which are based on competitive procedures, there are usually exceptions where direct negotiations are permitted - for example:

(a) in cases of extreme urgency because of disasters,
(b) in cases where national security is at risk,
(c) where additional needs arise and there is already an existing contract, or
(d) where there is only a single supplier in a position to meet a particular need.

Of course, not all single-sourced contracts are corrupt. In some instances, direct contract negotiations may well be the most appropriate course of action. However, if justifying circumstances are claimed that do not really exist, the reason is often to cover up and permit corruption.

Even if there is competition, it is still possible to tilt the outcome in the direction of a favoured supplier. If only a few know of the bidding opportunity, competition is reduced and the odds improve for the favoured party to win. One ploy is to publish the notification of bidding opportunities in the smallest, most obscure circulation source that satisfies the advertising requirements and hope that no one sees it. Cooperative bidders, of course, get firsthand information.

Bidder competition can be further restricted by establishing improper or unnecessary prequalification requirements - and then allowing only selected firms to bid. Again, prequalification, if carried out correctly, is a perfectly appropriate procedure for ensuring that bidders have the right experience and capabilities to carry out a contract’s requirements. However, if the standards and criteria for qualification are arbitrary or incorrect, they can become a mechanism for excluding competent but unwanted bidders.

Persistent but unwanted parties who manage to get past these hurdles can still be effectively eliminated by tailoring specifications to fit a particular supplier. Using the brand name and model number of the equipment from the preferred supplier is a bit too obvious, but the same results can be achieved by including specific dimensions, capacities and trivial design features that only the favoured supplier can meet. The inability and failure of competitors to be able to meet these features, which usually have no bearing on critical performance needs, are used as a ploy to reject their bids as being “non-responsive.”

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3 E.g. The only manufacturer of a unique piece of equipment; the only supplier with current stocks large enough to meet an urgent order, etc.
Competitive bidding for contracts can only work if the bids are kept confidential up until the prescribed time for determining the results. A simple way to predetermine the outcome is for the purchaser to breach the confidentiality of the bids, and give the prices to the preferred supplier to submit a lower figure. The mechanics are not difficult, especially if the bidders are not permitted to be present when the bids are opened.

The final opportunity to distort the outcome of competitive bidding is at the bid evaluation and comparison stage. Performed responsibly, this is an objective analysis of how each bid responds to the requirements of the bidding documents and a determination of which one is the best offer. If the intention is to steer the award to a favoured bidder, the evaluation process offers almost unlimited opportunities: if necessary, and unless prevented from doing so, evaluators can invent entirely new criteria for deciding what is “best”, and then apply them subjectively to get the “right” results. They are often aided in this process by issuing bidding documents that are deliberately vague and obscure about what requirements must be met and how selection decisions will be made.

These techniques are only a brief outline of some of the ways in which a purchaser is able to corrupt the procurement process.

It would be a mistake to think that the buyers are always the guilty parties: just as often, they are the ones being corrupted by the sellers, although perhaps without undue resistance.

Through bribes and other incentives, sellers can encourage buyers to take any of the actions described above. In addition, they may collude with other suppliers to decide which party will win a contract and then fix their prices accordingly – “bid rigging” – with an agreed payoff for the losers. This may be done without any knowledge of the buyer, and, if done cleverly, may never raise suspicions unless it occurs repeatedly. Even then, it may be hard to prove, let alone to punish.

Nor does the story end with the award of the contract, even though that is the stage most think of when corruption in procurement is discussed. Indeed, the most serious and costly forms of corruption may take place after the contract has been awarded, during the performance phase. It is then that the purchaser of the goods or services may:

- fail to enforce quality standards, quantities or other performance standards of the contract;
- divert delivered goods for resale or for private use; and
- demand other private benefits (trips, school tuition fees for children, gifts).

For his part, the unscrupulous contractor or supplier may:

- falsify qualities or standards certificates;
- over or under-invoice;
- pay bribes to contract supervisors.

If the sellers have paid bribes or have offered unrealistically low bid prices in order to win the contract, their opportunities to recover these costs arise during contract performance. Once again, the initiative may come from either side but, in order for it to succeed, corruption requires either active cooperation and complicity or negligence in the performance of duties by the other party.

Unscrupulous suppliers may substitute lower quality products than were originally required or offered in their bid. They may falsify the quantities of goods or services delivered when they
submit claims for payment, and pay more bribes to contract supervisors to induce them to overlook discrepancies. In addition to accepting bribes and failing to enforce quality and performance standards, buyers may divert delivered goods and services for their private use or for resale.4

Acceptance of gifts

Bribes can take the form of “gifts” and “gifts” can take many forms - a lunch, a ticket to a sports event, a Rolex watch, shares in a company, a holiday abroad, the school fees for a child. Some are acceptable; others are not.5

Throughout the developed world, the concept of the “hospitality tent” at major sporting functions has become big business. In the tents, more often than not, purchasing officers from the private and public sectors enjoy hospitality they cannot reciprocate, yet it is offered because it seems to make commercial sense to the hosts as a way of keeping on good terms with existing customers as well as to attract new business. Is this corrupt?

The answers can vary. Evaluations of such practices may turn on whether or not supervisors are in a position to monitor the consequences of their purchasing officers’ behaviour. Also relevant is whether a particular purchasing officer disqualifies him or herself in future situations where the firm in question is involved. Likewise, it will matter whether all the companies, likely to get the business, are acting in similar ways, so that no “obligation” to prefer one bidder over another is created. Furthermore, levels of hospitality which are expected and usual, and do not give rise to a sense of obligation, can vary considerably from one society to another.6

What is clearly unacceptable is where hospitality given is grossly excessive, such as all-expenses-paid holidays for a purchasing officer and spouse.7 Less obviously unacceptable are such things as lunches or festive presents; though even here, the acceptance of seemingly trivial gifts and hospitality can, over time, lead to situations where an official has unwittingly become ensnared by the giver.

The dividing line usually rests at the point where the gift places the recipient under some obligation to the gift-giver. This point will differ from one society to another, but it is usually defined in terms of cash (or hospitality) which must be reported as being in excess of a given figure. Attempts to make distinctions between “private” hospitality and “hospitality in a public capacity” generally give rise to controversy, and so are best avoided.8

Employment after holding public office

A crucial area of corruption - and one of growing concern - is the practice of corporations offering post-official employment to public servants with whom they have had official dealings.9

Clearly, regulations governing the post public sector employment of officials are important. It

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4 For a description of collusion and kickbacks occurring in spite of international competitive bidding procedures being used, see Robert Klitgaard, Controlling Corruption (University of California Press, 1988), p.136 ff.
5 A group of property developers in Britain was asked in confidence how they identified particular planning officials who would be prepared to take bribes. The answer was revealing. “We ask them out to lunch. If they are so stupid as to accept an offer of hospitality from a property developer, they will also be good for a bribe”, was the reply.
6 It is open for consideration whether traditional exchanges of gifts can or cannot be made.
7 Such holidays were provided, for example, in the early 1990s to purchasing staff at Britain’s Ministry of Defence. Large sums were spent on staff receiving holidays they could otherwise have only dreamed of.
8 Sample rules on gifts appear in the Best Practice compilation on the Internet version of this Source Book: www.transparency.org.
9 The question of post public sector employment is also discussed under the chapter on Conflict of Interests.
is neither practical nor sensible to insist that former public officials not engage in commercial activity after leaving office. However, whole networks of corruption can be constructed by outside suppliers, not only through cash bribes and expensive overseas holidays, but also through the promise to officials of lucrative employment when they retire.

It is tempting for a public official, blessed with rich work experience but a less than satisfactory pension, to accept employment with former suppliers. Often, there will be nothing wrong with such an arrangement. Indeed, it may be a constructive and useful way to ensure that valuable experience is not altogether lost to the community.

But it is susceptible to abuse. For example, an official who leaves the public service may take with him detailed knowledge of the government's impending contract bargaining strategy and the confidential discussions that may have been held with competitors of the official's new, post-retirement employer. In such an instance, neither the public interest nor the private sector is well served.

The promise of post-retirement employment can be used, too, by unscrupulous businesses as a "sweetener" to gain contracts and is one that will not show in any monitoring of assets or income. Although it is neither fair nor desirable to place an absolute ban on re-employment past retirement, some kinds of employment after leaving office are clearly contrary to the public interest. For example, a minister or highly-placed official may leave government service while negotiations for a large public works project are pending. Obviously it would be improper for such a person to immediately take up employment with one of the companies tendering or actively negotiating with the government.

What can be done to combat corruption in procurement?

The most powerful tool is public exposure. The media can play a critical role in creating public awareness of the problem and generating support for corrective actions. If the public is provided with the unpleasant and illegal details of corruption - who was involved, how much was paid, how much it cost them - and if it continues to hear about more and more cases, it is hard to imagine that the people will not come to demand reform.

Government officials around the world are discovering that taxpayers still think of public funds as their money and do not like to see it wasted. The public, of course, is particularly unhappy when it sees its money going into the pockets of others as a reward for corrupt practices. Once support is developed for the reform of procurement practices, the problem can be attacked from all sides. Usually the starting point will be the strengthening of the legal framework, beginning with an anti-corruption law that has real authority and effective sanctions.

One of the greatest anomalies in anti-corruption laws regarding public procurement is that most countries clearly prohibit bribery at home, but many are silent when their exporters are bribing abroad, or even reward it through tax write-offs.

At best, this is justified by a misguided notion of what is necessary for successful international business; at worst, it reflects a cynical and paternalistic view of what is good for others. Of all the major powers, only the United States has had a Foreign Corrupt Practices Act - since 1977 - that specifically makes it a crime under its domestic laws to bribe foreign officials to gain or

10 See the rules relating to conflict of interest and post-public sector employment in force in e.g. Canada in the Best Practice compilation on the Internet version of this Source Book: www.transparency.org.
maintain business, even when these events take place abroad. The OECD Convention, directed at outlawing international business corruption involving public officials, in essence aims to internationalise the US approach.\(^9\)

The next legal requirement is a sound and consistent framework establishing the basic principles and practices to be observed in public procurement.

This can take many forms, but there is increasing awareness of the advantages of having a unified Procurement Code, setting out clearly the basic principles, and supplementing this with more detailed rules and regulations within the implementing agencies. A number of countries are consolidating existing laws, which have often developed haphazardly over many years, into such a code.\(^1\)

In recent years, some of the largest multilateral development agencies have given support to the development of national procurement codes in the countries to which they are lending, and have fostered organisations to implement them. For years, each of these lending institutions has had its own procurement guidelines, which borrowers are required to follow when awarding contracts financed from their loans. These guidelines have, in fact, had a significant role in shaping what are now widely accepted as standards of good international procurement practice.

Unfortunately, the rules applied by the multilateral development agencies do not directly impact on corruption in procurement for projects financed through other sources. However, more recently, the development banks have recognised that it is in their member countries’ best interests to have national policies and procedures which apply these standards to other forms of procurement. Support from the banks includes both financial and technical assistance to countries that are willing to undertake procurement reforms, and associated institutional development.

**Transparency procedures**

Beyond the legal framework, the next defence against corruption is a set of open, transparent procedures and practices for conducting the procurement process itself. No one has yet found a better answer than supplier or contractor selection procedures based on real competition.

The complexity or simplicity of the procedures will depend on the value and nature of the goods or services being procured, but the elements are similar for all cases:

- describe clearly and fairly what is to be purchased;
- publicise the opportunity to make offers to supply;
- establish fair criteria for selection decision-making;
- receive offers (bids) from responsible suppliers;
- compare them and determine which is best, according to the predetermined rules for selection; and,
- award the contract to the selected bidder without requiring price reductions or other changes to the winning offer.

For small contracts, suppliers can be selected with very simple procedures that follow these principles. However, major contracts should be awarded following a formal competitive bidding process involving carefully prepared specifications, instructions to bidders and proposed

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12 Several models are available as a starting point: those developed by the GATT/World Trade Organization, the United Nations Committee on International Trade Law (UNCITRAL), and the European Union. There are also various national codes.
contracting conditions, all incorporated in the sets of bidding documents that are usually sold to interested parties.

Such documents may take months to prepare, and many more months may be needed for suppliers to prepare their bids and for the purchaser to evaluate them and choose the winner. These steps commonly take six months or more from start to finish. Procurement planning must be sure to take these time requirements into account, and start early enough to ensure that the goods and services will be ready when needed. Any pressures for "emergency" decisions should be avoided.

Opening of bids

One key to transparency and fairness is for the purchaser to open the bids at a designated time and place in the presence of all bidders or their representatives who wish to attend. A practice of public bid openings, where everyone hears who has submitted bids and what their prices are, reduces the risk that confidential bids will be leaked to others, overlooked, changed or manipulated.

Some authorities resist this form of public bid opening, arguing that the same results can be achieved by having bids opened by an official committee of the purchaser without bidders being present. Clearly this does not have the same advantages of perceived openness and fairness, especially since it is widely believed, and it is often the case, that a purchaser is a participant in corrupt practices.

Bid evaluation

Bid evaluation is one of the most difficult steps in the procurement process to carry out correctly and fairly. At the same time it is one of the easiest steps to manipulate if someone wants to tilt an award in the direction of a favoured supplier.

Evaluators can reject unwanted bids for trivial procedural matters - an erasure, failure to initial a page - or for deviations from specifications that they decide are significant. After bids are examined, if no one prevents them, evaluators may discover entirely new considerations that should be taken into account in choosing the winner. Or the bid evaluation criteria may be so subjective and so lacking in objective qualitative measures that the evaluators’ scoring can produce any result they wish.

All of this argues for requiring bid evaluation criteria to be spelled out clearly in bid documents and for an impartial review authority to check the reasonableness of the evaluators’ actions. The former allows bidders to raise objections in advance if they consider that the criteria are not appropriate, and the latter provides additional assurance that an evaluation has been conducted properly.

Delegations of authority

The principle of independent checks and audits is widely accepted as a way in which to detect and correct errors or deliberate manipulation, and it has an important place in public procurement. Unfortunately, it has also been used by some to create more opportunities for corruption. In particular, the delegation of authority for contract approvals is an area that warrants some discussion.

On-Line procurement advances

A few countries have moved unilaterally to enhance access to procurement information. Mexico, Korea and Chile have put substantial amounts of public procurement information on-line. Mexico’s CompraNet publishes procurement opportunities, bid documents, relevant laws and procedures, and results of the tenders online. Mexico expects to implement completely electronic procurement shortly. The government says it has had over 2 million "hits" to date and that CompraNet’s greater transparency and lowered cost have met with positive reviews. Chile has designed a similar information system with legislative approval of on-line tendering pending. The procurement systems can be found at:
www.compranet.gob.mx and
www.compraschile.cl.

TI-USA newsletter, January 2000
At face value, the rationale for delegation is convincing: low-level authorities can make decisions about very small purchases, but higher levels should review and approve these decisions for larger contracts. The larger the contract value, the higher should be the approving authority. A desk purchase can be approved by the purchasing agent; a computer must be approved by a director; a road must be approved by a Minister; and a dam may need to be approved by the President.

In some countries and organisations, this system works without any problems. In others, where contract awards are the main path to riches, it means a graduated payoff can be required at each step of the way: the higher the path leads, the larger the percentages demanded. Coincidentally, it also means that the larger the contract, the longer the delays in reaching any decision. All this points to a further essential element for reducing corruption: a well-trained, competent and honest body of civil servants to carry out procurement.

Establishing such a group requires a long-term effort, one that is never completely done. It requires regular training and re-training programmes; security in the knowledge that one’s job will not be lost if the winning contractor is not the one favoured by the Minister; and at least a level of pay that does not make it tempting to accept bribes to meet the bare necessities of a family. If a competent procurement cadre is developed, and there are a number of places where this has been achieved, the chain of approving authorities, with its accompanying delays, and other hazards can be reduced to a minimum.

Independent checks and audits

None of this is to suggest that all independent checks and audits should be eliminated; they have an important role. However, there are some countries where so many review and approval stages have been built into the process that the system is virtually paralysed. In some, it is impossible to award a major contract in less than two years from the time the bids are received.

Additional reforms

The list of actions suggested here is lengthy, but looks at the subject broadly, rather than examining such technical details as the standardisation of bidding documents and the establishment of simplified purchasing procedures for special kinds of procurement.

Public information programmes about procurement must address all parties - the officials who have responsibilities for procurement, the suppliers and contractors who are interested in competing for contracts, and the public at large. The messages should be:

• that the particular jurisdiction, whether a nation or one of its organisations, possesses clearly stated rules of good procurement practice which it intends to enforce rigorously;
• that violators of the rules will be prosecuted under the law;
• that officials who indulge in corrupt practices will be dismissed; and
• that bidders who break the rules will be fined, possibly jailed, and excluded from consideration for any future contracts, by being “blacklisted”.

13 Public authorities within the EU are provided with power to exclude contractors who have engaged in “unprofessional” conduct or criminal offences, from bidding for their business. They are empowered to exclude a company which has been convicted of an offence concerning its professional conduct in a judgment which has the force of res judicata (a legal determination); or which has been guilty of grave professional misconduct proven by any means which the contracting authorities can justify. (Article 29 of the Directive on Public Service Contracts, EC 92/50). Although this power has existed for some years, public authorities have seemed unwilling to exercise it. In 1993 three firms named in court as having paid £1.5 million in bribes to a Ministry of Defence official in the United Kingdom were still on that government’s list of approved tenderers two years later. (Times, 20 November 1995). Given such tacit acceptance of such conduct, a bribe becomes a risk-free investment from which a bidder can only win. A more aggressive approach has been adopted by the World Bank in recent times, with “blacklisted” firms being posted on its web site.
Whatever statements are made must then be backed up by appropriate actions.

It should be clear that none of the actions suggested here is sufficient by itself to curb corruption in procurement; however, a co-ordinated effort on all fronts will have dramatic effects. If anti-corruption laws are strengthened and publicised, if sound and proven procedures and good-quality documents are adopted, if procurement competence is increased by training and career development, and, if everyone knows that the government is serious about enforcing honest and fair practices, change will come.

It must be widely understood that corruption in public procurement will not be tolerated, and that guilty parties will be punished. Experience shows that although this approach may not stop all procurement corruption, it will definitely curtail the problem. Corrupt procurement is not inevitable. It can be cleaned up, and when it is, the public is the great beneficiary.

"Commissions" as a cover for corruption

As George Moody-Stuart has made clear, the greatest single cover for corruption in international procurement is the “commission” paid to a local agent. It is the agent’s task to land the contract. He or she is given sufficient funds to do this without the company in the exporting developed country knowing more than it absolutely has to about the details. This creates a comfortable wall of distance between the company and the act of corruption, and enables expressions of surprise, dismay and denial to be feigned should the unsavoury acts come to the surface. The process also enables local agents to keep for themselves whatever is left of the handsome commissions after the bribes have been paid. Much of it may have been originally intended for bribing decision-makers but none of it, of course, is accounted for. This gives rise to practices of kick-backs all along the line, with company sales staff effectively helping themselves to their employer’s money.

Obviously, if commissions can be rendered transparent it would have a major impact on this source of corruption.

In 1995, an unsuccessful attempt was made by the Parliament of Nepal to force disclosures in international procurement exercises. Much more promising have been the more recent efforts in Malaysia, Korea, Colombia, Argentina, Greece and Italy, where an “islands of integrity” approach has been developed by Transparency International.

Under this gradualist approach, the bidders for specific projects are being brought together and encouraged to enter into an “Anti-Bribery Pact” with the Government, and with each other. Each bidder agrees not to pay bribes and to disclose the commissions paid, and for its part, the Government pledges to take special efforts to ensure that the exercise is not tainted by corruption. In this way, the rules change for everyone and at the same time; and the players are, themselves, a part of that process of change. Once the selected contracts have been offered, the bidders continue to meet to monitor developments and build confidence for future exercises of a similar nature.

14 Consulting engineers in Tanzania are convinced that the local agents in their own country are the prime beneficiaries of the commissions, with much less going to decision-makers than overseas principals imagine. Discussions with FACEIT (Front Against Corrupt Elements in Tanzania), August 1995.

15 The Nepalese Parliament was reportedly informed by the country’s Ministry of Finance that such a move would be opposed by the World Bank and some bilateral lenders, and so the Bill was withdrawn. When Transparency International protested to the World Bank, it was informed that such was not the advice tendered by the World Bank from Washington. However, official sources in Nepal insist that such was the advice given to them, and that they acted on it only with reluctance. See TI Newsletter, September 1995; Kathmandu Post, 7 June 1995; advice provided from the World Bank headquarters to the World Bank office, Nepal of 27 February 1995. The World Bank has subsequently become much more supportive of these initiatives.
CONFRONTING CORRUPTION: THE ELEMENTS OF A NATIONAL INTEGRITY SYSTEM

Seoul’s “Integrity Pact”
In South Korea, the Seoul Metropolitan Government (SMG) has institutionalised the Integrity Pact concept developed by Transparency International, through a public-private partnership between the government and local NGOs. This was in response to a proposal from the People’s Solidarity for Participatory Democracy (PSPD), the country’s largest and most active civil society organisation.

Bidders submit the “Bidders’ Oath to Fulfil the Integrity Pact” along with their bid documentation, and a relevant SMG official submits the “Principal’s Oath”. The terms of the Pact are made a special condition of the contract, and the whole process is overseen by a team of five Integrity Pact Ombudsmen, appointed by the SMG on the recommendation of civil society organisations. There are three series of public hearings. Once the contract has been implemented, the process concludes with an evaluation undertaken jointly by the SMG and civil society. Those who report corruption are both guaranteed protection and given a reward. Key contents of the Integrity Pact include: (a) bidders refraining from offering bribes, gifts or entertainment to relevant SMG officials to influence a bid; (b) the SMG and its relevant officials pledging not to take bribes; (c) contracts being liable to termination and bidders liable to disqualification should there be a violation; and (d) no punitive action being taken against anyone who reports corruption from within their organisation.

The Pact was launched in three major project offices on 10 July 2000, and it will be extended to all offices in six months’ time, after any necessary fine-tuning.

Integrity Pact of Seoul, July 2000,
Seoul Metropolitan Government

A drawback has been opposition from some international lending institutions to any ad hoc arrangement for a specific project, the view being that the law must be changed across the board. This can present obstacles where a government has difficulty in persuading its Legislature to back serious anti-corruption efforts, and also where it may be beyond the capacity of the government machine to adequately police new arrangements, at least initially.

However, these problems have been largely overcome by making the Anti-Bribery Pact a voluntary one, and it has won encouraging levels of support from the private sector firms involved. Indeed, this may be the better approach.

Initial monitoring suggests that the innovation is working and that it is serving to significantly reduce corruption levels in the selected major contracts.16

Areas of action for the international lenders

Without doubt, the work of some international lending agencies has achieved much over the years, including the persuasion of reluctant governments to commit to public tender bid openings. Clearly, too, they could contribute even more significantly to anti-corruption reforms if they were to join in the push for transparency in commissions.

Although international lending agencies may be constrained, to some degree, by the constitutions which govern their operations, there are further steps which they may be able to take (some have already done so) to combat corruption. Transparency International argues that these measures should include:

- ensuring that development assistance addresses corruption within the context of good governance programmes;
- reviewing procurement guidelines to ensure that the agency has adequate powers to combat corruption when it occurs in agency-funded transactions;
- invoking, without hesitation, these powers when corruption is detected and taking the necessary steps to have consultants and suppliers blacklisted who are found to have been party to corruption;
- examining modalities whereby disputes with consultants and suppliers can be settled through international rather than national dispute resolution mechanisms. For example, US mechanisms have often supported damage awards which are out of line with those of other countries;
- adopting a more pro-active approach in contract oversight and project management. Such an approach would include random (but regular) in-depth audits undertaken collectively where other lenders are involved (to prevent double claims being made), and timely, professional follow-up procedures for handling complaints about corruption;
- considering the feasibility of placing staff responsible to the agency in key positions within vulnerable borrowing institutions, to ensure timely auditing, to continue monitoring operations, and to help develop the financial management skills of local officials;
- developing a dialogue with a core of consultants who are committed to working in

16 A detailed note on the process, including the documentation used, appears in the Best Practice compilation on the Internet version of this Source Book: www.transparency.org.
corruption-free environments and exploring their ideas on how such an environment can be brought about;

- reviewing internal checks on agency staff and consultants to ensure that any internal corruption is kept to a minimum (including monitoring the assets etc. of decision-makers and requiring disclosures of relationships with actual or potential suppliers; the agencies should “role model” the conduct they rightly expect from borrowers);

and,

- investigating complaints from unsuccessful tenderers through internal agency procedures, rather than referring complaints to the government or the borrower of funds.

Using contracts to counter corruption – A New York case history

For generations, New York City suffered from endemic corruption and racketeering in its construction industry. When state and federal prosecutors, working with the FBI and the New York Police Department, undertook a series of very successful criminal prosecutions against the Mafia during the 1980’s, virtually every indictment included allegations that the Mafia was profiteering from the City’s construction industry through extortion, bribery, bid rigging, labour racketeering, fraud and illegal cartels. Despite the success of these prosecutions and the imprisonment of dozens of Mafia bosses, corruption seemed to continue unabated.

The problem was so severe that the New York State Legislature refused to provide billions of dollars in funding to the City’s Board of Education for capital improvements to the City’s crumbling school infrastructure, the largest in the nation with more than 1100 schools serving more than one million school children. State officials were convinced that a major portion of any moneys allocated to the Board of Education would end up in the hands of the Mafia, or be wasted on bribes and fraud. In order to overcome this impasse, the City agreed to the creation of a new City agency, the School Construction Authority (SCA), with a very active and well funded office of Inspector General to ward off Mafia influence and to protect this critical investment in the school system. In 1989, the SCA was given $5 billion for new construction and major repairs; the budget of the Inspector General was just over $2 million annually (i.e. less than 0.05 per cent of the total).

The SCA’s Inspector General set about tackling the corruption and racketeering endemic in school construction. Significantly, this was accomplished without new legislation and without spending millions of taxpayer dollars on costly preventive measures. The Inspector General used existing state law and the concept of civil contract to accomplish its goals, together with simple monitoring and oversight measures to insure compliance. This effort succeeded beyond anyone’s expectations.

For example, the Inspector General redrafted the standard bidding and contract forms to include requirements for:

- full disclosure of ownership and performance history by each bidder (subcontractors as well as contractors);

- disclosure not only of details of previous arrests and convictions, but also of the payment of any bribes, participation in any frauds or bid rigging, and association with any organised crime figures;

17 Based on a paper by Toby Thacher, New York, prepared for a TI procurement workshop held in Abuja, Nigeria, 2000, and after discussions with Kevin Ford.
commitment to a code of business ethics by each bidder; and
• certification that all this information was true and correct, as well as an acknowledgement that it was submitted for the express purpose of inducing the SCA to award a contract.

The SCA’s standard contract included a rescission clause making the contract subject to termination by the SCA on severe terms if the contractor provided false information in its bidding documents. In practice, if a contractor was found to have lied in his bidding documents, or to have engaged in bribery or fraud during the execution of the contract, the contractor faced not only the termination of his contract, but also a legally enforceable requirement that he forfeit any and all moneys received for work already performed as liquidated damages. In addition, he and his company would be disqualified from receiving any SCA contracts in the future.

The information supplied by each contractor was subject to careful scrutiny by the Inspector General’s Office, which also performed extensive background checks. Whenever concerns arose, a bidder or contractor was summoned to the Inspector General’s Office to answer questions under oath. Any contractor who refused to cooperate was subject to the termination of his contracts and disqualification from future work. Any who lied under oath were, of course, liable to prosecution for perjury under the existing criminal law.

Contractors were required to make and maintain records regarding the work performed for the SCA for a period of three years after the completion of any contract. Such records were subject to audit and inspection by the SCA. If an audit disclosed over-pricing or overcharging of any nature and this exceeded one half of one-percent of the contract billings, then, in addition repaying the overcharges, the contractor had also to pay the reasonable costs of the audit.

Within the first five years of the SCA’s existence, several hundred contractors were barred from bidding on SCA contracts. Several dozen contracts were terminated, and contractors forfeited many millions of dollars as a result. All of this was achieved through the ordinary civil law process with very few court challenges. In addition, more than a dozen contractors were convicted of perjury as a result of false information supplied to the Inspector General.

More importantly, law enforcement officials intercepted conversations among Mafia members complaining that this process was effectively denying them access to SCA contracts. And best of all, the pool of available construction firms was increased substantially with the addition of law abiding and competent contractors who had formerly declined to bid on school construction work because of the prevalence of corruption and racketeering. This increased competition resulted in further reduced costs and even higher quality work overall.

Finally, in suitable cases, where a contractor was found to be unqualified to bid on SCA work or was liable to have his contracts terminated for reasons of integrity or character, the contractor was given an option. He could drop out of competition for SCA work, or he could agree to continue bidding on, and performing SCA work, subject to close monitoring and oversight by an Independent Private Sector Inspector General (IPSIG). The IPSIG, one of a number of qualified specialist firms with expertise in forensic accounting, law and investigation, would be selected by and report to the SCA’s Inspector General. However, all of the IPSIG’s fees and costs would be paid by the contractor.

The advantages in this approach are considerable, and the fact that the reforms have been shown to be effective is reason enough for others to look very closely at this “contract model” approach, and to consider adapting it to their own circumstances.
Questions of timing – and of the involvement of outsiders

The effects of normal anti-corruption legislation can usually be strengthened by adding two elements: the timing of actions and the involvement of “outsiders.”

Timing is crucial. Most public servants cannot say “yes,” but they can say “no,” “perhaps,” or nothing at all. Unreasonable postponement of important decisions is usually the most visible indicator that a corrupt deal is in the making. Procedures, therefore, should have strict calendars (which although strict, still recognise that procurement is often subject to frequent but legitimate delays). If the calendar is not respected, procedures should provide for an alternative decision-making process to make “blackmail by procrastination” unrewarding.

Since the partners to a corrupt deal are not protected by law, such deals can take longer to put together than regular business transactions. Dummy companies or money-laundering channels require time to set up. The arrangements must be both invisible and deniable. Delivery of the bribe and counter performance have to be closely linked, because mutual trust is usually absent. In some cases, officials want to build in elements of profits sharing. Sometimes two or three layers of “mediators” are built in to diminish the risk of exposure of the parties to the deal. Negotiations are delicate because, at any given moment, one of the parties may bail out and expose the whole scheme. All this takes time – time that an effective regulatory framework will not allow.

The role of “outsiders” is basically to hamper the creation of insider relationships of “trust” during the decision-making and implementation processes. Procedures should focus on keeping “outsiders” as “outsiders”, and not allowing them to be drawn into internal processes. Like external auditors, the “outsiders” should provide expertise combined with integrity.

Several measures are worthy of mention here:

- outsiders can assist in preparing bidding documentation (especially independent consultants with public reputations to defend);
- outsiders can participate in evaluation (adding an independent “audit” note of concurrence or otherwise);
- the contract-awarding committee should comprise persons of known integrity, not necessarily experts - with participation on the committees being a post of public honour and with the members’ own wealth being subjected to public scrutiny;
- the contract-awarding committee should not have advance knowledge of the particular projects for which their services may be needed. There should be more people on the list than will be needed at any one time. During the decision-making process the committee should be placed in a position where they cannot physically contact bidders individually (which may involve their remaining within a controlled environment, such as a hotel). If the committee cannot make a decision within a given time, a new session should be held with a committee of a different composition;
- the authority executing the works should not have a vote in the bid evaluation committee, but rather be available to the committee to answer questions: the same goes for any international consultant who prepares the bidding documentation;
- project implementation should be supervised by a consultant other than the one responsible for preparing the bid documentation;
- special procedures must close loopholes whereby artificially-created “cost over-runs” are met through the national budget, and not from a foreign loan;
- “cost over-runs” should only be accepted where supervision reports exist which iden-
tify the reasons for the higher costs at the time that these became evident. No ex post facto supervision reports should be accepted. This procedure makes the contractor responsible for timely reporting of the difficulties encountered.

None of this is a question of morality. It is directed towards undermining the reliability of corrupt deals, and maximising the risk to offenders of corrupt deals falling through or being disclosed.

**Some indicators for assessing integrity in public procurement**

- Are efforts made to streamline bureaucratic requirements to the minimum necessary?
- Are all major procurements advertised in ways which bring them to the attention of the private sector?
- Is the process as a whole transparent?
- Are integrity tests conducted on officers in sensitive posts?
- Are the assets, incomes and lifestyles of officers in sensitive posts monitored?
- Are the rules for public procurement laid down in documents accessible to the public?
- Do the rules require open competitive bidding? With access by anybody? Or only those invited to participate?
- Are invitations to bid advertised so that they become known to all interested bidders?
- Does competition actually take place, or is this requirement overridden frequently?
- Are procurement decisions made by a Central Tender Board? Or by each administrative unit?
- Are procurement decisions made public?
- Is there a procedure to request a review of procurement decisions?
- Is there an independent element in the procurement process as a means of ensuring compliance with laid down procedures?
- Can politicians over-rule the decisions of technical experts? If so, do they?
- Is the whole procurement process reasonably transparent? Or is it mostly confidential, and not subject to queries?
- Do the decision-makers (on procurement) stay in the same post for a long time, or are they rotated around?
- Are there any public audits of project performance as against original cost estimates? By internal officers? Or by an independent audit court?
- What happens when an Auditor-General or an audit court questions procurement decisions? Does the report go to Parliament? If so, what happens there?
Chapter 23

Good Financial Management

Just as it is impossible not to taste honey or poison that one may find at the tip of one’s tongue, so is it impossible for one dealing with government funds not to taste, at least a little bit, of the King’s wealth.

Kautilya (Prime Minister of a state in northern India)¹

One of the most powerful anti-corruption devices is the establishment of sound financial management practices, with timely and efficient accounting systems combined with punctual, professional reviews by internal and independent auditors. For this to be achieved, top-level management and political commitment to robust controls is vital – be it in the public or in the private sector. Such a commitment is a missing element in many countries today, and in both the public and the private sector.

Too often when fraud and corruption are considered, legal and prosecutorial mechanisms coupled with punitive measures come to mind. However, this is a simplistic approach, and all it accomplishes is a “feel good” glow when harsh laws and draconian penalties are enacted – even though, when one looks around the world, such actions have met with scant success.

One of the major purposes of a sound financial management system in business is to combat and disclose internal white collar crime. Some mistakenly think that the requirement of annual audits is all that is needed to do the trick. However, auditors’ hands are tied where inadequate accounting systems obscure the “audit trails” which should permit auditors to find irregularities and determine who is responsible for them.

Poor, disconnected and untimely accounting systems and disintegrated approaches to financial management provide opportunities for fraud. They also serve to cover it up, and, worse still, if fraud is discovered or reported, they make it impossible to identify and punish those responsible. On the other hand, clear and transparent paper trails not only serve to lead quickly to the guilty – and discharge any suspicion of the innocent – but they also provide a powerful deterrent.

The responsibility of a government is not, of course, limited to ensuring the proper financial management of central funds in accordance with standards and procedures. It extends, too, over the whole of the general government sector, including regions, districts and municipalities, as well as central government institutions. This task can be extremely difficult where there is a large degree of decentralisation accompanied by shortages in management and audit capacity, or where local democracy and subsidiarity are deeply embedded in political attitudes and cultures.

¹ Kautilya was writing more than two thousand years ago. Quoted in the Arthashastra (New Delhi: Penguin Books, 1991 at page 281).
The government should also ensure that strong financial management systems are introduced into agencies and organisations that are on the interface of the public and private sectors, and in public corporations that are subject to government regulation. In all of these, sound and reliable standards of governance are often badly needed. This can be complex in practice - in some countries, often thanks to Ministerial patronage, cronyism and nepotism - some agencies have almost developed an independent life of their own. Nevertheless, this only makes the need to bring them under control, and have them performing to acceptable standards, all the more compelling.

**What is good financial management?**

The objective of good financial management in the private sector is to provide information on which decision-makers can base wise and prudent judgements. In the public sector, however, financial management has been more concerned with compliance with legal mandates than it has been with providing inputs into decision-making. As a consequence, many key financial management decisions in the public sector tend to be based upon present political realities, rather than on a careful analysis of future outcomes.

It is this inevitable mixture of politics, law and public scrutiny that makes governmental financial management so much more difficult and complex than financial management in the business world. As a result, governmental financial management can be much more challenging than its private sector counterpart.

However, it is very important that the objectives for public sector financial management, including the financial management of internationally financed projects, be reformulated along the lines of private sector dynamics.

The scope of financial management responsibilities in government or business includes funding, custodial, analytical and reporting functions, among other elements. The following tasks characterise financial management in both sectors:

- Analysing and assessing the financial impact of management decision both prior and subsequent to implementation;
- Ensuring the necessary cash flow to finance planned activities and operations;
- Safeguarding resources through appropriate financial controls;
- Providing a financial framework for planning future activities and operations;
- Managing transaction processing systems which produce information for the control of planned activities and operations;
- Ensuring legality and regularity in the use of public funds;
- Paying attention to concepts of efficiency and effectiveness; and
- Reporting and interpreting the results of activities and operations measured in financial terms and thereafter ex post audit and evaluation.

As the demands on government have increased, and as new revenue sources have been exhausted, there has been a shift in emphasis among the financial management functions. Almost all nations are cash-poor in relation to the accepted demand made on their governments.

Hence, the spotlight of financial management is now on getting cash and managing it - for without cash, budgets cannot be executed. The existence of uncontrollable external economic influences, the questionable reliability of traditional revenue sources, and the insatiable demand for more and more public services, have all acted to bring cash management, including debt management, to the forefront of public sector interest. Yet, few countries have achieved ade-
quate or acceptable cash management systems. Even developed and industrialised countries have only recently begun to introduce new and improved approaches to cash management. The fragmentation of the central financial management functions is another characteristic peculiar to the public sector. Although businesses commonly designate qualified individuals as “chief financial officers”, few governments can identify their own key financial executives. The basic financial management functions are often divided among agencies which compete for influence, instead of collaborating for the common good.

All too often financial information is not available, is not timely, is not reliable and is not used in making the key decisions of government. A sense of financial management consciousness is sorely needed in the public sector. Each government needs an appropriate financial management philosophy, and a clear definition of the scope of the financial management function. Then it must assure competent professional financial management leadership for that function and provide adequate staffing and support.

As countries develop, their need for co-ordinated professional financial management increases. Thus, among the many needs of developing countries is the need to integrate basic financial management functions and responsibilities into a co-ordinated single system under competent professional leadership. This can be done without the extensive use of sophisticated computerised systems.

However, increasingly new microcomputer technology and decreasing costs are bringing integrated financial management systems within the reach of almost every national government. Individual government agencies, municipalities and other government units are likewise able to finance and maintain integrated agency-wide financial management systems which provide information useful and timely in making key managerial decisions, and also provide better accountability to higher levels of government and to all citizens.

**How good financial management counteracts corruption**

In general, a sound system of financial management and accounting inhibits, discloses and helps confirm and identify corrupt practices and their perpetrators in the following ways:

- It provides sound information for the various anti-corruption “watchdogs” – the Auditor-General (or Supreme Audit Institution), the Public Accounts Committee of the Parliament or Legislature, and the investigative and prosecutorial agencies;
- It forces a disciplined on-time approach to public activity and financial reporting. Sound financial management includes requirements that all transactions adhere to the same rules, eliminating the loopholes and alternative mechanisms which foster and cover up corrupt activities;
- It promotes the development of strong internal managerial controls. These include appropriate “audit trails” (requisites of sound financial management), which strengthen the probability that corrupt practices are discovered and identified as such, so permitting more prompt investigation;
- Managerial control is further strengthened with regards to oversight of discretionary power over resources and expenditures which are subject to a high degree of vulnerability. Typical areas of abuse are travel expenses, consulting contracts often subdivided to come below thresholds of review, particularly valuable or attractive and portable assets such as vehicles and portable computers, etc., not to mention the inevitable temptation for kickbacks posed by very large capital expenditure projects or acquisitions in large amounts;
- It facilitates audit. Professional and timely internal and independent audit which
focuses on highest risk areas is made possible where financial management, especially accounting systems are adequate; and

- It provides psychological control. It has been well established that fear of discovery and punishment is a prime factor in discouraging corrupt practices. The knowledge that internal managerial controls are in place, constantly being emphasised and improved, and subject to selective audit review, is a powerful disincentive to the potentially corrupt.

**An Integrated Financial Management System (IFMS)**

An Integrated Financial management System (IFMS) is a most important tool for good financial management. Some countries may lack the resources or the capacity to implement a full-blown IFMS, as described here. However, they should not be deterred from putting basic building blocks in place - such as modern accounting, cash management and internal audit systems – and so building up an IFMS on a step-by-step basis.

An IFMS consists of an interrelated set of sub-systems which plan, process, and report on resources, quantifying them in financial terms. The basic sub-systems normally are accounting, budgeting, cash management, debt management, and their related internal controls.

Other sub-systems sometimes included are collection and receivable management, acquisitions and supply management, information management, tax and customs administration, retirement or social security system administration, etc., together with their own related internal controls.

One of the most important elements of modern internal control in any government agency consists of an independent and professional internal audit function, which constitutes, together with the other internal controls, an integral part of an IFMS.

The principal factor which “integrates” the system is a common, single, reliable data base (or several interconnected data bases) to and from which all data expressed in financial terms flows. All of the sub-systems, and all users of financial data, must be required to participate in common data sharing. The validation, classification and recording of data is a function of the accounting sub-system which produces timely reports of classified data for use by all systems, and others who use financial information.

An IFMS can be developed regardless of a specific organisational structure, but it is likely to function better where the four basic sub-systems - accounting, budgeting, cash management, and debt management - are closely related within the organisational structure, under a common, professionally qualified financial management executive.

The failure to integrate financial management information traditionally results in:

- fragmented and unreliable data;
- duplications of data difficult to reconcile;
- failure to utilise actual results in the planning and budgeting processes;
- failure to fully and publicly report results of operations and financial conditions;
- hidden fiscal transactions, including contingent liabilities, quasi-fiscal transactions, government guarantees and the like, which can surface unexpectedly and cause major fiscal disruption; and,

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2 The World Bank has carried out pioneering work in codifying these kinds of transactions and encouraging countries to measure them and to publish information about them as part of regular budget documentation and government financial reports.
• undue emphasis on one of the component sub-systems (usually budgeting) which tends to dominate, duplicate and crowd out the others.

Components of an IFMS

The principal four components of an IFMS are accounting, budgeting, cash management and credit management. These component sub-systems of the IFMS must be permeated by sound internal managerial controls, imbedded and virtually invisible. Each of them must be supported by an environment of ethics and integrity, which must stem from the highest levels of government.

Accounting

The accounting sub-system is at the heart of the IFMS, because the other sub-systems depend on it for useful, timely and reliable data. If the accounting sub-system fails to produce timely data (which is all too frequently the case), the remaining sub-systems cannot function properly. In this case, substitute data is often sought, new ad hoc records are set up to produce indispensable data, and management decisions are made without the information necessary to apply good judgement. Thus, sound development and maintenance of the accounting sub-system are absolutely necessary to the success of the IFMS, and constitute a very important factor in its “integration”.

Among other things, the accounting system allows for:

• providing information to programme managers for use in making informed decisions;
• the substantiation of financial transactions based upon duly organised supporting documentation;
• making it possible to report results in financial terms, and where performance data is maintained, to report costs;
• control over current year budgetary execution as disbursements are made, and preparing future year budgets based upon actual expenditures made; and,
• providing periodic financial reporting and audit-ability, so lending credibility to governmental operations, and strengthening accountability.

It is very important that all accounting and budgeting classification or coding schemes be fully integrated into a single common classification which remains constant over a period of years. Changes in classifications from year to year impair the ability to compare data and to analyse trends.

For accounting purposes the chart of accounts should contemplate and integrate all accounts containing assets, liabilities, government equity, revenues and expenditures in such a manner so as to facilitate the preparation of financial statements in accordance with the accounting principles applicable in the public sector.3

The International Federation of Accountants' Public Sector Committee (IFAC/PSC) has issued a series of official pronouncements which discuss and interpret the applicability in the public sector of the International Accounting Standards and International Auditing Standards. These Standards were developed in a continuing effort to harmonise the professional standards of the accountancy profession across the world.

3 E.g. the IMF's Government Finance Statistics (GFS) system.
More recently the IFAC/PSC has issued accounting standards, based as closely as possible on the International Accounting Standards (IAS) applicable in the private sector, and which are specifically designed for all governments to follow. Although these pronouncements obviously cannot be binding on national governments, they do provide professional guidance which governments can use in determining which standards to recognise and apply.

For central government, a relatively uniform accounting system based upon a single general ledger is preferable. However, publicly owned corporations normally require sophisticated accounting systems designed according to the nature of their activities.

IFAC/PSC has generally stated that regardless of the nature of the enterprise (i.e. public or private), the international standards should apply. However it recognises that some government institutions have non-financial or social objectives, and may require different types of information, thus demanding certain modifications in the application of standards designed initially for the private sector.

There should be clear responsibility for the setting of accounting standards in the public sector, and for directing the accounting function throughout the government so as to assure the proper functioning of the accounting system and its adherence to professional standards.

Each public transaction, operation or event quantifiable in monetary terms, should be recorded in the accounting system and reported on. These should include funds outside or “off budget” as well as funds of third parties held in trust or agency, or which are in any other manner under the custody of public officials.

**Budgeting**

There is more literature available on public sector budgeting than all the other sub-systems of public sector financial management put together. Notwithstanding, it is extremely important to highlight the fact that budgeting must be integrated with the other financial management areas, even if it exists in an independent high level agency outside the finance ministry or treasury department.

Furthermore, budget execution data must be derived from the accounting system, and not separately recorded and processed. Many developing countries have lost control over their financial affairs due to the segregation of budgetary execution data from other financial data, and/or due to the maintenance of ad hoc budgetary execution records outside the accounting system. This aspect is probably the most problematic and most important area of integration in an IFMS.

No agency of the public sector should administer public funds outside the budget. Budgetary principles of universality and unity demand that all forecast revenues and all programmed expenditures of all types be accounted for within the government’s budget, including all transfers to other levels of government and autonomous entities or public corporations. This means that any use of “special” (or “earmarked”) revenues that are not paid into the general pool of revenues, should be minimised. So, too, should the use of supplementary budgets, which can distort the fiscal targets and ceilings set in the main budget.

The budgets of public corporations and substantially self-financed entities, need not be centralised within the budget of the state, but should be formally presented to the national budget authority.
The budgetary sub-system should be designed in such a simple and practical manner as to facilitate smooth operation in co-ordination with the other IFMS sub-systems. At the end of the day it is essential to ensure that the budget outturn for a year does not over-run by a substantial margin the figures set in the budget itself.

**Cash Management**

Cash management seeks to ensure that the achievement of budgeted goals and objectives are not frustrated by a lack of cash liquidity. This is the over-riding problem in governmental financial management today across the world. Meeting cash management objectives requires forecasting the combined flow of funds, and planning to meet financing needs, including short-term borrowing, as budgeted.

The scarcity of financial resources, in the face of growing demands for expenditure on public and social services, has compounded the problems posed by traditional practices of maintaining a multiplicity of idle funds languishing in numerous accounts, with various banks, and for multitudinous purposes. Thus, in the modern and efficient financial management system it is obligatory to unite all cash flows in what is sometimes called the “single bank account”. Every financial inflow from any source which results in public funds, should be deposited directly into the single cash depository account of the National Treasury. In the same way, all disbursements should be drawn against the same account, and based on authorisations which conform to the cash flow plan of the government.

To assure operational flexibility, public corporations and other substantially self-financed entities should not participate in the unified treasury system. However, like the central government, they should carefully plan and forecast their cash flows to avoid idle cash maintained in accounts, and to ensure that liabilities are met when they fall due.

**Credit Management**

As governments have incurred more and more indebtedness in recent decades, those institutions who market and underwrite public debt have assumed greater importance. There has been much emphasis on sound debt management since the developing world’s external debt crisis of the 1980’s, and the Asian crisis of the 1990’s.

There is certainly unanimity on the need to improve debt management. However, it is important not to lose sight of the fact that public debt is not, and cannot be, isolated from the rest of the financial management system. It has been the collapse of other financial management sub-systems, especially budgetary control, which have provided the motor for the phenomenal increase in public sector debt over the past two or three decades in almost every country.

Planning indebtedness is just as essential as planning cash flow, and many feel that these two sub-systems should be considered as one owing to their close relationship. Unfortunately, the present situation in nearly every country means that planning of indebtedness is indispensable to “balancing” the budget. Public sector borrowing has become the “finaglefactor” to budgetary stability. Public indebtedness is often the result of a political decision not to raise taxes or to reduce expenditures to affordable levels, or else as a periodic response to seasonal fluctuations in revenue and disbursement.

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4 In practice this will often be a series of linked accounts in respect of which information is continually available, and which can be pooled at the end of each day.

5 Finagle = to get or achieve by trickery, craftiness or persuasion; to use trickery or craftiness (on a person). Collins English Dictionary Millennium Edition.
At the national level, any financing operation based on committing the credit of the state should be channelled through the agency responsible for public credit. This will assure the oversight and proper recording of the transaction as a liability to new debt, and the planning of the corresponding inflow of cash.

Internal Control

Internal control, which may be considered synonymous with managerial control, is of great importance within each of the IFMS sub-systems. Appropriate internal control measures should be integrated within each sub-system in such a manner that their application becomes an integral part of the normal processing of transactions. Internal control comprises all the co-ordinated measures and methods adopted within an entity to:

- safeguard its resources;
- promote the reliability and accuracy of financial and operational information;
- promote efficiency in operations;
- stimulate adherence to legal provisions, policies and standards; and to
- achieve programmed goals and objectives.

Internal control measures and procedures should be installed in each entity and integrated within its administrative operating procedures. Pre-control and approval of administrative operations and transactions are performed by the same employees who are responsible for the ordinary flow of operations. No organisational unit should be specifically set up to perform pre-control functions (sometimes erroneously called “pre-audit”). Internal audit, an important part of internal control, should be exclusively dedicated to “post audit”, which includes a review and evaluation of the internal controls in place.

Internal audit is a part of the internal control structure dedicated to measuring and evaluating the other internal controls. Thus, internal auditors must be professionally independent and should not participate in, or approve, administrative acts or financial transactions. Internal auditors should observe the Standards for the Professional Practice of Internal Auditing promulgated by the Institute of Internal Auditors.

The particular anti-corruption advantages of IFMS

Integrated Financial Management Systems is a term first coined in the 1970’s to describe the systems developed after the near financial collapse and impending bankruptcy of both the City and State of New York. The financial management inadequacies and fragmentation highlighted by this collapse led to the development of high-technology tools for use in the fight against financial corruption, no less than against mismanagement.

IFMS counters corruption in a variety of ways:

- **Multi-level budgetary control** – Budgetary review and control may be exercised at the operational, supervisory, and central levels, based on varying thresholds of activity or other factors. Automatic flash points may be built in to call attention to deviations in areas of high vulnerability as well as to repetitive inappropriate budgetary manipulations.

- **Avoidance of cash flow “surprises”** – Actual cash flows can be monitored at appropriate levels through effective and timely cash management practices. Cash flow forecasts can be prepared, and the typical cash unavailability “surprises” which can provoke draconian austerity crises, can be avoided.

- **Spotlighting weaknesses** – “Exception reports” can be designed to provide prompt
feedback to managers in areas where weaknesses are becoming a trend.

- **Internal validation of integrity** – Validation of the integrity of transaction data is provided for at each key step during the processing of transactions, and is duly documented electronically both to avoid delay in internal controls execution and to limit external controls to those of a “post-audit” function.

- **Accounting control over resources** – The accounting system maintains general ledger controls overall valuable resources which are independent of operations. Governments in developing countries have generally been unable (both for internal purposes and project accountability) to control or account for important assets such as receivables, land, buildings, other fixed assets, vehicles, computer equipment, software, and all types of electronic equipment. An absence of such controls facilitates the “looting” of state resources by officials and their friends.

- **Transparency in public reporting** – Complete and timely financial reports are available for disclosure to legislative oversight committees, and to the public at large, as provided for in most national constitutions but without such a system are rarely produced. Once transparency is achieved it is hard for officials to cover up “bad news” when it is contained in financial reports. The tendency to ensure that “bad news” was never published has been a major reason why disciplined and transparent financial reporting has long been avoided.

- **Consistent enforcement of criteria** – The consistent policies and practices required by an IFMS, such as the use of a single unique Treasury bank account for all public funds and the prohibition of “off budget” expenditures, inhibit corrupt and collusive practices. Where they persist, they are entered into the accounting system of non-acceptable transactions, unless responsible officials are dismissed - which, in itself, results in disclosures of corrupt practices.

- **Decentralisation of authority and accountability** – Each unit or activity chief is in charge of financial planning and transaction authorisation within his or her specific area of responsibility. Original transaction entry is at the operational level, while managerial reports are about execution of their own financial transactions, but, all are subject to either on-line or very timely supervision and oversight from higher levels.

- **Reduced need for accountants** – Typical and repetitive transactions are pre-coded according to type and amount entered, and therefore appropriate accounting entries are made automatically, reducing the need for accounting expertise while at the same time reducing the possibility that transaction data can be manipulated.

- **Immediate audit capability** – Timely entry of transaction data at the point of origin permits internal auditors to pay immediate attention to areas and activities identified as being vulnerable to corrupt practices.

- **Disclosure through comparability** – High speed computer comparison of data available in comparable form (such as double salaried staff, retirees also drawing remuneration, duplicate payments to suppliers, etc.), can quickly and efficiently disclose patterns of corrupt practices and their overall impact.

- **Computer assisted audit** – Computer audit software can be utilised in selecting transactions for audit sampling, greatly reducing audit costs and enabling increased attention to be given to areas which demand more frequent audit coverage. This is an anti-corruption measure which hitherto has traditionally been unavailable in developing countries.

**Advantages of IFMS to the honest**

Finally, there is the constant need to protect honest employees from the shadow of suspicion. This invariably falls over the honest no less than the dishonest whenever corruption is sus-
pected or discovered, and whether it involves international projects or public sector activities in general.

IFMS can provide a safety net for dedicated and honest public servants in several ways:

- **It limits the number of people placed under suspicion** – Sound financial management and internal control systems, especially IFMS, establish clear lines of responsibility and authority. They provide for appropriate segregation of incompatible duties, and for clear audit trails which limit the number of individuals placed under suspicion during investigations when irregularities are discovered.

- **It ensures appropriate documentation** – Appropriate paper-based and electronic documentation of evidence supporting financial flows ensure the eventual exoneration of the honest, even when they may have been placed temporarily under suspicion.

- **It discourages pressure and executive override** – Direct pressure from higher officials or peers may be applied on financial staff or others to breach established standards and policies which inhibit corrupt practices. Pressures may also be indirect, such as when financial staff are urged to do nothing but where duty demands action or the reporting of irregularities. In this situation, honest staff soon leave public service if they try to resist such pressure. IFMS provides a disciplined environment and a series of specific control practices which diminish the force of corrupt official and/or peer pressure on financial staff. This in turn makes their professional career service more personally rewarding, instead of being an unbearable burden on their consciences.

Much more could be written about the role of the internal system of managerial controls accompanied by sound financial management systems. The Treadway Commission and the Committee of Sponsoring Organizations (COSO) in the United States, the Cadbury Commission in the United Kingdom, and the Criteria of Control Board in Canada have all focused considerable private sector attention on the importance of internal control for the safeguard of resources and assets.

The concept of internal control, which originated in the accountancy profession during the 1940’s, has been expanded to encompass the entire scope of managerial responsibility. It forms today’s generally accepted framework for safeguarding and maximising the use of limited resources in the private sector, and it should do the same in the public sector. Fraud and corruption can never be wholly eliminated, but they can be substantially counteracted, and diminished by the use of sound financial management policies and practices.

### The IMF Code of Good Practices on Fiscal Transparency

“Fiscal transparency” can be defined as “openness” to the public as to the structure and functions of government, fiscal policy intentions, public sector accounts, and fiscal projections. Greater transparency in these areas can lead to better informed public debate, better functioning markets, and stronger accountability of governments for the design and implementation of fiscal policy. Certainly, awareness of government policies and intentions can only be for the benefit of all – be they major economic decision-makers or ordinary citizens. Just as certainly, accountability is sharply restricted where such openness does not exist.

To promote “fiscal transparency”, in 1998 the International Monetary Fund (IMF) adopted a Code of Good Practices on Fiscal Transparency. The Code is a highly significant development...
because it represents the first coherent attempt to set a framework of international standards for the conduct of fiscal policy. Government activities relating to taxation and spending are at the core of the exercise of power. They have a major impact on economic growth and equity, and are a major source of opportunities for corruption.

The Code itself is based on four interlocking high level principles, which provide its framework. These four general principles reflect the essential elements of fiscal transparency. Collectively, they have the potential to create a self-sustaining fiscal integrity system.

The general principles are:

- **Clarity of Roles and Responsibilities** – roles and responsibilities within government, and between different levels of government, should be clearly defined, with a clear boundary being drawn between the government and the private sector;

- **Public Availability of Information** – governments should commit themselves to providing the public with comprehensive and timely information on a full range of fiscal and quasi-fiscal activities;

- **Open Budget Preparation, Execution and Reporting** – the complete budget process, from preparation through to reporting and auditing, should be conducted in an open and public manner; and

- **Independent Assurances of Integrity** – there should be mechanisms independent of the Executive to scrutinise and ensure the integrity of fiscal information.

Each high level principle stands at the pinnacle of a hierarchy of specific principles, which in turn are underpinned by good fiscal transparency practices.

Although the Code is aimed primarily at improving governance and fiscal performance across the board, and is not directed specifically at reducing corrupt practices, critically important elements of the Code do bear directly on the incidence and severity of corruption.

Of particular relevance in this regard are the following provisions:

1.1.2 Government involvement in the rest of the economy (e.g. through regulation and equity ownership) should be conducted in an open and public manner on the basis of clear rules and procedures, which are applied in a non-discriminatory manner.

1.2.1 Fiscal management should be governed by comprehensive laws and administrative rules applying to budgetary and extra-budgetary activities. Any commitment or expenditure of government funds should have a legal authority.

1.2.2 Taxes, duties, fees and charges should have an explicit legal basis. Tax laws and regulations should be easily accessible and understandable, and clear criteria should guide any administrative discretion in their application.

1.2.3 Ethical standards of behaviour for public servants should be clear and well-publicised.

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7 The full text of the Code is reproduced in the Best Practice documentation on the web site version of this Source Book (http://www.transparency.org), and it also appears on the IMF web site.
2.1.3 Statements should be published with the annual budget giving a description of the nature and fiscal significance of contingent liabilities, tax expenditures, and quasi-fiscal activities.

2.1.4 The central government should regularly publish information on the level and composition of its debt and financial assets. Government transactions should be on a gross basis, distinguishing revenue, expenditure and financing, and classifying expenditures on an economic and functional basis. In addition expenditure should be classified by administrative category. Data on extra-budgetary operations should be similarly classified. Budget data should be presented in a way that allows international comparisons.

3.2.4 The annual budget and final accounts should include a statement of the accounting basis (i.e. cash or accrual) and standards used in the preparation and presentation of budget data.

3.3.1 A comprehensive, integrated accounting system should be established. It should provide a reliable basis for assessing payment arrears.

3.3.2 Procedures for procurement and employment should be standardised and accessible to all interested parties.

3.3.3 Budget execution should be internally audited, and audit procedures should be open to review.

3.4.2 Timely, comprehensive, audited final accounts of budget operations, together with full information on extra-budgetary accounts, should be presented to the legislature.

4.1.1 A national audit body, or equivalent organisation, should be appointed by the legislature, with the responsibility to provide timely reports to the legislature and public on the financial integrity of government accounts.

Each of the general principles, specific principles, and good practices, is explained in a manual on fiscal transparency which is being made available on the IMF web site. The manual aims to provide practical guidance for the implementation of the Code, by illustrating in more detail the specific minimum practices which are required of countries if they are to adhere to the Code. The manual also provides information and examples of best practice from a number of countries.

The good practices on which the Code is based are conceived, not so much as “best practices”, but as practices which all 182 IMF member countries should adopt.

At present it is likely that no country fully meets every standard in the Code, although a small number of industrial countries are close to doing so. For developing countries and countries in transition, however, a significant number of the practices are not yet established.

All countries are encouraged to adopt the good practices proposed in the Code, but the emphasis is on voluntary implementation. For those countries starting from a low base, in terms of the principles and practices required in the Code, the manual will identify a sub-set of good practices which could form the core focus for initial efforts to increase fiscal transparency.
A “fiscal transparency questionnaire”, and a “self evaluation report” have also been prepared, as tools to assist assessments of the level of compliance of individual countries with the Code. The questionnaire is cross-referenced to the manual, and both follow the structure of the Code. The expectation is that country authorities will be interested in completing the questionnaire and self evaluation report as a basis for developing country-specific plans to increase fiscal transparency, and to identify their need for technical assistance in this area.8

It is open to anyone, however, to use the fiscal transparency framework developed by the IMF to conduct their own assessments of compliance of individual countries with the Code. Indeed, while the IMF will promote transparency in connection with its surveillance and technical assistance activities, the impact of the Code will be greatest if a wide range of official and non-governmental organisations and interests use the Code to assess country performance and to bring pressure to bear for improvements.

For TI National Chapters, the Code and supporting material represent a potentially very useful means of assessing the integrity of their countries’ fiscal management systems. The transparency code brings together the interconnections between the different elements of a high integrity fiscal system, including many that bear directly on corruption. It therefore has value in that it provides a framework for developing coherent proposals for reform in individual countries, focusing on the highest priority areas where there is the potential for creating a self-reinforcing and self-sustaining financial integrity system.

What has been done so far?

In recent years the bilateral and International Financing Institutions (IFI’s) have taken measures to improve financial management both in their own projects (the enclave approach) and in national governments. However, a strengthening of financial management limited only to projects may shield the donor from embarrassment, but does not protect the recipient government and its people from fraud and waste. Funds are fungible, and national funds may easily be taken and replaced by those from international sources, leaving no record of any irregularity in the books of the project or their “audited” financial statements.

A much stronger position than hitherto has been taken by the World Bank since its President, Jim Wolfensohn, speaking at the 1996 World Bank – IMF Annual Meeting, said:

“...Let’s not mince words: we need to deal with the cancer of corruption. In country after country, it is the people who are demanding action on this issue. They know that corruption diverts resources from the poor to the rich, increases the cost of running businesses, distorts public expenditures, and deters foreign investors...it is a major barrier to sound and equitable development...

...Working with our partners, the Bank Group will help any of our member countries to implement national programmes that discourage corrupt practices. And we will support international efforts to fight corruption...

...Let me emphasise that the Bank Group will not tolerate corruption in the programmes that we support.”

8 The United Kingdom is the first country to complete and publish an assessment of its level of compliance with the Code (see http://www.hm-treasury.gov.uk/pub/html/docs/ftpccs.html).
During the past decade the World Bank and other IFI’s have greatly increased the number of country projects in which they are assisting in the modernisation and professionalisation of financial management and auditing systems at the national level.\(^9\)

However, donor “enclave-based” efforts to strengthen project accountability have, for the most part, entirely ignored the importance of sound internal controls, and the role of internal auditors in reviewing and reporting on them. Most donors have been extremely lax in enforcing their own accountability requirements, and have chosen austerity over accountability where accountability oversight staffing has been involved. Most donor agencies, other than USAID, have failed to exploit the resources available through the accountancy profession, which has long played a leadership role in this area of the private sector.

In summary, although the IFI’s have begun to face up to the problem of financial corruption in several ways, there is much more that can be achieved.

Some indicators of the effectiveness of the Financial Management System as an integrity pillar

- Does the financial management system provide complete and timely financial reports for Legislative and Parliamentary oversight committees, and to the public at large?
- Does the system promote the development of strong internal managerial controls? Does it create appropriate “audit trails”, so facilitating prompt and effective investigation and prosecution?
- Is the complete budget process, from preparation through to reporting and auditing, conducted in an open and public manner?
- Are steps being taken to develop and improve tools for good financial management?
- Is there clear responsibility for the setting of accounting standards in the public sector, and for directing the accounting function throughout government so as to ensure the proper functioning of the accounting system and its adherence to professional standards?
- Does the financial management system in practice provide timely, reliable and comprehensive information for public decision making?
- Do agencies of government administer public funds outside the budget?

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\(^9\) In the Latin America and Caribbean (LAC) Region, the IFI’s have established or are planning Integrated Financial Management Systems (IFMS) in Bolivia, Argentina, Guatemala, Honduras, Ecuador, Colombia, Venezuela, Nicaragua, El Salvador, Panama and the Dominican Republic. The Spanish government has been collaborating with Uruguay and Costa Rica. USAID was a pioneer in the field, with its Model Integrated Financial Management System for Latin America (SIMAFAL). This has served as the conceptual model for all such systems. Other regions have begun to adopt the IFMS approach, including Ghana and Vietnam. Many of the projects have not fully developed the concept of internal managerial control as a management responsibility, nor have they included the strengthening of the internal audit function. Most heads of LAC Supreme Audit Institutions are not qualified auditors, but rather are political appointees, a factor which severely limits the effectiveness of their organisations in contributing to anti-corruption efforts. (For example, a Comptroller General of Ecuador (a vocal supporter of anti-corruption efforts) who had already resigned, was impeached and formally discharged from office by the Congress owing to corruption allegations involving his review of confidential expenditures authorised by the Vice President. More recently a highly controversial appointment was made in Peru, following the tarnished election of President Fujimori in 2000.)
The Right to Information – Information, Public Awareness and Public Records

Knowledge is the true organ of sight, not the eyes.

Panchantantra (c. 5th century)

The public, it is often said, has a “right to know.” But does it have such a right? And if it does, should it? If it should, how would such a right be recognised, protected and given effect?

The argument in favour of the public’s right to know was succinctly put forth by James Madison, one of America’s constitutional fathers: “A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy, or perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power that knowledge brings.”

The fight for information takes place between the public who want it and those in power who do not want them to have it. Madison’s philosophy suggests:

- that secrecy impedes the political education of a community so that electoral choices are not fully informed;
- that opportunities for individuals to respond meaningfully to political initiatives are blunted; and,
- that a political climate is generated in which the citizen views government not with responsibility and trust, but with malevolence and distrust.

According to another observer, “Just as the middle and working classes sought power and were given the vote, so today’s professional classes seek power and are given information. The process is called participation, and the result is called accountability.” The fight is, in many ways, a costly and unnecessary one for there are clear advantages to all concerned for an administration being open with information:

- a better informed public can better participate in the democratic process;
- Parliament, press and public must be able properly to follow and scrutinise the actions of government and secrecy is a major impediment to this accountability;
- public servants take important decisions which affect many people, and to be accountable the administration must provide greater flows of information about what they are doing;

2 In opposition, Labour were strong supporters of wide-ranging rights to public information, only to reverse their stand abruptly on being elected into government.
better information flows produce more effective government and help towards the more flexible development of policy; and,

public cooperation with the government will be enhanced by more information being available.4

The right to know is linked inextricably to accountability, the central goal of any democratic system of government. Informed judgement and appraisal by public, press and Parliament alike is a difficult, even fruitless task if government activities and the decision-making process are obscured from public scrutiny. Where secrecy prevails, major resource commitments can be incurred, effectively closing the door to any future review and re-thinking in the light of an informed public debate. There are, of course, other mechanisms within government such as the Legislature, the courts or an Ombudsman that act as a check on the abuse of power by an Executive. However, for these to be effective, their own access to information is an imperative. Given that such a right is worthy of recognition, how best can it be guaranteed?

A Freedom of Information Act?

If governments simply behaved in an open fashion, making information widely available to the public and affected individuals, there would be no problem. This approach has been tried, most recently in the U.K., but has generally failed to make much headway. Providing information that reflects well on an administration presents little difficulty; however, when the information reflects the opposite, the voluntary approach is most vulnerable. Where the release of information is a matter of discretion, be it of politicians or of administrators, the temptation to give themselves the benefit of the doubt when the information is embarrassing is too often irresistible.5

That should not stop a government from making a concerted effort to encourage attitudinal changes which would relax restrictions on disclosures and increase the accessibility of decision-makers to press and public alike. But the problem with administrative guidelines will always be that, at the end of the day, discretion remains. And discretion, it is argued, runs counter to the fundamental principle of natural justice - for the administration is the judge in its own cause. The same argument stipulates that any dispute over access to information should be determined by a third, and neutral party.

Legislation is therefore the only alternative.6 Hence the demand (which seems to be growing) for Freedom of Information (FOI) legislation.7 Not only can FOI legislation establish a right of review (e.g., by the Ombudsman), it can also establish practices which must be observed, even by those least willing to do so. It can reverse the usual presumption in favour of secrecy. Citizens are given the legal right of access to government documents without having to first prove special interest, and the burden of justifying non-disclosure falls on the government administration. Time limits within which the administration must respond to requests can be imposed and an unimpeachable right of access to certain categories of information can be conferred.8

5 See, for example, “Ministers to defer truth on nuclear power stations”, Guardian (UK), 21 August 1995: Sensitive financial information about the country’s oldest and dirtiest nuclear reactors is being kept under wraps by the Government until it has privatised the industry’s more modern atomic power stations.
7 The issue is not one only for developed countries as is shown by the list of countries given in the footnote above which have such legislation.
8 In many countries the principles of freedom of expression and free exchange of information are enshrined in the Constitution. However specific freedom of information legislation is required for citizens to exercise these rights. For example, the 1996 Constitution of South Africa contains provisions for the rights of access to information, requiring that these rights be enabled by specific legislation. The Promotion of Access to Information Act was passed in February 2000.
The earliest legislation governing open records dates back to 1776 in Sweden. That country’s present law is unique in that it is one of the four laws which together comprise the Constitution of the country. The law outlines the main principles of the open records scheme, but the detailed provisions are contained in an ordinary Act, the Secrecy Law. Similar, but nowhere near as rigorous systems were introduced in Norway and Denmark in 1970, and in Finland in 1971. Since then, the concept of open records legislation has started to emulate the Office of Ombudsman, and spread across the world.

Access to information legislation provides citizens with a statutory “right to know”. In practice the specific provisions of the legislation will determine the extent to which citizens are able to obtain access to records of government activities. The intention is to provide access whenever disclosure is in the public interest, not for public officials to use the legislation as a secrecy law.

Key points of freedom of information laws are that they:

- confer legal rights on citizens that can be enforced;
- seek to change the culture of secrecy within the civil service;
- provide access to records not just information;
- define exemptions; and,
- define rights of appeal.

FOI laws can, but do not have to, be applied retrospectively. Many countries have adopted a non-retrospective law, adopting a progressive “rolling back” approach. This means that only records created after the date the Act becomes effective fall under the jurisdiction of the Act. Others, such as, South Africa, have adopted fully retrospective Acts.

Freedom of information legislation not only establishes the citizen’s legal right of access to information, it also confers on government the obligation to facilitate access. The law should include provisions requiring agencies subject to the law to publish information relating to:

- their structure, functions and operations;
- the classes of records held by the body;
- arrangements for access; and,
- the internal procedures used by the agency in the conduct of its business.

Monitoring the extent of compliance with these requirements should be part of the remit of the Ombudsman. Governments should be required to actively inform citizens of the rights conferred on them by FOI and privacy legislation. This will demonstrate their real commitment to openness and increased accountability.

The coverage of FOI legislation varies a great deal, and it needs to be determined by the structure of government in each country. In Ireland, as in some other countries, the Freedom of Information Act applies not only to the Executive but also to local government, companies that are more than 50 per cent state-owned and even to the records of private companies that relate to government contracts (the last particularly useful for a civil society group keen to monitor a public procurement exercise). The rationale behind applying the provisions to a state-owned enterprise is that they are owned by the public and the “hybrid” nature of their

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10 For example, in the USA the Federal FOI Act applies only to the Executive branch of the Federal government. Most US States supplement the Federal law with their own “sunshine” laws, applying the principles of FOI to state and local government.
functions as well as their role in the community justify their inclusion in an FOI Act.

Whatever the scope of FOI legislation, there will always be arguments against it and for exemptions from it. The most frequent argument against FOI legislation is one of cost and efficiency. Some claim that it diverts resources and staff away from programmes that could actually make an impact on public welfare. Yet, one must consider the costs of failing to provide such legislation, a cost which includes a lack of accountability and transparency, and a fertile environment for corruption.

Defence, national security, foreign relations, law enforcement and personal privacy and, to some extent, the internal deliberative processes of a government agency may each have legitimate claims to protection or exemption from FOI legislation. The Swedish Secrecy Law, for example, has as many as 250 exemptions, some defined by their relation to protected interests and others by reference to categories of documents. Many exemptions contain a time limitation on the life of the exemption, which varies from as much as 70 years to as little as two. Still other exemptions protect documents only until a particular event has occurred. The options are many and varied, but the issue appears to be one of growing importance among civil societies around the world.

It is also said that too much openness can impede free and frank exchanges of opinion between public officials and that officials cannot operate efficiently in a "goldfish bowl". This argument has some merit, but it must be weighed against the alternative: secrecy and a lack of accountability. Can anyone seriously argue that decision-making which is not accountable is better than decision-making which is subject to scrutiny?

Perhaps the best known (but by no means the only) example of FOI legislation is that of the United States, where it has been demonstrated repeatedly that reports, studies and other documents can be taken into the public domain by the press and by community groups, to the benefit of public knowledge and understanding.

Equally remarkable as a demonstration of openness was the action of the Ugandan government in November, 1995, when it invited ten journalists to participate in (and report on) a meeting of its anti-corruption stakeholders, including senior law enforcement officials. The meeting was held to review progress in implementing the country’s national integrity action plan. The exchanges at the meeting were open and crisp, and the eventual reporting was considerable and highly favourable.

Extraordinary, too, was the decision by President Mkapa of Tanzania to release the Warioba Commission Report to the press in 1996 before even his own cabinet had been able to see it – some of whom were named in the report as being complicit in corrupt activities. President Mkapa’s decision was the more remarkable as his country had had, ever since independence in 1961, a culture of official secrecy and this was the first report of any significance to be shared with the public.11

The international reach of freedom of information laws, too, can be considerable. Information

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11 Efforts to build a more open bureaucratic culture continue there, with discussions being facilitated by the International Records Management Trust (IRMT) and the TI national chapter. A similar initiative is being undertaken in Ghana.
censored in the United Kingdom, on occasion, becomes available to British investigative jour-
nalists when the same material is held in the United States and has been made
accessible to the public at large there by the more liberal FOI United States
legislation. Increasingly, investigative journalists are learning where to go to
find the information that governments in their own countries deny them.

Requests for copies of official records

Under Freedom of Information laws, citizens usually have the right to request
copies of documents, not just the information contained within them. Many
FOI laws provide that, where only a part of the information may be disclosed,
agencies should provide a copy of the document excluding the exempt information rather than
refusing access. Fees may be charged for the provision of information but they should not
be prohibitive.\textsuperscript{13}

Time limits for responding to requests and appeals should be set out in the FOI Act. These are
legally binding. Failure to comply with these should constitute grounds for appeal to the Act’s
external monitors, as would the imposition of unreasonable charges.

Appeals against refusals

The right of appeal against adverse decisions is one of the most important provisions of a Free-
dom of Information Act. It protects against undue secrecy by providing a mechanism for the
independent review of decisions to deny people access to the information they need. Without
this safeguard, the effectiveness of any FOI is minimised.

Instances which should not constitute valid reasons for withholding information include that
its release:

- would be inconvenient to the Minister (or the department);
- might show the department in a bad light;
- might embarrass the Minister politically;
- is no business of the requester; or that it
- might be misunderstood by the requester, or by the media, (in which case the wisest
course may be to provide an explanation or material that will set the information in
its proper context).\textsuperscript{14}

Where access to records is denied, the agency concerned should be required by law to notify
the requester of the reasons for the refusal, citing the particular exemption that covers the
records requested. Sanctions for non-compliance should be provided for in the legislation.

Most Freedom of Information legislation provides for a two-stage appeal:

- Firstly, there is an administrative appeal to the agency concerned. Citizens can lodge
  an appeal requiring the agency to conduct an internal review of the decision. This
  appeal should be heard at a more senior level than the original decision-maker. If the
denial of access is upheld it is important that citizens then have recourse to an inde-
pendent arbitrator.
- The second stage of the appeal process under most existing FOI Acts is to an inde-

\textsuperscript{12} The Fiscal Responsibility Act is included in the Best Practice
section on the Internet version of this Source Book:
\textsuperscript{13} For example, in the USA many government bodies provide a
great deal of information for free. Charges are then levied for
more lengthy requests but these are usually restricted to cost-
recovery.
\textsuperscript{14} Guidance notes, NZ State Services Commission, 1995.
pendent Ombudsman or Information Commissioner.\textsuperscript{15}  
- Alternatively the second appeal stage could be for judicial review, as is the case in the US.\textsuperscript{16} In some countries the Ombudsman could also take the complaint to the courts.

In New Zealand, the Danks Committee,\textsuperscript{17} when assessing the options, came down firmly on the side of the Ombudsman being the sole appeal authority:  
We believe that ... there are convincing reasons not to give the courts ultimate authority in such a matter. The system we favour involves the weighing of broad considerations and the balancing of competing public interests against one another, and against individual interests. If the general power to determine finally whether there should be access to official information was given to the courts, they would have to rule on matters with strong policy and political implications.\textsuperscript{18}

Whichever option is chosen, the key point is that there is an effective provision for impartial review of contested decisions.

Privacy laws

FOI legislation should not, of course, be used to invade the personal privacy of individuals. Some Freedom of Information legislation incorporates provisions for accessing records held on individuals. Alternatively this aspect may be dealt with separately in a Privacy Act, as is the planned approach in South Africa.

Unlike the access provisions for general records of government in many FOI laws, access to personal records held by government agencies is usually applied retrospectively. However legislation is structured, access to personal information is usually restricted to records held within a system of filing and are retrievable by a form of personal identifier, i.e. personal name, number, index, etc. Along with the right of access to these personal files, a key provision of privacy laws is that citizens have the right to have incorrect information amended.\textsuperscript{19}

A culture of secrecy

Many countries that have introduced FOI are seeking to replace the “culture of secrecy” that prevails within their public service with a “culture of openness”. FOI laws are intended to promote accountability and transparency in government by making the process of government decision-making more open. Although some records may legitimately be exempt from disclosure, exemptions should be applied narrowly as the intention is to make disclosure the rule, rather than the exception.

It is one thing to confer a right to information on a citizen, and quite another when it comes to servicing his or her requests. In Tanzania, for example, every citizen has the right to be

\textsuperscript{15} In New Zealand, the relevant Cabinet Minister was empowered to overturn a recommendation of the Ombudsman in respect of any particular request for information. A pattern quickly developed of this power being exercised. In response to criticism, the arrangements were changed in 1987. Thereafter it required a veto of the full Cabinet to overturn a recommendation by the Ombudsman, not just that of an individual Minister. The result was dramatic. The power of veto has never to date been exercised under the new procedures. Judith Aitken, “Open Government in New Zealand”, in Open Government, Freedom of Information and Privacy, Andrew McDonald and Greg Terrill (eds.), (Macmillan, London, 1998): http://www.ero.govt.nz/speeches/1997/ajas130397.htm.

\textsuperscript{16} In the US, if an administrative appeal fails, complainants can apply to the district courts. This is made easier by allowing the individual seeking access to file their suit either in the district in which they are resident, or in the district in which the records are lodged.

\textsuperscript{17} Supra.

\textsuperscript{18} "Given the pivotal role of the Ombudsmen in the New Zealand system, the general approach and reputation for fairness of individual Ombudsmen have helped to create public confidence in the Act and been critical to the Act’s successful implementation [there]." Judith Aitken, supra.

\textsuperscript{19} For example, the Canadian Privacy Act establishes the requirement that personal information be managed throughout its life cycle, that is from its creation through to its ultimate destruction or preservation in the National Archives.
informed, yet public servants have no obligation to provide information to them. The Constitution of the United Republic of Tanzania of 1977 states that:

> Every citizen has the right to be informed at all times of various events in the country and in the world at large which are of importance to the lives and activities of the people and also of issues of importance to society. The rights and freedoms enumerated in Part III of the Constitution are considered basic rights and are arguable before the courts.

However, Tanzania is just one of many countries where there are few institutionalised mechanisms which require Government to facilitate the public’s right to be informed. A Code of Ethics and Conduct for the Public Service Tanzania was issued by the Civil Service Department in June 1999. Section III, Part 5 of the Code addresses the issue of Disclosure of Information. It states that:

- A Public Servant shall not use any official document or photocopy such as a letter or any other document or information obtained in the course of discharging his/her duties for personal ends;
- Public Servants shall not communicate with the media on issues related to work or official policy without due permission;
- Official information will be released to the media by officials who have been authorised to do so according to laid down procedures.

Although the requirements laid out by the Code are reasonable, there is no corresponding obligation for public servants to provide information. As a result, when citizens or their representatives ask public servants for information, their questions are often met with a defensive reluctance to provide answers.

A culture of secrecy will not disappear overnight. Officials have to develop confidence in making information available, and understand that all information should be accessible by the public - unless there are strong countervailing reasons why a particular piece of information should not. Too often, officials claim that journalists misuse information or use information recklessly, making this a pretext for refusing to cooperate with them. Yet, if journalists do not have access to reliable information, it can hardly be wondered that their stories will, from time to time, be at odds with the real position. This is more the fault of the official than of the journalist.

Government departments should, in their own interests, be open to the media and have staff who are capable of handling requests in a cooperative manner and ensure that copies of major documents (e.g. reports to the Legislature) are printed in sufficient quantities so as to ensure

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20 Article 18, clause 2 (Part III Basic Rights and Duties).
21 Information for Accountability Workshop: Tanzania, conducted by International Records Management Trust and TI-Tanzania, March 2000. There was agreement at the workshop that many citizens in urban areas are aware that Article 18 exists but few know how to exercise their right to obtain information. Mechanisms do not exist to provide guidance to citizens on accessing current government information. The National Archives Act provides for the right of citizens to consult public records that are over 30 years old. Legislation has been drafted to reduce the 30-year closure rule on public records in Tanzania to 25 years, but this legislation has not yet been passed. At the moment, the National Archives building is almost full and virtually nothing post-dating 1973 has been transferred to the National Archives. As a result, most public records that belong in the Archives are still held in the ministries and are, therefore, inaccessible to citizens. The report on the meeting is on the IRMT web site: http://www.irmt.org.
22 Ibid. Civil Service Department, The United Republic of Tanzania. Code of Ethics and Conduct for the Public Service Tanzania, June 1999. In many countries the claim is made that "only the Minister" can authorise the provision of information or the making of a statement. And as often as not, "the Minister" is either out of the country or "unavailable".
23 Ibid. Media professionals are expected to rely initially on information issued to them through press releases. Yet many press officers in the ministries are not trained journalists, and the general perception is that the information they produce is self-serving and not useful. If journalists want to pursue a matter further they are asked to submit a questionnaire on letterhead and wait for a response; often no reply is forthcoming. The need for the Government to reply is only an understanding, not an obligation. Media representatives can ask to interview officials and will often be given permission to do so. However, their success is likely to depend upon the strength of the informal networks they have cultivated within government.
that the media has reasonable access to them. Even with good informal networks, some information is still difficult if not impossible to obtain. In Tanzania the national accounts and the Auditor General’s Report are common examples. There, although both documents are published for the benefit of the Legislature, it is difficult to obtain a copy, even from the government printing office. Budgetary information is perhaps the most sought after type of information. Civil society groups, too, need budgetary and financial information to assess government priorities and determine which problems are being ignored or undervalued.24

Protection of sources

In some countries the mere possession of confidential information is a criminal offence if the individual is not authorised to have it. One illustration is the case of a part-time journalist, and small trader in Tanzania, who was found in possession of a confidential letter written by a Regional Commissioner. The letter contained instructions to refuse him a trading licence for spurious reasons. The journalist obtained this letter and took the Regional Commissioner to court on suspicion of corruption. However, because the document was classified, he was arrested for being in possession of a confidential document!25

Protection of sources is a core requirement for journalists to practise their profession freely. Journalists must know that they can print stories without risking fines or imprisonment for failing to reveal their sources of information. Individuals who provide journalists with information on an off-the-record basis need to have assurances that the journalists they confide in will not be intimidated by public authorities into revealing their identities. These assurances are essential if the media is to be an effective counterforce to the abuse of power by public officials.26

Disclosure of sources and common law jurisdictions

If journalists cannot gather information on a confidential basis, their ability to carry information to the public can be severely circumscribed. Thus laws providing for the protection of their sources assume particular relevance.

A “weak” privilege not to disclose the identity of sources at the discovery stage of a libel action known as the “newspaper rule” (as in Australia), has been recognised by the courts in some jurisdictions, but rejected in others.

For example, a case in Ontario27 clearly established that courts had a discretionary power, depending on all the circumstances, to refuse a request for disclosure during discovery, even where the evidence would otherwise be relevant. In another case from Ontario28, however, disclosure was ordered in the context of a highly uncomplimentary and admittedly false statement by the defendant about the plaintiff, a senior member of the Prime Minister’s staff. The newspaper rule has been completely rejected in some provinces. The British Columbia Court of Appeal, for example, held that the liberal discovery rules in that province were inconsistent with such a privilege.

A limited privilege not to testify at a trial has also been recognised as part of the law of evidence. In Slavutych v. Baker, the Supreme Court of Canada (SCC) held that courts might recog-
nise a qualified privilege not to testify where four criteria were satisfied:

- the communication must originate in a confidence of non-disclosure;
- this confidentiality must be essential to the ongoing relationship between the parties;
- the relationship must be one which ought to be fostered; and
- the injury to the relationship from disclosure must be greater than the benefit it would bring to the litigation.

These criteria are applicable to all confidential relationships and hence might assist journalists wishing to protect the identity of their sources. The relationship between journalists and confidential sources would generally satisfy the first three conditions but satisfaction of the fourth would obviously turn on the circumstances of the case. In a subsequent case, the Supreme Court held that the appellant, a journalist, did not come within the Slavutych criteria in respect of her claim of a privilege not to testify regarding information she had given to certain individuals. The fact that the information sought had passed from the journalist to the “source” rather than vice versa was clearly relevant, as disclosure would not have affected any expectation of confidentiality.

Judges may also have a general overriding discretion to exclude otherwise relevant evidence. In Crown Trust Co. v. Rosenberg, Saunders J. refused to force a journalist to disclose the identity of a source, requiring only disclosure of the substance of the communication. He based this holding on the public interest in preserving the confidentiality of sources and the fact that it might be possible to obtain the information in other ways.

Protection of sources and civil law jurisdictions

In France, prior to 1993, the duty of professional secrecy did not apply to journalists, who could be questioned regarding their confidential sources of information. However, in practice, at least in criminal cases, very few courts or investigative magistrats went so far as to require journalists to disclose their sources. Journalists are not entitled to any special protection in civil proceedings; the same law applies to all witnesses. In the few instances where disclosure was ordered, journalists generally declined to answer, invoking professional custom; the courts generally refrained from ordering sanctions. Journalists were sanctioned in only one or two cases in the decade leading up to 1993 when the criminal law was substantially revised.

In 1993 the Code of Criminal Procedure was amended, bringing legislation into line with accepted practice, at least as far as criminal proceedings are concerned.

Article 109(2) now provides that:

Any journalist who appears as a witness concerning information gathered by him in the course of his journalistic activity is free not to disclose its source.

Several points are worth noting. First, the right not to reveal sources is absolute, not qualified. Second, the law applies only to journalists called as witnesses; accused persons always have an unqualified right to refuse to testify. Third, the Act defines neither a journalist nor journalistic activity leaving areas of ambiguity.

In 1993, following the recommendation of the Committee of Enquiry into the Press and Judiciary of 1984, the protection of journalists’ sources was further indirectly reinforced by a new

29 Moysa v. Alberta (Labour Relations Board).
30 Briefing Paper on Protection of Journalists’ Sources, supra.
clause relating to searches and seizures in media premises. Article 56.2 of the Code of Criminal Procedure now provides that the investigating judge or State prosecutor must be present to ensure that investigations, “do not encroach on the free exercise of the journalist's profession.”

French law offers considerable protection to journalists’ sources. More significant than the letter of the law, perhaps, is the reluctance of the courts to sanction journalists who refuse to comply with an order to disclose their sources. This judicial rectitude perhaps reflects a wider consensus in the public at large that journalists should not be forced to divulge such information.31

**Libel (defamation) laws**

Libel laws, too, can constitute a formidable barrier to the provision of information to the public by the media, and libel laws are universal. The need for laws to protect individuals against defamation is not disputed. Many countries make a distinction under law between the treatment by the press of holders of public office and the treatment of private citizens. Such distinctions should be made, as the public has a broader right to be informed on the actions of public office holders rather than private citizens. At the same time, it is important to distinguish between the information made public and the type of person who has made it public. Libel matters should first and foremost focus on the information disseminated by the media.

People who are libelled in the press should have opportunities for redress under law. The courts should be the arbiters of the standards of privacy relative to the freedom of the press, and provide a greater level of protection from the press for individuals who hold no public office, or are in no position to influence the lives of numerous other people. The penalties levelled by the courts must be balanced: they must weigh the need to punish those in the media who act irresponsibly as against the rights of a society to be informed and a media whose freedom is not curbed for fear of devastating libel judgements.

The United Kingdom laws of libel, which may be viewed as reasonable by many governments and lawyers, in fact tip the balance against freedom of the press. The American approach, which involves very explicit concepts of malicious intent, strongly favours the media. Finding the right balance is difficult, but it is essential. Developing this balance is a challenge for the courts and a further reason why only in a system with an independent judiciary can freedom of the press thrive. If the judiciary is the subject of political control, then public office holders may be tempted to use the threat of very substantial libel penalties as a means of intimidating the press and so undermining the ability of the media to keep the public informed.

Today, in numerous countries, libel penalties can be imposed by the courts that are so burdensome as to ruin all but the wealthiest of journalists and publications.32

**The impact of the Internet**

The Internet has greatly reduced the ability of governments to control what their people can or cannot access, and affords individuals and organisations unrivalled opportunities to carry information into the public arena.

31 Briefing Paper on Protection of Journalists’ Sources, supra.
32 For example, in 1973-74, lawyers for a British newspaper were troubled by reporting from the publication’s Washington D.C. bureau on the Watergate affair. The lawyers argued against publishing many of the reports. They warned that President Nixon could sue for libel and that the costs of litigation could be enormous. These threats were factors in editorial decision-making. To take another example, one reason why many publications in Britain did not pursue full investigations of the illicit business dealings of the late entrepreneur, Robert Maxwell, was that he was notorious for suing journalists for libel.
“Official secrets” banned in one country, perhaps more for political than for security or public interest reasons, can be quick to find their way onto the web. A court order suppressing a well-known person’s name in one country will quickly appear on a website outside it.

A country can, of course, continue to control people and web sites within its borders. China is among those who have tried to stop web sites from “leaking state secrets”.

The Internet, too, has struck a blow in favour of access to information and against the domination of news dissemination by a small group of media magnates. However, at the same time it has posed genuine problems for governments struggling to combat pornography and organised crime, which have been quick to seize on the opportunities the Internet presents for swift transmission of encrypted messages which are virtually untraceable, particularly if mobile telephones are used to establish links to service providers. We can therefore expect increasingly strenuous efforts by governments to enhance their ability to monitor transactions on the Internet.

The Internet has also opened up new possibilities for governments to interact with their citizens. Malaysia is one country at the forefront of using the Internet to conduct as many of its transactions with its citizens as are possible, and is in the process of developing “electronic government”. Obviously, this option is not open to countries where access to the Internet is limited, but it would seem to be the shape of things to come.

Records management

Even legally enforceable rights of access to information are meaningless if government records are chaotic. Although information may be available in principle, if it cannot be found then it cannot be made available to citizens. Not only does this limit government accountability and its credibility in the eyes of citizens, but it also has a serious impact on the capacity of government to discharge its duties efficiently.

Records management issues must be addressed by a FOI law and improvements implemented prior to its introduction. One of the provisions of most FOI laws is that agencies must publish lists of the records series that they hold. Therefore series must be organised and captured within a record keeping system.33

A nation-wide government records management policy is essential - not just to provide citizens with information but also to ensure that individual civil servants can be held accountable for their actions. If there is no paper trail, chances of errant civil servants being identified and sanctioned are slight. Not only must the records exist, but they must also be readily accessible by those who need them. Records should not be simply kept in a capital city and members of the public be required to travel from rural areas if they want to consult them. Furthermore, documents of general interest should be prepared in a form understandable to the general public, especially such major documents as those of the Auditor-General to the Legislature. These can also be placed on the Internet at little or no cost for the benefit of those with access to it.

33 In Canada, in addition to the requirement that descriptions of records are published, there is a commitment to the introduction of policies, standards and best practice as well as systems to ensure that information is managed through its life cycle. This is in recognition of the fact that without such procedures, FOI cannot be successfully implemented.
A sound records management policy will vest an agency with over-all responsibility for records management, usually in the form of a national archive. Such a central agency will provide guidance to departments on the creation, maintenance and disposal of files, and will itself serve as the ultimate custodian of documentation once it has ceased to be of use to a department. The national archive should conduct periodic records management audits of departments to ensure that the records management policy is being faithfully carried out.\(^{34}\)

Improved access to information will not of itself enhance public participation in decision-making. Not everyone has access to technology, but all have a right to contribute to decisions which affect them. This places a heavy burden on the mass media to include more investigation and interpretation of the actions of government than ever before. They will have access to information on behalf of the public at large, and it is a central feature of the media’s role for it to use this availability for the widest public benefit.

**Some indicators as to the effectiveness of access to information**

- Is there a policy on the provision of information which favours access, unless the case against access in a particular instance meets prescribed and narrow grounds, justifying its being withheld?
- Do rights of access to information extend to information held by local governments and state-owned enterprises? Does it include records of private companies that relate to government contracts?
- Are there clear procedures and effective guarantees for citizens and journalists to access the official information they require?
- If access to information is refused by a government department, is there a right of appeal or review? Is this independent of government?
- Do courts award punitive sums in libel cases involving public figures? If so, do these serve as a deterrent to the media?
- Do the courts give appropriate protection to journalists’ sources?
- Is training given to officials in the proper handling of records and the making of information available to the public?

**Public sector records**

- Is there an official body with a legal duty for records maintenance (records tracking)?
- Are there clear administrative instructions on the maintenance of public records? If so, are these generally observed?
- Do citizens have a right of access to their personal files (other than those concerned with law enforcement) and the right to insist on corrections where these contain errors?
- Do public officials or others seeking information experience difficulties in obtaining it? If they do, what are the problems?
- What policies exist concerning the provision of information to the public (e.g. to service a complaint)?
- Can officials provide credible and timely audited accounts, and information about personnel numbers, etc?
- Does legislation cover the records of regions and districts (or their equivalents)?

\(^{34}\) The International Records Management Trust (IRMT) is an NGO which is working with a number of developing countries on aspects of their records management. The trust has carried projects throughout the world, including Cameroon, Egypt, Grenada, Guyana, Kenya, Malta, South Africa, Tanzania, Uganda, Ukraine, Zambia and Zimbabwe. Details of projects since 1997 are available on its web site: http://www.irmt.org.
Giving Citizens a Voice

Stand up, stand up – Stand up for your rights;
Don’t give up - Don’t give up the fight!

Bob Marley

An informed citizenry, aware of their rights and asserting them confidently, is a vital underpinning to a national integrity system. An apathetic public, ignorant of its rights and acquiescent in the face of administrative abuse, provides an ideal breeding-ground for complacency and corruption.

A primary task is an awareness campaign, both of the damage that corruption is doing to the community and to families within it, and of the need for individual citizens to take appropriate action when they encounter it. Public opinion and attitudinal surveys (discussed in the chapter on Surveys as Tools – Measuring Progress) are a primary tool in giving the public both a voice and the realisation that their opinions are valued and are taken seriously by others. So, too, is the “Report Card” approach, where users of particular services are questioned about their treatment.

Newspapers and radio stations are also particularly good vehicles: newspapers can run columns of complaints investigated, and publish the results of their inquiries together with the original complaint. In Kenya, one newspaper, the East African, has for some time published the names of public officials who have misbehaved - and of their superiors who have refused to take remedial action. In Tanzania, the independent Swahili newspaper Majira provides an informal communal channel for the public to voice complaints or to make appeals to the Government.¹

Reaching an even wider audience are radio “talk-back” programmes, where representatives of civil society, or even the Ombudsman, receive individual complaints on air and give advice. In this way, the advice given to a single person reaches others likely to encounter similar situations, giving them the opportunity to prevent them.² This can have a much more empowering impact than might at first be thought. Delay devices can be used to avoid problems with defamation laws, and “bleep” out names that could give rise to court proceedings.

More distant audiences may be reached through street and market theatre groups, who can carry social messages far and wide. In Uganda, for example, experience gained through the highly-successful AIDS awareness campaign, is now being used to alert ordinary people to the

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¹ Citizens send letters to Majira which are then published unedited in the paper on a daily basis according to prescribed subjects (e.g. Thursday relates to politics, Friday to culture and education, Saturday to social services, and so on). Although the paper tries to pressure the government on the public’s behalf, the letters rarely receive an official reply. The Ethics Inspectorate scans Majira daily for criticisms and accusations and then investigates accordingly. Its Director claims that if a complaint appears in the newspaper it will be followed up. However, the Inspectorate does not communicate the results of these investigations to the person complaining, or to the media. Majira has a circulation of approximately 45,000. However, its circulation is dropping from a high of 100,000 as a result of increased prices. The price increase is due to the Government placing a tax on imported newsprint. There is speculation that this was done to drive some papers out of business.

² The development of small, “community” radio stations can be particularly significant in this regard.
damage corruption does to the quality of their daily lives, and as to ways in which they can resist it.

Citizen’s Charters

While there is much that citizens can do to give themselves “a voice”, so, too, are there initiatives which a government should take to the same end.3

A recent innovation to improve government accountability is the development of “Citizen’s Charters”. These aim to introduce measurable standards of service, arrived at through consultation with both officials and users. By publicly committing agencies to published standards of service, the Charters provide citizens both with avenues for them to raise their concerns and with a yardstick against which to measure the agencies’ performance in an individual case.

Citizen’s Charters may be used as part of an overall strategy for improving government services, or else as a means of addressing localised problems within a particular sector4. They define the services that will be provided and the minimum standards that citizens should expect.

Charters set out the procedure for making complaints. The intention is to shift the emphasis from complaints as something negative, to viewing complaints as an important form of communication and feedback. Citizen’s comments can then be analysed for targeting improvements in public services in areas seen to be failing.

Charters can be used to promote freedom of information. They can be used to disclose information about the structure, functions and operations of public sector agencies. Information should be made widely available using all available means, including the media, public libraries or information technology. For example, in India, Citizen’s Charters are being used to tackle low level corruption by providing citizens with access to information about the services where bribes are often levied. These Charters describe the services that the government will provide, the time frame for each service, the government officer who should be contacted and a remedy should the service not be provided.5

Typically, Charters set out the government’s commitments to the public it serves. These Charters summarise details of the services that are provided by each government agency. They also explain how to obtain these services, and what to do if the services do not meet expectations. It is important that these provisions are set out clearly to enable their easy application in practice. If definitions are vague and general, then the public will get confused, misunderstandings will proliferate and civil servants will be unclear as to the targets they are expected to meet. Copies of its Charter should be displayed prominently wherever a department or agency is doing business with the public.

Key elements of a Citizen’s Charter are that they:

- are non-statutory (i.e. they do not have the force of law);
- are intended to increase citizen participation;
- define standards of service; and,
- require publication of information about services.

3 The role of people’s elected representatives and the need for accessibility is discussed in the chapter on the elected legislature. Similarly, the role of the Ombudsman is discussed in the chapter devoted to that office.
4 They can be introduced at all levels of government, national or local.
5 S. D. Sharma, Mobilising Civil Society: NGO initiatives to fight corruption and promote good governance – in the Indian context, Paper presented at the Workshop on Promoting Integrity in Governance at the World Conference on Governance, Manila, Philippines, 31 May - 4 June 1999. This initiative is the result of co-operation between Transparency International India and the central government.
Standards

Guiding principles outlined in a Citizen’s Charter can be applied to particular services and performance targets. Some easily measurable targets include:

- maximum response times (for both responding to complaints and to written enquiries i.e. replies to letters);
- maximum waiting times for appointments; and
- charges and fees.

Charters seek to change the culture of service provision by ensuring that users are consulted and that their needs and apprehensions are addressed by the system. By being open and by promising response times, and by indicating how and where to complain when standards are not met, the scope for corruption in the provision of the service is (or should be) significantly reduced. Standards should be drawn up after consultation with members of the public and government officials.

Monitoring

Charters should provide the means for monitoring public sector performance. One key aspect is the requirement for agencies to publish information about their performance. Agencies are required to collate and publish statistics as set out in the Charter, allowing citizens and the Legislature the opportunity to assess the performance of the service. If the Charter applies across a national service, e.g. schools or hospitals, the performance of local units can be compared by using this process. As well as helping to identify problem areas, this provides an opportunity to identify areas of strength and to track improvements in services.6

Complaints

The complaints process should include provision for an internal review and also external impartial adjudication, perhaps to an Ombudsman. However it is important to note that failure to meet the performance targets laid out in a Charter, whilst constituting grounds for complaint, does not normally carry any sanction in law.

Citizen’s Advice Centres

However, once aware that his or her rights may have been transgressed (and if the mechanisms under any relevant Citizen’s Charter have failed to provide redress), a citizen may need help. Lawyers cost money, and friends and relatives do not always have either answers or the resources. How, then, can an ordinary citizen, perhaps with a minor but worrying problem, find out about his or her entitlements and claim them successfully?

In many parts of the world, civil society groups have initiated ways to ensure that citizens - and especially the poor and the marginalised - can obtain free advice on how to deal with government agencies (e.g. housing, benefits, pensions etc.), and about their legal rights in general.

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6 In the United Kingdom, Citizen’s Charter Performance Indicators are published by all local authorities to provide a snapshot of how well local Councils are faring. Brent Council was the first to publish its results on the Internet: http://www.brent.gov.uk/ccpi.htm.

“Service First”, UK Cabinet Office, 1998
Principal elements of Citizen’s Advice Centres (often described as Citizen’s Advice Bureaux or CAB) are that they:

- disseminate information on public services;
- provide free and independent advice to citizens; and,
- provide a two-way channel of communication between citizens and the government.

A key feature is that the advice they give is free of charge. Often they are staffed by trained volunteers, and in some countries, young lawyers (and even older ones) are encouraged to give their services for free at these Centres. Although in some countries the Centres are funded by governments7 or donor agencies, it is important that they retain some independence to ensure that they are seen to offer a fair and impartial service.

One service states that its aims are:

- to ensure that individuals do not suffer through ignorance of their rights and responsibilities, of the services available, or through the inability to express their needs effectively, and
- to exert a responsible influence on the development of social policies and services, both locally and nationally.8

Where governments are required by freedom of information legislation, or other provisions such as Citizen’s Charters, codes of practice, etc., to publish and disseminate information about government services, the Advice Centres can provide an effective means of reaching citizens through their national network, thereby helping governments to fulfil their obligations. Some distribute a range of guidance leaflets, produced by their government, and others develop their own pamphlets, which are limited by their resources. These leaflets can provide information on:

- what services are available;
- how to obtain them;
- how to make complaints; and
- how to obtain redress.

Advice is usually given through personal consultations where it is given in response to a particular enquiry. These consultations identify the citizen’s legal rights, and provide advice on how their rights can be upheld, the services available to assist them and what to do if these services have not met their expectations.

Although some Advice Centres advise on “whistleblowing”, and on how to make a complaint, most do not actually act for citizens when they wish to obtain redress for grievances. They provide information on the process that must be undertaken, the choices available for obtaining redress, but they do not usually handle the cases themselves. They can, however, act as a pressure group for change in government programmes.

As well as providing guidance on complaints about public services, the Advice Centres can inform the government about problem areas, enabling the government to target limited resources on the programmes that most need them. They can also provide valuable information to the government on local needs, and complaints on conditions that are not directly related to government services, but that should be addressed by the public sector.9

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7 For example, in Mauritius the Citizen’s Advice Bureaux are run by the Ministry of Urban and Rural Development.
8 Glen Innes Citizens Advice Bureau, Auckland, New Zealand: http://www.geocities.com/SoHo/Veranda/2934/cabgi.html
9 For example, in Mauritius an important function of the network of Citizens Advice Bureaux is to provide a channel of communication from citizens to government, including attitudes to local developments and planned projects. In the UK feedback from citizens, enquiries are channelled from the local Bureaux to the national association through Bureau Evidence Forms. These are completed for enquiries that represent examples of a wider social problem. This information then forms the basis for well-distributed published reports.
Public interest litigation

Citizen’s Advice Bureaux do not normally go to court for people, but approaches can be developed to fulfil this need.

One such programme is the USAID-sponsored “Citizens Advocacy Office” (CAO) programme in Donetsk in the Ukraine. This serves as an active source of legal support for citizens and businesses with grievances concerning corrupt officials. Operating entirely independently of government, this Office provides legal advice free-of-charge to citizens about their rights, it represents them in court, and it helps them gather and submit evidence in cases of alleged corruption. Two offices have been established, and a 24-hour telephone hotline has been in operation since July 1999. The following examples illustrate some of their accomplishments:

- The captain of a cargo ship exposed the misdeeds of administration officials who were embezzling funds, but then found himself wrongly accused and sentenced to prison. The Centre’s lawyers succeeded in getting the convictions set aside and the sentences quashed. They then prepared claims against the officials concerned personally.

- Two government officials succeeded in removing a founder of a company in Donetsk from the board of her company, and then re-registered her company under a new name with new directors. The CAO applied successfully to the court to have the re-registration cancelled and the original founder’s rights restored. The district prosecutor then opened a case against the two officials, one of whom was a People’s Deputy of the Ukrainian Parliament and who was prohibited by law from engaging in private sector activities.

- A group of flower sellers, who had paid the required fee and taxes to the district government were refused renewal of their permits in 1998, being told that permits had to be bought only from a private company. The CAO conducted a preliminary investigation of this case and found that this company was not properly registered and did not pay any formal taxes to the district government. Moreover, the company encouraged the flower sellers to conduct businesses in the shadow economy - without providing receipts or recording cash income. The case was passed to the proper authorities for formal investigation. As a result, the district government has been charged with wrongdoing, and the flower sellers have been restored their rights to conduct business.

- Officials ordered a police team from Donetsk to arrest a criminal group in Kharkiv. Soon after that was accomplished, a criminal case was brought against the officer-in-charge. The case was brought by the former deputy head of the investigation unit of the prosecutor’s office of Kharkiv oblast, who was found to be a personal patron of the criminal group. The CAO appealed to the President of the Ukraine and the Prosecutor General, and the case against the Donetsk officer was dismissed.

- A village in the Donetsk oblast, Andreyivka, called upon the CAO to help investigate and support its claim of corruption against former government officials. The allegations relate to abuses of the privatisation process and nepotism. The grievances, along with documentation, were presented to appropriate oblast officials.¹⁰

¹⁰ Email from Vanessa Von Struensee, 24 May 2000.
There is, of course, no reason why these activities should be confined to NGOs. Where state-funded legal aid is not available, they can be undertaken by practising lawyers prepared to donate time to work pro bono (no fee) for public interest causes. Perhaps the most outstanding example is the work carried out in South Africa under apartheid, where some lawyers devoted themselves almost entirely, to challenging the legality of government actions through the courts (most conspicuously, perhaps, the “forced removals” programme of the Pretoria regime conducted under its Group Areas Act).

In Kenya, NGOs angered by corruption at the local government level have had recent successes in court challenges mounted against such decisions as increases in local government taxes, arguing that such was the extent of corruption that the rate increases carried with them no likelihood of improved services for the citizens. These cases, too, have been brought by lawyers on a pro bono basis.

**Telephone “Hotlines”**

Increasing use is being made of telephone “hotlines” to facilitate the making of complaints by aggrieved members of the public. For example, two types of anti-corruption hotlines operate in the Ukraine. There, a government hotline allows workers to phone in complaints concerning tax offices. However, the government hotlines have not yet gained public trust, as they are run by government officials. The hotline established by the Citizens Advocacy Office (CAO), the NGO mentioned above, is the more widely used. Their hotline is open 24-hours a day and is answered either by an operator or an answering-machine. Where complaints are anonymous they are documented, and as and when patterns emerge, appropriate action is initiated.

Where NGOs are involved in this way it is important that:
- the role of the Centres and precisely whom the anti-corruption hotlines are meant to serve is carefully defined;
- the lines are introduced as part of a larger strategy;
- the phone lines do not collapse under excessive caller response;
- there is a well-focused advertising campaign, explaining the purpose of the service and who is operating it;
- the trustworthiness of the service be respected;
- there be clarity and clear guidelines on whether and when anonymous information can be accepted;
- experienced and trained operators be on duty, capable of explaining to callers all their rights and of proposing a basic strategy for resolving their problems; and
- feed-back be given to the callers (where they identify themselves) by reporting back to them what has happened.

This is not to suggest that no government department should run hot-lines. Clearly there are departments in various countries who run these perfectly satisfactorily, be it police, tax, or customs. But where public trust is lacking, a government agency can join in a strategic partnership with a respected NGO to provide a hotline service to the agency.

**Using the Internet**

As access to the Internet grows, so, too, does its potential for giving citizens a voice.

In many countries government web sites are being developed to make much more information available, and available in much more user-friendly ways than has hitherto been the case.
some, full sets of the laws of the country are being made publicly accessible for the first time, and are no longer restricted to law libraries to which only lawyers have access.

On the NGO side, an imaginative example of the use of Internet for involving the people is Quipunet\textsuperscript{11}, a virtual organisation. A small number of Peruvians, spread all over the world, joined forces and created Quipunet, a "virtual village" of engineers, students, professors, diplomats and housewives, who, with a budget of only $167, set out to pioneer the Internet.

They planned to help people in rural areas but the reality was challenging. They encountered not only an almost non-existent infrastructure, but also a complete indifference to their project and to the wonders of the Internet. But they persevered. Their thrust has been in education, information and aid to places most in need across South America. To overcome distances and national borders, the founders learned how to communicate and cooperate among themselves over the Internet and how to plan and execute ideas. They also learned how to conduct virtual seminars; create "virtual bridges of help"; and to organise and direct tasks from afar.

The success of Quipunet has led to the formation of E-Connexions\textsuperscript{12}. The original founders used the experience they had gained, to form a "for-profit" company, where the objective is not primarily one of profit, but one of increasing the ways and means by which to help others.\textsuperscript{13}

"Whistleblowing" – providing safe channels for employees to complain

"Whistleblowing" is an issue in both the public and the private sectors.\textsuperscript{14} In both sectors, employees can become aware of the malpractices of their superiors in situations where the public, or the public interest, is put at risk. For example, the award-winning film, The Insider, portrays a "whistleblower" who, at considerable personal cost, exposed corrupt practices on the part of his employers, who had perjured themselves before a Congressional Committee inquiring into the harmfulness of tobacco products. Should he have had to pay such a high personal cost when his actions were plainly in the public interest? How many other potential "whistleblowers" are there who, for understandable reasons, are fearful of following his example?

In the United Kingdom, after a series of catastrophic yet avoidable events in the 1980s, the importance of the role of employees both in preventing scandals and disasters and in keeping a check on malpractice, was recognised.\textsuperscript{15}

Almost every public inquiry found that employees had known of the dangers before they materialised, but had either been too afraid to sound the alarm, or had raised the matter with the wrong people or in the wrong way. Thus, when a train crashed outside one of London's busiest railway stations killing 35 people, the inquiry found that a supervisor had noticed the loose wiring that subsequently caused the crash, but had said nothing for fear of upsetting his superiors. After the Bank of Credit and Commerce International (BCCI) collapsed, the inquiry

Government minister blows whistle on 'cover-up Britain'

"We want to see an end to the cover-up and blame cultures that exist in some organisations and to see a more mature attitude towards whistleblowing. "Inquiries into major disasters of the past decade have found that workers had been aware of potential dangers or wrongdoings but were too scared to sound the alarm. These include:

- The Clapham rail crash - the subsequent inquiry found that it was known that loose wiring was risky, but no one had wanted to rock the boat;
- Herald of Free Enterprise - the Sheen Inquiry found that workers in the Ferry Company were aware of the dangers of leaving port with bow doors open. They had raised their concerns on a number of occasions, but nothing had been done;
- Piper Alpha - the Cullen Inquiry concluded that workers did not want to put their continued employment in jeopardy through raising a safety issue, which might embarrass management; and
- Collapse of BCCI - the Bingham Inquiry into this banking collapse found that within BCCI there was a climate of fear, where staff felt intimidated and had been reluctant to voice their worries. "These incidents may have been avoided had the Public Interest Disclosure Act been in place earlier... It is essential we raise awareness of this legislation. This Government is committed to creating a culture of openness in both the public and private sectors."


\textsuperscript{11} http://www.quipu.net
\textsuperscript{12} http://www.e-connexions.net
\textsuperscript{13} Email from Martha Davies May, 2000.
\textsuperscript{14} The expression "whistleblower" (as by a referee in a football match) is of US origin. The Dutch equivalent is "bell-ringer" (a person who rings a bell to raise an alarm). Discussions of whistleblowing raise debates in the countries of Eastern and Central Europe, where discussants can confuse the legitimacy of contemporary whistleblower actions with the despised actions of those who denounced their neighbours under former totalitarian regimes.
\textsuperscript{15} The (UK) Public Interest Disclosure Act 1998 received Royal Assent on 2 July 1998 and came into force one year later. The Act was drafted by the NGO, Public Concern at Work.
found that an autocratic environment within the Bank had prevented staff from voicing any concerns about the Bank’s questionable activities.

The inquiry into the sinking of the Herald of Free Enterprise ferry at Zeebrugge discovered that staff had warned, on no less than five occasions that the ferries were sailing with their bow doors open, but their warnings had been ignored. Similarly, the Arms to Iraq inquiry revealed that an employee had written to the Foreign Office informing officials that munitions equipment was being prepared for Iraq in contravention of UN sanctions, but his letter was not acted upon.

Frequently these types of scandals can be nipped in the bud. The first people to notice any misconduct within an organisation are likely to be those who work there. Yet, the prevailing culture within the workplace is often one which deters employees from speaking up. Employees are well placed to sound the alarm, but they often fear the loss of their jobs and the alienation of their work-place friends, if they do so. This is especially true where a junior employee becomes aware of corrupt conduct by his or her superiors.

Employees aware of misconduct within their organisations are faced with four options:

• to remain silent;
• to raise the concern through an internal procedure;
• to raise the concern with an external body, such as a regulator; or,
• to make a disclosure to the media.

Unless the culture in the workplace is one which allows employees to speak up without fear, each option might be seen to have adverse repercussions - for the employer, or the employee, or the wider public (including shareholders, taxpayers, passengers and consumers).

Faced with equally uncomfortable choices, the option most employees will take will be the one of default - “turning a blind eye” to malpractice, and keeping silent. This is the safest option, and the most practised one. Unfortunately, this leaves the door open to even more malpractice going unchecked. A responsible employer is denied the opportunity to protect its interests, and an unscrupulous competitor or manager may start to assume that “anything goes”.

Of course, these outcomes only arise where the concern is well-founded. But even where a worry turns out to be mistaken or ill-considered, it is best that the matter be raised internally, so that the employer has the opportunity to investigate and thus allay any rumours or perceptions of impropriety that might otherwise be fuelled.

An employee who feels that “something must be done” is as likely to publicise the matter outside the organisation as inside it, unless he or she feels confident that the employer will address the message rather than “shoot the messenger”. In some circumstances, where there are no clear signals about appropriate external disclosures, the employee who decides to go outside the organisation is as likely to go to the media as anywhere else. This option is usually taken as a last resort, and is certainly not the preferred choice of a loyal employee. Media disclosures tend to be made by past or present staff who are either disgruntled, or who genuinely feel there is no other way to ensure the matter is addressed.

Disclosures made to the media will inevitably provoke a defensive response from the organisation. If those in charge are unaware of the issue, their instinctive response will be to deny it. If told that there is evidence to back up the concern, they will be tempted to take a position which can best be characterised as “dealing with the messenger rather than addressing the
message”. These scenarios reduce public confidence in the organisation. Equally, organisations that refuse to counter allegations with a wall of silence, do little to reassure the public.

Whilst the media is an essential safeguard to ensure public accountability, it should not - save in exceptional circumstances - be the first port of call for concerned employees.

If safe and acceptable ways can be provided to enable employees to raise concerns with their employer, it is likely that malpractice will be deterred. It is also more likely that where malpractice does take place, it can be detected and stopped at an early stage.

Organisations that are genuinely concerned about malpractice, tend to assume that their own internal complaints or grievance procedure provides an adequate avenue for the matter to be handled. However, it is now widely recognised that this approach is usually misguided, since such channels are designed to be used in circumstances where (a) the individual has some personal interest in the outcome of the matter; (b) the procedure is adversarial; and, (c) the individual is expected to prove his or her case.

For these measures to be effective, it is important that arrangements which allow employees to “blow the whistle” or to “ring the bell” clearly express the underlying purpose - which is to enable an individual to raise a concern so that those in authority are able to investigate it. Unless this fundamental principle of accountability underpins the design of the system, it is unreasonable to expect it to signal - let alone deliver - a change from a culture where people are discouraged from raising the alarm.

The UK Public Interest Disclosure Act 1998

The UK Public Interest Disclosure Act aims to promote accountability and sound governance in organisations by reassuring workers that it is both safe and acceptable to raise concerns about genuine malpractice. The Act draws on best practice from around the world and provides full and immediate protection against dismissal or victimisation of workers who raise concerns.

The Act applies to genuine concerns about crimes, civil offences (including negligence, breach of contract, breach of administrative law), miscarriages of justice, dangers to health, safety or the environment and the cover-up of any malpractice in these areas. It applies across the private, public and voluntary sectors, and, it covers workers, contractors, trainees, agency staff, homeworkers and every professional in the National Health Service (NHS). It does not presently cover the genuinely self-employed (other than in the NHS), volunteers, the intelligence services, the army or police officers.

The fullest protection under the Act is where a worker raises a concern within the organisation, or with the person legally responsible for the malpractice. In these cases, a reasonable and genuine suspicion is sufficient to give the worker protection. The rationale behind this approach is that those in charge of the organisation are best placed to investigate and put right any incidence of malpractice.

The Act also sets out the circumstances where a disclosure outside the organisation may be protected. These circumstances are outlined below:

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16 The Government has promised that police officers will receive protection equivalent to that available under the Act.
17 Applying this approach to the principle of parliamentary accountability, the Act provides similar strong protection where people in public bodies raise matters directly with the government department with responsibility for its operations.
protected through certain regulatory bodies prescribed by government under the Act. A disclosure to such bodies is protected as long as the worker has some good evidence to demonstrate the grounds for his or her belief in the truth of the concern.

For wider disclosures, including disclosures to the police, the media or to a Member of Parliament, the worker must satisfy a number of tests in order to gain protection:

- the worker must have raised the concern with the employer or prescribed regulator, (unless he or she reasonably feared victimisation); and
- the matter would be likely to be covered up and there is no prescribed regulator; and
- the matter must be exceptionally serious

Set out as it is, the Act should go a long way to ensuring that workers do not simply turn a blind eye to malpractice in the workplace, but feel sufficiently reassured that they can raise the matter with their employer. Employers who persist in shooting the messenger will have a heavy price to pay.

Devising an effective complaints handling system*

Many of the problems discussed here can be minimised, if not wholly avoided, by a well managed and responsible organisation having clear and well publicised complaints handling procedures. A good complaints handling system will ensure that most complaints are resolved swiftly; that there is a defined procedure for dealing with complaints remaining unresolved; and that lessons learned from the investigation of complaints can be used to improve an organisation’s services. It also means that the customer is listened to, and his or her legitimate needs can be defined and attended to, where these may have been overlooked.

How do complainants expect to be treated? When people complain they want six essential things:

- to be heard;
- to be understood;
- to be respected;
- an explanation;
- an apology; and
- remedial action as soon as possible.

For this to be achieved, complainants should be made aware of their rights and responsibilities. Complainants’ rights include fair and courteous treatment; timely and accurate advice; respect for their privacy; and to be informed of the reasons for decisions. On the other hand, complainants’ responsibilities include providing timely and accurate information; treating the organisation’s staff with courtesy; and adopting a reasonable and co-operative attitude.

Against this background, an effective complaints handling system should provide:

- a straightforward means for customers to make a complaint to the organisation;
- a procedure for investigating a complaint;
- a means of keeping the complainant informed about progress and outcome;
- redress where complaints are substantiated;
- a means of preventing recurrence of identified problems;
- feedback for management decisions on resource allocation, prioritisation, strategic

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*Adapted from the Hong Kong China Ombudsman’s Internal Complaint Handling (INCH) Programme (1996)
planning, service delivery and quality assurance; and
• a means for staff to raise their concerns in ways which do not leave them open to ret-
ribution by superiors or colleagues.

A good complaints handling system should be:
• easily accessible and conspicuous to customers and staff alike;
• simple to invoke and operate, with clearly defined stages and responsibilities;
• efficient, offering speedy action and resolution within pre-determined time limits;
• objective and free from undue influence or interference;
• confidential so as to protect the complainant’s privacy.

An effective complaints handling system should be clear on:
• the definition of a complaint;
• who can complain - generally anonymous complaints can be acted on where the mat-
ter is relatively serious and there is sufficient information in the complaint to enable
an investigation to be conducted;
• the stages of the procedure - experience suggests that a staged approach is the most
effective but the number of stages should be minimal;
• the form of complaints - as most organisations have telephone lines to handle
enquiries, they should be prepared to receive most of their complaints over the tele-
phone;
• time limits - limits need to be set for each stage of the procedure, including acknowl-
edgement of receipt, investigation and final response to the complainant;
• redress - where a complaint is found to be justified, consideration needs to be given
to providing a redress. In fact, a surprising number of people would be satisfied with
an acknowledgement of error;
• language - simple and easily understood terms should be used and technical and pro-
fessional jargons should be avoided as far as possible;
• further channels - complainants should be given information about what they can do
and where they can go within the organisation, or external redress channels such as
the Ombudsman, if they are dissatisfied with the outcome of their complaint;
• how to deal with difficult customers - preparations should be made to deal with more
difficult customers.

Remedies may take many forms and may:
• explain why the action complained about was taken;
• apologise with sincerity whenever warranted;
• try to meet any reasonable requests that would resolve the matter, or take some par-
ticular action, such as providing a service which has not been provided;
• provide further information to customers about the services available; or
• allocate a different officer to oversee the customer’s case.

At the same time, complaints should be monitored to answer two questions, in particular:
• Where did things go wrong?
  - Was this kind of problem/complaint foreseen?
  - Was there a system in place to deal with such problems?
  - Was the system operating as it should have? If not, why did the system fail?

• How can the organisation do better in the future?
  - Could this kind of problem/complaint recur?
  - What likelihood is there of recurrence?
- What would prevent recurrence?
- Would the cure be worse than the problem?
- Would the cost and complication of guarding against another mistake end up being counterproductive?

**What if an organisation is unsuccessful in resolving the complaint?**

- internal complaint handling does have its drawbacks. Complainants tend to doubt the system’s independence and impartiality, and complaint handling is often restricted by the policy of the organisation. It is up to the organisations to act positively and more openly in order to eliminate these doubts;
- it will not always be possible to satisfy complainants or agree to all the terms of any settlement they want. Common sense dictates what is reasonable or achievable, taking into account the limits of an organisation’s policy and resources;
- the complainant should be told in clear terms what the organisation can and cannot do; and,
- the complainant should be advised of established appeal mechanisms, both administrative or statutory, including an independent review by the Ombudsman.

**Indicators of the effectiveness of the public “voice” as an integrity tool**

- Do government agencies mount periodic campaigns to inform citizens of their rights?
- Do citizens have ready access to sources of advice as to their rights?
- Do government agencies have complaints channels? Are they used? Do they get results?
- Are citizens informed of the results of their complaints?
- Is there protection for “whistleblowers”? Do public servants or private sector employees feel able to make complaints when their superiors have acted corruptly?
- Do government agencies make a practice of surveying the public to test the public’s views on the services with which they are being provided?
- In countries where there is reasonable access to the Internet, is it the practice for government departments to have web sites carrying the information which citizens need? Does this meet the needs of citizens?
- Are “Citizen’s Charters” (or similar undertakings) published to establish the obligations of service providers and the rights of users?
Chapter 26

Competition Policy and Containing Corruption

*Competition...* 6. Ecology. The struggle between individuals of the same or different species for food, space, light, etc., when these are inadequate to supply the needs of all.

*Collins English Dictionary (Millennium Edition), 1999*

The fight against corruption does not, of course, take place only within the public sector, or only where the public sector and the private sector do business in the form of public procurement. It takes place, too, within private sector organisations and in areas governed by a country’s “competition policy”.

It is well beyond the scope of this Source Book to attempt to examine the concept of “competition policy” its entirety. Instead, this chapter seeks to comment on some of its aspects where competition policy touches on matters which many consider to be “corrupt”, including abusive exercises of economic power.

Because competition is essentially indiscriminate, in that it does not favour one interest over another, there are few political constituencies which have a vested interest in promoting and building a culture of fair competition. This renders the consumer movement an important stakeholder in the anti-corruption movement, with strategic alliances between consumer groups and Transparency International proliferating.¹

In essence, competition policy provides opportunities for civil society to mobilise and intervene in defence of consumer rights. Consumer groups can:

- informally monitor compliance with the standards which have been set;
- monitor the truthfulness of advertising;
- examine the safety of products;
- engage with the private sector, using the legal requirements as a minimum benchmark;
- make submissions to regulators; and
- where dialogue with the private sector interests in question fails, they can run test cases in court.²

At the same time, civil society (and consumer groups in particular) can foster the political will to pursue a process that stimulates an understanding of how a properly-conceived competition policy works in the interests of all.

¹ E.g. with Consumers International: [http://www.consumersinternational.org](http://www.consumersinternational.org). Consumers International is a federation of more than 260 member consumer organisations in 112 countries. Its current president is Pamela Chan Won Shui, of the Hong Kong Consumer Council [HKCC]. The head office is located in London, along with the Programme for Developed Economies and the Programme for Economies in Transition. There are also three regional offices - in Santiago, Chile; Kuala Lumpur, Malaysia; and Harare, Zimbabwe.

² For example, a local association in Kenya has been mounting court challenges to determine whether competition policy permits corrupt state-owned enterprises to raise their charges to the public when these reflect in large measure the costs of corruption, and when the enterprises are doing little to counter them.
What is "competition policy"?

"Competition policy" is an essential tool to protect and promote economic activity, and to ensure and to underwrite the integrity of private sector activities. It determines the place of the state in the economic life of the nation, defining the activities the state will be involved in and which will be left to the private sector. It also regulates in appropriate ways the manner in which the private sector is to function so as to ensure that this serves the best interests of all.

Competition policy seeks to deliver goods and services to a country’s citizens at the cheapest sustainable prices, to encourage innovation and development, to increase productivity and to engage in trade and competition on international markets. A prime purpose is to minimise the scope for rigging markets by prohibiting the formation of cartels. It also aims to reduce barriers to entry into business activities and to expand opportunities for small and medium sized businesses, but its aims are not confined to the economic. They include social objectives, including equity, the welfare of consumers and the enhancement of the quality of life of all (and particularly the most vulnerable, the poor).

Some might be forgiven for thinking that competition policy and laws are designed only for rich and urban societies, or that competition law is designed to impose forms of capitalism at the expense of the poor and the weak. In fact its functions are, if anything, the very reverse. Competition law builds and sustains public confidence in institutions, and so, in the end, can help underpin the stability of democracies. It is the key to an effective market economy. If, as many now believe, the route to development for the world’s poorest nations lies by way of private sector activity rather than through the largely-failed government-led commercial initiatives of the past, a sound competition policy can provide the bedrock for a country’s development. When the institutions designed to promote competition policy are weak, corruption can flourish, which is why those who would fight corruption should see the role they are playing against this broader background.

In many ways, a well-thought out “competition policy” in its totality can give substance to a country’s vision of what it wants to be.

The objectives of competition policy

A core objective of competition law is to create an open and well-regulated economy for the benefit of all the people in a given country through:

- regulating market excesses and restrictive trade practices (outlawing price-fixing, predatory pricing designed to drive a competitor out of business, fraudulent advertising, the formation of cartels etc.);
- providing efficient and effective regulation of banking and of stock exchanges;
- reducing the scope for mergers and the development of “market dominance” which are contrary to the public interest;\(^\text{4}\);
- reducing the scope for monopoly profits in such fields as infrastructure, transport and communications;
- providing a framework for the protection of intellectual property (patent, trade marks and copyright); and

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3 This is not, of course, to imply that all who fall foul of regulatory agencies are necessarily corrupt, nor that they are seeking to abuse the economic power they may have. The mechanisms work as a protection for all against potential abuses, as well as actual ones.

4 In the discussion of the media, the dangers of a country's privately-owned media falling into too few hands was highlighted. Competition policy is the tool used to prevent undue aggregations of newspapers and electronic media outlets.
• providing protection (through regulating the activities of financial institutions and pension funds).

Effective procurement laws (discussed earlier in this Source Book) are just one, if highly important, example of competition policies put into practice.

A sound competition policy can help the development of a country by rendering it more attractive to investors, usually by increasing investor confidence. But competition policy and competition law may be ineffective unless they are developed within the wider context of regulation and legal frameworks relating to the business environment. Issues of corporate governance, contract enforcement, the judicial system and dispute resolution mechanisms are also important.

The reform of competition policy and laws should go hand in hand with the strengthening of corporate governance and the development of appropriate codes of conduct.

Some of the more black-and-white mapractices which competition policy seeks to restrain include:

- **Tied selling**: Forcing a buyer to purchase greater quantities of goods and services than they need, or to buy the full range of products in a particular category or other products they neither need nor want.
- **Pyramid selling**: Franchises to sell products are granted on the basis that the franchisees will bring in further tiers of franchisees beneath them ad infinitum. Eventually the bubble bursts, those at the top disappear with the takings and those at the bottom, who thought they were buying business opportunities, find themselves left with nothing – a phenomenon which in various guises has laid waste to Albania.
- **Resale price maintenance**: The supplier dictates the price that the seller can charge and makes it a condition of supply that the price be no lower.
- **Exclusive dealing**: Creating local monopolies by agreeing to divide markets into regions whether geographically or by category of goods.
- **Refusal to deal**: Forcing a purchaser to act under instructions from the supplier under threat of the withdrawal of products or services. (This usually occurs where there are limited options for alternative supply.)
- **Differential pricing**: A supplier charges different prices to different buyers on a basis other than those of quality or of quantity ordered.
- **Predatory pricing**: The charging of artificially low prices to undercut a competitor with the aim of driving it out of business.
- **Cartels**: Groups of firms acting together to gain a dominant market position from which they can manage prices to artificially high levels.\(^5\)

**Competition policy and the role of the state**

There were times in the recent past when some economists attacked the notion of the state playing an economic role, asserting that governments should withdraw from the market-place entirely, privatising as they go, abandoning the old control and command economies they had been practising, and leaving the private sector more-or-less in sole charge.

Most have now rejected the more extreme elements in this minimalist view. The state is seen

rather as having a crucial role in ensuring that the principal players in the economy abide by well-defined and appropriate rules. This in turn demonstrates the absolute necessity of a strong state, well-equipped to protect the public interest and to regulate areas of the private sector susceptible to corruption and other forms of abuse.

It is obviously nonsensical to suggest that such critical strategic activities as banking, the management of pension funds, and insurance could ever be left free to operate entirely as they please. Indeed, the absence of effective banking regulation was one of the major factors behind the collapse of the “Asian Miracle”. In an ideal world, self-regulation might be effective: in the real world it tends to fail.  

One may be able to agree that government intervention in the economy should, to the extent possible, be restricted to setting the ground rules for fair competition, to providing a conducive environment for efficient production and provision of goods and services, and to regulating market excesses. At the same time the state must also be strong and properly equipped to be able to perform each of these functions. This may also take some time to achieve. Where the state has been deeply involved in the economy through state-owned enterprises, the government itself may well have become a monopoly, and it can take also quite some time for a competitive market to take responsibility for all of a government’s commercial activities.

Distortions in a domestic market, too, can often be the result of government interventions, such as protectionism of inefficient local industries producing sub-standard and over-priced goods. These interventions may also work against the interests of the poor in particular, by denying them access to cheaper goods of better quality, and need to be addressed in the context of competition policy.

**Competition policy and developing countries**

As noted, competition policy is not just for rich developed countries. At the national level, competition policies and laws are found in countries in all stages of development. History suggests that competition policy is actually a means for accelerating development by casting off the shackles of anti-competitive and anti-consumer practices.

The legislation of Canada, the United States and the United Kingdom, for example, dates back to the end of the nineteenth century, when all three had many of the less attractive features of today’s developing economies. There were small cliques of powerful private sector interests (oligarchs) which did not hesitate to manipulate markets at the expense of the public interest. Likewise, bribes and kickbacks flourished in the private sector. The responses to the challenges these interests posed can now be seen as marking an emerging recognition of the need for competition policy.

It was not that policymakers in these countries necessarily had a very clear concept of what they were trying to achieve, or of where their reforms would ultimately lead. The measures introduced were piecemeal, not comprehensive. In the US, for example, the law was developed

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6 E.g. “As the players in the Internet economy today formed new alliances and demonstrated their commitment to self-regulation as an effective scheme to protect consumer privacy, a new report suggests that such measures aren’t effective. The study, “Surfer Beware II: Notice is Not Enough,” from the Electronic Privacy Information Center (EPIC) shows that an attempt by the Direct Marketing Association to get members to abide by privacy guidelines has so far failed. According to EPIC’s research, only a handful of the association’s new members are observing the group’s privacy practices. “The Direct Marketing Association, after making a pitch for self-regulation and privacy, doesn’t seem to be doing a very good job of getting new members to follow”, Study: Self-Policing Fails, by Chris Oakes writing in Wired News, 22 June 1998. In the United Kingdom, the self-regulation of the medical profession has been called into question following major scandals involving doctors who were allowed to practise long after they had demonstrated their lack of competence, and others who had provided false references.
progressively and in response to differing problems. First, the Sherman Act of 1890 rendered conspiracies in restraint of trade a criminal offence, but it recognised no role for the state in actively regulating what was taking place (Canada had done so a year earlier, in 1889). Then came the Clayton Act of 1914, still the primary tool for the control of anti-competitive mergers and joint ventures in the US. At the same time, the Federal Trade Commission Act created the Federal Trade Commission and so introduced the element of active regulation. These countries, and other developed economies, are constantly modernising their legal framework, the United Kingdom as recently as in 1998, with its Competition Act.7

So it is that elsewhere today, countries such as Thailand and South Africa are enacting competition laws addressing unfair and unjustifiable dominant market conduct; mergers that may lead to monopolies or unfair competition; monopolies and the reduction of competition as a result of mergers; and unfair and restrictive trade practices.8

Competition policy works against cartels, and those who would manipulate positions either through being the sole provider of essential products, or through combining with others in a conspiracy against competition, and against the public interest. Many countries have been victims of cartels over the years - the areas of vitamins, cement and heavy electrical engineering being among the best-known. In the field of heavy electrical equipment, for decades collusive behaviour artificially inflated infrastructure costs around the world. Manufacturers closed down their cartelization in countries where they were prosecuted, but elsewhere - largely in the developing world - they continued where regulatory agencies did not exist or were powerless to intervene.9 Without doubt, suspicion of cartels fuels much of the contemporary hostility within the contemporary globalisation debate.

In retrospect, too, we can see that one of the root causes of the chaos in the transition process in Russia stemmed from a failure to recognise from the outset the need for a competition policy that would have acted as a brake on the “winner takes all” free-for-all that in fact developed. The need for Russia to have a sound regulatory framework within which competition can take place is all too stark today.10

Independent regulators and Competition Authorities

Competition policy and law does not operate simply by banning certain types of behaviour. It does much more than this. It establishes mechanisms which oversee and regulate the various activities for which they are responsible. In some instances a Competition Authority is established to oversee and enforce the whole gamut of pro-competition policies and laws; in other instances, specific regulators are appointed to regulate defined areas of activity (e.g.

The challenge of chaebol reform in Korea

In the history of the chaebol, Korea’s huge business conglomerates, 28 July 2000 was an important day. The nation’s top economic policy-makers agreed on a number of points that mark the beginning of the second phase of chaebol reform. They called for the government to strengthen its supervisory powers of the Financial Supervisory Commission and the Fair Trade Commission. The FTC’s power to investigate financial transactions of firms, which was due to expire in February 2001, will be extended for another year, and the FSC will gain the right to investigate the financial transactions of firms involved in workout programs. To date, the FSC’s activities have covered only the banking sector. The government was given expanded regulatory powers to assess responsibility for financial failure and punish illegal financial deals. Further measures to streamline bankruptcy procedures and strengthen the rights of minority stockholders were also announced. The second phase of chaebol reform, as the government calls it, has begun with an expansion of government regulatory powers over business. The power struggles and financial problems in the Hyundai Group are timely reminders of the deep-seated problems in corporate culture. Even the largest chaebol are essentially family businesses that lack professional management and are subject to strong family rivalries. The problem of chaebol reform is obvious: markets in Korea are too weak to influence chaebol behaviour. The more the government intervenes in the private sector, the weaker markets become. The less the government intervenes, the stronger markets become as the chaebol reassert their dominance. The pendulum swings, as it has since the economic boom began in the 1960s, from periods of government intervention followed by periods of chaebol consolidation, leaving little room for strong markets to develop. The swings closely mirror the cycle of reform and corruption that has marked previous administrations. The government’s get-tough measures are reassuring because they indicate that it is attempting to break from the cycle of reform and corruption...

Korea Herald, 2 August 2000.
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7 S. Chakravarthy (2000), Competition Regimes Around the World: Monographs on Investment and Competition policy, #3 (ICITS Centre for International Trade, Economics & Environment, Jaipur, India.)
9 Unattributable contribution to the discussions at the Round Table Forum on Competition Policy and Law - Their Role in Pro-

This is not to suggest that the faults were wholly on the part of the Russian administration. It was encouraged by a rash of economists from the US, all enthusiasts for the "free market" who urged on what was clearly a headlong plunge into chaos. By way of contrast, the step by step process being adopted in China appears to be designed to avoid these pitfalls.
telecommunications; electricity; water). 11

The regulators should be independent of government, otherwise they can simply become further centres of potential corruption, cronyism and mismanagement. The regulators should understand and work in with the competition policies of the government of the day. The regulators themselves should be accountable and required to give reasons for their decisions. The legality of their decisions should be subject to review by the courts. 12

Regulators also have a major role in promoting transparency and higher levels of public understanding of how the economy of their country functions. 13

For instance, the Australian Competition and Consumer Commission has been able to publicise and explain price fixing, has conducted studies on telecommunications demonstrating to the public the significant savings which they have enjoyed as a consequence of competition, and it has tried to address the belief that competition leads to reductions in services. 14 The Commission works closely with civil society, even to the point of making its country-wide video conference facilities available to consumer groups, an invaluable gesture where the groups are spread over vast distances.

In Thailand, a Competition Commission has been established, comprising politicians, civil servants and representatives of the private sector, and guidelines are being developed. The law there is not an attempt to impose a “quick fix” remedy, but cuts across the omnipotent monopolies and majority ownerships that feed poor corporate governance, minority shareholder abuse and manipulation. In the absence of experience and in the face of a market obviously lacking competition, which is monopolistic or oligopolistic in structure, the task for the Commission is as daunting as it is necessary. Added to this, monopoly businesses are in state hands but undergoing privatisation. 15

A prime difficulty for many developing countries is simply one of a lack of experienced people to serve as independent regulators and a dearth of strong institutions to service them. The questions individual regulators encounter are often highly technical and call for considerable experience and wise judgement. Yet while looking for such a cadre of professionals to emerge, developing countries have little time to lose. The best starting point might be for new competition agencies to give priority to fostering greater public understanding of precisely what “competition” means, its benefits, and who its beneficiaries are.

Financial institutions, regulation and corruption

Many developing countries have suffered grievously through a lack of competition policy in the area have of banking regulation. Much of the blame for corrupt practices which have degraded the economies of a number of developing countries can be laid squarely at the door of regulators in different countries and economies. The point made here is to flag their importance as a major player within a national integrity system. 14 This perception has been hard to shift, particularly in rural areas.

11 Many countries have competition regulators by whatever name. For an up-to-date list see http://www.usdoj.gov/atr/contact/otheratr.htm.
12 A decision by regulators in the United Kingdom to exclude the present licence-holder, Camelot, from further negotiations in connection with the granting of the licence to run the country’s national lottery when the present licence expires is presently under judicial review in the UK courts. The process is described in the chapter on Administrative Law.
13 Space does not permit an exhaustive discussion of the role of regulators in different countries and economies. The point made here is to flag their importance as a major player within a national integrity system.
14 This perception has been hard to shift, particularly in rural areas.
15 See, Development of Competition Policy and Law in Thailand, paper presented to the Round Table Forum on Competition Policy and Law - Their Role in Pro-Poor Development (no author indicated), London, 24 July 2000 organised by the (UK) Department for International Development.
of the banking system. Banks have been inadequately supervised so that politicians have been able to raise loans for political, not economic, reasons. Institutions have been brought to the threshold of insolvency, at times impoverishing small savers.

Now euphemistically described as "non-performing loans", enormous sums have been drawn from banks by the politically well-connected in developing countries from Asia to Africa, seemingly without the slightest intention of ever paying them back.

Some countries, too, have suffered from the depredations of "pyramid schemes", in which massive frauds have been perpetrated through financial operations that have involved the acceptance of deposits from the public at artificially high interest rates. The interest has been paid for a time, but out of fresh deposits being received. As the schemes gained a unmerited reputation for good performance, new deposits flowed in and before long the promoters were nowhere to be found. In Albania and Romania such schemes created major public unrest.

Globalisation and intellectual property

The struggle to strike a fair and justifiable “balance” between the competing claims of those who have developed intellectual property and those who need to have the benefits of it, seems likely to be a dominant feature of the globalisation debate.

A ferocious battle is being waged in the field of intellectual property - what degree of protection should a country afford to the “owners” of intellectual property, and what (if any) limits should be placed on the rights of its “owners” to exploit their positions.16

The debate has become particularly fierce as companies try to extract what to many seem to be unjustifiably high returns on investments in the development of new drugs - such as drugs to treat HIV-AIDS - and particularly when they seek to do so at the expense of the sick of the developing world.17

Even trade mark provisions have been used to derail national public health programmes, for example Canada’s programmes to discourage smoking and Guatemala’s legislation to guard against the aggressive marketing of breast-milk substitutes.18 Could those drafting the international Conventions that deal with patents, trade marks and copyright ever have foreseen that their work would be misused in such a manner?

Consumer groups also oppose attempts to “fix” prices across borders. Trademark or patent

16 There is a raft of international conventions on the subject of intellectual property. The “Paris Convention” dates from 1883 (the International Convention for the Protection of Industrial Property) covering patents, industrial designs, trademarks and unfair competition. The “Berne Convention” (the Convention for the Protection of Literary and Artistic Works) deals with authors’ rights and royalties dates from 1971.

17 The very public argument between President Mbeki of South Africa, the US authorities and the suppliers of drugs to assist AIDS patients is a recent example. It is simplistic to argue that a country should exhaust its entire health budget on expensive drugs for a comparatively small number of its population. Indeed, many argue that rather than purchase these drugs at all it would be better to concentrate resources on the provision of clean water and improved education as a means of increasingly longevity. A perceived failure to provide such drugs can, however, lay a government open to emotion blackmail by the pharmaceutical industry no less than by its political opponents.

18 A Canadian parliamentary committee was warned that the government faced trade sanctions and huge fines if it pursued a no-smoking initiative that would result in cigarettes being sold in plain packaging, rather than with distinctive tobacco company trade marks. Guatemala’s implemented the International Code of Marketing of Breast Milk Substitutes by law in 1983. This outlawed the aggressive marketing of much-criticised breast-milk substitutes by banning the use of pictures of babies on baby food for children of under two years of age. A Swiss-owned company threatened trade sanctions through the US government if it was denied the use of its distinctive trademark - a fat, chubby, blue-eyed westernised baby. Less controversially, US trade sanctions were also deployed to force China to enact stronger intellectual property laws and to close down factories making counterfeit movies and CDs. More than two million tapes and CDs were destroyed, and 30,000 counterfeit computer discs confiscated. See other instances cited in James Packard Love (Center for Study of Responsive Law) A Consumer Perspective of Prospects As They relate to Risks Regarding Intellectual Property Rights, Third Trade Ministerial and Americas Business Forum, Belo Horizonte, Brazil, May 1997: http://www.cptech.org/pharm.belo.paper.html.
“owners” claim the right to charge more for the same goods in one country than they do in others. This is seen as an unjustifiable manipulation against the interests of consumers in the markets where higher prices are demanded. Hence battles also rage over so-called “grey imports”, or “parallel importations”. Importers by-pass local franchised suppliers of well-known goods and import them directly from suppliers in other countries, where the prices are lower.19 Defenders of the manufacturers deny that this is market manipulation - and so a corrupt practice – claiming that “orderly” marketing through designated sales outlets assures quality, after-sales service and product development in line with specific country needs.

For years, many developing countries have been “free riding”, and denying protection to intellectual property owners either generally or by category. Weak patent laws have been part of the economic planning of Taiwan, Singapore, Hong Kong and Korea. Governments of India, Thailand and Brazil have been highly selective.20 Some countries, particularly in Latin America, have imposed systems of “mandatory licensing”, granting protection but affording the right to local manufacturers to be granted licences at fixed maximum royalty rates.

In recent times “intellectual property rights” have become a burning issue, especially for countries who have substantial trade with the United States. Although the US was for generations among the “pirates” of the intellectual property world (it did not sign the 1971 Berne Convention for the Protection of Literary and Artistic Works until as late as 1989)21, it has recognised the global power which ownership of intellectual property can confer, and successive administrations have worked assiduously to assert it.

Yet US intellectual property law can itself be quirky. Competition policy analysts are concerned about attempts being made in the US to “copyright” novel business practices, such as ways of avoiding (but not evading) income tax, and forms of financial instruments that have not been used before.22 The US is not alone in this. In Russia, a company has successfully applied to Rospatent for patent rights over the ordinary bottle – having previously “patented” nails and railway tracks!23 With such maverick developments at the national level there is added cause for disquiet.

The benefits for developing countries to sign up fully to the global intellectual property regime are promoted vigorously by the World Intellectual Property Organisation (WIPO), but others take a more sceptical view and note that intellectual property regimes mean little to countries in sub-Saharan Africa and in Asia where people live on less than one dollar a day, and where less than five per cent of economic activity relates to manufacturing.24

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19 The Australian Consumer Association has been pushing for the abolition of import and distribution of software after a survey revealed that consumers were paying too much for software products. Discrepancies as high as $US6500 were apparent in the sale of QuarkXPress between Australia and the US. Australia has introduced parallel import systems for CDs. See Rebecca Munro, Australia to adopt parallel import system for software?, 8 February 1999. http://www2.idg.com.au
21 The expression “pirate” is used in Nicolas S. Gikkas, supra.
22 James Packard Love, supra.
23 Red-faced over all this is Rospatent, a division of Russia’s Federal Institute of Industrial Property. They are investigating how the patent was issued, to quell public suspicions that someone in their office is taking bribes. “Russia is a country of miracles,” said Valeri Jermakyan, a deputy director of inspections at Rospatent. “Even ancient inventions can be patented.” The bottle was invented either sometime around 1500 B.C. by Egyptian artisans or in AD 12 by the Chinese Emperor Wu Hezhou. “Russian Idea for Riches: Why Not Patent the Bottle?” by Daniel Williams, Washington Post Service, 31 July 2000
24 The benefits for a developing country affording a high degree of protection to intellectual property are generally articulated by advocates as including such perceived benefits as: stimulating innovation by providing an environment in which innovation is rewarded; providing lower cost methods of production and distribution of existing products; inviting new, safe and effective products and technology; creating improved goods and services tailored to particular in-country needs through the adaptation and improvement of existing products and technology; creating jobs in the primary industries and in supporting businesses; creating a higher-quality and technically better prepared workforce through on-the-job training associated with authorised transfers of technology; increasing the amount of new capital that can be generated for investment in economic development; creating advances that will contribute to the level of technology throughout the world and in the process, gain revenues from those who benefit from their use; and rewarding creative talent in the cultural industries through systems of royalties and local foreign distribution rights. (National Law Center for Inter-American Free Trade, Intellectual Property Committee, www.natlaw.com/pubs/spmxip11.htm)
What seems overdue is a root-and-branch re-evaluation of the global intellectual property regime. It must ensure that it strikes a fairer balance between creators and users. Rewards should be provided for the enterprising to encourage further initiative, but they should not be such as to be able to deny most of the world the benefits of scientific and other advances, at least until patents expire - by which time, of course, science and innovation have moved on.25

**Competition policy and globalisation**

Quite apart from intellectual property considerations, globalisation brings a new dimension to competition policy. Abuse is not confined within national borders. International cartelization and similar abuse, and other forms of corruption, can impact seriously on international trade, and there is a growing realisation of the need for international guidelines for the control of anti-competitive conduct. These abusive practices do not impact simply on final consumer goods, but also on “input goods” such as steel, fertiliser and energy.

Countries with weak domestic institutions are particularly vulnerable to cross-border restrictive trade practices and international business conspiracies. Integration into the global economy may increase competition, but it does not necessarily ensure it. Cartels, vertical restraints (agreements between sellers and buyers), exclusive dealerships and controls over domestic imports can effectively block people from receiving the development benefits which globalisation should bring. Concern over these vulnerabilities lie at the heart of some of the protests against globalisation presently taking place around the world.

The problem, too, is a growing one as privatisation continues to place more and more previously publicly-owned assets into private hands, thus paving the way for increased levels of international mergers and acquisitions. As the public barriers to competition are removed the private barriers must, correspondingly, be addressed - and the more so with the growth of globalisation.

For regulators there is a growing headache. A merger in the host country of two previously-competing businesses may not result in an adverse reduction in competition there. However, in a foreign country the two firms may have subsidiaries, previously the only two rivals in a particular market. Thus the consequences of a merger going ahead in one country can have very serious consequences for another. Anti-competitive practices can also be imported through foreign direct investment, with international franchisers using local franchisees to source particular products and tie up local distribution chains.

There is also a controversial question to resolve: what is to be the role of the World Trade Organisation in enforcing competition policy at the global level? Is it to be a “global competition policeman”? Is there to be an international framework, perhaps developed at the WTO, to underpin the development of competition policy?26 Would such a framework be a way in which to tackle the provision of increased cooperation to counter abusive and corrupt practices which are adversely affecting international markets, and particularly the economies of developing countries?

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25 The “profiteering” charge is also made in developed countries. In the US, several sources document the exploitation of health insurance companies by corporations who over-price their drugs

26 Although it can be said that every country has a policy on competition, even if it is not articulated and amounts to simply letting the status quo remain undisturbed, those who are consciously developing their policies tend to enact competition laws. At present only some 80 countries of the WTO’s 136 members has such a law, although as noted in the text, the number is increasing.
Some indicators as to the effectiveness of a country's competition policy

- Has the government articulated a clear competition policy?
- Is such a policy being implemented through law and other reforms of practices and procedures?
- Does the private sector support the development of a coherent and effective competition policy? Do consumer protection organisations support it?
- Are efforts being made to educate the public as to the benefits for them of an effective competition policy (both in terms of lower prices and of protection against abuse)?
- Are there clear and enforceable laws criminalising the creation of cartels and bidding rings, etc.? Is price-fixing illegal?
- Are monopolies or near-monopolies in private hands the subject of regulation?
- Are mergers permitted which give rise to monopolies or create undue market dominance?
- Do local regulators receive the international assistance they require to discharge their roles?
- Are local regulators independent of political interference and protected against corruption?
- Are arrangements made to protect the poor and the most vulnerable against exploitation?
Laws to Fight Corruption

Bribery is an evil practice which threatens the foundations of any civilised society.
Attorney General v Reid [1994] 1 AC 324, 330

If lawyers could draft laws that prevent corrupt behaviour, there would be no problem with corruption. To a large degree, the present crisis stems from the fact that laws and legal institutions have failed. This failure has been in part due to the weaknesses already present in judicial systems, and in part from the lack of will to strengthen the system as a result of the interplay of actors who have a vested interest of one kind or another in the status quo.

If we were to start with the supreme law of a country, its Constitution, the example of Thailand is instructive:

As a piece of anti-corruption legislation, the Thai Constitution should be viewed as a landmark document which seeks to guarantee democracy through greater public participation in decision making and decentralisation of State powers, while at the same time tackling corruption through the establishment of institutions like the office of the Ombudsman and the National Counter Corruption Commission while promoting transparency and integrity in official life.2

It is widely agreed that the prevention of corruption should be at the forefront of reform efforts, however enforcement is just as important. Relying on a “big stick” approach to deal with corruption after the event, can be uncertain, ineffective and wasteful. Prosecutions, although unavoidable, are an indication that prevention has failed. Effective legal sanctions are, however, vital: not only are they essential to deal with those who misbehave, but the knowledge itself of sure and effective law enforcement contributes significantly to prevention efforts. The reformer must therefore address both aspects. Prevention and enforcement reinforce each other.

When we talk about laws to fight corruption we are not just talking about the criminal law and laws of evidence. These are important, and without sound criminal laws and procedures the task is made more difficult but to focus on these elements alone, as many reformers have, is to ignore a much wider range of laws. These include laws which cover:

- access to information (including official secrets legislation);
- conflict of interest;
- public procurement;
- freedom of expression;
- freedom of the press;
- protection of “whistleblowers” and complainants;

1 A decision of the Judicial Committee of the Privy Council in an appeal from Hong Kong. The Privy Council is the highest court for a number of Commonwealth countries and a court whose decisions are widely respected around the world.

CONFRONTING CORRUPTION: THE ELEMENTS OF A NATIONAL INTEGRITY SYSTEM

- enabling civil society to mobilise;
- democratic elections;
- banning those convicted of offences of moral turpitude from holding or running for election to public office or from holding directorships;
- gifts and hospitality;
- office of the Ombudsman; and
- judicial review of the legality of administrative actions.

These, and others, are covered in various chapters of this book.

Much can be accomplished administratively, and without any need to reform the law at all - abolishing unnecessary licences, streamlining necessary procedures, limiting areas of discretion (and defining criteria where they are necessary), developing ethics programmes and creating avenues for citizens to complain effectively.³

The discussion in this chapter will be limited to the role of the criminal law (the law which prosecutes offenders) and the role of the civil law (which affords remedies to victims against those who have wronged them or may empower citizens to enforce anti-corruption laws where public authorities fail to do so). For the moment let us examine the criminal law.

A. CRIMINAL LAW

Corruption cases can take a long time to come to the notice of the authorities. In some countries, the statutes of limitation (restricting the time within which an offence can be prosecuted), start to run from the date of the commission of the offence, not from the time when it was first brought to the attention of the authorities. This can mean that corrupt officials escape punishment entirely simply by reason of their corrupt acts going undetected for a sufficient length of time.

It is important, therefore, that statutes of limitation allow for a period of prosecution that runs, not from the date of the offence taking place but from the date of its first coming to light.

Secondly, the period of the limitation ought not to be too short. In Italy the bizarre situation prevails whereby accused persons, by the time they have fought appeals through the higher courts, are covered by the statute of limitations. Hence an energetic lawyer can almost guarantee that a corrupt person escapes punishment. Such laws bring the law itself into contempt whilst providing safe havens for the corrupt.

There are eight general principles which should govern remedies under the criminal law:

1. Laws against corruption should comply with international human rights standards and

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³ In some cases whole agencies may be found to be unnecessary. As, for example, in the case of the superfluous Office of the Restaurant Inspector in Zurich. "The affair centres on Raphael Huber, the canton of Zurich's former restaurant and bar inspecto, alleged to have taken some US$1.84 million in bribes from permit applicants in the ten years prior to 1991. The story has shocked a country where the honesty of public officials has always been taken for granted. No one had suspected that cantonal regulations giving inspectors immense discretionary powers could be so abused. Among other things, applicants had to show that there was a "need" for the establishment. According to the prosecutor, Huber established a "reign of fear" taking payments in the form of loans or encouraging applicants to buy, at excessive prices, pictures painted by his deceased father. Though earning only a modest salary, Huber managed to maintain two flats in Zurich and to build up a 90-hectare estate in Chianti, Italy, complete with vineyard and artificial lake. The case is expected to come to trial early next year. Meanwhile the cantonal government has introduced new regulations under which applicants no longer have to prove a "need" for their establishments." Financial Times, 8 July 1994 in TI Newsletter, September 1994.
afford a fair trial to those accused. It is crucial that criminal laws against corruption respect human rights guarantees, under a Constitutional Bill of Rights or an international code, to ensure specific procedures are not struck down by the courts as being unconstitutional.

2. Laws should not be seen as being unduly repressive. They should enjoy popular public support. If not, they risk a lack of enforcement. In some countries the argument will run that the penalties are so slight that it is not worth bringing the cases to court. For example, in Japan, suspended sentences were handed down to two Tobishima executives for bribing the Governor of Ibaraki Prefecture for a part of a large dam project, because they “repented”. In other countries, the opposite argument may apply. In South Korea, a review of criminal law penalties concluded that the penalties on conviction were simply too high. Civil servants faced a minimum of seven years imprisonment, and as a result the judges were loathe to convict. In Uganda, an anti-corruption law has never been used in over 20 years on the statute book, apparently because it was thought to be “simply too tough”.

3. There should be clear guidelines on sentencing so that sentences are consistent between one offender and another, and fair, but not outrageously punitive. Clearly, a court must be able to discriminate between cases in which an official has been bribed to perform his duty (e.g., to expedite official action), and the more serious cases in which an official has been bribed to act in a way which was in itself improper. Legislatures may find satisfaction in enacting laws which provide swingeing penalties, but this can actually undermine the reform effort. Many prosecutors dislike bringing cases in which sentences are likely to be imposed which the community regards as being excessive.

4. Combining the various criminal laws dealing with corruption and secret commissions together in a single law has much merit. It reduces the possibility of loopholes and can demonstrate the seriousness with which the law treats this form of behaviour by making it plain that anti-corruption offences apply to the public and private sectors alike. Whichever course is chosen, the offence of giving and receiving “secret commissions” should be provided for.

5. Regular reviews of the criminal law framework (including laws of evidence and of the adequacy of existing penalties) are essential. This is particularly true as modern technology can run ahead of the more pedestrian legal stipulations. For example, offences involving computers, and evidence generated by computers, may run counter to existing limitations designed for a paper-based world. There may also be difficulties where some legal systems have not caught up with the concept of criminal conduct by a corporate body. For example, the criminal law should be able to redress corrupt corporate practices such as “bidding rings” for public contracts, in which apparent competitors collude among themselves to decide who will get a particular contract and at what price.

6. Special provisions may be necessary in corruption cases which require individuals, once they are shown to be wealthy beyond the capacity of known sources of income, to establish the origins of that wealth to the satisfaction of the court. Constitutional problems may arise in circumstances where a law requires that an accused person give evidence under

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oath. In Zambia, this type of provision was held to be unconstitutional as it infringed on the right of the individual against self-incrimination. In such a circumstance, the difficulty lies in reversing the onus of proof - in compelling a person, under threat of conviction for presumed corruption, to explain how assets were acquired legitimately, as opposed to merely giving the person the option to adduce evidence in explanation (as is the position in many jurisdictions). The law may thus call for a prosecutor to prove a linkage - which may be exceptionally difficult to do to the degree necessary in criminal proceedings. A better approach would be to make special legislative provisions which state that conclusions may be drawn by the court "in the absence of a satisfactory explanation by the accused." This is not to compel the person to give evidence (which would contravene international human rights norms against self-incrimination) but, as in other cases where a prima facie case is made out against a person, to place them in the position of having to choose between giving evidence and risking conviction without doing so.

7. Special provisions will be needed to ensure that the proceeds of corruption can be recaptured by the state as they will often be in the hands of third parties or even located out of the country. The criminal law should provide for the tracing, seizure, freezing and forfeiture of illicit earnings from corruption. One of the few benefits to come out of the international war against illicit drug trafficking has been the development of legal frameworks which facilitate the investigation and seizure of proceeds, regardless of the jurisdiction in which they are located. Some countries provide for forfeiture even in the absence of conviction, unless a claim is made by a rightful owner within a certain time.

8. Provisions will also be needed to ensure that the crime of corruption is seen to include both the payment as well as the receipt of bribes. A few countries only make the acceptance of bribes a crime, not their payment. This is obviously a serious limitation to combating corruption at its source. Of course, where "bribes" are not offered, but are extorted under compulsion, it would be unfair to prosecute the payer, as to do so would be to victimise him or her twice over. The limits of the criminal law

The question of the refinement of laws to fight corruption through effective prosecutions, is a real one for countries who have a functioning judicial system, and investigators sufficiently independent or sufficiently bold to investigate cases of corruption which involve senior figures.

In this regard, two recent examples are in stark contrast: in Israel (where a former Prime Minister was being held to account for what some would see as serious but comparatively minor blemishes), and in Russia (where in 1999 an outgoing President was granted a carte blanche immunity, seemingly without restrictions). The one country has a functioning integrity system which was seen to be operating, and the other clearly does not. Hence, the precise content of the laws is a serious matter for Israel, but almost an irrelevance for Russia.

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6 See the (Hong Kong) Corrupt Practices (Amendment) Act, No. 29 of 1987, ss. 8 and 13. This places an evidential burden on an accused but no longer requires that the accused personally give evidence on oath.

7 The French criminal code is one of several that makes a distinction between "active corruption" and "passive corruption" - "active" being where a public official actively seeks a gift or other benefit before the award of a contract or the rendering of a service within his or her remit. "Passive" corruption is said to occur where an official accepts a gift or other reward after the award of the contract or the performance of the service. Whether such distinctions are required in terms of defining the offence (as opposed to deciding on the appropriate penalty) is debatable.

8 The former Prime Minister was alleged to have failed to return a number of gifts given to him on state occasions that by law belonged to the state, and to have had some work carried out on his private home at state expense. Both, of course, are matters which, if true, deserve censure.

Getting the evidence

Unlike most other crimes, (but in common with organised crime), corruption offences usually have no obvious victim to complain. All those involved are beneficiaries, and all have an interest in preserving secrecy. Thus, evidence of actual offences is exceptionally difficult to obtain. The perpetrators each have power over the others.

- An “integrity test” operated by an agent provocateur is one approach, but it is one which courts in many countries treat with considerable caution. However, they can be highly effective.

- Parties to offences can be encouraged to come forward and offer evidence. This inevitably gives rise to the question of immunities. In Central and Eastern Europe there has been for years, a provision that the giver of a bribe must report it within 24 hours or so, and thereby be immune from prosecution (others might see this really as being a matter of reporting the fact that one has been the victim of extortion). However, it seems that this provision has not operated effectively, if at all. In the US, the first person involved in a Securities And Exchange Commission offence who “blows the whistle” is granted automatic immunity. This introduces an element of risk into the corruption equation - far from each being dependent and able to rely on each other's continuing silence, each has considerable power over the other.

- Circumstantial evidence is frequently available, but actual evidence of corrupt acts may be lacking. The Customs Officer who is driving a late model Mercedes is surely a legitimate object of suspicion. So, too, is the head of government who has spent all his life on a modest public officials' salary but who lives in high style, far beyond the bounds of anything he could afford on his official earnings or known income (such as in the case of Charles Haughey now in Ireland). The very extravagance of their life-styles and their ostentatious displays of wealth require explanations. Whereas the Customs officer can readily be subjected to an “integrity test”, it is much more difficult to run an operation against those involved in “grand corruption” where the positions are more senior and the stakes so very much higher. Hence the offence of “living beyond one's official earnings” or of “illicit enrichment” is a necessity if these people are to be brought to account.

The concept is embodied in the Inter-American Convention Against Corruption (adopted at the third plenary session, on 29 March 1996) in the following terms:

Subject to its Constitution and the fundamental principles of its legal system, each State Party that has not yet done so shall take the necessary measures to establish under its laws as an offence a significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions.10

10 Article IX, Illicit Enrichment.

In Pakistan, the National Accountability Bureau Ordinance provides:

26. Tender of pardon to accomplice/plea-bargaining:

(a) Notwithstanding anything contained in the Code, at any stage of investigation or inquiry, the Chairman may, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to any offence, tender a full or conditional pardon to such a person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relating to the said offence including the names of the persons involved therein whether as principals or abettors or otherwise.

(b) Every person accepting a tender of pardon under sub-section (a) shall be examined as a witness in the subsequent trial.

(c) Subject to sub-section (d), the person to whom pardon has been granted under this section shall not:

(i) in the case of a full pardon be tried for the offence in respect of which the pardon was granted; and

(ii) in the case of a conditional pardon be awarded a punishment or penalty higher or other than that specified in the grant of pardon notwithstanding the punishment or penalty authorised by law. (d) Where the Chairman NAB certifies that in his opinion, any person who has accepted such tender has, either by wilfully concealing anything essential or by giving false evidence through willful or reckless mis-statement, not complied with the condition on which the tender was made, such a person may be tried for the offence in respect of which the pardon was so tendered, or for any other offence of which he appears to have been guilty in connection with the said matter including the offence of giving false evidence, which he knows or ought to know is false.

(e) Any statement made before the Chairman NAB or the Court by a person who has accepted a tender of pardon may be given in evidence against him at such trial.

National Accountability Bureau Ordinance 1999 (No. XVIII of 1999)
The Convention has won a wide degree of support throughout the Americas.¹¹

Commentators on the anti-corruption drive in Hong Kong ascribe much of its success to the enactment of such a law.¹²

The essential test for new criminal laws

Before new criminal laws are enacted it is suggested that one must make sure that:

(a) the laws are easily understood and do not give rise to technical debates among lawyers which can frustrate the lawmakers’ intentions;¹³; and,

(b) the laws do not require prosecutors to prove facts which are in reality not necessary (e.g. where a person is in a position of trust and they are found to have considerable unaccounted for wealth, careful drafting of the laws can avoid the necessity that prosecutors then be required to go on and prove that the wealth was obtained illicitly).

There is nothing inherently unfair in requiring a person to establish a defence (after a prosecution has established e.g. that a person is in possession of wealth grossly disproportionate to official earnings) where the facts are peculiarly, and perhaps exclusively, within his or her own knowledge.

"Reversing" the burden of proof and "credible explanations"

The expression “reversing the burden of proof” is one which should be avoided. Not only does it misrepresent the concept under discussion but it creates semantic space for opponents of reform (often in the pockets of corrupt interests) to fight and defeat well-thought-out and eminently fair reforms.

Paradoxically, the human rights movement, so loud in its condemnation of corruption as a font of much human rights abuse, can be among the first to attack reforms when governments try to redress the situation. In 1999, a “right to privacy” campaign in the US successfully blocked “Know Your Customer” requirements that would have markedly reduced the ability of banks to handle illicit funds and indulge in money-laundering. This can be profoundly disappointing to those within the anti-corruption movement - many of whom have spent a considerable time as members of the human rights movement and who are drawn to the fight against corruption because of the impact of corruption on the economic and social rights of so many around the world.

Does such a so-called “reverse onus” infringe the right of an accused to be presumed innocent

¹¹ “The U.S. and Illicit Enrichment – Some OAS countries have made illicit enrichment an offence under their domestic laws. The United States does not expect to establish illicit enrichment as a separate offence under U.S. law. One line of thought behind this position is that the notion may conflict with basic constitutional principles of U.S. law. In addition, a variety of U.S. laws and regulations, in their totality, reach the types of conduct by government officials that this provision seeks to address. For these reasons, the United States does not expect to make illicit enrichment, as described in the convention, a separate offence under U.S. law. Assistance and Co-operation by Parties (that do not have laws against transnational bribery or illicit enrichment) - Parties to the convention that do not establish transnational bribery and/or illicit enrichment as offences under their domestic laws must, to the extent permitted by their laws, provide the assistance and co-operation provided for in the convention to other parties with regard to transnational bribery and illicit enrichment.” Extract from Summary of the Inter-American Convention Against Corruption - Prepared by the U.S. Department of Commerce, Office of the Chief Counsel for International Commerce, April 22, 1998.

¹² See the various analyses by Bertrand de Speville, former Commissioner of the Hong Kong ICAC.

¹³ The German Penal Code is an example of a law which made it unnecessarily difficult for prosecutors to prove corruption. It was essential for them to establish beyond reasonable doubt that a bribe or benefit was given in respect of a specific official act. When the law was reformed in 1997 it was suggested that it simply be an offence where a bribe or benefit was given or offered “in connection with the public office” held by the official. However a more legalistic view prevailed and a middle course was adopted, so that the bribe or benefit must be in respect of the civil servant’s “exercise of his or her official duties”. At the same time the law was widened so that for the first time it included benefits given to third parties, such as a spouse. A number of countries need to reconsider the adequacy of their laws in this regard.
until proven guilty? One superior court which examined these types of provisions observed:

Before the prosecution can rely on the presumption that pecuniary resources or property were in the accused’s control, it has of course to prove beyond reasonable doubt the facts which give rise to it. The presumption must receive a restrictive construction, so that those facts must make it more likely than not that the pecuniary resources or property were held ... on behalf of the accused or were acquired as a gift from him. And construed restrictively in that way, the presumption is consistent with the accused’s fundamental right, being a measured response to devices by which the unscrupulous could all too easily make a mockery of the offences.\(^\text{14}\)

Only when it has been shown that the accused’s wealth could not reasonably have come from his or her official salary does the accused have to provide an explanation.\(^\text{15}\)

This is neither novel nor surprising. That said, and as courtroom lawyers will affirm, in any prosecution there can come a time when the evidence presented by the prosecution is such as to give rise to a belief in the guilt of the accused. The husband who runs from his home, a smoking gun in his hand, leaving his wife shot dead on the floor, will be highly likely to be convicted of her murder unless he can establish a probability (a) that she shot herself, or (b) that he was acting in self-defence, or (c) that the situation was not what it seemed – he had wrestled the gun from the hands of another and was running for help. The point is that it is not for the prosecution to exclude all or any of these possibilities.

Once there is sufficient evidence of guilt upon which to convict, it becomes appropriate (and is what in fact happens in courts around the world every day) for the accused to provide a credible explanation, without which he or she will be likely to be convicted.

This is not a question of “reversing the onus of proof” but of what lawyers call the “evidential burden shifting to the defence”. The “burden of proof” remains on the prosecution throughout; there is no presumption of guilt. It is once the prosecutor has discharged this burden that it falls to the defence to give an explanation. Thus the expression “reversing the burden of proof” is misleading and unsatisfactory, and the need for a more appropriate description remains as a challenge to the reformers’ vocabulary. A better formulation would be that “a defendant owes a credible explanation”.

B. CIVIL LAW

Remedies through civil law

There are several good reasons for having strong recovery mechanisms against corruption in the civil law, as opposed to the criminal law. Civil courts provide a less onerous atmosphere than the criminal courts for dealing with the consequences of corruption. In the civil court, the burden of proof is not as demanding, and in appropriate cases, the burden of disproving assertions can be more effectively and, at the same time, fairly placed on the suspect. Evidence obtained through civil law need only establish guilt via a “balance of probabilities” rather than “beyond a reasonable doubt”.

The corrupt official may be able to throw up enough dust to evade the criminal law, but the

\(^{14}\) Attorney-General v Hui Kin Hong, Hong Kong Court of Appeal, No. 52 of 1995, at p.16.

\(^{15}\) Most countries with this type of provision also have a procedure whereby the investigating agency makes a formal request to a person under investigation for them to account for their wealth. This affords an opportunity for those with valid explanations to give them, and the investigation comes to an end. It is only where an individual fails to give a likely explanation that the matter may go to a court hearing.
civil law has a broader reach. Judgments obtained in civil courts can usually be enforced in a large number of foreign countries in order to obtain the contents of foreign bank accounts and other assets. This increases the deterrent factor of the civil law as the corrupt official must think long and hard about where to hide the gains of his or her corrupt activities.

However, corrupt officials increasingly hide their wealth in family trusts and other vehicles which enable them to claim, when the time comes, that they have no control over the property. In many countries, this form of evasion is causing acute problems. The public at large boils with rage as corrupt officials are seen to do a short spell in prison and then simply pick up the benefits of their illicitly acquired assets, all safely in the name of their spouses or lawyers.

There are several civil law solutions currently under consideration. These include:
1) undoing “trusts” and “gifts” and treating them as being ineffective; and
2) declaring “matrimonial property” claims brought by spouses against assets illicitly acquired, as null and void and based on non-existent “ownership”; and
3) creating a presumption of “continuing control” of property by an accused arising from the circumstances in which the property was transferred.16

This area of civil law remedy against corruption is one which is moving swiftly and which merits being kept under continuing review.

Remedies through civil law for the state

The state is considered a victim of corruption because the moneys taken by a corrupt public official legally belong to the state. The bribes taken are held, technically, in trust for the state,17 therefore, the state can sue the official for the full amount of the value of the bribes he or she has received, even if the official (or ex-official) has spent most of the money.18 It can also make an equitable claim for compensation for breach of fiduciary duty.19

It is arguable that the person who actually gave the bribe is also liable for the resulting theft from the state’s coffers. Although existing common law could be invoked in this instance, it would be preferable to place the matter beyond all argument by entering a statute law. It would be a marked disincentive to bribers if they knew that they might be sued by the state and have to pay an amount equivalent to the original bribe. In terms of corrupt public procurement, this “re-payment” would logically cancel out an element of the price distortion generated by the original bribe, given that they are inevitably reflected in the final price.20 The extent of liability for corruption in a systemic situation should be such that, if a group of persons all received bribes within the one corrupt arrangement, each of them would became personally liable, not just for the amount they themselves took out of the common arrangement, but also as “constructive trustees” in respect of bribes received by the others.21

The civil law should also clearly state that contracts which are obtained through corrupt means are enforceable only at the discretion of the state. This would enable the state to decide for itself, and in the public interest, whether or not to be bound by a contract tainted by corruption. To avoid the arbitrary treatment of such contracts on the part of the state, a superior

16 See, for example, the (Hong Kong) Prevention of Bribery Ordinance, s.10. This is also a useful device for application in criminal proceedings.
17 See Reading v The King (1951) AC: 507,518; Maheson v. Malaysia Housing Society (1979) AC 374,380.
18 Attorney-General for Hong Kong v Reid (1994) 1 AC 324, 336.
19 Reading v. The King (supra) at p. 580; Maheson v. Malaysia Housing Society (supra), p. 380.
20 This approach is being tried in Britain.
21 See Selanger United Rubber Estates Ltd v Craddock (No 3) (1968) 1 WLR 155 per Ungood-Thomas J; and Karak Rubber Co Ltd v Burden (No 2) (1972) 1 WLR 602, per Brightman J at pp. 632-633.
court could be empowered by the state to inquire into the circumstances in which a contract was obtained and to declare it void if corruption was clearly an element in its award. A bidder’s knowledge that such contracts rest on shaky ground may be a further inducement against corrupt conduct.

**Remedies through civil law for the private citizen**

There are also several reasons why private citizens should be able to sue in cases of corruption. The first involves the potential liability of the state for the losses incurred by a citizen or groups of citizens by reason of the actions of a corrupt official. For example, if the state can be shown to have been negligent in its administration, then those who suffer a loss as a result of a corrupt public procurement exercise may well have a substantial claim for compensation.

If the private sector has little confidence in the anti-corruption efforts of the police and prosecution arms of government, one way of building support would be to empower the private sector to police itself by being able to sue through the civil courts. But whom should they sue? It is surely desirable, on the part of the state, to direct claims away from itself and in the direction of the corrupt public official - the wrong-doer. It can quite simply establish that the responsibility for the loss lies with the person or entity (or both) who gave or accepted the bribe. For example, where a public procurement exercise has been rigged, the private interests who have been harmed by the corruption could be empowered and/or encouraged to sue the perpetrators.\(^{22}\)

In cases where the state is not in a position to pay adequate compensation, it should consider empowering its citizens to take court action against corrupt officials when they have reason to believe that there may be sufficient assets to make such action worthwhile (the “qui tam” action is discussed below).

The Council of Europe’s 1999 Civil Law Convention on Corruption, to which many European countries are signatories, provides:

**Article 3 – Compensation for damage**

1. Each Party shall provide in its internal law for persons who have suffered damage as a result of corruption to have the right to initiate an action in order to obtain full compensation for such damage.

2. Such compensation may cover material damage, loss of profits and non-pecuniary loss.

**Article 4 – Liability**

1. Each Party shall provide in its internal law for the following conditions to be fulfilled in order for the damage to be compensated:
   (i) the defendant has committed or authorised the act of corruption, or failed to take reasonable steps to prevent the act of corruption;
   (ii) the plaintiff has suffered damage; and
   (iii) there is a causal link between the act of corruption and the damage.

2. Each Party shall provide in its internal law that, if several defendants are liable for damage for the same corrupt activity, they shall be jointly and severally liable.\(^{23}\)

The Convention also deals with contributory negligence, reasonable periods within which to

\(^{22}\) The Council of Europe’s 1999 Civil Law Convention on Corruption provides that the state parties should accept the liability to provide compensation to those who suffer as a result of the activities of corrupt public officials. This would obviously be far too heavy a burden for many countries to accept in the present stage of their development. Other articles of the Convention provide for civil remedies against the perpetrators of corruption.

\(^{23}\) For the full text, see http://www.coe.fr/eng/legaltxt/174e.htm.
bring claims, corruption rendering contracts null and void, the protection of whistleblowers and complainants, the keeping of accounts, the acquisition of evidence and international cooperation in the pursuit of claims.

The Convention also requires that the state pay compensation where persons have suffered as a consequence of officials acting corruptly in the course of their duties. Such a provision would, of course, be an intolerable burden for a country where corruption was systemic and widespread, but the provision does recognise the principle that the state which fails adequately to protect those doing business with it, has responsibilities for the consequences.

Judicial “blacklisting”

Finally, there is the question of using the civil courts to debar private citizens and firms from doing further business with the public sector. This has considerable potential as a deterrent to corruption in situations where an international firm operates outside the jurisdiction of the state and breaches the criminal law with impunity. Such a firm, in all probability, is operating in other countries as well. If the law allows the state to apply to the court using civil proceedings, which, unlike criminal proceedings, can be served on individuals and firms abroad, then a precedent is set for the debarment procedure. This can equip competitors to point to the court ruling when dealing with other states, and suggest that those who do business with such a company, or individuals associated with it, risk certain embarrassing conclusions being drawn as to the improper nature of their association.24

C. RECOVERING ILLICIT PROPERTY

It is axiomatic that crime should not pay. Yet in the real world, the proceeds of corruption can be enormous and the chances of their being recovered by the state from which they have been stolen, may seem minimal.

Illicitly-acquired wealth may be forfeited either through the criminal law or through the civil process. As has been said, it is important to ensure that both avenues be available to investigators. The civil process is easier to establish and can be made to function far more effectively.25 However, internationally it is generally necessary for criminal proceedings to be commenced before other countries are obliged to provide assistance in the tracing and freezing of illicitly-acquired assets.

South Africa’s “Heath Commission”

In most countries the recovery of state property is left to a traditional ministry, such as the Ministry of Justice or the Office of the Attorney-General. The names may vary but the functions are much the same. However, when it comes to the proceeds of corruption, these bodies are usually overwhelmed by other demands on their time and lack powers of investigation. When they act, they do so through the normal court system. In South Africa, legislation was enacted in 1996 to provide for the establishment of special commissions to investigate serious malpractices and maladministration of State institutions, and for the establishment of Special Tribunals to adjudicate on civil matters emanating from Investigations by Special Investigating Units.26

24 Such an approach was commended by a workshop on anti-corruption legislation attended by 120 MPs in Malawi in October 1995.
25 The Heath Commission in South Africa is an example.
26 Special Investigating Units and Special Tribunals Act 1996 (No. 74 of 1996)
To overcome both the problem of secrecy and of rules against self-incrimination, the following powers were conferred:

_Powers of Special Investigating Unit_

5. (2) Investigating Unit may-

(a) through a member require from any person such particulars and information as may be reasonably necessary;

(b) order any person by notice in writing under the hand of the Head of the Special Investigating Unit or a member delegated thereto by him or her, addressed and delivered, by a member, a police officer or a sheriff, to appear before it at a time and place specified in the notice and to produce to it specified books, documents or objects in the possession or custody or under the control of any such person: Provided that the notice shall contain the reasons why such person’s presence is needed;

(c) through a member of the Special Investigating Unit, administer an oath to or accept an affirmation from any person referred to in paragraph (b), or any person present at the place referred to in paragraph (b), irrespective of whether or not such person has been required under the said paragraph to appear before it, and question him or her under oath or affirmation.

(3) (a) The law regarding privilege as applicable to a witness subpoenaed to give evidence in a criminal case in a court of law shall apply in relation to the questioning of a person in terms of subsection (2): Provided that a person who refuses to answer any question on the ground that the answer would tend to expose him or her to a criminal charge, may be compelled to answer such question.

(b) No evidence regarding any questions and answers contemplated in the proviso to paragraph (a), shall be admissible in any criminal proceedings, except in criminal proceedings where such person stands trial on a charge of perjury or on a charge contemplated in section 319(3) of the Criminal Procedure Act, 1955 (Act No. 56 of 1955).

Money for nothing...

“Health’s unit, established at the beginning of last year, has so far uncovered theft of government assets, including land, cars and office equipment such as computers and funds of more than $1.5 billion. And that, he says, using an African phrase, is “only the ears of the hippo.”

“Administrative graft is not exclusive to the new South Africa. Cronyism and waste were hallmarks of the apartheid government which, says Tony Leon, leader of the opposition Democratic Party, “could give master classes, if not Ph.D.s, in the art of corruption.” Heath’s investigations, although concentrating largely on recent cases, go back as far as 1976.

“Some involve nefarious dealings in the so-called “independent” black states of apartheid South Africa, which have now been incorporated into the country’s reorganised nine provinces. Lucas Mangope, 74, former president of one such state, Bophuthatswana, which was divided between the North-West province and the Free State in 1994, was last month found guilty of fraud and theft involving about $760,000, including some $400,000 of tribal money he put into his own bank account. But deep in the apartheid past the skulduggery was usually cloaked in secrecy. Now, the transparency of the new South Africa brings it alarmingly into the open.”

_Time Magazine, 10 August 1998_

The Commission established under the 1996 Act headed by Judge Willem Heath, gained a high profile as it successfully recovered considerable sums of money from those who had accumulated them corruptly.

The Commission’s Special Investigating Unit has jurisdiction to investigate:

(a) Serious maladministration in connection with the affairs of any State institution;

(b) Improper or unlawful conduct by employees of any State institution;

(c) Unlawful appropriation or expenditure of public money or property;

(d) Unlawful, irregular or unapproved acquisitive act, transaction, measure or practice having a bearing upon State property;

(e) Intentional or negligent loss of public money or damage to public property;

(f) Corruption in connection with the affairs of any State institution;

(g) Unlawful or improper conduct by any person which has caused or may cause serious harm to the interests of the public or any category thereof.
In undertaking these tasks, the Commission has powers to:

(a) Investigate all allegations regarding the matter concerned;
(b) Collect evidence regarding acts or omissions which are relevant to its investigation and, if applicable, to institute proceedings in a Special Tribunal against the parties concerned;
(c) Present evidence in proceedings brought before a Special Tribunal;
(d) Refer evidence regarding or which points to the commission of an offence to the relevant prosecuting authority.

Upon the conclusion of an investigation, the Commission submits a final report to the President. It is also required to submit a report to Parliament on investigative activities, composition and expenditures of the Unit, at least twice a year.

The Unit applies a multi-disciplinary approach for conducting an investigation. The team preparing for an investigation usually consists of senior and junior investigators, auditors, accountants, lawyers, and if necessary Information Technology experts. All investigations are conducted with the view of a civil court action before the Special Tribunal. The Unit institutes a typical civil action in the Tribunal or brings an application for an order with similar but shorter procedures than those instituted in the High Court.

A major percentage of the cases dealt with by the Unit consist of actions to prevent the loss of State assets or the protection of State assets or money. The Unit has the power to apply to the Special Tribunal for an interdict or an Attachment Order to intervene and stop the loss of State assets (about to occur) or to freeze misappropriated assets out of the possession of State Institutions. An example of an order interdicting a transaction is where the State has entered into a contract without complying with the procurement requirements. The implementation of such a contract is then stopped pending an investigation. An example of an Attachment Order is where a person has stolen a State cheque, cashed and deposited it into a bank account. The money is then frozen or attached pending the outcome of the investigation. This has become a very useful weapon in the case of money laundering.

In cases of extreme urgency the Head of the Unit, a Judge of the Special Tribunal, is entitled to issue a Suspension Order or an Interdict. Such an Order must be confirmed within 48 hours after it has been issued.

The concept of the Unit to recover and protect State assets from a civil point of view is unique in the world, and its achievements show that the concept is a considerable success. It has also drawn criticism from some politicians, illustrating the need for any such Unit to enjoy a high level of public confidence and accountability if it is not to risk having its wings clipped.

"Qui tam" actions

An approach that has not as yet received extensive emulation, but which may be worthy of consideration by others, is that of the "qui tam" action. Its roots lie in mediaeval England as

27 In October 1999, Judge Willem Heath reported to the International Anti-Corruption Conference in Durban that the Unit had approximately 220,000 cases under investigation at the time, and during the period January 1998 to March 1999 the Unit saved, protected or recovered State assets or State money to the value of R1,35 billion.
28 This section draws from Willem Heath, Civil Process to Combat Corruption, a paper prepared for the 9th IACC, Durban, South Africa, 13-14 October 1999: http://www.transparency.org. Since the Durban Conference, tensions between the Commission and some politicians, and apparent resentment among the judiciary, has led to the functions of the Commission being severely curtailed. The experience of the Commission seems likely to become a case study in the difficulties a successful initiative can encounter, and from the most unlikely sources.
29 Shorthand for "qui tam pro domino rege quam pro se ipso in haec parte sequitur" (who brings the action for the king also does so for himself).
early as 1424, where someone who uncovered evidence of illegal conduct was rewarded with a share of the penalties paid by the wrongdoer. Early in its own life, the US Congress imported the notion into almost all of the first 14 American statutes which imposed penalties.

The present-day US False Claims Act had its origins in the American Civil War, where the large-scale fraud of government contractors cheated the Union out of resources it could ill afford to lose. Congress and the President sought to enlist the support of private individuals in the struggle to root out fraud and swell the state’s coffers.

Quite simply, the government had neither the time nor the resources to address the issue effectively, and by empowering members of the public to act in its name (and share in the proceeds recovered) they increased the risk factor, unlocked private enthusiasm and, ultimately, recovered billions of dollars which would otherwise have been lost to the state. This would seem to be an attractive position to governments who find themselves in the same position today.

The approach has been strengthened over the years, and in 1986 Congress described it as the Government’s “primary litigative tool for combating fraud.” Similar provisions also apply in other federal statutes, such as the area of patent infringement.

The US False Claims Act creates a civil liability where false transactions have taken place (which capture deliberate ignorance and reckless disregard of truth or falsity as well as actual knowledge), and there is no requirement of an specific intent to defraud. As the court actions are civil in nature – not criminal – the facts do not have to be established “beyond reasonable doubt” but to the slightly lower standard applicable in civil cases.

Defendants face a minimum penalty of $5000 for every separate false claim, plus three times the amount of damage caused to the Government by the defendant’s acts.

“Qui tam” actions can be started by individuals (they do not have to wait for the Government to take action) and there are protections for whistleblowers to safeguard them against reprisals. The Government is served with copies of the proceedings and has 60 days in which to decide whether the Department of Justice would intervene and take over primary responsibility for conducting the action. Even where it does, the original claimant has a right to remain as a party to the action, so it cannot be settled without the originator being heard on the issue. At the end of the day a successful private claimant receives either 10 per cent of the sum recovered (where the government takes the action over), or 25 per cent (where it has not).

There are safeguards against frivolous claims. The Government can intervene and settle the claim, or else can ask the court to strike it out. The court can also restrict the originator’s part in the litigation where unrestricted participation would be for the purposes of harassment. And where the claim fails because the claim was frivolous or vexatious, the court may award reasonable legal fees and expenses against the claimant. Some claimants have received million-dollar awards, and the resulting publicity may encourage others to come forward.

D. AMNESTIES – DEALING WITH THE PAST

About the most unpopular thing an administration can do is to grant an amnesty to those who

31 John C. Kunich, Qui Tam: White Knight or Trojan Horse, (1998) 33 AFLR 31.
32 Ibid. For example, in 1994 Teledyne Industries settled a claim relating to the false certification of electronic switches supplied to the US military. Two former employees filed suit and received $18.5 million as their share of the settlement of $112.5 million. "Teledyne to pay $112 million in two whistle-blower suits", LA Times, 22 April 1994.
have abused positions of public trust. Yet the question of “How to cut the Gordian knot?” is as crucial as it is a vexed one.

In countries where corruption is endemic, the present can be the captive of the past. The rich and powerful may feel threatened and may be in a position to block - or at least blunt - efforts to reform. Corrupted systems may be capable of reform on paper, but corrupt individuals can thwart the best intentions of reformers.

In several countries there are continuing debates about how to treat the past when the time for political change arrives. Can that time be brought forward by providing a scenario in which corrupt politicians in power are more likely to be prepared to step down? Those in power may feel the need for guarantees that their future, out of power, is relatively secure.

There are several reasons why an amnesty approach of sorts could be justified, however unpalatable it may be. Firstly, in a new moral climate under changed rules and with different expectations, it is perhaps not right that acts undertaken in the old and very different moral environment should be judged by these “new” (or revived “old”) standards.

Secondly, public awareness and expectations that something effective might at last be done about corruption is likely to result in a spate of allegations that can overwhelm the institutions designed to handle them.

Thirdly, the political will to defeat corruption may well be at risk of being undermined by those in positions of influence who could be adversely affected by competent anti-corruption action.

Amnesty, reconciliation or other ways of dealing with the past outside the traditional criminal justice system may be especially advisable if:

- the Government is about to create a new anti-corruption agency;
- corruption has been or still is systemic and the number of outstanding cases are likely to paralyse the new agency;
- a significant proportion of the public servants were forced, because of low salaries to use petty corruption in order to survive (a consideration which cannot be applied to those who perpetrate “grand corruption”); or,
- there has been a need to broker an arrangement with a corrupt administration as a basis for it surrendering power.

The options are limited:

(a) to declare an “amnesty” to the effect that matters occurring before a certain date will not be investigated;
(b) to initiate a “truth and reconciliation” process by which those coming forward within a certain time and who publicly admit their past acts of corruption will not be prosecuted;
(c) to restrict the use of new powers of investigation to investigating matters occurring only after a certain date (and new offences will, of constitutional necessity, only be effective from the time the laws are made, as they cannot be back-dated); or,
(d) simply do nothing in the hope that all allegations can be investigated to the general satisfaction of the public.
What would each of these options entail?

(a) Should there be an amnesty?
If it is decided to adopt this course, then it is essential that the people understand and appreciate the reasons behind this; and that the amnesty provision be set out carefully in a written law. Thus public awareness of the need for some sort of amnesty must be raised, and public discussion should precede the introduction of any law. If it is sprung on the public without first carefully preparing the ground, people are likely to suspect the worst and to take to the barricades - quite literally.\(^{33}\)

To any general amnesty there may need to be exceptions - both to allow monstrous behaviour which subsequently comes to light to be investigated and punished, and to make the whole concept of the amnesty more palatable to the general public. If there are to be exceptions, then the mechanism used to decide which cases do, and which cases do not, deserve amnesty, must be one the people have confidence in – and the decision should be final. The mechanism should be judicial in nature, and not be in the hands of politicians (who are unlikely to be trusted to administer it fairly).

If amnesties are to be conditional or granted on an ad hoc basis, any amnesty committee should comprise only people of high integrity who enjoy public trust. All allegations referring to cases of corruption before the date, should be analysed by the committee and then either forwarded for further investigation or filed.\(^{34}\)

(b) Initiate a “truth and reconciliation” process
The ICAC in New South Wales (Australia), another of the world’s leading anti-corruption agencies, has for some years been empowered to hold public hearings. Witnesses are summoned to give evidence and although their evidence cannot be used against them in criminal proceedings, the hearings provide an opportunity to enlighten the public as to precisely what has been taking place. For example, one such inquiry into abuses of travel privileges by elected Members of the State Legislature, led to greater clarity in procedures and higher standards of conduct by those concerned.\(^{35}\)

If the intention is to provide a forum for the “naming and shaming” of public officials and to provide an opportunity for them to clear their pasts but with an element of retribution that the public finds acceptable, then this course might be a possibility. Of course, the situation is qualitatively quite unlike the operations of the Truth and Reconciliation Commission in South Africa. It was dealing with human rights abuses, and was not faced with miscreants who were still holding on to the profits of their crimes.

(c) Restrict the use of new powers of investigation
From a pragmatic point of view, there is a real danger that a new anti-corruption authority will be overwhelmed by numerous complaints about old matters. That it will simply not be able to cope with the volume. Attempting to deal with old matters, too, will absorb resources and restrict the agency’s capacity to investigate allegations of new corruption.

How to make the best use of available resources in terms of addressing present and future alle-

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\(^{33}\) The whole anti-corruption drive in Hong Kong, today hailed as one of the few successes in modern times, nearly came to a halt before it had begun. When the new anti-corruption agency was set up, police went on strike, fearful that they would be its target. The government then issued a law granting an amnesty, and this provoked street riots. The final position was that serious cases could still be proceeded with, a police chief was extradited and jailed, and public discontent subsided.

\(^{34}\) The analysis is by Bertrand de Speville in Amnesty, Reconciliation and Other Alternatives of Dealing with the Past, UNICIP Experts Meeting, Vienna, 13-14 May 2000.

gations, as opposed to old ones, should be considered carefully. If a new leaf is being turned, any agency must be able to follow up fresh allegations swiftly and effectively.

A provision such as the following could be included in the new law:

Investigation of pre-[date] offences

(1) Notwithstanding section [...], the [anti-corruption authority] shall not act as required by that section in respect of alleged or suspected offences committed before [date] except in relation to –
   (a) persons not in [the country] or against whom a warrant of arrest was outstanding on [date];
   (b) any person who had been interviewed by an officer of police or of the [anti-corruption authority] and to whom allegations had been put that he had committed an offence referred to in this [law];
   (c) an offence which the [defined and established committee] on reference by the [head of the anti-corruption authority] considers sufficiently serious to warrant action.

(2) A certificate under the hand of the chairman of the committee stating the fact that the committee considers an offence sufficiently serious to warrant action shall be conclusive evidence of that fact.

(3) The decision of the committee under subsection 1(c) shall be final and not liable to being questioned in any legal proceedings.

Without the exceptions the provision would read:

Notwithstanding section [...], the [anti-corruption authority] shall not act as required by that section in respect of alleged or suspected offences committed before [date].

(d) Simply doing nothing

The final option is to do nothing: simply to let the past take care of itself. This leaves a cloud of uncertainty and does not establish clear and transparent guidelines to which new or revived agencies would be working. It leaves the public at a loss to know precisely what is going on and whether political will really exists. It is tempting, it certainly minimises obstruction by the powerful corrupt from the immediate past, but it is also arguably the most risky strategy of them all.

Some indicators for assessing the effectiveness of criminal and civil laws

- Does the criminal law provide for the following six basic offences:
  - bribery of public servants (including judges, Members of the Legislature and Ministers)?
  - soliciting or the accepting of gifts by public servants?
  - abuse of a public position for personal advantage?
  - possession by a public servant of unexplained wealth (or of living beyond one’s official salary)?
  - secret commissions made to or by an employee or agent (covering private sector corruption)?
  - bribes and gifts to voters?

- Does the criminal law adequately cover the worst types of corruption and provide a deterrent to would-be corrupt officials? If not, in what ways is it failing (distinguishing failings in actual laws as opposed to failings in the institutions responsible for their enforcement)?

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36 Draft by Bertrand de Speville, ibid. An adaptation of the Hong Kong provision.
• Are existing laws adequate to move against the illicitly acquired property of corrupt officials?
• Are the criminal laws being applied fairly, or selectively?
• Does the general public see all persons as being equal under the criminal law? Or, are some categories of officials seen as being exempt?
• Are some matters that are presently being dealt with as criminal matters, that could be dealt with more effectively with the imposition of an administrative penalty?
• Is the law on corrupt payments clearly understood? Is it adequate? Is it enforced? If not, why not?
• Are the remedies available to private citizens and the corporate sector adequate when it comes to coping with the consequences of corruption?
• Are claims by family members being used as shields to protect illicitly-acquired wealth from legitimate claims by the state?
CONFRONTING CORRUPTION: THE ELEMENTS OF A NATIONAL INTEGRITY SYSTEM
Surveys as Tools – Measuring Progress

Are we winning? Are we losing?
I can’t tell,
I just keep punching
‘til I hear some kind of bell...
Rock Follies, 1977

Corruption is perhaps the most under-reported crime there is. Kevin Ford has observed that:

[An act of corruption] is generally conducted in great secrecy. All parties involved in the immediate transaction (the bribe taker and the receiver) are usually satisfied with the result and recognise the possibly very negative consequences of revealing their own role in such criminal conduct even if they are not satisfied. Meanwhile the victims of corruption, which are usually the general public and society at large, are either blissfully unaware of specific acts of corruption or so inured to such corruption that they have become indifferent to it.¹

Given such secrecy and commonality of interest among its perpetrators, corruption levels are extremely difficult to measure. There is no such equation as the one that enables us to assess the size of an iceberg by the volume of the tip that we can see protruding above the waves.

Yet without measurement, it becomes extraordinarily difficult either to assess areas of particular difficulty or to ascertain whether reform programmes are, in practice, having a positive effect. Surveys of some description are now recognised as an essential tool in the context of containing corruption and illegal conduct, however fraught with difficulties they may be in their design and execution.³

It is, of course, unrealistic to expect people to admit to criminal or even socially undesirable conduct in the course of a survey, if at the same time they are exposing themselves to risk. There are, however, some categories of people that can be surveyed effectively, those where individuals see themselves as “victims” rather than as

¹ Communication of 30 November 1999: Internet Development Forum on Anti-Corruption Strategies co-ordinated by the World Bank et al. Kevin Ford is Chairman of the Council for the International Anti-Corruption Conference. He was formerly the Deputy Commissioner of Investigation for the City of New York (1994-98) and spent a total of more than 25 years investigating and prosecuting corruption in the United States.

² Ground-breaking work with surveys has been undertaken by Dani Kaufmann and his team at the World Bank Institute. These include details surveys in Albania, Georgia and Latvia which give a startling picture of systemic corruption that is deeply institutionalised, although each country’s pattern is distinct and different. Among the findings are that corruption disproportionately hurts the poor (richer households are more likely to pay bribes, but the burden of corruption, measured as a fraction of income paid in bribes, is much greater for poorer households); bureaucrats pay for lucrative positions in all three countries (suggesting that officials “invest” when buying their public office); and that enterprises would pay higher taxes if corruption were eliminated.

³ A further tool in the course of development is the definition and measurement of “governance indicators” in order to enable progress in the development of governance to be measured.

Why measure corruption?
Implementing reforms to improve governance is inherently difficult. Because such reforms dramatically diminish the rents from corruption, they are often resisted by senior officials, other politicians, and bureaucrats. Yet such resistance can often be cloaked by the lack of concrete evidence on corruption and by the assumption – now disproven – that corruption cannot be measured. When such evidence is available, the debate on corruption can be depoliticised and its focus shifted to substantive issues. Measuring corruption offers other benefits as well. It can help establish priorities... It educates the public... and it establishes a baseline against which the successes and failures of reform can later be measured.

Dani Kaufmann et al; Note prepared entitled “Corruption: Surveys, data analysis and reforms”, Utstein Internet discussions, 4 April 2000.
The facts, only the facts
"Facts alone are wanted in life. Plant nothing else, and root out everything else. You can only form the minds of reasoning animals upon Facts."
Mr Gradgrind in “Hard Times”, Charles Dickens (1854)

willing conspirators, as being exposed to “extortion” rather than as participating in consensual corruption.

Thus, international business (despite its proven role as a prime mover in grand corruption) has been willing to be polled. So, too, have local businesses, and ordinary people (as customers of government services).

However, although these groups of people know something about corruption levels, this knowledge, beyond that based on their immediate experience, is decidedly unreliable and really falls into the area of “perceptions”.

As a general rule, the broader and the less specific the survey, the more contentious its results. The fact that perceptions can lag well behind realities should also be taken into account, especially where things are in reality getting better but public perceptions are based on anecdotal experiences from the past.

Surveys, too, can give credence to what may appear to be extravagant claims, or assertions that the respondents are not equipped to make. For example, in a recent national poll in the Philippines it was reported that over half the respondents claimed that more than 50 per cent of the funding spent on roads was wasted. Nearly two-thirds thought that more than 40 per cent of the funds involved were lost in the process of collecting taxes, 30 per cent in providing free books to children in schools and 23 per cent in installing modern equipment in government offices.

This is not to say that the claims were necessarily wrong, but it seems unlikely that so many of the respondents were in possession of evidence that would establish these losses as fact. They were, and could only be, “perceptions”.

On the other hand, there is the ever-present question of who it is who “owns” the data? If the results of a survey are less than flattering, and if the survey is “owned” by the agency whose performance is being criticised, the temptation to suppress – or worse still, to massage – the results can be irresistible.

This temptation can prove to be overwhelming where an agency is given “performance targets” to reach, and where the survey data will be used to judge its management’s performance. It is therefore highly desirable that independent people be involved in the design and implementation of surveys, and that the results are publicised and “shared” with the community which has been surveyed. It is the honest and professional collection of data coupled with the subsequent transparent presentation of the results that give the citizen “a voice”.

The results of surveys should – as an important element of a national anti-corruption action plan – be publicised and put on web sites, rendering the results available to a wide public and presenting a clear challenge to the political will of a country’s leaders.

International surveys

International corruption perceptions surveys have been pioneered by Transparency Interna-

5 For this reason Transparency International has always insisted that its annual corruption index, listing a large number of countries by reference to corruption levels, is a “perceptions index” (a Corruption Perceptions Index) and does not necessarily reflect factual situations.
6 For example, efforts funded by the Government of Denmark to improve court filing systems in Uganda are credited with having dramatically reduced the “disappearances” of court files. However, participants from civil society at a workshop held a little time after the reforms had come into effect still ranked the disappearance of court files as the major problem with the judicial system. Discussions with members of the Ugandan judiciary, 1996.
tional, but not without a degree of controversy. As TI has always acknowledged, these surveys are of perceptions, not necessarily of reality, and have value as they reflect the views of the international business community, whose investment decisions impact on a national economy. The higher the perceived level of corruption, the less inclined are foreign investors to make no more than very short-term (and high return) commitments to a country.

In particular, TI’s Corruption Perception Index (CPI) has served to highlight the issue of corruption in a number of countries, and is credited with raising the level of attention accorded to the problem by some governments. It has also been strongly criticised for being “anti-South”, as focusing on only one side of the problem (the bribe-takers as opposed to their international bribe-givers), and as giving, at times, a depressing message to governments who are making sincere efforts to combat corruption. The methodology developed to amalgamate a series of different surveys has been under continuing review and has not yet fully achieved a consensus among experts in the field. Yet, the fact that countries must be covered by at least three different surveys means that the resulting index itself is comparatively robust.

The CPI sends out a simple message to governments who fare poorly. Whether the results be justified or not, the Index reflects the perceptions of business people who are making daily decisions that directly affect their countries’ economies. Action is called for, either to dispel the misunderstandings, or to remedy the complaints. In the words of The Economist, governments ignore the results at their peril.

The CPI has also helped address the “them and us” syndrome: a tendency by some developing countries to blame only the foreigners for their domestic ills. By focusing on corruption “at home”, the CPI stimulates domestic debate and fuels programmes to combat it.

A second, more recent “Bribe Payers Index” (BPI), was conducted by the internationally-renowned Gallup International on behalf of TI in 1999. It surveyed a cross-section of élites in a number of emerging markets to ascertain, from those most likely to know (businessmen, bankers, lawyers etc.), from where the bribes were most likely to come. This painted a depressing picture of the involvement in corruption of the exporters from many of the world’s leading exporting countries. The data from this survey can be regarded as being very reliable since it targeted a specific élite audience, and an audience that is prepared to be surveyed again to measure the extent and pace of any changes.

National and sectoral surveys

What can national surveys hope to achieve? Surveys of the views of citizens would appear to be of limited value unless they are conducted with high professional standards, and/or, are targeted at particular sectors (such as the customers of health clinics etc. to determine their experiences). When they are, the resulting data can be extremely useful both in establishing a base line against which to measure future change, and to determine what is going wrong. When the results are published, they can also raise public awareness and generate public debate.

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8 As Shang-Jin Wei has shown, “A one percentage point increase in the marginal tax rate reduces inward FDI by about five per cent... A one grade increase in the corruption level [on a 10-point scale] is associated with a sixteen per cent reduction in the flow of FDI, or approximately equivalent to a three percentage point increase in the marginal tax rate on foreigners.” See “How taxing is corruption for foreign investors?”, TI website, http://www.transparency.org.

9 The methodology is detailed on the TI website at: http://www.transparency.org.

10 Full details of the survey and its methodology are on the TI website at http://www.transparency.org.

11 For example, a survey conducted by TI-Bangladesh disclosed high levels of perceived corruption in the lower judiciary, so much so that magistrates asked for official action to be taken against the NGO. However, the President of the country intervened and indicated that, even if the results were only partly correct, the lower judiciary had a very real problem.
flushing out the facts, they can depoliticise corruption which is too often a political football.

In particular, the surveys can:

- **Promote institutional reforms** – Measuring the economic and social costs of corruption can help identify priority areas for reforms, and establish quantitative benchmarks to gauge the success of institutional reforms. Agency specific data focus the debate on institutions, not individuals. Information on the underlining institutional structures help explain why some institutions are more vulnerable to corrupt activities and behaviour than others.

- **Stimulate a technocratic and focused debate on concrete action** – Survey data and analysis helps build coalitions among key stakeholders by encouraging their positive participation, stimulating a technocratic debate on concrete reforms and promoting collective action.

- **Help identify problem areas and priorities for reform** – Survey instruments comprise closed, indirect questions that maximise response rates and facilitate a systematic analysis of the data. Rigorous empirical analysis leads to a non-political debate on concrete reforms to combat corruption. Survey questions emphasise experiential (i.e. empirical) rather than perception data. Both experiences and perceptions are helpful data sources for rigorous analysis. Concrete data on new and old subjects is a powerful tool for anti-corruption strategies.

- **Give the community a “voice” and strengthen local ownership** – Surveys are implemented by independent and technically capable local NGOs and survey firms, capitalising on and strengthening local knowledge and expertise. Survey results can be shared with stakeholders and widely disseminated to energise and empower public opinion and build momentum for reform.

Governance and anti-corruption diagnostic studies implemented by the World Bank now include three surveys carried out simultaneously, which focus on public officials, households and enterprises, respectively.

(a) Public Officials Survey – The purpose of this survey is to understand institution-specific determinants of corruption (including bribery, nepotism, political interference, embezzlement, etc), discretion/informality, performance, and governance. Survey results inform the policy dialogue on such links as those between governance and poverty alleviation and political and values/cultural differences.

(b) Enterprise Survey – This studies the business environment, with a special emphasis on the effects of public sector governance and corruption on private sector development. It examines firms’ roles as users of public services, as being subject to various forms of regulation and as clients for licences and permits. Special attention is paid to the judicial system.

(c) Household Survey - The purpose of the Household Study is to capture the citizens’ experiences with, and perceptions of, corruption in their daily lives in both the public and private sectors. Citizens are surveyed in their roles as users of public services, as the subjects of regulation, as clients for licences and permits, and as customers for
such services as education, health, water, electricity and housing. Special attention is devoted to social services such as health care or education.\textsuperscript{12}

An in-depth diagnostic is not the goal but rather a means of developing anti-corruption programmes that focus on reform and collective action.

However, all these surveys need to be conducted regularly if progress is to be measured. Furthermore, in democratic societies, people will want to know whether the government is actually being effective, particularly if they are not seeing immediate change in their daily lives. If surveys show that reforms are, in fact, starting to work, then they can play an arguably even more important role by building public support for reform programmes and thereby adding to their dynamism and impact. It has long been a truisim that an apathetic and disbelieving populace can fatally undermine the best-intended reform programmes.

Six other approaches may be of particular interest:

\textbf{(a) Report cards}  
A particular methodology pioneered by the Public Affairs Centre of Bangalore, is the use of “report cards” on public services. These involve the interviewing of the “customers” of various public utilities to ascertain what in the way of “extras” they are being required to pay in order to get their legitimate services. The resulting “report cards” are then discussed with managers responsible for the various services and published in the press and on radio. Various NGOs around the world are being trained in Bangalore to use this approach, including members from a number of TI national chapters.

\textbf{(b) “Big Mac” surveys\textsuperscript{14}}  
A different methodology has been developed by Poder Cuidano, TI’s national chapter in Argentina. This methodology involves, first winning the cooperation of a particular Government Ministry or City Mayor, and then carrying out an analysis of the prices paid or charged for various services. For example, it was found that identical supplies were being purchased by different hospitals at very different prices. Whether due to inefficiency or to corruption, the waste and extravagance was clear. Once the offenders had been identified through comparing the prices, official action was taken and the purchase prices dropped dramatically.

In another Argentinian “Big Mac” survey, a comparison of the costs of school meals and the prices being charged for them, revealed great discrepancies. Within a short time of the publication of the differentials, the suppliers who were overcharging had dropped their prices and brought them all into line.

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\textsuperscript{12} These comments are adapted from observations made by Pablo Zaido of the World Bank Institute’s Governance team. For detailed information, visit http://www.worldbank.org/wbi/gac/instruments.htm where examples of the survey instruments that have been implemented in several countries may be found, as well as the results that they have yielded.  
\textsuperscript{13} The Spinetta Law in France (1978) and the Merloni Law in Italy (1994) introduced the ten-year-guarantee liability. Compulsory insurance of public works in Morocco was first adopted in a Royal Decree as early as 1895!  
\textsuperscript{14} “Big Mac” surveys take their name from a technique that was first used to test the comparative wages in different parts of the world. In essence this involved calculating the time which an average worker would have to work in order to earn the price of a McDonald’s hamburger.  
\end{flushleft}
(c) Before and After surveys

In Milan, TI-Italy has tried to measure corruption through research on the cost of corruption by adopting a “before and after” approach.

As is well-known, the Pool of Milan Magistrates launched their “Clean Hands” investigation on corruption in the early 1990’s. A large group of politicians and businessmen were convicted of mismanaging public funds and of providing illicit finance to political parties and politicians. Civil society strongly supported the Pool and induced a change in the next municipal elections. Except for a few highly-respected individuals, none of the old City guard was re-elected.

In these circumstances, the TI National Chapter felt able to measure the cost of different public investments “before and after” in several areas. The results were striking. The cost of public investments in Milan before and after the “Clean Hands” campaign were:

- direct investments per year increased by nearly 400 per cent;
- total municipal debt was reduced by ten per cent;
- the construction cost of the underground railway more than halved;
- the new international airport (built in three years) had an actual total cost of less than half the previously-estimated cost;
- City-owned companies moved from an annual loss to a substantial profit; and
- municipal tax was limited to five per cent, as against the six-to-seven per cent of other comparable urban areas.

These figures helped to make people aware of the real cost for the taxpayers versus an otherwise somewhat abstract concept of corruption.

About one year later an independent poll company undertook a poll for TI-Italy on how Milan’s citizens felt about corruption. The results showed that:

- over 76 per cent felt that that state was not adequately protecting its citizens from the danger of corruption and intimidation, as they believed that criminals had taken over the state and its institutions;
- over half (52.2 per cent) thought that unlawfulness and thefts were rarely punished and a further 42 per cent thought that this proposition was “largely” true; and,
- nearly 93 per cent thought that the corruption network in Italy had not yet been totally uncovered, or that there were still some areas to be explored.

Yet, there was some comfort in the level of citizens’ awareness, as nearly 85 per cent considered the costs of corruption to the ordinary citizen to be very high.\(^\text{15}\)

Subsequent tracking of the costs of public procurement, after initial gains had been made, revealed a steady increase in the costs of some public procurement. Not, it seems, from corruption involving large private sector companies, but rather businesses that had started to form illegal cartels and to rig the tender processes for smaller contracts. In total contrast, the interest of international firms in competing in the new and more open market place has meant that the decline in costs for major public contracts has continued.\(^\text{16}\)

\(^{15}\) Communication from the Executive Board of TI-Italy of 29 November 1999 to the Internet Development Forum on Anti-Corruption Strategies co-ordinated by the World Bank et al.

\(^{16}\) This section draws on research undertaken by Fredrik Galtung, November 1999 to May 2000. His research continues.
(d) Value for Money

The guiding thesis is that corruption drives up prices while driving down quality and performance. Thus, when assessing a public transaction on the basis of “value for money”, if there are gross distortions it can be due either to corruption or to rank inefficiency. In either case, firm action is needed if systems are to be strengthened and repetition avoided. “Gross” distortions can be detected quite readily, particularly given the availability of agencies around the world who can quickly and inexpensively provide information on prevailing prices of goods and services.\(^\text{17}\)

(e) “Mirror statistics”

Mirror statistics are a form of civil society monitoring that has been developed in Bulgaria. It involves a comparison between the goods exported according to Bulgarian documents to neighbouring Romania, for example, with the Romanian import documentation, and vice versa. This promising initiative requires cooperation from both customs authorities. As well as comparing national statistics, the daily exchange of information and entries in registers on both sides of a border enables Bulgarian customs officers and those in neighbouring countries to compare information about the vehicles carrying goods in “high-risk” categories across the frontier. When this was applied to the Bulgarian/Romanian frontier, it revealed a variety of customs frauds, in particular involving cigarettes. Trucks loaded with cigarettes for export from Bulgaria were shown never to have crossed the border, or else to have done so loaded with toilet paper and the like (as recorded in the records on the Romanian side of the border). In this way the duty-free goods remained in Bulgaria with the duty unpaid.\(^\text{18}\)

(f) Monitoring major projects

Finally, there is the question of whether it is possible for civil society, with its necessarily limited resources, to monitor the implementation of very large projects. The approach that is emerging suggests that it is. Civil society should only aim to tackle tasks on which it can deliver useful results. Thus, where the scale of a particular project is beyond its reach, civil society can do either or both of two things. It can monitor selected key elements of the enterprise, and/or monitor the entire project by focusing on the “system” and the way it is functioning, thereby ensuring that the processes by which the tenders are awarded conform to the legal and administrative requirements.

\(^{17}\) This is the approach that has, in part, guided the deliberations of the committee established in Nigeria in 1999 (on the change to democratic government) to review outstanding government contracts, chaired by Christopher Kolade. It is also one which has enabled these reviews to be conducted quickly, fairly and objectively.

Chapter 29

Lessons Learned - A Progress Report

Where the ends are agreed, the only questions left are those of means, and these .... are technical, that is to say, capable of being settled by experts or machines like arguments between engineers and doctors.


The past five years or so have witnessed an unprecedented attempt by governments and international agencies to combat corruption. These efforts began against a history of a determined refusal to accept that corruption was anything more than “a little local difficulty”. East Asia aside, there was a dearth of experience in tackling the problem with any success, scant research had been undertaken and there had been little academic debate. Corruption was simply not taken seriously.

With the recent realisation of the extent and gravity of the problem has come widespread action. But looking back over the past five years or so, what have we learned? Where is the plethora of success stories? What has been seen to work, and what has been seen to fail?

The list of suggested “lessons learned” given here is by no means exhaustive. It lists some of the salient ones. Nothing is more certain than that we all have much more to learn.

1 None can claim moral superiority
There was a time when Western Europeans in particular would regard themselves as being morally superior when it came to corruption. “They do things differently abroad,” the argument ran. “We have to do things there we would not dream of doing at home.” They can no longer pretend to such moral superiority. The involvement of their exporters in systematic corruption throughout the world, and the degree to which their own political institutions have been corrupted through “black” money, have caused most of them to revise their views.

2 Everyone has to address the problem for themselves and in their own way
Reform efforts have to be home-grown and locally-driven. They can be encouraged and fostered by outside partners (e.g. donors), but the drive and the leadership must come from within. Internal corruption must be dealt with from within, and corruption in international business transactions has to be dealt with from both sides of the equation. There is no “one size fits all” solution.

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1 The opinions expressed are those of the author. However, they are informed among other things by a Development Forum Internet discussion organised by the World Bank (which took place at the end of 1999 and into early 2000) as a follow-up to the 9th International Anti-Corruption Conference held in Durban, South Africa, in October 1999.
2 This chapter will be kept up-to-date in the Internet version of this Source Book: http://www.ytransparency.org. Suggestions for inclusion in revisions are welcome and should be emailed to jeremypope1@compuserve.com.
3 Speaking on the BBC in May 1994, Lord Young of Graffam, the former Conservative British Cabinet Minister for Trade and Industry and then-executive chairman of Cable & Wireless, defended bribes in business. “The moral problem to me is simply jobs,” he said. “Now when you’re talking about kickbacks, you’re talking about something that’s illegal in this country, and that - of course, you wouldn’t dream of doing…. But there are parts of the world I’ve been to where we all know it happens. And if you want to be in business, you have to do - not something that is morally wrong…. In many countries in the world the only way in which money trickles down is from the head of the country who owns everything. Now that’s not immoral, or corrupt. It is very different from our practice. We must be very careful not to insist that our practices are followed everywhere in the world”. See TI Newsletter, June 1994
There are no "quick fixes"

There is no such thing as a "quick fix". There may be areas in which quick wins can be gained - such as streamlining procedures in customs administration, opening up public procurement to make it more transparent, prosecuting a large number of corrupt officials or frying a few "big fish" – but there is no over-all "quick fix". Combating corruption is a long and arduous process.

There is no place for exit strategies for donors

Anti-corruption strategies do not have fixed time-frames. Where donors are involved they should not be looking for an early exit, but must be prepared for a sustained period of involvement.

A clear overall strategy and good public relations are needed

A piecemeal approach to reforms is as reliable as a scattergun. The strategy must be all-embracing and should address all aspects of the national integrity system. Once a determined effort gets under way, public perceptions can be adversely affected by reports of Commissions of Inquiry or by seeing senior officials being prosecuted for serious offences. If the reform process is not accompanied by an appropriate public awareness and information programme, impressions can be formed that things are going from bad to even worse. It is crucial to pay special attention to public relations from the outset. Public expectations must be managed and the political risks contained.

Codes of ethics and "Citizens' Charters"

These must not be used as decorations but used as agents of change. Codes of ethics are useful, but only where they are “bought into” by the staff in question. They must be involved in the drafting of them, and training programmes for all must be conducted. Training programmes need to be highly participatory and involve the discussion of hypothetical situations, and perhaps with some role playing. Mere lectures or hand-outs are ineffectual. Similarly, Citizen’s Charters can have the effect of making highly visible commitments to the public, and constitute a challenge to a government agency to deliver what it promises. This means that the commitments in the Charters should be realistic. The Charters themselves must be publicised so as to reach the relevant members of the public.

Streamlining bureaucratic procedures

Red tape should be cut, bureaucratic requirements reassessed and kept to a minimum. Staff in sensitive positions should be rotated and, in particularly vulnerable areas, contact between staff and the public depersonalised to reduce the chances of personal relationships developing. Customs, for example, is just one of several areas which lends itself to such a streamlining of procedures. Where personal contact is necessary, the introduction of elements of unpredictability as to which particular official may handle a matter or client reduces the potential for bribery. The introduction of computerisation can advance these processes while enhancing the monitoring of the speed with which goods are cleared, identifying delays and enabling the reasons for any delays to be investigated. However, in many countries the cumbersome bureaucracy has developed, not haphazardly, but precisely with the creation of bribe-taking opportunities in mind. These reforms may be self-evident but they are none-the-less difficult to achieve.

Whistleblowers must be encouraged and protected

Aggrieved citizens, and “whistleblowers” inside the administration, can be encouraged to complain to new institutions such as anti-corruption commissions or Ombudsman offices, or...
through telephone “hot-lines”. Unless they do, necessary actions will be delayed, perhaps indefinitely. Complainants must be assured that their complaints will be taken seriously, and that they themselves will not be placed at risk. In some countries, social taboos about “denouncing” fellow citizens have to be overcome. Raising public awareness in these matters is much talked about, but is left almost entirely to civil society to address.

9 Continuous monitoring is needed
Experience shows that, for example, in police corruption, it is not enough to clean up a corrupt force. Unless processes are established for continuous monitoring, sooner or later a force will subside once more into a morass of corruption and require yet another extraordinary effort to try to rehabilitate it. It is not enough to remove corrupt officials without also removing opportunities and ensuring that honest officials are being appointed to positions of trust. “Integrity testing” can help ensure that honest officials are identified and considered for promotion.

10 Focus on “the system” not simply on “bad apples”
To win public cooperation, a reform programme should focus on getting “the system” right rather than simply taking individuals out. In a situation of systemic corruption, the corrupt individual is not a single “bad apple” and removing him or her will not save the barrel – the whole barrel needs to be addressed or else the person replacing the “bad apple” will be subjected to the same temptations. Prevention can be more effective and infinitely more economic than investigation and prosecution. At the end of the day, a government must have competent staff available and capable of discharging the affairs of state within a functioning institutional framework and subjected to an effective enforcement regime.

11 Escaping from the past – amnesties?
Escaping from a corrupt status quo is extremely difficult. Many powerful interests have reason to fear if a new dispensation is going to be unduly threatening to them. Amnesties are unpalatable, but may be unavoidable, at least in the context of small infractions by junior officials. Although the question of amnesties is problematic, there is much to be said for “letting sleeping dogs lie”. Some senior staff may need to be removed or disciplined but more junior staff, other than those who have been seriously abusing positions of trust, should not feel that they are at risk. Until workable solutions can be developed, the question of the past will remain one of the largest single stumbling blocks to any reform.4

12 Leadership is vital but not enough – coalitions of interests can help
Without leadership from the top, any attempt to achieve major reforms in an environment of systemic corruption will be bound to fail. Personal leadership is vital, and a leader must be seen to be “walking the talk”, and not just mouthing platitudes.5 However, just as laws alone will not suffice to achieve reform where corruption is systemic, so, too, is leadership not enough. Coalitions can be created to support leadership, but there is a danger where they embrace interests whose pasts are not “pure”. Yet if only “saints” are admitted to a coalition there will probably be far too few. What is important is that coalition partners commit them-

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4 A general amnesty in Hong Kong provoked such a negative reaction that the whole reform process was endangered, thereby forcing the terms of the amnesty to be varied. Today the debate is whether “public hearings” accompanied by a form of immunity, and perhaps bolstered by a “tax” levied on declared illicit wealth, would be effective and publicly acceptable. The rich corrupt might be left with the choice of paying an affordable tax and legitimising their wealth while facing the potential humiliation of a public hearing conducted along the lines of those in the Australian state of New South Wales. Or, alternatively, quietly settling up their accounts with the state.  

5 “I always think of Malaysia’s Prime Minister when it comes to giving a lead. He decided that the increased wearing of the veil by Muslim women in the public service was giving rise to anonymity. The way to tackle this was to insist that all public servants - irrespective of sex, title and position - wear a conspicuous name badge. So Dr Mahathir went on national television and announced the new rule. And there, in front of the cameras, he pinned his own badge to his lapel - where it has stayed ever since. And throughout the civil service the rule has been followed from that day through to this.” Jeremy Pope, Ethics, Accountability And Transparency: Putting Theory In To Practice, Workshop on Civil Service Reform in Anglophone Africa, held in Cape Town, South Africa, 24-28 April 1995 (EDI-World Bank, Washington, 1995).
selves to building a new future and, having made that commitment, that they be held to it.

13 Civil society has been overlooked...
There appears to be a correlation between high levels of corruption and low levels of civil society activity. Efforts to assist the emergence of a creative and vibrant civil society call for the development of both a legal framework within which civil society can establish its institutions free of government interference and control, and for the building of a positive dialogue between civil society and governments. This is not always easy to achieve, particularly in an emerging democracy, as it may cut across preconceived notions of how government decisions should be developed and imposed. One way of testing the genuineness of a government’s anti-corruption pledges is to see whether the government is prepared to work with civil society.

14 ... but NGOs themselves can be sources of corruption
In a number of countries, NGOs have sprung up ad hoc, simply to tap into the assistance dollars which external donors have been prepared to provide to organisations for developmental efforts conducive to the strengthening of civil society. NGOs must be transparent and accountable in their own practices. NGOs, no less than official institutions, cannot be taken at face value and need to be monitored for transparency.

15 Legislatures – when the watchdog becomes the thief
A serious flaw has emerged in a number of countries where the Legislature is not only a “watchdog” over official expenditure, but its Members are actively involved in spending public money (which they vote to themselves) and in letting public contracts (when they should be overseeing the process). This combination of “watchdog” role with that of the Executive gives rise to conflicts of interest and effectively poisons the body politic. It also breeds contempt for democratic institutions among the public at large. Unless these contradictions are resolved satisfactorily (e.g. by effecting a clear separation of powers) it is doubtful whether effective anti-corruption reforms can be achieved in those countries.

16 Political party funding remains a problem
The issue of political party funding has been largely ignored by the international community, perhaps because political parties in most industrialised countries thrive on illicit funding. Some argue that the best way to restrict the influence of “money politics” is not so much to restrict money flowing in to a political party, but to restrict the amount of expenditures and what money can be spent on. The change of Taiwanese government in March, 2000, however, has shown that an affluent political party with large investments and powerful cronies can none the less be voted out of office. This encourages the belief that the manipulation of political party funding need not necessarily be an insuperable barrier to changes of government.

17 Independent agencies without security can be toothless
The institutions of Ombudsman and of Auditor-General are attractive in theory but can only function effectively if their office-holders are protected from arbitrary removal by the very Executive they are required to be watching and reporting on. Constituencies outside the political processes have to be built to defend these office-holders and where necessary make their voices heard.

18 Access to information
Some governments have recognised transparent access to information as the most effective tool for curbing corruption and have enacted appropriate legislation. Government agencies can be required to post details of the services they provide and the official charges for them. Indonesia is an example where local information displays with details of development projects
have equipped the public with the information they need to keep a watchful eye on what is taking place.

19 Sound records management
Public access to information requires sound records management. So, too, does holding individual public servants to account. A government agency should be charged with overseeing public sector document handling processes by individual departments and making provision for the archiving of spent documentation.

20 The media and whistleblowing journalists
Most murders of journalists in recent years have been attributed to their investigating corruption cases and there is thus a need to render their work less risky as well as to raise standards of professionalism. Several institutions are running training courses in investigative journalism. However, in many parts of the world the media itself is blighted by corruption. The media is an “integrity pillar” which requires serious attention.

21 “Naming and shaming” seems attractive but doesn’t seem to work
Efforts to “name and shame” in the Kenyan Parliament drew a blank earlier in 2000 when a committee report which “named names” had all the names censored, and some of those “named” threatened to sue newspapers who published details – even though the information was already in the public domain. In India, the Vigilance Commissioner resorted to the Internet to post the names of hundreds of officials suspected of corruption. At best the jury is still out. The flamboyance with which the President of the Nigerian Senate, voted out of office in August, 2000, protested his innocence in the face of overwhelming evidence of malpractice, suggests that political leaders may have much thicker skins than do those who strategise to combat corruption. In any event, extreme care is needed to avoid any appearance of denying individuals a fair chance to defend themselves.

22 Is addressing inadequate salaries enough?
It stands to reason that inadequately paid public servants must be more vulnerable to temptation than those who are paid well. However, the depressing truth emerges that many of the most corrupt officials are in leadership positions which they have abused to amass large fortunes through “grand corruption”. Salaries, then, are more a question for those in low positions, whose insistence on payments for services may be seen by their peers as a form of “user pays”. Surveys suggest that people may be ready to pay for the services they receive, provided the fees are affordable and legal. What they bitterly resent is being subjected to extortion. One observer has noted that: “The evidence is at best unclear whether increasing public sector wages can reduce corruption. Yes, within a comprehensive package of civil service reform, proper compensation and incentives can play a role, but an in-depth look at country specific data does not support the notion that merely increasing official salaries to existing staff in corrupt agencies helps.”

23 But increasing pay may at least be a part of the answer….
Real wages have declined in the public sector in many countries over substantial periods of time. In several cases this decline has been mirrored by declines in the efficiency of the public sector. One study shows that higher wage levels carries with them the chance to recruit better skilled people into government service, raising the quality of the services provided and, as described in the paper, the amount of tax collected. Simply raising tax rates may not raise additional state income; enhancing the skills of those involved in collecting it can.

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6 Daniel Kaufmann of the World Bank Institute.
7 Nadeem Ul Haque and Ratna Sahay, Do Government Wage Cuts Close Budget Deficits? Costs of Corruption, IMF Staff papers Vol. 43 No. 4 December 1996.
24 Independent revenue authorities
Independent revenue authorities can be established with closely monitored and well-paid staff, employed outside the public service salary structures. These authorities can boost the collection of revenue and enable a developing country to pay its officials and service the financial needs of its institutions more adequately.\(^8\)

25 Do retirement benefits, especially for leaders, help?
Logic suggests that a lack of security in retirement is a factor in the corruption equation. However, when it comes to those in the most senior positions the anecdotal evidence to the contrary is depressing. In Zimbabwe, where controversial and excessively generous “retirement packages” were enacted for a large number of senior party figures, it seems to have had no impact whatsoever on the level of “grand corruption”, which has, if anything, increased. Perhaps because members of the extended families, rather than the leaders personally, have been the beneficiaries, there has been no willingness to end the looting.

26 Do laws alone do the trick?
Certainly, laws alone do not offer a quick route to curb corruption, except perhaps where they are conferring on courts a jurisdiction they have not had before: to review the legality of administrative decisions taken by officials.\(^9\) Repeatedly, Legislatures have passed new anti-corruption laws with great fanfare, and have regarded the job of reform (or at least the chimera of corruption reform) as a job completed. But laws are failing in every country where corruption is systemic, and they fail more from lack of enforcement than from any inadequacies in the laws themselves. There are also ways of achieving reforms, even in public procurement, without changing the law, but using contracts and civil penalties to ensure that standards of conduct improve.

27 ...where the Rule of Law is faltering...
There is an inherent contradiction in trying to use a corrupt judicial system to uphold the Rule of Law. Institutional elements of the Judiciary, particularly appointment, removal and accountability aspects, have to be provided for. The Office of the Ombudsman may offer a way of introducing redress that can be quick and effective, and not be subject to the distortions that may hamstring a judiciary, but questions of judicial independence and judicial integrity have to be addressed from the outset.

28 But there still needs to be better laws
That said, there still need to be laws that are workable. The burden of proof which is placed on a prosecutor should not be unnecessarily demanding. Affording an accused a fair trial does not mean making it impossible for a prosecutor to prove his or her guilt.\(^10\) Laws of evidence need to be kept up-to-date and consideration given to introducing the specific offences which in Hong Kong were a key to the success of the anti-corruption initiative there.

29 Time limits for prosecutions need to be realistic
“Grand corruption”, especially, can be slow to be revealed, and prosecution cases can take a long time to prepare thoroughly. For these reasons, time limitations for prosecutions to be brought, or for cases to be concluded, need to be realistic. In some countries it is virtually impossible to prosecute a case to its conclusion.

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\(^8\) The Internet version of this Source Book includes a major study on the experiences with these institutions in Ghana, Tanzania and Uganda: http://www.transparency.org.
\(^9\) E.g. in Latvia.
\(^10\) For example, a law that requires that the prosecution prove not only that a handsome gift was paid by a customer to a public servant, but also that the giver received a corrupt benefit in return, places a burden on the prosecution which it will often not be able to discharge. Frequently the gifts are given ahead of time, or after the event. Creating the connections can be tenuous, and in the context of a criminal trial, inadequate. Is it not enough that a junior customs official, with no other known means of income, is driving a new Mercedes?
30 The "illicit enrichment" law
One particular law which has proved to be effective in some countries is that of "illicit enrichment" which is effectively: the possession by a civil servant of inexplicable wealth. This law, coupled with a functioning legal and judicial system, spearheaded the Hong Kong reforms. However, some Legislatures have refused to enact such laws, ostensibly on the grounds that they may infringe human rights. In reality, however, refusals to enact such a law seem to stem from a desire to preserve the status quo.

31 Monitoring the assets of public officials
There is widespread belief that this is potentially an effective tool for containing corruption, but the case to date has only been made on paper. Parliamentarians are remarkably shy when it comes to enacting laws to provide for the monitoring of the assets and incomes of senior officials. When laws are enacted, declarations are seldom required to be made public. They are, still less, routinely investigated for their accuracy. Initiatives in this area are being followed closely.

32 The scope of immunities and privileges reviewed
In many countries immunities and privileges of senior public figures effectively shield them from the Rule of Law. Indeed, in some countries, criminals opt for elected office simply to gain immunity. These privileges and immunities need to be reassessed and their scope minimised to practical requirements. They are not granted to honour an individual, but to enable an individual to discharge his or her duties effectively.

33 The growing opportunities afforded by the Internet
The Internet can help build more open systems. Legislatures can establish web sites which enable citizens to interact with their elected representatives and serve to keep them informed of parliamentary business. Government departments can post their documentation. Reformers can advertise their national anti-corruption plans to the world at large, and monitor the progress being made very publicly. The Internet can be used for on-line public tendering, opening the information flow, and reducing opportunities for making potentially corrupt personal contacts. Of course, the usefulness of the web in this respect is limited by the number of people who may have access to it. Much of the Internet’s potential is presently denied to many in the world’s poorest countries, but growing numbers there do have access to the web, and any gains made by rendering their institutions and individuals more accountable should help to promote the interests of all.

34 Procurement is a battle-ground
The field of public procurement has been a battleground for corruption fighters. It is in public procurement that most of the “grand corruption” occurs with much of the damage visibly inflicted upon the development process in poorer countries and countries in transition. Although initially there were sceptics who fought against the “islands of integrity” approach, successes are increasingly being recognised. “Islands of integrity” is a process in which voluntary agreements are made, involving bidders and the government, to restrict opportunities for corruption in a particular project. The use being made of the Internet for public procurement by the city of Seoul and in Mexico is likewise promising.

35 The commissions bidders pay to agents should be declared...
Some thought that legislation requiring disclosures of commissions would undermine international competitive bidding and that some corporations would not wish to abide by such a rule. However, where such a requirement has been introduced, there has been little evidence of it having such negative effect. The honest have nothing to hide, and if the corrupt fold their tents...
and leave, the field is better without their presence. The experience in New York City has been an inspiration to corruption fighters, and is being followed in Nigeria.

36 ... and corrupt bidders should be blacklisted
Blacklisting firms caught bribing can be a potent weapon. Of course, this requires that due process be observed, and that penalties be proportionate. But there can be no doubt that the international corporations blacklisted by Singapore in the 1990’s received a considerable shock, and that in the future others will think twice before attempting to bribe Singaporean officials. The World Bank subsequently went down the same path. It posts the names of blacklisted firms and individuals on its web site. This remedy works best in countries where the Rule of Law is functioning properly and adequate appeal mechanisms are in place.

37 International problems require international solutions
To the surprise of many Americans, a survey by TI in 1999 showed that the US Foreign Corrupt Practices Act, passed as long ago as 1977, is not having the effect that had been supposed. American companies exporting into key emerging markets were shown to be about as corrupt as German exporters, operating without any such deterrent and with the added advantage of tax deductions for the bribes they paid. It would seem that unilateral action by a single government, even of the world’s most powerful nation, is insufficient to impact on a global problem. Rather the problem requires a coordinated international response. Hence, the need for international accords such as the OECD Convention Against the Bribing of Foreign Public Officials in International Business Transactions. The intentions of this Convention must be translated into reality.

38 International agreements require monitoring
It is not enough to sign a Convention. The Convention must be put into effect. Where a Convention strikes at a country’s successful export strategies, it is not altogether surprising that some exporting countries may be less than enthusiastic about the goals of the accord. On the other hand, those who support the aims of a Convention may regard some competitor countries with suspicion and need reassurance that they are not falling into a trap. Close evaluation and monitoring of implementation and enforcement, both by the governments involved and by civil society and the private sector, becomes a sine qua non.

39 Surveys can measure and identify successes and failures
Reform programmes should be monitored for desired results. Monitoring requires effective measurement and is best done through surveys – and with the data being made public. Surveys can measure the impact of corruption on business, public perceptions, and, by targeting selected service providers, measure the levels of corruption in the services being provided. These surveys can be international, national or local, but their practical utility increases the closer they get to the grass roots. By comparing the results from agencies in differing parts of the country, the least efficient, and perhaps most corrupt, can be identified and steps taken to redress their performance. International surveys help raise the issue on the national agenda and keep it at the forefront of public debate. However, international surveys are comparative and fraught with statistical difficulties, and so are of limited usefulness. One of their most valuable aspects has been to raise the issue of corruption on the national political agenda, and to highlight the need for national surveys which are now being undertaken with an increasing thoroughness.
Final thoughts

The task of achieving sustainable anti-corruption reforms will be a long and arduous one. That the stakes are high is beyond dispute. Yet just how much time we have to make a significant impact on the phenomenon is uncertain.

On the one hand, it could be that the people in the most corrupt countries lose heart, lose faith in democratic practices and turn to authoritarianism, seemingly as a logical reaction to democracy’s failure. There is, of course, no reason to suppose that a further round of autocracy will be any less disastrous than it has been in the past.

On the other hand, too, the international community may start to dilute their commitment to the cause. Other issues may attract their attention and may seem to offer more immediate responses to their interventions.

But one thing is clear. If we all – governments, civil society, the private sector and international organisations – do not grasp the opportunities we now have to confront corruption effectively, then the chances will pass. Corruption will steadily and inexorably undermine the new democracies and will continue to impact negatively on human rights, the environment and all aspects of globalisation. The stakes, surely, could not be higher than they now are.
Emerging Best Practice in Containing Corruption

The following is a list of the documentation available in full text on the TI website as at the date of publication. This is a “living archive” and, as such, is constantly being reviewed and revised. There is no claim of “perfection” advanced in respect of any particular document, but they are listed as each is seen as having value. Comments, and suggestions for future inclusions, may be sent by email to jeremypope1@compuserve.com, by fax to + 44 20 7610 1550 or by post to Transparency International (TI), London Office, 16-18 Empress Place, London SW6 1TT, United Kingdom.

1. Access to Information
   - **Australia, Freedom of Information Act 1982**
     The object of this law is to extend the right of the Australian community to access to information in the possession of the Government of Australia by (a) making available to the public information about the operations of departments and public authorities and, in particular, by ensuring that rules and practices affecting members of the public in their dealings with departments and public authorities are readily available to persons affected by those rules and practices; and (b) creating a right of general access to information in documentary form in the possession of Ministers, departments and public authorities, limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by departments and public authorities. It also contains a rule of interpretation designed to facilitate and promote, promptly and at the lowest cost, the disclosure of information. Provision is also made for the amendment of personal records, complaints to the Ombudsman, and review by the Administrative Appeals Tribunal.

   - **Australia, New South Wales, Freedom of Information Act 1989**
     This law seeks to extend the rights of the public to obtain access to information held by the government, and to ensure that records held by the government concerning the personal affairs of members of the public are not incomplete, incorrect, out of date or misleading. These objectives are sought to be achieved (a) by ensuring that information concerning the operations of government is made available to the public; (b) by conferring on each member of the public a legally enforceable right to be given access to documents held by the government, subject only to such restrictions as are reasonably necessary for the proper administration of the government; and (c) by enabling each member of the public to apply for the amendment of the government’s records concerning his or her personal records. Provision is also made for an internal review of decisions relating to disclosure, a review by the Ombudsman, and a review by Court.

   - **Australia, Victoria, Freedom of Information Act 1982**
     The object of this law is similar to that of the Freedom of Information Act 1982 of Australia, namely, to extend as far as possible the right of the community to access to information in the possession of the Government of Victoria and other bodies constituted under the law of Victoria by (a) making available to the public information about the operations of agencies; and (b) creating a general right of access to information in documentary form in the possession of Ministers and agencies.
The object of this law is to confer three important rights: (1) a general right of access to all documents held by government agencies, subject to specific exemptions necessary to protect the workings of government and business and personal confidences; (2) the right to examine information relating to the personal affairs of an individual and to seek any amendment necessary to correct errors or inaccuracies; and (3) the right to information on the structure and functions of government agencies.

• Belize, Freedom of Information Act 1994
This Act seeks to give to members of the public a right of access to official documents of the government and public authorities, subject to exemptions in respect of certain categories of documents. It also seeks to provide for public examination records relating to the government's financial, contractual and other transactions. The Ombudsman is the designated authority to review decisions made under this Act.

This Act seeks to provide to every person who is either a Canadian citizen or a permanent resident of Canada a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific, and that decisions on the disclosure of government information should be reviewed independently of government (by an Information Commissioner and/or the Federal Court).

• Hong Kong, Draft Access to Information Ordinance
This Bill was prepared prior to the transfer of sovereignty for presentation to the Legislative Council as a Private Member’s Bill. It was disallowed by the President of the Council on that ground that, being a Bill with financial implications, it was not approved by the Governor. In fact, the Bill was designed to incur minimal funds for its implementation. The draft Bill sought to confer on the public a general right of access to information in documentary form in the possession, custody or control of government departments and statutory public bodies. It also recognised the right of an individual to apply for the amendment of any such document if he or she was of the opinion that it contained information concerning such person and that information was incomplete, incorrect, out of date or misleading. Thirteen categories of documents were sought to be exempted from the application of the proposed law, including those relating to judicial functions, law enforcement and public safety, inter-governmental relations, personal affairs, business affairs, scientific research, and those subject to legal professional privilege. The Commissioner for Administrative Complaints (the Ombudsman) was the designated authority for the review of determinations made under the proposed law.

• Ireland, Access to Information Act 1997
This Act recognises the right of every person to be offered access to any record held by a public body, subject to limited exemptions provided for in the law. It prescribes the procedure for obtaining access; the amendment of records containing personal information which is incomplete, incorrect or misleading; for the review of decisions relating to the implementation of this Act by an Information Commissioner appointed for that purpose; and for appeal to the High Court on a question of law.

• Korea, Act on Disclosure of Information by Public Agencies
This law recognises the people’s ‘right to know’ and provides for access to information in the possession of state, local government and government-invested institutions. It prescribes the procedure for the disclosure of information, and provides for an appeal against non-disclosure, first to the public agency concerned, then to an adjudicator under the provisions of the Administrative Appeals Act, and finally to a judge under the provisions of the Administrative Litigation Act. Eight items of information are excluded from the operation of this law.

• New Zealand, Official Information Act 1982
The purposes of this law, which replaced the
Official Secrets Act 1951, are described as being (a) to increase progressively the availability of official information to the people of New Zealand in order to enable their more effective participation in the making and administration of laws and policies, and to promote the accountability of Ministers and officials; (b) to provide for proper access by each person to official information relating to that person; and (c) to protect official information to the extent consistent with the public interest and the preservation of personal privacy. The Ombudsman is empowered to investigate and review decisions made by a department or Minister in respect of the implementation of this law.

- Sweden, The Freedom of the Press Act 1989
  Chapter 2 of the Act provides to every Swedish subject a right of access to official documents. It defines what ‘official documents’ means; and sets out the circumstances in which the right of access may be restricted by law.

- Uganda, Right of Access to Information, Article 41 of the Constitution of Uganda 1995
  This provision in the Constitution of Uganda guarantees to every citizen a right of access to information in the possession of the state or any of its organs or agencies, except where the release of the information is likely to prejudice the security or sovereignty of the state or interfere with the right to privacy of any other person.

- United States of America, Freedom of Information Act (Part 552 of Title 5 (U.S. Code))
  The United States of America was a pioneer in the exposition of the principle of access to information. The original law enacted in 1966 imposed an obligation on the federal government to allow access to most documents in its possession. The Freedom of Information Act 1974, which sought to overcome the cumbersome procedures prescribed in the 1966 legislation, also enabled the courts to consider whether particular documents were properly classified as exempt from disclosure. Other supporting legislation includes the Privacy Act 1974 (which gives individuals an opportunity to inspect their files and correct them); the Fair Credit Reporting Act (which gives citizens a right to see the records held on them by credit reference agencies); the Government in the Sunshine Act 1976 (which allows the public access to meetings of certain government bodies); and the Whistle-blowers (Civil Service Reform) Act 1978 (which is designed to protect civil servants from any retribution from the government if they disclose government wrongdoing or malpractice, or releases information which the civil servant reasonably believes shows a violation of any rule or regulation, mismanagement, gross waste of funds or an abuse of authority).

2. Accountability of Public Officers
  The Constitution contains 18 provisions designed to secure the accountability of public officers. These include provisions for impeachment of the highest ranking officers, including the President; the establishment of the offices of Ombudsman and Special Prosecutor; the recovery by the state of properties unlawfully acquired by public officers; the declaration of assets and liabilities; and a prohibition on the grant of loans or other form of financial accommodation for any business purpose to a high ranking officer by a government-owned or controlled bank or financial institution.

3. Accounting Profession (in preparation)

4. Administrative Law (see Judicial Review)

5. Anti-Corruption Agencies
- Australia, New South Wales, Independent Commission Against Corruption Act 1988
  This Act seeks to constitute the Independent Commission Against Corruption and to define its functions. It also defines “corrupt conduct” which the ICAC is empowered, inter alia, to investigate. For the purposes of its investigations, the ICAC is empowered to hold a public hearing at which any person may be summoned to appear to give evidence on oath or affirmation or to produce a document or thing. Other institutions established under this law include an operations review committee, a joint committee of Members of Parliament on the ICAC, and a committee of the Legislative Council and a standing ethics committee of the Legislative Assembly to draft codes of con-
duct for their respective Members and to give advice to them on ethical standards.

- **Australia, New South Wales, How is the ICAC accountable?**
  This note prepared by the ICAC explains how it is rendered accountable to the people of New South Wales through the Parliament, the operations review committee, regular reporting, and through the Ombudsman and the courts.

- **Botswana, Corruption and Economic Crime Act 1994**
  This Act provides for the establishment of a Directorate on Corruption and Economic Crime, with an extensive mandate which includes the investigation of alleged or suspected offences under this Act, the alleged or suspected contravention of the fiscal and revenue laws of the country, and the conduct of any person which may be connected with or conducive to corruption; the examination of the practices and procedures of public bodies with a view to eliminating any which may be conducive to corrupt practices; the education of the public against the evils of corruption; and the fostering of public support in combating corruption. The Act also creates several offences including that of possession of unexplained property.

- **Hong Kong, Independent Commission Against Corruption Ordinance 1974**
  The Hong Kong ICAC was established as an independent institution subject only to the direction and control of the Governor. It consists of a Commissioner and a Deputy Commissioner appointed by the Governor, and such other staff as may be appointed by the Commissioner. The duties of the ICAC include the investigation of offences under the Prevention of Bribery Ordinance, the revision of practices and procedures of government departments and public bodies which are conducive to corrupt practices; advice to any person on ways in which corrupt practices may be eliminated; education of the public against the evils of corruption; and the fostering of public support in combating corruption.

- **Hong Kong, Note on the Corruption Prevention Department (Hong Kong ICAC)**
  This is a 1994 note on the structure of the Hong Kong ICAC, and includes a reference to the advisory and review role played by lay persons from outside the organisation.

- **Jamaica, Contractor-General Act 1983**
  The office of Contractor-General is established to monitor, on behalf of Parliament, (1) the award and implementation of government contracts with a view to ensuring that such contracts are awarded impartially and on merit; that the circumstances in which each contract is awarded or terminated do not involve impropriety or irregularity; and that the implementation of each contract conforms to the terms thereof; (2) the grant, issue, suspension or revocation of any prescribed licence, with a view to ensuring that the circumstances of such grant, issue, suspension or revocation do not involve impropriety or irregularity and, where appropriate, to examine whether such licence is used in accordance with the terms and conditions thereof.

- **Singapore, Prevention of Corruption Act (Cap 241)**
  This 1960 law establishes the Corrupt Practices Investigation Bureau; defines several offences and provides for their investigation and prosecution. The Act applies to citizens of Singapore in respect of offences committed both within and outside the country.

- **Thailand, The National Counter Corruption Commission, Chapter 10, Part 2 of the 1998 Constitution**
  Article 297 of the Constitution provides for the establishment of the National Counter Corruption Commission comprising a chairman and eight experts appointed by the King on the advice of the Senate. Its functions include the investigation of state officials for corruption, abuse of power, or being unjust, and the verification of declarations of assets and liabilities submitted by public office holders.

- **Uganda, The Inspector-General of Government Statute 1987**
  The Inspector-General is charged with the duty of protecting and promoting human rights and the rule of law in Uganda, and eliminating and fostering the elimination of corruption and abuse of public offices. He has the power to take
necessary measures for the detection, investigation and prevention of corruption in public offices, including the power to secure the revision of methods of work and procedure in public offices, and to enlist and foster public support against corrupt practices.

(See also relevant case law.)

6. Attorney-General
   - Australia, Queensland, Attorney-General Bill 1993
     This Bill sought to establish the office of Attorney-General for Queensland as a Minister of the government, and to define his functions and powers. Where the Attorney-General decides to exercise his powers in relation to a prosecution without first obtaining a decision on the matter from the Director of Public Prosecutions, or overriding a decision of the DPP, the Bill requires the Attorney-General to present to the Legislative Assembly, within 3 days, a statement outlining the circumstances and reasons for his decision. The Bill also requires the Attorney-General to cause to be published in the Gazette and to be laid before the Legislative Assembly any written directions or guidelines relating to the functions of the office of DPP which he may have given.

7. Auditor-General and Audit Standards
   - Australia, Australasian Council of Auditors-General, Memorandum of Understanding on Peer Reviews
     The ACAG peer review process is designed to uphold and embody the principles and fundamental values of objectivity, integrity, independence, quality, and opinions and reports based on sound research and analysis. A peer review is a comprehensive examination of an audit office’s operations in order to determine whether that office has managed its activities economically and efficiently; been effective in the discharge of statutory responsibilities; and/or applied appropriate quality assurance standards.

   - International Organization of Supreme Audit Institutions, Lima Declaration of Guidelines on Auditing Precepts
     This declaration was adopted at the IXth Congress of INTOSAI held in Lima, Peru, and focuses on issues such as independence; relationship to Parliament, government and administration; powers; auditing methods, auditing staff, and international exchange of knowledge; and reporting.

   - International Organization of Supreme Audit Institutions, Auditing Standards 1992
     This is the June 1992 revision of the INTOSAI Auditing Standards which were originally published in 1989. This revision recognises the particular needs of countries whose SAIs are constituted as courts of account. These Auditing Standards do not have mandatory application, but they reflect a “best practices” consensus among SAIs. It is a “living” document reflecting, to the extent possible, the current trends, issues and concerns in auditing methodology and practice.

     This law requires that an internal audit be conducted in every public body by an internal auditor. His functions include examining whether the activities of the public body are sound from the standpoint of upholding the law, proper management practice, moral integrity, economy and efficiency, and whether these activities contribute to the achievement of their stated objectives.

   - United States of America, Government Auditing Standards
     This is a 1994 revision of a statement of government auditing standards issued by the Comptroller General of the United States.

8. Banking Supervision
   - Basle Committee on Banking Supervision, Core Principles for Effective Banking Supervision 1977
     This list of core principles for effective banking supervision was issued by the Basle Committee on Banking Supervision after endorsement by the G-10 central bank governors. The list contains 25 basic principles that need to be in place for a supervisory system to be effective. It is intended to serve as a basic reference for supervisory and other public authorities in all countries and internationally.

9. Citizen’s Charters
   - United Kingdom, Citizen’s Charter Unit, Statement of Standards
The Citizen’s Charter was launched in July 1991 as a 10-year programme to improve the quality of public services. The Charter is the government’s statement about what people can expect from public services. There are now 42 national charters and thousands of local charters, applying to all public services – schools and colleges, hospitals, rail services, roads, council services, the police, the fire service, the post office, benefits agency offices and job centres, customs and excise, tax offices, and the privatised utilities such as electricity, gas, telephone and water. A charter sets out standards for individual public services and what to do if these are not met.

10. Civil Law (see also Criminal Law)

- **South Africa, Heath Special Investigating Unit**
The Heath Special Investigating Unit (named after its Head, Judge Willem Heath) was appointed by President Mandela of South Africa in March 1997 under the Special Investigating Units and Special Tribunals Act No.74 of 1996. The Unit, which is a novel concept, offers a process through which an allegation of corruption can be taken through investigations and civil proceedings to enforceable civil judgments by a Special Tribunal. This document serves as an introduction to the Unit and the investigation and litigation services performed by its members.

- **South Africa, Special Investigating Units and Special Tribunals Act, No.74 of 1996**
This law provides for the establishment of Special Investigating Units for the purpose of investigating serious malpractices or maladministration in connection with the administration of state institutions, state assets and public money, as well as any conduct which may seriously harm the interests of the public. It also provides for the establishment of Special Tribunals to adjudicate upon civil matters emanating from investigations by Special Investigating Units.

(See also relevant case law.)

11. Codes of Conduct – International and Inter-Governmental Organisations

- **European Bank for Reconstruction and Development, Code of Conduct 1991**
  Adopted by the Board of Governors of the EBRD on 15 April 1991, and applicable to all officials and staff members of the Bank and, when incorporated in their contracts, to experts and consultants engaged by the Bank, this code addresses issues such as confidentiality, business affiliations, gifts and honours, political activities, financial interests, investments, trading activities, and disclosure statements.

- **European Bank for Reconstruction and Development, Code of Conduct: Implementing Order No.1 1992**
The purpose of this implementing order was to clarify certain provisions of the code of conduct relating to the duties and responsibilities of staff members (see above) and to provide guidance with regard to certain practices which the Bank regards as improper and unacceptable.

- **European Union, Code of Conduct for the Commissioners**
The treaty article on the European Commission make special reference to the complete independence enjoyed by the members of the Commission, who are required to discharge their duties in the general interest of the Community. In the performance of their duties they must neither seek nor take instructions from any government or from any other body. The general interest also requires that in their official and private lives Commissioners should behave in a manner that is in keeping with the dignity of their office. The object of this code is to address this concern, particularly by setting limits to Commissioners’ outside activities and interests which could jeopardise their independence. It also responds to the need to codify certain provisions relating to the performance of their duties. Among the matters dealt with in this code are the outside activities of the Commissioners; their financial interests and assets; activities of spouses; collective responsibility and confidentiality; rules for missions; rules governing receptions and professional representations; acceptance of gifts and decorations; and the composition of their offices.

- **European Union, Extract from Wise Men’s Report 1999**
This extract focuses, inter alia, on the “common core of minimum standards” which binds holders of high public office in the absence of spe-
specific rules or codes of conduct applicable to them. In the view of the “wise men”, the higher the office, the more demanding those standards are in requiring the holders to conduct themselves properly in appearance and behaviour.

12. Codes of Conduct – Judges and Judicial Employees

• Canadian Judicial Council, Ethical Principles for Judges 1998
This statement of ethical principles for judges was prepared for the Canadian Judicial Council by a working committee which included four Chief Justices and an academic. It was designed to represent a concise yet comprehensive set of principles addressing the many difficult ethical issues that confront judges as they work and live in their communities, and to provide a sound basis to promote a more complete understanding of the role of judges in society and of the ethical dilemmas they often encounter.

• Tanzania, Code of Conduct for Judiciary Officers 1984
This code of conduct for judiciary officers of Tanzania was adopted by the Judges and Magistrates’ Conference held at Arusha in March 1984. A violation of any of the rules contained in the code constitutes judicial misconduct or misbehaviour and may entail disciplinary action.

• USA, Canons of Judicial Conduct for the Commonwealth of Virginia 1999
Adopted and promulgated by rules of court, these canons of judicial conduct are intended to establish standards for ethical conduct of judges. The document contains broad statements (canons), specific rules set forth in sections under each canon, and a commentary. The text of the canons and the sections is authoritative, while the commentary is advisory and provides guidance with respect to the purpose and meaning of the canons and sections.

13. Codes of Conduct – Private Sector

• British Petroleum, Code of Business Conduct 1993
This code of business conduct was issued by the Chairman of BP on 27 August 1993.

• European Bank for Reconstruction and Development, Business Standards and Sound Business Practices: A Set of Guidelines
Recognising that the success of a company depends not only on it having a sound strategy, competent management, good assets and a promising market, but also upon the company maintaining a sound relationship with the various constituencies on which it depends – customers, shareholders, lenders, employees, suppliers, the community in which it operates, and government authorities, the EBRD formulated this set of guidelines as being those which bona fide lenders and investors expect companies to follow in this regard.

• FMC Corporation, Code of Ethics and Business Conduct Guidelines
The code of ethics discusses the ethical principles that should guide all FMC employees in their daily work. The business conduct guidelines reflect the policy of FMC Corporation and its domestic and foreign subsidiaries with respect to political contributions, payments to government personnel, commission payments, proper accounting procedures and commercial bribery.

• General Electric Company, Statement of Ethical Business Practices
This statement of ethical business practices, which is applicable to all employees of the company throughout the world, relates, in particular, to certain kinds of payments (such as bribes, kickbacks, gifts, contributions, and entertainment) and political contributions.

• Hong Kong ICAC, Corporate Code of Conduct
This is a document prepared by the Hong Kong ICAC for the reference of business organisations interested in formulating a code of conduct to guide management and staff. It aims to present in a practical way the guiding principles to be incorporated in a code of conduct, exemplify the options and circumstances for the formulation of a code of conduct, and provide a variety of cases, situations and examples for reference. It also contains a sample corporate code of conduct.

Following a series of interfaith consultations between the followers of three monotheistic faiths - Christianity, Islam and Judaism, this Declaration was prepared by a group of eminent scholars, clerics and business people following a comprehensive review of the teachings of the three religions with regard to ethical issues in the conduct of business. It reflects the shared concern for justice, mutual respect, stewardship and honesty indicated in the teachings of the three religions.

• International Chamber of Commerce, Rules of Conduct to Combat Extortion and Bribery 1996

The ICC is a global business organisation with 63 national committees and over 7,000 member companies and associations from more than 130 countries. It seeks to promote international trade and investments, as well as rules of conduct of business across borders. These rules of conduct are intended as a method of self-regulation by international business. They are of a general nature constituting what is considered good commercial practice in the matters to which they relate but are without direct legal effect. However, a Standing Committee on Extortion and Bribery established by the ICC seeks, inter alia, to ensure that enterprises and business organisations endorse these rules.

• International Textile, Garment and Leather Workers’ Federation, Draft Code of Labour Practice 1997

This is a model code of conduct prepared by the federation and recommended to companies, contractors, subcontractors and suppliers in the relevant fields.

• ITT Corporation, Code of Corporate Conduct

This excerpt from the ITT code of corporate conduct addresses issues relating to corrupt and illegal practices; political activity; relations with government employees and sales agents.

• Medical Products, Code of Conduct in respect of the research, development, manufacture, distribution and procurement of, German Federal Association of Manufacturers of Medical Products and the Working Group of German Public Health Insurance Umbrella Bodies 1997

Based on the provisions of the laws of the European Union, this code is directed at manufacturers, distributors, employees of medical institutions and other service providers in connection with the research, development, manufacture, distribution and procurement of medical products. The code is designed to secure positive competition within the framework of a social health care system by establishing practical rules which would ensure the observance of “high ethical principles”, fulfil the requirements of medical research as well as those of the medical industry, and at the same time help to “increase the level of transparency and avoid irritations and inappropriate developments”.

• NYNEX, Code of Business Conduct

These excerpts deal with entertainment, gifts and gratuities, and is addressed to both managers and employees. The code also contains a provision dealing with the reporting of violations, and of any illegal, unethical or fraudulent acts within the NYNEX companies.

• OECD, Guidelines for Multinational Enterprises 1997

These guidelines are in the nature of recommendations addressed by member countries of the OECD to multinational enterprises operating in their territories. They take into account problems which can arise because of the international structure of these enterprises, and lay down standards for the activities of these enterprises in the different member countries. Observance of the guidelines is voluntary and not legally enforceable.

• Royal Dutch/Shell Group of Companies, Statement of General Business Principles 1997

This document, issued by the chairman of the committee of managing directors in March 1997, sets out the objectives, responsibilities and economic principles of Shell companies, and focuses on business integrity, political activities, health, safety and the environment, the community, competition and communication.
• Texaco, Corporate Conduct Guidelines
These guidelines relate to improper payments and gifts, the conduct of international business, the application of the Foreign Corrupt Practices Act, doing business with the government, and the reporting of irregularities.

14. Codes of Conduct – Professions and NGOs
This statement of 10 principles was approved by journalists from 34 countries at the Voices of Freedom World Conference on Censorship Problems held in London in January 1987. The conference was held under the auspices of the World Press Freedom Publishers, International Press Institute, Inter-American Press Association, North American Broadcasters Association, and the International Federation of the Periodical Press.

• International Bar Association, International Code of Ethics 1956
This statement of 21 rules for the legal profession was first adopted in 1956.

• International Bar Association, Standards for the Independence of the Legal Profession 1990
This statement of standards was adopted by the IBA in 1990 and is designed to assist in the task of promoting and ensuring the proper role of lawyers. It seeks to complement the UN Basic Principles on the Role of Lawyers and to provide more detail. While the UN principles are addressed to governments, this IBA statement seeks to address the question of independence of the profession from the view-point of lawyers.

• International Center for Not-for-Profit Law, Principles of Regulation for the Not-for-Profit Sector
The executive director of the International Center for Not-for-Profit Law, has, in this excerpt from an article, identified certain principles of regulation for the not-for-profit sector.

• Nigerian Code of Ethics for Journalists 1996
Originally drafted in 1996, this code of ethics was endorsed in 1998 by the Nigerian Union of Journalists, the Nigerian Guild of Editors, the Newspaper Proprietors Association of Nigeria, and the Nigerian Press Council.

• Transparency International, Conflict of Interest Policy
This policy statement on conflict of interest was issued by the Board of Directors of Transparency International, and is addressed to individuals who represent either TI or its national chapters.

• Uganda Journalists Association, Code of Professional Conduct
This code was formulated by the members of the Uganda Journalists Association to serve as a basis for the adjudication of disputes between the press and public and for disciplinary action when the conduct of a journalist falls below the required minimum standards enshrined in it.

• United Nations, Principles of Medical Ethics relevant to the role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1982
These 6 principles were adopted by the UN General Assembly by resolution 37/194 of 18 December 1982.

• United Nations, Basic Principles on the Role of Lawyers 1990.
These principles were adopted by the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, and “welcomed” by the UN General Assembly in its resolution 45/121 of 14 December 1990. The UN invited governments to be guided by them in the formulation of appropriate legislation and policy directives and to make efforts to implement them in accordance with the economic, social, legal, cultural and political circumstances of each country. In its resolution 45/166 of 18 December 1990, the UN General Assembly invited governments “to respect them and to take them into account within the framework of their national legislation and practice”.

15. Codes of Conduct – Public Officials, including Ministers and Parliamentarians
This draft code of conduct was adopted at the African Leadership Conference on Democratization of African Parliaments and Political Parties”
held in Gaborone, Botswana in July 1998, and attended by representatives drawn from Parliaments across the African continent. It was offered to African Parliaments in the hope and expectation that it would assist the processes of developing national codes of conduct to guide the various democratic institutions through the challenging years that lay ahead.

- **Australia, Draft Framework of Ethical Principles for Members of Parliament and Senators 1995**
  These principles, prepared by a working group, are intended to provide a framework of reference for Members of the House of Representatives and the Senate in the discharge of their duties. They outline the minimum standards of behaviour which, in the view of the working group, the Australian people have a right to expect of their elected representatives.

- **Australia, Draft Framework of Ethical Principles for Ministers and Presiding Officers 1995**
  The principles contained in this document, prepared by a working group, are intended to provide a framework of reference for Ministers and the presiding officers of the two Houses of Parliament. They supplement the draft Framework of Ethical Principles for Members and Senators and the provisions of the Standing Orders of both Houses.

- **Australia, Draft Code of Conduct for all Office Holders, Law Reform Commission of Australia**
  This model code of conduct prepared by the Australian Law Reform Commission contains ten general principles. In this document, the Commission also suggests how appropriate codes of conduct could be developed in respect of Members of Parliament, staffs of Members of Parliament, Ministers, Ministerial staff, public servants, members of the defence force, staff of Parliamentary departments, consultants, statutory office-holders, staffs of statutory office-holders, certain analogous office-holders, members of tribunals, the media, and lobbyists. The Commission also suggests machinery for the regulation of conflicts of interest and post-separation employment, and recommends amendments to the criminal law.

- **Australia, Draft Code of Conduct, Legislative Council of New South Wales**
  This draft code of conduct, prepared by the standing committee of the legislative council on Parliamentary privilege and ethics, focuses on such matters as general conduct, personal conduct, upholding the law, conflict of interest, use of public office for private gain, acceptance of gifts or travel expenses, use of inside information or official resources for personal gain, and post-employment restrictions.

- **Australia, Register of Members’ Interests, Parliament of Victoria**
  This is the prescribed form to be used for making the primary return under the Members of Parliament (Register of Interests) Act 1978.

- **Australia, Code of Conduct for the Public Employees in South Australia, Commissioners Circular No.64**
  This code of conduct for public employees in South Australia contains general principles of public administration (relating to such matters as impartiality, conflict of interest, gifts, avoidance of waste, equal opportunity); service to the government (including responsibility to the Minister obedience to directions, disclosure of information, public comment, freedom of information, whistleblowing, political activity in the workplace, and government motor vehicles); and the criminal law (including bribery and corruption, abuse of public office, extortion, threats and reprisals).

- **Australia, Parliamentary and Electorate Travel: Recommendations for reform, ICAC, New South Wales 1999**
  This is the second report of the ICAC on the subject of Parliamentary entitlements. It seeks to detail the results of an analysis of Members’ use of their entitlements and allowances and the administrative systems operating within the New South Wales Parliament, and makes recommendations for change. The first report, released in April 1998, examined the conduct of Brian Langton MP and six other Members of Parliament in relation to the use of travel entitlements.
• Canada, Conflict of Interest and Post-Employment Code for Public Office Holders 1994
This code seeks to enhance public confidence in the integrity of public office holders and the decision-making process in government by establishing clear rules of conduct respecting conflict of interest for, and post-employment practices applicable to, all public office holders. It also seeks to minimise the possibility of conflicts arising between the private interests and public duties of public office holders, and provides for the resolution of such conflicts should they arise.

• Canada, Ontario, Members’ Integrity Act 1994
This law prescribes rules of conduct for Members of the Legislative Assembly and the executive council designed to prevent a conflict of interests. It also requires each Member to file a statement disclosing the assets and liabilities of himself, spouse and minor children. Provision is made for the establishment of the office of Integrity Commissioner.

• Fiji, Code of Conduct, S.155 of the Constitution of Fiji 1997
This constitutional provision prescribes five rules of conduct applicable to holders of high public office (including the president), and requires Parliament to make a law to more fully implement these rules.

This directive contains instructions issued to all government offices on measures to be taken to prevent corruption. They include risk analysis, greater scrutiny and transparency, rotation of staff, the appointment of a contact person for the prevention of corruption, internal review, separation of planning, award and billing in respect of public procurement, the principle of public tender, the incorporation of an anti-corruption clause in contracts, and prior consent of the highest administrative authority for the acceptance of gifts or hospitality.

• Hong Kong, The Acceptance of Advantages and Entertainment, Civil Service Branch Circular 1992
This circular draws the attention of all officers to the Acceptance of Advantages (Governor’s Permission) Notice 1992, which is annexed to it, and to the provisions of Civil Service Regulations on the acceptance of entertainment. In his Notice, the Governor gives permission to all Crown servants to solicit/accept certain types of advantages in certain circumstances.

• India, The All-India Services (Conduct) Rules 1968
These rules, applicable to members of the Indian civil service, were made by the central government under the provisions of the All-India Services Act. They deal with such matters as securing employment of near relatives in private undertakings; taking part in politics and elections; connection with press and radio; giving or taking of dowry; participating in public demonstrations in honour of other public officers; engaging in private trade or employment; and speculating in stocks and shares. The rules also require the submission of a statement of assets and liabilities.

• India, Provisions as to Disqualification on Ground of Defection (Crossing the Floor legislation), Tenth Schedule to the Constitution of India, added by the 52nd Amendment Act 1985.
This amendment to the Constitution of India provides that if a Member of any Legislature, whether national or state, who belongs to a political party, either voluntarily gives up his membership of such political party, or votes or abstains from voting in such Legislature contrary to any direction issued by the political party to which he belongs, such Member shall be disqualified from being a Member of the Legislature. While it may be argued that a constitutional provision of this nature seriously inhibits the freedom of a Member of the Legislature to act according to his judgment and conscience, this amendment appears to have been designed to address the phenomenon of defections induced by bribery.
• Ireland, Ethics in Public Office Act 1995
This Act provides for the disclosure of interests of holders of certain public offices (including Members of Parliament - the oireachtas) and designated directors of and persons employed in designated positions in certain public bodies. It also provides for the appointment by each house of Parliament of a committee on Members’ interests, and for the establishment of a Public Officers Commission, to investigate contraventions of the Act.

• Malta, Code of Ethics of Members of the House of Representatives 1995
This code of ethics was enacted as an amendment to the House of Representatives (Privileges and Powers) Ordinance, and sought to establish standards of correct behaviour which the Members proposed to observe as elected representatives serving in their country’s highest democratic institution. The code also introduced a register of Members’ interests.

• New Zealand, Public Service Code of Conduct, State Services Commission 1997
This code of conduct was issued by the State Services Commission as a “minimum standard of integrity and conduct” applicable in the Public Service. It was intended to form the basis for any codes that may be required by chief executives to suit the particular operational requirements and circumstances of their departments. The code establishes three principles of conduct which all public servants are expected to observe: (a) employees should fulfil their lawful obligations to government with professionalism and integrity; (b) employees should perform their official duties honestly, faithfully and efficiently, respecting the rights of the public and their colleagues; and (c) employees should not bring their employer into disrepute through their private activities. The principles do not specify every potential act of behaviour but rather, establish the obligations generally expected of public servants in their relationships with government, their chief executive, colleagues, and the public.

• Nigeria, Code of Conduct for Ministers and Special Advisers of the Federal Government of Nigeria 1999
This code of conduct was adopted and signed by all the Ministers and special advisers of the Federal Government of Nigeria following their appointments to office by President Olusegun Obasanjo.

• OECD, Principles for Managing Ethics in the Public Service 1998
The Council of the OECD, on 23 April 1998, adopted these principles and recommended that member countries take action to ensure well-functioning institutions and systems to promote ethical conduct in the public service.

• Papua New Guinea, Organic Law on the Duties and Responsibilities of Leadership 1975
This law, which seeks to implement the Leadership Code prescribed in the Constitution, enumerates the responsibilities of leadership, which includes furnishing to the Ombudsman Commission a regular declaration of the assets, income, gifts and liabilities of each person to whom this law applies, his spouse and children. The Ombudsman Commission is empowered to verify the declarations and refer appropriate cases to the Public Prosecutor, as well as to investigate on its own initiative or on complaint by any person, any alleged or suspected misconduct in office by a person to whom this law applies. Other conduct incompatible with responsibilities of leadership, dealt with in the law, include the use of office for personal benefit, company directorships, shareholdings, engaging in other paid employment, interests in contracts, acceptance of bribes, acceptance of loans, misappropriation of state funds, and gaining a personal advantage from official information.

• Philippines, Code of Conduct and Ethical Standards for Public Officials and Employees Act (Republic Act No.6713 of 1989
This law seeks to establish a code of conduct and ethical standards for public officials and employees, and provides penalties for violations thereof. It requires the public disclosure of assets, liabilities, net worth, and financial and business interests, and commits the state to a policy of full public disclosure of all its transactions involving public interest. It also establishes an incentives and rewards system for exemplary service and conduct based upon the observance of the norms of conduct laid down in the code.
• South Africa, Code of Conduct for Elected Members of the ANC 1994
This code of conduct was adopted by the National Executive Committee of the African National Congress on 12 November 1994. It has to be read in conjunction with the Constitution of the ANC, and applies to all elected Members of the National Assembly, the Senate and Provincial Legislative Assemblies who have been elected on the ANC list or, in the case of the Senate, who were elected to their positions by Provincial Legislatures.

• South Africa, Code of Conduct in regard to Financial Interests of Members of the National Assembly and the Senate 1996
This code of conduct, prepared by the Rules Committee of the National Assembly, focuses only on financial interests. The non-financial conduct of Members, such as personal behaviour, is intended to be the subject of further work by the Committee.

• South Africa, Executive Members’ Ethics Bill 1998
This Bill seeks to provide for a code of ethics governing the conduct of members of the Cabinet, Deputy Ministers, and members of provincial Executive Councils, as required by section 96(1) of the Constitution.

• South Africa, Register of Members Interests, Parliament of the Republic of South Africa 1999
South Africa’s elected leaders are required to disclose shares and financial interests, remunerated employment outside Parliament, directorships and partnerships, consultancies and retainerships, sponsorships, gifts and hospitality, benefits, travel of certain categories, land and property, and pensions.

• South Africa, Code of Conduct for Persons in Positions of Responsibility, Moral Summit 1998
This code of conduct was adopted and signed by all the participants at a “moral summit” convened by President Nelson Mandela in October 1998 to discuss the “moral crisis” of South African political and social life. The participants included representatives of all major political parties and religious leaders.

• Tanzania, Public Leadership Code of Ethics Act 1995
This Act established a code of ethics for the President and other “public leaders”. (It also contains a relatively weak requirement that every public leader must make an annual declaration of his assets and liabilities and those of his spouse and unmarried children, but that he need not declare any property in the absence of an allegation that he appeared to have “suddenly and inexplicably come into possession of extraordinary riches in relation to his observable sources of income”. Also excluded are a wide variety of “non-declarable assets”).

• Transparency International, Questionnaire for Senior Officials
This questionnaire was developed by Transparency International for use in closed meetings of permanent heads of key government departments as a first step in a process leading to the formulation/revision of a departmental anti-corruption strategy.

• Uganda, Leadership Code of Conduct, Article 233 of the Constitution of Uganda
This Article of the Constitution of Uganda requires Parliament to establish by law a Leadership Code of Conduct for persons holding such offices as may be specified by Parliament, and authorises the Inspectorate of Government to enforce the Code.

• United Kingdom, Code of Best Practice for Board Members of Public Bodies, HM Treasury 1994
This document sets out a code of best practice for board members of executive non-departmental public bodies. Prepared by the Treasury, the code is intended as a model which the public bodies concerned should adopt with any modifications that may be necessary to take account of their own particular characteristics and circumstances. The code recommends that all boards of public bodies should establish Audit Committees.

• United Kingdom, The Code of Conduct for Members of Parliament 1996
This document contains the code of conduct for Members of Parliament prepared by a select committee pursuant to a resolution of the House
of Commons of 19 July 1995; a guide to the rules relating to the conduct of Members; and 10 resolutions of the House of Commons relating to the registration and declaration of Members’ interests and advocacy.

- **United Kingdom, The Seven Principles of Public Life, Nolan Committee 1995**
  Prepared by the Nolan Committee, these seven principles - selflessness, integrity, objectivity, accountability, openness, honesty and leadership - apply to all aspects of public life.

- **United Kingdom, The Civil Service Code 1996**
  The Civil Service Code sets out the constitutional framework within which all civil servants work and the values they are expected to uphold. It is modelled on a draft originally put forward by the House of Commons Treasury and Civil Service Select Committee. It came into force on 1 January 1996 and forms part of the terms and conditions of employment of every civil servant.

- **United Kingdom, Code of Conduct and Guidance on Procedures for Ministers 1977**
  This comprehensive 135-paragraph Ministerial Code was issued by Prime Minister Tony Blair in 1997 as a source of guidance and reference designed to assist Ministers to undertake their official duties “in a way that upholds the highest standards of propriety”. It deals with the conduct of Ministers in relation to the government, Parliament, their departments, civil servants, constituency and party interests, visits overseas, the presentation of policy, private interests, and pensions.

- **United Kingdom, The Duties and Responsibilities of Civil Servants in relation to Ministers (the "Armstrong Memorandum")**
  This updated version of the 1985 Armstrong Memorandum concerns the duties and responsibilities of civil servants in relation to Ministers and elaborates some of the principles in the Civil Service Code issued in January 1996.

- **United Kingdom, Draft Code of Practice for Public Appointments Procedures, Nolan Committee 1995**
  This draft code of practice prepared by the Nolan Committee recommends the steps to be taken in defining the task and the qualities sought; identifying a field of candidates; selecting a short list and recommending candidates to Ministers; choosing the preferred candidate; and confirming the appointment.

- **United Kingdom, A Standard of Best Practice for Openness (in government agencies), Nolan Committee 1995**
  This standard of best practice for openness in executive NDPBs and NHS bodies, prepared by the Nolan Committee, requires the adoption of a specific code on access to information; the opening of meetings to the public or making available to the public the minutes of such meetings; and the regular publication of information including plans and strategies, key statistics, results of consultation exercises, reports of regulatory investigations, and annual reports and accounts.

  This code, contained in Resolution 51/59: Action against Corruption, was adopted by the UN General Assembly on 12 December 1996, and recommended to member states as a tool to guide their efforts against corruption. The code enunciates three general principles, and then focuses on conflict of interest, disclosure of assets, acceptance of gifts or other favours, confidential information, and political activity.

- **USA, Governmental Ethics Ordinance, Municipal Code of Chicago 1997**
  This law contains a code of conduct applicable to all elected and appointed officials and employees of the City of Chicago; requires them to file an annual statement of their financial interests; provides for the registration of lobbyists; and creates a Board of Ethics with authority to receive, investigate and report on complaints of violation of the provisions of this law.

- **Vanuatu, Leadership Code Act No.2 of 1998**
  This Act gives effect to Chapter 10 of the Constitution of the Republic of Vanuatu by providing for a Leadership Code to govern the conduct of “leaders”. It contains provisions relating to a conflict of interest, the applicability of custom, and declaration of assets and liabilities. The
Ombudsman is empowered to investigate and report on the conduct of a leader, and to refer to the Public Prosecutor any breach of the Code, and to the Commissioner of Police any complaint involving criminal misconduct. The Act also prescribes penalties for a breach of the Code, including fine and imprisonment, dismissal from office, disqualification from future office, loss of employment benefits, and deprivation of proceeds of corruption.

  This Bill sought to establish a code of conduct for Ministers, Deputy Ministers and Members of the National Assembly, as required by the Constitution of Zambia, and to require Ministers to make an annual declaration of their assets, liabilities and income to the President of the Republic. It also sought to empower the Commission for Investigations to investigate any allegation of a breach of the code referred to it by the Speaker or the President or, in certain circumstances, received by it directly.

16. **Conflict of Interest (see also Codes of Conduct)**
   - **Australia, Constitution (Disclosures by Members) Regulation 1983 (New South Wales)**
     This regulation requires each Member of the Legislative Council or Legislative Assembly of New South Wales to make an annual return of any interests in real property, sources of income, gifts received, contribution to travel, interests and positions in corporations, positions in trade unions and professional or business associations, debts, dispositions of property, and any other direct or indirect benefits, advantages or liabilities, whether pecuniary or not, which might raise a conflict between his private interests and his public duty as a Member. The returns are tabled in the Legislative Council or the Legislative Assembly, as the case may be, and are then available for public inspection.

   - **Lithuania, Law on the Adjustment of Public and Private Interests in the Public Service**
     The purpose of this law is to prevent a conflict between the private interests of persons employed in the public service and the public interests of the community. Persons in central and local public service (including politicians, public servants and judges) as well as candidates for elective and appointive offices, are required to make a very comprehensive annual declaration of their private interests, which is then published in the official gazette. The law imposes certain obligations on these persons, including the duty of self-exclusion, restriction of the right of representation, restrictions on the acceptance of gifts or services, the obligation to notify any new job proposals, and limitations on concluding employment contracts after leaving office. An independent Chief Official Ethics Commission is established and charged with the implementation of this law, including the power to bring actions in court for the termination or invalidation of employment contracts and transactions concluded in violation of this law.

   (See also relevant case law.)

17. **Council of Europe**
   - **Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, November 1990**
     This Convention is designed to deprive criminals of the proceeds from crime through national measures and international co-operation.

   - **Combating Bribery in International Business Transactions, Recommendation of the Council 1997**
     This recommendation addresses issues such as the criminalisation of bribery of foreign public officials; tax deductibility; accounting requirements, external audit and internal company controls; public procurement; and international co-operation.

   - **Guiding Principles for the Fight against Corruption 1997**
     This resolution (97) 24 was adopted by the Committee of Ministers of the Council of Europe on 6 November 1997. It contains 20 guiding principles for the fight against corruption elaborated by the Multidisciplinary Group on Corruption (GMC). National authorities are invited to apply these principles in their domestic legislation and practice. The resolution also instructs the GMC to submit a draft text proposing the establishment of an appropriate and efficient mechanism...
for monitoring observance of these principles.

- **Criminal Law Convention on Corruption 1998**
  Adopted by the Committee of Ministers of the Council of Europe in November 1998, this Convention aims principally at developing common standards concerning certain corruption offences. In addition, it deals with substantive and procedural matters which closely relate to these offences and seeks to improve international co-operation. Attached to the text of the Convention is an explanatory report.

- **Civil Law Convention on Corruption 1999**
  Adopted by the Committee of Ministers of the Council of Europe on 9 September 1999, this Convention is a first and unique text dealing with questions relating to civil law and corruption. It addresses such questions as compensation for damage for victims of corruption, liability, including state liability for acts of corruption committed by public officials; contributory negligence; validity of contracts; protection of employees who report corruption; clarity and accuracy of accounts and audits; acquisition of evidence; court orders to preserve the assets necessary for the execution of the final judgment and for the maintenance of the status quo pending resolution of the points at issue; and international co-operation. Compliance by states parties with the commitments entered into under the Convention will be monitored by the Group of States against Corruption (GRECO). The Convention is open to member states, non-member states which took part in its elaboration, as well as the European Community. Attached to the text of this Convention is an explanatory report.

### 18. Country action plans
- **Global Coalition for Africa, Principles to Combat Corruption in African Countries 1999**
  At a meeting at Ministerial level held in Washington DC in February 1999 under the auspices of the GCA, the representatives of 11 African states agreed on 25 principles which would form the basis of a concerted and collaborative effort to combat corrupt practices and thereby contribute to the global fight against corruption.

### 19. Criminal Law (see also Civil Law)
- **Hong Kong, Prevention of Bribery Ordinance 1970**
  This law defines several offences of bribery and prescribes the penalties therefor. The offences include that of possession by a Crown servant of unexplained property, and the penalties include the confiscation of assets. The law also provides for the investigation of offences, including the power to obtain information, restrict the disposal of property, search premises, and require the surrender of travel documents. The law also contains evidentiary provisions, and confers power on the court to prohibit the employment of convicted persons.

- **Kenya, The Prevention of Corruption Act 1956**
  This 1956 law creates the offences of corruption in office, and prescribes an increased penalty where the offence relates to a contract with government. It creates a presumption of guilt (unless the contrary is “proved”) where the money, gift, loan, fee, reward or other consideration is received by a person in the employment of government or of a public body. Provision is made for the principal to recover, as a civil debt, the money value of any bribe received by an agent. The law also establishes the Kenya Anti-Corruption Authority charged with responsibility for the prevention of corruption in the public, parastatal and private sectors.

- **Malaysia, Anti-Corruption Act 1997**
  The giving and accepting of gratifications for certain corrupt purposes are criminalised by this law, as also the bribery of officers of public bodies (defined to include the government, local authorities, prescribed societies, etc.). An Anti-Corruption Agency is established with functions ranging from investigation to instruction, advice and education. Powers of investigation conferred under this law include that of requiring lawyers to disclose information, the interception of communications and the surrender of travel documents. Provision is also made for the forfeiture of property proved to be the subject-matter of an offence. This law is applicable to citizens and permanent residents of Malaysia in respect of offences committed outside the country as well.
• New Zealand, Secret Commissions Act 1910
This law, which came into operation in 1911, prohibits the offering or giving, and the soliciting or accepting, of any gift or other consideration to or by an agent, for doing or forbearing to do any act in relation to the principal’s affairs or business.

• Trinidad and Tobago, Prevention of Corruption Act 1987
This law seeks to define the offence of corruption in office and to prescribe penalties therefor. The corrupt use of official information by an agent is also criminalised.

• United States of America, Foreign Corrupt Practices Act 1977
The FCPA makes it unlawful for a firm (as well as any officer, director, employee or agent of a firm or any stockholder acting on behalf of the firm) to bribe a foreign government official, a foreign political party or party official, or any candidate for foreign political office, in order to obtain or retain business. It also makes it unlawful to make a payment to any person, while knowing that all of portion of the payment will be offered, given or promised, directly or indirectly, to any foreign official as a bribe for the purpose of assisting the firm in obtaining or retaining business. A foreign incorporated subsidiary of a US firm, however, is not subject to the FCPA, but the US parent may be liable if it authorises, directs or participates in the activity in question. Exempted from the application of the FCPA are payments made for facilitating or expediting performance of routine governmental action such as obtaining permits, licenses or other official documents, processing governmental papers such as visas, and providing police protection, phone service and power and water supply.

• Zambia, Corrupt Practices Act 1980
This law creates several offences of corrupt practice involving public officers or members of public bodies, including the offence of possession of unexplained property, and is applicable to citizens of Zambia in respect of offences committed within or outside the country. It establishes an Anti-Corruption Commission with functions and powers similar to that of the Hong Kong ICAC, and contains provisions relating to the prosecution of offences, including certain rules of evidence. The law also contains provisions relating to post-resignation/retirement employment of certain categories of public officers.

(See also relevant case law.)

20. Customs
• Declaration of the World Customs Organization, Customs Co-operation Council, Arusha 1993
This Declaration recognises that a corrupt Customs will not deliver the revenue that is properly due to the state; will not be effective in the fight against illicit trafficking; will obstruct the growth of legitimate international trade and hinder economic development; and that the Customs has no right to public recognition or trust if its staff break the law habitually. Accordingly, the Declaration identifies the key factors that must be taken into account in a national Customs integrity programme.

21. Declarations of Assets and Liabilities (see Monitoring of Assets)

22. Definition
• Australia, New South Wales ICAC, What is Corruption?
• Black’s Law Dictionary

23. Elections and Polls
• Commonwealth Secretariat, Good Commonwealth Electoral Practice 1997
This document is the product of discussions held at two workshops for chief electoral officers convened by the Commonwealth secretariat. It is designed to assist policy-makers, and electoral and other officials in the development and strengthening of their electoral systems. It deals with such matters as election administration, registration of voters, delimitation of constituencies, formation of political parties, nomination of candidates, disclosure of party/candidate’s income and expenditure, conduct of the campaign, and arrangements for the poll.

• Commonwealth Secretariat, Domestic Election Observers 1999
This is the report of a workshop of Commonwealth Domestic Election Observers, and exam-
ines the purpose and effectiveness of domestic observation, and the role of observer bodies in the context of the overall process of democratisation.

• **Hong Kong, Corrupt and Illegal Practices Ordinance 1955**
  This law seeks to prevent corrupt and illegal practices at elections. It defines several offences including bribery and treating, and contains provisions relating to election expenses.

• **International IDEA, Ethical and Professional Administration of Elections 1997**
  This document contains a code of conduct for the ethical and professional administration of elections. It is designed to assist election administrators by providing general guidelines for their work. In particular, election administration must demonstrate respect for the law; be non-partisan and neutral; transparent and accurate; and be designed to serve the voters.

• **International IDEA, Ethical and Professional Observation of Elections 1997**
  This document contains a code of conduct for the ethical and professional discharge of election observation activities. It specifies the behaviour expected of observers and provides guidelines in ‘good practice’ in observation. The code is intended to be primarily applicable to international election observers, although much of its contents are of direct relevance to national and domestic observers as well.

24. **Ethics (see Codes of Conduct: Monitoring Assets and Lifestyles)**

25. **European Union**

• **A Union Policy Against Corruption 1997**
  This communication from the Commission of the European Communities to the Council and the European Parliament sets out the main elements of a comprehensive Union Policy against Corruption. Further and more co-ordinated action is called for on several matters including the ratification and implementation of the First Protocol to the Convention on the protection of European Communities’ financial interests, and the abolition of tax deductibility in respect of the bribery of foreign officials.

26. **Immunities and Privileges**

• **Barbados, Parliament (Privileges, Immunities and Powers) Act 1964**
  This is an Act to determine and regulate the powers, privileges and immunities of the two houses of Parliament - the Senate and the House of Assembly - and of the Members thereof. It also seeks to regulate the conduct of Members and other persons in connection with the proceedings of Parliament; to give protection to persons employed in the publication of the reports and papers of Parliament; and to regulate admittance to the precincts of Parliament. Sections 32 and 33 make it a criminal offence for a Member of Parliament to seek or accept a bribe, and for any person to offer a bribe to a Member, in respect of the performance of any parliamentary function or duty.

• **Kenya, The National Assembly (Powers and Privileges) Act 1964**
  This Act declares and defines the privileges and immunities of members of the National Assembly, all of which relate directly to the performance of their lawful functions within the Assembly. The Act also prohibits a member from accepting any bribe, fee, compensation, gift or reward for or in respect of the promotion of or opposition to any Bill, resolution, matter or thing submitted or intended to be submitted for the consideration of the Assembly (s.24).

• **Zimbabwe, Privileges, Immunities and Powers of Parliament Act 1971**
  This Act recognises the freedom of speech and debate, and the privileges and immunities relating thereto of the Members of the Senate and House of Assembly, and provides for their enforcement.

  (See also relevant case law.)

27. **International Conventions and Treaties**

• **Council of Europe, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, November 1990**
  This Convention is designed to deprive criminals of the proceeds from crime through national measures and international co-operation.
• Council of Europe, Criminal Law Convention on Corruption 1998
Adopted by the Committee of Ministers of the Council of Europe in November 1998, this Convention aims principally at developing common standards concerning certain corruption offences. In addition, it deals with substantive and procedural matters which closely relate to these offences and seeks to improve international co-operation. Attached to the text of the Convention is an explanatory report.

• Council of Europe, Civil Law Convention on Corruption 1999
Adopted by the Committee of Ministers of the Council of Europe on 9 September 1999, this Convention is a first and unique text dealing with questions relating to civil law and corruption. It addresses such questions as compensation for damage for victims of corruption, liability, including state liability for acts of corruption committed by public officials; contributory negligence; validity of contracts; protection of employees who report corruption; clarity and accuracy of accounts and audits; acquisition of evidence; court orders to preserve the assets necessary for the execution of the final judgment and for the maintenance of the status quo pending resolution of the points at issue; and international co-operation. Compliance by states parties with the commitments entered into under the Convention will be monitored by the Group of States against Corruption (GRECO). The Convention has been signed by 25 countries, and ratified by 10. It entered into force on 6 March 1997.

• OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997, and other instruments
The OECD Convention represents an important step in the concerted international effort to criminalise bribery. Through it, the 29 member states of the Organization for Economic Co-operation and Development, representing the world's richest countries, agreed to make it a criminal offence for any person to offer, promise or give a bribe, whether directly or through intermediaries, to a foreign public official in order to obtain or retain business or other improper advantage in the conduct of international business.

• Inter-American Convention Against Corruption 1996
This convention, adopted by the member states of the OAS on 29 March 1996, was the first multilateral anti-corruption treaty instrument negotiated in the world. Its purpose is to promote and strengthen the development by each of the states parties of the mechanisms needed to prevent, detect, punish and eradicate corruption; and to promote, facilitate and regulate co-operation among the states parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption in the performance of public functions and acts of corruption specifically related to such performance. Among measures which states parties have agreed to take are the adoption of standards of conduct with mechanisms for enforcement; the prohibition of the bribery of foreign officials; the creation of the offence of “illicit enrichment”; and to designate corruption as an extraditable offence. The Convention has been signed by 25 countries, and ratified by 10. It entered into force on 6 March 1997.

28. International Financial Institutions
• Asian Development Bank, Policy Against Corruption, August 1998
The ADB’s anti-corruption policy focuses on three key objectives: first, to support competitive markets and efficient, effective, accountable and transparent public administration as part of its broader work on good governance and capacity building; second, to support promising anti-corruption efforts by member governments on a case-by-case basis and improve the quality of its dialogue with governments on a range of governance issues, including corruption; and third, to ensure that its projects and its staff adhere to the highest ethical standards.

• International Monetary Fund, The Role of the IMF in Governance Issues – Governance Note, August 1997
This document contains guidelines adopted by the Executive Board of the IMF covering the role of the IMF in issues of governance. It reflects a consensus on the importance of good governance (including the avoidance of corrupt prac-
tices) for economic efficiency and growth. While observing that its mandate did not allow it to adopt the role of investigative agency or guardian of financial integrity in member countries, the Note nevertheless directed its staff to address governance issues, including instances of corruption, on the basis of the economic considerations within its mandate. Individual instances of corruption are to be raised with the authorities when there is reason to believe they could have significant macroeconomic implications. In respect of international transactions, IMF staff are required to pay equal attention to both sides of corrupt transactions, and recommend that such practices be stopped if they have the potential to significantly distort economic outcomes.

- **International Monetary Fund, Code of Good Practices on Fiscal Transparency – Declaration of Principles, 16 April 1998**

Stressing that fiscal transparency is of considerable importance to achieving macroeconomic stability and high-quality growth, the IMF published this declaration on principles of a Code of Good Practices on Fiscal Transparency. The Code is based around the following key objectives: (a) roles and responsibilities in government should be clear; (b) information on government activities should be provided to the public; (c) budget preparation, execution, and reporting should be undertaken in an open manner; and (d) fiscal information should be subjected to independent assurances of integrity. The Code sets out what governments should do to meet these objectives in terms of principles and practices.

- **World Bank, Corruption and Good Governance – Policy Statement, October 1997**

In this policy statement, the World Bank acknowledges that while it had previously had no systematic framework for addressing corruption as a fundamental problem of development, its 1997 report “Helping Countries Combat Corruption: The Role of the World Bank” and the accompanying guidelines point to a new approach that addresses corruption as a fundamental impediment to long term economic growth and social development.

- **World Bank, Helping Countries Combat Corruption: The Role of the World Bank 1997**

In this report and the accompanying guidelines, the World Bank requires, inter alia, the disclosure of payments to agents and public advertisement of major consultancy contracts, permits the use of integrity pledges, and simplifies the procedure to suspend disbursements, cancel loans and bar offending firms.

29. **International Legal Assistance**

- **Switzerland, Federal Office of Police, Checklist for Foreign Mutual Assistance in Criminal Matters**

This document describes the requirements and the procedure for making requests to Switzerland for mutual assistance in criminal matters.

- **Switzerland, International Mutual Legal Assistance in Criminal Matters**

This 1998 contribution by Judith Natterer, assistant to Prof. Dr. Mark Pieth, examines the provisions of the Swiss Federal Law on Mutual Legal Assistance in Criminal Matters.

- **Switzerland, A Guide to Swiss Banking Secrecy (Peter F Mueller)**

This 1998 contribution by Dr Peter F. Mueller, President, Ethics and Business, examines the legal provisions relating to Swiss banking secrecy, and explains how requests for international legal assistance are dealt with.

- **United States of America, Mutual Legal Assistance Law 1986**

This law seeks to make provision for giving effect to the terms of a treaty made between the Governments of the United States of America and the United Kingdom (including the Government of the Cayman Islands) for improving the effectiveness of the law enforcement authorities of the USA and the Cayman Islands in the prosecution and suppression on crime through cooperation and mutual legal assistance in criminal matters.
30. **International Statements**

- **Global Forum on Fighting Corruption, Declaration on Safeguarding Integrity Among Justice and Security Officials, Washington DC 1999**
  
The Global Forum on Fighting Corruption was hosted in Washington DC by US Vice President Al Gore and attended by participants from 90 governments. It recognises that corruption cannot co-exist with democracy and the rule of law. It also recognises that corruption is not inevitable. It is intended to continue the dialogue begun in Washington at annual global Ministerial fora on fighting corruption.

- **International Anti-Corruption Conference, The Lima Declaration 1997**
  
  This Declaration was adopted at the conclusion of the 8th International Conference against Corruption held in Lima, Peru, in September 1997 and attended by over 1000 citizens from 93 countries. The participants included senior figures from international organisations and aid agencies, representatives of governments, officers of anti-corruption agencies and professional associations, as well as journalists, academics, businessmen, and representatives of civil society. The Declaration calls upon governments, international and regional agencies, and citizens around the world to mobilise their efforts and energies in achieving the actions enumerated in it at both international and regional levels and at the national and local levels.

31. **Judicial Assistance (see International Legal Assistance)**

32. **Judicial Decisions**

  [Note: The names of the 140 or so cases relevant to corruption issues and which are noted here have necessarily been omitted here in the interests of conserving space.]

33. **Judicial Review of Administrative Action**

- **The Commonwealth, Lusaka Statement of Government Under the Law (Lusaka Statement), 1993**
  
  This document was originally prepared and adopted at a workshop on administrative law held in Lusakazaar, Zambia, in October 1992. It was endorsed by Law Ministers of the Commonwealth at their meeting in Mauritius in November 1993, as a notable contribution to the development of administrative law. The Lusaka Statement contains principles which reflect good administrative practice and which, in many instances, are enforceable through the courts.

- **Council of Europe Resolution (77) 31 on the Protection of the Individual in Relation to the Acts of Administrative Authorities, 28 September 1977**
  
  Recognising the necessity to ensure fairness in relations between the individual and administrative authorities, the Committee of Ministers recommended the governments of member states to be guided in their law and administrative practice by the principles annexed to this resolution. These principles, which are designed to protect persons with regard to any individual measures or decisions taken in the exercise of public authority and which are of such nature as directly to affect their rights, liberties or interests, relate to the right to be heard, access to information, assistance and representation, statement of reasons, and indication of remedies.

- **Council of Europe Recommendation No.R(80)2 Concerning the Exercise of Discretionary Powers of Administrative Authorities, 11 March 1980**
  
  Considering that it is desirable that common principles be laid down in all member states to promote the protection of the rights, liberties and interests of persons, whether physical or legal, against arbitrariness or any other improper use of a discretionary power, without at the same time impeding the achievement by the administrative authorities of the purpose for which the power has been conferred, the Committee of Ministers recommended the governments of member states to be guided in their law and administrative practice by the principles annexed to this recommendation. The 11 principles which are applicable to the exercise of discretionary powers by administrative authorities are classified under Basic Principles, Procedure, and Control.

- **Uganda, Right to Fairness, Article 42 of the 1995 Constitution**
  
  This provision in the Constitution of Uganda guarantees to any person appearing before any
administrative official or body the right to be treated justly and fairly, and the right to apply to a court of law in respect of any administrative decision taken against him or her.

(See also relevant case law.)

34. Judiciary

This 10-page policy framework to address the problem of corruption in the judiciary resulted from a meeting of 16 experts convened by the CIJL in Geneva in February 2000. It is addressed to governments, international financial institutions, members of the judiciary, lawyers, and other policy makers, and urges them to take active steps to prevent and eliminate corruption in the judiciary. It makes six specific recommendations, including the drafting by the judiciary of a statement of judicial ethics with provision for the imposition of sanctions where necessary.

These draft principles on the independence of the judiciary were prepared by a committee of experts at a meeting convened by the IAPL, ICJ and CIJL and held in Siracusa, Sicily in May 1981.

These principles dealing with judges and the executive, judges and the Legislature, terms and nature of judicial appointments, and discipline and removal of judges, were adopted by the IBA at a meeting held in New Delhi in October 1982.

• LAWASIA, Beijing Statement of Principles on the Independence of the Judiciary in the Lawasia Region 1995
This statement of principles representing the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the judiciary was adopted by the 6th Conference of Chief Justices of Asia and the Pacific at a meeting held under the auspices of LAWASIA in Beijing in August 1995.

• United Nations, Basic Principles on the Independence of the Judiciary 1985
This document was adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders in September 1985 and endorsed by the UN General Assembly in November of the same year. The General Assembly invited governments to respect the principles and to take them into account within the framework of their national legislation and practices.

These procedures for the effective implementation of the Basic Principles on the Independence of the Judiciary were adopted by ECOSOC and endorsed by the UN General Assembly in 1989. They deal with matters such as publicity, provision of resources, periodic reporting, and technical assistance

This draft Declaration is contained in the final report on the independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, prepared at the request of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities by Dr. L.M. Singhvi (E/CN.4/Sub.2/1985/18 and Add.1-6). The Commission on Human Rights, at its 45th session, by resolution 1989/32, invited governments to take into account the principles set forth in this draft Declaration in implementing the UN Basic Principles on the Independence of the Judiciary

35. Law Enforcement Officials

• United Nations, Code of Conduct for Law Enforcement Officials 1979
This code of conduct was adopted by the UN General Assembly (Resolution 34/169) on 17 December 1979 with a recommendation that favourable consideration be given by governments to its use within the framework of national legislation or practice as a body of principles for observance by law enforcement offi-
cials. Article 7 requires law enforcement officials to refrain from committing any act of corruption, and to rigorously oppose and combat all such acts.

36. Law web sites (in preparation)

37. Legal Profession

- International Bar Association, International Code of Ethics 1956
  This statement of 21 rules for the legal profession was first adopted in 1956.

- International Bar Association, Standards for the Independence of the Legal Profession 1990
  This statement of standards was adopted by the IBA in 1990 and is designed to assist in the task of promoting and ensuring the proper role of lawyers. It seeks to complement the UN Basic Principles on the Role of Lawyers and to provide more detail. While the UN principles are addressed to governments, this IBA statement seeks to address the question of independence of the profession from the viewpoint of lawyers.

  This draft Declaration is contained in the final report on the independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, prepared at the request of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities by Dr. L.M. Singhvi (E/CN.4/Sub.2/1985/18 and Add.1-6). The Commission on Human Rights, at its 45th session, by resolution 1989/32, invited governments to take into account the principles set forth in this draft Declaration in implementing the UN Basic Principles on the Independence of the Judiciary.

  These principles were adopted by the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, and “welcomed” by the UN General Assembly in its resolution 45/121 of 14 December 1990. The UN invited governments to be guided by them in the formulation of appropriate legislation and policy directives and to make efforts to implement them in accordance with the economic, social, legal, cultural and political circumstances of each country. In its resolution 45/166 of 18 December 1990, the UN General Assembly invited governments “to respect them and to take them into account within the framework of their national legislation and practice”.

38. Local Government

- Bratislava Declaration for Municipal Reform 1999
  This document contains a model developed at a TI conference of representatives from Central and Eastern Europe for improving municipal service delivery in addition to identifying and rooting out corruption.

- Victoria Falls Charter 1997
  This Charter for building integrity in local government administration was adopted at a workshop for the training of trainers for the development of local integrity systems in East and Southern Africa, held at the A’Zambezi River Lodge, at Victoria Falls, Zimbabwe in August 1997. It adopts a holistic approach by drawing together a number of strands into an integrity system that is capable of sustaining and supporting sound local government.

39. Money Laundering

  The Council of the European Communities required by this Directive that member states bring into force laws, regulations and administrative decisions necessary to comply with several measures set out therein which were designed to prevent the use of credit and financial institutions for the purpose of money laundering.

- FATF (Financial Action Task Force on Money Laundering), The Forty Recommendations 1990
  FATF is an inter-governmental body whose purpose is the development and promotion of policies to combat money laundering - the processing of criminal proceeds in order to disguise their illegal origin. These recommendations set out the basic framework for anti-money laun-
dering efforts and are designed to be of universal application. They cover the criminal justice system and law enforcement, the financial system and its regulation, and international co-operation.

• **International Chamber of Commerce, Guide to the Prevention of Money Laundering 1998**
  This guide is designed to assist those who are unfamiliar with money laundering legislation and those who live in countries where there is no legislation. It is intended primarily for banks, but is also applicable to other financial institutions. Section 1 provides an overview of money laundering, its definition, risks and techniques. Section 2 sets out a framework for self-protection, based on best practice procedures, knowledge of business clients and counterparties and self analysis using the Compliance Chain Analysis (CCA) methodology. Section 3 contains case studies which illustrate the issues and procedures raised in the text. The appendices provide further details from the main body of the text.

  (See also relevant case law.)

40. **Monitoring assets and life-styles of public officials**

• **Belize, Prevention of Corruption in Public Life Act 1994.**
  This Act requires the regular declaration by every person in public life of assets, income and liabilities of such person, his spouse and his children. It provides for the publication of such declarations in the government gazette and for their verification and report to the National Assembly by an independent Integrity Commission established under the Act. The Act also prescribes a code of conduct, applicable to the Governor-General, members of the National Assembly, public officers, members and employees of all public bodies including local authorities, and members and officers of statutory corporations and government agencies. The code is enforceable by the Integrity Commission.

  This law seeks to establish a Commission to evaluate the assets and properties of public officers, to investigate suspected cases of corruption, and to inquire into the conduct of public officers in the performance of their duties and the dealings of a non-public officer with a public officer or a public body. The law also defines several offences of corrupt practice. A schedule to the Act contains a form prescribed for the purpose of furnishing information relating to assets and properties. The Commission, however, is required to report its findings to the President, and it is the latter who decides whether or not to refer the matter to the Attorney-General for further action.

• **Papua New Guinea, Statement to Ombudsman Commission of Incomes, All Assets, Business Dealings, Gifts, etc. 1976**
  This is the form to be used for the purpose of making a statement to the Ombudsman Commission of income, assets, business dealings, gifts, etc., as required by the Constitution and the Organic Law on the Duties and Responsibilities of Leadership.

• **Thailand, Declaration of Assets and Liabilities, Chapter 10, Part 1 of the 1998 Constitution**
  Article 291 of the Constitution requires designated holders of political office (including the Prime Minister, Cabinet Ministers, Members of Parliament and of local councils) to declare the assets and liabilities of themselves, their spouses and minor children to the National Counter Corruption Commission (NCCC) both when they take office and when they leave office. The declarations made by the Prime Minister and Cabinet Ministers are made public with 30 days of their submission. The NCCC is empowered to verify these declarations.

• **Trinidad and Tobago, The Integrity Commission**
  Section 138 of the Constitution of Trinidad and Tobago establishes the Integrity Commission, charged with the duty of receiving declarations of assets, liabilities and income of Members of the House of Representatives, Ministers of Government, Parliamentary secretaries, permanent secretaries and chief technical officers.

• **Trinidad and Tobago, Integrity in Public Life Act, No.8 of 1987**
  This Act requires every person in public life to
file with the Integrity Commission a declaration of his income, assets and liabilities, including assets placed in a blind trust. The Commission to empowered to verify the declarations and take appropriate action or refer any matter to the Director of Public Prosecutions.

(See also relevant case law.)

41. OAS (Organization of American States)
   - Inter–American Convention Against Corruption 1996
     This convention, adopted by the member states of the OAS on 29 March 1996, was the first multi-lateral anti-corruption treaty instrument negotiated in the world. Its purpose is to promote and strengthen the development by each of the states parties of the mechanisms needed to prevent, detect, punish and eradicate corruption; and to promote, facilitate and regulate co-operation among the states parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption in the performance of public functions and acts of corruption specifically related to such performance. Among measures which states parties have agreed to take are the adoption of standards of conduct with mechanisms for enforcement; the prohibition of the bribery of foreign officials; the creation of the offence of “illicit enrichment”; and to designate corruption as an extraditable offence. The convention has been signed by 25 countries, and ratified by 10. It entered into force on 6 March 1997.

   - Inter–American Program for Co-operation in the Fight against Corruption 1997
     This program, which was adopted by the General Assembly of the OAS on 5 June 1997, contains measures in four areas: legal, institutional, international, and civil society.

42. OECD
   - OECD Recommendation on Bribery in International Business Transactions 1994
     In a landmark development in the campaign against corruption in international business transactions, the member states of the Organization for Economic Co-operation and Development agreed in this Recommendation that each of them should take effective measures to deter, prevent and combat the bribery of foreign public officials. As anticipated, this Recommendation proved to be an effective catalyst for change, and led to the adoption, three years later, of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

   - OECD Recommendation to Combat Corruption in Aid–Funded Procurement
     This Recommendation calls on countries to require anti-corruption provisions in bilateral aid-funded procurement.

   - OECD 1997 Revised Recommendation on Combating Bribery in International Business Transactions
     This Recommendation sets out measures which countries should take in the fields of accounting, public procurement, and criminalising bribes to foreign public officials. These measures require companies to maintain adequate accounting records, adopt internal company controls, and undergo external audits. In the area of public procurement it is recommended that companies found guilty of bribing foreign public officials be suspended from future public contract bids. Countries are also requested to co-operate in investigations and other legal proceedings to efficiently prosecute cases in which foreign public officials have been bribed.

   - OECD 1998 Recommendation on Improving Ethical Conduct in the Public Service
     This Recommendation calls on countries to take action to ensure well-functioning institutions and systems for promoting ethical conduct in the public service.

   - OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997, and other instruments
     The OECD Convention represents an important step in the concerted international effort to criminalise bribery. Through it, the 29 member states of the Organization for Economic Co-operation and Development, representing the world’s richest countries, agreed to make it a criminal offence for any person to offer, promise or give a bribe, whether directly or through
intermediaries, to a foreign public official in order to obtain or retain business or other improper advantage in the conduct of international business.

43. Ombudsman

• Belize, Ombudsman Act 1993

This Act provides for the establishment of the office of a Parliamentary Commissioner to be known as the Ombudsman. He is appointed by the Governor-General on the recommendation of both Houses of the National Assembly, and has the power to investigate where he is of the opinion that a ministry, department or agency of government, the police force, a city council or other statutory body, or an officer or member thereof, has been guilty of corruption or other wrongdoing, or that any person or body of persons have sustained injustice, injury or abuse as a result of any action taken by any such authority. A complaint may be made direct to the Ombudsman. If no action is taken on a recommendation made by the Ombudsman after investigation, he is required to report to the National Assembly. Apart from an annual report, the Ombudsman may be required at any time by the National assembly to report in respect of any matter.

• The Philippines, The Ombudsman Act 1989

The office of Ombudsman (Tanodbayan) is created under the Constitution of the Philippines which also prescribes the qualifications for appointment (not less than 40 years of age; of recognised probity and independence; member of the Philippine Bar with 10 years experience in the practice of law or as a judge; and must not have been a candidate for elective office in the immediately preceding election), the procedure for appointment (by the President from a list of at least 6 nominees prepared by the Judicial and Bar Council), and term of office (7 years without reappointment; disqualified from standing for office in the immediately succeeding election). This Act further elaborates the constitutional provisions and defines the Ombudsman’s very extensive mandate. His powers include the investigation of any act or omission which appears to be illegal, unjust, improper or inefficient, and his disciplinary jurisdiction extends over all elective and appointed officials of the government (including members of the Cabinet) except those who may be removed only by impeachment and Members of Congress and the Judiciary. He may institute prosecutions, or direct any officer to perform and expedite any act or duty required by law, or to stop, prevent and correct any abuse or impropriety in the performance of duties, or to take appropriate action against a public officer or employee at fault. He may also recommend to the President and to Congress the repeal or amendment of any law or regulation which he considers to be unfair or unjust.

• South Africa, Public Protector Act, No.23 of 1994

The office of Public Protector was established under the Constitution of South Africa to protect the public against maladministration in connection with the affairs of government, improper conduct by a person performing a public function, improper acts with respect to public money, improper or unlawful enrichment of a person performing a public function, and an act or omission by a person performing a public function resulting in improper prejudice to another person. This Act provides for certain ancillary matters pertaining to the office of the Public Protector, including the conduct of investigations and the publication of his findings.

• Sweden, The Riksdag Act

This law provides for the Riksdag to elect 4 Ombudsmen to supervise the application in public service of laws and other statutes.

• Transparency International, The Office of the Ombudsman: Basic Principles

In this document, TI has identified nine essential elements for the effective functioning of the office of Ombudsman.

• Vanuatu, Ombudsman Act, No.14 of 1995

This law supplements the provisions of the Constitution of Vanuatu relating to the office of Ombudsman. It specifies qualifications and conditions of employment. In addition to the normal functions of an Ombudsman, this law empowers him to inquire into any alleged or suspected breach of the Leadership Code. However, his powers of enforcement are limited to publicity of his proceedings, and of the reports and recom-
mandations he makes to the Prime Minister, Parliament or other relevant authority. In certain circumstances, he may apply to Court for an order giving effect to a recommendation made by him which has not been implemented.

44. Open Government
(see Access to Information; Public Procurement; Transparency Provisions)

45. Parliament

- Australia, Recommendation of the Queensland Electoral and Administrative Review Commission on “Public Administration Committees in Parliament” 1992
In this extract from an October 1992 report on the Review of Parliamentary Committees, the Commission recommends the establishment of five Standing Committees with power to inquire into and report on any aspect of public administration in Queensland. The five committees are in respect of: finance and administration, legal and constitutional affairs, community services and social development, resources and infrastructure, and business and industry. The report details the specific functions of each committee.

- Commonwealth Secretariat, The Role of the Opposition 1998
This is the report of a workshop on the rights and responsibilities of the Opposition organised by the Commonwealth Secretariat and held in London in June 1998. Among the issues addressed are (a) holding the executive to account; (b) the Opposition as the “alternative government”; (c) the legislative function; (d) the Opposition, consensus and the national interest; (e) the Opposition, the people and civil society; and (f) the Opposition in decentralised democracies.

46. Pledges, Integrity

- Malawi, Lilongwe Integrity Pledge 1996
Participants drawn from a broad spectrum of Malawian society attending the launch of the Malawian chapter of Transparency International, in November 1996 at Lilongwe, Malawi, made this pledge on integrity.

- Southern and Eastern African NGOs, Usa River Communique 1995
The representatives of Southern and Eastern African NGOs participating in a regional seminar on corruption and its impact on development, held in Usa River, Arusha, Tanzania, in November 1995, acknowledged the extremely negative impact which corruption has had on development and on the fight against poverty, and made this pledge on the role of NGOs in combating corruption.

- Tanzania, Arusha Integrity Pledge 1995
This document contains the broad conclusions reached by participants drawn from a broad spectrum of Tanzanian society who participated in the 1995 Arusha Workshop on National Integrity in August 1995. In it, they called upon all political parties and candidates for elective office at a general election due to be held shortly thereafter to demonstrate their political commitment by publicly endorsing a plan of action outlined in it for strengthening national integrity.

- Uganda, Mukono Integrity Declaration 1995
This Declaration was made by the participants at the Uganda National Integrity System workshop held in Mukono, Uganda, on 28 November 1995.

47. Post-Public Sector Employment Rules
(see Codes of Conduct – Public Officials)

48. Private Sector

- International Chamber of Commerce, Recommendations to Governments and International Organisations on Extortion and Bribery 1996
In this document, the ICC enumerates several measures which governments should take in order to deal with the problem of extortion and bribery. They include periodic public reports of measures taken to supervise government officials involved directly in commercial transactions; appropriate measures to prevent the abuse of the power to issue permits or authorisations; mechanisms for the disclosure of political contributions; and legislation requiring the auditing of the accounts of economically significant enterprises by independent professional auditors.

49. Privileges (see Immunities and Privileges)

50. Procurement (see Public Procurement)
51. Prosecutors

- USA, Independent Counsel (Special Prosecutor Legislation), USA
  Whenever the Attorney-General receives information sufficient to constitute grounds to investigate whether certain designated persons, including the President and the Vice-President of the United States, may have violated any federal criminal law, and the Attorney-General determines that any investigation or prosecution of the person by him may result in a personal, financial or political conflict of interest, the Attorney-General is required to apply for the appointment of an independent counsel. (See also relevant case law.)

52. Public Procurement

- Asian Development Bank, Guidelines for Procurement under ADB Loans
  The purpose of these guidelines is to inform borrowers of the ADB and prospective suppliers and contractors about the general principles and procedures which should be observed in carrying out procurement of goods and works for Bank-financed projects. These guidelines apply to procurement under loans from both the Bank’s ordinary capital and Special Funds resources.

- Ecuador, Procedures for public bidding and award of contracts: law and practice
  This is a note on the application of the Ley de Licitaciones y Concurso de Ofertas, Ley No.679 of 20 August 1976, which is the basic law governing public bidding in Ecuador

- Hong Kong, Check list on purchasing and tender procedures, ICAC
  This document issued by the Hong Kong ICAC suggests certain essential control procedures to be implemented in a purchasing and tendering system. These are designed to prevent corruption, and the document therefore covers only those areas which are more susceptible to corruption malpractices.

- Jordan, Draft statute of the Purchases Supreme Authority 1994
  This law, when enacted, was intended to govern government departments in regard to purchases made in both local and international markets of property, goods, services, commodities, materials, equipment, and appliances. It sought to establish an independent authority known as the Purchases Supreme Authority with power to monitor compliance with the laws, regulations, decisions and directives relating to purchases. The draft law contains provisions which prohibit the payment of commissions or rewards, and the giving of gifts or benefits.

- South Africa, Transparency in fair and competitive public procurement, Article 187 of the 1994 Constitution
  This provision in the Constitution of South Africa requires that the procurement of goods and services for any level of government be regulated by an act of Parliament which makes provision for the appointment of independent and impartial tender boards; for the tendering system to be fair, public and competitive; for tender boards to record their decisions, and to provide reasons for their decisions to interested parties. It also prohibits improper interference with the decisions and operations of tender boards.

- Transparency International, Model legislation for public contracts to implement the Anti-Bribery Pact approach 1995
  The Public Contracts (Special Provisions) Act is a model law designed to implement the Anti-Bribery Pact. It prohibits certain practices and provides for the incorporation of implied terms in public contracts.

- World Bank, Guidelines: Procurement under IBRD Loans and IDA Credits 1996
  These procurement guidelines require borrowers and bidders under Bank-financed contracts to observe the highest standard of ethics during the procurement and execution of such contracts, and specify that the bank will, in respect of such contracts: (a) reject a proposal for award if it determines that the recommended bidder had engaged in corruption in competing for the contract; (b) cancel a loan if it determines that the borrower or its representatives had engaged in corruption during the procurement or execution of the contract; and (c) declare a firm that has engaged in corruption ineligible, either indefinitely or for a stated period of time, to be awarded a Bank-financed contract. (See also relevant case law.)
53. Public Sector Ethics  
(see Codes of Conduct)

54. Recovery of assets (includes search, freezing, seizure and forfeiture)  
- Singapore, Corruption (Confiscation of Benefits) Act 1989(Cap 65A)  
  This law seeks to provide for the confiscation of benefits derived from corruption. Whenever a defendant is convicted of a corruption offence, the court is required to make a confiscation order against the defendant in respect of any benefits derived by him from corruption. The confiscation order is then taken into account in determining the nature of the fine (but not any other sentence) to be imposed on him. A 'benefit from corruption' is defined to include any property disproportionate to the defendant’s known sources of income.  
  (See also relevant case law.)

55. Religious bodies, Statements by  
- Latin American Episcopal Council, Ethical Declaration against Corruption 1997

56. Sectoral Initiatives  
- Health Action International, Statement on Transparency and Accountability in Drug Regulation 1996  
  This statement resulted from a meeting of an international working group convened in Uppsala, Sweden, in September 1996, by HAI and the Dag Hammarskjöld Foundation, to seek ways of promoting openness and accountability in drug regulation, both in industrialised and developing countries.

57. Surveys (Public Opinion)  
- New Zealand, Public approval ratings 1997  
- Nigeria, Analysis of Values Questionnaire for Permanent Secretaries 1999  
- Tanzania, Optional attitude survey of Parliamentarians: questionnaire 1996  
- Tanzania, Optional attitude survey of Parliamentarians: summary of results 1996  
- Transparency International, Corruption Perception Index 1995  
- Transparency International, Corruption Perception Index 1996  
- Transparency International, Corruption Perception Index 1997  

- Bolivia, Transparency Decree (Article 5 of Supreme Decree No.23318-A of 3 November 1992)  
  This decree recognises that the transparent performance of their duties by public servants is fundamental for the credibility of their acts.

- New Zealand, Fiscal Responsibility Act 1994  
  This law requires the Minister, inter alia, to publish an annual budget policy statement and periodic economic and fiscal updates, including a pre-election update, and to make a disclosure of policy decisions and other matters that might influence future fiscal situations.

- The Philippines, Republic Act No.7041  
  This law is designed to achieve transparency and equal opportunities in the recruitment and hiring of new personnel by requiring a complete list of all existing vacant positions in all branches, subdivisions, instrumentalities and agencies of government, including government-owned or controlled corporations and local government units, to be published.

- South Korea, Real Names Law  
  By a presidential decree designed to combat corruption in the bureaucracy, a real name accounting system was applied to all financial transac-
tions, including deposits, savings, stocks and bonds. Those holding existing financial assets in a financial institution under a non-real name were required, within two months, to convert the names of the nominal holders of such assets to real names. Without such conversion, no withdrawal of money was possible.

59. United Nations (see also Judiciary)
- **United Nations, Code of Conduct for Law Enforcement Officials 1979**
  This code of conduct was adopted by the UN General Assembly (Resolution 34/169) on 17 December 1979 with a recommendation that favourable consideration be given by governments to its use within the framework of national legislation or practice as a body of principles for observance by law enforcement officials. Article 7 requires law enforcement officials to refrain from committing any act of corruption, and to rigorously oppose and combat all such acts.

- **United Nations, Principles of Medical Ethics relevant to the role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1982**
  These 6 principles were adopted by the UN General Assembly by resolution 37/194 of 18 December 1982.

  This Declaration was adopted by the UN General Assembly (Resolution 40/34) on 29 November 1985, and contains, inter alia, provisions relating to restitution and/or compensation to persons who have suffered economic loss through the acts or omissions that are in violation of criminal laws, including those laws proscribing criminal abuse of power.

- **United Nations, Basic Principles on the Role of Lawyers 1990.**
  These principles were adopted by the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, and “welcomed” by the UN General Assembly in its resolution 45/121 of 14 December 1990. The UN invited governments to be guided by them in the formulation of appropriate legislation and policy directives and to make efforts to implement them in accordance with the economic, social, legal, cultural and political circumstances of each country. In its resolution 45/166 of 18 December 1990, the UN General Assembly invited governments “to respect them and to take them into account within the framework of their national legislation and practice”.

- **United Nations Declaration Against Corruption and Bribery in International Commercial Transactions, UNGA Resolution 51/191, 16 December 1996**
  In this Declaration, the UN called on member states to take effective and concrete action to combat all forms of corruption, bribery and illicit practices in international commercial transactions. In particular, states were requested to criminalise the bribery of foreign public officials in an effective and co-ordinated manner; to deny tax deductibility of bribes paid by corporate bodies; to encourage the development of business codes, standards and best practices that prohibit corruption; to provide mutual assistance in connection with criminal investigations and legal proceedings; to ensure that bank secrecy provisions do not impede such investigations or proceedings; and to establish illicit enrichment by public officials as an offence.

- **United Nations, Resolution on Action against Corruption, UNGA Resolution 51/59, 12 December 1996**
  This resolution recommends to member states the International Code of Conduct for Public Officials, which is annexed to it, as a tool to guide their efforts against corruption, and requests the Secretary-General, in consultation with states and relevant entities, to elaborate an implementation plan and submit it to the Commission on Crime Prevention and Criminal Justice.

- **United Nations Declaration on Crime and Public Security, UNGA Resolution 51/60, 12 December 1996**
  In Article 10 of this Declaration, member states agreed to combat and prohibit corruption and bribery by enforcing applicable domestic laws.
against such activity. States also agreed to consider developing concerted measures for international co-operation to curb corrupt practices, as well as developing technical expertise to prevent and control corruption. The other Articles of this Declaration deal principally with transnational crime, including the laundering of proceeds from serious crimes.

  This code, contained in Resolution 51/59: Action against Corruption, was adopted by the UN General Assembly on 12 December 1996, and recommended to member states as a tool to guide their efforts against corruption. The code enunciates three general principles, and then focuses on conflict of interest, disclosure of assets, acceptance of gifts or other favours, confidential information, and political activity.

- **United Nations Resolution 52/87 on International Co-operation Against Corruption and Bribery in International Commercial Transactions, 12 December 1997**
  In this resolution the UN General Assembly agreed that all states should take all possible measures to further the implementation of the UN Declaration Against Corruption and Bribery in International Commercial Transactions and of the International Code of conduct for Public Officials. The UNGA also requested the Secretary-General to invite member states to provide a report on steps taken to implement the provisions of the Declaration for consideration by the Commission on Crime Prevention and Criminal Justice with a view to examining further steps to be taken for the full implementation of the Declaration.

  This report, which contains the conclusions and recommendations of the Expert Group Meeting, focuses on the implementation of UNGA Resolutions 51/59 and 51/191. It identifies the institutions that are essential in any programme for the prevention and control of corruption, and recommends 43 different measures, including the elaboration of an international convention against corruption and bribery.

- **Promotion and Maintenance of the Rule of Law: Action against Corruption and Bribery, Report of the Secretary-General 1998**
  This report prepared pursuant to UNGA Resolution 52/87 contains an analysis of the information provided by member states on action taken against corruption and bribery and presents an overview of the activities against corruption and bribery undertaken by the Centre for International Crime Prevention and by intergovernmental and non-governmental organisations. It also contains specific recommendations for consideration by the Commission on Crime Prevention and Criminal Justice regarding further work in the area of action against corruption.

60. **Whistleblowers**

- **Australia, Whistleblowers Protection Bill 1992 (New South Wales)**
  The object of this Bill was to encourage and facilitate the disclosure, in the public interest, of corrupt conduct, maladministration and substantial waste in the public sector by enhancing and augmenting established procedures for making disclosures concerning such matters; protecting persons from reprisals that might otherwise be inflicted on them because of those disclosures; and for providing for those disclosures to be properly investigated and dealt with. The Bill, however, lapsed on the prorogation of the New South Wales Parliament.

- **Australia, Whistleblowers Protection Act 1994 (Queensland)**
  The principal object of this Act is to promote the public interest by protecting persons who disclose unlawful, negligent or improper conduct affecting the public sector; danger to public health or safety; or danger to the environment. Because the protection is very broad, the Act contains a number of balancing mechanisms intended to focus the protection where it is needed; make it easier to decide whether the special protection applies to a disclosure; ensure appropriate consideration is also given to the interests of persons against whom disclosures are made; and prevent the law adversely affecting the independence of the judiciary and the commercial operation of GOCs. The law affords protection only to a ‘public interest disclosure’ which is a particular type of disclosure defined
by reference to the person who makes the disclosure, the type of information disclosed and the entity to which the disclosure is made.

• **United Kingdom, Public Interest Disclosure Act 1998**
  This law is in the nature of an amendment to the Employment Rights Act 1996. It is designed to encourage people to raise concerns about malpractice in the workplace, and to help ensure that organisations respond by addressing the message rather than the messenger, or by resisting the temptation to cover-up serious malpractice. It applies to people at work who raise genuine concerns about crime, civil liabilities (including negligence, breach of contract, breach of administrative law), miscarriage of justice, danger to health and safety or the environment, and the cover-up of any of these. It applies whether or not the information is confidential and extends to malpractice occurring overseas.

• **United States of America, District of Columbia, Whistleblower Reinforcement Act of 1998**
  Two amendments to the District of Columbia Government Comprehensive Merit Personnel Act of 1978 seek to increase protection for DC government employees who report waste, fraud, abuse of authority, violations of law, or threat to public health or safety, and to enforce an enforceable obligation on DC government supervisors to report violations of law when circumstances require, and to afford the same whistleblower protection to employees of DC instrumentalities and employees of contractors who perform work on DC contracts.

  (See also relevant case law.)
Note: A “Best of writings...” list is being developed in conjunction with the Internet version of this Source Book. See http://www.transparency.org. A number of papers have been commissioned for the Source Book project. These are not listed here but full texts are available on the TI web site.


Dogra, Madhu and Bharat Dogra. 1996. MKSS: Working for People, Learning from People, New Delhi: MKSS.


1 A full set of the papers from the Conference is on the Transparency International website: http://www.transparency.org.


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