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## **DIMENSIONS OF TRANSPARENCY IN GOVERNANCE**

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The views expressed in this paper are those of the author and do not necessarily represent those of the United Nations or its Member States.

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## INTRODUCTION

It is now generally accepted that transparency in government is an essential element of good governance. The more informed citizens can be, the more meaningful the role they will play in dialogue with their governments and with each other. This does not imply that citizens are entitled to know everything about the workings of their government. But it does suggest not only that there should be clear definitions as to what is and what is not in the public domain, but also that there should be clear and cogent reasons for any secrecy, justified by the demands of the “public interest” – and not just the interests of those holding power.

Corruption, it is said, thrives in the dark. By contrast, “Sunlight is the best disinfectant.” So noted Justice Brandeis in one of the most quoted utterances of any US Supreme Court judge. Any campaign to counter corruption can usefully start with efforts to minimise the extent and depths of the shadows within officialdom.

Broadly speaking, there have been three distinct phases in the global movement against corruption, starting from the late 1980s when mass mobilisations in countries as diverse as the Philippines, Bangladesh, China, Brazil, and Venezuela demonstrated that many people throughout the world were no longer prepared to tolerate corrupt leaders. A decade-long phase of awareness-raising and the “breaking of taboos” followed, so that by the end of the 1990s, development agencies, international organisations, and many governments were no longer in denial, and countries were now expected to address corruption openly and systematically in their funded programmes.

The second phase was one of standard setting and convention-making. Starting in the mid-1990s with the Inter-American Convention Against Corruption (1996) and the development of the OECD Convention Against the Bribery of Foreign Public Officials in International Business Transactions (1997), and continuing with the Council of Europe’s Criminal and Civil Conventions (1999), the phase culminated in the signing of the UN Convention Against Corruption in Mexico in December 2003.

The third and current phase is by far the most challenging: that of implementation and enforcement of these standards. A number of governments have embarked on this third phase and many are finding the path extremely difficult. The answers are proving to be elusive. Reforms are being attempted in the face of myriad obstacles. The situation in each country is to a greater or lesser degree unique, and there seem to be no “off the shelf” solutions. Containing corruption is not a mere matter of drafting the right laws – in many countries, for diverse reasons, legal systems are not functioning reliably. Nor is it primarily a matter of establishing a major anti-corruption agency with draconian powers. Rather it is the challenge of making containing corruption the business of every manager within public service and of forging an ethic of “public service for the public”.

In this, governments face formidable impediments. Not only may there be systemic corruption within their own institutions, but corrupt practices appear to be multiplying beyond the public sector and across society at large: in a private sector prepared to bribe for business and to lobby against necessary reforms, in the privately-owned media, internet scams abound and confer bogus qualifications, job-seekers forge doctors’ curricula vitae, and even on the sports field, the concept of “the best person winning” is called into question.

Even national integrity institutions designed to promote accountability can fall victim. In Brazil in October 2003, “Operation Anaconda” dismantled a ring that offered court sentences for “sale”. More recently, four highly-ranked officials from the federal accounting court, a body overseen by the congress and responsible for monitoring public resources and fighting

corruption, were arrested on charges of aiding and abetting fraud. Elsewhere, major audit companies fail to see their public interest role and lobby for limitations of their liability, even when they publicly endorse the accounts of corrupt corporations. Yet in rural areas, where the world's most poor predominantly live, ethics of honesty and trust can prevail, despite the poor themselves frequently being the subject of extortion on the part of local officials.

It would be a mistake to believe that corruption is only a scourge in the developing world and in countries in transition. Far from it. Although the industrialised countries are widely regarded as having sound standards of administration and have been the most active in generating good practice – they, too, experience much corruption.

## **I. ETHICS ADVANCES, CORE PUBLIC SERVICE VALUES, AND STANDARDS IN PUBLIC SERVICE**

**International Standards.** In 1996, the United Nations promulgated an International Code of Conduct for Public Officials (Resolution 51/59: Action Against Corruption adopted by the General Assembly on 12 December 1996), which was recommended to Member States as a tool for guiding their efforts against corruption.<sup>2</sup>

Similar to the United Nations' Code is the Council of Europe's Model Code of Conduct for Public Officials (2000).<sup>3</sup> The Code contains some mandatory items, but the document itself is a Recommendation and is intended to set a precedent for countries drafting their own mandatory codes of conduct. Many of the standards set by the Council of Europe deal with subject matter which is similar to the United Nations text, but the Council of Europe text goes beyond those aspects of public service conduct that are linked to anti-corruption measures or policies. Article 6, for example, which deals with arbitrary actions, is broad enough to cover problems such as general discrimination, as well as conduct which is specifically biased by corrupt influences.

Earlier, in an effort to hold its public servants to such standards, the United Kingdom had in 1994 introduced a broad code of behaviour for those in public life. Although developed under the stewardship of Lord Nolan in the context of the United Kingdom, the *Seven Principles of Public Life*<sup>4</sup> can be applied universally, regardless of differences in politics, history or culture. The Principles, which have since been adopted by a number of countries, state:

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 on merits.

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.

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<sup>2</sup> <http://www.un.org/documents/ga/res/51/a51r059.htm>

<sup>3</sup> <http://www.greco.coe.int/docs/codee.htm>

<sup>4</sup> See [http://www.public-standards.gov.uk/about%20us/seven\\_principles.htm](http://www.public-standards.gov.uk/about%20us/seven_principles.htm)

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 interests.

Leadership – Holders of public office should promote and support these principles by leadership and example.

**Codes of Conduct for Ministers and Public Officials.** Codes of conduct – for ministers, legislators, civil and foreign service officers, the judiciary, and local government<sup>5</sup> – can assist countries in putting these principles to work. Similarly, citizens’ charters can compel government agencies to provide certain levels of service to citizens and to solicit complaints if these levels are not met. Guatemala is among the countries that have instituted codes of conduct for ministers and permanent secretaries. Both South Africa and the United Kingdom have taken a lead in addressing the needs of local government.

In the United Kingdom, the Standards Board for England<sup>6</sup> is active, setting and enforcing standards of conduct, transparency, and accountability across local government structures. It asserts that confidence in local democracy is a cornerstone of our way of life. It can only be achieved when elected and co-opted members of local authorities are seen to live up to the high standards the public has a right to expect from them. The Board is responsible for promoting high ethical standards and investigating allegations that members’ behaviour may have fallen short of the required standards.

In South Africa, political restructuring has brought new entrants into local government administration. Unsurprisingly, ethics and ethical issues have accordingly become more important for municipal officials and both directly and indirectly developments in this regard derived an added impetus from the worldwide drive for enhanced levels of ethical conduct among public servants. A code of conduct for municipal officials accordingly has come to be seen as a matter of necessity.<sup>7</sup>

**Citizens’ Charters.** A comparatively recent innovation in a number of countries has been the introduction of “Citizen’s Charters.” These are intended to improve public sector accountability as well as service delivery. In India, Citizen’s Charters are being used to tackle low-level corruption by providing citizens with access to information about services where bribes are often levied. The 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.<sup>8</sup> In Nigeria, a service delivery campaign by

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<sup>5</sup> The United Kingdom has a commissioner who oversees the openness and propriety of public appointments (see <http://www.ocpa.gov.uk/index2.htm>.) A further recent example of openness at the level of local government is the UK’s project, Modern Local Government in Touch with the People.

([http://www.odpm.gov.uk/stellent/groups/odpm\\_localgov/documents/page/odpm\\_locgov\\_605468\\_hcsp](http://www.odpm.gov.uk/stellent/groups/odpm_localgov/documents/page/odpm_locgov_605468_hcsp).) Under a new ethical framework, councils are expected to embrace a new culture of openness and ready accountability for which a new Model Code of Conduct for Councillors is promoted. The code requires that elected Councillors of local authorities in England behave according to the highest standards of personal conduct in the performance of their duties.

<sup>6</sup> <http://www.standardsboard.co.uk/index.php>

<sup>7</sup> [http://www.absa.co.za/ABSA/Content/PubRef\\_Content/Article\\_Files/PubRefArtFile1017\\_0.html](http://www.absa.co.za/ABSA/Content/PubRef_Content/Article_Files/PubRefArtFile1017_0.html)

<sup>8</sup> See <http://goicharters.nic.in/>. See also SD Sharma, ‘Mobilising Civil Society: NGO initiatives to fight corruption and promote good governance – in the Indian context’, Paper presented at the

the Federal Government is centred on the publication of Charters and the raising of the expectations of citizens that they will receive their entitlements. A similar exercise is under way in Jamaica.<sup>9</sup> The approach is widely used in Britain, where the concept originated.<sup>10</sup>

In the typical Charter, a government department or agency sets out its commitments to the public it serves. Copies of the Charter are then displayed prominently wherever the department or agency is doing business with the public. A Charter from a customs department, for example, would be displayed in customs halls and customs offices. Their purpose is to increase accountability through the publication of government services. They can be introduced at the level of national or local services.

By being open, promising response times, and 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.

**Ethics Officers.** Codes and charters do not implement themselves. Training and advice are needed by officials. To be effective, over-all responsibility for public ethics development and training must be vested in a particular agency of government. Frequently, this is within the ministry for government administration. It can also provide a counselling service for public servants who face difficult conflict of interest questions and who need to be able to talk through the position with a trusted professional on whose advice they can safely rely.

In the wake of the Watergate scandal, the United States created the Office of Government Ethics (OGE) in 1978.<sup>11</sup> The OGE provides policy leadership and direction for the executive branch of the government's ethics programme. The system is decentralised, with each department or agency having responsibility for the management of its own ethics program.

The OGE issues Standards of Ethical Conduct for Employees of the Executive Branch, a document that applies to all officers and employees of executive branch agencies and departments.<sup>12</sup> These contain specific standards that provide detailed guidance in a number of areas: gifts from outside sources, gifts between employees, conflicting financial interests, impartiality, misuse of position, and outside activities. The rules are enforced through the government's normal disciplinary process.

The Office has also implemented uniform systems of financial disclosure. These are enforced throughout all agencies and are subject to periodic review by the OGE. In recent years, a number of countries have followed the United States' lead, including Argentina and South Africa. Former members of the OGE have worked with the Ethics Resource Center<sup>13</sup> to create parallel bodies in the United Arab Emirates, South Africa, Colombia, and Turkey.

In Canada, the federal government<sup>14</sup> as well as a number of provinces have introduced ethical advisors to provide guidance to parliamentarians and senior public officials on ethical issues. These all recognise that, in the area of ethics, there are two major risks when administrations rely solely on a legalistic system. First, public office holders can easily forget what truly

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*Workshop on Promoting Integrity in Governance at the World Conference on Governance, Manila, Philippines, 31 May-4 June 1999.*

<sup>9</sup> See <http://www.cabinet.gov.jm/citizenscharters.asp>

<sup>10</sup> See Geoffrey Sadler, Experience With Citizen's Charters in the UK  
[unpan1.un.org/intrdoc/groups/public/documents/nispacee/unpan006575.pdf](http://unpan1.un.org/intrdoc/groups/public/documents/nispacee/unpan006575.pdf)

<sup>11</sup> <http://www.usoge.gov/>

<sup>12</sup> [www.usoge.gov/pages/forms\\_pubs\\_otherdocs/fpo\\_files/reference/rfsoc\\_99.pdf](http://www.usoge.gov/pages/forms_pubs_otherdocs/fpo_files/reference/rfsoc_99.pdf)

<sup>13</sup> <http://www.ethics.org/>

<sup>14</sup> Office of Public Service Values and Ethics (Canada) [http://www.tbs-sct.gc.ca/veo-bve/res\\_e.asp](http://www.tbs-sct.gc.ca/veo-bve/res_e.asp)

ethical conduct actually is and choose to dwell on what they understand to be the legal technicalities of words and concepts – not the spirit that lies behind them. Second, rules are often extremely detailed about matters that should be self-evident to anyone with sound moral judgement. 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 high level of respect among citizens. For this reason, it has chosen not to codify ethical behaviour rigidly through an exhaustive list of forbidden conduct.

Civil society is also active. To strengthen the ability of countries to teach public sector ethics and to raise standards, a Public Integrity Education Network, based in Budapest, has recently been formed which brings together some 20 academic institutions to work on the teaching of corruption control.<sup>15</sup> A complementary initiative is the Global Integrity Alliance,<sup>16</sup> where the majority of the 45 participants include current and prospective ethics and anticorruption NGOs, as well as representatives from multinational corporations, intergovernmental institutions, and multilateral organisations.

**Gifts.** Cultures where gift-giving is a feature can present problems, particularly where public servants are inadequately paid. This has been tackled frontally in Indonesia, where for public servants, the annual Idul Fitri holiday (marking the end of the Islamic holy month of Ramadan) has traditionally meant a seasonal financial boom when civil servants are showered with hampers and other expensive gifts from those eager to lay the groundwork for future favours. The year 2004 was different. Only three weeks into a five-year term Indonesia's new president was already pushing through his pledge to fight the country's endemic corruption. He ordered public servants to refuse all Idul Fitri gifts.

The new president demonstrated leadership, turning away presents sent to the presidential palace and ordering his ministers to do likewise. In addition, the country's new anti-corruption commission issued guidelines specifically banning public servants from accepting Idul Fitri gifts, arguing that the practice can be accused of impropriety. The shift has caused civil servants to turn away the traditional baskets stuffed with dates, chocolate, and, occasionally, crystal decanters and bone china tea sets, which they had accepted in the past. Other high-profile figures have followed suit. "I'm not banning people from buying a gift," said one governor, "But don't send it to my house ... Just send it to City Hall and I'll pass it on to charities."<sup>17</sup>

**Conflicts of Interest.** Most countries consider the question of conflicts of interest so important and so fundamental to good administration, that they enact a specific conflict of interest law. This can provide, for example, that "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."<sup>18</sup> Given the interplay between the concepts – conflict of interest, nepotism, and cronyism – the three are often rolled together in a single pithy phrase.

The drafters of Thailand's 1997 Constitution saw conflicts of interest as being so important as to require provisions in the Constitution itself – and not just the ordinary law. 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 his-

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<sup>15</sup> [http://www.ceu.hu/cps/res/res\\_pien\\_firstmeeting.htm](http://www.ceu.hu/cps/res/res_pien_firstmeeting.htm) and <http://www.integrityeducation.org>

<sup>16</sup> [http://www.ethics.org/i\\_turkey\\_fgja\\_es.html](http://www.ethics.org/i_turkey_fgja_es.html)

<sup>17</sup> Indonesian officials give up their gifts *Financial Times*, 11 November 2004

<sup>18</sup> For a detailed discussion of the issue at senior levels of government, see *Conflict of Interest: Legislators, Ministers and Public Officials* by Gerard Carney (TI, Berlin) at <http://www.transparency.org/documents/world-papers/carney/3c-codes.html>.

or herself in a conflict of interest situation. Section 110 (Chapter VI, Part 2) clearly states that a member of the House of Representatives shall not:

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;

receive any concession from the State, a State agency or State enterprise, or become a party 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; or

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 provides:

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 agency, State enterprise or local government organisation, or cause such persons to be removed from office.

By virtue of Section 128, the provision also applies to senators.

However, in countries emerging from totalitarian regimes, the concept of the “public interest” colliding with a public official’s “private interest” has been taking some time to be fully appreciated.

**Monitoring and Surveys.** There is a strong case for continuously monitoring the performance of service delivery agencies. Much work has been done in this area, with civil society monitors, in particular, being independent from the service providers and feeding back useful insights to responsible managers.

Similarly, there is much to be said for measuring how countries are addressing corruption and how individual initiatives are faring. In this field, the national integrity system (NIS) concept offers a systematic, comprehensive, and coherent approach not only to what is being measured and how, but also can encourage countries (such as Pakistan) to use it as the basis for national plans and to identify areas for further reform. For donors, it provides a sound basis for their discussions with governments. It has been used by civil society to assess some 70 or so countries.<sup>19</sup>

It provides a methodology concerned with the purpose of combating corruption, not simply as an end in itself, but rather as part of the larger struggle against official abuse, malfeasance, and misappropriation in all its forms. This, in turn, is part of a general effort to create more effective, fair, and efficient government. As such, the NIS provides a conceptual framework for an informed and intelligent reform of existing institutions and practices that work together

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<sup>19</sup> [http://www.transparency.org/activities/nat\\_integ\\_systems/country\\_studies.html](http://www.transparency.org/activities/nat_integ_systems/country_studies.html)

toward delivering just and honest governance. In short, the NIS is about delivering good governance.

The NIS Country Reports outline a formal framework which provides for anti-corruption measures, in the following areas of public affairs: conflict of interest, declaration of assets, lifestyle monitoring, access to information, freedom of the press, freedom of speech, post-employment restrictions, whistle-blowing, codes of conduct, blacklisting, and complaints mechanisms. This is followed by an assessment of what actually takes place in practice. The assessment highlights deficiencies, both in the formal framework itself and in its implementation.

More recently, the use of the national integrity system as an auditing tool has been taken to a higher level by the development of “integrity system mapping.”<sup>20</sup>

A second tool, the Public Integrity Index is the centerpiece of the Global Integrity Report,<sup>21</sup> produced by the Center for Public Integrity. This provides a quantitative scorecard of governance practices in a range of countries. It brings together data on 292 corruption related governance variables for 25 countries and assesses the institutions and practices that citizens can use to hold their governments accountable to the public interest. The Public Integrity Index does not measure corruption itself, but rather the opposite of corruption: the extent of citizens' ability to ensure their government is open and accountable.

## II. TOOLS TO ENHANCE INTEGRITY IN GOVERNANCE INCLUDING CODES OF CONDUCT AND CONFLICT OF INTEREST POLICIES

**Open Public Procurement.** The procurement of goods and services by public bodies amounts on average to between 15 and 25 percent of a country's Gross Domestic Product (GDP) and in some countries even more. In absolute terms, this means the expenditure of trillions of dollars each year. Such is the importance of public procurement that South Africa accorded it special attention in its 1994 Constitution.

It is no surprise that there is a great temptation for many players to manipulate the processes for their own private benefit by extorting money and other favours from bidders, bribing purchasing agents, and giving contracts to friends and relations. A recent court case in Lesotho has laid bare the practices of industrialised firms joining together to bribe a senior procurement official in a developing country. The result of that case was a series of convictions, large fines, and the prospect of multi-national corporations being debarred from World Bank-financed projects worldwide for some time to come. The actions of a small and impoverished country in locking horns with some of the giants of international commerce, and winning, earned the country wide-spread extensive.<sup>22</sup>

Whether corruption in public contracting is really the most common form of public corruption may be questionable, but without doubt it is alarmingly pervasive. It is almost certainly the most publicised and arguably the most damaging form of corruption affecting the public welfare. It has been the cause of countless dismissals of senior officials, the imprisonment of

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<sup>20</sup> <http://www.griffith.edu.au/centre/kceljag/nisa/>

<sup>21</sup> <http://www.publicintegrity.org/ga/>

<sup>22</sup> For a description of the events, see “At Goliath's feet: the Lesotho corruption and bribery trials” by

Fiona Darroch, Barrister, U.K.

*Paper delivered to the Institute for Security Studies (ISS) seminar held in Gauteng, South Africa March 15/2004. Download from*

<http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=titles&SubID=526>



former presidents, and even the collapse of entire governments. It is a source of astronomical waste of public expenditure, estimated in some cases to run as high as 30 percent or more of total procurement costs. It is also the engine for much of the corruption in political party financing.

Corruption in procurement is sometimes thought to be a phenomenon found only in countries with weak governments and poorly paid staff. Yet highly developed countries with long traditions of democratic accountability have amply demonstrated in recent years that corrupt procurement practices can become an integral part of the way in which they, too, do business. Nor is procurement corruption the exclusive domain of the buyer who controls the purse strings. It can as easily be initiated by a supplier or contractor, who makes an unsolicited offer. Clearly, bribery and corruption need not necessarily be a part of doing business, but the risks will always be there. When they materialise, debarment (discussed below) is an obvious response.

Civil society has responded by monitoring what it can, but with profits being made on both sides of the corruption equation, the cloak of secrecy is hard to pierce. A possible approach is Transparency International's so-called "Integrity Pact" under which all the parties to a tender agree in advance that there will be no bribery, and civil society provides oversight to assure the integrity of the process. It is designed (a) to enable companies to abstain from bribing by providing assurances to them that their competitors will also refrain from bribing; (b) for government agencies to undertake to prevent corruption, including extortion, by their officials and to follow transparent procedures; and (c) to enable governments to reduce the high cost of corruption on public procurement, privatisation, and licensing.<sup>23</sup>

**Declarations of Assets.** Although forms providing for the disclosure of assets and income are unlikely to be accurately completed by those who are taking bribes, the requirement that they formally record their financial positions can lay 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 do disclosure requirements work? Experience has been patchy. In some countries, politicians have legislated for disclosure and then ignored the requirements completely. In other cases, the politicians have established agencies merely to receive declarations, but have prohibited the agencies from making the declarations available to the media or to the public. The agencies themselves have also been denied the power and/or the resources to check the accuracy of the disclosures. More recently, however, in several countries, the process has brought delinquent politicians to book – though whether through carelessness rather than corrupt intent is at least arguable. The transgressions have generally been because the first declarations had not been completed accurately, rather than failures to notify significant changes in wealth thereafter. What the declarations do achieve, however, is to record a person's interests, information which can be invaluable later when it comes to dealing with particular questions of conflict of interest.

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<sup>23</sup> [http://hq.unhabitat.org/cdrom/TRANSPARENCY/html/2c\\_5.html](http://hq.unhabitat.org/cdrom/TRANSPARENCY/html/2c_5.html) See also the cautions in Claudio Weber Abramo, "Citizen's Participation in Procurement: Some Pitfalls" <http://www.10iacc.org/content-ns.phtml?documents=104&art=190> and also in "What if? A Look at Integrity Pacts" [econwpa.wustl.edu/8089/eps/pe/papers/0310/0310008.pdf](http://econwpa.wustl.edu/8089/eps/pe/papers/0310/0310008.pdf)

South Africa has introduced a scheme for the monitoring of all parliamentarians (including Ministers).<sup>24</sup> 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.

**Civil Society Contributions.** A triangular relationship exists between government, the private sector, and civil society. Corruption can take root in all or any of the three parties. It is therefore impossible, both theoretically and in practice, for just one of the parties to address the issue of corruption in isolation from the other two – and it is arguably impossible to tackle the issue effectively without the participation of all three. Civil society encompasses the expertise and networks necessary to address issues of common concern, including corruption. And it has a vested interest in doing so.

As power devolves from the centre to local authorities, opportunities for corruption to take place shift downwards towards new actors who are in more direct contact with the public. At this level the ability of civil society to monitor, detect, and reverse the activities of the public officials in its midst is enhanced by proximity and familiarity with local issues. It is at the local level that civil society is at its most effective.

A classic example occurred in the province of Abra in the northern Philippines. There, a river divided a province, there were few bridges and many towns remained isolated, trapping their inhabitants in a cycle of poverty. When in 1987 an article appeared in a local newspaper boasting of 20 successful government infrastructure projects in the region, the Concerned Citizens of Abra for Good Government (CCAGG) took notice.<sup>25</sup> Its members – students, professionals, housewives, priests, church workers, and government employees – had little in common, but did share a sense of outrage at the waste of the province's precious financial resources. The organisation's very first initiative exposed the uncompleted projects of the Department of Public Works and Highways, which resulted in the suspension of eleven government engineers, who were found guilty of dishonesty and misconduct. Since then bridges have been completed, not simply abandoned when the funding vanished. Lives have been transformed.

Elsewhere, a number of NGOs, in discharging their various roles, systematically monitor the media for the content of its reports.<sup>26</sup> “Revenue Watch” committees track revenue flows. Still others survey public perceptions and the performance of service providers, the latter often yielding useful information for managers. The efforts of civil society have been greatly aided by those governments willing to place information on the Internet. In parallel with improved access to information arrangements, “open budgeting” has been introduced in a number of countries and municipalities, and across the world NGOs are monitoring expenditures as part of the International Budget Project.<sup>27</sup>

<sup>24</sup> Hugh Corder, South African code of conduct for MPs <http://www.transparency.org/newsletters/96.4/dec96-3.html> See also <http://www.pmg.org.za/docs/2003/comreports/030530ethicsreport.htm>

<sup>25</sup> [http://www.transparency.org/pressreleases\\_archive/2000/2000.09.28.i\\_award\\_portraits.html](http://www.transparency.org/pressreleases_archive/2000/2000.09.28.i_award_portraits.html)

<sup>26</sup> A Media Monitoring Manual is available at <http://www.media-diversity.org/resource%20categories/diversity%20manuals.htm>

<sup>27</sup> For the International Budget project, see: <http://www.internationalbudget.org> and A Taste of Success: Examples of the budget work of NGOs (2000) <http://www.internationalbudget.org/resources/success.pdf>; for Russia, see <http://www.internationalbudget.org/groups/russia.htm>

In several countries, civil society has played a leading role in protecting the integrity of the electoral process. Particularly interesting was the way in which civil society in Zambia was able, in 2001, to mobilise to prevent changes to the constitution that would have permitted the incumbent President (since jailed for corruption by his successor) to enjoy a third term in office.<sup>28</sup>

There is also an increasing awareness of the particular importance of the part civil society can play when its leading citizens are involved in oversight committees. The strengthening of “horizontal accountability” in this way reinforces the core of a national integrity system.

One such example, cited earlier, is the group of 40 leading citizens who act as a watchdog over Hong Kong’s anti-corruption agency. Another is the Anti-Corruption Prevention Unit (CPU) in the Philippines, where an NGO can be accredited as a CPU by the Office of the Ombudsman to help combat graft and corruption. This enables an otherwise severely under-resourced Ombudsman to function effectively.<sup>29</sup>

In any national strategy, the professions must also play their part. Corruption and incompetence among lawyers, doctors, and engineers inflicts considerable damage on many societies. These professions need to take firm action to discipline their own members – or risk having a government agency do it for them. There are, of course, Rule of Law objections to governments controlling the legal profession – some lawyers attract government attention, because of the clients they represent. Thus, there is every reason to suppose that law societies and bar councils should not require any encouragement to maintain standards within their profession, subject to their having the legal authority to do so.<sup>30</sup> In several countries, the participation of laypersons on disciplinary committees for the professions, such as lawyers and doctors, is a further way in which public confidence (and the actual integrity of the processes) is advanced.

Civil society is not without its own problems. The One World Trust's NGO accountability forum is among those addressing the need for adequate NGO reporting standards.<sup>31</sup>

**Parliaments.** A legislature has a crucial role to play in any integrity system, as the watchdog for the people as to how the executive is spending their money. The Supreme Audit Institution frequently reports to the legislature or to a Public Accounts Committee (where best practice suggests that the Chair should not come from the governing party). In addition, the legislature usually has a role to play in the approval or otherwise of significant public appointments proposed by the executive. As expected, arrangements in the new democracies have taken some time to settle down, and in a number of these there has been open competition for power between the legislature and the presidency. Promising signs are that the spectre of the overly-dominant presidency is being confronted successfully, and several countries have been moving to distribute power more rationally and more effectively between the executive and the legislature.

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<sup>28</sup> [http://www.afrol.com/News2001/zam005\\_chiluba\\_3\\_term3.htm](http://www.afrol.com/News2001/zam005_chiluba_3_term3.htm)

<sup>29</sup> Republic of the Philippines, Office of the Ombudsman: <http://www.ombudsman.gov.ph/index.php?pagename=Home&tag=>

<sup>30</sup> A common practice would be for the legal profession to be empowered to investigate and adjudicate on complaints, with a right of appeal to the courts by the lawyer the subject of the disciplinary action. A number of countries insist that there be some non-lawyers on the disciplinary committees to increase public confidence in the integrity of the proceedings.

<sup>31</sup> <http://www.oneworldtrust.org/> For a country code of conduct for NGOs, in Ethiopia, see <http://hq.unhabitat.org/cdrom/TRANSPARENCY/html/box49.html>

The legislature's role as financial watchdog, however, becomes blurred when members of the legislature vote themselves discretionary "development funds" to spend in their constituencies, funds often seen as "slush funds" and disbursed without any form of accountability. A menace, too, are those who "trade in influence" and sell access to decision makers, something that has given rise to the passing of laws to regulate lobbying in various parts of the world.

Crucial to the legitimacy of a legislature or a presidency are free and fair elections. These are run most smoothly when in the hands of an independent electoral commission which enjoys the confidence of the voter and the candidate alike. In many countries, substantial work has been done to improve procedures, and the Administration and Cost of Elections (ACE) Electronic Publication (a joint undertaking by Elections Canada, International IDEA, the Federal Electoral Institute of Mexico, IFES-democracy at large, UNDESA and the UNDP) is presently undertaking the first-ever attempt to provide a globally accessible information resource on election administration.<sup>32</sup> The participation of election monitors, both local and international, adds to the transparency of processes and facilitates exchanges of good practice to take place.

Truly remarkable progress has been made by the Electoral Commission of India. In 2002, to make good the failure of the country's parliament to legislate, the commission itself moved to compel candidates to provide the information voters needed before they could make informed decisions. The commission demanded disclosure, by affidavit, of such personal details as pending and previous prosecutions and convictions, educational achievements, wealth and their own income and that of their spouses and dependents. The commission proposed to make the information freely available to the media, the public, and to rival candidates.<sup>33</sup> Political parties challenged these actions, but the Supreme Court of India held that where the enacted laws are silent or make insufficient provision to deal with a given situation in the conduct of elections, the Election Commission has residuary powers under the constitution to act in an appropriate manner to fill the void. This provides an example of best practice, in which integrity institutions were working cooperatively towards a shared goal.

**Political Party Financing.** Without proper checks and balances, ruling political parties can gain a significant and essentially non-democratic grip on public life and political power. In some countries, efforts to avoid this situation have focused on the possibility of empowering electoral commissions to preside over elections within party congresses. This would separate the functions of a political party from those of the government and help avoid a de facto administrative "merger" of political parties with the state. Elected ad-hoc party commissions can play a similar role.

Political parties need adequate funding for offices, staff, and communication with the electorate, but individuals or companies often agree to fund a political party with the expectation that they will benefit in some way, if the party is elected to office. This can come in the form of appointments to public office or awards of lucrative contracts for the execution of state-funded projects. Often, much of the money that finds its way into the coffers of political parties has been illicitly acquired or not declared to tax authorities.

There are two models for political financing – the public model (for example, Japan, France, and Spain) and the private model (for example, the United States and the United Kingdom). However, few systems are exclusively one or the other. State funding would seem to offer a way out, but in South Africa, for instance, the argument was made that the country's 1998

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<sup>32</sup> <http://www.aceproject.org/>

<sup>33</sup> <http://www.loksatta.org/ecreforms.htm#amends>

Public Funding of Represented Political Parties Act unlawfully discriminated against parties that failed to meet the required funding threshold.<sup>34</sup>

Many countries have implemented mechanisms to monitor this situation, but often these mechanisms have been ineffective. Even long-established democracies with generous state funding of political parties have been wracked by scandals. In one country, an outgoing head of government persistently refused to disclose the identities of illicit funders on the grounds that he had promised to keep their names confidential. Certainly, a requirement to disclose the source of donations can give rise to claims that the right to privacy has been violated. The provision of confidentiality for donations up to a certain modest level can usually assuage this concern. In cases of disclosure, rights of freedom of association can also be asserted. For example, should public servants be required to disclose the fact that they are donating funds to an opposition party? Are spending limits imposed on candidates an infringement of their right to free speech?

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 secretly funding political parties as openly benefiting from handsome contracts and other government business. The election process can quickly degenerate into an auction of political power. Aspiring parties raise funds from supporters who believe them likely to win. Individuals do the same when legislators have "executive" powers in the granting of contracts. Transparency in political donations has become a major issue in virtually every democracy. Opinion surveys around the world show an almost universal distrust of their political elites.

In some countries, the cost of political campaigning has become so high that it is well above the limits prescribed by law. Therefore, in some, perhaps many countries, political parties quietly flout campaign finance laws. Political opponents frequently complain to international election observers about this practice, but few are willing to raise the matter officially as they, themselves, are doing the same.

Donations by foreign donors to political parties can often raise greater concerns among democratically-minded citizens. Such donations can easily be represented as an attempt by foreign powers, companies or individuals to place in power a party most likely to do their bidding. Political parties in the US, Britain, Germany, and Australia have all been asked to explain why foreign individuals and corporations have given them massive donations. Some countries, such as Poland, avoid the problem completely by simply prohibiting all foreign contributions to political parties.

At least for the time being, the topic of political corruption remains off-limits for the World Bank – although in view of the importance of the issue it may now be time for this restriction to be reviewed.

### **III. CITIZENS' NEEDS - THE RIGHT TO INFORMATION**

An "open society" recognises that no one has a monopoly on the truth. In such a society,<sup>35</sup> citizens are able vigorously to debate government policies and the future direction of their

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<sup>34</sup> [www.gov.za/gazette/acts/1997/a103-97.pdf](http://www.gov.za/gazette/acts/1997/a103-97.pdf) Amended in 2002, [www.pmg.org.za/docs/2002/appendices/021025funding.htm](http://www.pmg.org.za/docs/2002/appendices/021025funding.htm)

<sup>35</sup> The concept was advanced by the philosopher, Karl Popper, in *The Open Society and its Enemies* (written between 1938 and 1943 while a refugee from Nazism).

country, and freedom is maximised, but the weak and the poor are protected. Legal guarantees of freedom of association and freedom of speech are assured.

Such societies are not just the exclusive domain of mature democracies. They can be part of any state's democratic development. An open society is not a function of culture or history, but of a genuine commitment to government transparency and civil rights. It was a state of affairs that existed in many traditional societies.

In building a successful open society, guaranteed access to information is the most critical element. Freedom of speech and freedom of association also play a crucial part. Citizens should be able to discuss the issues of the day, challenge the media and government, and, when they see fit, take to the streets to register their protest in peaceful demonstrations. In turn, those in positions of public trust and authority should listen to citizens' concerns. Voters should be consulted on proposed legislation. Except in extreme circumstances, legislatures – and judiciaries – should sit in public session and their committee hearings be open to all.

Underpinning these processes should be a lively and independent media, ready, willing, and able to hold those who hold positions of public trust to the standards of an open society. The government should accept the media's legitimacy to challenge its policy and accept the public's support for such critiques. Politicians should make themselves readily accessible to the media. In such a society, the media accepts its responsibility to filter information fairly and objectively, so that citizens are accurately informed.

The purpose of such access is clear: to build public trust, which in turn safeguards against corruption. Political leaders who find themselves under intensive, regular public scrutiny are more inclined to act honestly, ethically, and in the public interest – and less inclined to sell out the public interest in favour of their own.

**Access to Information.** Article 19 of the Universal Declaration of Human Rights<sup>36</sup> provides a starting point for any discussion of access to information, but its applications are limited. The article is clearly aimed at curtailing government censorship, rather than promoting government transparency. Thus, the task of the reformer is to elaborate on Article 19.<sup>37</sup>

One can begin with the assumption that all information belongs to the public. For unless there are compelling reasons why it should be withheld, information is held in trust by a government to be used in the public interest.<sup>38</sup> This is the approach adopted in such countries as Brazil and New Zealand, where there is a legal requirement that all official information be made available to anyone who seeks it, unless there is adequate cause to withhold it.<sup>39</sup> If the reverse position is adopted – the starting point being that information belongs to the state and

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<sup>36</sup> [www.un.org/Overview/rights.html](http://www.un.org/Overview/rights.html)

<sup>37</sup> For a general discussion of contemporary access to information issues, see Jeremy Pope, "Access to information: Whose right and whose information?" in the 2003 Global Corruption Report: <http://www.globalcorruptionreport.org/gcr2003.htm>

<sup>38</sup> The Swedish government in November 2002 launched "Open Sweden" as part of its programme, "A Government in the Service of Democracy", intended to help ensure that the basic principles of democracy, the rule of law and efficiency are in force throughout the country. The need for greater openness is of central importance to Sweden's 21 county councils and 289 municipalities. As a result, Open Sweden is a joint effort involving representatives from the national, county council and municipal levels. See [www.atirtf-geai.gc.ca/consultation-sweden-e.html](http://www.atirtf-geai.gc.ca/consultation-sweden-e.html).

<sup>39</sup> Brazilian Constitution, Article 5, Item 33. Such is also the case with New Zealand's 1982 Official Information Act that reversed the principles of secrecy set out in its 1951 Official Secrets Act, which was repealed. For the New Zealand legislation, see: [http://www.legislation.govt.nz/browse\\_vw.asp?content-set=pal\\_statutes](http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes)

is to be used in the interests of the government of the day – then any residual rights of the citizen will be of little value in advancing a democratic environment or informed debate.

In Latvia, the rights of the citizen are specifically provided for in the constitution. The 1998 Law on Freedom of Information guarantees public access to all information in “any technically feasible form” not specifically restricted by law. Bodies must respond to requests for information within 15 days. Appeals can be made internally to a higher government body or directly to a court. For example, the Latvian Constitutional Court ruled in 1999 that a regulation issued by the Cabinet of Ministers restricting access to budget information was void, because it violated the Freedom of Information Act’s requirements. Moldova and Bosnia-Herzegovina also require that government institutions respond within 15 working days.

Experience shows that reforms take time to be implemented, and for fresh approaches towards the public and its right to know to become embedded in bureaucratic cultures. Several countries have found that a lack of public education about civic rights, coupled with unreliable records management systems, and an unwillingness by some public officials to change their ways have frustrated the intentions of the promoters of reform and meant that so far little use has been made of freedom of information legislation. Perhaps this is only to be expected and points to a need for governments to retrain public servants and to raise public awareness.

Although the right of access to public information is generally increasing worldwide, many countries are lagging behind when it comes to implementation. A recent survey conducted in Armenia, Bulgaria, Macedonia, Peru, and South Africa was one of the most comprehensive efforts yet to test the extent of government transparency. On average, only 35 percent of requests for information in these countries were fulfilled. Many requests not explicitly rejected were simply ignored.<sup>40</sup>

A surprise result was that short timeframes for official responses, far from posing a disincentive to the meeting of requests as some had feared, actually appeared to improve the chances of positive reactions. Peru, the country with the best rating of the five, permits the least time for officials to respond: just seven working days.

Initiatives at the level of local government can move faster than those at the national level. Home to some 16 million people in China, Shanghai adopted the country’s first provincial-level open information legislation in January, 2004. It has worked hard to transform itself into an international financial, trade, and shipping center, with a goal to become a “global metropolis.” Shanghai was an early proponent of e-Government and the nationwide movement for more “open government affairs,” recognizing that making more information available to its citizens would stimulate economic activity, help curb corruption, and ensure more efficient and effective governance.

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<sup>40</sup> The pilot survey monitoring freedom of information was released by the Open Society Justice Initiative on September 28, 2004 designated “Right to Know Day” by global FOI groups. Conducted in Armenia, Bulgaria, Macedonia, Peru and South Africa, the survey marks one of the most comprehensive efforts yet to test the limits of government transparency. See <http://www.justiceinitiative.org/>The OSI is also campaigning to have access to information declared to be a fundamental human right.

The Provisions of Shanghai Municipality on Open Government Information<sup>41</sup> represent the most comprehensive framework to date in China for accessing government-held information, building on the initiative taken by the pioneering Guangzhou Municipality of 2003. In May of 2004, Shanghai launched its Transparent Government Programme, and the new legislation came into force. There is a presumption of disclosure, making secrecy the exception rather than the rule. The law provides citizens, legal persons, and other organizations with the right to request government information from government agencies, including information about individuals themselves. It also imposes a legal obligation on government agencies to disclose all information not covered by a specified exemption. The new law was formulated through a process that included posting a draft for public comment and the final law was published together with an explanation of the drafting process and the comments that had been received. Intensive training should help ensure effective implementation.

Against the trend in favour of openness, the so-called “war against terror” has led a number of governments to review some of the material previously available to citizens and is proving to be a set-back for campaigners for greater transparency.

**The Media.** A free, independent and pluralistic media is essential to a free and open society and to accountable systems of government.<sup>42</sup> However, the year 2004 has been described by the Committee to Protect Journalists as the most deadly year for media since 1994.<sup>43</sup> Fully fifty-four journalists died in the course of their work. Some died in crossfire while covering dangerous wars, but the majority were murdered as a direct reprisal for their reporting, frequently of corruption. A campaign begun in September 2004 by news organisations is exploring the scope for an international convention that would oblige governments to investigate such killings.<sup>44</sup>

Allied to the protection of journalists is the protection of their sources. Here, too, there are indications of growing concern within the profession. In May of 2003, the International Federation of Journalists and its regional organisation, the European Federation of Journalists, initiated a global campaign to highlight the need to protect sources. They have also supported journalists who have refused to give evidence, even to international courts, if this might expose confidential sources. A further negative development has been that some governments have started to block access to the Internet.

Governments should embrace a basic set of principles to inform their policies towards the media. In general, these argue against legislation and restriction. A good example is the *Charter for a Free Press*, approved by journalists from 34 countries at the Voices of Freedom World Conference on Censorship Problems.<sup>45</sup> The then-United Nations Secretary General, Boutros Boutros-Ghali declared that 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.”

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<sup>41</sup> Adapted from: Shanghai Advances the Cause of Open Government Information in China (April 20, 2004) in which Yale Law School expert Jamie P. Horsley explains the importance of the Shanghai provisions: <http://www.freedominfo.org/news/shanghai/>

<sup>42</sup> For an excellent review of the position of the media, see “The Enabling Environment for Free and Independent Media: Contribution to Transparent and Accountable Government (Occasional Papers series, January 2002, Office of Democracy and Governance, USAID): <http://www.polity.org.za/pol/acts/2004/>

<sup>43</sup> *Daily Dispatch*, 13 December 2004

<sup>44</sup> Geneva Declaration on Actions to Promote Safety and Security of Journalists and Media in Dangerous Situations [www.ifj.org/pdfs/journalistssafetygeneva210904.pdf](http://www.ifj.org/pdfs/journalistssafetygeneva210904.pdf)

<sup>45</sup> <http://www.wpfc.org/index.jsp?page=Charter%20For%20A%20Free%20Press>



The countries participating in the OSCE declared their own commitment to the principle of a free, independent and pluralistic media in the Helsinki Final Act of 1975. This has been a guiding concept for all OSCE countries, as well as an integral part of all OSCE documentation regarding freedom of expression, from 1975 to the present day.

In order to strengthen the implementation of their commitments to freedom of expression, the OSCE countries established in 1997 the unique institution of the OSCE Representative on Freedom of the Media.<sup>46</sup> The OSCE Representative has since outlined a number of issues of general concern in Eastern Europe and the former Soviet Union. Paramount among these is “structural censorship”, an indirect pressure on the media from existing political and economic structures that can be remnants of the past. “Structural censorship,” like any other form of censorship, can effectively muzzle a free media.

Outside the channels of government-owned media, the media is essentially self-appointed. It can be sustained by citizens when they see the privately owned media as valuable, and so support it by consuming its products, be they print or electronic. However, concentrations of media ownership in private hands are a concern in some countries. These concentrations can give small numbers of unaccountable individuals considerable power to decide what citizens should – and should not – be told and an ability to manipulate election outcomes. A number of countries legislate in an effort to ensure a diversity of ownership. These virtual monopolies are also being countered from the grassroots, with the emergence of a proliferation of community radio stations, and even Internet newspapers – with “fact checkers,” rather than journalists – and where citizens act as reporters and file their own stories.

Within the media, too, there are problems with corruption, exacerbated by poor levels of pay. In a number of countries, journalists can be bribed to run fictitious accounts – or to suppress genuine stories. A survey of International Public Relations Association (IPRA) members published in 2003 revealed media corruption in most of the 52 countries surveyed.<sup>47</sup> Disclosed in the survey was the fact that when the 2001 crisis hit Argentina, a newspaper agreed only to report positive news about a mayor’s party in exchange for a regular subsidy. It was further reported that in China, firms and NGOs find it cheaper to pay journalists for stories than it is to pay for advertisements, and that in a “sting” operation in Moscow, 13 out of 21 journalists accepted bribes to run a fictitious account about the opening of an appliance store. A leading Russian journalist, however, described the latter result as an encouraging sign that professionalism is taking root in his country. He had expected all 21 to demand a bribe.

#### **IV. ANTI-CORRUPTION COMMISSIONS AND THEIR EFFECTIVENESS**

In recent years, a number of governments have sought to bolster detection efforts by introducing “independent” anti-corruption agencies or commissions based on the highly successful Hong Kong model.

The Hong Kong model has proved effective, not just because of the quality of its staff, the readiness of the executive to provide adequate funding and the legal framework which has facilitated its work, but because the concepts of prevention and prosecution have both been functions of the commission. Its role in prevention was not an after-thought in the law establishing its responsibilities. Rather, prevention (and the community education and awareness-raising that goes with it) has been a core activity of the Hong Kong model from the

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<sup>46</sup> <http://www.osce.org/fom/representative/>

<sup>47</sup> Reported in Mike McGraw, “Money vs. Ethics: a balancing act: Corruption infests the news business: Money compromises journalistic integrity” (IPI Global Journalist, First Quarter, 2003) [www.salzburgseminar.org/reports/Knight/McGraw\\_Feb2003\\_GlobalJournalist.pdf](http://www.salzburgseminar.org/reports/Knight/McGraw_Feb2003_GlobalJournalist.pdf)

outset. Prevention policies have often been informed by the revelations of investigators working on the enforcement side. This has enabled the commission to develop a coherent and coordinated set of strategies. It has also been able to use the simplified enforcement technique of prosecuting officials who possess unexplained wealth without having to prove specific acts of corruption, a practice that this paper discusses below in greater detail.

Success in combating corruption in Singapore has owed much to the determination of a former Prime Minister and Head of Government. Some writers have pointed to the agency's placement in the office of the prime minister, and the personal commitment of the prime minister to its mandate, as being an important factor in Singapore's 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 reported to the legislature. Its separateness from the public service and its autonomy of operation were and are reflected in both law and practice.

Whether this particular feature is a model for others to follow depends very largely on the accountability mechanisms that are in place. In some countries, the positioning of such an agency in the heart of the executive has proved to be counter-productive, exposing the agency to political manipulation and fatally undermining its independence of action. Such an agency can itself be used corruptly by being turned – with its formidable array of special powers – against political opponents. Furthermore, the worst excesses of "grand corruption" can take place in and around an office of the president. An anti-corruption agency placed in such an office is hardly in a position to investigate superiors in the hierarchy, unless it is supported by other independent accountability mechanisms. Thus, an 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 integrity of the institution.

There have also been other factors in Hong Kong's success. The agency has enjoyed independence from political interference, political will has been in abundance, adequate resources have been provided, and the agency has been able to rely on the support of independent courts committed to the Rule of Law. Those who have tried to copy the model have largely failed when they have lacked one or more of these elements.

Some countries have also experienced difficulties when they have turned to the judiciary to provide the heads of commissions. In both Kenya and South Africa, the highest courts have over-turned provisions for serving members of the judiciary to hold what they considered to be positions in the executive, as being an unconstitutional breach of the doctrine of separation of powers.

As noted, one of the keys to Hong Kong's success was an ability to prosecute civil servants who were conspicuously living beyond their known means, and who were unable to provide credible explanations of their ability to do so. In Pakistan, a policy of "plea bargaining" with suspects, who have been able to repay what they have purloined and escape further punishment, has met with considerable success.

Some countries combine the functions of an anti-corruption agency with the office of the conventional Ombudsman (as in Uganda and Papua New Guinea). Others argue that there should be a clear distinction between the two roles: that the Ombudsman exists to promote administrative fairness and that this is best achieved by winning the confidence of a public service. They suggest that an agency, which is also charged with the investigation and prosecution of public servants, is more likely to be feared than trusted.

**Civil Law Remedies.** The Council of Europe’s Civil Law Convention on Corruption (1999) is a unique attempt to provide 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.

As far as the state is concerned, a highly successful initiative in South Africa has been a strategy of civil asset forfeiture.<sup>48</sup> Their Asset Forfeiture Unit is placed within the Office of the National Director of Public Prosecutions. When property is tainted by criminal activity, the Unit can commence court proceedings for its forfeiture to the state. Under the Prevention of Organised Crime Act 1998,<sup>49</sup> such property is liable to be forfeited to the state by way of a civil action. Civil asset forfeiture enables the state to confiscate suspected criminals’ assets purely through a civil action against the property, without the need to obtain a criminal conviction against the owner of the property. This is important given that relatively few “Mr. Bigs” are convicted in the courts and, consequently, few are otherwise available to have the value of their assets confiscated.<sup>50</sup>

On an application made by the National Director of Public Prosecutions, the High Court can make an order forfeiting property to the state, which the court, on a balance of probabilities, finds to be “an instrumentality” of a crime (i.e. was used in the crime, such as a vehicle, or a building used to store stolen property) or the “proceeds of unlawful activities.” The validity of such an order is not affected by the outcome of criminal proceedings. Even if a suspected criminal is acquitted in a criminal court (where the state has to prove its case beyond a reasonable doubt – a higher burden of proof than a ‘balance of probabilities’), he or she can still have property forfeited to the state. A specialist multi-disciplinary unit, comprising lawyers (criminal and civil), accountants, and financial investigators was established in 1999 to ensure that forfeiture was used effectively.

Assets forfeited can be used to assist law enforcement agencies in combating organised crime, money laundering, criminal gang activity, and crime in general, as well as to compensate victims of crime. In the United States, where similar civil asset forfeiture legislation has been in existence since 1970, forfeiture actions annually raise about \$500 million for the federal government.

Initial experience in the United States was that civil asset forfeiture legislation was often implemented poorly, because the police and prosecutors were tending to focus their activities on achieving convictions, rather than also gathering evidence to support civil forfeiture proceedings. Forfeiture involved a relatively complex and novel law about which most police officers and prosecutors then knew very little. It was only after Congress had passed a special budget to employ forfeiture specialists in each of the US Attorney General offices nationwide, that civil asset forfeiture legislation started to be used as effectively as it is today.

The South African Unit was warned to expect litigation from rich and powerful criminals, desperate to retain their ill-gotten gains and able to afford the best legal brains in the country to raise every imaginable technicality. This proved to be the case. In the United States, the courts had consistently upheld civil asset forfeiture legislation against countless technical

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<sup>48</sup> See: <http://www.iss.co.za/PUBS/CRIMEINDEX/00VOL4NO3/Assetforfeiture.html>

<sup>49</sup> Republic of South Africa, Prevention of Organised Crime Act, 1998: <http://www.info.gov.za/gazette/acts/1998/a121-98.pdf>.

<sup>50</sup> For a discussion of constitutionality issues, see Deepak Gupta, Republic of South Africa’s Prevention of Organised Crime Act: A Comparative Bill of ‘Rights Analysis: <http://www.law.harvard.edu/students/orgs/crci/v.37/gupta.pdf>

objections. The US courts have held that proceeds forfeiture is a simple “restitution” and represents neither a fine nor a punishment. The courts have also rejected arguments that the assets in question should be available to pay for a defendant’s lawyers on the grounds that a defendant has no right to spend another person’s (i.e. the State’s) money.

A similar strategy has netted large returns for the Treasury in Ireland (under its Proceeds of Crime Act 1996 and the Criminal Assets Bureau Act 1996) and likewise for the United Kingdom.<sup>51</sup> In Scotland alone, in the six months up to October 2004 almost \$1.5 million was recovered from criminals under the Proceeds of Crime Act.<sup>52</sup>

**Immunities and Privileges.** One of the greatest problems for anti-corruption commissions and other criminal law enforcement agencies is presented by the immunities possessed by high officials. This can render them effectively above and beyond the reach of the law. As a consequence, it is believed that criminals have run for political office in some countries, solely to obtain this protection.

It is generally accepted that there should be some form of immunity for senior public figures and judges to enable them to perform their tasks. But the debate over the extent of these immunities is highly polarised. For some, the immunity principle safeguards freedom of expression in the legislature, and so lies at the core of the democratic system. For others, immunity actively undermines equality before the law and the very foundations of a democracy.

In a recent multi-country survey conducted by Gallup International, 63 percent of respondents considered public officials’ immunity from prosecution to be the main cause of an increase in corruption levels in their countries.<sup>53</sup> It seems that many investigations into high-level corruption allegations have been significantly impeded by claims of political immunity, although with recent changes in political leaders some high office-holders are being prosecuted in such countries as Costa Rica, Zambia, and Cameroon after their immunities have been lifted.

Such protection is designed, not to bestow a personal favour on the office-holder, but to facilitate his or her ability to perform the functions of office. It is not meant to enable a senior public official to conduct private business without having to pay rent or creditors or avoid contractual obligations of a personal nature. Rather, immunity from prosecution is meant:

- To ensure that the elected representatives of the people can speak in the legislature without fear of criminal or civil sanctions and a host of claims for defamation;
- To protect elected representatives from being arbitrarily detained and so prevented from attending the legislature; and
- To act as a shield against malicious and politically-motivated prosecutions being brought against them.

Immunity for politicians is designed to protect the democratic process – not to establish a class of individuals who are above and beyond the reach of the law.

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<sup>51</sup> <http://www.iap.nl.com/forfeit.html>

<sup>52</sup> <http://www.assetsrecovery.gov.uk/downloads/newsletter35.pdf>

<sup>53</sup> <http://www.transparency.org/surveys/index.html#barometer>

Immunity from arrest has been a cause for concern for the Group of States Against Corruption (GRECO), made up of member states of the Council of Europe, in their reviews of transition countries' anti-corruption legislation. In its review of Romania, the GRECO team of experts noted that the Romanian Constitution grants deputies and senators immunity from prosecution, not only for opinions expressed during the exercise of their mandate, but also from arrest, detainment, search, and prosecution for any criminal offence or transgression. As GRECO noted, "This situation has an undeniable potential for permanent obstruction of the judicial system."<sup>54</sup>

Another country where the subject of immunity has been openly debated is Slovenia. In its review, GRECO recommended that guidelines be established to provide criteria for deciding on requests to lift parliamentary immunity. The guidelines are meant to ensure that in the case of judges, decisions concerning immunity are free from political consideration and are based on the merits of the request submitted by the public prosecutor.<sup>55</sup>

In Belgium, the police can investigate the activities of parliamentarians without political interference – including searches, seizures, and questioning – but authorisation is required for a member of parliament to be committed to trial. By that stage, such authorisation meets little resistance. The accused still has certain rights, such as the guarantee of having a representative of the assembly present during any potential search. By comparison, in Nicaragua in 2002, it was only after a public petition had been signed by more than half a million citizens that a reluctant legislature cleared the way for a former president to be prosecuted for embezzling over \$100 million of public funds.

In addition to legislators, a head of state is generally immune for the period of his or her office (as confirmed in a recent decision in France). Constitutions usually provide for the impeachment of a president, and serious criminal acts would provide those grounds. Therefore, there is usually a remedy, but it lies with the legislature, rather than with the judiciary.

There are also classes of officials who enjoy personal immunity for their official actions. This simply means that they cannot be sued personally for mistakes that they may have made during their employment. The remedy for the wronged citizen is to sue their employer, the State. However, there is no valid reason why any such immunity should extend to cover the personal life and the private business dealings of such persons.

The Swedish Constitution states that the inviolability principle does not cover criminal offences that are punishable by two or more years in jail. In Finland, the provisions are more severe: parliamentarians are only protected if the potential investigation relates to a crime where the maximum penalty is less than six months' imprisonment. The latter is generally deemed to be best practice.

Immunity is given not as an honour or a privilege, but rather is a sacred trust that enables an individual to discharge his or her public duties effectively. Upon leaving office, the official must answer for any criminal conduct that he or she may have been involved in during his or her time in office. Non-liability for official acts would, of course, continue.

**Judges.** Members of the judiciary present special difficulty. They are generally immune from being sued personally for errors they may have made in their judgments (for example, for exceeding their jurisdiction). To protect them from political pressures, they are generally also

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<sup>54</sup> [www.greco.coe.int/evaluations/cycle1/GrecoEval1Rep\(2001\)13E-Romania.pdf](http://www.greco.coe.int/evaluations/cycle1/GrecoEval1Rep(2001)13E-Romania.pdf)

<sup>55</sup> [www.greco.coe.int/evaluations/cycle1/GrecoEval1Rep\(2000\)3E-Slovenia.pdf](http://www.greco.coe.int/evaluations/cycle1/GrecoEval1Rep(2000)3E-Slovenia.pdf)

immune from criminal prosecution, unless the immunity is lifted. In the case of Estonia, the GRECO review recommended that any decision to lift the inviolability of judges should be free from political influence. It should be a decision based on a request from the prosecutor, supported by the Supreme Court.<sup>56</sup>

**Limitation Periods.** Legal systems usually provide periods within which most types of criminal proceedings must be commenced. However, under the law of some countries they must also be completed, and this within comparatively short time-frame. Such a state of affairs not only renders the law simple to evade by time-wasting tactics on the part of the defence, but can also deprive an accused of the opportunity to establish his or her innocence in open court.<sup>57</sup> To citizens, it can appear to be a form of de facto immunity for those who can afford fees of the lawyers.

## V. CROSS-BORDER CORRUPTION AND THE ROLE OF MULTINATIONAL ORGANISATIONS

A web of anti-corruption international conventions now envelopes the globe. The recent UN Convention Against Corruption is fortified by several regional conventions (setting even higher standards for mutual legal assistance), although it must be said, in particular, that ratifications of the African Union Convention on Preventing and Combating Corruption have been slow.

There is also the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Although there have been complaints about the lack of prosecutions to date brought under the OECD Convention, there are indications that this may change in the near future, as some 50 investigations are understood to be imminent. Once the OECD Convention has been seen to bite, private sector conduct should change significantly, as at present there seems to be a fairly low level of familiarity with the new rules.<sup>58</sup> There are also steps being taken by some governments to alert their diplomatic representatives to the fact that the days of their directing would-be traders to “appropriate agents” (for generations the conduits for bribes) are effectively over. World Bank and national government debarments (discussed elsewhere) can also be expected to add pressure to the bottom lines of corporations who flout the new rules. Meanwhile, some private sector interests are showing themselves prepared to lobby in an attempt to dilute efforts to combat corruption in international transactions.<sup>59</sup> The battle for the “hearts and minds” of leading corporations is far from being won.

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<sup>56</sup> GRECO Evaluation Report on Estonia, 9 July 2003: <http://www.greco.coe.int/evaluations/cycle1/Eval1Reports.htm>

<sup>57</sup> "The statute of limitations derives from one of the worst things in our system, that trials last for so many years," said a legislator in one country with this system. "The final effect is that [the accused] is innocent, but people still cast doubt. It's not fair." *The New York Times*, 16 December 2004

<sup>58</sup> The Bribe Payers Index (created by Fredrik Galtung): ranks 21 leading exporting countries in terms of the degree to which their corporations are perceived to be paying bribes abroad. In 1999 only 6 percent of those surveyed (and in 2002 only 7 percent) claimed to be familiar with the contents of the OECD Convention. [www.transparency.org/pressreleases\\_archive/2002/2002.05.14.bpi.en.html](http://www.transparency.org/pressreleases_archive/2002/2002.05.14.bpi.en.html)

<sup>59</sup> “Bribery rules too tough for Rolls, Airbus and BAE” *Guardian* (UK), 17 November 2004: “Three of Britain's blue chip companies told the government they would boycott its export guarantee scheme unless tough new rules over bribery and corruption were relaxed, MPs were told yesterday. Rolls-Royce, the Airbus Consortium and BAE Systems were named by John Weiss, deputy director of the Export Credit Guarantee Department, as the main objectors to rules which came into force last May and are to be watered down from next month...” Subsequently, an NGO, The

Mutual legal assistance has been put to the test in both political and asset-recovery environments. The return from Venezuela to Peru of Vladimiro Montesinos, the corrupt runaway ex-secret service chief, tested the OAS Convention which denies political asylum to those wanted for corruption. Several interlocutors argued that Peru's interests would not be served by Montesinos' extradition, an assessment with which few Peruvians – and their government – would agree. In any event, he was returned. His President, Alberto Fujimori, however, continues to escape extradition by virtue of his Japanese nationality. This situation highlights the need for countries, whose constitutions preclude the extradition of their nationals, to accept an obligation to prosecute those concerned in their own courts. Fujimori's position is that he would not receive a fair trial in the country that he once governed as president.

Asset recovery came to dominate much of the proceedings when the UN Convention was being drafted in Vienna, and a workshop was given to familiarise delegates with the intricacies involved in international assets confiscations. However, the difficulties being experienced by countries such as Nigeria and Kenya in gaining the return from Europe of large sums of money, allegedly looted from their treasuries by former leaders, continue to dominate press headlines. On the first UN Anti-Corruption Day, 9 December 2004, the UNODC announced jointly with the two governments an initiative to undertake a field diagnosis of the shortcomings in the present arrangements. One notable feature in recent years has been the more accommodating approach of the Swiss Government with regard to lifting bank secrecy.<sup>60</sup>

Steps are also being taken in the fight against corruption to improve information sharing and best practices across the United Nations and other agencies, starting with an inter-agency anti-corruption coordination meeting held in Vienna in February 2002. There is now also a much more open debate about the role of donors in abetting corruption. To their very great credit, aid agencies – multilateral and bilateral – are now willing to discuss with critics whether the way in which donors deliver their aid and assistance promotes, rather than prevents corruption.<sup>61</sup>

Moves to address deficiencies in corporate governance have been taken in many OECD countries and have been the subject of attention by its secretariat. The Global Accountability Project<sup>62</sup> of The One World Trust focuses on three main types of organisations that operate at the global level – transnational corporations, intergovernmental organisations, and international non-governmental organisations – in an effort to ensure that the most powerful global organisations are answerable to the people they affect.

## VI. ROLE OF THE JUDICIARY IN TRUST AND TRANSPARENCY

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Corner House, commenced legal proceedings, seeking judicial review of the ministerial decision: *Guardian* (UK) 23 December 2003.

<sup>60</sup> "Switzerland offers support to Nigeria in Abacha case; Nigerian delegation with Federal Councillor Ruth Metzler-Arnold" <http://www.ofj.admin.ch/themen/presscom/2003/20031119-1-e.htm>

<sup>61</sup> Meeting of the Development Assistance Committee of the OECD, Paris, France, 9 and 10 December 2004. [http://www.oecd.org/document/21/0,2340,en\\_2649\\_34565\\_33790933\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/21/0,2340,en_2649_34565_33790933_1_1_1_1,00.html) See also Brian Cooksey, "Elixir or poison chalice? The relevance of aid to East Africa" (presented to the 8th ASEA Conference & Nairobi Stock Exchange Golden Jubilee, Nairobi, 23-26 November, 2004) [http://www.nse.co.ke/download/asea\\_conference/Speech%20by%20Brian%20Cooksey.doc](http://www.nse.co.ke/download/asea_conference/Speech%20by%20Brian%20Cooksey.doc)

<sup>62</sup> <http://www.oneworldtrust.org/?display=project&pid=10>

Throughout the world, experience has shown that without the Rule of Law, efforts to combat corruption are largely futile. If judges are not impartial, professional in their work, and independent, the criminal law cannot be relied upon as a major weapon in the struggle to contain corruption. If they are actually corrupt, the situation is even worse. Judicial independence is asserted internationally in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights. However, global surveys suggest that the public see many judiciaries as being weak, dictated to by politicians or even indulging in corrupt practices.

In a landmark development, chief justices drawn from a variety of countries drafted and adopted the Bangalore Principles of Judicial Conduct (2002).<sup>63</sup> These principles are designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. Endorsed by the United Nations in 2003, they are also intended to assist members of the executive, the legislature, lawyers, and the public in general to better understand and support the work of the judiciary. The principles assert that judges should be accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial. The principles are intended to supplement and not derogate from existing rules of law and conduct that bind the judge. The Bangalore Principles have been used to develop national codes in such countries as Thailand and the Philippines.

In the European context, there are a number of major instruments in this field. Among them are The Judges' Charter in Europe,<sup>64</sup> a Recommendation on the Independence, Efficiency, and Role of Judges<sup>65</sup> made by the Council of Europe, and the European Charter on the Statute for Judges<sup>66</sup> adopted by participants at a multilateral meeting in 1998.

Judicial integrity is best built and sustained by the judiciary itself as the "third arm" of the state (together with the executive and the legislature). This can be achieved through clear, well-publicised and enforced codes of conduct, and through judges providing examples of high personal standards. Leadership has to be asserted from the top, and instances of judicial malpractice disciplined. Courts should be inspected, and judgments examined for their consistency. Court staff should be properly supervised, and effective complaint mechanisms established for the public. Adequate personal security, facilities, salaries and status are also important. Subjecting the lower judiciary, in particular, to examinations has proved a success in weeding out incompetent judges in some countries in the former Soviet Union, and is now being used elsewhere in the world.

Like any public organisation, the judiciary must be well-managed if it is to deliver its services swiftly and efficiently. But the product of the judiciary is the just resolution of disputes, which demands that it be independent and operate without pressure from other branches of government.

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<sup>63</sup> [http://www.unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf). The Judicial Integrity Group is taking further initiatives to promote judicial standards and independence (see: <http://www.tiri.org/implementation/judicial-integrity.html>).

<sup>64</sup> <http://www.richtervereinigung.at/international/eurojus1/eurojus15a.htm>

<sup>65</sup> [http://www.coe.int/T/E/Legal\\_affairs/Legal\\_co-operation/Conferences\\_and\\_high-level\\_meetings/European\\_Public\\_Prosecutors/Rec%20R\(94\)%2012%20E.asp](http://www.coe.int/T/E/Legal_affairs/Legal_co-operation/Conferences_and_high-level_meetings/European_Public_Prosecutors/Rec%20R(94)%2012%20E.asp)

<sup>66</sup> [http://www.coe.int/T/E/Legal\\_Affairs/Legal\\_co-operation/Legal\\_professionals/Judges/Co-operation\\_activities/lisbon99.asp#TopOfPage](http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Legal_professionals/Judges/Co-operation_activities/lisbon99.asp#TopOfPage)



The mechanism for the appointment of judges is often a matter of controversy. Together with guarantees of judicial independence, it is frequently provided for in a country's constitution.<sup>67</sup>

Many believe that politicians are only interested in appointing judges who will do their bidding. Politicians can feel able to challenge the legitimacy of judges sitting in judgment on elected officials when the judges themselves have not been elected. Criticisms of the judiciary as not being accountable are wide off the mark when it sits in public, it gives reasons for its decisions, its actions are reported in the media and, for the most part, its decisions are subject to appeal to higher courts. Some countries are also establishing "court user committees" where representatives of user groups meet with local judges to find appropriate remedies for any problems experienced. This establishes de facto accountability at the grass roots level.

To prevent judicial appointments and case management from becoming a means by which judicial independence is compromised, many countries have created, or are in the process of creating, judicial councils. These are bodies separate from other government branches, and are entrusted with the selection and promotion of judges, and otherwise overseeing the court system, including responsibility for discipline.

Although these councils differ from country to country, their success depends on how well policymakers address questions relating to their composition, the selection of their members, their responsibilities, and their accountability. Spain's experience with its Consejo General del Poder Judicial is a good illustration of how one country has dealt with these issues, and reveals the factors that must be taken into account when addressing them. To guard against political cronyism, and to render appointment processes fully transparent, South Africa provides for open hearings at which candidates for the Bench are questioned by an appointments committee drawn from a variety of quarters.<sup>68</sup> However, it has to be said that experience in the United States has shown that even judges carefully chosen by conservative administrations for political reasons, once on the bench can flourish as progressive and fully independent reformers.

**Removing Judges.** Judicial independence exists for the benefit of the institution, not the individual judge. But judges' independence does not place them beyond the reach of accountability. The chief justices at Bangalore concluded that judicial independence is best served by other judges assuming responsibility for the accountability of the individual judge; at least up to the point where impeachment by the legislature may come into play. Individual judges, they declared, must be both appointed and held directly accountable in ways that do not compromise the institution's independence. In general, best practice dictates that disciplinary tribunals should have a majority from the judiciary and can be rendered more legitimate by the inclusion of non-lawyers, but never politicians (or at least no more than a small minority).

In most countries, constitutional guarantees require that only a special process, usually involving the legislature, can result in the removal of a member of the higher judiciary. And even then, only after due process. However, these processes are generally designed to deal with the occasional errant judge, not an entire judiciary that has gone "bad". Hence there were concerns about process in 2003, when an incoming administration in Kenya felt compelled to remove a significant number of senior judges (however suspect they had been thought to

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<sup>67</sup> Examples of best practice include, e.g., Articles 174, 178 of the Constitution of South Africa: <http://www.saweb.co.za/election/constit/saconst08.html>

<sup>68</sup> Articles 174, 178 of the Constitution of South Africa: <http://www.saweb.co.za/election/constit/saconst08.html>

be).<sup>69</sup> The same concerns arose in Ecuador, in December 2004, when a new President concluded that the senior judiciary had been irredeemably tainted with the politics of his predecessor.<sup>70</sup> These developments suggest that consideration needs to be given to the development of international standards to deal with such eventualities.

**Judicial Codes of Conduct.** The chief justices who drafted the Bangalore Principles were convinced that the senior judiciary should accept the task of building and sustaining judicial integrity for itself. In this the most potent tool is an appropriate code of conduct. The code should be developed by the judges themselves, who should 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.

Judicial codes of conduct have been used to reverse such unacceptable practices as when the sons and daughters of judges appear as lawyers to argue cases before their parents. In a country where there is considerable trust in the judiciary, such an appearance may not give rise to concern, but in a country where there is widespread suspicion that there is corruption in the judiciary, such a practice takes on an altogether different dimension, at least in the eyes of the public.<sup>71</sup>

## **VII. SYSTEMS AND PROCESSES OF CHECKS AND BALANCES AMONG THE EXECUTIVE, LEGISLATIVE, AND JUDICIAL BRANCHES**

Checks and balances are crucial to the functioning of any system of effective accountability. Not only must they exist on paper, but they must have functional independence, and in cases touching on the Rule of Law, be able to operate without political interference. As noted above, efforts are being made in a number of countries to redress the inheritance of overly-powerful Presidencies, where the executive has been able to suborn both the legislature and the judiciary. In the GRECO processes leading up to new countries acceding to the European Union, special attention was paid to these separation of powers.

**Integrity Systems and Horizontal Accountability.** The concept of the single national integrity system may be relatively new, but in fact all societies possess an integrity system of sorts. It is simply a matter of perception. The system does not comprise a host of separate instrumentalities, nor a set of separate systems operating in comparative isolation from each other (parliament; judiciary; civil service; media; civil society, etc.). Rather, the system should be viewed as a totality - one in which each sustains, serves, is served by, or protects, some or all of the others.

If a system is wholly dependent on a single element or “pillar” (perhaps a benign dictator), or if it possesses very few pillars, then it is vulnerable to collapse. It may seem to function in the short term (as with the clean-ups conducted by military governments on the overthrow of

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<sup>69</sup> “Kenya wields axe on judges” (BBC news, 23 October 2003) <http://newswww.bbc.net.uk/2/hi/africa/3195702.stm>; “ICJ demands fair hearing for judges accused of corruption” [http://www.icj.org/news.php3?id\\_article=3112&lang=en](http://www.icj.org/news.php3?id_article=3112&lang=en)

<sup>70</sup> <http://news.bbc.co.uk/2/hi/americas/4083847.stm>

<sup>71</sup> The “Restatement of Values of Judicial Life”, a code of conduct, adopted at a full court meeting of the Supreme Court of India on May 7, 1997, lists 16 principles to be followed by every Judge in order to reaffirm people's faith in the impartiality of the judiciary. Not permitting any member of the immediate family or any other close relative to appear before him or her in court, and not associating in any manner with a cause to be dealt with by that relative who is member of the Bar are among the prescriptions. Other items requires a judge to practise a degree of aloofness consistent with the dignity of his or her office; bar judges from accepting gifts of hospitality except from family members, close relatives and friends; prohibit contesting any election; and require him or her to avoid close association with individual members of the Bar.

corrupt civilian regimes), but the absence of a functioning integrity system carries with it a high risk of progressive decay.

This holistic approach unlocks a new form of diagnosis and potential cure. Instead of looking at separate institutions (e.g. the judiciary) and focusing on a stand-alone reform programme, reformers look at inter-relationships and effectiveness. For example, what price 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 will simply not have the cases presented to them for hearing and the judiciary would sit in isolation, able to achieve little. This holistic approach has been described as embodying “horizontal accountability”, another concept useful for visualising the way in which the pillars maintain each other’s integrity. This contrasts with the top-down approach of autocratic government.

With a near-universal collapse of trust in government, and a public deeply suspicious of decision-making taking place behind closed doors, there is an increasing recognition of the part civil society can play in strengthening “horizontal accountability” in support of their own national integrity systems.

**Records Management.** There can be no effective systems of accountability in the absence of a dependable records management system. Without paper and electronic trails, there is little or no accountability, and corruption can flourish in the vacuum. In Mexico, where a freedom of information law was enacted in April 2002, a report stated that “public records, transcripts, and notes from important meetings have been purposefully kept from public view, leaving almost no official record of how key decisions have been made. In many cases, official records have been destroyed or taken home by officials when they left office.” In some countries in Central America it is said to be a long-standing tradition for an outgoing administration to shred most of its sensitive records.<sup>72</sup>

Given such disorder, the role of the chief archivist is coming into focus. Long overlooked, this official is increasingly seen as holding one of the keys to accountability. The archivist’s records can provide the paper and electronic trails crucial for exposing mismanagement and corruption. Unfortunately, in most countries their posts are relatively junior, and their work under-resourced. Too many of them also work in the absence of a coherent and enforced records management policy.

Ideally, the post of chief archivist should be granted constitutional protection – perhaps placed on a par with a Supreme Court judge or the head of an independent financial watchdog body. An alternative might be to designate the chief archivist an officer of the legislature, appointed by, and responsible to, the elected representatives of the people. Close to such a model is the United Kingdom. There, the chief archivist is not a political appointee, and is not selected by the government from a pre-set list of nominated persons, as happens in some

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<sup>72</sup> Practice varies widely. Some countries see this as a matter of “executive privilege”; others, a means of preserving free and frank discussion and advice as between Ministers and their officials. One legacy of Richard Nixon’s troubled presidency in the United States is that of a restriction of the power of the executive branch, in particular a former president’s claim to his papers -- what he has the right to keep secret vs. what the public has a right to know. After Nixon left office and tried to maintain control of his papers -- along with his infamous tapes -- Congress eventually set limits to executive privilege by passing the Presidential Records Act (PRA) in 1978, which legally established that the papers of an outgoing president were public property. Instead of presidents deciding what should be released, the PRA set specific release guidelines and entrusted the papers to federal archivists, assuring that historians and researchers have access to source materials without the vanity and prejudices of the former president impeding the process.

See <http://www.salon.com/books/feature/2002/04/10/records/print.html>

European countries. The official is appointed by open competition and then confirmed by the Lord Chancellor. He or she can be removed for gross negligence by the Permanent Secretary, and the Treasury can remove the official's accounting officer status for financial irregularities. The chief archivist has the status of a regular public servant, and is a Statutory Office Holder under the Public Records Act of 1958. The relevant parliamentary select committee would be expected to inquire into any change in the post.

## VIII. INNOVATIONS AT SECTORAL AND SYSTEMIC LEVELS

Although there are examples of failure, many lessons have been learned, and efforts to contain corruption have produced a variety of imaginative ways in which reformers have responded. A number of examples, and some of the lessons learned, are given below in addition to those that have already been discussed.

**“Due Process.”** Beset though Nigeria is with rampant corruption, a highly successful initiative there has been the establishment of a “due process” office to clean up public procurement undertaken by the federal government. The Office of Budget Monitoring and Price Intelligence Unit (BMPIU), otherwise known as “Due Process, was established in June 2003, headed by a financial specialist and staffed with experts in financial regulation, project management and corruption prevention. Before a major contract can be signed, the unit must be satisfied that the correct tendering procedures have been followed, and that the proposed contract represents value for money. Situated in the Office of the President, it wields considerable power and has saved the state many millions of dollars by conducting value-for-money checks - so much so that there are plans for the unit to be placed on a constitutional footing.<sup>73</sup>

The objectives of the BMPIU include:

- harmonising existing government policies/practices and updating these on public procurement;
- determining whether or not due process has been observed in specific procurement exercises;
- introducing more honesty, accountability and transparency into the procurement process;
- establishing and updating pricing standards and benchmarks for all supplies to the federal government;
- monitoring the implementation of projects during their execution to provide information on performance, output and compliance with specifications and targets; and
- ensuring that only projects which have been budgeted for are admitted for execution.

The awarding of contracts is meticulously scrutinised by the BMPIU, with projects being cleared on the basis of financial prudence and the ability of a tendering company to perform effectively. This has curbed colossal wastage and has prevented public funds from being embezzled through bogus projects. It has also effectively checked the problem of abandoned projects. By August 2004, effectively the end of its first year of operation, the BMPIU and its efficient monitoring system had achieved savings of some \$US600 million<sup>74</sup>.

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<sup>73</sup> “Due Process Saves Nigeria N102bn, Says Obasanjo” This Day July 13, 2004

<sup>74</sup> Anti-Corruption Efforts of the Obasanjo Administration

**Licensing.** Systems for licensing, fraught with technicalities and frequently completely unnecessary, have been fertile fields for the corrupt in many countries. Many have, or are, simplifying requirements, reducing the number of applications needed (e.g. to open a new business). One country that has tackled the problem in a particularly imaginative way has been Bolivia. Reforms there have included the publication of details on all government procedures and fees. All government offices now have to display posters explaining the required paperwork and the exact costs of each transaction. This is designed to prevent government employees from demanding bribes, and to dispense with the need for “middle men” to help citizens through their transactions.

Along side this, “positive silence” has been introduced. This means that citizens applying for occupational licenses, car registrations or other government certificates will be considered to have had their applications approved automatically if the applications have not been rejected within 15 days. The expression “Come back tomorrow,” has been famous in Bolivia. What it really meant was “Come back with money.” Under the reforms, if citizens are asked to “come back” they need only to wait 15 days; thereafter, they can invoke “positive silence” if the application has not been refused before the deadline passes.<sup>75</sup>

**Police.** INTERPOL (International Criminal Police Organization-Interpol officially abbreviated to ICPO-Interpol) actively promotes integrity in policing the world over. Not only does it make use of a panel of anticorruption experts, but it also has developed a set of standards for fighting corruption in police forces worldwide.

Its Global Standards to Combat Corruption in Police Forces/Services<sup>76</sup> seek to ensure that police forces of member states have high levels of probity. Each member state commits to making corruption by a police officer a serious criminal offence. Other standards include establishing and maintaining high standards of conduct for the honest, ethical and effective performance; and setting up and maintaining effective mechanisms to oversee and enforce high levels of conduct in the performance of policing functions. INTERPOL is now developing ways in which to provide practical assistance and training to the forces of member states that require it.

**Integrity Testing.** In various parts of the developed world, police corruption reform strategies had been misconceived. Scandals had come in cycles because clean-ups had been based on the mistaken belief that getting rid of “rotten apples” would be sufficient to contain the problem.<sup>77</sup> Now, systems are being developed to ensure that police integrity receives continuous attention. In this, “integrity testing” has emerged as a particularly useful tool in metropolitan areas such as New York and London. The object is to test the integrity of an official, not to render an honest official corrupt through a process of entrapment.

The NYPD’s Internal Affairs Bureau in New York now creates fictitious scenarios based on 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 their officers. The tests are carefully monitored and recorded using audio and video electronic surveillance as well as the placement of “witnesses” at or

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[www.nigeria.gov.ng/ministryinformation/Anti-Corruption%20Efforts.htm](http://www.nigeria.gov.ng/ministryinformation/Anti-Corruption%20Efforts.htm)

<sup>75</sup> The initiative has been followed in Chile with the Terms for Administrative Procedure Act of 2003, better known as the “Administrative Silence Law”. For a discussion, see Legal Bulletin, December 2003 (Carey v Cia): [www.carey.cl/pdf/diciembre2003\\_i.pdf](http://www.carey.cl/pdf/diciembre2003_i.pdf)

<sup>76</sup> <http://www.interpol.int/Public/Corruption/Standard/Default.asp>

<sup>77</sup> It is widely accepted now that, where there is systemic corruption, the replacement of one “bad apple” without any change being made to the system simply produces a second bad apple, and arguably a second victim of circumstances.

near the scene. Those who fail the tests are either disciplined or dismissed from the force. Predictably, the introduction of the system has seen the number of reported attempts to bribe police officers soar – officers seldom know if an offer of a bribe is for real or simply part of an integrity test. The London Metropolitan Police has initiated a similar programme of integrity testing, administered by specialist internal anti-corruption units. Early reports indicate that the London police are obtaining some of the same benefits as the NYPD.

Most countries have agent provocateur rules in their criminal codes, which act as a judicial check on what is permissible in this area. These rules vary from jurisdiction to jurisdiction, but they obviously have to be borne in mind by those introducing the technique. It is, of course, important to ensure that the degree of temptation offered to an officer is not extreme.

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 illicit activities conducted in the private offices of judges. These cameras have captured corrupt transactions between judges and members of the legal profession. It would also seem to have potential use in other areas where the public sector is engaged in direct transactions with members of the public, particularly in customs.

The possibilities the technique presents have yet to be thoroughly explored. On the face of it, there would seem to be considerable merit in establishing a system by which all officials (be they police, customs or elsewhere in the system) know, at the very least, that integrity testing is taking place as a means for tackling levels of petty corruption.

**Revenue Collection.** There is no more notorious an area for corruption than revenue collection – nor, perhaps, one where the consequences can be so grave. In some countries (e.g. Peru and Uganda), corruption related to state revenues had become so endemic that governments decided to close down existing tax administrations and to replace them with new ones. In a number of countries, poorly paid positions in tax and customs administrations are eagerly sought after as applicants know that these jobs create opportunities for considerable extra income. Indeed, in several countries, the jobs are so highly sought after that they are actually bought and sold.<sup>78</sup>

Corrupt customs officials also mean porous borders. Through these can flow not only untaxed goods, but also arms and illicit drugs, illegal immigrants, goods which compete unfairly with local protected industries, and plants and species afforded protection by national and international law, such as ivory. The damage to a country can extend well beyond the fiscal. In this age of international terrorist networks, corrupt officials (custom officers, border police, etc.), who act as de facto members of transnational organised criminal groups, may seriously endanger national and international security.

The organisational structure of Latvia's State Revenue Service was improved to integrate tax, customs, and social security collections, and to create strong internal control and anti-corruption functions. A Vigilance Unit, operating independently from the tax police, was also established. Implicit in this was the need to ensure that tax assessments were simple to calculate, and that levied rates were realistic. A code of conduct, based on the WCO model, was developed that includes instructions on the proper response for staff when offered a bribe.<sup>79</sup>

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<sup>78</sup> Fjeldstad, Odd-Helge (2003) *Fighting fiscal corruption: Lessons from the Tanzania Revenue Authority* in Public Administration and Development 23/2 (165-175); and Fjeldstad, Odd-Helge & Bertil Tungodden (2003) *Fiscal corruption: A vice or a virtue?* In World Development, Vol.31 no. 8 pp. 1473-1475.

<sup>79</sup> The Code is at [www.vid.gov.lv/eng/2vidinf/docs/208-01.pdf](http://www.vid.gov.lv/eng/2vidinf/docs/208-01.pdf)

Guatemala decided to merge its tax and customs agencies into a single autonomous agency. All staff were either replaced or had to reapply for their positions. This hiring process was contracted out to private recruitment firms and a local university. In addition, an integrated financial management system was introduced, and procedures overhauled and simplified. A public information campaign was also launched to publicise the agency's progress in improving customer service and in meeting its revenue targets.<sup>80</sup>

A further example is provided by Poland, where the Central Board of Customs has embarked on sweeping reforms for revenue collection which address the integrity of its staff and introduce a range of anti-corruption measures. Greater care is now being taken in the recruitment of customs officials. During a probationary period, new staff members are assessed every six months to verify not only their competence, but also their susceptibility to corruption. Those permanently appointed to customs work are similarly assessed. Annual declarations of financial assets have been introduced; the director can require further declarations at any time. Internal controls have been strengthened and a customs ethics code introduced.<sup>81</sup> In addition, an independent research company carries out surveys of taxpayers to gain feedback as to the success of the reforms.

In the Philippines, automation has been used to reduce transactions, from 10 documents in triplicate and about 91 steps, to one single administrative document for the whole process. This has simplified work and minimised red tape, corruption, and tax evasion and at the same time has reduced cargo release times from 6-8 days to as little as four hours.

**Independent Revenue Authorities.** Three African countries (Ghana, Tanzania and Uganda) are among those that have undertaken comprehensive reforms of their tax administration to increase revenue and curb corruption. In doing so, they have established special tax collection authorities outside the conventional public service as a way of increasing the salaries of staff beyond the levels of their counterparts in public service. Tanzania has also introduced a telephone hotline and a system of rewards for informants reporting tax evasion. However, after an initial spurt of success, problems have emerged in all three countries. First, the higher wage rates were not maintained vis-à-vis the remainder of the public service, with the result that their "elite" status was lost. Second, there was no effective internal strategy to establish and maintain a sound ethical framework.<sup>82</sup>

Without effective management of government ethics, even with relatively high salaries and good working conditions, corruption has continued to thrive in Tanzania and Uganda. Salary increases have been shown to produce a highly paid, but, nevertheless, still highly corrupt tax administration. When corrupt officials have been identified and fired, they have tended to move into the private sector as tax consultants and have been able to exploit their internal networks to continue their corrupt activities. Nevertheless, tax revenues have increased.

**E-Procurement and E-Government.** Another powerful instrument against malpractice is the Internet. Several countries (Mexico, Chile, Colombia and, more recently, Austria) and a number of major municipalities (e.g. Seoul, Korea) have placed their entire procurement information systems on the web and allowed free access to the documentation.

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<sup>80</sup> See World Bank PREM Note 33: "Anti-Corruption Strategy for Revenue Administration", (October 1999): <http://www1.worldbank.org/publicsector/corecoursepapers.htm>

<sup>81</sup> [www.vid.gov.lv/eng/2vidinf/docs/208-01.pdf](http://www.vid.gov.lv/eng/2vidinf/docs/208-01.pdf)

<sup>82</sup> Michael Waller, Review of Integrity Management of Staff in the Ghana, Tanzania and Uganda Revenue Authorities (TI-CIR, London): [www.transparency.org/working\\_papers/mwaller/integrity\\_management\\_review.html](http://www.transparency.org/working_papers/mwaller/integrity_management_review.html)

The Seoul city system, the Online Procedures Enhancement for Civil Applications (OPEN)<sup>83</sup> was developed to achieve transparency in the city's administration by preventing unnecessary delays or abuses of civil affairs by its public servants. The web-based system allows citizens to monitor applications for permits or approvals where corruption is most likely to occur, and to raise questions in the event of any irregularities being detected. The site receives over 2,000 visitors daily.

E-Government is not without its difficulties. Among these is the loss of control of records and information trails, a hazard to which electronic environments are particularly vulnerable. Accurate official records are essential in providing a sound basis for the rule of law, economic development, poverty reduction and accountability frameworks. However, in many countries the systems for creating, organising, and preserving reliable official information have broken down. Where records are absent, accountability is highly problematic. Meanwhile the task of preserving electronically-generated records in authentic form is growing.

Solutions may be on the horizon. 'Evidence-Based Governance in the Electronic Age' is a five-year project initiated by the World Bank in partnership with the International Records Management Trust<sup>84</sup>. This involves coordinating a global network of institutions in order to tackle a significant global problem – the failure of records systems, particularly in electronic environments, to provide complete and trustworthy information. In parallel with measures to improve public sector management, the project involves coordinating a global network of institutions to provide support for modernising records management systems. Ultimately, the aim is to mainstream records management as a cornerstone of the global development agenda.

**Mobile Phones.** New technology has not simply aided governments in their efforts to reduce corruption. Mobile phones showed their usefulness in countering corruption in the local elections in Senegal in November 1996. Senegal's interior minister was caught out when he admitted, in a low voice near an open mobile phone, that there had been fraud. As a result, the president was obliged to annul the election. Then in the presidential election of 2000, the use of mobile phones forced the two presidential candidates to accept the results when the results of the counts were announced almost instantaneously by private radio stations. The two main stations had sent reporters to cover polling stations all over the country. Equipped with mobile phones, they were able to announce the results as soon as the votes had been counted. The organised presence of journalists, and the speed with which the results were announced, facilitated the peaceful handover of power from the defeated president to his successor. No fraud was possible, and the much-feared clashes between supporters of the two political leaders were avoided.<sup>85</sup> Mobile phones have also been put to good use in elections in the Philippines.<sup>86</sup> They can also, through text messaging, greatly facilitate civil society efforts to mobilise in times of crisis.

**Debarment.** Corruption scandals and criminal prosecutions in Lesotho against major western corporations have led to several companies being debarred (or "blacklisted") by the World Bank<sup>87</sup>. The Bank has given a lead in recent years by publicly naming, shaming and debarring those identified as undertaking corrupt practices in connection with projects the Bank has

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<sup>83</sup> [www1.worldbank.org/publicsector/egov/seoulcs.htm](http://www1.worldbank.org/publicsector/egov/seoulcs.htm)

<sup>84</sup> <http://www.irmt.org/evidence/index.html>

<sup>85</sup> [http://www.unesco.org/courier/2000\\_07/uk/connex2.htm](http://www.unesco.org/courier/2000_07/uk/connex2.htm)

<sup>86</sup> <http://www.ipsnews.net/interna.asp?idnews=23663>

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<http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0..contentMDK:20229958~menuPK:34463~pagePK:64003015~piPK:64003012~theSitePK:4607,00.html> and  
[www.iss.co.za/SEMINARS/2004/1503graft/lesotho.pdf](http://www.iss.co.za/SEMINARS/2004/1503graft/lesotho.pdf)



been funding.<sup>88</sup> This form of retribution is also used in Singapore, and is widely practised in the United States at both federal and state levels.

A major study conducted for the Utstein Group of governments against corruption (U4) (enlarged to include Canada, Germany, The Netherlands, Norway, Sweden and the United Kingdom) concluded that the sanction of blacklisting (or “debarment”) should be available to a government when its contracting partners breach ethical and performance standards<sup>89</sup>. Those found to have bribed, committed price-fixing or bid-rigging, or to have provided sub-standard or sub-specification goods or services - whether or not in collusion with any official - should be debarred from future contracts with the government. This should either be indefinitely, or for an appropriate period of time. They should also be subject to:

- loss or denial of contractual rights;
- forfeiture of their performance bond; and
- liability for damages, both to the government principal and to competing bidders (for the losses they have incurred through an unsuccessful bid).

Companies that have been debarred could be re-admitted to bidding processes after they have complied with stated requirements, such as paying damages, terminating the employment of the staff who had bribed public officials, or introducing an effective no-bribery policy in the company, and systematically implementing that new policy through a compliance programme.

In South Africa, the Prevention and Combating of Corrupt Activities Act, 2004 (No 12 of 2004)<sup>90</sup> provides that blacklisting take place after companies or their members have been convicted of corruption in court, rather than be imposed administratively as is the case elsewhere. This would seem to limit the scope for debarment, as only where successful criminal prosecutions have been brought would it be available. Happily, in other respects the legislation represents one of the best pieces of anti-corruption legislation of recent years.

**Complaints Systems.** A major obstacle has been the reluctance of individuals to ‘blow the whistle’ on corrupt activities. Fear of retribution from employers or colleagues dissuades many from reporting cases of corruption. The Protected Disclosures Act, in South Africa, is one example of legislation that sets out procedures by which both public and private sector employees who report unlawful or corrupt activities by their employer or colleagues are protected from reprisals. The law is intended to encourage honest employees to report wrongdoing. However, three years on, an overwhelming majority of South Africans seem to be unaware of the protection the Act accords, or of how to use it. The provisions are based on legislation enacted earlier in the United Kingdom.<sup>91</sup>

Measures to protect whistle-blowers have been enacted in various countries, so far only to limited success. In part this stems from a lack of confidence in the law’s ability to provide adequate protection. There are some acts of retribution that even the law is unable to prevent. An additional factor comes into play in countries where, because of their recent history, blowing the whistle on colleagues can all too easily be presented as practising the detested “denunciations” of a past era of non-democratic rule.

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<sup>88</sup> See “Contractors beware: the pitfalls of a World Bank debarment proceeding”, [www.pattonboggs.com/Views/releases/2002\\_09\\_24\\_World%20Bank%20Article.pdf](http://www.pattonboggs.com/Views/releases/2002_09_24_World%20Bank%20Article.pdf)

<sup>89</sup> Debarment as an Anti-Corruption Means - a Review Report (Pope, Doig and Moran) <http://www.u4.no/document/debarment/main.cfm>

<sup>90</sup> <http://www.polity.org.za/pol/acts/2004/>

<sup>91</sup> <http://www.pcaw.co.uk/legislation/legislation.html> ; Public Interest Disclosures Act (UK) [www.legislation.hmso.gov.uk/acts/acts1998/19980023.htm](http://www.legislation.hmso.gov.uk/acts/acts1998/19980023.htm).

Witnesses can play a crucial role in bringing to justice those responsible for human rights violations. However, Amnesty International reports that witnesses who are prepared to testify against police and hired gunmen (often protected by powerful political interests in the area), are routinely harassed and intimidated in such countries as Brazil. There the provisions for protection of witnesses are wholly inadequate, and the vast majority of witnesses receive no official protection, although the Brazilian government, for one, has now moved to create a national witness protection programme.

**Civil Society and New Presidential Appointments.** In Central America, in particular, on a change of presidency, there have been efforts to involve civil society in the screening of candidates for appointment to high office by the incoming administration. This has been designed to put an end to practices that have previously routinely saw senior posts being filled with political cronies, a state of affairs that effectively undermined the prospects of the presidency being held to accountable in any meaningful way.

**Visa Refusals.** A recent innovation has been the adoption by the United States of a policy limiting entry to the United States for politicians accused of corruption in their own countries. This has sent shock waves through political elites in a variety of countries. US business has expressed concern that visa refusals have been based on unproven corruption and criminal allegations. American consular services state that they are working diligently to identify problem cases, but that additional resources are needed to devote more attention to each case, and to lend experienced judgment to each application.<sup>92</sup>

**Privatisation and Competition Policy.** Although privatisation has its critics in established market economies, entirely different forces are at work in countries emerging from decades of central planning and communist rule. Few would disagree with the proposition that ambitious privatisation programmes were urgently needed in transition countries to end the grossly inefficient, state-owned monopolies which dominated the economy. Riddled with cronyism, bled to provide illicit funding for the party in power, plundered by corrupt managers and pilfered by staff at all levels, many of these companies were as bankrupt as they were unproductive. They survived only through unsustainable state subsidies and indefensible state protection.

Private ownership could be expected to bring a degree of rationality and efficiency to such companies. A company's financial and operating performance would improve, and the government would start collecting taxes instead of providing subsidies. Against this, formerly subsidised firms, once privatised, would be likely to experience a significant decrease in staff numbers that could provoke opposition. By contrast, companies that were already competitive would experience only minimal lay-offs, if any.

Privatisation can result in a diminution of corrupt practices by shifting the emphasis of an operation from an amorphous and opaque public sector to the transparent discipline of the private sector's pursuit of profit. Privatisation can reduce forms of corruption: managers of companies make decisions that ultimately have to satisfy owners instead of public officials; government assets for which no one is held accountable cease to exist; and once a particular privatisation has been completed, the company can conduct its affairs without government interference.

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<sup>92</sup> <http://www.usrbc.org/RABD/Initial%20May02/fulltext.htm#IA>

To be effective, however, policies must go beyond the mere process of privatisation and address the integrity of the markets in which the privatized concerns are to function.<sup>93</sup> As commentators such as economist Jeffrey Sachs have pointed out, a change of ownership in itself is insufficient to achieve economic performance gains. It is only when the legal and regulatory institutions supporting private ownership are in place and functioning that the owners can exercise their new rights and improve productivity and profitability.<sup>94</sup> More than this, schemes that do not create arrangements that are conducive to effective corporate governance are unlikely to achieve the desired outcomes.<sup>95</sup>

Experience in Eastern and Central Europe and elsewhere has shown how privatisation can create opportunities for politicians to distribute favours to their friends. Major economic assets have been let go at knock-down prices and still remain in the hands of elites. New owners who have acquired companies through patronage have tended to be very slow in restructuring them, and many such companies have had to be bailed out by the state. Although a government can privatise “profit”, where strategically important assets are involved they cannot privatise the “risk”.

The IMF senior official Vito Tanzi has commented that privatisation of “non-natural monopolies” is necessary to keep state enterprises from being used as a corrupt source of financing for political parties and to provide employment for those with party connections. “Unfortunately,” Tanzi writes, “the process of privatising public or state enterprises has itself created situations whereby some individuals (ministers, high political officials) have the discretion to make the basic decisions, while others (managers and other insiders) have information not available to outsiders so that they can use privatisation to benefit themselves ... The abuses appear to have been particularly significant in the transition economies [in which] terms such as asset stripping and nomenklatura privatisation have been used to describe the abuses associated with the transfer of state enterprises to private ownership... [This] leads to the conclusion that the current interest in corruption probably reflects an increase in the scope of the phenomenon over the years and not just a greater awareness of an age-old problem.”<sup>96</sup>

One critic of the privatization of essential services has commented that, “The problem for any government which attempts to run its services on free-market principles is that some people cannot afford to pay... [When] pre-paid meters were first installed ... those who had no money had to draw their water from the rivers. The inevitable outbreak of cholera infected over 100,000 people, and killed 260. The meter scheme was dropped.”<sup>97</sup>

In some countries, mass privatisation schemes have been implemented. They were considered to be a corruption-free way in which to distribute assets fairly. However, in terms of

<sup>93</sup> Public Services International (PSI)’s Research unit claims that multinationals privatizing water in the developing world are dogged by corruption, close to financial collapse and have long records of exploiting the poor: <http://www.labournet.net/world/0208/psi4.htm>

<sup>94</sup> Jeffrey Sachs, Clifford Zinnes and Yair Eilat, The Gains from Privatization in Transition Countries: Is Change of Ownership Enough? : <http://www.cid.harvard.edu/caer2/htm/content/papers/confpubs/bns/dp63bn.htm>

<sup>95</sup> Privatizing State-owned Enterprises: An Overview of Policies and Practices in OECD Countries (OECD Paris, 2003) ISBN 92-64-10408-9. p.17.

<sup>96</sup> Vito Tanzi, Corruption Around the World, IMF Staff Papers Vol.45 No.4 (December 1998) <http://www.imf.org/external/Pubs/FT/staffp/1998/12-98/pdf/tanzi.pdf>

<sup>97</sup> George Monbiot, Exploitation on tap: Why is Britain using aid money to persuade South Africa to privatise its public services? *Guardian* (UK), 19 October 2004: <http://talk.workunlimited.co.uk/print/0,3858,5042241-111446,00.html>

economic criteria, this approach failed because it did not result in raising capital, improving management or in restructuring companies to meet market challenges.

In many parts of the world, too, even when privatisation is not actually corrupt, there have been instances where the officials responsible for the privatisation policies (and their private sector advisors) have been inadequately informed as to the value of the assets they are selling. In particular, management buy-outs have been exorbitantly profitable where those individuals calculating prices have had inadequate records of even such obvious assets as land ownership.

Given public distrust of politicians and of private sector interests, privatisations will always carry a degree of political risk. Experience suggests that this is best minimised by making the whole process as transparent as possible, including, most importantly, the criteria against which the bidders will be judged.

Corruption does not, of course, take place only within the public sector. Nor is it restricted to public procurement transactions involving both the public and private sectors. It can also take place within and between private sector organisations, when corporations abuse market power in areas of the economy that should be governed by a country's competition policy.<sup>98</sup>

The development of a sound competition policy is an essential tool for protecting and promoting economic activity, and for underwriting the integrity of private sector activities. It determines appropriate ways in which the private sector should function, thus ensuring that its performance serves the best interests of all.

A prime purpose in developing a sound competition policy is to minimise the scope for rigging markets. To this end, cartels and bidding rings should be outlawed. Such a policy also aims to reduce barriers to business entry, thereby expanding opportunities for small and medium-sized businesses. Another objective is the establishment of sound corporate governance.

Some might be forgiven for thinking that competition policy and its laws are designed only for rich and urban societies. However, today's industrialised countries also once laboured under the handicaps of rampant corruption and blatantly self-interested government. To escape from this situation, a growing number of countries have opted for competition policies governing their market activities.<sup>99</sup>

Although it can be said that every country has a policy on competition, even if this 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.<sup>100</sup>

Others might think that competition law is intended to impose forms of capitalism at the expense of the poor and the vulnerable. In fact, its functions are, if anything, the reverse. They are not confined to the economic. They also include social objectives, including equity,

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<sup>98</sup> For a detailed discussion, see John Nellis, The World Bank, Privatization and Enterprise Reform in Transition Economies: A Retrospective Analysis: [http://www-wds.worldbank.org/servlet/WDS\\_IBank\\_Servlet?pcont=details&eid=000094946\\_0203080405032\\_5](http://www-wds.worldbank.org/servlet/WDS_IBank_Servlet?pcont=details&eid=000094946_0203080405032_5)

<sup>99</sup> For a discussion, see Jeremy Pope, Competition Policy and Containing Corruption: <http://www.transparency.org/sourcebook/26html>.

<sup>100</sup> At present, some 80 of the World Trade Organization's members have such a law, and the number is increasing. Recent examples include Thailand and South Africa, where competition commissions have been established.

the welfare of consumers and the enhancement of the quality of life for all (and particularly that of those most at risk).

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. As many now believe, the route to development for the world's poorer nations may lie in enhancing private sector activity, rather than by way of the failed government-led commercial activities of the past. A sound competition policy can, therefore, provide the bedrock for a country's development.

## **IX. CONCLUSION – ARE WE MAKING PROGRESS? THE IMPACT OF PUBLIC SERVICE ETHICS ON THE MILLENNIUM DEVELOPMENT GOALS (MDGS)**

At the end of the day we must ask ourselves: are efforts to contain corruption meeting with success? Intuitively we know they must be, despite the well-known Corruption Perceptions Index, compiled by Transparency International, annually suggesting that little if anything has changed in countries with severe corruption problems. Throughout the world public services are being reformed, systems of government are opening up, people are more able than ever to know about the functioning of their administrations, are more aware of their rights and are engaging in dialogue with decision makers. In many countries democratic practices are evolving – slowly, erratically, and not always progressively, but nonetheless the leaders of many are now more accountable to their citizens than ever before.

For over a decade now, the international community has engaged with the issue, giving rise to a web of international conventions, some with monitoring provisions, others, as yet, without. International judicial assistance is being taken to new levels of cooperation, particularly in the area of asset repatriation. The World Bank has demonstrated remarkable leadership, turning on its head decades of declining to tackle the issue and leading the way in actively debarring the corrupt from its projects. A major process of standard setting has resulted in a plethora of codes and requirements across the private sector, the banking system and international bourses.

Progress is being made, however tentative, in putting many of these into practice. In these efforts, the Global Compact, between leading private sector interests and the United Nations, with its “tenth anti-corruption principle” launched in June 2004, has the potential to achieve meaningful change.<sup>101</sup>

The practices of donors, too, have evolved with the realisation that building just and honest administrations is a long-term undertaking, and not one for which exit strategies can be designed. For sustainable development to be achieved, it is not enough for a country's institutions to be honest, they must also be competent. One can point to highly corrupt administrations that have been efficient, and arguably more effective in their developmental efforts, but at the price of wholly unacceptable human rights abuses. An interesting development is the establishment by USAID of the \$US5 billion Millennium Challenge Account, a “new compact for global development ...which links greater contributions from developed nations to greater responsibility from developing nations”.<sup>102</sup>

These advances have been underscored by the emergence of a range of networks. Within the UN, the inter-agency anti-corruption coordination meeting (the International Group on Anti-

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<sup>101</sup> [http://www.transparency.org/un\\_day/dnld/global\\_compact.pdf](http://www.transparency.org/un_day/dnld/global_compact.pdf)

<sup>102</sup> <http://www.mca.gov/> The MCA is not without its critics, who point to problems of indicators and measurement which will be applied to determine eligibility.

Corruption) has been established; the Development Assistance Committee (DAC) of the OECD is addressing the issue; a group of donor countries has been formed under the Utstein umbrella to share experience and pool resources; the GRECO Group of States Against Corruption has been conducting peer evaluations, as have the signatories to the OECD Convention Against the Bribery of Foreign Public Officials in International Business Transactions under the auspices of its active Working Group on Bribery in International Business Transactions. The same processes are getting underway in sub-Saharan Africa with NEPAD. The OECD has also been providing a lead in promoting best practice in the field of public sector ethics, both with its member countries and beyond, with the wider world.<sup>103</sup>

As well as governments, others have come together. These include the Group of Parliamentarians Against Corruption (GOPAC)<sup>104</sup>, the chief justices of the Judicial Integrity Group<sup>105</sup>; academics and training institutions under the rubric of the Public Integrity Education Network (PIEN)<sup>106</sup>; members of the International Chamber of Commerce with its Commission on Anti-Corruption<sup>107</sup>; and global banks under the caption of the Wolfsburg Principles<sup>108</sup>.

In almost every country, there are civil society groups active on the ground – lobbying for institutional change, public awareness raising and working to empower citizens in their day-to-day lives. People are more engaged with the issue than ever before, monitoring the activities of their governments in public procurement and in service delivery and organising themselves in order to press for needed reforms, be it improved access to information or perhaps the establishment of an Ombudsman.

Corruption, long rampant in the extractive industries, is being tackled jointly by governments and corporations through the Extractive Industries Transparency Initiative (EITI), the brainchild of the NGO, Global Witness and an example of governments listening to, and responding, to constructive proposals emanating from civil society.<sup>109</sup>

At the national level a very steep learning curve continues. New tools and approaches are being generated, and many lessons are being learned along the way, among them being that:

1. it is not enough for an incoming president to be personally committed to anti-corruption reforms – existing corrupt networks will be resilient and able to frustrate reforms unless the new president has sufficient support throughout the administration;
2. when leaders come to power on high-profile anti-corruption platforms, public expectations for immediate reductions in corruption levels can be unrealistically high, leading to swift disillusionment;

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<sup>103</sup> Among other relevant monitoring mechanisms are those of the Financial Action Task Force and the Multilateral Evaluation Mechanism (MEM) of the Inter-American Drug Abuse Commission.

<sup>104</sup> [http://www.parlcent.ca/gopac/index\\_e.php](http://www.parlcent.ca/gopac/index_e.php)

<sup>105</sup> <http://www.tiri.org/implementation/judicial-integrity.html>

<sup>106</sup> [http://www.ceu.hu/cps/res/res\\_pien\\_firstmeeting.htm](http://www.ceu.hu/cps/res/res_pien_firstmeeting.htm)

<sup>107</sup> [http://www.iccwbo.org/home/menu\\_extortion\\_bribery.asp](http://www.iccwbo.org/home/menu_extortion_bribery.asp)

<sup>108</sup> <http://www.wolfsberg-principles.com/>

<sup>109</sup> <http://www.eitransparency.org/>

3. making a break with the past is difficult, as amnesties and the like run into public and legislative opposition;
4. “country strategies” to combat corruption are frequently no more than “wish lists”, quite incapable of implementation within existing absorptive capacity and frequently lacking any strategic thinking in the sense of sequencing;
5. it is insufficient to address problems in isolation, as elements interact within integrity systems;
6. there are no “quick fixes” or “magic bullets”, and certainly a single anti-corruption agency is unable by itself to address deep-seated problems;
7. anti-corruption laws are not a complete answer in countries where there is systemic corruption in the judicial system;
8. transparency in and of itself does not necessarily bring accountability;
9. building an ethic of “public service to serve the public” throughout an administration that has been experiencing serious systemic corruption problems is a huge undertaking, but without major changes in attitude and behaviour significant progress is likely to remain elusive – institutional integrity management should therefore be an integral element in any public service reform programme;
10. countering corruption in the public sector is the task of every manager in his or her daily work, and this calls for continuous training in the recognition of “red flags” and in corruption risk management;
11. the pursuit of “absolute integrity” is unrealistic and counter-productive – managers will always need areas of discretion or administrations will become rule-bound; and
12. donors must achieve much higher levels of cooperation if their collective efforts are to bear fruit, and accept that imposed conditionalities seldom have desired outcomes.

Yet, for all this, there are those who see the glass as being at least half empty. At times, globalisation, for all the benefits that are claimed for it, can seem to be undermining international governance structures and making possible corruption on a scale never before seen. Political corruption and private sector corruption has never seemed to be as visible, though it is at least arguable that this is due, in part, to the emergence of a freer media operating with improved access to information, coupled with a more assertive stance adopted by enforcement agencies. Policies of decentralisation, by governments whose central accountability structures are far from being optimal, seem to some, to be pouring fuel on the corruption fire. Civil society, too, is being viewed with increasing suspicion in a number of countries, and it needs to better its own processes of transparency and accountability.

Given this somewhat confused picture, there are those who may think that corruption will always be with us and that efforts to date have been overly ambitious. Such feelings of negativism render the quest for reliable indicators more urgent than ever before.<sup>110</sup>

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<sup>110</sup> The recent resignation by John Githongo, on whom so many had pinned their hopes, from his post in the Office of the President in Kenya is forcing a reappraisal of the forces even the best-equipped of reformers are up against.

Measuring perceptions is relatively simple but clearly insufficient. Yet how does one measure reality when those realities lie cloaked in secrecy? It is generally accepted that crude, single-figure country “corruption scores” have their uses for awareness-raising purposes, but are not designed to measure progress on the ground, or to provide data indicating precisely where attention is needed.

Fortunately, three new approaches to meet these needs have evolved. The first, a Public Integrity Index,<sup>111</sup> provides a quantitative scorecard of governance practices in a range of countries to assess the extent of citizens' ability to ensure their government is open and accountable. The second is the Country Assessment in Accountability and Transparency (or CONTACT) model, developed by the UNDP with the main objective being to “assist governments in conducting a self-assessment of their financial management and anti-corruption systems.” The stated reason for the initiative being to provide “an international, uniform and comprehensive set of guidelines to any stakeholder in financial accountability.”<sup>112</sup>

Under a third and complementary approach, the functioning of National Integrity Systems are starting to be “mapped”, and in ways that can provide much greater insight than hitherto, as to where things are going wrong, and why, and where progress is being made. The tracking of the success or otherwise of reforms provides information that is presently not available.<sup>113</sup> As the World Bank’s Dani Kaufmann has observed, one does not fight corruption simply by “fighting corruption”. He notes that “Merely embarking on more campaigns, adopting more anti-corruption laws, or creating anti-corruption commissions will not do... The answer is to take a complex, systemic view of all the institutions and governance components in a country.”<sup>114</sup> National Integrity System mapping enables just that.

What, then, does this mean for the achievement of the Millennium Development Goals? At the macro level, it suggests optimism that the anti-corruption efforts will yield short-term significant gains towards the MDGs needs to be tempered by reality.

That said, there is encouraging news at the micro level. The success, for example, of reforms efforts to get budget moneys to schools in Uganda, and so to advance the MDG goal of education, shows that when people and reformers coordinate their efforts, corruption and incompetence can be squeezed and positive results can be quick to show.<sup>115</sup> The reforms in Uganda involved much more than simply posting school budgets on the school-house doors, as they are sometimes portrayed. Civil society, through the parents, played a significant monitoring role, but it was one only made possible by reforms in financial management. Such collaboration between service providers and their clients offer fruitful fields for further endeavour.

The most effective way forward would seem to involve two complementary approaches. One, at the macro level, focussing on strengthening national integrity systems in an holistic and informed manner. The second, working with citizens on the ground, actively involving them in the formulation and implementation of policies that affect their daily lives. Taken together, these approaches offer promising prospects for concrete progress in the present “third” and most testing phase of anti-corruption work – that is, putting newly-agreed standards into practice and thereby contributing significantly towards the realisation of the Millennium Development Goals.

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<sup>111</sup> <http://www.publicintegrity.org/ga/>

<sup>112</sup> [http://www.undp.org/governance/contact\\_2001.htm](http://www.undp.org/governance/contact_2001.htm)

<sup>113</sup> [www.griffith.edu.au/centre/kceljag/nisa/brown\\_uhr04.pdf](http://www.griffith.edu.au/centre/kceljag/nisa/brown_uhr04.pdf)

<sup>114</sup> No country is corruption-free, says World Bank *This Day*, 14 December 2004

<sup>115</sup> Ritva Reinikka and Jakob Svensson, “Fighting Corruption to Improve Schooling: Evidence from a Newspaper Survey in Uganda”: [econ.lse.ac.uk/staff/rburgess/eea/svenssonjeea.pdf](http://econ.lse.ac.uk/staff/rburgess/eea/svenssonjeea.pdf).