

# BEST PRACTICES IN COMBATING CORRUPTION



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## INTRODUCTION BY DR MARCIN ŚWIĘCICKI

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*“Power tends to corrupt; absolute power corrupts absolutely.”*

*– British historian Lord Acton, 1887*

No country, however democratic, is free from corruption. This social ill touches government officials, politicians, business leaders and journalists alike. It destroys national economies, undermines social stability and erodes public trust.

Corruption lowers tax revenue, inflates costs of public services and distorts allocation of resources in the private sector. The negative correlation between good governance and economic development has been identified. Corruption humiliates the ordinary citizen and weakens the state.

The fight against corruption has been recently placed high on the agenda of the OSCE states. The 1999 Istanbul Charter for European Security calls for anti-corruption efforts to intensify. In 2001, under Romanian chairmanship, the Economic Forum in Prague and subsequent seminar in Bucharest in 2002 were devoted to good governance. The OSCE Office for Democratic Institutions and Human Rights and the OSCE field presences have organized debates and training programs. In some cases, the OSCE has worked with both international and local partners in anti-corruption campaigns.

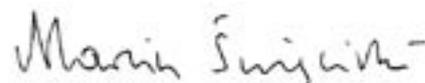
In December 2003, the OSCE reaffirmed its own commitment to good governance with the New Strategy Document for the Economic and Environmental Dimension. Commitments of all 55 participating States addressing transparency and corruption will be subject to systematic review. At the same time, OSCE institutions offer assistance to participating States in streamlining legislation, building institutional capacity and developing national anti-corruption strategies. This booklet serves as a confirmation of that pledge.

Elsewhere, other international organizations – the United Nations, the Council of Europe, the Organization for Economic Cooperation and Development as well as the World Bank and the European Bank for Reconstruction and Development – have launched similarly aggressive campaigns.

Political leaders in many countries have already declared combating corruption as their priority. In some countries national plans of combating corruption are being created and specialized agencies established. There is a growing number of international and national non-governmental organizations engaged in unmasking corruptive practices. Media, wherever free, denounces corruption in politics and business.

Yet practical knowledge of how to wage an effective anti-corruption campaign remains limited. To assist OSCE member-states in their endeavors, this booklet provides examples of best practices from the OSCE region and beyond. The described case studies are not meant as made-to-order solutions for fighting corruption. Rather, they are narrative examples whose lessons can be applied as individual country circumstances allow.

The booklet is addressed to legislators, public officials, media, NGOs, business circles and civil society at large. For those readers interested in gaining more detailed information on the practices cited here, an extensive list of Web sites and other materials has been provided at the end.



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What is an “open society”? An open society recognizes that no one has a monopoly on the truth. Citizens can vigorously debate government policies and the future direction of their country. Freedom is maximized, 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 – examples range from France to Sweden – but of a sincere commitment to government transparency and civil rights.

The concept of an open society first entered the modern political lexicon with the publication of one of the 20th century’s most influential books. Karl Popper’s 1945 landmark study *The Open Society and Its Enemies* prophesied the collapse of communism and exposed the flaws of socially engineered political systems. It argued for the widest possible freedoms, but also cautioned that “We must [also] construct social institutions, enforced by the power of the state, for the protection of the economically weak...”

But open societies can be traced still further back in history, to ancient Greece. Pericles, the legendary leader of Athens from 462 BC – 429 BC had a vision of society still relevant for the world today:

*Our political system does not compete with institutions which are elsewhere in force. We do not copy our neighbors, but try to be an example. Our administration favors the many instead of the few: this is why it is called a democracy. The laws afford equal justice to all alike in their private disputes, but we do not ignore the claims of excellence. When a citizen distinguishes himself, then he will be called to serve the state, in preference to others, not as a matter of privilege, but as a reward of merit; and poverty is no bar.*

*The freedom we enjoy extends also to ordinary life; we are not suspicious of one another, and we do not nag our neighbor if he chooses to go his own way. ... But this freedom does not make us lawless. We are taught to respect the magistrates and the laws, and never to forget that we must protect the*

*injured. And we are also taught to observe those unwritten laws whose sanction lies only in the universal feeling of what is right ...*

*Our city is thrown open to the world; we never expel a foreigner ... We are free to live exactly as we please, and yet, we are always ready to face any danger.... To admit one’s poverty is no disgrace with us; but we consider it disgraceful not to make an effort to avoid it ... We consider a man who takes no interest in the state not as harmless, but as useless; and although only a few may originate a policy, we are all able to judge it. We do not look upon discussion as a stumbling block in the way of political action, but as an indispensable preliminary to acting wisely...*

Today, the open society model faces fresh challenges. Corruption is one of the most insidious. In both the Balkans and the former Soviet Union, citizens and elected leaders have long struggled against what the World Bank describes as the “state capture” phenomenon. This occurs when organized crime groups and oligarchs infiltrate government affairs or corrupt public officials use their positions to finance lucrative businesses. The long-term effects of this phenomenon are devastating. But they can be avoided.

In recent years, numerous non-governmental organizations have undertaken campaigns to help countries realize the goal of good governance. One of the most prominent is the Open Society Institute, run by Hungarian-born philanthropist George Soros. Other noteworthy organizations concerned with the construction of an open society include Transparency International, Reporters Without Borders, Internews, and Article 19.

A recent World Bank report found that governments with greater transparency do, in fact, govern “better.”<sup>1</sup> The trick is how to make that desire a reality.

## BUILDING AN OPEN SOCIETY

A guaranteed access to information is the most critical element for building a successful open society. Freedom of speech and freedom of asso-

ciation also play a crucial role. Citizens should be able to discuss the issues of the day, to challenge the media and government, and, when they see fit, to take to the streets to register their protest in peaceful demonstrations. In turn, those in positions of public trust and authority are expected to listen to citizens' concerns. Voters should be consulted on proposed legislation. Except in extreme circumstances, legislatures should sit in public sessions, and their committee hearings should be open to all.

Underpinning these processes is 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 responsibilities to filter information fairly and objectively so that news consumers are accurately informed.

The purpose of such information access is clear: to safeguard 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 for their own.

In an effort to hold its public servants to such standards, the United Kingdom introduced a broad code of behavior in 1994 for those in public life. Developed under the stewardship of Lord Nolan, *the Seven Principles of Public Life*<sup>2</sup> can be applied universally, regardless of differences in politics, history or culture:

**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.*

**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, legislators, civil and foreign service officers, the judiciary, and local government*<sup>3</sup> – *can help countries put these principles to work. – Similarly, citizens' charters, compel government agencies to provide certain levels of service to citizens and to solicit complaints if these levels are not met.*

Public appointments should be made openly and based on merit<sup>4</sup>. Public bodies, too, and their boards must observe high standards of propriety involving impartiality, integrity and objectivity in relation to their stewardship of public funds. They will maximize value for money by ensuring that services are delivered in the most efficient and economical way on budget and with an independent validation of their performance, wherever practicable. They should be accountable to the legislature, and to the public at large for their activities, their financial management and the extent to which objectives have been met.

Government contracting should occur through an open tendering process so that citizens have full information about a government's commercial ties.

This helps curtail cronyism and political patronage financed at the public's expense. A financial watchdog should testify publicly to the legislature about the government's performance in these areas and its report should be published promptly. An aggrieved citizen should have access to an ombudsman, whose reports would also be made public and who would work to guarantee that any corrective action is timely.

Increasingly, to enhance national security in the face of rising terrorism, the argument is being made throughout the democratic world that such freedom of speech and assembly and right to public information should be restricted. Though the reality of the threat cannot be denied, in effect, this argument achieves what terrorists aim: the destruction of a civil society. A balance needs to be struck.

Corruption, like terrorism, thrives on a lack of reliable information. As the 1987 Nobel Peace Laureate Oscar Arias Sanchez has observed:

*We must not despair of arresting the cancer of corruption. As much as we speak of the globalisation of corruption, we must also welcome the global tidal wave of public demands for good government. Today, national leaders are beginning to accept that corruption must be discussed on the domestic and international stages.*

*But our most important weapon in the war against corruption will be the growing number of democracies and, consequently, free presses around the world. Without the freedom to ask questions, or to effect change, people are not empowered – they are, instead, caught in a system of superficial democracy. One of the most important freedoms in a democracy is the freedom of the press. When the voice of one man or woman is suppressed, all voices are in danger of being silenced. When even the smallest part of truth is hidden, a great lie may be born.<sup>5</sup>*

## ACCESS TO INFORMATION

The greater the information made publicly available and the more certain its accuracy, the greater the chances for a transparent and truly accountable

government. Without such access, confidence in public institutions is placed in jeopardy.

However, even when a society recognizes the importance of freedom of information, without a legally-enforceable right to information, citizens are often left at the mercy of public officials and politicians who may be reluctant to part with certain information. To correct this practice, the Council of Europe has come down firmly in favor of a formal guarantee:

*Member States should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including that of national origin.<sup>6</sup>*

*A sound freedom of information act may, therefore, be seen as providing the foundation for a sustainable democracy.*

## ACCESS TO INFORMATION LEGISLATION

Article 19 of the Universal Declaration of Human Rights provides a starting point for this process, but its applications are limited<sup>7</sup>. The article is clearly aimed at curtailing government censorship, rather than promoting government transparency.<sup>8</sup> Thus, the task of the reformer is to elaborate on Article 19.

One can start with the assumption that all information belongs to the public. Unless there are compelling reasons why it should be withheld, information is held in trust by the government to be used in the public interest.<sup>9</sup>

The approach adopted in such countries as Brazil and New Zealand has been to create a legal requirement that all official information be made available to anyone who seeks it unless there is adequate cause to withhold it.<sup>10</sup> If the starting point is that information belongs to the state and is to be used in the interests of the government, then any resulting rights will be of little value in advancing a democratic environment or informed debate. Section 5 of the 1982 New Zealand Official Information Act provides that:

**5. Principle of availability** – *The question whether any official information is to be made available... shall be determined, except where this Act otherwise expressly requires, in accordance with the ... principle that the information shall be made available unless there is good reason for withholding it.*<sup>11</sup>

There is no reason why, in any open and democratic society, state revenues should be kept secret from citizens. Nor, in a democratic society, why extra-budgetary funds should be maintained outside the government's formal accounting arrangements. In the interests of transparency and accountability, the whole of the state's revenues should be accounted for in its official budget. The budget should be audited by an independent financial watchdog and the findings made public. There is also a growing global consensus that recognizes the right of citizens to know what their governments receive as payments for the exploitation of natural resources. In this regard, transactions with multinational corporations ought not to be kept secret.

#### **SOME EXAMPLES FROM CENTRAL AND EASTERN EUROPE**

Among other countries in the OSCE region, Latvia uses a constitution that specifically provides for access to information. It states:

**Article 100.** *Everyone has the right to freedom of expression which includes the right to freely receive, keep and distribute information and to express their views. Censorship is prohibited.*

**Article 104.** *Everyone has the right to address submissions to State or local government institutions and to receive a materially responsive reply.*

**Article 115.** *The State shall protect the right of everyone to live in a benevolent environment by providing information about environmental conditions and by promoting the preservation and improvement of the environment.*

Similarly, Latvia's 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. Information can only be limited by law; if the information is for an institution's internal use; if it is a trade secret unrelated to public procurements or information about the private life of an individual; or if it concerns evaluation and certification procedures.

Appeals can be made internally to a higher government body or directly to a court. For example, in 1999 the Latvian Constitutional Court ruled 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.

Similar conditions prevail in Bulgaria, where Article 41 of the 1991 Bulgarian Constitution states:

**(1)** *Everyone shall be entitled to seek, receive and impart information. This right shall not be exercised to the detriment of the rights and reputation of others, or to the detriment of national security, public order, public health and morality.*

**(2)** *Citizens shall be entitled to obtain information from state bodies and agencies on any matter of legitimate interest to them which is not a state or other secret prescribed by law and does not affect the rights of others.*

In 1996, Bulgaria's Constitutional Court ruled that, though the constitution gives any person the right to information, additional legislation was needed to determine the conditions under which this prerogative would be restricted. After a number of lower courts had rejected requests by citizens and non-governmental organizations (NGOs) to obtain information, the Access to Public Information Act was enacted in 2000. It allows for any person or legal entity to demand access to any information held by state institutions.

The Personal Data Protection Act, which came into force in January 2002, gives individuals the right to access and correct information held about them by both public and private organizations. A Data

Protection Commission was created in 2002 to oversee the implementation of this act. In 2002, a bill on the National Archives was introduced. At present, Bulgarians have no right of appeal if access to these records is denied.

As did other countries in the region, Bulgaria passed a Law for the Protection of Classified Information in April 2002 as part of its attempt to join the North Atlantic Treaty Organization (NATO). The bill created a Commission on Classified Information appointed by the prime minister, and four levels of security for classified information. The law provides a very broad scope of classification. Anyone who is empowered to sign a document, may also classify it. There are no overriding public interest tests that can reverse the decision to classify a document. A short citizen's handbook has been published online that explains how the Bulgarian legislation works.<sup>12</sup>

Under a separate law, the Administration Act, the Bulgarian Council of Ministers is required to publish a register of administrative structures and "all normative, individual and common administrative acts." A copy of the register is required to exist on the Internet.

A third example of information access laws in the OSCE region is Moldova, where Article 34 of the Constitution provides that:

*(1) Having access to any information of public interest is everybody's right and may not be curtailed.*

*(2) According to their established level of competence, public authorities shall ensure that citizens are correctly informed both on public affairs and matters of personal interest.*

*(3) The right of access to information may not prejudice either the measures taken to protect citizens or national security.*

*(4) The State and private media are obliged to ensure that correct information reaches the public.*

In addition, Article 37 provides for a right to environmental, health and consumer information:

*(2) The State guarantees every citizen the right of free access to truthful information regarding the state of the natural environment, living and working conditions, and the quality of food products and household appliances.*

Under the Law on Access to Information, which came into force in August 2000, citizens and residents of Moldova can demand information from state institutions, publicly financed organizations and individuals and legal entities that provide public services and have access to official information. Institutions must respond within 15 working days.

Restrictions can be imposed to protect the following kinds of information: state secrets related to military, economic, technical-scientific, foreign policy, intelligence, counterintelligence and investigation activities if publication would endanger state security; business information submitted to public institutions under terms of confidentiality; personal data whose disclosure may be considered a violation of individual privacy; information related to the investigative activity of corresponding bodies; and information that represents the final or intermediate results of scientific and technical research. Information providers must prove that the restriction is authorized by law and that the damage caused by publication would outweigh the public interest in disclosing the information.

In Moldova, appeals against refusals, delays, fees and damages can be made to the supervisor of the department that holds the information or its superior body. Denied requests can be appealed directly to the courts. They can also be appealed to the ombudsman. The Administrative Code and Criminal Codes were amended in 2001 to allow for fines and penalties for violation of the Access to Information Act.

The Federation of Bosnia-Herzegovina provides a fourth example. The Freedom of Information Act was adopted in October 2000 in Bosnia-Herzegovina and in Republika Srpska in May 2001. The law went into effect in February 2002.

The Act was initiated by the Office of the High Representative for Bosnia-Herzegovina, the chief civilian peace implementation agency in the coun-

try, which had directed that a freedom of information bill be developed. A high-level group of international and national experts prepared a draft bill in June 2000, based on some of the best practices from around the world.

The Act applies to information in any form held by any public authority including legal entities carrying out public functions. It also provides for a broad right of access for any person or legal entity, both in and outside of Bosnia. The request must be in writing. The government agency must respond in 15 days.

Information can be withheld if it would cause “substantial harm” to defense and security interests, the protection of public safety, crime prevention and crime detection. Non-disclosure is also mandated to protect the deliberative process of a public authority, corporate secrets and personal privacy. A public interest test is applied to any exemption.

An ombudsman hears appeals. Those who have been denied information can also appeal internally and challenge decisions in court. The Federation’s ombudsman has issued two opinions on the implementation of the Freedom of Information Act. The first, issued before the Act came into force, called for ministries to disseminate guides, compile a register and to designate information officers. In a second decision, the ombudsman recommended not releasing intelligence files related to candidates in an upcoming election.

Based on experiences across the OSCE region, as well as elsewhere, it is all too apparent that reforms take time to be implemented and for fresh approaches 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 meant that not as much use has been made of the legislation as its promoters had intended. This is, perhaps, only to be expected. On the positive side, a number of governments and NGOs are making efforts to educate the public and public officials alike as to the requirements of the new openness. New laws need to be promoted energetically if they are to have the desired effects.<sup>13</sup>

## LIMITS

As we have seen from the regional examples, any freedom of information law will come accompanied by certain restrictions. A major challenge is what the criteria should be for those limits. Inevitably, exceptions will include state security, law enforcement, personal data on other individuals and commercially sensitive information.

The global non-governmental organization Article 19 has developed a sample freedom of information law for use in crafting such legislation.<sup>14</sup> This example bill includes the following restraints:

- ▶ *Unreasonable disclosure of personal information*
- ▶ *Information that cannot be used in court proceedings as evidence etc.*
- ▶ *Commercial or confidential information involving a breach of confidence, trade secrets, or whose disclosure would be likely to seriously prejudice the commercial or financial interests of a third party*
- ▶ *Confidential information obtained from another state or from an international organization that cannot be disclosed without seriously prejudicing relations with that state or organization*
- ▶ *The release of information that would be likely to endanger the life, health or safety of any individual*
- ▶ *Law enforcement records which would be likely to cause serious prejudice to law enforcement activities if made public*
- ▶ *Information that would likely jeopardize national security or defense*
- ▶ *Economic information which could undermine the government’s ability to manage the economy or which would be likely to cause serious prejudice to the legitimate commercial or financial interests of a public body*

- ▶ *Information the release of which would be likely to cause serious prejudice to the effective formulation or development of government policy.*<sup>15</sup>

In 2002, the Council of Europe reinforced this approach, stating that “member states may limit the right of access to official documents.” However, the Council states that any limitation should be set down precisely in law; be necessary in a democratic society; and be in proportion to the value of the information under protection.

The Council of Europe recognizes that limits can be placed on public information within the following areas:

- ▶ *national security, defense and international relations*
- ▶ *public safety*
- ▶ *the prevention, investigation and prosecution of criminal activities*
- ▶ *privacy and other legitimate private interests*
- ▶ *public or private commercial and other economic interests*
- ▶ *the equality of parties concerning court proceedings*
- ▶ *the environment*
- ▶ *inspection, control and supervision by public authorities*
- ▶ *state economic, monetary and exchange rate policies*
- ▶ *the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.*<sup>16</sup>

At the same time, however, caution should be exercised in implementing such restrictions. For example, it is easy for the state security card to be overplayed. The concepts of state security and the security of the political elite can quickly merge where

there is the chance of political embarrassment. It is also the case that an Official Secrets Act can follow hard on the heels of a progressive Access to Information Act, effectively reclaiming most or all of the rights previously recognized.<sup>17</sup> Singapore prosecuted *The Business Times* for publishing an official prediction of the country’s likely economic growth – material freely available in other industrialized countries – and then curtailed the circulation of the international weekly *The Economist*, when it criticized the move.<sup>18</sup>

At first glance, personal privacy would seem to be a relatively easy issue to resolve. Few would argue against rights to the confidentiality of medical records, but there can be exceptions; for example, if a person suffers from a highly contagious, life-threatening communicable disease. Yet the values societies place on personal privacy vary and are often shaped by their differing histories. The fact that in Sweden a citizen can see his or her neighbor’s income tax return may not convince other countries that such openness is desirable.

Public figures often claim the right to not have their private lives exposed in the mass media. Courts around the world have tended to support the argument that public figures necessarily will have their lives subject to greater scrutiny by individuals and the media.<sup>19</sup> This means that in a growing number of countries public figures are having to put up with greater scrutiny of their private lives than might be permitted in the case of ordinary citizens. Politicians, in particular, have to act more aggressively in suing for defamation of character and, consequently, should be accorded far less protection in this area, too.

Pleas that desired information is too commercially sensitive to release are also common. Yet as a matter of principle, citizens have the democratic right to know about the details of commercial arrangements entered into between their government and its suppliers, all the more so in cases of privatization of public assets. Whereas confidentiality may characterize lawful transactions within the private sector, it can be indefensible when public money is at stake.<sup>20</sup> It is too easy for officials to strike deals with the private sector and then claim that the transactions are privileged and exempt from public scrutiny.

Perhaps the most problematic area of all is the extent to which citizens should have access to advice given to ministers and leaders by government advisors. Those who support limiting access to such information argue that policy recommendations from civil servants to their ministers need to be delivered frankly and fearlessly. Exposing such exchanges to public view, they say, would undermine an essential atmosphere of confidence and, ultimately, effective decision-making. Based on this reasoning, internal official documents are often exempted from freedom of information requirements. Though this argument may appear attractive, countries which have made such information available tend to have encountered few, if any, problems as a result, and also have scored consistently well in international corruption surveys.<sup>21</sup>

### IN CASES OF DISPUTE

Once a legal right to information with an appropriate breadth of scope has been established, how should competing interests be resolved in case of dispute? How easy should it be for political, as opposed to public, interests to prevail when a citizen – or journalist – makes a request for information?

In some countries, ministers enjoy a discretionary power to decline requests for information. Clearly, no minister should have this authority unless it can be reviewed on appeal, since the privilege can be effortlessly abused. Guidance notes should comprehensively identify when access may be blocked. Information should never be withheld if its release might be inconvenient or embarrassing to the minister or the department. Nor should ministers be able to block access with the argument that information does not concern the applicant or that it could be “misunderstood” by the applicant or by the media.<sup>22</sup>

Some countries allow for a right of appeal to an independent information commissioner, an ombudsman or an appeals body. Recommendations for disclosure are either accepted by the minister in question or taken on appeal to the judiciary. Elsewhere, appeal bodies can do no more than recommend that the minister reverse an earlier decision to deny a request, with no right of appeal to a court should

the minister fail to do so. Systems of governance may vary, but there is always a wholly unacceptable conflict of interest whenever and wherever an official acts as the judge in his or her own cause.

### INFORMATION CAMPAIGNS AND RECORDS MANAGEMENT

Should people always have to ask for the information to which they are entitled? One view is that public authorities should not simply wait until they are asked for information. They should develop policies that take essential information to the people before they ask for it. Such positive actions can be much more cost-effective, and of greater practical utility, than is the case when departments wait passively for the submission of inquiries.<sup>23</sup> It means, too, that the information can be processed into simple and meaningful messages which are much more helpful to citizens than reams of documents simply dumped onto a website. The preparation of meaningful messages should never be allowed to provide an opportunity for the manipulation and projection of half-truths.

Such a strategy can be particularly advantageous to governments with limited resources. By making information available in offices and other public places, the calls on staff time to respond to individual queries can be greatly reduced – and citizens can learn of their rights without even being aware of their entitlement to know.<sup>24</sup>

When we campaign for greater access to information we must at the same time campaign for improved records management. There seems little point in having access to information that is chaotic and unreliable. Systematic, complete and dependable record-keeping is a must. Reliable public sector records management systems are essential. Similarly, without paper trails, there is little or no accountability, and corruption can flourish in the vacuum.

Increasingly, the role of the chief archivist is coming into focus. Long overlooked, this official is increasingly seen as holding a key to accountability. The archivist's records can provide the paper trails crucial for exposing mismanagement and corruption. Unfortunately, their posts are generally junior,

and their work under-resourced. 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.

But as governments open up, reformers must be prepared to take the world as it is old records may be so chaotic as to render rights of access highly time-consuming, if not wholly fruitless. Indeed, 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.”<sup>25</sup>

In such cases, transitional arrangements are essential if citizens’ faith in their newly won rights is not to be lost. Rather than allow poor records management systems to be used as a reason to block reform, it may be better to start afresh. Rights of access should not be retroactive in areas where the existing information system cannot deliver documents reliably.

Whatever the course adopted, a clear duty must be imposed that the information provided be complete, coherent and comprehensible. Invariably, the cost factor is raised as an argument against reform. Should those asking for information be required to meet the costs of preparing the replies? If so, should there be limits? Obviously, high fees deter requests and so undermine the whole purpose of the exercise. Fortunately, governments are learning that the benefits of openness can outweigh any related costs. Furthermore, wherever legislation has been passed, only nominal processing fees tend to be required.

## INFORMATION AND THE PRIVATE SECTOR

The private sector, too, has its own needs for access to complete and reliable publicly information; in particular, that related to public procurement rules and exercises, which some countries are starting to make available through the Internet.<sup>26</sup>

Even though information held by the private sector itself is governed by considerations distinct from those applicable in the public arena, certain categories of information must be made available to consumers, suppliers and employees. Examples range from accurately labelled food to business accounts, from professional audit and financial services to personnel files.

The public rightly expects greater accountability whenever private entities carry out public functions or when a traditional state function is privatized. Private agencies cannot be permitted to obscure their public accountability. On the contrary, citizens are entitled to know much more about public-private undertakings than about activities that are entirely confined to the private sector. After all, such state-funded activities involve taxpayers’ money.

Citizens, pension funds and insurance companies are also entitled to expect honest financial information from publicly listed corporations. Private sector auditors should discharge their duties independently of audited corporations and with a view to the public interest – not one crafted to meet the narrow ends of senior managers with performance bonuses. The financial reports they produce are vital to the welfare of citizens. These professionals perform a public function by providing information that gives a true picture of the financial health of audited companies.<sup>27</sup>

To their credit, leading corporations are starting to accept the legitimacy of public concern and in some cases are responding by promoting access to information policies.<sup>28</sup> Indeed, accountability by the private sector to the public at large lies at the very heart of the growing corporate social responsibility movement.

## A CULTURE CHANGE

Even if the benefits of openness are understood, citizens with the right of access to information can appear threatening to officials accustomed to regarding their files as confidential and safe from the eyes of an inquisitive public.

A culture change is needed – from the most junior government staff up to the responsible minister. Through training and the leadership examples of those at the top officials must come to understand that the introduction of access to information policies can demonstrably increase the quality of

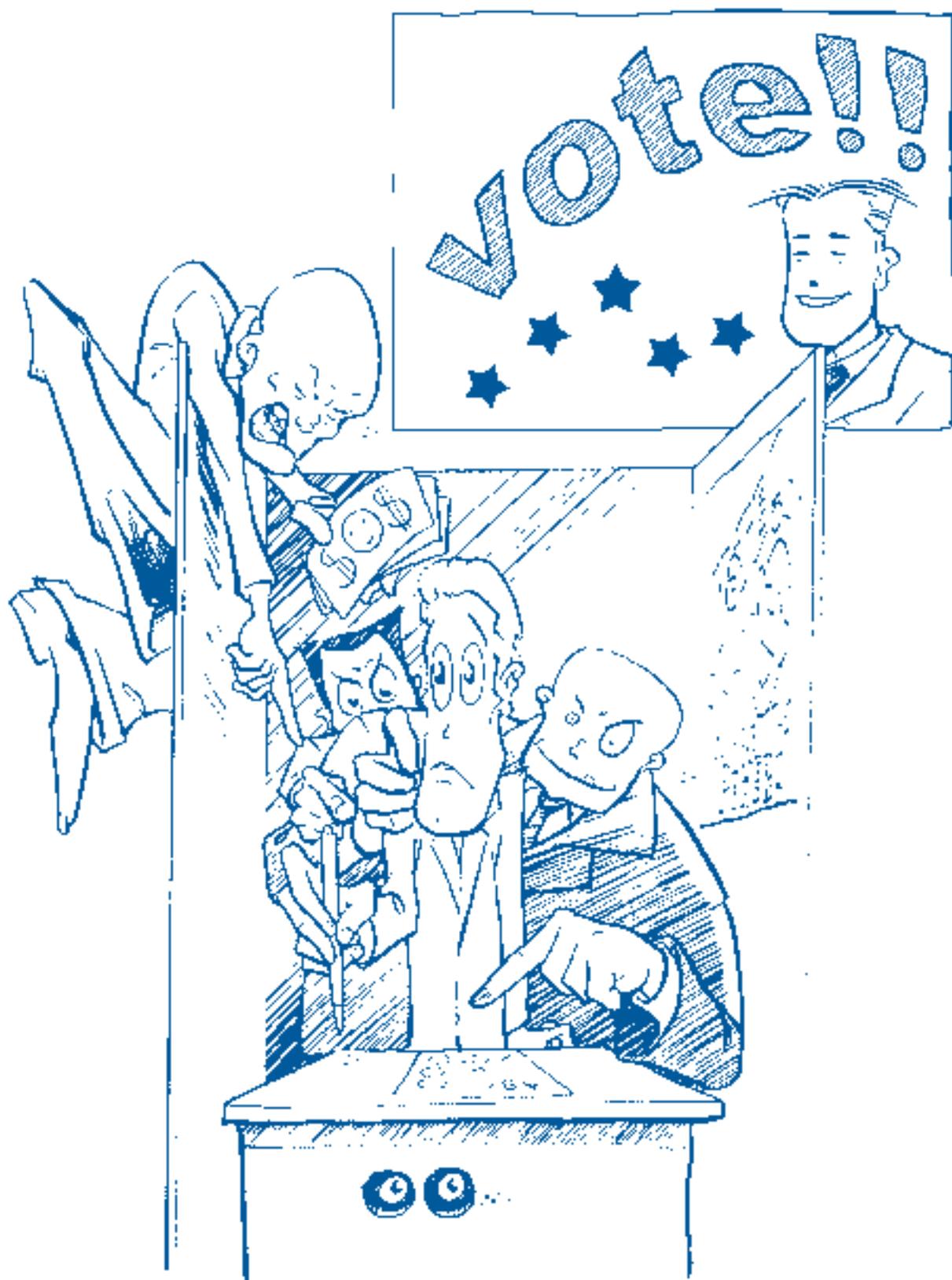
administration. Such policies foster a public sector ethic of service to the public, enhance job satisfaction, and raise the esteem in which public servants are held by the communities they serve, and in which they live.

#### ENDNOTES

- 1 The World Bank – Governance Policy Research Working Papers: <http://econ.worldbank.org/resource.php?topic=13&type=5> See also Governance Indicators: <http://www.worldbank.org/wbi/governance/govdata2002/>
- 2 UK Public Standards: [http://www.public-standards.gov.uk/about%20us/seven\\_principles.htm](http://www.public-standards.gov.uk/about%20us/seven_principles.htm)
- 3 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 United Kingdom'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 the 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.
- 4 For an example, see the Estonian Public Service Act (<http://unpan1.un.org/intradoc/groups/public/documents/NISPAcee/UNPAN007216.pdf>).
- 5 Transparency International Source Book 2000: <http://www.transparency.org/sourcebook/00-foreword.html>
- 6 Rec. (2002)2 of the Council of Europe Committee of Ministers to member states on access to official documents: [http://cm.coe.int/stat/E/Public/2002/adopted\\_texts/recommendations/2002r2.htm](http://cm.coe.int/stat/E/Public/2002/adopted_texts/recommendations/2002r2.htm). For a review of the position in Commonwealth countries, see Open Sesame: *Looking for the Right to Information in the Commonwealth*, a report prepared by a group of NGOs under the title of the Commonwealth Human Rights Initiative (2003): [http://www.humanrightsinitiative.org/publications/chogm/chogm\\_2003/default.htm](http://www.humanrightsinitiative.org/publications/chogm/chogm_2003/default.htm).
- 7 Article 19 proposes a model freedom of information law: See: <http://www.article19.by/publications/freedominfo/> The US Freedom of Information Act is the most open example of this type of legislation. See: [http://www.epic.org/open\\_gov/foia/us\\_foia\\_act.html](http://www.epic.org/open_gov/foia/us_foia_act.html); Australia's 1982 Commonwealth Freedom of Information Act 1982 at [http://www.comb.gov.au/publications-information/freedom\\_information.htm](http://www.comb.gov.au/publications-information/freedom_information.htm); and The Irish Freedom of Information Act (1997) at [http://www.finance.gov.ie/view\\_doc.asp?DocID=837](http://www.finance.gov.ie/view_doc.asp?DocID=837); For an analysis of Japan's first legislation on this topic, see <http://www.freedominfo.org/analysis/japan1/>.
- 8 See Anne Marie Goetz and Rob Jenkins, "Hybrid Forms of Accountability" Citizen engagement in institutions of public-sector oversight in India", *Public Management Review* Vol. 3 Issue 3 2001 pp 363-383. Also Rob Jenkins and Anne Marie Goetz, "Accounts and Accountability: theoretical implications of the right-to-information movement in India", *Third World Quarterly*, Vol. 20, No. 3, pp 603-622.
- 9 The Swedish government recently launched "Open Sweden", as part of its program "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 in the national government, and among the 150 Swedish public administrative bodies. The need for greater openness is of equal 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.
- 10 Brazilian Constitution, Article 5, Item 33. Such is also the case in New Zealand's 1982 Official Information Act. The act reversed the principle of secrecy set out in the 1951 Official Secrets Act, which it repealed.
- 11 1982 New Zealand Official Information Act 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).
- 12 Access to Information Programme (<http://www.aip-bg.org/library/laws/apia.htm>). See also the handbook How to Get Access to Information: Citizen's Guide (<http://www.aip-bg.org/handy.htm>).
- 13 The assistance of David Banisar of Privacy International in these matters is gratefully acknowledged. See also the websites for Privacy International (<http://www.privacyinternational.org/>) and for Article 19 (<http://www.article19.org/>).
- 14 Article 19 proposes a model freedom of information law: See: <http://www.article19.by/publications/freedominfo/>
- 15 Sections 25 to 32.
- 16 Rec.(2002)2 of the Council of Europe Committee of Ministers to member states on access to official documents: [http://cm.coe.int/stat/E/Public/2002/adopted\\_texts/recommendations/2002r2.htm](http://cm.coe.int/stat/E/Public/2002/adopted_texts/recommendations/2002r2.htm).
- 17 Zimbabwe combined the two approaches into one act, giving an apparently liberal title to a highly repressive set of provisions. In a June 17, 2002 article in Britain's Daily

Telegraph, license fees set under the act are described as "absolutely outrageous" and likely to induce several international news agencies to close their Zimbabwe operations. Others, such as the BBC, have already been forced out.

- 18 The Singapore *Business Times* editor was prosecuted with others under the country's Official Secrets Act for publishing so-called flash GDP estimates – early calculations of the most recent economic growth – before they were officially released. When the London-based *Economist* commented mockingly on the prosecutions it set in train a confrontation with the Singaporean government that led to *The Economist's* circulation in Singapore being curtailed. See: "Newspapers: a ban is not a ban unless restricted" by Francis T. Seow (former Solicitor General of Singapore), presented at an April 1998 conference on "The Limits of Control: Media and Technology in China, Hong Kong and Singapore" at University of California at Berkeley's Graduate School of Journalism. ([www.sfdonline.org/Link%20Pages/Link%20Folders/Press%20Freedom/seow.html](http://www.sfdonline.org/Link%20Pages/Link%20Folders/Press%20Freedom/seow.html)).
- 19 "Hollow victory reflected in paltry damages", *The Times* of London (UK), 29 March 2002: "*The Mirror* was entitled to show that [supermodel Naomi Campbell] was lying about not being a drug addict and receiving treatment. But the newspaper went too far in publishing sensitive personal data"... "Progress is far from universal, as Zimbabwe's laws forbidding criticism of its president make plain.
- 20 "Public Fraud Initiative," *The Guardian* (UK), 18 June 2002: "False accounting exposes private cash for public services as a theft from the taxpayer ..."
- 21 The Scandinavian countries and New Zealand invariably head international corruption surveys as among the countries least tainted by corruption.
- 22 New Zealand State Services Commission, 1995.
- 23 Such a requirement is now imposed on local authorities in Britain. See the website of the Standards Board for England at [www.standardsboard.co.uk/guidance/guidance\\_index.htm](http://www.standardsboard.co.uk/guidance/guidance_index.htm).
- 24 For example, in Indonesia, the World Bank has encouraged the erection of billboards on development sites carrying details of the particular project underway. The local community can then follow the process and monitor the undertaking. See Jenkins and Goetz. See also Anne Marie Goetz and Rob Jenkins, "Hybrid Forms of Accountability" Citizen engagement in institutions of public-sector oversight in India", *Public Management Review* Vol. 3 Issue 3 2001 pp 363-383. Also Rob Jenkins and Anne Marie Goetz, "Accounts and Accountability: theoretical implications of the right-to-information movement in India", *Third World Quarterly*, Vol. 20, No. 3, pp 603-622.
- 25 *The Washington Post* (USA), 1 May 2002.
- 26 A good example is the OPEN system of the South Korean city of Seoul; [www.transparency.org/building\\_coalitions/public/local\\_government/projects\\_topic/procurement.html](http://www.transparency.org/building_coalitions/public/local_government/projects_topic/procurement.html). See also Columbia's Government Portal [http://www1.worldbank.org/publicsector/egov/colombiaportal\\_cs.htm](http://www1.worldbank.org/publicsector/egov/colombiaportal_cs.htm) where the President has directed that all government agencies create a web site and post particular information there and conduct business on-line.
- 27 'The Ethical dimension – especially the question of the duties owed to people other than their clients – does not seem to have arisen...' Peter Martin in 'Accountants' Moral Duty', *Financial Times* (UK) 17 January 2002. See also *Financial Times* (UK), 5 March 2002.
- 28 One such initiative is by NIREX ([www.nirex.co.uk/publicn/guide.htm](http://www.nirex.co.uk/publicn/guide.htm)), a corporation 'working to develop safe and environmentally responsible solutions for the management of radioactive waste'. Its web-based "transparency policy" commits the corporation to "a policy of openness"; it also has a policy of responding to individual requests and provides for a right of appeal to an independent review panel.



No open society can exist without free and fair elections.<sup>1</sup> The challenge, however, is how to guarantee that an election meets international democratic standards. The Institute for International and Democratic Electoral Assistance (IDEA)<sup>2</sup>, a British non-governmental organization that promotes sustainable democracy worldwide, suggests several general guidelines:

- ▶ *Make institutions more effective representatives of the diverse composition and interests of the population (including gender equality)*
- ▶ *Delegate more power to local institutions*
- ▶ *Recognize opposition parties as essential elements of the political system and create mechanisms for co-existence and mutual respect between ruling and opposition parties*
- ▶ *Encourage the development of a sustainable party system*
- ▶ *Recognize and involve civil society, including critical lobby groups, such as human rights and minority groups, women's groups and women's political leagues as partners in the political and general development of each country*
- ▶ *Introduce laws and procedures that enhance the creation of a democratic environment in which political parties, local institutions, non-governmental organizations and media can operate freely.*

## ELECTIONS

A government gains its legitimacy from having won a mandate from the people. Elections that lack legitimacy can quickly breed civil unrest and instability, an environment in which corruption and human rights abuses can quickly establish themselves. The way in which this mandate is won is, therefore, crucial. Elections ought not only to be fair, but manifestly and openly be seen to be fair.

## AN INDEPENDENT ELECTORAL COMMISSION

The moral authority of the incoming government is greatly enhanced if the electoral processes have been efficiently and effectively overseen by an electoral commission that is seen to be independent.

Many countries have constitutional provisions for electoral commissions; others provide for them in legislation.<sup>3</sup>

Usually, such a commission consists of a group of persons drawn from across the spectrum of political parties, civil society and gender. The credibility of a commission depends largely on the manner in which its members are appointed. If appointed simply by the government and without consultation, the commissioners risk looking like government “stooges” with all that this implies for the acceptability of the results of any election. Therefore, it is generally thought best for political parties to consult with each other, and, if possible, agree upon commissioners before their appointment. Naturally, if political parties insist on the appointment of their own active supporters, it serves only to undermine the public's confidence in the commission to do its job impartially.

IDEA places paramount importance on the independence of a competent commission. They point out that election administration can be highly politicized and emotional, and that control over the electoral apparatus and manipulation of the process have been primary tools in the hands of non-democratic governments which seek to preserve their time in office. Election staff, too, can be seen as agents of the government, a particular party, or a sector of society.

In transitional regimes or new democracies, opposition parties often fear that incumbent parties will use their eventual control of the electoral apparatus to serve their own benefit.

Inexperienced commissions can also be suspect. Commissioners may be unknown or untested. Seasoned politicians and parties can exploit this inexperience. Such was the case in Cambodia's 1998 elections. Although the law called for a neutral election apparatus the ruling party still managed to

place its partisans, including government officials, into the system at many different levels.

Worldwide, distrust of elections is one of the primary reasons for the prevalence of additional safeguards during elections and for careful monitoring by both political parties and civil society. If participants or voters believe that an election is administered by one partisan group or is manipulated for political gain, they will not take part in the ballot or will call for its results to be rejected.

For an election to be perceived as free and fair, a well-organized, credible and neutral commission is essential. Such a commission can eliminate many of the opportunities for those opposed to an election to manipulate the process. This, in turn, builds trust in the elections and the institutions involved.

### RESPONSIBILITIES OF AN ELECTORAL COMMISSION

The commission should be responsible for all matters affecting the election in order to reduce the ability of a government to manipulate its results. Their responsibilities include:

- ▶ *Running civic education programs together with like-minded civil society organizations that will ensure that voters understand what the election is about, their role in the election as voters and how to cast their ballot*
- ▶ *Monitoring political party and candidate compliance with election rules*
- ▶ *Registering voters and preparing the electoral roll. The process should be an open one, able to be observed by the political parties and the public. Once complete, the roll should be made available for public inspection. Political parties should be able to file objections, as need be.*
- ▶ *Registering nominations and verifying the eligibility of candidates. This should also be a public process and candidates who are refused by the commission should have the right to appeal to the courts to review any decision that has been made against them.*

- ▶ *Overseeing the composition of the ballots, their printing and distribution. Ballot papers should be numbered to allow their use to be recorded and monitored by party agents and reconciled with the papers in the ballot boxes when they are opened for the vote count.*
- ▶ *Overseeing the poll's logistics, including polling stations, polling materials, ballot boxes, transportation, recruitment and training of polling station staff and other election workers. Polling stations should be designed to guarantee privacy for voters marking their ballots. Voters should have full confidence that their vote is secret.*
- ▶ *Overseeing the administration of the poll on the election day. This includes providing access to the polling stations for party officials; organizing separate vote counts at each polling station; seeing that results are certified by party agents; presenting a copy of the results to each of the party agents in attendance.*

Compiling and announcing the election's results

- ▶ *Publishing a full election report. Results of the vote counts for each polling station should be tabulated separately. Necessary recommendations should be made for reform for the next election.*

### TRANSPARENCY IN THE ELECTION PROCESS

Transparency is guaranteed to build voter confidence in an election. There will always be complaints during the campaigning phase of an election; generally to the effect that the governing party has the advantage of being in power and, thus, of having access to state resources. To this, the usual reply is that the governing party also has the liability of being responsible for their country's state of affairs.

It is widely accepted that elections are generally won or lost before the actual poll takes place. However, the mechanics of the poll itself are often open to corrupt practices. Results can be distorted in a variety of ways:

- ▶ *Voters' rolls can be inaccurate, with names of government opponents missing and "ghost" names included*
- ▶ *Voters can be prevented from voting, or intimidated as they go to the polling stations*
- ▶ *Ballot boxes can be exchanged, before the count, with boxes which have been stuffed in favor of a particular party or candidate*
- ▶ *Election officials can mis-mark ballots for voters with disabilities or for elderly people*
- ▶ *Vote counts can take place in secret*
- ▶ *The compilation of results can be fraudulent.*
- ▶ *Minor irregularities can be used as a pretext by a losing ruling party to call for fresh elections.*

The solution to these various problems is simple: transparency. Given that balloting must take place in secret, there are still many aspects of the election and its organization that can, and should be, open to scrutiny; especially by contesting candidates and political parties and, also, international and local civil society observers.

Areas for openness include the appointment of members of an independent electoral commission and polling officials. Each party should have a list of proposed appointments prepared well ahead of time to ensure a reasonable opportunity for their competitors to object when individuals with known or suspected politically partisan agendas are suggested as commission members. Obviously, the whole process is assisted when parties propose candidates as officials to whom their opponents cannot reasonably object.

The distribution of election materials should also be a completely transparent process. Parties should know the destination and serial numbers of ballots. As voting takes place, the officials in charge of individual polling stations should inform so-called "poll watchers" – party agents appointed by competing parties to attend the vote in each polling station. – These agents should know which ballots are, or are not, being used, and in what order. Copies

of electoral lists should be made available. Party agents should be able to keep their own checklists as to who is or is not voting. Unless all of the political parties agree that assistance should be given by polling officials, there should be limits to the number of voters which any one person can assist. It may also be necessary to keep the actual design of the ballot a secret until the very last minute, in order to minimize the chances of fraud.

At the end of voting hours, party agents should know, based on their observations, precisely how many papers should be in the ballot boxes (give or take the odd ballot paper that a voter may have taken away) and the serial numbers involved. This makes it difficult even to attempt to substitute the boxes. The party agents should then be entitled to be with the ballot boxes from the time polling ends to the time counting begins. After the vote count, they should be required to certify its accuracy. A copy of the poll results, certified by officials and the representatives of other parties, should be given to each agent. In this way, each party is equipped with documentation which enables it to compile its own, independent and accurate assessment of the final result. Even if the documentation is incomplete, it can still provide a random check on the official results, which can be extremely effective if these have been seriously distorted.

The number of people involved in the mechanics of the election process is directly related to the process's degree of transparency and accountability. The more people that are involved, the more difficult it becomes to suppress information and to manipulate figures. Involving civil servants who represent a broad cross-section of society can help increase voters' trust in the election process.

Best practice suggestions designed to address problems in the area of elections and campaign financing include the following items. The examples are drawn from a wide range of election observers' reports of elections in several parts of the world:

- ▶ *There should be a mutually acceptable code of conduct between political parties as to how they will conduct themselves during an election campaign. This ensures that the process is seen as being free and fair.*

- ▶ The electoral commission should, where possible, establish a forum for debate and consultation between the political parties. It should ensure that the political parties fully understand their rights and responsibilities with regard to all aspects of the election process.
- ▶ Contributions (in cash or in kind) by private individuals and corporations should be limited to reasonable amounts that would fall short of an amount likely to be perceived as buying influence. These limits should not extend to volunteer work.
- ▶ Candidates guilty of a false declaration or over-expenditure should forfeit the positions to which they have been elected.
- ▶ All parties and candidates should be required to declare their assets and liabilities before the start of the campaign and immediately after the poll. Some countries require income tax returns and asset declarations to be filed when a politician registers as a candidate for the election.
- ▶ Fee-based radio and television advertisements should be kept at acceptable levels, if not altogether banned. In addition, the electoral commission should determine how much free time on public radio and television should be made available to each party during the election campaign.
- ▶ Election advertising by special interest groups and others not authorized to do so by particular candidates or parties should be banned. This will stop circumvention of spending limits. All officials of the electoral commission should declare their assets, income and liabilities both before and after every national election.
- ▶ Campaign periods ought not to be too long. By truncating them, campaign costs can be reduced. If they are too short, however, the ruling party will have advantages over the opposition parties.
- ▶ Restrictions should be placed on political parties' and candidates' expenditures (in both cash and in kind) in the course of an election campaign.

Declarations of these expenditures should be made public and filed with the electoral commission within two months of the date of the election. Each declaration should be accompanied by an audit certificate certified by a qualified auditor. Also, political parties should file audited accounts annually detailing income at the local, regional and national levels.

- ▶ Anonymous donations and donations through "front" organizations should be banned.
- ▶ Grants from public funds should be made, either in accordance with a party's most recent election performance, or according to an agreed formula administered by an independent electoral commission. The grants can relate not only to immediate electioneering needs, but also to assist a party during a forthcoming parliamentary term.

### MONITORING THE POLL

Active monitoring is essential to ensure fairness, and takes place in all functioning democracies. Opposition political parties should themselves actively monitor all aspects of the poll, and document and report any irregularities they may detect. As noted above, their role should be incorporated into the election process from the start.

On top of this, civil society has an important part to play by monitoring elections in a politically non-partisan manner. As a matter of policy, citizens' groups should be legally and physically enabled to observe elections. This is a role that international observers are able to pursue, and which domestic civil society groups rightly assume with them.

In most countries where civil society organizations take on this responsibility, some change in the electoral laws will be required to enable accredited local observers to be present inside polling stations and to observe the count. When such groups are barred by law from being involved officially in the election processes, they can still make their presence felt. Information can be compiled by monitoring electioneering and by questioning voters after they leave polling stations. Exit polls of voters, when accurately performed, can serve as an additional check on the manipulation of vote results. The broadcast of exit

poll results has been cited as effective in pre-empting government attempts to falsify election results.

International observer teams also play particularly important roles in new democracies. They can provide help and guidance and build confidence in the election process, when judged to be fair, and they can draw attention to shortcomings in polls that fail to meet international standards. Groups drawn from local civil society, however, should also take part. In the long-term, the integrity of a country's voting system depends on the judgements of its own citizens.

### FOREIGN DONOR ASSISTANCE

Foreign donors can not only help meet the costs of elections, but, also, they can provide mediation in case of dispute. In Cambodia, foreign donors extended aid in exchange for the creation of a Constitutional Council, a supreme court that helps resolve election disputes.

On the question of cost, however, it is important that the sustainability of the electoral process be borne in mind. Mechanisms for insuring the vote's integrity should be adopted with an eye to costs. Transparency, should not add to an election's costs.<sup>4</sup> Effective planning and the development of good systems depend primarily on the time and knowledge of competent election monitoring experts.

### STATE-OWNED MEDIA

State-owned media is almost invariably an election battleground. There should be clear rules regarding opposition parties' access to publicly-owned media. If need be, allotted air time and the order of appearance on radio or television can be determined by lot. Similarly, clear rules are needed on the content of news broadcasts. Such reports should be objective, based on the known facts of a story, and devoid of the reporter's own political opinion.

## POLITICAL PARTY FINANCING

It is in the public interest that political parties be adequately funded and held accountable to society; not only through the ballot box, but also in terms of their electoral practices.

Too many political parties, as in the case often with newly emerging democracies, can cause confusion and divide rather than unite a society. In countries with a plethora of small parties, it is more likely that political parties that are effectively owned by individuals or state interests will dominate political discourse and power. The establishment of thresholds for party registration or for a vote to be deemed legitimate can provide an opportunity for a governing party to easily cripple opponents. Requirements that winning candidates receive at least 50 percent of the vote in a single election district system will lead to votes concentrating around major candidates. Similarly, the requirement that parties make a financial deposit to submit candidates for election poses a significant hurdle for parties representing the poor and dispossessed.<sup>5</sup> To avoid such scenarios, a 4-5 percent threshold for parties to secure seats in a proportionally elected legislature or to receive state funding for their campaigns should be sufficient.

Without proper checks and balances, ruling 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 empowering electoral commissions to also preside over free and fair elections within party congresses. This is to separate the functions of a political party from those of the government, and to avoid a *de facto* administrative merger<sup>6</sup> of political parties with the state. Elected ad-hoc party commissions can play a similar role.

### HOW SHOULD PARTIES FINANCE THEIR CAMPAIGNS?

The Roman Emperor Vespasian (9-79 AD) once observed that "money has no smell." But when it comes to elections, money can smell very badly indeed. Political parties are expensive to run. They need adequate funding for offices, staff, and for communication with the electorate.

It is generally considered legitimate for those involved in political activities to raise money from their supporters – at least to some extent. Yet at the same time, donations from large numbers of individuals can be expensive to collect. In most democracies, therefore, the principal source of funding for political parties lies within the private sector. This is particularly critical when a general election is called. 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 appointment to public office or the award of a lucrative contract for execution of a state-funded project.

Often, much of the money that finds its way into the coffers of political parties is illicitly acquired or not declared to tax authorities. In some countries, criminal elements have found it more attractive to run for office if they will enjoy immunity from prosecution upon election.

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. Their definition by category is essentially one of degree. Private funding still takes place within the public model, and public support for campaigns exists within the private model. However, as in Spain, there is no essential contradiction between there being spending limits within the public funding model.

State funding, however, carries risks if it leads to a profusion of small, weak parties, which can hinder the development of a country's political institutions. Certainly, the threshold for access to the electoral landscape should not be so high as to be unrealistic. However, thresholds can also raise questions about the constitutionality of an election process. In South Africa, for instance, the argument was made that the country's 1998 Public Funding of Represented Political Parties discriminated against parties that failed to meet the required threshold.

Whatever the fundraising process may be, it is important that it does not distort the political system so as to skew democratic structures in favor of those with access to money. Many countries have

implemented mechanisms to monitor this situation, but these mechanisms have often been ineffective. As has been noted, even 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 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 funding political parties 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.

In some countries, the costs of political campaigning have become so high that they are well above the limits prescribed by law. Therefore, in some, if not 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.

Donations by foreign donors to political parties can often raise greater concerns among democratically minded citizens than outside assistance with the financing of an election. 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 foreign contributions to political parties.

### HOW SHOULD PUBLIC FUNDING FOR PARTIES BE APPORTIONED?

Treating every party equally is, of course, not an option. It is hardly democratic – or feasible – to fund a very small party to the same extent as one which is a major national institution.

There is a limit to the size of the financial “cake” which a society can afford to invest in its democratic structures. So how can this be most evenly distributed? In some countries, public funds are allocated to parties in proportion to the votes they have won at the preceding election, or win in the current election. The latter enables parties to borrow funds from supporters with the reasonable expectation of how much they will be able to repay.

### “TRADING IN INFLUENCE”

Although a relatively new concept to many, the offense of “trading in influence” has long been recognized in such countries as France. “Trading in influence” constitutes a corrupt relationship in which a person with real or supposed influence “trades” this influence for money. The intermediary is not being “bribed” as a public official, but is merely serving as a link. For example, politicians and high officials, in exchange for the secret funding of their political activities, can “trade” their influence, distorting the proper function of a democratic system, violating the principle of equality and eroding principles of merit.

The European Convention prohibits this offense and similar restrictions were featured in early drafts of the UN Convention Against Corruption.

In practice, the line between “trading in influence” and mere sponsorship can be difficult to define.

### THE IMPORTANCE OF IDENTITY

During the 1990’s, the Government of South Korea took a unique approach to stamp out not only political corruption, but other forms of financial abuse. Decree No. 13957 banned the use of fictitious or “borrowed” names in financial deals. Previously, fictitious names were often used to hide assets, avoid taxation, bribe officials and make illegal campaign contributions.

Under the decree, all financial transactions, including deposits and savings, and stocks and bonds, had to be registered in the real name of the holder. Those Koreans holding assets under false names were required to convert their assets into accounts registered under their real names within two months. Citizens intending to open bank accounts – or to withdraw large sums – had to register their real names by presenting their national identity cards. Failure to do so resulted in investigation by the tax authorities and substantial penalties imposed on the financial assets held by those found in violation.

### A WAY FORWARD

In April 2003, The Council of Europe recommended the following Common Rules Against Corruption in the Funding of Political Parties and Electoral Campaigns to its member states<sup>6</sup>:

#### I. External sources of funding of political parties

##### Article 1 – Public and private support to political parties

*The state and its citizens are both entitled to support political parties.*

*The state should provide support to political parties. State support should be limited to reasonable contributions. State support may be financial.*

*Objective, fair and reasonable criteria should be applied regarding the distribution of state support. States should ensure that any support from the state and/or citizens does not interfere with the independence of political parties.*

#### **Article 2 – Definition of donation to a political party**

*Donation means any deliberate act to bestow advantage, economic or otherwise, on a political party.*

#### **Article 3 – General principles on donations**

*a. Measures taken by states governing donations to political parties should provide specific rules to:*

- *avoid conflicts of interests;*
- *ensure transparency of donations and avoid secret donations;*
- *avoid prejudice to the activities of political parties;*
- *ensure the independence of political parties.*

*b. States should:*

- i. provide that donations to political parties are made public; in particular, donations exceeding a fixed ceiling*
- ii. consider the possibility of introducing rules limiting the value of donations to political parties*
- iii. adopt measures to prevent established ceilings from being circumvented.*

#### **Article 4 – Tax deductibility of donations**

*Fiscal legislation may allow tax deductibility of donations to political parties. Such tax deductibility should be limited.*

#### **Article 5 – Donations by legal entities**

*a. In addition to the general principles on donations, states should provide:*

- i. that donations from legal entities to political parties are registered in the books and accounts of the legal entities; and*

*ii. that shareholders or any other individual member of the legal entity be informed of donations.*

*b. States should take measures aimed at limiting, prohibiting or otherwise strictly regulating donations from legal entities which provide goods or services for any public administration.*

*c. States should prohibit legal entities under the control of the state or of other public authorities from making donations to political parties.*

#### **Article 6 – Donations to entities connected with a political party**

*Rules concerning donations to political parties, with the exception of those concerning tax deductibility referred to in Article 4, should also apply, as appropriate, to all entities which are related, directly or indirectly, to a political party or are otherwise under the control of a political party.*

#### **Article 7 – Donations from foreign donors**

*States should specifically limit, prohibit or otherwise regulate donations from foreign donors.*

### **II. Sources of funding of candidates for elections and elected officials**

#### **Article 8 – Application of funding rules to candidates for elections and elected representatives**

*The rules regarding funding of political parties should apply mutatis mutandis to:*

- *the funding of electoral campaigns of candidates for elections;*
- *the funding of political activities of elected representatives.*

### **III. Electoral campaign expenditure**

#### **Article 9 – Limits on expenditure**

*States should consider adopting measures to prevent excessive funding needs of political parties, such as, establishing limits on expenditure on electoral campaigns.*

**Article 10 – Records of expenditure**

*States should require particular records to be kept of all expenditure, direct and indirect, on electoral campaigns in respect of each political party, each list of candidates and each candidate.*

**IV. Transparency****Article 11 – Accounts**

*States should require political parties and the entities connected with political parties mentioned in Article 6 to keep proper books and accounts. The accounts of political parties should be consolidated to include, as appropriate, the accounts of the entities mentioned in Article 6.*

**Article 12 – Records of donations**

**a.** *States should require the accounts of a political party to specify all donations received by the party, including the nature and value of each donation.*

**b.** *In case of donations over a certain value, donors should be identified in the records.*

**Article 13 – Obligation to present and make public accounts**

**a.** *States should require political parties to present the accounts referred to in Article 11 regularly, and at least annually, to the independent authority referred to in Article 14.*

**b.** *States should require political parties regularly, and at least annually, to make public the accounts referred to in Article 11 or as a minimum a summary of those accounts, including the information required in Article 10, as appropriate, and in Article 12.*

**V. Supervision****Article 14 – Independent monitoring**

**a.** *States should provide for independent monitoring in respect of the funding of political parties and electoral campaigns.*

**b.** *The independent monitoring should include supervision over the accounts of political parties and the expenses involved in election campaigns as well as their presentation and publication.*

**Article 15 – Specialised personnel**

*States should promote the specialisation of the judiciary, police or other personnel in the fight against illegal funding of political parties and electoral campaigns.*

**VI. Sanctions****Article 16 – Sanctions**

*States should require the infringement of rules concerning the funding of political parties and electoral campaigns to be subject to effective, proportionate and dissuasive sanctions.*

Further guidance comes from the 50 heads of state and government of the Commonwealth of Nations, which developed a “Commonwealth Framework Principles on Combating Corruption.”<sup>77</sup> This document includes provisions for the funding of political parties. These provisions are designed to:

- ▶ *Prevent conflicts of interest and the exercise of improper influence*
- ▶ *Preserve the integrity of democratic political structures and processes*
- ▶ *Proscribe the use of funds acquired through illegal and corrupt practices to finance political parties*
- ▶ *Enshrine the concept of transparency in the funding of political parties by requiring the declaration of donations exceeding a specified limit*

**A ROLE FOR CIVIL SOCIETY IN MONITORING CAMPAIGN FINANCE**

As we have discussed, added credence is given to elections where they are monitored not just by official organs of the state but also by civil society. Particularly in Latin America, civil society groups

have gone further than simply watching the poll. They have developed methodologies for monitoring campaign expenditures by recording obvious expenditures (television advertisements, poster sites, brochures, etc.) and comparing this with the spending reported by parties.

Allegations of widespread public sector corruption in Argentina were endemic in the 1990's and campaign finance corruption was no exception. To address this situation, one civil society organization, Poder Ciudadano, or Citizens' Power, initiated a program in one federal district in which candidates

provided certified financial disclosure of their assets and a written statement of their position on campaign issues. Substantial media attention helped facilitate this campaign; candidate participation was strong. A subsequent initiative included monthly monitoring and reporting of actual campaign expenditures. Eventually, this package of initiatives, termed the "Integrity Pact," resulted in substantial campaign reform throughout Argentina.<sup>8</sup> Similar initiatives are now being taken in several other countries in the region and the approach has attracted interest throughout the world.

## ENDNOTES

- 1** Major resources: The Project on Political Transformation and the Electoral Process in Post-Communist Europe, based at the (UK) University of Essex (UK), includes an online database of relevant electoral codes as well as laws related to campaign finance, media law and mass media. Countries include Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Moldova, Poland, Romania, Russia, Slovakia and Ukraine. See: <http://www.essex.ac.uk/elections/>; The University of Michigan (US)'s Comparative Study of Electoral Systems allows users to analyze election experiences in 50 countries worldwide. See: Comparative study of electoral systems: <http://www.umich.edu/~cses/>; IDEA's State of Democracy Project . See: [http://www.idea.int/ideas\\_work/14\\_political\\_state.htm](http://www.idea.int/ideas_work/14_political_state.htm); For information on administration and cost of elections, see the ACE project at <http://www.aceproject.org/>; For information on media coverage of elections, see the Center for Public Integrity <http://www.publicintegrity.org/dtaweb/home.asp>; K. D. Ewing (ed.) *The Funding of Political Parties: Europe and Beyond* (1999) (Bologna; ISBN 88-491-1269-6); Williams, R, *Party Finance and Political Corruption* (Palgrave, London, 2000)
- 2** IDEA: [http://www.idea.int/thematic\\_b.htm](http://www.idea.int/thematic_b.htm)
- 3** The United Kingdom has only recently taken this step, establishing an Electoral Commission and providing for the control of party financing under the Political Parties, Elections and Referendums Act 2000, following recom-

mendations from the (UK) Committee for Standards in Public Life.

- 4** For more on costs, see <http://www.aceproject.org/main/english/ei/ei40.htm>
- 5** Election deposits are a controversial subject matter. In 2001, the OSCE Office for Democratic Institutions and Human Rights recommended to Ukraine that "The deposit system will avoid the very many practical problems of regulating and verifying in a fair manner the collection of signatures in support of a candidate or party." However, in June 2003, the UK's electoral commission recommended the abolition of the £500 (roughly \$927; rate of conversion as of March 8, 2004) election deposit required of all general election candidates.
- 6** Council of Europe, Committee of Ministers, Recommendation Rec(2003)4: [http://www.cm.coe.int/stat/E/Public/2003/adopted\\_texts/recommendations/2003r4.htm](http://www.cm.coe.int/stat/E/Public/2003/adopted_texts/recommendations/2003r4.htm)
- 7** Commonwealth Heads of Government 1999 meeting, Background paper Fighting Corruption Requires Good Government by Nihal Jayawickrama: <http://www.chogm99.org/bgpapers/f2.htm>
- 8** Keeping Accounts: A Case Study of Civil Initiatives and Campaign Finance Oversight in Argentina (Working Paper 248, Center for Institutional reform and the Informal Sector, University of Maryland, USA): <http://128.8.56.16/docs/docs/wp248.pdf>





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Serving the public interest is the fundamental mission of a government and its public institutions. Citizens are entitled to expect that individual officials will perform their duties with integrity, and in a fair and unbiased way. Public officials who maintain private interests during their time in office can present a threat to this fundamental right. Such conflicts of interest have the potential to weaken the trust of citizens in public institutions.<sup>1</sup>

In a number of countries, public officials regularly, and in some cases openly, flout conflict of interest laws. Not only are the laws ignored, but little if any effort is made to enforce them. In those countries, the building of an ethical public service is of the highest priority.

Even while recognizing that conflicts of interest can be commonplace in certain countries, the discussion here proceeds on the basis that widespread defiance of the law is not the case, just the opposite. Rather, it provides a general overview for an ethical public administration on how to prevent such conflicts of interest from occurring. (*The challenge of building and sustaining an ethical public administration is discussed in Chapter 6.*)

A conflict of interest arises when a person, as a public sector employee or official, is influenced by personal considerations when carrying out his or her job. In such cases, decisions are made for the wrong reasons. Moreover, perceived conflicts of interests, even when the right decisions are being made, can be as damaging to the reputation of an organization and can erode public trust as easily as can an actual conflict of interest.

Most countries consider the matter 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>2</sup>

The framers of Thailand’s 1997 Constitution<sup>3</sup> saw conflicts of interest as such a fundamental threat to democracy that such conflicts are addressed in the Constitution itself. Provisions require government officials to be politically impartial<sup>4</sup> and prohibit a member of the House of Representatives, Thailand’s lower house of parliament, from placing himself or herself in a conflict of interest situation. Section 110<sup>5</sup> 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*
- ▶ *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 that:

*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 organization, or cause such persons to be removed from office.*

Section 128, also extends this provision to senators.

## HOW TO IDENTIFY CONFLICTS OF INTEREST

Most conflicts of interest are obvious: Public officials who award contracts to themselves, members of their family or to their friends or political patrons; public officials who personally hold – or whose close relations hold – shares in companies subject to their regulation, with which they are contracting or to which they are granting licences, etc. These conflicts require no explanation. They present circumstances which pose a threat to the public interest, however honest the official may claim to be.

Conflicts of interest situations cannot be avoided. It is inevitable that, from time to time, personal interests will come into conflict with work decisions or actions. For these to be identified from the outset is important if confusion and misunderstandings are to be avoided. The following checklist can help individual public servants identify situations where a conflict of interest is likely to arise:

- ▶ *What would I think if the positions were reversed? If I were one of those applying for a job or a promotion and one of the decision-makers was in the position I am in? Would I think the process was fair?*
- ▶ *Does a relative, a friend or an associate or do I stand to gain or lose financially from an organization's decision or action in this matter?*
- ▶ *Does a relative, a friend or an associate or do I stand to gain or lose my/our reputation because of the organization's decision or action?*
- ▶ *Have I contributed in a private capacity in any way to the matter being decided or acted upon?*
- ▶ *Have I received any benefit or hospitality from someone who stands to gain or lose from the organization's decision or action?*
- ▶ *Am I a member of any association, club or professional organization, or do I have particular ties and affiliations with organizations or individuals who stand to gain or lose from the organization's consideration of the matter?*
- ▶ *Could there be any personal benefits for me in the future that could cast doubt on my objectivity?*
- ▶ *If I do participate in assessment or decision-making, would I be worried if my colleagues and the public became aware of my association or connection with this organization?*
- ▶ *Would a fair and reasonable person perceive that I was influenced by personal interest in performing my public duty?*
- ▶ *Am I confident of my ability to act impartially and in the public interest?*

When someone considers that they may have a conflict of interest, what should they do? The first step should be to place the potential conflict on the record and seek the guidance of a superior or an ethics adviser, if one is available.

Clearly, some conflicts will be so minor as not to warrant anything more than the situation being recorded and made known to others who are participating in the decision-making process. For example, an official might hold such a small number of shares in a company that their value could not possibly be affected significantly by the outcome of the particular matter under review. In such a case, the others involved may feel comfortable with the official's continued participation in the decision-making process. When they do not, however, the person should excuse himself or herself from further involvement. The assumption here, of course, is that there are no pre-existing arrangements for such a recusal.

The following checklist can be used to assess whether a disclosed conflict of interest might require other public officials to ask the person in question to stand aside:

- ▶ *Has all the relevant information been made available to ensure a proper assessment?*
- ▶ *What is the nature of the relationship or association that could give rise to the conflict?*
- ▶ *Is legal advice needed?*

- ▶ *Is the matter one of great public interest? Is it controversial?*
- ▶ *Could the individual's involvement in this matter cast doubt on his or her integrity?*
- ▶ *Could the individual's involvement cast doubt on the organization's integrity?*
- ▶ *How would this individual's participation in the decision in question look to a member of the public or to one of the organization's potential contractors or suppliers?*
- ▶ *What is the best way to ensure impartiality and fairness and to protect the public interest?*

Although it is important to deal with perceptions of conflicts of interests, neither of these checklists should be seen as automatically disqualifying relationships that no fair and reasonable person would see as giving rise to a conflict of interest.

Other strategies that an organization or government can adopt to avoid compromising, or appearing to compromise, its integrity include:

- ▶ *Keeping full and accurate records of its decision-making processes*
- ▶ *Ensuring openness by making public accurate information about the organization's processes, decisions and actions*
- ▶ *Where there is a risk of a perception of conflict of interest, ensuring that the final decision of all participants can be substantiated*

## WHAT IS NEPOTISM?

Nepotism is a particular type of conflict of interest. Although the expression tends to be used more widely, it strictly applies to a situation in which a person uses his or her public power to obtain a favor – very often a job – for a member of his or her family.

The prohibition against nepotism is not a total ban on all relatives. Indeed, blanket bans on employing relatives of existing staff can be held to be in breach

of human rights guarantees against discrimination. This situation is distinct from one relative employing another relative to a position where he or she will retain supervisory powers over that family member. But it does prohibit a public servant from using (or abusing) his or her public position to obtain public jobs for family members. The objective is not to prevent families from working together, but to prevent the possibility that a public servant may show favoritism towards a fellow family member when exercising discretionary authority on behalf of the public to hire qualified public employees.

As a member of South Africa's Ombudsman's Office has said:

A typical example might be where it is alleged that someone received an improper advantage in that he received, through the intervention of a family member who works for a certain department, contracts which that department puts out. It might be found that no criminal act is involved but unethical behaviour is. Nepotism is not yet classified as criminal in our law, yet it is clearly reprehensible and sufficiently unacceptable to require action on the part of the Ombudsman. Furthermore, the act of nepotism may be a red flag alerting the Ombudsman to the possibility of the official's perceived need to surround him or herself with those considered to be more than ordinarily capable of being relied upon to act with 'discretion.'<sup>6</sup>

Nepotism frequently occurs in the private sector, particularly in the context of promoting family members within family-owned corporations, where it is seen as legitimate. The impact of any preference is ultimately on the bottom line (profit) of the corporation, and the bottom line is family "property". Nepotism may cause ill-feeling in the workplace in the private sector, but there is no reason why the state should intervene and legislate against it.

In the public sector, however, nepotism damages the public interest. It means that the most suitable candidate fails to get a post or a promotion, and the public as a whole suffers as a consequence. Or it can mean that a less competitive bid wins a government contract at the cost of taxpayers' money.

Nepotism can cause conflicts in loyalties within any organization, particularly when one relative is placed in direct supervision over another. These situations should be avoided. A typical legal prohibition would prevent a father, mother, brother, sister, uncle, aunt, husband, wife, son, daughter, son-in-law, daughter-in-law, niece, or nephew in a position as either supervisor or subordinate to one of the aforementioned relatives.

Even worse, of course, would be a judge sitting in a case in which he or she had a financial interest, or where a relation or good friend was involved. In a civil case, the parties may be asked (in case of doubt) whether they are content with the judge hearing the case, after he or she has explained the potential conflict of interest to them. In a criminal case, the judge should simply declare his illegibility and decline to sit.

A less frequent question, perhaps, is that which arises when sons and daughters of judges appear as counsel in court before their parents. In some court systems this has caused no complications. In others, it has aroused fierce controversy and given rise to serious allegations of collusion and corruption.

Nepotism primarily involves one or more of the following:

- ▶ *advocating or participating in or causing the employment, appointment, reappointment, classification, reclassification, evaluation, promotion, transfer, or disciplining of a close family member or domestic partner in a public position, or in an agency over which he or she exercises jurisdiction or control*
- ▶ *participating in the determination of a close family member's or domestic partner's compensation*
- ▶ *delegating any tasks related to employment, appointment, reappointment, classification, reclassification, evaluation, promotion, transfer, or discipline of a close family member or domestic partner to a subordinate*
- ▶ *lobbying in favor of a close relative, who subsequently is appointed either in the public sector*

*or as CEO in the private sector (in such case, the former has no jurisdiction or control over the latter)*

- ▶ *supervising, either directly or indirectly, a close family member or domestic partner, or delegating such supervision to a subordinate.*<sup>7</sup>

However, the public interest requires that only the best candidate for a job serve the state. There will be occasions when a relative is unquestionably the best qualified person for a particular post, and there must be a balancing of interests. For this reason, nepotism rules should not be an insuperable barrier and mean that well-qualified candidates are invariably disqualified. This has been drafted in terms that leave no room whatsoever for deviation or individual discretion.<sup>8</sup>

One US county government has adopted the following approach to prevent nepotism in hiring practices:

The county is interested in hiring able, qualified applicants and will consider any person for employment when they meet qualifications.

The goal of the county is to hire the most qualified applicant who is best suited for the position. Members of your family, members of your immediate household or your relatives will be considered for employment, except when:

- ▶ *their position or your position would exercise supervisory, appointment, grievance adjustment, dismissal or disciplinary authority or influence*
- ▶ *you or the employee would audit, verify, receive or be entrusted with public money or public property*
- ▶ *circumstances would exist making it foreseeable that the interest of the county and you or the employee would be in conflict or question*
- ▶ *where the county must limit hiring to avoid a conflict of interest with customers, regulatory agencies, or others with whom the City conducts business*

► *where the county must limit hiring to avoid employment discrimination, personnel policy conflicts or related problems*

The county will not knowingly place you in a situation where you are supervised by a member of your family, your immediate household or your relative, or where favoritism, interpersonal conflict, lack of productivity, lack of efficiency, or other unsound employment conditions including those mentioned in this policy may develop. This policy shall not be retroactive, unless any of the above adverse conditions are being practiced. In such a case, the county reserves the right to assign the affected employees to different operating levels, pay scales or locations.<sup>9</sup>

Further policies and procedures should address the need for and the means of disclosing and recording conflicts of interest and determining the appropriate action for minimizing their impact on the integrity of an organization's operations.

## WHAT IS CRONYISM?

Cronyism is a broader term than nepotism, and covers situations where preferences are given to friends, regardless of their suitability. It is most likely to occur in the context of the making of appointments, but it can arise in any instance when discretionary powers are to be exercised.

In Britain, cronyism is captured in such expressions as the "old school tie" or the "old boys club." In a number of countries around the world, fortunes have been made through cronyism and the abuse of connections. Indonesia under the regime of General Suharto provides many examples of cronyism. But even here, the preferences given were all within the law and many do not appear to have been tainted by criminal conduct. However, few of the decisions would have survived judicial examination of the process and criteria invoked when the privileges were conferred.

It is essential that organizations have clearly stated and well understood policies and procedures as well as written codes of conduct to deal with actual, potential and perceived conflicts of interests, including nepotism and cronyism.

However, whereas it is possible to define nepotism in terms of blood relatives or relations by marriage or partners, an effective legal definition of cronyism is impossible. This has to be dealt with more informally, on the basis of posing the question: Would well-informed, reasonable people think that this appointment or this decision was appropriate?

At times, the matter can be dealt with quite simply. If someone is applying for a position and a member of the interviewing panel knows him or her very well, they can – and should – excuse themselves from sitting on the panel. In essence, at what point does a person become a "crony" – "a friend or a companion" – so that a decision in their favor could be categorized as cronyism? To determine where the line should be drawn, the panel member can pose the question: What would the other candidates think if they knew about the relationship? Would they think it rendered the process unfair? If in doubt, the matter can be discussed and determined by the other panel members. What is necessary, of course, is for there to be complete transparency about the nature of the relationship, and that it be placed on the record.

On the other hand, if a candidate is known as a person with discretion and sound judgement, there can be greater confidence in his or her appointment. It can come down to the question of trust. The primary concern is that decisions are made that are defensible, both in the eyes of the other applicants and in the eyes of the wider public.

Some appointments are required by law to be made by a particular officeholder. Should that official feel compromised by his or her relationship with a prospective candidate, it should be possible for the officeholder to, in effect, stand aside in the selection process. He or she can also ask for formal independent advice from another official of equal or senior rank as to whom should be appointed, and act on that.<sup>10</sup>

However, ultimately, the emphasis is on being able to answer the charge of a decision being made regardless of suitability. A candidate's familiarity with decision-makers will quite rightly trigger this debate.

### AVOIDING NEPOTISM AND CRONYISM IN THE MAKING OF APPOINTMENTS

Basic principles for avoiding nepotism and cronyism with both the public and private sector are<sup>11</sup>:

- ▶ *Impartiality in all recruitment and selection processes. This is essential for public sector employees to meet their public duty by acting ethically and in the public interest. Therefore, to avoid perceptions of bias or corruption, a potential applicant should have no direct involvement in any part of the recruitment process for a job for which he or she may be a candidate. This includes acting as the contact person for potential candidates, framing advertisements or preparing the standard practice for preferred applicants' referees to be contacted. Each referee should be asked the same questions relating to the selection criteria and all the questions and responses should be documented.*

It should be clear to all concerned which person is accountable for key decisions throughout the process, and what the values are that will be applied. This should be formally recorded, and all decisions and the reasons for those decisions during a selection process should be documented.

As in all other aspects of sound administration, good recordkeeping increases accountability. In societies where there are particular pressures from clans or a person's extended family, it is advisable for those involved in the decision-making processes to formally certify that none of the applicants is a relative or is known to them, or else to excuse themselves from the process entirely.

- ▶ *Competition should be fostered. Advertisements should be framed to both adequately reflect the requirements of the job and to maximize the potential field of candidates. Generally, advertisements should be placed to attract the widest potential field possible. Selection criteria should also be reviewed before recruitment action is taken to ensure they adequately reflect the requirements of the position and attract the widest field of applicants. Only in exceptional circumstances should truly competitive measures be bypassed. When these*

*circumstances occur, the decision-maker must be able to demonstrate clear and unambiguous reasons for making direct appointments.*

- ▶ *Openness should be maximized. The risk of corruption is minimized when there are policies and procedures that promote openness in dealing with conflicts of interests. An administration that adopts a policy of openness for all its recruitment and selection decisions will avoid sending the wrong message to staff about preferred practices in recruitment and selection. This will also remove the justification for others to act contrary to stated recruitment practices and policies without valid reasons. Openness, however, does not mean breaching confidentiality.*
- ▶ *Integrity is always paramount. Taking shortcuts can compromise the integrity of the recruitment process. To ensure integrity in recruitment and selection practices, an administration must have clearly stated sanctions for non-compliance with established policies and practices. Decision-makers must be seen to use them when necessary. A number of countries have found that having independent persons involved in the selection process can markedly enhance the integrity of the process. These independent members of a hiring panel should not be known to the other committee members. If this is not possible, the extent of the independent member's affiliation with other committee members should be recorded in writing before interviews are held and form part of the recruitment file.*
- ▶ *Appeals should be available. Unsuccessful, but qualified applicants, who consider that proper procedures have not been followed, should be able to appeal to an appropriate authority for an independent review of the process and its outcome.*

### CONFLICT OF INTEREST ISSUES WHEN STAFF LEAVES THE PUBLIC SECTOR<sup>12</sup>

What happens when a public servant leaves the public service and enters the private sector? This question has become increasingly important when addressing conflict of interest issues.

This is a consequence of several factors. Efficiency reforms have led to the “downsizing” and contracting out of certain public sector functions to the private sector. Consequently, in many countries, the differences that traditionally separated public sector careers from those in the private sector are less distinct. As a consequence, there has been a growing tendency in many countries for public officials not to regard public sector employment as a long-term career, but to consider moving between the public and private sectors in the course of their working lives.

To ensure that public administrators are not tempted to exploit their government connections after leaving the public service, a sound approach to post-public sector employment is required. This both reduces the risk of corruption, and renders much less sensitive any confidential information which the departing public servant may have and which competing private sector interests may be keen to obtain for themselves.

The type of employment which may be cause for concern is one which has a close or sensitive link with the person’s former position as a public official. If a public official misuses his or her official position to obtain a personal career advantage, whether intentionally or innocently, it adversely affects public confidence in government administration.

There are, perhaps, four main areas in post-public sector employment that give rise to situations of conflict of interest and that merit consideration:

- ▶ *Public officials who modify their conduct while in office to improve prospects for future employment. Such conduct can involve favoring private interests over public duty; individual public officials “going soft” on their official responsibilities to further personal career interests; an individual only taking partial action on a certain issue out of concern for the interests of prospective private sector employers; or outright bribery, where a public official solicits employment in return for rendering certain favors.*
- ▶ *Former public officials who improperly use confidential government information acquired during the course of official functions for personal benefit, or to benefit another person or organization. This situation does not involve information that has become part of an individual’s skill set or knowledge that can be legitimately used to gain other employment.*
- ▶ *Former public officials who seek to influence public officials. This involves former public officials pressuring ex-colleagues or subordinates to act partially by seeking to influence their work or by securing favors.*
- ▶ *Re-employment or re-engagement of retired or redundant public officials. This may involve:*
  - (a) senior public servants receiving generous severance compensation and re-entering the public service in non-executive positions while keeping their severance payments;*
  - (b) public officials leaving public employment only to be re-engaged as consultants or contractors at higher rates of pay to perform essentially the same work*
  - (c) public officials who decide to go into business and to bid for work from their former employer after arranging their own severance packages.*

Codes of conduct do not provide an effective solution to preventing conflicts of interest in this area. The codes cease to have effect when people leave office – the very moment when these provisions would become relevant. This leaves three generally accepted approaches to consider:

- ▶ *Each government agency can develop specific policies for employment after an official has left the public sector. These policies should take into consideration the degree of risk to the government involved in a public official gaining employment in the private sector and the likely impact of these policies on public employees’ future careers; for example, highly qualified professionals with limited fields in which to work.*
- ▶ *Employment contracts can have specific restrictions written into them. (However, some countries limit the legal right to restrict future employment, and this can give rise to difficulties.)*

- ▶ *Enacting legislation; this is a route that some countries have taken, but any legislation should be careful to minimize restrictions and not to impose them on people unnecessarily.*<sup>13</sup>

There is, of course, a need to ensure that restrictions on post-separation employment are in proportion to the risks posed. For this reason, public sector managers in the Australian state of New South Wales decided that the best approach is to deal with the matter on a case-by-case basis. They did not consider that the level of risk to public sector integrity warranted the degree of hardship and inefficiency that broadly targeted restrictions on employment opportunities might impose.

### GOVERNMENT MINISTERS: CONFLICT OF INTEREST AND POST-PUBLIC SECTOR EMPLOYMENT

Ministers hold positions of power and influence. Some of the knowledge they acquire can be of a confidential nature, or could confer on them advantages if subsequently, as private citizens, they were to work in an area related to their former responsibilities. Restricting the conduct of ministers after they leave office is becoming increasingly common.

In the US, the heads of executive agencies are not members of Congress, but presidential appointees. These appointees are governed by Title 18 Section 207 of the US Code, in which they are referred to as “very senior personnel.” The US system is multi-tiered: there are limited restrictions to which every government employee is subject, which become progressively more onerous as staff become more senior.

Very senior personnel must comply with several restrictions:

- ▶ *a lifetime ban (which covers all executive employees) on representing any organization on a matter on which they directly worked as an executive employee*
- ▶ *a two-year ban in cases on which they may not have directly worked, but for which they had direct responsibility*
- ▶ *a one-year ban on representing any organization to any current representative of the executive branch of government,*
- ▶ *a one-year ban on representing a foreign entity “before any department or agency of the United States” and on aiding or advising a foreign entity.*<sup>14</sup>

A statutory agency, the Office of Government Ethics, advises executive employees to ensure compliance with this law.

In Canada, the Conflict of Interest and Post-employment Code for Public Office Holders<sup>15</sup> was established in June 1994. It is an executive instrument rather than a statute, but it is administered by a statutory office, the Office of the Ethics Counsellor. The Code governs ministers. Its stated aims for what it terms “post-employment compliance measures” are to:

minimise the possibilities of:

- (a)** *allowing prospects of outside employment to create a real, potential or apparent conflict of interest for public office holders while in public office*
- (b)** *obtaining preferential treatment or privileged access to government after leaving public office*
- (c)** *taking personal advantage of information obtained in the course of official duties and responsibilities until it has become generally available to the public*
- (d)** *using public office to unfair advantage in obtaining opportunities for outside employment. (s. 27)*

*The Canadian arrangement is similar to that in the American system of tiered restrictions. It contains a permanent ban on a public office holder “changing sides” in any “ongoing specific proceeding, transaction, negotiation or case where the former public office holder acted for or advised the Government.” (s. 29(1)). The key provision, however, is a two-year ban preventing ministers from:*

- (a)** *[accepting] appointment to a board of directors of, or employment with, an entity with which they*

*had direct and significant official dealings during the period of one year immediately prior to the termination of their service in public office, or*

*(b) [making] representations for or on behalf of any other person or entity to any department with which they had direct and significant official dealings during the period of one year immediately prior to the termination of their service in public office.’ (s. 30)<sup>16</sup>*

Unlike in the US, the Canadian prime minister has discretionary power to reduce the two-year waiting period, subject to consideration of a range of factors.

As in Canada, employment of former government ministers in the UK is governed by executive instrument, not statute. Chapter Nine of the Ministerial Code (Ministers’ Private Interests) guides post-separation employment:

On leaving office, Ministers should seek advice from the independent Advisory Committee on Business Appointments about any appointments they wish to take up within two years of leaving office, other than unpaid appointments... If, therefore, the Advisory Committee considers that an appointment could lead to public concern that the statements and decisions of the Minister, when in Government, have been influenced by the hope or expectation of future employment with the firm or organisation concerned, or that an employer could make improper use of official information to which a former Minister has had access, it may recommend a delay of up to two years before the appointment is taken up ...<sup>17</sup>

Whereas in Canada, there is a two-year ban unless the prime minister makes an exception, in the UK former ministers are merely restricted if, after seeking advice from the Advisory Committee, it is recommended that they delay their employment in the private sector.

Best practice suggests that:

- ▶ *post-public sector employment be addressed in any ministerial code*
- ▶ *a standing advisory body should assist ministers in complying with any guidelines that might*

*address their later employment. This feature is common to legislative and executive ethics instruments internationally and not just for dealing with post-public sector employment issues.<sup>18</sup>*

## SOME LEGAL APPROACHES

A number of countries have explicit conflict of interest laws. Croatia’s legislation provides not only for declarations of assets and income and for the prohibition of conflicts of interest, but also for a commission to receive declarations and to provide advice and guidance. The commission is elected by the parliament, but politicians are excluded from being members.

*The Croatian example also gives directions as to how offers of bribes are to be handled:*

### Article 14

*(1) Officials shall have the obligation without delay to reveal and inform the body which elected or appointed them, and the Commission about any pressure or improper influence to which they have been exposed in the exercise of public office.*

*(2) Officials who, contrary to the provisions of this Act, have been offered a gift or any other advantage related to the exercise of their public office, shall:*

- 1. reject such an offer,*
- 2. try to determine the identity of the person making the offer,*
- 3. in case of a gift which, due to specific circumstances, cannot be returned, the official shall keep it and report it immediately,*
- 4. list witnesses of this event, if possible,*
- 5. within reasonable time, submit the written report on the event to the competent person or body,*
- 6. if a punishable offence is involved, report it to the bodies in charge of conducting proceedings.*

The Croatian approach strikes a balance between the need for a firm legal framework for addressing such conflicts of interest and the need for flexibility. However, given the complexities of the situations which can arise, the enactment of more ambitious laws in the area of conflict of interest can be some-

thing of a blunt instrument. Thus, many countries have chosen various approaches to address the more detailed aspects of this problem. Often, no sanctions are imposed on those who refuse to give the needed information.

In this approach, laws are enacted which deal with the upper levels of government (for example, as in the 1997 Constitution of Thailand quoted above), and with basic principles. But the design of appropriate policies is effectively delegated to agencies and departments, each of which is expected to develop policies appropriate to their own situations.

Even in the implementation of these policies, a large measure of common sense is called for. The services of an ethics office can be particularly valuable. (These are discussed in Chapter 6). Equally clearly, conflict of interest, cronyism and nepotism should be covered in appropriate codes of conduct.

### ANTI-NEPOTISM LAWS

Nepotism poses particular problems. It is perhaps not surprising that by no means all countries have anti-nepotism laws – desirable though these may be. When these are lacking, favoritism shown to a relative tends to be dealt with by legal prohibitions. These include prohibitions against unwarranted privilege, direct or indirect personal financial interest that might reasonably be expected to impair objectivity and independence of judgement, or the appearance of impropriety.

A typical example of such a law reads:

**IC 4-15-7-1, on Nepotism,** *No person being related to any member of any state board or commission, or to the head of any state office or department or institution, as father, mother, brother, sister, uncle, aunt, a husband or wife, son or daughter, son-in-law or daughter-in-law, niece or nephew, shall be eligible to any position in any such state board, commission, office or department or institution, as the case may be, nor shall any such relative be entitled to received any compensation for his or her services out of any appropriation provided by law. However, this section shall not apply if such person has been employed in the same position in such office or department or insti-*

*tution for at least twelve (12) consecutive months immediately preceding the appointment of his relative as a board member or head of such office, department or institution. No persons related as father, mother, brother, sister, uncle, aunt, husband, wife, son, daughter, son-in-law, daughter-in-law, niece, or nephew may be placed in a direct supervisory-subordinate relationship.*<sup>19</sup>

The United States has an Office of Government Ethics to handle conflict of interests at the federal level, and Canada has chosen to deal with the issue of conflict of interest by establishing a series of Ethics Counsellors. (The framework is described in Chapter 6).

### MONITORING PUBLIC OFFICIALS' INCOME

In many parts of the world, the argument is advanced that one of the key instruments for maintaining integrity in the public service are income statements that indicate the assets and liabilities of all those in positions of influence as well as those of their immediate family members. It is a thesis that is winning support from international agencies. At the very least, such statements give the illusion of being a corruption “quick fix.” Some countries require senior officeholders to divest themselves of major investments, while others permit the establishment of “blind trusts.”<sup>20</sup>

Although the disclosure of assets and income will, of course, not be accurately completed by those who are taking bribes, it is thought that the requirement that they formally record their financial positions lays an important building block for any subsequent prosecution. It would, for example, preclude them from suggesting that any later wealth that had not been disclosed was, in fact, acquired legitimately.

The Act on Preventing Conflict of Interest in the Exercise of Public Office a Croatian law, includes the following provisions:

**(1)** *Within 30 days from the day they begin to exercise their office, officials shall provide a report with data on their property, permanent or expected income, and the property of their spouse and children, with the balance as of that day, and shall*

*provide a report upon the end of exercise of their office, and upon the expiration of the year in which in the course of the exercise of the office a major change occurred.*

**(2)** *Officials shall in the report from the paragraph 1 of this Article submit the data on monetary savings if it exceeds the net one year amount of official's income.*

**(3)** *An official shall not receive his salary prior to the fulfilment of the obligations under paragraph 1 of this Article...*

**(6)** *An official's tax card shall be a public document.*

Disclosure, the argument runs, should also extend to a certain post-service period, as a deterrent to the receipt of corrupt payments after retirement. Studies have suggested that it is unlikely that corrupt payments are made more than three years after a person has retired.

But does it work? In a vibrant democracy such as the United States, assets disclosures work because of third party enforcement. In elections, opposing candidates, for example, will scrutinize each other's asset declaration forms and make it an issue if an opponent seems to be living beyond his or her means. The same scrutiny occurs with forms requiring disclosures of campaign contributions and expenditures. If a candidate claims to receive only modest contributions and yet is travelling in a leased jet and staying at top-class hotels, his or her opponent will make it an issue. There are civil society groups, too, which check forms and report on those which seem problematic, and on donors who appear to have benefited handsomely from their financial support of candidates.<sup>21</sup>

With government bureaucrats, the process is less pronounced, but can still be effective. In U.S. public procurement, the declarations of officials making procurement decisions are examined by prospective bidders to detect possible conflicts of interest or inexplicable wealth.

Overall, countries' experiences with declarations of assets have been patchy. Initially, in countries with major corruption problems, politicians have legis-

lated for disclosure and then ignored the requirements completely. Alternatively, politicians have established an agency that merely receives declarations, none of which are made available to the media or the public. Moreover, this agency generally has neither the power nor the resources to check the accuracy of the declarations. In this way, they have been able to ensure that that third party enforcement of the kind described above has not been able to take place.

It is true that recently, in several countries, the process of disclosure has claimed some victims – though whether through carelessness rather than corrupt intent is debatable. What the declaration process can achieve is formally to record at least a measure of a person's interests, information which can later prove invaluable should it come to dealing with questions of conflict of interest.

Having accepted the argument in favor of disclosure, several questions follow: To whom should disclosure be made? What matters should be included? How broadly should disclosure requirements apply to members of an official's family? What access should the media and members of the public have to these declarations? And, in the case of career public servants, what levels of seniority must be required to submit to this process? There are no simple answers to any of these questions.

The tricky part of this process is not so much deciding on the categories of assets to be disclosed, and the categories of the officials who should be making disclosure, but rather on deciding the extent to which there should be public access to the declarations. The litmus test must be whatever is needed to achieve public peace of mind – not whatever is conceded by the noisiest of the opponents of disclosure. Nor are matters always as simple as they may seem. A minister of finance from Colombia has been quoted as saying that a public declaration of a politician's wealth would be an open invitation to kidnappers to claim the sums disclosed as a ransom.

However, if the public do not have access to disclosure information and if there is no aggressive monitoring of the declarations, the process has little impact.

In Australia, a system whereby officials make annual written disclosures to the head of their department has been seen as effective. These are not made public. Similar disclosures are managed by the ethics counsellors in Canada, and by contrast there are rights of public access. It should be noted that Croatia has opted in favor of public access, thus enabling its citizens to police the system.

In Nigeria, the Code of Conduct Commission was empowered, from 1979 onwards to require the filing of returns by all public officials. However, they had neither the resources nor the legal powers to actually check the contents of any of these statements. As a consequence, throughout a prolonged period of looting by public officials, the only prosecutions ever mounted were against public officials who failed to file an annual return – not for filing a false one.

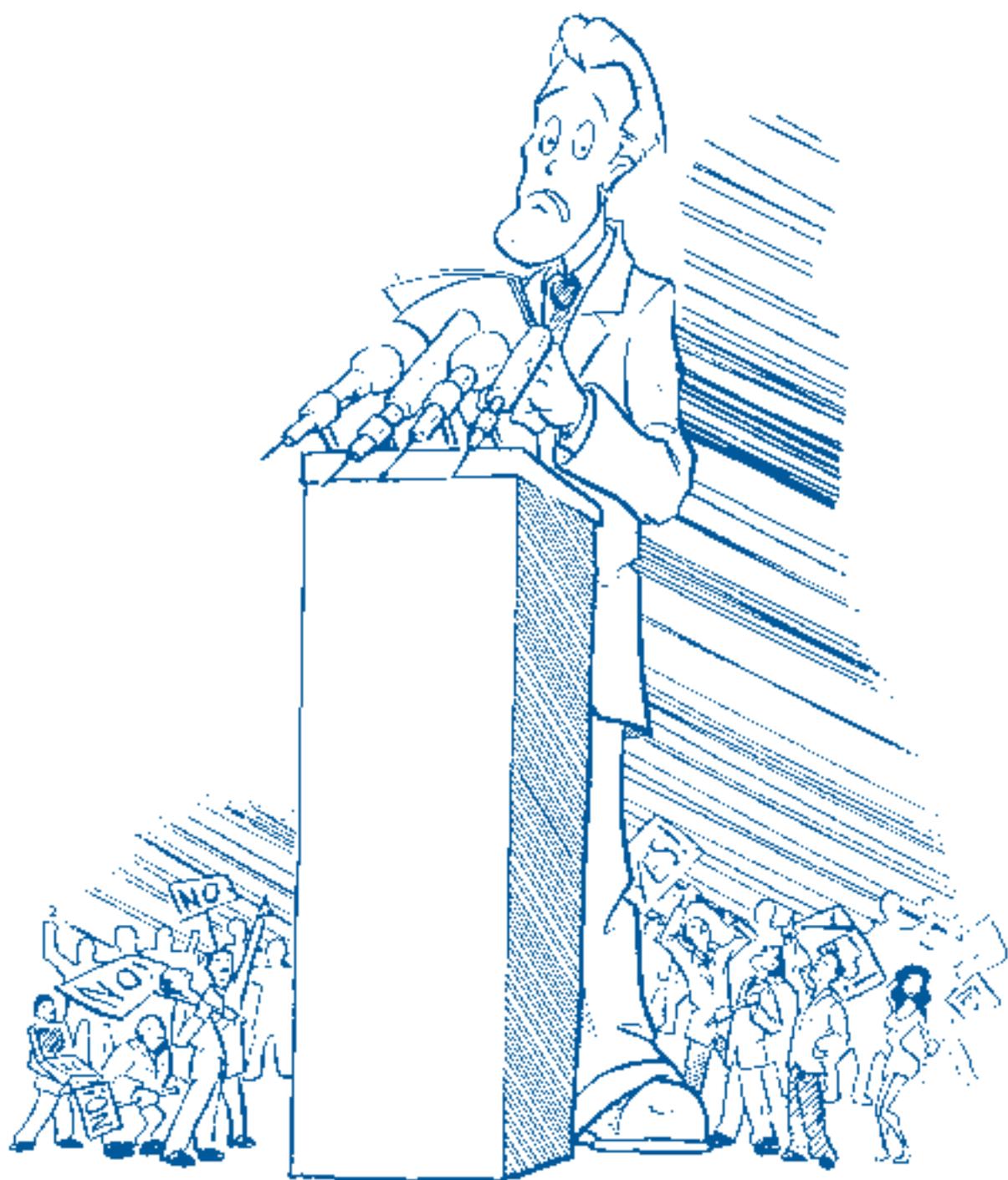
In today's world, however, governments are increasingly examining more meaningful public disclosure

arrangements. South Africa has designed an interesting model. It has introduced a scheme for the monitoring of the financial status of all parliamentarians and government ministers. A compromise has been reached in an effort to meet legitimate claims to privacy. The disclosure of certain interests is made openly and publicly; other interests are disclosed publicly but only as to the nature of the interest, with the actual value being disclosed privately. 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.

The development of effective and fair regimes for the monitoring of the incomes, assets and liabilities of senior public officials will be followed closely by anti-corruption activists. If they can be made to work – and there are obvious difficulties – then they will serve as a valuable tool in restraining abuses of office.

## ENDNOTES

- 1 See OECD Guidelines for Managing Conflict of Interest in the Public Service: <http://www.anticorruptionnet.org>. The same website contains excellent training materials developed for the OECD by Howard Whitton (howard.whitton@oecd.org). OECD – Recommendation of the Council on Guidelines for Managing Conflict of Interest in the Public Service (June 2003), <http://www.oecd.org/pdf/M00041000/M00041994.pdf>; The Canadian website, Values and Ethics Codes for the Public Service is a further excellent resource, [http://www.tbs-sct.gc.ca/pubs\\_pol/hrpubs/TB\\_851/vec-cve1\\_e.asp#\\_Toc46202807](http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/TB_851/vec-cve1_e.asp#_Toc46202807)
- 2 See Code of Ethics, State of New Jersey USA: [http://www.iit.edu/departments/csep/PublicWWW/codes/coe/State\\_of\\_New\\_Jersey\\_Community\\_Affairs.html](http://www.iit.edu/departments/csep/PublicWWW/codes/coe/State_of_New_Jersey_Community_Affairs.html); For a detailed discussion of the issue at senior levels of government, see Conflict of Interest: Legislators, Ministers and Public Officials by Gerard Carney (Transparency International, Berlin) at [http://www.transparency.org/working\\_papers/carney/index.html](http://www.transparency.org/working_papers/carney/index.html).
- 3 Constitution of the Kingdom of Thailand: [http://www.kpi.ac.th/en/con\\_th.asp](http://www.kpi.ac.th/en/con_th.asp)
- 4 Constitution of Thailand, Section 70, Chapter IV
- 5 Constitution of Thailand, Section 70, Chapter VI, Part 2
- 6 Quoted in Report on the Investigation of Allegations of Nepotism in Government: Report No 11 (Special Report) to the Parliament of South Africa by the Public Protector of the Republic of South Africa, 15 April, 1999
- 7 Board of Ethics, King County, State of Washington, USA. For additional information, please contact Jeremy Pope: [jeremy.pope@tiri.org](mailto:jeremy.pope@tiri.org)
- 8 Adapted from the City of Bristol, Tennessee, Nepotism Policy (US), September 1996
- 9 Board of Ethics, King County, State of Washington, USA. For additional information, please contact Jeremy Pope: [jeremy.pope@tiri.org](mailto:jeremy.pope@tiri.org)
- 10 In New Zealand, the minister of justice would ask the attorney general or the solicitor general to act in his or her stead. If the minister's friends were among the candidates for the job. A decision would be recommended to the minister, which he or she would then take formally in their own name.
- 11 This section draws on materials developed by the New South Wales Independent Commission Against Corruption (NSW ICAC), Sydney, Australia. Its assistance in the preparation of these and other materials is gratefully acknowledged. For some case studies, see the NSW ICAC publication Best Practice, Best Person: Integrity in Public Sector Recruitment and Selection on the Commission's website, where there is a wealth of valuable information and approaches in preventing corruption: <http://www.icac.nsw.gov.au>
- 12 The discussion in this section is based on a dialogue between the NSW ICAC and public sector employers in that state. The full report is entitled Corruption Prevention Publications: Strategies for Managing Post Separation Employment Issues and may be accessed on the ICAC website. <http://www.icac.nsw.gov.au>
- 13 For the Canadian legislation, see <http://strategis.ic.gc.ca/SSG/oe00002e.html>
- 14 US Office of Government Ethics, Memorandum Regarding Revised Post-Employment Restrictions, 26 October 1990.
- 15 Canadian Office of the Ethics Counsellor: <http://strategis.ic.gc.ca/SSG/oe01188e.html>
- 16 Canadian Office of the Ethics Counsellor website: <http://strategis.ic.gc.ca/epic/internet/inoec-bce.nsf/vwGeneratedInterE/Home7>
- 17 S.140 Ministerial Code: A Code of Conduct and Guidance on Procedures for Ministers, Cabinet Office, July 2001. <http://www.cabinet-office.gov.uk/central/1997/mcode/>
- 18 This section draws from Post-Separation Employment of Ministers, Research Note prepared by the Australian Department of the Parliamentary Library (Research Note 40, 28 May 2002) <http://www.aph.gov.au/library/pubs/rn/2001-02/02rn40.pdf>
- 19 State of Nebraska, USA.
- 20 See Bernard Pulle Conflicts of Interest Avoidance: Is There a Role for Blind Trusts? In Current Issues Brief 14, 1996-97. <http://www.aph.gov.au/library/pubs/CIB/1996-97/97cib14.htm>
- 21 For example, the Center for Public Integrity (<http://www.publicintegrity.org>) and Common Cause (<http://commoncause.org>)



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The act of lobbying is an integral part of a diversified democracy. It is a form of advocacy that attempts to change laws that affect the lives of individuals and communities. By banding together in organizations with particular social, economic and political agendas, citizens form interest groups that can directly impact a government's policymaking process.

Lobbyists can play an important role in preparing briefs on matters of public interest and – especially where there are lobbyists acting on both sides of any given issue – by ensuring that legislators are much better informed than they might be otherwise. Encouraging lobbying satisfies the participatory demand of the public and potentially provides an important channel for minority voices. Groups as diverse as oil companies and migrant farm workers all have lobbyists in capitals across the world both to protect and to advocate their interests.

Yet lobbying is not all to the public good. The negative aspect of this activity is that, in an age of professional lobbyists, such practices can give rise to unhealthy and corrupt relationships between the lobbyists and those being lobbied. This is a situation facilitated by money and privileges proffered by lobbyists. In the United States, one of the more worrying features of the Enron scandal was the discovery that the corporation had developed software specifically to track the “performance” of certain US congressmen Enron had targeted to make sure that the energy company was getting value for its money.

The influence of lobby groups across the world depends largely on countries' socio-political cultures; both in terms of governance and in terms of the strength of civil society. A famous study of lobbying practices in the United States in the 1960's concluded that lobbying did not constitute a significant influence on public policy in Congress. However, since then, lobbying practices everywhere have become far more sophisticated. Despite a wide range of safeguards, the United States is now often seen as demonstrating some of the worst distortions of an open society that can be induced by lobbying power.

As a consequence, many now consider that lobbying has gone too far and that governments are held vir-

tually hostage by entrenched lobbying organizations to the detriment of policymaking and the greater common good. It is feared that the relative power of the lobby from particular industries over the general political process has rendered politicians captive to the interests that fund and flatter them.

### **LOBBYING AND THE POTENTIAL FOR CORRUPTION**

Disillusioned by a perceived lack of channels for the average citizen to affect policy-making in a meaningful way, electorates in many parts of the world seem to be losing heart and voter participation is dwindling. Voters may feel that the most important policy decisions are made through bargains between politicians and organized interests groups led by professional lobbyists, rather than as a consequence of the ways in which citizens have expressed their views.

Increasingly, lobbyists seem to be too close to legislators and legislators too vulnerable to free hospitality and other forms of gifts. In the bargaining process, there is a significant risk that situations of severe conflicts of interest will arise. The United Kingdom is just one of the countries where scandals have forced the establishment of systems designed to track the hospitality and the gifts received by legislators.

Concerned citizens in democratic societies are increasingly demanding to know who is doing what and for which politician or government official.<sup>2</sup>

### **INFORMATION DISCLOSURES**

Specific rules establishing a lobbyist registration system can be introduced to formalize an otherwise highly informal process. This gives ordinary citizens, journalists, as well as other lobbyists the opportunity to see who is lobbying and for what purpose.

In terms of best practice, the lobby register should be published on the Internet so that a quick and efficient scrutiny of the data can be had. The Center for Responsive Politics, an American non-governmental organization, provides extensive

information on American lobbyists and interests (<http://www.opensecrets.org/lobbyists/>).

## EDUCATION

Any system of registration and information disclosures, however, should not impede open access to government, public servants and parliament. It should not muzzle the voice of the ordinary citizen or impair his and her ability to impact upon the government's agenda. On the other hand, it is generally considered that lobbying is an integral part of the political process, and it has certainly led to many grassroots issues being put on the national agenda. Most legislation recognizes that lobbying – as long as it is open – is a legitimate activity that lies at the very heart of the political process.

The public – through organizations and interest groups – should be able to access the proper procedures for lobbying core issues should they choose to do so. Since lobbying is often considered to be the exclusive domain of well-connected lobby organizations able to use clandestine channels and connections to influence relevant political institutions, it is important to demonstrate how other interest groups can succeed.

## LEGISLATION

In Poland, a bill drafted by the Ministry of Internal Affairs and Administration, seeks to control lobbying. It defines this as any activity carried out using lawful means and intended to influence public authorities to consider arguments in favor of the interests of specific social or professional groups.

Under the proposed legislation, lobbyists would be required to register and then to abide by prescribed standards of conduct. Lobbying would be open, with all contacts recorded between lobbyists and the officials in charge of matters of interest to them. These contacts would then be published in a public information bulletin. Officials who were lobbied would also be required to inform their supervisors.

The United States and its neighbor, Canada, have the most advanced forms of legislative procedures

for the registration of lobbyists. In Canada, a revised version of the Lobbyist's Registration Act<sup>3</sup> was enacted in 1995 for the purpose of responding to a number of conflict of interest scandals that had tarnished the reputation of successive governments. The intent was not to impede and over-regulate the lobbying process, but, rather, to make the system more transparent.

The Canadian Lobbyist's Registration Act is based on four key principles:

- *Free and open access to government is an important matter of public interest.*
- *Lobbying public office holders is a legitimate activity.*
- *Public office holders and the public must be able to know who is attempting to influence government.*
- *A system of registration of paid lobbyists should not impede free and open access to government.*

The Act identifies three types of lobbyist:

- *Consultant lobbyists – individuals, such as lawyers, accountants and government relations consultants, who are paid to lobby for clients.*
- *In-house lobbyists for corporations – employees who, as a significant part of their duties, lobby for an employer who carries out commercial activities for financial gain.*
- *In-house lobbyists for organizations – not-for-profit organizations in which one or more employees lobby, and the collective time devoted to lobbying amounts to a significant part of one employee's duties.*

This implies a relatively narrowly classified registration of lobbies, since it stipulates that only lobbyists who are paid for lobbying must register. It has the advantage of exempting automatically virtually all grassroots advocacy efforts undertaken by citizens.

The Canadian Act requires all lobbyists to disclose their political activities; thus, by examining the registry, anyone can ascertain who is lobbying what department and what they are discussing. Importantly, they must also disclose their past work with the government. Canadian lobbyists' registration and updating process can be easily accessed through the Internet.<sup>4</sup>

Another of the tasks of the Canadian Federal Ethics Counsellor has been to develop a Lobbyists' Code of Conduct<sup>5</sup> and to respond to any questions of ethics and business practice that arise in government relations. The Ethics Counsellor, appointed by the prime minister, offers guidance to both lobbyists and their clients to help determine whether their proposed activities are acceptable. Draft legislation is under consideration that would have the Counsellor reporting in future to the legislature, rather than to the prime minister.

The Lobbyists' Code of Conduct supports the Act, setting standards of conduct that lobbyists are to meet in their dealings with federal public office holders. Its preamble states that lobbying is a legitimate activity, provided that it is open and does not impede free and open access to government. It also allows individuals to register complaints with the Ethics Counsellor, and provides for the availability of reports on those complaints from the Counsellor's Office.

The position of Ethics Counsellor is designed to take control of enforcement issues. If it is thought that lobbyists are giving undue gifts or fundraising on the behalf of the officials they are lobbying, it is to the Counsellor that a complainant should turn.

In the United States, the two main federal lobbying regulations are the Byrd Amendment (31 US Code, §1352<sup>6</sup> and the Lobbying Disclosure Act (2 US Code, §1605). The Byrd Amendment prohibits the use of federal funds, either through grants, contracts, or co-operative agreements, in lobbying activities. The Amendment also provides for the monitoring of any lobbying expenditures made by recipients of federal funds. NGOs and charities, which tend to enjoy tax exemptions, are generally permitted to lobby as long as their lobbying does not form a core part of their organizations' expenditures.

The second US act, the Lobbying Disclosure Act, specifies procedures surrounding the registration and the bi-annual reporting of national lobbying activities.

A third act, the Anti-Lobbying Act (18 U.S. Code §1913<sup>7</sup>), a criminal statute, prohibits the use of appropriated (i.e. government) funds, whether directly or indirectly. It states that:

*No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favour or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to Members of Congress on the request of any Member or to Congress, through the proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business.*

*Violators are subject to fines, imprisonment and removal from office.*

### **"REVOLVING DOOR" LAWS**

In the United States, lobbyist regulations vary at the state level. For example, over twenty states stipulate a period of time that must elapse before a former legislator can represent clients to the legislature.

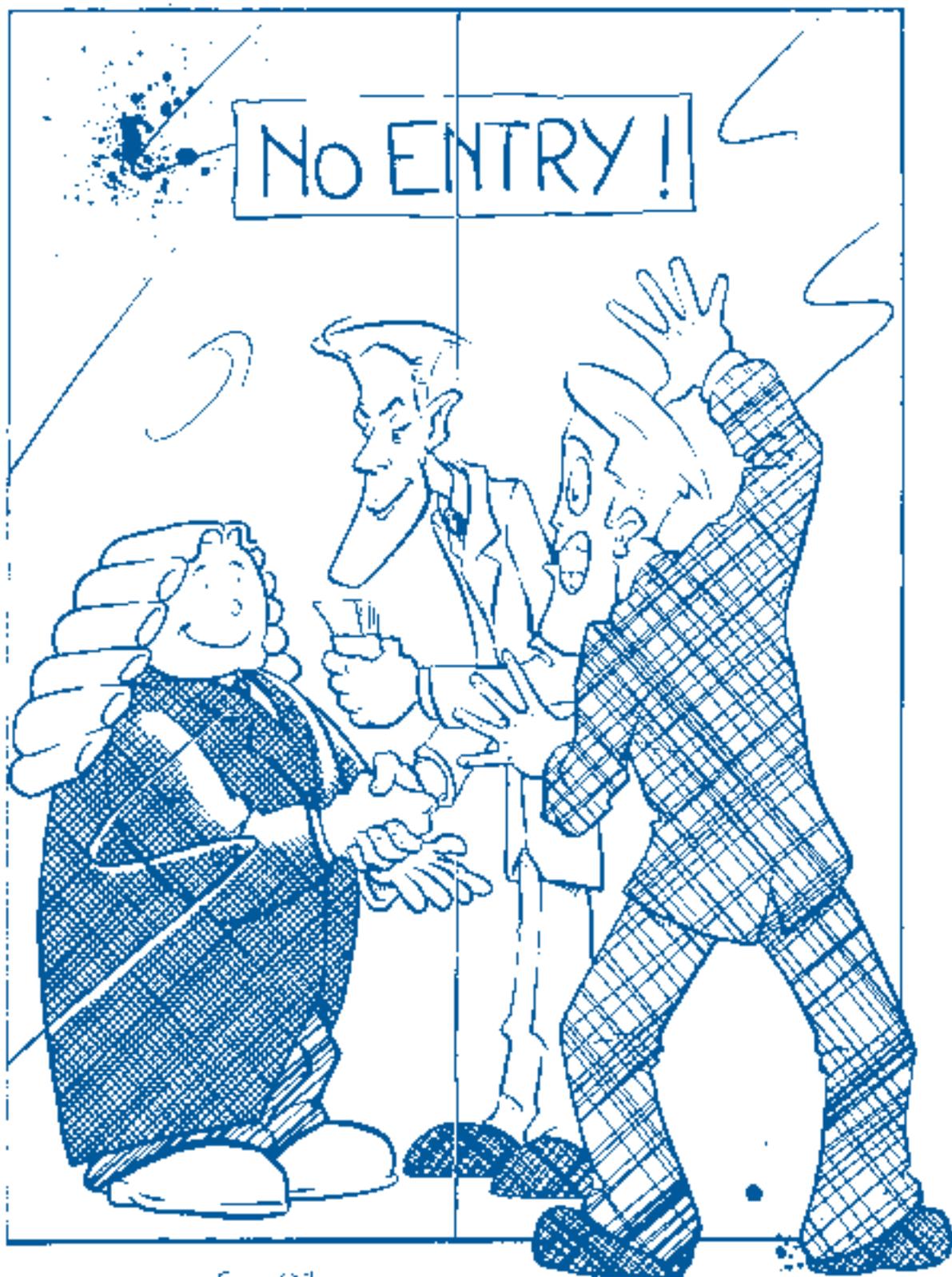
Known as "revolving door" laws or "cooling off periods," these provisions are designed to break the connection between the legislator's professional duties and the interests of lobbyists. They seek to create a system in which former public officials are unable to take advantage of their inside knowledge by becoming paid lobbyists. The periods range from one to two years.

Some states, such as California, extend the ban to all former government officials and ban them from contacting specified government agencies for a period of one year. New Mexico is one state where there is a permanent ban on officials (including legislators) representing a person in dealings with the government on any matter in which the former public official participated personally and substantially while still a public official.<sup>8</sup>

## ENDNOTES

- 1** (Canadian) Lobbyists' Registration Act, R.S. 1985, c. 44 (4th supp.), An Act Respecting the Registration Of Lobbyists: <http://laws.justice.gc.ca/en/L-12.4/text.html>; (Canadian)Lobbyists' Code of Conduct: <http://strategis.gc.ca/SSG/lr01044e.html>; Annual Reports Under the (Canadian) Lobbyists Registration Act: <http://strategis.gc.ca/SSG/lr01066e.html>; {US} Federal lobbying Regulations: [http://www.research.uh.edu/downloads/PDF\\_format/lobby99.pdf](http://www.research.uh.edu/downloads/PDF_format/lobby99.pdf); (US) state restrictions [http://www.ncsl.org/programs/ethics/e\\_revolving.htm](http://www.ncsl.org/programs/ethics/e_revolving.htm); (US) Prohibitions against legislators lobbying state government after they leave office: [http://www.ncsl.org/programs/ethics/c\\_revolving.htm](http://www.ncsl.org/programs/ethics/c_revolving.htm). The assistance of Gustav Ando with this chapter is acknowledged with thanks.
- 2** Weblobbying.com lets participants create their own online lobbying campaign or speak out on the issues that concern them most. Go to: <http://www.weblobbying.com>.
- 3** Lobbyists Registration System: <http://strategis.gc.ca/lobbyist>.
- 4** Lobbyists Registration System, Act and Other Documents: [http://strategis.ic.gc.ca/epic/internet/inlr-el.nsf/en/h\\_lr20007e.html](http://strategis.ic.gc.ca/epic/internet/inlr-el.nsf/en/h_lr20007e.html).
- 5** Lobbyists' Code of Conduct: [http://strategis.ic.gc.ca/epic/internet/inoec-bce.nsf/vwGeneratedInterE/h\\_oe01438e.html](http://strategis.ic.gc.ca/epic/internet/inoec-bce.nsf/vwGeneratedInterE/h_oe01438e.html)
- 6** 31 U.S. Code, §1352: <http://tinyurl.com/23t5b>
- 7** Anti-Lobbying Act (18 U.S. Code §1913) Lobbying with appropriated moneys:
- 8** Revolving Door Bans: [http://www.ncsl.org/programs/ethics/e\\_revolving.htm](http://www.ncsl.org/programs/ethics/e_revolving.htm).





Immunity for politicians is as old as politics itself. It is a generally accepted form of protection for senior public figures and judges.<sup>1</sup> But the debate over the extent of these immunities is highly polarized. For some, the immunity principle safeguards the freedom of expression in the legislature, at the heart of the democratic system. For others, immunity actively undermines democracy's very foundations of equality before the law.

### THE URGENT NEED FOR REFORM

As frustration increases world wide with political bribery, corruption and conflict of interest scandals, so, too, has frustration with the fact that suspected politicians can often enjoy *de facto* immunity from such crimes. In a recent survey undertaken by Gallup International, 63 percent of respondents considered public officials' immunity from prosecution to be the main cause of an increase in corruption in their country.<sup>2</sup> [.] Thus, in many parts of the world, the very idea of political immunity is considered anachronistic and in contravention of the most basic principles of constitutionality and equality before law. It recalls the popular Orwellian maxim that "all animals are equal, but some animals are more equal than others."

Indeed, it seems that many investigations into high-level corruption allegations have been significantly impeded by claims of political immunity. The scope of political immunity can be extended further than intended, and in such cases politicians enjoy *de facto* immunity from even serious crimes.

In many countries, senior public officials are shielded by immunities to such an extent that criminals often seek public office simply to avoid prosecution. In such cases, there is a very high risk for a vicious cycle of corruption; parliament, by virtue of its privileged protection, attracts unethical individuals who then perpetuate and augment corrupt conduct. Some individuals in need of legal protection have even bribed their way onto party election lists in order to secure immunity.

Even if a corrupt entrepreneur is unable to attain a public office, he may try to attach himself to a political patron who, using his shield of immunity, is able

to protect him. The exchange of favors and bribes is highly likely in such situations. Through excessive political immunity, politicians can be rendered virtually untouchable.

### THE ELEMENTS OF IMMUNITY

Any discussion of immunity raises four questions:

- *Who is given protection from prosecution?*
- *What acts are covered by immunity?*
- *How long does an official's or politician's immunity from prosecution last?*
- *How far does the protection extend (e.g. to the legislature only)?*

The immunities and privileges refer to instances whereby selected officials are specifically shielded from public prosecution or from civil action. The category of an official who is granted this immunity and the level of the immunity can be defined either in a country's constitution or in its legislation.

Such protection is designed not to bestow a personal favor 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 perform 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*
- *To act as a shield against malicious and politically-motivated prosecutions being brought against them*

Immunity for politicians should, therefore, be seen as intended to protect the democratic process – not to establish a class of individuals who are above and beyond the reach of the law.

Although the **principle of non-accountability or freedom of speech** is generally subscribed to and is non-controversial, the so-called “**inviolability principle**” (or freedom from arrest) is increasingly contested. In Ancient Rome, to obstruct the tribunes in their work was to invite immediate execution, but in more recent times, parliamentary immunity has been called anachronistic, contrary to the fundamental principles of modern constitutional law. Such criticisms have been countered by those who argue that, despite existing anomalies, the reasons which originally lay behind the introduction of parliamentary immunity into modern constitutions are still valid. The debate has resulted in some countries reforming their legal procedures and changing the practices followed by their legislatures, so that restrictions are imposed on the scope of inviolability.

## THE GRECO REVIEWS

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.<sup>3</sup>

Among the countries 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>4</sup>

The guidelines being considered in Slovenia read:

### I. As a rule, immunity shall not be granted if:

*a) the deputy is placed into custody or a criminal proceeding is instituted against him/her before his/her mandate is confirmed; or*

*b) the deputy is caught in the act of committing a crime punishable by imprisonment of more than five years; or*

*c) the deputy does not claim immunity.*

### II. In all of the above cases and in any other, the following procedures will be followed:

*a) each of the alleged criminal offences shall be dealt with separately, on the basis of a notice or request from the competent body;*

*b) functions of the deputy in question shall be determined;*

*c) it shall be estimated whether granting of immunity is essential for the deputy to perform his/her function; and*

*d) as a rule, immunity shall not be granted and therefore each decision on granting the immunity shall be well grounded.<sup>5</sup>*

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. Such immunity prevails unless the minister of justice submits an application for the removal of immunity, and parliament authorizes prosecution by a two-thirds majority in the Chamber of Deputies and by a simple majority of the Senate. The case is then heard by the Supreme Court of Justice. Immunity is automatically restored if the member is re-elected. As GRECO noted, “This situation has an undeniable potential for permanent obstruction of the judicial system.”

In cases of being caught *in flagrante delicto* (in the act of committing an offence), a deputy or senator may be detained and searched, but not prosecuted. The respective chamber must be promptly informed and may order the cancellation of the detainment.<sup>6</sup> According to one prosecutor from the Romanian Anti-Corruption Section, “We have problems with parliamentary immunity. In my opinion, it is not normal that an MP who plundered a bank or who

engages in smuggling benefits from immunity. These are some of the reasons why the judiciary is often powerless.” The Romanian government’s National Anti-Corruption Plan includes a commitment to limit immunity in general.

### THE HEAD OF STATE AND GOVERNMENT

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. There is, therefore, a remedy, but it lies with the legislature rather than with the judiciary.<sup>7</sup>

### OTHER SENIOR OFFICIALS

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.

### JUDGES

Judges present a special difficulty. They are generally immune from being sued personally for errors they may have made in their judgements (for example, for exceeding their jurisdiction) and to protect them from political pressures they are generally 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>8</sup>

Under the Estonian Constitution, the procedure for lifting judges’ immunity involves either the president of the republic or the Riigikogu (the legislature). The Courts Act of 2002 established rules for bringing

criminal charges against judges in both cases. These are meant to guarantee that no political influence is brought to bear on any decision to lift immunity and that it be based on a request from a prosecutor, supported by the Supreme Court. However, there is still a need to obtain the consent of parliament in order to bring charges against the chief justice and justices, or the consent of the president in order to bring charges against a senior judge.

The position of judges, their independence and their accountability is discussed in Chapter 16.

### PROSECUTORS

Attention should be paid also to the risks of immunity of prosecutors. In a number of countries, prosecutorial immunity has been too broadly defined. This undermines prosecutors’ ability to function as defenders of the public interest and in some cases led to a corrupt partnership between prosecutors and leading figures of the underground.

In some countries, like Bulgaria until recently, prosecutors were virtually untouchable, which fuelled widespread public criticism and international pressure to reform. Leading NGOs in this country recommended limiting such an immunity by structural reform, as well as by strengthening internal controls, and expanding transparency within the judiciary in general (See Corruption Assessment Report 2003, Sofia, 2004, p.32-33).

### IMMUNITY LEGISLATION AND PRACTICES

As we have seen, certain principles can be observed which are relevant to all countries on the question of political immunity. Generally speaking, there are two separate categories of immunity:

- **The principle of non-accountability or non-liability:** *This is the original, basic protection afforded to politicians, and refers mostly to the freedom of speech and expression.*
- **The principle of inviolability:** *This refers to a broader, more flexible protection which gives the politician freedom from arrest.*

The **non-liability principle** is recognised around the world, and is originally based on the notion that politicians should be protected from unfair charges levelled against them by superiors. Thus, members of parliament are not held accountable for accusations or comments that they make in a highly charged and politicized environment. Non-liability also refers to casting votes and other similar official declarations in which the interests of the people the parliamentarian represents must be safeguarded.

The non-liability principle, generally narrowly defined, is usually absolute; there are, in most cases, no time limits and no possibility of lifting the immunity. Closely related to the principle of unconditional freedom of speech, it is generally based on the tacit understanding that accusations and defamatory statements will be kept at an absolute minimum. It is felt that if protection is not guaranteed by non-liability privileges, then members of parliament would feel constrained, compromised and unable to speak and vote freely on behalf of the people they represent.

Without this immunity, the very independence of the parliamentary institution would be called into question, as well as its ability to function in light of potential politically motivated investigations into defamation allegations. Where the right to speak freely is abused, the institution itself generally has rules of accountability and is in a position to suspend a member from the legislature for a given period.

The same principle applies to the judiciary, which is also accorded a similar level of immunity. It would compromise the effectiveness of the judiciary as an institution if a judge could be held personally liable for honest mistakes of law made during a trial. The principle does not apply to judges who acted corruptly in their rulings. It is more effective for the state to be held liable in such instances and for judges to be removed only if they are proven incompetent or unfit for duty. Special procedures should exist to protect judges from politically motivated requests for removal.

By contrast, the **principle of inviolability** is far more controversial, and depends largely on the definition and the political environment. In the Netherlands, politicians do not enjoy any parliamentary inviolabil-

ity whatsoever. In the United Kingdom, parliamentarians are given very little protection on this question. They are immune from arrest for civil actions, but since there are now very few civil causes on which a person can be detained, the privilege offers little meaningful protection. Often, if parliamentary involvement is required, it is a matter of authorizing an investigation.

In Belgium, the police can investigate the activities of parliamentarians without political interference – including searches, seizures and questioning – but authorization is required for a member of parliament to be committed to trial. By that stage, such authorization 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.

This compares with Nicaragua where in 2002 it took a public petition signed by more than half a million citizens before a reluctant legislature cleared the way for the former president to be prosecuted (and convicted) for embezzling over \$100 million in public funds.<sup>9</sup>

On the issue of non-liability, the scope of immunity generally refers to acts committed in the performance of the politician's duty, either in parliament or on official occasions. Thus, it generally does not extend to statements made during non-official public speaking or in newspaper articles. The parliament building is the bricks-and-mortar manifestation of the boundaries of this form of immunity, outside of which the politician becomes an ordinary citizen again.

Some countries have particular provisions which allow for persons other than parliamentarians to enjoy the immunity privilege of absolute free speech. In the United Kingdom, for example, all those who attend parliamentary debates and proceedings – including civil servants and expert witnesses – are covered by the non-liability principle.

However, it is generally accepted that when parliamentarians are caught *in flagrante delicto* – in other words, if he or she is caught during or soon after committing the punishable offence – **inviolability**, the second category of immunity, offers no protec-

tion. There are different interpretations of *in flagrante delicto*, however, and some countries extend it to a full 24 hours after a crime was committed.

In terms of the acts covered under inviolability, there is little international harmony. Some countries define which crimes are not covered by immunity; others set limits on the length of the potential term of imprisonment for the crime. Thus, the Swedish Constitution states that the inviolability principle does not cover criminal offences that are punishable by two years or more 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. This is generally deemed to be a best practice.

Certainly, it is illegal for politicians to bribe or accept bribes, although the ability to prosecute such offences depends largely on the political environment and how strictly the inviolability principle is enforced. While a country may nominally forbid bribery among politicians and citizens alike, politicians are often protected not only by the vague lettering of the immunity provisions, but also by public officials who are supposed to prosecute serious offences, yet prefer to protect their colleagues.

Legislation differs from country to country on how long the principle of inviolability can be applied to parliamentarians and officials. The time limit for inviolability is a particularly important question to be considered in drafting any legislation on immunity. In some countries, the principle is only relevant for the length of the parliamentary session. In other countries, however, immunity practices allow for a legislator to have his or her immunity automatically restored if he or she is re-elected to office. Politicians elsewhere are granted immunity that pre-dates their term of office, a provision which can have the dangerous effect of attracting criminals who want to avoid prosecution. This type of provision can corrupt an entire series of politicians, and should be avoided in any political immunity legislation.

Certainly, life-long immunities of inviolability are indefensible. The privilege must be given up upon leaving office, in all cases. Limits should be imposed on the length of time that a president and/or prime minister can hold office. Some form of regulation must hold

officials and politicians accountable for their actions, even if they are immune from prosecution while on official duty. Naturally, this still makes any investigation difficult, since the investigators may be inquiring about events which happened several years earlier. Immunity is given not as an honor 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.<sup>10</sup>

### PROCEDURES FOR WAIVING PARLIAMENTARY IMMUNITY

Procedures for waiving parliamentary immunities can vary widely. Indeed, in many countries, there is no procedure provided at all, either because there have been no cases to set a standard procedure or because there is a distinct lack of political will to clarify such delicate matters. In some instances, the procedures for lifting immunity are deliberately made complicated in order to discourage such requests.

Nonetheless, it is particularly important to establish a firm set of principles to deal with requests for waivers. As a general rule, such principles should take into consideration that:

- *The request concerns a grave crime, in which the reputation of the parliament itself is at stake.*
- *The request does not unfairly impinge upon the politician's freedom of speech and freedom to carry out his or her mandate to represent voters.*
- *The purpose of the request is not to unfairly single out and discriminate against a politician.*
- *The facts of the case are not clouded by obvious political machinations.*

Often, when considering a request to waive parliamentary immunity, a specific parliamentary committee is established to hear the particular case. Depending on the conclusions of this committee, parliament will vote to decide on the immunity status of the member of parliament in question. The initial request to lift immunity for a given parliamentarian

is usually made by state prosecutors, a special prosecutor, or the minister of justice. In most cases, the relevant committee, the parliamentary speaker, and one or two ministers are notified of the request. Once the special committee has made its decision on the matter, the parliament tends to follow its recommendations. The level of majority required to authorize waiving political immunity is often two-thirds. This requirement, however, varies from country to country.

In France, the Bureau of the National Assembly is endowed with the power to deprive a parliamentarian of his or her immunity rights. Initially, this body decides only on whether a request to restrict a deputy's freedom is genuine, truthful and made in good faith. No consideration is given to the merits of the case. To waive the immunity – usually at the request of the Ministry of Justice – a rapporteur and ad hoc committee are appointed and their conclusions are debated by the National Assembly or Senate at a public sitting.<sup>11</sup>

The issue of political immunity transcends borders. Many allegations of corruption deal with international arms trade, personal wealth in a foreign country and the like. Also, the privilege of political immunity extends to a large corps of foreign diplomatic representatives. Thus, it is particularly important that elected public officials are also subject to extradition. This should carry with it the requirement that the countries concerned have an agreement that recognizes each other's criminal charges.

### AN EXAMPLE OF GOOD PRACTICE

In the Netherlands, there is very little scope for parliamentary immunity. Since 1884 Dutch legislators have been placed on the same basis as ordinary citizens in respect to criminal and legal proceedings. Privilege extends only to the non-liability principle, and this covers only acts which are explicitly linked to the parliamentary mandate. Thus, Dutch parliamentarians are protected only for opinions expressed and votes cast in the performance of official duties. This right is absolute and unlimited.

The parliament has no role in waiving its members' immunity. – Instead, for over 150 years, the Supreme Court has adjudicated in such matters. Today, there is no need for legal procedures for the privilege to be waived.<sup>12</sup>

The establishment of a clear and enforceable standard of political immunity is an essential component of any national anti-corruption campaign, especially in countries where important investigations are impeded by privileges and protection. The curtailment of excesses and abuses related to political immunity is an initiative that builds confidence in a democratic system. It demonstrates trust in the objective capability of its institutions and demonstrates a high degree of political will in favor of accountability.

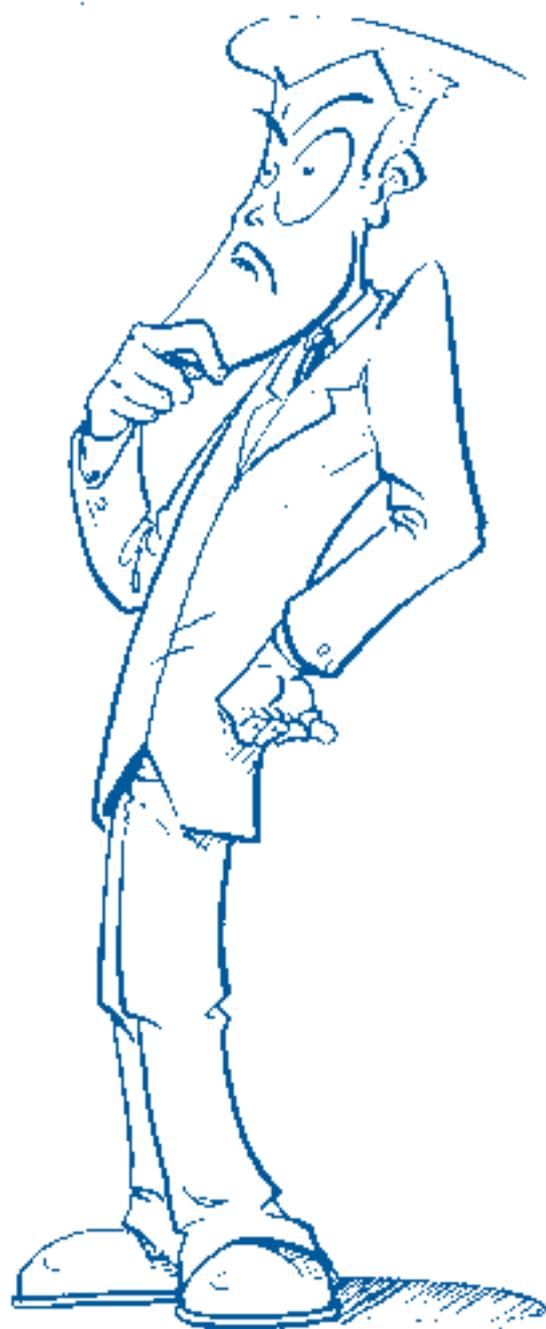
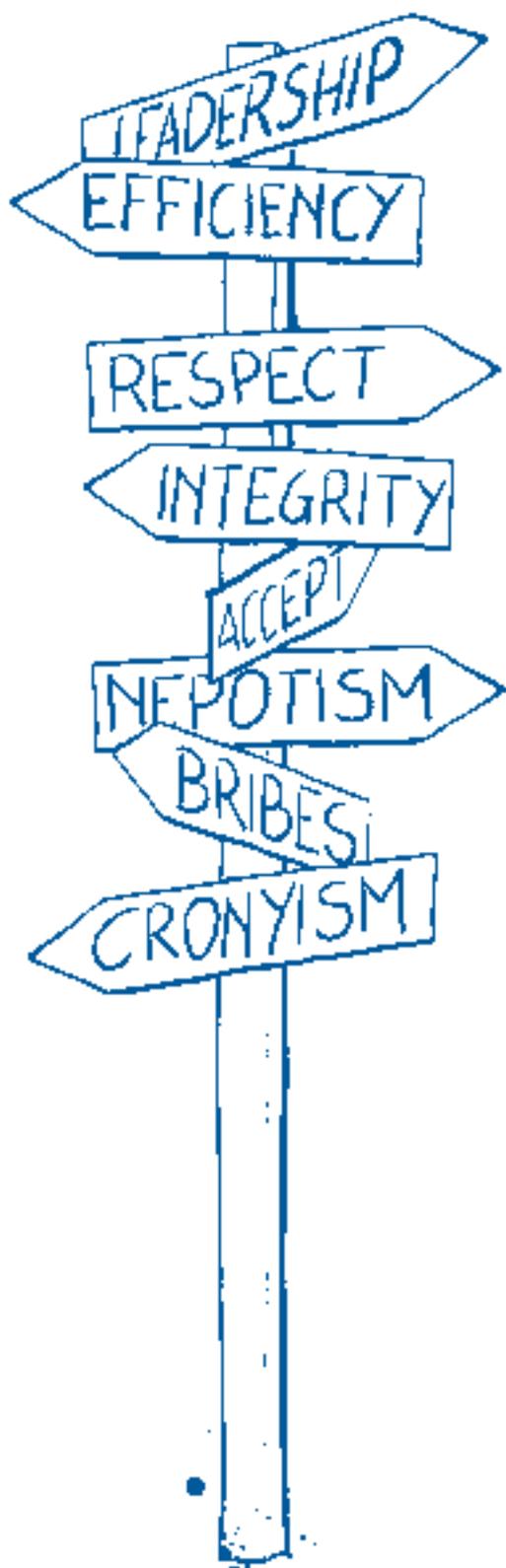
Certainly, it is essential that immunities and privileges are defined narrowly and do not deviate too far from the principle of equality before the law. Worryingly, the trend across many countries has been precisely the opposite; instigating legislation to increase the scope of political immunity in order to avoid or divert investigations into the nefarious activities of political leaders.

*By contrast, the closing declaration of the 11th International Anti-Corruption Conference in 2003 proclaimed that "immunities are afforded to far too many people and in a needlessly wide and general fashion... We believe that governments must review the scope of any immunities as a matter of urgency, and then take any action necessary to restrict these to legitimate and justifiable limits."*

*Any law on political immunity must strike a delicate balance between protecting the work of democratically elected officials against politically-motivated trials on the one hand. At the same time, in any democratic society which values the principle of equality before the law, it would be absurd to have a situation in which those who make the laws are also those who are exempted from complying with them. Political immunity ought never be allowed to become total impunity.*

## ENDNOTES

- 1** Resources: “Rules On Parliamentary Immunity In The European Parliament And The Member States Of The European Union,” European Centre For Parliamentary Research And Documentation (ECPRD): 2001. <http://www.ecprd.org/Doc/publica/OTH/RulesParlImmu.pdf>; GRECO reports series (see below)
- 1** A total of 48,038 people were surveyed in 47 countries for the Voice of the People survey, conducted by Gallup International in July 2002.
- 2** GRECO: <http://www.greco.coe.int/>
- 3** GRECO Evaluation Report on Slovenia, 28 March 2003 <http://www.greco.coe.int/evaluations/cycle1/Eval1Reports.htm> (scroll down)
- 4** GRECO, Compliance Report on Slovenia: [http://www.greco.coe.int/evaluations/cycle1/GrecoRC-I\(2003\)1E-Slovenia.pdf](http://www.greco.coe.int/evaluations/cycle1/GrecoRC-I(2003)1E-Slovenia.pdf)
- 5** GRECO, Evaluation Report on Romania, 8 March 2002 <http://www.greco.coe.int/evaluations/cycle1/Eval1Reports.htm> (scroll down)
- 6** There have, in fact, been very few cases of Romanian MPs being stripped of their immunity, and none concerning corruption cases. For example, in 1997 the Chamber of Deputies refused to cancel Deputy Gabriel Bivolaru’s immunity in connection with an alleged 2.425m fraud. The Anti-Corruption Section has unsuccessfully requested that the minister of justice waive another MP’s immunity.
- 7** For documents related to the impeachment of U.S. Presidents Andrew Johnson, Richard Nixon and Bill Clinton, see: <http://www.lib.auburn.edu/madd/docs/impeach.html>
- 8** GRECO Evaluation Report on Estonia, 9 July 2003 <http://www.greco.coe.int/evaluations/cycle1/Eval1Reports.htm>
- 9** Transnationale.org, “Nicaraguan ex-leader loses his immunity,” December 18, 2002: <http://forums.transnationale.org/viewtopic.php?t=765&view=previous>
- 10** Non-liability for official acts would, of course, continue.
- 11** Article 26 of the French Constitution
- 12** Article 71 of the French Constitution



### A PUBLIC SERVICE UNDER PRESSURE

Administrative traditions can vary depending on a country's culture, but there are generally shared views as to how public servants should fulfil their duties – fairly, honestly and effectively. However, these values can come into conflict with other expectations. For example, family members and others may believe that they should be provided with jobs, with contracts or simply with government property. Intense pressure can be brought to bear on a family member in public employment by the expectation that they will provide for various members of the extended family – even when pay levels are barely sufficient to meet the immediate personal needs of the public employee.

On top of these pressures, situations arise where the right decision is not an easy one to make or when it is difficult to identify even where the ethical dilemma lies. This makes it essential for civil servants to observe standards which they know and understand, and on the basis of which they can make ethical decisions. Confidential advice should be available to them when they feel the need for it.

Most people would prefer to be – and to be seen to be – honest and respected for their personal integrity. This assertion is correct and provides the starting point for an ethics management system that has the potential to make serious inroads into ethical misconduct. Often, this misconduct can be as much the result of misunderstandings and misperceptions as of blatant illegality.

In such an environment, working out what is right and wrong is usually very simple. The answer to the question “Should I, as a public servant, donate my office supplies to a charity I think is worthy of my personal support?” is not very difficult to grasp.

The real problem when it comes to ethics, however, is that the questions are not usually so simple. Rather than choosing between black and white, it becomes a matter of distinguishing between shades of grey.

Take, for example, such questions as:

- *Should I enforce the law in this instance? Even though it will cost the community a great amount of money to do so?*
- *Should I withdraw from re-negotiating this contract? Even though the contractor is only a very distant relative?*
- *Should I do as the minister has requested? Even though it is not clear that the law allows me to do what I am being asked to do?*
- *Should I do anything about a case of minor corruption in my work unit? Even though I can expect to be thought of as disloyal if I do?*
- *Should I make sure that the clients of my program are getting all of the financial assistance to which they are entitled? Even though my department is trying to save money?*

Even when the answers seem clear, there can still be an element of personal risk in acting on them, and a reluctance to do so.

Today, both in developed countries and countries in transition, strains on the public service come from varied quarters. These include: Increasing privatization and contracting out of traditional government functions; the delegation of responsibility, including financial responsibility, within public service organizations; greater pressures for openness and more intensive media scrutiny of the public sector; a greater and growing intensity of lobbying by those anxious to capture government business; and an increased willingness on the part of the public to complain when the quality of public service is poor. All have contributed to an increased awareness of the need to take steps to bolster the ethical basis on which public service functions. On top of this, many transition countries have had to cope with the inheritance of demoralized and dysfunctional public sector cadres, frequently underpaid and even left unpaid to survive on whatever they can extract from the public for the services they have been providing.

Public management reforms involving a greater delegation of responsibility and discretion for public servants, budgetary pressures and new forms of delivery of public services have challenged traditional values in the public service. Ethics may not have changed, but in managing a modern civil service, areas of discretion in many areas have widened.<sup>1</sup> Moreover, surveys in many countries have disclosed that the public's hostility towards government structures can run high. These concerns have manifested themselves at the international level, too. Member states of the Organization for Economic Cooperation and Development (OECD) have taken part in comparative surveys to share their experiences and so strengthen their own ethics programs.

There is a clear role for schools of public administration in the development of their country's standards and in inculcating these into the ethical frameworks of the public officials they train.

## INTERNATIONAL STANDARDS

In 1996, the United Nations promulgated an International Code of Conduct for Public Officials in 1996 (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). 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 deal with subject matter which is similar to the United Nations text, but the Council of Europe text goes beyond only those aspects of public service conduct which 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.

A study group within the OECD has suggested the following broad principles for ethical conduct within

public administrations. According to the organization, countries can use these principles as a tool to be adapted to national conditions, and to find their own ways of arriving at an effective framework that suits their own circumstances. The principles are, of course, not sufficient in themselves, but are a means of integrating ethics management within the broader public management environment.<sup>3</sup>

### 1. ETHICAL STANDARDS FOR PUBLIC SERVICE SHOULD BE CLEAR.

Public servants need to know the basic principles and standards they are expected to apply to their work and where the boundaries of acceptable behavior lie.

A concise, well-publicized statement, such as a code of conduct, of core ethical standards and principles that guide public service, for example, in the form of a code of conduct, can accomplish this by creating a shared understanding across government and within the broader community.

*[Note: The emphasis here is on broad statements of principle. The statement should not be written in detail or resemble legislation, or simply be a list of prohibitions and restrictions. The core values should be the focus. These are higher values than the minimum and minimal thresholds prescribed, for example, by criminal law. There is scope here for long-term goals.]*

### 2. ETHICAL STANDARDS SHOULD BE REFLECTED IN THE LEGAL FRAMEWORK.

The legal framework is the basis for communicating the minimum obligatory standards and principles of behavior are for every public servant. Laws and regulations could state the fundamental values of public service and should provide the framework for guidance, investigation, disciplinary action and prosecution.

*[Note: This is the opposite of the principle above. When drafting legislation, a code's long-term goals can be stated to reinforce the values protected by the laws and regulations that follow.]*

### 3. ETHICAL GUIDANCE SHOULD BE AVAILABLE TO PUBLIC SERVANTS.

Professional socialization should contribute to the development of the necessary judgement and skills to enable public servants to apply ethical principles in concrete circumstances. Training facilitates ethics awareness and can develop essential skills for ethical analysis and moral reasoning. Impartial advice can help create an environment in which public servants are more willing to confront and resolve ethical tensions and problems. Guidance and internal consultation mechanisms should be made available to help public servants apply basic ethical standards in the workplace.

*[Note: A code without a mentor or an adviser is like a ship without a rudder. Public servants need to know where and to whom they can turn when they are confronted by potential difficulties. These individuals need to be persons in whom public employees have trust, and in whom they can confide confidentially.]*

### 4. PUBLIC SERVANTS SHOULD KNOW THEIR RIGHTS AND OBLIGATIONS WHEN EXPOSING WRONGDOING.

Public servants need to know what their rights and obligations are in terms of exposing actual or suspected wrongdoing within the public service. These should include clear rules and procedures for officials to follow, and a formal chain of responsibility. Public servants also need to know what protection will be available to them in cases of exposing wrongdoing.

*[Note: A core value of public service is commitment to the law and to the rule of law. This is of higher value than any duty to superiors, colleagues or subordinates. It also overrides any claim to loyalty on the part of the political party in power.]*

The subject of “whistleblowing” is discussed in a separate chapter. It should never be necessary, other than in the most exceptional of cases, for a public servant to feel compelled to go outside the system in order to draw attention to wrongdoing.

This is an area, too, in which the private sector is taking an increased interest. Although previously senior managers would prefer not to know about such problems, today’s more progressive managers want to make sure that staff feel comfortable in raising matters which concern them. This allows senior managers to put matters to rights, or to correct mistaken impressions. It is, therefore, important that the official channels for complaint be trustworthy so that staff can use them without feeling exposed to reprisals by more senior staff on whom they may be reporting. They must also instill confidence in the staff that their complaints will be taken seriously, and not just ignored.

### 5. POLITICAL COMMITMENT TO ETHICS SHOULD REINFORCE THE ETHICAL CONDUCT OF PUBLIC SERVANTS.

Political leaders are responsible for maintaining a high standard of propriety in the discharge of their official duties. Their commitment is demonstrated by example and by taking action that is only available at the political level; for instance, by creating legislative and institutional arrangements that reinforce ethical behavior and create sanctions against wrongdoing; by providing adequate support and resources for ethics-related activities throughout government; and by avoiding the exploitation of ethics rules and laws for political purposes.

*[Note: Unless political leaders demonstrate high standards, they have no moral authority upon which to draw when they wish to reprimand others who step out of line. Experience suggests that when the behavior of superiors is seen to be incorrect, similar indiscretions occur among subordinates. Also important is the role of political leaders in clearly articulating their unqualified support for high ethical standards.]*

### 6. THE DECISION-MAKING PROCESS SHOULD BE TRANSPARENT AND OPEN TO SCRUTINY.

The public has a right to know how public institutions apply the power and resources entrusted to them. Public scrutiny should be facilitated by transparent and democratic processes, oversight by the legisla-

ture and access to public information. Transparency should be further enhanced by measures such as disclosure systems and recognition of the role of an active and independent media.

*[Note: A corrupt and/or inefficient administration will wish to shield its shortcomings through denying access to information. The provision of channels for information, and rights of access, are important antidotes to this malaise. The greater the transparency, the fewer the shadows.]*

### **7. THERE SHOULD BE CLEAR GUIDELINES FOR INTERACTION BETWEEN THE PUBLIC AND PRIVATE SECTORS.**

Clear rules defining ethical standards should guide the behavior of public servants in dealing with the private sector; for example, regarding public procurement, outsourcing or public employment conditions. Increasing interaction between the public and private sectors demands that more attention should be placed on public service values and requiring external partners to respect those same values.

*[Note: Much of the large-scale corruption that mars today's administrations around the world takes place on the interface between the public and the private sector, primarily in the context of public contracting. The question of respect for shared values is not exclusive to the public service. Leading players in the private sector, too, increasingly try to ensure that their own private sector partners respect and share the core business principles to which they subscribe.]*

### **8. MANAGERS SHOULD DEMONSTRATE AND PROMOTE ETHICAL CONDUCT.**

A working environment in which appropriate incentives are provided for ethical behavior has a direct impact on the daily practice of public service values and ethical standards. Such incentives can include adequate working conditions and effective performance assessment. Managers have an important role in this regard by providing consistent leadership and serving as role models in terms of ethics and conduct in their professional relationship with political leaders, citizens and other public servants.

*[Note: This principle reflects the same concerns for managers as are contained in principle five, above. Adequate working conditions would include pay levels, professional development prospects, and the physical working environment.]*

### **9. MANAGEMENT POLICIES, PROCEDURES AND PRACTICES SHOULD PROMOTE ETHICAL CONDUCT.**

Management policies and practices should demonstrate an organization's commitment to ethical standards. It is not sufficient for governments to have only rule-based or compliance-based structures. Compliance systems alone can inadvertently encourage some public servants simply to function on the edge of misconduct, arguing that if they are not violating the law they are acting ethically. Government policy should not only delineate the minimal standards below which a government official's actions will not be tolerated, but also clearly articulate a set of public service values that employees should aspire to.

*[Note: This principle stresses the importance of including long-term goals in standards for ethical conduct, and the need to avoid a minimalist, rule-bound approach under which everything which is not expressly forbidden is implicitly allowed.]*

### **10. PUBLIC SERVICE CONDITIONS AND MANAGEMENT OF HUMAN RESOURCES SHOULD PROMOTE ETHICAL CONDUCT.**

Public service employment conditions, such as career prospects, personal development, adequate remuneration and human resource management policies should create an environment conducive to ethical behavior. Using basic principles, such as merit, consistently in the daily process of recruitment and promotion helps operationalize integrity in public service.

*[Note: Just as unethical conduct can be contagious, ethical conduct can be built from scratch. If nepotism, favoritism and the selective application and waiver of rules are taking place, however, standards for such conduct will come under pressure.]*

## 11. ADEQUATE ACCOUNTABILITY MECHANISMS SHOULD BE IN PLACE WITHIN THE PUBLIC SERVICE.

Public servants should be accountable for their actions to their superiors and, more broadly, to the public. Accountability should focus both on compliance with rules and ethical principles and on achievement of results. Accountability mechanisms can be internal to an agency as well as government-wide, or can be provided by civil society. Mechanisms promoting accountability can be designed to provide adequate controls, while allowing for appropriately flexible management.

*[Note: Corruption and inefficiency flourish in an environment devoid of accountability. In this regard, an ombudsman can play a particularly potent role.]*

## 12. APPROPRIATE PROCEDURES AND SANCTIONS SHOULD EXIST TO DEAL WITH MISCONDUCT.

Mechanisms for the detection and independent investigation of wrongdoing such as corruption are a necessary part of an ethics infrastructure. It is necessary to have reliable procedures and resources for monitoring, reporting and investigating breaches of public service rules, as well as commensurate administrative or disciplinary sanctions to discourage misconduct. Managers should exercise appropriate judgement in using these mechanisms when actions need to be taken.

*[Note: Mechanisms need to be fair and trustworthy. They should protect the innocent and the naive, just as they should detect and publish the culpable. Penalties, where applicable, should be proportionate and should be consistently applied. A sanctions regime which is idiosyncratic and viewed as untrustworthy by staff can seriously undermine efforts to raise and to protect ethical standards.]*

### ESSENTIAL PREREQUISITES FOR AN ETHICAL PUBLIC SERVICE

Prerequisites for the establishment and maintenance of an ethical public service include:

- *Leadership by senior officials that inspires respect*
- *Building on values from the bottom up, not the top – down*
- *Clear rules and guidelines that are based on commonly understood and shared values and principles. These values should be politically neutral and applicable beyond any change of government.*
- *Broad participation in a discussion about the government's code of ethics and any concerns those affected by them might have.*
- *Efficient accountability mechanisms*
- *Wide dissemination of codes of conduct and other documents related to ethics and to expected standards among government agencies and those individuals or organizations which work with government agencies*
- *Training for public sector employees in how to use the code of conduct to make ethical decisions*
- *Positive incentives for compliance*
- *Counsellors to provide guidance and to enforce ethical conduct*
- *A non-partisan framework for the fulfilment of the code of conduct. The code should contain standards that any employee, whatever his or her political beliefs, can support*

### CODES OF CONDUCT

Subordinates take their lead from the conduct of their superiors. It is, therefore, essential that any drive to reduce corruption be led by the most senior public officials and that they openly display their support for the campaign.

One way of achieving this is to develop a code or statement of conduct which applies to everyone in a particular agency or department of government.

Thereafter, top officials within a department should not only exemplify the conduct recommended by the code, but also foster an understanding of the values the code seeks to capture.

As in the private sector, codes of conduct in public service are playing an ever-increasing part in the development of national integrity systems.<sup>4</sup> They offer a way by which to develop strategies to prevent scandals over corruption or other illicit actions. Obviously, if, from the outset, officials act properly and with an understanding of the principles they are expected to uphold, many problems will be minimized.

However, public sector codes tend to be drafted at the top, by senior public officials or managers, and then passed down to more junior staff. All too seldom are staff at all levels actively involved in the preparation of a code. As a result, such codes often fail to reflect the situations and aspirations of the public service as a whole. Public employees often have little sense of a personal stake in the code, since they were not asked to participate in its formation.

In some respects, the way a code is prepared is just as important as the code itself. It is also important that the code include at least some acknowledgement of long-term goals, rather than be simply a long list of prohibited actions. This will provide the code with a positive tone rather than with the somewhat forbidding appearance of a criminal statute. It is also why self-generated codes of conduct are much to be preferred to a “one-size-fits-all” piece of legislation imposed by a legislature and without participation by all employees.

As described below, the legislature in the north-eastern Australian state of Queensland recognized the importance of avoiding the imposition of a code that did not have the full participation of the government behind it. One example of a well-worded public service code is the Czech Republic’s Code of Ethics of the Public Administration<sup>5</sup>.

Once a code is finalized, many regard the process as at an end. However, to be effective, codes should be publicized throughout an organisation and to all those with whom it has dealings, including the gen-

eral public, so that everyone is aware of its contents. Moreover, employees should receive regular training that allows officials to apply the code to their work and discuss ethical dilemmas drawn from real life.

The interpretation of the code is also important. It should protect the staff who comply with its standards. For this reason, an effective code will usually have designated someone to provide advice and guidance for staff who have difficulty in determining what position they should take on a given question. Even if the advice offered turns out to be misconceived, if a full disclosure of the relevant facts has been made and if the advice has been followed, the person seeking guidance should be regarded as blameless. Such protection, however, is only applicable when the person in question has made full disclosure.

Interestingly, the Australian state of Queensland has established a legislative framework within which departments are required to develop their own codes of conduct.

### CODE OF CONDUCT LEGISLATION: THE QUEENSLAND APPROACH

Queensland is the only jurisdiction in Australia, and one of the few in the world, to have enacted specific legislation for ethical conduct in public management<sup>6</sup>. The 1994 Public Sector Ethics Act<sup>7</sup>, and its companion piece, the 1994 Whistleblowers Protection Act<sup>8</sup>, are Australia’s first examples of specific ethics legislation which aim at ensuring high professional standards in the public sector. Under these Acts, department chiefs are required to develop conduct codes and to make them accessible to staff and to the public, to institute training and to describe the implementation of the code in the department’s annual report.

Both Acts proceeded from an explicit demand by employees and managers for greater certainty about what was expected of them in the workplace. This demand was driven by everyday concerns about fairness, equity, responsiveness, and integrity and by community expectations that official wrongdoing would be effectively countered by the system itself.

## THE QUEENSLAND PUBLIC SECTOR ETHICS ACT

The Act, as passed, declares five principles to be the basis of the “Ethics Obligations” specified by the Act. These principles are required to be the basis of the agency-specific codes of conduct which individual public sector agencies are required to develop in consultation with staff and relevant members of the public.

The framework values are:

- *Respect for the law and the parliamentary system of government*
- *Respect for persons*
- *Integrity*
- *Diligence*

### ECONOMY AND EFFICIENCY IN MANAGEMENT OF PUBLIC RESOURCES

The Act sets out these obligations in the following terms<sup>9</sup>:

**Integrity** – *In recognition that public office involves a public trust, a public official should seek:*

- (a) *to maintain and enhance public confidence in the integrity of public administration; and*
- (b) *to advance the common good of the community the official serves.*

**Having regard to [that obligation], a public official –**

- (a) *should not improperly use his or her official powers or position, or allow them to be improperly used; and*
- (b) *should ensure that any conflict that may arise between the official’s personal interests and official duties is resolved in favour of the public interest; and*
- (c) *should disclose fraud, corruption, and maladministration of which the official becomes aware.*

In practice, this obligation requires that officials should, for example, not disclose official information improperly, not abuse the powers or resources available to them as officials, and avoid any conflict

between personal interest and official duties, or resolve such conflict in favor of the public interest.

**Diligence** – *In performing his or her official duties, the official should exercise proper diligence, care and attention, and should seek to achieve high standards of public administration.*

This obligation requires that officials should, for example, provide “a fair day’s work,” observe procedural fairness requirements of good administrative decision-making, make all reasonable efforts to provide high standards of service to clients, act in accordance with relevant “duty of care,” requirements to protect the health and safety of others in the workplace, avoid negligent conduct, provide expert and comprehensive advice to ministers, and seek to maintain high standards of public administration.

**Economy and Efficiency** – *In performing his or her official duties, a public official should ensure that public resources are not wasted, abused, or used improperly or extravagantly.*

In practice, this obligation requires that officials should manage all forms of public resources (for example human, material, and financial resources, intellectual property and information) in the interests of safeguarding public assets and revenues and ensuring efficient programs and service-delivery.

**“Chief Executives’ Obligations** – *The Ethics Act requires Chief Executives of public sector agencies to ensure that the Act is implemented in their agency, that training in ethics is undertaken, and, of utmost importance, that the agency’s “administrative practices and procedures” are consistent with the Act and with the agency’s Code of Conduct.*”

Failure to do so could result in sanctions under the Chief Executive’s contract of employment, or (potentially) in a private legal action for compensation resulting from breach of statutory duty. Such an action might arise when the interests of a citizen or client of the agency suffered damage from the foreseeable and preventable unethical conduct of an employee; for example, in a contract negotiation or tendering process involving the Chief Executive’s agency.

### THE ROLE OF THE PUBLIC OFFICIAL

In 1995, the guidelines issued to Queensland public sector agencies went a step further by reinforcing the traditional view of the appointed official's responsibility and accountability, and the official's relationship to power delegated by parliament and the community at large. The guidelines include the following statement:

*Public employment involves a position of trust.*

The standards of conduct which may be expected of public officials at all levels are, therefore, a matter for legitimate and continuing concern by the Government of the day, public sector organisations, and the community.

Public officials control, in various ways, the use of financial and other valuable resources provided by the community. The use, and misuse, of those resources raises important questions of professional ethics for administrators.

It is similarly expected that those public officials who control the financial and other resources provided by the community have an ethical obligation to ensure that those resources are used efficiently and appropriately.

Rather than blurring the distinctions which exist between the public and private sectors, the Queensland legislation sets down a benchmark for public sector integrity.

### AN EXAMPLE FROM LITHUANIA

In Lithuania, the 1995 Law on Civil Service sets out the rights, duties and main principles of the civil service as well as provisions for the prevention of corruption. It disqualifies those convicted of major crimes or crimes against the civil service and those who have been dismissed from the civil service for misconduct in office within the last 10 years.

An official may not work in a position in which he would be related to his or her immediate superior by a close relative or by marriage. Nor can he or she be related to an official who is a direct subordinate or

to an official who would supervisory power for his or her position. Nor may an official hold a second job in the civil service.

The law elaborates which activities are declared incompatible with the civil service. Civil servants cannot be managers of private companies or non-profit organizations or enter into contracts on behalf of the institution or an agency where the civil servant is employed with companies in which he or she has a personal stake. Nor may the official represent the interests of the country or foreign enterprises.

An official is required, without delay, to notify his or her superior about tasks or instructions which he or she believes to be unlawful. An official also has a right to refuse to carry out a task or an instruction if he or she believes that the task or the instruction is in breach of the law or a government decision. An official must report the matter in writing to his or her superior, and carry out the task or the instruction only if directed to do so in writing. In this case, responsibility for the consequences of this action lies not with the official who implemented the request, but with the superior who instructed the official to do so. However, no task or instruction may be carried out if it would constitute a criminal or administrative offence. Responsibility for the consequences of carrying out such a task or instruction lies not only with the official, but also with the superior who gave the task or the instruction. Similarly, no task or instruction is to be undertaken which would be degrading to human dignity.<sup>10</sup>

### OVERSIGHT: THE OMBUDSMAN AND THE INSPECTOR GENERAL

A government's ombudsman, inspector general and public service commission all have a keen interest in the public service achieving high ethical standards.<sup>11</sup> The higher the standards, the easier life is for all. Some governmental bodies which audit public finances have started to develop "ethical audits" to determine where they need to concentrate their limited resources, and where they do not.

Each of these officials and institutions can play a useful role in reviewing the internal management processes of government agencies and working with senior managers to develop cost-effective,

efficient and corruption-free internal processes. Such a role in prevention can pay large dividends. Preventing corruption can mean that losses have been avoided and costly investigations rendered unnecessary. (The role of the ombudsman is discussed in Chapter 7.)

### ESTABLISHING AN OFFICE OF GOVERNMENT ETHICS?

To be effective, over-all responsibility for public ethics development and training must be vested in a particular agency of government.<sup>12</sup> Frequently, this is within the ministry for government administration. It can also provide a counseling 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>13</sup> The OGE provides policy leadership and direction for the executive branch of government's ethics program. This system is a decentralized with each department or agency having responsibility for the management of its own ethics program.

The OGE has issued a uniform set of Standards of Ethical Conduct for Employees of the Executive Branch that applies to all officers and employees of executive branch agencies and departments. These regulations contain a statement of 14 general principles that should guide the conduct of federal employees. Central to these principles is the concept that public service is a public trust. Federal employees must be impartial in their actions and not use public office for private gain. These regulations also contain specific standards that provide detailed guidance in a number of areas: gifts from outside sources, gifts between employees, conflicting financial interests, impartiality, seeking employment, 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 systems, public and

confidential, are enforced throughout all agencies and are subject to periodic review by the OGE. It regularly reviews agency ethics programs, makes recommendations and conducts training workshops for ethics officials both in Washington D.C., and in cities throughout the United States.

In recent years, a number of other countries have followed the United States' lead, including Argentina and South Africa.

### THE CANADIAN APPROACH

In Canada, a number of provinces as well as the federal government<sup>14</sup> have introduced posts to provide guidance to parliamentarians and senior public officials on ethical issues. These positions are variously titled – “Ethics Commissioner” (Alberta), “Integrity Commissioner” (Ontario); “Conflict of Interest Commissioner” (British Columbia, Saskatchewan, Nova Scotia, New Brunswick, Northwest Territories and Yukon), “Commissioner of Members' Interests (Newfoundland) or “Ethics Counselor” (Federal Government).

These offices all recognize that, in the area of ethics, there are two major risks when relying wholly on a legalistic system.

First, public office holders can easily forget what truly ethical conduct actually is, and instead defend themselves by dwelling on what they understand to be the legal technicalities of words and concepts.

Second, rules are often extremely detailed about matters that should be self-evident to anyone with sound moral judgement. When this happens, it can do more to erode public confidence than it does to enhance it. Canada's federal government has taken an approach that assumes that public office holders do want to take ethical actions. It assumes they do want to earn a higher level of respect among citizens. For this reason, it has chosen not to rigidly codify ethical behavior through an exhaustive list of forbidden behavior.

The Canadian approach to building and managing an ethics structure turns on avoiding possibilities for conflict of interest well before the fact. It focuses on

working with people, based on the assumption that they do want to do the right thing.

The Canadian Federal Ethics Counsellor's Office deals with potential conflicts of interest and other ethical issues for those most likely to be able to influence critical decisions in the federal government, including those officials responsible for handling "blind trusts." Blind trusts are established to enable a decision-maker's investments to be held separately (and secretly) by independent trustees so as to avoid any conflict of interest. The decision-maker is wholly unaware of where his or her investments have been made and so is unable to be influenced in any way by them.

The Ethics Counsellor's Office covers all members of the federal cabinet, including the prime minister. This includes cabinet members' spouses and dependent children, members of government ministers' political staff and senior officials in the federal public service. The Office handles the monitoring of the assets, incomes and liabilities of those it oversees.

When it comes to suspected breaches of the criminal law, the Ethics Counsellor, of course, does not replace the role of the police, prosecutors and judges. Rather, he deals with those situations which could appear unethical to citizens without ever actually being illegal. In practice, his or her Office works closely with those covered by Canada's Conflict of Interest Code.<sup>15</sup> These officials come with questions about how a given asset or interest should be treated, and the Office offers advice. It is also asked by the prime minister to investigate and comment on specific issues when they arise.

The Office is also responsible for the Lobbyists' Registration Act and the Lobbyists' Code of Conduct. These laws are designed to bring a level of openness to lobbying activities and ensure high professional standards are met by the people involved in that work. Both laws are discussed in Chapter 4.

The present Canadian Ethics Counsellor believes the Office is succeeding in meeting its objectives: "The people that I deal with recognize that making the right decisions helps to ensure their long-term political health. They recognize that Canadians expect high standards of conduct and rightly so.

They have generally gone out of their way to meet those standards."

Notwithstanding, recent scandals in Canada have led the prime minister to introduce a so-called "Ethics Package" that, if enacted, would strengthen the position of the Ethics Office considerably.<sup>16</sup>

## RISK MANAGEMENT AND STAFF

Risk management involves identifying problems before they arise, and then making sure they do not do so.

There are some obvious "red flags":

- *Staff who do not take holidays. They may be work-obsessed, but they may also be anxious to prevent relieving staff from seeing their files.*
- *Staff who take holidays they could not afford based on their salaries alone.*
- *Staff in sensitive positions who have become addicted to gambling.*

None of these is evidence of misconduct, but each calls for a watchful eye on the part of managers.

More formal are arrangements for the disclosures of assets and liabilities and for staff in sensitive positions to be periodically rotated.<sup>17</sup>

Managers should be conscious of the areas of corruption risk. These should be reviewed regularly and an up-to-date organizational risk strategy implemented in which the corruption issue is dealt with appropriately.

High risk functions should be identified and documented, and contingency plans prepared ahead of any problem arising. These functions include such matters as:

- *Inspecting, regulating or monitoring the standards of premises, businesses, equipment or products*
- *Issuing qualifications or licenses to individuals to indicate their proficiency or enable them to undertake certain types of activities*

- *Receiving cash payments*
- *Allocating public fund grants*
- *Providing assistance or care to the vulnerable or disabled*

Helpful risk management tools include:

- *Codes of conduct; their relevancy should be reviewed every two years or so*
- *Code of conduct training; this should occur at regular intervals of no more than two years*
- *Gifts and benefits and gifts registers*
- *Information management and technology*
- *Educating staff about their role and responsibilities in information security management*
- *Recruitment; contracting and procurement strategies*
- *Providing information on ethical work practices to staff*
- *Audit procedures*
- *Regularly informing staff about the organization's internal reporting policy, its internal and external reporting channels and how they work*
- *Regularly informing staff about the organization's internal investigation capacity; specific plans should be detailed to effectively deal with an allegation of corrupt conduct if one were to arise*

### BUILDING AND SUSTAINING A MERIT-BASED PUBLIC SERVICE

No institution can be expected to perform with professionalism in the absence of qualified and motivated personnel. One of the most destructive features of corruption is when people are appointed to public service based on their connections rather than on their capabilities.<sup>18</sup>

The institutional arrangements for selecting, recruiting, promoting and dismissing public servants are central to the proper functioning of the public sector and can best be provided through legislation.<sup>19</sup> The right people have to be attracted to the right posts. This, in turn, means that the positions themselves need to be sufficiently attractive to qualified citizens and be a viable alternative to the private sector.

A public service whose members are appointed and promoted based on merit will be far less susceptible to corruption than one based predominantly on political and personal connections. In a meritocracy, staff advance on the basis of their performance and they owe their positions, at least in part, to the public they serve. Where positions have been obtained through powerful connections, the loyalty is to the connection, not to the institution to which the person has been appointed. Frequently, the beneficiary of such an appointment will look to his or her patron to protect them if they encounter any difficulties. Appointees of political parties can pose particularly difficult problems for managers who may be less well-connected.

A merit-based public service presents numerous advantages:

- *Candidates are judged against verifiable criteria that can be checked if breaches are suspected.*
- *Office holders have an incentive to perform well. Politicizing the civil service leads to mediocre performance. When politicians have a direct impact upon the recruitment, promotion and dismissal or transfer of civil servants for reasons other than those based upon merit, professional discipline may be hard to enforce and performance incentives difficult to use since their appointment is short-termed.*
- *Politically appointed civil servants may be more inclined to break the rules in order to maximize their personal gains in the short time they expect to be in office.*
- *Civil servants owing their positions to their own capabilities as well as to clear and verifiable criteria, will feel accountable towards the state that employs them rather than towards the government of the day.*

- *A merit-based public service avoids the relatively short-term nature of political appointments and the consequent loss of expertise with each change of government.*

However, a purely merit-based civil service may have to be varied to accommodate affirmative action programs consistent with democratic practices. For example, such programs may ensure that minorities are fairly represented in the public service, and redress gender and geographical imbalances. Furthermore, a merit-based civil service is no guarantee against corruption.

Prerequisites for corruption-free recruitment for public sector jobs include:

- *A predominantly merit-based recruitment and promotion program with objective and contestable criteria and with a clear career path*
- *A minimization of political interference in both the action and the staffing of the public sector*
- *A strict limitation of political appointments to certain high-level posts*
- *Suitable pay and other benefits to provide suitable incentives*
- *Protection of public servants through internal rule of law mechanisms*

Intuitively, many people often assume that increasing salaries will wipe out corruption among grossly underpaid civil servants. In practice, the situation is somewhat more complex. Pay reform, essential though it may be, is just one of a variety of incentives that needs to be addressed.<sup>20</sup>

Nevertheless, reforming the wage structure can be an important tool for the prevention of corruption. Such reforms change the incentive structure for public servants, make remuneration more transparent, eliminate underpay and win more skilled personnel for the public sector:

- *The incentives for public servants to reject corruption and work efficiently are much higher if the system of remuneration is based on the principle*

*of meritocracy. When wages and promotion clearly depend on public servants' respect for rules of conduct and on good performance, both incentives are more likely to be implemented. Greater value is placed on the job itself. Therefore, dismissal or demotion becomes a much more serious matter. This in turn, however, means that there have to be proper and effective disciplinary mechanisms.*

- *If public servants are not paid a living wage, incentives to demand bribes are considerable. Pay reforms that create living wages for public servants can, therefore, potentially curb petty corruption. This approach has been promoted by the World Bank in a number of countries it has assisted.*
- *Wage reforms can also try to make public sector wages competitive with private sector wages in order to attract more highly skilled employees. Better human capital increases the efficiency of the public sector and can induce better compliance with codes of conduct. Singapore and Hong Kong are examples of this.*
- *Among the measures for creating incentives for corruption-free behavior, so-called "social benefits" should also be included. For example, retired public servants should receive monthly allowances. Similarly, public servants, who are caught in a flagrant delit – receiving bribes or other corrupt benefits – should automatically lose their social benefits.*

### DRAWING THE LINE BETWEEN POLITICIANS AND SENIOR PUBLIC SERVANTS

A professional public service is essential to the smooth running of a government's administration. When a government changes, the great bulk of the public servants remain. Yesterday's politicians and their appointees have gone, but the business of administration continues under the new government.

As for all citizens, it is the duty of public servants to obey the law. However, civil servants also have a professional obligation to ensure that the official

actions they take – including those that politicians and ministers senior to them want them to take – are within the law.

This means that public servants can be required to inform their political superiors that certain actions they have been directed to take are illegal. They can be required to refuse to comply with such instructions. This is, however, easier said than done, and there are no clear solutions for such a situation.

Senior public servants need to be able to refer contentious matters to the government's legal advisers. When dealing with a minister who is asking them to act corruptly, they need to understand that it is no defense in a criminal prosecution for them to say that they were ordered by their ministers to act as they did. Government is subject to the law. Ministers are not above the law. On occasion, public servants have said to their ministers that they would like to comply with his or her wishes, but that to do so would render both of them liable to criminal prosecution.

The problem is at its most acute when ministers go outside their role and involve themselves in the administration and the implementation of policy. The role of ministers is to create policy, but it is left to public servants to put that policy into action. When this distinction in roles is not clear, and when senior public officials feel intimidated by a minister unwilling to accept that the law applies to his or her actions just as it does to those of others, corruption can flourish.

It is essential that training for senior officials emphasizes the fact that the mere fact that they were required to commit an unlawful act by the direction of a minister does not afford them any defense against criminal charges.

### WHEN IS A GIFT A BRIBE? GIFTS AND GIFTS REGISTERS

It is essential that there be clear rules and regulations as to what employees are entitled to receive in the course of their employment and how these gifts are to be recorded.

In a private context, gifts are usually not requested and are meant to convey a feeling, such as grati-

tude, on behalf of the giver. There is no expectation of repayment. Gifts given in a purely private context are not the focus of this discussion. However, gifts are also offered to individuals in the course of business relationships. Such gifts are usually given to create a feeling of obligation in the receiver.

For a public official to corruptly receive a gift or benefit is a criminal offense in all countries. How, then, is an official to distinguish between a gift and a bribe?

A gift can be offered innocently in good faith or it can be an attempt to influence the official. The giver may have any number of motives, ranging from friendship, hospitality and gratitude to bribery and extortion.

In a business context, gifts are rarely offered to an individual for purely charitable or hospitable reasons. This may be the case if the gift or benefit is of little or no commercial value, such as a memento or a trinket. However, in cases where the gift or benefit has more than a nominal value, it is possible that it was offered to create a sense of obligation and even an expectation that something will be given in return.

Feelings of obligation can arise with the acceptance of a free meal, tickets to a sporting event or discounts on commercial purchases. Once such a gift is accepted, a public official can be compromised. If the giver later requests favorable treatment, it can be difficult for the official to refuse. The giver may even threaten to allege that the official asked for the gift in the first place.

Individuals attempting to corrupt public officials often start with small inducements that appear to have no improper motive behind them.

One way officials can become involved in corruption is by rationalizing their acceptance of a gift or benefit. Frequently used rationalizations include:

- *Everybody else does it.*
- *The motivation of the giver is purely one of generosity, kindness or friendship.*
- *The exchange of gifts and benefits harms no one.*

- *Gifts and benefits foster the development of beneficial business relationships, which encourage administrative efficiency by allowing red tape to be cut.*
- *Gifts and benefits are merely part of cultural rituals or practices. To refuse may cause offense.*
- *Public officials are not paid enough. They deserve a little extra reward.*

These arguments ignore the concept of public duty. As a public official, officials have a duty to ensure that government business is carried out with impartiality and integrity. If they accept gifts and benefits offered to them in the course of their work, they may feel a sense of obligation toward the person offering the gift or benefit. Feelings of obligation will undermine their impartiality and generally help undermine confidence in the public service.

The Model Code of Conduct for New South Wales Public Sector Agencies (Australia)<sup>21</sup> states that employees should not accept a gift or benefit that is intended to, or is likely to, cause them to act with prejudice in favor of the giver in the course of their duties. If the gift or benefit is of more than nominal value, employees are expected to provide their supervisor with a note outlining the incident (described below).

The onus of deciding whether or not to accept a gift or benefit should not be on an individual employee. Rather, it is the responsibility of agencies to set limits and provide guidance on the types of gifts and benefits employees can receive. This can be achieved through developing gifts and benefits guidelines and policies.

#### **I. AS A GENERAL RULE, PUBLIC OFFICIALS SHOULD NOT SOLICIT OR ACCEPT GIFTS AND BENEFITS OF MORE THAN NOMINAL VALUE. OFFERS OF MONEY IN ANY FORM SHOULD NEVER BE ACCEPTED.**

By refusing gifts and benefits, public officials can avoid feeling compromised and contributing to a public perception of bias. An organization that adopts a policy which prohibits the acceptance of

gifts and benefits protects its employees from being compromised. In fact, employers have a positive legal obligation toward their employees to provide a safe working environment. Agencies may potentially be in breach of this duty if they fail to advise employees on how to handle compromising situations, which can cause considerable stress and anxiety. An advantage of prohibiting acceptance of gifts and benefits is that people who offer gifts are less likely to be offended by a refusal. Employees can decline offers by explaining that acceptance would be against agency policy and consequently they have no discretion in this area. Employees are then not placed in the difficult position of trying to decide whether a gift is an attempt to bribe.

#### **2. PUBLIC OFFICIALS WHO ARE OFFERED A GIFT OR BENEFIT, OR WHO ARE GIVEN A GIFT OR BENEFIT AGAINST THEIR WILL, SHOULD BE REQUIRED TO REPORT THE INCIDENT IN WRITING TO THEIR SUPERVISORS.**

All offers of gifts and benefits of more than nominal value, even those rejected, should be immediately reported to a supervisor. A written note from the employee should follow up the initial oral report as soon as possible. The note should include:

- *Date, time and place of the incident*
- *To whom the gift or benefit was offered*
- *Who offered the gift or benefit and contact details (if known)*
- *The response to the offer*
- *Any other relevant details of the offer*
- *The writer's signature and the date*

A copy of the note should be kept by the employee and a copy given to his or her supervisor, who should also sign and date it, and then place it on an appropriate file.

By writing a note, an employee who has been offered an inappropriate gift or benefit can remain in control of a situation. Most public officials feel

uneasy when they are placed in a compromising situation. A written statement allows a person to record their version of events, which provides them with a degree of comfort. The reporting of an incident also tends to oblige the official's organization to take appropriate action.

**3. IF A PUBLIC OFFICIAL'S REFUSAL IS IGNORED, OR FOR OTHER REASONS A GIFT OF MORE THAN NOMINAL VALUE CANNOT REASONABLY BE RETURNED, THE GIFT MUST BE REGARDED AS THE PROPERTY OF THE AGENCY CONCERNED.**

In some situations, it is difficult to refuse a gift; for example, if the giver ignores the refusal and persists with his or her offer. It may also cause embarrassment to refuse a gift in circumstances where it has been offered publicly; for instance, to a guest speaker at a conference. Once a gift or benefit becomes the property of an agency, its use or disposal is the responsibility of the organization, not the individual. Disposals can take many forms, including via public auctions.

**4. OFFERS OF NOMINAL VALUE CAN BE ACCEPTED.**

Gifts and benefits of nominal value usually do not create a sense of obligation in the receiver that will influence, or appear to influence, the exercise of his or her official duties. For this reason, allowing public officials to accept infrequently offered gifts of nominal value poses little risk of corruption. Examples of gifts and benefits that could be regarded as having a nominal value include cheap marketing trinkets or corporate mementos that are not targeted specifically at the business of an agency. It should not be up to employees to decide if a gift is of nominal value, however. Rather, guidance should be provided by agencies.

**5. IN SOME INSTANCES, A GIFT OR BENEFIT MAY BE ACCEPTED IF IT IS RECEIVED IN THE COURSE OF A PUBLIC OFFICIAL'S DUTIES AND RELATES TO THE WORK OF A PUBLIC OFFICIAL'S AGENCY, OR HAS A PUBLIC BENEFIT. ALL SUCH ITEMS MUST BECOME THE PROPERTY OF THE AGENCY.**

Agencies should clearly stipulate to their employees when it is appropriate to accept a gift or benefit under this category. An example of a gift or benefit relating to the work of an agency is a book on a relevant topic. Such gifts should become the property of the agency concerned.

It may also be appropriate for an agency (but not individual staff members) to keep a gift or benefit received through a purchase incentive scheme. For example, a company may offer a free car to all its clients after they have purchased a certain quantity of its product. The car should not result in a private benefit for anyone in the agency. An appropriate way for the agency to achieve this, while still obtaining the benefit of the car, would be to obtain a refund for the car, dispose of the vehicle at a public auction or ensure that the car is only used for official purposes. It is also important that agencies do not compromise their impartiality in order to obtain bonuses.

**6. IN SOME CASES, IT MAY BE APPROPRIATE TO ACCEPT MODEST HOSPITALITY ALSO MADE AVAILABLE TO COLLEAGUES OR ASSOCIATES WHO SHARE A COMMON PURPOSE OR TASK.**

Hospitality such as tea or coffee is a common courtesy, as opposed to a gift or benefit, and would be offered by most organizations to visitors. A modest lunch offered to a working group would also come under this category.

**7. IT MAY BE APPROPRIATE FOR PUBLIC OFFICIALS TO ACCEPT SPECIAL OFFERS UNCONNECTED WITH THEIR OFFICIAL DUTIES.**

In some countries, new products are launched at special prices or the price of goods is markedly reduced for a limited time. This provision suggests that it may be appropriate for public officials to be able to accept these offers when they are not connected with their official duties.

**8. AGENCIES SHOULD MAINTAIN A GIFTS AND BENEFITS REGISTER.**

If an organization decides that it is acceptable for

staff to receive gifts and benefits in some circumstances, limits still need to be set to regulate and monitor conduct. For instance, there should be a requirement that all gifts and benefits of more than nominal value be declared and noted on a publicly available gifts register against the name of the recipient. The name of the person who offered the gift and their agency or organization should also be included. There should also be a record of the decision that was taken in relation to the gift, and the register should be signed and dated by the employee's supervisor (or appropriate senior officer). If an issue arises later, it can be shown that the agency was open and transparent in dealing with the gift.

One of the most important determinants of the incidence of unethical decisions is the behavior of managers. In other words, employees are more likely to do what they see their managers doing, than adhere to ethical behavior policies. If an organization's management is perceived by its employees to preach one thing and do another, employees will soon become disillusioned.

Management can foster the ethical development of their organizations by leading by example. Particular strategies that can be adopted in relation to gifts and benefits include informing employees of instances when the organization's management declined to accept inappropriate gifts and benefits, and taking steps to actively reward those employees who display an understanding of ethical behavior.

There are also a number of pro-active approaches an agency can adopt when dealing with gifts and benefits. It can write to its major and potential suppliers informing them that it is its preferred practice that no offers of gifts, of whatever value, be made to its officers. This approach has the advantage of assuring potential suppliers that they are competing on a level playing field and that the processes involved in tendering for work are impartial, open and accountable.<sup>22</sup>

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WELL

Whether public or private, organizations need some reliable system for filing and addressing complaints. Those with concerns about potential corruption need a way to bring them to the attention of responsible managers. If the managers themselves are the cause of the problem, there must be a mechanism for employees to file their complaints with a body which is both trusted and endowed with the powers to investigate the matter.

In the absence of reliable complaint mechanisms, honest managers can know comparatively little about what is taking place in their organization. Corrupt managers are free to act in the knowledge that they are safe from subordinates' scrutiny. Misunderstandings about managers' or employees' actions can persist and lower morale. A sound complaint mechanism can rectify all of these situations.

However, in many societies there is a reluctance to report the misbehavior of workplace colleagues. Such reporting is seen as being anti-social, as "spying" on neighbors and "denouncing" fellow citizens. But, in an increasing number of countries, the reverse is being recognized. Citizens are coming to understand that the interests of society are best served if people who are aware of serious misbehavior – such as corruption – speak up.

Although it may take some time for public attitudes to change, a reform program that emphasizes the importance of allowing state employees to file complaints enhances the ability of each employee to act as a corruption watchdog.<sup>1</sup>

### INTERNAL COMPLAINT MECHANISMS

Each government department (and also, every private sector organization of any size) should have clearly defined procedures for filing internal complaints. Frequently, these procedures are misconceived. Usually, they are designed for individuals with a personal interest to pursue; the procedure is adversarial and the complainant is required to prove his or her case. For a more effective process, these mechanisms should allow employees to raise concerns with persons in authority, who are able to investigate.

### WHISTLEBLOWING – PROVIDING SAFE CHANNELS FOR EMPLOYEES' COMPLAINTS

The important role employees can play in preventing scandals and disasters, and in keeping a check on malpractice, was recognized in the United Kingdom following a series of catastrophic events in the 1980s.

Almost every public inquiry into these events found that employees had known of the dangers before they materialized, but had either been too scared to sound the alarm or had raised the matter with the wrong people or in the wrong way. Among the examples were:

- *When a train crashed outside of London's busiest railway station killing 35 people in December 1988 the inquiry found that a supervisor had noticed the loose wiring that eventually caused the crash, but had said nothing for fear of upsetting his superiors.*
- *After the Bank of Credit and Commerce International collapsed in July 1991 the inquiry found an autocratic environment had existed within the bank that prevented staff from voicing any concerns about the bank's activities.*
- *The inquiry into the sinking of the Herald of Free Enterprise ferry at Zeebrugge, Belgium in March 1987 discovered that staff had warned on no less than five occasions that the ferries were sailing with their bow doors opened, but their concerns had been ignored.*
- *The 1996 inquiry into arms shipments to Iraq revealed that an employee had written to the British Foreign Office informing them that munitions equipment was being prepared for Iraq, but his letter had not been acted upon.*

Each of these scandals could have been avoided. The first people to notice any misconduct within an organization are likely to be those who work there. Yet often the prevailing culture within the workplace is one which itself deters employees from speaking up. Employees are well placed to sound the alarm

and act as whistleblowers. But they may also feel that they have the most to lose – their jobs and their workplace friends – through raising the alarm.<sup>2</sup> This is particularly true when a junior employee becomes aware of corrupt conduct by his or her superiors.

Such employees are faced with four options:

- *To remain silent*
- *To raise the concern through some internal procedure*
- *To raise the concern with an external body, such as a regulator*
- *To make a disclosure to the media*

Each of these options is to some degree unsatisfactory. Unless the culture in the workplace is one which allows employees to speak up without fear, each option might be seen to have adverse repercussions – either for the employer, the employee or the wider public (be they shareholders, taxpayers, passengers or consumers).

Faced with such uncomfortable choices, employees will often opt to turn a blind eye to questionable conduct, and keep silent. For the individual, this is the safest option. Yet the effect is that risks are not averted, dangers are not removed and corruption goes unchecked. A responsible employer is denied the opportunity to protect the organization's interests, and an unscrupulous competitor or manager may start to assume that all actions are tolerated.

## TYPES OF COMPLAINT MECHANISMS

The law should provide for at least two types of institutions to which whistleblowers can report their suspicions or offer evidence. The first type should include entities within the organization itself, such as supervisors, heads of the organization or internal (or external) oversight bodies created specifically to deal with maladministration. If the whistleblower is a public servant, he or she should be able to report to bodies such as an ombudsman, an anti-corruption agency or a general auditor.

Whistleblowers should be able to turn to a second type of institution if their disclosures to these first bodies do not produce appropriate results, and, in particular, if the person or institution to which the information was disclosed:

- *Decided not to investigate*
- *Did not complete the investigation within a reasonable time*
- *Took no action regardless of the positive results of the investigation*
- *Did not report back to the whistleblower within a certain time*

Whistleblowers should also be given the possibility of being able to directly address these secondary institutions if they:

- *Have reason to believe that they would be victimized if they raise the matter internally or with a prescribed external body*
- *Reasonably fear a cover-up*

Members of the legislature, the government or the media could be among these secondary groups. Experience has shown that a whistleblower law, which provides legal protection for employees who speak out, by itself will not encourage people to come forward. In a survey carried out among public officials in New South Wales, Australia on the effectiveness of the protection offered by that country's 1992 Whistleblower Act, 85 percent of the interviewees were unsure about either the willingness or the desire of their employers to protect them if not of they shed light on problems of corruption or other issues. Fifty percent stated that a fear of reprisal would prompt them to refuse to make a disclosure.

In order to help the Whistleblower Act work, the Independent Commission Against Corruption New South Wales concluded that:

- *There must be a real commitment within the organization to act upon disclosures and to protect those making them*

- *An effective internal reporting system must be established and widely publicized within organizations.*

An employee who feels that something must be done is as likely to publicize the matter outside of an organization as within it. When there are no clear signals about which external disclosures are appropriate and in what circumstances, the employee who does decide to go outside is most likely to go to the media. This option is usually taken as a last resort and is certainly not the preferred choice of a loyal employee. Media disclosures tend to be made by staff, who are either disgruntled or genuinely feel there is no other way to ensure the matter is addressed without putting their own careers on the line.

Disclosures made to the media will almost invariably provoke a defensive response from the organization. If those in charge are unaware of the issue, their instinctive response will be to deny it. If told that there is evidence to back up the charge, they will be tempted to take a position which can best be characterized as “shooting the messenger.” For example, the whistleblower may be frequently verbally abused and malicious stories circulated about him or her; or he or she can be portrayed as a bitter individual who cannot be trusted to tell the truth.

These events do little to inspire public confidence in the organizations concerned. Similarly, organizations that use a wall of silence to counter allegations also fail to reassure the public. Their silence is seen as a tacit admission of culpability.

If safe and acceptable ways can be provided to enable employees to bring up concerns with their employer, it is likely that malpractice will be deterred. It is also more likely that where malpractice does take place, it will be detected and stopped at an early stage – with the minimum of embarrassment to the organization. Some organizations ask their external auditors to audit the effectiveness of their complaints channels.

## WHISTLEBLOWER LAWS

Accountability must accompany any attempt to encourage whistleblowing.

The United Kingdom's Public Interest Disclosure Act (PIDA) seeks to promote accountability and sound governance in organizations by reassuring employees that it is both safe and acceptable for them to raise genuine concerns about irregularities in the conduct of a business or other organization. It does this by providing full and immediate protection from dismissal or victimization to those employees who raise concerns in accordance with the law.<sup>3</sup>

PIDA applies to genuine concerns about crimes, civil offences (including negligence, breach of contract, breach of administrative law), miscarriages of justice, dangers to health, safety or the environment and the cover-up of any of these problems. It applies across the private, public and voluntary sectors and covers contractors, trainees, agency staff, home workers and every professional in the National Health Service (NHS). It does not at present cover the genuinely self-employed (other than in the NHS), volunteers, the intelligence services, the army or police officers.<sup>4</sup>

The fullest – and most readily available – protection under PIDA occurs when an employee raises a concern about irregularities within an organization or with the person who carries legal responsibility for correcting any problems. Here, a reasonable and genuine suspicion is sufficient to give the employee protection. The rationale behind this provision is that those in charge of the organization are best placed to investigate and put right any questionable practice<sup>5</sup>. This approach also furthers the principle of accountability. Should the concern subsequently prove to be well-founded, the law can more readily hold people to account for their actions when it can be shown they had actual knowledge or notice of the action.

However, the UK Act also sets out the circumstances in which a disclosure outside the organization may be protected. Under the Act, the government provides for certain regulatory bodies to also play a role in such disclosures. A disclosure to any of them is protected as long as the employee has a reasonable belief in the truth of the information and any allegation contained in it. In practical terms, the employee must have some good evidence to demonstrate the grounds for his or her belief – even if, in fact, that belief later turns out to be mistaken.

For wider disclosures – and this would include disclosures to the police, the media or to a member of parliament – the employee must satisfy a number of tests in order to gain protection. In order to receive protection, the employee must have raised the concern with his or her employer or the responsible regulator. Exceptions to this rule take place only if he or she reasonably feared victimization; if the matter is likely to be covered up and there is no named regulator to handle such a case; or if the matter is deemed exceptionally serious.

The legislation does not protect troublemakers. To be protected, the employee must be acting in good faith. The only instance when this requirement does not apply is when the employee makes a disclosure in the course of obtaining legal advice.

Such legislation can go a long way towards ensuring that employees do not simply ignore legal violations in the workplace, but feel reassured that they can safely raise a concern with their employer. Employers who attempt to silence such concerns can be ordered to pay damages in case of prosecution.

Similar legislation exists in Australia at both the federal and state level.<sup>6</sup>

## FALSE ALLEGATIONS

Individuals' rights and reputations must be protected against frivolous, vexatious and malicious allegations. The dreaded phenomenon of the "informer" in authoritarian states underscores this danger. Whistleblower legislation should therefore include clear rules to restore damage caused by false allegations.

In particular, the law should contain minimum measures to restore a damaged reputation. Such measures could include the publication of apologies and the correction of personnel files, among other items. Criminal codes normally do contain provisions which penalize those who knowingly come forward with false allegations. It should be made clear to whistleblowers that these rules can apply to them, as well, if their allegations are not made in good faith.

## TELEPHONE HOTLINES

When the Czech government set up its first anti-corruption hotline at the ministry of the interior (focused on combating corruption in the police force), many people wondered how deep the average citizen would trust a phone line manned by state employees.<sup>7</sup>

In the Czech Republic, at least, it appears that non-governmental organizations enjoy a greater level of trust – and a greater expectation that they will act on received complaints. This suggests that non-governmental organizations can be well placed to operate services which can give citizens a voice by ringing a hotline – anonymously or otherwise – and voicing their concerns.

When NGOs have this degree of involvement in combating corruption, it is important that:

- *The role of the hotline centers and the identity of callers who would rely on its services should be carefully defined.*
- *The hotlines are introduced as part of a larger strategy.*
- *The phone lines do not collapse under excessive caller response.*
- *There is a well-focused advertising campaign which explains the purpose of the service and who is operating it.*
- *The security of the phone lines from eavesdropping of any nature is not in question.*
- *A clear decision is made as to whether or not anonymous complaints will be accepted.*
- *Clear guidelines are given for use of the hotline.*
- *The hotline employs experienced and trained operators, who can explain to callers what their rights are and can propose basic solutions for their problems.*
- *Feed back about how the complaint was handled is given to callers who identify themselves.*

All this is not to suggest that government departments should never run hotlines. There are departments in various countries – including police, tax, and customs – which run such hotlines satisfactorily. However, when public trust in a government is not high, a government organization can join forces with a respected NGO which enjoys public trust. Together, the two can provide the hotline service on behalf of the government department. For those with concerns about corruption in World Bank projects, the World Bank itself runs a hotline service, with free telephone contacts in a large number of countries.<sup>8</sup>

Two types of anti-corruption hotlines operate in Ukraine. The government hotline allows employees to phone in complaints concerning tax offices. Unfortunately, however, the hotlines have not yet gained public trust; in part, because they are run by the government. A hotline established by the civil society organization, the Citizen's Advocacy Office, receives greater use. This hotline receives calls 24 hours a day and is answered either by an operator or an answering machine. Anonymous complaints are documented and when a pattern of such calls emerges, suitable action is initiated.

### A WIDER ROLE FOR CIVIL SOCIETY

In several countries there are NGOs which provide help, advice and counseling to whistleblowers. Concerned employees are encouraged to contact the NGOs so that they will go about raising their concerns in the proper fashion and to ensure that they appreciate the full ramifications of their intended actions. Some also provide expert advice on internal complaints systems to both the public and the private sector, and can serve as an official channel for complaints.

A United Kingdom NGO, Public Concern At Work (PCAW), was actually responsible for having the legislation enacted, and now works with all involved parties (employers, unions and regulators) to ensure that the legislation functions as it should. It also works in the community to show how individual action can inform and influence the public interest, and to promote whistleblowing not just as a private right, but as a public good based on consideration

for others.<sup>9</sup> PCAW has been co-operating with a similar NGO in South Africa, the Open Democracy Advice Centre.<sup>10</sup>

In the United States, the Government Accountability Project (GAP) is the country's leading whistleblower organization. It also promotes government and corporate accountability by advocating occupational free speech, litigating whistleblower cases, publicizing whistleblower concerns, developing policy and the reform of whistleblower laws.<sup>11</sup>

### THE OFFICE OF THE OMBUDSMAN

What can the ordinary citizen do when things go wrong? When grievances occur, and complaints about government bureaucracy fall on deaf ears? One option is to turn to the legal system. But even when a country's legal system operates in accordance with the law, courts tend to be slow, expensive and far from user-friendly. In addition to this, the courts may themselves be corrupt and their respect of the rule of law problematic.

In these situations, citizens need to be able to turn to an ombudsman.<sup>12</sup> In Spain, the ombudsman carries the title "Defender of the People;" in South Africa, "Public Protector." Friendly in style and informal in practice, the office of the ombudsman can be an ideal partner for civil society organizations that work in handling complaints and in educating the public as to their rights. This is the case especially in those countries where the introduction of an ombudsman was preceded by informal public mediators, who helped bridge the divide between citizens and municipal authorities. In Catalonia, Spain, the law itself introduced local ombudsmen who are independent from the national Defender of the People.

The concept of a public ombudsman originated in China over 2,000 years ago, and came to Scandinavia by way of Turkey. The Scandinavians shaped the office into its contemporary form. In recent years, many countries have adopted the concept, finding it to be useful for citizens when they are dealing with the powerful engines of authority. In 1962, New Zealand became the first country outside of Scandinavia to adopt the office. Norway also adopted the office in that year.<sup>13</sup>

Although historically the office has focused on malfeasance in public administration, in recent years a number of countries have expanded this traditional mandate to include human rights abuse as well as corruption. Ombudsmen have been established in many of the transition countries, and under various guises: The Parliamentary Civil Rights Commissioner in Hungary; the Defender of Civil Rights in Slovenia; the Human Rights Commissioner in Russia; the National Office for Human Rights in Latvia; and the Public Advocate in both Georgia and Romania.<sup>14</sup>

Lithuania, by its constitution and subsequent legislation, has a council of five parliamentary ombudsmen whose primary responsibility is to investigate petitions related to abuse of power and bureaucracy. Two ombudsmen investigate civil servants; one of them, military officers; the remaining two, local government officials.

To be effective, the office of ombudsman should fulfil four criteria:

- *The ombudsman is independent from organizations which he or she has the power to investigate.*
- *Its actions make a difference in building public trust in government. Recommendations made by the ombudsman should be generally acted upon.*
- *It exhibits fairness.*
- *It is publicly accountable.*

The ombudsman independently receives and investigates allegations of maladministration. It does not compete with the courts, or act as a further body to which those unsuccessful in the courts can appeal. Most do not have jurisdiction to investigate the courts themselves.

Definitions of the role of ombudsman can vary. Pakistan's legislation establishes the office's primary function as to examine:

*(i) A decision, process, recommendation, act of omission or commission which is contrary to law, rules or regulations, or is a departure from established practice or procedure, unless it is bona*

*fide and has valid reason; is perverse, arbitrary or unreasonable, unjust, biased, oppressive or discriminatory; based on irrelevant grounds; or, involves the exercise of powers or the failure or refusal to do so for reasons of corrupt or improper motives such as bribery, jobbery, favouritism, nepotism, and administrative excesses; and*

*(ii) Neglect, inattention, delay, incompetence, inefficiency and ineptitude in the administration or discharge of duties and responsibilities.<sup>15</sup>*

In essence, as a landmark Canadian court case found "[t]he Ombudsman can bring the lamp of scrutiny to otherwise dark places even over the resistance of those who would draw the blinds".<sup>16</sup>

The institution of ombudsman gives individuals an opportunity to place complaints about the practices of government before an independent and expert body. Complaints may result in remedial action being taken to resolve issues of concern in particular cases, and, in a broader context, help to restore confidence in the integrity of government institutions.

As a generally high-profile constitutional institution, the office is potentially better able to resist improper pressure from a government's executive branch, than are other institutions such as a public service commission, a police commission or a defense commission. It can perform audits which result in information that can reveal corruption within a government. Thus, it is able to contain corruption.

The confidentiality of these procedures gives the office the added advantage of providing a shield against possible intimidation of informants and complainants.

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

The office has also been found to be extremely adaptable, and has worked well in parliamentary

democracies, societies with radically different ethnic and religious backgrounds, and in one-party as well as military states.

Poland created its office of ombudsman in 1987 to investigate government of the law and principles of community life and social justice. Its success has inspired other emerging European democracies to do the same.<sup>17</sup> However, although a number of transition countries have established an office of ombudsman, the selection processes – although appropriate on paper – have not always provided the right calibre of person to undertake the role. Nor have the offices generally been given adequate resources.

### THE OMBUDSMAN IN POLAND

In Poland, the office has proven to be popular. The creation of an ombudsman in 1987 was one of the first democratic institutions to be created in Poland. The Commissioner for the Protection of Civil Rights is elected by the lower house of parliament and appointed with the senate's approval for a single term of five years. Everyone, including foreigners, has the right to apply to the commissioner for help in defending any rights or liberties believed to have been violated by public bodies. Access to the ombudsman is free, without formalities, and the commissioner is also empowered to act on his or her own initiative.<sup>18</sup>

The commissioner must be a Polish citizen of high public standing, be politically and ideologically neutral and have a good knowledge of law. The office-holder cannot hold any other positions.

### WHAT CRITERIA DOES AN OMBUDSMAN APPLY WHEN JUDGING OFFICIAL ACTIONS?

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

as against standards for good governance. These include the principles of:

- *Equal treatment for equal cases*
- *Reasonableness*
- *Proportionality between the means and the result when judging official actions*
- *Legal certainty of a citizen's expectations that he or she would acquire a right when he or she has acted in good faith on that expectation*
- *Provision of reasons for decisions*
- *Protection of a citizen against official actions which have an unjustifiably negative impact on him or her*

In addition, when reviewing a government action, an ombudsman also uses standards or guidelines for good governance which contribute to the propriety with which the executive branch acts.

These guidelines are manifested in certain accepted standards for administrative processes and the conduct of public servants toward the public. They include the requirement to act without undue delay; to supply the individual with relevant information; to treat people fairly and respectfully; and to be unbiased and helpful.

Finally, the ombudsman sets standards for the government organization related to co-ordination between ministries and agencies supplying a service. It monitors progress in meeting standards for delivery of services as well as relevant professional standards. It protects an individual's privacy, and public access to government authorities.

### SHOULD AN OMBUDSMAN HAVE A DISTINCT ANTI-CORRUPTION ROLE?

A classic ombudsman is concerned with eliminating maladministration; in other words, bad management of public affairs. Generally, maladministration can stem from a degree of corruption in public administration. Therefore, an ombudsman will need

to tackle corruption when it is the cause of malfunction in the administration. The question is how the ombudsman should do this.

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

However, several countries have taken the view that the ombudsman, given his or her right of access to government files, is in a far better position to investigate and police a government administration than are less expert and orthodox police investigators.<sup>19</sup>

### AN OMBUDSMAN’S ROLE IN MONITORING FINANCIAL STATEMENTS

Papua New Guinea and Taiwan are two countries where the ombudsman can review and monitor declarations of income and assets made by senior public officials.<sup>20</sup> As an office independent of government, with the investigative capacities to examine the contents of financial declarations, the ombudsman’s office can avoid the necessity for establishing other independent mechanisms specifically for monitoring financial assets.<sup>21</sup> Alternatively, when a large number of applications for information are likely to be disputed, a local government ombudsman’s office can be created to handle these requests.<sup>22</sup>

### THE APPOINTMENT PROCESS

As with many other elements in a system of checks and balances on government, the process of appointing an ombudsman is crucial to building and sustaining public confidence in the institution. If the office is filled with political partisans or retired officials, chances of success are severely limited. In some countries, the legislature itself makes the selection and the head of state formally announces

the appointment. In others, the head of state makes the appointment after consultation with the leader of the opposition and the prime minister (if there is one). In some cases, the appointment is simply made by the executive branch without any formal requirement for consultation.

The actual mechanics of the process are secondary to the outcome. The office must be seen by the public to be independent, fair, competent, and serving the best interests of the people; not as a bureaucratic appendage, serving the objectives of the ruling political party.

One distinguished ombudsman has noted that:

*However the appointments procedure may be set up, the institutional safeguards for independence will be undermined if there is any possibility of party political considerations leading to bias – or the appearance of bias – in the person appointed. It is equally important to guard against making an appointment that waives or dilutes the necessary professional qualifications. In this respect, all that can be done, once a sound selection procedure is enshrined in the law, is to hope that the responsible authority will act wisely. The Ombudsman himself, of course, must endeavour to steer clear of any conduct that could undermine his impartiality or public confidence in him in this regard. He must never use his Office to pursue his own personal interests, for instance in connection with his future career.<sup>23</sup>*

### THE COURTS AS A COMPLAINT MECHANISM

In simple terms, the rule of law requires that government operate within the confines of the law. Aggrieved citizens, whose interests have been adversely affected, have the right to approach an independent court to decide whether or not a particular action taken by, or on behalf of, the state is in accordance with the law. This right can appear in a country’s constitution or be conferred by legislation. Some countries have specialist administrative courts for this purpose; others give jurisdiction to the ordinary courts.<sup>24</sup>

In this context, the courts examine a particular decision made by an official, or an official body, to deter-

mine whether it falls under the authority conferred by law on the decision-maker.

In other words, the courts rule as to whether or not the decision is legally valid. In doing so, the judges do not substitute their own discretion and judgment for that of the government. They simply rule whether the government or its officials have acted within the limits of their lawful authority. Thus, the judges do not govern the country and, do not “displace” the government when government decisions are challenged in the courts.

As the role of the private sector increases in many countries, and the emphasis of government shifts more heavily toward regulation, the role of the courts is, if anything, becoming even more important. As public functions are privatized, the courts, rather than parliaments, begin to take the lead role in enforcing accountability.

The decisions of government regulators impact directly on the private sector interests that they are regulating, and the private sector will look to the courts with greater frequency to shield it from excessive or abusive use of regulatory powers. At times, the courts will be expected to go further, and actually review the legality of decisions being made in the private sector itself. They will be expected to apply the principles of administrative law (previously applicable only to official institutions), when these decisions impact significantly on the public interest.

The 1996 Constitution of South Africa goes so far as to make “just administrative action” a constitutionally protected right:

### 33.

- (1) *Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.*
- (2) *Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.*
- (3) *National legislation must be enacted to give effect to these rights, and must:*
  - a. *Provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;*
  - b. *Impose a duty on the state to give effect to the rights in subsections (1) and (2); and*

*c. Promote an efficient administration.*

South Africa’s Promotion of Administrative Justice Act 20 establishes the right to administrative action that is “lawful, reasonable and procedurally fair” and to the right to written reasons for administrative action as contemplated in the constitution.

### Section 6(1) and (2) provide:

- 1) *Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.*
- 2) *A court or tribunal has the power to judicially review an administrative action if*
  - a) *The administrator who took it*
    - i) *was not authorised to do so by the empowering provision;*
    - ii) *acted under a delegation of power which was not authorised by the empowering provision;*
    - or
    - iii) *was biased or reasonably suspected of bias;*
  - b) *A mandatory and material procedure or condition prescribed by an empowering provision was not complied with;*
  - c) *The action was procedurally unfair;*
  - d) *The action was materially influenced by an error of law;*
  - e) *The action was taken-*
    - i) *for a reason not authorised by the empowering provision;*
    - ii) *for an ulterior purpose or motive;*
    - iii) *because irrelevant considerations were taken into account or relevant considerations were not considered;*
    - iv) *because of the unauthorised or unwarranted dictates of another person or body;*
    - v) *in bad faith; or*
    - vi) *arbitrarily or capriciously;*
  - f) *The action itself-*
    - i) *contravenes a law or is not authorised by the empowering provision; or*
    - ii) *is not rationally connected to:*
      - aa) *the purpose for which it was taken;*
      - bb) *the purpose of the empowering provision;*
      - cc) *the information before the administrator; or*
      - dd) *the reasons given for it by the administrator;*
  - g) *the action concerned consists of a failure to take a decision;*

- h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or*
- i) the action is otherwise unconstitutional or unlawful.*

#### **THE WAY FORWARD**

No society can expect to tackle corruption effectively if its citizens have neither the will nor the ability to raise their complaints when they witness acts of corruption. Just as they play a vital role within the private sector, reliable and safe complaint mechanisms lie at the heart of any government strategy to fight corruption.

## ENDNOTES

1. Examples of legislation include 1994 Whistleblowers Protection Act (Queensland, Australia); 1998 Public Interest Disclosure Act (United Kingdom); Whistleblower Reinforcement Act of 1998 (District of Columbia, United States of America) and District of Columbia Government Comprehensive Merit Personnel Act of 1978 (United States)
2. The expression “whistleblower” (as by a referee in a football match) is of US origin. The Dutch equivalent is “bell ringer” (a person who rings a bell to raise an alarm). Discussions of whistleblowing raise debates in the countries of Eastern and Central Europe, when discussants confuse the legitimacy of the actions with the less respectable actions of those who denounced their neighbors under former totalitarian regimes.
2. The (UK) Public Interest Disclosure Act 1998 came into force in 1999. The text is at [www.hmso.gov.uk/acts/acts1998/19980023.htm](http://www.hmso.gov.uk/acts/acts1998/19980023.htm).
3. The UK government has promised that police officers will receive protection equivalent to that available under the Act.
4. Applying this approach to the principle of parliamentary accountability, the Act provides similar strong protection where people in public bodies raise matters directly with the sponsoring government department.
5. 1999 Queensland Whistleblowers Protection Regulation ([http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/W/WhistleblowProR99\\_01\\_.pdf](http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/W/WhistleblowProR99_01_.pdf)); The Australian Law Reform Commission has come out strongly in favor of whistleblower protection. See: Scope of Complaints System at <http://www.austlii.edu.au/au/other/alrc/publications/reports/82/ALRC82Scopeofcomplaintssys.html#Ch14Protectionandencouragementofwhistleblowers> Australia, Inc. is an NGO which provides support for those who have witnessed corruption or suspect its presence in their place of work. See: <http://www.whistleblowers.org.au/>.
6. This discussion draws from a Transparency International-Czech Republic round-table entitled Work of Contact Centres for Corruption Victims and Anti-Corruption Hotlines held in Prague, Czech Republic, on November 2, 1999.
7. Details of the contact numbers are at the World Bank’s web site: <http://www.worldbank.org>.
8. Public Concern at Work: <http://www.whistleblowing.org.uk>.
9. Open Democracy Advice Centre (South Africa): <http://www.opendemocracy.org.za>
10. Government Accountability Project (US): <http://www.whistleblower.org>
11. John Hatchard, “The Office of the Ombudsman”, in National Human Rights Institutions in the Commonwealth, Commonwealth Secretariat, London (1992)
12. The New Zealand legislation may be accessed at <http://www.ombudsmen.govt.nz/ombudsme.htm>. For the Office of the Ombudsman of New Zealand, see: <http://www.ombudsmen.govt.nz/>
13. See the report Possibilities for the Creation of a Ombudsman Institution in the Republic of Bulgaria done by the Center for the Study of Democracy, National Anti-Corruption Documents: [http://64.49.225.236/russian/ni\\_National\\_Docs\\_ru.htm](http://64.49.225.236/russian/ni_National_Docs_ru.htm)
14. The definition comes from the Pakistan legislation establishing the office.
15. The quotation comes from a landmark Canadian court case. For further information contact Jeremy Pope at [jeremy.pope@tiri.org](mailto:jeremy.pope@tiri.org)
16. Using an Ombudsman to Oversee Public Officials, Nick Manning and D. J. Galligan (PREM Notes, The World Bank, Washington DC 1999). For further information contact Jeremy Pope at [jeremy.pope@tiri.org](mailto:jeremy.pope@tiri.org)
17. The Commissioner’s mandate is set out in Poland’s report to the UN Human Rights Commission, October 2003: <http://www.unhchr.ch/tbs/doc.nsf/0/a6e8802acbd8d5b4802567a80053e0d4?Opendocument>
18. For example, the Office of the Inspector-General of Government in Uganda
19. Finland is an example.
20. Address by Dr Marten Oosting, president of the International Ombudsman Institute, National Ombudsman for the Netherlands, in the 1998 “The Independent Ombudsman in a Democracy Governed by the Rule of Law” given at the Opening Ceremony of the Third Asian Ombudsman Conference, Macau, May 4, 1998.
21. The Papua New Guinea model is widely seen as having had positive impact. However, in Taiwan, in order to cope with the implementation of the asset disclosure law, the Control Yuan, an agency that monitors government, set up the Department of Asset Disclosure for Public Functionaries in August 1993.
22. Declarations of assets are discussed in Chapter 3.
23. For a more general discussion of the courts, see Chapter 16.
24. For the complete text of The Promotion of Administrative Justice Act, see: [http://www.acts.co.za/prom\\_admin\\_justice/Index.htm](http://www.acts.co.za/prom_admin_justice/Index.htm) Also, Jeffrey Jowell, Andrew Le Sueur, Woolf Judicial Review of Administrative Action, 5th edition: Sweet & Maxwell (UK) SBN: 0-421-60790-4 (Soft cover).

NOTHING TO DECLARE



## REVENUE COLLECTION

There is perhaps no more notorious area for corruption than revenue collection—nor, perhaps, one where the consequences can be so grave.<sup>1</sup>

In some countries (e.g. Peru and Uganda), corruption related to state revenues has become so endemic that the government has decided to close down the existing tax administrations and replace them with new ones. In a number of countries, poorly paid positions in tax and customs administrations are eagerly sought after since 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 bought and sold.<sup>2</sup>

Corrupt customs officials also mean porous borders, through which not only untaxed goods can flow, 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 organized crime groups, may seriously endanger national and international security.

Enormous losses can flow from the public purse. A handful of dollars to a customs officer means a container-load of cigarettes can escape duty payments of thousands of dollars. Recently, in Shanghai a single customs official was found to have successfully defrauded the state of \$ 145 million USD. He was simply buying up false sales tax receipts and selling them to local companies. Some 3,194 false invoices were seized.

As the World Customs Organization (WCO) has observed, corruption is most likely to occur where customs officials:

- *Enjoy monopoly power over clients*
- *Have discretionary power over the provision of goods or services*
- *The level of control or accountability is low*

The WCO adds that a number of additional factors need to be considered as contributing to the probability of administrative corruption. These include:

- *Salary levels for customs officials*
- *The degree to which the organizational culture and behavioral norms foster or actively discourage corrupt behavior. This includes penalties for violators of the law.*
- *The deterrence value of existing administrative controls*
- *The amount of face-to-face contact between customs officials and clients*

In addition, it matters little what anti-corruption strategies are employed if the risk of detection is low.<sup>2</sup>

Other issues can also contribute to a culture of corruption:

- *The laws are difficult to understand and can be open to differing interpretations.*
- *The payment of taxes requires frequent contacts between taxpayers and tax administrators.*
- *Acts of corruption on the part of administrators are either ignored or not easily discovered, and when discovered, are dealt with mildly, if at all.*
- *More broadly, controls exercised by the state over the officials charged with carrying out its functions are weak.*

Surveys have shown that it is the ineffective and discretionary administration of tax and regulatory regimes as well as corruption, that increases the size of a country's unofficial economy. This retards the development of the economy as a whole: Countries with a large unofficial, or shadow, economy tend to grow more slowly.<sup>4</sup> Corruption both reduces government revenue and cripples economic growth. At the same time, corrupt officials are eager to increase government spending – and, subsequently, their opportunities for profit. This contributes to larger budget deficits.<sup>5</sup>

According to the United Nations Council on Trade and Development, the cost of complying with customs formalities in many countries can exceed the cost of duties paid on a shipment of goods. This points to a basic problem with complex customs procedures. Importers and exporters have complained for years that these create complexities and possibilities ripe for corruption.<sup>6</sup>

On the other hand, some countries practice dumping policies and openly encourage “suitcase trade.” In so doing, they can inflict serious damage on neighboring countries’ industries and encourage corrupt “partnerships” between custom officials and importers.

Minimizing corruption in revenue systems is important for several reasons:

- *It provides the state with revenues with which to finance expenditures, provide basic public goods and safety nets and funds for infrastructure development and maintenance.*
- *It facilitates economic efficiency, by reducing the distortions caused when businesses avoid tax.*
- *It fosters fair competition (among those who do pay tax and those who do not).*
- *It promotes economic growth and development by improving the investment climate for both domestic and foreign enterprises.*
- *It reduces external deficits and borrowing, and stabilizes the exchange rate. Corruption is often associated with high levels of capital flight.*
- *It protects the ordinary citizen who bears the cost of the negative consequences of corruption.*

### EXAMPLES OF REVENUE REFORM

Among examples of reform given by The World Bank are Latvia and Guatemala.<sup>7</sup>

Latvia’s anti-corruption strategy for revenue administration was part of a broad national strategy. The organizational structure of the country’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 established to:

- *Monitor and educate staff based on a code of ethics*
- *Investigate cases of illicit enrichment*
- *Conduct disciplinary proceedings*
- *Develop guidelines for managers dealing with corruption*
- *Redesign business processes to reduce opportunities for unsupervised decision-making*
- *Develop incentives to foster integrity and good conduct*
- *Monitor declarations of income and assets by parliamentarians, ministers, and public servants*

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 over a period of six months. This code clearly explains external laws and regulations and relates them to the everyday work of customs staff. The guidelines include instructions on the proper response for staff when offered a bribe.<sup>8</sup>

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<sup>9</sup> was introduced and procedures overhauled and simplified. A public information campaign was also launched to publicize the agency’s progress in improving customer service and in meeting its revenue targets.<sup>10</sup>

The Central Board of Customs in Poland has embarked on sweeping reforms for revenue collection which address the integrity of its staff and

a range of anti-corruption measures. Greater care is being taken on recruitment of customs officials. During a probationary period, new staff 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. In addition, an independent research company carries out surveys of clients and the public to gain feedback as to the reforms' success.

Three African countries (Ghana, Tanzania and Uganda) are also among those which 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 the "elite" status was lost. Second, there was no effective internal strategy to establish and maintain a sound ethical framework.<sup>11</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. However, tax revenues have increased nonetheless.

The experience has led to the suggestion that one way in which to increase tax collection would be to strengthen – not weaken – the bargaining powers of tax collectors. This is based on the assumption that the tax collectors would collect more for the

state even as they collected more for themselves. The thesis is hardly tenable: What government could justify encouraging corrupt officials to feed on its citizens in this way? And what message would such a government send to the rest of its public service?<sup>12</sup>

## A PROGRAM FOR REFORM

Anti-corruption programs can include the following measures:

- **Simplification of tax and customs regulations:** *These laws and codes are often highly complex and difficult to understand and give officials discretionary powers. To minimize corruption, rules should be simple and clear, with few exceptions, and the rules known to all. Information and documentation requirements should be minimized. The revenue administration can define their information and documentation needs in ways that minimize administrative requirements. The agency's clients and the public at large should be kept informed of new notices and important announcements. If customs duties and the tax system are perceived to be fair, citizens' incentives for corruption will diminish.*
- **Standardization of procedures and interpretations:** *Procedural manuals and electronic forms make revenue collection services more transparent, reduce officials' opportunities for unsupervised decision-making and strengthen accountability. Standardized procedures should limit one-on-one contacts between officials and customers and reduce the number of forms and/or approvals needed ("one-stop procedures"<sup>13</sup>). Interpretation of customs regulations must be consistent. Importers and tax payers can only be expected to declare their liabilities in an environment where the interpretation of the laws is consistent and procedures are standardized, with each transaction treated in the same way as the previous one.*
- **Professional standards:** *Experienced, highly trained managers should be recruited, instead of politically appointed heads of administration. Other staff should also be recruited and promoted based on merit, paid a living wage and*

given regular training. In addition, responsibilities should be separated according to function and mechanisms for processing complaints put in place. Hiring procedures should be rationalized, exemplary performance rewarded and staff disciplined who are found in violation of customs regulations.

- **Controls:** Both tax and customs services should be subject to regular internal and external controls. In order to make controls effective, performance standards (relating to revenue targets and service standards) as well as codes of conduct should be in place. These codes need to be backed up by effective sanctions, which should include internal disciplinary measures for minor offences and the involvement of law enforcement agencies for more serious cases of fraud and corruption. The establishment of special vigilance units can support internal controls.
- **Computerization:** Perhaps more than any other change, the introduction of computerized support for the processing of customs documents provides the opportunity to implement standardized procedures that leave little to the discretion of the officials. Such a system can also provide useful information such as identifying transactions that do not meet pre-set time limits. for processing or individual officers who undertake actions that are out of the ordinary (e.g., physically inspecting too many shipments).
- **Customer surveys and consultation with users:** Customer surveys are useful tools to diagnose problems and monitor the ongoing effects of reforms. Finally, there should be regular consultation with private sector groups, civil society, the media and other government agencies.<sup>14</sup>

The World Customs Organization's Self-Assessment Checklist<sup>15</sup> covers the matters referred to in the 1993 WCO Arusha Declaration (discussed below). Among the questions posed for administrations to answer are the following:

- Are staff permitted to hold positions where they may be targeted by corrupt individuals or firms for long periods of time?
- Are staff expected to transfer or rotate at regular intervals?
- Is rotation or mobility a clearly understood condition of service?
- Are there established mechanisms in place to oversee the posting of staff at regular intervals? Is this process free of bias or favoritism?
- Does the working environment foster the development of an inappropriate relationship between staff and clients? If so, what mechanisms are in place to ensure suitable control, accountability and supervision of staff working in such environments?
- At points of interaction with the public, are there mechanisms in place to prevent it being known in advance which particular officials will occupy certain positions at certain times?
- Are functions segregated in areas that are vulnerable to corruption? For example is it possible for an individual official to initiate, check and authorize payments?

## PRE-SHIPMENT INSPECTION

Pre-shipment inspection (PSI) takes place when a company is engaged to carry out an inspection of goods before they are transported and imported. Basically, the exporter makes a declaration to the PSI company, which then checks the goods and the invoicing and furnishes its own report to the customs service of the importing country. When the goods are imported, the two reports are reconciled with the shipment. The idea is to tackle over- and under-invoicing and misclassification of goods.

The PSI concept is contested by some on the grounds that the real need is to tackle corruption and inefficiency in the customs administration of the importing country. There is little hard evidence that PSI is effective in a situation mired by corruption in the importing country. Collusion between PSI inspectors and exporters is still a possibility, notwithstanding clear incentives for an inspection company to protect its reputation for integrity. There

has even been an instance where a PSI company in Europe was convicted of bribing a Pakistani government minister in order to win a PSI contract. PSI is also costly, although exporters generally contribute about a 1 percent fee for the service.

One of the reasons for this shipment control strategy's failure seems to lie with customs authorities often not being in control of their own borders. Thus, border clearances can be easily evaded. However, the more effective a revenue collection proves is, the greater is the incentive to smuggle to evade duty payments. The prime reason for the failure of PSI is that corrupt or inefficient customs do not corrupt one set of documents with another as a cross-check. This is known as a **reconciliation process** and is essential for the PSI system to work. Otherwise, its basis on which it operates can be undermined.

However, the view is now emerging that if an importing country's customs organization is reasonably reliable, there is, indeed, a place for PSI as an additional anti-corruption tool.<sup>16</sup>

## CROSS-BORDER CO-OPERATION

Corruption can flourish in cross-border operations unless there is a substantial level of co-operation on both sides of international boundaries. Such co-operation is usually the subject of bilateral agreements between governments. This area is frequently neglected and periodic audits of the current range and suitability of a country's arrangements are necessary.

While monitoring events in their own country, civil society groups in Bulgaria have developed and implemented a means by which to measure the volume of imported and exported contraband. This is done by using so-called "mirror statistics." By comparing Bulgarian official data for export and imports with data from neighboring countries, the scope of the grey economy as a whole is assessed, and the main contraband markets in Bulgaria identified.<sup>17</sup>

## THE ARUSHA DECLARATION OF THE WORLD CUSTOMS ORGANIZATION (WCO)

In 1993, the Customs Cooperation Council (now the World Customs Organization – WCO) issued a declaration that addresses good governance and integrity in customs.<sup>18</sup> The Arusha Declaration, named after the Tanzanian city in which the WCO met, has since been supplemented by a Self-Assessment Guide that explains how to implement the Declaration's principles.<sup>19</sup>

The WCO's Arusha Declaration<sup>20</sup> stresses that the issue of integrity is of paramount importance if customs administrations are to develop and maintain public trust and confidence. The Declaration acknowledges the negative effect corruption can have on the efficient functioning of an administration and establishes ten key principles that should be used by customs administrations when developing their national integrity programs.

### 1. Leadership and Commitment

*The prime responsibility for corruption prevention must rest with the head of customs and the executive management team. The need for high levels of integrity must be stressed and commitment to the fight against corruption maintained over the long term.*

### 2. Regulatory Framework

*Customs laws, regulations, administrative guidelines and procedures should be harmonized and simplified to the greatest extent possible. Customs formalities can proceed without undue burden. Customs practices should be reviewed and reformed to eliminate red tape and reduce unnecessary duplication. Duty on imported and exported goods should be moderated where possible and exemptions from standard rules minimized.*

### 3. Transparency

*Customs laws, regulations, procedures and administrative guidelines should be made public, easily accessible and applied in a uniform and consistent manner. The basis upon which discretionary powers can be exercised should be clearly defined. Appeal and administrative review mechanisms should be established to provide a mechanism for clients to challenge or seek review of customs*

decisions. Client service charters or performance standards should be established which set out the level of service clients can expect from customs.

#### 4. Automation

Automation or computerization of customs functions can improve efficiency and effectiveness and remove many opportunities for corruption.

#### 5. Reform and Modernization

Customs administrations should reform and modernize their systems and procedures to eliminate any perceived advantages that might be obtained by circumventing official requirements.

#### 6. Audit and Investigation

The prevention and control of corruption can be assisted by a range of monitoring and control mechanisms such as internal check programs, internal and external auditing and investigation and prosecution regimes.

#### 7. Code of Conduct

A key element of any effective integrity program is the development, issue and acceptance of a comprehensive code of conduct which sets out in very unambiguous terms the behavior expected of all customs personnel.

#### 8. Human Resource Management

Human resource management practices, which have proven useful in controlling or eliminating corruption in customs services, include:

- Providing a sufficient salary package to ensure that customs personnel are able to maintain a decent standard of living
- Recruiting and retaining personnel who have, and are likely to maintain, high standards of integrity
- Ensuring staff selection and promotion procedures are free of bias and favoritism and based on the principle of merit
- Ensuring that decisions on the deployment, rotation and relocation of staff take into account the need to remove opportunities for customs personnel to hold posts susceptible to corruption for long periods of time.

- Providing adequate training and professional development to customs personnel upon recruitment and throughout their careers to continually promote and reinforce the importance of maintaining high ethical and professional standards

- Implementing appropriate performance appraisal and management systems which reinforce sound practices and which foster high levels of personal and professional integrity

#### 9. Morale and Organizational Culture

Customs employees are more likely to act with integrity when morale is high, when human resource management practices are fair and when there are reasonable opportunities for career development.

#### 10. Relationship with the Private Sector

Customs administrations should foster an open, transparent and productive relationship with the private sector. Private sector clients should be encouraged to accept an appropriate level of responsibility and accountability for any customs problem and for the identification and implementation of practical solutions.

### A ROLE FOR THE PRIVATE SECTOR

There is a clear role for the private sector in working to reduce corruption within customs services. In a growing number of countries, customs administrations regularly consult with importers and exporters on this topic through standing committees, both to determine where the problems lie and the degree of progress that is being made to resolve them.

The International Chamber of Commerce has developed its own Customs Guidelines directed towards developing modern, efficient and effective customs administrations. Their 54-point plan covers the processing of cargo, and the need for transparency and simplicity of administration and regulation, as well as automation, classifications, disputes, sanctions and passenger processing.<sup>21</sup>

## TAX INSPECTORS AND THE OECD CONVENTION

Tax inspectors also have a role in countering bribery. The signatories to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997) have made the bribing of foreign public officials a criminal offense. It is important that tax inspectors be aware of these provisions and of their role in implementing a Convention designed in part to protect the integrity of their country. In this context, the OECD has published the OECD Bribery Awareness Handbook for Tax Examiners.<sup>22</sup>

## REVENUE TRANSPARENCY

The view is widely held that revenue transparency is one of the keys for achieving good governance. Both the OECD and the International Monetary Fund (IMF) have codes that are relevant for achieving this end.

### OECD BEST PRACTICES FOR BUDGET TRANSPARENCY

The budget is the government's key policy document. It should be comprehensive, encompassing all government revenue and expenditure, so that the necessary trade-offs between different policy options can be assessed.

The OECD "best practices" for budget transparency include a high degree of accountability and transparency. All of the documents referred to below should be published promptly:

- *The government's draft budget should be submitted to parliament far enough in advance for a thorough review. The budget should be approved by parliament prior to the start of the fiscal year. It should include a detailed commentary on each revenue and expenditure program. Non-financial performance data, including performance targets, should be presented for expenditure programs where practicable.*
- *The budget should include a medium-term perspective that illustrates how revenues and*

*expenditures will develop and be reconciled with forecasts contained in earlier fiscal reports for the same period; significant deviations should be explained.*

- *Comparative information on the past year's actual revenue and expenditure tallies should be provided for each program. An updated forecast for the current year should also be provided. Similar comparative information should be shown for any non-financial performance data.*
- *If legislation authorizes certain amounts of revenue and expenditure, the tallies should be shown in the budget for informational purposes.*
- *The economic assumptions underlying the report should be made public and the budget should include a discussion of tax expenditures. Both documents should be compiled in accordance with the OECD Best Practices.*

There should be a pre-budget report to encourage debate on the budget and how it will affect the national economy. As such, it also serves to create appropriate expectations for the budget itself. It should be released at least a month prior to the introduction of the budget proposal.

The report should state explicitly the government's long-term economic and fiscal policy objectives and the government's economic and fiscal policy intentions for the forthcoming budget and for at least the following two fiscal years. It should highlight the total level of revenue, expenditure, deficit or surplus, and debt.

A year-end report is the government's key accountability document. It should be audited by an independent watchdog institution and be released six months before the end of the fiscal year.

The year-end report shows compliance with the level of revenue and expenditures authorized by parliament in the budget. Any adjustments to the original budget should be shown separately. The report should contain a comprehensive discussion of the government's financial assets and financial liabilities, non-financial assets, employee pension obligations and contingent liabilities.

A pre-election report serves to illuminate the general state of government finances immediately before an election. This fosters a more informed electorate and serves to stimulate public debate. The feasibility of producing this report may depend on constitutional provisions and electoral practices. Optimally, it should be released no later than two weeks prior to elections and should contain the same information as the mid-year report. Special care needs to be taken to assure the integrity of such reports, in accordance with OECD best practices.

A long-term report assesses the long-term sustainability of current government policies. It should be released at least every five years, or when major changes are made in substantive revenue or expenditure programs. The report should assess the budgetary implications of demographic change, such as population aging and other potential developments over the long term (10 to 40 years). All key assumptions underlying the projections contained in the report should be made explicit and a range of plausible scenarios presented.

Specific disclosures required are:

- *Employee Pensions: These obligations should be disclosed in the budget, the mid-year report and the year-end report.*
  - *Contingent Liabilities: These are liabilities whose budgetary impact depends on future events that may or may not occur. Common examples include government loan guarantees, government insurance programs, and legal claims against the government. All significant contingent liabilities should be disclosed in the budget, the mid-year report and the annual financial statements.*
- A section of the OECD Best Practices document addresses "Integrity, Control and Accountability:"
- *A summary of relevant accounting policies should accompany all reports and the same accounting policies should be used for all fiscal reports.*
  - *Any change in accounting policies should be fully disclosed and information for previous reporting periods should be adjusted, as practicable, to allow comparisons to be made between reporting periods.*
  - *A dynamic system of internal financial controls, including an internal audit, should be in place to assure the integrity of information provided in the reports. Each report should contain a statement of responsibility by the finance minister and the senior official responsible for producing the report. The minister certifies that all government decisions with a fiscal impact have been included in the report. The senior official certifies that the finance ministry has used its best professional judgement in producing the report.*
  - *The year-end report should be audited by an independent financial watchdog institution in accordance with generally accepted auditing practices. Audit reports prepared by the institution should be scrutinized by Parliament.*
  - *Parliament should have the opportunity and the resources to examine any fiscal report that it deems necessary.*
- *Economic Assumptions: Deviations from the forecast of the major economic assumptions underlying the budget are the government's principle fiscal risk.*
  - *Tax Expenditures: These are the estimated costs to the tax revenue from preferential treatment for specific activities. The estimated cost of key tax expenditures should be disclosed as supplementary information in the budget. To the extent practicable, a discussion of tax expenditures for specific areas should be incorporated into the discussion of general expenditures in order to inform decisions about the budget.*
  - *Financial Liabilities and Financial Assets: All financial liabilities and financial assets should be disclosed in the budget, the mid-year report, and the year-end report.*
  - *Non-Financial Assets: All such assets, including real estate and equipment, should be disclosed.*

## IMF CODE OF GOOD PRACTICES ON FISCAL TRANSPARENCY

The IMF revised its Code of Good Practices on Fiscal Transparency in 2001. Although the basic principles remain the same as those of the original code, the revised version gives added emphasis to assurance of the quality of fiscal data.<sup>23</sup>

The IMF shares the view that fiscal transparency can make a major contribution to the cause of good governance. It should lead to a better-informed public debate about the design and results of fiscal policy, make governments more accountable for the implementation of fiscal policy, and thereby strengthen credibility and public understanding of macroeconomic policies and choices.

In a globalized environment, fiscal transparency is of considerable importance to achieving macroeconomic stability and effective economic growth. However, it is only one aspect of good fiscal management, and attention has to be paid also to increasing the efficiency of government activity and establishing sound public finances.

IMF member countries are being encouraged to implement the Code of Good Practices on Fiscal Transparency (set out below), which has been distilled from the IMF's knowledge of fiscal management practices in member countries.

The Code asserts that the roles and responsibilities in government should be clear; information on government activities should be provided to the public; budget preparation, execution, and reporting should be undertaken in an open manner; and fiscal information should attain widely accepted standards of data quality and be subject to independent assurances of integrity. There is a manual to assist with implementation.

The IMF Revised Code of Good Practices on Fiscal Transparency provides for:

### I. Clarity of Roles and Responsibilities

*1.1 The government sector should be distinguished from the rest of the public sector and from the rest of the economy, and policy and management*

*roles within the public sector should be clear and publicly disclosed.*

*1.1.1 The structure and functions of government should be clearly specified.*

*1.1.2 The responsibilities of different levels of government, and of the executive branch, the legislative branch, and the judiciary, should be well defined.*

*1.1.3 Clear mechanisms for the coordination and management of budgetary and extra-budgetary activities should be established.<sup>24</sup>*

*1.1.4 Relations between the government and non-government public sector agencies (i.e., the central bank, public financial institutions, and non-financial public enterprises) should be based on clear arrangements.*

*1.1.5 Government involvement in the private sector (e.g., through regulation and equity ownership) should be conducted in an open and public manner, and on the basis of clear rules and procedures that are applied in a nondiscriminatory way.*

*1.2 There should be a clear legal and administrative framework for fiscal management.*

*1.2.1 Any commitment or expenditure of public funds should be governed by comprehensive budget laws and openly available administrative rules.*

*1.2.2 Taxes, duties, fees, and charges should have an explicit legal basis. Tax laws and regulations should be easily accessible and understandable, and clear criteria should guide any administrative discretion in their application.*

*1.2.3 Ethical standards of behavior for public servants should be clear and well publicized.*

### II. Public Availability of Information

*2.1 The public should be provided with full information on the past, current, and projected fiscal activity of government.*

2.1.1 The budget documentation, final accounts, and other fiscal reports for the public should cover all budgetary and extra-budgetary activities of the central government, and the consolidated fiscal position of the central government should be published.

2.1.2 Information comparable to that in the annual budget should be provided for the outturns of the two preceding fiscal years, together with forecasts of the main budget aggregates for two years following the budget.

2.1.3 Statements describing the nature and fiscal significance of central government contingent liabilities and tax expenditures, and of quasi-fiscal activities, should be part of the budget documentation.

2.1.4 The central government should publish full information on the level and composition of its debt and financial assets.

2.1.5 Where sub-national levels of government are significant, their combined fiscal position and the consolidated fiscal position of the general government should be published.

2.2 A commitment should be made to the timely publication of fiscal information.

2.2.1 The publication of fiscal information should be a legal obligation of government.

2.2.2 Advance release date calendars for fiscal information should be announced.

### **III. Open Budget Preparation, Execution, and Reporting**

3.1 The budget documentation should specify fiscal policy objectives, the macroeconomic framework, the policy basis for the budget, and identifiable major fiscal risks.

3.1.1 A statement of fiscal policy objectives and an assessment of fiscal sustainability should provide the framework for the annual budget.

3.1.2 Any fiscal rules that have been adopted (e.g., a balanced budget requirement or borrowing limits for sub-national levels of government) should be clearly specified.

3.1.3 The annual budget should be prepared and presented within a comprehensive and consistent quantitative macroeconomic framework, and the main assumptions underlying the budget should be provided.

3.1.4 New policies being introduced in the annual budget should be clearly described.

3.1.5 Major fiscal risks should be identified and quantified where possible, including variations in economic assumptions and the uncertain costs of specific expenditure commitments (e.g., financial restructuring).

3.2 Budget information should be presented in a way that facilitates policy analysis and promotes accountability.

3.2.1 Budget data should be reported on a gross basis, distinguishing revenue, expenditure, and financing, with expenditure classified by economic, functional, and administrative category. Data on extra-budgetary activities should be reported on the same basis.

3.2.2 A statement of objectives to be achieved by major budget programs (e.g., improvement in relevant social indicators) should be provided.

3.2.3 The overall balance of the general government should be a standard summary indicator of the government's fiscal position. It should be supplemented where appropriate by other fiscal indicators for the general government (e.g., the operational balance, the structural balance, or the primary balance).

3.2.4 The public sector balance should be reported when non-government public sector agencies undertake significant quasi-fiscal activities.

3.3 Procedures for the execution and monitoring of approved expenditure and for collecting revenue should be clearly specified.

3.3.1 *There should be a comprehensive, integrated accounting system which provides a reliable basis for assessing payment arrears.*

3.3.2 *Procurement and employment regulations should be standardized and accessible to all interested parties.*

3.3.3 *Budget execution should be internally audited, and audit procedures should be open to review.*

3.3.4 *The national tax administration should be legally protected from political direction and should report regularly to the public on its activities.*

3.4 *There should be regular fiscal reporting to the legislature and the public.*

3.4.1 *A mid-year report on budget developments should be presented to the legislature. More frequent (at least quarterly) reports should also be published.*

3.4.2 *Final accounts should be presented to the legislature within a year of the end of the fiscal year.*

3.4.3 *Results achieved relative to the objectives of major budget programs should be presented to the legislature annually.*

#### **IV. Assurances of Integrity**

4.1 *Fiscal data should meet accepted data quality standards.*

4.1.1 *Budget data should reflect recent revenue and expenditure trends, underlying macroeconomic developments, and well-defined policy commitments.*

4.1.2 *The annual budget and final accounts should indicate the accounting basis (e.g., cash or accrual) and standards used in the compilation and presentation of budget data.*

4.1.3 *Specific assurances should be provided as to the quality of fiscal data. In particular, it should be indicated whether data in fiscal reports are internally consistent and have been reconciled with relevant data from other sources.*

4.2 *Fiscal information should be subjected to independent scrutiny.*

4.2.1 *A national audit body or equivalent organization, which is independent of the executive, should provide timely reports for the legislature and public on the financial integrity of government accounts.*

4.2.2 *Independent experts should be invited to assess fiscal forecasts, the macroeconomic forecasts on which they are based, and all underlying assumptions.*

4.2.3 *A national statistics agency should be provided with the institutional independence to verify the quality of fiscal data.*

#### **THE FINANCIAL STABILITY FORUM AND THE 12 KEY STANDARDS FOR SOUND FINANCIAL SYSTEMS**

Twelve standard areas have been designated by the Financial Stability Forum (FSF), a basis for sound financial systems and deserving of priority implementation depending on country circumstances.<sup>25</sup>

The Financial Stability Forum brings together senior representatives of national financial authorities (e.g. central banks, supervisory authorities and treasury departments), international financial institutions, international regulatory and supervisory groupings, committees of central bank experts and the European Central Bank.

The FSF plays a central role in the multilateral effort to achieve sound financial systems. It was first convened in 1999 to promote international financial stability and promotes integrity through exchanges of information, international cooperation, and financial supervision and surveillance.

The Forum brings together national authorities responsible for financial stability in significant international financial markets, international financial institutions, international regulatory and supervisory groupings and committees of central Bank experts. From the outset, the FSF recognized the importance of developing and promoting international standards, both for the strengthening of domestic

financial systems and for the promotion of international financial stability and integrity.

While the key standards vary in terms of their degrees of international endorsement, they are broadly accepted as representing the minimum requirements for good practice.

Some of the key standards are relevant for more than one policy area, e.g. sections of the IMF Code of Good Practices on Transparency in Monetary and Financial Policies have relevance for aspects of payment and settlement as well as financial regulation and supervision. The Audit Office in the Czech Republic is one which has worked to implement these standards.<sup>26</sup>

The twelve standards are:

### Macroeconomic Policy and Data Transparency

1. *Monetary and financial policy transparency: Code of Good Practices on Transparency in Monetary and Financial Policies (IMF)*<sup>27</sup>
2. *Fiscal policy transparency: Code of Good Practices in Fiscal Transparency (IMF)*<sup>28</sup>
3. *Data dissemination: Special Data Dissemination Standard*<sup>29</sup> / *General Data Dissemination System*<sup>30</sup> (IMF)

### Institutional and Market Infrastructure

4. *Insolvency (in preparation by the World Bank)*
5. *Corporate governance: Principles of Corporate Governance (OECD)*<sup>31</sup>
6. *Accounting: International Accounting Standards (IAS) (IASB)*<sup>32</sup>
7. *Auditing: International Standards on Auditing (ISA) (IFAC)*<sup>33</sup>
8. *Payment and settlement: Core Principles for Systemically Important Payment Systems (CPSS)*<sup>34</sup> and *Recommendations for Securities Settlement Systems (CPSS/IOSCO)*<sup>35</sup>
9. *Market integrity: The Forty Recommendations of the Financial Action Task Force (FATF)*<sup>36</sup> and *Eight Special Recommendations Against Terrorist Financing (FATF)*<sup>37</sup>

### Financial Regulation and Supervision

10. *Banking supervision: Core Principles for Effective Banking Supervision (BCBS)*<sup>38</sup>
11. *Securities regulation: Objectives and Principles of Securities Regulation (IOSCO)*<sup>39</sup>
12. *Insurance supervision: Insurance Core Principles (IAIS)*<sup>40</sup>

### A ROLE FOR CIVIL SOCIETY

Despite the best efforts of parliamentarians, financial audit institutions and, at times, the executive branch of government, translating good auditing recommendations into effective policy and behavioral change has generally proven difficult. Cooperation with civil society organizations provides an opportunity to change this situation. In this context, the International Budget Project draws in civil society groups in many parts of the world, including a number of transition countries.<sup>41</sup> The International Budget Project assists non-governmental organizations and researchers in their efforts both to analyze budget policies and to improve budget processes and institutions. The Project is especially interested in assisting with applied research that is of use in ongoing policy debates and with research on the effects of budget policies on the poor. The Project works primarily with researchers and NGOs in developing countries or new democracies. An “Open Budget” project is also being developed in St Petersburg.<sup>42</sup>

Activity tends to focus on the legislative stage of the budget process, although budget groups are also active, where possible, in drafting legislation and in monitoring implementation. To date, civil society groups have been least involved in the auditing stage of the budget process, but there are some signs that this is changing. Cooperation with civil society organizations presents innovative possibilities for improving the auditing function and public oversight.

One reason why audit findings might not have greater resonance with the public is that people are often unaware of the role of a country’s financial watchdog institution and its potential impact on their lives.

To build an engaged citizenry interested in holding the government to account, it is necessary to demystify the institution's role and to raise the level of budget and audit literacy in the population.

Such an institution can fulfill this function itself, by developing an outreach campaign, or it can cooperate with civil society groups and the media, to assist. Budget groups have expertise in translating complex materials into timely, accessible documents and in designing and delivering training courses specifically targeted at non-technical audiences, an example is The Citizen's Guide to Taxation and A Citizen's Guide to the Budget prepared by the Institute of Public Finance in Croatia.<sup>43</sup>

Civil society can assist in a variety of ways:

- *Civil society groups can help build citizen literacy on the financial watchdog institution's function and on issues of financial management and oversight.*
- *Civil society groups and the media can raise issues for the financial watchdog body to investigate based on their close contact with citizens.*
- *Civil society groups and the media can conduct initial investigations into financial mismanagement or further investigate the issues that arise from an audit report.*
- *Civil society groups can help monitor government's follow-up to an audit report and parliamentary hearings. Together with attention from the media, this can put pressure on government's executive branch to take corrective action*
- *Civil society can directly assist the financial watchdog's work through its involvement in tracking expenditure, assisting with local auditing and measuring program performance.*

The growth of budget groups may signal an important shift in public finance practice. In most countries, public budgeting has long been considered by politicians to be their own exclusive preserve. It is only recently that the value of opening budget processes to non-governmental inputs has been considered desirable in some countries. For many developing countries and countries in transition, a set of powerful negative myths continue to constrain the independent budget work of civil society, legislatures and the media. These can include the following misguided beliefs:

- *Budgets must be formulated in secret or they may upset financial markets.*
- *Non-government intervention can destroy the integrity of the budget.*
- *Legislators and civil society have a greater interest in advancing the interests of their constituents as opposed to the interests of the country as a whole.*
- *It is the government's mandate to produce the budget internally in a closed process and for it to be rubber-stamped by the legislature.*

Budget secrecy may encourage market speculation, but greater transparency may actually smooth market adjustments to known policy choices. Further, useful, accessible and timely budget information facilitates foreign and domestic private sector planning and investment.

The work of civil society groups in this area promises to be some of the most innovative and most useful of all the tasks assumed by civil society in its quest for good governance.

## ENDNOTES

- 1 Public Expenditure Management Handbook (The World Bank) (1998): <http://www1.worldbank.org/publicsector/pe/handbook/pem98.pdf>; J. Crotty, Practical Measures to Promote Integrity in Customs Administrations: [http://www.transparency.org/iacc/8th\\_iacc/papers/crotty.html](http://www.transparency.org/iacc/8th_iacc/papers/crotty.html); LINK A. Das-Gupta, An Anticorruption Strategy for Revenue Administration, World Bank PREMnote October 33, 1999: <http://www1.worldbank.org/publicsector/tax/documents/PREMnote33.pdf>; Sheetal K. Chand & Karl O. Moene, "Controlling Fiscal Corruption," International Monetary Fund, August 1997; World Bank, "E-Government: Philippine Customs Reform," Governance & Public Sector Reform. J. Gill, Customs: Developing an Integrated Anti-corruption Strategy, in: D. Kaufmann, M.G. de Asis, P. Dininio (2001), Improving Governance and Controlling Corruption: <http://www.worldbank.org/wbi/governance/pubs/improving.htm>; World Bank: Helping countries reform economic and sector policies: <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor05.htm>; OECD website on taxation: [http://www.oecd.org/topic/0,2686,en\\_2649\\_37427\\_1\\_1\\_1\\_1\\_37427,00.html](http://www.oecd.org/topic/0,2686,en_2649_37427_1_1_1_1_37427,00.html)
- 2 Vito Tanzi, Corruption Around the World: Causes, Consequences, Scope and Cures: <http://www.imf.org/external/Pubs/FT/staffp/1998/12-98/tanzi.htm>
- 3 World Customs Organization: <http://www.wcoomd.org/ie/En/en.html>. The WCO has a strategy and a program for building integrity in customs organizations. A model code of conduct for customs officials covers: personal responsibility; compliance with the law; relations with the public; acceptance of gifts, rewards, hospitality and discounts; avoiding conflict of interest; political activities; conduct in money matters; confidentiality and use of official information; use of official property and services; private purchases of government property by staff; the work environment.
- 4 Simon Johnson, Daniel Kaufmann & Pablo Zoido-Lobaton Corruption, Public Finances, and the unofficial Economy, World Bank Working Paper. 2169.
- 5 Tanzi, Vito (1997) Corruption in the Public Finances, Paper presented at the Eighth International Anti-Corruption Convention, Lima, Peru: [http://www.transparency.org/iacc/8th\\_iacc/papers/vtanzi.html](http://www.transparency.org/iacc/8th_iacc/papers/vtanzi.html)
- 6 The G8 countries seek to facilitate international trade, reduce costs for businesses and governments, and promote economic growth. To these ends, the G8 Customs Group has sought to simplify customs data requirements to the minimum consistent with effective administration of customs responsibilities, standardize the data requirements and standardize the format for reporting that data. See the G7 Initiative on Customs Standardization and Simplification Plain Language Description (KYOTO Customs Data Principles): [http://www.wcoomd.org/ie/En/Topics\\_Issues/FacilitationCustomsProcedures/DataModeIG7Initiative.html](http://www.wcoomd.org/ie/En/Topics_Issues/FacilitationCustomsProcedures/DataModeIG7Initiative.html)
- 7 For a description of reforms in Morocco, see Best Practices in Customs Reform – Lessons from Morocco PREM notes No. 67 April 2002: <http://www1.worldbank.org/publicsector/tax/documents/PREMnote67.pdf>;
- 8 Latvian Customs Code of Conduct: <http://www.vid.gov.lv/eng/user/show.asp?ID=208&Cld=30>
- 9 See Transparency International Source Book 2000, Chapter 23 – Good Financial Management: <http://www.transparency.org/sourcebook/23.html>
- 10 See World Bank PREM note 33 (see above): <http://www1.worldbank.org/publicsector/tax/documents/PREMnote33.pdf>;
- 11 Michael Waller, Review of Integrity Management of Staff in the Ghana, Tanzania and Uganda Revenue Authorities (TI-CIR, London): [http://www.transparency.org/working\\_papers/mwaller/integrity\\_management\\_review.html#summary](http://www.transparency.org/working_papers/mwaller/integrity_management_review.html#summary)
- 12 Fjeldstad, Odd-Helge (2003) Fighting fiscal corruption: Lessons from the Tanzania Revenue Authority in Public Administration and Development 23/2, p.165-175; and Fjeldstad, Odd-Helge & Bertil Tungodden (2003) Fiscal corruption: A vice or a virtue?, World Development, vol. 31 no. 8 pp. 1473-1475
- 13 In the case of customs reform, there can be a one-step process. A customs declaration can be presented to the customs office and the paperwork processed by the office's administration with no further need for contact.
- 14 Adapted from Practical Measures to Promote Integrity in Customs Administrations (above): [http://www.transparency.org/iacc/8th\\_iacc/papers/crotty.html](http://www.transparency.org/iacc/8th_iacc/papers/crotty.html); and the Utstein Anti-Corruption Resource Centre FAQ: <http://u4.no/document/faqs1.cfm>
- 15 World Customs Organization: <http://www.wcoomd.org/ie/En/en.html>
- 16 José Anson, Olivier Cadot and Marcelo Olarreaga, Tariff Evasion and Customs Corruption: Does Pre-shipment Inspection Help? [http://www.econ.worldbank.org/files/30442\\_wps3156.PDF](http://www.econ.worldbank.org/files/30442_wps3156.PDF) and Noel Johnson, Committing to Civil Service Reform: The Performance of Pre-shipment Inspection under Different Institutional Regimes [http://www.econ.worldbank.org/files/1714\\_wps2594.PDF](http://www.econ.worldbank.org/files/1714_wps2594.PDF)
- 17 Corruption and Trafficking: Monitoring and Prevention: [http://www.csd.bg/news/law/CorTREP\\_E.html](http://www.csd.bg/news/law/CorTREP_E.html)
- 18 The 1996 Arusha Declaration on Burundi and the 1999 Arusha Declaration on the Rights of Indigenous Peoples.
- 19 World Customs Organization: <http://www.wcoomd.org/ie/En/en.html>
- 20 For the full text, see [www.wcoomd.org/ie/En/Topics\\_Issues/FacilitationCustomsProcedures/Revised%20Arusha%20E-Print%20version.PDF](http://www.wcoomd.org/ie/En/Topics_Issues/FacilitationCustomsProcedures/Revised%20Arusha%20E-Print%20version.PDF)
- 21 International Chamber of Commerce Customs Guidelines: [http://www.iccwbo.org/home/statements\\_rules/statements/2003/customs\\_guidelines.asp](http://www.iccwbo.org/home/statements_rules/statements/2003/customs_guidelines.asp)
- 22 Second Evaluation Round: Training Seminar for GRECO Expert-Evaluators: Information and Working Documents: <http://www.greco.coe.int/evaluations/seminar/DocsE.htm>. Also available in Russian.
- 23 IMF Code of Good Practices on Fiscal Transparency: <http://www.imf.org/external/np/fad/trans/code.htm#code>

- 24** Extra-budgetary accounts are common in many countries. Some have legitimacy and are set up for specific purposes (pensions, road funds etc.). Others are designed to reduce the political and administrative controls that are more likely to accompany spending that goes through the budget. In some countries, foreign aid and the proceeds of sales of natural resources are also channelled into special accounts that tend to be less transparent and less controlled than money channelled through the budget, and often finds its way into illegitimate uses or into the pockets of officials. Vito Tanzi, Corruption Around the World: Causes, Consequences, Scope and Cures: <http://www.imf.org/external/Pubs/FT/staffp/1998/12-98/tanzi.htm>
- 25** Financial Stability Forum: [http://www.fsforum.org/compendium/key\\_standards\\_for\\_sound\\_financial\\_system.html](http://www.fsforum.org/compendium/key_standards_for_sound_financial_system.html)
- 26** Tenth International Anti-Corruption Conference: <http://www.10iacc.org/content.phtml?documents=102&art=177>
- 27** Financial Stability Forum: [http://www.fsforum.org/compendium/compendium\\_of\\_standards\\_2\\_9.html](http://www.fsforum.org/compendium/compendium_of_standards_2_9.html)
- 28** Financial Stability Forum: [http://www.fsforum.org/compendium/compendium\\_of\\_standards\\_2\\_10.html](http://www.fsforum.org/compendium/compendium_of_standards_2_10.html)
- 29** Financial Stability Forum: [http://www.fsforum.org/compendium/compendium\\_of\\_standards\\_2\\_12.html](http://www.fsforum.org/compendium/compendium_of_standards_2_12.html)
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- 31** Financial Stability Forum: [http://www.fsforum.org/compendium/compendium\\_of\\_standards\\_2\\_17.html](http://www.fsforum.org/compendium/compendium_of_standards_2_17.html)
- 32** Financial Stability Forum: [http://www.fsforum.org/compendium/compendium\\_of\\_standards\\_2\\_18.html](http://www.fsforum.org/compendium/compendium_of_standards_2_18.html)
- 33** Financial Stability Forum: [http://www.fsforum.org/compendium/compendium\\_of\\_standards\\_2\\_19.html](http://www.fsforum.org/compendium/compendium_of_standards_2_19.html)
- 34** Financial Stability Forum: [http://www.fsforum.org/compendium/compendium\\_of\\_standards\\_2\\_7.html](http://www.fsforum.org/compendium/compendium_of_standards_2_7.html)
- 35** Financial Stability Forum: [http://www.fsforum.org/compendium/compendium\\_of\\_standards\\_2\\_24.html](http://www.fsforum.org/compendium/compendium_of_standards_2_24.html)
- 36** Financial Stability Forum: [http://www.fsforum.org/compendium/compendium\\_of\\_standards\\_2\\_30.html](http://www.fsforum.org/compendium/compendium_of_standards_2_30.html)
- 37** Financial Stability Forum: [http://www.fsforum.org/compendium/compendium\\_of\\_standards\\_2\\_28.html](http://www.fsforum.org/compendium/compendium_of_standards_2_28.html)
- 38** Financial Stability Forum: [http://www.fsforum.org/compendium/compendium\\_of\\_standards\\_2\\_4.html](http://www.fsforum.org/compendium/compendium_of_standards_2_4.html)
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- 41** Warren Krafchik, What Role Can Civil Society and Parliament Play in Strengthening the External Auditing Function?: <http://www.internationalbudget.org/auditorgeneral.htm>
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Few activities create greater temptations or offer more opportunities for corruption than public sector procurement.<sup>1</sup>

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. 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 favors from bidders, bribing purchasing agents and giving contracts to friends and relations. A recent court case in Lesotho has laid bare the practices of industrialized 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.<sup>2</sup>

Whether corruption in public contracting is really the most common form of public corruption may be questionable, but without doubt it is alarmingly widespread. It is almost certainly the most publicized and arguably the most damaging form of corruption to the public welfare. It has been the cause of countless dismissals of senior officials, and even the collapse of entire governments. It is a source of astronomical waste in public expenditure, estimated in some cases to run as high as 30 percent or more of total procurement costs. It is the engine for much corruption in political party financing. Regrettably, however, it is more talked about than acted upon.<sup>3</sup>

To the non-specialist, the procurement procedures appear complicated, even mystifying. They are often manipulated in a variety of ways, and without great risk of detection. On both sides of the transaction, ready and willing collaborators can be readily found. Special care is needed, as the people doing the buying (either those carrying out the procurement process or those approving the decisions) are spending government money, rather than their own funds.

Such is the importance of public procurement that South Africa accorded it special attention in its 1994 Constitution. Section 187 provides that:

1. *The procurement of goods and services for any level of government shall be regulated by an Act of Parliament and provincial laws, which shall make provision for the appointment of independent and impartial tender boards to deal with such procurements.*
2. *The tendering system referred to in subsection (1) shall be fair, public and competitive, and tender boards shall on request give reasons for their decisions to interested parties.*
3. *No organ of state and no member of any organ of state or any other person shall improperly interfere with the decisions and operations of the tender boards.*
4. *All decisions of any tender board shall be recorded.*

Corruption in procurement is sometimes thought to be a phenomenon found only in countries with weak governments and poorly paid staff. Yet highly developed countries with a long tradition of democracy have amply demonstrated in recent years that corrupt procurement practices can become an integral part of the way in which they do business, too. Nor is procurement corruption the exclusive domain of the buyer who controls the purse strings. It can just as easily be initiated by the supplier or contractor who makes an unsolicited offer.

#### **PRINCIPLES OF FAIR AND EFFICIENT PROCUREMENT**

Procurement should be economical. It should result in the best quality of goods and services for the price paid. Both price and quality should be evaluated when making procurement decisions; neither factor should drive the final decision alone.

The price of a good or service should be interpreted as its "evaluated price," meaning that additional factors such as operating costs, the availability of spare and replacement parts and servicing facilities are all taken into account.

Contract award decisions should be fair and impartial. Public funds should not be used to provide

favors. Standards and specifications must be non-discriminatory. Suppliers and contractors should be selected on the basis of their qualifications and the merit of their offers. There should be equal treatment of all prospective suppliers in terms of deadlines and confidentiality.

There are several requirements to keep in mind:

- *The procurement process should be transparent. Procurement requirements, rules and decision-making criteria should be readily accessible to all potential suppliers and contractors, and preferably announced as part of the invitation to bid. The opening of bids should be public, and all decisions should be fully recorded in writing.*
- *The procurement process should be efficient. The procurement rules should reflect the value and complexity of the items to be procured. Procedures for small value purchases should be simple and fast, but as purchase values and complexity increase, more time and more complex rules will be required to ensure that principles are observed. Procurement decisions for larger contracts may require review by a committee; bureaucratic interventions, however, should be kept to a minimum.*
- *Accountability is essential. Procedures should be systematic and dependable, and records that explain and justify all decisions and actions should be maintained.*
- *Competence and integrity should be encouraged. This prompts suppliers and contractors to make their best offers, which, in turn, lead to even better procurement performance. Purchasers who fail to meet high standards of accountability and fairness are quickly identified as poor partners with whom to do business.*

When a project is funded by an international financial institution, additional requirements usually apply:

- *A fair chance must be given for suppliers, contractors, and consultants from multiple countries to take part in the bidding process, particularly those from member countries of the donor institution.*

- *Suppliers/bidders or contractors from the host country may sometimes be entitled to a preference expressed as a percentage of the contract value (For example, the World Bank places this as 15 percent for goods contracts, 7.5 percent for works contracts.) This preference is usually announced in the bid invitation.*

- *For contractors, there is often a requirement of pre-qualification. (Explained further below)*
- *For consultants, there is usually a short list of those invited to bid. The list should be prepared by the purchaser, not the funding institution. This avoids expensive preparatory efforts by too many consultants when only one can get the contract. The short list must have geographic variety (usually no more than two contractors from one country)*
- *There may be encouragement for foreign consultants to include consultants from the host country for at least part of the job, and there may also be encouragement of joint ventures involving foreign and local consultancy firms.*

When the United Nations funds a project, the purchaser is, in most cases, the UN itself. Although the UN basically applies similar procurement standards as those described above, it makes special efforts to make procurements from countries which are donor countries, but which have received a disproportionately small share of UN procurement in the past. It also tries to make procurements from countries in which the UN holds large amounts of non-convertible funds.

Clearly, bribery and corruption need not be a necessary part of doing business. Experience shows that much can be done to curb corrupt procurement practices if there is a desire and a will to do so. In order to understand how best to deal with corruption in procurement, it helps to understand first how it takes place.

## HOW CORRUPTION AFFECTS PROCUREMENT

Contracts involve a purchaser and a seller. Each participant has many ways of corrupting the

procurement process, and at any stage of the process.

Before contracts are awarded, the purchaser can:

- *Tailor specifications to favor particular suppliers*
- *Restrict information about contracting opportunities*
- *Claim urgency as an excuse to award a contract to a single contractor without competition*
- *Breach the confidentiality of suppliers' offers*
- *Disqualify potential suppliers through improper pre-qualification requirements*
- *Take bribes*

At the same time, suppliers can:

- *Collude to fix bid prices*
- *Promote discriminatory technical standards*
- *Interfere improperly in the work of evaluators*
- *Offer bribes*

The most direct approach for corrupting a procurement process is to contrive to have the contract awarded to the desired party through direct negotiations without competition. Even in procurement systems that are based on competitive procedures, there are usually exceptions where direct negotiations are permitted. For example:

- *In cases of extreme urgency because of disasters*
- *In cases where national security is at risk*
- *Where additional needs arise and there is already an existing contract*
- *Where there is only a single supplier in a position to meet a particular need*

Of course, not all single-sourced contracts are corrupt. In some instances, direct contract negotiations

may well be the most appropriate course of action. However, if justifying circumstances are claimed that do not really exist, the motivation for this deception is often to facilitate corruption.

Even if there is competition, it is still possible to tilt the outcome in the direction of a favored supplier. If only a few know of the bidding opportunity, competition is reduced and the odds improve for the favored party to win. One ploy is to publish notification about the bid in a small, obscure circulation source, which satisfies the advertising requirements, but which may not be seen by potential bidders. Bidders who co-operate in the scam, of course, get firsthand information.

Bidder competition can be further restricted by establishing improper or unnecessary pre-qualification requirements, and then allowing only selected firms to bid. Again, pre-qualification, if carried out correctly, is a perfectly appropriate procedure for ensuring that bidders have the right experience and capabilities to carry out a contract's requirements. However, if the standards and criteria for qualification are arbitrary or incorrect, they can become a mechanism for excluding competent but unwanted bidders.

Persistent but unwanted parties who manage to get past these hurdles can still be effectively eliminated by tailoring specifications to fit a particular supplier. Using the brand name and model number of the equipment from the preferred supplier is a bit too obvious, but the same results can be achieved by including specific dimensions, capacities and trivial design features that only the favored supplier can meet. The failure of competitors to be able to meet these features, which usually have no bearing on critical performance needs, are used as a ploy to reject their bids as "non-responsive."

Competitive bidding for contracts can only work if the bids are kept confidential up until the scheduled time for determining the results. A simple way to pre-determine the outcome is for the purchaser to breach the confidentiality of the bids, and give the prices to the preferred supplier so that it can submit a lower figure. The mechanics are not difficult, especially if the bidders are not permitted to be present when the bids are opened.

This process may become more transparent if an NGO watchdog is present at the opening of the bid documents.

The final opportunity to distort the outcome of competitive bidding occurs at the stage of bid evaluation and comparison. Carried out responsibly, this is an objective analysis of how each bid responds to the requirements of the bidding documents and a determination of which one is the best offer. If the intention is to steer the award to a favored bidder, the evaluation process offers almost unlimited opportunities. If necessary, and unless prevented from doing so, evaluators can invent entirely new criteria for deciding what is “best”, and then apply them subjectively to get the “right” results. They are often aided in this process by issuing bidding documents that are deliberately vague and obscure about what requirements must be met and how selection decisions will be made.

These techniques are only a brief outline of some of the ways in which a purchaser is able to corrupt the procurement process.

It would be a mistake to think that the buyers are always the guilty parties. Just as often, they are the ones being corrupted by the sellers, although perhaps without undue resistance.

Through bribes and other incentives, sellers can encourage buyers to take any of the actions described above. In addition, they may collude with other suppliers to decide which party will win a contract and then fix their prices accordingly – known as “bid rigging” – with an agreed payoff for the losers. This may be done without the buyer’s knowledge, and, if done cleverly, may never raise suspicions unless it occurs repeatedly. Even then, it may be hard to prove, let alone to punish.

Nor does the story end with the award of the contract, even though that is the stage when most people think that corruption of the procurement process is discussed. Indeed, the most serious and costly forms of corruption may take place after the contract has been awarded, during the performance phase. It is then that the purchaser of the goods or services may:

- *fail to enforce quality standards, quantities or other performance standards of the contract*
- *divert delivered goods for resale or for private use*
- *demand other private benefits (trips, school tuition fees for children, gifts)*

For their part, the unscrupulous contractor or supplier may:

- *falsify qualities or standards certificates*
- *over or under-invoice*
- *pay bribes to contract supervisors*

If the sellers have paid bribes or have offered unrealistically low bid prices in order to win the contract, their opportunities to recover these costs arise during contract performance. Once again, the initiative may come from either side, but, in order for it to succeed, corruption requires the other party’s either active co-operation or negligence in the performance of duties.

Finally, unscrupulous suppliers may substitute lower quality products than were originally required or offered in their bid. They may falsify the quantities of goods or services delivered when they submit claims for payment, and pay more bribes to contract supervisors to induce them to overlook discrepancies. In addition to accepting bribes and failing to enforce quality and performance standards, buyers may divert delivered goods and services for their private use or for resale.

## ACCEPTANCE OF GIFTS

Some gifts to public officials are acceptable; others, which can create a sense of obligation are not. Gifts meant as bribes can take many forms – a lunch, a ticket to a sports event, a Rolex watch, shares in a company, a holiday abroad, school fees for a child.

Evaluations of such practices as “corporate entertainment” may depend on whether or not supervisors are in a position to monitor the consequences

of their purchasing officers' behavior. Also relevant is whether a particular purchasing officer disqualifies him or herself in future situations that involve the firm in question. Likewise, it will matter whether all the companies likely to get the business are acting in similar ways, so that no obligation to prefer one bidder over another is created. Furthermore, levels of hospitality which are expected and usual, and do not give rise to a sense of obligation, can vary considerably from one society to another.

What is clearly unacceptable is when given hospitality is grossly excessive, such as all-expenses-paid holidays for a purchasing officer and spouse. More debatable gifts are such things as lunches or festive presents; though even here, the acceptance of seemingly trivial gifts and hospitality can, over time, lead to situations where an official has unwittingly become ensnared by the giver.

The dividing line usually rests at the point where the gift places the recipient under some obligation to the gift-giver. This point will differ from one society to another, but it is usually defined in terms of cash (or hospitality) which must be reported as being in excess of a given figure. Attempts to make distinctions between private and public hospitality generally give rise to controversy, and so are best avoided.

The point is that purchasing officers are always at risk and need to be monitored carefully. Any sign that they may be living beyond their means is an obvious red flag.

A government should have clear rules about official conduct that establish that:

- *Officials (and their family members) may not accept anything of value from any individual or company in contractual dealings with the ministry or department for which that official works.*
- *Public disclosure rules regarding the assets, liabilities and income of senior officials should be introduced and enforced; unexplained wealth of officials should lead to an inquiry.*
- *Any suspicion of wrongdoing by another official must be reported, and officials will be protected in carrying out that duty.*

- *Officials in posts involved with procurement and other contracting activities should be asked to sign a pledge that they will not demand or accept anything of value that in fact or perception could influence the exercise of governmental discretion.*
- *Officials will be informed and trained about how to apply the rules for official conduct.*

### EMPLOYMENT AFTER HOLDING PUBLIC OFFICE

A crucial area of corruption – and one of growing concern – is the practice of corporations offering post-official employment to public servants with whom they have had official dealings. Clearly, regulations governing the post-public sector employment of officials are important. It is neither practical nor sensible to insist that former public officials not engage in commercial activity after leaving office. However, whole networks of corruption can be constructed by outside suppliers, not only through cash bribes and expensive overseas holidays, but also through the promise to officials of lucrative employment when they retire.

It is tempting for a public official, blessed with rich work experience but a less than satisfactory pension, to accept employment with former suppliers. Often, there will be nothing wrong with such an arrangement. Indeed, it may be a constructive and useful way to ensure that valuable experience is not altogether lost to the community.

But it is susceptible to abuse. For example, an official who leaves the public service may take with him detailed knowledge of the government's impending contract bargaining strategy and the confidential discussions that may have been held with competitors of the official's new employer. In such an instance, neither the public interest nor the private sector is well served.

The promise of post-retirement employment can be used, too, by unscrupulous businesses, as a "sweetener" to gain contracts and is one that will not show in any monitoring of assets or income. Although it is neither fair nor desirable to place an absolute ban on re-employment after retirement from public service, some kinds of employment are clearly contrary to

the public interest. For example, a minister or highly placed official may leave government service while negotiations for a large public works project are pending. Obviously, it would be improper for such a person to immediately take up employment with one of the companies tendering or actively negotiating with the government. (Post-employment restrictions are discussed in Chapter 3)

### WHAT CAN BE DONE TO COMBAT CORRUPTION IN PROCUREMENT?

Transparency has two roles to play in countering corruption in public procurement. First, there is the possibility of making the process as open as possible. This includes publishing all calls for tender (both in newspapers and trade papers which possible participants in a tender are likely to read) and on the Internet, and doing both in a timely fashion.

Second, there is public exposure, a most powerful tool. The media can play a critical role in creating public awareness of corruption in procurement processes and generating support for corrective actions. If the public is provided with the unpleasant and illegal details of corruption – who was involved, how much was paid, the cost to taxpayers – and if it continues to hear about more and more cases, it is hard to imagine that the people will not come to demand reform. Indeed, public perceptions of “sleaze” have led to governments being voted out of office in long-established democracies. In the new democracies, it is by no means uncommon for opposition candidates to succeed to power when the outgoing administration has been tainted by corruption. This most frequently occurs frequently in the field of government contracting.

Government officials around the world are discovering that taxpayers still think of public funds as their money and do not like to see it wasted. The public, of course, is particularly unhappy when it sees its money going into the pockets of others as a reward for corrupt practices. Once support is developed for the reform of procurement practices, the problem can be attacked from all sides. Usually the starting point will be the strengthening of the legal framework, beginning with an anti-corruption law that has real authority and effective sanctions.

One of the greatest anomalies in anti-corruption laws regarding public procurement is that most countries clearly prohibit bribery at home, but many are silent when their exporters bribe officials abroad, or even reward it through tax write-offs.

At best, this is justified by a misguided notion of what is necessary for successful international business; at worst, it reflects a cynical and paternalistic view of what is good for others. The United States has had a Foreign Corrupt Practices Act since 1977<sup>3</sup> that specifically makes it a crime under its domestic laws to bribe foreign officials to gain or maintain business<sup>4</sup>, even when these events take place abroad. More recently, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,<sup>5</sup> directed at outlawing international business corruption involving public officials, aims essentially to internationalize the US approach.

The next legal requirement is a sound and consistent framework establishing the basic principles and practices to be observed in public procurement.

This can take many forms, but there is increasing awareness of the advantages of having a unified procurement code, setting out clearly the basic principles, and supplementing this with more detailed rules and regulations within the implementing agencies. A number of countries are consolidating existing laws, which have often developed haphazardly over many years, into such a code.

In recent years, some of the largest multilateral development agencies have given support to the development of national procurement codes in the countries to which they are lending, and have fostered organizations to implement them. For years, each of these lending institutions has had its own procurement guidelines, which borrowers are required to follow when awarding contracts financed from their loans. These guidelines have, in fact, played a significant role in shaping what are now widely accepted as standards of good international procurement practice.

Unfortunately, the rules applied by the multilateral development agencies do not directly impact on corruption in procurement for projects financed through

other sources. However, more recently, the development banks have recognized that it is in their member countries' best interests to have national policies and procedures, which apply these standards to other forms of procurement. Support from the banks includes both financial and technical assistance to countries that are willing to undertake procurement reforms, and associated institutional development.

### TRANSPARENT PROCEDURES

Beyond the legal framework, the next defense against corruption is a set of open, transparent procedures and practices for conducting the procurement process itself. No one has yet found a better answer than supplier or contractor selection procedures based on real competition.

The complexity or simplicity of the procedures will depend on the value and nature of the goods or services being procured, but the guidelines are similar for all cases:

- *Describe clearly and fairly what is to be purchased.*
- *Publicize the opportunity to make offers.*
- *Establish fair criteria for selection of suppliers and/or contractors.*
- *Receive offers (bids) from responsible suppliers.*
- *Compare the offers and determine which is best, according to the predetermined rules for selection.*
- *Award the contract to the selected bidder without requiring price reductions or other changes to the winning offer.*

For small contracts, suppliers can be selected with very simple procedures that follow these principles. However, major contracts should be awarded following a formal competitive bidding process involving carefully prepared specifications, instructions to bidders and proposed contracting conditions, all incorporated in the sets of bidding documents that are usually sold to interested parties.

Such documents may take months to prepare, and many more months may be needed for suppliers to prepare their bids and for the purchaser to evaluate them and choose the winner. These steps commonly take six months or more from start to finish. Procurement planning must be sure to take these time requirements into account, and start early enough to ensure that the goods and services will be ready when needed. Any pressures for "emergency" decisions should be avoided.

### OPENING OF BIDS

One key to transparency and fairness is for the purchaser to open the bids at a designated time and place in the presence of all bidders or their representatives who wish to attend. A practice of public bid openings, where everyone hears who has submitted bids and what their prices are, reduces the risk that confidential bids will be leaked to others, overlooked, changed or manipulated.

Some authorities resist this form of public bid, arguing that the same results can be achieved by having bids opened by an official committee of the purchaser without bidders being present. Clearly, this does not have the same advantages of perceived openness and fairness, especially since it is widely believed, and it is often the case, that a purchaser is a participant in corrupt practices.

### BID EVALUATION

Bid evaluation is one of the most difficult steps in the procurement process to carry out correctly and fairly. At the same time, it is one of the easiest steps to manipulate if someone wants to tilt an award in the direction of a favored supplier.

Evaluators can reject unwanted bids for trivial procedural matters – an erasure, failure to initial a page – or for deviations from specifications that they decide are significant. After bids are examined, if no one prevents them, evaluators may discover entirely new considerations that should be taken into account in choosing the winner. Or the bid evaluation criteria may be so subjective and so lacking in objective measures that the evaluators can produce any result they wish.

All of this argues for requiring bid evaluation criteria to be spelled out clearly in bid documents and for an impartial review authority to check the reasonableness of the evaluators' actions. The former allows bidders to raise objections in advance if they consider that the criteria are not appropriate, and the latter provides additional assurance that an evaluation has been conducted properly.

### DELEGATING AUTHORITY

The principle of independent checks and audits is widely accepted as a way in which to detect and correct errors or deliberate manipulation, and it has an important place in public procurement. Unfortunately, it has also been used by some to create more opportunities for corruption. In particular, the delegation of authority for contract approvals is an area that warrants some discussion.

At face value, the rationale for delegation is convincing. Low-level authorities can make decisions about very small purchases, but more senior officials should review and approve these decisions for larger contracts. The larger the contract value, the higher should be the approving authority. The purchasing agent must approve a desk purchase; a director must approve a computer purchase; a minister must approve procurement decisions related to road construction; and a president may need to approve decisions related to construction of a dam.

In some countries and organizations, this system works without any problems. In others, where contract awards are the main path to riches, it means a graduated payoff can be required at each step of the way: the higher the path leads, the larger the percentages demanded. Coincidentally, it also means that the larger the contract, the longer the delays in reaching any decision. All this points to a further essential element for reducing corruption: a well-trained, competent and honest body of civil servants to carry out procurement.

Establishing such a group requires a long-term effort, one that is never completely finished. It requires regular training and re-training programs; security in the knowledge that one's job will not be lost if the winning contractor is not the one favored

by the minister; and at least a level of pay that does not make it tempting to accept bribes to meet the bare necessities of a family. If a competent procurement cadre is developed, and there are a number of places where this has been achieved, the chain of approving authorities, with its accompanying delays, and other hazards can be reduced to a minimum.

### INDEPENDENT CHECKS AND AUDITS

None of this is to suggest that all independent checks and audits should be eliminated; they have an important role. However, there are some countries where so many review and approval stages have been built into the process that the system is virtually paralyzed. In some, it is impossible to award a major contract in less than two years from the time the bids are received.

### OPEN HEARINGS

The experience of a growing number of countries demonstrates that a series of well-publicized open hearings is a particularly effective means to spread information and to obtain public contributions and support for a large project. For the construction of a new subway line in Buenos Aires, for example, three large public hearings were held at which the mayor of Buenos Aires himself laid out the plans and invited comments and suggestions on such topics as the location of the line, the location and design of the stations and the process for selecting construction companies. The hearings were judged a great success; they were broadcast live on local TV and were video-recorded for later reference.

### INTEGRITY PACTS

"Integrity pacts" are agreements between prospective bidders and the contracting authority in which all agree to the rules of the particular exercise and agree not to bribe.<sup>6</sup> They are negotiated with interested bidders for a particular government contract. The process is explained to all interested bidders once the bidding process is opened and a meeting is held at which all bidders are invited to discuss the possible pact. The contracting body is present at

the meeting unless its presence is likely to inhibit the bidders from talking freely.

Integrity pacts provide for the appointment of an independent arbitrator to resolve any complaints made against parties involved in the process. The arbitrator is given a free hand in deciding if sanctions should be imposed in instances of alleged malpractice (the function of the arbitrator and sanctions are set out in the pact).

If the process receives sufficient support from likely bidders, the text of the integrity pact is signed by the highest-ranking official in the contracting body and the highest-ranking representatives of the respective bidding companies.

### MONITORING BY CIVIL SOCIETY

In a number of countries, civil society has been able to play an active role in monitoring major public procurement exercises and in giving public assurance that all has gone well.

In such cases, the following criteria should apply:

- *Monitors should be highly respected people of unquestioned integrity.*
- *Monitors should possess (or have easy access to) the required professional expertise.*
- *When local civil society representatives do not possess the required expertise, they should promptly contract such expertise from outside, including, when necessary, from overseas. Without expertise, problems may not be discovered, professional corrective proposals cannot be submitted, and the monitors will not gain the respect of officials.*
- *Individual monitors should not be subject to a veto by government.*
- *Monitors should have free and unlimited access to all relevant government documents, to all relevant meetings and to all relevant officials.*

- *Monitors should raise issues and complaints first with the authorities, and only go public when no corrective action is taken within a reasonable period of time.*
- *Monitors should be prepared to offer a limited confidentiality pledge regarding certain types of proprietary business information.*
- *Monitors should review and have full access to the tender documents, the evaluation reports, the award selection decision and the implementation supervision reports, technical as well as financial. They should participate in meetings and have the right to ask questions.*

However, it has to be noted that civil society is not always able to attract the high degree of expertise that is occasionally needed, and arrangements may be needed to ensure that this can be provided from an independent source.

It should also be noted that civil society generally lacks the capacity to monitor events subsequent to a contract being let, when variations to price and to specifications frequently occur, effectively to undermine the apparent integrity of the letting of the contract in the first place.

### USE OF THE INTERNET

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 that information. The argument has been made, however, that providing such access to certain pieces of information about government procurement can undermine quality and endanger entire projects.

The Seoul city system, the Online Procedures Enhancement for Civil Applications (OPEN) was developed to achieve transparency in the city's administration by preventing unnecessary delays or abuses of civil affairs by civil 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.<sup>7</sup>

Increasingly, all interactions between the city administration and companies doing business with it, or wishing to obtain contracts, and citizens in general, will be handled through this medium. If everybody can check on a real-time basis which contracts are offered by the city at a given time, under what conditions, and identify competitors by name and bidding price, the opportunities to manipulate the process – and, thus, the temptation to bribe – are greatly reduced.

## BLACKLISTING

The sanction of blacklisting (or “debarment”) should be available to the government when its contracting partners breach ethical and performance standards. 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 the bid or provision of a guarantee from a solvent institution that the work will be carried out or that the goods will be delivered (performance security)*
- *liability for damages, both to the government principal and to competing bidders for the losses they have incurred through an unsuccessful bid*

Firms that have been debarred could be re-admitted to the bidding process after complying with certain requirements, such as paying damages, terminating the employment of the staff who bribed public officials, introducing an effective no-bribery policy in the firm, and systematically implementing that new policy through a compliance program.

Debarment is widely practiced in the United States, at both federal and state level, for such causes as:

- *conviction of, or civil judgment for, fraud violation of antitrust laws, embezzlement, theft, forgery, bribery, false statements, or other offences indicating a lack of business integrity*
- *violation of the terms of a government contract, such as a willful failure to perform in accordance with its terms or a history of failure to perform*
- *any other action of such serious and compelling nature, affecting responsibility as a contractor as may warrant suspension or debarment*

Contractors which fall under these categories are excluded from receiving contracts. Agencies are not permitted to solicit offers from, award contracts to, renew or otherwise extend the duration of current contracts, or consent to sub-contracts with such contractors. Exceptions occur only if the acquiring agency’s head or a designee determines that there is a compelling reason for such action. Debarments are for a specified term as determined by the debarring agency and as indicated in the listing above.<sup>8</sup>

In South Africa, a slightly different approach has been taken. A bill presently before the South African parliament<sup>9</sup> provides that the blacklist be a public document. This will enable others, both within government and in the private sector, to know who has been sanctioned in this way, and why.

Similar blacklisting (or debarment) is practiced by the World Bank and in countries such as Singapore. The process is discussed in detail in South Africa’s Public Service Commission: Report on Blacklisting (2002).<sup>10</sup>

## COMMISSIONS AS A COVER FOR CORRUPTION

The greatest single cover for corruption in international procurement is the commission paid to a local agent. It is the agent’s task to secure the government contract. He or she is given sufficient funds to do this without the company in the exporting developed country knowing more than absolutely necessary about the details. This creates a comfortable wall of distance between the company and the act of corruption, and enables expressions of surprise, dismay and denial to be feigned should the

unsavory act come to the surface. The process also enables local agents to keep for themselves whatever is left of the handsome commissions after the bribes have been paid. Much of it may have been originally intended for bribing decision-makers but, there is no accounting, of course, for any of it. This gives rise to kick-backs all along the line, with company sales staff effectively helping themselves to their employer's money.

Obviously, if commissions can be rendered transparent it would have a major impact on this source of corruption.

Without a doubt, the work of some international lending agencies has achieved much over the years, including the persuasion of reluctant governments to commit to public tender bid openings. Clearly, too, they could contribute even more significantly to anti-corruption reforms if they were to join in the push for transparency in commissions.

### USING CONTRACTS TO COUNTER CORRUPTION — A NEW YORK CITY CASE HISTORY

For generations, New York City suffered from endemic corruption and racketeering in its construction industry. A series of successful criminal prosecutions against the mafia during the 1980's revealed that the mafia was profiteering from the city's construction industry through extortion, bribery, bid rigging, labor racketeering, fraud and illegal cartels. Yet, despite the success of these prosecutions and the imprisonment of dozens of mafia bosses, the corruption seemed to continue unabated.

The problem was so severe that the New York State Legislature refused to provide billions of dollars in funding to the New York City Board of Education for capital improvements to city's crumbling school infrastructure, the country's largest, with more than 1,100 schools serving more than one million school children. State officials were convinced that a major portion of any moneys allocated to the Board of Education would end up in the hands of the mafia or be wasted on bribes and fraud. In order to overcome this impasse, the city agreed in 1988 to the creation of a new agency, the School Construction Authority (SCA), with a very active and well-funded Office of

Inspector General to ward off mafia influence and to protect critical investment in the school system. In 1989, the SCA was given \$5 billion for new construction and major repairs; the budget of the Inspector General was just over \$2 million annually (i.e. less than 0.05 per cent of the total SCA budget).

The SCA's Inspector General set about tackling the corruption and racketeering endemic in school construction. Significantly, this was accomplished without new legislation and without spending millions of taxpayer dollars on costly preventive measures. The Inspector General used existing state law and the concept of civil contract to accomplish its goals, together with simple monitoring and oversight measures to insure compliance. This effort succeeded beyond anyone's expectations.

For example, the Inspector General redrafted the standard bidding and contract forms to include requirements for:

- *full disclosure of ownership and performance history by each bidder (sub-contractors as well as contractors)*
- *disclosure of details of previous arrests and convictions, and of the payment of any bribes, participation in any frauds or bid rigging, and association with any organized crime figures*
- *commitment to a code of business ethics by each bidder*
- *certification that all provided information was true and correct, as well as an acknowledgement that it was submitted for the express purpose of inducing the SCA to award a contract.*

The SCA's standard contract included a rescission clause making the contract subject to termination on severe terms if the contractor provided false information in its bidding documents. In practice, if a contractor was found to have lied in the bidding documents, or to have engaged in bribery or fraud during the execution of the contract, the contractor faced not only the termination of the contract, but also a legally enforceable requirement that any and all moneys received be forfeited. In addition, both the contractor and the contractor's company would

be disqualified from receiving any SCA contracts in future.

The information supplied by each contractor was subject to careful scrutiny by the Inspector General's Office, which also performed extensive background checks. Whenever concerns arose, a bidder or contractor was summoned to the Inspector General's Office to answer questions under oath. Any contractor who refused to cooperate was subject to the termination of his contracts and disqualification from future work. Any contractor who lied under oath was, of course, liable to prosecution for perjury under the existing criminal law.

Contractors were required to make and maintain records regarding the work performed for the SCA for a period of three years after the completion of any contract. Such records were subject to audit and inspection by the SCA. If an audit disclosed over-pricing or overcharging of any nature and this exceeded one half of one-percent of the contract billings, then, in addition to repaying the overcharges, the contractor had also to pay the reasonable costs of the audit.

Within the first five years of the SCA's existence, several hundred contractors were barred from bidding for SCA contracts. Several dozen contracts were terminated, and contractors forfeited many millions of dollars as a result. All of this was achieved through the ordinary civil law process with very few court challenges. In addition, more than a dozen contractors were convicted of perjury as a result of false information supplied to the Inspector General.

More importantly, law enforcement officials intercepted conversations among mafia members complaining that the process was effectively denying them access to SCA contracts. Best of all, the pool of available construction firms increased substantially with the addition of law-abiding and competent contractors who had previously declined to bid on school construction work because of the prevalence of corruption and racketeering. This increased competition resulted in further reduced costs and even higher quality work overall.

Finally, in suitable cases, where a contractor was found to be unqualified to bid on SCA work or was

liable to have his contracts terminated for reasons of integrity or character, the contractor was given two options. He could drop out of competition for SCA work, or he could agree to continue bidding on and performing SCA work, subject to close monitoring and oversight by an Independent Private Sector Inspector General (IPSIG). The IPSIG, one of a number of qualified specialist firms with expertise in forensic accounting, law and investigation, would be selected by and report to the SCA's Inspector General. However, all of the IPSIG's fees and costs would be paid by the contractor.

The advantages in this approach are considerable, and the fact that the reforms have been shown to be effective is reason enough for others to look very closely at this "contract model" approach, and to consider adapting it to their own circumstances.

#### **QUESTIONS OF TIMING – AND OF THE INVOLVEMENT OF OUTSIDERS**

The effects of normal anti-corruption legislation can usually be strengthened by adding two elements: the timing of actions and the involvement of outsiders.

Timing is crucial. Most public servants cannot say "yes," but they can say "no," "perhaps," or nothing at all. Unreasonable postponement of important decisions is usually the most visible indicator that a corrupt deal is in the making. Procedures, therefore, should have strict calendars (which, although strict, still recognize that procurement is often subject to frequent, but legitimate delays). If the calendar is not respected, procedures should provide for an alternative decision-making process to make "blackmail by procrastination" unrewarding.

Since law does not protect the partners to a corrupt deal, such deals can take longer to put together than regular business transactions. Dummy companies or money-laundering channels require time to set up. The arrangements must be both invisible and deniable. Delivery of the bribe and the promised treatment have to be closely linked, because mutual trust is usually absent. In some cases, officials want to build in elements of profits sharing. Sometimes two or three layers of "mediators" are built in to

diminish the risk of exposure of the parties to the deal. Negotiations are delicate because, at any given moment, one of the parties may bail out and expose the whole scheme. All this takes time – time that an effective regulatory framework will not allow.

The role of outsiders is basically to hamper the creation of insider relationships during the decision-making and implementation processes. Procedures should focus on not allowing outsiders to be drawn into internal processes. Like external auditors, the outsiders should provide expertise combined with integrity.

Several measures are worthy of mention here:

- *Outsiders can assist in preparing bidding documentation (especially independent consultants with public reputations to defend).*
- *Outsiders can participate in evaluation (adding an independent note of concurrence or otherwise).*
- *The contract-awarding committee should include persons of known integrity, not necessarily experts. Participation on the committees should be considered a public honor. The committee members' own wealth should be subjected to public scrutiny.*
- *The contract-awarding committee should not have advance knowledge of particular projects for which their services may be needed. There should be more people on the list than will be needed at any one time. During the decision-making process, the committee should be placed in a position where they cannot physically contact bidders individually (which may involve their remaining within a controlled environment, such as a hotel). If the committee cannot make a decision within a given time, a new session should be held, with a fresh committee.*
- *The authority executing the works should not have a vote on the bid evaluation committee, but rather be available to the committee to answer questions. The same goes for any international consultant who prepares the bidding documentation.*
- *Project implementation should be supervised by a consultant other than the one responsible for preparing the bid documentation.*
- *Special procedures must close loopholes whereby artificially created “cost overruns” are met through the national budget, and not from a foreign loan.*
- *“Cost over-runs” should only be accepted where supervision reports exist which identify the reasons for the higher costs at the time that these became evident. No ex post facto supervision reports should be accepted. This procedure makes the contractor responsible for timely reporting of the difficulties encountered.*

#### ADDITIONAL ACTIONS

Public information programs about procurement must address all parties – the officials who have responsibilities for procurement, the suppliers and contractors who are interested in competing for contracts, and the public at large. The messages should be:

- *that the particular jurisdiction, whether a nation or one of its organizations, possesses clearly stated rules for procurement which it intends to enforce rigorously.*
- *that violators of the rules will be prosecuted under the law.*
- *that officials who indulge in corrupt practices will be dismissed.*
- *that bidders who break the rules will be fined, possibly jailed, and excluded from consideration for any future contracts, by being “blacklisted.”*

It is, of course, essential that those “blacklisted” have a right of appeal to an independent and competent tribunal. This is a precaution against corrupt officials abusing any powers they may have to impose by “blacklisting” through an administrative process. Such a right generally exists in all countries where courts have the jurisdiction to review the legality of administrative actions.

It should be clear that none of the actions suggested here is sufficient by itself to curb corruption completely in procurement, let alone overnight; However, a co-ordinated effort on all fronts can have a dramatic effect. If anti-corruption laws are strengthened

and publicized, if sound and proven procedures are adopted, if procurement competence is increased by training and career development, and, if everyone knows that the government is serious about enforcing honest and fair practices, change will come.

## ENDNOTES

- 1 Several inter-governmental organizations have worked on the procurement issue for a number of years. The UN Commission on International Trade Law has a Model Law on Procurement of Goods, Construction and Service: <http://www.undp.org.fj/gold/docs/UNICITRA.PDF>; for the European Union's Procurement Guidelines and Legislation: [www.bisinfonet.ac.uk/InfoKits/contract-negotiation/InfoKits/infokit-related-files/ec-procurement-issues](http://www.bisinfonet.ac.uk/InfoKits/contract-negotiation/InfoKits/infokit-related-files/ec-procurement-issues); for guidance on the policy framework etc. see <http://www.ogc.gov.uk/index.asp?id=1000084>; for a "procurement excellence model" see <http://www.ogc.gov.uk/index.asp?id=417>; For the OECD recommendation of anti-corruption proposals for aid-funded procurement, see [http://www.oecd.org/document/30/0,2340,en\\_2649\\_201185\\_2394526\\_119672\\_1\\_1\\_1,00.html](http://www.oecd.org/document/30/0,2340,en_2649_201185_2394526_119672_1_1_1,00.html); For preventing corruption in World Bank projects, see <http://www1.worldbank.org/publicsector/anticorrupt/preventing.htm>; For the World Bank's Panel of Procurement Experts: Fiduciary Risk Management, Capacity Building and Anti Corruption see <http://www.worldbank.org/html/extdr/business/dfid.htm>; For the OECD Anti-Corruption Instruments and the OECD Guidelines for Multinational Enterprises, see <http://www.greco.coe.int/web/Default-orgE.htm>.
- 2 Southern African Documentation and Cooperation Centre, "Heavy Fine in Lesotho Corruption Trial," October 30, 2002: <http://www.sadocc.at/news2002/2002-323.shtml>
- 3 Many of the decision-making points addressed in this chapter are covered in part by various procurement rules. They include the General Procurement Agreement of the World Trade Organization, the UNCITRAL Model Law on Procurement of Goods, Construction and Services issued by the UN Commission on International Trade Law (UNCITRAL), the World Bank Guidelines for the Selection of Consultants and the Procurement of Goods and Services, and the Manual of Procedural Rules (SCR) of the European Commission. All of these rules make an effort to address the issue of corruption prevention. But none of them offers or requires a sufficiently broad structure of transparency and accountability. What is needed is full transparency and reliable assurance of implementation of the rules through efficient inspection, and intensive internal and public monitoring and auditing.
- 4 Foreign Corrupt Practices Act: <http://www.usdoj.gov/criminal/fraud/fcpa.html>
- 5 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: <http://www.imf.org/external/np/gov/2001/eng/091801.htm>
- 6 Transparency International, The Corruption Fighters' Toolkit: [http://www.transparency.org/toolkits/2001/ccinp\\_ip-columbia.html](http://www.transparency.org/toolkits/2001/ccinp_ip-columbia.html)
- 7 Online Procedures Enhancement for Civil Applications: <http://open.metro.seoul.kr/>
- 8 The names of those debarred are placed on the Internet. EPLS is the electronic version of the Lists of Parties Excluded from Federal Procurement and Non-Procurement Programs, which identifies those parties excluded throughout the U.S. government (unless otherwise noted) from receiving federal contracts or certain sub-contracts and from certain types of federal financial and non-financial assistance and benefits. See Excluded Parties List System: <http://epls.arnet.gov/>
- 9 The bill was before South Africa's parliament in November 2003.
- 10 Public Service Commission Report on Blacklisting (April 2002): <http://www.polity.org.za/pdf/blacklisting.pdf>



# LICENCES



In many countries, government has become a synonym for rules, regulations and red tape. Licenses, permits and authorizations of many kinds are required to engage in everything from driving a car to engaging in trade, and frequently require permissions from multiple agencies.

As a leading IMF official has observed, “The existence of these regulations and authorizations gives a kind of monopoly power to the officials who must authorize or inspect the activities ... [They] may refuse the authorizations or simply sit on a decision for months or even years. Thus, they can use their public power to extract bribes from those who need the authorizations or permits.”<sup>1</sup>

In many countries, too, a government provides goods and services at below market prices – water, public housing, education and health facilities, access to public land, access to some forms of pensions (e.g. disability pensions), and so on. Limited supplies can make rationing or queuing unavoidable, excess demand is created and decisions have to be made to share out the limited supply. It is not surprising that those who want these goods and services are prepared to pay bribes to jump queues or to get preferred access to what the government is providing.

In addition to these situations are discretionary decisions in which corruption – including high-level and political corruption – can play a major role:

- *The provision of tax incentives, which may be worth millions to those who acquire them.*
- *The zoning and re-zoning of land can convert land values from minimal to highly desirable.*
- *Licenses for the use of state-owned land, e.g. timber cutting and mining rights, can be lucrative.*
- *Decisions to authorize major foreign investments, which often provide investors with monopoly powers.*
- *The sale of significant public sector assets.*
- *Decisions on whether or not to privatize, and if so, how?*

- *Decisions providing monopoly power to particular export, import, or domestic activities.*<sup>2</sup>

Underpaid and corrupt bureaucrats love red tape, as it encourages businessmen to offer bribes as they wait for permits or delivery of services, and it enables them to feed on the needs of their fellow citizens. Given that in some countries, the low-level bureaucrats may not have been paid for months, it seems somewhat unfair to categorize them as “corrupt.” A first priority for any administration must be to ensure that their employees are paid on time.

In Indonesia, “wet” agencies refer to those which provide opportunities for enrichment on the side. “Dry” ministries are those where such opportunities are few. “Wet” government jobs are said to be the police, the tax office, and any government minister post. “A job as a tax collector was one of the surest roads to riches in the government bureaucracy,” said one individual interviewed for Keith Loveard’s “Suharto: Indonesia’s Last Sultan.”<sup>3</sup> “Being posted to a dry position is about the worst fate any official could fear,” said another.

The Bureau of Immigration in the Philippines was described as being enmeshed in graft and corruption, “and the only language spoken from commissioners down to clerks and janitors was money, money, dirty money.”<sup>4</sup>

Col. Salvador Rodolfo, a former intelligence consultant of the Bureau of Immigration described the scene:

*[C]orruption at the Bureau of Immigration is from top to bottom, permeating every rung in the bureau’s hierarchy. Because of the discretion given to immigration officials to determine the lives and destinies of both aliens living in the Philippines and Filipinos leaving for abroad, the opportunities for payoffs abound... [M]any employees are under-qualified [and] ... were hired because of nepotism or political patronage.*<sup>5</sup>

In neighboring Malaysia, fully 100,000 people were found to have obtained drivers’ licenses without passing the required tests.

Half a world away, a Canadian journalist painted this depressing picture of life in one transition country:

*Private businesses are spending an annual average of \$37,000 on bribes, protection money and other “extralegal payments,” according to recent surveys. Company managers must spend 40 percent of their working day in meetings with officials to “negotiate” licenses and taxes. By comparison, businesses in Lithuania are spending only 15 percent of their time with officials, in Pakistan the figure is 12 percent and in El Salvador 8 percent.*

Across the country, licenses are required for more than 100 separate economic activities — “a virtually comprehensive list” of all possible activities, a World Bank study noted. Only about one-third of these licenses are justified for reasons of health, safety, environment or state security. The licensing procedures often take several months to complete and can require extensive documentation and spending.<sup>6</sup>

Based on a survey of 150 enterprises in five cities in one European country citizens must pay on average \$1,250 to install a telephone line; \$390 for an import license; \$295 to cross a border; \$125 for every visit by a tax inspector; and \$60 for every visit by a health or fire inspector. The average bribe for the same services in a neighboring country is roughly similar, according to a poll of 50 enterprises.<sup>7</sup>

Once licenses are obtained, penalties for any failure to comply with the terms on which they were granted should be commensurate with the violation. There has been a school of jurisprudence that has argued that firms should balance the cost of a fine against the benefits that would flow from a deliberate breach. For a licensing system to function properly, it should never be the case that it was more profitable for a license-holder to breach the terms of his or her license than it would be to comply with its terms.

Corruption can assume various forms, from petty corruption engaged in by lowly-paid clerks who sit on papers until suppliers provide money to grease government machinery to top-level corruption, where policymakers change, bend or breach the rules to favor the suppliers that come up with bribes.

But these activities are not confined to the developing world. In the United States, extraordinary situations have been revealed. Applicants for truck drivers’ licenses in Illinois need to pass long and complex tests on safety and mechanical matters. Immigrants, eager for well-paying jobs as truck drivers but speaking little or no English, have virtually no hope of passing. So, federal prosecutors say, hundreds of license seekers paid bribes to state workers, who, in return, coached the applicants or just filled in answers for them. The state workers then funneled some of the payoff money into the campaign fund of the state governor. Thirty-one people have been charged, and of these 26 have pleaded guilty.<sup>8</sup> Similar scams have been uncovered in Western Europe.

What makes all this possible? Obscure or incomprehensible regulations. Areas of discretion. An ability to keep people waiting for lawful entitlements to such items as driver’s licenses. An absence of independent appeal mechanisms for the public to use.

What does all this mean for business? Surveys have shown that in some countries, senior executives have been spending up to a quarter of their time in dealing with public officials.<sup>9</sup>

### DO BRIBES SPEED THINGS UP?

“Petty” corruption bribes are sometimes referred to as “speed money” — they “grease the wheels” and things move faster when small bribes are paid. But is this true?

Using data from three worldwide surveys covering thousands of enterprises, World Bank economists Daniel Kaufmann and Shang-Jin Wei have examined the relationship between bribe payments, management time wasted with bureaucrats and the cost of capital. They found that firms that pay more in bribes are also likely to spend more — not less — management time negotiating regulations with bureaucrats. Businesses that bribe also face a higher, not lower, cost of capital.<sup>10</sup>

The authors conclude that it is simply not true that bribery can alleviate red tape for businesses where bureaucrats can choose the regulatory burden and

use delays with red tape to extract bribes. The authors' empirical test found that firms using bribes waste more management time dealing with bureaucrats.

The business community can benefit from laws and collective initiatives that strengthen its ability to say "no" to bribery.

### WHAT DOES BRIBERY MEAN FOR THE PUBLIC INSTITUTIONS INVOLVED?

There is growing evidence that low-level corruption, long described as "petty," is in fact much more damaging than many had realized. In a number of countries, the posts where public servants can extract the most bribes have become highly desirable. This has resulted in a market developing in which these positions are either sold outright by the appointing authority or else "leased" on the basis that the post holder will provide his or her superiors with regular sums of money. The money can pass up the line from the bottom to the very top, rendering the whole agency systemically – and systematically – corrupt.

Public service appointment mechanisms have to be examined. Wherever practicable, appointments should be made on merit, in open competition and made independently of the department or agency in question.

### A PLETHORA OF LICENSES

In many countries where corruption is endemic there is a plethora of licenses required, whether by private citizens or by businesses, and, for the private sector, a host of different inspections, some annual, some more frequent. Every time an inspector calls, a business may be at risk of being closed down.

Frequently, too, licenses and concessions are not automatically renewable. Receiving a license is not the end, but the beginning of a relationship of extortion.

Indeed, in some countries, so many permissions are required that there is not even a complete inventory of what they all are. Each department and agency

seems simply to set its own requirements and to make its own demands. These are overlaid by a high number of legal rules, many general in nature and capable of an infinite number of interpretations. Conditions for the granting of licenses are stipulated vaguely and broadly, creating a hotbed for corruption. Added to this, complaints and appeals wind up behind the same doors as those where the original decisions were taken.

Slovakia has been one such country. A central feature of its National Program of the Fight Against Corruption has been to require senior public officials in individual agencies to compile detailed lists of all the licenses, concessions, permits, loans, subsidies and allocations they administer. Further, they have been required to attach to each permit or category of allocation, details of the departments which handle them, the names of the officials responsible, the criteria applied and copies of all procedural and decision-making rules. This is followed by the preparation of an action plan designed to abolish all unnecessary permits, to introduce automatically renewable permits and concessions, and to set out clear and binding rules for granting any permits, concessions and allocations still considered necessary.

The first GRECO review in 2003 applauded the plan, but noted that as yet the government has not been able to provide details of the number of licenses abolished, nor of the reasons behind keeping those that are being retained.

Even in Switzerland, a remarkable discovery was made some years ago when the Inspector of Restaurants, whose permission was needed for a new restaurant to be opened in Geneva, was found to be extorting money from existing restaurateurs and to have acquired considerable property in Italy. After the inspector had been jailed, the Geneva city council considered appointing his replacement until one of the councilors asked why the post even existed. There were no health or safety considerations; it was simply a matter of whether the official considered that a new restaurant would be economically viable. Once this was explained, the council lost no time in abolishing the post completely.

But the abolition and/or streamlining of the process for granting licenses and concessions is no easy

task. However unnecessary a permit may appear to be, it is a fair assumption that the more illogical and indefensible it is, the greater the likelihood that it was invented simply as a means of extracting money from those forced to obtain it. Streamlining administration involves putting whole networks of corrupt officials out of business.

### **BREAKING THE PERSONAL RELATIONSHIPS**

Unhealthy relationships can develop, even unwittingly, when public servants spend too long a period in serving the same clients. Friendships can develop, social invitations can follow, and even the most honest public servant can find himself or herself under a sense of obligation for hospitality received. Two measures can address this problem.

The first is to depersonalize transactions, so that members of the public have no way of knowing precisely who is, or who will be, handling their applications. Customs clearances in Singapore were greatly accelerated through the use of computers, which can also establish deadlines for the clearance of goods, an approach that has been adopted in other countries. If goods are not cleared on time, supervisors demand explanations. Since the interactions between officials and citizens are by way of computer terminal, not across a counter, there is no face-to-face contact. Doing business by mail, rather than face-to-face, provides further opportunities to depersonalize these transactions.

The second is to rotate staff regularly so that employees are not left in vulnerable positions for undue lengths of time. This can have a cost; people will be moved away from posts where they have developed an expertise, but, nevertheless, it is a cost that has to be factored into management of the risks. The cost of leaving employees in these positions for too long will, in all probability, be much greater.

A third can be the involvement of third parties. In one country, corruption in the tax administration was markedly reduced by requiring that all tax payments be made through a stipulated bank, thereby eliminating the handling of payments by tax officials completely.

### **CITIZEN'S CHARTERS**

Citizen's charters were first introduced in the United Kingdom and are spreading rapidly around the world. In the UK, national charters cover such key public services as the courts, the National Health Service and the Benefits Agency. They set out the standards of service that people can expect and explain how to file a complaint if things go wrong.

There are also charters covering local services, such as an individual doctor's practice, local hospitals, schools and community care services. By informing the public of the standard of service to which they are entitled – and informing them of their rights to complain if these are not met – petty corruption can be rendered somewhat more risky for the officials concerned.<sup>11</sup>

The charters are self-enforcing, relying on members of the public to assert their rights as guaranteed by the charters, and to use the specified complaints channels to be used when services are not up to the standard required. The pressure on officials to perform is, thus, psychological rather than legal. But the fact that the guarantees of service are posted on the wall of public offices means that they are readily available for the reference of members of the public.

By fostering a culture of demands for service from the public, supervisors are in a position to monitor complaint levels and to take appropriate action in offices where these are inexplicably high.

### **USING THE INTERNET**

Clearly the Internet has the potential to reduce corruption levels in granting licenses and concessions. However, experience in India suggests that it is not enough simply to place an existing system, in which corruption flourishes, online and to call it e-government. The practices and procedures themselves have to be reformed and redesigned if the benefits of the web are to be won.

The Seoul city system, the Online Procedures Enhancement for Civil Applications (OPEN) was developed to achieve transparency in the city's

administration by preventing unnecessary delays or unjust handling of civil affairs on the part of civil 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 any irregularities are detected. The site receives over 2,000 visitors daily.<sup>12</sup>

### “POSITIVE SILENCE”

Recent reforms in Bolivia include 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.

“Positive silence” has also 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,” is famous in Bolivia. What it really means is “Come back with money.” Under the reforms, if citizens are asked to “come back” they need only to wait 15 days; thereafter, they can invoke “positive silence” if the application has not been refused before the deadline passes.

This still leaves open, of course, the possibility that someone applying for a permit to which they are not entitled might bribe an official to mislay his or her application and so acquire an approved application. In any such system, it would be important to monitor the instances in which the right of “positive silence” was asserted to ensure that there were acceptable explanations and that the phenomenon was not occurring frequently with regard to any one office or any group of individuals.

The World Bank has observed that one of a country’s most important institutions is a professional and well-motivated public service, with selection and promotion based on merit rather than patronage. A well-performing public service not only resists petty corruption, but also provides the staff for many of

the institutions that protect integrity in government. Such institutions as finance and personnel ministries, government tender boards, technical departments that evaluate bids, bodies that implement regulatory policy, accounting units, and internal and external audit departments. However, the Bank’s experience in assisting with public service reform in more than 60 countries has shown that progress in this particular area tends to be slow.<sup>13</sup>

### AN ACTION PLAN FOR LIMITING CORRUPTION IN PERMIT AND LICENSING REGIMES

In one transition country, a leading NGO put forward the following action plan for countering corruption in the area of licenses:

*It is necessary for permit and license-requiring activities to be regulated by law, with all procedures and conditions for issuing permits and licenses stipulated by the law itself, rather than by other regulations and individual acts. Suggested actions include:*

- *limiting such activities to only those areas where they are absolutely indispensable. In such cases there should be better guarantees for transparency. The institutions issuing permits and licenses ought to be publicly accountable for their actions*
- *disallowing any permit or licensing regimes not expressly stipulated by law*
- *abolishing the numerous existing ordinances, rules, and instructions regulating permit and licensing regimes*
- *abolishing all legal provisions allowing for the issuing of permits and licenses at the discretion of the authorities. (One case in point is the Protection Competition Act with its section on advertising; also, the draft law on the media, etc.)*
- *extending possibilities for control in cases of refusal to grant permits or licenses.*

*Stipulation of basic requirements concerning the implementation of administrative procedures*

- *In the field of foreign trade, there should be strict adherence to the country's commitments to the European Union and the World Trade Organization.*
- *In the field of finance and the currency board, there should be strict adherence to the country's commitments stemming from membership in the IMF, including Article VIII of the IMF Articles of agreement. This adherence would lead to improvement in the methods, mode of operation and performance of public administration, and hence to better administrative servicing of the general public. The achievement of this result would be aided by introducing certain requirements for the administration to follow in the decision-making process (e.g., deadlines for rendering decisions, manner of informing the public about decisions made, etc.). A pilot project in a small or medium-sized municipality could be developed and implemented to test the anti-corruption effect.*

*Changing the legislation in order to reduce opportunities for subjective judgments on behalf of the administration.*

This could be achieved through clear-cut definition of the rights, obligations, and procedures involved in the exercise of discretionary power and by reviewing the philosophy of the role of government in society.

### **Adoption of a civil service act**

Such a law should clearly define the rights, obligations, and responsibilities of public officials. In this respect, the following specific measures to curb corruption could be undertaken:

- *Training public officials at all levels and formulating clear-cut guidelines and codes of conduct*
- *Regulating the obligation of public officials to file income and property declarations for themselves and members of their family (along with the introduction of the same obligation for members of parliament). In turn, the agencies entitled to request and verify such information should also have the power to request officials to prove the legitimate origin of their income and property rather than be expected to provide evidence of*

*illegal origin themselves. Such authority could be assigned either to the inspectors' offices with the ministries or to national agencies – the Financial Police or the Bureau for Investigation of Financial Fraud.*

- *Regulating the admissibility of gifts to public officials, to be monitored through internal control mechanisms*
- *Introducing a public register to ensure transparency of the financial and property status of high-ranking public officials*
- *Preventing conflicts of interest*

*Introduction of a system of performance evaluation of public officials, including disciplinary measures with the aim of enhancing internal control effectiveness.*

Controlling functions could be assigned to a body with the office of the Minister of Public Administration.

*Improved remuneration of public officials, combined with viable control and evaluation mechanisms.*

This will improve the motivation of public officials, as well as their social status.

### *Establishing internal rules and detailed instructions*

To achieve this objective, the rules and instructions concerning relations of the general public with the institutions should be publicly accessible and as simple, clear, and specific as possible. The publication of the rules and instructions in the press will lead to better awareness of citizens of their rights and the obligations of public officials. In this way, the rules and instructions will themselves become even more binding for public officials. Their observation will be a safeguard against arbitrariness and infringement of citizens' interests.

### *Legal regulation of measures and sanctions of varying scope and form for public officials involved in corruption*

It is necessary to provide for both criminal sanctions and disciplinary action. The liability to various forms of legal action will have a deterring effect on the conduct

of public officials. Disciplinary action could include demotion or financial liability of officials in case of unprofitable deals endorsed as a result of corruption. In this respect civil liability is deemed more effective.

*Financial liability ought to include reimbursement of any expenses involved in the termination of the contract.*

At the same time, the officials who have helped expose corrupt practices should be encouraged and receive part of the damages or fine owed by those involved in corruption.

*Introduction of a legal ban on public officials who become members of the governing bodies of commercial companies as a means of ensuring independent decision-making.*

Any exceptions to this ban ought to be carefully considered and thoroughly regulated by law, so as to avoid leaving any loopholes on the one hand, and to prevent such a regulation from becoming a potential barrier to hiring qualified staff in public administration, on the other.

*Introduction of restrictions regarding immediate hierarchical sub-ordination of public officials to spouses or family members (lineal or collateral relationships up to the fourth degree).*

The restriction could be applied only in the case of transactions and actions where such a dependence actually occurs rather than the assumption of office in principle.

*Providing for personnel rotation mechanisms in the relevant laws or regulations.*

In this manner, public officials could maintain their qualification and further develop their skills by assuming comparable positions and similar functions all while avoiding routine interaction with specific private individuals.<sup>14</sup>

## APPEALS

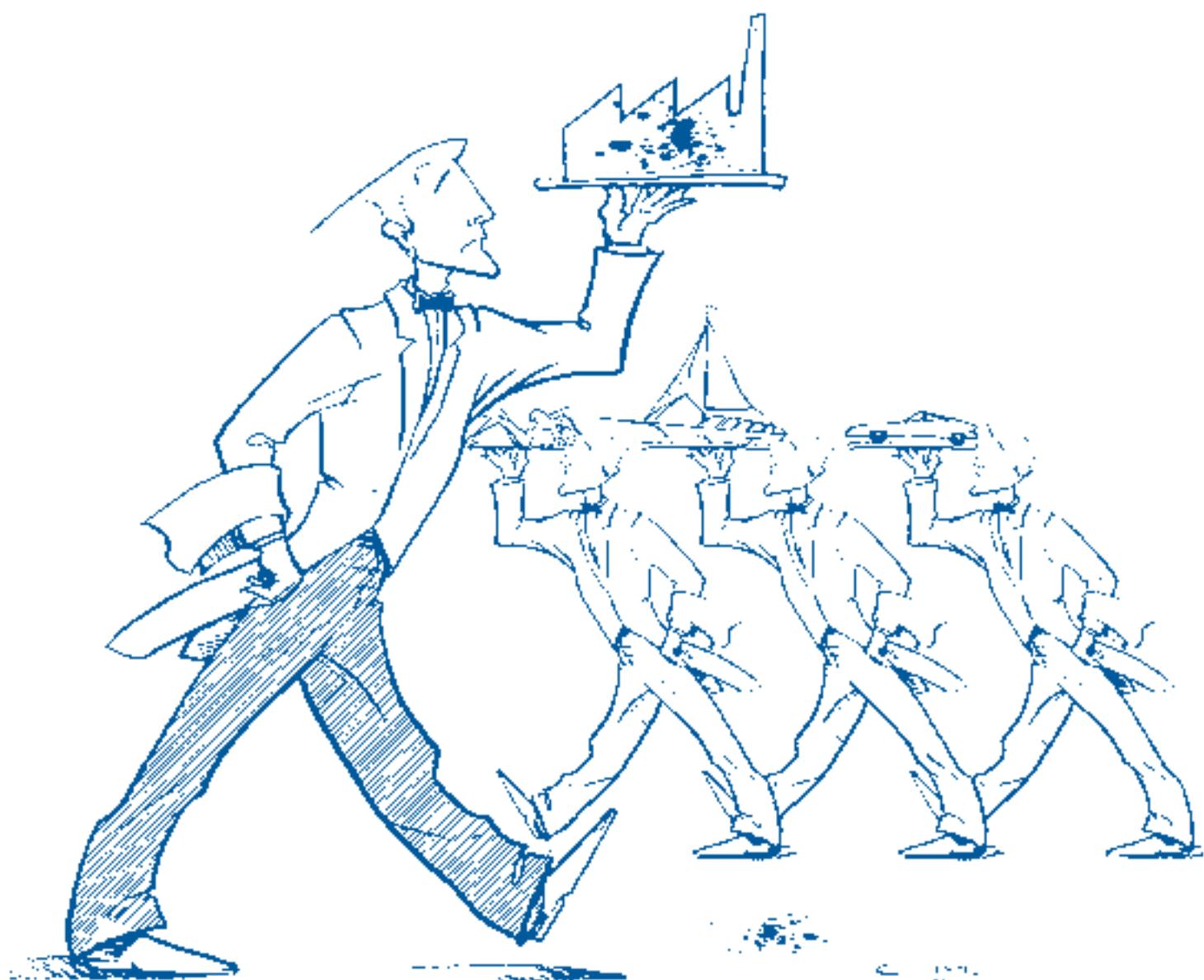
The final preventive measure is the appeal mechanism. In every case where a citizen has a right to

apply for a license or a permit, there should be the opportunity to challenge any decision denying that right. Appeals should be made to a separate office, not to the one where the original decision was made. The appeal should involve officials senior to those involved in the original decision. Appeals should be heard promptly, and there should be a right of appeal to the ombudsman and to the courts, if a citizen wishes to take the matter further.

When individual decisions are subject to independent review, and by others, this can be the most effective deterrent to officials who might otherwise be tempted to abuse their powers.

## ENDNOTES

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- 10 Shang-Jin Wei, and Daniel Kaufmann, Does "Grease Money" Speed Up the Wheels of Commerce? <http://www.nber.org/papers/w7093>
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- 12 OPEN: Seol's Anti-Corruption Project: [www1.worldbank.org/publicsector/egov/seoulcs.htm](http://www1.worldbank.org/publicsector/egov/seoulcs.htm)
- 13 Helping countries combat corruption: Therole of the WorldBank, Note #35: <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor06.htm#note35>
- 14 "Clean Future" Public Awareness Campaign, Coalition 2000 (Bulgaria): [http://www.csd.bg/publications/coalition2000/Clean%20Future\\_Public\\_awareness\\_](http://www.csd.bg/publications/coalition2000/Clean%20Future_Public_awareness_)



C. 1937  
The factory is the first step  
to the house and the car.

While privatization 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 privatization programs were urgently needed in transition countries to end grossly inefficient, state-owned monopolies' dominance of 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 firm's financial and operating performance would improve and the government would start collecting taxes instead of providing subsidies. Against this, formerly subsidized firms, once privatized, would be likely to experience a significant decrease in staff levels that could provoke labor union opposition. By contrast, competitive firms would be likely to experience only minimal lay-offs, if any.

Privatization 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. Privatization reduces corruption: Managers of companies make decisions that ultimately have to satisfy owners instead of public officials; government assets for whom no one claims accountability cease to exist. Once privatization is completed, independent businesses can conduct their affairs without government interference.

Nevertheless, privatization pitfalls do exist. The co-existence of state companies with a newly formed private sector creates opportunities for corruption in both sectors. One of the foremost mechanisms for corruption is known as the **"entry-exit economy."** Under this scenario, private companies approach state-owned enterprises to obtain lucrative contracts which include a kickback for managers from the state-owned company.

The "entry-exit" economy is also linked to the privatization of firms by employees themselves. This is one of the most common mechanisms for corporate corruption. For example, the Bulgarian Privatization Law (1996-1997) outlined privileges for managers and employees (10 percent down payment and re-scheduling the remaining 90 percent over a ten-year period). This legal option permitted corrupt managers to negotiate deals with semi-criminal groups and/or the ruling party in order to privatize the state-owned companies they manage. They paid only 10 percent of the market price for their shares. This particular scheme of privatization favored managers, but was not fully enforceable.

*In monopolies, especially in public utilities, privatization can eliminate petty corruption, but can lead to more serious abuses. Therefore, privatization of public utilities should be preceded by the introduction of a carefully planned regulatory framework and the establishment of a regulatory agency staffed with trained personnel.*

As we will discuss, policies must go beyond the mere process of privatization and address the integrity of the markets in which the privatized concerns are to function.<sup>1</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>2</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>3</sup>

Experience in Eastern and Central Europe has shown that privatization can create opportunities for politicians to distribute favors to their friends. Major economic assets have been let go at knock-down prices and still remain in the hands of an elite. New owners who have acquired companies through patronage have tended to be very slow in restructuring them, and many such firms have had to be bailed out by the state.

IMF senior official Vito Tanzi has commented that privatization of “non-natural monopolies” is necessary to keep state enterprises from being used as a corrupt source of financing for political parties financing and for the 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>4</sup>

In some countries, mass privatization schemes have been implemented. They were considered to be a corruption-free way to distribute assets fairly. However, in terms of 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 privatization is not actually corrupt, there have been instances when the officials responsible for the privatization 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 when those individuals calculating prices have had inadequate records of even such obvious assets as land ownership.

If the public interest is to be protected, steps must be taken to minimize opportunities for abuse.

## THE CHALLENGE OF CORRUPTION-FREE PRIVATIZATION

Once a government has decided to launch a privatization program, what should be done to minimize the risks for corruption? In essence, of course, the transaction is very similar to a major government procurement, and many of the procedures for public procurement will be applicable. (These are discussed in Chapter 9.)

Sufficient time should be allowed for the process to be handled professionally, but not so much time as to permit corrupt deals to be negotiated. In the past, various problems have occurred partly because of deadlines set by international financial institutions. Public services have been privatized without suitable time for setting up workable frameworks for regulation. One International Monetary Fund report noted: “In [many] countries undertaking programs of public sector reform, the privatization process has always begun before an appropriate legal framework in the form of a divestiture implementation or state enterprise law is passed.”<sup>5</sup>

Premature privatization can lead to the following problems:

- *Governments are often unable to arrange transparent and open bidding processes or promulgate the necessary regulatory laws.*
- *Managers and employees, fearful for their future and confident of their ability to escape punishment, commonly strip the assets of the entities undergoing privatization.*
- *Many interested parties are able to engage in insider dealing and political manipulation of the process for their own profit.*
- *Many state enterprises do not have the time to become economically viable before being sold off, leading to frequent sales of industries at prices below market value, despite heavy government spending on recapitalization.*<sup>6</sup>

Some specific examples of corruption observed in the privatization process include:

- *Blackmail of potential bidders designed to prevent them from participating in an auction or from increasing their bids*
- *Extorting from serious investors a non-participation fee by speculators who promised to refrain from bidding and/or increasing prices*
- *Organizing “Dutch auctions” with serious potential investors intimidated by threats. In “Dutch auctions,” a high price is set by the seller and then gradually reduced until a bidder accepts the figure on offer.*
- *Purchasing businesses in an auction with the intention of defaulting on the obligation to pay the price by a certain date and of using the business to strip it of its assets or for other purposes before the outcome of the auction is declared null and void*
- *Forging documentation allegedly confirming that an auctioned operation was previously leased to one of the bidders with the aim of using the preemptive right to purchase*
- *Gross undervaluation of assets*
- *Participation of ineligible foreign entities through local entities<sup>7</sup>*

### SOME CHOICES IN METHODOLOGIES

The particular manner in which a given privatization is to be carried out will depend on various social, economic and political considerations.

The processes least likely to be seriously affected by corruption are voucher-based privatization and the process known as “liquidation,” when company assets are sold separately and not in a single package.

Marginally more vulnerable is privatization through the means of **IPOs** (Initial Public Offerings, or “share offerings”), but this does have the benefit of provid-

ing a formal process with public pricing for shares.

Tenders (or “trade sales”) are more problematic; they take time, they are less transparent, and considerable discretion can be involved. Susceptibility to corruption can be reduced if it is possible to have the tender process handled independently and out of the hands of politicians. Tenders do, however, offer greater opportunities for improved governance structures for the companies than is the case with IPOs.

A less attractive form of privatization are the management and employee buy-outs which have been featured in many privatization programs. These have almost invariably presented buyers with the chance to buy shares at less than their market value. Worst of all are the so-called “spontaneous privatizations,” which the economists Daniel Kaufmann and Paul Sigelbaum have described as “the very essence of corruption, being the outright theft of public assets by politicians and enterprise directors associated with the nomenklatura.”<sup>8</sup>

There should be diversity, too, in advisors to the government on any privatization program. Using the same advisor for both strategy and for transaction-specific advice can certainly speed up the process, but carries with it a real potential for giving rise to conflicts of interest. It can also bring the advisor into conflict with the government’s policy objectives. The government may wish to restructure an industry and introduce competition, while the advisor presses for the sale of an asset with monopoly rights attached as a means of maximizing revenue and, in turn, yielding higher commissions for the advisors.<sup>9</sup>

### PRIVATIZATION BEST PRACTICES

Although there are multiple ways to carry out privatization, certain principles should apply throughout:

- *Buyer competition. Auctions and public tenders reduce the risk of favored treatment for select buyers.*
- *A public tender announcement that contains clear and complete information on tender conditions.*

- *Once announced, the tender and privatization terms should not be subject to change.*
- *Equal conditions of participation for all interested parties.*
- *Unlimited access to the company undergoing privatization. Potential buyers should be able to visit the company, consult with corporate management and have free access to the company's financial information.*
- *The bidder's price should be the only criterion for selection of a winning bid.*
- *Direct sales should be avoided. These are the most risky form of privatization, especially when one political party effectively controls the government.*
- *A short timeline that minimizes the time available for corrupt deals to be struck.*
- *Clear and objective criteria should be applied to the privatization process that prevent excessive discretionary powers from being assigned to officials.*
- *Publication of all relevant privatization-related information so that the rules are known to all and the public can act as privatization watchdogs.*
- *Scrupulous adherence to codes of conduct and to conflict of interest rules.*
- *Independent administration of the privatization process. This makes it more difficult for existing corrupt relationships with public officials to be exploited.*
- *Public officials dealing with privatization should be better paid than other civil servants and receive performance-related bonuses for each successfully completed privatization.<sup>10</sup>*

### **CAN PUBLIC SECTOR ETHICS SURVIVE PRIVATIZATION?**

Whatever the benefits of privatization, and however effective the regulatory framework, the question of ethics will always remain open. Whereas government actions can be subjected to public inspection through the legislature and an ombudsman, private sector operations are invariably covered by claims of "commercial confidentiality" – a pretext commonly used to deny the public the information to which they would otherwise be entitled.

Performance targets are a useful way of ensuring that privatization yields more than a one-time return to the state budget. These might include the holding of the assets or shares for a stipulated minimum period (to avoid the involvement of speculators), maintaining prescribed minimum levels of employment for a proscribed period of time and perhaps maintaining company research and development divisions.

Lawyers, however, can distort performance targets when they insist that they be objectively verifiable and measurable. Unfortunately, for them it can be not a matter of raising the immeasurable quality of a service, but the provision of measurable quantities. For example, it is not the quality of medical care given by a hospital that interests them, but the number of patients that hospital sees. The formulae lawyers prefer are those which can be tested in court and externally verified, so that it can become a question not of how prisoners are treated in a privatized prison, but how many have succeeded in escaping.

### **CIVIL SOCIETY OBSERVERS OF PRIVATIZATION**

*Civil society organizations can play a constructive role in monitoring privatizations. In 1999, a Bulgarian NGO became involved in monitoring one of the largest and most contentious privatizations in Bulgaria – that of the Bulgarian Telecommunications Company (BTC). As a result of this monitoring, a flawed privatization process was aborted, and a report prepared on measures to be taken to improve the privatization process in the future.<sup>11</sup>*

Half a world away, in Panama, another respected local NGO was invited by the government to sit in as a civil society observer while the sale of the state Panamanian telecommunications company was negotiated. There had been only two bidders, and the government reasoned that the public would be suspicious if the process were not wholly transparent. The NGO was satisfied that the transaction had been properly handled and reported this to the public. As a result, what could have been a highly contentious privatization passed off without controversy.

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

### **CORRUPTION, PRIVATIZATION AND COMPETITION POLICY**

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 organizations when corporations abuse market power in areas of the economy that should be governed by a country's competition policy.<sup>12</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. After the collapse of communism, there was a belief that a government could privatize a conglomerate without first breaking it up, and assume that import competition would prevent the abuse of market power. But this overlooked a variety of factors, such as structural barriers to imports from exchange rate issues, poor transportation systems, and often corrupt regional and local governments that moved to protect their enterprises from competition of any sort.<sup>13</sup>

A prime purpose in developing a sound competition policy is to minimize 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 industrialized countries also once labored under the handicaps of rampant corruption and blatantly self-interested government. To escape from this situation, these countries opted for competition policies governing their market activities.<sup>14</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>15</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, the welfare of consumers and the enhancement of the quality of life for all (and particularly that of those most at risk).

### **CONDITIONS FOR A SUCCESSFUL PRIVATIZATION PROCESS**

Conditions for a successful privatization program include:

- *A strong political commitment to privatization coupled with a wide public understanding of and support for the process*
- *The creation of competitive markets through the removal of entry and exit barriers*
- *Financial sector reforms that create commercially-oriented banking systems*

- *Effective regulatory frameworks that reinforce the benefits of private ownership*
- *Clear and detailed procedures for conducting privatization negotiations and selecting buyers<sup>16</sup>*
- *Advisors are hired through open and transparent competition and work only in the interests of the government.*
- *Transparency in the privatization process itself*
- *Transparency in the treatment of privatization proceeds<sup>17</sup>*
- *Measures to mitigate adverse social and environmental effects from privatization.<sup>18</sup>*

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. Many now believe that the route to development for the world's poorer nations lies by way of 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.

## ENDNOTES

- 1 Public Services International (PSI)'s Research Unit, based at the University of Greenwich in London, claims that multinationals privatizing water in the developing world are dogged by corruption, close to financial collapse and have long track records of exploiting the poor: <http://www.labournet.net/world/0208/psi4.html>
- 2 Jeffrey Sachs, Clifford Zinnes and Yair Eilat, The Gains from Privatization in Transition Economies: Is Change of Ownership Enough?, <http://www.imf.org/External/Pubs/FT/staffp/2001/04/zinnes.htm>
- 3 Privatizing State-owned Enterprises: An Overview of Policies and Practices in OECD Countries (OECD, Paris, 2003) ISBN 92-64-10408-9, p.17.
- 4 Vito Tanzi, Corruption Around the World, IMF Staff Papers Vol. 45 No. 4 (December 1998)
- 5 External Evaluation of the ESAF, Report by a Group of Independent Experts, IMF, 1998, p.94. <http://www.imf.org/external/pubs/ft/extev/index.HTM>
- 6 See Sue Hawley, Exporting Corruption: Privatisation, Multinationals and Bribery, The Corner House Briefing 19, 1 June 2000 ([www.thecornerhouse.org.uk/pdf/briefing/19\\_bribe.pdf](http://www.thecornerhouse.org.uk/pdf/briefing/19_bribe.pdf)).
- 7 Ivan Miklos, Privatisation Corruption Risks, <http://www.internet.sk/mesa10/PRIVAT/CORRUPT.HTM#III.1%20mall-scale%20Privatisation>
- 8 Daniel Kaufmann and Paul Siegelbaum, Privatisation and corruption in the transition: <http://www.worldbank.org/wbi/governance/pdf/siege12.pdf>
- 9 Privatising State-Owned Enterprises (supra), p. 62. The book contains advice on ways of establishing distinct mandates for advisors.
- 10 These criteria include those drawn from the privatization criteria recommended by the German Advisory Group for Privatisation in Ukraine: [http://www.privatisation.kiev.ua/Priv\\_Eng/rounde/XIX/10yearsE.htm](http://www.privatisation.kiev.ua/Priv_Eng/rounde/XIX/10yearsE.htm). See also the work of the OECD Working Group on Privatisation and Governance of State-owned Assets [http://www.oecd.org/document/36/0,2340,en\\_2649\\_37439\\_2431588\\_1\\_1\\_1\\_37439,00.html](http://www.oecd.org/document/36/0,2340,en_2649_37439_2431588_1_1_1_37439,00.html); German Advisory Project on Privatisation in Ukraine: [http://www.privatisation.kiev.ua/Priv\\_Eng/aboutE.htm](http://www.privatisation.kiev.ua/Priv_Eng/aboutE.htm). Germany has a high level of expertise in the transformation process gained as a result of the reunification process. The legal, economic and social changes in East Germany were without precedence in European history. The German government believes that this experience gives it a clear picture as to the scope of work involved in privatization and the time required to accomplish it.
- 11 The methodology has been published by Transparency International as a toolkit for like-minded organizations: [http://www.transparency.org/toolkits/2001/ccinp\\_telebulgaria.html](http://www.transparency.org/toolkits/2001/ccinp_telebulgaria.html)
- 12 See Chapter 26, TI Source Book 2000 for a detailed discussion: <http://www.transparency.org/sourcebook/26.html>. See also Thailand's Competition Act, 1999: <http://www.oecd.org/dataoecd/40/45/2491524.doc> and South Africa's Competition Act, 1998: [http://www.compcom.co.za/thelaw/thelaw\\_act\\_competition\\_acts.asp?level=1&child=1](http://www.compcom.co.za/thelaw/thelaw_act_competition_acts.asp?level=1&child=1).
- 13 For a detailed discussion, see John Nellis, The World Bank, Privatization and Enterprise Reform in Transition Economies: A Retrospective Analysis: <http://lnweb18.worldbank.org/OED/OEDDocLib.nsf/0/A8579A9A28A100B485256B6D006542F6?opendocument>
- 14 For a discussion, see Jeremy Pope, Competition Policy and Containing Corruption <http://www.transparency.org/sourcebook/26.html>
- 15 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.
- 16 Poland is a country that has been reported by the OECD as having established a set of clear, detailed and transparent processes which have allowed trade sales, or sales to corporations, frequently foreign, which already trade in the same sector. to be used as a successful approach: See Privatising State-owned Enterprises (supra), p. 93
- 17 In Poland, proceeds have been earmarked for social security reform. The Czech and Slovak governments have also earmarked funds for special purposes. In the UK, Sweden and Denmark the proceeds have simply flowed into a general revenue fund. Establishing a special purpose fund is believed to be one way of reducing the likelihood of underselling public assets in the interests of short-term liquidity. Under the German Federal Budget Code, the administration must obtain the full value of the company by ensuring that it realizes the best price the market offers. Privatising State-owned Enterprises, (supra) at p 84.
- 18 See John Nellis and Sunita Kikeri, Privatization in Competitive Sectors: The Record to Date (World Bank): <http://econ.worldbank.org/view.php?topic=20&type=5&id=15960>. See also the OECD Working Group on Privatisation and Governance of State-owned Assets (formerly the OECD Privatisation Network)



A criminal law geared to fight corruption is essential to any battle against graft, whether in the public or private sector. In this chapter, the evolution of a criminal law is traced from its genesis to its final impact on police and prosecutors. (*The role of the judiciary is discussed in Chapter 16.*)

### ANTI-CORRUPTION LAWS

The most carefully planned laws cannot by themselves control corruption.<sup>1</sup> To a large extent, the present crisis in many countries stems from the fact that their laws are not enforced. Legal institutions are failing owing to the weaknesses in national judicial systems, and in part from the lack of will to strengthen the institutions themselves.

Nonetheless, a sound legal framework is a necessary starting point. When laws are drafted, they should be simple both to understand and to enforce.

Corruption activists see a range of laws as relevant. Among them are laws providing for:

- *Access to information (including official secrets legislation)*
- *Resolution of conflicts of interest*
- *Public procurement processes*
- *Freedom of expression*
- *Freedom of the press*
- *Protection of whistleblowers and those who file complaints about government abuses*
- *Mobilization of civil society*
- *Democratic elections*
- *Ban on those convicted of offenses of serious moral significance such as rape or theft from holding or running for election to public office or from running companies*
- *Rules regulating gifts and hospitality to public officials*

- *Creation of an ombudsman*
- *Judicial review of the legality of administrative actions*

For criminal law, there are eight general principles which should be observed:

- *Compliance with international human rights standards*
- *Avoidance of unduly repressive provisions*
- *Clear guidelines on sentencing so that sentences are consistent*
- *Consolidation of various criminal laws dealing with corruption*
- *Regular review of the criminal law framework*
- *Special provisions for corruption cases which require individuals to establish the origins of unexplained wealth to the satisfaction of the court*
- *Forfeiture of the proceeds of corruption to the state*
- *Definition of corruption as including both the payment and receipt of bribes*

### DRAFTING LAWS

Criminal law can act as a deterrent to corruption, but only up to a point. If the laws are not enforced or enforceable, then those who breach them have little to fear and the laws themselves can become meaningless.

Some see the passing of new anti-corruption laws as a first step towards countering corruption (even though many countries already have a range of laws that could fight corruption if they were enforced). As a result, laws to punish bribery and other forms of corruption have proliferated around the world, but frequently at the expense of doing anything to ensure their enforcement or to make sure that preventive measures are also taken. Passing a new law can appear to be a cost-free way of taking action, but, in reality, alone it can change little.

Anti-corruption legislation generally targets bribery, nepotism, conflicts of interest, and favoritism in the award of contracts or of government benefits. In doing so, some drafters try to list every imaginable activity and make each of them illegal. However, the corrupt are nothing if not imaginative, and can quickly find ways around such prohibitions. It is, therefore, generally more effective to draft more general prohibitions – such as the “abuse of public office for private gain.”

General language such as this captures everything, but its disadvantage is that it can also be used by rivals within the system to challenge actions that are, in fact, completely innocent. This is particularly the case if investigators and judges are subject to political or other pressures. In these ways, an anti-corruption law can, itself, become a source of corruption.

To avoid such scenarios, those drafting laws should first ask themselves a series of questions:

- *Will institutions charged with enforcing the law have the capabilities to do so?*
- *Are the police, prosecutors, courts, and other enforcement agencies staffed by honest, technically competent professionals? (Surveys in many parts of the world show citizens as believing that the police and the judicial system are among the most corrupt of their countries' institutions.)*
- *Are these officials independent of the executive in theory? In practice?*
- *To whom, and in what ways, are these officials accountable?*

It may take time to build the essential capacity and structures for the fair and professional administration and enforcement of the law. Therefore, the law's drafters must take into account any weaknesses of agencies charged with enforcing the legislation.

### “BRIGHT-LINE” RULES

In countries with such institutional weaknesses, the World Bank has suggested that draft legislation include so-called “bright-line” rules. These

are rules that are easily understood, simple to apply and demand little or no judgment to determine their applicability. Such laws contrast with those containing standards that are open to interpretation by enforcement agencies.

“Bright-line” rules eliminate enforcers' discretion, but do so at some cost. For instance, if nepotism and favoritism in government recruitment are serious problems, legislation could prohibit government employees from hiring a friend or relative unless he or she was qualified for the position. But then the prosecutors and courts would be left to determine whether or not a particular relative was qualified, and so have considerable discretion in enforcing the law.

Alternatively, legislation which incorporates a “bright-line” rule could simply prohibit the appointment of any friend or relative, with no exceptions or qualifications. In this case, the enforcers would have no discretion. If an official's relative appeared on the payroll, the breach would be obvious. But if the law contained an exception for qualified individuals, arguments about the candidate's qualifications would be used to justify – and obscure – the appointment. Without the exception, the breach is clear for all to see, and citizens, the media, and watchdog groups can readily determine whether the government is serious about enforcing anti-corruption laws.

However, such laws are inflexible and allow no exceptions. They are simplified (perhaps over-simplified) to the point of being arbitrary. In the case of an anti-nepotism law, a government may well lose the person best qualified for the job.

Yet the fact is that weak courts are generally ill-equipped to develop and impose standards when they are working from more general principles.

The World Bank has recommended that countries with weak enforcement institutions consider including the following “bright-line” rules in their anti-corruption laws:

- *No government employee may receive any gift, payment, or anything of value in excess of a small sum from anyone who is not a member of that person's immediate family.*

- *No employee may hold, directly or indirectly (that is, through family or other agents), an interest in a corporation or other entity affected by that employee's decisions.*
- *Every year, all employees above a certain pay level must publicly disclose all assets they hold directly or indirectly.*
- *No employee may hire a relative (with a precise specification on how distant a relation must be before he or she is not a "relative").*
- *All employees must disclose any relationship with people hired and with firms or entities to which they award a contract or concession. (Since in many countries the pool of talented workers and qualified firms is small, this rule leaves decisions about corruption to public opinion.)*

#### ADVANCE RULINGS CAN AVOID PROBLEMS

When there are general provisions in an anti-corruption law that create broad discretionary powers, those in doubt about how to exercise their judgement on any case should be able to obtain advice and guidance from the relevant enforcement agency. If, based on the facts disclosed, the enforcement authority concludes that the action proposed would not constitute a violation, the employee would be free from any later prosecution. To prevent the process from unduly delaying government action, agency representatives can be required to rule on the request within a set period. If they do not, the law can provide that the action in question is legal.

An advance ruling procedure can also turn what could be an adversarial relationship into a cooperative one as civil servants work with ethics officers to structure transactions in ways consistent with the law. In addition, if a questionable action is later discovered that was not blessed with an advance ruling, it is one sign that an intent to evade the law existed.

Statutes outlawing bribery, nepotism, and other corrupt acts should always be complemented by laws that help bring corruption to light.

#### POSSESSION OF UNEXPLAINED WEALTH

Frequently, it is very obvious that public officials are enriching themselves. Sometimes one need go no further than a customs office's parking lot to see the evidence. But how can an enforcement agency get the proof necessary to gain a criminal conviction without evidence of bribes being demanded and received?

The Law Commission for England and Wales has stated that getting a conviction in a corruption case is "no more difficult" than for any other case of serious economic crime. But this begs the point. When resources are scarce, enforcement agencies do not have the capacity to take on many cases, and this means that most – or perhaps all – administrative corruption can go virtually unpunished.

In Hong Kong (where anti-corruption legislation has attracted considerable interest and emulation around the world), a way forward was found.<sup>2</sup> It was made a criminal offense for a public servant to possess wealth in excess of his official salary unless he can give a satisfactory explanation for his possession of such wealth. This approach not only means that it is relatively simple to prosecute cases of repeated administrative corruption, but also serves as a strong disincentive for corruption.

The value of such an offense to serve as an example for the conduct of public servants, especially senior public servants, is being increasingly recognized. The question is whether the human rights and fundamental freedoms of a public servant charged with such an offense are infringed. There are two aspects to be considered: first, whether an offense of merely possessing wealth in excess of an official salary infringes upon the right to a fair trial; second, whether placing the onus for having to establish the defense of "satisfactory explanation" on the accused infringes the right to be presumed innocent until proven guilty under the law.

The illicit enrichment concept has been adopted and incorporated into the Inter-American Convention Against Corruption, which terms the accumulation of a "significant increase" in assets by any government official an offense if that official cannot reasonably explain the increase in relation to his lawful functions and earnings.<sup>3</sup>

The Hong Kong Bill of Rights Ordinance, in article 11(1), provides, in exactly the words of the International Covenant, that “Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”<sup>4</sup> Not long after the Bill of Rights came into force in Hong Kong in 1991, senior public servants, charged with possessing excessive wealth, challenged the validity of the offense with the argument that it infringed upon their right to be presumed innocent.

The highest appeal courts in both Hong Kong and the United Kingdom have rejected this assertion. They acknowledged that, for this type of offense, the primary responsibility for proving matters of substance against the accused, beyond a reasonable doubt, rests with the prosecution. Only when it has been established by the prosecution that the accused’s wealth could not reasonably have come from his or her official salary does the accused have to provide a satisfactory explanation. A satisfactory explanation would be one which might reasonably account for the wealth in excess of the salary. It is a matter peculiarly within the knowledge of the accused.

But requiring the accused to provide a satisfactory explanation needs strong justification if this departure from the fundamental principle of the rule of law (that the prosecution has the onus of proving every element of the case against the accused) is to be compatible with the protection of human rights.

What is that strong justification? As the UK Privy Council (on an appeal from Hong Kong) has said, “Bribery is an evil practice which threatens the foundations of any civilised society.” It has also said there is “notorious evidential difficulty” in proving that a public servant has solicited or accepted a bribe. But there is, the Privy Council said, “a pressing social need to stamp out the evil of corruption in Hong Kong.” The Court of Appeal of Hong Kong has echoed that view: “Nobody... should be in any doubt as to the deadly and insidious nature of corruption.” In another case, the Privy Council said the offense of possessing excessive unexplained wealth was “manifestly designed to meet cases where, while it might be difficult or even impossible for the prosecution to establish that a particular public ser-

vant had received any bribe or bribes, nevertheless his material possessions were of an amount or value so disproportionate to his official salary as to create a *prima facie* case that he had been corrupted.”<sup>5</sup>

In summary, the right to a fair trial and the right to be presumed innocent until proven guilty require that the onus of proof must fall upon the prosecution, but may be transferred to the accused when he or she is seeking to establish a defense of insanity or diminished responsibility. Provisions that enshrine the right to be presumed innocent do not prohibit presumptions of fact or law against the accused, although such presumptions must be confined within reasonable limits, which take into account the importance of what is at stake and maintain the rights of the defendant. Nor do they prohibit offenses of strict liability; namely, offenses which do not require a criminal intent on the part of the accused. They do, however, impose certain evidential and procedural requirements that bear on the pursuit of the corrupt.<sup>6</sup>

### USING THIRD PARTIES TO CONCEAL CORRUPTION

Corrupt officials can also conceal the proceeds of corruption by transferring them to friends or relatives, but still retaining control over the funds. In response to such scenarios, national laws sometimes provide that assets believed to be held by a third party on behalf of the accused or acquired as a gift from the accused will be presumed to have remained in the control of the accused. This presumption is most commonly applied to cases of bribery or unexplained excessive wealth and applies when there is no evidence to the contrary. The onus of providing that evidence rests on the accused.

Does such a so-called “reverse onus” infringe upon the assumption of innocence? Again, the Hong Kong Court of Appeal showed a sensible approach to this question, and one that balances all interests involved:

*Before the prosecution can rely on the presumption that pecuniary resources or property were in the accused’s control, it has, of course, to prove beyond reasonable doubt the facts which give rise to it. The presumption must receive a restric-*

*tive construction, so that those facts must make it more likely than not that the pecuniary resources or property were held ... on behalf of the accused or were acquired as a gift from him. And construed restrictively in that way, the presumption is consistent with the accused's fundamental right, being a measured response to devices by which the unscrupulous could all too easily make a mockery of the offences.<sup>7</sup>*

### TERMING “ADVANTAGES” AS BRIBES

There is a presumption often found in anti-corruption legislation that argues that if it is found that the accused in a bribery case gave or accepted an item that could be termed an “advantage,” a benefit that need not be in money or have a financial denomination, that advantage will be deemed an inducement or reward, unless proven otherwise. However, this principle is rarely used.

Anti-corruption specialist Bertrand de Speville is among the lawyers who believe that a challenge to such a provision would succeed on human rights grounds. First of all, this presumption assumes corruption, an offense which the prosecution is obliged to prove. Also, just because a gift was made by a person charged with corruption does not mean that that gift can be automatically associated with corruption.

### USING CIVIL LAW TO RECLAIM ASSETS

One way of recovering the assets of illicit activity without recourse to the criminal courts is by using civil law since civil proceedings do not require proof beyond reasonable doubt, but only on the balance of probabilities. This makes the cases easier to prove. *(This option is described in Chapter 14.)*

### CONTAINING CORRUPTION IN THE PRIVATE SECTOR

Increasingly, governments are concerned with encouraging a corruption-free private sector. Their goal is to help businesses build a commercial environment characterized by efficiency and fair

competition. Sound anti-corruption laws applicable to the private sector also protect employers from unscrupulous employees who abuse their powers for personal gain. A good law applying to the private sector would provide that:

- *an agent (normally an employee) cannot solicit or accept an advantage without the permission of his principal (normally the employer) when conducting his principal's affairs or business.*
- *the person who offers the advantage also commits an offense.<sup>8</sup>*

## ENFORCEMENT

Once a legal framework has been enacted, the challenge is to actually make it work. However, even here, corruption can play a role. The work of investigators, prosecutors, judges and court staff alike remains at risk.

## POLICE AND INVESTIGATIVE TECHNIQUES

### CORRUPTION IN THE POLICE

As this chapter is being written, Moscow police are investigating allegations that a gang of corrupt police have been providing what is commonly referred to as a “roof” or “cover” – protection of businesses in exchange for payment of money. Store managers had been blackmailed over a long period of time and the gang had threatened that store directors and their families would be beaten if the money was not paid. At the same time, allegations were being investigated in Poland that the police chief, since resigned, had tipped off a junior government minister about an impending police raid. The minister had then passed the information on to the suspects, who were members of his political party.

At a recent INTERPOL conference, Commissioner Giuliano Zaccardelli, head of the Royal Canadian Mounted Police (RCMP), recounted a similarly disturbing discovery. An inspector in charge of a drug unit had accepted tickets to a hockey game from a lawyer, a professional acquaintance who, it proved,

represented a member of an organized crime group. In return for additional tickets and, eventually, money, the lawyer requested certain favors, including tip-offs to local drug lords about pending drug busts. In the end, as his involvement intensified, the inspector committed suicide in his office at RCMP headquarters in Ottawa. This tragedy was the impetus for a major examination of corruption in Canadian law enforcement.<sup>9</sup>

Commissioner Zaccardelli suggested that four elements should be in place for a police force to function with integrity and efficiency:

- **Recruitment:** *There is a need not only to recruit the right people but more importantly, to screen out the wrong people. Candidates' values should reflect those of the organization. They must be absolutely committed to serving the public, above themselves or their personal interest.*
- **Training:** *A rigorous training program can instill in recruits a good foundation for police work – one based on ethical behavior and integrity in decision-making. This is more difficult than it may seem. Police training has traditionally been paramilitary in nature. Cadets are told what they will do, when they will do it, and how they will do it. The trick is to balance traditional paramilitary training, which emphasizes command and control, with the need to empower recruits to be responsible and accountable for their actions. The training period is an optimal time to instill these values in each and every employee. If these values do not take root here, then employees may be vulnerable to corruption. In addition to training for recruits, veteran police officers, who have been on the job for 20 years, should be challenged to consider their own commitment to public service, examining their ethical foundation, vulnerabilities, integrity and courage of conviction.*
- **Supervision:** *An upstanding young citizen can be recruited to the ranks. He or she can be trained to be the best officer possible. But if there is inadequate supervision on the front line, where life and death decisions are made, all outstanding efforts can fail. It is hard for a supervisor to know enough about one of his or her employees*

*to detect subtle changes in their personality that may signal that the officer is vulnerable to corruption or is taking part in it. Several questions are in order for police departments to consider. Is there a need to take a hard look at the value placed on managers' time? Are supervisors pushing paper or really mentoring and looking out for their staff? Do supervisors know the warning signs that one of their own might be vulnerable to, or engaging in, corrupt behavior? Perhaps most importantly, is each and every supervisor leading by example? Or is corruption in the office and on the front line merely a reflection of practices higher up the organization?*

- **Detection:** *The final area is detection and disclosure. This means, putting in place measures in your organization that can identify potential corruption and deal with it appropriately. For example, at the RCMP, officers are required to report a change in marital status to the human resources department. This is done so that personnel can know if an officer is going through a separation or divorce and experiencing marital difficulties that can make officers vulnerable to corruption. The challenge is to use this knowledge in ways that support the officer, and yet make him or her aware of their vulnerabilities and give them tools to manage the risk. Policies and procedures are needed that will identify inappropriate behavior early on, and consistently. Managers need to assess if their organization has effective methods for the disclosure of wrongdoing as well as for the management of the disclosure of any such behavior. Police culture enshrines confidentiality, the management of information, even secrecy. And yet these often positive qualities can lead to a breakdown in accountability and be abused for the purpose of hiding problems.*

As a necessary barrier to corruption, there should be a number of prerequisites for transparency in the activities of the police. Such prerequisites should include:

- *Legislative oversight including detailed budget spending within the Ministry of Interior*
- *Extra-institutional inspections and anti-corruption control by a government agency*

- *A specialized inspectorate within the ministry or department responsible for a country's police force*
- *A public-private sector partnership in monitoring and assessing police anti-corruption measures*
- *Widening the scope of public information about police activities, with an emphasis on the anti-corruption program and its results*
- *Sharing all information about corrupt policemen and networks of corruption within the security forces with the general prosecutor's office*
- *Full information about police officers' income and assets; especially those of more senior officers, and those of their closest relatives*

### THE INTERPOL INITIATIVE

INTERPOL (International Criminal Police Organization-Interpol officially abbreviated to ICPO-Interpol) actively promotes integrity in policing around the world. Not only does it make use of a panel of anti-corruption experts, but it also has developed a set of standards for fighting corruption in police forces worldwide.<sup>10</sup>

INTERPOL's Global Standards to Combat Corruption in Police Forces/Services 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 offense. Other standards include establishing and maintaining high standards of conduct for the honest, ethical and effective performance of policing functions; 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 member states' forces that require it.

### INVESTIGATIVE TECHNIQUES: INTEGRITY TESTING

Unless a corrupt act is exposed, how do we know that an officer is corrupt? And more importantly, how can we ensure that these officers are not promoted to positions where they can wreak even more damage? And, in handling allegations of corruption made against officers, how do we ensure that morale is not adversely affected? And that complainants – and innocent parties – are protected? Such allegations are easily made. If they are not based on fact, they can be damaging.

A further complication can occur when those making allegations have a history of criminal involvement, especially when their complaints are made against the police. This puts the complainant's credibility under question. So how can reliable evidence (either of integrity or of corrupt tendencies on the part of police officers) be produced? Can this be done in ways consistent with the constitutional rights of officers as citizens, and in ways in which neither the complainant nor the person implicated in the complaint is exposed to outside pressures?

In various parts of the developed world, police corruption scandals have come in cycles. Rampant corruption has been exposed, clean-up measures have been implemented, corrupt police have been prosecuted or dismissed. But within a few years, a bout of fresh scandals has emerged.

This, it is now realized, is because whole reform strategies have been misconceived. They have been founded on a belief that getting rid of "rotten apples" in the form of corrupt officers would be sufficient to contain the problem. It is now clear that it is not enough to clean up an area of corruption when problems show. Rather, systems must be developed which ensure that incidences of corruption will not be repeated. It is in the essential field of follow-up and monitoring that integrity testing comes into its own.

Integrity testing has now emerged as a particularly useful tool for cleaning up corrupt police forces – and for keeping them clean. The object is to test the integrity of an official, and not to render an honest one corrupt through a process of entrapment.

Most countries have agent provocateur rules in their criminal codes, which act as a judicial check on what is permissible. These rules vary from jurisdiction to jurisdiction, but they obviously have to be borne in mind.

It is, of course, important to ensure that the degree of temptation is not extreme.

Integrity testing has to be developed and conducted very carefully. It is essential, for instance, that the temptation placed in the way of an official is not so great as to tempt even an honest person to succumb.

### INTEGRITY TESTING IN NEW YORK CITY

Since 1994, the New York City Police Department (NYPD) has conducted a very intensive program of integrity testing.

The department's Internal Affairs Bureau creates fictitious scenarios based upon known acts of police corruption, such as the theft of drugs and/or cash from a street level drug dealer, to test the integrity of NYPD officers. The tests are carefully monitored and recorded using audio and video electronic surveillance as well as the placement of numerous "witnesses" at or near the scene.

The NYPD strives to make the scenarios as realistic as possible and they are developed based upon extensive intelligence collection and analysis. All officers are aware that such a program exists and that their own conduct may be subjected, from time to time, to such tests. They are not, however, told about the frequency of such tests. (This has produced a sense that they are far more frequent than actually occurs.)

Integrity tests are administered on both a targeted and a random basis. That is, certain tests are directed at specific officers who are suspected of corruption, usually based upon one or more allegations from members of the public, criminals or even other officers.

In addition, certain tests are directed against officers selected at random, based upon the knowledge

that they are engaged in work that is susceptible to certain acts of theft or corruption. All of the tests are carefully planned to avoid entrapment, and no officer is enticed into committing an act of corruption. The scenario merely creates realistic circumstances in which an officer might choose to engage in a corrupt act.

More than 1,500 integrity tests are administered each year among a force of 40,000 officers. The data produced by these tests provides reliable, empirical evidence of the rate of corruption among NYPD officers. The results have been both useful and instructive.

The rate of failure (i.e., when the subject engages in a corrupt act) in the targeted tests is significant. About 20 percent of the officers tested on this basis fail the test, are prosecuted and removed from the force. This would seem to validate both the reliability of carefully analyzed public complaints and allegations of police corruption and the efficacy of the specific integrity tests employed.

The introduction of the system has also seen the number of reported attempts to bribe police officers soar.

No police officer can now know whether or not the offer made to him or her is an integrity test. Officers believe that it is better to be safe and to report the incident than risk treating it as irrelevant, let alone accepting it.

By contrast with the comparatively high number who fail the targeted test, only about 1 percent of the officers who are subjected to random tests fail. This would seem to support the long-held view of senior NYPD officials that the vast majority of its officers are not corrupt.

In addition to providing valuable empirical evidence about the rate of corruption among police officers, integrity testing has produced very useful lessons about the strengths and weaknesses of the supervision and control of police officers in the field. Such lessons are used to develop better training and more effective policies to ensure that police services are provided effectively and honestly.

There can also be no question that integrity testing is a tremendous deterrent to corruption.

The NYPD has seen a dramatic rise in the number of reports by police officers of bribery attempts and other corrupt conduct by members of the public and/or other officers since the integrity-testing program was initiated. Some of this increase is undoubtedly attributable to the fact that NYPD police officers are concerned that their actions may be subject to monitoring and that even the failure to report a corrupt incident could subject them to disciplinary action.

The London Metropolitan Police has initiated a similar program 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.

In tandem, there should be independent police complaint boards. The police should not be left in the position of investigating complaints against themselves. Boards should have civil society representation to assure the public that the procedures adopted are thorough and appropriate.

#### **INVESTIGATIVE TECHNIQUES: WIDER USES OF INTEGRITY TESTING**

The concept need not be confined to police activities. In some countries, hidden television cameras have been used in the ordinary process of criminal investigations to monitor 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.

It would be interesting, too, to see the effect of this same approach in the area of international government procurement contracts. Under such a scenario, major international corporations bidding on government contracts in a developing country would know that they would have to contend with an integrity testing program. They would know the payment of any bribe (or even the failure to report

the solicitation of a bribe) would subject them to instant exposure as a corrupt company, and to public blacklisting. It would be a simple matter to use integrity testing to identify and remove junior staff who are taking a large number of small bribes. Yet junior officials do not lie at the heart of the corruption problem. It will be more difficult to adapt the methodology to counter those senior officials who are involved in a small number of highly lucrative transactions.

The possibilities the technique presents for much of the world have yet to be thoroughly explored. However, on face value 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 random integrity testing take place as a means for tackling and reducing levels of petty corruption.

Integrity testing has to be developed and conducted very carefully. It is essential, for instance, that the temptation placed in the way of an official is not so great as to tempt even an honest person to succumb. The object is to test the integrity of the official, not to render an honest official corrupt through a process of entrapment. More than this, most countries have agent provocateur rules in their criminal codes, which act as a judicial check on what is permissible. These rules vary from jurisdiction to jurisdiction, but they obviously have to be borne in mind. It is important to ensure that the degree of temptation is not extreme.

That said, there is no doubt that the New York experience has shown that integrity testing, properly and fairly conducted, is potentially a highly effective weapon for the launching of a campaign to confront systemic corruption in many public agencies.

#### **INVESTIGATIVE TECHNIQUES: UNDERCOVER INVESTIGATIONS**

Undercover investigations are closely related to integrity testing, but lack the random element. These investigations are only looking for what is wrong, and not to establish what is going well, and who is honest.

There are a number of risks that must be minimized, countries should have clear guidelines for this type of investigation. The risks can include:

- *harm to undercover employees*
- *harm to private individuals and businesses, and the risk of liability for other losses being incurred by the government*
- *invasion of privacy*
- *entrapment (i.e. creating an offense where one would otherwise have been unlikely to occur, such as offering a very large bribe)*
- *undercover employees or cooperating individuals actively participating in the activity being targeted by the operation*

It is usually thought advisable for the person likely to be the prosecutor – if there is one – to be involved in the oversight of the investigation. This can ensure that the evidence obtained is both relevant and admissible in court proceedings and of a quality which is likely to bring a conviction.

### CIVIL SOCIETY CAN HELP

Civil society groups can be of assistance to police forces and help to bridge the gap that exists in many countries between the people and those responsible for their protection. One such group, Transparency International Czech Republic (TIC), has conducted a survey of anti-corruption strategies in the police in 25 countries. The findings are contained in a TIC publication entitled “Crossing the Thin Blue Line.”

TIC is now working on creating a anti-corruption strategy for the Czech police in cooperation with representatives from all sectors of public life: the Ministry of the Interior, Ministry of Justice, Police Presidium, Czech Police, Bureau of the Attorney General, judges, Office of the President, Ombudsman, Government Commissioner for Human Rights, and non-profit organizations such as the Czech Helsinki Committee, People in Need, and Civil Legal Observers.

One measure regarded as very effective is the introduction of regular integrity and ethics training for police and students at police schools. TIC has initiated steps towards introducing these into the Czech police, through a pilot course for police school teachers.<sup>11</sup>

### PROSECUTORS

Rule of law requires that state prosecutions be conducted fairly and reasonably.

Beginning prosecution proceedings – or refusing to open a prosecution – ought not to be motivated by improper, and, in particular, political, considerations, but by the public interest and the need for justice. Unquestionably, one of the most difficult areas of the law is the discretion to prosecute. This issue lies at the very root of the rule of law.

Clearly, considerations such as possible political advantage or disadvantage, or the race, origin or religion of the suspected person are wholly irrelevant. However, other significant areas which may affect the decision-making process can only be resolved through the exercise of independent judgement.

To exercise decision-making fairly and transparently, a public prosecutor should not be subject to direction from any political party or interest group. For example, the Serbian Law on the Public Prosecutor’s Office provides that the office is a autonomous agency and that the use of any public office, the media, or any public statement that may influence the Office is prohibited, as is any other form of influence.

The office of the public prosecutor can be equated with that of a high judicial office; as such, accountability can be brought to bear through provisions that require removal for cause.

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

The document International Guidelines on the Role of Prosecutors, was developed by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba in 1990.<sup>12</sup>

The Seventh UN Congress had called for guidelines relating to the selection, professional training and status of prosecutors, their expected tasks and conduct, means to enhance their contribution to the smooth functioning of the criminal justice system and their cooperation with the police, the scope of their discretionary powers, and their role in criminal proceedings, and to report to future United Nations congresses.

The UN Guidelines adopted in Havana include the following:

10. *The office of prosecutors shall be strictly separated from judicial functions.*
11. *Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.*
12. *Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.*
13. *In the performance of their duties, prosecutors shall:*
  - (a) *Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination.*
  - (b) *Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect.*
  - (c) *Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise.*
  - (d) *Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.*
14. *Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.*
15. *Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.*
16. *When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.*
17. *In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution.<sup>13</sup>*

Unfortunately, prosecutors can also be a weak link in the chain towards enforcing anti-corruption laws. There are instances of prosecutors being bribed, put under political pressure, threats, and of being

removed from office in the event of effective prosecutions.

Maintaining the discretion to prosecute is essential. The prosecutor must, after a careful review of the evidence, decide whether there is sufficient evidence to warrant a prosecution and, even if there is, whether the public interest dictates that charges ought not to be brought. As examples of the last, it might be thought that highly expensive court proceedings are not warranted where the offense in fact is trivial; alternatively, an accused person might be in such poor health that having him or her standing trial would be oppressive and offend society's values.

In a determined effort to raise standards worldwide, the International Association of Prosecutors was established in June 1995 and was formally inaugurated in September 1996 at its first general meeting in Budapest.

One of its most important goals is to "... promote and enhance those standards and principles which are generally recognized internationally as necessary for the proper and independent prosecution of offences." In 1999 it adopted The International Association of Prosecutors' Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors. This is a statement meant to serve as an international benchmark for the conduct of individual prosecutors and of prosecution services. It is a working document used by prosecution services in developing their own standards.

An edited version follows:<sup>14</sup>

### 1. Professional Conduct

*Prosecutors shall at all times maintain the honor and dignity of their profession and always conduct themselves professionally, in accordance with the law and the rules and ethics of their profession. At all times, they should exercise the highest standards of integrity and care, and strive to be, and to be seen to be, consistent, independent and impartial. They should always protect an accused person's right to a fair trial, and, in particular, ensure that evidence favorable to the accused is disclosed in accordance with the law or the*

*requirements of a fair trial. Prosecutors should always serve and protect the public interest, and respect, protect and uphold the universal concept of human dignity and human rights.*

### 2. Independence

*The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference. If non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, such instructions should be:*

- *transparent*
- *consistent with lawful authority*
- *subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence*

*Any right of non-prosecutorial authorities to direct the institution of proceedings or to stop legally instituted proceedings should be exercised in a similar fashion.*

### 3. Impartiality

*Prosecutors should perform their duties without fear, favor or prejudice and in particular carry out their functions impartially. They should remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest. They should act with objectivity, and seek to ensure that all necessary and reasonable enquiries are made and the result disclosed, whether that points towards the guilt or the innocence of the suspect. They should always search for the truth and assist the court to arrive at the truth and to do justice between the community, the victim and the accused according to law and the dictates of fairness.*

### 4. Role in criminal proceedings

*Prosecutors should:*

- *perform their duties fairly, consistently and expeditiously – objectively, impartially and professionally*
- *proceed only when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and not continue with a prosecution in the absence of such evidence*

- *ensure that throughout the course of the proceedings, the case will be firmly but fairly prosecuted, and not beyond what is indicated by the evidence*
- *safeguard the rights of the accused in co-operation with the court and other relevant agencies*
- *disclose to the accused relevant prejudicial and beneficial information as soon as reasonably possible, in accordance with the law or the requirements of a fair trial*
- *refuse to use evidence reasonably believed to have been obtained through recourse to unlawful methods which constitute a grave violation of the suspect's human rights and particularly methods which constitute torture or cruel treatment*

### 5. Co-operation

*In order to ensure the fairness and effectiveness of prosecutions, prosecutors should co-operate with the police, the courts, the legal profession, defense counsel, public defenders and other government agencies, whether nationally or internationally, and render assistance to the prosecution services and colleagues of other jurisdictions, in accordance with the law and in a spirit of mutual co-operation.*

### 6. Empowerment

*In order to ensure that prosecutors are able to carry out their professional responsibilities independently and in accordance with these standards, prosecutors should be protected against arbitrary action by governments. In general they should be entitled to:*

- *perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability*
- *be physically protected by the authorities when their personal safety or their families' safety is threatened as a result of the proper discharge of their prosecutorial functions*
- *reasonable conditions of service and adequate remuneration, commensurate with the crucial role performed by them and not to have their salaries or other benefits arbitrarily diminished*
- *reasonable and regulated tenure, pension and age of retirement subject to conditions of employment or election in particular cases*
- *recruitment and promotion based on objective factors, and in particular professional qualifications, ability, integrity, performance and experience, and in accordance with fair and impartial procedures*
- *expeditious and fair hearings, based on law or legal regulations, where disciplinary steps are necessitated by complaints alleging action outside the range of proper professional standards*
- *objective evaluation and decisions in disciplinary hearings*
- *form and join professional associations or other organizations to represent their interests, to promote their professional training and to protect their status*
- *relief from compliance with an unlawful order or an order which is contrary to professional standards or ethics*

In Slovenia, an effort has been made to eliminate political influence on the appointment and promotion of prosecutors. A Law on Changes and Amendments of the State Prosecutor's Act (OG No. 110/02) has been enacted under which prosecutors will be appointed and promoted following proposals from the State Prosecutor's Council. The Council has seven members, all state prosecutors. The Prosecutor General and his/her deputy are always members. One member is nominated by the minister of justice from among the heads of prosecution districts. Four members are elected by state prosecutors who are not in senior positions.

A Council proposal for an appointment or promotion of a prosecutor is submitted to the minister of justice, who has to approve the proposal in cases of promotion. In cases of appointment of a new prosecutor, the minister has the power to reject the proposal, but is obliged to approve it if the Council brings the same decision again, supported by a two-thirds majority of its members. The minister then has to submit the proposal to the government for a final

decision. The new system, to a large extent, has reduced possible political influence over recruitment and promotion.<sup>15</sup>

### INDEPENDENT PROSECUTORS

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

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

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

The existence of legislation empowering the appointments of independent prosecutors can be a useful addition to a country’s armory of investigative and prosecutorial weapons. As such, a growing number of countries are showing interest in this model. However, it must be noted that when an event arises that would justify the appointment of an independent prosecutor, it is usually too late to create such a post if it does not already exist. A hurried appointment may result in less than adequate legislation governing the powers of the independent prosecutor. This, in turn, can increase political suspicion that the office’s con-

stitution may be less than what is really needed for a professional and independent discharge of duties. If such an office is necessary, it should be established in an atmosphere not charged with scandal. The lessons learned from the actions and cost to taxpayers of the public prosecutors appointed during the administration of U.S. President Bill Clinton also should be considered.

### INTERNATIONAL JUDICIAL ASSISTANCE

A country’s laws generally cease to have effect at the country’s borders. This creates a range of opportunities for corrupt officials and criminals to exploit deficiencies in the effectiveness of a national legal system when events take place beyond its borders, or – even more usually – when the proceeds of corruption have been removed from the country.

#### JUDICIAL ASSISTANCE FROM ABROAD

The reformer will need to audit the arrangements his country has for receiving (and providing) legal assistance with other countries, and covering such matters as extradition of wanted criminals, the search for evidence abroad, the acquisition of evidence abroad, and the seizure and eventual forfeiture of illicit property kept abroad.

Today, it is widely accepted that the internationalization of crime (including drug trafficking, financial fraud and terrorism) dictates that countries modify their traditional reluctance to enforce the criminal laws of other countries, and extend mutual legal assistance to each other in appropriate cases. Such co-operation should be provided for either by treaty or by parallel legislation which reflects best international practice (including compliance with international human rights norms).

However, it is not normally possible for a state to provide assistance to another state which would not otherwise be available to its own investigation and prosecution authorities. Thus, special procedures or rights of investigation (such a compulsory interrogation) may not be available in a foreign country, even if they are in the prosecutor’s own country.

Before most states can offer cooperation in an investigation, the government or court in the relevant country needs to be satisfied that the standards of justice and penal administration in the requesting state are such that it would be in the interests of justice to surrender a fugitive.

Certain matters of process must also be addressed, including whether:

- *the courts of the country in question have a legitimate claim to jurisdiction over the events which have taken place*
- *the investigation or prosecution of the crime is politically motivated*
- *the ordinary court process is being used (i.e., not ad hoc military or other special tribunals)*
- *the offense being prosecuted was actually an offense at the time*
- *the rule of law is being observed. (A number of countries also require assurances that the death penalty will not be imposed, or that corporal punishment will not be inflicted.)*

In addition, if a particular case is to warrant the provision of mutual legal assistance, the alleged misconduct must usually be recognized as constituting an offense in both of the countries concerned (known as the “**dual criminality**” test. It must also be liable to attract punishment of a certain level, usually at least one or two years’ imprisonment.

The technical nature of the work means that expertise must be developed within the field of international mutual legal assistance. Clearly, there may be a role for a country’s diplomatic service in the making and processing of such requests.

Usually, police budgets and the institutional arrangements governing the conduct of foreign relations will not permit investigators to make requests for assistance from a foreign country without any form of verification. Generally, some form of central authority is needed in each country to handle all requests for investigation assistance in order to ensure that the details provided in support of these requests

meet all legal requirements, both local and foreign. Although such an authority may already exist to service requests made under other treaties, its staff will, in most cases, require a significant level of training if the mutual legal assistance arrangements are to work as quickly and as effectively as they should.

### INTERNATIONAL CONVENTIONS FOR PROVIDING ASSISTANCE

Many countries are moving towards the development of formalized international assistance agreements which can further tighten the noose on international corruption. The Council of Europe introduced a framework for mutual legal assistance which was recast into a global setting by the Commonwealth countries in 1986. In turn, this work was adapted by the United Nations to provide assistance provisions for the 1988 United Nations Convention Against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances.<sup>16</sup>

Since then, under the auspices of the Organization of American States, the Inter-American Convention Against Corruption was adopted in 1996 to battle domestic and transnational acts of corruption.<sup>17</sup> This treaty not only facilitates the return of stolen moneys, but also declares that corruption offenses cannot be regarded as being “political” in character. Therefore, those charged with them are subject to extradition to their home countries, without being able to shelter behind the familiar shield of “political persecution.” The new United Nations Convention Against Corruption aims to take levels of mutual assistance (and, in particular, the recovery of looted wealth from abroad) to greater heights.

Corruption has also been identified as an impediment to the enlargement of the European Union, and so has been an added factor in pan-European efforts to tackle corruption. These have resulted in a series of conventions within the Council of Europe, namely the:

- *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, 1990*<sup>18</sup>
- *Criminal Law Convention on Corruption 1999*<sup>19</sup>

- *Civil Law Convention on Corruption 1999*<sup>20</sup>
- *Agreement establishing the “Group of States Against Corruption – GRECO”*<sup>21</sup>

Under the Criminal Law Convention on Corruption, each party agrees to enact a range of measures at the national level to counter corruption in public life, in public administration and in the private sector. Corporations are to be rendered subject to the criminal law and measures introduced to facilitate the gathering of evidence and the confiscation of proceeds. Although these are essentially matters of national law, they will greatly facilitate the enforcement of criminal law internationally. The Criminal Law Convention’s implementation is monitored by members of the Group of States Against Corruption (GRECO), who monitor not only this Convention, but also other measures developed by the Council of Europe as part of its action plan against corruption.

The Civil Law Convention on Corruption is a unique attempt to deal with questions relating to the civil law, providing remedies for victims through the civil process. It deals with such questions as compensation for damage and loss sustained by victims; liability (including state liability) for acts of corruption committed by public officials; validity of contracts; protection of employees who report corruption; and the clarity and accuracy of accounts and audits.

### RECOVERING ILLICIT ASSETS FROM ABROAD

The proceeds of large-scale corruption are frequently stashed in bank accounts in industrialized countries, and techniques of money-laundering are brought into play (perfected mainly by corrupt accountants, lawyers and bankers who are all too often happy to service drug traffickers and to ask no questions). Therefore, deterrence, no less than justice, dictates that a country should try to put itself in a position where it can successfully bring criminal or other proceedings against such persons and recover the looted assets through international assistance arrangements.

In the arena of international legal assistance, it is also important for law enforcement officials to stay abreast of recent international developments, and

abandon the age-old belief that once moneys have fled the country, there is no one outside the country who can or will help recover them. Increasingly, countries with substantial financial sectors now offer some forms of assistance. For example, the Swiss government will now provide assistance when there is a court finding that moneys have been stolen.

### SECRET BANK ACCOUNTS AND OFF-SHORE “FINANCIAL CENTERS”

A particular problem here is that a foreign country can, by establishing itself as a financial center, position itself to facilitate the laundering of moneys stolen by public officials in other countries. Such centers have secrecy laws which make it difficult, if not impossible, to trace the funds, and thereby create a safe haven for corrupt individuals in other countries.

All countries have bank secrecy laws, so that the legitimate privacy interests of individuals are protected. In many societies, people like to keep the amount of their savings and their financial positions confidential. These banking laws are not designed to enable a bank’s customers to avoid, let alone evade, tax collectors, and the accounts are generally subject to inspection by local revenue authorities.

However, some countries extend far greater protection than is reasonably justified, and their laws can be ruthlessly exploited by professional advisers to drug traffickers and corrupt high-ranking officials. They capitalize on a long-standing international consensus that it is not for one country to help another to collect its taxation revenue. Tax-haven regimes have exploited this weakness, and even try to block knowledge of the beneficial ownership of accounts. For example, the claim could be made that a share register is considered secret in a given tax haven and, so, its contents cannot be made public without incurring criminal sanctions. If an individual responded to a summons from a second country to disclose information about the account, so this argument goes, he or she would incriminate himself or herself.

Money laundering methods are not only being used after a crime, but also during, and even before a bribe transaction. In order to camouflage the origin and destination of bribe money, the financial flows

are directed through countries that do not possess a comprehensive and effective system to detect money laundering and similar illegal transactions.

Financial sectors in these countries are generally inadequately regulated and supervised, their legislation does not guarantee access by judicial authorities to information, and their company law allows the founding of shell companies and trusts, to conceal the true identity of the beneficiaries of transactions and the actual owners of funds. Bearer shares (whereby ownership of company shares passes by delivery of a share script, like money) and bearer savings books (whereby possession of the account passbook and a numbered access code carry with them ownership of the account), are frequently used.

Since the establishment of the Financial Action Task Force Initiative of the G7 in 1989, a series of international measures have been undertaken to make the laundering of funds which have their origins in drug trafficking “or other criminal activities” a criminal offense.<sup>22</sup> As a result, at least 40 countries, including nearly all members of the OECD, have implemented legislation and other administrative arrangements so as to be able to trace the flow of funds through their banking systems.

These arrangements require commercial banks to report the receipt of deposits, which may have criminal origins, to a central bank or national criminal intelligence office. In the case of the EU, these arrangements have been embodied in a directive that is binding on all member states. However, there remain countries which have not yet made money laundering a predicate offense, and so are unable (or unwilling) to provide mutual legal assistance when money-laundering charges are brought by another country.

## MONEY LAUNDERING

Principles have been developed to counter these activities in the context of preventing money laundering. These principles, however, pursue the much broader agenda of establishing a paper trail for all (including all legitimate) business, and creating “structures of global control” in the financial sector.

The principles include:

- *“Know Your Customer:” Financial institutions should not do business with unknown customers*
- *An obligation to apply increased diligence in unusual circumstances*
- *An obligation to keep identification files, and records on the economic background of transactions*
- *An obligation to notify competent authorities about suspicious transactions*

However, money laundering continues, apparently unabated, not least because there is competition among private banks to attract business, although there is increasing uneasiness in the banking community about handling accounts for senior public officials and members of their families. Additional measures to address these concerns include:

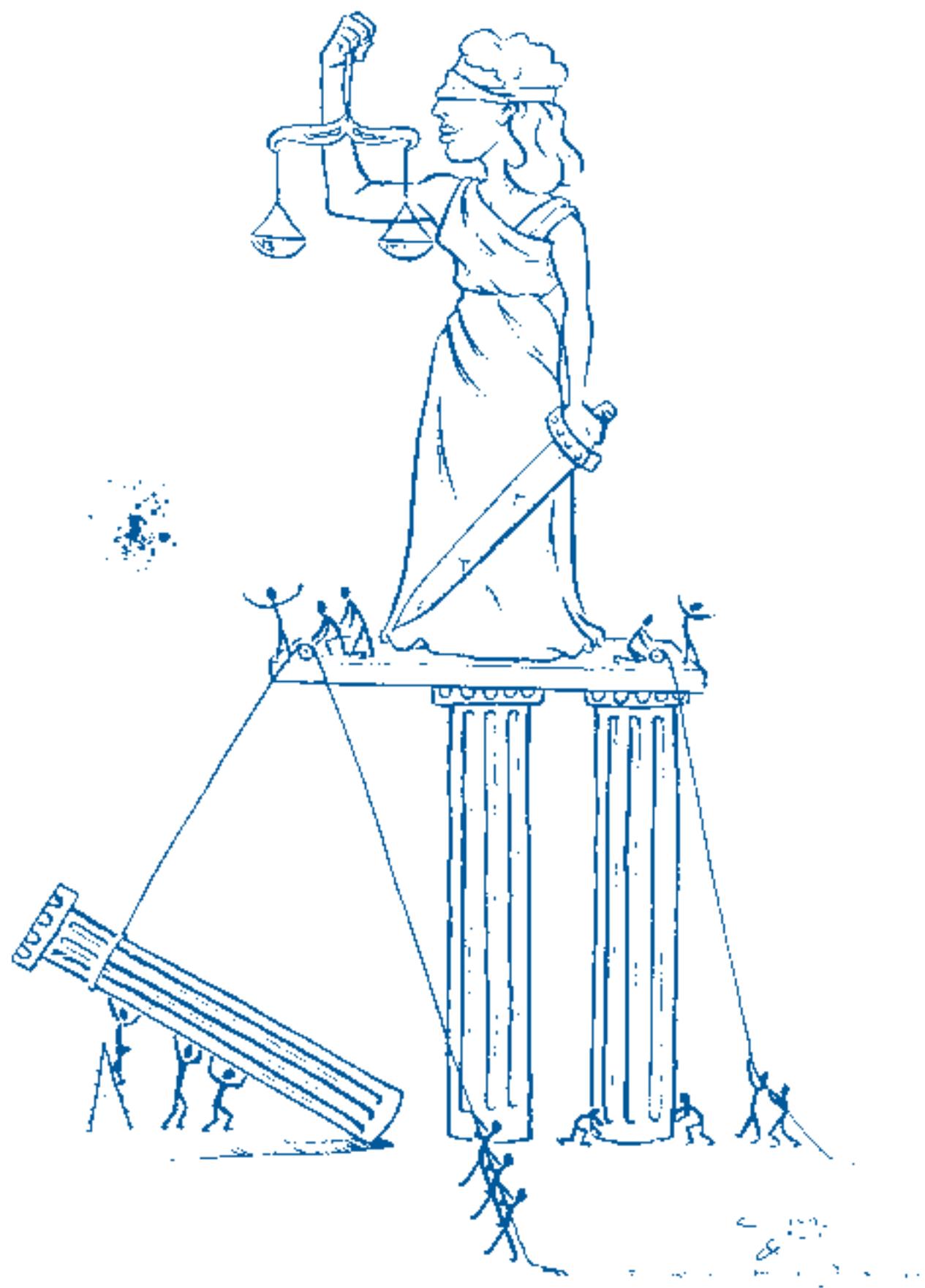
- *The revision of “red flag catalogues” to include transactions emanating from regions where corruption is endemic, where involved personalities include clients or beneficiaries holding high public office, and where clients are involved in high-corruption areas of business, such as the arms trade.*
- *Encouraging financial institutions to apply due diligence. Integrity tests can be run to test financial institutions and to identify training needs.*
- *Identifying non-compliant financial institutions and operators. Such an approach could identify institutions which – be it for reasons of lack of will or for lack of capacity – are failing to comply with international rules, and allow for administrative sanctions to be applied.*

It is not clear whether these legislative and administrative measures to combat money laundering will actually sweep up the proceeds of bribery. Countries which are not party to the present arrangements, and which may be a link (perhaps unknowingly) in the money-laundering chain, must introduce comparable legislation and couch it in such a way that it specifically encompasses the proceeds of bribery.

## ENDNOTES

- 1 Writing an Effective Anticorruption Law: Prem Notes No. 58, October 2001. <http://www.worldbank.org/afr/findings/english/find203.pdf>. -
- 2 The full legislation is at: <http://www.justice.gov.hk/blis.nsf/CurEngOrd?OpenView&Start=201&Count=59&Expand=201.1>
- 3 OAS General Assembly resolution AG/res.1398 (XXVI-0/96) of 29 March 1996, annex.
- 4 Office of the High Commissioner for Human Rights: International Covenant on Civil and Human Rights: [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm)
- 5 Quoted in Bertrand de Speville, "Reversing the Onus of Proof: Is It Compatible with Respect for Human Rights": [http://www.transparency.org/iacc/8th\\_iacc/papers/despeville.html](http://www.transparency.org/iacc/8th_iacc/papers/despeville.html)
- 6 For details of the cases and a more technical description of the issues, see Speville, Bertrand de. 1997. Reversing the Onus of Proof: Is It Compatible with Respect for Human Rights Norms (above) on which this section and the following section are based.
- 7 Attorney-General V. Hui Kin Hong, Court of Appeal of Hong Kong, Appeal No. 52 of 1995, p.16.
- 8 Section 9 of the Prevention of Bribery Ordinance (Hong Kong). Similar provisions are in the Secret Commissions Act 1905 (Australia) and 1910 {New Zealand}.
- 9 The Commissioner's full address and other related papers may be seen at <http://www.icac.org.hk/conference/AboutCF/Progframe.html>.
- 10 INTERPOL: Global standards to combat corruption in police forces/services: <http://www.interpol.int/Public/Corruption/Standard/Default.asp>
- 11 Transparency International: Transparency in the Police: [http://www.transparency.cz/index\\_uk.php?id=48](http://www.transparency.cz/index_uk.php?id=48)
- 12 Guidelines on the Role of Prosecutors, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 189 (1990): <http://www1.umn.edu/humanrts/instree/i4grp.htm>
- 13 Adopted by the International Association of Prosecutors in Havana, Cuba, September 1990: [http://www.iap.nl.com/icc\\_guidelines.html](http://www.iap.nl.com/icc_guidelines.html).
- 14 The full text is contained in International Prosecution Standards by Nicholas Cowdery QC <http://www.odpp.nsw.gov.au/speeches/HOPAC%202001-%20International%20Prosecution%20Standards.htm>. The IAP's website is at <http://www.iap.nl.com/>
- 15 GRECO 2003 Evaluation Report – Slovenia: [http://www.greco.coe.int/evaluations/cycle2/GrecoEval2Rep\(2003\)1E-Slovenia.pdf](http://www.greco.coe.int/evaluations/cycle2/GrecoEval2Rep(2003)1E-Slovenia.pdf)
- 16 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988: <http://www.unodc.org/adhoc/decade/conv.htm>
- 17 Inter-American Convention Against Corruption: <http://www.oas.org/juridico/english/Treaties/b-58.html>
- 18 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime: <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=141&CL=ENG>
- 19 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime: <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=141&CL=ENG>
- 20 Council of Europe Civil Law Convention on Corruption: <http://conventions.coe.int/Treaty/EN/Treaties/Html/174.htm>
- 21 Group of States against Corruption: <http://www.greco.coe.int/>
- 22 Financial Action Task Force on Money Laundering: <http://www.fatf-gafi.org/>





## STRATEGIES, SYSTEMS AND SOLUTIONS

Initiatives to improve standards of governance worldwide have until recently overlooked what promises to be the most significant approach of all: the systematic and conscious reshaping of a country's national integrity system. Even the expression is of recent origin, having emerged from discussions within the anti-corruption movement and widely popularized by development agencies.<sup>1</sup>

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

### SOME NATIONAL STRATEGIES

Lithuania's legislature, the Seimas, adopted a national anti-corruption program in January 2002 containing measures to be implemented during a long-term period between seven and ten years. The overall objective of the strategy is to reduce the level of corruption to the point where it no longer undermines social, economic and democratic development.

The program includes three main elements – corruption prevention, investigation and enforcement, public education – which are to be implemented in parallel, without giving priority to any of one of them. The program also establishes provisions for increasing the effectiveness of investigations of corruption, for involving society in combating corruption, and for the development of anti-corruption teaching programs.

All the active political parties cover the corruption issue in their own policy documents. The Seimas regularly receives reports from legal and other institutions (e.g. the custom department) and passes resolutions obliging the executive to implement specific anti-corruption measures. The anti-corruption measures themselves occupy an important place in the government's own agenda. The presi-

dent addresses the corruption issue in each of his annual addresses.

These issues are well covered by the media, which also highlights significant corruption cases. Often the media itself exposes corrupt officials and investigates the spread of corruption within various institutions. The Lithuanian media enjoys broad freedoms, and is not censored.<sup>2</sup>

The country strategy calls for increased transparency in the funding of political parties as well as improving the current system of land acquisition. Corruption-prone sectors are targeted and remedial measures provide for the curbing of political corruption, administrative corruption (including corruption in tax and customs, public procurement and privatization, health care and law enforcement). It is not a static document and may be reviewed, if necessary, every two years.<sup>3</sup>

In Hungary, a national action plan to curb corruption has been developed as part of the UN's Global Programme against Corruption<sup>4</sup> pilot project. It is intended to serve as a model for other newcomers to the European Union. The anti-corruption measures are aimed at integrating national level specifics with the EU regional requirements and the United Nations' global approach.

Romania's action plan is also driven in part by the prospect of EU accession (anti-corruption measures are examined as in the context of the “Copenhagen Criteria”<sup>5</sup> by which preparation for accession to the EU is assessed). In 2001, it established a National Committee for the Prevention of Criminality, within which a central group is responsible for the implementation of two programs, entitled The National Programme for Prevention of Corruption and The National Action Plan against Corruption.

The multi-pronged Romanian strategy targets sectors and other areas vulnerable to corruption. For example, the judicial reform program focuses on:

- *building a competent legal profession*
- *ensuring that the appointment and promotion of magistrates is both fair and independent*

- *ensuring that universities adopt ethics programs.*

The reform of public administration and management is based on the decentralization of public services and seeks to streamline and simplify administrative regulations and to strengthen the oversight roles played by the judiciary, audit organizations and ombudsmen. The National Programme also targets corruption in political activities and conflicts of interest, as it seeks to regulate and restrict both parliamentary immunity and political party financing.

The Romanian action plan is fortified by an ability to appoint a specialised anti-corruption group on the request of the Prosecutor's Office. The group, modeled on Spain's independent Anti-Corruption Special Prosecutor's Office, investigates claims of corrupt behavior and bribery allegations.<sup>6</sup>

## A NATIONAL INTEGRITY SYSTEM

It is generally accepted that modern government requires accountability. Without it, no system can function in a way that promotes the public interest, rather than the private interests of those in power.

Basically, the task in developing countries and countries in transition, is to move away from a system which is essentially top-down; one in which an autocratic ruling elite gives orders which are followed, to a greater or lesser degree, by those down the line. The approach is to move instead to a system of "horizontal accountability", one in which power is dispersed, where no one has a monopoly, and where each person is separately accountable. The process is not new. It is one which industrialized countries have also experienced on their way to attaining a modern form of government.

In such a system, there must be a free press. But the press must respect certain limits imposed by law – for example, avoiding defamatory attacks on individuals. For even a free press is accountable, not only perhaps to a press council (which may or may not be a statutory body) but also, and ultimately, to the courts. For their part, the courts are no longer servants of the ruling elite, but rather act with independence and enforce the rule of law, and the rule under the law. Yet such independence is

not absolute. Judges are answerable for their individual decisions through a system of appeals, and each judge is accountable to another body, be it a legislature or a judicial services commission, for his or her integrity.

That body, in turn, is generally accountable to a legislature, and, thus, ultimately, to the people through the ballot box. The system of "horizontal accountability" results in a so-called "virtuous circle:" one in which each actor is both a watcher and is watched, is both a monitor and is monitored. Power is diffused, rather than monopolized.

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

Although the contemporary wave of democracy has held much promise, in practice, democratic gains are being threatened and undermined by some of the very phenomena that were meant to disappear with construction of democratic states: corruption, abuse of power and nepotism. Simply to democratize is to introduce a different form of vertical accountability – downwards, rather than upwards. But the need to refashion instruments of governance runs very much deeper than simply moving from a totalitarian system to one in which the people periodically have a voice.

The shift is thus from a system of vertical responsibility to one of horizontal accountability, whereby a system of agencies and watchdogs are designed to prevent abuses of power by other agencies and branches of government. These agencies and watchdogs include the courts, independent electoral commissions, supreme audit institutions, central banks, professional organizations, legislatures (and their public accounts committees) and a free and independent media.

However, the passage of transition is slow and painful. In some societies it has been a question of rehabilitating what was once there before; in others, notably in Eastern Europe, it can be a question of constructing the modern state literally from the

ground upwards. There are no institutional memories of times of horizontal accountability.

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

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

The whole integrity edifice is maintained (or undermined) by a bottom-up process. Corruption may filter down through poor leadership examples and practices, but it is public awareness and, where warranted, public outrage, that is a society’s ultimate defense.

However, the assumption underlying the approach advanced here, is that evolution can be an effective and preferable route to society’s participation – through democratic processes and involving the private sector, media, professions, churches and mosques, as well as non-governmental organizations. Thus, reform is initiated and sustained not only by politicians and policy makers, but also throughout civil society.

Reform programs, particularly those in developing countries and countries in transition which have been supported by international or donor agencies, have tended to focus on a single area to the exclusion of others. These are “single pillar” strategies. Frequently, the choice has been made of a “pillar” that is relatively “safe,” at the expense of addressing more difficult and challenging areas. For instance,

in one country, donor agencies invested heavily to strengthen the operational capabilities of a financial watchdog institution. However, although widely covered by the media, the institution’s highly professional reports were simply ignored, as the rest of the “system” remains effectively dysfunctional.

Certainly, a national integrity system reform program can accommodate a piecemeal approach, but this must be coordinated and within the bounds of a program which embraces each one of the relevant areas, and their inter-relationships with others.

Underpinning the integrity system strategy is the conviction that all of the issues of contemporary concern in the area of governance – capacity development, results orientation, public participation, and the promotion of national integrity – are integral to the performance of the overall strategy. General goals should include:

- *public services that are both efficient and effective, and which contribute to sustainable development*
- *government functioning according to the law, with citizens protected from arbitrariness, including human rights abuses*
- *development strategies which yield benefits to the nation as a whole, including its poorest and most vulnerable members, and not just to the well-placed elite*

## **BUILDING A COHERENT NATIONAL INTEGRITY SYSTEM**

The ultimate goal of establishing a national integrity system is to make corruption a high-risk undertaking that yields low returns. Administration of the system, however, should not at the same time be difficult and cumbersome. It is not a pursuit of “absolute integrity,” which, as some writers have pointed out, can needlessly encumber administrators. Such an aspiration risks creating so many layers of checks and balances that officials are unable to do their jobs. Alternatively, the result can be so repressive and restrictive that officials are similarly impeded. The national integrity system approach avoids these

pitfalls as it is designed to prevent corruption from occurring in the first place at the same time as it leaves managers free to manage. Nor does it rely unduly on penalties after the event.

Every country already has a national integrity system of some description in place, however dysfunctional and ineffective it may be. The concept of a national integrity system helps to focus reformers on the overall strategy for fighting corruption. It is not enough to address a single element or “pillar” of the system in isolation from others.

There are variations from country to country, but typical pillars of a national integrity system include:

- *Executive*
- *Judiciary*
- *Legislature*
- *Financial Watchdog Institution*

- *Watchdog agencies (public accounts committee, auditor-general, ombudsman, police, anti-corruption agency, etc.)*
- *Public service*
- *Civil society (including the professions, the trade unions and the private sector)*
- *Media*
- *International agencies*

Complementing each of the national integrity system institutional pillars are core rules and practices. These rules and practices make up the toolkit employed by the various institutions. The absence of core rules and practices are clear indicators of weakness.

These rules and practices are not necessarily confined to any single part of society, as the following table illustrates:

Sector	Anti-Corruption Instrument	Main Goal
Society at large	Elections	Achieving integrity by evicting corrupt politicians
Parliament	Anti-corruption laws	Empowering anti-corruption enforcement
Judiciary	Courts	Punishing the corrupt; Corruption-free judiciary
Government	Anti-corruption reforms; adopting integrity regulations and policies	Integrity of the executive branch of government
Public service	Codes of conduct; auto-regulatory instruments	Limiting corruption and purging the service from corrupt officials
Business	Codes of professional ethics	Corrupt-free economy
NGO sector	Watchdog activities	Preventing corruption
Media	Publications; electronic programs	Exposing corruption; enhancing integrity standards

In their totality, the social sectors in the left-hand column together with the anti-corruption instruments and the main goals in the other two columns comprise the outline of a basic national integrity system.

Establishing a sound national integrity system requires the systematic identification of gaps and weaknesses, as well as opportunities for strength-

ening or augmenting each of these pillars into a coherent framework. If the system is wholly dependent on a single pillar such as, perhaps, a “benign dictator,” or only a very few pillars, it will be vulnerable to collapse. The system may give the outward appearance of functioning in the short term; for instance, in the case of clean-ups conducted by military governments on the overthrow of corrupt

civilian regimes. However, unless there is also a timely move toward accountable governance, societal institutions can gradually decay without a functioning integrity system.

The national integrity system approach unlocks a new form of diagnosis and potential cure for corruption. Instead of looking at separate institutions (e.g., the judiciary) or separate rules and practices (e.g., criminal law) and then focusing on stand-alone reform programs, the whole system is considered. For example, what is the benefit of a sound and clean judiciary ready to uphold the rule of law, if there is corruption in the police, investigators, prosecutors or the legal profession? The trial judges would simply not receive the cases they should hear; they would then sit in isolation – honest, capable, yet able to achieve little.

### THE NATIONAL INTEGRITY WORKSHOP

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

A national integrity workshop takes as its starting point the premise that:

- *People living in a country know and understand their problems far better than any outside expert. No outsider can better understand the social dynamics, the history and the political realities that underlie the incidence of corruption in a society, than can its own members. The expression “members” embraces civil society (including the private sector), no less than government.*
- *The issue of integrity transcends the divides of political parties and so should be something upon which all can agree.*
- *Without the active participation of leaders from all fields of government and civil society, meaningful reforms are unlikely to be achieved.*

- *Without the support of civil society, any anti-corruption reform initiative by a government is likely to lack credibility and be unlikely to succeed, let alone be sustainable in the longer term.*

The exercise, therefore, is wholly conceptualized, driven and owned by local participants. The process involves not just government stakeholders, as identified by the integrity pillars, but also non-governmental organizations, including business groups and professions, the media and political parties from across the political spectrum.

The essential dynamic must be an internal one. Similarly, the role of outside experts, to be effective, should be limited to that of facilitators for a project. They can inform and provide guidance as to what may have been found to work in other countries, but they cannot pretend to diagnose or to prescribe. People know their own societies best.

There is much evidence to show that prescriptions by external experts fail to take root and flourish. Such interventions tend to be based on a relatively unsophisticated implanting of approaches taken from one country and applied to another. In the processes described above, there is a clear and effective role for such experts, but as mentors who provide ideas and concepts, not solutions as such. Their role has to be contained to ensure that an internal dialogue takes place, and not an intrusive lecture by an external source on how other countries have approached similar problems, which may have little, if any relevance to the challenges facing the country concerned.

Above all, the reforms must be sustainable and be capable of outliving their initiators. The system must be able to cope with and contain the pressures that are placed upon it by changes of government. The process is likely to be slow, often frustrating and never ending. Experience in the developed world demonstrates that there can be no perfect solution. Rather, a fine-tuning of these reforms is required as the dynamics of society change.

To achieve reform, a coalition has to be built around a consensus in support of concerted action. It must draw in various stakeholders from civil society no less than from the formal state apparatus, and it

must gain their commitment to a concrete action plan. The agreed reform program must move forward with a very clear vision of how the people would like to see their country governed, not just for the present or the immediate future, but for future generations.

### DEVELOPING A NATIONAL INTEGRITY REFORM PROGRAM

The design and implementation of a national strategy requires the whole-hearted participation of a variety of stakeholders. It is, therefore, important for these to be identified and brought into the process from the outset, both to build ownership but also to ensure that the resulting program reflects their own insights and experience.

Once the stakeholders have been identified, the formal process usually starts with the holding of a meeting to discuss the national integrity program.<sup>7</sup> This brings together a broad-based group of stakeholders to form a shared understanding of the types, levels, locations, causes, and remedies for corruption and to promote better public service delivery by facilitating reform that increases accountability and transparency in institutions.

In a national integrity meeting, the objectives will normally be threefold:

- *To initiate a sharing and learning process*
- *To create a partnership between participants from different stakeholder groups, the immediate product of which would be an outline adopted by consensus which could serve as a focus for informed public discussion and political debate in the run-up to elections*
- *To create an environment where new roles could be tested and practiced in a fashion that may be replicated in society in general*

One of the workshop's focuses is to create partnerships between country participants, e.g. representatives of the government, media, religious and private sector groups, and NGO's. Partnerships can, however, be created between various other

stakeholders. For example, participants may wish to organize workshops involving donors as well.

As has been emphasized above, it is important that participants from donor agencies do not impose their own views on country participants. They can be observers who feed in their experience as and when the country participants ask for it and otherwise only listen and comment on group feedback by country participants during plenary sessions.<sup>8</sup>

One model emphasizes the production of tangible outputs, including both an action plan and an integrity pledge that express the consensus of the workshop on the issue of corruption and the personal commitment of those attending the workshop to address the issues meaningfully. The action plan and the integrity pledge should be given wide publicity at the end of the workshop by both print and broadcast media, both as a way to raise public awareness of the problem and also to create public expectation that those at the workshop will live up to their commitments.<sup>9</sup>

It is important for participants to devise solutions and action plans that:

- *identify the key policy instruments and programs that could potentially affect the national integrity system*
- *consider how policy instruments and programs could best be designed and implemented so as to enhance integrity*
- *review constraints internal and external to the organizations' effectiveness and efficiency, including coordination between government departments and between various other actors*
- *focus on sharing the learning process; i.e., what does work and what does not work within organizations, and among organizations in other countries/regions.*

### NATIONAL INTEGRITY SYSTEM SURVEYS

There is a strong case for measuring and monitoring how countries address and deal with corrup-

tion. The national integrity system (NIS), through its constituent parts, offers a systematic, cohesive and coherent approach not only to what is being measured, and how, but also to encourage countries and donors to use it as the basis for national plans and to identify areas for further reform.

The National Integrity System Country Study Reports series, prepared by Professor Alan Doig, establishes not only that pillars for a national integrity system are identifiable (most countries in these reports had nearly all the pillars, though some had additional pillars) but that they provide a gateway through which a country's anti-corruption performance can be assessed.

Importantly, the NIS Country Study Reports come from organizations based within the countries themselves – primarily capable NGOs and specialist research institutes with the knowledge and expertise to monitor developments and draw attention to traditional and emerging patterns of corruption. Bulgaria and Lithuania are two countries among those that have been covered to date.<sup>10</sup>

This in-country research identifies the core laws, rules and practices that seek to protect societies from corruption through national integrity systems in the following areas: executive branch of government; legislature; political party financing; elections; auditor general; judiciary; police and state prosecutors; public service; public procurement; local government; media and civil society organizations.

The Country Study 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; whistleblowing; codes of conduct; blacklisting and complaints mechanisms.

This formal framework is followed by an assessment of what actually happens in practice. The assessment highlights deficiencies in the formal framework itself or in its implementation. For example, rules and procedures designed to reduce opportunities for nepotism and cronyism or other corrupt relationships may exist, but may not always be applied in practice.

The Country Study Reports also examine the governments' anti-corruption strategies (where such a strategy exists). In several cases, they make use of further surveys and indicators to measure progress. An overview report of the first 18 countries covered in the series draws together the reports' findings, providing examples from the individual countries and discussing how the national integrity systems' pillars interact.<sup>11</sup>

### INTEGRITY SYSTEM "MAPPING"

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>12</sup> The first system to be mapped was in the Australian state of Queensland. Queensland was chosen as the first jurisdiction for this project because it has a reasonably comprehensive list of integrity agencies and practices, many of which were developed comparatively rapidly during the early 1990s following a comprehensive investigation into long-standing systemic corruption, particularly in the police and in political processes. Moreover, the improvements were developed following a deliberate process of institutional reform via an electoral and administrative reform commission.

The Queensland pilot program (published as the Queensland Integrity Systems Assessment)<sup>13</sup> involved:

- *A preliminary workshop involving major integrity agencies*
- *Interviews and questionnaires with 24 public agencies*
- *A second workshop to discuss the interaction between agencies*
- *A focus group to consider preliminary findings*
- *The compilation of a handbook*

The goals of the Queensland pilot program were to:

- *Describe and map the Queensland Integrity System*

- *Understand the interactions between elements of the Queensland Integrity System*
- *Develop a methodology for describing and mapping other such systems*
- *Lay the groundwork for developing best practice models*
- *Generate discussion of the Queensland integrity system and identify a range of issues which participants believed would benefit from review and reform.*

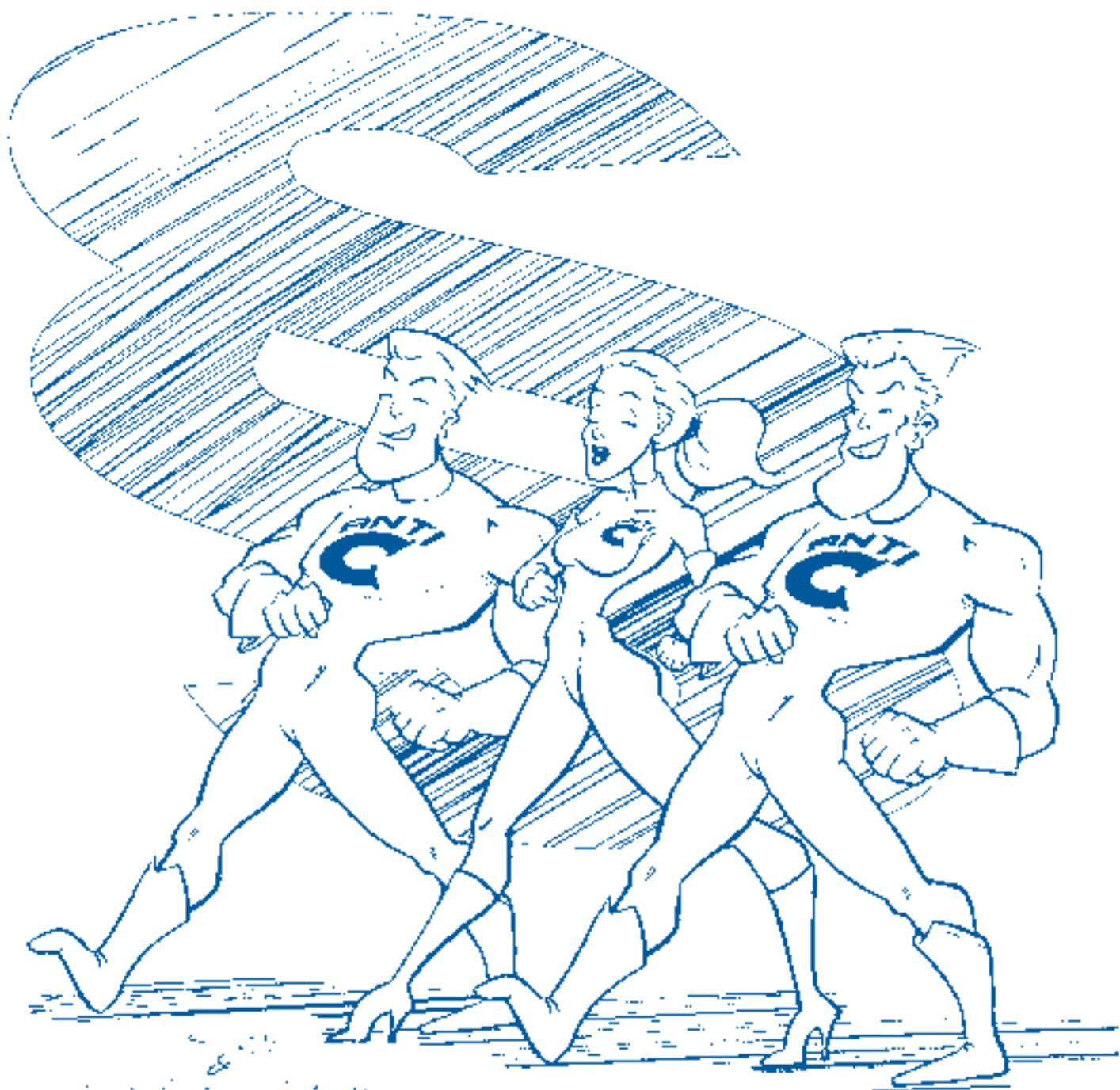
The Queensland national integrity system methodology is an ambitious undertaking and requires considerable resources. The more straight-forward country studies, on which the Queensland approach is based, provide an attractive entry point for diagnosis of the strengths and weaknesses of integrity institutions and practices, leaving it for later to decide whether to tackle more complex, second-generation mapping of national integrity systems.

#### ENDNOTES

- 1 The concept was first advanced in the first edition of what is now *Confronting Corruption: The Elements of a National Integrity System*; *The TI Source Book 2000* by Jeremy Pope (Transparency International, Berlin, 2000). The full text is available at <http://www.transparency.org/sourcebook/index.html>
- 2 In 1999, a sociological survey revealed that 73.8 percent of the businessmen interviewed considered that the media was the institution deserving the greatest praise for combating corruption. Other respondents also gave the media the first place.
- 3 *Anti-Corruption Plan for Transition Economies*: <http://www.oecd.org/dataoecd/48/57/1960725.pdf>
- 4 The GPAC was launched by the UNODC in 1999 in collaboration with the United Nations Interregional Crime and Justice Research Institute (UNICRI) to assist member states in their efforts to curb and prevent corruption by increasing the risks and costs of abusing power for private gain. "The manifestation of corrupt practices in public life, and the lack of effective institutions to counter it, has long-term detrimental effects on sustainable development," UNODC Executive Director Antonio Maria Costa stressed at Brussels on 12 June 2003 at the ? National Conference on Cleaner Public Life in Hungary.
- 5 European Commission Strategy Paper and Report 2003: [http://www.fifoost.org/EU/strategy\\_en\\_2002/node7.php](http://www.fifoost.org/EU/strategy_en_2002/node7.php)
- 6 The Spanish model has been recommended for Slovakia.: See: [http://www.vlada.gov.sk/bojprotikorupcii/twining\\_eng/anticorruption\\_prosecution\\_spanish\\_slovakia.doc](http://www.vlada.gov.sk/bojprotikorupcii/twining_eng/anticorruption_prosecution_spanish_slovakia.doc)

- 7 The UN Anti-Corruption Toolkit contains a detailed description of how national integrity workshops can be organized and executed: [http://www.unodc.org/unodc/corruption\\_toolkit.html](http://www.unodc.org/unodc/corruption_toolkit.html)
- 8 There should be no more than 15 people per group and facilitators should ensure that all group members have an opportunity to speak. Facilitators should prevent participants from dominating discussions.
- 9 Examples of integrity pledges include Papua New Guinea ([peb.anu.edu.au/pdf/PEB18-1Iarmour-policy.pdf](http://peb.anu.edu.au/pdf/PEB18-1Iarmour-policy.pdf)); Honduras (<http://216.239.39.104/search?q=cache:cqm0MxiPuzlJ:www.wri.org/wri/governance/pdf/ncsds-gfed/honduraspledge-eng.pdf+Honduras,+%22integrity+pledge%22&hl=en&ie=UTF-8>.)
- 10 Transparency International National Integrity Systems Country Reports: [http://www.transparency.org/activities/nat\\_integ\\_systems/country\\_studies.html](http://www.transparency.org/activities/nat_integ_systems/country_studies.html)
- 11 The full overview report can also be downloaded as well as the country studies at [http://www.transparency.org/activities/nat\\_integ\\_systems/nis\\_index.html](http://www.transparency.org/activities/nat_integ_systems/nis_index.html). The series is being continued by Prof. Alan Doig and Stephanie McIvor of Teesside Business School, University of Teesside, United Kingdom.
- 12 The project partners are TIRI (the governance-access-learning network) ([www.tiri.org](http://www.tiri.org)) and the Key Centre for Ethics, Law, Justice and Governance at Griffith University, Brisbane, Australia (<http://www.gu.edu.au/centre/kceljag/>).
- 13 The study and the handbook that was developed are available at: <http://www.gu.edu.au/centre/kceljag/>





As the corrupt grow more sophisticated, conventional law enforcement agencies become progressively less able to detect and prosecute complex corruption cases. Matters are made worse when corruption is endemic and when conventional law enforcement mechanisms themselves harbor corrupt officials.

In recent years, governments have sought to bolster enforcement and prevention efforts by creating specialized anti-corruption agencies.<sup>1</sup>

### CAN ANTI-CORRUPTION COMMISSIONS BE EFFECTIVE?

The usual model for anti-corruption agencies or commissions is the Hong Kong Independent Commission against Corruption (ICAC)<sup>2</sup> This Commission, established by the Independent Commission against Corruption Ordinance 1974<sup>3</sup> serves not only to investigate (but not prosecute) allegations of corruption, but also to run public awareness campaigns and to audit the management systems of individual government departments and agencies from an anti-corruption perspective. It has proved to be one of the relatively few outstanding successes in the fight against corruption anywhere in the world. It was also set up against a background of systemic and widespread corruption, as graphically related on its website.<sup>4</sup> Since its inception, the Commission has adopted a three-pronged approach of prevention, investigation and public education to fight corruption.<sup>5</sup> It has won the support of the community, and Hong Kong is now one of the least corrupt places in the world.

Surveys of the public in Hong Kong over the years have confirmed a confidence rating in the ICAC of between 98 and 99 per cent – well above that of any other agency of the administration. There could be no greater endorsement of their success in winning public support.

Hong Kong takes as its starting points the following principles:

- *Corruption occurs when an individual abuses his authority for personal gain at the expense of other people.*
  - *Corruption brings injustice and, in its more serious manifestations, puts the lives and properties of the community at risk.*
  - *The spirit of the Prevention of Bribery Ordinance (POBO)<sup>6</sup> enforced by the ICAC is to maintain a fair and just society.*
  - *The law protects the interests of institutions and employers and inflicts punishments on unscrupulous and corrupt staff.*
- Government officials are subject to Sections 3, 4 and 10 of the Prevention of Bribery Ordinance and staff of public bodies (who may not technically be “government officials”) are subject to Section 4.<sup>7</sup>
- Section 3 reinforces the spirit to uphold a high standard of integrity within the civil service by:
- *restricting civil servants from soliciting or accepting any advantage without the general or special permission of the head of government*
  - *waiving the requirement of proof of an actual corrupt act or undertaking*
- Section 4 deals with corruption of public officials. Under this section:
- *It is an offense for a public servant to solicit or accept any advantage offered as an inducement to or reward in connection with the performance of his official duty.*
  - *Any person offering such an advantage (the “giver”) also commits an offense.*
- Section 10 tackles seriously corrupt civil servants and brings to book those who receive bribes over a period of time even when the assets they possess cannot be linked to any specific corrupt deal. It stipulates that, in the absence of a credible explanation, it is an offense for a civil servant to maintain a standard of living or to possess or to control assets not commensurate with his official salary and benefits.
- The Hong Kong model does not allow the ICAC itself to prosecute cases, leaving the conventional prosecution service to decide whether or not the

facts warrant court proceedings. The separation of powers ensures that no case is brought to the courts solely on the judgment of the ICAC.

The Hong Kong model has proved effective not just because of the quality and determination of its staff coupled with the excellent legal framework within which they work. Rather, it is because the concepts of prevention and prosecution have both been functions of the Commission. Prevention (and the community education that goes with it) has been a core activity of the Hong Kong example, often 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, with results that are the envy of many. Those who have tried to copy the model have largely failed because they have lacked both this coherent approach and the resources necessary to carry it through. More recently, promising starts have been made in Botswana and Malawi. There is also the well-established New South Wales ICAC in Australia, whose website is a unique source of information on corruption prevention and investigation.<sup>8</sup>

Another major feature has been that, from the outset, Hong Kong had a judiciary of integrity, which meant that cases were properly heard and processed. In the absence of the rule of law, the experiment would almost certainly have had very different results. This provides the caution that a country intending to follow the Hong Kong path needs also to focus very sharply on the integrity needs of its judiciary.

If a judiciary is suspect, then the emphasis from the outset would need to be on the preventive and awareness-raising aspects of a Commission's mandate, rather than centered on prosecutions. However, given that corrupt civil servants can be dismissed administratively, without a court case, and that a head of government generally has it within his or her power to dismiss ministers, the agency could still make a considerable impact. The creation of specialized "anti-corruption courts" or "integrity courts" would be another possibility. Judges and support staff carefully selected for their integrity would be selected for such courts.

In a different model, the responsibilities of an anti-corruption agency are combined with the office of

the ombudsman. The ombudsman, in this case, has the power to prosecute. This has been done with some success in a number of countries, including the Philippines.<sup>9</sup>

Others argue that there should be a clear distinction between the two roles: that the ombudsman's office serves to promote administrative fairness, and that this is best achieved by winning the confidence of the bureaucracy. (Even so, the South African experience suggests that the conventional Ombudsman is still able to make his mark in the fight to contain corruption.)<sup>10</sup> An agency or commission which is also charged with enforcement is more likely to be feared than trusted.

In 2000, to strengthen anti-corruption efforts, the Lithuanian legislature, the Seimas, adopted a law on the Special Investigations Service (SIS) and converted a body previously accountable to the government, into an agency accountable to the president and the Seimas.

The Lithuanian law provides for the independence of both the SIS as an agency and for its investigations. The main functions of the SIS are:

- *to carry out operational activities in detecting and preventing crimes involving corruption*
- *to conduct an inquiry and preliminary investigation*
- *to collect, store, analyze and sum up information about corruption and related social and economic phenomena*
- *to prepare and implement corruption prevention measures*
- *to report to the President of the Republic and the Seimas on the results of the activity of the service*
- *to submit its proposal on how to make anti-corruption activities more effective*

In performing some of their functions, the SIS officers have the right to carry out all operational activities provided for by the Code of Criminal Procedure and the Law on Operational Activity. In certain cases, the

activities must be sanctioned by a prosecutor or a judge. This last is an important safeguard against possible abuse of otherwise wide-ranging powers.

### WHY SOME ANTI-CORRUPTION AGENCIES FAIL AND WHY SOME SUCCEED

It is likewise important to understand some of the reasons why anti-corruption agencies have failed and to ensure that these pitfalls are avoided. These include:

- *Weak political will – Vested interests and other pressing concerns overwhelm the leadership*
- *Lack of resources – There is a lack of appreciation for the cost-benefits of a “clean” administration and of the fact that an effective agency needs proper funding.*
- *Political interference – The agency is not allowed to do its job independently, least of all to investigate officials at the higher and highest levels of government.*
- *Fear of the consequences – A lack of commitment and a readiness to accommodate the status quo lead to agencies losing independence, resources, or both.*
- *Unrealistic expectations – Fighting systemic corruption is a long-term exercise.*
- *Excessive reliance on enforcement – The effective preventive capacities of the agencies are not fostered.*
- *Ignoring the elimination of opportunities for corruption to occur – Relying on enforcement after the event, corruption levels continue unabated.*
- *Inadequate laws – Without enforceable and effective laws, an agency is hamstrung.*
- *Being overwhelmed by the past – A new agency, usually small and needing to settle in, can be overwhelmed by inheriting a vast backlog of unfinished business from other enforcement agencies.*
- *Failure to win the involvement of the community – Lack of public awareness campaigns, etc.*
- *Insufficient accountability – If the agency is not itself accountable in appropriate ways, it can become an agency for persecuting government critics.*
- *Loss of morale – As people lose confidence in the agency, its staff lose morale.*
- *The agency itself becomes corrupt.<sup>11</sup>*

From this, it is apparent that to succeed an agency needs:

- *To be an element within a wider, tailor-made national strategy*
- *Government commitment and political will*
- *Concerted action with all other stakeholders*
- *Adequate laws with clearly-defined offenses and enforcement provisions*
- *Impartiality and independence from political influences*
- *Transparency and effective accountability mechanisms*
- *Credibility and public trust*
- *Consultation with civil society*
- *Appropriate expertise and specialization*
- *Adequate resources and funding*
- *A high level of ethics embodied in effective codes of conduct*

In deciding whether or not to establish an anti-corruption agency, the words of Alan Doig, a professor of fraud management at the University of Teesside in the UK, should be heeded.<sup>12</sup> In a major study, he notes that many countries have established anti-corruption agencies without proper evaluation and in contexts where the appropriate organizational

features are absent. This adversely affects their development and operational effectiveness.

Doig suggests that the following questions be taken into account:

- *What is the problem to be addressed, and how should it be addressed?*
- *Is the corruption high-volume (such as traffic police or license clerks) or high-value (such as procurement contracts) or politically sensitive (involving government ministers) or sophisticated (such as money laundering with overseas and organized crime dimensions) or a combination of all of these?*
- *What are the strengths and weaknesses of existing institutions and should or could they be resolved by a new institution, a merger, interagency co-ordination or co-operation, or segmented responsibilities?*

### **CAN A PROPOSED AGENCY BE PROPERLY RESOURCED?**

From the outset, it is important to assess whether any such new body is necessary, and in particular, whether the costs of running a properly funded commission can be assured. An under-funded exercise will be doomed to failure, although few will be able to afford the well-funded operation in Hong Kong. There the funding approach was built on the conviction that the resources invested in corruption prevention in fact return large dividends to the public purse, both directly and indirectly. Some administrations provide their agencies with a share of what they recover, although this approach can lead to over zealousness and abuse. However, notwithstanding its relatively modest resources, the Lithuanian agency has earned a good reputation in a comparatively short period of time.

### **WHERE SHOULD SUCH AN AGENCY BE POSITIONED?**

Having decided that an agency is needed, where should it be positioned? Should it be independent

of other government agencies? In Hong Kong, the agency is placed administratively within the office of the head of government, but reports independently to the legislature. Its separateness from the public service and its autonomy of operation is reflected in law and practice. Alternatively, should an agency be placed within a ministry of the interior or ministry of justice? This model was recently rejected in Lithuania.

An agency can itself be used corruptly, in that it can be turned – with its formidable array of special powers – against political opponents. The introduction of any agency must guard against this possibility. Placing it under a minister in a government agency is to tempt fate. The administration creating it may be above suspicion, but in democracies institutions have a longer life span than do governments, and none can predict the future. Continuing integrity at the highest levels of government should not be assumed.

More than this, the worst excesses of “grand corruption” can take place in and around the office of the president. An anti-corruption agency placed in such an office is hardly in a position to tackle superiors in the office hierarchy unless it is supported by other accountability mechanisms. Thus, an agency should be responsible to the legislature and to the courts, in much the same way as is an ombudsman. By monitoring the daily work of the Hong Kong Independent Commission against Corruption (ICAC), citizens’ advisory committees build additional public confidence in the institution.

By contrast, when a commission has been placed wholly under the office of president (without the support of other separate accountability mechanisms), and reports only to the president, it has generally been conspicuously unsuccessful in tackling high-level corruption.<sup>13</sup>

### **APPOINTING THE HEAD OF THE AGENCY**

The effectiveness of the agency may well be determined by how the officeholder is appointed or removed. If the appointing mechanism ensures consensus support for an appointee through the legislature, rather than government, and an account-

ability mechanism exists outside government (e.g., a legislative committee on which all major parties are represented), the space for abuse or non-partisan activities can be minimized.

A flaw in many legislative schemes involves giving a president (or any political figure) too much control over the appointment and operations of an anti-corruption agency. The president is the head of the executive branch of government, and members of the executive can also succumb to temptation. This could place the president in the impossible position of deciding whether or not to prosecute close political colleagues.

Precise appointment procedures will vary from country to country, but each should address the issue of whether the proposed mechanism sufficiently insulates the appointment process. It must be one that ensures that an independent person of integrity is likely to be appointed, and that such a person is adequately protected while in office. The office-holder should also be afforded the same rights of tenure of office as those enjoyed by a superior court judge. Removal from office should never be at the discretion of existing powers, but only in accordance with a prescribed and open procedure, and only on the grounds of incompetence or misbehavior.

In several countries, attempts have been made to appoint serving judges as head of an anti-corruption commission. However, these have invited successful court challenges on the grounds that a judge is, by virtue of his or her post, constitutionally disqualified from serving at the same time in a position within the executive government by virtue of the doctrine of separation of powers.

### THE POSITION OF THE HEAD OF STATE AND GOVERNMENT

The framework must necessarily provide for a procedure to deal with the theoretical situation of the anti-corruption agency or commission finding evidence that a president may have acted corruptly. However remote the likelihood of this happening may be, lawmakers must look ahead to unpredictable eventualities. They must also reflect on the

issue of public distrust if the president is seen as being outside the scope of the agency's effective jurisdiction. Even more significantly, a special provision will send the very important signal to the public that the government and the legislature are serious about countering corruption and that no one is exempt from the rule of law. The public relations aspect of this provision alone warrants its inclusion.

The head of an anti-corruption agency cannot generally bring charges against a president while in office, as he or she is usually immune from suit or legal process under a country's constitution. Impeachment proceedings will generally follow per orders from the legislature. The legislature speaker presides over the proceedings. This immunity gap can be closed if the anti-corruption legislation allows the head of the anti-corruption agency to report the matter in full to the speaker of the legislature when:

- *There are reasonable grounds to believe that the President has committed an offense against the Act.*
- *There is prima facie evidence which would be admissible in a court of law.*

Thereafter, it would be the responsibility of the speaker to proceed in accordance with the legislature's orders. An alternative is to provide for a special prosecutor, as occurs under US law.

### KEEPING THE ANTI-CORRUPTION AGENCY CORRUPTION-FREE

Such an agency is obviously a ripe target for corrupt interests and for the attention of organized crime. Robust steps have to be taken to prevent it from becoming a victim of corruption itself. Hong Kong has achieved this through augmenting its accountability to the head of government and to the legislature with a series of advisory committees.

There are four of these, made up of some 40 prominent citizens who are appointed by the head of government to oversee the work of the ICAC. The Advisory Committee on Corruption oversees the general direction of the ICAC and advises on policy matters; the Operations Review Committee

oversees the work of the ICAC's investigative arm; the Corruption Prevention Advisory Committee advises on the priority of the corruption prevention studies and examines all the study reports; and the Citizens Advisory Committee on Community Relations advises the ICAC on the strategy to educate the public and enlist their support.<sup>14</sup>

Particularly critical is the role played by the Operations Review Committee, which is positioned to detect any serious malfunctioning and abuse within the organization. The terms of reference for this committee include:

1. *To receive from the Commissioner information about all complaints of corruption made to the Commission and the manner in which the Commission is dealing with them.*
2. *To receive from the Commissioner progress reports on all investigations lasting over a year or requiring substantial resources.*
3. *To receive from the Commissioner reports on the number of, and justifications for, search warrants authorized by the Commissioner, and explanations as to the need for urgency, as soon afterwards as practical.*
4. *To receive from the Commissioner reports on all cases where suspects have been set free on bail by ICAC for more than six months.*
5. *To receive from the Commissioner reports on the investigations the Commission has completed and to advise on how those cases that, per legal advice, are not being subject to prosecution or caution, should be pursued.*
6. *To receive from the Commissioner reports on the results of prosecutions of offenses within the Commission's jurisdiction and of any subsequent appeals.*
7. *To advise the Commissioner on what information revealed by investigations into offenses within its jurisdiction shall be passed to government departments or public bodies, or other organizations and individuals; or, where in exceptional cases, it has been necessary to pass such infor-*

*mation in advance of a Committee meeting, to review such action at the first meeting thereafter.*

8. *To advise on such other matters as the Commissioner may refer to the Committee or on which the Committee may wish to advise.*
9. *To draw to the Chief Executive's (head of government's) attention any aspect of the work of the Operations Department or any problems encountered by the Committee.*
10. *To submit annual reports to the Chief Executive which should be published.*

From the outset, an internal investigation and monitoring unit was established to investigate all allegations of corruption made against ICAC staff. All completed investigations are reported to the Operations Review Committee for resolution.

An additional safeguard is an independent ICAC Complaints Committee, chaired by an Executive Council member (member of the Cabinet), that monitors all complaints against the ICAC. Those wishing to lodge a complaint against the conduct of an ICAC officer or ICAC practices and procedures are directed to the Committee through the ICAC's website.

Should there be reasonable grounds for believing that officials have been behaving improperly, the exercise of powers of suspension become necessary while investigations are taking place. However, these powers of suspension, too, can easily be abused. One can imagine a scenario in which the head of an anti-corruption agency might be suspended by a future president, simply because he or she was investigating allegations which might be politically embarrassing. There must always be an appropriate independent check on the power of suspension.

The relationship between an anti-corruption agency and a director of public prosecutions is also a critical one. What use is evidence if the suspect cannot be prosecuted? Generally, under a constitution, such a director is given sole oversight for all prosecutions and is empowered to intervene in any criminal proceedings initiated by any other person or authority.

However, in assessing the independence and the likely effectiveness of an anti-corruption agency, the question arises whether, under the constitution, the director enjoys sufficient independence in exercising the discretion to prosecute. A guarantee is needed to ensure that there will be little scope for political interference after investigations by the agency have been completed.

### ARRANGEMENTS TO CONSULT WITH THE PUBLIC

The agency's relationship with the public is also critical to its success. Some agencies, such as the highly successful Hong Kong ICAC, have established formal arrangements whereby public participation in policy formulation is ensured through the Committees discussed above. By providing for such an arrangement, which can take the form of a committee chaired by the Minister of Justice, the anti-corruption framework encourages public accountability.

The relationship with the public is also important in laying the foundation for the preventative functions of an anti-corruption agency. The framework must provide for the involvement of a wide range of people and interests in the formulation of prevention policies and their execution. In this way, various stakeholders become involved in the prevention process, and their own institutions – both within government and in the private sector – can be mobilized in support of the agency's efforts.

### RECOMMENDATIONS TO OTHER GOVERNMENT AGENCIES

It would be misleading to think that every anti-corruption recommendation from an agency will be relevant and practical. It can be counterproductive to give an agency the power to require that specific changes be made. Rather, it is better for the head of the administration to direct departments to cooperate with the agency, and for the agency to sit down with a department's management and work out practical and acceptable changes to the system under review. The department should implement the solutions thus identified. If not, the department should give an explanation to both the head of the

administration and to the agency. There may be, for example, compelling factors that render recommended reforms inappropriate.

Nevertheless, some countries have found that a public service can ignore an anti-corruption body's recommendations. In such cases, the legislature, through the agency's annual report, a special oversight committee or otherwise, may be able to be used as a forum in which departments which fail to cooperate can be held to account for failures to revise bad practices.

### THE LEGAL AND ADMINISTRATIVE FRAMEWORK

To operate successfully, an anti-corruption agency must have:

- *guaranteed access to information*
- *power to freeze assets and bank accounts*
- *power to seize travel documents*
- *power to protect informers*
- *power to blacklist or debar corrupt foreign and domestic companies from public contracting*
- *the criminalization of "illicit enrichment"*

In addition, there can be special provisions relating to disclosures by bidders when tendering for public contracts (see below).

It is also important that any special powers conferred on an anti-corruption agency conform to international human rights norms, and that the agency itself operates under the law and is accountable to the courts. In setting the parameters for the establishment of an anti-corruption agency, a government must ask itself if it is creating something that would be acceptable if it were an opposition party. Very often the answer changes with perspective. The search should be for a formula which seems fair and workable to everyone, whether in or out of government. Above all, it should allot appropriate powers of investigation, prosecution and, sometimes most importantly, prevention. Arrangements must be

such that the agency not only can, but will survive changes in power.

Further elaboration of the requirements for a successful anti-corruption agency follows:

#### **(a) Access to information**

*An important factor to be considered in establishing the legal framework for an anti-corruption agency or commission is that adequate powers be given to access documentation (including bank accounts) and to question witnesses. In some countries, efforts are made to restrict the access of an agency to information. However, there is no reason, in theory or in practice, why an agency ought not to enjoy, as an ombudsman does, all the rights of law enforcement officers, and full access to government documents and public servants.*

#### **(b) Special powers to seize assets, freeze bank accounts**

*The anti-corruption agency or commission must have the power to freeze those assets that it reasonably suspects may be held on behalf of people under investigation.<sup>15</sup> When speed is of the essence, it should be able to do so prior to getting a court order. Without this power, bankers can simply transfer money electronically in a matter of minutes. There should also be a corresponding right of application to a superior court when a third party feels aggrieved.*

#### **(c) Seizing travel documents**

*It is also usual for an agency to have the power to seize and impound travel documents to prevent a person from fleeing the country; perhaps in emergency cases, even to do so temporarily without having to wait for a court order. This is a necessity, as an agency's power of arrest generally arises only when there is reasonable cause to believe that an offense has been committed.*

#### **(d) Protecting informers**

*It is also customary for an agency to have the power to protect informers. In some cases, informers may be junior government officials who com-*

*plain about the corrupt activities of their supervisors. (They cannot be expected to complain if they risk losing their jobs or other forms of harassment.) Not only should there be legislative protection for informers, but physical protection should also be available – extending, where necessary, to safe houses and, in exceptional cases, sanctuaries in other countries.*

*In the context of protecting all informants, the relevant provisions in Botswana's legislation read as follows:*

*45 (1) In any trial in respect of an offence under Part IV, a witness shall not be obliged to disclose the name or address of any informer, or state any matter which might lead to his discovery.*

*(2) Where any books, documents or papers which are in evidence (contain his name, etc.) the court ... shall cause all such passages to be concealed from view or to be obliterated so far as may be necessary...*

*(3) If in any such proceedings ... the court, after full inquiry into the case, is satisfied that the informer willfully made a material statement which he knew or believed to be false or did not believe to be true, or if in any other proceedings a court is of the opinion that justice cannot be fully done between the parties thereto without disclosure of the name of the informer ... the court may permit inquiry and require full disclosure<sup>16</sup>*

*Legislation should also ensure that legal practitioners, accountants and auditors can all be required to disclose certain information about their clients' affairs notwithstanding professional privilege.*

#### **(e) Debarment of corrupt foreign companies from bids on public procurement contracts**

*Knowing that they are beyond the reach of authorities and free to breach the criminal law by paying bribes to public officials, foreign suppliers often regard themselves as exempt from local laws. This situation can be resolved, at least in part, by adding a remedying provision to the act creating*

*an anti-corruption agency. Such a provision may state that when the agency has evidence which establishes, on the balance of probabilities, that such a company or its subsidiary has committed an offense against the act, the agency can apply to the court for an order excluding that firm or its directors and all other companies associated with it, from undertaking any business with the government for a period of time decided by the courts.*

#### **(f) The offense of unexplained wealth**

*In a number of countries, the law requires that persons in possession of unexplained wealth be called upon to give a credible explanation as to how they came by it or risk being charged with “living beyond one’s known means.” The Hong Kong ICAC has found Section 10 of its Ordinance to be particularly effective:*

*(1) Any person who, being or having been a prescribed officer (i.e. public servant):*

*(a) maintains a standard of living above that which is commensurate with his present or past official emoluments; or*

*(b) is in control of pecuniary resources or property disproportionate to his present or past official emoluments, shall, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be guilty of an offence.*

*(2) Where a court is satisfied in proceedings for an offence under subsection (1)(b) that, having regard to the closeness of his relationship to the accused and to other circumstances, there is reason to believe that any person was holding pecuniary resources or property in trust for or otherwise on behalf of the accused or acquired such resources or property as a gift from the accused, such resources or property shall, in the absence of evidence to the contrary, be presumed to have been in the control of the accused.*

*(3)-(4) (Repealed 56 of 1973 s. 2)*

*(5) In this section, “official emoluments” includes a pension or gratuity...<sup>15</sup>*

Mandatory disclosure of commissions paid in public procurement bids

The use of “commissions” (which are paid to local agents and are often the cover for bribes) is the most frequent source of corruption in international transactions. Not only does this practice threaten sound decision-making, but also adds to the national debt. Little or no income tax is paid by those receiving the payments. The public loses out in all three respects.

Therefore, legislation establishing an anti-corruption agency or commission could oblige those tendering for public contracts – and their local and other agents – to make full disclosure of all commissions and performance bonuses paid in respect to their bid. It can also require that tenderers provide, on request, full details of the services rendered for those commissions. Such disclosures should be made at the time of the bidding and again within six months of the completion or abandonment of a contract. A good example of dealing with secret commissions is New Zealand’s Secret Commissions Act of 1910.<sup>17</sup>

#### **SHOULD NEW LAWS AND OFFENSES BE RETROSPECTIVE?**

A new anti-corruption agency is usually established in a situation where corruption has become out of control. There will be a large number of outstanding cases requiring attention, and at the same time, urgently needed reforms in official practices and procedures. There will also be a skeptical public, unsure as to whether the anti-corruption efforts are genuine. In such circumstances, it is easy for a new agency to be swamped by old cases, and quickly take on the appearance of being just another ineffectual body. How can these dangers be avoided?

It is usually best for the legislative framework to provide that a new agency or commission focus on the future, rather than be forced to deal with outstanding and perhaps crippling caseloads inherited from the police. Such a burdensome state of affairs could quickly overwhelm the new agency with enforcement obligations at the expense of other

essential tasks of prevention and containment. The Hong Kong ICAC overcame this through the legislation referred to above, which states that:

Notwithstanding section 12 (jurisdiction), the Commissioner shall not act as required by paragraphs (a), (b) and (c) of that section in respect of alleged or suspected offences committed before 1 January 1977 except in relation to:

*(a) persons not in Hong Kong or against whom a warrant of arrest was outstanding on 5 November 1977; (b) any person who before 5 November 1977 had been interviewed by an officer and to whom allegations had been put that he had committed an offence; and (c) an offence which the Governor considers sufficiently heinous to warrant action.*

Such legislation leaves existing offenses to be dealt with in the ordinary way (by the police) and under the existing law. However, it also allows flexibility with respect to those cases which occurred in the past, but which a Head of Government deems in the public interest to be important enough to be investigated by the commission. Including this kind of provision in the legislative framework helps a commission begin on a fresh footing and allays any possible fears about witch-hunts over past events. It also makes the whole idea of putting the past aside more palatable.

### **ASSETS FORFEITURE UNITS – THE SOUTH AFRICAN EXPERIENCE WITH CIVIL ASSET FORFEITURE**

A highly successful initiative in South Africa has been not to establish an anti -corruption commission as such, but to embark on a strategy of civil asset forfeiture.<sup>18</sup>

South Africa's Asset Forfeiture Unit is a unit 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>19</sup>, property tainted by criminal activity 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.

On application 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 that it is 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.

Assets forfeited are used to assist law enforcement agencies in combating organized 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 raise about \$500 million for the federal government per year.

In South Africa, 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.

Experience in the United States had shown that civil asset forfeiture legislation was often implemented poorly because the police and prosecutors tended to focus their activities on achieving convictions rather than also gathering evidence to support civil forfeiture proceedings. Forfeiture involved a relatively complex and novel civil law about which most police officers and prosecutors 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 effectively.

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 imag-

inable technicality. This has proven to be the case, notwithstanding the fact that in the US another experience has prevailed. American courts have consistently upheld civil asset forfeiture legislation against countless technical objections. The US courts have held that proceeds forfeiture is a simple restitution, and represents neither a fine nor a punishment. They have also rejected arguments that the assets in question should be available to pay for a defendant's lawyers on the basis that a defendant has no right to spend another person's money.

There were, however, initial difficulties in South Africa on the issue of whether the forfeiture law should cover assets acquired before the Act came in to force. The Act has since been amended to remove the various points of difficulty, and it now appears to be working effectively.<sup>20</sup> By the beginning of June 2000, the unit had initiated 28 cases and had been successful in 23. Assets seized as of June 2003 exceeded 11 million US dollars.

### PUBLIC HEARINGS

The ICAC in New South Wales, Australia, another leading anti-corruption agency, has for some years been empowered to hold public hearings.<sup>21</sup> On these occasions, witnesses are summoned to give evidence and, although their evidence cannot be used against them in criminal proceedings, the hearings provide an opportunity to enlighten the public as to precisely what has been taking place. Once illegal and highly questionable patterns of behavior have been exposed in this way, it is reasonable to expect that those involved are likely to be shamed into changing their ways. In particular, an inquiry into abuses of travel privileges by elected members of the New South Wales State legislature led to greater clarity in procedures and higher standards of conduct by those concerned.

However, such public hearings have sparked an intense debate and led to a re-examination of the way in which the Agency is to work in the future. Public hearings outside the criminal justice system can leave allegations unresolved and, worse, prevent the trial of suspects who, justifiably, say that they could not now have a fair trial. Although the practice may well be abolished in New South Wales, in a state

gripped by systemic corruption and anxious to put the past behind it, the approach may have value as a way of closing down corrupt practices by exposing them to public view. If there are to be no subsequent court proceedings (provided, of course, that a full and honest disclosure has been made), it would serve as a way of shaming those from the past, and as a means of highlighting practices which were unacceptable and so must be changed.

Some argue for versions of truth and reconciliation commissions as a way of breaking with the past. However, this gives rise to difficulties. It is one thing to forgive and pardon a human rights abuser – quite another to do so leaving the offender in possession of illicitly acquired wealth.

### EXPECTATIONS

It is true to say that anti-corruption agencies have met with mixed results. For reasons not yet wholly apparent, they have tended to be much more successful in East Asia – in countries such as Singapore, Malaysia, Taiwan and Hong Kong – than they have been elsewhere. One factor is clear: in each of those countries the agencies have enjoyed high levels of political and public support. They have also had adequate research abilities, and have adopted both rigorous investigative methods and innovative programs of prevention and public education.

One may suspect that some other anti-corruption agencies have been established with perhaps no real expectation of their ever tackling difficult cases at senior levels of government. They have been staffed and resourced accordingly. Some have done good work in attacking defects in integrity systems, but only at junior levels; however, most have had a negligible impact on tackling grand corruption.

Even when agencies or commissions are well-resourced and established under model legislation, to be wholly successful they will still have to rely on other institutions. If the judicial system is weak and unpredictable, then efforts to provide remedies through the courts will be problematic. So when corruption is widespread, an agency alone will not provide a complete answer, but it will be an important part of a broader national plan of action.

## ENDNOTES

- 1 Hong Kong ICAC: <http://www.icac.org.hk/eng/main/>
- 2 Hong Kong Bilingual Laws Information System: <http://www.justice.gov.hk/home.htm>
- 3 About the Hong Kong ICAC: <http://www.icac.org.hk/eng/about/index.html>
- 4 For a discussion of the Hong Kong ICAC's experience in prevention, see: <http://www.unafei.or.jp/pdf/56-26.pdf>
- 5 [http://www.csb.gov.hk/hkgcsb/rcim/pdf/english/central/aan\\_e.pdf](http://www.csb.gov.hk/hkgcsb/rcim/pdf/english/central/aan_e.pdf)
- 6 The complete legislation may be accessed at <http://www.justice.gov.hk/blis.nsf/D2769881999F47B3482564840019D2F9?OpenView>.
- 7 New South Wales ICAC: <http://www.icac.nsw.gov.au>
- 8 The Ombudsman "shall act promptly on complaints filed in any form or manner against officers or employees of the Government, or of any subdivision, agency or instrumentality thereof, including government-owned or controlled corporations, and enforce their administrative, civil and criminal liability in every case where the evidence warrants in order to promote efficient service by the Government to the people (Section 13, R.A. No. 6770; see also Section 12 Article XI of the 1987 Constitution). The Ombudsman shall give priority to complaints filed against high ranking government officials and/or those occupying supervisory positions, complaints involving grave offenses as well as complaints involving large sums of money and/or properties (Sec. 15, R.A. No. 6770)." <http://www.ombudsman.gov.ph/about/mandate.html>
- 9 See [http://www.transparency.org/iacc/9th\\_iacc/papers/day3/ws3/d3ws3\\_gpienaar.html](http://www.transparency.org/iacc/9th_iacc/papers/day3/ws3/d3ws3_gpienaar.html).
- 10 Adapted from Bertrand de Speville, Why do anti-corruption agencies fail, UNGOPAC, Vienna, Austria, April, 2000. To obtain a copy, please email: [bdes@compuserve.com](mailto:bdes@compuserve.com)
- 11 Doig, A, Moran, J, and Watt, D. (2001) Working paper: Business Planning for Anti-Corruption Agencies; To obtain a copy, please email: [r.a.doig@tees.ac.uk](mailto:r.a.doig@tees.ac.uk)
- 12 In South Africa, where the Heath Commission required the approval of the Minister of Justice before it could act on a particular complaint, the working relationship collapsed on a change of Minister.
- 13 See [http://www.icac.org.hk/eng/power/powe\\_acct\\_1.html](http://www.icac.org.hk/eng/power/powe_acct_1.html)
- 14 The Corruption and Economic Crime Act, 1994
- 15 Hong Kong Prevention of Bribery Ordinance (Cap 201)
- 16 Secret Commissions Act 1910: [http://www.legislation.govt.nz/browse\\_vw.asp?content-set=pal\\_statutes](http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes)
- 17 See: <http://www.iss.co.za/PUBS/CRIMEINDEX/00VOL4NO3/Assetforfeiture.html>
- 18 Republic of South Africa, Prevention of Organised Crime Act, 1998: <http://www.gov.za/acts/1998/a121-98.pdf>
- 19 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/studnets/orgs/crcl/v.37/gupta.pdf>
- 20 New South Wales ICAC: <http://www.icac.nsw.gov.au/>





A FREE MEDIA  
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# NEWS

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## DETAILS

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## THE MEDIA

A free media ranks alongside an independent judiciary, as one of the two powers that should not be held accountable to politicians. Both serve as potent counter-forces to corruption in public life and both must receive special protection. Unlike judges, public prosecutors and attorneys-general, the privately owned media is not appointed or confirmed in office by politicians. Without a free media, civil society is crippled, both by a lack of information and an inability to engender public debate.

### PRINCIPLES OF A FREE MEDIA

Governments should embrace a basic set of principles to shape approaches to the media. In general these argue against legislation and restriction.<sup>1</sup>

An example is set out in the *Charter for a Free Press* approved by journalists from 34 countries at the Voices of Freedom World Conference on Censorship Problems.<sup>2</sup> Then United Nations Secretary General, Boutros Boutros-Ghali declared that “They [the Charter’s principles] deserve the support of everyone pledged to advance and protect democratic institutions.” He added that the provisions, while non-binding, express goals “to which all free nations aspire.”

The Charter reads:

- *Censorship, direct or indirect, is unacceptable; thus laws and practices restricting the right of the news media freely to gather and distribute information must be abolished, and government authorities, national and local, must not interfere with the content of print or broadcast news, or restrict access to any news source.*
- *Independent news media, both print and broadcast, must be allowed to emerge and operate freely in all countries.*
- *There must be no discrimination by governments in their treatment, economic or otherwise, of the news media within a country. In those countries where government media also exist, the indepen-*

*dent media must have the same free access as the official media have to all material and facilities necessary to their publishing or broadcasting operations.*

- *States must not restrict access to newsprint, printing facilities and distribution systems, operation of news agencies, and availability of broadcast frequencies and facilities.*
- *Legal, technical and tariff practices by communications authorities which inhibit the distribution of news and restrict the flow of information are condemned.*
- *Government media must enjoy editorial independence and be open to a diversity of viewpoints. This should be affirmed in both law and practice.*
- *There should be unrestricted access by the print and broadcast media within a country to outside news and information services, and the public should enjoy similar freedom to receive foreign publications and foreign broadcasts without interference.*
- *National frontiers must be open to foreign journalists. Quotas must not apply, and applications for visas, press credentials and other documentation requisite for their work should be approved promptly. Foreign journalists should be allowed to travel freely within a country and have access to both official and unofficial news sources, and be allowed to import and export freely all necessary professional materials and equipment.*
- *Restrictions on the free entry to the field of journalism or over its practice, through licensing or other certification procedures, must be eliminated.*
- *Journalists, like all citizens, must be secure in their persons and be given full protection of law. Journalists working in war zones are recognized as civilians enjoying all rights and immunities accorded to other civilians.<sup>3</sup>*

Freedom of expression and freedom of the media are among the most basic human rights and an essential component of any democratic society. A

free, independent and pluralistic media is essential to a free and open society and to accountable systems of government.

The OSCE participating States have already declared their commitment to the principle of a free, independent and pluralistic media, and did so in the Helsinki Final Act of 1975. This has become a guiding concept for all OSCE participating States 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 regarding freedom of expression, in 1997 the OSCE participating States decided to establish the unique institution of the OSCE Representative on Freedom of the Media.<sup>4</sup>

The OSCE Representative on Freedom of the Media has outlined a number of issues of general concern in Eastern Europe and the former Soviet Union. Paramount among them is “structural censorship”; i.e., indirect pressure on the media from existing political and economic structures that are often remnants of the past. “Structural censorship,” just like any other form of censorship, can effectively kill a free media. Outside the channels of government-owned media, the media is self-appointed and generally sustained by a public that sees the privately owned media’s output as valuable and so consumes its products, be they print or electronic.

*An essential pre-requisite for any free media is a legal guarantee of freedom of expression, a provision found in most constitutions.*

## INDEPENDENCE OF THE MEDIA

Who should be the guarantor of a free media? Censorship of the media takes many forms and raises its head in almost all countries. Few have legal systems which guarantee absolute freedom of the media.

The First Amendment of the Constitution of the United States, as tested before the U.S. Supreme Court, comes as close to guaranteeing a society free of censorship as any particular legislative act.

The Constitution of Malawi enshrines the concept of the freedom of the media not once, but twice, and in the following terms:

*“Every person shall have the right to freedom of expression”.*

*“The press shall have the right to report and publish freely, within Malawi and abroad, and to be accorded the fullest possible facilities for access to public information”.*<sup>5</sup>

Laws declaring freedom of expression require support and enforcement from the courts. A prerequisite for building a free media, therefore, is a legal system that is independent of political influence and has a firm constitutional jurisprudence supporting the concept of a free media. Judges can draw strength from Article 19 of the International Covenant on Civil and Political Rights, which states:

*Everyone shall have the right to freedom of opinion and expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*

## THE STATE-OWNED MEDIA AND PUBLIC SERVICE BROADCASTING

Some argue that the state has no role to play in owning mass media. Few, however, would argue against the concept of public service broadcasting.

Public service broadcasting has three essential features. It has objectives that differ from those dictated by the market; these are to inform, to educate and to entertain across genres; and, above all, it is free to everyone as a truly public service.

Broadcasting markets exhibit market failure. Leaving broadcasting entirely to the market would result in programs that do not reflect what even well-informed viewers and listeners would want to see or hear. The market, left to itself, could produce a glut of violence and pornography, which is not what many consumers want. A key role for public policy is, therefore, to correct these failings.<sup>6</sup>

In many countries, the government itself is the largest media owner (often of the leading television and radio stations) – a situation which undermines the very concept of ensuring the genuine independence of the media from the influences of the state. The rights of journalists in state-owned media enterprises and the degree of freedom they enjoy are sometimes, but not always, stipulated and guaranteed in law. Any lack of legislation and regulation in this context can be a direct threat to the independence of the media.

Perhaps the best model is that of the British Broadcasting Corporation (BBC). Established by an act of the Executive (a Royal Charter), the body periodically enters into a formal agreement with the government about the terms for its existence. The present agreement is for a period of ten years so it is not tied to the term of a government. The institution is funded through a government levy on viewers. Para 2.1 (the very first substantive section) reads:

*2.1. The Corporation shall be independent in all matters concerning the content of its programmes and the times at which they are broadcast or transmitted and in the management of its affairs.<sup>7</sup>*

Invariably, there is a contest between the government of the day and the BBC, whose governors, although government-appointed, have sought to defend their independence when criticized by the government. In this, they are fortified by a strong body of public opinion in support of an independent public service broadcasting body.

An alternative is the American public broadcasting system, which is supported by a combination of member donations, federal appropriations, grants and endowments from non-governmental organizations and corporate sponsors, and tax-based revenues from federal, state and local governments. PBS, the Public Broadcasting Service, is the system's television branch, and radio programs are broadcast through NPR or National Public Radio. Despite the common perception that the system relies primarily on government funding for its existence, private sources in fact account for 75 percent of all funding.<sup>8</sup>

## RESTRICTIONS ON OWNERSHIP

Private media ownership carries with it the danger of the mass media conglomerate. A concentration of media ownership in too few hands can drown out dissenting voices and constitute a threat to democracy through its ability to manipulate the opinion of the electorate. This is a menace that calls for strong and principled regulation to restrict mergers and takeovers. Countries should ensure that there is always competition in the media market-place. This is increasingly difficult to manage in a globalized world, and particularly in an age of satellite television. However, with the growth of the Internet, the ability to convey news has to some extent been democratized. This can carry another set of problems, but it does mean that global communication is no longer the exclusive preserve of powerful.

The United Kingdom is also one of the countries that aims to foster a diversity of ownership. There are bans on media holdings by local authorities; political organizations; religious organizations (regulators have discretion to waive this in relation to some services); publicly funded bodies; advertising agencies and bodies the regulators consider already to have undue influence. There are also bans on cross-media ownership, which limit the growth of media companies with radio, television and print media interests.<sup>9</sup>

## RESTRICTIONS ON CONTENT

Restrictions on widely accepted rights of freedom of expression relate to the rights or reputations of private individuals, matters of national security and bans designed to protect the public interest which can be reasonably justified in a democratic society (e.g., bans on pornography and pedophilic material).

Article 10 of the European Convention on Human Rights reads:

*1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not*

*prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

*2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

Although many journalists would accept that such restrictions are reasonable, they would almost all agree that they must be narrowly interpreted. Criminal libel and defamation claims can be used to intimidate or even to imprison and bankrupt journalists and media company owners. Worse still, the same laws can be used to muzzle, bankrupt and imprison political opponents when they criticize a ruling regime.

While the legal and regulatory frameworks should provide appropriate protection for the reputations of the innocent, these ought not, for example, provide restrictions that may prevent the media from publishing matters simply because these could damage the public reputation of public office holders. To do so would undermine freedom of expression. A decision by the European Court on Human Rights held that the politician “inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and must display a greater degree of tolerance<sup>10</sup>. Laws should distinguish between honest and wilful or malicious mistakes in reporting, and allow for prompt apologies to count for much when the defamatory publication is not intentional.

### **THE BURDEN OF PROVING THE TRUTH – THE DANGER OF PUBLISHING IT**

In recent years a number of governments have introduced legislation which stipulates severe penal-

ties for journalists who publish articles that may be viewed as insulting to holders of high government office. In some cases, these laws make no distinction as to whether media reports are truthful or not. In other words, the fact that a journalist wrote the truth about improper acts by leaders of the government would not be viewed by the courts as a defense in cases where anti-insult laws are applied. These laws amount to forms of intimidation and censorship which can be particularly advantageous to corrupt officials. In this regard, anti-insult laws should be subsumed within libel law. Much better examples are provided by French and by German law.

In France, a defendant can use pleas of truth, good faith and privilege. Truth is an absolute justification, except in criminal or civil cases where the matter is protected under the law of privacy, is more than ten years old, or the matter is subject to amnesty, rehabilitation, limitation or successful judicial appeal. Defendants unable to establish the truth can present evidence of good faith, such as a belief in the truth of the statement; deadline pressures; a desire to inform the public; the use of the word “allegedly”; or that the statement originated from another source.

The balance in Germany is also a sound one. The German media enjoys constitutional freedom of expression, which limits the effect of libel claims against them, and defamation damages awards are lower than those of the US and other countries such as the United Kingdom.

Criminal defamation law in Germany recognizes three distinctions: insult, slander and malicious defamation. Insult is an attack on the plaintiff’s honor which tends to lower the victim’s reputation to society at large. Slandorous statements must have been communicated to a third party and must lower a person in the estimation of right-thinking members of the community. The malicious defamation offense concerns the deliberate and intentional dissemination of false factual statements that are either defamatory or cause harm to the person.

Defenses for both civil and criminal defamation suits are: truth, legitimate public interest, and comment and critical opinion. Although truth is a good defense, it is not always a complete defense. Legitimate public interest is a defense that applies

solely to statements of fact. German courts look favorably on defense pleas when public interest issues are at stake. There is also a strong emphasis on corrections of publishing errors through retractions and apologies and damages are regarded as a secondary remedy.

The OSCE Representative on Freedom of the Media has also outlined the misuse of libel and defamation laws by government officials that may often lead to the closure of independent, and especially opposition, media as a major concern. The use of libel and defamation can infringe on the corrective function of the media in reference to important government or business decisions, and can have a particularly chilling effect on journalists' investigations of corruption.

Frequently, in some transition countries, investigative journalists, who write about malpractices in public institutions, are pressured to reveal their sources; i.e., the identities of whistleblowers within the system. This fact outlines the importance of Recommendation R (2000) of the Committee of Ministers of the Council of Europe that journalists have a right not to disclose their information sources.

### **GOVERNMENT INFLUENCE THROUGH PLACING OR WITHHOLDING ADVERTISING**

In many countries, there is very little advertising money available to support the media. As a consequence, the media is poorly funded and dangerously dependent on advertising revenue. Major advertisers (of which the government is usually among the most prominent) exert enormous control over content. As well, political and business entities have a wide scope to bribe reporters (who tend to be very poorly paid) to write stories that serve their political and business interests. In these types of situations, the media frequently fails to perform its watchdog role.

There should be clear rules regarding the placement of publicly funded advertisements.

### **CONTROL OF THE PRESS THROUGH THE REGISTRATION OF NEWSPAPERS AND JOURNALISTS**

Licensing of newspapers is used in some countries as a way of controlling the press. The only legitimate rationale for imposing a licensing requirement is to ensure that a newspaper has a registered address where legal process can be served in the event its proprietors breach the law.

Requirements for the licensing of journalists can take many forms and frequently represent a form of intimidation. In some countries, governments seek to regulate the licensing of media enterprises and their employees directly, while elsewhere there may be media trade unions that seek to force restrictive practices on their members. Licensing practices do not serve the public interest and there is no valid reason to support them. The elimination of media licensing should embrace foreign correspondents; they should always have as much access to information and as much opportunity to practice their profession as do all local journalists.

### **CENSORSHIP AND ACCOUNTABILITY**

Any form of restriction on the media should be consistent with the European Convention on Human Rights quoted above.

The critical factor in all issues concerned with restricting freedom of the media is that the limits be publicly debated and that they be interpreted by a fully independent judiciary composed of individuals of the highest integrity.

However, in many emerging democracies the media's experience is limited and the temptation to be less responsible is significant. A legal system which, in essence, provides full scope for the media to be irresponsible, may actually damage the growth of an emerging democracy. In one country in transition to democracy, election observers considered the media and its extravagant reporting to be the greatest threat to the election processes.<sup>11</sup>

Press councils can be established either by the media themselves as an act of self-regulation or by

the state. They can be constructed so as to provide an open forum for complaints against the media by the public, to chastise the media when it is irresponsible, influence (to a degree) its behavior. It has to be said, however, that the record of press councils is generally not particularly impressive; too much should not be expected of them.

Press councils need to be independent and directed by people widely respected for their non-partisan standing and their integrity. These bodies should not have powers of legal sanction, which could enable them to become over-bearing censors. Rather, they should have the prestige and integrity that give their reports strong moral force. A useful requirement is for the subject of a complaint to be required to publish, in full and unedited, the findings of the press council when a complaint against it has been upheld.

A very fine line exists between responsible and irresponsible journalism. As such, time and place are important factors that should influence judgements. Indeed, the moral force of a press council is a better way to secure a responsible media than to provide governments and courts with wide-ranging powers to curb it.

Assertions of media irresponsibility often lead to calls for laws and systems that guarantee only a “reasonably” free media. Experience shows that the term “reasonably” is highly subjective, and that acceptance of it in this context can be the first step down a slippery slope towards diverse forms of censorship.

The safest and most effective system in a democracy for guaranteeing freedom of the media is one where the media itself is empowered to make careful judgements on its own. To provide publishers and journalists with freedom is also to burden them with difficult decisions regarding public responsibility. Through the responsible judgements of editors and journalists, combined with consistent judicial support, a tradition and culture of media freedom develops. This culture is, above all, the most important guarantor of media freedom and of the ability of the media to fully operate as a watchdog over public office holders. The tradition must provide for the media to be tough in its scrutiny of the work of those who enjoy the public trust.<sup>12</sup>

The media culture, as is evident in many democracies today, must involve a sense that it is the duty of the media to “afflict the comfortable” (those holding public office), in order to “comfort the afflicted” (the public at large).

There is no question that such a culture can, at times, lead to media irresponsibility. This is an inevitable price to pay. An independent, wise judiciary and an effective press council, may be able to assist in curbing excesses in such times. Nevertheless, societies should be willing to pay some price for the greater good of securing media freedom. There is merit in accepting the basic spirit, if not the total and literal statement, of the view of Lord McGregor of Durris, chairman of the UK Press Complaints Commission, that:

*a free society which expects responsible conduct from a free press must go on tolerating some “often shocking” irresponsibility as the price of liberty, because a press which is free to be responsible must also be free to be irresponsible.”<sup>13</sup>*

## CODES OF ETHICS FOR JOURNALISTS

An example of journalists accepting their responsibilities and laying down professional standards with obligatory ethical limits was given when the parliament of the Slovak Syndicate of Journalists prescribed the following standards for its members:<sup>14</sup>

### I. The journalist and the public

*The journalist will do everything which is necessary to give the public veracious, precise, verified, complete and professional information. The veracity of information necessitates that the facts as its base are given as objectively as possible, in their real context, without any deformation or withholding of the circumstances, with appropriate use of the journalist’s creative abilities. If some facts cannot be verified, it is necessary to mention this. The journalist can freely express personal or group opinions within the limits of the pluralistic context of ideas provided he does not violate the civil rights of another person or group of persons and provided he does not menace societal morals. At the same time, he himself has to respect the*

*request for a free exchange of opinions and for a free flow of information. He always respects the measures of good taste and the suitability of his means of expression.*

*He has a right and a moral duty to refuse the publication of such information as he finds untrue, half-true (deformed), speculative, incomplete or commercially directed (the so called "hidden advertisement").*

*If the journalist publishes untrue, half-true (deformed), speculative or incomplete information, he must rectify it by including the publication of a correction or response. The correction must be published in approximately the identical graphical arrangement, the best way in the same place as the information being corrected. The rejoinder of the author of the original information should not be supplemented by the response so that one party does not have permanent advantage.*

*Accusations without proof, misusing of trust, profession or media, for a personal or group benefit, falsification of documents, deformation of facts, any lie and purposeful withholding of the knowledge of the violation of law and societal morals are regarded by the journalist as the greatest professional guilt.*

## **II. The journalist and the object of his interests**

*The journalist takes over the responsibility for everything published by him. Without the consent of the respective person, he is not allowed to defame this person, or to interfere with his private life unless this person acts against the law or causes public offense.*

*For the sake of objectivity, the journalist tries in the course of preparation of his work or its realization to let all the persons concerned speak.*

## **III. The journalist and the information source**

*The journalist has an undeniable right of free access to all information sources.*

*The journalist is obliged to let his informant know about his intentions as an author immediately.*

*When collecting information, he does not use pressure.*

*He is not allowed to misuse either the events and the statements which he witnessed or the documents which he reproduced.*

*The journalist is obliged to keep his information sources secret until such time that he is exempted from this duty by the informant or by the court.*

## **IV. The journalist and editorial staff or publisher**

*The journalist has a right to such a contract that secures his material needs and his professional honor.*

*He has a right to refuse any pressure on him to act against his conviction. He only accepts orders from his superiors according to his contract.*

*The journalist has a right to be protected by his direct superior and publisher by all legal and accessible means, including the protection of his right to use a pseudonym. The journalist must not enforce private and subjective interests for his personal gain, he does not sign his own name under commercial or paid advertisements.*

*The editorial staff is entitled to be consulted by the editorial or publisher's board on every decision important for the work of the mentioned staff.*

## **V. The journalist and his colleagues**

*The journalist will not publish somebody else's work under his own name or abbreviation.*

*He may not quote from any publication without citing the source.*

*He will not offer his work for publication simultaneously to more editors.*

*Without the author's consent he does not intervene in the contents of the work.*

*He does not decrease the authority and abilities of his colleagues; during collective work he respects their needs and opinions.*

## VI. The journalist and the public interest

*The journalist holds in due respect the Constitutional State Order, its democratic institutions, the valid law and generally accepted moral principles of the society.*

*The journalist must not promote aggressive wars, violence and aggressiveness as the means of international conflicts solution, political, civic, racial, national, religious and other sorts of intolerance. The journalist shows due respect to other states and nations, and to their democratic traditions.*

*In many countries, journalists are in urgent need of training in the skills required for compiling investigative reports and to acquire perspectives and insights on international standards.<sup>15</sup>*

## INVESTIGATIVE JOURNALISM

Investigative journalism is one of the key weapons that the public can use for uncovering corrupt practices. A difficult and sometimes risky profession, investigative journalism needs encouragement and support. There are a number of rules in investigative journalism which should be fulfilled for the sake of professionalism. For example, the Bulgarian Coalition 2000 has recommended 11 such rules for the next generation of journalists<sup>16</sup>:

- *Always double check information, using at least two independent sources.*
- *Identify the entity/persons whose interests will be hurt by your investigation.*
- *Consult a lawyer, especially when investigating documentary evidence.*
- *Avoid personal qualifications in reported stories*

- *Use pseudonyms, when they cannot be avoided.*
- *Always be critical of any information, received from the police, unauthorized public officials or by victims.*
- *Never rush to publish an investigation without checking your information first.*
- *When investigating a case, it is advisable to consult a person of authority within the interior ministry or judiciary.*
- *Always try to record your interviews on cassette, including phone interviews.*
- *Your investigative methods should always be within the law.*
- *Pay your taxes. (Unpaid taxes can be used as a tool for pressuring journalists to drop stories unflattering to state authorities.)*

## CIVIL SOCIETY

Woodrow Wilson once famously observed that "Liberty has never come from the government. Liberty has always come from the subjects of it." But simply to function at all, civil society needs the minimum guarantees of freedom of association and freedom of speech.

In recent times, policy-makers have come to realize that nascent democratic institutions in transitional phases are fragile, and that market forces alone are inadequate to ensure social and economic equity without the countervailing participation of civil society in decision-making processes.

Responsible non-governmental organizations (NGOs) ensure that these processes are run democratically and accountably, but it is also true that many NGOs are run in neither fashion. Indeed, many are formed for the sole purpose of gaining aid funds from donors for the personal benefit of the NGOs' founders. Efforts are underway to foster the adoption of codes of conduct and transparent accounting practices by NGOs to help meet these criticisms. However, the driving force behind NGO reforms

should be the recognition that civil society cannot demand higher standards in public affairs than the standards to which its NGOs themselves are prepared to submit.

### THE ROLE OF CIVIL SOCIETY IN FIGHTING CORRUPTION

Civil society encompasses the expertise and networks needed to address issues of common concern, including corruption. And it has a vested interest in doing so. Most of the corruption in a society involves two principal actors: the government and the private sector. Civil society is typically the major victim. And as power devolves from the center to local authorities, opportunities for corruption shift downwards towards new actors who are in more direct contact with civil society. This means that the ability of civil society to monitor, detect and reverse the activities of the public officials in its midst is enhanced by proximity and familiarity with local issues. In discharging this role, a number of NGOs systematically monitor the media for the content of its reports.<sup>17</sup>

There is also an increasing tendency to recognize the part civil society can play by involving societies' leaders in oversight committees and in strengthening the "horizontal accountability" that lies at the heart of their national integrity systems.

One such example cited earlier are the 40 leading citizens who act as watchdogs over Hong Kong's anti-corruption agency. Another is the Anti-Corruption Prevention Unit (CPU), whereby an NGO is accredited as a CPU by the Office of the Ombudsman in The Philippines to help in the fight against graft and corruption.<sup>18</sup>

"Open budgeting"<sup>19</sup> has been introduced in a number of countries and municipalities (in parallel with improved access to information arrangements) and numerous NGOs are monitoring public procurement and elections.

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 have 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). There is, thus, every reason to suppose that law societies and bar councils should not require much encouragement to maintain standards within their profession, subject to their having the legal authority to do so.<sup>20</sup>

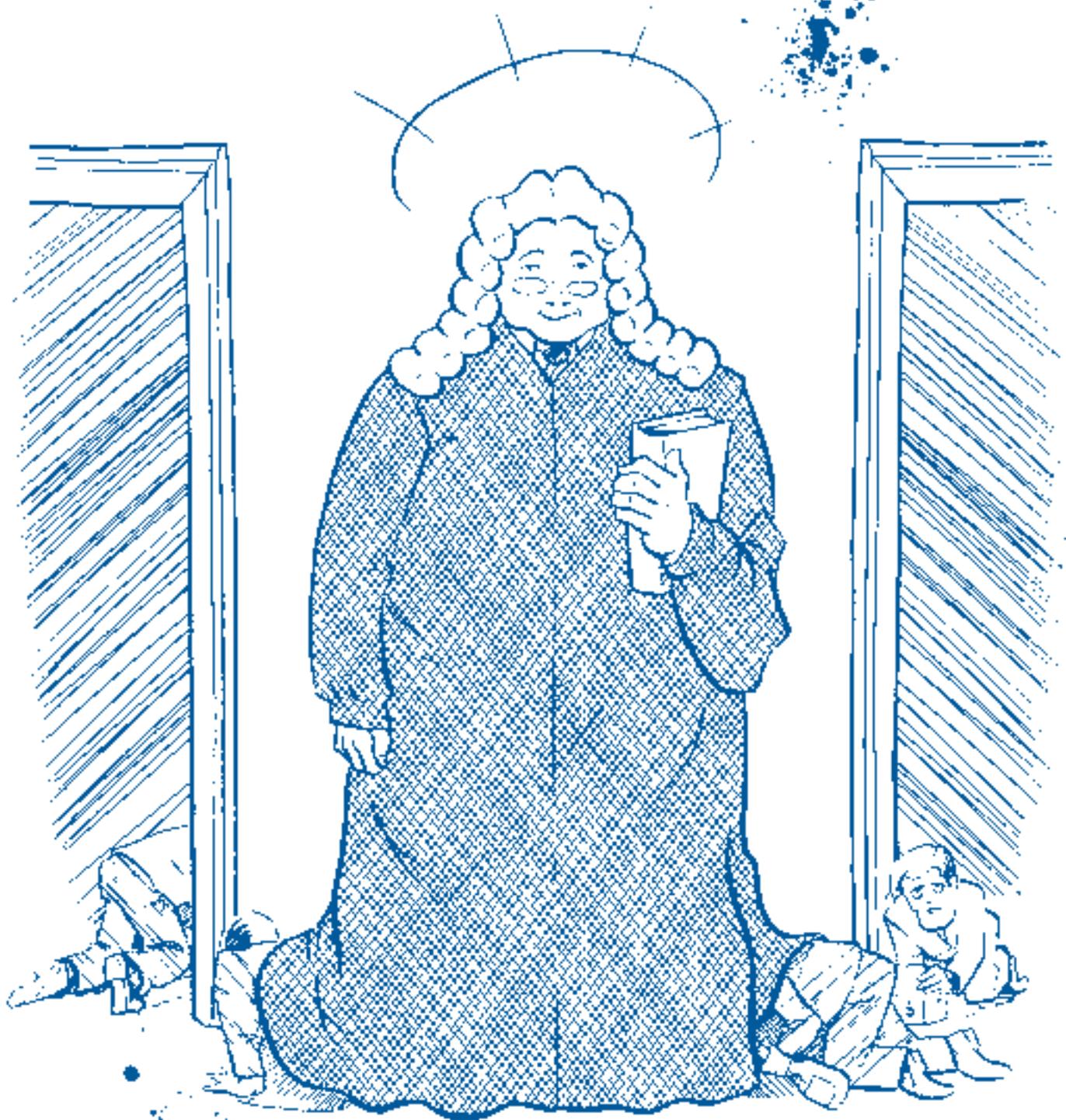
A triangular relationship exists between government, civil society and sources of capital. Corruption can take root in all or any of the three parties to the relationship. It is, therefore, impossible both theoretically and in practice for just one of the parties to address the issue of corruption on its own and in isolation from the other two – and it is arguably impossible to tackle the issue effectively without the participation of all three.

Government can, therefore, provide a legal and regulatory framework which allows the necessary space for civil society to operate. This framework includes freedom of expression, freedom of association, and freedom to establish non-governmental entities. Laws governing the formal constitution of an NGO and its tax status will vary greatly, but these should be clearly understood, accessible, consistent with international norms, and not needlessly restrictive or cumbersome. Public officials handling any accreditation procedures should clearly understand that the law must be applied even-handedly, without broad discretionary powers. In this context, any requirement to register is best served where decisions are made by a court or other independent body.

## ENDNOTES

- 1 For an electronic collection of media laws from around the world, see: [http://www.ijnet.org/FE\\_Article/MediaLawsearch.asp?UILang=1](http://www.ijnet.org/FE_Article/MediaLawsearch.asp?UILang=1)
- 2 The conference was held in London, January 16-18, 1987, under the auspices of the World Press Freedom Publishers (FIEJ), International Press Institute, Inter-American Press Association, North American National Broadcasters' Association and the International Federation of the Periodical Press.
- 3 Charter for a Free Press: <http://www.wpfc.org/index.jsp?page=Charter%20For%20A%20Free%20Press>
- 4 The OSCE Representative on Freedom of the Media (FOM) observes media development in OSCE participating States and provides early warning on violations of freedom of expression. In 1997 the participating States created the office of the FOM in Vienna to monitor the freedom of expression as a fundamental human right and a basic component of a democratic society. Under the aegis of the Permanent Council, the Representative, while not exercising a juridical function, has the tasks to observe relevant media developments, to advocate and promote full compliance with OSCE principles and commitments and to assume an early-warning function. As one of the important elements of OSCE's human dimension, the FOM has the right to collect information, travel without impediment, and meet with persons and representatives of institutions without prior notice. He or she is requested to report on his or her findings to the Permanent Council of the OSCE. ([http://www.isn.ethz.ch/osce/structure/osce\\_bodies\\_e/fom.htm](http://www.isn.ethz.ch/osce/structure/osce_bodies_e/fom.htm))
- 5 Articles 35 and 36: <http://www.sdn.org.mw/constitut/chapter4.html#36>
- 6 For a full discussion, see *The Future of Communications: Public Service Broadcasting: A Discussion Document* by Andrew Graham, Balliol College, Oxford (2000) ([http://www.communicationswhitepaper.gov.uk/dti-dcms\\_comms-reform\\_experts.html](http://www.communicationswhitepaper.gov.uk/dti-dcms_comms-reform_experts.html))
- 7 For the text of the documents, see: <http://www.bbc.co.uk/info/policies/charter/>
- 8 Corporation for Public Broadcasting: Public Broadcasting FAQ: [http://www.cpb.org/pubcast/#what\\_is\\_cpb](http://www.cpb.org/pubcast/#what_is_cpb)
- 9 For details, see the UK's Communications White Paper published at <http://www.communicationswhitepaper.gov.uk/>
- 10 European Court of Human Rights in *Lingens v. Austria* (1986) 8 E.H.R. 407
- 11 Ghana Elections: Report of the Commonwealth Election Observer Group, Commonwealth Secretariat, London, 1991.
- 12 For a set of codes of ethics from countries round the world compiled by the International Journalists' Network, see: [http://www.ijnet.org/FE\\_Article/DoceEthicsList.asp?UILang=1](http://www.ijnet.org/FE_Article/DoceEthicsList.asp?UILang=1)
- 13 Quoted in [www.transparency.org/sourcebook/14.html](http://www.transparency.org/sourcebook/14.html)
- 14 International Journalists' Network, Codes of Ethics: [http://www.ijnet.org/FE\\_Article/codeethics.asp?UILang=1&CId=8352&CIdLang=1](http://www.ijnet.org/FE_Article/codeethics.asp?UILang=1&CId=8352&CIdLang=1)
- 15 The World Bank runs occasional in-country courses for investigative journalists. A more ambitious program involving training in the United States is organized by the International Center for Journalists, often in partnership with local associations of journalists: <http://www.icij.org>.
- 16 *The Media against Corruption*, Sofia, 2000, p.44-47; in Bulgarian
- 17 A Media Monitoring Manual is available at [www.media-diversity.org/resource%20categories/diversity%20manuals.htm](http://www.media-diversity.org/resource%20categories/diversity%20manuals.htm)
- 18 Republic of the Philippines, Office of the Ombudsman: [http://www.ombudsman.gov.ph/publications/cpu\\_program.html](http://www.ombudsman.gov.ph/publications/cpu_program.html)
- 19 For the International Budget project, see: <http://www.internationalbudget.org/faq> and *A Taste of Success: Examples of the budget work of NGOs* (2000) <http://www.internationalbudget.org/resoruces/success.pdf>; for Russia, see: <http://openbudget.karelia.ru/eng/anona.shtml>
- 20 A common provision would be for the legal profession to investigate and adjudicate on complaints, with a right of appeal to the courts by the lawyer the subject of disciplinary action. A number of countries insist that the legal bodies contain a minority of non-lawyers in order to increase public confidence in the integrity of disciplinary proceedings.





## THE JUDICIARY

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.<sup>1</sup>

The United Nations Basic Principles on the Independence of the Judiciary was adopted at the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders in 1985. The chapter on the independence of the judiciary reads<sup>2</sup>:

- 1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.*
- 2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.*
- 3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.*
- 4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.*

*5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.*

*6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.*

*7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.*

Most recently, in a landmark development, chief justices around the world have drafted and adopted the Bangalore Principles on Judicial Integrity.<sup>3</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 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, and are intended to supplement and not to derogate from existing rules of law and conduct that bind the judge.

In the European context, there are a number of major instruments; among them, The Judges' Charter in Europe<sup>4</sup>, a Recommendation on the Independence, Efficiency and Role of Judges<sup>5</sup> made by the Council of Europe, and the European Charter on the Statute for Judges, adopted by participants at a multilateral meeting in 1998.<sup>6</sup> 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-publicized 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 disci-

plined. 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.

### INDEPENDENCE AND JUDICIAL COUNCILS

Like any public organization, 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.

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.

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. Ideally, there should be a process that involves consultation with other senior judges and with practicing judges.

To prevent judicial appointments and management from becoming a means for compromising judicial independence, many countries have created judicial councils. These are bodies separate from other government branches and are entrusted with selecting and promoting judges, and otherwise managing the court system. The senior judiciary is frequently appointed by a judicial council, which can also be responsible for discipline. Such councils are usually provided for in a country's constitution, but can generally also be created by legislation.

Although these councils differ from country to country, their success depends on how well policymakers address questions related to their composition,

the selection of their members, their responsibilities, and their accountability. Spain's experience with its Consejo General del Poder Judicial shows how one nation has dealt with these issues and reveals the factors that must be taken into account when addressing them.<sup>7</sup>

### SHOULD JUDGES BE ELECTED?

The election of judges by the people is superficially attractive.<sup>8</sup> It was introduced in the United States during the 19th century as a way of trying to combat corruption in the judiciary by removing the power of appointment from corrupt politicians and placing it in the hands of the electors.

As one scholar has observed: "Concerns about the penetration of partisanship into the appointive judicial selection process reinforced worries about administrative efficiency and the status of the bench and bar. By the mid-1840s the second American party system thrived as part of a robust political culture in which the spoils of public office belonged to the victors. Judgeships were important items of patronage, but delegates from across the ideological spectrum criticized the party-directed distribution of these offices whether by the executive or the legislative branch. Radicals adopted a strong antiparty position. They believed popular election would prevent party leaders from dictating the composition of the bench."<sup>9</sup>

For a long period, this system seemed to work satisfactorily. However, in recent times, judicial elections have become a battlefield for special interest groups, each determined to get judges elected who will favor their particular position. This risks jeopardizing qualified candidates who will administer the law fearlessly, fairly and without favor. These special interest groups often act without the consent of the candidate they are supporting. This development has given rise to projects designed to promote reforms, which would reduce the excesses of the present.

There is a paradox in the idea of the public electing judges. Voters will need information that will allow them to assess how each candidate is likely to perform in office. Candidates for election to the

executive branch of government and legislature typically make promises as to what they will do in office, but in the case of judges, voters want courts that are fair and impartial. Judges cannot be unbiased if they have previously made commitments about how they would act in specific types of case if elected to the bench. The United States has rules to try to resolve the paradox; meaningful information is needed, but candidates should not impair their impartiality as judges (e.g. by expressing political views which might suggest that they had prejudged issues before they heard legal arguments). As judicial candidates and third parties now increasingly turn to “vicious and often misleading rhetoric”<sup>10</sup> to make their points, there needs to be a thoughtful re-examination of the present rules, particularly as the issue of judicial candidates’ speech is now before the US Supreme Court.

Discussions among non-American, senior common law judges have come down firmly against the practice of electing judges.

### DISCIPLINING JUDGES

Constitutional guarantees exist against arbitrary removals of judges. These 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 has been provided. Similarly, salaries and benefits for judges cannot be reduced to prevent a government from pressurizing judges through threats to cut their incomes, etc. The judiciary is further protected by its very actions – it sits in public, it gives reasons for its decisions 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.

The most important element is probably security of tenure. If a judge, once appointed, can only be removed for grave and serious misconduct, then the judge is freed from the need to court popularity – whether among the public or politicians – in order to be re-appointed. Experience in the United States

has shown that even judges carefully chosen by conservative administrations can become progressive reformers once on the bench.

Judicial independence is for the benefit of the institution, not the individual judge. But judges’ independence does not place them beyond the reach of accountability.

However, judicial independence is best served by other judges assuming responsibility for the accountability of an individual judge; at least up to the point where impeachment by the legislature may come into play. Individual judges must be both appointed and held directly accountable in ways that do not compromise the institution’s independence. Disciplinary tribunals should have a majority from the judiciary and can be rendered more legitimate by the inclusion of non-lawyers, but never politicians.

The chief justices who drafted the Bangalore Principles (above) believed that the senior judiciary should accept the task of building and sustaining judicial integrity for itself. The most potent tool would seem to be an appropriate code of conduct. This 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.<sup>11</sup> In a country where there is considerable trust in the judiciary, such an appearance might not cause any 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 appearance.

### WHAT JUDGES CAN DO TO BUILD INTEGRITY AND PUBLIC TRUST

A meeting of the Nigeria’s Federal Chief Justice and State Chief Justices recently addressed the challenges they face. As leaders of judicial administrations, they have to ensure that standards of

performance are raised to a level where the public has total confidence in the judiciary as an institution and in individual judges in particular.<sup>12</sup>

In the course of their deliberations they identified four broad headings under which to address their tasks:

- *Improving access to justice*
- *Improving the quality of justice*
- *Raising the level of public confidence in the judicial process*
- *Improving efficiency and effectiveness in responding to public complaints about the judicial process*

Having established these headings, they then identified the ways in which they, themselves, would wish to be judged – or “measured” as a technician would say.

This involved intensive brainstorming about what the indicators should be that they would like to see applied to measure the impact of their work. They bore in mind that these had to be matters over which the judges themselves had a measure of control, and that they had to be actions which could impact the judicial process favorably. on.

The following is the program that the Nigerian chief judges designed for themselves:

### **Access to justice**

7. *Code of conduct reviewed and, where necessary revised, in ways that will impact on the indicators agreed at the Workshop. This includes comparing it with other more recent Codes, including the Bangalore Code. It would also include an amendment to give guidance to Judges about the propriety of certain forms of conduct in their relations with the executive (e.g. attending airports to farewell or welcome Governors). Ensure that anonymous complaints are received and investigated appropriately.*
8. *Consider how the Judicial Code of Conduct can be made more widely available to the public.*

9. *Consider how best Chief Judges can become involved in enhancing the public's understandings of basic rights and freedoms, particularly through the media.*
10. *Court fees to be reviewed to ensure that they are both appropriate and affordable.*
11. *Review the adequacy of waiting rooms etc. for witnesses etc. and where these are lacking establish whether there are any unused rooms etc. that might be used for this purpose.*
12. *Review the number of itinerant Judges with the capacity to adjudge cases away from the court centre.*
13. *Review arrangements in their courts to ensure that they offer basic information to the public on bail-related matters.*
14. *Press for empowerment of the court to impose suspended sentences and updated fine levels.*

### **Quality of Justice**

15. *Ensure high levels of cooperation between the various agencies responsible for court matters (police; prosecutors; prisons).*
16. *Criminal Justice and other court user committees to be reviewed for effectiveness and established where not present, including participation by relevant non-governmental organisations.*
17. *Old outstanding cases to be given priority and regular decongestion exercises undertaken.*
18. *Adjournment requests to be dealt with as more serious matters and granted less frequently.*
19. *Review of procedural rules to be undertaken to eliminate provisions with potential for abuse.*
20. *Courts at all levels to commence sittings on time. Increased consultations between judiciary and the bar to eliminate delay and increase efficiency.*
21. *Review and if necessary increase the number of Judges practising case management.*

22. *Ensure regular prison visits undertaken together with human rights NGOs and other stakeholders.*
23. *Clarify jurisdiction of lower courts to grant bail (e.g. in capital cases).*
24. *Review and ensure the adequacy of the number of court inspections.*
25. *Review and ensure the adequacy of the number of files called up under powers of review.*
26. *Examine ways in which the availability of accurate criminal records can be made available at the time of sentencing.*
27. *Develop Sentencing Guidelines (based on the United States' model).*
28. *Monitor cases where ex parte injunctions are granted, where judgments are delivered in chambers, and where proceedings are conducted improperly in the absence of the parties to check against abuse.*
29. *Ensure that vacation Judges only hear urgent cases by reviewing the lists and files.*

### Public Confidence in the Courts

30. *Introduce random inspections of courts by the Prevention of Corruption Commission.*
31. *Conduct periodic independent surveys to assess level of confidence among lawyers, judges, litigants, court administrators, police, general public, prisoners and court users.*
32. *Strengthen the policies and initiatives to improve the contact between the judiciary and the executive.*
33. *Increase the involvement of civil society in Court User Committees.*

### Improving our efficiency and effectiveness in responding to public complaints about the judicial process

34. *Systematic registration of complaints at the federal, state and court level.*
35. *Increase public awareness regarding public complaints mechanisms.*
36. *Strengthening the efficiency and effectiveness of the public complaints.<sup>13</sup>*

The Nigerian judges have demonstrated that there are areas in which they are free to impact positively on the integrity of the judicial process without having to wait for laws to be changed.

### LEGISLATING FOR INTEGRITY IN LITHUANIA

Lithuania's Law on Courts provides that a person may only be designated as a judge if he or she has an impeccable reputation. It provides that a person cannot be considered as having an "impeccable reputation" if:

- *he or she has been convicted of an intentional crime, notwithstanding the expiration of the conviction*
- *he or she was convicted of a negligent crime and the conviction has not expired*
- *he or she was dismissed from office on the basis of the decision of the Court of Honour of Judges*
- *his or her conduct or activities are not in line with rules of judges' professional ethics.*

In order to guarantee the independence of the judges, the Law (a) prohibits any interference by government authorities and institutions, members of the Seimas and other officers, political parties and public organizations or individuals with the work of judges; and (b) provides for judges which are non-political. No judge may hold any other elected or appointed post, or be employed in a business, or any other private organization or enterprise. He or she may not receive any salary other than that of a judge, and compensation for any educational or research activities he or she may undertake.<sup>14</sup>

## COURT STAFF

Surveys around the world suggest that malpractices among court staff are prevalent when court records management systems are inadequate. Lawyers and their clients bribe for files to be lost, for cases to be slowed down (or accelerated), for judgments not to be enforced, and for judges to be changed to those of their choosing. Little of this can happen without the active participation of court staff. Surveys of court users' experiences have been carried out in a number of countries in order to ascertain the extent of the problem in order to craft necessary reforms.

In the Indian state of Karnataka, it was found that court staff were refusing litigants access to their files to discover routine information such as dates for hearings. To overcome this problem, a website was established and all routine information posted on it. The very existence of the website – as a competitive source of information – was reported as having forced court staff to drop these demands. The website does not provide access to their files as such, but to information on when and where cases will be tried.

## COURT USER COMMITTEES

A growing number of countries (including Nigeria) are constituting “court user committees” which bring together various court user groups to discuss, with judges, how a judicial system is functioning, to promote cooperation and to identify both problems and solutions. This added accountability at the local level can be a powerful inducement for all those involved in the justice system to conduct themselves with integrity.

## THE LEGAL PROFESSION

In many countries, lawyers are a prime source of corruption. They stand accused of bribing court officials, bribing judges and defrauding clients with false claims of having paid bribes. In such countries, the way in which the legal profession is disciplined becomes central to the integrity of the judicial process. However, this is another area into which the government intrudes at the risk of making matters even worse. The temptation to “discipline” a lawyer

whose successes in court have upset a government can be overwhelming. Yet, if the public is to be served, and the rule of law is to prevail, citizens must have an independent legal profession available to them.

The United Nations Basic Principles on the Role of Lawyers asserts that professional associations of lawyers have a vital role to play in upholding professional standards and ethics.<sup>15</sup> This should be achieved by protecting their members from persecution and improper restrictions and infringements, by providing legal services to all in need of them, and by cooperating with governmental and other institutions to further the ends of justice and defend the public interest.

The principles require that governments:

*shall ensure that lawyers:*

*(a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference*

*(b) are able to travel and to consult with their clients freely both within their own country and abroad*

*(c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics*

Although recognizing the central role played by the legal profession in upholding the rule of law and the fairness of legal proceedings, the corruption law reformer will want to ensure that the legal profession is properly regulated and disciplined. This will help prevent lawyers themselves from becoming actively involved in corrupt practices, whether on their own behalf or that of their clients.

While it is desirable that a legal profession should police itself, through the profession's own disciplinary body, it is also increasingly recognized that the participation of a minority of outsiders in the deliberations can make the decisions more transparent and more acceptable to the public.

## ENDNOTES

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- 7 See Guerra, Luis Lopez: Governing the justice system: Spain's judicial council, World Bank PREM Note 54(: <http://www1.worldbank.org/prem/premnotes.cfm?offset=21>)
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The past decade has witnessed an unprecedented attempt by governments, international agencies and non-governmental organizations to combat corruption. These efforts began against a history of refusal to accept that corruption was anything more than “a little local difficulty.” East Asia aside, there was a dearth of experience in tackling the problem, scant research had been undertaken and serious academic debate was spasmodic. Corruption was simply not taken seriously.

Widespread action has come with the recent realization of the extent and gravity of the problem. A series of inter-locking international conventions now exists which includes the OECD Convention Against the Bribery of Foreign Public Officials and a global UN Convention Against Corruption, as well as conventions within Europe, the Americas, and, soon, in Africa. These have achieved, for the first time, a global consensus on what corruption is, why it should be confronted and how. Although the consensus inevitably reflects a minimum, the conventions have nevertheless been negotiated, ratification is under way and implementation is in train. This should augur well for the future of the global anti-corruption campaign.

But looking back over the efforts of the past ten years or so, how can we gauge success or failure? The phenomenon of corruption is so complex that attributing success to any particular initiative, or set of initiatives, is frequently elusive. Sound reforms have been undertaken without seeming to have affected levels of corruption. However, the situation may well have become even worse without them. We cannot assume simply that because corruption levels have increased, efforts to contain the phenomenon have necessarily been ineffectual. We need much more sophisticated means of surveying the phenomenon of corruption before we can answer many of the questions to which efforts to contain it give rise.

The suggested lessons learned given here is by no means exhaustive, and space does not permit their detailed elaboration. It simply suggests some of the salient lessons, but nothing is more certain than that we all still have much more to learn.

### **1. NO COUNTRY CAN CLAIM MORAL SUPERIORITY**

There was a time when some industrialized countries would regard themselves as being morally superior when it came to corruption. “They do things differently abroad,” the argument ran. “We have to do things there we would not dream of doing at home.” The involvement of these countries’ exporters in systematic corruption throughout the world has now been exposed, and the degree to which their own political institutions have been corrupted through “black” money, have caused most of them to change their views.

### **2. EVERYONE HAS TO ADDRESS CORRUPTION FOR THEMSELVES AND IN THEIR OWN WAY**

Reform efforts have to be homegrown and locally driven. They can be encouraged and fostered by outside partners (e.g. donors and international financial institutions), but the motivation and the leadership must come from within. Internal corruption must be dealt with from within, and corruption in international business transactions has to be dealt with from both sides of the equation. There is no “one size fits all” solution.

### **3. THERE ARE NO “QUICK FIXES”**

There is no such thing as a “quick fix” when it comes to containing corruption. There may be areas in which quick wins can be gained – such as streamlining procedures in customs administration, opening up public procurement to make it more transparent, prosecuting a large number of corrupt officials, but there is no over-all “quick fix.” Combating corruption is a long, arduous and never-ending process.

### **4. THERE IS NO PLACE FOR EXIT STRATEGIES FOR DONORS**

Anti-corruption strategies do not have fixed timeframes. Reforms take time to design, implement and to bear fruit. When donors are involved, they should not be looking for an early exit, but be prepared for a sustained period of involvement.

## **5. A CLEAR ANTI-CORRUPTION STRATEGY AND EFFECTIVE PUBLIC RELATIONS CAMPAIGN ARE NEEDED**

A piecemeal approach to reforms is not reliable. The strategy must be all-embracing and should address all aspects of the national integrity system. Once a determined effort gets under way, public perceptions can be adversely affected by reports of commissions of inquiry or by seeing senior officials being prosecuted for serious offenses. If the reform process is not accompanied by an appropriate public awareness and information program, impressions can be formed that things are going from bad to even worse. It is crucial to pay special attention to public relations from the outset. Public expectations must be managed and the political risks contained.

## **6. CODES OF ETHICS AND CITIZENS' CHARTERS**

These documents must not be used as decorations, but as agents of change. Codes of ethics are useful, but only when the staff in question supports them. Staff members must be involved in their drafting, and training programs for all must be conducted. Training programs need to be highly participatory and involve the discussion of hypothetical situations, perhaps with some role-playing. Mere lectures or hand-outs are ineffectual. Similarly, citizen's charters can have the effect of making highly visible commitments to the public, and constitute a challenge to a government agency to deliver what it promises. This means that the commitments in the charters should be realistic. The charters themselves must be publicized.

## **7. STREAMLINING BUREAUCRATIC PROCEDURES**

Red tape should be cut, bureaucratic requirements reassessed and kept to a minimum. Staff in sensitive positions should be rotated wherever possible, and, particularly in vulnerable areas, contact between staff and the public depersonalized to reduce the chances of personal relationships developing. Customs, for example, is just one of several areas which lends itself to such a streamlining of procedures. When personal contact is necessary, the introduction of elements of unpredictability as to which particular official may handle a matter or cli-

ent reduces the potential for bribery. Computerizing a customs system can advance these processes, while enhancing the speed with which goods are cleared, identifying delays and enabling investigations of the reasons for any delays. However, in many countries the cumbersome bureaucracy has developed, not haphazardly, but precisely with the creation of bribe-taking opportunities in mind. These reforms may be self-evident, but they are nonetheless difficult to achieve.

## **8. WHISTLEBLOWERS MUST BE ENCOURAGED AND PROTECTED**

Aggrieved citizens and whistleblowers inside the administration can be encouraged to complain to new institutions such as anti-corruption commissions or ombudsman offices, or through telephone hot-lines. Unless they do so, necessary actions will be delayed, perhaps indefinitely. Complainants must be assured that their complaints will be taken seriously, and that they themselves will not be placed at risk. In some countries, social taboos about "denouncing" fellow citizens may have to be overcome. Raising public awareness in these matters is much talked about, but is left almost entirely to civil society to address.

## **9. CONTINUOUS MONITORING IS NEEDED**

Experience shows that, for example, in police corruption, it is not enough to clean up a corrupt force. Unless processes are established for continuous monitoring, sooner or later a force will subside into a morass of corruption and require yet another extraordinary effort to try to rehabilitate it. It is not enough to remove corrupt officials without also removing opportunities and ensuring that honest officials are being appointed to positions of trust. "Integrity testing" can help ensure that honest officials are identified and considered for promotion.

## **10. FOCUS ON THE OVERALL SYSTEM OF GOVERNANCE OR MANAGEMENT**

To win public cooperation, a reform program should not focus on simply eliminating individuals with

questionable records on corruption. In a situation of systemic corruption, the corrupt individual is not a single “bad apple” and removing him or her will not save the barrel. Instead, the whole system needs to be addressed or else the person brought in as a replacement will be subjected to the same temptations. Prevention can be more effective and infinitely more economic than investigation and prosecution. At the end of the day, a government must have competent staff available and be capable of discharging the affairs of state within a functioning institutional framework and subjected to an effective enforcement regime.

## 11. AMNESTIES MAY BE UNAVOIDABLE

Escaping from a corrupt status quo is extremely difficult. Many powerful interests have reason to fear if a new dispensation is going to be unduly threatening to them. Where corrupt interests have acquired major holdings, action against them can have the potential of destabilizing a country’s economy. How can the position be redressed without making matters worse? Amnesties are unpalatable, but may be unavoidable. They certainly are unavoidable in the context of small infractions by junior officials. Although the question of amnesties is problematic, there is something to be said for absolving certain staff from blame. Some senior staff may need to be removed or disciplined, but more junior staff, other than those who have been seriously abusing positions of trust, should not feel that they are at risk. Until workable solutions can be developed ( “truth and reconciliation commissions” have been considered), the question of dealing with the past will remain one of the largest single stumbling blocks to any reform.

## 12. LEADERSHIP IS VITAL, BUT NOT ENOUGH BY ITSELF. COALITIONS OF INTERESTS (PRIVATE SECTOR, CIVIL SOCIETY, RELIGIOUS ORGANIZATIONS, CONSUMERS, ENVIRONMENTALISTS, HUMAN RIGHTS ACTIVISTS ETC.) CAN HELP

Without leadership from the top, any attempt to achieve major reforms in an environment of systemic corruption will be bound to fail. Personal leadership is vital, and a leader must be seen to not just be

mouthed platitudes. However, just as laws alone will not suffice to achieve reform where corruption is systemic, so, too, is leadership not enough. Coalitions can be created to support leadership, but there is a danger when they embrace interests whose pasts are questionable. Yet if only groups untainted by suspicion or past corruption problems are admitted to a coalition, they will number far too few. What is important is that coalition partners commit themselves to building a new future and, having made that commitment, that they be held to it.

## 13. CIVIL SOCIETY SHOULD NOT BE OVERLOOKED

There appears to be a correlation between high levels of corruption and low levels of civil society activity. Efforts to assist the emergence of a creative and vibrant civil society call for the development of both a legal framework within which civil society can establish its institutions free of government interference and control, and for the building of a positive dialogue between civil society and governments. This is not always easy to achieve, particularly in an emerging democracy, as it may cut across preconceived notions of how government decisions should be developed and imposed. One way of testing the genuineness of a government’s anti-corruption pledges is to see whether the government is prepared to work with civil society.

## 14. CIVIL SOCIETY ORGANIZATIONS THEMSELVES CAN BE SOURCES OF CORRUPTION

In a number of countries, civil society organizations have sprung up ad hoc, simply to tap into the assistance dollars which external donors have been prepared to provide to organizations for developmental efforts conducive to the strengthening of civil society. Civil society organizations must be transparent and accountable in their own practices. No less than official institutions, they cannot be taken at face value and need to be monitored for transparency.

## 15. LEGISLATURES CAN GO FROM WATCHDOG TO THIEF

A serious flaw has emerged in a number of countries where the legislature is not only a watchdog

over official expenditure, but spends public money (including increases in its members' own salaries) and in allowing public contracts. This combination of watchdog role with that of the executive branch gives rise to conflicts of interest and effectively poisons the body politic. It also breeds contempt for democratic institutions among the public at large. Unless these contradictions are resolved satisfactorily (e.g. by effecting a clear separation of powers) it is doubtful whether effective anti-corruption reforms can be achieved in those countries.

#### **16. POLITICAL PARTY FUNDING REMAINS A PROBLEM**

Until recently, the issue of political party funding had been largely ignored by the international community. Some argue that the best way to restrict the influence of "money politics" is not so much to restrict money flowing into a political party, but to restrict the amount of expenditures and what money can be spent on. The change of Taiwanese government in March 2000, however, has shown that an affluent political party with large investments and powerful cronies can nonetheless be voted out of office. This encourages the belief that the manipulation of political party funding need not necessarily be an insuperable barrier to changes of government.

#### **17. INDEPENDENT AGENCIES WITHOUT SECURITY OF TENURE FOR THEIR LEADERS**

The institutions of ombudsman and of auditor-general are attractive in theory, but can only function effectively if their office-holders are protected from arbitrary removal by the very executive they are required to watch.. Constituencies outside the political processes have to be built to defend these officeholders and, when necessary, make their voices heard.

#### **18. ACCESS TO INFORMATION CAN BE A HIGHLY-EFFECTIVE ANTI-CORRUPTION TOOL**

Some governments have recognized transparent access to information as the most effective tool for curbing corruption and have enacted appropriate legislation. Government agencies can be required

to post details of the services they provide and the official charges for them. Indonesia is an example where local information displays with details of development projects have equipped the public with the information they need to keep a watchful eye on what is taking place.

#### **19. SOUND RECORDS MANAGEMENT ARE ESSENTIAL TO TRACING CORRUPTION**

Public access to information requires sound records management. So, too, does holding individual public servants to account. A government agency should be charged with overseeing public sector document handling processes by individual departments and making provision for the archiving of spent documentation.

#### **20. THE MEDIA AND WHISTLEBLOWING JOURNALISTS COMPLETE SENTENCE**

Most murders of journalists in recent years have been attributed to their investigating corruption cases and there is, thus, a need to render their work less risky as well as to raise standards of professionalism. Several institutions are running training courses in investigative journalism. However, in many parts of the world the media itself is blighted by corruption. The media is an "integrity pillar" which requires serious attention in many countries.

#### **21. PUBLISHING LISTS OF THOSE ACCUSED OF CORRUPTION OFTEN DOES NOT HAVE THE INTENDED CONSEQUENCES**

Efforts to "name and shame" in the Kenyan Parliament drew a blank in 2000 when a committee report which "named names" had all the names censored, and some of those "named" threatened to sue newspapers which published details – even though the information was already in the public domain. In India, the Vigilance Commissioner resorted to the Internet to post the names of hundreds of officials suspected of corruption. The flamboyance with which the President of the Nigerian Senate, voted out of office in August 2000, protested his innocence in the face of overwhelming

evidence of abuse of office, suggests that political leaders may have much thicker skins than do those who strategize to combat corruption. In any event, extreme care is needed to avoid any appearance of denying individuals a fair chance for self-defense.

## **22. INCREASING SALARIES ALONE IS NOT A SUFFICIENT FOR REDUCING LEVELS OF CORRUPTION**

It stands to reason that inadequately paid public servants must be more vulnerable to temptation than those who are well paid. However, the depressing truth emerges that many of the most corrupt officials are in leadership positions, which they have abused to amass large fortunes through “grand corruption.” Salaries, then, are more a question for those in low positions, whose insistence on payments for services may be seen by their peers as a form of “user pays.” Surveys suggest that people may be ready to pay for the services they receive, provided the fees are affordable and legal. What they bitterly resent is being subjected to extortion. One observer has noted that: “The evidence is at best unclear whether increasing public sector wages can reduce corruption. Yes, within a comprehensive package of civil service reform, proper compensation and incentives can play a role, but an in-depth look at country specific data does not support the notion that merely increasing official salaries to existing staff incorrupt agencies helps.”<sup>1</sup>

## **23. INCREASING SALARIES CAN BE AT LEAST A PART OF THE SOLUTION FOR FIGHTING CORRUPTION**

Real wages have declined in the public sector in many countries over substantial periods of time. In several cases, this decline has been mirrored by declines in the efficiency of the public sector. One study shows that higher wage levels are accompanied by the chance to recruit better skilled people into government service, raising the quality of the services provided and, as described in the paper, the amount of tax collected. Simply raising tax rates may not raise additional state income; enhancing the skills of those involved in collecting it can.

## **24. INDEPENDENT REVENUE AUTHORITIES CAN FACILITATE REVENUE COLLECTION**

Independent revenue authorities can be established with closely monitored and well-paid staff, employed outside the public service salary structures. These authorities can boost the collection of revenue and enable a developing country to pay its officials and service the financial needs of its institutions more adequately.

## **25. RETIREMENT BENEFITS, ESPECIALLY FOR POLITICAL LEADERS, ARE OFTEN NOT AN APPROPRIATE RESPONSE TO CORRUPTION**

Logic suggests that a lack of security in retirement is a factor in the corruption equation. However, when it comes to senior government officials, the anecdotal evidence to the contrary suggests otherwise.

## **26. NEW ANTI-CORRUPTION LAWS ALONE ARE NOT THE ANSWER**

Certainly, laws alone do not offer a quick route to curb corruption, except perhaps when they confer on courts a jurisdiction they have not had before: to review the legality of administrative decisions taken by officials. Repeatedly, legislatures have passed new anti-corruption laws with great fanfare, and have regarded the job of reform (or at least the appearance of corruption reform) as a job completed. But laws are failing in every country where corruption is systemic, and they fail more from lack of enforcement than from any inadequacies in the laws themselves. There are also ways of achieving reforms, even in public procurement, without changing the law, but using contracts and civil penalties to ensure that standards of conduct improve.

## **27. CORRUPT JUDICIAL SYSTEMS CANNOT SUPPORT THE RULE OF LAW**

There is an inherent contradiction in trying to use a corrupt judicial system to uphold the rule of law. Provisions have to be made for institutional elements of the judiciary, particularly those related to appointment, removal and accountability. An ombudsman

may offer a way of introducing redress that can be quick and effective, and not be subject to the distortions that may hamstring a judiciary, but questions of judicial independence and judicial integrity have to be addressed from the outset.

### **28. THE LAW SHOULD NOT BE AN OBSTACLE TO CORRUPTION PROSECUTIONS**

There still needs to be laws that are workable. The burden of proof that is placed on a prosecutor should not be unnecessarily demanding. Guaranteeing an accused a fair trial does not mean making it impossible for a prosecutor to prove his or her guilt. Laws of evidence need to be kept up-to-date and consideration given to including in them specific offenses which an anti-corruption initiative would target. This technique enjoyed a particular success in Hong Kong.

### **29. TIME LIMITS FOR PROSECUTIONS NEED TO BE REALISTIC**

Considerable time can be required to detect cases of “grand corruption,” and even additional time to prepare a case thoroughly to prosecute those responsible. For these reasons, time limitations for prosecutions or cases need to be realistic. In some countries, it is virtually impossible to prosecute a case to its conclusion. Prosecutions and/or appeals to “run out of time” merely serve to bring the law into disrepute and increase levels of public frustration.

### **30. A LAW ON ILLICIT ENRICHMENT BY CIVIL SERVANTS CAN SPEARHEAD AN ANTI-CORRUPTION CAMPAIGN**

One particular law, which has proven to be effective in some countries, is that of “illicit enrichment.” This law refers to a civil servant’s acquisition of inexplicable wealth. Such a law, coupled with a functioning legal and judicial system, spearheaded the Hong Kong anti-corruption reforms. However, some legislatures have refused to enact such laws, ostensibly on the grounds that they may infringe human rights. In reality, however, refusals to enact such a law seem to stem from a desire to preserve the status quo.

### **31. MONITORING THE ASSETS OF PUBLIC OFFICIALS REMAINS AN AS YET UNTESTED TOOL**

There is widespread belief that this is potentially an effective tool for containing corruption, but the case to date has only been made on paper. Parliamentarians are remarkably shy when it comes to enacting laws to provide for the monitoring of the assets and incomes of senior officials. When laws are enacted, declarations are seldom required to be made public. They are, still less, routinely investigated for their accuracy. Initiatives in this area are being followed closely.

### **32. OFFICIAL IMMUNITIES AND PRIVILEGES SHOULD NOT SHIELD THE CORRUPT FROM RESPONSIBILITY FOR THEIR CRIMES**

In many countries, senior public figures’ immunities and privileges effectively shield them from the rule of law. Indeed, in some countries, criminals opt for elected office simply to gain immunity. These privileges and immunities need to be reassessed and their scope minimized to practical requirements. They are not granted to honor an individual, but to enable an individual to discharge his or her duties effectively.

### **33. THE INTERNET CAN BUILD AN OPEN EXCHANGE OF INFORMATION BETWEEN GOVERNMENT AND GOVERNED**

The Internet can help build more open systems of governance. Legislatures can establish websites that allow citizens to interact with their elected representatives and keep them informed about parliamentary business. Government departments can post their documentation online. Reformers can advertise their national anti-corruption plans to the world at large, and monitor the progress being made very publicly. The Internet can be used for online public tendering, thereby reducing opportunities for making potentially corrupt personal contacts. Of course, the usefulness of the web in this respect is limited by the number of people who may have access to it. Much of the Internet’s potential is presently denied to many in the world’s poorest countries, but growing numbers there do have access to the web, and

any gains made by rendering their institutions and individuals more accountable should help to promote the interests of all.

### **34. PROCUREMENT IS A BATTLEGROUND**

The field of public procurement has been a battleground for corruption fighters. It is in public procurement that most of the “grand corruption” occurs with much of the damage visibly inflicted upon the development process in poorer countries and countries in transition. Although initially there were skeptics who fought against the idea of “integrity pacts”, successes are increasingly being recognized. “Integrity pacts” are a process in which voluntary agreements are made, involving bidders and the government, to restrict opportunities for corruption in a particular project. The use being made of the Internet for public procurement by the city of Seoul and in Mexico is likewise promising.

### **35. THE COMMISSIONS THAT BIDDERS PAY TO AGENTS SHOULD BE DECLARED**

Some thought that legislation requiring disclosures of commissions would undermine international competitive bidding and that some corporations would not wish to abide by such a rule. However, when such a requirement has been introduced, there has been little evidence of it having such a negative effect. The honest have nothing to hide, and if the corrupt leave a bidding process, all concerned benefit from their absence. The experience in New York City has been an inspiration to corruption fighters.

### **36. CORRUPT BIDDERS SHOULD BE BLACKLISTED**

The blacklisting of firms caught bribing can be a potent weapon. Of course, this requires that the system is fair and any penalties proportionate. But there can be no doubt that the international corporations blacklisted by Singapore in the 1990’s received a considerable shock. Since then, others have thought twice before attempting to bribe Singaporean officials. The World Bank subsequently went down the same blacklisting path. The Bank posts the names of blacklisted firms and individu-

als on its website. At the national level this remedy works best in countries where the rule of law functions properly and adequate appeal mechanisms are in place. However, care has to be taken to guarantee due process so as to ensure that the blacklisting process itself does not become an instrument of extortion and corruption.

### **37. INTERNATIONAL PROBLEMS REQUIRE INTERNATIONAL SOLUTIONS**

To the surprise of many Americans, two surveys have revealed that the US Foreign Corrupt Practices Act, passed as long ago as 1977, is apparently not having the effect that had been supposed. American companies exporting into key emerging markets were shown to be about as corrupt as German exporters, operating without any such deterrent and with the added advantage of tax deductions for the bribes they paid. It would seem that unilateral action by a single government, even of the world’s most powerful country, is insufficient to reverse a global problem. Rather, the problem requires a coordinated international response. Hence, the need for international accords such as the OECD Convention Against the Bribing of Foreign Public Officials in International Business Transactions. The intentions of this Convention must be translated into reality, and there are still few signs of individual governments’ readiness to do this. The same surveys showed that awareness of the Convention among international businessmen is extremely low. They can hardly be expected to comply with provisions of which they know nothing.

### **38. INTERNATIONAL AGREEMENTS REQUIRE MONITORING**

It is not enough for a country to sign a convention. The convention must be put into effect. When a convention strikes at a country’s successful export strategies, it is not altogether surprising that some exporting countries may be less than enthusiastic about the goals of the accord. On the other hand, those who support the aims of a convention may regard some competitor countries with suspicion and need reassurance that they are not falling into a trap. Close evaluation and monitoring of implemen-

tation and enforcement, both by the governments involved and by civil society and the private sector, become essential. Monitoring of a particularly constructive kind is provided in the European Conventions through the GRECO mechanisms, but is, unfortunately, absent elsewhere. Although styled as “monitoring,” the GRECO process is, in reality, an exercise in technical cooperation delivered in a highly effective and user-friendly fashion.

### **39. SURVEYS CAN MEASURE AND IDENTIFY SUCCESSES AND FAILURES**

Reform programs should be monitored for desired results. Monitoring requires effective measurement and is best done through surveys – and with the data made public. Surveys can measure the impact of corruption on business, public perceptions, and, by targeting selected service providers, measure the levels of corruption in the services being provided. These surveys can be international, national or local, but their practical utility increases the closer they get to the grass roots. By comparing the results from agencies in differing parts of the country, the least efficient, and perhaps most corrupt, agencies can be identified and steps taken to redress their performance. International surveys help raise the issue on the national agenda and keep it at the forefront of public debate. However, international surveys are comparative and fraught with statistical difficulties, and so are of limited usefulness. One of their most valuable aspects has been to raise the issue of corruption on the national political agenda, and to highlight the need for national surveys, which are now being undertaken with an increasing thoroughness.

### **40. INSTITUTIONS THAT CAN ASSIST WITH PREVENTION NEED STRENGTHENING**

There is a role for schools of public administration in the training and retraining of public servants. These schools need increased capacity, particularly in the field of ethics training and in corruption risk management. Business schools, too, are in need of compulsory courses on corruption risk management, and should cease treating business ethics as an unimportant option for a MBA degree.

### **41. THE PRIVATE SECTOR IS AN UNRELIABLE PARTNER**

Although some private sector partners have made positive contributions to fighting corruption and have embraced corporate social responsibility, the private sector, by and large, has a long way to go before it embraces anti-corruption risk strategies as Being in its own self-interest. Notwithstanding the current publicity given to corrupt activities, major corporations continue to flout both the law and public opinion, and are all too frequently supported by their host governments in this conduct. The International Chamber of Commerce (ICC) has been extremely energetic in promoting its anti-bribery policies, but as a voluntary organization, it lacks the ability to monitor the activities of its members.

### **42. EXPORT CREDIT GUARANTEES CAN BE RENDERED VOID IN THE EVENT OF CORRUPTION.**

A number of governments have removed the cover afforded by export credit guarantees granted to underwrite contracts when these are found to have been tainted by corruption. Nevertheless, some governments continue to turn a blind eye to corruption when contracts are large and judged to be in the national interest.



The task of achieving sustainable anti-corruption reforms will be a long and arduous one. That the stakes are high is beyond dispute. Yet the amount of time required to realize this goal is uncertain.

It could be that people in the most corrupt countries lose heart, lose faith in democratic practices and turn to authoritarianism as an apparently logical reaction to democracy’s failure. There is, of course, no reason to suppose that a further round of autocracy would be any less disastrous than it has been in the past.

The international community, too, may start to dilute their commitment to the cause. Other issues may attract their attention and may seem to offer more immediate responses to their interventions.

But one thing is clear. If governments, civil society, the private sector and international organizations do not grasp the opportunities they now have to confront corruption effectively, then the chances will pass. Corruption will steadily and inexorably undermine the new democracies and reduce the standing of the established democracies. It will also continue to impact negatively on human rights, the environ-

ment and all aspects of globalization. The stakes could not be higher than they are today.

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