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Combating Corruption: The Misunderstood Role of Law

CLAES SANDGREN*

I. A New View of Corruption, Development and Culture

A silent revolution has taken place during the last decade or two. Not only has corruption and its detrimental consequences been brought into focus, but the prospects of fighting corruption have also improved dramatically.

Twenty or thirty years ago, the general view was that corruption in the south—the developing world—was a part of its underdevelopment or perhaps even a consequence of such underdevelopment. The conclusion was that economic development had to take place first and only then would it be possible to fight corruption. There was also a high degree of cultural relativism. Corruption was seen as part of the culture of many, if not all, developing countries.

This approach was very similar to that regarding human rights. There was at the time a view that you could not demand that a poor country respect human rights because it had to be developed, as it was sometimes expressed. Now all this has changed—the basic notion is just the opposite. Corruption is now seen as a cause of poverty, not merely a consequence. Honesty and integrity, as well as democracy and human rights, are seen as necessary steps in the work to bring about development. It is no longer possible to justify corruption and oppression on the ground that they are part of the culture, even though some one-party regimes still maintain such a view.

II. Corruption in Industrialized Countries

The legitimacy to address corruption in both the south and the east, namely the former Communist countries,¹ stems from the fact that we are now more prepared to admit that corruption also exists in the so-called developed world (the OECD countries—the Organization for Economic Cooperation and Development), and we are more prepared to dis-

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1. These countries are often referred to as transition countries. See THE WORLD BANK, *ANTICORRUPTION IN TRANSITION: A CONTRIBUTION TO THE POLICY DEBATE* 13 (Sept. 30, 2000), available at www.worldbank.org/wbi/governance/pdf/contribution.pdf.

cuss ways to combat corruption. In other words, corruption exists independently of the level of development. So there is no reason not to attack it wherever it turns up.

It is another matter that the degree of corruption is higher in the south and the east. The OECD countries rank seven to eight on a scale of one to ten, whereas the countries of the south and the east rank between three and four, according to Transparency International's (TI) Corruption Perceptions Index.²

III. The Asia Crisis

Even in Asia, which has traditionally had a high level of acceptance of corruption, a new view has emerged.³ One reason is that corruption is seen as a major cause of the financial crisis that hit East Asia in 1997, particularly in Indonesia, South Korea, and Thailand. The previous view that corruption facilitated decision-making and thus helped economic progress in the region is no longer viable. It is more fitting to say that progress was achieved in spite of existing corruption.

IV. The Effects of Corruption

The damaging effects of corruption are much better known, understood, and acknowledged now than they were twenty to thirty years ago. Research has demonstrated in a convincing way that corruption causes great damage to a society. A high level of corruption in a country reduces investment and the inflow of capital.⁴ In addition, it also reduces efficiency because money is spent on the wrong projects. The result is a reduction in economic growth.⁵

Not only is corruption an obstacle to development, but it is also unfair. A company that wins a contract using bribes is not acting fairly and is, in fact, distorting competition. Corruption is unfair to poor people as well because it reduces funds available for social sector spending and because it costs poor people relatively more to pay bribes for societal services such as medical care and schooling for their children.⁶ Besides, corruption renders government regulation ineffective because it generates non-compliance with requirements for safety, public health, and environmental protection.⁷

V. The Magnitude of Corruption

Previously, the prevailing view was that it was not possible to measure corruption and consequently not possible to know the volume of corruption. But various institutions have

2. Press Release, Transparency International, Nine Out of Ten Countries Urgently Need Practical Support to Fight Corruption (Oct. 7, 2003), available at http://www.transparency.org/pressreleases_archive/2003/dnld/cpi2003.pressrelease.en.pdf.

3. Press Release, Transparency International, Corruption in South Asia: Insights & Benchmarks from Citizen Feedback Surveys in Five Countries (Dec. 17, 2002), available at http://www.transparency.org/pressreleases_archive/2002/dnld/south_asia_report.pdf.

4. Daniel Kaufmann, *Anticorruption Strategies: Starting Afresh? Unconventional Lessons from Comparative Analysis*, in *CURBING CORRUPTION: TOWARD A MODEL FOR BUILDING NATIONAL INTEGRITY* 35, 45-46 (Rick Stapenhurst & Sahr J. Kpundeh eds., 1999).

5. UNITED NATIONS DEVELOPMENT PROGRAMME, *ANTI-CORRUPTION PRACTICE NOTE* (Feb. 2004), available at <http://www.undp.org/policy/practicenotes.htm> [hereinafter ANTI-CORRUPTION PRACTICE NOTE].

6. *Id.*

7. *Id.*

now been able to fashion instruments that allow for a fairly reliable measurement of the magnitude of corruption in various sectors and countries.⁸ For instance, the World Bank makes diagnostics for a school system in a specific country.⁹ If one translates the figures they have collected into a global figure the magnitude is estimated at one trillion U.S. dollars, which corresponds to 3 percent of the global income in 2002.¹⁰

The sectors most prone to corruption seem to be public infrastructure, the arms industry, and the extractive industries. In addition, state-controlled industries, in general, and banks are high-corruption environments. Low-corruption sectors include agriculture, fishery, and light industry. Within the public sector police, prosecutors, courts, customs, and the tax administration are afflicted. The informal sector is very large in the south. Companies in this sector escape formal taxation, but are subject to a number of other costs, such as bribes to police and other authorities that they must offer in order to operate.

VI. Public Opinion

The spread of corruption and its effects have received enormous publicity thanks to efforts by various organizations such as TI, Global Forum, and others. Democratization has facilitated these efforts and the use of the Internet has been crucial to the spread of knowledge. Even a poor peasant in the south might now possess the insight that corruption is detrimental—knowledge that carries a powerful potential for change. TI's Corruption Perceptions Index, which has been publicized since 1995, has had a great impact.¹¹ Governments worry about how they fare in this index, which is used by media and non-governmental organizations (NGOs) to attack governments that do not seriously fight corruption. All governments nowadays pretend (claim) that they fight corruption. TI also publishes a Bribe Payers Index that gives an account of the likelihood that companies in industrialised countries pay bribes.¹² Companies domiciled in clean countries are least likely to pay bribes abroad in order to win contracts.

In addition, quite a number of other organizations also influence public opinion. One example is Global Compact (GC), an international network formed under the auspices of the United Nations (UN) in 2002. Global Compact's purpose is to promote corporate responsibility in the world. At the time of its founding, GC adopted nine principles for its work on human rights, labor conditions, and the environment. It is a sign of the times that a tenth principle was added in 2004—the fight against corruption.¹³ Publish What You Pay

8. Vito Tanzi, *Corruption Around the World: Causes, Consequences, Scope and Cures*, in 45 IMF STAFF PAPERS 559 (Dec. 1998), available at <http://www.imf.org/external/Pubs/FT/staffp/1998/12-98/tanzi.htm>.

9. See, e.g., World Bank Institute Programs, Countries Where Diagnostic Tools Have Been Implemented, available at <http://www.worldbank.org/wbi/governance/capacitybuild/d-surveys.html> (last visited Aug. 31, 2005); THE WORLD BANK, CAMBODIA, GOVERNANCE AND CORRUPTION DIAGNOSTIC: EVIDENCE FROM CITIZEN, ENTERPRISE AND PUBLIC OFFICIAL SURVEYS (May 1, 2000), available at www.worldbank.org/wbi/governance/pdf/guide_pdfs/06-survey_report.pdf.

10. The World Bank, *The Costs of Corruption*, April 8, 2004, www.worldbank.org.

11. Nine out of Ten, *supra* note 2.

12. Press Release, Transparency International, Russian, Chinese, Taiwanese and S. Korean Companies Widely Seen Using Bribes in Developing Countries (May 14, 2004), available at http://www.transparency.org/pressreleases_archive/2002/2002.05.14.bpi.en.html.

13. United Nations Procurement Service, Global Compact, <http://www.un.org/Depts/ptd/global.htm> (last visited Sept. 12, 2005).

is another example of an organization that influences public opinion. It is an association of more than 200 NGOs throughout the world that want to increase the transparency of payments made by extractive industries. In addition, the Extractive Industries Transparency Initiative has also placed on its agenda the increase of transparency regarding payments to states and states' income deriving from extractive industries. One purpose is to produce statistics that allow for a comparison of the amounts paid by companies and the amounts reported by states as income.

VII. Policy Changes of Developmental Institutions

Many developmental institutions—bilateral as well as international financial institutions—have drawn attention to corruption and its damaging effects. The most important example of this was in 1995 when the President of the World Bank declared war on corruption, claiming that corruption is the single greatest obstacle to development. Nowadays, most developmental institutions have specific, anti-corruption programs.¹⁴ In addition, they have established special offices entrusted with the task of fighting corruption in their programs and within their own organizations.¹⁵

VIII. The Business Community: A New View

There are clear signs that businesses all over the world are increasingly apt to repudiate bribes. They realize that it is an expensive way of doing business, that it creates a breeding ground for disloyalty within their own companies, and is becoming more and more dangerous for the top management of the companies. In addition, they also have come to acknowledge that corruptive practices by a company damage its goodwill.

The International Chamber of Commerce (ICC) favours self-regulation.¹⁶ For this purpose, it has issued guidelines entitled *Rules of Conduct on Extortion and Bribery in International Business Transactions*, with its first version drafted in 1977.¹⁷ In addition, the ICC has also published a handbook, *Fighting Corruption: A Corporate Practice Manual*, and established the Commission on Anti-Corruption.¹⁸ The distortion of competition caused by corruption is a major reason behind the ICC's actions. The World Economic Forum has taken an initiative as well, called Partnership Against Corruption Initiative.¹⁹ This initiative, launched in 2004, builds on TI's Business Principles for Countering Bribery. In addition, TI has also created the Integrity Pact that seeks to counteract corruptive practices with respect to public procurement.²⁰

14. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, SYNTHESIS OF LESSONS LEARNED OF DONOR PRACTICES IN FIGHTING CORRUPTION 6 (June 23, 2003), <http://www.oecd.org/dataoecd/14/44/19936969.pdf>.

15. BANCO INTERAMERICANO DE DESARROLLO, MODERNIZACIÓN DEL ESTADO: DOCUMENTO DE ESTRATEGIA (July 2003), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=351821>.

16. International Chamber of Commerce, Extortion and Bribery in International Business Transaction, http://www.iccwbo.org/home/statements_rule/rules/1999/briberydoc99.asp (last visited Sept. 12, 2005).

17. *Id.*

18. International Chamber of Commerce, *ICC Celebrates Anti-Corruption Day*, Dec. 9, 2004, http://www.iccwbo.org/home/news_archives/2004/anti_corruption_day.asp.

19. World Economic Forum, Partnering Against Corruption Initiative, <http://www.weforum.org/paci> (last visited Sept. 12, 2005).

20. TRANSPARENCY INTERNATIONAL, BUSINESS PRINCIPALS FOR COUNTERING BRIBERY (July 29, 2005), available at http://www.transparency.org/building_coalitions/private_sector/business_principles.html.

IX. Success Stories

There has been a firm belief that corruption is almost impossible to eradicate once it has taken root in a country. This is not true. That was proven in England once upon a time and again by the United States in the nineteenth century. Recently the success stories of Hong Kong, Singapore, and South Korea provide more evidence. Naturally, these examples inspire similar efforts in many countries.

X. European Union Enlargement

Candidate countries continue to have a very strong incentive to combat corruption in order to be eligible for membership in the European Union (EU). The widespread corruption in the courts, police, and customs authorities in many of these countries has not been eradicated, but clear progress has been recorded, in terms of awareness of the problem and reduced acceptance of corruption. The programs Tacis, Phare, and CARDS (Community Assistance for Reconstruction, Development and Stabilisation) have contributed to a better understanding and to resolute measures.²¹ In fact, the EU effect is great even in countries that are still far from membership. For example, the Albanian government is taking aim at the very severe corruption in the country in order to one day be able to qualify for EU membership.²²

XI. Terrorism and Organized Crime

Institutions that are charged with the task of addressing the problems of terrorism and organized crime—police, prosecutors, customs, etc.—are, of course, much less successful if they are corrupt themselves. Organized crime weakens the state because those who commit these crimes have resources to finance large-scale corruption and to bribe officials in the legal system. This has induced the United States and the EU, among others, to help fight such corruption using political pressure, economic incentives, and technical assistance in countries where corruption is endemic, such as Indonesia and Pakistan. Money laundering is directly associated with corruption, as it is typically a consequence of criminal action and in many cases triggers corruption because bribes are a means of getting away with money laundering and of concealing the underlying crime.

XII. Disasters and Vulnerability

Corruption contributes to man-made disasters by weakening safety systems and hence lowering thresholds to disasters, such as transport accidents. Corruption also makes the consequences of disasters—natural or man-made—worse than necessary since the effects of disasters depend on human planning and respect for the law in the form of safety standards, land use regulations, warning systems, etc. In a corrupt system, all this might fail.

21. TRANSPARENCY INTERNATIONAL, INTEGRITY PACT (Dec. 31, 2002), available at http://www.transparency.org/building_coalitions/integrity_pact.

22. Tanja Borzel & Thomas Risse, *One Size Fits All! EU Policies for the Promotion of Human Rights, Democracy, and the Rule of Law* (Apr. 27, 2005), www.eu-newgov.org/database/PUBLIC/P23000-02-CLU302_One_size_fits_all.pdf.

The legal system as a whole is relevant for the creation of a secure environment because a corrupt environment is not a secure environment.

International donors and financial institutions will pay much attention to any misuse of the funds allocated to the post-tsunami reconstruction in southeast Asia, and the tsunami might mobilize people to condemn and resist corruption. The governments of Indonesia and Sri Lanka are aware of the terrible bad-will that it will cause the country if reconstruction money is misused. It will damage the general reputation of these countries and discourage foreign investment.

XIII. Corruption—A General Definition

The concept of corruption varies from one country to another. Corruption has become a generic term for a variety of bad phenomena in the public sector. In many countries, almost any encroachment on state property is labelled as corruption. In Vietnam, a vice-minister who had sold state property and kept the money was executed for corruption.

There is no generally accepted definition of corruption.²³ TI has a definition that has gained wide usage: “misuse of entrusted power for private gain.”²⁴ The World Bank uses a similar definition: “use of public office for private gain.”²⁵ Just about any act committed by an official could be corruption if it benefited him or her personally. Obviously, this definition excludes misuse within the private sector, such as bribing the employees of companies. But it includes misuse in favour of political parties, such as benefits for such parties or for persons associated with such political parties.

The ICC makes a distinction between bribery and extortion. Extortion is defined by the OECD as “[t]he solicitation of bribes is the act of asking or enticing another to commit bribery. It becomes extortion when this demand is accompanied by threats that endanger the personal integrity or the life of the private actors involved.”²⁶

XIV. Corruption—A Legal Definition

It is no problem for an economic analysis of corruption to have a rather vague definition of corruption. But definitions of a legal character must be more precise. A rather typical legal definition reads as follows:

whenever a public officer or other agent accepts or solicits a bribe, or any person gives or promises a bribe to such a public officer or other agent; provided, however, that the purpose of the bribe is to serve as a reward to the public officer or agent for an act that he has done or refrained from doing in the exercise of his functions, or as an inducement designed to ensure

23. Tanzi, *supra* note 8, at 576.

24. Transparency International, Frequently Asked Question About Corruption, <http://www.transparency.org/faqs/faq-corruption.html> (last visited Sept. 12, 2005).

25. Cheryl W. Gray & Daniel Kaufmann, *Corruption and Development*, in 35 FINANCE & DEVELOPMENT 7 (Mar. 1998), available at www.imf.org/external/pubs/ft/fandd/1998/03/pdf/gray.pdf; see also Daniel Kaufman, *Corruption, Governance and Security: Challenges for the Rich Countries and the World*, in THE GLOBAL COMPETITIVENESS REPORT 83 (Michael E. Porter et al. eds., 2004), available at <http://www.worldbank.org/wbi/governance/pubs/gcr2004.html>.

26. THE GLOBAL COMPACT, GUIDANCE DOCUMENT: IMPLEMENTATION OF THE 10TH PRINCIPLE AGAINST CORRUPTION (Dec. 2004), available at http://www.unglobalcompact.org/content/NewsDocs/guid_a-corr_081204.pdf.

that the public officer or agent does, or refrains from doing, any act, in the exercise of his functions.²⁷

Differing legal concepts are used in different countries but also within countries. For instance, the concept used in legislation against corruption is often much narrower than the concept used to lay down the mandate of special bodies set up with the task to fight corruption. In some jurisdictions, the concept of corruption is very narrow and some jurisdictions do not have the crime of corruption or bribery at all, which does not, however, mean that certain acts, typically regarded as corruption, are lawful. Bolivia is one such example, whereas Vietnam has a very open-ended definition with very harsh sanctions, including capital punishment.

In most countries, a distinction is made between the public and the private sectors in so far as a private employee's abuse of his position for personal gain is not regarded as corruption. The reason for this differentiation is most likely that a civil servant's abuse damages faith in public institutions. Another reason is probably that public property is regarded as more worthy of protection than private property. None of these arguments, however, seems to be convincing. Trust in the private sector is a societal interest. The latter argument might be a relapse of the view in the former Communist countries that an attack on public property was an attack on the system. A tendency can be noted, however, whereby more and more countries penalize the solicitation or acceptance of bribes by private employees.

Sometimes large corporations attach conditions to their decisions to invest in a country, such as requiring the host country to invest in infrastructure or change its taxation policy. Such conditions are sometimes labelled as corruption (state capture). However, as long as nobody derives a personal advantage from the arrangement, it is dubious to classify such conditions as corruption.

XV. Types of Corruption

The most conspicuous type of corruption is so-called petty corruption, which includes bribes to policemen, customs personnel, medical doctors, teachers, etc.²⁸ So-called grand corruption signifies bribes given in connection with big projects, for example infrastructure projects or arms sales.²⁹ Political corruption—defined as abuse of entrusted power by political leaders for private gain—is a type of serious grand corruption because it may erode democracy.³⁰

A special category of grand corruption, known as state capture, implies that a company influences the legislation of a state, institution, or the governmental policy in an entire area, for instance the environment, taxation, or mining.³¹ State capture is common in small coun-

27. W. Paatii Ofosu-Amaah et al., *Combating Corruption. A Comparative Review of Selected Legal Aspects of State Practices and Major International Initiatives* 63 (1999).

28. The World Bank, *Assessing Political Commitment to Fighting Corruption*, in PREMNOTES 29 (Sept. 1999), available at <http://www1.worldbank.org/prem/PREMNotes/premnote29.pdf>.

29. *Id.* "Political corruption"—defined as abuse of entrusted power by political leaders for private gain—is a type of grand corruption that is serious because it may erode democracy.

30. Joel S. Hellman & Daniel Kaufmann, *The Inequality of Influence*, in *BUILDING A TRUSTWORTHY STATE IN POST-SOCIALIST TRANSITION* 100 (Janos Kornai and Susan Rose-Ackerman eds., 2004).

31. JOEL S. HELLMAN ET AL., *SEIZE THE STATE, SEIZE THE DAY: STATE CAPTURE, CORRUPTION, AND INFLUENCE IN TRANSITION 2* (Sept. 2000), available at <http://www.worldbank.org/wbi/governance/pubs/seizestate.html>.

tries where a financially strong business group could influence state policy and favour its interests or stakeholders, for instance political parties. Countries afflicted by state capture are Angola and the Democratic Republic of Congo (former Zaire). Other states that are examples of grand corruption are the Central Asian countries, such as the former republics of the Soviet Union.

Sometimes a political system manipulates private companies for personal gain. This type of reversed state capture could be called “power chasing wealth,” in contrast to “wealth chasing power.” Russia can serve as an example of this phenomenon. “Crony bias/crony capitalism” is at hand when the state, business, and organizations are intertwined in networks that can exert influence and gain economic benefits without bribes being paid. It can take the form of politicians receiving well-paid positions within the private sector or of state subsidies flowing to private organizations that support the government.

XVI. Corruption and the Political System

There is widespread corruption in democracies as well as in one-party states. The introduction of democracy does not automatically reduce corruption. Low institutional quality means that corruption is perceived to be high. As soon as people have that perception, the system loses its legitimacy, tax evasion increases, and the investment climate is affected.³²

Corruption increases inequality and creates inefficiency. For this reason, corruption damages the legitimacy of a regime whatever its type of governance, whether democratic or one-party. For example, the leadership in China and Vietnam is well aware of this and tries by all means to combat corruption.

XVII. Corruption and the Legal System

A weak legal system is conducive to corruption, but corruption also weakens the legal system. There is a causal relationship both ways. First, a weak legal system is closely related to an informal economy. The grey zone between poorly working official rules and institutions on the one hand and the informal law on the other is a breeding ground for corruption. Most companies prefer to rely on public rules and institutions, but if the state is incapable of enforcing its own rules effectively and impartially, bribes and private protection fill the void left by inadequate state enforcement. The absence of the state system, including the legal system, inhibits investments and transactions.

Next, corruption within the law enforcement administration—police, customs, tax administration, coastal administration, etc.—as well as public institutions overseeing this administration, is devastating for the efficacy of the campaign against corruption, since the existence of corruption is so closely related to a lack of accountability.³³ This also applies to the judiciary (i.e., prosecutors and judges), which should be the ultimate warrant for fairness and justice. One cannot expect low-ranking officials to be loyal to the system unless they have faith in the system and see that their efforts make a difference.

32. Daniel Kaufmann, *Governance Redux: the Empirical Challenge*, in *THE GLOBAL COMPETITIVENESS REPORT* (Michael E. Porter et al. eds., 2003), available at <http://www.worldbank.org/wbi/governance/pubs/govredux.html>.

33. Susan Rose-Ackerman, *Governance and Corruption*, in *GLOBAL CRISES, GLOBAL SOLUTIONS* 322 (Bjorn Lomborg ed. 2002).

XVIII. Weak States and Weak Governance as Causes of Corruption

Corrupt countries often have a weak and overburdened state that cannot fulfill its functions or control its own officials. Consequently, the weakening of a state is not the solution to corruption. On the contrary, the state should be reinforced, not necessarily by becoming bigger, but rather more effective in fulfilling its core tasks, such as the functioning of its legal system. The underlying institutional weaknesses must be addressed.³⁴ Corrupt states are in many instances top-heavy, with the power in the hands of a few. Popular influence and participation are low, and there is a lack of accountability. Hence, improvement of the system of governance is the way to go.

XIX. What makes corruption possible?

There are circumstances that directly create opportunities for corruption: state monopolies, regulations, the need for official permits, decisions to make public investments, procurement, etc. Some circumstances facilitate corruption. A key determinant is the reward structure. Bureaucratic traditions that favour recruitment or promotion of officials on arbitrary grounds, as opposed to on the merits, and low salary levels are part of this. Another determinant is the effectiveness of accountability systems. Lack of transparency, discretionary powers for officials, and room for arbitrary decisions impede accountability. The low probability of being exposed and lenient consequences for an official, who does get caught, are also part of an inadequate accountability system. A third factor is the leadership. Corruption will thrive in the absence of political leadership that is strongly committed to anti-corruption activities.

As seen, there will be opportunities for corruption in any system. As a matter of fact, the cleanest countries, like the Nordic countries and the United Kingdom, offer ample opportunities for corruption. These opportunities cannot be eliminated unless the state abdicates from its vital functions. The fact that many countries are relatively clean is in other words not because the opportunities for corruption have been reduced. On the contrary, public procurement occurs on a large scale, these societies are heavily regulated with quite a number of subsidy schemes in operation and state monopolies.

XX. The Key Issue?

A strategy to fight corruption must take aim at the system of governance. The higher the incidence of corruption, the more the strategy should focus on the broad underlying features of the governance system.³⁵ For example, one strategy is to build the rule of law and strengthen institutions of accountability. The main issue is how weak states can bring about fundamental change of their system of governance in terms of control and sharing of power (accountability), openness, public attitudes, citizen influence, and trust in public institutions.³⁶

34. *Id.* at 309.

35. ANWAR SHAH & MARK SCHACTER, *COMBATING CORRUPTION: LOOK BEFORE YOU LEAP*, in *FINANCE & DEVELOPMENT* 40 (Dec. 2004), available at www.imf.org/external/pubs/ft/fandd/2004/12/pdf/shah.pdf.

36. Michael Johnston & Alan Doig, *Different Views on Good Government and Sustainable Anticorruption Strategies*, in *CURBING CORRUPTION* 13 (Rick Stapenhurst & Sahr Kpundeh eds., 1999).

Bringing about such change is no easy feat. It means challenging influential forces in society, especially such forces within the state, that benefit from the corruptive practices. State officials and state institutions that subsist on bribes are supposed to combat that practice. These officials and institutions are asked to combat themselves. This is why institutions most in need of anticorruption programs are the institutions least likely to initiate such programs. It is easier, though, if “key champions”—persons who really want change—become frustrated and are prepared to fight for that change.

To make progress there must be pressure from below. Popular acceptance of corruption is a powerful ally of corruption. That acceptance can be broken only if people are made aware of the societal costs that corruption causes and of what can be feasibly done. But there is also a need for political commitment, preferably non-partisan, and a leadership that exerts pressure from above to set a good example. If the top is rotten the bottom will also be rotten.

XXI. The Economic “Solution”

As stated above, many activities of a modern welfare state create opportunities for corruption, such as state subsidies, public procurement, regulation of business, high taxation, land use planning, construction standards, safety regulation, and environmental protection. The greater the state intervention in the economy, the greater the opportunities for corruption. The ability of an official to provide a private partner protection in the market will depend upon the openness of the market to external (imports) and internal competition. Economists would therefore stress deregulation, privatization, market entry to increase competition, macroeconomic soundness, etc., as ways to come to grips with the presumed root causes of corruption. Much of the work of development institutions has such an orientation or at least the strategies of the institutions have such a focus.³⁷

However, economic reform cannot solve the problem. The economic solution requires a minimal state, because its pillars are deregulation, privatization, and market openness. Many countries undeniably suffer from over-regulation and inefficient state monopolies and these should be reduced. But a modern welfare state will always need the types of activities mentioned above. Economic policy can make a difference, but it cannot provide a final solution.

XXII. The Role of the Legal System

A. IN GENERAL

Most or all types of action needed for combating corruption require a basis in the legal system to be effective. Lawyers and politicians have misunderstood the role of law when they stress only criminal law. There is a need for quite a number of legal rules and devices to counteract corruption—rules that provide for openness, checks and balances, a merit-based system for officials, privatization, independence of media, access to the Internet, tender procedures, the right to establish a business, protection of property, basic liberties to organize meetings, reform of taxation, competition law, etc. These rules are necessary elements for containing corruption, but most of them have no direct bearing on corruption

37. ROBERT KLITGAARD ET AL., *CORRUPT CITIES: A PRACTICAL GUIDE TO CURE AND PREVENTION*, (1999).

as such, and a few persons, lawyers included, would associate these legal rules with the fight against corruption. Many of these measures could be parts of larger reform programs, such as civil service or financial management reforms.

Clean countries are not “clean” simply because they have harsh penal law systems, but because they have strong legal systems and good systems of governance. In fact, many institutional and economic reforms are legal reforms. For example, the restructuring of the state business sector often emerges due to reform of bankruptcy legislation. In addition, the significance of the legal system also is demonstrated by developments in former Soviet republics and similar countries, where the transition from centrally-planned to market economies allowed for state capture and administrative corruption.

B. ACCOUNTABILITY AND TRANSPARENCY

Accountability includes political, administrative, and financial accountability.³⁸ Emphasis should be put on systemic reform rather than on individual performance, namely measures that improve institutions, including institutional culture. Institutions must have a rigorous internal control of high integrity and independence. Also, whistle-blowers should not only be tolerated but also protected and encouraged. The ordinary citizen needs access to an effective complaint mechanism and appellate procedure to be able to avoid involvement in corrupt practices. The independence of the judiciary must be coupled with the accountability of prosecutors and judges.

Official documents should be available to the public. The amount of politicians’ and officials’ salaries should be public information as well as any conflicts of interest and political contributions. These persons should also be obliged to declare their assets. Procedures for recruitment and promotion of officials should be transparent. Accounting practices should allow for the transparency of delivery of public services. There should be mechanisms that enable the tracing, seizure, and forfeiture of illicit earnings from corrupt activities.

Public procurement practices deserve special attention.³⁹ Tendering companies should be given a possibility to inspect tender documents once the procedure is concluded, and reasons for procurement decisions should be put forward. Price comparisons of similar projects in different countries, so-called benchmark cost estimates, may point at cost increases due to bribes.

C. THE BUSINESS SECTOR

In addition to the official regulation of business, there is a need for corporate codes of conduct, which, among other things, may promote integrity in business practices. Such codes can be effective to the extent that they are embedded in the corporate culture and are not merely a piece of paper. Many small companies operate in the informal sector. The elimination of barriers to the formal business sector would reduce opportunities for corruption and provide increased security and access to social security systems. State capture is, to a large extent, unleashed by a weak protection of property and contractual rights. If

38. Accountability is a key concern of most developmental institutions. ANTI-CORRUPTION PRACTICE NOTE, *supra* note 5, ¶¶ 3f, 13.

39. KLITGAARD ET AL., *supra* note 37, at 101, 117.

businesses cannot rely on such rights, they are inclined to protect their interests using bribes.

D. TAX ADMINISTRATION

Corruption is an effect of a weak state, and a state is weak if it lacks resources. A state cannot function if it is unable to collect taxes.⁴⁰ Without resources, a state cannot pay reasonable salaries and cannot maintain effective public institutions, such as providing adequate premises or equipment for law enforcement agencies. For revenue collection to be effective, the tax authorities must be clean. The willingness of people to pay taxes depends on their faith in the tax administration. In many cases, this is where an anti-corruption program should start.

E. THE SUPPLY SIDE

Most corrupt acts involve a bargain between a public official and some private actor. Measures of the kind that have so far been dealt with take aim at conditions in the countries that have a high level of corruption. But do not forget about the supply side, such as corporations and powerful interest groups in the industrialized world who pay bribes. Much of the grand corruption in the south and east has its roots in these countries, for instance, corruption related to arms sales, extraction of oil and gas, as well as mining. For the fight against corruption to be effective, it must also target the supply side. The OECD and the UN conventions have such an orientation and there are organizations—such as TI and the British Department for International Development (DFID)—that stress such an approach.

F. CRIMINAL LAW AND OTHER SANCTIONS

In order to effectively combat corruption, it is necessary to focus on the workings of institutions, not individuals. Penal law is therefore of less importance than one might think. This is not to deny, however, that the criminal prosecution of corrupt activities—and associated activities, such as money laundering—may give the business community a strong signal, particularly if high level directors of a company are charged. For example, collusive corruption—for instance, that are bribes paid in a tender procedure—is more difficult to detect than extortive corruption. To charge high-level individuals, whether in business, public institutions or politics, with collusive corruption increases the trust of ordinary people in the system and consequently their support in the fight against corruption.

There is room for a number of other sanctions, which may be easier to impose than criminal law sanctions. Examples are blacklisting of corrupt firms and seizure and forfeiture of the illicit earnings resulting from corruption, whether inside the country or abroad.

G. INTERNATIONAL COOPERATION

Quite a number of anti-corruption conventions are now in force or have at least been signed; the most important one is perhaps the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions that entered into force in 1999.

40. Rose-Ackerman, *supra* note 33, at 333.

The convention obliges the signatory states to make it a crime to pay bribes overseas (but not to receive bribes).⁴¹ The UN Convention of December 2003 is the only convention adopted at the global level.⁴² Also the Organization of American States, the Council of Europe, and the African Union have adopted anti-corruption conventions.⁴³

These instruments are often alleged to be rather ineffective, having weak mechanisms for accountability. To some extent that might be true, but it is often overlooked that they affect the societal discourse. They make it less acceptable that companies use bribery as a method of business. In addition, to the extent that agreements make it easier to seize property in any country where a bribing company has property and to make bribery a criminal offence even if it was committed outside the prosecuting country, the net effect is still positive.⁴⁴

H. SPECIAL ANTI-CORRUPTION BODIES

There are quite a number of special anti-corruption bodies.⁴⁵ Positive experiences have been cited in connection with anti-corruption bodies invested with broad investigative and prosecutorial powers. The Independent Commission Against Corruption in Hong Kong and the Singapore Corrupt Practices Investigations Bureau are both recognized as having meant a lot for the successful fight against corruption in their respective countries.⁴⁶ Such a special body has also had some success in Bolivia. Indonesia is another example where a special body has been instituted, and a special court for corruption cases has been established. The experience of Indonesia is reasonably good too.

However, the picture is quite different in Kenya as the following quotation by the Attorney-General of Kenya demonstrates:

The government has this morning formed an anti-corruption squad to look into the conduct of the anti-corruption commission, which has been overseeing the anti-corruption task force, which was earlier set to investigate the affairs of a Government ad-hoc committee appointed earlier this year to look into the issue of high level corruption among corrupt Government Officers.⁴⁷

It is disputed whether a general case can be made for special bodies.⁴⁸ Such bodies may seem to be the only practical solution in highly corrupt countries provided that they enjoy support from the highest political level as well as complete independence to investigate the highest level of government. On the other hand, the success stories that can be recorded

41. Organization for Economic Cooperation and Development, Anti-Bribery Convention, <http://www.oecd.org> (last visited Sept. 12, 2005).

42. United Nations Declaration Against Corruption and Bribery in International Commercial Transactions, G.A. Res. 51/191, U.N. Doc. A/RES/51/191 (Feb. 21, 1997).

43. United Nations Convention Against Corruption, G.A. Res. 58/4, U.N. Doc. A/Res/58/4 (Oct. 31, 2003).

44. Rose-Ackerman, *supra* note 33, at 328.

45. Examples are Australia, Bolivia, Botswana, Hong Kong, Indonesia, Jamaica, Kenya, Singapore, Thailand, and Uganda. See JEREMY POPE, *CONFRONTING CORRUPTION: THE ELEMENTS OF A NATIONAL INTEGRITY SYSTEM* 307 (2000).

46. ANTI-CORRUPTION PRACTICE NOTE, *supra* note 5, ¶ 12.

47. Daniel Kaufmann, Revisiting Anti-Corruption Strategies: Tilt towards Incentive Driven Approaches?, in *Corruption and Integrity Improvement Initiatives in Developing Countries* 63, 64 (1998), available at <http://magnet.undp.org/Docs/efa/corruption/Chapter04.pdf>.

48. SHAH & SCHACTER, *supra* note 35, at 42.

cannot always be attributed to the special bodies as such. In many cases the progress was a result of a resolute effort to fight corruption, where the special body has been only one of several reform initiatives.

I. LEGISLATION AND LEGISLATIVE TECHNIQUE

Many countries do not have the crime bribery but may have an efficient legal system for fighting corruption nonetheless. Acts in one country regarded as corruption might in another country be classified as fraud, embezzlement, or misconduct. As stated above, the entire legal fabric is what counts. The legislative technique is important as well. General provisions open up for arbitrariness and, hence, for officials to solicit bribes. In particular, officials in a monopoly position, who wield discretionary powers in the absence of genuine accountability, have opportunities to solicit bribes. Legislative acts should be published and made easily available. Authorities should have public manuals for their decision-making and internal rules of procedure, particularly guidelines for exercising discretion.

XXIII. Conclusions

The prospects of a successful fight against corruption have improved greatly over the last decade or two. Several factors contribute to this advantageous development, such as the awareness of the damaging effects of corruption, reduced acceptance of corruption, the knowledge that progress is possible, and the pressure on governments to take action and the preparedness of many regimes to take action.

Corruption is a phenomenon that easily escapes us because it is difficult to nail down. A country is poor because it is corrupt, but it is also corrupt because it is poor. Organized crime and corruption go hand in hand as well. What is the cause, and what is the effect? There are causal relationships in various directions, but there is an insight that corruption slows down and diverts investment, distorts competition, is economically inefficient, and is unfair to poor people. In addition, it fosters uncertainty, unpredictability, and declining moral values, and therefore creates a governance deficit that impacts on the whole fabric of society.

There is no easy way to fight corruption. One cannot just identify the root causes and eradicate them. Each country has its own preconditions; there are no quick fixes or one-size-fits-all approaches. If there is one single root cause it is human greed. The opportunities that make corruption possible are also abundant in clean states.

They are clean because they exercise good governance, including a number of factors that countervail corruption, such as accountability, openness, good leadership, reasonable over-regulation, good taxation systems and hence financial resources for the states, clear rules for public procurement, popular participation in governance, etc.

The role of the legal system is to provide the institutional framework—rules as well as institutions that apply the rules—for good governance. This includes a framework for accountability, channels for complaints, a clean judiciary, taxation and customs, and good and secure working conditions for non-governmental organizations and the media, including the Internet.

The legal system is the warrant for this type of governance that counteracts corruption. Criminal law has a role to play, even though it is not as prominent as one may assume. In

addition, the legal system also has the vital role of overseeing the institutions that fight corruption and to hold them accountable. Only if this task is accomplished in an effective way, and is seen as being effective, is it possible to gain and maintain the confidence of the public. Without such confidence, citizens cannot be expected to reject corruption and abstain from using bribes. In the end, the attitude of the public at large is crucial to the prospect of success for any effort to fight corruption.

