

# THE INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY

## Corruption and Human Rights

### IDENTIFYING POSSIBLE POINTS OF ENTRY FOR AN ALLIANCE BETWEEN THE STRATEGIES OF HUMAN RIGHTS AND ANTI-CORRUPTION

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1. Day after day, in silence, government corruption systematically violates people's human rights. People cannot have access to justice or protect their life if judges and police pay more heed to bribes than to laws. A hospital that is undersupplied because of corrupt public contracting mechanisms cannot guarantee people's right to health. A family living below the poverty line cannot aspire to a dignified life if social programs distribute resources with an eye to maintaining the local government's patronage networks. A public school cannot offer its students a free breakfast because the funds were siphoned off to finance the local government's political campaign. A huge dam that promises economic development ends up displacing thousands of people, flooding forests and cropland, and causing an environmental disaster due to collusion between the government and large construction and financial firms promoting their particular interests. Private businesses providing public services flout basic principles of availability and accessibility in response to deliberately negligent government regulation and control. Corruption encourages discrimination against people, slows the gradual fulfilment of social, cultural and economic rights of the most vulnerable groups and violates civil and political rights.
2. Over the last two decades, the good governance agenda has included the control and exposure of corruption as one of its main points. Thus, the causes of corruption have been measured empirically, as well as its impact on human development; institutions and administrative procedures have undergone massive overhauls. Countries have negotiated and signed international anti-corruption conventions. And Transparency International (TI) was formed, an international coalition of NGO's that takes on corruption "from below". Unfortunately, the anti-corruption strategies implemented over the last two decades have not achieved the results that were expected. Designed and promoted by international organizations as an integral part of the good governance agenda of the 90's, anti-corruption reforms have limited their scope to pushing legislative and institutional reforms, without attacking the social and economic causes that sustain and reproduce corruption. In this sense, the way new anti-corruption reforms incorporate new tools and strategies will be fundamental to defining their impact and their limitations.
3. The present study, commissioned by the International Human Rights Council, aims primarily at bridging the discourses and practices of the human rights and anti-corruption movements. With this objective as the central topic, the present study will attempt to identify points of entry to

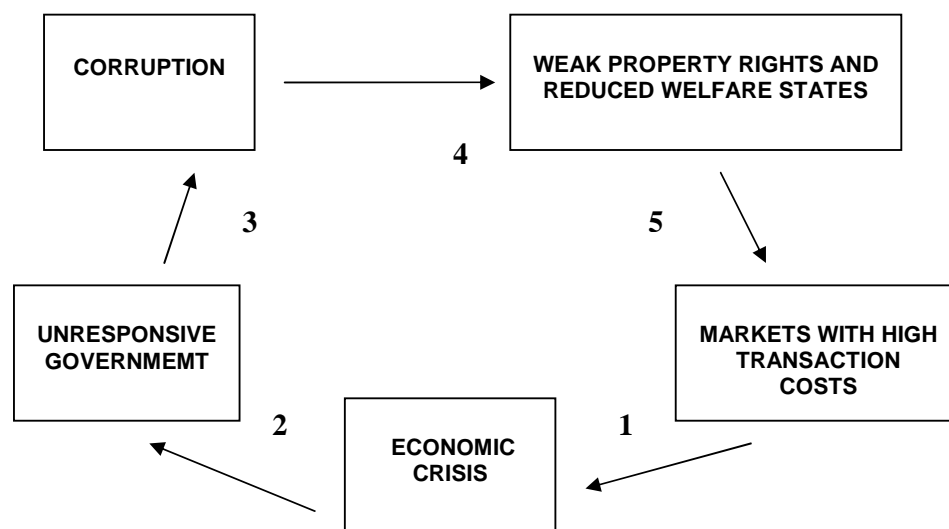
improve and enrich the practice of both movements through the exchange and critical analysis of principles, concepts, tools and strategies.

## **1. FROM THE POWER OF ECONOMICS TO POWERLESS POLITICS**

4. In the year 1989, the term “governability” appeared for the first time in a development policy context, in a report by the World Bank on the crisis in Sub-Saharan Africa. (World Bank, 1989). The inclusion of this term represents a change in the Bank’s corporate policies, motivated primarily by the negative results of the poverty-reduction policies implemented in Africa during the last years of the Cold War.
5. Poverty reduction emerged as a key objective in the development policies of multilateral credit agencies in the early 70’s. Enmeshed in an overall strategy that sought to protect underdeveloped countries from the spectre of communism, international aid began to shape international relations between countries in the North and developing countries. International aid grew rapidly until the early 90’s, reaching a peak of 60 million dollars in 1992. (Aubut, 2004).
6. General consensus regards poverty reduction and economic growth as two key aims of international aid, and yet the way to achieve these aims has changed over time. During the 70’s and 80’s, the World Bank’s development policies focused mainly on economic reforms as the engine that would drive social and economic development. In this way, the Bank began to condition the loans it made on economic reforms that would give priority to free trade, deregulation, and fiscal discipline. (Aubut, 2004). This agenda was rapidly adopted by other international agencies.
7. But these loans did not produce the results that were expected. Governments accepted the conditions and obtained financial assistance, but then never implemented the reforms and the funds were used discretionally for purposes other than those agreed to. Instead of encouraging development, international aid propped up corrupt governments that did not promote investment, used up the funds and implemented discretionary policies that benefited only the political elite. (Boone 1995, 1996; Burnside and Dollar, 1997; World Bank, 1998; Feyzioglu, Swaroop and Zhu, 1998)
8. Criticisms of this strategy were quick in coming. One of the fiercest critics of international aid, Peter Bauer (1991, 1996) maintains that given the institutional conditions of the governments receiving aid, international aid does not promote sustainable development, but rather turns into a subsidy given by poor people in rich countries to rich people in poor countries. Instead of improving the lives of the neediest, international aid is used to favour the interests of the most powerful. Examples of this strategy can be found in Ethiopia and Burma in 1980. (Aubut, 2004)
9. The end of the Cold War, and the evidence that the economic conditions tied to international aid had failed, brought about an important change in the dominant international development strategy. The market continued to be the means for encouraging economic growth, but a new paradigm emerged that highlighted the role of institutions and public administration as key areas for fostering a favourable environment for economic development. A new good governance agenda then emerged that redirected attention toward the institutions that set the “rules of the game” that economic agents play by.
10. The analysis that underlies this new agenda accounts for poverty and low economic growth by pointing to poor institutional capacities and high levels of corruption. The persistence of inefficient markets with high transaction costs is attributed to weak property rights and reduced welfare states caused by a high level of corruption. In countries with high levels of corruption, a

privileged minority plunders public resources at the expense of the majority. The absence of a system of accountability, together with the poor organizational capability of society at large, enables the minority to exploit and exclude the majority. This vicious circle explains the unyielding levels of poverty and underdevelopment. (Khan, 1999)

**Figure 1: Fundamental aspects of the governability agenda**



*Source: Mushtaq Husain Khan, Governance and Anti-Corruption Reforms in Developing Countries: Policies, Evidence and Ways Forward*

11. While they do have certain elements in common, not all development organizations and agencies share the same notion of governance. In fact, due to the vagueness of the term, it has meant different things in different contexts. Some conceptions define governability in economic terms only, focusing on legal and judicial reforms, anti-corruption measures, accountability and transparency in government processes as the main areas to work on. Other definitions see governability through a democratic prism, as the promotion of citizen participation and the search for a new role for civil society. (Dreifuss, 2003).
12. The World Bank defines governance as “the way power is wielded in the management of social and economic resources for a country’s development” (World Bank, 1992 in Aubut) and a government’s ability to design, formulate and implement public policies (World Bank 2000). The recognition the key role played by governability in fostering economic development has led to a reformulation of Washington’s consensus agenda and raised interest in the political processes that accompany economic reforms. In this way, issues like state capacity and government autonomy take on significance in contexts of market reform and democratic consolidation. In the 80’s, the main emphasis had been on economic stabilization and liberalization; the second generation of reforms, however, is trying to reinforce the market economy by strengthening public institutions. In this sense, the World Bank proposes scrutinizing the skill, capacity and will of political authorities to govern effectively in the interests of the common good. The World Bank is developing six main dimensions to measure good governance: 1) Voice and Accountability, 2) Political Stability and Absence of Violence, 3) Government Effectiveness, 4) Regulatory Quality, 5) Rule of Law, and 6) Corruption Control (Kaufmann, 2003.)
13. While the World Bank states that in theory its mandate strictly forbids it to interfere in other countries’ internal political affairs, in practice the governability agenda treads a fine line between intervention in economic issues and the inclusion of a significant number of conditions to

international aid that touch on political and situational issues. The notion of “good governance” introduces prescriptive dimensions that imprint specific requirements on decision-making processes and public-policy formulation. By defining governability as a technical issue, the World Bank has succeeded in justifying its involvement in public issues without violating the terms of its mandate. This approach tends to give the good governance agenda a false air of being politically neutral by depicting development as a world without politics (Santiso, 2001). As we will see later, this issue is crucial for understanding the use of language and concepts promoted by the governance agenda and a possible connection with human rights.

14. Anti-corruption reforms emerge as a leading element of the governance agenda. The fight against corruption has been a formal part of the World Bank mandate since 1996, and has taken its place as one of the core issues of the good governance agenda. The fight against corruption is conceptualized as a response to the ineffectiveness of the economic reforms that were promoted in the 80's. The scope, limitation and effectiveness of these reforms cannot be analyzed without considering the ideological, theoretical and practical context in which they are situated. (Dreifuss, 2003) In this way, it becomes impossible to analyze anti-corruption reforms and conventions without examining the conceptual framework that the good governance agenda is based on.
15. According to this agenda, the fight against corruption is construed as the implementation of much-needed reforms that must be promoted in government in order to allow markets to function freely. The agenda thus proposes regulation as a response to rent-seeking, fiscal transparency as a solution for political corruption and patronage, and a change in the incentive structure for public officials as a way to reduce extortion (by raising public servants' salaries, increasing the opportunity costs of corrupt practices, promoting social overseers to monitor the public sector, and creating anti-corruption offices to investigate and eventually prosecute acts of corruption. (Khan, 1999)
16. Another multilateral credit institution that has defined governance as a deciding factor in its international aid policy is the Asian Development Bank (ADB). Stressing the economic side of governance, the ADB advocates the efficient management of public resources. The objectives of the ADB's governance agenda include economic efficiency, transparency, accountability, efficiency and effectiveness, and participation. (Dreifuss, 2003)
17. The United Nations Development Program (UNDP) has also taken up the governance agenda as a key element for sustainable development. The UNDP defines governance as “wielding political, economic and administrative authority to manage a country's affairs on all levels.” The UNDP's approach goes beyond the economic sphere to include actions that promote democratic governability, including the work of legislatures, electoral systems, access to justice, decentralization, local government, public administration, transparent accountability, urban development, gender and the fight against corruption. (Dreifuss, 2003)
18. Industrialized countries' development agencies also promote the importance of the governability agenda, but with a slightly different focus. AID, for example, defines its governance agenda as the competent management of national resources in a way that is fair, open and responsive to people's needs. AID concentrates on promoting better economic and financial administration, strengthening law and justice, promoting the development of the civil society and democratic systems. The Canadian International Development Agency (CIDA), for its part, has adopted the governance agenda with quite a different focus. CIDA describes governance as “wielding power at the different levels of government effectively, honestly, fairly, transparently, and with accountability.” (Dreifuss, 2003)

### **A single language for different tongues: depoliticizing the power of words**

19. In spite of the possible ideological differences that exist among these and other agencies, they all seem to share a certain common language of development policy. This language couches its messages in a combination of seductive and optimistic words that warmly and optimistically call for “a world without poverty,” “empowering the poor,” and promoting the “participation of civil society.” The language of development over the last ten years evokes an optimistic world, where everyone has the opportunity to make decisions about their own life, where nobody goes hungry or suffers discrimination, where we all have opportunities in a regulated, governable and controlled world.(Cornwall 2005)
20. An analysis of development language assumes that words are never neutral, but that they end up taking on meaning when they are used in a policy. (Cornwall 2005) The words “poverty reduction,” “empowerment,” “accountability,” “transparency,” and “participation,” among others, are used by the different international development organizations and agencies but they take on different meanings depending on the interests and objectives that each organization advocates. Even more important is the fact that the meaning each word takes on defines the terms of the problem, and the solution that is designed.
21. Laclau (1996) describes how words are woven together into “chains of equivalency” with other words that give them specific meanings. The way words are brought together allows certain meanings to prosper while others are barely understood. A clear example is the meaning that the concepts “participation” and “empowerment” acquire in the governability agenda promoted by the World Bank, a meaning very different from the one that was associated with these words in the grassroots organizations and social movements of the 70’s and 80’s. Words that were once used to talk about politics and power were reconfigured in the governance agenda, and placed at the service of “one-size-fits-all” recipes, where they took on an apolitical slant that “everyone can accept” (Cornwall 2005)
22. As set forth in the work of Paulo Freire and Orlando Fals-Borda, participation for development in the 60’s and 70’s was understood as a way to discover and promote the social changes necessary to achieve self-determination and self-government for people. In this context, far from being participatory processes focused on designing and providing social services, social participation sought to challenge the structural relationships of power and subordination in terms of rights and citizenship in order to increase oppressed and excluded social groups’ control over the distribution of public resources (Lean and Opp, 1999).
23. The concepts of citizen participation from the 70’s are but a distant echo in the design and practice of participatory methods in the governability agenda of the 90’s. (Cornwall 2003). Within the institutional framework of neo-liberal reforms, participation advanced slowly but surely toward a kind of depoliticized, tamed participation. This context saw the emergence of the main participatory methods used to improve the effectiveness of social policies. In this way, participation became a one-dimensional mechanism and began to form part of a linear, rational process of programming and management of development projects for poverty reduction. (Leal and Opp, 1999) Instead of proposing that the “people” participate in the definition of their own development, participation in the 80’s began to be understood as the input from the community and the beneficiaries of the development projects to cover part of the costs and risks of these projects. (Cornwall 2005)
24. The word “empowerment” underwent a similar process. The original use of this word was associated with a radical project of social transformation, focused on creating a counter-hegemonic power that would allow excluded groups to mobilize collectively in order to define and demand their rights. It was also a key discourse for second-generation feminism, through

which empowerment took on both a collective and an individual dimension in the construction of power to fight for a fairer and more equitable world. Under the paradigm of governance, however, the term empowerment became a buzzword to describe the activities of consultation and inclusion of beneficiaries in the implementation of social programs with no consideration of their role in decision making. (Lea and Opp, 1999)

25. The meaning shifts pulled off by neo-liberalism regarding the words participation and empowerment serve to technify and mechanize the concepts while power relationships are rendered invisible. Participation becomes documentation and/or communication of experiences while power is construed as a technical problem in projects. In this way, both concepts are adapted to different strategies and methodologies more as a technique to follow than as a process for change. Their definitions become so vague that they lose all meaning. The World Bank's definition of participation, for example, ends up being so wide-open that it manages to accommodate just about any practice of development policy. (Cornwall 2003)
26. With this new language, the beneficiaries of international aid are transformed into consumers (USAID), stakeholders (World Bank), and actors (OECD). The discourse legitimizes them as active members in the social aid programs. In practice, however, they are made invisible by the perpetuation and promotion of exclusion mechanisms. In this way, for example, governability language describes the main stakeholders of a social policy as "the poor and marginalized, including women", thereby fostering a myth about the community of international aid recipients, papering over the differences and rendering power relationships invisible.
27. This same process has emptied the word "accountability" of meaning in governability discourse. In the terms of this agenda, accountability is reduced to a technical process, implemented by means of a clear and transparent procedure that respects laws and regulations. Accountability strategies include the development of auditing and monitoring systems that keep track of indicators of the impact, spending and financing of social projects. But while sound management, access to information and respect for the law sound very nice in development discourse, this conventional and technocratic way of looking at accountability leaves many loopholes open. This definition overlooks basic issues that have to do with public agencies' level of responsibility toward the demands of ordinary citizens. Accountability is seen as a key aspect in the fight against poverty and social injustice, and yet its theorization in the governance agenda and the fight against corruption put aside any analysis of the power relationships that exist between agents and principals in each of the contexts. (Gaventa 2006)

### **The power of corruption in poverty**

28. Understanding and analyzing the way the meaning of these words is transformed is essential to understanding the limitation of the anti-corruption reforms promoted under the neo-liberal governance agenda. To this end, a brief review is needed of the relationships between the governance agenda, corruption and the fight against poverty.
29. As we mentioned at the beginning of this study, the governance agenda's diagnosis named corruption as a key and central element for explaining the ineffectiveness of international aid in the 70's and 80's. Several studies state that corruption by itself does not produce poverty, but it does impair the economy and governability and thus has an indirect impact on poverty levels by blocking sustainable development. This agenda explains the relationship between corruption and poverty with two basic models: the economic model and governability model. (Chetwynd, 2003)
30. The economic model asserts that corruption has an impact on poverty by hindering economic growth. Corruption discourages private investment, reduces business development and innovation, lowers the quality of public infrastructure, as it reduces and affects the distribution

of public resources. Aside from limiting economic growth, corruption also aggravates inequity in income distribution. The governance model, on the other hand, relates corruption to low levels of capacity and autonomy in governments, weakness of political institutions and deficient public services. (Chetwynd, 2003). Kauffman (2004) supports these studies by doing an empirical analysis of the correlation between poverty indicators and the incidence of corruption in 209 countries from 1996 to 2004. He thus demonstrates empirically that child mortality is higher in countries with more corruption than in countries with a lower corruption index, and that higher levels of governability correspond to higher per capita income.

### **In search of lost power: the contribution of human rights strategy**

31. While corruption is not in itself a violation of human rights, government action or inaction that creates conditions that increase or maintain poverty and marginalization over time often reflect violations or denial of human rights. National and regional governments have a commitment, as signors of human rights treaties, to answer for the fulfilment of rights in their territory. This would imply, in theory, answering as well for the effects of government corruption on people's quality of life.
32. The conclusion of the studies analyzed in the previous section thus demonstrates a strong correlation between corruption and low levels of fulfilment of people's social, cultural and economic rights. By assuming this correlation, we can review the anti-corruption strategies launched under the governance agenda with an eye to their possible limitations.
33. The lack of a human-rights-based perspective in anti-corruption strategies leaves out certain key factors that have a negative impact on the effectiveness of these initiatives. The relationship between poverty and human rights is multi-faceted and profound. When groups of people suffer discrimination and marginalization, human rights are a powerful tool for securing them access to basic services that can help them escape poverty by guaranteeing them a dignified life, including access to health services, housing, a healthy environment and security. In this sense, without a systematic examination of how corruption affects marginalization and discrimination, thereby causing, aggravating and perpetuating poverty, an anti-corruption strategy loses much of its content. For example, when an organization implementing an anti-corruption program holds a public hearing to discuss and audit a call for bids for the construction of a dam, and it does not consider or even know how to promote the effective participation of affected minority groups, the effectiveness of the strategy is severely compromised.
34. In this sense, strategies that limit themselves to addressing the issue of corruption without a rights-based component simply reproduce marginalization and inequity. A human rights perspective, on the other hand, raises questions about how the design or implementation of an anti-corruption program affects, directly or indirectly, situations of marginalization, disadvantage, vulnerability and social discrimination. Human rights principles imply identifying and overcoming obstacles (like language differences, cultural beliefs, racism, gender discrimination and homophobia) that hold disadvantaged groups hostage to corruption.
35. In this sense, the persistence of corruption is understood by the neo-liberal governance agenda as a problem of inefficiency in public administration, while from a human-rights perspective it is seen as a systematic violation of people's rights, which suggests a reorientation of anti-corruption strategies to include new dimensions of equality, non-discrimination, transparency, participation and accountability. The differences between the two approaches will have important consequences in terms of how to focus and design solutions to the problem of corruption.

## **The Convention against Corruption: controlling power... without power?**

36. In spite of the enormous potential of the human-rights perspective, the instruments created and promoted for fighting corruption under the aegis of the governability agenda have limited themselves to working on the institutional and legal reforms needed to limit corruption in public administration, without formulating tools to help people overcome the perverse effects that public corruption causes in their daily lives.
37. One of the clearest examples of these instruments is the Convention against Corruption adopted by the General Assembly of the United Nations in October of 2003. In his inaugural speech, the Secretary General of the United Nations, Kofi Annan, stated that corruption has a disproportionate effect on the poorest people because it eats up the resources needed for development, limits the government's capacity to provide basic services, fosters inequality and injustice, and discourages foreign investment and international aid. (Pilapitiya, 2004) And yet this same Convention offers few tools for fighting corruption from this perspective. If we return to the analysis of the language used by the governability agenda, we see that it is reproduced in the Convention, thereby diluting the strength of the very tools the Convention offers for an effective and strong anti-corruption strategy.
38. Instead of referring directly to human rights, the Convention only mentions the "rule of law" and "equality before the law". Article 5 (section 1) of the Convention mentions rule of law, and the Preamble mentions equality before the law. While it can be inferred that the rule of law can indirectly refer to the existence of human rights protection (Pilapitiya, 2004), the lack of direct reference to human rights and the way corruption affects them is in itself an indicator of the limitation of this strategy.
39. If we analyze the Convention from a human rights perspective, we can see that the proposal it makes for promoting fundamental human rights principles is limited to say the least. The Convention mentions the need to promote participation, empowerment and accountability, and yet it does so by falling back on the language of governance, diluting the content of both concepts and thus their potential to promote a rights-based strategy. From a human rights perspective that considers power asymmetries, accountability means creating institutional conditions so that public officials explain and justify their actions to citizens, and/or face sanctions if their conduct or justifications do not meet expectations. In other words, this means creating conditions for reducing the costs to people of protesting and denouncing abuses of corruption, and increasing benefits in terms of the appropriate handling of complaints and the subsequent imposition of sanctions.
40. The Convention, however, overemphasizes the harmony of accountability relationships, limiting itself to mentioning the actors' responsibilities without offering clear enforcement tools. Thus, the Preamble to the Convention states that "the prevention and eradication of corruption is a responsibility of all States and that they must cooperate with one another, with the support and involvement of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, if their efforts in this area are to be effective." (Pilapitiya, 2004) The way the Convention conceptualizes people's empowerment and participation follows this same logic. References to empowerment are limited to promoting access to information and knowledge, with no mention of the need to increase the social and economic resources of corruption victims so that they can enforce their rights and claims. In this way it would seem that the only resource needed for mobilization against corruption is information. This completely ignores the inequalities that citizens come up against when they try to claim and promote their rights in the face of government corruption. Participation likewise appears in a watered-down form in the text, as a way of creating a homogenous coalition among "individuals and groups outside the public sector, such as civil

society, non-governmental organizations and community-based organizations” to accompany the government in its fight against corruption.

41. Finally, the Convention makes no explicit mention of two key concepts: the principle of non-discrimination and the need to pay special attention to vulnerable groups. (Pilatiya, 2004) This omission takes on crucial importance in analyzing the agreement’s potential for promoting a battle against corruption that would improve the living conditions of the poorest sectors of the population. The principle of non-discrimination and the need to pay special attention to vulnerable groups are explicit enunciations of the meaning that the governance agenda tries to minimize behind the concepts of participation, empowerment, accountability and transparency, namely, the relationships of power that foster, maintain and strengthen the processes that exclude the less powerful.
42. So far we have seen how the relationship among governance, corruption and human rights is multi-faceted on the level of reality. On the prescriptive level, however, the intersection of these concepts is still lacking. In international conventions or even in work that tries to have an impact on anti-corruption issues, human rights are seldom mentioned (Kauffman, 2004). One indicator that illustrates the tenuous relationship among these concepts on the prescriptive level is, for example, the lack of any mention of corruption in international human rights treaties and the absence of any discussion of human rights in the recently adopted United Nations Convention against Corruption. The following table shows a simple statistical count of the main words present in good governance discourse and in international human rights treaties. Even though human rights and corruption are so inextricable in reality, the table shows that international human rights treaties do not mention corruption, while international anti-corruption conventions make no reference to human rights.

**Table 1: Simple count of words describing key concepts of Human Rights in International Treaties and Declarations**

	International Covenant on Economic, Social and Cultural Rights	International Covenant on Civil and Political Rights	Declaration on the Right to Development	Total # of words (three documents)	United Nations Convention against Corruption
<b>Total number of words per document</b>	7,195	3,762	1,674	12,631	18,417
<b>Political rights</b>	3	1	2	6	0
<b>Torture</b>	1	0	0	1	0
<b>Health</b>	5	4	1	10	1
<b>Food</b>	0	5	1	1	0
<b>Wages</b>	0	0	0	0	0
<b>Governability</b>	0	0	0	0	0
<b>Corruption</b>	0	0	0	0	73
<b>Rule of law</b>	0	0	0	0	3
<b>Judicial independence</b>	0	0	0	0	0
<b>Data</b>	0	0	0	0	1
<b>Monitoring</b>	0	0	0	0	1
<b>Human rights indicators</b>	0	0	0	0	0

*Source: Kauffman, Human rights and development: towards mutual reinforcement, 2004*

## **Making sense of meanings: a new perspective for the anti-corruption battle**

43. The previous section showed how the legal and institutional mechanisms included in the United Nations International Anti-Corruption Convention, and in the anti-corruption strategies of the good governance agenda, are not enough to combat corruption. When corruption is so widespread in people's daily lives in a society, its solution calls for changes that are greater than legislative and institutional reform. In this sense, it is essential to make corruption a meaningful concept again and place it in the centre of public discourse. An anti-corruption strategy that does not bear in mind the mechanisms of exclusion and discrimination, and the power relationships that reproduce these mechanisms, by design limits its own effectiveness.
44. In the previous section we also saw how the focus for defining corruption had a decisive impact on the design of solutions for exposing it to public view. A human rights perspective redefines the problem of corruption and suggests new solutions. The human rights approach insists that the battle against corruption cannot be effective unless it includes the people who suffer its consequences. While the institutional reforms in the fight against corruption only affect the opportunities and alternatives that public officials have, this other strategy proposes generating reform "from below" by also taking into account the vulnerability of ordinary citizens to corruption. In this way, a "bottom-up" reform proposes opening political and economic alternatives that will help to remove people from exclusion as a key strategy that goes hand in hand with efforts to make public administration transparent and promote the reform of the state.
45. This involves being one step ahead of legislative and institutional reform and undertaking a process of social empowerment – defined no longer as an apolitical technique but as a process of bringing about the conditions that will allow excluded groups to mobilize collectively in order to define and demand their rights. By social empowerment we do not mean simply strengthening civil society; we propose the inclusion of civil society in a human rights-based strategy. In the same way, in order to protect and expand ordinary citizens' political and economic resources, social empowerment must necessarily be rooted in a human rights strategy.
46. We are not so naive as to believe that social empowerment in and of itself will eradicate corruption. We do however believe that it is an indispensable element that must accompany institutional reforms, thereby weakening the power structures that foster the opacity and non-accountability associated with structural corruption. Empowerment also helps to institutionalize reform and make it more sustainable by inserting it into a long-term process of political and social transformation. (Ogundokun 2005)
47. The battle against corruption from the perspective of human rights proposes the recognition of a right to live in a corruption-free world, at the same time as it underscores the need to strengthen human rights guarantees, especially the guarantee of social and economic rights. (Ogundokun 2005) The right to live in a corruption-free world is a basic right because it is fundamental for guaranteeing the right to life, personal dignity, equality and many other rights. When corruption is endemic, it destroys the fundamental values of human dignity and political equality. As in the case of social empowerment, we do not believe that the mere existence of this right will in itself guarantee the end of corruption in public administration. Nevertheless, the importance of the right to live in a corruption-free world lies in the fact that a specific instrument is created to demand that institutions ensure the protection and promotion of this right. (Ogundokun 2005) The leading defenders of the right to live in a corruption-free world, Kofele-Kale and Kumar, propose that the right should first be observed from an international perspective in order to raise the violation of this right to the status of an international crime. These authors believe that in this way, a common basis can be created so that countries adopt

this right as a fundamental right within the framework of their national constitutions. (Ogundokun 2005).

48. Unlike the proposal to recognize the right to live in a corruption-free world, a second proposal of human rights-based anti-corruption strategy recommends guaranteeing human rights as an anti-corruption battle strategy. This strategy is plausible for contexts with all possible types of corruption (ranging from isolated incidents to institutional and systemic corruption). It assumes that there is interdependence between a society's socio-economic factors and the battle against corruption. The lack of opportunities and alternatives that people face in a world that runs by informal rules leaves few opportunities to choose legitimate paths for meeting one's basic needs. In other words, this proposal assumes that a public official who works under adverse conditions and receives low wages will be more prone to ask for bribes, and that a person who must struggle for access to health services and to enrol her children in a public school will also prefer to pay a bribe than be excluded from health and educational services. In this way, a low level of fulfilment of social, cultural and economic rights restricts people's opportunities and opens the door to discretionary actions by public officials. On the other hand, according to this proposal, in a society where rights are guaranteed and implemented, corruption will be drastically reduced.
49. This proposal renews the theory of social empowerment by expanding and protecting the social and economic resources needed to offer people different life alternatives. In this way, poor people and grass-roots organizations in a community organize into patronage networks in order to find solutions to the economic, social and cultural exclusion they experience, because that is the only way they can find to meet their basic material needs and achieve social cohesion and political participation.
50. The reduction of corruption is possible, but the institutional reform efforts must go hand in hand with foundational changes in society in order to be sustainable over time. In other words, the battle against corruption needs not only reforms to detect and sanction corrupt practices, but also the long-term construction of a system of public order and rights. (Ogundokun 2005).

## 2. GOOD GOVERNANCE, ANTI-CORRUPTION AND HUMAN RIGHTS: POINTS OF ENTRY FOR REFORM

51. In the first part of this study, we showed and identified similarities and differences between human rights practices and anti-corruption strategies in the good governance agenda. A first glance would seem to reveal more shared principles than differences. Words like participation, accountability and transparency are key to both agendas, and are used with the same intensity by activists from both movements. Yet an analysis that looks more closely at experience can help us discover profound differences in the content of these words and in each movement's practices.

**Table: Shared principles**

Principles	Good Governance	Human Rights
Participation	Yes	Yes
Accountability	Yes	Yes
Transparency and right to information	Yes (not as a right)	Yes
Non-discrimination	Yes (implicitly)	Yes
Availability	No	Yes
Accessibility	No	Yes
Acceptability	No	Yes
Adaptability	No	Yes

*Adapted from ICHR, 2005*

52. We believe that the shared use of these principles, although they could have different meanings, has the potential to work as a bridge between human rights practice and anti-corruption strategies, and as a point of entry for human rights principles to influence the design and implementation of new anti-corruption strategies.
53. Next we will analyze the three basic principles of accountability, transparency and participation. The analysis will focus on demonstrating how these principles can enhance the impact of anti-corruption strategies through human rights practice.
54. The principle of non-discrimination, fundamental to human rights but only timidly implicit in the good governance agenda, will be made to intersect both fields in order to promote the inclusion of vulnerable groups during the implementation of the other three principles.
55. And finally, we will choose two of the standards to measure the fulfilment of social rights (availability and accessibility) as a mechanism for exposing corruption in the provision of basic social services.

### **Accountability: the weak make demands on the powerful**

56. The discourse and practice of accountability stand at the centre of any anti-corruption strategy. In the face of abuse of power and corruption, people demand justifications and sanctions. In theory, accountability systems fulfil this twofold function of obligating those who wield power to explain their actions, and of making them liable to sanctions every time they fail to fulfil their obligations (Shedler 2000).
57. Accountability is, in sum, a relationship between those who wield and have more power and those who have the least power. It is a way of offering citizens a concrete mechanism for controlling the conduct of politicians, public officials to whom they have delegated power (IDS 2004). But it is a special kind of power: it implies having the capacity to require a person to provide explanations and justify his or her decisions, and/or the capacity to impose sanctions when his or her performance falls short of the expectations or agreements (Goetz 2002).
58. In theory, accountability describes a relationship where A is accountable to B because: A is obligated to explain and justify his or her actions to B, and/or A is liable to receive sanctions if his or her conduct or justifications do not meet B's expectations.
59. The act of rendering accounts can be carried out in two spatial dimensions, horizontal and vertical (O'Donnell, 1997). The spatial dimensions indicate the operational dimension of the control institutions. The concept of horizontal accountability is associated with a system of intra-state controls, while vertical accountability implies the operation of controls from outside of the state, specifically from civil society. This classification thus underscores the directionality of the control system and the sphere in which accountability is implemented<sup>1</sup>. While horizontal accountability is implemented through a network of institutions within the State which have mutual controls and balances, vertical accountability takes place outside of the State, through external social control.
60. Anti-corruption reforms promoted by the good governance agenda give priority to top-down technocratic and legalist reforms, for the purpose of improving horizontal accountability. The wide-open field of vertical accountability, on the other hand, offers participation and mobilization channels so that different social groups affected by corruption can demand their rights to corruption-free access to resources and services that are essential for their lives.

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<sup>1</sup> See appendix 1

61. Thus the difference between the two spatial control dimensions is not trivial. As we will see later, the differences in the nature and performance of horizontal and vertical accountability mechanisms have significant practical implications for the inclusion of the human rights perspective in the design and implementation of anti-corruption strategies.

### **Horizontal accountability systems: formal institutions without control**

62. In most countries the map of accountability institutions is extensive and varied. We can find examples of the executive, legislative and judiciary branches fulfilling the classic role of checks and balances, in an attempt to assure a strict republican division of powers. The classic process of checks and balances is based on what James Madison (1788) envisioned as a system for neutralizing the power ambitions among the three branches of the state: i.e., the ambition of one power tends, at least in theory, to neutralize the ambition of another power. Thus, the executive branch vetoes laws passed by congress; congress decides whether to pass the budget or not, and on extremely rare occasions impeaches the executive; while the judiciary branch reviews the unconstitutionality of the laws passed by congress and the executive. These are, in general and by way of example, the fundamental instruments of the system of checks and balances that serve to avoid and control the excessive concentration of power in a single branch of government.
63. Over the last two decades, within the paradigm of good governance reforms and due in part to the failure of the classic rule of checks and balances to actually control structural corruption, most countries in Latin America, Asia and Africa have created a series of new accountability institutions to complement traditional controls: ombudsmen, anti-corruption offices, general auditors and oversight offices are some of the main institutions.
64. The number and variety of control institutions, however, does not guarantee greater accountability. On the contrary, for these new accountability institutions to control the concentration and abuse of power without overlapping, competing or neutralizing one another, they must develop the ability to work together so that they can operate like a network of agencies, and have a judicial branch that is committed to the practice of accountability, thereby closing the system from above (O'Donnell 1999). As we will see later on, many of the new accountability institutions are not equipped with the jurisdictional authority to impose sanctions. Therefore, the impact of their reports, rulings or resolutions will depend, in the final analysis, on the degree of commitment and activism of the judges with regard to the control and sanctioning of abuses of power by public officials.
65. This proliferation and variety of new horizontal accountability institutions created over the last two decades as part of the transition to democracy, can be grouped into three overall categories:

#### ***Supreme auditing institutions***

- ***Office of the Comptroller General***
- ***Accounts Tribunal***
- ***General Auditing Office***
- ***Court of Accounts***
- ***Superior Oversight Office***

### *Prosecutorial and Investigative Bodies*

- *Attorney General's Office*
- *Public Prosecutor*
- *General Inspector's Office*

### *Bodies for Defending Citizens' Rights*

- *Ombudsman's Office*
- *Human Rights Protection Agency*
- *National Human Rights Commission*

66. The above table shows us that there is a wide variety of these institutions, and within each category, as well as among categories, we find an extensive array of institutional arrangements in terms of institutional location, the degree of functional autonomy, the source of financing, the rules of selection and appointment of officers, and the degree of interrelation of their rulings, among other important institutional design variables.
67. Next we will take a look at the case of Latin America, and briefly compare the main formal and operational characteristics of horizontal accountability institutions that have an indirect bearing on the control of corruption and abuse of power.

### **Autonomous auditing institutions**

68. Autonomous auditing institutions (AAI's) are in charge of overseeing public expenditures and monitoring public finances. They also, at least in theory, play a fundamental role in promoting the transparency and accountability of the budgeting process, which was traditionally dominated by the executive branch. From this perspective, AAI's have a relevant role to play in the political economy of public finances and in the budget-making relationship between the executive and legislative branches.
69. In Latin America we find a general tendency toward the formal design of autonomous or semi-autonomous AAI's, with a greater or lesser degree of financial autonomy, dependent on the legislative branch or functioning as support agencies for the legislative branch. On the basis of different institutional arrangements in each country, we can find two ideal AAI models and a third composite variant.
70. **Model 1:** This is a model with a board of directors, independent of the executive and legislative branches, with quasi-judicial powers on administrative issues, and that gives priority to the legal monitoring of budget management as opposed to performance and results. Guatemala, Brazil and El Salvador follow this model.
71. **Model 2:** This is a one-person model, led by a single auditor general, and operating generally as an auxiliary or support institution for the legislative branch, but with extensive autonomy. This model lacks judicial powers, generally operates through ex-post auditing processes, and focuses primarily on monitoring performance and results. Most of the countries in the region follow this model.

72. **Model 3:** This is a composite or hybrid model, with a board of directors but without jurisdictional authority or quasi-judicial powers. This AAI model, like Model 2, prepares non-binding reports that must however be analyzed and considered by the legislative branch. Argentina and Nicaragua follow this model.
73. The following table gives an overall description of the main formal institutional arrangements of the different AAI's operating in Latin America.

Country	Institution tied to the executive branch	Institution tied to the legislative branch	Degree of independence	Possible accusations: auditing of accounts and legal infractions
<b>Argentina</b> General Auditing Office of the Nation		X	Financial and functional independence	
<b>Bolivia</b> Comptroller General of the Republic	X			
<b>Brazil</b> Court of Accounts of the Union		X	Financial and functional independence	X (Auditing of accounts)
<b>Chile</b> Comptroller General of the Republic			Institutional independence	X (Both)
<b>Colombia</b> Comptroller General of the Republic			Institutional independence	X (Auditing of accounts)
<b>Costa Rica</b> Comptroller General of the Republic		X	Financial and functional independence	
<b>Ecuador</b> Comptroller General of the State			Administrative, budgetary and financial autonomy	
<b>El Salvador</b> Court of Accounts of the Republic		(Submits report to Congress)	Institutional independence	X (Auditing of accounts)
<b>Guatemala</b> Accounts Comptroller of the Republic		X	Functional independence	X (Auditing of accounts)
<b>Honduras</b> Comptroller General of the Republic		X	Functional and administrative independence	

<b>Mexico</b> Superior Oversight Body of the Federation		X	Technical and administrative autonomy	
<b>Nicaragua</b> Superior Council of the Comptroller General of the Republic		X	Functional and administrative autonomy	
<b>Panama</b> Comptroller General of the Republic			Institutional independence	X (Auditing of accounts)
<b>Paraguay</b> Comptroller General of the Republic Court of Accounts		X		
<b>Peru</b> Comptroller General of the Republic			Institutional independence	
<b>Dominican Rep.</b> Comptroller General Chamber of Accounts	X			
<b>Uruguay</b> Court of Accounts of the Republic		X	(Functional autonomy)	
<b>Venezuela</b> Comptroller General of the Republic			Citizen Power (functional, administrative and organizational autonomy)	

*Adapted from Carrillo (2005)*

74. Form is not everything, however. The independence and effectiveness of AAI's do not depend only on their institutional design and location. There are other variables associated with the organization and functioning of the state in general that have an impact on the operation of these organizations. For example: direct interventions by the executive branch or a congress with a governing-party majority tend to have a direct impact on the autonomy and effectiveness of the different AAI models.
75. An example of this observation is the case of Guatemala's AAI, which has a formally independent design, is equipped with financial and functional autonomy, and judicial powers to sanction corruption, but which has brazenly broken the law. The last comptroller of accounts (2002-2006) was sentenced to 17 years in prison for embezzlement and money laundering, while

the comptroller of accounts who served from 1998 to 2002 was tried for fraud consisting of diverting US\$ 8 million from the superintendency of the tax revenue administration.

76. Another example of the classic meddling of the executive branch in AAI autonomy occurred in the 1999 constitutional reform in Nicaragua. Before the reform of 1999, the AAI was one person and autonomous, but as a result of a series of investigations that led to accusations of corruption and illicit enrichment against the executive branch, a constitutional reform was put through that replaced the one-person directorship with a board of directors named by the executive branch. A short time later, after the reform, the Comptroller General of the Republic was dismissed and tried in criminal court, accused by the President of the Republic Arnoldo Alemán, who was sentenced 4 years later (December 2003) to 20 years in prison for money laundering, fraud, embezzlement of public funds, conspiracy to commit a crime and electoral crime against the State.

## Ombudsman

77. Over the last two decades most Latin American countries have created a new institution called the Ombudsman<sup>2</sup>, Human Rights Protection Agency or National Human Rights Commission.
78. The Latin American Ombudsman follows the Spanish model, as opposed to the Scandinavian model. This means that the operation of the Ombudsman goes far beyond monitoring the State's administrative acts: the Ombudsman receives accusations and files charges of human rights violations; it demands accountability from the State regarding any practice involving abuse of power against citizens, and pressures the executive branch to progressively fulfil economic, social and cultural rights.
79. The regional tendency is to find Ombudsmen tied to the legislative branch; they make non-binding rulings; they must submit regular reports to Congress; they are relatively autonomous institutions; the authority is appointed by Congress and almost always with a special majority.
80. The following table shows the main characteristics of the institutional design of the Ombudsman in Latin America.

Country	Year founded	Ties to Legislature	Type of formal autonomy
<b>Argentina</b> Ombudsman's Office	1993	X	Functional and financial autonomy
<b>Bolivia</b> Ombudsman	1994	X	Institutional autonomy
<b>Colombia</b> Ombudsman	1991		
<b>Costa Rica</b> Ombudsman's Office for the Inhabitants of the Republic	1992	X	Functional and discretionary autonomy
<b>Ecuador</b> Ombudsman's Office	1998	X	Functional and financial autonomy
<b>El Salvador</b> Human Rights Protection Agency	1993	X	Institutional autonomy

<sup>2</sup> For ease of reading, we will put all three types into the category of Ombudsman.

<b>Guatemala</b> Human Rights Commission	1985	X	Operational autonomy
<b>Honduras</b> National Human Rights Commissioner	1992	X	Operational and financial autonomy
<b>Mexico</b> National Human Rights Commission	1990	X	Functional and financial autonomy
<b>Nicaragua</b> Human Rights Protection Agency	1995	X	Institutional autonomy
<b>Panama</b> Ombudsman's Office	1997		Institutional autonomy
<b>Paraguay</b> Ombudsman's Office	1992	X	Functional autonomy
<b>Peru</b> Ombudsman's Office	1993	X	Operational autonomy
<b>Dominican Rep.</b> Ombudsman	2001		
<b>Venezuela</b> Ombudsman's Office	1999		Institutional autonomy

*Sources: Adapted from Carrillo (2005)*

81. Once again, however, form is not everything. Political factors, such as a congressional majority controlled by the executive branch, can block the Ombudsman's initiatives. Another key factor for the Ombudsman to reach his or her goals is directly tied to the performance of the judicial branch. Given the Ombudsman's lack of power to sanction, the effectiveness of his or her investigations and charges depend on the degree and type of judicial activism practiced by the courts and by the congress's commitment to monitoring the executive. And since in most of the countries in the region the judicial branch neither shares nor supports the Ombudsman's redistributionist and guarantee-based agenda, his or her impact generally ends up being rather limited. One example of this is the performance of the Peruvian Ombudsman during the Fujimori administration. During that time, the Ombudsman was the only horizontal accountability institution that had not been ensnared in the executive branch's network of corruption set up by Montesinos. Operating in isolation and having to face a judicial branch aligned with the executive branch, the Ombudsman nevertheless enjoyed the widespread support of human rights organizations throughout the country.

### **The Public Prosecutor**

82. In Latin America, the job of investigating crimes in the public sector and bringing offenders to court is assigned to different institutions: the Public Prosecutor<sup>3</sup>, the Attorney General's Office or the General Inspector's Office. The creation of these new accountability institutions was a direct result of the massive reform that criminal justice systems underwent in most Latin American countries. The reform was an attempt to overcome the inquisitorial system of criminal justice and to establish more democratic and transparent accusatory systems. The reform introduced the innovation of public oral trials instead of written judgments, and separated the

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<sup>3</sup> While these institutions are not identical, we will use the term Public Prosecutor indistinctly to describe factors that are common to the three types.

function of investigating and accusing from the function of judging, inasmuch as the blending of these two functions in a single person is one of the characteristics of the inquisitorial system of criminal justice. In this context of reform, the Public Prosecutor began to take care basically of formulating the charges and prosecuting the criminal case; and to defend the State's interests and citizens' human rights.

83. The following table shows some of the basic institutional arrangements of Public Prosecutors in Latin America.

Country	Name of entity	Institution tied to the judicial branch <sup>1</sup>	Independent institution or not tied to any branch	Term of mandate
<b>Argentina</b>	Public Prosecutor's Office and Public Defender's Office		X	Not defined in the Constitution
<b>Bolivia</b>	Office of the Inspector General of the Republic		X	10 years
<b>Brazil</b>	Office of the Public Prosecutor of the Union or of the States	X	Functional and administrative autonomy	2 years
<b>Chile</b>	Public Prosecutor's Office		X	4 years
<b>Colombia</b>	Office of the Attorney General of the Nation		X	4 years
<b>Costa Rica</b>	Office of the Inspector General of the Republic	X	Full functional independence	10 years
<b>Ecuador</b>	Public Prosecutor's Office		X	6 years
<b>El Salvador</b>	Office of the Attorney General of the Republic		X	3 years
<b>Guatemala</b>	Office of the Inspector General and Attorney General of the Nation		X	5 years
<b>Honduras</b>	Public Prosecutor's Office		X	5 years
<b>Mexico</b>	Federal Public Prosecutor's Office	X		Unlimited
<b>Nicaragua</b>	Public Prosecutor's Office		X	5 years
<b>Panama</b>	Public Prosecutor's Office	X		10 years
<b>Paraguay</b>	Public Prosecutor's Office	X	Functional and administrative autonomy	5 years
<b>Peru</b>	Public Prosecutor's Office		X	3 years
<b>Dominican Rep.</b>	Public Prosecutor's Office	X		Unlimited
<b>Uruguay</b>	Public Prosecutor's Office		Technical independence	Indefinite
<b>Venezuela</b>	Public Prosecutor's Office			7 years

*Source: adapted from Carrillo (2005)*

84. Once again, institutional design runs up against real politics. Despite efforts to bestow autonomy and capacity on the Public Prosecutor's Office, one of the typical practices of the region is still the executive branch's meddling in the agenda and practice of the Public Prosecutor's Office (Duce 1999), which blocks any independent initiative to control administrative corruption and prevent or redress human rights violations.

85. Generally speaking, the main weaknesses and failures that have been identified in the operation of Public Prosecutor's Offices in Latin America are tied to three factors: 1) The entrapment of the Public Prosecutor's Office by both the executive and judicial branches, leading to a process of politicization in the former case and/or judicialization in the latter; 2) lack of, or poor coordination with, other key institutions like the police and judges; and 3) the poor provision of the Public Prosecutor's Office in terms of human, economic and material resources.
86. Up to this point we have reviewed the main horizontal accountability institutions and practices. The traditional practice of checks and balances has been followed over the last two decades of democratization by the design and operation of new autonomous monitoring institutions. And yet the massive inclusion of these new corruption-control institutions has not led to the results that were hoped for (TI, 2006). We have analyzed the case of Latin America to better understand the main causes of the failure of these reforms. In general, formal accountability institutions have a strong bias against citizens' demands, which becomes even more pronounced when the citizens are poor (Anderson 2003). The bias against poverty in the operation of accountability institutions leads to a spate of everyday problems like lack of access to basic social services, discrimination in public schools and hospitals, police brutality, patronage-based allocation of public resources, and judges' inaction in the face of human rights violations, among others (HDR 2002).
87. Before proceeding to describe the main characteristics of vertical accountability, we feel it is necessary to analyze critically, from a human rights perspective, the fundamental role the judicial branch must play in controlling corruption, and its disappointing performance.

### **The judicial branch: the cornerstone of the accountability system**

88. Judicial decisions determine the distribution of power and wealth in our societies, which explains why the judicial system has been vulnerable from its beginnings to being captured to serve sectoral interests (Ackermann 1999). To avoid this phenomenon, the judicial branch was designed to maintain its independence in the face of all manner of political or economic interests. In most countries, the main mechanisms for meeting this objective were: 1) the indirect form of election and 2) tenure of the position as long as good conduct was observed. As Jennet describes (2007), there is also an extensive body of international standards regulating the conduct of judges and the integrity of the judicial system.
89. With the paradigm of the good governance reforms, however, it became clear that over the last two decades, judicial systems had worked in concert with military dictatorships and authoritarian governments. It was in this context that starting in the 80's, a series of reforms was implemented that ranged from enacting legislative measures, modifying and repealing laws, regulations, customs and practices that undermined human rights and the democratic system; to adopting the administrative and management measures needed to raise standards of respect for guarantees and of the efficiency of the justice system. The World Bank alone reports that it has supported 330 "rule of law" projects in Latin America, spending 2.9 billion dollars since 1990<sup>4</sup>.
90. And yet, opinion polls show that citizens, who traditionally have a poor opinion of the justice system, continue to believe that it has not improved its transparency or its performance in controlling corruption. Expectations raised by the judicial reform (Bou, 2004:24) are still far from being met; recent evaluations recognize that arbitrariness and corruption are still the rule in

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<sup>4</sup> Up to that date, USAID was one of the main sources of financing for judicial reform projects. From 1984 to 1993, USAID invested 46 million dollars in Latin America (GAO, 1993).

most countries. If we carefully analyze TI's 2006 Global Corruption Barometer<sup>5</sup>, we will see that the judicial branch appears as one of the 14 institutions of democracy most affected by corruption. In South-eastern Europe (Albania, Bulgaria, Croatia, Kosovo, Macedonia, Romania, Serbia and Turkey), the judicial branch is evaluated as the institution most affected by corruption (4.1) together with medical services (4.1), followed closely by political parties (4.0) and Congress (4.0). In Africa (Cameroon, Congo (Brazzaville), Gabon, Kenya, Morocco, Nigeria, Senegal and South Africa) the judicial branch comes in third place (4.0) followed closely by political parties (4.2) and the police (4.6), the institution most affected by corruption. In Latin America (Argentina, Bolivia, Chile, Colombia, Dominican Republic, Mexico, Panama, Paraguay, Peru and Venezuela) the judicial branch was evaluated as the second-most corrupt institution (4.1) followed closely by political parties (4.2) and Congress (4.2).

91. In this global scenario, the judicial branch does not seem to be the ideal institution to close the accountability system from the top, as O'Donnell suggests. This is why many of the reforms to the accountability system that consist of creating new autonomous control institutions have not managed to meet their goals, in part, because the high levels of corruption in the judicial branch and the resulting lack of commitment to controlling corruption, have sapped most of the reports and rulings written by the autonomous control institutions of their effectiveness and impact.
92. Moreover, corruption in the judicial branch disproportionately affects poor people (Jennett, 2007). "The legal system offers a field where people can control political leaders and public officials, protect themselves from exploitation by those with more power, and resolve individual and collective conflicts. Access to justice is therefore crucial not just for the fulfilment of constitutionally guaranteed rights, but also for meeting wider goals of development and poverty reduction... Making legal institutions accessible and receptive to poor people is one of the greatest challenges facing legal and judicial reform initiatives" (Anderson, 2003). In this sense, the human rights approach is crucial for targeting poor people for programs promoting access to justice. These people tend to have limited access to legal institutions and are infrequent users of justice systems. (Anderson, 2003). The causes behind this lack of access, aside from the economic factors mentioned above, include the distrust of legal instruments, attributed mainly to the violence poor people undergo at the hands of judicial institutions<sup>6</sup>; the illegality of their living situation, which means that approaching the courts could jeopardize their quality of life<sup>7</sup>; the formal, technical language used in judicial institutions (legal illiteracy), racism and sexism (UNDP, 2002).

### **Vertical accountability: beyond formal institutions**

93. In general, a restricted interpretation associates vertical accountability with the electoral dimension, i.e., the possibility that citizens will use reasonably free and regular elections to punish or reward their rulers by voting for or against them in the next election. Voting,

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<sup>5</sup> The TI Global Barometer gives a score of 1 to institutions that are not at all corrupt, and a 5 to extremely corrupt institutions. To see the report's complete methodology, see: [www.transparency.org/policy\\_research/surveys\\_indices/gcb/2006](http://www.transparency.org/policy_research/surveys_indices/gcb/2006)

<sup>6</sup> "Poor people rarely appear in court except as defendants. This should come as no surprise if we bear in mind that the judicial function is conceived as a service provider in a demand-dominated market. Poor people possess a limited capacity to express an effective demand for a given good or service, and there is no reason justice should be any different. The real costs of retaining a lawyer, the opportunity cost of the time spent in court, and the overall level of capacity and education required to litigate effectively, serve as negative incentives". (Anderson, 2003)

<sup>7</sup> "They usually live a various forms of illegality – in their housing or work, use of electricity, etc. – and they encounter the justice system primarily through criminal prosecution". (Anderson, 2003)

however, constitutes a mechanism that is too weak and imperfect<sup>8</sup> to control public officials' conduct. A wider and more radical interpretation of the nature and operation of vertical accountability includes numerous innovative social control mechanisms that have been implemented to make vertical control an ongoing activity from one election to the next. These new vertical experiences of accountability include the participation of a number of different social actors: civil associations, NGO's, cooperatives and social movements, located at the intersection between rights and resources/basic social services.

94. From this perspective, horizontal accountability would be associated with the struggle of disadvantaged groups for corruption-free access to the right to health, housing, water, land, etc. As the studies by Terracino (2007) and Alolo (2007) show, corruption in the provision of these basic services disproportionately affects the most vulnerable groups (poor women, the indigenous, the elderly, etc.).
95. One potential way to enhance the effectiveness of the anti-corruption strategies implemented so far within the framework of good governance reforms would be to include the human rights perspective and to make the principle of non-discrimination intersect with accountability practices in cases of corruption involving access to basic resources. While these reforms focus fundamentally on vertical accountability mechanisms and give priority to legalist and technocratic reforms through the creation of new independent control institutions and reforms to justice systems, the inclusion of the human rights perspective would focus on vertical accountability strategies. From this perspective, accountability becomes a political project (Newell and Wheeler, 2005) with a potential for making power conflicts visible and promoting channels for participation in and social control over corruption-free access to resources, focusing especially on the most vulnerable groups.

**This new agenda of anti-corruption strategies could be structured as in the following conceptual framework.**

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<sup>8</sup> Przeworski and Stokes maintain on the one hand that "democratic institutions do not contain mechanisms for effectivizing prospective representation" and, on the other, "retrospective voting, which takes as information only public officials' past performance, is not incentive enough to make governments act responsibly." In a more recent study Przeworski insists that "elections are inherently a blunt instrument of control since voters have only one decision to make with respect to the whole package of government policies implemented over the course of the administration in question." Przeworski, Stokes and adapted from Manin (comps.), *Democracy, accountability and representation*, Cambridge University, introd., 1999.

Who?	Type of strategy		Right demanded	Resource/ service involved	Corruption: areas of risk	Main parties responsible
	Formal	Informal				
Indigenous groups from Veracruz, Mexico	Negotiation with municipal government	Blocking dam. Citizen water council	Right to water	Water	-Privatizations -Regulation	-Private companies - Regulatory body
Community organizations, Cabo, Brazil	Participation in Health Councils		Right to health	Adequate health services	-Contracting	-Health Ministry -Service providers
Renters' association, Mombasa, Kenya	International treaties	Blocking illegal buildings Alliance with media Mobilizing residents	Right to housing	Access to adequate housing	-Granting of deeds	-Government -Landowners
Poor communities in the Niger Delta		Theatre Protests	Right to work Right to a healthy environment	Petroleum	-Regulation	-Regulatory body -Multinational companies
Movements of unemployed, Argentina	Participation in consultation councils	Blocking highways, urban protests	Right to social inclusion	Minimum income	-Allocation of social programs	-Government
Local leaders, Petorca Province, Chile	Participation in consultation processes		Right to a healthy environment	Mining	-Regulation	-Regulatory body -Mining company
Local groups and international NGO's	Panel of international WB Lobby	Protest Media Alliances with int'l NGO's	Right to a healthy environment Work Land	Energy Water	Contracting Regulation	Companies Government

*Source: adapted from Newell and Wheeler, 2005.*

96. This conceptual framework serves to shape new anti-corruption strategies by focusing the strategy on the resources involved and making the act of rendering accounts intersect with the social rights involved. From this perspective, the nature of the resources and who has the right to access these resources, defines possibilities of redistribution, social justice, and exposure to corruption. In this framework, the discourse and practice of human rights expose and put on view the unequal power relations and conflicts that are at stake. An apolitical vision of accountability strategies based only on legal or institutional reforms is unlikely to modify the conditions that encourage corruption and abuse of power in both government and the marketplace. In fact, many of the vertical accountability strategies set forth in this document are not channelled through any of formal accountability institutions promoted by the anti-corruption good governance agenda over the last 20 years.
97. Another key aspect to using human rights principles in an accountability policy is the possibility of identifying clearly who the rights-holders are and who bears the obligations. Since corruption

involves multiple actors, clear assignment of responsibility makes accountability easier. Many accountability conflicts at the local level are enmeshed in a global policy where the main obligated parties, state and private, are under constant change. This can be seen most clearly in the commercialization of natural resources (water, minerals, land, etc.). Behind these activities are strong incentives on the part of businesses to influence government regulations. In cases of corruption or governments who fall captive to mining interests, we find a wide variety of actors involved, such as indigenous groups, local and international NGO's, governments, local businesses and multinational corporations. At this point, the clear definition of who the rights-holders are and who bears the obligations, is a key factor for designing and implementing an accountability policy capable of preventing or exposing corruption.

98. Within the framework of this study, we maintain that the causes that give rise to corruption in different activities such as the provision of health, education or drinking water services; the regulation of mining industries; or the granting of deeds to land or housing, should be confronted with the discourse and practice of human rights in order to achieve systemic changes in the distribution of power among the different groups involved: government, national/multinational businesses, and the direct victims of corruption.

### **Transparency: information with rights**

99. There is no common definition of what transparency is exactly<sup>9</sup>; in public administration, however, most definitions stress the fact that an accessible, accurate, understandable and timely flow of information is a fundamental factor for determining the degree of transparency in a State's administration. The definitions vary depending on the institutions that state them, be it the OECD, IMF or World Trade Organization. Nevertheless, all of these definitions refer to the publication or flow of information but they make no reference to the right to access to public information. Darbshire (2007) completes this picture by explaining that until very recently, the right to information was not considered by international human rights organizations to be a positive obligation of governments; instead it was interpreted as an obligation of governments not to interfere in the flow of information. It was not until 2002 that the African Human Rights Commission introduced this notion of positive obligation more explicitly and in 2006 the Inter-American Human Rights Court ruled unambiguously in favour of the right to access to public information.
100. Thus, from the human rights perspective, a transparency policy should be articulated on two prescriptive levels. On the first prescriptive level, a strict system should be approved and applied to make administrative documents public when they could prove to be crucial for citizens' decision-making and for a social audit of the State's administration. On a second level, a system of law should be approved and applied to guarantee the fulfilment of the subjective right of all citizens to be able to access public information with no need to justify the cause or interest, including effective mechanisms for filing administrative and judicial complaints in the event of non-fulfilment.
101. The right to access to public information at a national level has evolved and expanded in recent decades, with over 70 national laws enacted between 1946 and 2007. On the basis of this extensive experience we can say that, generally speaking, an ideal access-to-information law (AIL)<sup>10</sup> should follow certain basic parameters. The following table illustrates these principles:

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<sup>9</sup> Adapted from Gruenberg, CH. and Pereyra Iraola, V., *Manual de Estudio de Casos: Transparencia, Participación y Rendición de Cuentas*. Tinker Foundation, 2007.

<sup>10</sup> Mendel, Toby. 2003. *Freedom of Information Act: A Comparative Legal Survey*. UNESCO, New Delhi. India. Quoted in Ackerman, John and Sandoval. 2005. *Leyes de Acceso a la Información en el Mundo*. Cuadernos de Transparencia 7. IFAI. DF, Mexico.

Core principles <sup>11</sup>	Example of application
<b>Maximum openness of information</b>	Information-access laws must be guided by the principles of maximum openness of information.
<b>Obligation of transparency</b>	Public institutions must be obliged to make key information public periodically.
<b>Promotion of open governments</b>	Institutions must actively enable and encourage the functioning of open governments.
<b>Limited scope of exceptions</b>	Exceptions must be clear and strictly delimited and they must be subjected to rigorous tests of “social harm” and “public interest”.
<b>Efficiency in accessing information</b>	Requests for access to information must be processed promptly and fairly, and there must be the possibility of an independent review of all negative responses.
<b>Costs</b>	Citizens must not be discouraged from demanding information due to excessive economic costs. Costs may not exceed those of photocopying and mailing.
<b>Open meetings</b>	Meetings at the institutions should be open and public.

102. The new laws have learned from the design and implementation of previous laws, and these principles have been construed differently, some AIL’s being more outstanding than others.<sup>12</sup> Even though government reforms have been carried out to promote transparency in many countries, the desired impacts in terms of greater operational effectiveness are still limited. Fox<sup>13</sup> analyzes then new reforms that have been carried out to increase transparency, and states that these have been, overall, more *outward-looking* (intended to establish international credibility) than *inward-looking* (actually increasing access to significant operational information for organized social actors).

103. However, actually fulfilling the right to access to public information requires more than formal rules. The challenge of making the State’s administration transparent and guaranteeing citizens access to information that in the State’s power implies a series of reforms and positive measures that governments must carry out in order to make progress in the effective application of this right. To give an example of this sequence of reforms, we can take the case of Mexico: when the Mexican Congress ratified the Federal Law of Transparency and Access to Governmental Public Information (11/6/2002), it left pending the application of the law for a period of 12 months after it took effect in order to implement the main administrative reforms that were needed. The effective application of the law requires trained and motivated public officials, a civil society that is aware of its right, new administrative circuits and an independent and autonomous application agency. And once all these changes are in place, effective monitoring is needed for each of the different public agencies that make up the State, because the State does not tend to act as a consistent organization; on the contrary, each public agency or jurisdiction is often motivated by its own political incentives and interests.

104. The recent implementation of an initiative to monitor the application of decree 1172 regarding access to public information in Argentina exemplifies this phenomenon. The monitoring,

<sup>11</sup> Idem.

<sup>12</sup> Ackerman, John and Sandoval. 2005. Leyes de Acceso a la Información en el Mundo. Cuadernos de Transparencia 7. IFAI. DF, Mexico.

<sup>13</sup> Fox, J. 2004. Empowerment and Institutional Change: Mapping “Virtuous Circles” of State-Society Interaction in Ruth Alsop, 2004, Power, Rights and Poverty: concepts and connections.

carried out by the Center for the Implementation of Public Policies for Equality and Growth<sup>14</sup>, consisted of a request for extensive information on conditions of transparency and control in the execution of social anti-poverty plans. The result of the monitoring showed that the two main ministries responsible for managing social programs had developed institutional cultures that were diametrically opposed. While the Ministry of Labor and Social Security<sup>15</sup> guaranteed free access to information about the eligibility lists for social programs, the Ministry of Social Development<sup>16</sup> denied access to this information, appealing to the National Law for Protecting Personal Information and arguing that the files for social programs contain confidential personal information. This lack of consistency in the interpretation and practice of the right to access to public information points out how the two main ministries in charge of managing social programs interpret the right to access to public information in a contradictory and incompatible way.

105. But the ratification of a law is only the first stage of a pro-transparency reform; in general it is necessary to have power in order to induce the openness, dissemination and release of public information. For this reason, the key to implementing transparency policies is to look closely at the incentives of all the social actors involved (Weil, 2002). In other words, it must be remembered that as these policies proceed to disseminate public information, costs are generated that are concentrated in small groups of political actors, while the benefits are spread out over the rest of society. This particular cost-benefit structure encourages groups that might eventually be threatened by this dissemination or whose reputation could be tarnished, to organize and restrict access to the information, or to paralyze the pro-transparency reforms, while those who stand to benefit from the transparency policies tend to feel much weaker incentives to organize, which limits the collective action of these groups and in some cases undermines the sustainability of pro-transparency reforms.
106. The application of human-rights principles to transparency policies can help, in the first place, to expand the interpretation of the right to access to information as a positive obligation of governments, and to influence the inclusion of this right in the constitutions and national laws of countries where this right has not yet been included. In the second place, the operationalization of human rights principles, and especially of the principle of non-discrimination, plays a key role in the de-elitization of transparency policies so that they guarantee access to information for the most vulnerable groups. While not all countries with AIL's have evaluated their performance or generated statistical data, the scarce data published so far point to a disturbing trend. According to Darbshire (2007), in the United States, 40 years after the law's implementation, less than 10% of the requests for information are made by journalists and NGO's, while most of the requests are made by businesses and lawyers. In Mexico a similar pattern was detected, with 10% of the requests made by journalists, 20% by NGO's and 30% by businesses. Finally, a recent comparative study by Justice Initiative (2007) in 14 countries showed that discrimination against minority groups had a negative impact on the number of requests received. While NGO's received a 32% response rate to their requests for information, vulnerable groups received a positive response to only 11% of their requests. These results simply verify a predictable phenomenon, that the asymmetry of information between government and citizens becomes more pronounced in the case of excluded groups. On the one hand, these groups lack the economic and cultural resources needed to demand information from governments, and on the other, governments tend to discriminate against these groups by putting up barriers to information access or by simply denying them the information. In this context, human rights principles and tools can oblige governments to release relevant information in order to improve these groups' living conditions. And in the second place, they can empower these groups to demand public information as a strategy for preventing or

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<sup>14</sup> See report: [www.cippecc.org](http://www.cippecc.org)

<sup>15</sup> [www.trabajo.gov.ar/](http://www.trabajo.gov.ar/)

<sup>16</sup> [www.desarrollosocial.gov.ar/](http://www.desarrollosocial.gov.ar/)

exposing corruption. Darbshire (2007) offers a series of illustrative cases that show how the right to access to public information has been used in different countries, to expose corruption in the areas of public education and access to HIV treatment in Mexico, or in the execution of development projects in India.

## Participation for change

107. There is a very diffuse boundary between the expansive concept of participation and that of vertical accountability. In fact, vertical accountability is simply another way of saying participation. Within the framework of this study, however, we will distinguish between these two terms and speak of vertical accountability when we refer to outside control strategies, with or without the cooperation of the government or companies, and we will speak of participation when we analyze participatory processes organized by governments or companies. While the former tend to control access to resources/services and expose corruption, the latter are generally a part of processes where the intention is to take the affected parties' opinion into account and know their demand, with differing levels of association and in general a high likelihood of being co-opted.
108. With the structural adjustment programs of the 80's, "participation" became a buzzword in all areas of anti-poverty policies. This fashion also influenced the good governance agenda, which as we saw earlier considers citizen participation to be a key process for controlling the administration of public policies and preventing corruption. This marriage of convenience, however, between good governance reforms and the participatory approach in many cases served as a strategy de depoliticize participation processes and reinforce official authority. At the local level, for example, this strategy often reproduced patronage relationships already in place and deepened inequality in the distribution of power.
109. Discourse in favour of participation can be implemented over a wide spectrum of actions, ranging from participation without influence to empowerment of minorities, passing through the experience of participating in decision-making.
110. From this point of view, human rights principles have a great deal to contribute to participation strategies in controlling corruption. The principle of non-discrimination is a fundamental tool to guarantee the inclusion of disadvantaged groups in participation processes. Many strategies implemented by TI to prevent corruption in the provision of social services or in public contracting have incorporated participation processes but without giving serious consideration to the causes that restrict the participation of vulnerable groups. These processes thus end up reinforcing the influence of powerful groups in decision-making or in the access to basic resources. By using the principle of non-discrimination as a basic rule of inclusion, a classification can be made, as well as a more complex analysis of what is usually understood generically and abstractly as participation. In this way, when consideration is given not only to the subjects included/excluded from the participatory processes, but also to the contribution to community social capital and the strengthening of social organizations, four participation mechanisms emerge<sup>17</sup>:
  - ✓ **Instrumental:** This kind of participation allows for a minimum level of influence in decision-making. The offer of participation is integrated into the program and/or project in the corresponding institutional channels. The flow of information is one-way and the participants can make no more than a restricted definition of their needs. The results of these

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<sup>17</sup> See Gruenberg, CH., Pereyra Iraola, V., "Manual de Empoderamiento en programas sociales", Tinker Foundation, mimeo.

participatory processes are not binding; they are more about extracting information from the participants.

- ✓ **Consultative:** This kind of participation combines minimum influence on decision-making with the identification of the participants' needs. There are channels, or if not they are generated, to receive the participants' opinions and positions on a certain issue, and the consultation can be binding or non-binding.
- ✓ **Managerial:** This kind of participation implies greater influence on decision-making but a limited satisfaction of the needs expressed. The actors are considered implementers and/or managers of social programs and/or projects in order to respond to local problems. In this way, the actors participate in a negotiation process, which leads to binding agreements and therefore have an impact on the decision that is made, although these benefits do not necessarily translate into the satisfaction of needs.
- ✓ **Empowerment:** This kind of participation combines the maximum level of influence on decision-making with optimal satisfaction of demands. In this way, the community develops skills and abilities, reinforces its spaces and organizations, and acts with a sense of its own identity and community. The strengthening of organizations and the work in networks make for efficient action focused on fulfilling goals and projects.

111. In this context, the intersection of human rights principles with participatory processes within the framework of anti-corruption strategies can prevent the manipulation of these processes, thereby avoiding the exclusion or co-optation of vulnerable groups. Otherwise, the implementation of channels of participation without bearing in mind the local power structures that bring about the exclusion or co-optation of vulnerable groups can lead to undesirable results. In international experience and in specialized literature about social conflicts involving access to natural resources or basic services, this phenomenon is known by such varied names as "the tyranny of participation"<sup>18</sup>, "voice without influence"<sup>19</sup>, "participation as fleeting enthusiasm"<sup>20</sup>, and finally as "rhetorical make-up"<sup>21</sup>. All of these expressions refer to a kind of participation that is neither authentically democratic nor autonomous, and that makes it highly unlikely that the structural causes of corruption will be brought to light or challenged.

### 3. MAIN AREAS OF CORRUPTION AND THEIR IMPACT ON HUMAN RIGHTS

112. Among governments' responsibilities there is a series of positive obligations that are fundamental to fulfilling human rights. These activities can involve a wide variety of operations, ranging from the provision of public services, to the creation of social programs for reducing poverty, to the regulation of the industrial sector to protect the environment. At the same time, all of these activities give rise to opportunities for corruption. In the following section we will select 3 kinds of corruption associated with a strong negative impact on the fulfilment of human rights. These areas of high corruption risk are not the only ones, but unlike others, we think they can function as points of entry to introduce human rights tools into anti-corruption strategies.

<sup>18</sup> Cooke, B. and Kothari, Y. (2001). "Participation, the new tyranny?" Zed Books.

<sup>19</sup> Goetz, A.M. and J. Gaventa (2001). 'From consultation to influence: bringing citizen voice and client focus into service delivery.' IDS Working Paper 138

<sup>20</sup> Cohen, J. and Uphoff, N. (□□□□). 'Participation's place in rural development: seeking clarity through specificity', World Development.

<sup>21</sup> Cernea, M., (□□□□) 'Knowledge from social science for development policies and projects', in M. Cernea (ed.) Putting People First: Sociological Variables in Rural Development, Washington: □□□□ /Oxford: Oxford University Press.

## Managing social anti-poverty programs in the face of political patronage

113. In the context of a process that began in the mid-80's and intensified in the 90's, a large number of developing countries set up programs aimed at compensating for the negative impacts that structural adjustment mechanisms were having among the poor. In this context, the criterion of targeting social policies put an end to the universalist conception of social services and reoriented scarce resources toward the most marginalized groups within the poorest sector of society. Following this logic, targeted social programs were conceived as a faster, more efficient and more flexible form of intervention that could channel direct subsidies and transfer resources and services to the people most affected by restructuring, and avoid the bureaucratic obstacles and lack of transparency characteristic of ministerial processes. These programs, although insufficient to meet the demand for goods and services of the population living in poverty, still represent the main access to the social rights of food, housing, health, jobs and income. But the combination of targeted social policies with non-transparent, personalized and discretionary practical welfare policies made it possible for political patronage to flourish as a form of corruption.
114. In addition, in an institutional context where the market was deregulated, public enterprises were privatized, the State was shrunk and subsidies cut back, political parties lost their traditional sources of political financing that came from patronage. In this new context of scarcity, social programs became one of the instruments that were most highly valued by political parties to maintain and recover their patronage networks<sup>22</sup> without modifying their commitments to international financing bodies with regard to inflation levels, budget deficits and the exchange rate. Thus, by using targeted social programs, political parties can change the programs' geographical distribution at their discretion, in order to favour certain groups and discriminate against others. From this viewpoint, the manipulation of social programs for patronage purposes neutralizes the steady fulfilment of economic, social and cultural rights, even though these rights have been formally recognized as such and the State has committed financial resources for their fulfilment.
115. As described in studies by Bacio Terracino (2007) and Alolo (2007) on how corruption disproportionately affects vulnerable groups and especially poor women, the phenomenon of political patronage forces us to look at this issue in greater depth and make it more visible. The feminization of poverty is more than an economic concept that explains women's lack of income as compared to men. This concept also considers women's greater social vulnerability in the face of social risks and abuse of power produced by gender inequality (Baden 2000). In general, women earn less income than men, suffer higher unemployment rates, are concentrated in the labour market's lower-income sectors, and are overrepresented in the poorest social segments.
116. Gender inequality is also reflected in the design and operation of public institutions, where women face restricted access to decision-making processes and spaces for participation. In this context, women are subjected to discrimination and have less access to information, social services and justice (HDR 2002).
117. Corruption and patronage also affect women more than men. The question of whether women are more or less corrupt than men had been widely discussed (IDS 2005), but what has received

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<sup>22</sup> For a more in-depth analysis we recommend the excellent work done by: Edward L. Gibson and Ernesto Calvo (1997). "Electoral Coalitions and Market Reforms: Evidence from Argentina". Department of Political Science, Northwestern University. Michelle Dion (2000). "The Political Economy of Social Spending: The Mexican Solidarity Program, 1988-1994". Department of Political Science, University of North Carolina at Chapel Hill. Norbert R. Schady (1998) "Seeking Votes: The Political Economy of Expenditures by the Peruvian Social Fund (FONCODES), 1991-95". World Bank

less attention is the differential impact that corruption and patronage can have on women and men. In the first place, corruption diverts public resources that could be allocated to anti-poverty policies; thus they have a disproportionate impact on the welfare of women and their dependents. Secondly, in institutional settings controlled by men, women do not have enough power to challenge corruption or patronage practices. On the contrary, they may suffer forms of patronage based on gender inequality, as when a women's enrolment in a social programs is contingent on her giving sexual favours.

118. So far we have briefly analyzed the institutional conditions and politicians' incentives that encourage political patronage and how patronage affects women more than men. Next we will introduce the human rights perspective as a way of confronting patronage.
119. Poverty, as a social phenomenon, generates economic, cultural and political exclusion. Any institutional response for confronting poverty should include a strategy to attack each one of the three types of exclusion (Schneider, 2005).
120. In less developed regions, the traditional institutional response has been political patronage. In the face of economic exclusion, i.e., the lack of private assets (income and consumption) and public assets (social services and social security), patronage responds through a series of reciprocal but vertical relationships by which divisible goods covering basic needs are exchanged on an individual basis. In the face of cultural exclusion, based mainly on discrimination and lack of access to cultural assets and spaces, patronage offers social cohesion through networks of affiliation that, although distinctly hierarchical and exclusive of those who do not follow the rules, offer shared space and a membership that allows people to organize their lives and give them meaning.
121. Finally, in the face of political exclusion, characterized by low-quality, authoritarian and discriminatory institutions, patronage offers the power to mobilize during electoral campaigns, the ability to articulate demands and even to participate in elections.
122. To summarize: patronage networks, although based on clearly unequal relationships of subordination, do offer an alternative to the exclusion of poverty: material benefits that cover basic needs, social cohesion and political participation.
123. From this perspective, any strategy for combating poverty must be able to offer a better alternative than the one patronage delivers.
124. Along these lines, an alternative response to poverty is a strategy based on the practice of human rights. This approach considers poverty not as a deprivation of income, but as a deprivation of capacities (Sen, 1999). The fulfilment of human rights implies the possibility of developing each person's capacities fully. The implementation of a strategy based on the practice of human rights proposes a series of responses that are radically different from patronage practices. While patronage offers short-term solutions to economic, cultural and political exclusion, over the long term it reproduces poverty. A rights-based strategy, on the other hand, offers a series of responses that can potentially transform poverty. Thus, rights guide institutions' policies and the concrete processes through which they offer an alternative to patronage. In response to economic exclusion, the rights-based strategy promotes the redistribution and allocation of social goods and services on the basis of universal, non-individual criteria. In response to cultural exclusion, the principle of citizenship guarantees and respects people's identity and diversity, in ethnic, sexual, racial, religious, political or gender terms. Finally, in response to political exclusion, the creation and maintenance of transparent and participatory institutional channels promotes political inclusion and social cohesion.

125. In summary, while patronage does offer a short-term solution, it ends up reproducing poverty and inequality over the long term. The rights-based strategy, on the other hand, aims at transforming poverty.
126. In our current societies, targeted social programs are the only social services that are delivered directly to people living in poverty. These programs are fundamental public policies, but not only because of their redistribution function<sup>23</sup> through the direct transfer of resources (in cash or in kind). They also constitute a channel for exercising rights and recovering the lost status of citizenship by integrating people living in poverty into the public sphere through participation in, and control of, the policies that affect their lives.
127. However, in order to bring about this change, it is necessary to put through an institutional reform of social programs and of the public agencies that administer them, so as to guarantee the operationalization of the three principles of human rights 1) effective access to information about eligibility criteria, registration dates and locations, periodicity of benefits, operational rules, impact studies, etc.; 2) genuine participation in decision-making with respect to design, implementation and control issues; and 3) solid accountability mechanisms capable of guaranteeing access to justice for people who, finding themselves excluded by poverty, are subjected to abuses of power.

### **Public contracting**

128. A system of public purchasing and contracting should meet the following three objectives simultaneously:
- Equity to guarantee fair access to any bidder competing for a business opportunity with the government.
  - Integrity to prevent and control corruption during the entire contracting process
  - Economy and efficiency to be able to contract goods and services offered at the lowest possible price combined with the required quality.
129. When governments develop the capacity to guarantee competitive processes, these three objectives tend to be met. Thus, competition guarantees fair access for all businesspeople, reduces prices and reduces opportunities for corruption. On the other hand, when corruption dominates contracting processes, the prices of goods and services go up while quality declines. The control of corruption in the area of public purchasing and contracting is a key factor conditioning governments' capacity to provide public services.
130. Governments purchase and contract goods and services in order to meet social demand for such public goods as education, health, infrastructure and housing, among others. For every extra dollar paid over and above the lowest price possible, the production of these public goods is reduced proportionally. In general, governments spend 70% of the national budget on contracting goods and services, and while there are no precise statistical data on the average percentage of surcharge paid by governments due to corruption, TI has made a conservative estimate of 20 to 25%. But in addition to the price, corruption in the purchasing and contracting system distorts the efficient allocation of public resources by directing public investment to projects and services that do not respond to citizens' real needs, but rather to the personal

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<sup>23</sup> While this part of the study is based on the management of social anti-poverty programs, we are not suggesting that social anti-poverty policies should be limited to this kind of targeted intervention. On the contrary, we believe that the only social policies that succeed in promoting social development and reducing inequality are those that combine and complement solid universal social policy with targeted strategies for groups living in extreme poverty.

interests of public officials and private-sector businesses. To sum up, contracting processes are complex, transparency is limited and corruption is hard to detect.

131. Public contracting processes have four stages. Each one of these stages presents different risk factors that must be borne in mind by non-governmental organizations that seek to control corruption in such processes. On the basis of TI's experience in evaluating the risk of corruption in public contracting in over 20 countries around the world (TI, 2006), the following common patterns can be identified.

#### *1) Planning stage*

132. Risk factors: During this stage, one of the main risk factors characterizing contracting systems in most countries is the phenomenon of regulatory inflation, which means the overlapping of rules and norms that tend to contradict or annul each other, making the area of contracting difficult to manage. In addition, the legal framework often sets unclear or ambiguous limits to the power to contract directly by means of exceptions to the procedure.
133. Another characteristic factor is insufficient planning, or else inadequate planning procedures (lack of information about inventory control, benchmark prices, forecast of future needs, etc.). This phenomenon includes the absence of previous studies, or else biased previous studies.
134. In addition to these factors that are inherent to contracting systems themselves, there is a shortcoming of the State that goes beyond the contracting area and ties in with inconsistencies in the budgeting and financial control processes. It often occurs that once contracting is planned, it is not executed according to the original plans, which encourages and generates opportunities for resorting to non-competitive procedures.
135. With regard to opportunities for citizen control, the legal framework normally does not include mechanisms for citizen participation in community needs analyses, which encourages the definition of high social impact projects behind closed doors.

#### *2) Stage of designing bidding forms and publishing demand*

136. Risk factors: In this stage, one of the main weaknesses of contracting systems is the lack of model contracts and of detailed norms for writing up bidding forms. The lack of these standardized documents increases public officials' discretionary authority and generates administrative disorder by allowing the use of multiples contract formats for acquiring the same goods and services. The lack of experience and capacity, together with a lack of up-to-date information, also creates conditions for bidding forms to simply repeat previous forms, often without any direct relation to stock or to the organization's needs.
137. The forms often contain restrictive conditions concerning capital, indebtedness, labour obligations, etc., which restrict free competition even more. Finally, the lack of transparency and restricted access to information about bidding forms represent an obstacle for citizen participation and public debate about the design of bidding forms.

#### *3) Evaluation of bids and the awarding of contracts*

138. Risk factors: Evaluation committees are poorly qualified, responsibility often falls to one person, and no complete bid evaluation reports are written up (complete description of evaluation,

reasons for rejecting bids, the way of verifying the qualification of the winning bidder, etc.). Another important factor to consider is the absence of norms regulating evaluators' conflicts of interest, which lets people with ties to bidders sit on evaluation committees. There is also little or no information about the performance of bidders on previous contracts, nor is information available about bidders' professional competence. As for citizen control and participation, access to information about members' background and about evaluation criteria tends to be restricted or practically non-existent.

#### *4) Contract execution stage*

139. Risk factors: While the stages analyzed above are carried out in relatively short periods of time, this last stage can go on for months or years, depending on the nature of the goods, services or projects. This makes it more difficult for the comptroller's office as well as civil organizations to exercise oversight. But just as in the previous stages, the lack of information plays a key role in the conditions for covering up corruption. We can begin by pointing to the lack of adequate procedures for supervising the procurement of goods/services and verifying their quantity, quality and punctuality. The lack of records on contract administration (contractual notifications issued by the supplier, the contractor and the purchaser or contracting party; records of invoices and payments; inspection certificates, etc.) also makes it difficult to detect corruption. Another important factor to keep in mind is the definition of the order in which payments are scheduled, which is done discretionally, thereby giving a large number of mid- and low-level administrative officials an opportunity to apply arbitrary criteria. In Bolivia, for example, payments are rarely made on the agreed-upon dates, and a Payment Commission is in charge of prioritizing payment cancellations on the basis of analysis criteria aimed at maintaining a sufficient level of financial liquidity for the institution and the obligation to fulfil contractual responsibilities. These criteria, however, are not formally set down in any norm or procedure. Regarding citizen participation, access to information about procurement of goods/services and about changes in contractual terms is highly restricted or non-existent.

### **Public contracting and corruption in three key areas**

140. The risk factors we just analyzed operate at different levels of intensity in different public services provided or regulated by governments: education, health, water, electricity, transportation. But the health and education sectors are without a doubt the most vulnerable, which interferes with the fulfilment of basic social rights for any society. Another area of public contracting where corruption has a disproportionate impact on vulnerable groups is the construction of major development projects and public works, like dams and roads.
141. The study by Toebe (2007) confirms that the health area is highly vulnerable to corruption. The main reasons are the asymmetry of information at all levels. Physicians and public officials have more information than patients do. And at the same time, pharmaceutical companies have more information than governments do. Another of the reasons has to do with the multiple actors involved. The diverse relationships among medical service providers, the entities that provide medical services, and the decision-makers in the health sector blur the lines of responsibility when the time comes to render accounts. And very little information is exchanged, which reduces the sector's transparency.
142. Under these corruption-inducing conditions, the health sector has an ample repertoire of corrupt practices. Bribes and corruption severely distort purchases, payment systems, the pharmaceutical supply chain and finally the provision of service. All of these illegal practices are an obstacle to the fulfilment of the right to health.

143. The education sector feels the impact of corruption in three different and important ways. Corruption reduces the available resources due to unfinished projects or low-quality goods and services. It affects the quality of service by distorting selection systems due to patronage and nepotism. And finally it exacerbates the inequality of vulnerable groups because they lack the resources to pay the bribes required to gain access to educational services.
144. Finally, we will take a brief look at the impact of corruption on contracting for major infrastructure projects. Most of these projects involve multi-million dollar investments and promise economic and human development. The quintessential example of this type of project is the dam, with its potential to generate energy, irrigate millions of hectares of land and provide running water to communities lacking this service. This type of project, however, also generates less publicized collateral effects: whole towns are submerged, thousands or millions of people are displaced, and thousands of hectares of crops and forests are destroyed. Corruption in this sector is very common and worsens the violation of human rights that are already in jeopardy. Corruption in major infrastructure projects justifies unnecessary work, reduces the quality of materials, compromises workplace safety, exacerbates the ecological impact on affected communities, and co-opts participatory and resistance processes that question this kind of project.

### **A map of possible alliances**

145. We have shown only three areas where corruption in public contracting has a negative impact on the fulfilment of the rights to health, education, a healthy environment, land and jobs. We believe that the area of public contracting, more than any other, can be a point of entry for coordinated work between human rights and anti-corruption organizations. Over the last 10 years, for example, TI's different national chapters have developed tools and technical skills for monitoring complex public contracting processes. Human rights organizations, on the other hand, can use the discourse and practice of human rights to complement this technical work on bidding forms and administrative procedures in order to shed light on the ways corruption in public contracting violates vulnerable groups' social rights. The complementarity of these two approaches to the same problem has the potential to enhance anti-corruption strategies and increase social mobilization around the violation of minority groups' social rights.

### **The principles of availability and accessibility as tools for exposing corruption in public services**

146. The practice of human rights has developed tools for measuring fulfilment of social rights. These 4 standards: availability, accessibility, acceptability and adaptability, are used by the human rights movement to measure the implementation of health, education, housing, nutrition and drinking water services. At the same time, these services and other basic infrastructure projects that improve the living standards of disadvantaged groups are usually implemented locally and are susceptible to political manipulation. Corruption can distort prices, the size of the project, the quality of the service or project and its geographic distribution or location. In Latin America alone there are 125 million people without access to drinking water, 200 million without sewers, and an estimated 70 million have no access to modern energy sources. When the poorest communities are consulted, the lack of access to public services is always mentioned as one of the greatest obstacles to a better standard of living.
147. Three interest groups are usually involved in the contracting process for public services and projects: politicians and bureaucrats, citizens who benefit from the service, and private-sector companies eager to do business by delivering the service or project. But there can be no doubt

that the least-favoured group of the three is the citizenry. Asymmetry of information, corruption or lack of transparency means that citizens suffer the worst consequences, with the gravest effects for disadvantaged groups. In this context, availability and accessibility standards can become powerful tools for exposing corruption in public services and works.

148. According to the principle of availability, the service must be available in sufficient quantity and quality to meet the needs of the community in question. Second, according to the principle of accessibility, the services must be allocated and provided to the whole community without discrimination. This also means that physical access to the sector's places, goods and services is safe and does not discriminate against vulnerable groups. This principle also guarantees economic access to the service: whether public or private, it must be accessible for all groups.
149. Corruption in the provision of public services affects and distorts mainly these two principles in a wide variety of ways, such as the under-provision of services, low-quality services, under-utilization of materials in detriment to the project, incomplete or non-existent work, the need to pay surcharges for the delivery of a public service, or simply the impossibility of availing oneself of a public service due to bureaucratic obstacles or discrimination. These are just some of the ways corruption impacts the provision of health and education services, and public contracting in general.

#### **4. MAIN LIMITATIONS OF HUMAN RIGHTS ORGANIZATIONS IN THE IMPLEMENTATION OF ANTI-CORRUPTION REFORMS**

150. In the new global post-dictatorial era, the human rights movement has had to stop and reflect, and reformulate its traditional repertory of practices and strategies. This process of reform and change, which Ignatieff has defined as a mid-life crisis (2005), makes direct reference to the third wave of democratization as defined by Huntington and the subsequent impact on the working paradigm of the human rights movement aimed at combating crimes against humanity and other human rights violations committed by governments.
151. In brief summary, governments that used to confront and repress human rights organizations now make use of human rights discourse to justify and legitimize their public policies. Most of the time, however, this discourse degenerates into empty rhetoric, or corruption becomes the main obstacle to the effective execution of these public policies.
152. Thus, authoritarian and dictatorial governments have turned into democratic governments with high levels of corruption, in a global context where good governance and social exclusion have become the central theme of the rhetoric of governments and international organizations alike (PNUD, 2004). In this new and ambiguous global context, human rights organizations face new problems and challenges to keep up the effectiveness and legitimacy of their actions.
153. In the next section we will analyze the four limitations we consider the most important, although not the only ones: 1) the formation of alliances with government actors and other key social actors; 2) the analysis and gathering of budget data and 3) empirical data to be able to better evaluate the impact of their strategies and the fulfilment of governments' obligations; and 4) human rights discourse as the only discourse for confronting violence and abuse of power.

#### **The formation of new alliances: from isolation to alliance-building**

154. If we carefully examine the main themes of anti-corruption strategies (Transparency International, 1994; Kaufmann, 2003), especially the National Integrity System devised by TI

(Koechlin, 2007), we can see that the creation of national and international alliances with actors from civil society, the state and the private sector is one of the most distinct and innovative components.

155. In this context, the human rights movement has already begun to reformulate its alliance strategies and to develop new cooperation skills, but it must continue developing this internal reform agenda in order to join forces with new actors from the anti-corruption agenda. The organizations of the human rights movements had no choice but to start up and develop in isolation (Abregú, 2004): their original members were victims or relatives of victims, and their natural confrontation with authoritarian governments were factors that shaped a rather closed style of working, with cooperation limited to a tight core of organizations that shared the same identity.
156. Thus, human rights organizations must continue identifying and developing the skills needed to be able to join forces with new government and social actors in order to influence the design and execution of anti-corruption reforms.

### **Numbers and rights: the analysis of the public budget as a tool for measuring the fulfilment of ESCR's**

157. The progressive fulfilment of social rights, through the maximum allocation of available public resources (CIDESC, 1956) is explicitly reflected in the public budget. In order to transform these legal obligations into objective budgetary indicators, however, one must know how to observe. In order to achieve this objective, human rights organizations must develop new analytical skills that can be applied to the analysis and oversight of the budgetary cycle. Another possible alternative is the formation of alliances<sup>24</sup> among different movements, for example: the human rights and budget oversight movements. The development of these new skills from within organizations or through alliances will allow the human rights movement to influence, prevent and control corruption in the allocation of public resources that are fundamental to fulfilling basic social rights such as access to health, education, housing and drinking water. Budgetary analysis and oversight offer a number of challenges for human rights organizations. The creation and approval of the budget takes place in a series of differentiated stages in which different political actors intervene. The budget process is not the same in all countries. The budget can be analyzed from a broad framework (the budget as a whole), a sectoral perspective (Education, Health, etc.), or from the perspective of a minority group in particular (women, indigenous citizens, etc.). Budget analysis and oversight can be done from a position of isolation, but in general it requires coordinated efforts with key political actors from the executive and legislative branches.
158. One of the first initiatives that brought together human rights and budget oversight organizations was promoted by the Ford Foundation (2002) in Latin America. However, in order to enhance the human rights movement's influence over the progressive fulfilment of social rights through the maximum allocation of available public resources, it is important to continue developing and strengthening these new skills and alliances.

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<sup>24</sup> The search for alliances is a key step for organizations that do not have enough resources to train their own specialists in the field of budgets and statistics. I am referring to community movements and groups, and organizations that do grass-roots work.

## **The power of data: empirical evidence for measuring, persuading, pressuring and controlling**

159. A data and measurement revolution is underway in the social sciences, from the fields of human development and poverty to good governance and anti-corruption reforms. Where this revolution has had the least impact, however, is in the field of human rights (Ignatieff, 2005). Due to both practical and philosophical reasons, the human rights movement has from its beginnings been wary of the practice of quantifying problems and advances in the fulfilment of human rights. Today, however, it is more necessary than ever for the human rights movement to enter a new stage where the organizations themselves will be able to gather, classify and use quantitative and statistical data to enhance the impact of their work, and in this way complement the traditional analysis of individual cases, and incorporate existing indicators of governance and corruption into their measurements (Kaufmann, 2004, 2005).
160. In this context: the measurement of human rights in the field of anti-corruption reforms is important for 4 basic purposes (Hines, 2005):
- To set priorities: The rigorous measurement of human rights allows for a better definition of problems, which in turn permits strategic decision-making about where to concentrate scarce resources in order to maximize impact.
  - To improve strategy: The measurement of human rights allows for a better understanding of the nature and causes of problems and human rights violations. In this way, the human rights movement is better prepared and equipped to design appropriate strategies for solving these problems.
  - To demand accountability: Rigorous measurement of human rights fulfilment makes it easier and more feasible to hold public officials to account for their responsibility in protecting and fulfilling human rights.
  - To evaluate impact: In order to improve and correct their strategies, and to increase their legitimacy and base of support, human rights organizations need to systematically measure the impact of their actions and strategies.

## **Human rights discourse as the only discourse of resistance: blind and elitist.**

161. Finally, we need to examine some of critiques raised by Rajagopal (2003) regarding human rights discourse and practice, particularly two critiques that we consider useful and that have implications for the relevance of human rights organizations in the fight against corruption. Rajagopal first analyzes the relationship between human rights discourse and violence, and points out the existence of types of violence that are invisible to human rights discourse. From this perspective, Rajagopal asserts that human rights discourse is not based on a theory of non-violence. On the contrary, human rights approve of one kind of violence and disapprove of another. In this context, human rights discourse lacks a theory of violence that can justify this selectivity among different kinds of violence. What would seem to be operating behind this selectivity is a division between different groups of rights, some more important than others.
162. This division is based on the central function that the State is supposed to fulfil in the overall economy, as expressed in development discourse. From this point of view, the State is only qualified to ensure a limited group of political and civil rights while it ignores the structural causes that generate inequalities in the distribution of income, land and other basic resources. But Rajagopal insists that this selectivity does not come from the principle of progressive fulfilment of social rights, nor is it justified by this principle. Rather it comes from the model of the State that emerges from development discourse. From this perspective, while human rights discourse identifies as a crime against humanity the massive deportation of 1.5 million people

from Phnom Penh by the Khmer Rouge in 1975, it does not regard or define in the same terms the eviction/deportation of 33 million people due to dam construction by the government of India. In this latter case, we are looking at an inevitable social cost of development, and thus the violence committed for development's sake remains invisible to human rights discourse. This critique should be taken seriously by the human rights movement, because in countries with high levels of corruption, major public works like dams, highways and other large infrastructure projects that promote development are usually captured in the design and execution stages by economic elites such as contractors and/or investors (Ackerman, 1999).

163. Secondly, Rajagopal criticizes the elitist origin and practice of what is considered to be an authorized "voice" in human rights discourse. From this point of view, Rajagopal denounces the ideal racist type of authorized "voice", basically white, male and from the north. This criticism takes on fundamental importance in the framework of anti-corruption reforms implemented mainly in countries of the south, and where the victims that suffer a disproportionate impact of corruption are the most vulnerable groups: poor women, the indigenous, the elderly, etc.

## 5. CONCLUSIONS

164. Anti-corruption reforms are not designed or implemented in an institutional vacuum. In the present study we show that these reforms are an integral part of the good governance agenda. Thus, the main actors involved, the concepts and the practices of good governance shaped the discourse and the tools of early anti-corruption reforms.
165. We also saw that anti-corruption reforms share three main fundamental prescriptive principles with the human rights movement: accountability, transparency and participation. Detailed analysis, however, shows how these principles are theorized and put into operation by both movements in different and sometimes contradictory ways.
166. The anti-corruption reforms of the good governance agenda concentrated on "top-down" reforms of a technocratic and legalist bent, modifying regulatory and institutional frameworks. Ten years later, it became clear that these reforms had not generated the expected results. The human rights movement, on the other hand, has for some time been developing and practicing a "bottom-up" accountability policy by empowering the most vulnerable groups to participate in and oversee the distribution and allocation of resources and basic services in order to improve their standard of living.
167. Transparency appears in anti-corruption reforms as a free flow of information. This information must be clear, timely and useful so that people can make better decisions and control the administration of governments and businesses. From the human rights perspective, transparency is a product of the recognition of a subjective right belonging to all people to demand and access public information without having to justify the cause, including the chance to lodge a formal complaint when the information is refused.
168. Participation in anti-corruption reforms is seen as a process of vulnerable groups' extracting information from governments and a means for legitimizing their actions. From the human rights perspective, participatory processes must empower vulnerable groups by improving their negotiating skills, and demand more resources and better social services. In this context, the participation and empowerment of vulnerable groups are necessary conditions for these groups to be able to challenge the corrupt practices of governments and businesses.
169. And finally, the fundamental principle of non-discrimination intersects with the other three prescriptive principles to ensure that any strategy against corruption is targeted at the structural

causes of inequality that encourage corruption and other abuses of power. This conceptual and practical manoeuvre of making non-discrimination an intersecting principle is without a doubt one of the main influences that the practice of human rights could have on the design and implementation of new anti-corruption reforms for the inclusion and identification of vulnerable groups as the main victims of corruption and abuse of power in general.

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			WHAT IS CONTROLLED?		
			ACTORS	POLITICIANS	BUREAUCRATS
			Executive branch	-Veto	-Regulation -Ad minister. control -Personnel selection and removal
WHO CONTROLS?	Horizontal	Checks	Legislative branch	-Impeachment -Investigative commissions -Veto	- Regulation -Ad minister. control -Personnel selection and removal
			Judicial branch	-Judicial review	-Judicial review
		Assigned	Control inst.: Ombudsman, Courts of accounts Comptroller's offices Inspector's offices		
	Vertical	Social	-Media -Civil associations -NGO's -Social movements -Citizen committees	-Investigation and public accusation -Social mobilization and public accusation -Accusation in control agencies -Litigation	-Investigation and public accusation -Social mobilization and public accusation -Accusation in control agencies -Litigation
		Electoral	-Individual citizens	-vote	

**Appendix 1: Different mechanisms and resources through which each type of accountability is put into operation. Source: Peruzzotti and Smulovitz, 2002.**

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