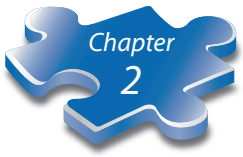
PART 2

NATIONAL INTEGRITY PILLARS



The Role of the Executive

The Executive plays a central role in building, maintaining, and respecting the country's National Integrity System. The Executive is expected to provide the requisite degree of principled, ethical leadership, and exercise oversight over the Civil Service responsible for executing its policies and programmes.

In the course of discharging its considerable responsibilities, the Executive must ensure that

- it provides clear leadership and political will to maintain clean government;
- its own actions are lawful, transparent, and fully accountable;
- the independence of the courts is respected and their judgments complied with; and
- the watchdog agencies are given the resources and the mandate to discharge their functions without fear or favour.

Leadership

The leadership role of the Executive cannot be overemphasized. As the National Integrity Plan states:

Leadership is extremely vital in developing the culture of any organisation or of a society as well as raising their level of integrity. Leadership at various levels should have the resolve and political will to provide guidance as well as to bring about the necessary changes. Lack of political will may result in the deterioration of integrity. The same can be said of leaders who do not lead by example, and who do not walk their talk. Leaders must strictly adhere to laws, procedures and regulations. Any instructions issued by them that contradict or fly in the face of established laws, procedures and regulations will undermine integrity.[1]

Heads of governments are particularly well placed, with excellent media access and exposure, to deliver messages to the public. Being in the media spotlight, they are in a position to role model the conduct to be followed by others.

A new Executive in particular comes under scrutiny, both by the public and by the media, which examine its performance in terms of whether or not the Executive indulges in extravagance or in the appointment of cronies to public positions. The moral tone of an administration is very quickly set. One approach is to hold, early on in a new administration, a 'values retreat' for a new Cabinet, where Cabinet members can settle and internalize a Code of Conduct for Ministers. One model that has proved successful in other Commonwealth countries requires the Head of Government to convene a retreat which the Ministers attend without any officials for the purpose of discussing the standards of conduct that should be expected of individual Ministers. This first involves a discussion of the conduct of Ministers from the past whom they admire. This is then followed by a similar discussion of Ministers from the past whose conduct has fallen short of that expected by their colleagues and the general public. Each Minister is then invited to write in two or three sentences how he or she would like to be remembered by the people after their term of office is completed. Finally, a Code of Conduct for Ministers which draws upon the content of the discussions is drafted. The whole event is 'covered' by the so-called 'Chatham House Rules'[2] that require the participants not to quote each other outside the four walls of the meeting room. If a participant is quoted without his or her

[1] National Integrity Plan, p.13.

[2] The rule (i.e. 'when a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s) nor that of any other participant may be revealed') originated in 1927 with the aim of guaranteeing anonymity to those speaking within the walls of Chatham House (officially the World Institute of International Affairs) so as to promote and improve international relations. It is now used throughout the world as an aid to free discussion. Participants agreed that they should be subject to the rule and its effectiveness depends upon it being considered to be morally binding. The rule allows people to speak as individuals, and to express views that may not be those of their organizations. Speakers are free to voice their opinion without concerns to the personal reputations or their official duties and affiliations. See http://www.chathamhouse.org.uk/index.php?id=14.

consent, they are entitled to deny ever having made any such comment.

Above all, a sound understanding of conflict of interest is essential for members of the Executive, and for staff throughout the Public Service. If public officials are not properly trained, private interests will dominate public decision-making, leading to irrational and self-serving decisions that betray the public interest.

Relationship with the Judiciary

Perhaps the most significant of the Executive's relationships is that involving the Judiciary. The Judiciary is, and must be, independent of the Executive—not only on paper but also in practice. This is essential for it to be able to perform its central functions: to hold the Executive accountable for the lawfulness of its conduct and to ensure that the Executive governs under the law (i.e. to ensure that the Rule of Law prevails).

Inevitably, this process of review can give rise to tensions, as in some cases the Judiciary can be sitting quite literally in judgment over the Executive. For its part, the Executive may feel that it has been elected by the people with a mandate to rule, and the Judiciary has been merely appointed by the Executive under the Constitution.

However, the Executive is elected by the people to rule under the law, and not as a lawless dictatorship. Thus, the Judiciary acts as an agent of the people when it ensures that the Executive observes the limits of its democratic mandate. Because some controversial judicial decisions are inevitable, a special responsibility rests with the Executive to protect and respect the standing of the Judiciary.

Unlike the Executive, it is generally regarded as improper for members of the Judiciary to make public statements and to enter into public debates. This is to avoid situations in which they may have made statements on matters that subsequently come before them in the courts. Judges, then, are unable to defend themselves when publicly criticized, let alone vilified. Restraint in these matters is essential. Judges generally have just one opportunity to explain themselves, and that is when they deliver the reasons for their judgments. Thereafter they are dependent on others to come to their defence. At times, however, it may be necessary for the Head of the Judiciary to make public statements when this is essential in order to inform the public of debate that is taking place.

It is essential that the Executive respects the independence of the Judiciary and other office-holders who are given powers of independent action. In many countries where the integrity systems fail to function satisfactorily, much of the blame lies with the Executive for its refusal to accept the concept of judicial and prosecutorial independence. Until it does, the integrity system is unlikely to function satisfactorily. It goes without saying that, however much the Executive or a Minister may dislike a final court judgment, the court ruling must be complied with. Should this not happen, the whole concept of the Rule of Law is undermined.

Relationship with the Civil Service

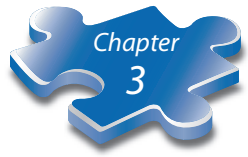
Members of the Executive must also have a clear understanding of their relationship with public servants, whose role should be to serve the public at large, not the narrow political interests of the governing party. It is for the Executive to make policy (guided, it is true, by advice from civil servants), but it is for civil servants to execute it. A Minister is not the Chief Executive Officer of his or her Ministry.

Although in some countries the Constitution has been designed to distribute power across a number of independent institutions in ways that would ensure that the Executive was not overly powerful, in practice, some argue, this aim has not always been realized. On the contrary, in these countries, there has been a steady accretion of power to the Executive and an erosion of power from the Judiciary, the Parliament, the Election Commission, and other integrity institutions.

In these countries, the Executive, as the overwhelmingly most powerful integrity institution, risks becoming a potential threat to the country's integrity system, rather than being a core pillar of the system itself.

Integrity checklist for assessing the effectiveness of the Executive

- Are there valid grounds for the suggestion that the Executive has become too powerful in terms of its relationships with other integrity institutions and the roles they are expected to play?
- Do members of the Executive exhibit respect for the independence, as well as the roles, of other integrity institutions, in particular the Judiciary?
- Do they exhibit leadership and demonstrate by their own actions the highest standards of ethical conduct?
- Are there clear and well-understood conflict of interest rules? If so, are these generally observed?
- Are there clear rules against political interference in day-to-day administration—that is, are the formal rules requiring political independence of civil servants being observed in practice?
- Are transparent methods used to sell government assets?
- Are there sales of public assets which are seen as unduly favouring those with close links to the ruling party?



The Role of Parliament

Malaysia's elected Parliaments—both Federal and State—are clearly among the country's major integrity institutions.

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

Sustaining good governance

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

Elected Parliaments are the essence of democracy: indeed, democratization in itself presents an opportunity to control systemic corruption by opening up the activities of public officials to public scrutiny and accountability. It has been suggested that democracies, more so than any other political system, are better able to deter corruption through institutionalized checks and balances and other meaningful accountability mechanisms. They reduce secrecy, monopoly, and discretion, but they do not guarantee honest and clean government, nor do they eliminate all corruption. Legislation can only reduce the extent, significance, and pervasiveness of corruption, but as is repeatedly demonstrated in the United States and elsewhere, other institutions will be needed, not least to alert Parliament to what it needs to know.

In various countries around the world, Parliaments have been 'captured' by elites determined not to advance the well-being of the people they are supposed to represent, but rather to profit themselves to the greatest extent possible—by fair means or foul. To this end, they have rigged public contracts, paid themselves absurd and unjustified salaries, provided their cronies with protection and immunity from prosecution, and manipulated the next election to ensure that they remain in power and control.

Safeguarding Parliament

The risk is always present that some individuals will seek public office not so much for what they can do for the public, but rather for what the public can do for them. Thus every democracy must be on its guard. The National Integrity Plan provisions designed to ensure the integrity of Members of Parliament (MPs) and members of the State Legislatures, among which is the monitoring of assets,[1] are therefore of the greatest importance.

[1] National Integrity Plan, 'Political Institution Strategies', p. 129 et seq. MPs are not alone in needing to have their assets monitored, as throughout the administration there are those in positions of vulnerability who need this form of protection, particularly officials involved in public procurement.

Parliamentary Select Committee

To strengthen Malaysia's bulwarks against unethical conduct, the formation of a Parliamentary Select Committee on Integrity, announced in October 2005, holds considerable promise. Under the leadership of a Minister in the Prime Minister's Department, the Committee's tasks include the following:

- To study and discuss issues relating to ethics and integrity among the communities as well as among council members.
- To plan and implement the Integrity Action Plan based on the National Integrity Plan, which includes the establishment of Parliamentary and State Legislature Committees on Integrity, and the provision of training for MPs and State Legislators on power, travel, the Code of Ethics, and the bodies on which they serve. Means for members of the public to have direct access to their elected representatives are also to be provided.
- To suggest improvements to programmes and activities to be implemented as part of the National Integrity Plan which are connected and have an impact on the prosperity of the community and the country.
- To study laws and regulations relating to enhancing values, ethics, and integrity and to discuss the views as well as proposals in the interests of the public.
- To suggest changes in policy, legislation, and regulations and submit them to Parliament for study, consideration, and approval, and finally for implementation by the parties involved.
- To study and implement strategies which have been drawn up in the National Integrity Plan for all institutions.[2]

Such a powerful Parliamentary Select Committee should prove a major asset in the realization of the aims of the National Integrity Plan and the strengthening of the National Integrity System.

Monitoring the propriety of elected representatives

There will always be people trying to enter politics for the wrong reasons, in pursuit of personal power and self-interest and devoid of any real commitment to serving the public. For obvious reasons, to be eligible for election as a Member of Parliament, a person must be a citizen who is resident in the country. He or she must not be insane, nor should he or she be a bankrupt or a convicted criminal who has been sentenced to more than a year's imprisonment.

Money politics can threaten the very integrity of the Parliamentary institution itself. Opinion polls have shown that throughout the world's democracies, there is grave public concern about political party financing. As demonstrated in Washington, these often lead to a shameless exploitation of the public purse by special interest groups through their hired congressional collaborators, with disastrous consequences for the public interest.[3]

The fusion of money and politics constitutes a fundamental challenge to any reformer. Special attention is needed if it is to be denied the space it needs to achieve illegitimate ends. At present, however, Malaysia has no restrictions on how a political party obtains its funds. There are limits on campaign expenditure, but donations and other sources of funds do not have to be declared.

Among those sounding a note of caution has been former Deputy Prime Minister, Tan Sri Musa Hitam. If these warnings are to be heeded, what will be needed is a framework for transparency in political party donations, with limits on size as well as restrictions on spending. For these limits to be effective, they will need to be policed independently and, in the words of the former Deputy Prime Minister, 'The bigger the politicians are and the larger the amounts, the more serious the penalties should be.'[4]

[2] 'Bill on integrity panel tabled', *Sun*, 6 October 2005.
[3] A link can be made between the deep and extensive levels of poverty in the world's richest nation and its system of federal governance.
[4] 'Punish Those Guilty of Money Politics', *New Straits Times*, 29 April 2005.

Questioning and probing government actions

For the Parliamentary system to operate democratically, it is essential that Opposition members be afforded the ability to question and to probe government actions. Where a Legislature is dominated by a ruling party, it can be difficult for Opposition MPs to generate a lively debate about any issue that is unfavourable to the government, including corruption.

In some countries, a number of practices seem to further weaken the position of the Opposition. In many democracies, the Chair of the Public Accounts Committee is, by convention, selected from among the Opposition MPs. Moreover, the time allowed for MPs to debate in Parliament is limited, and many MPs, not just those of the Opposition, feel they are not given adequate opportunity to make their contributions. Draft bills and reports, too, tend to be tabled in Parliament at very short notice, so that MPs have very little time to study the documents in order to have a meaningful debate.

Lobbying

The act of lobbying is an integral part of a diversified and fully-fledged liberal pluralist democracy.[5] It is a form of advocacy which attempts to change laws that affect the lives of individuals and communities. By banding together in organizations with particular social, economic, and political agendas, citizens form organized interest groups that can impact directly upon the governmental policy-making process through influence or education.

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

That, then, is the positive aspect to lobbying. The dark underside is that, as scandal after scandal in the United States has demonstrated, in an age of professional lobbyists, such practices can give rise to unhealthy and corrupt relationships between the lobbyists and those being lobbied, a situation fuelled by money and privileges supplied by the lobbyists. One of the more worrying features of the Enron scandal was the discovery that the corporation had developed software specifically to track the 'performance' of the United States Congressmen it was paying, to make sure that Enron was getting value for its money.

The influence of lobby groups within a country depends largely on its socio-political culture, in terms of both its governance and the strength of its civil society. A famous study of lobbying practices in the United States in the 1960s concluded that lobbying did not constitute a significant influence on public policy in Congress. However, there can be little doubt that since then the world has changed markedly and lobbying practices everywhere have become far more sophisticated. Indeed, the United States, despite a raft of rules and regulations designed to act as a check, is now often seen as demonstrating some of the worst excesses that can be induced by lobbying power.

As a consequence, many now consider that the power of lobbying has gone too far and that their governments are held virtually hostage by entrenched and powerful lobbying organizations to the detriment of fair policy-making and the greater public good. It is feared that the relative power of the lobby from particular

[5] Resources: (Canadian) Lobbyists' Registration Act, R.S., 1985, c. 44 (4th suppl.), An Act Respecting the Registration of Lobbyists, http://laws.justice.gc.ca/en/L-12.4/text.html; (Canadian) Lobbyists' Code of Conduct, http://strategis.gc.ca/SSG/lr01044e.html; Annual Reports Under the (Canadian) Lobbyists Registration Act, http://strategis.gc.ca/SSG/lr01066e.html; {US} Federal Lobbying Regulations http://www.research.uh.edu/downloads/PDF_format/lobby99.pdf ; (US) State Restrictions http://www.ncsl.org/programs/ethics/e_revolving.html.

industries over the general political agenda-setting process has rendered politicians captive to the interests that fund and flatter them.

International opinion polls suggest that many electorates, disillusioned by a perceived lack of channels for the average citizen to effect change in policy-making in a meaningful way, may be losing heart, and voter participation is dwindling as a consequence. Voters may feel that the most important policy decisions are made through bargains between politicians and organized interests groups led by professional lobbyists, not as a consequence of views expressed by citizens.

The lobbyists seem to be too close to the legislators and the legislators too vulnerable to free hospitality and other forms of gifts. In the bargaining process, there is a significant risk that severe conflicts of interest will arise, perhaps driven by a cultivated sense of obligation, and mutual favours will be exchanged at the cost of public interest. The United Kingdom is one of the countries where scandals have led to the establishment of systems designed to track the hospitality and gifts received by MPs.

Citizens in democratic societies are becoming concerned and demand to know who is doing what and for whom. It is to try to reduce these levels of cynicism and to build levels of confidence that controls on lobbyists have been introduced in a number of countries.[6] In these countries, specific rules establishing a lobby registration system have been introduced to formalize an otherwise highly informal process. This gives ordinary citizens, journalists, and other lobbyists the opportunity to see who is lobbying and for what purpose.

In terms of best practice, the lobby register should be published on the Internet so that quick and efficient scrutiny of the data is available to the public. Thus, on http://www.opensecrets.org/lobbyists/ (although not a full lobby register), American citizens can monitor much of what is taking place, thanks to an initiative by the civil society in the form of the Center for Responsive Politics, an NGO.

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

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

Lobbying in Canada

The United States and its neighbour Canada have the most advanced forms of legislative procedures for the registration of lobbyists. In Canada, a revised version of the Lobbyists Registration Act[7] was enacted in 1995 for the purpose of responding to a number of conflicts of interest scandals that had tarnished the reputation of successive governments. The intent was not to slow down and over-regulate the lobbying process, but rather to make the system more transparent.

[6] Civil society in the United States strikes back with a web-based open lobbying site. The site aims to lend a voice to the citizens of the United State by allowing them to express their opinion and gather the support of other like-minded citizens to spread the word about vital issues confronting the nation. www.weblobbying.com.

[7] http://strategis.gc.ca/lobbyist.

The Canadian Lobbyists Registration Act is based on four key principles:

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

The Act identifies three types of lobbyist:

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

This implies a relatively narrow classification of lobby registration, since it stipulates that only lobbyists who are paid for lobbying must register. It has the advantage of exempting virtually all lobbying undertaken voluntarily by citizens in pursuit of the public interest.

The Canadian Act requires all lobbyists to disclose their political activities; thus, by examining the registry, anyone can ascertain who is lobbying what department and what they are discussing. Importantly, they must also disclose their past work with the government. The lobbyists' registration and updating process can be accessed easily by Canadians through the Internet.[8]

One of the first tasks of the Canadian Federal Ethics Counsellor was to develop a Lobbyists' Code of Conduct and to respond to any questions of ethics and business practice that arise in government relations. The Ethics Counsellor, appointed by the Prime Minister, offers guidance to both lobbyists and their clients to help determine whether their proposed activities are acceptable. Draft legislation is under consideration that would have the Counsellor reporting in future to the Legislature, rather than to the Prime Minister.

The Lobbyists' Code of Conduct supports the Act, setting standards of conduct that lobbyists are to meet in their dealings with federal public office-holders. Its preamble states that lobbying is a legitimate activity provided that it is open and does not impede free and open access to government. It also allows individuals to register complaints with the Ethics Counsellor, and provides for the availability of reports on those complaints from the Counsellor's Office. The position of Ethics Counsellor is thus designed to take control of enforcement issues. If it is thought that lobbyists are giving undue gifts or fundraising on behalf of the officials they are lobbying, it is to the Counsellor that a complainant should turn.

The two main federal lobbying regulations in the United States are the Byrd Amendment (31 US Code, s. 1352)[9] and the Lobbying Disclosure Act (2 US Code, s. 1605). The Byrd Amendment prohibits the use of federal funds, either through grants, contracts, or cooperative agreements, in lobbying activities. It seeks to prevent the use of federal funds for lobbying purposes and simultaneously monitors the lobbying expenditures of recipients of Federal funds. NGOs and charities, which tend to enjoy tax exemptions, are generally permitted to lobby as long as their lobbying does not form a core part of the organization's expenditures. The Lobbying Disclosure Act specifies procedures surrounding the registration and the biannual reporting of national lobbying activities.

[8] http://strategis.ic.gc.ca/cgibin/sc_mrksv/lobbyist/bin/lrs.e/view_search.phtml.
[9] http://www.research.uh.edu/downloads/PDF_format/lobby99.pdf.

A third Act, the Anti-Lobbying Act (18 US Code s. 1913),[10] a criminal statute, prohibits the use of appropriated funds directly or indirectly. It states that:

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

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

In the United States, lobbyist regulations vary at the state level. Thus, for example, over twenty states stipulate a period of time that must elapse before a former legislator can represent clients in front of the Legislature. Known as 'revolving door' laws or 'cooling off periods', these provisions are designed to break the connection between the legislator's professional duties and the interests of lobbyists. They seek to create a system in which former public officials are unable to take advantage of their inside knowledge by turning to lobbyism.[11]

Relationship between Parliament and civil servants

For the Parliamentary system to function properly, it is important that the Civil Service be neutral. Civil servants at management level are prohibited from actively participating in politics. They are not allowed to contest elections, hold office in political parties, or openly campaign for candidates in elections. They are, however, permitted to be ordinary members of a political party. Any review should ensure that these restrictions are being enforced and are operating fairly. However, the most important safeguard is provided when there is an independent Election Commission.

Over the years, money politics have plagued the Malaysian body politic, and it continues to do so—a situation that has led to the downfall of several prominent politicians. Clarity in political funding and putting an end to the need for individual candidates to personally solicit their own financial sponsorship, both of which are features of the National Integrity Plan, would improve matters.

[10] http://liimirror.warwick.ac.uk/uscode/18/1913.html.
[11] http://www.ncsl.org/programs/ethics/e_revolving.htm.

Integrity checklist for assessing the performance of Parliament

- If performance indicators are developed for Members of Parliament, as foreshadowed in the National Integrity Plan, what should these be?
- Are there clear and well-understood conflict of interest laws which are an effective barrier against elected members of the Legislature using their positions for personal benefit?
- Do legislators who oppose the government have a reasonable opportunity to express their views in the Legislature? Are debates open to the public?
- Do select committees meet in public? Are their reports made public? Do select committees make a practice of hearing submissions from members of the public and civil society organizations?
- Would the Public Accounts Committee operate more effectively if Commonwealth parliamentary practice were followed and its Chair were a member of a party in opposition to the government?
- Are the recommendations of the Public Accounts Committee generally accepted and acted upon by the Executive? Does the Public Accounts Committee have power to call officials (including Ministers) for questioning?
- Is the Legislature generally ready to lift any immunity enjoyed by one of its members, regardless of the party to which the member belongs, where there are serious grounds for believing that he or she may be guilty of a serious criminal offence?

Chapter 4

The Role of the Judiciary

The Superior Courts play pivotal roles in Malaysia's National Integrity System. Not only do they fulfil a function by holding errant public officials to account, but they are also charged with upholding the Rule of Law, so that the Executive governs 'under' the law (not 'with' the law) and the Legislature does not overstep its constitutional limits when enacting new laws. In these ways, the Judiciary is charged with protecting the individual citizen as well as the body politic.

As the National Integrity Plan observes, 'It is important to have in place an effective legal framework that is not only effective, but also responsive to contemporary challenges. In addition, an independent Judiciary that ensures justice is dispensed speedily and fairly, without fear or favour, is also highly critical in instilling confidence among the people. These two elements will contribute towards realizing the National Integrity Plan's objectives.'[1] The Plan thus acknowledges that an independent, impartial, and informed Judiciary holds a central place in the realization of a just, honest, open, and accountable government.

A Judiciary must be independent of the Executive if it is to perform its constitutional role of reviewing actions taken by the government and public officials to determine whether or not they comply with the standards laid down in the Constitution and with the laws enacted by the Legislature. In emerging democracies, they have the additional task of guaranteeing that new laws passed by inexperienced Executive or Legislative branches do not violate the Constitution or other legal requirements. This inevitably gives rise to tensions between the Judiciary and the politicians in power, and it does so in democracies old and new throughout the world.

In simple terms, the Rule of Law requires that government operate within the confines of the law and that aggrieved citizens, whose interests have been adversely affected, be entitled to approach an independent court to adjudicate whether or not a particular action taken by, or on behalf of, the state is in accordance with the law.

In these instances, the courts examine a particular decision made by an official, or an official body, to determine whether it falls within the authority conferred by law on the decision-maker. In other words, the courts rule as to whether or not the decision is legally valid. In so doing, the judges do not substitute their own discretion and judgment for that of the government. They simply rule whether the government or its officials have acted within the ambit of their lawful authority. Thus, the judges do not 'govern' the country and do not 'displace' the government when government decisions are challenged in the courts.

With the increasing dominance of the private sector in many countries and the emphasis of government activity shifting from direct participation (through government-owned corporations) to regulation (as often as not, of privatized activities), the role of the courts is becoming even more important. As decisions of government regulators impact directly on the private sector interests that they are regulating, the private sector will look to the courts with greater frequency to shield it from excessive or abusive use of regulatory powers. At times, the courts will be expected to go further and actually review the legality of decisions being made in the private sector itself, applying the principles of administrative law (previously applicable only to official institutions), where these decisions impact significantly on the public interest.

[1] National Integrity Plan, p. 54.

In general terms, administrative law is the law governing the administration of government business, and it is a potential battleground in a contest for power between the Executive (who are tempted to challenge judges by asking 'Who is running this country?') and the judges (who challenge the Executive by demanding that the Executive comply with the law).

Administrative law governs both central and local government and public bodies in their exercise of statutory or other public powers, or in their performance of public duties. In both civil and common law countries in Europe, these types of functions are sometimes called 'public law functions' to distinguish them from 'private law functions', which govern the relationships between individual citizens and some forms of relationships with the state. For example, if a citizen who works in a state-owned factory is injured and decides to sue, his or her lawsuit would be treated as a 'private law function'. If residents of the surrounding community were concerned about a decision to enlarge the state-owned factory because of environmental pollution, the courts' review of the legality of the decision would be considered a 'public law function'.

In terms of administrative review, the basic question asked is not whether a particular decision is 'right', or whether the judge, had he been the Minister or the official, would have come to a different decision. The question is, What is the power or discretion the law has conferred on the official in question?

There is inevitably a tension between politicians who are generally interested in exercising power and extending their influence, and the Constitution, which must seek to contain that power in order to protect the citizen from arbitrariness. In the middle of this tug-of-war are the courts. The courts are asked to decide whether a disputed decision is in accordance with the Rule of Law. Of course, some elected politicians resent this, at times very deeply. They see themselves as being elected by the people, and as having their authenticity (and power) derived from an exercise of political will. When confronted with a critical Judiciary, they are inclined to ask, Who appointed you? The answer may well be the elected politicians.

However, the role of the courts is not to impose the political views of the majority on minorities, but to protect minorities against the exercise of what some call 'majority tyranny'. The majority may, in a political system, have the right to make a decision, but that decision must be in conformity with the law and the Constitution. The law expects public officials to exercise their administrative functions justly and fairly. And it falls to the Judiciary to enforce that law.

Safeguards for the Judiciary

Among the prerequisites for a functioning integrity system is that the judges and the judicial role be accorded respect by both the Executive and Parliament, and that their independence be defended by the people they protect. Much criticism can hurt, especially those judges who do their very best in difficult, and at times, challenging situations. Criticism should be restrained, fair, and temperate. In particular, politicians should avoid making statements on cases which are before the courts and should not take advantage of their immunity as legislators in order to attack individual judges or comment on their handling of individual cases in ways that would constitute contempt of court if undertaken by an ordinary citizen.

Judicial independence

If judges are not impartial, professional in their work, and independent, the criminal law cannot be relied upon as a major weapon in the struggle to contain corruption. If they are actually corrupt, the situation is even worse. Judicial independence is asserted internationally in the

Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights.

The *United Nations Basic Principles on the Independence of the Judiciary*[2] were agreed at the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders in 1985. The chapter on the 'Independence of the Judiciary' reads as follows:

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.
5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal pro-cedures. Tribunals that do not use the duly esta-blished procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.
6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.
7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

Most recently, in a landmark development, Chief Justices from around the world have drafted and adopted the *Bangalore Principles on Judicial Integrity*,[3] designed to provide guidance to judges and to afford the Judiciary a framework for regulating judicial conduct. Endorsed by the United Nations in 2003, they are also intended to assist members of the Executive and the Legislature, and lawyers and the public in general, to better understand and support the Judiciary.

The principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct that bind the judge.

In the European context, there are a number of major instruments, among them *The Judges' Charter in Europe*,[4] which observes that political changes in some parts of Europe have demonstrated once more that a genuine separation of powers is indispensable for the proper functioning of any state that respects the Rule of Law. The principle of the separation of powers, it asserts, must form a vital part of the policy of European integration—all the more so because the member states look upon themselves as democracies.

A Recommendation on the 'Independence, Efficiency and Role of Judges'[5] made by the Council of Europe emphasizes the fact that the need to promote the independence of judges is not confined to individual judges only but may have consequences for the judicial system as a whole. States should therefore bear in mind that

[2] Agreed at the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Italy, 26 August – 6 September 1985, http://www1.umn.edu/humanrts/instree/i5bpij.htm.

[3] www.unodc.org/pdf/crime/co rruption/judicial_group/ Bangalore_principles.pdf. The document was adopted by the General Assembly of the UN Human Rights Commission on the recommendation of the Special Rapporteur on the Independence of the Judiciary in May 2003.

[4] Judges' Charter in Europe, draft first presented at the meeting of the European Association of Judges on 20 March 1993 at Wiesbaden, by Mr G FCnter Woratsch. See also European Association of Judges Recommendation No. R (94)12 of the Committee of Ministers to Member States on the 'Independence, Efficiency, and Role of Judges', 13 October 1994, 518th Meeting of the Ministers Deputies, Council of Europe, http://www.richtervereinigung.at/international/eurojus1/eurojus15a.htm.

although a specific measure does not concern any individual judge directly, it might have consequences for the independence of judges.

Finally, there is the European *Charter on the Statute for Judges*, adopted by participants at a multilateral meeting in 1998.[6] The Statute aims at ensuring the competence, independence, and impartiality which every individual legitimately expects from the courts of law and from every judge to whom is entrusted the protection of his or her rights. It excludes every provision and every procedure liable to impair confidence in such competence, such independence, and such impartiality. The present Charter contains provisions best able to guarantee the achievement of those objectives and for raising the level of guarantees in the various European States.

The value of this Charter does not flow from a formal status, which it does not have, but from the strength that its authors give to its contents. The Charter is directed at judges, lawyers, politicians, and more generally at all individuals with an interest in the Rule of Law and democracy.

Codes of conduct

Judicial integrity is best built and sustained by the Judiciary itself as the 'third arm' of the state (together with the Executive and the Legislature). This can be achieved through clear, well-publicized, and enforced codes of conduct and through judges role modelling high personal standards. Leadership has to be asserted from the top, and instances of judicial malpractice disciplined. Courts should be inspected and judgments examined for their consistency. Court staff should be properly supervised, and effective complaints mechanisms established for the public. Adequate personal security, facilities, salaries, and status are also important.

Removal of judges

Experience in several countries has shown that constitutional provisions designed to protect judges from arbitrary removal can be gerrymandered quite shamelessly when a powerful Executive is determined to have its way.

The members of the Judiciary command no armies, direct no police force, and control no purse. Their sole weapons in defence are the orders they make, reinforced by their standing in the community. But court orders can be ignored and remain unenforced and unrespected, and public attacks on the Judiciary by politicians and politically motivated prosecutions can undermine public confidence in the institution. Malaysia has experienced all of these, and as a result the integrity of its Judiciary, widely regarded as being among the finest in the Commonwealth, has been called into question. It takes a considerable time for a Judiciary to recover its standing and to win back appropriate levels of respect. The provision in the National Integrity Plan for MPs to be bound not to challenge public institutions is an important one for the Judiciary.[7]

Judicial accountability

Judges are required to be 'independent', but this does not free them from being accountable. Their independence is designed to protect the judicial institutions from the Executive and from Parliament, and from being manipulated by politicians. The Judiciary lies at the very heart of the separation of powers. Other arms of governance are directly accountable to the people, but the Judiciary—and the Judiciary alone—is accountable to a higher value and to standards of judicial rectitude.

The concepts of independence and accountability of a Judiciary, within a democracy,

[5] Recommendation No. R (94)12 was adopted by the Committee of Ministers of the Council of Europe on 13 October 1994 and explanatory memorandum Council of Europe Press, 1994, http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Legal_professionals/Judges/Instruments_and_documents/Rec_94_12E%20+%20explanatory%20memorandum.pdf.

[6] Meeting on the statute for judges in Europe, organized by the Council of Europe, 8–10 July 1998, http://www.coe.int/T/E/Legal_Affairs/Legal_cooperation/Legal_professionals/Judges/Instruments_and_documents/charte%20eng.pdf.

[7] National Integrity Plan, p. 135.

actually reinforce each other. Judicial independence relates to the institution; independence is not designed to benefit an individual judge or the Judiciary as a body. It is designed to protect the people.

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

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

- Judges sit in courts open to the public.
- Their decisions are subject to appeal.
- Their decisions (like those of other official bodies) are subject to judicial review.
- Judges are obliged to give reasons for decisions and publish them.
- They are subject to law of bias and perceived bias.
- They are subject to questions in the Parliament.
- They are subject to media criticism.
- They are subject to removal by a constitutional process.
- They are accountable to their peers.

The accountability of judges was also touched upon by Chief Justice Tun Ahmad Fairuz Sheikh Abdul Halim in the Federal Court in March 2006 when he said that 'a judge could be held accountable if it could be established that he has acted in bad faith (i.e. *mala fide*) in the course of his or her duties'.[8]

The fact that individual judges can be held to account increases the integrity of the judicial process and helps to protect the judicial power from those who would encroach on it.

Vulnerabilities of the Judiciary

There are, of course, ways in which an Executive can try to influence the Judiciary and alert citizens should always be on the lookout for them. As experience elsewhere has shown, these are many and varied. Some are subtle, such as awarding honours or changing the ranking of judges in the hierarchy on state occasions. Some may be impossible to guard against, and others are simply blatant, such as providing houses, cars, and privileges to the children of judges.

Perhaps the most blatant abuse by the Executive is the practice of appointing as many of its supporters or sympathizers as possible to the court. The appointment process is therefore a critical one, even though some governments have found that their own supporters develop a remarkable independence of mind once appointed to high office, even in the United States where the appointment processes to the Supreme Court are so heavily politicized.

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

When a particular judge falls from Executive favour, a variety of ploys may be used to try to bring the judge to heel. He or she may be posted to unattractive locations in distant parts of the country; benefits, such as cars and household staff, may be withdrawn; court facilities may be run-down to demean the standing of the judges in the eyes of the public and to make their already arduous jobs even more difficult; or there may be a public

[8] 'Judges Not Above the Law, Chief Justice Tells Daim's Lawyer', *Star*, 8 March 2006; see also http://www.malaysia-today.net/Blog-e/2006_3_8_MT_BI_archive.htm.

campaign designed to undermine the public standing of the Judiciary.

In such instances, judges are not in a position to fight back without hopelessly compromising themselves and their judicial office. When it comes to public attacks (and they take place in both well-established and newer democracies), judges must not be, nor consider themselves to be, above public criticism. They cannot claim, at one and the same time, to be guarantors of the right to freedom of speech and yet turn on their critics. Nor should they attempt to muzzle public debate about problems within the Judiciary itself, as has been the case in some countries when the issue of corruption in the judicial process has arisen.

The Malaysian experience

There is little doubt that the Judiciary in Malaysia has, in relatively recent times, been through a challenging period of its history. However, there are grounds for optimism, notwithstanding the suggestion made by the respected former Lord President Tun Mohamed Suffian Hashim that it would need some two generations for the Judiciary to recover from its protracted crisis of confidence. The current and past state of the Judiciary was summed up by the outgoing Chief Justice, Tun Mohamed Dzaiddin Abdullah, when he said in March 2003, 'Yes, the Judiciary is transparent. It has been since I took over.' It was reported that on his appointment to the office of Chief Justice in 2000, he had an agenda to clean up and restore respectability to the Judiciary. He was further quoted as saying, 'It's not easy for one person to overhaul the Judiciary in two years,' and adding, 'But I fervently hope my successor will carry on.'

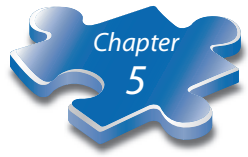
The incoming Chief Justice, Tan Sri Ahmad Fairuz, was quoted as saying that he will not hesitate to remove any judge from office if he were found to be corrupt. Raja Aziz Addruse, a former Chairman of the Bar Council of Malaysia, has acknowledged that 'confidence in the Judiciary is beginning to be restored'. According to Raja Aziz Addruse, judges were now free to perform their functions as judges and that the practice of allocating selected sensitive cases to particular judges for them to hear had been discontinued.

The objectives of the Judicial Code of Ethics, promulgated in 1994, are now starting to be realized. Under the Judges' Code of Ethics 1994, the breach of any of its provisions may constitute grounds for his or her removal from office. The Code forbids judges, *inter alia,* to allow their private interests to conflict with their judicial duties or to impair their usefulness as judges; to use their judicial position for personal advantage; to act such as to bring the Judiciary into disrepute; and to participate in political activity. This process will be enhanced if effective channels for public complaints against the Judiciary are established in the context of the National Integrity Plan.[9]

[9] Complaints systems are envisaged on p. 148.

Integrity checklist for assessing the effectiveness of the Judiciary

- Are appointments to the senior Judiciary made independently of the other arms of government? Are judges seen as being influenced by political considerations?
- Are judges free to enter judgments against the Executive without risking retaliation, such as the loss of their posts, the loss of cars and benefits, and transfers to obscure and unattractive parts of the country?
- Are adverse judgments respected by the Executive?
- Do citizens have confidence in the independence of the Judiciary when they are hearing such cases?
- Are the public able to complain effectively about judicial misconduct (other than appeal through the formal court system)? Are members of the public aware of their rights? Is there a general awareness of the existence and content of the Judicial Code of Ethics?
- Do courts have the jurisdiction to hear cases in which citizens claim that official decisions have been made unlawfully?
- Are members of the legal profession making sufficient use of the courts to protect their clients and to promote just and honest government under the law? If not, is access to the courts as simple as it can be? Are the legal requirements unnecessarily complicated?
- Do judges have the jurisdiction to review the lawfulness of Executive decisions? If so, are these powers used? Are decisions respected and complied with by the Executive? Is there a perception that the Executive gets special treatment, be it hostile or preferential?
- Have the judges adequate access to legal developments in comparable legal systems elsewhere?
- Are cases brought on for trial without unreasonable delay? If not, are these delays increasing or decreasing? Are judgments given reasonably quickly after court hearings? Are there delays in implementing/executing orders of the court (e.g. issue of summons, service, grant of bail, and listing for hearing)? Are there delays in delivering judgments?
- Are court filing systems reliable?
- Is there a conscious effort on the part of public officials in the administration to comply with good administrative practice and make decisions fairly and justly (i.e. seeking the opinions of affected citizens before decisions are taken; affording them an opportunity to be heard; giving due weight to opinions expressed; giving reasons for decisions; staying within the bounds of the powers conferred by law, etc.)?
- Are relevant court rules and procedures readily available to members of the public?



The Role of the Auditor-General

A prime accountability mechanism is the office of the Auditor-General. Public officials must be held accountable to the public and to the Legislature for their performance and stewardship of public funds and assets. The currency of financial accountability is infor-mation, but Ministers and officials (representing the Executive) are unlikely always to agree with members of the Legislature as to the quantity and quality of information that should be provided.

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

As the officer responsible for auditing government income and expenditure, the effective Auditor-General acts as a watchdog over his country's financial integrity and the credibility of reported information. The Auditor-General reports to Parliament on the results of the audit of government accounts. The Public Accounts Committee (PAC) in Parliament then examines the Auditor-General's Report to identify areas that warrant further action or explanation. The Chairman of the PAC may request relevant agencies or ministries to respond to non-conformities raised in the Auditor-General's Report. The PAC decides whether further investigation is warranted.

Notwithstanding, as recently as 9 October 2005, the former Inspector-General of Police (IGP), Tun Haniff Omar, commented on the shortcomings of government audits:

> Malaysians have been despondently tantalised by the Auditor-General's hard-hitting reports on the mismanagement and financial state-of-affairs in the public sector... In some cases the Auditor-General has recommended a fuller investigation. Question is, by whom and ... accountable to whom?
>
> These are important questions that, I think, the public would like answers to because there is already cynicism that anything good will come of the AG's brave effort. Very soon it will be forgotten and the culprits will be back to their merry ways. Hasn't this been the past experience? Was anyone identified and penalised for blatant shortcomings last year, or the year before ...?
>
> We ... seem to lack the instruments for following through, so [that] the wrongdoers are penalised and mistakes become lessons to be learnt and not repeated.[1]

These comments drive home the point that the integrity institutions do not stand alone, but must work together in a coherent integrity 'system'.

The classic description of the role of the Office of Auditor-General comes from a UK House of Commons report:

> The [Auditor-General] audits the Appropriation Accounts on behalf of the House of Commons. He is the external auditor of Government, acting on behalf of the taxpayer, through Parliament, and it is on his investigations that Parliament has to rely for assurances about the accuracy and regularity of Government accounts.[2]

[1] 'Just Keep the Light Shining on Corruption', Tun Hanif Omar writing in the *Star*, 9 October 2005.
[2] UK House of Commons, *First Special Report from the Committee of Public Accounts, Session 1980–81, The Role of the Comptroller and Auditor-General*, Vol. 1, HMSO Report, 4 February 1981.

Responsibilities of the Auditor-General

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

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

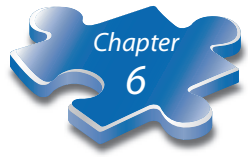
The effectiveness of the Office of the Auditor-General has been called into question, not least by the Executive itself. In a speech at the Civil Service Commission Quality Day Celebration, 2003, a senior Minister in the Prime Minister's Department commented that the Civil Service often pays little heed to what is recommended in the Auditor-General's Annual Report. He complained that many irregularities remain unchecked despite being highlighted by the Auditor-General.

It is widely acknowledged that the recommendations contained in the Auditor-General's Report often remain as they are, to be repeated in the years ahead. Since the recommendations are not taken up by Parliament and/or by the Civil Service, the question arises as to whether the Auditor-General ought not to have an enforcement role in addition to its reporting one.

The most important relationship here is the one between the Auditor-General and the Public Accounts Committee. Recently, there have been indications that the Public Accounts Committee is starting to pay much greater attention to the Report of the Auditor-General than previously. This is a development that promises to strengthen integrity in the disbursement of public money.

Integrity checklist for assessing the Auditor-General's Office

- Is the post of Auditor-General a genuinely non-political appointment made on merit?
- Is the post adequately remunerated?
- Is the Auditor-General's Office adequately staffed?
- Are the Auditor-General's Reports to the Legislature up-to-date?
- Are the Auditor-General's Reports made public promptly? If not, why not?
- Are the Auditor-General's Reports followed up regularly by a Public Accounts Committee of the Legislature or another equivalent body? If not, why not?
- Is action taken on the Auditor-General's Reports? If not, why not?
- Are there rules requiring annual auditing of financial accounts of state and parastatal institutions (e.g. government-linked companies) by independent auditors, and requiring public disclosure of the results? Is the Auditor-General responsible for the conduct of these audits?
- Is there an assets tracking system to enable periodic evaluation of assets so as to ensure that assets purchased by the state remain in the state's control until they are properly disposed of?
- Does the Auditor-General's Office meet appropriate accounting and auditing standards?
- Does the Auditor-General's Office actually receive what is budgeted for it by the Ministry of Finance or by the Legislature?



The Role of the Private Sector

The private sector plays a major part in the life of Malaysia. It provides goods and services, it provides employment, and it creates the wealth that uplifts the material life of its citizens. Companies exist to make profits, and if they fail, their employees and those of associated enterprises, suffer along with their shareholders.

The private sector also has a particular role in the maintenance of the country's national integrity, not only within Malaysia itself but also in the foreign markets where Malaysian companies choose to operate. As a key player in the country's socio-economic life, the private sector looms large in the National Integrity Plan (NIP).

Countries such as Malaysia that have adopted the 'market economy' model look to the private sector to deliver goods and services to the public at competitive prices. Competition is designed to offer prospects for new players in the commercial field, expanding opportunities for participation and resulting in the lowest economic prices being charged to members of the public. Under the system, all are intended to benefit.

Fortunately, the traditional view that corporations exist solely to make profits for their shareholders—all that matters is a profitable bottom line—is giving way to a new sense of corporate responsibility, not only to customers and clients, but also to the communities and societies in which they operate. The private sector has increasingly come to recognize that 'people seem happier working for organizations they regard as ethical [and that] in a booming jobs market, that can become a powerful incentive to do the right thing'.[1]

Corporate social responsibility

Corporate social responsibility (CSR) is being fostered by the Government of Malaysia in imaginative ways. Whereas most countries have left the issue entirely to the private sector (where efforts in this regard have tended to be forms of window dressing), in Malaysia the private sector is offered significant taxation and other benefits to encourage them to establish and maintain meaningful corporate social responsibility programmes. In this way, the government is fostering the achievement of a number of elements in the NIP.[2]

Corporate governance

Closely allied to CSR is good corporate governance. The Malaysian Code on Corporate Governance of 2000 provides a set of principles and best practices for companies on corporate governance. Experience in other countries has shown how extremely vulnerable even a very large corporation can be when it lacks the essential checks and balances in its governance structure that can serve as a check on unethical conduct. This includes such features as independent directors, external audit being conducted by firms that have no other link to the corporation, effective internal complaint channels, effective internal audit, and full and complete disclosures to stakeholders, the Securities Commission, and the Bursa Malaysia stock exchange. Corporations should require their directors to be familiar with Bursa Malaysia's Listing Requirements, and if necessary, to attend education and training programmes. Internal audits should comply with the guidelines developed by the Institute

[1] *The Economist*, 19 April 2000.
[2] National Integrity Plan, p.117.

of Internal Auditors Malaysia in August 2002. Accounting and auditing standards should comply with the requirements of the Malaysian Institute of Accountants (MIA) and the Malaysian Accounting Standards Board (MASB).

Given the expanding role of the private sector in providing essential goods and services, many of which for generations have been the preserve of government agencies, improved corporate responsibility is a powerful tool in fighting corruption. With the passing of control to the private sector, accountability through Parliament is effectively diminished, if not completely lost. Accountability through financial reporting has also been under challenge, with recent scandals in the United States and Europe highlighting miscreant company directors and their auditors. At times, it has appeared as though the 'robbers' were appointing the 'police', with audit firms profiting from the provision of non-audit services, being anxious not to jeopardize their relationships with their clients by conducting rigorous audits.

Accurate financial reporting

It is essential for the health of the private sector that financial reporting be accurate, and in this, Malaysia has been quick to learn from the misfortunes of others. The National Integrity Plan provides for a review of current practices of appointments of independent auditors by the companies themselves and suggests that such appointments should be done by the Companies Commission of Malaysia or by an independent body consisting of representatives from various parties.[3] This would moderate the conflict of interest that arises whenever directors have a free hand in appointing those whose task it is to keep watch over them. That system may work for the honest but clearly not for those who lack integrity.

Likewise, it is crucial that corporations discharged their obligations to file returns with the Companies Commission of Malaysia diligently. Where they fail to do so, other players in the private sector are effectively denied the information they need in order to make informed judgements on doing business with those concerned. In some countries, directors of companies who failed in this regard are disqualified from holding directorships for an appropriate period. The need for compliance was graphically illustrated in the financial crisis following the collapse of the 'Tiger economies' in 1997, when banks had effectively been lending 'blind' to companies which had failed to keep their records up-to-date.

Social accounting

'Social Accounting' is also being increasingly recognized as a necessity, not just a desirable activity. Standards of corporate governance[4] are being developed by such organizations as the Organisation for Economic Cooperation and Development (OECD) and the World Bank to provide greater protection, not only for corporations and their shareholders, but also for all those who have a stake in the success of the private sector, which includes just about everyone. For this reason the National Integrity Plan has a focus on corporate ethics, enhancing the accountability of top management, and ethics training for staff at all levels.[5]

Legitimizing 'whistleblowers' is also being recognized as important in safeguarding the public interest. Employees who raise matters of public concern that arise in the course of their employment, but which their employers may be trying to hide, must be given protection. Examples include the health risks of company products and the presence of unsafe signals on railway lines, not to mention the abuse and misuse of entrusted funds. This is included in the National Integrity Plan[6] and is discussed in Chapter 18. But if a culture of whistleblowing is to be inculcated (and experience elsewhere suggests that this is extremely difficult to

[3] National Integrity Plan, p. 118.
[4] National Integrity Plan, p. 118.
[5] National Integrity Plan, p. 117.
[6] National Integrity Plan, p. 102.

achieve), it is not enough to encourage staff to voice their concerns to their own management. If management is not listening, or is complicit in the activities being complained about, staff must be encouraged to take their complaints to other appropriate channels.

Regulatory bodies

In parallel, regulatory structures are being developed in many countries, simply to impose standards and ensure that ordinary people are not being exploited by monopolies and near monopolies. The National Integrity Plan recognizes the importance of regulatory bodies in the context of integrity; it acknowledges that they have major roles to play in ensuring that the private sector's ethical environment accords with society's aspirations and contributes to economic growth.[7]

Critics of the market economy should reflect on the fact that in the United States, the Bell Telephone Corporation was broken up on the insistence of regulators, simply because it had been so successful as to be unduly dominant. It is a myth that under 'capitalism', the market is everything and 'capitalists' are free to do whatever they wish. For a system of competition to work, it is crucial that dominant positions are not abused (e.g. aggressively undercutting prices to drive a smaller newcomer to the wall). If the marketplace is to serve the needs of all, then it must be effective, efficient, and fair; above all, it cannot be corrupt without negatively affecting everyone.

For better or for worse, actions within the private sector impact on others within the sector. For example, when embarrassed banks give neutral references for staff dismissed for reasons of dishonesty, they are taking the easy way out. However, such an action can lead to other employers hiring staff whom they believe to be honest but who are, in fact, the reverse.[8] In some countries, former employers have been sued successfully for misleading those who have taken on such staff as employees.

Private sector corruption

The activities of the private sector take place in two quite separate arenas: transactions with the public sector on the one hand and transactions that lie wholly within the private sector on the other. Blurring this distinction somewhat is the fact that activities which in the past have traditionally been viewed as 'public sector' activities are now increasingly passing into private hands. As privatization proceeds apace in many countries, the importance of checking corruption in the private sector grows ever more urgent. Activities in both arenas need to be purposefully addressed. Nonetheless, despite their various differences, whether organizational or cultural, the public and private sectors are very much dependent upon each other. Each provides and consumes the goods and services of the other, and for either to function effectively, both must be able to function together efficiently in a complementary manner.

The corruption of public officials is explicitly or implicitly illegal in every country which has a legal system; therefore, it should not be an option for any private sector company. There is no difference in principle between a large bribe given to a Minister or top official ('grand corruption') and a small bribe given to a junior official ('petty corruption'). The directors of a

[7] National Integrity Plan, pp. 35, 45.

[8] 'Banks must stop covering up fraud….' British banks must abandon their long-held practice of hushing up fraud committed by staff and outsider, says the head of Britain's Serious Fraud Office. 'Fraud does not get reported because it is not felt to be in the interests of a bank to [say] that it has been the dupe of a clever criminal or con-man', Rosalind Wright tells the British Bankers Association. The days of giving crooked staff, at worst, a neutral reference must end. 'Fraudsters who stay unidentified and unprosecuted live to defraud another day—and another victim.' She also condemns paying 'security consultancy fees' to computer hackers who penetrate their computer systems. 'Banks Told to Stop Shielding Fraudsters', *Guardian* (UK), 14 March 2000.

company have a specific responsibility to ensure that the company obeys all relevant laws.[9]

However, corruption in the private sector is far from being as clear-cut as public sector corruption.[10] While some countries have laws explicitly criminalizing the acceptance by private sector employees of 'secret commissions' or 'kickbacks', many do not. Somewhat surprisingly, the United Nations Convention Against Corruption (UNCAC) does not address corruption conducted wholly within the private sector. Yet it is increasingly recognized that such activities are criminal. The recipients of kickbacks within the private sector, as well as those who exploit their positions by selling their employers' goods at a premium and pocketing the difference when the goods are in short supply, are effectively stealing from their employers. This self-evident truth is recognized in the criminal laws of Malaysia.

As former publicly owned utilities pass into the private sector, frequently in monopoly or near-monopoly situations, the need to ensure that any loopholes in this area are closed becomes ever more compelling.

Private sector bribery

Private sector bribery (also known as private-to-private corruption) is pervasive in all parts of the world and in numerous industry sectors. Given our global economy, it is as international in scope as public sector bribery.[11]

The American Board of Certified Fraud Examiners asserts that trust, and abuse of it, is the cornerstone of occupational fraud. It recommends striking a balance between trusting employees too much and trusting them too little. It argues for the following measures:

- the ethical tone being set by top management;
- a written code of ethics (something many small firms, who are at highest risk, do not have);
- the checking of employee references;
- the appointment of a responsible person, who is not involved in bank reconciliations, to receive the company's unopened bank statements and examine them for unusual patterns or disbursements;
- the maintenance of a 'hotline' that facilitates employees reporting malpractices; and
- the creation of a positive work environment in which employees will not feel an urge to strike back at their employers because they believe they are being treated unfairly.

The Board predicts a continuing rise in occupational fraud and abuse, arguing that the increasing use of computers has drastically changed the speed of transactions and that computers do not necessarily create the documents needed to detect fraud and abuse—although computers can, in some circumstances, be tools for detection.[12]

[9] '[T]he law is not the only motivator. Fear of embarrassment at the hands of NGOs and the media has given business ethics an even bigger push. Companies have learnt the hard way that they live in a CNN world, in which bad behaviour in one country can be seized on by local campaigners and beamed on the evening television news to customers back home… There may still be two good reasons for companies to worry about their ethical reputation. One is anticipation: bad behaviour, once it stirs up a public fuss, may provoke legislation that companies will find more irksome than self-restraint. The other, more crucial, is trust. A company that is not trusted by its employees, partners and customers will suffer. In an electronic world, where businesses are geographically far from their customers, a reputation for trust may become even more important. Ultimately, though, companies may have to accept that virtue is sometimes its own reward. One of the eternal truths of morality has been that the bad do not always do badly and the good do not always do well.' *The Economist*, 19 April 2000.

[10] A survey in Hong Kong revealed that among top management the top four problems of unethical behaviour (comprising more than 80 per cent) are conflict of interest, illegal kickbacks, misuse of company proprietary information, and inequitable treatment of suppliers and contractors; 'Survey on Business Ethics', commissioned by the ICAC of Hong Kong, March 1994.

[11] Attempts to have private-to-private corruption included in the United Nations Convention Against Corruption were effectively blocked by the United States, arguing that laws prohibiting such practices could act as an impediment to the development of a market economy.

[12] Despite all of this, 'there is still much confusion over who has the responsibility for manning a system of internal control in individual businesses, and for preventing and detecting fraud… [When surveyed], just 29% and 22% respectively responded with the correct answer: the whole board.' (Price Waterhouse Survey on Corporate Governance, January 1995.

Among the major areas where private sector bribery occurs are the following:

- **Procurement.** Bribery of purchasing agents for private sector projects is just as common as bribery for government projects. Closely allied to this, and also common, is bribery to obtain subcontracts on major projects.
- **Distributorships, Licences, and Franchises.** The German 'Opelgate' scandal, where company officials accepted bribes to award lucrative distributorships, is an example of widespread corruption in the granting of distributorships.
- **Retail Display Space.** Sales representatives of consumer goods manufacturers commonly bribe store managers to provide favourable display space for their products. Likewise, there is the bribery of radio disc jockeys by record companies to play their records.
- **Proprietary Technical and Commercial Data.** There are numerous cases of competitors paying a company's technical and marketing employees to obtain copies of proprietary information such as manufacturing drawings, customer lists, and pricing information.
- **Financial Industry.** Bribery of bank officials to obtain loans or better interest rates have been common, as disclosed in investigations following bank scandals in Japan, Indonesia, as well as the US Savings & Loans crisis. In the securities industry, there have been cases of bribes paid by brokers to obtain special allocations of shares in attractive initial public offerings (IPOs).
- **Scrap Disposal.** This is a common area for bribery, often involving organized crime. There are several variations, including bribery of quality control inspectors to reject good products, which can then be purchased as scrap and resold as quality products.
- **Sports.** Examples include leading members of the International Olympic Committee accepting 'inappropriate gifts'; a boxing organization that accepted bribes from managers of fighters to grant higher rankings, which then qualified fighters for more lucrative matches; bookmakers who have bribed cricketers to underperform; and football players rigging results.

Internal concealment of bribes can lead to false accounting, false tax declarations, and kickbacks to company staff. Furthermore, one of the main principles of competitive tendering is that contracts should be won by those companies offering the best combination of price and quality, with other factors such as delivery or financing terms sometimes being taken into consideration. Corruption is an unacceptable factor which destroys such free and fair competition. It is also the case that corruption in the marketplace retards private sector development. New players are effectively excluded, and inefficiencies are rewarded, rather than redressed.

Fraud and private sector procurement

Fraud, particularly in the area of financial management, is, of course, a long-standing problem for the private sector, no less than for the public one. An example is the accountant who warned her superiors that a bookkeeper was fiddling the books by raking money from the payments system. The bookkeeper was prosecuted and sacked, but the company did nothing to improve its management scrutiny. As a result, the very same accountant started running identical scams, but for even larger amounts, writing cheques to suppliers who were, in fact, supplying herself.

In another instance, a company secretary started paying his bills with company cheques drawn on the directors' current accounts. Being careful to use the same suppliers as the Board, the swindle went undetected for a long time. Such malpractices are hard to spot, and even harder to stop, when controls are not breached but simply circumvented. This is a classic illustration of the importance of addressing

personal value systems, and not having an over-reliance on repressive laws and enforcement. Laws, it is sometimes said, are made to be broken.

However, bribery to obtain contracts is still the most frequent form of fraud in the private sector and probably more widespread than employers realize. Simply having tenders evaluated by different people at different stages is no real safeguard unless the procedures also prevent people from doing the following:

- carefully selecting who is to tender;
- drawing up specifications which favour one supplier over another; and
- sending different specifications to other suppliers.

As procurement moves onto the Internet, so does fraud. However, the Internet's electronic systems record all the traffic meticulously and there are 'data-mining' programmes that can unearth and expose suspicious patterns.

Recommended E-trade customer checks include the following:

- Checking the company name, incorporation, and registration;
- Looking at the last three years' accounts to check solvency;
- Finding out the names and addresses of directors and shareholders;
- Checking other positions for conflicts of interest;
- Looking for records of court judgments or bankruptcy orders;
- Verifying the trading address and registered office;
- Checking that the e-mail, billing, and delivery addresses match;
- Checking that the mailing address is not a service bureau or a post office box; and
- Locating the customer's Internet service provider.[13]

Procurement frauds range from creating cartels to faking invoices, but the most frequent is the kickback in exchange for a contract. As this is effectively a 'refund' on the price (paid to the employee, not the employer), it drives up the costs of business.

Other points of vulnerability

Off-shore bribery

Off-shore bribery (banned for its members by an OECD Convention) is generally condoned by the private sector 'because everybody does it' or because 'that's the way they do things in their country'. It may even be morally defended on the grounds that the resulting business is saving jobs, regardless of the fact that it may be costing the workers of other companies their own jobs.

Many company directors also feel entitled to shelter behind ignorance of their company's operations, particularly its foreign operations. This position is not supported legally, but it is a widespread phenomenon and can lead a director to feel no responsibility for questioning the level of an overseas representative's commission, even if it seems excessive.[14]

Off-shore bribery is also tacitly condoned, it would seem, by some of the governments which are party to the Convention. The Convention is a 'motherhood document' that cannot be openly opposed, but equally the governments which have signed do not want their companies to lose large contracts. So far there has been a startling lack of prosecutions under the OECD Convention for what is presumably seen as being a widespread evil.

Directors should understand and accept the responsibility for keeping their companies within the laws of all countries where they operate. They should also play an active and probing role to ensure, wherever possible, that the spirit and the letter of the law are observed. It appears that grand corruption in international

[13] 'Procurement Fraud in E-business' by Jon Hayton (PricewaterhouseCoopers, London), reported in the *Daily Telegraph*, 10 July 2000.

[14] The 'commissions' paid to 'company representatives' are frequently simply a ploy that places large sums of money taken off a company's books into the hands of someone outside the company who can bribe on that company's behalf.

transactions, which distorts competition and has a restrictive impact on trade, offends the rules of the World Trade Organization (WTO).

While there is no difference, in principle, between grand and petty corruption, companies may be excused for believing that the difference is more than merely a matter of scale. Grand corruption is intended to influence decision-makers in favour of one company against another or to favour one project or purchase over the alternatives. By contrast, 'grease' or 'facilitation' payments to minor officials (to do the work which they are already being paid to do and to provide services to which a company is legally entitled) are highly undesirable. However, it is recognized that, in the real world, companies cannot always be expected to adhere to the strictest principles on very small matters. For example, the US Foreign Corrupt Practices Act (FCPA) does not apply to 'grease payments', although it certainly does not condone them. Huge shipments of vitally needed equipment may be stranded at the dockside, with customs officials demanding small payments before they will release them.

This is a complex and contradictory area, and the dilemma will subsist until there are reliable enforcement procedures in the countries concerned. In the meantime, where companies accept, however reluctantly, that on occasions they may be victims of extortion and have little option but to pay, clear rules are needed to guide their staff. All such payments should be recorded, and any payment that is more than a very small one should require authorization at a senior level to ensure that 'grease payments' do not become a gateway for grand corruption. Above all, the companies should make it clear to all staff that these practices are not condoned.

As long as the position of bribes paid in international transactions remains unclear in criminal and civil law, companies' voluntary codes of conduct will be important to set the tone for all employees and to indicate to third parties the standards to be expected from the company. Even if companies find it unavoidable to bribe abroad to win or to conduct business, this ought never to be contemplated, let alone condoned, within Malaysia itself.

Company codes vary greatly in strength. The least useful are those that are limited to well-intentioned, but vague expressions of principle. The most effective are those that are specific in their descriptions of what employees are not allowed to do on behalf of the company. The best are those that are not only specific, but that also require an annual or six-monthly signature from the Chief Executive to confirm that they have been observed in every respect.

However, it must be recognized that the best voluntary code is only as effective as the company's board of directors is determined to make it. Directors should take responsibility for monitoring the application and observance of company codes, recognizing that they can be an effective means of discharging their liability for maintaining the company's legal and moral standards. Ideally, the post of 'Chief Ethical Officer' referred to in the NIP[15] which corporate bodies are asked to appoint should be held by a member of the Board of Directors.

Large companies should ensure that there are ethics programmes to breathe life and meaning into what are otherwise decorative documents: and these should not be lectures on what to do and what not to do, but involve real life situations and dilemmas, and active discussion among employees as to how these should be resolved. These examples should be drawn from recent experiences in the industry in question.

There is considerable scope for professional associations and federations to include mandatory anti-corruption clauses in their ethics codes, with expulsion from membership as the sanction for non-observance. One thinks of lawyers, accountants, engineers and surveyors—professions with rogue members prepared to facilitate corrupt conduct by their clients. When such an association is strong in

[15] National Integrity Plan, p.117.

terms of worldwide membership, its members have relatively little to fear from non-members gaining an unfair advantage from bribery.

Private sector companies should also recognize that grand corruption is the enemy of high standards and efficiency. When the decision-maker is influenced by a bribe, opportunities are created for substandard performers to gain a contract at the expense of those whose product, reputation, or skills would make them the likely winners of a fair competition.

Companies at risk

One of the most compelling reasons for companies reviewing their ethical behaviour is likely to be that of self-interest. There is a growing body of evidence that appears to indicate that companies that tolerate corruption abroad by their employees are placing themselves at risk. 'Off the books' accounts, secret bank accounts, payment of staff serving prison terms, and use of former senior staff as 'middlemen' all cultivate an atmosphere in which the bottom line justifies criminal activity. This is inherently dangerous, and it may be only a matter of time before the company itself finds that it is the victim of similar conduct on the part of its employees.

Best practice

Best practice dictates that private sector companies should adopt the following guidelines:

- Obey the law in all countries in which they operate;
- Ensure that directors are fully aware of their legal liabilities;
- Press for clarification or strengthening of the law, if current law places the company at a disadvantage relative to its competitors;
- Introduce specific anti-bribery clauses into corporate codes of conduct and ensure that all employees know that these must be observed;
- Encourage directors to actively monitor the application and effectiveness of corporate codes of conduct;
- Encourage any international professional body to which the directors belong to include a mandatory anti-bribery clause in its code of conduct; and
- Press relevant governments, directly or through the company's relevant commercial or professional body, to support the OECD anti-corruption initiative and to encourage the WTO to recognize grand corruption as a barrier to fair trade.

Gifts in business

Personal contacts in business, as in other walks of life, frequently find expression in exchanges of gifts and hospitality. However, in business, potential buyers and potential sellers come together and these can lead to transactions which are more meaningful. The question can quickly arise as to whether a particular gift is appropriate, and perhaps, whether it should be described more bluntly as a bribe. For example, when a sales person works for a performance bonus, or needs to win an order to preserve his or her job, the temptations to use all means available (including presenting inappropriate 'gifts' to clients) can be considerable. It is therefore desirable for companies to have internal policies and rules governing the giving and receiving of gifts.

Assessing the effectiveness of codes of conduct

The Malaysian Code of Business Ethics has been formulated to raise the standards of ethics and business throughout Malaysia. However, there is

substantial debate over the extent to which corporate codes of conduct actually alter corporate behaviour. Although codes have become increasingly popular with companies in industrialized countries, they have by no means become embedded within the organizations. Rather, the codes have often been seen as ends in themselves, not as a means to an end. Enron is an example of a corporation that flaunted its code of conduct as a badge of honour—and then rampantly breached it.

There have been various studies relating to corporate codes, but many have simply undertaken broad surveys of existing codes, rather than analysing the essence of what makes a code effective. In addition, much of the research relates to slightly different questions, such as whether general corporate ethics programmes promote social accountability. Nevertheless, some studies have identified factors that may contribute to the effectiveness of codes of conduct.

Arthur Andersen/London Business School Study Report

One report by Arthur Andersen/ London Business School, 'Ethical Concerns and Reputation Risk Management',[16] focuses on the means chosen to implement business ethical norms, including the types of training they provide, which individuals play the greatest organizational role in promoting business ethics, and whether stakeholders are involved, rather than assessing the effectiveness of such efforts.

The report found that Values and Mission Statements and Codes of Conduct remain the most widely used business ethics practices, with about 80 per cent of companies implementing such programmes. These results represent substantial increases over surveys conducted only three years earlier, when less than 60 per cent reported having codes.

Perhaps the most interesting finding of the report relates to the lack of management systems used to implement codes:

- In 20 per cent of the companies surveyed, the codes were not made available to all employees;
- In 65 per cent of the companies, codes were developed by legal/compliance and corporate secretariats; and
- Human resource personnel were involved in developing codes in only 43 per cent of the companies surveyed.

In other words, firms' senior management has tended to supervise the development of codes, and the codes have had a legal, rather than a behavioural, focus.

Some 40 per cent of companies provided training only to selected employees. Of these, less than half related the training to the practical application of their codes in realistic situations; and fewer still involved a sharing of participants' experiences. Not surprisingly, the survey concluded that the average employee in most companies was not nearly as aware of the existence of the code as were senior personnel.

The study also found that fewer than half of the companies surveyed had hotlines for staff and outsiders to raise ethical concerns and to report suspected misconduct, while 60 per cent of those with these facilities reported no use being made of them. This is hardly surprising when significant numbers of companies provided no confidentiality for callers or for alleged offenders alike.

The report concluded that many business ethics programmes fail to reflect important principles, and that many organizations still grapple with how to make their employees actually 'live' their values and codes.

[16] Based on a 1999 study undertaken by Arthur Andersen's Ethics and Responsible Business Practices Consulting Group and the London Business School, which convened an advisory board with members drawn from business, the academic world, and consultancy companies. It oversaw a survey of various approaches to business ethics among 78 UK companies drawn from the FTSE 500, as well as a number of non-listed companies. In the report, fraud is defined 'loosely' to include 'all offences of which a dishonest representation or appropriation is an element'.

Berenbeim Report

In a paper prepared for the 9th International Anti-Corruption Conference in Durban, South Africa,[17] Ronald Berenbeim argued that although codes have become widely instituted in corporations, they have not had the impact they should have had. Surveys undertaken by his organization revealed that in nearly 80 per cent of corporations, the board of directors was involved in the drafting of the codes, so the codes did not 'belong' to the staff as a whole. He noted that many corporate codes contained virtually identical provisions prohibiting corrupt practices, and he argued that internal corporate procedures, which require disclosure and accountability (including whistleblower protections and other means of reporting of violations), are essential for a code to be effective.

Business & Society Journal Study

Another somewhat different study prepared for the *Business & Society Journal* in 1999 concluded that the analysis did not demonstrate that good social performance 'leads to' poor financial performance. The study shows that determining precisely what constitutes an 'effective' corporate code of conduct is a difficult question to answer. Does 'effective' mean that 'people are behaving ethically'? Does it simply mean that no major scandal has erupted? Or does it only mean that a company is staying within the confines of the law?

OECD Survey

The OECD, now highly active in the field of corporate governance, conducted its own survey of 233 corporate codes of conduct. The survey was limited to documenting the provision of the codes rather than analysing the accomplishments or effectiveness of the codes.

In the companies surveyed, the monitoring of codes received relatively little attention. The majority provided for internal corporate monitoring, and some 40 per cent did not mention monitoring at all. Only a quarter provided for corrective action, and very few stated that non-compliance could or would result in termination of a contract or business relationship.

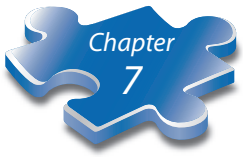
Generally speaking, research on corporate codes of conduct is incomplete. The research suggests that codes have, indeed, had some positive influence, but such a broad conclusion still lacks a firm empirical base. The research indicates that the degree to which the code of conduct becomes 'embedded', as part of the corporate culture, will have some positive effects on employee behaviour. However, determining precisely what 'embeddedness' means in terms of organizational structures and managerial leadership remains elusive.

The key determinant in achieving organizational adherence to a code appears to be training, monitoring, and enforcement activities—another conclusion still more intuitive than scientific, but one rightly reflected in the National Integrity Plan. A core activity in the NIP is the promotion of the Malaysian Code of Business Ethics and compliance by all companies and enterprises. The research discussed above suggests that this will not be easy unless business leaders have not only the commitment to realize ethical business conduct but also a readiness to involve the whole of their staff in these efforts.[18]

[17] Ronald Berenbeim, 'How Effective are Corporate Codes in Combating Corruption?' (1999). The paper is available on the 9th IACC website, accessible through www.transparency.org.
[18] National Integrity Plan, p. 119.

Integrity checklist for assessing the effectiveness of the private sector

- Does the private sector take part in a continuing dialogue on competition policy that recognizes the benefits for all that a sound policy can bring?
- Do companies in general obey the law?
- Do leading companies have codes of conduct? Do these cover corruption and gift giving? Are the codes well publicized?
- Do leading local companies play an active role in developing ethical business standards?
- Does the private sector acknowledge that cartels and bidding rings are both illegal and damaging to the development of the private sector?
- Do businesses in general avoid bribing to obtain government contracts? If this is a common practice, is it one that is disliked and discouraged? Or is it tolerated and accepted?
- Are political office-holders active participants in private sector activities? If so, are conflict of interest situations avoided? Is their involvement transparent?
- Are national private sector associations active? Do they take an active interest in developing an honest marketplace? Does the national section of the International Chamber of Commerce (ICC) actively promote the ICC's code of good business practices?



The Role of the Public Service

In the early days of the Islamic empire, the administration of Caliph Umar set several principles which were worth noting. The elements include anti-corruption, the need for consultation, the need to avoid nepotism and cronyism, the importance of planning, systems and strategies, the importance of being truthful, just and firm, and the need to have a caring culture, especially to address the needs of special groups, such as minorities.

(Datuk Sulaiman Mahbob, *New Straits Times*, 30 July 2005)

The constitutional and practical role of the Public Service is to assist the duly constituted government in formulating policies, carrying out decisions, and administering public services for which they are responsible. Constitutionally, all administrations form part of the state and, subject to the provisions of the Constitution, civil servants owe their loyalty to the department in which they serve.

Public Service principles

Civil servants should administer their organizations with the following principles in mind:

- the accountability of civil servants to their Minister;
- the duty of all public officers to discharge public functions reasonably, and in so doing, upholding the administration of justice and complying with the law (including international law and treaty obligations); and,
- the obligation to observe the ethical standards that govern particular professions.

All civil servants should conduct themselves with integrity, impartiality, and honesty, and deal with the affairs of the public sympathetically, efficiently, promptly, and without bias or maladministration. They should be prepared to offer frank and fearless advice to their Ministers, and they should also endeavour to ensure the proper, effective, and efficient use of public money. In formulating policy proposals, they should strive to develop policies that are not only ethical in themselves and 'corruption-proof' but also take account of the interest of all relevant stakeholders.

At the same time, civil servants should always be aware that their Ministers also have duties and are answerable in a number of ways:

- Ministers are accountable to the elected representatives of the people through the Legislature;
- Ministers have a duty to give the Legislature and the public as full information as possible about their policies, decisions, and actions, and not to deceive or knowingly mislead them;
- Ministers have a duty uphold the political impartiality of the Public Service; they should not use public resources for party political purposes or ask civil servants to act in any way which would conflict with their Public Service code;
- Ministers are duty-bound to give fair consideration and due weight to informed and impartial advice from civil servants, as well as to other considerations and advice, in reaching decisions; and,
- Ministers have a duty to comply with the law, including international law and treaty obligations, and to uphold the administration of justice (and are answerable to the courts where they exceed or misuse their powers).

All of these matters, and more, can be clarified and codified in the form of a Public Service Act,[1] a vehicle which could serve to assist in the implementation of a number of the strategies set out in the National Integrity Plan.

System of merit selection

A prime safeguard for the Public Service is an entrenched system of merit selection, both for appointment and for promotion. It is in a pubic sector environment in which staff see their colleagues as having deserved their posts that 'high work morals, loyalty and patriotism' (objectives of the National Integrity Plan[2]) are most likely to be achieved. The screening of officials in positions of corruption 'risk', which is another objective of the National Integrity Plan,[3] is also important. To these must be added effective complaints channels and whistleblower protection, also envisaged in the National Integrity Plan, so as to ensure that management is made aware whenever things start to go wrong.

Politicization of the Public Service

The external threats to an honest and effective Public Service lie both at the bottom and at the top. The general public may be so accepting of the need to offer gratuities to low-level civil servants as to perpetuate corrupt practices even against the wishes of Public Service managers. The public may be won over through imaginative campaigns such as the introduction of 'no corruption zones'. At the other end of the spectrum, coping with intrusive Ministers can be quite problematic.

The National Integrity Plan spells out the problem in stark terms:

The boundaries of authority between the administration and politics have also somewhat overlapped. The administrators feel that politicians are encroaching into their domain, whilst politicians feel they can encroach into the field of administration since that is their responsibility as they have been given the people's mandate. This has to be resolved to avoid any conflict between administrators and politicians.[4]

There is thus a need for the boundaries to be clearly drawn between the making of policy (which lies in the domain of the Minister) and the implementation of policy (which is the responsibility of the Public Service).

In general, the more a Minister is involved in the day-to-day administration of his or her Ministry, the more likely it is that irrelevant political considerations overtake good administrative practice. Hence the desirability of a Public Service Act.

Rules and procedures for civil servants

In any Public Service, there should be clear rules and procedures which ensure that civil servants understand both their rights and their responsibilities. Among these are the following:

- Civil servants should not misuse their official position or information acquired in the course of their official duties to further their private interests or those of others. They should not receive benefits of any kind from a third party which might reasonably be seen to compromise their personal judgement or integrity.
- Civil servants should not without authority disclose official information which has been communicated in confidence within the administration or received in confidence from others. They should not seek to frustrate or influence the policies,decisions, or actions of Ministers or the Legislature by the unauthorized, improper, or premature disclosure outside the administration of any information to which they have had access as civil servants.

[1] See, for example, the Public Service Act 1999 (of Australia) which came into force in 2005; http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/195AE123CAA985BBCA256F81007A24C5?OpenDocument.
[2] National Integrity Plan, p. 152.
[3] National Integrity Plan, p. 151.
[4] National Integrity Plan, p. 47.

- Civil servants should not seek to frustrate the policies, decisions, or actions of their administrations by declining to take, or abstaining from, action which flows from decisions by Ministers or the Legislature. Where a matter cannot be resolved on a basis which the civil servant concerned is able to accept, he or she should either carry out his or her instructions or resign from the Public Service. Civil servants should continue to observe their duties of confidentiality after they have left public employment.

But members of the Executive, too, must know where the lines are drawn, and respect these.

However, where a public servant is instructed by a superior, or even a Minister, to take an action which the public servant believes to be illegal, what should he or she do? The public servant may be able to address his or her superior and persuade the superior that the instruction should be withdrawn, perhaps pointing out that they would both be liable to prosecution or disciplinary action were the instructions to be carried out. In such a case, the superior could generally be expected to withdraw the instruction.

In a case where the superior insists, it may be possible for the public servant to form a committee and then present the views of the group to the superior. Often, this may not be practicable, and if at the end of the day compliance with an improper direction is unavoidable, the facts of the matter should be set out in a formal note to the file. This should include recording the fact that the public servant had taken exception to the instruction, and be complete with times, dates, and the names of the persons involved. The effect of this is to create a paper trail which can be used as evidence later.[5] Should the instruction be from a Minister to a public servant be oral (as they often can be), the public servant should enter full details into his or her official diary and ask for the instruction to be given in writing. If the improper instruction is given in a note written in pencil, this should be photocopied and filed. It is always important for the government officer to record whatever directives or decisions that are made by the Minister in the minutes sheet of the file, so as to safeguard the decision-making process. The matter should then be raised with the Head of the Civil Service for the latter to take up with the Prime Minister.

Raising the quality of public service

Effective complaints channels

In the private and public sector alike, open and effective complaints channels serve to raise levels of performance. They also help to identify those responsible for malpractice and the channels provide protection for bona fide but vulnerable complainants. The provision of such channels is foreseen in the National Integrity Plan.[6]

Rules for professional behaviour: the Hong Kong model

In a 'Guide to Good Standards of Customer Service', developed by the Ombudsman of Hong Kong for its public sector, the following principles are suggested:

Serving your customers in a **'responsible'** manner means dealing with them

- promptly, without undue delay and in observance of the organization's mission, objectives, and performance pledges;
- correctly, in accordance with the law or other rules governing their circumstances;
- carefully, by considering all relevant and material facts and factors in the decision-making process;
- sensibly, by maintaining a proper balance between the adverse effect of your decision

[5] See Sulaiman Mahbob, quoted in the *Star*, 13 November 2005.
[6] National Integrity Plan, p. 148.

on the legitimate rights and interests of the affected persons and the purpose being pursued by taking that decision, in particular where discretionary power is to be exercised.

Serving your customers in a **'reasonable'** manner means

- treating your customers with respect;
- showing empathy to your customers, listening to them, and understanding their legitimate needs and concerns, giving due consideration to their age, ability to understand complex issues, any physical or mental disabilities, feelings, privacy and convenience;
- seeing to it that your decisions can stand the test of fundamental reasoning and common sense;
- helping your customers by simplifying procedures, forms, providing clear and precise information on the scope and limit of your services and referring cases to the appropriate authorities if necessary.

Serving your customers in a **'fair'** manner means

- treating people in similar circumstances in a like and consistent manner;
- giving reasons for your decisions and explaining the likely effects on your customers;
- keeping your customers informed about the progress of matters of their concern;
- informing your customers of any available appeal or complaint channel in respect of your decisions or actions;
- handling such appeals or complaints cautiously, sympathetically, and with an open mind;
- avoiding creation of inequity through rigid application of rules and regulations where a certain degree of flexibility can be exercised;
- changing rules and procedures as and when warranted to keep abreast of changes in circumstances;
- consulting the persons likely to be affected by any change in the rules and procedures or their representatives and giving them adequate notice before changing any rules and procedures;
- having an internal review system so that adverse decisions can be re-examined by someone not involved in the initial decision-making process.

Serving your customers in an **'impartial'** manner means

- making decisions based on relevant rules and laws and not on arbitrariness or personal preferences;
- avoiding bias by reasons of a person's race, sex, age, marital status, health, physical appearance, ethnic origin, culture, language, religion, sexual orientation, reputation, social status, political inclinations or personal affections, affiliations or prejudice;
- ensuring priorities are accorded fairly, consistently and with a high degree of transparency.

Serving your customers in a **'positive'** manner means

- avoiding adoption of an adversarial approach when faced with the likelihood of litigation;
- admitting and correcting mistakes and offering apologies when it is appropriate to do so;
- taking the initiative to offer assistance to your customers when they are not clear about the proper procedures, services available, or units responsible;
- putting in place adequate complaint channels and developing effective complaint-handling procedures and informing customers accordingly when the situation warrants;
- taking complaints as opportunities to improve the service of the organization and using complaints as a management tool to monitor the standards of service and changing customer expectations.

The Malaysian experience

In the Malaysian context, as long ago as in 1955, concerns about corruption in the Public Service gave rise to a report from a special Commission of Inquiry,[7] which made the following observation:

> [A]n efficient Government is, on the whole, an incorrupt government. An inefficient Department allows opportunities for corruption; sooner or later they will be taken and the Department will become corrupt. To a great extent therefore a campaign against corruption and a campaign for efficiency will use the same methods—organizations—discipline—supervision. The keynote is promptness.

A common criticism levelled by the public in Malaysia has been the poor quality of service rendered by the client/counter service staff. As front-liners, the quality of service given by the client/counter service staff has a tremendous influence on public perceptions of the quality of the Public Service.[8]

Major improvements and innovations introduced by the government over the years include the following:

- one-stop counters located on the ground floor of office buildings to answer questions from the public; the use of an electronic queuing system to facilitate queues at counters; and one-stop bill payment centers;
- a GIRO system that facilitates the collection of fees for several Public Services at a single counter to streamline the flow and increase public revenue;
- an online computer system that enables information to be accessed immediately from the main computer system; and
- a general information telephone system that enables members of the public to obtain basic information without having to go to the counters.

In addition to these examples, efforts have been made to upgrade the physical aspects of the client/counter services through the provision of additional counters, better layout, setting up of information counters, 'paperless' bureaucracy, landscaping of offices, provision of directional signs and signposts, and other basic facilities for the public.

To further assist government agencies in enhancing and systematizing their client/counter services, the government has prepared and distributed a guidebook outlining a four-stage approach for upgrading the quality of such services.

To ensure that government personnel efficiently fulfil the needs of their customers, 'A Guideline Towards the Improvement of the Quality of Telephone Communication' was issued, intended for use by telephonists and other government personnel who provide services over the telephone.

Realizing that outdated rules and regulations can hinder the government's efforts to increase the efficiency of the delivery of services, the government also implemented a 'Manual of Office Procedures', as well as corresponding desk files, an 'open office system', 'procedures on office correspondence', and 'management of meetings'. The introduction of the 'open office' concept facilitates communication and close supervision, as well as creating a more businesslike atmosphere in government departments.

Client's Charter

A further innovation in the Public Service has been the 'Client's Charter'. Introduced in 1993, it involves a written commitment by a government agency to deliver goods and services to its customers according to predetermined quality standards. It is mandatory for all government agencies to formulate their own Client's Charter. The innovation is designed to ensure that agencies are customer-focused.

[7] Commission of Inquiry, 'Report on the Integrity of the Public Service, Federation of Malaya, 1955'.

[8] This comment and the following discussion are drawn from 'Improving the Efficiency of the Public Sector: A Case-Study of Malaysia', presented at the Twelfth Meeting of Experts on the United Nations Programme in Public Administration and Finance, New York, 31 July–11 August 1995 (ST/SG/AC.6/1995/L.5–5 July 1995), prepared by Muhammad Rais Bin Abdul Karim, consultant to the Department for Development Support and Management Services of the United Nations Secretariat.

Based on the Client's Charter at the agency level, individual officers are required to write their own Client's Charter that explicitly states the quality of service or output that will be provided to their customers. This makes the process more transparent to the customers. Departments are said to have reported a significant drop in complaints shortly after they had formulated their Clients' Charters, but the National Integrity Plan rightly sees this as a key avenue for strengthening effective good governance, and undertakes to bring about the formulation of Client Charters in all sectors.[9]

Streamlining government processes

In line with the aim to have a 'paperless' bureaucracy and to improve the delivery of services to customers, government agencies have reviewed the amount of information that is required of applicants for a licence or permit, the number of forms that have to be completed, and the number of licences for which application must be made in order to run a business.

Often, the customer has had to provide much unnecessary information, to complete forms in triplicate or more, and to make separate applications for each separate permit or licence. To improve the quality of service, agencies have reduced the amount of information that they request of applicants, reducing the number of copies of the forms to be completed and introducing the concept of composite or multiple licences (where one application form suffices to obtain several licences from the same organization). Some agencies have even done away with the need to complete forms at all, as in the case of renewal of motor vehicle registration at the Road Transport Department.

To make it easier for investors to apply for licences and permits, the government has established one-stop licensing system centres. Under this system, an entrepreneur need only go to one centre to apply for and receive all the licences and permits that are required to run a business.

Office automation and computerization of the public sector has been expanding at a rapid rate over the years. The use of equipment for expediting work processes, enhancing the quality of output, and upgrading the comfort and safety of personnel is being actively promoted.

Improvements in asset management have required proper record keeping of assets, preventive and maintenance repairs, better control systems to ensure optimal use of the assets, and better management of stores in line with the Treasury guidelines.

Notwithstanding these efforts, complaints persist—from the private sector and members of the public alike—that outdated laws are causing problems and generating demands of bribes to 'lubricate' the system'. Further problems include user-unfriendly laws. These can be resolved quite simply. For example, the Trade Licence Act 1946 required chicken sellers to be licensed and traders in the interior of Belaga in Sarawak to fly all the way to Kuching just to pay a derisory RM1 licence fee. When this problem was identified, it was readily solved by the simple abolition of the licence fee.

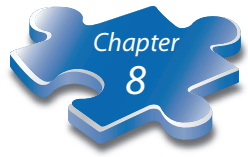
Records management

No system providing for accountability can operate adequately in the absence of a sound records management policy and its professional implementation. Records show 'where the bodies are buried' and can disclose just who was responsible for doing what. Malaysia is fortunate in having a records management system which enjoys a high international reputation, so much so that it attracts records managers from other countries for training-to the chagrin, it is said, of Australia, which offers the same facilities.

[9] National Integrity Plan, p. 145.

Integrity checklist for assessing the Public Service

- Is a Public Service Act needed to define the boundaries between the responsibilities of politicians and those of senior public servants?
- Does the senior Civil Service offer 'frank and fearless advice' to its Ministers? If not, why not?
- To what extent is merit selection practised in appointments and promotion in the Public Service?
- To what extent have the Client's Charters proved effective? Can they be rendered more effective?
- Has the quality of service delivery actually improved over the past ten years? If there are improvements, have these improvements been sustained? Is the quality of service delivery regularly monitored and the results published and made available to relevant stakeholders? If not, why not?
- Are Public Service ethics depoliticized, in the sense that the raising of ethical standards is something to which all shades of legitimate political opinion can subscribe and in which they can participate meaningfully?
- Is the code of conduct in the public sector built on values from the bottom up, not just from the top down?
- Do regular ethics training sessions take place for public servants at all levels? Do these include role playing and the discussion of real-life situations (as opposed to simply being printed handouts and/or lectures)?



The Role of Watchdog Enforcement Agencies

The watchdog agencies are the bulwark of horizontal accountability, as was discussed in Chapter 1. There is an inherent public distrust of coercive power, and these agencies give the public confidence that power will not be abused, or if it is, that remedies will be available to redress matters.

In one sense, of course, every institution is a 'watchdog'—Parliament watches the Executive; the Auditor-General watches public finances and those who handle them; the Judiciary upholds the Constitution; the private media are alert to public indiscretions, and so on. But for the purposes of this chapter, watchdog agencies are the enforcement agencies.

These agencies can only function effectively if they have an appropriate degree of independence. A 'watchdog' that is under the control of the 'burglar' will be unlikely to 'bark', and so watchdog agencies need to be insulated from political interference if they are to do their jobs effectively. They also need to work within a framework of appropriate laws and to be appropriately resourced. They, too, must be accountable, but in ways that do not undermine their effectiveness.

Anti-Corruption Agency

The Anti-Corruption Agency (ACA), established in Malaysia in 1967, is the primary institution charged with combating corruption in the public and private sectors. As do the most effective of the anti-corruption agencies in other parts of the world, it has been adopting a three-pronged approach of investigation, prevention, and education. The Anti-Corruption Act 1997 (Act 575) provides for the mandate and function of the ACA.

Organizationally, the ACA is placed under the Prime Minister's Department. The appropriateness of this placement is open to question, just as it is with the Electoral Commission, which is also housed in the Prime Minister's Department.

The ACA is headed by a Director-General, who is appointed by the Yang di-Pertuan Agong on the advice of the Prime Minister from amongst members of the Public Service.[1] The Director-General holds office at the pleasure of the Yang di-Pertuan Agong, subject to the advice of the Prime Minister.[2] A much better formulation would be to give the head of the ACA the same protection of tenure as is accorded to a senior judge.

For the purpose of discipline, the Director-General of the ACA is deemed to be an ordinary member of the Public Service.[3] Assuredly, s/he should be accountable, but in the manner of a senior judicial officer rather than as a simple civil servant.

In accordance with the Anti-Corruption Act 1997, the Director-General is responsible for the direction, control, and supervision of all matters relating to the ACA.[4] Two Deputy Director-Generals support the Director-General. The ACA is made up of a head office comprising nine divisions as well as a state office in each of Malaysia's fifteen states. In turn, each of these is headed by a State Director.

[1] Anti-Corruption Act 1997, s. 3(2).
[2] Anti-Corruption Act 1997, s. 3(4).
[3] Anti-Corruption Act 1997, s. 3(5).
[4] Anti-Corruption Act 1997, s. 3(6).

Functions of the ACA[5]

The main functions of the ACA are as follows:

- To receive and consider any report of corrupt practices and conduct open as well as covert investigations into reports as is considered practicable;
- To detect and investigate any suspected offence, attempt at committing an offence, or conspiracy to commit any offence under the Anti-Corruption Act;
- To gather evidence in order to prove the commission of corruption, abuse of powers, and disciplinary misconduct;
- To ensure that public interest and justice are safeguarded under the relevant national laws and regulations through legal counsel and fair trial in corruption and abuse of power cases;
- To assist heads of public and private sectors in handling disciplinary action against officers who have violated work regulations and the code of ethics reported in the ACA Disciplinary Report;
- To examine the practices, systems, and procedures of public bodies in order to facilitate the discovery of offences under the Anti-Corruption Act as well as to secure the revision of such practices, systems, and procedures which in the opinion of the Director-General may be conducive to corruption;
- To advise heads of public bodies of changes in practices, systems, and procedures which in the opinion of the Director-General are necessary in order to reduce the likelihood of corruption;
- To oversee the selection and approval of eligible officials to high-level posts within the public sector as well as certain institutions in order to ensure that only candidates who have not been involved in corruption and abuse of powers are confirmed; and
- To educate the public by raising awareness of the harmful effects of corruption as well as enhancing and fostering public support in combating corruption.

Powers of ACA officers

In some of the most effective legislation of its kind to be found anywhere in the world (and legislation that has been copied by a number of other countries), the officers of the ACA are given far-reaching powers in order to fulfil the functions of the Agency. In accordance with section 7(1) of the Anti-Corruption Act 1997, 'an officer of the Agency shall have, for the purpose of [the Anti-Corruption Act 1997], all the powers and immunities of a police officer appointed under the Police Act 1967'. Senior officers of the ACA are given the same right as an officer in charge of a Police District to give orders and issue certificates.[6] When an officer of the ACA has reason to believe that an offence under the Anti-Corruption Act 1997 has or will be committed, he/she may initiate an investigation and in doing so exercise all the powers of investigation as provided under the Anti-Corruption Act 1997 and the Criminal Procedure Code.[7]

Section 22 of the Anti-Corruption Act 1997 provides that, in conducting an investigation, an officer of the Agency has the power to call witnesses who are required to attend and to disclose all the information in respect of the matter for which they are being questioned, as well as require any person to produce documents, etc. However, the power to order any person to produce document under this Section does not extend to banker's book. Should an individual contravene Section 22, he/she is guilty of committing an offence. Section 28 of the Anti-Corruption Act further provides that '[e]very person required by an officer of the Agency ... to give any information on any subject which it is such officer's duty to inquire into under [the Anti-Corruption Act 1997] and which is in the person's power to give, shall be legally bound to give the information'.

When conducting an investigation, movable property relating to an offence under the Anti-Corruption Act 1997 may be seized by any officer of the ACA who is of or above the rank of Investigator.[8] An officer of the Agency also has

[5] Anti-Corruption Act 1997, s. 8
[6] Anti-Corruption Act 1997, s. 7(4).
[7] Anti-Corruption Act 1997, s. 21(3).
[8] Anti-Corruption Act 1997, s. 25.

the right to arrest a person suspected of having committed an offence under the Anti-Corruption Act 1997.[9] Further powers of the officers of the ACA are subject to the authorization of the Public Prosecutor.

Role of the Public Prosecutor

Any prosecution of an offence under the Anti-Corruption Act 1997 can only be instituted by or with the consent of the Public Prosecutor.[10] This accords with best practice, as it is generally thought advisable that the decision to prosecute (and to determine whether there is sufficient admissible evidence) should be taken by someone other than the investigator.

In accordance with Article 145(3) of the Federal Constitution, it is the Attorney-General who 'shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial'. The Attorney-General is appointed by the Yang di-Pertuan Agong on the advice of the Prime Minister and who is qualified to be a judge of the Federal Court.[11]

Within the Attorney-General's Chambers, it is the Prosecution Division which has the task of exercising the powers of the Attorney-General in his/her capacity as the Public Prosecutor, in accordance with Section 376 of the Criminal Procedure Code.

Additional functions of the Prosecution Division include

- conducting prosecutions in the Session Courts and Magistrate Courts;
- conducting criminal trials, appeals, applications, and revisions in the High Court;
- conducting appeals and applications in the Court of Appeal and the Federal Court;
- giving advice and instructions to all enforcement agencies in relation to investigations and criminal prosecutions; and
- perusing investigation papers and deciding whether or not to institute prosecutions.

The Public Prosecutor is given additional powers under the Anti-Corruption Act which are relevant in the fight against corruption. The Public Prosecutor may authorize officers of the ACA to inspect banker's books and receive other material and information from a bank.[12] The Public Prosecutor may also authorize officers to enter premises and conduct searches of the premises as well as persons on the premises. Should an officer of the ACA believe that it is impracticable to seek the authorization of the Public Prosecutor she/he may proceed with entering and searching without having received any authorization.[13] When the Public Prosecutor is satisfied with the information given by the ACA, he/she may also in certain circumstances order the freezing or seizure of assets.[14]

When the Public Prosecutor has reasonable grounds to believe, based on the investigation carried out by the ACA officer, that a person has committed an offense under the Anti-Corruption Act 1997, the Public Prosecutor may require him/her to provide a declaration of assets. If the Public Prosecutor has reasonable grounds to believe that a relative, associate, or any other person may be available to assist in the investigation, the Public Prosecutor may request that they also give a declaration of assets. In these cases, the Public Prosecutor may also request banks to provide information on the above-mentioned individuals' assets.

Should the Public Prosecutor have reasonable grounds to believe that any officer of a public body required to declare his/her assets has assets which are excessive in relation to his/her income, and considering other relevant circumstances, he/she may request that person to give an explanation of how these assets were acquired. Should the officer fail to give a

[9] Anti-Corruption Act 1997, s. 30.
[10] Anti-Corruption Act 1997, s. 50.
[11] It is crucial for the Attorney-General to enjoy public confidence.
[12] Anti-Corruption Act 1997, s. 31.
[13] Anti-Corruption Act 1997, s. 23(3).
[14] Anti-Corruption Act 1997, ss. 33 and 34.

satisfactory explanation, he/she is guilty of an offence and shall on conviction be given a sentence within the same range as for those convicted of corruption. The same sentence may be given to an individual who does not comply with the investigation of the Public Prosecutor.[15] It should be noted that in these cases the burden of proof is on the accused.

Public Complaints Bureau

A second watchdog agency is the Public Complaints Bureau (PCB), established in Malaysia in 1971. Like the ACA, it is placed within the Prime Minister's Department. Being more akin to an Ombudsman, its placement in the Prime Minister's Department is not open to the same objections as that of the ACA. The PCB serves as a mechanism through which members of the public can lodge complaints about malpractices and abuses of power in the Public Service.

Permanent Committee of Public Complaints

There is also a Permanent Committee of Public Complaints (PCPC) which has the function and responsibility to formulate policies on systems for managing public complaints; to consider and make decisions on reports of public complaints made by the PCB; to direct the heads of the authorities concerned to attend meetings of the PCPC to explain specific complaints or cases; and to direct the authorities concerned to take remedial action based on the findings of the investigation into a complaint. The PCPC has the administrative powers to request and obtain information; to check files and related documents; and to seek explanations from the officers concerned.[16]

Ensuring effectiveness of the watchdog agencies

In the light of the need, acknowledged in the National Integrity Plan,[17] to strengthen the effectiveness of good governance by modernizing the administration and its institutions, the question arises as to whether institutions such as the ACA and the PCB are really sufficient to meet the integrity needs of any major country. A number of reformers are of the view that they are not, and that any major country requires both a fully independent 'Independent Anti-Corruption Commission' (IACC) and an Ombudsman appointed by and reporting to Parliament, in place of, or in addition to, a Public Complaints Bureau. In each case, the concern is that these agencies are normally placed in the hands of the Executive, whereas, to be fully effective, they need to be independent of the Executive and be responsible instead to the elected Legislature.

The classic independent anti-corruption commission is that of Hong Kong, and whilst it is true that it was outstandingly successful in Hong Kong, the model has not transplanted very effectively into other countries. This is generally because those countries have not had fully functioning judiciaries or the Rule of Law and have lacked the political commitment to fight corruption. Fortunately, none of these is lacking in Malaysia. Unlike countries which have sought a 'quick fix' by setting up a commission that has been effectively toothless, Malaysia is well placed to take the step of upgrading the ACA into a fully independent body, with a head appointed by—and removable by—Parliament. At the same time, it could be given an expanded mandate that enables an emphasis to be placed on prevention, with the agency equipped to analyse and recommend changes to administrative practices in ministries whose staff are at risk of corruption.

[15] Anti-Corruption Act 1997 , s. 32(4).
[16] Based on analyses of the ACA and the PCB prepared by the office of the UNDP in Malaysia. However suggestions for reform are those of the author.
[17] National Integrity Plan, p. 145.

In addition, adoption of the Hong Kong model would strengthen the National Integrity System as it brings a highly successful three-pronged approach to bear on the problem: prevention and education, investigation, and prosecution.

A similar argument can be made in respect of the PCB. While there is much to be said for an agency within the Prime Minister's Department that acts as an internal inspection agency, there is also good reason to consider the creation of an Office of Parliamentary Ombudsman—an Office which has, quite literally, swept across the world over the past thirty years and has been adopted in virtually all of the world's democracies.

Immunities and privileges

When Transparency International released its first Global Corruption Barometer Survey in July 2003, many were surprised to find that the survey revealed that citizens consider political parties to be the institutions where corruption must be dealt with most urgently. In three countries out of four, respondents to the survey singled out political parties ahead of the judiciary and police. In another survey, immunity of public officials was considered by 63 per cent of respondents to be the main factor contributing to the increase in corruption in their country; this was second only to low public sector salaries. These results, which are drawn from a worldwide sample, indicate the extent to which ordinary citizens distrust their political leaders and representatives.

This reflects a growing frustration with political bribery, corruption, and conflict of interest scandals within the party political system, along with the feeling that suspected politicians in many countries enjoy total political immunity and protection. In many corners of the world, the very idea of political immunity is considered anachronistic and in contravention to the most basic principles of constitutionality and equality before law. It recalls the popular Orwellian maxim that 'All animals are equal, but some animals are more equal than others'.

The same international surveys have captured concerns among the people of Malaysia as to the integrity of their elected representatives, and these worries are rightly addressed in the National Integrity Plan. Envisaged are political party codes of conduct; Parliamentary and State Legislature Committees on Integrity ensuring that Legislators adhere to their own Code of Ethics and the Election Code of Ethics; and a strengthening of the oath taken by Legislators to include 'a more definite and visible element of integrity'. Inner-party rules are to be fostered that would prevent any party member involved in corrupt practices from standing for any party post or being a candidate in a general election. Possibilities are also being explored for political parties to have their own Integrity Committees.[18]

An ethics agency?

In reform processes, it is all too tempting to propose the creation of another agency, and certainly reformers ought always to carefully consider whether existing agencies are not, in fact, able to address the tasks in question. Although it is timely to consider whether in Malaysia there is a practical need for an Ethics Office, such a role might be filled by an arm of the existing Malaysian Institute of Integrity. This might be based on the North American experience of the United States and Canada.

[18] National Integrity Plan, p. 129 et seq.

Office of Government Ethics: the US approach

To be effective, overall responsibility for public ethics development and training must be vested clearly in a particular agency of government. It can also provide a counselling service for public servants who face difficult conflict of interest questions and who need to be able to talk through their position with a trusted professional on whose advice they can safely rely. In a ministry with a broad mandate, the emphasis on ethics can frequently be lost.

To overcome this, in a novel experiment (and in the wake of the Watergate scandal), the United States in 1978 created the Office of Government Ethics (OGE).[19] The OGE provides policy leadership and direction for the Ethics Programme in the Executive branch. This particular system is a decentralized one, with each department or agency having responsibility for the management of its own Ethics Programme.

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

The Office has also implemented uniform systems of financial disclosure. These systems, public and confidential, are enforced throughout all agencies and are subject to periodic review by the OGE. It regularly reviews agency Ethics Programmes, makes recom-mendations, and conducts training workshops for Ethics officials both in Washington, DC and in cities throughout the United States.

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

The Canadian approach

A different approach has been adopted in Canada. There a number of Provinces—and the Federal Government[20]—have each introduced posts to provide guidance on ethical issues to Parliamentarians and senior public officials. These positions are variously titled: 'Ethics Commissioner' (Alberta); 'Integrity Commissioner' (Ontario); 'Conflict of Interest Commissioner' (British Columbia, Saskatchewan, Nova Scotia, New Brunswick, Northwest Territories, and Yukon); 'Commissioner of Members' Interests (Newfoundland); and 'Ethics Counsellor' (Federal Government).

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

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

Secondly, rules are often extremely detailed about matters that should be self-evident to anyone with sound moral judgement, leaving the average citizen with the impression that those appointed to public life have no moral sense whatsoever. When this happens, it can do more to corrode public confidence than it does

[19] http://www.usoge.gov/
[20] http://strategis.ic.gc.ca/SSG/oe00001e.html.

to enhance it. Canada's Federal government has taken an approach that assumes that public office-holders do want to take ethical actions. It assumes they do want to earn a higher level of respect among citizens. For this reason, it has chosen not to take the other major approach to ethics-that is, rigidly codifying ethical behaviour through a series of 'Thou shalt not's'.

The Canadian approach to building and managing an ethics structure turns on avoiding possibilities for conflict of interest well before the fact. It focuses on working with people, based on the assumption that they do want to do the right thing.

The Canadian Federal Ethics Counsellor's Office deals with potential conflicts of interest and other ethical issues for those most likely to be able to influence critical decisions in the Federal Government. This includes the handling of 'blind trusts' established to enable a decision-maker's investments to be held separately (and secretly) so as to avoid any conflict of interest. The Office covers all members of the Federal Cabinet, including the Prime Minister. It covers their spouses and dependent children; members of Ministers' political staff; and senior officials in the Federal Public Service. The Office also handles the monitoring of the assets, incomes, and liabilities of those it oversees.

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

The Office, of course, does not replace the role of the police, prosecutors, and judges when it comes to suspected breaches of the criminal law. Rather, it deals with the grey areas of situations that could realistically appear wrong to citizens, without ever being illegal. Its role is designed to provide advice and counsel to those in government, not to act as prosecutor, judge, and jury. In practice, the Office works closely with those covered by the Code. They come with questions about how a given asset or interest should be treated, and the Office offers advice. It is also asked by the Prime Minister to investigate and comment on specific issues as and when these arise.

As recent election results in Canada have shown, the Office does not render an administration bulletproof. Major political figures, who are tempted to exploit their positions, are always able to subvert any ethics regime, at least for a time. However, on a day-today basis the Office appears to fill a continuing need for the officials who, from time to time, require guidance through what can be a moral maze.

Chapter 9

The Role of the Mass Media

The mass media has a major role to play in the implementation of the National Integrity Plan (NIP) across a wide range of objectives: nation-building, instilling patriotism, promoting gender roles and responsibilities, asserting women's rights and care for the environment, and increasing levels of understanding of ethics and integrity across all levels of the community. Importantly, too, the media serves as an outlet for public complaints, promotes public awareness and, by giving communities a 'voice', serves as an early warning system if all is not well.[1]

On the enforcement side of the equation, the media provides the humiliation of public exposure—a very strong disincentive for the would-be corrupt. Once these people imagine how their actions might look when printed on newspapers' front pages, they may well refrain from their contemplated unethical conduct.

Freedom of the press

Given the importance of the media's role, the NIP seeks to formulate and streamline the Media Code of Ethics so as to encourage a 'responsible' media, and to enable readers to obtain accurate information.[2] One of the objectives of the NIP is to inculcate respect for the freedom of the press, and to ensure its ability to play an effective part in efforts to enhance public integrity.[3] There are, however, difficulties with the word 'responsible', as this can vary depending on the eye of the beholder. It is also important to recognize that the media will inevitably make mistakes from time to time, as it is not always in possession of all relevant material or it may be misled by persons who are mistaken or who are acting maliciously.

Thus for a society to have the benefits of a free media—and they are considerable—it must also be prepared to accept that the media will not always get a story right. Honest mistake is, of course, one thing, and malice is never defensible. There must be remedies for those who are defamed by the press, but these should not be such as to unduly restrict the press.

Without information, there is no accountability. Information is power, and the more people who possess it, the more that power is distributed and the more that power is dissipated. Access to information on the part of the people is fundamental to a nation's integrity system. Without it, democratic structures cannot operate as they should, and individuals are left unable to enforce their rights, perhaps not even knowing that their rights have been infringed. The principal vehicle for taking information to the public is an independent and free media.

The mass media—in particular, the privately owned mass media—plays an essential 'watchdog' role in a National Integrity System. It is through the media that the government of the day is accountable to the people. If the media is muzzled, if it is subjected to indefensible restrictions and if it is denied information, it cannot perform its vital function. The country, together with its integrity, suffers as a consequence. Just as the courts and the corruption investigators need independence from the Executive, so, too, does the privately owned media.

The more a society develops open and transparent practices, the more information becomes available within the public domain. However, a deluge of information makes it almost impossible, even for the most diligent citizen, to keep abreast of everything that is going on. The proceedings of the Legislature or

[1] National Integrity Plan, p. 73.
[2] National Integrity Plan, p. 97.
[3] National Integrity Plan, p. 97.

Parliament, of public and local authorities, of courtrooms, and of public companies may all be open to the public, but no one member of the public can ever hope to attend them all. The most we can hope for is that there is a diligent, professional media which is devoted to sifting through this mass of information on a daily basis, selecting with wisdom and with at least one eye on the public interest, precisely what it is that should concern us—and then conveying this information to us fairly and responsibly. Of course, there will be an inevitable conflict of interest between the media exercising its constitutional function of informing the public and its desire to attract a wide readership, ample advertising, and a healthy profit margin.

A free media ranks alongside an independent Judiciary as one of the twin powers that should not be held accountable to politicians. Both serve as powerful counterforces to corruption in public life. Unlike judges, public prosecutors and Attorneys-General, the privately owned media is not appointed or confirmed in office by politicians. Outside the channels of government-owned media, the media is self-appointed and sustained by a public that sees the privately owned media's output as valuable. The media should be, and can be, free of the political patronage that is entrenched elsewhere even in the most democratic of societies.

Private media ownership carries with it a particular danger: that of the mass media conglomerate, a concentration of media ownership in too few hands. This can constitute a threat to democracy itself, where major political parties can be held to ransom by media proprietors, who wield enormous power through their ability to manipulate the opinion of the electorate, should they choose to do so.[4] This is a menace that calls for strong and principled regulation to restrict mergers and takeovers, and countries should ensure that there is always competition in the media marketplace. This is increasingly difficult to manage in a globalized world, and particularly in an age of satellite television. However, with the growth of the Internet, the ability to convey news is to some extent being democratized. This can carry another set of problems, but it does mean that global communication is no longer the exclusive preserve of powerful interests.

The degree to which the media is independent is the degree to which it can perform an effective public watchdog function over the conduct of public officials. Just as the Legislature should keep the Executive under day-to-day scrutiny, so should the media keep both the Legislature and the Executive (along with all others whose posts impinge on the public domain) carefully monitored. As the former editor-in-chief of Time Inc., Henry Grunwald, noted, 'Even a democratically-elected and benign government can easily be corrupted when its power is not held in check by an independent press.'

The media, too, has a particular vulnerability when it comes to countering corruption. Politicians and civil servants may be all the more tempted to abuse their positions for private gain if they are confident that they run no risk of public exposure and humiliation through the media. Politicians, in the pursuit of such comfort, have sought to muzzle the media. Even in societies that pride themselves on their openness, there can be powerful authorities who, on the premise that the media might act 'irresponsibly', support Official Secrets legislation that greatly restricts the right to know and the right to publish. These authorities also sustain punitive libel laws that can be used to intimidate individuals and newspapers from publishing.

It must be recognized, of course, that corruption can exist within the journalism profession as well. In such countries as Mexico and India, for example, many reporters earn a stipend from the institutions they cover to supplement their meagre salaries. Journalists in various other countries, such as Indonesia, are also known to accept such pay-offs. This creates a powerful disincentive to explore misdeeds in high places.

[4] Rupert Murdoch is seen in the United Kingdom as having such power over both the Labour and the Conservative parties.

Independence of the media

Independence of the media is a very complex concept. In general terms, it focuses on the notion that journalists should be free from any form of interference in the pursuit and practice of their profession. In reality, the owners of the media intervene daily in the operations of the journalists in their employment. In many countries, the government itself is the largest media owner (often of the leading television and radio stations)—a situation which undermines the very concept of ensuring the genuine independence of the media from the influences of the state.

The rights of journalists in state-owned media enterprises and the degree of freedom they enjoy are sometimes, but not always, stipulated and guaranteed in law. The lack of legislation and regulation in this context is a direct threat to the independence of the media. In the United Kingdom, for example, where the British Broadcasting Corporation (BBC) is widely seen as operating at arms-length from the government and enjoying more independence than many state-owned media outlets in other countries, the Thatcher government explicitly banned the BBC, along with the private media, from broadcasting direct interviews with leaders of the Irish Republican Army (IRA). There is obviously validity to the argument that 'a financially dependent media cannot be truly free'.[5]

Efforts should be undertaken to strengthen the independence of the media and systems developed which ensure a diversity of media ownership, so that competition within the media stimulates a wide range of perspectives on public policy issues and acts as a check on the political power of media magnates. A free, privately owned media is only possible when there is meaningful competition in the media marketplace. Rivalry in the market makes the corrupt newspaper owner fearful of exposure, just as it serves as a deterrent to the corrupt public office-holder.

In late 1994, for example, a book publishing company owned by News Corporation (a global enterprise headed by Rupert Murdoch) offered US$4.5 million in advance payments to Congressman Newt Gingrich, then Speaker of the US House of Representatives, for two books. Very swiftly, many media outlets reported the offer and some suggested the possibility that Mr Murdoch, who had major issues before Washington governmental bodies regarding his television interests, had offered a bribe to the new Republican Party leader.

Reporting by the media forced the cancellation of the book deal. However, many countries do not have the same abundance of media owners; rivalry is far less intense and, at times, media 'cartels' can be formed to suit the political interests of the day. In some cases, one family may 'rule' the media in a country. Such an overwhelmingly dominant position means that media magnates need not fear exposure by rivals, and in an age of electronic media, their political power can enable them to wield great influence over the outcomes of elections. Monopolies in the media area are potentially even more dangerous than are monopolies in other areas of economic life.

In numerous instances, governments assert that their democratic institutions are still fragile and their free media inexperienced, and argue that there is merit in continued governmental ownership. This is often the case, but in such circumstances, the state-owned media should not enjoy a monopoly. In countries where governments insist on retaining some measure of control, safeguards or an independent regulator should be in place to stand between the government and the rights of a free media.

[5] The UK television channels refused to be silenced. They still showed interviews with members of the IRA, but to comply with the letter of the law, the voices of those interviewed were dubbed by actors.

Safeguards for the mass media

As is the case throughout the democracies, the media in Malaysia has no greater right to freedom of expression than has the ordinary public. Censorship of the media takes many forms, and raises its head in almost every country. Few have legal systems which guarantee absolute freedom of the media. Laws declaring 'freedom of expression' require support and enforcement from the courts. An independent Judiciary is the handmaiden of a free media, and without an independent Judiciary, media freedom is likely to be illusory. A prerequisite for building a free media, therefore, is a legal system that is independent of political influence and has a firm constitutional jurisprudence supporting the concept of a free media.

Such jurisprudence can draw strength from Article 19 of the International Covenant on Civil and Political Rights, which states:

> Everyone shall have the right to freedom of opinion and expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Restrictions on these widely accepted rights relate to the rights or reputations of private individuals and to matters of national security. Although many journalists would accept that such restrictions are reasonable, they would almost all agree that they must be narrowly interpreted. Thus, the legal and regulatory frameworks should not, for example, provide restrictions on the media that may prevent them from publishing matters simply because these could damage the public reputation of public office-holders. To do so would, in fact, undermine freedom of expression. A decision by the European Court on Human Rights held that the politician 'inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance'.

Press Council and media code of ethics

To deal with such cases, and to provide ordinary citizens with a speedy and inexpensive remedy when they are aggrieved, there may be merit in the establishment of a Press Council which can act as the enforcement mechanism for an agreed Media Code of Ethics. This can provide an open forum for the public to make complaints against the media, to chastise the media when it is irresponsible, and through these means, to influence (to a certain degree) its behaviour.

Press Councils need to be independent and directed by people widely respected for their non-partisan standing and their integrity. These bodies should not have powers of legal sanction, which could enable them to become powerful censors. Rather, they should have the prestige and integrity to give their reports strong moral force. A useful requirement is for the subject of a complaint to be required to publish, in full and unedited form, the findings of a Press Council where a complaint against the subject has been upheld.

A very fine line exists between responsible and irresponsible journalism. Consequently, time and place are important factors that should influence judgments. Indeed, the moral force of a Press Council is a better way to secure a responsible media than to provide governments and courts with wide-ranging powers to curb it. Assertions of media irresponsibility often lead to calls for laws and systems that guarantee only a 'reasonably' free media. Experience shows that the term 'reasonably' is highly subjective and that acceptance of it in this context can be the first step down a slippery slope towards diverse forms of censorship.

The 'reasonably' free approach often comes to the fore in matters relating to national security. The Official Secrets Act in the United Kingdom, and similar legislation in other countries, can provide an umbrella for all manner of secret activities by a government. For example, President Nixon attempted, in the early 1970s, to withhold tapes of conversations in the White House from the courts and Congress on the grounds of national security. Following the eventual publication of the tapes, however, few were heard to argue that their publication had in any way been damaging to the nation's security.

Government officials, conditioned over many decades to label items 'confidential' or 'secret' or 'top secret', build a strong prejudice against public disclosure of information, and frequently seek to prevent disclosure through claims of national security. It is important, when establishing best practices, that the independent Judiciary be objective in assessing these claims. It should take the view that all government documentation should be in the public domain and open to public scrutiny, unless there is a forceful and compelling argument, presented by the government, for maintaining secrecy. Secrecy is more often justifiable on the grounds of the legitimate protection of personal privacy or the maintenance of commercial confidentiality, than it is on the (relatively rare) grounds of protecting national security.

The most effective system for guaranteeing freedom of the media is one where the media itself is empowered to make careful judgments on its own. To provide publishers and journalists with freedom is also to burden them with difficult decisions regarding public responsibility. In the 1960s, the *New York Times* received several thousand pages of documents from a source within the US Department of Defence. These documents, which dealt with the war in Vietnam, became known as the 'Pentagon Papers'. The editors of the *New York Times*, after assuring themselves of the authenticity of the documents, agonized for days over whether or not it was responsible to publish them. They weighed considerations of national security against the public's right to know. They decided to publish. Their decision was not taken lightly and it emerged that many individuals of experience, in public affairs, the law, and the media had differing perspectives on the issue. None could claim a monopoly of wisdom, and none claimed that the judgements of journalists were necessarily inferior to those of experts from other professions.

The decision to publish the 'Pentagon Papers' was carefully reviewed by the courts when the newspapers concerned were prosecuted (unsuccessfully). The Supreme Court concluded that the freedom of the media, as expressed in the First Amendment to the US Constitution, was of greater significance in this instance than national security claims made by the US Government. Consistent judgments of this kind by an independent court system can serve, over time, to build a tradition of media freedom. Such a tradition can be fortified by 'sunshine laws', such as the US Freedom of Information Act 1966, which enables every citizen to obtain access to almost all documents held by the government.

Through the responsible judgements of editors and journalists, combined with consistent judicial support, a tradition and culture of media freedom develops. This culture is, above all, the most important guarantor of media freedom and the ability of the media to fully operate as a watchdog over public office-holders. The tradition must provide for the media to be tough in its scrutiny of the work of those who enjoy the public trust. The media culture, as is evident in many democracies today, must involve a sense that it is the duty of the media to afflict the comfortable (those holding public office), in order to comfort the afflicted (the public at large).

Nevertheless, such a culture can, at times, lead to media irresponsibility. This is an unavoidable

price to pay if a society is to have the undoubted benefits of a free media. An independent, wise Judiciary and an effective Press Council may be able to assist in curbing excesses in such times. Societies must be willing to pay some price if they are to enjoy the greater good of securing media freedom.

There is considerable merit in accepting the basic spirit, if not the total and literal statement, of the view of Lord McGregor of Durris (Chair of the UK Press Complaints Commission) that 'a free society which expects responsible conduct from a free press must go on tolerating some "often shocking" irresponsibility as the price of liberty, because a press which is free to be responsible must also be free to be irresponsible'.

Charter for a free press

The critical factor concerning any restrictions on the freedom of the media is the need to ensure that the limits are publicly debated and the relevant laws are interpreted by a fully independent Judiciary, composed of individuals of the highest integrity. Governments should embrace a basic set of principles to govern approaches to the media. An example of such principles was set out in the Charter for a Free Press approved by journalists from 34 countries at the Voices of Freedom World Conference on Censorship Problems.[6] United Nations Secretary-General, Boutros Boutros-Ghali, declared that 'they [the Charter's principles] deserve the support of everyone pledged to advance and protect democratic institutions'. He added that the provisions, while non-binding, express goals 'to which all free nations aspire'. The Charter provides a useful basis for the implementation of the National Integrity Plan.

The Charter reads as follows:

- Censorship, direct or indirect, is unacceptable; thus laws and practices restricting the right of the news media freely to gather and distribute information must be abolished, and government authorities, national and local, must not interfere with the content of print or broadcast news, or restrict access to any news source.
- Independent news media, both print and broadcast, must be allowed to emerge and operate freely in all countries.
- There must be no discrimination by governments in their treatment, economic or otherwise, of the news media within a country. In those countries where government media also exist, the independent media must have the same free access as the official media have to all material and facilities necessary to their publishing or broadcasting operations.
- States must not restrict access to newsprint, printing facilities and distribution systems, operation of news agencies, and availability of broadcast frequencies and facilities.
- Legal, technical and tariff practices by communications authorities which inhibit the distribution of news and restrict the flow of information are condemned.
- Government media must enjoy editorial independence and be open to a diversity of viewpoints. This should be affirmed in both law and practice.
- There should be unrestricted access by the print and broadcast media within a country to outside news and information services, and the public should enjoy similar freedom to receive foreign publications and foreign broadcasts without interference.
- National frontiers must be open to foreign journalists. Quotas must not apply, and applications for visas, press credentials and other documentation requisite for their work should be approved promptly. Foreign journalists should be allowed to travel freely within a country and have access to both official and unofficial news sources, and be allowed to import and export freely all necessary professional materials and equipment.
- Restrictions on the free entry to the field of journalism or over its practice, through licensing or other certification procedures, must be eliminated.
- Journalists, like all citizens, must be secure in their persons and be given full protection of law. Journalists working in war zones are recognized as civilians enjoying all rights and immunities accorded to other civilians.

[6] The Conference was held in London, 16–18 January 1987, under the auspices of the World Press Freedom Publishers (FIEJ), International Press Institute, Inter-American Press Association, North American National Broadcasters' Association, and the International Federation of the Periodical Press.

Securing best practice

Although civil libel actions can be consistent with the notion of a free media, this is patently not the case with regard to criminal libel actions. These can unreasonably and oppressively protect public office-holders and should only be invoked in the most extreme cases.

All regulation of the media, in terms of permits, licences, and ownership, should be conducted with total transparency and by regulators who are independent and non-partisan. The burden of ensuring a responsible, independent media should be shouldered primarily by the media itself. Journalists must work hard to build public regard. They must demonstrate their independence, objectivity, and professionalism, each and every day, in order to earn public trust and confidence. At the same time, it is imperative that the owners of the media ensure that journalists are paid wages that encourage independence, rather than dependence.

Numerous national and multinational media organizations focus on the preservation of the freedom of the media. The Press Foundation of Asia Committee, the Canadian Committee to Protect Journalists, the International Federation of Journalists, and the World Press Freedom Committee are but a few of the organizations which make efforts to help governments put in place laws and arrangements that correspond with the needs of a free media.

None of this is to suggest that the media should not be accountable for its actions. Far from it. In a National Integrity System, no actor is exempt from accountability. The core question is how this process of accountability should take place.

In a modern democracy that respects the international standards for the freedom of the press that have emerged over time, accountability is to the courts. Newspapers, for instance, can be sued for defamation where individuals have been wronged, but awards of damages should not be punitive. The awards certainly should not be such as to close a newspaper down or to exert a chilling effect on its willingness to publish stories that deserve to be read by the public.

In another sense, the media is also accountable to the public on whom it relies for its livelihood. A newspaper that is disgraced will, in all likelihood, lose some or much of its circulation. In this way, the general public can exert their own influence over a newspaper they believe is not worth purchasing.

In all of this, compliance with a Media Code of Ethics looms large, but any code should be developed predominantly by the journalists whose work it governs and not be a restrictive code imposed by a government ministry. To protect against a code being used as an instrument of censorship, its operation should be overseen by a committee which, although it may contain government nominees, is not dominated by them.

Integrity checklist for assessing the effectiveness of the media

- Is the privately owned media in Malaysia as free and as independent as it needs to be to play an effective part in building the country's integrity?
- Is 'Official Secrets' legislation used as a tool to effectively secure censorship of the media by the government? Is security legislation having a negative effect on the readiness of the privately owned media to report instances of corruption and unethical official conduct? Is there a need for legislation to protect the freedom of the press?
- Are libel laws used, in effect, to censor the media and curb the dissemination of information about persons who influence the community? Is self-censorship practised by the media in ways that adversely affect the public's right to know?
- Is the licensing of newspapers used as a device to effectively curb journalistic freedom?
- Is the publicly owned media independent of government control as to editorial content? If not, is the publicly owned media in practice relied upon by the public at large as a credible news source?
- Does the publicly owned media routinely carry stories critical of the administration (e.g. quoting Opposition politicians)?
- Are the non-media business interests of media owners and their interactions with the government public knowledge?
- Are criminal libel actions against journalists rare or common?
- Does the (a) print media or (b) television/radio media regularly carry articles by investigative journalists?

Chapter 10

The Role of the Civil Society

Definition and origins of civil society

For the purposes of this discussion, civil society refers to the sum total of those organizations and networks that lie outside the formal state apparatus. It includes the whole gamut of organizations that are traditionally labelled 'interest groups'—not just non-governmental organizations (NGOs), but also labour unions, professional associations, chambers of commerce, religions, student groups, cultural societies, sports clubs, and informal community groups. Thus civil society embraces organizations whose objectives are diametrically opposed to each other, such as hunting groups and groups of animal rights activists.

'Civil society', which can be traced back to the works of Cicero, was developed by political theorists over the past 200 years as a domain parallel to, but separate from, the state: a realm in which citizens associate according to their own interests and wishes. It is a much broader concept than that represented by NGOs (important though these undoubtedly are). Moreover, the causes pursued by elements within civil society are not necessarily noble and in the interests of the public good. If one limits civil society to those actors who pursue high-minded aims, the concept becomes a theological notion, not a political or sociological one. Many civil society groups are single-minded in the pursuit of their particular cause and have no interest in balancing their aspirations within the wider public good. An extreme example of this would be the National Riflemen's Association in the United States, which campaigns against gun control laws in a country beset with gun violence.

A long line of political commentators have commented on the impact of civil society participation on the quality of governance. Alexis De Toqueville credited the strength of democracy in the United States to the proliferation and vigour of 'a thousand different types' of associations of citizens pursuing a common purpose. A recent study of the relationship between civic participation and governance found that in those civic communities marked by active participation in public affairs, citizens 'expect their government to follow high standards, and they willingly obey the rules that they have imposed on themselves'.

Relationship between the government, the private sector, and civil society

A triangular relationship exists between the government, the private sector, and civil society. Corruption can take root in all three parties in the relationship. It is thus impossible both in theory and in practice for just one of the parties to address the issue of corruption on its own, in isolation from the other two; and it is arguably impossible for a country to tackle the issue effectively without the participation of all three.

Civil society encompasses much of the expertise and networks needed to address issues of common concern, including corruption, and it has a vested interest in doing so. Most of the corruption in a society involves two principal actors—the government and the private sector. Civil society is typically the major victim.

As power devolves from the centre to local authorities, opportunities for corruption shift downwards, towards new actors who are in more direct contact with civil society. This means that the ability of civil society to monitor, detect, and reverse the activities of the public officials in their midst is enhanced by proximity and familiarity with local issues. Indeed, this may be the training ground needed to gain the experience and confidence necessary for action at the national level.

An informed citizenry—jealous of safeguarding its values, aware of its rights, and confident of asserting them—is a vital underpinning to any National Integrity System. Conversely, a dispirited public, ignorant of its rights and acquiescent in the face of social and administrative abuses, provides an ideal breeding-ground for corrupt and abusive conduct.

In a democracy, the government has a duty to provide a legal and regulatory framework, which allows the necessary space for civil society to operate. This includes permitting freedom of expression, freedom of association, and freedom to establish non-governmental entities. Laws governing the formal constitution of an NGO and its tax status will vary greatly, but these should be clearly understood, accessible, consistent with international norms, and not needlessly restrictive or cumbersome. Public officials handling any accreditation procedures should clearly understand that the law must be applied even-handedly, without broad discretionary powers. In this context, any requirement to register is best served where decisions are made by a court or other independent body.

Civil society and the promotion of public interest

Civil society, in essence, gains its legitimacy from promoting the public interest; hence, its concerns with human rights, the environment, health, education, and, of course, corruption. Its motivation is a special interest, not personal profit. It is characterized by a strong element of voluntary participation: people participate in the causes championed because they believe in what they are doing, and not simply to spend another day in the office.

This is seen most sharply when one looks at some of the actors within civil society. Trade unions, for example, see themselves as acting in the public interest but not always, for there will inevitably be times when they are pursuing the interest of the group they represent. They have, then, one foot in civil society and another outside. By contrast, an organization of business interest, which can be as important as a trade union, would not usually see itself as having a public interest role that is wider than the advancement of its own area of activity.

The same can be said of the private sector. The traditional response has been that members of the private sector are individually accountable to their shareholders and to them alone. However, the growth of social accounting and the recognition that business must, in its own enlightened self-interest, see itself as being a part of the community, and as having broader responsibilities than those crudely dictated by a 'bottom line', have led many business leaders to see the role of the private sector as being, at least in part, aligned with civil society.

The same can also be said of professional organizations, particularly doctors, lawyers, accountants, and engineers. These have codes of conduct which they enforce and which are designed to ensure that their members do not put their own narrow self-interest ahead of their professions' duty to serve the public.

Critics are on firm ground when they ask 'who elects civil society?' for, in fact, no one does. Groups form themselves, usually around a charismatic (and generally autocratic) figure. Sometimes these groups formalize and democratize, with leadership passing into the

hands of others; more often than not, they collapse when the founder departs from the scene. By contrast, trade union members elect their leaders. Public company shareholders elect their directors. There is a particular crisis of legitimacy for NGOs within the context of civil society. They have to earn the trust of the community and the respect of the government of the day.

Mobilizing civil society in support of integrity

Governments which ignore civil society miss crucial opportunities to implement mechanisms that would institutionalize accountability and build public trust. Responsible NGOs ensure that they are run democratically and accountably, and in a number of countries, efforts are under way to encourage the adoption of codes of conduct and transparent accounting practices by NGOs with a view to enhancing legitimacy and raising ethical standards across NGO communities.

However, the driving force behind NGO reforms should be the recognition that civil society is in no position to demand higher standards in public affairs from its governors than the standards NGOs themselves are prepared to apply to their own. As a first step in implementing the National Integrity Plan with civil society, civil society should be invited to examine its own ethical performance in order to strengthen its capacity and credibility to be a meaningful partner with government.

In a recent article,[1] Transparency International Malaysia entered a plea for NGO board members to be trained in accountability, raising its voice in support of the National Integrity Plan and the strategy to ensure that NGO leaders effectively manage their own organizations and enhance their integrity.[2]

It was observed here that there are two levels of governance—public and internal governance:

The former is the relationship of NGOs with other NGOs, state, market and the public. The root of organisational crises can often be found in the nonexistence of and noncompliance with the elements of democratic internal governance. Some critical elements [for the latter] are organisational goals, meeting legal requirements, public disclosure of management systems and policies, financial sustainability and the appropriate use of funds, programme impact, the roles of the board/executive committee, the membership/constituencies and donors.

Malaysian NGOs remain largely leadership-driven with most operating with a handful of individuals or around the personality of a single individual. As a result, with some exceptions of course, many NGOs do not meet the elements of democratic internal governance and fail in their role to protect the public interest. Constitutions are drafted to meet the minimum legal requirements and do not therefore address issues such as limiting the tenure of the president/chair and board members. The constitution of an NGO has often been drafted by its founders, and a founder driven board continues to dominate and influence the agenda of the organizations. The independence of the organisation is therefore compromised.

It is baffling that while NGOs demand tenure of political terms in public governance, the same is not asked of their founders and leaders. Inactive board members continue to remain in NGOs because they are eminent persons or friends of other board members. To circumvent this, in Britain for example, NGOs advertise for board positions. Those who do not perform are told to leave. The Societies Act 1966 is silent on the tenure of the board and may need to be reviewed. The board rarely develops guidelines on its functions, tenure and active participation in the internal governance of the NGO.

[1] 13 February 2006, http://www.sun2surf.com/article.cfm?id=12968.

[2] TI Malaysia noted that NGOs have begun to play greater roles in development processes as governments alone cannot cope with the increasingly complex socio-economic issues in a globalized world: NGOs now participate in the governance of society in the context of the protection and promotion of the public interest. The robust growth of NGOs in Malaysia and elsewhere attests to this. NGOs are recognized as major actors in domestic and international governance through their participation at both local and international levels. In order for NGOs to be effective, the sector must address the challenges of its internal governance. A study of 'Governance and Organisational Effectiveness of the Non-Profit Sector' conducted in 2003 in several countries in the Asia–Pacific region revealed weaknesses in internal governance. On the positive side, NGOs in several countries in the region were shown to have taken progressive measures, such as introducing codes of conduct, in efforts to improve their internal governance.

The highest decision making authority in an NGO is its membership, and in fact the board serves at the pleasure of the membership. Unfortunately in most NGOs, members are inactive and obtaining a quorum at annual general meetings is a monumental task, as the Bar Council experience famously demonstrates. Membership growth is slow in most NGOs. Sometimes this is a deliberate strategy of the leadership, one rationale being that too frequent changes in the leadership may affect ongoing programmes. It is therefore no surprise that relatives and friends of board members are members of the NGO.

The most important instrument of integrity and accountability in an NGO is its board as it is entrusted with achieving the mission and policies of the organisation. There must be a separation of the roles of the board and staff of the NGO to ensure checks and balances. In some NGOs board members work closely with staff in the day-to-day functions of the office, making accountability and transparency difficult. An interesting discourse has emerged in India, the Philippines, Thailand and Indonesia on standard operating procedures to be used for separation of internal staff and board relations.

The role of donors in the internal governance of NGOs is often overlooked. Corporate donors and individuals, in particular, tend to focus on financial reports and not on programmes and organisational development.

A related issue in this context is the disclosure of information on the effectiveness of programmes, staff development and the participation of the board in an NGO. Annual reports are often public relations exercises or are there to meet the minimum requirements of the Registrar of Societies. To ensure credibility, NGOs must improve the practice of accurately informing their constituencies and the public of programme outcomes, in addition to accounting for the resources of the organisation.

Financial sustainability and quality management are vital to the implementation of internal governance systems. Quality management is only possible when there is a separation of duties of the board and staff.

The government in its commitment to promote a vibrant NGO sector must create policies and mechanisms, such as the allocation of resources for the training of boards and donors, to create an enabling environment for the growth of this sector. NGOs must avoid a backlash in the form of further government control and public criticism by demanding the highest standards of internal governance, self-regulation and accountability. A number of countries have developed NGO codes of conduct. Malaysian NGOs should work towards this to sustain confidence in the sector and its independence.

In civil society, there are many people who have a fundamental interest in achieving an effective integrity system for their own countries. And, in a number of countries, members of civil society are involved as independent participants on ad hoc oversight boards. The National Integrity Plan rightly singles out civil society as having great potential to be partners in enhancing integrity.[3] This they should be able to do in politically non-partisan ways, but in their other work they will always be 'partisan', in the sense that they will be promoting their causes whether the government of the day likes these or not. Therefore the strategy in the National Integrity Plan, 'to ensure the non-partisan role of NGOs',[4] ought to be read restrictively and not as a licence for the public sector to control the activities of NGOs generally. Certain aspects of the National Integrity Plan designed to address the integrity of NGOs themselves are also of critical importance.

Awareness campaigns against unethical conduct

A primary task is an awareness campaign, both of the damage that a lack of integrity and corruption is doing to the nation's values, and to the community and families within it. Individual citizens need to be motivated to speak out and to take appropriate action when they encounter unethical conduct. In this, public opinion and attitudinal surveys, such as those being developed by the Malaysian Institute of Integrity, are primary tools in giving the public both a voice and the realization that their opinions are valued and are taken seriously by

[3] National Integrity Plan, p. 83.
[4] National Integrity Plan, p. 85.

others. So, too, is the 'Report Card' approach, where users of particular services are questioned about their treatment and the results published.

Reaching a wide audience are radio programmes, where leading citizens can receive individual complaints on air and give advice. In this way, the advice given to a single person reaches many others likely to encounter similar situations, giving them the opportunity to prevent them. This can have a much more empowering impact than might at first be thought. Delay devices can be used to avoid problems with defamation laws and to 'bleep' out names that could give rise to court proceedings.

Client's Charter

The 'Client's Charter' introduced by the government is important in raising public service performance. By publicly committing agencies to published standards of service, the Charters provide citizens with both an avenue for them to raise their concerns and a yardstick against which to measure the agencies' performance in an individual case. The intention can be to shift the emphasis from seeing complaints about lack of service as something negative to viewing complaints as an important form of communication and feedback. Citizens' comments can then be analysed for targeting improvements in public services in areas seen to be failing.

Charters can be used to promote access to information. They can be used to disclose information about the structure, functions, and operations of public sector agencies. Information should be made widely available using all available means, including the media, public libraries, or information technology.

Assistance for citizens

In cases where a citizen's rights have been transgressed (and the mechanisms under the relevant Client's Charter have failed to provide redress), he/she may need help. Lawyers cost money, and friends and relatives do not always have the required answers or resources. Although the government has provided a channel for complaints, by establishing the Public Complaints Bureau within the Prime Minister's Department to check malpractice and abuses in government agencies and to redress public grievances, not all are aware of it or have ready access to it. How, then, can an ordinary citizen, perhaps with a minor but worrying problem, find out about his or her entitlements and claim them successfully?

Legal Aid Bureau

In partnership with the legal profession, the government has established a Legal Aid Bureau with Advice Centres across the country, staffed by volunteers. This initiative is designed to ensure that citizens, especially the poor and the marginalized, can obtain free advice on how to deal with government agencies (on such matters as housing, benefits, pensions, etc.) and about their legal rights in general.

The principal elements of these Advice Centres are noted below:

- They disseminate information on Public Services;
- They provide free and independent advice to citizens; and,
- They provide a two-way channel of communication between citizens and the government.

A key feature is that the advice they give is free of charge. In some countries, such centres are

provided completely by the legal profession, while in others, they are funded by governments or aid agencies. However they are funded, it is always important that the centres retain a degree of independence to ensure that they are seen by citizens as offering a fair and impartial service.

Advice Centres can provide an effective means of reaching citizens through their national network, thereby helping governments to fulfil their obligations. Some distribute a range of guidance leaflets, produced by their government, while others develop their own pamphlets, which are limited by their resources. These leaflets can provide information on:

- what services are available;
- how to obtain them;
- how to make complaints; and
- how to obtain redress.

Advice is usually given through personal consultations where it is given in response to a particular enquiry. These consultations identify the citizen's legal rights and provide advice on how their rights can be upheld, the services available to assist them, and what to do if these services do not meet their expectations.

Recently, the government has introduced a system called 'e-government' to provide citizens with a single reference point to address queries they may have about the services the government can provide for them.

Whistleblowing and hotlines

Although some Advice Centres advise on 'whistleblowing', and on how to make a complaint, most do not actually act for citizens when they wish to obtain redress for grievances. They provide information on the process that must be undertaken and the choices available for obtaining redress, but they do not usually handle the cases themselves. At a more general level, they can, however, act as a pressure group for change in government programmes.

Besides providing guidance on complaints about public services, the Advice Centres serve to inform the government about problem areas, enabling it to allocate resources to the programmes that most need them. They also provide valuable information to the government on local needs and complaints on conditions that are not directly related to government services but that should be addressed by the public sector.

Increasing use is being made of telephone 'hotlines' to facilitate the making of complaints by aggrieved members of the public, of which the hotline established to protect workers in the Malaysian construction industry is an example.

In the Ukraine, two types of anti-corruption hotlines have been set up. A government hotline allows workers to phone in complaints concerning tax offices. However, these hotlines have failed to gain public trust because they are run by government officials and nothing seems to happen when the people complain. By contrast, a hotline established by the Citizens Advocacy Office (an NGO) is more widely used. The NGO hotline is open 24 hours a day and is answered either by an operator or an answering machine. Where complaints are anonymous, they are documented, and as and when patterns emerge, appropriate action is initiated.

Where NGOs are involved in this way, it is important that

- the role of the Advice Centres is explicitly defined and the people whom the anti-corruption hotlines are meant to serve are clearly identified;
- the lines are introduced as part of a larger strategy;

- the phone lines do not collapse under excessive caller response;
- there is a well-focused advertising campaign, explaining the purpose of the service and who is operating it;
- the trustworthiness of the service is respected;
- there are clear guidelines on whether and when anonymous information can be accepted;
- there are experienced and trained operators on duty, who are capable of explaining to callers all their rights and proposing a basic strategy for resolving their problems; and
- feedback is given to callers (who identify themselves) by reporting back to them what has happened.

This is not to suggest that no government department should run hotlines. Clearly, there are departments in various countries which run these perfectly satisfactorily, such as the police, tax, or customs. But where public trust seems to be lacking, experience has shown that it is more effective for a government agency to form a strategic partnership with a respected NGO to provide a hotline service to the agency.

Integrity checklist for assessing the effectiveness of civil society

- Are there restrictions on the ability of civil society to organize itself through the formation of NGOs?
- If so, are these reasonably necessary in terms of ensuring accountability by the NGOs? Or do they constitute unjustified obstructions?
- Are there restrictions on the holding of public meetings that act as a barrier to the mobilization of NGOs?
- If there are requirements for the licensing of meetings (e.g. by the local police), are licences issued as a matter of course where there are unlikely to be problems of maintaining law and order?

Legal Profession

- Is the legal profession subject to disciplinary measures?
- Are lawyers who are detected as behaving corruptly likely to lose their right to practise?

Accounting/Auditing Profession

- Is the accounting/auditing profession subject to disciplinary measures?
- Are those who are detected as behaving corruptly likely to lose their right to practise?

Medical Profession

- Is the medical profession subject to disciplinary measures? Is there broad public confidence in the effectiveness of these processes?
- Are those who are detected as acting corruptly likely to lose their right to practise?
- Are health workers in the Public Service also permitted to have private fee-paying practices? If so, are there effective procedures to contain potential conflicts of interest?