

Laws to Fight Corruption

Bribery is an evil practice which threatens the foundations of any civilised society.
Attorney General v Reid [1994] 1 AC 324, 330¹

If lawyers could draft laws that prevent corrupt behaviour, there would be no problem with corruption. To a large degree, the present crisis stems from the fact that laws and legal institutions have failed. This failure has been in part due to the weaknesses already present in judicial systems, and in part from the lack of will to strengthen the system as a result of the interplay of actors who have a vested interest of one kind or another in the status quo.

If we were to start with the supreme law of a country, its Constitution, the example of Thailand is instructive:

As a piece of anti-corruption legislation, the Thai Constitution should be viewed as a landmark document which seeks to guarantee democracy through greater public participation in decision making and decentralisation of State powers, while at the same time tackling corruption through the establishment of institutions like the office of the Ombudsman and the National Counter Corruption Commission while promoting transparency and integrity in official life.²

It is widely agreed that the prevention of corruption should be at the forefront of reform efforts, however enforcement is just as important. Relying on a “big stick” approach to deal with corruption after the event, can be uncertain, ineffective and wasteful. Prosecutions, although unavoidable, are an indication that prevention has failed. Effective legal sanctions are, however, vital: not only are they essential to deal with those who misbehave, but the knowledge itself of sure and effective law enforcement contributes significantly to prevention efforts. The reformer must therefore address both aspects. Prevention and enforcement reinforce each other.

When we talk about laws to fight corruption we are not just talking about the criminal law and laws of evidence. These are important, and without sound criminal laws and procedures the task is made more difficult but to focus on these elements alone, as many reformers have, is to ignore a much wider range of laws. These include laws which cover:

- access to information (including official secrets legislation);
- conflict of interest;
- public procurement;
- freedom of expression;
- freedom of the press;
- protection of “whistleblowers” and complainants;

¹ A decision of the Judicial Committee of the Privy Council in an appeal from Hong Kong. The Privy Council is the highest court for a number of Commonwealth countries and a court whose decisions are widely respected around the world.

² See Jeffrey Tan, The Thai Constitution: The Fight Against Corruption, in the Internet version of this Source Book: <http://www.transparency.org>.

- enabling civil society to mobilise;
- democratic elections;
- banning those convicted of offences of moral turpitude from holding or running for election to public office or from holding directorships;
- gifts and hospitality;
- office of the Ombudsman; and
- judicial review of the legality of administrative actions.

Statutes of Limitation block criminal accountability

A Milan appeals court overturned a bribery conviction against media mogul and opposition leader [and former Prime Minister] Silvio Berlusconi on Tuesday in a personal victory for the former prime minister who is hoping for a political comeback.

The court cleared him of one of four counts of bribery and invoked the statute of limitations to overturn the conviction on the other three on grounds that too much time had passed since the events to make a ruling.

Berlusconi was found guilty in 1998 of complicity in bribing tax inspectors in return for lenient audits at his Fininvest media empire, but the appeal court on Tuesday annulled his sentence of two years and nine months in prison. The case may now go to Court of Cassation, Italy's highest tribunal, if the prosecution appeals or if the defence wants to push for an "innocent" verdict in the three counts where the statute of limitations was applied.

Milan, 9 May 2000 (Reuters)

These, and others, are covered in various chapters of this book.

Much can be accomplished administratively, and without any need to reform the law at all - abolishing unnecessary licences, streamlining necessary procedures, limiting areas of discretion (and defining criteria where they are necessary), developing ethics programmes and creating avenues for citizens to complain effectively.³

The discussion in this chapter will be limited to the role of the criminal law (the law which prosecutes offenders) and the role of the civil law (which affords remedies to victims against those who have wronged them or may empower citizens to enforce anti-corruption laws where public authorities fail to do so). For the moment let us examine the criminal law.

A. CRIMINAL LAW

Corruption cases can take a long time to come to the notice of the authorities. In some countries, the statutes of limitation (restricting the time within which an offence can be prosecuted), start to run from the date of the commission of the offence, not from the time when it was first brought to the attention of the authorities. This can mean that corrupt officials escape punishment entirely simply by reason of their corrupt acts going undetected for a sufficient length of time.

It is important, therefore, that statutes of limitation allow for a period of prosecution that runs, not from the date of the offence taking place but from the date of its first coming to light.

Secondly, the period of the limitation ought not to be too short. In Italy the bizarre situation prevails whereby accused persons, by the time they have fought appeals through the higher courts, are covered by the statute of limitations. Hence an energetic lawyer can almost guarantee that a corrupt person escapes punishment. Such laws bring the law itself into contempt whilst providing safe havens for the corrupt.

There are eight general principles which should govern remedies under the criminal law:

1. Laws against corruption should comply with international human rights standards and

³ In some cases whole agencies may be found to be unnecessary. As, for example, in the case of the superfluous Office of the Restaurant Inspector in Zurich. "The affair centres on Raphael Huber, the canton of Zurich's former restaurant and bar inspector, alleged to have taken some US\$1.84 million in bribes from permit applicants in the ten years prior to 1991. The story has shocked a country where the honesty of public officials has always been taken for granted. No one had suspected that cantonal regulations giving inspectors immense discretionary powers could be so abused. Among other things, applicants had to show that there was a "need" for the establishment. According

to the prosecutor, Huber established a "reign of fear," taking payments in the form of loans or encouraging applicants to buy, at excessive prices, pictures painted by his deceased father. Though earning only a modest salary, Huber managed to maintain two flats in Zurich and to build up a 90-hectare estate in Chianti, Italy, complete with vineyard and artificial lake. The case is expected to come to trial early next year. Meanwhile the cantonal government has introduced new regulations under which applicants no longer have to prove a 'need' for their establishments." Financial Times, 8 July 1994 in TI Newsletter, September 1994

afford a fair trial to those accused. It is crucial that criminal laws against corruption respect human rights guarantees, under a Constitutional Bill of Rights or an international code, to ensure specific procedures are not struck down by the courts as being unconstitutional.

2. Laws should not be seen as being unduly repressive. They should enjoy popular public support. If not, they risk a lack of enforcement. In some countries the argument will run that the penalties are so slight that it is not worth bringing the cases to court. For example, in Japan, suspended sentences were handed down to two Tobishima executives for bribing the Governor of Ibaraki Prefecture for a part of a large dam project, because they “repented”.⁴ In other countries, the opposite argument may apply. In South Korea, a review of criminal law penalties concluded that the penalties on conviction were simply too high. Civil servants faced a minimum of seven years imprisonment, and as a result the judges were loathe to convict. In Uganda, an anti-corruption law has never been used in over 20 years on the statute book, apparently because it was thought to be “simply too tough”.
3. There should be clear guidelines on sentencing so that sentences are consistent between one offender and another, and fair, but not outrageously punitive. Clearly, a court must be able to discriminate between cases in which an official has been bribed to perform his duty (e.g., to expedite official action), and the more serious cases in which an official has been bribed to act in a way which was in itself improper. Legislatures may find satisfaction in enacting laws which provide swingeing penalties, but this can actually undermine the reform effort. Many prosecutors dislike bringing cases in which sentences are likely to be imposed which the community regards as being excessive,
4. Combining the various criminal laws dealing with corruption and secret commissions together in a single law has much merit. It reduces the possibility of loopholes and can demonstrate the seriousness with which the law treats this form of behaviour by making it plain that anti-corruption offences apply to the public and private sectors alike. Whichever course is chosen, the offence of giving and receiving “secret commissions” should be provided for.
5. Regular reviews of the criminal law framework (including laws of evidence and of the adequacy of existing penalties) are essential. This is particularly true as modern technology can run ahead of the more pedestrian legal stipulations. For example, offences involving computers, and evidence generated by computers, may run counter to existing limitations designed for a paper-based world. There may also be difficulties where some legal systems have not caught up with the concept of criminal conduct by a corporate body. For example, the criminal law should be able to redress corrupt corporate practices such as “bidding rings” for public contracts, in which apparent competitors collude among themselves to decide who will get a particular contract and at what price.
6. Special provisions may be necessary in corruption cases which require individuals, once they are shown to be wealthy beyond the capacity of known sources of income, to establish the origins of that wealth to the satisfaction of the court. Constitutional problems may arise in circumstances where a law requires that an accused person give evidence under

Brazil mayor must step down – but plays for time

SAO PAULO, Brazil (AP) - A state court ruled Thursday that the mayor of South America's largest city must step down from office because of his illegal use of public funds. But the ruling allows Celso Pitta to remain mayor of Sao Paulo pending an appeal.

The court also ruled he could not hold public office for eight years and ordered him to pay \$98,000 in legal fees, Cesar Lacerda, the court's press spokesman said by phone. The ruling upheld a 1998 decision that found Pitta guilty of misusing \$200,000 in an advertising campaign defending himself against accusations of his alleged involvement in a 1997 government bond scandal.

He has been able to remain in office due to the lengthy appeals process.

Pitta, considered one of Brazil's most unpopular mayors, is also battling a stream of accusations made by his ex-wife Nicea, who this week accused him of running a massive corruption ring, tampering with investigations and bribing legislators.

On Wednesday, about 800 high school students marched through downtown Sao Paulo to demand Pitta's impeachment.

Reuters 16 March 2000

⁴ Financial Times, 22 July 1994. Reported in TI Newsletter, September 1994.

⁵ Mumba v The People (1984) ZR 38.

oath. In Zambia, this type of provision was held to be unconstitutional as it infringed on the right of the individual against self-incrimination.⁵ In such a circumstance, the difficulty lies in reversing the onus of proof – in compelling a person, under threat of conviction for presumed corruption, to explain how assets were acquired legitimately, as opposed to merely giving the person the option to adduce evidence in explanation (as is the position in many jurisdictions). The law may thus call for a prosecutor to prove a linkage – which may be exceptionally difficult to do to the degree necessary in criminal proceedings. A better approach would be to make special legislative provisions which state that conclusions may be drawn by the court “in the absence of a satisfactory explanation by the accused”.⁶ This is not to compel the person to give evidence (which would contravene international human rights norms against self-incrimination) but, as in other cases where a *prima facie* case is made out against a person, to place them in the position of having to choose between giving evidence and risking conviction without doing so.

7. Special provisions will be needed to ensure that the proceeds of corruption can be recaptured by the state as they will often be in the hands of third parties or even located out of the country. The criminal law should provide for the tracing, seizure, freezing and forfeiture of illicit earnings from corruption. One of the few benefits to come out of the international war against illicit drug trafficking has been the development of legal frameworks which facilitate the investigation and seizure of proceeds, regardless of the jurisdiction in which they are located. Some countries provide for forfeiture even in the absence of conviction, unless a claim is made by a rightful owner within a certain time.
8. Provisions will also be needed to ensure that the crime of corruption is seen to include both the payment as well as the receipt of bribes. A few countries only make the acceptance of bribes a crime, not their payment. This is obviously a serious limitation to combating corruption at its source. Of course, where “bribes” are not offered, but are extorted under compulsion, it would be unfair to prosecute the payer, as to do so would be to victimise him or her twice over.⁷

Confidentiality for corruption, but not for illicit drugs trafficking?

“If the principle of confidentiality is inapplicable to the transfer of drug money, I wonder why it should apply to stolen money from corruption?”

*Olusegun Obasanjo, Opening Address to the Corruption, Democracy and Human Rights in West Africa Seminar, Africa Leadership Forum and Transparency International, Cotonou, Benin, September 1994.*⁹

The limits of the criminal law

The question of the refinement of laws to fight corruption through effective prosecutions, is a real one for countries who have a functioning judicial system, and investigators sufficiently independent or sufficiently bold to investigate cases of corruption which involve senior figures.

In this regard, two recent examples are in stark contrast: in Israel (where a former Prime Minister was being held to account for what some would see as serious but comparatively minor blemishes⁸), and in Russia (where in 1999 an outgoing President was granted a *carte blanche* immunity, seemingly without restrictions). The one country has a functioning integrity system which was seen to be operating, and the other clearly does not. Hence, the precise content of the laws is a serious matter for Israel, but almost an irrelevance for Russia.

6 See the (Hong Kong) Corrupt Practices (Amendment) Act, No. 29 of 1987, ss. 8 and 13. This places an evidential burden on an accused but no longer requires that the accused personally give evidence on oath.

7 The French criminal code is one of several that makes a distinction between “active corruption” and “passive corruption” – “active” being where a public official actively seeks a gift or other benefit before the award of a contract or the rendering of a service within his or her remit. “Passive” corruption is said to occur where an official accepts a gift or other reward after the award of the contract or the performance of the service. Whether such distinctions are required in terms of defining the

offence (as opposed to deciding on the appropriate penalty) is debatable.

8 The former Prime Minister was alleged to have failed to return a number of gifts given to him on state occasions that by law belonged to the state, and to have had some work carried out on his private home at state expense. Both, of course, are matters which, if true, deserve censure.

9 See Ayodele Aderinwale (ed.), *Corruption, Democracy and Human Rights in West Africa: Summary Report of a Seminar organised by the Africa Leadership Forum* (ALF Publications, Ibadan, 1994).

Getting the evidence

Unlike most other crimes, (but in common with organised crime), corruption offences usually have no obvious victim to complain. All those involved are beneficiaries, and all have an interest in preserving secrecy. Thus, evidence of actual offences is exceptionally difficult to obtain. The perpetrators each have power over the others.

- An “integrity test” operated by an agent provocateur is one approach, but it is one which courts in many countries treat with considerable caution. However, they can be highly effective.
- Parties to offences can be encouraged to come forward and offer evidence. This inevitably gives rise to the question of immunities. In Central and Eastern Europe there has been for years, a provision that the giver of a bribe must report it within 24 hours or so, and thereby be immune from prosecution (others might see this really as being a matter of reporting the fact that one has been the victim of extortion). However, it seems that this provision has not operated effectively, if at all. In the US, the first person involved in a Securities And Exchange Commission offence who “blows the whistle” is granted automatic immunity. This introduces an element of risk into the corruption equation - far from each being dependent and able to rely on each other’s continuing silence, each has considerable power over the other.
- Circumstantial evidence is frequently available, but actual evidence of corrupt acts may be lacking. The Customs Officer who is driving a late model Mercedes is surely a legitimate object of suspicion. So, too, is the head of government who has spent all his life on a modest public officials’ salary but who lives in high style, far beyond the bounds of anything he could afford on his official earnings or known income (such as in the case of Charles Haughey now in Ireland). The very extravagance of their life-styles and their ostentatious displays of wealth require explanations. Whereas the Customs officer can readily be subjected to an “integrity test”, it is much more difficult to run an operation against those involved in “grand corruption” where the positions are more senior and the stakes so very much higher. Hence the offence of “living beyond one’s official earnings” or of “illicit enrichment” is a necessity if these people are to be brought to account.

The concept is embodied in the Inter-American Convention Against Corruption (adopted at the third plenary session, on 29 March 1996) in the following terms:

Subject to its Constitution and the fundamental principles of its legal system, each State Party that has not yet done so shall take the necessary measures to establish under its laws as an offence a significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions.¹⁰

In Pakistan, the National Accountability Bureau Ordinance provides:

26. Tender of pardon to accomplice/plea-bargaining :

- (a) Notwithstanding anything contained in the Code, at any stage of investigation or inquiry, the Chairman may, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to any offence, tender a full or conditional pardon to such a person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relating to the said offence including the names of the persons involved therein whether as principals or abettors or otherwise.
- (b) Every person accepting a tender of pardon under sub-section (a) shall be examined as a witness in the subsequent trial.
- (c) Subject to sub-section (d), the person to whom pardon has been granted under this section shall not -
 - (i) in the case of a full pardon be tried for the offence in respect of which the pardon was granted; and
 - (ii) in the case of a conditional pardon be awarded a punishment or penalty higher or other than that specified in the grant of pardon notwithstanding the punishment or penalty authorised by law.
- (d) Where the Chairman NAB certifies that in his opinion, any person who has accepted such tender has, either by wilfully concealing anything essential or by giving false evidence through wilful or reckless mis-statement, not complied with the condition on which the tender was made, such a person may be tried for the offence in respect of which the pardon was so tendered, or for any other offence of which he appears to have been guilty in connection with the said matter including the offence of giving false evidence, which he knows or ought to know is false.
- (e) Any statement made before the Chairman NAB or the Court by a person who has accepted a tender of pardon may be given in evidence against him at such trial.

National Accountability Bureau Ordinance 1999 (No. XVIII of 1999)

¹⁰ Article IX , Illicit Enrichment.

The Convention has won a wide degree of support throughout the Americas.¹¹

Commentators on the anti-corruption drive in Hong Kong ascribe much of its success to the enactment of such a law.¹²

The essential test for new criminal laws

Before new criminal laws are enacted it is suggested that one must make sure that:

- (a) the laws are easily understood and do not give rise to technical debates among lawyers which can frustrate the lawmakers' intentions¹³; and,
- (b) the laws do not require prosecutors to prove facts which are in reality not necessary (e.g. where a person is in a position of trust and they are found to have considerable unaccounted for wealth, careful drafting of the laws can avoid the necessity that prosecutors then be required to go on and prove that the wealth was obtained illicitly).

There is nothing inherently unfair in requiring a person to establish a defence (after a prosecution has established e.g. that a person is in possession of wealth grossly disproportionate to official earnings) where the facts are peculiarly, and perhaps exclusively, within his or her own knowledge.

"Reversing" the burden of proof and "credible explanations"

The expression "reversing the burden of proof" is one which should be avoided. Not only does it misrepresent the concept under discussion but it creates semantic space for opponents of reform (often in the pockets of corrupt interests) to fight and defeat well-thought-out and eminently fair reforms.

Paradoxically, the human rights movement, so loud in its condemnation of corruption as a font of much human rights abuse, can be among the first to attack reforms when governments try to redress the situation. In 1999, a "right to privacy" campaign in the US successfully blocked "Know Your Customer" requirements that would have markedly reduced the ability of banks to handle illicit funds and indulge in money-laundering. This can be profoundly disappointing to those within the anti-corruption movement - many of whom have spent a considerable time as members of the human rights movement and who are drawn to the fight against corruption because of the impact of corruption on the economic and social rights of so many around the world.

Does such a so-called "reverse onus" infringe the right of an accused to be presumed innocent

11 "The U.S. and Illicit Enrichment - Some OAS countries have made illicit enrichment an offence under their domestic laws. The United States does not expect to establish illicit enrichment as a separate offence under U.S. law. One line of thought behind this position is that the notion may conflict with basic constitutional principals of U.S. law. In addition, a variety of U.S. laws and regulations, in their totality, reach the types of conduct by government officials that this provision seeks to address. For these reasons, the United States does not expect to make illicit enrichment, as described in the convention, a separate offence under U.S. law. Assistance and Co-operation by Parties (that do not have laws against transnational bribery or illicit enrichment) - Parties to the convention that do not establish transnational bribery and/or illicit enrichment as offences under their domestic laws must, to the extent permitted by their laws, provide the assistance and co-operation provided for in the convention to other parties with regard to transnational bribery and illicit enrichment." Extract from Summary of the Inter-American Convention Against Corruption -

Prepared by the U.S. Department of Commerce, Office of the Chief Counsel for International Commerce, April 22, 1998.

12 See the various analyses by Bertrand de Speville, former Commissioner of the Hong Kong ICAC.

13 The German Penal Code is an example of a law which made it unnecessarily difficult for prosecutors to prove corruption. It was essential for them to establish beyond reasonable doubt that a bribe or benefit was given in respect of a specific official act. When the law was reformed in 1997 it was suggested that it simply be an offence where a bribe or benefit was given or offered "in connection with the public office" held by the official. However a more legalistic view prevailed and a middle course was adopted, so that the bribe or benefit must be in respect of the civil servant's "exercise of his or her official duties". At the same time the law was widened so that for the first time it included benefits given to third parties, such as a spouse. A number of countries need to reconsider the adequacies of their laws in this regard.

until proven guilty? One superior court which examined these types of provisions observed:

Before the prosecution can rely on the presumption that pecuniary resources or property were in the accused's control, it has of course to prove beyond reasonable doubt the facts which give rise to it. The presumption must receive a restrictive construction, so that those facts must make it more likely than not that the pecuniary resources or property were held ... on behalf of the accused or were acquired as a gift from him. And construed restrictively in that way, the presumption is consistent with the accused's fundamental right, being a measured response to devices by which the unscrupulous could all too easily make a mockery of the offences.¹⁴

Only when it has been shown that the accused's wealth could not reasonably have come from his or her official salary does the accused have to provide an explanation.¹⁵

This is neither novel nor surprising. That said, and as courtroom lawyers will affirm, in any prosecution there can come a time when the evidence presented by the prosecution is such as to give rise to a belief in the guilt of the accused. The husband who runs from his home, a smoking gun in his hand, leaving his wife shot dead on the floor, will be highly likely to be convicted of her murder unless he can establish a probability (a) that she shot herself, or (b) that he was acting in self-defence, or (c) that the situation was not what it seemed – he had wrestled the gun from the hands of another and was running for help. The point is that it is not for the prosecution to exclude all or any of these possibilities.

Once there is sufficient evidence of guilt upon which to convict, it becomes appropriate (and is what in fact happens in courts around the world every day) for the accused to provide a credible explanation, without which he or she will be likely to be convicted.

This is not a question of “reversing the onus of proof” but of what lawyers call the “evidential burden shifting to the defence”. The “burden of proof” remains on the prosecution throughout; there is no presumption of guilt. It is once the prosecutor has discharged this burden that it falls to the defence to give an explanation. Thus the expression “reversing the burden of proof” is misleading and unsatisfactory, and the need for a more appropriate description remains as a challenge to the reformers' vocabulary. A better formulation would be that “a defendant owes a credible explanation”.

B. CIVIL LAW

Remedies through civil law

There are several good reasons for having strong recovery mechanisms against corruption in the civil law, as opposed to the criminal law. Civil courts provide a less onerous atmosphere than the criminal courts for dealing with the consequences of corruption. In the civil court, the burden of proof is not as demanding, and in appropriate cases, the burden of disproving assertions can be more effectively and, at the same time, fairly placed on the suspect. Evidence obtained through civil law need only establish guilt via a “balance of probabilities” rather than “beyond a reasonable doubt”.

The corrupt official may be able to throw up enough dust to evade the criminal law, but the

14 Attorney-General v Hui Kin Hong, Hong Kong Court of Appeal, No. 52 of 1995, at p.16.

15 Most countries with this type of provision also have a procedure whereby the investigating agency makes a formal request to a person under investigation for them to account for their

wealth. This affords an opportunity for those with valid explanations to give them, and the investigation comes to an end. It is only where an individual fails to give a likely explanation that the matter may go to a court hearing.

civil law has a broader reach. Judgments obtained in civil courts can usually be enforced in a large number of foreign countries in order to obtain the contents of foreign bank accounts and other assets. This increases the deterrent factor of the civil law as the corrupt official must think long and hard about where to hide the gains of his or her corrupt activities.

However, corrupt officials increasingly hide their wealth in family trusts and other vehicles which enable them to claim, when the time comes, that they have no control over the property. In many countries, this form of evasion is causing acute problems. The public at large boils with rage as corrupt officials are seen to do a short spell in prison and then simply pick up the benefits of their illicitly acquired assets, all safely in the name of their spouses or lawyers.

There are several civil law solutions currently under consideration. These include:

- 1) undoing “trusts” and “gifts” and treating them as being ineffective; and
- 2) declaring “matrimonial property” claims brought by spouses against assets illicitly acquired, as null and void and based on non-existent “ownership”; and
- 3) creating a presumption of “continuing control” of property by an accused arising from the circumstances in which the property was transferred.¹⁶

This area of civil law remedy against corruption is one which is moving swiftly and which merits being kept under continuing review.

Remedies through civil law for the state

The state is considered a victim of corruption because the moneys taken by a corrupt public official legally belong to the state. The bribes taken are held, technically, in trust for the state,¹⁷ therefore, the state can sue the official for the full amount of the value of the bribes he or she has received, even if the official (or ex-official) has spent most of the money.¹⁸ It can also make an equitable claim for compensation for breach of fiduciary duty.¹⁹

It is arguable that the person who actually gave the bribe is also liable for the resulting theft from the state's coffers. Although existing common law could be invoked in this instance, it would be preferable to place the matter beyond all argument by entering a statute law. It would be a marked disincentive to bribers if they knew that they might be sued by the state and have to pay an amount equivalent to the original bribe. In terms of corrupt public procurement, this “re-payment” would logically cancel out an element of the price distortion generated by the original bribe, given that they are inevitably reflected in the final price.²⁰ The extent of liability for corruption in a systemic situation should be such that, if a group of persons all received bribes within the one corrupt arrangement, each of them would become personally liable, not just for the amount they themselves took out of the common arrangement, but also as “constructive trustees” in respect of bribes received by the others.²¹

The civil law should also clearly state that contracts which are obtained through corrupt means are enforceable only at the discretion of the state. This would enable the state to decide for itself, and in the public interest, whether or not to be bound by a contract tainted by corruption. To avoid the arbitrary treatment of such contracts on the part of the state, a superior

16 See, for example, the (Hong Kong) Prevention of Bribery Ordinance, s.10. This is also a useful device for application in criminal proceedings.

17 See *Reading v The King* (1951) AC: 507,518; *Maheson v. Malaysia Housing Society* (1979) AC 374,380.

18 *Attorney-General for Hong Kong v Reid* (1994) 1 AC 324, 336.

19 *Reading v. The King* (supra) at p. 580; *Maheson v. Malaysia*

Housing Society (supra), p. 380.

20 This approach is being tried in Britain.

21 See *Selanger United Rubber Estates Ltd v Craddock* (No 3) (1968) 1 WLR 155 per Ungood-Thomas J; and *Karak Rubber Co Ltd v Burden* (No 2) (1972) 1 WLR 602, per Brightman J at pp. 632-633.

court could be empowered by the state to inquire into the circumstances in which a contract was obtained and to declare it void if corruption was clearly an element in its award. A bidder's knowledge that such contracts rest on shaky ground may be a further inducement against corrupt conduct.

Remedies through civil law for the private citizen

There are also several reasons why private citizens should be able to sue in cases of corruption. The first involves the potential liability of the state for the losses incurred by a citizen or groups of citizens by reason of the actions of a corrupt official. For example, if the state can be shown to have been negligent in its administration, then those who suffer a loss as a result of a corrupt public procurement exercise may well have a substantial claim for compensation.

If the private sector has little confidence in the anti-corruption efforts of the police and prosecution arms of government, one way of building support would be to empower the private sector to police itself by being able to sue through the civil courts. But whom should they sue? It is surely desirable, on the part of the state, to direct claims away from itself and in the direction of the corrupt public official - the wrong-doer. It can quite simply establish that the responsibility for the loss lies with the person or entity (or both) who gave or accepted the bribe. For example, where a public procurement exercise has been rigged, the private interests who have been harmed by the corruption could be empowered and/or encouraged to sue the perpetrators.²²

In cases where the state is not in a position to pay adequate compensation, it should consider empowering its citizens to take court action against corrupt officials when they have reason to believe that there may be sufficient assets to make such action worthwhile (the "qui tam" action is discussed below).

The Council of Europe's 1999 Civil Law Convention on Corruption, to which many European countries are signatories, provides:

Article 3 – Compensation for damage

- 1 Each Party shall provide in its internal law for persons who have suffered damage as a result of corruption to have the right to initiate an action in order to obtain full compensation for such damage.
- 2 Such compensation may cover material damage, loss of profits and non-pecuniary loss.

Article 4 – Liability

- 1 Each Party shall provide in its internal law for the following conditions to be fulfilled in order for the damage to be compensated:
 - (i) the defendant has committed or authorised the act of corruption, or failed to take reasonable steps to prevent the act of corruption;
 - (ii) the plaintiff has suffered damage; and
 - (iii) there is a causal link between the act of corruption and the damage.
- 2 Each Party shall provide in its internal law that, if several defendants are liable for damage for the same corrupt activity, they shall be jointly and severally liable.²³

The Convention also deals with contributory negligence, reasonable periods within which to

22 The Council of Europe's 1999 Civil Law Convention on Corruption provides that the state parties should accept the liability to provide compensation to those who suffer as a result of the activities of corrupt public officials. This would obviously be far too heavy a burden for many countries to accept in the present

stage of their development. Other articles of the Convention provide for civil remedies against the perpetrators of corruption.

23 For the full text, see <http://www.coe.fr/eng/legaltxt/174e.htm>.

bring claims, corruption rendering contracts null and void, the protection of whistleblowers and complainants, the keeping of accounts, the acquisition of evidence and international cooperation in the pursuit of claims.

The Convention also requires that the state pay compensation where persons have suffered as a consequence of officials acting corruptly in the course of their duties. Such a provision would, of course, be an intolerable burden for a country where corruption was systemic and widespread, but the provision does recognise the principle that the state which fails adequately to protect those doing business with it, has responsibilities for the consequences.

Judicial "blacklisting"

Finally, there is the question of using the civil courts to debar private citizens and firms from doing further business with the public sector. This has considerable potential as a deterrent to corruption in situations where an international firm operates outside the jurisdiction of the state and breaches the criminal law with impunity. Such a firm, in all probability, is operating in other countries as well. If the law allows the state to apply to the court using civil proceedings, which, unlike criminal proceedings, can be served on individuals and firms abroad, then a precedent is set for the debarment procedure. This can equip competitors to point to the court ruling when dealing with other states, and suggest that those who do business with such a company, or individuals associated with it, risk certain embarrassing conclusions being drawn as to the improper nature of their association.²⁴

C. RECOVERING ILLICIT PROPERTY

It is axiomatic that crime should not pay. Yet in the real world, the proceeds of corruption can be enormous and the chances of their being recovered by the state from which they have been stolen, may seem minimal.

Illicitly-acquired wealth may be forfeited either through the criminal law or through the civil process. As has been said, it is important to ensure that both avenues be available to investigators. The civil process is easier to establish and can be made to function far more effectively.²⁵ However, internationally it is generally necessary for criminal proceedings to be commenced before other countries are obliged to provide assistance in the tracing and freezing of illicitly-acquired assets.

South Africa's "Heath Commission"

In most countries the recovery of state property is left to a traditional ministry, such as the Ministry of Justice or the Office of the Attorney-General. The names may vary but the functions are much the same. However, when it comes to the proceeds of corruption, these bodies are usually overwhelmed by other demands on their time and lack powers of investigation. When they act, they do so through the normal court system. In South Africa, legislation was enacted in 1996 to provide for the establishment of special commissions to investigate serious malpractices and maladministration of State institutions, and for the establishment of Special Tribunals to adjudicate on civil matters emanating from Investigations by Special Investigating Units²⁶.

24 Such an approach was commended by a workshop on anti-corruption legislation attended by 120 MPs in Malawi in October 1995.

25 The Heath Commission in South Africa is an example.

26 Special Investigating Units And Special Tribunals Act 1996 (No. 74 of 1996)

To overcome both the problem of secrecy and of rules against self-incrimination, the following powers were conferred:

Powers of Special Investigating Unit

5. (2) Investigating Unit may-

- (a) through a member require from any person such particulars and information as may be reasonably necessary;
- (b) order any person by notice in writing under the hand of the Head of the Special Investigating Unit or a member delegated thereto by him or her, addressed and delivered, by a member, a police officer or a sheriff, to appear before it at a time and place specified in the notice and to produce to it specified books, documents or objects in the possession or custody or under the control of any such person: Provided that the notice shall contain the reasons why such person's presence is needed;
- (c) through a member of the Special Investigating Unit, administer an oath to or accept an affirmation from any person referred to in paragraph (b), or any person present at the place referred to in paragraph (b), irrespective of whether or not such person has been required under the said paragraph to appear before it, and question him or her under oath or affirmation.

(3) (a) The law regarding privilege as applicable to a witness subpoenaed to give evidence in a criminal case in a court of law shall apply in relation to the questioning of a person in terms of subsection (2): Provided that a person who refuses to answer any question on the ground that the answer would tend to expose him or her to a criminal charge, may be compelled to answer such question.

(b) No evidence regarding any questions and answers contemplated in the proviso to paragraph (a), shall be admissible in any criminal proceedings, except in criminal proceedings where such person stands trial on a charge of perjury or on a charge contemplated in section 319(3) of the Criminal Procedure Act, 1955 (Act No. 56 of 1955).

Money for nothing...

"Heath's unit, established at the beginning of last year, has so far uncovered theft of government assets, including land, cars and office equipment such as computers and funds of more than \$1.5 billion. And that, he says, using an African phrase, is "only the ears of the hippo."

"Administrative graft is not exclusive to the new South Africa. Cronyism and waste were hallmarks of the apartheid government which, says Tony Leon, leader of the opposition Democratic Party, "could give master classes, if not Ph.D.s, in the art of corruption." Heath's investigations, although concentrating largely on recent cases, go back as far as 1976.

"Some involve nefarious dealings in the so-called "independent" black states of apartheid South Africa, which have now been incorporated into the country's reorganised nine provinces. Lucas Mangope, 74, former president of one such state, Bophuthatswana, which was divided between the North-West province and the Free State in 1994, was last month found guilty of fraud and theft involving about \$760,000, including some \$400,000 of tribal money he put into his own bank account. But deep in the apartheid past the skulduggery was usually cloaked in secrecy. Now, the transparency of the new South Africa brings it alarmingly into the open."

Time Magazine, 10 August 1998

The Commission established under the 1996 Act headed by Judge Willem Heath, gained a high profile as it successfully recovered considerable sums of money from those who had accumulated them corruptly.

The Commission's Special Investigating Unit has jurisdiction to investigate:

- (a) Serious maladministration in connection with the affairs of any State institution;
- (b) Improper or unlawful conduct by employees of any State institution;
- (c) Unlawful appropriation or expenditure of public money or property;
- (d) Unlawful, irregular or unapproved acquisitive act, transaction, measure or practice having a bearing upon State property;
- (e) Intentional or negligent loss of public money or damage to public property;
- (f) Corruption in connection with the affairs of any State institution;
- (g) Unlawful or improper conduct by any person which has caused or may cause serious harm to the interests of the public or any category thereof.

In undertaking these tasks, the Commission has powers to:

- (a) Investigate all allegations regarding the matter concerned;
- (b) Collect evidence regarding acts or omissions which are relevant to its investigation and, if applicable, to institute proceedings in a Special Tribunal against the parties concerned;
- (c) Present evidence in proceedings brought before a Special Tribunal;
- (d) Refer evidence regarding or which points to the commission of an offence to the relevant prosecuting authority.

Upon the conclusion of an investigation, the Commission submits a final report to the President. It is also required to submit a report to Parliament on investigative activities, composition and expenditures of the Unit, at least twice a year.

The Unit applies a multi-disciplinary approach for conducting an investigation. The team preparing for an investigation usually consists of senior and junior investigators, auditors, accountants, lawyers, and if necessary Information Technology experts. All investigations are conducted with the view of a civil court action before the Special Tribunal. The Unit institutes a typical civil action in the Tribunal or brings an application for an order with similar but shorter procedures than those instituted in the High Court.

A major percentage of the cases dealt with by the Unit consist of actions to prevent the loss of State assets or the protection of State assets or money. The Unit has the power to apply to the Special Tribunal for an interdict or an Attachment Order to intervene and stop the loss of State assets (about to occur) or to freeze misappropriated assets out of the possession of State Institutions. An example of an order interdicting a transaction is where the State has entered into a contract without complying with the procurement requirements. The implementation of such a contract is then stopped pending an investigation. An example of an Attachment Order is where a person has stolen a State cheque, cashed and deposited it into a bank account. The money is then frozen or attached pending the outcome of the investigation. This has become a very useful weapon in the case of money laundering.

In cases of extreme urgency the Head of the Unit, a Judge of the Special Tribunal, is entitled to issue an Suspension Order or an Interdict. Such an Order must be confirmed within 48 hours after it has been issued.

The concept of the Unit to recover and protect State assets from a civil point of view is unique in the world, and its achievements show that the concept is a considerable success.²⁷ It has also drawn criticism from some politicians, illustrating the need for any such Unit to enjoy a high level of public confidence and accountability if it is not to risk having its wings clipped.²⁸

"Qui tam" actions²⁹

An approach that has not as yet received extensive emulation, but which may be worthy of consideration by others, is that of the "qui tam" action. Its roots lie in mediaeval England as

27 In October 1999, Judge Willem Heath reported to the International Anti-Corruption Conference in Durban that the Unit had approximately 220,000 cases under investigation at the time, and during the period January 1998 to March 1999 the Unit saved, protected or recovered State assets or State money to the value of R1,35 billion.

28 This section draws from Willem Heath, Civil Process to Combat Corruption, a paper prepared for the 9th IACC, Durban, South Africa, 13-14 October 1999: <http://www.transparency.org>. Since

the Durban Conference, tensions between the Commission and some politicians, and apparent resentment among the judiciary, has led to the functions of the Commission being severely curtailed. The experience of the Commission seems likely to become a case study in the difficulties a successful initiative can encounter, and from the most unlikely sources.

29 Shorthand for "qui tam pro domino rege quam pro se ipso in haec parte sequitur" (who brings the action for the king also does so for himself).

early as 1424, where someone who uncovered evidence of illegal conduct was rewarded with a share of the penalties paid by the wrongdoer. Early in its own life, the US Congress imported the notion into almost all of the first 14 American statutes which imposed penalties.

The present-day US False Claims Act³⁰ had its origins in the American Civil War, where the large-scale fraud of government contractors cheated the Union out of resources it could ill afford to lose. Congress and the President sought to enlist the support of private individuals in the struggle to root out fraud and swell the state's coffers.³¹

Quite simply, the government had neither the time nor the resources to address the issue effectively, and by empowering members of the public to act in its name (and share in the proceeds recovered) they increased the risk factor, unlocked private enthusiasm and, ultimately, recovered billions of dollars which would otherwise have been lost to the state. This would seem to be an attractive position to governments who find themselves in the same position today.

The approach has been strengthened over the years, and in 1986 Congress described it as the Government's "primary litigative tool for combating fraud." Similar provisions also apply in other federal statutes, such as the area of patent infringement.

The US False Claims Act creates a civil liability where false transactions have taken place (which capture deliberate ignorance and reckless disregard of truth or falsity as well as actual knowledge), and there is no requirement of an specific intent to defraud. As the court actions are civil in nature – not criminal – the facts do not have to be established "beyond reasonable doubt" but to the slightly lower standard applicable in civil cases.

Defendants face a minimum penalty of \$5000 for every separate false claim, plus three times the amount of damage caused to the Government by the defendant's acts.

"Qui tam" actions can be started by individuals (they do not have to wait for the Government to take action) and there are protections for whistleblowers to safeguard them against reprisals. The Government is served with copies of the proceedings and has 60 days in which to decide whether the Department of Justice would intervene and take over primary responsibility for conducting the action. Even where it does, the original claimant has a right to remain as a party to the action, so it cannot be settled without the originator being heard on the issue. At the end of the day a successful private claimant receives either 10 per cent of the sum recovered (where the government takes the action over), or 25 per cent (where it has not).

There are safeguards against frivolous claims. The Government can intervene and settle the claim, or else can ask the court to strike it out. The court can also restrict the originator's part in the litigation where unrestricted participation would be for the purposes of harassment. And where the claim fails because the claim was frivolous or vexatious, the court may award reasonable legal fees and expenses against the claimant. Some claimants have received million-dollar awards, and the resulting publicity may encourage others to come forward.³²

D. AMNESTIES – DEALING WITH THE PAST

About the most unpopular thing an administration can do is to grant an amnesty to those who

30 U.S.C. §§ 372-933.

31 John C. Kunich, *Qui Tam: White Knight or Trojan Horse*, (1998) 33 AFRLR 31.

32 *Ibid.* For example, in 1994 Teledyne Industries settled a claim relating to the false certification of electronic switches supplied

to the US military. Two former employees filed suit and received \$18.5 million as their share of the settlement of \$112.5 million. "Teledyne to pay \$112 million in two whistle-blower suits", LA Times, 22 April 1994.

have abused positions of public trust. Yet the question of “How to cut the Gordian knot?” is as crucial as it is a vexed one.

In countries where corruption is endemic, the present can be the captive of the past. The rich and powerful may feel threatened and may be in a position to block – or at least blunt – efforts to reform. Corrupted systems may be capable of reform on paper, but corrupt individuals can thwart the best intentions of reformers.

An oligarch pleads for amnesties...

Russian tycoon Boris Berezovsky called for an amnesty on misdeeds relating to a chaotic and often corruption-tainted sell-off of state assets, saying the arrest this week of a Moscow media magnate showed that Russia needed a clean slate to protect a post-Soviet division of property... “Everybody who has been in business over the last 10 years may be a victim of this system,” said Mr. Berezovsky... “We need to find a solution. The solution is amnesty for initial capital. We need to finalise the story of what happened.”... He said that the absence of clear rules governing business in the early stages of reform and frequent changes in the law since had pushed businessmen into a grey area and left them vulnerable to prosecution if they fall foul of the Kremlin... All Russian businessmen, he said, risk imprisonment.

Wall Street Journal, 16-17 June 2000

In several countries there are continuing debates about how to treat the past when the time for political change arrives. Can that time can be brought forward by providing a scenario in which corrupt politicians in power are more likely to be prepared to step down? Those in power may feel the need for guarantees that their future, out of power, is relatively secure.

There are several reasons why an amnesty approach of sorts could be justified, however unpalatable it may be. Firstly, in a new moral climate under changed rules and with different expectations, it is perhaps not right that acts undertaken in the old and very different moral environment should be judged by these “new” (or revived “old”) standards.

Secondly, public awareness and expectations that something effective might at last be done about corruption is likely to result in a spate of allegations that can overwhelm the institutions designed to handle them.

Thirdly, the political will to defeat corruption may well be at risk of being undermined by those in positions of influence who could be adversely affected by competent anti-corruption action.

Amnesty, reconciliation or other ways of dealing with the past outside the traditional criminal justice system may be especially advisable if:

- the Government is about to create a new anti-corruption agency;
- corruption has been or still is systemic and the number of outstanding cases are likely to paralyse the new agency;
- a significant proportion of the public servants were forced, because of low salaries to use petty corruption in order to survive (a consideration which cannot be applied to those who perpetrate “grand corruption”); or,
- there has been a need to broker an arrangement with a corrupt administration as a basis for it surrendering power.

The options are limited:

- (a) to declare an “amnesty” to the effect that matters occurring before a certain date will not be investigated;
- (b) to initiate a “truth and reconciliation” process by which those coming forward within a certain time and who publicly admit their past acts of corruption will not be prosecuted;
- (c) to restrict the use of new powers of investigation to investigating matters occurring only after a certain date (and new offences will, of constitutional necessity, only be effective from the time the laws are made, as they cannot be back-dated); or,
- (d) simply do nothing in the hope that all allegations can be investigated to the general satisfaction of the public.

What would each of these options entail?

(a) Should there be an amnesty?

If it is decided to adopt this course, then it is essential that the people understand and appreciate the reasons behind this; and that the amnesty provision be set out carefully in a written law. Thus public awareness of the need for some sort of amnesty must be raised, and public discussion should precede the introduction of any law. If it is sprung on the public without first carefully preparing the ground, people are likely to suspect the worst and to take to the barricades – quite literally.³³

To any general amnesty there may need to be exceptions – both to allow monstrous behaviour which subsequently comes to light to be investigated and punished, and to make the whole concept of the amnesty more palatable to the general public. If there are to be exceptions, then the mechanism used to decide which cases do, and which cases do not, deserve amnesty, must be one the people have confidence in – and the decision should be final. The mechanism should be judicial in nature, and not be in the hands of politicians (who are unlikely to be trusted to administer it fairly).

If amnesties are to be conditional or granted on an ad hoc basis, any amnesty committee should comprise only people of high integrity who enjoy public trust. All allegations referring to cases of corruption before the date, should be analysed by the committee and then either forwarded for further investigation or filed.³⁴

(b) Initiate a “truth and reconciliation” process

The ICAC in New South Wales (Australia), another of the world’s leading anti-corruption agencies, has for some years been empowered to hold public hearings. Witnesses are summonsed to give evidence and although their evidence cannot be used against them in criminal proceedings, the hearings provide an opportunity to enlighten the public as to precisely what has been taking place. For example, one such inquiry into abuses of travel privileges by elected Members of the State Legislature, led to greater clarity in procedures and higher standards of conduct by those concerned.³⁵

If the intention is to provide a forum for the “naming and shaming” of public officials and to provide an opportunity for them to clear their pasts but with an element of retribution that the public finds acceptable, then this course might be a possibility. Of course, the situation is qualitatively quite unlike the operations of the Truth and Reconciliation Commission in South Africa. It was dealing with human rights abuses, and was not faced with miscreants who were still holding on to the profits of their crimes.

(c) Restrict the use of new powers of investigation

From a pragmatic point of view, there is a real danger that a new anti-corruption authority will be overwhelmed by numerous complaints about old matters. That it will simply not be able to cope with the volume. Attempting to deal with old matters, too, will absorb resources and restrict the agency’s capacity to investigate allegations of new corruption.

How to make the best use of available resources in terms of addressing present and future alle-

33 The whole anti-corruption drive in Hong Kong, today hailed as one of the few successes in modern times, nearly came to a halt before it had begun. When the new anti-corruption agency was set up, police went on strike, fearful that they would be its target. The government then issued a law granting an amnesty, and this provoked street riots. The final position was that serious cases could still be proceeded with, a police chief was

extradited and jailed, and public discontent subsided.

34 The analysis is by Bertrand de Speville in *Amnesty, Reconciliation and Other Alternatives of Dealing with the Past*, UNCICP Experts Meeting, Vienna, 13–14 May 2000.

35 See *Corruption Matters: February/March/1999* No. 11, NSW ICAC publication at <http://www.icac.nsw.gov.au>.

gations, as opposed to old ones, should be considered carefully. If a new leaf is being turned, any agency must be able to follow up fresh allegations swiftly and effectively.

A provision such as the following could be included in the new law:³⁶

Investigation of pre-[date] offences

- (1) Notwithstanding section [...], the [anti-corruption authority] shall not act as required by that section in respect of alleged or suspected offences committed before [date] except in relation to –
 - (a) persons not in [the country] or against whom a warrant of arrest was outstanding on [date];
 - (b) any person who had been interviewed by an officer of police or of the [anti-corruption authority] and to whom allegations had been put that he had committed an offence referred to in this [law];
 - (c) an offence which the [defined and established committee] on reference by the [head of the anti-corruption authority] considers sufficiently serious to warrant action.
- (2) A certificate under the hand of the chairman of the committee stating the fact that the committee considers an offence sufficiently serious to warrant action shall be conclusive evidence of that fact.
- (3) The decision of the committee under subsection 1(c) shall be final and not liable to being questioned in any legal proceedings.

Without the exceptions the provision would read:

Notwithstanding section [...], the [anti-corruption authority] shall not act as required by that section in respect of alleged or suspected offences committed before [date].

(d) Simply doing nothing

The final option is to do nothing: simply to let the past take care of itself. This leaves a cloud of uncertainty and does not establish clear and transparent guidelines to which new or revived agencies would be working. It leaves the public at a loss to know precisely what is going on and whether political will really exists. It is tempting, it certainly minimises obstruction by the powerful corrupt from the immediate past, but it is also arguably the most risky strategy of them all.

Some indicators for assessing the effectiveness of criminal and civil laws

- Does the criminal law provide for the following six basic offences:
 - bribery of public servants (including judges, Members of the Legislature and Ministers)?
 - soliciting or the accepting of gifts by public servants?
 - abuse of a public position for personal advantage?
 - possession by a public servant of unexplained wealth (or of living beyond one's official salary)?
 - secret commissions made to or by an employee or agent (covering private sector corruption)?
 - bribes and gifts to voters?
- Does the criminal law adequately cover the worst types of corruption and provide a deterrent to would-be corrupt officials? If not, in what ways is it failing (distinguishing failings in actual laws as opposed to failings in the institutions responsible for their enforcement)?

³⁶ Draft by Bertrand de Speville, *ibid.* An adaptation of the Hong Kong provision.

- Are existing laws adequate to move against the illicitly acquired property of corrupt officials?
- Are the criminal laws being applied fairly, or selectively?
- Does the general public see all persons as being equal under the criminal law? Or, are some categories of officials seen as being exempt?
- Are some matters that are presently being dealt with as criminal matters, that could be dealt with more effectively with the imposition of an administrative penalty?
- Is the law on corrupt payments clearly understood? Is it adequate? Is it enforced? If not, why not?
- Are the remedies available to private citizens and the corporate sector adequate when it comes to coping with the consequences of corruption?
- Are claims by family members being used as shields to protect illicitly-acquired wealth from legitimate claims by the state?

