

## Corruption

Claes Sandgren

### *Defining Corruption*

Among the various types of corruption, the most conspicuous type is *petty corruption*, e.g., bribes to policemen, customs personnel, medical doctors, and teachers. *Grand corruption* signifies bribes given in connection with big projects, for instance, infrastructure projects or arms sales. *Political corruption*, which is defined as abuse of entrusted power by political leaders for private gain, is a type of grand corruption that is serious because it may erode democracy.<sup>1</sup> A special category of political corruption is *state capture*, which implies that a company influences the legislation of a state, institution or the governmental policy in an entire area, for instance, the environment, taxation, or mining. State capture is common in small countries where a financially strong business group could influence state policy and favor its interests or stakeholders, such as political parties.

Corruption always includes a private party at the supply side, such as a company bribing a public official in order to gain some benefit. But corruption may also include “private-to-private” transactions, for instance, a company bribing an employee of another company in order to gain some benefit.

For any program to reduce corruption, it is important to distinguish between endemic and sporadic corruption. The former type is at hand when corruption is an integrated aspect of the system and the major institutions and practices are routinely dominated and used by corrupt individuals and groups, and when most people have no alternatives to dealing with corrupt officials. Obviously, endemic corruption is the type that is most damaging and difficult to combat. It is therefore this type that deserves the greatest attention and, hence, it will be the focal point of this article. Sporadic corruption does not threaten the mechanisms of governance or the economy as such; however, even though it is not crippling in this sense, it must not be tolerated.

The concept of corruption is amorphous, varying as it does from one country to another. Corruption has become a generic term for a variety of bad phenomena in the public sector. In many countries, almost any encroachment on state property is labeled as corruption.

Because of this, there is no generally accepted definition of corruption. Transparency International has a definition that has gained wide usage: “abuse of public power for personal gain.”<sup>2</sup> The World Bank uses a similar definition: “misuse of public power for private or political gain.”<sup>3</sup> These definitions are wide: just about any acts committed by an official could be corruption if they benefit him or her personally. They exclude misuse within the private sector, such as bribing the employees of companies; but, they include misuse in favor of political parties, for instance, benefits for such parties or persons associated with political parties.

It is no great problem for an economic analysis of corruption to use a rather vague concept of corruption. The two definitions mentioned have received wide usage but have the disadvantage of being rather broad, including various types of misappropriation of public property, but also narrow in the sense that “private-to-private” transactions are excluded. Definitions of a legal character ought to be more precise, making clear that corruption is related to the bribing party’s intention to influence the recipient’s decision-making, thus

---

<sup>1</sup> J. S. Hellman & D. Kaufmann, *The Inequality of Influence*, in BUILDING A TRUSTWORTHY STATE IN POST-SOCIALIST TRANSITION 100 (J. Kornai & S. Rose-Ackerman eds. 2004).

<sup>2</sup> See [http://www.transparency.org/news\\_room/faq/corruption\\_faq](http://www.transparency.org/news_room/faq/corruption_faq).

<sup>3</sup> See <http://www.worldbank.org>.

excluding all kinds of misappropriations that do not involve an external private party, e.g., embezzlement of public property.

Bribery is by definition corruption, but the concept of bribery varies much from one jurisdiction to another.<sup>4</sup> Bribery that refers to the offence committed by the person on the supply side of the corruption may be defined as “the promising, offering or giving by any person, directly or indirectly, of any undue advantage...for himself or herself or for anyone else, for him or her to act or refrain from acting in the exercise of his or her functions.”<sup>5</sup> On the other (demand) side, accordingly, bribery is “the request or receipt...directly or indirectly, of any undue advantage, for himself or herself or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in the exercise of his or her functions.”<sup>6</sup>

The International Chamber of Commerce (ICC) has a similar definition of bribery that also equals behavior on the demand and the supply sides, but it makes a distinction between “solicitation” and “extortion” of bribes: Extortion exists when the demanding of a bribe is coupled with a threat if the demand is refused.<sup>7</sup>

A more detailed definition reads as follows:

Whenever a public officer or other agent accepts or solicits a bribe, or any person gives or promises a bribe to such a public officer or other agent; provided, however, that the purpose of the bribe is to serve as a reward to the public officer or agent for an act that he has done or refrained from doing in the exercise of his functions, or as an inducement designed to ensure that the public officer or agent does, or refrains from doing, any act, in the exercise of his function.<sup>8</sup>

Differing legal concepts are used in different countries, but also within countries. For instance, the concept used in legislation against corruption is often much narrower than the concept used to lay down the mandate of special bodies set up with the task to fight corruption. In some jurisdictions, the concept of corruption is very narrow and some jurisdictions do not have the crime corruption/bribery at all which does not mean, however, that acts, typically regarded as corruption, are lawful.

It should be noted that there might be a case of corruption even if the official acts in full compliance with his duties and takes the measures he would have taken even in the absence of the payment. In other words, if the parents of a child pay a school administrator to admit the child into a school, this is normally corruption, regardless of whether the child would have been admitted anyway.

In many countries, a distinction is made between the public and the private sectors in so far as a private employee's abuse of his position for personal gain is not regarded as corruption. The reason for this differentiation, which excludes “private-to-private” corruption, is most likely that a civil servant's abuse damages faith in public institutions. Another reason is the fact that public property is regarded as more worthy of protection than private property. None of these arguments seems to be convincing. Trust in the private sector is a societal interest. The latter argument might be a reversion of the view in the former Communist

---

<sup>4</sup> For a thorough review of national and supranational law with emphasis on criminal law *see* PRIVATE COMMERCIAL BRIBERY: A COMPARISON OF NATIONAL AND SUPRANATIONAL LEGAL STRUCTURES (G. Heine, B. Huber & T. O. Rose eds. 2003) ICC Publication No. 953.

<sup>5</sup> Council of Europe, Criminal Law Convention on Corruption, ETS No. 173 (1999), Art. 2.

<sup>6</sup> *Id.* at art. 3.

<sup>7</sup> INTERNATIONAL CHAMBER OF COMMERCE, COMMISSION ON ANTI-CORRUPTION, COMBATING EXTORTION AND BRIBERY: ICC RULES OF CONDUCT AND RECOMMENDATIONS (2005), at art. 1.

<sup>8</sup> W. PAATI OFUSU-AMAAH, R. SOOPRAMANIEN & K. UPRETY, COMBATING CORRUPTION: A COMPARATIVE REVIEW OF SELECTED LEGAL ASPECTS OF STATES PRACTICE AND MAJOR INTERNATIONAL INITIATIVES 63 (The World Bank 1999).

countries that an attack on public property was an attack on the system. However, a tendency can be noted whereby more and more countries penalize the solicitation or acceptance of bribes by private employees, which international conventions have promoted.

Corruption signifies that an individual, group, or entity receives an advantage. It is not corruption if the state or the general public receives some advantage. For instance, corporations frequently attach conditions to their decisions to invest in a country, such as conditions that the host country invest in infrastructure or change its taxation policy. Such conditions are sometimes labeled as corruption, or *state capture*, but they are not contrary to any of the conventions on corruption.

The root cause of corruption is human greed. There are circumstances that directly create opportunities for corruption: state monopolies, regulations, need for official permits, decisions to make public investments, procurement, etc.

There are other circumstances that facilitate corruption: the reward structure and bureaucratic traditions that favor recruitment or promotion of officials on arbitrary grounds. The ineffectiveness of accountability systems is another facilitating factor. Lack of transparency, discretionary powers for officials and room for arbitrary decisions impede accountability. A low probability of being exposed and lenient consequences if an official does get caught are also part of an inadequate accountability system. A third factor is the leadership. Corruption will thrive in the absence of a political leadership strongly committed to anti-corruption activities.

As we see, there will be opportunities for corruption in any system. As a matter of fact, the cleanest countries, like the Nordic ones, offer ample opportunities for corruption. These opportunities cannot be eliminated unless the state abdicates from its vital functions. The fact that many countries are relatively clean is in other words not because the opportunities for corruption are small. On the contrary, public procurement occurs on a large scale, the societies are heavily regulated, a number of subsidy schemes are in operation, and there are state monopolies, as well as other factors.

Corruption causes great damage to a society.<sup>9</sup> A high level of corruption reduces investment and the inflow of capital. The Global Competitiveness Report 2006-2007 summarizes the current thinking about growth and competitiveness. It stresses *inter alia* that “[c]orruption leads to resource misallocation as funds are no longer directed toward their most productive ends, but are instead captured for private gain. It undermines the credibility of those who are perceived as being its beneficiaries (e.g., public officials, government ministers, and business leaders) and thus sharply limits their ability to gain public support for economic and other reforms.”<sup>10</sup> The result is a reduction of investment, inflow of capital and economic growth.<sup>11</sup>

Corruption is also unfair. A company that wins a contract using bribes is not acting fairly and is distorting competition. Corruption is also unfair to the lower classes of society, because it reduces funds available for social sector spending and because it costs them relatively more to pay bribes for societal services such as medical care and schooling for their children. Where corruption reigns, basic human rights come under threat. Corruption is one of the main obstacles to sustainable pro-poor development.

---

<sup>9</sup> In general concerning the consequences, see UNITED NATIONS DEVELOPMENT PROGRAMME, ANTI-CORRUPTION 3 (February 2004).

<sup>10</sup> The Global Competitiveness Report 4 2006-2007, available at <http://www.weforum.org/en/initiatives/gcp/Global%20Competitiveness%20Report/index.htm>

<sup>11</sup> D. Kaufmann, *Anticorruption Strategies: Starting Afresh? Unconventional Lessons from Comparative Analysis*, in CURBING CORRUPTION: TOWARD A MODEL FOR BUILDING NATIONAL INTEGRITY 45 (R. Stapenhurst & S. J. Kpundeh eds. 1999).

Besides, corruption renders government regulation ineffective, because it generates non-compliance with requirements for safety, public health and environmental protection and it generates tax evasion. Thus, corruption increases inequality and creates inefficiency. For this reason, corruption damages the legitimacy of a regime whatever its type of governance, democratic or one-party.

Previously, the view prevailed that it was not possible to measure corruption and consequently not possible to know the volume of corruption. But Transparency International and various other institutions have now been able to fashion instruments that allow for a reasonably reliable measurement of the magnitude of corruption in various sectors and countries and, in particular, of the magnitude of perceived corruption.<sup>12</sup> Surveys of firms, public officials, and individuals provide views of stakeholders. Countries' institutional features provide indications of the possibility of corruption. Audits of development projects may also provide useful information.

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

### *Measures Against Corruption*

To address corruption effectively, conventional wisdom holds that a so-called holistic approach is needed. It examines all regulations, policies and institutions that are relevant to maintaining an honest government and private sector and political, economic and legal reforms are combined. Besides public institutions, the private sector is included, as are non-market institutions. In reality, however, such an approach becomes burdensome and hardly feasible. It is necessary to make priorities and to identify entry points. This explains why an anti-corruption program must be adapted to the conditions of each country. The feasibility of a given approach and the availability of potential entry points will not be the same in all countries.

A strategy to fight corruption must take aim at the system of governance. The higher the incidence of corruption the more the strategy should focus on the broad underlying features of the governance system,<sup>13</sup> e.g., by building the rule of law and strengthening institutions of accountability. The main issue is: how can weak states bring about fundamental change of their system of governance in terms of control and sharing of power (accountability), openness, public attitudes, citizen influence, trust in public institutions, etc.?<sup>14</sup>

Bringing about such change is no easy feat. It means challenging influential forces in society, in the first place such forces within the state, which benefit from the corruptive practices. State officials and state institutions that subsist on bribes are supposed to combat that practice. These officials and institutions are asked to combat themselves. This is why institutions most in need of anticorruption programs are the institutions least likely to initiate

---

<sup>12</sup> The World Bank, in particular, has considerably refined the methods. See THE WORLD BANK, A DECADE OF MEASURING THE QUALITY OF GOVERNANCE: GOVERNANCE MATTERS (2006) available at [www.worldbank.org/wbi/governance](http://www.worldbank.org/wbi/governance).

<sup>13</sup> A. SHAH & M. SCHACTER, COMBATING CORRUPTION: LOOK BEFORE YOU LEAP, FINANCE & DEVELOPMENT 40, n. 42 (December 2004).

<sup>14</sup> See e.g. M. Johnston & A. Doig, *Different Views on Good Government and Sustainable Anticorruption Strategies*, in CURBING CORRUPTION, *supra* note 8, at 13.

such programs. It is easier, though, if there are “key champions,” persons who really want change, who are frustrated and prepared to fight for that change.

Corrupt countries often have a weak and overburdened state, including a weak and overburdened legal system; a state cannot fulfill its functions and cannot control its own officials. Consequently, the weakening of a state is not the solution to corruption. On the contrary, the state should be reinforced, which does not mean it should become bigger, but rather more effective in fulfilling its core tasks, for instance, the functioning of its legal system. The underlying institutional weaknesses must be addressed.<sup>15</sup> Such systemic change requires political commitment, preferably non-partisan, a leadership that exerts pressure from above and sets a good example.

Corrupt states are in many instances top-heavy with the power in the hands of a few. Popular acceptance of corruption is a powerful ally of corruption. That acceptance can be broken only if people are made aware of the societal costs that corruption causes and of what can be feasibly done about it. There must be pressure from below.

The spread of corruption and its negative effects have received enormous publicity thanks to efforts by various organizations such as Transparency International, Global Forum and others. Democratization has facilitated these efforts and the use of the Internet has been crucial to the spread of knowledge. Transparency International's Index, which has been publicized since 1995, has had a great impact. Governments worry about how they fare in this index, which is used by media and NGOs. TI publishes a Bribe Payers Index (BPI) as well, which gives an account of the likelihood that companies in industrialized countries pay bribes.

Quite a number of other organizations also influence public opinion. One example is Global Compact, an international network formed under the auspices of the UN in 2002. Its purpose is to promote corporate responsibility in the world. At the time of its founding, Global Compact adopted nine principles for its work (on human rights, labor conditions and the environment). It is a sign of the times that a tenth principle was added in 2004, namely the fight against corruption.<sup>16</sup> The creation of a number of international conventions is also important for NGOs fighting corruption since these conventions are a powerful platform for their advocacy.

As stated above, many activities of a modern welfare state create opportunities for corruption, such as state subsidies, public procurement, regulation of business, high taxation, land use planning, construction standards, safety regulation, environmental protection, etc. The greater the state intervention in the economy is, the greater the opportunities for corruption. The ability of an official to provide a company protection in the market will depend upon the openness of the market to external (imports) and internal competition.

Accordingly, economists would stress deregulation, privatization, market entry to increase competition, macroeconomic soundness, etc., as ways to come to grips with the presumed “root causes” of corruption. They also stress tools such as public expenditure management and auditing functions. Much of the work of development institutions has such an orientation or at least the strategies of the institutions have such a focus.<sup>17</sup> These measures may be useful and make a difference, but economic reform cannot solve “the problem.” The economic solution requires a minimal state, because its pillars are deregulation, privatization and market openness. There is no doubt that many countries suffer from over-regulation and

---

<sup>15</sup> S. Rose-Ackerman, *Governance and Corruption*, in *Global Crises, Global Solutions* 309 (B. Lomborg ed. 2004).

<sup>16</sup> The Global Compact, *Corporate Citizenship in the World Economy* (United Nations September 2004); *see also*, The Global Compact, *Guidance Document, Implementation of the 10th Principle against Corruption* (December 2004).

<sup>17</sup> *See e.g.*, R. KLITGAARD, R. MACLEAN-ABAROA & H. LINDSEY PARRIS, *CORRUPT CITIES* 31 (World Bank Institute 2000).

inefficient state monopolies and that these should be reduced. But a modern welfare state will always need the types of activities mentioned.

It is not easy and unnecessary to keep apart legal, economic and institutional reform. In fact, many institutional and economic reforms are legal reforms. Restructuring of the state business sector often emerges thanks to reform of bankruptcy legislation, to give just one example. It is rather a matter of perspective. As was seen, legal matters have a prominent place also in the preceding sections. In the remaining part of this article, the legal system will, however, be center-stage, that is, the perspective will be legal.

Accountability, which includes political, administrative and financial accountability, is one of the key aspects of an efficient legal system.<sup>18</sup> Emphasis should be put on systemic reform rather than on individuals' performance, in other words, on measures that improve institutions, including the culture of institutions. Institutions must have a rigorous internal control of high integrity and independence. Whistleblowers should not only be tolerated but also protected and encouraged. The ordinary citizen needs access to an effective complaint mechanism (and procedures for appeals) to be able to avoid involvement in corrupt practices. The independence of the judiciary must be coupled with the accountability of prosecutors and judges.

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

Public procurement practices deserve special attention.<sup>19</sup> Tendering companies should be given a possibility to inspect tender documents once the procedure is concluded and reasons for procurement decisions should be put forward. Price comparisons of similar projects in different countries, so-called benchmark cost estimates, may reveal cost increases due to bribes.

### *The Role of the Business Sector*

Most measures directed against corruption take aim at conditions in the countries that have a high level of corruption. However, the supply side, corporations and interest groups in the industrialized world who pay bribes, must be dealt with as well. Much of *grand corruption* in the south and east has its roots in these countries, for instance, corruption related to arms sales, extraction of oil and gas, as well as mining. The role of the supply side, the business sector, has increasingly come into focus. Measures should target this sector and "private- to-private" corruptive practices should be part of the anti-corruption campaign.<sup>20</sup>

Many small companies in the South and East operate in the informal sector. The grey zone between poorly working official rules and institutions on the one hand, and the informal law, on the other, is a breeding ground for corruption. Most companies prefer to rely on public rules and institutions, but if the state is incapable of enforcing its own rules effectively and impartially, bribes and private protection fill the void left by the inadequate state enforcement. The absence of the state, including the legal system, inhibits investments and transactions.

---

<sup>18</sup> Accountability is a key concern of most developmental institutions; see e.g. UNITED NATIONS DEVELOPMENT PROGRAMME, ANTI-CORRUPTION, *supra* note 9, at 3, n. 13.

<sup>19</sup> KLITGAARD, MACLEAN-ABAROA & PARRIS, *supra* note 17, at 101.

<sup>20</sup> The OECD and UN conventions have such an orientation and there are organizations, such as TI and the British DFID, which stress such an approach. Another example is the Extractive Industries Transparency Initiative (EITI) that promotes publication of payments to states and states' proceeds of extractive industries.

The elimination of barriers to the formal business sector would reduce opportunities for corruption and provide increased security and access to social security systems.

In addition to the official regulation of business, there is a need for corporate codes of conduct, which among other things may promote integrity in business practices. Such codes can be effective to the extent that they are embedded in the corporate culture and are not merely a piece of paper.

The ICC favors self-regulation. For this purpose it has issued guidelines, its first version being drafted already in 1977.<sup>21</sup> The ICC has also established a Commission on Anti-Corruption and published a handbook.<sup>22</sup> The distortion of competition caused by corruption is a major reason behind the action of the ICC. The World Economic Forum has taken an initiative as well, called Partnership Against Corruption Initiative (PACI). This initiative, which was launched in 2004, builds on TI's Business Principles for Countering Bribery (BPCB). In addition, TI has elaborated an Integrity Pact (IP), which seeks to counteract corruptive practices with respect to public procurement.

### *1. Tax Administration*

Corruption is an effect of a weak state and a state is weak if it lacks resources. A state cannot function if it is unable to collect taxes.<sup>23</sup> Without resources a state cannot pay reasonable salaries and cannot maintain effective public institutions, for instance, provide adequate premises or equipment for law enforcement agencies. For revenue collection to be effective, the tax authorities must be clean and act in accordance with the rule of law. The willingness of people to pay taxes depends on their faith in the tax administration. In many cases this is where an anti-corruption program should start.

### *2. Criminal Law and Other Sanctions*

In order to effectively combat corruption, it is necessary to focus on the workings of institutions, not individuals. This is not to deny, however, that the prosecution of corrupt individuals' activities—and associated activities, for instance, money laundering—may give a strong signal, in particular if high-level politicians, public officials or business executives are charged. However, collusive corruption, for instance, bribes paid in a tender procedure, is more difficult to detect than *extortive corruption*. Charging high-level individuals with collusive corruption increases the trust of ordinary people in the system and consequently their support in the fight against corruption.

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

### *3. Legislation and Legislative Technique*

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

---

<sup>21</sup> *Supra* note 6.

<sup>22</sup> ICC, FIGHTING CORRUPTION, A CORPORATE PRACTICAL MANUAL (2003, 2d ed.).

<sup>23</sup> Rose-Ackerman, *supra* note 15, at 328.

### *Framework to Combat Corruption*

A weak legal system is conducive to corruption but, also, corruption weakens the legal system. There is a causal relationship both ways. Clean countries have good legal systems and good systems of governance.<sup>24</sup> They do not necessarily have harsh penal law systems, but an effective penal law system is an integral part of good governance.

There is a broad consensus about the importance of an efficient and independent *judicial* system (prosecutors and judges), which should be the ultimate warrant for fairness and justice. Firstly, it matters significantly for productivity whether firms are able to resolve legal disputes through a system that operates transparently, with reasonable speed, and without delivering outcomes reflecting vested interests. Secondly, the judicial system is a key part of a legal system in charge of the campaign against corruption. In other words, corruption in the judiciary has a dual negative effect.<sup>25</sup>

Corruption within the *law enforcement* administration—police, debt enforcement, penitentiary system, customs, tax administration, coastal administration, etc.—as well as public institutions overseeing this administration, is devastating for the efficacy of the campaign against corruption, since the existence of corruption is so closely related to lack of accountability.<sup>26</sup> One cannot expect low-ranking officials to be loyal to the system unless they have faith in it and see that their efforts make a difference.

There is a need for legal rules and devices to counteract corruption: rules about openness, checks and balances, a merit-based system for officials, privatization, independence of media, access to the Internet, tender procedures, the right to establish a business, protection of property, basic liberties to, for instance, organize meetings, reform of taxation, competition, etc. These rules are necessary elements for containing corruption, but most of them have no direct bearing on corruption as such and few persons, lawyers included, would associate these legal rules with the fight against corruption. Many of these measures could be parts of larger reform programs, such as civil service or financial management reforms. This legal fabric is vital to prevention of corruption as well as to law enforcement. In fact, prevention and enforcement go hand-in-hand. Most legal anti-corruption measures fulfill both functions.

Over the last decade a number of conventions have been agreed upon. This development reflects an increased awareness of the detrimental effects and trans-boundary character of corruption and of the possibility to fight it.<sup>27</sup>

The United Nations Convention Against Corruption (UNCAC) was adopted on 31 October 2003 and entered into force on 14 December 2005.<sup>28</sup> It is the only convention that is truly global because it is open to all states and regional economic organizations. It sets a standard for what states should do in the areas of criminalization and prevention of corruption, as well as asset recovery. Also, it stresses the need for international co-operation in cases of cross-border corruption activities. However, many provisions are not mandatory, which undermines the ambition to develop common standards world-wide.

---

<sup>24</sup> The Global Competitiveness Index, in measuring the effectiveness of public institutions, uses five criteria, all more or less related to the legal system. These criteria are: 1. Respect for property rights; 2. Respect for ethics of government behavior and the prevalence of corruption; 3. Independence of the judiciary; 4. Waste of public resources and a heavy regulatory burden; 5. Adequate levels of public safety.

<sup>25</sup> The Global Competitiveness Report, *supra* note 10, at 4.

<sup>26</sup> Rose-Ackerman, *supra* note 15, at 322.

<sup>27</sup> Detailed information on the conventions may be found at the homepages of the organisations mentioned in relation to each convention. The homepages of various non-governmental organisations also contain valuable information, for instance, the homepages of Transparency International, *available at* [www.transparency.org](http://www.transparency.org), and U4, *available at* [www.u4.no](http://www.u4.no).

<sup>28</sup> Dec. 9, 2003, G.A. res. 58/4, UN Doc.A/58/422 (2003).

The convention covers a wide range of offences, including domestic and foreign bribery, embezzlement, trading in influence, and money laundering. It covers not only public sector corruption but also recognizes the role of the private sector and of private sector corruption. This includes an obligation for states to provide for effective, proportionate and dissuasive civil, administrative or criminal penalties for the private sector and an obligation to establish accounting and auditing standards for the private sector and to eliminate the tax deductibility of bribes. A weakness of the convention is the lack of concrete provisions on monitoring and lack of resources for implementation.

The Inter-American Convention Against Corruption (OAS Convention) was the first international anti-corruption convention.<sup>29</sup> The OAS Convention, which covers corruption only in the public sector (supply and demand sides), embraces a wide interpretation of corruption offences, including bribery, domestic and foreign; illicit enrichment; money laundering and concealment of property. It provides for preventive measures, criminalization, regional assistance cooperation as well as recovery of assets. The preventive measures are numerous: public sector standards of conduct; declaration of assets; standards for hiring and procurement; government revenue collection and control systems deterring corruption; denial of tax deductibility of corruption-related expenditures; whistleblower protection; oversight bodies; books and records requirements for companies as well as internal accounting control requirements; mechanisms to encourage the participation of civil society; and denial of bank secrecy as a basis for refusal by a state to provide assistance sought by another state.

There is a fairly strict follow-up mechanism, including analysis of implementation by States Parties, and making non-governmental organizations and other actors of civil society part of the procedure.

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (The OECD Convention)<sup>30</sup> targets the supply side of the bribery of foreign public officials, both “bribery” and “foreign public official” being broadly defined. Its scope is restricted to public officials, thus excluding “private-to-private” bribery. It obliges the signatory states to make it a crime to pay bribes overseas, but not to receive bribes. It focuses on criminalization, mutual legal assistance, requirements regarding company accounting, and provides for civil sanctions, as well as effective, proportionate, and dissuasive criminal penalties.

The convention is characterized by its strict monitoring of member states’ compliance. The parties to the convention, which are required to monitor and promote the convention through the OECD Working Group on Bribery, review the states’ implementing legislation, as well as the effectiveness of the application and enforcement of this legislation. The Group adopts and publishes a report on the performance of each state evaluated.

The African Union Convention on Prevention and Combating Corruption (AU Convention)<sup>31</sup> represents the regional consensus on what African states should do in the areas of prevention, criminalization, regional cooperation, mutual legal assistance and asset recovery. It has a wide scope covering public and private sector corruption and a wide range of offences: domestic and foreign bribery; diversion of property by public officials; trading in influence; illicit enrichment; money laundering; and concealment of property. It provides, *inter alia*, for transparency in political party funding—the only convention to have mandatory provisions on this subject—protection of whistleblowers, declaration of assets by public

---

<sup>29</sup> Inter-American Convention Against Corruption, O.A.S. B-58, March 29, 1996, *entered into force* March 6, 1997.

<sup>30</sup> OECD, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and related documents, DAF/IME/BR(97)20, Nov. 21, 1997, *entered into force* Feb. 15, 1999.

<sup>31</sup> African Union Convention on Prevention and Combating Corruption, No. 26, July 11, 2003, *entered into force* Aug. 4, 2006.

officials, creation of codes of conduct for public officials and restrictions on immunity for such officials, access to information for the media and broad jurisdictional rules.

The convention has a broad range of mandatory provisions, but reservations are allowed. The implementation has some apparent weaknesses: there is no provision on sanctions, no real peer review mechanism is envisaged, and resources for follow-up are lacking.

The Council of Europe Criminal Law Convention on Corruption (CoE Criminal Convention)<sup>32</sup> is open not only to the member states of the Council of Europe but also to the European Community, as well as Belarus, Canada, the Holy See, Japan, Mexico, and the USA.

The convention covers public sector as well as private sector corruption (private-to-private) and a broad range of criminal offences, encompassing not only bribery of domestic and foreign public officials, but also international public officials. It includes a regional cooperation framework for mutual law enforcement assistance, including extradition, investigations, confiscation and seizure of proceeds of corruption, as well as restrictions on the use of banking secrecy. It requires specialized anti-corruption authorities and the protection of whistleblowers and witnesses.

It provides for corporate liability and requires effective, proportionate and dissuasive criminal penalties or, for legal persons, at least effective non-criminal sanctions. There is a monitoring mechanism, GRECO, which monitors the compliance of States with their undertakings in the field of corruption, *inter alia* their undertakings under the two CoE conventions.

The Council of Europe Civil Law Convention on Corruption (CoE Civil Convention)<sup>33</sup> is open basically to the same states and parties, which may join the CoE Criminal Convention. The convention covers public sector and private sector (private-to-private). It is the first international instrument to define common rules in the field of civil law and corruption. It is unusual in the sense that all provisions are mandatory and no reservation may be made in respect of any provision in the convention. It has the same monitoring mechanism as the CoE Criminal Convention and no reservation may be made in respect of any provision in the convention. The convention provides for remedies for persons who have suffered damage as a result of acts of corruption, including compensation for a broad range of damages and it requires that states are liable to compensate for the corrupt act of a public official. It also requires that “corrupt contracts” be held void and that measures be taken that ensure that accounts present a true and fair view of the company’s financial position and that auditors be required to confirm this. It further requires effective procedures for acquisition of evidence in civil cases of corruption and provides for international cooperation in such cases, including the obtaining of evidence abroad, jurisdiction, and the recognition and enforcement of foreign judgments. It has no provision on banking secrecy.

In conclusion, a number of anti-corruption conventions are now in force. They are recognition of the detrimental effects of corruption and the resolve of the international community to tackle corruption, be it domestic or international. They provide a comprehensive framework for the legal campaign against corruption and are a reminder that this campaign is not only a matter of penal law. It is an important step forward to include in the conventions “private-to-private” corruption. The conventions draw attention to a large number of measures to be considered by any country that wants to fight corruption. For instance, they highlight the possibility to seize property in any country where a bribing

---

<sup>32</sup> Council of Europe Criminal Law Convention on Corruption, *supra* note 5.

<sup>33</sup> Council of Europe Civil Law Convention on Corruption, ETS No. 174, Nov. 4, 1999, *entered into force* Nov. 1, 2003.

company has property and make bribery a criminal offence even if it was committed outside the prosecuting country.<sup>34</sup>

The instruments laid down in the conventions are often alleged to be rather ineffective. It is true that the implementation of the conventions in national legislation and the enforcement of such legislation in some instances are failing and there are weak mechanisms for accountability of states not complying with their obligations under the conventions. Several conventions also suffer from the fact that states parties are able to make reservations. It is often overlooked, however, that the conventional obligations affect the societal discourse by making it less acceptable for companies to use bribery as a method of business.

### *National Legislation Against Bribery*

There is a worldwide trend to sharpen legislation against corruptive practices in the light of the conventions just mentioned. The purpose is not only deterrence but also the strengthening of public awareness of the negative effects of corruption and the changing of social behavior.

Most countries nowadays make both active and passive bribery a crime. Some countries have criminal provisions against bribery in their penal codes, while others have the provisions in special laws or in their commercial codes. Still others use laws against fraud, misappropriation, embezzlement, and forgery to fight corruption. However, in most countries one core criminal offence is available, sometimes in combination with commercial or other special laws.

Basically three legislative techniques are used for fighting *grand corruption*.<sup>35</sup> Firstly, the classical approach is to protect the property and assets of the enterprise involved. The typical offence is fraudulent management, which is generally the breach of a duty to manage or supervise the management of entrepreneurial property. In laws of this type, damage or potential damage to the company are normally not a prerequisite for the application of the law. Secondly, the approach is to protect the employment relationship. It emphasizes a relationship of trust and penalizes a breach of loyalty, hence accepting as a defense the employer's or superior's knowledge or acceptance. The third approach is that of protecting free and fair competition and the proper functioning of the market. Although no harm or breach of duties need exist according to this approach, "improper benefits" must exist to promote the business. Obviously this third approach is the basis for the self-regulation by the business community, since it seeks to counteract distortion of competition.

### *Special Anti-Corruption Bodies*

The regular law enforcement bodies and other institutions—police, prosecutors, audit agencies—should be in charge of combating corruption. In many countries, corruption is, however, endemic and the regular agencies highly corrupt themselves. They are not credible as anti-corruption bodies and not well equipped to carry out preventive programs. It becomes then an important issue to decide on the institutional arrangements for combating corruption, in particular whether it would be useful to establish a special anti-corruption agency (ACA).<sup>36</sup> Numerous governments have established such bodies. Examples are Argentina, Australia (New South Wales), Benin, Bolivia, Bosnia and Herzegovina, Botswana, Bulgaria, Guinea, Hong-Kong, India, Indonesia, Jamaica, Kenya, Korea (the Republic), Kyrgyzstan, Lithuania,

---

<sup>34</sup> Cf. Rose-Ackerman, *supra* note 15, at 333.

<sup>35</sup> See PRIVATE COMMERCIAL BRIBERY, *supra* note 4, at 613.

<sup>36</sup> Various names are used: agency, commission, committee, directorate, investigations bureau, services, etc. In this article, the term "agency" is preferred.

Malaysia, Mauritius, Nepal, Pakistan, Singapore, Thailand, and Uganda. In fact, ACAs have become a main means in many countries to come to terms with corruption.<sup>37</sup>

Positive experiences have been cited in connection with ACAs vested with broad investigative and prosecutorial powers. The Independent Commission Against Corruption (ICAC) in Hong Kong, as well as the Singapore Corrupt Practices Investigations Bureau (CPIB), are both recognized as significant organizations in the successful fight against corruption in their respective countries. Other examples are Botswana's Directorate on Corruption and Economic Crime (DCEC) and New South Wales' Independent Commission Against Corruption (ICAC).

Also ACAs in other countries record advances, but a mounting body of evidence indicates that in most countries the ACAs have doubtful impact.<sup>38</sup> Kenya is a case in point, as the following quotation demonstrates:

The Government has this morning formed an anticorruption squad to look into the conduct of the anticorruption commission, which has been overseeing the anticorruption task-force, which was earlier set to investigate the affairs of a Government ad hoc committee appointed earlier this year to look into the issue of high-level corruption among corrupt Government Officers.<sup>39</sup>

Various requirements must be met for an ACA to be effective in a very corrupt environment. There should be determination and support at the political level for its activities and the agency should be established in response to demands for reform from a broad base of domestic constituents.<sup>40</sup> It ought to be independent from all major power centers, such as the government, Parliament, and the Prosecutor-General. It should have a generous budget and enjoy a high level of integrity that resists interference from the political sphere and other powerful groups.

There should be a clear reporting hierarchy ensuring that no person or institution may monopolize the information or eliminate accountability. An ACA should have a solid, legal foundation for its activities. This includes an unambiguous and well defined mandate and effective legal tools. One must ensure clear rules of engagement that will guide the interaction and collaboration between the ACA and other institutions involved in the fight against corruption, e.g., its relationship to police and prosecutors.<sup>41</sup>

Basically, the mandate should be broad, but the exercise of discretionary powers is itself susceptible to corruption. The ACAs should be constantly scrutinized by oversight institutions that ensure their unbiased functioning. This will be a guarantee that the ACA does not initiate proceedings without due cause against opposition parties, business groups etc. Civil society could be part of such a scrutinizing procedure. The independence is also enhanced if the appointments of the members of the ACA are a shared responsibility of several institutions and the members have a security of tenure.

The mandate could include the following functions: investigation, prosecution, education, awareness-raising, prevention, and coordination. However, the mandate must depend on the situation on the country. If the police and prosecution services are corrupt, the ACA may well be the only body with sufficient independence and credibility to investigate a case and bring it to court. The education and awareness-raising function might be very

---

<sup>37</sup> Transparency International Source Book 307 (2000), *available at* <http://www.transparency.org/publications/sourcebook>; UNDP, INSTITUTIONAL ARRANGEMENTS TO COMBAT CORRUPTION: A COMPARATIVE STUDY 3 (2005).

<sup>38</sup> J. R. HEILBRUNN, ANTI-CORRUPTION COMMISSIONS: PANACEA OR REAL MEDICINE TO FIGHT CORRUPTION (The World Bank 2004).

<sup>39</sup> Statement released by the Attorney-General of Kenya, *see* THE DAILY NATION, October 28, 1997.

<sup>40</sup> HEILBRUNN, *supra* note 38, at 2.

<sup>41</sup> UNDP, *supra* note 37, at 4.

broadly defined, comprising public hearings and interviews, sponsoring documentaries and artistic events. Part of preventive measures is to take account of lessons learned and use them to propose amendments to laws and regulations. A related area is the capacity for research on corruption and knowledge management.

It is highly disputed whether a general case can be made for special bodies.<sup>42</sup> Arguments against such bodies are that the success stories that can be recorded cannot always be attributed to the special bodies as such and that the work could be done by the regular bodies if they had the same mandate, powers, backing, and resources. It would then be better and less expensive to reinforce and modify existing institutions than to establish new ones. In many cases, the progress was a result of a resolute effort to fight corruption, where the special body was but one of several reform initiatives.

In theory this might be true, but the problem is that it is very difficult to restore confidence in an institution that has been fraught with corruption. ACAs may be the only practical solution in highly corrupt countries provided that they meet the requirements mentioned above such as support from the political level and independence to investigate the highest level of government.

### ***Conclusion***

The prospects of a successful fight against corruption have improved over the last decade or two. Several factors contribute to this development, such as the new anti-corruption conventions, the increasing awareness of the damaging effects of corruption, the pressure on governments and the preparedness of them to take action.<sup>43</sup>

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

There is no easy way to fight corruption. One cannot just identify the root causes and eradicate them. Each country has its own preconditions; there are no quick fixes or one-size-fits-all approaches. If there is one single root cause it is human greed. The opportunities that make corruption possible are also abundant in clean states. They are clean because they exercise good governance, including a number of factors that countervail corruption, such as accountability, openness, good leadership, reasonable regulation, good taxation systems and financial resources for the states, clear rules for public procurement, and popular participation in governance.

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

The legal system is the warrant for this type of governance that counteracts corruption. Criminal law has a role to play, even though it is not as prominent as one may assume. The legal system also has the vital role of overseeing the institutions that fight corruption and to hold them accountable. Only if this task is accomplished in an effective way—and is seen as

---

<sup>42</sup> Shah & Schacter, *supra* note 12, at 42. Heilbrunn is doubtful of their ability to reduce corruption. HEILBRUNN, *supra* note 38.

<sup>43</sup> DAC Network on Governance, Synthesis of Lessons Learned of Donor Practices in Fighting Corruption, DCD/DAC/GOVNET/ (2003)1, June 23, 2003.

being effective—is it possible to gain and maintain the confidence of the public. Without such confidence, citizens cannot be expected to reject corruption and abstain from using bribes. In the end, the attitude of the public at large is crucial to the prospect of success for any effort to fight corruption.