CURRENT ISSUES IN THE WAR AGAINST CORRUPTION - A PERSONAL PERSPECTIVE!

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What I am not going to talk about.

I have been asked to discuss, from a personal perspective, the various ways in which corruption is addressed in the various jurisdictions with which I have familiarity. In doing this I have attempted to focus on a series of issues that are, in my opinion, of practical significance. In considering the way in which countries address these issues I can say, that the one common denominator is that none of them do so particularly well. Albeit in saying this, my perspective is inevitably subjective influenced by a host of perceptions many of which may not be correct or even if accurate in the circumstances fair. One thing is, however, absolutely certain, in addressing the problems of corruption there is no panacea and in fighting it there is no silver bullet.

While I have the honour and pleasure to deliver this paper in Manila I have deliberately focussed on issues that are of wider significance than the issues that are specifically of concern today in the Philippines. I first visited Manila in 1976 and in large measure, with respect many of the issues relating to the control of abuse in public office appear to be much the same. I have also had the privilege of working on integrity enforcement related programmes in the Philippines and I am aware of the practical and political issues. Having said this, generally speaking the law is generally not the problem. The Philippines is blessed, or perhaps cursed, with a richness in its legal heritage that few countries can compete with. In the result the Philippine law is usually comprehensive enough to be able with application to address specific issues. The problem is, as in so many countries – including my own, the ability in practical and resource terms to be able to devote sufficient commitment, over time, to a meaningful resolution. Consequently, in this paper I have attempted to address issues which are primarily, albeit not exclusively, relevant to the institutions and procedures of enforcement.

Corruption – what do we mean?

When I first became professionally interested in corruption, or rather the control of corrupt practices, as a young diplomat it was acceptable to observe that in different parts of the world corruption was not always seen to be the same thing or for that matter to raise the same implications. Colonialism afforded many individuals with an opportunity for promoting themselves through bribery and other corrupt dealings which they would never had if they had remained in their own societies. Indeed, there is an argument that this contributed to the perception that bribery and corruption was something that only happened overseas and inevitably in those countries which had not developed a structure of government and society that would be recognised as such by the so called metropolitan powers. In other words, the very corruption that officials were exposed to was part and parcel of someone else's problem. The notion that colonial officers took their corruption with them and to some degree even imported it into other societies would have been a heresy. Having said this, the form and content of corruption, in for example, the then Royal Hong Kong Police Force, which I personally observed forty or so years ago, was not inherited from a pre-existing Chinese establishment.

Of course, today it is unacceptable to express the view that some societies operate in ways that are inherently corrupt or even conduct their affairs in a manner which while they accept as normal, indeed, even commendable, would to others be characterised as corrupt. Today in the world of international standards of behaviour expressed in what we like to call, because it is rather more comfortable, soft international law, there is little room for the peculiarities of societies where gratefulness and respect is manifested in at least the expectation of a gift as a token of esteem. Today we require the conduct of everyone with whom we do business, albeit increasingly remotely and electronically, to be standard in a sense that it can be checked off against a uniform international compliance programme. In the modern world banks and others who by their very business operate trans-nationally cannot accommodate oddities of behaviour in their proven compliance procedures. One size must fit all and as has so clearly been shown in for example, the crusades against money launders and those who do business with people branded subversive, if you do not manage to comply you will in practical terms be excluded from direct access to the western financial system. Indeed, the Philippines needs no lessons on this.

Therefore, in this paper I will not attempt to do, what a sound academic should, and test our very understanding of corruption as something worthy of being branded evil and anti-social. Nor will I seek to raise the arguments of some of my colleagues who teach development studies that corruption at certain levels and at certain stages in development is if not an inevitability to be expected and perhaps even ignored. Having consigned myself to the realm of practicality, I will none the less presume to raise one issue that I think has clear implications for control and enforcement: that of transparency.

Transparency

It has been argued that one of the most significant dangers presented by corrupt activity is that it is done in secret. Indeed, as in the case of fraud the badge of dishonesty is that what is being done is done in secret. The desire to create and maintain secrecy itself gives rise to what some criminologists describe as ‘slippery slope’ crimes. In other words to hide what has been done records may be distorted and others brought into the web of corruption. Transparency has often been invoked as a weapon to deal with conduct that might not survive the glare of publicity and possibly attendant public criticism. Indeed, the famous observation of US Justice Brandeis – that “sun light is the best disinfectant and electric light is the best policeman” has much to commend. Of course, in practice disclosure of relevant details might not only focus opprobrium – particularly in a democracy, but also empower those who deal with the relevant individuals or organisations to re-evaluate the terms upon which they continue their relationship or, indeed, discontinue it.

Disclosure also assist in enforcement in that it either provides those responsible for policing with a ‘red flag’ indicating the need for action, or if there is a failure of candid disclosure - a preliminary offence which it may in practice be much easier to police. For example as in other areas of self-dealing such as insider trading, it is often easier to prosecute persons who have failed to make a report – than proceed to the investigation and proof of often complex substantive offences.

There are, however, obvious limitations to the effectiveness and efficacy of the so called ‘fish bowl’ philosophy. Perhaps most importantly it assumes that disclosure of certain types of conduct will throw up concerns on the part of those to whom disclosure is made. In other words, those who are made aware of the relevant facts must not only be of the view that they are abusive or at least objectionable, but also they must be empowered to take some form of action to denounce and hopefully correct and punish such conduct as is revealed. It is only on this basis that transparency can be an effective control mechanism against self-interested and corrupt dealings.

While in some societies the mere fact that what is considered to be unethical conduct is revealed will, given the homogeneity of moral attitudes, be a sufficient disincentive to abuse, there are others where perhaps the value of reputation is less or is more equivocal. Indeed, there are some societies and situations where the ability to secure personal or in particular benefits for members of one’s family or supporters is seen primarily as confirmation of status and power, which itself is applauded or at least condoned by members of that society or group. For example, a recent survey conducted in China among senior business executives revealed that most retained what they considered to be Confucian values. Consequently in the conduct of their businesses, even though they involved at least in part the

management and use of other people's money, advancement of personal and family interests came first. Indeed, there was little knowledge of the 'fiduciary' obligations on directors and officers imposed by China's Corporations Act and several respondents went as far as saying that if these impeded the advancement of family interests the law needed to be changed! It is also the case, that there are still many societies where the giving of a gift is considered a mark of respect and is not necessarily given in the expectation of a specific benefit. In such cases, a failure to acknowledge this expectation might even be a justification for criticism.

Making Transparency Work

Before we move on from this issue, there is another consideration. This is the medium of disclosure and the mechanisms which are in place to ensure that those who are considered to be the 'control' element are in fact enabled to understand properly what has occurred. For example, if those who are required to report their own or another's conduct are able to ensure that the disclosure is either in practical terms meaningless or unintelligible the underlying abuse is in effect compounded. The protection that transparency might otherwise afford is rendered a delusion.

Indeed, in practical terms the majority of disclosure mechanisms in the business world assume that disclosure is efficacious through the medium of mandatory corporate financial reporting. Even if the laws and regulations requiring continuous and timely reporting are actually and properly complied with, which of course in many cases and countries they are not, there are real issues as to the ability of ordinary investors and others to understand and interpret the relevant information. In relation to what might be considered integrity related disclosures much will in practice depend upon the existence and ability of intermediation. The vast amounts of information that are available need to be analysed, monitored and rendered intelligible and understandable by those who may be expected to act upon it. Hence the need for professional analysts, the media and pressure groups to process such disclosures, target and filter information. In practice few societies particularly in the developing world have these luxuries.

Consequently while it is certainly arguable that at least some of the concerns relating to corruption are addressed by greater transparency it is clear that disclosure is no panacea. Of course, in some cases the fact that there is adequate disclosure might well result in the relevant conduct not being, at least in law, objectionable. For example in those countries that have embraced the traditions of the common law and, in particular equity, persons in a fiduciary position might not be considered to have breached the duties that would otherwise attach to their status, if they make full and effective disclosure and obtain the consent of those who might otherwise have a basis for calling them to account. This is a complex area of the law, but in most jurisdictions that would require a fiduciary to yield up to the person with whom he is in a fiduciary relationship any benefit that has come to him by virtue of that relationship – often referred to as the secret profits rule, full disclosure and the consent of the other party will in effect render what would otherwise have been a breach of the duty of loyalty unobjectionable. It is probable that in most cases the same rule would apply to the taking of a bribe, although it is possible that as the rules are applied in certain jurisdictions the two situations might not be entirely the same. This is something that we will return to.

Before we do move on, however, there is a point that is worth making in regard to the involvement of corporations in corruption and unethical conduct. In recent years much has been made of the importance of ensuring good governance structures and procedures in companies. Indeed, until the recent financial crisis many argued that in large measure such closer internal systems of control had much to commend over the costly one size fits all approach of the law. Of course, governance while still of value was seen to be a very weak barrier to the rampant greed and self-interest that characterised the conduct of many in the financial industry leading up to the near collapse of the western banking system. While governance in my view can never replace competent and effective external and public policing, it can still assist. It has at least an educative role and proper procedures may throw up earlier misconduct particularly if reinforced with sound compliance. It is also becoming far more recognised that the reputation of corporations is a valuable asset which management has a responsibility to protect. We are near to judges finding directors of companies personally responsible in the discharge of their duties to their companies for failing to adequately protect this asset of the business. Indeed, in one case in England an employee of a bank that had collapsed in large measure due to the frauds and abuses that it facilitated around the world, was able to seek compensation from the bank's directors for their failure to run the bank properly and thereby safe-guard the employability and reputation of its staff.

The Forms of Corruption

Mention has already been made of the fact that the way in which people in positions of authority and trust improperly take advantage of their position will inevitably be influenced by the manner in which opportunities present themselves. Thus, the social, political and economic environment within which the conduct occurs will impact on and shape the form of misconduct in question. Indeed, this will also be reflected in the laws that are invoked to address it. In developing countries particularly where the state is rather more involved in the conduct of activities which in a more developed economy might be rather more in the hands of the private sector, there will be greater opportunity to engage in misappropriation and diversion of state assets. This is a particular issue in countries which still have a significant public business economy such as China. In fact it was recognised by the Nanking National Government in China in 1927 that given the greater degree of involvement of officials in making or participating in decisions which made a material impact of the fortunes of economic actors, that there is a greatly enhanced opportunity for insider dealing by officials. Indeed, it is interesting that this recognition resulted in the imposition of law to address this problem. Article 41 of the Revised Stock Exchange Law 1935 specifically outlawed speculation on the markets by officials and all this was well before the development of the communist state.

The greater involvement of government in fostering entirely beneficial programmes such as those relating to the protection of the environment and natural resources has similarly provided opportunities for officials to in effect take advantage of information on the design and implementation of their own policies. It is also relevant that the more the state is involved in the ownership and control of enterprise the more likely that it will interpret such misconduct as an offence against the state. It has been said, for example, in the USSR because of the degree of state and collective involvement in the economy more fraudsters and other economic criminals were executed than any other category of offender. Their misconduct was clearly identified as a crime against the state's interests. It is important to note that this might still have important implications in addressing the control of corruption. For example, in a recent case with which I was involved acting on behalf of the Supreme People's Procuratorate of China, the execution of an individual who had misappropriated funds from a state owned enterprise in Jilin and then laundered the money through Hong Kong, Singapore and Italy, effectively prevented satisfactory legal assistance from the country where the money had ended up.

Why do we do corruption?

Over the years a considerable amount of discussion has taken place in the academy as to the nature and implications of corruption. I do not think this need detain us on this occasion. However, it is desirable in modelling more efficacious responses to the threats associated with corruption, to recognise the practical significance of Edwin Sutherland's explanation of deviant white collar behaviour. In a nutshell Sutherland argues that in the case of certain forms of economically motivated activity we are all susceptible to temptation. The determination of whether we actually engage in conduct that might be characterised as criminal or abusive will in large, perhaps determinant, measure be resolved by our own cost benefit analysis. In other words, we will assess the rewards as compared with the risk of something unpleasant happening to us. There will in any given situation be a host of factors which influence our subjective determination of this balance and where the tipping point is encountered.

Of course, morality and education will have a role to play as will the efficiency of detection and the mechanisms of punishment. However, it is important to take on board that the moral and ethical aspects might vary and in many cases of what might be described as financial crimes there may well be a perception that they reflect no great moral principle and are essentially technical offences. The perception in a society that undertaking the activity in question is common place or that most would - given the opportunity engage in it, will be powerful factors. Indeed, this was all powerfully set out in the context of Filipino society in an article recently published in Planet Philippines (Eight Ways Filipino Politicians justify corruption, September 2013).

The potential for ambiguity in designing the controls and certainly in policing them is, perhaps illustrated again by reference to a form of misconduct that it is quite closely related to corruption, namely insider dealing. While arguments based on the abuse of loyalty may in the circumstances be relatively strong or weak, the justification often invoked in the criminalisation of the misuse by insiders of privileged information is the adverse impact that this may have on investor confidence. It is argued that investors will be less attracted to markets where there is not a semblance of

equality of opportunities to profit. Of course, for many reasons this simplistic contention is not always convincing. However, it is the case that few individuals are likely to see a profound moral imperative here. Their castigation of insider trading as an abuse, at this level, is probably rather more associated with their jealousy that someone else who is in a privileged position is able to take a benefit which they are unable to access to. Indeed, the same argument is manifest in regard to some of the excesses that we have seen on the part of bankers in the lead up to the recent global financial crisis. In the result, it is possible that morality may play less of a role in the balance of opportunities and risks than some think and hope for. The prime issue may be simply at what price is the risk of punishment and possibly loss of reputation worth taking.

Consequently the level of detection and likelihood effective enforcement action consequent upon detection is, on this analysis, a significant if not determining factor. The more that can be done to render the risk of detection and the certainty of effective policing and punishment the higher will be the financial threshold to wrongdoing. Thus the role of soft and early procedures and devices, such as compliance, transparency and whistle blowing have a real role to play in fixing the tipping point. Non the less given the efficacy or rather the lack of efficacy in bringing economic criminals and those involved in corruption to justice, the threshold may be rather lower than we assume. Having regard to the nature of the likely offender it may not be necessary to invoke the full panoply of criminal justice that is more usually encountered for other forms of crime and misconduct. By definition we are dealing with more or less the elite in a given society, or at least those who have a privilege the exercise of which is worth influencing. One does not bribe people for the sake of it - there will always be a purpose and usually one that has economic significance.

Exposure and detection

It is in the analysis of the viability of detection and effective enforcement that there is perhaps the clearest distinction between so called 'grand' corruption and shall we say 'ordinary' corruption. In the former those involved will hold some of the most powerful positions in the relevant society. They will while they remain in power often be able to ensure that their corrupt activities are shielded and even if known generally or within specific circles, are in practical terms ignored, perhaps even condoned. Indeed, in extreme cases the culprit – if this is a meaningful description in this context - may even be able to change the very character of what has occurred by effectively authorising or seeking the authorisation of what would otherwise be a misappropriation or act of corruption. The examples of this occurring are sadly not exceptional. The extent to which as a matter of law even within the relevant domestic jurisdiction self-authorisation is practicable is a matter of debate. For example, even under - in this respect the most facilitative construction of a constitution it may be assumed that there is only authority to act within the law. Of course, as a very senior English judge once put it, albeit in another context, "this is a matter of legal theory and bears no resemblance to fact". Regardless of the law – and there is certainly room for jurisprudential debate, while those in power remain in power they are often in a position to effectively close down inquiries and ensure that no action is taken. Once they leave office, they may be more vulnerable but even then it is extra-ordinarily difficult to pursue, almost inevitably in a foreign jurisdiction, those who have effectively exercise the sovereign authority. To such individuals and their associates the threat of unpleasant consequences attaching to their conduct has, at least until relatively recently been at best a remote possibility.

There are indications, however, the balance might be tilting. While we have a long way to go before it could convincingly be argued that corruption or for that matter money laundering have become international crimes in the sense we understand that term in international law. There have been significant developments in the efficacy of trans-national criminal justice in large measure spurred on by important international instruments such as the UN Convention against Corruption. The ability of states within their own domestic law to provide meaningful assistance to other states and even private actors in pursuing the proceeds of corruption and other crimes has increased dramatically. Also the willingness and capacity of states acting within their domestic laws to act promptly and effectively in interdicting and freezing tainted wealth is infinitely greater today than it has even been. This was illustrated in the rapid response of many European countries to the requests of new governments to identify and freeze the assets of former leaders and their families during the so called Arab spring. There are many examples of cases in the past where it has taken years to trace and then initiate steps, often without success, to interdict wealth 'stolen' and diverted from countries such as the Philippines, Pakistan, Haiti and Indonesia. On the other hand the British government was able to effectively respond to a request received from the Egyptian government in regard to Mr Hosnay Mubarak within minutes. The system of and for

international mutual assistance today in this respect bears no resemblance to that even five years ago. Of course, a prerequisite to this is an effective request from the relevant lawful authority in the state concerned and this may well constitute a problem where it remains unclear exactly where authority actually does reside in a state that has gone through turmoil. The ability of overseas agencies to trace and interdict, for example, funds taken out of Libya has proved less impressive and sadly I say this on the basis of personal experience! Any international system for co-operation is only as effective as the agencies at either end of the process. In this regard the provision, perhaps from other governments, intergovernmental organisations and even the private sector, of timely technical assistance and support may prove to be crucial.

Crimes of the Powerful

In considering economic crimes – and for that matter perhaps crimes generally of the powerful, it is important to recognise the practical realities. The ability of those in positions of influence who may already have disproportionate authority as a result of their scant regard for the law and good governance, to discourage criticism let alone effective investigation within their society is a reality. Those who have, in this context, amassed power and wealth for them selves are unlikely to play by the rules. Indeed they will do whatever is necessary to protect their interests and those of their associates. Indeed, as organised crime 'survives on fear and corruption' so do such individuals and their coterie of confederates. Their ability over time to almost institutionalise this protection through further patronage and domination presents an almost insurmountable barrier to effective action within their society or state.

Over the years working in this field I have personally witnessed on innumerable occasions direct interference in the proper operation of the law and where this has failed to secure their objective, the assassination and intimidation of witnesses and those who attempt to stand up for justice. Indeed, it is a sad but true comment that few if any champions of justice, in this context, retire happy or for that matter make it through until retirement! On countless occasions, including in some of the most developed countries which pride themselves on their seeming adherence to the rule of law, I have witnessed black propaganda campaigns designed to discredit testimony and place those who have acted corruptly, beyond the reach of such systems as may exist to render them accountable. In a number of such cases, some of which sadly I have had direct experience these initiatives have drawn the support of organised crime, naïve or possibly corrupt journalists and even renegade intelligence officers. The failure of societies to recognise the risks faced by those taking on those in power and authority, let alone seek to assist and protect them, is in my opinion one of the greatest threats to the efficacy of the law. I am afraid in this regard the Philippines enjoys an ambiguous history – as has my own country the United Kingdom!

Of course, it is not always the case that those in power will be so bold to stoop to intimidation, violence and misinformation. Perhaps an even more shocking response is to attack the standing and resources of the agencies that have been set up specifically to promote integrity and police the relevant law. Although politicians are inclined, often with the support of the media, to bemoan the inadequacies of agencies responsible for promoting integrity in, for example, the financial markers or discovering and pursuing financial crime and corruption, there are again too many examples, where as a result of the perceived effectiveness of such agencies their budgets have been slashed and their recruitment curtailed. Whether this be predicated on the notion that such have become too overbearing and powerful – undermining the very values that they are tasked to protect, or simply on the basis that they have done their job, it is not hard to find examples of the virtual emasculation of in particular the enforcement and surveillance capabilities of these agencies throughout the world. Again the Philippines has not been immune from this, albeit there are far more dramatic examples elsewhere.

Elite Enforcement

On the other hand it has also to be recognised that there are too many examples around the world of elite prosecutorial and investigative agencies, set up specifically to spear head the fight against corruption and economic crime, themselves becoming tainted by the very ills that they are addressing. There have been real examples of such agencies being undermined from within as a result of penetration by other criminals and the corruption of key personnel. One need only thing of the example, of the Commercial Crime Unit in Hong Kong. I had the privilege to be involved in establishing this elite prosecutorial unit within the Attorney General's Department and suffered the disappointment of witnessing

almost the destruction of its reputation by its corrupt director Warrick Reid. As Lord Templeman, then one of the most distinguished judges in the Privy Council observed: “bribery is an evil practice which threatens the foundations of any civilised society. In particular, bribery of policemen and prosecutors brings the administration of justice into disrepute … in (this) case the amount of harm caused to the administration of justice in Hong Kong …cannot be quantified”. Indeed, even in that bastion of propriety, Singapore, a similar agency established to fight economic crime and corruption had problems, albeit less dramatic, with its director. Sadly there are many other examples.

In my view the ever present danger of specialised law enforcement agencies and in particular those established to fight really serious economic criminals and the most corrupt and powerful members of our societies, becoming part of the problem, is exacerbated by a failure on the part of politicians and the media to properly understand and appreciate the real problems in doing the work they do. In some, perhaps the majority of cases where such agencies and in particular their directors have stepped over the line and become associated with the problem rather than the solution, the initial reason has been a desire, perhaps even a laudable desire, to meet the expectations of those who have appointed them and set them their task. The reality is that in all systems of law – whether common law, civilian, Roman Dutch or as in the Philippines an intriguing mix thereof, it has proved over time incredibly difficult to secure convictions, through the traditional processes of the criminal justice system, for economic crime and in particular fraud and corruption. The reasons are many and varied and a detailed discussion is beyond the scope of this paper. It is not without interest, however, that even the most developed and respected legal systems have in reality faired little better when judged in terms of convictions. For example, back in 1986 an eminent senior criminal judge appointed to make recommendations for the improvement in England in the trail of fraud cases, reported that “the public no longer believes that the criminal justice system can effectively and efficaciously bring the perpetrators of fraud to book. The overwhelming evidence brought before us suggests that the public is right”. Despite many new laws, procedures and agencies, few in the United Kingdom would have any confidence that the situation has got any better.

The record elsewhere, including in the USA is little better. Indeed, it is largely as a result of the criminal justice systems profound inability to deliver results – in terms of convictions, or for that matter the seizure and interdiction of the proceeds of crime, that many law enforcement agencies around the world have redefined their objectives as the disruption of crime rather than the traditional investigation and prosecution of crime. The emphasis now placed on the disruption or organised crime – including terrorist organisations and serious economic criminality, has inevitably impacted on the way in which we attempt to deliver justice. There is, for example, a much greater emphasis on the role of intelligence and in particular financial intelligence, thrown up by our anti-money laundering systems. On the other hand the more we involve the spy rather than the traditional policeman in these tasks and move away from the discipline of a traditional prosecution the greater are the risks to human rights and the greater are the risks for justifying actions on the basis of their empirical results.

In my view based on the experience of working in and with a number of specialist enforcement agencies from China to South Africa, I am firmly of the view that the temptation to meet the unrealistic short term expectations of politicians has resulted in tendency to start bending the rules and the procedures to achieve what appear to be results recognised as justifying the special powers, budgets and status that there agencies are given. Elitism breeds an ambition for a level of success that a proper and responsible administration of law cannot achieve. Consequently the very real pressures within the organisation in terms of career security, development and esteem and externally in terms of continued support and standing - become almost irresistible. The inclusion of evidence that has been procured in dubious circumstances, perhaps even illegally, is a step towards fabrication and manipulation of evidence – the ends justify the means. The fact that this corrupts the very fabric of the legal system and makes justice a delusion is obscured by expediency and pragmatism.

Having said this, it would be wholly hypocritical to pretend that over the last forty years I have not been a very vocal advocate of the need for creating and deploying specialist resources in the fight against crime and in particular economic crime. Indeed the first occasion I had the privilege to commend such an approach in Manila was in August 1976. Since then I have had the honour to work closely with a number of agencies in the Philippines and on several occasions have been involved directly with training and institution building. I have also had similar experience in a number of other countries ranging from Uganda to Barbados.

While I remain convinced of the need for specialisation in the justice system I have become less sanguine about the equivalent of the deployment of 'special forces' in the fight. I had the honour and then it really was an honour, to work directly under Mr Magabe in the new Zimbabwe, establishing a new intelligence agency to work alongside the then distrusted Central Intelligence Organisation, and to focus in particular on the protection and advancement of the economy. This agency was staffed almost entirely by intelligence and security officers and it achieved a considerable level of success in the short term – in particular it facilitate the bringing to justice of a number of individuals who were unquestionably undermining development and national security. I was privileged to be able to replicate this in Zambia, Ghana, Mozambique, Botswana, Malawi and perhaps most importantly South Africa. The model was also adapted for the circumstances in Indonesia, Argentina, Taiwan and even Trinidad. To some degree it also provided the basis for the then Bureau of Investigation and Intelligence in the Philippines.

The impact that these initiatives had was manifest and on the whole positive. Results were achieved, albeit in some cases at the cost of strict adherence to human rights. Indeed, the mandate for the initiative in Zimbabwe recognised that the organisation would need to function 'untramelled by the constitution' – whether in fact it actually did, I will leave to one side – particularly as the British Government funded this as an aid programme! To some degree these agencies morphed into embryonic financial intelligence units and one or two still operate in this milieu. The extent to which in the longer term that they contributed to justice in any substantive sense is rather more debateable. They did their job primarily as a short sharp attack on a reasonably well defined problem that had arisen as a result of turmoil and transition, or as in the case of Taiwan where there was perceived to be an over bearing external threat.

To identify and recruit or to develop similar skills and specialisations within the confines of more traditional law enforcement structures and in particular police organisations is problematic. Traditional justice agencies do not provide the career structures that can comfortably accommodate the sort of specialisations that are required for the effective investigation of, for example, economic crime and corruption. Of course, if there is the political will then it is conceivable that significant organisations capable of supporting highly specialised skills can be established and operated. A good example of this is the Independent Commission Against Corruption (ICAC) in Hong Kong. However, the very considerable resources that have been placed at the disposal of the ICAC over the years are in practical terms beyond the reach of most countries and those that have attempted to emulate the experience of Hong Kong with lesser resources have on the whole not faired as well as was expected. The ICAC in terms of its structure and operations has to be considered in the historical context of Hong Kong and the political imperatives that gave it so much significance in the political system such as it was and is. For example, for much of its life the ICAC operated within a colonial environment which had implications for in particular accountability and its independence. There are those who wonder whether its perceived strengths will, or indeed, can survive – at least as they were, in the modern reality of Hong Kong.

Prosecutorial Independence

While to remain firmly within what we regard as the rule of law - particularly in the context of the Philippine justice system, the role of prosecutors is vital not only constitutionally and in terms of due process, but also in achieving a fair and focussed investigation tailored to the production of admissible evidence. There may be debate as to the desirability and in some jurisdictions the acceptability of prosecutors directing case development and in particular investigation, but the benefits for investigators of access to prosecutorial advice cannot be denied. Indeed, this is one of the particular strengths of the US justice system. The civilian system provides, at least in form and structure greater support and focus in terms of the magisterial involvement, but is essentially different to the common law procedure. The coming together of both systems provides a number of advantages, but is perhaps idealistic. The special powers accorded to prosecutors, for example, in the United Kingdom in the Serious Fraud Office while criticised by some as starting down the inquisitorial path, in practice have not resulted in an appreciable improvement in the efficacy of traditional prosecution. Of course, as we have seen there are real dangers in prosecutors being placed in control of specialised enforcement agencies given their natural desire as lawyers to achieve results before the courts and in the main their lack of managerial experience. Consideration might better be given to the appointment of those with judicial experience such as in South Africa and even Australia, although this itself, may give rise to issues in some cases of constitutionally.

Thus, while there are real advantages in providing specialised and focussed agencies, independent of government, to combat serious economic crime and in particular corruption there are also real dangers. Indeed, even their

independence might result in their isolation from other law enforcement agencies and in particular damage the flow of information and intelligence. It is in practice rare to encounter a significant case of corruption, for example, that does not have implications for other areas of law enforcement. We have already noted that most forms of corruption are essentially facilitative of some other primary objective, which may well be criminal. Even in the case of the ICAC in Hong Kong it soon became apparent that it was necessary to allow the ICAC to pursue other criminal offences in addition to corruption. In practice this is not unusual, so for example, the English courts have allowed the former Financial Services Authority to bring charges of money laundering and even fraud in policing the anti-insider dealing laws and the specific offences under its relevant statute.

Where constitutional arrangements in a jurisdiction do not permit specialised agencies to bring prosecutions themselves but to refer matters to independent prosecutors, there is perhaps less risk of special agencies becoming too focussed on their own objectives and perhaps self-esteem. Of course, in a number of jurisdictions which favour prosecutorial independence, including of course, the Philippines, it may be practical to second prosecutors who then acquire specialised skills, to the relevant agency. This is what has happened, for example, in Hong Kong, Singapore and Malaysia. The downside of this is that unless there is proper management individual prosecutors may become captured by the culture of the agency within which they work. This has resulted in issues, not least in Hong Kong - albeit not primarily in regard to the ICAC. There is, of course, another factor when prosecutions are the responsibility in law and practice of for example the Law Officers of the state, namely that given the real problems in successfully prosecuting economic crime and corruption, ambitious prosecutors are reluctant to take such cases or pursue them with the requisite degree of commitment and diligence. This has, for instance, been perceived as a problem in the USA.

Civil Enforcement

Indeed, the perception and probably the reality, that Federal prosecutors in the USA were unenthusiastic in prosecuting securities offences led to the development within, for example, the US Securities and Exchange Commission of its own civil enforcement jurisdiction. Frustration with the traditional criminal process encouraged enforcement lawyers within the SEC to develop a relatively effective process of civil enforcement based on seeking injunctive relief in the Federal Courts. The efficacy of using essentially civil law procedures in fighting economically motivated crime, with the attendant practical and evidential advantages, has resulted in administrative enforcement assuming a very significant role in the USA in the enforcement of not just the securities laws but increasingly those concerned with integrity, such as the Foreign Corrupt Payments Act. As the use of civil enforcement has become more widespread the courts and, indeed, Congress have imposed certain constraints and to some degree regularised the processes and sanctions in statute.

Obviously there is not the opportunity to explore civil enforcement in more detail here, although I would commend it as a very important additional weapon in the arsenal of those seeking to fight economic crime and corruption. On the other hand, there is a need for circumspection as the procedures that have been developed in the USA, both at Federal and State level, while effective and relatively efficient, are the product of US legal history and jurisprudence. They are not easily transportable into other systems. For example, the attempt by statute to emulate the SEC's jurisdiction in regard to market abuse in the United Kingdom has not been entirely successful. The English Courts have also been unimpressed with attempts by regulators and in particular the Serious Fraud Office to utilise civil processes when what has occurred is clearly criminal. Judges have deplored the use of the 'soft' option of civil enforcement and effectively 'agreed' penalties where crime is involved. Judges in other jurisdictions, such as Hong Kong, have declined to recognise and give effect to US court orders in regard to civil enforcement on the basis that what is in issue is essentially a criminal matter dressed up as a civil one. Having said this, the development of the US law in regard to tracing and forfeiture of criminal property through a civil process in rem has met with a great deal more support in foreign courts.

Civil restitution as a remedy

The United Nations Convention against Corruption places a great deal of emphasis on alternatives to the traditional criminal law in policing corruption. Indeed, as one of the chairman of the early working groups on these provisions, I am delighted to see that so much of what was advocated by practitioners ended up in the Convention! In article 1 and 51 of the Convention it is made absolutely clear that one of the principal objectives of the Convention is the recovery and restitution of the proceeds of corrupt practices. In addition to significantly facilitating the effectiveness, on a trans-

national basis, of domestic anti-money laundering and criminal property provisions, the Convention specifically recognises the importance of states being able to bring proceedings in their own and other jurisdictions to pursue the ill gotten gains of those who have engaged in corruption. Of course, much depends upon the vitality and efficacy of domestic law and in particular the law relating to restitution.

We have already touched upon this in the context of the obligation of fiduciaries in the common law tradition, to eschew conflicts of interest and be accountable for the taking of 'secret profits'. These principles have been applied not merely to those in private relationships but also those in positions of trust in government. For examples, ministers, senior officials and even members of the armed forces, who use their position to exploit others. The importance of these principles is much wider than it might at first seem. They are of practical importance not just in those jurisdictions that embrace the pragmatism of the common law. For example, it is common to find in corporation laws, the statutory incorporation of the duties of loyalty upon which this liability to account is based. A good and pertinent example of this is sections 31 to 34, and in particular section 34 of the Philippines Corporations Code, or articles 21, 116, 148 and 149 of China's Companies Statute. Furthermore, the courts in a number of common law jurisdictions have held that the principles of fiduciary accountability and in particular the imposition of a constructive trust apply where the money ends up. Therefore, a Singapore Court had no hesitation in invoking these principles in regard to the proceeds of corruption in Indonesia held in a Japanese bank in Singapore, as has a court in Dubai in regard to bribes paid in Pakistan.

It is, however, the ability of the law to trace the proceeds of corruption and fraud into other property and to then regard it as belonging to the person with the equitable claim that is perhaps the most significant weapon. In a series of cases involving corruption and breaches of fiduciary duty, invariably committed overseas, English courts in common with those in many other common law countries, have been prepared to trace such property and impose on it a constructive trust. Any one who comes into possession of the property or who exercises control over it, will - if they have knowledge of the circumstances or are reckless, be held equally liable the same extent as the wrongdoer. Such third parties will only escape liability if they have acted in good faith and given proper consideration for the property, before they appreciate the true facts or before parting with it.

Indeed, there will be similar civil liability on those who dishonestly assist in the laundering of such property. Thus, those who provide accounting, legal and banking services might well be exposed to liability. The state of knowledge required for this form of liability includes wilfully turning a blind eye to facts that would have put an honest and reasonable person on notice that something improper was a foot. Thus, the English courts have not hesitated to impose personal liability on an accountant in the Isle of Man who incorporated English companies and then opened bank accounts for these companies in London, on behalf of a crooked French lawyer and an employee of an Italian company, without asking the questions that an honest and reasonable person in his position should have asked. Indeed, in another case, the court held that even a lawyer who had good grounds for suspecting that a client whose monies he had placed into certain overseas trusts may be related to an investigation in the USA if he wished to escape personal liability was under an obligation to search out those who might have a claim against these funds and inform them!

To the regret of many a note of caution has recently been introduced into English law largely because of the impact of these principles on entirely innocent third parties. The English Court of Appeal has recently ruled that while in the case of bribery, the person taking the bribe is fully accountable to his principal – the person with whom he has a fiduciary relationship, for the value of the benefit he has improperly received, this is a personal liability and cannot therefore give rise to the proprietary relationship that is necessary for tracing into to derivative property and the imposition of a constructive trust. A nineteenth century decision of the English Court of Appeal had decided that in this respect there is a difference between the taking of a bribe and receiving a secret profit in breach of a fiduciary duty or the misappropriation of property. The Privy Council in the case to which reference has already been made involving Warrick Reid, the corrupt prosecutor in Hong Kong, on appeal from the courts in Hong Kong, rejected the distinction and in the view of many - sensibly held that in the case of bribes the tracing remedy was available and a constructive trust could be imposed on the derivative property. As Lord Templeman observed 'the law must prevent monies being whisked away to some Shangri La which hides bribes and other corrupt payments in numbered accounts and the like'. The decision of the Board of the Privy Council while now doubted in England remains authoritative throughout the Commonwealth and has recently been re-affirmed in Australia and New Zealand.

It remains to be seen whether the more restrictive approach of the English courts will have a marked impact on the recovery of corrupt payments. Of course, the person who has received the corrupt sums remains fully liable - personally. It is also arguable that in at least some cases it may be contended there is still a misappropriation of information or property in the sense of a diverted opportunity. In such cases there might well be sufficient 'property' to allow in rem claim. Furthermore, it must also not be forgotten that the criminal law may still be very relevant, although it must be noted that in the case of banks and other intermediaries the interplay of the civil and criminal law in this area is both uncertain and potentially risky.

Costs and Bounty Hunting

A serious obstacle to developing countries in utilising this law in pursing those who have raped their economy is frankly, the costs involved in conducting the investigation, securing the evidence, freezing the suspect funds and property and then mobilising a civil action – often in expensive and foreign legal systems. The practical issues were, of course, dramatically illustrated in the attempt to trace and recover the 'Marcos missing million'! The United Nation's Convention provides that countries should seek to assist each other in this and there are potentially useful provisions for technical assistance. Under the United Nation's Convention and various other international instruments such as those of the OECD and Council of Europe there are a number of potentially significant initiatives. The Stolen Assets Recovery programme of the World Bank is of particular note as is the OECD derived initiative in Basle, to provide governments with technical legal assistance. Under these programmes financial and legal and investigative assistance is provided to countries seeking to recover the proceeds of corruption. While very worthy and to be applauded these initiatives are limited both in terms of their mandates and the resources that they are able to offer. Governments wishing to pursue wealth that has been stripped from their economies, often in difficult political circumstances, still need to be able to do a great deal on their own. Paradoxically it is, as in cases of fraud, those who have been most damaged and abused that will in fact be least able to mount a claim.

Consequently, much more thought is now being given to how the private sector may be afforded an incentive to intervene and in effect take on these cases in collaboration with the relevant government in the expectation of sharing in the property recovered. Of course, lawyers in certain jurisdictions have long been able to provide professional services on the basis of 'no win no fee'. Indeed, even those jurisdictions such the United Kingdom where such an approach was considered improper has in certain respects modified its views. However, in regard to the sort of cases that we are here discussing the issue of attorney's fees while crucial is only one factor. There will be a need for covering considerable other costs - primarily in regard to investigation and the freezing of suspect monies. There will also in most cases be the need to conduct legal proceedings in a number of jurisdictions. There are few lawyers and investigators who are able and willing to assume an almost 'business' interest in the matter and obtain independent funding for these additional costs. In practice, however, few of these cases have so far resulted in significant levels of recovery. The development of a class of international 'bounty hunters' is something which will I am sure occur and there are many in the development community that would welcome it. Indeed, the British government has expressed on a number of occasions that provided there is adequate surveillance by the courts this may well be an effective and efficacious way of dealing with at least some cases.

It is perhaps worth making the observation here that while commendable for a number of reasons – and not least those who abuse their positions should not be allowed to retain the benefits – and nor should their families, procedures that at best are capable of taking back what should never have been stolen, might not present a significant disincentive to those who are contemplating the risk and rewards. Ideally such procedures should never trump
the application of the criminal law and the prospect of a criminal penalty. Having said this, there is room for debate as to how the imposition of criminal penalties might be modified and mitigated by meaningful co-operation on the part of those under investigation. In cases where corrupt individuals have willingly made restoration then there is scope for the amelioration of the defendant's position. Indeed, in the USA it is not uncommon to condition civil penalties and even fines on the basis of co-operation.
It is also not uncommon in similar circumstances, particularly in the context of taxation, to compound conduct that might otherwise result in serious criminal sanctions.

In fact before there was a much greater level of co-operation and mutual legal assistance agencies such as the Special Investigation Team, Economy and Trade (SITET) in Zambia regularly negotiated with economic criminal and those involved in corrupt acts for the return of at least a proportion of their ill gotten gains. In many ways this was preferable from the perspective of the Government of Zambia to seeing the Swiss or British seize these monies under their relevant domestic laws and often retain them. Hence, SITET was cautious in the information that it passed to foreign agencies and in the requests that it made for assistance. While no doubt things have improved – jurisprudentially, there are still many governments and agencies that remain cautious as to what information they share with other governments. This is exacerbated by the approach of some countries which allow their agencies to retain some of the property seized either as an incentive or to facilitate further enforcement. While the US authorities have for many years been prepared to share seizures, after deduction of their expenses, with other states, few other governments have in practice done this; Switzerland being a notable exception. The UN Convention specifically provides for this and hopefully this will herald a more constructive approach.

Empowering the Citizen

The above discussion to some extent is based on only part of the picture and perhaps in the case of other than the grandest of corruption, a relatively small part at that. We have been considering the circumstances where a state or an organisation with the requisite capacity, is able to assert a claim on the basis that its property has been misappropriated or someone in a position of trust (responsibility recognised by law) has taken a benefit that they should not have. The basis of the claim will therefore be predicated on a notion of fiduciary accountability or a provision in a domestic statute. The fact is, of course, it may well be that those with such a claim have not really suffered any direct harm other than the violation of the duty of loyalty owed to them. In fiduciary law it is enough that the fiduciary has improperly benefited from his position irrespective of whether the benefit in question could have gone to or even been taken by the principal. It is the violation of stewardship upon which the liability is predicated. Given this, it is not always clear that the state or in particular a corporation, will have a sufficient incentive to embark on possibly expensive and unpredictable litigation. It is also the case that there may well be reservations in 'washing their dirty linen in public'. Indeed, the emphasis that is increasingly being placed on 'control' liability – particularly in the USA and UK, it might not be in the interests of anyone – in a corporation, for example, to draw attention to acts of corruption. Not only might shareholders consider that directors and others were asleep on their watch, but there might be the prospect regulatory and legal liability for a failure in compliance (such as under section 7 of the UK Bribery Act 2010).

While the development of control liability especially for misconduct relating to integrity has been regarded as a means of improving compliance and attributing responsibility, it is a two edged sword. Senior management may well be reluctant to report suspected violations of provisions possibly giving rise to control liability or in co-operating with the investigation of the predicate wrongdoing. Indeed, in some societies the arguments are at best evenly balanced. However, there is another and perhaps even more pertinent consideration. There is a real risk in demonising businesses and their managements. This concern is perhaps best illustrated in regard to the cases that have arisen in the US and UK in particular in regard to economic sanctions violations and money laundering. In recent months there have been a number of cases where major international financial institutions, such as the Hong Kong and Shanghai Bank, Barclays Bank and the Standard Chartered Bank have been accused of significant failures in compliance in regard to such issues. Very large fines and settlements have been imposed especially in the USA. There has been a very high level of criticism of the management of these and other institutions in the media. The problem with all this is that it remains, as we shall see, to be convincingly seen whether the relevant underlying laws relating to the identification and interdiction of suspect funds work and have any real value within the legal system. If one considers the level of successful enforcement in regard to criminal and suspect property in the vast majority of jurisdictions, then one might be excused for doubting the efficacy of such laws and the cost that they impose both directly and indirectly in terms of risk, on ordinary financial institutions which provide a vital service to the economy.

Considering all this, who else might have an incentive to complain and initiate action in cases of corruption? Perhaps the most likely candidates will be those who have suffered loss as a consequence of the corruption. Of course, in most cases their damage will be a result of what the corruption has facilitated rather than the corrupt act itself, for example, those who have lost relatives or sustained injury when, as in China, a major road bridge collapsed as a result of the failure of inspectors to properly monitor its construction. In many cases, perhaps the vast majority, those who have been harmed

will not under their domestic law have a particularly clear cut claim to compensation. Here we are talking about a claim for the damage and losses that has resulted from the corrupt action, rather than restitution of the illicit payments. The UN Convention does place an obligation on states to facilitate such actions. Providing a new cause of action is one thing, actually empowering those who have been harmed to bring such is a very different matter. Without a litigation friendly environment with the possibility of class actions and contingent attorney fees it is hard to see that in many countries this would be a meaningful and viable strategy. In the USA the so called False Claims Act has long enabled citizens to bring civil claims on behalf of the state based on allegations of fraud and misconduct against the government. Litigants and their lawyers are then, if successful, permitted to share in the recovery. While the UK government is currently considering such a procedure, without contingent fees and the US rules relating to cost, it is highly unlikely that such a device would achieve what it has in the USA.

A real problem in practice where there are multiple causes of action and the prospect of regulatory and disciplinary action, civil enforcement and criminal prosecution – possibly in a number of jurisdictions - more or less at the same time, is that of managing parallel proceedings. The 'best evidenced' rule which permeates the laws of most jurisdictions will necessitate the deployment of the best evidence in each and every proceeding. There is also the primacy of causes and actions. Should the criminal case proceed first, albeit it may well take a very long while to be resolved? If not, is there not a real issue in a subsequent criminal case of unfair prejudice? The imposition on an individual of the need to defend multiple actions involving disproportionate resources surely also raises issues of human rights? These and many other practical issues have not been adequately considered domestically let alone in the context of the various international initiatives.

Criminal Culpability

There are those who argue that the gold standard in combating serious corruption must involve the robust use of the criminal law. We have already touched upon this in the context of the institutional and procedural considerations. Over the last few laws many states have revised their criminal laws to improve the drafting of the primary offences relating to corruption and in particular the taking and giving of brides. This is not the place to attempt a discussion of the substantive law. However, while very few cases have so far been brought under it, I would have no hesitation in commending as a good model the new UK Bribery Act 2010. Before its enactment Britain's anti-bribery law was so antiquated and inefficient that it lulled some into thinking that bribery and corruption were social diseases that largely had not appeared in our society. Of course, all countries are exposed to corruption and one need only consider the allegations that were made during Prime Minister Tony Blair's government about the selling and handling of political privileges and in particular honours, the management of major international scandals and an increasing perception of police corruption to realise that Britain had and has real problems. In practice in the United Kingdom, as in a number of common law countries, it is other provisions in the ordinary criminal law that have been utilised with some effect. The re-shaping of the law relating to fraud, in the Fraud Act 2006, and especially the creation of a 'new' offence of criminal breach of trust is particularly welcome in the UK. Perhaps of most significance, however, has been the use of our anti-money laundering laws and provisions for confiscating and taxing criminal property.

Having said this, the efficacy of anti-money laundering laws in the context of corruption control has yet to be proved. For such provisions to be able to bite there is a need for the conduct that is considered corrupt to be, had it occurred, within jurisdiction a criminal offence. In part this is why it was desirable to provide clearly in UK law that the bribery of a foreign official anywhere in the world by an agent of a British company or a company with a defined relationship with the UK is a specific and serious offence. While it is the domestic law where the anti-money laundering law is invoked that is relevant, it is the case that the approach of other jurisdictions is not uniform, particularly in regard to such issues as facilitation payments and the conduct of independent actors. It is also the case that the record of most countries in actually forfeiting or confiscating the proceeds of crime is far from impressive. For example, in the United Kingdom, the amount of criminal property that has been confiscated is a miniscule proportion of the assumed whole. Even in the relatively clear cut case of drugs related crime, it is guessed that in the United Kingdom we are confiscating less than 0.001 per cent of the suspect wealth involved. Indeed, there are those who consider that this 'guestimate' is significantly over estimated. In the case of fraud and corruption the amounts that have been confiscated are ridiculously small. Indeed, as we have seen our record in policing the predicate crime is also far from impressive. The fact is that even in the USA the proportions are not vastly different. In most countries they are far worse.

As we have indicated earlier in our discussion when one considers the considerable cost involved in creating and maintaining compliance in this context and the impact, particularly in terms of legal, regulatory and 'reputational' risk, on the banks and other intermediaries - of in effect placing them in the front line in the 'war' against organised crime, terror and now corruption, it is far from clear how proportionate our strategies are. Of course, it is true, as we have noted already, that it is misguided to attempt to judge the efficacy of such laws on the basis of convictions or for that matters the amounts of criminal property taken out of the criminal pipeline. In the modern world the information and intelligence thrown up by, for example, suspicion based reporting systems is arguably of considerable significance to other areas of law enforcement and not least those concerned with proactively protecting our integrity and security. Sadly it is difficult to judge how effective disruption as a policing tool is, particularly in the context of our current discussion. It is probable that disruption as a strategy in law enforcement is better suited in dealing with organisations and structures that require consistent and timely flow of funds.

Intelligence – two edged sword

The role of intelligence in discouraging corruption and assisting in its control is a dark area. Indeed, it is often said that intelligence agencies themselves are privy to and perhaps occasionally involved directly in corruption. Indeed, the UK Bribery Act 2010 specifically exempts the intelligence agencies in Britain, in certain and limited circumstances from its provisions. As an investigator involved in a great number of cases involving economic crime and corruption it is perhaps shocking that in so many there is more than a hint of one or more intelligence or security agencies being at some level involved or complicit. Indeed, it was not that long ago that agencies and even government departments in Europe offered advice to businessmen on who to bribe and what the going rates were - and boasted that their information gathering facilities would be used to advance the business and commercial activities of their nationals. Indeed, it was only recently in Britain that the payment of overseas bribes ceased to be a tax deductible item for UK taxation. Ignoring this somewhat unpalatable albeit probably necessary activity, there is clear evidence that intelligence agencies have when it was thought appropriate assisted in the exposure of corrupt officials, albeit mostly overseas! More recently some have played a very significant and positive role in assisting in the tracing of missing and stolen assets, particularly from North Africa.

On the other hand and perhaps not surprisingly given the comments that I have made, anti-corruption agencies, including for example, the ICAC in Hong Kong have been wary about having a too closer connection with the intelligence community. They have in particular feared being used or rather misused, as against the benefits that might arise as a result of information passed to them. This attitude is changing in particular as a result of the value of the information being provided from financial intelligence units (FIUs). The extent to which profiling of potential targets and highly vulnerable persons actually takes places in the context of anti-corruption policing varies enormously from country to country. The inclusion of political exposed persons, particularly pursuant to the UN Convention, within the mechanisms and procedures for financial monitoring have vastly increased the potential for agencies to on an almost real time basis obtain valuable intelligence. Of course, the political advantages of this – especially in the context of international relations have not been missed by the traditional intelligence agencies and their governments. However, few if any purely anti-corruption agencies have the capacity or at present the mandate - let alone the inclination to do this. Sadly, however, this might serve to further differentiate the capacity and relevance of agencies in the developed and developing world. This is an area where there has been relatively little discussion or perhaps realisation as to the quite profound implications.

Control and facilitator liability

Mention has been made as to the strategy of throwing the legal or at least regulatory net over persons who are in a position to control or at least influence the conduct of others and in particular those who are more likely to engage in corruption or facilitate it. We have long realised that in the case of serious economic crime and particularly organised economic crime, it is rare that the primary perpetrators can effectively be brought to justice in conventional terms. They will often be in a position as we have seen, to protect themselves because of their power and or ability to corrupt others. While not always untouchable – few can be effectively pursued during the currency of their power. Hence the argument goes that it makes sense to focus enforcement on those who are needed to perfect the criminal and anti-social

objectives of these elite and powerful individuals. This is not simply going after the little guys because the bosses are too smart, but rather a strategy designed to increase the costs and risks of engaging in corruption and abuse. There will become a point, at which the costs are just too great and are disproportionate to any assumed rewards. In the context of the financial services industry, we can achieve this in part through policies of ring-fencing access to the industry and markets and then imposing compliance, recording and reporting obligations on those concerned. In effect we create new types of responsibility on the facilitators to in effect vouch for the integrity of their clients and their transactions. This is one of the cardinal strategies within anti-money laundering systems whereby compliance risk and costs are placed firmly on those who in the ordinary course of their business, mind other people's money. We have already touched on a possible down side to all this.

Quite early in the development of probity related legislation in the USA attempts were made to impose liability on those, for example, in the financial services industry who could not show that they had taken reasonable steps in the supervision and management of those under them, to prevent such persons engaging in fraud and other abusive conduct – including corruption. These provisions have been refined and developed into a comprehensive strategy imposing the threat of legal responsibility on those in control positions. Obviously there are issues of proportionality and, indeed, fairness in terms of allocating risk and responsibility for culpable acts. In the United Kingdom there has been some hesitation in proceeding down this path. There are decisions of House of Lords and Privy Council which allow the actions of an employee acting within the scope of his employment - notwithstanding it is outside the authority he has and the fact that his employer has done everything reasonable to prevent the conduct in question - being attributed to the corporate employer as its acts for the purposes of criminal liability. However, in practice there has been reluctance among prosecutors to use these cases to develop a form of control liability, outside the areas of consumer and to a lesser degree investor protection. On the other hand a recent proposal for improving our approach in prosecuting fraud and corruption in the UK by the shadow Attorney General has advocated a far more robust use of such principles.

Section 7 of the UK's new Bribery Act 2010 in this sense is somewhat revolutionary, albeit not quite as draconian as some would have liked. This provision accords criminal responsibility to a company for the acts of an agent, who not with standing having no authority has committed the offence in section 6 of bribing an official of an overseas government. The company is entitled to a defence if it can show that it put in place 'adequate arrangements' to prevent such misconduct. In certain cases directors and others of a company that is so convicted can be held personally liable provided they had knowledge of what was going on. Given the very wide and all encompassing definition in the statute of what amounts to bribery there has been widespread concern in the commercial and business sectors as to what is said to be an unfair and unreasonable exposure to criminal liability. However, it is clear that the enactment of this offence has greatly increased the concern of managements to ensure that they have in place adequate compliance and training programmes. Thus, this provision has already had significant beneficial results.

It is also not without interest that the UK Financial Conduct Authority (which has taken over from the defunct Financial Services Authority) considers that it would be a breach of General Principle 3 of their rules and regulations for a financial institution in the United Kingdom not to have tailor made compliance procedures aimed at the giving of bribes, or facilitating of bribery and other forms of financial misconduct. In such circumstances the FCA is empowered to impose unlimited fines and take other action, including against persons in control and those responsible for compliance. There is a palpable change of attitude in the management of British businesses, in the financial sector and generally, in regard to the risks thrown up by these laws and regulations.

Blowing the whistle

This is also comes at a time when rather more attention is being given to the significance of whistle blowers in promoting integrity and due compliance. Indeed, the UK Home Office has recently established a working party to inquire into whether the UK's laws protecting whistle blowers need to be further strengthened. In particular, there is interest in the extent to which whistle blowers feature in US strategies for exposing financial misconduct and in facilitating investigation and enforcement action. The most recent legislation in the USA relating to the financial industry (i.e. the Dodds Frank Act) in addition to increasing the legal protection for whistle blowers provides that they may be awarded bounties up to 30 per cent of the fine eventually imposed by regulators for violation of the law. Given the size of some of the fines imposed by US financial regulators the rewards for informing might be very significant indeed.

Of course those complicit in wrongdoing themselves are not generally entitled to whistle blower status. Given that many acts of corruption are consensual and are in secret any thing that can be done to provide one of the parties to the corrupt act to co-operate with the authorities is desirable. The prosecutorial policy within countries varies greatly on this. Some are prepared not waive prosecution and on the basis of full co-operation regard the repentant party an informer and even a competent witness. Indeed, in such circumstances they might even be brought into a witness protection programme – something that is often needed in serious cases of corruption particularly involving allegations against those still in office and especially those in law enforcement. The position in England is usually that the prosecution will not agree to barter away the possibility of a conviction, but will attempt to assist in mitigation of sentence.

The area of plea bargaining is one that it is equally controversial. Again in the USA plea bargaining plays a major role in securing convictions for economic crime cases and in particular those involving continuing enterprises. In Britain there has been reluctance to adopt this approach and recent attempts by the Serious Fraud Office to do so, without the involvement of the court, and 'agree' levels of financial penalty (in collaboration with the US authorities) has been declared unlawful wholly unacceptable. On the other hand, it has been accepted that encouraging in particular corporations that discover misconduct has occurred to 'self-accuse' themselves to the authorities is desirable and to be encouraged. The Serious Fraud Office in such cases is able to enter into a deferred prosecution agreement, with the agreement of the court, with the 'defendant' under the terms of which no prosecution will be initiated within a period provided agreed steps are taken to remedy what has occurred and make restoration. If these conditions are properly observed, under monitoring, then the case will be dropped. In the US considerable reliance is now being placed on similar procedures.

Unexplained Wealth

Perhaps a rather more controversial suggestion for strengthening the hands of those who are concerned to discourage and pursue corruption is the development of procedures that identify unexplained wealth. Again the UN Convention contains a provision basically commending such an approach without actually obliging countries to enact such laws. The British colonial governments in imposing criminal codes on many parts of the Empire were concerned about misconduct in public office albeit the same degree of concern appears not to have been felt at home! The Bribery Ordinance in Hong Kong is of particular interest in this respect. Section 10 in effect creates a statutory presumption that any wealthy over and above the lawful remuneration of a public official is the proceeds of corruption. In addition to the offence of having excessive unexplained wealth, there are provisions for its recovery and for the net to also be thrown over close relatives and associates. Similar provisions were enacted in other parts of the Commonwealth. Of course, today in many countries and even in Hong Kong there has been concern as to whether such laws comport with human rights.

It is also the case that in not a few developing countries there is an express or implicit desire to see some degree of reallocation of wealth. South Africa is a good example of this. Consequently, the strict operation of such a provision is unlikely to find political favour. None the less, it is probable that the identification of unexplained wealth will play an increasingly important role in the identification of those suspected of tax fraud and evasion and possibly other acquisitive crimes. At the intelligence level net worth analysis has always been an important and useful tool. Now that there is so much more information available it is certain to become even more effective. It is also the case that under the laws relating to identification and interdiction of criminal property, we are increasingly adopting procedures which focus on unexplained wealth. For example, in the United Kingdom two convictions within a period will enable the court to presume that wealth in the hands of the defendants is the proceeds of a life style of crime and to avoid confiscation the defendant will be required to explain the source of this wealth. Indeed, in civil proceedings against assumed criminal property it is possible to allege that unexplained wealth is likely to be the proceeds of crime on a civil burden of proof. Indeed, given the practical problems in establishing the nexus to a specific crime it makes a lot of common sense to focus simply on unaccounted for wealth.

Even if there is reluctance to bring into law specific consequences, as a result of holding unexplained wealth it may well be possible to achieve at least some of the practical advantages of such a strategy through contract law and in particular employment law. The incorporation of obligations to declare wealth and explain unearned income and to provide for monitoring within compliance systems has much to commend, if the relevant activity is such as to carry high risks of temptation. Similarly appropriate provisions can be included in transactional contracts - although this may in practice be

rather more difficult to negotiate. Of course, control and compliance provisions have long been used in procurement contracts.

Investigations and Secrecy

Finally, we come to the efficacy of investigation, something that is often held out as the reason why cases have not been pursued. At the end of the day, to bring any case before a court there must be admissible evidence. Intelligence let alone mere information is not evidence. Intelligence might assist in locating evidence and deciding how to manage it, but for a legal result the court will need to be presented with convincing and admissible evidence.

Given the so many cases of abuse and corruption will be perpetrated in secrecy, often between conniving parties and in a good many, those involved will be able to control and manipulate the records, it is perhaps not surprising that investigators, often coming to the matter years afterwards, experience so much difficult in identifying, securing and then protecting evidence of sufficient weight and credibility. During the commission of the crime and its aftermath, including the hiding of the proceeds, the culprits will be in control and may well also be able to effectively frustrate ant form of external interference let alone criticism. In practice, it is often only where there is an unexpected and significant event or a change of government in the case of a state or change of management in the case of a company, that there is any chance of an investigation being initiated. The very facts resulting in the initiation of this opportunity for action, may well of themselves obviate the need or the justification. There are, as we have seen many reasons, some more justified than others, dissuading those now in a position to question what has occurred from doing so with any real commitment. In a good many cases where there is a change in government, there are likely to be urgent and compelling other priorities. Furthermore, it is assumed in this analysis that there in fact competent and honest investigators with the requisite authority and resources to undertake the required investigation.

There will always in the case of serious corruption be an international aspect, even if it is simply that the relevant ill-gotten wealth will be salted away overseas. Even through there have been, as we have noted, fundamental improvements in mutual legal assistance between states, the fact is that most law enforcement agencies are parochial in terms of their mandate, resources and priorities. The ability for investigators let alone prosecutors to reach out and conduct inquiries on a timely and efficient basis in different and perhaps uncooperative jurisdictions is exceptionally limited.

Those who have acted corruptly will not give up easily. They will have structured their actions to make it difficult to detect let alone investigate and they will have used experts to hide their wealth and discourage inquiries. Of course, this is nothing new the same techniques are used by those who wish to hide the proceeds of serious crime and terrorist related finance. Today the number of countries that are willing to prostitute their sovereignty by deliberately facilitating money launders and the like are much fewer. However, they do still exist and there are jurisdictions, such as Taiwan, that have very few procedures for cooperation with other states. Furthermore, it cannot always be assumed that the government and its agencies of other states are willing to cooperate. They may have some sympathy, where there has been a change in government, with the former leadership. Or they may have been corrupted. This is not fanciful. There are examples of governments and their central banks that have been willing for a price to become essentially money launders for organised crime and other criminals. In one case that I am aware of the corruption encompassed the Prime Minister and Attorney General of the country and investigators from the USA were simply killed! In another country I was mugged and threatened by the Presidential bodyguards while waiting in an anti-chamber - as a diplomat seconded to that government - to present a report to the President on corruption related issues. The week before the woman judge who was spear heading the new anti-corruption programme and her young son were shot dead driving past the President’s palace! In such cases there is no justice or realistic prospect of justice.

While governments were apparently reluctant to give up the benefits of providing bank secrecy and other offshore related services to suspected criminals simply on the basis that they might be assisting such in laundering their wealth and allowing them to re-invest it in further criminal activity, there was a sea change after 9/11. The concern of President Bush, albeit perhaps in retrospect misguided, to turn the financial weapons that had been developed to deal with drug dealers on terrorist, meant that countries were in reality either part of the solution or part of the problem! While even the Republican Party had been loath to expose to the glare of the US Internal Revenue Service the financial

arrangements that numerous leading US corporations had developed with certain Caribbean jurisdictions and Bermuda, the fear – that turned out to be more or less groundless, that these jurisdictions were being used to launder terrorist funds, resulted in the near death of financial privacy. As a subsequent Congressional Committee reported that attempting to identify terrorist funds in the same way as drugs money was a nonsense and the mechanisms that were adopted was like trying 'drain the ocean to find one kind of fish.' The more so because in practice the unofficial underground banking systems such as the hawallah systems were far more significant for the terrorists, and in any case where they did use banks they were invariably based in the Pacific or the US itself!

Now that the crusade has moved on from drug lords and terrorists to corruption we see the same arguments being employed to expose the financial arrangements and wealth of those who are suspected of corrupt practices or, perhaps rather more worrying, those who are or who have been politically exposed, their families and their business associates. A cynic might think that all this has perhaps more to do with exposing financial records to the tax authorities, than actually promoting integrity worldwide! The financial crisis and the near collapse of western banking have focussed governments' attention rather more openly on tax evasion and revenue enhancement. The recent meeting of the OECD carried the concern about tax havens and the like into the facility that many jurisdictions offer for easy corporate registrations. In almost any conceivable fraud or money laundering operation there is a need for corporate and trust vehicles. The use of such companies and trusts enables beneficial ownership to be hidden or at least obscured. Of course, perhaps the prime offenders in terms of easy incorporation and the ability to hide beneficial ownership are not in the main small island jurisdictions in the Caribbean and Pacific, by the UK and USA. The OECD has agreed to severely limit the opportunity that the corporate form affords those who wish to hide or complex their financial transactions and Mr David Cameron the British Prime Minister has gone as far as to announce that legislation will soon be introduced to expose the beneficial ownership of UK companies.

While all this is obviously to be welcomed it remains to be seen whether in practice it will make much difference for those who are charged with the investigation of corruption. In the end the transparency of the international financial system is only as good as its weakest link. The notion that China is going to become a firm and committed player in the world's anti-corruption team, not with standing that it hosts and largely pays for the International Association of Anti-Corruption Agencies, is sadly fanciful. Finally in this regard in the wholesale abandonment of the virtues of privacy we should perhaps not forget why financial privacy was invented by the lawyers and bankers; to protect the weak and legally vulnerable from the unjustified deprivations of governments and tyrants – well this is how the Swiss used to justify their bank secrecy laws! In all our deliberations about corruption and its malevolent cousins it is necessary to retain a sense of proportion and in particular to be aware of unintended consequences both in the conception of law and in particular in its application.

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