Will a bill's details defend against corruption? Will these details make corrupt behaviors more difficult?)

# CHAPTER NINE: ENACTING LEGISLATION TO FOSTER GOOD GOVERNANCE

In some countries, people complain that a veritable culture of official corruption undermines development efforts. That poses a major challenge to legislators: How to ensure that a bill's provisions reduce the ever-present danger of officials' arbitrary decision-making and corrupt behaviors? No law can entirely eliminate corruption. The laws you enact, however, can make it more difficult for officials to behave corruptly. This chapter gives you the tools to assess whether a bill's detailed provisions will likely reduce corrupt behaviors.

Merely by examining a decision – of a court, a minister, an agency official – no one can determine whether it accords with the Rule of Law. To reduce the probability that a bill will permit arbitrary, corrupt decision-making, it must prescribe decision-making structures in which the decision-makers:

(a) receive the relevant ***inputs*** and ***feedbacks*** from the entire population of stakeholders (and exclude irrelevant or prejudicial matter);

(b) take into account ***specific criteria*** that they must consider;

(c) employ a methodology that ensures they ground their decisions on ***facts and logic***; and

(d) reach their decisions using transparent, accountable procedures.

Following problem-solving's four steps, this chapter examines:

A. The most common and serious sorts of corrupt officials' behaviors;

B. Some explanations and possible legislative remedies for those corrupt behaviors, emphasizing that their roots lie, not merely in weak individuals, but also in weak institutions;

C. Legislative devices to structure official discretion;

D. Mechanisms to enhance transparency and accountability;

E. A general strategy and specific laws to combat a 'culture of corruption' by controlling government procurement, reducing officials' conflicts of interest, and implementing codes of conduct for officials.

# A. CORRUPT PRACTICES UNDERMINE GOOD GOVERNANCE

CORRUPT PRACTICES

Corrupt practices always involve officials' ***exercise of public power for their private purposes.*** Five types of corrupt behavior seem most common:

(1) **Bribery:** An official receives value for exercising discretion in the payer's favor.

(2) **Embezzlement:** An official takes money from entrusted funds for personal use.

(3) **Speculation**: An official uses knowledge from his or her work to make an unfair profit.

(4) **Patronage and nepotism:** An official uses official power to provide jobs to family members and friends, regardless of merit.

(5) **Conflict of interest:** Consciously or unconsciously, an official makes an official decision motivated, not by public good, but by personal or material interests.

All constitute examples of arbitrary decision-making; they all undermine good governance.

## EXERCISE: CORRUPT PRACTICES

Have you seen any evidence of these kinds of corrupt practices in your country? Into which category of those listed above do you think it fits?

# B. EXPLANATIONS FOR CORRUPTION

This section explores

(1) the many different causes of corruption;

(2) the inadequacy of remedies directed solely to 'subjective' causes; and

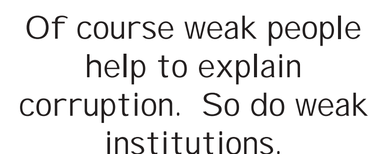
(3) the necessity of reducing 'objective' causes by ensuring transparent, accountable and participatory decision-making.

## 1. No one-size-fits-all explanation, no one-size-fits-all remedy.

In different times and places, different factors cause different kinds of corruption. Not only does bribery differ from embezzlement or nepotism; the nature and causes of bribery differ in different times and places. A number of distinct and separate role-occupants, behaviors, and explanations lie behind different incidents of corruption that may appear similar. Consider, for example, these different kinds of bribe-taking: by education ministry officials to favor particular textbook publishers in Zimbabwe in the 1980s; by judges in Nepal to decide in a party's favor; a Nigeriann clerk-of-the-works to accept concrete containing more sand and less cement that required; an Indonesian customs officer to classify an importer's goods in a lower-taxed category than the regulations stipulate. Explanations for corruption also vary with official rank: why a highly-paid minister demands a bribe of millions to award a warship contract to a particular firm does not explain why a poorly paid hospital nurse demands a shilling to provide a patient with clean sheets.

## 2. Why do legislative solutions seldom work when they assume subjective causes for corruption?

Too often, law-makers assume (implicitly if not explicitly) that officials behave corruptly only for ***subjective*** reasons – that they are greedy, or they have no moral integrity, or that they value kinship over merit. Because they see no objective mechanisms to change these corrupt official's minds, many law-makers resort to drastic criminal sanctions – including the death penalty. They ignore the fact that, as a general deterrent, capital punishment never works (not to mention that it violates human rights).




Some criminal sanctions may convey the message that the state does not tolerate corruption. The nature of corruption, however, frustrates effective implementation of such sanctions, if authorities try vigorously to enforce them. As in gambling, prostitution and drug crimes, the parties to corruption receive the benefit, but usually no specific 'victim' exists to report the crime to the police. Even where whistle-blower statutes establish huge rewards, hot-line telephone numbers, and efficient specialized enforcement units, criminal punishment has rarely eradicated an entrenched culture of corruption.

Some experts recommend a whole slew of platitudes to deal with these subjective evils of corruption: 'the passage of time', 'the spread of education', "the evolution of public opinion," "the growth of commerce and industry," 'the .growth of the professional class', 'the diffusion of power' from politicians to all of society, 'democracy,' the increased prestige of accountants and auditors, the 'rigorous enforcement' of anti-corruption laws, and 'the personal witness of individuals who are opposed to bribery and corruption'. These bromides do little to help people whose government officials daily sell favors and pick their pockets.

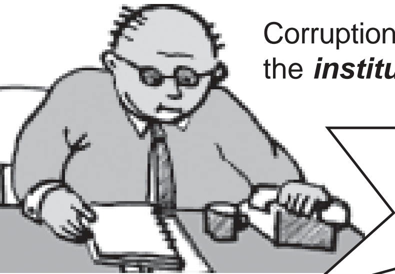
## EXERCISE:

To try to stamp out corruption, has your country's government relied primarily on the criminal law? If so, has it effectively reduced the incidence of corrupt behaviors?

Legislative theory argues that you can help reduce corruption by ensuring that every bill contributes to reducing corruption's objective, *institutional* causes.

### 3. Objective explanations for corruption

Corruption breeds where institutions permit it. A bill's provisions may help to alter or eliminate the ***institutional causes of corruption*** suggested by the ROCCIPI categories.



In particular, we highlight here the importance of Rule,Opportunity and Capacity in explaining corruption.

***Law can cause corruption.*** By granting officials discretionary power to dispense scarce government goodies in high demand, ***poorly drafted laws*** help to create circumstances that breed corruption. Official Secrets Act and the Civil Service Regulations often have secrecy provisions that permit corruption to flourish in the dark. Lack of accountability, especially fiscal accountability, breeds corrupt behavior.

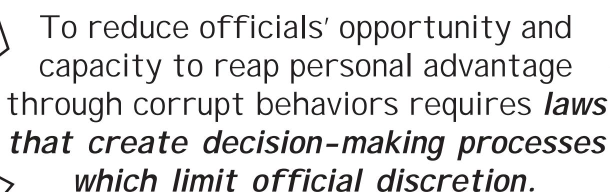
***Opportunity and Capacity can also cause corruption.*** More than two millennia ago, the Greek philosopher Aristotle articulated government's great paradox: Law cannot avoid granting officials power (that is discretion) to make crucial decisions. How to avoid the exercise of power for selfish reasons? In the 20th Century, the American jurisprudent, Roscoe Pound, observed that ***all jurisprudence concerns discretion and its control***.

Unaccountable power to allocate official favors – in procurement, in licensing, in deciding disputes, in granting zoning and planning exceptions, in locating government facilities, in ruling whether a farmer has brought to a marketing board office sixteen kilos of cocoa or only fifteen kilo (enabling the official to pocket the price of the extra kilo), in deciding who gets credit in a government loan scheme to aid small farmers and start-up industries, in running a government electricity or steel or airlines corporation, a thousand others – all of these present officials with opportunities to behave corruptly. Circumstances differ. A Director of the Navigational Aids Division of the Coast Guard may have fewer opportunities to milk the job for corrupt advantage than a Ministry of Mines official who approves oil drilling licenses.

Neo-liberal writers claim that corruption's basic cure lies in getting government 'out of business'. Where government has no favors to give away, they argue, there can be no corruption. The market's 'invisible hand' ensures the best possible allocation of resources.

Without appropriate laws and institutions, however, the market's 'invisible hand' everywhere too often enables powerful oligopolistic interests to charge excessively high prices, limit entry, restrict market information, produce shoddy and sometimes dangerous goods, use insider information to benefit insiders – a litany of abuses which exhibit many of the same features as government officials' corrupt behaviors. Over the years, industrialized country governments have come to use law to restrict market actors' mis-behaviors. ***How can legislators both protect against market abuse and reduce the danger of officials' corrupt behaviors? That constitutes the issue you face.***

Of course, the law should punish corruption – if the police can catch the culprits. Laws to reduce the objective causes suggested by the ROCCIPI categories of Rule, Opportunity and Capacity will likely prove more effective. Tthe next section emphasizes the necessity of imposing limits on officials' discretion to make decisions.




# C. LIMITING THE SCOPE OF OFFICIALS' DISCRETION

Unaccountable, secret and unnecessarily broad discretion creates opportunities for arbitrary and corrupt decision-making. First, always ask, does a bill contains rules that require the decision-maker to ***take into account a specified range of factors — and only those factors?*** Second, make sure the bill permits decision only by ***procedures authorized by the law.***

This section reviews the input-output process model of decision-making to identify the key points and ways in which a bill's details can limit officials' discretion (see chapter 6).

**1. Input and feedback processes.** A law may limit the scope of officials' discretion by specifying criteria as to whose and what kinds of facts and ideas they may consider.

***a. Limit the issues agency officials may decide.*** If a law permits agency officials to decide only specified issues, the *ultra vires* rule forbids them from deciding other issues. If a law says, "The Mining Environment Agency may issue rules concerning the control of the environment in coal and in hard-rock mining locations," that Agency cannot legally issue a rule regulating the drilling of oil wells ('hard-rock mining locations' does not subsume 'oil wells').

**b. *Specify who may supply inputs and feedbacks.*** Bent on making an arbitrary decision, officials may limit facts and opinions they consider to those that support their predetermined position (on a factory safety inspection, an industrial safety inspector may have lunch with the employer, ignoring the union leadership). Similarly, an official bent on corruption invariably holds secret meetings with the corruptors, and ignores other stakeholders' inputs. To prevent officials' arbitrary or corrupt behaviors, a law might require the officials to hold a public hearing; solicit facts and ideas from vulnerable groups that the law would likely affect; and refrain from contacting one affected party without the presence of other affected parties.

EXAMPLE

Suppose a law empowers a ministry to make regulations to facilitate disabled persons' access to a public building, and requires that the ministry first consult disabled groups' representatives. A building inspector (taking a bribe from the contractor, and without further consultation with groups representing disabled persons) might permit the contractor not to provide wheelchair access to a public building. If a disabled person complained, a court would likely insist that wheelchair access be provided, on the grounds that the building inspector had no power under the law to exempt the contractor.

A law may limit inputs by specifying who has standing (the right) to appear and present evidence and argument. It may require that agency officials respond in writing to a stakeholder who complains about a decision. If the officials fail to respond to a proper complaint, a court could upset the decision.

**c. *Limiting substantive inputs to decision.*** A law may specify criteria that directly or indirectly limit the inputs admitted into the decision-making process.

In a proceeding to determine whether an agency should identify a particular species as endangered, a statute might state ***directly,*** "The hearing officer may not admit evidence of the economic importance of harvesting the species"; or ***indirectly,*** "The agency may not consider the economic importance of harvesting the species."

In either case, the *ultra vires* rule forbids a hearing officer from admitting or considering the forbidden evidence (see Subsection 2(b), below).

**2. Procedural and substantive limits on the conversion process.** A bill may also limit discretion by structuring the conversion process.

**a.** ***Requiring a justification for a decision****.* To reduce the danger of corrupt influence, a law might limit the conversion process by several procedural devices:

- require agency officials to state in writing the facts and logic on which a decision rests;
- require officials to follow agency precedents ;
- require that two or more officials make decisions.

EXERCISE:

Can you can think of other procedural limits on the conversion process?

**b.** ***Limiting factors officials consider***

Most frequently, bills limit discretion by specifying the factors that decision-making officials may or may not take into account.

EXAMPLE

For example, "In issuing or denying a mining permit pursuant to this section, the Agency may take into account only the following factors: The potential of the proposed mining activity for injuring the physical environment, cultural or architectural monuments, and archeological treasures; the potential of the activity for polluting air, water, sound, or the natural aesthetic qualities of the environment; and the potential of the activity for destroying rare species of wild plants and animals."

Suppose the agency admits evidence that the proposed mining activity "will unduly interfere with agricultural pursuits," and later, declines to grant the permit in part on the grounds of the mine's probable interference with farming in the locale. Because the agency took into account a matter (interference with agricultural pursuits) which the applicable law by implication excluded from the factors the agency might consider, a court probably would not uphold its decision. If farmers object, they should seek a change in the law.

In a variety of ways, a bill may stipulate the factors an official must or may take into account when formulating regulations. At one end, a 'bright-line' rule might give officials a minimum of discretion – for instance, a law might require aircraft pilots to retire at age 60. At the other extreme, the law might give the agency discretion to retire a pilot 'when the agency deems it desirable'. Many alternatives fall in between. But the further from a bright-line rule, the more discretion the rule permits — and the greater the possibility for corruption.

EXAMPLE:

***The long road from "bright-line" to agency discretion***

The law might require aircraft pilots to retire at age 60. The law might give the agency discretion to retire a pilot 'when the agency deems it desirable'. A whole range of alternatives fall in between. To set a standard against which a court might later measure an official's exercise of discretion, the law might require the agency to retire a pilot 'when the pilot becomes physically unfit to fly'. Or the law might list factors for consideration, leaving the factors' relative weight to the officials who make the decision. (For example, the agency may retire a pilot when no longer fit to fly, taking into account eyesight, reaction time, hearing acuity, hand-eye coordination and cardiological health). The law might reduce these factors into a series of bright line rules: A pilot may not retain a license to fly if the pilot has less than 20-20 vision in each eye when corrected; blood pressure within specified limits; ability to do thirty-five sit-ups without pause; and so forth.

The legislation may give the agency officials discretion to experiment with (and alter) criteria by changing the factors they must take into account. At the same time it may require officials always to keep a list of criteria in force, and to give reasons for changes made. To enhance consistency and add relevant factors case-by-case, the law may require officials to follow agency precedents .

Finally, the bill's General Purposes Section in effect imposes criteria for decision. Whether to specify criteria or to rely on a general purposes clause depends upon what seems required to resolve the kinds of issues the official must decide, and whether sufficient reasons exist for granting the officials discretion to decide them.

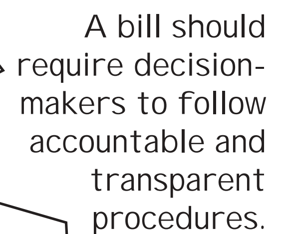
By definition, specifying criteria for highly complex decisions seems difficult if not well-nigh impossible. The greater the number of factors likely to affect decisions, the more criteria seem necessary; but how can a bill state all those likely to prove relevant? Even a vague criterion, like 'reasonable,' may seem better than none. Yet vague criteria create two dangers:

(1) On appeal, a generalist court may substitute its relatively inexpert judgments for those of a specialist agency (see Chapter 6);

(2) Where the law requires courts to defer to agency judgment, vague criteria may hinder a judge from questioning a corrupt or arbitrary agency decision.

As a possible solution, a law may require the agency to accompany its decision by an impact statement, listing along with its decision the factors its officials considered in assessing that decision's probable consequences. On appeal, a court or reviewing agency may then 'second guess' the agency about the sufficiency of the reasons given. Unless some organization — usually an organization of civil society – can afford to bring a case to court, an impact statement provision dies a-borning. In some countries, an ombud (see p. 169) may hear complaints against administrative decisions.

Remember: unless, in your country, a bill effectively structures its grants of discretion, it too easily fertilizes the field for corruption. Ensure that, as far as possible, every bill contains adequate criteria and procedures to limit implementing agency discretion.




## D. ACCOUNTABILITY AND TRANSPARENCY

### 1. Institutions of accountability

To reduce the ever-present danger of corruption, a bill's details must require officials to provide reasons for all important decisions, especially those relating to finances.

a. ***Accountability for decisions***.

A bill may establish institutions that require :

(i) ***on-going*** accountability;

(ii) accountability in response to an aggrieved party's ***complaints***;

(iii) ***upwards*** accountability to an office higher in the hierarchy of authority (an administrative superior, a judge); and

(iv) ***downwards*** accountability, for example, to a legislative committee, a stakeholders' general meeting, or a town meeting.

Some useful devices include requirements for:

- ***written, published reasons*** for decisions so legislators and the public can make sure administrators have taken into account the relevant factors.
- ***regular evaluations of a law's social consequences*** by requiring a 'sunset clause' (which terminates the law on a set date unless renewed by the legislature); annual reports laid before the legislature; a legislative oversight

committee.

- ***dispute-settlement systems*** so aggrieved parties can make internal and external appeals from administrative decisions.
- In particular cases, **review of proposed decisions by a bureaucratic superior**.
- Accompanying important bills (including administrative regulations) by a ***research report*** that demonstrates that the bill contains an adequate system of accountability appropriate to its subject-matter.

b. ***Financial accountability***. In the Anglophonic tradition, an Audit and Exchequer Law usually provides the basic framework for fiscal accountability. If, in your country, no such law exists, check every bill to ensure that it provides basic financial accountability. Its provisions might require:

- ***annual audits*** by an independent auditor;
- identification of ***a senior civil servant who must certify*** before payment that an expenditure meets the requirements of the laws;
- the agency to ***keep its funds on deposit with the Treasury*** and keep up-to-date ***account books available for inspection.*** Avoid giving an agency sole power over special funds.

Laws can require either secrecy, or transparency.

## 2. Institutions of Transparency

From their former authoritarian rulers, some governments have inherited official secrecy laws. In contrast, Sweden's Constitution includes a public information section that, in practically all matters, forbids government secrecy. A bill's provisions may induce greater transparency by requiring an agency to:

- ***advertise its meetings in advance,*** notifying the public of their right to attend;
- on demand to ***make available to interested persons relevant information*** from its files;
- widen the rules of standing to ***permit interested persons to appear and speak in agency proceedings*** that may affect them; and
- ***broaden the concept of 'interest'*** to permit, not only by those with a material but also an ideological interest to intervene in a proceeding (for example, in a proceeding to determine whether to sell a national park, permitting, not only

neighboring landowners but also non-government organisations concerned with the preservation of national park lands, to intervene).

**ENSURING PARTICIPATION IN THE RULE-MAKING PROCESS**

PARTICIPATION

A bill can make corruption more difficult by increasing participation in the decision-making process (and thus decreasing the likelihood that a briber can 'buy' a favorable decision or rule). In addition to the points mentioned above, a bill might include these mechanisms:

***Notice and comment:*** The agency must publish a proposed regulation in specified media, inviting the public to submit written comments before a stated date. After receiving the comments, the agency reconsiders and, if necessary, redrafts the regulation When it promulgates the regulation, it must accompany it with a statement on each comment received, and, with reasons, its disposition .

## EXERCISE 1:

***A draft bill concerning the allocation of water resources reads in part as follows:***

"**Section 17. Allocation of River Water**.

(1) Where a river, stream, or irrigation channel has two or more users of its water flow, the Minister shall by order determine what percentage of the water flow a user may take from the river, stream or irrigation channel.

"(2) A person may not appeal from the Minister's order."

***Critique the draft in terms of the likelihood that it will produce results in conformity with the Rule of Law.***

## EXERCISE 2:

***1. The following excerpts from a bill contain all of its substantive provisions for creating a National Service Agency within the Ministry of Defense. How would you assess whether these provisions make compliance with the Rule of Law probable? What changes, if any, would you recommend?***

After providing for appointments to the Agency, their terms of office, etc., the draft bill states:

"**Section 23. Powers and duties.** The Agency shall have the following powers and duties:

(1) To create, operate and run a National Service system which will employ graduates from the nation's universities for one year after graduation on works of national importance.

(2) The Agency may make regulations to carry out the power granted in subsection (1).

***The bill contains no other substantive provisions.***

## EXERCISE 3:

**2.** ***The draft bill that follows proposes that under certain conditions, an official or agency may base subsidiary legislation on negotiations between stakeholders***. For example, the electrical appliance industry requires a high degree of standardization in order to function. A consumer must have confidence that when the consumer purchases an electrical plug, the plug will fit the outlet in the consumer's home. That will only happen if the industry has standardized the sizes and shapes of plugs and outlets. There seems no strong objection to letting the various elements in the electrical appliance industry bargain out the regulations to create those standards, and having the agency then promulgate them as subsidiary legislation to regulate the sale of electrical plugs and outlets in the country.

***Critique the following bill in terms of the likelihood that it will produce results in conformity with the Rule of Law and good governance. Taking your critique into account, how would you ask the drafter to rewrite the bill?***

## EXERCISE 3 *continues:*

The draft bill reads as follows:

"**REGULATORY NEGOTIATION**

"(1)Any official or agency who is empowered to issue proclamations or to enact subordinate legislation in terms of this Act may choose regulatory negotiation as a pre-adoption procedure either as a supplement to the procedure set out in section xx (concerning notice and comment) or as a procedure on its own, if such official or agency is of opinion that such a procedure would be appropriate in the public interest.

"(2)In making a decision to use regulatory negotiation exclusively or as a supplement to the procedure set out in section xx, the official or agency must take into account the following considerations, whether: —

(a) there is a need for a rule;

(b) there are a limited number of interests that will be significantly affected by the rule;

(c) there is a reasonable likelihood that a negotiating committee can be formed with a balanced representation of persons who —

(i) can adequately represent the interests identified under paragraph (b); and

(ii) are willing to negotiate in good faith to reach consensus on the proposed rule;

d) there is a reasonable likelihood that the committee will reach a consensus on the proposed rule within a fixed time period;

(e) the agency has adequate resources and is willing to commit such resources, including technical assistance, to the negotiating committee; and

(f) in the event that the agency chooses to use the negotiation as a supplement to the notice and comment procedure as contemplated in paragraph (1):

(i) the use of negotiation will not unduly delay the notice of the proposed rule making and the issuance of the final rule; and

(ii) the agency will, to the maximum extent possible consistent with its legal obligations, use the consensus of the committee as the basis for the rule proposed by the agency for notice and comment."

***Critique the draft in terms of the likelihood that it will produce results in conformity with the Rule of Law and good governance.***

# E. COMBATING A 'CULTURE OF CORRUPTION'

This section first proposes a general strategy and then reviews measures which elsewhere have reduced corrupt behaviors in government procurement, conflicts of interest, and civil service codes of conduct.

**1. Combating hopelessness about corruption: a general strategy.**

Transparency International emphasizes adopting a positive approach, expressing confidence in public servants and a desire to assist them to fulfil their responsibility for acting in the public interest. The checklist below suggests questions you might ask about every bill.

CHECKLIST: A BILL'S DEFENSE AGAINST CORRUPTION

**A CHECKLIST FOR ASSESSING A BILL'S DEFENSES AGAINST CORRUPTION**

To assess whether a bill's proposed safeguards and controls seem adequate to prevent corrupt behaviors you might use this checklist:

A. Does the bill's provisions for the implementing agency's general control environment permit corruption? Does the bill contain provisions that make it likely that –

1. the management will commit the agency to a strong system of internal control?
2. the agency's units will have appropriate reporting relationships?
3. the agency will have a staff of people of competence and integrity?
4. the agency employees will undrstand and work well together to implement its policies and procedures?
5. the agency will budget and report on its finances according to well-specified and effectively implemented procedures?
6. the agency will have well-established and safeguarded financial and management controls – including the use of comuters?

B. Does the bill properly delegate and limit the agency's discretion?

C. To what extent will the agency's activity carry the inherent risk of corruption?

1. Does the bill's prescriptions for the agency program seem vague or complex? Wil the agency likely become heavily involved with cash dealings, or in the business of approving licenses, permits or certifications? (The more an agency engages in these activities, the greater the risk of corruption.)
2. In light of the agency's activities, does the amount required for funding the

agency seem large? (If corruption exists, the bigger the budget, the greater the loss.)

3. Will the agency's activities have a significant financial impact on non-government interests? (The greater the 'rents,' the greater the incentive for corruption.)
4. Does the agency implement a new program? Does it work under a tight time constraint or an imminent expiration date? (If so, corruption seems more likely.)
5. Does the agency's level of centralization seem appropriate for its activity?
6. Does evidence indicate previous illicit agency activity?

*Source: Office of Management and Budget [U.S.],* Internal Control Guidelines*(1982), Ch. 4, cited in Robert Klitgaard, CONTROLLING CORRUPTION (1988).*

CHECKLIST ON CORRUPTION

New legislation can require seminars and other means of engaging agency leaders and staff in constant discussions about the necessity, as well as ways and means, of combating corruption.

Do bills provide devices to improve transparency, helping to make the criminal law somewhat more instrumentally effective by incorporating 'whistle blower' statutes? incentives for clients to report attempts to obtain bribes? better auditing and control systems? more highly trained evaluators and evaluation systems? Has your government established an Ombud or its equivalent, an office to which anyone can bring complaints and which itself may proactively investigate corrupt behavior?

**AN OMBUD OFFICE?**

The effectiveness of an ombud to police the administration depends on the provisions of the law that establishes it. Some commentators vew the ombud as a radically new approach to ensuring administrative accountability, an institution simpler and easier for ordinary citizens to approach than the courts. Others say that, too often, the rules establishing an ombud limit it, like courts, to dealing with corruption, not on an institutional level, but only on a case-by-case basis. In effect, they only reduce the high cost of court suits to end bureaucrats' misbehavior.

Review the detailed rules for an existing or proposed ombud office to ensure that its officials--

- may proactively investigate alleged corrupt practices;
- that they receive inputs and feedback from all stakeholders, especially the most vulnerable ones;
- that they publish reasons for their decisions; and
- that they make annual reports to you, as legislators, on specific issues on which they decide, and on remaining areas of potentially corrupt behaviors, if necessary accompanied by drafts of new rules.

AN OMBUD OFFICE?

## 2. Three general kinds of laws to combat corruption

This section reviews the causes of corruption in three areas where, as national markets have expanded in an increasingly complex global economy, corruption has appeared especially pronounced: government procurement and sale of assets; senior officials' conflicting interests; and the expanding public service.

***a. Government procurement and sales of assets.*** Everywhere, to build the socio-economic infrastructure for expanding markets and to foster socio-economic development, governments must purchase a seemingly endless list of goods and services: roads, railroads, bridges, ports, schools, textbooks, hospitals, preventive care measure, military equipment and supplies, parliament and government office buildings, covered markets, dams, electrical systems, water systems. In recent years, as governments have begun to sell off their assets, private companies and individuals have dangled before responsible public officials opportunities for enrichment almost beyond belief: plush cars, fancy new housing, overseas jaunts, outright cash payments.

CORRUPTION IN PROCUREMENT AND SALES

Many countries' experiences in using law to reduce corruption in government purchases and sales of assets suggests that an adequate procurement law should incorporate six elements:

1. Rather than permitting each ministry to do its own procurement or sales of assets, require decisions relating to major assets(defined by specified criteria) to pass through a single, specialized agency.
2. Require open bidding for practically all government contracts for the purchase or sale of assets.
3. Prescribe procedures to make open bidding a reality (for example, advertising requests for bids, and written reasons for choosing the winning bidder).
4. For unavoidable negotiated contracts, prescribe criteria and procedures ensuring transparency, accountability and stakeholder participation in decision-making.
5. Detail provisions for ensuring contract performance.
6. Establish specialized research agencies to provide information concerning the prices and costs of goods, services and expertise acquired internationally. To facilitate this, and to take advantage of economies of scale, some governments have cooperated to establish regional research and information units.

International agencies and some industrialized country governments have begun to introduce measures to prohibit corporations from bribing other countries' officials in return for favors.

**INTERNATIONAL MEASURES TO BLOCK 'SUPPLY SIDE' CORRUPTION***

By the last decades of the 20th Century, the rapidly growing international anti-corruption movement mainly focused on corruption's 'supply side'. In 1978, the U.S. Congress enacted a Foreign Corrupt Practices Act that made it a crime for U.S. firms to pay foreign bribes. In 1997, representatives of 29 member governments of the Organization for Economic Development and Cooperation (OECD) signed a Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Until governments formally enact national laws to enforce the provisions, the convention will remain a 'soft' law. By 1998, several emerging market economies, including Argentina, Brazil, Bulgaria, Chile and Slovakia, had signed the OECD convention.

In 1998, an international NGO, Transparency International, then only five years old, had established 70 chapters around the world. Liinked with other NGOs and international agencies, Transparency International works to reduce corruption.

The spread of money laundering — in 1998 estimated by IMF Managing Director Camdessus to equal in value some 2-5% of the global output of goods and services — persuaded many governments to improve mechanisms to supervise banking institutions and detect corrupt behaviors. The OECD Financial Action Task Force began to seek cooperation among national authorities and financial institutions to pool intelligence, to strengthen regional anti-money laundering agreements, and to provide greater transparency and regulation. The World Trade Organization (WTO) initiated exploration of a possible multilateral investment agreement, including provisions for dealing with corruption.

In addition to a general government procurement law, legislation should specify transparent and accountable procurement and sales practices in particular sectors. A bill dealing with road construction should incorporate provisions to block road building companies' attempts to influence officials to overlook their shortcomings. The Armed Forces bill should include provisions to prevent corruption in military procurement.

You should never copy another country's government procurement law. From other countries' efforts to use law to combat corrupt procurement practices, however, you

can learn a lot about the nature and scope of corrupt procurement practices likely to emerge as your national economy expands. You can also learn about the possible causes of corrupt procurement behaviors of government officials and private sector actors, including domestic and foreign investors; the probable social costs and benefits of measures that logically seem likely to reduce or eliminate those causes; and possible measures for monitoring the social consequences of the procurement practices they incorporate into their proposed law.

***b. Conflicts of interest legislation.*** Senior government officials typically comprise many of a country's most educated citizens, with extensive personal ties to civil society's leaders, including private entrepreneurs. Aspects of their personal concerns inevitably tend to conflict with the public interest.

**THE MANY FORMS OF CONFLICT OF INTEREST**

THE MANY FORMS OF CONFLICT OF INTEREST

1. *Private employment:* In some countries many officials and political figures hold part-time jobs or operate side-line businesses. These private concerns frequently conflict with their public responsibilities. Government regulations may affect their private business. As officials, they must deny privileged access to official information to persons whose favor they need in their private affairs. The potential conflicts seem innumerable.

2. *Gifts, hospitality, and other personal benefits*: Persons or organizations may offer officials gifts, invitations to social affairs, holiday travel opportunities – supposedly innocent symbols of friendship. Too often, these become transformed into no-nonsense cash bribes.

3. *Employment after leaving a public post*: On retiring from public office, officials may take private sector jobs from firms that do business with their former offices. As private contractors or consultants, some do business with their former offices or help unauthorized private sector actors gain access to privileged information and contacts.

4. *Shareholdings, directorships, and commercial partnerships:* Holding shares or serving as directors or partners in private sector firms, officials may make decisions favoring not the public's but those firms' private interest.

5. *Travel perks*: Officials may make unnecessary trips within their country or abroad in order to claim per diem payments, or to accrue airplane mileage benefits for themselves.

6. *Preferential treatment:* Officials may accept preferential treatment from private interests in exchange for favors to an individual or organization. Over more competent applicants, an official may employ a family member or a friend (the act of nepotism).

**SPECIFIC CONFLICT OF INTEREST PROVISIONS**

Many countries' laws include provisions to make it difficult for officials to conceal conflicts of interest or to participate in decisions where conflicts exist. Some or all of these might appear in a general conflicts-of-interest law:

1. *Make specific corrupt activities criminal*: Giving and receiving bribes, preferential treatment of family or friends, accepting gifts above a small minimum, accepting a job with a former client of the official's department within a stated period after leaving the public service; taking kickbacks from suppliers; and others. To reduce officials' interest in violating these provisions, many laws threaten heavy fines, and encourage detection by giving whistle-blowers a major share of fines collected. As a cure for corruption, however, these rules suffer the same disabilities as general criminal law.

2. *Eliminate other potential causes of corrupt behavior*, like low official salaries, secret decision-making processes, and unaccountable decision-making procedures.

3. *Improve transparency* by requiring officials publicly to disclose their outside commercial and property holdings and relationships and gifts larger than a specified minimum; and, on important issues, to accompany their decisions with an adequate published justification.

4. *Provide for an implementing agency with the opportunity, capacity and incentives to enforce these kinds of provisions* (see Chapter 6).

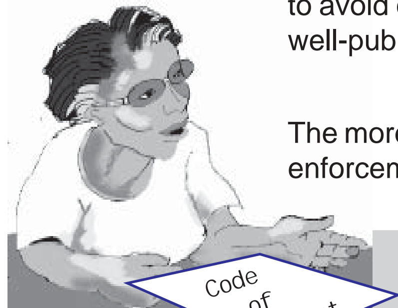
5. *Prohibit potentially compromising ties:* No person running for public office may hold dual citizenship or declare allegiance to another government; no person seeking to become a legislator or minister may already hold another legislative or ministerial office.

6. Specify negative consequences for exposed conflicts of interest, including provisions to
   - require an appointed official holding a government contract to resign;
   - remove the official from business operations;
   - render the contract void;
   - establish monitoring mechanisms to ensure that in their private capacities officials do not derive undue advantages from their official positions;
   - require the official to declare a personal interest to an appropriate body. *(Critics argue this reduces the negative consequences for officials who declare their interest, and permits elected officials to participate in commercial activities.*)

*c. **General codes of conduct applicable to the public service***. A Code of Official Conduct either as a separate law or as part of the Civil Service Regulations may serve as a general deterrent to conflicts of interest.

***1. Substantive:*** Most codes focus on helping ministers, legislators. and public servants to avoid corruption-producing circumstances. Some governments combine these into one well-publicized code applicable to all government personnel.

The more detailed a code (including its implementing measures) the more likely its effective enforcement.






**POSSIBLE GUIDELINES FOR DRAFTING A CODE GOVERNING LEGISLATORS' CONDUCT**

I. A code should begin with a clear statement of its purpose. A code for legislators might emphasize that service in the legislature constitutes a public trust. In that context, it might state as its aims:

1. maintainance of public confidence in the legislature's and individual legislators' integrity;

2. guiding legislators in reconciling their private interests and public duties; and

3. fostering consensus among the legislators by providing common rules and establishing an independent non-partisan advisor to answer questions relating to conduct.

II. The code then might stipulate rules prohibiting legislators from —

1. using for private purposes the influence or confidential information they obtain in the course of their legislative responsibilities;

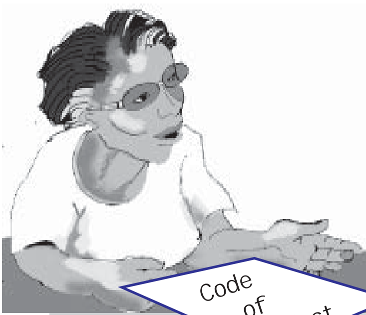
2. accepting compensation for services that, in their legislative capacity, they render to an individual or group;

3. participating in official actions dealing with issues in which they have a personal (financial or otherwise) interest;

4. attempting to restrain others from performing official duties;

5. in specified circumstances, accepting gifts or honoraria for speeches, articles, or other employment; and

6. referring to their legislative role to advance their professional or occupational pursuits.






**POSSIBLE ELEMENTS OF A CODE OF CONDUCT FOR MINISTERS AND SENIOR PUBLIC OFFICIALS**

I. A code for ministers and senior public officials might include any or all of the following provisions.

1. *Limit participation in business enterprises*: Require ministers and senior public officials to dispose of all interests on taking public office by transferring business interests to a blind trust (see below); establishing an authority to decide when they may retain business; or withdrawing from daily business operations.

2. *Restrict vocational, professional and other private employment*: Use devices similar to those relating to participation in business enterprise.

3. *Prohibition on holding directorships*: Require withdrawal from all except perhaps family companies (and in those cases, require withdrawal if conflict of interest seems likely to arise).

4. *Shareholdings*: Require disposal of shares beyond a minimal threshold amount; deposit of shareholdings in blind trust (see below); or declaration of shareholdings to Registrar to detect danger of conflicts (difficult to monitor and enforce, this has proven relativelly ineffective).

5. *Gifts, hospitality, sponsored travel*: Limit the value of any one of these that ministers and senior officials may receive; require declaration of gifts above that amount, or turn them over to state property (apply that ruling to close family members, too).

6. *Prohibit use of government property or resources (including employees) for personal purposes or for ministers' political parties or constituencies*.

7. *Prohibit nepotism in government appointments*: Establish standards for appointments.

8. *Decide permissible limits on family ties*: Define the extent to which ministers and senior public officials must publicly disassociate themselves from activities of family members, associates, and non-public organizations which might conflict with government policy.

9. *Blind trusts: r*equire a public official to place assets in a trust in which trustees make investment decisions concerning management of trust assets with no direction from or control by the public official concerned, and may not give information to the official other than required by law or relating to total value of trust assets. (*A cautionary note:* Blind trusts have many advantages, but also pose significant problems — including designing devices that effectively prevent the official from learning of the trust's holdings and activities. If you contemplate legislation to create blind trusts, study these problems carefully.).

Some governments' codes regulate political party officers' behaviors. Political parties may play a significant role in law-making and implementing processes. South Africa's post-apartheid government introduced a code of conduct to control political donations and set standards for lobbyists. Canada's 1997 Lobbyist Code, administered by an Ethics Counselor, established general principles and a list of rules to ensure transparent decision-making.

**2. Disclosure of private interests.** To enable responsible authorities and the public to assess the danger of potential conflicts, *as a minimum*, officials should disclose their interests. Because of difficulties in administration and supervision, however, the code should limit (probably to legislators, ministers, and senior public service officials) the number of officials required to declare their interests. To prevent officials from shifting assets to other family members, the definition of 'potentially conflicting interest' should include family members' holdings. The officials should declare their interests under oath, under penalties of perjury.

Some governments have found it useful to engage department officials in determining the scope of declaration of interests relevant to that department's particular concerns. Three categories of interests seem important:

(a) *Assets*: The registrar should specify the value of assets required for disclosure. These might include real property, shareholdings, business interests and partnerships, directorships, other investments and assets, trusts, gifts, sponsored travel and hospitality (and perhaps others specific to a particular country's circumstances; the United Kingdom's House of Commons Register requires legislator-barristers or solicitors to declare their clients' names).

(b) *Liabilities*: Since creditors may exercise undue influence over large debtors, the legislative provisions should require officials to declare liabilities. Country circumstances will determine the size of the debts that require listing.

(c) *Income*: The law should require officials to declare the amounts and sources of their income.

3. **Ethics training**. Combined with other measures, ethics training may help. As a start, a law might require officials to participate in formulating a code's details, both to legitimize its provisions and deepen their awareness of their own responsibilities for good governance.

4. **Assigning an agency to implement the code.** For effective enforcement, every anti-corruption law should specify relevant standards; identify the responsible implementing agency; institutionalize appropriate sanctions; and establish an appeals system (see Chapter 6).

# EXERCISE: PUNISHING CORRUPT BEHAVIORS

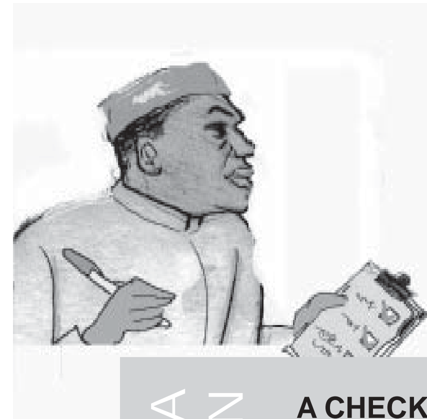
Drawing on your knowledge of the circumstances in your own country,

1. For one of the three general types of anti-corruption laws discussed in this chapter, outline the section of a research report that identifies the nature and scope of the corruption problem, and whose and what behaviors seem to comprise it.

2. Outline the primary factors that seem to cause the public officials' problematic behaviors.

3. For one of the three areas, outline for your own country the structure of a bill incorporating appropriate measures (including those for its implementation) that logically might help to overcome the causes of official's corrupt behavior. If an anti-corruption law already exists, assess the likelihood that its provisions seem sufficient to overcome corrupt behaviors' causes.

**5. A checklist for corruption control**: Given the qualitatively different conditions prevalent in differing government departments, enactment of laws in the three most problematic areas — government procurement, conflicts of interest, and public service regulations — although necessary, may not prove sufficient. To combat a 'culture of corruption,' the following checklist suggests the kinds of anti-corruption measures which every law you enact should contain.



CHECKLIST OF MEASURES TO COMBAT A CULTURE OF CORRUPTION

**A CHECKLIST FOR MEASURES FOR COMBATING 'A CULTURE OF CORRUPTION'**

A review of the ROCCIPI categories of possible causes of corrupt behaviors suggests measures that you should consider incorporating in all of your country's laws as part of an effort to mount an effective campaign against corrupt behaviors. These kinds of provisions should:

I. Reduce officials' opportunities for behaving corruptly by restructuring their role in decision-making processes to limit their discretion:

1. Where possible, change the agency's mission, product, or technology to reduce agents' corruption opportunities;
2. More strictly define the objectives, rules, and procedures relating to input-, conversion- and feedback-processes;
3. Require agents to work in teams and subject their decisions to review by higher authority;
4. Where possible, divide large decisions into separate tasks.
5. Rotate agents functionally and geographically

II. Open decision-making processes to public view:

1. Eliminate secrecy provisions;
2. Require public hearings and other forms of inputs and feedback from stakeholders;
3. Require written decisions accompanied by reasons that underpin them.

III. Organize client groups/stakeholders

1. Where appropriate, require open, competitive behaviors among private or government clients.
2. Engage clients in reducing the likelihood that their members will attempt to corrupt agency officials;
3. Create an anti-corruption lobby.

IV. Reduce agents' capacity to behave corruptly:

1. Select agents for 'honesty' and 'capability';
2. Screen out dishonest candidates (past records, tests, predictors of honesty);

3. Exploit outside ‘guarantees’ of honesty (networks for finding dependable agents and ensuring they stay that way).

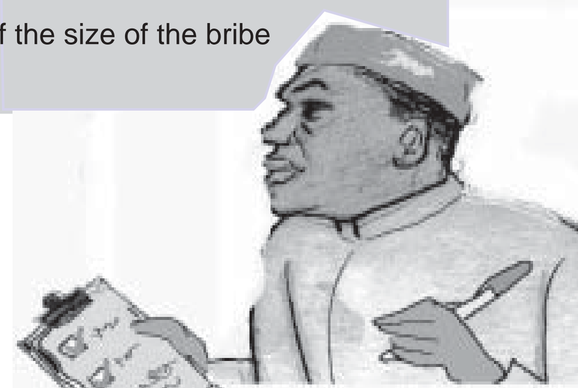
V. Improve auditing and management information systems:

1. Publish evidence that corruption has taken place (red flags, statistical analyses, random samples, inspections);
2. Strengthen ‘information agents’;
3. Beef up specialized staff (auditors, investigators, surveillance, internal security);
4. Create a climate where officials or stakeholders will report improper activities (‘whistle blowers’);
5. Create new units (ombuds, special audit committees, agencies to register officials’ non-official interests, anti-corruption agencies);
6. Use information provided by third parties (media and banks);
7. Use information provided by clients and the public;

VI Reduce agents’ potential interest in behaving corruptly: Change rewards and penalties confronting agents and clients:

1. Raise salaries to reduce need for corrupt income;
2. Reward specific actions and agents that control corruption;
3. Vary the rewards of officials according to their achievements as defined in their employment contract;
4. Penalize corrupt behaviors:
5. Where an agent appears to have behaved corruptly, change the burden of proof to require the agent to demonstrate innocence.
6. Raise the general level of formal penalties;
7. Increase the principal’s authority to punish;
8. Calibrate penalties in terms of deterrence (as a function of the size of the bribe and the size of the illicit profit).





## SUMMARY

The world around, officials' corrupt behaviors threaten to undermine effective implementation, good governance and the Rule of Law. This last chapter offered guides for using reason informed by experience to propose defensive measures against that ever-present danger. It underscores two overarching commands to all law-makers: First, anti-corruption measures must aim not merely to change individuals' weak moral fiber, but fundamentally to alter the institutions that foster corrupt behaviors; and, second, since no one-size-fits-all-remedy exists, you, in your own country, must explore your own way through the morass.

These two commandments thrust on you, as member of your nation's primary law-making body, two critical responsibilities: you must ensure that every bill you enact specifies first the criteria that limit officials' discretion; and second procedures to ensure transparency, accountability, and as much participation as possible, especially of the historically disadvantaged and vulnerable, in the law making and implementing processes.

To reduce the ever-present danger of corrupt official behaviors, this chapter has recommended a two-pronged strategy. First, enact three general anti-corruption laws (or assess and revise existing ones) to limit discretion and ensure transparency and accountability in the three areas in which corrupt officials most commonly seek to advantage their private interests at the public's expense: government procurement and sale of goods and services; potential conflicts between senior officials own and the public's interest; and public servants' opportunities, at all levels, to misuse government resources to advance their personal welfare.

The second prong — briefly stated, but requiring eternal vigilance — proposes that you always scrutinize *every* bill's detailed form and substance with an eye to blocking officials' opportunities and capacities to decide public issues for private reasons. Using the ROCCIPI agenda, always ask yourself whether a proposed bill's substance and the detailed articles, indeed the specific words in each sentence, sufficiently close the door against the ever-present corroding danger of officials' corrupt behaviors.

The issue of corruption encapsulates this manual's central theme: that the Rule of Law lies at the heart of good governance and development. Good laws alone do not guarantee development and good governance; poor laws, however, do constitute a major cause of their defeat. At every stage in the law-making process, you and your colleagues must explicitly assume primary ethical and professional responsibility for enacting bills that seem likely to prove effectively implemented and facilitate good governance and development.