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## **Public Administration Reform and Anti-Corruption A Series of Policy Discussion Papers**

# **International Comparative Analysis of Anti-Corruption Legislation:**

## **Lessons on Sanctioning and Enforcement Mechanisms for Viet Nam**

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The series of *Policy Discussion Papers on Public Administration Reform and Anti-Corruption* is led and edited by Jairo Acuña-Alfaro, Policy Advisor on Public Administration Reform and Anti-Corruption at UNDP Viet Nam.

The series aims to analyze trends in Viet Nam regarding the implementation processes and options in specific public administration reform areas. In order to confront the social, economic, political and environmental challenges facing Viet Nam, policy makers need to be informed by evidence. These policy papers aim to contribute to current policy debate by providing discussion inputs on policy reforms – thereby helping to improve Viet Nam’s development efforts.

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## Executive Summary

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This policy research paper undertakes a comparative analysis of the legal frameworks of anti-corruption (AC) laws and sanctioning and enforcement practices in five jurisdictions (Australia, Hong Kong, Indonesia, Singapore and South Africa). The purpose is to identify lessons that Viet Nam can learn in reforming its AC laws (ACLs).

Most jurisdictions that have adopted a special-purpose ACL have included in it details of the nature of the crimes, penalties for those crimes and special measures to recover the proceeds of corruption. Three of the five jurisdictions in this study have adopted harsh and extraordinary measures to facilitate recovery of 'illicit assets'. These have been applied with good effect. Close coordination between criminal investigations and disciplining of public officials is a feature of the successful jurisdictions, with strict codes-of-conduct rigorously applied providing an important supplement to the criminal proceedings.

Establishment of a powerful, stand-alone ACA with extraordinary powers for criminal investigations is the practice in all but one of the jurisdictions. Whether or not the enforcement machinery is focused on a stand-alone ACA, independence and impartiality of the enforcement and sanctioning processes are critical features. The underlying purpose of independence – impartial and fearless pursuit of corruption – rests on a much wider, more generalized set of political norms and conventions about non-interference by the political executive in law enforcement and judicial affairs more broadly. Transparency of the process enhances the adherence to these norms.

Viet Nam's ACL deals in large measure with preventive and administrative matters. It is limited in scope and purpose and does not cover the main issues that

need addressing in order to resolve problems in AC sanctioning and enforcement.

The definition and coverage of corruption in the ACL 2005 and in the Criminal Code makes it limited to the public sector only. Moreover, the definition of corruption limits to acts committed by only the position holders, so excluding such act as giving a bribe out of the concept. The element of 'consequence' and 'quantifiable value' in most offences creates unnecessary difficulties for application. The fact that 'illicit enrichment' has not been criminalized as crime and special measures for recovery of illicit assets are not paid attention. Sanctions (criminal and disciplinary) for corruption is not set out in the ACL.

The enforcement system in Viet Nam is fragmented and poorly coordinated. There are multiple agencies sharing overlapping responsibilities. Criminal investigation and administrative inspection get in each other's way. Political intervention and obstruction at all levels are commonly reported.

The laws and regulation on AC investigation and prosecution in Viet Nam have not sought to ensure 'independence' in the sense that was observed in the overseas cases.

In short, the analysis of the possible lessons for Vietnam focuses on the amendment of Viet Nam's AC legal framework, but the conclusions look beyond this process to recommend wider institutional and legal reforms. The findings and recommendations can be grouped in three main headings, with specific near and short term policy initiatives as follows.

### **1. On AC Laws and Regulations**

In redrafting and reviewing AC related legislation, including the ACL and the Criminal Code<sup>1</sup>, it is necessary to develop comprehensive and thorough AC legislation that defines clearly that corruption is dangerous for the society and clarifies that all forms of corruption are criminal acts. A consistent list of all forms of corrupt acts needs to be included in revised legislation together with other necessary regulations (e.g. illicit enrichment, bribery in the private sector, bribery that involves international civil servants as provided for in the United Nations Convention on Anti-corruption - UNCAC) as well as the liability of legal persons. A set of administrative and criminal sanctions needs to be associated with such crimes in the revised legislation in addition to a set of requirements for accountability by AC agencies and organisations.

Such AC legislation should also cover special measures to combat corruption, including special investigation authorities; to prevent obstruction of judicial activities in investigation and sanctioning corruption; to protect whistle-blowers and informants; and to recover 'illicit assets' from corruption.

### **2. On Sanctions and Enforcement**

In restructuring the investigation and prosecution system, the mandates of responsible agencies should be clarified so as to concentrate the required authority, competency and resources.

The roles of the State Audit and the investigation system need to be unified to make a stronger corruption detection system that covers the whole society rather than just the public sector.

It will be necessary to concentrate and differentiate the respective roles of agencies, and to strengthen the core criminal investigation functions in a specialized agency.

### **3. On Institutional Arrangements: Independence and Accountability**

There should be regulations in the ACL or relevant legislation to ensure 'independence' in the sense that was observed in the overseas cases.

For criminal investigation and prosecution of (in particular) the most serious cases of corruption, there is a need in Viet Nam to strengthen the AC investigation and prosecution agencies, to ensure their impartiality so far as is feasible and to institute effective oversight and supervision in order to prevent abuses.

Special investigative powers and resources should be devoted to AC enforcement work in a specialized unit that is subject to transparent accountability processes.

There is a good case, drawing on some of the overseas cases, to explore the appointment of judges specialized in corruption cases within the framework of the existing court system.

With formal oversight and accountability in the hands of the National Assembly, it will help reduce the incidence of political 'micro-intervention' in investigation, prosecution and handling corruption.

The upcoming revision of the 1992 Constitution provides an opportunity to consider options to strengthen the basis on which institutions engaged in AC enforcement are able to act effectively without fear or favour.

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<sup>1</sup> The term 'Criminal Code' is used in this document rather than 'Penal Code'.

## About the Authors

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## Introduction

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The aim of this research paper is to undertake a comparative analysis of the legal frameworks of anti-corruption (AC) laws in five countries in order to analyze their strengths and weaknesses, with particular emphasis on sanctioning and enforcement mechanisms, with a view to identifying lessons Viet Nam can learn in reforming its anti-corruption law (ACL) and associated legislation.<sup>1</sup>

A key assumption underlying this paper's analysis is that a pre-condition for combating corruption is a workable, effective set of sanctioning and enforcement mechanisms contained in an appropriate set of laws and other regulations. This assumption does not deny the significance of other factors. For example, preventive mechanisms such as reductions in unnecessary government regulations and education to change attitudes are key aspects of an AC drive; systems of motivation and reward in public employment need addressing (that is, good performance needs to be rewarded and bad performance needs to be punished); and so on.

Most importantly, in a situation where corruption within the government apparatus is widespread and serious, political leadership that is sustained and determined – or 'political will' as it is commonly referred to – is a necessary condition for making inroads. But having acknowledged this, workable laws and effective sanctions applied through an appropriate set of AC institutions and processes are also necessary conditions for combating corruption. Indeed, they are the effective demonstration of such political will.

The occasion for commissioning this policy research was the 2012 revision of the Anti-Corruption Law 2005 (Law No.55/2005/QH11). Article 1 of this law states:

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<sup>1</sup> This research paper could not have been made possible without the substantive contributions from different senior experts in fields relevant to this study. We owe our greatest gratitude to Mr. Duong Van Phung, Director General and Mr. Le Mai from Department 1B on Prosecution and Procuracy for Corruption Cases, the Supreme People's Procuracy; Mr. Nguyen The Binh, Director General of Monitoring Adjudication of Serious Corruption Cases, and Mr. Hoang Cac, Deputy Director General of Department III, the Office of the Steering Committee on Anti-corruption (OSCAC); Mr. Le Hong Hanh, Director General of Legal Sciences Institute from the Ministry of Justice; Mr. Nguyen Dinh Quyen, Vice Chairman of Judicial Committee, the National Assembly; Mr. Nguyen Van Thanh, Deputy General Inspector, Mr. Do Gia Thu, Director General of Legal Department and others from the Government Inspectorate; Mr. Dang Van Hai, Deputy Director General and others from the State Audit of Vietnam; Mr. Dang Thanh Tung, Deputy Chief Inspector, the Ministry of Home Affairs; Mr. Le Ba Than, Chief Judge of Criminal Court, Ms. Phung Thi Loc, Head of Division of Criminal Court, and Mr. Vu Tuan Duc, Deputy Head of Division of Criminal Court, the Supreme People's Court; and Mr. Ha Huu Duc, Deputy Director General of the Research Department (the Party Inspection Commission of the Communist Party of Vietnam). The interviews with these senior experts were conducted from 17-21 September, and from 3-5 October, 2012. While their expertise was invaluable in contributing to the information required for this study, the findings and judgments presented in this paper are the responsibility of the authors and should not be attributed to any of those listed above. We are also grateful for the assistance of Professor Robert Gregory, Victoria University of Wellington, in the conduct of the research on the overseas cases.

‘This Law provides for the prevention, detection and handling of persons who commit corrupt acts and the responsibilities of agencies, organizations, units and individuals in preventing and combating corruption.’

The emphasis of this policy research paper is on the ‘handling’ aspects. As described later, Viet Nam’s ACL is not the only legal instrument relevant to the detection, investigation, prosecution and adjudication of acts of corruption in Viet Nam. While a major focus is on the provisions of the ACL, the paper also looks beyond to the adequacy and effectiveness of the wider setting of anti-corruption laws and institutions for sanctioning and enforcement.

Revision of the ACL was on-going in 2012 at the time the research was conducted. Later in the paper, some comments are made on some of the draft revisions. However, the analysis and the conclusions look beyond this process to recommend wider institutional and legal reforms that may be needed.

## Research Design

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Five countries are chosen for the comparative analysis: Australia, Hong Kong, Indonesia, Singapore and South Africa. Some simple rules of thumb were applied in case selection:

1. ‘Success stories’ – Hong Kong and Singapore are the most commonly cited AC ‘star turns’ in Asia, and have been widely emulated by other adopting countries (for example, Indonesia deliberately copied aspects of Hong Kong’s AC model). Australia has a well-established, relatively stable set of AC institutions that have successfully brought some high profile prosecutions. These three jurisdictions rank high on the various ‘league tables’ of good governance. Both Indonesia’s and South Africa’s AC institutions have achieved cases of successful prosecutions against prominent political figures in a very challenging environment.
2. Each of the countries chosen has (like Viet Nam) purpose-built AC legislation, which was adopted in the face of serious corruption challenges. In Australia, which is a federal system, this special purpose legislation is at state or territory government level (the national or Commonwealth Government deals with corruption crimes in its Criminal Code). Singapore and Hong Kong adopted their tough anti-corruption laws in the 1960s and 1970s, respectively; the rest more recently.
3. The cases cover both civil law (Indonesia) and common law (Singapore, Hong Kong) legal traditions, with South Africa and Australia best classified as ‘hybrid’.
4. Four of the five cases (the exception being Australia) provide instances of countries approaching or aspiring to middle-income status when they adopted their respective ACLs.<sup>2</sup>

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<sup>2</sup> There are no obvious anti-corruption success stories available from countries both in a similar socio-economic situation to Viet Nam (approaching middle-income status and transitioning from a command to a market economy) and with similar legal and political systems (Communist one-party polities

5. The cases cover a significant variety of legal instruments and institutional arrangements in the fight against corruption.
6. The cases provide for a variety of developmental models and circumstances to consider in terms of Viet Nam's aspirations to become an industrialized nation (see Table 1).

The research into the five cases was conducted using documents (both primary and secondary) that were immediately available either on-line or in print form. Accessibility of the primary materials and the extensiveness and depth of secondary literature were additional considerations in case selection. The five case summaries are attached at Appendix 1.

As well as undertaking the comparative analysis of the five cases, the research team also conducted a diagnostic analysis of some of the difficulties faced in combating corruption in Viet Nam. This analysis focused on the obstacles to detecting, investigating, prosecuting and punishing corruption within the anti-corruption system, particularly those impediments relating to sanctioning and enforcement mechanisms. This research combined use of documentary evidence with fieldwork. Previous research and analysis,<sup>3</sup> both external to government and from within, was surveyed.<sup>4</sup> The team members conducted interviews in Ha Noi in September and October 2012 in order to collect first-hand evidence on the operations of key actor and institutions engaged in the sanctioning and enforcement processes. The full list of institutions visited and the respondents interviewed is provided in Appendix 2.

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operating within a Socialist legal tradition). China's experience is highly relevant, but most observers would argue that China has not been conspicuously successful in recent years in anticorruption.

<sup>3</sup> The International Senior Lawyers Project (ISLP) based in Washington, D.C. with the Support of a team of international lawyers from Shearman and Sterling LLP from New York contributed to this research with a special memorandum comparing other countries including Chile, Georgia, Turkey, Ukraine, and South Africa. This analysis was based on countries' respective similarities to Viet Nam in terms of development metrics, their relative success in their respective anti-corruption efforts, and/or certain interesting aspects of their anti-corruption legislation and enforcement. The research team greatly acknowledges this contribution.

<sup>4</sup> Particular note was taken of the UNCAC self-assessment documents and supporting research: *Survey Report In Support of the Government's Self-Assessment of the Implementation of the United Nations Convention against Corruption (UNCAC) in Viet Nam in 2011*, Ha Noi: Transparency International and Towards Transparency, 2011; and *Viet Nam's Responses to UNCAC Self-Assessment Checklist*: Ha Noi, Government of Viet Nam, n.d.

**Table 1: Key socio-economic development and corruption characteristics of selected cases and Viet Nam**

	Total Population (thousands)	Corruption Perception Index (2011)*	Control of Corruption (2011)**	Rule of Law (2011)**	Human Development Index (HDI) (2011)***	GDP per capita (2009)^	Foreign Direct Investment (2007-2011) (thousands) @	Anti-Corruption Agency (ACA)
<b>Australia</b>	22,605.7	8.8 (8)	+2.16 [96.7]	+1.78 [96.2]	0.929 (2)	34,259	30,576,304 (2002-2006 data)	New South Wales Independent Commission Against Corruption (1989) #
<b>Hong Kong</b>	7,122.2	8.4 (12)	+1.84 [94.3]	+1.54 [90.6]	0.898 (13)	39,255	83,174,183	Independent Commission Against Corruption (1974)
<b>Indonesia</b>	242,325.6	3.0 (100)	-0.68 [27.5]	-0.65 [31.0]	0.617 (124)	3,813	18,159,533	Corruption Eradication Commission (2003)
<b>Singapore</b>	5,187.9	9.2 (5)	+2.12 [96.2]	+1.69 [93.4]	0.866 (26)	45,978	38,638,121 (2002-2006 data)	Corrupt Practices Investigation Bureau (1952)
<b>South Africa</b>	50,460.0	4.1 (64)	+0.03 [59.7]	+0.10 [58.7]	0.619 (123)	9,333	5,717,863	Directorate of Special Operations (2001) ##
<b>Viet Nam</b>	88,792.0	2.9 (112)	-0.63 [29.9]	-0.48 [38.5]	0.462 (128)	2,682	8,000,000 (2002-2006 data)	Central Steering Committee for Anti-Corruption (2007)

Notes: \* Transparency International (TI). Score between 1 and 10. Ranking in parenthesis ( ). Source: [www.transparency.org](http://www.transparency.org)

\*\* Worldwide Governance Indicators (WGI). Score between -2.5 to +2.5. Percentile rank in brackets [ ]. Source: [www.govindicators.org](http://www.govindicators.org).

\*\*\* United Nations Development Programme (UNDP). Rank in parenthesis ( ). Source: [www.undp.org](http://www.undp.org)

^ GDP per capita (2005 PPP \$). Source: [www.undp.org](http://www.undp.org)

@ Foreign direct investment, net inflows (BoP, current US\$). Source: [www.data.worldbank.org](http://www.data.worldbank.org)

# All other Australian states except one also have ACAs

## Replaced in 2008 by the Directorate of Priority Crime Investigations

In the concluding sections and recommendations of the paper, the experience of the five case jurisdictions are drawn on in proposing remedies for the gaps and obstacles identified from the situation in Viet Nam. This analysis is intended to assist in identifying and solving problems specific to Viet Nam, rather than to try to transfer so-called general 'best practices' without regard to the context.

## Experiences from selected country cases

This section reviews the experience of the AC sanctioning and enforcement mechanisms in the five cases under the following headings:

- The underlying 'architecture' of the laws and regulations for combating corruption
- Definitions of acts and crimes of corruption, including scope and coverage
- Range and scope of penalties (both criminal and administrative) including mechanisms for recovery of the proceeds of corruption
- Enforcement arrangements and mechanisms, including allocation of responsibilities for investigation and adjudication. Special attention is paid to the integrity and independence of the processes of investigation, prosecution and sanctioning.

The same headings will be used to organize the findings on Viet Nam.

## **AC Laws and Regulations**

While there is no one simple best ‘legal architecture’, the cases provide a rich variety of examples from which to draw lessons. First, they differ in the range and type of anti-corruption laws in place. In the past, civil code jurisdictions would deal with corruption offences, such as bribery or abuse of a public position for personal gain, in relevant sections of the Criminal Code. However, it has become common to adopt special AC legislation as well. Such an omnibus ACL typically defines the nature of corruption as a criminal act, sets out powers and responsibilities for investigation and prosecution (often, special powers are stipulated) and specifies sanctions and penalties (with cross-reference to the Criminal Code where needed). Other provisions refer to such things as the power to freeze and instigate recovery of assets from persons being investigated and prosecuted. The only jurisdictions among our cases without a special anti-corruption law are the Australian Commonwealth and the state of South Australia.<sup>5</sup>

Where there are special ACLs, they differ in important respects. In Indonesia and Hong Kong a separate law in addition to the general ACL sets up an anti-corruption agency (ACA). In Indonesia, the Act setting up the ACA was passed in 2002 following a major consolidation and update of the ACL in 2001. Law 30/2002 not only set up the Corruption Eradication Commission (*Komisi Pemberantasan Korupsi* or KPK) but also a special corruption court. In Hong Kong, a separate ordinance setting up the Independent Commission against Corruption (ICAC) was adopted in 1974, following the passage in 1971 of the Prevention of Corruption Ordinance. In Singapore the Prevention of Corruption Act (PCA) introduced in 1960 assigns investigation to a pre-existing Corruption Prevention and Investigation Bureau (CPIB). In South Africa, the ACL of 2004 also assigns investigation and prosecution to existing agencies, neither of which, however (unlike Singapore), was solely concerned with corruption. In New South Wales, the 1988 Act setting up its ICAC also contains the provisions relevant to defining the nature and scope of corruption crimes.

In addition, other laws such as witness protection and ‘whistleblower’ legislation are relevant for investigating and punishing corruption. Special legislation on money laundering may also be relevant, often handled by agencies other than those undertaking anti-corruption investigations. In Indonesia, amendments to the ACL in 2010 gave the ACA special powers to investigate money laundering without having to seek cooperation with and the consent of the Attorney General’s Department.

Legislation on public employment and the civil service is also highly relevant to anti-corruption sanctions and enforcement. The effectiveness of discipline mechanisms under laws concerning government employment is a key element of an overall integrity system. Where such mechanisms are ineffectively implemented, systemic corruption can continue to thrive despite the best efforts of an ACA and other law enforcement agencies to achieve criminal convictions. ACAs commonly have responsibilities in advising and monitoring the effectiveness of anti-corruption efforts

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<sup>5</sup> The South Australian legislature introduced a Bill for an ACA in May 2012

by government departments, such as the drawing up and promulgation of codes of conduct and the provision of training.

Asset declaration is a feature of ACLs and civil service regulations (mostly the latter) in the five jurisdictions. In most cases, asset registers and their administration are part of the responsibility of agency heads. For example, Singapore requires all senior civil servants to make an annual, detailed disclosure of all assets, including those of immediate family members, to their head of department. The disclosures are not made public. Senior officials must also inform the head of department if they purchase shares at any time. The department head inspects the declaration and makes a judgment as to whether any conflict of interest arises from these holdings. Disciplinary proceedings under the Civil Service codes would be initiated if the declarations are found to be false. Indonesia is unusual in that under the provisions of the ACL, KPK administers the asset register. Senior public officials upon appointment and promotion submit asset declarations to the KPK, rather than to a higher official within the government bureaucracy. Declaration of assets in all the five cases is restricted to senior officials. International experience suggests that extending asset declaration to all or most civil servants may be self-defeating.<sup>6</sup> It may be extremely difficult to implement or monitor effectively, with the result that the process is fundamentally discredited through encouraging indifference at best, and deliberate falsification at worst.

### ***Definition, Scope and Coverage of 'Corruption' Crimes***

How 'corruption' is defined differs considerably across jurisdictions. Under South Africa's *Prevention and Combating of Corrupt Activities Act 2004*, for example, corruption is defined as the act of giving or accepting, or agreeing or offering to accept or give, any 'gratification' in order to act illegally or dishonestly, or in a manner that abuses a position of authority, or amounts to a breach of trust or a violation of a legal duty. 'Gratification' (or 'benefit' or 'advantage' as it is termed in other jurisdictions) refers both to material and non-material promises and gifts. The ACL thus deals specifically with bribery. Other offences such as embezzlement and fraud are dealt with in other legislation. Hong Kong's *Prevention of Bribery Ordinance*, as its name implies, also deals specifically with bribery and leaves coverage of crimes such as embezzlement of public funds to other ordinances.

In New South Wales, the ICAC Act 1988 defines corrupt conduct as follows: '....any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority; bribery (including election bribery), blackmail, official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition), obtaining or offering secret commissions, perverting the court of justice, embezzlement, the misuse of information or material that a public official has acquired in the course of his or her official function....'. This very broad definition goes beyond bribery and consolidates all forms of corruption in one statute.

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<sup>6</sup> See, for instance, U4 Expert Answer, *African Experience of Asset Declarations*, 21 April 2008

Indonesia's ACL reflects what might be termed a 'statist' view of corrupt acts: Article 2 spells out that 'anybody' who illegally commits an act to enrich themselves or another person or corporation that results in loss to the state finance or state economy is subject to prosecution. On the one hand, 'anybody' seemingly sets out a wide net but on the other hand, the idea that 'loss to the state finance or state economy' is involved defines a narrower scope than reference to various corrupt acts *per se*, regardless of consequences or damage. Indonesia's ACL also contains measures to deal with the offer of 'gifts or promises' to civil servants.

In the case of bribery, the definition of corruption to cover of both bribers (payers) and bribed (receivers) – that is, active and passive bribery, respectively – is a feature of the law in all five jurisdictions. So, too, is the inclusion of corporations or 'legal persons' as well as individuals. Some laws spell out that it matters not whether a benefit offered or taken produces the desired result. Simply accepting or requesting the benefit is enough, including cases where the official had no power to deliver a favourable result.<sup>7</sup> In some cases, the basic definition of corruption makes it clear that such considerations are not relevant to prosecuting or defending a case.

The ACLs in four of the five jurisdictions cover private sector as well as public sector corruption. Thus, any abuse of trust, whether in a public or private setting, is considered 'corruption'. In Australia, separate laws on so-called 'secret commissions' cover such private sector offences. Indonesia's ACLs do not cover all forms of private sector corruption, only those cases where it can be shown that some damage to the state economy or finances was caused, such as a case where a company is engaged in a state-subsidized activity. All jurisdictions have provisions extending coverage of the anti-corruption laws to foreign persons.

Corruption in some jurisdictions is also dealt with by case law. In Hong Kong and other common law jurisdictions, including some in Australia, some crimes of corruption may be also be prosecuted under the common law offence of Misconduct in Public Office. In Hong Kong, a body of recent case law has built up clarifying the nature of this offence through rulings of the Court of Final Appeal.

A noteworthy provision in several jurisdictions is to criminalize the possession of assets by a public official for which they can give no reasonable account (that is possession of so-called 'illicit assets' is a crime). This is dealt with in the next section on sanctions.

### ***Penalties and Sanctions***

Sanctions that are enforceable and penalties that are actually applied act both as a punishment and as a deterrent. The deterrent effect is particularly important. Aside from fines and imprisonment, a high probability that a convicted person will not be able to keep the proceeds of corruption is likely to be a particularly effective deterrent. In addition, 'victims' justice', as viewed from the standpoint of the general

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<sup>7</sup> See, for example, Singapore Prevention of Corruption Act, Section 9

public, is better satisfied if a convicted corrupt politician, after leaving prison, is unable to resume an extravagant life-style based on the proceeds of corruption.

A common feature of jurisdictions where an AC campaign has been launched through special-purpose AC legislation is that sanctions for conviction and the means to recover the proceeds of corruption are clearly set out in this legislation. Such sanctions include measures that may require special powers or unconventional measures, which are also contained in the ACL. These features are found in the cases surveyed here, in particular Indonesia, Hong Kong, Singapore and South Africa.

### Criminal Penalties

Imprisonment and Fines are common penalties to be applied to corruption crimes in all five jurisdictions. However, the extent and severity of such penalties differ. Indonesia's AC legislation provides a clear example of an ACL that puts up-front the deterrent effect of tough sanctions. Article 2 spells out that 'anybody' who illegally commits an act to enrich themselves or another person or corporation that results in loss to the state finance or state economy may be subject to life imprisonment, or to a scale of sentences ranging from four to 20 years in jail, or to a fine between Rp.50m and Rp.1b.<sup>8</sup> Article 3 refers to public officials who abuse their position for personal gain, making them liable to a term of imprisonment from one through to 20 years, and to the same range of fines.

Chapter 5 of South Africa's *Prevention and Combating of Corrupt Activities Act 2004* is on 'penalties and related matters'. A scale of penalties is set out for the defined offences, depending on which court is hearing the case. The High Court may impose a prison sentence for life; a regional court a sentence not exceeding 18 years; and a magistrate's court a sentence not exceeding five years. Some offences defined in the Act are given more limited sentences (no more than 10 years in a case before a High Court or regional court, and three years with respect to a local court). In addition to any fine for the offence itself, the court may impose an additional fine, of up to five times the amount of the gratification received.

Section 4 of the Hong Kong Prevention of Bribery Ordinance (POBO) makes it an offence to accept or offer an advantage in connection with a public servant's official duties and sets a maximum penalty of a heavy fine and imprisonment for seven years. (Courts in Hong Kong generally favour custodial sentences for corruption crimes.) In Singapore, Under sections 5 and 6 of the Prevention of Corruption Act, persons convicted of corruption, whether in their own right or as an agent, are liable to a fine of up to S\$100,000 (increased in 1989 from S\$10,000), or to imprisonment for up to five years, or to both.<sup>9</sup> Other sections of the PCA provide for stronger penalties. Sections 7 and 10 make bribery in regard to government contracts liable for a S\$100,000 fine, or a jail term of up to seven years, or both. Sections 11 and 12, respectively, provide for the same penalties in relation to the bribery of members of parliament or of a public body.

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<sup>8</sup> Rp.1b is approximately USD100,000

<sup>9</sup> S\$100,000 is equivalent to approximately USD80,000

In Australia, ACLs impose at most ten years of imprisonment for corruption offences. Prior to the Commonwealth Code Amendment 1999 (Theft, Fraud, Bribery and Related Offences), the penalties provided for the offences were relatively low (a maximum of two years imprisonment). A fine may also be imposed. The Crimes Legislation Amendment (Serious and Organized Crime) Act 2010 increases the financial penalties for corruption offences. The new penalty is a fine of up to 10,000 penalty units (AUD 1.1 million) for an individual; and a fine of up to 100,000 penalty units or three times the value of benefits obtained by the act of bribery, whichever is greater, for a legal entity (a body corporate).

It is not easy to compare the extent and severity of sanctions such as fines and prison sentences from one jurisdiction to another (much less their effectiveness as a deterrent). In most of the cases above, the fines imposed for corruption are high relative to fines for other criminal offences. Australian provisions for a tenfold fine on corporate bodies, as distinct from individuals, are also worth noting. Prison terms show considerable variety. A factor to be borne in mind in comparing the apparent severity of fines and prison terms as set out in ACLs is the sentencing policy of the courts. Policies and practices for parole and pardon need also to be considered. For example, annual presidential pardons in Indonesia result in much reduced terms for many criminal offenders, including those imprisoned for corruption.

#### Recovery of Corruptly Acquired Assets

Under Section 10 of Hong Kong's *Prevention of Corruption Ordinance* it is an offence for a government officer to maintain a standard of living, or to possess or control assets, which are not commensurate with his or her official income, unless he or she can give a satisfactory explanation to the court. This provision places the onus of proof on the accused. The highest penalty for this offence is a 10-year imprisonment sentence plus a fine (up to HKD500,000).<sup>10</sup> In the first five years after the ICAC was set up, prosecutions under Section 10 were laid in 37 cases. Most notorious was the '\$600 million detective' (with total assets in equivalent to 10,000 years of his official annual income).<sup>11</sup> The provision has not been used since 1995.<sup>12</sup>

A similar provision exists in Singapore. Section 24 of its Prevention of Corruption Act empowers the CPIB to investigate any person who possesses pecuniary resources or property disproportionate to his or her known sources of income, and for which he or she cannot account. The fact that a person is in possession of such can be taken as evidence that he or she has obtained these pecuniary resources or property 'corruptly as an inducement or reward.' The courts can also confiscate such assets.

Article 38B of Indonesia's Law 20 (2001) stipulates that where someone is convicted of a major corruption offence, in addition to having the proceeds confiscated, they can be required to prove that their wealth for which they were not indicted was not

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<sup>10</sup> HKD500,000 is approximately USD65,000

<sup>11</sup> Timothy H.M. Tong, (2007), 'Building a Public Sector Integrity System for Effective Governance: the Hong Kong Experience', Australian Public Sector Anti-Corruption Conference, Sydney, October

<sup>12</sup> This strongly suggests that the provision was particularly valuable and effective in the earlier stages of the anti-corruption campaign, when the beneficiaries of the loopholes and weaknesses of a previously ineffective set of ACLs and institutions were subject to investigation and prosecution. The effect of making examples of such individuals at this stage may be dramatic.

also the proceeds of corruption. Upon conviction, a hearing is held in which the court asks the convicted person to demonstrate that such assets were legally acquired. If this cannot be proven, they are confiscated. Such provisions also exist in Hong Kong and Singapore.

In the case of South Africa, Sections 22 and 23 of the ACL 2004 concern the investigation of property and lifestyles of individuals where corruption is suspected. Investigation may be initiated, upon application to a judge who may issue an order, where a person's property or standard of living is observed to be 'disproportionate to a person's present or past known sources of income or assets'. The application may be granted where the judge agrees that 'such investigation is likely to reveal information ... which may afford proof that such a standard of living (or property) is maintained through the commission of corrupt activities...'. However, the possession of such assets is in itself not a crime. Specific evidence of crimes under other sections of the Act needs to be uncovered.

The provisions in Hong Kong, Singapore and Indonesia would seem in some respects to go against the basic legal principle of 'presumption of innocence'. They are justified by legislators on the ground that AC investigation and prosecution require special measures. The provisions in Hong Kong and Singapore are particularly strict, as prosecutions may be launched simply on the basis of unexplained possession of assets. Even in Indonesia, where they apply only to convicted criminals, they remain controversial as a departure from the legal norm. Their exceptional nature is significant in each jurisdiction for signifying the seriousness of the commitment to an AC campaign.

Recovery of the proceeds of corruption may also be achieved more conventionally through penalties and fines for specific crimes. In Singapore, the court may impose a penalty in addition to those specified for the crime concerned in the form of a fine equal to the amount of bribe received. In South Africa, an additional fine may be imposed, of up to five times the value of the gratification involved in the offence. Similar examples can be found in other jurisdictions. In Hong Kong, under Section 12 of the POBO, a principal is entitled to recover from his / her corrupt agent the bribe received by that agent and any proceeds flowing from it. The principal may also take action against the person who bribed the agent to recover any loss sustained as a result of corruption.

### Disciplinary Sanctions

Another class of sanctions for public officials is found in employment-related codes of conduct and legal provisions to enforce them. For example, in Singapore the disciplinary sections of the Civil Service Law provide for dismissal of corrupt officials and loss of pension. If there is insufficient evidence for a prosecution, a civil servant will be subject to a range of possible departmental disciplinary actions, including dismissal, reduction in rank, stoppage or deferment of salary increment, a fine or reprimand, or retirement in the public interest. Extremely strict rules and regulations govern the conduct of all Singaporean public officials.<sup>13</sup>

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<sup>13</sup> They are prohibited from borrowing money from any person with whom they have dealings; an official's unsecured debts and liabilities cannot total more than three times their monthly salary; they cannot use official information to further their private interests; they must declare their assets on

Similar provisions exist in Hong Kong and in Australia, and depend in such cases on a sound and effective set of civil service employment regulations and a disciplinary system that is fair and transparent.<sup>14</sup> Arguably the existence of such civil service codes and rules and their enforcement is a precondition for the wider implementation of anti-corruption mechanisms. A similar point can be made about regulations that govern the conduct of elected officials. Certainly it can be observed that they go hand in hand with tough criminal sanctions and effective criminal law enforcement in jurisdictions that have demonstrated effective anti-corruption strategies.

As in the case of assets declaration, a wider environment of effective civil service administration makes a significant contribution to AC efforts. In two of the five jurisdictions (Indonesia and South Africa), significant weaknesses exist in implementation of civil service rules and procedures. As an example of this, South African AC legislation until recently suffered from loopholes that allowed corrupt officials to be transferred from one department to another and hence to evade dismissal.

### ***Law Enforcement Mechanisms***

The deterrent effect of a sanction is a product of its severity and the likelihood of it being applied if a crime is committed. The latter is a function of the chance of being apprehended and convicted. Sanctions are an essential component of enforcement but there is a chain of other necessary conditions or events for a sanction to be effective. A common way of conceptualizing the criminal enforcement process as a whole is to break it down into a series of stages: detection, investigation, prosecution, adjudication and sentencing. Our focus here is on the institutional arrangements for the enforcement process and their effectiveness.

In all of the five country cases except one (South Africa), there is a special-purpose stand-alone ACA. In all cases, these bodies carry the principal responsibility for investigating corruption with a view to criminal prosecutions. In Indonesia, the ACA also conducts prosecutions. In Singapore, Hong Kong and Australia, decisions on whether or not to prosecute are made by the public prosecutor, an independent legal office within the ministry of justice (or equivalent), after the cases have been handed over to it by the ACA. Indonesia is unusual also in that there is a system of specialized anti-corruption courts. In South Africa, investigation of corruption crimes was at first entrusted to a special investigative bureau within the National Prosecuting Authority, but this responsibility was later transferred to a branch of the South African Police Force.

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appointment and thereafter annually; they cannot engage in any trade or business or undertake part-time employment without approval; and they are not permitted to receive any entertainment or gifts from the public.

<sup>14</sup> The following case from Hong Kong illustrates the use of severe non-criminal sanctions under a code of conduct: 'A case involved a senior tax official who failed to declare conflict of interest when he personally dealt with tax cases handled by his wife's tax consultancy firm. Although a subsequent audit revealed that there was no evidence suggesting that he had given favour to his wife's firm, the Hong Kong Government subsequently terminated his employment contract.' Quoted in Thomas Chan, *Issue Paper (Workshop D): Managing Conflict of Interest in the Public Sector*, 5<sup>th</sup> Regional Anti-Corruption Conference, Beijing, September 2005

The establishment of a separate, stand-alone ACA is a common feature of many jurisdictions, following the Hong Kong model. Often, this is done in part to signal the strength of AC commitment and the willingness to devote special attention and resources. The Hong Kong model combines prevention and investigation in one special agency. The significance of creating a separate agency (that is, outside the normal police service) lay in the fact that the police unit responsible for investigating corruption was perceived to have failed to combat widespread corruption in the Hong Kong Police itself. Thus, there was a simple, practical logic for an independent investigative agency. However, there was not seen to be a significant corruption problem within other parts of the law enforcement system, namely prosecution and the courts. As noted above, the ICAC has no prosecution powers, but hands cases to the Director of Public Prosecutions. The existing court system is also considered to be up to the task. .

In Indonesia, after the fall of the Suharto regime in 1998, there was a different situation. The law enforcement bureaucracy and the courts were widely perceived to be corrupt. Thus, a separate ACA and a system of special AC courts were set up to 'ring-fence' the AC enforcement processes from the police, from the rest of the law enforcement bureaucracy and from the judiciary.

Whether or not an ACA is a separate, stand-alone organization is not necessarily in itself the primary consideration (although it is a commonly adopted solution that works well in many contexts). The effectiveness of any enforcement agency or unit, whether independent or part of a wider organization, can be analyzed through applying a set of criteria concerning the features that are most likely to produce results. Here, the following criteria or benchmarks are adopted:

- a. The strength of a unit's investigative and other relevant powers and capacities
- b. The 'independence' of law enforcement agencies involved in AC work and their ability to operate 'without fear or favour'
- c. The effectiveness of cooperation and coordination among different elements of the law enforcement system.

#### **a. Powers of Investigation and Other Capacities**

Exceptional powers of investigation and other legal powers, such as the capacity to block bank accounts and impose travel bans, are a feature of most purpose-built AC legislation. So too are safeguards against the abuse of such powers by the investigating agencies, including in some case the need to go to a judge for a warrant.

Indonesia's KPK has special powers of investigation. KPK has the power to arrest a person and detain him or her for up to 120 days. Its powers of investigation include wire-tapping, travel bans, investigation of financial assets and bank accounts, blocking of bank accounts of suspects and access to information on tax records and assets. Unlike other law enforcement agencies, it can investigate private bank accounts without obtaining the prior approval of the Governor of the Bank Indonesia. It has a special mandate to conduct investigations and mount cases against law enforcement agencies and to initiate investigations where the losses to the state exceed Rp.1b.

As in Indonesia, Hong Kong's AC legislation includes detailed sections on powers of investigation available to the ICAC. Special attention is given to providing adequate powers to search, including investigation of financial records in accounts and books of all kinds. The ICAC can apply for a court order to require a suspect to surrender travel documents and to freeze their assets. With a special court warrant, the ICAC can also inspect tax records. In Singapore, special investigatory powers can be granted to the CPIB (the AC investigation unit) by the Public Prosecutor in appropriate cases. Such orders may authorise CPIB officers to investigate any bank account, share account, purchase account, expense account or any other form of account or any safe deposit box, and require the disclosure or production to the officer of all information, accounts, documents or articles required by the officer. The Public Prosecutor may also authorise the Director or any officer of the CPIB to inspect any banker's books.

Effective ACAs are expensive to run and demand high levels of skill and integrity of their investigators. In 2011 the staffing establishment of Hong Kong's ICAC stood at 1380 and its total budget was approximately US\$90m. Indonesia's KPK has a budget in excess of US\$50m and a staff of over 700. Investigators and prosecutors are chosen through a rigorous selection process, with most being recruited from within the government law enforcement agencies. Strict integrity tests are applied. Staff are hired on fixed-term contracts, and if these are not renewed the individuals return to their original jobs. A position in KPK is highly prized. KPK's recruiting exercise in 2008 received over 28,000 applicants for 85 positions.<sup>15</sup>

Much of the work of ACAs by its nature involves combating resistance and overcoming reluctance to cooperate from other arms of government, especially when the primary targets are senior public officials. Seniority and other forms of 'bureaucratic muscle' are needed. These capacities may be endowed through the process of selection and appointment of agency heads and senior staff (see next section) such that the head of the AC agency cannot easily be 'brow-beaten' by bureaucratic rivals..

In sum, AC work requires not only special legal powers but also somewhat unique bureaucratic resources. It is expensive and demands high levels of technical skill. For all these reasons, some kind of separate unit with a distinct legal status, conferred with high levels of bureaucratic prestige and control over its own resources, is often preferred.

### **b. Independence and Impartiality**

'Independence' normally is taken to mean freedom from interference. AC enforcement is especially vulnerable to such interference, as the principal target of investigations and prosecutions are often powerful members of society, including politicians. One of the underlying purposes of measures to ensure independence is impartiality in the conduct of enforcement procedures and the exercise of

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<sup>15</sup> Emil P. Bolongaita, *An Exception to the Rule? Why Indonesia's Anti-Corruption Commission succeeds where others don't – a Comparison with the Philippine's Ombudsman*, U4 Anti-Corruption Resource Centre, 2010, p.17

enforcement powers. The conduct of AC investigations and prosecutions 'without fear or favour' is of paramount importance. While this is a general principle of law enforcement across the board, special measures are often adopted to try to ensure the integrity and impartiality of the AC enforcement process.

ACAs are generally set up with the explicitly stated intent of ensuring independent, fearless enforcement. One way to affirm the independence of the AC investigative unit is to stipulate in the ACL that the political executive does not have the power to exercise direction. Statutory provisions of this kind have the advantage of seemingly binding future power holders as well as those currently in office. A very clear case of this exists in the legislation setting up the Independent Broad-Based Anti-Corruption Commission (IBAC) in the State of Victoria (Australia). Section 12 of the IBAC Act (2011) provides that: '[t]he IBAC is not subject to the direction or control of the Minister in respect of the performance of its duties and functions and the exercise of its powers', and subsections 6 and 7 of Section 13 provide that: '(6) Subject to this Act and other laws of the State, the Commissioner has complete discretion in the performance or exercise of his or her duties, functions or powers. (7) In particular and without limiting subsection (6), the Commissioner is not subject to the direction or control of the Minister in respect of the performance or exercise of his or her duties, functions or powers.'

Not only ACAs but also many other statutory bodies in jurisdictions such as Australia contain provisions designed to ensure their 'independence'. In most, the power of the oversight minister is restrained rather than eliminated altogether. For example, the minister may be required to issue a public statement if he or she intervenes in a decision of the independent agency concerned, or rejects its advice. Other mechanisms include an oath of office upon appointment of the head of the agency; guarantee of job security (e.g. fixed terms beyond the normal term of the appointing government); checks and balances in the appointment and dismissal process through the involvement of the legislature and the judiciary; and external benchmarking of remuneration and other employment conditions to take them out of the realm of political discretion. The agency is usually given high levels of financial and personnel management autonomy; oversight by the legislature provides constraints on arbitrary political interference by the government of the day; and the requirement to publish an annual report provides a mechanism for external accountability. Some, but not necessarily all of these measures apply to ACAs in the five jurisdictions.

'Independence' implies not only freedom from interference but also capacity to act autonomously. This more positive sense requires an ACA to be given extensive powers to direct and intervene in the actions of other agencies. Indonesia's KPK is an extreme case of an ACA designed to be both politically independent and also all-powerful. Article 3 of Law 30 2002 provides that: '(t)he KPK is to be a State agency that will perform its duties and authority independently, free from any and all influence.' The KPK comprises five commissioners, nominated by the President with the assistance of a selection committee, and selected by Parliament. Once appointed, the KPK Commissioners swear an oath of office and can claim a high level of legitimacy to act independently. Many of the KPK cases are high profile. KPK has not shied away from going after some rich and powerful figures, including leading members of the president's own ruling party, very senior government

officials, including members of the police force, prominent tycoons and parliamentarians.<sup>16</sup> At the same time, critics point to many other high profile cases that do not proceed to court. The suggestion is that pragmatic considerations are relevant in which cases to prioritize.

Institutional safeguards such as rules of appointment and legal provisions granting the agency freedom from political direction only tell part of the story in understanding independence. A good illustration is found in Hong Kong, whose ICAC is often held up as an exemplar of independence and impartiality. On the surface, however, the Chief Executive has the potential to exercise control. Section 5 of the ordinance setting up the ICAC provides that: '(t)he Commissioner shall not be subject to the direction or control of any person other than the Chief Executive'. The Chief Executive is the head of government. The Commissioner is appointed by the Chief Executive and 'holds office on such terms and conditions as the Chief Executive may think fit'.<sup>17</sup> The average tenure of the Chief Commissioner since 1974 has been less than three years.<sup>18</sup>

In Singapore, the CPIB is located in the Prime Minister's Department. The appointment process, however, does indicate that the director is somewhat unlike a normal head of a branch of the civil service under the PM's direction, as the incumbent is appointed by the President, not by the PM or Cabinet. Moreover, one section of the Constitution on the powers of the President (Article 22G) provides that the director of the CPIB can continue to investigate any minister or senior civil servant even if the PM does not consent, providing the director secures the President's approval to do so.

Notwithstanding the various formal provisions, the extent of independence and impartiality of the ICAC Chief Commissioner and the Director of the CPIB rests on factors in addition to formal provisions. These factors include the surrounding norms and rules that institutionalize the 'rule of law' and judicial independence more broadly; a wider tradition of neutrality and professionalism in the senior civil service; and most importantly, the strong public and political support in Hong Kong and Singapore alike for an effective, independent anti-corruption regime. The political executive exercises 'political self-denial' and adopts a hands-off approach to the day-to-day work of the ACA for political as much as for legal or constitutional reasons. In the long run, it does so because this is the firmly established norm. Where transparency is also in place – for example, in the details provided by the ICAC on its activities in its Annual Report – the constraints on interference are greater.

A recent case from Hong Kong illustrates how the norms and rules of 'independence' in practice operate through a system of checks and balances designed to eliminate the risk of partiality. The case involved investigation by the ICAC of a very senior

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<sup>16</sup> Bolangaita, *op.cit.* p. 9

<sup>17</sup> Since 1997 under the Basic Law, the appointment is actually made by the State Council of the People's Republic of China on recommendation of the Chief Executive.

<sup>18</sup> Conventionally, the head of the ICAC is a senior civil servant, often on the point of retirement. In 2006, the incumbent was replaced and returned to the civil service, with the two officials swapping positions. This was viewed as a break with convention and possibly an attempt by the political executive to influence the ICAC. Media and political criticism was strong.

government minister. The ICAC investigated the case and presented its findings to the Director of Public Prosecutions in August 2003. The Director instructed a local senior counsel to provide an independent opinion on whether a prosecution was appropriate. The senior counsel advised the Director not to proceed with a prosecution. The Director sought a second opinion from a British QC, who also recommended that a prosecution not proceed, on the grounds that there was no reasonable prospect of securing a conviction. The Director advised the Secretary for Justice, who accepted the advice.

Under the Basic Law, the Department of Justice is responsible for the control of prosecutions, free from any interference, and the Secretary for Justice is head of the department. However, in order to avoid any possible perception of bias arising from the fact that she was a political colleague of the suspect, the Secretary for Justice delegated the decision in this case to the Director of Public Prosecutions. It was agreed that after the Director had reached his decision, he would explain its basis to the Secretary, so that she, in turn, would be in a position to explain it to others as required. The details of the case, the manner of the proceedings and the reasons for the decision were published in a twelve-page report on December 15, 2003. Impartiality in this case was demonstrated not by removing the power of the Secretary of Justice to decide, but by constraining that power to ensure it was exercised in the name of impartiality and the rule of law. Among these constraints, transparency of the process and of the reasons for action was particularly important.

Indonesia offers other lessons concerning the conditions under which independence and impartiality can be effectively institutionalized. The lack of settled norms and institutions of judicial independence and impartial law enforcement were fundamental problems that the post-Suharto AC laws were seeking to address. Extreme measures were adopted to 'ring-fence' the AC enforcement agencies from the rest of the law enforcement system, including setting up a special system of anti-corruption courts (known in Indonesia as the *Tipikor*).

In 2006, the Constitutional Court ruled that this so-called 'parallel' court system was unconstitutional, as it set up two classes of accused – one tried before the normal courts and another before the *Tipikor* under different rules – and hence denied the basic principle of 'equality before the law'. The Parliament was instructed to remedy the situation. The result was Law 46 on the Courts of Criminal Acts of Corruption 2009 to give the *Tipikor* exclusive jurisdiction over corruption cases and, at the same time, to set up a national system of regional *Tipikor* in order to handle the increased workload. These decentralized *Tipikor* were subordinated to district courts. This extension of the system resulted in an influx of local prosecutors and judges who were not hand-picked for anti-corruption work and who had little or no experience in anti-corruption cases. Consequently, the rate of successful prosecutions was lower.<sup>19</sup> At the same time, the extension of the special corruption courts across the whole system is a necessary step for the longer-term.

Here, some other potential limits of detaching the AC enforcement system from the wider system of law enforcement and the surrounding political accountabilities and

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<sup>19</sup> The KPK also apprehended and prosecuted cases of corrupt local judges in the new local courts

controls were revealed. On the one hand, it was seen necessary to take the extreme step of setting up an entirely autonomous system, set apart from the normal systems of political control and operating under a separate set of rules. On the other hand, this offended some widely held legal norms and constitutional principles. The result was the subsequent reaction and later adoption of measures to 'normalize' the new system within the established framework of judicial administration.

The contested and political nature of the process of establishing and actually implementing norms of impartiality in AC enforcement is vividly seen in the South African case. Investigation and prosecution of corruption cases under the 2004 AC legislation was handed to a pre-existing unit of the National Prosecuting Authority (not the police), which had been set up to deal with organized crime. This unit pursued its anti-corruption investigations and prosecutions vigorously, including not only prosecuting the police commissioner – who was a member of the ruling party – for taking bribes (he received a 15-year sentence) but also investigating the future president, Jacob Zuma.

The government of Zuma's ruling party, the African National Congress (ANC), decided to transfer the corruption investigation role to a special directorate in the police. This led to a court challenge by a private citizen, the result of which was a ruling by the Supreme Court that the independence of the new directorate was insufficiently guaranteed. A Bill amending the Police Service Act was presented to Parliament in 2012 in order to comply with this ruling.

In South Africa there is an alternative independent agency that plays a prominent role in AC investigation, namely the Public Protector (the South African equivalent of the Ombudsman). The Public Protector is set up under Chapter 9 of the Constitution, which guarantees its independence (as in the case of several other 'Chapter 9' bodies such as the Human Rights Commission and the Auditor-General). The current incumbent has conducted numerous investigations into corruption, including by government ministers, and made public the findings. The Public Protector has no enforcement powers, but findings in one published report resulted in the sacking of yet another police commissioner.

One possibility canvassed in South Africa is that a new, independent ACA should be set up under Chapter 9 of the Constitution. However, impartiality in AC enforcement is not guaranteed solely by legislating for an 'independent ACA' or even by instituting constitutional black letter provisions. Impartiality in an apolitical law enforcement system is a product of a wider institutionalization of norms that more broadly generate respect by the political executive for impartiality and legality. Neither is there one best set of institutional arrangements within which such a process of institutionalization is most likely to be set in motion. It is a moot point as to whether such a process is best sustained in the long-run by setting the AC enforcement process apart and writing a special set of rules under which it can operate to fight corruption. Undeniably, the short-term 'shock value' of the KPK and the *Tipikor* as a dramatic breakthrough in fighting corruption is undeniable. However, the longer-term sustainability of such a system is less certain, especially with the need to diffuse its gains more broadly beyond its enclave of successful prosecutions.

It is widely held in the AC literature that ‘political will’ is the key ingredient in a successful anti-corruption system. That is, the political leadership must put their weight behind an effective enforcement system. The other side of the coin of ‘political will’ – indeed, equally significant – is ‘political self-denial’. The political executive must both put its political weight behind the effort and at the same time stand back from individual cases so as to let the law enforcement agencies get on with the job – ‘macro-intervention’ more than ‘micro-intervention’. Formal, *de jure* institutional independence for an ACA, or for any other component of the AC enforcement system, may in this sense be less important than political support for impartial, fearless investigation and sanctioning, implemented by ACAs with the professionalism, integrity and capacities to do the job. Finally, a key factor in sustaining these norms of impartial law enforcement is a degree of transparency in the system such that public accountability is imposed.

### **c. Coordination**

AC enforcement systems are, to a greater or lesser extent, multi-agency fields of activity. The cooperation and coordination problems that may arise in such systems can be serious impediments. One extreme manifestation of this was the politicized ‘turf wars’ in South Africa prior to the transfer of investigative powers to the police department. At the other end of the spectrum are found highly regularized and uncontested cooperative relations between agencies that need to work together in the enforcement process, such as the routine coordination of the Hong Kong ICAC and the public prosecutor in the Ministry of Justice.

ACAs are specially created investigative bodies, which are separated in some measure from the rest of the criminal investigation system. Immediately, there is a jurisdictional issue concerning which crimes fall under the ACA and which ones are other investigative bodies handle. Friction and ‘turf battles’ seem inevitable. There is an unavoidable dilemma facing the architects of an ACA law enforcement system: it may be necessary to set up a powerful, independent body where the standard law enforcement system itself cannot be relied upon but, in so doing, resistance and friction are created that may impede the enforcement process in another way.

In Indonesia, this problem is tackled by giving the KPK supreme power and authority. The KPK ‘coordinates’ and ‘supervises’ other agencies involved in combating corruption. Its oversight of other agencies extends to the power to take over investigations that it considers to be taking too long or not producing the desired results, in particular where it believes corruption may be hindering the process. It has special investigative powers that rule out the need to cooperate with other agencies. It also has a special mandate to conduct investigations and mount cases against other law enforcement agencies.

Other law enforcement agencies have not, however, always complied and submitted. There are continual ‘turf wars’ and legal disputes over the conduct of investigations. The KPK frequently has had to exercise its powers physically to enter police premises and to seize files in order to take over cases (particularly where the case is one involving police corruption). In 2009, two KPK Commissioners were charged with corruption by the public prosecutors, and its chairman was charged with murder (and later found guilty). The verdict on the murder case has been widely viewed as appropriate. However, the Constitutional Court ultimately dismissed the corruption

charges. It was revealed that police and Attorney General's Office officials fabricated evidence, presumably as a counter to on-going KPK investigations and prosecutions of officials in those departments. The KPK mounted a counter-investigation and its wiretaps provided the evidence of a conspiracy.

Indonesia also demonstrates other coordination problems, which may be endemic in a system where there are wider weaknesses in administrative capacity across the whole of government. An important dimension of the work of all ACAs, including the KPK, is to coordinate anti-corruption prevention and detection with the bureaucracy at large. For example, the ACA may offer advice on codes of conduct and liaise with the civil service authorities on implementation of disciplinary measures under the civil service ordinances. Effective cooperation with the KPK in administering these systems is not possible when government departments lack the capacity, much less the will, to implement the regulations.

In sum, the challenge of coordination is an inevitable feature of a complex process such as AC investigation and prosecution. Where there are serious coordination problems, they are mostly symptoms of more deep-seated challenges in implementing an effective AC enforcement system. To the extent that powerful, independent ACAs are given effective powers to combat bureaucratic or judicial corruption, they inevitably arouse bureaucratic resistance and produce 'turf wars'. These may be unavoidable if the AC efforts are to succeed, particularly in the short term. In other words, imposing a single, more powerful ACA over an existing system may be the best immediate strategy. But it is clear from observing the most successful jurisdictions that alignment of priorities and interests among cooperating law enforcement agencies is, in the longer term, a key success factor.

#### **d. Conclusions**

Most jurisdictions that have adopted a special-purpose ACL have included in it **criminal nature of corruption**, details of the nature of typical types of corrupt acts, penalties for crimes involving these acts and special measures to recover the proceeds of corruption. Enforcement mechanisms may be included in a single ACL or in a separate act setting up an ACA.

Three of the five jurisdictions with successful AC systems have adopted harsh and extraordinary measures to facilitate recovery of suspected corrupted assets from public officials who are clearly living beyond their means. These have been applied with good effect in the early stages of a tough anti-corruption campaign. Asset declaration measures have been less successful as an anti-corruption tool, especially where officials have the strongest incentive to conceal their wealth. Weak capacity to monitor these declarations for their accuracy discredits them to the point where they become counter-productive. Such measures are best applied selectively to senior officials to monitor potential conflicts of interest as a way of building public confidence.

Close coordination between criminal investigations, on the one hand, and disciplining of public officials, on the other hand, is a feature of the successful jurisdictions, with strict codes-of-conduct rigorously applied providing an important supplement to the criminal proceedings. Tough administrative measures such as dismissal and loss of pension rights for convicted officials also feature in these jurisdictions.

Establishment of a powerful, stand-alone ACA is a common choice for pragmatic reasons in order to tackle corruption within the normal law enforcement agencies. In one case, a special court was also set up due to widespread judicial corruption. The need for special powers of investigation and extra resources are additional reasons for setting up a special body.

Whether or not the enforcement machinery is focused on a stand-alone ACA, independence and impartiality of the enforcement and sanctioning processes are critical features. Having a statutory basis for the ACA, including special legal provisions guaranteeing its independence, can facilitate independence. However, this does not on its own guarantee rigorous anti-corruption measures. The more powerful the agency, the higher is the danger of political capture. The underlying purpose of independence – impartial and fearless pursuit of corruption – rests on a much wider, more generalized set of political norms and conventions about non-interference by the political executive in law enforcement and judicial affairs more broadly. Transparency of the process enhances the adherence to these norms. Such transparency increases public trust in the system, facilitates the watchful scrutiny of the media and encourages citizen participation.

Whether or not there is a single agency or several, coordination and cooperation problems will inevitably arise in the enforcement and sanctioning process. Where such difficulties are endemic and persistent, there is a much stronger reason to set up a single agency with special powers over other similar bodies.

# Anti-Corruption Sanctions and Enforcement in Viet Nam: Similarities, Differences and Lessons

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In this section, the AC laws and enforcement mechanisms in Viet Nam are surveyed, contrasting them with the overseas cases and pointing to possible lessons that might be learnt. The analysis draws on Viet Nam's recent experience with AC investigation and enforcement to highlight possible weak points in the Vietnamese anti-corruption mechanisms, and we look to the overseas cases to provide some possible remedies to these weaknesses.

The Government of Viet Nam (GoV) and the Communist Party of Viet Nam (CPV) and members of the National Assembly (NA), as well as many outside observers, have concluded that current anti-corruption efforts are failing to meet the challenges.<sup>20</sup> In what follows, the principle objective is not to measure or document the extent to which corruption investigations, prosecutions and sanctions are effective in combating corruption. The paper does not seek to quantify the extent to which corruption investigations and cases are blocked, thwarted, delayed and otherwise obstructed, but throughout the research for this paper, many such instances were reported. Some examples of the kinds of obstacles faced are provided below, but mostly that analysis makes general and broad observations rather than giving specific details.

## *AC Laws and Regulations*

Viet Nam's self-assessment document following signing of the UNCAC agreement lists 88 laws and other legal documents relevant to its anti-corruption efforts. Most of these documents are circulars and resolutions that implement laws and decrees. Among the most significant laws are the 2005 Law on the Prevention and Combating of Corruption (hereafter referred to as the ACL); the 1999 Criminal Code (as amended 2009); the 2005 Law on State Audit; the Law on Public Officials and Civil Servants (2008); and the 2010 Law on Inspection.

The 2005 ACL differs in a number of respects from the ACLs already discussed. The Viet Nam ACL does not set out first and foremost to strengthen the investigative powers and criminal sanctions available to combat corruption. The Law is focused more on raising awareness of corruption and setting out responsibilities for anti-corruption bodies and public officials more broadly, rather than establishing applicable law enforcement mechanisms for dealing with corruption. The law also sets out requirements and obligations in such areas as asset declaration; publicity and transparency of budgets and other public decisions and documents (enumerated in detail for separate functional areas and sectors of government); formulation of

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<sup>20</sup> See for instance Gainsborough et al (2009); Acuña-Alfaro (2012a and 2012b); and also VietnamNet October 25, 2012 "Sửa không khéo, luật chống tham nhũng như hổ không răng" available at <http://vietnamnet.vn/vn/chinh-tri/91964/sua-khong-kheo--luat-chong-tham-nhung-nhu-ho-khong-rang.html> and October 26, 2012 "Chống tham nhũng, đừng dùng 'bình cũ rượu cũ'" available at <http://vietnamnet.vn/vn/chinh-tri/91969/chong-tham-nhung--dung-dung--binh-cu-ruou-cu-.html>.

codes of conduct; and rotation of public officials among different posts. Criminalization of corruption and the criminal sanctions to be applied are covered in the Criminal Code.

Article 3, Chapter 1 of the 2005 ACL defines a 'corrupt act', drawing on terminology already contained in the Criminal Code but, rather confusingly, also including crimes that are not classed as 'corruption' in the Code. Article 68, Chapter 4 of the 2005 ACL sets out a list of acts that would be subject to 'discipline or criminal prosecution', namely:

- 1 Persons who commit corrupt acts as set out in Article 3 of this Law.
- 2 Persons who fail to report or denounce corrupt acts upon detecting them.
- 3 Persons who fail to handle reports, denunciations or declarations about corrupt acts.
- 4 Persons who take revenge against or repress persons who make reports, denunciations or declarations or who disclose information relating to corrupt acts.
- 5 Heads of agencies, organizations, and/or units, who let corrupt acts occur in the agencies, organizations, and/or units under their management.
- 6 Persons who commit other acts violating the provisions of this Law or of other relevant laws.

The Criminal Code and the Criminal Procedures Code, not the ACL, provide the legal basis for anti-corruption criminal investigation and prosecution, while the laws on public officials and public employees provide the basis for non-criminal disciplinary actions. There is no mention of sanctions or penalties in the ACL; these are to be found in the laws just mentioned.

In sum, the 2005 ACL, relative to the laws described in the five case jurisdictions, did not make a major breakthrough in strengthening the sanctioning and enforcement mechanisms. It left the machinery of detection, investigation and sanctioning much as it was, other than with respect to coordination (a new steering committee mechanism, discussed below); it did not seek to address weaknesses in the powers and procedures of criminal investigation of corruption; and it did not establish any special investigative powers or add new measures to recover the proceeds of corruption.

### ***Definition, Scope and Coverage of Corruption Crimes***

The AC Law set out a range of corrupt acts (Article 3) as follows:

1. Embezzlement (of property in the public sector)
2. Receiving a bribe
3. Extortion of property by abuse of position and abuse of authority
4. Use of position / authority in the performance of public duties for private gain
5. Abuse of position / authority in the performance of public duties for private gain

6. Use of position / authority to influence other public officials in their performance of public duties for private gain
7. Falsifications (of documents) in the performance of a public duty
8. Giving a bribe or acting as an intermediary for bribery
9. Abuse of position and power to illegally use state assets for private gain
10. Harassment for private gain
11. Omission of public duty for private gain
12. Abuse of position, authority to protect or conceal persons who commit law violations for private gain; or to obstruct or unlawfully interfere in the monitoring, inspection, auditing, investigation, prosecution, adjudication, and enforcement of judicial decisions for private gain.

These provisions only apply to public officials and civil servants. Some of them appear on the face of it to be identical (for example use of position/authority in the performance of duty for private gain and abuse of position/authority in the performance of duty for private gain) or vague (for example, harassment for private gain).

The primary legal document that defines corruption crimes is not the 2005 ACL but the Criminal Code. The anti-corruption provisions of the Penal Code are found in Chapter XXI 'Crimes Relating to Position'. Position-related crimes are confined to persons with positions in which they perform official duties. Part A (Crimes of Corruption) criminalizes seven types of corruption as follows:

1. Embezzlement (Art 278);
2. Receiving a bribe (Art 279);
3. Extortion of property by abuse of position, authority (Art 280);
4. Use of position, authority in the performance of duty (Art 281);
5. Abuse of position, authority in the performance of duty (Art 282);
6. Use of position, authority to influence other public officials for private gain (Art 283); and
7. Falsifications in the performance of public functions (Art 284).

Part B of Chapter XXI on Position Crimes ('Other Crimes Relating to Position') also includes crimes normally understood as 'corruption', including some crimes against state property and giving bribes and acting as an intermediary for bribery (again, only with reference to public officials and civil servants). Several of the corrupt acts mentioned in the AC law are not to be found in Chapter XXI at all. Similar crimes can be found in other parts of the Criminal Code, such as the Chapter on 'Economic Crimes'. There has to date been no effort to codify, with specific reference to corruption, the various corrupt acts referred to in the final category listed in the ACL on obstruction of justice.

One deficiency in these provisions is that the definition of corruption as a 'position crime', coupled with the emphasis on 'losses to the state', excludes from coverage acts that occur in or by a large number of former state entities that have, in some way, been privatized or socialized, but in which the state and its officials still have

major interests. Actions of managers and employees of joint-stock companies in the which the state owns less than 50% are not covered as corruption offences, for example. The operations of such entities are the source of many acts of corruption but there are serious difficulties in investigating and prosecuting them under the current laws against corruption.

In sum, there are a number of anomalies and inconsistencies in the laws against corruption in Viet Nam. They are also incomplete by international standards through not covering illicit enrichment, bribe-giving by private citizens, private sector corruption and corruption of or by foreign officials.<sup>21</sup> In addition, the section in the Criminal Code on 'Position Crimes' contains none of the measures we have observed in other jurisdictions' laws that are specifically designed to deal with the special circumstances of combating corruption. As discussed in the following sections, there are also weaknesses and omissions with respect to sanctions and enforcement.

### ***Sanctions and Penalties***

The starting point of this research is the 2005 ACL and its intended amendment of late 2012. In that respect, the research has found that despite article 1 setting out the scope of the Act to include 'handling' of corrupt behaviours, the law itself has no sanctions or penalties embedded in it. The 'handling' in this sense is left to secondary legislation in the form of decrees and circulars or other laws, particularly the Criminal Code. Thus, no incentives or sanctions are clearly articulated in the ACL to ensure public officials and civil servants abide by its provisions.

### ***Fines and Imprisonment***

The Criminal Code provides very severe penalties for corruption offences. The principal penalties are fixed-term imprisonment, life imprisonment and the death penalty. For such offences as embezzlement and receiving a bribe, the severest punishment is the death penalty. The principle of proportionality is adhered to with the establishment of four different frames of penalties for bribery offences. The key factor for the establishment of different frames of penalties is the size or value of loss of property by the state and, more generally, the severity of the consequences caused by the offences. For embezzlement, for example, where the value is between 500,000 dong and 50 million dong, the term of imprisonment is between two and seven years; for appropriating property between 50 million and 200 million dong, the prison term is from seven to 15 years; between 200 million and 500 million dong, the term is between 15 and 20 years; and over 500 million dong, and 'causing other particularly serious consequences' the sentence may be 20 years, life imprisonment or capital punishment. An additional consideration in determining the severity of the offence (and hence the sentence) is whether an offender has a prior record, either 'already been disciplined for such acts but continues to commit them' (in the case of an offence for which the sentence is imprisonment between two and seven years) or 'committed the offence more than once' (an offence carrying a term of between

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<sup>21</sup> *Survey Report In Support of the Government's Self-Assessment of the Implementation of the United Nations Convention against Corruption (UNCAC) in Viet Nam in 2011*, Ha Noi: Transparency International and Towards Transparency, 2011

seven and 15 years). 'Disciplined' refers here not to criminal conviction but to administrative discipline.

The way sanctions are described and graduated in the Criminal Code adds to the complexity of successfully prosecuting an offender. The definition of a corruption offence includes the severity in terms of damage to the state. Thus, to lay a charge, a prosecutor is in principle required to categorize the act of embezzlement or bribery as one with a particular quantifiable consequence, involving a certain loss to the state. Some of the difficulties this causes are described in the next section. Evidence of prior administrative disciplinary actions needs also to be presented. Some of the difficulties this causes are described in the next section.

### Other Penalties

Further penalties are also provided for corruption offences. First of all, a prohibition of holding a public position for between one to five years can be applied for embezzlement and for receiving bribes; second, a fine of between one and five times the monetary equivalent of the bribe or confiscation of property is provided as an optional additional penalty for bribery offences. Provisions under Article 41 of the Criminal Code, that all objects and money directly related to offences are subject to confiscation, are invariably imposed in corruption cases.

Another feature of the different offences listed under 'Position Crimes' is that for offering a bribe or being an intermediary, if the offender is 'coerced to offer bribes' but takes the initiative in reporting the crime before being detected, criminal liability may be waived; and a bribery intermediary who takes the initiative in reporting the crime before being detected is exempted from criminal liability. No such provisions are explicitly set out for receiving (or being offered) a bribe.

### Recovery of Corruptly Acquired Assets

There are no provisions in the ACL or in the Criminal Code to criminalize 'illicit enrichment'. The GoV, in not agreeing to follow the UNCAC recommendation to adopt such a law, gave as reasons the 'infeasibility' of the requirement that public officials must prove the origin of their income. They gave as reasons the lack of adequate legal and administrative means to undertake such monitoring; the fact that most transactions have not in the past been undertaken through the banking system; and the 'traditional family model' under which property is not assigned to individuals but to 'all generations of the family' who are living together. The 'presumption of innocence' argument was also raised.<sup>22</sup>

Viet Nam's claim to 'exceptionalism' in these matters is not a self-evident truth. In Hong Kong and Singapore, similar cultural practices were to be found in the recent past. Moreover, anti-corruption laws are themselves part of the process of effective regulation of conduct in a market economy, so that the development of the institutions associated with the latter can be seen as a parallel process, not a pre-requisite. The adoption of ACLs in developing countries historically goes hand in hand with a process of regularization and legalization of modern financial transaction

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<sup>22</sup> Viet Nam's Responses to UNCAC Self-Assessment Checklist: Ha Noi, Government of Viet Nam, n.d., pp.46-7

systems, property rights and land title systems, in such a form that records are increasingly accurate and verifiable. Finally, if a government is prepared to make a special exception on the 'presumption of innocence' in the case of illicit enrichment, this would be seen as a sign of the seriousness with which the corruption challenge is being addressed. Certainly, this was historically the case among our five overseas cases.

### Codes of Conduct and Disciplinary Proceedings

Apart from the criminal sanctions, disciplinary sanctions for corruption are covered by regulations on administrative discipline. Decrees on Disciplinary Sanctions for Public Officials and Civil Servants (No. 34/2011/ND-CP and No. 27/2012/ND-CP respectively) allow for sanctions for corruption in two circumstances: first, where a criminal conviction occurs and second, when a violation is not so serious that a criminal prosecution follows. Here, it should be noted that the Criminal Code exempts what might be termed 'petty corruption', such as receiving a bribe of less than 500,000 dong, from being a criminal offence unless the action concerned caused 'serious consequences' or was committed by a person with a prior record of disciplinary action or with a criminal conviction for corruption. That is, the disciplinary procedures and sanctions administered under the public employment regulations and the criminal prosecution procedures and sanctions are viewed as a continuum of anti-corruption sanctions and enforcement mechanisms.

Effectively, in Viet Nam a large segment of corrupt behaviour by public officials is not treated as criminal behaviour. Instead, sanctions relying upon disciplinary procedures in the workplace are invoked. It is a universal and basic requirement across all those jurisdictions that have taken anti-corruption seriously, including in our five cases, that all forms of corruption are criminalized.

The Decrees on disciplinary sanctions referred to above set out different offences, including violations of the ACL as well as the Criminal Code, that result in different punishments – a reprimand, a warning, reduction in classification of salary dismissal from position and termination of employment. Thus, for example, false declaration of assets under the 2005 ACL law can be dealt with under these decrees. As in the Criminal Law, the gradation of offences and punishments is based primarily on the criterion of 'seriousness of consequences' and losses to the state.

Under Viet Nam's ACL, a number of responsibilities and obligations of agency heads are stipulated. Agency heads are required to take responsibility for corruption that occurs in the units under their supervision. Decree No 107/2006/ND-CP sets out disciplinary procedures and sanctions for these 'responsible' officials. In practice, action would be initiated under these provisions only where an employee has been convicted of corruption. Article 2 of the Decree defines who is the responsible head, including the head of the agency and the less senior head of the unit where the corruption occurs. The severity of the corruption case determines the nature of the sanction – a reprimand for a 'serious' case, a warning for a 'very serious' case and dismissal for an especially serious case. In practice, in administrative discipline cases, judgments on penalties are made at the time of the consideration of the case, on a case-by-case basis, by the disciplinary panel concerned (a secret vote is taken).

The 2005 ACL provides for annual asset declaration by public officials from commune level upwards and by candidates for election. Agencies and units are given responsibility for administering the declaration of assets. 'Verification' is required in certain circumstances and is undertaken by the managing agency of the individual concerned. The proposed revisions to the Law before the National Assembly in 2012 add significantly to the scope and requirements of asset declaration.

No direct evidence was found in our research that asset declaration in Viet Nam's government agencies assists in combating corruption.<sup>23</sup> To our knowledge, no successful case of detection of corruption has arisen from information gleaned from such information. During the time that asset declaration has been required, the extent of corruption has not diminished. In the course of the research for this paper, problems were observed in verifying and monitoring these declarations. One effect of the assets declaration regulations has been to impose a new administrative and regulatory burden. False asset declaration is not a criminal act, although administrative sanctions may be imposed.

### **Enforcement**

The institutional arrangements for anti-corruption enforcement in Viet Nam are unlike those to be found in any of the overseas cases. This is due in large part to the inheritance in Viet Nam of certain features of Soviet models and practices of state management. Some of these inheritances, such as the role of the CPV as the 'leading force' in state and society and the implementation of judicial 'impartiality' and supervision, are expressed in Viet Nam's Constitution. Others, such as the role of the Government Inspectorate (GI) and of Inspectorates within every ministry and department, are part of the inheritance of the way the machinery of the state is organized. Remnants of a tradition or doctrine of 'Socialist Law' can be found in some legal documents, judicial practices and legal institutions.<sup>24</sup> These inheritances and the manner in which they shape and constrain the anti-corruption enforcement process at every step are discussed in the analysis that follows.

The 2005 ACL stipulated a set of special-purpose AC administrative units and other bodies and it allocated AC responsibilities to existing bodies as supplementary activities. It set up a Central Steering Committee for Anti-Corruption chaired by the Prime Minister and an Office of the Steering Committee (OSCAC) and it required the GI, Ministry of Public Security (MPS) and Supreme People's Procuracy (SPP) to set

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<sup>23</sup> For a commentary on some of the problems of assets declaration in Viet Nam see "Việt Nam vẫn kê khai tài sản kiểu 'đóng và kín'", interview with Jairo Acuña-Alfaro at VietnamNet, June 4, 2012 and available at <http://vietnamnet.vn/vn/chinh-tri/74709/viet-nam-van-ke-khai-tai-san-kieu--dong-va-kin-.html>, accessed November 13, 2012 and also "Oversight of officials' assets deters corruption", November 16, 2009 available at <http://www.lookatvietnam.com/2009/11/oversight-of-officials-assets-deters-corruption.html>, accessed November 13, 2012

<sup>24</sup> On Soviet Law traditions and their influence on contemporary Vietnam, see Bui Thi Bich Lien, 'Legal Interpretation and the Vietnamese Version of the Rule of Law', *National Taiwan University Law Review*, 6:1, 2011, pp. 323-37; and J. Gillespie, *Transplanting Commercial law Reform: Developing a 'Rule of Law' in Vietnam*, Aldershot, UK: Ashgate, 2006

up special anti-corruption divisions or departments.<sup>25</sup> Thus MPS has a special investigative body responsible for corruption and the SPP has a separate Division (Department 1B) responsible for overseeing the investigation and prosecution of corruption crimes. The GI was charged with ‘...organizing, directing and guiding inspection of the implementation of the provisions...’ of the ACL.

Otherwise, the ACL mostly reiterated the overall duties and obligations of specific agencies such as the State Audit (SA) and GI as they relate to detecting or investigating corruption – for example, it restated SA’s responsibility for inspecting the public accounts in terms of detecting possible acts of corruption, and set out the requirement for the agency to pass on such findings to the appropriate authority. No special reference was made in the ACL to dealing with anti-corruption cases by the judiciary: there are no special AC courts or judges and corruption cases are dealt with in a similar manner to other criminal cases.

Consequent to the ACL a large number of decrees and circulars were issued by the respective ministries and responsible agencies in order to implement the law. As with much primary legislation in Viet Nam, the ACL contains broad principles and general responsibilities, while supplementary legal documents such as ministerial decrees and circulars flesh out the details. For example, OSCAC has issued circulars on coordination and cooperation between the various agencies when dealing with particular cases and (as referred to in the previous section) decrees have been issued to implement the provisions on disciplining ‘responsible’ agency heads for corruption committed by employees under their supervision.

Nowhere in the AC legislation is there mention of the CPV or its organs. However, the Party Inspectorate under the command of the Party’s Central Committee plays a significant role in the investigation and sanctioning of Party members accused of corruption. Internal CPV disciplinary measures (including expulsion) may be invoked.

In sum, the allocation of tasks and responsibilities for investigating and sanctioning acts of corruption in Viet Nam is complex. Briefly, the main elements in the system are as follows:

1. The GI and inspectorates within an administrative unit (such as a national ministry or provincial department) are responsible for conducting investigations in order to ensure that there is compliance with all legal requirements. An inspection ‘mission’ seeks to answer four basic questions:
  - a) Is there a violation of the law?
  - b) Who is the violator?
  - c) What is the degree of severity of the violation?
  - d) What form of discipline and what kind of penalty should be applied?

Administrative measures for disciplinary action may be commenced and, where criminality as defined by the Criminal Code seems to be evident, the case should

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<sup>25</sup> The Central Steering Committee on Anti-Corruption was set up in October 2006. It contained eight members in addition to the Prime Minister as chair: Deputy Prime Minister; Chairman of OSCAC; Deputy Head of the Communist Party Inspection Committee; the Inspector-General (head of the GI); Minister of Public Security; Minister of Information & Communication; Chairman of the SPP; and Chief Justice of the Supreme People’s Court.

be passed on to the police for further investigation. Not only position crimes (such as corruption) but also economic crimes and other criminal violations may be identified in this process.

2. The SA is charged with undertaking financial compliance audits of all government agencies and departments. If illegality is identified – including suspected corruption – the details are passed to the ‘appropriate authority’. This may be the agency concerned or the police. At this point the GI may also become involved in investigating illegality. In this sense SA’s role is purely in the realm of ‘detection’. However, its documents and findings may form an important part of the evidence.
3. The anti-corruption investigative unit of the MPS, namely the Police Investigation Department on Corruption-related Crimes, is responsible for conducting investigations and preparing evidence for prosecution in cases of corruption. Some cases come to the attention of the police as a result of referrals from other agencies while others are followed up as a result of complaints and denunciations from informants. Some matters may need to be passed on for investigation first by the GI.
4. The CPV Party Inspectorate may conduct its own investigations into corruption where information and complaints are received directly. It reports to the Central Committee of the Party. The Inspectorate does not undertake criminal investigations. In the case of criminal investigations into corruption involving senior party members, the police investigation agency will inform the Party Inspectorate so that it can conduct its own investigation. Decisions will be made by the Central Committee on appropriate disciplinary measures (for example, temporary dismissal from the party pending the conclusion of the criminal proceedings). The Party Inspectorate might also, in rare cases, conduct its own investigations of investigators, prosecutors or judges. After coming to its own conclusions about such a case, it forwards information to MPS and especially to SPP, where an Investigation Department deals with offences within the law enforcement and judicial process, potentially leading in due course to administrative or criminal sanctions.
5. The SPP is charged with supervising all criminal investigations and with conducting criminal prosecutions. Its function is to ensure that legality is applied at all stages of the judicial process (the Procuracy also supervises the legality of court proceedings). Police investigators must work closely with the SPP during the course of an investigation and the prosecutor engaged in a case has rights of interrogation. Only the Procuracy can bring a case to court. All corruption criminal investigations and trials come under the supervision of the division of the SPP specially charged with anti-corruption crimes.
6. The Central Steering Committee on Anti-Corruption coordinates the anti-corruption efforts within the government, under the chairmanship of the Prime Minister.<sup>26</sup> OSCAC issues guidance on coordination in the name of the Central

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<sup>26</sup> Amendments proposed to the Anti-Corruption Law in 2012 and put before the National Assembly would result in the transfer of the ‘central steering’ function to the Politburo of the Communist Party and the abolition of the Steering Committees on Anti-corruption at the provincial level. At the time of

Steering Committee and exercises detailed oversight of serious anti-corruption cases in seeking to expedite the handling of the matters concerned.

7. The SPC Criminal Court Division and provincial courts handle the adjudication of corruption crimes under the overall supervision of the Procuracy.

Multi-agency systems create complexity and stimulate delays and friction. These problems may be compounded where the system is dealing with matters that are governed by multiple laws and regulations. Grey areas between the jurisdictions of agencies are made even greyer by ambiguities in the rules – for example, whether a case is a ‘disciplinary’ investigation or a ‘criminal’ investigation. In the process of bringing corruption cases to a conclusion decisions often have to be taken on whether or not and to whom to ‘pass on’ a dossier; whether or not to seek higher authority; and whether or not to ‘hand back’ a dossier because it is deemed ‘incomplete’ for some reason. Such decisions may demand complex rather than be matters of difficult ‘black and white’ judgments, being sensitive and contentious and requiring decisions by superiors (all the way up to Ministers and the Prime Minister). This, in turn adds complexity, and the greater the complexity, the larger the number of ‘veto points’ and the more chance that cases will fall short of being concluded successfully. Several of the people interviewed for this research paper saw this is a common occurrence.

In other jurisdictions, the lack of any coherent focus for anti-corruption efforts has prompted a clarification of the law and a reorganization and consolidation of AC investigation and prosecution activities so as to enhance their effectiveness. In Viet Nam, the response in the ACL was not to clarify the laws as set out in the Criminal Code or to reorganize the system but to leave things much as they were while adding yet one more administrative unit, OSCAC, in an effort to improve effectiveness. Such a flawed ‘solution’ it creates still more complexity and obfuscation.

Instances of this complexity and other problems arising from the AC institutional arrangements in Viet Nam will be discussed further in the following sections. As in the discussion of the enforcement of AC sanctions in the overseas cases, we shall follow the same set of topics and headings in describing and assessing the effectiveness of the various AC units and enforcement processes in the Viet Nam case:

- 1 The strength of a unit’s investigative and other relevant powers and capacities
- 2 The ‘independence’ of law enforcement agencies involved in AC work and their ability to operate ‘without fear or favour’
- 3 Where more than one agency is involved, the effectiveness of cooperation and coordination among them.

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writing (October 2012) this had not yet been implemented. We discuss the implications of this proposed change in a later section.

## *Powers of Investigation*

As already discussed, an important segment of anti-corruption sanctioning and enforcement involves administrative discipline rather than criminal sanctions. Legal requirements under both the laws on public employment and the laws on inspection give agencies and actors outside the criminal investigation process important enforcement roles. There are problems and weaknesses in these parts of the AC system in Viet Nam.

First, the disciplinary mechanisms are conducted internally and are therefore unlikely to be objective. An employee subject to disciplinary action is required to appear before a temporary disciplinary committee appointed by the head of his or her agency. The chair of this committee is the leader or the vice leader of the authority. The procedure consists of several meetings, including a first, open meeting of the violator's colleagues for the violator to review the offence. The disciplinary committee then organizes a meeting to adjudicate the offence and propose sanctions against the offender. The proposed sanctions are decided through a secret vote. This conclusion is advisory and the agency head finally decides the sanction. The offender may appeal the decision. In these processes, many influences other than the facts of the case or the severity of the offence can influence the outcome, including personal connections and the wish of colleagues and superiors not to disrupt good relations in the workplace. Especially where corruption is systemic or collective in nature, there will be pressures to be lenient. Where there is a 'culture of corruption' in a particular administrative unit, external intervention is needed to break the cycles of complicity and mutual protection.

Second, the GI faces many challenges that limit the effective conduct of investigations. This is not to deny the professionalism and integrity of officers in the Inspectorate, nor to ignore the cases of maladministration that they succeed in revealing through their investigations. However, the GI's effective powers are influenced by such things as its standing politically within the overall context of the executive branch of government. It is a ministerial agency, not an independent body outside the executive branch. Similarly, inspectorates within departments and ministries are under the management of the head of the agency, including staff appointments to these inspectorates. There are weak incentives acting on heads of agencies to ensure that the technical and other capacities of the inspectorate are sufficient to ensure rigorous, impartial investigations of units under his or her responsibility. In addition, there is every incentive on the part of many concerned to avoid offending powerful figures within the agency. The same limitations that affect the impact of internal disciplinary arrangements also, though to a lesser degree, will limit the effectiveness of the inspectorates.

The main burden of investigative work in criminal corruption cases rests ultimately on the police investigation agency charged with the work, namely The Police Investigation Department on Corruption-related Crimes (commonly known as C48). The first point to make is that this unit, although charged with investigating corruption, has no special investigative powers conferred by law beyond those available to any other investigative branch within MPS. For example, one difficulty it faces is that under the existing regulations, only after a decision to prosecute has been made can some financial information and documents held in bank archives be

demanded. Ideally, such information should be sought at the earliest possible stage in an investigation. Second, the investigating department lacks the necessary resources to conduct a complete investigation of many corruption offences. As discussed earlier, in order to lay a charge of corruption under the Criminal Code, a prosecutor is required to categorize the act of embezzlement or bribery as one with a particular quantifiable consequence, involving a certain loss to the state. Hence it is necessary in preparing many cases for prosecution to assess accurately and unambiguously the extent of loss or damage to the state. In a case where a construction project has been completed below specifications due to substituting poor quality materials, for example, a technical assessment of the damage and a financial assessment of the amount stolen are needed.<sup>27</sup> This ‘legal assessment’ is a complex matter in many corruption cases, involving technical know-how that is not available in the investigation department. The experts who have to be engaged to do this work may only be available inside the agency concerned, or in a related professional agency. For a variety of reasons – including technical limitations and vulnerability to pressure – their reports are often inadequate for the purpose of producing a sound case and may cause terminal delays in proceeding to a prosecution.<sup>28</sup> The lack of special powers and of specialized resources within the responsible investigating agency is a major impediment to effective enforcement of the AC laws.

Many other problems confront the investigation of corrupt offences and the successful prosecution and conviction of corrupt officials. These are dealt with further in the following sections.

### ***Independence and Impartiality***

The need for ‘independent’ investigative, prosecuting and adjudicative actors and agencies is an article of faith in most international discussions of anti-corruption. As discussed earlier in relation to the overseas cases, independence is in fact a means to an end, namely it is a mechanism for achieving impartiality. The actual degree of independence and the mechanisms that bring it about are both ambiguous and contested in many jurisdictions. In practice, political support and protection are needed just as much as ‘independence’ in order to provide the necessary resources and the required autonomy to conduct effective investigations and prosecutions against powerful public officials. A combination of political intervention at the macro-level and political self-denial at the micro-level is required from political leaders. Indeed, rather than focusing solely on the formal requirements for ‘independence’ of agencies and actors, it was concluded that a variety of institutional and cultural preconditions exist in different contexts under which both determined commitment and impartiality may be achieved in an effective enforcement process.

In Viet Nam, the idea of ‘independence’ is understood very differently from the way it is viewed in other countries. Under the Constitution, the CPV is ‘the force assuming

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<sup>27</sup> Cases were described to the research team in which the offender had made a confession of corruption, but the technical and financial assessment of the loss to the state resulting from the offence could not be completed with sufficient certainty in order for the cases to proceed to court.

<sup>28</sup> At the time of writing a law to improve the conduct of ‘legal assessment’ and to ensure it was adequately resourced was in the process of being implemented

leadership of the State and society' (Article 4). The CPV sets ideological directions and makes key policy decisions which set the parameters for the actions of all organs of the state. Moreover, there is not a constitutional 'separation of powers'. Under the 1992 Constitution, the National Assembly (NA) appoints the President, the Government, the Head of the SPP and the Chief Judge of the Supreme Court. The NA supervises all of these bodies, and they are in various ways accountable to the NA for their actions. These separate organs of the state are each in some respects independent one from another in terms of budgets and personnel appointments. In an important change, in 2002 the judiciary was removed from the supervision of the Ministry of Justice (i.e. the government).

The Procuracy supervises and can countermand decisions and actions of police investigators working under the control of the executive branch and also supervises the work of the courts. The Procuracy and the courts constitute separate hierarchies at national and provincial level, although they are each in different ways accountable to and supervised by Provincial Peoples' Councils. Separation of the court system and the Procuracy from the political executive is intended to ensure that they fulfill a distinct set of legal obligations. These obligations are spelt out in laws framed by the NA and, in some cases, in the Constitution itself. For example, Article 130 of the Constitution states: 'During trials, judges and people's assessors are independent and subject only to the law'. That is, they have an independent responsibility to act without coming under any external influence when judging a case.<sup>29</sup>

The Constitution does not declare that the judiciary is 'independent' nor are there special provisions that seek to guarantee independence by institutional means. More important are the principle of hierarchical accountability to the NA and direct, personal accountability of individual judges for their performance.<sup>30</sup> The Peoples' Councils have powers of supervision of provincial courts and they also appoint 'honorary judges' (or 'peoples' assessors', who sit alongside professional judges). But as one authority puts it: 'The system of People's Procuracy is organized and operated in accordance with the principle of hierarchy and independence. Procuracies do not depend on local state agencies. Procuracies are under the leadership of Chiefs. The Chief of a Procuracy agency is under the leadership of Chiefs of Procuracies at higher level.'<sup>31</sup>

Within the organization of the executive there is no clear set of conventions or rules about the distinct, 'arm's-length' roles of politicians and law enforcement agencies more broadly, including the police. At the same time, the work and duties of GI inspectors and of police investigators are regulated by laws that set out both their obligations and their powers. However, in an earlier section, the lack of *de facto* 'independence' of the GI and its potential weaknesses as an investigative agency

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<sup>29</sup> Van-Hoa To, *Judicial Independence: A Legal Research on its Theoretical Aspects, Practices from Germany, the United States of America, France, Viet Nam and Recommendations for Viet Nam*, Lund: Juristforlaget i Lund, 2006, pp.400-1

<sup>30</sup> *Ibid.*, pp.404-7

<sup>31</sup> Nguyen Minh Duc, 'The People's Procuracy of Vietnam and the Fair Trial Principle', Ha Noi: Supreme People's Procuracy, n.d. Nguyen Minh Duc is Director of the Institute for Prosecution, Supreme People's Procuracy.  
<http://www.jus.uio.no/smr/english/about/programmes/vietnam/publication/>.

was discussed. In the same way, the MPS is a government ministry and the security forces are an integral arm of state power under the direct control of political leaders. Investigation of corruption by C48 is not afforded any special privilege in being free from such political control and potential political intervention. The complex subordination mechanisms to which AC agencies are subject is in similar to all other government agencies. At the same time, supervision by the Procuracy helps to safeguard, at least in part, the integrity of the criminal investigation process.

Compared with the perspective on 'independence' found in other jurisdictions, the sharpest contradiction is the fact that in the case of the prosecution of a senior official who is accused of corruption, and against whom a case has been found fit to proceed to the court, the CPV Inspectorate must be informed before the case proceeds, in order that the Party's disciplinary measures can be implemented.

The most notable recent response to meeting the challenges facing the anti-corruption enforcement system was the establishment of the Government Central Steering Committee and OSCAC. As discussed in the next section, this initiative was designed to address, first and foremost, chronic problems of coordination. A further stated aim was to signal the government's determination to address corruption, a commitment symbolized by the Prime Minister taking direct control as Chair of the Central Steering Committee. OSCAC was designed to bring stronger central authority to bear on coordinating the different agencies involved in anti-corruption efforts.

In 2012, when the revision of the AC law was addressed, the conclusion was drawn that the Central Steering Committee on Anti-Corruption had not succeeded in providing a new momentum to anti-corruption efforts. Therefore, it was proposed to transfer the political 'steering' and coordination function to the Politburo.<sup>32</sup> Aside from the political rationale, another justification for the move was that it removed a fundamental conflict of interest in the existing system, namely that the political executive was put in charge of rooting out its own corruption. The principle of institutional separation for the sake of ensuring impartiality was clearly instructive.

In conclusion, while the overall system of unified party leadership and control would seem to contradict the independence of the law enforcement process, there are some elements in the architecture of the state which acknowledge the need for institutional separation and which provide some checks and balances that afford the possibility for a more effective, objective and impartial system of anti-corruption enforcement. In the case of anti-corruption, governments elsewhere have made a special effort to draw on those institutional arrangements that exist in their own systems (for example, the model of an independent judiciary) in order to provide

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<sup>32</sup> In accordance with Conclusion No. 21-KL/TW of the fifth plenum of the Party Central Committee (the XIth Congress), the Central Steering Committee on Anti-corruption will be set up under the Politburo and headed by the General Secretary of the Communist Party of Viet Nam. The Central Internal Affairs Commission will be re-established to act as the advisory body that directly and regularly reports to the Politburo and the Party Secretariat on major internal affairs policies and concurrently as the standing body of the Central Steering Committee on Anti-corruption. OSCAC will be dissolved and OSCAC human resources will be transferred to the Central Internal Affairs Commission.

specific and special protections and safeguards to the anti-corruption law enforcement process, which is particularly vulnerable to political interference and irregularities of all kind in ways that undermine its impartiality and effectiveness. So far, such efforts have not been to the fore in Viet Nam, where the focus has been more on improving the efficiency of the separate parts of the existing system and on asserting greater political control and coordination.

### **Coordination**

A fundamental and debilitating weakness in the anti-corruption enforcement and sanctioning system in Viet Nam is the existence of chronic coordination problems among the multiplicity of agencies involved. Numerous examples were referred to in the course of this research of potential corruption cases and actual investigations being thwarted as a result of confusion regarding the jurisdictions of various agencies; of dossiers passing to and fro and dropping out of sight; of delays and frustrations because cases were diverted from one agency to another; of the sheer waste of time and energy expended on endless coordinating requirements among the different actors and agencies; and of the efforts needed under OSCAC's guidance to break logjams and move cases forward.

The ACL and associated decrees and circulars impose an obligation on agencies to cooperate and pass on information in detecting, investigating and prosecuting corruption crimes. SA and GI have a clear duty to pass on to MPS cases which may give rise to criminal prosecution. In January 2009, OSCAC issued a regulation for coordination among five separate agencies and between these agencies and OSCAC itself. In 2011, a joint circular was issued elaborating on the procedures.<sup>33</sup> Judgments must be made about the 'extent of corruption' and 'evidence of criminal signs' in deciding on whether and where to pass the dossier. The legal framework only provides general principles, whereas actual performance is dependent on the willingness or goodwill from all parties. The result is that the exchange of information necessary to investigate corruption is limited. OSCAC in its first five-year review noted that '...the number of cases of corruption discovered and treated through the work of inspection, monitoring and auditing is still small.' GI reports that over five years, it handed over 464 cases to the investigative agency for criminal investigation. MPS in turn claims that only 10 cases were of a nature that could be followed up for criminal prosecution. In reviewing the origin of cases that had been prosecuted during this period, OSCAC noted that most of the serious ones had stemmed from information provided directly by 'insiders' as a result of disputes within the offices concerned, not by GI, State Audit or other official bodies.<sup>34</sup>

It is not clear where the problem lies in all such cases. SA proposed an amendment to the ACL in 2012 that would require the receiving agency to report back within a reasonable time on the result of the case. There would seem to be two kinds of

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<sup>33</sup> Inter-agency Circular No. 12/2011/TTLT-TTCP-VKSNDTC-TANDTC-KTNN-BQP-BCA issued on 15 December 2011 contained regulations on the exchange, management and use of information relating to preventing and combating corruption.

<sup>34</sup> Additionally, few denunciations came from those who had observed corruption rather than being part of it, suggesting that more needs to be done to encourage, reassure and protect potential 'whistleblowers'.

problem: first, in the process of passing information and dossiers, there are multiple veto points where those affected (especially if they are powerful) can seek to block the case; and second, in passing a case on, weak evidence and incomplete documentation creates obstacles to taking it further. As the proverb goes: 'Too many cooks spoil the broth'.

OSCAC was set up in part to regulate this regime of information exchange and cooperation, that is to clarify and monitor the requirements to pass on information so that investigations make progress. It has issued regulations and coordinated the issue of inter-ministerial circulars. It also performs another role – namely taking action to 'knock heads together' in order to speed up progress on particular serious cases. It works closely with both Department 1B in the Procuracy and with the Police Investigation Agency, C48, to coordinate the process of information gathering and investigation. It may, for example, hold a general meeting asking for inter-ministerial leadership and report it to the Central Steering Committee on AC and ask it for its guidance in dealing with a difficult case. The obstacle may be delays in the process of legal assessment, requiring OSCAC to deal with the agency concerned; or the need may arise to sort out any differences in opinion between the Procuracy and the Court in the interpretation of the evidence regarding the nature of the crime. Provincial judges (who deal with many of the cases) may lack the confidence or capacity to proceed promptly, or they may be under political pressure to adopt a different approach. In such cases, OSCAC may seek to mediate or facilitate a resolution.

In sum, OSCAC in principle is a useful addition to the machinery of enforcement. But it could be said that its very existence is a sign that the enforcement system is not working well. It would be far better if there were neither a chronic coordination problem nor 'weak links in the chain' in the first place.

## Conclusions and Recommendations

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This concluding section summarizes the findings of this research paper. It does so in a form that makes recommendations for dealing with the weaknesses and shortcomings identified in the previous sections, while drawing on the lessons of international experience that are most relevant to dealing with these problems. Where the analysis suggests that there are fundamental incompatibilities between international experience and the situation in Viet Nam (for example, with respect to basic differences in the political and constitutional frameworks) the recommendations seek to adapt the overseas experience to suit these circumstances.

### *The Anti-Corruption Laws*

**Viet Nam's ACL deals in large measure with preventive measures and administrative matters. It is limited in scope and purpose and as a result does not cover fundamental issues that need addressing in order to resolve problems in the AC sanctioning and enforcement processes.** In addressing these reforms, it is necessary to undertake a review of other laws, including the Criminal Code. **In redrafting the relevant laws in a comprehensive manner, consideration should be given to a consolidated ACL that includes a clear statement that the nature of corruption is criminal;** a comprehensive list of types of offences defined as corruption; a system of administrative and criminal sanctions that apply to these offences; and a set of mechanisms that require accountability of agencies and institutions concerned. Such a law should cover comprehensively the special measures that are needed to combat corruption effectively, such as special investigative powers; provisions to guard against obstruction of justice in dealing with corruption offences; adequate protection for informants; and provisions concerning recovery of assets.

**Gaps and omissions in Viet Nam's AC laws, which have been widely recognized in other commentaries and reviews (see footnote 2), need attention in this comprehensive review in order to provide an effective set of sanctions and enforcement procedures.** A particularly significant omission is the absence of criminalization of 'illicit assets'. The threat of loss of such assets, even in the absence of conviction for a specific corrupt act, has proven an effective mechanism in many other jurisdictions for combating corruption. It has enabled prosecution of the most egregious cases where inexplicably extravagant lifestyles of people holding positions of public trust are visible to all. This is challenging in the context of Viet Nam, where property and other assets have only in recent times come into private hands, but it should not in the long run be a fundamental obstacle.

**The categorization of corruption as a 'position offence' in the Criminal Code is neither necessary nor helpful.** For example, it excludes from a definition of corruption any act by a non-state actor (including bribery of a public official). It also excludes a large segment of state activity from investigation, namely enterprises in which the government has a significant stake, but less than 50%. In addition, the manner in which corruption offences are defined through connecting them with different degrees of 'losses' to the state or different levels of 'seriousness' is not helpful. **It would be simpler to refer only to 'benefits' or 'advantages' to the corrupt individual arising**

**from abuse of office.** Viewing corruption through the lens of ‘losses to the state’ draws attention away from its intrinsic nature as fundamentally a criminal breach of trust by a public official. Similarly, leaving some corruption cases to be dealt with through administrative discipline obfuscates the same fundamental point. All corruption, regardless of the material damages that follow from it, should be criminalized. In sum, it might be appropriate to set up a whole new division of the Criminal Code to deal with corruption offences in all sectors of society (for example, along the lines of the Commonwealth Criminal Code of Australia).

### ***Sanctions and Enforcement***

**The ineffectiveness of existing criminal sanctions against corruption derives not from the fact that they are lenient, but that they are not enforced.** This is due to a series of major weakness in the enforcement system. With regard to many administrative matters in the AC law, such as assets declaration and the responsibility of agency chiefs for acts of corruption of their subordinates, the sanctions to be exercised to enforce these provisions are weak and ineffectual. Some of these provisions for disciplinary sanctions belong in laws governing the management of the civil service, rather than in an AC law.

**Investigative bodies in Viet Nam lack some of the necessary powers and capacities to conduct effective AC investigations. A comprehensive AC law should address this by naming these exceptional powers** (for example, access to financial accounts and ‘wire-tapping’). The need to assess ‘losses’ and ‘consequences’ in framing a charge and bringing a prosecution places an unnecessary and onerous burden, resulting in offences going unpunished.

**The enforcement system in Viet Nam is fragmented and poorly coordinated. There are multiple agencies sharing overlapping responsibilities.** Weak links in the chain and frictions caused by the need to cooperate create many obstacles to effective implementation of investigations and prosecutions. Dossiers pass back and forth between MPS and inspectorates and MPS and the Procuracy, and between all of these and OSCAC. The potential for delays over differing interpretations or incomplete procedures is considerable. Aside from these coordination problems, multi-agency arrangements create multiple veto points. There are thus many opportunities to delay and obstruct an investigation. OSCAC as a coordinating agency has sought to solve these problems through a facilitating and mediating role, backed by the authority of the Prime Minister. This is not a long-term solution and only deals with a symptom of the underlying problem, which is that the system is excessively fragmented.

In reforming the fragmented system of investigation and prosecution, and in emphasizing to all that corruption in all forms and in all parts of society is a criminal offence that requires the concerted efforts of dedicated law enforcement agencies, **it will be necessary to concentrate the role of some agencies, and to strengthen the core criminal investigation and prosecution agencies in a specialized agency.** The roles of State Audit and Government Inspectorate should be concentrated on being one part of a wider detection system that encompasses the whole of society, not just the state. In other jurisdictions, sources of information used in the detection of corruption offences include the citizenry at large, public officials who are committed to combating corruption and disgruntled accomplices of offenders.

### *Institutional Arrangements: Independence and Accountability*

**The laws and regulations on AC investigation and prosecution in Viet Nam have not sought to ensure ‘independence’ in the sense that was observed in the overseas cases**, where legal or even constitutional rules provide for autonomy and special provisions apply to the appointment of the heads of the key agencies, in terms of who appoints them, the procedures in place to select the most meritocratic and competent candidate and the period of length in office.

The principle of ‘independence’ observed in the overseas cases is not yet adopted in the same form in the contemporary Vietnamese context. However, institutional separation between the different arms of the state, accompanied by distinct legal obligations of the different agencies, does provide for some checks and balances. The Procuracy is the principal guardian in this system of legality and impartiality, over both criminal investigations and court proceedings. The judiciary also is required to be ‘independent’ in the manner in which it makes decisions (as discussed earlier judges are required to exercise independent judgment, according to the law).

**For criminal investigation and prosecution of (in particular) the most serious cases of corruption, there is a need in Viet Nam to strengthen the AC investigation and prosecution agencies, to ensure their impartiality so far as is feasible and to institute effective oversight and supervision in order to prevent abuses.** Special investigative powers and resources should be devoted to AC enforcement work in a specialized unit that is subject to transparent accountability processes. The important consideration is that it be located outside the executive branch. Current provisions under which the Procuracy is accountable to the NA might form the basis for special oversight of the new unit. It would deal with investigation of high profile and sensitive cases (following the Indonesian model). Lesser corruption crimes and associated offences, such as economic crimes, would remain with existing investigative agencies. As in Indonesia, the new ACA should have the power to call in investigations and override these other agencies where it was dissatisfied with progress. There is a good case also, drawing on some of the experience of Indonesia, to explore the appointment of judges specialized in corruption cases within the framework of the existing court system.

There would be far less need for a body such as OSCAC if the clarification of roles suggested above were implemented and if the main AC anti-corruption enforcement effort were concentrated in one organization.

In such a system, with formal oversight and accountability in the hands of the National Assembly, the formal adoption of the role of political ‘steering’ by the Party, rather than by the Government, would be a positive sign that political will is indeed behind the AC process. So long as that political will were there, such an arrangement would also reduce the incidence of political ‘micro-intervention’. The incentive to maintain a ‘hands-off’ stance would be the growing evidence of an increasingly effective enforcement process.

And last, but not least, **the upcoming revision of the 1992 Constitution, provides an ideal opportunity to consider options to strengthen the basis on which institutions engaged in AC enforcement are able to act effectively without ‘fear or favour’.**

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## Appendix: Country Case Studies

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### Anti-Corruption in Australia:

#### *A Summary of Sanctions and Enforcement Mechanisms*

Australia is a federal system comprising eight states and territories. The national or Commonwealth government has the power to enact criminal law which covers criminal matters in the whole country while the states also have power to enact their own criminal laws dealing with offences in their territory. Australian criminal law draws on the common law tradition, but criminal laws in some jurisdiction have been codified (the Commonwealth, Territories, Queensland, Tasmania and Western Australia). At all levels of criminal law, corrupt offences are provided for. Corrupt behaviours are also breaches of the Australian Public Service Code of Conduct and can be punished through disciplinary procedures of the Public Service Act 1999. In the States, codes of conduct under public service legislation and other codes, such as ministerial codes of conduct, are also acknowledged in anti-corruption legislation.

The Commonwealth's anti-corruption laws are contained in the Commonwealth Criminal Code. Provisions of the Commonwealth Criminal Code 1995 dealing with corruption have a wide application and cover most persons working for and on behalf of the Commonwealth. Chapter 7 under the title "The proper administration of Government" includes sections on theft, fraudulent conduct and bribery and related offences (Part 7.6). Offering, causing to offer and providing a 'benefit' of any kind to a Commonwealth official is an offence, as is asking for or receiving a bribe. Only bribery offences in the public sector are provided for in the Criminal Code. The so-called 'secret commission' offences, which are described by the MCCOC as "essentially an attempt to create a bribery offence for corruption in the private sector," are dealt with in State and Territory legislation.<sup>1</sup> Australia's law draws a distinction between corruption in the public and in the private sector. Bribery which is confined to public officials, originated in the common law; whereas, private sector corrupt offences are entirely statutory. The Commonwealth Fraud

Guidelines 2002 set out the context in which 'fraud' includes 'bribery, corruption or the abuse of office'.<sup>2</sup> The Guidelines note that agencies should consider prosecution in appropriate cases and should be committed, in the absence of criminal prosecution, to applying appropriate civil, administrative, or disciplinary penalties.<sup>3</sup>

As a member of the OECD Convention on Combating Bribery, Australia implemented the Convention at the Commonwealth level and enacted the Criminal Code Amendment Act 1999 on Bribery of Foreign Public Officials. Accordingly, the offence of bribery of foreign public officials is now regulated under Article 70 of the Criminal Code. The objectives of the legislation are to prohibit undue benefit provided or offered with the intention of influencing a foreign public official in the exercise of his duties in order to obtain or retain an undue business advantage, to apply the prohibition to conducts within and outside Australia and to ensure that Australia complies with the key features of the OECD Convention.<sup>4</sup>

Corruption is also dealt with at state level. All states and territories bar one have specific AC legislation (South Australia is in the course of adopting such a law). In New South Wales, for example, the ICAC (Independent Commission Against Corruption) Act 1988 sets out a very specific definition of a corrupt conduct which consists of any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority; bribery (including election bribery), blackmail, official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance; malfeasance,

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<sup>1</sup> Model Criminal Code Officers Committee of the Standing Committee of Attorney-General (MCCOC), Chapter 3 – Theft, Fraud, Bribery and Other related Offences Report 1995, p.241.

<sup>2</sup> Nicholls, C., Daniel, T., Polaine, M. and Hatchard, J. (2006), *Corruption and Misuse of Public Office*, Oxford University Press, pp. 454, 455.

<sup>3</sup> Guideline 1(4).

<sup>4</sup> Joint Standing Committee on Treaties (JSCT) of Australia, *OECD Convention on Combating Bribery and Draft Implementing Legislation*, 16<sup>th</sup> Report in June 1998, p.21.

oppression, extortion or imposition), obtaining or offering secret commissions, perverting the court of justice, embezzlement, the misuse of information or material that a public official has acquired in the course of his or her official function, etc.<sup>5</sup>

Some States' Criminal Codes specify very specific cases of bribery, for instance the WA Criminal Code 1913 stipulates such offences as Bribery of Member of Parliament in section 61, Bribery of public officer in section 82, Bribery (at elections) in section 96, Judicial Corruption in section 121 and Corruption of Witnesses in section 130. The States and Territories of Australia have similar legislation on bribery offences in the private sector. Such offences are often dealt with by virtue of legislation on secret commissions. For example, the Criminal Code of Western Australia 1913 Chapter LV on "Corruption of agents, trustees, and others in whom confidence is reposed" deals with bribery offences in the private sector. The NSW Crimes Act covers bribery in both public and private sectors without distinguishing.<sup>6</sup>

Australian anti-corruption laws apply to both individuals and legal entities. For cases involving bribery offences committed by legal persons, corporate criminal responsibility will be imposed. In principle, the Criminal Code applies to bodies corporate in the same way as it applies to individuals and a body corporate may be found guilty of any offence, including one punishable by imprisonment (section 12.1). Criminal corporate liability includes the circumstance in which 'the body corporate failed to create or maintain a corporate culture that required compliance with the relevant provision (section 12.3)'. In short, the Criminal Code does provide the essential grounds for imposing criminal responsibility on individuals and legal persons. It is worth noting that these two kinds of responsibility do not exclude each other.

### **Sanctions**

Anti-Corruption Laws allow imposing at most ten-years of imprisonment on corrupt offences. Prior to the Commonwealth Code Amendment 1999 (Theft, Fraud, Bribery and related Offences), the penalties provided for the offences were very low (maximum 2 years imprisonment). Along with the need for more comprehensive obligations and propriety on

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<sup>5</sup> Article 8 (Part 3).

<sup>6</sup> Section 249B of the NSW Crimes Act 1900 covers bribery and secret commissions.

the Commonwealth public officials, the Government required significantly increased penalties for corruption.<sup>7</sup> The maximum penalty for bribery offences currently is imprisonment for 10 years. A fine may also be imposed in accordance with the principles of criminal law. The Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 which was passed in February 2010 increases the financial penalties for corrupt offences. The new penalty is a fine of up to 10,000 penalty units (AUD 1.1 million) for an individual; and a fine of up to 100,000 penalty units or three times the value of benefits obtained by the act of bribery, whichever is greater for a legal entity (a body corporate). If the value of the benefits obtained from bribery cannot be ascertained, the penalty is a fine up to 100,000 penalty units or 10% of the annual turnover of the company, whichever is greater. In short, the penalties imposed on corrupt offences may be imprisonment for 10 years or a fine or both.

Further, an agency head or delegate can impose the following sanctions as disciplinary penalties for breaches of the Australian Public Service Code of Conduct:

- Termination of employment;
- Reduction in classification;
- Re-assignment of duties;
- Reduction in salary;
- Deductions from salary, by way of fine; and
- A reprimand<sup>8</sup>

### **Enforcement**

At the Commonwealth level there is no specific anti-corruption agency. A National Crime Commission focuses on key challenges of serious and organized crime, among which corruption is currently not a major priority. New South Wales (Independent Commission Against Corruption), Queensland (Crime and Misconduct Commission), Victoria (the Independent Broad-based Anti-corruption Commission, legislated for in 2011) and Western Australia (the Corruption and Crime Commission of Western Australia, formerly the Anti-Corruption Commission) have established

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<sup>7</sup> Explanatory Memorandum for the Criminal Code Amendment (Theft, Fraud, Bribery and related Offences) Bill 1999, in General Outline.

<sup>8</sup> Australian Public Service Commission (2000), Managing Breaches of the APS Code of Conduct, online at <http://www.apsc.gov.au/publications00/breaches.htm>.

specific anti-corruption bodies with special powers to investigate corruption in the public sector. South Australia is in the process of setting one up.

The Country Report by Transparency International in 2004 commended the independent of investigation, prosecution and judicial processes by Australian authorities.<sup>9</sup> Independence for the ACA in Australian jurisdictions is a powerful norm and, in practice, is institutionalized in several ways. The NSW ICAC is a statutory agency that reports to the Parliament. It is supervised by a special Joint Committee of the Parliament rather than being responsible to a minister of the government for its actions. Its Commissioner is appointed for a fixed five-year term and can only be dismissed by the Governor (the head of state as distinct from the head of the government of the day). It has an annual budget of approximately AU\$20m and a staff of approximately 120.

A very clear case of a prescription of independence exists in the legislation setting up the Independent Broad-Based Anti-Corruption Commission (IBAC) in the State of Victoria. Section 12 provides that: '[t]he IBAC is not subject to the direction or control of the Minister in respect of the performance of its duties and functions and the exercise of its powers', and subsections 6 and 7 of Section 13 provide that: '(6) Subject to this Act and other laws of the State, the Commissioner has complete discretion in the performance or exercise of his or her duties, functions or powers. (7) In particular and without limiting subsection (6), the Commissioner is not subject to the direction or control of the Minister in respect of the performance or exercise of his or her duties, functions or powers.'

ACAs in Australia generally have a high reputation for independence and impartiality. They are investigative not prosecuting authorities. They hold many hearings and inquiries in public, before passing findings and recommendations on to the Director of Public Prosecutions. They have wide powers of interrogation, seizure and arrest and, in most cases, special powers that exceed those available to the police. They have mostly been led by prominent legal professionals. Senior public figures have been among their 'victims'. Premier of New South Wales Nick Greiner was forced in 1992 to resign after an adverse

finding by the ICAC. His 'crime' was to do a 'deal' to induce an unpopular minister to move from his portfolio, by offering him an attractive position in the public service (head of the Environment Protection Agency). After a public hearing, on 19 June 1992 the ICAC commissioner concluded Greiner had not acted criminally and had not set out to be corrupt, but nevertheless he would be seen "by a notional jury as conducting himself contrary to known and recognized standards of honesty and integrity".<sup>10</sup> ICAC has over the years undertaken many investigations and found against a large number of public officials, many of them in local government and government agencies. It is currently (November 2012) investigating charges of corruption against former government ministers.<sup>11</sup>

Despite this reputation for effective enforcement, political interference in the work of ACAs in Australia is not unknown. In Queensland, a judicial inquiry has recently been established into partisan interference in the work of the Crime and Misconduct Commission. The inquiry has been set up by a recently elected government in order to investigate what it considers unwarranted political interference by the previous government, namely the referral of matters for inquiry involving (then) opposition politicians.<sup>12</sup> It is not unusual for ACA investigations to become politicized, but in this case the assertion (yet to be tested fully) is that the government of the day was abusing its power of referral for political ends. This, however, would fall short of actually influencing any subsequent finding by the ACA.

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<sup>9</sup> Transparency International, National Integrity Systems – Country Study Report – Australia 2004, p.38.

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<sup>10</sup> Independent Commission Against Corruption (1992). *Report on Investigation into the Metherell Resignation and Appointment*, accessed 10 November 2012

<sup>11</sup> 'ICAC public inquiry into alleged corruption involving former ministers and MP in relation to mining exploration licences and other matters,' Tuesday 7 August 2012 <http://www.icac.nsw.gov.au/investigations/current-investigations/article/4108> accessed November 10 2012

<sup>12</sup> Scott Prasser, 'Bligh, Beattie Used Crime Watchdog as a Political Weapon', *The Australian*, 6 November 2012

## **Anti-Corruption in Hong Kong:** *A Summary of Sanctions and Enforcement Mechanisms*

The offence of bribery has been covered by Hong Kong anti-corruption legislation since the enactment in 1898 of the Misdemeanours Punishment Ordinance (MPO). The MPO was replaced in 1948 by the Prevention of Corruption Ordinance (POCO). In 1971, the POCO became the Prevention of Bribery Ordinance (POBO), with new offences, heavier penalties and stronger investigative powers written into its provisions. The law applies to corrupt acts in both public and private sectors. The Common Law offence of 'misconduct in public office' currently offers an additional basis for prosecution of a wide range of misdemeanours of public officials. The Elections (Corrupt and Illegal Conduct) Ordinance covers corruption offences associated with elections.

The passage of the POBO in 1971 was the first component of a major anti-corruption campaign, in response to rising local protests about the level of corruption in many government agencies, in particular the police force. The second component was the establishment in 1974 of the Independent Commission against Corruption (ICAC). Successful, high profile prosecutions of senior British Hong Kong police officers in the mid-1970s set the pattern for Hong Kong's tough anti-corruption regime.

### *Coverage of the Anti-corruption Laws and Sanctions*

Section 3 of the POBO prohibits any government official from soliciting or accepting an 'advantage' of any kind, regardless of whether it is connected with his or her official duties. This very broad provision, which might cover a civil servant's conduct in all walks of life, carries a relatively light sentence of up to one year. Section 4 makes it an offence to accept or offer an advantage in connection with a public servant's official duties. The maximum penalties for Section 4 offences are a heavy fine and imprisonment for 7 years. Further sections make specific reference to tenders, contracts and auctions and spell out the scope of the bribery provisions in covering all kinds of public bodies (including, for example, state owned companies). A separate schedule lists these public bodies. The POBO covers acts of bribery whether or not committed in Hong Kong.

Under Section 10 it is an offence for a government officer to maintain a standard of

living, or to possess or control assets, which are not commensurate with his or her official income, unless he or she can give a satisfactory explanation to the court. This provision is intended to catch public officials who are not apprehended or convicted for any specific corrupt act, but who are believed by the investigating authorities to have accumulated wealth over a period of time from the proceeds of corruption. The provision places the onus of proof on the accused and has been copied by other jurisdictions (including Indonesia). It would seem to go against the Common Law basic principle of 'presumption of innocence', but is designed for circumstances in which corruption might otherwise continue unchecked.<sup>1</sup> It acts as a deterrent in a context where corruption is systemic and where evidence sufficient to bring a prosecution for a specific corrupt act is hard to collect. The highest penalty for this offence is 10 years' custodial sentence plus a fine (up to HKD500,000).<sup>2</sup> Under Section 12 of the POBO, a principal is entitled to recover from his / her corrupt agent the bribe received by that agent and any proceeds flowing from it. The principal may also take action against the person who bribed the agent to recover any loss sustained as a result of corruption. Hong Kong courts have tended to impose tough custodial sentences for their deterrent effect.

Private sector bribery offences under the POBO (Section 9) cover offering of an advantage to an agent in connection with his or her performance or abstaining from performance of any act in relation to his or her principal's business; and likewise soliciting or accepting an advantage. As with the offence of corruption in the public sector, the legislation intends that of the act of offering or accepting a bribe is sufficient, without reference to the acts intended to be influence or that may have followed from it.

The Common Law offence of misconduct in public office (MIPO) is used with increasing frequency by ICAC as a basis for recommending prosecution of public officials.

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<sup>1</sup> In the first five years after the ICAC was set up, prosecutions under Section 10 were laid in 37 cases. Most notorious was the '\$600 million detective' (with total assets in equivalent to 10,000 years of his official annual income). The provision has not been used since 1995.

<sup>2</sup> 1 USD = HKD7.8

The law lends itself to coverage of a wide range of 'wilful' acts of misconduct by public officials which are not captured under the definitions of 'bribery' or 'advantage' and where non-trivial harm to the public interest can be shown to have taken place. Imprisonment for up to 4 years may result from a conviction. The Hong Kong Court of Final Appeal in rulings in 2002 and 2005 clarified the law in relation to MIPO offences. Conflict of interest cases are one class of misconduct cases successfully prosecuted under this offence (for example, the chairman of a licensing authority who recommended his brother to applicants as their legal representative, but failed to declare his relationship). Other offences concerning abuse of public office such as fraud and embezzlement are covered under other ordinances such as the Theft Ordinance and the Crimes Ordinance. While it may be an advantage to consolidate some of these offences under the one anti-corruption ordinance, this has not been considered of high enough concern or priority to be acted on by the government.

Under the Civil Service Regulations a Code of Conduct guides all members of the civil service.<sup>3</sup> Strict regulations restrict the acceptance of gifts or loans (while allowing for small gifts from relatives (up to HKD3,000) and friends (up to HKD1,500) 'when gifts are traditionally given or exchanged', for example weddings and New Year). Situations where potential conflicts of interest may arise are spelt out and reference is made to the coverage of the offence of 'misconduct in public office'. All government officials are required to declare their investments on their first appointment to the Civil Service. Senior civil servants must update a register of such investments. Public officers are also prohibited from using for personal gain confidential or unpublished information that they acquire during their official duties. Failure to meet these requirements can result in disciplinary action and dismissal from the service, as well as the possibility of criminal proceedings. The provisions apply equally to members of the civil service and officers employed under other terms and conditions.

### **Enforcement**

ICAC was set up in 1974 to replace the Anti-Corruption Branch (ACB) of the Hong Kong

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<sup>3</sup> *Civil Servant's Guide to Good Conduct*, Civil Service Bureau, 2005

Police Force. One reason an independent body was seen to be required was because the most notorious cases of corruption were to be found in the police force. The ICAC was distinguished from the ACB by the seniority of its chief (on a par with the Police Commissioner and other first-ranked officials, rather than three ranks below him) and by the size of its establishment (three times that of the ACB).<sup>4</sup>

The ICAC ordinance spells out that the head of the ICAC cannot be directed by 'any person' other than the Chief Executive of the Hong Kong government. The Chief Commissioner is appointed by the Chief Executive and 'holds office on such terms and conditions as the Chief Executive may think fit'.<sup>5</sup> According to international templates, this would not be considered ideal conditions for assuring political independence. Moreover, the average tenure of the Chief Commissioner since 1974 has been less than three years. At the same time, the appointees have been exclusively drawn from the civil service. By convention, the appointee is a very senior member of the top cadre of administrative grade officers and, in many cases, is transferred from a permanent secretary position as the last posting before retirement.<sup>6</sup>

Underlying the independence of the ICAC Chief Commissioner, however, is another factor: the strong public and political support in Hong Kong post-1974 for the anti-corruption regime and for the ICAC in particular. The political executive, for political more than for legal reasons, must exercise self-denial. As the controversy over the appointment of the Commissioner in 2006 demonstrated (see footnote 6), the media and the public are ever on the look-out for a break with this 'golden rule' of Hong Kong politics.

The ICAC has the powers to conduct investigations, seize evidence, make arrests and detain persons under suspicion of

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<sup>4</sup> In 2011 the establishment of ICAC stood at 1380 and its total budget was approximately HKD700 million.

<sup>5</sup> Since 1997 under the Basic Law, the State Council of the People's Republic of China makes the appointment on recommendation of the Chief Executive.

<sup>6</sup> A controversy erupted in 2006 when the incumbent was replaced and returned to the civil service, with the two officials swapping positions. This was viewed as a break with convention and possibly an attempt to influence by the ICAC by the political executive. Media and political criticism was strong.

corruption. It can apply for a court order to search premises, require a suspect to surrender travel documents and freeze their assets. Prosecutions are conducted under the direction of the Director of Prosecutions in the Department of Justice. ICAC does not impose any sanction or sentences itself. The Department of Justice decides whether to proceed with a prosecution on the basis of the strength of the evidence collected by ICAC and also in consideration of the public interest. Article 63 of the Basic Law (Hong Kong's constitution) guarantees the independence of the prosecution.

Constitutional conventions, coupled with the transparency of proceedings, as much as black letter provisions in the law (including the Basic Law), underpin the professional and legal independence of the various parties involved in investigating and prosecuting corruption cases in Hong Kong. The system was transplanted from the UK under colonial rule and strengthened by local legislation to deal with the specific concerns of police corruption in the 1970s. A recent prominent case provides a good illustration of the various checks and balances.

Complaints about impropriety in relation to the purchase of a car were leveled in early 2003 against Antony Leung, the Financial Secretary. Mr. Leung purchased a luxury car for his wife and took delivery in late January. Government discussions were ongoing (specifically, within the Budget Strategy Group, chaired by Mr. Leung) about increasing the luxury car registration tax, to be implemented after the budget announcement in March. Mr. Leung chose to purchase a car that was available for immediate delivery, rather than others that would be delivered after the budget.

The case against Mr. Leung was that he profited from knowledge of the forthcoming tax by choosing a car that could be purchased with the lower registration fee. ICAC investigated the case and presented its findings to the Director of Public Prosecutions in August 2003. He instructed a local senior counsel to provide an independent opinion on whether a prosecution was appropriate. He advised the Director not to proceed with a prosecution. The Director sought a second opinion from a British QC, who also recommended not proceeding with a prosecution on the grounds that there was not a reasonable prospect of securing a conviction. The Director advised the Secretary for Justice, who accepted the advice.

Under the Basic Law, the Department of Justice is responsible for the control of prosecutions, free from any interference, and the Secretary for Justice is head of the department. However, in order to avoid any possible perception of bias arising from the fact that he was a political colleague of the suspect, the Secretary for Justice delegated the decision in this case to the Director of Public Prosecutions. It was agreed that after the director had reached his decision, he would explain its basis to the secretary, so that she, in turn, would be in a position to explain it to others as required. The details of the case, the manner of the proceedings and the reasons for the decision were published in a twelve-page report on December 15, 2003.

The ICAC relies heavily on public reports or complaints in commencing investigations. A significant statistic is that about three-quarters of complainants provide their full details, demonstrating the trust which Hong Kong citizens place in the integrity and security of ICAC and the anti-corruption proceedings more generally. In 2011, it received over 4,000 such complaints (excluding over 600 relating to elections). It found over 70% of these 4,000 cases worthy of pursuing further. Total caseload by the operations department was over 5,000. In the same year, 283 prosecutions were launched as a result of ICAC investigations, the great majority of which (213) related to the private sector. Its overall rate of conviction for concluded cases in 2011 was over 80%. In addition to the relatively low number of prosecutions launched against public officials, a further 78 cases were referred to the Secretary for the Civil Service for disciplinary action. In addition to the 238 prosecutions launched relating specifically to corruption offences, a further 171 prosecutions were launched for related offences, including money laundering, perversion of the course of justice and theft.<sup>7</sup>

The ICAC points to long-term trends in the number of complaints and rates of prosecution as a sign of its success in reducing corruption in government. In 1974, over 80% of the 3,189 complaints were against public officials, of which nearly half were against the police. By 1988 the proportion of complaints in public and private sectors were in equal proportions; currently, about one-third of complaints relate to public sector officials. Public sector officials comprised over half the suspects prosecuted

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<sup>7</sup> ICAC *Annual Report 2011*

in the early days; the comparable figure today is close to 10%.<sup>8</sup>

ICAC has a reputation for investigating corruption in high places. Aside from the Antony Leung case mentioned earlier, two current cases involve high level political figures and prominent Hong Kong property tycoons. The first involves the ex-Chief Executive, Donald Tsang, who is being investigated for accepting invitations for free travel and entertainment from property developers and for renting an apartment in Shenzhen from another (who was at the time applying for a broadcasting license). Mr. Tsang made a tearful public apology just before stepping down as Chief Executive and broke the lease on the apartment.

In the second case, in March 2012 the ICAC arrested Raymond and Thomas Kwok, co-chairmen and controlling shareholders of Sun Hung Kai Properties on suspicion of corruption. The brothers are part of one of the richest families in Hong Kong and are reported to be jointly worth in excess of US\$18 billion. At the same time, Rafael Hui, the former Chief Secretary for Administration in the Hong Kong government, was also arrested. In July 2012 they and two others were charged with corruption and misconduct offences concerning unsecured loans and payment to Mr. Hui totaling HKD35m between 2000 and 2009. It is alleged that Sun Hung Kai Properties provided Mr. Hui with two rent-free flats, unsecured loans and payments with a view to favourable treatment. The defendants face a total of eight charges under the POBO ordinance, the Crimes Ordinance, the Theft Ordinance and under Common Law. Mr. Hui is accused of misconduct, conspiracy and not declaring a conflict interest when involved as a senior public official in a number of matters concerning Sun Hung Kai properties.

### **Conclusion**

The Hong Kong ICAC has an outstanding international reputation as an effective anti-corruption agency. The coverage and the sanctions contained in the anti-corruption laws are only one element in its effectiveness. Hong Kong's long tradition of rule of law and an

independent judiciary are underlying buttresses of the integrity of the anti-corruption regime. Governing institutions such as an effective and well-disciplined civil service provide additional support. A free media eager to give publicity to corruption to an avid public audience is an additional underlying positive contributor to an effective anti-corruption system in Hong Kong.

Specific provisions in the POBO and ICAC ordinances make for effective processes of investigation and prosecution but, just as importantly, ICAC benefits inestimably from a wellspring of hard-won public trust. The role of the public in coming forward with complaints is crucial in keeping corruption in check. The general perception that the integrity system is working in the public interest provides a strong wellspring of public support, which the ICAC draws on in its anti-corruption education and corruption prevention campaigns, as well as in day-to-day operations of investigating and prosecuting crimes.

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<sup>8</sup> Timothy H.M. Tong, 'Building a Public Sector Integrity System for Effective Governance: the Hong Kong Experience', Australian Public Sector Anti-Corruption Conference, Sydney, October 2007 (Timothy Tong is the serving ICAC Chief Commissioner)

## **Anti-Corruption in Indonesia:** *A Summary of Sanctions and Enforcement Mechanisms*

Following the fall of the Suharto government in 1998 and in the era since then of *reformasi* and democratization, there has been strong public support for a vigorous anti-corruption drive. President Susilo Bambang Yudhoyono, elected in 2004 and again in 2009 for a second term, has consistently taken a strong public stand against corruption. Anti-corruption laws are set out in the Indonesian Criminal Code and in three major pieces of anti-corruption legislation: Law 31/1999, Law 20/2001 amending that law and Law 30/2002 setting up the anti-corruption commission. Articles 5 & 12 of the Criminal Code spell out a number of offences such as bribery and extortion where punishments of between 1 year and life and / or fines between Rp.50 million and Rp.1 billion may be imposed (approximately USD5,000 and USD100,000 respectively).<sup>1</sup> Separate provisions exist to define particular acts of corruption such as bribery of judges, extortion and corruption in government procurement. These provisions are all expanded on and made more precise in Law 31/1999. This law relates only to corruption in the public sector (albeit non-government actors are brought within its reach where they are party to such acts).

Law 31/1999 clarifies the definitions of different categories of government employees in order to ensure all types of government officials are covered, including those in the pay of corporations and other entities who receive public financial assistance or who benefit from infrastructure or facilities directly provided from central or regional budgets. These provisions cast the net very wide. Article 2 spells out that 'anybody' who illegally commits an act to enrich himself or another person or corporation that results in loss to the state finance or state economy may be subject to life imprisonment or to a scale of sentences from four to twenty years imprisonment or a fine between Rp.50m and Rp.1b. Article 3 refers to public officials who abuse their position for personal gain, making them liable to imprisonment between 1 and 20 years and to the same range of fines. Giving of 'gifts' to any government employee may result in a prison term up to 3 years and a fine up to Rp.150m.

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<sup>1</sup> 1USD = Rp.9,940

Other articles in Law 31 increased the fines for specific offences laid down in the Criminal Code. Law 20/2001 amended some of these provisions to lower the fines for very small gifts. It also defined more precisely the concept of in-kind 'gratifications' and drew a line of Rp.10m in value, above which the recipient has to prove that a gift is not a bribe, and below which the proof of bribery remains with the prosecutor.<sup>2</sup> Where someone is convicted of a major corruption offence, in addition to having the proceeds confiscated, they can be required to prove that their wealth for which they were not indicted was not also the proceeds of corruption.<sup>3</sup> The receipt of a gift is not a crime if it is officially reported. Reporting of a gift is mandatory and the anti-corruption commission (see below) makes a decision whether the recipient can keep the gift or if it becomes state property.

Corporations as well as individuals are liable for corruption offences under Law 20/2001.<sup>4</sup> Additionally, anyone who prevents or hinders an investigation or gives false information is liable to imprisonment and fines. Law 31 also gives investigators sweeping powers to use wire-tapping, demand financial information from banks and require disclosures on the assets of family members.<sup>5</sup> The Law also mandated the establishment of an anti-corruption commission within two years.

A whistleblowing law (No 13/2006 on the Protection of Witnesses and Victims) has been adopted and gives protection to all citizens in both public and private sectors (the Agency set up to administer the law did not commence work until 2009). Civil service secrecy laws are strict and result in tough sanctions for those wishing to reveal acts of corruption, effectively overriding whistleblower protections. Accused persons in corruption cases have also turned to the defamation laws to discourage whistleblowing. Money-laundering laws were passed in 2002 and amended in 2010.<sup>6</sup> These laws provide some additional weapons for anti-corruption investigation and enforcement, with the anti-corruption commission given new

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<sup>2</sup> Law 20/2001, Article 12B

<sup>3</sup> Law 20/2001, Article 38B. This shifting of the burden of proof, which is also evident in other provisions, has created much controversy.

<sup>4</sup> Law 20/2001, Article 20

<sup>5</sup> Law 20/2001, Article 26A

<sup>6</sup> Law 10/2010

powers in the 2010 amendments to conduct its own investigations into money laundering associated with corruption without having to rely on the Attorney-General's Department.

Indonesia's civil service laws contain provisions for discipline, including dismissal of corrupt officials. Civil service corruption is high, with purchase of office and collectivization of corruption commonplace through networks of patronage.<sup>7</sup> This state of affairs may have got worse since the extensive decentralization measures adopted as part of the post-Suharto reforms, with management and supervision of the civil service in the hands of regional administrations. The anti-corruption laws' provisions on gifts are not effectively implemented, while the civil service regulations result in a negligible number of cases of punishment.<sup>8</sup>

Indonesia has an Ombudsman, set up by presidential decree in 2000 and later (in 2008) under legislation. It has jurisdiction in both public and private sectors and it responds to public complaints and reports on its findings. It can issue summonses for evidence and documents. It has no legal powers to enforce its own findings and it refers corruption cases to other authorities. It is severely under-resourced.<sup>9</sup>

### **Enforcement Mechanisms**

A common perception in Indonesia was that the pre-existing Suharto era enforcement agencies, including the civil service, the police and the judiciary, were all subject to widespread corruption, rendering enforcement of the laws (however strict) ineffective. To overcome this, a separate investigative and prosecuting body, the Corruption Eradication Commission (*Komisi Pemberantasan Korupsi* or KPK) and a special corruption court were set up under Law 30/2002. KPK is composed

of 5 Commissioners, nominated by the President with the assistance of a selection committee, and elected by Parliament. The term of office is 4 years with a maximum of two terms. Commissioners swear an oath of office. The selection committee must seek input from the public in presenting to the President a list of candidates.

KPK 'coordinates' and 'supervises' other agencies involved in combating corruption; it has the power to conduct investigations and prosecutions with respect to corruption; and it is charged with undertaking preventative measures. Its oversight of other agencies extends to the power to take over investigations which it considers to be taking too long or not producing the desired results, in particular where it believes corruption may be hindering the process. It has a special mandate to conduct investigations and mount cases against law enforcement agencies and to initiate investigations where the losses to the state exceed Rp.1b. Its powers of investigation include wire-tapping, travel bans, investigation of financial assets and bank accounts, blocking of bank accounts of suspects and obtaining information on tax records and assets. KPK has power to arrest a person and detain him or her for up to 120 days. Unlike other law enforcement agencies, it can investigate private bank accounts without obtaining the prior approval of the Governor of Bank Indonesia. The Law provides for the formation of an Advisory Team to assist the Commission.

KPK has a budget in excess of USD\$50m and a staff of over 700.<sup>10</sup> Investigators and prosecutors are chosen through a rigorous selection process, with most being recruited from within the government law enforcement agencies (technically, they retain their legal status as police officers and public prosecutors while working under KPK's direction, as KPK lacks legal power to authorize its own). Strict integrity tests are applied. They are hired on fixed term contracts; if not renewed, they go back to their original positions. KPK's recruiting exercise in 2008 received over 28,000 applicants for 85 positions.<sup>11</sup>

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<sup>7</sup> Stein Kristiansen and Muhid Ramli, 'Buying an Income: The Market for Civil Service Positions in Indonesia', *Contemporary Southeast Asia*, 28(2), 2006, pp. 207-33

<sup>8</sup> 'A Civil Service Untouched by Reform', *Jakarta Post*, March 9, 2011  
<http://www.thejakartaglobe.com/commentary/a-civil-service-untouched-by-reform/427495>, Accessed 24 August 2012

<sup>9</sup> 'Ombudsman Office Struggles to Keep Public Services Honest – and Stay Afloat' *Jakarta Globe*, September 26, 2011  
[http://www.thejakartaglobe.com/news/ombudsman-office-struggles-to-keep-public-services-honest-and-stay-afloat/467693#Scene\\_1](http://www.thejakartaglobe.com/news/ombudsman-office-struggles-to-keep-public-services-honest-and-stay-afloat/467693#Scene_1), accessed 24 August 2012

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<sup>10</sup> 'KPK looks to Public in House Row', *Jakarta Post*, June 23 2012,  
<http://www.thejakartapost.com/news/2012/06/23/kpk-looks-public-house-row.html>, accessed 24 August 2012

<sup>11</sup> Emil P. Bolongaita, *An Exception to the Rule? Why Indonesia's Anti-Corruption Commission succeeds where others don't – a Comparison with*

Article 54 of Law 20/2002 establishes the Court of Corruption (*Pengadilan Tindak Pidana Korupsi* or *Tipikor*). The Court was based in the Jakarta District Court and formed by recruiting, through a rigorous selection process, a team comprising both experienced career judges and also 'ad hoc' judges (for example, academics and senior legal practitioners) who would only hear corruption cases. A case is heard by a panel of 5 judges (including three 'ad hoc' judges). It commenced operations in 2004. The *Tipikor* must complete its hearing and judgment of a case within 90 days. If an Appeal to the High Court ensues, that Appeal must be completed within 60 days; if it proceeds to the Supreme Court, the proceedings must take no longer than a further 90 days.

In 2006, the Constitutional Court ruled that this so-called 'parallel' court system was unconstitutional, as it set up two classes of accused – one tried before the normal courts and another before the *Tipikor* under different rules – and hence denied the basic principle of 'equality before the law'. The Parliament was instructed to remedy the situation. The result was legislation in 2009 to give the *Tipikor* exclusive jurisdiction over corruption cases and, at the same time, to set up a national system of regional *Tipikor* in order to handle the increased workload. These decentralized *Tipikor* were subordinated to district courts, giving the district court chief the role of assigning cases. The requirement for a majority of external 'ad hoc' judges was removed and ordinary prosecutors as well as the KPK prosecutors could bring cases before these courts. This extension of the system resulted in an influx of prosecutors and judges who were not hand-picked for anti-corruption work and who had little or no experience in anti-corruption cases.

### **Enforcement Outcomes**

KPK's success rate in cases brought before the Jakarta *Tipikor* is 100%, compared with approximately a 50% success rate for corruption cases in other courts.<sup>12</sup> The reasons for this outcome are several. First, KPK is highly selective in the cases it brings to

court.<sup>13</sup> The Commission closely reviews all proposed prosecutions in order to ensure that a watertight case exists. A second reason for its success is that KPK has high levels of capacity – it is well resourced and has very strong investigative powers. A third reason is that the Jakarta *Tipikor* operates transparently and predictably. For some, this is a reason for complaint. The *Tipikor* is often accused of having 'ignored the presumption of innocence in favour of a high conviction rate'.<sup>14</sup> A related criticism (also a reason for the success rate) is that the anti-corruption laws are framed in such a way that a relatively light burden of proof is required to gain a conviction.<sup>15</sup>

Many of the KPK cases are high profile. KPK has not shied away from going after some rich and powerful figures, including leading members of the president's own ruling party, very senior government officials, including members of the police force, prominent tycoons and parliamentarians.<sup>16</sup> For example, KPK convicted the father-in-law of the President's son, Aulia Pohan, a former deputy governor of the Central Bank, in 2009.<sup>17</sup> In April 2012 a former treasurer and 'rising star' of the President's ruling Democrat Party, Muhammad Nazaruddin, was convicted and jailed for four years for rigging construction project tenders for the Southeast Asian Games in 2011. Nazaruddin had fled the country, from where he conducted a public campaign in his defence including accusations against leading party figures and ministers. He was finally tracked down to Columbia and extradited. KPK's investigations of the affair went wider, but no further prosecutions eventuated.<sup>18</sup>

The revisions in 2009 to the *Tipikor* have resulted in some changes to conviction rates. Figures cited by the Chief Justice of the

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*the Philippine's Ombudsman*, U4 Anti-Corruption Resource Centre, 2010, p.17

<sup>12</sup> Simon Butt, 'A Wolf in Sheep's Clothing', *Inside Indonesia*, 108, April-June 2012, available at <http://www.insideindonesia.org/edition-108-apr-jun-2012/a-wolf-in-sheep-s-clothing-02042898>, accessed 24 August 2012

<sup>13</sup> In 2007, for example, the public prosecutor dealt with 712 corruption cases against the KPK's 27: 'Indonesia's Corruption Cases Keep Rising', *ASEAN Affairs*, August 26, 2008

[http://www.aseanaffairs.com/page/indonesia\\_corruption\\_cases\\_keep\\_rising](http://www.aseanaffairs.com/page/indonesia_corruption_cases_keep_rising), accessed 24 August 2012

<sup>14</sup> Butt, *op.cit.*

<sup>15</sup> See footnote 3

<sup>16</sup> Bolangaita, *op.cit.* p. 9

<sup>17</sup> Pohan received a sentence of four and a half years and a fine of Rp.200m

<http://www.thejakartapost.com/news/2009/06/17/sb-y039s-inlaw-aulia-pohan-gets-45-years-corruption.html>

<sup>18</sup> *New York Times*, April 20 2012: available at <http://www.indonesia-digest.net/5040nazaruddin.htm>, accessed 24 August 2012

Supreme Court showed a ratio of 60 convictions to 12 acquittals in the Surabaya regional corruption court; in Bandung the equivalent figures were 46 and 4. In general, acquittals remain higher than in normal courts but lower than in the Jakarta *Tipikor*.<sup>19</sup> In some regional courts, there is a shortage of qualified 'ad hoc' judges, leaving career judges in the majority and raising suspicion that the new courts will be vulnerable to corruption.<sup>20</sup>

### Backlash

In 2009, two KPK Commissioners were charged with corruption by the public prosecutors and its chairman was charged with murder (and later found guilty). The verdict on the murder case has been widely viewed as appropriate. However, the Constitutional Court ultimately dismissed the corruption charges. Police and Attorney General's Office officials fabricated evidence, presumably as a counter to ongoing KPK investigations and prosecutions of officials in those departments. KPK wiretaps provided evidence of a conspiracy.

A key factor in KPK's survival in the face of these attacks was widespread popular support, which has also helped to hold the President to account on his repeated promises to fight corruption. KPK worked closely with civil society groups in mounting this political defence. KPK has continued to pursue high profile investigations against members of the police force. Correspondingly, however, the counter-attacks continue:

- In addition to the backlash from corrupt law enforcement agencies, the legislation decentralizing the *Tipikor* may also have been a kind of 'payback', aimed at watering down KPK's effectiveness.<sup>21</sup> Thirty parliamentarians were among those investigated by the KPK for corruption crimes.
- In another measure that seemed aim at trimming its powers, parliament is considering amendments to Law 30/2002 to restrict KPK's wiretapping

powers, after a ruling by the Supreme Court in 2011 that laws covering wiretapping must be reviewed. The Ministry of Communications is seeking to exert its powers in any new regulatory regime.

- Other revisions to the KPK law under review in Parliament during 2011-12 would restrict KPK's powers of indictment and prosecution and set up a Supervisory Council.<sup>22</sup>

### Conclusion

The anti-corruption laws adopted in Indonesia since the fall of Suharto have brought in an anti-corruption regime that has in some respects made huge strides towards combatting corruption. Investigations, prosecutions and convictions that would formerly have been inconceivable in Indonesian society have been conducted under these laws. The manner in which the laws are drafted, placing the onus of proof in some matters on the accused, has been one factor. Another has been the effectiveness of KPK as an independent, well-resourced and effective investigative and prosecuting body. The third success factor was the new system of corruption courts, deliberately set up to insulate them from the rest of the judiciary.

Deficiencies in the legislation include the lack of coverage of private sector corruption (other than where there is loss to the state economy); exclusion of the military from coverage of the law; relatively weak and ineffective whistleblower protection; and the absence of a legal obligation to report acts of corruption (although the law refers to a public 'right and responsibility' to prevent and eradicate corruption). In addition, the impact of laws on declaration of gifts for public officials has been negligible, other than in high profile cases, largely because the civil service remains in large part unreformed and intent on resisting change. In the case of the police, this resistance takes the form of direct opposition and undermining, including both false prosecutions of KPK commissioners and also open resistance to KPK's claim to jurisdiction over anti-corruption investigations. Backlash from the politically powerful has also been

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<sup>19</sup> Butt *op.cit.*

<sup>20</sup> In August 2012 KPK apprehended two Semarang (Central Java) *Tipikor* judges in the act of receiving bribes and launched an investigation on corruption charges: *Jakarta Globe* August 17, 2012, <http://www.thejakartaglobe.com/lawandorder/two-indonesian-anti-corruption-judges-caught-red-handed-receiving-bribes/538838>, accessed 24

August 2012

<sup>21</sup> Butt, *op.cit.*

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<sup>22</sup> 'Kneecapping the KPK', *Tempo* 30/12, March 21, 2012, accessed at [http://www.asiaviews.org/index.php?option=com\\_content&view=article&id=35496:kneecapping-the-kpk&catid=1:headlines&Itemid=2](http://www.asiaviews.org/index.php?option=com_content&view=article&id=35496:kneecapping-the-kpk&catid=1:headlines&Itemid=2), 24 August 2012

fierce, but so too has public defence of the KPK. Reasons have been found both within the judiciary and also within the parliament to 'trim it down to size'. The power and independence of the KPK is both its strength and its vulnerability. While the outcome of the counter-attacks to date has not been to destroy its work, it remains a target.

The overall impact of the anti-corruption laws and the activities of KPK have been to create an island of successful anti-corruption activity in a sea of lingering systemic corruption. This is not to say that the longer-term deterrent effects, coupled with a vigorous education and prevention campaign, will not bear fruit. However, parallel reform such as civil service and judicial reform may need to be accelerated.

## **Anti-Corruption in Singapore:** *A Summary of Sanctions and Enforcement Mechanisms*

The Prevention of Corruption Ordinance (POCO), effectively Singapore's first anti-corruption law, was enacted in 1937 to prevent 'bribery and secret commissions in public and private business.' At the time, police corruption was a major problem. However, the anti-corruption measures available to the authorities under the POCO, including relatively weak penalties for corrupt activities, proved to be largely insufficient to make major inroads into the problem. The Anti-Corruption Branch (ACB) established in 1937 to enforce the POCO, was located within the Criminal Investigation Department (CID) of the Singapore Police Force (SPF). It was under-resourced, and was largely subsumed within the CID's overriding mission of dealing with serious crimes.

In October 1951 a major public scandal involving three police officers induced the colonial government to set up a year later an anti-corruption agency separate from the police.<sup>1</sup> This new body, which remains today the Corrupt Practices Investigation Bureau (CPIB), was the first such organization to be created in Asia. Yet this new agency itself was at first also largely ineffective, as it lacked adequate staff and enforcement powers. It was not until after Singapore had been granted its sovereign independence from British colonial rule, in 1959, that the CPIB was able to make major inroads into both public and private sector corruption in the city-state. The newly-elected People's Action Party (PAP) government, led by Prime Minister Lee Kuan Yew, in 1960 introduced the Prevention of Corruption Act (PCA, or PCA), which greatly strengthened the CPIB's powers as an anti-corruption agency and increased penalties for corruption. Singapore at this time was a developing country with a GDP per capita of only US\$433. Its civil servants were poorly paid and commonly tempted into corruption to supplement their income. By contrast, today Singapore is a modern first-world country, which is seen to have the lowest levels of corruption among all Asian countries.<sup>2</sup>

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<sup>1</sup> A consignment of 1,800 pounds of opium worth US\$133,330 was stolen by a gang of thieves which included three of Singapore's police detectives.

<sup>2</sup> As measured by Transparency International's Corruptions Perceptions Index (CPI), and by the Political and Economic Risk Consultancy (PERC).

### ***The PCA***

Under the PCA (section 2) what would commonly be known as a bribe is called a 'gratification' (similar, in effect, to what is called in Hong Kong an 'advantage'). A gratification is: '(a) money or any gift, loan, fee, reward, commission, valuable security or other property or interest in property of any description, whether movable or immovable; (b) any office, employment or contract; (c) any payment, release, discharge or liquidation of any loan, obligation or other liability whatsoever, whether in whole or in part; (d) any other service, favour or advantage of any description whatsoever, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary or penal nature, whether or not already instituted, and including the exercise of forbearance from the exercise of any right or any official power or duty; and (e) any offer, undertaking or promise of any gratification within the meaning of paragraphs (a), (b), (c), and (d).'

Thus, in Singapore, 'gratification' is very broadly defined. Moreover, corruption is deemed to occur even in cases where someone who accepts a bribe has no power to return a favour to the giver of the bribe (section 9). No excuses can be accepted on the grounds of 'customary' practice (such as gift-giving) in connection with any profession, trade, vocation or calling (section 23). In earlier years especially, the CPIB had a higher than usual workload during the Chinese New Year, as bribery was often disguised as festive money.

Under sections 5 and 6 of the PCA, persons convicted of corruption, whether in their own right or as an agent, are liable to a fine of up to S\$100,000 (increased in 1989 from S\$10,000), or to imprisonment for up to five years, or to both.<sup>3</sup> Under the Corruption, Drugs Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (CDSA), introduced in 1999, people convicted of corruption can be required to re-pay any money they have received as gratification, as part of the punishment. If they are deceased it can be recovered from their estate.<sup>4</sup> Other

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<sup>3</sup> S\$1= USD0.81

<sup>4</sup> In December 1986 a minister killed himself after being interrogated by the CPIB regarding two

sections of the PCA provide for stronger penalties. Sections 7 and 10 make bribery in regard to government contracts liable for a fine or up to S\$100,000, or a jail term of up to seven years, or both. Sections 11 and 12, respectively, provide for the same penalties in relation to the bribery of members of parliament or of a public body.

Section 37 ensures that Singaporean citizens working for their government in embassies and other government agencies abroad can be prosecuted for corrupt offences committed outside Singapore and dealt with as if such offences had occurred within Singapore. The PCA (section 14) enables a principal to recover from an agent, as a civil debt in money value, any illegal gratification received by that agent or from any person who has given the gratification.

As is similarly the case in Hong Kong, section 24 of Singapore's PCA is a presumption clause, which empowers the CPIB to investigate any person who possesses pecuniary resources or property disproportionate to his or her known sources of income, and for which he or she cannot account. The fact that a person is in possession of such can be taken as evidence that he or she has obtained these pecuniary resources or property 'corruptly as an inducement or reward.' The courts can also confiscate such pecuniary and/or property resources. Importantly, section 32 of the PCA provides that every offence under the Act is deemed to be a seizable one, meaning that any public official who is given or offered gratification of any kind must arrest the person concerned and 'make over' that person to the nearest police station. Public officers who fail to do so without 'reasonable excuse' are automatically guilty of an offence and liable to a fine of up to S\$5,000, or a jail term of up to six months, or both.

Any anti-corruption strategy must rely to a large extent on the willingness of citizens to make allegations of corruption to the authorities. The PCA (section 36) guarantees anonymity to those who make such allegations in good faith, and enables their names to be made public if they do so in bad faith.

Other anti-corruption legislation in Singapore includes the Parliament (Privileges, Immunities and Powers) Act, which ensures that members of parliament cannot benefit from any

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allegations of serious corruption made against him by a building contractor.

parliamentary debate in which he or she has a pecuniary interest, and the Political Donation Act, which requires any candidate for political election to declare donations. The Customs Act provides a presumption that any money in the possession of a customs officer that cannot be properly accounted for must have been illegally obtained.

Public service administrative rules ensure that civil servants convicted of corruption will be dismissed from their jobs and will lose any pension or other entitlements they may have. If there is insufficient evidence for a court prosecution, a civil servant will be subject to a range of departmental disciplinary actions, including dismissal, reduction in rank, stoppage or deferment of salary increment, a fine or reprimand, or retirement in the public interest. Extremely strict rules and regulations govern the conduct of Singaporean public officials.<sup>5</sup> Moreover, administrative measures have been designed to lower the risk of corruption by civil servants. These include streamlining administrative procedures and cutting red tape (to reduce the likelihood that 'speed money' will be offered or sought); ensuring that officials' salary levels are kept competitive with those in the private sector; and reminding government contractors when they sign contracts that bribing public officials may result in the termination of the contracts. The major reforms of the Singaporean civil service in 1995, 'Public Service in the 21<sup>st</sup> Century (PS21)', built upon and accentuated some of these provisions, in the expectation that a more efficient and effective public service would also reduce the possibilities for corruption. The progressive development of e-government is also seen to be an important element in this continuing endeavour.

As part of Singapore's anti-corruption strategy, the courts invariably take a strict approach towards people convicted of corruption. This policy was spelled out in 2002 by the then Chief Justice, when delivering his verdict on a corruption punishment appeal: 'To lightly condone the offence in the present case would

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<sup>5</sup> They are prohibited from borrowing money from any person with whom they have dealings; an official's unsecured debts and liabilities cannot total more than three times their monthly salary; they cannot use official information to further their private interests; they must declare their assets on appointment and thereafter annually; they cannot engage in any trade or business or undertake part-time employment without approval; and they are not permitted to receive any entertainment or gifts from the public.

no doubt undermine the efficacy of our public service as a whole, not only diminishing the public's trust in the country's law-enforcement agencies, but also setting back the government's efforts at establishing Singapore in the international community as a safe and corruption-free city state.'

### **The CPIB and Political Independence**

The CPIB is the only agency empowered to deal with corruption offences in Singapore. It is responsible for enforcing the provisions of the PCA and other related legislation. Its stated mission is 'To combat corruption through swift and sure, firm but fair action.' In this, it operates completely independently of the Singapore Police Force, although it cooperates with the police as needed. The agency today employs about 100 people, as compared with the five who staffed it when it was first established in 1952. Its budget has also been increased substantially. For example, it expanded from S\$1.024million in 1978 to S\$20.1 million in 2010. According to one comparative analysis, conducted for 2005, the CPIB's annual expenditure per capita was US\$1.71, far higher than for the anti-corruption agencies in the Philippines, Indonesia, and India. However, the CPIB's budget was shown to be much lower than that of Hong Kong's ICAC, which was more than seven times higher.<sup>6</sup>

The CPIB was originally under the jurisdiction of the Attorney-General's Chambers (AGC). Since 1969 the CPIB has been under the jurisdiction of the Prime Minister's Office (PMO). This raises questions about the agency's political independence in what is a predominantly one-party, authoritarian, state. On the one hand, the fact that the CPIB reports directly to the PMO reinforces the view that its anti-corruption mission has the strongest possible political backing.<sup>7</sup> On the other hand, and despite the fact that the CPIB has brought serious corruption charges

against some government ministers in the past, the lack of 'political distance' from the Prime Minister and the absence of statutory guarantees places the onus on the existence of widespread trust in the political commitment to impartial AC investigation.<sup>8</sup>

Although the director of the CPIB is formally appointed by the President of Singapore, the President would normally be giving formal approval to a nomination made by the Cabinet. Nevertheless, the President, who since 1991 has been chosen by popular election, has the right to decline a nomination and can also block any prime minister's move to dismiss a director of the CPIB. Further, under the Constitution of Singapore (Article 22G), the director of the CPIB can continue to investigate any ministers or senior civil servants even if the Prime Minister does not consent, providing the director secures the President's approval to do so.

### **Enforcement**

The PCA gives CPIB clear powers of search and seizure. It has the same powers as the SPF in initiating and carrying out investigations, and may also exercise special powers of investigation, especially into bankers' books, when required to do so by Singapore's Public Prosecutor.<sup>9</sup> The Public Prosecutor also has strong powers under the PCA to investigate the financial and other affairs of any Singaporean civil servant and his or her immediate family members.

In general, the CPIB carries out three main functions: (1) receiving and investigating complaints concerning corruption in both the private and public sectors; (2) investigating malpractices and misconduct by public officials; and (3) examining public service

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<sup>6</sup> See J Quah (2010) 'Curbing Corruption in Asian Countries: The Difference Between Success and Failure', paper presented at the Fourth International Conference on *Public Management in the 21<sup>st</sup> Century: Opportunities and Challenges*, Macau SAR, 22-23 October, p. 28.

<sup>7</sup> According to former Prime Minister, Lee Kuan Yew, '...a CPIB which is scrupulous, thorough, and fearless in its investigations...has to receive the full backing of the Prime Minister, under whose portfolio it comes.' - quoted in J Quah (2003) *Curbing Corruption in Asia: A Comparative Study of Six Countries*, Singapore: Eastern Universities Press, p. 126.

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<sup>8</sup> Two former ministers for national development were investigated by the CPIB in 1966 and 1986, respectively, as was the minister of state for the environment in 1975. Senior civil servants to have been convicted after CPIB investigations include a former director of the electricity department, who in 1995 was found to have accepted the biggest bribe ever in the investigative history of the CPIB. He was jailed for 14 years and the S\$13.85 million 'gratification' he received was forfeited to the state. Currently, in 2012, the former heads of the Central Narcotics Bureau and of Singapore's Civil Defence Force have both been charged with receiving sexual gratification in return for the advancement of business interests.

<sup>9</sup> 'Bankers' books' means 'any ledger, day book, cash book, account book or other book or document used in the ordinary course of the business of a bank' (PCA, section 20).

practices and procedures, to minimize opportunities for corruption, by removing 'loopholes and vulnerabilities'. The agency also screens candidates selected for public service positions, including statutory boards.

The CPIB comprises three departments: the Operations Department (OD), the Corporate Affairs Department (CAD), and the Investigation Department (ID). The OD gathers intelligence for the ID and also provides the ID with other forms of support. The CAD provides the agency's internal managerial services. The ID carries out the bureau's main function of investigating cases under the terms of the PCA. It is divided into two divisions, one specializing in public sector corruption cases, the other in private sector cases. The CPIB adopts a 'total approach to enforcement', and is committed to dealing with all cases of corruption regardless of their size or seriousness.

In 2011, the CPIB received a total of 757 complaints, of which it registered 138 for investigation. (There has been, since 2007, a declining trend in the number of complaints deemed worthy of investigation by the CPIB.) Of these, 75% related to activities in the private sector, 13% to government departments, 10% to statutory boards, and 2% to government-linked companies. Of the 156 people charged in court in 2011, only nine were from government departments, the rest being in the private sector (143) or government-linked companies (4). From the 136 cases concluded in 2011, there were 131 convictions, 2 acquittals, and three withdrawal of charges, a conviction rate of 98% excluding withdrawals. Such figures indicate that when it decides to investigate particular cases the CPIB is usually very confident of securing convictions.<sup>10</sup>

### **Conclusion**

Singapore's CPIB is recognized internationally as one of the two most successful anti-corruption agencies in Asia (or anywhere, for that matter), the other being Hong Kong's ICAC. The CPIB's success is undoubtedly a function of the strong political support

exercised from the top levels of the Singaporean government. The authoritarian nature of Singapore's political system has been a key factor in the CPIB's effectiveness, enabling the agency to implement rigorous enforcement provisions, backed up by strongly deterrent penalties, all in relation to a very wide definition of corrupt 'gratification'. Thus, the CPIB's strategy has by law been predominantly coercive in nature, and very successful over time in reinforcing in the minds of most Singaporeans that corruption is a high risk/low reward activity.

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<sup>10</sup> Whether or not the CPIB is motivated to proceed largely with relatively 'sure' cases, at the expense of others for which convictions may be more difficult to obtain, is a matter for speculation, but from the agency's perspective it would seem to be a rational strategy, to sustain its strong reputation for effectiveness.

## **Anti-Corruption in South Africa:** *A Summary of Sanctions and Enforcement Mechanisms*

Under the *Prevention and Combating of Corrupt Activities Act 2004*, a corrupt action is defined inclusively and broadly as the act of giving or accepting, or agreeing or offering to accept or give, any 'gratification' in order to act illegally or dishonestly, or in a manner that abuses a position of authority, or amounts to a breach of trust or a violation of a legal duty.<sup>1</sup> As well as a section on the 'general offence', the Act contains sections on 'specific persons', namely 'public officers'; foreign public officials; 'agents' who act for another person; legislators; judicial officers; and members of the prosecuting authority.<sup>2</sup> A 'public officer' is 'a member, an officer, an employee or a servant of a public body' (other than legislators, judicial officers and members of the prosecuting authority).<sup>3</sup> A 'public body' is any department of state or administration or 'any other functionary or institution' exercising a public power or function in national, provincial or local government.<sup>4</sup>

Specific instances or types of activities where corrupt acts may occur are spelt out, such as voting, performing or not adequately performing any official function, favouring a particular person, diverting property belonging to the state and exerting improper influence over decision making.<sup>5</sup> 'Corrupt activities' are also enumerated with respect to 'specific matters' where corruption is prone to occur, such as interfering with the process of evidence collection, witness testimony and court proceedings; contracting and tendering; auctions; sporting events; and gambling or gaming.<sup>6</sup>

A separate chapter of the Act concerns the investigation of property and lifestyles of individuals where corruption is suspected.<sup>7</sup> Investigation may be initiated, upon application to a judge who may issue an order, where a person's property or standard of living is observed to be 'disproportionate to a person's present or past known sources of income or assets'.<sup>8</sup> The application may be granted where the judge agrees that 'such

investigation is likely to reveal information ... which may afford proof that such a standard of living (or property) is maintained through the commission of corrupt activities...'.<sup>9</sup>

In bringing a prosecution and trying a case, certain common 'presumptions and defences' are specifically ruled out, for example, that the accused person did not have the right or power to act in the way the gratification was intended to bring about; that the gratification was received without any intention to act; and that the act which the gratification was intended to bring about was not in fact performed.<sup>10</sup>

Chapter 5 is on 'penalties and related matters'. A scale of penalties is set out for the defined offences, depending on which court is hearing the case: the High Court may impose a prison sentence for life; a regional court a sentence not exceeding 18 years; and a magistrate's court not exceeding 5 years. Some offences defined in the Act are given more limited sentences (no more than 10 years in a case before a High Court or regional court and 3 years with respect to a local court). In addition to any fine for the offence itself, an additional fine may be imposed by the court up to five times the amount of the gratification received.<sup>11</sup>

In cases of contracting and tendering, private companies and individuals subject to successful corruption prosecutions are entered on a Register for Tender Defaulters, effectively barring them from participating in government business for a time period of no less than five and no more than ten years. The Court orders the entry on the Register and the Minister of Finance decides the time period.<sup>12</sup>

The Act makes it a duty of 'any person who holds a position of authority' to report any corrupt action upon becoming aware of it. Not reporting such an act is an offence.<sup>13</sup> The Act covers extra-territorial corruption.<sup>14</sup>

### **Enforcement**

There is no specialized anti-corruption commission in South Africa. For purposes of

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<sup>1</sup> Section 3

<sup>2</sup> Sections 4-9

<sup>3</sup> Section 1

<sup>4</sup> *Ibid.*

<sup>5</sup> See, for example, Section 4 on 'public officers'

<sup>6</sup> Sections 11-16

<sup>7</sup> Sections 22-23

<sup>8</sup> Section 23(3)(b)

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<sup>9</sup> *Ibid.*

<sup>10</sup> Sections 24-25

<sup>11</sup> Section 26

<sup>12</sup> Sections 28-33

<sup>13</sup> Section 34

<sup>14</sup> Section 35

enforcement, the Act makes reference to two principal officers: the National Commissioner of the South African Police Force (SAPS) and the National Director of Public Prosecutions (NDPP), who is in charge of the National Prosecuting Authority (NPA).<sup>15</sup> The NPA is required under the Constitution to 'exercise its functions without fear, favour or prejudice'. Under this provision, national legislation sets out its independent powers. Investigation and prosecution of corruption cases under the 2004 Act were taken on by a designated pre-existing unit of the NPA, the Directorate of Special Operations, which was legislated for in 1999 and came into existence in 2001 (its remit was to combat organized crime). Other specialized units in the NPA that may be involved in anti-corruption cases are the National Prosecuting Service, the Asset Forfeiture Unit and the Specialized Commercial Crime Unit.<sup>16</sup>

The Directorate of Special Operations in NPA, known as the Scorpions, pursued a number of high profile anti-corruption investigations. In 2007 it initiated a prosecution for taking bribes against the SAPS Commissioner, Jackie Selebi, who was formerly an African National Congress (ANC) party official. Mr. Selebi was found guilty and sentenced to 15 years imprisonment.<sup>17</sup> The Scorpions also undertook lengthy investigations against Mr. Jacob Zuma, who was forced to resign as deputy president of the ANC in 2005 over alleged involvement in a major arms deal corruption scandal.<sup>18</sup> Zuma was elected President of the ANC in December 2007. At the same party congress, the ANC voted to disband the Scorpions. This decision was put into effect by the ANC government in 2008 and the Scorpion's investigating powers were transferred to a new Directorate of Priority Crime Investigations (DPCI) – known as the Hawks – in SAPS. The Hawks reported directly to the Police Commissioner. Some reports suggest that, while the Hawks pursued

its anti-corruption work diligently, it was thwarted by direct pressures from its line managers and the Minister. For example, investigations into the Head of Crime Intelligence concerning widespread allegations of murder, rape and corruption were reportedly halted on instruction of the Minister of Police.<sup>19</sup>

SAPS and the NPA became increasingly politicized, with cross-investigations conducted by different units to target factional enemies within the ANC. On a technicality, the case against Mr. Zuma was dropped by the NPA in 2009. Zuma and his supporters claimed that the Scorpions and a previous Head of the NPA were politically motivated in preparing the case against him. High Court Judge Nicholson, in a ruling on whether the case against Zuma could proceed, also opined in September 2008 that the charges were politically motivated.<sup>20</sup> The leader of the opposition Democratic Alliance, Helen Zille, filed for a judicial review against the NPA's subsequent decision to close the case. In March 2012 the Supreme Court ruled that the case could be re-opened.

A private citizen brought an action concerning the unconstitutionality of the 2008 legislation that handed anti-corruption investigations to the DPCI. The action was upheld in the Supreme Court by a majority of 5-4 on the grounds that the new Directorate did not have sufficient guarantee of independence.<sup>21</sup> It ordered the Government to remedy the situation. A Bill to amend the Act (the South Africa Police Service Amendment Bill 2012) was passed by the Lower House in July 2012, granting some measure of autonomy to the DPCI (it is yet to become law).<sup>22</sup>

Other agencies are also involved in anti-corruption investigation and enforcement. The South African equivalent of the ombudsman, the Public Protector (set up under Chapter 9 of the Constitution, which guarantees its independence, as in the case of several other

<sup>15</sup> Section 1

<sup>16</sup> Melea Lewis and Philip Stenning, 'Considering the Glenister Judgment: Independence requirements for anti-corruption institutions', *SA Crime Quarterly* 39, March 2012, pp. 11-21

<sup>17</sup> His successor, Bheki Cele, also an ANC member, had his appointment terminated in June 2012 under provisions of the South African Police Service Act 1995, following the findings of a special board of inquiry into a police accommodation scandal. This inquiry was set up following adverse findings in a published Report by the Public Protector in 2011.

<sup>18</sup> Zuma's financial advisor was convicted of corruption and sentenced to 15 years in June 2005

<sup>19</sup> Gareth Newman, 'Why a South African Anti-Corruption Agency Must be Independent of the Police to be Effective', Institute of Security Studies, Pretoria, ISS News 8 June 2012

<sup>20</sup> 'SA Court rejects Zuma Graft Case', BBC News, 12 September 2008, <http://news.bbc.co.uk/2/hi/africa/7612233.stm>, accessed 20 August 2012

<sup>21</sup> Lewis and Stenning, *op.cit.*

<sup>22</sup> IF Aisa, *Submission to the Constitutional Review Committee of Parliament*, Institute for Accountability in Southern Africa, 30 April 2012

[http://www.ifaisa.org/current\\_affairs/ifaissa\\_submissions\\_to\\_the\\_Constitutional\\_Review\\_Committee\\_of\\_Parliament.pdf](http://www.ifaisa.org/current_affairs/ifaissa_submissions_to_the_Constitutional_Review_Committee_of_Parliament.pdf), accessed 20 August 2012

'Chapter 9' bodies such as the Human Rights Commission and the Auditor General),<sup>23</sup> conducts numerous investigations into maladministration and corruption, including by government ministers, and makes public its findings.<sup>24</sup> The Public Protector has no enforcement powers. Regarding public employees, the Public Service Act 1994 contains provisions on termination of employment for misconduct, including corruption. The Public Service Amendment Act (2007) tightened up the provisions referring to employees who were dismissed for misconduct, including those found guilty of a corruption offence. It closed a loophole under which such an employee, upon being dismissed, might be re-employed in another department. It also enabled the Minister to determine a time period after which any such person might be re-employed, with specific reference of the severity of the misconduct.<sup>25</sup>

South Africa has 'whistleblower protection' legislation, namely the Protected Disclosures Act of 2000.

### **Conclusion**

Evidence suggests that systemic corruption remains a serious problem under the ANC regime.<sup>26</sup> However, the Anti-corruption Act of 2004 is potentially an effective instrument for investigating and prosecuting crimes of corruption. The prosecuting authority and the judiciary are granted a high degree of independence under provisions in the Constitution and their actions in corruption cases in the past have demonstrated this independence. The Selebi case, among others, shows that the courts can and do impose punitive sanctions against powerful figures.

Nevertheless, there is some evidence, and copious allegations, that the investigative, prosecuting and judicial institutions are

increasingly politicized.<sup>27</sup> Political interference to impede effective enforcement has been exercised through several means, including undermining the independence of the investigative and prosecuting agencies through legislation passed by the ANC-dominated Parliament. However, some of this legislation may be open to challenge under provisions of the constitution. Thus, the current amendments to the SAPS Act, if they become law, are almost certain to be subject to further legal challenges.<sup>28</sup>

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<sup>23</sup> The Institute for Accountability in Southern Africa, supported by other anti-corruption NGOs, has argued that an independent anti-corruption commission should be established under Chapter 9 of the constitution

<sup>24</sup> See footnote 17.

<sup>25</sup> Public Service Act as amended by Act 30 of 2007, Section 17

<sup>26</sup> 'Corruption and Governance Challenge: the South African Experience', Address by the Public Protector of South Africa, Advocate Thuli N. Madonsela, National Conference on Corruption and Governance Challenges, Nigeria, 21 January 2010

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<sup>27</sup> For a critical view of measures proposed by the ANC to reform the judicial system, see International Bar Association, *Beyond Polokwane: Safeguarding South Africa's Judicial Independence*, London, July 2008

<sup>28</sup> IF Aisa, *op. cit.*