NEW AND NOT SO NEW STRATEGIES IN PROMOTING INTEGRITY WITH PARTICULAR REFERENCE TO AFRICA

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Abstract. This article is focused on exploration not merely proposed developments in and refinements of the law and its administration, but the very significant role that financial intelligence can and should play in protecting our societies. It is the contention of the author that the intelligence community at large and in particular financial intelligence units have an important role to play in protecting our economies and ensuring confidence is maintained in our financial institutions and markets. In this article the author considers a number of issues pertinent to the advancement of integrity and in particular the interdiction of corruption to some degree from the perspective of Africa. The potential for Africa as a player in the world economy is enormous. So far, the ambiguous inheritance of rapacious empires and the turmoil of self-dealing elites in post-colonial times has successfully obscured and undermined this potential. Indeed, such has been the mismanagement, selfishness and importuning that many have grave doubts as to the ability of many states to achieve an ordered transition to what they could and should be. South Africa is perhaps the best example of a society that while avoiding the catastrophe that its recent past predicted, remains racked by corruption and mismanagement. That there is the will in many parts of the continent to further stability and security by addressing the cancer of corruption, the reality is that few have remained or been allowed to remain steadfast in their mission and all have been frustrated by political self-interest and lack of resources. The key might be education and inter-generational change as it has been in other parts of the world, but only an optimist would see this coming any time soon – there is too much vested interest inside and outside Africa in keeping things much as they are! The author focuses not so much on attempting to perfect the letter of the law, but rather on improving the ways in which we administer it.

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A Personal note and a word of caution!

I have had the privilege of teaching a wide range of subjects, albeit mostly connected with law in Cambridge since 1976. My interest in and experience of addressing issues related to economic crime and in particular corruption is almost exclusively as a former public official and then as consultant seconded to various governments around the world. Although after retirement I am delighted to teach and direct courses within the Centre of Development Studies of the University of Cambridge as an academic I have little exposure to the various disciplines within development studies or for that matter criminology and sociology, other than as a lawyer and former diplomat. Consequently those who choose to read and consider this paper please do so with this in mind!

The issues

I propose in this paper to discuss, from a very personal stand point new and perhaps not so new, strategies for promoting integrity and combating economically motivated crime with reference to developing economies and in particular Africa. The issues that are addressed are admittedly eclectic and of varying relevance to the circumstances of different societies. Not all that is suggested have significant resource implications and even those that might are capable of being externally supported and would be attractive to the wider international community and especially donor countries. That the control of economic crime and especially corruption is an important, topical and pressing issue in most countries and for development needs little argument [1]. The failure of highly developed law and regulation to control let alone prevent, the near collapse of the traditional banking system – at least in the West – very few years ago, is as obvious as it is disturbing. It would seem that if scandals not least in the City of London are anything to go by, very few people have learnt any lessons and very few have been brought to justice. Therefore, I make no apology for addressing an issue which has done more harm to our societies and weakened our ability to provide our citizens with security than all other crime put together. In this discussion we will explore not merely proposed developments in and refinements of the law and its administration, but the very significant role that financial intelligence can and should play in protecting our societies. It is the contention of this author that the intelligence community at large and in particular financial intelligence units have an important role to play in protecting our economies and ensuring confidence is maintained in our financial institutions and markets. This is not novel or particularly radical thinking. Commonwealth Law Ministers meeting in Sri Lanka in 1983 specifically recognised this [2]. In an entirely different environment the US Congress's Committee on Unconventional Warfare reiterated this view at a special conference organised by the Senate of Argentina last November.

An attempt to proffer predictions even of a most tentative character as to the ways in which the form and character of financial crime and particularly economically motivated crime, will develop, is task for those who get paid exorbitant amounts of money in the risk industry [3]. Everyone appreciates that technology will have an impact on the ways in which human beings interact and cheat each other. However, the forms of crime and abuse have remained extraordinarily similar if not identical over the ages. For example, a special committee appointed by the English House of Commons in 1696 which among other things considered the embryonic financial market in the City of London, identified conduct which was 'damaging the trade of England' which closely resembles what today we would refer to as a 'pump and dump' scam [4]. In other words deliberately circulating rumours to increase the price of a particular security on the market allowing those responsible to sell on that market at an inflated price securities that they had acquired at a much less price before they

initiated their fraud. In fact, this is still listed as one of the most serious frauds by the UK's Financial Conduct Authority and National Crime Agency in the UK. Indeed, in many parts of the world – including South Africa and China the same fraud is rampant albeit today conducted through the internet. The disturbing truth is that despite a great deal of new legislation and heart searching we seem to be extra-ordinarily inept in punishing, let alone inhibiting, those who do abuse our financial systems. As Mr P.D. Connolly QC in his report on the affairs of Queensland Syndication Management Pty Ltd and Ors for the Australian Government in 1974 opined "It is fashionable in modern times when substantial amounts of public money are lost on questionable corporate affairs to produce a sheaf of amendments to the Companies Acts. Doubtless the ingenuity of the confidence trickster does from time to time reveal deficiencies in the legislation. One cannot help feeling, however, that in most cases the Act and the general law are quite adequate and it is at the point of enforcement that the system breaks down".

Consequently in this paper we will focus not so much on attempting to perfect the letter of the law, but rather on improving the ways in which we administer it. Furthermore, we have attempted to address our observations to essentially an international audience and have not dared to focus on the experience of one jurisdiction over and above that of another, albeit we will often take as a starting point the relevant circumstances in the United Kingdom simply on the basis of familiarity and, indeed, the relevance of our traditions in many parts of Africa [5].

The relatively poor record in securing convictions before criminal courts for fraud and most other forms of economic crime is sadly a fact in most jurisdictions. The seeming inability of the legal system to deliver justice has brought in to issue the significance of the rule of law and in some instances validated the calls of those who seek far more fundamental change. How many leaders and their cronies in Africa have been expelled from office on the basis that the legal system, over which they may well have had influence, has failed to deliver justice? Indeed, how long will President Zuma in South Africa be able to resist the apparently increasing clamour for his departure from office!

We shall explore some of the reasons for this, but it is the case that even in those societies that have been able to invest much greater resources in the control of crime the results remain unimpressive and a matter of concern. This has resulted in more interest being shown in alternative strategies to address the threats presented by serious criminal and in particular organised criminal activity. Where the criminal activity resembles more an enterprise, many advocate an approach based rather more on disruption than the traditional emphasis on investigation and effective prosecution. The traditional criminal process, according to this stance is merely one of several tools to be used in the disruption of criminal activity and hopefully its prevention or at least displacement. Of great importance in developing a strategy of disruption is the use of financial intelligence. We will return to this in due course, but in modern law enforcement the practical significance of this should not be under-estimated – nor its implications for the somewhat cosy views some of us hold on the rule of law!

It is in the arena of structured crime and thus, almost inevitably – economic crime, that disruption can seemingly have greatest impact. There are, of course, many different definitions of economic crime, but here we will focus in economically motivated criminal activity. This allows us to consider a range of enterprise based crimes and particularly those involved in trafficking. In going forward with out discussion, however, we will concentrate on one of the most important facilitative crimes which represents perhaps one of the most serious and persistent threats to stability, security and development. In taking the exemplar of corruption, we will attempt a forward looking discussion of strategies that might be best advocated to address its prevention and control. In selecting this form of misconduct, however, we do so on the basis that it involves many of the issues that arise generally in regard to financially motivated misconduct such as insider dealing, market abuse [6] and

taking advantage of conflicts of interest [7]. While corruption and money laundering are essentially facilitative crimes, both give rise, particularly from the stand point of control and prevention to much wider issues which pertain to the promotion of integrity and fair dealing [8]. It is the thesis of this discussion that without concern for such issues, no financial system will endure – as confidence will evaporate and instability follow [9]. Again we do not have to search very far to find examples of this having happened.

The perimeters of our discussion

There was a time – not too long ago, when it was acceptable to observe that in different parts of the world corruption was not always seen to be worthy of the same degree of condemnation or for that matter to raise the same implications [10]. Indeed, there could be more or less legitimate debate as to what should be considered corrupt or simply justified as facilitative or a token of esteem. Colonialism afforded many individuals with an opportunity for promoting themselves through bribery and other corrupt dealings which they would never have had if they had remained in their own societies. Indeed, there is an argument that this contributed to the perception, at least in Britain, that bribery and corruption was something that only happened overseas and inevitably in those countries which had not developed a structure of government and society that would be applauded as such by the so called metropolitan powers. In other words, the very corruption that officials were exposed to was part and parcel of someone else's problem. The notion that colonial officers took their corruption with them and to some degree even imported it into other societies would have been a heresy. This was compounded by attitudes that accepted or at least tolerated the notion that other societies, perhaps considered less developed or even downright primitive, could not be expected to adhere to higher principles of social justice – albeit in practice even in those societies which were eager to share their religion and ethics with other less fortunate peoples around the world, corruption, as we would understand it today, was part and parcel of every day life.

Today it is unacceptable to express the view that some societies operate in ways that are inherently corrupt or even conduct their affairs in a manner which while they accept as normal, indeed, even commendable, would to others be characterised as corrupt. Today in the world of international standards of behaviour expressed in what we like to call, because it is rather more comfortable, soft international law, there is little room for the peculiarities of societies where gratefulness and respect is manifested in at least the expectation of a gift or as a token of respect. We require the conduct of everyone with whom we do business, albeit increasingly remotely and electronically, to conform to a standard that can be checked off against a uniform international compliance programme [11]. In the modern world banks and others who by their very business operate trans-nationally cannot accommodate oddities of behaviour in their 'proven' compliance procedures. One size must fit all, and as has so clearly been shown in the 'crusades' against money launders and those who do business with people branded subversive, if you do not manage to comply, you will in practical terms, be excluded from direct access to the western financial system [12].

Therefore, in this paper the author will not attempt to test our very understanding of corruption as something worthy of being branded evil and anti-social [13]. Nor will he seek to raise the arguments of some that corruption, at certain levels and at certain stages in development is, if not an inevitability, to be expected and perhaps even ignored. Having consigned thereby our discussion to the realm of practicality, we will none the less presume to raise one issue that has clear implications for control and enforcement: that of transparency and the role that disclosure of information can play in achieving our objective or reinforcing 'integrity'.

The many sided aspects of transparency

It has been argued that one of the most significant problems presented by corrupt activity is that it is done in secret. Indeed, as in the case of fraud and other crimes of dishonesty what is done is almost inevitably done in secret. The desire to create and maintain secrecy itself gives rise to what some criminologists describe as 'slippery slope' crimes [14]. In other words to hide what has been done, records may be distorted and others brought into the web of corruption. Transparency has often been invoked as a weapon to deal with conduct that might not survive the glare of publicity and possibly attendant public criticism. Indeed, the famous observation of Louis D. Brandeis – that "sun light is the best disinfectant and electric light is the best policeman" has much to commend [15]. Of course, in practice disclosure of relevant details might not only focus opprobrium – particularly in a democracy, but also empower those who deal with the relevant individuals or organisations to re-evaluate the terms upon which they continue their relationship or choose elect to discontinue it. The ability to understand and be able and willing to act on information varies considerably. There is also inevitable disparity in the ability to generate meaningful information let alone intelligence and to then effectively deploy it. The extent to which intelligence organisations develop and deploy information that may assist their own economies and businesses has always been a controversial issue. Many 'western' intelligence gathering agencies have made it clear that in certain circumstances relevant information will be utilised to facilitate better decision making including in business. Indeed, it is accepted that in protecting the national interest advancement of the economy is a legitimate concern. Until the late 1970s agencies of the UK government were prepared to give advice on who to 'bribe' to facilitate key business and, indeed, what the going rates were – and, of course, the payment of bribes overseas, was tax deductible as a business expense. On the other hand, where the information is provided to facilitate decisions which limit or impede criminal or other activities against the public interest the analysis is somewhat different. We will return to this, but to what extent is it acceptable for intelligence agencies to assist financial institutions in determining whether, for example, a foreign prospective client is the sort of person that they should be doing business with? Regulators in deciding whether someone is a 'fit and proper' person to give authorisation to enabling them access the financial services industry have long courted the intelligence community.

Disclosure may also assist in enforcement. Timely disclosure of facts may provide those responsible for policing with a 'warning flag' indicating the need for action, or if there is a failure of candid disclosure – a preliminary offence which it may in practice be much easier to sanction. For example, as in other areas of self-dealing such as insider trading, it is often easier to prosecute persons who have failed to make a report as to their dealings or other relevant conduct– than proceed to the investigation and proof of often complex substantive offences.

There are, however, obvious limitations to the effectiveness and efficacy of the so called 'fish bowl' philosophy. Perhaps most importantly it assumes that disclosure of certain types of conduct will throw up concerns on the part of those to whom disclosure is made. In other words, those who are made aware of the relevant facts must not only be of the view that they are abusive or at least objectionable, but also they must be empowered to take some form of action to denounce and hopefully correct and punish such conduct as is revealed. It is only on this basis that transparency can be an effective control mechanism against self-interested and corrupt dealings [16].

While in some societies, the mere fact that what is considered to be unethical conduct is revealed will, given the homogeneity of moral attitudes, be a sufficient disincentive to abuse, there are others where perhaps the value of reputation is less or is more equivocal. Indeed,

there are some societies and situations where the ability to secure personal or in particular benefits for members of one's family or supporters is seen primarily as confirmation of status and power, which itself is applauded or at least condoned by members of that society or group. For example, a survey conducted in China [17] among business executives revealed that most retained what they considered to be Confucian values. Consequently in the conduct of their business advancement of personal and family interests came first. Indeed, there was little knowledge of the 'fiduciary' obligations on directors and officers imposed by China's Corporations Act and several respondents went as far as saying that if these impeded the advancement of family interests the law needed to be changed! There are, of course, many other examples of societies and circumstances in which group, class and or family values are placed above the vaguer, perhaps even 'foreign' notions encountered within western fiduciary based value systems. While many cultures have developed principles which are akin to fiduciary obligations as understood within the common law tradition, they lack sanction and are often seen as little more than ethical imperatives. A good example, is Sahri'a, where stewardship of other's property and interests is recognised, but as part and parcel of a believer's general obligation to God. These obligations in Islam are not enforced by an intervention of law as they are in, for example, the English law of trusts [18]. Given the importance that we attach to the fiduciary standard particularly in the financial world fostering and maintaining an understanding of the obligations that should be expected of a person in a fiduciary relationship is arguably one of the greatest hurdles to improving the level of integrity and professionalism in the developing world.

Making transparency work

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

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

Within Africa, however, there are social and political mechanisms which have shown themselves to be surprisingly robust and efficient in receiving, processing and, indeed, acting on information of the nature we are discussing. Various political groups have long recognised the power of information and have used disclosure to advance their own ideology and objectives. Indeed, in many African societies the media – both formal and informal is developed, articulate and effective. Another important factor in many African states is the church. While religious observance is diverse and certainly not of one voice, Christian

communities in particular have been prepared to express concern and to varying degrees act against conduct that is regarded as unacceptable. In Nigeria and Ghana for example, the established church and other church based communities have had a powerful voice in condemning, on occasion, instances of corruption.

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

There is a further point that is worth making in regard to the involvement of corporations in corruption and unethical conduct. In recent years much has been made of the importance of ensuring good governance structures and procedures in companies [19]. Indeed, until the recent financial crisis many argued that such closer internal systems of control had much to commend over the costly one size fits all approach. Governance while still of value was seen to be a very weak barrier to the rampant greed and self-interest that characterised the conduct of many in the financial industry leading up to the near collapse of the western banking system after the so called sub-prime fiasco. While governance can never replace competent and effective external and public policing, it can still assist. It has at least an educative role and proper procedures may throw up earlier misconduct particularly if reinforced with sound compliance. It is also far more recognised today that the reputation of corporations is a valuable asset which management has a responsibility to protect. We are near in at least some jurisdictions, to judges finding directors of companies personally responsible in the discharge of their duties to their companies for failing to adequately protect this asset of the business. In one case in England an employee of a bank that had collapsed in large measure due to the frauds and abuses that it facilitated around the world, was permitted to proceed with a claim seeking compensation from the bank's directors for their failure to run the bank properly and thereby safe-guard the employability and reputation of its staff.

In South Africa while the courts have hesitated to hold employers liable for the harm occasioned to the employability of their employees as a result of their involvement in wrongdoing, the Constitutional Court has expressed the view that it is a human right for citizens to live in a corruption free society and individual judges have extra-judicially expressed sympathy with the view that the civil law should recognise this entitlement.

The way in which people in positions of authority and trust improperly take advantage of their position will inevitably be influenced by the manner in which opportunities present themselves. Thus, the social, political and economic environment within which the conduct occurs will impact on and shape the form of misconduct in question. Indeed, this will also be reflected in the laws that are invoked to address it. In developing countries particularly where the state is rather more involved in the conduct of activities, which in a developed economy might be rather more in the hands of the private sector, there will be greater opportunity to engage in misappropriation and diversion of state assets. This is a particular issue in countries

which still have a significant public business economy. The greater involvement of government in fostering entirely beneficial programmes such as those relating to the protection of the environment and natural resources has similarly provided opportunities for officials to take advantage of information on the design and implementation of their own policies. It is also relevant that the more the state is involved in the ownership and control of enterprise the more likely that it will interpret such misconduct as an offence against the state [20].

Why do we abuse our positions?

Over the years a considerable amount of discussion has taken place in the academy as to the nature and implications of corruption. While we need not rehearse this here, it is desirable in modelling more efficacious responses to the threats associated with corruption, to recognise the practical significance of Edwin Sutherland's explanation of deviant white collar behaviour [21]. In a nutshell and in grossly simplistic terms, Sutherland recognises that in the case of certain forms of economically motivated activity we are all susceptible to temptation. The determination of whether we actually engage in conduct that might be characterised as criminal or abusive will in large, perhaps determinant, measure – be resolved by our own cost benefit analysis. In other words, we will assess the rewards as compared with the risk of something unpleasant happening to us. There will, in any given situation, be a host of factors which influence our subjective determination of this balance and where the tipping point is encountered.

Of course, morality and education will have a role to play as will the efficiency of detection and the mechanisms of punishment. However, it is important to take on board that the moral and ethical aspects might vary [22] and in many cases, of what might be described as financial crime, there may well be a perception that they reflect no great moral principle and are essentially technical offences. The perception in a society that undertaking the activity in question is common place or that most would – given the opportunity engage in it, will be powerful factors.

The potential for ambiguity in designing the controls and certainly in policing them is, perhaps illustrated again by reference to a form of misconduct that it is quite closely related to corruption, namely insider dealing. While arguments based on the abuse of loyalty may in the circumstances be relatively strong or weak, the justification often invoked in the criminalisation of the misuse by insiders of privileged information, is the adverse impact that this may have on investor confidence. It is argued that investors will be less attracted to markets where there is not a semblance of equality of opportunities to profit. For many reasons this simplistic contention is not always convincing. However, it is the case that few individuals are likely to see a profound moral imperative here. Their castigation of insider trading as an abuse, at this level, is probably rather more associated with their jealousy that someone else who is in a privileged position is able to take a benefit which they are unable to access to [23]. Indeed, the same argument is manifest in regard to some of the excesses that we have seen on the part of bankers in the lead up to the recent global financial crisis. In the result, it is possible that morality may play less of a role in the balance of opportunities and risks than some think and hope for. The prime issue may be simply at what price is the risk of punishment and possibly loss of reputation worth taking.

Consequently the level of detection and likelihood of effective enforcement action consequent upon detection is, on this analysis, a significant if not determining factor. The more that can be done to render the risk of detection and the certainty of effective policing and punishment, the higher will be the financial threshold to wrongdoing. Thus, the role of 'soft' and early – essentially extra-legal procedures and devices, such as compliance,

transparency and whistle blowing have a real role to play in fixing the tipping point. None the less, given the efficacy or rather the lack of efficacy, in bringing economic criminals and those involved in corruption to justice, the threshold may be rather lower than we assume. Considering the nature of the likely offender it may not be necessary to invoke the full panoply of criminal justice that is more usually encountered for other forms of crime and misconduct. By definition we are dealing with more or less the elite in a given society, or at least those who have a privilege the exercise of which is worth influencing. One does not bribe people for the sake of it – there will always be a purpose and usually one that has economic significance.

There is a further point that is worth alluding to here. We have underlined the danger of certain legal and regulatory obligations being considered as technical and not having a moral imperative. This is a particular issue in the context of financial intelligence. Today we increasingly recognise the contribution that good intelligence can make not only to effective policing, but also prevention, both at strategic and tactical levels. While good and useable financial intelligence does not depend solely, or perhaps even significantly, on various forms of reporting – perhaps based on the level of currency involved in a transaction or upon a suspicion, the obligations imposed on those who are required to report, are invariably perceived as merely an additional regulatory burden – with significant costs and risks. It would seem that very few upon whom these obligations are cast, whether by law, regulation or compliance procedures, perceive them as implying any moral obligation. At least in their perception the underlying issues and predicate crimes are wholly divorced from the process. The moral turpitude of, for example, drug dealing or funding terrorist activity, is seemingly – as far as the limited research that has taken place indicates, almost wholly distinct from the chore of compliance with these obligations. If those concerned to better the supply of information upon which intelligence can be developed are to be effective, then much greater attention needs to be focussed on these issues and in particular upon generating awareness and understanding. Of course, the flaw in this is being able to convince us that the information produced by these costly procedures actually does impede the activities of serious criminals and terrorists to any great extent. The proportionality of the burden imposed on those required to report suspicious financial activity as compared with the results achieved by official intervention on the basis of the relevant information, has been raised in Jamaica as an issue in determining whether the public interest in fighting crime with the assistance of such procedures outweighs the public interest in attorney client privilege [24].

Concerns have similarly been raised in regard to the consequences for an economy that cannot readily meet and implement the international standards, for example, on customer identification and due diligence. In the context of rural Africa for instance, the ability to verify with the requisite degree of specificity potential customers' addresses has caused real issues for the implementation of country wide measures that are required for international compliance with, for example, FATF standards. The result is often the denial of access to banking and financial services to those who cannot meet the requisite standards. This again throws up issue of human rights and the ability to participate fairly in the relevant economy. Differing levels of resource, both in terms of sophistication and efficacy, within the compliance regimes' of banks and other intermediaries in developing countries is another highly pertinent issue. The consequences of an actual or perceived inability to prove the appropriate levels of verification and monitoring might well persuade other financial institutions to exercise such caution as to effectively deny access to the international financial system. The risks, in regulatory and reputation terms, for in particular 'western' banks in dealing with customers of banks in certain jurisdictions, including Nigeria, might be too great or disproportionate from a business standpoint to justify ordinary correspondent or service banking relationships. Indeed, when the Patriot Act was enacted in the USA after the 9/11

atrocities, a number of leading financial institutions in the USA and Europe decided that dealing with business involving many countries in Africa and certain other locations was just not cost effective in terms of risk. The financial crisis following the sub-prime scandal to some degree over-shadowed this initial move to de-risking, but in recent years it has become both obvious and of real concern.

Exposure, discovery and detection

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

There are indications, however, that the balance might be changing. While we have a long way to go before it could convincingly be argued that corruption or for that matter money laundering have become international crimes in the sense we understand that term in international law, there have been significant developments in the efficacy of trans-national criminal justice in large measure spurred on by important international instruments such as the UN Convention against Corruption [25]. The ability of states within their own domestic law to provide meaningful assistance to other states and even private actors, in pursuing the proceeds of corruption and other crimes has increased dramatically. Also the willingness and capacity of states acting within their domestic laws to act promptly and effectively in interdicting and freezing tainted wealth is infinitely greater today than it has even been. This was illustrated in the rapid response of many European countries to the requests of new governments to identify and freeze the assets of former leaders and their families during the so called Arab spring. There are many examples of cases in the past where it has taken years to trace and then initiate steps, often without success, to interdict wealth 'stolen' and diverted from countries such as the Philippines, Pakistan, Nigeria, Haiti and Indonesia. On the other hand the British government was able to respond effectively to a request received from the Egyptian government in regard to former president Hosnay Mubarak within minutes – largely as a result of first class financial intelligence. The system of and for, international mutual assistance today in this respect bears no resemblance to that even five years ago. Of course, a prerequisite to this is an effective request from the relevant lawful authority in the state concerned and this may well constitute a problem where it remains unclear exactly where

authority actually does reside in a state that has gone through turmoil. The provision, perhaps from other governments, intergovernmental organisations and even the private sector, of timely technical assistance and support may prove in practical terms of crucial significance.

Crimes of the Powerful

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

The present author having had the privilege of working for many years in this field has witnessed, on innumerable occasions, direct interference in the proper operation of the law and where this has failed to secure their sinister objective, the assassination and intimidation of witnesses and those who attempt to stand up for justice. Indeed, it is a sad, but true comment that few if any, champions of justice – in this context, retire happy – or at all! On countless occasions, including in some of the more developed countries which pride themselves on their adherence to the rule of law, there is evidence of black propaganda campaigns designed to discredit testimony and place those who have acted corruptly, beyond the reach of such systems as may exist, to render them accountable. In a number of such cases these perverse initiatives have drawn the support of organised crime, naïve or possibly corrupt journalists and even renegade intelligence officers. The failure of societies to recognise the risks faced by those taking on those in power and authority, let alone seek to assist and protect them, is in opinion of this author one of the greatest threats to the efficacy of the law.

It is not always the case that those in power will be so bold to stoop to intimidation, violence and misinformation. Perhaps an even more shocking response is to attack the standing and resources of the agencies that have been set up specifically to promote integrity and police the relevant law. Although politicians are inclined, often with the support of the media, to bemoan the inadequacies of agencies responsible for promoting integrity in, for example, the financial markers or discovering and pursuing financial crime and corruption, there are again – too many examples, where as a result of the perceived effectiveness of such agencies their budgets have been slashed and their recruitment curtailed. Whether this be predicated on the notion that such have become too overbearing and powerful – undermining the very values that they are tasked to protect, or simply on the basis that they have done their job, it is not hard to find examples of the virtual emasculation of in particular, the enforcement and surveillance capabilities of these agencies. In the present context, recent history sadly records a number of examples where corrupt or perverse elements in governments have taken steps – often based on arguments of efficiency and cost, to cut the budgets and undermine the work of financial intelligence units and similar organisations. A good example is the way in which the Bureau of Investigation and Intelligence which was established in the Philippines, with western support, saw its budget consistently reduced as its perceived utility in identifying corruption increased. A similar fate befell the National Economic Crime Inspectorate in Zimbabwe, the Public Conduct Inspectorate in Ghana and Scorpions in South Africa [26].

Elite Enforcement

On the other hand it has also to be recognised that there are too many examples around the world of elite prosecutorial and investigative agencies, set up specifically to spear head the fight against corruption and economic crime, themselves becoming tainted by the very ills that they seek to address. There have been real examples of such agencies being undermined from within, as a result of penetration by other criminals and the corruption of key personnel. One need only consider the example of the Commercial Crime Unit in Hong Kong and its corrupt director – Warrick Reid. As Lord Templeman, then one of the most distinguished judges in the Privy Council observed: "bribery is an evil practice which threatens the foundations of any civilised society. In particular, bribery of policemen and prosecutors brings the administration of justice into disrepute … in [this] case the amount of harm caused to the administration of justice in Hong Kong …cannot be quantified" [27]. Indeed, even in that bastion of propriety, Singapore, a similar agency – the Commercial Affairs Investigation Department, established to fight economic crime and corruption had problems, albeit less dramatic. Sadly there are many other examples.

In the author's opinion the ever present danger of specialised law enforcement agencies and in particular those established to fight really serious economic criminals and the most corrupt and powerful members of our societies, becoming part of the problem, is exacerbated by a failure on the part of politicians and the media to properly understand the problems that they face. In some, perhaps the majority of cases where such agencies and, in particular those who run them, have stepped over the line and become associated with the problem rather than the solution, the initial reason has been a desire – perhaps even a laudable desire, to meet the expectations of those who have appointed them and given them their task. The reality is that in all systems of law – whether common law, civilian, Roman Dutch or an intriguing mix thereof, it has proved over time incredibly difficult to secure convictions, through the traditional processes of the criminal justice system, for economic crime and in particular fraud and corruption. The reasons are many and varied and a detailed discussion is beyond the scope of this paper. It is not without interest, however, that even the most developed and respected legal systems have in reality faired little better when judged purely in terms of conviction rates. For example, back in 1986 an eminent British senior criminal judge, Lord Justice Roskill appointed to make recommendations for the improvement in England of the trail of fraud cases, reported that "the public no longer believes that the criminal justice system can effectively and efficaciously bring the perpetrators of fraud to book. The overwhelming evidence brought before us suggests that the public is right [28]". Despite many new laws, procedures and agencies, few in the United Kingdom would have any confidence that the situation has got any better [29].

The record elsewhere, including in the USA is in truth – no better! As we have already pointed out it is largely as a result of the criminal justice systems profound inability to deliver results – in terms of convictions, or for that matter the seizure and interdiction of the proceeds of crime, that many law enforcement agencies around the world have redefined their objectives as the disruption of crime, rather than the traditional investigation and prosecution of crime. The emphasis now placed on the disruption of organised crime – including terrorist organisations and serious economic criminality, has inevitably impacted on the way in which we attempt to deliver justice. There is, for example, a much greater emphasis on the role of intelligence and in particular financial intelligence, thrown up by anti-money laundering systems [30]. On the other hand the more we involve the spy rather than the traditional policeman in these tasks and move away from the discipline of a traditional prosecution, the greater are the risks to human rights and the temptation to justify actions on the basis of their empirical and pragmatic results. Experience appears to demonstrate that the temptation to

meet the unrealistic short term expectations of politicians has resulted in a tendency to bend rules and procedures to achieve what appear to be results – recognised as justifying the special powers, budgets and status that there agencies are given. Elitism breeds an ambition for a level of success that a proper and responsible administration of law cannot in all probability achieve. Consequently the very real pressures within the organisation in terms of career security, development and esteem and externally in terms of continued support and standing – become almost irresistible. The inclusion of evidence that has been procured in dubious circumstances, perhaps even illegally, is a step towards fabrication and manipulation of evidence – the end justifying [in the minds of some] the means! The fact that this corrupts the very fabric of the legal system and makes justice a delusion is obscured by expediency and pragmatism.

Having said this, specialisation in the development and handling of intelligence, investigation and pursuit of economic crime is vital. To identify and then recruit or to foster similar skills and specialisations within the confines of more traditional law enforcement structures and in particular police organisations, is problematic, particularly in the context of developing economies. Traditional justice agencies do not provide the career structures that can comfortably accommodate the sort of specialisations that are required for the effective investigation of, for example, economic crime and corruption. This is a particular problem in the context of intelligence and especially financial intelligence. Not only will the networks that service those who are responsible for gathering intelligence invariably be substantially outside traditional law enforcement or for that matter the public sector, but so will in most cases their own organisation. Indeed, it was largely because those interested in fostering financial intelligence were in organisations such as central banks and fiscal authorities that law enforcement and bodies such as ICPO-Interpol took so long to realise their importance. It is still the case that in many countries there remains a lack of effective interface between these non-traditional and non-policing agencies and the conventional law enforcement and prosecutorial agencies. There is the further problem that the skills required for intelligence work are generally not common in traditional law enforcement and in particular analytical skills are often under-appreciated.

If there is the political will, then it is conceivable that significant organisations capable of supporting highly specialised skills can be established and operated – this is something that we will return to in our comments on financial intelligence units. A good example of this is the Independent Commission against Corruption [ICAC] in Hong Kong. However, the very considerable resources that have been placed at the disposal of the ICAC over the years are in practical terms beyond the reach of most countries and those that have attempted to emulate the experience of Hong Kong with lesser resources – such as in the African context, Botswana, Malawi and Mozambique have not faired as well as was hoped. The ICAC in terms of its structure and operations has to be considered in the historical context of Hong Kong and the political imperatives that gave it so much significance in the political system. For example, for much of its life the ICAC operated within a colonial environment which had implications for in particular accountability and its independence. There are those who wonder whether its perceived strengths will, or indeed, can survive – at least as they were, in the modern reality of Hong Kong and its politics!

Prosecutorial independence and discretion

To remain firmly within what we regard as the rule of law, the role of prosecutors is vital not only constitutionally and in terms of due process, but also in achieving a fair and focussed investigation tailored to the production of admissible evidence. There may be debate as to the desirability and in some jurisdictions the acceptability of prosecutors directing case

development and in particular investigations, but the benefits for investigators of access to prosecutorial advice cannot be denied. Indeed, this is one of the particular strengths of the US justice system. The civilian system provides, at least in form and structure greater support and focus in terms of the magisterial involvement, but is essentially different to the common law procedure. The coming together of both systems provides a number of advantages, but is perhaps idealistic. Having said this there are experiments taking place in China, Italy and Japan to achieve just this. The special powers accorded to prosecutors, for example, in the United Kingdom in the Serious Fraud Office while criticised by some as starting down the inquisitorial path, in practice have not resulted in an appreciable improvement in the efficacy of traditional prosecution [31] As we have seen there are real dangers in prosecutors being placed in control of specialised enforcement and intelligence agencies given their natural desire as lawyers to achieve results before the courts and in the main their lack of managerial experience. Consideration might better be given to the appointment of those with judicial experience such as in South Africa and Australia, although this itself, may give rise to issues in some cases of constitutionally.

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

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

Civil enforcement

The perception and probably the reality that Federal prosecutors in the USA were unenthusiastic in prosecuting securities offences led to the development within the US Securities and Exchange Commission of its own civil enforcement jurisdiction. Frustration with the traditional criminal process encouraged enforcement lawyers within the SEC, to develop a relatively effective process of civil enforcement based on seeking injunctive relief in the Federal Courts. The efficacy of using essentially civil law procedures in fighting economically motivated crime, with the attendant practical and evidential advantages, has resulted in administrative enforcement assuming a very significant role in the USA in the

enforcement of not just the securities laws, but increasingly those concerned with integrity, such as the Foreign Corrupt Payments Act. As the use of civil enforcement has become more widespread the courts and, indeed, Congress have imposed certain constraints and to some degree regularised the processes and sanctions in statute.

Obviously there is not the opportunity to explore civil enforcement in more detail here [32], albeit it is a very important additional weapon in the arsenal of those seeking to fight economic crime. On the other hand, there is a need for circumspection as the procedures that have been developed in the USA, while effective and relatively efficient are the product of US legal history and jurisprudence. They are not easily transportable into other systems. For example, the attempt by statute to emulate the US SEC's jurisdiction in regard to market abuse in the United Kingdom has not been entirely successful. There are examples of attempts to emulate US experience in several African states, most noticeably South Africa and Nigeria, but the results have been at best mixed. Judges have an understandable dislike of imposing what in practice amounts to criminal or at least public penalties on the basis of a civil rather than criminal standard of proof.

The English Courts have also been unimpressed with attempts by regulators and in particular the Serious Fraud Office, to utilise civil processes when what has occurred is clearly criminal. Judges have deplored the use of the 'soft' option of civil enforcement and effectively 'agreed' penalties where crime is involved. Judges in other jurisdictions, such as Hong Kong and South Africa, have declined to recognise and give effect to US court orders in regard to civil enforcement on the basis that what is in issue is essentially a criminal matter dressed up as a civil one [34]. Having said this, the development of the US law in regard to tracing and forfeiture of criminal property through a civil process *in rem* has met with a great deal more support in foreign courts.

Civil restitution – making the crooks pay!

The United Nations Convention against Corruption places a great deal of emphasis on alternatives to the traditional criminal law in policing corruption. In articles 1 and 51 of the Convention it is made absolutely clear that one of the principal objectives of the Convention is the recovery and restitution of the proceeds of corrupt practices. In addition to facilitating the effectiveness, on a trans-national basis, of domestic anti-money laundering and criminal property provisions and the critical role of financial intelligence units, the Convention specifically recognises the importance of states being able to bring proceedings in their own courts and in those of other jurisdictions to pursue the ill gotten gains of those who have engaged in corruption. The experience of Nigeria and Zambia in utilising the civil law to pursue former leaders who have milked their economies was influential in persuading countries such as China that this was an important weapon. Of course, much depends upon the vitality and efficacy of domestic law and in particular the law relating to restitution [35].

We have already touched upon this in the context of the obligation of fiduciaries in the common law tradition, to eschew conflicts of interest and be accountable for the taking of 'secret profits' [36]. These principles have been applied not merely to those in private relationships but also those in positions of trust in government. For examples, ministers, senior officials, spies and even members of the armed forces, who use their position to exploit the trust that has been reposed in them, have been rendered accountable in the civil courts. The importance of these principles is much wider than it might at first seem. They are of practical importance not just in those jurisdictions that embrace the pragmatism of the common law [37]. For example, it is common to find in company laws, the statutory incorporation of the duties of loyalty upon which this liability to account is based. Furthermore, the courts in a number of common law jurisdictions have held that the principles

of fiduciary accountability and in particular the imposition of a constructive trust apply where the money ends up. Therefore, a Singapore appeal court had no hesitation in invoking these principles in regard to the proceeds of corruption that took place in Indonesia – held in a Japanese bank in Singapore [38].

It is, however, the ability of the law to trace the proceeds of corruption and fraud into other property and to then regard it as belonging to the person with the equitable claim that is perhaps the most significant weapon. In a series of cases involving corruption and breaches of fiduciary duty, invariably committed overseas, English courts in common with those in many other common law countries, have been prepared to trace such property and impose on it a constructive trust [39]. Any one who comes into possession of the property or who exercises control over it, will – if they have knowledge of the circumstances or are reckless, be held equally liable to the same extent as the wrongdoer [40].Such third parties will only escape liability if they have acted in good faith and given proper payment for the property, before they appreciate the true facts or before parting with it.

There will be similar civil liability on those who dishonestly assist in the laundering of such property. Thus, those who provide accounting, legal and banking services might well be exposed to liability. The state of knowledge required for this form of liability includes wilfully turning a blind eye to facts that would have put an honest and reasonable person on notice that something improper was a foot. Thus, the English courts have not hesitated to impose personal liability on an accountant in the Isle of Man who incorporated English companies and then opened bank accounts for these companies in London, on behalf of a fraudulent French lawyer and an employee of an Italian company, without asking the questions that an honest and reasonable person in his position should have asked [41]. Indeed, in another case, the court held that even a lawyer who had good grounds for suspecting that a client whose monies he had placed into certain overseas trusts may be related to an investigation in the USA – if he wished to escape personal liability was under an obligation to search out those who might have a claim against these funds and inform them [42].

Costs and Bounty Hunting

A serious, often insurmountable, obstacle for developing countries in utilising these laws to purse those who have raped their economies, is the costs involved in conducting the investigation, securing evidence, freezing the suspect funds and then mobilising civil actions – often in expensive and foreign legal systems. The United Nation's Convention against Corruption provides that countries should seek to assist each other in this, and there are potentially useful provisions for technical assistance. Under the Convention and various other international instruments such as those of the OECD, the Commonwealth and Council of Europe there are a number of potentially significant initiatives. The Stolen Assets Recovery programme of the World Bank is of particular note, as is the OECD supported International Centre for Asset Recovery, to provide governments with technical legal assistance. Under these programmes financial, legal and investigative assistance is provided to countries seeking to recover the proceeds of corruption. While to be applauded these initiatives are limited both in terms of their mandates and the resources that they are able to offer. However, it is also the case that individual governments have also provided development resources and technical support in assisting countries to pursue stolen assets. The US Kleptocracy Asset Recovery Initiative and numerous programmes sponsored by the UK Department of International Development are especially worthy of mention. None the less governments wishing to pursue wealth that has been stripped from their economies – often in difficult political circumstances, still need to be able to do a great deal on their own. Paradoxically it is, as in cases of fraud, often those who have been most damaged and abused, will in fact be least able to mount a claim.

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

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

It is also not unusual in similar circumstances, particularly in the context of taxation, to compound conduct that might otherwise result in the application of serious criminal sanctions. In countries such as China where many such cases are brought under the administrative jurisdiction of the Chinese Communist Party there is even greater scope for co-operation and mitigation, although it must be noted that this had led to some speaking out against the current initiative against corruption, on the basis that it has the potential to undermine the rule of law. There are many, who see things in rather black and white terms and consider negotiated justice is not justice. Indeed, there are examples of agencies in, for example, Mauritius, Zambia, Uganda and Kenya appearing to be overly lenient in such 'negotiations.' Indeed, even in the United Kingdom there has been serious criticism of the revenue authorities for being too soft in cases of corporate fiscal wrongdoing.

While no doubt things have improved at least jurisprudentially, there are still many governments and agencies that remain cautious as to what information they share with each other, even within the same jurisdiction. This is exacerbated by the approach of some countries which allow their agencies to retain some of the property seized either as an incentive or to facilitate further enforcement. While the US authorities have for many years been prepared to share seizures, after deduction of their expenses, with other states, few other governments have in practice done this – Switzerland being a notable exception.

There have been cases particularly involving countries such as the Special Investigation Team, Economy and Trade in Zambia and the Office of the Special Prosecutor for Economic Crimes in Ghana, where agencies have been reluctant to seek assistance from, for example, the authorities in Britain or France, for fear that if suspect property is eventually confiscated it

may not be returned or shared with them. This has resulted in rather unorthodox 'negotiations' with suspects involving threats and inducements that would not reflect due process let alone the rule of law. The UN Convention specifically provides for this and hopefully this will herald a more constructive approach. The emphasis that the Convention places on the importance of the role of financial intelligence units, particularly in developing and deploying information, and seemingly the willingness of many governments to foster this, is a hopeful indication.

Empowering the citizen

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

While the development of control liability especially for misconduct relating to integrity has been regarded as a means of improving compliance and attributing responsibility, it is a two edged sword. Senior management may well be reluctant to report suspected violations of provisions – possibly giving rise to control liability, or in co-operating with the investigation of the predicate wrongdoing. Indeed, in some societies the arguments are at best evenly balanced and there may well be strong pressure to resolve problems informally and away from the glare of publicity. This may be all the more compelling where those in government have had a role in appointing those at risk of criticism. It is also the case that in societies with a high degree of class, tribal and or political identity among those concerned it will be seen as in no one's interest to 'rock the boat'. Indeed, there are those who explain the seeming reluctance of authorities in the United Kingdom to 'police' misconduct in certain parts of the City of London's financial community on this basis. There is another and perhaps even more pertinent consideration. There is a real risk in demonising businesses and their managements. This concern is perhaps best illustrated in regard to the cases that have arisen in the US and UK in particular, in regard to economic sanctions violations and money laundering. There have been a number of cases where major international financial institutions, such as the Hong Kong and Shanghai Bank, Barclays Bank and the Standard Chartered Bank have been accused of significant failures in compliance. Very large fines and costly settlements have resulted. There has been a very high level of criticism of the management of these and other

institutions in the media. The problem with all this – is, as we have already pointed out, that it remains to be convincingly established whether the relevant underlying laws relating to the identification and interdiction of suspect funds work and have any real value within the legal system. If one considers the level of successful enforcement in regard to criminal and suspect property in the vast majority of jurisdictions, then one might be excused for doubting the efficacy of such laws and the cost that they impose both directly and indirectly in terms of risk, on ordinary financial institutions which provide a vital service to the economy.

Considering all this, who else might have an incentive to complain and initiate action in cases of corruption? Perhaps the most likely candidates will be those who have suffered tangible loss as a consequence of the corruption. In most cases their damage will be a result of what the corruption has facilitated rather than the corrupt act itself. For example, those who have lost relatives or sustained injury when as, for example in China a major road bridge collapsed as a result of failures by inspectors to properly monitor its construction. In many cases – perhaps the vast majority, those who have been harmed will not, under their domestic laws, have a particularly clear cut claim to compensation. Here we are talking about a claim for the damage and losses that have resulted from the corrupt action, rather than restitution of the illicit payments. The UN Convention against Corruption places an obligation on states to facilitate such actions. Providing a new cause of action is one thing, actually empowering those who have been harmed to bring it is a very different matter. Without a litigation friendly environment with the possibility of class actions and contingent attorney fees, it is hard to see that in many countries this would be a meaningful and viable strategy. In the majority of developing countries access to competent legal advice and assistance in litigation just does not exist. Access to justice is often at best a visit from a local policeman! In the USA the False Claims Act has long enabled citizens to bring civil claims on behalf of the state, based on allegations of fraud and misconduct against the government. Litigants and their lawyers are then, if successful, permitted to share in the recovery. Again, while the lawyers – particularly in inter-governmental organisations think this is a useful model – it has to be seen in context!

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

Criminal culpability

There are those who argue that the gold standard in combating serious corruption must involve the robust use of the criminal law. We have already touched upon this in the context of the institutional and procedural considerations. Over the last few years many states have revised their criminal laws to improve the drafting of the primary offences relating to corruption and in particular the taking and giving of brides. This is not the place to attempt a discussion of the substantive law. However, while very few cases have so far been brought under it, the author has no hesitation in commending as a good model the UK's Bribery Act 2010. Before its enactment Britain's anti-bribery law was antiquated and inefficient. In

practice in the United Kingdom, as in a number of common law countries, it was [and still to some degree is] other provisions in the ordinary criminal law that have been utilised to promote integrity. The re-shaping of the law relating to fraud in the UK, in the Fraud Act 2006, and especially the creation of a 'new' offence of criminal breach of trust is particularly welcome in this context [43]. Perhaps of most significance, however, has been the use of anti-money laundering laws and provisions for confiscating and taxing criminal property.

There has recently been debate in the United Kingdom as to how effective the English law is in allowing the courts to find the appropriate degree of culpability in the case of corporations. Companies are in most systems of law legal persons and as such subject to the ordinary criminal law. The various theories that have been developed, especially in the common law tradition, to attribute the state of mind of an individual to the company have not worked particularly well. The identification of a single individual with the company is in the context of a large corporation – perhaps operating in many jurisdictions, almost impossible. On the other hand, regulatory systems have had success in holding companies and in particular financial institutions, accountable for failures in compliance and have as we have seen, perhaps counter-productively, imposed swinging financial penalties – which arguably are disproportionate to the wrong in question. There is an increasing worry about this state of affairs and a desire to place responsibility fairly on those who are either at fault, or who because of their positions have in effect almost a duty of care to prevent wrongdoing occurring on the part of those for whom they are responsible. Company law has long struggled with such issues. Until relatively recently directors were allowed to more or less delegate their functions with impunity and to some extent the less responsibility they assumed the less likely they would be criticised if something went wrong. There were exceptions particularly in the case of insolvency and attitudes have changed especially in regard to non-executive directors. In the financial sector there has been even more emphasis on the responsibility of those in authority to make sure that appropriate procedures have been put in place to address risks. However, while we have increasingly come to appreciate, that most complex frauds and other forms of misconduct require the assistance, innocent or otherwise, of lawyers, accountants and bankers, with the exception of the money laundering offences, we have hesitated to impose liability for 'mere' facilitation of other people's misconduct.

There are real issues for debate as to the level of culpability at which it is seen to be justified to impose responsibility in the criminal, civil and regulatory law. Where real penalties are involved traditionally there has been a degree of hostility to imposing meaningful liability for less than recklessness. In the context of developing economies or where expertise and experience is at a premium, a willingness to impose more onerous responsibilities on those who manage other people's wealth might result in a reluctance to assume responsibility and undermine development. For similar reasons, there is a very real problem in attributing knowledge and intention to corporations. The English courts have on the whole required prosecutors to identify the 'directing mind and will' of the company and it is the state of mind of that individual which will be attributed to the company. In complex situations invariably viewed two or three years down the road, establishing this in court to the requisite standard of proof is a barrier that few have managed to surmount. Of course, there are other theories which may be more effectively employed and it is true that some courts, including the House of Lords, have taken a rather more robust approach. An alternative approach to attempting to fix criminal responsibility on a company for the misconduct of those it employees or who act for it, is to simply create liability for failing to prevent certain types of misconduct taking place.

This is not a new idea as we point out later on in our discussion. The US law as early as 1934 imposed liability on those who while in a supervisory position could not show that they had taken reasonable steps to prevent the wrongdoing of those under them. While this

approach has morphed into a much more developed jurisprudence based on 'control' some other jurisdictions have espoused it in this rather simple form. Indeed, Commonwealth Law Ministers meeting in Zimbabwe commended it as a sensible approach in 1986. There is, of course, a watered down version in English law: namely section 7 of the Bribery Act 2010. The Coalition Government in the UK under Prime Minister David Cameron became interested in such ideas and the Attorney General, Jeremy Wright QC announced at the 32nd Cambridge Symposium on Economic Crime that the government were considering legislative proposals for a new separate offence of failing to prevent economic crime. However, the following year then Minister of Justice, Mr Andrew Selous, announced that the government had decided not to pursue this approach. In May 2016, Justice Minister Dominic Raab announced that the government had not in fact jettisoned the idea and consultations would take place. Mr David Cameron also at his international conference on corruption in May 2016, stated that it was the governments intention to press on with the crafting of such an offence, not only in regard to the facilitation of tax evasion [an agenda that the Treasury had been pursuing more or less independently] but also for other crimes such as money laundering, bribery and fraud.

The UK's Criminal Finances Act 2017 provides for a new criminal offence of corporate failure to prevent tax evasion or the facilitation of tax evasion. In many respects it follows the approach in section 7 of the Bribery Act 2010, which might be problematic. This offence is limited to the facilitation of tax crimes although it should be noted that the Finance Act 2016 extends significantly the scope of the criminal law. For example, section 166 creates an offence of failing to give notice of liability to income or capital gains tax, failing to provide a tax return or failing to make an accurate return relating to offshore wealth and assets. At the 34th Cambridge symposium in September 2016 the Attorney-General announced that it is a priority in the governments overall strategy against economic crime to impose similar liability for the facilitation of a much wider class of economic crime. The Director of the Serious Fraud Office, Mr David Green has been a vocal and strong supporter of a new offence of corporate failure to prevent economic crime. In successive addresses the symposium since his appointment he has emphasised that without such an offence, the current law actually gives those in senior management an incentive to disassociate themselves from what is happening in their businesses.

There is also pressure from the UK's National Crime Authority to incorporate a wider offence that would extend to the facilitation of money laundering and fraud. Several attempts were made to introduce amendments to the Criminal Finances Bill to achieve this. On the other hand there appears to be very strong opposition from the business community – especially the City of London and the leading law firms. There are those who feel that given the uncertainties that have been thrown up by Brexit, to impose on businesses a new and potentially serious threat of prosecution for failure to police the misconduct of those associated with them would be a bridge too far!

Section 7 of the Bribery Act although in its enactment somewhat watered down from what was first advocated – largely as a result of pressure from City law firms, has not proved to be as useful as some had hoped. While it may yet prove to be an effective persuader of probity through the process of monitoring and deferred prosecution agreements, prosecutors have been reluctant to use it. As is already feared in regard to the new offence of corporate failure to prevent tax fraud, establishing a defence on the basis that reasonable steps were taken by the company to prevent the relevant misconduct, the similarly worded defence in section 7 has proved problematic. There is a view that a jury faced with evidence of bribery would be reluctant to regard any procedures as reasonably adequate. The Government has made it clear in the context of the new corporate tax offence that 'reasonable procedures need not be fool-proof and need not have actually stopped the financial crime from occurring.'

Indeed, in one leading case on attribution of responsibility for misconduct, Lord Templeman, in the House of Lords, stated that if what is forbidden has in fact been done by those working for the company in question, the sufficiency of compliance is merely an issue for mitigation!

In the USA the pervasive use of control, as we discuss below – as a basis for civil and occasionally criminal liability, has not proven to be a 'silver bullet' let alone some kind of panacea for addressing economically motivated crime. The circuits in the USA diverge significantly in the degree of 'control' and *scienter* that needs to be proved. There remains a reluctance – and perhaps one that we should respect – on the part of the judiciary to impose criminal liability of those who have simply failed to prevent the misconduct of others. The law is always hesitant, as we have already intimated, to impose obligations on others to prevent even the crimes of those that cannot reasonably be attributed to them. Indeed, there are jurisdictions that have attempted to impose a general duty to prevent crime and this has not worked well. On the other hand we properly recognise that it is desirable to impose legal duties on those who are in certain positions, to protect those who are especially vulnerable. We have also, particularly in the context of those who by virtue of their business or profession take it upon themselves – for reward, to mind other people's wealth to assume wider responsibilities not least to society. While the present author sees value in imposing on those who assume managerial responsibilities to discharge them properly and adequately supervise the conduct of those for whom they are responsible, the expedient of a broad and strict liability on the business itself might be premature.

Not with standing the emphasis that is placed in the modern world on fighting serious crime through laws concerned with criminal property, the efficacy of anti-money laundering laws in the context of corruption control and many other areas of criminality has yet to be proved. For such provisions to be able to bite there is a need for the conduct that is considered corrupt to be, had it occurred, within jurisdiction a criminal offence. In part this is why it was desirable to provide clearly in UK law that the bribery of a foreign official anywhere in the world by an agent of a British company or a company with a defined relationship with the UK, is a specific and serious offence. While it is the domestic jurisdiction where the anti-money laundering law is invoked that is relevant, it is the case that the approach of other legal systems is not uniform, particularly in regard to such issues as facilitation payments and the conduct of independent actors. It is also the case that the record of most countries in actually forfeiting or confiscating the proceeds of crime is far from impressive. For example, in the United Kingdom, the amount of criminal property that has been confiscated is a miniscule proportion of the assumed whole. Even in the relatively clear cut case of drugs related crime, it is guessed that in the United Kingdom we are confiscating less than 0.001 per cent of the suspect wealth involved [44]. Indeed, there are those who consider that this 'guestimate' is significantly over estimated. In the case of fraud and corruption the amounts that have been confiscated are ridiculously small. Even in the USA the proportions are not vastly different. In most countries, particularly in the developing world they are far worse.

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

It is probable that disruption as a strategy in law enforcement is better suited to dealing with organisations and structures that require consistent and timely flow of funds [45].

Intelligence – a two edged sword!

The role of intelligence in discouraging corruption and assisting in its control is a dark area. Indeed, it is often said that intelligence agencies themselves are privy to and perhaps occasionally involved directly in corruption. The UK Bribery Act 2010 specifically exempts the intelligence agencies in Britain, in certain and limited circumstances from its provisions [46]. It would be naïve to underestimate the interest that intelligence agencies have in the corrupt and illicit activities of persons in power. The involvement directly or indirectly of governments and their agents, in addressing the implications of, for example – historically, indigenization in countries such as Uganda and Malaysia, overseas investment – particularly by countries such as China and the turmoil generated by the assertion of fundamentalist religious views are never simple or for that matter necessarily transparent. Considerable expertise, not least within government agencies, was developed in Rhodesia and in apartheid South Africa in laundering and hiding wealth and in particular busting sanctions. During the Cold War similar conduct occurred, facilitated by various governmental players throughout Africa – but particularly in Angola, the Congo and even Ghana. To some degree this expertise has remained accessible to those who wish to loot their countries and facilitate the flight of capital. As we have already pointed out it was not that long ago that agencies and even government departments in Europe offered advice to businessmen on who to bribe and what the going rates were – and boasted that their information gathering facilities would be used to advance the business and commercial activities of their nationals. Ignoring this somewhat unpalatable albeit probably necessary activity, there is clear evidence that intelligence agencies have when it was thought appropriate assisted in the exposure of corrupt officials, albeit mostly overseas! More recently some have played a very significant and positive role in assisting in the tracing of missing and stolen assets, particularly from North Africa.

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

Blowing the whistle

Mention has already been made of the difficulty of identifying viable champions to stand up against corruption and wrongdoing. It has also been pointed out that many of the forms of misconduct which we are addressing occur behind closed doors where there is little incentive for

anyone who is ‘in the know’ to complain. Indeed, given the power and influence that those involved in abusing their positions have it can be very dangerous to raise effective opposition. The experience in more developed jurisdictions of attempting to combat abuse indicates that a very significant factor is the willingness of persons who do know or suspect what is going on to ‘blow the whistle’ or act as an informant. There are many reasons why someone might be prepared to take a stand or at least alert others to what might be taking place. There are those who as a matter of conscience and moral outrage are prepared to step forward, others might simply be jealous of those who are lining their pockets. Indeed, some of the best sources of information are persons who have a vengeance against the wrongdoers – particularly jilted wives and ex-lovers! In ‘western’ societies there is an increasing recognition of the significance of whistle blowers in promoting integrity and due compliance. Indeed, the UK Home Office has recently established a working party to inquire into whether the UK’s laws protecting whistle blowers need to be further strengthened. In particular, there is interest in the extent to which we can all learn from whistle blower strategies in the USA. The most recent legislation in the US relating to the financial industry, in addition to increasing the legal protection for whistle blowers provides that they may be awarded bounties up to 30 per cent of the fine eventually imposed by regulators for violation of the law. Given the size of some of the fines imposed by US financial regulators the rewards for informing might be very significant indeed.

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

The area of plea bargaining is one that it is equally controversial. Again in the USA plea bargaining plays a major role in securing convictions for economic crime cases and in particular those involving continuing enterprises. In Britain there has been reluctance to adopt this approach and recent attempts by the Serious Fraud Office to do so, without the involvement of the court, and ‘agree’ levels of financial penalty [in collaboration with the US authorities] has been declared unlawful wholly unacceptable [47]. On the other hand, it has been accepted that encouraging in particular corporations that discover misconduct has occurred, to ‘self-accuse’ themselves to the authorities is desirable and to be encouraged. The Serious Fraud Office in such cases is able to enter into a deferred prosecution agreement, with the agreement of the court, with the ‘defendant’ under the terms of which no prosecution will be initiated within a period provided agreed steps are taken to remedy what has occurred and make restoration. If these conditions are properly observed, under monitoring, then the case will be dropped [48]. In the US considerable reliance is now being placed on similar procedures and the SFO in the UK is keen to build on the success it has had in its first three cases.

Creating and sustaining systems for the protection of whistle blowers and even informants is an expensive business. Many developing countries are not in a position to provide in law or in practice the protections that would persuade a vulnerable person to speak out let alone appear in subsequent legal proceedings as a witness [49]. The Commonwealth scheme for facilitating the protection of witnesses in criminal cases which has influenced other international initiatives and instruments has played a role, albeit few countries are in a position to offer the level of financial support that is necessary. Countries such as Canada and

Australia have contributed much in offering new identities and re-settlement to endangered witnesses, but these have tended to involve organised crime and mainly drugs related cases. There is a real problem with human trafficking, where the victim who may be the best witness might be vulnerable not least in terms of their legal status in the country where they are trafficked into. Indeed, their plight might be even greater where they have been further exploited and inveigled into providing sexual and other illicit services. There is much to be done in this context as again it is the most at risk that are seemingly the least protected.

Unexplained wealth

Perhaps a rather more controversial suggestion for strengthening the hands of those who are concerned to discourage and pursue corruption and acquisitive crime is the development of procedures that identify unexplained wealth and in certain circumstances allow for its seizure [50]. Again the UN Convention contains a provision basically commending this approach without actually obliging countries to enact such laws [51]. There is obviously some sensitivity in empowering the state to demand under threat of criminal penalties details as to the ownership of property. Indeed, in some cases it may well be argued that such wide ranging powers might be unconstitutional in so far as they violate the 'right' to privacy [52]. British colonial governments in imposing criminal codes on many parts of the Empire were concerned about misconduct in public office albeit the same degree of concern appears not to have been felt at home! The Bribery Ordinance in Hong Kong is of particular interest in this respect. Section 10 in effect creates a statutory presumption that any wealthy over and above the lawful remuneration of a public official is the proceeds of corruption. In addition to the offence of having excessive unexplained wealth, there are provisions for its recovery and for the net to also be thrown over close relatives and associates. Similar provisions were enacted in other parts of the Commonwealth. A number of civil law jurisdictions have adopted similar provisions, but in the main within their administrative law. In the context of promoting good governance and leadership much has been done, not least in Africa, to establish more or less effective codes, requiring a degree of wealth transparency, for leaders and persons in positions of influence. On the other hand, in many countries and there has been concern as to whether such laws comport with human rights. It is also the case that in not a few developing countries there is an express or implicit desire to see some degree of reallocation of wealth – explained or otherwise, albeit not as a result of corruption!

In the United Kingdom while some have advocated the adoption of such procedures at least within compliance systems, until recently there has been reluctance on the part of successive governments to invoke legislation. The Coalition Government under Prime Minister David Cameron took a more robust stand against international corruption and in particular the inveigling of the City of London into money laundering. Indeed, the concern of the government was wider than the traditional financial markets and extended to the property market especially in London and high value commodities. In part this concern was perhaps political, but considerable effort has been made to address what are seen to be the legal and administrative weaknesses of the UK's anti-money laundering laws and the law relating to criminal property. The Criminal Finances Act 2017 introduced unexplained wealth orders for the first time in UK law. An individual or company may be required under such an order to explain the origin of assets that appear to be disproportionate to their known income and they are suspected of involvement in or being associated with serious criminal conduct. Politically exposed persons can also be required to disclose the origin of their assets whether they are suspected of involvement in crime or not. A number of agencies, including the Serious Fraud Office and Financial Conduct Authority in the UK are able to apply to the court for such an order and the property in question may be frozen. The provision of false information will be

an offence and a failure to respond will render the assets in question liable to the civil confiscation procedure. The Act also extends the power to issue disclosure orders in the case of money laundering investigations [52].

Going forward it is probable that focussing unexplained wealth will play an increasingly important role in the identification of those suspected not only of tax fraud and evasion, but other acquisitive crimes [53]. At the intelligence level, net worth analysis has always been an important and useful tool particularly for revenue services. Now that there is so much more information available, it is certain to become even more effective. It is also the case that under the laws relating to identification and interdiction of criminal property, we are increasingly adopting procedures which focus on unexplained wealth [54]. In the United Kingdom, for example, two convictions within a period will enable the court to presume that wealth in the hands of the defendants is the proceeds of a life style of crime and to avoid confiscation the defendant will be required to explain the source of this wealth. Indeed, in civil asset recovery cases it is possible to allege that unexplained wealth is likely to be the proceeds of crime on a civil burden of proof. Given the practical problems in establishing the nexus to a specific crime it makes a lot of common sense to focus simply on unaccounted for wealth.

There are relatively few countries that have statutory powers analogous to those contained in the recent legislation in Britain. The experience of those that have such as Australia and Ireland is mixed. Of course, as we have seen revenue authorities have long had the authority to raise charges and thus effectively require disclosure, in regard to unaccounted for wealth. Net worth analysis, as has been pointed out, has also been used to identify unexplained wealth in particular in the context of suspected corruption. For example, in the context of Africa, the Special Investigation Team, Economy and Trade in Zambia regularly used this form of analysis to identify potential cases of interest. The British government also run specialised training for agencies in many countries including Ghana, Malawi and Zimbabwe. While the use of mandatory disclosure orders has been discussed in several African states, there is a fear that they might be used for political purposes and therefore there is distrust in the impartiality of their use. This has been an issue specifically in South Africa.

Financial Intelligence

Throughout our discussion we have in various contexts emphasised the importance of intelligence [54]. It is the case that until relatively recently most police agencies had at best very limited access to and perhaps understanding of intelligence. The role of intelligence while well appreciated in protecting national security was not widely seen as a tool in traditional and conventional law enforcement [55]. This was a result of many factors both social and political, and in some countries legal – where a divide was maintained between the institutions of the state concerned with defence and related issues and law enforcement. In recent years particularly as a result of the threat of terrorism the barriers between law enforcement and agencies more involved in national security has to some degree diminished. This is not to say that in a good many countries there remains a certain amount of professional rivalry if not distrust. The agencies which been primarily concerned to develop and deploy intelligence have not always needed to work through the legal system as their objective is not focussed on a successful prosecution. As they will often intervene on the basis of intelligence rather than evidence, they are not subject to the constraints that traditional law enforcement must observe. The skills and incentives for those working in intelligence are different to those in conventional policing.

Police agencies have increasingly recognised the role that good intelligence can play both in strategic and tactical decision making. The problem has been in many cases is that the intelligence may not have been fashioned for the purposes for which the police seek to utilise it. Real issues arise in the legal system in the handling and sharing of intelligence and as we

have already indicated intelligence is not evidence, let alone admissible evidence. As more emphasis has been placed in policing on the tactics of disruption particularly in regard to criminal enterprises, the importance of intelligence has become obvious. Many police agencies have attempted with varying degrees of success to develop their own intelligence capabilities. Problems have arisen rather more in their ability to analyse and deploy intelligence than in gathering information. Mention has already been made of the tensions that exist within the legal system in police agencies adopting disruption as an approach to limiting the impact of serious and organised crime. Disruption even if effective does not generally fit well with the more traditional objectives of the criminal justice system and the expectations of the public and their politicians. It is not well understood by the media and, of course, perhaps some of the most effective interventions must be kept confidential. Intelligence relies on discretion both in terms of source and effect. This may well run counter to the desire for accountability and measurement both of which are required in policing.

Financial intelligence, as we have underlined in this paper, has a particularly important role to play in establishing linkages and vulnerabilities. Indeed, financial intelligence is fast becoming recognised as one of the most important tools for addressing structured criminal and subversive activity, both in terms of management and intervention. The problem for most conventional law enforcement agencies is that such intelligence may be even more specialized in its import and use, than non-financial intelligence. Even where the analysis and interpretation is provided to police it may be that they lack the expertise and resources to use it effectively. To some degree this problem is addressed by expanding the scope of what might be considered appropriate recipients and actors. We have already mentioned the important role in preventing and fighting particularly financial crime of regulatory bodies and even the private sector through their compliance structures. The danger is, of course, the reluctance of organisations to expose sources and reduce the value of information and intelligence through over or insecure dissemination. It must also be remembered that regulatory and other action, based on such disclosures, might well be challenged in the courts, where mere intelligence might not provide an acceptable justification for the action that has or not been taken. Once the matter is litigated, evidence is required – not mere information, not matter how reliable!

The relationship of financial intelligence to financial investigation is also worth of consideration. Financial intelligence may well need to be refined into evidence through a process of forensic investigation. Rarely will the agencies that create financial intelligence have the mandate, powers and resources to process the intelligence to a point when it can be considered evidence. This process will often be undertaken by other agencies and most often the police. Understanding of the mutual limitations of these functions by all concerned in law enforcement is vital. There have been many examples where good financial intelligence, provided by a financial intelligence unit, has languished in the hands of police agencies that either do not fully appreciate its significance or have the resources to take it further. There have also been cases where much the same has happened in the case of regulators. There is obviously a real issue for recipients of information where they are unable to properly use it, as they then become themselves objects of criticism and at risk in the future. It is not uncommon to find in such circumstances senior officials loose their jobs and even the organisation comes under serious attack. It must also be remembered that there could be serious civil law consequences in addition to public and media criticism. Therefore it is highly desirable that those who create financial intelligence can achieve proper and effective integration with those who are expected to use their product.

A practical issue that often arises is the integrity and reliability of the intelligence in question, as this will impact on its use and the willingness of others to deploy their resources and make available their powers. This is a perennial problem for providers of intelligence as

they will often be understandably reluctant to disclose sources or will be unable to do so because of legal constraints. This is exacerbated where all or part of the information is sourced from overseas. An effective integration of the intelligence stage, the investigation and development of legal interventions – including prosecution, is perhaps the optimum [56]. However, in the real world, the legal and other constraints which affect these processes tend to militate against efficiency. The more that can be done to facilitate understanding between the various players the better are likely to be the results.

Investigations and secrecy

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

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

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

Those who have acted corruptly will not give up themselves or their ill-gotten gains easily. They will have structured their actions to make it difficult to detect, let alone identify and investigate those involved and the property in question. They will have used experts to hide their wealth and discourage inquiries. Of course, this is nothing new the same techniques are used by those who wish to hide the proceeds of serious crime and terrorist related finance. Today the number of countries that are willing to prostitute their sovereignty by deliberately facilitating money launders and the like are much fewer. However, they do still exist and there are jurisdictions that have very few procedures and or capacity for co-operation with other states. Furthermore, it cannot always be assumed that the government and its agencies are willing to co-operate. They may have some sympathy, where there has been a change in

government, with the former leadership. Or they may have been corrupted. Sadly, this is not fanciful. There are examples of governments and their central banks that have been willing for a price to become essentially money launders for organised crime and other criminals. In one case involving a Commonwealth country in the Caribbean the corruption encompassed the then Prime Minister, Attorney General and banking regulator. Investigators from the USA were simply murdered and others – including the Secretary-General of ICPO-Interpol and an investigating magistrate in Switzerland defamed and sued. In such cases there is no justice or realistic prospect of justice. In another case, the then government of Ghana seemingly entered into an arrangement with an international fraudster to share the proceeds of his frauds and launder illicit wealth. Those who raised this as a concern were silenced. The Seychelles even went so far as to enact legislation facilitating laundering of suspect wealth and inhibiting the tracing of criminal property. Sadly there are many other examples.

While governments were apparently reluctant to give up the benefits of providing bank secrecy and other offshore related services to suspected criminals simply on the basis that they might be assisting such in laundering their wealth, there was a sea change after 9/11. The concern of President Bush, albeit perhaps in retrospect misguided, to turn the financial weapons that had been fashioned to deal with South American drug dealers, on terrorist, meant that countries were in reality either part of the solution or part of the problem! While the Republican Party had been loath to expose to the glare of the US Internal Revenue Service the comfortable financial arrangements that some leading American corporations had developed with certain Caribbean jurisdictions and Bermuda, the fear – that turned out to be more or less groundless, that these jurisdictions were being used to launder terrorist funds, resulted in the near death of financial privacy. As a subsequent Congressional Committee reported attempting to identify terrorist funds in the same way as drugs money was a nonsense and the mechanisms that were adopted was like trying to ‘drain the ocean to find one kind of fish.’ The more so because in practice the unofficial underground banking systems such as the hawallah systems were far more significant for the terrorists in issue [57]. Furthermore, where conventional bank accounts had been utilised they were invariably based in the Pacific – mostly US dependencies or the US itself!

Now that the ‘crusade’ has moved on from drug lords and terrorists to corruption we see the same arguments being employed to expose the financial arrangements and wealth of those who are suspected of corrupt practices or, perhaps rather more worrying, those who are or who have been politically exposed, their families and their business associates. A cynic might think that all this has perhaps more to do with exposing financial records to the tax authorities, than promoting integrity! The financial crisis and the near collapse of western banking combined with spiralling social welfare and health costs have focussed governments’ attention rather more openly on the collection of taxes and the public account. Of course, concern about combating terrorism still remains the best ‘can opener’. However, in reality it is the widely held perception that considerable amounts of wealth properly subject to taxation are being ‘held’ in or ‘laundered’ through the remaining jurisdictions that offer discreet offshore financial services. Revelations such as the so called ‘Panama papers’ scandal fuel this suspicion. The apparent willingness of established and hitherto respected international banks to facilitate deliberately or negligently the hiding of this wealth has exacerbated concern particularly at a political level. Indeed, it has been said that up to a third of the world’s wealth is in this sense ‘unaccounted’ for [58]. The implications in terms of accountability and thus, responsibility are profound. Lawyers and others who facilitate the hiding and washing of wealth have come under particular scrutiny and the UK’s National Crime Agency has made it a priority to focus on such as ‘targets’. Mention has already been made of the new legislation in the UK rendering it a crime to assist in tax evasion.

Whether wealth from crime, corruption or simply seeking escape from taxation, it will often be held in the name of a company and companies will often be employed to facilitate the laundering process and hide those involved [59]. The OECD and the G7 has expressed concern about the facility that many jurisdictions offer for easy and cheap incorporation [60]. While the offshore jurisdictions have come in for a great deal of criticism, the prime offenders in terms of easy incorporation and the ability to hide beneficial ownership are arguably not exotic island jurisdictions in the Caribbean and Pacific, but the UK and USA. Mr David Cameron when British Prime Minister announced that legislation would be introduced to expose the beneficial ownership of UK companies [61]. The UK's dependencies have also been required to introduce registers of beneficial ownership [62]. Such measures while helpful to some degree, are relatively easily evaded and there has been an increase in the use of other business forms, such as the trust and individual nominees. While all these initiatives are to be welcome it remains to be seen whether in practice it will make much difference for those who are charged with the investigation of corruption. In the end the transparency of the international financial system is only as good as its weakest link. In this regard, in the wholesale abandonment of the virtues of privacy in financial matters, we should perhaps not forget why privacy was invented, or at least called in aid, by lawyers and bankers – namely to protect the weak and legally vulnerable from the unjustified deprivations of governments and tyrants. In all our deliberations about corruption and its malevolent cousins, it is necessary to retain a sense of proportion and in particular to be aware of unintended consequences both in the conception of law and in particular in its application.

A postscript!

In this paper we have considered a number of issues pertinent to the advancement of integrity and in particular the interdiction of corruption to some degree from the perspective of Africa. The potential for Africa as a player in the world economy is enormous. So far the ambiguous inheritance of rapacious empires and the turmoil of self-dealing elites in post-colonial times has successfully obscured and undermined this potential. Indeed, such has been the mismanagement, selfishness and importuning that many have grave doubts as to the ability of many states to achieve an ordered transition to what they could and should be. South Africa is perhaps the best example of a society that while avoiding the catastrophe that its recent past predicted, remains racked by corruption and mismanagement [63]. That there is the will in many parts of the continent to further stability and security by addressing the cancer of corruption, the reality is that few have remained or been allowed to remain steadfast in their mission and all have been frustrated by political self-interest and lack of resources [64]. The key might be education and inter-generational change as it has been in other parts of the world, but only an optimist would see this coming any time soon – there is too much vested interest inside and outside Africa in keeping things much as they are!

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5. See generally, W. Twining, Globalisation and Legal Theory, (2000), Butterworths and H. Glenn, Legal Traditions of the World (4th Ed), Oxford, K. Zweigert and H. Kotz, An Introduction to Comparative Law (3rd ed) (1998), Oxford, Pt 111, S. Frommel and B. Rider (eds), Conflicting Legal Cultures in Commercial Arbitration (1999), Kluwer, B. Rider, Law at the Centre (1999), Kluwer and B. Rider, Y. Tajima and F. Macmillan (eds) Commercial Law in a Global Context (1998), Kluwer

6. See B. Rider, K. Alexander, S. Bazley and J. Bryant, Market Abuse and Insider Dealing, (2016) Bloomsbury.

7. See generally B. Rider and T.M. Ashe, The Fiduciary, the Insider and the Conflict, (1995), Sweet and Maxwell and from a comparative perspective, C. Nakajima and E. Sheffield, Conflicts of Interest and Chinese Walls (2002), Butterworths.

8. B. Rider (ed), Corruption – The Enemy Within (1997) Kluwer

9. See D. Chaikin and J. Sharman, Corruption and Money Laundering – a Symbiotic Relationship (2009) Palgrave and more generally B. Rider and M. Ashe (eds), Money Laundering Control (1996), Sweet & Maxwell and B. Rider "The wages of sin – taking the profit out of corruption – a British perspective" (1995) Dickinson Journal of International Law 391. It is also worth noting that in many jurisdictions the control of insider dealing is often associated in time and in legislation with money laundering, see B. Rider, "The Control of Insider Trading – smoke and mirrors!" 1 International and Comparative Corporate Law Journal (1999) 271. See also B. Rider, "The practical and legal aspects of interdicting the flow of dirty money" 3 Journal of Financial Crime (1996) 234.

10. See for a discussion of differing attitudes to such integrity related issues B. Rider and H.L. Ffrench, The Regulation of Insider Trading (1979) Macmillan and B. Rider, "Policing Corruption and Economic Crime – how can we do it better?" (2015) Frontiers of Law, issue 4. See also S. Press, Rogue Empires, Contracts and Conmen in Europe's Scramble for Africa, (2017), Harvard University Press.

11. For a discussion of the institutional aspects see B. Rider, The Promotion and Development of International Co-operation to Combat Commercial and Economic Crime(1980) Commonwealth Secretariat, London, B. Rider, "Combating International Commercial Crime," (1985) Lloyds Maritime and Commercial Law Quarterly 217; B. Rider, "Policing the City – combating fraud and other abuses in the corporate securities industry" 41 Current Legal Problems (1988) 47 and B. Rider 'Blindman's Bluff – A model for securities regulation' in J. Norton and M. Andenas (eds) Emerging Financial Markets and the Role of International Financial Organisations (1996) Kluwer.

12. A communique setting out a common approach to tackling corruption, as agreed by participating countries and, where appropriate, international organisations. Published: 12 May 2016, UK Cabinet Office as Part of The Anti-Corruption Summit: London 2016 Government transparency and accountability hosted by Prime Minister David Cameron MP. See generally L. Cockcroft, Global Corruption, money, power and ethics in the Modern World, (2014) Tauris.

13. See B. Rider "Probing Probity; A discourse on the dark side of development' in S. Schlemmer-Schulte and K. Tung, International Finance and Development Law (2000), Kluwer and in regard to the similar issues that arise in regard to insider abuse, B. Rider and M. Ashe, Insider Crime (1993) Jordans and B. Rider 'The control of insider trading: smoke and mirrors' in E. Lederman and R. Shapira, Law, Information and Information Technology (2001) Kluwer.

14. For an excellent discussion of this see M. Levi, The Phantom Capitalists (2008 ed), Ashgate.

15. L. Brandeis, Other People's Money and how the Bankers use it (1914), Harpers, Ch 5.

16. Much has been written on the 'reaction' to corruption in Africa not least in the Journal of Financial Crime and Journal of Money Laundering Control of which the present author is general editor, but see in particular W. Adebanwi, A Paradise for Maggots (2010), Wale Abedanwi. See also J. Sharman, The Despot's Guide to Wealth Management (2017) Cornell and C. Gpredema, "Measuring Money Laundering in Southern Africa" 14 African Security Review (2005) No 4.

17. R. Chan, D. Ho, A. Lau and A Young, "Chinese traditional values matter in regulating China's company directors: Findings from a empirical research" (2013) 34 The Company Lawyer 146. See also B. Rider, H. Yan and Li Hong Xing, The Prevention and Control of International Financial Crime (2010) China Financial Publishing House, Chs 1 and 2.

18. See B. Rider, "Islamic Financial Law; Back to Basics" in The Changing Landscape of Islamic Finance (2010) IFSB, Ch 5.

19. For a discussion of similar issues in Shar'ah see B. Rider, "Corporate Governance for Institutions offering Islamic Finance" in C. Nethercott and D. Eisenberg (eds) Islamic Finance, Law and Practice (2012) Oxford University Press and B. Rider and C. Nakajima, "Corporate Governance and Supervision" in S. Archer and R. Karim (eds), Islamic Finance – The Regulatory Challenge (2007) Wiley Finance; C. Nakajima, "Responsible business" 20 Journal of Financial Crime (2013) 256 and C. Nakajima, "The importance of legally imbedding corporate social responsibility" 32 The Company Lawyer (2011) 257

20. "Russia ranks first in use of death penalty" Los Angeles Times 5 February 1972. China regularly uses the death penalty for serious cases of economic crime, but see B. Rider "A tale of two cities" 19 Journal of Financial Crime (2012) 4 and B. Rider "When Chinese whispers become shouts" 20 Journal of Financial Crime (2013) 136. See also B. Rider, Organized Economic Crime (In Chinese) (1999), Peking University Law Journal, 1-128

21. See E. Sutherland, White Collar Crime (1949) Dryden Press; E. Sutherland, White Collar Crime: the Uncut Version (1983) Yale and E. Sutherland, "Is White Collar Crime Crime?" 10 American Sociological Review (1945) 132. See also N. Shover and J. Wright,

Crimes of Privilege (2001) Oxford, in particular Ch 1 and E. Soltes, Why they do it – inside the mind of the white collar criminal (2016), Public Affairs and B. Rider, "The Wages of Sin – Taking the Profit Out of Corruption – A British Perspective," (1995) 13 Dickinson Journal of International Law, 391 in regard to motive.

22. See for a perspective on this issue, Siti Faridah Abdul Jabbar, "Corruption: delving into the muddy water through the lens of Islam" 20 Journal of Financial Crime 139 and B. Rider "Back to Basics" in The Changing Landscape of Islamic Finance – imminent challenges and future directions (2010), *supra*, and also in Strategies for the Development of Islamic Capital Markets (2011) Asian Development Bank and IFSB in Ch 3.

23. See B. Rider and H. Ffrench, "Should Insider Trading be Regulated? Some initial considerations" 95 South African Law Journal (1978) 79 and B. Rider "Insider Trading – A crime of our times" in D. Kingsford Smith (ed), Current Developments in Banking and Finance (1989) Stevens

24. See Jamaican Bar Association v. The Attorney General of Jamaica (2017) JMFC 2 and B. Rider, "A privilege or a curse!" Editorial Comment (fourth coming) Journal of Financial Crime (2017).

25. United Nations Convention Against Corruption was adopted by resolution 58/4 of the UN General Assembly 31 October 2003 and came into force on 14 December 2005.

26. See generally L. Thompson, A History of South Africa (4th Ed) Yale University Press. A similar fate has befallen a number of initiatives in South Africa.

27. Attorney General for Hong Kong v. Reid (1994) 1 All ER 1

28. Report of the Fraud Trial Committee (1986) HMSO para 1. See also B. Rider, "Combatting International Commercial Crime" (1985) Lloyds MCLQ 217 and B. Rider "Policing the International Financial Markets" in C.Lye and R.Lazar (eds) The Regulation of Financial and Capital Markets (1990) Singapore Academy of Law and B. Rider, "Policing the International Financial Markets – an English Perspective" XVl Brooklyn Journal of International Law (1990) 179.

29. It is reported that of some 81,631 reports of suspected fraud by businesses in London in 2013 to 2014 there were only 9 successful convictions. Of some 103,000 suspected cases of business related crime only 758 were considered solvable by the police, H. Warrell, "Police urged to crack down on business crime" Financial Times 23 July 2014. The UK police also fail to identify a suspect in three quarters of property related crimes, R. Ford, Times July 18 2014 albeit the Homes Secretary asserts "criminal gangs are running swathes of Britain" R. Ford, Times 12 June 2014. Perhaps even more disturbingly it is arguable that only 2 per cent of computer related crime is actually reported and less than 0.5 per cent of this figure results in official investigation.

30. See B. Rider "Intelligent investigations: the use and misuse of intelligence – a personal perspective" 20 Journal of Financial Crime (2013) 293. See also S. Keene, Threat Finance, Disconnecting the Lifeline of Organised Crime and Terrorism (2012) Gower. See generally K. Hinterseer, Criminal Finance, the political economy of money laundering in a comparative context, (2002) Kluwer.

31. The Conservative Party in its recent manifesto for the general election in June 2017 proposed the amalgamation of the SFO with the National Crime Authority.

32. See B. Rider "Civilising the Law – the use of civil and administrative proceedings to enforce financial services law" 3 Journal of Financial Crime (1995) 11 and in particular, S. Bazley, Market Abuse Enforcement: Practice and Procedure (2013) Bloomsbury Professional.

33. For example, Nanus Asia Co v. Standard Chartered Bank (1990) 1 HKLR 396. However, the Hong Kong courts, as have most common law jurisdictions, have been prepared to recognise and support *in rem* orders by US courts in regard to proceeds of crime and see in particular in regard to freezing orders USA v. Abacha (2014) All ER (D) 56. In this case Field J. stated "corruption, like other types of fraud, is a global problem and it and its consequences are only going to be dealt with effectively if there is co-operation and assistance not only between the governments of states but also between the courts of different national jurisdictions." See also Republic of Hati v. Duvalier (1989) 1 ALL ER 456 where Staughton LJ observed – "this case demands international co-operation between all nations". Another important example is Motorola Credit Corporation v. Uzan (2003) All ER (D) 150.

34. See K. Stephenson et al, Barriers to Asset Recovery, Stolen Assets Recovery Initiative (2011) World Bank and UNODC and B. Rider "Pursing Corruption – civil weapons: old law in new bottles!" in Legal Studies in the Global Era, Legal Issues beyond the Boarders (2010) Chuo University Press.

35. See B. Rider, "The limits of the law: An analysis of the inter-relationship of the criminal and civil law in the control of money laundering" 25 Journal of Juridical Science (2000) 1.

36.See supra at n. 7, and in particular Regal (Hastings) Ltd v. Gulliver (1967) 2 AC 134, and generally R. Pearce, J. Stevens and W. Barr, The Law of Trusts and Equitable Obligations (5th Ed) Oxford University Press, Pt V and A. Burrows, The Law of Restitution (2011) Oxford University Press, Ch 26.

37. See for example of B. Rider "The regulation of insider trading in the Republic of the Philippines" 19 Malaya Law Review (1977) 355; B. Rider, "The regulation of Insider trading in the Republic of South Africa," (1977) 94 South African Law Journal 437 and see also in the context of China, B. Rider, Y. Haiting and Li Hong Xing, The Prevention and Control of International Crime (2010), China Finance.

38. Sumitomo Bank Ltd v. Karitika Ratna Thahir (1993) 1 SLR 735. See also M. Ashe and B. Rider, The International Tracing of Assets (2000) FT Law and Tax.

39. See FHR European Ventures LLP v. Cedar Capital Partners (2014) UKSC 45, noted B. Rider, "A simple approach to justice" 21 Journal of Financial Crime (2014) 379 and Attorney General of Hong Kong v. Reid (1994) 1 All ER 1 *contra* Sinclair Investments (UK) Ltd v. Versailles Trade and Finance Ltd (2011) 3 WLR 1153. See also B. Rider, Old Weapons for New Battles, (2009) Centre of Anti-Corruption Studies, ICAC, Hong Kong and B. Rider, "Corruption –The Sharp end of Governance" in S.Ali (ed), Risky Business, Perspectives on Corporate Misconduct (2010), Caribbean Law Publishing Co. for these developments in context.

40. See Selangor United Rubber Estates Ltd v. Craddock (No 3) (1968) 1 WLR 1555, Governor and Company of the Bank of Scotland v. A (2001) 3 All ER 58 and Armstrong DLW Gmbh v. Winnington Networks Ltd (2012) 3 All ER 425.

41. Agip (Africa) Ltd v. Jackson (1992) 2 All ER 451

42. Finers v. Miro (1991) 1 WLR 35. Of course, this has implications for those who handle and advise on the handling of other people's wealth in the ordinary course of their business, see for example, the Bank of Scotland case cited at n.31, Shah v. HSBC (2010) All ER 477 and B. Rider, "When risk becomes reality" 13 Journal of Money Laundering Control (2010) 313 and on the dilemmas faced by financial institutions B. Rider Compliance, An International Perspective on some of the challenges facing global compliance today (2014) Occasional Paper 72, Central Bank of Sri Lanka.

43. Another issue relevant to the discussion is the standard of culpability that is considered acceptable for the imposition of responsibility in the criminal law. An example of this is the discussion

that has surrounded the creation of a new offence for senior managers of relevant financial institutions in the UK whose reckless decisions result in the failure of the institution, section 36 Financial Services (Banking Reform) Act 2013. Similar concerns have manifested themselves in the law relating to directors duties in the civil law, see B. Rider "Amiable Lunatics and the Rule in Foss v. Harbottle" 37 Cambridge Law Journal (1978) 270. On the issue of attribution of responsibility see Re Supply of Ready Mixed Concrete (No2) (1995) 1AC 456 and Meridian Global Funds Management Asia Ltd v. Securities Commission (1995) 2 AC 500 and Labour's Policy Review: Tackling Serious Fraud and White Collar Crime (2013), Labour. It is also important to note the wide range of provisions in law and regulatory systems that may be more or less relevant on the facts of a particular case – see generally, C. King and C. Walker (eds), Dirty Assets, emerging issues in the regulation of criminal and terrorist assets, (2014), Palgrave and W. Blair, R. Brent and T. Grant, Banks and Financial Crime – the international law of tainted money, (2017) Oxford.

44. The UK National Audit Office estimated in the UK confiscation of criminal assets was no more than 26 pence in every £ 100 of criminal property and that in only two per cent of cases is the fill amount of the confiscation order actually collected, NAO Confiscation Orders, 17 December 2013. See also Report of the House of Common's Committee of Public Accounts, Confiscation Orders, 21 March 2014, SO and Proceeds of Crime, Home Affairs Committee, Fifth Report of Session 2016-2017, House of Commons. See also B. Rider "Taking the Profit out of Crime" in B. Rider and M. Ashe (eds), Money Laundering Control (1996) Sweet & Maxwell and B. Rider, "Recovering the Proceeds of Corruption" 10 Journal of Money Laundering Control (2007) 5 particularly p 26 *et seq* and A. Kennedy, "An evaluation of the recovery of criminal proceeds in the UK" 10 Journal of Money Laundering Control (2007) 33. Perhaps even more alarming is that not with standing over 350,000 suspicion based reports to the authorities in the UK in 2015 only 7 bank accounts were actually blocked. See generally UK National Risk Assessment of Money Laundering and Terrorist Finance (2015), UK Treasury and Home Office. See also P. Alldridge, What went wrong with money laundering law? (2016) Palgrave andM. Levi, P. Reuter and T. Halliday, "Can the AML system be evaluated without better data" (fourth coming) Crime, Law and Social Change (2018).

45. See A. Leong, The Disruption of International Organised Crime (2007) Ashgate and supra at n 18. See also B. Rider "The Enterprise of Crime" in B. Rider and M. Ashe (eds), Money Laundering Control (1996) Sweet & Maxwell.

46. Bribery Act 2010 section 13. See also on this R (on the application of Corner House Research) v. Director of the Serious Fraud Office (BAE Systems plc, interested party) (2008) EWHC 714 and (2008) UKHL 60 in regard to the legality of halting corruption related investigations and proceedings on the basis of national security, and see R. Norton-Taylor and R. Evans, 'No national security issue says agency', the Guardian 16 January 2007 and M. Evans *et al* in the Times 17 January 2007.

47. In R. v. Innospec Ltd, 26th March 2010, Southwark Crown Court) Lord Justice Thomas censured the SFO for failing to adhere to the rule of law. In his remarks on sentencing the learned judge stated 'it is clear that the SFO cannot enter into an agreement under the laws of England with an offender as to the penalty in respect of the offence charged'. He emphasized that such deals had no effect and, indeed, in a subsequent case Bean J. specifically rejected the recommendation of the SFO for a suspended sentence on the basis that the accused had co-operated fully and had done a 'deal' with the UK and US authorities. Thomas LJ considered that a traditional fine was the appropriate financial penalty and emphasized that there should be no difference, given the seriousness of the offence of corruption, between the UK and USA. In previous cases the SFO had settled a much smaller financial penalty than the millions imposed, albeit also by settlement, in the USA. Thomas LJ thought that 'if the penalties in one state are lower than in another, businesses in the state with lower penalties will not be deterred so effectively from engaging in corruption in foreign states whilst businesses in states where the penalties are higher may complain that they are disadvantaged in foreign states'. He also noted the very considerable fines that were imposed for in cases involving allegations of wrongdoing under competition law and made the point that corruption could have an even more serious impact on trade and business. He was not impressed by the argument that the SFO and US has brokered their deal because they did not want to put the business out of business. In his opinion if the business was corrupt it should be sanctioned. Indeed, Thomas LJ stated that it was improper for the SFO to try and do deals with the American authorities. See C.Nakajima, "Maybey may be the bridge we need," 19 Journal of Financial Crime (2012) 124.

48. Deferred Prosecution Agreements are now authorized pursuant to Schedule 17, Crime and Courts Act 2013 and See Deferred Prosecution Agreements Code of Practice, 2013, Serious Fraud Office and Crown Prosecution Service. A recent example of the efficacy of this 'device' is the prosecution agreement relating to Tesco Stores in the UK, under which the company 'agreed' to pay a fine of £ 129 million (Southwark Crown Court, Monday 10th April 2017)

49. The practical importance of whistle blowing in South Africa was emphasized by Corruption Watch in its Annual Report 2016, Issue 1. Note also the importance of this topic, 35th Cambridge International Symposium on Economic Crime (2017) University of Cambridge, Jesus College, September 2017.

50. The present author has long advocated this as a potentially important strategy, see for example, B. Rider, "Commercial Crime Co-operation in the Commonwealth" (1983) in the published papers of the 7th Commonwealth Law Conference (Hong Kong) at 433 and in particular, B. Rider and M. Ashe (Eds), Money Laundering Control (1996) Sweet & Maxwell. As an investigative tool in combating insider abuse see B.Rider, The Unacceptable Insider (1987) Legal Research Foundation (New Zealand) and B. Rider, "Policing the City – Combating Fraud and other Abuses in the Corporate Securities Industry," (1988) 41 Current Legal Problems 47

51. Article 20 provides "subject to its constitution …each state party shall consider adopting such legislation and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is a significant increase in the asserts of a public official that he or she cannot reasonably explain in relation to his or her lawful income." There are of course different issues here. There is the ability to use intelligence to identify unexplained and possibly suspicious wealth. Then the ability of those with a legitimate interest to demand, under penalty, details of ownership and control. Finally, there is the issue of interdiction – which might involve separate offence based on unjust enrichment or confiscation and taxing.

52. See for example J. Boles, "Criminalising the Problem of Unexplained Wealth: Illicit Enrichment Offences and Human Rights Violations," 17 New York University Journal of Legislation and Public Policy (2014) No 4. See also for various perspectives, Unexplained Wealth Orders: thoughts on scope and effect in the UK, Briefing Papers (January 2017), The White Collar Crime Centre (UK).

53. The UK's Criminal Finances Act 2017 also seeks, among other things, to improve the operation of seizure and forfeiture laws particularly in regard to cash; reform the regime for suspicious activity reports and information sharing.

54. See B. Rider "Intelligent Investigations: The use and misuse of intelligence – a personal perspective," 20 Journal of Financial Crime (2013) 293 and see also B. Rider, "Financial Crime – a thoroughly modern crime," 1 Financial Crime Review (2000) 2 and

"Policing the international financial markets: An English Perspective," (1990) XVI Brooklyn Journal of International Law 179

55. See R. Blum and M. Ricks, " Political Intelligence Agencies acting against Organised International Economic Crime," 4 Journal of Financial Crime (1996) 17 and B. Rider, The role of ICPO-Interpol in promoting international cooperation in combating serious international crime (1980) pp. 80, Report to Commonwealth Law Ministers. But see also

B. Rider "The war on Terror and Crime and the Offshore Centres: The New Perspective" in D. Masciandaro (ed), Global Financial Crime (2004) Ashgate.

56. See B. Rider, Report on Commercial Crime in Hong Kong with recommendations for the establishment of a Commercial Crime Unit within the Legal Department of the Hong Kong Government and the creation of a specialised unit within the Royal Hong Kong Police Force (1980), pp. 320; B. Rider, Report to the Prime Minister, Minister of National Defence and Central Intelligence Organisation of Zimbabwe, on the destabilisation and the establishment of a specialised agency (1986), pp.210, Overseas Development Administration UK; B. Rider and D. Phillips, Report to the President of Ghana on economic destabilisation and the establishment of a Public Conduct Inspectorate (1988), pp. 112; B. Rider, Report to the Prime Minister of Trinidad and Tobago on destabilisation, economic and political security (1988), pp. 260; B. Rider,The Prevention and Control of Corruption, Report to the Government of Mozambique and the Swedish International Development Agency (SIDA) (1994), pp. 130 and B. Rider, Report on Organised Crime in the U.K., Home Affairs Committee, House of Commons (1993 and 1994), pp. 220.

57. See also in regard to ‘chop’ and other systems B. Rider, “Fei Ch’ien Laundries – The Pursuit of Flying Money,” 1 Journal of International Planning (1992) August and December and B. Rider, Organized Crime in Hong Kong, Focus on Money Laundering and Asset Forfeiture (1993) and B. Rider, “The Financial World at Risk,” (1993) Managerial Auditing Journal No. 7.

58. See generally F. Schneider, The Economics of the Hidden Economy (Vols 1 and 11) (2008) Elgar. See also N. Shaxson, Treasure Islands (2012) Vintage and R. Murphy, Dirty Secrets (2017) Verso.

59. See generally S. Platt, Criminal Capital, (2015) Palgrave.

60. See G20 High Principles on beneficial ownership (16 November 2014), but see B. Rider, “The end of havens?” 12 Journal of Money Laundering Control (2009) 213. English judges have also done their bit – see B. Rider, “Exposing the modesty of companies” 34 The Company Lawyer (2013) 263. See also B. Rider, “Rumblings in the Corporate Jungle” 36 The Company Lawyer (2015) 33.

61. The UK Government in the context of implementing the EU Fourth Money Laundering Directive 2015/849EU promulgated the People with Significant Control (Amendment) Regulations 2017. This instituted a public register of beneficial ownership and in collaboration with UK Overseas Territories and Crown Dependencies has established a network of agreements which require effective disclosure and recording of beneficial ownership of companies, by the end of 2017, and the UK’s authorities will have access to this on a real time basis. In Europe the ‘systematic exchange’ of beneficial ownership established by the UK, Germany, France, Italy and Spain now extends to over 50 jurisdictions and covers trusts and other entities as well as companies.

62. See n 61, *supra.*

63. For an interesting panorama see M. Meredith, The State of Africa (2013) Simon & Schuster, particularly Pt 1V.

64. See S.C. Wanjala, Fighting Corruption in Africa: Mission Impossible? (2012) IACS and see BBC, No progress on African corruption says watchdog (27 January 2016). However, also note CGD (2015), Unintended consequences of anti-money laundering policies for poor countries, http://www.cgdev.org/sites/default/files/CGD-WG-Report-Unintended-Consequences-AML-Policies-2015.pdf.

СТРАТЕГИИ, НАПРАВЛЕННЫЕ НА ПОДДЕРЖКУ ЦЕЛОСТНОСТИ АФРИКИ

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Аннотация. В статье рассматривается ряд вопросов, касающихся борьбы с коррупцией и экономическими преступлениями в Африке. Потенциал Африки в качестве игрока в мировой экономике огромен. До сих пор неоднозначное колониальное наследие и произвол элит успешно подрывали этот потенциал. Нерациональное использование ресурсов, эгоизм, привели к тому, что многие стали подвергать сомнению способность некоторых государств совместными усилиями добиться значительных результатов в борьбе с коррупцией. Также рассматривается важная роль, которую играет финансовая элита стран Африки в экономике, и ее способность защитить общество.

Акцент в исследовании делается не столько на важности улучшения закона, сколько на совершенствовании методов его применения, описываются стратегии, которые направлены на предупреждение экономических преступлений. Изучаются преступления, которые несут угрозу стабильности, безопасности и развитию государств. В эпоху высоких технологий взаимодействие между людьми приобретает все новые формы, однако виды преступлений остаются прежними или слегка видоизмененными.

Ключом к успешному сокращению уровня коррупции может быть образование, которое даст свои плоды через поколения, как это было в других частях света, но только оптимист увидит кардинальные изменения к лучшему в ближайшем будущем: слишком много заинтересованных внутри и за пределами Африки в сохранении вещей такими, какие они есть.

Ключевые слова: Африка, борьба с коррупцией, элиты, экономика, безопасность, закон, ЮАР.

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