

# Introduction to the JGLR special issue on New Governance Strategies for Preventing Corruption: Law, Theory and Practice

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## 1 Introduction

In April 2007, the 5<sup>th</sup> Global Forum on *Fighting Corruption and Safeguarding Integrity* was held in Johannesburg, South Africa. It brought together representatives of Governments, International Organizations, private sector, and other Non-state actor organisations. The overarching themes of the global conference were very similar to those of the Toronto 2017 conference *-Towards New Governance Strategies for Preventing Corruption: Law, Theory and Practice* (September 14<sup>th</sup>-15<sup>th</sup>, 2017) resulting in contributions to this special edition of *Jindal Global Law Review*.

Eleven years later, despite the fact that the Final Declaration of the Forum was signed by all parties; the complexity, scope, and scale of global corruption has only intensified. However, what has changes and this is reflected in the contributions in this edition, is the ability of researchers and watchdog organizations to better track and expose the scale of local, national, regional and global corruption. There is a growing awareness that corruption is a global phenomenon and not simply a global South phenomenon. This edition contains country specific case studies on Nigeria, Vietnam, Albania, and Russia. In 2005, Daniel Kaufmann put the cost of bribery, which is only one form of corruption, at US \$1.1 trillion.<sup>1</sup> A more recent estimate by

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<sup>1</sup> Daniel Kaufmann, *Myths and Realities of Governance and Corruption*, MPRA PAPER 8089, (Oct. 2005).

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the International Monetary Fund (IMF) puts it at about US \$1.5 to US \$2 trillion, approximately 2 percent of global Gross Domestic Product.<sup>2</sup>

## 2 Defining corruption

Corruption takes place at the interface of the public and private sectors. Corruption reinforces the banality of pillaging public resources and its conceit which lies in its complicity, and ability to implicate and violate the laws of nation states as well as flout international conventions and treaties. It thrives among those who subscribe to Thomas Hobbes' view that:

because the basic condition of man ... is a condition of war of every one against every one; in which case every one is governed by his own reason; and there is nothing he can make use of, that may not be a help unto him, in preserving his life against his enemies; it followeth, that in such a condition every man has a right to everything; even to another's body. And therefore, as long as this natural right of every man to everything endureth, there can be no security to any man, how strong or wise soever he be, of living out the time, which nature ordinarily alloweth men to live'<sup>3</sup>

But is this really the value system bequeath to us from time immemorial? Surely it cannot be correct to say that everyone has the natural right to everything. To agree with this maxim is to argue that corruption is nothing more than an extension of this natural right in a world where we are at war with each other. This logic, much vaunted even today, seeks to justify a world in which wealth, profitability, and conspicuous consumption is pursued by individuals and corporations at all costs. Hobbesian logic negates the very existence of an alternate value system based on the principles of *ubuntu* or humanity, care and compassion towards others. It negates the system of *potlatch* among the Indigenous People of North America where sharing, not a condition of war, defined relations between individuals and communities. Sembene Ousmane's character Houdia M'Baye in his novel *God's Bits of Wood*, recalls the words of another character (Ramatoulaye) who said "Real misfortune is not just a matter of being hungry and thirsty; it is a matter of knowing that there are people who want you to be hungry and thirsty – and that is the way it is with us".<sup>4</sup> Here Ousmane is pointing to the relationship between poverty and power and between power and corruption. For Ousmane there are people and by extensions systems and institutions that want to engage in corruption and want to corrupt others.

Corruption cannot be seen as a natural condition, it is a social, political and economic act that perverts and distorts the very essence of humanity. It implicates both the corrupter and the corrupted and alienates them from others. In all its forms

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<sup>2</sup> International Monetary Fund (IMF), *Corruption: Costs and Mitigating Strategies*, Staff Discussion Note No. 16/05, (May 11, 2016), <http://www.imf.org/external/pubs/ft/sdn/2016/sdn1605.pdf>.

<sup>3</sup> THOMAS HOBBS, *LEVIATHAN* (1651).

<sup>4</sup> SEMBENE OUSMANE, *GOD'S BITS OF WOOD* (1970).

and manifestations corruption involves acts that abrogate domestic and international laws' commitment to social justice. Corruption is very much related to the "perverse application" of the law<sup>5</sup> and it perverts the law making and law enforcement processes as well. Ultimately, corruption is closely tied to the failure of governance at multiple levels of state and society interactions.

Article 19 of the 2003 United Nation Convention against Corruption addresses the issue of "*abuse of functions.*" It states that "[e]ach State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity."<sup>6</sup> The IMF uses a somewhat narrow definition of corruption – "the abuse of public office for private gain"<sup>7</sup>. This definition only focuses on public officials abusing their positions and completely ignores the abuse of private office for personal gain and for corporate gain. CleanGovBiz, an initiative led by the Organization for Economic Co-operation and Development, defines corruption more broadly "Corruption is the abuse of public or private office for personal gain. It includes acts of bribery, embezzlement, nepotism or state capture. It is often associated with and reinforced by other illegal practices, such as bid rigging, fraud or money laundering."<sup>8</sup>

What these definitions point to is effective anti-corruption strategies that must be designed to both enhance democracy in the political sphere as well as corporate governance in the private sector.

Interestingly Akinkugbe in his paper titled, "*Informal Networks of Corruption: Assessing the Challenges for Public Sector Whistleblowing in Nigeria*", argues that in Nigeria corruption has been historically privileged. Similarly, Merkulov and Shedij in their paper "*Why Russian Anti-Corruption Policies Fail? Examination of Corruption in the Civil Service and the Business Community*", point to pervasive corruption in Russia and argues that corruption is an entrenched phenomenon in the Russian society, making reforms in civil service and business community challenging. Even though both papers take a more micro-level approach, what emerges from both these papers is an extension of the broader argument that corruption is rooted in the forces of the market and in the pursuit of profitability, and is often seen as "the price of doing business". However, in making this argument we need to be careful not to view corruption simply as an intrinsic element of the value system of democratic capitalism.

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<sup>5</sup> IMF, *supra* note 2.

<sup>6</sup> United Nation Convention Against Corruption, Dec. 9, 2013, 43 I.L.M. 37.

<sup>7</sup> IMF, *supra* note 2.

<sup>8</sup> OECD, THE RATIONALE FOR FIGHTING CORRUPTION, (2014).

### 3 Seven Premises of Corruption

In the run up to organizing the 5<sup>th</sup> Global Forum on Anti-Corruption in South Africa seven premises of corruption were identified. However, not all nation states agreed with the premises.

The first premise is that while corruption manifests itself in the relationship between individuals and institutions, as a practice it is rooted in the operation of market forces, in the pursuit of individual prosperity as opposed to the common good. Free market ideology has generated a rugged individualism that has led to the atomization of society and given rise to a rampant pursuit of individual gain. This possessive individualism has undermined the goals and objectives of national and community level development.

Underdeveloped capitalism has lacked an independent basis for accumulation within the economy, making access to the state and its levers critical for capital accumulation. A connection to the state has thus become a *sine qua non* for capitalist accumulation and the state connection has become a life and death struggle for the elite. This has undermined democracy and spawned networks of corruption that have pillaged public resources in the pursuit of personal wealth.

The second premise is that corruption is fundamentally undemocratic, it undermines the legitimacy and credibility of democratically elected governments, and of responsible and accountable civil servants. It can lead to the undermining of the democratic ethos and can contribute to increased political instability.

The third premise is that corruption is about the interface of political and economic elites at a global, regional, national, and local scale.

The fourth premise is that the intellectual preoccupation in the global discourse on corruption about bribe takers and givers but particularly about bribe takers is disingenuous, ideologically loaded, and simplistic. This discourse needs to be challenged precisely because it overlooks the complexity of the social forces, systems, processes, and structures which underpin acts of corruption. It also needs to be challenged because as democratic states in Africa and Asia continue to strengthen the fight against poverty and underdevelopment, this preoccupation detracts from the broad goals of development.

The fifth premise is that corruption is systemic, and the focus must therefore be on effects as well as on intentions. The effect of corruption is that it undermines the value system, the norms and the very cohesion of society.

The sixth premise is that an anti-corruption strategy must be articulated by leaders in the political, economic, and civil society spheres which must engage all sectors of society based on a core set of leadership practices and values. If corruption has a deep and lasting impact on the very core values of society, then an anti-corruption strategy must articulate an alternative ethos and value system.

The seventh premise is that corruption is a direct impediment to the development of nations and continents. Corruption hurts many and benefits few. It inhibits the ability of government to respond to citizens' needs and to utilize scarce resources in the most efficient and effective manner. It takes away resources from priority areas such as health, social development, and education. It also hampers the continent's

efforts to instill sound political, socio-economic, and corporate governance. Corruption is gendered and it affects the most vulnerable and marginalized the most.

Just over a decade after the Johannesburg conference the IMF released a report in which it confirms the premises identified above.

Firstly, the report notes that corruption is very costly as it affects inclusive growth - growth that benefits all including the poor. Low rates of inclusive growth also lead to “increased incidence of corruption, creating a negative feedback loop that can become self-fulfilling and long lasting”.<sup>9</sup> Secondly, it weakens trust in government and undermines institutions of good and better governance and undermines the capacity of the state to deliver public goods and services. Akinkugbe in his article argues that “that the whistleblowing program [in Nigeria] is embedded in the wider socio-political and informal social norms that have historically privileged corruption in Nigeria”. This endemic corruption in Nigeria cannot be easily wiped out by the country by adopting its first National Anti-Corruption Strategy. Muçollari, in her the paper titled “Anti-Corruption Strategy versus Public Service and Good Governance: Case of Albania,” concurs and argues that “there is a high correlation between corruption and an absence of respect for human rights, and between corruption and undemocratic practices. Corruption alienates citizens from their government”. Thirdly, it affects some or “all drivers of potential and inclusive growth, such as macro-financial stability, public and private investment, human capital accumulation, and total factor productivity”.<sup>10</sup> Fourthly, it negatively affects national revenue collection because of tax evasion and erosion of compliance by individuals. The latter is a function of the erosion of trust in government and in the institutions of governance.<sup>11</sup> Fifthly, it affects national spending programs. A 2013 study found that corruption increased the costs of a public project by 13 percent on average in eight European states.<sup>12</sup> Corruption has a detrimental impact on the types of public infrastructure projects selected, their costs and their quality “Corruption can distort the selection of public investment projects through bribery, rent seeking and cronyism ... it can lead to inflated costs due to inadequate procurement processes, resulting in poor investment outcomes. This undermines efforts to reduce infrastructure gaps and boost growth.”<sup>13</sup> Sixthly it reduced private investment. Seventhly, it affects credit ratings and access to credit markets. Finally, corruption harms the fight against poverty, reduces spending on public education, health care and other social services along with disproportionately (negatively) affects women, children and the aged.

Similar to the stand taken by IMF, CleanGovBiz, argues that first, corruption increases the costs of doing business. The World Economic Forum estimates that corruption increases the cost of doing business by up to 10 percent on average

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<sup>9</sup> IMF, *supra* note 2.

<sup>10</sup> *Id.*

<sup>11</sup> Vito Tanzi & Hamid Davoodi, *Corruption, Public Investment, and Growth, in GOVERNANCE, CORRUPTION, AND ECONOMIC PERFORMANCE*, (George T. Abed & Sanjeev Gupta, eds., IMF, 2002).

<sup>12</sup> Wim Wensink & Jan Maarten de Vet, *Identifying and Reducing Corruption in Public Procurement in the EU*, PwC, (Jun. 30, 2013).

<sup>13</sup> IMF, *supra* note 2.

(2014).<sup>14</sup> Second, it leads to wasteful and inefficient use of public investments. Third, it perpetuates poverty and harms and excludes the poor. Thus, the significant impact of corruption on income inequality and the negative effect of corruption on income growth for the poorest 20 percent of a country have been proven empirically.<sup>15</sup> The World Bank estimates that each year US\$ 20 to US\$ 40 billion, corresponding to 20 percent to 40 percent of official development assistance, is stolen through high-level corruption from public budgets in developing countries and hidden overseas. And fourth, it "...corrodes public trust, undermines the rule of law and ultimately delegitimises the state".<sup>16</sup>

The IMF and other institutions of global governance and finance are increasingly, albeit belatedly, concerned about corruption globally – as Pyntikova points out:

Multilateral development banks, or MDBs are responsible for billions of dollars in development financing each year. The projects financed by MDBs are diverse, and often include infrastructure and public services components. Private companies that work in these sectors therefore place a high premium on being selected to perform contracts under MDB-financed projects and find that forced exclusion from such contracts may be devastating to their reputation and revenue. As such, administrative remedies that MDBs may apply to corrupt behavior, especially when imposed on firms in a coordinated fashion, can exert a strong influence on companies in industries that rely on publicly financed projects.<sup>17</sup>

What is increasingly clear is that the corruption/anti-corruption discourses of both North and South need to be rethought. One focuses on the corrupted, the other seeks to focus on the corrupter, but both ignore the complexity and nuances surrounding the structural relationships which are embedded in the political economic interface. This is the political economy of corruption wherein corruption is symptomatic of the current globalization conjuncture. It is in this conjuncture that multinational corporations and individuals can take advantage of vulnerable states by eroding value systems and where possessive individualism overrides any sense of common good.

Corruption engenders perverse political dependencies, lost political opportunities to improve the general well-being of the citizenry and fosters a climate of mistrust particularly of public officials. The losses that accrue from a culture of permissiveness with respect to corruption includes loss of revenue, trust, values, credibility and legitimacy, and a loss of the democratic ethos and impulse within institutions and organizations.

It is critical to develop a common understanding of corruption based on a conception of the "common good". Under conditions of democracy, the state needs to take the lead in combating, preventing, managing, and eliminating corruption.

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<sup>14</sup> OECD, *supra* note 8.

<sup>15</sup> Sanjeev Gupta, et al., *Does Corruption Affect Income Inequality and Poverty?*, 3 *Eco. Gov.* 23 (2002).

<sup>16</sup> OECD, *supra* note 8.

<sup>17</sup> IMF, *supra* note 2.

The political cost of corruption is that it undermines democracy, responsibility, accountability, and legitimacy. Corruption destroys trust and erodes sense of global citizenship, shared responsibility and social cohesion as well as national citizenship.

The state has the responsibility of securing the conditions under which development takes place and security is ensured. Where states are undemocratic this proposition becomes problematic, as the ruling group frequently abuses state power in the interests of narrow sectional concerns. This promotes neither development nor security but creates conditions under which corruption and so called predatory states flourish. However, the state cannot be solely responsible for developing sound anti-corruption policies. Business and civil society groups must also be part of this complex process.

#### 4 Nationality Integrity Systems

Many of the articles in this edition echo a similar call for national anti-corruption measures that are transparent, evolve mechanisms of accountability, and meaningfully engage civil society. For Akinkugbe, Nigeria's whistleblowing legislation will be ineffective unless there is the "adoption of a comprehensive legislative protection framework which is a minimum requirement, to enhance the overall effectiveness and institutionalization of the whistleblowing program in Nigeria. Significant but practical steps must be taken to address the complex background of informal social networks of corruption, power dynamics, and social norms that are peculiar to the Nigerian economic and political context" (2018). In Russia, Merkulov and Shedij note, reform is still possible however:

... reforms will depend upon a true partnership being developed between the government and various civil society organizations, the development of solid opposition parties that can hold the current government responsible for following through on its anti-corruption agenda and encouraging mechanisms for developing a general intolerance of corrupt practices.

Thu Huyen and Cong Giao (2018) analyse the shortcomings in Vietnam, of legal process and procedures for the recovery of stolen assets. They conclude that the problems faced by the judiciary are due to the absence of a legal and technical infrastructure including law on disclosure of assets and income, and law against money laundry. They too call for more comprehensive integrated legislation that is enforceable. Cong Giao opines that nepotism and secret principles (prevalent in Vietnam and constituting major sources of corruption) are irreconcilable with the principles of openness and transparency. They too call for various legal reforms that would improve the mechanism to control state officials' assets and income. Muçollari (2018) argues that corruption alienates citizens from their government and further, there is a high correlation between corruption and an absence of respect for human rights, as well as between corruption and undemocratic practices.<sup>18</sup>

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<sup>18</sup> Wim Wensink, *supra* note 12.

In the case of Canada, Stedman notes that increasingly Parliamentary anti-corruption initiatives are being centralised in the offices of (Provincial and Federal) Parliamentary Ethics Commissioners. This tendency brings with it the challenges of transparency and accountability (to the public), Stedman points out that centralization of anti-corruption initiatives “may be warranted, but there is unfortunately very little data being made publicly available by the individual commissioners that can help us understand why these institutions are evolving in this way. Ethics commissioners ought to collect and publish more data about how their offices actually function in order to allow for more meaningful public scrutiny into how these institutions are evolving.”

Franklin, sees corruption as a “continuum” from that which is illegal based on domestic legislation, to that which may be illegal depending on circumstances, to that which is totally legal as it is either approved of directly by domestic legislation or is exempted from the legislation. Franklin suggests that while corruption may sustain dictatorial regime, investment decisions should balance these often-conflicting principles. The key questions for consideration include whether the investment will result in improving human rights in the host state, the effect(s) of corruption, and whether such the corruption is legal or illegal.

Unlike nation states, multilateral institutions of finance do not resort to legislation. Instead, as discussed in the paper by Pyntikova:

Many of the MDBs operate an internal administrative sanctions system that provides the institutions with an opportunity to impose administrative measures on companies and individuals that engaged in corrupt conduct while competing for or executing projects financed by the MDBs. These sanctions may range from a private letter of reprimand to a public and permanent debarment of the “respondent” company or individual. Over time, the types of sanctions applied by MDBs against corrupt actors have reflected a cross-institutional tendency toward transparency, innovation, self-assessment, and coordination.

Hence, looking at internal institutional culture is key to assess the impact of formal anti-corruption measures and barriers to their effective functioning.

All articles in this edition point to the importance of good governance as a prerequisite to preventing and combating corruption while acknowledging corruption undermines good governance. Corruption is a governance challenge. The concept of a National Integrity System is fundamental to the development of an anti-corruption discourse. It comprises the building blocks necessary for the long-term fight against corruption and other forms of unethical behaviour. Its core elements are constituted by a society’s value system.

The successful practice and implementation of a National Integrity System is predicated on strong leadership and the ability of leaders to set a vision, based on the values of the society. Governments can create a National Integrity System infrastructure with legal systems and structures, but ultimately there needs to be on the part of leadership, a voluntary submission to a higher code of probity, which goes beyond strictly legal prescriptions. This submission to a moral code ensures that institutions do not become vacuous without direction or purpose. Ethical



behaviour while highly desirable, respected, and valued cannot be assumed. Therefore specific measures and institutions are necessary to safeguard integrity and to promote ethics. The lack of these measures and institutions, or their ineffective implementation and functioning opens the way for unethical behaviour including corruption. Civil society has to be closely involved in monitoring and ensuring governmental compliance with the National Integrity System.

The National Integrity System's values must permeate the structures, practices and principles of the state, the corporate sector, and civil society. These values include accountability, transparency, equity, efficiency, developmentalism, and fundamental rights and freedoms including freedom of speech, access to information, democracy and participation.

## 5 Conclusion

Corruption undermines democracy and negatively impacts sustainable growth and development. The most effective antidote to corruption therefore has to be a strengthened National Integrity System that puts issues of good governance in all the spheres of society (the political sphere, the corporate sector and in civil society) at the very heart of the anti-corruption project. The perception discourse that focuses on the corrupted and the discourse of blame that focuses on the South do little to illuminate the complexities hidden beneath the surface. They are simplistic and glib and avoid a more holistic approach that is structural and systemic and looks at social forces that are conjunctural. A structural approach to corruption is a far better approach to the debate for it located corruption precisely at the interface of the public and private sectors, thus allowing us to focus our attention more sharply towards the critical issues that distress the world today.