

2. CORRUPTION

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KEY TERMS AND PHRASES

Corruption

This term has no precise meaning, but is popularly associated with the abuse of power for personal gain. Within the popular conception of corruption, not only legal wrongdoing but behaviours that are seen as immoral can be considered to be corrupt.

Fiduciary

A fiduciary is a person who is subjected to special legal duties to act always in the interests on whose behalf he or she acts. Fiduciaries are also denied the possibility of making personal profits or gains from the carrying out of their functions. There are many types of fiduciary with different standards of responsibility. A trustee is the traditional kind of fiduciary and subjected to the highest duties.

Political legitimacy

Political legitimacy is concerned with the justification of a government or a system of government to operate within any particular society. The word 'legitimacy' has connections with legality, although now it is used in a broader sense as meaning something like the basis of political authority.

INTRODUCTION

Corruption in political systems is a pervasive international issue. The political systems of the South Pacific region are certainly not immune to corruption. It is not a phenomenon which only attends larger developed political systems. Certainly neither the smallness nor the communal atmosphere of the Pacific island states have prevented the occurrence of corruption on a relatively wide scale.¹ The phenomenon produces some basic themes which are seemingly incontrovertible. Corruption is one of the most significant threats to democracy world-wide. It produces instability and thrives on the social inequality to which it is a substantial contributor. It undermines the confidence of peoples in the legitimate institutions of government. It is a major contributor to social, cultural and economic decline of nation states. It is evanescent, perverse and consequentially difficult both to detect and eliminate.

To begin it is appropriate to seek some understanding of the concept of (political) corruption. As with many of our concepts in general use 'corruption' is a rather amorphous notion. It is not quite a term of legal art in the sense that it does not lend itself easily to a precise definition. It might sometimes be used to denote 'non-legal' corruption in the sense that it refers to acts which constitute abuses of power or the appropriation of advantage which, though not precisely illegal or criminal in nature, are nonetheless open to condemnation. Some have in mind the contemptible actions of public officials only whilst others would include corruption in the private sphere as a significant component of corrupt activity. From a legal point of view the focus has perhaps been on a special category of crime; namely that type of crime which is committed by public officers or which is, in some way, connected with the performance of public duties and functions.

What is corruption in some places might not be considered so in others. In a world where cultural relativism pretends considerable explanatory power one is often confronted with the possibility of misinterpretation of the acts of others. A condemnation of something as obviously corrupt, particularly by cultural outsiders, will often be met with a standard response; namely, that the perspective of the observer does not take account the cultural norms and values. In particular, it fails to take into account the system of privileges and favours which specific actors, especially the traditionally powerful, are entitled to within the culture concerned. Hence what might be treated as clearly a case of corruption in Australia or the United Kingdom might not readily be perceived as such in, say, Pacific cultures.

It is an unfortunate fact that thinkers from a Western tradition are not always attuned to these factors. Given a Western tradition of philosophical and political thought which pretends, be it cultural imperialism or not, the seeking out of universal patterns of thought and understanding, the cause of the error is obvious enough. No doubt, if the pretence of a universal moral order were still a realisable objective we would be on clearer ground. Some simple and universal understanding of corruption might exist which could direct our thinking on this issue and encourage our forthright condemnation of unacceptable behaviour. But corruption is not reducible to such a

simple formula. That aside, most people carry with them certain clear assumptions about what corruption involves but then find it difficult to provide a reasonable definition of it or, at least, one which applies to all potential cases of corruption. In fact, there is no single definition which encompasses everything that people would want to take as corruption.

The regulation of corruption is rendered problematic by the fact that the understanding of corruption tends to vary from place to place and from jurisdiction to jurisdiction. Certainly cultural factors play a part in this. However, there are many interesting issues that arise in the context of corruption that are not confined to problems of definition. Does corruption involve only some positive action on the part of a particular person or can a failure to act also involve corruption? Are all forms of corruption intrinsically bad or can corrupt conduct be justified under some circumstances — for instance where it does no immediate harm or where it actively promotes some good, or perhaps more good than bad? Let us consider firstly some definitions of corruption and before turning to some of these questions.

THE MEANING OF CORRUPTION

As indicated above, the legal sense of corruption is somewhat unsettled.² Certainly the term has appeared in statutes and in cases from time to time. This has become more frequent over the last 30 years or so with the rise of efforts to combat corrupt behaviour of various sorts — usually as some aspect of maladministration. It can mean anything from the exercise of undue influence to the making of false declarations (e.g. for electoral purposes). Undue influence, or perhaps breach of fiduciary duties on the part of trustees or other fiduciaries, seems in fact the closest that private law comes to dealing with corruption. These breaches involve essentially a failure on the part of a person who is in a position of power to comply with the duties and obligations of office. Thus they involve a form of equitable fraud that very often leads to the imposition of a constructive trust. Whilst corruption is often seen as a public law issue there is some degree of similarity with principles of equity. I will return to this issue later on.

The term ‘corruption’ in everyday usage is likewise very broad in its meaning. It has many synonyms including decomposition, neology, foulness, disease, deterioration, imperfection, perversity, degeneration, improbity, fraud, deceit and vice. But whatever dictionary meaning the term has, it is now predominantly associated with a failure in the performance or observance of a public duty by someone who is considered to be an actor in the public sphere. A Commonwealth paper on corruption offers this working definition:

Corruption... [is] the wrongful exercise of public duty for direct or consequential personal gain ... Quite apart from the harmful effects which corruption may have on the actual processes of democracy, government, the law and the judiciary, the corrupt act is inherently undemocratic.³

A document issued by the Independent Commission Against Corruption of New South Wales, Australia states:

What is corruption? Corruption commonly involves the dishonest or preferential use of power or position which has the result of one person or organisation being advantaged over another. It includes the conduct of non public officials who cause public officials to misuse their power or position. The community expects public officials to perform their duties with honesty and in the best interests of the public. Corruption involves a breach of public trust and leads to inequality, wasted resources and wasted public money. A key notion when considering whether or not corrupt conduct has occurred is the misuse of public office in the public sector of New South Wales.⁴

There are some authorities which appear to suggest that the word ‘corruptly’ where it appears in legislation denotes merely action which is deliberate.⁵ There are others that suggest that it imposes a requirement of purposefully doing the act that the legislation forbids.⁶ These are authorities that are concerned with the offering of bribes to public officials which indicate that the innocent receipt of a bribe by the recipient does not constitute corruption.⁷ The general tendency, however, is to say that the element of corruption does not require proof of any special element such as evil, immorality, dishonesty, wickedness, iniquity, improbity or deceit.⁸ Something is corrupt simply if it “does something that the legislature forbids”.⁹

The definition of corruption in section 8 of the *Independent Commission Against Corruption Act 1988* (N.S.W.) in fact shows how broad the concept has become in terms of the types of conduct which can be considered corrupt. According to that section corruption includes: “official misconduct, bribery, blackmail, obtaining or offering secret commissions, fraud, theft, perverting the course of justice, embezzlement, election bribery, election funding offences, election fraud, treating (corruptly influencing a person’s vote), tax evasion, revenue evasion, currency violations, illegal drug dealings, illegal gambling, obtaining financial benefit from vice engaged in by others, bankruptcy and company violations, harbouring criminals, forgery, treason or other offences against the Sovereign, homicide or violence and any conspiracy or attempt to conspire in relation to any of the above.” Not all of these are in fact crimes. Where they are civil matters, however, the general tendency has been for the courts to require proof of corrupt activity according to the criminal standard of proof or something approximating it.¹⁰ But it tends to be the fact that the relevant activity relates to a public official that brings out the association with corruption. It is this which also allegedly warrants special treatment of corruption within the legal system.

Corruption as a Legal Concept

There is no specifically designated crime of corruption in English law, although it might be an element in certain criminal conduct as we have seen — for example, something done with an intention to corrupt or done corruptly. In *Woolmington v the Director of Public Prosecutions*¹¹ the House of Lords gave recognition to a

common law offence of corrupting public morals. The corrupting circumstance in that case was running a brothel, clearly an element of supposed immorality. This case is therefore sometimes displayed as an attempt to show that there often is a moral content to the law. This is a claim that stops short of the natural law claim that there is always a moral criterion that determines the validity of law. It also stops short of the contention that the legal condemnation of corruption is based essentially on moral grounds.

One of the primary legal senses of corruption has long been that of bribery. Put another way, bribery is perhaps the classical legal sense of corruption. Bribery conveys the basic idea of procuring or attempting to procure favourable actions on the part of a public official by the payment or offer of a reward. In English law the bribery of public officials was a common law misdemeanour. Bribery of and by agents was also recognised as a misdemeanour under the *Prevention of Corruption Acts* 1906 and 1916 (UK). There are now several statutes which deem corruption or bribery and corruption an offence — see in the UK for example, the *Public Bodies Corrupt Practices Act* 1889, the *Sale of Offices Acts* 1551 and 1809 and the *Representation of the People Act* 1949. There is now also legislation in some jurisdictions which prohibits the taking by public officers of secret commissions for the performance of their duties.¹²

There is no doubt that bribery has been regarded as a serious breach of public trust and, in criminal cases, has attracted the imposition of serious penalties. For example, in *R v Nath*¹³ Perry J. said (at 119):

A breach by persons holding public office of the duty to act honestly in the performance of their public duties is a most serious matter which should ordinarily attract a substantial penalty.

In *R v Challoner*,¹⁴ a case involving fraud by a branch bank manager, Kirby P. said (at 375):

There is no doubt that a long line of authority in this court lays down the principle that, in offences of this kind, by persons in a position of trust involving the manipulation of public monies, a custodial sentence is normally required.

The concept of corruption is now clearly much wider than mere bribery although, no doubt, this remains one of its primary senses. Although corruption is frequently linked with the activities of organised crime this is not necessarily the case. One thing that the link with organised crime does show us is that corruption need not involve something so simple as an isolated act undertaken by a public official done in return for the offer of a reward or payment. The techniques, and indeed the conduct, involved might be much more subtle than mere payment or offers of reward to procure particular outcomes.

It should be noted that now, particularly in those statutes constituting corruption investigation agencies, legal definitions appear which widen the concept of corruption considerably. Evidence of this has been provided above. The focus is now much more on maintaining the performance of duties and standards by public

officials. This is not to say that it is only the acts of public officials that can be regarded as corrupt for the purposes of the law. The breach by a fiduciary (say a trustee or a corporate director) of his or her duty to act in the best interests of the entity which he or she controls is a significant form of corruption which the law, and more especially equity, has long sought to control. There are clearly parallels between the logic applied with respect to the corrupt activities of public actors and the principles of public law in the general area of equitable fraud, breach of fiduciary duty and so on.

In fact the two cases just mentioned (public and private corruption) are not so distinct as is sometimes thought. Fiduciaries are, by definition, persons who are obliged to act in the interests of others rather than in their own interest. They are obliged to avoid conflicts of duty and interest (including the payment of bribes). Public officials and politicians are really in the position of fiduciaries and, in some jurisdictions, they have been explicitly treated as such for some purposes. This has been taken as an implicit part of the conferral of political power for the purposes of administrative law. The power is conferred on trust. For example, in *Manunivavalagi Dalituicama Korovulasvula v Public Service Commission*¹⁵ it was said

The Common Law makes it clear that, generally speaking a statutory power conferred on any person or authority for public purposes is conferred as it were, upon trust and not absolutely. Accordingly the holder of such a power does not have an unfettered discretion in exercising the power.

Some of the bribery cases such as *R. v Nath* and *R. v Challoner* (both above) have treated the action in question as a breach of trust reposed in a public official. But that is not quite the same as enforcement as a fiduciary duty. Unfortunately, imposing a fiduciary duty on someone operates merely as an *ex post facto* attempt to rectify a breach of the duty on behalf of someone whose interest, usually a proprietary interest, has been affected. It has not been, and would not be, entirely effective in eliminating or perhaps lessening corruption. The anti-corruption measures, which we will examine in a moment, have a much broader purpose.

IS CORRUPTION ENDEMIC IN POLITICAL/LEGAL SYSTEMS?

There are divergent views on how far corruption is an inevitable part of all political systems. The ideologically conservative view is that corruption is part of human nature and therefore will be an aspect of all forms of human interrelationship. That is so whether the relationship be realised in national politics, Pacific as well as Western politics, commerce, village or local administration, corporations and clubs, families or other such forms of association. Yet such an answer is too simple, in my view. For one thing, corruption does not appear all the time, nor does it colour all forms of relationship at all times. The proposition that people are basically or primarily bad is, to anyone with any reasonable experience of human affairs, quite a naïve and untenable proposition. It would, of course, be just as naïve and untenable to claim that corruption and other forms of ‘badness’, do not exist at all. Corruption is, as has been conceded already, a prevalent aspect of contemporary life and, especially, public life.

However, corruption in the public sphere has sometimes been treated as if it were prevalent only in certain forms of society — for example in underdeveloped or third world societies. The impression has been, indeed that it was or is a characteristic of those societies; that is, corruption was or is institutionalised in them as an aspect of the stage of development. The causes are sometimes taken to be poor economic conditions, ineptitude of administration or the poor education of public officials. Sometimes it is the existence of the traditional structure of society that is inconsistent with the regime of public administration imposed by colonisers which is treated as the primary cause. According to this theory the assumption behind the neutral administrative role of a public service (bureaucracy) on the Western model does not work when it falls into the hands of those who have loyalties which lie elsewhere. Post-colonial societies such as India are often targeted for attention as examples.¹⁶ Hargreaves, for example, once wrote of the Indian bureaucracy:

One major element in the effective operation — and in the public image — of bureaucracy is corruption. Whilst most people continue to see government service as prestigious, their confidence in it is low. Public servants are described as ineffectual, self-seeking, and dishonest. In a survey of residents of Delhi State, almost 60 percent felt that at least half the government officials were corrupt. Corruption may be greatly exaggerated in India because economically frustrated individuals seek a scapegoat in official misbehaviour, but A.D. Gorwala argues that “the psychological atmosphere produced by the persistent and unfavourable comment is itself the cause of further moral deterioration, for people will begin to adapt their methods, even for securing a legitimate right, to what they believe to be the tendency of men in power and office”. Moreover, the public may decry corruption, but traditional attitudes often condone it, and fatalism may lead many to accept it as inevitable. Nepotism is officially condemned, but in traditional terms it may be viewed as loyalty to one’s family friends and community.¹⁷

On the other hand, the occurrence of corruption in Western societies is sometimes supposed to be rare or, at least, very occasional and nothing approximating its institutional occurrence in third world countries. It might still be the case that the occurrence of corruption in economically less developed countries is higher. But it is a significant factor in the developed countries as well. However, more recent experience has shown that corruption in Western societies has been much more regular and institutionalised than otherwise thought. Hence the pointing of the finger at underdeveloped or eastern countries alone was unfair. Confirming this, a recent report on OECD countries begins:

OECD countries are concerned about declining confidence in government. This so-called “confidence deficit” has been fueled by well publicised “scandals”, ranging from inappropriate actions on the part of public officials, to full-scale corruption. Few, if any, Member countries have escaped the taint, if not the reality of wrongdoing. As a result, ethics or standards in public life have become an important public and political issue.¹⁸

Some research has been published by the University of Goettingen and Transparency International on corruption in various countries throughout the world.¹⁹ The report covers only 85 countries — less than half of the countries in the world. Unfortunately the South Pacific does not receive a mention at all. A score of 10 indicates the least level of perceived corruption. The lower the score the worse the perceived corruption level. The best rankings were: Denmark (10.0) Finland (9.6) Sweden (9.5) New Zealand (9.4) Iceland (9.3) Canada (9.2) Singapore (9.1) Netherlands (9.0) Norway (9.0) Switzerland (8.9) Australia, Luxembourg, United Kingdom (8.7). The ten worst were : Vietnam (2.5) Russia (2.4) Ecuador (2.3) Venezuela (2.3) Colombia (2.2) Indonesia (2.0) Nigeria (1.9) Tanzania (1.9) Honduras (1.7) Paraguay (1.5) Cameroon (1.4).

This is an index compiled on the basis of perceptions of corruption held by members of the public, business and non-government organisations. It is not a survey of actual corruption which would, of course, be extremely difficult if not impossible to survey simply because much of it is undetected. It is a ranking only. Hence a score of 10 for Denmark does not indicate an absence of corruption in that country. It just means that it obtained the best score. Significantly, however, it appears that over fifty of the countries failed to attain a score of at least five which is a remarkably poor performance. One can merely conjecture how the South Pacific countries might have ranked given the many reported instances of corruption which have occurred in recent times. On recent indications they would certainly not rank very highly. If the exercise is one based on perception of corruption then one would expect the perception level of corruption throughout the Pacific to be high. For one thing these are small countries where often corruption is a matter of common knowledge. Additionally, that common knowledge or awareness simply does not seem to lead to an impetus to reform.

SHOULD WE ATTEMPT TO COMBAT CORRUPTION?

There was once a view that corruption, in certain sorts of environments, including bureaucratic environments, could be seen in positive terms. It achieved effective results where this was otherwise impossible or unlikely. One could argue, for example, that corruption in certain developing countries at least provided a means of getting the job done. Many large corporations have had the experience of dealing with bureaucracies in these countries in just this way. If bribery is necessary to get the corporate project under way then bribery as the means is justified by the end. To take another view of it, could one argue that if corruption benefits a majority of the community and harms no-one in particular and, as an aside, also gets things done, should it be condoned or at least tolerated?

Say, for example, that it is of importance that a particular bureaucratic action should be undertaken to ensure that a building project of major importance to the economic well-being of a section of the community in a small island state should be undertaken. Several jobs will result if the work goes ahead. It will produce considerable revenue for the people of the island state as a whole because it will dramatically increase the

revenue of the country. The bureaucracy in the country is renowned for its inefficiency and incompetence. It has had the development application for over a year and nothing has happened. Wouldn't a small bribe by the developer to an official to get the job done be tolerable in the interests of the overall well being of the community concerned? What harm is there in producing effective bureaucratic action? Many would oppose such a view on the ground that corruption is *absolutely* wrong on moral grounds and ought to be opposed and condemned wherever it occurs on that basis. Corruption ought to be seen as a crime and it should be referred to criminal investigation divisions for investigation, detection and prosecution. In short, corruption must not be condoned. It must be rooted out and the corrupt brought to justice.

Corruption and inefficiency

But whatever the moral issue involved, such a position of moral condemnation never seems to have worked very well. If anything it has been a realisation of the failure of the moral high ground position, just referred to, which seems to have produced somewhat more effective measures in combating corruption. The move in this direction came initially from large business organisations in the 1980s. There appears to have been an increasing awareness of the need to combat corruption. It was a recognition which went hand in hand with the so-called white collar crime phenomenon. White collar crime, or crime committed by officers and employees of corporations, had long been outlawed by corporations legislation and, for the most part, subjected to harsh criminal sanctions. But such crimes were notoriously difficult to prosecute successfully. Furthermore, they attracted unwanted attention to the corporation involved with the publicity potentially able to do damage to the public image of the company and, more especially, to the image of the corporation in financial or investment circles.

Hence an alternative strategy was thought appropriate in this area on the part of both corporations themselves and on the part of corporate legislators. Firstly, as noted already, the business corporations came to see corruption within a corporation as counter productive to the general nature of the enterprise. Corporations which had sound ethical business practices seemed to perform better on the stock exchange and to outperform those which didn't. In other words, big business started to adopt measures to combat corruption within organisations, not because it was perceived as morally wrong but because it was bad for business. In the business world moral issues rarely count. It is turnover and the competitive edge which matters most. Corruption was and is seen as counterproductive to business performance. This, of course, is not quite the same view opposing corruption that we might be used to.

On the other hand, corporate regulators, realising the ineffectiveness of hard-line criminal prosecutions in counteracting white collar crime, proceeded to create particular categories of quasi-criminal liability — what is in essence a form of civil liability. Certainly this measure facilitated proof against the delinquent officer but it also lessened the stigma attaching to the corrupt action against the corporation. The

business management view of corruption — as something which was counterproductive to the enterprise and appropriate for alternative strategies of elimination — then seems to have filtered through to the public sector. One of the reasons for this was the adoption of the new approaches to public sector management which sought to adopt business strategies and private sector management techniques to improve the efficiency of the bureaucracy.

Corruption and Political Legitimacy

The prevention of corruption is not just a matter which goes to the achievement of efficiency in the operations of government. I think that this is of as little worth in explaining the phenomenon of corruption as cavalier condemnations of the immorality or evil of corruption. An important factor which is of greater significance than either of these is that of maintenance of political legitimacy of the institutions within a given political and/or legal system. These are the institutions which are basic to the stability of the political system and the maintenance of some sense of order and regularity in it. The term ‘institutions’ here should be taken broadly enough to include not only the likes of parliament and the courts but the other institutions established by and as part of the operation of the law. Thus it would include such established principles as fundamental constitutional guarantees of human rights, due process and the like. Enshrined egalitarian principles are, indeed, the most immediately offended by corrupt activities because the latter provide access for some to advantages and benefits which are not capable of enjoyment by other citizens. It is clear enough that order and regularity within any politico-legal system are sometimes matters which are over-emphasised, most usually by conservatives, as factors necessary to human life. They have to be balanced against the need for innovation and change, but they are, nonetheless, important factors.

It is common enough to hear of crises of political legitimacy in the modern and post-modern worlds. The element of legitimacy means different things to different authors and indeed the causes of alleged crises in legitimacy is as debatable as the proposals for their rectification. But in one vital sense legitimacy does involve questions of the acceptance by the population at large of the place and the functions of established institutions. Corruption is clearly a major factor which has the potential to devalue the operation of these institutions and to characterise them in the public mind sometimes as worthless or unjust and sometimes as having fallen into disuse. To illustrate this, take the case of the judiciary. If the decisions of judges were the product of corruption on the part of occupants of judicial office, they would not be decisions according to law. They would not be impartial. They would be prejudiced. The consequence of this would clearly be that citizens, other than those initiating the corruption perhaps, would lose faith in the judicial system and most likely resort to extra legal means to resolve their disputes. That in turn would cause widespread instability in the political system itself.

It is not too difficult to draw out further examples of the destabilising effects of corruption relating to other primary institutions including those for the making and

administration of law. Nor is it too difficult to see why corruption is perceived as a danger to the role of institutions of government whether we take them as strictly democratic in any complete sense or not. Just what constitutes a democracy is an arguable concept from the point of view of political theory. However if we assume, as many would do, that it has much to do with the effective role of a parliament, courts of law and a neutral executive, then the erosion of their legitimacy is also a challenge to democracy in that sense. There are other less acceptable alternatives and corruption clearly points us in the direction of some of the least desirable of these alternatives.

CORRUPTION, DEMOCRACY AND THE SOUTH PACIFIC COUNTRIES

We have seen how eliminating corruption is regarded by many as essential to maintaining democracy and the democratic process in various ways. It has significance for the legitimacy of political institutions. Its elimination encourages better business practice on the part of bureaucracies and governments. Corruption has the capacity to erode fundamental human rights to be enjoyed by people within the system and to undermine the rule of law and basic political institutions.

In this context it could be said that democracy assumes a predominantly liberal conception of a desirable system of government. On this view, government is seen as serving the interests of those individuals who are governed by it. In the so-called Western sphere it is premised on assumptions relating to the individual composition of society.

The democratic institutions of government, in this sense, were brought to the Pacific countries as part of the colonial inheritance. This is true enough, although it would be wrong to say that the original colonial institutions of government were themselves democratic. They were the agencies of colonial rule rather than agencies of popular government. Parliamentary democracy was slow to emerge in these countries and was only achieved through various stages leading towards independence. Many Pacific countries have subsequently adopted some anti-corruption measures and agencies along the lines of Western countries, although this has not been as extensive as elsewhere. There remains in fact a certain degree of both ambivalence and ignorance about these institutions, their basic functions and their objectives.

One reason for this is the lack of education and training of public officials (and the general public) in matters pertaining to codes of conduct, political responsibility, competence and ethics awareness. So far as politicians are concerned there have been few political systems which have required that political representatives have minimal educational qualifications to hold office. Yet the jobs they perform are often intellectually demanding, carrying high levels of financial responsibility and indeed often requiring considerable business acumen. It is not difficult to point to many instances where there have been Attorney Generals or their equivalents who hold no legal qualifications, Ministers of Finance who cannot understand a simple balance

sheet and Ministers of Education who have no formal educational training at even the most basic level. There is an element of failure of any democratic system where those who are elected often do not have the simple competence to engage in informed and sensible debate concerning the future of a country and its people. No wonder that when they are forced into dealings which all manner of schemers and articulate con-artists, they are often left short. This is a ready road to corruption. Apart from this there have been numerous areas in which persons who are elected to political office have no understanding of the responsibilities which attach to their office. Little wonder again that they perform in a manner which is wholly different from expectations. Unfortunately the same comments can often be extended to non-elected public officials who obtain office not on the basis of merit but through political patronage. Whilst these problems are not unique to South Pacific countries it is a considerable factor in the region, as with other so-called developing countries. Sometimes corruption on the part of public officials can be explained not by greed or criminal dispositions *per se*. It is often simply a matter of ignorance. People are elected from backgrounds which are steeped in customary obligations. They frequently have no idea what the nature of the office to which they are elected requires of them in terms of simple accountability and responsibility. Although this is not, of course, the only cause of corruption in South Pacific countries, it is a pervasive one.

A more fundamental reason for the ambivalence towards the existing political institutions is their perceived relevance. Why should one really set to work upholding institutions which appear rather remote from cultural experience in any event? It is a point which might well need addressing before effective moves to combat corruption can even begin. If we perceive corruption as simply something which is anti-democratic in the western liberal sense of that term then we will likely be drawn into numerous side issues about the relevance of democracy in that sense to these countries. Many Pacific societies are ordered according to traditional lines of authority which might be better called monarchic or oligarchic, but not democratic. If, for example, chiefly authority is a predominant factor in such societies, as it mostly is, the system cannot be understood as democratic in the liberal sense. If they are communally based societies as we are often told, then one couldn't say that the individual members of them are possessed of certain fundamental rights against those who rule. Their primary position is that they owe obligations to the community. It is on this basis that we often hear about concepts such as Asian style democracy or leader-democracy. The contention here is that developing or new countries, or those countries which are remarkably different from European countries in their social composition, cannot have the luxury of democracy on the Western model. If they are not to be called democratic on the Western liberal model does that mean that the elimination of corruption cannot be justified because it is democratic to do so?

To agree with the above statement is somewhat unpalatable if one accepts that corruption necessarily results in political instability. Rather, one might want to say that South Pacific countries are democratic but in a rather different sense from that understood elsewhere. Perhaps their makeup is more appropriate to a communitarian

concept of democracy.²⁰ It is to be borne in mind, of course, that in most of the world it is better to be seen as democratic than not. The constitution of the former USSR proclaimed that it was a democratic constitution. So did that of Cuba. This may simply be because democracy is, as I have said, a 'good' word in international politics, just as perhaps communism is now a 'bad' word. However that might be, it is still arguable that democracy is just one form of government which does not necessarily require precise implementation of particular models drawn from elsewhere. There can be just forms of government which might not conform closely to the liberal model of democracy. Would corruption still be condemned in such systems? I would think so on the basis of the destabilising effect of corruption on any such system. It is condemned because of its challenge to the legitimacy of basic political institutions whatever they might be.

In societies such as those of the South Pacific which are based to some considerable extent on custom one might think that there is some basic brake against corruption which is provided by the operation of the customary system which provides at least some restraint against interference with traditional values. But clearly custom is a fluid set of practices which can enhance the possibility of corruption in many ways. Clever leaders can, and often do, manipulate the appeal to customary practices and obligations to achieve purposes which are foreign to them.²¹ In fact, the simple existence of introduced law alongside customary systems often creates what could best be termed a confusion of authority, which frequently lends itself to exploitative practices, distortion and misrepresentation by leaders and public officials who are determined to achieve particular ends of their own. It is not the mere existence of custom as such but the duality of the system in which it operates which creates this particular confusion.

As a final point we should perhaps acknowledge that the move to adopt anti-corruption measures of a particular type is not only a matter which is driven by national politics. Of course it could be questioned how high corruption would be on the agenda of South Pacific countries if the matter was simply left to these countries alone. There are, however, numerous external pressures for the adoption of reforms of a particular type. Much of the agenda of the small island states is written elsewhere. The pressures brought on a country can be direct or indirect. They might range from encouragement to diplomatic argument at various levels. Or countries might be encouraged by economic rewards — for example, tied grants of aid which are often made on the basis that a country will introduce systematic reforms including legal anti-corruption measures. The involvement of the European Union in bringing pressure through the sugar concession for human rights reform in Fiji is one pertinent example. The role of international development agencies such as the World Bank²² and the Asian Development Bank as well as foreign government agencies in bringing about the Comprehensive Reform Programme in Vanuatu is another. True enough, many people see this as a form of interference in the local political makeup or political sovereignty of a country. But the fact is that the smaller players in international politics are often at the whim of the larger countries. This frequently

leads to a situation where law reform is introduced which does not really reflect what we could call public opinion or the public mandate. And when it does occur in areas which are a challenge to established cultural values and practices then there is dissent about the need for reform in the first place. Put another way, there is apathy about what might otherwise be entirely justifiable commitment to reform.

Given the existing ambivalence towards political institutions that are perceived to be irrelevant impositions, it is hard to see how ‘imposed’ anti-corruption law reform agendas will achieve their desired effects throughout the Pacific. Instead it would seem that an approach that goes back to basics — first of all considering how political institutions can be structured to make them relevant for each Pacific island country, and then considering the meaning of corruption and the role of anti-corruption measures within these institutions — will be required to meaningfully address corruption within the Pacific.

ENDNOTES

- 1 See for example Larmour, P. 1997. *Corruption and Governance in the South Pacific. Discussion Paper No. 97/5 State Society and Governance in Melanesia Project*. Canberra: ANU at p. 1. The examples provided by Larmour can be supported by reference to many more recent instances in the South Pacific region. The content of various public reports of the Ombudsman of Vanuatu over the period from 1997–1999 give numerous accounts of corrupt practices by politicians. The National Bank scandal in 1997/1998 in Fiji provides another example, as do allegations of money laundering in Nauru in 1999/2000. It was allegedly allegations of corruption on the part of politicians in Samoa which was behind the assassination of a government Minister in 1999. In fact there are numerous other examples.
- 2 See Powles, G. 1998. *Official Power and Corruption: The Abuse of Power and Accountability*. Paper delivered at the Pacific Islands Legal Officers’ Meeting. Canberra 20th October 1998.
- 3 Commonwealth Secretariat. 1998. *Position paper on Corruption*. Presented to the Pacific Island Legal Officers’ Meeting. Canberra 20th October 1998. At p. 1.
- 4 From Independent Commission Against Corruption (N.S.W.). Home Page <http://www.icac.nsw.gov.au/frame.htm> (Accessed March 1999)
- 5 See *Cooper v Slade* (1858) 6 H.L.C. 746 and *R. v Smith* (1960) 2 Q.B. 423.
- 6 See *R. v Wellburn*, *R v Nurdin*, *R v Randel* (1979) 69 Cr. App Rep. 69 at 73, 74.
- 7 See *R. v Carr* [1956] 2 All E.R. 979; *R v Mills* (1978) 68 Cr. App. Rep. 154 at 158.
- 8 See *Alisae v Salaka* [1985/86] SILR 31.
- 9 See *Alisae v Salaka*, above, n 8, at p 37.
- 10 See *Alisae v Salaka*, above n 8. This involved an allegation in an election petition of corrupt practices. The court held that the criminal standard was appropriate although this was essentially a civil action following *Menyamy v Open Parliamentary Election* [1977] PNGLR 302. The court distinguished *Tegatova v Bennett* [1983] SILR 34 and *In re*

Moresby Parliamentary Election No. 2 [1977] PNGLR 448 on the basis that these cases were concerned not with corrupt practices but with residential qualifications.

- 11 [1935] AC 462.
- 12 On the range of offences see *Halsbury's Laws of England*. 1990. London: Butterworths. Vol. 11, pp. 231ff. In the South Pacific see, for example, the various corruption offences specified in sections 106–108 *Penal Code* [Cap 17] (Fiji).
- 13 (1994) 74 A. Crim. R 115.
- 14 (1990) 49 A. Crim. R. 370.
- 15 Unreported, Fiji Islands Court of Appeal, Civil Appeal No 6/94.
- 16 See Hiro, D. 1976. *Inside India Today*. London: Routledge, Kegan and Paul, chapter 3. Hiro identifies modernisation and industrialisation of traditional society in India as the reasons the existence of wide scale corruption in that country after independence.
- 17 Hardgrave, R. 1980. *India: Government and Politics in a Developing Nation*. New York: Harcourt Brace Jovanovich pp. 75–76.
- 18 OECD 1999. *Ethics in the Public Service – Executive Summary*. Report at <http://www.oecd.org/puma/gvrnance/ethics/pbs/eip96/execsum.htm>. (Accessed March 1999)
- 19 The Corruption Perception Index is accessible at <http://www.gwgd.de/uwvw/icr.html> (Accessed March 1999)
- 20 This concept is relatively unexplored in the context of the Pacific.
- 21 See Field, M. 2000. Corruption Rife in the Pacific. *Fiji Times*. 2nd March 2000, p. 10.
- 22 On the World Bank's position in respect of corruption see its paper World Bank. 1997. *Helping Countries to Combat Corruption: The Role of the World Bank*. World Bank: Washington D.C.