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PREVENTING CORRUPTION IN THE PUBLIC SECTOR AND THE PRINCIPAL-AGENT-CLIENT MODEL: WHITHER INTEGRITY?

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Since the 1990s, regional and international institutions have made it their mission to tackle corruption by adopting treaties to that effect. Of the many conventions, the United Nations Convention against Corruption (UNCAC) is the most widely known due to its adoption by 164 State parties. One of the key features of this Convention is the promotion of preventive measures. As part of prevention, the Convention promotes integrity in the public sector driven by the principal-agent-client (PAC) model. According to this model, corruption occurs when there is a lack of (or near lack of) accountability when an agent (A) to whom the principal (P) has entrusted to carry out the services to a client (C), has an element of discretion in administering the services. This paper questions whether the preventive mechanisms promoted by the UNCAC can introduce the level of integrity required to combat corruption. Using a hypothetical illustration, the paper exhibits how the integrity of an official can be compromised by equally worthwhile competing demands, each with integrity at its core, eventually leading the official to making a moral choice. The concluding section of the paper offers a few suggestions for guiding moral choices.

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I. INTRODUCTION

The global anti-corruption agenda took off with gusto in the late 1990s internationally. Institutions such as the World Bank (WB) highlighted the economic impact of corruption on their infrastructure projects in developing countries and denounced corruption in strong terms. International and regional law-making institutions such as the United Nations Office on Drugs and Crime (UNODC),[1] the Organisation for Economic Cooperation and Development (OECD),[2] and the African Union (AU)[3] drafted anti-corruption legal instruments, resulting in a plethora of conventions and protocols, some in force and some not.[4] Of these instruments, the most comprehensive in scope and widely-ratified instrument is the United Nations Convention against Corruption, 2003 (UNCAC).[5] With a view of promoting integrity in the public sector, anti-corruption conventions that included provisions on prevention have been influenced by the principal-agent-client (PAC) model.[6]

Despite the wide ratification of the UNCAC, corruption is still rife. If anything, the level of corruption is higher than before not just in developing countries, but also in developed countries. According to Transparency International,[7] even G7[8] countries such as Canada have slipped in the Corruption Perceptions Index (CPI)[9] to the twelfth position with a score of seventy-seven out of hundred.[10] So why this

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[1] *About the United Nations Office on Drugs and Crime*, U.N. OFF. DRUGS & CRIME, https://www.unodc.org/unodc/en/about-unodc/index.html.

[2] *About the OECD*, ORG. ECON. COOPERATION & DEV., https://www.oecd.org/about/.

[3] *Who we are: About the African Union*, AFR. UNION, https://au.int/en/overview.

[4] For a brief outline of the anti-corruption conventions in force, see Part IV(c) below.

[5] G.A. Res. 58/4, annex, United Nations Convention Against Corruption (Oct. 31, 2003) [hereinafter UNCAC].

[6] For more on the PAC model, see Part V below.

[7] Transparency International (TI) is a movement that started in the 1990s with the goal to 'stop corruption and promote transparency, accountability and integrity at all levels and across all sectors of society'. For more on TI, see *About*, TRANSPARENCY INT'L., https://www.transparency.org/en/about.

[8] On the role of the G7, see *Role of the G7*, EUR. COMM., https://ec.europa.eu/info/food-farming-fisheries/farming/international-cooperation/international-organisations/g7_en.

[9] This is an annual index published by Transparency International. The last one published in 2019 looked at 180 countries. The countries are scored on a scale of 100 (not corrupt) to 0 (highly corrupt). For a useful map, see *World Map, Results, Corruption Perceptions Index, 2019*, TRANSPARENCY INT'L., https://www.transparency.org/en/cpi/2019/results/bwa.

[10] *Canada Falls from its Anti-Corruption Perch*, TRANSPARENCY INT'L. (Feb. 25, 2020), https://www.transparency.org/en/blog/canada-falls-from-its-anti-corruption-perch.

deterioration when most States seem to have robust laws after years of intervention by aid agencies such as the United States Agency for International Development (USAID) and the United Kingdom Department for International Development (DFID) based on the UNCAC? A number of reasons are often advanced: lack of political will, weak anti-corruption enforcement units, lack of experienced investigative officers, and lack of evidence.[11] While these reasons explain the lack of progress in curbing corruption, not much has been said about the limited impact of the PAC model in infusing integrity in the public sector in the face of integrity-driven 'socially-valued virtues' such as familial loyalty, duties to kith and kin, and friendships that influence everyday social interactions and human relationships. This paper argues that the PAC model on its own is insufficient to introduce the necessary level of integrity to tackle corruption, and that a rethink is required to understand why in the event of a face-off between integrity in the workplace and integrity in the wider social context, the latter always triumphs.

Before proceeding with the main argument, a brief account of the negative impact of corruption on trade and growth and the international response is provided in order to convey the importance of tackling corruption at a global level. Part II, therefore, gives a brief account of the pervasive character of corruption and its negative economic impact. Part III highlights the difficulties in arriving at a universal definition of corruption, and Part IV concerns itself with the evolution of the anti-corruption narrative and the resulting anti-corruption conventions. This background moves the discussion forward to the main argument of this paper in Part V, on the limitations of the PAC model, as reflected in the UNCAC provisions on prevention in the public sector. It also highlights, through a hypothetical illustration, how a public official's integrity in the public sphere may be undermined by competing demands. Concluding the paper, Part VI makes a few suggestions for guiding moral choices.

II. THE PERVASIVE CHARACTER OF CORRUPTION

Thinkers since ancient times have highlighted the problem of corrupt practices. For instance, Kautilya (c. 250 BCE), in his book on statecraft, '*Arthasastra',* writes:

> [j]ust as it is impossible not to taste the honey or the poison that finds itself at the tip of the tongue, so it is impossible for a government servant not to eat up, at least, a bit of the king's revenue. Just as fish moving under water cannot possibly be found out either as drinking or not drinking water, so government

[11] *See generally,* Rema Hanna et al., *The Effectiveness of Anti-Corruption Policy: What Has Worked, What Hasn't, and What We Don't Know – A Systematic Review* (EPPI Centre, Social Science Research Unit, University of London, 2011).

> servants employed in the government work cannot be found out (while) taking money for themselves…[12]

A. Low Level or Petty Corruption

Many of the characteristics described by earlier thinkers are still present and relevant. While corruption in ancient times may have taken root within the realms of the ruling class and the administrative elite, it has evolved to take many forms, like a shape-shifter,[13] depending on the opportunities and the surrounding environment. Corruption is no longer contained within politics or bureaucracy. It encroaches upon all aspects of human existence, from citizens' access to healthcare, education and other basic services, to access to markets, sale of goods and services and infrastructure investments. In some countries, it has become so pervasive that it is said to have become a part of the social fabric.[14] Payments of small bribes to low-level officials such as traffic policemen and telephone linesmen are so commonplace in countries such as Mexico, India, and Nigeria, that they are often said to be a tax on the poor.[15]

The pervasive character of low-level corruption is supported by surveys conducted in many African[16] and Asian countries[17]. This type of corruption is commonly

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[12] Kautilya, *Chapter IX: Examination of the Conduct of Government Servants*, *in* Kautilya's Arthshastra: Book II (R. Shamasastry trans., Raghuveer Printing Press 1956), https://www.wisdomlib.org/hinduism/book/kautilya-arthashastra/d/doc366055.html; *see also* Shawn Ni & Pham Hoang Van, *High Corruption Income in Ming and Qing China*, 81 J. Dev. Econ. 316 (2006).

[13] In mythology and science-fiction, a human being is capable of changing its shape at will. For instance, in Greek mythology, Metis (a Titaness and the wife of Zeus) could change her shape at will.

[14] Some consider corruption as a normative system. *See* D. DELLA PORTA & A. VANNUCCI, THE HIDDEN ORDER OF CORRUPTION: AN INSTITUTIONAL APPROACH (2012); *see also* Peter Larmour, *A Short Introduction to Corruption and Anti-Corruption* (Int'l. Ctr. Sports Stud., Working Paper No. 37, 2007).

[15] Max Lawson, *A Tax on the Poor to Benefit the Rich: Corruption and Inequality*, OPEN GOVT. PARTNERSHIP (Oct. 19, 2018), https://www.opengovpartnership.org/stories/a-tax-on-the-poor-to-benefit-the-rich-corruption-and-inequality/; THE WORLD BANK, THE MANY FACES OF CORRUPTION (J. Edgardo Campos & Sanjay Pradhan eds., 2007).

[16] According to a survey conducted in Ghana in 2011, 78.8% of the respondents had to pay a bribe for utilities such as water and electricity and 64.8% paid a bribe for accessing health services and education: *see* GHANA INTEGRITY INITIATIVE, THE "VOICE OF THE PEOPLE" SURVEY 10 (2011); A similar trend is also reported from Kenya which reports that 36.1% of those seeking public services were solicited for a bribe and of these 41% paid the bribe: ETHICS & ANTI-CORRUPTION COMMISSION, NATIONAL CORRUPTION PERCEPTION SURVEY 2011 (2012); A survey conducted by TI Kenya in 2013 also reports the high percentage of bribe paying and states that between 50-74.9% of the respondents had paid

known as 'petty corruption', and is widely understood as the soliciting of comparatively small payments by officials, usually low-level, to speed up administrative services such as access to utilities, travel documents, tender details, and customs clearances sought by a citizen or a business organisation.[18] The State official in these circumstances abuses his position and imposes on the citizen or the organisation a form of arbitrary 'tax' to provide a service to the citizen even though the official, as an employee of the State, is expected to provide the service sought. The relationship between the State as a service-provider and citizen as the service-seeker is one that could be described as a relationship between the powerful and the vulnerable. As Lord Acton said, "power tends to corrupt".[19] The service-seeker is in a vulnerable position since the service sought is essential to the service-seeker and can be obtained only from one service provider, the State.

B. Grand Corruption

At the other end of the corruption continuum is 'grand corruption', which is generally understood to be corruption that takes place at the upper reaches of society involving the political elite, public officials, middlemen and the business sector.[20] A case from the United Kingdom (UK) that will go down in the annals of history for causing ripples globally is an illustration of the scale of grand corruption and the difficulties faced by investigators. On September 11, 2003, *The Guardian* published an item on a slush fund of £20 million[21] used for alleged payment of bribes to members of the Saudi royal family and public officials for the purchase of

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bribes in the previous year, see TRANSPARENCY INT'L., GLOBAL CORRUPTION BAROMETER, 10 (2013), https://www.transparency.org/en/publications/global-corruption-barometer-2013.

[17] Transparency International, India 2005 study estimates that "common citizens of the country pay a bribe of INR 21,068 crores [a crore being ten million] while availing one or more of the eleven public services in a year" based on a sample of 14,405 respondents from 151 cities and 306 villages of twenty States in India. As high as 62% of citizens think that corruption is not a hearsay, but they, in fact, have had firsthand experience of paying a bribe or 'using a contact' to get a job done in a public office; TRANSPARENCY INT'L. INDIA, INDIA CORRUPTION STUDY, 3 (2005), https://transparencyindia.org/wp-content/uploads/2019/04/India-Corruption-Study-2005.pdf.

[18] Alan Doig & Robin Theobald, *Introduction: Why Corruption?* 37 COMMONWEALTH & COMP. POL. 3 (1999) [hereinafter Doig & Theobold].

[19] LORD ACTON, *Letter to Bishop Mandell Creighton (Apr. 5, 1887)*, *in* HISTORICAL ESSAYS & STUDIES (John Neville Figgis & Reginald Vere Laurence eds., 1907); *see also* John Warburton, *Corruption, Power and the Public Interest*, 17 BUS. & PROF. ETHICS J. 79 (2008).

[20] Doig & Theobold, *supra* note 18.

[21] David Leigh, Rob Evans & David Gow, *Fraud Office Looks again at BAE*, GUARDIAN (Sept. 12, 2003, http://www.guardian.com/uk/2003/sep/12/freedomofinformation.saudiarabia.

defence equipment.[22] This initiated an investigation by the UK Serious Fraud Office (SFO),[23] as part of which, two arrests were made.[24] While the investigations were ongoing, in December 2006, *The Daily Telegraph* reported that Saudi Arabia had given the UK ten days to suspend the SFO investigation, and threatened that they would take their purchase of fighter planes that was being negotiated with BAE (a British defence and aerospace company) to France.[25] The contract was said to be worth around £10 billion, with 50,000 jobs at stake. The head of the SFO, Robert Wardle, also revealed later that they had received a threat from Saudi Arabia that they would cease to co-operate on activities related to counter-terrorism. These threats seemed to have been seriously taken on board by the then Prime Minister, Tony Blair,[26] and the Attorney General's (AG) advice to not drop the case did not have any effect. On December 13, 2006, the rule of law took a backseat when the Director of the SFO wrote to the AG that it was dropping the investigation and would not be looking into the Swiss accounts containing the slush funds. The reason given was "real and imminent damage to the UK's national and international security [which] would endanger the lives of UK citizens and service personnel".[27] The next day, the AG announced that the investigation was to be discontinued due to public interest. In the House of Lords, the AG stated:

> I have, as is normal practice in any sensitive case, obtained the views of the Prime Minister, the Foreign and Defence Secretaries as to the public interest considerations raised by this investigation. They have expressed the clear view that continuation of the investigation would cause serious damage to UK/Saudi security, intelligence and diplomatic co-operation, which is likely to have

[22] This contract for the purchase of defence equipment was known as the *Al-Yamamah* Defence contract.

[23] The Serious Fraud Office prosecutes complex fraud, bribery and corruption. For more details, see *Home*, SERIOUS FRAUD OFF., https://www.sfo.gov.uk.

[24] *SFO to Investigate BAE Contracts*, BBC (Nov. 3, 2004), http://news.bbc.co.uk/1/hi/business/3978703.stm.

[25] Christopher Hope, *Halt Inquiry or we Cancel Eurofighters*, TELEGRAPH (Dec. 1, 2006), https://www.telegraph.co.uk/news/uknews/1535683/Halt-inquiry-or-we-cancel-Eurofighters.html.

[26] David Leigh & Rob Evans, *Blair Forced Goldsmith to Drop BAE Charges*, GUARDIAN (Feb. 1, 2007), https://www.theguardian.com/world/2007/feb/01/bae.saudiarabia; Blair justified the decision to drop the case thus: "Our relationship with Saudi Arabia is vitally important for our country in terms of counter-terrorism, in terms of the broader Middle East, in terms of helping in respect of Israel and Palestine. That strategic interest comes first"; *Blair Defends Saudi Probe Ruling*, BBC (Dec. 15, 2006), http://news.bbc.co.uk/1/hi/uk_politics/6182125.stm.

[27] R. (on the application of Corner House Research) v. Director of the Serious Fraud Office [2008] EWHC 1354 (Admin).

> seriously negative consequences for the UK public interest in terms of both national security and our highest priority foreign policy objectives in the Middle East. The heads of our security and intelligence agencies and our ambassador to Saudi Arabia share this assessment.[28]

Corruption in the defence sector is not uncommon,[29] and the BAE incident referred to above is not an isolated incident. Companies such as BAE Systems and Rolls Royce continue to be in the news. *The Sunday Times*, not so long ago, reported that it had evidence to show that BAE Systems was implicated in a multi-billion Rand arms deal involving a South African ex-minister.[30] Corruption, however, is not unique to the defence sector and is regularly found in other sectors such as information technology (IT), extractive industries, and pharmaceuticals. For instance, Rolls Royce, Samsung, and Halliburton, among others, have been implicated in an oil industry scandal. These companies (according to internal documents seen by *Huffington Post*) used a Monaco-based company, Unaoil, to obtain contracts in a number of States including Kazakhstan, Iraq and Libya. Unaoil is accused of bribing public officials and it is estimated that £700 billion was paid out in bribes.[31] In the pharmaceutical sector, Novartis has been accused of paying illicit rebates to doctors in Korea,[32] and in 2014, UK's GlaxoSmithKline was found guilty of bribery in China and fined $490 billion.[33] Similarly, Novartis paid $25 million to the United States Security and Exchange Commission (SEC) after they violated the US Foreign Corrupt Practices Act (FCPA) when two of

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[28] 687 Parl. Deb HL, (2006) col. 1711 (UK).

[29] *New Evidence of Arms Deal Corruption – Report*, DEFENCE WEB (June 3, 2013), http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=30710:new-evidence-of-arms-deal-What-corruption-report&catid=54:Governance&Itemid=118; Other items on BAE involvement in corrupt deals, *see also, Arms chief in cover-up over £6m penthouses*, SUNDAY TIMES (Feb. 3, 2013), http://www.thesundaytimes.co.uk/sto/news/insight/article1206718.ece.

[30] *Id.*

[31] Mary-Ann Russon, *Unaoil Bribery Scandal, Hyundai, Rolls-Royce Implicated in $1 tn Oil Industry Corruption*, I.B. TIMES (Apr. 1, 2016), http://www.ibtimes.co.uk/unaoil-bribery-scandal-samsung-hyundai-rolls-royce-implicated-1tn-oil-industry-corruption-1552538; Nick Baumann et al., *Unaoil's Huge New Corporate Bribery Scandal*, HUFFINGTON POST (Mar. 30, 2016),http://www.huffingtonpost.com/entry/unaoil-scandal-explained_us_56fbd2f0e4b0daf53aee0cff.

[32] Jonathan Webb, *Why Pharma Faces So Many Corruption Allegations*, FORBES (Feb. 23, 2016), http://www.forbes.com/sites/jwebb/2016/02/23/why-pharma-faces-so-many-corruption-allegations/#728a2e761bd3.

[33] *GlaxoSmithKline Fined $490m by China for Bribery*, BBC (Sept. 19, 2014), https://www.bbc.com/news/business-29274822.

their subsidiaries in China bribed doctors to prescribe their drugs.[34] More recently, Airbus conducted a massive operation offering and paying bribes to senior executives so as to obtain orders.[35] So, the list goes on.

Along with the payment of bribes, the common thread running through the above illustrations is that they are all large multinational corporations (MNCs) operating in regulated sectors with high levels of competition. This, however, should not be taken as suggesting that small and medium-sized enterprises (SMEs) do not engage in corruption. The focus of research largely has been on MNCs as suppliers of bribes, and not on SMEs. This lack of interest regarding SMEs may be due to the scale of acts of corruption. Operating in domestic markets, most SMEs are generally not known for seeking overseas trade. However, a survey of 1122 SMEs by KPMG and YouGov revealed that only 33% of them are not interested in expanding overseas.[36] There are, however, some success stories.[37] It is clear that more needs to done by way of support for SMEs to engage in international trade. A survey conducted by Association of Chartered Certified Accountants (ACCA),

> [f]ound strong support for the proposition that the risk [of bribery] is present at the SME level too, and therefore needs to be addressed and managed by smaller firms: over 62% of respondents disagreed with the statement that SMEs are not generally likely to come across the risk of bribery during the course of their business dealings.[38]

Corruption is an ever-present challenge for MNCs and SMEs. From the business perspective, it may seem attractive to offer bribes to cut the red tape they face, be

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[34] Richard L Cassin, *Novartis pays $25 million to SEC to Resolve China FCPA Offenses*, FCPA BLOG (Mar. 23, 2016), http://www.fcpablog.com/blog/2016/3/23/novartis-pays-25-million-to-sec-to-resolve-china-fcpa-offens.html; Novartis is a Swiss pharmaceutical but they are listed in NYSE (New York Stock Exchange). Hence, the involvement of the US investigation authorities; for a recent case, see Harry Cassin, *Herbalife pays $123 million to resolve China FCPA offenses*, FCPA BLOG (Aug. 28, 2020), https://fcpablog.com/2020/08/28/herbalife-pays-123-million-to-resolve-china-fcpa-offenses/.

[35] Peggy Hollinger, et al., *Airbus ran 'massive' bribery scheme to win orders*, FIN. TIMES (Jan. 31, 2020), https://www.ft.com/content/f7a01a60-442b-11ea-abea-0c7a29cd66fe.

[36] KPMG, AGENDA FOR GROWTH REPORT (2014), https://home.kpmg/il/en/home/insights/2014/10/agenda-for-growth.html.

[37] PARLIAMENTARY BUSINESS PUBLICATIONS & RECORDS, ROAD TO SUCCESS: SME EXPORTS, SELECT COMMITTEE ON SMALL AND MEDIUM SIZED ENTERPRISES – REPORT (2013), https://publications.parliament.uk/pa/ld201213/ldselect/ldsmall/131/13102.htm.

[38] ASSN. CHARTERED CERTIFIED ACCOUNTANTS, COMBATING BRIBERY IN THE SME SECTOR (Nov., 2013), https://www.accaglobal.com/content/dam/acca/global/PDF-technical/other-PDFs/tech-tp-cbissuk.pdf.

it in domestic or in overseas dealings, to overcome competition and to satisfy their shareholders with sustained economic growth. A case for corruption as a positive force has been made by a number of academic writers[39] who see corruption as an aid to removing regulatory obstacles to trade. The notorious 'License Raj' in India is often cited an as illustration.[40] However, the argument in favour of corruption to ease bureaucracy has few adherents. The majority and well-established view is that corruption is detrimental to economic growth and negatively impacts the well-being of citizens. Therefore, the need for greater attention to corruption is felt. According to Tanzi, corruption contributes to reduction in foreign direct investment (FDI) due to increase in costs, the productivity of public investment and infrastructure, and investment generally, thus hindering the growth and development of a nation.[41] Shleifer & Vishny,[42] the WB,[43] and Bardhan[44] also reached similar conclusions. The WB, as a major international financial institution, lent vital support to the anti-corruption voices[45] since many of its funded projects had fallen prey to corruption.[46]

III. CORRUPTION – THE CONCEPT AND CAUSES

So far 'corruption' and 'bribery' have been used interchangeably. Before proceeding with an examination of the emergence and subsequent development of the anti-corruption narrative in Part IV, it is important to focus on how corruption is viewed in order to provide a backdrop. This will aid towards understanding the legal approach to corruption. The word 'corruption' in ordinary language, is normally used in a variety of ways. According to *The New Collins English Dictionary*, 'corruption' is the "act of corrupting or state of being corrupt…depravity…dishonesty (especially, bribery)… ."[47] It is used in a variety of

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[39] *See* Toke Aidt, *Economic Analysis of Corruption: A Survey*, 113 ECON. J. 632 (2003) [hereinafter Toke Aidt]; Nathaniel Leff, *Economic Development through Bureaucratic Corruption*, 8 AM. BEHAV. SCIENTIST 8 (1964) [hereinafter Nathaniel Leff].

[40] Fuad Cassim, *Some Lessons from the License Raj and Economic Growth in South Africa*, BROOKINGS (2015), https://www.brookings.edu/research/some-lessons-from-the-license-raj-and-economic-growth-in-south-africa/.

[41] Vito Tanzi, *Corruption Around the World*, 45 STAFF PAPERS IMF 559 (Dec. 1998).

[42] Andrei Shleifer & Robert W. Vishny, *Corruption*, 106 Q. J. ECON. 599 (1993).

[43] WORLD BANK, WORLD DEVELOPMENT REPORT: THE STATE IN A CHANGING WORLD (1997).

[44] Pranab Bardhan, *Corruption and Development: A Review of Issues*, 35 J. ECON. LITERATURE 1320 (1997).

[45] *See* Part IV (b) below.

[46] *See* BRETTON WOODS PROJECT, DAMS ON TRIAL: THE WORLD BANK AND THE CANCER OF CORRUPTION, https://www.brettonwoodsproject.org/resources/dams-on-trial-the-world-bank-and-the-cancer-of-corruption/.

[47] *Corruption,* COLLINS ENGLISH DICTIONARY (1986), https://www.collinsdictionary.com/dictionary/english/corruption.

contexts, from perceived degradation of values in society and deep-seated changes in a person's character in the pursuit of goals, to irregular practices that undermine the sense of justice and fair play. It is common for older generations to talk of the corruption of the young, for instance, by new aesthetic styles, be they in fashion, music, dance or other art forms. The reference here is not only to changes at the surface level, but also to changes taking place at the deeper level to the value systems of the youth that may not correspond with those of the older generation or meet with their approval. The older generation's response to flower power in the late 1960s is one such illustration.[48] Corruption can also refer to a person's character when it takes a turn for the worse. The word is also used in the context of institutions, as in institutional corruption, where it does not follow the processes that might have been set up to ensure objectivity, impartiality, transparency, and equality of opportunity. Systems are said to be corrupt, for instance, where steps initiated for making an appointment within an organisation do not follow open and objective standards, as in cases where an individual is appointed purely on the basis of references from 'important people' without taking into account the quality of the applicants' responses at the interview. There is also an ethical dimension to corruption as, for instance, in the giving of a gift by a student to a teacher even though the giving of a gift to someone is not illegal in itself. The motivations become important in this context. Regardless of these complexities, attempts have been made to provide a general definition of corruption and these definitions rotate around economic or other gains made by an individual in a position of power as a result of that individual's role within an organisation or institution. These definitions locate corruption in the space between power and vulnerability. What stands out in the many attempts made to define corruption is that they all focus on corruption in the public sector.

The widely quoted definition in the anti-corruption narrative is that of Nye, according to whom corruption is:

> Behaviour which deviates from the formal duties of a public role because of private-regarding (personal, close family, private clique) pecuniary or status gains, or violates rules against the exercise of certain types of private-regarding influence. This includes such behaviour as bribery (use of a reward to pervert the judgment of a person in a position of trust); nepotism (bestowal of patronage by reason of ascriptive relationship rather than merit); and

[48] Stuart Hall, *The Hippies - An American 'Moment',* (University of Birmingham: Centre for Cultural Contemporary Studies, 1968), https://www.birmingham.ac.uk/Documents/college-artslaw/history/cccs/stencilled-occasional-papers/1to8and11to24and38to48/SOP16.pdf.

> misappropriation (illegal appropriation of public resources for private-regarding uses).[49]

The interplay of power in public office and personal (private) gain is a feature that figures in other definitions as well. For instance, according to Treisman, corruption is the "misuse of public office for private gain."[50] According to Aidt, "[c]orruption is an act in which the power of public office is used for personal gain in a manner that contravenes the rules of the game."[51] Similarly, for Kennedy, "corruption is a code word for 'rent-seeking' using power to extract a higher price than that which would be possible in an arms-length or freely competitive bargain and for practices which privilege locals."[52]

This focus on public sector in these definitions can be criticised since they seem to leave out corruption found within the private sector, the charitable sector,[53] the education sector,[54] and more recently in sports, which the FIFA scandal has exposed.[55] This rather one-sided focus on public sector has come under criticism from Hodgson and Jiang, who regard these definitions by economists as unsatisfactory, and attribute this focus on the public sector to the "widespread influence of individualistic and libertarian ideology" where the "primary target…is the abuse of power by politicians."[56] According to them, "the misuse of large corporations does not raise the same level of concern among leading individualistic and libertarian thinkers such as Milton Friedman and Fredrick Hayek."[57] To some extent, Hodgson and Jiang's criticism of the focus on the public sector is understandable, but the view that corporate corruption (private sector) is totally ignored is incorrect, in my view. If we take the emergence of the anti-corruption narrative and its subsequent development by focusing on business integrity

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[49] Joseph S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, 61 AM. POL. SCI. REV. 417, 419 (1967) [hereinafter Nye on Corruption].
[50] Daniel Treisman, *What Have we Learned about the Causes of Corruption from Ten Years of Cross-National Empirical Research?* 10 ANN. REV. POL. SCI. 211 (2007).
[51] Toke Aidt, *supra* note 39.
[52] D. Kennedy, *The International Anti-Corruption Campaign*, 14 CONN. J. INT'L. L. 455 (1999).
[53] Mark Steven Le Clair*, Malfeasance in the Charitable Sector: determinants of "Soft" Corruption at Nonprofit Organizations*, 29(1) PUB. INTEGRITY 54 (2019).
[54] ORG. ECON. COOPERATION & DEV., INTEGRITY OF EDUCATION SYSTEMS (2018), https://www.oecd.org/corruption/acn/OECD-ACN-Integrity-of-Education-Systems-ENG.pdf.
[55] ANDREW JENNINGS, THE DIRTY GAME: UNCOVERING THE SCANDAL (2003).
[56] Geoffrey M. Hodgson & Shuxia Jiang, *The Economics of Corruption and the Corruption of Economics: An Institutional Perspective*, 41 J. ECON. 1043, 1046 (2007).
[57] *Id.*

through hard and soft law[58] mechanisms, the focus is on curbing the practice of businesses supplying bribes to the public sector. The law, as it has developed through the many anti-corruption conventions, has the potential to cope with corrupt practices emerging in sectors where public sector officials are not (or may not be) involved. The UNCAC specifically addresses the issue of corruption in the private sector. Articles 21 and 22 therein address the offences of bribery and embezzlement of property in the private sector. Further, as a preventive mechanism, Article 12 requires State Parties to promote standards and procedures that safeguard the integrity of private entities, including the adoption of codes for conducting correct, as well as honourable and proper performance of business activities.

The focus on public sector corruption by the economists is justifiable to some extent since the State and the public officials play an important role in economic growth in creating and implementing the rules and regulations that affect all including citizens, businesses and inward investment. What stands out in respect of corruption is its multi-perspective dimension and against this context, whatever definition we provide of corruption will be incomplete and, therefore, unsatisfactory. Furthermore, the ethical undercurrent of corruption also poses particular problems in constructing an all-encompassing definition due to the different approaches to ethics, ranging from utilitarianism to virtue ethics. Were utilitarianism, the ethical stance to be adopted, it would be justifiable to say that in some circumstances an official could accept a bribe, so long as it was for the happiness of the greater. Thus, where a public official solicits a substantial bribe in the form of the building of a hospital in his village from a corporation to benefit the villagers, it could be justified on utilitarian grounds. After all, it is for maximising the happiness of the many. Since this kind of corruption is not for "private gain" and is motivated by gain for the many, it is called "noble cause corruption".[59] However, if one were led by virtue ethics, then the idea that utilitarianism could arguably allow for noble cause corruption would not be tolerated.

Given the complexities in arriving at a universal definition, it is easy to see why regional and international conventions have not attempted to provide a general definition of corruption. The purpose of these conventions is harmonisation of the law and it would be short-sighted if a proposed convention were to fall at the first hurdle of deriving a definition. Further, note must also be taken of the policies

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[58] Soft law initiatives include the OECD's Guidelines for Multinational Enterprises; ORG. ECON. COOPERATION & DEV., GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011), http://www.oecd.org/daf/inv/mne/48004323.pdf.

[59] SEUMAS MILLER, PETER ROBERTS & EDWARD SPENCE, CORRUPTION AND ANTI-CORRUPTION: AN APPLIED PHILOSOPHICAL APPROACH (2005).

driving a convention. In the case of an anti-corruption convention, the purpose is to combat and prevent corrupt behaviour that harms or affects the socio-economic climate and development of a country. As Kofi Annan notes in the Preface to the UNCAC, "[c]orruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development."[60] *A priori,* this restricts the types of acts and contexts that an anti-corruption convention is likely to engage with. In the absence of economic detriment, it is unlikely to be concerned with issues of emerging youth culture or the motivations of a student in giving a low value gift to a teacher.

IV. THE EMERGENCE OF THE ANTI-CORRUPTION NARRATIVE

The modern-day anti-corruption discourse started in the 1970s and gained substantial momentum from the 1990s onwards.

A. The 1970s

The 1970s were interesting times in modern US history in exposing the abuse of power in both the political and the commercial arenas. This is evidenced by the Watergate scandal, which exposed not only the extent of political corruption,[61] but also corruption in the commercial arena. The Commission inquiring into the Watergate affair revealed that:

> …violations of the federal securities laws had indeed occurred. The staff discovered falsifications of corporate financial records, designed to disguise or conceal the source and application of corporate funds misused for illegal purposes, as well as the existence of secret 'slush funds' disbursed outside the normal financial accountability system. These secret funds were used for a number of purposes including in some instances, questionable or illegal foreign payments. These practices cast doubt on the integrity and reliability of the corporate books and records which are the very foundation of the disclosure system established by the federal securities laws.[62]

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[60] UNCAC, *supra* note 5, at iii.

[61] This scandal exposed the illegal contributions made towards the re-election campaign of President Richard Nixon. During the investigations, officers from major US corporations testified about corporate political of the Concealment of Questionable or Illegal Corporate Payments and Practices, Exchange Act, Release No. 15, 570, 16 SEC DOCKET 1143, 1144 (Feb. 15, 1979); *see also* KEITH W OLSON, WATERGATE: THE PRESIDENTIAL SCANDAL THAT SHOOK AMERICA (2003); BARRY SUSSMAN, THE GREAT COVER UP: NIXON AND THE SCANDAL OF WATERGATE (4th ed., 2010).

[62] STAFF OF COMM. ON BANKING, HOUSING & URBAN AFF., 94TH CONG, REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE

A survey by the SEC also highlighted the prevalence of corruption to further commercial interests by US businesses whilst conducting business abroad. According to their Report to the House of Representatives:

> [m]ore than 400 corporations have admitted making questionable or illegal payments. The companies, most of them voluntarily, have reported paying out well in excess of $300 million in corporate funds to foreign government officials, politicians, and political parties. These corporations have included some of the largest and most widely held public companies and over 117 of them rank in the top Fortune 500 industries. The abuses disclosed run the gamut from bribery of high foreign officials in order to secure some type of favourable action by a foreign government to so-called facilitating payments that allegedly were made to ensure that government functionaries discharge certain ministrial [sic] or clerical duties. Sectors of industry typically involved are: drugs and health care; oil and gas production and services; food products; aerospace, airlines and air services, and chemicals.[63]

There were also specific instances that made apparent that businesses were suppliers of bribes to foreign officials.[64] A sub-committee on MNCs was set up under Senator Frank Church, and came to be known as the Church Committee. One of the most important cases involving bribery that alarmed the US Congress was that of Lockheed, the largest US defence company, which had received a $250 million guaranteed loan from the US federal government to keep it out of bankruptcy. It transpired, however, that it was involved in payments to the Japanese Prime Minister, the Inspector General of the Dutch Armed Forces and the husband of Queen Juliana of the Netherlands (Prince Bernhard), and Italian political parties.[65]

PAYMENTS AND PRACTICES (Comm. Print 1976), *reprinted in* Special Supplement, Sec. Reg. & L. Rep. (BNA) No. 353 (May 19, 1976) at 2.

[63] H.R. REP. NO. 95-640, 1ST SESS. (1977), http://10.173.2.10/criminal/fraud/fcpa/history/1977/houseprt.html.

[64] In 1975, the Church Committee held a number of hearings involving number of companies which had directly or indirectly made payments to either political parties or public officials of foreign States for the purposes of obtaining commercial benefit. Gulf Oil, for instance, had paid the President of the Republic of Korea for his political campaign and Northrop had made payments to a Saudi Arabian general; *The Activities of American Multinational Corporations Abroad: Hearings Before the Subcomm. on Int'l. Econ. Pol'y. of the H. Comm. on Int'l. Relations*, 94th Cong. 2 (1975).

[65] *See Foreign Payments Disclosure: Hearings Before the Subcomm. on Consumer Prot. & Fin. of the H. Comm. on Interstate & Foreign Com.*, 94th Cong. 2 (1976).

The response to the SEC survey came in the form of a new legislation, the FCPA,[66] which criminalised the bribery of foreign public officials by US businesses. The US exerted pressure through diplomatic channels on other industrialised nations to adopt similar legislations in their jurisdictions. The UK was one of the countries targeted by the US. In a courtesy call in June, 1977, the US Ambassador to the Secretary of State stressed that President Carter was "taking the issue of corruption very seriously."[67] The UK's response was not even lukewarm. The common reason provided whenever the issue of corruption was raised was that that was the way business was conducted abroad. An item entitled "Britain Blocks Reform"[68] published in *The Guardian,* as well as the documents referred to therein, are extremely revealing. Given the importance of the export market for the UK, the government felt that it would be difficult for the UK to meet the US-driven moral standards, and that the question of criminalising and prosecuting bribery was a matter to be left to the State in which the corrupt activity took place.[69] The idea of long-arm jurisdiction of the kind adopted by the FCPA did not find favour. It may also be noted that the UK felt that to adopt long arm jurisdiction would run counter to the relations that they had established with the former colonies, and would be seen by them as interference in their internal affairs. In other words, the matter was a sensitive one and they would not wish to jeopardise the delicate balance they had achieved with their ex-colonies post-independence. This attitude is arguably based on the entrenched view of the territorial State as the political unit since the sixteenth century.[70] However, of late, there seems to be an emerging realisation that long-arm jurisdiction is much-needed in specific areas such as cybercrime, human trafficking, corruption, and money laundering where crimes transcend borders.[71]

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[66] Foreign Corrupt Practices Act, 15 U.S.C. §78dd-1 (1977), http://www.justice.gov/criminal/fraud/fcpa/; For more on the history of the FCPA, see Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO STATE L. J. 930 (2012).

[67] Secretary of State for Trade Office, Meeting Minute No. 748/77 (June 23, 1977), *microformed on* The National Archives, http://image.guardian.co.uk/sys-files/Guardian/documents/2007/05/29/ch06doc03.pdf.

[68] *Britain Blocks Reforms*, GUARDIAN (Dec. 12, 2011), http://www.guardian.co.uk/baefiles/page/0,,2095820,00.html.

[69] Secretary of State for Industry's Office, Note of a Meeting after Lunch at Chequers on Sunday (May 22, 1977), http://image.guardian.co.uk/sys-files/Guardian/documents/2007/05/29/ch06doc1.pdf.

[70] Harold G Maier, *Resolving Extraterritorial Conflicts, or "There and Back Again"*, 25 VA. J. INT'L. L. 7 (1984 -1985).

[71] *See* ALEJANDRO CHEHTMAN, THE PHILOSOPHICAL FOUNDATIONS OF EXTRATERRITORIAL PUNISHMENT (2010); M HIRST, JURISDICTION AND THE AMBIT OF THE CRIMINAL LAW (2003).

At this juncture, it would be reasonable to ask why the US initially was so keen to criminalise the behaviour of their businesses abroad. A straightforward answer to this question is not easy as a number of variables could have affected their decision to go down the criminal law route. The notorious Watergate scandal exposed the politicians' abuse of their powers, the power of the US corporations, and the use and existence of international slush funds. The SEC survey exhibited the negative effects of bribery on competition amongst US firms when conducting business abroad. It may also be that the US, after its important and central role in World War II, perceived itself to be an important leader on the international scene and wanted to send out the message worldwide that they ran a clean house, and that the rule of law was fully respected. The politics of Cold War may have also contributed to their decision to show that capitalism was not a corrupt force. Whatever their reasons were, it would not be naïve to say that they genuinely expected other industrialised nations to follow suit with similar legislations with the intention of creating a level playing field for businesses. Equally, it could be said that the US was arrogant in assuming that other States would be willing to see the US as the standard bearer for setting moral standards. As Hotchkiss observed, "as soon as the FCPA became law, critics lambasted it as ineffective, naïve, arrogant (for attempting to impose US standards on other countries), and just plain bad for US businesses."[72]

Despite the enactment of the FCPA, the period from 1977 to 1997 was not that spectacular in the enforcement history of the FCPA. The SEC and the Department of Justice (DOJ) appeared to be lax, since only twenty-three prosecutions were brought by them despite the SEC survey indicating that bribery was a common practice adopted by US companies. It is possible that these bodies were not proactive in prosecuting corruption cases since it would have undermined the competitiveness of US businesses against those from other jurisdictions – like the UK and France – which did not criminalise the corrupt conduct of their businesses when engaging in overseas transactions. Turning a blind eye would have been beneficial for the US economy.[73] The result was that the FCPA came to be colourfully described as a 'sleeping dog'.[74]

It must, at this stage, be pointed out that the link between corruption, economic growth and poverty was not an issue that had influenced the US when enacting the FCPA. For decades, the voices from the wilderness – the 'third world' - in respect of lack of opportunities for economic growth had been largely ignored. The

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[72] Caroyn Hotchkiss, *The Sleeping Dog Stirs: New Signs of Life in Efforts to End Corruption in International Business*, 17 J. PUB. POL'Y. & MKTG., 108, 108 (1998) [hereinafter Hotchkiss].
[73] *See* LE Longobardi, *Reviewing the Situation: What is to be Done with the Foreign Corrupt Practices Act?* VAND. J. TRANSNAT'L. L. 431 (1987).
[74] *Id.*

reluctance on the part of the industrialised nations to follow in the footsteps of the US continued despite consistent US pressure. The persistently negative stance taken by these States led some to believe that the US might repeal its legislation on foreign bribery so that their businesses would not be disadvantaged. There were also many ambiguities in the FCPA, as originally drafted, which led to a number of amendments introduced by the Omnibus Trade and Competitiveness Act, 1988 (OTCA).[75] During this process, the International Agreement Negotiations Report to Congress included in the OTCA stated that "the President should pursue the negotiation of an international agreement, among the members of the Organization of Economic Cooperation and Development…."[76] This was seen as a possible way to progress the adoption of FCPA-like legislation in different jurisdictions.[77] The negotiations thus initiated[78] resulted in the signing of the now well-established OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997, which has been ratified by forty-four countries including the US.[79]

B. The World Bank and the Anti-Corruption Discourse

In the 1996 annual meeting of the WB and the International Monetary Fund (IMF), James Wolfensohn, the then President of the WB, suddenly raised the issue of corruption.[80] As is well known, the WB is an important international financial institution that provides low-interest and interest-free loans to countries for

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[75] For criticisms, see M. Maris & E. Singer, *Foreign Corrupt Practices Act*, 43 AM. CRIM. L. REV. 575, 583 (2006).

[76] Omnibus Trade and Competitiveness Act, Title V, Subtitle A, Part I, s 5003 (d), 102 Stat. 1424 *as cited in* Beverley Earle, *The United States' Foreign Corrupt Practices Act and the OECD Anti-Bribery Recommendation: When Moral Suasion Won't Work, Try the Money Argument*, 14(2) DICK. J. INT'L L. 207 (1996).

[77] U.S. DEP'T. OF JUST., A LAY PERSON'S GUIDE TO THE FCPA, http://insct.syr.edu/wp-content/uploads/2013/02/lay-persons-guide.pdf.

[78] Stanley Sporkin, *The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on its Twentieth Birthday*, 18 NW. J. INT'L L. & BUS. 268, 277 (1997).

[79] For a full list, see *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Ratification Status as of May 2018,* ORG. ECON. COOPERATION & DEV. (May, 2018), https://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf; Countries such as India and China are yet to engage fully with the OECD with a view to ratification.

[80] *Annual Meetings Address by James D. Wolfensohn*, WORLD BANK (Oct. 1, 1996), http://documents1.worldbank.org/curated/en/135801467993234363/text/People-and-development-annual-meetings-address-by-James-D-Wolfensohn-President.txt [hereinafter Wolfensohn Address].

infrastructural development.[81] Since its inception, the WB has provided funds that run into billions of US dollars. For instance, in 2014, the total lending of the International Bank for Reconstruction and Development (IBRD) and International Development Association (IDA)[82] was $40.8 billion, with South Asia receiving 24%; the Middle East 5%; Latin America and the Caribbean 22%; Africa 16%, East Asia and the Pacific 19%; and Central Asia 14%.[83] The total IBRD and IDA lending by sector was Water, Sanitation and Flood Protection receiving 8%; Transportation 20%; Public Administration 22%; Agriculture, Fishing and Forestry 5%; Education 4%; Energy and Mining 14%; Finance 2%; Health and Other Social Services 16%; Industry 5%; and Information and Communications 1%.[84] These data provide a picture of the amount of money that changes hands between the donor and the borrowing States, and the variety of sectors and activities where the monies lent are put to use. By way of illustration, India, the WB's largest borrower in 2011, received funds for a variety of infrastructure projects, including the Prime Minister's Rural Roads Programme, Mission Clean Ganga and the Eastern Dedicated Freight Corridor to be run as a 'freight-only rail line'.[85] All of these infrastructural improvement projects will, without doubt, involve both public sector authorities such as the railways and environment authorities, and the private sector (both domestic and international). Given news reports on how millions of dollars are squandered, for instance, in the Commonwealth Games held in India[86] and the subsequent civil movement by the Indian anti-corruption activist Anna Hazare,[87] the question that immediately comes to mind is how much of the monies

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[81] Reconstruction and poverty reduction are important parts of their work. For more on the history and evolution of the World Bank, see *What we do*, WORLD BANK, https://www.worldbank.org/en/about/what-we-do.

[82] The World Bank comprises two development institutions – the IBRD and the IDA – and three affiliate agencies – the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA) and the International Centre for the Settlement of Investment Disputes (ICSID).

[83] Information derived from Fig. 3, WORLD BANK, WORLD BANK ANNUAL REPORT 2011, http://siteresources.worldbank.org/EXTANNREP2011/Resources/8070616-1315496634380/03TheRoleofIBRDandIDA.pdf.

[84] *Id.*, Fig. 4.

[85] *Id.*, at 24, http://siteresources.worldbank.org/EXTANNREP2011/Resources/8070616-1315496634380/SouthAsia.pdf.

[86] *See Commonwealth Games: Corruption, Chaos & a Race to Avert a Crisis*, INDEPENDENT (Aug. 20, 2010), http://www.independent.co.uk/sport/general/others/commonwealth-games-corruption-chaos-amp-a-race-to-avert-a-crisis-2057234.html; *India Orders Probe into Commonwealth Games Corruption*, VOA NEWS (Oct. 15, 2010), https://www.voanews.com/east-asia/india-orders-probe-commonwealth-games-corruption.

[87] *See* Jason Burke, *Indian Activist Anna Hazare Refuses to End Hunger Strike*, GUARDIAN (Apr. 7, 2011), http://www.guardian.co.uk/world/2011/apr/07/anna-hazare-hunger-strike; Jason Burke, *Indian Activist Anna Hazare on Hunger Strike as MPs Debate Anti-graft Bill*,

that are borrowed from the WB actually reach the projects for which they are earmarked.

Many of the WB-funded projects have fallen prey to allegations of corruption, and the media is replete with stories about the squandering of aid monies by politicians and civil servants to serve their own purposes: as for example in Kenya,[88] and Lesotho.[89] According to a news item dated 2004, a US Senate Committee is reported as saying that since 1946, the WB has lost $100 billion, which is nearly 20% of its lending portfolio, through corruption.[90] It was not as if the WB was unaware of the high exposure to corruption when they lent monies for various projects from road building to health provision. Question thus arises as to why the WB did not take action. Its inaction until the mention of corruption by James Wolfensohn, its ninth President, was often justified on the basis of its Articles of Agreement. These Articles did not provide the WB with a mandate to make lending decisions on the basis of political considerations, or to intervene in the political structures and matters of a State.[91] The WB saw corruption as a political matter. However, this perception changed when Wolfensohn said:

> Let's not mince words: we need to deal with the cancer of corruption. In country after country, it is the people who are demanding action on this issue. They know that corruption diverts resources from the

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GUARDIAN (Dec. 27, 2011), http://www.guardian.co.uk/world/2011/dec/27/indian-anti-graft-hunger-strike.

[88] BANK INFORMATION CENTER, WORLD BANK ACCUSED OF TOLERATING CORRUPTION IN KENYA, https://www.worldhunger.org/world-bank-again-accused-of-tolerating-corruption-in-kenya/.

[89] For examples of corruption in DFID funded projects, see *Appendix I, Select Committee on International Development*, Parliamentary, *Business Publications and Records*, PARLIAMENT. UK, http://www.publications.parliament.uk/pa/cm200001/cmselect/cmintdev/39/39ap06.htm.

[90] Emad Mekay, *Poorest Pay for World Bank Corruption – US Senator*, IPS NEWS (May 14, 2004), http://www.ipsnews.net/2004/05/development-poorest-pay-for-world-bank-corruption-us-senator/.

[91] The exclusion of politics is clearly stated in art. III (5)(b) and art. IV(10) of the IBRD Articles of Agreement which read:

Art. III, §5 (b): 'The Bank shall make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations.'

Art. IV, §10: 'The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article 1.'

> poor to the rich, increases the cost of running businesses, distorts public expenditures, and deters foreign investors. They also know that it erodes the constituency for aid programs and humanitarian relief. And we all know that it is a major barrier to sound and equitable development.
>
> Corruption is a problem that all countries have to confront. Solutions, however, can only be home-grown. National leaders need to take a stand. Civil society plays a key role as well. Working with our partners, the Bank Group will help any of our member countries to implement national programs that discourage corrupt practices. And we will support international efforts to fight corruption and to establish voluntary standards of behaviour for corporations and investors in the industrialized world.[92]

It is also clear from his 1996 speech that the WB did not intend to intervene in the political affairs of a State using the sceptre of corruption, but saw itself as giving "advice, encouragement and support to governments that wish to fight corruption."[93]

Up until 1996, there was no mention of the word 'corruption' by the WB. It could be that they may have been influenced by the functionalist theory of corruption. This theory views corruption as a useful tool for change by enabling modernisation of post-colonial States, thus bettering the economic state of a nation. The functionalist theorists include Leys,[94] Leff,[95] and Nye.[96] It was easy to sympathise with the view that triggered economic development (even if it included corruption), for it was much needed in the newly-independent States. The process of independence started after World War II when the economies of the colonisers such as Great Britain and France were in tatters. While some of the countries such as India had seen some infrastructural development during the colonial times (for example, the railways in India), there was still a great deal that needed to be done. Many of the newly independent States (for example, India, Tanzania) were attracted to the economic model of the USSR and put in place five-year plans reminiscent of the five-years plans of the Soviet Union.

There were strict controls on what could or could not be imported, and this was largely due to lack of foreign exchange. The import of luxury items such as

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[92] Wolfensohn Address, *supra* note 80.
[93] *Id.*
[94] C. Leys, *What is the Problem about Corruption?* 3 J. MODERN AFR. STUD. 215 (1965).
[95] Nathaniel Leff, *supra* note 39.
[96] Nye on Corruption, *supra* note 49.

refrigerators and televisions was not encouraged and when on rare occasions the import of these items was allowed, they were channelled through State trading corporations. While there was some scope for the private sector to import goods, parastatals[97] (State trading corporations) were the main actors in the import/export trade. By way of illustration, the State Trading Corporation of India Ltd. (STC), operating under the administrative control of the Ministry of Commerce & Industry, was set up in 1956 primarily to undertake trade with East European countries and to help the efforts of the Indian private sector, along with the efforts of private trade and industry in developing exports from the country.[98] In the pre-liberalisation era, the STC was involved in the import of chemicals, fertilisers, commodities such as sugar, newsprint, and raw materials for the industry. It also acted as a conduit for importation in some sectors such that a private sector company with an import licence for a product had to arrange its import through the STC. The reason behind this was the idea that economies of scale would benefit the nation.

A common problem in many of the newly independent States was excessive bureaucracy, together with complex tax systems and labour laws. This made it extremely difficult for businesses and entrepreneurs to enter the market and kick-start economies that were stagnating due to the State trading organisations that largely controlled international trade, as in Tanzania and India.[99] The reason for adopting the State trading model was justified by the example set by the Soviet Union, which had transformed itself from a "backward country to a country of extensive industrialisation and modern technique at an unprecedented tempo…effected under the guidance and control of a national economic plan."[100]

Against this context of centralised control and the red tape, bribery was seen as a means to induce economic growth through investment from the private sector. For Nye, corruption also had the potential to bring about political development through economic development.[101] It is possible to support this functionalist view with illustrations such as India's Licence Raj,[102] where extensive red tape made it

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[97] On parastatals in Tanzania, see WORLD BANK, PARASTATALS IN TANZANIA TOWARDS A REFORM PROGRAM (WB Rep. No 7100-TA, 1988), http://documents1.worldbank.org/curated/en/824721468116369551/pdf/multi-page.pdf.

[98] *About Us*, STATE TRADING CORP. OF INDIA LTD., http://www.stclimited.co.in/content/about-us.

[99] For instance, the State Trading Corporation of India was set up in 1956. It still exists though it does not have the monopoly on international; for more on this entity, see *Id.*

[100] MAURICE DOBB, SOVIET ECONOMIC DEVELOPMENT SINCE 1917 2 (Routledge & Kegan Paul ed., 1948).

[101] Nye on Corruption, *supra* note 49.

[102] Phillipe Aghion, et al., *The Unequal effects of Liberalization: Evidence from Dismantling the License Raj*, 98 AM. ECO. REV. 1397 (2008).

virtually impossible for investors to bring their expertise and capital to fuel economic growth. However, there are serious drawbacks to the functionalist theory. From an economic perspective, the very corruption that induces the economy to stir can also act as a disincentive, resulting in donors refusing aid and foreign investors not providing their capital or know-how. The reason for this refusal is plainly obvious in that the aid provided for particular projects would not be used for the intended purposes and the funds would end in the hands of the corrupt. For instance, in 2006, Denmark cut $3.16 million in aid to Tanzania because of the slow pace of the Anti-Corruption Bill that they had insisted Tanzania to adopt to tackle corruption. Denmark's envoy, Carsten Pedersen, is reported as having said: "[f]rom my perspective it is a contract which has been broken. If Tanzania met this target, they would get the money."[103]

There is also the danger of corruption becoming embedded within the value system of a State such that any attempts to bring about anti-corruption reforms are difficult, if not impossible. Equally, corruption creates an elite class, largely consisting of politicians, civil servants and businessmen, creating a huge gap between the rich and the poor, leaving scope for civil unrest and loss of legitimacy of the government in the eyes of the citizens who are left behind in poverty. Nepotism and cronyism become part and parcel of such a system, with no room for recognising merit. The recent Arab Spring provides a good illustration.[104] From a governance perspective, corruption is likely to increase red tape since it is a convenient method of extracting fees from those who wish to engage in business transactions. In extreme forms, the State becomes a financial predator.

In a WB survey measuring bribery from the private sector to the public sector,

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[103] *Denmark Cuts Tanzania Aid over Graft Law Delay*, BDNEWS24 (Dec. 18, 2006), https://bdnews24.com/world/2006/12/18/denmark-cuts-tanzania-aid-over-graft-law-delay; *see also,* Verena Fritz at al., *Corruption, Anti-Corruption Efforts and Aid: Do Donors Have the Right Approach?* (Good Governance, Aid Modalities & Poverty Reduction Working Paper Series, Working Paper No. 3, 2008); MG Quibiria, *Foreign Aid and Corruption: Anti-Corruption Strategies Need Greater Alignment with the Object of Effectiveness*, 18(2) GEO. J. INT'L. AFF. 10 (2017).

[104] The Arab Spring (beginning in 2010-11) was a series of protests in Arab countries such as Tunisia and Egypt expressing discontent with the corrupt political leadership, cronyism, and nepotism, with youths demanding democracy and better employment prospects. *See* L. Anderson, *Demystifying the Arab Spring*, FOREIGN AFF. (2011), http://www.foreignaffairs.com/articles/67693/lisa-anderson/demystifying-the-arab-spring; Steven A. Cook, *Corruption and the Arab Spring,* 18(2) BROWN J. WORLD AFF. 21 (2012).

worldwide bribery was estimated at $1 trillion per annum.[105] As Kaufmann observed, "the main point is that [bribery] is not a relatively small phenomenon of a few billion dollars – far from it."[106] The control of corruption and good governance also impacts income growth and business sector growth by improving the investment climate of a country. According to Kaufmann,

> [T]here is a '400 % governance dividend' of good governance and corruption control: countries that improve on control of corruption and rule of law can expect (on average), in the long run, a four-fold increase in incomes per capita. Thus, a country with an income per capita of US$ 2,000 could expect to attain US$ 8,000 in the long run by making strides to control corruption.
>
> We have also found that the business sector grows significantly faster where corruption is lower and…the rule of law is safeguarded. On average, it can make a difference of about 3% per year in annual growth for the enterprises.[107]

This resulted in international financial institutions such as the WB adopting a variety of mechanisms to fight corruption in donee States. One tool was the use of conditionalities whereby donees were expected to improve their governance systems in the public sector. Similar measures were also adopted by other state-based international development agencies such as the Norwegian Agency for Development Co-operation (NORAD) and the Swedish International Development Cooperation Agency (SIDA). In respect of the US, Hotchkiss refers to the change in the US government policy as a contributory factor.[108] While the US initially used aid to developing countries as a tool to prevent Soviet influence after the end of the Cold War, provision of aid was tied to conditionalities which required States to put in place better governance systems, including the adoption of anti-corruption legislation. This enabled the US to operate at both the multilateral and bilateral levels to further the anti-corruption agenda.

As to whether such conditionalities have contributed greatly to reduction in corruption, is highly debatable. Much has been written both about the success and

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[105] Indira Carr, *Development, business integrity and the UK Bribery Act 2010*, *in* MODERN BRIBERY LAW: COMPARATIVE PERSPECTIVES 128 (Jeremy Horder & Peter Alldridge eds., 2013).

[106] *Id.*

[107] *World Bank finds corruption is costing billions in lost development power*, PROBE INT'L. (Sept. 29, 2004), https://journal.probeinternational.org/2004/09/29/world-bank-finds-corruption-is-costing-billions-in-lost-development-power/.

[108] Hotchkiss, *supra* note 72.

lack of success of such programmes in academic literature.[109] However, as a result of these conditionality-induced pressures, developing countries such as Tanzania[110] introduced measures for improving governance structures by adopting codes of conduct for civil servants, procedures for transparency in the government institutions and public procurement and ratification of regional and international conventions. Many new laws were passed and existing laws were amended to better reflect the increasing convergence of the mechanisms devised for preventing and combating corruption.

C. The Anti-Corruption Legislative Framework

As stated in Part I, there is an abundance of international and regional legal instruments. It is not the intention to look at these conventions in any detail since it is beyond the scope of this paper. The intention here is only to examine the UNCAC. This Convention has been chosen for a number of reasons: its near-universal applicability with 187 ratifications,[111] as well as its comprehensiveness with a Chapter devoted to prevention, which includes provisions on prevention that promote integrity in the public sector. However, a very brief outline (for the sake of completeness) of the other anti-corruption conventions in force is provided below in chronological order:

In 1996, the earliest convention was adopted by the Organisation of American States. The Convention, known as the Inter-Organisation of American States Inter-American Convention against Corruption,[112] creates a number of offences (including corruption) involving mutual exchange (bribery), and those that do not, such as acts or omissions by a public official such failure to record donation and their diversion for personal or third-party use. Concealment of property derived through corrupt acts is also made an offence. It is one of the few conventions that

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[109] Paul Collier, *The Failure of Conditionality*, *in* PERSPECTIVES ON AID & DEVELOPMENT 51-77 (Catherine Gwin & Joan M. Nelson eds., 1997); Paul Collier, et al., *Redesigning Conditionality*, 25 WORLD DEV. 1399 (1997).

[110] SJ Sitta, *Integrity Environment and Investment Promotion: The Case of Tanzania*, Paper Presented to the OECD Addis Ababa Conference: Alliance for Integrity – Government & Business Roles in Enhancing African Standards of Living (Mar. 7-8, 2005), https://www.oecd.org/investment/investmentfordevelopment/34571058.pdf; *See also* TANZANIA CHIEF SECRETARY'S OFFICE, TANZANIA'S NATIONAL ANTI-CORRUPTION STRATEGY AND ACTION PLAN (NACSAP), (July, 2017), http://www.chiefsecretary.go.tz/uploads/documents/publications/en/1502281794-NACSAP_III%20ENGLISH.pdf.

[111] List available at *Signature and Ratification Status*, U.N. OFF. DRUGS & CRIME, https://www.unodc.org/unodc/en/corruption/ratification-status.html.

[112] Inter-American Convention Against Corruption, Mar. 29, 1996, Org. American States, http://www.oas.org/en/sla/dil/inter_american_treaties_B-58_against_Corruption.asp.

include the 'controversial'[113] offence of illicit enrichment under which a public official or any other person cannot reasonably explain the possession of those assets. Article III lists the prevention measures, which include standards of conduct for public officials and declaration of assets of those who perform public functions.

In 1997, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[114] was adopted by the OECD. It deals only with transnational bribery. In Article 1, it makes the criminal offering or bribing of a foreign public official in the context of international business transactions an offence. It also includes a provision on accounting and auditing standards (Article III), which could be described as a preventive measure. Its historical antecedent lies in the FCPA which was adopted as stated earlier after the Watergate scandal.[115]

In the same year, the European Union (EU) adopted its Convention on Corruption. Specific to the EU, it addresses both active and passive corruption[116] (namely, bribe offering and bribe soliciting) involving community and national officials. It does not, however, contain any provisions on prevention.

In 1999, the Council of Europe adopted two conventions – the Criminal Law Convention on Corruption and the Civil Law Convention on Corruption.[117] They apply to both the public and private sectors and focus on the abuse of power in return for an undue advantage regardless of the context in which it occurs. They also take a comprehensive approach in construing the term 'public official' by including domestic public officials; members of domestic public assemblies, foreign public assemblies, and international parliamentary assemblies; officials of

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[113] It is perceived to be controversial since the onus is laid on the accused to show that s/he is innocent.

[114] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, Org. Econ. Co-operation & Dev., http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

[115] *See*, David A. Gantz, *Globalising Sanction Against Foreign Bribery the Emergence of an International Legal Consensus*, 18 NW. J. INT'L. L. & BUS. 457 (1998).

[116] Convention drawn up on the basis of the Treaty on European Union on the Fight against Corruption involving officials of the European Communities or officials of Member States of the European Union, June 25, 1997, Official Journal C195, P. 0002 – 0011, art. K.3(2)(c), https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:41997A0625(01).

[117] Criminal Law Convention on Corruption, Jan. 27, 1999, ETS No. 173, Council of Europe https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007f3f5; Civil Law Convention on Corruption, Apr. 11, 1999, ETS No. 174, Council of Europe, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/174.

international organisations; and judges and officials of international courts. Trading in influence, fraudulent practices such as the creation or use of an invoice or other accounting document containing false or incomplete information, and unlawful omission to make a record of payment are also made offences. There is, however, no provision on prevention measures.

The next convention to be adopted was the African Union Convention on Preventing and Combating Corruption in 2003.[118] Compared to the above-listed conventions, it is wider in scope and lists specific acts of corruption and related offences. Covering both the private and public sectors, it includes in its list not only active and passive bribery, but also trading in influence, diversion of funds, and concealment of funds resulting from acts of corruption. Laundering of monies obtained through corruption is also made an offence. This Convention includes an interesting provision on the funding of political parties, which is not found in the other conventions though there is a brief reference to funding of candidature for public office and political properties in Article 7(3) of the UNCAC. It expects the Contracting States to proscribe the use of funds acquired through illegal and corrupt practices to finance political parties and incorporate the principle of transparency in such funding. The Convention also includes preventive measures including codes of conduct that enable transparency and accountability, though they are not as extensive as the ones within the UNCAC.

Compared to the above conventions, the UNCAC is comprehensive, in that it not only covers different kinds of corruption such as bribery, fraud, embezzlement, and trading in influence, but also covers aspects of money laundering, asset recovery, and international co-operation.[119] What is of interest for current purposes, however, is its second chapter (consisting of ten articles) on prevention, especially the provisions relating to infusing integrity within the public sector.

IV. REFLECTION OF THE PAC MODEL IN THE UNCAC

One of the central pillars to tackle corruption in the UNCAC is prevention. The importance of prevention is set out in its opening article, which states that one of the purposes of UNCAC is "to promote and strengthen measures to prevent and combat corruption more efficiently and effectively."[120] There is no explanation as to the inclusion of prevention as one of the core pillars in the *travaux*

[118] African Union Convention on Preventing and Combating Corruption, July 11, 2003, https://au.int/sites/default/files/treaties/36382-treaty-0028-_african_union_convention_on_preventing_and_combating_corruption_e.pdf.

[119] For an article-by-article commentary of the UNCAC, see THE UNITED NATIONS CONVENTION AGAINST CORRUPTION: A COMMENTARY (Cecily Rose, Michael Kubiciel & Oliver Landwehr eds., 2019) [hereinafter UNCAC Commentary].

[120] UNCAC, *supra* note 5, art. 1(a).

préparatoires.[121] While there are plenty of criminal provisions in the UNCAC,[122] their impact is likely to be limited since their enforcement is dependent on various factors such as capacity of investigative authorities, willing witnesses, an independent judiciary, respect for the rule of law, and political will. Oftentimes, it is believed that criminalisation of corruption would act as a deterrent. The threat of punishment would convince people to refrain from prohibited conduct since punishment would be viewed as a form of pain to be avoided.[123] In the context of criminalisation, the deterrent effect of punishment and fines is highly debatable. It is difficult to measure the effectiveness of the deterrent amongst those who refrain from engaging in a proscribed act.[124] Offenders may not know the rules or, even if they do, may still decide to commit the offence in the belief that they are unlikely to be caught or even if caught, the punishment is likely to outweigh the benefits in the short term.[125] There is also no clear argument to indicate that deterrence will stop individuals from re-offending, since punishment does not always work.[126] The Technical Guide to the UNCAC[127] also notes that focusing only on criminalisation measures is expensive in that it is resource-intensive. Instead "[e]mphasis should be given to prevention because it not only safeguards the integrity of the government and the political system and ensures the applications of rules, procedures and funds, but also has wider benefits in promoting public trust and managing the conduct of public officials."[128] Against this backdrop, it makes sense for States to take steps to create a climate that does not present opportunities for engaging in corrupt activities such as bribes, trading in influence, and embezzlement.

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[121] *Travaux Préparatoires on the Negotiations for the Elaboration of the United Nations Convention against Corruption*, U.N. OFF. DRUGS & CRIME (2010), https://www.unodc.org/documents/treaties/UNCAC/Publications/Travaux/Travaux_Preparatoires_-_UNCAC_E.pdf.

[122] *See* UNCAC, *supra* note 5, arts. 15, 16 (Bribery), 17 (Embezzlement) & 18 (Trading in Influence).

[123] JEREMY BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (T. Payne ed., 1789); Johannes Andenaes, *The General Preventative Effects of Punishment*, 114 U. PA. L. REV. 949 (1996).

[124] ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 78 (2010).

[125] *See*, *e.g.*, Paul H. Robinson & John M. Dailey, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 OXFORD J. LEGAL STUD. 173 (2004); Lawrence W. Sherman, *Defiance, Deterrence and Irrelevance: A Theory of the Criminal Law Sanction*, 30 J. RES. CRIME & DELINQUENCY 445 (1993).

[126] LUCIA ZEDNER, CRIMINAL JUSTICE 93-95 (2004); Ros Burnett & Shadd Maruna, *So Prison Works, Does It?* 43 HOWARD J. CRIM. JUST.390 (2004).

[127] *Technical Guide to the United Nations Convention Against Corruption*, U.N. OFF. DRUGS & CRIME 5 (2009), http://www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf [hereinafter Technical Guide].

[128] *Id.*, 5.

A set of policies and practices for the prevention of corruption outlined in Article 5 "reflects the consensus among policymakers and practitioners alike that in the case of prevention and control of corruption, a comprehensive array of measures is essential, especially in view of the multifaceted nature of the phenomenon"[129]. It is an expectation that these policies reflect the principles of integrity (where officials do not engage in self-seeking behaviour and there is separation of the public sphere from the private sphere in their activities), transparency (where State processes and procedures are open, accessible to all and not hidden behind a veil of opacity), accountability (where responsibility, answerability and providing explanations and justifications are central), rule of law (where all including the State and public officials are equally subject to legal codes and processes), and proper management of public affairs and public property (where relations between State and various institutions and public funds are well governed).

In promoting principles of integrity, removal of opacity, and responsibility, the UNCAC appears to be theoretically informed by the PAC model formulated by Robert Klitgaard.[130] In brief, this model draws upon the Weberian rational-legal model of administration under which the public and private spheres of officials are separate, and this separation has to be maintained. According to the PAC model, corruption is the betrayal of the principal's (P) interest by the agent (A) in pursuit of his own interests by accepting or seeking a benefit from the client (C) who is the service-seeker. The conditions for corruption present themselves when the principal (P) is in a powerful position and the agent (A), whom P has entrusted to carry out the services, has an element of discretion in administering the services, and there is a lack or near lack of accountability. If P (the State) is in a monopolistic position, for instance in the mining sector, and the decision of how, when, where and to whom licences are to be allocated for further exploration is left to A's (e.g., senior civil servants and ministers) judgment with no clear and accessible procedures and checks in respect of the decision-making process, the situation easily lends itself to corruption. Opacity and high discretion levels in an organisation that holds a powerful position create the right conditions for corrupt

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[129] *Id.*, 5. The setting up of anti-corruption bodies for the prevention of corruption is covered in art.6, recruitment and retention within the public sector in art.7, codes of conduct for public officials in art.8, public procurement and management of public finances in art. 9, transparency in public administration in art. 10, measures relating to the judiciary and prosecution services in art. 11, preventing corruption involving the private sector in art.12, participation of civil society in art.13 and measures to prevent money-laundering in art. 14. The range of issues from prevention of public sector corruption, prevention of money laundering to participation of society is addressed in subsequent provisions (arts. 6 -14).

[130] ROBERT KLITGAARD, CONTROLLING CORRUPTION (1st ed., 1991).

behaviour. The proposition here is that A may be or is likely to be self-seeking (behaving in his own interest), rather than acting in the interests of P. In other words, A does not have the level of integrity, or overlooks the level of integrity expected of him, in that he makes no separation between the public and the private spheres and uses his public position for private gain.[131] The solution to reducing corruption according to the PAC model is through the reduction of monopolistic power of an institution, improvement in the environment within which discretion is allowed and exercised such that it imparts confidence in the way the discretion is exercised, and the improvement of accountability and transparency.[132] While this model has focused primarily on the public-private interface, it can also be applied to explain corruption and improve integrity within the private sector.

Articles 7, 8 and 12[133] cover the public sector, code of conduct for public officials, and the private sector. Article 7 covers a wide range of issues, but starts off by addressing aspects of human resource issues (e.g., appointment, retention, promotion) in the public sector. One of the common observations made in relation to public officials is that their low income is a cause of corruption.[134] Articles 7(1) and 7(1)(a) expect State Parties to adopt mechanisms in the recruitment, retention, and promotion of public officials based on principles of efficiency, transparency, objective criteria and merit, equity, and aptitude. The intention behind this provision is to try and tackle nepotism and favouritism exercised during the appointment process. Article 7(1)(c) addresses the issue of remuneration and equitable pay scales, subject to the State Party's level of economic development. This provision addresses the point made earlier regarding low pay as a contributory factor of corruption. The issue of promoting transparency and preventing conflicts of interest is addressed under Article 7(4).

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131 *See* MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION (1947); Until the nineteenth century, in much of Europe the rule was of a patrimonial type and did not follow the Weberian rational-legal model. The transition to the Weberian model was a gradual one. For more on this gradual evolution from patrimony where all assets, personal and public, are owned by the leader to the modern Weberian model, see DOUGLASS C. NORTH AND ROBERT PAUL THOMAS, RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY (1973).

132 For more on this, see Indira Carr, *Corruption, the Southern African Development Community Anti-Corruption Protocol and the Principal—Agent—Client Model*, 5 INT'L. J. L.147 (2009).

133 These articles are semi-mandatory indicating they are optional requirements since they use phrases such as "each state shall consider adopting", and "each state shall endeavour to adopt". The expectation with the adoption of such phrases in formulating the obligations and measures to be adopted therefore seems to be that States will initiate discussions to establish their feasibility in the context of the fundamental principles of their legal systems.

134 *See* Koh Teck Hin, *Corruption Control in Singapore*, U.N. ASIA & FAR EAST INST. (Aug. 20, 2020), https://www.unafei.or.jp/publications/pdf/RS_No83/No83_17VE_Koh1.pdf; Roel Veldhuizen, *The Influence of Wages on Public Officials' Corruptibility: A Laboratory Investigation*, 39 J. ECO. PSYCHOL. 341 (2012).

This provision seems to affect the public sector as a whole and is likely to include transparency in financial assets and interests of public officials though a declaration of assets under Article 8(5) as well. The Convention does not define 'conflict of interest', though the common understanding seems to be that a conflict of interest could arise where a public official's private interest conflicts with public duty in a way that affects his ability to perform his duty in an impartial manner.[135] The inclusion of conflict of interest yet again underlines the need to prevent favouritism and nepotism, which is a common occurrence in dealings with the public sector, for instance in the course of public procurement and FDI contracts.[136]

The focus of UNCAC's Article 8 lies in codes of conduct for public officials. Article 8(1) expects State Parties' integrity, honesty and responsibility in accordance with the fundamental principles of its legal system. These value terms are not defined but the common understanding is that public officials should carry out their duties in public interest, such that they are not hindered or subject to private interests. In carrying out their official duties, they must do so responsibly, meaning thereby, they should be accountable for their actions. So, for instance, where a public official (charged with obtaining Personal Protective Equipment (PPE)) signs a contract with a party for the supply of such equipment without checking whether the party has the ability and capacity to supply such items, he would be acting irresponsibly. Article 8(2) calls on States to adopt codes of conduct for their public officials for the correct, honourable, and proper performance of their public functions.[137] The formation of codes of conduct for public officials is not a new concept and many States already have codes of conduct and codes of ethics for public officials. For instance, India[138] has a number of codes of conduct covering aspects such as maintaining high ethical standards, integrity and honesty in the discharge of duties, accountability, and transparency.[139] The intention behind these written codes is that they act as a

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135 *See Recommendation of the Council on OECD Guidelines for Managing Conflict of Interest in the Public Service*, ORG. ECON. COOPERATION & DEV. 15 (2003), https://www.oecd.org/gov/ethics/48994419.pdf, which defines conflict of interest thus:
"A conflict between the public duty and private interests of public officials, in which public officials have private-capacity interests which could improperly influence the performance of their official duties and responsibilities."

136 *See* JEAN-BERNARD AUDY, EMMANUEL BREEN & THOMAS PERROUD, CORRUPTION AND CONFLICT OF INTEREST (2014).

137 Howard Whitton, IMPLEMENTING EFFECTIVE ETHICS STANDARDS IN GOVERNMENT AND THE CENTRAL SERVICE, ORG. ECON. COOPERATION & DEV. (2001).

138 *See* India Dep't. of Pers. & Training, All India Services (Conduct) Rules (1968), https://dopt.gov.in/sites/default/files/Revised_AIS_Rule_Vol_I_Rule_10.pdf.

139 *Id.*; *see also* Subramaniam Chandran, *Civil Servants and Code of Conduct in India: Question of Raising Standards*, POL. INST.: BUREAUCRACIES & PUBLIC ADMIN. E J. (2015).

constant reminder to public officials of the standards that should govern their behaviour whilst performing their duties. Indeed, it is not uncommon to find iterations of this mantra of honesty and integrity in the discharge of duties displayed on the office walls in India. As to whether these iterations make any impact on the ground is unknown in the absence of surveys about the efficacy of code of conduct. The provision contained in Article 8(2), as Terracino correctly observes, "strengthen[s] the skills of public officials generally…[and] a strong public administration based on high performing public officials, guided by public service values, provides an underlying guard against corruption."[140] For purposes of implementing the Article, State Parties are asked to take note of initiatives of regional and international organisations on codes of conduct. In particular, the United Nations International Code of Conduct for Public Officials[141] is mentioned. In avoiding potential conflicts of interest and introducing transparency under Article 8(5), States are expected to endeavour to put in place systems that see public officials disclosing their external activities, employment, assets, and substantial gifts or benefits from which a conflict of interest could result. This provision is meant to cover, for instance, situations where a public official holds directorship which has the potential to cause a conflict of interest. The asset declaration mechanism, including the verification processes and periodic checks, should also expose enrichment that cannot be explained against the context of the financial status of the public official.

When outlining the PAC model above, it was noted that it could equally explain the causes of corruption in the private sector. The UNCAC, at Article 12, expects State Parties to take a number of measures to prevent corruption in the private sector. Article 12(2)(b) promotes the development of standards and procedures designed to safeguard the integrity of private entities, including codes of conduct for the correct, honourable, and proper performance of business activities, as well as the prevention of conflicts of interest.

The above provisions, which combine the appointment processes and codes of conduct, if followed closely, should, theoretically speaking, result in preventing corruption. However, cognizance also needs to be taken of the fact that a public official is not purely an instrument of the state with public interest as the core guiding principle in his behaviour in different contexts. A public official is part of the wider society with social wants and needs, and engages with those around him, including kith, kin, and friends. Integrity plays an important role in this wider context. Oftentimes, a person who helps his friend in difficult situations is regarded as a person having integrity; same with a mother who goes out of her way

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[140] Julio Bacio-Terracino, *Article 8: Code of Conduct for Public Officials, in* UNCAC Commentary, *supra* note 119.

[141] G.A. Res. 51/59 (Jan. 28, 1997), https://undocs.org/pdf?symbol=en/A/RES/51/59.

to help her children, or a citizen helping their community. When integrity in performing duties as a public official is juxtaposed with integrity in the wider social sphere, there is likely to be a clash between the two. An illustration at this juncture might help to clarify the point being made. X, a senior public official, is regarded as a good civil servant who takes his duties seriously and abides by the code of conduct in the execution of his duties. One day, he learns that his only child suffers from a serious health condition and needs to be operated on immediately if she is to live. He does not have any savings and cannot raise a loan. While discussions about how the family can meet the expenses are taking place, X is involved in the process of negotiating the award of a contract for the manufacture of tractors. One of the manufacturers offers a bribe to X in exchange for awarding the contract to them. In the face of his inability to fund his daughter's operation, what should X do? Should he refuse the bribe and report the company to the enforcement authorities in public interest and thus not lose his integrity in the workplace, or should he, in the interest of his family, accept the bribe to pay for his daughter's operation? It becomes a question of choosing between duty towards his employer and duty towards his family. Sometimes, the same virtue (in this case, integrity), when placed in different contexts, can become opposing forces. If X lets his daughter die, he would be viewed as a bad father who did not do his duty by his child whilst maintaining his integrity in the workplace. On the other hand, if he accepts the bribe, he would have breached the integrity expected of him in the workplace. One of the integrities, be it integrity in the workplace or integrity in social context, has to eventually triumph. What this illustration shows is that it is not that easy to separate the public sphere and private sphere of public officials. Is there a rational way to guide choice in a manner that integrity, as promoted by Article 8, always overrides? Could morality offer a way forward? After all, X's choice will be a moral choice.

V. A WAY FORWARD AND CONCLUSION

Legislation, by and large, guides human behaviour by drawing the parameters of acceptable behaviour, especially when it comes to criminal law. Moreover, law at times straddles morality even though the Hart-Devlin debate[142] exhibits the tensions between law and morality. Corruption certainly has a moral side to it. The

[142] In 1957, the Report of the Departmental Committee on Homosexual Offences and Prostitution was published. This Report (i.e., the Wolfenden Report) recommended that homosexual acts between consenting adults in private should not be a criminal offence. In response to the Report, Devlin (later to be Lord Devlin of the House of Lords) argued that lawmaking should be influenced by popular morality. That is, law should concern itself with the moral fabric of society. The opposing view was put forward by Hart, the legal positivist. He argued that law should allow private acts that do not harm anyone. For more on this debate, see Peter Cane, *Taking Law Seriously: Starting Point of the Hart/Devlin Debate*, 10 J. ETHICS 21 (2006).

promotion of virtues such as integrity, honesty, responsibility has a moral flavour. Returning to X's choice, what should he be guided by? Should he take a utilitarian approach to morality? Should he be guided by the greater good? But what is the greater good? The greater good seems to be to act according to the code of conduct since taking a bribe could have far reaching consequences such as undermining citizens' trust in the State. Equally, however, it could be said that saving the life of his daughter is the greater good in the social context. Thus, in this context, utilitarianism does not seem to provide a clear choice though its concept of the greater good is a relevant one as, for instance, when viewed from the perspective of the following illustration. Y, a public official, is in charge of buying land mines and knows that they will kill numerous innocent lives. He accepts a bribe and signs a contract with a manufacturer with full knowledge that his land mines are inert. His behaviour could perhaps be justified from a utilitarian viewpoint as being for the greater good.

Is an alternative approach available to X? Would his action of saving his daughter by taking a bribe be moral if everyone in similar circumstances were to do the same? Drawing upon universalisability,[143] X has to ask the following question: "What will happen if all public officials when deciding used personal moral judgments independent of the code of conduct?" The simple answer in this event is that the system would collapse. Just as if every soldier in the army were to take a personal decision on whether to shoot or not, the army would fall apart.

Moral choices are indeed very difficult and the more complex the circumstances, the more difficult they become. Whilst law cannot be expected to solve moral dilemmas at an individual level, the UNCAC provisions (though grasping moral concepts such as integrity) may not go far enough, thus creating room for making moral choices as illustrated through the hypothetical case in the previous section. Is this one of the reasons why preventive mechanisms such as codes of conduct have not lessened the incidence of corruption? Codes of conduct are drawn in generic terms for a particular context (i.e., the workplace) and they can in no way be expected to help in resolving the existential issues that an individual may face in meeting his duties as an employee and as a member of the wider society.

This paper examined the phenomenon of corruption, its detrimental impact at the economic level, and the emergence of the anti-corruption narrative in the twentieth century and the legal response. The issue of preventing corruption in the public

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[143] Often expressed as "What is right for one person must be right for any similar person in similar circumstances"; *see* Steen O. Welding, *Is Universalizability a Principle of Ethics?* 75 ARCHIVES PHIL. L. & SOC. PHIL. 161(1989).

sector through the UNCAC was considered and using an illustration it was shown that integrity, as promoted in the UNCAC, is insufficient in guiding a public official's behaviour at all times. His role in the wider society places demands on him which may require him to make moral choices. The concluding part suggests that the principle of universalisability, as opposed to utilitarianism, may aid towards making that moral choice.