New and not so new strategies in fighting financial crime, corruption and money laundering - a practical evaluation!

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I propose in this paper to discuss, from a very personal stand point, new and perhaps not so new strategies for promoting integrity particularly in the financial sector. That this is a pressing, topical and significant issue in Malta today, as it is throughout the world needs little argument (1). The failure of highly developed law and regulation to control let alone prevent the near collapse of the traditional banking system - at least in the West - very few years ago, is as obvious as it is disturbing. It would seem that if recent scandals not least in the City of London are anything to go by, very few people have learnt any lessons. Indeed, very few have been brought to justice. Therefore, I make no apology for addressing an issue which has done more harm to our societies and weakened our ability to provide our citizens with security than all other crime put together. In this discussion we will explore not merely proposed developments in and refinements if the law, but also in its administration and especially in the governance of businesses and the compliance procedures that they adopt.

An attempt to proffer predictions even of a most tentative character as to the ways in which the form and character of financial crime and particularly economically motivated crime, will develop, is task for those who get paid exorbitant amounts of money in the risk industry (2). Everyone appreciates that technology will have an impact on the ways in which human beings interact and cheat each other. However, the forms of crime and abuse have remained extraordinarily similar if not identical over the ages. For example, a special committee appointed by the English House of Commons in 1696 which among other things considered the embryonic financial market in the City of London, identified conduct which was 'damaging the trade of England' which closely resembles what today we would refer to as a 'pump and dump' scam. In other words deliberately circulating rumours to increase the price of a particular security on the market allowing those responsible to sell on that market at an inflated price securities that they had acquired at a much less price before they initiated their fraud. In fact, this is still listed as one of the most serious fraud in the financial markets by the UK's Financial Conduct Authority and National Crime Agency. The disturbing truth is that despite a great deal of legislation and

re-organising our agencies it is not obvious much in terms of results has been achieved. As Mr P.D. Connolly QC in his report on the affairs of Queensland Syndication Management Pty Ltd and Ors for the Australian Government in 1974 opined "It is fashionable in modern times when substantial amounts of public money are lost on questionable corporate affairs to produce a sheaf of amendments to the Companies Acts. Doubtless the ingenuity of the confidence trickster does from time to time reveal deficiencies in the legislation. One cannot help feeling, however, that in most cases the Act and the general law are quite adequate and it is at the point of enforcement that the system breaks down".

What this present author will attempt, however, in taking the exemplar of corruption, is a forward looking discussion of strategies that might be best advocated to address its prevention and control. In selecting this form of misconduct, however, we do so on the basis that it involves many of the issues arise generally in regard to financially motivated misconduct such as insider dealing, market abuse (3) and taking advantage of conflicts of interest (4). While corruption and money laundering are essentially facilitative crimes, both give rise, particularly from the stand point of control and prevention to much wider issues which pertain to the promotion of integrity and fair dealing. It is the thesis of this discussion that without concern for such issues, no financial system will endure as confidence will evaporate and instability follow.

There is something that resembles controversy among comparative lawyers as to when the study of law on a comparative basis became sufficiently acknowledged as a distinguishable process different from other areas of juristic inquiry, to be considered a discipline in itself. However, comparisons between the manner and detail in which societies order their affairs is nothing new and, indeed, both Plato and Socrates (5) engaged in what some would see as comparative constitutional analysis. That the comparative study of law, particularly in the European tradition, is now well established as a respectable contribution to legal scholarship cannot be questioned. However, for such study to have any real purchase in the minds of those who seek to predict, with any certainly, the application of a particular law in another jurisdiction, then the inquiry must go much further than simply the form and content of the rule. The political, social and economic environment within which law operates must be taken into account, if for no other reason that such impact on the very institutions that serve and apply the law. Consequently, in relatively new areas of legal intervention regard needs to be had by the comparative commentator, all the more in relation to the environment within which the law and its administration operate. (6) The study of corruption and its control, why not always a modern concern, particularly requires the development of law, its application and the institutions that serve it's enforcement to be viewed in this wider context.(7) Consequently, when looking at the efficacy of strategies from a comparative perspective the sheer volume of factors and considerations can easily turn the exercise into a morass of material that obscures and possibly serves little purpose other than to attest to the diligence of the researcher. Therefore in this paper the discussion will proceed with the benefit of comparative experience, but will not pretend to be a comparative analysis of the relevant law and those who search for a wealth of comparative citation will search in vein. It is also necessary for us to emphasise that what we address are issues in the round

and are not meant to refer to specific countries let alone the present situation in Malta. None the less, it is to be hoped that these comments and observations will be pertinent to the experience of those in Malta both now and in the future.

The author has no special interest or skill in the study of matters relevant to the categorisation and classification, from a criminological or for that matter any other, perspective – of financial crime or misconduct that is economically motivated. However, for many years, essentially as a lawyer and investigator he has been involved in the more practical aspects of discovering and controlling economic crime, in all its manifestations, in a number of jurisdictions. In looking forward in an attempt to identify possible strategies for the better interdiction and control of such crimes, he has taken, as we have noted, the exemplar of corruption. Corruption, a close relative of money laundering in that it is facilitative in design, object and purpose, (8) attempts to inhibit and interdict corrupt activity throw up a host of issues which the present author offers as issues possibly of wider relevance in the control of financial crime and in particular abuse which is motivated by economic factors. In so doing, the present author takes the view, that generally speaking the problem facing those who seek to intervene against those who engage in corrupt practices – in one form or another, is rarely the inadequacies of the law.(9). Of course, while it is no new thing, that workmen are wont to blame their tools for shoddy results and lawyers are no different than other artisans, the majority of legal systems – whatever their jurisprudential parentage, with a bit of diligence on the part of the inquirer, have offences and devices adequate to the job in hand. The problem is only too often, whether in developed economies or those of the so called third world, the ability in practical and resource terms to mobilise and then devote sufficient commitment, over time, to a meaningful resolution. Consequently, in this paper the author has attempted to address issues which are primarily, albeit not exclusively, relevant to the institutions and procedures of enforcement rather than the crafting and practice of law, let alone the worthy activities of criminal scientists and criminologists.

What are the perimeters of our discussion?

There was a time – not too long ago, when it was acceptable to observe that in different parts of the world corruption was not always seen to be the same thing or for that matter to raise the same implications. Colonialism afforded many individuals with an opportunity for promoting themselves through bribery and other corrupt dealings which they would never have had if they had remained in their own societies. Indeed, there is an argument that this contributed to the perception that bribery and corruption was something that only happened overseas and inevitably in those countries which had not developed a structure of government and society that would be recognised as such by the so called metropolitan powers. In other words, the very corruption that officials were exposed to was part and parcel of someone else's problem. The notion that colonial officers took their corruption with them and to some degree even imported it into other societies would have been a heresy.

Today it is unacceptable to express the view that some societies operate in ways that are inherently corrupt or even conduct their affairs in a manner which while they accept as

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

Therefore, in this paper the author will not attempt to do, what a sound academic should, and test our very understanding of corruption as something worthy of being branded evil and anti-social (10). Nor will he seek to raise the arguments of some that corruption, at certain levels and at certain stages in development is if not an inevitability, to be expected and, perhaps, even ignored. Having consigned thereby our discussion to the realm of practicality, we will none the less presume to raise one issue that has clear implications for control and enforcement: that of transparency.

The many sided aspects of transparency

It has been argued that one of the most significant dangers presented by corrupt activity is that it is done in secret. Indeed, as in the case of fraud and other crimes of dishonesty what is done is done in secret. The desire to create and maintain secrecy itself gives rise to what some criminologists describe as 'slippery slope' crimes (11) In other words to hide what has been done, records may be distorted and others brought into the web of corruption. Transparency has often been invoked as a weapon to deal with conduct that might not survive the glare of publicity and possibly attendant public criticism. Indeed, the famous observation of Louis D. Brandeis – that "sun light is the best disinfectant and electric light is the best policeman" has much to commend (12). Of course, in practice disclosure of relevant details might not only focus opprobrium – particularly in a democracy, but also empower those who deal with the relevant individuals or organisations to re-evaluate the terms upon which they continue their relationship or, indeed, discontinue it.

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

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

While in some societies, the mere fact that what is considered to be unethical conduct is revealed will, given the homogeneity of moral attitudes, be a sufficient disincentive to abuse, there are others where perhaps the value of reputation is less or is more equivocal. Indeed, there are some societies and situations where the ability to secure personal or in particular benefits for members of one's family or supporters is seen primarily as confirmation of status and power, which itself is applauded or at least condoned by members of that society or group. For example, a survey conducted in China (13) among business executives revealed that most retained what they considered to be Confucian values. Consequently in the conduct of their business advancement of personal and family interests came first. Indeed, there was little knowledge of the 'fiduciary' obligations on directors and officers imposed by China's Corporations Act and several respondents went as far as saying that if these impeded the advancement of family interests the law needed to be changed! It is also the case, that there are still many societies where the giving of a gift is considered a mark of respect and is not necessarily given in the expectation of a specific benefit. In such cases, a failure to acknowledge this expectation might even be a justification for criticism.

Making transparency work

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

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

pressure groups to process such disclosures, target and filter information. While these resources exist in Malta in many other parts of the world they would be considered luxuries.

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

Before we do move on, however, there is a point that is worth making in regard to the involvement of corporations in corruption and unethical conduct. In recent years much has been made of the importance of ensuring good governance structures and procedures in companies (14). Indeed, until the recent financial crisis many argued that such closer internal systems of control had much to commend over the costly one size fits all approach. Governance while still of value was seen to be a very weak barrier to the rampant greed and self-interest that characterised the conduct of many in the financial industry leading up to the near collapse of the western banking system after the so called sub-prime fiasco. While governance can never replace competent and effective external and public policing, it can still assist. It has at least an educative role and proper procedures may throw up earlier misconduct particularly if reinforced with sound compliance. It is also far more recognised today that the reputation of corporations is a valuable asset which management has a responsibility to protect. We are near in at least some jurisdictions, to judges finding directors of companies personally responsible in the discharge of their duties to their companies for failing to adequately protect this asset of the business. In one case in England an employee of a bank that had collapsed in large measure due to the frauds and abuses that it facilitated around the world, was in permitted to proceed with a claim seeking compensation from the bank's directors for their failure to run the bank properly and thereby safe-guard the employability and reputation of its staff.

The character of abuse

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

The greater involvement of government in fostering entirely beneficial programmes such as those relating to the protection of the environment and natural resources has similarly provided opportunities for officials to take advantage of information on the design and implementation of their own policies. It is also relevant that the more the state is involved in the ownership and control of enterprise the more likely that it will interpret such misconduct as an offence against the state. It has been said, for example, in the USSR because of the degree of state and collective involvement in the economy more fraudsters and other economic criminals were executed than in any other country (15). Their misconduct was clearly identified as a crime against the state's interests. It is important to note that this might still have important implications in addressing the control of corruption. For example, in one recent case in China the execution of an individual who had misappropriated funds from a state owned enterprise in Jilin and then laundered the money through Hong Kong, Singapore and Italy, effectively prevented satisfactory legal assistance from the country where the money had ended up. Indeed, similar issues have arisen in recent months in regard to the level of assistance that the authorities have been able to obtain from foreign governments in the tracing and interdiction of funds related to current corruption investigations in China.

Why do we abuse our positions?

Over the years a considerable amount of discussion has taken place in the academy as to the nature and implications of corruption. While we need not rehearse this here, it is desirable in modelling more efficacious responses to the threats associated with corruption, to recognise the practical significance of Edwin Sutherland's explanation of deviant white collar behaviour (16). In a nutshell and in grossly simplistic terms, Sutherland recognises that in the case of certain forms of economically motivated activity we are all susceptible to temptation. The determination of whether we actually engage in conduct that might be characterised as criminal or abusive will in large, perhaps determinant, measure - be resolved by our own cost benefit analysis. In other words, we will assess the rewards as compared with the risk of something unpleasant happening to us. There will, in any given situation, be a host of factors which influence our subjective determination of this balance and where the tipping point is encountered.

Of course, morality and education will have a role to play as will the efficiency of detection and the mechanisms of punishment. However, it is important to take on board that the moral and ethical aspects might vary (17) and in many cases, of what might be described as financial crime, there may well be a perception that they reflect no great moral principle and are essentially technical offences. The perception in a society that undertaking the activity in question is common place or that most would - given the opportunity engage in it, will be powerful factors.

The potential for ambiguity in designing the controls and certainly in policing them is, perhaps illustrated again by reference to a form of misconduct that it is quite closely related to corruption, namely insider dealing. While arguments based on the abuse of loyalty may in the circumstances be relatively strong or weak, the justification often invoked in the criminalisation of the misuse by insiders of privileged information, is the adverse impact that this may have on investor confidence. It is argued that investors will be less attracted to markets where there is not a semblance of equality of opportunities to profit. For many reasons this simplistic contention is not always convincing. However, it is the case that few individuals are likely to see a profound moral imperative here. Their castigation of insider trading as an abuse, at this level, is probably rather more associated with their jealousy that someone else who is in a privileged position is able to take a benefit which they are unable to access to (18). Indeed, the same argument is manifest in regard to some of the excesses that we have seen on the part of bankers in the lead up to the recent global financial crisis. In the result, it is possible that morality may play less of a role in the balance of opportunities and risks than some think and hope for. The prime issue may be simply at what price is the risk of punishment and possibly loss of reputation worth taking.

Consequently the level of detection and likelihood of effective enforcement action consequent upon detection is, on this analysis, a significant if not determining factor. The more that can be done to render the risk of detection and the certainty of effective policing and punishment, the higher will be the financial threshold to wrongdoing. Thus the role of ‘soft’ and early - essentially extra-legal procedures and devices, such as compliance, transparency and whistle blowing have a real role to play in fixing the tipping point. None the less, given the efficacy or rather the lack of efficacy, in bringing economic criminals and those involved in corruption to justice, the threshold may be rather lower than we assume. Considering the nature of the likely offender it may not be necessary to invoke the full panoply of criminal justice that is more usually encountered for other forms of crime and misconduct. By definition we are dealing with more or less the elite in a given society, or at least those who have a privilege the exercise of which is worth influencing. One does not bribe people for the sake of it - there will always be a purpose and usually one that has economic significance.

Exposure, discovery and detection

It is in the analysis of the viability of detection and effective enforcement, that there is perhaps the clearest distinction between so called ‘grand’ corruption and shall we say ‘ordinary’ corruption. In the former those involved will hold some of the most powerful

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

There are indications, however, that the balance might be tilting. While we have a long way to go before it could convincingly be argued that corruption or for that matter money laundering have become international crimes in the sense we understand that term in international law. There have been significant developments in the efficacy of trans-national criminal justice in large measure spurred on by important international instruments such as the UN Convention against Corruption (19). The ability of states within their own domestic law to provide meaningful assistance to other states and even private actors, in pursuing the proceeds of corruption and other crimes has increased dramatically. Also the willingness and capacity of states acting within their domestic laws to act promptly and effectively in interdicting and freezing tainted wealth is infinitely greater today than it has even been. This was illustrated in the rapid response of many European countries to the requests of new governments to identify and freeze the assets of former leaders and their families during the so called Arab spring. There are many examples of cases in the past where it has taken years to trace and then initiate steps, often without success, to interdict wealth 'stolen' and diverted from countries such as the Philippines, Pakistan, Haiti and Indonesia. On the other hand the British government was able to effectively respond to a request received from the Egyptian government in regard to former president Hosnay Mubarak within minutes. The system of and for international mutual assistance today in this respect bears no resemblance to that even five years ago. Of course, a prerequisite to this is an effective request from the relevant lawful authority in the state concerned and this may well constitute a problem where it remains unclear exactly where authority actually does reside in a state that has gone through turmoil. The provision, perhaps from other governments, intergovernmental organisations and even the private sector, of timely technical assistance and support may prove in practical terms of crucial significance.

Crimes of the Powerful

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

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

It is not always the case that those in power will be so bold to stoop to intimidation, violence and misinformation. Perhaps an even more shocking response is to attack the standing and resources of the agencies that have been set up specifically to promote integrity and police the relevant law. Although politicians are inclined, often with the support of the media, to bemoan the inadequacies of agencies responsible for promoting integrity in, for example, the financial markers or discovering and pursuing financial crime and corruption, there are again, too many examples, where as a result of the perceived effectiveness of such agencies their budgets have been slashed and their recruitment curtailed. Whether this be predicated on the notion that such have become too overbearing and powerful – undermining the very values that they are tasked to protect, or simply on the basis that they have done their job, it is not hard to find examples of the virtual emasculation of in particular the enforcement and surveillance capabilities of these agencies.

Elite Enforcement

On the other hand it has also to be recognised that there are too many examples around the world of elite prosecutorial and investigative agencies, set up specifically to spear head the fight against corruption and economic crime, themselves becoming tainted by the very ills that they are addressing. There have been real examples of such agencies being undermined from within as a result of penetration by other criminals and the corruption of key personnel. One need only consider the example of the Commercial Crime Unit in Hong Kong and its corrupt director – Warrick Reid. As Lord Templeman, then one of the most distinguished judges in the Privy Council observed: "bribery is an evil practice which threatens the foundations of any civilised society. In particular, bribery of policemen and prosecutors brings the administration of justice into disrepute … in (this) case the amount of harm caused to the administration of justice in Hong Kong …cannot be quantified"(20). Indeed, even in that bastion of propriety, Singapore, a similar agency established to fight economic crime and corruption had problems, albeit less dramatic. Sadly there are many other examples.

In the author's opinion the ever present danger of specialised law enforcement agencies and in particular those established to fight really serious economic criminals and the most corrupt and powerful members of our societies, becoming part of the problem, is exacerbated by a failure on the part of politicians and the media to properly understand and appreciate the real problems in doing the work they are tasked to undertake. In some, perhaps the majority of cases where such agencies and in particular their directors have stepped over the line and become associated with the problem rather than the solution, the initial reason has been a desire - perhaps even a laudable desire, to meet the expectations of those who have appointed them and set them their task. The reality is that in all systems of law – whether common law, civilian, Roman Dutch or as in the Philippines an intriguing mix thereof, it has proved over time incredibly difficult to secure convictions, through the traditional processes of the criminal justice system, for economic crime and in particular fraud and corruption. The reasons are many and varied and a detailed discussion is beyond the scope of this paper. It is not without interest, however, that even the most developed and respected legal systems have in reality faired little better when judged in terms of convictions. For example, back in 1986 an eminent senior criminal judge, Lord Justice Roskill, appointed to make recommendations for the improvement in England of the trail of fraud cases, reported that "the public no longer believes that the criminal justice system can effectively and efficaciously bring the perpetrators of fraud to book. The overwhelming evidence brought before us suggests that the public is right (21)". Despite many new laws, procedures and agencies, few in the United Kingdom would have any confidence that the situation has got any better (22).

The record elsewhere, including in the USA is in truth little better. It is largely as a result of the criminal justice systems profound inability to deliver results – in terms of convictions, or for that matter the seizure and interdiction of the proceeds of crime, that many law enforcement agencies around the world have redefined their objectives as the disruption of crime rather than the traditional investigation and prosecution of crime. The emphasis now placed on the disruption of organised crime – including terrorist

organisations and serious economic criminality, has inevitably impacted on the way in which we attempt to deliver justice. There is, for example, a much greater emphasis on the role of intelligence and in particular financial intelligence, thrown up by anti-money laundering systems (23). On the other hand the more we involve the spy rather than the traditional policeman in these tasks and move away from the discipline of a traditional prosecution, the greater are the risks to human rights and the temptation to justify actions on the basis of their empirical results. Experience appears to demonstrate that the temptation to meet the unrealistic short term expectations of politicians has resulted in a tendency to bend rules and procedures to achieve what appear to be results - recognised as justifying the special powers, budgets and status that there agencies are given. Elitism breeds an ambition for a level of success that a proper and responsible administration of law cannot in all probability achieve. Consequently the very real pressures within the organisation in terms of career security, development and esteem and externally in terms of continued support and standing - become almost irresistible. The inclusion of evidence that has been procured in dubious circumstances, perhaps even illegally, is a step towards fabrication and manipulation of evidence – the ends justify the means. The fact that this corrupts the very fabric of the legal system and makes justice a delusion is obscured by expediency and pragmatism.

Having said this, specialisation in the investigation and pursuit of economic crime is vital. To identify and then recruit or to foster similar skills and specialisations within the confines of more traditional law enforcement structures and in particular police organisations, is problematic. Traditional justice agencies do not provide the career structures that can comfortably accommodate the sort of specialisations that are required for the effective investigation of, for example, economic crime and corruption. Of course, if there is the political will then it is conceivable that significant organisations capable of supporting highly specialised skills can be established and operated. A good example of this is the Independent Commission against Corruption (ICAC) in Hong Kong. However, the very considerable resources that have been placed at the disposal of the ICAC over the years are in practical terms beyond the reach of most countries and those that have attempted to emulate the experience of Hong Kong with lesser resources, have on the whole not faired as well as was hoped. The ICAC in terms of its structure and operations has to be considered in the historical context of Hong Kong and the political imperatives that gave it so much significance in the political system. For example, for much of its life the ICAC operated within a colonial environment which had implications for in particular accountability and its independence. There are those who wonder whether its perceived strengths will, or indeed, can survive – at least as they were, in the modern reality of Hong Kong.

Prosecutorial independence and discretion

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

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

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

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

Civil enforcement

The perception and probably the reality that Federal prosecutors in the USA were unenthusiastic in prosecuting securities offences led to the development within the US

Securities and Exchange Commission of its own civil enforcement jurisdiction. Frustration with the traditional criminal process encouraged enforcement lawyers within the SEC, to develop a relatively effective process of civil enforcement based on seeking injunctive relief in the Federal Courts. The efficacy of using essentially civil law procedures in fighting economically motivated crime, with the attendant practical and evidential advantages, has resulted in administrative enforcement assuming a very significant role in the USA in the enforcement of not just the securities laws, but increasingly those concerned with integrity, such as the Foreign Corrupt Payments Act. As the use of civil enforcement has become more widespread the courts and, indeed, Congress have imposed certain constraints and to some degree regularised the processes and sanctions in statute.

Obviously there is not the opportunity to explore civil enforcement in more detail here (24), although it is a very important additional weapon in the arsenal of those seeking to fight economic crime and corruption. On the other hand, there is a need for circumspection as the procedures that have been developed in the USA, while effective and relatively efficient are the product of US legal history and jurisprudence. They are not easily transportable into other systems. For example, the attempt by statute to emulate the US SEC's jurisdiction in regard to market abuse in the United Kingdom has not been entirely successful. The English Courts have also been unimpressed with attempts by regulators and in particular the Serious Fraud Office, to utilise civil processes when what has occurred is clearly criminal. Judges have deplored the use of the 'soft' option of civil enforcement and effectively 'agreed' penalties where crime is involved. Judges in other jurisdictions, such as Hong Kong, have declined to recognise and give effect to US court orders in regard to civil enforcement (25) on the basis that what is in issue is essentially a criminal matter dressed up as a civil one. Having said this, the development of the US law in regard to tracing and forfeiture of criminal property through a civil process *in rem* has met with a great deal more support in foreign courts.

Civil restitution as a remedy

The United Nations Convention against Corruption places a great deal of emphasis on alternatives to the traditional criminal law in policing corruption. In articles 1 and 51 of the Convention it is made absolutely clear that one of the principal objectives of the Convention is the recovery and restitution of the proceeds of corrupt practices. In addition to facilitating the effectiveness, on a trans-national basis, of domestic anti-money laundering and criminal property provisions, the Convention specifically recognises the importance of states being able to bring proceedings in their own courts and in those of other jurisdictions to pursue the ill gotten gains of those who have engaged in corruption. Of course, much depends upon the vitality and efficacy of domestic law and in particular the law relating to restitution (26).

We have already touched upon this in the context of the obligation of fiduciaries in the common law tradition, to eschew conflicts of interest and be accountable for the taking of 'secret profits' (27). These principles have been applied not merely to those in private relationships but also those in positions of trust in government. For examples, ministers,

senior officials, spies and even members of the armed forces, who use their position to exploit others. The importance of these principles is much wider than it might at first seem. They are of practical importance not just in those jurisdictions that embrace the pragmatism of the common law (28). For example, it is common to find in company laws, the statutory incorporation of the duties of loyalty upon which this liability to account is based. Furthermore, the courts in a number of common law jurisdictions have held that the principles of fiduciary accountability and in particular the imposition of a constructive trust apply where the money ends up. Therefore, a Singapore appeal court had no hesitation in invoking these principles in regard to the proceeds of corruption that took place in Indonesia held in a Japanese bank in Singapore (29).

It is, however, the ability of the law to trace the proceeds of corruption and fraud into other property and to then regard it as belonging to the person with the equitable claim that is perhaps the most significant weapon. In a series of cases involving corruption and breaches of fiduciary duty, invariably committed overseas, English courts in common with those in many other common law countries, have been prepared to trace such property and impose on it a constructive trust (30). Any one who comes into possession of the property or who exercises control over it, will - if they have knowledge of the circumstances or are reckless, be held equally liable to the same extent as the wrongdoer (31).Such third parties will only escape liability if they have acted in good faith and given proper payment for the property, before they appreciate the true facts or before parting with it.

There will be similar civil liability on those who dishonestly assist in the laundering of such property. Thus, those who provide accounting, legal and banking services might well be exposed to liability. The state of knowledge required for this form of liability includes wilfully turning a blind eye to facts that would have put an honest and reasonable person on notice that something improper was a foot. Thus, the English courts have not hesitated to impose personal liability on an accountant in the Isle of Man who incorporated English companies and then opened bank accounts for these companies in London, on behalf of a fraudulent French lawyer and an employee of an Italian company, without asking the questions that an honest and reasonable person in his position should have asked (32). Indeed, in another case, the court held that even a lawyer who had good grounds for suspecting that a client whose monies he had placed into certain overseas trusts may be related to an investigation in the USA - if he wished to escape personal liability was under an obligation to search out those who might have a claim against these funds and inform them (33).

Costs and Bounty Hunting

A serious obstacle to developing countries in utilising these laws to purse those who have raped their economies is the costs involved in conducting the investigation, securing the evidence, freezing the suspect funds and then mobilising civil actions – often in expensive and foreign legal systems. The United Nation's Convention against Corruption provides that countries should seek to assist each other in this, and there are potentially

useful provisions for technical assistance. Under the Convention and various other international instruments such as those of the OECD, the Commonwealth and Council of Europe there are a number of potentially significant initiatives. The Stolen Assets Recovery programme of the World Bank is of particular note as is the OECD derived initiative in Basle, to provide governments with technical legal assistance. Under these programmes financial, legal and investigative assistance is provided to countries seeking to recover the proceeds of corruption. While to be applauded these initiatives are limited both in terms of their mandates and the resources that they are able to offer. Governments wishing to pursue wealth that has been stripped from their economies, often in difficult political circumstances, still need to be able to do a great deal on their own. Paradoxically it is, as in cases of fraud, those who have been most damaged and abused that will in fact be least able to mount a claim.

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

It is perhaps worth making the observation here that while commendable for a number of reasons – and not least those who abuse their positions should not be allowed to retain the benefits – and nor should their families, procedures that at best are capable of taking back what should never have been stolen, might not present a significant disincentive to those who are contemplating the risk and rewards. Ideally such procedures should never trump the application of the criminal law and the prospect of a real criminal penalty. Having said this, there is room for debate as to how the imposition of criminal penalties might be modified and mitigated by meaningful co-operation on the part of those under investigation. In cases where corrupt individuals have willingly made restoration then there is scope for the amelioration of the defendant's liability. Indeed, in the USA it is not uncommon to condition civil penalties and even fines on the basis of co-operation.
It is also not uncommon in similar circumstances, particularly in the context of taxation, to compound conduct that might otherwise result in serious criminal sanctions. Of course, in countries such as China where many such cases are brought under the administrative jurisdiction of the Chinese Communist Party there is even greater scope for co-operation and mitigation, although it must be noted that this had led to some speaking out against

the current initiative against corruption on the basis that it has the potential to undermine the rule of law.

While no doubt things have improved – jurisprudentially, there are still many governments and agencies that remain cautious as to what information they share with other governments. This is exacerbated by the approach of some countries which allow their agencies to retain some of the property seized either as an incentive or to facilitate further enforcement. While the US authorities have for many years been prepared to share seizures, after deduction of their expenses, with other states, few other governments have in practice done this; Switzerland being a notable exception. The UN Convention specifically provides for this and hopefully this will herald a more constructive approach.

Empowering the citizen

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

While the development of control liability especially for misconduct relating to integrity has been regarded as a means of improving compliance and attributing responsibility, it is a two edged sword. Senior management may well be reluctant to report suspected violations of provisions possibly giving rise to control liability or in co-operating with the investigation of the predicate wrongdoing. Indeed, in some societies the arguments are at best evenly balanced. However, there is another and perhaps even more pertinent consideration. There is a real risk in demonising businesses and their managements. This concern is perhaps best illustrated in regard to the cases that have arisen in the US and UK in particular, in regard to economic sanctions violations and money laundering. There have been a number of cases where major international financial institutions, such as the Hong Kong and Shanghai Bank, Barclays Bank and the Standard Chartered Bank have

been accused of significant failures in compliance in regard to such issues. Very large fines and costly settlements have resulted. There has been a very high level of criticism of the management of these and other institutions in the media. The problem with all this is that it remains, to be convincingly seen whether the relevant underlying laws relating to the identification and interdiction of suspect funds work and have any real value within the legal system. If one considers the level of successful enforcement in regard to criminal and suspect property in the vast majority of jurisdictions, then one might be excused for doubting the efficacy of such laws and the cost that they impose both directly and indirectly in terms of risk, on ordinary financial institutions which provide a vital service to the economy.

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

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

Criminal culpability

There are those who argue that the gold standard in combating serious corruption must involve the robust use of the criminal law. We have already touched upon this in the

context of the institutional and procedural considerations. Over the last few years many states have revised their criminal laws to improve the drafting of the primary offences relating to corruption and in particular the taking and giving of brides. This is not the place to attempt a discussion of the substantive law. However, while very few cases have so far been brought under it, the author has no hesitation in commending as a good model the UK's Bribery Act 2010. Before its enactment Britain's anti-bribery law was antiquated and inefficient. In practice in the United Kingdom, as in a number of common law countries, it is other provisions in the ordinary criminal law that have been utilised to promote integrity. The re-shaping of the law relating to fraud in the UK, in the Fraud Act 2006, and especially the creation of a 'new' offence of criminal breach of trust is particularly welcome in this context (34). Perhaps of most significance, however, has been the use of anti-money laundering laws and provisions for confiscating and taxing criminal property.

Having said this, the efficacy of anti-money laundering laws in the context of corruption control has yet to be proved. For such provisions to be able to bite there is a need for the conduct that is considered corrupt to be, had it occurred, within jurisdiction a criminal offence. In part this is why it was desirable to provide clearly in UK law that the bribery of a foreign official anywhere in the world by an agent of a British company or a company with a defined relationship with the UK, is a specific and serious offence. While it is the domestic jurisdiction where the anti-money laundering law is invoked that is relevant, it is the case that the approach of other legal systems is not uniform, particularly in regard to such issues as facilitation payments and the conduct of independent actors. It is also the case that the record of most countries in actually forfeiting or confiscating the proceeds of crime is far from impressive. For example, in the United Kingdom, the amount of criminal property that has been confiscated is a miniscule proportion of the assumed whole. Even in the relatively clear cut case of drugs related crime, it is guessed that in the United Kingdom we are confiscating less than 0.001 per cent of the suspect wealth involved (35). Indeed, there are those who consider that this 'guestimate' is significantly over estimated. In the case of fraud and corruption the amounts that have been confiscated are ridiculously small. Indeed, as we have seen the record in policing the predicate crime is also far from impressive. The fact is that even in the USA the proportions are not vastly different. In most countries they are far worse.

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

strategy in law enforcement is better suited to dealing with organisations and structures that require consistent and timely flow of funds (36).

Intelligence – a two edged sword

The role of intelligence in discouraging corruption and assisting in its control is a dark area. Indeed, it is often said that intelligence agencies themselves are privy to and perhaps occasionally involved directly in corruption. Indeed, the UK Bribery Act 2010 specifically exempts the intelligence agencies in Britain, in certain and limited circumstances from its provisions (37). It was not that long ago that agencies and even government departments in Europe offered advice to businessmen on who to bribe and what the going rates were - and boasted that their information gathering facilities would be used to advance the business and commercial activities of their nationals. Indeed, it was only relatively recently in Britain that the payment of overseas bribes ceased to be a tax deductible item for UK taxation. Ignoring this somewhat unpalatable albeit probably necessary activity, there is clear evidence that intelligence agencies have when it was thought appropriate assisted in the exposure of corrupt officials, albeit mostly overseas! More recently some have played a very significant and positive role in assisting in the tracing of missing and stolen assets, particularly from North Africa.

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

Control and facilitator liability

Mention has been made as to the strategy of throwing the legal or at least regulatory net, over persons who are in a position to control or influence the conduct of others and in particular those who are more likely to engage in corruption or facilitate it. We have long realised that in the case of serious economic crime and particularly organised economic crime, it is rare that the primary perpetrators can effectively be brought to justice in conventional terms. They will often be in a position, as we have seen, to protect

themselves because of their power and or ability to corrupt others. While not always untouchable – few can be effectively pursued during the currency of their power. Hence the argument goes that it makes sense to focus enforcement on those who are needed to perfect the criminal and anti-social objectives of these elite and powerful individuals. This is not simply going after the little guys because the bosses are too smart, but rather a strategy designed to increase the costs and risks of engaging in corruption and abuse. There will become a point, at which the costs are just too great and are disproportionate to any assumed rewards. In the context of the financial services industry, we can achieve this in part through policies of ring-fencing access to the industry and markets and then imposing compliance, recording and reporting obligations on those concerned. In effect we create new types of responsibility on the facilitators to vouch for the integrity of their clients and their transactions. This is one of the cardinal strategies within anti-money laundering systems whereby compliance risk and costs are placed firmly on those who in the ordinary course of their business, mind other people's money. We have already touched on a possible down side to all this.

Quite early in the development of probity related legislation in the USA attempts were made to impose liability on those in the financial services industry who could not show that they had taken reasonable steps in the supervision and management of those under them, to prevent such persons engaging in fraud and other abusive conduct – including corruption. These provisions have been refined and developed into a comprehensive strategy imposing the threat of legal responsibility on those in control positions. Obviously there are issues of proportionality and, indeed, fairness in terms of allocating risk and responsibility for culpable acts (38). In the United Kingdom there has been some hesitation in proceeding down this path. There are decisions of House of Lords and Privy Council which allow the actions of an employee acting within the scope of his employment - notwithstanding it is outside the authority he has and the fact that his employer has done everything reasonable to prevent the conduct in question - being attributed to the corporate employer as its acts for the purposes of criminal liability (39). However, in practice there has been reluctance among prosecutors to use these cases to develop a form of control liability, outside the areas of consumer and to a lesser degree investor protection. On the other hand a recent proposal for improving our approach in prosecuting fraud and corruption in the UK by the shadow Attorney General has advocated a far more robust use of such principles (40).

Section 7 of the UK's new Bribery Act 2010 in this sense is somewhat revolutionary, albeit not quite as draconian as some would have liked. This provision accords criminal responsibility to a company for the acts of an agent, who not with standing having no authority has committed the offence in section 6 - of bribing an official of an overseas government. The company is entitled to a defence if it can show that it put in place 'adequate arrangements' to prevent such misconduct. In certain cases directors and others of a company that is so convicted can be held personally liable provided they had knowledge of what was going on. Given the very wide and all encompassing definition in the statute of what amounts to bribery there has been widespread concern in the commercial and business sectors as to what is said to be an unfair and unreasonable exposure to criminal liability. However, it is clear that the enactment of this offence has

greatly increased the concern of managements to ensure that they have in place adequate compliance and training programmes. Thus, this provision has already had significant beneficial results.

It is also not without interest that the UK Financial Conduct Authority (which has taken over from the defunct Financial Services Authority) considers that it would be a breach of General Principle 3 of their rules and regulations for a financial institution in the United Kingdom not to have tailor made compliance procedures aimed at the giving of bribes, or facilitating of bribery and other forms of financial misconduct. In such circumstances the FCA is empowered to impose unlimited fines and take other action, including against persons in control and those responsible for compliance. There is a palpable change of attitude in the management of British businesses, in the financial sector and generally, in regard to the risks thrown up by these laws and regulations.

Blowing the whistle

This also comes at a time when rather more attention is being given to the significance of whistle blowers in promoting integrity and due compliance. Indeed, the UK Home Office has recently established a working party to inquire into whether the UK's laws protecting whistle blowers need to be further strengthened. In particular, there is interest in the extent to which whistle blowers feature in US strategies for exposing financial misconduct and in facilitating investigation and enforcement action. The most recent legislation in the USA relating to the financial industry in addition to increasing the legal protection for whistle blowers provides that they may be awarded bounties up to 30 per cent of the fine eventually imposed by regulators for violation of the law. Given the size of some of the fines imposed by US financial regulators the rewards for informing might be very significant indeed.

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

The area of plea bargaining is one that it is equally controversial. Again in the USA plea bargaining plays a major role in securing convictions for economic crime cases and in particular those involving continuing enterprises. In Britain there has been reluctance to adopt this approach and recent attempts by the Serious Fraud Office to do so, without the involvement of the court, and 'agree' levels of financial penalty (in collaboration with the US authorities) has been declared unlawful wholly unacceptable (41). On the other hand,

it has been accepted that encouraging in particular corporations that discover misconduct has occurred, to 'self-accuse' themselves to the authorities is desirable and to be encouraged. The Serious Fraud Office in such cases is able to enter into a deferred prosecution agreement, with the agreement of the court, with the 'defendant' under the terms of which no prosecution will be initiated within a period provided agreed steps are taken to remedy what has occurred and make restoration. If these conditions are properly observed, under monitoring, then the case will be dropped (42). In the US considerable reliance is now being placed on similar procedures and the SFO in the UK is keen to build on the success it has had in its first case.

Unexplained wealth

Perhaps a rather more controversial suggestion for strengthening the hands of those who are concerned to discourage and pursue corruption is the development of procedures that identify unexplained wealth. Again the UN Convention contains a provision basically commending this approach without actually obliging countries to enact such laws (43). The British colonial governments in imposing criminal codes on many parts of the Empire were concerned about misconduct in public office albeit the same degree of concern appears not to have been felt at home! The Bribery Ordinance in Hong Kong is of particular interest in this respect. Section 10 in effect creates a statutory presumption that any wealthy over and above the lawful remuneration of a public official is the proceeds of corruption. In addition to the offence of having excessive unexplained wealth, there are provisions for its recovery and for the net to also be thrown over close relatives and associates. Similar provisions were enacted in other parts of the Commonwealth. Of course, today in many countries and even in Hong Kong there has been concern as to whether such laws comport with human rights.

It is also the case that in not a few developing countries there is an express or implicit desire to see some degree of reallocation of wealth. South Africa is a good example of this. Consequently, the strict operation of such a provision is unlikely to find political favour. None the less, it is probable that the identification of unexplained wealth will play an increasingly important role in the identification of those suspected of tax fraud and evasion and possibly other acquisitive crimes. At the intelligence level, net worth analysis has always been an important and useful tool. Now that there is so much more information available, it is certain to become even more effective. It is also the case that under the laws relating to identification and interdiction of criminal property, we are increasingly adopting procedures which focus on unexplained wealth. For example, in the United Kingdom two convictions within a period will enable the court to presume that wealth in the hands of the defendants is the proceeds of a life style of crime and to avoid confiscation the defendant will be required to explain the source of this wealth. Indeed, in civil proceedings against assumed criminal property it is possible to allege that unexplained wealth is likely to be the proceeds of crime on a civil burden of proof. Indeed, given the practical problems in establishing the nexus to a specific crime it makes a lot of common sense to focus simply on unaccounted for wealth.

Even if there is reluctance to bring into law specific consequences, as a result of holding unexplained wealth it may well be possible to achieve at least some of the practical advantages of such a strategy through contract law and in particular employment law. The incorporation of obligations to declare wealth and explain unearned income and to provide for monitoring within compliance systems has much to commend, if the relevant activity is such as to carry high risks of temptation. Similarly appropriate provisions can be included in transactional contracts - although this may in practice be rather more difficult to negotiate. Of course, control and compliance provisions have long been used in procurement contracts.

Investigations and secrecy

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

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

There will always in the case of serious corruption be an international aspect, even if it is simply that the relevant ill-gotten wealth will be salted away overseas. Even through there have been, as we have noted, fundamental improvements in mutual legal assistance between states, the fact is that most law enforcement agencies are parochial in terms of their mandate, resources and priorities. The ability for investigators let alone prosecutors to reach out and conduct inquiries on a timely and efficient basis in different and perhaps uncooperative jurisdictions is exceptionally limited (44).

Those who have acted corruptly will not give up easily. They will have structured their actions to make it difficult to detect let alone investigate and they will have used experts to hide their wealth and discourage inquiries. Of course, this is nothing new the same techniques are used by those who wish to hide the proceeds of serious crime and terrorist related finance. Today the number of countries that are willing to prostitute their sovereignty by deliberately facilitating money launders and the like are much fewer. However, they do still exist and there are jurisdictions, such as Taiwan, that have very few procedures for cooperation with other states. Furthermore, it cannot always be assumed that the government and its agencies are willing to cooperate. They may have some sympathy, where there has been a change in government, with the former leadership. Or they may have been corrupted. This is not fanciful. There are examples of governments and their central banks that have been willing for a price to become essentially money launders for organised crime and other criminals. In one case involving a Commonwealth country in the Caribbean the corruption encompassed the then Prime Minister and Attorney General and investigators from the USA were simply murdered. In such cases there is no justice or realistic prospect of justice.

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

Now that the 'crusade' has moved on from drug lords and terrorists to corruption we see the same arguments being employed to expose the financial arrangements and wealth of those who are suspected of corrupt practices or, perhaps rather more worrying, those who are or who have been politically exposed, their families and their business associates. A cynic might think that all this has perhaps more to do with exposing financial records to the tax authorities, than actually promoting integrity worldwide! The financial crisis and the near collapse of western banking have focussed governments' attention rather more openly on tax evasion and revenue enhancement. The recent meetings of the OECD concern about tax havens and the like, has increasingly focussed on the facility that many jurisdictions offer for easy corporate registrations. In almost any conceivable fraud or

money laundering operation there is a need for corporate and trust vehicles. The use of such companies and trusts enables beneficial ownership to be hidden, or at least obscured. Perhaps the prime offenders in terms of easy incorporation and the ability to hide beneficial ownership are not in the main small island jurisdictions in the Caribbean and Pacific, but the UK and USA. The OECD, G8 and G20 have agreed to severely limit the opportunity that the corporate form affords those who wish to hide or complex their financial transactions and Mr David Cameron the British Prime Minister has gone as far as to announce that legislation will soon be introduced to expose the beneficial ownership of UK companies (45).

While all this is obviously to be welcomed it remains to be seen whether in practice it will make much difference for those who are charged with the investigation of corruption. In the end the transparency of the international financial system is only as good as its weakest link. In this regard, in the wholesale abandonment of the virtues of privacy in financial matters, we should perhaps not forget why privacy was invented, or at least called in aid, by the lawyers and bankers - namely to protect the weak and legally vulnerable from the unjustified deprivations of governments and tyrants. In all our deliberations about corruption and its malevolent cousins, it is necessary to retain a sense of proportion and in particular to be aware of unintended consequences both in the conception of law and in particular in its application.

Footnotes:

1. See generally B. Rider (ed), International Financial Crime (2016) Elgar

2. See generally T. Kaiser and P. Merl (eds), Reputational Risk Management in Financial Institutions (2014) Risk Books and R. Saleuddin, "Reputation risk management on financial firms" 22 Journal of Financial Regulation and Compliance (2014) 287 and in particular N. Ryder, The Financial Crisis and White Collar Crime – A perfect storm? (2014) Edward Elgar.

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

4. See generally B. Rider and T.M. Ashe, The Fiduciary, the Insider and the Conflict, (1995), Sweet and Maxwell.

5. See K.Zweigery and H. Kotz, An Introduction to Comparative Law (3rd Ed), Oxford, Ch 5 p 49.

6. For an illustration of this see B.Rider and L. Ffrench, The Regulation of Insider Trading (1979) Macmillan and S. Frommel and B. Rider (eds), Conflicting Legal Cultures in Commercial Arbitration (1999) Kluwer.

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

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

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

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

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

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

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

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

of legally imbedding corporate social responsibility" 32 The Company Lawyer (2011) 257

15. "Russia ranks first in use of death penalty" Los Angeles Times 5 February 1972. China regularly uses the death penalty for serious cases of economic crime, but see B. Rider "A tale of two cities" 19 Journal of Financial Crime (2012) 4 and B. Rider "When Chinese whispers become shouts" 20 Journal of Financial Crime (2013) 136.

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

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

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

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

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

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

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

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

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

25. For example, Nanus Asia Co v. Standard Chartered Bank (1990) 1 HKLR 396. However, the Hong Kong courts, as have most common law jurisdictions, have been prepared to recognise and support *in rem* orders by US courts in regard to proceeds of crime.

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

27.See supra at n. 11, and in particular Regal (Hastings) Ltd v. Gulliver (1967) 2 AC 134, and generally R. Pearce, J. Stevens and W. Barr, The Law of Trusts and Equitable Obligations (5th Ed) Oxford University Press, Pt V and A. Burrows, The Law of Restitution (2011) Oxford University Press, Ch 26.

28. See for example of B. Rider “The regulation of insider trading in the Republic of the Philippines” 19 Malaya Law Review 355

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

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

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

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

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

34. Another issue relevant to the discussion is the standard of culpability that is considered acceptable for the imposition of responsibility in the criminal law. An example of this is the discussion that has surrounded the creation of a new offence for senior managers of relevant financial institutions in the UK whose reckless decisions result in the failure of the institution, section 36 Financial Services (Banking Reform) Act 2013. Similar concerns have manifested themselves in the law relating to directors duties in the civil law, see B. Rider "Amiable Lunatics and the Rule in Foss v. Harbottle" 37 Cambridge Law Journal (1978) 270.

35. The UK National Audit Office estimated in the UK confiscation of criminal assets was no more than 26 pence in every £ 100 of criminal property and that in only two per cent of cases is the fill amount of the confiscation order actually collected, NAO Confiscation Orders, 17 December 2013. See also Report of the House of Common's Committee of Public Accounts, Confiscation Orders, 21 March 2014, SO. See also B. Rider "Taking the Profit out of Crime" in B. Rider and M. Ashe (eds), Money Laundering Control (1996) Sweet & Maxwell and B. Rider, "Recovering the Proceeds of Corruption" 10 Journal of Money Laundering Control (2007) 5 particularly p 26 *et seq* and A. Kennedy, "An evaluation of the recovery of criminal proceeds in the UK" 10 Journal of Money Laundering Control (2007) 33. Perhaps even more alarming is that not with standing over 350,000 suspicion based reports to the authorities in the UK in 2015 only 7 bank accounts were actually blocked. See generally UK National Risk Assessment of Money Laundering and Terrorist Finance (2015), UK Treasury and Home Office.

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

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

38. See n 34 *supra.*

39. Re Supply of Ready Mixed Concrete (No2) (1995) 1AC 456 and Meridian Global Funds Management Asia Ltd v. Securities Commission (1995) 2 AC 500.

40. Labour's Policy Review: Tackling Serious Fraud and White Collar Crime (2013), Labour

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

42. Deferred Prosecution Agreements are now authorized pursuant to Schedule 17, Crime and Courts Act 2013 and See Deferred Prosecution Agreements Code of Practice, 2013, Serious Fraud Office and Crown Prosecution Service.

43. Article 20 provides "subject to its constitution …each state party shall consider adopting such legislation and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is a significant increase in the asserts of a public official that he or she cannot reasonably explain in relation to his or her lawful income."

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

45. See G20 High Principles on beneficial ownership (16 November 2014), but see B. Rider, "The end of havens?" 12 Journal of Money Laundering Control (2009) 213. English judges have also done their bit – see B. Rider, "Exposing the modesty of

companies" 34 The Company Lawyer (2013) 263. See also B. Rider, "Rumblings in the Corporate Jungle" 36 The Company Lawyer (2015) 33.

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