Legal Means for Eliminating Corruption in the Public Service*

John Bell

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The fight against corruption in the public service is a subject of common interest to all developed legal systems. It is not a topic on which the classical divisions between civil and common law, or between French-style public law, German-style public law and common law public law have a great deal of relevance. Instead, this paper will use the experience of a small number of legal systems to reflect on two major features of legal systems: the punitive and the preventative functions of the law in relation to administrative practice, and the relationship between criminal law and administrative law. In broad terms, the theme of the paper is that the importance of law in the fight against corruption lies in its contribution to ‘designing out’ corrupt practices within governmental processes and, therefore, the contribution of law will be modest, since the key to success lies in the culture of administrative practice. Furthermore, the focus of law’s contribution lies in administrative law, rather than criminal law, even though most treaties and accounts of the subject focus on criminal sanctions.

This Report draws on six contributions: from Germany, Israel, the Netherlands, Spain, the United States and the United Kingdom. These can be read in their own right on the website. They are by no means comprehensive, but they do illustrate the three classical ‘families’ or traditions of public law mentioned in the previous paragraph. These reports were carefully written in response to a questionnaire. This Report does not directly follow that scheme, but rather tries to draw out the major issues. I see five main issues (1) Is corruption a problem? (2) What counts as ‘corruption’? (3) What preventative measures are taken to avoid corruption? (4) What criminal and administrative law sanctions and procedures exist that are specific to corruption? (5) What lessons can be drawn from a comparative law perspective?

* Session IVD1. National reports received from: Germany, S. Graf von Kielsmansegg; Israel, D. Barak-Erez; The Netherlands, H. Addink & G. ten Berge; Spain, E. Moreu Carbonell; UK, J. Bell; US, P. W. Schroth.
1. Is Corruption a Problem?

None of the national reports suggest that corruption for them is endemic or a pervasive problem in their system. There is no sense that organised crime has taken over the public sector. At the same time, all the systems report some problems of corruption. So we are presented with a number of questions in relation to different legal systems: what is the scale of the problem? what is the character of the problem? and what is its core issue?

1.1. The Scale of the Problem

The national reporters adopted different measures of the scale of the problem. Some adopted the Corruption Perception Index of an international organisation, Transparency International.\(^{1}\) Now this measures perception by business people and country analysts of whether there is a problem of corruption in a country. It presumes that these outsiders would be aware and would be able to calibrate the importance of the instances of corruption it encounters. At best this Index is a suggestive indicator of the scale of a problem, but is not, as such, evidence.\(^{2}\) Reliance on self-reporting in such surveys is problematic. Whilst over 20% in such surveys see corruption as increasing, when asked whether people in their family paid a bribe in the previous year, very few actually said this had happened. The Transparency International “Global Corruption Barometer 2005” Report states

> the prevalence of bribery varies considerably. At one end, a very low percentage of families in mostly high-income countries admitted bribing over the course of the past year. At the other, a relatively high proportion of families in a group of Eastern European, African, and Latin American countries admitted paying a bribe in the previous twelve months.

All the national reports are convinced that criminal prosecutions and convictions are a poor indicator of the scale of the problem. There are a variety of reasons why an investigation will be started and why it may fail to lead to a conviction. But more fundamentally, the kind of activity that the criminal law punishes is not the typical way in which corruption occurs. As our American reporter puts it, “Outright bribery of federal or state career civil servants is not a very interesting topic.”\(^{3}\) There are many other forms of activity which countries consider corrupt. This has been brought out, for example in the Netherlands, where criminal prosecutions are low, but a series of investigations by journalists and administrative authorities revealed a significant level of corruption in the area of public contracts.\(^{4}\) This example, replicated in Germany and the United Kingdom, shows the place of the press as a

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\(^{2}\) See the comments in the German report, p. 5.

\(^{3}\) US report, p. 18.

\(^{4}\) Dutch report, §1.2.
further source of evidence about the scale of the problem. In brief, there is no single measure, but ‘soft’ indicators such as opinion surveys and press investigations are more reliable measures of the problem than the ‘hard’ evidence produced by criminal statistics.

1.2. The Character and Core of the Problem

The previous sub-section has already explained that one needs to look beyond bribery to discover what is corrupt activity. The next sub-section will deal with the definition of corruption in more depth, but it suffices here to state that corruption involves a variety of ways in which the proper performance of a public function is abused for private gain. As we will see, ‘private gain’ goes beyond personal advantage and includes gain to a group, such as a political party. Viewed in this way, as our Dutch reporter put it, “Corruption is an issue with a legal history, but for too long only the narrow penal law approach has been adopted.”

In this way, the subject goes beyond the concerns of the various international treaties. Three among the numerous international treaties that have been agreed in recent years are of particular significance. OECD Corruption Convention 1997 focuses on criminal liability, as does the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997. By contrast, the UN Convention against Corruption 2003 is mainly concerned with money laundering and transfer of assets by corrupt rulers. It imposes duties on banks to report suspicious transactions. The rest of this paper will go further and argue that the rules illustrated by these treaties do not represent the most significant contribution of law to the fight against corruption. In addition, the Council of Europe’s Group of States against Corruption (GRECO) has been set up and it provides reports on different countries. As can be seen from national reports, this has been used by national authorities to benchmark existing practice and to trigger national legislation. Its focus has not only been on the criminal law, but it has focused on a range of administrative practices which can help to prevent corruption.

The core of the problem is culture. As the Spanish report suggests, there is a clear link between corruption and a lack of a sense of civic responsibility among both public officials and office-holders. Much of what we will see in section 3 on preventive measures focuses on clarifying the requirements of integrity in government and providing procedures by which this is respected, well before any corrupt activities take place. Law does not create a culture, but it can both emphasise the requirements of a culture and support them. Law has a subsidiary, not a primary role.

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5 *Id.*, §I.1.
6 *Id.*, §I.1.3; German report, p. 1.
7 Spanish report, pp. 2-3.
2. What Counts as “Corruption”?

For our purposes, “corruption” is not a legal term of art within national laws. There is a spectrum of definitions. At its widest, “corruption” denotes abuse of trust, a misuse of power or authority for private ends. In a narrow sense, it means making one’s official conduct the subject of exchange of benefits – influence or benefit to a user of the public service is exchanged for some illicit gain on the part of the official. Within that spectrum of activity, a whole host of administrative and criminal conceptions can be located. All the same, it would be true to state that criminal liability tends to refer to the exchange conception, whereas administrative preventive policies tend to be concerned with the much wider conception of what counts as corruption. As a working definition, we can define corruption as the use of a public position of power, trust or authority for unauthorised or inappropriate private objectives.

2.1. Different Cultural Conceptions

Although the different national reports make use of the spectrum of ideas mentioned above and would agree with the working definition, they do highlight a number of differences. Corruption is one of those ideas which relates both to a social culture about how people are expected to behave and whose contours are defined by a particular society in terms of its own history of institutional activity. The definition will be drawn in order to prevent the recurrence of an event in the past.

The point can be made by taking the example of the appointment of senior civil servants. Should this be done by reference to the results of competitive examination or should political office-holders be able to exercise patronage or at least ensure a similarity of political tendency among senior officials? The American report provides us with a fascinating account of how the US federal government has charted a course between these ideas over the past 200 years and more. The ‘spoils’ system has dominated at various times, and seems to be strongly to the fore at the moment. On the other hand, the idea of a meritocratic civil service has been espoused by the French and then the British, and this has also been a strong value in the way the federal civil service has been appointed, and was a dominant value in the 1940s and 1950s. Even where the spoils system operates, there are procedural devices, such as Senate hearings, to prevent misuse of power. The German report also notes that such a ‘spoils’ system happens to some extent in relation to public enterprises. The UK paper makes it clear that a major recent concern has been ‘cronyism’ in public appointments. As a result, a number of

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8 US report, pp. 2-12.
9 German report, p. 3.
10 UK report, p. 5.
procedures for screening proposals, e.g. for membership of the House of Lords or as political advisers have been devised. In such a tradition, as with the French emphasis since art. 6 of the Declaration of the Rights of Man of 1789 on “careers open to all talents” in the public service, there is a basic rejection of the ‘spoils’ system in favour of a dedicated and professionalised bureaucracy. In the 1980s, Israel too rejected the relevance of political affiliation as a criterion in determining the membership of government corporations. Considered in this light, it can be seen that the use of political reasons to justify the selection of an official will be seen as ‘corrupt’ in one political culture and yet perfectly proper in another (or at least within a range of permissible actions). Cultural specificity is an important feature in defining ‘corruption’, and yet there are also emerging international norms that suggest that certain actions, such as bribery, are wrong, whatever may be the local cultural expectations. But for the most part, what is permissible or authorised by way of private motive\textsuperscript{11} depends on the expectations of the local political culture.

Such partisan political justifications have to be distinguished from justifications based on the public good, but interpreted from a particular religious or ideological perspective. Actions based on a particular religious view are designed to further the good of all, but seen in a particular light. By contrast, where the religious motive is merely to further the careers of co-religionists, then this would be unacceptable.

2.2. Corruption and other Ideas

The Dutch report is very helpful in drawing a distinction between corruption and fraud.\textsuperscript{12} Fraud basically involves the deception of the other person in a two-party relationship. One person is persuaded to transfer a benefit or confer an advantage under the impression that he will gain something of value, which will not in fact happen. Corruption is a three-party situation. The person conferring an advantage is not at all deceived by what the official is agreeing to do. The dishonesty is in relation to a third party, the State, which is made to believe that the action of the official is for the public good, when it is not.

Corruption is not confined to the receipt of money. There is a range of advantages from which another may benefit, which are of an intangible kind. Such non-monetary advantages are less easy to identify. For example, the German and Dutch reports\textsuperscript{13} raise the example of expenses-paid trips to a foreign place to undertake ‘inspections’. Another example would be the sale of a house at an advantageous price. These have the appearance of legitimacy, and only become illegitimate in the broader context of an attempt to secure the exercise of

\textsuperscript{11} By ‘private motive’ I mean merely a reason that is not directed to advancing the public good, but is rather motivated by the desire to achieve the goals of a particular person or group.

\textsuperscript{12} Dutch report, §I.2.2.

\textsuperscript{13} Id., §II.5; German report, p. 4.
influence. But the broadening of the concept of “corruption” beyond the receipt of money makes the focus of attention increasingly on the motives for the action, rather than on its material content. The definition in the German Penal Code (§§331-334) focuses on conferring an advantage or benefit, without attempting to give any specific material content to the concept.14

2.3. Types of Corruption

In the various national reports, a number of specific areas for corrupt activity emerge and confirm the idea that bribery is not the most important aspect of corruption in western countries. Four activities in particular merited special attention: the award of public contracts, public appointments, abuse of position, and the funding of political parties. The “Global Corruption Barometer 2005” study15 suggests that persons seeking an advantage paid money to a public official without a request either to get out of trouble with the public authorities (e.g. where they were in the wrong) or in order to obtain a service to which they were entitled. It is interesting to note that neither of these forms of corruption feature in the national reports submitted for this Congress.

2.3.1. Public Contracts

Both the Dutch and the German reports16 suggest that the award of public contracts, in particular construction contracts, is the major area for corruption in the public service. The German report suggests that, in 2003, 54% of the investigations for corruption related to public service contracts and 34% of the suspects were involved in the construction industry.17 As the Dutch and UK reports make clear,18 much of the problem lies in local government. Relatively small local authorities are run by people with limited experience of handling large sums of money. The step change in handling sums of money in the public sphere which were out of proportion to those they handled in their private sphere gave rise to the temptation to apply different standards of probity. With large sums of money to be spent on urban regeneration and the need to achieve results fast in order to meet political timescales in making noticeable achievements, the public authorities needed the private sector to achieve their objectives. At the same time, this large public investment created significant

14 German report, pp. 9-10.
16 Dutch report, §§I.1.4 and III.2; German report, pp. 2-3.
17 Transparency international also suggest that the construction and the arms trades are the most likely to pay bribes when dealing with foreign governments. This is predominantly because of the size of the benefits to be gained.
18 Dutch report, §I.1.5; UK report, p. 2.
opportunities for the construction industry. In local government, the alternation of political parties does not always take place, and so office-holders continue to exercise authority for significant periods of time, and officials serve the same superiors for a long time. The large number of projects and the continuity of office-holders and officials can lead to long-standing relationships with contractors. This cosiness can be reinforced by the inevitable social interactions in a local area between business people and local elected leaders. These relationships can be positive. ‘Planning gain’ in which developers provide benefits to the local community in return for planning permission provides improvements to the local environment without cost to the local taxpayer. But the relationships can also give rise to improper influence. Illustrations in the German paper relate to Frankfurt am Main (1987), in the UK paper to Doncaster (1990) and in the Dutch paper to Amsterdam.

A further area of potential for corruption is that of contracts for health products, notably pharmaceuticals. In these cases, the investment cost for the producer is high, so that there is a need to get the product into use and thus into the cycle of raising revenue. On the other side, the public health service needs to seem effective. There are a limited number of suppliers, so there is the potential for undue pressure to be exerted on public authorities to accept products that have not been properly evaluated or that are sold at too high a price. The potential for improper influence is great, again because the numbers of people involved are small.

2.3.2. Appointments

Public appointments should be based on merit, unless other criteria are expressly allowed. This has been the European tradition since the 19th century and is the idea espoused by the American and Israeli reports. But there is always the danger that appointments may be based on personal relationships (nepotism) or on political or ideological affiliation (cronyism). The Spanish paper notes that it is seen as necessary in Spain to criminalise those who appoint people who are not qualified for the post. The UK report notes a wider concern that inappropriate criteria are used in deciding on appointments. The rules in this area are considered in section 3.3.1, but it has become a significant area once the public service expands beyond purely the civil service to include appointments to public enterprises and the appointment of policy advisers.

2.3.3. Abuse of position

Bribery is not the only form of abuse of position. A number of other activities are identified. In order to help a private person, a public official may breach confidentiality and transmit information that should be kept within the public service. In transmitting the information, the public servant confers an unfair advantage on the person to whom the information is
given, which enables him or her to compete better in the market, often the market for public contracts. A variant of this would be that the office-holder or public official offers consultancy in areas on which he or she will be involved in making decisions. Favouritism of this kind can also include the willingness to exercise influence in return for private advantage. Often the benefit conferred on the official is not monetary, but something that is considered of worth to the recipient.

An obvious alternative way to misuse a position is to misappropriate funds. Using funds for private purposes is a clear breach of trust.

The Spanish report helpfully brings these different forms of inappropriate behaviour together under the rubric of “non-performance of duties or abuse of trust.”

2.3.4. Funding of Political Parties

Transparency International’s “Global Corruption Barometer 2005” identifies political parties as the most likely bodies to be corrupt (the top ranked institution for corruption in 45 out of 69 countries surveyed). This is particularly the case in high-income countries, including all those who contributed reports to this topic area. Many countries in Europe impose restrictions on how political parties can raise funds or on the amounts of money they can spend on activities such as elections. The idea is that such limits will keep the electoral process untainted by external influences and that all will be able to afford to take part in the competition for elected office. In practice, Germany, France and the United Kingdom have found in different ways that this does not work fully. Political figures seek to evade these restrictions. One way used in France and Germany has been for political parties to issue fictitious invoices for ‘services rendered’, e.g. consultancy in relation to applications for planning permissions in local areas controlled by that party. This form of activity amounts to corruption because it tries to hide from the public authorities what is really happening and so enabling the party to retain public funding or at least not to appear to be using unauthorised sources for their political activities. The difference from bribery is that the official in question seeks not to benefit himself, but to benefit his party. It is ideologically inspired corruption, rather than greed inspired corruption.

19 See website, supra note 1; Report p. 3. See generally TI Policy Brief No. 1/2005 Standards on Political Funding and Favours and TI Policy Brief No. 2/2005 Political Finance Regulations: Bridging the Enforcement Gap, both on the same website.
20 Report, p 4: Table 1. See, for example, the discussion in the German report, pp. 4-5 & 18-19.
3. Preventing Corruption

All the national reports note the significance of measure designed to prevent corruption in the public service. There are broadly four areas in which this is attempted: (1) the definition and promulgation of ethical standards for the public service; (2) the management of conflicts of interest through prohibitions and transparency; (3) controls on the entry, exit and performance of public offices and the public service; (4) controls over particular kinds of transaction.

3.1. Promoting Integrity Ethics

As the public service has grown and diversiﬁed, the informal mechanisms of ensuring common ethical standards have no longer sufficed. When the functions of the state were limited to maintaining order and minimal public services, and these were often provided by local authorities, then it was possible to ensure a relative similarity in the understanding of standards. But the demands for state intervention have grown and there are large public services on a national level. For example, France has almost 5 million civil servants in 1700 corps.21 In addition, as the UK report explains, there has been an effort in recent years to involve the expertise of the private sector far more in the provision of public services.22 Among those elected to public ofﬁce, most will come from a variety of public and private sector backgrounds that are different one from another. The result is a growing heterogeneity among those involved in the delivery and management of public services. One cannot make assumptions in societies with a plurality of ethical beliefs about common standards. It has therefore become a signiﬁcant issue in most western countries to reinforce existing ethical standards. In 1998, the OECD produced its “Principles for Managing Ethics in the Public Service” [C(98)70/FINAL], and these are now incorporated in the Recommendation of the Council on “Guidelines for Managing Conﬂict of Interest in the Public Service” of 2003.23

National concern with these issues has not been simply following international trends.24 The UK Report notes that the Nolan Commission reported already in 1995 with a very substantial statement of standards that has been expanded into a wide range of areas. The Dutch Report also explains that there is an integrity policy in its public service since 2003, and the Spanish report provides a detailed account of the “Code of Good Government” adopted in 2005. The German report indicates that similar “soft law” provisions are being proposed. The content of these principles can be seen from the following table.

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<tr>
<th>Spain</th>
<th>England</th>
<th>Netherlands</th>
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24 See Dutch report, §1.2.3; Spanish report, pp 7-8; UK report, pp 3-4;
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<th>1. Objectivity</th>
<th>1. Selflessness</th>
<th>In principles of proper administration</th>
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<tr>
<td>Decisions adopted should serve the general interest and be based on objective factors to the exclusion of personal, family, corporate or other interests.</td>
<td>Holders of public office should take decisions solely in terms of the public interest. They should not do so in order to gain financial or other benefits for themselves, their family or their friends.</td>
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<th>2. Integrity</th>
<th>2. Integrity</th>
<th>In principles of proper administration</th>
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<tr>
<td>Members of government or authorities should abstain from any private activity that might create a conflict of interest.</td>
<td>Holders of public office should not place themselves under any financial or other obligation to outside individuals or organisations that might influence them in the performance of their official duties.</td>
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<tr>
<td>Members of government or authorities must not accept any special treatment or privilege or unjustified advantage. They must not exercise influence over administrative procedures without just cause.</td>
<td>In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.</td>
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<th>4. Accountability</th>
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<th>Principles of accountable administration</th>
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<td>Office holders are accountable for their decisions and for the bodies they direct. They are responsible for their actions to superiors and must not pass this on to subordinates</td>
<td>Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.</td>
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<th>8. Transparency</th>
<th>5. Openness</th>
<th>Principles of transparent administration</th>
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<tr>
<td>Decisions should be open and accessible to the public.</td>
<td>Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.</td>
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<th>13. Honesty</th>
<th>6. Honesty</th>
<th>In principles of proper administration</th>
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<td>Office holders are bound to refuse gifts, favours or services beyond the usual social or courtesy gifts. They should not make improper use of goods public property or services.</td>
<td>Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.</td>
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<th>7. Leadership</th>
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<td>Holders of public and support these principles by leadership and example.</td>
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The Spanish list includes duties of confidentiality and respect for confidences; a duty to be fully committed to the public service and to exercise restraint when administering public funds; and a duty to be accessible to the public. The Dutch would also add principles of public participation and principles of administration according to human rights. There are thus similarities and differences in how the list of ethical principles is constructed. The Spanish are more concerned about gifts and accessibility than the British, whilst the British are more concerned about leadership by example and the Dutch about public participation. In each case, however, there are broadly similar ethical ideals that are promulgated to the public service.

The Dutch report makes the valuable point that the notion of ‘integrity’ goes beyond preventing corruption and positively promotes socially accepted standards. For this reason, the Spanish and Dutch label of “Principles of Good Government/Governance” is accurate. The prevention of corruption is one by-product among many from the application of better ethical principles in the public service.

3.2. Managing Conflicts of Interest: Prohibitions and Transparency

The idea of establishing procedures for managing conflicts of interest is well-established. In the systems which have provided reports, there are both sets of prohibitions and requirements of transparency and openness.

3.2.1. Prohibitions and Incompatibilities

Most systems have rules under which it is not permitted for public officials to have potentially conflicting activities or interests. Some of the prohibitions are permanent. For example, German ministers cannot exercise any other profession, and US civil servants cannot exercise political activity in electioneering, and senior British civil servants cannot exercise political activity. The Netherlands prohibits outside activities among its public officials. In the draft German law, the prohibition is on holding more than 10% of the shares in companies that have dealings with government contracts. A distinction is usually drawn between the restrictions that apply to permanent civil servants and those that apply to elected office-holders. Whereas it is expected that civil servants will dedicate themselves completely to the public service, elected officials will usually have outside interests, either because they are part-time in such a role, or because they may well have to return to such private activity, if they are not re-elected. Ministers are expected to be full-time, but others would be expected to maintain private sector links and so incompatibilities that relate to specific transactions or categories of transaction seem more appropriate. This is well illustrated by the German rules on federal ministers and parliamentarians. As

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25 Spanish report, pp. 5-6.
26 Dutch report, §1.2.3.
a result, some of the incompatibilities are temporary and relate to situations in which an office-holder or official has a private or personal interest in a specific matter. The person must recuse herself for that matter and does not participate in it. This formal approach avoids actual breaches of impartiality. In the systems recorded here, there are very specific rules on the matter of incompatibilities.

Rather than create outright incompatibilities, countries may prefer to adopt the German approach of requiring prior approval before an official is allowed to take on an external task, and requiring the person to recuse herself when a particular act of public business is potentially compromised by the external activity in question.

As has been seen in the previous sub-section, the Spanish notion of ‘honesty’ includes a duty to refuse gifts that are in any way unusual. Israel has a similar prohibition on gifts in the Public Service (Gifts) Law 1979. The Netherlands has legislation requiring public officials to refuse gifts over a prescribed low cash value (€50), whilst this forms part of the ministerial code of conduct in the United Kingdom, though the sum that can be retained is £140 (over €200). The Germans prefer a duty to report the receipt of the money, combined with a prohibition on gifts to civil servants without special permission. In the UK, items above £140 are retained by the ministry, but are also reported on an annual basis.

3.2.2. Transparency

The national reports provide most information on issues of transparency. In the UK report, it is noted that in Parliament and in local authorities, members must register their external interests of all kinds, and this is also reflected in the Israeli and Spanish reports. This is the most obvious form of transparency in that the public can see where an elected member is presenting an argument for which he has a private interest. It is noticeable that this form of transparency has increased in recent years.

The rules of some countries go further and require the holders of senior offices to declare their private earnings. This is most significant in the United States where the personal tax returns of some senior office-holders have to be made public. In Germany, the rules of Parliament require members to declare earnings from outside their parliamentary duties. The UK Parliament makes similar requirements. The concern to police such earnings has increased because of the increasing significance of organised lobby groups. In Britain, the

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28 Israeli report, p. 5.
29 Cabinet Office (UK) Ministerial Code (July 2005), §5.25. Hospitality likely to influence an elected official also has to be reported: normally if it is over £550 for a member of the House of Commons, or £1000 for a member of the House of Lords; Id. §5.28.
30 German report, p. 12.
31 UK report, p. 5.
32 Israeli report, p. 12; Spanish report, p. 6.
33 German report, p. 17.
34 UK report, pp. 1-2.
“cash for questions” scandal among parliamentarians in the early 1990s demonstrated the need to ensure that outside influences did not compromise the performance of parliamentary duties.

In addition to specific duties of disclosure, there is also the increasing importance of general legislation on the freedom of information through which the personal interests of elected office-holders and officials is made public. The availability of information on companies and their advisers, directors and shareholders also provides a parallel source of information. So far, the availability of such freedom of information in Europe is patchier than in the United States, as is illustrated by the diversity of legal regimes in the various Länder within Germany. The UK offers a mixed picture. There are rights to access government information and there are also administrative requirements about the publicity policy which each particular administration must adopt.

Clearly within this area, there are different approaches to the role of law. As the UK report notes, the current law in the UK was criticised by the Council of Europe’s Group of States against Corruption (GRECO) in 1999. The self-regulatory structure of the UK Parliament was a particular target and it was considered that this should be put on a statutory basis. This has not happened. The tradition of Parliament regulating itself is too strong. By contrast, the US and now the Dutch have now moved to create much more specific legal duties, and Spain and Germany are following. There is an issue about the balance between ‘soft law’ and ‘hard law’ in this field. The decline in confidence in politicians suggests that confidence in self-regulation is also declining, and that hard law will be of increasing importance.

3.3. Controls on Entry and Leaving the Public Sector

The culture of those who work in the public sector is crucial to the lessening of corruption. One aspect of this is the way in which people enter and leave public offices or public employment. There are three areas in which preventive measures are taken: entry into positions of responsibility, conduct in those positions, and what people are allowed to do immediately on leaving the public sector. Issues of conduct within office (such as gifts or external activities) have already been considered. This section will deal with entering and leaving the public sector.

36 UK report, p. 5.
3.3.1. Appointment Procedures

Throughout the national reports, there are concerns about nepotism and cronyism as factors that can distort appointments to the public sector and can make corruption easier. There may be corruption in the appointment process itself – people will pay to obtain public offices, especially where these lead to positions of influence. Furthermore, those appointed because of their associations with particular families or political or corporate interests may not be as dedicated to the public interest in making decisions as those who have been appointed on merit.

As was noted in section 2.3.2 above, there are different cultural attitudes to the appropriateness of party political considerations in the appointment of senior civil servants. If the executive has to implement policies that elected officials have decided and be effective in doing so, then the ability of an individual official to deliver on that agenda is a relevant consideration. But there are divergent views on whether it is necessary that the official be ideologically committed to the policies that he has to carry out. The German and British civil service traditions are based on the ideal of the neutral but efficient bureaucrat who will carry out orders, whatever they are, as long as they are compatible with the fundamental values of society. As a result, they rely heavily on competitive examination processes to select career civil servants. This is the principle adopted in Israel and increasingly entrenched in the 1980s. At the same time, it has become more common for governments to appoint “policy advisers” who are drawn from outside the civil service in order to assist in the design and implementation of specific policies. These temporary appointments are made from people with an acknowledged expertise, but these individuals are also likely to be ideologically committed to the policy on which they are chosen to advise. It is becoming difficult to say that these are not very close to being political advisers helping a party in power, but paid out the public purse.

3.3.2. Leaving the Public Service

Those who leave the public service are of great value to private parties who have regular dealings with it. They understand the way it works, they know the people and they know the current agendas. As a result, they are well placed to provide informed advice to help such parties. But, of course, the utility of this ability to advise declines quite rapidly. In order to prevent individuals providing advice in matters on which they were actively engaged before retiring from the public service, there is usually a ‘cooling off’ period. This prevents both the use of confidential information gained in the public service for the benefit of private

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39 See, for example, Spanish report, p. 10.
individuals, and also it prevents any attempt by private parties to offer inducements to public employees to move into the private sector and make use of an ‘inside track’ to assist a private company.

The US report\textsuperscript{40} notes that the Criminal Code (USC §207) prohibits a public official or office-holder from making representations to the public sector on matters with which they had dealings in public office in the two years before leaving office. The Israeli report similarly notes that, since the Public Service (Restrictions after Retirement) Law 1969, there has been legislation preventing an official dealing with matters on which he served in the year before retirement. The Spanish report states that similar legislation is before the Spanish Congress. The German report states that civil servants who retire and take a pension are subject to restrictions, but this does not apply to those who leave before retirement, but this situation is being discussed.\textsuperscript{41} In the case of the UK, the problem is handled not by legislation, but by various codes of practice for ministers and civil servants.\textsuperscript{42} The preferred approach is that, within two years of leaving office, an ex-minister or senior civil servant has to apply to an independent committee for permission to take up an appointment in the private sector and this may be refused if:

a) an appointment could lead to public concern that the statements and decisions of the Minister, when in Government, have been influenced by the hope or expectation of future employment with the firm or organisation concerned;
b) an employer could make improper use of official information to which a former Minister has had access.

There seems a broad consensus on the principle that there must be a “cooling off period” after a person has left the civil service or ministerial office, but there are divergences in the way in which this objective is secured. Certainly there are differences about whether this is best done by law (as in the US) and whether this is best done by way of prohibition, rather than strict and independent scrutiny on a case-by-case basis.

3.4. Controls over Particular Transactions

As has been stated, public contracts provide the biggest area of potential for corruption. The risk of corruption is reduced in two ways. In the first place, there is competition for the contract. The Israeli report illustrates the importance of tendering, which is made mandatory by the Mandatory Bidding Law of 1992.\textsuperscript{43} The European Union Public Procurement Directives operate in a similar fashion. They require that contracts over a certain level are submitted to open competition, except in specified circumstances. The second feature which

\textsuperscript{40} US report, p. 15.
\textsuperscript{41} German report, pp. 13 & 16.
\textsuperscript{42} Cabinet Office, Ministerial Code (July 2005), §5.29.
\textsuperscript{43} Israeli report, p. 10.
reduces corruption is transparency. By advertising the invitation to tender, e.g. in the *Official Journal of the European Union*, then it becomes easier to scrutinise the decisions that are taken. All the same, the German report notes that having such rules is not sufficient. In that country the decisions on the various stages of the process of tendering are assigned to different offices or departments. Such a division of power reduces the scope for influencing the process through a single channel.

This area of compulsory tendering illustrates how the prevention of corruption can come as a by-product of legislation with other objectives. The legislation on compulsory tendering has been designed to foster competition and, in Europe, to avoid preferences for national firms. Transparency serves to clarify who has been involved in the process of decision-making. Such legislation is not directly aimed at preventing corruption. But the competition and transparency regimes introduced in this way achieve the result of making corruption more difficult. A similar effect is found from general competition law, under which the competition authority will check there has been no undue collusion between competitors, as well as between the contracting parties. In this way, attempts to abuse the public sector, e.g. in the area of pharmaceuticals, can be limited. (This was noted earlier as a potential area for corruption.)

4. Criminal and Administrative Sanctions and Investigations

Much attention in international treaties is placed on the criminal law, but it is also important to note the place of administrative law in providing sanctions for failures to comply with standards. Inevitably, criminal law enforces the very basic minimum standards, whereas administrative law will enforce some of the higher standards contained in codes of ethics.

4.1. Corruption as a Crime

The Israeli report notes that criminal law has provided the traditional weapon in the fight against corruption. Criminal law sets out clearly what is seriously wrong conduct and punishes it publicly. It is interesting that the Spanish report finds much of its evidence for bribery and corruption through criminal statistics and definitions of crimes. But the Dutch report shows the limitations of this approach, since it misses much of the scale of what happens. A finding that there had been only 77 people imprisoned for corruption in the last 10 years makes the problem sound very small. But the rest of the report notes how much has been discovered from other (mainly administrative) sources.

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44 German Report, p. 20.
4.1.1. Bribery

The core crime is bribery. For example US 18 USC §201 and following make it a specific crime to bribe public officials. The range of conduct covered obviously includes the receipt of payments in situations where there is a conflict of interest between what is requested by the payer and the official’s duty to the public service. The Dutch report notes that the definition of bribery has been widened in 2000 through arts. 177, 177a and 178 of the Penal Code to include not only the payment of money, but also the provision of services or other advantages. The area of services was not previously included. This now embraces expenses-paid trips, the provision of a holiday bungalow at a derisory price, or offering a seat on the Board of a company. Such a broadening of the scope of bribery recognises the multiple ways in which an official may be provided with something valuable to him or her in return for the exercise of improper influence.

A number of types of decision may be caught within bribery. Obviously, the performance of an illegal act would be caught, where an official acts unlawfully against his duty. German law does not require that there is always an illegal act, merely that the official had a discretion and in some way fettered himself as a result of the payment. The decision is valid because there was a discretion which was validly exercised; but there was a wrongful fettering of that discretion. Indeed, as the Transparency International report makes clear, there can be bribery where a person feels obliged to pay an official to receive a service to which she is in fact entitled.

4.1.2. Other Crimes

Clearly, there are a wide range of crimes other than bribery that can be committed. In section 3.1 on prohibitions, the Spanish and US reports note that many of these are reinforced by the creation of criminal offences. For example, the US law prohibits public officials engaging in electioneering and punishes this with a criminal penalty. The UK report also notes offences relating to specific public services, e.g. posts and telecommunications, or particular activities, such as the sale of honours. On the whole, each of such specific offences relates to a specific legal history – a set of problems to which these specific laws are an answer. The US report makes this clear in relation to electioneering and the UK report does the same in relation to the sale of honours. (Both of these offences are rarely prosecuted these days.)

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46 US report, p. 13; Spanish report, p. 3.
47 Dutch report, §II.5.
48 E.g. German report, pp. 9-10 & 15.
49 See Spanish report, pp. 3-5.
50 UK report, p. 8; US report, pp.16-17.
4.2. Criminal Investigation

Most countries featured in the national reports have a division between ordinary prosecutors and serious fraud prosecutors. Many corruption cases would come within the remit of serious fraud prosecutors. All the same, the Dutch report notes that since 2000 the Netherlands has had a group of special prosecutors with special investigatory powers to deal with corruption.\(^{51}\) Likewise in Germany, there are special investigation units in some Länder, but not in all.\(^ {52}\)

A major feature of modern procedural law is the protection afforded to those who report corruption, “whistleblowers”. Some of the national reports draw specific attention to this. Thus the Israeli law protected whistleblowers in 1997. The Netherlands responded in part to criticism from GRECO that it needed legislative protection for whistleblowers and it enacted the Civil Servants Act 2003, which protects them against retaliation.\(^ {53}\) Clearly in some positions, individuals will have a duty to report. But for the most part, whistleblowers are volunteers, and so need special protection like any other informant in the public interest.

A particular issue in the area of corruption by ministers and parliamentarians is whether this is prosecuted in the ordinary courts or through impeachment in Parliament. Although most systems have an impeachment procedure, this is rarely used. In the UK, this was last used 200 years ago against a minister. In France, there were changes in 2000 that made this less likely.\(^ {54}\) It is nevertheless likely that the availability of a special impeachment process reduces the likelihood of a criminal prosecution and makes it more likely that the matter will be handled by some administrative process within the Parliament itself.

4.3. Administrative sanctions

Administrative sanctions include a range of non-judicial penalties that are imposed by administrative or parliamentary authorities in the event of a finding of corruption. This would include the imposition of a sanction on a local councillor by his authority.

All the reports accept the possibility of disciplinary sanctions against public officials for corruption. The German report notes that parliamentary sanctions are being reinforced.\(^ {55}\) Similarly, it is accepted that elected officers may be subject to sanctions from their local or parliamentary assembly. Indeed, the special legal immunities enjoyed by parliamentarians make administrative sanctions all the more necessary. The German report notes that administrative sanctions may have the advantage of serving to remove the enrichment that

\(^{51}\) Dutch report, §IV.1.1

\(^{52}\) German report, p. 23.

\(^{53}\) See Dutch report, §I.3; Israeli report, p. 15.


\(^{55}\) German report, p. 27.
has resulted from corruption. So economic sanctions may be very effective.\textsuperscript{56} Administrative penalties may also remove an individual from potential opportunity to engage in corruption, e.g. through disbarment.

4.4. Administrative and Non-Judicial Investigation of Corruption

The story of the discovery of corruption in Amsterdam illustrates the importance on non-judicial investigation. Here it was a parliamentary fact-finding committee, triggered by a media report based on information from a whistleblower, that provided the basis for action.\textsuperscript{57} Most national reports identify a number of standing administrative mechanisms for investigating corruption, as opposed to ad hoc mechanisms such as the parliamentary fact-finding committee. As the Introduction to the Dutch national report suggests, the typical pattern of the legal systems that provided reports is that the investigation of corruption is mainly a role for Fourth Power institutions (the Court of Auditors, the Ombudsman, or the Council of State), rather than for judges.

In the first place, there are the usual mechanisms of financial audit. In many countries, this is labelled the ‘court of auditors’ because it has disciplinary powers over accounting officers.\textsuperscript{58} But many of the functions are to investigate the appropriateness of expenditure and to report on whether it has been cost-effective. In the UK, the National Audit Office and the Audit Commission have an independent status, with the latter having a direct link to Parliament. The investigation of accounts is a routine process, but this can enable irregularities to be identified and investigated further. In addition, a court of accounts has the authority to begin more specific investigations which may initially target categories of transaction or activity, rather than just focusing on individuals. Not only does it identify things that have gone wrong, it may also suggest good practice that could prevent corruption in the future. Such a potential for a holistic view of transactions makes a court of auditors a pivotal institution in the fight against corruption.

In the second place, there may be specialist administrations that investigate corruption. So the Dutch Integrity Bureau of Amsterdam identifies the most vulnerable fields of activity, such as construction contracts and reviews how potential problems can be avoided. It is interesting that its programme of activities goes well beyond the investigation of actual instances of corruption. It bases its activity on risk management – identifying potential risks and then seeking to deal proactively with them. The Dutch have also introduced mechanisms

\textsuperscript{56} German report, p. 21.
\textsuperscript{57} Dutch report, section 1.1.
\textsuperscript{58} For example, German report, p. 24; Spanish report, pp. 12-13.
for screening potential contractors for risks of corruption and abuse. (This is through an organisation called BIBOB.) Few other countries have gone this far, but many will have lists of approved contractors for other reasons.

The identification in the Spanish and Dutch reports of the Ombudsman as a mechanism for avoiding corruption is unusual. Such a body deals with complaints about misadministration. Naturally, an investigation of a complaint might lead to the discovery of corruption, but this will be very much incidental to a complaint. The Dutch report acknowledges that this will be a limited check on corruption. A similar comment might be made about the role of administrative courts in quashing decisions that are corrupt. This is really only a sanction where corruption has been proved, rather than an effective mechanism for investigating corruption.

5. Conclusion: Lessons for Comparative Law

What shapes the nature of the national systems for investigating corruption? In my view, the key factor is the national tradition of public administration. This explains the very different national structures both for preventing and for investigating and punishing corruption. At the same time, it is undoubtedly true that in recent times there is a lot of international benchmarking and this acts as a catalyst for change and a source of examples on which national governments will draw.

In terms of national traditions, it is clear that each national report has to explain its approach to corruption within a set of different institutions and in a context of different historical experiences of corruption. Institutions have grown and adapted incrementally in response to events. The US report has a very valuable historical introduction that shows clearly the way institutions have adapted to meet the different experiences of countries. The Dutch report also provides that explanation for more recent developments, and so does the UK report. The timing and the character of responses depend predominantly on local conditions. Reforms requiring legislation are difficult to introduce without local conditions that are favourable, and a local crisis typically triggers action. This is clear from the UK, Dutch and Israeli reports, to take but three examples. The institutions that are created also reflect that tradition. Whereas the British and Dutch reacted to findings of corruption by strengthening their parliamentary and administrative institutions, the Spanish and the Israelis have predominantly increased their criminal offences and judicial powers of intervention. The experience of Spanish investigating magistrates, operating like those in Italy and France,

59 Dutch report, §IV.1.2.
60 See German report, pp. 21-22.
61 Dutch report, §IV.1.5; Spanish report, p. 12.
62 US report, pp. 2-12.
has encouraged Spain to see this as a reliable mechanism to counter the corruption by the politicians and senior officials. Other systems with stronger parliamentary institutions that include independent committees or organisations, such as the UK Parliament’s National Audit Office and Public Accounts Committee, have adopted different paths and have relied very little on criminal sanctions and investigations. We can talk in this context of a path dependency as the internal dynamic of each system. By and large solutions are worked out by continuing that path.

It would be wrong, however, to see the dynamics as simply internal. Each system has looked at other advanced countries and seen what might be emulated, albeit in a local way. The Israeli reforms of 1969 which prohibit public servants from dealing in matters on which they had served in the two years before leaving public office follows closely the US Code §207. The Spanish Code of Conduct follows closely the Nolan Principles. The various national reports note that treaties have been signed and incorporated into national law. These serve to provide a degree of uniformity between countries, e.g. on the corruption of public officials in foreign countries. These offer different ways in which norms are followed. There is here a clear form of comparison of legal norms.

In addition, there is the power of international organisations. In particular, GRECO has produced reports on different countries that have clearly had some influence in encouraging legislation (though the UK did not complete the process of enacting legislation in this respect). In this case, an international organisation was able to say that particular countries were not doing enough to prevent and investigate corruption. The OECD has also offered a series of recommendations that serve to encourage various forms of good practice in areas such as administrative practice (often shaped by a legislative framework). Such organisations can be both a forum in which experiences of different countries have been discussed and in which an exchange of ideas can occur. The result of such a process may be a borrowing of ideas or the identification of good practice, which others can emulate in their own way. Such institutional catalysts are an important vehicle for a form of comparative law.

The final observation is that the various national reports show the importance of “soft law” over hard, criminal law. Although criminal sanctions are useful in some cases, they are not the main ways of preventing corruption. The law contributes by setting out the design of procedures and institutions, such as public contracts or the terms of employment of public officials. The structures of tendering, lists of approved contractors, and so on enable the scope for corruption in public contracts to be reduced. Similarly, the limitations on the public service officials in terms of what they can do after employment does reduce the scope for improper influence. Many systems use the law here, but there is also an important role for

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63 Israeli report p. 6.
64 Supra section 3.1.
“soft law” instruments such as guidelines and codes of conduct to ensure that the relevant standards are respected. In terms of investigation, specific criminal investigation is likely to be less important than general financial scrutiny and processes of transparency that enable journalists and others to identify possible suspect activities. In the end, the law is only part of the solution. It makes a contribution whose significance differs from country to country.