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The impact of corruption on the human rights based approach to development

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Abbreviations

A2J	-	Access to Justice
CBI	-	Central Bureau of Investigations, India
CVC	-	Central Vigilance Commission, India
DAC	-	Development Assistance Committee
DCEC	-	Department of Corruption and Economic Crime, Botswana
DFID	-	Department for International Development, UK
HRBA	-	Human Rights Based Approach
ICAC	-	Independent Commission Against Corruption, Hong Kong
NGO	-	Non-Governmental Organization
OECD	-	Organization for Economic Cooperation and Development
UN	-	United Nations
UNDP	-	United Nations Development Programme
USAID	-	United States Agency for International Development

Definitions

Human Rights Based Approach to Development (HRBA)

A **rights**-based approach to development is a conceptual framework for the process of human development that is normatively based on international human **rights** standards and operationally directed to promoting and protecting human **rights**.

UN High Commissioner for Human Rights
www.unhchr.ch/development/approaches.html

Corruption

An act done with an intent to gain some advantage inconsistent with official duty and the **rights** of others. It includes bribery, but is more comprehensive; an act may be corruptly done, though the advantage to be derived from it be not offered by another.

Lectric Law Library Lexicon
www.lectlaw.com/def/c314.htm

The misuse of public power, office or authority for private benefit – through bribery, extortion, influence peddling, nepotism, fraud, speed money or embezzlement.

UNDP policy paper, July, 1998

Executive Summary



The author of this paper is
Thusitha Pilapitiya,
Programme Analyst (legal),
UNDP Sri Lanka

This paper discusses the reduction and eradication of corruption to support and strengthen human rights based approaches especially in the area of Access to Justice.

Corruption affects the poor disproportionately, due to their powerlessness to change the status quo and inability to pay bribes, creating inequalities that violate their human rights. The Human Rights Based Approach (HRBA) with its main elements of Express Linkages to Rights, Accountability, Empowerment, Participation and Attention to Disadvantaged Groups, has been developed specifically to address these inequalities and to ensure that the poor and disadvantaged are also equal partners in development. However, if corruption creates fundamental inequalities in the poor's access to justice and to development services, the results envisaged by the HRBA cannot be achieved. Therefore, anti-corruption should be added to the main elements of the HRBA that have now generally been agreed upon.

When applying a HRBA to accessing justice, it is even more crucial that issues of corruption in the justice sector be addressed as a priority. In this case, justice sector includes normative protection; implementation and enforcement including the judiciary, police and prisons; and empowerment mechanisms such as lawyers, civil society organizations and watchdog institutions. If there is corruption in any of these sectors, a HRBA to accessing justice cannot be successfully applied. Therefore, in developing strategies for Access to Justice Projects, there must be clear outcomes targeting both duty bearers and claim holders to tackle the issue of corruption.

The recent United Nations Anti-Corruption convention explicitly imposes certain requirements on member states to fight corruption, through involvement of duty bearers and claim holders. Therefore, for the HRBA discourse that is now based on UN conventions for civil, political, economic and social rights, the anti-corruption convention can be added as the guideline for fighting corruption. In this way, member states will have a point of reference to measure individual countries' performances.

HRBA based anti-corruption activities can be substantially strengthened by direct anti-corruption activities. In this spirit, three brief country studies have been included: Hong Kong, Botswana, and India. Hong Kong's Independent Commission Against Corruption (ICAC) is an often told success story but with limited scope for replication given Hong Kong's position as a city state. Botswana is a better case for replication, but questions are now being raised about its effectiveness against high level officials. India is the most

interesting in view of its diversity and size, and also the difficulties in making a real impact despite extensive efforts such as the Central Vigilance Commission (CVC), Crime Detection Bureau (CDB), and various statutes and laws.

The UNDP office in Sri Lanka has developed an Access to Justice Project focusing on the HRBA. Although the project design has now been completed, and some activities targeting ethics are already included in the project, there are a number of entry points to introduce further anti-corruption activities as described in Annex A.

This paper has been written with the expectation that it can stimulate thinking on the development of projects incorporating HRBA, anti-corruption, and Access to Justice.

1. Introduction

In 1986, the United Nations declared that the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized¹.

(1)
Declaration on the Right to Development Adopted by General Assembly resolution 41/128 of 4th December 1986, Article 1

(2)
UNDP, Bureau for Policy and Programme Support, Management Development and Governance Division, Corruption and Good Governance – Discussion Paper 3, New York, July 1997

In 1997, UNDP research concluded that corruption has a pervasive and troubling impact on the poor, since it distorts public choices in favour of the wealthy and powerful, and reduces the state's ability to provide a social safety net². Such corruption would therefore interfere with the right to development, which is an inalienable right enjoyed by all people including the poor.

In 2004, the United Nations agreed that human rights must be mainstreamed into all its programmes and defined the three main points of HRBA:

- i. All programmes of development co-operation, policies and technical assistance should further realization of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments;
- ii. Human rights standards contained in, and principles derived from, the UDHR and other human rights instruments guide all development cooperation and programming in all sectors and in all phases of the programming process;
- iii. Development cooperation contributes to the development of the capacities of duty bearers to meet their obligations and/or of rights holders to claim their rights³.

(3)
UNICEF, The State of the World's Children, 2004, Annex B, The Human Rights Based Approach, Statement of Common Understanding

The HRBA literature does not explicitly consider corruption, and corruption literature does not discuss its impact on HRBA. If the duty bearers are corrupt, none of the three points listed above can be achieved. If the duty bearers in the justice sector are corrupt, this is even more serious, as the justice sector is tasked with upholding and protecting the rights of the rights holders. Whether corruption is need based (as in the case of poorly paid low level officials who need the bribe to pay for food or schooling) or greed based (as in more highly paid officials who don't need the bribe to survive), this will have the effect of making HRBA redundant. The issue needs to be directly tackled if HRBA is to be credible and effective.

The recent convention against corruption has a number of links to the concept of the human rights based approach although these are not explicitly stated. As more fully discussed in section 5 of this paper, the convention stipulates a number of duties to be placed on duty

bearers who solicit and accept bribes, and claim holders who offer or give bribes. In addition, the Convention places importance on the rule of law, which protects human rights of citizens.

Against this background, the study of the impact of corruption on the successful application of HRBA is a natural next step for development practitioners interested in either of the two subjects. There are inherent difficulties in analyzing, discussing, and dealing with the issue of corruption, especially with duty bearers who are critical to the successful application of a HRBA, since most duty bearers do not want to accept or admit the existence of corruption in their respective countries or departments. However, entry points need to be found and the problem of corruption tackled in appropriate ways if the application of HRBA is to be meaningful.

2. Links between corruption and Human Rights Based Approach to Development

2.1. Corruption and Development

The negative impact of corruption on development is no longer questioned. Corruption hinders economic development, reduces social services, and diverts investments in infrastructure, institutions and social services.⁴ The World Bank⁵ distinguishes between two main forms of corruption: state capture and administrative corruption. State capture refers to the actions of individuals, groups or firms, both in the public and private sectors, who influence the formation of laws, regulations, decrees and other government policies to their advantage as a result of the illicit and non-transparent provisions of private benefits to public officials. Administrative corruption refers to the intentional imposition of distortions in the prescribed implementation of existing laws, rules and regulations to provide advantages to either government or non-government actors as a result of the illicit and non-transparent provision of private gains to public officials. Investors will be reluctant to invest in development efforts in a country where there is state capture and administrative corruption. In addition, international donors would not lend to a country with high corruption affecting the human rights and right to development of poor people in that country.

(4)
UNDP, Anti-corruption practice note, February 2004

(5)
The World Bank, Anticorruption in Transition: A contribution to the policy debate, 2000

Corruption can also be classified as petty (need based) and grand (greed based) corruption. Petty corruption is found where public servants who may be grossly underpaid depend on small kickbacks from the public to feed their families and pay school fees. Grand corruption involves high officials who make decisions on large public contracts⁶. Here too, there is a negative impact on the poor as they cannot afford to provide any gains to public officials, or if they do, it constitutes a great part of their earnings which they could have otherwise used for their own subsistence or development.

(6)
UNDP, Fighting Corruption to improve Governance, Feb. 1999

2.2. Corruption and Human Rights

The Seoul findings⁷ declared that large scale corruption should be designated a crime against humanity, as for many around the world it falls into the same category as torture, genocide and other crimes against humanity that rob humans of human dignity. The findings condemned corruption as immoral, unjust and repugnant to the ideals of humanity enshrined in the Universal Declaration of Human Rights, and confirmed the conviction that all human beings have a basic human right to live in a corruption-free society.

(7)
The Seoul Findings: 11th International Anti-corruption Conference, Seoul, May 2003

A corrupt state creates a vicious circle in which the state quickly loses its authority and ability to govern for the common good. Corruption makes it possible for critics to be silenced, for justice to be subverted and for human rights abuses to go unpunished. When corruption

(8)
UNDP, Practice Note: Anti-corruption,
February 2004

(9)
International Covenant on Civil and
Political Rights, *entry into force* 23
March 1976, in accordance with
Article 49

(10)
International Covenant on Economic,
Social and Cultural Rights, *entry into
force* 3 January 1976, in accordance
with article 27

(11)
Government of the Republic of South
Africa & Ors v. Grootboom & Ors;
Grootboom v. Osstenberg Municipality
& Ors. 2000

(12)
Raj Kumar.C, Corruption and Human
Rights – Promoting Transparency in
Governance and the Fundamental
Right to Corruption-Free Service in
India

(13)
[www.unhcr.ch/development/
approaches.html](http://www.unhcr.ch/development/approaches.html)

(14)
UNDP, The Partnership for Governance
Reform in Indonesia and the World
Bank, The Poor Speak Up, 17 stories of
corruption

reigns, basic human rights and liberties come under threat and social and economic contracts become unpredictable⁸. Therefore corruption affects both civil and political rights⁹, as well as economic, social, and cultural rights¹⁰. The concept that rights include all rights has now received judicial acceptance in the South African courts, where it has been held that Section 7(2) of the Constitution of South Africa 'requires the State to respect, protect, promote and fulfil the rights in the Bill of Rights. In this regard, given that socio-economic rights are expressly included in the Bill, the question is not whether they are justiciable, but how to enforce them in a given case'¹¹.

As aptly described by C.Raj Kumar, an Indian writer, 'First, corruption dilutes human rights in a significant way, although it is rarely observed and understood from this perspective. Second, an institutionalized form of corruption creates mass victimization resulting in a threat to rule of law, democratic governance and the social fabric in Indian society. Third, human rights discourse is a powerful resistance to violation of various rights and the problem of corruption can be addressed by framing it from the standpoint of it being a human rights violation. Fourth, the benefit of developing corruption as a human rights issue will be enhanced due to development of international human rights law, along with national developments in constitutional rights, legal rights and judicially recognized rights. Fifth, the corruption problem, when framed as a human rights issue, can empower the judiciary to enforce certain rights for the citizenry and to demand a transparent, accountable and corruption free system of governance in India and also help monitor the process'¹².

2.3. Corruption and HRBA

A rights based approach to development is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights¹³. There is no single, universally agreed rights based approach, although there may be an emerging consensus on the basic constituent elements as being express linkages to rights, accountability, empowerment, participation, and non-discrimination and attention to vulnerable groups.

Express linkage to rights –Corruption can directly affect rights at a macro level and a micro, local level. For example, the Indonesia case studies¹⁴ reveal that poor people are expected to pay bribes to teachers to obtain reports, for school uniforms, and for scholarships affecting their right to education. In Sri Lanka, where healthcare is free, patients in line for heart surgery are reportedly required to pay a

bribe to hospital staff to bring them up in the line for surgery. In these cases, corruption directly impacts upon the poor people's rights to education and health.

Accountability – Rights based approaches focus on raising levels of accountability in the development process by identifying claim holders (and their entitlements) and corresponding duty holders (and their obligations). In this regard, they look both at the positive obligations of duty holders (to protect, promote and provide) and at their negative obligations (to abstain from violations). Where duty bearers are corrupt, they work against both positive and negative obligations. Improving integrity, or developing and implementing strategies for the prevention or control of corruption, is therefore an integral part of ensuring accountability.¹⁵

(15)
Cheema, G.Shabbir, Director,
Management Development and
Governance Division, Bureau for Policy
and Programme Support, UNDP, July
1997

Empowerment – Empowerment of the poor and vulnerable is an integral part of HRBA. Corruption exposes the poor people's powerlessness vis-à-vis duty bearers where a combination of a lack of information and knowledge plus a strongly felt dependence on the providers of services usually prevents the poor from voicing their concerns¹⁶. The poor and disadvantaged need to be empowered through awareness of corrupt practices, their rights and entitlements that corruption is taking away, as well as where and who they can contact to report instances of corruption, without fear of reprisals, and with quick and effective results.

(16)
UNDP, The Partnership for Governance
Reform in Indonesia and The World
Bank, The poor speak up, 17 stories of
corruption.

Participation - Rights based approaches require a high degree of participation, including from communities, civil society, minorities, indigenous peoples, women and disadvantaged groups. According to the UN Declaration on the Right to Development, such participation must be «active, free and meaningful» so that mere formal or «ceremonial» contacts with beneficiaries are not sufficient. Corruption studies in Indonesia have demonstrated that participation in development projects and other local activities from their very inception, including selection of beneficiaries, and calculation of benefits, can reduce corruption.

Non-discrimination and attention to vulnerable groups – In the fight against corruption, the poor must be considered as the principal actors of development. They can no longer be seen as passive recipients; they are strategic partners rather than target groups¹⁷. However, benefits of anti-poverty programmes are sometimes distributed based upon relationships or willingness or ability to pay. The penalty for refusing to pay a bribe even in an anti-poverty programme can be exclusion or lower quality of services. By

(17)
Ibid.

discriminating against the poor, corruption directly violates the principle of non-discrimination.

Can HRBA cure corruption? HRBA can strengthen claim holders to demand their rights. It can also help train duty bearers to perform their duties. The demand and supply situation can therefore make duty bearers more professional in carrying out their duties, and claim holders stronger in demanding the services due to them. At a local level, this would have a greater rate of success than at the national level, where relationships are more impersonal. For HRBA to cure or lower corruption at the national level, while the mutual strengthening of duty bearers and claim holders will help, and bottom-up demands can be felt at the top level, political commitment has a large bearing. Local level partnerships, civil society participation, and a strengthened media are also necessary ingredients.

What is the impact of corruption on HRBA? The impact of corruption on HRBA is to completely negate the impact of any improvement that can be brought into the lives of poor people through HRBA. A HRBA project may train duty bearers how to perform their duties, but if the duty bearers demand even a small extra payment, the burden on poor people is not reduced. As was the case in a UNDP experience in Bosnia Herzegovina¹⁸ (BiH), all improvements to the municipality were neutralized by appointing officials who were relatives or in some way connected to the political leaders, rather than appointing the most qualified persons who would have efficiently carried out the duties. A separate study on BiH by World Bank¹⁹ clearly delineates the incidence of corruption in the country and states that nearly 80% of officials in the municipal administration are 'running businesses on the side'²⁰.

Can HRBA impact on the causes of corruption? The causes of corruption can be listed as greed, need, opportunity, lack of punishment, lack of enquiry or follow up, peer pressure, and habit. Some of these causes of corruption are outside the scope of HRBA. For example, need refers to the low salaries that some officials are paid. It needs political commitment, and availability of funds in the government budget, to increase salaries to such an extent that there is no 'need' to resort to corruption. Enquiries into instances of corruption, follow-up and punishment also need commitment from the highest level of government. However, this creates a grave problem when those at the highest level of government may themselves be corrupt. Ferdinand Marcos (1917-1989), who was the Dictator of the Philippines from 1965 to 1986, is estimated to have amassed wealth amounting to US\$ 3-35 million through corrupt

(18)
Rights based municipal assessment and planning project (RMAP), Bosnia Herzegovina

(19)
The World Bank, Bosnia and Herzegovina, Diagnostic Surveys of Corruption, 2000

(20)
Ibid. P.3

practices. Joseph Desire Mobutu, who ruled what is now called the Democratic Republic of Congo as Mobutu Sese Seko for 32 years, according to IMF estimates had stolen US\$ 4 billion from mostly western aid for the country. Although he had to spend most of it to hire mercenaries to fight Laurent Kabila, at the time of his death in exile in 1977 aged 66, he still had luxury mansions in many countries in Europe and Africa. Another famous example of corruption at the highest level is the Somoza dynasty, which ruled Nicaragua from the mid 1930s to the late 1970s and were Nicaragua's largest landowners, with alleged ownership of, for example, 342 properties worth over US\$ 500 million, acquired through corrupt practices.

It is also difficult for HRBA to deal with corruption in developed countries. The counterparts of such high level corruption are agencies from the developed world who have a duty not to resort to corrupt practices to obtain contracts in developing countries. Most corrupt monies earned by high level officials are placed in bank accounts in developed countries such as Switzerland. Switzerland's refusal to join the Schengen states is partly because the country fears this will compromise banking secrecy²¹. Nigeria now seeks Swiss assistance to investigate millions of dollars placed in Swiss bank accounts by the former dictator, General Sani Abacha, and his entourage²².

It is promising to note Swiss cooperation in a recent case heard by the court of appeal of Lesotho. This involved the World Bank funded Lesotho Highlands Water Project, Africa's largest infrastructure project, where the success in convicting several accused, including Lesotho citizens²³ and foreign companies²⁴, to prison sentences and fines was partly due to assistance by Swiss authorities. Large amounts of bribe money were placed in Swiss bank accounts, and the prosecution case was largely based on bank records received in accordance with the Swiss mutual assistance legislation. Guido Penzhorn SC states that 'the prompt and efficient manner in which the Swiss authorities dealt with what eventually became a complex and multi-layered application contributed immeasurably to the successful outcome of these prosecutions.'²⁵ The same paper also discusses what donors can do in such cases against offending companies who in most cases initiate the bribe giving. Such companies pay the fine out of company profits and do not feel the punishment. Penzhorn correctly argues that in such cases the company must be blacklisted by all donor agencies. However, Penzhorn felt that the interest of first world countries lies not so much in the successful outcome of these prosecutions, but rather in protecting the interests of the companies.

(21)
Haefliger, Marcus, Swiss Senate Fears
Joining Schengen Agreement Will
Compromise Banking Secrecy,
Swissinfo 13 June 2001

(22)
Swissinfo, 5 June 2001, Switzerland
Asks Nigeria for Proof of Abacha
Accounts

(23)
M.E.Sole vs the Crown, Lesotho Court of
Appeal, case number C of A (CRI) 5 of
2002, 14.4.2003

(24)
Africa News Service, 6/20/2003,
Lesotho Judge convicts German Firm
of bribery on water project

(25)
Penzhorn, Guido, Comments on the
current Lesotho Bribery Prosecutions,
Presentation before the Senate
Foreign Relations Committee on 21
July 2004

(26)
Chatterjee, Pratap, Special to
Corpwatch: Halliburton makes a killing
on Iraq War

(27)
Human Development Report, 2000,
Chapter 1, Human rights and human
development

Corruption in the developed countries also includes instances such as American Vice President Dick Cheney's former company, Halliburton, working alongside US troops in Kuwait and Turkey under a package deal worth close to a billion dollars.²⁶ Under these circumstances, the issue of the existence of rights by claim holders in developing countries on developed countries as duty bearers must be recognized, although these are not now 'fulfilled'²⁷ as argued by Amartya Sen, in that the question of a fulfilment of rights must be distinguished from the issue of their existence.

It is clear that HRBA cannot have an impact on all causes of corruption. It is also clear that HRBA cannot succeed in the presence of corruption. The elements of HRBA as it now stands are express linkages to rights, accountability, participation, empowerment, and attention to vulnerable groups. One could argue that anti-corruption is already included or can be included as a cross-cutting theme among these elements. However, that would diffuse the importance of addressing corruption, and reduce the impact of anti-corruption activities. Therefore, an element must be added to the application of HRBA dealing expressly with corruption. Then, any projects or activities that promote HRBA can expressly look at this issue, and develop suitable, well-targeted interventions to address the problem of corruption.

3. Incorporating anti-corruption strategies into HRBA within the Access to Justice Sector

Corruption in the judiciary and law enforcement defeats the whole purpose of HRBA principles by overlooking criminals and their activities against society in general, and affecting disadvantaged groups in particular. Corruption gives justice a price tag and renders rule of law ineffective. If bribes are a prerequisite for justice, it cuts the poor off from a vital conflict-resolution mechanism²⁸. 'If the judiciary congeals a substantial measure of corruption, the constitution and our democracy are in peril.'²⁹

(28)
The Partnership for Governance Reform in Indonesia and The World Bank, *The Poor Speak Up*, 17 stories of corruption

(29)
The Hindu, Rajeev Dhavan, *Judicial Corruption*

(30)
UNDP, *Asia Pacific Access to Justice Practice Group, Visioning Workshop*, Kathmandu, Nepal, 2003

The scope of the justice sector covers the following elements³⁰:

1. Normative protection of rights (treaties, constitution, laws and regulations, customary law)
2. Provision of effective remedies:
 - a. Implementation (judicial, quasi-judicial, and watchdog institution)
 - b. Enforcement (police, prisons)
3. Legal empowerment (seek a remedy)
 - a. Legal awareness
 - b. Legal counsel
 - c. Ability to access justice services (without fear of reprisals)

3.1 Normative Protection of Rights

Under the HRBA, normative protection of rights plays a key role. Firstly, the constitution of a country promotes and guarantees the fundamental rights of all its people. The government of a country also signs international treaties, and the parliament passes laws. In addition, in some countries there are provisions for the application of customary law in certain instances. The HRBA requires that all these constitutional provisions, treaties, laws, and regulations must universally protect human rights, especially of disadvantaged people. However, if a government is corrupt in the design and application of these laws, it can be harmful to the interests of disadvantaged groups.

An example of such a questionable law is the Inland Revenue (Special Provisions) Act No. 7 of 2002 of Sri Lanka. The preamble to the Act states that this is an 'Act to enable persons who have not furnished a return of income or a full return of the income for any year of assessment commencing prior to April 1, 2002, to make a declaration in respect thereof, to indemnify such persons against liability to pay certain taxes and against investigations, prosecutions or penalties in respect thereof, with a view to securing compliance in the future by such persons with tax laws; and to provide for matters connected therewith or incidental thereto'. The Act has been questioned by

private parties and civil society in the Supreme Court as being corrupt, since it resulted in extremely wealthy persons being exempted from any tax on their earnings over a number of years. These taxes would have been used to provide services such as health and education for the poor. The passing of such laws by a country violates the principles of normative protection of rights.

How does one cope with such practices? First of all, there must be sufficient provision for public review of laws prior to the law being passed by parliament. Civil Society activism is required to make law-making transparent. Taking the example of Sri Lanka, there is a law that requires any new law to be gazetted prior to being passed for public review and comments. However, parliament gazettes a law on the eve of it being passed, not giving civil society or the public any time to comment on it. Once passed in parliament, judicial review is limited and the law cannot be set aside. Transparency throughout the law-making process, sufficient time for the public to comment on the Act, and convenient and clear mechanisms for feedback are important elements to eliminate corruption and ensure the HRBA principles of empowerment, accountability, and transparency.

To ensure that normative protection is supportive of HRBA, international treaties and standards are a good measure to match local laws with. In addition, introduction of new laws to protect 'whistle-blowers', to prosecute bribe takers and bribe givers, and to expedite the trials of bribe takers and bribe givers can enhance the fight against corruption.

3.2 Provision of Effective Remedies

Implementation (judicial, quasi-judicial and watchdog institutions)

The top three corrupt institutions identified by the poorest quintile in the Indonesia diagnostic survey were traffic police, police excluding traffic police, and judges, in that order. In a study carried out by Transparency International in Sri Lanka about perceptions of corruption among the people, police were number one, followed by the judiciary. The judiciary and police are the official guardians of human rights in a society, and where these are corrupt there is no chance of success for HRBA based development.

At a macro level where the judiciary and police are corrupt, organized crime groups can take over whole countries, as has happened in some countries in Eastern Europe. These crime groups are not only paying off judges and police, but also threaten and intimidate honest judges and police officers as well as litigants. Incentives for corruption are greatly influenced by the credibility of

law enforcement in acting against both those who pay and those who accept bribes. Where the judges and police constitute the segment that accepts bribes, there is very little incentive for anti-corruption among other public or private officials.

Introducing principles of transparency and accountability that do not transgress on issues of judicial independence is a challenge. Due to the separation of powers in many democratic constitutions, the judiciary is an independent arm of government and rules and regulations that can be brought in to combat corruption against public officials may be difficult to apply in the case of judicial officers. If HRBA is to be applied and if disadvantaged and poor people's rights are to be protected, a judiciary that is corrupt must be made subject to criticism. 'The Bar and the media are the best placed to expose judicial corruption. If both are to be stifled we will be left nowhere'³¹.

(31)
Dhavan, Rajeev, Contempt of Truth

In countries where there is no separation of powers and the judiciary is not the third arm of government, but controlled by the ruling party, a different kind of problem is created regarding corruption. Here, decisions may be totally based on party lines and corrupt politicians may control the judicial system, giving no chance at all for application of the HRBA.

There must be vigorous self-policing among judges and a reduction in the extent of discretion, for example regarding sentencing policies. While the Penal Code of a country stipulates the punishment for a given offence, the judge nevertheless has great discretion in applying these provisions according to the merits of each case. In the interest of transparency, judges need to have uniformity in applying these rules.

In Sri Lanka the Judicial Services Commission chaired by the Chief Justice, and consisting of two other senior judges of the Supreme Court, hear complaints against the minor judiciary and prescribe suitable punitive action. Such mechanisms can be effective against junior judges, but senior judges need different levels of disciplinary action which is at present limited to parliamentary impeachment. In India, Clause (4) of article 124 of the constitution states that «a judge of the Supreme Court shall not be removed from his office except by an order of the President after approval by parliament». Section 107 of the constitution of neighbouring Sri Lanka deals with the independence of the judiciary and appointment and removal of judges of the Supreme Court and Court of Appeal in a similar manner. The difficulties involved in the removal of these judges place a grave duty on the judges of the Supreme Court and the Court of Appeal to be completely above any corruption and take strong action against

cases of corruption that come up for hearing before them. This is even more important when judicial appointments are for life.

Ethics committees must be established within the judiciary, and codes of ethics introduced to the judges accompanied by suitable training in the code. This must be followed up with clear and strict punishment for those who break the code. At the same time, there must be clear and simple guidelines for people who want to report a judge for a corrupt practice. Judges must also be sensitized to the quick resolution of corruption cases. As is the case with any other type of litigation, delays increase the chance of reprisals against complainants, and make the result redundant by delays. One of the criticisms of the Prevention of Corruption Act, 1988, of India is that cases brought under the act are not adjudicated fairly and in a timely manner. Restrictions on employment for retired judges are in place in many countries, including India and Sri Lanka, to reduce corruption and unfair advantage.

Civil society has an important role to play as watchdog institutions. Dedicated watchdog institutions must be developed to be vigilant about judicial behaviour and empower disadvantaged groups to complain when their rights have been abused. Promoting public interest litigation is a useful activity. Watchdog institutions can also advocate for amendments to the law in terms of uniform and transparent court procedures, and sentencing.

Media institutions must be developed and properly trained to report, while keeping within the law. Most countries have 'gagging laws' that prevent the media from reporting on judicial matters in deference to the independence of the judiciary. In instances where the judiciary is corrupt, such laws can prevent the media from exposing corrupt practices.

Enforcement (police, prisons)

Policemen are notoriously badly paid, and have little formal education and insufficient training. The Indonesia case study has documented cases where police allow people to go free for a small bribe. In some instances, people are arrested purely in the hope of receiving a bribe. This creates a serious state of lawlessness where poor people are at the mercy of organized crime gangs for protection.

The issue of independence associated with the judiciary is not a problem for the media when it comes to the police, and the media needs to play an active role in highlighting police corruption. Here, the main problem that the media and citizens willing to complain

face are threats and intimidation by the police. To overcome this problem, there must be clear and simple procedures for complaining, as well as strict guidelines for punishing the police officers who react defensively. Whistleblower protection is a key element of such a strategy. A strict code of ethics must be implemented against the police by a special body appointed for this purpose. In Sri Lanka, corruption among the police rose to such high levels that a special independent police commission was appointed to deal with transfers, promotions, complaints, enquiries, and disciplinary action for police officers. The public can write to the commission about any problem they face with the police including corrupt practices. The commission is empowered to take disciplinary action against the police officer concerned, irrespective of his rank.

Training in ethics must be an integral part of police training, and continued training. This must be coupled with a practical complaints procedure. Corruption among lower officials should be reported to their higher officers, who should follow a transparent system of taking action against the police officer concerned. In the case of higher officers, a police commission or a similar organization should investigate complaints.

Putting in place dedicated and powerful anti-corruption bodies is encouraged so that ordinary and disadvantaged people can select from a number of methods available to put through their complaints against judges or police and have them addressed.

Prisons make up the final institution to be included in the section on effective remedies. Wrongful imprisonment violates a person's human rights and is contrary to HRBA. In developing countries, there are many people in prison due to ignorance of the law, negligence, and financial problems. In addition, as prison officials are badly paid, corruption is rampant in prisons and many luxuries can be bought at a price. Prohibited goods such as drugs and even arms can be smuggled into a prison for the right price.

Just as in the case of police officers, prison officials must also undergo training in ethics and principles of HRBA. There must be clear and easy complaints mechanisms for wronged people to complain, and errant officials must be punished in a transparent manner by the judiciary and any other disciplinary mechanism to be set up by the authorities.

In the case of the police and prisons, as reporting is not covered by contempt laws, media has a pivotal role to play. Media must be alert to highlight cases of corruption so that people are aware of corrupt

officials, and action is taken against them. Such publicity will also deter police officers from taking revenge on complainants, and will encourage others who have been affected by corruption to complain.

3.3 Legal Empowerment (to seek a remedy)

Legal Awareness

Legal awareness is an important element of empowerment. Without awareness of their rights, people cannot seek a remedy when these are violated. Application of the HRBA requires the most disadvantaged among these people to have such awareness and knowledge. However, the poor and the disadvantaged remain the least informed of their rights, and of actions to be taken when these are violated. This also includes corruption. Poor people must be aware how much a service costs, including in the justice sector, and anything above that is an extra payment or a bribe. Adequate protection by the law enforcement authorities must be provided for poor people so that they can report without fear of reprisals.

Civil society organizations have a key role in disseminating knowledge and facilitating group action by the poor, and also liaising with the media to inform people of their rights; the impact of corruption; the remedies available; and stories about corruption and actions taken. For example, in Indonesia parents grouped together against a corrupt school principal, and this resulted in his transfer. Civil society organizations must assist the poor to unite and voice their concerns about corrupt practices.

Increasing transparency and participation in local affairs must be encouraged. People are also often scared to ask questions for fear of losing the little service or assistance that they receive, as was proved in the Indonesian case study. This too needs to be addressed through participatory processes and giving proper awareness of what benefits are due, so that these are not dependent on the goodwill of the duty bearers.

Legal Counsel

Corruption by lawyers is a grave violation of people's rights and has a serious impact on HRBA. Lawyers who use their knowledge of the law and the judicial system to the disadvantage of the litigants violate the trust placed in them by litigants and create a serious travesty of the justice sector. There are cases of lawyers who receive a fee from both parties to a case, and appear in a way that is beneficial to the higher payer. For example, a plaintiff's lawyer may collect a bribe from the defendant in the case, and not appear on the court date so that the

defendant can win the case on an *ex parte* basis. Such practices need to be reported and punished.

Bar Associations are popular organizations to report corrupt lawyers. Almost all countries have a Bar Association that regulates the conduct of lawyers. Codes of ethics are common, and complaints to the Bar Association can be investigated and referred to the Supreme Court of the country for disenrolment. Errant lawyers can also be reported directly to the Supreme Court of the country or the court that enrolls them for investigation by the judiciary and subsequent disciplinary action and disenrolment. Media too can support civil society by highlighting corruption cases against legal counsel. Support from civil society organizations can also make a poor and illiterate litigant more confident in reporting a lawyer who is normally seen as enjoying a higher status in society.

Ability to access justice services (without fear of reprisals)

If there is an environment of fear about reporting corrupt practices, any system that is put in place becomes redundant, leading to a failure in the application of a HRBA. The impartial handling of complaints by police, and handing out of punishment in a uniform and transparent manner by the judiciary will create confidence in the claim holders of their ability to report further instances of corruption.

Unifying the claim holders gives strength in numbers. For example, if action is to be brought against a particular police officer who is corrupt, if a number of the people in a community can complain together against him, there is less opportunity for reprisals against all members of the community. Civil society organizations can help bring the people together in such cases through public interest litigation.

Watchdog institutions can work together with media organizations to highlight instances of reprisals, so that duty bearers would be reluctant to engage in such activities. Watchdog institutions can follow up complaints from the first instance that they are made to ensure the complainants are not put under undue pressure. Rules for protection of 'whistle-blowers' can assist in boosting confidence and eliminating reprisals.

4. An illustrative strategic framework

(32)
Doig, Alan and Riley, Stephen,
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developing countries

Effective anti-corruption strategies need to be tailored to the social environment in which corruption occurs and therefore, it is difficult to advocate a single universal strategy to fight corruption³². However, HRBA is a standard goal for any country and an effort will be made in this section to establish some ideas for a flexible strategy to combat corruption within the universal principles of HRBA. The flexibility of the HRBA approach enables immediate action that can have short, medium, and long term impacts.

The strategic framework must target both duty bearers (bribe takers) and claim holders (bribe givers) and include strategic incentive structures to reduce corruption. The framework must cope with voluntary bribes, and demand bribes, as well as need based and greed based bribes.

The strategic framework is limited to the capacities of a development agency. Activities, especially with regard to political commitment, are at the discretion of the government and a development agency can only play a supporting and guiding role.

The strategy will have three mutually reinforcing outcomes. The first of these would be increased awareness among citizens about corruption and its effects, and ability to act as a group against corruption. This outcome is targeted at the claim holders and can have immediate impact in the short term. In the medium and long term, the effectiveness and the outcome can spread and improve as claim holders will become increasingly empowered. The outcome will have two intended outputs: partnerships between duty bearers and claim holders to combat corruption; and a strong media regularly reporting on corruption issues. To achieve the first output, a number of illustrative activities can be conducted, including to form committees involving civil society, media, government, and private sector at the local level to act as watchdogs; arrange monthly meetings to discuss incidents of corruption; provide training to committees on recognizing, reporting, and following up on corruption; and conduct awareness programmes on anti-corruption for students, and other civil society groups. To achieve the second output of a strong media regularly reporting on corruption issues, there are three illustrative activities that can be proposed. These include training seminars, workshops, and study tours for media personnel on corruption reporting; forming a strong association for media personnel to withstand any threats and pressures; and creating links with other countries where similar media efforts are being made. The inputs required to carry out these activities would be technical assistance and training.

(33)
The Hindu, Whistles, stings, and slaps by
Rajeev Dhavan

The second outcome to support the strategy would be strong political commitment to reduce corruption and non-interference in corruption proceedings. This outcome targets duty bearers at the highest level. International donors can only influence and pressure, but governments must institute high level anti-corruption bodies, appoint suitable high calibre people to run these organizations, and then allow these bodies to function freely. Political support is also necessary to ensure that politicians do not interfere in, or sabotage anti-corruption proceedings at the courts or any other tribunal of the country. Political commitment also includes withdrawing political patronage of corruption and corrupt practices. 'Hired goons and thugs terrorise huge localities. Since they have political patronage at all levels, their perversity, and not the people, is protected'³³. Political commitment also means that politicians do not use the media, and other complaint methods, just to sling mud at each other. This kind of irresponsible behaviour can be counter-productive and takes away from the seriousness of corruption, and does not help in its reduction. There must be political commitment also to protect those who complain.

The first output to support the second outcome will be politicians who are well informed on effects of corruption. This output can be achieved by conducting regular training programmes, seminars, and study tours for politicians on impact of corruption. A second output can be the formation of anti-corruption groups among like-minded politicians. The donor funded activity to support this output will be to assist the formation of anti-corruption groups among, for example, young politicians and those who take an active stand against corruption, and to strengthen their hands through international exposure, training, and conduct of seminars and workshops. An important output will be to have a strong anti-corruption body formed at the highest level and effectively functioning. An external development agency can assist the country to comply with the requirements of the UN Convention on anti-corruption, and provide technical assistance for the formation and effective functioning of an anti-corruption body as per the convention. Another output under this outcome is executive and administrative support to, and non-interference in anti-corruption enquiries. This output can be achieved by the implementation of two activities to influence government to bring in regulations on disciplinary action for interference in corruption enquiries, and use citizen groups and media to publicize instances of interference by politicians. A final but important element is the protection of complainants. This can be achieved by activities supporting legislation to protect complainants or whistle-blowers and strong punishment mechanisms for violators. The inputs required for this outcome would also include technical

assistance and training, including high-level advisors and consultants to draft the required legislation.

The third and final expected outcome in the strategy is improved laws and procedure to detect, investigate and adjudicate cases of corruption. The first output is an impartial and incorrupt judiciary effectively adjudicating corruption cases. While this output can be strengthened by general judges' training programmes, specific activities to support this strategy will be to conduct training for judges on effectively judging corruption cases and introduce internal mechanisms for strict disciplinary action for corrupt judges. A second output would be an impartial and incorrupt police effectively investigating corruption cases. Activities to support this output will be to conduct training for police officers on effectively investigating corruption cases and protecting complainants and witnesses; introduce internal mechanisms for strict disciplinary action for corrupt policemen; and encourage citizen groups to report on corrupt practices by the police.

These activities are not expected to be exhaustive, but merely suggestive in the formulation of a strategy to combat corruption while applying a human rights based approach to development. The HRBA is more about how you implement, than what you implement, and therefore the involvement of people at all levels needs to be emphasized throughout implementation of activities. While the above activities in isolation have already been included in previous attempts on anti-corruption, what the HRBA does is to introduce an element of integration that includes all claim holders and relevant duty bearers. This would provide a comprehensive approach and be mutually supportive, and impact positively on the main goal of combating corruption. For example, earlier anti-corruption efforts that created specialized anti-corruption units, but did nothing to target the judiciary, failed when these cases were tried in courts where the judges were corrupt or inefficient. The HRBA approach targets both duty holders in the anti-corruption agency who would receive and investigate complaints, the judiciary who would adjudicate in the complaints, and the police who would have to provide protection to the whistle-blowers and any witnesses.

In addition, these activities can be reinforced by other anti-corruption activities involving what have been termed the «pillars of integrity» including 'Executive, Civil Society, Private Sector, Champions of Reform, Judiciary, Enforcement Agencies, Media, Watchdog Agencies, and Parliament'³⁴.

(34)
The World Bank, Economic
Development Institute, Workshops
with Transparency International, 1997

(35)
United Nations Office on Drugs and Crime, Anti-Corruption Toolkit (developed from the participants of the Expert group Meeting on Global Programme against Corruption – Implementation Tools held in Vienna in April 200)

(36)
The World Bank, Poverty Reduction and Economic Management (PREM) Network, Helping Countries Combat Corruption: Progress at the World Bank since 1997, June 2000

(37)
www.usaid.gov/democracy/anticorruption

(38)
www.dfid.gov.uk/

(39)
Norwegian Development Network, Best practices: Good Governance and Anti-corruption, Report on seminar March 16, 2004

(40)
Initial support from the Programme for Accountability and Transparency (PACT), by Denmark, Netherlands, and Germany, enabled UNDP to address emerging concerns on corruption.

(41)
Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted at Paris on November 21, 1997

(42)
OECD: No longer business as usual – fighting bribery and corruption, October 2000

(43)
OECD: Anti-corruption instruments and the OECD guidelines for multinational enterprises, 2003

(44)
DAC Network on Governance, Development Co-operation Directorate, Synthesis of Lessons Learned of Donor Practices in Fighting Corruption, Meeting on 1-2 July, 2003

A key element in any anti-corruption strategy is donor coordination, and it is important to coordinate with what other UN agencies³⁵ and donors are doing in order to maximize results and avoid overlap. The World Bank³⁶ is a donor active in this area and has developed an anti-corruption strategy that focuses on four key areas: prevent fraud and corruption in the projects and programmes the Bank finances; assist countries that ask for help in curbing corruption; mainstream its concern for corruption directly into its country analysis and lending decisions; and contribute to the international effort to fight corruption. The United States Agency for International Development (USAID) has also expanded its role in anti-corruption since 1989 and anti-corruption is an important part of USAID democracy and governance programmes³⁷ in eastern European countries, Latin America and Asia, with the most recent in Asia being the democracy programme launched in Nepal. USAID activities to strengthen media also indirectly support anti-corruption activity. The United Kingdom Department for International Development (DFID)³⁸ is another donor active in the area of corruption, and bases its fight against corruption as part of its overall aim of poverty elimination. It would be critical for these donors to coordinate efforts to maximize their effectiveness. There are other bilateral donors becoming increasingly involved in anti-corruption, such as Norway³⁹. Transparency International is the leading NGO in anti-corruption, and needs to be also involved in such donor coordination. UNDP, as an intergovernmental non-profit organization which has been increasingly involved in anti-corruption since 1997⁴⁰, can take the lead in such coordination activities in a meaningful and sustained manner.

Such coordination can also be supported by cooperation from counterparts and development partners in the donor countries. Donor countries have taken some action in this regard. 'In the new millennium, the Organization for Economic Cooperation and Development (OECD) and associated governments, which account for over 75% of trade and investment worldwide, will play by stricter rules. The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions⁴¹ will outlaw the practice of bribing foreign officials, making competition for international business much more fair and open⁴²'. OECD has also developed guidelines to promote and facilitate companies' contribution to the fight against corruption.⁴³ The work done by the Development Assistance Committee (DAC) in anti-corruption⁴⁴ also provides valuable lessons that can be used as tools for donors in planning and implementing anti-corruption activities.

5. Analysis of the Convention against Corruption from a rights based viewpoint

Kofi Annan, United Nations Secretary-General, in his statement on the adoption by the General Assembly of the United Nations Convention against Corruption said “Corruption hurts the poor disproportionately—by diverting funds intended for development, undermining a government’s ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid”.

The Convention was adopted by the General Assembly by resolution 58/4 of 31 October 2003. A high level signing conference was held in Merida, Mexico in December 2003 with more than 120 governments being represented at the highest level. Although over 100 countries have signed the Convention to date, the real question is whether the signing will have any impact on the lives of the ordinary, poor, disadvantaged people living in those countries that the rights based approach intends to protect.

The Preamble to the Convention starts by referring to the concern about the ‘seriousness of the problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law’.

Sustainable development has many interpretations, but primarily means development that meets the needs of the present without compromising the ability of future generations to meet their own needs⁴⁵. This definition contained in the Brundtland Report implies a very important shift from an idea of sustainability as primarily ecological, to a framework that also emphasizes the economic and social context of development. The preamble then couples sustainable development with the rule of law, which can be defined as including a formally independent and impartial judiciary; laws that are public; the absence of laws that apply only to particular individuals or classes; the absence of retroactive laws; and provisions for judicial review of government action⁴⁶. Therefore, it can be argued that the convention begins by recognizing the economic and social rights as well as the civil and political rights of people that the human rights based approaches seek to promote and protect.

The Convention also recognizes the HRBA concepts of duty bearers and claim holders since the articles contain a number of obligations on the part of both groups if corruption is to be eradicated. While the bulk of the obligations are naturally on the state, there are many examples where corresponding duties are placed upon bribe givers (citizens who are the claim holders) and bribe takers (officials who are the duty bearers).

(45)
World Commission on Environment and Development (WCED). Our common future (the Brundtland Report) Oxford, 1987 p. 43.

(46)
The World Bank, www1.worldbank.org/publicsector/legal/ruleoflaw2.htm

A clear example of this is to be found in Chapter III, Criminalization and law enforcement, Article 15, Bribery of national public officials. Part (a) of the article establishes the offer by a claim holder as a criminal offence, and part (b) establishes the solicitation or acceptance by a duty bearer as a criminal offence. Similarly Article 16, Bribery of foreign public officials and officials of public international organizations, Part 1 refers to the 'promise, offering or giving to a foreign public official or an official of a public international organization' and part 2 refers to the 'solicitation or acceptance'. Similarly Article 18, Trading in Influence, part (a) criminalizes the 'promise, offering or giving to a public official', and part (b) criminalizes the 'solicitation or acceptance by a public official'. Article 21, parts (a) and (b) criminalize the 'promise, offering or giving, directly or indirectly, and 'the solicitation or acceptance, directly or indirectly' of bribes in the private sector. As such, there is a trend throughout the Convention that both duty bearers and claim holders have a role to play in fighting corruption.

There follows an examination of the Convention and the fundamental principles of HRBA, i.e. express linkages to rights, accountability, empowerment, participation, and non-discrimination and attention to vulnerable groups.

Express linkages to rights: The convention does not directly refer to human rights. However, in its preamble the Convention refers twice to the rule of law. Again in Article 5, Preventive anti-corruption policies and practices, section 1, there is a reference to the principles of the rule of law. There can be no rule of law without protection of rights. Rule of law requires that all citizens have equal rights, and have equal protection before the law. The preamble also makes reference to fairness, responsibility and equality before the law. Therefore, although the Convention does not directly delineate how corruption can affect people's rights, there are express linkages to rights within the convention.

Accountability: The convention is about the accountability of the state to combat corruption, the accountability of the judiciary to punish corruption, the accountability of duty bearers not to accept bribes, and the accountability of the claim holders not to offer bribes. The preamble states that the 'prevention and eradication of corruption is a responsibility of all states, and that they must cooperate with one another, with the support and involvement of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community based organizations if their efforts in this area are to be effective'. This

section would in effect create accountability on the part of all these actors to be active in eradicating corruption.

Empowerment: Knowledge and awareness creates empowerment. Article 6, Preventive anti-corruption body or bodies, section 1 (b), refers to 'increasing and disseminating knowledge about the prevention of corruption'. Article 10 on Public Reporting empowers the general public to obtain, where appropriate, information on the organization, functioning and decision-making process of its public administration, and on decisions and legal acts that concern members of the public. Article 13, section 1 (b) empowers the public by requiring states to ensure that the public has effective access to information. Section (c) refers to public education programmes including school and university curricula which will take information not only to the public but also to students. Section (d) respects, promotes and protects the freedom to seek, receive, publish and disseminate information concerning corruption. Such access to information and increased awareness will empower citizens to exercise their rights against corruption.

Participation: The preamble requires states to obtain the support and involvement of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community based organizations, if their efforts in this area are to be effective. Article 5, preventive anti-corruption policies and practice, requires state parties to develop, implement and maintain anti-corruption policies that promote the participation of society. Article 13 is dedicated to the Participation of Society in detail. Section 1 requires state parties to 'promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption'.

Non-discrimination and attention to vulnerable groups: Non-discrimination is implicit in the Convention with various references to the rule of law and participation. However, there is no mention of attention to vulnerable groups. As such, this is the only element of the HRBA that the Convention does not address.

The Convention also makes direct reference to Access to Justice. Article 11 refers to 'Measures relating to the judiciary and prosecution services'. Section 1 of Article 11 refers to preventing corruption among members of the judiciary including rules with respect to the conduct of members of the judiciary. Section 2 extends

the strengthening of integrity and preventing of corruption to the prosecution services of the states as well. Article 25 deals with Obstruction of Justice and makes it a criminal offence to use physical force, threats or intimidation to induce false testimony, or to interfere in a proceeding.

The Convention takes a step further in the HRBA discourse and also includes the prevention of corruption in the private sector as stated in Article 12. Article 21 too refers to bribery in the private sector, establishing as criminal offences under (a) the promise, offering or giving, directly or indirectly of a bribe, and (b) the solicitation, or acceptance, directly or indirectly, of a bribe.

Interestingly, section 2(e) of Article 12 goes so far as 'imposing restrictions, as appropriate and for a reasonable period of time, on the professional activities of former public officials or on the employment of public officials by the private sector after their resignation or retirement.....' This is a useful common feature to be adopted by state parties as some state parties already have such provisions in their constitution, as is the case in India.

HRBA is developed on universally accepted human rights, which are enshrined in UN conventions. Governments who are signatories to these conventions are committed to upholding these rights. Similarly the Convention against Corruption is a universal document, which over 100 countries have ratified. As such, the Convention against Corruption provides the universal standards necessary for inclusion in the HRBA discourse and provides the perfect platform for launching the new concept of HRBA with its focus also on anti-corruption.

6. Some examples of current anti-corruption efforts

Any anti-corruption activity has a positive impact on the Human Rights Based Approach to Development. In this context, it is pertinent to examine some of the recent efforts introduced in some countries to combat corruption.

‘Corruption differs considerably in developing countries. Because of this diversity, corruption is difficult to minimise or control. It is thus important to examine the specifics of corruption and anti-corruption efforts, including questions of culture, organisation and the effectiveness of campaigns, while also considering the more universalist strategies that have been developed in recent times⁴⁷.

(47)
Doig, Alan and Riley, Stephen,
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from Developing Countries

6.1. Hong Kong

In the sixties and early seventies, corruption was rampant in Hong Kong at all levels. The police were the most corrupt agency, and there were reports of police officials appointed to investigate corruption covering up for the accused for 50% of the bribe that was given. At a lower level there were, for example, instances of ambulance drivers refusing to transport a patient without a cup of tea, or a hospital attendant refusing to assist a bed ridden patient without a small payment. The people of Hong Kong were very frustrated, and during this time Peter Godber, a Chief Police Superintendent accused of amassing over HK \$ 4.3 million in bribe money, escaped to England to avoid an enquiry. There were massive student protests asking the government to act on corruption as well as the repatriation of Godber, and in 1974, the Government established the Independent Commission Against Corruption (ICAC)⁴⁸. The mission statement of the ICAC is ‘With the community, the ICAC is committed to fighting corruption through effective law enforcement, education and prevention to help keep Hong Kong fair, just, stable and prosperous.’

(48)
www.icac.org.hk/eng/about/about_icac_1.html

Since its inception, the Commission has adopted a three-pronged approach of detection, investigation and prosecution of corrupt acts; eliminating opportunities for corruption by introducing corruption resistant practices; and educating the public on corruption and fostering their support in fighting corruption. The ICAC was staffed at the senior level with expatriate staff from the United Kingdom. As its first task, the ICAC brought back Godber and convicted him on charges of bribery with a four year prison sentence. This gained ICAC the confidence of the community. With the support of the Government and the community, Hong Kong has now become one of the least corrupt places in the world.

The ICAC today has a staff of 1,314 persons, most on contracts, and over 50% serving for over ten years. The handing over of Hong Kong back to China by Britain in 1997 has not affected the work of the ICAC,

and the Commission is in the midst of its 30th anniversary celebrations in 2004 with several public activities from February to November. The Transparency International Corruption Index for 2004 has ranked Hong Kong in 14th place and, with the exception of Singapore in 5th place, it is the only other Asian country to appear in the top 20.

It is pertinent to analyse the success of the Hong Kong model and how far it is transferable to another country. The ICAC had, and has, the full support of the government of Hong Kong. The government continues to make available sufficient funds for the Commission, and ensures its independence⁴⁹. The ICAC could also afford to recruit seconded expatriate staff from England to its highest positions. It is doubtful that a developing country will have such vast resources to staff and operate an independent anti-corruption body.

49 In return, the ICAC is transparent and has for example, published its 2002-3 savings HK\$ 14.4 M on its website.

The ICAC is also an organization within a small 'city state' with high economic growth, similar to Singapore. 'It is important to be aware that there are few success stories or examples of actually reducing corruption in a sustained way. The only clear cut successes have been in Hong Kong and Singapore, both city states that had fairly authoritarian governments when they initiated their anti-corruption efforts. They are also special cases and it is debatable how much these examples apply to other countries⁵⁰'.

(50) Development Assistance Committee, Synthesis of lessons learned of donor practices in fighting corruption, Meeting on 1-2 July, 2003

In Hong Kong, exceptionally high political commitment, popular support, good organization and a coherent strategy has yielded results, yet there are questions regarding the sustainability and transferability of such an approach due to the dissimilarities between Hong Kong and other developing countries in relation to population, geographic size, type of government, and levels of economic growth.

However, there is one note of caution for the ICAC. In its inaugural stages, the ICAC prosecuted high-level officials who were accused of corruption. Some high level police officers confessed to their corrupt deeds and were pardoned. In addition, Hong Kong is also home to the Triad, one of the best known underworld gangs in the world today. However, going through the ICAC cases⁵¹, all cases are against minor officials or private citizens such as a chauffeur, land inspector, or an unemployed man. There are some cases against high officials in the private sector. The last reported case against a senior government official was in 1992 and the last extradition to Hong Kong of a high level criminal was in 2001. There are two possible scenarios. One is that high-level corruption has been totally eradicated in Hong Kong. The second is that the ICAC is only going after low level criminals. Given the reputation that the ICAC has received globally as an

(51) www.icac.org.hk/eng/0/1/12/14651.html

effective and successful organization, one can only hope that the first scenario is the true one.

6.2. Botswana

Botswana is a multi-party democracy with separation of powers between the executive, legislative, and the judiciary. The Botswana Democratic Party has been the ruling party since independence in 1966. The country is one of the most stable democracies in Africa with low levels of corruption. However, a series of corruption scandals in the 1990s involving government's purchase of schoolbooks, land distribution, and housing management, led to three Presidential Commissions of enquiry in the early 1990s, which revealed that cabinet ministers and the highest level public officials in the country were involved.

There was great political commitment to tackle the issue and, in August 1994, Botswana brought in the Corruption and Economic Crime Act to establish a Directorate of Corruption and Economic Crime (DCEC). The Act sets out its functions, prescribes the powers and duties of the Director, states the procedures to be followed in handling a suspect, and specifies the offences involving public officers, employees of public bodies, agents and those in the private sector. The thinking of the Botswana government was that adding anti-corruption tasks to existing bodies would not be effective. The DCEC follows the Hong Kong model and adopts a three pronged attack involving investigation, corruption prevention and public education⁵². There are six investigation groups, and intelligence analysts who gather information and also receive reports from the public through phone, fax, letter or in person. Corruption prevention involves examining the operational systems of government departments and private companies with the objective of reducing or eliminating corrupt practices. Public education is responsible for creating awareness and educating the public about corruption, and fostering public interest and support to combat corruption. The DCEC also acts upon reports of corruption in the media, and in 2001, 26 of its 1,688 corruption reports were based on media reports. However, 85% of them turned out to have nothing to do with corruption⁵³.

The DCEC is an autonomous institution and its director is directly responsible to the president but the decision to prosecute is the responsibility of the Attorney General. There are prosecutors attached to the DCEC who liaise with the Attorney General. The DCEC submits an annual report to the Office of the President, and the last available report, which is for 2001⁵⁴, details its work in development

(52)
www.gov.bw/government/directorate_on_corruption_and_economic_crime.html

(53)
www.gov.bw/cgi-bin/news.cgi?d=20021118

(54)
www.gov.bw/government/doc/Annual_Report_2001.doc

and international activities, investigations, prosecutions, intelligence and technical support, public education, and corruption prevention.

Botswana is ranked as the least corrupt country in Africa by Transparency International (TI). However, having risen to 24th in 2001, from 26th in 1999, the country has fallen to 30th in 2004. While this is not conclusive proof of corruption levels, it gives some indication of the corruption status in the country.

(55)
Frimpong, Kwame, University of Botswana, National Integrity Systems, Country Study Report, Botswana 2001

In a 2001 country study report on Botswana⁵⁵ it was stated of the DCEC, 'its independence is limited by the fact that it is under the office of the president and reports directly to the president. It would be better for it to be autonomous and report directly to parliament. Furthermore, there should be a provision for security of tenure for the Director so that he cannot be removed through the normal public service regulations. It appears the Directorate has investigated and prosecuted on the small fishes and avoided the big fishes'.

In the 2001 country study report, there are several reasons included for the failure of the DCEC to bring in zero tolerance on corruption. These include the lack of necessary personnel for prosecution, dependence on the already overworked Attorney General's Department for prosecution, law delays in the courts, compromise of independence through reporting to the president and not parliament, parliament's non-compliance with the Auditor General's recommendations, limitations on the ombudsman's department because it is part of the public service, the lack of commitment shown by the executive and national assembly in declaring assets, and the lack of trained personnel in the local government structures who can supervise against corruption.

The country report proves that establishment of an anti-corruption body is not sufficient to eradicate corruption without sufficient support from other stakeholder agencies such as the Attorney General's Department. It is also important to have strong stakeholder agencies such as the Ombudsman to support anti-corruption activities. Most importantly, parliament must be committed to acting upon audit reports as well as complying with requirements such as declaration of assets.

(56)
Botswana Daily News, DCEC: A toothless bulldog, 28 May, 2001

The DCEC has also been called a 'toothless bulldog' by the opposition party Botswana National Front (BNF).⁵⁶ The BNF claimed that the employees of DCEC were not screened or appointed on merit but are just political appointees to protect the ruling party. They also accused the DCEC of adopting a punitive approach instead of reforming people who are just victims of a corrupt system. However,

the Director of the DCEC, Tymon Katlholo defended the Commission stating that «No one has ever dictated to us how we should investigate cases and neither has the government ever withheld finances in an attempt to stifle our operations.»

This type of problem can be eliminated if an anti-corruption body is staffed by personnel appointed on their own merit, and in a multi-party democracy, all parties are represented at the directorate of the commission. It is also useful to change the head of the institution; in the case of Botswana it appears that the same Director has been in charge of the DCEC for many years⁵⁷. However, the Botswana experience in anti-corruption work, also staffed by some overseas officers initially as in Hong Kong, does suggest there may be evidence that it has a role elsewhere, but its success will need to be gauged through continuing political support as senior figures in political and public life are investigated.

(57)
Botswana Daily News, Corruption is evil, says Katlholo, 3 May 2004

6.3. India

India is changing. But however you turn the kaleidoscope, one thing never changes: corruption. Most normal people are sick of it, but it's all-pervasive⁵⁸.

(58)
Thekaekara, Mari Marcel, The Broken Kaleidoscope

India's case is interesting because this view is held despite efforts by successive governments to curb corruption including the setting up of the Central Vigilance Commission; the Central Bureau of Investigations; passing of a Prevention of Corruption Act and provision in other legislation such as the Penal Code, the Income Tax Act, and right to information legislation; and Civil Society efforts.

The Central Vigilance Commission(CVC)⁵⁹ was set up by the government in February, 1964 on the recommendations of the Committee on Prevention of Corruption to advise and guide central government agencies in the field of vigilance.

(59)
Site of Chief Vigilance officer, India
www.cvc.nic.in/

CVC is conceived to be the apex vigilance institution, free of control from any executive authority, monitoring all vigilance activity under the Central Government and advising various authorities in Central Government organizations in planning, executing, reviewing and reforming their vigilance work. The CVC has been made a multi-member Commission with «statutory status» with effect from August, 1998 consisting of a Chairperson and not more than four Vigilance Commissioners.

The jurisdiction of the CVC extends to the Central Bureau of Investigations (CBI), all central government departments, and central government companies including nationalized banks and central

government organizations. In every state of India, there is either a State Vigilance Commission or Lok Ayukta which looks after the vigilance matters of the state governments. The CVC either gets the investigation done through the CBI or through the Departmental Chief Vigilance Officers. The CVC orders investigation into cases of officials of central government departments/ companies/ organizations only. The Commission is empowered to enquire or cause inquiries to be conducted into offences alleged to have been committed under the Prevention of Corruption Act, 1988 by certain categories of public servants.

(60)
Site of Central Bureau of Investigation,
India <http://cbi.nic.in/>

Central Bureau of Investigation (CBI)⁶⁰, was established through a Home Ministry resolution dated 1.4.1963. Initially the offences that were notified by the central government related only to corruption by central government servants. In due course, with the setting up of a large number of public sector undertakings, the employees of these undertakings were also brought under CBI purview. Similarly, with the nationalization of the banks in 1969, the public sector banks and their employees also came within the ambit of the CBI. The ambitious mission of the CBI is to uphold the Constitution of India and law of the land through in-depth investigation and successful prosecution of offences; to provide leadership and direction to police forces; and to act as the nodal agency for enhancing inter-state and international cooperation in law enforcement. The CBI is under the Prime Minister's Office.

The Prevention of Corruption Act was passed in September, 1988, replacing the Prevention of Corruption Act, 1947, to consolidate and amend the law relating to the prevention of corruption and for related matters. The act applies to the whole of India and to all Indians living outside of India. However, the impact will not be fully felt until trials under the Prevention of Corruption Act are concluded expeditiously without endless postponements of cases. Some go as far as to argue that conviction under the act must be on the basis of "preponderance of evidence" and not "proof beyond all doubt". The Indian Penal Code⁶¹ also deals with corruption indulged in by public servants for private gain and illegal actions by individuals. There are also separate acts in India for dealing with different kinds of illegal actions of private individuals, such as the Income Tax Act.⁶² The Freedom of Information Bill passed in 2002 also helps combat corruption by empowering the media to report on corruption cases and ensuring the free flow of information.

(61)
The Indian Penal Code, No. 45 of Year
1860

(62)
Transparency International, Corruption
in India: An Empirical Study, 2002

(63)
[www.skdubeyfoundation.org/
index.php](http://www.skdubeyfoundation.org/index.php)

Civil society activity is also important to combat corruption. In this regard, it is pertinent to examine the Dubey case. Satyendra Kumar Dubey⁶³ was a 40 year old engineer working on the Golden

Quadrilateral Highway project. Frustrated with inaction regarding his complaints on corruption, he finally wrote to the Prime Minister urging action. Requesting confidentiality, he detailed the «loot of public money» and «poor implementation». The letter was forwarded down the bureaucratic chain. Dubey received numerous threats from those he blew the whistle on. Dubey was murdered on Nov 27, 2003. The CBI has been accused of duplicity in investigation into the murder, and in general, of allowing it to be manipulated to meet political ends.

Dubey's murder created a huge public outcry in India and a foundation has been set up called the S.K.Dubey Foundation for the fight against corruption in India. Dubey is one of the seven nominees announced by TI on July 12, 2004 for this year's Transparency International integrity awards. The Dubey murder has also contributed to renewed efforts to have the Whistleblower Protection Bill passed in the Indian parliament. The draft Whistleblowers Act, formally called The Public Interest Disclosure (Protection of Informers) Bill, was the last of the 20 reports Justice Jeevan Reddy submitted in December 2001 as chairman of the Law Commission of India. Another key measure suggested by the Dubey Foundation is the idea of a «competent authority» in every government organization set up under the law to receive and probe complaints of corruption and misadministration. The campaign in Rajasthan by the Labour Farmer Strength Organization (MKSS) has focused on demanding transparency of official records, a social audit of government spending and redress mechanisms for people who had not been given their dues.⁶⁴

(64)
Raj Kumar, C, Corruption and Human Rights – Promoting Transparency in Governance and the Fundamental Right to Corruption-Free Service in India

(65)
Iyer, J.N. India's Ugly Face: Corruption, as revised in Feb 2003 (J N Iyer was a senior bureaucrat in the Indian Railways for 36 years).

(66)
www.ispsquash.com/Link_CorruptionInIndiaPage.htm

'If 54 years after Independence we have made no progress to effectively control corruption it is because our politicians and their cohorts in the bureaucracy and the corporate world have no will to eliminate or control corruption. They are the beneficiaries of the corrupt system and pay only lip service to probity in public life.'⁶⁵ Corrupt activities reported in recent times refer to direct receipt of bribes and 'speed money' for doing legitimate work; petty corruption indulged in by low-level government employees; 'Kick-backs' against government contracts for works or purchases; massive payments to politicians and bureaucrats for policy changes or decisions intended to benefit particular business groups; siphoning off of government funds; misuse of power by Ministers in diverting funds to nurse particular constituencies, without regard for national priorities; and senior posts being 'auctioned away' to the highest bidder. The good news is that cases⁶⁶ including HDW Submarine, Churhat Lottery, Fooder scam, Bitumen scam, Anantnaq, Tansi Land Deal, JMM,

Nagarwala, Sukram, Urea scam, Bofors scam and sugar scam, are being investigated with great transparency.

C.Raj Kumar convincingly argues that right to a corruption-free life should be enshrined as a fundamental right in the constitution of India. However, India seems to have sufficient legislation and agencies to combat corruption. What is required now is a seriousness of purpose, and a commitment from the highest political and official levels to seriously put these laws and institutions into action. 'In the present context, corruption is so much linked with power that politicians in India have adopted a cynical attitude toward political morality'⁶⁷. Mahatma Gandhi in 1939 said 'I would go to the length of giving the whole congress a decent burial, rather than put up with the corruption that is rampant'. What India requires now is that level of political commitment.

(67)
Upadhyay.R, Political Corruption in
India: An Analysis, South Asia Analysis
Group, 2001

Annex A

Entry points for the Sri Lanka Equal Access to Justice Project

The UNDP practice note on anti-corruption discusses the following approach with eight key entry points.

Prevention and Enforcement

Entry Points:

1. Launch, development and monitoring of national and local pro-poor anti-corruption strategies and supporting legislation
2. Demonstrating UNDP's own internal accountability and transparency

Strengthening National Integrity Institutions

Entry Points:

3. Capacity building of accountability, transparency and integrity (ATI) bodies and national integrity institutions
4. Providing special focus to strengthening ATI in post-conflict situations

Increasing Public Participation and Building Coalitions

Entry Points:

5. Engagement of civil society organizations in ATI programming and policies
6. Working with the international community

Coordination of anti-corruption initiatives at the country and international levels

Entry Points:

7. Implementation and monitoring of the UN Convention Against Corruption
8. Knowledge codification and measuring performance

These entry points refer to a general anti-corruption project and need to be suitably modified as entry points into an Equal Access to Justice Project with a strong HRBA focus. A reduction in corruption would undoubtedly increase access to the justice sector, especially for the poor and disadvantaged who cannot afford to pay bribes in addition to lawyers' fees and other official court charges. In this spirit, there are various entry points in the project where anti-corruption can be strengthened through the project activities as they are now planned.

The Equal Access to Justice Project has a strong rights based approach and has five mutually reinforcing project outcomes.

1. Increase in number and diversity of persons receiving effective legal services
2. Increase in number and diversity of persons receiving information on their rights and duties
3. Decrease in barriers to accessing the legal system through public interest litigation and improved court performance
4. Increase in number and diversity of persons receiving community level ADR services
5. Human rights better promoted and effectively protected

Within the above outcomes, there are a number of entry points. Firstly, the project will establish regional committees including the police, judiciary, local government agencies, lawyers, clergy, Human Rights Commission to obtain inputs, conduct, and evaluate project activities using a report card type methodology designed by the urban governance programme of UNDP. While the primary purpose of these committees will be the implementation and monitoring of project activities, their task will also naturally involve any complaints of corruption against the duty bearers represented on the committee. This is a great tool to be further sharpened through training on identification of corrupt activities and remedial actions so that the regional committees can also function as watchdog organizations against corruption. This sensitization can be conducted within the project framework as it now stands, through the project coordinators and special consultants who are experts on anti-corruption at the local level. The committees can also systematically document instances of corruption at the local level for reporting through the media, or to a national level organization like the Bribery Commission.⁶⁸

(68)

The Bribery Commission of Sri Lanka was dormant for some time due to the non-appointment of a third member to the Commission. The third Commissioner was appointed in July, 2004, and now the Commission is effective with three members.

Another key point is to create awareness and instil a sense of social responsibility among young law students who would later make up a large part of the justice sector. Educating law students about corruption would have the effect of training the younger generation towards a responsible citizenry. Sensitizing future generations to key principles of democratic governance and the negative consequences of corrupt behaviour is a crucial step in the fight against corruption. It is also important to instil in young people a culture of positive engagement, and respect and skills for constructive and investigative debate on the quality of governance and its impact on people's lives. In this regard, corruption is a key subject for the attention of young students as well.

More specifically, the following activities can be undertaken under each of the outcomes of the Equal Access to Justice Project:

Outcome 1: Increase in number and diversity of persons receiving effective legal services

- A think tank of young lawyers will be established at the office of the national execution partner, the Ministry of Constitutional Reform. There will be six policy papers researched and prepared per year for wide dissemination by the think tank. Up to two of these papers can be on corruption issues in the justice sector.
- There will be a code of ethics developed for lawyers, and training provided. The code of ethics will naturally be targeted towards anti-corruption. In the same training, the role that lawyers and the Bar Association can play in curbing corruption, not only among themselves, but also in acting as a watchdog mechanism for reporting corruption in the judiciary, as well as the police, will be highlighted.
- Legal Aid Clinics will be established at the Law Faculty of the University of Colombo, Department of Law at the Open University, and the Sri Lanka Law College. These clinics will be operated by students who will be trained in the subject with the probability of being given credit for this towards their graduation. The training and clinics can be used to sensitize students to the issues of corruption within the justice sector, and how they can contribute to its eradication when they enter the profession, but also as watchdogs even while they are students.
- Publications of the above law schools will be supported. Articles on corruption related issues can be included in the publications.
- Law students will be financially supported to participate in national and international seminars and study programmes. These seminars and programmes can include some on corruption issues, and especially the relatively new Convention on Anti-corruption.

Outcome 2: Increase in number and diversity of persons receiving information on their rights and duties

- Under this outcome, there are plans to organize international and national level conferences in SL around the theme of social responsibility targeting lawyers and judges. Some of these conferences can be organized around the issue of corruption, and certainly there can be sessions on anti-corruption in all of the conferences.
- For awareness programmes envisaged under this outcome, awareness material will be developed in all three languages used in Sri Lanka, targeted at various levels of citizens including NGO officials, government officials at the local level, ordinary citizens

and disadvantaged groups. These materials will all include a section on corruption and how both duty bearers and claim holders can play their part to eradicate corruption.

- There will be legal literacy programmes including information on judiciary, procedures in a particular court, and facilitating the execution of court orders given. These legal literacy programmes can also include a section on procedure to be followed if the claim holders come across corruption when dealing with the courts.
- There will be research and development of simple leaflets on rights in all three languages for distribution to local government institutions, NGOs, schools, and others. These can also include a section on how corruption affects rights, and instructions on how to report and combat corruption.
- There will be development and conduct of training programmes on unbiased and professional legal issues reporting for media professionals. This training can easily include modules on investigating and reporting on corruption issues in the justice sector, including the limits placed through contempt of court procedures.
- The project will arrange participation in international training programmes for selected journalists based upon their levels of interest in human rights and legal reporting. Some of these programmes can be in corruption and anti-corruption, based upon their demonstrated interest in these subjects.
- Activities include structured meetings and focus group meetings between media groups and claim holders. Corruption can be included as one of the themes for these focused meetings.
- Strengthening of media associations to independently report on sensitive human rights issues can also include reporting on corruption. Such strengthening could act as a deterrent for reprisals by powerful corrupt elements.
- There will be programmes on human rights and legal literacy for media personnel. These programmes can include modules on how corruption also adversely affects the rights especially of poor people who have to dispose of a larger percentage of their earnings to corrupt officials.
- Together with the media institutions, the project will develop television dramas on human rights themes. These stories can also include issues of corruption that face poor and disadvantaged people in their daily lives.

Outcome 3: Decrease barriers to accessing the legal system through public interest litigation and improved court performance

- This outcome focuses on promoting public interest litigation at the local level including identification of appropriate issues, up to

completion of court cases and targets communities, NGOs, and lawyers. Corruption in, for example, large government contracts is an ideal subject for public interest litigation, and this could be actively promoted through the project.

- When local level officials are being trained to promote decentralized legal services, modules on anti-corruption can be developed and included in the training.
- There will be a code of ethics developed for court staff under this outcome to enable them to perform their duties better. This is targeted at anti-corruption.

Outcome 4: Increase in number and diversity of persons receiving community level Alternative Dispute Resolution (ADR) services

- This outcome refers to ADR services and in particular training of police officers in mediation techniques. If the police mediate based on bribes, the mediation will be made redundant. Therefore, the training on mediation will include anti-corruption and mediating on the merits of the case and not based upon 'gifts'.
- Training on mediation for NGOs can also include modules on anti-corruption, and following strict ethics when mediating local disputes.
- As mediation programmes are an activity that can be immediately carried out in LTTE controlled areas, anti-corruption concepts could be introduced into this project element at the appropriate level.

Outcome 5: Human rights better promoted and effectively protected

- Under this outcome, lawyers and judges participating in human rights programmes can be exposed to corruption and its impact on human rights. Research by lawyers in this area and presentation of papers can be encouraged.
- Training for prison officials on human rights of prisoners will be included. These programmes can also include sensitization on anti-corruption.
- A training programme on human rights for police will also include a code of ethics on the treatment of suspects in custody. Elements of anti-corruption can be strategically included in the training programme.
- There will be annual essay competitions and quiz competitions organized on the theme of human rights. These could also include elements of anti-corruption and how corruption impacts upon the rights of poor people.

The above entry points are presented as those possible without any amendments to the outcome or outputs of the project. They can be strategically woven in to strengthen the human rights based approaches by reducing the burden that corruption places on especially the poor and disadvantaged in direct demands for bribes, and indirect reduction in the quality of services. These activities cover training and technical assistance, which is also a subject dealt with in detail in Article 60 of the UN Convention Against Corruption, titled Training and Technical Assistance.

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