The Emerging Regimes on Anticorruption and State Enterprise Governance in the Commonwealth Caribbean

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by

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Abstract

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This thesis argues that there is an identifiable and distinct body of law, administrative regulations, and institutional structures on state enterprise governance, anti-corruption and public sector ethics emerging in the Commonwealth Caribbean. The law and administrative structures are still developing, but they are sufficiently well developed to be recognised as distinct regimes. These emerging regimes are based on the common law, UK legislation that have been received in the region, and several contemporary legislative and administrative initiatives, many of which have been provoked by international and inter-American developments. The Commonwealth Caribbean anticorruption project can usefully be assessed from the perspectives of agency cost and moral hazard that are essential, but too little explored, features of the agency relationship.

The first chapter introduces the thesis, sets out the theoretical statement, explains why the Commonwealth Caribbean anticorruption regimes are suitable objects of study, and investigates the definitions of corruption. Chapter 2 discusses the theory that drives the assumptions of this thesis. It presents the reconstructed theory of corruption that is useful in the analysis of corruption. Chapter 3 sets out the existing state of knowledge on corruption, examines the literature on corruption, including the contribution to the subject by Caribbean scholars. Chapter 4 discusses the international developments and the legal regimes on anticorruption in the region, including the common law rules on bribery and misconduct in public office, the tort of misfeasance in public office, judicial misconduct, anticorruption legislation, and the constitutional implications. Chapter 5 deals with anticorruption strategies and the new institutional framework. Special emphasis is placed on the Contractors-General in Belize and Jamaica as an emerging and unique anticorruption agency. Chapter 6 represents the conclusion of the study.
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For her patience and support, to my wife, Grace, with all my love
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<td>Law Reports Appeal Cases</td>
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<td>A-G</td>
<td>Attorney-General</td>
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<td>AHRC</td>
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<td>Bds</td>
<td>Barbados</td>
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<tr>
<td>Bel</td>
<td>Belize (formerly, British Honduras)</td>
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<td>BG</td>
<td>British Guiana (now Guyana)</td>
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<tr>
<td>BH</td>
<td>British Honduras (now Belize)</td>
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<td>BVI</td>
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<td>Court of Appeal</td>
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<td>CARICOM</td>
<td>The Caribbean Community</td>
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<td>Caribbean Court of Justice</td>
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<td>CI</td>
<td>Cayman Islands</td>
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<td>CIDA</td>
<td>Canadian International Development Agency</td>
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<td>CJ</td>
<td>Chief Justice</td>
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<td>Criminal Justice Commission (Queensland)</td>
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<td>Acronym</td>
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<tr>
<td>HKCA</td>
<td>Hong Kong Court of Appeal</td>
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<td>HKCFA</td>
<td>Hong Kong Court of Final Appeal</td>
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<td>HKSAR</td>
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<td>IAIHR</td>
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<td>ICAC</td>
<td>Independent Commission Against Corruption (New South Wales)</td>
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<td>IJCHR</td>
<td>Independent Jamaica Council for Human Rights</td>
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<td>IMF</td>
<td>International Monetary Fund</td>
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<td>J</td>
<td>Judge, Justice</td>
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<td>JA</td>
<td>Justice of Appeal</td>
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<td>Jamaica</td>
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<td>Jamaica Information Service</td>
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<td>JLR</td>
<td>Jamaica Law Report</td>
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<td>KB</td>
<td>King's Bench</td>
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<td>LDC</td>
<td>Less Developed Country</td>
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<td>LRBG</td>
<td>Law Report of British Guyana</td>
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<td>NCC</td>
<td>National Contracts Commission</td>
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NPJ  Non-permanent Judge (Hong Kong)
NZLR New Zealand Law Reports
OAS Organisation of American States
OECD Organisation for Economic Cooperation and Development
Ont Ontario
Ont R Ontario Reports
P President (of the Court of Appeal)
PJ Permanent Judge (Hong Kong)
plc Public Limited Company
QB Law Reports, Queens Bench Division
R Rex, Regina
Salk Salkelds King’s Bench Reports
SAUTT Special Anti-Crime Unit of Trinidad and Tobago
SCC Supreme Court of Canada (Neutral Citation)
SCR Supreme Court Reports (Canada)
SFO Serious Fraud Office, UK
Sol Jo Solicitors Journal
SSRN Social Science Research Network
StC St Christopher (Kitts) and Nevis
StL Saint Lucia
Sup Ct Canada Supreme Court Canada
SVG Saint Vincent and the Grenadines
T&T Trinidad and Tobago
TCI Turks and Caicos Islands
TI Transparency International
TRA Tanzania’s Revenue Authority
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<td>UWI</td>
<td>University of the West Indies</td>
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CHAPTER 1

INTRODUCTION

This thesis addresses the issues of corruption in the several Anglophonic jurisdictions of the Caribbean and Central and South America. Throughout this study, these jurisdictions will be jointly called the Commonwealth Caribbean states. In this work, I examine the emerging Commonwealth Caribbean law on the subject of corruption, its interpretation and its development, and the strategies and institutions established to discourage corruption or, as it is sometimes put, to promote the anticorruption project. We often speak of anticorruption developments and initiatives as if they are part of a project; and the implication is that those in charge of governance have clear and coordinated project objectives to reduce corruption and promote good governance. However, the objectives are not always clear and most certainly they are not always well coordinated. Nevertheless, it is the fundamental premise of this thesis that the existing anticorruption legal regimes in the Commonwealth Caribbean are sufficiently well developed and sufficiently coherent to be treated as a distinct object of study.

What the Work is About

In this thesis, I show that there is an emerging body of anticorruption law and regulations, anticorruption institutions and public sector ethics in the

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1 These states, also called the West Indies, include five UK colonies: Anguilla, British Virgin Islands, Cayman Islands, Montserrat, and Turks & Caicos Islands; and 12 former colonies: Antigua and Barbuda, Barbados, Belize, Commonwealth of the Bahamas, Commonwealth of Dominica, Federation of St Kitts & Nevis, Grenada, Guyana, Jamaica, St Lucia, St Vincent and the Grenadines, and Trinidad & Tobago. Bermuda, while not in the West Indies, shares the British Colonial experience and common law tradition.
Commonwealth Caribbean. In pursuing this examination of state enterprise governance, I depart from the traditional approach of looking at the governance of government owned corporations but rather address the Commonwealth Caribbean public sector as a whole. In this sense, I am adopting the definition of governance advanced by the World Bank as "... the traditions and institutions by which authority in a country is exercised for the common good."² The laws and institutions in the Commonwealth Caribbean are still developing, but they are sufficiently well developed to be recognised as distinct regimes. This first chapter introduces the thesis, sets out the theoretical statement, explains why the Commonwealth Caribbean anticorruption regimes are suitable objects of study, and investigates the definitions of corruption. In arguing that Commonwealth Caribbean anticorruption law is a worthy object of study, I do so from the perspective that this emerging law is now something peculiarly Caribbean. Notwithstanding the importance of the historical English sources to Commonwealth Caribbean law, the emerging anticorruption regimes in the region are not just simple restatements of English law.

In Chapter 2, I present a reconstructed theory of corruption. I argue that the Commonwealth Caribbean anticorruption projects may usefully be assessed from the perspectives of agency cost and moral hazard theories. Agency costs and moral hazard are essential, but too little explored, features of the agency relationship in the delivery of public services. Chapter 3 sets out the existing state of knowledge on corruption, examines the literature on corruption, including the contribution to the subject by Caribbean scholars.

² See the World Bank definition of governance at http://go.worldbank.org/MKOGR258V0.
Chapter 4 discusses the legal regime on anticorruption in the region, including the common law rules on bribery and misconduct in public office, the tort of misfeasance in public office, judicial misconduct, anticorruption legislation, and the constitutional implications. In that chapter, I show that these emerging regimes are based on the English common law, which was received in the Caribbean from time to time, and UK legislation at several stages of development that have been received, copied or incorporated into the legal systems of the Anglophonic countries of the region. The principal methodology used in this chapter is the analysis of the common law and the interpretation of legislation. It will be seen that common law play a significant role in defining the conceptual framework in the region on the law of corruption. Commonwealth Caribbean jurisdictions are predominantly common law systems and legislation is never completely free from the influence of the common law method. After all, common lawyers accept that legislation mean what the judges say they mean. So even the new legislative initiatives in the Commonwealth Caribbean must be understood in the context of the evolving common law.

In addition, there is an emerging international framework to domestic anticorruption regimes and I also discuss that international framework in Chapter 4. Over the last decade and a half, corruption has been the subject of several international or regional conventions or protocols. These include the Organisation of American States' Inter-American Convention Against

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The international law is thus both directly and indirectly relevant to Commonwealth Caribbean legal systems. However, although it is necessary to acknowledge the influence of international conventions on the developing Commonwealth Caribbean law on corruption, this is not a study of international law. Rather, this is a study of the state laws of the several territories of the Commonwealth Caribbean region. Nevertheless, international law directly and indirectly influences the domestic law. For example, there is a peculiar sense in which the European Convention on Human Rights of 4 November 1950 is especially important to the emerging Commonwealth Caribbean anticorruption regimes. As the constitutions in the region are the
supreme law in each territory, legislation including the new anticorruption legislation must be consistent with the constitutional provisions. The fundamental rights and freedoms provisions of the constitutions of the Commonwealth Caribbean are based, for the most part, on the European Convention on Human Rights and by this device the new anticorruption provision need to be generally consistent with that treaty. So in Chapter 4, under the topic of Constitutional Relief and Corruption Prevention, I address the question whether some of the provisions of anticorruption conventions, such as the Inter-American Convention Against Corruption, being legislated into domestic law are consistent with the provisions of the Commonwealth Caribbean constitutions and thus, indirectly, with the provisions of the European Convention on Human Rights.

It is not just the law that defines the anticorruption regime, but also the anticorruption strategies and the institutional framework that have been put in place to combat corruption. I also set out in Chapter 5 to show the administrative initiatives that Commonwealth Caribbean states have been pursuing in the anticorruption project. Many of these initiatives have been provoked by international and inter-American developments. Commonwealth Caribbean states are signatories to the Organisation of American States’ Inter-American Convention Against Corruption of 29 March 1996, the United

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4 I Carr, 'Fighting Corruption Through Regional and International Conventions: A Satisfactory Solution?' (2006), The Centre For Business Relationships, Accountability, Sustainability and Society Working Paper Series No 33, Cardiff University, 25, described the Inter-American Conventions as ‘... very much a product of US policy in the Americas.’ See also Carr, ‘Corruption, legal solutions and limits of law’ (2007) 3(3) Intl JL in Context 227, 238. The following Commonwealth Caribbean states have ratified or acceded to the Inter-American Convention: Antigua and Barbuda, Barbados, Belize, Commonwealth of the Bahamas, the Commonwealth of Dominica, Grenada, Guyana, Jamaica, St Kitts & Nevis, St Lucia, St Vincent & Grenadines, and Trinidad & Tobago.
Nations’ Convention Against Corruption of 31 October 2003\(^5\) and the Convention against Transnational Organised Crime of 15 November 2000.\(^6\) Commonwealth Caribbean states are dualists systems and for their international obligations to become part of the national law, they would have to be incorporated by legislation.

Chapter 5 therefore deals with anticorruption strategies, including those suggested by the new institutional framework. Special emphasis is placed on the institution of the Contractor-General, already adopted in Belize and Jamaica, as an emerging and unique anticorruption agency. Chapter 6 concludes that greater transparency and accountability are essential to the success of the Commonwealth Caribbean’s anticorruption projects.

**Background to the Study**

The several jurisdictions of the Commonwealth Caribbean, operate in an integrated regional context and each territory draws much of its understanding of the law and social policy from what is taking place in its sister territories in the region. It is not unusual for Commonwealth Caribbean judges to speak of this shared common bond between the territories.\(^7\) This thesis seeks to address the question: What are the contemporary anticorruption initiatives in the Commonwealth Caribbean and how do we make them more effective in

\(^{5}\) Among Commonwealth Caribbean states, Barbados signed the UN Convention, Jamaica and Trinidad and Tobago have ratified it, and Antigua and Barbuda, the Commonwealth of the Bahamas, and Guyana acceded it.

\(^{6}\) Among Commonwealth Caribbean states, Antigua & Barbuda, Bahamas, Barbados, Jamaica, and Trinidad & Tobago have ratified the convention; Belize, Grenada, and Guyana have acceded to it.

tackling and reducing the incidences of corruption in Commonwealth
Caribbean public service? In doing so, I draw on the constructs of agency cost
theory and moral hazard. These provide the bases for analysing the emerging
public sector anticorruption regimes. I conclude that Commonwealth
Caribbean anticorruption initiatives will be more effective if they sufficiently
address the problems of moral hazard.

It is sometimes convenient to see corruption in terms of anomie.\textsuperscript{8} This
approach provides an easy explanation for deviant behaviour, and it is easy to
regard incidents of corruption as rejection or retreat from the usual norms and
standards that should otherwise govern society. Thus, the existence of
corruption is understood to be a consequence of the economic or social
changes which promote discrepancy between the ‘values and attitudes’ that the
society commonly professes and the reality of everyday life.\textsuperscript{9} If one accepts
that point of view, then it would also seem fair to accept that a society that is
more robust and integrated, and whose members share the ‘proper’ values and

\textsuperscript{8} N Passas, ‘Global Anomie, Dysnomie, and Economic Crime: Hidden Consequences of
Neoliberalism and Globalization in Russia and around the World’ (2000) 27 (2) Social
Justice 16. Passas’ study focussed on transnational crimes, which he defined in sufficiently
broad terms to indicate that he was thinking also about corruption. See also U Zalaa-Uul,
International Christian University JDS Working Paper Series No. 4; A Harriott, Police and
Crime Control in Jamaica: Problems of Reforming Ex-Colonial Constabularies
(University of the West Indies Press, Barbados 2000) 67; and GF Lungu, ‘Administrative
Responsibility in a Developing Country: Theoretical Considerations and the Case of
Zambia’ (1983) 3 Pub Admin & Dev 361. Lungu, however, regarded moral responsibility
as only one of two important bases of an anticorruption regime.

\textsuperscript{9} Passas (n 8). See also C Brookfield (tr), E Durkheim, Professional Ethics and Civic Morals
(Routledge, London 1992) 8. For an interesting variant on this point of view in the
international sphere, see W Sandoltz and MM Gray, ‘International Integration and
National Corruption’ (2003) 57(4) Intl Org 761, where they argue, ‘Countries that are
more integrated into international society are more exposed to economic and normative
pressures against corruption.’ See also Carr ‘Fighting Corruption Through Regional and
International Conventions’ (n 4) 34, et seq, which argue for fighting corruption through re-
socialization. The re-socialization argument was restated in Carr ‘Corruption, legal
solutions and limits of law’ (n 4). Carr, however, does not specifically ground this
approach in anomie.
attitudes, would experience fewer incidents of corruption.\textsuperscript{10} This approach has been an important if not particularly successful policy in the region for over a decade.\textsuperscript{11} It had emerged as a critical plank of the Government of Jamaica’s anticorruption programme,\textsuperscript{12} but other jurisdictions in the Commonwealth Caribbean region also subscribed to this approach.\textsuperscript{13}

It is suggested, however, that corruption is more rationally treated as a problem of agency and accountability. A society is not corrupt simply because some of its members have not been inculcated with ‘… values, attitudes and behaviours based on the principles of integrity and justice.’\textsuperscript{14} Neither is a society corrupt simply because it is undeveloped, because it lacks political competition, or because its public agents are poorly paid, although the literature on the subject is replete with those explanations. Rather, a society is corrupt because public agents engaged to manage and administer its public

\textsuperscript{10} See BS Turner, ‘Preface to the Second Edition: Interpreting Emile Durkheim’ in Durkheim (n 9); and K Thompson (ed), Readings from Emile Durkheim (Routledge, New York 2004), especially 101. In the latter extract, Durkheim was speaking specifically about suicide but it is submitted that the principle applies to social alienation in general. See also A Mishra, ‘Persistence of Corruption: Some Theoretical Perspectives’ (2006) 34(2) World Dev 349, 351. See also Zalaa-Uul (n 8).

\textsuperscript{11} See PJ Patterson, ‘Promoting Better Values and Attitudes’ at launch of the National Consultation on Values & Attitudes on 15 February 1994, at JIS, Values and Attitudes, from <http://www. valuesandattitudes.info/PMSpeech.htm> accessed 1 January 2008. Patterson was, at that time, Prime Minister of Jamaica.


\textsuperscript{14} Dato’ Seri Abdullah Bin Haji Ahmad Badawi in his ‘Address to the 4th Regional Anti-Corruption Conference for Asia and the Pacific,’ 3 December 2003, Kuala Lumpur. Ironically, in the years after the delivery of this address, the Prime Minister’s regime had also become embroiled in allegations of corruption and cronyism.
bureaucracies naturally seek to maximise their own welfare, that their activities are not sufficiently transparent, and that they are often placed in positions of moral hazard. Moral hazard arises in the public service when public agents can engage in corrupt activity without fear that any significant adverse consequence will follow. Where public sector agents rarely face the consequences of their corrupt acts, or where those acts are treated as merely venial, those agents are more likely to pursue a corrupt course of action, and will have little incentive not to do so. Commonwealth Caribbean judges support this sentiment, as Carey JA’s statement in the Jamaican Court of Appeal case of *R v Blair* demonstrates. There, Carey JA said:

> This court has on occasions prior to this, intimated that the sort of sentences which should be imposed for corruption by members of the Force will in fact be serious and condign. It is a matter of regret that police officers choose to continue to ignore what they know to be correct procedure and correct action on their part. They have taken an oath to uphold the law and are well aware that they cannot sell their services in this way. We wish to repeat that if officers in the police force are caught and convicted of acts of corruption, they must expect sentences of the sort which were imposed in this case.\(^\text{15}\)

In *Blair*, the appellant, a member of the Jamaican police force, was put on trial and convicted on an indictment averring three counts of bribery under the Prevention of Corruption Act, and a fourth count of attempted bribery. He was found to have collected money from individuals, while promising them that he would stifle their prosecutions. He could not sustain his principal ground of appeal, that the Resident Magistrate had started and continued his trial without the consent of the Director of Public Prosecutions as required by s 10 of the Corruption Prevention Act, and he was therefore left to prosecute his appeal

\[^{15}\text{R v Blair (1989) 26 JLR 9.}\]
on the ground of the over-severity of his sentence. The Court of Appeal decided that the several terms of imprisonment imposed for the several counts for which the appellant had been convicted, were quite appropriate. That the Court of Appeal found that this punishment was appropriate is one thing. That they found it necessary to point out that they had on prior occasions intimated that serious and condign punishment should be meted out to corrupt members of the police force, is another.

It is not sufficient to have an elaborate anticorruption regime if it is not enforced. Neither is it sufficient that only the corrupt individuals who have been caught are punished appropriately. It is equally important that all corrupt officials are caught, charged, convicted and then punished. All corrupt activity should be exposed and serious adverse consequences should follow at every stage. Understanding the necessary characteristics of the agency relationship, and a further understanding of moral hazard, are important to understanding how corruption develops, and how corruption is sustained. In this context, moral hazard is not concerned with morality, as the term is commonly used; rather it concerns the public agent’s subjective assessment of the risk associated with improper behaviour. Such an understanding is therefore the key to developing a legal and administrative regime that will effectively address the issue of corruption. In this thesis, considerations of moral hazard are treated as a necessary extension to agency cost theory.

Although relative anomie and agency cost are essentially different explanations of corruption, there is a point where both approaches converge.

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16 As Carr 'Fighting Corruption Through Regional and International Conventions' (n 4) 26, explained: 'Regulation in the absence of enforcement is meaningless and at best, is a
Whichever approach one adopts as an explanation of the existence of corruption, the success of the anticorruption regime will depend on the consistent and certain application of sanctions to the nonconforming acts.\textsuperscript{17}

Although the following example arises from outside of the Commonwealth Caribbean region, it is nevertheless still instructive: While asserting that ‘Inculcating values, attitudes and behaviours based on the principles of integrity and justice is arguably the most important element in the fight against corruption,’ the Prime Minister of Malaysia had also to concede that:

\begin{quote}
\ldots merely appealing to a person’s sense of right and wrong alone may not be sufficient to fight corruption. I believe that to be successful, we must always consider a systems-wide approach. Our actions, especially in the area of good governance and anti-corruption, should not only be aimed at instilling the right values and attitudes, but should go beyond that to strengthening processes, institutions, as well as punitive measures.\textsuperscript{18}
\end{quote}

That approach does not suggest solutions fundamentally different from those implied by the agency cost and moral hazard approaches.

A proper assessment of the Commonwealth Caribbean anticorruption regimes requires a full evaluation of the currently prescribed sanctions for corrupt behaviour. These sanctions are necessary parts of an anticorruption regime, but some of the prescribed punishments may be draconian and even antithetical to the anticorruption project. Even if we were to concede, as J Finnis has so forcible argued, that ‘… there is no necessary connexion between law and reasonableness, justice or morality,’\textsuperscript{19} most of us agree that

\begin{flushright}
political exercise that does not serve the citizens of a state well.'
\end{flushright}

\textsuperscript{17} Durkheim (n 9) 2.

\textsuperscript{18} Dato’ Seri Abdullah Bin Haji Ahmad Badawi (n 14).

there can be, and that there should be such a connection. It is not sufficient only to comment on how dysfunctional our past attempts to engineer efficient anticorruption regimes have been. Our purpose must also be to find reasonable, just, and moral solutions that will promote in the region public administration regimes free from corruption.

That approach calls for a rational balance between crime and punishment. Lord Bingham of Cornwall had pointed out in Singh v State of Trinidad and Tobago that, ‘The ends of justice are not on the whole well served by the laying down of hard, inflexible rules from which no departure may ever be tolerated.’ 20 Yet some of the new Commonwealth Caribbean legislative initiatives, while apparently well intentioned, have introduced severe punishment even for minor infractions. 21 In addition, where the act of corruption involves the deliberate non-disclosure of a public servant’s property, new legislation in the region authorises the court to order that the property, if situate in the jurisdiction, be forfeited to Crown; and this is in addition to the imposition of a fine or a term of imprisonment or both. 22 That approach has a social cost, not the least is the possibility of administrative nullification by those charged with administering the anticorruption regime. This seems to have been substantially the complaint of the appellant in Sharma v Registrar to the Integrity Commission. 23 In this case, the appellant sought judicial review of decisions of the Trinidad and Tobago Integrity

21 See, eg, the penalties in the Corruption Prevention Act 2001, Jamaica, s 15 (1).
22 Corruption Prevention Act 2001, Jamaica, s 15 (3).
23 [2007] UKPC 42.
Commission for, among other things, exempting persons in public life from filing declarations of their income, assets and liabilities for the calendar year 2002, as required by s 11 and s 14 the Integrity in Public Life Act 2000 of Trinidad and Tobago. The appellant had succeeded before the High Court but the Court of Appeal overturned the order, and his further appeal to the Judicial Committee of the Privy Council failed. The Judicial Committee found that the Commission had a good reason for not requiring the filing. There were no prescribed forms as required by the Act and; and as the forms were the subject of regulations, to a great degree the provision of them was outside the control of the Commission. Nevertheless, one understands the appellant’s sentiment that the Commission was less than diligent in discharging its statutory responsibilities. It is conceivable that prosecutors and administrators charged with enforcing the anticorruption regime will not do so effectively if they believe that the regime is harsh or unfair.  

24 Ultimately, this defeats the purpose of the anticorruption project.

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24 Administrative nullification is not a well-developed concept. I am extrapolating the concept of administrative nullification from the better-developed US constitutional law theory of nullification, and the less well-developed legal concept of judicial nullification. *Bushell’s Case* in 1670 (124 Eng. Rep. 1006) acknowledged the ‘power’ of jury nullification in Anglo-American law. Fish J in the Canadian Supreme Court in *R v Krieger* [2006] 2 SCR 501, 2006 SCC 47 [27] explained the concept thus: ‘It has since then been well established that under the system of justice we have inherited from England juries are not entitled as a matter of right to refuse to apply the law — but they do have the power to do so when their consciences permit of no other course.’ See also *R v Wang* [2005] UKHL 9, [2005] 1 WLR 661; and see Stern, ‘Between Local Knowledge and National Politics: Debating Rationales for Jury Nullification after Bushell’s Case’ (2002) 111 Yale LJ 1815. No such privilege has been extended to judges in common law systems, except to the final courts of appeal. The doctrine of judicial precedent is antithetical to judicial nullification, and the practice of the UK House of Lords, the UK Judicial Committee of the Privy Council, and the English Court of Appeal Criminal Division is to avoid following previous decisions only in exceptional ‘appropriate’ cases. The limited scholarship on the subject of judicial nullification would suggest that US trial judges are not likely to nullify what they regard as unjust laws, but appellate judges regularly do: MBE Smith, ‘May Judges Ever Nullify the Law?’ (1999) 4 Notre Dame LR 1657. Without putting too much stock on Smith’s views, administrative nullification may nevertheless be one explanation why so few corruption matters get before the courts in the Commonwealth Caribbean.
A proper assessment of the anticorruption regimes also requires a complete evaluation of the utility of the anticorruption agencies and the new administrative arrangements. For example, administrative solutions that initially appear impartial, rational and sensible, such as installing a comprehensive ‘one-stop shop’ anticorruption agency in the Office of the Attorney General, may later flounder on allegations of political partisanship driving the anticorruption initiatives. The Court of Appeal in Trinidad and Tobago recently singled out this latter approach for judicial criticism. In speaking of the Corruption Investigation Bureau, Archie JA said:

… the wisdom of locating it within the Attorney General’s department instead of the agencies normally charged with the investigation of crime is questionable in view of the continued political controversy and the possible impression on the mind of a fair-minded observer generated in this and other cases.\textsuperscript{25}

These comments were made in the context of the Court of Appeal having to address the question of whether the Leader of the Opposition’s conviction for failing to make a complete declaration of his assets, as required by the Integrity in Public Life Act 1987, should be quashed for apparent bias.\textsuperscript{26} In this case, several issues had given rise to allegations of apparent bias; significant among these was the relationship of the Attorney General, in whose office the anticorruption agency was placed, to the Chief Magistrate who tried the case.

Commonwealth Caribbean societies are very sensitive to allegations of

\textsuperscript{25} Panday v Virgil Mag App No 75 of 2006 (T&T unreported).

\textsuperscript{26} There is some poetic irony in this case as the Integrity in Public Life Act under which Panday was convicted was passed under his administration when he was Prime Minister in 1987. This statute was replaced by the Integrity in Public Life Act 2000 (T&T).
corruption. Over the last several years, these states have embarked on a process of amending their laws and introducing new administrative structures to address corruption. In the language of the new legislation in Trinidad and Tobago these initiatives are:

... to provide for the establishment of the Integrity Commission; to make new provisions for the prevention of corruption of persons in public life by providing for public disclosure; to regulate the conduct of persons exercising public functions; to preserve and promote the integrity of public officials and institutions, and for matters incidental thereto.

Nevertheless, although corruption is a seriously contested issue in the Commonwealth Caribbean, there is nothing to suggest that there is any clear theoretical underpinning guiding the several options that Commonwealth Caribbean states are now pursuing. The policies that guide the decisions seem confused. If Jamaica is used as the example, that country modified its laws in 2000 to introduce the new Corruption (Prevention) Act. That legislation replicated the provisions of earlier anticorruption legislation, with its UK antecedents, in addition to copying from the Inter-American Convention.

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27 The sensitivity of the local community to corruption was one of the considerations that justified the otherwise quite significant damages in the defamation case of *Gleaner Co Ltd v Abrahams* [2003] UKPC 55; (2003) 63 WIR 197. Abrahams was a former minister of tourism that the *Gleaner* newspaper had defamed with an unfounded allegation that he had accepted bribes and kickbacks from an American public relations firm engaged by a Jamaican government agency.

28 Integrrity Commission Act 1997 (Cap 19:12 Guy); Integrity in Public Life Act 1997 (T&T) replaced by Integrity in Public Life Act 2000 (T&T); Integrity in Public Life Act 2004 (A&B); Integrity in Public Life Act 2004 (St L); Integrity in Public Office Act 2003 (Dominica); Parliament (Integrity of Members) Act 1973 (Jam); Prevention of Corruption Act 1987 (Cap 11:11 T&T); Prevention of Corruption Act 2004 (A&B); and Prevention of Corruption in Public Life Act 1994 (Cap. 12 Belize). The initiatives in most jurisdictions of the Commonwealth Caribbean are more extensive and demanding than the modest recommendations for the UK contained in the Noland Report. See Lord Noland, ‘Standards in Public Life: First Report of the Committee on Standards in Public Life’ *Volume 1, Report* (Cm 2850-I, 1995).

29 Long title, Integrity in Public Life Act 2000 (T&T).

Against Corruption the new concept of the ‘act of corruption.’ This term, the act of corruption, now includes not only the offences covered by the previous legislation but also the new offence of illicit enrichment. To facilitate the prosecution of that new offence, the Prevention of Corruption Act also requires that several categories of public officers and public servants declare their wealth. There is nothing to suggest that the old offences in its new guise of ‘acts of corruption’ or even the new offence of illicit enrichment will operate any better than the older provisions to restrain public agents from corrupt behaviour. Of even greater significance is the fact that in the Commonwealth Caribbean, few public service employees, and even fewer parliamentarians, have been successfully prosecuted for failure to make the required declaration of their assets, or for making an inaccurate return.\(^\text{31}\) The most notorious prosecution to date, in Trinidad and Tobago, floundered on appeal.\(^\text{32}\) Whether it is because of the few prosecutions, or in spite of it, the public continues to clamour that the legal regime on corruption is in an unsatisfactory state.\(^\text{33}\)


\(^{32}\) Panday v Virgil (n 20). Although the Court of Appeal allowed the appeal and quashed the conviction, that court refused to order a stay, leaving the way open for a new trial. The appellant’s appeal to the Judicial Committee of the Privy Council in Panday v Virgil [2008] UKPC 24, [2008] 3 WLR 296, was dismissed. Nevertheless, it is still uncertain whether a new trial will take place, and with what result. A Jamaican newspaper has now reported that several parliamentarians have been prosecuted for failing to make the required returns: Saturday Gleaner, ‘Davis, Peart to face the courts’ The Gleaner (Kingston, Jamaica, 13 June 2009) A3. The final results of those persecutions are yet to be determined.

Theoretical Statement

There have been several theories of corruption but few of these have offered a satisfactory explanation of what a state needs to do to contain corruption, and these theories generally do not suggest what type of legislative and administrative regimes should be put in place to reduce or prevent it. This is true not only of the social sciences in general, but it is true also of studies from the discipline of law. Legal scholars generally do not ground the study of corruption on a solid theoretical foundation. Drawing upon the experiences of Commonwealth Caribbean law and public sector bureaucracies, I offer in this thesis a reconstructed agency cost theory and generate a model of the firm as the basis of examining and explaining corruption. An application of agency cost theory will also show that the critical problem in the agency relationship is not merely the conflict of interest situation in which the public servant is often placed, neither is it the moral dilemma that occasionally arises. Rather, the critical problem is the moral hazard that exists when agents do not face fully the consequences of their misconduct. This reconstructed theory can be used to assess the Commonwealth Caribbean approaches, and it is offered as a measure of the likely success or failure of the emerging regimes on anticorruption and state enterprise governance.

The recognition of potential conflict of interests in agency relationships is important to an understanding of agency, but that by itself is not sufficient to address the problems of agency. Management solutions designed only to reduce or remove the conflict of interest have not been
particularly effective in resolving agency cost problems.\textsuperscript{34} Thus, executives have been given generous salaries and, where the institutional arrangements allow, participation in ownership of the enterprise; but this has not been sufficient to align their interests with those of their principals.\textsuperscript{35} For the same reason, provisions exist for punishing employees who deviate from the desired conduct. Yet these solutions have not generated the success it was thought that they would have.\textsuperscript{36} This is as true for both the private and public sectors. The real solution lies in understanding why, in cases of conflict, an agent will resolve his decision against the interest of his principal. We could put this as a question of ethics—why is it that an agent, who is in a conflict of interest situation, and who understands and who can easily distinguish between the ethical and the unethical courses of conduct, will resolve that conflict by choosing the unethical course?

It was suggested above that it is easy to see corruption in terms of anomie, but that approach is a little short-sighted. It is not just that corrupt people do not share the mainstream values and attitudes, but that even those who share mainstream values sometimes behave in a corrupt manner. Corruption is essentially a problem of the agency relationship. A very real cost


of agency results from the moral hazard that arises when an agent does not bear the consequence of her conduct. Schemes that seek only to inculcate good morals, or even to resolve the conflict of interest, cannot solve that problem. In the first place, we cannot always avoid a conflict of interest between the principal and the agent. Our theoretical model will show that even when an executive receives a larger share of the ownership of the enterprise, in effect to create in her the characteristics of a principal, she retains the character of an agent. Secondly, and in any event, principals themselves are often in conflict with each other. It seems fair to say that the conflict of interest is a necessary characteristic of the agency relationship and it cannot always be avoided. On the other hand, it is possible to reduce the opportunities for moral hazard, and any analysis of law and public sector bureaucracies in the Commonwealth Caribbean should also address this issue. Where the law and the supporting bureaucracies require public agents to accept the consequences of their actions, we can expect fewer incidents of corrupt behaviour.

**Defining Corruption**

A study of corruption must begin with an agreement as to what we mean by corruption. This is perhaps the most difficult issue to confront in the study of corruption—agreeing on a construct that defines the area of study. It cannot be without significance that other than the Southern African Development Community Protocol Against Corruption of 2001, none of the conventions in force that purport to establish the international legal framework against corruption seeks to define what corruption is. Carr and Lewis attribute this.

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37 See I Carr and D Lewis, ‘Combating corruption through employment law and
failure in part to the complexity of the subject matter, or what Carr's calls the '... multi-layered and multi-perspective character of corruption.' In this regard, we are merely acknowledging what has been said in much of the literature.

There is no common law offence known as 'corruption'. Over the centuries a wide range of offences, such as bribery, extortion, misconduct in public office, and fraud have been outlawed, and these offences have generally been regarded as examples of corruption, and described as such in legislation and by the judges. Thus, in *Singh v State of Trinidad and Tobago* where the appellant was charged and convicted of two counts under s 3(1) of the Prevention of Corruption Act 1987, Lord Bingham of Cornhill who delivered the reasons of the Board in the UKPC referred to the charges as ‘... two counts of corruption.’ Section 3(1) actually provides:

> Every person who, by himself or by or in conjunction with any other person, corruptly solicits or receives, or agrees to receive, for himself or for any other person, any gift, loan, fee, reward, or advantage whatsoever, as an inducement to, or reward for, or otherwise on account of, an agent doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which the State or a public body is concerned, is guilty of an offence.

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43 Ibid [1]; 427.
We can see that the statutory formulation covers conduct that at common law would be treated as bribery.\textsuperscript{44} However, the usual practice in applying the statute is to treat that conduct as corruption.

The common law has had a long history of treating with corruption offences. In \textit{R v Rhoden and Thomas}\textsuperscript{45} O’Connor JA asserted, ‘The common law abhors fraud and corruption as nature abhors a vacuum.’\textsuperscript{46} The appellants in that case were charged with, among other things, bribery at common law. The Jamaican Court of Appeal relied on Lawrence J in \textit{R v Whitaker}, where the judge had set out the particulars of the common law offence as—‘Whenever an officer has a public duty to perform, to bribe that officer to induce him to show favour or abstain from showing disfavour in violation of his duty constitutes a misdemeanour.’\textsuperscript{47} What is particularly interesting, however, is the equation that the Jamaica Court of Appeal applied in this case. In the eyes of the court: Public duty, plus bribes not to perform that duty, equals corruption.

The legislative approach in the Commonwealth Caribbean to corruption is based, principally, on the UK antecedents of the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906, and Prevention of Corruption Act 1916.\textsuperscript{48} The Public Bodies Corrupt Practices Act

\begin{footnotesize}
\begin{enumerate}
\item The Bahamian representations of the UK statutes describe the conduct as such in the Prevention of Bribery Act 1973, Chap 88.
\item (1953) 6 JLR 259.
\item Ibid 265, quoting Lawrence J in \textit{R v Whitaker} (1914) 10 Cr App Rep 245, 252.
\item (1953) 6 JLR 259, 265.
\item The complete antecedents include the Corrupt Practices Prevention Act 1854; Public Bodies Corrupt Practices Act 1889; Prevention of Corruption Act 1906; and Prevention of Corruption Act 1916. For a classic example of the reception of the UK anticorruption legislation in the Commonwealth Caribbean, see Prevention of Corruption Act 1929 (Bds); where s 3 of the local act replicates s 1 of Public Bodies Corrupt Practices Act 1889 (UK),
\end{enumerate}
\end{footnotesize}
1889 was passed ‘… for the more effectual Prevention and Punishment of Bribery and Corruption of and by Members, Officers, or Servants of Corporations, Councils, Boards, Commissions, or other Public Bodies.’ The stated objectives of the later Act were even broader. The Prevention of Corruption Act 1906 was, simply, ‘An Act for the better Prevention of Corruption.’ The UK legislation followed the approach of the common law: it proscribed certain corrupt acts, without outlawing corruption in general. Very broadly, the earlier Public Bodies Corrupt Practices Act 1889 outlawed the soliciting, giving, and receiving bribes of public officials for doing or refraining from their public functions. Section 1 of the act provides as follows:

(1) Every person who shall by himself or by or in conjunction with any other person, corruptly solicit or receive, or agree to receive, for himself, or for any other person, any gift, loan, fee, reward, or advantage whatever as an inducement to, or reward for, or otherwise on account of any member, officer, or servant of a public body as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which the said public body is concerned, shall be guilty of a misdemeanour.

(2) Every person who shall by himself or by or in conjunction with any other person corruptly give, promise, or offer any gift, loan, fee, reward, or advantage whatsoever to any person, whether for the benefit of that person or of another person, as an inducement to or reward for or otherwise on account of any member, officer, or servant of any public body as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which such public body as aforesaid is concerned, shall be guilty of a misdemeanour.

The Act does not define what corruption is, even how one ‘corruptly’ receives

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5 The local act replicates s 1 of Prevention of Corruption Act 1906 (UK), and s 7 of the local act replicates s 2 of the of Corruption Act 1916 (UK).

50 Preamble, Public Bodies Corrupt Practices Act 1889 (UK).

50 Preamble, Prevention of Corruption Act 1906 (UK).
or ‘corruptly’ gives a bribe, as is provided for in s 1. One may even question the utility of using ‘corruptly’ to qualify the giving or receiving bribes. It is difficult to conceive how the bribery of a public official could be anything but corrupt. The best construction of this section may be that the Act was not merely replacing the common law on bribery, but that it was intended to create the new offence of corruption. Thus, it is not uncommon for a judge to refer to the offences created by this section, or its derivatives in the Commonwealth Caribbean, as offences or charges of corruption.\footnote{51}

The 1906 Act extended the anticorruption regime beyond public service agents to include agents in general. That Act provided—

If any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or for bearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or

If any person corruptly gives or agrees to given or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to this principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; …

he shall be guilty of a misdemeanour …\footnote{52}

The later act speaks of ‘any gift or consideration as an inducement or reward …’ as distinct from the words, ‘any gift, loan, fee, reward, or advantage …’ used in the earlier legislation. Nevertheless, it does not seem that one formulation is qualitatively different from the other. Indeed, the latter act also

\footnote{51}{See, eg, Lord Bingham of Cornhill in Singh v State [2005] UKPC 35 [1].}
\footnote{52}{Prevention of Corruption Act 1906 (UK) s 1.}
carries the qualification of ‘corruptly’ giving or accepting an inducement. Neither act purports to define what ‘corruptly’ means. Blackburn J, in the *Bewdley Election Petition* case, interpreted ‘corruptly’ in the predecessor Act to the Public Bodies Corrupt Practices Act 1889 to mean, ‘… [not] wickedly, or immorally, or dishonestly, or anything of that sort, but with the object and intention of doing that which the legislature plainly means to forbid.’\(^{53}\) That can hardly be described as a helpful definition. The Court of Appeal in *R v Smith* offered, perhaps, a better definition. This was an interpretation of ‘corruptly’ under the 1889 act. Here the Court of Appeal said, ‘A person corruptly offers a gift within the subsection if he offers it deliberately with the intent that the person to whom it is offered shall enter in a corrupt bargain.’\(^{54}\) Willes J’s formulation in *Cooper v Slade*,\(^ {55}\) interpreting the Corrupt Practices Prevention Act 1854, may be even more helpful. He said that corruptibly means, ‘… not “dishonestly”, but in purposely doing an act which the law forbids as tending to corrupt [others].’\(^ {56}\) In this particular case, those corrupted were voters in an election; and those who gave the pecuniary inducement, as well as those who received it, were held to have acted corruptly.

 Whatever inconvenience might have been caused by the insertion of the qualification, ‘corruptly’, in the Public Bodies Corrupt Practices Act, was later redressed by a presumption of corruption introduced by the Prevention of Corruption Act 1916. That act provides—

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\(^{53}\) 19 LT 676.

\(^{54}\) [1960] 2 QB 423.

\(^{55}\) (1858) 6 HL Cas 746.

\(^{56}\) Ibid 773.
Where in any proceedings against a person for an offence under the Prevention of Corruption Act 1906, or the Public Bodies Corrupt Practices Act 1889, it is proved that any money, gift, or other consideration has been paid or given to or received by a person in the employment of His Majesty or any Government Department or a public body by or from a person, or agent of a person, holding or seeking to obtain a contract from His Majesty or any Government Department or public body, the money, gift, or consideration shall be deemed to have been paid or given and received corruptly as such inducement or reward as is mentioned in such Act unless the contrary is proved.57

Although the 1916 act refers to both the Prevention of Corruption Act 1906 and the Public Bodies Corrupt Practices Act 1889, and the implication to be drawn from that might be that this presumption of corruption applies both to public officers and private agents, an analysis of the language used in the Prevention of Corruption Act 1916 shows that this is not the case. It seems reasonably clear that the presumption of acting corruptly where one has received any money, gift, or other consideration, or where the same is solicited by, given to, or received by anyone, is confined to public agents only and not to agents in general.

The 1906 act had extended the range of the law on corruption to cover not only the new class of agents, but also a new class of activity. The third paragraph of s 1(1) of the Prevention of Corruption Act 1906 Act also provides:

If any person knowingly gives to any agent, or if any agent knowingly uses with intent to deceive his principal, any receipt, account, or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal:

he shall be guilty of a misdemeanour …

57 Prevention of Corruption Act 1916 (UK) s 2.
There is no reference in this paragraph to the defendant acting corruptly, and it seems reasonable that it should carry the same tenure and general purpose of the rest of the legislation, which is to suppress corruption of, by or through agents. Nevertheless, it has been held that the new offence created by this paragraph does not require that the defendant acts corruptly, nor does the offence require the corruption or attempted corruption of the agent.\textsuperscript{58} It is difficult to conceive why knowingly issuing a false, erroneous, or defective receipt, account or document to one person with the intention that it should mislead that person’s principal should not be characterised as corrupt. Bray J in \textit{Sage v Eicholz} suggested that the word ‘knowingly’ was deliberately used in the statute as an alternative to ‘corruptly’ probably because of the difficulty of proving corruption.\textsuperscript{59} A more recent judicial interpretation held that while it is an offence to misuse the agent, it is not an offence under that paragraph where it is the agent who knowingly issues the defective document intending to mislead his principal.\textsuperscript{60}

As the legislation followed the common law in outlawing particular corrupt acts but not corruption in general, and these acts did not provide a definition of corruption, it follows that a general definition of corruption can only be derived from the case law or the literature; but even here, there is no universally satisfactory definition. As Deflem puts it, ‘… there are as many definitions of corruption as there are studies that have been devoted to its

\begin{itemize}
\item \textsuperscript{58} \textit{Sage v Eicholz} [1919] 2 KB 171.
\item \textsuperscript{59} Ibid 176.
\item \textsuperscript{60} \textit{R v Tweedie} [1984] QB 729. Under the existing Commonwealth Caribbean law, a prosecutor in cases such as this may have to rely on the common law offences of fraud or uttering.
\end{itemize}
research. A consistent use of one conceptual formulation is often lacking or theoretically unsubstantiated. There seems to be no restriction as to the social domains where an enquiry into corruption might not be relevant, even if a satisfactory answer cannot be achieved. For example, can a state commit a corrupt act? Is it corruption if a government, as a matter of public policy, authorises its agents to bribe other agents abroad so that a local strategic enterprise, say in the aerospace industry, is enabled to expand its foreign sales? Some would argue that an act of state, no matter how immoral or reprehensible, cannot be classified as corrupt. On the other hand, the state acts through its agents, and the actions of its agents in carrying out government policy may well be corrupt in the terms of either local or foreign law, and thus subject to indictment and prosecution. The recent contretemps over allegations of a British company bribing Saudi officials to secure export sales puts the focus squarely on this debate. An act may well be regarded as corruption in one set of circumstances, but not regarded as corrupt in another.

The Al Yamamah/BAE issue raises two additional provocative questions: What are the implications when a government as a matter of public policy instructs its investigators not to investigate allegations of corruption;

\[\text{Deflem (n 40) 244.}\]
\[\text{BAE Systems plc, 6 Carlton Gardens, London, SW1Y 5AD, United Kingdom.}\]
\[\text{If BAE with the connivance of high UK government officials had bribed Saudi officials, then the question still remains—when did the bribery begin and when did that action become illegal? UK anticorruption law did not have extraterritorial effect until 2001.}\]
and how does one assess the actions of successive governments that pursued fraud and bribery as normal public policy? That the SFO may have been prevented by the UK government from pursuing its investigation into corruption is one thing;\(^{65}\) that government ministers seemed to have accepted that this was an appropriate way to do business abroad is quite another.\(^{66}\) There are many who would find very disturbing the equanimity with which former Defence Secretaries accepted bribery as a normal course of British companies doing business abroad.\(^{67}\) The unfortunate implication is that this type of activity is not new, but that it represents a policy adopted by several governments over many years.

Corruption is frequently described as the use of public office for private gain.\(^{68}\) This is the definition used by the World Bank, and its use

\(^{65}\) The Serious Fraud Office (SFO) is a government department and part of the UK criminal justice system. The popular press suggested that the SFO was prevented by the Government from pursuing the matter, but the House of Lords in \textit{R (on the application of Corner House Research) v Director of Serious Fraud Office} [2008] UKHL 60 held that the decision of the SFO Director not to pursue the prosecution was an independent and proper exercise of his discretion.


dominates the literature. There are several difficulties with that definition. In the first place, in a strict sense, almost everyone takes an office, whether it is public or private, for some personal gain. Indeed, if we acknowledge that ‘gain’ need not be measured in financial terms, then it is true that everyone takes his or her employment in pursuit of some utility or with the intent to maximise some welfare. Secondly, that definition is based on the assumption that corruption is solely confined to public offices. It is true that breaches of trust by public officers strikes at the heart of our system of public administration. As McLachlin CJ of the Supreme Court of Canada explained in *R v Boulanger*, the law against such breaches—

… gives concrete expression to the duty of holders of public office to use their offices for the public good. This duty lies at the heart of good governance. It is essential to retaining the confidence of the public in those who exercise state power.

However, while this study emphasises corruption as a public sector phenomenon, corruption is not solely a public sector issue. For well over a hundred years, in the UK and in the Commonwealth Caribbean, the corruption of or by private agents have been treated as criminal offences. More recently, Kaufmann, who is closely associated with the World Bank definition mentioned above, and Vincente challenged the traditional definition of corruption as the ‘... abuse of public office for private gain’ because corruption as the abuse of public office for private gain, and made the distinction between legal and illegal forms of corruption.

69 See, eg, Carr, 'Fighting Corruption Through Regional and International Conventions' (n 4) 13-14.

70 [2006] 2 SCR 49; 2006 SCC 32 [1].

71 See Bardhan (n 68).

72 Prevention of Corruption Act 1906 s 1.
contemporary views of corruption do not require the existence of an illegal act. They argue—

… it is increasingly widely accepted that corruption may arise through other less obvious forms, which may involve collusion between parties typically both from the public and private sectors, and may be legal in many countries. Legal lobbying contributions by the private sector in exchange of passage of particular legislation—biased in favor of those agents—or allocation of procurement contracts may be regarded as examples of interaction of both private and public sector representatives where the second makes use of her publicly invested power at the expense of broader public welfare.\(^73\)

Many examples of misconduct in public office are clearly corrupt, but there is debate on what is a public office.\(^74\) It seems reasonable to accept that a constable,\(^75\) a justice of the peace,\(^76\) a premier of a state,\(^77\) or a minister of the Crown\(^78\) hold public offices. Nevertheless, as the law has so far evolved, the common law offence of misconduct in a public office is not limited to officers or agents of the Crown, but applies generally to every person who is appointed to discharge a public duty.\(^79\) In addition, contemporary developments in the Commonwealth Caribbean show that the definition of corrupt acts subject to criminal sanction extend far beyond the public arena, and covers private

\(^73\) Kaufmann and Vicente (n 68) 2.

\(^74\) The question of who was a public office was one of the problems that challenged the court in Walter v R (1980) 27 WIR 386 (CA WIAS Crim Div).

\(^75\) R v Rhoden and Thomas (1953) 6 JLR 259 (CA Jam).

\(^76\) R v Young (1758) Burr 557; 97 ER 447.

\(^77\) Walter v R (n 64). It this case, the Court of Appeal of the West Indies Associated States decided that a public officer is a question of law and not a question of fact to left to the jury (p 388). They nevertheless accepted, on the authority of R v Whittaker (1972) 18 WIR 379, ‘public officer’ was ‘one who discharges any duty in which the public are interested and more particularly if he receives payments from public money’ (p 389).


\(^79\) R v Bowden [1996] 1 WLR 98.
individuals and agents.\textsuperscript{80} Thus, it is acknowledged that corruption cannot be confined solely to the abuse of public office.\textsuperscript{81} One need only reflect on the accusations levelled against the principal financial and executive officers in the Enron, WorldCom and Tyco cases in the US to see that corruption is the concern of both the public and private sectors.\textsuperscript{82} The Parmalat case provides similar evidence from Europe.\textsuperscript{83}

Therefore, not everyone readily accepts this World Bank definition of corruption as the use of public office for private gain. In fact, the definition adopted by Transparency International is significantly more accommodating. Transparency International defines corruption as '... the abuse of entrusted power for private gain.'\textsuperscript{84} This recognises that the entrusted power may be derived from a source other than a public office. In fact, Transparency International goes further and differentiates between corruption 'according to

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\textsuperscript{80} Corruption Prevention Act 2001 (Jam) s 14.

\textsuperscript{81} See generally, JG Lambsdorff, M Schramm and M Taube (eds) \textit{The New Institutional Economics of Corruption} (Routledge New York 2004). See also Kaufmann and Vicente (n 68).


rule,' such as a bribe to receive preferential treatment for something that the person receiving the bribe is already required by law to provide, and corruption 'against the rule' where a bribe is paid to obtain services the person receiving the bribe is prohibited by law from providing.\(^{85}\)

As Johnston asserts, ‘Corruption is not easily defined. Some observers, perhaps persuaded that defining corruption presents difficult and complex challenges, undertake extensive definitional efforts.’\(^{86}\) Not all of these ‘definitional efforts’ have produced results that are easy to understand. For example, Cragg offers this definition:

> Corruption is any attempt, whether successful or not, to persuade someone in a position of responsibility to make a decision or recommendation on any grounds other than the intrinsic merits of the case with a view to the advantage or advancement of him – or herself or another person or group to which he or she is linked through personal commitment, obligation, or employment, or individual, professional, or group loyalty.\(^{87}\)

Notwithstanding the obvious effort to address a broad range of constructs, it may well be that Cragg’s definition of corruption is still too restrictive, particularly since it appears to confine its application to cases of personal gain and nepotism. Nevertheless, there are many who would find Cragg’s approach attractive. For example, Johnston approves of it; but he does so principally because he regards that definition as ‘culturally neutral’ and thus easily

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\(^{85}\) Ibid.


\(^{87}\) AW Cragg, ‘Business, Globalization, and the Logic and Ethics of Corruption’ (1998) 53 Intl J 651. Cf R v Smith [1960] 2 QB 423, where the defendant was on an anticorruption crusade, and tried to expose corruption by entrapping public officials, but who was nevertheless still found guilty of a corruption.
applicable to different societies.\textsuperscript{88} Even the approach of defining corruption as ‘the collaboration between public officials and private actors for private financial gains in contravention of the public’s interest,’\textsuperscript{89} which has acquired much currency, is not completely satisfactory. A satisfactory application of that definition requires of necessity that one settles first the debate on what is meant by public interest.

One measure of public interest is the economic utility that the public gains. If we adopt this approach, then it may well be in the public interest of a home country for its exporters to bribe foreign officials to make export sales. It may even be in the public interest of the host country for its importers to purchase the best products from a corrupt seller. On the other hand, it is also in the public interest that the integrity of public institutions, public administrative processes, and the rule of law are maintained; even at the cost of jobs and a favourable balance of trade.

Deflem approached the definition of corruption from the perspective of Habermas’ theory of communicative action.\textsuperscript{90} He says:

\begin{quote}
... corruption can be defined as that type of strategic action in which two or more actors undertake an exchange relation by way of a successful transfer of steering media (money or power) which sidesteps the legally prescribed procedure to regulate the relation.\textsuperscript{91}
\end{quote}

\textsuperscript{88} Johnston (n 86).
\textsuperscript{89} Ibid. See also Cragg (n 87); JN Rosenau & H Wang ‘Transparency International and Corruption as an Issue of Global Governance’ (2001) 7(1) Global Governance 25.
\textsuperscript{91} Deflem (n 40) 248.
This definition also raises some difficult questions. In the first place, this approach accepts that by definition what is corruption is just a construct of law. One understands that when Deflem asserts that corruption is a relationship of exchange where the participants avoid the requirements of the law, he is building on Habermas’ concepts of ‘juridification’ and ‘densification’ where law generally regulates social relations, and that those relations are regulated in more and greater detail. Deflem interprets this to mean that if there were no law then there would be no corruption. In other words, the more comprehensive the legal and regulatory environment, the greater are the opportunities for corruption. Deflem’s difficulty arises from his attempt to develop a clear conceptualisation of corruption without any reference to a socially constructed moral code. There is some doubt whether this can be done. In attempting to do this, Deflem would lead us to accept that there is no universal definition of corruption; but that what should be regarded as corruption will depend on the laws of each particular state. The approach—that corruption is what the law says it is and that the challenge in the anticorruption project becomes simply a matter of constructing the relevant legal rules—is attractive. Its significant weakness, however, is that it does not tell us what the law should regulate in the first place.

The second problem with Deflem’s definition is that it does not seem to accommodate a concept of corruption as an inchoate unilateral act. In other words, as this definition of corruption contemplates an exchange between two actors—say between one person offering a bribe and another person accepting

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92 Ibid 250.
it, or between a person proposing a corrupt act (who Deflem calls the ‘corruptor’) and another agreeing to it (who Deflem identifies as the ‘corruptee’) — then an unsuccessful attempt by one person to corrupt another, such as that in *R v Smith*, would not by this definition be corruption. It is not immediately clear from Deflem’s further discussion of the subject that he necessarily accepts both implications, in which event this demonstrates how difficult it is to construct a definition that completely captures one’s intention.

Corruption may be distinguished by scale, ranging from small bribes of petty officials to large contributions to high-level politicians to distort government’s policy. It has become popular now to speak of grand corruption, referring to corruption involving large sums of money that occurs at the highest levels of the political system, and a new word, ‘kleptocracy’, which is used to describe regimes where the political elites use the institutions of the state to garner personal wealth for themselves and their cronies, has crept into the literature. Buscaglia describes the entrenched corrupt practices within the public sector that hampers the definition and enforcement of law as ‘... official systemic corruption’, which he defines as ‘... the systematic use

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of public office for private benefit that results in a reduction in the quality or availability of public goods and services. This definition also creates some discomfort because it carries the inference that corruption is not an absolute ill, but it becomes so when it has adverse economic consequences. Buscaglia understands systemic corruption to be ‘... the use of public office for private benefit that is entrenched in such a way that, without it, an organisation or institution cannot function as a supplier of a good or service.’

Many argue that we all know corruption when we see it, and thus we do not need highly evolved definitions; nor do we need to make elaborate distinctions between the several dimensions of corruption as a prerequisite for a functional anticorruption regime. This is not necessarily true. The term ‘corruption’ has become part of the popular lexicon and many use the term as if its content and meaning is always completely understood, often forgetting that which is regarded as corruption in law may not be what is regarded as corruption in general society. For example, in Attorney-General v Lightbourn, Blake CJ in the Bahamian High Court seemed to have treated allegations of corruption and allegations of offences under the Bribery Act as the same. In that case, the defendant, while in Parliament, had made allegations of misconduct against a number of public officials that the Attorney General regarded as offences under the Prevention of Bribery Act

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99 Buscaglia (n 97).
100 Johnston (n 86).
102 Prevention of Bribery Act 1976 (Bah).
and, under the provisions of that Act,\textsuperscript{103} he served the defendant with a notice to furnish him with information about the allegations he had made. In treating with the matter, Blake CJ said:

The revelations made by the defendant were widely publicised in the local newspapers. They were such as to smear the Cabinet, civil servants and other officials through whom the executive authority of The Bahamas is exercised, with corruption. I entertain no doubt that this was the impression they created in the minds of the ordinary man who read the newspaper accounts of what had transpired in the House of Assembly \textlayout{...} They constituted reasonable grounds for suspecting that offences under the Bribery Act had been committed.\textsuperscript{104}

However, an allegation of corruption against a government and its members is not necessarily an allegation of corruption under the Prevention of Bribery Act.\textsuperscript{105} The Bahamian statute covers particular acts, which it treats as corrupt. These acts include the bribery of public officers\textsuperscript{106} and the fraud of private agents,\textsuperscript{107} as we would expect in legislation that traces its drafting pedigree to the UK antecedents, as well as bid rigging and corruption of public sector auctions,\textsuperscript{108} which issues are not usually addressed in Commonwealth Caribbean anticorruption legislation. In addition, because the law seeks to prevent activity that would impede or corrupt the investigatory process, s 21 of

\textsuperscript{103} Ibid s 12(4).

\textsuperscript{104} A-G v Lightbourn (1982) 31 WIR 24, 28.

\textsuperscript{105} See, eg, Prevention of Bribery Act 1976 (Bah). This act received the basic provisions of the UK law. That is, s 3 of the Prevention of Bribery Act 1976 (Bah) generally replicates s 1 of the Public Bodies Corrupt Practices Act 1889 (UK), s 8 generally replicates s 1 of Prevention of Corruption Act 1906 (UK), and s 18 replicates s 2 of the Prevention of Corruption Act 1916 (UK). However, the local act also extends to corruption of bids and auctions and bid rigging, in addition to a range of law enforcement provisions such as the state’s powers of investigations and the admissibility of evidence.

\textsuperscript{106} Prevention of Bribery Act 1976 (Bah) s 3 and s 7.

\textsuperscript{107} Ibid s 8.

\textsuperscript{108} Ibid s 5 and s 6.
the Prevention of Bribery Act creates an additional offence where someone makes a false report. The precise language of s 21 is as follows:

Any person who, during the course of an investigation into, or in any proceedings relating to, an offence alleged or suspected to have been committed under this Act, knowingly—

(a) makes or causes to be made a false report of the commission of an offence under this Act to—
   (i) any police officer specified in an authorisation given under section 11; or
   (ii) any public servant specified in an authorisation given under section 11; or

(b) misleads—
   (i) any police officer specified in an authorisation given under section 11; or
   (ii) any public servant specified in an authorisation given under section 11,

shall be guilty of an offence ...

In effect, the offence consist of making a false report to a police officer or other authorised person, of an offence under the Prevention of Bribery act, during the course of an investigation or other proceedings under this act. This is not designed to protect the reputation of members of a government or legislature. Neither is this a prohibition against general allegations of corruption, whether or not those allegations are otherwise actionable, whatever impression they might have served to create in the minds of the ordinary man.

Treating every example of bad behaviour as a corruption offence under the law is the first step in the wrong direction. Quite apart from leading the judge or practitioner to wrong conclusions, that inadequate definition misdirects us from finding appropriate solutions in reforming the anticorruption project. That is precisely the problem that Barnet and Bedau
pointed out: If the subject matter is not adequately defined, then further debate on it may be so unclear as to be futile. If we are to accept that corruption is to be prohibited, and that anticorruption measures require enforcement, then of necessity, corruption must also be defined and this may not be adequately accomplished merely by referring to the existing legislation. From that perspective, the approach suggested by Article VI of the Inter-American Convention Against Corruption is quite useful. Several acts are first proscribed, and the proscribed acts are then generally classified as ‘acts of corruption.’

Some will argue that corruption must be analysed from a cultural perspective. This is saying that not only are some societies more corrupt than others, but it also acknowledges that which is corruption in one society may not be regarded as corruption in another. As Carr and Lewis explain, ‘... the concept of corruption is also riddled with cultural nuances since a practice accepted or tolerated in one culture may well be unacceptable in another.’


111 This was a part of the argument advanced by the defendants in resisting the jurisdiction of the English courts to order service on the defendants outside the jurisdiction, in the case of Pakistan v Zardari & Ors [2006] EWHC 2411 (Comm); [2006] 2 CLC 667. Pakistan’s argument in support of the Court’s right to assume jurisdiction was that the whole subject matter of its claim against the defendants relates to property located within the jurisdiction. The defendants, unsuccessfully, resisted this claim based on the following argument, at pp 687-8 [84]: ‘In substance the subject matter of this claim is, or at least includes, corruption and money laundering. There is no suggestion that any corrupt acts, or any money laundering, took place within the jurisdiction. Accordingly it cannot be said that the “whole subject matter of the claim” relates to property within the jurisdiction. The purpose of requiring the whole subject matter to relate to property within the jurisdiction is to prevent a claimant from using the fact that a claim relates partly to property within the jurisdiction to pursue other aspects of a claim which have no sufficient connection with the jurisdiction.’

112 Carr and Lewis (37) 55.
Cragg’s approach to defining corruption seems focussed on overcoming that cultural limitation.\textsuperscript{113} It may well be that the approach that one takes in defining corruption will depend not only on one’s cultural perspective but also on one’s academic discipline. This is what Keyuan suggests.\textsuperscript{114} In Keyuan’s view, economists usually define corruption in one of two ways: first, in the manner we have done, as where public goods are sold for private gain; or second, where ‘the benefit to a corrupt agent of acting against the expectation of a principal outweighs the cost.’\textsuperscript{115} Keyuan argues that economists look for the causes of corruption in the country’s economic and administrative structures. He says political scientists, on the other hand, sees corruption as rooted in a country’s structures for attaining, maintaining and regulating power. Sociologists, however, treat corruption as an issue of social relationships.\textsuperscript{116} This classification is in no way perfect. One needs only reflect on Mishra’s work to see that this classification could not properly apply to him.\textsuperscript{117} He takes something of a multidisciplinary or cross-disciplinary approach. He offers this definition of corruption:

> Corruption is commonly defined as ‘behavior that deviates from formal duties because of private gains.’ Hence, the very definition of corruption would suggest that corrupt acts are deviations from implicit or explicit behavioral norms (with or without legal and ethical connotations).\textsuperscript{118}

\textsuperscript{113} Cragg (n 87).
\textsuperscript{115} Ibid 323.
\textsuperscript{117} Mishra (n 10).
\textsuperscript{118} Ibid.
This is a useful definition but it too contains a weakness. It acknowledges that the corrupt act deviates from an implicit norm; but it refuses to accept that this deviation must have legal or ethical connotations. This is similar to the approach adopted by Harriott in his study of the Jamaican police,\(^ {119} \) where he defined corruption as ‘... the misuse by police personnel of their office or authority for personal or other particularistic ends.’\(^ {120} \)

If the prohibition of corruption is to be part of a legal or administrative regime then there must be clear and unambiguous rules as to what is prohibited and what is allowed. These rules must be measured by explicit legal and ethical standards.\(^ {121} \) It is not enough that the behaviour of a public official is thought to be corrupt if it is not clearly proscribed by law or regulation. Many would regard the behaviour of the appellant in *Walter v R*,\(^ {122} \) for which he was prosecuted, as corrupt. As premier of the state, the appellant had used the government’s facilities to import and clear through customs, without the payment of customs duty, two steel building that he had purchased from abroad. He sold one of the steel buildings to the state for a profit and the other he kept for himself. He was later charged with, among other things, misconduct in public office. There was testimony in court, although there was no documentary evidence, that he had achieved the approval of the Cabinet for the duty-free import. Yet as reprehensible as the appellant’s conduct appeared

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\(^ {119} \) Harriott (n 8).


\(^ {121} \) Carr (n 38) 157, suggest that notwithstanding that a ‘... universally acceptable definition is not possible, ... there is a high degree of convergence of the standards expected of behaviour in the affairs of business, public sector administration and decision-making worldwide.’

\(^ {122} \) (1980) 27 WIR 386.
to be, the court was not satisfied that he acted from any ‘... fraudulent or oblique motive’ to find him guilty of misbehaviour as a public officer. Peterkin JA put it thus: ‘Put another way, this court is not at all sure, on the learning available to it from recent cases of this nature, that such a fraudulent or oblique motive is not an important and necessary ingredient of this offence.’ The result is clearly unsatisfactory. One would think that if the activity was acknowledged as corrupt, then the law should have proscribed the activity. The case demonstrates how difficult it is to determine what constitutes misconduct in public office at common law; and it serves to demonstrate the point that corruption in general is not necessarily corruption in law.

It should be obvious that the persistence of corruption is not dependent on the absence of laws and conversely, that even in the most elaborately developed and complex legal regimes corruption will persist. Nevertheless, if we wish to see corruption eradicated from political and administrative behaviour then that must come through the application of laws and regulations. Arguably, the more precisely defined these laws and regulations are then the easier it will be to establish and administer an anticorruption project for the public sector. This is by no means an argument that a well-defined legal regime is all that is required for the anticorruption project.

123 Ibid 393.
124 See R v Bowden [1996] 1 WLR 98; Williams v R (1986) 39 WIR 129; R v Bembridge (1783) 3 Doug 327; Henly v Lyme Corporation (1828) 5 Bing 91; R v Whitaker [1914] 3 KB 1283; R v Llewellyn-Jones (n 97); and R v Dytham [1979] QB 722.
126 See A Doig, ‘The Matrix of Integrity: Is it Possible to Shift the Emphasis from Compliance to Responsibility in Changing Contexts?—Lessons from the United Kingdom’ in P
The legislative regime is a necessary but not a sufficient requirement. The legislative regime must be supported by other administrative structures, including independent anti-corruption agencies. Some attribute to anticorruption legislation a higher purpose in public administration. Rowe P in \textit{R v Davis} put it in this manner:

\begin{quote}
The Corruption Prevention Act is a general statute aimed at the prevention of bribery and corruption of and by members of public bodies. Its intention is to preserve the dignity and integrity of public officials and to ensure honesty and impartiality in the exercise of their functions.\end{quote}

More recently, in the aftermath of the Inter-American Convention Against Corruption, some Commonwealth Caribbean states have begun to adopt a more innovated approach. In keeping with the provisions of the Inter-American Convention Against Corruption, these territories have enacted new legislation establishing several classes of 'acts of corruption.' These include acts of corruption by a public servant, acts of corruption by a citizen or resident, acts of corruption by an individual (who need not be a citizen, resident or public servant), and acts of corruption by an agent. The 2003 Corruption Bill in the UK proposed a similar approach. That bill contemplated the new offences of corruptly conferring an advantage, corruptly obtaining an advantage, and performing functions corruptly and then described the circumstances where these offences could occur. It has been suggested that

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\textsuperscript{128} (1989) 26 JLR 395, 398.
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\textsuperscript{129} The Corruption Prevention Act 2001 (Jam) s 14. The Prevention of Corruption Act 2004 (A&B) s 5 also criminalizes corrupt transactions by an agent; but again ‘agent’ is not defined.
\end{flushright}
this approach suffers from the drawback, as the itemised circumstances of corruption may not be exhaustive.\textsuperscript{130} The new UK Bribery Act 2010, which is not yet in force, takes an even more innovative approach: It describes the offences of bribing another person\textsuperscript{131} and being bribed,\textsuperscript{132} the functions or activity to which a bribe relates,\textsuperscript{133} the improper performance to which a bribe relates,\textsuperscript{134} and what a person would expect in relation to the performance of a function or activity which may be the subject of a bribe.\textsuperscript{135}

In applying the principles of the Inter-American Convention, the Corruption Prevention Act 2001, Jamaica, also introduced into the national law the offence of illicit enrichment, an offence hitherto unknown to the common law. Section 5 of the Act provides as follows:

Where there is a significant increase in the assets of a public servant which cannot be reasonably explained having regard to his lawful earnings, the significant increase shall be deemed to be illicit enrichment that public servant shall be deemed to have committed an act of corruption.

Although the term ‘illicit enrichment’ is not used in the Antigua and Barbuda legislation, its provisions are along similar lines. Section 7(1) of the Prevention of Corruption Act 2004, Antigua and Barbuda, provides as follows:

A person who, being or having been a public official –

(a) maintains a standard of living above that which is commensurate with his present or past official emoluments; or

\textsuperscript{130} See Carr (n 3) 205.
\textsuperscript{131} Bribery Act 2010 UK s 1.
\textsuperscript{132} Ibid s 2.
\textsuperscript{133} Ibid s 3.
\textsuperscript{134} Ibid s 4.
\textsuperscript{135} What the new Act calls the 'Expectation Test'. Bribery Act 2010 UK s 5.
(b) is in control of pecuniary resources or property disproportionate to his present or past official emoluments,

unless he gives a satisfactory explanation to the court as to how he was able to maintain such standard of living or how such pecuniary resources or property came under his control, commits an offence.

In addition, and in the peculiar language of the new Jamaican legislation, it may also be an act of corruption if a public servant, when asked to explain his disproportionate wealth, ‘... gives an explanation which is not considered to be satisfactory.’ Similar offences have been created throughout the region by legislation outlawing the possession of the proceeds of crimes in general and drug trafficking in particular.

As this thesis is looking at corruption from the perspective of agency theory there is some attraction to Eskeland and Thiele’s understanding of corruption which is, ‘... corruption occurs if a party to a (implicit) contract breaks it for private gain by side-contracting with a third person.’ However, we are also concerned with corruption as a public sector phenomenon, and for our purposes, the term ‘corruption’ will be used to mean, ‘the illicit use of office for private gain contrary to the established and accepted law, regulations

136 The Corruption Prevention Act 2001 (Jam) s 14 (5)(b)(i) & (ii). See also Proceeds of Crime Act 2000 (Bah); and Proceeds of Crimes Act 2000 (T&T).

137 See, eg, Tracing and Forfeiture of Proceeds of Drug Trafficking Act 1986 (Cap 86 Bahamas). This has been replaced by the Proceeds of Crime Act 2000 (Chap 93, Bahamas) which does not contain this provision. It is still an unanswered question whether the old legislation sought to abolish the presumption of innocence, and thus contravened the Bahamian Constitution. The question was raised, but not answered in Commissioner of Police v Woods (1990) 54 WIR 1, as the applicant obtained relief on other grounds. In addition to the provision in the Inter-American Convention against Corruption, provisions against illicit enrichment is to be found in the AU, ECOWAS and UN anticorruption conventions. For a further discussion see Carr (n 38) 160; and Carr, 'Corruption, legal solutions and limits of law' (n 4) 233.

or rules for holding that office.’ This is quite consistent with the Transparency International's definition of corruption as the '... abuse of entrusted power for private gain.’ It is also similar but not the same as Zimring and Johnson’s definition of corruption as, ‘... the illegal use of power for personal gain.’ The term ‘illicit’ covers a wider field than the term ‘illegal’. This definition is also in keeping with the spirit, if not the exact language as that proposed by Klitgaard, MacLean-Abaroa and Parris:

Most broadly, corruption means the misuse of office for personal gain. The office is a position of trust, where one receives authority in order to act on behalf of an institution, be it private, public, or nonprofit. Corruption means charging an illicit price for a service or using the power of office to further illicit aims. Corruption can entail acts of omission or commission. It can involve legal activities or illegal ones. It can be internal to the organisation (for example, embezzlement) or external to it (for example, extortion).

This approach is also consistent with one of the offences created by the new Prevention of Corruption Act 2004 of Antigua and Barbuda. The new law makes it an ‘offence of corruption’ where ‘... one allows his private interest to conflict with his public duties or to improperly influence his conduct in the performance of his functions as a public official.’ Put simply, this means that corruption is the illicit use of public office for private gain. Increasingly, we come to regard corruption as the misuse of resources that fiduciary agents are asked to steward; it is therefore important that we have clear standards of

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141 Prevention of Corruption Act 2004 (A&B) S 3 (1) (e).
use, misuse, and abuse of the trust resources.\textsuperscript{142} It will be difficult in particular circumstances to determine what exactly is meant by illicit use,\textsuperscript{143} but as a general rule we can all agree that it will include ‘…a “marked” departure from the standards expected of an individual in the accused’s position of public trust.’\textsuperscript{144}

**Distinguishing Corruption, Governance and Ethics**

The improvement of public sector ethics and the containment of corruption are intimately related, but they are not the same. These may best be regarded as different parts of a scale of public sector governance, and therefore the anticorruption project must also include initiatives to improve public sector ethics, schemes to engender a robust culture of institutional governance, as well as legislative provisions to counter corruption.\textsuperscript{145} Moreover, as it is increasingly acknowledged that corruption is not just a public phenomenon, scholars have even begun to examine corporate social responsibility as part of the anticorruption project.\textsuperscript{146} This is true of enterprise engaged in national and international business.

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\textsuperscript{143} See, eg, Walter v R (1980) 27 WIR 386.
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\textsuperscript{144} McLachlin CJ in R v Boulanger [2006] 2 SCR 49. See also Shum Kwok Sher v HKSAR [2002] HKCFA 27, where the defendant acted contrary to the instructions of a civil service branch circular.
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\textsuperscript{145} Speaking of the AU Convention, Carr (n 39) 118, acknowledged, 'Extra-legal measures such as codes of conduct may prove helpful in this context in increasing the integrity of the public officials and their departments.'
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\textsuperscript{146} For a discussion of the application corporate social responsibilities concepts to the anticorruption project, and especially to the promotion of whistleblower protection as a means of reducing corruption, see Carr and Lewis (n 37) 59-62. Applying corporate social responsibility concepts to the anticorruption project may be something of an intellectual stretch, unless one also acknowledges that the state and the general society are also legitimate stakeholders and avoiding corrupt acts advance the interests of those.
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transnational business.

Commonwealth Caribbean governments have had to address all of these issues. For example, in speaking to the needs or good corporate governance of public sector companies, s 6 of the Public Bodies Management and Accountability Act 2001, Jamaica, provides:

Every board shall—

(a) take such steps as are necessary—
   (i) for the efficient and effective management of the public body;
   (ii) to ensure the accountability of all persons who manage the resources of the public body;
(b) develop adequate information, control, evaluation and reporting systems within the body;
(c) develop specific and measurable objectives and performance targets for that body;
(d) advise the responsible Minister on matters of general policy relating to the management of the body.

Directors and managers of public sector agencies should apply the highest standards of governance in their discharge of the public trust. This is as true for those managers who were promoted through the public service system, as well as those who were engaged directly from the private sector. Although it is neither logical nor correct, there are those who argue that directors and managers joining government boards and agencies from outside the traditional public service come with a more ‘business-like’ approach.\textsuperscript{147} This is just a euphemistical way of suggesting that persons employed from the private sector are less ethical, and thus there is greater need to impress upon them the requirements of good governance. The improvement of public sector ethics,

the development of a robust culture of institutional governance, and the introduction of anticorruption legislation are all necessary parts of a unified regime of anticorruption based on law as well as institutional and administrative arrangements.

The current anticorruption solutions being pursued in the Commonwealth Caribbean demonstrate a critical disinclination, perhaps even inability, to distinguish between corruption, issues of governance, and applied ethics. There is an increasing tendency to treat all examples of public sector dysfunction as corruption, requiring the intervention of the criminal law. This posture is not unique to Commonwealth Caribbean governments.¹⁴⁸ McLachlin CJ, in defining the offence of breach of trust by a public officer as set out in s 122 the Canadian Criminal Code 1892, asserted that ‘Public officers, like other members of the public, are entitled to know where the line lies that distinguishes administrative fault from criminal culpability.’¹⁴⁹ He went on to explain—

… it cannot be that every breach of the appropriate standard of conduct, no matter how minor, will engender a breach of the public’s trust. For example, the personal use of an office computer might be contrary to an employment guideline yet not rise to the level of a breach of trust by a public officer. Such a low threshold would denude the concept of breach of trust of its meaning. It would also overlook the range of regulations, guidelines and codes of ethics to which officials are subject, many of which provide for serious disciplinary sanctions.¹⁵⁰

More than two decades earlier, the Court of Appeal of the West Indies

¹⁴⁸ Bardhan (n 68) 1321, speaks generally of the tendency to use the words ‘corrupt’ and ‘illicit’ interchangeably, and the further need to make the distinction between ‘immoral’ and ‘corrupt’ transactions.

¹⁴⁹ R v Boulanger [2006] 2 SCR 49 [47].

¹⁵⁰ Ibid [50].
Associated States had adopted a similar approach. Speaking for the Court in ruling that a minister of government was not guilty of misconduct in public office, Peterkin JA said: ‘While there must be many standards of conduct which may be said to be reprehensible, they do not all constitute criminal offences at common law.’

If the lines between corrupt and unethical behaviour are not clearly drawn, it will be easy for public agents to slip on one side or the other. In their book, *Public Sector Ethics*, Sampford, Preston, and Bois criticised the usual assumption that public sector governance and ethics merely require the writing of a code of ethics that includes tough penalties for poor behaviour, and there is some doubt as how effective codes of ethics will be if they are not enforced. Using the example of the UK, Doig made the argument as to why the traditional strategies of laws, regulations, monitoring, controlling, and punishment are inadequate for the task of creating a superlative public service. Sampford, Preston, and Bois link improving ethics with institutional and managerial reform, and they set out their views as follows:

It is rarely appreciated that such penalties essentially involve a return to legal regulation and enforcement without legal safeguards, a system which has in any case been found to be wanting. Finally, it is, often dimly, appreciated that the problems are not solely a matter of individual conduct and the sanctions (legal or otherwise) that can be applied.

This problem arises because of the tendency to confuse corruption issues in

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152 Carr (n 39) 119, interpreted the research on the subject to show ‘... that in the corporate sector, codes of conduct largely tend to be no more than statements of good intention and in the absence of an independent monitoring system corporate codes of conduct seem to be of limited use.’
153 Doig (n 126) 101.
154 Sampford, Preston and Bois (n 147) 1.
the public service, which may properly fall for regulation by the criminal justice system, with ethical ones that perhaps should not be.

If corruption is defined as the illicit use of public office for private gain, as it is recommended that it should be, then every corrupt act in the public service is an unethical one. On the other hand, not every erroneous or unethical act by a public servant is by definition corruption. As Abbott CJ explained in *R v Borron*, ‘To punish as a criminal any person who, in the gratuitous exercise of a public trust, may have fallen into error or mistake belongs only to the despotic ruler of an enslaved people, and is wholly abhorrent from the jurisprudence of this kingdom.’ It is true, of course, that a public servant’s unethical behaviour may be so gross as to be corrupt, and thus warrant the intervention of the criminal justice system. Other types of improper behaviour do not. Some issues require the intervention of the criminal justice system and some issues require the intervention of managers. While corrupt behaviour should be outlawed, ethical behaviour should be encouraged. We may legislate to discourage corrupt behaviour but we need supportive administrative structures to achieve good public service ethics. Not all types of corruption are homogeneouse, and corruption is not a one-dimensional construct. The difficulty in developing an appropriate definition probably demonstrates that fact. The search for essentialism is perhaps misguided, since it encourages the search for one-dimensional solutions to multidimensional problems. What Rose-Ackerman and Moody-Stuart call grand corruption is not the same as what Buscaglia defines as systemic

155 (1820) 3 B & Ald 432, 434.
corruption; even assuming that one accepts that Buscaglia’s definition is appropriate for what it purports to define. Neither do they require the same solutions. It is important to acknowledge that the anticorruption process must begin with an understanding of and an agreement on the constructs before one can contemplate the solutions.

**Caribbean Corruption Law as Object**

The object of this study is the emerging anticorruption regimes in the Commonwealth Caribbean. The thesis advanced here is that the legal regimes addressing corruption and public sector governance are legitimate objects of study. In fact, I go further. I contend that the anticorruption projects in the Commonwealth Caribbean share sufficient characteristics to allow us to view them as a common object. Sayer argues that in the research process, ‘... the subject must have a language in which to think about the object.’

156 He goes on—

> Usually the language community is internally differentiated, embracing specialist sub-groups with some of their own linguistic and conceptual resources, be they those of physics, economics, farming, cooking, computer programming or whatever.157

The language that encompasses this study is the jurisprudence of the region. It must be understood that there is a double hermeneutic at play in this study—Here the object of study provides the language with which it can be studied. Countries of the Commonwealth Caribbean share the English common law, UK legislation in various stages of its development, membership in the inter-

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157 Ibid.
American family of nations, and in many cases a pursuit of common developmental objectives in CARICOM.\textsuperscript{158} Some of these territories share a common legal education system, several participate or have participated in a complex arrangement of shared appellate courts and, generally, they share a similar set of concerns over the impact of corruption on public institutions. The countries of the region have shared close to 400 years of British colonial history, including the Westminster parliamentary system of government. It is natural that with such shared experiences, Commonwealth Caribbean legal scholars should find a common legal language, a Caribbean jurisprudence, for the region.

Commonwealth Caribbean judges have struggled with this concept of Commonwealth Caribbean jurisprudence or, as it is sometimes called, West Indian jurisprudence. It is quite common for Caribbean judges to speak of ‘the jurisprudence’, meaning the inherited and shared English legal system and legal methods. On other occasions, they sometimes speak of the jurisprudence of the particular state, or other states, referring to the body of law that has developed specifically in that particular jurisdiction. Some judges have even identified the jurisprudence of the UK Judicial Committee of the Privy Council, referring to the particular approaches the Judicial Committee has adopted on various issues. Less frequently do judges speak of the West Indian

\textsuperscript{158} The Caribbean Community, CARICOM, was established by the Treaty of Chaguaramas, on 4 July 1973. Its 15 current members are Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saint Lucia, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Suriname, and Trinidad and Tobago. CARICOM also has five associate members: Anguilla, Bermuda, British Virgin Islands, Cayman Islands, and Turks and Caicos Islands. Although the member states are individually tackling the corruption issue, CARICOM as a community has not yet taken on the anticorruption project. But see Sandoltz and Gray (n 9), who argue ‘… greater degrees of international integration leads to lower levels of corruption.’
or Commonwealth Caribbean jurisprudence; but when they do, they refer to a common body of law and legal approaches adopted by Commonwealth Caribbean states over the years. For example, in *State v Ramsingh*,159 Crane JA in the Court of Appeal of Guyana acknowledged the concept of Commonwealth Caribbean jurisprudence, even if he was not then supporting the interpretation of it as advanced by his colleagues in the other Commonwealth Caribbean jurisdictions. The question that arose in *State v Ramsingh* concerned the admissibility into evidence at a trial of previously sworn statements. The accused had denied making the incriminatory statement at all and the trial judge ruled that this was a question of fact for the jury, and not a matter of law for a judge to determine at a *voir dire*. Crane JA put the issue thus:

The question for us now to decide is whether the above ruling is right. It is a question which has arisen time and again before courts of first instance and of appeal in Guyana, Barbados and Trinidad where, it is said, the law is settled and is peculiar to West Indian jurisprudence. We in Guyana, however, cannot make that claim, there being a division in our Court of Appeal on the matter. That is why we are seated here en banc to have it settled once and for all.160

It is significant that although Crane JA did not accept that the law on the admissibility of contested confessions was well settled in Guyana, or for that matter in the rest of the Commonwealth Caribbean, he nevertheless acknowledged the concept of Commonwealth Caribbean jurisprudence. Crane JA’s concern was how did the ‘... law now applied’ in Commonwealth Caribbean courts come to be different from English law, and he traced the

159 (1973) 20 WIR 138
160 Ibid 188.
genesis of the Commonwealth Caribbean approach to this question to
Campbell v R, a judgement of the Court of Appeal of Trinidad and Tobago. It is obvious that Crane JA was uncomfortable with this Commonwealth Caribbean innovation. He asked—

What was the reason for West Indian courts launching out in a field of jurisprudence which, it is claimed, is now peculiarly their own when in the past they had adopted and applied the rule of law that has been authoritatively settled for those parts of the Commonwealth in which English criminal law obtains…

He concluded that there was no justification for the claim that the Commonwealth Caribbean law on the subject of the admissibility of confessions was different from the English law, which in his opinion was represented by the Ontario case of R v Mulligan. To the extent that the highly regarded West Indian Federal Supreme Court had suggested otherwise in R v Farley, Crane JA’s view was that the decision should be regarded as having been given per incuriam. Moreover, in his opinion, R v Farley had not been established for sufficient time for it to be considered acceptable to the principle of communis error facit jus. The learned judge’s understanding of the rules of precedent was straightforward: An Ontario court in R v Mulligan

\[\text{[1969] Ont R 240.}\]
\[\text{[1955] Ont R 240.}\]
\[\text{[1961] 4 WIR 63.}\]
\[\text{State v Dhannie Ramsingh (1973) 20 WIR 138, 192.}\]
had followed the UK Privy Council’s decision on the common law in an appeal from Hong Kong in *Ibrahim v R*,\(^{167}\) therefore, the West Indian court should follow the Ontario decision. To be sure, both before and after the decision in *State v Ramsingh*, the approach taken in *Ibrahim*, that the question of whether a confession is voluntary and thus admissible as evidence is for the judge to decide, had acquired a rather impressive pedigree. This would suggest solely on the analysis of the law in this area that although Crane JA was in the minority, on this point he was probably correct.\(^{168}\) Nevertheless, other Commonwealth Caribbean judges have not been as reticent as Crane JA had been to search out for commonality among the several common law jurisdictions of the Caribbean, and to pursue a unified understanding of the law. In the Trinidad and Tobago Court of Appeal in *Boodram v AG*,\(^{169}\) Sharma JA sought help from the case law of another Caribbean jurisdiction in the following terms:

> The first case to which I wish to refer is *Grant v Director of Public Prosecutions* (1981) 30 WIR 246. This is a case from Jamaica, a country which shares with us among other things a common history and jurisprudence. Of course, we also have differences but these, however, have done nothing to dispel the strong common bond which we share with it, and the other islands of the region.\(^ {170}\)

This common history and jurisprudence are also facilitated by the decisions of the Judicial Committee of the Privy Council. At one time all


\(^{168}\) *Ibrahim v R* [1914] AC 599, was applied or followed in the following cases: *Badry v DPP* [1983] 2 AC 297; *Customs and Excise Commissioners v Harz* [1967] 1 AC 760; *DPP v Ping Lin* [1976] AC 574; *R v Fitton* [1956] 6 DLR (2d) 529 (Sup Ct Canada); *R v Rennie* [1982] 1 WLR 64; *A-G v Perera* [1953] AC 200; *Prasad v R* [1981] 1 WLR 469; and *R v Wilson* [1967] 2 QB 406 (CA Crim Div).

\(^{169}\) (1994) 47 WIR 459.

\(^{170}\) Ibid 477.
Commonwealth Caribbean countries shared the UK Judicial Committee of the Privy Council as their final court of appeal. Today, all but Barbados and Guyana still retain the Privy Council as their final court.\textsuperscript{171} While it is fair to expect more Commonwealth Caribbean countries to jettison the Judicial Committee of the Privy Council and adopt the Caribbean Court of Justice, for the time being the Privy Council is the principal appellate court for most countries in the region. Its judgements will continue for several years at least to shape the region’s comprehension of its laws. Judges in the Privy Council have from time to time sought to identify a common theme in its jurisprudence. This has not been as simple as it sounds because Privy Council judgments, especially on the issue of Commonwealth Caribbean constitutional law, are constantly evolving. Lord Steyn acknowledged this quite readily in \textit{Fisher v Minister of Public Safety and Immigration and Others},\textsuperscript{172} a case on appeal from the Court of Appeal of the Commonwealth of the Bahamas. In that case, Lord Steyn advanced the argument for the utility of the dissenting judgement. In Lord Steyn’s opinion, ‘A dissenting opinion anchored in the circumstances of today sometimes appeals to the judges of tomorrow. In that way a dissenting opinion sometimes contributes to the continuing development of the law.’\textsuperscript{173} Judicial Committee of the Privy Council’s rulings

\textsuperscript{171} Jamaica’s attempt to abolish the right of appeals to ‘Her Majesty in Council’ and to substitute a right of appeal to newly established regional Caribbean Court of Justice foundered on the entrenched provisions of the Jamaica Constitution. The UKPC held that the change could not be achieved by ordinary legislation but only by employing the special procedure appropriate for altering the Constitutional provisions that protect the jurisdiction of the Supreme Court and Court of Appeal: \textit{Independent Jamaica Council for Human Rights (1998) Limited v Marshall-Burnett [2005]} UKPC 3.

\textsuperscript{172} (1997) 52 WIR 1.

\textsuperscript{173} Ibid.
that were once delivered in absolute terms have since been reconstructed and this, Lord Steyn asserts, ‘... is amply demonstrated by the jurisprudence of the Privy Council over the last twenty years.’\(^{174}\) As useful as Lord Steyn’s views are on the importance of the dissenting judgement, his views are advanced here to support a different principle; and this is that Commonwealth Caribbean jurisprudence exists, even if it still under development. In the words of Lord Steyn—

Thus the law of conveyancing is singularly impervious to change. But constitutional law governing the unnecessary and avoidable prolongation of the agony of a man sentenced to die by hanging is at the other extreme. The law governing such cases is in transition. This is amply demonstrated by the jurisprudence of the Privy Council over the last twenty years.\(^{175}\)

To be sure, Lord Steyn was speaking specifically to the evolving Commonwealth constitutional law on the death penalty\(^{176}\) and he returned to this argument later in *Higgs and Mitchell v Minister of National Security and Others.*\(^{177}\) This was also an appeal from the Commonwealth of the Bahamas. In that case Lord Steyn noted that the evolving ‘jurisprudence of the Privy Council’ required a ‘certain approach’ to the treatment of condemn men.\(^{178}\) It may well be that certain approach is a willingness to rethink and reconstruct one’s views on the law.

Other members of the Judicial Committee, with regard to protecting

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\(^{174}\) Ibid.

\(^{175}\) Ibid.

\(^{176}\) A corresponding argument can and have been made for the evolving Commonwealth Caribbean human rights in general. See D McKoy, ‘Capital and Corporal Punishment and Human Rights Law’ in *Seminar for Caribbean Judicial Officers on International Human Rights Norms and the Judicial Function* (IAIHR, San Jose, CR 1995).

\(^{177}\) (1999) 55 WIR 10.

\(^{178}\) Ibid 128.
the jurisdiction and independence of the judiciary from legislative and executive encroachment, have adopted a similar evolutionary approach. In the years since the Judicial Committee of the Privy Council decided *Hinds v R*,\(^{179}\) that court has on several other occasions revisited the question of the extent to which Commonwealth Caribbean constitutions represent the separation of powers doctrine.\(^{180}\) Notwithstanding the apparent incongruity of the theory of the separation of powers with the structure and practice of Westminster model constitutions, since the Privy Council decision in *Hinds v R* and the several subsequent cases which have followed or applied *Hinds*,\(^{181}\) it is no longer possible to seriously challenge the contention that in the structure of Commonwealth Caribbean constitutions there is a constitutional separation of the judiciary from the other arms of government. In other words, *Hinds* must be seen as the watershed—prior to that case, no one seriously contended that the separation of powers was a part of the law of the Commonwealth Caribbean; but since that case, no one can seriously contest that the doctrine applies.\(^{182}\)


\(^{180}\) *Commissioner of Police v Davis* [1994] 1 AC; *DPP v Mollison* [2003] UKPC 6; *Griffith v R* [2004] UKPC 58; *IJCHR (1998) Ltd v Marshall-Burnett* [2005] UKPC 3; *John v DPP* [1985] 1 WLR 657; and *Browne v R* [2000] 1 AC 45. In *State v Khoyraty* [2006] UKPC 13, the Judicial Committee declared that the separation of powers was one of the three distinguishing elements of a ‘democracy’.


\(^{182}\) *Independent Jamaica Council for Human Rights (1998) Limited and Others v Marshall-Burnett* [2005] UKPC 3, where an act of Parliament which was otherwise constitutional of itself was nonetheless struck down because it was seen as necessary companion measure to two other acts which infringed on the constitutional protection of the judiciary, must be seen as the culmination of the *Hinds* doctrine. But see *Suratt v A-G* [2007] UKPC 55, where the majority held that the Equal Opportunity Tribunal which was constituted by the
This approach of the Judicial Committee of remaking the law was again replicated on the question of the discretionary powers of the heads of state in the region. Decisions of heads of state on political or prerogative-type matters, which used to be thought to be non-justiciable, are no longer sacrosanct. In 2000, the Judicial Committee of the Privy Council, in *Lewis v AG*, suggested that if the prerogative power is used in an unreasonable way then the courts may intervene. Earlier in the history of that case, in the Jamaican Court of Appeal, Forte JA had said—

> Although decisions of the Governor General in the exercise of the Prerogative of Mercy are not justiciable, nevertheless the Courts can in accordance with the procedural fairness guaranteed by the Constitution, require the Governor General to consider matters that by virtue of the law and the Constitution, he is mandated to consider in coming to his decision.

Despite paying lip service to the principle of the non-justiciability of the prerogative of mercy, this statement clearly implies that some decisions of a head of state would now certainly be regarded as justiciable, and this is an opinion that the Judicial Committee of the Privy Council seemed to have accepted. That view contradicts the earlier Privy Council decisions of *de

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183 *De Freitas v Benny* [1976] AC 239; and *Reckley v Minister of Public Safety and Immigration* (No. 2) [1996] AC 527.


185 Quoted in the judgment of Lord Slynn of Hadley, ibid.

186 The argument can also be made that the so-called ‘prerogative of mercy’ in the Commonwealth Caribbean constitutions is not a prerogative at all, at least not in classical British constitution law sense, since the power to review and commute the sentence is actually and specifically conferred by the constitutional documents and not derived from any inherent or residual power left in the Crown.
Freitas v Benny\textsuperscript{187} and Reckley v Minister of Public Safety and Immigration (No. 2).\textsuperscript{188} In de Freitas v Benny, Lord Diplock had assumed the royal prerogative of mercy in Trinidad and Tobago to be the same as it was in England at common law and said, ‘A convicted person has no legal right even to have his case considered by the Home Secretary in connection with the exercise of the prerogative of mercy.’\textsuperscript{189} But even if only on the basis that the precise constitutional provisions in Jamaica, and other Commonwealth Caribbean jurisdictions, on this matter are different from those in Trinidad and Tobago, the Privy Council in Lewis now seems willing to retreat from its earlier position in de Freitas. In delivering the majority judgment in Lewis, Lord Slynn of Hadley put the position in this manner—

There could in their Lordships’ view be no justification for excluding review by the courts if it could be shown that the Governor-General proposed to reject a petition without consulting the Jamaican Privy Council, that the Governor-General refused to require information recommended to be obtained by the Jamaican Privy Council or that the Governor-General having required the information to be obtained, the Privy Council indicated that it refused to look at it. The same would be the position if it could be shown that persons not qualified to sit on the Jamaican Privy Council or who were not members of the Jamaican Privy Council had purported to participate in one of the recommendations of the Jamaican Privy Council.\textsuperscript{190}

The Board then went on to cite with approval the statement of Singh J in the unreported Belize Supreme Court Case, In re John Rivas’ Application for Judicial Review, 2nd October 1992, where he said at pages 12-13:

\begin{itemize}
\item \textsuperscript{187} [1976] AC 239.
\item \textsuperscript{188} [1996] AC 527.
\item \textsuperscript{189} De Freitas v Benny [1976] AC 239, 247.
\item \textsuperscript{190} Lewis v A-G (n 184).
\end{itemize}
Unique or not, any institution, be it inferior court or superior tribunal, which deals with the legal and human rights of any subject, in any capacity whatsoever, must conform to the time-honoured and hallowed principles of fundamental rights and natural justice. Any allegation that there has been a breach of any of these principles in relation to any person must, in my view, be subject to inquiry by the Supreme Court, irrespective of the calibre of the institution in respect of which the allegation has been made.

In the Board’s own opinion in *Lewis*, where there is an applicant for mercy, ‘There is every reason to have a confident expectation that the Jamaican Privy Council will behave fairly but if they do not the court can say so.’ *Lewis* has also found favour with the Caribbean Court of Justice when that court first addressed the issue in *Attorney General, Superintendent of Prisons, and Chief Marshal v Joseph and Boyce*. In delivering their joint judgment, de la Bastide P and Saunders J had no difficulty identifying what they regarded as the principal responsibility of the Caribbean Court of Justice. They put it in these terms:

The main purpose in establishing this court is to promote the development of a Caribbean jurisprudence, a goal which Caribbean courts are best equipped to pursue. In the promotion of such a jurisprudence, we shall naturally consider very carefully and respectfully the opinions of the final courts of other Commonwealth countries and, particularly, the judgments of the JCPC which determine the law for those Caribbean States that accept the Judicial Committee as their final appellate court. In this connection we accept that decisions made by the JCPC while it was still the final Court of Appeal for Barbados, in appeals from other Caribbean countries, were binding in Barbados in the absence of any material difference between the written law of the respective countries.

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191 Quoted by Lord Slynn of Hadley in *Lewis v A-G* (n 184).
193 Ibid 119.
In the same case, Witt J also spoke along similar lines although at that time he was speaking specifically about the doctrine of the unenforceability of unincorporated treaties. He asserted that there were English legal concepts ‘… unsuitable for Caribbean climate and soil’ and ‘… a new structure should be raised on the terra firma of the Caribbean Constitutions themselves.’

What we see here are examples of the Commonwealth Caribbean jurisprudence evolving through decisions of the Judicial Committee on the Privy Council on issues of human rights, separation of powers, the non-justiciability of discretionary decisions of a heads of state and the enforceability in the national legal system of unincorporated treaties. Similar arguments are taking place in Commonwealth Caribbean courts on the issue of the rule of law. In every case, the law has evolved and changed; and this is especially true over the last thirty years. A corresponding argument on the evolving law can be made for the anticorruption regime. The issue of corruption is no less topical than any other issue of public law. States are struggling with legislative, administrative, and international solutions to the corruption challenge. At this time, Commonwealth Caribbean courts have not been engaged with these issues to the extent that civil society and public sector bureaucracies have been; but it is natural that in time the local courts will also be called upon to address these issues.

194 Ibid 236.

The older corruption-prevention legislative regimes in the Common-
wealth Caribbean were copied, as much of the current law still is, from
English and UK sources.\textsuperscript{196} Of course it is only in recent years that
governments in the region have begun to rethink the utility of the common law
and the older legislation, such as the Prevention of Corruption Acts 1906 and
1916 (UK) and their local derivatives, and to question the efficacy of those
provisions to emerging regimes addressing issues of corruption and public
sector governance.\textsuperscript{197} Even with the new legislative initiatives, it is still
necessary to consider the original common law.\textsuperscript{198} The contemporary approach
to corruption in the public services of developing countries is been supported,
indeed has been instigated by several international initiatives. Contemporary
Commonwealth Caribbean governments believe, or have been led to believe,
that the old legislative and administrative structures were inadequate to meet
the challenges of corruption and defective governance in contemporary times;
and several initiatives have been introduced over the last several decades to
address this perceived inadequacy. These include new legislative initiatives on
transparency in the operations of the public sector,\textsuperscript{199} money laundering,\textsuperscript{200}

\begin{footnotes}
\item See Commissions of Inquiry Act 1911 (Bah); Commissions of Inquiry Act 1996 (St Ch &
N); Criminal Procedure Code (Bah); Dangerous Drugs Act (Bah); Financial
Administration & Audit Act (Bds); Financial Administration & Audit Act 1951 (Jam);
Powers & Privileges (Senate and House of Assembly) Act 1969, (Bah); Prevention of
Bribery Act 1976 (Bah); Summary Jurisdiction (Offences) Ordinance, Cap 14 (Guy).
\item See Contractor-General Act 1983 (Jam); Corruption (Prevention) Act 2001 (Jam);
Prevention of Corruption Act (T&T); Tracing and Forfeiture of Proceeds of Drug
 Trafficking Act 1986 Cap 86 (Bah).
\item Executive Agencies Act 2002 (Jam) s 3; Access to Information Act 2002 (Jam) s 2;
Contractor-General (Amendment) Act 1999 (Jam) s 3.
\item For example, see Money Laundering (Prevention) Act 1996 (A&B); Money Laundering
(Prevention) Act 1996, Cap 104 (Bel); The Money Laundering Act 1998 (Jam); Proceeds
\end{footnotes}
public sector procurement,\textsuperscript{201} disclosure of assets of parliamentarians,\textsuperscript{202} disclosure of assets of public servants,\textsuperscript{203} and illicit enrichment.\textsuperscript{204} Some of these new initiatives also purport to give the national law extraterritorial effect.\textsuperscript{205} The question remains, how will we judge the efficacy of these new initiatives? An equally pressing question is whether Commonwealth Caribbean states have effectively used the existing common law. The evidence is that a rigorous use of the common law offence of misconduct in public office can be quite effective in pursuing the ends of the anticorruption project.\textsuperscript{206}

\textbf{Need for Further Research}

The subject of corruption, especially in the context of the Commonwealth Caribbean, begs for further study. The evidence will show that there is no study of corruption as object from the perspective of the discipline of law in or about the Commonwealth Caribbean. Scholars from other disciplines have approached the subject, and several have adopted the corruption perceptions methodology in their studies. Both that methodology and its applications are significantly flawed. Quite apart from the questions about the reliability of the

\begin{itemize}
  \item \textsuperscript{201} The Contractor-General Act 1983 (Jam); and Contractor-General Act 1994, Cap 6 (Bel).
  \item \textsuperscript{202} The Parliament (Integrity of Members) Act 1973 (Jam) s 4; The Integrity In Public Life Act, 2000 (T&T).
  \item \textsuperscript{203} The Corruption (Prevention) Act 2001 (Jam) s 4. The Integrity In Public Life Act, 2000 (T&T) applies to ‘persons exercising public functions’ and also extends the obligation to members of the boards of statutory bodies and state enterprises; Prevention of Corruption in Public Life Act 1994, Cap 12 Bel.
  \item \textsuperscript{204} The Corruption Prevention Act 2001 (Jam) ss 14(4) & (5).
  \item \textsuperscript{205} Ibid s 14(9).
  \item \textsuperscript{206} Hong Kong is perhaps the best of example a jurisdiction that has very effectively reduced corruption relying not on new legislative initiatives, but on administrative reforms, the old anticorruption statutes, and the common law.
\end{itemize}
instruments used in corruption perceptions studies, the validity of the instruments are also suspect. There is a tendency in current studies to equate ‘belief’ with ‘perception’ without adequate analysis as to the basis of that belief. Nevertheless, even without questioning the utility of these studies to scholars in the several disciplines of the social sciences, legal scholars generally do not address the subject and the analytical and evaluative methodologies have not been applied to legislative and judicial developments in the region. Yet new legislative initiatives abound and questions on the application of the new laws have already begun to provoke the courts.\textsuperscript{207} Therefore, there is need for analysis and evaluation of the existing law on the subject of corruption, and this study seeks to do that.

The analytical and evaluative approaches are essential characteristics of legal methods, but as mentioned earlier these methods have yet to be applied by legal scholars to the study of corruption in the region. It is as if Commonwealth Caribbean lawyers, including academic lawyers, have abandoned to other disciplines any right to participate in the debate on corruption. This is especially distressing as the legislative initiatives, which have been provoked by the Inter-American Convention Against Corruption, beg for coherent analysis. Although only some of the Commonwealth Caribbean territories have introduced the prescribed reforms,\textsuperscript{208} all the independent states have signed the treaty and in the course of time must carry


\textsuperscript{208} Antigua & Barbuda, Jamaica, and Trinidad & Tobago have already introduced reforms consistent with the treaty.
out their obligations under it. The simple proposition is—we need to know the full effect and implication of our laws on the issue of corruption in the region, and thus there is great need for more legal scholarship on the subject.

The analytical approach can be usefully supported by the comparative method, but the application of comparison standards is not a methodology applied in this study. The several jurisdictions of the Commonwealth Caribbean are treated as part of an increasingly coherent whole. The theme that is being pursued here is that there are in Commonwealth Caribbean jurisprudence several issues that are peculiar to corruption that can be identified and articulated. In this way, the study seeks to speak to stakeholders who have an interest in Commonwealth Caribbean law and legal practice. At the same time, this study seeks to find audience with the policy makers of the region and to ensure that they have an adequate understanding of the considerations relevant to initiating legislative and administrative changes to combat corruption. It should be acknowledged that policy makers in the region are concerned with corruption, and thus it is important that they understand the deficiencies in the current state of legal scholarship on the subject. The argument will be made that corruption is an important contested issue in political arena, and lawyers and legal scholars must be able to offer realistic contributions to this debate.

Lawyers usually approach the subject of corruption using the analytic and evaluative methods discussed above. This is a form of linguistic analysis. In fact, it is reasonable to use the term ‘the interpretive approach’ interchangeably with the analytical approach. However, some legal scholars approach corruption from the perspective of jurimetrics, or the socio-legal
perspective. In those cases, individual people are usually the units of observation and analysis. Even when one is studying the performance or the appropriateness of a particular institution, it is easier to measure what impact that institution has had on individuals or how they perceive the performance of the institution. Although jurimetrics have evolved as an appropriate method of analysis of judicial behaviour in some jurisdictions, and has found broad application in the United States, some still question whether it is apposite or even likely to be fruitful when applied to other jurisdictions.\textsuperscript{209} Other scholar-practitioners suffer from no such reservation. Buscaglia, for example, glibly speaks of the successful application of jurimetrics to studies of the judiciary in Latin America.\textsuperscript{210} On the other hand, Robertson argue that technical analysis of political charged decisions of the US Supreme Court are easier to achieve than, say, of the United Kingdom House of Lords. This is because in the US Supreme Court nearly all decisions are by majority, all members of the Supreme Court justices hear all appeals, and there is a much larger caseload. Thus, there is a broader base for analysis in the US than in the United Kingdom.\textsuperscript{211} Another explanation may be that it is easier to design closed systems of analysis for the openly politically charged decisions of the US Supreme Court than it is for the judicial decisions of the superior courts of other jurisdictions, where political positions do not play such an openly important part of the decision-making.


\textsuperscript{210} See Buscaglia (n 98); Buscaglia (n 97); and E Buscaglia and M Dakolias, ‘An Analysis of the Causes of Corruption in the Judiciary’ (1999) L & Policy Intl Bus 95.

\textsuperscript{211} Robertson (n 209).
A critical and overarching problem is to develop an appropriate typology of corruption, identifying what should be prohibited, and determining what mechanism should be best used to achieve that objective. Secondly, it will be important to develop some clear ideas as to the state of the law and what possible or probable advances may take place in the future. This is true, not only of legislation but also of judge made law. Lord Steyn’s dissenting opinion in *Fisher v Minister of Public Safety and Immigration and Others*, given in the context of the constitutional law of the Commonwealth of the Bahamas, is nevertheless relevant to evolving law on corruption. As Lord Steyn explained, ‘The law governing such cases is in transition.’ Therefore, it is important that we understand what corruption means to our judges and how they are likely to respond when faced with applying the common law and legislation on the subject. The principal assumption of the thesis of this study is that there is an identifiable and distinct body of law, administrative regulations, and institutional structures on state enterprise governance, anticorruption and public sector ethics emerging in the Commonwealth Caribbean. The law and administrative structures are still developing but they are sufficiently well developed to be recognised as distinct regimes. These emerging regimes are based on the common law, UK legislation that have been received or replicated by the legislatures of the region, and several contemporary legislative and administrative initiatives, many of which have been provoked by international and Inter-American

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212 (1997) 52 WIR 1 (UKPC).
developments. Too little thought have been given to the theory or theories underpinning anticorruption legislation. Commonwealth Caribbean anticorruption legislation can usefully be assessed from the perspective of agency cost theory and moral hazard that is an essential but too little explored feature of the agency relationship.

Finally, it should be noted that this study is of the law and governance structures on corruption in the Commonwealth Caribbean. It is not a study of international law, although the developments in international are clearly relevant to the emerging law in the Commonwealth Caribbean. Neither is this a study of English or UK law, except in so far as those sources have influenced the development of the law of the region. Nevertheless, although the theoretical stance on corruption, and the analysis of the law, focussed on Commonwealth Caribbean developments, these are also consistent with many of the concerns expressed in the report of the House of Lords and House of Commons joint committee on the UK draft Corruption Bill.\textsuperscript{213} That members of the joint committee considered as pertinent to the UK law on corruption many of the issues are considered in this thesis as pertinent to the Commonwealth Caribbean, speaks to the near university of corruption concerns, at least in common law jurisdictions, and the struggle we are having putting a modern definition this most ancient construct.

\textbf{Conspectus}

The fundamental hypothesis of this work, that there is identifiable body of Commonwealth Caribbean law on corruption, formed the basis of a more

\textsuperscript{213} Joint Committee on the Draft Corruption Bill, ‘Draft Corruption Bill: Report and Evidence’
general article, ‘Reshaping Commonwealth Caribbean Jurisprudence: From Pratt and Morgan to Joseph and Boyce.’\textsuperscript{214} The sections of Chapter 1 that define corruption and distinguish corruption, governance and ethics form the basis of a chapter, ‘Defining Corruption’, in a book edited by Agata Stachowicz-Stanusch.\textsuperscript{215} The ideas and opinions in Chapter 2 were first presented to the Faculty of Law Graduate Conference, University of Leicester, in March 2006, and later developed and published as a journal article, ‘An Agency Cost Approach to Public Sector Corruption.’\textsuperscript{216} Chapter 2, however, now represents a more mature reflection on those views, and while agency cost theory is still regarded as critical to a good understanding of corruption, the Chapter now presents a reconstruction of the theory and offers a new model to accommodate the implications of moral hazard to the anticorruption project.

Chapter 3 discusses the contribution of Commonwealth Caribbean scholarship to the knowledge base on corruption, and expressed dissatisfaction especially with the corruption perception methodology.\textsuperscript{217} Significant parts of Chapter 4 make up the article, ‘Knowing the corners: the relevance of the common law to the Caribbean anticorruption project.’\textsuperscript{218} The discussions of the Contractor-General in Chapter 5 are also contained in ‘Whither the

\textsuperscript{214} (2007) 32(2) WILJ 155.
\textsuperscript{215} Agata Stachowicz-Stanusch (ed) \textit{Organisational Immunity to Corruption: Building Theoretical and Research Foundations} (Polish Academy of Science, Katowice 2009) 83-98.
\textsuperscript{216} (2006) 31(2) WILJ 182.
\textsuperscript{217} Those ideas are also contained in an article, ‘Known knowns: Corruption in the Commonwealth Caribbean’ offered for publication to Carib J Pub Sector Mgmt, but at the time of this submission not yet accepted.
\textsuperscript{218} (2009) 34(1) WILJ 119.
Contractor-General? Reforming Parliamentary Oversight of Executive Procurement in Belize and Jamaica,\(^219\) emphasising the oversight role of the legislature, and ‘Contractor-General Oversight of Public Procurement in the Commonwealth Caribbean,\(^220\) emphasising the roles of the Contractor-General, National Contracts Commission, and Central Tenders Board in the public procurement processes. Chapter 5, in a modified form, has also appeared as ‘Commonwealth Caribbean anticorruption strategies: the new institutional framework.’\(^221\)

This work is based on materials and scholarship available to me as of May 2010. It is clear that events are not staying still. One of the deficiencies in the administration and enforcement of the anticorruption project is that Commonwealth Caribbean politicians and public officials, other than in Trinidad and Tobago, are not often prosecuted for failing to declare their assets as required by law. In June 2009, however, a Jamaica newspaper reported that several members of Parliament, including a past Speaker of the House and the Current chairman of the Public Accounts Committee, were prosecuted for failing to make those returns.\(^222\) Whether they will be convicted, is still to be determined.

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\(^{219}\) (2007) 8(2) Carib J Pub Sector Mgmt 34.


\(^{221}\) (2009) 34(2) WILJ 77.

\(^{222}\) Saturday Gleaner, ‘Davis, Peart to face the courts’ The Gleaner (Kingston, Jamaica, 13 June 2009) A3.
CHAPTER 2

RECONSTRUCTING CORRUPTION THEORY

It is not acceptable in a contemporary legal system that particular rules established and applied by the state are mere random creations, or that they are arbitrary, and that they reflect no more than chance. If we are to keep faith in our legal system, we must believe that law has purpose. Not only must we believe in the grand design of the law, that is that the rule of law is a great good, but we must believe in the utility of individual laws. The common law rules that prohibit bribery of public officials or misconduct in public office serve a specific and very useful purpose. The same should be true of legislation that augments the common law. Most people would have no difficulty agreeing with Rowe P that the purpose of anticorruption legislation is, ‘… to preserve the dignity and integrity of public officials and to ensure honesty and impartiality in the exercise of their functions.’ So too, many would agree with the implied premise to that statement that preserving the integrity of public servants and ensuring honesty are good things. In political and economic terms, it is good that public officials carry out the duties of their offices. It is both desirable and necessary that laws and regulations discourage public agents from breaching that trust. However, circumstances change and the rules that at one time discouraged certain types of antisocial behaviour may be inadequate to address undesirable conduct in new social

\[1\] R v Davis (1989) 26 JLR 395, 398.
circumstances. It is necessary, therefore, that rules also change to address the new social needs.

**Why a Theory of Corruption?**

There is a point of view that a theory of law should provide an account of the nature of law, and that to do so legal theory must contain propositions about law that are true and which explain what law is. In applying theory to the law on corruption, we are in effect seeking to assure ourselves that anticorruption laws are purposeful and that they can achieve and are achieving the grand goal of discouraging corrupt behaviour among public agents. The application of theory provide a basis for determining whether particular legislative and administrative solutions are successful or whether they are likely to fail in the overall objective of reducing and even eliminating corruption.

This thesis focuses not only on the positive analysis of what is the law on corruption in the Commonwealth Caribbean, but it also adopts a normative approach in seeking to declare what the law ought to be. This is based on the assumption, introduced in the previous chapter, that in the Commonwealth Caribbean there a distinct body of law peculiar to public sector governance and corruption that is capable of being studied. Having identified the rules that characterised that regime, a far more daunting challenge is to determine the efficacy of those rules. It remains to be determined what makes a particular legislative or administrative arrangement best for public sector governance.

In the study of a legal system, or any subset of it, theory provides the means to understand what is being examined. On the other hand, and perhaps

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2 J Raz, ‘Can There Be a Theory of Law?’ in M Golding and W Edmundson (eds),
even more important, a well-constructed theory can provide the basis for stipulating what one would wish to see in a legal system. In other words, both our law and our theory of law should reflect the social realities. However, it is a challenge to ascertain what the underlying social realities are. When a small Caribbean country, developing itself as an international financial centre, introduces anti-money laundering legislation, that initiative may not principally be to address a dysfunction in its local financial institutions that money laundering has caused. It is quite plausible that in introducing this legislation, that state is responding to international pressure to avoid dysfunction in the financial institutions of other countries. Nothing better demonstrates these concerns than the respondents’ application in *Ingraham v Glinton and Esfakis*. The substantive issue before the Judicial Committee of the Privy Council was whether the Supreme Court of the Bahamas had jurisdiction to strike out proceedings brought under article 28(1) of the Constitution. That article provides a cause of action in the Supreme Court where, ‘... any person alleges that any of the [fundamental rights] provisions ... has been ... contravened in relation to him.’ On the other hand, Order 18 Rule 19(1)(a) of the Rules of the Supreme Court 1978 states:

> The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or the indorsement on the ground that (a) it discloses no reasonable cause of action or defence....

The Judicial Committee advised that Order 18 Rule 19(1)(a) applies to constitutional proceedings, as to any other, and it was thus appropriate for the

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3 [2006] UKPC 40.
Chief Justice to have struck out part of the pleadings on the basis that ‘They were argumentative and political and quite incapable of giving rise to the legal declarations sought.’ Nevertheless, it is the circumstances that gave rise to the application in the first place that are particularly instructive. In delivery the opinion, their Lordships disclosed:

Following a G7 meeting in 1989 a Financial Action Task Force was established with responsibility amongst other things for making recommendations as to the labelling and blacklisting of jurisdictions ‘non-cooperative in the fight against money-laundering.’

The task force later reported on ‘serious deficiencies’ and ‘serious systemic problems’ in the Bahamian anti-money-laundering regime, and recommended that the Bahamas be included on a blacklist of ‘... uncooperative jurisdictions in relation to the prevention of money-laundering.’ In response to which, the Prime Minister of the Bahamas ‘... set in train the preparation and enactment of a raft of legislation, both primary and secondary, based on measures recommended by the Organisation for Economic Co-operation and Development.’ It was against this background that the respondents sought, unsuccessfully, a declaration that ‘...the Cabinet for the Bahamas ... abdicated their collective responsibility for the direction and control of the government of the Bahamas.’ Whether or not our courts can provide an appropriate forum

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5 Ibid [4].
7 [2006] UKPC 40 [4]-[6].
8 Ibid [8].
for discussing these issues, there must be some sympathy for the nationalist politician who thinks that the affairs of his government are determined not by locally developed policies but dictated by foreign interests, such as those of the OECD.

Similarly, when a government of an OECD country removes tax credits for bribery committed overseas, it is not necessarily that it is principally addressing distortions in its local system of public administration. It is equally plausible that those initiatives are also in response to pressure from other OECD members to introduce higher ethical standards of business practices, so that businesses from other OECD countries may compete on a level playing field. In other words, this state’s social realities include concerns in other OECD member states to participate in international trade and investment. Thirty years ago, when UK government officials expressed their concerns about the Bank of England granting exchange control permission to pay bribes abroad, they were worried less by any dysfunction caused to the UK economy than they were about what other countries might think of the ethical standards of British public administration. Notwithstanding our difficulty in understanding the law’s response to our social realities, we must also accept the role of law in determining what our social realities ought to be. In other words, we must be quite willing to offer solutions that through the application of law will generate the corruption free society that we all consider desirable.

It may well be true, as Raz suggests, that analytical jurists other than Hart have paid little attention to the content of a legal system and this may very well be one of the weaknesses of general legal theory. In this thesis on public sector governance and the emerging anticorruption regime, it is the content of law that is the defining characteristic of the study; and the following chapters will seek to address that need. However, if the study must identify and analyse content of law then the question may be asked, why bother to start with theory at all? There is the obvious support which comes from Raz’s own assertion that, ‘… a theory of legal system is a prerequisite of any adequate definition of “a law”.’\(^{10}\) That by itself is hardly enough. Part of the problem lies with how lawyers traditionally contemplate theory, which forces us to consider alternative approaches. In other words, Raz’s approach that, ‘The three most general and important features of the law are that it is normative, institutionalised, and coercive,’\(^{11}\) restricts the lawyers’ role to identifying these three characteristics, while passing on the examination of the utility served by any of these to disciplines other than law.\(^{12}\)

It is not being suggested here, as Friedman has suggested elsewhere, that legal theory is merely an expression of politics.\(^{13}\) That approach is both unnecessary and undesirable. Bell, while not speaking from the perspective of


\(^{11}\) Ibid.

\(^{12}\) See J Finnis, ‘On Hart’s Ways: Law as Reason and as Fact’ \textit{University of Oxford Faculty of Law Legal Studies Research Paper Series Working Paper No. 07/2008} (Oxford, 2008), especially at 18-19. Finnis was directing his ire at Hart, but the criticism has more general applicability. See also Raz (n 2), who asserts that a theory of law must meet two criteria: ‘First, it consists of propositions about the law which are necessarily true, and, second, they explain what the law is.’

\(^{13}\) W Friedmann, \textit{Legal Theory} (5\textsuperscript{th} edn Stevens & Sons, London 1967) 1.
a lawyer, provides a better approach to how we should see the utility of theory. She suggests that theory is a set of interrelated abstract propositions about human affairs, or a proposition of the relationship between things. At the lowest level, however, she puts a theory as an ad hoc classification system, which organises and summarises empirical observations. This is not too distinct from Finnis’ characterisation of the aspirations of a law and legal systems theorist, which is ‘…to identify and affirm general and warranted propositions about a human practice or institution thoroughly shaped by thought.’ If we accept this approach then it is quite possible to construct a theory of a subset, class, or dimension of law from the practice that we are about to examine. That is, one can set out to derive a theory from the collected data. This is theory generation. This is distinct from theory verification, where one starts with a theory from which one will deduce hypotheses that can then be tested in a study. It is in the nature of the discipline of the common lawyer to look at the mass of materials from which she can derive some general principle, theory or model that explains the whole. As the common

17 Finnis (n 12).
19 Punch, ibid, cited by Bell.
lawyer sets out to discover the rules of law on a particular subject from the mass of the case law, she is aware that she is seeking to discover the relevant rule or rules that will clarify or explain the subject. It is quite true that she does not necessarily think that she is developing a model or a theory of the subject. Nevertheless, the common lawyer is doing exactly that. She is identifying a theory to tell her what to expect from the practice.

What Theory Informs the Framework of this Thesis?
Agency cost theory informs the framework of this thesis. That theory is relevant and helpful to our understanding of corruption and the laws that seek to discourage it. Agency cost theory is the application of the concept of the rational actor to the agency relationship. This recognises that there are certain costs associated with agency, which are essential attributes of that relationship. One scholar defined agency cost as ‘... the difference between the profit of a firm run by an owner-manager and the same firm run by an agent.’\(^\text{20}\) This definition is attractive for its simplicity, and it emphasises the instrumental character of agency cost theory, but it is not especially helpful; especially in this case where we are applying agency cost theory to public service agencies, where not all agencies are disciplined by the need to make a profit. Government, in the narrow administrative sense, seeks to maximise a wide range of utility, but not necessarily profit.

A critical characteristic of the agency relationship is that the principal delegates some decision-making functions to the agent, and that in the

management of the delegated functions the agent is expected to have more
detailed knowledge of the project than the principal does. The theory further
assumes that principals and agents are generally welfare seeking. In placing
welfare seeking agents in circumstances where there is asymmetry of
information between the agents and the principal may also put the agents in a
situation of a conflict of interest. Another importance characteristic of the
agency relationship is the need on the part of the principal to incur expense to
promote a convergence of interest between herself and the agent. Those
expenses will include attractive pay schemes, employee benefits and, in the
new public management dispensation, schemes for profit sharing or gain
sharing. Equally important are the monitoring costs that the principal must
establish to discourage divergence of interests between the agent and the
principal. These include support facilities for audits, investigations,
prosecutions, and whistleblowers. However, because in most circumstances
the principal is usually unwilling or unable to incur the full cost of perfect
monitoring, the agent will often make sub-optimal decisions.21

Lawyers and economists do not see agency in exactly the same terms.
For example, Fridman defined agency in law as—

... the relationship that exists between two persons when one,
called the agent, is considered in law to represent the other,
called the principal, in such a way as to be able to affect the
principal’s legal position in respect of strangers to the
relationship by making contracts or the disposition of
property.22

This is popular definition, and few lawyers would take exception to it. On its

21 A Barnea, RA Haugen and LW Senbert, ‘Market imperfections, agency problems and

face, this approach would not seem to be much different from the definition by
the economists. For example, Jensen and Meckling defined agency as:

A contract under which one or more persons (the principal(s))
engage another (the agent) to perform some service on their
behalf which involves delegating some decision making
authority to the agent.23

In this context, however, Jensen and Meckling take ‘contract’ to mean only
agreement and not the formal legal construct that lawyers use. The critical
characteristic of both definitions of the agency relationship is that there are
two parties, with one party acting for and on behalf of the other. Economists,
however, take much broader view of agency than lawyers do. Agency to the
economist is a question of fact. To lawyers, agency is a construct of law. For
example, a lawyer would not regard a company director as necessarily being
an agent of the shareholders or of the company, even though she is in a
fiduciary relationship with the company. On the other hand, economists would
have little difficulty characterising this relationship as one of agency.

Secondly, in the legal definition of agency, an essential characteristic
of agency is that the relationship is capable of affecting the principal’s position
in respect of third parties to the relationship. The most important idea is that
the principal is responsible for the acts of the agent when the latter is acting
within the scope of his authority,24 and much energy has been expended
determining the limits of this authority. However, equally important as the
effect the agency relationship has on third parties, is the relationship between

28(1) Pub Pers Mgmt 39.
the principal and the agent themselves; and it is with the latter relationship that
principally concerns the economists.

Economists assume that individuals are rational actors who will make
decisions designed to maximise their own welfare.\(^\text{25}\) The utility that a
particular individual pursues and the welfare that she seeks to maximise may
not be easily or even necessarily measured in terms of money.\(^\text{26}\) For example,
some prefer consumption to savings. One manager may prefer a higher salary;
another may wish for deeper carpets for her office.\(^\text{27}\) The essential
characteristic of the rational actor is that she makes a choice, and expresses a
preference, recognising that there are costs and benefits associated with every
choice.\(^\text{28}\) It is not true that every single person is rational in every decision she
makes but, generally, average people on a whole behave rationally.\(^\text{29}\) The
rational actor to the economist is like the reasonable man to the lawyer. The
concept of the rational actor applies to exchange as well.\(^\text{30}\)

**Principal–Agent–Client (PAC) Model**

The principal-agent-client (PAC) model of corruption is closely associated
with Klitgaard and was discussed extensively by him in his 1988 book,

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\(^{27}\) Cheffins (n 25) 4.

\(^{28}\) Ibid; See also, LJ Halper, ‘Parables of Exchange: Foundations of Public Choice Theory

\(^{29}\) Cheffins (n 25) 5.

\(^{30}\) Ibid 6.
Controlling Corruption.\textsuperscript{31} It has been suggested that the PAC model has been a 'widely accepted' tool in corruption studies,\textsuperscript{32} and the model has certainly attracted support from some of the principal scholars in the field.\textsuperscript{33} In his 1998 work, Klitgaard had asserted that 'The principal-agent model has been an active topic of research in economics for the past decade.' And while there have been several variants of the principal-agent model, Klitgaard went on to suggest that, at the time of his writing, '... several features of corruption as it encountered in real life have yet to be incorporated in the economic models.'\textsuperscript{34}

Others would agree. Pechlivanos, for example, argued that in organisations where there were asymmetry of information and objectives between the parties, then 'The principal-agent model is the simplest framework used to analyse such situations.'\textsuperscript{35} He further asserts that as organisations get more complex and as principal-agent obligations are more difficult to enforce, then

\begin{itemize}
\item \textsuperscript{31} R Klitgaard, \textit{Controlling Corruption} (University of California Press, Berkley 1988), 72. For a further discussion of how the PAC may be applied, see R Klitgaard, R MacLean-Abaroa and HL Parris, \textit{Corrupt Cities: A Practical Guide to Cure and Prevention} (Ics Press, Oakland, CA 2000).
\item \textsuperscript{32} I Carr, 'Corruption, the Southern African Development Community Anti-corruption Protocol and the principal-agent-client model' (2009) 5(2) Intl JL in Context 147, 151.
\item \textsuperscript{34} Klitgaard (n 31) 73.
\item \textsuperscript{35} Pechlivanos (n 33) 93. In support of the proposition, Pechlivanos relied on B Holmström, 'Moral Hazard and Observability' (1979) 10(1) Bell J Econ 74; and SJ Grossman and O
\end{itemize}
a more robust framework, such as the principal-agent-client, is required.\textsuperscript{36} Klitgaard had also suggested that existing principal-agent approaches did not adequately consider the need to induce agents '... to produce both optimal amounts of legitimate, productive behaviour \textit{and} optimal amounts of corrupt behaviour' in the principal-agent-client relationship. This is what Klitgaard described as '... the multiplay nature of the principal-agent-client game,' and it covers the range of policy measures that the principal may consider.\textsuperscript{37}

In depicting the relationships in the PAC model, Klitgaard postulates that the principal engages the agent to provide services to himself or to his client. In that relationship, the agent has discretion over how that service will be provided and may use that discretion to achieve a personal advantage. In doing so, the agent may cause harm to the principal. Information about the relationship of the agent and the clients is asymmetric, and it will be expensive for the principal to overcome that asymmetry. Kristiansen and Ramli summarise the PAC model as follows:

\begin{quote}
... the model presumes that an agent, like a bureaucrat, will become corrupt if the net benefits from corrupt practices exceed those of honesty. Costs related to payback to principals or risks of being detected and sanctioned by them, for instance, the politicians or the judiciary, need to be taken into consideration. The model further predicts that a client will accept bribery if a net benefit can be gained compared with undertaking a clean practice.\textsuperscript{38}
\end{quote}

It will be noted that Klitgaard draws on many of the assumptions that Jensen and Meckling drew on earlier in developing agency cost theory: These are that

\begin{footnotesize}
\textsuperscript{36} Pechlivanos (n 33) 94.
\textsuperscript{37} Klitgaard (n 31) 72.
\textsuperscript{38} Kristiansen and Ramli (n 33).
\end{footnotesize}
the principal engages the agent to provide services; that the agent has a discretion over how the services are provided; that the agent may pursue his own interests to the disadvantage of the principal; that there is asymmetry of information between the principal and the agent and thus the principal may not know the extent to which the agent can and has breached the terms of his engagement; and that the cost of overcoming that asymmetry of information is so great as to be prohibitive. Thus, the parties have not managed to create between themselves a perfectly enforceable contract. It is also interesting to note that Klitgaard, in *Controlling Corruption*, did not acknowledge Jensen and Meckling as contributing to the development of the general discourse on the principal-agent relationship, or to his own ideas on the PAC model, and there is no reference in Klitgaard's book to Jensen and Meckling's seminal essay published a decade earlier.\(^\text{39}\) However, in discussing the principal-agent framework,\(^\text{40}\) Klitgaard did cite Harris and Raviv who in turn had referenced Jensen and Meckling's earlier work and described it as interesting.\(^\text{41}\)

In examining the principal-agent relationship, Klitgaard's PAC model assumes that the principal's position is dominant and that he has the capacity to reconstruct the principal-agent relationships. Klitgaard also assumed that

\(^{39}\) Jensen and Meckling (n 23). In discussing how principal's should pay and punish agents, and what information gathering strategies principals should follow, Klitgaard did cite S Shavell, 'Risk Sharing and Incentives in the Principal and Agent Relationship' (1979) 10(1), Bell J Econ 55 and F Gjesdal, 'Information and Incentives: The Agency Information Problem' (1982) 49(3) Rev Econ Stud 373, both of whom extensively discussed Jensen's but not Meckling's work.

\(^{40}\) Klitgaard (n 31) 72.

\(^{41}\) M Harris and A Raviv, 'Some Results on Incentive Contracts with Applications to Education and Employment, Health Insurance, and Law Enforcement' (1978) 68(1) Am Econ Rev 20.
principal could also garner information from the client and thus, to some degree, rebalance the asymmetry of information between the principal and the agent. These are only implicit in Jensen and Meckling's agency cost model. In Klitgaard's view of the PAC model the principal has an array, or what he calls 'clusters', of policy measures with regard to corruption. First, the principal has the power to select which agents work for him. Secondly, he has the power to set the agent's reward and penalties; and there may be, conceivably, a similar power over the client. Third, the principal can collect information about the agent and the client from both the agent and the client. Fourth, the principal may restructure the principal-agent-client relationship. Fifth, the principal may affect attitudes about corruption. This latter policy measure is what Klitgaard describes as '... changing the "moral costs" to the agent and the client of being corrupt.'

Thus, one of Klitgaard's critical contributions to corruption studies is the departure from the notion that the corrupt transaction has only two actors, as in the principal-agency relationship. He popularised the proposition that the corrupt transaction encompasses three actors, the principal, the agent and the client. This approach invites the investigator to contemplate a wider range of factors, including incentives and disincentives to the client, as well as gathering information from and on both the agent and the client. There is, however, an important weakness in the PAC model, at least as Klitgaard has articulated it. That model places almost preeminent reliance on the principal

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as the institution or agency for avoiding corruption. The model does not acknowledge that in other circumstances the principal can also be an agent.\textsuperscript{43} As Galtung and Pope explain, when speaking of the political executive:

\ldots a president can be both principal and agent, depending on the circumstances. The principal in Klitgaard's sense has the power to define and influence both its relationship to agents and clients as well as their relationship to each other. P (e.g., a minister) can also become an agent, however, either by assuming this role illicitly (e.g., by interfering in public contracts) or because another P (e.g., a head of state) redefines its position. (page 261)

It is important to understand that in the public service space and in the delivery of public services, the roles and functions of principal are determined from time to time by the circumstances in which the parties find themselves. Someone who should be considered a principal in one set of circumstances will demonstrate all the characteristics and all behaviours of an agent in another. In effect, the principal-agent relationship is not static as Klitgaard seem to imply.

Klitgaard has made an additional contribution to corruption studies that should not be confused with the PAC model, although the two are often discussed together. Klitgaard hypothesises that corruption will arise in situations where the agents have monopoly power over clients, and the agents have great discretion, but where accountably to the principal is weak.\textsuperscript{44} The proposition may be expressed in the following terms:

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\textsuperscript{43} In support of this point, Galtung and Pope (n 42) 261, give as an example '... the former president of Mexico, [who] might on the one hand take initiatives to curb corruption, while on the other hand continue to engage in grand corruption for his political party and his personal benefit.'

\textsuperscript{44} Klitgaard (n 31) 75.
Corruption = monopoly + discretion - accountability.

Carr's characterisation of the PAC model readily accommodates the both the principal-agent-client relationship as well as the Klitgaard hypothesis. She says:

According to this widely accepted model (the principal–agent–client or PAC model), corruption occurs when an agent betrays the principal’s interest in pursuit of his own by accepting or seeking a benefit from the service seeker, the client (C). The conditions for corruption present themselves when the principal (P) is in a powerful position and the agent (A), whom P has entrusted to carry out the services, has an element of discretion in administering the services, and there is a lack or near lack of accountability.45

This is a plausible hypothesis, especially in developing countries where public services are almost always delivered by monopoly agencies. It also serves as the basis of an argument for accountability and transparency in the delivery of public services. However, the argument for removing monopolisation in the delivery of public services may not be as compelling. As Carr points out, the delivery of public service and public goods through multiple institutions and departments has the potential to create greater bureaucracy, confusion and possibly even harassment.46 Nevertheless, in either case, the PAC model provides a framework for analysing the potential anticorruption solutions.

**Why Agency Cost Theory is Preferred**

Agency cost theory is a theory of social relationships and the economic behaviour of groups. Its utility to this discourse is that it helps to explain why some public agents will diligently and honestly carry out their duties while


46 Carr (n 32) 152.
others will pursue courses of conduct that are generally acknowledged to be wrong, immoral, unethical, or illegal. If it is possible to do that, then we can assess the utility of the regulations that proscribe the latter types of behaviour. With agency cost theory, one can evaluate existing law to determine whether they achieve their objectives in the anticorruption project. Agency cost theory is preferred to the PAC model in explaining corruption in the Commonwealth Caribbean because agency cost theory is mature, well understood, and has served the disciplines of law, finance, and economics for the last thirty years.\textsuperscript{47} Agency cost theory is simpler than the PAC model and therefore easier to model. Even though it is essentially an instrumental theory, agency cost theory can still serve a useful normative purpose. Agency cost theory captures something that the PAC model does not. That is, in the principal-agent relationship in the public service someone who is a principal in one context may be an agent in another.

It is true that agency cost theory cannot assist in identifying what is the law but it can assist us in deciding what the law ought to be. In this regard, it is not inferior to the PAC model. Properly reconstructed agency cost theory can assist us in assessing how well the law functions as an instrument against corruption, and it will help in determining what rules are or will be more effective. It is useful to start from the premise that corruption is a social ill, and that anticorruption measures are social good. However, anticorruption measures are good only if they achieve their ends. An application of agency

cost theory can assist in determining what initiatives are likely to be effective in the anticorruption project.

Agency cost theory suffers from the limitations of focusing on the principal-agent relationship and does not take into account the competing and complementary interests of the various stakeholders that make up the agency. In this regard, the Klitgaard’s PAC model is arguably superior, in that it adds the additional dimension of the Client. However, the Client is just one of many stakeholders. The modern public service agency, like the modern corporation, is a complex arrangement of bureaucracies, partnerships, coalitions, and incentive and reward systems. These issues are not easily accommodated in a neoclassical theory like agency cost or, for that matter, by the PAC model.\(^{48}\)

Notwithstanding this limitation, agency cost theory can still be applied, with some reconstruction, to useful effect in a modern public service, and can be used to guide lawyers and public sector practitioners in constructing schemes of convergence of interest among public agents. Agency cost theory can also provide a basis for assessing the utility of the several anticorruption initiatives recently adopted in the region. More importantly, a reconstructed agency cost theory can also provide a guide for where we should go next in the anticorruption project. More importantly, agency cost theory accommodates, in a way the PAC model does not, the significant and chimerical character of the senior public functionary, who is an agent in one context but a principal in another.\(^{49}\)


\(^{49}\) See the arguments for the appellant in \textit{R v Condell} (1955) 6 JLR 397, discussed below.
The Assumptions of Agency Cost Theory

Agency cost theory is based on three necessary assumptions—that there is necessarily disequilibrium of information between the principal and the agent, that both principal and agent are welfare seeking, and that the juxtaposition of these two often put the agent in a situation of a conflict of interest. First, on the issue of disequilibrium of information: In a simple model of the firm, an owner will delegate to her employee some functions of the enterprise. This is the whole point of having an employee, which is to share the work. In the course of time, whatever particular function he is discharging, the agent-employee will have more knowledge of his work than the principal-employer will. The employer can seek to redress that disequilibrium in information by, for example, examining the shop floor after it has been swept or auditing the books of accounts after they have been prepared, but such review or audit can never be perfect and, in any event, it takes place after the fact. The existence of asymmetrical information creates a problem in the agency relationship because the principal is forced to incur the expense and effort to overcome it. However, the principal will never fully overcome this problem. This is a necessary characteristic of the agency relationship, which is that between the principal and the agent there is disequilibrium of information, and this is as true for agency cost theory as it is for the PAC model.

Secondly, humans are welfare seeking. Different persons will not pursue the same welfare or if they do, they will not measure it in the same terms. For example, the welfare valued most highly by a Himalayan monk may be, say, ‘enlightenment’ and he will direct his activities toward that aim, as he perceives it. On the other hand, the welfare valued most highly by the
London investment banker may be financial wealth, and she will organise her activities to achieve that end. We may say that human beings are utility seeking, in that they will organise their activities to advance their welfare. This imperative operates between the members of the simple firm also. The owner-manager’s interest is advanced, perhaps, by higher profits or higher value in her firm, and thus she will organise her affairs and the affairs of the enterprise that she owns and manages to give her the greatest return either in profits or in value in the firm. To advance her utility the owner-manager need to ensure that her employee works properly, that he is not soldiering on the job, that he does not pilfer the assets of the firm, that he does not embezzle the firms funds and present a fraudulent set of books to cover that up, and so on. Similarly, the employee will also pursue his welfare, which in this case may be to get a higher wage for easier work. The employee will seek to impress his employer with his industry and his contribution to the value created by the firm, and thus to make a claim for a greater share of that value.

Thirdly, the agent is sometimes put in a situation of conflict of interest between pursuing his own welfare on the one hand and advancing the welfare of his employer on the other. This may give rise to moral hazard, which is discussed in greater detail below. There may be further costs to the agency relationship. As the principal will be unable or unwilling to achieve a complete alignment of the agent’s interests with those of hers, of necessity she assumes the risk that the agent will pursue a course of conduct that will advance his welfare to the disadvantage of the firm and, of course, to the disadvantage of the principal.
Moral Hazard and Moral Dilemma in Public Service

Moral Hazard

In the public sector, moral hazard arises in the delivery of public services when an agent does not bear the full adverse consequences of his or her actions. The less likely an agent will face adverse consequences on pursuing a corrupt course of conduct, the more likely he will pursue the corrupt conduct. This is one cost of the principal-agent relationship. The insurance industry has had a long history of dealing with moral hazard. The term is used in that industry commonly to describe situations where insured persons become less risk-averse the greater the amount of insurance they carry. The solution to the problem of an insured pursuing risky behaviour lies in reducing the risk of moral hazard, which is achieved by having the insured share in the adverse consequences of her risky decision-making.

This is done in several ways, such as requiring the insured to pay the first part of the claim herself, usually for a lower premium. Another device that is used is to charge the insured a lower premium for the insurance if the insured has never made a claim, and to deny this bonus once a claim has been made. Where the insured person under-insures her property and incurs a complete loss, the insurance company will pay only a proportion of that loss. Where the insured person over-insures her property, the insurer will pay only the actual loss. In addition, were the insured person over-insures by taking out several policies with several insurance companies for the same risk, the

insurers will proportion the loss between themselves. All of these are designed to ensure that the insured person shares in the consequences of her risky behaviour.

For an anticorruption regime to be successful, it must of necessity also set out to reduce the moral hazard of corrupt behaviour. To do so successfully any legislative regime and any administrative systems must provide for transparency in public administration, accountability and responsibility of public officers, clarity of rules proscribing corruption, facilitate investigation of allegations of impropriety, provide for nondiscretionary enforcement, and provide also for appropriate and nondiscretionary punishment. All of these should be directed at discouraging risky behaviour among public agents. In short, the corrupt agent should be constantly exposed to the adverse consequences of his corrupt actions.

**Moral Dilemma**

In the agency relationship of the firm, because the principal does not have the full knowledge of all the circumstances, the agent who has better knowledge can advance his own welfare without fear that there will be adverse consequences for any improper acts. Writers on agency cost theory sometimes characterise this as a moral dilemma, but it is difficult to see how this could be a dilemma at all. The agent’s moral imperative is to carry out the conditions of his contract, and to obey the law, by providing the agreed work and by not defrauding his employer. To be sure, the agent faces the choice between pursuing the principal’s welfare or his own, but these are not equally balanced moral imperatives. This is not an obligation dilemma where one must choose between pursuing only one of two right courses of conduct; neither is it a
prohibition dilemma where the agent must choose between avoiding only one of two wrong courses of conduct. In addition, it is not a genuine two or multi-person dilemma where the principal cannot pursue her welfare if the agent pursues his. Although Jensen and Meckling used the term conflict of interests, they never used the term moral dilemma in their seminal paper on the subject of agency cost theory.\textsuperscript{51}

The term moral dilemma has crept in the literature over the last thirty years and has come to be seen by some as a characteristic of agency cost, but it is not. The use of the term adds an unnecessary complication to the theory and misrepresents the nature of the relationship between principal and agent. It is sufficient that the agent will have an opportunity to choose between his welfare and that of his principal, whether or not the choice presents a moral dilemma, and that his choice of his own welfare over that of his principal’s is facilitated by the asymmetry of information that exists between him and his principal. There is naturally, and perhaps necessarily, a conflict of interests between the agent and his principal. The early discussions on agency cost focussed on this conflict, and it is perhaps understandable that the focus on the conflict of interest could suggest that that the agent would have a moral dilemma. In other words, some will suggest that because the agent has a conflict of interests between his welfare and the principal’s welfare then he has a moral dilemma as to which course of action to pursue. However, it does not necessarily follow that a person who has a conflict of interest is by that

\textsuperscript{51} Jensen and Meckling (n 23) did not use the term ‘moral hazard’ either, but it is clear from their discussion on the conflict of interest that moral hazard arises from the conflict of interest between principal and agent. See also Eskeland and Thiele (n 50) for a discussion of the agency relationship in terms of moral hazard.
fact alone faced with a moral dilemma. A conflict of interest merely describes the situation where someone has conflicting duties or responsibilities to two or more persons, one of whom could be himself. This does not mean that the agent’s sense of morality or ethics cannot resolve the conflict as to which course is right and which is wrong. In fact, in most cases where an agent finds himself in a conflict of interest situation he can resolve the issue as to which course is the moral or ethical one to pursue, even if he is tempted not to pursue it. On the other hand, an agent with a well-developed personal sense of ethics or morality that proscribes a particular course of conduct as wrong, in some circumstances, will nonetheless still pursue the unethical or immoral course. In other words, persons will sometimes knowingly pursue the wrong course. This is why examining the question of ethical choice in the agency relationship only in terms of the conflict of interest, or even in terms of the moral dilemma, is not sufficient to explain the agent’s behaviour. Again, charactering the problems of agency only in terms of a conflict of interest between the agent and the principal has a further weakness of implying that agency costs can be resolved by resolving the conflict between the principal and the agent. Such an approach is not sufficient, at least not when the agent’s pursuit of his welfare amounts to a corrupt act.

Reconstructing Agency Cost Theory

The suggestion that agency cost theory is applicable to public sector agencies is certainly not new. Many contemporary economic studies of corruption in the public service are modelled on some form of agency relationship. Jensen and Meckling in their original work on the theory of the firm some thirty years
ago had argued for the universal applicability of the theory. In applying this theory to corruption in the public sector, it is necessary first to construct a model from which we can extrapolate to more complex structures, such as government departments or agencies. It would be especially useful if our model is sufficiently generic to apply to both public sector agencies as well as private sector firms, and we should identify those circumstances where the model needs to be qualified because it does not have universal applicability.

The Reconstructed Model

The model used for this analysis is the small firm, from which we will extrapolate to the workings of larger firms and public sector agencies, and we will use the term ‘firm’ in this discussion to identify the basic organisational structure of the agency for both the public and private sectors. In the one-person enterprise, the proprietor does everything for herself. She is owner, manager, and worker. In her person, she represents all the factors of production. As owner, she represents land and capital; and as manager and worker, she represents labour. However, in the operations of the multi-member firm, the proprietor-manager-worker cannot do everything herself. She employs a range of skilled people to do things she cannot do or she is not willing to do herself. Within the enterprise, her character changes from the omnibus provider of all resources to usually that of proprietor-manager, while she calls upon others to provide the labour. As the range of operations become more demanding and more complex she will not even be able to supervise all

52 Jenson and Meckling (n 23).
53 For the purposes of this discussion, the question of whether management is a distinct factor of production form labour is unimportant.
the labour herself, so she will have to employ other managers to oversee that work, and her character changes yet again from proprietor-manager to that principally of proprietor. In the course of developing the enterprise, the proprietor may need more capital; in which case she will invite partners or investors to provide this. Based on how the investment is provided, if it is provided in stocks and shares in the enterprise or from loans, then her character will change again, from that of sole proprietor to that of a partner, stockholder or creditor.

With the change from sole proprietorship to a firm with several owners and several employees, the character of the firm also changes. As soon as the proprietor employs labour and seeks outside financial support from investors, she creates a firm that must balance a range of competing interests. The firm does not now exist principally for the interests of the investors or the workers; but neither does it now exist only for the interest of the owner. If the enterprise becomes large enough, the stake holding will extend to include the interests of the proprietor’s employees, neighbours, town, region, and even state. An enterprise may become so important that its existence and operations are strategic to the interests of the state, and deserving of its own rules. However, long before the enterprise becomes ‘strategic’ to the interest of the state, the state will develop an interest in the affairs of this firm and others like it, with how it treats its workers, with how it relates to its investors, and with the impact its operations has on the physical and social environment within which it operates. The state will establish the rules and regulations under which this enterprise, and others like it, will be allowed to exist and operate. In most societies, the interests of the owner are regarded as important, even
paramount, but they are not the only interests that must be accommodated. In a free enterprise system, a proprietor who is not willing to live under these rules can usually dispose of her interest in the firm, or the firm’s assets, or she may close the firm and move her capital someplace else. The critical point to note is that as the firm evolves from the one-person enterprise to become a multimember firm, it ceases to represent the interest only of the proprietor and must accommodate itself to a broader stake holding.

In free societies, where there is market competition for the allocation of the factors of production, members of the firm will measure their contribution to the firm in terms of how they share in the value that it creates. Whenever someone’s share of the production of the firm is less than what she believes the value of her investment in the firm is worth, in terms of capital or labour, she will remove those resources and apply them somewhere else. If we accept this model of the firm, that it exists to add value for its stakeholders, we can apply it to entire range of firms, from the sole proprietorships, to partnerships, and to private and public companies. We can also apply it to public sector enterprises. To do so we must accept that value creation does not necessarily mean only money value. Value means economic value, social value, and political value. The public enterprise is set up to achieve social, economic or political goals, which may not be easily measured in money terms. Public and not-for-profit enterprises may be distinguished from for-profit firms by the specificity of the value creation function.

Value creation as the reason for a firm’s existence is not a complete theory of the firm, as it does not address the relationship of persons making up the firm. Value creation explains why a firm exists and how it may reorient the
reasons for its existence, but it does not explain how it exists. Lawyers have developed several theories that account for the operations of the corporation, such as that the corporation is a nexus of contracts, or that it exists to protect property rights, or that it is a financial device to organise capital. These approaches are not all completely satisfactory; and further, the corporation is only one type of firm. Moreover, those approaches cannot readily accommodate the traditional public enterprise.

Agency cost theory focuses on the relationship of the participants within the firm, and characterises those relationships principally as one of agency. Agency is the devolution of authority from one person to another. In the simplest terms, someone who has power or authority over something appoints someone else to exercise some or all of that authority. The relationship is based on expressed or implied agreement, which sets out the rights and responsibilities of the parties. Lawyers typically look on the agency agreement from the perspective of the authority given to the agent and the extent to which the agent is authorised to commit or bind the principal to some other legal relationship, whether he acted within his authority, or whether he has exceeded it. Thus, lawyers are typically concerned about the measure of delegated authority and the effect this has on third parties. To be sure, the nature of the principal-agent inter-parties relationship is also important. So there will be concern over whether or not the principal or agent has carried out his obligations, but these issues are usually resolved by applying the rules of contract and the specialist terms that may be expressed or implied into the agency relationship, taking into account the particular trade in which they are engaged. Agency cost, on the other hand, focuses on the nature of the
relationship between principal and agent, between principals and co-principals, and between agents and co-agents in the firm. Agency cost is the application of the agency construct to explain the relationship of members of a firm.

**Identifying Principals and Agents**

The first task in applying the agency construct to the intra-firm relationship is identifying the principal and the agents, and the nature of the relationship as determined by the agreement between them. As we are using for the purposes of this discussion the model of the simple firm, with an owner-manager and an employee, we note that the task of identifying principal and agent is straightforward: The proprietor is the principal and the employee is the agent; the contract of employment represents most of the agreement between them. In this case, the characteristic of principal is defined by proprietorship and the characteristic of agent is defined by employment. However, even in the simplest firm, the contract of employment cannot represent the totality of the agreement between the parties. Of necessity, there will be additional implied terms; variations to that contract by conduct, course of dealing, and even other expressed agreements; and modifications of it by various government regulations. Nevertheless, as a simple model this suffices. We can add one further degree of complexity to this model of the firm by introducing a silent partner who invests 50 percent of the value of the enterprise but who is not engaged in the management of the firm. It is not difficult to construct the relationship of principal and agent between the investor and his managing partner. In both cases, between the owner-manager and her employee and between the investor and his managing partner, the concept of the principal in
the agency relationship is constructed based on the ownership of property. It is also important to note that in this model, at different times the proprietor is both principal and agent.

If we accept that the characteristic of principal is determined by ownership in the enterprise, then a more complex firm, such as the large publicly listed limited liability company, the principals are the owners of the stock in the company. These principals are in a constant state of flux, as they are constantly changing. For the most part, principals in a large publicly listed limited liability company have nothing to do with the company or the employees of the company. Their interests in the company, both in law and in fact, are based on financial claims on the firm’s assets. In other words, the stockholders have contributed to the capital of the company and acquired a right to share in the value the company creates, but they have little other interest. For large public companies listed on large stock exchanges, a very few of these ‘principals’ can actually and effectively control the company but often real control passes to the senior executives.

In company law and agency law theories, the company itself is often cast in role of principal vis-à-vis the employees, who are themselves cast as agents, and that suffices for most of the problems involving third parties’ rights. However, that does not address the issue of the relationship of the agents with the stockholders. This representation of ownership as the basis of being the principal in the agency relationship is one of the basic principles of agency cost theory as originally developed by Jensen and Meckling.\textsuperscript{54} The

\textsuperscript{54} Jensen and Meckling (n 23); Jensen, \textit{A Theory of the Firm} (n 47); and Jensen, \textit{Foundations of Organisational Strategy} (n 47).
original theory acknowledges that the degree of ownership will be reduced over time, and indeed in the case of the large publicly listed limited liability company, this may be reduced to relatively infinitesimal amounts. However, in tying the concept of the principal completely with that of ownership in the enterprise the theory does not acknowledge that the character of principal can also change over time. The original theory sees the character of principal only in terms of a claim on the assets of the firm.

Although we may have difficulty identifying the principals of a large multimember firm, identifying who are the agents in such a firm is not quite as difficult. It is very easy to extrapolate from the model of the simple two or three-person firm to the large publicly listed limited liability company, and say that every employee is an agent. We usually think of employees as agents of the firm itself rather than agents of the owners, and this model works well for the most part in company law; but either construct is possible. The characteristics of agents do not necessarily change, as the firm gets large or small. As the character of principal is determined by ownership and the character of agent is determined by employment, agency cost theory easily accommodates the fact that some persons will be both principal and agents, as someone can be both an employee and a partial owner of a firm.

The construct of principal as owner and the agent as the employee presents some problems when applying traditional agency cost theory to public sector. Some agencies fit well in the model, and thus we can ignore for the time being agencies such as the new executive agencies and state-owned commercial enterprises that can be easily modelled on the simple firm. Other institutions of government present greater problems. For example, who are the
principals in a ministry and who are the agents? When the appellant in *R v Condell* 55 argued that a member of the Cabinet, as the government's principal policy maker, was not an agent within the meaning of s 13 of the Prevention of Corruption Law, 56 he was not only making an interesting legal argument. That argument also raised important questions of corruption theory.

We could characterise of all the people in the society as principals and all public servants as agents, but such a characterisation does not meaningfully describe the public service agency relationships. In this construct, principals are even more removed from a relationship with the agents than are the stockowners of a large listed company are removed from the employees of the company. We can think of a minister of government, a permanent secretary, and every employee of the state as public agents; but a reference to the Crown, the Queen, the People, the State, or the Commonwealth as principal is almost meaningless. When agency cost theory is applied to the privately owned firm, someone can be both an agent and a principal; but this dichotomy of personality does not readily translate to the public service unless we can find some other way to identify principals other than by ownership in the enterprise.

In law, the position of principal does not necessarily flow from a relationship of ownership. It can flow from that relationship, because ownership of an object confers rights and responsibilities over that object and the owner has the capacity to delegate those rights over and the responsibilities

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55 (1955) 6 JLR 397.

56 The Prevention of Corruption Law replicated in the Colony the Prevention of Corruption Act 1906 (UK) s 1.
for that object to someone else. However, the power to delegate can exist even when one is not an owner. Thus, the essential character of being a principal in an agency relationship is not necessarily derived from ownership, but rather the essential character comes from the authority in the principal to delegate the rights and responsibilities that he or she has to someone else, however he or she may have acquired those rights and responsibilities. Thus, an owner can delegate the responsibilities over an object to someone who in turn could sub-delegate to someone else. Whether the second delegation takes effect or not depends on the authority given to the first delegate. So we can say that in applying the agency cost theory to the public service, the principal is person who has authority by law, regulation, contract, or otherwise which she can delegate to an agent.

In Jensen and Meckling’s original view of agency cost, the relationship of agency was the function of agreement. This characterisation of agency cannot work for the public service, and it did not work very well in the original formulation without further qualification. The relationship of principal and agent is never completely independent of influence from third parties. Even in the simplest characterisation of our model of the firm, with an owner-manager and one employee, the employment contract that establishes the agency relation is not based solely on agreement. In no modern marketplace, no matter how closely it aspires to be of the capitalist free-market model, are factors and output of production exchanged solely based on unfettered agreement between the buyer and the seller. In contemporary times, this is especially true of labour. The nature of a modern marketplace is that it
operates consistent with a supervisory body of regulations. This is true whether you are selling wheat, employing labour, or lending money. Employment contracts, like many commercial contracts are subject to a wide range of obligations imposed by law and regulations. In any event, in the Jensen and Meckling model the term ‘contract’ or ‘agreement’ was not intended to carry the same meaning as contract in law, in the same way that the term agency in finance theory does not necessary carry the same meaning as it does in law.

Harmonising Principal-Agent Interests
The fundamental principle is that agents can and will behave opportunistically and the fact that the agent knows more about the circumstances of the enterprise facilitates that behaviour. This is not to say that agents are necessarily immoral, or that they must behave that way. We can assume that most people in a situation of agency will not behave opportunistically and not all agents will act against their employer’s interests; but many can and some do. When the employer is not in a position to know how well an employee is working, an employee may work less hard. Although not every employee will, some employees will use this opportunity to soldier on the job when there is no risk of being caught. The problem of agency cannot be characterised only in terms of a conflict of interests or a moral dilemma, but it must also be seen as a problem of moral hazard. Thus, the operative question in the agent's mind will be whether there will be adverse consequences following the prohibited behaviour.

If we use our slightly more complex model of the firm with an owner-manager, a fifty percent silent partner who is not involved in the management
of the firm, and one employee, we will see that there are similar circumstances for opportunistic behaviour between all the parties. The owner-manager will have to make decisions as to how to apply the resources of the firm. For example, a particular expenditure may increase the welfare of the manager, such as a larger expense account. If the expenditure is not made, then the firm will accrue greater savings and greater profits or value. The owner-manager must now decide whether she should incur the expenditure, where she will be the principal beneficiary; or alternatively, choose not to incur the additional expenditure on the expense accounts and instead share the increased profit equally with her partner. This is not necessarily a moral dilemma, because the owner-manager can easily resolve the questions of the morally right and wrong conduct, but it is certainly a position where the owner-manager is in a position of a conflict of interest with her partner. Not every owner-manager will use the opportunity to advance her welfare to the disadvantage of her partner, but in these circumstances owner-managers can and that opportunity is facilitated by the asymmetry of information between herself and her partner.

As the principal is aware that the agent may pursue his own welfare to the disadvantage of the firm, because the principal knows less of the agents circumstances than the agent does, and because the agent can pursue his own welfare without the risk of adverse consequences, the principal needs to establish procedures that will discourage or avoid that divergence. Thus, the principal will establish, or have established for her, greater oversight systems, more rigorous inspections, more effective supervision, more detailed audits, whistle-blowing schemes that will encourage other employees to report on deviant behaviour, and in those cases where the agent embarks on illegal
activity, thorough investigations and prosecutions to discourage this and other agents.

Total control and oversight by the principal is theoretically possible but not practicable. A business where the agent is so completely controlled as to have no opportunities for him to wrongfully or fraudulently pursue his own interest would not function effectively. The principal will have to decide how much cost she is willing to incur to supervise the agent, and how much risk of the agent depreciating the value of the firm that she is willing to accept. Similarly, in addition to devices to discourage divergence of interest between the principal and the agent, the principal will decide what incentives should be put in place to encourage the agent to align his interest with that of the principal. Therefore, the principal will have to introduce reward schemes, such as increased salaries, bonuses and cash rewards for better work, and gain sharing schemes based on the increased value or profitability of the enterprise. Such incentive and disincentive schemes add a burden to the enterprise. They must be paid for, and they can only be supported by the value creating functions of the enterprise. In other words, the enterprise is worth less than otherwise because it has to incur the additional cost of aligning the interest of the agent with that of the principal.

*Investment Equilibrium Function in the Public Sector*

The principal-agency relationship carries the costs of discouraging divergence of interests, the costs of encouraging convergence of interest, and the cost of failure in either event. A similar problem arises between a silent partner and the owner-manager. Conduct of the employee-agent that reduces the value of the firm, also reduces the return on the investment of the silent partner.
Notwithstanding the fact that the agent-employee can embark on a course of conduct inimical to the silent partner’s interests, the silent partner has given over the responsibility for supervision to the owner-manager. The relationship would not be necessarily different if the silent partner were an active partner. Between partners, as between co-investors, there is a tendency to free ride. In pursuit of his or her welfare, each partner will try to expend as little as possible to get as much as possible. Each one expects the other to supervise the agent effectively. Because neither is supervising the agent completely, so the agent’s range for moral hazard expands. Therefore, the agency relationship is a cost to the partner-principal as well, in that the agent may pursue a course of conduct that depreciates the partner’s investment in the firm.

In our theory of the firm, if the owner-principal is unhappy with her investment, for example if she believes that the costs of the agency relationship are too great, she can discount her interest to some other investor. The same is true of her silent partner. If he is dissatisfied with the cost of the agency relationship then he too can discount his interest to someone else. In fact, when he first invested in the firm he would have factored the costs of the agency relationship into his valuation of his investment and this would be true for every subsequent investor. This model works well when it is extrapolated to the large publicly listed limited liability company. Any stockholder who is unhappy with the value of his stock or the return on his investment in the company consequent of the large salaries and extensive perquisites that its executives apply in rewarding themselves, can pass on his stocks or shares to someone else who will pay for them what she thinks they are worth. The market will always value the shares; and all other things being equal, a
company with lower agency costs will attract a higher premium for its stocks and shares than another company with higher agency cost will. In the for-profit firms, agency cost need not be a great burden, as investors in such firms will discount their investments to accommodate the agency cost burden that those firms carry. Firms with high agency cost will become relatively unattractive to investors in comparison to firms with lower agency cost. Firms that are burdened with high agency cost must find ways to increase its value creation functions and thus attract investors. Thus, we expect the financial markets to search out equilibrium in the sale and purchase of the ownership of firms.

This is not possible for agencies in the public sector space, as this capacity to discount does not work well for agencies in the public sector domain. The state cannot easily or readily, through its agents, discount its holdings in a public services agency if that agency is over-encumbered by agency cost; and even if it could, it would not readily wish to do so. It is true that in the new public management, governments sometimes remove themselves from the delivery of some public services and instead buy those services from a competitive marketplace. However, even where governments are deeply committed to the new public management, it is neither likely nor desirable that governments will divest themselves of a wide range of public agencies. The investment equilibrium function that the market provides to the owners of for-profit enterprises is not generally available to the state. Thus, the burden of agency cost falls more heavily on government agencies.

**Applying the Reconstructed Agency Cost Approach**

The application of agency cost theory to the public sector presents some
challenges, and a need to reconsider some of the assumptions. In the first place, when applying agency cost to the public sector it is necessary to abandon the use of the word ‘profit’ to describe the utility that the state will seek to maximise. It is more appropriate to suggest that organisations seek to maximise value, which may or may not be represented by profit, and thus the terms ‘value maximisation’ or ‘welfare maximisation’ might be better applied to both public sector agencies and private sector firms.

Agency law is principally concerned with the relationship between the principal and third parties to the agency relationship. Agency cost theory on the other hand has been principally concerned with the relationship between those identified as principals, defined usually as the investors and owners of capital, and those identified as agents, usually defined as the executives, managers, and employees of the organisation. In applying agency cost theory to the modern public service, a major concern must be the relationship between the agents themselves. For example, in relationship to the Crown, a minister is clearly an agent; but how should the relationship between a minister and permanent secretary, or between a permanent secretary and director in her ministry, be characterised?57

Understanding this distinction between principal and agent in the anticorruption project is especially important, if only because anticorruption legislation typically views corruption in agency terms. This is demonstrated by the case of R v Condell.58 In 1955, the appellant attempted to bribe a

57 Some economic models identify three players—the principal, the supervisor, and the agent: See, eg, Eskeland and Thiele (n 50).
58 (1955) 6 JLR 397.
government minister in Jamaica by offering to pay a sum of money to the ruling political party. In return, the minister should secure the purchase by the government of seven locomotive engines manufactured in the US. The appellant was charged and convicted for three counts on the indictment—First, that he attempted to bribe the minister by offering him a payment to influence the conduct in securing the purchase by the government of the locomotive engines. Second, that he corruptly offered the minister, ‘... being a person serving under the Crown and an agent within the meaning of section 13 of the Prevention of Corruption Law,’ a consideration consisting of a contribution to the funds of his party as an inducement for doing an act in relation to the affairs of the principal. Third, and finally, that he corruptly offered to the minister, ‘... an agent within the meaning of section 13 of the Prevention of Corruption Law,’ a consideration as an inducement to show him a favour ‘... in relation to the affairs of the principal.’ It may be a matter of debate whether these counts disclosed separate offences, but that issue was apparently not raised. The appellant offered a far more elegant argument. There seem to have been little question that Condell had in fact offered the bribe to the minister, and his appeal focussed on whether it was possible to bribe a minister when he exercised his functions as a member of the Cabinet. Condell argued that the minister occupied two positions. He was both a minister and in addition, under the then colonial administration, he was a member of the Executive Council. The Minister had described his role in these terms: ‘As a Member of
Executive Council I help in deciding Government policy. As Minister I am responsible for administration of certain Government Departments.  

The Executive Council under the colonial Constitution was the colonial equivalent of the Cabinet. It advised the Governor. As such, it was the principal instrument of policy. The appellant argued that its members were principals, and not agents. He had approached the minister in his capacity as a member of the Executive Council, as a principal, because it was in that capacity that he was in a position to assist in deciding the Government's policy. As such, the minister was not an agent within the meaning of the section creating the offence. It is an ingenious argument, and one that warrants more than the short shrift given to it by the Court of Appeal. The Court of Appeal’s response was that the minister was someone serving under the Crown. The corrupt offer to him was an offer to a person serving under the Crown. It did not matter in what capacity he was serving.

In effect, in the public service, all are agents and each one is engaged in welfare maximisation. Each public agent is representing the interests of an amorphous or virtual principal. The terms, ‘principal agents’ or ‘primary agents’ are confusing and unnecessary. Nevertheless, some agents are more important than others are to the organisation; and some are superior in the responsibility that they exercise over their colleagues. Applying the logic of agency cost theory, the success of anticorruption project requires that the interests of all public agents, but most especially those of the more important

59 Ibid 399.
60 Cf Joint Committee on the Draft Corruption Bill, ‘Draft Corruption Bill: Report and Evidence’ HL and HC (2002-03) [103], suggesting that UK members of parliament were not agents within the meaning of the Prevention of Corruption Act 1906.
agents, be closely aligned with that of the state. This presents two important problems—first, identifying and communicating the interests of the state; and second, ensuring that while the interests of the public agents are consistent with those of the state, the agents’ interest are not confused as being the same as the state’s interests. This problem is not simply solved by saying that it is in the interest of the state to suppress corruption.

The firm is a value-creating enterprise consisting of principals and agents joined together by complex arrangements of agreements, contracts, rules and regulations. Legislation and regulation may establish additional obligations between principals and agents, and these will moderate the obligations established by the contract between the parties. The agreement establishing the agency must be certain. It must not allow for too much discretion in the hands of either the principal or the agent, as there is a proven correlation between discretionary behaviour and corruption. When agents are given the opportunity to redefine the rules of the agency, they will redefine to their advantage.

Contemporary approaches to agency cost theory emphasise the convergence of interests, and the argument is that if the interests of the agent and the principal converge then the agent is less likely to pursue his own welfare to the disadvantage of the principal. This is the foundation of many of the profit sharing, gain sharing, and employee stock options schemes that have characterised executive salaries in recent years. It is also the basis of higher public service salaries. The assumption is that the higher the public servant’s
salary is, then the less likely he will be corrupt.61 This does not necessarily follow,62 and in this regard the theory has not worked particularly well. Excessively high salaries and stock options given to senior executive officers have become associated with more greed, fraud, corruption, poor governance, and increased agency costs.

There is good reason why this should be so. If we reflect on our simple model of the firm, with an owner-manager, a non-managing silent partner, and an employee, we will see that the sharing in the ownership of the firm will not necessarily align more closely the interest of the owner-manager with those of the silent partner. Let us say that in our model, the firm earns £100 after it has paid all its expenses including the employee’s wages. The owner-manager, with whom the decision-making functions lies, can apply this to reward herself or to be shared as profit between herself and the other owner. In our model of the firm, the silent partner had a 50 percent share in the firm so if all the income were applied to be shared as profit between the owners then the silent partner and the owner-manager would each get £50. On the other hand, if all the earnings were applied to reward the owner-manager, she would get £100 and the partner would get nothing. If we change the model so that the silent partner owns on 40 percent of the firm and the owner-manager owns 60 percent, it is still to the advantage of the owner-manager to apply all the earnings to executive salaries and other benefits, where she will get £100 rather than £60 when the earnings are shared between the owners. If there

61 P Bardhan, ‘Corruption and Development: A Review of Issues’ (1997) 35(3) J Econ Literature 1320, 1329, certainly seems to have adopted this view.

were a cap as to what the firm would pay the owner-manager then, with her increasing shareholding there would be a point when it would be to the advantage of the manager to take more of her earnings through her shareholding, but she would still pay herself first to the maximum of the cap. In allocating the profits, the owner-manager will also take into account the different taxations rates, if any, for income from employment, on the one hand, and income from investments or company dividends, on the other. The important thing to note is that the owner-manager will seek to maximise her welfare, which means that she would seek first to reward herself and then share with the other owners. So increasing an agent’s gain share does not necessarily result in a coincidence of her interests with those of the principal. There is the argument that an agent may become so psychological satiated by the rewards she has secured for herself that she will freely share anything above that with the principals. In other words, there is a limit to the agent’s imperative to maximise welfare. That is, the agent will maximise welfare only to the point that she is satisfied. This means that the agent pursues welfare satisfaction and not welfare maximisation. Economists do not readily subscribe to welfare satisfaction. In the economic theory of incentives, more is always better. Welfare maximisation rather than welfare satisfaction is the dominant imperative; but even if the reverse were true, it still means that the agent will seek first to maximise welfare to the point of her satisfaction before she seeks to share. Merely giving someone more of the interests of the principal does not necessarily result in a loss in her of the characteristics of agent.
So gain sharing, including increasing the agent’s share in the ownership of the firm, does not necessarily result in coincidence of the interests of principals and agents, and therefore will not reduce the problems of agency. This is demonstrated both by our model of the firm and by the recent experiences of large publicly listed companies, especially in the US. If gain sharing is not a successful strategy in addressing agency problems in the private sector, there is there no reason to believe that it will have better results in the public sector. It is quite common for analysts of public sector corruption to associate high levels of corruption with low wages and salaries and for them to prescribe higher salaries, and even gain sharing arrangements, as one way of addressing the problem. It is reasonable to expect that this approach will have no greater success in the public sector than it has had in the private sector. There are public officials that are comparatively poorly paid, in comparison with the others in the markets from which public sector labour is selected, but who are not regarded as corrupt. In addition, the welfare-seeking imperative can also destroy some of the objectives of gain sharing. For example, to improve its revenue collection activities the Revenue may reward its assessors by the number of assessments they make and the tax collectors by the amount of taxes that they collect. In maximising their welfare, the assessors may issue assessments that the tax collectors cannot enforce and on which they cannot collect. This is not to disparage the broad utility of gain sharing arrangements. The direct reward of an employee for doing exactly the activity that an agency wants to achieve is a good thing, and we should expect to see more gain sharing arrangements in both private sector firms and public sector agencies. However, it is a mistake to believe that merely increasing an
agent's rewards, without more, will necessarily avoid corruption and the other problems of the agency relationship.\textsuperscript{63}

It is reasonable to assume that if there were no conflicts of interest between principals and agents, then both would be united in pursing their joint objectives. Institutional arrangements, rewards, provisions for joint ownership, and gain sharing arrangements are all designed to achieve those ends. However, no scheme can be so successful as to completely achieve a convergence of interests, and therefore it is still necessary to discourage the agent from pursing his own interest to the disadvantage of the principal. The criminal law is based on this premise: if you deviate from the desired conduct then you will be punished. This is the assumption on which current anti-bribery and anticorruption laws should be based.

Within the enterprise, a principal will establish schemes for the supervision of the agent, for inspection of his conduct, for the audit of his work, and for the investigation into his activities. More recently, we are seeing the introduction, administratively in some cases and by legislation in others, of whistle blowing arrangements design to encourage agents to bring the improprieties of their colleagues to public attention and to protect them, the whistle blowers, when they do so. These schemes are all to discourage a divergence between the interests of the agent and those of the principal. They are based on the assumption that if the supervision, inspection, audit, or investigation brings to light the undesired behaviour of the agent then some

adverse consequence will follow. In the case of fraud, bribery, or corruption then the adverse consequence will be prosecution, conviction, and punishment. It is ironical that anti-divergence schemes also create further opportunities for corruption, especially in the public sector. An agent who is appointed to investigate, audit, or monitor others may be induced by his corrupt colleagues not to do so. ⁶⁴ The problem may be further compounded when multiple regulatory or supervisory agencies are established to cover the same field. ⁶⁵ As in the cases of convergence schemes, anti-divergence schemes have not been completely successful in resolving agency problems, and certainly have not solved the problem of corruption. The lessons are very clear that the provisions for anti-corruption schemes are not enough. Even in countries where public service agents are generally regarded as being very corrupt, there will be legislation outlawing corruption and providing for severe punishment for corrupt acts.

In applying the agency cost approach to corruption, we note that the agent has an imperative to maximise his own welfare. Moreover, as the agent knows more about the circumstances of the enterprise than the principal does, the agent is at risk of pursuing opportunistic behaviour, such as shirking work, consuming perquisites, or just sheer outright corruption which advances his welfare to the disadvantage of the principal. An employer may seek to avoid or minimise the problems by acquiring better information, introducing incentives to converge the interests of the parties, and providing disincentives


⁶⁵ See Bardhan (n 61) 1325.
to discourage a divergence of interests. These have been the typical solutions. We now know, however, that the principal needs to reduce the risk of moral hazard.

The potential for the moral hazard will always be a possibility. All agents are welfare seeking, and agents will always know more than principals will. In every agency relationship, the principal will have to trade-off costs, on the one hand, with better information, incentives, gain sharing, oversight, auditing, investigation, and punishment on the other. When applied to the issue of corruption, the question will be—what costs is a state willing to incur to achieve low corruption or corruption-free public service? In agency cost terms, an anticorruption environment is something a state must pay for. In pursuing the anticorruption project, it is important in every agency relationship to identify the welfare that it is desired should be maximised. It is important also to identify ways to avoid asymmetry of information, implement schemes that will promote a convergence of interests, and decide how best to avoid a divergence of interest between the principal and the agents.

66 Eskeland and Thiele (n 50).
CHAPTER 3

CORRUPTION KNOWLEDGE BASE

In his review of public administration in the English speaking Caribbean, Mills, at that time the acknowledged doyen of Caribbean public administration scholarship, described ‘... the significant increased in the incidence of unethical conduct and political and bureaucratic corruption ...’ as a subject of ‘... considerable concern.’\(^1\) Mills attributed this increase in part, at least in the case of Jamaica, to the highly competitive two-party political system.\(^2\) The issue of corruption has certainly become one of the principal contested issues in Commonwealth Caribbean elections, and it is plausible that there is a causal relationship between allegations of corruption against a government and its subsequent performance at the polls. Very few Commonwealth Caribbean governments have gone to elections in recent years and have not had to defend their records on combating corruption, and few governments have come into power and have not indicated early that tackling corruption will be high on their policy agenda. On a change of government, an anticorruption housecleaning is generally expected, even if one is not always forthcoming. In addition, concerns with corruption also define the economic landscape. Institutional failures in the private sector, the development of Ponzi schemes, and other fraudulent investment operations are often attributed to both corrupt practices and weak governance, and these place greater demand on


\(^2\) Ibid.
governments in their roles as regulators to establish structures and regimes that will provide for better oversight.\(^3\)

Increasingly, grantors of international aid focus on governance issues including especially the capacity of the state to combat corrupt practices. In their various international postures, Commonwealth Caribbean states are signing on to new anticorruption programmes.\(^4\) Most importantly, Commonwealth Caribbean peoples have put the anticorruption question on the international as well as national agendas. Notwithstanding the overwhelming interest in the subject, the pool of relevant Commonwealth Caribbean scholarship is very shallow. There is therefore need for further research on the subject that will generate new information and a new understanding of the circumstances of corruption, especially in the public service. In the meantime, it is necessary to extrapolate from extra-regional literature to achieve a better understanding of the Commonwealth Caribbean situation.

**Why Corruption Exist**

In addition to the assumptions mentioned in Chapter 1, many explanations have been given in the literature for the persistence of corruption. These include inadequate governmental initiatives, inappropriate political and economic incentives, lack of will in the political directorate, and the lack of


\(^4\) See, eg, the Inter-American Convention Against Corruption. All the independent states of the Commonwealth Caribbean have signed on to the Inter-American convention, only a few of these with any reservation.
adequate political competition. These are but a few of the possible explanations, and many of these explanations are relevant to the Commonwealth Caribbean. Most would agree that corruption makes for dysfunctional administrative systems, but it also seems generally true that corruption does not completely prevail even in countries believed to be very corrupt. Indeed, no society is completely corrupt. Of course, we are speaking of states, such as those in the Commonwealth Caribbean, that have made significant attempts to institute and sustain organised public administration. In this discussion of corruption, we therefore cannot include what Rose-Ackerman calls the ‘... purely kleptocratic or “vampire” states,’ where there is no distinction between state management and private affairs and where the dominant oligarchs capture as much of the counties resources as they wish. While that model does not apply to the Commonwealth Caribbean, these are nonetheless vulnerable states. So while Commonwealth Caribbean states are not at risk from complete state capture by organised crime or criminal elements, their public bureaucracies are at risk from corrupt influence.


6 The explanation of inadequate political competition would not apply to Commonwealth Caribbean societies. In addition to receiving the Westminster Export Model of constitutional government, these countries have embraced the multiparty political system. No Commonwealth Caribbean government is safe from political competition.


8 In the sense that this term is understood by JS Hellman and others, ‘Measuring Governance...
It may well be true, as S Sullivan has argued, that:

Poverty cannot be studied without addressing corruption and the political system that distributes society’s surplus wealth, and both categories remain empty and static without addressing banality, the unhealthy and commodified leisure culture under capitalism that distracts rich and poor alike from realizing their freedom.9

On the other hand, it does not necessarily follow that the converse is always true—that corruption cannot be studied without addressing poverty; and no attempt is being made in this study to examine corruption in the Commonwealth Caribbean from that perspective. Nevertheless, corruption is often discussed in developmental terms, with greater corruption associated with lower levels of development. Generally, this is what the data from Transparency International’s corruption perception indices (CPIs) suggest.10 If these indices accurately represent of the existing data, and it is submitted that the methodology for collecting and analysing the data for those indices are suspect,11 they clearly show a strong linear correlation between development and corruption. The CPIs suggest that rich countries are less corrupt and poor countries are more corrupt. The CPIs, however, do not demonstrate the nature of relationship. We are still left to address this question—is it the presence of


10 TI CPI 2006. Similar results are reported on the CPI 2007.

corruption that impedes economic development, or is it the existence of higher
economic development that reduces corruption?

Moreover, we must conclude that notwithstanding the data from
Transparency International, it is not necessarily true that there is always a
linear connection between corruption and economic development. Perhaps the better view is—

Societies with relatively same levels of development, judicial
machinery, and politico-legal structures can exhibit varying
degrees of ‘illegal (pre)occupation’ such as corruption, tax
evasion, and other regulatory non-compliance.

Many have offered this or similar arguments, and it is perhaps also
significant that even though the Transparency International indexes show a
general worldwide correlation between economic development and corruption,
they do not show a similar correlation among Commonwealth Caribbean
states. Only seven Commonwealth Caribbean territories were included in the
2006 Transparency International CPI. In ranking the states in the order of
those perceived to be the least corrupt to those perceived to be the most
corrupt, the Commonwealth Caribbean states included in the 2006 index are
ranked by Transparency International as follows—Barbados, Dominica,
Jamaica, Belize, Grenada, Trinidad and Tobago, and Guyana. Yet this order

does not coincide with either the gross or the per capita domestic of the several territories.\textsuperscript{15} A similar position exists for the 2007 and 2008 Indices.\textsuperscript{16}

Corruption has also been associated with the level of development of political systems, with high levels of political development associated with low levels of corruption.\textsuperscript{17} Rose-Ackerman is one of the principal proponents of this view,\textsuperscript{18} but she is not the only one. Mishra, among others, also identify inadequate political competition as one of the causes of corruption.\textsuperscript{19} In their opinion, the protection of civil liberties, democratic elections, and transparency in government are defences to corruption, while nondemocratic states are more susceptible to corrupt influences.\textsuperscript{20} This assumed correlation between corruption and political development is an oversimplification. There is certainly an association between weakly developed democratic institutions and corruption; but some highly competitive political systems are also corrupt,\textsuperscript{21} and this fact has been evident for a long time.\textsuperscript{22} Even in societies where democratic political institutions are highly developed, some types of corruption can become institutionalised. This is especially true where the

\textsuperscript{15} See International Monetary Fund, \textit{World Economic Outlook Database}, April 2007 Edition. The IMF ranks these counties Gross domestic product per capita, from highest to lowest, as follows: Trinidad & Tobago, Barbados, Grenada, Dominica, Belize, Jamaica, and Guyana.


\textsuperscript{17} Mills (n 1) takes the opposite view on political corruption in the Caribbean, attributing higher levels of corruption to higher levels of political competition.

\textsuperscript{18} S Rose-Ackerman, ‘Political Corruption and Democratic Structures’ in AK Jain (ed) \textit{The Political Economy of Corruption} (Rutledge, New York 2001) 35.

\textsuperscript{19} Mishra (n 5) 350.

\textsuperscript{20} Rose-Ackerman (n 18).

\textsuperscript{21} See, generally, Jain (n 18).

\textsuperscript{22} RC Brooks, \textit{Corruption in American Politics and Life} (Dodd Mead, New York 1910), discussing corruption in the United States a hundred years ago. See also Mills (n 1).
corrupt acts are associated with promoting the economic interests of the state.\textsuperscript{23} Thus, we have examples of ministers of trade and bank regulators ignoring the existence of bribes and corrupt foreign payments ostensibly because these promote exports and encourage the economic competitiveness of the country.\textsuperscript{24} More recently, and particularly in the countries of the Americas, public sector bureaucracies have been put at risk by the corrupt influence of the international drug trade. One point of view holds that the institutions of the state in the Americas, such as the police, the customs, and the judiciary, may not be able to resist the corrupt influence of the drug cartels.\textsuperscript{25}

**Expectations of Corruption Become Self-fulfilling**

The expectation of corruption in a society is a multiplier factor—if people expect others to be corrupt, then increasingly more will be.\textsuperscript{26} In addition, the


more pervasive is corruption the more persistent it is likely to be.\textsuperscript{27} These phenomena are not fully understood.\textsuperscript{28} Part of the problem lies in the regrettable looseness in how we use the term corruption. The term can be applied easily to cover any example of misadministration. One understands that there is good political mileage to be achieved by taking the ‘anticorruption’ stance; but in characterising every failure in administration or governance as corrupt, we allow the more offensive examples of corrupt behaviour to be hidden among a wide range of examples of poor ethics or weak governance.

In addition, by not isolating and dealing with the worst types of maladministration, we may also be achieving something far worse. By loosely describing all the institutions and managers of the public service as corrupt, we may also be fostering a culture that they must be. Ghoshal, in his seminal article published posthumously in the \textit{Academy of Management Learning and Education}, cautioned against the double hermeneutics that characterise the link between theory and practice in social domains. Ghoshal argued:

\begin{quote}
A theory that assumes that people can behave opportunistically and draws its conclusions for managing people based on that assumption can induce managerial actions that are likely to enhance opportunistic behaviour among people.\textsuperscript{29}
\end{quote}

That public services institutions in Commonwealth Caribbean jurisdictions are corrupt is asserted with such confidence and so often, sometimes irrespective of the evidence, puts us in danger that this supposition will begin to inspire the

\textsuperscript{27} See Mishra (n 5) 350.

\textsuperscript{28} Ibid.

practice.

**Corruption in Non-Caribbean Literature**

An examination of the literature on corruption is perhaps best approached as a meta-study, and it is intended here to provide a conspectus of the scholarly commentary on corruption. This review will look at corruption and the public service and try to capture the universe of available studies on corruption in general and corruption in the Commonwealth Caribbean in particular.\(^{30}\) The focus here will be on what scholars think of the corruption problem and its possible solutions.

While there are some common themes in the contemporary literature, the documented approaches are still wide-ranging and quite varied. A rudimentary taxonomy would include discussions of corruption as crimes, including the international approach to crime; public sector management and change; governance and ethics; elimination and control of corruption; and economic theory. Bishop, Connors and Sampford in their 2003 collection, promote a multidisciplinary approach by looking at management organisation in the public sector from the perspective of law, ethics and governance;\(^{31}\) but a significant proportion of the literature deals with corruption from the criminal justice perspective.\(^{32}\) For example, Branon and Fauvre reviewed the law of

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\(^{31}\) Bishop, Connors, and Sampford (n 26).

Federal criminal conflict of interest in the United States;\textsuperscript{33} Letsika\textsuperscript{34} examined anticorruption legislation and the powers of the anticorruption directorate in Lesotho and questioned that country’s capacity to create a ‘corruption–free zone’; and Polinskya and Shavell approached the subject from the impact it has on law enforcement.\textsuperscript{35} Ravitz and Sanservino reviewed the law of federal criminal conflict of interest in the United States,\textsuperscript{36} while Dyer and Meitl, approached the subject from the perspective of the criminal justice system.\textsuperscript{37} Increasingly, especially from the perspective of the Americas, scholars are turning their attention to the transnational effects of crime. This is understandable, because the inter-American states were the first to agree to an international anticorruption treaty.\textsuperscript{38}

There is a line of scholarship, perhaps beginning in 1999 with Zagaris and Lakhani,\textsuperscript{39} which increasing look to international law, and more specifically to international anticorruption conventions, as the solution to the problems of corruption. Carr's voice is probably the most prominent in this


\footnotesize{38} Inter-American Convention Against Corruption, adopted March 29, 1996, OAS B-58, art VI (entered into force 6 March 1997).

Recently she opined, 'Fighting corruption is no longer a localised phenomenon but an international one, and the aim is to eliminate poverty and improve the quality of life of millions around the world,' and this position has attracted broad support. Zagaris and Lakhani, for example, identified the emergence of an international enforcement regime on transnational corruption, and noted the increased momentum in international and national laws. Block later argued that what he called ‘transnational organised crime’ and drug trafficking had emerged as threats to national and international security, as they were overwhelming the integrity of governments and undermining national economies. Block, Carr, and Zagaris and Lakhani, have touched on a theme that seems to be driving much of the anticorruption reform process, including it seems what is taking place in Commonwealth Caribbean states: That is, international law and institutions are providing much-needed solutions to underdeveloped, weakened, and ill-equipped states. Carr, however, has also added a word of caution. She points out that The adoption and quick ratification of the conventions by a great number of states are insufficient to curb the undesirable practice of corruption. She argues further that the several conventions covering the same field creates noise rather than provide

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41 Carr, ‘Corruption, the Southern African Development Community Anti-corruption Protocol and the principal-agent-client model’ ibid 149.


43 Carr, ‘Fighting Corruption Through Regional and International Conventions’ (n 14) 39.
direction in the anticorruption project. As she puts it, 'The presence of this number of conventions is bound to leave states wondering which convention to ratify and implement or alternatively which model to base their own legislation on.'

Notwithstanding the increasing importance of the international solutions, this thesis is based on a fundamentally different premise and that is that success in the anticorruption project requires essentially national solutions. The international theme should be examined critically, because it is not immediately clear that the international influence on the Commonwealth Caribbean is having a positive effect. Nevertheless, when we examine Commonwealth Caribbean solutions, we will see the significant impact international law is having.

Other contemporary scholars have addressed the issues of public sector corruption from the perspective of governance and ethics; and these scholars sometimes argue, and governments often accept, that improving ethics in the public sector will reduce corruption. In the first chapter of this thesis, we noted that political leaders especially find that approach attractive.

Maletz and Herbel have pointed out, however, that the enforcement of ethics in government may also impose significant social costs to the ethics project. This may be as simple as discouraging from public service competent people who do not wish to subject themselves to the financial reporting and scrutiny requirements that are becoming more and more popular. The instruction drawn from Maletz and Herbel’s work, which is supported by

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44 Carr, 'Corruption, legal solutions and limits of law' (n 14) 237.

other scholars, is that the anticorruption project is not without negative consequences and often it will involve a trade-off, choosing between conflicting ideals.

The new public policy initiatives do not always achieve the necessary balance between the conflicting interests. For example, in reporting on its progress in implementing the Inter-American treaty, the Government of Trinidad and Tobago indicated its commitment to ‘… to establish, maintain and strengthen systems for registration of income, assets and liabilities of persons exercising public functions.’

Indeed, Trinidad has gone further than any other Commonwealth Caribbean state, by enshrining its integrity commission in its constitution. Yet in making this report, the Government did not refer at all to the concerns, already discussed publicly in Trinidad and Tobago, that the existing provisions could have adverse effects on the government’s ability to attract competent people to sit on public boards.

The anticorruption project presents universal challenges. Indeed, in different works, Hors and later Carr disabuse their audiences of the misconception that corruption is a feature of underdevelopment while

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47 The Constitution of Trinidad and Tobago, s 138, provides that there shall be an Integrity Commission charged with receiving declarations of the assets, liabilities and income of persons in public life and the supervision and monitoring of standards of ethical conduct. Section 139 provides that Parliament may make provision for the procedure with which the Commission is to perform its functions.

48 Hors (n 9).

49 Carr (n 5). See also Carr and Lewis (n 40) 53; and Carr, ‘Fighting Corruption Through Regional and International Conventions’ (n 14) 3.
anticorruption strategies are the monopoly of developed countries, as widespread as that perception may be. Their approach contradicts the data in Transparency International’s Corruption Perception Indexes, which suggest otherwise.\(^{50}\) However, while Hors asserts that significant efforts are being made to reduce corruption in developing countries, she also acknowledges that those initiatives have not been particularly successful. Indeed, Hors’ opinion is that it is not for want of trying but little progress is being made to reduce corruption in developing countries.\(^{51}\) The literature on the subject generally supports Hors, in that it shows that even where there is significant commitment to reducing corruption a fundamental problem still remains in deciding what approach to take. Even well established experts on anticorruption reform acknowledge that there is no single method for stamping out public sector corruption.\(^{52}\)

A range of studies has shown that different methods have had varying results, and many of the common assumptions have not been vindicated. For example, Fjeldstad’s study in 2003 on Tanzania’s experiences in reforming its tax administration services show that merely paying higher salaries did not reduce corrupt practices.\(^{53}\) Other studies support this contention. For example, Besley and McLaren developed a model to evaluate three alternative payment

\(^{50}\) It must be noted that contrary to the general implication, Transparency International’s limited data on the Commonwealth Caribbean do not support the correlation between underdevelopment and corruption.

\(^{51}\) See Hors (n 9); cf Sullivan (n 9).

\(^{52}\) See, eg, J Bertok, ‘Getting the Public Ethics Right’ (2000) a.220 OECD Observer 42; and Carr (n 5).

\(^{53}\) OH Fjeldstad, ‘Fighting fiscal corruption: lessons from the Tanzania Revenue Authority’ (2003) 23 (2) Pub Admin & Dev 165. Carr (n 5) 201, cautions against drawing solid conclusions from the range of corruption studies, including those advancing the hypothesis that lower wages in the public sector influences corruption.
schemes for tax inspectors in the context of a corrupt public service, and described the schemes as follows:

First, one could pay the same wage that a tax inspector could earn elsewhere—his reservation wage. Second, one could pay a wage which solves the moral hazard problem, i.e., deters bribery. This we call an efficiency wage, by analogy with recent models examined in macroeconomics. Third, the government could pay a wage below the reservation wage, at which only the dishonest become tax inspectors—the capitulation wage.\textsuperscript{54}

They conclude that in most circumstances the government is better off paying the ‘reservation wage’, where nobody behaves honestly, and instead rely on strong monitoring to secure the revenue.\textsuperscript{55} Even in situations where the government paid the ‘efficiency wage’, which is the wage greater than what the employee could earn elsewhere, the model still requires strong monitoring for its success.\textsuperscript{56} The model suggests that the payment of a higher wage does not reduce corruption, but monitoring and oversight will.\textsuperscript{57}

The findings of Fjeldstad, as well as those of Besley and McLaren, challenge the commonly held assumption that low or inadequate wages cause corruption in the public sector and that merely increasing public sector wages is an effective way to reduce corruption.\textsuperscript{58} One or two studies by themselves

\textsuperscript{55} Ibid, 137.
\textsuperscript{56} Ibid.
\textsuperscript{58} See Besley and McLaren (n 54) 120, and the other authorities discussed there. Besley and McLaren, at 135, also suggest that the situation in Malawi, where relatively poorly paid civil servants are believed to be comparatively less corrupt, also contradicts this commonly held assumption. Nevertheless, the assumption is still widely held that ‘adequate’ public service wages is still widely held. See, for example, the obligation created on the contracting parties under the United Nations Convention against Corruption,
may not be sufficient to cause one to abandon a theory, but the assumption that developing countries can buy themselves out of corruption by creating new elites of highly paid public agents requires reconstruction. Unfortunately, the view that higher public sector salaries will reduce public sector corruption already has currency in the region.\textsuperscript{59}

In addition to the social costs that Maletz and Herbel identified above, there are also financial and administrative costs associated with the anticorruption project. Sarte associates this additional oversight costs with reduced public sector monitoring.\textsuperscript{60} Deininger and Mpuga,\textsuperscript{61} also agree that greater accountability and transparency will reduce the incidence of corruption, but they go on to argue that governments are sometimes unable or unwilling to add to the national budgets the additional financial and administrative burden associated with the creation of new anticorruption monitoring and enforcement agencies. This creates a dilemma, because both of the following hypotheses are plausible—first, greater accountability reduces corruption; and second, because of the high cost of introducing and sustaining monitoring mechanisms, accountability schemes are often not introduced, adequately funded or supported and corruption is thus sustained. The literature makes it clear that a government cannot reduce corruption without both the willingness as well as the ability to do so, and thus Commonwealth Caribbean


\textsuperscript{60} P-DG Sarte, ‘Rent-Seeking Bureaucracies and Oversight in a Simple Growth Model’ (2001) 25 J Econ Dynamic & Control 1345.

solutions in the anticorruption project will have to be varied and multifaceted.

Some scholars promote a multidisciplinary approach to corruption by looking at management organisation in the public sector from the perspective of law, ethics and governance. There is much to be said in support of that approach, as corruption should not be seen as a purely legal study. However, this is not the dominant approach represented in the literature. Most scholars on corruption approach the subject from the limitations only of their own disciplines, and this approach to scholarship reflects the practice. One may argue that part of the weakness of contemporary anticorruption solutions in the Commonwealth Caribbean stems from the fact that these are principally legislative initiatives, with little support from disciplines other than law.

Doig in particular takes a very pessimistic view of what is possible in the struggle against corruption in the public sector. He noted as early as 1995 that international development agencies were increasing seeking to link developmental aid to sustainable reform. The experience of the last decade has demonstrated how right he was. Although Doig is a proponent of public sector reform, he does not accept that corruption will disappear merely because administrative and political systems mature. He therefore argues for the establishment of ‘... properly focussed independent anti-corruption agencies as the key strategy in the anticorruption project.’


64 Ibid.

65 Ibid.
Lungu, on the other hand, sees administrative weaknesses in developing economies as the critical impediment to anticorruption regimes.66 Speaking from the perspective of post-colonial Africa in general, and Zambia in particular, Lungu described public administration as characterised by ‘... rampant corruption, tribalism, administrative inefficiency, and general institutional ineffectiveness.’67 Whereas Doig put his trust in independent anticorruption agencies, Lungu looks to the theme of responsibility. Indeed, he is critical of the failure in the literature on public administration to deal with the theme of responsibility.68 Lungu acknowledges that the prior debate on administrative responsibility has developed along two lines: First, in terms of formal lines of responsibility and authority, set out in rules and regulations that are administered by governmental agencies such as the courts; and second, in terms of the development of personal moral obligations. He goes on to argue that both lines are essential components of administrative responsibility.69 It is important to note that Lungu’s work was not principally on corruption but on dysfunctional public administration, of which corruption is but one characteristic. Nevertheless, the debate between formal responsibility, as set out in rules and regulations, versus personal moral development, as defining characteristics of administrative responsibility, is also relevant to the corruption discourse.

Sekwat takes a similar if somewhat less focussed line to the problem as

67 Ibid 361.
68 Ibid.
69 Ibid 362.
Lungu does. Sekwat’s study examined post-independence Nigeria and concluded that attempts at reform had produced little. He identified the anticorruption measures as critical to developing a sustainable civil service in Nigeria but concluded that civil service reform had produced only limited results. However, whereas Lungu characterised public administration failure in Zambia, and by extension in the developing world, to the irresponsibly of those charged with the management of public administration, Sekwat proffered a whole raft of problems to account for Nigeria’s failure. These include—

… poor leadership, limited fiscal resources, inadequate compensation, rampant corruption, weak governance, lack of measurable objectives, inadequate evaluation, mismanagement, inadequate facilities, and excessive government involvement in production of goods and services as key factors that impeded previous reform proposals.

If Sekwat is correct, that corruption and maladministration are attributable to a host of causes, it is likely that Bertok is also correct when he asserts that there is no single method for stamping out public sector corruption.

It should not be surprising that the literature supports the proposition that the incidents and persistence of corruption will increase as the number of corrupt agents in the economy increases. A significant segment of the literature addresses the elimination or control of corruption, suggesting that

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71 Ibid 514.
72 J Bertok, ‘OECD Supports the Creation of Sound Ethics Infrastructure: OECD Targets Both the “Supply Side” and the “Demand Side” of Corruption’ (1999) 28(4) Pub Pers Mgmt 673; and see Bertok (n 52).
73 See R Damania, PG Fredriksson and M Mani The Persistence of Corruption and Regulatory Compliance Failures: Theory and Evidence (IMF, Washington DC 2003); Cadot (n 32); JC Andvig and KO Moene (n 26); and Tirole (n 26).
corruption of the public bureaucracy can be eliminated or reduced by one or any combination of the following—increasing penalties for corrupt activities, increasing the probability of conviction for corruption offences, and paying efficiency wages to public agents.\(^74\) The question most often put in the literature seeks to ascertain how to eliminate and control corruption, but there is an additional, interesting and most unusual question put by Damania, Fredriksson and Mani. That is, not why does corruption exist, but why does corruption persist? It is the World Bank’s position that while much is known about the proximate causes and consequences of corruption, little is known about the factors underlying its persistence.\(^75\) Damania, Fredriksson and Mani have advanced a theory that deals with the persistence of corruption. Even more interesting is their assertion that there is a correlation between political instability and the persistence of corruption.\(^76\) There are several arguments why such a correlation should exist but the most persuasive is that which suggest that unstable governments, faced with the prospect of losing power, will place relatively lower weight on the welfare consequences of its future actions and more weight on those actions with current or contemporary utility. In other words, corruption becomes more self-sustaining, and more persistent, in politically unstable regimes.\(^77\) To say that there is a correlation between


\(^75\) See Damania, Fredriksson and Mani (n 73).

\(^76\) This is different from the association of the lack of political competition with corruption made by Rose-Ackerman (n 18), and contradicted by Mills (n 1). Unstable political regimes can be highly competitive.

\(^77\) Damania, Fredriksson and Mani (n 73) 4.
political instability and the persistence of corruption is not the same as saying that there is a correlation between political instability and the creation of corruption, but Damania, Fredriksson and Mani argue that there is an indirect relationship. They maintain that political instability result in less effective judicial and administrative institutions and this in turn increases the incentives to give and accept bribes.\textsuperscript{78} The same argument can be made of regulatory compliance.\textsuperscript{79}

Carr cautions that corruption studies '... draw from a variety of sources relating to different countries with varying economic, political and cultural backgrounds', and she goes further to question '... whether the derived generalizations are defensible.'\textsuperscript{80} Notwithstanding the caution, which Carr advises, several themes emerge from these studies. These are that corruption is debilitating, that it is difficult to manage, and that it seems to have the most deleterious effect on developing economies. Other than that, there is no universal theme emerging from the scholarship. Scholars and parishioners have identified different problems with corruption and have proffered different solutions, and it remains to be determined what approach best suits the circumstances of the Commonwealth Caribbean. As Carr explains, the body of corruption literature is generally written '... in the context of development studies, politics or economics.'\textsuperscript{81} To the extent that contemporary literature from outside the region addresses corruption theory, as distinct from

\textsuperscript{78} Ibid.
\textsuperscript{79} Ibid. Damania, Fredriksson and Mani contend that this connection between political instability and regulatory non-compliance is their original contribution to the literature.
\textsuperscript{80} Carr (n 5) 201.
\textsuperscript{81} Ibid 200.
corruption practice, it has been suggested that the theories focus on the problems of inefficiency and incentives in a corrupt organisation.\textsuperscript{82}

Although Carr's work is largely oriented to seeking international solutions, along with Lewis she has suggested the very innovative approach of looking to employment law to curb corruptive activities at the workplace.\textsuperscript{83}

Carr and Lewis were looking at UK employment law, which is somewhat similar to employment law in Commonwealth Caribbean. Certainly, the common law is essentially the same. However, there is a significant body of UK employment related legislation that have not been replicated in the Commonwealth Caribbean, and thus many employment law options available in the UK are not available in the Commonwealth Caribbean. It is very interesting that one could advance the anticorruption project on a body of exiting law, especially where it is difficult getting agreement in the legislature for new anticorruption legislation. Carr and Lewis rely on the law of fiduciaries and the breach of the implied duty of fidelity, trust and confidence. On further analysis, it is difficult to see what corrupt act would be prohibited by the law of employment that would not be covered even by the old law on corruption. There is the obvious advantage that the law of fiduciaries and the breach of the implied duty of fidelity, trust and confidence are enforceable by the civil law and require a lower standard of proof, and less demanding formality than what is necessary for a criminal charge, but not many other obvious advantages. Carr and Lewis clearly acknowledge that 'Corruption is a

\textsuperscript{82} S Marjit and A Mukherjee, A Simple Theory of Harassment and Corruption (Bonn Graduate School of Economics, University of Bonn 1996).

\textsuperscript{83} Carr and Lewis (n 40).
complex, multifaceted global phenomenon and it would be unrealistic to expect employment laws alone to combat it.\textsuperscript{84} Nevertheless, employment can be added to what they describe as the 'further tools' arsenal of anticorruption measures. This is especially true for countries where other anticorruption measures are weakly developed.

**Caribbean Contributions to the Literature**

Commonwealth Caribbean countries have not featured significantly in the academic literature on corruption. Recent legislative initiatives especially those on transparency in government and the introduction of the obligation on public officials to declare their assets, have received some favourable comment but not serious analysis.\textsuperscript{85} There have been several government reports on maladministration in the region,\textsuperscript{86} and although these might have been seminal in their time, they are now too dated to be useful.\textsuperscript{87} Harriott’s study of the police in Jamaica is more current, insightful and relevant to the contemporary problem of corruption, but it too is limited by its narrow focus on the Jamaican police.\textsuperscript{88}

\textsuperscript{84} Carr and Lewis, ibid 78.

\textsuperscript{85} See the Forward by President Jimmy Carter in L Neuman (ed), *Fostering Transparency and Preventing Corruption in Jamaica* (The Carter Center Atlanta 2002) 5.


\textsuperscript{87} These reports are discussed in T Munroe, ‘Transforming Jamaican Democracy through Transparency: A Framework for Action’ in Neuman (n 85) 13-23; and also in Mills (n 1).

\textsuperscript{88} Harriott, *Police and Crime Control* (n 25). See also Harriott, *Understanding Crime* (n
Munro is an authentic Caribbean voice, although he too speaks mostly from the Jamaican experience and mostly to Jamaican concerns. Nevertheless, what he says is regarded as important. Most of his work is theoretically focussed, drawing up on constructs developed by other scholars and applying them to the Caribbean experiences in general and to those of Jamaica in particular. Monroe recognises that the success of the pro-transparency and anti-corruption initiatives will depend also on the transformation and strengthening of government institutions. For the time being, he acknowledges a gradual weakening of both the foundations and the structures governance in the country, and a general inability to address the issues of corruption.

The tendency in scholarly discussions of corruption in the Commonwealth Caribbean is to draw up on the experiences of other counties, as if these are always applicable to the local circumstances, and consequently many pressing but parochial problems have not been adequately addressed. Perhaps the most important item missing from the Commonwealth Caribbean contribution to the scholarship is a valid and reliable instrument for measuring corruption, especially one validated for local circumstances. There have been some attempts at quantitative studies of corruption in the Commonwealth Caribbean. One recent study is Powell, Bourne and Waller’s *Probing Jamaica's Political Culture*, which is based in part on what they characterised as a perception of corruption questionnaire. Waller and others’ quantitative study, ‘Landscape Assessment of Perceptions on Corruption in

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Jamaica,’ uses a similar methodology. In neither case were the results surprising, which is that corruption in the country is pervasive. In both cases, however, the methodologies remain suspect. The Transparency International CPIs have had an unfortunate influence on scholarship since their inception, and we see the weaknesses of that approach represented here in Commonwealth Caribbean scholarship. In Powell, Bourne, and Waller’s study, for example, the ‘perception of corruption’ questions included, ‘How much time do you think will be needed to eliminate corruption in Jamaica?’

The possible responses on the survey were: 1-5 years, 5-10 years, 10-20 years, more than 20 years, never, and don’t know/no answer. The subject’s belief of the object was taken as a measure of his perception of the object, although we do not know from the study what informed that belief. Worse, the perception of corruption, even assuming that it was correctly measured, was taken as a measure of actual corruption. The assessment of the new anticorruption measures is problematic as there is no consensus among researchers as to what should be measured, or what research instrument should be used. Transparency International’s CPI methodology was once considered

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91 For a critical analysis of the Transparency International and other methodologies, see S Knack, Measuring Corruption in Eastern Europe and Central Asia: A Critique of the Cross-Country Indicators (World Bank Policy Research Working Paper 3968, Washington, DC, July 2006). Notwithstanding the fact that there are concerns with the CPI methodology, many scholars seem willing to accept that its advantages outweigh its disadvantages. See, eg, Carr, ‘Fighting Corruption Through Regional and International Conventions’ (n 14) 9, who offered the following rationalization: ‘Regardless of the concerns about lack of a uniform approach in data collection what TI has highlighted is that corruption is perceived as a global problem, be it in a business or in a wider context’.

92 Powell, Bourne and Waller (n 89).

93 See the several contributions to Sampford and others (n 11).
a useful tool, but today its use is highly suspect and arguably discredited. The CPI has been criticised by Economist Intelligence Unit and by Galtung, the former head of the research unit that originally developed it.\textsuperscript{94}

\textbf{Prospectus}

There should be little disagreement on the general direction where Commonwealth Caribbean states need to go to further the anticorruption project. It is generally agreed, both in the local and international literature, that public sector corruption misapplies the resources of government, discourages investment in the economy, fosters a culture of crime, and increases poverty while at the same time depriving the needy of necessary government benefits.\textsuperscript{95} Over the last two or three decades concerns in developing counties with corruption prevention in public services entities have evolved from merely focussing on individuals inducing public officials to abuse their offices to the belief that organised crime, and drug traffickers and money launders in particular, were putting public service management under threat. International aid is becoming increasingly dependent on national anticorruption postures.\textsuperscript{96}

Government corruption, improper award and management of public sector contracts, and the allocation of public benefits along partisan political lines have been documented.\textsuperscript{97} Allegations of corruption have been made against political parties, government officials, members of the police forces, as

\textsuperscript{94} Galtung (n 11).


\textsuperscript{96} See Zagaris and Lakhani (n 39).

\textsuperscript{97} Munroe (n 87) 13-23, referring to DaCosta Commission 1973, Green Commission 1993,
well as private sector and trade union functionaries. In the international arena, perceptions of Commonwealth Caribbean corruption are no more favourable. Over the last several years, Transparency International corruption perception indices have consistently placed many Commonwealth Caribbean countries low on the corruption perceptions scales. Dissatisfaction with the current state of affairs accounts in part for the several initiatives in the region to introduce new legislative measures with more severe penalties for corrupt activity. These concerns with corruption may also account for the aggressive posture Commonwealth Caribbean States have taken on the subject in various inter-American forums.

The political consequences of public sector corruption are no less significant than the economic and social implications. It is becoming increasingly apparent that corruption, and allegations of corruption, destroy the confidence of people in their government and deny democratic institutions the public support on which they depend. Such views of corruption are not peculiar to developing countries, even if some scholars speak as if developed counties should have higher expectations of their public office holders.

While we have general idea of where we need to go in the anticorruption project, there is not universal agreement as to how to get there. It is easy for lawyers, schooled as they are in statutory interpretation and law enforcement, to confine corruption to questions of whether the law prescribes

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100 Doig (n 26) 101. Carr (n 5) also makes the point, ‘Despite popular belief, corrupt practices are not a developing country’s problem.’
a particular conduct, and whether there is a breach of the duty that the law prescribes. Nevertheless, while the rule analytic and rule evaluative approach is necessary to the study of corruption, such an approach by itself may be insufficient to the task of preventing or reducing corruption. The problem is, perhaps, well stated by Buscaglia. He puts it thus:

Therefore, in order to develop reliable anticorruption policies, it is necessary to go beyond the simply descriptive and symptomatic studies of official corruption by focusing on the search for scientifically tested causes of corrupt practices in specific institutions within the public sector. Although all the above studies have made path-breaking contributions to the economic analysis of corruption, the literature has not yet isolated or empirically tested the main legal, organisational, and economic causes of corruption within specific public sector institutions.

However, while Buscaglia is inviting us to look for solutions beyond the law, he also seems to assume that once we have indentified the legal, organisational, and economic causes of corruption, the solution to avoiding corruption will reveal itself. We will see later that corruption arises not only or even principally from legal, organisational, or economic causes but from administrative arrangements that allow public sector agents to avoid fully the consequences of their actions. The solution will lie not only in identifying the legal, organisational, and economic causes of corruption, but also in identifying the legal solutions that will reduce and prevent it.


CHAPTER 4

THE ANTICORRUPTION REGIME

The anticorruption regimes in the Commonwealth Caribbean are based on the common law, nineteenth and early twentieth century UK corruption legislation that have been replicated in the local legal systems, and several new initiatives driven by international developments, such as the Inter-American Convention Against Corruption. While the latest legislative initiatives fulfil the region’s international commitments, and may be desirable additions to the arsenal of weapons in the anticorruption project, they imply a disparagement of the existing law, including the common law. This disparagement might be unnecessary, as there is much in the common law that is still useful to the anticorruption project.

Although the new legislative initiatives against corruption in the Commonwealth Caribbean seemed to have left the common law offences intact, this need not have been so. In South Australia, for example, several common law offences were abolished by legislation. These include ‘... bribery or corruption in relation to judges ... [and other] public officers; buying or selling of a public office; obstructing the exercise of powers conferred by statute; oppression ..., breach of trust or fraud [and] neglect of duty by a public officer; [and] refusal to serve in public office.’\(^1\) These were replaced by a series of statutory offences,\(^2\) and the new statutory offence of ‘abuse of public

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2 See the discussion by Olson J in the South Australian Supreme Court in Question of Law Reserved (No 2 of 1996) No SCCRM 96/131 Judgment No 5674 [72] – [73].
office’ is now characterised by the following dimensions:

A public officer who improperly—
(a) exercises power or influence that the public officer has by virtue of his or her public office;
(b) refuses or fails to discharge or perform an official duty or function; or
(c) uses information that the public officer has gained by virtue of his or her public office, with the intention of –
(d) securing a benefit for himself or herself or for another person; or
(e) causing injury or detriment to another person,
is guilty of an offence.³

There is some doubt as to whether covering the field in this manner abolished the common law. In the opinion of Olsson J of the South Australian Supreme Court, in Question of Law Reserved (No 2 of 1996), even this expansive language was not sufficient to abolish completely the common law offence of misconduct in public office.⁴ Doyle CJ, on the other hand, was more accommodating to the legislative intent and, adopting a more purposeful approach, he held that the abolition of the common law offences was ‘… achieved by implication rather than expressly.’⁵ Although new legislation in some Caribbean jurisdictions, such as Antigua and Barbuda and Jamaica, have repealed and replaced the earlier corruption legislation, it would seem that they have not changed the common law, and the common law offences of bribery, extortion and misconduct in public office remain. The

³ Criminal Law Consolidation Act 1935, s 251.
⁴ Olsson J, in Question of Law Reserved (No 2 of 1996) (n 2), argued that the list of common law offences stipulated in the Schedule to the statute were just ‘practical examples of conduct constituting the broader generic offences of misfeasance or nonfeasance in public office.’
⁵ Ibid [43].
Commonwealth Caribbean’s solution is to add the new legislative regime to the existing common law offences and, as the common law offences are still intact, a prosecutor looking for effective ways of addressing corruption issues may therefore usefully rely on them.

**International Developments**

Commonwealth Caribbean initiatives on corruption have been provoked, in part, by developments in several international forums. For the last 30 years, the US has been the dominant player in the international anticorruption project. The law, practice, and international posture of the US have influenced many anticorruption initiatives. The US Foreign Corrupt Practices Act of 1977 (FCPA) may be regarded as the genesis of much of the international concern with public sector corruption, particularly where there is a transnational impact. The FCPA was enacted against the background of political scandals in the US about illegal political contributions and ‘slush funds’ which were used, in part, to bribe foreign government officials. Some provisions of the FCPA made it unlawful for a US company to make a corrupt payment to a foreign official for the purpose of obtaining, retaining or redirecting business.

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6 See the discussion of the common law and the Canadian legislative developments by McLachlin CJ in *R v Boulanger* [2006] 2 SCR 49, 2006 SCC 32. See also the Penal Code 1873 (Bah); Criminal Code 1927 (Bel); and the Criminal Law (Offences) Act 1894 (Guy).


The Act imposed on American businesses, under threat of prosecution in the US, higher standards of ethical behaviour than those imposed by its OECD partners; and businesses operating from other OECD jurisdictions therefore enjoyed something of an international competitive advantage. This aggressive posture of the US in various international forums was designed to level the playing field for US corporations.

Whatever might have been the genesis of the Act, there is a reasonably compelling argument that the FCPA has had a significant impact on international agreements, most notably the Inter-American Convention Against Corruption and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention). Following the Inter-American Convention, eight additional international conventions dealing with corruption have been adopted. Zagaris and Lakhani now speak of ‘… near universal concern with corruption [which] is becoming international.’ Much of that near universal concern had its genesis in the FCPA. International agreements such as the Inter-American

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10 Carr, ‘Fighting Corruption Through Regional and International Conventions’ (n 7) 16 n 47, asserts: ‘The OECD Convention is influenced by the US Foreign Corrupt Practices Act enacted in 1977 ... when it became clear that multinationals such as Mobil and Lockheed were making payments to heads of states and senior civil servants for obtaining lucrative contracts.’

11 For a discussion of these see Carr, ‘Fighting Corruption Through Regional and International Conventions’ (n 7) 10.

Convention Against Corruption, the OECD Anti-Bribery Convention, and the UN Convention Against Corruption have in turn influenced the regulation of corruption in the national jurisdictions of the signatories. The substance of these conventions demonstrate that concerns about corruption have moved from the debilitating effects of bribery on public administration to include now additional concerns with money laundering, organised crime, and drug trafficking.

**International Legal Framework**

Many developing countries, including those in the Commonwealth Caribbean, have become what Carr described as serial 'ratifiers'. These are countries which for whatever reason ratify several anticorruption conventions, some with contradictory provisions. Carr argues that this serial ratification by a state of several conventions with similar but not exactly the same provisions on corruption leads to the further complication of determining the precise obligations binding on the state. To this complicated equation must be added the existing domestic regime on corruption.

The Inter-American Convention Against Corruption was signed in April 1996, and it is the first international treaty requiring signatories to outlaw corruption in their home jurisdictions. Twelve Commonwealth

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13 B-58, 29 March 1996.
Caribbean countries\(^{16}\) are among the 22 countries to have signed or acceded to the convention, and some have passed legislation specifically to give effect to its provisions.\(^{17}\) The OECD Convention Against Bribery of Foreign Public Officials in International Business Transactions went into effect on 15 February 1999.\(^{18}\) That Convention makes it a crime to offer, promise or give a bribe to a foreign public official in order to obtain or retain international business.

In 1997, the Council of Europe also adopted a convention against corruption. More recently, in December 2003, one hundred countries signed the UN Convention Against Corruption. This treaty needed only thirty countries to ratify for it to come into effect. The UN treaty provisions cover bribery, embezzlement, misappropriation, money laundering, protection of whistle-blowers and cooperation among states. Most significantly, the UN treaty requires member states to return assets obtained through corruption to the country from which they were stolen. This treaty may be regarded as complementing another treaty, the UN Convention against Transnational Organised Crime, which requires ratifying countries to cooperate with each

\(^{16}\) Antigua & Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, St. Kitts & Nevis, St. Lucia, St. Vincent & Grenadines, and Trinidad and Tobago. Suriname, a member of CARICOM, has also signed and ratified the convention but as Suriname is not a common law jurisdiction that country is excluded from this study.

\(^{17}\) See Prevention of Corruption Act 2004 (A&B); and Corruption (Prevention) Act 2001 (Jam).

\(^{18}\) Argentina Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States have ratified the convention and enacted implementing legislation. South Africa ratified the convention on 19 June 2007 but has not enacted implementing legislation. Source: OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions Ratification Status, 19 June 2007 <http://www.oecd.org/dataoecd/59/13/1898632.pdf> accessed 9 July 2007.
other in combating money-laundering, organised crime and human trafficking.\textsuperscript{19}

The international legal framework on anticorruption in the Commonwealth Caribbean is based largely on the following conventions: The Organisation of American States’ Inter-American Convention Against Corruption of 29 March 1996,\textsuperscript{20} the United Nations’ Convention Against Corruption of 31 October 2003\textsuperscript{21} and the Convention against Transnational Organised Crime of 15 November 2000.\textsuperscript{22} These and other international anticorruption conventions generally follow four themes.\textsuperscript{23} The first is corruption prevention. The Conventions generally seek to ensure that the State Parties put in place provisions that will discourage or prevent corruption. These policies include the establishment of anti-corruption bodies, enhanced

\textsuperscript{19} UN General Assembly resolution 55/25 of 15 November 2000.
\textsuperscript{20} The following Commonwealth Caribbean states have ratified or acceded to the Inter-American Convention: Antigua and Barbuda, Barbados, Belize, Commonwealth of the Bahamas, the Commonwealth of Dominica, Grenada, Guatemala, Guyana, Jamaica, St Kitts and Nevis, St Lucia, St Vincent & Grenadines, and Trinidad and Tobago.
\textsuperscript{21} Among Commonwealth Caribbean states, Barbados signed the UN Convention, Jamaica and Trinidad and Tobago have ratified it, and Antigua and Barbuda, the Commonwealth of the Bahamas, and Guyana acceded to it.
\textsuperscript{22} Among Commonwealth Caribbean states, Antigua & Barbuda, Bahamas, Barbados, Jamaica, and Trinidad & Tobago have ratified the convention; Belize, Grenada, and Guyana have acceded to it.
transparency in public administration and public sector governance, codes of conduct and ethics for public servants, provisions for the disclosure of assets, transparent public procurement schemes and increasingly the involvement of civil society in the anti-corruption project. The second theme represented in the body of international conventions against corruption is increased criminalisation of corrupt acts. The Conventions all require State Parties to establish a wide range of acts of corruption as criminal offences, if these are not already offences in the domestic law. The range of acts of corruption include not only those acts, such as bribery and the embezzlement of public funds, which are traditionally considered to be criminal offences, but also matters which might not have been previously criminalised in some jurisdictions, such as trading in influence and money laundering. The third theme is asset recovery. Increasingly, State Parties are asked to establish provision to recover the assets garnered by illicit or corrupt means. Finally, the fourth universal theme emerging from the spate of international conventions against corruption is the promotion of international cooperation. All the Conventions require the State Parties to cooperate with each another in the anticorruption project, signifying that prosecution of this project cannot be seen purely as a domestic issue.24

Inter-American Convention

Notwithstanding the propensity of Commonwealth Caribbean states for serial ratification of anticorruption conventions, and the possible exposure to

24 See generally, see UN Office on Drugs and Crime, Compendium on International Legal Instruments on Corruption (n 23).
contradictory obligations under the various international treaties, it is the Inter-
American Convention Against Corruption the anticorruption convention
which seem to have had the most obvious impact on anticorruption reforms in
the region. All independent Commonwealth Caribbean states have ratified or
acceded to it. That Convention restates all the concerns that regional leaders
have from time to time expressed on the impact and effect of corruption on
their societies. These include a conviction that corruption undermines the
legitimacy of public institutions, strikes at society’s moral order and justice,
impedes comprehensive development of the people of the region, and that the
people should be aware of the problems of corruption and be organised to
confront it. These convictions included the view that modern representative
democracy requires that governments themselves combat corruption in the
performance of public functions and that fighting corruption strengthens
democratic institutions. Finally, that there is recognition that there is close
association of corruption with organised crime and that corruption often has
international dimensions, including the illicit trade in narcotics, which threaten
legitimate commercial and financial activities. The expressed purposes of the
Inter-American Convention are set out in Article II, and these are:

1. To promote and strengthen the development by each of the
   States Parties of the mechanisms needed to prevent, detect,
   punish and eradicate corruption; and

2. To promote, facilitate and regulate cooperation among the
   States Parties to ensure the effectiveness of measures and
   actions to prevent, detect, punish and eradicate corruption in
   the performance of public functions and acts of corruption

25 Antigua and Barbuda, Barbados, Belize, Commonwealth of the Bahamas, Commonwealth of Dominica, Grenada, Guyana, Jamaica, St Kitts and Nevis, St Lucia, St Vincent & Grenadines, and Trinidad and Tobago.

26 Inter-American Convention Against Corruption, Preamble.
specifically related to such performance.

The Inter-American Convention contemplates a number of preventative measures in the anticorruption project. Thus, the parties are required to consider measures for creating, maintaining and strengthening 'Standards of conduct for the correct, honorable, and proper fulfilment of public functions.'\textsuperscript{27} The standards that are contemplated are intended to prevent the conflicts of interests among public officials and, especially interesting from the perspective of the theory advanced in this thesis, '... measures and systems requiring government officials to report to appropriate authorities acts of corruption in the performance of public functions.'\textsuperscript{28} It is true that the English text of the Convention is a little cumbersome, but the meaning is reasonably clear. The text obligates the parties to consider measures to create, maintain and strengthen standards of conduct, and that those standards of conduct should avoid the conflicts of interest and, it is submitted, promote whistle blowing. Indeed, the State Parties are required specifically to consider systems to protect whistleblowers.\textsuperscript{29} The obvious weakness with these provisions is that an obligation to consider something is not the obligation to implement it. Notwithstanding that several of the critical considerations under the Inter-American Convention are not binding on the State Parties, Commonwealth Caribbean states have been fairly aggressive in implementing them.

The Convention requires the contracting parties to consider a host of other considerations. For example, they should consider mechanism to enforce

\footnotesize{\textsuperscript{27} Inter-American Convention Against Corruption, art III para 1.  
\textsuperscript{28} Ibid.  
\textsuperscript{29} Ibid art III para 8.}
the proposed standards of proper conduct, and they should develop instructions to government personnel so that they will understand their responsibilities and the ethical rules governing their behaviour. The State Parties are required to consider public procurement systems '... that ensure openness, equity and efficiency ...' and revenue collection systems that deter corruption. Most significantly, article III, paragraph 4, require the State Parties to consider 'Systems for registering the income, assets and liabilities of persons who perform public functions in certain posts ... and, where appropriate, for making such registrations public.' The implication of this provision will be considered in greater detail elsewhere, but it is important to note here that although the implementation of the declaration of assets provision is not mandatory under the Convention, Commonwealth Caribbean States have universally adopted it. On the other hand, only Trinidad and Tobago introduced provisions to make, at least in part, such declarations public.

Not all of these considerations are new to the system of public administration in the Commonwealth Caribbean. It is arguable that the public services in the Commonwealth Caribbean were well established and public servants have had, even from the colonial period, standards of conduct for the correct, honourable and proper fulfilment of their public functions, including

30 Ibid art III para 2.
31 Ibid art III para 3.
32 Ibid art III para 5.
33 Ibid art III para 6.
elaborate schemes for public procurement.\textsuperscript{34} Even the registration of assets has been a feature of Commonwealth Caribbean law since 1973, although at that time requirement to declare assets was restricted to members of the legislature.\textsuperscript{35} On the other hand, some of the new considerations required by the Convention, such as the whistle blowing provisions, still have not been implemented.

In addition to considering general anticorruption measures, the Convention requires that each State Party establish its jurisdiction over corruption offences in accordance with the Convention.\textsuperscript{36} The Convention also requires the State Parties to assert, if ‘... its Constitution and the fundamental principles of its legal system ...’ allow, transnational jurisdiction over bribery. Thus, the State Parties are to prohibit and punish their nationals, residents and domiciled companies where they bribe foreign government officials.\textsuperscript{37} The Convention also introduces the concept of illicit enrichment and requires the State Parties, subject to their Constitutions and fundamental principles of their legal systems, to establish in their laws as an offence a ‘... significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions.’\textsuperscript{38} The implications of this concept of illicit enrichment will also be discussed below.

\textsuperscript{34} See, eg, Central Tenders Board Ordinance No 22 of 1961 (Trinidad and Tobago), Exchequer and Audit Act 1959 (Trinidad and Tobago, Financial Administration and Audit Act (Barbados), Financial Administration and Audit Act 1951 (Jamaica), Financial Administration and Audit Act 1951 (Jamaica), and Financial Administration and Audit Act 1962 (Guyana).

\textsuperscript{35} Parliament (Integrity of Members) Act 1973 (Jamaica).

\textsuperscript{36} Inter-American Convention Against Corruption, art V.

\textsuperscript{37} Ibid art VIII.

\textsuperscript{38} Ibid art IX
It is sufficient here to note that several Commonwealth Caribbean states have already adopted and implemented this provision, although it may be argued that it is neither consistent with the constitutions of Commonwealth Caribbean states or with the fundamental principles of the legal systems.

The Convention applies to 'acts of corruption,' which is defined as follows:

a. The solicitation or acceptance, directly or indirectly, by a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions;

b. The offering or granting, directly or indirectly, to a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions;

c. Any act or omission in the discharge of his duties by a government official or a person who performs public functions for the purpose of illicitly obtaining benefits for himself or for a third party;

d. The fraudulent use or concealment of property derived from any of the acts referred to in this article; and

e. Participation as a principal, coprincipal, instigator, accomplice or accessory after the fact, or in any other manner, in the commission or attempted commission of, or in any collaboration or conspiracy to commit, any of the acts referred to in this article.

This is a very useful drafting device and one that is followed in the new Jamaican anticorruption legislation.
Domestic Legal Hurdles to the Convention

While its broad objectives are laudable, the implementation of some of the provisions the Inter-American Convention Against Corruption by Commonwealth Caribbean states may be problematic. For example, Article IX of the Convention obligates each contracting party, subject to its constitution and the fundamental principles of its legal system, to make ‘... a significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions,’ a criminal offence—now called illicit enrichment.\(^{39}\) As a companion measure, the convention contemplates that member states may introduce anti-corruption legislation requiring comprehensive disclosure of public servants’ assets. Unlike the first provision on criminalising illicit enrichment, this latter provision on disclosure of assets is not an obligation of the contracting parties. Under Article III 4, the contracting parties agreed merely to consider creating ‘Systems for registering the income, assets and liabilities of persons who perform public functions.’ Disclosure of the financial interests of parliamentarians was introduced in the Commonwealth Caribbean as early as 1973,\(^ {40}\) but the original legislation had not criminalised illicit enrichment. Subsequent to the treaty, however, several Commonwealth Caribbean territories have introduced new legislation implementing Articles III and IX, covering a broad range of public officials.\(^ {41}\)

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\(^{39}\) This provision has raised concerns in some quarters. For example, Carr, ‘Fighting Corruption Through Regional and International Conventions’ ( n 7) 15, describes it as ‘An interesting but questionable offence ...’

\(^{40}\) Parliament (Integrity of Members) Act 1973 (Jam).

\(^{41}\) See, Prevention of Corruption in Public Life Act 1994 (Chapter 12, Laws of Belize);
The concept of illicit enrichment was previously unknown to Commonwealth Caribbean legal systems, and there are good reasons why common law jurisdictions like the USA and Canada refused to introduce that concept to their legal systems. In some cases, the haste to implement the obligations under international treaties have resulted in legislative blunt instruments, whereas what are needed are consistent law enforcement and carefully crafted systems of disclosure of interests, transparency, and accountability. Although no Commonwealth Caribbean country reserved on this issue, Canada and the US signed the treaty with reservations on the illicit enrichment provisions, as these were seen to be inconsistent with their constitutions or the fundamental principles of their legal systems. For example, Canada’s statement of understanding of Article IX, on illicit enrichment, is as follows:

> Article IX provides that the obligation of a Stated Party to establish the offence of illicit enrichment shall be ‘Subject to its Constitution and the fundamental principles of its legal system’. As the offence contemplated by Article IX would be contrary to the presumption of innocence guaranteed by Canada's Constitution, Canada will not implement Article IX, as provided for by this provision.

The US reserved on Article IX on somewhat similar terms:

> The offense of illicit enrichment as set forth in Article IX of the Convention, however, places the burden of proof on the defendant, which is inconsistent with the United States constitution and fundamental principles of the United States legal system.

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Integrity in Public Life Act 1997 (T&T); Integrity in Public Life Act 2004 (A&B); Integrity in Public Life Act 2004 (St L); Integrity in Public Office Act 2003 (Dominica); Corruption (Prevention) Act 2001 (Jam); Integrity Commission Act 1997 Cap 19:12 (Guy); and Integrity in Public Life Act 2000 (Chap 20:11 T&T).

A review of the Jamaican application of these obligations under the Convention shows how the new legislation passes the burden of proof of innocence onto the defendant. Section 15(5) of the Corruption (Prevention) Act, 2000 provides as follows:

Where a public servant—
(a) owns assets disproportionate to his lawful earnings; and
(b) upon being requested by the Commission or any person duly authorised to investigate an allegation of corruption against him, to provide an explanation as to how he came by such assets, he—
(i) fails to do so; or
(ii) gives an explanation which is not considered to be satisfactory,
he shall be liable to prosecution for the offence of illicit enrichment…

By a later amendment, subsection 14 (5A) added the following—

It shall be a defence to a person charged with an offence of illicit enrichment to show the court that he came by the assets by lawful means.

This shifting of the burden of proof is unusual, but it is not unknown to Commonwealth Caribbean law. For example, under the Unlawful Possession of Property Act 1952, Jamaica, a person reasonably suspected of having stolen or being in unlawful possession of property may be brought before the Resident Magistrate and if he does not within a reasonably time ‘… give an account to the satisfaction of the Resident Magistrate by what lawful means he came by the same, he shall be guilty of an offence.’ It has been held that

43 Act 42 of 2002. This amendment was obviously drafted with an eye on the provisions of the Jamaica Constitutions 20(5).

44 Unlawful Possession of Property Act 1952 (Jam) s 5 (4). A similar provision exists in the Bahamas Penal Code. S 64 (1) provides—‘Where any person is brought before a magistrate charged with [unlawful possession] … the onus probandi shall be on him or them to show that such possession was honestly come by. Upon the refusal or inability of
under this provision the burden passes entirely to the accused to satisfy the
Resident Magistrate of his innocence, and that ‘… it is not sufficient that he
should produce in the mind of the Court a reasonable doubt as to his guilt.’

This approach was held to be applicable to some charges under the
Prevention of Corruption Acts 1906 and 1916, and the Public Bodies Corrupt
Practices Act 1888, which provided the foundation of Commonwealth
Caribbean anticorruption law. Brown J, in *R v Beckford*, cited with
approval the Lord Chief Justice in *R v Evans, Jones and Perkins* as follows:

> The Legislature has provided in clear terms that, where certain
> conditions are fulfilled and certain payments are made such
> payments shall be deemed to be corrupt until the contrary is
> proved, and the Legislature cannot be supposed to have thought
> it worthwhile to enact that statute if all it meant was that such
> payments, made in such circumstances, were to be deemed to
> be corrupt only until explanation, however grotesque or false,
> might be offered to explain them. The explanation required is
> an explanation which satisfies the jury.

Both cases, *R v Evans, Jones and Perkins* and *R v Beckford*, interpreted
legislation that predated the post-independence constitutional provisions,
which now contain protection of law clauses. Contemporary protection of law
provisions require, ‘Every person who is charged with a criminal offence shall
be presumed to be innocent until he is proved or has pleaded guilty.’ Under

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45 *R v Beckford* (1934) 2 JLR 18, 21.
46 Ibid.
47 (1934) 2 JLR 18.
48 17 CAR 121.
49 Ibid.
50 (1934) 2 JLR 18.
51 Constitution of Jamaica, s 20(5).
the savings law provisions of Commonwealth Caribbean constitutions, laws that predate the constitution will not be held void because they are inconsistent with the fundamental rights provisions. However, the same is not true of the new anticorruption legislation in the region. Nevertheless, some constitutions further reduce the protection of law provision. For example, the proviso to s 20 (5) of the Jamaica Constitution reads:

Provided that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this subsection [on the presumption of innocence] to the extent that the law in question imposes upon any person charged as aforesaid the burden of proving particular facts.

The Belize Constitution, s 6(10)(a), and the Bahamas Constitution, s 20(11)(a), contain similar provisions but the limitation Belize was for a specific period of time, five years, and that time is now spent. It is still to be decided if the new anticorruption provisions have effectively removed the presumption of innocence or merely shifted the burden of proof of an act of corruption.

It is not always easy to make the distinction between the more reprehensible public administrative actions, which require the full application of the criminal law, and those that can be best addressed by other types of administrative sanctions. Peterkin JA, who delivered the judgment of the court in Walter v R said, ‘While there must be many standards of conduct which may be said to be reprehensible, they do not all constitute criminal offences at

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52 Constitution of Belize, s 21: ‘Nothing contained in any law in force immediately before Independence Day nor anything done under the authority of any such law shall, for a period of five years after Independence Day, be held to be inconsistent with or done in contravention of any of the provisions of this Chapter.’ See also, San Jose Farmers’ Co-operative Society Ltd v A-G (1991) 43 WIR 63.
common law.\(^{53}\) The new legislative initiatives may well leave our courts with a similar dilemma, as to what reprehensible conduct constitutes offences under the new law. The question of the constitutional entrenchment of the presumption of innocence, which the State Parties' obligations under Article IX would remove, was raised in the Supreme Court of the Bahamas in *Commissioner of Police v Woods*.\(^{54}\) Unfortunately, that case did not settle the issue.

**OECD Anti-Bribery Convention**

The OECD convention may have an indirect influence in the Commonwealth Caribbean by virtue of the impact it has had on UK legislation. The UK Parliament has now enacted a new Bribery Act.\(^{55}\) This Act is not yet in force. It will come into force on a day that the Secretary of State may, by order, appoint.\(^{56}\) Nevertheless, it is anticipated that it will come into effect in 2010. When this act comes into effect, it will repeal in whole or in part several existing statutes, including entirely the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916.\(^{57}\)

The new act will also abolish the common law offences of bribery and embracery.\(^{58}\) Embracery is the common law offence where one corruptly

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54 (1990) 54 WIR 1.  
55 Bribery Act 2010, Chap 23 (UK).  
56 Ibid s 19 (1).  
57 Ibid s 17 (2) and Schedule 2.  
58 Ibid s 17 (1).
influences a juror in a trial to give a verdict for one side or the other. The new act makes it an offence to offer\textsuperscript{59} or accept a bribe,\textsuperscript{60} which were already offences in the UK. However, the new law arguably improves the definition of bribery and bring the UK anticorruption legislation closer in line with OECD rules. The new Act has extraterritorial application\textsuperscript{61} and specifically makes it an offence to bribe foreign public officials.\textsuperscript{62} It also makes it an offence, in some circumstances, for a commercial organisation to prevent bribery.\textsuperscript{63} Most significantly, the new Act removes the Attorney General's control over bribery prosecutions and now requires the consent of the Director of Public Prosecutions, the Director of the serious Fraud Office or the Director of Revenue and Customs Prosecutions.\textsuperscript{64} The penalty for bribery has also been extended. Summary conviction may be subject to imprisonment for up to 12 months and or a fine, but conviction on indictment may result in imprisonment for up to 10 years, and or a fine.\textsuperscript{65}

The OECD's Working Group on Bribery was especially critical of the UK's failure to bring its anti-bribery laws into conformity with the provisions of the OECD Anti-Bribery Convention.\textsuperscript{66} The Working Group's view was that

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\textsuperscript{59} Bribery Act 2010 s 1.
\textsuperscript{60} Ibid s 2.
\textsuperscript{61} Ibid s 12.
\textsuperscript{62} Ibid s 6.
\textsuperscript{63} Ibid s 7.
\textsuperscript{64} Ibid s 10 (1). Similar provisions exist in relation to prosecution in Northern Ireland, s 10 (2).
\textsuperscript{65} Bribery Act 2010 s 11.
the existing legislation makes it difficult for prosecutors to bring cases effectively against companies for bribery offences. There can be little doubt that the discontinuance of the prosecution in the Al Yamamah/BAE case caused the Working Group considerable concern. The Working Group singled out that case for special mention, and the report specifically identified the power that the politically appointed Attorney General exercised over bribery prosecutions, such as in the Al Yamamah case, as one of the features of the UK law that might have made it difficult for prosecutors to initiate corruption cases. The Working group make several specific recommendations, which may be summarised as follows:

- Enact modern foreign bribery legislation and establish effective corporate liability for bribery as a matter of high priority;
- Take all necessary measures to ensure that Article 5 of the Convention, which notably prohibits consideration of the national economic interest when prosecuting foreign bribery, applies effectively to all investigative and prosecutorial decisions at all stages of a foreign bribery case;
- Ensure that the Attorney General cannot give instructions to the Director of the Serious Fraud Office about individual foreign bribery cases, and eliminate the need for Attorney General consent to prosecutions of such cases; and
- Ensure that the SFO attributes a high priority to foreign bribery cases and has sufficient resources to address such cases effectively.

67 The Al Yamamah case is discussed in this thesis also as the BAE case.


69 Ibid 71-72.

The new act addresses many of these issues. The opinion expressed by Adrienne Margolis is that the new law is ‘... designed to bring its legislation closer into line with the OECD rules.’\textsuperscript{71} Krishnan, Executive Director of Transparency International (UK), is reported to have said, ‘The UK came in for a lot of criticism and now has the prospect of wiping the slate clean and becoming compliant with the OECD Convention.’\textsuperscript{72}

It is significant to note the OECD Working Group was especially critical of the political control that the Attorney General exercised over bribery prosecutions, which impeded the independent prosecutions of corruption in the UK and which facilitated the UK avoiding Article 5 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Article 5 provides as follows:

Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

This political control of bribery prosecutions is not a feature of Commonwealth Caribbean law. Control of prosecutions in the independent states of the Commonwealth Caribbean is vested in the hands of the Director of Public Prosecutions, which is an independent public officer. In the colonial period, the power to prosecute was in the hands of the Attorney General but the Attorney General, in the colonial administrations of the region, was a public


\textsuperscript{72} Reported by Margolis, ibid.
officer and not a political appointee. Thus, the political influence as exercised by the Attorney General in the Al Yamamah/BAE case in the UK could not lawfully be exercised in the Commonwealth Caribbean. This independent control of prosecutions predated the modern anticorruption reforms in the region.

**Public Sector Ethics**

It may not be completely cynical to suggest that Commonwealth Caribbean anticorruption initiatives might have been driven as much by the need to satisfy their international treaty obligations as by the desire to engineer effective public governance regimes free from corruption. It is significant to note that the treaties discussed above generally require the intervention of the criminal justice system for their effectiveness. Although improved public sector ethics increasing form part of the theme of corruption prevention in these conventions, the conventions generally treat with public sector ethics and public sector governance as administrative and managerial concerns. Criminalisation of corruption seems to be the linchpin of these conventions. This orientation to criminalisation is understandable. Indeed, it may well be justifiable. Nevertheless, the noise emanating from the international concerns with the criminalisation of corruption should not deafen us to the call for a more ethical system of public sector governance. Neither should we think that

73 For example, Article III 3 of the Inter-American Convention Against Convention require the member states to consider providing instructions in ethics for public officials.

74 Of the nine international conventions on corruption, eight treat with corruption as a criminal concern. For a discussion, see Carr, 'Fighting Corruption Through Regional and International Conventions' (n 7) 10; and Carr, 'Corruption, legal solutions and limits of law' (n 15).
effective public management would be achieved only by anticorruption legislation, while ignoring the need for codes of ethics and guidance on broader ethical issues. If we may take instructions from developments in the OECD, we should note that member states of the OECD have now broadened their concerns to include not just corruption but also public sector ethics. The OECD have established an Ethics and Corruption Department, promoted a Public Sector Code of Conduct, and published the Principles for Managing Ethics in the Public Service. On the other hand, in the rest of the international arena, most countries are still concerned principally with corruption law enforcement. The OECD’s approach has yet to achieve universal appeal, but its lessons should not be lost on the Commonwealth Caribbean.

Incorporating International Law

Commonwealth Caribbean states are dualists systems and for their international obligations to become part of the national law, they would have to be incorporated by legislation. De la Bastide P and Saunders J explained the position thus:

In states that international lawyers refer to as ‘dualist’, and these include the United Kingdom, Barbados and other Commonwealth Caribbean states, the common law has over the centuries developed rules about the relationship between domestic and international law. The classic view is that, even if ratified by the Executive, international treaties form no part of domestic law unless they have been specifically incorporated by the legislature. In order to be binding in municipal law, the terms of a treaty must be enacted by the local Parliament. Ratification of a treaty cannot ipso facto add to or amend the Constitution and laws of a State because that is a function reserved strictly for the domestic Parliament. Treaty-making on
the other hand is a power that lies in the hands of the Executive.\textsuperscript{75}

De la Bastide P and Saunders J then concluded, 'Municipal courts, therefore, will not interpret or enforce the terms of an unincorporated treaty. If domestic legislation conflicts with the treaty, the courts will ignore the treaty and apply the local law.'\textsuperscript{76} As will be seen below, there was in Commonwealth Caribbean states an elaborate body of domestic law even before the development of the international legal framework. Commonwealth Caribbean states have been reasonably aggressive at incorporating their treaty obligations, but even in those cases where the international obligations have not been incorporated into the national law, or where the unethical behaviour of the public agent requires more severe sanction, the older legislation in the region, or even the common law, may suffice.

**Legislation**

Commonwealth Caribbean anticorruption legislation may be classified into three broad categories. First, there are those territories that have codified the criminal law, and who have reproduced in their codes the common law rules on bribery and misconduct in public office.\textsuperscript{77} Second, we have in all cases the replication of the late nineteenth century and early twentieth century UK corruption legislation. In some cases, the local territory merely reproduced, almost line by line, the UK legislation. In other cases, the UK statutes were

\textsuperscript{75} A-\textit{G} v \textit{Joseph and Boyce} (2006) 69 WIR 104, 134.

\textsuperscript{76} Ibid.

\textsuperscript{77} The Colonial Office commissioned RS Wright's model criminal code for the West Indies in 1887. See, eg, Criminal Code 1887 (St Lucia) and Criminal Code 1927 (Belize); cf Penal Code 1873 (Bahamas).
amalgamated into one local act.\textsuperscript{78} Third, we have a series of modern legislation beginning in the 1970s with the integrity in public life legislation and including new legislative initiatives promoted by international anticorruption conventions.\textsuperscript{79} Following on the Convention, several Commonwealth Caribbean countries introduced the necessary enabling legislation. This meant, in some cases, replacing or modifying the old anticorruption legislation. Jamaica replaced the old Prevention of Corruption Act with the new, treaty-inspired, Corruption (Prevention) Act 2001. This new legislation introduced or modified several of the concepts of the old legislation. ‘Public body’, ‘public function’, and ‘public officer’ assumed new definitions. The new legislation also created a new obligation on public officers to disclose their assets and introduced into the law the new offence of illicit enrichment. Finally, the law established a new bureaucracy, the Commission for the Prevention of Corruption.

In pursuit of the now popularly characterised state action, ‘the war against drugs,’ Commonwealth Caribbean States have introduced legislation to allow the state to forfeit the proceeds derived from illegal dealing in drugs. One example of this was the Tracing and Forfeiture of Proceeds of Drug Trafficking Act, now the Proceeds of Crime Act 2000 of the Bahamas.\textsuperscript{80} In the

\textsuperscript{78} See, eg, Prevention of Bribery Act 1976 (Bahamas); Prevention of Corruption 1927 (Barbados); and Prevention of Corruption Act 1927 (Belize). See also Criminal Law (Offences) Act 1894 (Guyana).

\textsuperscript{79} Integrity Commission Act 1997 (Guyana); Integrity in Public Life Act 1997 (Trinidad & Tobago), replaced by Integrity in Public Life Act 2000 (T&T); Integrity in Public Life Act 2004 (Antigua & Barbuda); Integrity in Public Life Act 2004 (St Lucia); Integrity in Public Office Act 2003 (Dominica); Parliament (Integrity of Members) Act 1973 (Jamaica); Prevention of Corruption Act 1987 (Trinidad & Tobago); Prevention of Corruption Act 2004 (Antigua & Barbuda); and Prevention of Corruption in Public Life Act 1994 (Belize).

\textsuperscript{80} Chaps 86 and 93, Bahamas.
language of Henry P of the Bahamian court of appeal, the purpose of the act is ‘... to ensure that persons who lay up for themselves treasure derived from their activities in relation to trafficking in dangerous drugs do not continue to enjoy the fruits of these activities.’\textsuperscript{81} Section 4(1) of the Bahamian Tracing and Forfeiture of Proceeds of Drug Trafficking Act provided:

Upon conviction for one or more drug trafficking offences committed after the coming into operation of this Act a person shall in addition to any other penalty prescribed by any law for that offence be liable at the time of sentencing in respect of that conviction or at any time thereafter to have a confiscation order made against him in accordance with the provisions of this Act.

The \textit{Re Lehder-Rivas} case is authority for the proposition that the court may make a restraint order under s 10 of the Tracing and Forfeiture of Proceeds of Drug Trafficking Act 1986 in respect of assets held by companies, even where there is no evidence that the companies had been improperly used by the defendant.\textsuperscript{82}

Commonwealth Caribbean Countries have also developed many schemes for public sector procurement. Some schemes are set out in legislation and regulations, whereas others are based on administrative structures. In Barbados, the Financial Administration and Audit Act delegate to the Cabinet the authority to legislate in relation to the control of public finance, including procurement.\textsuperscript{83} The procurement regime is now governed by regulations made pursuant to that Act in 1971. Part XII of the rules is headed ‘Government Contracts.’ Those rules provide that whenever a

\textsuperscript{81} \textit{Re Lehder-Rivas, International Dutch Resources Ltd v A-G} (1990) 56 WIR 1, 3.
\textsuperscript{82} Ibid.
\textsuperscript{83} Section 39.
Government contract larger than $25,000 is to be awarded, tenders should be invited. The rules also set out a scheme for how the tenders are to be assessed. For example, tenders are first to be examined by a tenders committee, the committee itself is to be specially constituted. The obvious rationale behind the procedural components of the scheme is, ‘... eliminate the possibility of corruption, to protect the public purse from exploitation and to ensure fairness to tenderers.’ The rules also provide that the committee shall make its recommendations on the award to the head of department who in turn is required to submit the recommendation to the Minister; if the minister does not accept the recommendation then he or she must pass it on to the Cabinet for final decision.

In *C O Williams Construction Ltd v Blackman*, the applicant submitted the lowest tender to construct a road and the committee recommended it for the award. However, the minister did not accept the recommendation and urged Cabinet to accept the higher tender of a competitor. Cabinet did so. When a governmental function is regulated by legislation, that function can only be exercised in accordance with that statute. A breach of those procedures even by Cabinet is justiciable, although the question of the appropriate remedy in the circumstances may be in dispute. In the *C O Williams Construction* case, the Judicial Committee of the Privy Council accepted this principle, although it too acknowledged the

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84 *C O Williams Construction Ltd v Blackman* (1994) 45 WIR 94, 97-98.
85 Rule 148.
86 (1994) 45 WIR 94.
87 Ibid 99.
88 Ibid 100-101.
difficulty of determining the appropriate judicial remedy after a wrong public procurement decision had been carried out.

Jamaica also has a modified public procurement scheme that is based both on legislation and on special administrative arrangements. The Jamaican scheme presents two sets of problems. First, there is potential conflict between the two acts governing public procurement. Secondly, there is some doubt as to the enforceability of the current administrative arrangements. A 1992 amendment to the Financial Administration and Audit Act, introduced new provisions on ‘… regulations governing contracts.’ That amendment added s 19B which provides that all agreements for the supply of goods or services to, and for the carrying out of works for any department of government shall be on such terms conditions as the Minister may, by regulations, prescribe. Those regulations may prescribe the extent to which an officer is authorised to enter into the agreement, the procedures relating to the offer and acceptance of tenders, the signing of the agreements, the forms they may take, and the measures for executing the agreements and making payments under them. In addition, a 2001 amendment to the Contractor-General Act established an independent commission also with responsibilities to promote the efficiency, transparency and equity in public procurement contracts, and which seems to cover the same field as the responsibilities given to the Minister under Financial Administration and Audit Act. The minister has not introduced regulations but, over the years, the Ministry of Finance has issue many

\[89\] Amendment introduced by Act 1/1992, s 5(a).
\[90\] Financial Administration and Audit Act s 19B (2).
\[91\] Contractor-General Act s 23D.
directives on the public sector procurement process to the other departments of
government.

Notwithstanding the new initiatives, there is still a sense of
dissatisfaction with the perceived prevalence of corruption in the region, and it
is this sense of dissatisfaction that suggests a re-examination of the common
law to augment the new anticorruption initiatives. In addition, those territories
that have not yet implemented the new fangled initiatives promoted by the
Inter-American Convention Against Corruption and the UN Convention
Against Corruption may take comfort that there is some utility left in their old
corruption legislation.

**Misconduct in Public Office**

The common law offences of bribery, extortion and misconduct in public
office are all anticorruption devices; but the crime of misconduct in public
office covers a much broader field of misbehaviour than corruption. As Paul
Finn explained—

> Unlike with the more narrow offences of bribery and extortion, official misconduct is not concerned primarily with the abuse of official position for pecuniary gain, with corruption in the popular sense. Its object is simply to ensure that an official does not, by any wilful act or omission, act contrary to the duties of his office, does not abuse intentionally the trust reposed in him.\(^{92}\)

To satisfy the requirements of the offence, there must be an element of
misconduct calculated to injure the public interest, and thus sufficient to call
for condemnation and punishment, even if the conduct is not of such a nature

as to be described as corrupt or dishonest. Nevertheless, misconduct in public office has long been in the arsenal against corruption, it has been used quite effectively in some jurisdictions, and this common law offence should remain one of the necessary planks of the anticorruption project in the Commonwealth Caribbean.

The terms, ‘misconduct in public office’, ‘misbehaviour in public office’ and ‘misfeasance in public office’ are often used interchangeably, and they seem to refer to the same common law offence. A second view, however, is that the term really accommodates two distinct offences; which are misfeasance in public office and neglect in public office. A third view is that misconduct in public office is really an omnibus offence, with many different dimensions or characteristics. Olsson J, in the Court of Criminal Appeal of South Australia, perhaps best articulates this latter opinion. He suggested that apart from ‘… specific offences termed bribery, extortion, buying and selling public offices…’, the common law did not ‘… contemplate closed, specifically titled, categories of offences in relation to public officers’; and thus a public officer could have been indicted for any misbehaviour ‘… categorised as misfeasance, malfeasance or nonfeasance in office of a

95 Finn (n 92) suggest that the offence has been ‘… variously described as “official misconduct”, “breach of official trust”, or “misbehaviour in a public office”.’
96 R v Boulanger (n 6) [10], (where McLachlin CJ concluded that misfeasance in public office alone, and not neglect in public, was incorporated in Canada in the Criminal Code, RSC 1985, c C-46, s 122).
criminally culpable nature.\textsuperscript{97} The omnibus nature this offence is both a help and a hindrance in the anticorruption project. While a broad range of undesirable conduct is caught by its prohibitions, courts have also had to struggle with defining exactly what are the dimensions, characteristics or requirements of misconduct in public office.

This offence of misconduct in public office has been recognised in the common law for over 400 years, and it now has a ubiquitous presence in all common law legal systems. McLachlin CJ, in the Supreme Court of Canada,\textsuperscript{98} suggested that the first mention of the offence in a written judgment dates back to 1704.\textsuperscript{99} It is clear, however, that the offence of misconduct in public office even predates that.\textsuperscript{100} The offence seems well ensconced in the Commonwealth Caribbean legal systems, and it has never been seriously suggested that it has not been received in any Commonwealth Caribbean territory.\textsuperscript{101} Such a suggestion, however, is not necessarily frivolous. One of the questions put to the South Australia Supreme Court in \textit{Question of Law Reserved (No 2 of 1996)} was whether there existed in South Australia common law any offence known as abuse of public office, misconduct in public office, or misbehaviour in public office prior to 6 July 1992 when they

\textsuperscript{97} \textit{Question of Law Reserved (No 2 of 1996)} (n 2). Olsson J finds support for this view in \textit{R v Llewellyn-Jones} [1968] 1 QB 429.

\textsuperscript{98} \textit{R v Boulanger} (n 6).

\textsuperscript{99} McLachlin CJ cited \textit{Anonymous} (1704), 6 Mod 96, 87 ER 853 (KB), where it was court held, ‘If a man be made an officer by Act of Parliament, and misbehave himself in his office, he is indictable for it at common law, and any publick officer is indictable for misbehaviour in his office.’

\textsuperscript{100} See the arguments in \textit{AG’s Reference (No 3 of 2003)} (n 100); [2005], citing \textit{Crouther’s Case} (1599) Cro Eliz 654.

\textsuperscript{101} The basic rules governing the reception of law in the Commonwealth Caribbean are set out by Lord Mansfield CJ in \textit{Campbell v Hall} 1 Cowp 204; 98 ER 1045. Under these rules, the English common law and statutes of general application come to colonies with settlement.
were purportedly abolished by legislation.

The reception dates for English law vary for the several states of the Commonwealth Caribbean. Saint Christopher, Barbados, Nevis, Antigua and Montserrat were settled in the early seventeenth century and these are the earliest recipients of English law in the region. Nevertheless, even in those cases, the settlement of the colony, and the reception of English common law postdates the development in England of the common law rules of misconduct or misbehaviour in public office, as set out in Crouther’s Case in 1599. Saint Lucia is possibly one exception to the suggestion that the English common law rules of misconduct in public office is part of the local common law; but even that argument against the reception of the common offence into the legal system of St Lucia is not entirely convincing. Patchett

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102 In some cases, the reception dates for the common law are determined by settlement and in other cases by legislation. Interestingly, Montserrat was settle by Irish settlers, but under the British colonial constitutional law, they brought with them English law. KW Patchett, ‘Reception of Law in the West Indies’ (1972) JLJ 17, argues for the following dates for the reception of the English common law into the several territories of the region: St Christopher, 1625; Nevis, 1628; Anguilla, 1625 (by virtue of its assimilation into St Christopher); Antigua, 1632; Montserrat, 1632; the British Virgin Islands, 1672; the Leeward Islands, possible in 1705 by an Act of the General Assembly of the Leeward Islands (a later statute by the Leeward Island Federal Legislature to institute the later reception date of 21st August 1871 was disallowed); Barbados, 1628; Belize, 1899; Jamaica, 1724 (by an Act of the local legislature in 1728); Dominica, 1763 (on the authority of Shillingford v A-G of Dominica (1967) 12 WIR 57, holding that English statutes, including the Nullum Tempus Act, did not apply to the territory); Grenada, 1832 (by virtue of a local ordinance passed in 1834); St Vincent, 1763; Tobago, 1763, later extended to 1841 by Act 346 of 1841, and later still to 1848 on the merger of the territory with Trinidad; and Trinidad, reception date for English law is 1848 by virtue of a declaratory statute of 1914 (re-enacted in the Judicature Act 1962). Noel v Noel (1959) 1 WIR 300, and Nedd v Simon, Civil Appeal 60 of 1972 (cited by Patchett) suggested the earlier reception date of 1783 for the common law in Grenada.

103 Stoby CJ in Blades v Jaggard (1961) 4 WIR 207, 210, accepted that 1625 is the reception date for English law in Barbados. An Anglo-French treaty of 1627 divided St Christopher between both nations. As there were already English settlers on the Island, a part of it could have been settled from as early as 1623; but certainly no earlier than that date.

104 Crouther’s Case (n 100). In this case a constable was indicted because he failed to make ‘a hue and cry’ after he had received notice of a burglary.
explains, ‘St Lucia, the only territory in the Caribbean not to have introduced the common law and laid down a reception date for English Statutes of general application, has nonetheless by piecemeal made much of its law English.’

He goes on to say of St Lucia, ‘It may be doubted that the common law of crime has ever being adopted.’ St Lucia is one of the Commonwealth Caribbean territories that adopted the model Criminal Code in 1887. Nevertheless, prior to the adoption of the code, the St Lucian Criminal law Ordinance 1875 made all criminal offences that could then be tried before the English courts, also crimes in St Lucia. By this device alone, the English Common law rules on misconduct in public office, such as existed in 1875, are also part of the law of St Lucia.

In contemporary circumstances only rarely would a question turn on whether a particular English law has in fact been received into the local law. There is the occasional historical exception. In 1693, for example, the question arose in *Blankard v Galdy* whether an Elizabethan statute ‘… prohibiting the purchase of offices concerning the administration of Justice…’ applied in Jamaica. The plaintiff was appointed Provost Marshall and he sold the office to the defendant, securing the performance of the duties of the office

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105 Patchett (n 102) 28.

106 Ibid.

107 The RS Wright 1887 model criminal code was adopted in St Lucia in 1887, and repeated in 1920 and in 1992 (the current version). There is a new draft under consideration. See *Phillip and John v R* [2007] UKPC 31.

108 On the other hand, St Lucia is one of the Commonwealth Caribbean countries that has codified the common law on crime, and by this device of covering the field may have abolished the common law on misconduct in public office.

109 (1693) 2 Salk 411, 90 ER 1089.

110 See the discussion in Patchett (n 102) 22.
with a bond. The defendant took the benefits of the office without performing the duties, and the plaintiff sought to enforce the bond. In this case, the English statute that prohibited the sale of public office was held not to extend to Jamaica, as it was a conquered territory. By this reasoning Jamaica, having been acquired from Spain, would not have received English law except through extension by the Crown. The contract for the sale of the public office was therefore held to be neither illegal nor unenforceable under Jamaican law, and thus the bond that sought to ensure the performance of the contract was valid. There is some doubt about the correctness of the reasoning in Blankard v Galdy. The case turned on the non-reception of an English statute into the local law. Nevertheless, there is some authority to suggest that the sale of a public office was also an offence at common law, and therefore the proper question was whether the English common law had been received. If that were so, as a matter of public policy, such an agreement for sale would have been unenforceable at common law, whether or not the statute had been received. Later English decisions, such as R v Vaughn, Campbell v Hall, and the Jamaican Supreme Court case of Jackquet v Edwards, treated Jamaica as if it were a settled colony receiving the common law. Those cases now represent the orthodox approach. As such, applying R v Vaughn, Campbell v Hall, and Jackquet v Edwards, Jamaica would have received the English

111 Olson J in Question of Law Reserved (No 2 of 1996) (n 2), seem to have accepted that this would be just one example of the offence of abuse of public office.

112 (1769) 4 Barr 2494.

113 1 Cowp 204; 98 ER 1045.

114 1 Jamaica Supreme Court Decisions 414.
common law prohibiting the sale of public office, as well as on misconduct in public office.

Although the charge of misconduct in public office is sometimes directed at the corrupt behaviour of public officials, in the manner in which corruption has previously been defined in Chapter 1, the crime does not specifically treat with corruption. The common law offence is directed principally at the neglect of public duty, not necessarily the deliberate corruption of it. The editors of *Russell on Crime* set out the common law offence in the following terms:

Where a public officer is guilty of misbehaviour in office by neglecting a duty imposed upon him either at common law or by statute, he commits a misdemeanour and is liable to indictment unless another remedy is substituted by statute. The liability exists whether he is a common law or a statutory officer; and a person holding an office of important trust and of consequence to the public, under letters patent or derivatively from such authority, is liable to indictment for not faithfully discharging the office.  

The common law offence therefore covers many matters that are not caught by the anticorruption statutes, and not covered by the definition of corruption that we have applied to this study.

The leading case of *R v Bembridge* is generally accepted as the source of the modern law, and it is possible to interpret Lord Mansfield’s statement in that case on the common law offence as accommodating two distinct types of activity. Lord Mansfield had said:

Here there are two principles applicable: first, that a man accepting an office of trust concerning the public, especially if attended with profit, is answerable criminally to the King for misbehaviour in his office; this is true, by whomever and in

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116 (1783) 3 Doug KB 327.
whatever way the officer is appointed ... Secondly, where there is a breach of trust, fraud, or imposition, in a matter concerning the public, though as between individuals it would only be actionable, yet as between the King and the subject it is indictable. That such should be the rule is essential to the existence of the country.\(^{117}\)

Thus, on the authority of *Bembridge*, the public officer is criminally responsible when he misbehaves in carrying out his office; and he is also guilty if there is breach of trust or fraud in carrying out his office. *Bembridge* was not discussed at all by the Court of Appeal of the Eastern Caribbean States when it turned its attention to the question in *Williams v R*.\(^{118}\) Here, the Court relied on two later cases—*R v Whittaker*\(^{119}\) and *Walter v R*.\(^{120}\) Nevertheless, the conclusions seem for the most part consistent with the approach adopted by Lord Mansfield in *Bembridge*. In *Williams v R*, Moe JA in delivering the judgment of the Court suggested that the following must be present for the offence to exist—That the accused is a public officer; that as such he owes a duty; that there has been a breach of that duty; that the conduct of the accused was calculated to injure the public interest and was of such a nature as to call for condemnation and punishment; and that there was an oblique or fraudulent motive.

Moe JA’s last requirement, that there must be an oblique or fraudulent motive, brings misbehaviour in public office into the realm of corruption, as we have so far defined it, but that does not completely acknowledge the suggestion inherent in Lord Mansfield's definition that the offence can be

\(^{117}\) *R v Bembridge* ibid 332.

\(^{118}\) *Williams v R* (1986) 39 WIR 129.

\(^{119}\) [1914] 3 KB 1283.

\(^{120}\) (1980) 27 WIR 386.
constituted in any one of two ways—misbehaviour in carrying out the office, or breach of trust or fraud in carrying out the office.\textsuperscript{121} There is some doubt whether this oblique or fraudulent motive remain a necessary requirement of the modern English criminal offence. This was the question referred to the English Court of Appeal in \textit{A G’s Ref (No 3 of 2003)}.\textsuperscript{122} Here the Court of Appeal was asked to answer:

(1) What are the ingredients of the common law offence of misconduct in a public office? (2) In particular is it necessary, in proceedings for an offence of misconduct in a public office, for the prosecution to prove ‘bad faith’ and, if so, what does bad faith mean in this context?\textsuperscript{123}

In this case, several police officers were charged with manslaughter and misconduct when they neglected to attend on a prisoner in their custody who was in some physical distress. The prisoner died when he was left unattended. In addition to the other requirements of the offence, the critical question here was whether the police officers had wilfully neglected to perform their duty or wilfully misconduct themselves in looking after the prisoner. Pill LJ, who delivered the opinion of the court, said that discussions of ‘bad faith’ were inappropriate to this case. But even if oblique or fraudulent motives or bad faith are not necessary requirements for misconduct in public office, and \textit{R v Borron}\textsuperscript{124} and \textit{Williams v R}\textsuperscript{125} suggest that they are necessary, the existence

\textsuperscript{121} McLachlin CJ in \textit{R v Boulanger} (n 6), suggested the dichotomy of non-feasance, were the neglect of official duties, and misfeasance (or malfeasance) where there is a ‘… a corrupt, dishonest or oppressive intent.’


\textsuperscript{123} Ibid [2], 77.

\textsuperscript{124} (1820) 3 B & Ald 432.

\textsuperscript{125} \textit{Williams v R} (n 118).
of fraudulent motives or bad faith is certainly one way of constituting the offence.

It seems clear, as Moe JA suggested, ‘The offence of misbehaviour in public office may be committed in a variety of ways.’ Abbott CJ in *R v Borron* was of the opinion that ‘… dishonest, oppressive, or corrupt motive, under which description fear and favour may generally be included,’ was one way of grounding an indictment or criminal information. Thus, it cannot be suggested that such considerations are always irrelevant and there are many situations, such as the one the Court of Appeal of the Eastern Caribbean States addressed in *Williams v R*, where whether or not the defendant has acted in bad faith will be critical to guilt. It is possible to characterise misconduct in public office as corruption when it is accompanied by an oblique or fraudulent motive.

Several Commonwealth Caribbean States have codified the common law on crime. These codes also reproduce the common law injunctions against bribery, extortion and misconduct in public office. For example, s 284 the Criminal Code of Belize provide as follows:

> 284. Every public officer or juror who is guilty of corruption or of wilful oppression or of extortion in respect of the duties of his office shall be liable to imprisonment for two years.

Similar provisions are to be found in the law of the other code territories.

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126 *Williams v R* (n 118) 139 (Moe JA). Support for this approach can also be found in *Question of Law Reserved (No 2 of 1996)* (n 96) – [97], and *R v Llewellyn-Jones* (n 97).

127 (1820) 3 B & Ald 432, 434.

128 *Williams v R* (n 118).

129 Ibid.

130 See, eg, the Bahamas Penal Code, Chapter 84, 1873, s 453 (1). See also the Guyana
Although similar, the code provisions are not exactly the same. For example, the Bahamas Penal Code, ss 453(2) and (3), goes on to explain what is meant by ‘oppression’ and ‘extortion’. The explanatory provisions are as follows:

(2) A public officer or juror is guilty of wilful oppression in respect of the duties of his office if he wilfully commits any excess or abuse of his authority, to the injury of the public or of any person.

(3) A public officer is guilty of extortion who, under cover of his office, demands or obtains from any person, whether for public purposes or for himself or any other person, any money or valuable consideration which he knows that he is not lawfully authorised to demand or obtain, or at a time at which he knows that he is not lawfully authorised to demand the same.

The question has not yet arisen in the code states of the Commonwealth Caribbean whether the code provisions on oppression and extortion sufficiently cover the field so as to abolish the common law on misconduct in public office. The Court of Appeal of the Eastern Caribbean States, in interpreting the Penal Code 1983 of Montserrat, made it clear that the code is not merely a replication of the common law, but an addition to it. Sir Vincent Floissac CJ explained:

Accordingly, the legislative purpose of the Code is not merely to codify but to amend the penal laws … of Montserrat. Some sections of the Code purport to be mere codifications of the common law, but other sections are clearly intended to introduce new penal laws.

The provisions of the Criminal Law (Offences) Act 1894 on corruption in Guyana more closely reflect the UK anticorruption legislation that they do the common law. In any event, it is certainly clear that in the non-

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131 See, eg, Question of Law Reserved (No 2 of 1996) (n 2).

code territories of the Commonwealth, even in those where new anticorruption legislation have been introduced, the legislation also tend to represent more the UK legislation than they do the common law. For example, under s 14 (1) (a) of the Corruption (Prevention) Act 2001 in Jamaica, a public servant commits an act of corruption where he:

… corruptly solicits or accepts, whether directly or indirectly, any article or money or other benefit, being a gift, favour, promise or advantage for himself or another person for doing any act or omitting to do any act in the performance of his public functions.

This bears more than a passing resemblance to the Prevention of Corruption Act 1906 (UK) s 1(1). The Prevention of Corruption Act 2004 of Antigua and Barbuda seems to cover a much broader field, and it includes as an offence of corruption where ‘… one allows his private interest to conflict with his public duties or to improperly influence his conduct in the performance of his functions as a public official.’

It is submitted that in neither case do the statutory provisions cover the same field as the common law.

**What Amounts to Misconduct**

What amounts to misconduct in public office for purposes of constituting the office at common is not without controversy. This is because the offence is defined in such general terms, and the terms are used to cover such wide a range of wrongdoing. The problem is not completely solved by adopting McLachlin CJ’s suggestion in *Boulanger*, that misconduct in public office is really two distinct offences: misfeasance in public office and neglect in public

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133 Prevention of Corruption Act 2004 (A&B) S 3 (1) (e).
134 [2006] 2 SCR 49.
office. Commonwealth Caribbean courts have had to address this issue from time to time. In Williams, the appellant was jointly charged with another with four offences, including the common law offence of misbehaviour in public office. At the material time, the appellant was Minister of Communications and Works in the Government of St Vincent and the Grenadines. He was also the owner of a vessel named the mv Richard. Lake Asphalt, a firm in Trinidad, shipped from Trinidad to St Vincent, by the mv Richard, 2000 drums of asphalt bitumen consigned to St Vincent’s Ministry of Communications and Works. Lake Asphalt paid the freight for the shipment to the agent for the mv Richard in Trinidad, and the agent’s officers informed the appellant of the payment. On the appellant’s instructions, the agent transferred part of this payment to his bank account. The appellant later presented to the general manager of the St Vincent Government Funding Scheme, a bill for the freight cost for the shipment of asphalt. He received a payment voucher in the name of the agent for the mv Richard in St Vincent, and presented it to the Treasury for a cheque drawn in favour of that agent in the sum of $40,000. The appellant then deposited the proceeds of that cheque into his bank account. The appellant’s conviction for misbehaviour in public office was upheld by the Court of Appeal.

On the other hand, in Walter v R the Premier of the State of Antigua appealed his conviction of two counts of misbehaviour in public office and a third count of conspiracy to defraud the Government of Antigua of import

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duty payable on certain goods. While he was premier of the state, the appellant negotiated in his private and personal capacity for the purchase and importation into the state of two steel buildings. He negotiated for one building to be sold to the government of the state and then he applied the other to his personal use. After the shipping documents arrived, the appellant handed them over to the Assistant Secretary in his ministry and the buildings were eventually cleared from the customs by the Public Works Department and entered the state free of duty. The officers responsible for the preparation of the documents and the clearing of the goods acted in the belief that both buildings were imported solely for the Government’s use. The court of appeal agreed that the management of the trial and the treatment of the witnesses’ testimony by the trial judge were unsatisfactory and, as such, the conviction on the second count, which dealt with the impropriety in the importation into the State of a quantity of steel frames without the payment of the relevant duties, could not stand.\(^{137}\) With regard the first count, which concerned the sale of the building to government at a profit, the court of appeal felt that a critical ingredient of the offence was missing. Peterkin JA put it thus:

\[\text{It would however appear from the sum total of the learning revealed in the reports of the recent cases of this nature that proof of some fraudulent or oblique motive is a necessary ingredient of the offence at common law of misbehaviour in a public office, particularly in cases of the type alleged against the appellant. Put another way, this court is not at all sure, on the learning available to it from recent cases of this nature, that such a fraudulent or oblique motive is not an important and necessary ingredient of this offence.}\(^{138}\)

\(^{137}\) Ibid 391.

\(^{138}\) Ibid 393. It is likely that this conduct would now be caught by the Prevention of Corruption Act 2004, s 3(1)(e), which makes it an offence where “… one allows his private interest to conflict with his public duties.”
As reprehensible as the appellant’s conduct may have been the court decided
that the prosecution failed to prove that in the sale of the building to the
government the appellant acted from any ‘fraudulent or oblique motive.’ Thus,
in the opinion of the Court of Appeal, the appellant, by this conduct, had not
committed the offence of misbehaviour in public office. The scheme to evade
the customs duty could be misbehaviour in public office, but the evidence on
this count was unreliable.

Our understanding of the Commonwealth Caribbean law is assisted by
developments elsewhere in the Commonwealth. In Bembridge\textsuperscript{139} the
defendant, an accountant in the office of the Receiver and Paymaster-General
of the Forces, had deceitfully concealed from his superiors his knowledge that
certain sums were omitted from the final accounts. He was convicted. In Henly
\textit{v} Lyme Corporation,\textsuperscript{140} the mayor and burgesses of Lyme Regis were held
liable for failing in their public duty to repair the Cob. In \textit{R v Hall},\textsuperscript{141} an
overseer for the poor who also had the statutory duty to prepare the register of
qualified voters in parliamentary and council elections was indicted for
corruptly omitting from the register persons qualified to vote, and including
persons who were dead or otherwise not qualified. Although the indictment
was found to be defective, because subsequent legislation had covered the
field and established the remedies for electoral offences,\textsuperscript{142} Hirst LJ in \textit{R v

\textsuperscript{139} (1783) 3 Doug 327.}
\textsuperscript{140} (1828) 5 Bing 91.
\textsuperscript{141} [1891] 1 QB 747.
\textsuperscript{142} The Representation of the People Act 1832 (2 & 3 Will 4 c 45).
Bowden said, ‘It was clearly implicit in the decision of R v Hall that, but for the statutory provisions, the indictment would have been good.’

In Whitaker, the Court of Criminal Appeal upheld the conviction of a commanding officer who accepted money from a firm of caterers as inducement to accept their representative as tenant of the regimental canteen. While the conviction of a county court registrar who made an order, intending to gain by it an improper personal advantage, was also upheld in R v Llewellyn-Jones. In R v Dytham the Court of Appeal upheld the conviction of a constable who had witnessed the commission of a serious offence of violence, and had wilfully failed to take any steps to prevent the commission of the offence, protect the person of the victim, or to arrest the assailant. The fact that the constable was in uniform was mentioned in that case, and in its subsequent analysis in the Court of Appeal by Hirst LJ in R v Bowden, but that can hardly be a significant fact as the public duty exist, and may be breached, whether the constable is in uniform or not.

In Question of Law Reserved (No 2 of 1996), the South Australian Supreme Court held that police officers who had improperly passed on to a private detective information they had acquired in the course of performing their duties, abused their public office at common law. There was no suggestion that the police officers had solicited or received payment for the

144 [1914] 3 KB 1283.
145 R v Llewellyn-Jones (n 97).
148 Question of Law Reserved (No 2 of 1996) (n 2).
information that they supplied. In the light the sensitivity of Commonwealth Caribbean governments to impropriety in public sector procurement, the Hong Kong case of *Shum Kwok Sher v HKSAR*\(^{149}\) is particularly instructive. The appellant was the Chief Property Manager in the Government Property Agency of the Hong Kong Government. He was tried and convicted on four charges of misconduct in public office. On the first charge or count, he was charged with failing to declare a conflict of interest, as he was required to do by a Civil Service Branch Circular, and participating in the pre-qualifying a company with which he was connected when the company was not qualified for prequalification. The particulars of the other three charges were that he had participated in awarding or recommending for award contracts to three connected companies in which his brothers-in-law were directors and or shareholders. The trial judge found that his non-disclosure of the conflict of interest was based on the appellant’s desire to favour the connected companies, and that he recommended the connected companies for the contracts in order to favour them. The Court of Appeal dismissed his appeal.\(^{150}\)

Even more problematic than the facts that may give rise to the offence of misconduct in public office is the question of the requisite *mens rea* of the offence. Judges do not often address this issue and there is some uncertainty as to exactly what mental element is required. Certainly, this was the difficulty

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\(^{149}\) *Shum Kwok Sher* (n 94).

\(^{150}\) In his arguments before the Court of Final Appeal of Hong Kong the appellant accepted that misconduct in public office was an offence at common law but that, in addition to contravening the International Covenant on Civil and Political Rights, ‘… it is too vague, uncertain and ill-defined to comply with arts 8, 28 and 39 of the Basic Law [of Hong Kong].’ *Shum Kwok Sher* (n 94) [46]. This argument did not succeed.
confronted the Court in *Walter v R* where it could not find any ‘... fraudulent or oblique motive’.\(^\text{151}\) The problem may not be as easy to address as Sir Anthony Mason NPJ in *Shum Kwok Sher v HKSAR* seemed to suggest. Having set out the facts, which constituted the offence, he then concluded: ‘Accordingly, his conduct was wilful in that he was aware of his responsibilities, and realised that what he was doing was dishonest.’\(^\text{152}\) The weight of the authorities seem to support Mason NPJ,\(^\text{153}\) but if the *mens rea* for misconduct in public office is mere wilfulness, then the Court of Appeal in *Walter*\(^\text{154}\) should have had no difficulty upholding the defendant’s conviction. There should be no suggestion that the legislative solution is any less problematic.\(^\text{155}\)

Misconduct in public office appears to be a powerful weapon in the anticorruption arsenal. The offence appears to cover a broad range of activities that a state would desire to suppress as it seeks to engineer the delivery of public services to its people. However, it is the very breadth of the field that makes this offence so difficult to establish. The Court of Appeal in *AG’s Reference (No 3 of 2003)* noted, with some sympathy it seems, the trial judge’s lament of how difficult it is, ‘... to identify the precise ingredients and limits of old common law offences such as this one.’\(^\text{156}\) Indeed, Pill LJ noted

\(^{151}\) (1980) 27 WIR 386.
\(^{152}\) [2002] HKCFA 27 [100].
\(^{153}\) See *AG’s Reference (No 3 of 2003)* (n 100) [28], where Pill LJ said that ‘wilfulness in the commission of the offence’ is the required *mens rea*. See also, *R v Young* (1758) *Burr.* 557, 97 ER 447, where Lord Mansfield accepted wilfulness as a constituent of the offence.
\(^{154}\) (1980) 27 WIR 386.
\(^{156}\) *AG’s Reference (No 3 of 2003)* (n 100) [9].
that ‘… some of the ingredients set out in the formulation of the offence in \( R v Dytham \) ... are not easy to identify in earlier authorities or texts.’\(^{157}\) It seems that however we may regard the crime, whether the offence of misconduct in public office requires a fraudulent motive, misfeasance in the performance of the public duties, or gross neglect in the performance of them, the criminal offence is only committed if the officer wilfully performed or wilfully failed to perform the acts.

**Bribery**

Bribery is just one type of corruption, and Commonwealth Caribbean countries have for the most part imported the common law or copied the common law on bribery into local legislation. All territories have also copied the UK legislation on corrupt payments, and there is an argument that this is not simply a codification of the common law on bribery since the legislation introduced the additional requirement of ‘corruptly’ to offering or giving a gift or consideration as an inducement to do or refrain from doing one’s public duty. It is virtually impossible, however, to make functional distinction between the corruption offences of giving or receiving an inducement or favour and that of bribery, even with the additional requirement of corruptly doing the act. A bribe under the existing law is anything, whether it is money or some other inducement or favour, which is offered or given to someone in trust or authority to influence that person’s views or conduct. A significant feature of the offence is the fact of influence or attempted influence of the

\(^{157}\) Ibid.
public agent’s conduct. This is demonstrated by the British Guiana Supreme Court case of *Sooknanan v Hopkinson*, where the court considered the offence of a corrupt transaction with an agent, contrary to s 105(2)(b) of the Summary Jurisdiction (Offences) Ordinance. An offence is committed under s 105(2)(b) when:

… anyone corruptly gives, or agrees to give, or offers, any gift or consideration to an agent as an inducement or reward for doing or forbearing to do, or for having after the enactment of this section done or forborne to do, any act in relation to his principal’s affairs or business, or for showing or forbearing to show favour or disfavour to anyone in relation to his principal’s affairs or business....

The appellant was charged with corruptly giving a policeman an inducement not to institute a charge against the appellant’s brother. It seemed to have been conceded by all the parties that the particular section under which the appellant was charged required that money be offered to or received by the policeman to induce him in breach of his duties to do or forbear from doing the required act. The appeal was based in part on the argument that, since the constable had already reported the matter to his superiors at the time he was offered the gift and was waiting on instructions as to what he should do, he was not at that time in a position to prosecute the accused. Therefore, he could not be induced to forbear from doing so. As attractive as the argument was, it did not find favour with the Court of Appeal.

It is quite understandable that when Commonwealth Caribbean judges have had to address the issues of interpreting and applying these statutes they

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159 Cap 14 (BG).
160 *Sooknanan v Hopkinson* (n 158).
turn to English case law. In *Sookanan v Hopkinson*, the court found itself persuaded by the decisions in *R v Smith*\(^\text{161}\) and *R v Dickinson, R v De Rable*.\(^\text{162}\) In the earlier case, *Smith*, the appellant was charged with corruption, contrary to s 1(2) of the Public Bodies Corrupt Practices Act 1889. The allegations against the appellants were that he had corruptly offered a gift to the local mayor so that the mayor would influence the council to favour him. The appellant admitted offering the gift, but said that he had done so as part of a scheme to expose corruption on the council. The appellant was something of an anticorruption campaigner, and there is little doubt that he believed that there was corruption among the members of the council, the police, and the magistrates. Notwithstanding this arguably good motive, the Court of Appeal confirmed his conviction. In delivering the judgment of the court, Lord Parker CJ said:

> It seems to this court that the word ‘corruptly’ here used (and it is a word which appears throughout the Act and other Acts dealing with corruption) … denotes that the person making the offer does so deliberately and with the intention that the person to whom it is addressed should enter into a corrupt bargain.

In this sense, it does not mean that the defendant’s action at attempted entrapment is necessarily dishonest but that his action put public officers or public servants in a position where they may be subject to temptation; and that is precisely the mischief that that the Act, and other like it, seek to address.\(^\text{163}\)

It is not immediately obvious why the decision in *Smith* should be such a complete answer to the appellant’s argument in *Sookanan v Hopkinson*. After

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\(^{161}\) [1960] 2 QB 423.

\(^{162}\) (1949) 33 Cr App R 5; (1948) 92 Sol Jo 574.

\(^{163}\) In support of this Lord Parker CJ cited with approval the majority in *Cooper v Slade* (1858) 6 HLC 746.
all, in *Sooknanan v Hopkinson* the argument was that the constable was under no duty to prosecute and therefore the appellant could not corruptly induce him to not to perform that duty. In *Smith*, on the other hand, the appellant’s attempted bribe of the public official was motivated by a laudable motive; but it was still corrupt because he was trying to induce someone, who had a public duty, to perform that duty in a corrupt manner. It seems that the operative consideration in *Sooknanan v Hopkinson* was that neither the trial magistrate nor the appellate court accepted the contention that the constable, having reported the matter to his superiors, was relieved by that act from the further duty to prosecute.

In the *Dickinson* case, the appellants were indicted under the Prevention of Corruption Acts, 1906 and 1916, with conspiring corruptly to obtain money from a company as an inducement to favour that company in its dealings with the appellants’ employer. Section 1(1) and s 2 of the Prevention of Corruption Act, 1906 are materially similar to s 105(2)(a) and (b) and s 105(3) respectively of the Summary Jurisdiction (Offences) Ordinance of Guyana.\(^{164}\) One appellant, Dickinson, was an official with the Ministry of Aircraft Production and the other, De Rable, was his driver. Dickinson persuaded a manager of a tool making company to open a commission account in the name of De Rable, under the threat that the company would suffer if this were not done. This account was really for the benefit of Dickenson. Commissions were paid on the De Rable account on orders for tools coming to this company. Dickenson argued that as his duties with his employer

\(^{164}\) Cap 14 (BG).
concerned aeroplane engines and not tools, any payments made to him or to De Rable for him with regard to orders for tools could not be payments made to corrupt him in his duty.

The Court of Criminal Appeal rejected this contention and took the view that there was evidence that Dickinson, being an agent, corruptly obtained money from the tool making company as an inducement for forbearing to do an act in relation to his principal’s affairs. The fact that his forbearance could not have had the deleterious effect he implied it would have had is unimportant. This activity fell clearly within the prohibitions of s 1(1) of the Act of 1906. In *Sooknanan v Hopkinson*, the Court of Appeal in British Guiana accepted and adopted this approach. That court declared its understanding of the decision in *Dickinson* as follows:

… wherever the agent is in a position to show favour in some way or other when he receives the money, it matters not whether he has the power directly or indirectly to do the particular act in relation to his principal’s affairs in respect of which he has received the money.  

This approach, rather than that of *Smith*, better answered the question at hand. The constable in *Sooknanan v Hopkinson*, having passed on the matter to his superiors, may no longer have had the power to prosecute on the particular charge, but he was nevertheless still in a position to show favour in some way when the appellant offered him money. It was also the prosecution’s position in the *Sooknanan* case that the constable always had the right to prosecute, even though he had brought the matter to the attention of his superior officers for them to deal with it. However, once the court adopted the approach in

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165 (1961) 4 WIR 1, 7.
Dickinson, the question of whether or not the constable still had the right to prosecute becomes irrelevant.

Indeed, Dickinson was applied earlier in Guyana in Shankland v Billyeald.\textsuperscript{166} There, the Full Court of British Guiana cited with approval the Dickinson decision. The Shankland case also involved bribery. The appellant in that case was a disposal officer and an agent of the Board of Control. The case for the prosecution was that the appellant corruptly accepted money as an inducement for selling a quantity of articles below their real value, and he was convicted of an offence under s 105 of the Summary Jurisdiction (Offences) Ordinance.\textsuperscript{167} The appellant argued that as he had no authority to sell the articles, and that his superiors had specifically prohibited him from selling them, he was therefore not an agent for the sale of the articles. The appellant’s counsel even argued that while the appellant might be guilty of stealing the articles, he could not be guilty of an offence under s 105 of Cap 14. This argument received the short shrift. The Full Court applied Dickinson, and held that for the appellant to come within the meaning of s 105 it is necessary to show only that he was in a position to show favour to someone, and had received money purportedly for that purpose.\textsuperscript{168} The Supreme Court in Sooknanan v Hopkinson cited Shankland v Billyeald with approval.

The law on bribery is directed primarily at public agents, as the provisions of the Bahamas Prevention of Bribery Act 1976 demonstrate.

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\textsuperscript{166} [1951] LRGB 185.
\textsuperscript{167} Chap 14 (Guy).
\textsuperscript{168} (1961) 4 WIR 1, 7. See also Morgan v DPP \textsuperscript{[1970]} 3 All ER 1053, where the court held that for the purposes of the Prevention of Corruption Act s 1, acting in relation to the principal’s affairs should be considered broadly, and that it was not necessary that the corrupt consideration be received in the capacity of an agent.
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Cabinet ministers, officers of the central bank, and civil servants are public servants within the meaning of the act. If any of those agents received any gift, in the form of money or otherwise, or any loan or favour as a reward for performing any act in their respective official capacities as public servants, it is an offence under the Act.169 Bribery offences under the Act are punishable on conviction on an indictment by a fine not exceeding $10,000, or by a term of imprisonment not exceeding four years, or by both a fine and imprisonment. On summary conviction, the fine is $5000 and the term of imprisonment for a period not exceeding two years; or both a fine and imprisonment. In Attorney-General v Lightbourn,170 the High Court of the Commonwealth of the Bahamas held that s 4 of the Powers and Privileges (Senate and House of Assembly) Act 1969 does not provide immunity for a member of a house of legislature from an order of the court requiring him to furnish information under the Prevention of Bribery Act 1976. This position holds even though the order may be based on a notice that was occasioned by things said in Parliament.

In Trinidad and Tobago, the Prevention of Corruption Ordinance defines ‘Agent’ to include ‘any person employed by or acting for another and any person serving under the Crown or other public body.’171 Wooding CJ in Bates v James held that the authorities are clear that a police constable is a person serving under the Crown and consequently is an agent within the

170 Ibid 24.
171 Chap 4 No 14 (T&T),

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meaning of that Ordinance.\textsuperscript{172} In \textit{Bates v James} the appellant was charged that while being an agent, he corruptly obtained money as an inducement or reward for forbearing to prosecute for the offence speeding contrary to the provisions of the Motor Vehicles and Road Traffic (Amendment) Ordinance.\textsuperscript{173}

Section 10 of the Prevention of Corruption Ordinance then required that a prosecution for an offence the Ordinance should not be instituted, except by or with the consent of the Attorney-General.\textsuperscript{174} This action was not initiated by or with the consent of the Attorney-General, but rather it was initiated with the consent of the Director of Public Prosecutions who gave his consent under the powers vested in him by an order made by the Governor under s 15 of the Trinidad and Tobago (Constitution) Order in Council, 1961. The court held that the Ordinance had been properly amended to substitute Director of Public Prosecutions for Attorney General. The court also reaffirmed its earlier decision\textsuperscript{175} that it was not necessary for a magistrate to state specifically that he had considered the matter of corroboration if there was in fact corroborative evidence on which he could and did rely. In this case, the court had clear evidence of corroboration on which the magistrate could rely.\textsuperscript{176}

The requirement that a prosecution for a corruption offence could only be instituted by or with the consent of the Attorney-General was copied from

\textsuperscript{172} (1964) 7 WIR 203, 204.

\textsuperscript{173} Chap 16 No 3 (T&T).

\textsuperscript{174} The Act has since been amended. Section 11 replaces s 10 and now provides, ‘A prosecution for an offence under this Act shall not be instituted except by or with the consent of the Director of Public Prosecutions.’

\textsuperscript{175} \textit{Jacobs v Matthews} (1963) 5 WIR 442.

\textsuperscript{176} \textit{Bates v James} (n 172) 207.
the UK legislation, but in Commonwealth Caribbean jurisdictions this restriction operated somewhat differently than in the UK. In the Common-
wealth Caribbean, in the colonial period, an Attorney-General was not a political officer. He was a civil servant. In any event, the contemporary practice in the region is for control of corruption prosecutions to be placed in the hand of a clearly independent and constitutionally protected law officer, the Director of Public Prosecutions. Thus, the criticism by the Council of Europe's Group of States Against Corruption that the UK position on the prosecution of corruption represents a form of political control could not have been levelled at Commonwealth Caribbean colonies and cannot now be made against the independent states of the region.177

A gift to a public official may be inappropriate, but not necessary corrupt. Indeed, the payment could be quite innocent. For example, in Sooknanan v Hopkinson178 part of the defendant’s defence before the magistrate was that he had in fact paid a sum of money to the constable, but that money represented the repayment of a debt and not an inducement to the constable not to prosecute. In that case, the court did not accept that the payment was innocent, and thus the defence was not successful. Nevertheless, the responsibility is on the prosecution to establish that the accused received the money corruptly and that he or she received it for the particular purpose alleged in the charge.179 This is not an easy burden to discharge, and it is

177 See the discussion on the Group of States Against Corruption and the UK in Carr, 'Fighting Corruption in International Trade' (n 23) 204-05.
assisted considerably by the provision in the Prevention of Corruption Act 1916, and its derivatives in the Caribbean, that raises a presumption of corruption where:

‘… it is proved that any money, gift, or other consideration has been paid or given to or received by a person in the employment of His Majesty or any Government Department or a public body by or from a person, or agent of a person, holding or seeking to obtain a contract from His Majesty or any Government Department or public body.’\(^{180}\)

The Full Court in *Sooknanan v Hopkinson*\(^{181}\) discussed two earlier cases from British Guiana, *Shankland v Billyeald*\(^{182}\) and *Went v Billyeald*,\(^{183}\) that appeared to have had contradictory results. In *Shankland v Billyeald* the appellant was found guilty of corruptly accepting money as an inducement to sell government property below its real value. The fact that he had no authority to sell the items in question was considered unimportant. On the other hand, in *Went v Billyeald* a similar defence succeeded. In *Went’s* case, it was proved that the appellant had nothing to do with the awarding of contracts and thus was not in a position to show favour as alleged by the prosecution. In light of the earlier decision of the British Guiana Full Court,\(^{184}\) and the English Court of Appeal decision in *R v Dickinson, R v De Rable*,\(^{185}\) it followed that that fact by itself should have been unimportant. Bollers J, who delivered the judgment of the court, reconciled the Full Court’s two apparently inconsistent decisions in this manner:

\(^{180}\) Prevention of Corruption Act 1916 (UK) s 2.

\(^{181}\) (1961) 4 WIR 1.

\(^{182}\) [1951] LRBG 185.

\(^{183}\) [1950] LRBG 107.

\(^{184}\) *Shankland v Billyeald* (n 182).

\(^{185}\) (1948) 92 Sol Jo 574; 33 Cr App Rep 5.
[W]hat we believe the court to be saying is that the difference between the two cases was that in the former case [Went v Billyeald] the appellant had established prima facie that he had received the money for a lawful purpose and had rebutted the presumption of a corrupt purpose, whereas in the latter case [Shankland v Billyeald] the appellant gave no explanation which established prima facie that the money was received for a lawful purpose or raised a doubt as to whether the money was received for the corrupt purpose alleged.\footnote{\textit{A G’s Ref (No 3 of 2003)} (1961) 4 WIR 1.}

Thus, it was the innocence of the payment, rather than the absence or existence of agency, that made the difference. The offer or acceptance of an innocent payment is not a breach of the law. On the other hand, an agent with limited or even nonexistent authority can be guilty of accepting a corrupt payment as an inducement to do something he cannot do.

\textbf{Public Bodies and Public Office}

There is some debate as to what is a public body or who holds a public office and whether the offence is restricted to special types or classes of public employees. Pill LJ in \textit{A G’s Ref (No 3 of 2003)} declined to consider the question, although in the context of that case it was very clear that the term applied to the police officers who had been charged with the offence. The question is particularly vexing when it is considered that, in what is now described as the new public management, more private individuals and firms are engaged to do the work of public officers.\footnote{See, eg, P Aucoin, \textit{The New Public Management: Canada in comparative perspective} (IRPP, Montreal 1995); E Ferlie and others, \textit{The new public management in action} (Oxford University Press, New York 1996).} In \textit{R v Bowden}\footnote{[1996] 1 WLR 98.} the Court of Appeal in England had held that the common law offence of misconduct in a public office is not limited to being committed by officers or agents of the
Crown, but applies generally to every person who is appointed to discharge a public duty. In Bowden, the appellant was the chief building maintenance manager of a city council works department and his responsibilities included, in addition to the management of subordinate employees, ensuring that the department’s activities were within the approved budget. While engaged in this capacity, the appellant dishonestly used the council’s employees to refurbish premises that he let to one of his friends. Bowden was convicted in the Crown Court on the charge of misconduct in a public office. On his appeal, Bowden did not challenge that his behaviour was capable of being characterised as criminal misconduct, but rather he contended that his appointment as chief building maintenance manager to the city council was not a public office. The Court of Appeal had little difficulty rejecting that contention.

The case of Bowden raised some interesting questions on the responsibility of officers of the new executive agencies introduced in consequence of the new public management now being pursued by some Commonwealth Caribbean states. In the Bowden case, the department was a direct labour organisation, set up under Part III of the UK Local Government, Planning and Land Act 1980. Under Bowden’s contract of employment with the council, he was responsible for management and direction of subordinate employees, accountable for the handling of money, and ensuring that his department’s activities were within budget. In addition, it is also the statutory responsibility for each local authority to ensure that its revenue from

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189 Ibid 100-01.
construction or maintenance works show such positive rate of return on the capital employed for carrying out the works as the Secretary of State may direct.\(^{190}\) It seems clear, and we can now assert with some confidence, that officers in these new executive agencies are as subject to the common law on misconduct in public office, as are the traditional civil servant.

Although UK Members of Parliament are subject to the common law offense of bribery,\(^ {191}\) it was the understanding of the UK Joint Committee on the Draft Corruption Bill that the statutory offences of corruption do not apply to parliamentarians, as neither House of Parliament is a public body within the meaning of the 1889 Act, and the members are not agents within the meaning of the 1906 Act.\(^ {192}\) In the Commonwealth Caribbean, the Court of Appeal of what was the then the West Indies Associated States held in \textit{Walter v R},\(^ {193}\) as one would expect, that the premier of the state was a public officer for purposes of the common law offence of misbehaviour in public office. In \textit{Williams v R},\(^ {194}\) the Eastern Caribbean States Court of Appeal held that a Minister of the Crown, even though he was not a public officer under the Constitution of St Vincent and the Grenadines, nevertheless holds a public office for the purposes of the common law offence of misbehaviour in public office. Moe JA, in delivering the opinion of the Court, was of the view that

\(^{190}\) Local Government, Planning and Land Act 1980, section 16.

\(^{191}\) Ibid [104]. The Committee reported that in 1992 a Member of Parliament was prosecuted for allegedly accepting a bribe, but the Crown later offered no evidence against him.

\(^{192}\) Joint Committee on the Draft Corruption Bill, ‘Draft Corruption Bill: Report and Evidence’ HL and HC (2002-03) [103].

\(^{193}\) (1980) 27 WIR 386.

\(^{194}\) (1986) 39 WIR 129.
constitutio nal definition of public officer was not relevant to the offence. Moe

JA said:

We would add that in our view the meaning ascribed to ‘public
officer’ at common law as enunciated in R v Whittaker [1914] 3
KB 1283, ie ‘a person who discharges any duty in the discharge
of which the public are interested, more clearly so if he is paid
out of a fund by the public’, is not inconsistent with the
meaning of the term set out in section 105(1).195

The appellant had argued that as s 105(2) of the Constitution of Saint Vincent
and the Grenadines provided, ‘In this Constitution, reference to an office in the
public service shall not be construed as including – (a) references to … the
Prime Minister or any other Minister,’196 then an essential element of the
charge, that he holds a public office, was not established. However, the court
relied on its earlier decision in Walter,197 where it had interpreting a similar
provision in the Constitution of Antigua.198 Moe JA specifically adopted the
meaning enunciated in Whittaker199 that a public office at common law is ‘…
a person who discharges any duty in the discharge of which the public are
interested, more clearly so if he is paid out of a fund by the public.’ Among
the earliest authorities to be found for this principle is the statement of Lord
Mansfield CJ in Bembridge.200 There he had put the position thus:

Here there are two principles applicable: first, that a man
accepting an office of trust concerning the public, especially if
attended with profit, is answerable criminally to the King for
misbehaviour in his office; this is true, by whomever and in

195 Ibid 133.
196 Constitution of St. Vincent and the Grenadines.
197 (1980) 27 WIR 386.
199 [1914] 3 KB 1283.
200 (1783) 3 Doug 327
Therefore, in the Commonwealth Caribbean, a prime minister may not be a public officer for purposes of the constitution, but he is certainly a public officer for purposes of the common law.

So too, relying on *R v Whitaker*, the Court of Appeal of Jamaica in *R v Rhoden and Thomas* agreed that, ‘A public officer is one who discharges any duty in which the public is interested, and more particularly if he receives public money.’ In *Rhoden and Thomas*, the appellants, members of the Island Special Constabulary Force, were charged and convicted before the Resident Magistrate on two counts: The first was a count of conspiracy to pervert or defeat the course of public justice, and the second was a count of bribery at common law. The evidence was that the appellants had asked for and had accepted a bribe from the vendor of illegal gambling tickets to refrain from prosecuting him. The Court of Appeal had no difficulty agreeing that the appellants were properly convicted on the first count, but reserved judgment on the appeal on the count of bribery. The question that provoked the court was whether special constables had a public duty to prosecute, in the same manner that regular constables do. In an earlier case, the same Court of Appeal had held that the regulations setting out the particular duties of special constables were *ultra vires* the Constables (Special) the Act, 1904. Those regulations had purported to give the special contestable the powers and

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201 Ibid 331-332
202 (1953) 6 JLR 259.
203 (1914) 10 Cr App Rep 245, 252.
204 This was the decision in *Lee v Steele and Holder*, an unreported Jamaica Court of Appeal case.
privileges of a regular constable, which powers had not been conferred by the Act. At the time of the hearing of the Rhoden and Thomas appeal, the Constables (Special) Act had already been amended to overcome that defect, but the amendments did not apply retroactively. The Court of Appeal accepted that special constables, whether or not they had the exact duties and privileges of regular constables, were nevertheless public officers and, applying Whitaker, the court further agreed that, ‘A public officer is one who discharges any duty in which the public is interested and more particularly if he receives public money.’\textsuperscript{205} From this perspective the conviction of the appellants and the rejection of their appeals are quite correct. For the purposes of the prosecution, it does not matter whether or not in carrying out the offending acts, the appellants were exercising the powers of constables or discharging the functions of any other public servant.

In many cases, there is no doubt that the accused is a public officer. For example, no one would doubt that a police chief is a public officer.\textsuperscript{206} Herst LJ, who delivered the judgment of the court in \textit{R v Bowden},\textsuperscript{207} surveyed the cases, beginning with \textit{Bembridge},\textsuperscript{208} and concluded that an accountant in the office of the Receiver and Paymaster-General of the Forces,\textsuperscript{209} the mayor and burgesses of Lyme Regis,\textsuperscript{210} bishops, clergymen, lords of the manor, bishops, clergymen, lords of the manor,

\textsuperscript{205} 10 CAR 245, 252.
\textsuperscript{206} \textit{R v Boulanger} (n 6). Here the office police chief is public service is designated the ‘director of public security,’ and there was no doubt in the minds of Supreme Court of Canada that was an ‘official’ under the law.
\textsuperscript{207} [1996] 1 WLR 98, 103.
\textsuperscript{208} (1783) 3 Doug. 327.
\textsuperscript{209} \textit{R v Bembridge} (n 117).
\textsuperscript{210} \textit{Henly v Lyme Corporation} (1828) 5 Bing 91. This was a civil action and not a criminal case for misbehaviour in public office.
officers of the Bank of England, an overseer for the poor, the commanding officer in charge of renting the regimental canteen, a county court registrar, and a constable, were public offices. It light of the preceding line of authorities it is not difficult to find that the premier of a state and a minister of government were public offices.

What are public offices, or who are public officers, are often defined and clarified by the several examples of legislation in the Commonwealth Caribbean dealing with corruption and official misconduct. It was already suggested that the Criminal Code of Belize and the Penal Code in the Bahamas include provisions on misconduct in public office, similar to the common law. In the case of Belize, the Criminal Code in defining a public officer focuses on how the officer is appointed. Thus, the code defines a ‘public officer’ to mean any person holding an office or performing the duties of an office where the power to appoint someone to that office is vested in Her Majesty, the Governor-General, or in any public commission or board; any person holding an office which is appointed by statute or public elections; any person holding a civil office, appointment to which has been vested in a public officer as previously defined; any arbitrator or umpire appointed by the court; and any Justice of the Peace. Interestingly, a minister of religion is also a

211 Ibid.
212 R v Hall [1891] 1 QB 747.
213 R v Whitaker [1914] 3 KB 1283.
214 R v Llewellyn-Jones (n 97).
215 R v Dytham (n 93). See also Wooding CJ in Bates v James (1964) 7 WIR 203, 204, where he asserted that the English authorities are clear that constables are persons serving under the Crown and consequently fall within the meaning of the anticorruption legislation.
216 Criminal Code s 299(1) (Bel).
public officer for purposes of the Criminal Code for purposes of performing functions in respect of the notification of intended marriage, solemnisation of a marriage, or making or keeping any register or certificate of marriage, birth, baptism, death or burial.\textsuperscript{217} The language in the provisions under the Bahamas Penal Code is almost the same as the Belizean provisions.\textsuperscript{218} In the Commonwealth Caribbean reproductions and amalgamations of the UK anticorruption legislation,\textsuperscript{219} public officers are defined by the fact that the person holds a public office. In Belize, for example, the statutory offence is directed at ‘... any member, officer, or servant of the Government or of a public body’\textsuperscript{220} and ‘public office’ has been defined to mean ‘... any office or employment of a person as a member, officer or servant of such public body.’\textsuperscript{221} Jamaica’s anticorruption legislation also takes this approach of focussing on the ‘public servant’ who is defined to mean anyone employed to the public, municipal, or parochial services, anyone in service with a statutory body, authority, or government company, any official of the State or its agencies, and anyone appointed, selected, elected or engaged to perform a public function.\textsuperscript{222} The Bahamian incarnation of the UK anticorruption legislation is called the Prevention of Bribery Act, and it directs it attention to

\textsuperscript{217} Ibid s 299 (2). This was one of the professions that Herst LJ in \textit{R v Bowden} [1996] 1 WLR 98, 103, identified as a public office.

\textsuperscript{218} Penal Code s 6 (Bah).

\textsuperscript{219} Public Bodies Corrupt Practices Act 1889 (UK), Prevention of Corruption Act 1906 (UK), and Prevention of Corruption Act 1916 (UK).

\textsuperscript{220} Prevention of Corruption Act 2000 (Bel) s 3(1).

\textsuperscript{221} Ibid s 2.

\textsuperscript{222} Corruption (Prevention) Act 2001 (Jam) s 2.
a ‘public servant’ who are defined to be ‘…a public officer and any employee or member of a public body,’ and ‘public body’ means:

(a) the Government;
(b) a Ministry or Department of the Government;
(c) the Senate or House of Assembly;
(d) a corporation established by Act of Parliament for public purposes or any subsidiary company thereof registered under the Companies Act;
(e) any board, commission, authority, committee or other body, whether paid or unpaid, appointed by the Governor-General or a Minister of the Government.\(^{223}\)

This is how the term is typically defined in Commonwealth Caribbean anticorruption legislation.\(^{224}\)

The new Corruption (Prevention) Act in Jamaica does not use the term ‘public officer’ to describe its subjects. In fact, the term ‘public officer’ is used only in the first schedule and then only in relation to the staffing of the Commission established by the Act.\(^{225}\) Instead, the new act directs its attention to the ‘public servant’ and defines that term in broadest sense. A ‘public servant’ is defined in the Act to mean any person:

(a) employed—
   (i) in the public, municipal or parochial service of Jamaica;
   (ii) in the service of a statutory body or authority or a government company;
(b) who is an official of the State or any of its agencies;
(c) appointed, elected, selected or otherwise engaged to perform a public function.\(^{226}\)

\(^{221}\) Prevention of Bribery Act 1973 (Bah) s 2 (1).
\(^{224}\) See, eg, Prevention of Corruption Act 2004 (A&B) s 2; and Prevention of Corruption Act 1987 (T&T) s 2.
\(^{225}\) Corruption (Prevention) Act 2001 (Jam) First Schedule, para 13(2).
\(^{226}\) Ibid s 2(1).
On any construction, the class of persons characterised as public servants is very wide indeed.

This definition extends even further to include employees of ‘Government Companies’ as public servants. A ‘Government Company’ is defined to mean, ‘… company registered under the Companies Act being a company whose policy the Government or an agency of Government, whether by the holding of shares or by financial input, is in a position to influence.’

There is precedent in Jamaican law for this broad definition of a government company and this is to be found in the Contractor-General Act. There, a public body is defined to include a company registered under the Companies Act, ‘being a company in which the Government or an agency of Government, whether by the holding of shares or by other financial input, is in a position to influence the policy of the company.’ Because of Caribbean governments’ extensive participation in the private sector, adding members to private sector boards or providing financial support, many employees of private companies may find themselves classified as public servants and thus subject to the oversight that in the past was reserved for public officers in the more limited sense.

The new anticorruption legislation in the Commonwealth Caribbean, especially the newer legislation in Antigua and Barbuda and Jamaica, and

227 Ibid. In Belize, the Prevention of Corruption Act 1927, s 2 and the Prevention of Corruption in Public Life Cap 12, 1994, s 2, both define ‘public body’ to ‘… include local and public authorities of all descriptions.’ The latter term is also the interpretation given to public bodies in the Integrity in Public Life Act 200 (T&T). The Integrity in Public Life Act 2004 (A&B) does not define public body. It overcomes this limitation by providing a schedule with a list of ‘Persons in Public Life’ to whom the provisions of the Act apply.

228 Contractor-General Act 1983 (Jam) s 2(1). In Belize, s 2 of the Act extends the meaning to include a company where the government owns 51 per cent or more of the shares.
integrity in public life legislation in Trinidad and Tobago and Belize, treat with misconduct somewhat differently than the common law. Perhaps the most significant difference is the expansion of the meaning of public office or public service. The Prevention of Bribery Act 1976 in the Bahamas define public body to mean the Government, a government ministry or department, the Senate and House of Assembly, a statutory corporation established for a public purpose and its subsidiaries, and any board, commission, authority, committee or other body appointed by the Governor-General or a Minister.\textsuperscript{229} In Trinidad and Tobago, under the Prevention of Corruption Act 1987, ‘public body’ has been defined to include ‘… the Cabinet, the House of Representatives, the Senate, the Tobago House of Assembly, local, statutory and public authorities of all descriptions and all State Enterprises and the Boards thereof.’

**Judicial Misconduct**

It may be a matter of some debate whether the definitions of public office and public officer in the new anticorruption legislation in the region, or for that matter in their UK antecedents, properly cover judges and magistrates.\textsuperscript{230} It is obvious that the new declaration of assets provision are intended to extend to the judiciary, although as will be seen later, there must be some doubt as to whether that intention can be realised in the Commonwealth Caribbean region.

\textsuperscript{229} Prevention of Bribery Act 1976 (Bah) s 2.

\textsuperscript{230} Carr, ‘Fighting Corruption in International Trade’ (n 23) 205, suggest that the Council of Europe Criminal Law Convention on Corruption 1999 and Civil Law Convention of Corruption raise no doubt that judges and magistrates are covered, which is an advance on the OECD convention and, by implication, also the UK law.
in the absence of constitutional amendments. Nevertheless, because there is a well-developed body of law on judicial misconduct which covers a different field than misconduct in public office, whether or not a judge falls under the definition of public officer in the anticorruption legislation may be unimportant. Misconduct in public office by a judge or magistrate is certainly judicial misconduct, but many examples of judicial misconduct would not necessarily constitute the common law crime of misconduct in public office.

There is a common law offence known as perverting the course of justice that is committed when someone, intending to do so, embarks on a course of conduct that has a tendency to pervert the course of public justice. As the tribunal established in Trinidad and Tobago to enquire into whether the impeachment of the Chief Justice should be referred to the Judicial Committee of the Privy Council explained:

The gist of the allegation is that the Chief Justice attempted to pervert the course of justice. That is an accusation of a crime. The commission of a crime, at least of the kind alleged here, must inevitably be ‘misbehaviour’. Thus, the Tribunal should begin by identifying the elements of the crime of attempting to pervert the course of justice, and then go on to consider whether those elements were present here. If they were, then misbehaviour is proved. If they were not then misbehaviour is not proved.

Whereas a judge who has perverted the course of public justice has, by that fact, also committed judicial misconduct, it is conceivable that a judge may misconduct herself without necessary committing this particular offence.

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233 Lord Mustill, Sir Vincent Floissac and C Dennis Morrison, ‘Report of an Enquiry Under Section 137 of The Constitution Of Trinidad And Tobago’ (Government of Trinidad and Tobago, December 2007); hereafter, the Mustill Report.
There are many examples of judicial misconduct that are not crimes. Nevertheless, any such allegation of judicial misconduct, whether or not it is a breach of the criminal law, strikes at the very heart of the society. As Lord Bingham of Cornhill and Lord Walker of Gestingthorpe said, speaking of the prosecution of a Chief Justice for perverting the course of public justice and consequential legal processes, ‘The case is one of acute sensitivity and moment.’ The same could be said of any allegation of a judicial misconduct.

Allegations of judicial misconduct are sometimes associated with corruption, but this has not been an issue in the Commonwealth Caribbean the way it has become a prominent issue in some parts of Latin America. Indeed, in *Barnwell v AG*, Bishop CJ noted that suspending a judge for misconduct is a rare occurrence. Nevertheless, it is true that there are many precedents of judicial misconduct, some of which were for corrupt behaviour. Bishop CJ in Guyana referred to several examples in English history, such as the thirteenth century commission of inquiry appointed by Edward I which led to the dismissal of two out of three judges of the Court of King’s Bench and four out of five judges of the Court of Common Pleas; the conviction of Sir William de Thorpe, Chief Justice, for bribery and his removal from office in 1350; the conviction for bribery and dismissal of Lord Chancellor Bacon in 1621; the resignation in 1725 of Lord Chancellor Macclesfield after his conviction for selling offices in the Court of Chancery; and the forced resignation of Lord Chancellor Westbury in 1865, after revelations of abuses in the administration

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234 *Sharma v Deputy DPP and Others* [2006] UKPC 57.

of bankruptcy. Kennard JA, sitting on the same case as Bishop CJ, recounted that in 1830 Sir Jonah Barrington, a judge of the High Court of Admiralty in Ireland, was removed from office on an address presented by both Houses of Parliament ‘… after being he was convicted of appropriating for his own use funds paid into the court.’ In the Commonwealth Caribbean, there is the case of a Chief Justice in what was then British Guiana in 1867 who was removed from office, not for corruption, but because the Judicial Committee of the Privy Council found that he had ‘… allowed himself to be influenced in the exercise of his judicial office by a desire to embarrass the executive Government [of the Colony] rather than to promote the ends of justice.’

More recently, the Governor-General of Belize, acting on the advice of the Belize Advisory Council and following complaints of misbehaviour filed by the Bar Association of Belize, removed a justice of the Supreme Court from office. The particulars of the complaints as considered by the Belize Advisory Committee were appalling. These were—the judge had had colluded with the Solicitor General in preparing his judgment in a case where the Solicitor General had appeared; he had expressed a willingness to interfere improperly with the functions of the justice system; he had entered into an improper relationship with a defendant in a criminal proceeding; and on two occasions...

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236 Ibid 98.
238 Ibid 156.
239 The Belize Advisory Council is the Belize equivalent of the local Privy Council.
occasions he had received gifts from litigants appearing before him.\textsuperscript{241} The Belize Advisory Council found the complaint sufficiently substantiated to recommend to the Governor-General that he should be removed from office. The judge’s appeal against this decision to the Judicial Committee of the Privy Council was dismissed. Although recent allegations of judicial misconduct have also arisen in Guyana, Trinidad and Tobago, and the Cayman Islands, these have not been sustained.

Barnwell was a judge of the High Court of Guyana. He was accused of visiting the Chief Magistrate’s chambers with a view to influencing the result of a case that was then engaging the magistrate’s attention. The persons accused in that case were Barnwell’s relatives. In the course of the hearing of Barnwell’s application to the court challenging the Judicial Service Commission’s representation to the President that the question of removing him from office ought to be investigated, and even on his own admission, it is clear that he had spoken to the magistrate in connection with the charges. Moreover, it was clear that he was seeking to have her impose a monetary penalty, as distinct from a term of imprisonment on those persons. Those allegations were communicated by the chief magistrate to the Chancellor of the Judiciary in Guyana, who is also chairman of the Judicial Services Commission. The Commission then made representation to the President of Guyana that the question of removing Barnwell from office should be investigated. In doing so, the Commission purported to act under the

\textsuperscript{241} Ibid [9].
provisions of the Constitution. Barnwell was then suspended from office and he applied for judicial review of the commission’s decision. Barnwell’s application to the Supreme Court was refused, but he succeeded on appeal because he was not given an opportunity to address the allegations made to the Commission before those allegations were acted on. In this regard, the Court of Appeal of Guyana applied the principle earlier articulated by the UKPC in *Rees v Crane*, an appeal from Trinidad and Tobago.

While *Barnwell v AG* reaffirms several important principles of administrative law, it raises some unsettling questions on the issue of misbehaviour in public office. It is quite clear that many regarded Barnwell’s action as reprehensible. One judge in the Court of Appeal, Churaman JA, described it as a ‘… deplorable and lamentable lack of ethical and moral rectitude,’ and an ‘unbelievably shocking piece of insolence.’ It is also significant that Barnwell’s subsequent explanation of his behaviour may be regarded as unsatisfactory: He said that he was acting to secure a plea bargain.

242 Constitution of Guyana, article 197(5) provides: ‘If the Prime Minister, in the case of the Chancellor or the Chief Justice, or the Judicial Service Commission, in the case of any other judge, represents to the President that the question of removing such judge from office under this article ought to be investigated, then – (a) the President shall appoint a tribunal, … and (b) the tribunal shall inquire into the matter and advise the President whether or not the judge ought to be removed from office.’


244 (1993) 49 WIR 88.

245 In the opinion of the Court of Appeal of Guyana, the application would have succeeded for any of the following reasons: The Chancellor as chairman of the commission had no authority to act on its behalf; the commission had not given the appellant an opportunity to be heard by it before it reached its decision; the appellant had been deprived of his legitimate expectation that he would be given an opportunity to be heard before the commission reached any decision; and that the commission was required to apply the rules of procedural fairness and natural justice to its deliberations and it had acted in breach of the rules of natural justice (*audi alteram partem* and right to a fair hearing) when it made its representation to the President.

246 *Barnwell* (n 244) 188.
The Guyanese legal system did not contemplate plea-bargaining as an appropriate part of the system administration of justice. The important subtext to this decision is that promoting fairness and natural justice and discouraging misbehaviour in public office are both desirable objectives; but one cannot abandon the former objective to achieve the latter. Kennard JA identifies the contradictory public interest elements as follows:

To those persons who may be unacquainted with our judicial process, it may seem strange that the appellant has succeeded on appeal, even though we have an admission from him that he had spoken to the chief magistrate in connection with the charges that were brought against the Abrams and was seeking to have her impose a monetary penalty on those two persons. But that is not the point before us. We are not concerned with the question whether or not he is guilty of misbehaviour. Our task is to decide whether he was fairly dealt with by the [Judicial Services Commission], whether he was given ‘a fair opportunity to correct or contradict the allegations made against him by the then chief magistrate.’

In 2006, the Chief Justice of Trinidad and Tobago faced the imminent prospect of prosecution on a charge of attempting to pervert the course of public justice. To avert such prosecution he obtained leave from the High Court to seek judicial review of the Deputy Director of Public Prosecutions’ decision to prosecute, and an order staying all actions consequential on that decision. Similar orders were later sought and made against the Commissioner and the Assistant Commissioner of Police. The respondents appealed to the Court of Appeal of Trinidad and Tobago and succeeded in having the grant of leave to seek judicial review set aside. The Chief Justice’s further appeal to the Judicial Committee of the Privy Council was dismissed. In the opinion of

247 Ibid 184.
Lord Bingham of Cornhill and Lord Walker of Gestingthorpe, ‘… judicial
review of a prosecutorial decision, although available in principle, is a highly
exceptional remedy.’\textsuperscript{249} Baroness Hale of Richmond, Lord Carswell and Lord
Mance shared a similar opinion.\textsuperscript{250}

The allegations of misconduct against the Chief Justice came from the
Chief Magistrate. After he had heard a case against the leader of the
opposition, and convicted and sentenced him for failure to disclose certain
assets contrary to the Integrity in Public Life Act,\textsuperscript{251} the Chief Magistrate
reported that on three occasions during the trial, and on one occasion after it,
the Chief Justice has sought to influence the decision in favour of the
defendant. The Chief Justice’s response to these allegations, in the language of
the Judicial Committee of the Privy Council:

\textit{… involves an accusation of improper, politically-motivated,}
\textit{interference in the prosecution process by the Prime Minister}
\textit{and the Attorney General; of politically-inspired dishonesty by}
\textit{the Chief Magistrate, a subordinate but important figure in the}
\textit{judicial hierarchy; and of improper, politically-inspired,}
\textit{decision-making and conduct by the Deputy Director, the}
\textit{Assistant Commissioner and the Commissioner, respectively an}
\textit{attorney discharging the important functions of the Director of}
\textit{Public Prosecutions and two of the most senior police officers}
\textit{in the state.}

In the final analysis, as the Chief Magistrate refused to give evidence at the
trial of the Chief Justice, neither set of allegations were put to the test in a
court of law.\textsuperscript{252} In the interim, between the making of the allegations of

\textsuperscript{249} Ibid [5].
\textsuperscript{250} Ibid [30].
\textsuperscript{251} Integrity in Public Life Act 1987 s 27(1) (T&T).
\textsuperscript{252} For a full report of the circumstances surrounding the management of the allegations, see the Mustill Report (n 233).
misconduct and the withdrawal of the charges before the magistrate, the Prime Minister initiated steps to remove the Chief Justice from office under the provisions of the Constitution.\textsuperscript{253}

The procedure for removing a Chief Justice from office in Trinidad and Tobago requires that the Prime Minister represents to the President of the Republic that the matter ought to be investigated, that the President appoints a tribunal of persons who hold or have held high judicial office in some part the Commonwealth, and that this tribunal enquire into the matter and recommend to the President that he should refer the question of removal of the Chief Judge from office to the Judicial Committee of the Privy Council.\textsuperscript{254} In this case, the Prime Minister made appropriate representation to the President who appointed the tribunal under s 137 of the Constitution. The tribunal recommended that the question of the removal of the Chief Justice from his office should not be referred to the Judicial Committee. The allegations of the Chief Magistrate were unsatisfactory. The tribunal were of the opinion that on the question ‘… whether the allegations against the Chief Justice are proved so as to make the Tribunal sure beyond reasonable doubt that they are well founded, then all the Members of the Tribunal are of the unanimous opinion that they are not so proved.’\textsuperscript{255}

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\textsuperscript{253} Constitution of Trinidad and Tobago, s 137(1): ‘A Judge may be removed from office only for inability to perform the functions of his office (whether arising from infirmity of mind or body or any other cause) or for misbehavior, and shall not be so removed except in accordance with the provisions of this section.’

\textsuperscript{254} Constitution of Trinidad and Tobago s 137(3).

\textsuperscript{255} Mustill Report (n 233) [101].
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In September of 2008, a judge of the Grand Court of the Cayman Islands was arrested on suspicion of misconduct in public office. He was fingerprinted, photographed, and had a DNA sample taken. His home and judicial chambers, including the court computers, were searched. He was interviewed by the police on two separate occasions for a total of almost five hours. Whatever else might have motivated the actions of the police officers involved in the investigation, it is difficult not to conclude that the actions were also calculated to embarrass the Cayman judiciary in general and this judge in particular. Misconduct in public office is not an arrestable offence in the Cayman Islands. The arresting officers, Metropolitan Police officers from the UK who were on assignment as special constables and consultants to the Cayman government, had not sought local legal advice but relied instead on the expertise of an English lawyer. Prior to his appointment to the Grand Court, the judge had a distinguished career as a lawyer, prosecutor and Supreme Court judge in British Columbia; and until his arrest, he had an impeccable reputation. The particulars of the offence, of which the judge was accused, were never made completely clear; but it seems that he was accused of violating a local online news publisher’s rights to privacy by ‘using his influence’ in asking a journalist to find out the identity of the author of certain objectionable letters published on the online news service that were critical of


258 Criminal Procedure Code (Cayman Islands) Schedule 1.
the judiciary in general and Chief Justice in particular. Most remarkably, in a statement on the ‘unprecedented’ corruption investigation that led to the judge’s arrest, the governor also found it appropriate to reassure the public that the judge was not charged with any crime. One wonders that if the judge was not charged, or would not be charged, why he was arrested? In subsequent applications for judicial review, Cresswell J held that the search warrants and arrest warrants were illegal, and consequently so were the subsequent actions taken based on them. Within a matter of weeks of the arrest, the Attorney General announced that the judge was no longer a subject of the investigation; but the damage to the reputation of the Cayman judiciary was already done.

That fact that we can recount so few contemporary examples of judicial misconduct in the Commonwealth Caribbean may be testimony that the institution of the judiciary, at least better than other public institutions, is weathering the onslaught of misconduct in office. The very stature of the judiciary may well be what induces good behaviour. Bishop CJ in Barnwell v A-G put it thus:

[So] great are the social expectations and obligations that bear on that responsible position together with the role and functions related to it. In the circumstances, it is not unreasonable to propose that suspension of a judge engenders disgrace and dishonour of him; and, even if eventually he should be cleared

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of the allegation made against him, the social stigma caused by the suspension is never wholly eradicated. That great ‘social expectation’ makes any allegation of misconduct against any judge significant, perhaps even devastating. This is true even were the allegations are made against only one or two members of the judiciary.

Judicial misconduct require special mention in the broader discourse of corruption in the Commonwealth Caribbean precisely because if a judge were found guilty of any misconduct, the constitutions of Commonwealth Caribbean states would make it very difficult to dismiss him; as the case of Barnwell demonstrates. In fact, even failing to address speedily a complaint of misconduct against a judge or magistrate may be unconstitutional. In replicating the English rules of protecting judges from the arbitrary and unrestrained discretion of the Crown, Commonwealth Caribbean states have achieved in their constitutions a significant entrenchment of the security of tenure of judges.

The special protection given to judges under Commonwealth Caribbean constitutions may also mean that some of the provisions of the new corruption prevention acts may not apply to them. In the unreported case, Integrity Commission v The Attorney General (HCA 1735 of 2005), the High Court of Trinidad and Tobago determined that, in the absence of a constitutional amendment, the Integrity in Public Life Act cannot require Judges and Magistrates to declare their assets to the Integrity Commission.

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264 Durity v A-G [2008] UKPC 59
Jones J could not have been any clearer in her assertion when she said:

I am of the view therefore that having regard to the provisions of the Constitution of the Republic of Trinidad and Tobago and the Integrity in Public Life Act Judges and Magistrates are not subject to the provisions of the Integrity in Public Life Act as amended. [221]

This is a position that was at one time also conceded by the government, because the Attorney General in an address to Parliament on the subject pointed out that:

… I have advised the Cabinet that the relevant provisions are in fact unconstitutional and that the constitution, properly interpreted, intended that only the Judicial and Legal Service Commission would have oversight over Judicial Officers. (Quoted in the judgment by Jones J at [28])

Nevertheless, this was not the position that the Attorney General later advanced in hearing of the application by the Integrity Commission to construct the statute. Before the High Court, the Attorney-General argued that the requirement of Judges and Magistrates declaring their assets to the Commission was constitutional. The separation of powers doctrine, which is embedded in Commonwealth Caribbean Constitutions, was the basis on which the Court denied the Integrity Commission jurisdiction to require Judges to the declare their assets. Lord Diplock in *Hinds v R* [1975] 24 WIR 326, 330, had said, ‘It is taken for granted that the basic principle of the separation of powers will apply to the exercise of their respective functions by these three organs of government ….’ That doctrine is now firmly entrenched in the constitutions of the region. Lord Bingham of Cornwall in *DPP v Mollison* [2003] 2 AC 411, 424, explained, ‘…the separation between the exercise of judicial powers on the one hand and legislative and executive on the other is totally or
effectively so.’

Jones J found that contrary to the constitutional requirements for the separation of powers, the provisions of the Integrity in Public Life Act that Judges make declarations had altered their terms of service, and that the integrity regime imposed by the Act, in effect, sought to ‘… control the manner in which [judges] perform the functions of their office’[160] – [163]. Although Magistrates do not enjoy the expressed or implicit independence of a Judge, in Trinidad and Tobago the Constitution vests disciplinary control in the Judicial and Legal Services Commission or, with the consent of the Prime Minister, to a Judge of the Supreme Court. The Integrity in Public Life Act, on the other hand, sought to appropriate such control to the Integrity Commission and is thus unconstitutional. Similar challenges have not yet arisen in the other jurisdiction of the Commonwealth Caribbean, but were they to arise it would be difficult to see how the arguments that convinced Jones J in Integrity Commission v The Attorney General of Trinidad and Tobago would not be equally compelling.

The Tort of Misfeasance in Public Office

Many judges identify the criminal offence of misconduct in public office as including or meaning misfeasance in public office.\(^{266}\) It was suggested earlier that those terms, and others, are sometimes used interchangeably to identify the same crime and there are some circumstances where that term, misfeasance in public office, may even be regarded as ‘…happier and more

\(^{266}\) See McLachlin CJ in R v Boulanger (n 6) [10], citing with approval the definition of misfeasance in public office, as defined by JF Stephen, in Digest of the Criminal Law (4th ed Macmillan & Co, London 1887) 85.
appropriate phraseology …’ to be applied to the criminal misbehaviour of public officials than the term misconduct in public office. However, in addition and distinct from the criminal offence of misconduct in public office, the common law recognises the separate tort of misfeasance in public office.

That there is a distinction between the crime and the tort has been long recognised. Bembridge, decided in 1783, has been credited with ‘… providing the seminal formulation of the offence’ of misconduct or misbehaviour in public office. Bembridge, an accountant in the British army, was charged with misbehaviour in his office in that he had wrongfully, unjustly, and fraudulently contrived to conceal omissions in the records to defraud the King. His defence was that the matter was a civil wrong and not indictable. Lord Mansfield dismissed Bembridge’s motion on the basis that if one accepts an office of trust concerning the public, and misbehaves in his office, he is criminally liable. Lord Mansfield went on to say, ‘… where there is a breach of trust, fraud, or imposition, in a matter concerning the public, though as between individuals it would only be actionable, yet as between the King and the subject it is indictable.’ Thus, as the facts that ground the tort of deceit may also ground the criminal charge of fraud; so the facts that ground the tort of misfeasance in public office may also ground the criminal offence of misconduct in public office.

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267 Question of Law Reserved (No 2 of 1996) (n 2).
269 (1783) 3 Doug 327; 99 ER 679.
270 R v Boulanger (n 6) [10], (McLachlin CJ, citing Finn (n 92) 308).
271 (1783) 99 ER 679, 681.
That there should be some consistency between the tort and the crime seems desirable, but the precise extent to which they are similar or dissimilar is not clear. The Court of Appeal in *Attorney General's Reference (No 3 of 2003)* held that the commission of the offence of misconduct in public office requires *mens rea*, which can be characterised as wilfulness in the commission of the offence; and that this is equivalent to the recklessness required in *R v G*. This means, in the words of Pill LJ, ‘There must be an awareness of the duty to act or a subjective recklessness as to the existence of the duty.’ The further suggestion that the distinction between the crime and the tort depends on the measure of the public interest is only superficially attractive. In *Attorney General's Reference (No 3 of 2003)*, Pill LJ said:

> We venture the comment, however, that there must be differences between the crime and the tort in that the crime is committed upon an affront to the Crown, that is in this context the public interest, whereas the tort requires a balancing of interests as between public officers and individual members of the public or organisations seeking private remedies having asserted a loss which must be proved. The approach in the Three Rivers case to the mental element appears to us, however, to be consistent with that we find appropriate to the criminal offence. Lord Steyn, at p 193, noted the acceptance by counsel that only reckless indifference in a subjective sense will be sufficient, reliance on the Caldwell test having perceptively been abandoned.

It does not seem that Pill LJ acknowledges any distinction between the *actus reus* of the crime of misconduct in public office and the tort of misfeasance in public office, because whether the acts are torts or crimes depend not on the

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272 See Pill LJ in *AG's Reference (No 3 of 2003)* (n 100) [9], quoting the trial judge in the case.
273 Ibid [28].
275 *AG’s Reference (No 3 of 2003)* (n 100) [30].
276 Ibid. This reference is to the *Three Rivers District Council* case (n 268).
conduct of the defendant, but on how the acts are treated. On the question of the distinction between the *mens rea* for the crime and the tort, Pill LJ accepted Lord Steyn’s suggestion that the nature of the tort contained ‘… a meaningful requirement of bad faith in the exercise of public powers…’ and that ‘… the unifying element of conduct amounting to an abuse of power accompanied by subjective bad faith,’ while for the crime, ‘There must be an awareness of the duty to act or a subjective recklessness as to the existence of the duty.’ Under this approach, meaningful requirement of bad faith, or subjective bad faith, appears to be a more demanding standard than awareness of the duty or subjective recklessness as to its existence.

In *Attorney-General of Antigua and Barbuda and Others v Lake*, the respondent had sought, among other types of relief, a declaration that the prime minister was guilty of misfeasance in public office in relation to him. The respondent was appointed a surgeon specialist at a public hospital in Antigua in 1967 and, with the exception for a break of two years, worked continuously at that hospital until 1994. In 1987, he was appointed to the position of medical superintendent, which is a statutory one, and this appointment was renewed from time to time. In 1994, the Minister of Health advised the respondent that he should not return to the hospital and he later confirmed that someone else had assumed the respondent’s responsibilities. It

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277 [2003] 2 AC 1, 193.
278 Ibid 191.
280 The Medical and Holberton Institution Act 1899 (A&B) s 4 (1) provides, ‘It shall be lawful for the Public Service Commission to appoint some duly qualified medical practitioner to be medical superintendent of the Holberton institution.’
was disclosed that at some time the Prime Minister had written to the chairman of the Public Service Commission to the effect that he had instructed someone other than the respondent to act as medical superintendent ‘… until his contract as medical superintendent is signed.’\textsuperscript{281} The respondent had claimed that his dismissal was a breach of the Constitution of Antigua and Barbuda, s 100 of which provides in part:

\begin{quote}
\textbf{100. – (1)} Subject to the provisions of this Constitution, the power to appoint persons to hold or act in offices in the public service (including the power to make appointments on promotion and transfer and to confirm appointments), the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons from office shall vest in the Public Service Commission …
\end{quote}

In effect, in dismissing the respondent and appointing someone else in his place at the hospital, the prime minister had usurped the position of the commission. Lord Diplock, in \textit{Thomas v Attorney-General},\textsuperscript{282} had cautioned against the development in Commonwealth Caribbean constitutional practice of the ‘spoils’ system such as that which characterises the US on a change of government. Indeed, the whole purpose of the independent commissions’ provisions in Commonwealth Caribbean constitutions is to insulate members of the public service from the direct political influence by the government of the day.\textsuperscript{283}

The High Court in Antigua was quite prepared to hear the respondent’s application, but the appellants challenged the court’s jurisdiction to hear the motion on the ground that the facts alleged by the applicant (if proved) did not

\begin{footnotesize}
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\item \textsuperscript{281} (1998) 53 WIR 145, 153.
\item \textsuperscript{282} (1981) 32 WIR 375, 381.
\item \textsuperscript{283} Ibid.
\end{itemize}
\end{footnotesize}
constitute a breach of his constitutional rights or give rise to remedies under
the Constitution. However, this challenged failed in the High Court, the Court
of Appeal, and the Judicial Committee of the Privy Council. After the full
discussion in the Privy Council, and the views expressed in the opinion of
Lord Hutton, it is quite clear that the respondent would have succeeded had his
application been heard. It is significant that while the Privy Council addressed
the issues from the perspective of the constitution, it specifically noted without
any adverse comment the respondent’s claim that the prime minister had been
guilty of misfeasance in public office.

While the common law offence of misconduct in public office is
sometimes applied to corrupt acts, the tort of misfeasance in public office
hardly ever is. One reason for this is that corruption is seen more as a breach a
public trust and not often as a private wrong and, as Pill LJ had suggested in
Attorney General's Reference (No 3 of 2003), there is greater public interest in
those matters that we would characterise as crimes than in those matters that
we characterise as torts. There is an argument to be made, however, that were
public bureaucracies, especially those charged with law enforcement, are
weakly developed then greater use should be made of private rights of action
to enforce public law.\textsuperscript{284} The private action was clearly one of the options
contemplated by Lord Mansfield in \textit{R v Young},\textsuperscript{285} if the circumstances were
serious enough to warrant it. In \textit{Young}, the question was whether two justices

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\item \textsuperscript{284} Carr, 'Fighting Corruption Through Regional and International Conventions' (n 7) 32, goes
even further and suggested that, 'It seems from the US experience that \textit{qui tam} action has
the potential to play an important role in fighting corruption.' See also, Carr 'Corruption,
legal solutions and limits of law' (n 15).
\item \textsuperscript{285} (1758) Burr 557; 97 ER 447.
\end{itemize}
of the peace were guilty of misconduct because they had ‘... arbitrarily, obstinately, and unreasonably’ refused a tavern licence. Lord Mansfield put the issue thus:

But if it clearly appears that the justices have been partially, maliciously, or corruptly influenced in the exercise of this discretion, and have (consequently) abused the trust reposed in them, they are liable to prosecution by indictment or information; or even, possibly, by action, if the malice be very gross and injurious.286

The clear statement is that action is appropriate if the malice is very gross and injurious. In this particular case, Lord Mansfield refused the information as he found that there was no mens rea. That is, there was no ‘...clear and apparent partiality, or wilful misbehaviour.’287 The prevailing doctrine, especially since Rookes v Barnard,288 is that it is not the role of the private law to punish. Nevertheless, it is not difficult to conceive that corrupt activities by public agents are often also oppressive, arbitrary, or unconstitutional actions by the servants of government to warrant even punitive damages. However, even where punitive or exemplary damages are not justified, private action may be a useful adjunct in the anticorruption project.

**Constitutional Relief and Corruption Prevention**

In the pursuit of the anticorruption project, and as more legislative initiatives restrict the freedoms of the individual, it is to be expected the emerging anticorruption regimes may conflict with the fundamental rights and freedoms

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286 97 ER 447, 450.

287 Ibid. Cf R v Williams (1762) 3 Burr 1317, 97 ER 851, where the information was granted against the justices who had corruptly refused to grant licences to applicants who had voted for members of Parliament of whom they did not approve.

guaranteed under the written constitutions of the Commonwealth Caribbean. In which event, of course, the constitutions would prevail and the new anticorruption initiatives would have to give way. On the other hand, the general assumption of Commonwealth Caribbean jurisprudence is that existing laws, such as the common law offence of bribery or misconduct in public office, and the legislation in existence at the time the constitutions came into effect would not be subject to this review. The orthodox view in Commonwealth Caribbean jurisprudence is best represented by the opinion of Lord Devlin in *DPP v Nasralla*, where he said of the chapter on fundamental rights and freedoms in the Jamaica Constitution:

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\text{This chapter proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. The laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions.}^{289}
\]

Lord Devlin was not the first to have adopted this approach on Commonwealth Caribbean constitutions. Barnett attributes that to Wooding CJ in *Collymore v A-G for Trinidad & Tobago*.\(^{290}\) The Jamaica Court of Appeal in *Nasralla* had also made a similar argument, and this view represents a consistent line of decisions among Commonwealth Caribbean courts.\(^{291}\) Barnett suggests that *Maharaj v A-G (No 2)*\(^{292}\) was the first case where the

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\(^{289}\) [1967] 2 AC 238, 247-248. See also *de Freitas v Benny* (1976) AC 239, 244, where Lord Diplock advanced a similar opinion on the Constitution of Trinidad & Tobago.

\(^{290}\) (1967) 12 WIR 5.


\(^{292}\) [1978] 2 WLR 902.
Judicial Committee of the Privy Council acknowledged ‘… that common law rules could be in conflict with the constitutional guarantees as evidenced by the insertion of saving clauses in respect of pre-Independence law both written and unwritten.’

This initial reluctance of members of the Judicial Committee of the Privy Council, as well as member of the Commonwealth Caribbean judiciary, to acknowledge that our Bills of Rights added something new to our jurisprudence, as distinct from merely restating the common law rules of due process, is understandable. The bills of rights in the constitutions, based as they then were on the European Convention on Human Rights of 1950, were then new to British jurisprudence. Schooled as Commonwealth Caribbean judges were in British legal traditions, these new Bills of Rights were not things to which they were accustomed. Thus, when the Convention was first incorporated in the Nigeria Independence Constitution, and later in the constitutions of the Commonwealth Caribbean, its construction as a part of domestic law presented quite a challenge. Whereas we would expect the new legislative changes to be subject to constitutional review, we would not expect that of the common law and legislation that predated the constitutions.

The question arose in the Hong Kong Court of Final Appeal in *Shum Kwok Sher v HKSAR* ‘…whether the common law offence of misconduct in public office is inconsistent with rights guaranteed by the Basic Law.’

In other words, in Hong Kong, is the offence of misconduct in public office so

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293 Barnett (n 291) 38.

294 [2002] HKCFA 27, FACC 1/2002 [8]. A similar question was raised in *R v Cotter* [2002] Crim LR 824, where the court examined whether the common law offence of perverting the course of justice was sufficiently certain to satisfy the requirements of Article 7(1) of the European Convention on Human Rights.
vague as to be unconstitutional? A similar question can be raised regarding the new anticorruption legislation in the Commonwealth Caribbean. The potential of conflict between new legislation and the constitution was very clearly demonstrated in *Re Lehder-Rivas, International Dutch Resources Ltd v AG.*

The several grounds of appeal in that case were argued under four major heads. Three of those heads were concerned with allegations of breaches of articles 20 and 27 the Constitution of the Commonwealth of the Bahamas. The defendant in this case was the beneficial owner of the entire issued share capital of the appellant companies, which in turn owned the lots of land that were the subject matter of charging orders under the Tracing and Forfeiture of Proceeds of Drug Trafficking Act. At the time of the application for the charging order under the Act, the defendant was in custody in the US on a conviction of drug trafficking and he was in custody there since 1987. There was the allegation, and some evidence derived from a commission of inquiry, that the defendant’s properties were used by the defendant as ‘a drug entrepôt’ into the Bahamas. In the application before him, the Chief Justice was satisfied that an information should be laid under the Criminal Procedure Code Act charging the defendant with possession of property derived from his participation in ‘drug trafficking offence,’ in breach of s 20(2)(a) of the Act.

In *Commissioner of Police v Woods,* the respondent was charged

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296 Under the s 4(8)(b) of the Tracing and Forfeiture of Proceeds of Drug Trafficking Act, ‘… a person against whom proceedings have been instituted for a drug trafficking offence is referred to (whether or not he has been convicted) as “the defendant”.’
297 At that time, Cap 86 (Bah).
298 (1990) 56 WIR 1, 11.
299 (1990) 54 WIR 1.
with being in possession of property derived from drug trafficking.\textsuperscript{300} The prosecution relied on the presumption, introduced by s 20(6) of the Tracing and Forfeiture of Proceeds of Drug Trafficking Act.\textsuperscript{301} That section provided:

20 (6) In proceedings against a person for an offence under subsection (2), evidence establishing –

(a) that a person had acquired substantial amounts of money, land, property, shares, stock, bonds, notes, debentures, debenture stock, units under a unit trust scheme or any other securities; and

(b) that in relation to the value of the money, land, property or any security as is mentioned in paragraph (a), the person had no apparent legitimate source of income to account for the acquisition of his wealth, as the case may be, is, in the absence of evidence to the contrary prima facie proof that the money, property, security as is mentioned in paragraph (a) or wealth was knowingly derived from that person’s participation in drug trafficking.

It is was the prosecution’s case that as the respondent had no legitimate income to explain the acquisition by him of certain property, so he must be presumed to have acquired that property from participation in drug trafficking.

In the course of the trial, and during a period of an adjournment, the prosecution applied ex parte to the trial magistrate for an order under section 22(2) of the Act requiring bankers to the respondent to make specified materials available to the police. The responded applied to the Supreme Court by way of originating motion and succeeded in obtaining a declaration that the hearing of the application \textit{ex parte} during the course of the trial contravened the provisions in the Constitution guaranteeing a fair hearing of a criminal

\textsuperscript{300} Contrary to s 20(2)(a) of the Tracing and Forfeiture of Proceeds of Drug Trafficking Act (Bah).

\textsuperscript{301} The Tracing and Forfeiture of Proceeds of Drug Trafficking Act 1986 (Bah) has been replaced by Proceeds of Crime Act 2000 (Bah) which no longer makes this presumption.
charge. The respondent obtained a further declaration that a court could not under section 20(6) of the Act take into consideration property acquired before the Act came into force, as to do so would contravene s 20(4) of the Constitution which prohibited the retroactive application of the criminal law. The Court of Appeal dismissed the Commissioner of Police’s appeal, holding that the powers under s 22 of the Act were intended to be used in the course of an investigation and not in the course of a trial. The ex parte application infringed the audi alteram partem rule and the respondent’s right to a fair hearing under s 20(1) of the Constitution. Georges CJ at first instance, and Henry P and Smith and Melville JJA in the Court of Appeal, all relied on the Privy Council decision in Kanda v Government of the Federation of Malaya. In that case, Lord Denning had said, ‘The rule against bias is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it.’ For this reason, the charges were dismissed.

There was disagreement in the Court of Appeal as to whether s 20(6) of the Act, which allowed the court to take into consideration illicit property acquired prior to the passage of the legislation, was constitutional. Georges CJ had held that a court should not take into consideration, for purposes of making out the offence of being in possession of property derived from

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302 Constitution of the Bahamas, s 20(1).
303 [1962] 2 WLR 1153.
304 Ibid 1161-2:
305 In support of the respondent, and in dismissing the appeal, Smith JA relied on the principles stated in R v Bodmin Justices, ex parte McEwen [1947] 1 All ER 109, 111, and Kanda v Government of the Federation of Malaya [1962] 2 WLR 1153, 1161-2.
participation in drug trafficking, acquisitions of property made before the enactment of the Act. The majority of the Court of Appeal overruled Georges CJ on this point, rationalising that this section did not create a new office but that it was merely a procedural device that raised a rebuttable presumption of the commission of the principal offence of drug trafficking. However, as Smith JA explained in his dissent on this issue, once the presumption is raised the defendant is required to give an answer; or he will be found guilty of the offence. That which raised the presumption under the language of the Act is not the possession of the illicit property, which is a continuing state of affair; but the presumption is created by the acquisition of the property that ‘… occurs once and for all.’ That acquisition might have been illicit or not, and if it were illicit it could have been acquired by some other means other than drug trafficking. Smith JA conceded that the issue was one of some difficulty, but concluded:

I am, however, persuaded ... that applying the provisions to acquisitions prior to the Act coming into force has the potential of violating the fundamental rights in article 20(4) of the 20 Constitution. In my judgment, the Chief Justice was right in granting redress to the respondent in respect of his rights under article 20(1) and (4) of the Constitution.  

The case Commissioner of Police v Woods raised and left unsettled another important issue, which has implications for those jurisdictions that have introduced provisions, similar to those in the Bahamas, into their law. One question put in the respondent’s originating motion was, ‘Whether section

306 (1990) 54 WIR 1, 20.
307 Ibid.
308 Ibid 20-1.
20(6) of the Tracing and Forfeiture of Proceeds of Drug Trafficking Act contravenes article 20(2) of the Constitution.’ Section 20(2) of the Constitution of the Commonwealth of the Bahamas provides, ‘Every person who is charged with a criminal offence – (a) shall be presumed to be innocent until he is proved or has pleaded guilty.’ As Georges CJ had already granted the respondent relief on other grounds, it was perhaps unnecessary for him to answer the final question. The Court of Appeal was aware that the issue had arisen in the Supreme Court before the Chief Justice; but as he had not given an answer to it and this was not a matter before the Court of Appeal, it is therefore also understandable that they too would not have dealt with it.

It was suggested above that it might be desirable to rely on the tort of misfeasance in public office, especially where the institutions necessary to advance the anticorruption project are weakly developed. However, if a remedy for the tort of misfeasance in public office is available to a litigant, that litigant may lose the right to apply for relief under the constitution. A basic principle of Commonwealth Caribbean constitutional law is that an applicant will not be entitled to constitutional relief if he could receive adequate redress by remedies under the common law. In Kemraj Harrikissoon v Attorney-General 310 Lord Diplock put the rationale for that principle as follows:

The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute

310 (1979) 31 WIR 348.
for the normal procedures for invoking judicial control of administrative action.311

On the other hand, it may be argued that constitutional redress are additional rights, not alternative rights; and a litigant should be allowed to pursue an action in tort without losing the right to complain under the constitution. In Attorney-General of Antigua and Barbuda and Others v Lake the applicant was allowed to seek constitutional relief while he also sought a declaration that one of the defendants had been guilty of misfeasance in public office.312

**Transparency in Public Administration**

One tool in fighting corruption in the public sector is exposing the corrupt activity to public scrutiny. One may argue that the more likely the corrupt behaviour will be exposed, then the less likely it will occur in first place. Exposing the departments of government to public scrutiny while they work is a useful prophylactic measure. Exposing the mismanagement and corruption after it has taken place is essentially palliative. Some Commonwealth Caribbean jurisdictions have directed their economies towards producing financial services. Secrecy or privacy of financial and corporate information is considered essential to the successful provision of those services. Many Commonwealth Caribbean countries have therefore introduced legislation to protect the privacy of financial information and to protect the privacy of corporations providing such services. Naturally, those statutes will conflict with the objectives of other legislation that seeks to promote openness and transparency in government. The Confidential Relationships Act of St

311 Ibid 349.
Christopher and Nevis is an example of privacy legislation that may operate against the mission of promoting transparency and openness in government.

The Court of Appeal of the Eastern Caribbean States addressed this question in *Simmonds and Others v Williams and Others (No 2)*.\(^{313}\) Georges JA, who delivered the judgment of the court, appeared to have offered a solution. The court suggested that in cases of conflict between the Commissions of Enquiry Act and the Confidential Relationships Act, ‘… if the matter fell under public welfare’ or if what is enquired into was the company rather than private affairs, then the private rights protected by the Confidential Relationships Act would have to give way to the public interests as represented by the Commission of Enquiry Act. It is not immediately obvious why the affairs of a company, an insurance company in the case of *Simmonds and Others v Williams and Others (No 2)*, should be any less private than that of a private individual. In any event, the information that the company was asked to provide was information on one of its clients.\(^{314}\) This decision in *Simmonds and Others v Williams and Others (No 2)* leaves a lot to be desired.

Commissions of enquiry are very useful in searching out and exposing public sector corruption. The power to appoint such commission may well have been a prerogative right of the Crown. Today, such powers are to found in legislation or the constitutions of several states of the Commonwealth.

\(^{313}\) (1999) 57 WIR 95.

\(^{314}\) Ibid 106-7.
It is important, of course, that when such commissions are appointed their terms of reference are clearly defined and the matters to be enquired into should be specified. A commission of enquiry ‘ought not to be a roving commission.’

Under legislation, there is a power in the state, now usually vested in the Governor-General, to appoint such commissions. For example, section 2 of the Commissions of Inquiry Act 1911 of the Bahamas provides:

> Whenever it shall appear to the Governor-General that it will be for the public benefit so to do, the Governor-General may issue a commission … appointing persons, not less than three in number, to inquire into and report upon any matter stated in such commission as the subject of inquiry.

Commissions of enquiry have power under the Acts to summon and compel attendance of witnesses and to hear evidence on oath. Section 10 the Bahamas Act provides:

> (1) Subject to the provisions of this Act, any commissioner shall have the powers of a justice of the Supreme Court to – (a) summon and compel the attendance of witnesses; (b) call for the production of documents or things including the power to retain and examine the same; (c) examine persons appearing before them on oath.

Notwithstanding this power, however, commissions of enquiry are not trials and they do not have the power to find anyone guilty of any offence.

> In *Bethel v Douglas and Others*, the Judicial Committee of the Privy

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316 *Ratnagopal v A-G* [1970] AC 974; [1969] 3 WLR 1056. See also *Bethel v Douglas* (n 315) 24; and *Simmonds v Williams (No 2)* (1999) 57 WIR 95, 105-6.
317 *Simmonds v Williams (No 2)* (n 316) 105-6.
318 See *Bethel v Douglas* (n 315) 15; citing with approval the High Court of Australia in *McGuinness v A-G* (1940) 63 CLR 73 and distinguishing the earlier New Zealand case of *Cock v A-G* (1909) 28 NZLR 405.
Council, on appeal from the Court of Appeal of the Bahamas, considered the validity of appointment and the powers of a commission of enquiry into corruption. In 1992, the Governor-General of the Bahamas appointed a commission of inquiry into matters relating to Bahamasair Holdings Ltd, the Hotel Corporation of the Bahamas, and the Bahamas Telecommunications Corporation. The appellant was summoned to appear and give evidence before the commission, but prior to appearing he issued an originating summons challenging the validity of the appointment of the commission and of its power to summon him to give evidence on the basis that the constitution prohibited compelling anyone to give evidence in a criminal trial.\textsuperscript{320} The Chief Justice dismissed the originating summons, and the Court of Appeal and the Judicial Committee of the Privy Council dismissed the appeal. The judges all agreed that a commission should not be equated with a criminal trial.

A commission of enquiry will completely fail in its objectives if it is partial to one side or the other. In \textit{Simmonds and Others v Williams and Others (No 2)},\textsuperscript{321} the Court of Appeal of the Eastern Caribbean States held that because of the actual bias of the attorneys to the commission there was danger that they could improperly influence the commission. Acting under the provisions of s 2 of the Commission of Enquiry Act, the Governor-General of the federation of St Christopher and Nevis had appointed a sole commissioner to make a full inquiry into several Ministries, statutory bodies and other corporations. A second document, signed by the Governor-General and the

\textsuperscript{320} Ibid 16-7.

\textsuperscript{321} (1999) 57 WIR 95.
Prime Minister, and published along with the former commission, set out the specific conduct and management of the Ministries, statutory bodies and corporations that were to be inquired into by the commissioner.

The commissioner had summoned three members of the political opposition to testify before him. They were members of the former political administration, one as prime ministers, one as deputy prime minister, and the third as a junior minister in the Ministry of Finance. They all objected to the commission’s secretary and legal counsel, as both were longstanding political opponents of the witnesses. It was clear to the Court of Appeal that ‘… the object and purpose of the commission was to inquire into the conduct and operations of certain Government Ministries, statutory bodies and corporations under the [previous] Administration.’

It was argued before the court that, as counsel to the commission played no part in the decision-making process and would play no part in writing of the commission’s report, there is no real threat that the bias of counsel would infect the commission. The court of appeal responded to that argument as follows:

The answer to that question, as I have demonstrated, is that in their proactive roles counsel, although not the decision-makers, could quite conceivably improperly influence the actual decision-maker, namely the commissioner in his findings.

Yet, only one of the three applicants, the former prime minister, succeeded in the Court of Appeal on those grounds that alleged bias. It seems that very

322 Ibid 99.
323 Ibid 112.
324 Simmonds v Williams (No 2) (n 316).
little distinguished his circumstances from those of his co-appellants, and if a
court could find bias against him in those circumstances it seems just as
reasonable that it should find bias against the other two witnesses also.
Nevertheless, the broad principle of the case is sound: bias will defeat the
effectiveness of the commission.

**Conclusion**

The administration of law in the anticorruption project should not be seen as a
crusade, and in advancing that cause prosecutors must not perpetuate injustice.
The difficulty in finding the right balance between condemnation and
punishment is demonstrated by the case of *Nandlal v The State*.\(^\text{325}\) Here, the
magistrate had previously acquitted the appellant of charges relating to the
possession of a firearm and possession of ammunition, contrary to the Firearm
Act, and possession of foreign currency contrary the Exchange Control Act.
Following the acquittals, the magistrate received $440,000 and a new motor
car that was paid for by the appellant. The appellant and the magistrate were
respectively indicted and convicted of corruptly giving and receiving the
motor car, and both were sentenced to the maximum penalty of two years
imprisonment with a fine of $20,000. Fourteen days after the conviction and
sentence, a second set of indictments charging them with conspiracy to pervert
the course of justice and with corruption contrary to section 3(1) of the
Prevention of Corruption Act of Trinidad and Tobago, in relation to the giving
and receiving of the money, was served on the appellant and the magistrate.
The Court of Appeal quashed the convictions on this indictment, and declared

that the prosecution of the appellant on the second indictment in the circumstances of this case was ‘… a clear affront to common decency and fair play.’

The anticorruption project requires the highest standards in the administration of justice. An accused is not entitled to less because he is charged with corruption. In *Alexander v Williams*, the applicant’s conviction for corruption was overturned; but only because the trial magistrate had failed to provide reasons for his decision and thus denied the applicant the opportunity to prosecute his appeal. The applicant was the chief administrative officer of the Nariva/Mayaro County Council in Trinidad and Tobago. While holding that office, he was charged under indictment with corruptly receiving a bribe. The matter was heard and determined summarily by the magistrate, who convicted and sentenced him to a term of imprisonment of two years with hard labour. The applicant appealed against his conviction but several years later his appeal was still not heard. The trial magistrate had failed to produce the reasons for his decision and the appeal was not listed for hearing. The applicant then applied to the Court of Appeal for an order requiring the magistrate to supply his reasons, or for a resolution of the appeal in the absence of the magistrate’s reasons. At the time the motion was heard, the magistrate had still not supplied his reasons. The Court of Appeal treated the motion as an appeal, holding that when a defendant lodged an appeal against a magistrate’s decision in criminal proceedings it was a rule of law that

326 Ibid 424.
327 *(1984)* 34 WIR 340.
328 Ibid 342.
the magistrate must provide reasons for his decision. In addition, the Court of Appeal also declared that in cases involving the liberty of the subject, the furnishing of reasons by a magistrate where appeals had been lodged was an indispensable requirement of ‘due process’ provisions of the Constitution. To its credit, the prosecution did not oppose the application in the Court of Appeal.

The anticorruption initiatives sweeping the Commonwealth Caribbean may well be justified, but is will be sometime before these initiatives are fully operational. We can expect a period of learning and experimentation as regional governments seek to ensure that their countries discharge their international obligations and engineer workable social systems free from corruption. At the same time, we should not ignore the fact that we have had nearly 400 years of experience in the region with the common law. While it is now quite clear that the common law cannot address all that is required in the anticorruption project, greater use can be made of the common law provisions. Where the new initiative fail to address some particular misconduct, the common law may still suffice to ensure that it is nevertheless discouraged.

329 Constitution of Trinidad and Tobago, s 4(a).
CHAPTER 5

ANTICORRUPTION STRATEGIES AND THE NEW INSTITUTIONAL FRAMEWORK

Commonwealth Caribbean governments are pursuing several administrative and institutional strategies to advance the anticorruption project. These strategies are driven by the main themes emerging internationally in the anticorruption discourse. One strategy in the anticorruption project centres on the reform of the public service. A responsible and responsive public service should reduce corruption, especially systemic corruption. This strategy includes establishing anticorruption agencies. Another strategy involves updating the legislative framework to address issues such as money laundering and drug trafficking, which of necessity involves increased criminalisation. The underlying assumptions of this strategy are that criminals engaged in money laundering and drug trafficking tend to corrupt the institutions of public sector governance, and that reducing money laundering and drug trafficking will also reduce the debilitating effects those activities have on the public service. Moreover, as the rewards from illegal activities need to be deposited somewhere, removing the opportunities for securing those funds will make the pursuit of illicit activities less attractive.

One aspect of legislative reform targets public officials directly, requiring disclosure of their assets. This disclosure does not necessarily promote more transparency in the public service, as the disclosure is usually made to a commission that is required under the law to keep the information secret. Trinidad and Tobago is the exception, and provides for the public
disclosure of some of the data collected. Typically, other Commonwealth Caribbean territories require disclosure only in pursuit of a prosecution for a breach of the law. The new strategies also include adopting anti-corruption clauses in public procurement contracts, introducing public sector codes of ethics, promoting new principles of corporate governance of public bodies, and establishing public procurement oversight agencies such as contractors-general, contracts commissions and tenders board.

**Main Themes**

For the last two or three decades, corruption in the public sector has been a leading concern in all types of economies.¹ The stock market crashes of 1987 and property crashes of the early 1990s exposed weaknesses in private sector governance as well as in some government administrative structures that had adopted a similar ‘business-like’ approach to the delivery of public service.² Similarly, the current international financial and mortgage meltdown is attributed to weaknesses in financial regulations and governance. Whereas the previous Conservative Government in the UK was associated with initiating unprecedented public sector reforms that significantly improved public service delivery, it was also associated with opportunism characterised in the popular press as ‘sleaze’.³ The ‘cash for questions’ scandals in the UK, the Wright and Gingrich Congressional ethics investigations in the US, and the repeated prime

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² Ibid.

³ Ibid.
ministerial corruption scandals in Japan are more recent examples of such failure. The position in Australia was somewhat similar. The 1989 Fitzgerald Report on police corruption in Queensland, the 1993 report of the Royal Commission in Western Australia, the Royal Commission into Police Corruption in New South Wales, the Independent Commission Against Corruption in New South Wales, and the Criminal Justice Commission in Queensland exposed many examples of public sector corruption in those jurisdictions. Similarly, the federal government in US has been addressing this problem as early as the post-Watergate years, resulting in the passage of the Ethics in Government Act and the Inspector General Act in 1978, the Ethics Reform Act in 1989 and the Lobbying Disclosure Act of 1995. We now know that the UK government, at the very least as early as 1975, through its foreign exchange control regime had positive knowledge of and provided support for the bribery of foreign officials, and this was a matter of some concern to officials in the government. More recently, the UK government has had to contend with the Al Yamamah/BAE scandal. It is cold comfort to the countries of the Commonwealth Caribbean that many other countries share their concerns with public sector ethics.

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4 T Sherman, ‘Public Sector Ethics: Prospects and Challenges’ in Sampford, Preston and Bois (n 1) 14.
5 Quoted by Sherman, ibid.
Anti-corruption Clauses

It has been suggested that one useful strategy to prevent corruption is to require anticorruption clauses in a public procurement contract. However, such clauses are defined more by intent than content. We know what the clause is supposed to do, but no one agrees on how it should do it. There is no consensus on the terms of such a clause, other than that it contains a declaration that in the public sector procurement contact the contracting parties have not been or will not be corrupt. It seems that there are two distinct approaches to the so-called anticorruption clause. One approach, adopted by CIDA since 2003, requires the contractor to declare all previous corruption related offences. The second approach which is been promoted by the OECD, requires a declaration in the procurement contract that the contractor has not made and or will not make any illegal offer, gift, payment or bribe.

In Trinidad and Tobago, the potential use of the anticorruption clause allegedly scuttled one public procurement contract. In the negotiated procurement of an executive jet aircraft from Bombardier Inc, the government of Trinidad and Tobago allegedly called for the inclusion of an anticorruption clause requiring, as a condition of the contract, Bombardier to declare that neither it nor its agents had entered, either directly or indirectly, any agreement with any Trinidad and Tobago citizen, resident, public official, or

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company director connected with the purchase of the aircraft. The government
also called for an undertaking from Bombardier that neither it nor its agents
gave either directly or indirectly any payment, reward or advantage of any
kind to facilitate or induce the government or its agents to enter into the
agreement to purchase the aircraft. In breach of the clause, the procurement
would be cancelled and the purchase price returned to the government. In the
final analysis, the procurement was not concluded. However, even in Trinidad
and Tobago, where there is much public discussion on its use, the
anticorruption clause was not included in the government’s most recent large
procurement.\footnote{Oral Response by the Honourable Minister of National Security to House of
Representatives Question No. 111 of the 2007-2008 Session of Parliament on Friday
September 5 2008 Government of Trinidad and Tobago in \textit{SAUTT technical team
negotiated for airships} Government Information Service Limited (Port of Spain, 2008)

It is difficult to appreciate the utility of the anticorruption clause, in
either of its variations. In the case of the CIDA approach, before the
procurement and most likely as a part of prequalification process, potential
contractors are required ‘… to declare previous corruption-related convictions
and sanctions’ and they ‘… must confirm that, in the three years prior to
signing a contract or contribution agreement, they have not been convicted of,
and are not under sanction for, any corruption-related offence.’\footnote{CIDA (n 8).} Under this
arrangement, the contractor will be allowed to make representations to the
CIDA to show what steps have been taken to resolve or counter the ‘problem.’
Nevertheless, under this arrangement the procuring agency, in this case CIDA,
will still reserve the right to accept, accept conditionally, or simple refuse to
do business with a contractor that has been previously convicted or sanctioned for a corruption related offence. The typical procedures for large public sector procurements would in any event reserve to the procuring agency the right to accept or reject tenders, but this anticorruption clause effectively broadens the discretion of the typical public sector procuring agency. In the absence of established government procurement procedures that provide otherwise, and other than in cases of unfairness or bad faith, the action of the procuring agency would normally not be subject to judicial review. An anticorruption clause of this nature, however, broadens the procuring agency’s discretion, and thus widens the scope for corruption. At the same time, this clause also widens the scope for judicial review, since it has now established a new standard against which the exercise of the agent’s discretion can be assessed.

The OECD approach to the anticorruption clause is equally problematic, at least in a common law jurisdiction. First, there are different drafting approaches to the clause that may lead to different results. The Australian application of the anticorruption clause sets out to prohibit future misbehaviour. For example, the following clause is in AusAID contracts:

The contractor will not make or cause to be made any offer, gift or payment, consideration or benefit of any kind, which would or could be construed as an illegal or corrupt practice, either directly or indirectly to any party, as an inducement or reward


14 See NH International (Caribbean) Ltd v Urban Development Corporation of Trinidad And Tobago Ltd and Hafeez Karamath Ltd, CvA. No 95 of 2005 (T&T), unreported; but cf CO Williams Construction Ltd v Blackman (1994) 45 WIR 94, were there were established government procurement procedures in Barbados; and see Auckland Electric Power Board v Electricity Corporation of New Zealand Ltd [1994] 1 NZLR 551; and R v Lord Chancellor's Department ex parte Hibbits & Saunders (a firm), March 12, 1993, The Times Law Report.
in relation to the execution of this contract. Any such practice will be grounds for termination of this contract.\(^{15}\) One may argue that such a clause is only effective if it is included in the prequalification or invitation to tender documents, as distinct from the contract itself, as it is principally directed at prospective behaviour. This is not to suggest that this is unimportant, because there is much scope for corruption in the administration of a public procurement contract. Another approach, which may be more effective, is to include in the clause a retrospective warrant or condition. That approach is also used by CIDA. That clause reads as follows:

No offer, gift or payment, consideration or benefit of any kind, which constitutes an illegal or corrupt practice, has or will be made to anyone, either directly or indirectly, as an inducement or reward for the award or execution of this contract. Any such practice will be grounds for terminating this contract or taking any other corrective action as appropriate.\(^{16}\)

In neither case, however, does the anticorruption clause actually terminate the contract. It merely gives the procuring agency discretion to do so. One understands the desirability of this approach. After all, a corruptly obtained procurement contract may nevertheless be to the advantage of the procuring agency. Automatic termination can act against the interest of the procurer. On the other hand, the increasing discretion in the hands of public sector agents opens up greater opportunities for corruption.

### Anticorruption Agencies and Declaration of Assets

Another strategy to combat corruption is the establishment of independent anticorruption agencies. The contemporary approach acknowledges that the

\(^{15}\) Directorate for Financial and Enterprise Affairs (n 9).

\(^{16}\) Ibid.
anticorruption project cannot rely only on legislation proscribing corrupt behaviour. An essential feature of the integrity in public life legislation is the declaration of assets of public officials, and the establishment of a commission to receive those declarations and to enforce the act, including investigating allegations of corruption.

The declaration of assets is now regarded as an essential tool in the anticorruption project. This approach has its origins in US public administration, and some form of declaration is now required in most areas of the US government at the federal, state, and in some cases even at the city level. There are two approaches to requiring public agents to declare their assets. One approach, which may be characterised as the US approach, is to require officials to declare their interests so as to give early warning of any potential conflict between those interests and the officials’ public responsibilities. The efficacy of that approach requires disclosure of these interests to the public and more particularly to investigative journalists. The other approach may be described, for convenience, as the Latin American approach, and in the Commonwealth Caribbean region it has its foundation in the Inter-American Convention Against Corruption. This approach requires that public agents declare their wealth, and this is based on the premise that


18 See, eg, Prevention of Corruption in Public Life Act 1994 (Chapter 12, Laws of Belize) s 3 (1); Integrity Commission Act 1997 Cap 19:12 (Guy); Integrity in Public Life Act 1997 (T&T); Integrity in Public Life Act 2000 (Chap 20:11 T&T) s 4; Integrity in Public Life Act 2004 (A&B); Integrity in Public Life Act 2004 (St L); Integrity in Public Office Act 2003 (Dominica); Corruption (Prevention) Act 2001 (Jam); Parliament (Integrity of Members) Act 1973, s 3; Integrity in Public Life Act 2004, s 4 (1).

19 Corruption (Prevention) Act 2000 (Jam) s 5; Integrity in Public Life Act, 2000 (T&T) s 5.
certain functionaries are at risk from criminal capture or corrupt influence. This approach seeks to ascertain if a public agent has wealth inconsistent with her legal income. In which event, the inability to give an account of the acquisition of that wealth will be regarded as a criminal act, or what is sometimes now called an act of corruption. In its usual application, this latter approach does not require public disclosure of the public agent’s assets. Instead the public official will report on her assets to a public authority that has the responsibility to keep the disclosure confidential unless or until it has instituted action to enforce the disclosure provisions.

Jamaica is an example of the latter approach. Trinidad and Tobago, however, has adopted both approaches: Section 11 of the Integrity in Public life Act, Trinidad and Tobago, requires confidential declarations of persons in public life’s income, assets, and liabilities; while s 14 requires a declaration of ‘registrable interests’, which is open to the public. Such interests include, directorships, contracts made with the state, investments in companies and partnerships, interests in trusts, beneficial interest in land, contributions to funds, particulars of membership in political, trade or professional association, particulars of sources of income, and ‘... any other substantial interest whether of a pecuniary nature or not, which he considers may appear to raise a material conflict between his private interests and his public duty.’

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Public Sector Codes of Ethics

Article III 3 of the Inter-American Convention Against Corruption, require the contracting parties to consider institutional systems to ‘... create, maintain, and

20 Integrity in Public life Act (T&T) s 11.
strengthen ... Instruction to government personnel to ensure proper understanding of their responsibilities and the ethical rules governing their activities.' Few Commonwealth Caribbean states have done so. As part of the anticorruption project, the governments of Antigua and Barbuda, the Bahamas, and Jamaica have embarked on programmes introducing public service codes of ethics. The Antigua and Barbuda code of conduct is based on legislation: The Integrity in Public Life Act 2004, Second Schedule. The Bahamian code is confined to the political directorate—ministers and parliamentary secretaries. This code prohibits private work by ministers, and directorships in companies engaged in business or trade. Ministers previously engaged in a profession or business must remove their names from the letterheads of the enterprise, or modify it to reflect their inactive status. They can no longer participate in the profits of the enterprise except for amounts due in return for previous investments. They must divest themselves of shares in companies that have contractual relationships with the government. If divestment is impracticable, the minister may obtain the prime minister’s permission to establish a blind trust. There is an obligation under the code to declare interest where it exists and not to use insider information to make speculative investments. Ministers may not accept gifts that might be perceived to create an obligation to donor; and under the code, they cannot use their ministerial status to enrich themselves or their families.21

A different approach is taken in Jamaica. In that jurisdiction, provisions for codes of ethics are not based on legislation, but have been

21 Report of the Government of the Bahamas on steps taken to implement the Inter-American Convention Against Corruption.
introduced on the executive authority of the Cabinet. The programme is directed at the professional public service, not the political directorate. Under the direction and supervision of the Cabinet Office, each public sector department or agency is required to develop and publish a code of ethics. Each department and agency is also required to appoint an ethics officer. Finally, through its public sector management-training agency, the Management Institute for National Development, the government has embarked on a course of ethics training for public servants.

An effective ethics infrastructure for the Public Sector requires a fair and reasonable code of conduct setting out the standards to which public sector employees will be held accountable, and such a code may provide the legal standards by which misconduct in public office is assessed. It is possible to have one code for the entire service, as what prevails in the Canadian public service, or what the Government of the Bahamas has introduced for its political directorate. On the other hand, as in the Queensland example, the state may pass a law that requires each department to establish a code peculiar to its circumstances. Whatever their basis, public service codes of ethics must provide clear and unequivocal prohibitions against the conflict of interest. In any case, the code must be open and freely available to the employees and the public. The code should provide for an officer within the department with responsibility to advise on the code and to promote the

22 SD Potts, ‘Ethics in Public Service: An Idea Whose Time Has Come.’ In Sampford, Preston and Bois (n 1) 85.
highest standards of public sector ethics. The code or the law should provide for an approved authority to resolve differences about its application.

**Corporate Governance of Public Bodies**

Ten years ago, Desai and Imrie described the wave of public sector reforms that had swept through Western Europe, North America, and several parts of the Commonwealth as a ‘... new public management revolution’\(^2^5\). That revolution was at first associated with initiatives in the United Kingdom but they quickly found near universal applicability.\(^2^6\) One characteristic of the new reforms was introduction of an increasing number of ‘devolved’ and ‘quasi-autonomous agencies’\(^2^7\). Another was the importation of business processes from the private sector to improve the efficiency and effectiveness of the delivery of central government services, widen accountability, and promote performance measurement and performance reporting systems.\(^2^8\)

Commonwealth Caribbean public service reforms have been influenced in large part by the reforms that had already taken place in the United Kingdom, and the states of the region have adopted or are adopting strategies designed in part to return better governance and superior service quality delivery.\(^2^9\)

This new approach puts great emphasis on the use of statutory corporations and


\(^{27}\) Ferlie and others, ibid, 6.


government-owned private companies. There is a belief in some quarters that this thrust to making public service delivery more businesslike has introduced new problems of ethics, governance, and ultimately corruption. However, managers of public sector agencies and the directors of statutory corporations and government companies do not behave better, or worse, than their private sector counterparts do. Both need to be accountable to their several stakeholders and, in seeking the advancement of their respective enterprises, both public and private sector managers and directors must be constrained in their methods. As in the private sector, it is becoming increasingly clear than non-executive directors require training in governance. We should require no less from directors on public sector boards.

Unfortunately, the new initiatives to promote a more business-like and responsive public services in the Commonwealth Caribbean are not generally accompanied by corresponding or supporting schemes to improve public sector ethics and governance. As mentioned above, Antigua and Barbuda, the Bahamas, and Jamaica have introduced codes of ethics for the political directorate or the professional public service, and Jamaica has recently introduced compulsory corporate governance training for members of commissions and directors of public sector boards. At this time, however, public service schemes for the training of directors are not compulsory in the rest of the Commonwealth Caribbean. The reporting mechanisms for statutory corporations are usually to the minister, but there are some who would argue the responsibilities of a director of a government-owned limited liability private company is to the company and not the political directorate. The position is still untidy. This new strategy of improved public service delivery
is not generally accompanied in the Commonwealth Caribbean by new strategies of improved ethics and governance.

It is difficult to identify a specific theory that grounds the governance principles of the new public management. Public management scholars have not identified a particular theory on which the current structure of the new public management is being built. There is no Commonwealth Caribbean equivalent of Nolan’s ‘Seven Principles of Public Life.’ Nevertheless, public policy makers and public managers are drawing on the constructs of general management theories to justify the directions of contemporary public sector reforms. In other words, the new initiatives in public management are based on the theories and practices relevant to management in general, not to public sector governance in particular.

Not everyone agrees that this development is good for the anticorruption project. Some argue that contemporary management theory is justifying the behaviour of an avaricious and self-serving management class inclined to exploit the institutions that they are employed to steward. Moran and Ghoshal were among the principal scholar-practitioners leading this charge. Ghoshal in particular argued that contemporary management theories, and consequently contemporary management practices, depreciate

31 P Aucoin, The New Public Management: Canada in comparative perspective (IRPP, Montreal 1995), seems to promote a variant of agency theory.
social values. Managers are now so focused on value creation in the enterprise that they do so at the expense of social values. The ends become far more important than the means. If this argument is correct, it is not difficult to extrapolate from management in general to public management in particular. Our public sector managers can become so focussed on the outcomes that they discount the means to achieving them. This problem may be more acute for our independent agencies and quasi-governmental organisations. This may be one of the pitfalls associated with the current public sector reform process. Sherman puts the position thus:

The recent developments in the area of economic rationalism also raise ethical issues as we move towards more commercialisation and privatisation of significant areas of the public service. The major issue is: what ethical standards and accountability mechanisms are going to apply in these privatised/commercialised areas?

In reviewing the Australian and UK public services, Lawton points out the debilitating effect of an organisational culture that emphasises, ‘Performance is what really counts; Must meet targets; Be loyal and show that you are a team player; Don’t break the law; Don’t over-invest in ethical behaviour.’ As Commonwealth Caribbean states turn their attention to developing new strategies for better service quality delivery, they are faced with the challenge of overcoming the limitations of this style of public management. At the same time there is the need to promote among our public sector managers and directors, both those developed within the public sector and those who join public service from private enterprise, the values of accountability which are

33 Sherman (n 4) 21.
34 A Lawton, ‘Business Practices and the Public Service Ethos’ in Sampford, Preston and Bois (n 1) 65.
essential to a functioning public sector ethics infrastructure.

A basic strategy in the promotion of the new public management is the development and empowering of independent administrative agencies. However, the establishment of an independent agency does not mean that it should be unaccountability. Further effort is necessary to improve the accountability of public service governance, especially in the quasi-governmental organisations. Transparency is a critically important characteristic of a healthy public sector. The managers of public sector agencies will be less inclined to inappropriate behaviour if they knew that their actions were always open to public scrutiny. More and more Commonwealth Caribbean governments are encouraging transparency in government. Some have even begun to legislate for it. Transparency is not something that is intuitively a part of the government process, and government officials who are inclined to corruption are threatened by it. If Bermuda is used as an example, in what has been described as that country’s biggest corruption scandal, long before anyone was prosecuted for the actual acts of corruption, the Auditor General was arrested for being in possession of stolen documents relevant to the investigation. The allegation was that the Attorney General and the Chief of Police were determined that the findings of the investigation of corruption should not be published. If transparency is difficult to achieve in the

36 Eg, Executive Agency Act 2002 (Jam); and the Contractor-General (Amendment) Act 1999 (Jam).
Traditional public sector it may be even more difficult to achieve in some of our new administrative structures. Although public officials charged with public sector oversight see the utility in whistle blowing legislation, no Commonwealth Caribbean country has yet introduced such legislation. Nevertheless, in some jurisdictions this issue is under review.

**Increased criminalisation**

Perhaps because of the insecurity and oversensitivity with accusations of corruption, Commonwealth Caribbean governments’ knee-jerk responses often result in an increased spate of criminal legislation and ad hoc law enforcement. There is a perception that the state treats white-collar crimes too leniently, and that increased criminalisation of corruption is a viable option. However, criminal law solutions may introduce offences that are difficult or even impossible to prosecute successfully. Over-criminalisation is sometimes associated with schemes that leave the question of enforcement to the law enforcement or regulatory authorities, with increased vagueness in the definitions of offences and the increased use of civil standard to assess

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41 Barbados, National Commission on Law and Order, *Final Report* (2004). See also *Sharma v Registrar to the Integrity Commission* [2007] UKPC 42, where the appellant complained, unsuccessfully, that the Trinidad and Tobago integrity commission failed to discharge its duties under the Act.
criminal conduct.\textsuperscript{42} An example of this may be found in s 4(4) of the Corruption (Prevention) Act 2000 (Jam), where the Commission may require such additional particulars from the declarant as ‘... the Commission may think fit.’ A similar discretionary power exists under s 7(1).\textsuperscript{43} The insidiousness of the over-discretionary approach is well demonstrated by the Trinidad and Tobago case of \textit{Nandlal v The State}.\textsuperscript{44} It will be recalled that in that case, two weeks after the appellant was convicted of giving and receiving a corrupt payment, he and his co-defendant were again served with a second set of indictments arising from the same circumstances as the first. The Court of Appeal agreed that the service of the second indictment on the appellant was nothing more than a charade and oppressive in the circumstances. The prosecutors’ behaviour in this case is by no means prescribed or even typical, but the case demonstrates the type of abuse that is possible.

The new legislative approach to public sector corruption sometimes applies the most severe criminal sanctions for small infractions. The question may well be asked, is this approach not self-defeating? The concern with over-criminalising any activity has long occupied lawyers and social reformers.


\textsuperscript{43} Under the provisions of s 15 (2) failure to provide this information is a criminal offence subject to fine or imprisonment.

\textsuperscript{44} (1995) 49 WIR 412.
Moohr defines over-criminalisation as follows:

… over criminalisation occurs when a complete analysis of the consequences of treating conduct as criminal indicates that the costs of treating a matter as criminal outweigh the benefits.  

It is a long established principle that the state should not create greater criminal sanction than what is required. Many scholars from the common law tradition have expressed concern with over criminalising offences and the unlikelihood of that process achieving the desired objectives. As Moohr puts it, advocating criminal penalties by considering only likely benefits is disingenuous, and policy makers who adopt such an approach effectively promote a dysfunctional administration of justice system. Moohr argues for a cost-benefit analysis, suggesting that this approach has the capacity to provide the content for debate over the substantive legal issues. He says that in identifying and classifying all the consequences of a new law, one will also determine ‘... whether proposed criminal legislation is appropriate, ineffective, or counterproductive.’ The cost-benefit approach is conspicuously missing from the Commonwealth Caribbean anticorruption project.

**Contractors-General**

A public sector procurement regime that avoids corruption, and the appearance of corruption, achieves an important utility. Civil society need to have faith in its political leaders and public sector managers. Making the right

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45 Moohr (n 42).
47 See all at n 42.
48 Moohr (n 42).
49 Ibid.
initial decision is critical, since bad public sector procurement decisions are so hard to correct.\textsuperscript{50} There is also the view that Commonwealth Caribbean judges are reluctant to entertain applications for judicial review in public sector procurement cases.\textsuperscript{51} There is some doubt as to the soundness of that opinion. The Privy Council, in \textit{C O Williams Construction Ltd v Blackman},\textsuperscript{52} was quite willing to accept that under the Administrative Justice Act of Barbados even Cabinet procurement decisions were reviewable. Lord Bridge of Harwich expressed the Board’s opinion in these terms:

\begin{quote}
When the Cabinet exercises a specific statutory function which, had it been conferred on a Minister instead of the Cabinet, would unquestionably have been subject to judicial review, their lordships can see no reason in principle why the Cabinet’s exercise of the function should not be subject to judicial review to the same extent and on the same grounds as the Minister’s would have been.\textsuperscript{53}
\end{quote}

Unfortunately, in delivering their advice their lordships did not find it necessary to refer to any supporting cases.\textsuperscript{54} It is possible that support for the proposition that public sector procurements in the Commonwealth Caribbean are not readily reviewable may be found in the judgment of Warner JA in \textit{NH}

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\textsuperscript{50} See \textit{CO Williams Construction v Blackman} (n 14) where the Privy Council commented on the difficulty in constructing a remedy for an improperly awarded public procurement contract since by the time the matter was resolved in the courts the contract was already substantially performed by the competing bidder.

\textsuperscript{51} See KT Hudson-Phillips ‘Judicial Review and Public Procurement in Trinidad and Tobago’ presented at the Caribbean Public Procurement (Law & Practice) Conference 2008, Port of Spain, Trinidad, 19th – 20th March. See also \textit{Pratt Contractors Ltd v Transit New Zealand} [2003] UKPC 83, where the Board cited with approval Finn J in \textit{The Federal Court of Australia v Hughes Aircraft Systems International} [1997] 146 ALR, at 442, when he observed that the implied duty to act fairly and in good faith “does not as such impose on the employer under the guise of contract law, the obligation to avoid making its decision or otherwise conducting itself in ways which would render it amenable to judicial review of administrative action.”

\textsuperscript{52} (1994) 45 WIR 94.

\textsuperscript{53} Ibid 100.

\textsuperscript{54} In \textit{Auckland Electric Power Board v Electricity Corporation of New Zealand Ltd} (n 14), and \textit{R v Lord Chancellor’s Department ex parte Hibbits & Saunders} (n 14), the court had
In this case, the Court of Appeal of Trinidad and Tobago held that the decision of the 
UDC to award a works contract to the second lowest bidder was not amenable to 
judicial review. It is important to note, however, that the Trinidad and Tobago Court of Appeal did not hold that no public sector procurement decisions were reviewable. It held that in this particular case, this procurement decision was not. Similarly, in 2002 the Belize Supreme Court considered granting an application of judicial review of the decision of the Government of Belize and the Minister of Finance, Foreign Trade and Economic Development to enter into contracts for the provision of telecommunication services to the Government of Belize.56 The application for leave to apply for judicial review was set aside because Blackman J found that the Applicant had not disclosed all the material facts when applying for leave, not because the subject matter was not reviewable. In any event, whatever the state of the law in the Commonwealth Caribbean on whether public procurement contracts are justiciable, the fact remains that the litigation process is costly and uncertain. It invariably takes place after the fact, leaving the claimant if she is successful to rely only on damages.57

There is also the point of view that in the Commonwealth Caribbean Parliamentary oversight of executive action in general, and public sector

55 CvA. No 95 of 2005 (T&T), unreported. See also Hudson-Phillips (n 51).
56 R and Others v Belize Telecommunications Limited (n 13).
57 See CO Williams Construction v Blackman (n 14) where the UKPC noted that the traditional remedies of certiorari, mandamus, and prohibition would not be suitable after a contract had been improperly awarded and referred the matter to the court below to determine the appropriate remedy in the circumstances.
procurement in particular, is weakly developed. The Public Accounts Committees of the local legislatures remain the principal agencies of legislative oversight of executive spending; but this type of oversight also involve a review of the procurement after the fact, when the abuse has already taken place. We generally agree that executive supervision and management have not been sufficiently effective to eliminate corruption. It is against this background of the uncertainty of judicial review of public sector procurement, weak legislative oversight of public sector, and inadequate executive supervision that the Contractor-General approach was adopted in Belize and Jamaica.

The commission of Contractor-General is a unique Caribbean contribution to the anticorruption project. The office monitors and investigates government licenses, permits, and procurement contracts to ensure that these are awarded and, where necessary, terminated fairly, on merit, and without irregularity. The institution adds an additional layer of oversight to public procurement in Belize and Jamaica, without unnecessarily restricting the performance of public procurement contracts. The institution has near unfettered power to investigate and monitor the grant of government licenses, permits and contracts but has no power to enforce its findings and decisions.

The concept was introduced first in Jamaica in 1983 and in Belize in 1994. The Jamaican Act was a modification of the Jamaican Ombudsman Act, and the Belizean Act was clearly based on the Jamaican precedent. The

58 See the opinion of Wit J of the Caribbean Court of Justice, in A-G v Joseph and Boyce (2006) 69 WIR 104, 235, where he asserts that Commonwealth Caribbean legislatures function differently, and has acquired ‘a more modest role’, than their UK counterpart has.

59 In Belize, the Ombudsman Act 1994 was passed by the National Assemble the year after
passage of both acts followed intense public discussion on alleged impropriety in public sector procurement in the respective countries. Both acts were passed early in the tenure of new governments that had made anticorruption a critical part of their electoral campaigns. Interestingly, in both cases the first commissions of Contractor-General were issued several years after the passage of the legislation. It seems that the institution of Contractor-General is far more attractive to legislators when they are in opposition, and less so when their party forms the government.

The office of the Contractor-General is intended to be independent of the executive. For example, the Contractor-General Act in Belize provides:

In the exercise of the powers conferred upon him by this Act, the Contractor-General shall not be subject to the direction or control of any other person or authority and no proceedings of the Contractor-General shall be called in question in any court of law by way of certiorari or any other means.\(^60\)

The Act also provides that, ‘The Contractor-General shall be appointed without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, or public administration.’ The Jamaican Contractor-General is appointed by the Governor-General after he consults the Prime Minister and the Leader of the Opposition,\(^61\) while in Belize, the Contractor-General is appointed by the Governor-General, acting on resolutions of both Houses of the National Assembly.\(^62\) This method of independent appointment to an office is not common in the region, but it is similar to provisions in the

\(^{60}\) Contractor-General Act s 4(1) Belize.
\(^{61}\) Jamaica s 3(1).
\(^{62}\) Belize s 3(2).
Constitution of Trinidad and Tobago for the appointment of the Chief Justice and the Chairman of the Public Services Commission.

The appointments are for fixed terms in both jurisdictions, and the disqualifications to both offices are the same. The office holder cannot be a member of parliament, a bankrupt, an ex-convict of an offence involving dishonesty or moral turpitude; and a Contractor-General is disqualified for failure to disclose interest in any contract with government.\textsuperscript{63} Both Contractors-General enjoy security of tenure from arbitrary dismissal. Both are removable from office only for inability to discharge the functions of his office, for misbehaviour, or for trading with the Government without the prior approval of both houses of the legislature.\textsuperscript{64} In both cases, dismissal is only possible on resolutions in both houses of the legislature. In Jamaica, the matter must be referred to a special tribunal of not less than three judges or retired judges. In Belize, the matter is referred to the Advisory Council, which is the equivalent of the local Privy Council in other Commonwealth Caribbean territories.

Contractors-General may investigate or monitor any ministry, department or agency of government, statutory body or authority and, in the case of Jamaica, limited liability company ‘... in which the government or an agency of government, whether by the holding of shares or other financial input, is in a position to influence the policy of the company.’ In Belize, the power is more modest. There the Contractor-General may investigate a limited

\textsuperscript{63} Jamaica s 8(1); Belize s 7(1).

\textsuperscript{64} Belize s 6(1); Jamaica s 7(1).
liability company where the government owns 51 per cent of the shares. In *Wright v Telecommunications of Jamaica Ltd*, 65 the Supreme Court of Jamaica was asked to interpret what the Act meant by the government being ‘... in a position to influence the policy of a company.’ The defendant, a limited liability company engaged in providing telecommunications services, entered into a contract for the purchase of two parcels of land from another company that was connected to its chairman. At the date of the hearing, the Accountant General, on behalf of the Government of Jamaica, owned 20 per cent of the shares in the defendant. The defendant challenged the Contractor-General’s attempt to investigate the sale and purchase of the parcels of land, and the Contractor-General applied to the court for a declaration that the defendant was ‘a public body’ within the meaning of the Act, that the defendant’s agreement for the purchase of the parcels of land was ‘a government contract’, and that he therefore had authority under the Act to review that contract. The Court held that as the largest shareholder, the Government’s holding was significant in shaping or determining the company’s policies and thus the defendant is a ‘public body’ but the sale and purchase of land by a limited liability company, even one that was a public body, was not a government contract as defined by the Contractor-General Act. Thus, this agreement for the purchase of land was not subject to investigation under the Contractor-General Act. 66


66 It is possible to interpret this judgment to mean that the Contractor-General cannot investigate the sale of land by ‘government companies’ as that construct has an artificial meaning under the Act, but that the office can investigate contracts for the sale and purchase of land by a regular government department.
There is also a restriction on the Contractor-General’s power to investigate or monitor contracts and licences for supply to the security forces. This requires the prior approval of Cabinet. In addition, the cabinet may also direct that the Contractor-General should not have access to confidential information on cabinet proceedings that is likely to be injurious to the public interest. Similarly, the Cabinet may withhold information that would prejudice the country’s international relations, prejudice criminal investigations, or prejudice national security or defence.\textsuperscript{67}

It is understandable that as a corollary to the extensive rights granted to these commissions to receive information, the Acts also impose on each commission a corresponding duty to maintain the confidentiality of the information received. Contractors-General must regard as secret and confidential all documents, information and things received in the execution of their duties and can disclose such information only where it is necessary in the discharge of the functions of the office, or in making complaints regarding the offence of perjury.\textsuperscript{68} Other disclosure is unlawful and an offence punishable by fine or imprisonment.\textsuperscript{69} In addition, in Jamaica a court may order the Contractor-General not to publish a report or part of it if such publication is likely to prejudice the proceedings pending before the court.\textsuperscript{70} Finally, a Contractor-General cannot publish a report until it is laid on the table of the Houses of the National Assemble in Belize or Parliament in Jamaica. A

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\textsuperscript{67} Belize s 19(1); Jamaica s 19(1).

\textsuperscript{68} Belize s 25; Jamaica s 24.

\textsuperscript{69} Belize s 30(c); Jamaica 29 (c).

\textsuperscript{70} Jamaica (s 30 (2)).
Contractor-General has no power to enforce his findings and decisions. This is quite consistent with the ombudsman-like character of the office and this replicates the restraints applicable to ombudsmen and parliamentary commissioners in the Commonwealth Caribbean region. The real power of a Contractor-General is in the reports that he or she is entitled or required to make. There is a duty on the Contactor-General to make an annual report to the legislature on the conduct of the affairs of the office. There is a further duty to make a report to the head of department and to the responsible minister after the Contractor-General has conducted an investigation. Copies of the latter type of reports can be and often are sent to the legislature, and it is this type of report that enhances the legislature’s oversight of the executive. In addition, there is a power in the office to make a report to the legislature at any time. Finally, there is a power in the legislature to require the Contractor-General to report on any matter being investigated by him. Unfortunately, that power has never been exercised. Once the report is tabled in the houses of legislature it becomes a public document, and an informed public is a firm foundation for further legislative action.

The office of Contractor-General is an ombudsman or parliamentary commissioner, and it has the strengths and weaknesses of that institution. The principal weakness of the ombudsman is that one usually complains to that office after one has suffered some abuse or disadvantage by an agency of government. It was important that the Contactor-General was not limited in this manner and thus the office was given the power to monitor the awards of procurement contracts to ensure that no subsequent impropriety takes place. It is now generally conceded that monitoring institution that is confined to
reporting only on what it has found after the fact is for the most part ineffectual. However, the recognition of this right was hard earned, as Lawrence v Ministry of Construction (Works) and Attorney-General\textsuperscript{71} demonstrates. In that case, the Court was asked to determine how early the Contractor-General could intervene in the public sector procurement process. The precise question was whether the Contractor-General Act was entitled to monitor the pre-contract stages of government contracts and to obtain information from public bodies relating to the pre-contract stages of the award of such contracts. The Court answered, yes. It would seem that such a contention is easily supported by s 4 of the Act that requires that the Contractor-General monitors the award and implementation of government contracts with a view to ‘... ensuring that such contracts are awarded impartially and on merit.’ To discharge this function the Act authorises the Contractor-General to be advised of the award or variation of any government contract and to have access to all records relating to that contract. If the Contractor-General is to ensure that contracts are awarded fairly and on merit then he could only do so if he is advised before the award takes place. In the Lawrence case, the Contractor-General wrote to the Permanent Secretary in the Ministry of Construction (Works) requesting a listing of all projects planned, and being executed by the Ministry, that involving the award of contracts. The permanent secretary in that Ministry refused the request on the basis that he was not legally required to provide this information before the award of a contract. In other words, if the Contractor-General is to monitor a

\textsuperscript{71} (1991) 28 JLR 265.
contract then that contract must first exist. There could be no contract before one had been awarded. The permanent secretary was fortified in view by an opinion from the Attorney General. The case presented an interesting dilemma: A Contractor-General is to monitor contracts to ensure that they are properly awarded; but in legal terms, no contract exists until it has been awarded. The court was not moved by this apparent contradiction. Adopting a purposive approach to the interpretation of the Act, Courtney Orr J held that the intention of the Act was to empower the Contractor-General to monitor the pre-contract stages of the government contracts and to obtain information from public bodies prior to the award of such contracts. He concluded:

I am of opinion that the ordinary meaning of the words of the statute in light of the context and grammar suggest no other interpretation … He cannot monitor the award and implementation of government contracts, and the grant, issue, suspension or revocation of prescribed licences in the manner required by the Statute unless he is enabled to be privy to the pre-contract stages of the award of government contracts before they are granted.72

Thus, the Court held that the Contractor-General is entitled to review procurement procedures and documentation before the agreement was concluded and the procurement contract awarded.

Notwithstanding the proven advantages of establishing the Contractor-General, we still do not have the full measure of what is possible from such an office. The annual and special reports of the offices in Belize and Jamaica are perhaps the best measure of the utility of the institutions.73 The reports

72 Ibid 269-70.

73 Some annual and some special reports of the Office of the Contractor of Jamaica are available online. The Belize reports are not available from the Internet.
succeed in bringing infractions to the attention of the legislature and the public, but those reports do not suggest that because of the establishment of the offices irregularities in public sector procurement are in decline. A closer integration of the office with the legislature is desirable. This could be achieved by providing a standing parliamentary committee to receive and act on the Contractor-General’s reports, and to request special reports when necessary. In addition, the office as it is now established suffers from an additional weakness. Although the office is independent of the executive, it must still look to the executive for financial support. In both Belize and Jamaica, the salary for the holder of the commission of Contractor-General is charged under the Act to the Consolidated Fund and is thus guaranteed, but the government secures all the other costs and expenses of the office, including the salaries of the employees in the Office, in the annual budget. Although the legislature fixes the number of staff and the rates of remuneration, it funds the staff and the operational expenses of the office on the request of the government. Secondly, even when the expenses of the office are approved as a part of the government’s annual budget it still remains for the government to release the funds from time to time. The full independence of the office requires that the legislature fund its operations directly. Nevertheless, even in its current form, the office of the Contractor-General as it operates in Belize and Jamaica offers some useful instructions on public procurement oversight. The office operates to expose infractions and to decrease the risk taking behaviour of potentially corrupt individuals.

**Contracts Commission and Central Tenders Board**

It is probably an indication of the dissatisfaction with the effectiveness of the
ombudsman-like institution in Jamaica that the Contractor-General Act was amended to introduce the National Contracts Commission (NCC). Whereas the Contactor-General is to monitor and investigate government contracts, the stated objects of the Commission are ‘... the promotion of efficiency in the process of award and implementation of government contracts and ensuring transparency and equity in the awarding of such contracts.’

The amendments to the law called for more direct executive control of the contracts awards process.

This Commission was established to replace a centralised executive committee of the Government of Jamaica, the Government Contracts Committee, and to some extent the design and operations of the new commission was informed by the structure and experiences of the Central Tenders Board (CTB) of Trinidad and Tobago, and to copy the strengths and avoid the weaknesses of that institution. As such, while there are similarities there are also some fundamental differences between both institutions.

Like the CTB, the NCC may work through subcommittees, called sector committees in Jamaica, and it may establish such number of sector committees as it considers necessary for it to carry out its functions. At this time, there are seven sector committees and these committees work in different areas of the public sector and recommend the award of government contracts within subordinate limits established from time to time. Part of the rationale, apart from the efficiency that can be achieved by decentralisation, is

74 Contractor-General Act (Jam) s 23C.
75 Central Tenders Board Ordinance, No 22 of 1961.
76 Contractor-General Act (Jam) s 23F.
the expectation that a sector committee will be able to develop specialist expertise in its sector. The idea to work in committees might have been informed by the experience of the CTB and a desire to avoid the delays that too much centralisation would entail.77

The composition of the NCC in Jamaica is somewhat similar to the composition of the CTB in Trinidad and Tobago, but the methods of appointment of the members are different. Whereas the CTB and its subcommittees are essentially agencies of the executive, the NCC is a commission of Parliament. The CTB in Trinidad and Tobago consists of eight members, at least five of whom are ex officio (that is public officers) and the others, as many as three, are at large.78 A Director and Deputy Director of Contracts are appointed from among the ex officio members and these are respectively the Chairman and Deputy Chairman of the Board. These persons are all appointed by the President. As the Act does not purport to direct how the President should act, it is fair to assume that he would act in accordance with the advice of the Cabinet or a Minister as provided for by s 80 (1) of the Constitution.79 The NCC in Jamaica also consists of eight members. There is a Chairman, appointed by the Governor-General from a list of three names submitted to him by the Contractor-General. There are five other ex officio members, meaning that they are employees of public bodies, appointed by the

77 Central Tenders Board Act 1961 s 5.
78 Central Tenders Board Act 1961 s 5.
79 Constitution of the Republic of Trinidad and Tobago s 80 (1): ‘In the exercise of his functions under this Constitution or any other law, the President shall act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet, except in cases where other provision is made by this Constitution or such other law …’
Governor-General on the advice of the Cabinet. Of these, three at least must be actual public officers, or civil servants, employed by the Public Services Commission. An additional member of the Commission is selected by the Governor-General from a panel of five persons nominated by the Joint Consultative Committee of the Building Industry, and the final member is selected from a panel of five persons nominated by the Professional Societies Association of Jamaica.\(^8^0\) The fundamental distinction between the NCC and the CTB is that the former does not actually invite tenders and award contracts. The NCC oversees the tenders and contracts awards process, approves the recommendations of its sector committees and, in appropriate cases, recommends the award of contracts to the Cabinet. Another distinction is that unlike the CTB of Trinidad and Tobago, where the subcommittee members are selected by the responsible minister, sector committees members in Jamaica are appointed by the NCC.

\(^8^0\) Contractor-General Act, Third Schedule, s 1.
CHAPTER 6

CONCLUSION

Commonwealth Caribbean governments are struggling to find administrative structures and governance regimes that will ensure fairness, efficiency, value for money, and on time delivery for public sector procurements while at the same time avoiding corruption, nepotism and fraud. To achieve all those things require complex administrative arrangements, and some of the proposed initiatives may very well be incompatible with others.\(^1\) For example, while it is theoretically possible to devise a public sector procurement regime that will be completely free of corruption, nepotism, or fraud, such a regime would not necessarily be very efficient. In every public sector procurement exercise, procurement managers are constantly trying to balance these two conflicting objectives—being efficient on the one hand, and being fair on the other.\(^2\) The same can be said for all public service delivery: Total supervision to avoid bribery or corruption may be theoretically possible, but not practical.


\(^{2}\) The Integrity in Public Life Act 2000 (T&T), like the Corruption Prevention Act 2001 (Jam), requires public officials to declare their assets. It is expected that through these provisions corrupt officials will be identified and prosecuted. Several former ministers have been indicted under the Prevention of Corruption Act 1987 (T&T) for corruption associated with public procurement and these matters are now before the courts. However, the first attempt to prosecute someone for failing to make a correct return of assets under the provisions of the predecessor to the Integrity in Public Life Act 2000, enacted first in 1987, was not successful: See *Panday v A-G* [2005] TTCA 20; and *Panday v Virgil Mag App No 75 of 2006*, unreported. Unreported Court of Appeal cases from Trinidad and Tobago can sometimes be accessed at <http://www.ttlawcourts.org/c_appeal.htm>; and Trinidad & Tobago High Court Cases are sometimes available at <http://www.ttlawcourts.org/c_high.htm>. Similar attempts have been made in Jamaica, as yet with uncertain results, to prosecute parliamentarians: Saturday Gleaner, ‘Davis, Peart to face the courts’ The Gleaner (Kingston, Jamaica, 13 June 2009) A3.
The new anticorruption strategies are built around the main themes that dominate the scholarly and practitioners’ literature on the subject. Local real-world studies, as paltry as these studies are, tend to reinforce the conventional themes, placing great emphasis on corruption perception. The methodologies of corruption perceptions studies are sometimes suspect, but their results are often used to support the opinion that corruption is rampant in the Commonwealth Caribbean and thus require the most serious responses. Such studies further justify additional legislation to criminalise corrupt behaviour, putting these states at risk of over-criminalisation.

The contemporary trend is to associate the application of the rule of law with anticorruption measures. This has arguably been an international strategy of the US over three decades. There is some debate as to whether this approach of the US was cynically self-serving in the wake of the debilitating competitive implications to American businesses of the Foreign Corrupt Practices Act (FCPA) 1977; or whether there was a genuine desire, as Eizenstat suggests that there was, to cultivate among her international partners ‘... the ethos of the rule of law and ... replace cynicism about the rule of law with optimism.’ Whatever might have been the proper motivation, it is true that the US government in several international forums initiated and promoted

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5 15 USC §§ 78dd-1 to -3 (1994 & Supp. IV 1998), USA. See also, Colares, ibid; and Cuervo-Cazurra, ibid.
this posture and today the global trend towards the rule of law and anticorruption is moving, at least in the opinion of one scholar, ‘... in the right direction.’

The FCPA was passed against the background of atrocious abuses of executive and military spending, but the Act directed its attention principally on the behaviour of the corrupt practices of US businesses operating abroad and included far reaching anti-bribery provisions enforceable by the US Department of Justice. Under that legislation, acts of bribery by US corporations committed in foreign jurisdictions became criminal acts punishable in the US. Some regarded bribing public officials as an essential part of international business competition. As the US trading partners had not at that time instituted similar anticorruption measures, the US legislation was seen as an act of unilateral international competitive disarmament; or at the very least, a device that emasculated US companies as they sought to do business abroad. Consequently, the Foreign Corrupt Practices Act also provided a foundation for an important plank of US foreign policy for three decades, and one US foreign policy objective was to encourage other members of the OECD as well as the USA’s trading partners in Latin America to introduce similar anticorruption legal regimes.

At the time of the passage of the Foreign Corrupt Practices Act no other member of the OECD, and possibly no other country in the world, had

6 Eizenstat (n 3).

7 The Foreign Corrupt Practices Act (FCPA) was followed in the US by the Ethics in Government Act 1978 and the Inspector General Act 1978; but because the FCPA set out directly to confront foreign corruption, it was that Act rather than the other two that had to most influence on international developments on anticorruption and public sector ethics.

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imposed on its nationals doing business abroad the standard of behaviour that the US required of its nationals and corporations. It is not immediately clear how the world moved from a policy posture that focussed on the corrupt behaviour of private corporations, and that of their officers, directors, employees, and agents, to one that focussed primarily on the improper behaviour of foreign public officials. Nevertheless, it is necessary only to look at the content of the emerging anticorruption legislations in the Commonwealth Caribbean, as an example, to see that this change has already taken place.

For the most part, contemporary Commonwealth Caribbean anticorruption regimes are based on the common law and the UK corruption legislation received into the laws of the region, but the new initiatives have been strongly influence by these international developments, and these states are all signatories of the first international treaty against corruption. Thus, the region’s emerging anticorruption projects are taking on this clear and unambiguous international character, and legislative initiatives in the region often follow and enforce international agreements. This international posture tends to emphasise criminal law enforcement as the appropriate anticorruption strategy. The concept of the act of corruption and the offence of illicit enrichment, which have already become part of Antiguan and Jamaican law and my yet gather further mileage in the other jurisdictions of the region, owe their genesis to the Inter-American Convention Against Corruption.

**Adopting a New Oversight Theory**

The process of modernisation of the public sector bureaucracies required not only establishing new agencies, but also adapting to public service new
governance concepts and theories. Some of these theories might have proven
deficient in the past, in that they have not effectively addressed problems of
poor governance in the private sector, and therefore there is some suggestion
that they might be ill suited to corruption and governance in the public sector.
Theories such as agency cost theory have been specifically criticised. The
argument was made in Chapter 2 that agency cost theory is useful to
understanding public sector corruption, but that it required reconstruction to be
effective. One of the weaknesses of past applications of agency cost theory has
been the focus on rewarding agents as a means of realigning their interests
with those of their principals. Nevertheless, modern agency cost theory, as it
has been reconstructed in this study, suggests placing greater emphasis of
oversight and accountability to avoid the moral hazard on which the
anticorruption project has so far floundered.

The fundamental principle is that corruption will more easily develop
when there is asymmetry of information between principals and public sector
agents, and that corrupt public agents will necessarily pursue their own utility
if they can get away with it. In addition, discretionary spending in the public
service will provide many opportunities for corruption. To be sure, agency
cost theory by itself has not been a sufficient explanation of the persistence of
corruption in the public procurement process, but it tells us that there are some
circumstances when we may expect that public agents to be more corrupt.
When reconstructed, as was done in Chapter 2, agency cost theory instructs us
how to avoid corruption of public agents. We know now not to rely only on
developing new compensation schemes for public agents, because that
approach has not worked well.\textsuperscript{8} The solution to reducing corruption and improving governance in the public sector lies in reducing or avoiding moral hazard. The challenge for Commonwealth Caribbean governments is to establish anticorruption regimes that can achieve that. Those regimes must include different roles for the legislatures, the promotion of new anticorruption agencies and, most importantly, greater transparency, accountability and oversight.

This thesis has argued against the draconian approach to anticorruption, suggesting that such an approach is often counterproductive. Although, some would argue, severe punishment is one way to discourage moral hazard. However, the administration of overly draconian punishments sometimes suffers from potential judicial, jury, and administrative nullification. The experiences of the criminal law and the administration of justice have shown that it is not the severity of the punishment but the certainty of the punishment that discourages crime. The moral hazard approach argues not for harsh punishment, but for certain punishment. The detection of corruption is the critical factor.\textsuperscript{9} Once corruption is detected, then

\textsuperscript{8} Agency cost theorists, such as MC. Jensen and WH. Meckling, ‘The Theory of the Firm: Managerial Behavior, Agency Cost and Ownership Structure’ (1976) 3(4) J Financial Econ 305, argued that executives should be given incentives, typically by way of stocks or stock options, that would align their interests with those of the stockholders of the company. However, the evidence has shown that even highly paid and generously rewarded executives will still act against the interest of the owners of their companies. See ‘Executive Compensation’ Business World accessed 16 March 2008 <http://www.ethicsworld.org/corporategovernance/executivecompensation.php#CEOhearing>. See also MC Jensen, ‘How Stock Options Reward Managers for Destroying Value and What To Do About It’ (April 2001). Harvard NOM Working Paper No. 04-27; and MC Jensen, KJ Murphy, and EG Wruck, ‘Remuneration: Where We've Been, How We Got to Here, What are the Problems, and How to Fix Them’ (2004) Harvard NOM Working Paper No. 04-28.

certain punishment should be applied. It is therefore important that the focus move from punishment to detection. There is no point having elaborate rules on punishment, if we do not have adequate facilities for detection and enforcement.

The Trinidad and Tobago approach to the declaration of assets of persons in public life better reflects the demand of our theory than the approach taken, say, in Jamaica. The latter approach requires a confidential declaration of wealth, while the former approach requires, in addition, an open declaration of interests. A public agent is less likely to pursue a private interest that conflicts with his public duties, if his private interests are readily available to public scrutiny. Requiring an open declaration of interests, as distinct from a private filing of a declaration of wealth, better facilitates the detection of corruption and, consequently, the enforcement of the law against it.

Redefining the Role of the Legislature

Kaufmann had identified the challenges facing those engaged in the anticorruption project as those of civil society participation, the convergence between process and substance, integrating the participatory process with concrete institutional reforms, adopting insights from the methodology of public finance, and relying more on empirical data. It is interesting to note that Kaufman had not identified the legislature as an anticorruption agency, or even as a specific object of interest. The role of legislature, especially in the Westminster export model of constitutional government, is often confined to

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enacting legislation giving effect to the policies of the executive. However, the legislature has an important role in the anticorruption project. In addition to its obvious responsibility for enacting legislation, the legislature has a capacity for oversight, and if that oversight is properly exercised, it can be an unequalled tool against corruption. It is obvious that legislative oversight requires the offices of other agents, but special parliamentary commissions such as the Contractor-General and the National Contracts Commission (NCC) demonstrate what can be achieved. Public procurements provide the greatest opportunities for public sector corruption, and commissions of the Contractor-General and the NCC, as constituted in Belize and Jamaica, are particularly useful instruments to deal with corruption in public sector procurement.

In principle, in the Westminster export model of government the legislature is charged with oversight of executive spending. This aspect of Westminster theory of government does not necessarily coincide with the experiences of the Westminster export model, at least as the model is applied in the Commonwealth Caribbean. Wit J had characterised Commonwealth Caribbean constitutions as ‘fundamentally different’ from the Westminster prototype, and suggests that in the Commonwealth Caribbean region the legislature had acquired a more modest role than its UK counterpart had. In

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11 The distinction is made here between the Westminster constitutional model, represented by the UK Constitution, and Westminster export model, meaning those constitutional systems based on the Westminster model but containing such additional features as to make them distinguishable. These new features include, among other things, entrenched bills of rights, the supremacy of the constitution doctrine, and a diminished importance of the legislature in comparison to the executive.

the opinion of Wit J, at least, the independence and authority that the legislature enjoys in Westminster does not hold for the export model in the Commonwealth Caribbean.

This characteristic of Commonwealth Caribbean legislatures is perhaps more true for some territories than others, and in some cases almost every member of the legislature who supports the government is also a member of the executive. This is more a characteristic of small legislatures than on large executives, but this means that a Commonwealth Caribbean legislature is never fully independent of the executive. Because the executive dominates the legislature in the Commonwealth Caribbean’s application of Westminster export model, legislative oversight of public sector discretionary procurement is for the most part nominal and almost entirely after the fact. To be sure, the Auditor General’s reports to Parliament and the work of the Public Accounts Committee are critical to the oversight process, but these reports are usually sent to a Parliament that is not likely to be sympathetic to criticisms of the government. Nominal consideration of reports on past spending represents almost the totality of the legislative oversight of executive procurement in most Commonwealth Caribbean jurisdiction and often the only utility achieved by this approach is the public embarrassment to the nonconforming public servants.

It occasionally happens, but it is not often that a corrupt public official is prosecuted because of a report from the Auditor General or the Public Accounts Committee. Nevertheless, a Public Accounts Committee provides a valuable platform for parliamentary oversight. To be fully effective, however, local legislatures must avoid the partisanship, which now characterises
anticorruption initiatives. Opposition members of the legislatures are quite keen to allege corruption and to pursue the anticorruption agenda whilst they are in opposition. New governments are also keen to pursue the anticorruption agenda, at least in the early periods of their government. In such cases the full force of investigations under their control are likely to fall more on members of the previous government, who are now in opposition. The legislatures of the Commonwealth Caribbean need to rethink their roles in the anticorruption project, as independent of their law making function they have a potential for oversight that is unequalled in other agencies.

**Oversight Strategies**

Kaufmann reminds us of several myths or misconceptions about corruption. While the entire list is important, it is necessary to focus on just two items: The first myth is that in developing countries the public sector is the principal font of organised corruption. The second myth is that developing countries can do little to improve governance and advance the ethics project. This thesis contests both those myths, and the underlying assumption of this study is that corruption principally occurs were the business activities of the public and private sectors intersect, and that governments’ discretionary spending for purchases from the private sector provide many opportunities for corruption. Secondly, it is also a fundamental assumption of this thesis that it is most certainly possible to improve public sector governance and reduce the opportunities for corruption with effective oversight institutions.

Parts of the current Commonwealth Caribbean strategies involve the

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13 Kaufmann (n 10) 139.
establishment and empowerment of anticorruption agencies, such as integrity commissions. These agencies are still in their embryonic stages, and are still tentative in their approach to corruption. This strategy acknowledges, at least in part, that public sector corruption cannot be addressed only as a criminal law enforcement exercise. It also requires initiatives to develop a greater sensitivity to ethics in public service. At the current time, few Commonwealth Caribbean states have adopted this further step of the improvement of public sector ethics as part of their anticorruption strategy, and in the cases of those who have adopted this approach, the process is still in its early stages. Whereas the OECD countries, for example, recognise the critical role that public sector ethics must play in the anticorruption project, this approach is yet to commend itself fully to the Commonwealth Caribbean.

In addition, a lot of attention has been spent improving financial management, including the procurement processes of the public service. In our penchant for fanciful terms, and encouraged by the UN Economic Commission for Latin America and the Caribbean (ECLAC), Commonwealth Caribbean bureaucrats have now begun to speak of the ‘new fiscal covenant.’ In this way they are referring to—

An agreement among the various sectors of society on the role of the State in economic and social development, the amount of resources it should manage, the sources of its revenues and the rules governing the allocation of public funds.\textsuperscript{14}

It is true that the anticorruption project requires greater support for oversight agencies, especially in the field of public sector procurement, and it is in this

\textsuperscript{14} UN Economic Commission for Latin America and the Caribbean \textit{The Fiscal Covenant: Strengths, Weaknesses, Challenges—Caribbean Perspectives} (LC/CAR/G.564) (UN New York 1999) 1.
area of public procurement oversight that Commonwealth Caribbean governance systems are especially weak. These states have not developed sufficient administrative and oversight agencies to treat effectively and consistently with corruption in the area of discretionary procurement. Only Belize and Jamaica have introduced contractors-general. A fair and effective public sector procurement system should involve several elements. These include open invitations to bid, clear documentation setting out the requirements, clear and consistent explanation of how the procurement process will be conducted, clear and consistent statements on the intended contract terms, clear and transparent procedures for accepting and opening bids, predetermined criteria for evaluating the bids by competent evaluators, and the award of the contract to the most competitive responsive bidder.\textsuperscript{15} In addition to all of this, there is also need for a monitoring agency to ensure that all the parties are following the rules of the road. The institution of the contactor-general can usefully in promoting these objectives, and it is recommended that Commonwealth Caribbean states adopt the Belize and Jamaica precedent of the contractor-general.

As one duty of the Contractor-General is to monitor to ensure that a breach does not take place, then of necessity, the office needs to intervene before the award is made.\textsuperscript{16} As such, for agencies such as the Contractor-General, the NCC, and the Commission for the Prevention of Corruption to be effective, they will have to adopt a proactive role. They must be willing to


\textsuperscript{16} \textit{Lawrence v Ministry of Construction (Works)} (1991) 28 JLR 265.
provide support in the form of monitoring and guidance to the Ministers, Permanent Secretaries, and Heads of Departments before a breach occurs. After the fact reporting to Parliament, while it captures the public’s attention and is required under the law, does not provide the support that public sector agencies need. The NCC in Jamaica has authorised the circulation of a Handbook for Public Sector Procurement Procedures for Jamaica, and the Office of the Contractor-General has published and circulated this handbook openly and freely to the public and has made it available in printed and electronic format. In addition, the Office publishes all recommendations and endorsements of the NCC. One contentious issue is the extent to which commissions such as these should be allowed to prosecute or enforce their own decisions, rather than rely on enforcement through other agencies, such as the Director of Public Prosecutions. However, the challenges of moral hazard are better met by greater oversight and transparency, and it is effective oversight and transparency that are now missing from the Commonwealth Caribbean anticorruption project, not prosecutors.

Transparency and Whistleblower Protection

The success of the anticorruption project in the Commonwealth requires greater transparency in the conduct of public affairs. To some extent, some useful initiatives have already been made in this direction. Among the broad purposes of institutions such as the Integrity Commission in Trinidad and Tobago, the Contractors-General in Belize and Jamaica, and the NCC in

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17 Contractor-General Act 1983 (Jam) s 21; Contractor-General Act 1994 (Bel) s 21; Corruption (Prevention) Act 2000 (Jam) s 12 (1) & (2); Integrity in Public Life Act, 2000 (T&T) s 17 (1); and Parliament (Integrity of Members) Act 1973 (Jam) s 12.
Jamaica are the promotion of transparency and integrity. In fact, one of the statutory duties specifically imposed on the NCC is to promote transparency in the procurement processes. Transparency in public affairs is a critical assumption of the Integrity in Public Life Act of Trinidad and Tobago, and greater efforts are being made in other Commonwealth Caribbean countries to provide access to information held by public bodies.\(^{18}\) More governments have begun to look to transparency as the solution to public sector corruption. As Leon explains, ‘Transparency forms an important component of the principles of good governance.’\(^{19}\) Others, however, see the solution as systemic. We are told—

The search is for a new kind of development State (or paradigm) where the State not only concentrates on activities it is in the best position to undertake, but operates with greater transparency and accountability while encouraging broader participation in decision-making and in the development process. In this context, concepts like ‘social capital’ which recognises communities’ traditions and knowledge as assets are gaining increased popularity.\(^{20}\)

Nevertheless, it is clear that a significant challenge facing any government is the behaviour of its public officials when they are engaged in activities that are not readily open to public scrutiny. It is in these areas that opportunities for moral hazard increase. This is certainly more so where the activities of the agent are not obviously corrupt. In these circumstances, the agent is less likely

\(^{18}\) The provisions for disclosure under the Integrity in Public Life Act 2004 (T&T) should be contrasted with those of the Corruption Prevention Act 2004 (Jam), where no provision exists for public disclosure of the declaration of assets of a public agent except in the prosecution of an offence under the Act.

\(^{19}\) C Leon, ‘The New Fiscal Covenant’ in UN Economic Commission for Latin America and the Caribbean (n 14) 101, 104.

\(^{20}\) R Ramsaran, ‘The fiscal challenge and Caribbean states’ in UN Economic Commission for Latin America and the Caribbean (n 14) 19.
to pursue the self-serving activity if that suspect activity is immediately brought to the public’s attention.

Commonwealth Caribbean governments need to adopt a more nuanced approach to the declaration of assets. The current approach emphasises the declaration of wealth, but this declaration is for the most part confidential. While such declarations may provide evidence in accusations of illicit enrichment, they do not readily disclose to the public the circumstances where the public agent may be in a situation of a conflict of interest between his own welfare and that of his office. The additional provision in Trinidad and Tobago that requires declaration of interests is commendable and should be adopted throughout the Caribbean.

Finally, and most importantly, there is no compelling reason why any Commonwealth Caribbean state should not introduce whistleblower legislation. There is no equivalent in the region of the UK Public Interest Disclosure Act 1998, and although it has been on the political agenda for many years, and a bill on the subject has been brought to the legislature in some jurisdictions, no Commonwealth Caribbean government has yet adopted whistleblower legislation. 21 Neither is the need being met by private sector or public-private partnership initiatives. Thus, there is nothing in the region such as the British Standards code of practice on whistle blowing, 22 and thus the

21 In addition the Public Disclosures Act 1999, UK, there are several examples in the Commonwealth of whistleblower legislation. These include: Protected Disclosures Act 1994, New South Wales; Protected Disclosures Act 2000, South Africa; Protected Disclosures Act 2000, New Zealand; Protected Disclosures Amendment (Police) Act 1998, New South Wales; Public Interest Disclosure Act 2002, Tasmania (Australia); Public Interest Disclosure Act 2003, Western Australia; and Public Interest Disclosure Act 2008, Northern Territory (Australia).

need for state intervention is even more pressing. The need for reform is especially demanding, as the existing law is so inadequate. As Davis Lewis explains, the existing duty of fidelity under the common law can be used to prevent disclosure of information on corrupt acts:

The common law has never given workers a general right to disclose information about their employment. Even the revelation of non-confidential material could be regarded as undermining the implied duty of trust and give rise to an action for breach of contract. In relation to confidential information obtained in the course of employment, the common law again provides protection against disclosure through both express and implied terms.

Carr cautions us that 'There are no available comparative statistics relating to number of complaints about malpractices involving whistleblowers to assess the success of the legislation.' However, once we accept the hypothesis that transparency and accountability reduces moral hazard in the principal-agency relationship and thus reduce corruption, then it should be generally accepted that transparency in general, and whistleblower protection legislation in particular, will advance the anticorruption project. Article 33 of the United Nations Convention Against Corruption require that State Parties to the Convention:

... shall consider incorporating into its domestic legal system

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24 D Lewis, 'Ten Years of Public Interest Disclosure Legislation in the UK: Are Whistleblowers Adequately Protected?' (2008) 82 J Bus Ethics 497. See also Carr and Lewis (n 23).

appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.

Although this provision is not mandatory on the State Parties, as Carr and Lewis point out, it nevertheless demonstrates that the parties to the Convention consider it desirable to protecting parties providing insider information on corruption. A similar provision requiring mere consideration, rather than providing a mandatory obligation to provide whistleblower protection, exists under Article III.8 of the earlier Inter-American Convention Against Corruption. There the State Parties agree--

... to consider the applicability of measures within their own institutional systems to create, maintain and strengthen ... Systems for protecting public servants and private citizens who, in good faith, report acts of corruption, including protection of their identities, in accordance with their Constitutions and the basic principles of their domestic legal systems.

Carr and Lewis would have gone much further, and would have made measures requiring whistleblower protection an obligation, rather than a mere consideration, of the State Parties. The consequence of not making whistleblower protection mandatory is that few of the State Parties have introduced such protection.26 However, even when the convention mandates whistleblower protection, it does not follow that the insider providing information is necessarily adequately protected from adverse repercussions.27 Whistleblower procedures provide support to employees who provide

26 Carr and Lewis (n 23) 58.
27 See Carr and Lewis, Ibid 58-59, for a discussion of the Group of States against Corruption Second Evaluation Report (2003-06). Although Article 9 of the Council of Europe's Civil Law Convention on Corruption 1999, requires the parties to ensure Parties to provide the ‘... appropriate protection’ to whistleblowers, they received no special protection.
information on improprieties at the workplace. Such procedures promote transparency, they discourage moral hazard, and ultimately advance the anticorruption project.

The principal assumption of this thesis is that to reduce or eliminate corruption requires reducing or eliminating moral hazard among public sector agents. Reducing moral hazard requires greater oversight and accountability. Oversight and accountability can only be achieved through greater transparency in public management. It is submitted that the most cost effective way to achieve greater transparency is to encourage whistleblowers to come forward and to protect them when they do. It is unfortunate that while Commonwealth Caribbean states have proceeded so aggressively on the criminalisation of corruption they have all been tardy on implementing whistleblower protection. It seems clear that, notwithstanding other initiatives, the anticorruption project will not be successful without it.
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