

## **Essay by Dylan Thomas MacDonald**

# **Using the Non-Uniformity Theory to Assess Collective Anti-Corruption Measures in the Private Sector**

### **Abstract**

Purpose: To assess the challenges and associated solutions for companies working together in collective action to fight corruption.

Design/methodology/approach: This essay defines corruption with reference to international instruments and domestic legislation. Scholarly articles and reports of international organisations are used to gain insight into the causes and consequences of corruption. The same sources are used to gain insights into measures used to combat corruption, the structure of an anti-corruption program and suggested improvements for future developments in anti-corruption measures. In an effort to explain the causes of corruption, the non-uniformity thesis is proposed. Its efficacy is tested by applying it to real world examples of corrupt activities. Individuals who are employed within the private sector were consulted order to gain a practical understanding of corruption.

Findings: The essay finds that there is a lack of uniformity in anti-corruption measures used by countries and companies. The lack of uniformity is caused by cultural nuances and the level of structural development of a country. The non-uniformity results in an ethical and legal vacuum which is in turn exploited by individuals for private gain. The cardinal motivation for individuals exploiting the vacuum is greed.

Originality/value: This essay proposes a novel theory to describe the causes of corruption which can also be used to recommend solutions. The theory has only satisfied a prima facie standard of proof.

## 1. Introduction

The aim of this essay is to identify the challenges and solutions associated with corporate collective action taken against corruption. To do this the essay looks to the causes of corruption in an attempt to better understand which measures will be successful in the combat against corruption and why. A new thesis referred to as the non-uniformity thesis, is proposed to explain the causal chain of corruption. It provides that the non-uniformity in anti-corruption measures such as laws and codes of conduct is caused by cultural nuances and the level of structural development within a country. This non-uniformity creates an ethical and legal vacuum which is exploited by corrupt actors for private gain. The theory is tested against the corrupt activities of Siemens AG and South Korean companies from 1997 to 2000.

Chapter 2 defines corruption by referring to international conventions and domestic law. Chapter 3 describes the causes of corruption through the non-uniformity theory. The efficacy of the theory is tested against real world examples. Lastly, the motivation for pursuing anti-corruption measures is scrutinised by considering the consequences of corruption. Chapter 4 proposes measures which must be taken to combat corruption. The challenges and associated solutions are evaluated by using the non-uniformity theory. Chapter 5 contains the conclusion.

## 2. Defining corruption

Presently, there are numerous instruments both internationally and nationally which provide definitions of corruption. In formulating a definition, reliance will be primarily placed on the UN *Convention Against Corruption*, the US's *Foreign Corrupt Practices Act* of 1977 15 U.S.C.,<sup>1</sup> the United States Agency for International Development's *Anticorruption Strategy*<sup>2</sup> and the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*.<sup>3</sup>

Primary reliance on the four instruments is justified on the following grounds: The UN *Convention Against Corruption* has the widest application and therefore purports to represent the global position. The *FCPA* applies to many of the world's largest multinational companies as those companies are incorporated in the US. Furthermore, many foreign companies list in the US and therefore fall under the jurisdiction of the *FCPA*. It follows then that the anti-corruption measures of the world's most powerful businesses would be drafted with the *FCPA* in mind. The USAID has run and runs many developmental projects around the world. In the course of its work the USAID has come across corruption numerous times across many locations. The OECD *CCB* is similar to the *FCPA* in that it addresses corrupt acts involving foreign officials however the former is a multinational instrument and in this regard it is similar to the *Convention Against Corruption*.

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<sup>1</sup> Hereafter *FCPA*.

<sup>2</sup> U.S., Agency For International Development *Anticorruption Strategy* (Washington D.C.: USAID, 2005), online: United States Agency for International Development <[www.usaid.gov/our\\_work/democracy\\_and\\_governance/publications/pdfs/ac\\_strategy\\_final.pdf](http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/ac_strategy_final.pdf)> at 8 [USAID].

<sup>3</sup> 37 I.L.M. 1 (1998) [*CCB*].

## 21. Understanding a broad definition of corruption

Broadly, corruption is the abuse of entrusted authority for private gain.<sup>4</sup> This definition is sufficiently broad to cover all three of the relevant stakeholders affected by any act of corruption, namely: Government, the private sector and civil society. All three can be involved in a corrupt transaction or it can be limited to only one.

Corruption can be split into two sub-categories: 'Grand corruption' and 'administrative corruption'. 'Grand corruption involves the distortion and exploitation of entire systems for the benefit of private interests.'<sup>5</sup> Practically, large or elite firms secure benefits corruptly through high level officials in any one of the spheres of government – executive, legislature or judiciary – or political parties.<sup>6</sup> Conversely, administrative corruption refers to lower level corruption.<sup>7</sup> Relative to grand corruption, it is characterised by smaller payments, smaller benefits and involves low-level government officials. Administrative corruption reflects specific weaknesses in a government system as opposed to the complete manipulation thereof which is grand corruption.<sup>8</sup>

### 2.2. The offence of bribery

The definition of bribery consists of four parts: Active participant, the public servant, the act and the purpose of the act. The active participant is any person who indulges in the act of bribery. Furthermore, this includes any person who is complicit in any act of bribery.<sup>9</sup> The public servant may either be a public official, a political party official or a candidate for foreign political office, or an intermediary between the active participant and the (one of the other forms of) public servant.<sup>10</sup>

The act of bribery is 'to intentionally... offer, promise or give any undue pecuniary or other advantage'<sup>11</sup> to the public servant for the purpose that they may act or refrain from acting in their official capacity, to secure an improper advantage, or to influence the decision of the government or instrumentality thereof.<sup>12</sup>

A specific definition of bribery is proffered because it is the most common form of corruption. Furthermore, a few of the real world examples of corruption below contain an element of bribery.

### 2.3. The role of fraud

Corruption and fraud are distinct concepts however it is unusual for a corrupt transaction to be without a fraudulent lining. If one takes for example a bribe: An active participant,  $\pi$ , will resort to creative accounting to ensure that the payment is recorded as legitimate or is left off the books completely. This misrepresentation in the accounts of the company (for whom  $\pi$  acts) is fraud. Furthermore, if the fictitious company is to discover the corrupt activity, the creative accounting or lack thereof will be its main means of doing so.

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<sup>4</sup> USAID, *supra* note 2 at 8.

<sup>5</sup> S E Hendrix "New Approaches to Addressing Corruption in the Context of U.S. Foreign Assistance with Examples from Latin America and the Caribbean", 12 *Sw. J. L. & Trade Am.* 1 at 4.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> CCB, *supra* note 3 at Art. 1(2).

<sup>10</sup> FCPA §78dd-1.

<sup>11</sup> CCB, Art1(1).

<sup>12</sup> FCPA, §78dd-1; CCB, Art. 1.

Fraud is relevant to corruption in two ways. First, corruption cannot be proven without accounting records which are evidence of misrepresentations or lack of misrepresentations. Without any proof no enforcement of anti-corruption legislation or disciplinary codes can take place. Second, if the combat against corruption is to be successful, companies must have accounting practices which are fraud proof. Companies with well developed internal controls will secure greater transparency and accountability which, in turn, will make the perpetration of fraud and its subsequent 'covering up' that much harder to execute.

### **3. What gives rise to corruption: Causes and consequences**

The causes and consequences of corruption must be contemplated so as to understand how it can be effectively curtailed and what is at stake. In this chapter the understanding of the causes of corruption is encapsulated in the non-uniformity thesis. The non-uniformity thesis is based on the categorisation of factors listed in a World Bank publication entitled *Helping Countries Combat Corruption: The Role of the World Bank (1997)*.<sup>13</sup> The efficacy of the thesis is tested by analysing real world examples of corruption.

The thesis is stated as follows: Non-uniformity in anti-corruption efforts of nations has created an ethical and legal vacuum which has been exploited by government officials together with the private sector for private gain.

#### **3.1. What is non-uniformity?**

Non-uniformity is used to describe the lack of consistency between laws and codes of conduct relating to the sphere of anti-corruption on a multi-national level as countries adopt various measures to combat corruption. The non-uniformity is caused by broad provisions of international instruments which countries are members of. These broad provisions are necessary to accommodate the two remaining causes of non-uniformity – cultural nuances and the level of structural development within a country.

In Chapter 1 a definition of corruption was proposed with reference to a number of international, regional and national instruments. As the jurisprudence of anti-corruption efforts has been gaining momentum there has been a proliferation of international and regional instruments. Each has maintained a level of consistency in their language and purposes. Unfortunately, each allows for a certain degree of customisation. These instruments make it the responsibility of its respective members to enact the necessary legislation which is appropriate to the country while still complying with the guidelines set out in the signed instrument. Consequently, there is a sufficient degree of scope for countries to differ in their anti-corruption legislation. Without this scope countries would be unable to adapt the provisions of international instruments to specific cultural nuances and differing levels of structural development.

The level of structural development describes the level of formal capacity the country has to address corruption. The countries that have developed the necessary internal governmental controls, legislative enactments, administrative measures and a competitive civil service are better placed to address and prevent corruption. Generally, underdeveloped or developing countries will have a

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<sup>13</sup> As cited in JP Wesberry, Jr "International Financial Institutions Face the corruption eruption: If the IFIS put their muscle and money where their mouth is, the corruption eruption may be capped" (1998) 18 *Nw. J Int'l L. & Bus.* 498 footnote 14.

lower level of structural development relative to developed states because of the formers' lack of resources ranging from monetary to political will.

Cultural nuances determine what constitutes acceptable practices in new locations and is especially relevant to 'grey items'. 'Grey items' is a phrase used to describe facilitation payments and business courtesies (gifts, travel expenses and entertainment).<sup>14</sup> Depending on the cultural norms of a country, a corporate practice might either be illegal or the test for legality differs from that of another country. The best outcome would be for companies to fashion a 'common law' of corporate codes which enshrine the core values of international business transactions and acceptable practices, for specific countries, consistent with the core values, mentioned above, and cultural norms of those countries.<sup>15</sup>

The level of structural development and cultural nuances, which give rise to uniformity, create a legal and ethical vacuum which is exploited by corrupt actors. The primary grounds for exploiting the vacuum are low risk of apprehension, pressure (financial or operational targets, lifestyle, self destructive addictions and health), pecuniary benefit, competitive advantage and greed.<sup>16</sup>

### 3.2. Examples of corruption

The purpose of the three examples, which follow, is to establish the prima facie efficacy of the non-uniformity thesis. Given the limitations of the essay valuable space cannot be set aside for proving the thesis.

Siemens AG had been accused of perpetrating corrupt activities in, but not limited to, Iraq, Argentina, Venezuela and Bangladesh. Broadly, the corrupt activities consisted of funnelling funds to shell corporations, bribing government officials to secure undue advantage or preferential treatment and recourse to creative accounting in an attempt to avoid detection. Furthermore, corruption had pierced all tiers of the company.<sup>17</sup> Measures had even been taken to reduce the efficacy of the internal auditors and compliance measures to ensure the corruption continued unhindered.<sup>18</sup>

The allegations of corrupt activities in the aforementioned countries are all developing countries. All four countries have lower levels of structural development which government officials and Siemens AG exploited to ensure private benefit.

Lastly, Siemens AG was able to evade charges of corruption in the US and Germany because of its institutionalised spirit of corruption which allowed for the manipulation of accounting records, methods which kept some corrupt payments off the books and weak internal audits. Effectively, the management structure had come to facilitate misrepresentation and assimilate it as a way of doing business.

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<sup>14</sup> TW Dunfee & D Hess "Getting from Salbu to the 'tipping point': The role of corporate action within a portfolio of anti-corruption strategies" (2001) 21 Nw. J. Int'l. & Bus. 471 at 476 – 479.

<sup>15</sup> *Ibid.*, at 479 – 480.

<sup>16</sup> Ernest & Young, *Fraud: Six Myths that Hold Companies Back*, online: Ernest & Young <[www.ey.com](http://www.ey.com)> at 5.

<sup>17</sup> FCPA Blog, "Siemens: Systematic Global Corruption", *The FCPA Blog* (14 December 2008) online: The FCPA Blog <[fcgablog.blogspot.com](http://fcgablog.blogspot.com)>; TO Gorman, "The Siemens FCPA Case: A Record Settlement And A Warning To All", *SEC Actions* (16 December 2008) online: SEC Actions <[www.secactions.com](http://www.secactions.com)>.

<sup>18</sup> *Ibid.*, FCPA Blog.

The next two examples of corruption occurred in South Korea (hereafter 'Korea') during the period 1997 and 2000.

Hanbo was the first of the Korean 'chaebol' to go bankrupt. The chaebols refer to a name given to describe the biggest business conglomerates in Korea. Hanbo had made significant contributions to the then Korean President.<sup>19</sup> In return Hanbo was given permission to build a steel mill. Consequently, Hanbo bribed the legislature and bankers to put pressure on banks to approve loans to fund the steel mill project. With liabilities significantly outweighing assets Hanbo was declared bankrupt in 1997. The collapse of Hanbo contributed to the economic crisis which Korea endured between 1997 and 1999.

In August 1999 the Daewoo group had collapsed under a debt of \$80 billion.<sup>20</sup> It had managed to continue as a going concern up to August as a result of accounting fraud. The auditors, the Korean office of KPMG, were suspended from practice for 12 months and a CPA (Certified Public Accountant) was convicted under the External Audit Act on the basis of receiving 470 million won in bribes.<sup>21</sup>

During the period of observation the Korean economy proved to be a fertile ground for the seeds of corruption because of a number of characteristics. It would appear that a culture of corruption was cultivated between Korean business and government and perhaps still exists today. This culture was fostered by a number of factors which can be broadly categorised under the headings of cultural nuances and the level of structural development.

The cultural nuances of Korea were exploited by government officials and businesses and were not inherently corrupt. The Confucius teachings and the tradition of gift giving (such as 'ttokkap') were used as a means to justify and perpetrate corruption.<sup>22</sup>

The high degree of regulation of the Korean economy ensured frequent contact between government and the private sector. This characteristic promoted corruption by making government officials the gatekeepers to the riches of the Korean economy. Without the political will to combat corruption and in light of the strengthening culture of corruption government officials were always going to be susceptible to corruptive advances.

The independence between government, business and accounting firms was vitiated through corruption, namely bribes masquerading as gifts.<sup>23</sup> The effect of the collusion between government and business damaged the Korean economy, weakened the policing measures, compromised the public prosecutor and allowed for lenient sentences for those actually convicted of corrupt activities.

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<sup>19</sup> Verena Blechinger, *Transparency International Working Paper: Report on Recent Bribery Scandals 1996-2000*, online: Transparency International <[www.transparency.org/content/download/15515/167319](http://www.transparency.org/content/download/15515/167319)> at 2.

<sup>20</sup> CP Ehrlich & DS Kang, "Independence and Corruption in Korea" (2002) 16 *Colum. J. Asian L.* 1 at 9

<sup>21</sup> *Ibid.*

<sup>22</sup> Dunfee & Hess, *supra* note 13 at 479.

<sup>23</sup> Ehrlich & Kang, *supra* note 17 at 21.

Collusion between business and accounting firms allowed uncompetitive businesses to continue to operate.<sup>24</sup> When the charade could no longer continue and chaebols went into bankruptcy the Korean economy suffered tremendously both financially and in terms of its reputation.

Where businesses and government officials have acted corruptly and done so on a grand scale, both the country and the company implicated suffers significant financial loss and reputational damage. The company may even go on to suffer fatal damages! In the above examples the perpetrators of corrupt activities exploited the cultural and structural characteristics of their environment to execute corruption. No country is inherently corrupt but corruption is easier to perpetrate in some countries relative to others. To ensure a country and its economy has a greater resistance to corruption; measures must be taken by the public sector, private sector and civil society both individually and in collaboration with the other sectors.

### 3.3. The Consequences of corruption

Financial loss and reputational damage are the two main categories of fallout stemming from a corrupt activity. Financial loss refers to the actual money lost as a result of the corrupt activity. The success of recuperating financial funds lost to corruption in the private sector does not make for pleasing reading. Ernest & Young reports that companies on average secure only 20% and a further 19% of the loss from the perpetrators and insurance policies respectively.<sup>25</sup>

Reputational damage is more difficult to quantify because of its far reaching nature. It incorporates business relations, risk of legal action and secondary effects. A tarnished reputation means less business opportunities as other businesses and governments are hesitant to enter into business with a corrupt company. Legal action gives rise to two costs – legal fees and the order of the court. The latter, of course, depends on the finding of the court if the matter goes that far. Secondary effects are drops in stock price, decline in customer loyalty, reduced sales and reduced employee productivity.<sup>26</sup>

In light of these potential losses it is in the interest of business to address corruption. The world is no longer turning a blind eye to corruption Those companies who can adapt to the present anti-corruption climate are the ones who will be rewarded.

## 4. Combating Corruption

A successful anti-corruption program requires that measures be taken by the public sector, private sector and civil society.<sup>27</sup> Any program which omits one of the stakeholders runs the risk of creating a loophole which can be exploited. The private sector is placed in an unique position to deal with the challenges of corruption. Large multinational companies have the resources and publicity to exercise responsible corporate governance throughout the globe even in locations which have low levels of structural development. All companies have the duty to take up anti-corruption measures, to collaborate and to co-operate with government and civil society.

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<sup>24</sup> *Ibid.*, at 7.

<sup>25</sup> *Ibid.*, at 8

<sup>26</sup> *Ibid.*

<sup>27</sup> Dunfee & Hess, *supra* note 13 at 472 & 473; M Schloss "Symposium: Fighting International Corruption & Bribery in the 21<sup>st</sup> Century" (2000) 33 *Cornell Int'l L.J.* 469 p471.

The causes of corruption thesis provides that non-uniformity in laws and practices results in an ethical and legal vacuum which is in turn exploited by corrupt actors. The reverse of the thesis is that where uniformity is achieved there is less scope to exploit cultural nuances, and the political and economic structure of the state for private gain. In order to combat corruption uniformity is an imperative! So how is uniformity established? Simply put, through collective action.

#### **4.1. A complete anti-corruption program**

An anti-corruption program undertaken by any company can be divided into three categories: Prevention, Enforcement and Interfacing. The three categories are distinct and overlap. Preventative measures are those measures taken to prevent the occurrence of a corrupt activity and is part of an attempt to make an institution 'corrupt-proof'. Enforcement measures are those measures taken in response to an instance of corruption. Interfacing allows for the interaction between the three stakeholders (government, private sector and civil society) to develop and improve preventative and enforcement measures.

##### **4.1.1. Preventative measures**

The main instruments of the first category will be internal auditors and a specialised sub-department of the legal department which deals specifically with internal training and compliance assistance under the code of conduct.

The internal auditors will deal specifically with overseeing the internal controls of the company. The persons who work in this department must have the necessary training and experience to analyse controls for the presence of fraud.<sup>28</sup> Furthermore, the auditors must be given the scope and resources to perform their functions thoroughly.<sup>29</sup> The absence of these requirements allows for a greater opportunity to perform fraud within a company.

Companies have often acted to limit the powers of internal audits for a number of reasons. In the case of Siemens internal controls were loosened and the powers of auditors were limited so as to better conceal fraudulent practices.<sup>30</sup> Furthermore, companies would want to avoid the disruption and possible animosity in the workplace that an audit may bring. The complaints of disruption and animosity inadequate justifications to water down audits in light of the severe cost of corruption.

To avoid the latter complaint companies will have to develop the process of auditing to better suit their company. In pursuance of that aim the audit department should be open to feedback, review all audits, ensure transparency and accountability in how an audit is run and management must make it a provision of the code of conduct that employees are expected to cooperate with all internal audits.

Larger companies are able to call upon the consultancy and auditing services of one of the Big 5 accounting firms (PricewaterhouseCoopers, KPMG, Ernst & Young, Arthur Andersen, Deloitte & Touche) to improve and reinforce the ability of the internal controls to detect fraud and consequently corruption.<sup>31</sup>

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<sup>28</sup> Ernest & Young, *supra* note 15 at 7.

<sup>29</sup> P Zikmund "Four Steps to a Successful Fraud Risk Assessment" *Internal Auditor* (February 2008) 60.

<sup>30</sup> FCPA Blog, *supra* note 16.

<sup>31</sup> Hereafter 'Big 5'.

In relying on the services of a Big 5 accounting firm to develop controls goes some way to developing uniformity in the anti-corruption measures taken by firms. The underlying premise is that the actual content of the consultancy and auditing services between Big 5 firms do not differ. What does differ is the way each firm presents and implements their services. Indirectly, companies, by seeking the assistance of Big 5 firms, are creating greater uniformity amongst themselves with regard to their internal controls. The disadvantage of calling upon a Big 5 firm is the cost of their services.

The main aim of the specialised sub-department is to achieve consistency throughout the company or group (depending on the size of the corporation) in relation to training, legal advice and code of conduct compliance. The collaborative efforts to realise such a sub-department can be divided into two tiers. The lower level comprises of those efforts between different departments within the company working towards uniformity in how the employees of a company understand and apply the rules regarding corruption and fraud.<sup>32</sup>

The upper tier concerns the implementation of those efforts between different branches of the company. Uniformity between branches involves the consistent application of the company's code of conduct and the ability to accommodate the cultural nuances of the foreign setting within the code of conduct. Achieving uniformity on the branch level requires procedural integrity – no matter where the location the company must follow the same process to meet the challenges posed.

#### **4.1.2. Enforcement measures**

The code of conduct encapsulates the core values of the company and sets out the standard of behaviour expected from employees. The code is a guide for action and therefore is the justification for enforcement measures. A company which wishes to combat corruption must clearly declare its commitment to high ethical standards and address corruption, bribery and fraud directly.

A general survey, performed by OECD, of 246 codes issued by companies and business associations made the following findings:<sup>33</sup>

- i) Only 24% of the codes addressed bribery and corruption directly
- ii) This made it the 4<sup>th</sup> most cited issue
- iii) Of the Codes addressing corruption
  - a. Only 1/3 contained a general prohibition against bribery
  - b. The others provided detailed descriptions of what employees are allowed to do

Additionally the concepts of corruption, bribery and fraud must be defined and guidelines included to direct the behaviour of employees. The authors of the survey found that little consensus exists between companies on how to define corruption or in setting behaviour guidelines. In a competitive market it is unlikely that a direct dialogue between companies can be established. In the absence of such a platform the role of NGOs become invaluable as they serve to bridge the gaps between companies.

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<sup>32</sup> For example the specialised sub-department may be the product of a collaboration between the legal department and whichever department oversees company compliance and ethics.

<sup>33</sup> K Gordon & M Miyake, *No Longer Business as Usual: Fighting Bribery and Corruption*, OECD (Paris: OECD Publishing, 2000) at 185-198.

The efficacy of a code of conduct is dependent on the accompanying compliance program.<sup>34</sup> A compliance program ensures the enforcement of the code of conduct through its investigative and disciplinary mechanisms.<sup>35</sup> An effective compliance program requires the full support of management. Without it the mechanisms of a compliance program will be toothless.

A compliance program creates the opportunity for a company to interface with government. A clear example of where collaboration can be achieved is criminal law.

A government can incentivise the implementation of internal corporate controls through its legislation. The US Department of Justice's sentencing guidelines take into account whether a company has a compliance program, a functioning disciplinary process, internal audits and whether due diligence measures are taken up after detection.<sup>36</sup> Companies with such controls are offered more lenient sentences.

The settlement offered by the US Department of Justice to Siemens AG is evidence of government-private sector collaboration delivering positive results. In an effort to cooperate with the Department of Justice's investigation, Siemens AG implemented 'a sweeping internal investigation, the creation of innovative and effective amnesty and leniency programs, and exemplary efforts with respect to preservation, collection, testing, and analysis of evidence...'<sup>37</sup>

#### **4.1.3. Interfacing**

Interfacing refers to the potential for collaboration between the three stakeholders.

For a company, in dealing with corruption, the code of conduct is the central document. It defines how serious a company takes the combat against corruption and how a company expects its employees to behave. Underlying the definitions and standards of the code is a need to comply with domestic and international laws.

Similar to governments who have scope to define how local legislation corresponds to international conventions on corruption, companies are free to build upon the requirements set forth by domestic statutes in their corporate codes of conduct. This process of setting higher standards is an attempt to woo over the market at large – governments, private investors and NGOs. In designing corporate governance which would appear attractive to the market, companies might stumble upon anti-corruption measures which actually work. The difficulty becomes the dissemination of such discoveries. The competitive nature of the capitalist economy does not lend itself to the sharing of information which may lead to a competitive advantage. Lack of information sharing ultimately results in non-uniformity which is the seminal point of corruption.

The remedy to curing non-uniformity is collective action. It was submitted above that 'direct' collective action between companies is unlikely. The adversarial nature of the capitalist system can be overcome through civil society mechanisms namely Non-Governmental Organisations (NGOs). The NGO may play the role of intermediary and thereby ensure the indirect dissemination of best

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<sup>34</sup> See Transparency International-USA, *Corporate Anti-Corruption Programs: A Survey of Best Practices*, June 1996, <[http://www.transparency-usa.org/survey\\_96.htm](http://www.transparency-usa.org/survey_96.htm)>; Schloss, *supra* note 24 at 469.

<sup>35</sup> BP, *Code of Conduct*, online: BP <[www.bp.com](http://www.bp.com)> at 11.

<sup>36</sup> Schloss, *supra* note 24 at 474.

<sup>37</sup> FCPA Blog, *supra* note 16.

practices. The NGO fulfils this role through reports, publications and publicity. Broadly, the reports and publications can be used as guidelines for developing anti-corruption codes. Publicity either shames those companies who are doing poorly and encourages them to change or identifies those companies who have exemplary internal controls in place. Companies in the process of developing their internal controls can attempt to mimic the controls of those celebrated companies.

A solution to the inability of companies to define corruption and set behavioural guidelines is the naming and shaming of those laissez-faire companies by either NGOs or the media. The resulting decline in share price of those shamed companies will stimulate those companies and others to take action. An alternative is government intervention in the form of a legislative enactment requiring companies to address corruption and fraud within their codes of conduct.

An important function of a NGO is to facilitate interactions between stakeholders. Above the stakeholders were companies but NGOs can also be facilitators on a grander level namely between government, the private sector and civil society.

## **5. Conclusion: Why does corruption continue to remain a problem?**

Corruption is a problem which will continue to plague the world indefinitely. Corruption will perpetuate because of the inherent flaws of, one, the measures used to combat corruption and, two, the economic and political systems in which corruption operates. That flaw is non-uniformity.

Uniformity is an asymptote which anti-corruption measures, whether individual or collective, can bring the world closer to but it is not a pinnacle which can ever be reached. International conventions allow states scope to tailor the provisions to better fit a domestic jurisdiction. Companies have the discretion, which is limited by the provisions of domestic enactments, to formulate codes of conduct. Developments in legislation and codes of conduct, hopefully, improve anti-corruption measures and therefore leave less scope for non-uniformity. To use an analogy; every development in anti-corruption measures is a chip off a marble slab. Every chip leaves the sculptor with less artistic options, every chip brings the sculptor closer to his intended sculpture.

The fight against corruption is dissimilar to the analogy in one important aspect - the intended sculpture will never be completed. The reason being is that there are many sculptures with differing ideas on how to go about sculpting!

The second flaw is that all anti-corruption measures and institutional systems depend on human actors. Legislation and rules may put controls in place and set behavioural guidelines to reduce the incidence of corruption but the potential to commit corruption still exists. It is the human actor which crystallises that potential into a corrupt act. Employees and government officials commit corruption for a portfolio of reasons but the cardinal motivating factor, in the experience of one auditor, was greed.

The solution to corruption is the moral integrity of the employees who work in government, the private sector or NGOs. All the internal controls cannot stop individuals who are intent on committing corruption. The people of the world need to take a collective stance against the greed associated with corruption. Some of these people work for governments, in the private sector or NGOs. The moral stance of the employees will permeate their respective institutions and be

assimilated into the institutional culture. In this way governments, companies and NGOs will achieve a uniform collective stance against corruption.

Such a world would be one free of corruption.