

# Combating **Corruption** toward Clean Governance in Asia: Country Cases

March 2018







In 2016, Asia Democracy Research Network (ADRN) selected corruption, shrinking civic space, and gender inequality as the common challenges across Asia that continue to plague and work against deepening the quality of democracy.

Against this background, ADRN published this special report to evaluate the current state of corruption in the region by studying the strengths and weaknesses of each country's mechanisms including law and regulations, public participation, and public governance.

The report investigates pressing, contemporary questions such as:

What is the state of corruption in Asia?

What successes and failures has each country experienced in controlling corruption?

How can state of corruption in Asia be improved?

Drawing on a rich array of resources and data, this report offers country-specific analysis, highlights areas of improvement, and suggests policy recommendations for clean governance in Asia.

"Combating Corruption toward Clean Governance in Asia:  
Country Cases"

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Each author is solely responsible for the content of this report.

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## Executive Summary

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In Asia corruption is the major barrier to greater public value and greater prosperity for all. Corruption costs governments and businesses trillions of dollars per year globally, and Asian countries share this burden. The catalogue of harms is well known.

Corruption discourages investment and limits growth; it hampers economic performance; it adds to the cost of doing business; it distorts natural resource development; it damages the environment and threatens sustainability; it reduces tax revenue, which in turn distorts services and diminishes the quality of health and education opportunities; it creates unsafe conditions; it makes for inefficient public administration; and it weakens judicial integrity and the rule of law. In short it diminishes the quality of life and undermines trust, the glue that holds societies together.

As Asian countries face the future, they want to take advantage of monumental change and greater sophistication as well as greater public value. Asian countries have seen significant changes in recent decades. Traditional orders have been overtaken by technological innovation, old ways of doing things have become more streamlined, and transactions have become global. Corruption can burst the Asian bubble and negate many of these innovations and successes.

Of course, it is not accurate to speak of Asia as an undifferentiated entity with a homogenous culture or even as countries in similar stages of development. Some of the most technological and sophisticated economies are in Asia. There is a great deal that the rest of the world, rich countries and poor countries alike, can learn from South Korea, Singapore, and Japan about technology, telecommunications, high-tech manufacturing, transport, construction, and education. Some of the poorest countries are also in Asia - Bangladesh, Myanmar, Cambodia, and North Korea.

Asian countries are spread across the full spectrum of the Transparency International Corruption Perceptions Index. Singapore, Hong Kong, Japan, and South Korea rank in the top quarter (least corrupt) while North Korea, Myanmar, Timor-Leste, Nepal, and Cambodia languish in the bottom quarter. The rest of the Asian nations fall in the middle, afflicted in varying degrees by significant corruption.

According to the Global Corruption Barometer 2016, more than a quarter of the population paid a bribe to a public official in the past year in Indonesia, Pakistan, Myanmar, Thailand, Cambodia, Vietnam, and India. In India and Vietnam it was close to two-thirds, while in all the others it was about one-third or less. More than half of the citizens in China, Indonesia, Malaysia, Vietnam, and South Korea believed that corruption had increased in their country in the past year. In South Korea, Malaysia, Mongolia, Japan, Vietnam, Hong Kong, Cambodia, Pakistan, and Taiwan more than half of the population thought that the government was handling the fight against corruption badly.

No one picture can be painted about corruption in Asia. As a starting point readers might like to ask three questions of their countries:

- Is corruption the norm, or is it the exception?
- Do those institutions whose job is to combat corruption have the legal tools and financial resources to do their job?
- When corruption is uncovered is there an adequate response by the government? Is there political will to counter corruption?

The answers to these questions will shape the strategy that needs to be employed to combat corruption.

Careful study of corruption is important so as to understand its dynamics and, further, to develop strategies to deal with corruption that affects countries, or sectors within countries. It is important to note that not all corruption is the same. We all know of cases of low-level officials who take a kickback to overlook a violation, certify something that is not right, make something happen more quickly, or change a document to benefit somebody. We know of supervisors or managers who manipulate contracts and distort services so they can obtain some kind of benefit. We know of politicians who make decisions or write legislation to favor their friends or families and who misuse the resources of the state for their personal benefit.

Is it some individuals, either low level or high level, who are corrupt, or is it the society as a whole that is infected? Are transactions and daily activities based on kickbacks and favors rather than universal and fair allocation for all citizens, clients, and businesses?

When corruption is the norm in a society the consequences are severe. Everything is diminished. This is a different story from the “rotten apple” in the barrel that manipulates for his or her own benefit, but does so against the rules of the organization. Corruption covers a wide spectrum of behaviors that range from bribery and extortion to misuse of information, conflicts of interest, nepotism and cronyism, as well as grand theft, kleptocracy, and state capture. All of this can be found in Asia. Dealing with these differences requires different strategies.

The architecture of corruption control must take cultural and developmental factors into account. There is no “one size fits all,” no Asian solution. Just about all of the nations in Asia have ratified the United Nations Convention against Corruption (UNCAC), but corruption still persists, though in different degrees.

The architecture of control operates at several levels. At the national and international levels, adherence to global treaties like the UNCAC or the OECD Anti-Bribery Convention is a first step. Then official bodies such as the World Bank, the Asian Development Bank, and the United Nations (UNODC and UNDP) have significant influence and technical assistance roles to play in limiting corruption. At a national level there are often anti-corruption agencies, though some are hampered by lack of resources, lack of independence, political interference, or an inadequate legal structure.

Many institutions are weak from an integrity point of view, and in many countries the citizens believe the parliament and political parties, judiciary, government offices, banks, or military to be corrupt. Thus institution building is a key strategy which operates largely in the political domain.

At an individual and organizational level, integrity building and better processes are critical. These involve leadership which focuses on guidance, management, and control. There are strategies for each of these. Integrity building follows ethical leadership, and there are established strategies for this as well. The UNCAC, for example, has a range of punitive measures and some preventive measures, and these should be used accordingly.

Punitive measures include the criminalization of activities such as bribery of national and foreign public officials; bribery of persons working in the private sector; embezzlement by public officials; illicit enrichment and trading in influence; and money laundering. Breaches here can involve severe sanctions, including prison time.

On the preventive side, at a government level we could seek advances in public sector ethics and procedures; better public procurement; improved public sector finance; more transparent public reporting, access to information, whistleblower protection, and public education; and improved private sector standards, including accounting and auditing standards.

It is important to understand and classify the behaviors in each Asian country so that effective countermeasures can be put in place and the relevance of these measures to the country and the situation can be ensured.

Corruption follows opportunity, and the first task is to identify the types of corruption that exist in a society and the opportunities that give rise to these corrupt behaviors. Preventive mechanisms will focus on closing off or diminishing these opportunities. It is not an easy task, but having a road map such as this can help people on the way to understanding and preventing corruption.

The six countries that are analyzed in this report have issues that range from prevalent cronyism and strong links between government and powerful interests in the society, to lack of transparency, to ineffectiveness of Anti-Corruption Agencies (ACAs). The countries vary greatly, and no one solution fits all. They range from South Korea, which wishes to attain levels and practices that are prevalent in other OECD countries, to Pakistan and Myanmar, in which very little progress has been made in countering corruption. There are implications for governments and for civil societies in this report. Governments must show political will in dealing with corruption. In Malaysia and Sri Lanka the spoils of office weaken political will to take firm action. This would necessitate the granting of greater independence for anti-corruption agencies and adequate resourcing. A base of transparency needs to be built, and it is here that civil society can hold governments to account.

The one common theme is that there is a plethora of anti-corruption agencies, and they are insufficiently powerful or insufficiently independent. In South Korea the ACA cannot investigate or prosecute. In Malaysia there is a clear conflict of interest, as there is in Sri Lanka with interference of the executive. In Myanmar, politics seems to be more important than controlling

corruption. In Mongolia there are mechanisms in place, but these seem ineffective, while in Pakistan there are many agencies but an insufficient legislative base for the meeting of UNCAC obligations.

There are three implications or ways forward. First, where there are many anti-corruption agencies, they should be consolidated. In some cases new legislation needs to be written. Second, political will is often lacking. There needs to be a major cultural shift and a commitment from governments to the independence of anti-corruption agencies. This needs to be backed by clear legislation and financial arrangements that give the agencies adequate resources and financial certainty and sustainability. Third, there must be calls for transparency. Governments cannot hide behind secrecy when resources are manipulated and citizens' lives are diminished through corruption. In this sphere, civil society has a major role to play.

There are ways to analyze and build national integrity systems. Not all countries can afford what the rich western nations can afford, but there are means of identifying integrity pillars, strengthening institutions (without massive expenditure), and showing a more open demeanor. Anti-corruption agencies are not the only answer, but they should have authority and independence and be backed by political will. This political will should then extend to strengthening institutions. This can work when transparency is enhanced.

## Case Study 1: South Korea

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### 1. Introduction

Corruption is a problem that does not discriminate against rich or poor, developed or developing, democratic or undemocratic countries. It does not restrict itself only as a problem of governments. However, when one thinks of corruption in terms of democracy, it should be noted that corruption can undermine the very root of support for democracy. Corruption, especially when it is not monitored, punished, or contained properly, can lower public trust in the government system and breed cynicism. In this regard, high-level corruption is far more dangerous to democracy than petty, low-level corruption. This is because if high-level officials are deemed honest in the eyes of the public, people are more likely to seek administrative reforms to demand accountability and clean governance at lower levels. In other words, efforts to not only reduce corruption, but root out the very cause of corruption are of utmost importance in deepening the quality of democracy.

Like other countries in Asia, South Korea at first regarded corruption as necessary “collateral damage” for the sake of economic development. It was not until the mid-1990s, when global anti-corruption initiatives such as the OECD Anti-Bribery Convention highlighted the necessity to upgrade the anti-corruption systems across all sectors within Korean society that South Korea began to view corruption as a serious undermining factor against democracy. It has since been establishing various mechanisms to combat corruption.

Despite South Korea’s attempts to address its corruption problems, the country remains a corruption paradox to democracy scholars. Although a large number of South Koreans believe that the country is corrupt, as indicated by the Transparency International Corruption Perceptions Index, few Koreans have any actual experience paying bribes. In this report, we attempt to understand this so-called South Korean Corruption Paradox. What is it about the character of corruption in South Korea that makes people perceive their country as corrupt despite rarely actually directly encountering corruption? What mechanisms exist to counter

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corruption, and why does corruption remain prevalent in society despite these mechanisms and regulations? In the last section, we outline general policy recommendations that might provide some useful ideas for other countries, while acknowledging that corruption in one country is not exactly the same as that in another.

## 2. Measuring the Level of Corruption in South Korea

This report uses several indices that draw on both national and international data in order to observe the diverse aspects of the perceived level of corruption in South Korea. These surveys look at not only the level of corruption perceived by people in general, but also instances of actual everyday practices of corruption, such as paying bribes to officials, or the effectiveness of the anti-corruption system. Corruption is a multi-faceted problem; therefore, it requires a multi-dimensional approach. In addition to more established and better known indicators such as Transparency International’s (TI) Corruption Perceptions Index (CPI) and the World Bank’s Worldwide Governance Indicators (WGI), this report also includes TI’s new assessment tool, the Global Corruption Barometer (GCB). This report also uses two indices from national surveys conducted by the Anti-Corruption & Civil Rights Commission (ACRC) to reflect a more local perspective on corruption.

### 2.1) South Korea’s Level of Corruption as Seen in Global and Local Data

Transparency International’s (TI) Corruption Perceptions Index (CPI) is the most widely used indicator to measure perceived levels of corruption in various countries. The CPI defines corruption as “the misuse of public power for private benefit” and it is determined by expert assessments and opinion surveys on how citizens perceive the level of corruption in their own country. The score ranges from 0 (most corrupt) to 100 (cleanest). According to the CPI 2016, South Korea scored 53 points with a rank of 52 out of 176 countries. South Korea’s CPI index has remained in the mid-50s for the last decade, far below the OECD average of 68.

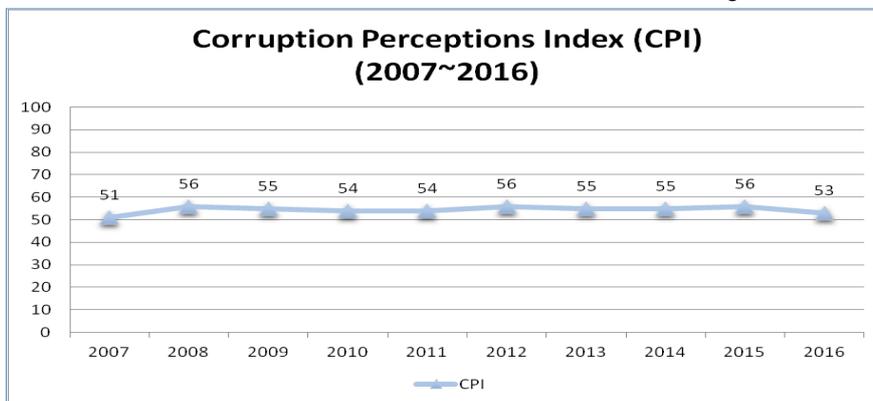


Fig. 1. South Korea’s Corruption Perceptions Index (Source: Transparency International)

A comparison of South Korea to other OECD countries as in Figure 2 clearly shows that South Korea ranks at the bottom in terms of CPI index scores among developed countries. Most recently in 2016, South Korea ranked 29<sup>th</sup> out of 35 OECD countries.

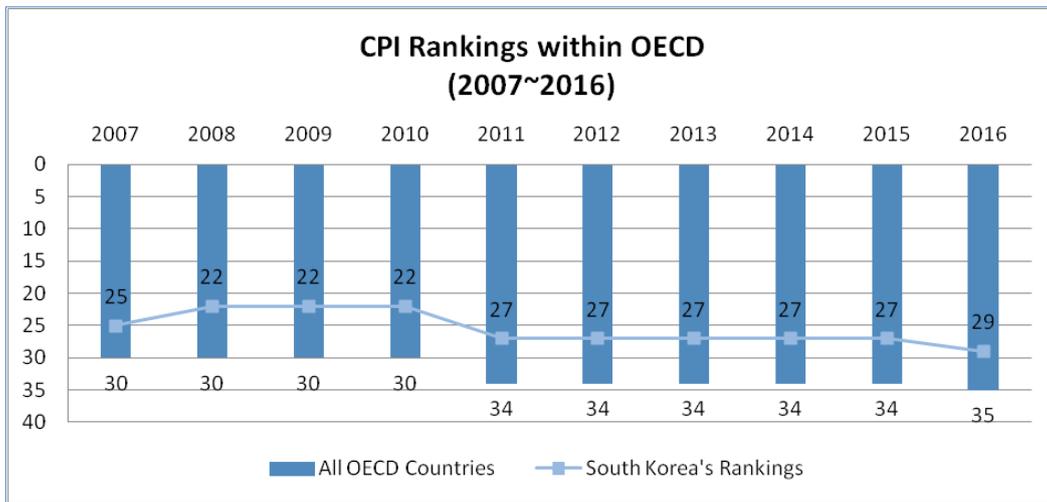


Fig. 2. Corruption Perceptions Index (Source: Transparency International)

The World Bank provides six categories for assessing governance in its annual Worldwide Governance Indicators (WGI) report, including control of corruption (CoC). The CoC index, which ranges from -2.5 (worst control of corruption) to +2.5 (best control of corruption), measures the strength and effectiveness of a country's policy and institutional framework to prevent and combat corruption. According to this data, South Korea received a score of 0.37 with a rank of 70<sup>th</sup> out of 214 countries in 2016. It appears that during the past twenty years, South Korea's anti-corruption institutions and legal framework improved somewhat, trending slightly upwards during certain periods as seen in Figure 3. However, recently South Korea's CoC index has been declining, indicating that the country's institutional mechanisms and legal framework to counter corruption are perceived as relatively more ineffective in recent times.

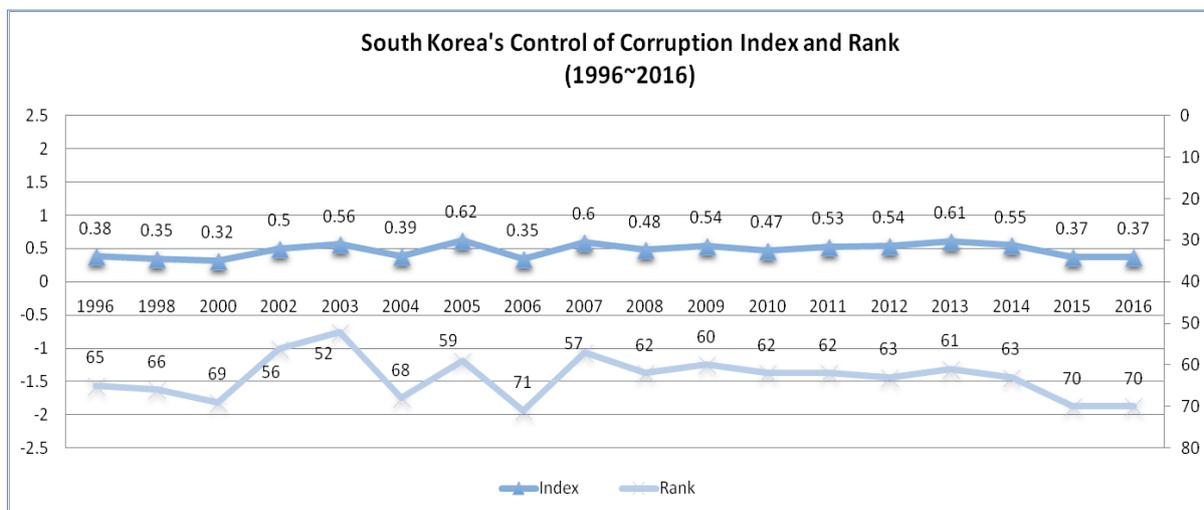


Fig. 3. Control of Corruption in South Korea (Source: World Bank)

The Global Corruption Barometer (GCB) is TI's other tool used to measure corruption, which asks specific questions to citizens nationwide regarding their actual experiences of corruption. While both the CPI and the GCB are conducted by the Transparency International, some scholars actually prefer the GCB to the CPI as a measure of the level of corruption because the former takes a more broadly representative group of citizens and addresses their actual experiences instead of *perceptions* of corruption. According to the GCB 2017, half of South Koreans responded that the level of corruption had increased over the last year. In addition, over three quarters of the people surveyed (76 percent) rated the government's performance as bad in terms of fighting against corruption. This was the highest percentage of negative responses among fifteen Asian countries surveyed. Only fourteen percent of people indicated that they felt positively regarding the government's anti-corruption efforts. In contrast, South Korea's score in the category of experiences of bribery was respectable. When the survey asked respondents whether they had ever been asked for a bribe while accessing basic public services, only three percent replied in the affirmative. It was the third lowest affirmative response rate among fifteen Asian countries. South Koreans seem to view corruption in terms of large scandals involving high-level public officials and politicians rather than petty corruption surrounding their daily lives. This is understandable as scandalous and sensationalized news stories about political kickbacks and rebates are given a great deal of coverage by the media.

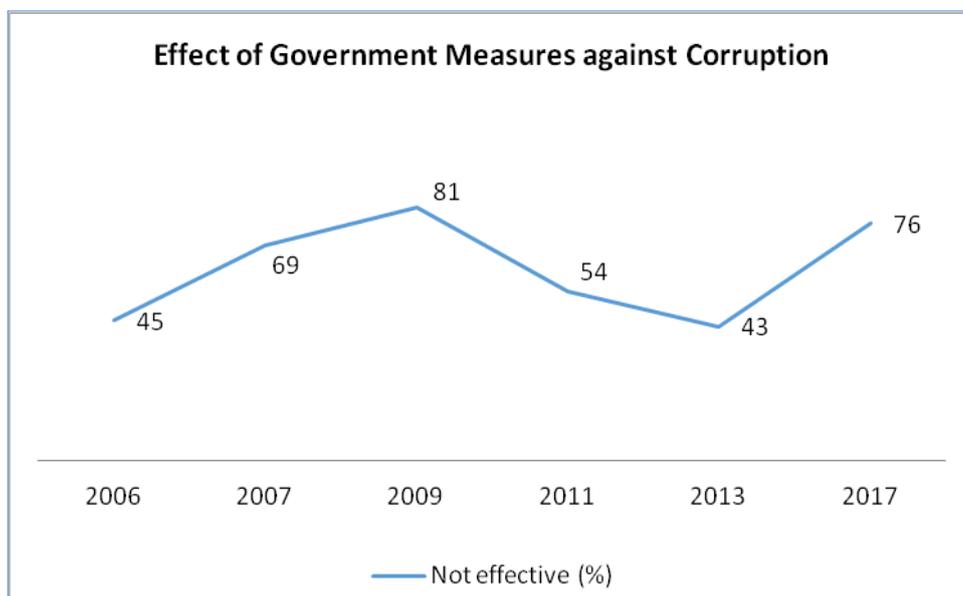


Fig. 4. Global Corruption Barometer (Source: Transparency International)

Several South Korean institutions have also measured the public’s perception of corruption. According to the annual Perception of Corruption Survey conducted by the ACRC, a little over half of respondents (51.6 percent) answered that they perceive South Korea to be a corrupt society. However, when this figure is viewed with respect to past surveys, one can see that the percentage of South Koreans who think that the country is corrupt is on the decline.

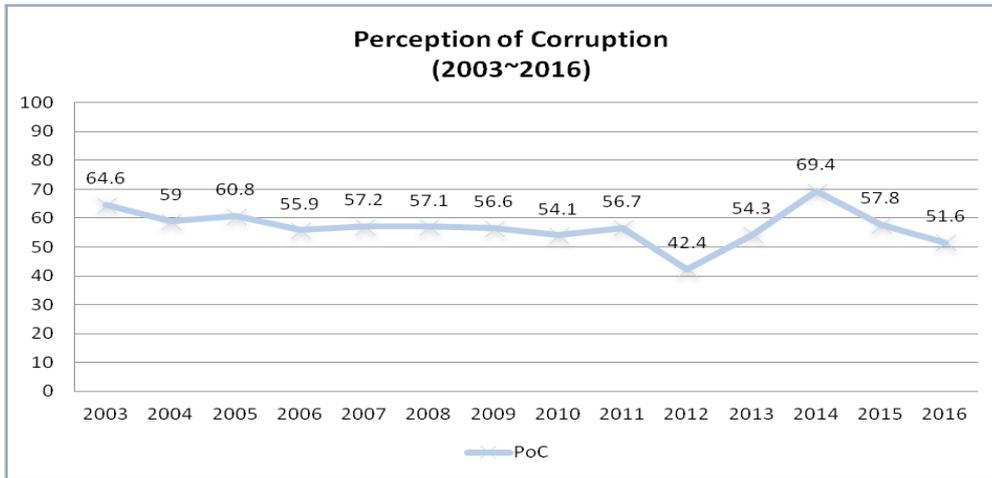


Fig. 5. Perception of Corruption Survey (Source: Anti-Corruption & Civil Rights Commission)

Another indicator from the Anti-Corruption & Civil Rights Commission is the Public Institutions Integrity Survey, which awards a score on a scale from 1 (lowest level of integrity) to 10 (highest level of integrity). As seen in Figure 6, the integrity level of South Korea’s public organizations improved steadily until 2007, rose after a drop in 2008, and then decreased until it reached a low in 2014. The survey, which interviewed more than 235,000 Koreans about 573 public institutions in 2017, is the most comprehensive Korean survey that addresses institutional transparency and the corrupt behaviors of public officials. The overall integrity score in 2017 was 7.94, a 0.09 point increase from 2016. This improvement is interpreted to be a result of the implementation of the Improper Solicitation and Graft Act in 2016.

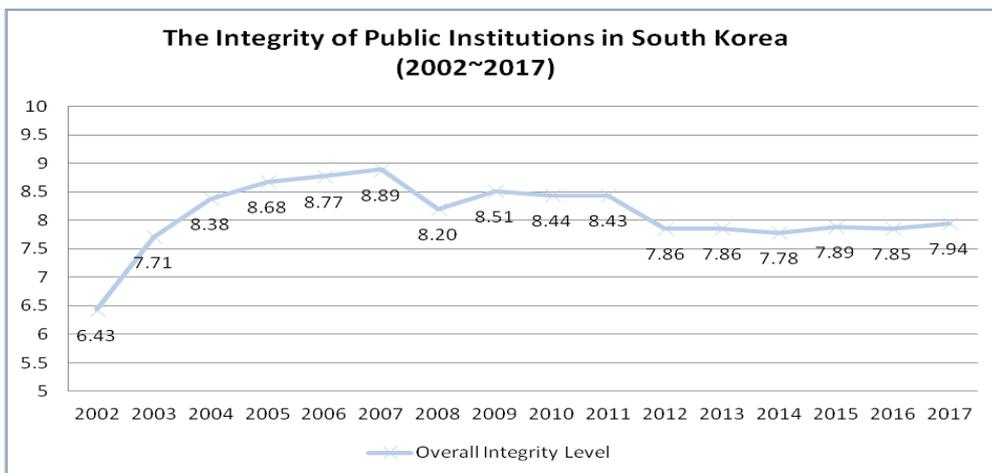


Fig. 6. Public Institutions Integrity Survey (Source: Anti-Corruption & Civil Rights Commission)

## 2.2) Implications

All three surveys conducted by international organizations indicate that the South Korean public's perception of corruption has not improved in recent years. In particular, the overall score and the rank both dropped from the previous year. In contrast, domestic indices show that South Korean perceptions of corruption have improved, particularly recently. These differences in global and local data can be explained by the fact that the surveys target different audiences and respondents, ask different sets of questions using different survey methodologies, and conduct their surveys at different times of year. Therefore, it might not be helpful to focus on why there is a gap between global and local data. The more important takeaway from these survey results is that even though the percentage of people who think that South Korea is corrupt appears to be on the decline, the majority of people (51.6 percent in 2016) still believe that corruption is a serious problem in South Korea.

This declining trend in national competitiveness in terms of anti-corruption efforts can be traced to several factors. First, the South Korean government has failed repeatedly to respond effectively to the corruption problems of presidential relatives and associates; collusion between politicians, political parties, and business; and power-driven corruption. Responses to private corruption practices such as price-fixing, kickbacks, accounting fraud, and oppressive and unfair practices have been inadequate in the eyes of the public. Second, growing public mistrust in the national anti-corruption mechanism, especially the government agencies responsible for investigating and countering corruption, is another major contributor. Third, there have been insufficient efforts on the part of the government to bring in diverse stakeholders such as civil society organizations to discuss anti-corruption policies.

As mentioned above, while the percentage of people who think that South Korea is corrupt is declining, over half of the population in South Korea still perceives the country to be corrupt. This paradox in corruption perception can be explained by the fact that petty, low-level corruption that directly affects lives of people is on the decline while grand corruption is still prevalent and sometimes goes unpunished in the eyes of the public. Grand corruption in South Korea is based on crony capitalism, which perpetuates the link between political and economic power. Collusion between political elites and *chaebol* is alive and well, as can be seen in the most recent cases of the bribery scandal of the Samsung leader and the corruption scandal involving the suicide of Sung Wan-jong, a successful businessman who left a note containing the names of all of the high-profile politicians he had bribed and the specific amounts. Political-business collusion is allowed to continue because of South Korea's political landscape, which provides great regulatory authority to the government and incentivizes politicians to intervene in business affairs for their own benefit.

### 3. Existing Anti-Corruption Mechanisms

Despite South Korea's dynamic democratization, institutional efforts to combat corruption started relatively late. In the mid-1990s global anti-corruption initiatives such as the OECD Anti-Bribery Convention highlighted the necessity to upgrade anti-corruption systems across all sectors of Korean society. Only then did the perception that previous government responses to corruption were inadequate become widespread, especially against the backdrop of the 1997 Asian Financial Crisis. Triggered by public demand and a growing expectation from the international community for South Korea to meet global standards, the South Korean government began to strengthen its anti-corruption institutions. Figure 7 illustrates the evolution of South Korea's anti-corruption institutions.

	The Board of Audit and Inspection (BAI)	Government Officials Ethics Committee	Anti-Corruption and Civil Rights Commission (ACRC)
Formed	1962	1983	2008
Parent Agency	President	Ministry of Personnel Management (MPM) under the Prime Minister's Office	Prime Minister's Office
Appointed by (Head)	President with agreement of the National Assembly	President	President
Primary Purpose	To audit and inspect the accounts of state and administrative bodies	To mandate the registration of property by high-ranking government officials and restrict the re-employment of retired public officials	To provide citizens with a convenient service for filing public complaints and administrative appeals
Term Length (Head)	Four years; renewable once	Two years; renewable once	Three years; single term

Fig. 7. Major Anti-Corruption Institutions in South Korea

South Korea recognized the need to upgrade its anti-corruption policies from “hard policy” that relies on detection and punishment to “soft policy” aimed at preventing corrupt activities beforehand. In order to meet this need, the Korea Independent Commission against Corruption (KICAC) was established in 2002. KICAC was later merged in 2008 with the Ombudsman of Korea and the Administrative Appeals Commission into the current Anti-Corruption and Civil Rights Commission (ACRC) in order to provide “one-stop service” to citizens to address public complaints and file administrative appeals. To this day, the ACRC serves as the key anti-corruption agency that integrates three functions of corruption prevention, administrative appeals, and ombudsman.

There have been legislative efforts to address the deep rooted problems of corruption in South Korea. As seen in Figure 8, these efforts have been strong since the 2000s.

Legislation	Year Enacted	Primary Purpose
Code of Conduct for Public Officials	2001	To prescribe the standards of conduct to be observed by public officials
Act on the Prevention of Corruption and the Establishment and Management of the ACRC	2008	To protect the basic rights and interests of the people, ensure appropriate public service and serve to create a clean climate in the civil service sector and society
Public Service Ethics Act	2008	To contribute to the establishment of the ethics of public officials as servants of the citizens by mandating the registration of property by high-ranking officials and preventing the re-employment of retired officials
Act on the Protection of Public Interest Whistleblowers	2011	To contribute to the stability of people’s livelihoods and to a more transparent and ethical social climate by protecting and supporting people who report violations of the public interest and others
The Improper Solicitation and Graft Act	2016	To prevent public officials from accepting bribes and improper solicitations from the private sector regardless of whether the money was related to an official’s duties or position, or whether favors were given in return

Fig. 8. Major Pieces of Anti-Corruption Legislation in South Korea

Along with the establishment of the KICAC in 2002, another noteworthy development in the history of South Korea’s anti-corruption efforts is the establishment of the institutional basis for corruption prevention among government officials, including the Code of Conduct for Public Officials. All public officials of South Korea must comply with the Code of Conduct for Public Officials, which lays down specific guidelines for public officials in situations involving a strong possibility of conflicts between public and private interests while performing official duties. For example, it provides behavioral guidelines on how to cope with specific conflict-of-interest situations, including giving and receiving unfair profits. Another milestone in South Korea’s anti-corruption efforts was the enactment of the Public Service Ethics Act, which stipulated the requirement for public officials of Grade 3 or above to register their existing assets. This Act was later revised to expand asset registration requirements to include public officials of Grade 4 as well. South Korea’s senior public officials of Grade 4 or above are required to register their incomes and assets. To create a positive environment in which corrupt activities can be reported, the South Korean government enacted the Act on the Protection of Public Interest Whistleblowers in 2011, which is designed to protect individuals who report violations of the public interest to prescribed bodies against suffering disadvantages such as dismissal, disciplinary action, or other employment-related penalties. While these measures still tend to focus on the detection and punishment aspects of fighting corruption, South Korea’s recent efforts to counter corruption by introducing the Improper Solicitation and Graft Act in 2016 turned its attention to reducing the possibility of corruption beforehand. The Improper Solicitation and Graft Act makes it illegal for public officials

to accept gifts worth more than a certain amount and limits dinner expenditures. It also broadens the definition of public officials to include journalists, private school teachers and their spouses. This act is an especially important milestone in South Korea's history of fighting corruption in that it attempts to prevent not only public officials from accepting gifts, but also anyone from offering bribes. This can, in the long run, change the way that the general public thinks, including government officials, about actions that can potentially breed opportunity for giving and accepting bribes. Fostering this change in mentality will ideally lead to an internalization of an anti-corruption "culture of compliance" throughout society as a whole.

Despite these efforts, current anti-corruption mechanisms are neither designed effectively to counter diverse forms of corruption nor institutionalized in a way that has allowed them to become internalized governance practices. There are various deficiencies in the institutional design of the main anti-corruption agency in South Korea, the ACRC. First, the institutional design of the ACRC is not on par with the structure and functions of an ideal anti-corruption agency. As an organization dedicated solely to corruption prevention and control, an ideal anti-corruption agency should have the mandate and authority to conduct investigations. ACRC does not have investigation authority. Instead, the Public Prosecutors' Office has the sole right to investigate corruption charges. This situation forces the ACRC to rely on cooperation from the Public Prosecutors' Office and limits its ability to fully deal with corruption cases.

Second, in 2008, KICAC, the Ombudsman of Korea, and the Administrative Appeals Commission were combined to create the current ACRC. Some civic groups and experts consider this decision to be the decisive factor that weakened the status and power of the ACRC since the integration combined three agencies that had very different functions and organizational cultures. This, in turn, led to a decline in professionalism and clarity regarding the role and responsibilities of the ACRC.

Third, the head of the ACRC is nominated by the president and its budget is limited. As a government agency, there are limits to its independence in establishing an official case against high-ranking public officials and politicians, not to mention of people protected by the president.

Overall, the most serious challenge for establishing independent anti-corruption mechanisms in South Korea is strengthening horizontal accountability among public institutions engaged in combating corruption. The lack of horizontal accountability across the Korean public sector in monitoring, investigating, and punishing corruption or abuses of power exercised by high-ranking officials, such as the president, is a serious deficiency. The Public Prosecutors' Office is often criticized for being politically influenced when investigating and prosecuting political corruption, especially cases involving high-ranking government officials.

There are also several shortcomings in terms of implementing anti-corruption laws and policies. First, the definition and scope of the current anti-corruption laws are restricted. Many anti-corruption laws are directed at the executive branch and do not apply to the legislature or the judiciary, which are the primary breeding grounds for high-level political corruption. For example, the Anti-Corruption Act in South Korea limits the scope of corruption to the

government and does not target private sector corruption. Current boundaries of the Act restrict the ability to tackle the corruption-prone motivations of the private sector.

Second, while laws and policies have been implemented, it is difficult for the public to internalize because they are overly complicated. For example, as the Act on the Prevention of Corruption, the Establishment and Management of the Anti-Corruption and Civil Rights Commission, and the Protection of Public Interest Reporters' Act were enacted for similar intents and purposes, people still face difficulties in reporting corrupt activities because it is difficult to distinguish the differences between each of these laws. Different acts apply to whistleblowers depending on the legal status of the organizations with which the whistleblowers are affiliated (public vs. private), their occupational status (public official vs. civilian), their status within the organization at the time of reporting (internal vs. external), the type and nature of information reported (corrupt conduct vs. conduct detrimental to the public interest), and the means of reporting (e.g. filing a charge, providing information, filing a petition, providing evidence for corruption investigation, etc.).

Third, South Korea first enacted its Public Service Ethics Act in 1981, which mandates asset registration by high-ranking public officials and extends its scope to include retired officials. However, this act is still prescribed in the form of a merely normative declaration and does not specify either procedures or penalties. This act is only prescribed in the Code of Conduct for Public Officials and is not regulated as a specific law or policy.

#### **4. Case Study<sup>3</sup>**

The recent corruption scandal surrounding former President Park Geun-hye, which led to her impeachment and later imprisonment, illustrates the structural problem of grand corruption in South Korea. Until the story was unraveled by the media, state institutions including the Prosecutors' Office, the judiciary, and the anti-corruption agency were unable to check the improper use of presidential power. In this case, it was civil society rather than governmental bodies who continually raised the issue of Park's governance problems. While it did not catch the attention of the public in the beginning, one media outlet launched an investigation into Park and her associates. Through several months of investigation and coverage, the media discovered the unlawful meddling of Choi Soon-sil, Park's long-time friend, in the creation of public foundations. Their corruption cases are being scrutinized by the court as of February 2018.

The public outcry was huge, expressed through the series of nationwide protests between October 2016 and April 2017. A mass protest was held every Saturday during this period for a total of 23 protests altogether. The total number of participants exceeded 15 million, which is recorded as the largest mass protest in South Korean history. As calls for her impeachment

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<sup>3</sup> Written by James Dongjin Kim, Research Associate, Research Planning Department, EAI

became deafening, the National Assembly voted 234-56 to strip Park of her executive powers in December 2016. The Constitutional Court unanimously upheld the impeachment vote in March 2017. When the Constitutional Court judges determined whether Park should be removed from office, they acknowledged that Park misused her political power in the pursuit of Choi Soon-sil's private interests. This corruption scandal is an eloquent illustration of the essential role of public demand in correcting the system and holding the most powerful accountable to combat instances of grand corruption that the existing anti-corruption measures cannot address. This force of vertical accountability stems from the popular aspiration to improve the quality of democracy. In this respect, fights against corruption positively enforce strong democracy.

Choi Soon-sil Gate shows how a lack of independence of anti-corruption institutions can prevent high-ranking officials from being kept in check. The Supreme Prosecutors' Office has been a particular target of criticism for being subject to presidential power. The Supreme Prosecutors' Office maintains a monopoly of authority over investigations and prosecutions so that corruption problems are only able to be investigated by the prosecutors. However, their exercise of power is often unfair and selective in the case of large scandals as they use their sole discretion to determine whether or not to investigate cases and, if they investigate, whether and which criminal charges should be filed. Over the past few decades, many people have criticized the abnormal amount of power given to the Supreme Prosecutors' Office and the lack of appropriate checks on their authority. With the president nominating the head of the Supreme Prosecutors' Office and key appointments in the Prosecutors' Office, the Blue House tends to develop close ties with the top prosecutorial leadership, thereby undermining the independence of the office. The lack of independence and impartiality of the Supreme Prosecutors' Office not only hampers the efficacy of anti-corruption activities but also damages public trust in the government's anti-corruption efforts.

In response to this problem, the new Moon Jae-in administration is attempting to rebuild the nation's integrity system by launching a reform to check the power of the Prosecutors' Office. During the presidential campaign, Moon promised that he will not only ensure the independence of investigatory bodies, but also prevent abuses of power by establishing a new independent body that will be solely dedicated to investigating corruption among high-level government officials. This politically neutral agency tasked with investigating corruption among high-ranking officials and checking the power of the existing investigative body will be modeled off of equivalent institutions in Singapore and Hong Kong. The organization will be empowered to investigate and indict any and all top-ranking government officials, including the president, lawmakers, judges, prosecutors, and members of their families. Former officials will also be subject to investigation during the two-year period after they leave their posts. The new agency will also be able to take over cases of corruption that prosecutors are looking into.

While strong opposition is expected to come from the Supreme Prosecutors' Office, this plan has already made substantial progress. The Special Committee for the Reform of the Prosecution presented the first reform proposal, which is specified as Option 1 in Figure 9 on the next page, in September 2017. The committee, formed by the Ministry of Justice, consists of 17 experts of

different areas, including academics, lawyers, civil society representatives, and media. A month later, the Ministry of Justice announced their modified plan as outlined in Figure 9 under Option 2.

	Independent body to investigate corruption cases of high-level public officials (South Korea)		Independent Commission Against Corruption (Hong Kong)	Corrupt Practices Investigation Bureau (Singapore)
	Option 1	Option 2		
Established	-	-	1974	1952
Proposed by	Special Committee for the Reform of the Prosecution	Ministry of Justice	-	-
Parent Agency	President	President	Chief Executive of Hong Kong	Prime Minister's Office
Appointed by (Head)	President	National Assembly	Chief Executive of Hong Kong	President
Main Function	Investigate and prosecute corruption	Investigate and prosecute corruption	Investigate corruption	Investigate corruption
Term Length (Head)	Three-year single term	Three-year single term	No fixed term	No fixed term
Term Length (Prosecutors)	Six-year term; renewable once	Three-year term; renewable twice	No fixed term	No fixed term
Size	122 (50 prosecutors, 72 investigators)	55 (25 prosecutors, 30 investigators)	1,300 (estimated)	82 (estimated)

**Fig. 9.** Comparison of Proposed Anti-Corruption Agencies in South Korea to Existing Agencies in Hong Kong and Singapore

Compared to the original plan proposed by the Special Committee for the Reform of the Prosecution, the Ministry’s revised plan reduces the overall size and power of the body. The total number of prosecutors and their term length is reduced by half. It also moves the authority from the president to the National Assembly to appoint the head of the agency. This modification is intended to alleviate the concern over the powers allotted to the proposed agency which are considered more excessive than that of the existing prosecution office. While the new body needs strong authority to fight against the corruption of high-ranking officials, it also needs to be checked to prevent the organization from becoming another abuser of state power. This was the main rationale for the proposed modification and the amount of power that is to be assigned to the agency is more notable when compared to the existing institutions in Hong Kong and Singapore. While South Korea’s proposed new agency has the right to prosecute corruption cases in order to check the Supreme Prosecutors’ Office, its relatively small size and the fixed term of the head and prosecutors are designed to restrain its authority. Although this initiative is not final and the ministry will collect more opinions before putting forward legislation, finding a way to balance the guarantee of political independence while preventing the body from becoming another power abuser will remain a challenge for the success of the institution.

## 5. Policy Recommendations

South Korea poses a corruption paradox. A large number of Koreans believe that the country is corrupt, but few Koreans have ever directly paid a bribe, and business people generally do not indicate that corruption poses a barrier to business in the country. Instead, corruption in South Korea is perceived to exist at the institutional level; the president, National Assembly, police, tax officials, judiciary, and other public officials are deemed to be corrupt. In South Korea, anti-corruption institutions and a legal framework exist to combat deep-rooted corruption problems. As discussed above, however, these mechanisms suffer from institutional deficiencies, which in turn hinder them from being effectively institutionalized. In order to address the deep-rooted causes of corruption in the country, this section will propose recommendations for the administration in their continuing efforts to fight corruption. These recommendations are intended to provide lessons and general guidelines to not only the South Korean government, but also to other countries with similar challenges in tackling corruption.

First of all, main anti-corruption agency solely responsible for combating corruption needs to be equipped with three functions: investigation, corruption prevention, and the ability to conduct public campaigns and education. A single agency with the power to investigate corruption charges and protect whistleblowers, thereby providing one-stop anti-corruption service, will concentrate all authority into one organization and increase its capacity to monitor and prevent corruption.

The independence of an anti-corruption agency needs to be ensured at all costs. This is especially important for South Koreans since they view their governing system as insufficiently transparent and accountable. For the public to feel their society is fair and just, the structural irregularities and deficiencies that invite corruption need to be eradicated. Creating a new independent anti-corruption agency cannot be the sole answer. Political leaders and high-ranking public officials need to realize the importance of combating corruption for the sake of good governance. Without a real commitment from the leadership to sustained reform, the addition of new laws and agencies will remain superficial. At the same time, civil society actors and the media should continue to play the role of watchdog to check public sector corruption.

Additionally, both institutional and legal anti-corruption efforts need to turn their attention to the private sector as well. Currently, South Korean laws and policies tend to focus on the public sector as the main perpetrator of corruption. In light of the fact that corruption is intertwined with rule violation and exclusive favoritism, controlling corruption in the private sector is a critical step towards protecting the equal rights of citizens and making society safer. South Koreans need to demonstrate their commitment to improving integrity and the rule of law. Businesses are often less transparent and accountable than the government. In the most recent report on the transparency of private companies, Samsung Electronics ranked 97<sup>th</sup> out of 124 overseas subsidiaries. The International Monetary Fund and the World Economic Forum indices that evaluate the private sector ranked Korea's private sector transparency 59<sup>th</sup> out of 61 countries

surveyed. It is difficult to monitor businesses and nongovernmental organizations. But an appropriate degree of regulation and citizen activism can reduce corruption in the private sector.

Controlling corruption both in the public and private sectors will enhance the quality of democracy of South Korea. When its vibrant participatory democracy dovetails with social integrity and the rule of law, South Korea will rise as a democracy that embodies good governance.

## Case Study 2: Malaysia

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### 1. Introduction

In 2016, Malaysia ranked 55<sup>th</sup> out of 176 countries in Transparency International's Corruption Perceptions Index (CPI), with a score of 49 out of 100. Transparency International's Global Corruption Barometer (GCB) showed that 59 percent of respondents in Malaysia felt that the level of corruption in their country had increased, surpassed only by China at 73 percent. The report also noted that Malaysia, together with Vietnam, performed the worst, with not a single positive rating in the entire questionnaire. In addition, in 2016 Malaysia ranked second behind Russia in the crony capitalism index published by *The Economist*, which ranks countries where businessmen with government ties are most likely to prosper.

What do these numbers tell us? Is there a connection between this perceived high level of corruption and the public's trust in the government? This paper aims to make the argument that this increasing level of corruption has resulted in dwindling public trust in the ruling government. The corruption case that this paper will focus on is the 1MDB scandal currently plaguing Malaysia.

For the purpose of this paper, "government" is taken to mean Barisan Nasional ("National Front" or BN), the coalition that has been in power in Malaysia since it achieved independence in 1957. While the author realizes that dwindling trust in a political party (in this case the BN coalition) cannot be equated with a loss of trust in government, it must be acknowledged that in Malaysia the lines between the two are blurred. Because no other party has ever been in power, the author opines that it is difficult to separate trust in parties from trust in government.

The question of public trust will be dealt with by first defining the concept of trust. The definition that will be used comes from the Organization for Economic Co-operation and Development's (OECD) publication entitled *Trust and Public Policy: How Better Governance Can Help Rebuild Public Trust*.<sup>2</sup> To analyze levels of public trust, this paper presents findings from several indicators such as the Edelman Trust Barometer, the Gallup Poll, and the Pew Research

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<sup>2</sup> OECD. (2017). *Trust and Public Policy: How Better Governance Can Help Rebuild Public Trust*. Paris: OECD Publishing.

Center. For Malaysia-specific trust indicators, surveys from the Merdeka Center for Opinion Research are used.

In addition to surveys, this paper will also discuss the outcome of the last two general elections in Malaysia. Electoral results are important indicators of any government's performance, and consequently a significant measure of the public's trust in that government. Electing a certain political party into power indicates some level of trust between citizens and that party and also indicates a certain level of mistrust towards the party that lost. This paper also attempts to foreshadow the upcoming 14<sup>th</sup> general elections, but in doing so, acknowledges the difficulty in predicting the outcome of the next election. Why this is so will also be explained.

What must be done to restore the public's trust in BN? The final part of this paper will include specific steps needed for democratic and institutional reforms in Malaysia. The democratic reforms proposed include freer and fairer election processes and the enactment of legislation on political financing, asset declaration, whistleblower and witness protection, and freedom of information laws. Institutional reforms include reforming the Malaysian Anti-Corruption Commission (MACC) and the Attorney General's (AG) Chamber. These reforms are urgently needed to ensure that those who commit corruption are brought to justice.

### 1.1) The Definition of Corruption

Transparency International defines corruption generally as "the abuse of entrusted power for private gain." More specifically, grand corruption is defined as "acts committed at a high level of government that distort policies or the central functioning of the state, enabling leaders to benefit at the expense of the public good."<sup>3</sup> This essay will use these two definitions to refer to corruption.

### 1.2) The Definition of Trust

The OECD gives a general definition of trust as "holding a positive perception about the actions of an individual or an organization." It further elaborates that:

(Trust) supports most if not all collective and individual human interactions, from trade and commerce to welfare systems and education. In all cases, trust allows people, businesses and organizations to make decisions without having to renegotiate with and/or reassure their counterparts at each interaction. This eliminates or reduces costs and increases the speed of social interactions. By allowing one actor to give the benefit of the doubt to another, trust generates tangible benefits for each - a "trust dividend."<sup>4</sup>

<sup>3</sup>Transparency International. (2017). "What is Corruption?" Retrieved from <https://www.transparency.org/what-is-corruption/#define>.

<sup>4</sup> OECD. (2017). *Trust and Public Policy: How Better Governance Can Help Rebuild Public Trust*. Paris: OECD Publishing, p 17.

The OECD also presents the different “trust dividends” gained from different trust relationships, such as those among citizens, between businesses and the government, and between the government and citizens. For this paper, the trust of citizens in government is particularly important. The trust dividend yielded from this trust relationship is “greater compliance with and support of government programs and policies” and “lower enforcement costs.”<sup>5</sup>

The OECD categorizes trust between citizens and the government under “systemic or institutional trust,” where institutional trust is that which is generated when citizens evaluate public institutions and/or the government and individual political leaders as promise-keeping, efficient, fair, and honest.

Furthermore, trust also impacts how citizens behave in ways that affect the health of democratic governance:<sup>6</sup> people’s feelings of trust towards the government have been found to shape their propensity to pay taxes<sup>7</sup> and to comply with collective obligations.<sup>8</sup> This theory seems to relate the level of trust in government to the level of compliance with laws and regulations, which, if current indicators are true, does not bode well for the peace and stability of functioning democracies around the world.

### 1.3) The 1MDB Scandal

In 2015, Malaysia made headlines around the world when it was revealed that over \$700 million had been transferred into Prime Minister Dato’ Seri Najib Razak’s personal bank accounts via banks, companies, and agencies linked to 1Malaysia Development Berhad (1MDB). 1MDB is a strategic development company owned by the government of Malaysia with a mission to drive long-term sustainable economic development by forging strategic global partnerships and promoting foreign direct investment. Najib Razak was the Chairman of the Board of Advisers of 1MDB.

In 2016, the US Department of Justice (DOJ) filed civil forfeiture complaints seeking the forfeiture and recovery of more than USD \$1 billion in assets associated with 1MDB.<sup>9</sup> The complaint names “Malaysian Official 1” as a “high-ranking official in the Malaysian government who also held a position of authority with 1MDB.” In an interview with the BBC last year, Minister in the Prime Minister’s Department Datuk Abdul Rahman Dahlan confirmed that Malaysian Official 1 refers to Najib.<sup>10</sup>

<sup>5</sup> Ibid.

<sup>6</sup> Seyd, Ben. (2016). How Should We Measure Political Trust? Paper for PSA annual conference, Brighton, March 21<sup>st</sup>-23<sup>rd</sup> 2016.

<sup>7</sup> Scholz, John T. & Lubell, Mark. (1998). Trust and Taxpaying: Testing the Heuristic Approach to Collective Action. *American Journal of Political Science*, 42 (2), 398-417.

<sup>8</sup> Marien, Sophie & Hooghe, Marc. Does Political Trust Matter? An Empirical Investigation into the Relationship between Political Trust and Support for Law Compliance. *European Journal of Political Research*, 50 (2), 267-291.

<sup>9</sup> United States Department of Justice. (2016, July 20). United States Seeks to Recover More Than \$1 Billion Obtained from Corruption Involving Malaysian Sovereign Wealth Fund. Retrieved from <https://www.justice.gov/opa/pr/united-states-seeks-recover-more-1-billion-obtained-corruption-involving-malaysian-sovereign>.

<sup>10</sup> The Star Online. (2016, September 1). Rahman Dahlan: Najib is ‘MO1’ but not involved in investigation. Retrieved from <https://www.thestar.com.my/news/nation/2016/09/01/rahman-dahlan-najib-is-mo1/>.

More recently, on June 15<sup>th</sup> 2017, the DOJ filed another civil forfeiture complaint seeking the forfeiture and recovery of almost USD \$540 million in assets associated with 1MDB. Details of the complaint are particularly damaging, including specifics regarding million-dollar purchases of jewelry, luxury yachts, and paintings. At the time of writing, the Malaysian government's response has been to question the "lack of action" by the DOJ, and to say that there is no evidence of misappropriation of 1MDB funds.<sup>11</sup>

### 1.3.1) The significance of 1MDB

Malaysia is no stranger to corruption cases. During the reign of Tun Mahathir Mohamad, Malaysia's fourth Prime Minister (PM), accusations of cronyism, nepotism, and widespread corruption were rife. The connections between business and politics were strengthened during Mahathir's time, and the government-linked companies (GLCs) that continue to be a huge presence in Malaysia's economy today were established during his premiership. Why then is the focus of this paper on 1MDB?

Firstly, the sheer scale of the corruption involved in the 1MDB case, which spans several years and countries, makes it a landmark case in transnational corruption. In its press release following the filing of the civil forfeiture complaints, the DOJ noted that the 1MDB case is the "largest single action ever brought under the Kleptocracy Asset Recovery Initiative."<sup>12</sup> Furthermore, there are currently nine countries other than Malaysia that are conducting investigations surrounding 1MDB, namely Singapore, Switzerland, the United Kingdom, the United States, Australia, Hong Kong, Thailand, Luxembourg, and the United Arab Emirates.

Secondly, never before in Malaysia's history has a sitting prime minister been caught with billions of ringgit in his personal bank account. The UD \$681 million in Najib's personal account is problematic in itself, and the reason the money was given to him raises further questions. A source from Saudi Arabia claimed that the donation was approved by the late King Abdullah, and its purpose was to help Najib and his coalition with the 2013 general elections, which Najib's party won in one of the ruling coalition's poorest showings since Malaysia's independence.<sup>13</sup>

If indeed this was true, and the money was given for election financing purposes, the legality of this action will not be questioned as Malaysia does not have a law that regulates political financing practices. Thus, Najib's receipt of the USD \$681 million in his personal bank account from the Saudi royal family to finance his party's election campaign is not a criminal offense.

<sup>11</sup> Star Online. (2017, June 17). 1MDB: DoJ civil suit without proof. Retrieved from <http://www.thestar.com.my/news/nation/2017/06/17/1mdb-doj-civil-suit-without-proof-it-also-does-not-have-witness-statements/>.

<sup>12</sup> United States Department of Justice. (2016, July 20). United States Seeks to Recover More Than \$1 Billion Obtained from Corruption Involving Malaysian Sovereign Wealth Fund. Retrieved from <https://www.justice.gov/opa/pr/united-states-seeks-recover-more-1-billion-obtained-corruption-involving-malaysian-sovereign>.

<sup>13</sup> Gardner, Frank. (2016, January 27). Saudi gift to Malaysia PM Najib Razak 'for election campaign.' Retrieved from <http://www.bbc.com/news/world-asia-35409424>.

After this donation scandal broke, the National Consultative Committee on Political Financing (NCCPF) was formed in 2015. Najib himself launched the Committee, and its terms of reference were to “provide a people [sic] consultative forum for members of the civil society to discuss ways to improve the transparency, accountability and integrity compliance of political parties and politicians in the securing of funds for the purpose of political activities.<sup>14</sup>” Among the more notable of the recommendations given by the committee was a proposal to ban foreign donations, to ban donations from government-linked companies (GLCs), and to enact the Political Donations and Expenditure Act (PDEA). The recommendations have been submitted to the Cabinet, and Committee Chairman Senator Datuk Paul Low has stated that the PDEA will be enacted in time for the 15<sup>th</sup> general election.

All of these reasons set the 1MDB case apart from other corruption scandals that have plagued Malaysia today and in the past.

## 2. The State of Corruption in Malaysia

This section will explore the state of corruption in Malaysia by focusing on the public’s and government’s reactions to 1MDB, as well as Malaysia’s performance in several corruption indicators.

### 2.1) The Public’s Reaction

The reaction towards the scandal amongst Malaysians was mixed. The Coalition for Free and Fair Elections (“Bersih” which means clean in Malay) – a coalition of non-governmental organizations demanding free, clean and fair elections – organized their fourth mass rally, Bersih 4.0, in Kuala Lumpur. Past Bersih rallies held in 2007, 2011 and 2012 focused on calls for electoral reform, but in 2015, the rally specifically demanded the resignation of Najib Razak.<sup>15</sup> It is difficult to obtain an accurate figure of attendees at the rally as figures differ between 50,000 (as stated by the police) and 500,000 (according to the organizers).<sup>16</sup> A “milestone” from this rally was the appearance of Mahathir, Malaysia’s prime minister for 22 years and now a staunch critic of Najib, who ironically opposed any form of civil liberties when he was in power. Mahathir’s presence added legitimacy to the rally and was an indication of how serious things were.

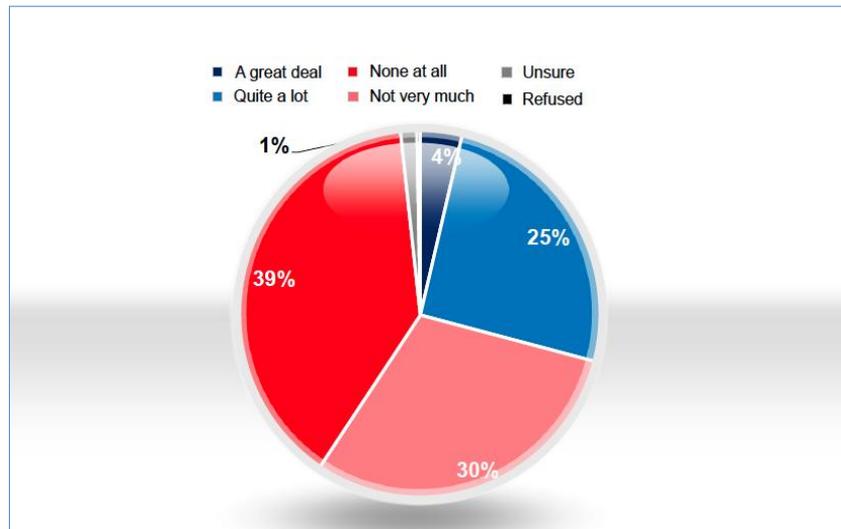
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<sup>14</sup> National Consultative Committee on Political Financing. (2016). Political Financing in Malaysia: Reinforcing Integrity. Kuala Lumpur: National Consultative Committee on Political Financing.

<sup>15</sup> Naidu, Sumisha. (2015, August 3). RM2.6b in Malaysian PM’s accounts from donations, not 1MDB: Special Task Force. *Channel News Asia*. Retrieved from <http://www.channelnewsasia.com/news/asiapacific/rm2-6b-in-malaysian-pm-s-accounts-from-donations-not-1mdb-specia-8229540>.

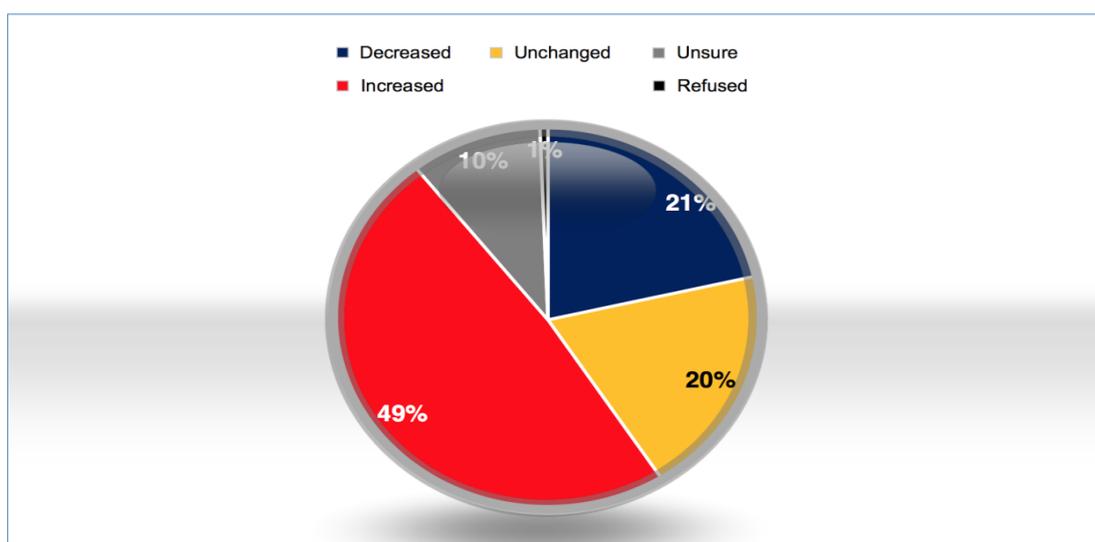
<sup>16</sup> Malay Mail Online. (2015, September 2). So how many people were in Kuala Lumpur for Bersih 4? Retrieved from <http://www.themalaymailonline.com/malaysia/article/so-how-many-people-were-in-kuala-lumpur-for-bersih-4>.

The strong show of protest by Bersih, however, does not necessarily translate into a deep understanding of the 1MDB issue. A survey conducted by the Merdeka Center for Opinion Research in 2015 showed that 39 percent of respondents answered “none at all” when asked to what extent they were aware of the 1MDB issue. 30 percent of respondents answered “not very much” and 25 percent answered “quite a lot.”



Source: Public Awareness of the 1Malaysia Development Berhad Controversy, Merdeka Center for Opinion Research, 2015.

Interestingly, a survey done by the Merdeka Center about a year before the 1MDB scandal exploded revealed that 49 percent of Malaysians perceived that the level of corruption had increased, while 21 percent perceived that it had decreased. 20 percent of respondents felt that there had been no change in the level of corruption.



Source: Public Perceptions of Corruption in Malaysia 2014, Peninsular Malaysia Voter Survey, Merdeka Center for Opinion Research.

The findings from these two surveys indicate that a perceived high level of corruption does not necessarily translate into a deep understanding of certain issues related to corruption. This observation is important as it begs the question of whether corruption levels are truly high, or if people only perceive them to be high. Although these numbers provide an indication of the public's perception of corruption, one must always exercise caution in interpreting them, as respondents are picked at random and one survey's outcome does not necessarily affect the other.

### 3. The Government's Reaction

This section will explore the Malaysian government's various responses to the 1MDB scandal.

#### 3.1) An attempt at transparency

After the news on 1MDB broke in 2015, the government, through the Department of Special Affairs of the Ministry of Communications and Multimedia, published a 61-page book entitled "Siapa Kata Tidak Dijawab?" ("Who Says It's Unanswered?") that was distributed at an event where Najib gave his 2015 National Day Speech.<sup>17</sup> The book serves as an answer to "frequently asked questions" regarding 1MDB and the allegations surrounding it written in simple language accompanied by infographics. For example, one of the questions included is, "Is it true that money from 1MDB was banked into Najib Razak's personal accounts?" with the answer being that the RM 2.6 billion was given by a donor and did not come from 1MDB.<sup>18</sup>

#### 3.2) Punishing dissent

In an unprecedented move, on July 28<sup>th</sup> 2015 Najib reshuffled his Cabinet by sacking his deputy, Tan Sri Muhyiddin Yassin, along with four other ministers. Muhyiddin and one of the other Cabinet members who was sacked, Regional and Rural Development Minister Datuk Seri Shafie Apdal, were both known to have openly criticized Najib's handling of the 1MDB scandal. In a nationally televised statement, Najib said that "differing views and opinions should not be aired in public forums that can negatively impact the perception of the government and the nation."<sup>19</sup> Muhyiddin is now the President of Parti Pribumi Bersatu Malaysia (PPBM), an all-Malay party formed in 2016 with the dual missions of restoring institutional reforms and democratic

<sup>17</sup> Ahmad, Azyyati. (2015, August 31). Buku '1MDB: Siapa Kata Tidak Dijawab' rungkai semua persoalan. Astro AWANI. Retrieved from <http://www.astroawani.com/berita-malaysia/buku-1mdb-siapa-kata-tidak-dijawab-rungkai-semua-persoalan-71664>.

<sup>18</sup> Ibid.

<sup>19</sup> Teoh, Shannon. (2015, July 29). Najib sacks DPM, four ministers and A-G. *The Straits Times*. Retrieved from <http://www.straitstimes.com/asia/se-asia/najib-sacks-dpm-four-ministers-and-a-g>.

governance and upholding the separation of powers, among others. The chairman of the party is Tun Dr. Mahathir Mohamad. PPBM is currently part of the opposition coalition, Pakatan Harapan (PH).

In addition to the sackings, several new ministerial appointments were made. The investigations into 1MDB that were being carried out by the Public Accounts Committee (PAC) had to be halted as four of its members, including its chairman, were appointed as Cabinet ministers. By virtue of the Malaysian Parliament's Standing Orders, a minister cannot be a member of the PAC. A request from one of the current PAC members, Tony Pua, to reopen the investigations into 1MDB in light of the civil forfeiture complaint by the US was declined, resulting in him walking out of the committee meeting.<sup>20</sup>

### 3.3) Dismantling institutions and civil liberties

One of the most significant aftereffects of 1MDB has been the serious weakening of institutions. On the same day that the five members of the Cabinet were sacked, Attorney General Tan Sri Abdul Gani Patail was also removed and replaced by Tan Sri Mohamed Apandi Ali. Abdul Gani's termination was said to be due to "health reasons."<sup>21</sup> At the time of his termination, Abdul Gani was heading a special task force investigating 1MDB. The task force comprised the Malaysian Anti-Corruption Commission (MACC), the Central Bank of Malaysia, and the Royal Malaysian Police. There has been no news from the task force so far, and the Attorney General's Chamber has denied allegations that it has been disbanded.

A year after the Cabinet reshuffle, new security legislation, the National Security Council (NSC) Act,<sup>22</sup> came into force. Pushed through Parliament the previous December, the NSC poses many threats to civil liberties. The Act grants the government the power to declare martial law in areas deemed to be a "security threat" and allows the National Security Council, headed by the prime minister, to suspend civil liberties in designated "security areas," giving security forces sweeping powers of search, seizure, and arrest.<sup>23</sup> The law was promoted by the government on the pretext of countering threats to security posed by radical Islamists.<sup>24</sup> However, giving the prime minister an extraordinary amount of power to suppress civil liberties is dangerous, as noted by the United Nations Human Rights Office for South East Asia who also added that the law might

<sup>20</sup> Malay Mail Online. (2016, August 8). PAC chief says already probed 1MDB thoroughly. Retrieved from <http://www.themalaymailonline.com/malaysia/article/pac-chief-says-already-probed-1mdb-thoroughly>.

<sup>21</sup> Shagar, Loshana & Mageswari, M. (2015, July 28). Mohamed Apandi Ali replaces Gani Patail as Attorney-General. *The Star Online*. Retrieved from <http://www.thestar.com.my/news/nation/2015/07/28/gani-patail-terminated/>.

<sup>22</sup> Other such legislation includes the Security Offences (Special Measures Act) 2012 and the Peaceful Assembly Act 2012.

<sup>23</sup> Al-Jazeera. (2016, August 1). Malaysia: Controversial National Security Act launched. Retrieved from <http://www.aljazeera.com/news/2016/08/malaysia-controversial-national-security-act-launched-160801062824956.html>.

<sup>24</sup> The Straits Times. (2016, July 27). Najib gets new security powers on Aug 1 amid planned protests over 1MDB scandal. Retrieved from <http://www.straitstimes.com/asia/se-asia/najib-gets-new-security-powers-on-aug-1-amid-planned-protests-over-1mdb-scandal>.

lead to human rights violations.<sup>25</sup> The NSC came into force on top of the already draconian colonial-era Sedition Act, which has been used in the past to prosecute political cartoonists, journalists, and lawyers.<sup>26</sup>

### 3.4) The USD \$681 million donation

In January 2016, Apandi declared that the USD \$681 million transferred into Najib's personal bank account was a gift from the Saudi royal family, and there were no criminal offenses or corruption involved.<sup>27</sup> Apandi further stated that no further action would be taken and instructed the three separate investigations into 1MDB to be closed. He also added that there was no reason why the money was donated to Najib, and the matter was between him and the Saudi royal family.<sup>28</sup>

## 4. Public Trust

This section deals with the issue of public trust in the Malaysian government. This section first presents a worldwide picture of the current status of public trust in government, and then zeroes down on the situation in Malaysia.

### 4.1) The State of Public Trust in Other Countries

Trust, as one can imagine, is not straightforward or easily measureable. The media often reports on citizen dissatisfaction with the government, with demonstrations, petitions, and protests being the common mechanisms by which dissatisfaction is displayed. There exist, however, polls and surveys that attempt to quantify the level of peoples' trust towards the government. The ones that this essay will refer to are the Edelman Trust Barometer, the Gallup World Poll, and the Pew Research Center.

The Edelman Trust Barometer measures trust in four institutions: the government, non-governmental organizations (NGOs), businesses, and the media. Their 2017 report, entitled "Trust in Crisis," reveals that general populations distrust their institutions in 20 out of 28

<sup>25</sup> The Straits Times. (2016, July 29). UN rights body 'gravely concerned' by new Malaysian security law that grants govt search, seizure powers. Retrieved from <http://www.straitstimes.com/asia/se-asia/un-rights-body-gravely-concerned-by-new-malaysian-security-law-that-grants-govt-search>.

<sup>26</sup> Amnesty International. (2016, March 11). Malaysia: End unprecedented crackdown on hundreds of critics. Retrieved from <https://www.amnesty.org/en/latest/news/2016/03/malaysia-end-unprecedented-crackdown-on-hundreds-of-critics-through-sedition-act/>.

<sup>27</sup> Holmes, Oliver. (2016, January 26). Malaysian prime minister cleared of corruption over \$681m Saudi 'gift.' *The Guardian*. Retrieved <https://www.theguardian.com/world/2016/jan/26/malaysian-pm-najib-razak-cleared-corruption-gift-saudi-royals>.

<sup>28</sup> Ibid.

countries, the government is not trusted in 75 percent of countries, and trust in government fell from 42 percent in 2016 to 41 percent in 2017.<sup>29</sup> The survey lists issues that citizens are concerned or fearful about: corruption, globalization, eroding social values, immigration, and the pace of innovation. Although corruption is just one part of this survey, it is the top issue of concern amongst respondents, with 69 percent being concerned and 40 percent being fearful about the issue. This finding is particularly interesting for the purposes of this essay.

The 2016 US presidential election results are perhaps one of the best examples of the consequences of distrust and fear among citizens in recent history. This is reflected in the Edelman survey finding that 67 percent of President Donald Trump's voters were fearful, compared to 45 percent of Hillary Clinton's. This finding is echoed across the Atlantic in the United Kingdom, where 54 percent of those who voted to leave the EU were fearful, as opposed to only 27 percent amongst those who voted to remain (Edelman Trust Barometer 2017).<sup>30</sup> The Pew Research Center also found that the level of trust in government around the world remains near historic lows, as only 20 percent say they trust the government to do what is right always or most of the time.<sup>31</sup>

The Gallup World Poll reports similar findings to the Edelman Trust Barometer. According to Gallup, 26 percent of Americans lacked confidence in their national government and were discouraged about their own future in 2016.<sup>32</sup> Gallup relates these findings to the recent rise in populism in the US and elsewhere in the world. Among EU countries, Gallup found that 81 percent of the population in Greece was disaffected towards the national government, the highest in the region. Considering the situation in Greece at the moment, it is not too difficult for one to imagine why such a high percentage of the population mistrusts the government. Overall, the Gallup World Poll agrees that growing deficits of hope and trust are more likely to be prevalent in countries experiencing a rise in support for populism.<sup>33</sup>

#### 4.2) The State of Public Trust in Malaysia

The Edelman Trust Barometer's section on Malaysia begins by saying "[W]e have been accustomed to seeing Malaysian trust levels dip year after year." This pessimistic tone is then followed by the statement that this decline in trust is in line with global trends, and is therefore

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<sup>29</sup> Edelman Trust Barometer. (2017). 2017 Edelman Trust Barometer Global Report. New York: Edelman Trust Barometer.

<sup>30</sup> Edelman Trust Barometer. (2017). 2017 Edelman Trust Barometer - Trust and the US Presidential Election. New York: Edelman Trust Barometer.

<sup>31</sup> Pew Research Center. (2017, May 3). Public Trust in Government Remains Near Historic Lows as Partisan Attitudes Shift. Retrieved from <http://www.people-press.org/2017/05/03/public-trust-in-government-remains-near-historic-lows-as-partisan-attitudes-shift/>.

<sup>32</sup> Zapryanova, Galina & Christiansen, Anders. (2017, April 7). Hope, Trust Deficits May Help Fuel Populism. *Gallup*. Retrieved from [http://www.gallup.com/poll/207674/hope-trust-deficits-may-help-fuel-populism.aspx?g\\_source=AMERICAS&g\\_medium=topic&g\\_campaign=tiles](http://www.gallup.com/poll/207674/hope-trust-deficits-may-help-fuel-populism.aspx?g_source=AMERICAS&g_medium=topic&g_campaign=tiles).

<sup>33</sup> Ibid.

not unique to Malaysia.<sup>34</sup> In Malaysia, 52 percent of citizens believe the system is failing them, while only 12 percent say the system is working for them. Of particular importance is the fact that Malaysians pointed specifically to corruption and immigration as their main concerns. More than 80 percent of Malaysians are concerned that widespread corruption makes it difficult to make the changes necessary to solve the country's problems and compromises the safety of citizens.

Despite these findings, it is interesting to note that between 2016 and 2017, trust in the government among better-educated, higher-income Malaysians rose from 34 percent to 43 percent. This is interesting because in Malaysia, various studies have shown that the rural population tends to favor the ruling government, and has historically voted for the Barisan Nasional coalition in general elections.<sup>35</sup> Conversely, voting trends show that the urban population favors the more multi-ethnic opposition coalition. The fact that the two richest states in Malaysia, Selangor and Penang, are governed by the opposition coalition, is a testament to this trend.

## 5. Elections as an Indicator of Public Trust in Malaysia

The surveys and indicators shown in previous sections paint a picture of a Malaysia where trust in government has indeed dwindled. However, considering the limitations of surveys and opinion polls in measuring trust, this paper now shifts its focus to the results of the previous two general elections in Malaysia. In the last two general elections, the BN coalition failed to retain its two-thirds majority in Parliament. This decreased majority means that the government is unable to amend the Constitution according to its will, and weakens BN's position as the dominant political force in the country. These two general elections, the first in 2008 (GE12) and the second in 2013 (GE13) will now be explored in turn.

### 5.1) The 12<sup>th</sup> General Elections

March 8<sup>th</sup> 2008 was a landmark date for Malaysians, as the country's 12<sup>th</sup> general elections revealed results that were shocking to many. For the first time since 1969, the Barisan Nasional coalition lost its two-thirds majority in the lower house of Parliament, the Dewan Rakyat (People's House).<sup>36</sup> Furthermore, the opposition took control of five states in Peninsular Malaysia: Kelantan, Kedah, Selangor, Penang, and Perak. Many factors are thought to have contributed to this result, among them a rejection of BN by non-Malays in Peninsular Malaysia in favor of secular opposition parties, political scandals involving then-Deputy Prime Minister Najib,

<sup>34</sup> Edelman Trust Barometer. (2017). Trust - Asia Pacific, Middle East and Africa. New York: Edelman Trust Barometer.

<sup>35</sup> Aspinall, Edward. (2013, May 7). Triumph of the machine. *Inside Story*. Retrieved from <http://insidestory.org.au/triumph-of-the-machine/>.

<sup>36</sup> Pepinsky, Thomas B. (2009). The 2008 Malaysian Elections: An End to Ethnic Politics? *Journal of East Asian Studies*, 9 (1), 87-120.

increasing tension in ethnic relations, rising inflation, and corruption at the highest levels of Malaysian politics.<sup>37</sup>

Another interesting aspect of the GE12 results was that they came just four years after BN's spectacular victory in the 11<sup>th</sup> General Elections in which BN won 198 out of 219 parliamentary seats, or 90.4 percent of all seats.<sup>38</sup> Much credit has been attributed to the "Pak Lah" factor (Pak Lah is the nickname of Tun Abdullah Ahmad Badawi, Malaysia's fifth prime minister and successor to Tun Dr. Mahathir). After Mahathir's iron-fisted rule of Malaysia for 22 years, the people welcomed the reserved and pious Pak Lah, who introduced the concept of Islam Hadhari (a more progressive interpretation of Islam suited to modern times<sup>39</sup>) and a slew of reforms to the anti-corruption agency. Despite this resounding victory for BN in 2004, things took a turn for the worse over the next four years and voters subsequently voiced their dissatisfaction through the polls.

## 5.2) The 13<sup>th</sup> General Elections

Following Pak Lah's resignation after BN's poor performance in 2008, his deputy Najib Razak ascended to the presidency of the United Malays National Organization (UMNO, the largest party in the ruling BN coalition) and hence Malaysia's premiership. Najib started off his premiership with a slew of measures to liberalize the economy, releasing several detainees under the Internal Security Act (ISA) and introducing performance-driven policies for the government and civil service. National unity became a central agenda of his administration with the launch of the 1Malaysia tagline, a concept that encapsulates the very idea of unity in diversity and emphasizes the importance of national unity regardless of race, background, or religious belief for a better tomorrow.<sup>40</sup>

The 13<sup>th</sup> general election results saw the opposition coalition gain seven more seats than the previous election, bringing their total number of seats to 89 out of 222 and again denying BN their two-thirds majority. Most notably, despite winning the elections, it was the first time that BN lost the popular vote, winning 47 percent compared to the opposition's 51 percent. While this phenomenon is not entirely strange in the first-past-the-post, winner-takes-all electoral system, allegations of malapportionment, gerrymandering, and the use of phantom voters were believed to have skewed the election results in favor of BN.<sup>41</sup> Moreover, this election was the most expensive in history due to BN's use of the mainstream media and excessive use of state resources in their campaign strategy.<sup>42</sup>

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<sup>37</sup> Ibid.

<sup>38</sup> Kok, Francis Wah Loh. (2005). The March 2004 General Elections in Malaysia: Looking Beyond the "Pak Lah" Factor. *Kasarinlan: Philippine Journal of Third World Studies*, 20 (1), 3-24.

<sup>39</sup> Mohamad, Marzuki. (2004). Malaysia's 2004 General Elections: Spectacular Victory, Continuing Tensions. *Kasarinlan: Philippine Journal of Third World Studies*, 19 (2), 25-53.

<sup>40</sup> Government of Malaysia. (2017, June 30). The Story of 1Malaysia. Retrieved from <http://www.1malaysia.com.my/en/the-story-of-1malaysia>.

<sup>41</sup> Welsh, Bridget. (2013, June 19). Malaysia's Election and Najib's Challenged Mandate. *Asia Pacific Bulletin* No. 216.

<sup>42</sup> Ibid.

### 5.3) GE14 and the Black Swans of Malaysian Politics<sup>43</sup>

Although BN still emerged victorious in both elections, the denial of the two-thirds majority for BN in the 2008 elections and the further addition of seats for the opposition in 2013 strongly signaled the feelings of the Malaysian public toward the ruling government. Following the results of GE13, the opposition alleged that election fraud had taken place via immigrants given citizenship on shaky grounds and sent to vote in areas with close races; the presence of voters over 120 years of age; and hundreds of voters registered under the same address.<sup>44</sup> Dato' Seri Anwar Ibrahim, then opposition leader and former deputy prime minister, led a series of mass rallies in protest of the election results, and proceeded to challenge the results in court. The very structure of the Election Commission itself is problematic, as it is a body that falls under the purview of the Prime Minister's Department and reports directly to the prime minister, thus failing the basic international standard of impartiality.<sup>45</sup>

The next general elections are expected to be held on or before August 24<sup>th</sup> 2018. Between the last elections and now, corruption scandals have plagued the country as mentioned previously. Will this result in further gains by the opposition in the next elections? Or perhaps, with the ongoing investigations of 1MDB and the unpopularity of the prime minister,<sup>46</sup> will the BN coalition finally be unseated from power? As difficult as it is to measure public trust, predicting election results in Malaysia is even harder. The outcome of GE12 was seen as a "black swan" in Malaysian politics, and it is impossible to say whether the next election might be the same.

The past two general elections have shown a trend of the opposition gaining a progressively greater number of seats in Parliament. Having said that, however, the author does not think that BN will lose the next election. This is because, despite the corruption scandals plaguing the prime minister, four factors still strongly favor BN: first, the entrenchment of ethnic-based politics; second, the tight control BN has over the press and media; third, the lack of independent institutions; and last, a disunited and polarized opposition. These four factors stand in the way of a victory for the opposition, although it is likely that BN will not regain its two-thirds majority in Parliament.

This paper focuses on the lack of independent institutions. The other three factors are just as important, but they are beyond the scope of this article.

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<sup>43</sup> Hon. Liew Chin Tong, a Member of Parliament from the Democratic Action Party (DAP) – which is part of PH – used the term "black swan" to describe the GE12 results. Black swan is a term used to describe an unpredictable or unforeseen event, typically one with extreme consequences.

<sup>44</sup> Koswanage, Niluksi. (2013, May 26). Bitter election aftermath undermines Malaysian PM Najib. *Reuters*. Retrieved from <http://www.reuters.com/article/us-malaysia-politics-idUSBRE94P01120130526>.

<sup>45</sup> Welsh, Bridget. (2013, June 19). Malaysia's Election and Najib's Challenged Mandate. *Asia Pacific Bulletin* No. 216.

<sup>46</sup> Merdeka Center's Public Opinion Survey 2015 found that 46% of respondents were dissatisfied with the performance of the Prime Minister.

## 6. Institutions in Malaysia's Anti-Corruption Ecosystem

This section will explore the three most crucial three institutions in Malaysia to ensuring that anti-corruption efforts are carried out effectively. These institutions are the Election Commission (EC), the Attorney General's Chamber (AGC), and the Malaysian Anti-Corruption Commission (MACC). These three institutions are important to consider as their absolute independence is central in ensuring the effectiveness of anti-corruption efforts. When anti-corruption institutions are independent, it is more difficult for perpetrators to escape with impunity, and this will likely result in a higher level of trust amongst citizens.

### 6.1) The Election Commission

*“The integrity of elections is also political, because integrity depends on public confidence in electoral and political processes. It is not enough to reform institutions; citizens need to be convinced that changes are real and deserve their confidence. Inclusiveness, transparency, and accountability are all fundamental to developing that confidence. Without transparency, there is no way for citizens to know for themselves that elections are genuine. And there must be effective mechanisms and remedies for citizen complaints. The absence of accountability produces cynicism and reinforces citizen apathy and inefficacy.”*

-Global Commission on Elections, Democracy and Security, Deepening Democracy: A Strategy for Improving the Integrity of Elections Worldwide (2012)

The EC was constitutionally established in 1957 under Article 114 of the Federal Constitution of Malaysia. Its mission is to strengthen the parliamentary democratic system and to guarantee the rights of citizens to choose their representatives through the free and fair management, monitoring, and handling of elections.<sup>47</sup> Criticisms of the EC in recent years have suggested that the conduct of elections has not been free and fair.

The Institute for Democracy and Economic Affairs (IDEAS) and the Center for Public Policy Studies (CPPS) submitted a joint interim report to the EC on GE13. Three criticisms of the EC were identified in the report. First, almost all of the current members of the EC are from civil service backgrounds and much of the EC's staff is also seconded from the civil service. This raises serious credibility challenges, especially since the civil service is often accused of partisanship. Secondly, there were instances in which the EC had issued statements that were inconsistent with the dignity of its office. For example, the Deputy Chairman of the EC said that the opposition leader was “flat-out bluffing” when he claimed that there were foreigners registered as voters.

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<sup>47</sup> Suruhanjaya Pilihan Raya Malaysia (Election Commission of Malaysia). (2017, June 30). Visi, Misi dan Dasar Utama. Retrieved from <http://www.spr.gov.my/ms/info-spr/visi-misi-dasar-utama>.

Thirdly, the EC was overly defensive when dealing with criticism of its internal governance and operations, especially in relation to the revision and cleaning up of the electoral roll.<sup>48</sup>

Apart from structural problems, numerous other issues relating to the conduct of elections themselves have been raised. These issues include the unequal delineation of constituencies, the ineffectiveness of indelible ink, and allegations of foreigners being flown in to vote on polling day. These issues were also identified by other reports on GE13 by CSOs like Bersih as well as other independent observers.<sup>49</sup>

## 6.2) The Attorney General's Chamber

The Attorney General's (AG) role is defined in the Malaysian Constitution. (S)he acts as the adviser to the King or the Cabinet or any minister on legal matters. A flaw in this system, however, is the fact that the AG also assumes the role of public prosecutor. As the public prosecutor's role is to prosecute in criminal cases on behalf of the state, this fusion of roles presents a clear conflict of interest, especially when the person to be prosecuted is a high-ranking government official. An example of this incident occurred during the IMDB investigations when Tan Sri Abdul Gani Patail, who was AG at the time, was removed as he was heading the investigative task force. Since the power to appoint or remove the AG lies in the hands of the prime minister, and because the AG in Malaysia is also the public prosecutor, he could very well remove an AG that might bring a criminal prosecution against him. The fusion of these two roles is the first, and probably toughest, obstacle in tackling corruption in Malaysia. This is because the Malaysian Anti-Corruption Commission (MACC), the body in charge of investigating corruption, has no prosecutorial power. Prosecution of corruption is done by the public prosecutor, who is essentially the AG. If the public prosecutor's position is compromised, one can only expect corruption offenders to escape with impunity.

## 6.3) The MACC

One of the darkest days of the MACC was in 2009, when the body of Teoh Beng Hock, an aide to one of the State Assemblymen of Selangor, was found dead on the fifth floor landing of Plaza Masalam in Shah Alam. In 2015, the Court of Appeal held that his death was caused by multiple injuries resulting from a fall from the 14<sup>th</sup> floor of Plaza Masalam, which occurred following a nine hour interrogation session by the MACC. This tragedy thrust the MACC into the limelight, revealing the real threat to the lives of innocent people when the checks and balances that institutions must be subjected to are compromised.

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<sup>48</sup> Institute for Democracy and Economic Affairs and Center for Public Policy Studies. (2013). Was GE13 Free and Fair? Kuala Lumpur: Institute for Democracy and Economic Affairs and Center for Public Policy Studies.

<sup>49</sup> See also "Findings of the People's Tribunal of Malaysia's 13th General Elections" by Bersih 2.0 and, for an on the ground account of GE13, see "Malaysia's election: An Indonesian comparison" by Edward Aspinall.

During the height of the 1MDB scandal in 2015, several MACC officers were investigated under the Penal Code and the Banking and Financial Institutions Act 1989 for leaking government documents and banking information (Kumar 2015). The police also raided the MACC special operations division office of its deputy public prosecutor, taking documents related to the 1MDB probe.<sup>50</sup> The deputy chief commissioner of MACC at the time, Datuk Mustafar Ali, admitted that the MACC's investigation into 1MDB had been affected by the raids and questioning by the police (Malay Mail Online 2015). MACC has previously confirmed the existence of RM 2.6 billion in Najib's accounts, although they clarified that the money came from donors and not from 1MDB directly.<sup>51</sup>

A few days later, two MACC directors, Datuk Bahri Mohamad Zin (Special Operations) and Datuk Rohaizad Yaakob (Strategic Communications), were transferred to the Prime Minister's Department effective immediately. Both officers were known to be vocal against the actions taken by the police because of MACC's 1MDB investigation, and it is believed that they were transferred precisely for this reason (Mustafa 2015). Sources also said that they were transferred because of "disciplinary problems".<sup>52</sup>

The Teoh Beng Hock tragedy and the crackdown on MACC because of 1MDB are two incidents that elicit opposite reactions from the public. In the former, Beng Hock's death through such brutal methods by a state agency reveals the real threat to innocent peoples' lives when the checks and balances that institutions must be subjected to are compromised. During the 1MDB crackdown however, the tables were turned as MACC became the victim of persecution. Their crime? Trying to uncover the truth.

#### 6.4) Legislation Necessary for Gaining Public Trust

Apart from independent institutions, an effective anti-corruption environment needs to be supported by legislation that ensures accountability on the part of the government and guarantees rights for citizens. This section will outline the laws needed for a strong corruption prevention environment.

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<sup>50</sup> The Straits Times (Aug. 2 2015). Malaysian police says office of deputy public prosecutor raided, denies link to 1MDB. Retrieved from <http://www.straitstimes.com/asia/se-asia/malaysian-police-says-office-of-deputy-public-prosecutor-raided-denies-link-to-1mdb>.

<sup>51</sup> Naidu, Sumisha (Aug. 3 2015). RM2.6b in Malaysian PM's accounts from donations, not 1MDB: Special Task Force. *Channel News Asia*. Retrieved from <https://www.channelnewsasia.com/news/asiapacific/rm2-6b-in-malaysian-pm-s-accounts-from-donations-not-1mdb-specia-8229540>.

<sup>52</sup> Mustafa, Muzliza (Aug. 7 2015). 2 MACC directors in 1MDB probe transferred to PM's Department. *The Edge Markets*. Retrieved from <http://www.theedgemarkets.com/article/2-macc-directors-1mdb-probe-transferred-pm%E2%80%99s-department>.

#### 6.4.1) Asset declaration

Currently, the asset declaration practice in Malaysia involves ministers and top government officials, members of the civil service, members of Parliament, special officers to the ministers, and State Assemblymen from the Penang and Selangor governments. However, these practices are inadequate. For example, ministers and top government officials declare their assets confidentially to the prime minister annually and MPs are not legally required to declare their assets. There exists, however, a Code of Ethics that requires MPs to declare their assets every two years. The Penang and Selangor governments have no state regulations on asset declaration, but some state assemblymen have declared their assets voluntarily (Onn 2016).

#### 6.4.2) Political financing

As stated earlier in this essay, Malaysia does not have any laws that regulate donations to political parties or politicians. What do exist are limitations on expenditures by election candidates, stated in Section 19 of the Election Offences Act 1954. The limit for parliamentary candidates is RM 200,000 and RM 100,000 for State Assembly candidates.

#### 6.4.3) Freedom of information

There is currently no Freedom of Information (FOI) law at the federal level. Penang and Selangor have FOI enactments at the state level, although there have been criticisms that they are not thorough enough. A significant hindrance to FOI in Malaysia is the Official Secrets Act (OSA). This Act makes all government documents secret by default. For FOI to be possible, the OSA must first be abolished.

#### 6.4.4) Witness and whistleblower protection

The current Witness Protection Act of 2009 does not give adequate protection to witnesses. As for whistleblowers, it is proposed that disclosures can be made through other means apart from an enforcement agency. Examples of enforcement agencies are the police force, MACC, and the Royal Malaysian Customs Department. The law should be amended to have an independent whistleblower protection statutory body (like SUHAKAM) that evaluates the information and decides whether or not to give protection to a whistleblower.

## 7. Recommendations

### 7.1) Institutional reforms

The EC should, first and foremost, be completely independent of the Prime Minister's Department. Once the EC is completely independent of the influence of the executive, reforms in the electoral processes can be implemented.

The roles of the AG and the public prosecutor should be separated and independent of each other (Azhari and Lim 2016). The public prosecutor will head the Office of Public Prosecutions and be in charge of all prosecutorial decision-making functions, whereas the AG will be a government minister who is accountable in Parliament for the actions of the public prosecutor – securing both prosecutorial independence and transparency. The strongest path to reform is through the amendment of the Federal Constitution, the Criminal Procedure Code (where the role of the AG as the public prosecutor is defined) and the Interpretation Acts of 1948 and 1967.

The public prosecutor should have security of tenure to ensure that (s)he carries out their duty without fear or favor. (S)he cannot be easily removed before compulsory retirement. (S)he can choose to retire, or be subjected to impeachment if (s)he has committed any misconduct.

The Federal Constitution should be amended to establish a new constitutionally ratified body, the Independent Anti-Corruption Commission (IACC). The IACC is to be made up of a group of commissioners whose task it is to oversee the ACA (formerly, the MACC). The IACC is to be akin to the Election Commission, in that it is independent from the Public Services Commission.

The IACC would operate as a constitutional oversight body that supervises the operational arm, the ACA.<sup>53</sup> The IACC would be responsible for the appointment, promotion and discipline of ACA officers. Its recruitment powers are to be exercised independent of the Public Services Commission. The IACC may further establish working committees as they see fit. An IACC annual report is to be tabled and debated in Parliament.

### 7.2) Legislative reforms

A federal-level law should be enacted to make it mandatory for ministers, MPs, and senators to declare their assets. The law should state that all of Malaysia's ministers, MPs, and senators must declare their assets to a parliamentary committee that is independent from the executive. The MACC should be given the mandate to verify and monitor asset declarations by civil servants as well as politicians. Finally, information on declared assets should be made publicly available.

A federal-level law that sets out the rules and procedures relating to political donations should be enacted. The law should include mechanisms for punishing parties and individuals who do not adhere to the rules and procedures set out in the act.

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<sup>53</sup> The Malaysian Bar (2015). Memorandum for the Reform of the Malaysian Anti-Corruption Commission. *The Malaysian Bar, Circular No. 151*.

An FOI law should be enacted at the federal level and all government documents should be open and readily available to the public by default.

An independent oversight body should be formed to protect witnesses who are uncovering corruption within the executive. The term “witness” in the Act should be expanded to include whistleblowers as well.

## **8. Conclusion**

This essay has attempted to show that there is a correlation between corruption and public trust. The evidence put forth to show that public trust has dwindled comes from the Edelman Trust Barometer, Merdeka Center Surveys, and gains by the opposition coalition in the previous two general elections. The current state of institutions and legislation relating to corruption has been examined, and recommendations for reform have been proposed.

Although the results of surveys might be debatable and elections in Malaysia are alleged to be unfair, the voting trends of the previous two elections are significant indicators of an increasing public demand for higher levels of accountability and transparency in government. With the 14<sup>th</sup> GE looming in the near future, Malaysians continue to hold their breath for the usual theatrics, promises, and manifestos of election season.

For meaningful change to happen, it is more crucial than ever for Malaysians to realize the importance of values such as honesty, integrity, accountability and transparency in all aspects of governance. But in order for these values to be strongly entrenched in the fabric of the nation, there needs to be demand from all Malaysian citizens. The government has to realize that it is costly for them to ignore the people’s demands. If this does not happen soon, Malaysia is at risk of falling behind its regional neighbors.



## Case Study 3: Mongolia

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### 1. State of Corruption in Mongolia

Although the utilization of its rich mineral and natural resources has been the root of Mongolia's rapid economic growth in the past few years, it has also had many negative impacts on governance and corruption. No concrete results have emerged yet, despite vast transformations and efforts against corruption that are currently underway.

Most research reports by independent survey organizations, including the IAAC (Independent Authority against Corruption), emphasize that the level of corruption in Mongolia remains consistently high. According to an assessment conducted by citizens and researchers, the level of corruption among government institutions varies.

Since 2008, pursuant to the 13<sup>th</sup> Decree by the Parliament of Mongolia, the IAAC has been conducting an annual perception survey about political and law enforcement agencies. According to this data, high level corruption is most common within the political and judicial systems.

The index of high level corruption was 3.65 in 2015, 0.07 higher than the 2014 index of 3.58. 83.3 percent of respondents thought that the financing mechanisms of political parties as well as the political appointment system had a major effect on increasing high level corruption, while 80.3 percent of respondents said that the electoral financing system had a major impact on the higher corruption rate in 2015. Furthermore, in 2015 78.8 percent of respondents indicated that influence over government officials through political arrangements such as politicians and high level officials was very widespread, whereas 62.1 percent of researchers agreed that a political corruption shifted into more pre-arranged and secret form.

Table 1 illustrates the scores of Mongolia on the Corruption Perceptions Index of Mongolia, which range between 2.7 and 3.9, demonstrating that Mongolia falls into the category of most corrupt countries. Moreover, some research studies have noted that corruption is the third biggest problem Mongolia is facing today and needs to be tackled urgently.

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<sup>1</sup> Chairman, Academy of Political Education

Year	Score	Rank	Number of Countries
2004	3.0	85	145
2005	3.0	85	159
2006	2.8	99	180
2007	2.8	102	180
2008	3.0	106	180
2009	2.7	120	180
2010	2.7	116	178
2011	2.7	120	183
2012	3.6	94	176
2013	3.8	83	177
2014	3.9	80	175
2015	3.9	72	169
2016	3.8	87	176

**Table 1.** Corruption Perceptions Index of Mongolia (2004-2016)

(Source: [www.transparency.org](http://www.transparency.org) and <https://freedomhouse.org/report/freedom-world/2017/mongolia>.)

In recent years, studies have ranked government institutions, including high-level state organizations, as the most corrupt in the country. Notably, the Parliament of Mongolia placed 5<sup>th</sup> in 2010 and the Cabinet of Ministers placed 5<sup>th</sup> in 2015 on lists of Mongolia's most corrupt institutions.<sup>2</sup> In 2015, the first five entries on the list were all government organizations: the Administration of Land Affairs, political parties, the Mineral Resource Authority, the Cabinet of Ministers, and the Parliament. In 2016, the most corrupt institutions were political parties, the Parliament, and the Cabinet of Ministers. This indicates the current state of corruption in the country and the low level of public trust in political institutions.<sup>3</sup>

<sup>2</sup> Sant Maral Foundation and The Asia Foundation. (2013, March). "Survey on Perceptions and Knowledge of Corruption 2013." Retrieved from <https://asiafoundation.org/resources/pdfs/SPEAKfinalAPRILTAFSMF.pdf>.

Sant Maral Foundation and The Asia Foundation. (2015, April). "Survey on Perceptions and Knowledge of Corruption 2015." Retrieved from <https://asiafoundation.org/resources/pdfs/SPEAK16thSurveyENG.pdf>.

<sup>3</sup> Sant Maral Foundation and The Asia Foundation. (2016, March). "Survey on Perceptions and Knowledge of Corruption 2016." Retrieved from <https://asiafoundation.org/publication/survey-perceptions-knowledge-corruption-speak-vii/>.

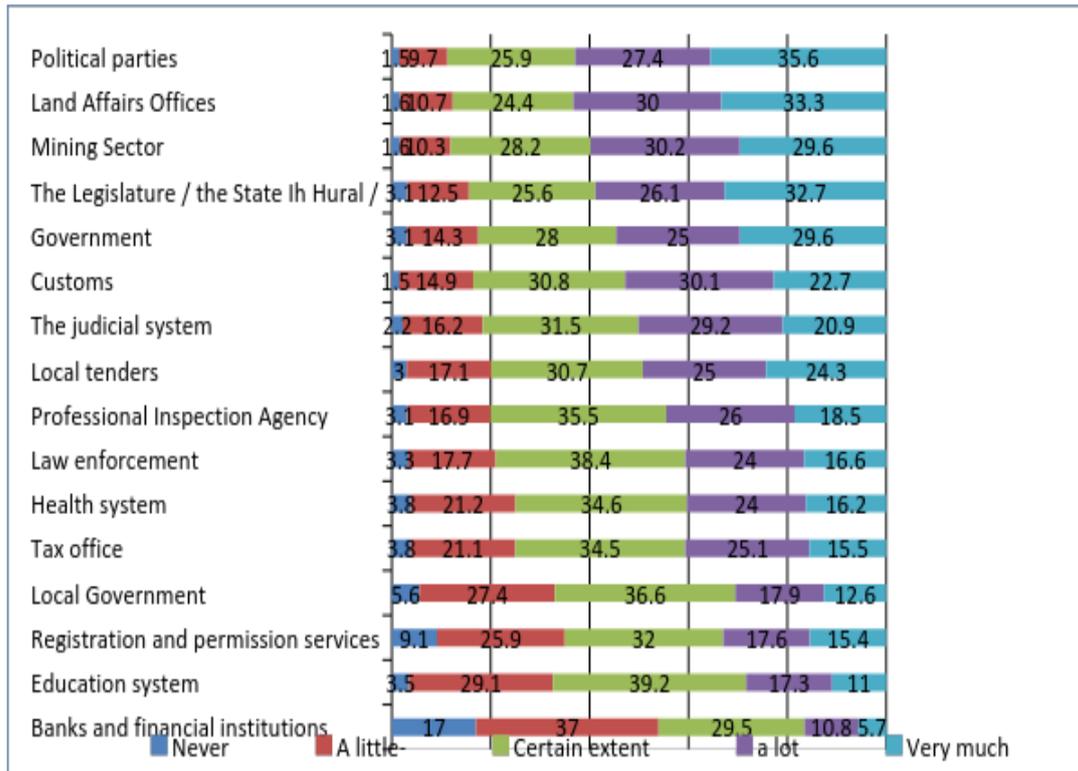


Fig 1. Corruption Scores in 2016 (by sector) (Source: Sant Maral Foundation and The Asia Foundation, "Survey on Perceptions and Knowledge of Corruption 2016.")

In the results of a nationwide survey conducted in 2014, the level of corruption in Mongolia received a high score of 3.77.<sup>4</sup> 48.5 percent of experts responded that the level of corruption was high, 24.3 percent responded that it was average, 16.6 percent responded that it was extremely high, 7.6 percent responded that it was low, and 3 percent chose "Don't know" as a response. No one, however, chose the response "Not at all." These indications show that the level of corruption is still steady (Figure 2).

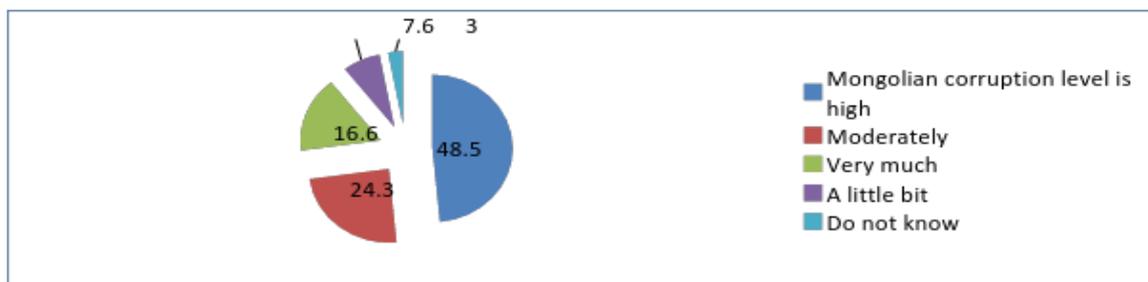
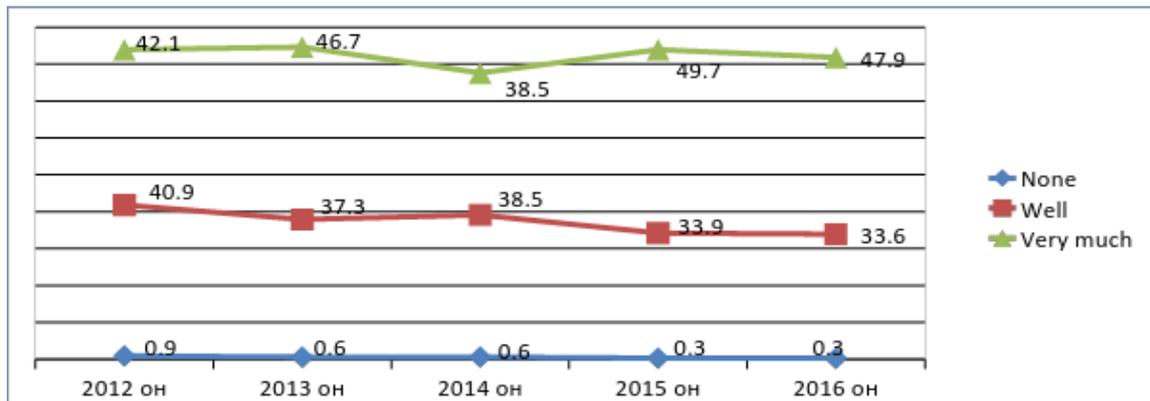


Fig 2. The Level of Corruption in Mongolia (Source: IAAC, "Survey on Perception of Corruption in Politics and Law Enforcement Agencies, 2014.")

<sup>4</sup> The level of corruption in Mongolia was evaluated by experts with indicators of (1) Not at all corrupt, (2) Slightly, (3) Average, (4) High, and (5) Extremely.

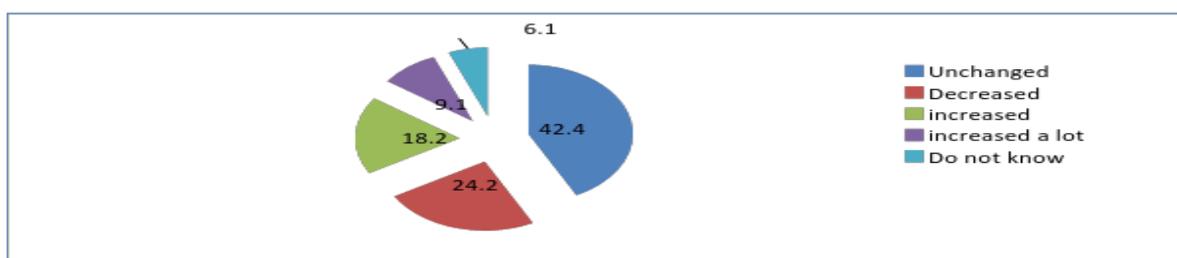
### 1.1) Corruption in Government Institutions

Assessments of the corruption level within government institutions did not decline between 2015 and 2016 (Figure 3). Half of the respondents surveyed responded that the corruption level was extremely high in state organizations. One in ten respondents answered “Don’t know.”<sup>5</sup>



**Fig 3.** “In your opinion, how much corruption is there in the public sector?” (Source: Sant Maral Foundation and The Asia Foundation, “Study of Private Sector Perceptions of Corruption 2016,” <https://asiafoundation.org/publication/study-private-sector-perceptions-corruption-stopp-survey-2016/>)

In assessing changes in the corruption level of political and law enforcement agencies in 2014, 42.4 percent of respondents said there had been no change and 24.2 percent of respondents said that it had decreased. 18.2 percent of respondents, however, said that corruption had increased and 9.1 percent responded that it had increased significantly. Furthermore, no respondent selected the answer “it has decreased significantly.” 6.1 percent of respondents answered “Don’t know.” The average score of the evaluation was 3.13 (Figure 4).<sup>6</sup>



**Fig 4.** “How has corruption in Mongolia’s political and law enforcement institutions changed over the last year?” (Source: IAAC, “Perception survey on political and law enforcement agencies, 2014.”)

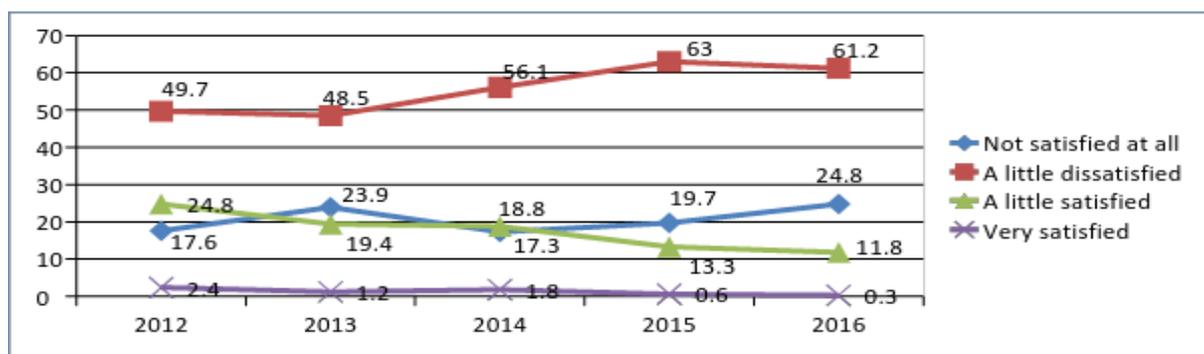
<sup>5</sup> Sant Maral Foundation and The Asia Foundation. (2016, March). “Survey on Perceptions and Knowledge of Corruption 2016.” Retrieved from <https://asiafoundation.org/publication/survey-perceptions-knowledge-corruption-speak-vii/>.

<sup>6</sup> Independent Authority against Corruption. (2014). “Survey on Corruption Perception of Political and Law Enforcement Agencies, 2014.”

As noted by the Chair of Transparency International Mongolia, L.Tur-Od, “Globally, democracy declines where political and judiciary corruption increases. Conversely, with the decrease of corruption democracy becomes stronger. This has been reflected in Mongolian practice as well.”<sup>7</sup>

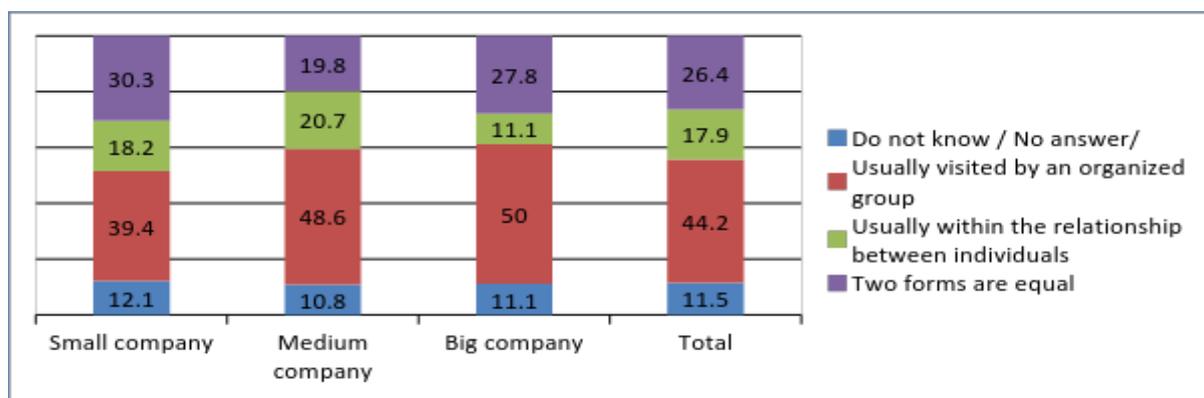
## 1.2) Corruption in the Private Sector

The influence of government institutions in the private sector is significantly widespread. According to the Survey on Private Sector Perceptions of Corruption, in 2016, the satisfaction level of the private sector dropped to the lowest point of all time and nearly a quarter of respondents answered that the business environment in Mongolia is not satisfactory (Figure 5).



**Fig 5.** Factory Environment Survey on Private Sector Perceptions of Corruption in Mongolia  
(Source: Sant Maral Foundation and The Asia Foundation, “Study of Private Sector Perceptions of Corruption 2016.”)

A majority of entrepreneurs emphasized that corruption in government institutions has become more pre-arranged and organized (Figure 6). Out of all respondents, 26.4 percent participated in government bidding and tender processes (17.6 percent of small companies, 28.8 percent of medium companies, and 48.1 percent large companies). Business entities tend to shoulder a comparatively higher level of cost in order to obtain special licenses or win in tender processes.



**Fig 6.** “In your opinion, is corruption spread more through contacts or organized groups?”  
(Source: Sant Maral Foundation and The Asia Foundation, “Study of Private Sector Perceptions of Corruption 2016.”)

<sup>7</sup> “Corruption Impact on Democracy” Roundtable Meeting, May 14<sup>th</sup>, 2017 at the Academy of Political Education, Ulaanbaatar.

The United Nation's Sustainable Development Goals are yet another mechanism which came into force on the 1<sup>st</sup> of January 2016, adopted by world leaders the year prior. Goal 5 of the SDGs, *Gender Equality and Women Empowerment*,<sup>8</sup> provides a comprehensive set of targets to provide women and girls with access to education, employment, health and other socio-political rights. These include:

- 1) Ending all forms of discrimination against all women.
- 2) Eliminating all forms of violence against and exploitation of women and girls.
- 3) Eliminating all forms of harmful practices such as forced marriages and female mutilation.
- 4) Recognizing the value of domestic work through the provision of public services.
- 5) Ensuring women's full and effective participation in decision-making mechanisms.
- 6) Ensuring access to sexual and reproductive health, and reproductive rights.
- 7) Undertaking reforms to give women equal rights to economic resources.
- 8) Enhancing the use of enabling technology to promote the empowerment of women.
- 9) Adopting policies and legislation to promote gender equality.

International law requires states to put appropriate mechanisms in place to allow women to access and enjoy due rights and freedoms. In order to meet objectives laid out under the Sustainable Development Goals, Pakistan must have an effective legislative system and justice sector which not only secure these rights, but ensure that policing and prosecution services to protect women are implemented so that gender equality in all sociopolitical and economic areas may be achieved.

### 1.3) Corruption in Politics and Political Parties

The following factors are taken into account to assess the political corruption level in Mongolia: scope of political corruption, types, circumstances, causes, consequences, and negative impacts. The fact that there are fewer changes in the IAAC's 2016 report than in its 2015 report shows that the scope of political corruption has not decreased and no critical actions have been taken against corruption.

D. Jargalan, senior specialist in the Survey Department of the IAAC, notes that "In addition to a proper legal framework, the participation of other organizations is essential to combat corruption. Accountability mechanisms are weak at every level even though political influence and its financing concerns are included in the National Anti-Corruption Program and Law on Transparency of Conflict of Interests."<sup>9</sup>

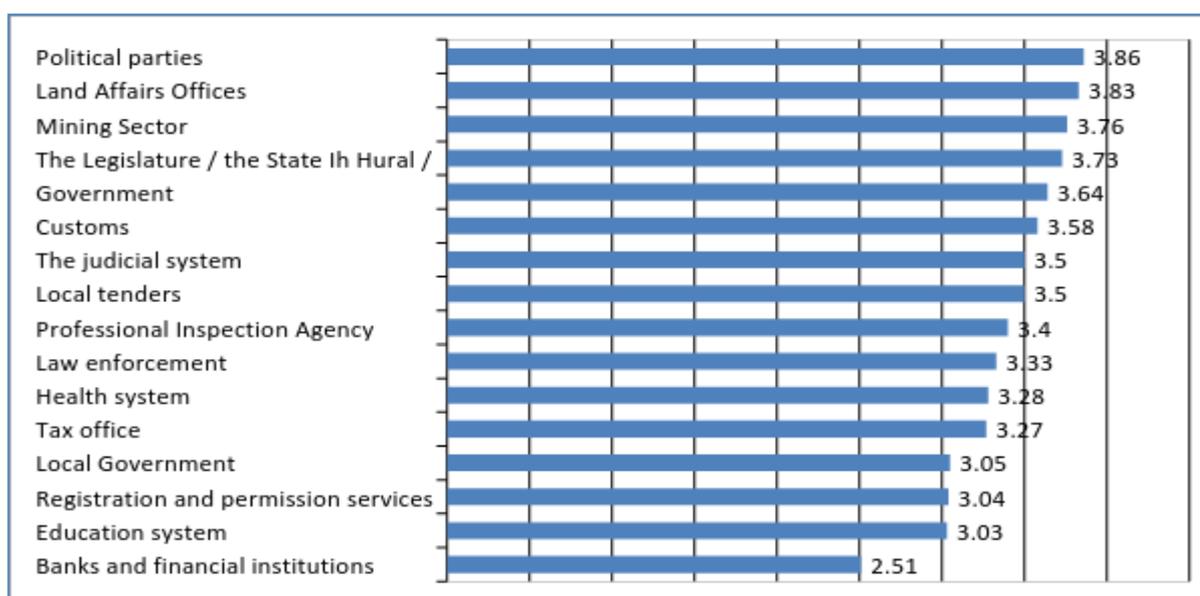
<sup>8</sup> See <http://www.un.org/sustainabledevelopment/gender-equality/>.

<sup>9</sup> "Corruption Impact on Democracy" roundtable meeting, May 14<sup>th</sup>, 2017 at Academy of Political Education, Ulaanbaatar.

Political Corruption level (3.65)	
Scope (3.53)	<ul style="list-style-type: none"> <li>Political corruption (4.05)</li> <li>Political corruption level (3.58)</li> <li>The extent of political corruption in the sector (3.39)</li> <li>Corruption levels of specific public sector institutions (3.47)</li> <li>Political corruption in sectors and activities (3.72)</li> </ul>
Type (3.58)	<ul style="list-style-type: none"> <li>The form of bribe (3.49)</li> <li>The form of influence (3.64)</li> <li>Political party affiliation (3.44)</li> <li>Form of political corruption (3.84)</li> <li>To get a bribe (3.37)</li> </ul>
Causes (3.89)	<ul style="list-style-type: none"> <li>Factors influencing political corruption (3.90)</li> <li>Deficiencies leading to political corruption (3.94)</li> </ul>
Consequences (3.69)	<ul style="list-style-type: none"> <li>The consequences of political corruption (4.02)</li> <li>Spending on political corruption (3.38)</li> </ul>

**Table 2.** Assessment of the Corruption Level in Political and Law Enforcement Agencies (Source: IAAC, "Survey on Perception of Corruption in Politics and Law Enforcement Agencies, 2016.")

Despite the fact that corruption has shrunk in scope, the negative consequences of political corruption have increased and influenced the public's perceptions of corruption in a negative way.<sup>10</sup> In a 2016 report, Parliament, the Cabinet of Ministers, and political parties were ranked among the top five most corrupt institutions in Mongolia just as they were in the 2015 report. Hence, the most challenging issue facing this country today is its state of public corruption.<sup>11</sup>



**Fig 7.** Corruption Perceptions (by sector) 2016 (1 = "never" and 5 = "very much" corrupted) (Source: Sant Maral Foundation and The Asia Foundation, "Study of Private Sector Perceptions of Corruption 2016.")

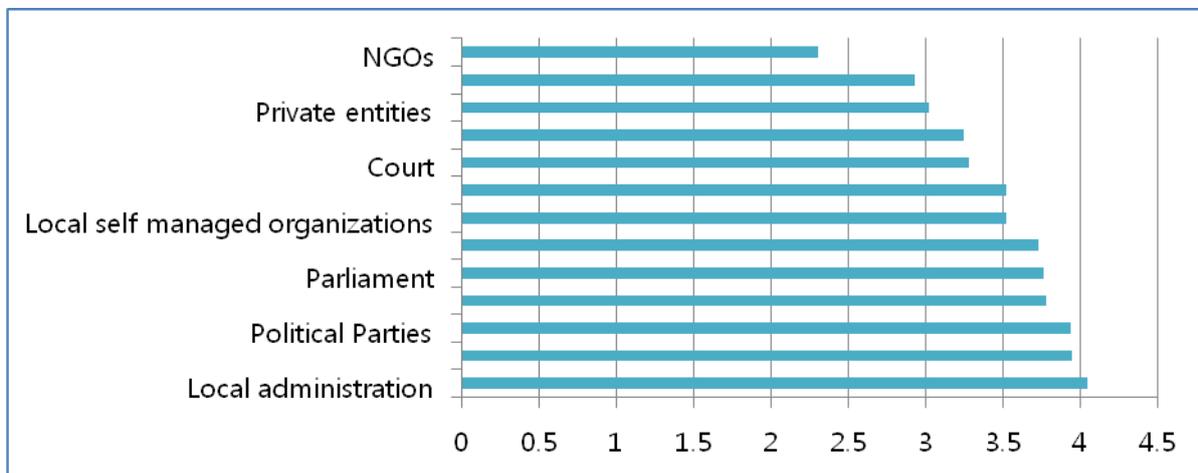
<sup>10</sup> IAAC, (2017). "Survey on Perception of Corruption in Politics and Law Enforcement Agencies, 2016."

<sup>11</sup> Sant Maral Foundation and The Asia Foundation. (2016, March). "Survey on Perceptions and Knowledge of Corruption 2016." Retrieved from <https://asiafoundation.org/publication/survey-perceptions-knowledge-corruption-speak-vii/>.

Comparable surveys by relevant organizations<sup>12</sup> show that corruption in political parties was nearly as high in 2016 (3.86) as it was in 2014 (3.94) (Figures 7 and 8).

A 2013 survey emphasizes that the political and electoral financing system should be taken into account when considering the reform of related legislation. Moreover, it suggests that appointments made on political grounds should be changed to merit-based appointments.<sup>13</sup>

In an assessment of the corruption level of Mongolia given by experts from public institutions, political parties, NGOs, the private sector, and the media who have working relationships with government institutions, 65 percent of respondents answered that corruption is highest in local administrations, 66.6 percent responded that it is highest in the Cabinet of Ministers and its relevant agencies, and 53 percent responded that it is highest in political parties.<sup>14</sup> Political parties are not keen to change their approaches, which lead to high risks of corruption, despite these publicly released survey reports.



**Fig 8.** "How do you perceive the extent of corruption in the last year?"

(Indicators: 1- not at all, 2- slightly, 3- average, 4- high, 5- significantly high)

(Source: IAAC, "Survey on Perception of Corruption in Politics and Law Enforcement Agencies, 2014.")

#### 1.4) Combating High Level Corruption

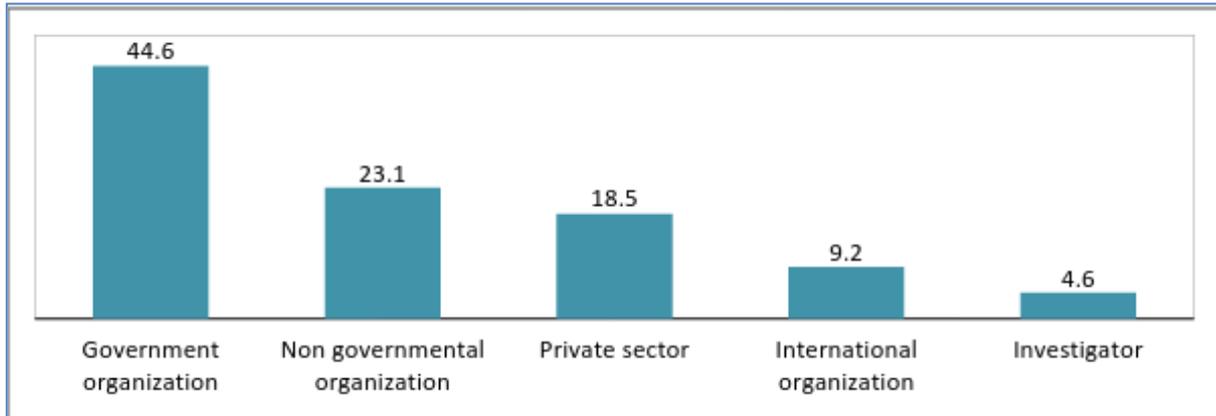
Experts have stated that in order to reduce high-level corruption in politics there are several important steps that should be taken, such as instituting merit-based appointments, increasing the transparency of political parties, and encouraging the politicians to combat corruption.<sup>15</sup>

<sup>12</sup> These organizations use the same scale that TI does to measure corruption.

<sup>13</sup> IAAC. (2014). "Survey on Perception of Corruption in Politics and Law Enforcement Agencies, 2013."

<sup>14</sup> IAAC. (2015). "Survey on Perception of Corruption in Politics and Law Enforcement Agencies, 2014."

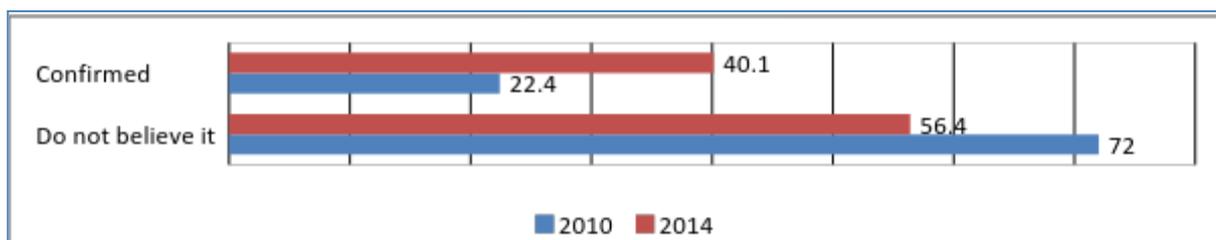
<sup>15</sup> IAAC. (2017). "Survey on Perception of Corruption in Politics and Law Enforcement Agencies, 2016."



**Fig 9.** Distribution of Experts and Researchers by Sector Surveyed  
(Source: IAAC, "Survey on Perception of Corruption in Politics and Law Enforcement Agencies, 2016.")

### 1.5) Level of Confidence in the Independent Authority against Corruption

As stated in the Asian Barometer Survey on Democracy, Governance and Development<sup>16</sup>, the level of public confidence in the Independent Authority against Corruption increased from 22.4 percent to 40.1 percent between 2010 and 2014.



**Fig 10.** "Are you confident in the IAAC?"  
(Source: Asian Barometer Survey - Democracy, Governance and Development Report)

In the 2014 survey, 38.1 percent of respondents answered that the government is not taking proper action against corruption while 35.1 percent responded that it is taking action to some extent. However, this indicator has yet to receive a positive response from 50 percent or more of total respondents.

Chair of Transparency International Mongolia, L.Tur-Od, states that "A will to fight against corruption is caused by one's political interest. Besides government efforts against corruption, it is important that citizens are willing to participate in anti-corruption. In the recent case of South Korea, public participation played an enormous role in bringing down the president. Even if a person is sincere enough, whether (s)he has an interest in fighting against corruption is important. Moreover, another important issue for anti-corruption is whether instructive information is delivered to the public."<sup>17</sup>

<sup>16</sup> Asian Barometer Survey. [www.asianbarometer.org](http://www.asianbarometer.org)

<sup>17</sup> "Corruption Impact on Democracy" Roundtable Meeting, May 14<sup>th</sup>, 2017 held at the Academy of Political Education, Ulaanbaatar.

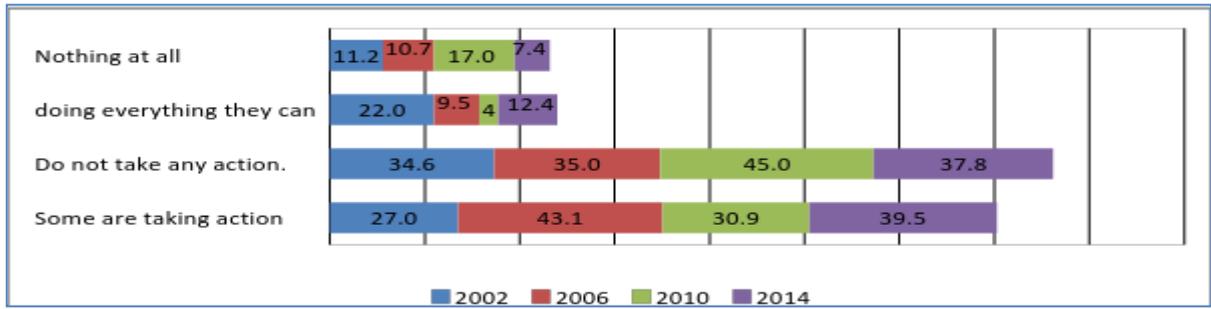
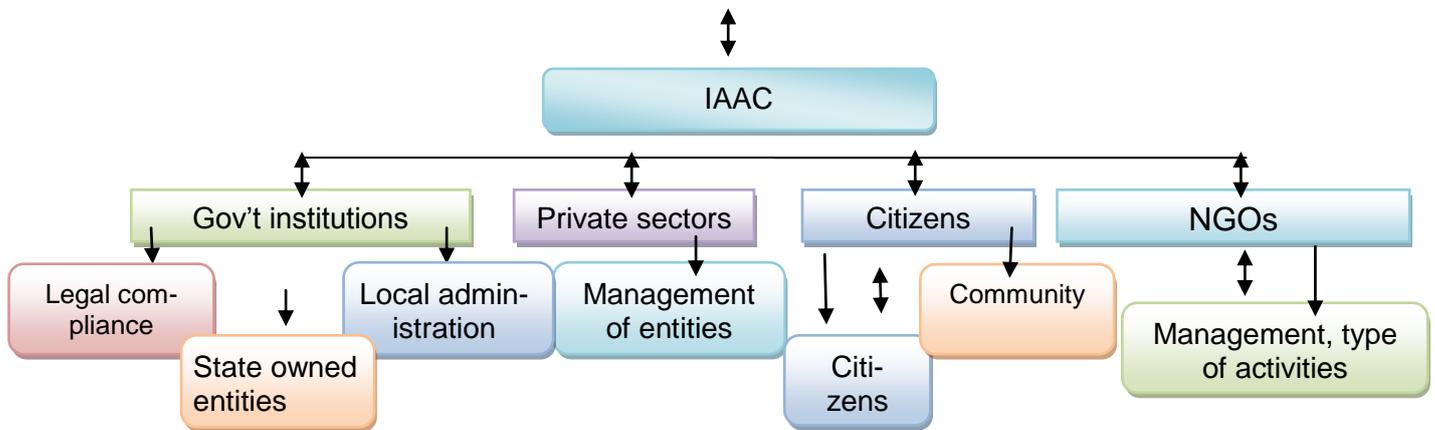


Fig 11. "How much do you think the government is working to stop corruption and eliminate corruption?" (Source: Asian Barometer Survey - Democracy, Governance and Development Report)

## 2. Mechanisms to Combat Corruption



### 2.1) Institutions Participating in Anti-Corruption Efforts

**THE PARLIAMENT:** Parliament initiates and approves laws and programs under anti-corruption and reform legislation.

**INDEPENDENT AUTHORITY AGAINST CORRUPTION (IAAC):** The Independent Authority Against Corruption is a special, independent government body charged with the functions of raising public anti-corruption awareness through education, preventing corruption activities, carrying out undercover operations, inquiring into and investigating corruption crimes, and reviewing and inspecting the assets and income declarations of those required by law.

**GOVERNMENT INSTITUTIONS:** The government is responsible for implementing the code of ethics for civil servants and officials, carrying out activities to prevent corruption, providing necessary surveys and data to IAAC, and reporting to the IAAC if corruption cases occur or are witnessed. The government is also obligated to submit asset and income declaration reports and other necessary information annually. Officials who hold managerial positions in political, administrative, or special

agencies of government and administrative and managerial officials of public service organizations, including senior accountants, are all subject to the Anti-Corruption Law.

**LOCAL ADMINISTRATION:** All legal obligations under the Anti-Corruption Law are applied to local governments as they are to other governmental organizations. All relevant officials and citizen representatives are subject to the Anti-Corruption Law.

**STATE OWNED ENTITIES:** The common rules that apply to government organizations under the Anti-Corruption Law apply to state owned entities as well. Managers and administrative officials of state or locally owned legal entities or legal entities with state or local equity, including partial equity, are subject to the Anti-Corruption Law.

**PRIVATE ENTITIES:** Private entities must adopt and comply with the code of ethics according to the Anti-Corruption Law and perform preventive activities. They may submit corruption investigation requests, complaints, and information to the IAAC.

**NON-GOVERNMENTAL ORGANIZATIONS:** NGOs conduct and participate in surveys, contribute to education and training processes, provide independent monitoring of state organizations, and support IAAC activities. Persons subject to the Anti-Corruption Law are limited to administrative or managerial officials in organizations funded by state or local budgets in order to conduct activities for state purposes.

**CITIZENS:** Citizens or legal persons may submit corruption-related requests, complaints, or information to the IAAC, which is responsible for approving regulations on reporting via writing, oral communication, or social networks. However, in the current law there is no sanction that specifies that citizens have the right to monitor and evaluate IAAC activities.

**PROSECUTING AGENCIES:** Agencies responsible for prosecution have control over IAAC investigations of corruption crimes pursuant to the Criminal Procedure Law, the Law on Intelligence Activities, and the Law on Prosecuting Agencies.

The Anti-Corruption Law states that a special monitoring panel of Parliament shall have overall control of how the IAAC conducts its duties pursuant to the Law on Intelligence Activities. Reorganization and dissolution of the IAAC are subject to Parliament resolution based on the opinion of the National Security Council.

## 2.2) The Legal Framework for Anti-Corruption

- Mongolia adopted the Law on Anti-Corruption in 1996 (amended nine times).<sup>18</sup>
- In 2002, Parliament approved the National Program on Combating Corruption and established a non-standing national committee to monitor and follow up on the program.
- Another big accomplishment in combating corruption was the Mongolian government's ratification of the UN Convention Against Corruption in 2005.<sup>19</sup>
- On July 6<sup>th</sup> 2006, the Parliament of Mongolia adopted the Anti-Corruption Law of 2006 which then entered into force on November 1<sup>st</sup> 2006. This law established the Independent Authority against Corruption, which started operating on January 11<sup>th</sup> 2007.<sup>20</sup>
- The bylaw of Public Council under the IAAC has been approved by Annex 120 of the Presidential Declaration of the President of Mongolia.
- The Law on Regulating Public and Private Interests in Public Service and Preventing Conflicts of Interest (amended seven times<sup>21</sup>) was adopted on January 19<sup>th</sup> 2012.
- Approval of a new National Anti-Corruption Program on November 3<sup>rd</sup> 2016 improved the legal framework for implementing anti-corruption objectives.

## 3. The Role and Participation of NGOs and Survey Organizations in Anti-Corruption Efforts

### 3.1) The Role and Participation of Civil Society in Combating Corruption

The IAAC cooperates with law enforcement institutions as well as governmental and non-governmental organizations.<sup>22</sup> Within this framework, it works with non-governmental organizations to conduct surveys and educational activities.

Anti-corruption research organizations and non-governmental organizations work in the following areas:

- Accessing, creating, and using information to increase the accountability of government agencies and officials
- Raising awareness of corruption issues, educating citizens, and distributing information to the public

<sup>18</sup> Dates of amendments: 10.11.2016; 07.09.2016; 21.07.2016; 30.10.2015; 29.05.2015; 24.01.2014; 18.05.2012; 19.01.2012; 29.05.2008.

<sup>19</sup> The UN Convention Against Corruption was opened for signature in 2003.

<sup>20</sup> See [www.iaac.mn](http://www.iaac.mn).

<sup>21</sup> Dates of amendments: 2012, twice in 2013, and annually since 2014.

<sup>22</sup> Section 18.4.4 of the Anti-Corruption Law of 2006 mandates the IAAC to "Obtain necessary information, surveys, explanations, definitions and other documents, free of charge, from businesses and entities, officials and individuals, and review these materials and acquire expert analyses and verifications."

- Collaborating, coordinating, and partnering with governments in developing and implementing anti-corruption legislation and programs
- Offering assistance to corruption witnesses and whistleblowers
- Conducting comprehensive research on corruption issues and making independent reports
- Participating in anti-corruption inquiries and investigations, and supporting the activities of the IAAC

### 3.2) Challenges for the Role and Participation of Civil Society

Challenges for civil society are more likely to be performance-related (time, funding, and transparency) than caused by government policy restrictions<sup>23</sup>. Significant challenges include:

- Competition: Many civil society organizations are competing for limited resources and a small amount of funding sources
- Politics: The government may not be committed to providing opportunities for the participation of civil society organizations
- Perception: Civil society organizations may be seen as incompetent and ineffective
- Administration: It may not be responsive in a timely manner
- Acquisition of information: The government may be reluctant to reveal useful information
- Financing: Civil society organizations may not be sustainable or stable

Distribution of Information: Lack of required information and no public interest

### 3.3) Recommended Measures to Improve the Role and Participation of Civil Society

- Creation and improvement of a favorable legal and institutional environment for active civil society organizations
- Strengthen multilateral mechanisms for coordinating, monitoring, and evaluating the implementation of legislation against corruption and ensuring substantial involvement of civil society organizations
- Strengthening the political interests of many organizations involved in the anti-corruption process
- Ensuring valid civil society participation in government policies and programs against corruption, holding public hearings, and consulting with citizens

New primary goals of anti-corruption and prevention practices in Mongolia include: protection of whistleblowers, accountability for delivering public services and goods, managing conflicts of interest, regulations on lobbying, and contract transparency.

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<sup>23</sup> *U4 Expert Answer*. [www.u4.no/publications/the-un-convention](http://www.u4.no/publications/the-un-convention).

## 4. Challenges of Fighting Corruption

- Branches of the IAAC are still not established in local administrative units although they are legally granted a wide range of authority to combat corruption. Due to these circumstances, educational and preventive anti-corruption work is not consistent in local areas.
- The extensive number of government officials with immunity and capacity in the government is another challenge in the prosecution of corruption cases.
- The complex networking of government officials and highly organized corruption structures is the root of still more hurdles in the legal framework for fighting against corruption.
- Government institutions, officials, and citizens are not taking adequate preventive actions against corruption based on suggestions made in relevant reports and surveys by the IAAC and independent survey organizations. The will of political institutions to implement anti-corruption measures is very weak.
- Changes in the managerial appointments and organizational structure of the IAAC are subject to the powers of the president and Parliament of Mongolia. Changes in the management of the IAAC frequently occur after a new Parliament is elected.
- Political institutions – including the Parliament, Cabinet of Ministers, and political parties – are ranked in the top five most corrupt organizations in Mongolia. These are the very institutions that make appointments within the IAAC.<sup>24</sup>

## 5. Conclusion

Mongolia is a country where politics, especially involving top government officials, plays an almost-too-important role in all sectors, including the Independent Authority against Corruption. As a result, government policies and actions are failing to serve as a good governance model, and economic and social policies are failing to have a positive impact on Mongolia's people economically, socially, judicially, and ethically. Mongolia needs to progress to the status of a consolidated democracy, where democracy becomes the only rule of the game and democratic culture expands to other social sectors. In order to achieve such a system, Mongolia must resolve its issues concerning institutionalization in the public sector, activation of civil society, and current economic conditions. Some laws still need to be reformed and corrupt behavior needs to be eliminated.

Government officials who are elected are increasingly involved in corruption or considered to be highly corrupt, and this fact may have a negative impact on public confidence in the public sector. The erosion of confidence in the public sector may by association erode public confidence in democracy as a whole.

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<sup>24</sup> IAAC. (2014). "Survey on Perception of Corruption in Politics and Law Enforcement Agencies, 2014."

The level of corruption in Mongolia's political and law enforcement institutions is slightly lower than in previous years. This is a manifestation of the continued spread of corruption in politics. The methods and forms of corruption have not changed, but the causes, circumstances, and consequences of corruption have increased. Although anti-corruption street protests and administrative measurements are in progress, high-level corruption in the political arena is still widespread. This shows that there have been no significant measures taken by the government to decrease the level of political corruption.

Political party financing and electoral finance mechanisms, as well as conflicts of interest between business groups within the political milieu, have become the main cause of political corruption. Analysts underline that illegal actions taken during regular elections and struggles for power are essential factors influencing the state of political corruption. Moreover, flaws in the civil service such as the absence of accountability for government officials and public servants when they violate laws and regulations, the presence of overly complicated bureaucratic procedures, duplication of roles, gaps within the law and regulatory frameworks, and weak monitoring of the implementation of regulations all lead to corruption.<sup>25</sup>

Although Mongolia has a legal environment for combating corruption and an anti-corruption body, the work of reducing the scope and growth of corruption has not yet been achieved. It has been observed that Mongolians tend to relate their certain perceptions on corruption to social reforms and the transition to democracy. With this trend, democracy may be blamed for the growing perception of corruption and this may undermine the efforts of organizations and people trying to strengthen democracy in the country.

Corruption is widespread in the majority of state institutions, and if the work of intensifying educational and preventive measures and support from people and non-governmental organizations is delayed, then the scope of corruption will expand. Over the last few years, government institutions including the Parliament, Cabinet of Ministers, and political parties have ranked among the top five most corrupt organizations in the country. Experts and citizens have assessed corruption to be "high" in political, judicial, and law enforcement institutions. In the meantime, corruption within government institutions has not decreased. Furthermore, almost half of respondents in relevant surveys think that public sector corruption is still significantly high. This fact indicates that the risk for corruption risk also remains high in local and central administrations.

High levels of corruption in the civil service impact corruption in the private sector, which has been increasing significantly in recent years. Satisfactory assessments of Mongolia's business environment have declined, reaching their lowest level in 2016. Private entities that operate in fields that require special permission from government agencies noted that public sector corruption has become more pre-organized. The mining sector's activity, the use of natural resources, and the expansion of the country's economy have all simultaneously overlapped with the increase in corruption.

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<sup>25</sup> IAAC. (2017). "Survey on Perception of Corruption in Politics and Law Enforcement Agencies, 2016."

Mongolia has a strong democratic foundation grounded in the 1992 Constitution, and the basic institutional infrastructure of democratic governance is largely in place. However, ensuring that governing institutions maintain the will and the ability to implement existing legislation that promotes transparency and accountability remains an ongoing challenge. There is increasing public concern that a lack of good governance may prevent faster and more inclusive economic growth, and public dissatisfaction with high levels of corruption is growing along with the income gap and rising inflation.

## 6. Comments and Suggestions

1. There is a strong need to encourage the participation of NGOs and survey organizations in providing crucial information regarding the challenges and risks of fight against corruption. Doing so will help citizens understand corruption more logically and help to uncloud the wide range of misperceptions that currently surround it. It will also help to eradicate the misperception that democracy or democratic society is the foundation and cause of corruption.
2. Ensuring merit-based appointments in government institutions, encouraging the will of politicians to fight against corruption, and increasing the transparency of political parties are the most urgent steps that must be taken in order to reduce political corruption.
3. The IAAC should conduct ongoing educational activities for high-level officials of political parties.
4. NGOs should be included extensively in local efforts to fight against corruption. The following clause should be added to Article 18 of the Law on Anti-Corruption 2006, which stipulates the IAAC's powers and mandate: "The IAAC shall encourage NGO involvement, provide support to NGO proposals, and suggest and organize activities to increase NGO participation in anti-corruption." By doing this, the IAAC can expand its educational and preventive activities in local areas.
5. The IAAC should cooperate with survey organizations extensively in its educational and informational activities. Cooperation with NGOs should be implemented in accordance with Clause 18.3 of the Law on Anti-Corruption 2006, which directs the IAAC to cooperate with other organizations in order to perform its rights and duties.

## Case Study 4: Sri Lanka

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Verité Research

### 1. Background and Political Context

In January 2015, President Maithripala Sirisena was elected to power on a campaign of good governance (*yahapaalanaya*) and anti-corruption, defeating Mahinda Rajapaksa's bid for a third presidential term. Sirisena's victory reflected the widespread public resentment towards the excesses of the Rajapaksa administration: large-scale corruption and mismanagement alongside a clampdown on democratic rights and freedoms. His campaign was backed by a range of anti-incumbent forces, including the main opposition United National Party (UNP) and ethnic minority parties. The *yahapaalanaya* campaign was also supported by civil society movements advocating 'good governance' and 'clean politics'. Sirisena's mandate for anti-corruption and governance reform was reinforced in August 2015 when the United Front for Good Governance (UNFGG) won a plurality of seats in Parliament. The UNFGG comprises the UNP and other smaller parties. A coalition government was thereafter established, with Sirisena's Sri Lanka Freedom Party (SLFP) and UNFGG represented in the Cabinet. Ranil Wickremesinghe, leader of the UNP, was appointed prime minister.

While Sri Lanka has had coalition governments in the past, the present alliance between the two largest political parties is unprecedented. The SLFP and UNP have historically been electoral rivals, and draw on disparate bases of public support. Nevertheless, the election of the SLFP-UNFGG government corresponds to a pattern of cyclical political transitions in Sri Lanka, where the public has typically voted in parties with contrasting ideological orientations to the incumbent, in terms of the economy and politics. Furthermore, the coalition's anti-corruption campaign singled out a major source of discontent with the Rajapaksa administration, enabling it to bring together a broad range of anti-incumbent actors on to a single *yahapaalanaya* platform.

The election of the Sirisena-Wickremesinghe government renewed public expectations of action to combat corruption, nepotism, and mismanagement in government. In the months after the parliamentary elections, a number of new anti-corruption institutions were created, such as the Anti-Corruption Secretariat, the Presidential Task Force (PTF) for the Recovery of Illegally

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<sup>1</sup> Head of Legal Research, Verité Research

Acquired State Assets, and the Presidential Commission of Inquiry on Serious Acts of Fraud, Corruption and Abuse of Power, and State Resources and Privileges. The roles, mandates, and jurisdictions of these institutions frequently overlap with those of existing ones, resulting in a web of *ad hoc* and permanent bodies dealing broadly with anti-corruption.

However, the government's track record on anti-corruption has since been mixed. There has been some progress on governance reforms; for instance the passage of the 19<sup>th</sup> Amendment in April 2015 and Sri Lanka's Right to Information Act in 2016. The 19<sup>th</sup> Amendment reintroduced presidential term limits and limited the executive's power over appointments to key state institutions. However, the coalition has also been mired in fresh corruption scandals, particularly the UNP. For instance, the UNP came to be closely associated with the infamous 'bond scam' of February 2017, which involved the auction of Treasury bonds by the Central Bank of Sri Lanka to Perpetual Treasuries, a primary dealer closely linked to the son-in-law of then-Central Bank Governor Arjuna Mahendran. The governor was widely perceived to have been picked by Prime Minister Wickremesinghe, and the UNP was alleged to have interfered in attempts to probe the incident. The lack of visible progress on anti-corruption has undermined the credibility of the coalition's core campaign commitments, and contributed to growing skepticism that the widely anticipated break from the past would eventually be delivered.

This paper examines why public support and political rhetoric on anti-corruption have failed to translate into meaningful action against allegations of large-scale corruption in the government. Accordingly, the analysis will focus on examining the factors impeding the advancement of anti-corruption reform in Sri Lanka. First, it will set out a conceptual frame for analyzing anti-corruption in Sri Lanka that draws on the ideas of horizontal and vertical accountability of the state. It will then examine the ability of Sri Lanka's anti-corruption institutions to exercise horizontal accountability in terms of their structural and operational autonomy from the executive. Finally, it will analyze the extent to which public demand for anti-corruption has been able to complement the stronger exercise of horizontal accountability over the executive in Sri Lanka.

## **2. Executive Accountability and Anti-corruption**

Effective public accountability systems feature a range of mechanisms to constrain executive power, ensure responsiveness to public demand, and prevent the abuse of public office for private enrichment. These mechanisms include the classic tripartite separation of powers, periodic elections, and a multitude of institutions such as independent commissions, central banks, auditors, ombudsmen, and anti-corruption bodies.

This analysis of Sri Lanka's anti-corruption institutions draws on the concept of 'horizontal accountability' developed by Guillermo O'Donnell and others.<sup>2</sup> Horizontal accountability refers to the capacity of state institutions to check abuses of power by other state institutions and branches of government.<sup>3</sup> It is defined by the 'existence of state agencies that are legally enabled and empowered, and factually willing and able, to take actions...in relation to actions or omissions by other agents or agencies of the state that may be qualified as unlawful.'<sup>4</sup> Accordingly, specialized anti-corruption bodies fall within the category of state agencies exercising horizontal accountability over unlawful actions by executive agencies.

The exercise of horizontal accountability assumes an asymmetry of power between the 'accounting' and the 'accountable' agency. Anti-corruption agencies are typically called upon to oversee, audit, or sanction agencies that are vastly more powerful than themselves – except in the agencies' specific sphere of competence.<sup>5</sup> Hence, in terms of anti-corruption, effective accountability requires anti-corruption agencies to be independent from the executive in all decisions and actions relating to their own mandate and jurisdiction. Furthermore, the effectiveness of horizontal accountability relies not on agencies acting in isolation but on a 'network of relatively autonomous powers' - courts, legislative oversight bodies, state attorneys and so on - working together within a democratic system.<sup>6</sup> Sri Lanka's public accountability landscape features a number of such specialized anti-corruption bodies with varying levels of autonomy and independence from the executive.

Horizontal accountability is complemented by 'vertical accountability', which refers to the ability of the public to make elected officials answerable for their actions and enforce standards of proper conduct among the same. Vertical accountability is thus exercised between the state and society, while horizontal accountability is exercised between state agencies. Elections represent an important exercise of vertical accountability by providing voters an opportunity to promote or penalize officials for their performance. Accountability as exercised through popular protests, the media, and civil society action also falls within the category of vertical accountability.

The effectiveness of horizontal accountability is to an extent dependent on the force of vertical accountability: the latter is often what creates public demand for subjecting the state to the former. In terms of anti-corruption, public demand to punish corrupt officials and root out malpractice could generate momentum for reforms that enhance horizontal accountability.

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<sup>2</sup> Guillermo O'Donnell, 'Horizontal Accountability and New Polyarchies', Kellogg Institute for International Studies Working Paper #253, April 1998. Available at: <https://kellogg.nd.edu/publications/workingpapers/WPS/253.pdf> [Accessed on: 19 Jul. 2017]. See also Guillermo O'Donnell, 'Horizontal Accountability in New Democracies' *Journal of Democracy* (1998), 9(3), pp.112-126, and Andreas Schedler, Larry Diamond, and Marc F. Plattner, *The self-restraining state* (Boulder: Lynne Rienner Publishers, 1999)

<sup>3</sup> Andreas Schedler, Larry Diamond, and Marc F. Plattner, *The self-restraining state* (Boulder: Lynne Rienner Publishers, 1999)

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> O'Donnell, 'Horizontal Accountability and New Polyarchies.'

In conclusion, to effectively exercise horizontal accountability, anti-corruption institutions must be autonomous and independent from the executive. The strength of horizontal accountability for anti-corruption can also be conditioned by the formation of public opinion and demand for stronger action against corruption, which creates vertical accountability of the executive to the public. The following sections provide an overview of Sri Lanka's anti-corruption system, and analyzes its ability to hold the executive to account. The strength of horizontal accountability over the executive is analyzed in terms of the structural and operational autonomy of anti-corruption institutions from the executive. Moreover, the effectiveness of vertical accountability under the Sirisena-Wickremesinghe administration is assessed in terms of its ability to influence increased horizontal accountability for anti-corruption.

## 2.1) Executive Accountability in Sri Lanka

Sri Lanka is governed by a semi-presidential system which couples a popularly elected executive president with a unicameral 225-member Parliament. The president heads the Cabinet, whose members are appointed from the majority party or coalition in Parliament. The president appoints as prime minister an MP (s)he deems most likely to command the confidence of Parliament. The 19<sup>th</sup> Amendment provides for a system of power sharing between the president and prime minister in determining the composition of the Cabinet as well as the assignment of subjects and functions to ministries.

The current coalition can be characterized as a 'two-headed' government, with two centers of executive power under the president and prime minister. The UNP holds a majority of Cabinet portfolios, following from its plurality of seats in Parliament. With two historically rival parties wielding power, the coalition government has been characterized by a mix of cooperation and intense competition. While cooperation has been necessary to sustain the coalition and to see its legislative agenda through Parliament, each party has sought to independently appeal to its own public support base, including at the expense of its coalition partner. This competition has been especially acute for the SLFP, as a large faction of the party has remained publicly supportive of former president (and current Member of Parliament) Rajapaksa. Together with members of other smaller parties, pro-Rajapaksa 'dissidents' in the SLFP have formed the 'Joint Opposition'. The Joint Opposition has come to function as the *de facto* political opposition. It was within this volatile political context that the government embarked on its anti-corruption and good governance agenda.

The creation of anti-corruption institutions necessarily serves to limit the executive's exercise of political power. In Sri Lanka, a history of political interference and control over the functioning of state institutions has created systemic barriers to public accountability. Executive government agencies have long been utilized as mechanisms for patronage distribution. For instance, politicians often grant privileged access to government jobs, resources, and services to their local constituencies as a means of garnering support for their re-election. As such, political control over major government agencies is often a 'reward' granted by the executive to party loyalists and

allies. Moreover, appointments to senior positions in government are often subject to partisan political influence. These practices have contributed to a state institutional structure that is prone to high levels of executive influence under successive governments. The over-politicization of state institutions impedes anti-corruption efforts in at least two ways: first, by creating an enabling environment for cronyism and corruption to flourish, and second, by eroding institutional protections against the same. Efforts to strengthen accountability for corruption are hence likely to draw resistance from within the political establishment. Such systemic barriers are unlikely to be undone by government transitions alone.

In Sri Lanka 'weak' governments, such as those with uncertain support in the legislature, have typically been more sensitive to public pressure as they attempt to secure and maintain public legitimacy. Hence, weaker governments have been relatively more amenable to democratic reform. The 19<sup>th</sup> Amendment, for instance, was passed despite the UNP's uncertain legislative majority in 2015. In contrast, stronger governments have been better positioned to overrule public opposition in pushing through measures that have enhanced executive power. The 18<sup>th</sup> Amendment - which removed presidential term limits and granted the president control over appointments to standing institutions - was passed at the height of Rajapaksa's power in 2010, when the ruling alliance held over two-thirds of parliamentary seats. In the current context, the dynamics of competition between the SLFP and UNP has created incentives for both parties to court public support, including by gaining credit for progress on anti-corruption at the expense of their coalition partner.

Based on the analysis above, seeking public office can both advance politicians' private interests as well as incentivize responsiveness to public demand. Thus, while the desire to respond to public demand may compel the creation of anti-corruption institutions, the executive can also be expected to develop an interest in limiting the powers of those institutions to effectively exercise horizontal accountability. As such, political will to meaningfully strengthen anti-corruption bodies and other accountability institutions is likely to be limited. However, renewed public demand for action against corruption has put pressure on the government to demonstrate progress on its *yahapaalanaya* mandate. The coalition's first few months in power witnessed the proliferation of new anti-corruption institutions established by competing centers of executive power.

The following section provides a brief overview of existing anti-corruption institutions in Sri Lanka. Both standing and *ad hoc* anti-corruption institutions feature a high level of executive influence in their function, which undermines their ability to effectively exercise horizontal accountability. The autonomy of the above anti-corruption institutions from the executive is analyzed along two axes: (i) structural autonomy, and (ii) operational autonomy. Structural autonomy refers to the protections against executive influence granted by the formal legal basis and institutional placement of the anti-corruption agency in question. Operational autonomy deals with the extent of executive influence over the management, administration, and finances of anti-corruption agencies.

### 3. The Government's Reaction

The establishment of standing anti-corruption institutions is often considered the clearest expression of the executive's commitment to curbing corruption. Standing institutions typically derive their authority from legal instruments that ensure the institution's continuity through successive governments. Sri Lanka's standing anti-corruption bodies include a dedicated Commission to Investigate Allegations of Bribery and Corruption (CIABOC) and the recently established Fraud and Corruption Investigation Division (FCID) of the Sri Lanka police. They operate alongside other horizontal accountability institutions: parliamentary committees on public accounts and public enterprises, the Auditor General's Department, the Attorney General's Department, and the judiciary.

Meanwhile, since the coalition's election to power in 2015, several new, *ad hoc* institutions were established to deal with allegations of large-scale corruption by the former government. These institutions were typically granted a term of operation and a specific mandate, and were established through the exercise of executive power by the president or prime minister. Often, their mandates overlap with those of existing permanent institutions. For instance, in January 2015 the Cabinet approved the establishment of the Anti-Corruption Committee (ACC). The ACC was reportedly tasked with investigating large-scale corruption by the previous government, initiating legal action against those responsible for the same, and recommending measures to prevent such occurrences in the future.<sup>7</sup> The Anti-Corruption Committee Secretariat (ACCS) was subsequently established in February 2015 to support the ACC and was terminated in July 2017.<sup>8</sup> A 13-member presidential task force for the Recovery of Illegally Acquired State Assets was appointed to aid the recovery of state assets alleged to have been stolen and transferred out of the country. Sirisena also established the Presidential Commission of Inquiry (COI) on Serious Acts of Fraud, Corruption and Abuse of Power, and State Resources and Privileges (PRECIFAC) in March 2015. The Commission was mandated to examine the abuse or misuse of power, corruption, fraud and misappropriation of property between 10 January 2010 and 10 January 2015 by persons who have held or continue to hold political office.<sup>9</sup>

The creation of these parallel anti-corruption institutions has reflected the dynamics of intra-coalition competition described above. Both the president and PM as well as their respective parties in government have sought to gain credit for their association with anti-corruption initiatives, including at the expense of their coalition partners. For instance, the establishment of the FCID pursuant to the proposal to the Cabinet by Prime Minister Wickremesinghe was

<sup>7</sup> 'SLFP-UNP marriage of convenience heading for separation', *The Sunday Times*. Available at: <http://www.sundaytimes.lk/170716/columns/slfp-unp-marriage-of-convenience-heading-for-separation-250516.html> [Accessed on: 19 Jul. 2017].

<sup>8</sup> 'Sri Lanka to set up an Anti-Corruption Secretariat', *News.lk*, 21 February 2017. Available at: <https://www.news.lk/news/item/6158-government-to-set-up-an-anti-corruption-secretariat> [Accessed on: 20 Jul. 2017].

<sup>9</sup> Extraordinary Gazette No. 1904/57, dated 6 March 2015. Available at: [http://www.documents.gov.lk/Extgzt/2015/PDF/Mar/1904\\_57/1904\\_57%20E.pdf](http://www.documents.gov.lk/Extgzt/2015/PDF/Mar/1904_57/1904_57%20E.pdf) [Accessed on: 03 Nov. 2015].

associated primarily with the UNP. Meanwhile the bond scandal offered a clear demonstration of intra-coalition competition over credit for anti-corruption.

In February 2015, an auction of treasury bonds offered by the Central Bank of Sri Lanka (CBSL) was mired in allegations of insider trading to the benefit of primary dealer Perpetual Treasuries. At the center of the controversy was the relationship between then-CBSL Governor Arjuna Mahendran and his son-in-law, Arjun Aloysius of Perpetual Treasuries. An unanticipated tenfold increase in the price of bonds auctioned, at above market interest rates, was considered to have directly contributed to Perpetual Treasuries' substantial profits from the transaction. As per section 12(1) of the Monetary Law Act, the president is required to appoint the governor of CBSL on recommendation of the minister in charge of the subject of finance. Accordingly, Mahendran was recommended for the post of CBSL governor by then-Minister of Finance Ravi Karunanayake of the UNP, despite a potential conflict of interest arising from Mahendran's link to Perpetual Treasuries.

The bond scandal came to be seen as a major indictment of the government's claims to good governance. More *ad hoc* bodies were created in the aftermath of the Central Bank bond scandal, including a three-member investigative committee appointed by the Prime Minister, and a Presidential Commission of Inquiry to 'investigate and inquire into the management, administration and conduct of affairs of the Central Bank of Sri Lanka in respect to the issuance of Treasury Bonds'. The fallout from the bond scandal was borne primarily by the UNP, which was perceived to have actively opposed accountability measures over the scandal. For instance, the investigative committee appointed by the Prime Minister was alleged to comprise party loyalists, thus lacking credibility as an independent body. UNP MPs were also alleged to have pressured the Auditor-General to withdraw his report on the issue submitted to Parliamentary Committee on Public Enterprises (COPE). These allegations against the UNP served to shift focus to President Sirisena as the stronger champion of good governance. The SLFP claimed it would undertake its own inquiry into the bond issue. In January 2017, Sirisena appointed a COI to 'investigate and inquire into the management, administration and conduct of affairs of the Central Bank of Sri Lanka in respect to the issuance of Treasury Bonds', thus casting himself as an enabler of accountability for UNP-associated corruption.

Table 1 below maps selected anti-corruption institutions into three categories: monitoring institutions, investigative institutions, and prosecuting institutions. Monitoring institutions are those tasked with scrutinizing and auditing executive agencies, thus permitting the detection of corruption. Investigative institutions are primarily fact-finding bodies, and forward their findings to prosecutory institutions if the evidentiary threshold is met. Prosecutory bodies are empowered to carry out further investigations or institute criminal proceedings in a competent court. Note that the agencies presented below do not form an exhaustive list of anti-corruption institutions in Sri Lanka. For instance, the judiciary and certain law enforcement institutions have been excluded.

	Monitoring and oversight institutions	Investigative institutions	Prosecutory institutions
Permanent institutions	<ul style="list-style-type: none"> <li>- Parliamentary Committee on Public Enterprises (COPE)</li> <li>- Parliamentary Committee on Public Accounts (COPA)</li> <li>- Auditor General's Department</li> </ul>	<ul style="list-style-type: none"> <li>- Fraud and Corruption Investigation Division (FCID)</li> </ul>	<ul style="list-style-type: none"> <li>- The Attorney General's Department</li> </ul>
<i>Ad hoc</i> institutions		<ul style="list-style-type: none"> <li>- Commission to Investigate Allegations of Bribery and Corruption (CIABOC)</li> <li>- Presidential Commission of Inquiry on Serious Acts of Fraud, Corruption and Abuse of Power, State Resources and Privileges (PRECIFAC)</li> <li>- Anti-Corruption Committee Secretariat (ACCS)</li> <li>- Presidential Commission of Inquiry to Investigate and inquire into the management, administration and conduct of affairs of the Central Bank of Sri Lanka in respect to the issuance of Treasury Bonds</li> </ul>	

**Table 1.** Anti-corruption Institutions in Sri Lanka

### 3.1) The exercise of horizontal accountability in anti-corruption efforts

#### 3.1.1) Structural autonomy

The ability of Sri Lanka's anti-corruption institutions to hold the executive to account is compromised by a number of structural challenges. These challenges stem broadly from: (i) a high degree of executive influence in determining the mandates and membership of anti-corruption institutions, and (ii) fetters on the powers and functions of standing anti-corruption institutions.

The mandates, composition, and terms of operation of *ad hoc* anti-corruption institutions are typically determined by the executive. For instance, the president appoints commissions of inquiry through the exercise of powers granted to him or her by the Commissions of Inquiry Act No. 17 of 1948 (as amended). The Act permits the president to appoint a commission of inquiry if he or she deems an inquiry is necessary into any matter relating to public administration, the conduct of any member of the public service, or any matter in which an inquiry will be in the interest of public safety or welfare. The warrant issued by the president under section 2(1) of the

Act identifies the members of the COI, and the COI's terms of reference. Section 2(3) of the Act provides for the removal of any member appointed to the commission, provided that the president is satisfied that one or more of the following conditions are fulfilled: (i) the member has abused or misused their office or the powers conferred to them under the COI Act or relevant warrant, (ii) the member has engaged in bribery or corruption, or (iii) the member is suffering from mental or physical infirmity. The president is required to report such removal of a COI member to Parliament, along with reasons for the same.<sup>10</sup>

The ability of *ad hoc* COIs to effectively hold the executive to account is limited for at least two reasons. First, by virtue of their establishment by the president, the mandates, members, and terms of reference, and period of operation of COIs are directly subject to the executive's discretion. The president also reserves discretion over the public disclosure of the outputs of a COI; for instance, the president may choose to publish or withhold a COI's reports and findings. The extent to which a COI is able to hold an executive to account could thus be undermined by the executive's direct influence in defining the scope of the COI's operations. Such influence leaves room for a COI's operations to be determined by the executive's own interests in limiting the COI's ability to exercise horizontal accountability over it. Second, COIs rarely possess the material, infrastructural, and human resources available to standing institutions. For instance, COIs often lack the dedicated staff cadres and office requisites available to standing institutions. Furthermore, *ad hoc* COIs with mandates that overlap with those of standing institutions will likely contribute to the duplication of work and strains on existing resources.

Two major COIs were established as part of the collation's anti-corruption agenda: PRECIFAC and the COI on the bond scandal. PRECIFAC's mandate was to inquire into instances of abuse or misuse of power, corruption, fraud, and misappropriation of property by persons that were or remained in political office, public servants, or officers of statutory bodies.<sup>11</sup> The period under review by PRECIFAC was fixed to between 10 January 2010 and 10 January 2015,<sup>12</sup> which almost directly coincided with Mahinda Rajapaksa's second presidential term. PRECIFAC's mandate thus reflected the Sirisena-Wickremesinghe government's interest in demonstrating progress on its promise to root out corruption by its predecessor. PRECIFAC has reportedly completed its inquiries into a number of corruption cases.<sup>13</sup> The reports submitted by PRECIFAC to President Sirisena have not been made public thus far. The establishment of the COI on the bond scandal also reflected an opportunity for President Sirisena to demonstrate action on anti-corruption by responding to public disapproval at the expense of the UNP.

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<sup>10</sup> Section 2(4) of the Commissions of Inquiry Act, No.17 of 1948.

<sup>11</sup> Extraordinary Gazette No. 1904/57, dated 6 March 2015. Available at: [http://documents.gov.lk/files/egz/2015/3/1904-57\\_E.pdf](http://documents.gov.lk/files/egz/2015/3/1904-57_E.pdf) [Accessed on: 19 Jul. 2017].

<sup>12</sup> *Ibid.*

<sup>13</sup> 'PRECIFAC to complete 35 reports on large-scale corruption', *The Daily FT*, 29 June 2017. Available at: <http://www.ft.lk/article/625010/PRECIFAC-to-complete-35-reports-on-large-scale-corruption> [Accessed on: 20 July 2017].

In contrast to *ad hoc* institutions, standing institutions are not time-bound and enjoy continuity through successive governments. Their mandates, members, and functions of standing institutions are typically – though not necessarily - determined through legislative enactments. Key standing institutions exercising horizontal accountability in relation to corruption include CIABOC, the Auditor-General, the FCID, and the parliamentary Committee on Public Accounts (COPA) and the Committee on Public Enterprises (COPE).

Sri Lanka’s standing anti-corruption institutions face structural barriers to exercising horizontal accountability in the form of limits on their powers and functions. The legal and institutional frameworks governing standing anti-corruption institutions are often prohibitively narrow in scope. For instance, CIABOC’s investigations are limited to offences under the Bribery Act No. 11 of 1954 or the Declaration of Assets and Liabilities Law No. 1 of 1975. This fetter on CIABOC’s powers prevents the Commission from investigating matters such as conflicts of interest, money laundering, insider trading, and nepotism. Notably, the 19<sup>th</sup> Amendment empowered CIABOC to investigate allegations of bribery or corruption through its own motion,<sup>14</sup> whereas previously CIABOC’s investigations could only be triggered upon communication of such allegations to CIABOC by a member of the public. Meanwhile, Article 154(3) of the Constitution and Section 13 of the Finance Act, No. 38 of 1971 fail to detail the specific powers of the Auditor-General. In practice, this ambiguity has tended to limit the role of the Auditor-General to performing financial audits of public corporations while neglecting audits based on financial management and value for money.

Other standing anti-corruption institutions are subject to indirect or contingent forms of executive influence over their functions. For instance, the FCID was established in February 2015 as a functional division of the police with a wide-ranging mandate to investigate “(i) grievous financial crimes, corruption and massive unauthorized projects, (ii) crimes against public funds and property, (iii) grievous crimes against national security, public finance, health and environment, (iv) unlawful enrichment and misuse of official powers, and (v) money laundering, funding of terrorists and illegal transactions.”<sup>15</sup> However, the FCID’s investigations into the above are triggered by complaints forwarded to the Inspector General of Police by two *ad hoc* executive-appointed bodies: the Anti-Corruption Committee (ACC), chaired by Prime Minister Wickremesinghe, and the ACCS.<sup>16</sup> This condition permits a high level of executive discretion over the investigations undertaken by the FCID while limiting the FCID’s autonomy to initiate its own investigations.

Meanwhile, there exist two parliamentary committees that exercise horizontal accountability over the executive in relation to public finance: (i) the Committee on Public Enterprises (COPE), and (b) the Committee on Public Accounts (COPA). COPE is tasked with scrutinizing public funds utilized by public corporations and any other vested undertakings, while COPA is tasked with ensuring financial oversight over public spending by any ministry, government department,

<sup>14</sup> Article 156A(2), Constitution of the Democratic Socialist Republic of Sri Lanka.

<sup>15</sup> Extraordinary Gazette No. 1901/20, dated 13 February 2015. Available at: [http://documents.gov.lk/files/egz/2015/2/1901-20\\_E.pdf](http://documents.gov.lk/files/egz/2015/2/1901-20_E.pdf) [Accessed on: 19 Jul. 2017].

<sup>16</sup> *Ibid.*

provincial council, or local authority.<sup>17</sup> As per the Standing Orders that govern parliamentary procedure, both COPE and COPA are to consist of 12 members each who are nominated by the parliamentary committee on selection. The membership of COPE and COPA reflects the party composition of Parliament. As a result, the ruling parties that hold a majority of seats in Parliament also dominate COPE and COPA, thus limiting the autonomy of these committees from the executive. Moreover, the membership of COPE and COPA currently exceeds the 12-member composition stipulated in the Standing Orders, with COPE and COPA both comprising 31 members each. This increase in the membership of COPE and COPA leaves room for the over-representation of the executive in those institutions tasked with holding the executive to account. The expansion of COPE and COPA undermines horizontal accountability, as it allows for ruling party members to ‘protect’ executive agencies from scrutiny. COPE’s and COPA’s ability to effectively scrutinize and exercise horizontal accountability over the executive is thus compromised by the high level of executive influence in their functioning permitted by current practice.

As such, both standing and *ad hoc* anti-corruption institutions in Sri Lanka enjoy limited autonomy from the executive, which in turn undermines their ability to hold the executive to account. Standing prosecutory institutions, namely CIABOC, and the Auditor-General, are hampered by prohibitively narrow jurisdictions. Oversight institutions in Parliament, COPE and COPA, are compromised by a lack of protections against executive influence in their memberships that could prejudice the committees’ scrutiny and oversight over the executive. Meanwhile, by virtue of their establishment by and proximity to the executive, *ad hoc* anti-corruption institutions are susceptible to discretionary executive actions - such as the setting of their mandates and terms of operations - that could undermine their ability to hold the executive to account.

### 3.1.2) Operational autonomy

In addition to structural barriers, the effectiveness of horizontal accountability can also be conditioned by operational rules and practices within anti-corruption institutions. Strong anti-corruption institutions enjoy autonomy from the executive in all matters pertaining to their own spheres of competence and discharge of their functions. The autonomy of anti-corruption institutions can be compromised by practices that permit executive influence over the operations, resources, and appointments of key personnel to these bodies.

The 19<sup>th</sup> Amendment to the Constitution provides that appointments of commissioners to standing commissions are made by the president on the recommendation of the Constitutional Council. The Constitutional Council comprises seven MPs and three members unaffiliated to any political party. Prior to the 19<sup>th</sup> Amendment, these appointments were made by the president, who was required to ‘seek the observations’ of a five-member parliamentary council. Although the president was required to seek the observations of the council, the president retained full

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<sup>17</sup> Standing Orders 125(2) and 126(2) of the Parliament of the Democratic Socialist Republic of Sri Lanka.

discretion over the appointments of chairpersons and commissioners to key standing institutions, including CIABOC. By making these appointments contingent on the recommendations of the Constitutional Council, the 19<sup>th</sup> Amendment restored an important check on executive influence over standing institutions. The appointment of CIABOC's commissioners and chairperson are thus subject to the scheme of checks and balances provided by the 19<sup>th</sup> Amendment.

In contrast, the appointment of CIABOC's Director General (DG) is by the president in consultation with the commissioners.<sup>18</sup> The DG is CIABOC's chief administrator and chief accounting officer. The DG is tasked with managing CIABOC's investigations and prosecutions under the direction of the Commission. The president's power over the appointment of the DG could leave room for executive influence over CIABOC's management.

The ability of anti-corruption institutions to effectively discharge their duties and functions can be undermined by shortfalls in financial and human resources. Standing anti-corruption bodies in Sri Lanka have faced shortfalls in terms of resources that have compromised their autonomy. As a result of their limited resources, personnel attached to anti-corruption institutions are drawn from executive agencies, thus compromising their autonomy from the executive.

For instance, CIABOC prosecuting officers are seconded from the Attorney General's Department. The latter serves as the government's chief legal advisor. The Attorney General and officers of the Attorney General's Department provide advice to the government on all legal matters. The AG is authorized to appear on behalf of the government, government departments, statutory boards, and government corporations in any court or tribunal. This role establishes a conflict of interest when personnel from the Department are seconded to CIABOC, as the latter is tasked with investigating and initiating prosecutions of corruption in government bodies. Meanwhile, CIABOC's investigative officers are seconded from the police force. The Inspector General of Police wields the authority to recall any seconded CIABOC officer to the police force. CIABOC's investigative staff account for a majority of its personnel. In 2015, CIABOC's staff cadre included 198 investigative officers and 155 civilian officers. CIABOC's reliance on seconded officers has compromised its autonomy by leaving its investigative officers vulnerable to reprisals from the police force. Furthermore, as data published by CIABOC indicates, a substantial number of bribery complaints are filed against the police force.<sup>19</sup> Secondment of investigative officers from the police could thus potentially create a conflict of interest, as seconded police officers could be reluctant to pursue investigations into the conduct of senior police personnel for fear of employment-related sanction. Moreover, secondment to CIABOC compromises police officers' prospects of promotion, as it precludes them from the existing scheme of promotion available to police officers. As a result, officers have few incentives to opt for secondment to the CIABOC, thus limiting the pool of personnel available to serve as investigative officers.

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<sup>18</sup> Section 16(1) of the Commission to Investigate Allegations of Bribery or Corruption Act, No. 19 of 1994.

<sup>19</sup> Commission to Investigate Allegations of Bribery and Corruption, *Report on Bribery and Corruption* (2015). Available at: <http://www.ciaboc.gov.lk/web/images/pdf/publications/reportonbriberyorcorruption2015english.pdf> [Accessed on: 27 July 2017].

The operational autonomy of anti-corruption institutions is also undermined by executive influence over the allocation of their financial resources. Article 148 of the Constitution grants the Parliament of Sri Lanka full control over public finance. The government's annual budgetary proposals are thus subject to parliamentary scrutiny and debate, and are passed into law in the form of the Appropriation Act. However, once the budget is passed by Parliament, the disbursement of funds to all state spending agencies is managed by the Department of Treasury Operations, which is housed in the Ministry of Finance. Spending units, including independent commissions and standing anti-corruption bodies, are required to apply to the Department for disbursement of funds for their operations. The disbursement of available funds is influenced by a range of considerations, including the government's fiscal position and debt levels. As such, the Department retains discretion over the release of funds to anti-corruption institutions. This discretionary power leaves anti-corruption institutions vulnerable to executive influence, as the executive is able to withhold financial resources from their operations. The lack of an independent check on executive control over the resources of anti-corruption institutions thus leaves them dependent on the executive's own political will in pursuing accountability. Executive discretion over the financial resources of anti-corruption institutions thus erodes the latter's autonomy, and in turn their ability to effectively hold the executive to account.

#### **4. Vertical accountability over anti-corruption**

Anti-corruption formed the cornerstone of the *yahapaalanaya* campaign in 2015, providing a unifying cause that brought a wide range of anti-incumbent forces onto a single platform. Sirisena's bid for the presidency as the 'common' opposition candidate provided a platform for political and civil society mobilization against the corruption that prevailed during the Rajapaksa administrations. Sirisena's and thereafter the UNFGG's successes at the polls reflected the high levels of public mobilization in support of good governance and clean politics. Such mobilization provided an important avenue for vertical accountability over the executive for anti-corruption.

However, in the two years since the 2015 elections, the lack of demonstrable progress on anti-corruption has furthered a sense of public disillusionment. The SLFP-UNP coalition is widely perceived to have failed to fulfill public expectations in terms of action against corruption under the former government. Fresh corruption scandals under the current administration, such as the Central Bank bond scandal, have further undermined the credibility of the coalition's commitment to its anti-corruption mandate. Public demand and civil society mobilization have had limited impact in enhancing horizontal accountability over the executive, indicating the weakness of vertical accountability in anti-corruption efforts in Sri Lanka.

This weakness of vertical accountability can be attributed in part to the nature of public demand for action against corruption. In Sri Lanka, corruption in the executive has primarily been attributed to 'unscrupulous' individuals holding political power, rather than viewed as a systemic

feature of political activity. Press discussion of corruption is typically anecdotal, focusing on specific incidents or allegations while overlooking the institutional shortcomings signaled by the depth of corruption perceived and reported. For instance, allegations of large-scale corruption in government procurement in a range of sectors are routinely reported in the press. However, despite the widespread prevalence of corruption in public tendering, press coverage of such cases provides little scrutiny over the weaknesses in Sri Lanka's public procurement processes that permit corruption on a large scale. Meanwhile, press coverage of the bond scandal overlooked the lack of protections against the conflicts of interest in enabling alleged insider trading in the bond market.

The *yahapaalanaya* campaign against the Rajapaksa administration raised public expectations of high-profile investigations and prosecutions of individuals associated with large-scale corruption. By pledging to root out corruption that characterized the former government, Sirisena and the UNFGG sought to cast themselves as the actors most committed to good governance within the political establishment.

Meanwhile, standing anti-corruption institutions were faced with a trust deficit, resulting from the perceptions that they had long been compromised by partisan interests that could continue to undermine their effectiveness, despite the government transition. For instance, the appointment of new commissioners to CIABOC was received with a degree of pessimism in the Sinhala press as to whether it could effectively discharge its functions.<sup>20</sup> The creation of new anti-corruption institutions proximate to the president and prime minister, such as COIs, could thus be interpreted as important steps forward in the fight against corruption. In this vein, the establishment of the FCID was welcomed as an extraordinary but necessary measure to deal with large-scale corruption by the former government.<sup>21</sup>

The poor progress in arrests and prosecutions of high profile individuals for corruption has contributed to skepticism towards the government's anti-corruption agenda. Moreover, the coalition's own perceived embrace of corrupt politicians, as well as controversies such as the bond scandal, have further fueled discontent over the trajectory of the *yahapaalanaya* campaign. In this context, President Sirisena's controversial accusation in October 2016 that anti-corruption institutions were carrying out selective, politically motivated investigations into 'insignificant' cases, including against cabinet members and military figures, was largely endorsed in the Sinhala press.<sup>22</sup> The subsequent resignation of Dilrukshi Dias Wickramasinghe from her post as Director General of CIABOC was interpreted as an admission of wrongdoing that lent credence to Sirisena's position. The press response in this instance, marked by the failure to question the exercise of executive political power to publicly undermine standing institutions, reflected the general lack of value attached to robust, independent institutions in debates on anti-corruption. Public demand for stronger action against corruption has instead centered on calls for more committed individual leaders that champion anti-corruption while overlooking institutional reforms that would enhance horizontal accountability for corruption in government.

<sup>20</sup> Verité Research, *The Media Analysis*, Vol.05, #42.

<sup>21</sup> Verité Research, *The Media Analysis*, Vol.05, #23.

<sup>22</sup> Verité Research, *The Media Analysis*, Vol.06, #40.

Moreover, when public demand and appeals for accountability are directed towards political leaders, incentives to effectively enhance horizontal accountability are directly compromised. Appeals to the executive for redress place political leaders at the center of the anti-corruption system, reinforcing perceptions that proximity to the executive is a strength rather than a risk in anti-corruption efforts. This perception - coupled with the electoral legitimacy afforded to popular leaders - could serve to grant the executive greater credibility as an agent of accountability than anti-corruption institutions. In this context, public demand for anti-corruption efforts in Sri Lanka has strengthened the hand of the executive in the anti-corruption system. High levels of trust placed in the executive to deliver on anti-corruption creates incentives for weakening rather than strengthening institutional exercises of horizontal accountability.

## 5. Conclusion

In Sri Lanka, the coalition's anti-corruption campaign reflected widespread public resentment over large-scale corruption under the former administration. Renewed public demand and civil society mobilization created pressure on the executive to investigate and prevent corruption in government. However, public pressure for action against corruption has failed to translate into a stronger system of accountability for corruption by the executive. The ability of Sri Lanka's anti-corruption institutions to exercise horizontal accountability has been compromised on two broad fronts. First, both standing and *ad hoc* anti-corruption institutions are structurally compromised by high levels of executive influence over their mandates and terms of operations. The autonomy of anti-corruption bodies is also undermined by prohibitively narrow jurisdictions granted to them by law. Second, anti-corruption institutions are also compromised by executive influence in their routine operations, for instance through executive control over their financial and human resources. The lack of autonomy anti-corruption institutions have from the executive has weakened their ability to exercise horizontal accountability.

Given that the executive's political incentive to enhance horizontal accountability is weak, public pressure offers an important means to compel the executive to take action against corruption. In order for vertical accountability to influence horizontal accountability, it is necessary that the threat of electoral penalties for misconduct is perceived to be credible. Furthermore, public demand for reforms must prioritize institutional strengthening over changes in personnel. Popular protests and swings in public opinion may not necessarily translate into the enduring institutional reforms that advance horizontal accountability. As the *yahapaalanaya* campaign has shown, public demand for anti-corruption measures could prove inadequate to compel the stronger exercise of horizontal accountability.

In Sri Lanka, calls for delivering justice have been directed towards political leadership, rather than institutions - despite limited confidence in the political will to deliver on corruption. This demand suggests that political responses are viewed as the only recourse in a highly politicized

system of governance, while institutional exercises of horizontal accountability are granted limited credibility. In this context, the political leadership's incentives favor the proliferation of *ad hoc* anti-corruption institutions that draw legitimacy from their proximity to the executive. Meanwhile, standing institutions are pushed to the periphery of the anti-corruption system. Moreover, appeals to the executive to ensure accountability for anti-corruption efforts have created political incentives to weaken rather than enhance the institutional exercise of horizontal accountability.

In this context, strengthening horizontal accountability in Sri Lanka will entail enhancing the structural and operational autonomy of anti-corruption institutions from the executive. Furthermore, in the absence of immediate political interest in strengthening horizontal accountability, progress on institutional reform rests on reorienting public demand to focus on curbing – rather than reinforcing – executive influence over anti-corruption institutions.

## Case Study 5: Pakistan

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### 1. Introduction

This paper<sup>2</sup> is an attempt to undertake an independent review of the state's compliance with the United Nations Convention against Corruption (UNCAC) in Pakistan. The paper examines the following questions:

- i. To what degree is the Pakistan government in compliance with the UNCAC?
- ii. What are the key accomplishments and flaws in the government's implementation of the recommendations in the UNCAC?
- iii. How can implementation be made more effective?

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<sup>2</sup> This paper benefits from the following PILDAT publications and interactions:

- PUBLIC OPINION ON QUALITY OF GOVERNANCE IN PAKISTAN, Third Year of Federal and Provincial Governments (June 2015 – May 2016)
- PUBLIC OPINION ON QUALITY OF DEMOCRACY IN PAKISTAN, Third Year of Federal and Provincial Governments (June 2015 – May 2016)
- Accountability Structures: A Comparative Analysis Citizens' Periodic Reports on the Performance of State Institutions
- [National Accountability Bureau : An Independent Review of Structure and Performance Citizens' Periodic Reports on the Performance of State Institutions](#)
- Meeting with Chairman and officials of the National Accountability Bureau – NAB, Pakistan, on June 15, 2017: <https://www.thenews.com.pk/print/210865-NAB-committed-to-eradication-of-corruption>
- Meeting with Chairman and officials of the National Accountability Bureau – NAB, Pakistan, on June 15, 2017: <https://vid.app.com.pk/vid/2017/06/president-pildat-calls-on-chairman-nab/>
- Consultative Workshop held by PILDAT with officials from the National Accountability Bureau – NAB, MPs, MPAs, Academicians and Media persons on July 13, 2017: <https://twitter.com/Pildat/status/885398519951044609>, <https://twitter.com/Pildat/status/885390200880455680>, <https://twitter.com/Pildat/status/885388240651419650>, <https://twitter.com/Pildat/status/885387149213880320>, <https://twitter.com/Pildat/status/885386408004812800>, <https://twitter.com/Pildat/status/885383866952843267>

## 1.1) Background

The Convention (UNCAC) was adopted by the General Assembly of the United Nations on October 31<sup>st</sup> 2003 and came into force on December 14<sup>th</sup> 2005. As of now, 181 countries including Pakistan are party to the Convention.

The Convention has a built-in implementation review process. The result of the country implementation review and the accompanying reports are not generally made public. In addition, the implementation review is based primarily on the information provided by the governments, which in some cases may not be completely forthcoming in sharing all relevant information with reviewers. It is therefore useful to compile independent parallel (or shadow) implementation review reports for each country using the guidelines of the United Nations Office on Drugs and Crime (UNODC), the entity responsible for coordinating the implementation of UNCAC.

Each organization may undertake a review of its own country. The research group may consult and devise a common methodology and may share lessons learnt. The review report may also be shared among the group members for peer review before these are finalized and made public.

The key objective of this research by PILDAT is to assess the effectiveness of the state institutions and mechanisms to combat corruption.

## 1.2) Methodology

The UNODC encourages citizens to conduct parallel reviews. It has organized a number of training courses to enable civil society organizations to undertake independent reviews. PILDAT proposes using the guidelines set forth by UNODC to undertake this independent review.

## 1.3) Data

This paper has been prepared using desk research, PILDAT's earlier analyses on the subject, meetings, workshops, and interactions with the National Accountability Bureau (NAB), as well as selected MPs, MPAs, lawyers, academicians and media persons.

## 2. Evaluation of the Current State of Corruption in Pakistan

In January 2017, the annual Corruption Perceptions Index released by Transparency International (TI) ranked Pakistan 116<sup>th</sup> out of 176 countries included in the index for the year 2016. Though this marked a slight improved from previous years, the rank indicated a continuing 'high' level of corruption in the country.

[The index](#), which ranks countries on a scale of 0 (highly corrupt) to 100 (very clean), awarded Pakistan a score of 32 — a slight improvement from 2014 and 2015 when the country was given 29 and 30 points, respectively.

Corruption has also been indicated to be fourth largest issue identified by nationwide respondents in a PILDAT public opinion poll in 2016. In the same vein, public opinion in Pakistan has continued to rate the country's anti-corruption measures poorly. In a nationwide public opinion poll conducted by PILDAT in 2016, the predominant opinion was one of disapproval with the performance of the federal government, with just 38 percent of respondents looking favorably at anti-corruption measures.<sup>3</sup> This reflects the public perception that the federal government needs to do more to build trust, and also highlights the fact that the public perceives rampant corruption in the management of the country's affairs.

### 3. Existing Anti-corruption Mechanisms in Pakistan

Pakistan inherited its basic legal framework and legislation from British rule when it became independent in 1947. Initially, corruption was dealt with under the Pakistan Penal Code of 1860. Over a period of 68 years, numerous anti-corruption efforts were undertaken, and despite the development of numerous laws and law enforcement agencies, corruption in the private and public sectors could not be curtailed.

The primary laws that deal with corruption in Pakistan are the Pakistan Penal Code (PPC) of 1860, the Prevention of Corruption Act (PCA) of 1947, and the National Accountability Ordinance (NAO) of 1999. Two Anti-Corruption Authorities (ACAs), the National Accountability Bureau (NAB) and the Federal Investigation Agency (FIA), work at the federal level, while four ACAs, or Anti-Corruption Establishments (ACEs), operate at provincial level. These institutions are empowered to investigate various cases of public sector corruption. Accountability courts have been established under the NAB Ordinance and deal with cases sent by the NAB. The Central and Provincial Special Courts set up under the Criminal Law Amendment Act of 1958 deal with cases sent by the FIA and ACEs respectively. Various authorities like the Public Procurement Regulatory Authority (PPRA) through Public Accounts Committees (PACs) also work in this regard. The Office of the Auditor General of Pakistan and the Office of the Wafaqi Mohtasib (Ombudsman) of Pakistan are also empowered to check executive action.

Like India, Pakistan also had a Special Police Establishment as its first ACA, which was set up in 1938 by the British government. It was renamed the Pakistan Special Police Establishment (PSPE) in 1947. The PSPE was empowered to investigate corruption among central government

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<sup>3</sup> PUBLIC OPINION ON QUALITY OF GOVERNANCE IN PAKISTAN, Third Year of Federal and Provincial Governments (June 2015 – May 2016)

employees, but was not very effective, and was replaced by the Federal Investigation Agency (FIA) in 1975 under the Federal Investigation Agency Act (1974). To deal with corruption at the provincial level, four Anti-Corruption Establishments (ACEs) were established. The FIA became a political tool for regimes, which led to creation of the Ehtesab (Accountability) Bureau under the Ehtesab Act of 1997. The fourth military coup in 1999 replaced the Ehtesab Bureau with the National Accountability Bureau (NAB) with the enactment of the National Accountability Bureau Ordinance (No XVIII of 1999) (NAO). The ordinance was enacted to apply retroactively, taking cognizance of offenses from as far back as 1985.

The NAO is the key federal law governing anti-corruption in Pakistan and extends to the whole of Pakistan. It applies to all persons in Pakistan, and persons who are or have been in the service of Pakistan, wherever they may be, including areas that are part of the Federally and Provincially Administered Tribal Areas.

The Ordinance provides for:

- i. The detection, investigation, prosecution, and speedy disposal of cases involving corruption, corrupt practices, misuse of power, misappropriation of property, kickbacks, commissions, and matters connected and ancillary or incidental.
- ii. The recovery of outstanding amounts from persons who have defaulted on repayments to banks, financial institutions, the government, and other agencies.
- iii. The recovery of state money and other assets from those people who have misappropriated such assets or removed these assets abroad.

The NAO went through an evolutionary process, with various amendments added in the form of Ordinance XIX of 1999, Ordinance IV of 2000, and Ordinance No XXIV of 2000. Some of the important amendments pertained to the security of the tenures of the top hierarchy of the organization (comprising the chairman, deputy chairman, and the prosecutor general, accountability); the appointment of serving district and sessions judges to the Accountability Courts; the facilitation of the accused in making an application for the transfer of their case from one Accountability Court to another; requiring the prosecution to produce the accused in court after each 15 days of detention for extension in remand, and others.

The National Accountability Bureau (NAB) was formed under the NAO as Pakistan's apex anti-corruption organization. The NAB is charged with eliminating corruption through a holistic approach of awareness, prevention and enforcement.

As per the NAB's own website, while the initial focus of the NAB was the detection, investigation and prosecution of white collar crime, in 2002 the NAB launched its National Anticorruption Strategy (NCAS) resulting in the agency's empowerment to undertake prevention and awareness functions in addition to enforcement functions.

The NAB was created in the image of the ACAs of Hong Kong and Singapore. It has peculiar features that defy criminal procedure codes norms, such as shifting the onus of proof onto the accused and forcing those accused to testify against themselves. It attained the status of the

supreme anti-corruption authority and came into the field with full force having wide powers, stiff procedures and harsh punishments for anyone, in the public or private sector, involved in corruption and corrupt practices, misuse and abuse of power and authority, defrauding and cheating the public at large, willful bank loan default, money laundering, and other crimes. Its jurisdiction extends to all sitting or former members of legislatures, politicians and government officials, including chief ministers of provinces, the prime minister, former presidents, and the governors of provinces. Special provisions of 'voluntary return' and 'plea bargaining' were incorporated, which helped to bring back looted wealth to the government's treasury. It can seek information from any organization or department during investigations and has extraordinary powers to seize assets of someone who is accused, even in the inquiry stage. A holder of public office or anyone involved in an offense under the NAO is liable to be punished by up to 14 years of imprisonment.

Until 1999 and prior to the formation of the NAB, the FIA was the primary accountability institution at the federal level. It still operates as an anti-corruption authority, but with curtailed jurisdiction. The NAO and the NAB have jurisdiction that extends to the whole of Pakistan and overrides all other corruption-related laws. No court can grant bail to a person accused of an offense by the NAB. As a statutory body, the NAB has a very strong and independent legal setup. The provisions of its enabling law (NAO, 1999) have an overriding effect of all other laws and jurisdictions. Hence when the NAB takes cognizance of an offense, all other agencies are barred from taking cognizance of the same.

The NAB has two offices; the Chairman and the Prosecutor General Accountability (PGA). The Chairman and the PGA are appointed by the president with the consent of the Leader of the House and the Leader of the Opposition in the National Assembly for a non-extendable period of four and three years respectively. They can only be removed on grounds that are required for removal of a Judge of the Supreme Court.

By virtue of law, the NAB has sufficient operational and functional independence. There is no legal provision that holds the NAB accountable to any institution or to any federal or provincial government. However, in practice, the NAB has not been free from political influence. It has been accused of being exploited as a tool of political victimization. Various regimes have tried to curtail or replace the NAB, and these pressures have made the NAB 'sluggish'. The exoneration of politicians, political workers and bureaucrats accused of corruption under the controversial National Reconciliation Ordinance (NRO) on October 5<sup>th</sup> 2007 together with acquittals made in high-profile political corruption scandals have undermined public trust in the agency. However, against all odds, the NAB has still managed to recover Rs. 247.331 and has to its credit the prosecution of public servants, politicians and senior military officials resulting in convictions.

Initially, the NAB had an enforcement-based policy focused more on punishments and recovery; however, after failing in its objective of curbing corruption, it initiated a three-pronged National Anti-Corruption Strategy (NACS) in 2002 that was directed towards eliminating corruption not only through enforcement, but also through prevention and education. To comply with these objectives, the NAB created an awareness and prevention wing engaged in eliminating

corruption by implementing preventive measures in the public sector and by creating awareness of corruption among the public through media campaigns and educational programs. It also exercises its authority to call for contract copies and inspects major public projects and contracts. It also examines legal frameworks, procedures and systems of federal and provincial government departments, ministries, statutory corporations, public bodies, and the conduct of public office holders to identify loopholes and makes recommendations for reducing corruption opportunities. For effective accountability, the NAB ensures the dissemination of adequate information regarding its functions by publishing annual reports and quarterly updates. Its official website also has a complaint mechanism, and the NAB under law has to provide anonymity to informants. The NAB's official website guides the 'informants' to provide information or evidence that leads to investigation and prosecution of corruption or corrupt parties, bank loan defaults and write-offs, and help in recovering the looted public money. Provisions regarding rewards for whistleblowers can be found under section 33A of the NAO of 1999. However, whistleblowers are reluctant to disclose public corruption as they do not trust the implementation of protective provisions.

#### **4. Ineffective Accountability Structures in Pakistan**

In 2016 when respondents from across Pakistan were asked to state their level of trust in major national institutions, the National Accountability Bureau ranked quite poorly with only 39% respondents expressing their trust in the country's apex anti-corruption institution.

Despite sufficient operational and functional independence with excellent legal provisions to hold any public or institution accountable, the NAB has been unable to make a significant impact on the fight against corruption.

With the release of the Panama Papers in 2016 which culminated with the disqualification of a sitting premier, the issue of governance and corruption has been brought to the forefront with greater intensity in Pakistan. More than anything, the emergence of the 'Panama Papers' and the subsequent maelstrom over the issue highlighted the weakness of Pakistan's accountability institutions, especially the NAB, the Federal Board of Revenue (FBR), and the FIA. Given the wide-ranging powers that the NAB enjoys and the resources at its disposal, it has been disappointing to witness its inactivity over the Panama Papers issue.

Pakistan has experimented with a number of models to address the menace of white-collar corruption. One major weakness in the laws controlling these institutions was the unbridled power of the ruling party to appoint and remove the heads of these institutions. A major improvement in the law governing the NAB was introduced through the NAO of 2002 when the appointment of the NAB Chairman was required to be made through a bipartisan process involving consultation with the Leader of the Opposition in the National Assembly. Consultation with the Leader of the Opposition by the prime minister required under this amendment was

made meaningful and effective after the Supreme Court specified the extent and requisites of the consultation. Following these two developments, the NAB has attained, to a great extent, the position of a truly independent entity largely protected from partisan influence.

However, the National Accountability Bureau has come under increasing scrutiny from the Supreme Court of Pakistan, especially for its reluctance to pursue mega-corruption cases, instead choosing to devote its efforts to cases that should actually be pursued by Provincial Anti-Corruption Bureaus.

Parliament, especially the Standing Committees of the Senate and National Assembly on Law and Justice, has a special responsibility in this context. Parliamentary Committees should hold special meetings to ask the NAB the reasons for its dormancy in the context of the recent Panama leak.

#### 4.1) State Compliance with the United Nations Convention against Corruption (UNCAC) in Pakistan

As shared earlier, the UNCAC is the first legally binding international instrument on anti-corruption. Pakistan became a signatory to the United Nations Convention against Corruption (UNCAC) under UNODC on December 9<sup>th</sup> 2003 and ratified the Convention on August 31<sup>st</sup> 2007. As of now, 181 countries have ratified the UNCAC.

Country review is a mandatory requirement under the review mechanism devised in accordance with Article 63 Paragraph 7 of the UNCAC. Reviews must assess the implementation status of UNCAC based on the Terms of Reference (TORs). The UNCAC review mechanism is based on a peer-review system and experts of two countries (selected through balloting) review the anti-corruption laws and procedures of a country under review to assess the implementation of its provisions.

The first review cycle under the mechanism was launched in the year 2010 (for a period of five years: 2010-2015). Under first cycle, Chapter 3 (Criminalization and Law Enforcement - Articles: 15-42) and Chapter 4 (International Cooperation – Articles: 43-50) have been reviewed. As per the results of a drawing of lots, Pakistan's review began in the third year of the first review cycle, June 2012. Norway and the Solomon Islands were drawn as Reviewing State Parties for Pakistan. As a result, peer review of Pakistan's compliance with the UNCAC has been carried out by Norway and the Solomon Islands, and the report has been submitted to the federal Cabinet for approval. Likewise, Pakistan conducted a country review of Kazakhstan together with Qatar, and Kyrgyzstan together with Indonesia. The reports have been submitted to the UNODC Secretariat in Vienna, Austria.

In Pakistan, the NAB is designated as the central authority of Pakistan under the UNCAC. The other ten national stakeholders that remained engaged during review process were as follows:

- i. Ministry of Law (M/o Law).
- ii. Ministry of Interior (MoI).
- iii. State Bank of Pakistan (SBP)
- iv. Securities & Exchange Commission of Pakistan (SECP).
- v. Federal Investigation Agency (FIA).
- vi. Financial Monitoring Unit (FMU).
- vii. Four Provincial Anti-Corruption Establishments (ACEs).

Following a lengthy process of review that spanned from June 2012 to March 2017, which included the sharing of a draft report by the UNCAC as well as a response from Pakistan to these observations/comments to reviewers, the final Review Report shared by the UNODC with Pakistan on March 29, 2017 has been forwarded to the government of Pakistan for agreement / approval, as per Paragraph 34 of the TORs. After approval by the government of Pakistan, the country review report will be considered finalized and its executive summary will be published on the official UNODC website.

## 5. Conclusion

The National Accountability Bureau (NAB) very graciously shared the key findings and reflections from the Country Review Report (CRR) which is awaiting final approval from the government of Pakistan.

For the purpose of this paper, a consultative workshop reviewed and discussed the findings of the Country Review Report (CRR) on July 13, 2017. This section provides an overview of the yet-to-be-approved report highlighting recommendations for reform where it is due.

An overview of the Country Review Report (CRR) and executive summary of Pakistan's compliance with the UNCAC appear to present a fair picture of the existing criminal justice system in its sections on "Criminalization & Law Enforcement" and "International Cooperation." While the report points out deficiencies, it also acknowledges and reflects positive developments as well as good practices. Overall, the Country Review Report agrees that Pakistan has criminalized all UNCAC offenses. However, the report also points out areas where further legislation or legislative amendments may be required to bring the existing legal framework on corruption in Pakistan to be in line with international commitments.

Table 1 lists the findings and observations contained in the yet-to-be-approved report. The column titled PILDAT's perspective contains our independent review of the report.

**Table 1:** Independent Review of State Compliance with the United Nations Convention against Corruption (UNCAC) in Pakistan

No.	Articles	Description	Findings /Observations by NAB	PILDAT Perspective
1.	15 (a)(b)	Bribery of national public officials ( <i>Similar to Sections 161,165 &amp;165A PPC</i> )	- Largely criminalized in relevant sections of the NAO and PPC. Exhaustive list of "holder of public office" - "catch-all" clause is required to be added. Element of "promise" is also lacking.	<b>Legislative Amendment required</b>
2.	16 (1-2)	Bribery of Foreign Public Officials & of International Organs	- Partially criminalized through Sections 4 and 9 (a)(i) of NAO. - Not expressly mentioned in the NAO of 1999 and other related laws.	<b>Legislative Amendment required</b>
3.	17 (a)(b)	Embezzlement, misappropriation or other diversion of property by a public official	- These acts in the public and private sectors are criminalized through relevant sections of the NAO and PPC 405 & 406.	<b>In Compliance</b>
4.	18	Trading in influence ( <i>Similar to Sections 162,163 &amp; 164 PPC</i> )	- Largely criminalized through relevant sections of the PPC and NAO. - Element of "promise" is lacking.	<b>Legislative Amendment required</b>
5.	19	Abuse of functions (Sections 9(vi)(vii) NAO, 5 PCA)	- Criminalized through relevant provisions on misuse of power and breach of trust in the NAO, PPC and PCA of 1947.	<b>In Compliance</b>
6.	20	Illicit enrichment (Sections 9(v) NAO & 5(e) PCA)	- Criminalized through Sections 9(a)(iv-v) and 14 (c) of the NAO together with PCA Section 5. Cases filed in the Accountability Courts.	<b>In Compliance</b>
7.	21 (a)(b)	Bribery in the private sector (Any other person)	- Criminalized in the NAO, as clarified by a 2002 Supreme Court judgment. The sanctions apply as in cases of bribery of a public official.	<b>In Compliance</b>
8.	22	Embezzlement of property in the private sector ( <i>Similar to Sections 405, 406 PPC</i> )	- Criminalized through relevant sections of the NAO and PPC Sections 405 & 406.	<b>In Compliance</b>
9.	23 (1-2)	Laundering of proceeds of crime (AMLA 2010)	- All aspects of money laundering criminalized through the Anti-Money Laundering Act of 2010 (AMLA).	<b>In Compliance</b>
10	24	Concealment (AMLA 2010)	- Criminalized through AMLA Section 3.	<b>In Compliance</b>

11.	25 (a)(b)	Obstruction of justice (Sections 191-204, 221-223 PPC)	- Falsification of evidence and false testimony, as well as interference with the course of justice is criminalized in a general sense (NAO). - Legislatively covered, however, the elements of "promise, offering or giving of an undue advantage" are recommended to be included.	<b>Legislative Amendment required</b>
12	26 (1-4)	Liability of legal persons (Sections 5(o) r/w 9 NAO, Companies Ordinance 1984)	- General reference to the corporate liability, or liability for legal persons as outlined in Section 305 (f) of the Companies Ordinance of 1984. - Urged to ensure that sanctions against legal persons are in line with the Convention and are effective, proportionate and dissuasive.	<b>Enforcement &amp; Legislation Required</b>
13	27 (1-3)	Participation and attempt	- The provision is in compliance with the Convention.	<b>In Compliance</b>
14	29	Statute of limitations	- It was explained that as long as an investigation remains open – no limitation. No adverse or advisory observation given.	
15	30 (1-10)	Prosecution, adjudication and sanctions	- Largely in compliance - Urged to review the professional immunities in view of the Convention. - Urged to ensure that its plea bargaining system in relation to corruption offenses uses the plea as an attenuating circumstance. Enforcement.	<b>Enforcement Required</b>
16	31 (1-10)	Freezing, seizure and confiscation	- Largely in compliance. - Encouraged to establish clear guidelines for handling seized / confiscated assets as well as a centralized Assets Management Office to ensure that the assets retain their value. Enforcement.	<b>Enforcement Required</b>
17	32 (1-5)	Protection of witnesses, experts and victims	- Urged to expedite the adoption of the Draft Law in order to establish a full-fledged protection program.	<b>Legislation Required</b>
18	33	Protection of reporting persons	- Urged to accelerate the adoption of a whistleblowing law (Public Interest Disclosure Bill).	<b>Legislation Required</b>
19	34	Consequences of acts of corruption	- Provision appears to be implemented in practice.	

20	35	Compensation for damage	- Not possible to assess due to lack of data. Urged to take measures to ensure implementation.	<b>Enforcement Required</b>
21	36	Specialized authorities	- Appreciated the role/efforts of the NAB with the recommendations of more training facilities.	<b>Enforcement Required</b>
22	37 (1-5)	Cooperation with law enforcement authorities	- Lack of data makes it challenging to get a clear impression.	<b>Enforcement Required</b>
23	38 (a)(b)	Cooperation between national authorities	- Legislatively Implemented.	
24	39 (1-2)	Cooperation between national authorities and the private sector	- Implemented.	
25	40	Bank Secrecy		
26	41	Criminal record		
27	42 (1-6)	Jurisdiction		
28	44 (1-18)	Extradition	- UNCAC offenses to be included in the list and extradition treaties. - Extradition for offenses, when at least one is extraditable. - Provisional arrest when extradition is sought.	<b>Legislation Required</b>
29	45	Transfer of sentenced persons	- Largely in compliance. - Pakistan is not a party to any multilateral treaties.	
30	46 (1-30)	Mutual legal assistance	- Draft law on MLA with the inclusion of required provisions is to be expedited. - No specific legislation.	<b>Legislation Required</b>
31	47	Transfer of criminal proceedings	- No legislation / practice exists.	<b>Legislation Required</b>
32	48 (1-3)	Law enforcement cooperation	- In compliance.	
33	49	Joint investigations	- In compliance. - No examples/data provided.	
34	50 (1-4)	Special investigative techniques	- Partially implemented.	<b>Legislation Required</b>



## Case Study 6: Myanmar

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### 1. Introduction

There is a general consensus that corruption is a universal problem. It exists in many forms in both developed and developing countries and it can occur in both the public and private sectors.<sup>2</sup> Therefore, Myanmar is also not free from corruption. On Transparency International's (TI) 2016 Corruption Perceptions Index (CPI),<sup>3</sup> Myanmar scored 28<sup>4</sup> and ranked 136<sup>th</sup> out of 176 countries. Despite Myanmar's low score on the 2016 CPI, TI's regional analysis gave the country credit for making progress in corruption control, citing the NLD government's commitment to fight corruption. However, it also highlighted the lack of oversight over the military by referring to the deadly violence in Rakhine State and the military's impunity, which contributed to Myanmar's low score. The low scores of neighboring countries and their rankings on the CPI reflect the fact that corruption is one of the major issues that must be addressed to promote the democratization and sustainable development of the countries in the Asia-Pacific region.

That is why there is a growing recognition that corruption, particularly systemic corruption, can have an adverse impact on the political, economic and social development of the country<sup>5</sup> and reform-minded leaders in the region have taken the initiative to fight corruption in their countries. A commitment from leadership is highly necessary to fight corruption effectively and promote good governance. In contrast, some leaders in the region do not have enough power to fight against corruption, even though they recognize the importance of doing so. For instance, Myanmar's democracy leader Aung San Suu Kyi, who is no doubt determined to fight corruption and uphold the rule of law, is maneuvering under very difficult circumstances and does not have enough power to control the bureaucracy, particularly the military. In addition, Myanmar's national reconciliation agenda looms large and achieving this depends heavily on the cooperation

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<sup>2</sup> U Myint. (2000). Corruption: Causes, Consequences and Cures. *Asia-Pacific Development Journal*, 2(7), 33-58.

<sup>3</sup> Transparency International (2016), Corruption Perceptions Index. Retrieved from [https://www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2016](https://www.transparency.org/news/feature/corruption_perceptions_index_2016)

<sup>4</sup> Points scale between 0 (most corrupt) and 100 (cleanest).

<sup>5</sup> Ibid *supra* 1.

of the powerful military group. The military controls 25 percent of the seats in Parliament and three powerful ministries at the Union level. Therefore, she has placed political considerations ahead of a true crackdown on corruption. No prominent cases involving high-level bureaucrats have been tried or big fish sent to prison since she came to power in April 2016.

This case sheds light on the fact that political leaders with conflicting goals have to choose the best strategies depending on their available power resources to fight against corruption. Sometimes, they have to be content with controlling corruption at lower levels by prosecuting petty bribery cases, or more colloquially, ‘frying small fish.’ Sometimes they have to be content with taking preventative measures such as passing an asset disclosure law, streamlining bureaucratic procedures, promoting transparency and access to information, and strengthening complaint mechanisms rather than taking charge against the wrongdoers at the top level. Corruption must be weighed against other important priorities such as democratization, national reconciliation, peace, and development.

This paper will mainly focus on analyzing the current situation of corruption since the NLD government came to power in 2016 and explain the challenges and opportunities for controlling corruption within the difficult context of transition. It will also explain the present institutional arrangements as compared to past institutions. Finally, it will provide recommendations to relevant stakeholders on how to hold the government more accountable and institutionalize good governance in Myanmar.

This paper is divided into four parts. Section Two will discuss the historical context in which the seeds of corruption were sown. Section Three will focus on the current status of corruption, including challenges and opportunities to control corruption. Section Four will explain existing institutional arrangements, and Section Five will conclude with recommendations.

## **2. Historical Context**

Historically and culturally, corruption was considered an ignoble behavior to be avoided by people of dignity. Abuse or misuse of power/office for private gain was denigrated. Myanmar inherited its civil bureaucracy from the British colonial government, which gave rise to an elite class of Indian Civil Service (ICS) and Burma Civil Service (BCS) bureaucrats. They were highly educated, loyal to their institutions, valued professionalism, upheld the rule of law, and followed administrative rules and regulations exactly. They did their utmost to block political influence in their implementation of policies. Their political masters during the post-independence parliamentary government led by Prime Minister U Nu respected them and took their advice seriously. Civil servants who worked under this elite class also held them in high regard because of their integrity, professionalism, moral courage, impartiality, and loyalty to their institutions. As a result, the bureaucratic machinery was considered to be clean, and corruption in all forms, from petty bribes to high profile cases, was rare at that time. Public opinion of the bureaucrats at that

time was positive, while it was more negative towards politicians. Another contributing factor that kept the bureaucracy clean during the period of parliamentary government (1948-62) could be the presence of a decent incentive structure and the ability of bureaucrats to maintain their status without recourse to corruption. Many older people recounted earning salaries that provided more than enough for their monthly expenditures and allowed them to save for housing and retirement. In a way, social security schemes may be important for curbing corruption and providing a sense of security to civil servants.

That situation changed completely after 1962, and more than half a century of authoritarian rule has contributed to a well-institutionalized, widespread, and culturally accepted level of corruption as indicated by the country's current ranking and score. Crony capitalism was born during the military dictatorship which ruled the country from 1988 to 2011. During a focus group discussion<sup>6</sup> on corruption with informed people, including MPs, lawyers, former bureaucrats, civil society actors, and authors, it was put forth that the seed of corruption was sown when military personnel started taking civilian positions in the bureaucracy during General Ne Win's rule (1962-1988), first as leader of the revolutionary council and then as chairman of the Burma Socialist Program Party (BSPP). Ne Win appointed his loyalists to ministerial positions and as heads of government departments. According to anecdotal evidence,<sup>7</sup> the clash between senior bureaucrats and their political masters started when they tried to explain the complexity of administrative procedures, rules, and regulations that the military personnel thought was unnecessary. They wanted bureaucrats to follow their motto of "Don't give the excuse that there is a hole in the water container; you must fetch water by all means." As a result, distrust grew exponentially between the former elite class of bureaucrats and the incoming military appointees. Many experienced ICS/BCS class civil servants were removed, retired or resigned one after another.

One personal story<sup>8</sup> told to the author recounted an incident where a group of senior civil servants had dinner together, and during the dinner they made remarks about the military personnel's ignorance of civilian affairs. Somehow these remarks circulated back to Ne Win and his top aides. Within a few days, those senior bureaucrats were removed from their duties and revolutionary council leaders said that they could manage civilian affairs on their own. The mass departure of senior bureaucrats left the bureaucracy with a moral vacuum, reduced institutional memory, and lacking competent leadership. This in turn contributed to the entrenchment of clientelism and sowed the seed of corruption.

Some focus group discussion members recounted their experiences and said heads of departments who were also active or ex-military sold government positions to their juniors, particularly general township/district administrative positions, as they could generate a great deal of rent from position-holders. However, the corruption at the time was not on the same level as it

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<sup>6</sup> The author conducted a focused-group discussion with an informed group of people on corruption in Oct 2017 in Yangon. The FGD group included members of parliaments from Yangon Regional Parliament, legal experts, ex-government officials, authors and CSO members.

<sup>7</sup> A former senior bureaucrat who served the government at the time the revolutionary council was in power.

<sup>8</sup> Ibid.

is in today's bureaucracy, partly because of the closed economy. Political or grand corruption on a massive scale could not occur as there were few major investment projects or extractive industry-related concessions. Each and every sector of the economy was controlled by state-owned enterprises and they were not very open to foreign and domestic investment.

The situation continued to worsen after the military took power from the BSPP government in 1988 following a brutal crackdown on mass democracy uprisings. According to discussants in the focus group, mass corruption was used as a tool to maintain regime legitimacy and survival during the State Law and Order Restoration Council's (SLORC) era, as well as later during the reign of the State Peace and Development Council (SPDC). Both elite-level corruption and corruption at all levels of bureaucracy was tolerated by the SLORC/SPDC leadership as a way to maintain unity and control the bureaucracy. Their highest priority was state stability or regime survival.

Some observers noted that the SLORC/SPDC used mass corruption and mass repression as a means to control the general public. For instance, they raised the salaries of civil servants by printing money, which fueled inflation, and by allocating plots of land in new satellite towns in urban areas to civil servants. The opening of the economy and privatization of state assets compounded this issue. Due to the imposition of Western sanctions, the government did not have much access to international aid and was in desperate need of financial resources to hold on to power. Their only source of government revenue was the extraction of natural resources. Revenue was critical; especially to purchase the arms and ammunitions needed as the government fought numerous ethnic armed groups and the Communist Party Burma (CPB). The SLORC believed that they were surrounded by both external and internal enemies,<sup>9</sup> but it was difficult to maintain so many battle fronts, and so they extended ceasefire agreements to ethnic armed groups. At the same time, they promoted their relationship with China to a new level, recognizing the advantage of an alliance with a neighbor that was a member of the United Nations Security Council. The SLORC/SPDC also pursued closer ties with neighboring Thailand in order to place pressure on ethnic armed groups on the Thai-Myanmar border by offering natural resource extraction concessions and investment opportunities. However, they were unable to systematically manage natural resource extractions and privatization. As a result, political corruption occurred on a massive scale and crony capitalism was born.

As economic conditions worsened for ordinary people, corruption at all levels of bureaucracy became rampant, with even previously respectful teachers engaging in the practice. This corruption was tolerated by the regime leadership. It was a strategy of control, as civil servants had to be subservient to the military personnel above them as they too were involved in corrupt practices. As a result, all of the values and norms which had been the backbone of the bureaucracy and society were broken down. Corruption was accepted as a way of life under authoritarian rule and later it became a means to wealth and climbing social ladders.

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<sup>9</sup> Billboards stating "Resist both domestic and external enemies" were displayed during the reign of the SLORC/SPDC.

It is now very difficult to combat corruption in Myanmar, although the National League for Democracy (NLD) came to power after winning a landslide victory in the 2015 elections led by democracy icon Aung San Suu Kyi. This is because the NLD must share power with the military as prescribed in the 2008 Constitution. Three powerful ministries (the Ministry of Home Affairs, the Ministry of Border Affairs, and the Ministry of Defense) are under the control of the commander in chief. The effectiveness of Anti-corruption Commission is in doubt due to several factors which will be discussed in details Section Four. Many believe there is still a long way to go along the path to controlling corruption in Myanmar, as evidenced by its rank of 136<sup>th</sup> on the 2016 CPI.

### **3. The Current Status of Corruption in Myanmar**

During the campaign leading up to the 2015 elections, Aung San Suu Kyi vowed to crack down on corruption and said she personally would send her party members with government positions to jail if they committed corruption. Soon after she came to power in April of 2016, a decree was issued barring Cabinet members and bureaucrats from taking gifts worth more than MMK 25,000 (less than USD \$20). Anecdotal evidence suggests that she selected older members for her Cabinet members (the majority of her Cabinet is aged 60 or above) because she thinks that younger people in power are more prone to corruption due to their stronger need for material wealth. She is concerned about having scandals in her government as her government has to share power with the military. In addition, many people say she believes that the effective control of corruption will attract foreign investment and promote economic development. She considers corruption to be the major hindrance to economic development. In a keynote speech delivered during the ASEAN Summit meeting which was held in the Philippines in 2017, she said “I would also like to mention that we depend on the enhancement of integrity for economic development. I think it is a better way of saying getting rid of corruption. I was talking earlier about the new possibilities that have opened up in our country. I can’t help mentioning the fact that some of those who are engaged in business in Myanmar previously say that it was much easier then because you knew who to bribe. It is a lot more difficult now, because now, you have to know how to do business in the right way. Integrity runs business.”

As a result of the NLD leadership’s commitment to controlling corruption, corruption at the top level has significantly decreased according to informal interviews and conversations. For instance, the business of one high-end liquor shop in Naypyidaw has been badly affected because businesspeople no longer need to give very expensive bottles of liquor to Cabinet ministers. An attempt by a media company to bribe a newly-appointed minister in NLD government by giving five million kyats in a gift box was thwarted, and the President’s Office sent a warning letter to the

media company in which it stated that action would not be taken this time and it would be treated as an ‘educational moment.’<sup>10</sup>

A well-known journalist who ran a story in the Singapore Straits Times about the Yangon Region Chief Minister taking a bribe of an expensive Patek Philippe watch was sued by the Chief Minister under Article 66(d) of the Telecommunication Law for defamation. The journalist was only released on bail after Eleven Media group, which the journalist leads, issued a public apology and retracted the editorial. Some analysts said that the Chief Minister had to sue the CEO and Editor-in-Chief of Eleven Media in order to prove his innocence, as corruption will not be tolerated by the NLD leadership, particularly Aung San Suu Kyi. At the beginning of the NLD government’s term, the bureaucratic machinery nearly came to a halt and processes in government offices were very slow because civil servants did not know what would happen if they continued to take bribes as usual. They took the stance of “Ma Lote, Ma Shoke, Ma Pyoke” meaning no action, no complicity and no punitive action against them. The NLD leadership, as mentioned by Aung San Suu Kyi in her above-quoted speech, believes that the economy has slowed down not because of their weak capacity for economic management, but rather on account of this removal of the ‘lubricant’ from the bureaucratic machinery. Its crackdown on petty bribes has forced businesses to take a new approach and find a new equilibrium. It is possible that there is some truth to this theory, as the entire civil bureaucracy previously relied on lubricant (bribes) to survive and accumulate wealth. The slowdown in government processes could be attributed to the bureaucrats’ response to the dismantling of their illicit but informally institutionalized incentive system.

However, there are constraints on the ability of the NLD government to take effective actions against grand-level corruption involving powerful interest groups. As mentioned above, political considerations come first when selecting strategies to control corruption. The government’s national reconciliation agenda prevents it from taking punitive actions against individuals or groups that are extracting rents, mainly from natural resources. The government still cannot address the issue of other accounts held by state-owned enterprises at Myanmar Economic Bank, although the Ministry of Planning and Finance has changed the reporting formats of the enterprises.<sup>11</sup> The huge gap between actual production and revenue from Myanmar’s jade sector in which powerful cronies, drug lords and armed groups are involved as pointed out by Global Witness<sup>12</sup> means there must be massive corruption in the extractive industry sector. At the moment, these issues are very sensitive and have the potential to destabilize the transition and national reconciliation process. Accordingly, the NLD leadership seems unwilling to touch them.

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<sup>10</sup> Kyaw Phyo Tha & San Yamin Aung. (2016, April 20). President Office Calls Out Media Company for Alleged Govt Bribe. *The Irrawaddy*. Retrieved from <https://www.irrawaddy.com/news/burma/presidents-office-calls-out-media-company-for-alleged-govt-bribe.html>.

<sup>11</sup> Myanmar Extractive Industries Transparency Initiative. (2015). EITI Report for the Period April 2013-March 2014 – Oil, Gas and Mining Sectors. Retrieved from [https://eiti.org/sites/default/files/documents/fy2013-2014\\_myanmar\\_eiti\\_report.pdf](https://eiti.org/sites/default/files/documents/fy2013-2014_myanmar_eiti_report.pdf).

<sup>12</sup> Global Witness. (2015). *Jade: Myanmar’s “Big State Secret”*. London: Global Witness Limited.

This author posits that this is the reason why the current government appears to have contented itself with legal reforms and educational measures.

Some analysts say that the power of bureaucrats has grown and corruption within the bureaucracy returned, although not as explicitly as before, due to the lack of governing experience and weak capacity of the NLD ministers. During informal interviews<sup>13</sup> in one region in upper Myanmar, some locals said there were even incidents of corruption during the selection process for National Outstanding Students. No action was taken against those responsible, although the parents of students who felt their children were left out because they did not bribe the officials sent complaint letters to the highest authorities. The author's observations also indicate that civil servants at the township level in rural areas generally continue to ask bribes from ordinary people when providing services such as issuing national identity cards or passports. However, civil servants in capitals do not dare to ask for bribes from clients as the clients may have access to senior civil servants or ministers, be more familiar with proper procedures, or lodge complaints on social media.

The Ministry of Information conducted a perception survey on corruption in 2017 that sheds light on the current status of corruption in Myanmar (Myanmar Affairs, 2017). The survey covered 31 townships in the Yangon region with a total of 794 respondents of different age groups from both the private and public sectors. The survey questions covered topics including reasons for giving bribes; the most corrupt government departments; the main cause of corruption; the status of corruption under current government; satisfaction with the current government's measures to control corruption; and others. More than 58 percent of respondents stated that their reason for giving bribes was to smooth administrative processes. Six government departments, namely immigration, the judiciary, municipal offices, the police, customs, and the General Administration Department stood as the most corrupt government organizations. Forty-six percent of respondents stated that the main cause of corruption is the government's failure to take effective action against the culprits. Fifty-three percent also stated that the status of corruption under the current government has not changed much, while more than 54 percent responded that current government's measures to control corruption have not been very effective. More than 51 percent of respondents answered that the formation of anti-corruption committees was not effective, and more than 71 percent said they believe that salary reform would help curb corruption.

The survey answers offer information about bribery in government departments, but they do not tell us much about political corruption or state capture by influential interest groups. Political corruption or state capture refers to the ability of powerful, influential people to exert pressure on decision makers to change policies or implement programs/projects that are in line with their private interest. It can be categorized as a type of grand corruption. Cronyism is closely related to this concept. Private business groups can capture states through non-monetary as well as monetary incentives. The issues mentioned above of the existence of other accounts and the illicit siphoning

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<sup>13</sup> The author talked to local businesspeople, CSO members and political party members in Monywa, Sagaing Region in September 2017.

of revenue from the jade sector can also be classified as political corruption. This sort of corruption is hard to investigate, and its exposure requires that civil society, the press, and independent think tanks possess a technical skill set. The most important factor in controlling this type of corruption is transparency in major private investments, public-private partnerships, and public procurements. Without accurate data, no outsider can analyze or expose political corruption.

The current government needs to improve its transparency.<sup>14</sup> Many lawmakers, particularly those from the Yangon region, complain about the lack of transparency in major urban development and housing projects during interviews with the news media. They have raised the point that although the Constitution requires major investment projects to pass through legislatures in order to be approved, regional governments are implementing projects without prior parliamentary discussion. Public confidence in government may be eroded if major investment projects are not transparent, and government must disclose its investment documents to the public to the greatest extent possible. Not long ago, the Ministry of Construction signed a Build-Operate-Transfer (BOT) contract with Japanese construction giant Kajima for a USD \$400 million investment mixed-use housing project in Yangon. The terms of the concession raised the eyebrows of many analysts, as the term of the contract is 70 years.<sup>15</sup> The government should clear beyond a shadow of a doubt why they gave such a long concession to the Japanese company. International organizations like DFID-funded Construction Sector Transparency (COST) and the Myanmar Center for Responsible Business (MCRB) are pushing for construction sector transparency by holding meetings with Union Parliament's Public Accounts Committee (Myanmar Union Parliament, 7 Feb 2018). The inability of the Office of the Auditor-General (OAG) to scrutinize military expenditures and the military-industrial complex considerably limits the ability of anti-corruption agencies to investigate political corruption. Although the defense budget has been submitted to the Parliament since 2013, there is a complete lack of transparency and civilian oversight over defense services as Article 20 of the 2008 Constitution stipulates that "Defense Services have the right to independently administer all affairs of the armed forces."<sup>16</sup> Transparency of the whole executive branch, including military, is crucial to the control of corruption in Myanmar.

Controlling corruption in Myanmar is currently at a critical juncture and remains a huge issue that is having a significant impact on conflict resolution, peace, and the long-term development of the country. The NLD government is initiating many legal and institutional reforms such as budget transparency, the Union Civil Service Reform Action Plan, the Public Procurement Law, the Myanmar Investment Law, and the Myanmar Company Law with the intention of promoting transparency and accountability in the public sector. The success or

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<sup>14</sup> A Right to Information (RTI) law is being drafted by civil society, and according to an insider involved in the drafting process, the government will enact this law soon.

<sup>15</sup> Nikkei Asian Review. (2017, November 18). Kajima takes on \$400m urban development project in Myanmar. Retrieved from <https://asia.nikkei.com/Business/Companies/Kajima-takes-on-400m-urban-development-project-in-Myanmar?page=1>.

<sup>16</sup> Transparency International Government Defense Anti-Corruption Index. (2015). Myanmar 2015 Country Summary.

failure of these reforms will to a great extent decide the future of corruption control in Myanmar. Not long ago, Anti-Corruption Commission (details of which will be discussed below) was re-organized with a new chairman, who is a former general with a good reputation, and other new members. Hence, it can be assumed that although the government is focusing on addressing more urgent issues, it is not neglecting corruption and is applying a multi-pronged approach.

#### 4. Anti-corruption Institutions in Myanmar

Before 2013, two laws, namely Penal Code 1861 and the Suppression of Corruption Act of 1948 were the main institutions controlling corruption in Myanmar. In addition, there are 23 special laws related to anti-corruption in Myanmar, including the Public Properties Protection Act of 1947, the Money Laundering Law of 2002, the Commercial Tax Law of 1990, and the Narcotic Drugs and Psychotropic Substances Law of 1993.<sup>17</sup> The enforcement of the two main laws and most of the related ones lies mainly with the Bureau of Special Investigation (BSI). The BSI was established in 1951 with 31 staff members under the Bureau of Special Investigation Act and placed under the Prime Minister's Office. Its name was changed to the Special Investigation Department (Sa Thone Lone in Myanmar) and it was placed under the Ministry of Home Affairs. The objectives of the BSI include: investigate and prosecute economic crimes and malpractice by public servants; collect intelligence for national security; and serve the interest of the people.<sup>18</sup> Although the first two objectives are directly related to corruption control, the latter two seem to focus more on security and politics. Many analysts assume that the BSI focuses more on politics and see it as a machine to purge the political rivals of the top leaders, as it is not an independent anti-corruption agency and it is the only specialized police agency under the Ministry of Home Affairs.

Many observers have considered the level of corruption in Myanmar as systemic at both the national and local levels. They also assume that former junta leaders, their families, and associates were deeply involved in economic activities which include the multibillion-dollar jade trade (Freedom House, 2016).<sup>19</sup> That is why corruption charges against Cabinet members and top generals were considered political purges rather than punitive measure to control corruption. For instance, the arrest of General Khin Nyunt in 2004 on charges of corruption was considered a political purge. A limited number of public officials were prosecuted in the past twelve years.<sup>20</sup> Therefore, its effectiveness as an anti-corruption agency has been questioned by many as the level

<sup>17</sup> Myo Khaing Swe. (2014). *Anti-Corruption Efforts in Myanmar*. In *UNAFEI Resource Material Series No. 92* (252-260). Tokyo: UNAFEI. 253.

<sup>18</sup> See [http://myanmarmoha.org/eng/index.php?option=com\\_content&view=article&id=109&Itemid=547&lang=en](http://myanmarmoha.org/eng/index.php?option=com_content&view=article&id=109&Itemid=547&lang=en).

<sup>19</sup> Le Maitre, Candice. (2016). *Analysis of Anti-Corruption Measures in Myanmar*. Graduate Diploma Thesis in Politics and International Studies, School of Social and Political Sciences, University of Melbourne.

<sup>20</sup> *Ibid.*

of corruption has increased to become widespread/systemic during nearly half a century of authoritarian rule.

In 2003, the SPDC regime unfolded its seven-step roadmap to democracy, titled the Roadmap to Discipline Flourishing Democracy, after the Depayin massacre in which many of Aung San Suu Kyi's supporters were killed or arrested (she herself was put under house arrest in the wake of this incident). During the implementation of this roadmap, the SPDC held elections in 2010 and dissolved itself to transfer power to former President Thein Sein's pseudo-civilian government in April 2011. Thein Sein promised to promote good governance and clean government in his inaugural speech in Parliament.<sup>21</sup> In order to implement his good governance agenda, the government initiated legal reforms and applied for membership to the Extractive Industry Transparency Initiative (EITI) and the Open Government Partnership. Included in the legal reforms was the Anti-corruption Law (ACL) enacted in 2013. The objectives of the ACL are 'to eradicate bribery as a national cause'; 'to provide clean and good governance'; 'to promote prestige and accountability'; 'to prevent the impairment of State property, and citizens' rights and interests resulting from bribery'; 'to take effective action against those who commit bribery'; and 'to encourage transparency in order to encourage economic development by local and foreign investments.'<sup>22</sup> However, the real motivation behind the enactment of this law has been questioned by numerous scholars, and it is considered to be more of an attempt to boost the economy than a measure enacted with genuine political will. Lindsey<sup>23</sup> stated that "Even though influence of the military in politics has decreased recently, Myanmar's reform process was 'controlled by senior regime figures.' Therefore, their motivations for initiating anti-corruption measures while being involved in corruption themselves, could be questioned. Poor economic performance and rampant corruption in the business sector were the main reasons to introduce new anti-corruption measures."

However, it is also possible that the pseudo-civilian government wanted to maintain the military's dominant position in society while simultaneously gaining more legitimacy, especially among the international community, to have sanctions lifted and attract much needed foreign investments. Therefore, to show its commitment to good governance, clean government and democratization, they enacted this Anti-corruption Law in 2013. As mentioned above, many were doubtful of their commitment and political will and stated that the actual implementation of the Anti-corruption Law would determine whether or not they did in fact have strong political will.<sup>24</sup> The subsequent formation of the nine-member Action Committee against Bribery (ACAB) in 2013 and Anti-Corruption Commission (ACC) in 2014 were like putting the same wine in a new bottle.

<sup>21</sup> Ko Htwe. (April 1 2011). Thein Sein Calls for Clean Government. *The Irrawaddy*. Retrieved from [http://www2.irrawaddy.com/article.php?art\\_id=21062](http://www2.irrawaddy.com/article.php?art_id=21062).

<sup>22</sup> Pyidaungsu Hluttaw. (2013). Anti-Corruption Law – Pyidaungsu Hluttaw Law No. 23, 2013. Retrieved from [http://www.burmalibrary.org/docs18/2013-08-07-Anti-Corruption\\_Law-23-en-red.pdf](http://www.burmalibrary.org/docs18/2013-08-07-Anti-Corruption_Law-23-en-red.pdf).

<sup>23</sup> Lindsey, T. (2014). Myanmar, Reform and the Indonesian Model. In M. Crouch and T. Lindsey (Ed.), *Law, Society and Transition in Myanmar*. Oxford: Hart Publishing (344-357). 354. Cited in Le Maitre (2016).

<sup>24</sup> Crouch, M. (2014). The Layers of Legal Development in Myanmar. In M. Crouch and T. Lindsey (Ed.), *Law, Society and Transition in Myanmar*. Oxford: Hart Publishing (33-56). 48. Cited in Le Maitre (2016).

Apart from suspicions regarding the political will to take action against corruption, a number of legal experts pointed out the numerous weaknesses of the Anti-Corruption Law (ACL) and Anti-Corruption Commission. From 1948 to 2013, corruption was a crime punishable by imprisonment,<sup>25</sup> and those who committed corruption crimes could be charged under the Anti-corruption Law of 1948 and Sections 161, 162, 163, and 165 of the Penal Code of 1861. However, these laws were nullified with the enactment of the ACL in 2013 as Section (68) of the law stipulates that any cases related to corruption must be charged under this law regardless of the potential application of other criminal laws. However, the process of prosecution under this law is cumbersome and complex (Myanmar Affairs, 2017, 8) so that one legal expert (a retired judge) stated during a focus group discussion that it was not anti-corruption law; rather it should be named a “protection of corruption law”.

Candice L.M Lemaitre summed up the ACL’s weaknesses in three points.<sup>26</sup> She considers that ACL is unlikely to have a real impact because of its lack of provisions regarding the protection of whistleblowers and witnesses, the right to information, and anti-corruption education. The first weakness is that the ACL does not provide protection for complainants, witnesses, or whistleblowers. She writes that, contrary to this, Article 32 of the UN Convention against Corruption (UNCAC) recommends the establishment of a protection mechanism for witnesses, experts, and victims against potential retaliation or intimidation. Instead, with regard to witnesses, Section (59) of the ACL states that those who are found guilty of providing false information or lodging a complaint with the intention of defaming a person can be punished by imprisonment of not more than five years and a fine. In addition, the ACL also requires the complainant to provide his/her identity. In response, Transparency International (TI) wrote as follows:

“These provisions and the absence of protection for witnesses may deter citizens to report corruption acts. When there is a lack of meaningful protection for whistleblowers, the chances of detecting corruption behaviors are low, since corruption acts are not reported.”<sup>27</sup>

It is obvious that without transparency in public affairs, it is very difficult to expose corruption, particularly those acts that fall under the category of grand corruption. Although a Right to Information (RTI) law is likely to be approved by the government and Parliaments in the near future, there is currently no RTI law in Myanmar and access to government information is very difficult even for international organizations that work with government ministries, let alone ordinary people. Article (10) of UNCAC endorses each state party to enhance transparency in public administration. That’s why Transparency International clearly states in its report “Fighting

<sup>25</sup> Le Maitre, Candice. (2016). Analysis of Anti-Corruption Measures in Myanmar. Graduate Diploma Thesis in Politics and International Studies, School of Social and Political Sciences, University of Melbourne.

<sup>26</sup> Ibid.

<sup>27</sup> Transparency International. (2014). Fighting Corruption in South Asia: Building Accountability. Berlin: Transparency International. Cited in Le Maitre (2016).

Corruption in South Asia; Building Accountability” that “when citizens’ right to information is denied, they are less able to hold decision makers to account for their actions.”<sup>28</sup> With respect to the final weakness of ACL, there is only one provision in Section (41) for educating the public to promote the eradication of bribery. However, in an ACL by-law enacted on July 10<sup>th</sup>2015, Section (59) lists the activities that the ACC can implement in order to induce cooperation from the public in prevention and eradication measures. Most of these activities are related to information dissemination and public education, including conducting educational lectures at schools and for civil society. To some extent this reflects Article 13 of UNCAC, which promotes public participation. The government seems to be aware of the importance of public education in controlling corruption.

Aside from its weaknesses, the ACL does contain Section (47) which relates to asset disclosure by public officials. If that can be enforced, it can be a deterrent measure. There are also other sections in the ACL which allow investigators to investigate the bank accounts of the accused and confiscate properties obtained through bribery. Asset disclosure will be useful for investigators in their scrutiny of bank accounts and properties of those accused.

Institutions matter, but finally the burden of enforcement falls on organizations that implement institutions and laws. In accordance with the ACL, the Anti-Corruption Commission was formed in 2014. There are many critiques regarding the previous ACC. The relevance of the ACC has been questioned in the context of weak institutions and the absence of strong political will.<sup>29</sup> There were several reasons for these critiques, but two should be highlighted. One is political independence and another is the selection process of members. Many held doubts about the political independence of the previous ACC. This was partly due to the ACL provision allowing the president and Speakers of the Hluttaws (parliaments) to assign the ACC to investigate corruption cases in which political office holders are presumably involved.<sup>30</sup> Some argue that anti-corruption agencies must be able to prosecute all public officials irrespective of their ranks,<sup>31</sup> and that political independence in the context of widespread corruption refers to an anti-corruption agency’s operational autonomy and capacity to carry out its mission without political interference.<sup>32</sup> Therefore, the ACC’s inability to prosecute political officeholders without approval from the president and Speakers of Hluttaws compromised its mission.

The ACC’s reputation has also been tarnished by the background of its members. The ACC can be formed with five members nominated by the president, five members nominated by the Amyotha Hluttaw Speaker, and five members nominated by the Pyithu Hluttaw Speaker. The members were required to be at least 45 years of age and no more than 70 years of age (before

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<sup>28</sup> Ibid.

<sup>29</sup> Ibid *supra* 23.

<sup>30</sup> Ibid.

<sup>31</sup> Pope, Jeremy & Vogl, Frank. (2000, June). Making Anticorruption Agencies More Effective. *Finance and Development* 37(2), 8. Cited in Le Maitre (2016).

<sup>32</sup> De Sousa, L. (2009). Anti-corruption agencies: between empowerment and irrelevance. *Crime Law and Social Change* 53(1), 5-22. 13. Cited in Le Maitre (2016).

revision of this section by NLD government). Pope and Vogl state that an anti-corruption agency's leaders should be persons of integrity who are protected from political pressure while they are in office.<sup>33</sup> Although the ACL prescribes that the ACC's members are expected to be honest and fair, appointees include former ambassadors, civil servants, and military generals who have been involved in bribery themselves.<sup>34</sup> ACC chairperson Mya Win is a former general who was accused of committing bribery while serving in the military.<sup>35</sup> Out of 15 members, eight were former military officials, which is why their impartiality and willingness to investigate their former colleagues was questioned.<sup>36</sup> In connection with impartiality, the ACC was accused of targeting only low-level corruption while grand corruption remained untouched.<sup>37</sup> In addition to political independence and impartiality issues, the appointment of former military officials without anti-corruption expertise or experience undermined its effectiveness and operational capability.<sup>38</sup> Because of its weaknesses, the previous ACC was heavily criticized from various quarters.

Despite these weaknesses, the NLD government recently reorganized the ACC with 12 of its own appointees on November 23<sup>rd</sup> 2017.<sup>39</sup> Although the NLD appointed another former general as the chairperson, this general has a good reputation. Out of the 12, three are retired officials from Auditor-General's Office, three are retired officials from Attorney General's Office, and two are advocates. There are also three women on the Commission. This reformation of the ACC with new members who have generally good reputations has greatly enhanced the image of the ACC. Now is the time for the reformed ACC to bring about legal and institutional reforms to the ACL and the ACC.

## 5. Conclusion

As discussed above, some legal experts have gone so far as to call for the abolition of the ACL, with one retired judge referring to it as the "protection of corruption law" because it was written in such a way that, unlike previous anti-corruption laws, it is difficult to take action against wrongdoers. However, one legal expert wrote in an article that "it was not good for laws to be abolished a few years after enactment. We have to practice and enforce the 2013 Anti-Corruption

<sup>33</sup> Pope, Jeremy & Vogl, Frank. (2000, June). Making Anticorruption Agencies More Effective. *Finance and Development* 37(2), 6-9. Cited in Le Maitre (2016).

<sup>34</sup> Nyein Nyein. (2014, February 24). Questions Over Would-Be Anticorruption Chief's Military Past. *The Irrawaddy*. <https://www.irrawaddy.com/news/burma/questions-anticorruption-chiefs-military-past.html>. Cited in Le Maitre (2016).

<sup>35</sup> Hadminh. (2015). Anti-Corruption Commission achieves little. *Eleven Myanmar*. Cited in Le Maitre (2016).

<sup>36</sup> Thompson, R. (2014, April 7). Can Myanmar Escape Corruption?. *The Lowy Interpreter*. Cited in Le Maitre (2016).

<sup>37</sup> *Ibid supra* 34.

<sup>38</sup> *Ibid supra* 23.

<sup>39</sup> The Republic of the Union of Myanmar President Office. (2017). Anti-corruption Commission reformed. Retrieved from <http://www.president-office.gov.mm/en/?q=briefing-room/orders/2017/11/24/id-8026>.

Law” (Advocate Maung Kan, 2016). Referring to the duties and responsibilities of the ACC in Section 16 (J) of the ACL, he wrote that the ACC must make arrangements to enable the participation of the public in line with its mission of eradicating of corruption as a national cause. He emphasized the importance of the people’s participation in the anti-corruption movement.

In this author’s opinion, the overarching issues of political independence; protection of witnesses, complainants and victims; public participation in anti-corruption measures; and providing anti-corruption education to the public must be given priority in revising the ACL and reforming the ACC.

- 1) The provision barring the ACC from investigating and prosecuting political officeholders without the consent of the president and the Speakers of Amyotha and Pyithu Hluttaws should be reviewed. To enhance its credibility, the ACC must be able to investigate and prosecute, if committed, grand-level corruption. However, the national reconciliation agenda looms large.
- 2) Instead of taking action only when the president or Speakers of the Hluttaws order and investigation or receive complaints, the ACC should be able to take initiative on its own to investigate and prosecute corruption cases. That will enhance its credibility and political independence. To do this, it needs resources and technical expertise. To some degree, as the newly-appointed members have background in legal, financial and public affairs, it now has an enhanced ability to investigate and prosecute.
- 3) A provision for the protection of whistleblowers and witnesses should be considered. Along with this, the penalty for complainants and the requirement for witnesses and complainants to provide identity should be reviewed.
- 4) The enactment of a Right to Information Law and citizen access to public information is crucial to corruption control. The government should enact this law in the near future.
- 5) The right to information and arrangements made by the ACC for citizen participation can enhance public participation in the anti-corruption agenda.
- 6) The ACC should be decentralized to States/Regions, districts, and townships to receive complaints and investigate. This will enhance public participation.
- 7) The asset disclosure provision should be enforced and the ACC should investigate the accuracy of disclosures from public officials.
- 8) The ACC should collaborate with NGOs/CSOs in anti-corruption public education programs.

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## Epilogue

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This report has reviewed the status of corruption in five Asian countries and discussed the level of corruption, institutional anti-corruption responses, and some policy recommendations. Despite some gaps, as expected, the respective citizens in each country perceive their own countries to be corrupt. This popular perception of corruption is usually related to a low level of trust in public institutions. Corruption, mistrust, and a lack of accountability are symptoms of “bad governance.” While the negative influence of corruption is manifest, it is difficult to identify what causes corruption due to its multiple social, cultural, and institutional dimensions. Accordingly, prescribing reform policies to combat corruption is challenging. One thing we know is that there is no universal solution that can remedy corruption as a social phenomenon. We must seek to paint a holistic picture of corruption and search for pragmatic solutions appropriate to the political and economic conditions of each country. For that matter, this report has reviewed existing anti-corruption mechanisms and worked to analyze why they are not working properly. Some policy recommendations provided are general while others are more specific to certain countries. The five country cases presented here offer three things as food for thought.

### **Interpreting Corruption Levels**

Compared to other parts of the world, the Asian region possesses a great deal of diversity in terms of the level of economic development and democratization of its member countries. Corruption is no exception. According to Transparency International’s Corruption Perceptions Index (CPI) 2016, released in January 2017, Singapore ranks 7<sup>th</sup> on the scale of least corrupt countries, parallel with the high-ranking European countries. Hong Kong (15<sup>th</sup>), Japan (20<sup>th</sup>), and Taiwan (31<sup>st</sup>) are also noteworthy in terms of their relatively higher rankings among the 176 countries surveyed. As the CPI 2016 points out, however, many countries in the Asia Pacific sit at the bottom, with 19 out of 30 countries in the region scoring 40 points or less out of 100. The five countries reviewed in this report also have a large gap between them, although none of them made the ranks of the clean countries: South Korea ranked 52<sup>nd</sup> with a score of 53 points; Malaysia 56<sup>th</sup> with 49 points; Mongolia 87<sup>th</sup> with 38 points; Sri Lanka 95<sup>th</sup> with 36 points; Pakistan 116<sup>th</sup> with 32 points; and Myanmar 136<sup>th</sup> with a score of just 28.

It is interesting to note that while the CPI Index rankings vary, the point scores for each country have tended to remain consistent over the recent years. Country rankings are less meaningful as the number of countries surveyed differs each year. Therefore, trends can be more accurately identified by referencing the perception scores of the public towards their officials. Despite the huge political corruption scandals of the South Korean president and Malaysian

prime minister addressed in this report, the CPI score of these countries did not suffer much. South Korea's CPI scores in 2015 and 2014 were 54 and 55 respectively, meaning there was a drop of just 1-2 points in 2016. According to the 2017 CPI data released in February 2018, South Korea's score increased by just one point and it rose by a single place in the rankings, despite the opposition party taking power during that time. Malaysia's 2016 score also reflected a small drop of just 1-2 points from its previous scores of 50 and 52 points in 2015 and 2014 respectively. Its CPI score in the 2017 Index dropped by an additional two points to reach 47, dragging its ranking down to 62<sup>nd</sup> place. Although the inadequate investigation into the Malaysian PM's scandal increased the public's perception of corruption slightly, one cannot say it resulted in a dramatic change. This minute change may be the result of TI's methodology of calculating its annual CPI scores using data from 13 other international surveys. But other international surveys also show no dramatic changes in corruption among the countries surveyed. This implies that the public's perception of corruption is not dramatically influenced by individual political scandals. Rather, people perceive corruption within their societies from a more holistic perspective.

The case of Myanmar is also interesting, and reinforces this conclusion. Its TI score was a mere 15 points in 2012, but has gradually improved to reach 28 in 2016. If it is the military oppression of the Rakhine region that is influencing the public's strong perception of corruption, as claimed in this and the TI report, the TI score should have decreased rather than increased over the years. Once again, these observations remind us that we must be cautious when linking the degree of corruption perception with individual political scandals. While international corruption perception survey data tends to show no dramatic changes year on year, local survey data reflects greater ups and downs. This may be because local surveys tend to ask more domestically relevant questions. Since many countries do not conduct regular local polls on domestic corruption and some countries still ban sensitive questions from surveys, it is difficult to say that local polls are better. But it is certain that international surveys need to be cross-checked against local survey data and vice versa.

Apart from the question of to what degree do these surveys actually reflect reality, it is clear that a majority of the people in the five countries reviewed in this report view their societies as corrupt and wish to eradicate that corruption. However, even these popular perceptions of corruption call for more careful analyses. Only three percent of South Koreans stated that they had ever had to pay a bribe to access public services, while more than half of those surveyed indicated that they believe the public sector is corrupt. Corruption in everyday life needs to be distinguished from public sector corruption. Needless to say, the latter is more serious since the corruption of public officials and politicians damages society to a greater extent than that of individual citizens. Government officials and legislators can use their official positions for personal gain or for the benefit of their family members or friends, resulting in the misallocation of public money and resources and, more significantly, undermining the social values of fairness and justice. As more citizens become aware of corruption and their right to demand accountability from public authorities, popular perceptions of corruption may increase as a country evolves towards democracy.

The relationship between the level of corruption and the level of democracy is not a simple one, however. As seen in much of the international data on corruption, most ‘clean’ countries are advanced democracies. Full democracy, including the freedom of expression, available public information and the guaranteed access rights, financial transparency, and the rule of law, drives corruption out of society. However, some countries like Singapore and Hong Kong shine as clean societies in Asia despite the fact that their political systems are not liberal democracies. At the same time, not all full democracies are clean. Spain, Italy, and Greece were ranked as 41<sup>st</sup>, 47<sup>th</sup>, and 69<sup>th</sup> on the CPI 2016 despite being liberal democracies. Therefore, when trying to combat corruption, we must pay attention to the institutional layers at work rather than hoping that further democratization will dampen corruption on its own.

## Institutions Matter

Corruption thrives where corruption control mechanisms are weak. All countries reviewed in this report have developed penal codes to punish corruption. This is not surprising, considering the fact that corruption has long been regarded as bad behavior. There have also been many laws implemented to try to regulate the unethical behavior of public officials, primarily bribe-taking. However, many countries, including full democracies, have only recently begun to institutionalize anti-corruption mechanisms. The countries reviewed here launched serious anti-corruption efforts during the 2000s. Mongolia began to build up these mechanisms later than its neighbors, while Myanmar passed its Anti-Corruption Law as recently as 2014 and continues to lag behind in corruption control. Given that the country’s democratization is quite recent, it is understandable why Aung San Suu Kyi’s anti-corruption pledges have not materialized in the face of deep-rooted cronyism and the still-influential military. It goes without saying that international organizations and donors have played an important role in pushing for and assisting in the adoption and implementation of anti-corruption mechanisms. Of particular note is the 2003 United Nations Convention Against Corruption (UNCAC), which has been influential in institutionalizing anti-corruption measures in many developing countries. Regional organizations have also been active in efforts to push for anti-corruption policies and measures. The ADB/OECD Anti-Corruption Initiative for Asia and the Pacific, which was endorsed by about 20 countries in the region when it launched, is one such regional organization. Its 2004 report identifies three areas of reform policies to institutionalize anti-corruption mechanisms; preventing corruption, sanctioning and prosecuting corruption and related offenses, and active public involvement in the fight against corruption.<sup>1</sup> Preventing corruption covers public administration, electoral campaigns and elected politicians, and the business sector. But the role

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<sup>1</sup> ADB/OECD Anti-Corruption Initiative for Asia and the Pacific Secretariat, “Anti-Corruption Policies in Asia and the Pacific: The Legal and Institutional Framework for Fighting Corruption in Twenty-one Asian and Pacific Countries” (2004).

of public administration is the most important, as administrative positions are not subject to competitive electoral pressure and it is government that manages and regulates the systems relevant to corruption control. The government sets up various rules regarding the recruiting of public officials and regulation of conflicts of interest and codes of conduct. Auditing institutions and their procedures also fall under the purview of government in most cases. It is the government that makes procurement rules and procedures more transparent and provides relevant information to the public.

While anti-corruption functions are diffused among multiple government bodies, most countries have at least a single agency exclusively committed to combating corruption. All five countries reviewed here have such an agency. South Korea has the Anti-Corruption and Civil Rights Commission (ACRC). Malaysia has the Malaysian Anti-Corruption Commission (MACC). Mongolia recently created the Independent Authority against Corruption (IAAC). Sri Lanka, on the other hand, has multiple agencies: the Commission to Investigate Allegations of Bribery and Corruption (CIABOC) and the Fraud and Corruption Investigation Division (FCID). In January 2015, the Cabinet approved the establishment of the Anti-Corruption Committee (ACC) in addition to the other existing institutions. The ACC has reportedly been tasked with investigating large-scale corruption by the previous government, initiating legal action, and recommending measures to prevent future corruption. Among the five countries, Sri Lanka shows a stronger commitment from its leadership to fighting corruption among politicians. Pakistan has also multiple bodies. The National Accountability Bureau (NAB) and the Federal Investigation Agency (FIA) are two major authorities working at the central level, and four Anti-Corruption Establishments (ACEs) operate at the provincial level. Myanmar has also set up the Anti-Corruption Commission (ACC). All of these agencies enjoy a statutory status with a backing law, but most of them belong to the government rather than the parliament. However, each agency is not equal in terms of power and status. The power of South Korea's agency is limited to reporting rights to the prosecutors' office, while the agencies in Sri Lanka, Mongolia, and Pakistan have some investigation authority. In both initial reporting and further investigation processes, protecting whistleblowers is widely acknowledged to be important.

It is difficult to measure the performance of the anti-corruption control agencies in these countries. First of all, there is limited data on their concrete activities and methods, making it difficult to assess performance. The *Strengthening the Anti-Corruption Agencies in the Asia-Pacific* report is the first attempt to measure the performance of anti-corruption agencies using more rigorous indicators. Reviewing six countries in the region, it uses fifty indicators that are categorized into legal independence, financial/human resources, detection and investment, prevention/education/outreach, cooperation with other organizations, accountability and oversight, and public perception. It should be noted that each anti-corruption agency has strengths and weaknesses across the different categories of performance indicators. For example, Pakistan's NAB is assessed as having a better performance than the CIABOC of Sri Lanka in terms of overall scores. The NAB performs better in terms of accounting and oversight, cooperation with other organizations, and detection and investigation, while the CIABOC

performs better in all other categories. This reminds us why we should avoid making simplistic assessments of agency performance. This report only examines the performance of the anti-corruption agencies themselves. However, their complex embeddedness in specific political contexts is not carefully examined. The performance of an anti-corruption control agency is strongly influenced by the institutional arrangement and environment in which it is situated.

Sanctioning and prosecuting offenses is crucial in curtailing corruption. Since anti-corruption government agencies usually do not have the authority to criminalize or punish corrupt offenses, their cooperation with law enforcement authorities, primarily the prosecutors' office, is critical to success, especially in controlling grand corruption. Law enforcement agencies are usually powerful, but their power can be exercised selectively. When the president or prime minister is in a position to influence appointments to leadership positions in law enforcement agencies, the agencies may be unduly influenced by political considerations. The corruption cases of the South Korean and Malaysian top political leaders illustrate this point well. Understanding how to protect these agencies from political and administrative interference is critical to controlling grand corruption scandals. As pointed out in several of the country reports here, establishing horizontal accountability among administrative anti-corruption agencies, law enforcement agencies, and parliamentary checks would guarantee their institutional integrity in pursuing anti-corruption endeavors.

## **Public Engagement and Social Integrity**

Interestingly, the Pakistan section of this report states that the country has quite strong anti-corruption laws and agencies. Ironically, however, Pakistan is ranked as highly corrupt by many surveys. This reminds us that setting up institutions is one thing, but operating them is another. For anti-corruption mechanisms to operate properly, people must engage them. First of all, the public should be aware of the cost of corruption on economic and political development. Both anti-corruption agencies and civil society organizations need to educate their citizens. At the same time, citizens should be allowed to access information produced by public institutions. Still, citizens' access rights are limited in most of the countries reviewed here. South Korea is relatively advanced when it comes to collecting and making information accessible to the public thanks to its highly developed e-government system. People should demand that their governments make information publicly available and make public administration transparent. This kind of public demand is only possible when citizens work to hold their government accountable. In this sense, corruption is likely to be curtailed as a country becomes more democratized regardless of how the political system is labeled.

The public cannot criticize their government and politicians for corruption if they fail to acknowledge their own participation in low-level corrupt behaviors. Bribery and kickbacks to public officials and politicians are offered by businessmen or individuals from all walks of life.

People try to take shortcuts when waiting lines are long and competition is high. While streamlining bureaucratic red tape is the responsibility of officials, it is the responsibility of citizens to observe rules. In this respect, the recent introduction of the Improper Solicitation and Graft Act in South Korea, which punishes private sector individuals who solicit or give gifts to people working in the public sector, is meaningful as it raises the level of social integrity in the country. Businessmen try to bribe public officials in exchange for special favors. When bureaucrats have greater discretionary power, collusion between public officials and the business sector may develop. Corruption in the private sector has long been immunized from public scrutiny for the sake of its freedom and independence. However, it is the behavior of individual citizens rather than corrupted officials and politicians that more greatly determines the level of social integrity and underlying anti-corruption norms. When a society is clean, the public demand for cleaner and more accountable government and politicians can be legitimate and effective.



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