

COUNTRY REPORT: THE REPUBLIC OF THE FIJI ISLANDS

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I. INTRODUCTION

The seriousness of a country's desire to eradicate corruption can be judged by the laws it passes and the actions of its government in implementing them. It has been suggested that the fight against corruption is composed of three elements – an effective anti-corruption legal infrastructure, international partnerships for mutual legal assistance and the political will to make it work.

Fighting corruption in an effective and sustainable manner firstly requires a country to look inwards at the fundamental causes of corruption in its society. This will allow the design and implementation of a national anti-corruption programme that is tailored to suit the circumstances of a particular country and that is sufficiently flexible to cover and deal with the full range of corruption occurring or likely to occur within its society. Secondly the implementation of anti-corruption measures will need a firm commitment from government, the private sector and civil society.

II. TREND, CRIMINAL SITUATION OF CORRUPTION

Over the past two decades Fiji has had a spate of instances of mismanagement of public funds highlighted by the media. Allegations of government corruption and of judicial impropriety went to the very heart of transparency and good governance in Fiji.

Although Fiji has long felt the impact of corruption since independence, the political will to address it has been a more recent development largely due to the high incidences of bribery and corruption in the public sector in recent times.

In the late 1980s the National Bank of Fiji (NBF) saga set the tone for the number of ministerial investigations, inquiries or audits, which highlighted bribery and corruption in what was one of Fiji's largest financial scandals in decades.

The NBF was established as a government-owned commercial bank in 1976. Four years after the 1987 Coup, the NBF introduced new services, trebled staff (mainly indigenous) and quadrupled advances mainly to indigenous Fijians, where the lending criteria favoured privileged groups. By 1996 NBF's bad and doubtful debts were estimated to cost the country about \$200 million dollars - a debt that was taken over by the government of Fiji causing much bitterness in a small ethnically divided nation. Those who carried the tax burden were not necessarily the same persons who benefited from the poor quality of lending.

More recently the Ministry of Agriculture lost thousands of dollars under its Agricultural Affirmative Action Plan for indigenous Fijians and Rotumans. The Ministry implemented the affirmative action plan in 2000 for indigenous Fijians and Rotumans to enhance their participation in agriculture. The audit investigation revealed that there was no system of authorization, lack of forecasting and planning, poor channels of communication and co-ordination and no means of performance monitoring and control. The audit noted that there were no standard selection criteria or documented procedures for selecting farmers for assistance and for monitoring them after assistance was provided. In the majority of cases, the Permanent Secretary, the Deputy Secretary and/or the Principal Accounts Officer approved the applications without any technical assessment and evaluation by experts in the field located in various districts. There was much evidence of uneconomic purchases by the Ministry. No quotations were obtained and the investigation revealed that the majority of purchases were made from a single supplier whose prices on average were twice as much as in other hardware shops. The audit found that the Ministry acquired goods and services without issuing local purchase orders requiring authorization/approvals at different levels, and liabilities committed through such irregular practices ran in millions of dollars. This irregular practice is viewed as a deliberate attempt by the Ministry, particularly the Principal Accounts Officer, to violate standard Government procurement procedures, thereby opening avenues for abuses. The special audit further revealed that some local purchase orders issued to suppliers were open, leaving room for

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manipulation by the supplier and/or the farmer, a practice contrary to the accepted procedures. The audit further noted that no stock registers were maintained for receipts books, cheque books, purchase orders and requisitions as they were sent direct to the divisions and centres by the printer, thus escalating misuse of funds. Finally, evidence exists to support purchases of items not covered by the plan (for example the purchase of lap top computers, fax machines, generators, air compressors, spray guns, etc.). Investigations are continuing with four senior civil servants and a businessman charged with fraud and corruption related offences.

III. POLITICAL WILL

In 1999 the People's Coalition Government was elected into office. Their manifesto promised a government that would be clean, open, accountable and just.

Several measures were proposed in this manifesto, which included;

- (i) Legislating a code of conduct for politicians, government ministers and other holders of high public office to ensure accountability and transparency
- (ii) Enacting a Freedom of Information Act, a requirement of the Constitution and
- (iii) Establishing an independent anti-corruption commission

The Attorney General at that time Hon. Anand Singh instituted the Fiji Law Reform Commission, which was referenced to inquire into fraud, bribery and corruption. The main aim of the reference was firstly to gauge the nature, extent and scale of corruption in Fiji through wide consultations with various levels of the community, institutions, non-governmental organizations (NGOs) and private individuals, and secondly to review the current laws on corruption and the role of the "watchdog" institutions with a view to making appropriate recommendations to better prevent and combat incidents of corruption.

This paper will reflect on the findings of the Fiji Law Reform Commission's Bribery and Corruption Report 2003, which was tabled in Parliament in November 2004.

IV. PERCEPTIONS OF CORRUPTION IN FIJI

The Law Reform Commission relied heavily on a report compiled by the Fiji Chapter of Transparency International (TI - Fiji Chapter- Report), which highlighted perceptions of corruption in Fiji. These reports were independently confirmed by the numerous submissions received by the Commission during its public and private hearings.

The following are a summary of incidents of corruption highlighted in the TI (Fiji Chapter) Report.

1. Kickbacks

In the Immigration Department in the issuance of passports and work and residency permits.

2. Greasing the Palms

In the Land Transport Authority (LTA) involving the issuance of driving, minibus and taxi licenses and in the certification of motor vehicles for roadworthiness; and in the Fiji Islands Revenue and Customs Authority (FIRCA), in tax assessments and its enforcement.

3. Nepotism

In the appointment, recruitment and promotion of public officers within the public service and executives of state owned entities.

4. Rank Pulling and Queue Jumping

By well connected businessmen, traditional leaders and politicians

5. Unethical Decisions on Public Procurement and Government Contracts

Such as hiring of transportation and earth moving equipment for major public projects.

6. Misuse/Abuse of Public Funds

In the claiming of allowances and in the issuance of Local Purchase Order (LPOs). As highlighted in the Auditor General's reports to Parliament.

7. Organizational Values

These include shared assumptions, beliefs and attitudes held by staff towards corruption and corrupt activities which affect and influence the degree and extent, to which such illegal practices are tolerated and exposed

Bribery and corruption by their very nature are activities that occur in secret. Access to official information is also limited and there is strong reluctance in Fiji to report such instances that individuals may have witnessed. Furthermore, mechanisms or legislation to protect "whistleblowers" (i.e. those who have alerted authorities) are non-existent in Fiji thereby reinforcing the culture of silence.

V. RELEVANT AGENCIES AND INSTITUTIONS, AND THEIR JURISDICTIONS

Fiji currently does not have an anti-corruption agency. All criminal investigations are carried out by the Fiji Police Force through its Criminal Investigation Department. Within the department an Anti-Fraud Unit has been established which investigates fraud and corruption related offences.

The Director of Public Prosecutions Office

The office of the Director of Public Prosecutions has been in existence for over 35 years. In Fiji, unlike most other similar jurisdictions, the Office enjoys a constitutional guarantee of independence. This is a reflection of the importance of the Office in the maintenance of law and order and the achievement of good governance in the State.

The office of the DPP, where appropriate, prosecutes criminal cases following an investigation by the police or other prosecution agencies.

Under the Constitution the DPP may:

- (i) institute and conduct criminal proceedings;
- (ii) take over criminal proceedings that have been instituted by another person or authority; and
- (iii) discontinue at any stage before judgment is delivered, criminal proceedings instated or conducted by the DPP or another person or authority.

Sanction of the Director of Public Prosecutions is required pursuant to section 379 of the Penal Code for the prosecution of a corruption related offence.

VI. EXISTING LEGISLATION & ASSOCIATED PROBLEMS

The primary source of criminal law in Fiji is found in the Penal Code. The rules that apply to issues of criminal procedure are contained in the Criminal Procedure Code

In the absence of a stand-alone legislation for corruption, the key statutory provisions are contained in two chapters of the *Penal Code*. *Chapter 11* titled *Corruption and Abuse of Office* and *Chapter 40* titled *Secret Commissions and Corrupt Practices*.

In its enquiries the Commission received numerous generalized submissions that anti-corruption provisions contained in the Penal Code were deficient and outdated. After careful consideration the Commission formed the view that with the exception of two offences namely Abuse of Office and Official Corruption, the other offences in the Penal Code were rarely, if ever, investigated or charged by the police or DPP's office.

The most widely known section is section 106 of the Penal Code, which relates to persons employed in the public service

Section 106 states:

Any person who

- (a) Being employed in the public service and being charged with the performance of any duty by virtue of such employment corruptly asks for, solicits, receives or obtains or agrees or attempts to receive or obtain, any property or benefit of any kind for himself or any other person on account of anything already done or omitted to be done or to be afterwards done or omitted to be done, by him in the discharge of the duties of his office; or
- (b) Corruptly gives, confers or procures or promises or offers to give or confer or to procure or attempts to procure to upon or for any person employed in the public service, or to upon or for any person or property or benefit of any kind on account of any such act or omission on the part of the person so employed,

Is guilty of a felony and is liable to imprisonment for seven years.

In State v Humphrey Chang HAC No 8/91 Jesuratnum J. stated that the prosecution must prove two elements to establish an offence of official corruption; These are

1. That the accused being employed in the public service received some “property” or “benefit” from some person; and
2. That the “benefit” or property was received “on account of” or in consideration for something done or omitted to be done by the accused in the discharge of his duties

In State v Seruveveli Aisake Criminal Appeal No 6 of 1993 Fatiaki J. stated

“It is not merely enough to prove that a favour had been shown by a civil servant in the discharge of his duties or that a benefit or property had been received by the civil servant, additionally it must be shown that the two elements are so linked in time and circumstances as to give rise to an irresistible inference that the transactions was a corrupt one.... Needless to say it does not in my view necessarily follow that every payment or benefit conferred on a civil servant outside office hours is unlawful per se. It is only unlawful, if there is a link between the payment and him doing something in pursuance of his public duty. The reward must relate to something done or omitted to be done in respect of a matter in which his employer is concerned. In other words the offence of official corruption lies not in showing favour to someone but rather in accepting a reward for doing so.”

Section 107

“Any person who being employed in the public service, takes or accepts from any person for the performance of his duty as such officer, any reward beyond his proper pay and emoluments, or any promise of such reward is guilty of a misdemeanour and liable to imprisonment for three years.”

This section criminalizes the mere acceptance of any reward for the performance of his duty without requiring proof of the existence of any official connection between the civil servant and the person giving the reward.

Section 375 of the Penal Code

375(1) For the purpose of this Chapter, the expression consideration includes valuable consideration of any kind; the expression “agent” includes any person employed by or acting for another; and the expression “principle” includes an employer.

- (2) A person serving under the [State] or under any town council or under any other public body having power to impose rates or entrusted with the expenditure of any Government funds or grants, and a member of any such town council or other public body, is an agent within the meaning of this Chapter.

Section 376 If-

- (a) any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement for reward for doing or forbearing to do or for having done or forborne to do, any act in relation to his principal’s affairs or business or for showing or forbearing to show favour or disfavour to any person in relation to his principals affairs or business; or
- (b) Any person corruptly gives or agrees to give or offers any gift or consideration to any agent as

an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or

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

He is guilty of a misdemeanour and is liable to imprisonment for two years or to a fine of six hundred dollars.

Section 378

Presumption as to Corrupt Practices

378. Where in any proceedings against a person for an offence under this Chapter it is proved that any money, gift or other consideration has been paid or given to or received by a person in the employment of the State or any Government department or a town council... or other public body having power to impose rates or entrusted with the expenditure of any Government funds or grants, by or from a person or agent of a person holding or seeking to obtain a contract from the State or any Government department or town council or other public body having power to impose rates, the money, gift or consideration shall be deemed to have been paid or given and received corruptly as such inducement or reward as is mentioned in this Chapter unless the contrary is proved

Chapter 40 offences have a wider scope, which extends to the private sector as well as statutory bodies and local government officials

VII. CURRENT PROBLEMS AND MOVES RELATING TO CORRUPTION IN FIJI

A. Legislation

- (i) The drafting style is complex, difficult to understand and analyze. Provisions are scattered in the Penal Code.
- (ii) There is a clear identify between section 376 offence and s.106 offences which could give rise to duplicity.
- (iii) The broad concept of corruption should be the key issue borne in mind rather than the narrow manifestation of bribery.
- (iv) Section 106 is limited to bribery situations and does not cover nepotism, queue jumping and "kerekere" (Fijian term for borrowing or asking).
- (v) The scope of corruption in s.106 is limited in that an act which does not link the benefit to the official act is not corrupt. The core of section 106 is the link between the "benefit", "reward" and the "act" the requested mens rea must relate to the receivers knowledge or belief as to the existence of the link.
- (vi) The distinction between public officer and non-government officer should be abolished and the legislation should adopt a more neutral description such as agent or person.
- (vii) There should be a single generic term or expression to replace the variety of expressions to be found in the Penal Code, which refer to the corrupt transaction. Section 106 uses the expression "any property or benefit of any kind" Section 107 uses the expression "reward beyond his proper pay and emoluments"; and Section 376 uses the expressions "gift" and "considerations". Arguably these definitions do not include sexual favours or future promises to process favourable tax returns, for example.
- (viii) Cultural exceptions. The giving of and receiving of gifts and valuable benefits is a common occurrence in many areas of business and arguably is traditional to Fijian culture and protocol. Queue jumping the "who you know" syndrome and helping people from your own family or province are all real problems in Fiji. There is a strong public interest in enacting laws which prevent public officials from showing any kind of favour at all whether it is for personal gain or not.

B. Problems and Solutions at the Investigative Stages

In Fiji the police are primarily responsible for all criminal investigations but the consent of the Director of

Public Prosecutions is required for the prosecution of certain criminal offences, including corruption. The DPP may request the police to investigate suspected criminal offences but it cannot order the police to do so. The Director of Public Prosecutions has no authority to direct or supervise police investigations because the independence of the Police Commissioner in operational matters is constitutionally protected. Even in those cases where the decision to charge an accused person requires the prior consent of the DPP the decision is inevitably coloured by the quality of the police investigation.

Financial scams over the years have undoubtedly shaken public confidence in the police and other regulatory institutions to effectively investigate and punish those at fault. Apart from the difficulties with the legislation, there are concerns about the lack of skills and resources in the police force for investigating crimes of serious fraud and corruption

The very nature of the crime of corruption makes any investigation very difficult.

1. A Secret Crime

Each corrupt transaction involves at least two parties. The person who offers the bribe and the person who accepts the bribe. Both derive mutual benefit. Corruption therefore involves secrecy and concealment making it difficult to detect.

2. A Crime that Leaves No Trace

Unlike other crimes there is no obvious crime scene where the perpetrators of corruption effect the commission of an offence. With new technology there is no need for the corrupt to meet.

3. A Victimless Crime

There is usually no identifiable victim.

4. A Culture of Silence

A further aspect making it difficult to investigate is the pervasive ‘culture of silence’ in Fiji. Where patronage is tied to family race and culture, silence is said to be the golden rule. A culture of silence provides a perfect medium for corruption to take hold and flourish.

5. Gathering Evidence

Government must be willing to consider granting special powers to investigating authorities to enhance their operational effectiveness. However, granting special powers of investigation can be a sensitive issue in Fiji due to certain constitutional provisions e.g. electronic surveillance may encounter problems with s. 37(1) of the Constitution “the right to privacy of personal communications”.

Society must decide where the right balance lies between competing interests.

6. Undercover Operations

With the relatively small population of Fiji with almost limitless extended relationships and acquaintances amongst its people, there seems to be little opportunity to undertake undercover operations with any guarantee of success.

7. No Whistleblower Legislation

The investigation of corruption and fraud related matters are greatly assisted with two pieces of legislation The *Proceeds of Crime Act 1997* which allows for restraint and confiscation proceedings to be taken against a person accused of a serious crime who has fled Fiji. The Act also allows us to assist another country by restraining the disposal of a criminal’s property found here and to enforce an order made by the foreign country for the confiscation of the property or to take proceedings in our courts against such property. *The Mutual Assistance Act* is generally resorted to in an effort to obtain admissible evidence of a crime that has been committed and facilitates the enforcement of a forfeiture order made under the Proceeds of Crime Act in a foreign country with whom we have an agreement and vice versa. It is carried out under legislation and bilateral or multilateral treaty.

C. Problems and Solutions at the Trial Stage

1. Impediments to prosecution include procedural delays as well as evidential hurdles during the trial.

Recently the Criminal Procedure Code has been amended effectively removing the need for Preliminary Inquiries, which was seen to be the cause of inordinate delay in proceedings.

2. There are several evidential problems relating to these sections. The use of the word “corruptly” in section 106 and 376 is not defined by statute. It is suggested by the Law Reform Commission that rather than attempting to define the word corrupt, the law would be better served by presuming that certain types of behaviour are presumptively corrupt and thereby shifting the onus to disprove it on the accused who would be the best person able to discharge the evidential burden.
3. In most cases the main witness in a corruption case is an accomplice, who either took or received the bribe. As a rule of practice, a corroboration warning must be given. In many jurisdictions this rule has been abolished in favour of a general judicial discretion to warn the assessor about the lack of reliability of evidence in a particular case.
4. One of the most prominent hurdles to successful prosecution is the reluctance of witnesses to testify; this could be due to the “culture of silence” or the misguided sense of loyalty not to the institution but to employers.
5. Lack of expertise of prosecutors dealing with corruption cases.

VIII. SOLUTION? ESTABLISHMENT OF AN INDEPENDENT ANTI-CORRUPTION AUTHORITY

The difficulties in investigating and proving corruption have led many jurisdictions to create special independent bodies to investigate and in some instances, to prosecute corruption and fraud.

The Commission recommended that an Independent Anti-Corruption Authority be established by separate legislation and that such legislation include the following minimum features.

- Be multifunctional, investigating, educating and prosecuting
- Be subject to independent review
- In the exercise of its investigative powers the Authority should be subject to the sanction of the DPP
- Legislative provisions include comprehensive powers of investigation and aids to prosecution
- That there be legislative protection of informants and whistleblowers
- That the legislation contains offence provisions.

IX. OTHER INITIATIVES BY THE GOVERNMENT

In the Asia-Pacific region, twenty one countries, including Fiji, expressed their commitment to fight corruption by endorsing an anti-corruption action plan within the framework of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific. The Action Plan comprehensively promotes the regions objectives and needs for reform to develop effective and transparent systems for public service to strengthen anti-bribery initiatives, to promote integrity in business operations, and to support citizen’s involvement.

Since 2003 the following anti-corruption policies have reportedly been in place in the Fiji Islands.

- (i) Reform of the public service, which is currently taking place in Fiji by establishing a system of government hiring of public officials that assure openness, equity and efficiency and promotes hiring of individuals at the highest level.

Establishing ethical and administrative codes of conduct that prescribe conflicts of interest, ensure the proper use of public resources, and promote the highest levels of professionalism. Includes the requirement for public officers and other employees to disclose annually their earnings on investment, properties and from any other source.

Safeguard accountability of public service through effective frameworks, management practices, and auditing procedures. Ministries and departments are required to prepare corporate plans, submit their annual budget estimates for approval by Parliament through the Minister of Finance and to compile their annual reports at the end of the year.

- (ii) A Financial Intelligence Unit (FIU) has been formed under the Financial Transactions Reporting Act. The Ministry of Justice, the Reserve Bank of Fiji, the Director of Public Prosecutions and the Fiji Police Force signed a memorandum of agreement (MOA) on 14/06/03 to establish a formal Unit. This was done in response to Fiji's obligation under the UN Special Resolution and recommendations of the Financial Action Task Force (FATF), the international standard setting body in the area of countering money laundering and the financing of terrorism. The FIU is responsible for receiving, analysis and disseminating to the relevant law enforcement authorities suspicious transaction reports and other financial information concerning suspected proceeds of crime and other related serious offences. This year there were 100 suspicious transactions report.
- (iii) The Ministry of Justice is currently reviewing legislation to strengthen and effectively combat the offence of bribery of public officials. Under review are The Charitable Trust Act, The Companies Act and the Religious Body's Registration Act.
- (iv) Encouraging public discussion of corruption. There has been increasing public awareness of corruption evident by media reports and the support of non-governmental organisations, including Christian denominations. The commercial banks have made an undertaking with the Reserve Bank of Fiji that they will inform them of any unusual or suspected transaction.

X. CONCLUSION

Although corruption as a legal concept is usually limited to situations of the exchange of gifts for favours, the real dilemma is to create a society which is hostile to a wide range of politically improper conduct. The abuse of office, nepotism, the acceptance of gifts or sexual favours are examples of corrupt behaviour in the wider sense.

The challenge for Fiji is to provide a climate, which is intolerant of this wider definition of corruption. The tools for this challenge are a strong political will, firm leadership, the development of codes of conduct, establishment of an independent commission against corruption, a free and fair media and good accounting practices. Together these measures and institutions can help to create a social and cultural will to combat corruption.