

CORRUPTION CONTROL IN CRIMINAL JUSTICE: THE MADAGASCAR SITUATION, PROBLEMS AND SOLUTIONS AND CORRUPTION CASES

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I. INTRODUCTION

As in many other countries, corruption is a daily part of life in Madagascar as it occurs at all levels of public institutions.

Madagascar being one of the poorest countries in the world, poverty is often considered as the main cause of corruption. Low salaries earned by public servants make it easy for them to be corrupted. Another approach though considers corruption as the cause of poverty. This vicious circle sounds almost impossible to overcome and for a while, corruption was encouraged by public compliance, fatalism being one aspect of Malagasy mentality.

Nevertheless, under the impetus of the international donors' standards and an increasing public consciousness, a wind of change has started to blow in Madagascar these last few years.

The fight against corruption has become one of the most important tasks of the current Malagasy Government in order to comply with the requirements of good governance and to enhance the economy of the country which is severely affected by the plague. It has become a pressing concern at the highest levels of policy making.

II. THE PRESENT SITUATION

According to the 2005 Transparency International Corruption Perception Index, Madagascar scores 2.8/10 and is ranked 99 out of 159 countries in the world. This shows that some efforts have been put forward to increase that score. In fact, in the August 28, 2002 Transparency International Corruption Perception Index Rankings, Madagascar received a score of 1.8/10 and was ranked 98 out of 120 countries. The impact of the score and the rank led the Malagasy Officials to implement drastic measures to improve the situation.

Therefore, the Malagasy government decided to establish an Anti-Corruption National Council. Its mission was to establish a national anti-corruption strategy, prepare the creation of an independent anti-corruption agency and draft a new anti-corruption law leading to legislative reforms addressing the issue.

A. The Anti-Corruption Law

Madagascar signed the United Nations Convention against Corruption in Merida, Mexico on December 10, 2003. It was therefore ratified on September 22, 2004 without reservations. The Convention recommended countries to criminalize behaviours that are considered acts of corruption.

This led the Anti-Corruption National Council to draft the Anti-Corruption Law which was adopted September 9, 2004.

A major part of the Law deals with the renewing of existing laws criminalizing the giving, offer or promise of bribes by any party and the receipt or solicitation by any official of a bribe, and laws prohibiting improper use of official power or position for personal enrichment. In addition to that, new offences have been instituted. The law now criminalizes the giving or receiving of an improper gratuity or improper gift, the fact of not revealing to the proper authority conflict of interest and unjustified enrichment. Officials are required to disclose their assets. Failure to do so may lead to prosecution.

Most of these measures are aimed at promoting integrity amongst public servants and officials but bribes in the private sector are also prohibited.

Measures to ensure the protection of the perpetrators of corruption acts who before prosecution report

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the offence to the authorities have been instituted in order to encourage denunciation.

Before the Law was passed, there was much controversy about the penalization of public officials receiving improper gifts, as it appears to be a Malagasy custom to give gifts. Also, criminalizing illicit enrichment seemed to derogate from the principle of presumption of innocence as the burden of proof is reversed.

The Anti-Corruption Law also instituted the Anti-Corruption Independent Bureau or BIANCO.

Some efforts have been put forward lately to elaborate new laws in application of international conventions but the change is occurring at a very slow pace.

The other Laws that are used in the fight against corruption are mainly the Penal Code and the Money Laundering Law.

B. Anti-Corruption Institutions

1. The Anti-Corruption National Council (CSLCC)

The Anti-corruption National council was created by Presidential Decree in September 2002. According to its mission statement it has to focus mainly on setting up the National Anti-Corruption Strategy, preparing the creation of an independent anti-corruption agency and drafting an anti-corruption law.

The CSLCC works in partnership with various institutions including governmental departments and the civil society. It has launched many observatory missions throughout the country to evaluate the scale of corruption in different sectors.

Its main mission was accomplished when the Anti-Corruption Law was passed, the law which among others measures created the BIANCO. The CSLCC's mission now consists of supervising and counselling the BIANCO, monitoring and evaluating the implementation of the policy and national anti-corruption strategy.

2. The Anti-Corruption Independent Bureau (BIANCO)

According to the Anti-Corruption Law of September 9, 2004, BIANCO has three main missions: Prevention, Education and Investigation. It is also responsible for the implementation of the Anti-corruption National Strategy.

In its prevention activities, the Bureau needs to identify in the legislation, rules and administrative processes that are factors of corruption and submit reforms to address those factors. It also counsels public institutions or officials and recommends measures to prevent corruption.

In its education activities, it holds campaigns of sensitization for the general public on the dangers of corruption and the need to fight against it.

Finally, BIANCO investigate allegations of corruption that they are made aware of through complaints or denunciations.

To accomplish that task, it has been invested of important powers that regular police officers do not have. Immunities cannot be invoked against them and they can issue their own search warrant without court approval.

They are also independent meaning that the Head of Prosecution or any other judicial or political authority does not have any control over them.

The BIANCO then hands those cases over to the prosecution or drops them if they consider that there is not enough ground for prosecution.

Up until June 2005, BIANCO has received 3823 complaints and denunciations from all over the country.

3. The Anti-corruption Judiciary Unit (CPAC)

In Madagascar, the Judiciary is one of the sectors severely affected by corruption, hence a loss of trust from the general public. Also, this undermines the application of law and the implementation of public policy.

For this reason, the CPAC was put in place in May 2004. It is composed of Magistrates from the Tribunal and Court of Appeal of Antananarivo including public prosecutors, investigating judges and judges. They have been selected for their high level of competence and integrity. They have been trained in matters pertaining to corruption and financial crimes. Also, some police and gendarme officers and secretaries are working with those magistrates.

Their task is to prosecute, investigate and judge cases of corruption that are referred to them, mainly by the BIANCO. They are set apart in their own offices, away from the Court in order to reduce the pressure from other colleagues and are provided with facilities such as cars and computers which have been funded by the Government of Japan. They are required to work efficiently and with speed, in contrast to the way regular cases are being processed in regular courts.

The CPAC actually started to be operational in August 2004 and about 100 cases so far have been submitted to its prosecution office, mainly cases from the BIANCO and the CPAC police officers. Twenty-three of those cases have been dropped mainly because of lack of evidence but also because the acts being investigated were not offences. Many public officers starting from the basic civil servant to Mayors and Ministerial high officials have been sentenced and jailed on corruption charges.

The CPAC is still experimental and is only competent for the Antananarivo area. For the other provinces, corruption cases are handed over to regular courts.

III. PROBLEMS AND SOLUTIONS RELATED TO THE LEGAL SYSTEM IN REGARD TO CORRUPTION CONTROL

Despite all the aforementioned deterrent measures, the fight against corruption still has many challenges to face in Madagascar. Ownership of the strategy by many sectors is not satisfactory. Legislative anti-corruption measures are important, but they may not be effective in the absence of honest, efficient investigative and judicial bodies.

A. Corruption in the Judiciary

The perception of corruption within the judiciary is very high in Madagascar despite the efforts put forward by the Ministry of Justice.

The causes of such corruption are multiple:

1. Low Salaries

Prosecutors and judges as they are endowed with discretionary powers may be particularly vulnerable to attempts by powerful litigants to influence the outcome of cases where large funds are involved. Thus, it would be important to ensure their financial security through adequate remuneration. Measures aiming at enhancing their career development opportunities need to be considered. These equally apply to judicial clerks and other administrative staff.

2. Lack of Training

Maintaining the professionalism in the service is an important key. Objective systems of recruitment and promotion based on qualifications and performance, continuous training and promotion of ethics in the civil service are some ways to do so. Efforts have been put forward to follow those standards.

In the context of the fight against corruption, prosecutors need to be highly competent. They need to learn to be proactive and modernize their practice and methodology.

Judges need to be trained in judicial reasoning and in the exercise of judicial discretion. A system of accountability should exist in the application of law.

Efforts need to be put forward to understand the new anti-corruption law and specifically the offences in order to avoid different interpretations by the anti-corruption institutions.

3. Complex Judicial Procedures

The Malagasy legal system is an inheritance from the French colonization. Unfortunately, only a few updates have been made and some legal texts do not fit in our modern context.

Outdated court procedures supported by archaic texts increase opportunities of corruption. Way too many formal prerequisites decrease the accessibility of justice and in order to come to a fast resolution of a case, bribes are solicited and offered.

Effective measures would be judicial reforms aiming at increasing the accessibility of the public to legal information, and making judicial procedures clearer and less complicated to encourage a speedy resolution of disputes.

Alternative sources of dispute resolution should be promoted. In Madagascar, the public tend to view the judicial system as the only way to resolve any disputes they may have and courts are crowded with many minor cases.

B. Immunity of Some Public Officials

One of the issues in the Malagasy legal system that hinders the fight against corruption is the system of immunity protecting some public officials.

This includes the police, the judiciary and state officials at all levels.

For example, unless he/she is caught committing a flagrant act of corruption, a policeman can only be prosecuted with the consent of the Police Minister. Experience has shown that this consent is very rarely given. This system is also applied within other bodies of civil servants.

Only the Head of Prosecution in the Court of Appeal can prosecute some administrative authorities like heads of provinces or prefects or members of the judiciary. Higher Magistrates need the consent of the Justice Minister.

Members of Parliament are also highly protected.

As for the President, the Prime Minister, members of the government and presidents of legislative institutions, only the High Court of Justice is competent to hear their cases.

In order to fight efficiently against corruption, all these procedures need to be simplified in order to reduce impunity. In Madagascar, The High Court of Justice only exists in the Constitution. As for now, it has not yet been established.

Some encouraging steps have been taken as the BIANCO is not bound by those limitations. It can hear anyone, regardless of his/her position. The problem lays at the prosecution stage. Empowering sufficiently and appropriately prosecutors in charge of fighting corruption is definitely an important condition.

C. Independence of Anti-Corruption Investigators, Prosecutors and Judges

One of the feelings that prevail among the general public is the impunity of corruption perpetrators, even those that are notorious in the matter. Such impunity can be interpreted as the existence of interference of politicians to protect those perpetrators from investigations or prosecution. The Judiciary then appears to be a mere executor of state policies, regardless of the interests of litigants.

In the Malagasy legal system, prosecutors are part of the Judiciary. Because they represent the society, they are directly under the authority of the Ministry of Justice. Their actions are strictly supervised and can be guided by that authority. Those principles are stipulated in the Constitution. Only judges are independent.

The BIANCO is totally independent in its actions. But as they refer cases for prosecution, the context is different, hence the need to ensure the independence of prosecutorial services.

When the CPAC was created, in order to promote transparency in the prosecutorial process, instructions from superiors were required to be in writing. In practice though, it appears difficult if not impossible for a prosecutor to ignore verbal instructions given the risk that it may engender for his/her career.

IV. CORRUPTION CASES IN MADAGASCAR

One of the reasons why such emphasis has been put lately on the fight against corruption is the negative effects on the country's economy.

Since the creation of the BIANCO and the CPAC, many corruption cases have been uncovered, prosecuted and the perpetrators have been sentenced with imprisonment and fines. Nevertheless the great majority of these cases are related to petty corruption.

A. Petty Corruption

It is standard practice to pay bribes for the transportation of goods, a new permit, traffic violations, and even a high school diploma in Madagascar. All fields of the public service are severely affected. Some cases though are more recurrent than others.

1. Within the Police

Within the last ten months about seven Antananarivo police officers have been prosecuted by the CPAC on corruption charges. Abuse of power, solicitation of bribes and extortion have been reported. Actually, the BIANCO acts according to complaints and denunciations, and evidence is gathered mainly through a system of "traps" that is actually admissible as evidence by the Court, as long as the willingness of the perpetrator to commit the offence is proved.

2. Corruption in the Judiciary

Corruption acts in the Judiciary are committed by judicial clerks and Magistrates. Usually, the bribes that are being paid are relatively small unless powerful litigants are involved. Only a few magistrates have been officially prosecuted for corruption charges. Still, many have been sanctioned by the discipline board of the Magistrates' Superior Council. In 2003, twelve of them were suspended for corrupt practices. More magistrates have since been sanctioned.

B. Serious Corruption

High level corruption involves high-ranking officials and the interests involved can be huge. It undermines the State's economy as public funds are being used in a personal and improper way. Although rare, a few cases have been uncovered and successfully prosecuted and this had a great impact on public opinion and politicians

1. Corruption During Public Procurement Procedures

In the last few months, a couple of mayors and other administrative officials in charge of public procurement procedures have been charged with embezzlement, corruption and favouritism. The information came from anonymous denunciation or complaints. Some efforts need to be carried out in this matter for the prosecution to be proactive and collaborate with commissions checking public procurement procedures to detect irregularities deserving investigation.

2. Corruption Within Public Enterprises

In April 2005, the Administration Board of the Malagasy Post was prosecuted and found guilty of corruption acts as they improperly used their official position to the detriment of the Post for personal enrichment. This engendered a lot of controversies about the extent of the power of the Public Enterprises' Administration Board.

3. Corruption Among Tax and Customs Officials

Important cases are currently underway involving high-ranking tax and customs officers charged with

corruption acts, falsification of public documents and embezzlement. These kinds of behaviour have a deep impact on the country's economy because funds that should be for the State's reserve are either embezzled or not collected efficiently because of corruption.

V. CONCLUSION

After the recent Anti-Corruption National Convention organized by the CSLCC, the motto that has been adopted is "Free the Economy from Corruption". The strategy for 2005-2007 has been renewed, after the progress made during the first two years of the implementation of the strategy, the long term goal is to achieve a score of 7/10 in the Transparency International Corruption Perception Index. Emphasis has been put on the judiciary and its major role in the fight against corruption. Plans have been made to dismantle the ramparts of corruption within the judiciary in order accomplish the objectives of a clean and efficient justice system, respectful of human rights and safe for investors.

The anti-corruption institutions cannot eradicate corruption by themselves. They need the support of a strong political will, the help of international agencies and NGOs and the adherence of every single citizen. Also, since corruption related crimes tend to be transnational, international judicial cooperation seems to be a key issue in order to efficiently fight against corruption. But as of now, only a very few cases, if no cases at all, have required such cooperation.

APPENDIX

ANTI-CORRUPTION INDEPENDENT BUREAU
Investigation DepartmentInvestigation Department Statistics
As to Sept, 28 2005

I. INVESTIGATION GROUP (IG)

September 2005

Number of Cases		Current		Processed				
Received	Last month left over	In Antananarivo	Outside Antananarivo	Procedures transmitted to courts				Reports
				Number	Arrests	Suspects in custody	Suspects not in custody	
40	146	75	96	6	09	03	06	08

Overall Statistics

	Number of Cases Received	Procedures transmitted to courts				Reports
		Number	Arrests	Suspects detained	Suspects not detained	
2005	350	74	145	63	76	84
2004	56	8	12	2	10	4
TOTAL	406	82	157	65	86	88

Kind of Complaints Received

Sector	Number	%
Justice	9	22.50
State Institutions	6	15.00
National Gendarmerie	5	12.50
Financial Institutions	4	10.00
Administrative Services	3	7.50
National Police	2	5.00
Education	2	5.00
Internal Affairs Department	2	5.00
Decentralized Collectives	2	5.00
Health	1	2.50
Land Administration	1	2.50
Public Construction	1	2.50
Private Sector	1	2.50
Public Procurement	1	2.50
TOTAL	40	100.00

II. OPERATIONAL SUPPORT GROUP

A. Reception and Process of Complaints

Complaints Received

	<i>Sept. 2005</i>	<i>2005</i>	<i>2004</i>	<i>TOTAL</i>
Complaints Received	546	5250	813	6 063
Processed Complaints	242	4946	813	5 759
Complaints being Processed	304	304	0	304

Receivable Complaints

Filing	<i>Sept. 2005</i>	<i>2005</i>	<i>2004</i>	<i>TOTAL</i>
For Investigation	12	350	56	406
For Information	8	242	35	277
TOTAL	20	592	91	683

Reported Complaints

Object of Complaints	<i>Sept. 2005</i>	<i>2005</i>
1. Land Conflict	52	863
2. Judiciary	44	554
3. Police Officers	36	592
4. Administrative Officers	32	525
5. Health and Education Field	15	273
6. Family and Social Matters	27	697
7. Customs and Ports Fields	4	44
8. Crime Commission	24	418
9. Others	8	738

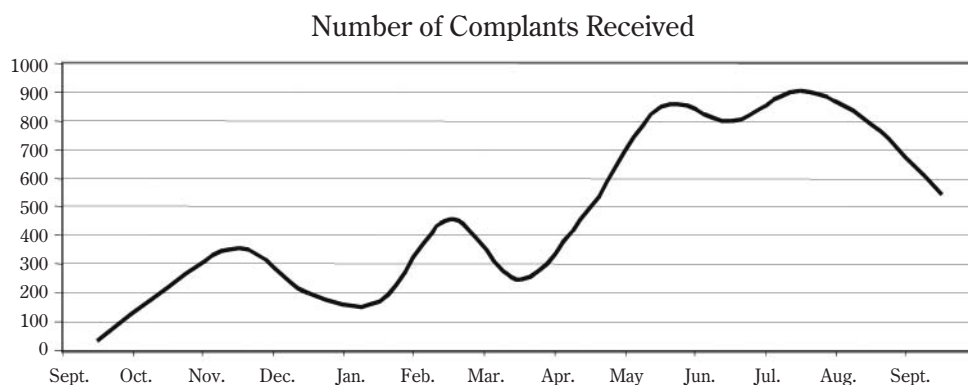
Geographical Origin of Complaints

Province	<i>Sept. 2005</i>	<i>2005</i>	<i>2004</i>	<i>TOTAL</i>
Antananarivo	128	2 992	572	3 564
Mahajanga	22	524	75	599
Toamasina	22	372	75	447
Toliara	21	523	23	546
Fianarantsoa	32	318	46	364
Antsiranana	17	217	22	239

Complaints Received (17 September 2004 - 28 September 2005)

2004	<i>Sept.</i>	<i>Oct.</i>	<i>Nov.</i>	<i>Dec.</i>
Number of Complaints	37	221	355	200

2005	<i>Jan.</i>	<i>Feb.</i>	<i>Mar.</i>	<i>April</i>	<i>May</i>	<i>Jun.</i>	<i>Jul.</i>	<i>Aug.</i>	<i>Sept.</i>
Number of Complaints	170	455	245	496	847	799	906	788	545



B. Information Collection Activities

September 2005

Number of Cases Received	Current		Left Overs		Treated	
	In Tana	Outside Tana	In Tana	Outside Tana	Filed in database	Transmitted
33	12	37	42	27	-	23

Overall Statistics

	Number of Cases Received	Output	
		Filed in Database	Transmitted
2005	328	76	123
2004	16		14
TOTAL	344	76	137

Declaration of Assets

Declaration of Assets Received up to 04/24/05	1 813
Declaration of Assets Received Since 04/24/05	4 423
Total	6 236

C. Visitors

<i>Visitors</i>	<i>Sept. 2005</i>	<i>2005</i>	<i>2004</i>	<i>TOTAL</i>
Plaintiffs	310	2 726	301	3 027
Summoned	50	1 074	55	1 129
Others	313	3 650	390	4 040
TOTAL	673	7 450	746	8 196

D. Complaints Box

Number of Complaints	82
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