

CORRUPTION ← NO RULE OF LAW → NO DEMOCRACY
**COULD SEPARATELY ELECTED ATTORNEYS GENERAL IN A
DIVIDED EXECUTIVE GIVE AFRICA NEW HOPE?**

EXPERIENCES FROM THE U. STATES OF A.

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By J. Todd Fernandez
S28532122

**Prepared under the supervision of Mr. Tilahun Teshome
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Building Bridges

The bridge between law and practice is like a spiritual pathway from ideals to reality. Protecting that bridge must be accomplished delicately in order to ensure that the exchange is fluid because the fate of humanity hinges upon its success.

In this social compact, constitutions form one pillar of the bridge while government forms the other. Designed to function in harmony, their equilibrium determines the quality of modern life. This necessary balance is realized when government exemplifies the ideals flowing across the great divide. In order to accomplish this synthesis, the joining force must be of an exemplary nature, itself a third pillar.

This is the auspicious challenge bestowed upon the chief law enforcement officer in a representative democracy. This is where respect for the rule of law begins and from which lawfulness flows. This is the daunting job of the modern Attorney General.

Africa is constructing its bridges at a precarious time for democracy. For magnified well beyond historic complexities, international forces now radically distort the path to collective realization, continuously altering inherent altruism and distancing the horizon.

Given globalization's increasingly distorting nature, the future of life in Africa depends more than ever upon its constitutions and governments. In this time of need, however, states have disturbingly failed to fulfill their promise forcing their people to suffer the reality of tainted systems and ignoble keepers. The ensuing chaos has permitted a desperate greed to ambush the bridge, diseasing both sides. With structural integrity deeply afflicted, democratic government and its ideals are trapped in a menacing cycle of corruption.

Given this outcome, the path to rebuilding society calls for a fundamental review of the structural elements of democracy. Particularly in Africa, because the absence of a

¹ Mr. Fernandez is a graduate of Boston University, *cum laude*, in 20th century history, and Boston University School of Law. Following a distinguished career in Massachusetts State Government as General Counsel for Economic Development and Governor's Ombudsman for Brownfields Redevelopment, he is now focusing his efforts in the international arena as he pursues a Masters of Law in Human Rights and Democratization from the University of Pretoria, South Africa. Tfernandez4@gmail.com

third pillar has meant an endless despair, a kind of despair fervently averted by other former colonies, a cyclical despair of lawless tyranny.

The solution for numerous constitutional democracies has been the "divided executive" in which the traditional powers of the head of state are separated and apportioned among various elected executive offices. Most important in this scheme is the power of judicial law enforcement. For when properly separated and invested in the office of an elected attorney general, the immense power of the law can emerge as a tool of the people. When entrusted to their own directly elected representative, their constitution and laws become a golden weapon against a traitorous government. Vitally, the fundamental aspect of democracy - separation of powers – itself gains a champion.

History has proven that, if freed from the grasp of the unitary executive, the elected attorney general flourishes as a lawyer for the law dedicated above all else to the "public interest." In light of these proven benefits, the pressing question becomes whether this tested design can help the peoples of Africa as they fight to reclaim their wayward governments. Might a popularly elected chief law enforcement officer steady the bridge so Africa can pass through to freedom and prosperity? More immediately, does the divided executive with its elected attorney general represent a new hope for Africa in combating corruption?

The Approach

In exploring this quandary, our journey will pass briefly through the colonial birth of modern democracy and the elected attorney general, momentarily touch on the discussion of attorneys general around the globe, and arrive at the populist emergence of the office in Africa's contemporary politics. Shifting substantively to the seemingly intractable curse of corruption infecting the world, but pillaging Africa, blame is attributed to its ultimate culprit, the all-powerful unitary President and his appointed law enforcement. In contrast, a sincere, but perhaps enthusiastic, portrait is presented of the modern office of the elected attorney general in the states of America, and its role in securing democracy. In closing, those converted to the cause are humbly offered a launching pad for political discourse designed to empower the peoples of Africa to make a single, collective demand: "We Deserve A Lawyer!"

Colonial Solutions to Colonial Problems

Africa's Cousins, The American States

The first colonies to design a worthy democratic bridge were the former English colonies of North America in the late 1700s. Revolutionaries in both deed and thought they set out to construct a government immune from what they had experienced before independence. Beyond independence, they now sought to be free.

Well aware of the obscenities of government and men, and with a strong "colonial aversion to royal governors who possessed unified executive powers,"² the enlightened activists embarked on a fascinating quest which, thanks to their fortunate perspective as part of the elite, foresaw the potential for post-colonial masters among them, like those now afflicting Africa.³

In 1780 the Constitution birthed by the Massachusetts colony was one of the first to enshrine the new, but not original, foundational theory of separation of powers. Evidently well drafted, the Massachusetts Constitution is the oldest functioning written constitution continuously in effect in the world.⁴ Not by mistake, this class, of insightfully crafted new state constitutions, was designed as a "limitation on the power of state government."⁵

The true genius of these new state leaders revealed itself in their stewardship of these fledgling ideas. Endlessly willing to refine the concept and intensely distrustful of power, early constitutions contained tight limits on time in office, restricting many to one year, under the theory that frequent elections keep officials closer to the people.⁶ Amidst sweeping alterations, term limits emerged as the quintessential containment of individual authority, death being the ultimate.⁷

² E. Myers and L. Ross (ed), *State Attorney General Powers and Responsibilities*, National Association of Attorneys General, 2nd ed. (2007) (SASG), p. 55 (citing *State ex. rel. Mattson v. Kiedrowski*, 391 N.W.2d 777, 782 (Minn.1986)).

³ The atrocities of these same men against the indigenous peoples of North America, and, in turn, slaves from Africa taint their every other deed. Though, if it helps to save Africa, perhaps their intellectual legacy will help atonement.

⁴ http://en.wikipedia.org/wiki/Massachusetts_Constitution (accessed October 5, 2008).

⁵ SASG, pp. 55, 293 (In stark contrast, the federal constitution of the United States is a grant of authority to the federal government, and is comprised of a unitary executive.)

⁶ SASG, p. 26.

⁷ Establishing and enforcing term limits is an urgent and paramount issue in African constitutional development. See Vencovsky, D. "Presidential Term Limits in Africa" (2008) (In the 1990s, 33 of the 48 new constitutions adopted in Africa contained term limits, in that period "18 African presidents completed two terms in office, eight presidents stood down without seeking a constitutional amendment to remain in office, while 10 attempted such an amendment and the majority (seven) were successful. All seven presidents won the subsequent elections. Leaders that failed to secure a constitutional amendment to remain in office resorted to an indirect strategy: they hand-picked a successor candidate hoping, that, once he became president, they would be able to control him via their political parties.") (www.africafiles.org/article.asp?ID=17065) (accessed October 5, 2008).

Regarding the value of term limits, Mr. Vencovsky astutely pointed out the essence: "Term limits offer a periodic guarantee of personal change and thus enhance the possibility of change of party in government. This is significant, as power alteration is an important feature of a democratic polity." See also, "Term Limits, the Presidency, and the Electoral System: What Do Nigerians Want?" (Afrobarometer Briefing Paper No. 35, April 2006) (www.afrobarometer.org/papers/AfrobrieftNo35.pdf) (accessed October 5, 2008).

The focus here, of course is the African and American states, but term limits for the federal president of the United States has an interesting pedigree. Not putting term limits in the federal constitution was a controversial decision in its day. The first President, former General, George Washington stepped down after two four-year terms, on principle, and that tradition held until Franklin D. Roosevelt ran for and won a fourth term, only to die in office. Following his

Despite these protections, it was apparent early on that the executive's authority was so extensive it virtually guaranteed an imbalance among the three branches. Zeroing in on the sweeping power to "administer and enforce law," they ingeniously invented the "intrabranh" division of power.⁸

The result was that no one person had the concentrated power (1) to manage the state funds, (2) to control civil and criminal judicial law enforcement, (3) to administer election laws, and, (4) to audit state operations. To accomplish this ideal, in various assortments over time they created separate offices of the Treasurer, Attorney General, Secretary of State, and State Auditor, respectively.⁹ No longer could the President control the agencies, the elections, the money and the law enforcement. No longer could the President police himself. Now the Attorney General was top cop.

Evolution of the Elected Attorney General

The position of attorney general dates back to the mid-thirteenth century England where it was established by the monarchy to represent its legal interests.¹⁰ The slow evolution of this role began in colonial America starting as early as 1643.¹¹ Because the position was ill defined in "sketchy statutes" and founded in common law determined far away in England, the role of the attorney general evolved into an "astonishing array of mutations" among the colonies.¹² Consistently, however, the authority broadened and the independence solidified.

Paramount to this development was a shift that occurred slowly and unevenly over decades and centuries after the Attorney General was a fixture in early American state politics. In the early constitutions of most of the states, the Attorney General was selected by the legislature or by the governor.¹³ However, after the Jacksonian Era of the early 1800s, a "new ethic" enveloped American government in which universal suffrage and direct election of public officials became the rule.¹⁴

death, in 1951 the country quickly rallied to pass the 22nd Amendment to the Constitution limiting any single person to two terms in office. Opponents of term limits sometimes argue the "loss to the nation of such great talent", but truly great Presidents go on to greater public service, such as William Jefferson Clinton is doing with his global AIDS work, and Jimmy Carter is doing with democracy and elections.

⁸ SASG, p. 295.

⁹ SASG, p. 17 (*citing* Council of State Governments, *The Book Of The States*, Vol. 37 (2005)). A Treasurer is elected in 37 states, a Secretary of State in 35, and a Comptroller or Auditor in 20).

¹⁰ SASG, p. 1.

¹¹ SASG, p. 4 ("The first recorded appointment of an Attorney General in the New World was that of Richard lee in Virginia in 1643.") (*citing* Key, "The Legal Work of the Government," 25 Va.L.Rev. 165, 169-173 (1938)).

¹² SASG, pp. 4-7, 37 (*citing* DeLong, "Powers and Duties of the State Attorney General in Criminal Prosecutions," 25 J. Crim. L. 392 (1934)).

¹³ SASG, pp. 7-9.

¹⁴ SASG, p. 18.

Consistent with the dynamic nature of constitutional development,¹⁵ the Attorney General became a constitutional office, whose holder was selected by direct popular vote. The journey was not without set backs as some states eliminated and then recreated the office.¹⁶ Some states took almost a hundred years to provide for direct election,¹⁷ and some only recently provided for popular election.¹⁸ But significantly, "no state has switched from popular election to executive appointment."¹⁹

Second only to the Governor, the Attorney General is the most prevalent and powerful statewide-elected office in state government. Forty-three sovereign states select the Attorney General by popular vote, five are appointed by the Governor, one by secret ballot of the Legislature, and one by the State Supreme Court. None of them are easily removed, and although originally limited to terms of one or two years, almost every state has since established four-year terms.²⁰

Nature and Authority of the Modern Attorney General

The precise nature of the office of attorney general is itself the subject of artistic debate. Historically the office holder has been part of the executive, quasi-judicial, and an ex officio member of parliament, simultaneously, and shares attributes of all three branches.²¹ Adding to the complexity, in the American state systems, the Attorney General evolved to be both lawyer for the government and for the people. Capturing the esoteric elements well, professors of the topic have described the Attorney General as "the quasi-judicial officer in the administration whose job it is to bridge the gap between law and state practice."²²

¹⁵ Collectively, among 50 states, there have been almost 150 state constitutions and they have been amended roughly 12,000 times, *see* <http://www.stateconstitutions.umd.edu/index.aspx> (accessed October 5, 2008).

¹⁶ SASG, p. 9 (Massachusetts, the first to appoint an AG with broad common law powers in 1686, abolished the AG 1843 as an "economy measure," but recreated it in 1849 and in 1855 passed its 17th Amendment making the office a constitutional one and providing for popular election.).

¹⁷ SASG, pp. 18-19 ("For example, North Carolina's 1776 Constitution provided for appointment by the legislature, its 1868 Constitution provided for election.").

¹⁸ SASG, p. 19 (Indiana changed to popular election in the early 1940s, and Pennsylvania in 1978).

¹⁹ SASG, p. 19. The trajectory demonstrates public contentment with the elected structure: By 1860, 11 of 33 states elected the Attorney General, 28 of 38 by 1880, 35 of 45 by 1900, 39 of 48 by 1920, and 42 of 49 by 1959. Matheson, S. "Constitutional Status and Role of the State Attorney General," 6 U. Fla. J.L. & Pub. Pol'y 1 (1993) (*citing* Abenathy, B. "Some Persisting Questions Concerning the Constitutional State Executive," (Gov't Research Center, University of Kansas, Report 23) (1960)). In a foundational article on the topic, Professor William Thompson emphasizes that the arguments against elected attorney generals are founded on "a priori" reasoning, and that they have been, in any event, unpersuasive in state decisions. *See* Thompson, W. "Should We Elect or Appoint State Government Executives? Some New Data Concerning State Attorney Generals," 8 Midwest Rev. Pub. Admin. 17, 23 (1974).

²⁰ SASG, pp. 26-27 (this solidification occurred intensively over the 1930-1970s with one state resisting until as late as 1993).

²¹ Thompson, p. 32.

²² SASG, p. 52.

This confluence of overlapping roles is what makes an elected attorney general uniquely important to the whole. Like a glue emanating from and attractive to all, he connects disparate parts. This is the enigma of the office that is most relevant these days to the varying levels of power and authority currently bestowed.

In the states of the United States, historic common law powers still underlie more specific enumeration of powers in constitutions and statutes. The extent of the common law authority evades precise categorization and has evolved more as a "mode of treating definite legal problems rather than a fixed body of definite rules."²³ As a result, the prevailing concept is that the Attorney General enjoys extensive discretion to preserve and protect the interests of the general public.²⁴

The Government's Lawyer

Within this focus, as previously mentioned, the elected Attorney General serves two clients, the government and the people. As legal advisor for the executive, all its agencies, and the legislature,²⁵ they provide both oral and written advice in the form of "advisory opinions" interpreting the law and "articulating the respective powers and duties of the various agencies of state government."²⁶ They have exclusive control over civil litigation by or against the executive agencies, and in such cases, the "client" is the "unitary" state, meaning that the position they take in the case must reflect the interests of the state as a whole, rather than any particular "agency manifestations of the state."²⁷

The Peoples' Lawyer

Superceding these responsibilities, however, is the primary obligation of elected attorneys general to the public interest.²⁸ It is the paramount nature of this obligation and the independence it requires to ensure its loyalty that argues most strongly in favor of separate elections. Thus envisioned, the attorney general operates as the ultimate "public interest lawyer" affording "many opportunities to improve the quality of life for citizens of the states."²⁹ Through this structure, the law itself gains a lawyer.

²³ SASG, p. 36 (*citing* Dean Roscoe Pound in R. Pound, *The Spirit of the Common Laws* (1921)).

²⁴ SASG, pp. 37-38.

²⁵ SASG, pp. 52-53.

²⁶ SASG, pp. 57, 78-80 (Advisory opinions are generally not binding on the state officials and are never binding on courts, but are "respected" as "persuasive" and given "considerable deference". State officials who act consistent with issued opinions are generally immune for any subsequently determined illegality.); Thompson, pp. 34-35 (emphasizing the "awesome" authority of the elected attorney general to individually issue opinions that have the virtual "appearance of law", as opposed to the more collective decision making power of the legislature and judiciary, and the expansive realm opinions fill when laws are struck down or obscured by judicial decisions). This role could be particularly relevant in new legal systems with fledging legal and judicial systems.

²⁷ SASG, pp. 53,

²⁸ Marshall, W. P. "Break up the Presidency? Governors, State Attorneys General and Lessons from the Divided Executive," 115 *Yale L.J.* 2446, 2456 (2005-2006) (Regarding the right of the Attorney General to substitute her own opinion for that of the Governor on a disputed legal issue: "The majority rule favors attorney general independence. Her primary duty, as the state's chief law officer, is to represent the public interest and not simply 'the machinery of government.'"); SASG, p. 56.

²⁹ SASG, p. 52.

The Need For Independently Elected Attorneys General Everywhere

Around the globe, the concept of the public interest and its paramount nature appear naturally associated with the execution of the practice of law by civil servants, appointed or otherwise.³⁰ Because of this inherent potential conflict, which is exacerbated when operating within the unitary model, systems around the world are wrestling to reconcile conceptual and practical problems.

The independence of attorneys general is topical from Singapore to Malaysia to Australia to South Africa to Guam and back to the United States where the idea first originated. The familiar refrains echo themes of separation of power, division of power, and integrity of the office in protecting the public interest.

Well-ensconced as a state level antidote to executive power, active discourse in the United States today is directed at diffusing the ever increasing power of the federal presidency, precipitated no doubt by its forty-third office holder.³¹ One article advancing the charge to amend the Constitution of the United States in order to weaken the presidency given its proclivities, soberly concludes:

*The debate over the unitary executive has tended to disregard the state experience, although virtually every state government has a divided executive structure. ... The current presidency has the potential of becoming a law unto itself ... [and] the President's ability to control the office of the Attorney General makes him effectively the only arbiter of the legality of his actions. An independent attorney general, in the form of the state divided executive, may therefore be an appropriate model from which to reconstruct a workable system of intrabranched checks and balances.*³²

Other former colonies from Singapore to Malaysia to India to Australia to Canada are also developing the concept of the common law attorney general, while striving to leave the practical "political connotations" of the English model behind as they embrace the role's independence and discretionary authority vis-à-vis the Courts.³³

To resolve the inherent conflict of interest, in a rather inspirational case the people of Guam embraced the potential of an elected attorney general and created such a position in 2003. In a moving address that demonstrates the power of the pulpit attendant to the office as well as early challenges, Attorney General Douglas Moylan, the first so elected, assailed the barrage of preemptive attacks:

³⁰ See Thompson, p. 32 ("the lawyer is most sacredly bound to uphold the laws") (*citing* former Supreme Court Justice Joseph Bradley in *Ex Parte Wall*, 107 U.S. 265, at 274 (1882)).

³¹ George W. Bush.

³² Marshall, p. 2477.

³³ Sornarajah, M. "Attorney-General's Powers Over Criminal Prosecution, 8 SAclJ 47, 48 (1996) (exploring in depth the relative powers and independence of attorneys general in Singapore, India, Canada, England, Australia).

"When the going gets tough, the tough get going." The tough got going. The People did something about this sad state of affairs [a corrupt government]. They knew that they needed someone to protect their interests. They knew they needed someone to serve as a watchdog of wrongdoing, someone who had the authority to uphold the law. So came the elected Attorney General, an Office within the Government that wouldn't be influenced by power, but instead be directly controlled by the People. ... Believe in me and this Office and the dream will come true. Our strength comes from you, the People, and it is through democracy that we will overcome those corrupt individuals and politicians who would destroy this Honorable Office. Use this Office as your catalyst for meaningful change. Support us and vote out any politician who would undermine your elected Attorney General in our efforts to Protect the Public Interest. Continue calling in and telling us about the corruption and where you'd like to see us strike next.³⁴

Attorneys General Are Active And Increasingly Important In Africa

The story of attorneys general in Africa appears to be at a crossroads as constitutionalists work through the growing pains of democracy while civil society emerges. Fidgeting in the unitary executive model bequeathed it, familiar discomfort surrounds the office as it morphs, increasingly subject to public accountability and increasing norms of professionalism. A familiar fixture in most countries, its presence reflects an appreciation for the ideal of the rule of law, though its arrival as a populace power awaits realization.

The scant available literature on the office imparts a singular message. Stories from Nigeria,³⁵ South Africa,³⁶ Zimbabwe,³⁷ Uganda, Tanzania, and Kenya³⁸ paint a

³⁴ *Speech*, "State of Protecting the Public Interest Address" by the Attorney General of Guam, Douglas Moylan (Delivered April 27, 2004) (Guam AG Speech) (www.kuam.com/govguam/camachomoylanadministration/attorneygeneral/address-protectingthepublicinterest-042704.aspx) (accessed July 24, 2008).

³⁵ See "Nigeria Attorney General Michael Aondoakaa Moves to Stall Peter Odili's Corruption Case in Port Harcourt," W. Arisekola, Publisher Street Journal Magazine, Ireland (December 10, 2007) (www.africanews.com/site/list_messages/13775) (accessed September 22, 2008); "Nigeria: General's attorney & all the General's men?" Oguchi Nkwocha, MD (February 2, 2005) ("The so-called Attorney-General of Nigeria also takes orders and cues from General Obasanjo [the President], legally rationalizing and ratifying the General's anti-constitutional and criminal policies and even criminal acts) (www.africamasterweb.com/AdSense/GeneralsAttorney.html) (accessed September 22, 2008).

³⁶ *Zuma v. National Director of Public Prosecutions*, Case No: 8652/08 (Nicholson, J.); "South African Judge Throws Out Zuma Graft Case" (Reuters, September 12, 2008) (reporting that Nicholson, J. said it was clear that there was political influence in the case) (www.reuters.com/article/worldNews/idUSLCS54653420080912?feedType=RSS&feedName=worldNews&rpc=22&sp=true) (accessed October 6, 2008).

³⁷ Goredema, C. "The Attorney-General in Zimbabwe and South Africa: Whose Weapon - Whose Shield," 8 Stellenbosch L. Rev. 45 (1997) (noting interestingly, that the first South African Attorney General was set up by the Dutch, as was the case in the State of New York.)

common picture of betrayal, as each laments the inclination of the Chief Law Officer to pander to Presidential and party politics, and/or wrestles with the call for greater judicial review of politically charged prosecutions. Akin to the same theoretical dilemma encountered elsewhere, the growing debate over the role of the attorney general in Africa is basically whether the obligation is, above all, to the public interest, or rather, to the appointing President.

The worst part of the story is that many countries have Constitutional provisions that expressly proclaim the preemptive nature of the "public interest" and the Attorney General's obligation to this concept in the execution of his duties.³⁹ Unfortunately, as presently configured, the office of the African Attorney General does not have the practical ability to enforce or live up to this type of language or the structure of government it earnestly anticipates. The ideals nevertheless provide a valuable underpinning for a movement toward the elected genre.

Happily, as with other histories of democracy, there is a growing public empowerment approaching the critical status of "entitlement," which is cultivating an expanding demand for integrity in the office. As the clamor escalates, so do the scandals involving abuse of prosecutorial process, usually alleged to be politically motivated. Fortunately, as this process provokes, the tension over the Attorney General's lack of independence suggests an almost visceral yearning for emancipation.

The question could not be more pressing, because as it stands today, the appointed African Attorney General is widely presumed to be ineffective at enforcing the law at the highest levels where democracy is most affected. The worst ramifications of this current scenario are most evident in the story of political and financial corruption that is ravaging the Continent. Until this virus is cured, which subordinated attorneys general are failing to do, the future of Africa's democracies and peoples remains adrift amongst powerfully selfish political winds.

Evil In the World Is Most Manifest In Corruption in Africa

Corruption in Africa is public enemy number one.⁴⁰ Among its numerous victims is the very pursuit of freedom. In its grasp, democracy is fraudulent.⁴¹ People are facades. Life itself crumbles.

³⁸ Musila, G. "The Office of the Attorney General in East Africa: Protecting Public Interest Through Independent Prosecution and Quality Legal Advice," p. 3 (AG East Africa) (www.saifac.org.za/docs/res_papers/RPS%20No.%2013.pdf) (accessed September 1, 2008).

³⁹ For example, see Ugandan Constitution, Article 119 (5); 1999 Constitution of Nigeria, Sec. 211(3); Code of Ethics for State Attorneys and other Law Officers, Tanzanian Office of Attorney General Act, Art 27.

⁴⁰ See African Governance Report, Ch. 7, "Corruption in Africa," UNECA-GPAD (2008) (AGR-2008, Ch. 7), p. 9 (quoting President Ellen Sirleaf Johnson describing Liberia). [Note: The page and chapter references to the AGR-2008 are from pre-publication drafts.]

⁴¹ See Stapenhurst, Johnson and Pelizoo (eds), *Role of Parliament in Curbing Corruption*. (World Bank, Washington, D.C., 2006) (In 2002, corruption was identified as "the greatest threat to the democratic ideal of self-government" by the Global Organization of Parliamentarians Against Corruption).

The exorbitant magnitude of an unquestionably worldwide phenomenon⁴² renders its harshest consequences in Africa.⁴³ As much as 50% of tax revenue presumed to state coffers is siphoned off by tax departments.⁴⁴ Investment in water for the entire continent – the most basic element of life – seeps out by 30%.⁴⁵

Twenty-five percent of Africa's gross domestic product – everything it creates -- is consumed by corrupt actors, costing the continent 148,000,000,000.00 US dollars annually.⁴⁶ Over time, forty percent of Africa's wealth has mystically found its way to foreign banks,⁴⁷ virtually concealed and coveted by Western countries.⁴⁸

Democracy Itself is Corrupt

In many countries, the natural counterbalance-of-power so fundamental to democracy is itself corrupted.⁴⁹ The legislature, who in theory serves a watchdog

⁴² Corruption exists all over the world and its history is age-old. See AGR-2008, Ch. 7, pp. 1-2 (citing E. Campos and V. Bhargava, "Introduction: Tackling a Social Pandemic" in J. Edgardo Campos and S. Pradhan (eds.) *The Many Faces of Corruption* (World Bank, Washington, D.C., 2007), p. 2; 2007 Global Integrity Report on Canada, France, Italy, Japan and the United States of America (available at <http://report.globalintegrity.org/>); and Transparency International's reports (www.transparency.org).

⁴³ For a moving collection of personal statements on the issue of corruption in Africa, see the BBC report (June 2004) and public comments at <http://news.bbc.co.uk/2/hi/africa/3819027.stm> (accessed August 18, 2008).

⁴⁴ AGR-2008, Ch. 7, p. 18.

⁴⁵ AGR-2008, Ch. 7, p. 17; see also, TI *Global Corruption Report 2008: Corruption in the Water Sector*

(www.transparency.org/news_room/latest_news/press_releases/2008/2008_06_25_gcr2008_en).

⁴⁶ Kofele-Kale, N. "Change of the Illusion of Change: The War against Official Corruption in Africa," 38 *Geo.Wash.Int'l.Rev.* 697, 728 (2006) (Kofele-Kale) (citing Mustafa, H. "Combating Corruption in Malawi," 14(4) *African Security Rev.* 91, 93 (2005)) (Kofele-Kale's piece is an excellent overview of the subject); see also "Corruption 'costs Africa billions,'" Elizabeth Blunt, BBC Africa analyst (September 18, 2002) (<http://news.bbc.co.uk/1/hi/world/africa/2265387.stm>) (accessed August 18, 2008). For an overview of methodologies and organizations estimating corruption, see U4 Helpdesk reply to the query: "Africa: Scale of corruption and impact on poor" at www.u4.no/helpdesk/helpdesk/queries/query20.cfm (accessed August 18, 2008).

⁴⁷ Foreign banks and their regulators should be held criminally liable as accomplices after the fact to gross corruption, which is clearly a crime against humanity. On money laundering generally, see Moshi, H. "Fighting money laundering the challenges in Africa," Paper 152, 2, Institute for Security Studies, 2007.

⁴⁸ Kofele-Kale, p. 728, fn. 235 (citing Thompson Ayodele et al. "African Perspectives on Aid: Foreign Assistance Will Not Pull Africa Out of Poverty," *Cato Inst. Econ. Dev. Bull.* Sept. 14, 2005, at 2 (based on World Bank estimates)). See also, AGR-2008, Ch. 7, p. 34 ("[G]rand corruption in Africa would have been discouraged and proven to be unattractive without safe haven and receiving banks in the Western world for such stolen funds.").

⁴⁹ Parliaments, p. 17 ("Corruption is associated with the absence of civil liberties" such as "free and fair elections, competitive political party funding, freedom of information, a free and independent media, and freedom of assembly and speech"); UNOCD Country Corruption Assessment Report, South Africa 2003 ("In order to assist in the implementation of the new United Nations agenda for the development of Africa, especially in relation to the intensification of democratic processes and the strengthening of the protection of civil society, the United

function over the executive, is often a product of electoral corruption, lacks expertise, is corrupt itself, and most importantly, operates weakly under the intimidation and de facto control of the President.⁵⁰ Parliamentary oversight accordingly has not yet proven an effective means of anti-corruption activity, and for it to do so would require that the President voluntarily respect an ideal of separation of powers, without real structural obstacles.⁵¹

The judiciary is similarly plagued by the fact that it does not "exercise relative independence" from the executive in most countries.⁵² Corruption and systems of Presidential appointment mean that "gross corruption cases usually end up without convictions in Africa."⁵³

Anti-corruption Efforts are Flourishing Without Results

Echoing this environment, an almost musical dialogue concerning corruption has erupted around the world.⁵⁴ In 2003 the United Nations⁵⁵ and the African Union

Nations urged Africa states to combat corruption and organized crime.") (as quoted in Kofele-Kale, p. 714.).

⁵⁰ AGR-2008, Ch. 7, pp. 12-14; Role of Parliament, pp. 2-3 ("Legislators, for example, encounter many opportunities to engage in corruption either to ensure their reelection (vote buying, illicit party financing) or to obtain private financial gain from their work (some committees, such as the appropriations committee, may be particularly prone to kickbacks).").

⁵¹ Arguably, the Westminster system of government was ineffective and badly constructed for the needs of fledgling governments in poor nations. In such a context, its reliance on culture and institutions developed over hundreds of years failed to provide structural or substantive separation among the branches. The judiciary lacks power compared to the other two branches, primarily because judges do not have power to invalidate laws. The interrelationship between the parliament and the head of state is tangled in terms of cabinet and minister overlap and selection of the Prime Minister. Finally, historically and conceptually, in contrast to the American state systems, its developmental history shares no commonality with the African context. Although evidently separation of power concepts were embedded in post-colonial constitutions, their fallibility is evident from the successful systematic deconstruction by post-colonial surrogates to concentrate more power in the executive. See AGR-2007, p. 6.

⁵² AGR-2008, p. 14; AGR-2005, p. 7.

⁵³ AGR-2008, p. 15.

⁵⁴ Kofele-Kale, p. 697; Heineman, B. & Heimann, F. "Long War Against Corruption," 85 Foreign Aff. 75 (2006) (H&H) (Subdued, this piece begins with: "Since the mid-1990s, the issue of corruption has gained a prominent place on the global agenda."); SASG-2008, Ch. 7. For an overview of the various international treaties see Brandolino, J. & Luna, D. (Director for Anticorruption and Governance Initiatives, Bureau for International Narcotics and Law Enforcement Affairs, US State Department), "Addressing Corruption Via International Treaties and Commitments," (May 06, 2008)

(www.america.gov/st/democracylenglish/2008/May/20080601212227SrenoD0.646084.html)

(accessed August 19, 2008).

⁵⁵ As an aside, the United Nations is itself appropriately the subject of much discussion regarding its righteous place in the world order. Critics maintain that it is a post-war, self-appointed political oligopoly, whose executive power is growing without a the form of legitimacy it espouses (democracy). Absent a full restructuring to become truly democratic, the future legitimacy of the organization as configured, and particularly the Security Council, will hinge upon its recognition of the fiduciary nature of its authority and role. Consistent with its

harmonized as they each passed comprehensive anti-corruption treaties.⁵⁶ Every imaginable group is working on corruption, except the World Trade Organization, which could really affect change, at least among multinational corporations and financial institutions.⁵⁷ With similar resistance, the African Union Commission, after five years, has yet to appoint the advisory board its convention establishes to oversee member implementation.⁵⁸

Although all of this is crucial to creating an environment for change, it is only a beginning and implementation is lagging seemingly intentionally. Leading experts assert that, despite all the corresponding "changes in rules, rhetoric, and awareness, ... [g]iven vast, continuing problems, the anticorruption movement will maintain its credibility and momentum only if it can translate its rhetoric into action and prevent and punish misbehavior in a more focused and systematic manner."⁵⁹

Disingenuous Reform

Within Africa, the story deepens below the surface revealing the astuteness of lip service. Domestic laws have sprouted up like pesticide. All African states have some form of anti-corruption law,⁶⁰ some of them several.⁶¹ Heads of state throughout Africa

condemnation of self-interest on the part of public officials in the member states, the United Nations needs to form a code of conduct eschewing decision-making based upon the political self-interest of individual nations and embracing the fiduciary responsibility it owes as the self-anointed trustee of the world public interest. Absent real public accountability, the obligation in this regard is paramount.

⁵⁶ For good summaries of each *see* Kofele-Kale, pp. 717-729. As Kofele-Kale points out, the Preamble to the African Union Convention on Preventing and Combating Corruption identifies the Constitutive Act of the African Union and its commitment by African states to "foster a culture of democracy and the rule of law" as a underlying principle supporting the corruption convention. (Preamble, July 11, 2003) (www.afiica-union.org/Official-documents/Treaties%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf).

⁵⁷ In 2001 Yves Meny, a Professor of Political Science at the Institut d'Etudes Politique (Paris), referring to corruption wrote: "It is still to be hoped – but this again is a pious hope – that the new World Trade Organization (WTO) will be at pains to investigate one of the most striking cases of flouting the rules of competition, not to mention the erosion of private and public ethics." (*see* Meny Y. "Fin de Siecle' Corruption: Change, Crisis and Shifting Values." ISSJ 149/1996 UNESCO (2001), p. 318.). According to a lecturer at the Centre for Human Rights, University of Pretoria, the WTO did put corruption on its agenda only to remove it. Hopefully investigative journalism will explore this mysterious maneuver.

⁵⁸ According to interviews with the legal department, the African Union Commission is awaiting nominations from northern Africa to the Advisory Board and expects a full compliment of nominations, thanks to promised submissions by Libya, in time for the first Heads of State meeting in 2009.

⁵⁹ H&H, p. 75.

⁶⁰ Laws targeted at anti-corruption correspond to its many shapes: bribery, money laundering, embezzlement, etc. Even without them, it is hard to imagine there is not some law that covers executive theft and civil servant siphoning.

⁶¹ SASG-2008, Ch. 7.

earnestly denounce the infestation, though, "for all the bombast about eradicating corruption, Africa has made little progress on this front."⁶²

Anti-corruption institutions, ombudsmen and investigatory bureaus are the current popular attractions.⁶³ Largely toothless by design,⁶⁴ even those with investigatory capacity and prosecutorial authority are headed by political appointees of the head of state and thus, are "seriously challenged" due to "lack of autonomy, political interference, and poor funding."⁶⁵ As the evidence accumulates, the general impression is that anti-corruption efforts in Africa are not working.⁶⁶

Chief Thief – The Head of State

For some reason probably related to fear, there seems to be a polite, possibly cultural, reluctance to publicly slaying the tiger responsible for all of this.⁶⁷ Of course, it is known that African's unitary presidents generally exercise control over all branches of government, throughout which corruption is rampant.⁶⁸ Not surprisingly therefore, as corruption is deconstructed and anti-corruption capabilities analyzed, the finger inevitably points back to the head of state who in too many African states rules with impunity.⁶⁹

⁶² Kofele-Kale, p. 697; Coldham, S. "Legal Responses to State Corruption in Commonwealth Africa," 39 J. Afr. L. 115, 120 (1995) (ombudsmen have failed to live up to expectations).

⁶³ Kofele-Kale, p. 705 ("The general trend of the last fifteen years has been to entrust the investigation of corruption to independent anti-corruption agencies or commissions."); AGR-2008, p. 26.

⁶⁴ Role of Parliament, p. 145 ("It is evident that policy makers' incentives in these countries [Argentina, Bangladesh, Brazil, India, Tanzania, Thailand, and Uganda] do not include offending entrenched constituents who may oppose sustainable anti-corruption reforms."); *see also*, UNECA-GPAD Internal Research Document, by Kidist Mulugeta (on file with Author) (GPAD Research), discussing Nigeria, and *citing* Shehu, A. "Combating Corruption in Nigeria: Bliss or Bluster?" *Journal of Financial Crime*, 12(1), pp. 69-74 (2004).

⁶⁵ AGR-2008, pp. 9, 24-26 (discussing the case of Kenya where the former top anticorruption official resigned and fled the country evidently fearing for his life).

⁶⁶ Role of Parliament, p. 135; GPAD Research, *citing* various sources including the African Development Bank, USAID, and private authors. This is consistent with this author's impression from the UNECA/CODESRIA International Conference: Institutions, Culture and Corruption in Africa (Addis Ababa, October 2008) (UNECA/CODESRIA Corruption Conference).

⁶⁷ Kofele-Kale, pp. 737-738 ("Graft at the presidential level is merely mirrored, on a smaller scale, by officials at all levels of government, therefore making chief executives the appropriate target for corruption inquiries."). In 1999, *The Economist* estimated that African leaders stowed 20 billion US dollars in Swiss Banks. *See* "When the money goes west," Michela Wrong (a New Statesman columnist) (March 14, 2005) (www.newstatesman.com/200503140015) (accessed October 5, 2008).

⁶⁸ *See generally*, AGR-2008, Ch. 7.

⁶⁹ The downfall of President Mbeki of South Africa in an interesting contrast, perhaps indicative of the increasing strength of civil and public institutions in that country, or possibly just the nature of titan struggles.

Of course the system is skewed this way. Underlying the unethical tentacles, the head of state legitimately controls all the major functions: (1) he manages the money,⁷⁰ (2) he controls public procurement, and (3) he is chief law enforcement officer. By virtue of this structure, he is the proverbial fox guarding the chicken coop.⁷¹ It is this consolidation of power that deflects anti-corruption efforts, rendering them more noisy annoyances than power threats.

Among this prevalent reality, exceptions uniformly derive from the integrity of specific heads-of-state truly committed to reform.⁷² Despite such positive examples, however, the "general trend in Africa is one of executive arbitrariness in the use of public funds and corruption."⁷³

In some, leadership in Africa has indeed become a perverse inversion of its tribal origins and there is nothing African about it that deserves respect or deference. For, sadly, what was once true of "colonial masters" is now also true of lingering "post-colonial masters." The need for a better system of checks and balances on executive power in Africa is corresponding epic.⁷⁴

Consistently, reformers call for "granting" greater autonomy from centralized executive authority.⁷⁵ The prevalent tactical and organizational focus is geared toward decentralization, local government reform, and empowerment of civil society and the media.⁷⁶ These are at best, however, a sideswipe and at most ineffective.⁷⁷ More recently, "power-sharing" has emerged on the scene, though this is more of a political strategy to resolve electoral impasses among political elites in dubious elections than a thoughtful, systematic division of executive authority.⁷⁸

⁷⁰ Equally worthy of consideration is the system of electing a separate officer to serve as the chief custodian of the state treasury. *See* Role of Parliament, p. 4 ("financial integrity is central to anti-corruption efforts"). The role of the appointed Auditor General perpetrating "executive theft" as well as extensive cabinet-level collusion is documented. *See* Kofele-Kale, p. 110. In this scenario, budgetary independence is exceptionally important given that parliaments in Africa "rarely or never" investigate executive fiscal practices. *See*, GPAD Research, *citing* "A Rapid Anti-Corruption Assessment Technique for USAID/Africa: Developing a Practical Checklist for USAID Missions in Africa" pp. 31-47 (Washington, D.C. USAID, 2007).

⁷¹ Roche, p. 602, fn. 12 (optimistically maintaining that, in this scenario, the AG "should be a rather independent-minded fox").

⁷² AGR-2008 (referencing frequently Botswana and Liberia).

⁷³ ARG-2008, p. 9.

⁷⁴ African Governance Report, UNECA/GPAD (2005) (AGR-2005), p. 6.

⁷⁵ AGR-2005, p. 9.

⁷⁶ AGR-2005, p. 6.

⁷⁷ AGR-2005, p. 6.

⁷⁸ *See* cases of Kenya and Zimbabwe. Power sharing (dividing cabinet office appointments between a Prime Minister and President) is theoretically in the realm of a "divided executive", but it based not on functions, but rather power. This approach squarely implicates the biggest concern with the divided executive structure -- accountability. At the end of their election cycle, finger pointing will no doubt blur accountability. By contrast, the divided executive model functioning in the American states separates clearly divisible functions, leaving government administration in tact, thereby promoting rather than obscuring accountability.

One legitimate complaint levied against anti-corruption efforts in Africa is that they were imposed upon leaders by donor communities.⁷⁹ The implication is therefore, and the results bear this out, that anti-corruption efforts are not sincerely undertaken with intent to effectively implement them or to stop corruption at its source.⁸⁰ This is sometimes the most ingenuous work in the field of corruption: disingenuous reform.⁸¹

The Elephant in the Room

Law enforcement of course is responsible for prosecuting executive theft. Despite this fundamental issue, a major shortcoming in anti-corruption efforts is inadequate attention to enforcement.⁸² Perhaps distracted by the flurry of anti-corruption activity, most analysis of the effectiveness of the various state initiatives stops shy of specifying the precise law enforcement command chain or deconstructing the intersection between investigatory and prosecutorial power.⁸³ That detailed analysis is probably not readily available because all roads lead to Rome in this labyrinth. Though, by splintering the responsibility, administrations cleverly cloud accountability for law enforcement, thereby miring the anti-corruption law enforcement system in finger-pointing and turf battles.

Tactical Decisions

Experts on global corruption are urging the movement's attention away from developing nations in acknowledgement that that particular fight there is embroiled in the broader context of state development.

In the near term, the implementation of anticorruption measures must come in important part from international organizations, developed nations, and MNCs. Developing nations also have a critical role to play. But their legal, political, and economic systems vary greatly - they are failed or failing, fragile or rising - and so anticorruption initiatives in the

⁷⁹ Role of Parliament, p. 145 (maintaining that political leaders and reformers are simply yielding to the "international donor community").

⁸⁰ This tactic is used more openly in treaty writing where "constructed ambiguity" is virtually accepted, based on arguments of political expediency, i.e., a vague treaty is better than no treaty. Given the lack of enforcement mechanisms, perhaps these general expressions of international policy are a useful step. However, as approached, a certain dishonesty permeates the final product.

⁸¹ Coldham, at 115 ("If a special commission or squad is set up, if a trial is held and a conviction obtained, or if the criminal law is made more draconian, at least the government can give the impression of tackling the problem.").

⁸² Role of Parliament, p. 51, 62 ("[L]aws to punish bribery and other forms of corruption have proliferated around the world—and frequently at the expense of paying attention to ensuring that the laws can and will be enforced or to see that preventive measures are also taken.")

⁸³ See AG East Africa, (pointedly questioning the relationship among law enforcement entities in Kenya, Uganda and Tanzania).

*developing world will have to be a part of, and dependent on, each country's broad, complex, and often lengthy state-building process.*⁸⁴

This analysis essentially affirms that isolating corruption as a law enforcement agenda in an otherwise flawed law enforcement structure is pointless. Corroborating the idea that the system itself is broken, there is "growing evidence that [anti-corruption] commissions [have] fail[ed] to reduce corruption."⁸⁵ Perhaps this undertaking was necessary, though, to convince optimists of the futility of operating in the current law enforcement system, but that jury is now in.

The tactical issue for anti-corruption activists now therefore, becomes whether to further finagle the current power structure hoping for gradual, targeted progress over time, or whether to shock the system with a major adjustment directly altering the power to control judicial law enforcement. Relevant to this decision is the consideration of the impact such a strategy might have in empowering all other activists seeking meaningful advancement in the outsider's fight for human rights, electoral integrity, free speech, and criminal and constitutional justice.

Rarely does a single opportunity arise that offers so much to so many. But this is the nature of law enforcement within a system of laws. Bad law enforcement poisons every valiant cause and breeds contempt for the very ideal of democracy and the rule of law. As a proven alternative, the elected Attorney General may offer new hope for an array of crucial societal concerns common to the two continents. Dreamers, like the people of Guam, can imagine for themselves the range of possibilities.

Modern Elected Attorneys General in the American States

Breadth of Activity

Due to the integral nature of law enforcement in society, the independent modern attorney general in all fifty American states has emerged to preeminence.⁸⁶ The topics addressed by state attorneys general cover the full spectrum of civil, political, electoral and social human rights and policy. Continuously expanding the space of law enforcement, the breadth of this work collectively establishes the rule of law.

Attorneys general work on water rights sensitive to historic uses and preservation, land ownership as experts in the complexities of public trust and border issues, tribal rights respectful of sensitive sovereignty issues, and corrections law protecting against overcrowding and ensuring proper mental health.

⁸⁴ The two expert authors of this statement are Ben W. Heineman, Jr., a Senior Fellow at the Belfer Center for Science and International Affairs at Harvard's Kennedy School of Government and former Senior Vice President for Law and Public Affairs of General Electric, and Fritz Heimann, Co-founder of Transparency International and Chair of TI-USA from 1993 to 2005.

⁸⁵ Role of Parliament, p. 135.

⁸⁶ SASG, pp. 43-47. Support for the propositions set forth in this section, when not otherwise cited, are from SASG generally or are based on direct experience of the author who, while working for the Governor of Massachusetts for eight years, negotiated policy and interfaced extensively with the elected Attorney General.

An aggressive protector of the environment, their work extends to water pollution, drinking water, ocean waters, waste management, hazardous waste management, environmental remediation, recycling, species protection, pesticide use and control, right-to-know (for community awareness of toxins in use in their environments), criminal enforcement of environmental law, indigenous land rights, and involves complex analysis of cross-border issues extending all the way to climate change.⁸⁷

Prevention and education has expanded to include domestic violence programs, underage drinking campaigns, anti-gang and drug initiatives, and hate crimes involving the most marginalized of groups. Much of this work is done in conjunction with, and thereby empowers, community organizations and civil society. Civil society and non-governmental organizations, however, are themselves the target of considerable oversight by attorneys general to protect against fraudulent fundraising and other scams.

Collectively, but to differing degrees, the state attorneys general now operate in numerous arenas including: i. defending the executive and its agencies in all court proceedings, ii. initiating investigations of criminal and civil matters against private and public parties in the public interest, iii. controlling litigation commenced by independent local prosecutors, iv. conducting all appellate litigation, v. guiding state and local law enforcement, vi. operating state investigative bureaus, vii. conducting public education and awareness, viii. developing crime prevention initiatives, ix. determining training for law enforcement and local prosecutors, and, x. leading policy enforcement priorities and shaping public policy.⁸⁸

Corruption

Setting law enforcement priorities is a powerful tool of the office and corruption is a stalwart on the attorneys general's agenda.⁸⁹ The National Association of Attorneys General confirms that public corruption is a specific concern within most offices of the Attorney General and they collectively have undertaken "extensive efforts" to combat official corruption.⁹⁰ Responding to the call for zero tolerance in this field, increasingly vigilant, new candidates continue to call for anti-corruption units to buttress existing efforts.⁹¹

Work in this area implicates various functions and powers of the Attorney General spanning from the critical ability to bring lawsuits against the Government, to the power to investigate and prosecute violations of criminal laws, to more fundamental issues like ensuring the right of the people to investigate the records of government

⁸⁷ SASG, pp. 123-149.

⁸⁸ See Clayton, C. "Law and Politics and the New Federation; State Attorneys General as National Policy Makers" 56 *The Review of Politics*, No. 3, pp. 525-553.

⁸⁹ SASG, p. 70.

⁹⁰ SASG, p. 70.

⁹¹ "Attorney General Corbett (Pennsylvania) announces formation of Public Corruption Unit" (February 28, 2006) (www.attorneygeneral.gov/press.aspx?id=989) (accessed September 24, 2008); "Republic Ohio attorney general candidate Mike Crites wants a Corruption Commission" (August 19, 2008) (www.cleveland.com/news/plaindealer/index.ssf?/base/news/121913470855360.xml&coll=2) (accessed September 24, 2008).

directly. A glance at these areas illustrates the overall impact of states attorneys general on good governance including corruption.

Criminal Prosecution & Police Force

As in Africa, the Attorney General's authority and practice in initiating criminal prosecutions is of crucial importance.⁹² With many variants, the strongest model uses a form of concurrent jurisdiction that allows the Attorney General to initiate or intervene in any matter of statewide interest, criminal or civil.⁹³ Most states have local prosecutors, also independently elected,⁹⁴ who are empowered to initiate criminal prosecution, though they work closely with the Attorney General's office because, among other substantive reasons, she controls appellate litigation.⁹⁵

The Attorney General's relationship with the police force, the front line in law enforcement, is equally important. Formal relationships in the states range from direct supervisory authority over the entire state police force, to, more commonly, authority over specific officers involved in investigation.⁹⁶ Regardless of the formal structure, the stature of the office enables the Attorney General to set the standard using an array of tactics from establishing state-of-the-art bureaus of investigation and developing special units and expertise, to determining law enforcement training and certification. The influence extends to establishing policy via public relations, and coordinating targeted anti-crime initiatives, making each Attorney General the "leader in their respective jurisdictions."⁹⁷

Procurement Fraud & Maladministration

Attorneys general have many tools in their arsenal to combat official misconduct and fraud perpetrated, including specifically, in public procurement. A particular problem in Africa,⁹⁸ the developed attorneys general office creatively uses every criminal law available.⁹⁹

⁹² See generally, Sornarajah.

⁹³ SASG, p. 310.

⁹⁴ Many attorneys general have prior experience as local prosecutors or district attorneys, which provides a substantive record from which to derive their ability to enforce the law and their approach in doing so. See Thompson, p. 28 (survey covers prior work records for attorneys general from 1930-1970).

⁹⁵ The current, popular female AG from Massachusetts is Martha Coakley.

⁹⁶ SASG, pp. 305-317,

⁹⁷ SASG, p. 309; see also, Police Powers, p. 111 (emphasizing the importance of formal police organizational rules, regulations, and policies, and the extent to which the nature of police training "affect[s] how they enforce laws and maintain order").

⁹⁸ See generally, DeAses, A. "Developing Countries: Increasing Transparency and other Methods of Eliminating Corruption in the Public Procurement Process," 34 Pub. Cont. L.J. 553 (2004-2005) ("bribery in government was once rampant throughout the world with the United States being the exception" referencing procurement systems and enforcement as the reason (at 554), and noting the causal relationship between corrupt governments, transparency and procurement fraud (at 561), and the need for independent law enforcement (at 569)).

⁹⁹ SASG, p. 284 (citing examples from New York, Wisconsin, Tennessee, Arizona involving bid rigging, kickbacks, and the ability to use civil and criminal causes of action)

Related to this field, attorneys general plays a vital role in protecting the public interest in major state undertakings. This is a major concern with appointed Attorney Generals in Africa, where, in some countries, the history is "littered with inexplicable decisions of a legal nature that have plunged them into deep indebtedness, perpetrated the scourge of corruption and abuse of human rights."¹⁰⁰

In this regard, the Attorney General's ability to sue government officials to enforce the law is important. In one instance, the Attorney General of South Carolina sued the state's Governor on separation of power grounds to prevent the Governor from transferring earmarked monies to the general fund.¹⁰¹ The Court held that the Attorney General may bring an action against the Governor "when it is necessary for the enforcement of the laws of the State, the preservation of order, and the protection of public rights." This authority in the hands of an elected attorney general in Africa could alter governmental practice substantially.

Access to Public Records

Detecting corruption is of course the first step and in the US an army of civilians and organizations keep a close eye on public records ranging from ethics filings to campaign finance information, to environmental impact reports and emissions licenses, to department and project budgets.¹⁰² Gaining access to these types of government records is the most fundamental aspect of transparency, which in turn, is the foundation of anti-corruption.¹⁰³

Critically, state attorneys general are aggressive advocates of these rights.¹⁰⁴ The role is so developed that the state attorneys general can actually shift the balance of power in this arena from the government to the people, essentially altering a government's general attitude about responding to public requests for information. In Florida, the website of the Attorney General demonstrates this:

In Florida, every person has been granted the Constitutional right to inspect or copy any public record with some exemptions, and the Sunshine Law provides a right of access to government proceedings at both the state and local levels. These essential laws afford citizens of our state the ability to see behind the curtain of government and remain involved in the processes that affect their lives. Without this access there is little accountability, and accountability is vital for good government. ... The Attorney General's Office plays a key role in keeping Florida's government open to all Floridians. The office is charged with mediating disputes involving access to public records and provides a mediation program to that effect - a resource which can be requested by any member of the public and was put into action more than 75 times in 2007.

¹⁰⁰ AG East Africa, p. 4 (referencing Kenya, Tanzania and Uganda).

¹⁰¹ SASG, p. 57 (*citing State ex rel. Condon v. Hodges*, 562 S.E.2d 623, 628 (S.C. 2002).

¹⁰² SASG, pp.109-110.

¹⁰³ SASG, pp. 347-351; Azubike, A. "Legal and Strategic Framework for Entrenching the Right to Public Information as the Bedrock of the Culture of Transparency and Accountability in African Countries" (Paper, Presented at UNECA/CODESRIA Corruption Conference) (on file with author).

¹⁰⁴ SASG, p. 110.

Incredulously, only four African countries even have a freedom of information law, and only one, South Africa, is attempting implementation.¹⁰⁵ Fortunately, the essential nature of this issue is gaining recognition internationally.¹⁰⁶ Pragmatically, there is no legislative initiative more critical to Africa's fight against corruption and for democracy.¹⁰⁷ Combined with an elected attorney general to enforce it, this could create a sea change.

Fair and Free Elections

Prosecuting election irregularities is at the heart of the matter because it involves the very essence of democracy -- the vote -- and it protects the right of the people to get ride of corrupt politicians. Precisely because an appointed attorney general in African cannot effectively take action against his boss and his bosses thugs, democracy itself is more often only an idea on a piece of paper called a constitution and the vote is a façade.

In this context, Presidents unabashedly use their Attorney General as a shield. The 1985 elections in Zimbabwe demonstrate the extent of political non-prosecutions. One author believed that, despite extensive police investigation and criminal charges, most of the politically inspired vandalism, murder, arson and rape were deliberately not prosecuted by the President-appointed Attorney General.¹⁰⁸

Beyond failing to protect the process, dependent attorneys general may even be used as weapons within the electoral process to protect the bosses' incumbency and frankly, their own jobs. Uganda and other states have witnessed such power wielding by the office against opposition candidates and rebellious election commissions.¹⁰⁹

¹⁰⁵ Azubike.

¹⁰⁶ Azubike (*citing* the Atlanta Declaration and Plan of Action for the Advancement of the Right to Information (February 29, 2008)) (www.cartercenter.org/documents/Atlanta%20Declaration%20and%20Plan%20of%20Action.pdf).

¹⁰⁷ The decade long battle in Nigeria reveals its centrality, where it is said that the bill was subject to "unprecedented debate, wrangling and bickering" between activists and lawmakers. Information being power, the government clearly knows what it will be losing. (Azubike, *citing* "FoI: The Bill With Nice Lives," Jude Igbanoi, *This Day* (July 14, 2008) (<http://freedominfo.org/news/20080717b.htm>)).

¹⁰⁸ Goredema, p. 54-55 (describing the 1985 elections and the ZANU (PF) and ZANU Youth, as well as other high-level regional officials) ("This collusion by the attorney-general in the frustration of the criminal justice process had three implications. First, it destroyed the myth of political neutrality that had hitherto been taken for granted. It served to underline the fact that, in a conflict between the interests of the executive and those of a powerless citizen, the attorney-general would side with the executive. Secondly, it reassured the executive that they could rely on the attorney-general to shield them from the criminal law. This lesson was to be put to use in subsequent conflict situations. Thirdly, it weakened the respect for the rule of law in Zimbabwe. It obviously set a bad precedent and left the police frustrated and confused. There can be no doubt that it harmed the public confidence in the administration of justice.").

¹⁰⁹ Modise, O. "Kanjabanga hounded by BDP – Boko," Mmegi News (www.mmegi.bw/index.php?sid=1&aid=40&dir=2008/January/Thursday24) (accessed September 15 2008); Role of Parliament, p. 146 ("In some circumstances, a commission linked to the executive branch is used to settle old scores with political rivals.").

Protecting the electoral process from political abuse and corruption is so important that responsibility for this activity in most of the American states is further relegated to yet another separately elected official, the Secretary of State.¹¹⁰ But in the end, judicial enforcement remains the prerogative and responsibility of the Attorney General, who when elected himself, has a vested interest in fair and open elections.

Corruption in the States

More investigation into state public corruption is warranted, but at present the extent of public corruption within the states is difficult to specify. What was formerly endemic in the 70s, is now more likely to be described as peppered, though prosecutions are believed to spike public perceptions of the scope.¹¹¹ Prosecution of state legislators and executive officials is an on-going game of cat and mouse in which the federal government's role has been pivotal.¹¹² Data on state corruption and prosecution is lacking, though Transparency International places the United States as a whole at 7.3 tied for 18th place.¹¹³

Personal impressions of the author based on eight years in Massachusetts Government in the Governor's Cabinet, working extensively with ethics reporting, procurement, and negotiating endlessly with the Attorney General, indicates that corruption is a footnote where proper systems are in place. Though the move toward stronger ethics, campaign finance, public records and other laws for transparency and accountability is an on-going effort, still fueled by public scandals and prosecutions.

The overarching message as it pertains to the state attorney general is ultimately much broader than fighting public corruption, however. The main point is that independence of the attorney general by virtue of being directly elected creates a champion for the people on a wide array of topics that collectively enforce the rule of law (including, fundamentally, separation of powers) and the judicial system.

¹¹⁰ The Attorney General of Kenya has recently emphasized the need for independent oversight for elections. See "Kenya's Attorney General Seeks Vote Verification," National Public Radio (January 3, 2008) (www.npr.org/templates/story/story.php?storyId=17806564) (accessed September 22, 2008).

¹¹¹ "The Corruption Puzzle, Is Graft Getting Worse, or Are [Federal] Prosecutors Out of Control," Alan Greenblatt (July 2008) (Corruption Puzzle) (www.governing.com/articles/0807corruption.htm) (accessed October 10, 2008) (canvassing an array of federal prosecutions of state-level officials, suggesting generally that the defense allegations of improper political motive have become a standard line of defense of a dubious nature; see also, Meny (suggesting that media hype may exaggerate the scope in Africa).

¹¹² See DiBiagio, T. "Politics and the Criminal Process: Federal Public Corruption Prosecutions of Popular Public Officials Under the Honest Services Component of the Mail and Wire Fraud Statues," 105 Dick. L. Rev. 57 (2000-2001).

¹¹³ See "Public Corruption In the United States," Report filed by Corporate Crime Reporter (National Press Club, January 2004) (on file with author) (This is the only paper identified that tries to rank public corruption among the states using federal prosecution figures from the Public Integrity Section, US Justice Department and a population ratio. The numbers do not seek to quantify or describe the extent of public corruption otherwise. Federal prosecutions of state and local officials for the ten-year period from 1993 to 2002 totaled 9208.).

The consolidated and elected office, by virtue of its involvement with and detachment from all branches has evolved to be well funded, professional and effective across the many states. Admittedly, as demonstrated by the Guam experience, a new office of elected attorney general in Africa will no doubt have a fight on its hands as they embattle entrenched interests.¹¹⁴ But with time, the already visible standing of the African Attorney General, combined with a new populace mandate will, if faithfully executed, command resources necessary to the task of repairing many of the current administrative issues in Africa from salaries, to staff qualifications, to capacity.¹¹⁵

Still Scandals

As politics continues to exercise its demons, the elected nature of the attorney general presents its own potential complications. As elected officials themselves, states' attorneys and local prosecutors may be susceptible to party loyalties.¹¹⁶ Additionally, some commentators allege that attorneys general are using litigation to create policy, unfairly targeting big industries, and improperly enlisting outside trial firms that contributed to their campaigns.¹¹⁷

Individual attorneys general also fall short personally. Of recent resignations, the Attorney General of New York was implicated in a prostitution ring, another in Ohio was embroiled in an office affair and sexual harassment allegations, and a third in New Jersey fell because she supposedly received preferential treatment from the police at an automobile accident involving her boyfriend.¹¹⁸ The fact that an attorney general would be forced to resign over such matters demonstrates the caliber of public expectation and

¹¹⁴ See Guam AG Speech ("The fight for righteousness and for good has been a lonely one, and accusations and allegations abound when we rock a foundation which was ill created. That is why we create so much attention and controversy. I suggest it is because we are changing the status quo, and reshaping and reforming the establishment. We have come from saying we were going to prosecute corruption, to now prosecuting about 38 government corruption cases indicted for charges including theft, abuse of credit cards and official misconduct to name a few. We are prosecuting in almost every part of this Government and at least 45 officials have been indicted by you, the Public. This is what giving power "back to the People" truly means. However, we are the lightning rod for the wrath of the People's enemies. We ground their corruption.").

¹¹⁵ Role of Parliament, p. 135 ("Evidence of dysfunctional anti-corruption commissions is manifest in the number of agencies that lack independence from the executive, receive inadequate budgetary support from the legislature, have no procedures for forwarding cases of corruption for prosecution by the relevant judicial authorities, and fail to submit regular reports to the legislature.").

¹¹⁶ Corruption Puzzle (*citing* Professor James Eisenstein, University of Pennsylvania).

¹¹⁷ "Publicity-seeking politicians and contingency-fee lawyers corrupt the law," James K. Glassman (January 29, 2001) (<http://www.reason.com/news/show/36042.html>) (accessed October 9, 2008).

¹¹⁸ "Spitzer Gets Spitzered," Daniel Gross (March 10, 2008) (www.newsweek.com/id/120371) (accessed October 6, 2008); "Scandal Plagued Ohio Attorney General Resigns"(involving an extramarital affair and sexual harassment allegations) (www.usatoday.com/news/nation/2008-05-14-ohio-ag-resigns_N.htm) (accessed October 6, 2008); "NJ Attorney General Steps Down Amid Scandal," Beth Defalco (August 16, 2006) (www.capitolhillblue.com/artman/publish/article_9311.shtml) (accessed October 6, 2008).

its power over the office. Despite instances of more serious cases,¹¹⁹ generally speaking allegations of substantial official misconduct appear relatively rare. In any event, the public election process provides for a vetting of these issues.

To Elect or Not

To some extent the case for elected attorneys general almost makes itself, but at the same time is difficult to prove. The best circumstantial evidence is the states of the United States themselves, which one by one, embraced the idea, and internally developed peacefully and prosperously to great stature overcoming major historic challenges, and which, collectively, account for the prosperity and stability of the United States as a whole.¹²⁰ Despite the inevitable bad actors, respect within the states for the rule of law cannot seriously be questioned today.

The main historical arguments against an elected office are neither empirical nor persuasive as evidenced by the steady trend toward elected office and the absence of any reversal by the forty-three sovereign American states and Guam, to so choose. The only empirical study directly on the question of "elected vs. appointed" outlines those arguments as including concerns about government efficiency, accountability, distractions of campaigning, competency, voter apathy on sub-office races, and intrusive political considerations in decision making.¹²¹

Practically speaking, most of the theoretical, negative consequences asserted in opposition to an elected office, as well as the concerns levied against the "divided executive" of inefficiency and unaccountability, are already frequently present in the current African unitary executive model. The weight of these arguments correspondingly, dissipates. But, most damaging to the historical arguments is the fact that, in practice, these concerns have not materialized in the states.

Plausibility in Africa

Unique and legitimate concerns over the elected attorney general will naturally arise in the various African contexts. Initial reaction to the idea at an international conference on corruption hosted by UNECA and CODESRIA included some reactionary skepticism, but consisted mostly of intrigue. Some participants were immediately enamored of the idea and left strategizing on how to introduce the idea in the political discourse in their country. UNDP and World Bank representatives showed great interest.

¹¹⁹ See "Book Investigates corruption in Florida Attorney General Charlie Crist's Administration" (September 30, 2006) (www.1888pressrelease.com/book-investigates-corruption-in-florida-attorney-general-cha-pr-q778a0fz2.html) (accessed September 24, 2008).

¹²⁰ For example, the State of California is the eight largest economy in the world (GDP 1.7 trillion, after the UK 2.3, France at 2.2) (www.ccsce.com/pdf/Numbers-jul07-CA-Rank.pdf), and the State of New York is home to people from all over the world.

This is in contrast to the federal government of the United States and the respect for the office of President, which, unchecked by an independent Attorney General, is, in 2008, embroiled in myriad allegations of torturing foreign prisoners, illegal aggression against foreign governments, lies leading to war, and electoral fraud. See Marshall (advocating for an elected federal Attorney General).

¹²¹ Thompson, p. 19.

One concern was raised over whether the current nature of electoral corruption and abuse would affect this contest as well.¹²² The presumption is that initially this will be a major area of concern. The weight of the evidence in the states, however, which historically have had pervasive voter fraud, suggests that, with time, the development of the rule of law diminishes voting irregularities.¹²³

To minimize this concern, the initial process for electing an attorney general in an African state must be carefully considered and structured. Among the safeguards, the initial terms should probably be limited to one or two years, with a four-year total term limit.¹²⁴ The initial job will be primarily to develop the office's capacity and establish the system of electing the Attorney General. Short terms and term limits will provide more opportunity for refinement and guard against the personification of the office.¹²⁵ Most importantly, frequent elections will better acclimate people to engaging in the process and ultimately will inculcate a stronger sense of ownership in the office.¹²⁶

Moreover, broadly speaking, having multiple office elections involving offices with integrated duties but separate accountability, inclines all office holders to support a legitimate electoral process and intrinsically destabilizes the electoral monopoly currently held by one office, the President. With time, having two bites at the apple appears likely work its own magic.

The question arises as to how heads of state in Africa will respond to this idea. The answer will probably vary widely, but the issue is clearly topical and the fact of the matter is that an elected attorney general need not worry a lawful President, particularly one honestly wed to legitimate elections and stable democracy.

Today Governors (heads of state) and attorneys general "have generally learned to cooperate effectively within a divided executive framework."¹²⁷ The suggested causes for this center on a mutual deference born mostly of self-interest related to public

¹²² The paper was presented and comments received at the UNECA/CODESRIA Corruption Conference, *supra*, a gathering of 100 academics, practitioners, including current Ministers of Justice.

¹²³ In Boston, MA, not long ago, the joke used to be that more dead people voted than live (their names having never been removed from the voter register), hence the expression, "vote early and often." It is also roundly assumed that Mayor Daily of Chicago orchestrated John F. Kennedy's election.

¹²⁴ This is the predominant strategy used in approaching the idea in the states, which, after establishing the office's role, all moved to four-year terms, with varying term limits. *See* SASG.

¹²⁵ This careful and measured approach was a critical component of the strategy for establishing democracy in the American colonies. Similarly, the current situations in Africa argue in favor of greater comparative study of the journey of the states, post colonialism, to stable democracies. Given its failure in Africa, the entire Westminster system, born inappositely of a monarchical environment, should be reevaluated.

¹²⁶ All of this is equally true for elections of the head of state as well. The evidence is conclusive that in Africa's fledgling democracies, four or five years between elections, and endless terms, have prevented the development of the institutions and promoted presidential autocracy.

¹²⁷ Marshall, 2006 (*citing* Tierney, J. "The State Attorney General: Who Is the Client?" (Sept. 1, 1995) (<http://c-128.port5.com/articles/art2.html>)). The prospects of higher office for both AG and Governor also inclines the office-holders toward lawfulness. (*See* Thompson, p. 29) The formation of a real pan-African government could instill a similar incentive for African politicians, as well as offer other structural advantages.

expectations.¹²⁸ Most importantly from the perspective of stability, when the two do clash the differences of opinion are peacefully resolved by the judiciary, whose independence of course is quite relevant.¹²⁹ Given the continuing complexities surrounding the judiciary in Africa, this will no doubt take some time to work itself out.

Additional comfort might otherwise derive from the fact that, building on past success, the modern elected attorney general has not only established his importance in bridging democracy, but is clearly forward marching toward true justice for all.¹³⁰ With the extent of the problems with the current forms of democracy in Africa and the absence of alternative proposals for structural solutions, the idea is at least worthy of discussion. If it resonates in Africa, the reality is just a bridge away.

Building the Bridge: An Activist's Agenda

In today's civilized revolutions, public relations is the armament of choice and fortunately the public relations industry has joined the struggle for democracy in the world.¹³¹ With its strategists standing ready to take on the right cause, "We Deserve A Lawyer!" could easily sweep the lands.

In conjunction with an outreach effort to everyone interested in human rights, corruption and law enforcement, a public awareness campaign could be easily designed and launched using pro-bono support and professional expertise like that available from Oglivy International's offices in Johannesburg.

An effective approach would be to target the radio listening audience, specifically football fans, but others as well, with celebrity spokespersons from the sports and entertainment worlds. A media campaign directed at editorial boards and journalists on the substance of the issue and up coming PSA campaign (itself newsworthy) would ideally precede the launch.

Integral to all of this, a fun and substantive website geared at targeted and age-appropriate audiences could be launched, with academic papers, games, multi-media, and live on-line chat with collaborating celebrities. Collecting the content and partners for this component is the first order of business.

We Deserve A Lawyer!

¹²⁸ Marshall, p. 2006.

¹²⁹ Marshall, p. 2006.

¹³⁰ The benefits of an elected attorney general in the states extends to virtually human, civil, political, and increasingly social, rights, covering societies most vulnerable groups and issues, including, the LGBTI community and hate crimes, women's rights and domestic violence, and prisoners care.

¹³¹ See "Can a PR Institute help in the war against corruption?," Elizabeth Lewis-Jones, Chartered Institute for Public Relations (CIPR), (Can PR Help Corruption) (February 18, 2008) (prepared for the Timex Global Communications Summit in Abuja, Nigeria on the theme of "Building a Corruption Free Society," which summit evidently wisely reached out to the broader business community, including the public relations industry, to engage them in this community effort) (http://prvoice.typepad.com/pr_voice/2008/02/can-a-pr-instit.html#more) (accessed September 25, 2008)).

Simplicity is essential for a mass message. "We Deserve A Lawyer!" is a good sound bite. It captures the essence of an arguably complex issue, while conveying both the theory (a lawyer for the "public interest"), and the practical implications (creating a separately elected official for the people). From this strong phrase, the explanation of the movement flows seamlessly and directly. Importantly, it does not require a complex understanding of democracy in order for its impact on government to be understood.

As to context, although it serves the interests of virtually every movement from human rights to democracy, corruption is particularly enticing as a "poster topic" because of its current popularity and the breadth of its impacts on the lives of everyone. This of course, is the story that needs to be told. Both focused and expansive as a target, corruption's impact on the rule of law and elections makes it a powerful motivator: it is a common enemy for all activists.

The current cacophony surrounding the issue also makes for fertile political ground for both domestic and international audiences. So rather than conceding anti-corruption efforts to the dictates of a broken system, corruption can be the vehicle of its own downfall if used tactically in a bigger agenda designed to reform the entire legal framework governing the balance of power over law enforcement.

The peoples of Africa are suffering silently. Although the drumbeat patiently intensifies, there has been no singular galvanizing message since independence. No groundswell powerful enough to propel Africa past its post-colonial tyranny perpetrated today by its own post-colonial masters and thieves.

A campaign of this nature could cultivate a sense of empowerment, reviving a long-lost sense of entitlement. A grassroots, continent-wide campaign, even if it fails, would likely alter the political trajectory irreversibly. No longer would there be reluctance to challenge authority. Misplaced deference and unfounded respect would go their proper way. Just one good common political fight could galvanize a new breed of activism propelling the civil society sector to its rightful place at the forefront of public policy development.¹³²

If the campaign itself could do all this, just imagine what actually having an advocate on the inside could do. Imagine the bridge that could be built.

In Conclusion

Africa has a fascinating opportunity. New ideas are a dime a dozen in politics and lots of time is spent testing them. Rarely does an idea come around that has been extensively implemented with great success over hundreds of years, that suddenly presents itself as a tight solution to many specific problems. It is so unlikely that it almost appears too obvious.

But in the absence of guarantees, a tried and true structure bears great persuasion. There is no doubt that Africa is struggling under the current system, tinkering around the

¹³² See David, A. & Richards, J. "Comparative Revolutionary Constitutionalism: A Research Agenda for Comparative Law," 26 N.Y.U. J. Int'l L. & Pol. 1, 14-15 (1993) (noting that popular discussion and debate in American constitution-making was important for the legitimacy of institutions created by the constitution).

edges with inadequate success, particularly in the fight against corruption that undermines every other aspect of life. With so much to gain, is it not worth a try?

Perhaps now is the time to start creating the history of Africa's ultimate escape from the endless vestiges of colonialism still embedded in the unitary executive. Maybe now is the time for the peoples of Africa to borrow an idea from their American cousins and get their own lawyer.

"But how could this happen?" asks the activist? "Would the demand of 900 million people be enough?" ponders the public relations strategist. "We Deserve A Lawyer!" cry the people. "It's happened again!!" exclaims the historian.

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