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PREFACE

by Donald J. Johnston, Secretary-General of the OECD

1. Corruption is a cancer which can destroy the body politic and distorts economic growth. Corruption can be when parents have to pay to enrol their child in a free school; or an international company bribes a foreign public official in order to get a major contract. Apologists have likened corruption to “reducing friction in ill-functioning economies”; others have located it in traditional patterns of behaviour as though that might somehow make it more acceptable. But recent studies by the World Bank and others leave no room for doubt: corruption reduces the efficiency of resource allocation. By undermining the rule of law, it increases transaction costs and weakens the legal/administrative framework necessary for economic activity. It hinders the spread of free trade. It threatens OECD member democracies and impedes the consolidation of democracy in the wider world.

2. Corruption flourishes where there are weak States and under-developed civic societies and in strong states which do not ensure transparency and accountability. With the internationalisation of the world’s economy, corruption, too, has become international. But it is at the international level that the system of governance is weakest. The fight against corruption will have to be a joint, co-ordinated effort by national governments through such activities as criminalising corruption, as in the recent OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, or nullifying the gains from corruption, as in work to counter money-laundering through the OECD-based Financial Action Task Force. These efforts attack the results of this disease, but to prevent corruption we have to tackle the root of the disease, deep in the public sector.

3. That is what this publication is about. It presents and gives the background to the OECD Recommendation on Improving Ethical Conduct in the Public Service. This is intended to stimulate OECD Member governments to take action using a common framework. The framework is also available for non-member countries, many of which are struggling with profound transformations which put their public sectors at risk.

4. Preventing corruption means ensuring ethical behaviour by public servants and repairing the defence mechanisms that allow corruption to prosper. This publication aims to help countries strengthen ethical systems in their public sectors by sharing information and experience, and by building common understandings that can underpin collaboration. It reports on significant steps being taken by many Member countries to promote and reassert high standards of ethical conduct in the public service.

5. There is a dilemma here. A decade of public management reforms, affecting government roles and functions as well as management methods, has had an impact on public service ethics. The trend in countries today is to move increasingly towards decentralisation and to grant more autonomy to public managers. Will ethics suffer? To respond to public demands for clean **and** effective government, clear ethical principles must be built into managerial and accountability structures of public organisations. Governments will also have to further empower civic society to take an active role in public affairs. 6. Respect of rules and of the ideals of the overall culture prevailing in the public service are important elements. Rules are needed, but they must be adaptable, workable and known to public officials, private sector partners and citizens. The OECD’s work on regulatory management

can help to reduce the scope for corruption as well as raise efficiency in the management of the economy.

7. The Public Management Committee started to address these questions in 1996. In April 1998, the OECD Council adopted the Recommendation based on a set of Principles for Managing Ethics in the Public Service. This was designed as a tool to verify whether current government systems provide effective incentives for good conduct and sanctions for wrongdoing. Governments can use the Recommendation and Principles to define, disseminate, inculcate and monitor standards of ethics and professional conduct among public servants. As a reference document, it can help Member countries find their own ways of combining and balancing the various elements to achieve a consistent and effective framework that will suit their political, administrative and cultural traditions.

8. The Public Management Committee was instructed by the Council to present a report in 2000 analysing the relevant experiences, actions and practices that have proved effective in Member countries. This will contribute to the promotion of reliable public institutions and effective governance, which, together with sustainable economic growth and social stability, is a pillar of the OECD's mission.

MORAL REASONING IN THE PUBLIC SERVICE

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Executive summary

Much of the interest in public service ethics has been directed towards gross immorality and even crime -- acts that we know for sure are wrong. The paper argues that this concern should be complemented by an equally strong interest in modes of conduct that require moral reasoning in order to determine whether they are right or wrong.

Public service ethics and the need for moral reasoning

Public service ethics deals with how public servants should conduct themselves, how they should contribute to making a good public service and a good society, and what sorts of persons they should strive to be. As a branch of applied (or practical) ethics, public service ethics consists in applying abstract and basic norms and values -- such as beneficence, nonmaleficence, respect for persons, freedom, justice, loyalty, truthfulness, and many more -- to problems in the public sector. Moral reasoning is required to clarify what such principles demand in concrete contexts. For example, what does the principle of justice demand with regard to impartiality of civil servants? Even when more context-specific norms (legislation or quasi-legislation) are construed from the basic principles, ambiguities remain, and they call for further moral reasoning.

When is moral reasoning required in the public service?

Moral reasoning is required in inter alia the following types of situation:

- policy-making;
- the preparation of legislation and quasi-legislation (regulations, instructions etc.);
- the interpretation of law and quasi-law;
- the exercise of administrative discretion;
- when legislation, quasi-legislation and custom are reticent;
- grey areas (i.e. areas of moral uncertainty between the clearly right/good and wrong/bad);
- moral dilemmas or conflicts (i.e. when morally relevant values, norms or considerations conflict);
- prioritisation (i.e. when legitimate needs or claims cannot all be met due to scarce resources);
- when conscience demands disobedience.

The list is not exhaustive, nor are the types of situation necessarily mutually exclusive.

Bribery and other questionable transactions as examples of moral reasoning

Bribery consists in payment by A to B in exchange for some service or favour by B to A that violates duties pertaining to B's office, position, role or the like. This is morally wrong because B, by acting on A's behalf, is unfaithful or disloyal to her employer, principal or organisation, C; because A gets a benefit or advantage to which he is not entitled, often at the expense of some other party, D, who is entitled to it (injustice); and because the transaction causes harm to society in general and to C and D in particular. Some transactions may resemble bribery in this strict sense of the term without being categorised as such. Moral reasoning is required on the legislative or rule-making level to determine somewhat more precisely what modes of conduct to outlaw. For example, the Norwegian Civil Servants Act forbids a civil servant to accept on behalf of himself or others a gift, commission, service or other payment which is likely, or by the donor intended, to influence his official actions. Moral reasoning is also needed on the application level to determine more exactly what modes of conduct are licit or illicit. While there are some offers that it would be clearly illegal to accept (e.g. a sum of money in exchange for preferential treatment) and others that it would be clearly legal to accept (e.g. a calendar with the giver's company name on it), there is a grey area somewhere in-between that requires moral reasoning in order for us to determine the permissibility or impermissibility of accepting an offer. Problematic cases in the central government administration in Norway have included, inter alia, the following: invitations from travel agencies to officials responsible for travel bookings and information to free trips and arrangements; testamentary gifts from patients in nursing homes to employees of such homes; bonuses from airline companies to officials who travel for the government; and participation of officials in an expensive management course sponsored by an oil company with business interests within the professional domain of the officials. Benefits that pharmaceutical companies confer on health personnel have also been considered morally problematic. All the above-mentioned cases resemble bribery in that A offers B a benefit with a view to influencing B to behave in a way that is to A's advantage and to the disadvantage of B's employer or organisation (as well as A's competitors). But unlike central cases of bribery, B does not necessarily agree to reciprocate by acting on A's behalf, although B may obviously be influenced (at least subconsciously) do so. The same principles are at stake as in central cases of bribery -- namely, fidelity, or loyalty, justice, and nonmaleficence -- and moral reasoning is necessary in each case.

Implications for ethics management of the need to develop a capacity for moral reasoning

An overall ethics management system must contain tools for (1) discouraging conduct that we know is wrong, (2) encouraging conduct that we know is right, and (3) clarifying issues of moral uncertainty. (1) has to do with control and enforcement, through the threat of negative sanctions, to ensure compliance with strict duties, or minimum requirements; (2) refers to incentives, by the use of positive sanctions, to perform supererogatory acts or pursue high ideals. (1) is more amenable to rule-based (or compliance-based) management, while (2) and (3) lend themselves more easily to value-based management (management by objectives, or performance-oriented management), although there will always be some moral uncertainty in areas of rule-based management too. When rule-based management is not clearly indicated it is argued that value-based management is preferable because it stimulates moral creativity and responsibility, whereas rule-based management

tends to lead to moral dullness as a result of reliance on an infinite number of rules as the key to solutions to moral problems.

Moral reasoning is required to solve many moral problems that continuously come up in the public service. A responsibility for developing personnel's capacity for moral reasoning must be identified and the undertaking institutionalised. An ongoing ethics programme containing two main parts is suggested: a character development part aimed at developing dispositions, attitudes, habits -- or "virtues" -- such as honesty, loyalty, fairness, benevolence, conscientiousness and more, and a reasoning ability part aimed at (1) sensitising public servants to moral problems, (2) improving their analytical skills, and (3) developing their ethical imaginativeness. With regard to the moral reasoning part, a proper balance must be struck between theory and practice.

It is vital that recognition on all political and administrative levels is obtained, and also among all public servants who are supposed to reason morally.

Introduction

In the public debate, it seems that ethics is generally invoked when vital moral norms or values are violated or otherwise at stake. We hear little about ethics when there is discussion about how moral norms and values can best be used to solve difficult problems. For example, in discussions of uses of gene technology, those who want to ban certain uses cry out for "ethics", but this word is seldom used when the question is how we can best take advantage of the technology for desirable results. Similarly, there is a demand for "ethics" when gross corruption in business or government is disclosed, but seldom when the question is how to make a highly competent and service-oriented public service.

We can see this preoccupation with transgressions of moral norms and values in business ethics and in public sector ethics, also in the ethics work of the OECD, although there has recently been a somewhat stronger emphasis on aspirational values and the problem-solving function of ethics, as the Ethics Checklist, which is presented at this symposium, shows. Let me add that the strong concern about crime and other forms of immorality is certainly called for. This concern should, however, be complemented by an equally strong interest in aspirations that go beyond mere compliance with law and morals. This part is morally more problematic than the compliance part, hence it requires more moral reflection and reasoning. This is what I will elaborate on in this paper, and I will leave it to others to focus on the control and enforcement (compliance) part of what PUMA calls the Ethics Infrastructure (of the public service).

Public service ethics and the need for moral reasoning

"Ethics" is a synonym for moral philosophy, i.e. systematic reflection on three closely interrelated questions: what is right living, what is good social organisation, and what sort of persons should we strive to be? Ethics, or moral philosophy, is a practical branch of philosophy, together with legal philosophy, political philosophy and social philosophy, which are not always easily separable from each other.

"Ethics" is also used about moral norms and values that regulate the conduct a particular group of people, often a professional group, or a particular field of life, e.g. medical ethics, lawyers' ethics, engineering ethics, journalistic ethics, environmental ethics etc. Ethics in this sense is usually called

“applied ethics” -- the idea being that very general moral norms, values or theories are applied to particular problems that occur in various fields of life -- or “practical ethics”, stressing the fact that this kind of ethics is practical rather than theoretical.

Public service ethics is applied -- or practical -- ethics. Some people prefer to talk of “civil service ethics”, “administrative ethics”, or “government ethics”, for more or less the same phenomenon. Public service ethics consists in operationalising and applying general and basic norms and values -- such as beneficence, nonmaleficence, respect for persons, freedom, justice, fairness, equity, loyalty, truthfulness, honesty, peace, harmony, and others (some of these values or principles are virtues of persons as well), and sometimes religious doctrines -- to activities in the public sector, and also in helping public servants develop good attitudes, dispositions and habits. In line with ethics in the more general sense, public service ethics deals with how public servants should conduct themselves and contribute to making a good society, including a good public service, as well as improving themselves as persons.

Pursuant to my remarks in the introduction, a distinction must be made between two types of question: (1) when we think we know for sure what is morally right or good and set out to encourage people to do the right things and discourage them from doing the wrong things, and (2) when we do not know for sure what is morally right or good and have to find that out. (2) above calls for moral reflection or reasoning; (1) calls for measures of education, socialisation, control and enforcement, but not much moral reflection and reasoning.

In cases of moral uncertainty, we do not know what is the morally right mode of conduct or the best social arrangement, either because we do not have applicable norms or values, or because we do not know what the apparently relevant norms or values imply or demand in the public sector. For example, what does “veracity” or “truthfulness” prescribe or proscribe in the public service with regard to distorting facts and withholding vital information from the public? If nothing but the full and unadulterated truth is accepted, how is the giving of anything less justified? Is it done with reference to what truthfulness implies, or with reference to other norms or values, and if so, what warrants these norms or values to curtail -- or even take precedence over -- truthfulness? Moral reasoning is required to clarify what abstract moral norms and values demand in concrete contexts, which exceptions may be made from them, how they may be balanced against other norms and values, and how exceptions and balancing may be justified. Such reasoning is necessary both in order to construe from the abstract norms more context-specific norms, such as legal or quasi-legal rules or guidelines, and in order to apply these more context-specific norms in concrete situations, as they will never be able to specify exhaustively what is the right mode of conduct in any conceivable and inconceivable sort of situation.

While there probably is universal unanimity with regard to very basic and abstract values such as those mentioned above (although moral concepts do not always overlap neatly across cultures), there is a great deal of disagreement about what they imply, hereunder exceptions, and about their relative weight when they conflict. This is largely due to three factors:

- 1) social and cultural conditions vary;
- 2) other norms and values that are applicable in the same situations as the basic ones vary,
and
- 3) the ultimate criterion of moral rightness and goodness vary (e.g. some divine or human authority, human reason, intuition, the general welfare or well-being in some sense etc.).

Even when the ultimate criterion, or central source of ethics, remains the same, there may be drastic changes in moral positions on important issues, as we can see, for example, in Christian traditions regarding stands on issues such as slavery, the position of women and homosexuality. Differing views on the human rights might even better illustrate the point. There is probably little or no disagreement across cultures about the validity of the basic values that underlie the human rights, or even about those that underlie violations. Disagreement is in large part due to different socio-cultural conditions, to other norms or values, and to ultimate moral criteria. (This is why it is easy to reach consensus on a very abstract level but all the more difficult on a very concrete level.) Thus, in a culture where social harmony is a core value and social responsibility generally is rated higher than individual freedom (which, however is valued, i.e. it is respected so long as there is no conflicting and overriding value), respect for persons, the autonomy of the individual -- or whatever we wish to call the principle at stake here -- will tend to yield to the demands of social harmony, or the general welfare, when this is seen as being threatened by the autonomy of the individual. However, we should not forget that the human rights are a fairly new construction even in the countries that most strongly advocate them. It should also be noted that these countries fall into in the same line of reasoning in other -- analogous -- matters, most notably wars, in which not only the autonomy but also lives of thousands or even millions of people are sacrificed for the sake of “the national interest” in the form of peace or the “right” ideology.

So, moral reasoning is required in situations of moral uncertainty. These situations include both the making of norms, i.e. when we construe context-specific norms from more abstract ones, and the application of norms to concrete cases. A moral reasoning aimed at arriving at a conclusion about what it would be right to do in a concrete situation must consist of at least one normative premise and one descriptive premise, plus a normative conclusion. A moral reasoning with a view to making a moral or legal norm does not in theory (logically) need any descriptive premise(s), although in practice it often will contain one or more, especially in public sector ethics, since the whole purpose of making it generally is to meet concrete problems. Sometimes the conclusion can be drawn by way of a simple deductive inference, i.e. the conclusion follows with logical necessity from the premises, and no other conclusion would be logically possible. But often the premises merely support the conclusion without making it logically necessary, i.e. some other conclusion(s) might also be possible on the basis of the same set of premises, e.g. with a different weighting of the normative premises. (In such cases, Norwegian agencies responsible for a decision or proposal usually mention the most relevant considerations and conclude by saying “all in all/everything considered, we have come to the conclusion that...”, or something to that effect.)

Deductive inferences are possible only when the relevant norms are very specific and clear-cut, which is often not the case. When they permit different interpretations, applying them often requires moral reasoning. Two examples from The Norwegian Public Administration Act of 10 February 1967 might illustrate the difference between deductive and non-deductive inferences. The Act specifies in the first paragraph of section 6 five very precise impartiality requirements, i.e. when a public official shall be disqualified from preparing or deciding an administrative case, e.g. “if he himself is a party to the case”, or if “he is or had been married or is engaged to a party”, to mention but two of those requirements. These normative requirements are clear-cut (at least when we know what a “party” is, which is defined in article 2 of the Act, and what it means to be married or engaged). Therefore, a conclusion can normally be drawn by way of a simple deductive inference. For example:

Normative premise: a public official is disqualified to decide a case if he is married to a party to a case;

Descriptive premise: Public official A is married to B who is a party to case X before A;

Conclusion: A is disqualified to decide case X.

Here, the conclusion contains no information that is not contained in the two premises. Drawing it, requires no moral reasoning beyond identifying the impartiality requirement, ascertaining the facts, and making the inference, i.e. moral reasoning is not necessary to clarify what the requirement implies.

The second paragraph of section 6 of the Public Administration Act says that a public official is disqualified “if there are any other special circumstances which are apt to impair confidence in his impartiality; due regard shall inter alia be paid to whether the decision in the case may entail any special advantage, loss or inconvenience for him personally or for anyone with whom he has a close personal association.” This rule does not specify what the special circumstances or the special advantage might be. The rule has to be interpreted and discretion must be used. Clearly, we cannot deduce from the provision itself that an official's friendship with a party or hostility or animosity against a party, previous involvement in the case, good or bad consequences (economically or otherwise) of the decision for herself, or political involvement in a matter relating to a case, disqualifies her. Disqualification can only be determined in each case in the light of the concrete facts of the case in relation to the requirement in question together with other moral norms or values that can facilitate its application -- most notably, I suppose, principles of justice (impartial, objective and fair treatment), and of utility, especially consequences relating to people's confidence in the integrity and impartiality of public servants and to the effectiveness of the public service. This is moral reasoning, although many people would call it legal reasoning. However, there is no reason to distinguish sharply between moral reasoning and legal reasoning when a legal reasoning involves moral norms and values, and not merely sources that are more narrowly legal, such as laws and legal precedents.

It should be noted that non-deductive moral reasoning is called for not only when we apply laws or regulations but also when we make them. Since it is not always clear what the basic and abstract moral norms and values that I mentioned earlier imply and require in many situations, as the above-mentioned example of truth-telling suggests, we devise norms that are somewhat more concrete or specific with regard to what types of persons and situations they apply to and what mode of action is required. They are derivative norms in relation to the more basic ones. Laws and quasi-laws are often attempts to concretise or operationalise norms or values, and this requires moral reasoning. For example, impartiality requirements for civil servants can be derived from a principle of justice. If a civil servant favours a family member, friend or someone to whom she is indebted or whom she wishes to make indebted to herself, many people would say that she acts unjustly. The injustice consists in the recipient of the favour getting something to which he is not entitled, instead perhaps of someone who is entitled to it. (I say many people, because this will depend on the cultural setting. In some cultures, nepotism and partisanism are accepted, sometimes even expected. This, however, does not mean that justice is not a value; it only means that the conception of what is just varies across cultures). An important point to keep in mind, though, is that there is normally no deductive path leading from the abstract principles (norms or values) to the more concrete ones. The path is intersected by other norms, e.g. norms about desirable or undesirable consequences and norms guiding the interpretation or understanding of the basic ones, in close interaction with our cognisance of the reality in which they are meant to be employed.

When is moral reasoning required in the public service?

Moral reasoning is constantly required in the public service in *inter alia* the following types of situation:

- policy-making;
- the preparation of legislation and quasi-legislation (regulations, instructions, codes of ethics etc.);
- the interpretation of law and quasi-law;
- the exercise of administrative discretion;
- when legislation, quasi-legislation and custom are reticent;
- grey areas;
- moral dilemmas or conflicts;
- prioritisation;
- disobedience.

The list is not meant to be exhaustive, nor are the types of situation mentioned necessarily mutually exclusive. Clearly, some of the above types of situation, especially the first two, are more applicable to officials in the central government administration than to other categories of officials. Nevertheless, all categories of public servants will experience situations that call for moral reasoning, especially situations that require use of discretion, grey areas, moral dilemmas and problems of prioritisation. It follows from the above list -- and also from what is said about moral reasoning and moral uncertainty in the preceding section -- that moral reasoning is not called for in cases that involve routine decisions, which for most public servants are by far the most common cases.

Policy-making is an important part of the work that is carried out by civil servants in the ministries. Although they are not free to propose anything according to their own personal convictions, the scope may in many cases be rather wide. Backed by expertise in their particular policy areas, civil servants have ample opportunity to influence the political decision makers. On the basis of their understanding of moral principles of beneficence, welfare and well-being, respect for persons, justice, truthfulness and so on, civil servants play an important role in the making of government policies in areas such as the distribution of social benefits and health care, education, taxation, the organisation of the police, the judicial system and the prison service, the protection of the environment, worker protection, the freedom of business and industry, immigration and treatment of immigrants, information strategies, to mention just some policy areas.

Similarly, such moral principles also underlie legislation and quasi-legislation in different fields. Legislation is generally prepared by civil servants in the appropriate ministries, and they have considerable power when it comes to establishing the premises and conclusions with regard to legislation. As for many types of quasi-legislation (e.g. regulations, instructions, circulars, codes of conduct), they have more power.

Statutes, regulations and other rules often require interpretation. Special considerations pertaining to a case are a recognised source of law, at least in the Scandinavian countries.² This source of law is in Norwegian legal theory defined as opinions of what is just, fair, equitable, or expedient. Needless to say, this would be opinions as to what would be a morally right or good solution.

Moral considerations play a still more important role when administrative discretion has to be exercised in public decision-making. The trend in Norway is towards more discretionary power for public servants. The scope, the relevant criteria and their relative weight may differ from provision to

provision and from case to case, but the common denominator is that the law permits alternative decisions and presupposes individual judgement on the part of public officials with regard to particular cases that they prepare or decide. Often the discretion relates to social objectives pertaining to health or welfare, the environment, anti-discrimination, local autonomy etc. Since government officials thus have a certain latitude to decide cases on the basis of their own judgement and choice, and also because the merits of discretionary decisions are generally not reviewable by the courts, it is important that officials exercise discretion in a morally sound way. It is equally important that they reverse bad decisions -- even when they are legal but to the detriment of the public that they are set to serve -- when such cases come up, instead of vehemently protecting their own prestige, which often has the opposite effect.

When there are no formal rules or guidelines or established practices that prescribe or advise course of action, public officials have to rely on their own moral judgement. This is typically the case when objectives for administrative activities are to be defined and when means to further those objectives are to be chosen. As opposed to rule-based management (also called compliance-based management although I think that compliance-oriented would be better) which relies heavily on control and enforcement to ensure compliance with rules, value-based management (or management by objectives or performance-oriented management or integrity-based management) appeals to the public servant's imagination and resourcefulness as well as to her sense of responsibility in terms of providing the best results (i.e. realisation of the values or objectives) in a morally commendable -- or at least defensible -- way. There is in Norway and many other countries a trend towards more value-based management, although there are areas, e.g. personnel management, where strict and predictable rules will always be very important. Some areas lend themselves more naturally to value-based management than others, e.g. service-rendering. Sometimes a combination is the right thing, e.g. when there is reason to constrain the freedom to choose the most expedient means to an end.

Grey areas are areas of moral or legal uncertainty between the clearly right or good and the clearly wrong or bad. A trivial example -- but of wide-ranging relevance -- is the private use of government property and time, e.g. in what cases we might use the office telephone and copy machine for private purposes and what kinds of private business we might take care of during working hours. More serious grey areas may be found between bribes and legitimate gifts and other benefits, a topic I will come back to in the following section.

We are faced with a moral dilemma when we have to make a choice between two or more alternative courses of action which are supported by different -- but relevant -- norms or values. Thus, there is a norm or value conflict in the sense that in the particular situation in question, the norms or values are incompatible -- giving preference to one means breaking or overriding the other. A common, and sometimes trivial, dilemma in Norway -- and in most other countries, I suppose -- is caused by a conflict of the duty to clarify a case thoroughly and the duty to make an expeditious decision. This can be seen as a conflict between justice, or security under the law, and efficiency, or economy. When the dilemma is caused by scarce resources, it also has a bearing on prioritisation, which in fact often involves moral dilemmas, although I have chosen to treat the two separately. Justice and utility, or expediency, are two principles that often collide. In most kinds of policy-making, there is a conflict -- often inherent -- between the value or goal we wish to further and the expenses that this would incur, e.g. health, education and crime control versus the costs of their realisation. What is useful for one person, or a number of persons, may be unjust or unfair to some other person(s). A lot of public administration, both on the policy-making level and on the executive level, involves curtailing the freedom of people. More freedom to one group of people often means less freedom to other groups. Besides, freedom often collides with other values, such as justice and welfare.

Loyalties may also conflict, e.g. our loyalty to superiors and our loyalty to subordinates. Sometimes our loyalty to the government or to the public service is said to clash with our loyalty to society, or the public, e.g. when serious wrongdoing has been committed by politicians or government officials which one thinks the public has a right to know about. Personally, I prefer to consider this as a conflict between loyalty (to the government) and integrity, honesty, or truthfulness.

A moral problem of prioritisation occurs when we cannot at the same time meet two or more legitimate claims or needs due to scarce resources. This happens all the time, e.g. in the health care sector, on the policy-making level as well as on the service-rendering level. For example, should priority of medical treatment be given on the basis of age, seriousness of condition, prospect of recovery, or what? All are relevant criteria, but they are far from clear-cut and require considerable estimation and judgement in concrete cases. Should they be hierarchically ordered by the policy makers or weighted by the practitioners in concrete cases? Prioritisation is necessary in all policy areas and in the everyday work of most public servants. All the time we have to decide, on the basis of criteria of importance, which tasks demand our immediate attention and which tasks have to wait. This requires moral reasoning. Prioritisation problems pose moral dilemmas, hence they can be considered a sub-category.

The same applies to disobedience, which involves a moral dilemma when there are moral reasons for compliance as well as non-compliance with the law, which is always the case, I suppose, since the duty to obey the law is not absolute -- it is a *prima facie* duty that may be overridden by higher obligations, e.g., the responsibility to serve the public interest.³ Grounds for disobedience, e.g. in the form of whistle-blowing, are rare, but on the other hand so morally and politically important that disobedience deserves special mention. This is so because it is usually justified with reference to the demands of conscience -- and conscience is something we value highly and wish were more prevalent in corrupt and unjust persons and regimes. If we accept the principle, it must be valid in our own administrative context. But, needless to say, conscience does not absolve us from moral or legal responsibility.

Bribery and other questionable transactions as examples of moral reasoning

Let me use bribery and transactions that in some respects resemble bribery to illustrate the role of moral reasoning in both the making of norms and the application of them, including the clarification of grey areas. All civilised societies have prohibitions against bribery, even though this word (or linguistic equivalents) may not be used. Bribery might, for the present purpose, roughly be defined as payment (not necessarily money) by A to B in exchange for some service or favour by B to A that violates duties pertaining to B's office, position, role or the like. I think that this definition would be cross-culturally applicable insofar as cultures have a concept of bribery, although specifically what kinds of transactions count as bribery will inevitably vary, depending on sociocultural characteristics, especially what the duties of B are. (Therefore, transnational prohibitions against bribery can be morally problematic, especially in international business.) The moral principles at stake here seem to be fidelity or loyalty, justice and harm to society. B, by acting on A's behalf, infringes his positional duties and is thereby unfaithful or disloyal to his employer, principal, organisation or the like (C). A gets a benefit or an advantage to which he is not legally or morally entitled, often at the expense of some other party (D) who is entitled to it, which is unfair. (B's payment is also undeserved and hence unjust.) The transaction causes harm to society in general, and to C and D in particular. This seems to be true at least of what we might call central or primary cases of bribery. When prohibitions are

made, I presume that it is on the basis of the above-mentioned principles, although I have not checked the legislative history of the relevant Norwegian provisions.

The Norwegian Penal Code has several prohibitions against bribery which I shall not quote. The word “bribery” is not used, but we would use this label to characterise the transactions in question. Violations of the provisions constitute criminal behaviour, which, as I stated in the introduction, is not my present concern. However, the making of the prohibitions is relevant to my discussion, as it requires moral reasoning -- e.g. in line with what I have indicated above -- on the part of the civil servants who prepare legislation, regulations, instructions and so on.

Instead of delving into morally problematic cases in relation to the Penal Code, I will focus on section 20 of the Norwegian Act Relating to Civil Servants, which says: “No senior civil servant or civil servant may on behalf of himself or others accept a gift, commission, service or other payment which is likely, or which by the donor is intended, to influence his official actions, or which regulations forbid the acceptance of”. There are no regulations that further specify the nature of what is prohibited. Not any kind of act that is prohibited by section 20 would constitute bribery, only the more serious ones, e.g. if official B, who is dealing with applications for a certain kind of commercial licences accepted a sum of money or some other benefit from one of the applicants, A, in exchange for treating A favourably by granting his request in violation of the lawful criteria. However, this would presumably also be punishable by the Penal Code.

Not any gift, commission, etc. -- for the sake of brevity I shall use the term “benefit” for all such value transfers -- is prohibited. It must be likely or intended to influence official actions, the rationale being, according to the background documents,⁴ that this may give rise to doubt about the civil servant's impartiality and objectivity. And for my own part I might add that since it is a civil servant's duty to be impartial, an infringement of that duty would constitute disloyalty to her employer. It was also pointed out that it is immaterial whether the doubt is unfounded, because it is the public's perception of the situation that is of consequence to the requisite confidence in the civil service. It was mentioned that it would be difficult to formulate a prohibition against any undesirable transaction, as such a prohibition would be too detailed; it is only in a concrete situation that it is possible to determine whether a certain benefit may influence the official, and relevant circumstances would then be who it is that offers the benefit, the position of the recipient, the value of the benefit, whether the offer has a bearing on a concrete case etc. It was assumed that advertising articles of insignificant value -- such as calendars, diaries, ashtrays etc. with company name or logo -- would not violate the prohibition, as they would not be likely or intended to influence civil servants beyond what other forms of commonly accepted advertising do. Likewise, flowers of insignificant value would be acceptable. Even gifts of significant value might in special cases be acceptable, e.g. if a civil servant has been injured in the course of service.

The Ministry of National Planning and Coordination (see endnote 1), which is in charge of the Civil Servants Act, receives from time to time inquiries about the propriety of various sorts of transactions. The Ministry has taken the view that it is not possible to state in general terms what is a benefit of considerable value or when it is apt or intended to influence official actions. This fact is indicative of the difficulties of formulating clear-cut prohibitions against undesirable value transactions. The Ministry has emphasised that discretion has to be exercised in each case.

A recent discussion in the Ministry involved invitations from a travel agency to civil service customers -- especially those responsible for travel information and bookings -- to various arrangements, e.g. a boat trip to meet car rental companies, credit card companies, hotels, airlines and

travel agencies; or a flight to a European capital to see the airport and its facilities, the communication systems of the city, hotels etc. While such information may be professionally relevant, it becomes a problem if the treatment or entertainment of the participants is of a sort than may incline them favourably towards the payer or give the public the impression that this is the case. There is bound to be a grey area, and what is acceptable or unacceptable can only be determined in a concrete context. Another recent discussion in the Ministry concerned testamentary gifts from patients in nursing homes to nurses or other employees of such homes. In an actual case, the recipient of such a gift was unaware of the existence of a will that made him a beneficiary until the death of the testator, and hence could not possibly have been influenced. But what about other cases? There has also been a discussion of the bonuses that airline companies give to travellers. The moral problem here is that the travelling civil servant gets a benefit as a result of her employer buying a ticket, and the bonus system may incline the holder to favour the airline company in question in a way that is not necessarily in the interest of her employer (e.g. because the tickets may be more expensive, flights may involve longer stays with more per diem etc.). The Ministry resolved the problem by reaching an agreement with an airline company to the effect that the Ministry receives the bonuses. A case a few years ago involved participation of government officials in a management course at one of the leading European business schools that was sponsored by an oil company with business interests in an area that several of the officials were in a position to influence with regard to policy-making and decision-making. The high quality course was relevant to the officials' professional responsibilities, and sponsored participation of the kind in question was in compliance with the Norwegian Petroleum Act and its regulations. On the other hand, there was of course the consideration of impartiality, integrity and public confidence. The then Ministry of Government Administration [now the Ministry of National Planning and Coordination (see endnote 1)] concluded that the arrangement was acceptable.

The last case resembles cases that have been considered morally problematic in the health service, namely, the various kinds of benefits that pharmaceutical companies confer on physicians and other categories of health personnel. The benefits may be paid conference trips (including travel and accommodation, sometimes for spouses as well), often to exotic or attractive places, information meetings at comfortable hotels, meals, gifts (books, paintings etc.), commissions and various other things. Doctors, and to a lesser extent nurses, who prescribe medication or are in a position to influence others' prescriptions, are targeted for benefits; chief physicians at hospitals and professors of medicine are of particular interest, since their influence is so great. The cases that resemble the oil business case above, and also the travel industry case, are the paid conference trips, which, although often useful (the lecturers may be highly recognised in their field of expertise), nevertheless may have some influence on the doctors that is not in the best interest of their patients (and this interest is a doctor's primary obligation). There is a large grey area here, and moral judgement can only be made in a concrete situation, balancing the usefulness of the lectures against the likelihood of influence to violate professional duties (e.g. to prescribe medication on a wrong basis or give preferential treatment to patients). Even the worst cases of sponsored conference trips and the like would hardly constitute bribery, if this is taken to imply some agreement or understanding between the pharmaceutical company and the doctor that the benefit is to be reciprocated in a specific and improper way. But even when there is no such agreement or understanding, the recipients of the benefits may nevertheless be influenced to act in an undesirable and morally blameworthy way, although perhaps only unconsciously so. This is anyhow a difficult thing to prove. However, the above remarks do not mean that bribery does not occur. It does sometimes, although probably infrequently, typically when a doctor is paid a certain amount for each favour he does for a pharmaceutical company in violation of his professional duties, e.g. airline frequent flier miles for each prescription he writes (authentic case from the US), or a sum of money for each patient he transfers to the company's medication from that of its competitor (authentic case from Norway).

Legislation is now being prepared by the Ministry of Health and Social Affairs which -- if the draft proposal remains unaltered and is approved by the Storting -- will forbid health personnel to accept, on behalf of themselves or others, "a gift, commission, favour or other service that is apt to influence health personnel's official actions in an undue manner...". A prohibition for health personnel against accepting gifts, commissions, favours or other services that are not insignificant from patients is also being prepared. However, the proposal does not seem to resolve the problems that I have indicated above. For example, what sorts of sponsored conferences or courses may health personnel attend? This issue is not clarified much in the Ministry's comment on the draft proposal. Clearly, further regulations will be as difficult to formulate here as in the case of the Civil Servants Act. Moral reasoning is obviously called for. It would have to include careful deliberations concerning possible impropriety with regard to the intention of the party that offers the benefit (perhaps the intention was to show appreciation of legitimate work that the health worker has carried out for the company?); what sort of relationship between the company and the physician might evolve; the influence on the recipient, especially with regard to unethical reciprocation, but also with regard to unconscious bias or favouritism; how patients or clients might be affected favourably (will the health worker's medical knowledge be expanded to the benefit of her patients?); or unfavourably (will patients be given medication that is inferior to what the doctor would otherwise have chosen, or will some patients receive worse treatment than other patients?); how might the reputation of health personnel in general, and the personnel being considered in particular, be affected; and last but not least: is the participation known to the health worker's employer, patients and other relevant parties? These questions suggest that the principles at stake here are those that are at stake in cases of bribery, namely, loyalty and justice (even if cases do not constitute bribery), in addition to the principles of beneficence, nonmaleficence, and also transparency and accountability.

The types of cases that I have discussed above in relation to the Civil Servants Act and the legislation under preparation relating to health personnel, are not -- with a few exceptions -- central or primary cases of bribery, i.e. bribery in the strict sense of the term. Nevertheless, they resemble bribery in some essential respects. One party, A, confers some benefit on another party, B, for the purpose of influencing B to behave in a way that is to A's advantage and quite possibly to the disadvantage of B's employer, principal, organisation or the like.⁵ Bribery requires conscious (intentional) reciprocation on the part of B, while this is not the case with benefits in relation to the Civil Servants Act or the law relating to health personnel under preparation. It suffices that the benefit is intended by A to influence B, or is likely to have this effect, although we must assume that not any influence counts -- it must be an influence to act improperly, probably in violation of professional duties, first and foremost to act impartially (the loyalty obligation). In other words, if A provides B with correct and unbiased information that is professionally useful (e.g. about travel arrangements or medicines), B does not violate positional duties by receiving that information (provided there is no prohibition against receiving it); on the contrary, it might be argued that she fulfils them by expanding the knowledge she needs to do her job well, at least so long as she gets the same kind of information from A's competitors. The crux of the matter, then, would seem to be whether the setting in which the information is given represents a benefit that may improperly influence B. It is hard to see that a stay at a hotel or a meal -- unless overly luxurious -- represents such a benefit, but it would have to be considered in each actual case. For my own part, I think that the personal relationship that is created between a civil servant or a physician and business companies in cases where preferential treatment is possible is a larger problem than the benefits themselves, as personal relationships -- even where there are no benefits involved -- tend to incline people favourably towards each other. On the other hand, personal relationships are important and desirable in many contexts. So moral judgement must be exercised in each and every case.

The impression that the transaction will create among the public is of course a relevant consideration (although it has nothing to do with whether the transaction itself is morally questionable), but this is also a question of communication. There may be strategic or tactical reasons, or reasons of expediency, to forbid modes of conduct that are not morally blameworthy per se, but this requires a rationale. If the transactions take place in the open (transparency), both inside the agency and vis-à-vis the public, the likelihood of a negative impression will be greatly reduced. There is also the question of other beneficial or harmful consequences of the transaction or practice. Anyhow, the bottom line is that success both in-house and vis-à-vis the public hinges on moral reasoning.

Implications for ethics management of the need to develop a capacity for moral reasoning

An overall ethics management system must contain tools for:

- 1) discouraging conduct that we know is wrong;
- 2) encouraging conduct that we know is right; and
- 3) clarifying issues of moral uncertainty.

With regard to 1), I have in mind the combating of conduct that violates law, regulations, codes of ethics etc., compliance with which must be considered a minimum requirement, or strict duty. The tools here, besides information about the relevant rules, are control and enforcement, including negative sanctions in cases of non-compliance. Of course, depending on the issue, compliance can, in addition or alternatively, be induced by positive sanctions, i.e. encouragement in some form. However, while we may encourage the fulfilment of minimum requirements, incentives, rewards and other forms of encouragement are more appropriate in connection with supererogatory acts, i.e. when we wish to make people stretch a bit further than the strict duties require, or perhaps even to pursue the highest ideals, or strive for (unattainable) perfection. That is, failing on this point will not expose the civil servant to negative sanctions (blame, punishment etc.) but succeeding will, or should, induce positive sanctions (appreciation, praise, rewards etc.). With regard to this point, management training is probably required, because it is a difficult task to master for managers.

The problem of indifference, which at least in Norway is conceived to be a problem of some magnitude, must first and foremost be met with measures of encouragement. I am not thinking of situations in which civil servants fail to comply with explicit rules but rather of situations in which they might be able to do a little more than just observing the rules. This is the case in situations where action has been taken on the basis of principles, goal statements, guidelines etc. -- often not very clear -- that do not demand any particular course of action to be chosen. This would be an area of what I have called value-based management (see section 3 above), as opposed to rule-based (or compliance-based) management.

It is important that all the three above-mentioned parts are in place in an overall ethics management system. However, it is not the discouragement and encouragement parts -- where we know what is morally right or good -- that I have set out to talk about but the moral reasoning part, where we do not know exactly which course of action or social arrangement to opt for. I have indicated a need for moral reasoning in the public service and said a little about what it implies. It remains to be said something about how a capacity for moral reasoning can be developed and the implications of this for ethics management.

But first a few more words about rule-based versus value-based management systems. I mentioned in section 3 that some areas are more amenable to rule-based management and other areas to value-based management, and sometimes a combination is called for. I might add that a total management system (as opposed to a particular area) will always consist in a combination of the two. What is needed does not only depend on the area as such but also on the actual situation in the area. For example, where corruption is a major problem, there is a greater need for rule-based management, with control and sanctions, than where corruption is not a problem. Conversely, where public servants are highly motivated to perform to the best of their ability, value-based management is more likely to succeed than where public servants try to escape responsibility, either by staying passive or by actively doing the wrong things.

When rule-based management is not clearly indicated, I am of the opinion that value-based management is preferable. Why? Because rule-based management tends to make people look for solutions to moral problems in the available rules: in the statutes, in the regulations, in the instructions, in the circulars, in the handbooks, in the established practices or customs, in the codes of ethics and so on. One problem is that these bodies of rules cannot possibly contain answers to all moral problems. Such rules would have to be very precise and specific (when they are not, moral reasoning is required), and not any eventuality or contingency can be foreseen and included in the rules. Even if this were possible (which, I repeat, it is not), in practice the body of rules would be quite an untractable instrument because of the infinite number of rules. However, the main problem, in my opinion, is that rule-based management is apt to lead to moral dullness, as it trains people to look for solutions to moral problems in the available bodies of rules rather than to think for themselves. Public service ethics cannot only be a question of observing moral and legal injunctions, because where there is no injunction that applies to a case before us, not all possible solutions are equally good. Some are better than others, and to find that out requires moral reasoning. This means that also overly rule-based management systems need moral reasoning, in the first place to devise the rules, in the second to apply them, and in the third place when the rules are reticent (see section 3). Nevertheless, moral reasoning is required to a much larger extent in value-based management systems.

This means that the public service must encourage moral reasoning, and ethics management systems must include measures aimed at developing the capacity for moral reasoning. It would of course be desirable that such a capacity be developed before people enter the public service. Civil servants have some policy-making power with regard to education. But my concern now is what can be done in the civil service.

The first thing to be done is to obtain recognition on all political and administrative levels that not only is ethics important -- it is difficult too. The simplistic impression must be fought that ethics is a new kind of rule-based management, or even a form of policing, and a concession must be induced that there are moral problems in the public service -- some of them small and simple, others complex and complicated -- that need to be solved on a continuous basis, a fact that necessitates some sort of institutionalisation of the ethics commitment. It is important that a responsibility for the ethics undertaking is placed somewhere.

In my view, this institutionalisation should consist in an ongoing ethics programme that contains two main parts, namely a character development part and a reasoning ability development part. In the public service, we do not only need people who are technically clever at moral reasoning. We also need people with good character traits, motives, dispositions, attitudes, qualities, habits etc. Therefore, it is important to recruit the right people and equally important to help them develop in the

right direction. We want people who are honest, loyal, just, benevolent, conscientious and much more, not only people who are clever to analyse problems and argue for and against different solutions to the problems. The underlying idea is that people with such virtues tend to perform right and good actions. (Moral philosophers call positions that emphasise this aspect of ethics “virtue ethics”.) Virtuous people may of course perform wrong actions (although we often readily excuse or forgive them for that), which is why moral reasoning is important. But moral reasoning must not be a purely technical or intellectual activity. Virtues are important in all kinds of situations, including the fulfilment of strict duties (the minimum requirements), but especially important when it comes to supererogation (more than the minimum requirements). Akin to the virtue approach are questions like: what qualities are needed in a good leader, personnel manager, human resources manager, policy maker, diplomat, physician, nurse, auditor and so on and so forth. Many management training programmes touch on such questions (there are even tests for measuring various qualities that are thought necessary for different kinds of personnel), but I think it is important that they are put in a context of ethics too. Also akin to the virtue approach is the idea of exemplary persons -- ideals that people can try to emulate. It is important that an overall ethics management system takes this part seriously too.

As for moral reasoning, it is difficult to give very specific advice as to how to go about this part. I am sure of one thing: education, training, counselling and debate must be based on concrete -- preferably authentic -- cases. They must be analysed and discussed. A somewhat controversial question is whether any theory at all should be introduced or whether the enterprise should be entirely practical. My own experience from business ethics, medical ethics and public service ethics is that a combination is needed. I have listened to many discussions among professionals in the respective areas that could have been greatly facilitated by the introduction of some theory. On the other hand, I have listened to a lot of theory (and probably contributed with some myself) that hardly was useful to the audience. The challenge is of course to select the right theory and get the balance between theory and practice right. Since moral reasoning and legal reasoning resemble each other in many respects, I think there are lessons to be learnt from law here. Legal reasoning is very practical, but nobody would argue that you can do without theory. The study of law contains a lot of theory, at least in Norway, and a person who have just read statutes, regulations, precedents and so on and discussed cases and solutions with lay people only, would not be competent to give legal advice or to plead cases in court, or even handle cases -- except simple routine cases -- in the public service. But one does not need a law degree to discuss law competently -- only some knowledge of legal theory. I think the same applies to ethics, and politics for that matter.

In my opinion, relevant theory would include something about the logic of reasoning, something about the logic of norms, something about ethical theories (consequentialism, deontological ethics, virtue ethics and so on), something about moral philosophers who have addressed practical problems of relevance to the public service, some decision theory and some legal theory.

I think that the goals of moral reasoning training should be (1) to sensitise the participants to moral problems, i.e. to develop their ability to perceive that a situation or a case is morally problematic, and what it is that makes it morally problematic, (2) to improve their analytical skills, i.e. their ability to identify and interpret the relevant norms and values, to perceive the relevant aspects of the situation, and to reason logically, and (3) to develop their ethical imagination or creativity, i.e. their ability to escape routine and find new and innovative solutions to difficult moral problems. But as I emphasised above, concrete cases are important and any theoretical part of an ethics programme must justify its existence with reference to how it helps public servants solve those cases better.

Conclusion

Moral norms and values are very pervasive: they underlie individual actions and social arrangements, and they constitute the ultimate justification of such. Throughout this paper, I have stressed the importance of moral reasoning and given various examples of situations and cases that require moral reasoning. I have also indicated how ethics might be dealt with in the public service. I am pleased that the OECD has put ethics on the agenda, and I hope that the organisation will follow up its ethics commitment after this symposium.

NOTES

1. As from 1st January, 1998: Ministry of Labour and Government Administration.
2. In Norway, the following sources of law are recognised: (1) Statutes, regulations and the like, (2) background documents pertaining to the law, (3) legal precedents, (4) administrative practice, (5) customs and conventions, (6) opinions of legal scholars, and (7) special considerations pertaining to a concrete case.
3. For example, the United States Code of Ethics for Government Service of 1958 lays down that government servants “put loyalty to the highest moral principles and to country above loyalty to persons, party, or government”. Quoted from Sissela Bok, “Whistleblowing and Professional Responsibility”, *New York University Education Quarterly*, 11 (Summer 1980).
4. See Ot prp nr 44 (1976-77) *Om lov om offentlige tjenestemenn*, pp. 33-36 (the bill relating to Civil Servants, including its rationale).
5. In my discussion of bribery and related transactions, the civil servant is the bribe-taker (B), which is by far the more common type of situation. However, it is conceivable that we in some situations may have to consider whether a civil servant may justifiably be a bribe-offerer (A). For example, imagine that civil servant A offers B, who is a prison warden in a rather corrupt and unjust state, where C, under inhuman conditions, is innocently serving a sentence as a result of fabricated evidence, a sum of money in exchange for B releasing C, in violation of his (B's) lawful positional duties. Bribery is, like lying, *prima facie* wrong, i.e., it is wrong so long as there is no conflicting (*prima facie*) duty that overrides it, which in some situations may happen. The same applies paid to espionage (as opposed to espionage on idealistic grounds), which resembles bribery in essential respects. The spy, B, is paid by A to provide A with secret information -- military, political or industrial -- in violation of B's positional duties towards his employer or principal, C; hence, B is disloyal or unfaithful to C. This would of course be wrong unless it could be justified with reference to some higher good that the transaction is likely to produce. Espionage is something that will affect some civil servants in one way or another, either through active participation or through planning, managing or justifying it or explaining it away.

REALIGNMENT AND PUBLIC SECTOR ETHICS: THE NEGLECTED MANAGEMENT PROBLEM IN THE NEW PUBLIC ADMINISTRATION

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If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

James Madison, Federalist #51 (1787)

More than 200 years ago Madison recognized the need for developing systems to control the excesses of government and government officials. In the United States, these auxiliary precautions included separation of powers, two legislative bodies, division of powers between the federal government, the states and the people, and the executive veto. In time, these precautions would include the development of bureaucracy, of a merit based civil service, and of oversight systems designed to prevent abuse of office and corruption. Although it has been ignored to this point, the debate between the advocates of the new public administration and those who want to preserve the current order is now turning into an argument about these same auxiliary precautions.

There is much with which to credit the new public administration (re-invention) literature and subsequent initiatives by governments. They have forced governments to adopt, or at least confront, a new paradigm about the role and function of government. They have focused on the delivery of government services, attempted to set standards for efficiency and effectiveness, and forced agencies to clearly articulate their missions and goals. However, one implicit theme of the reinvention literature and programs is that if organizations are restructured, management systems will automatically adapt to these changes. These management systems encompass the laws, the offices and officers with distinct professional management responsibilities. Often the latter (officers) are not thought of in terms of the way management systems “fit” government. In the U.S. the list of management systems would include professionals responsible for the merit system, procurement, acquisitions, contracting, environmental policy, administrative procedure, Equal Employment Opportunity, and Designated Agency Ethics Officials. Recently the Congressional Research Service identified 80 such management laws and systems.¹ Yet often there is no attention paid to adjusting these systems, much less the underlying laws that enable them.

In fact, very little attention has been paid to re-alignment problems. Even more vexing is that many of the dilemmas created have been ignored, and in worse cases concealed by only focusing on the “positive.” This often results in festering, unresolved issues which, if left untreated, will lead to the undoing of many of the major management reforms implemented through the new public management.

The focus of this paper is on government ethics as one of the key management functions of modern democracies.² By “government ethics” I mean the systems, programs, laws, regulations and codes with which government regulates the behavior of government employees, as well as individuals outside the government who regularly work for or contract with the government. One of the standards of an effective public service is that it is populated by “objective” employees who do not have a personal interest in the outcome of government action; they are umpires who make “calls” about violations and encourage fair play, but who do not participate in the actual “play of the game.” In the new public administration this standard of purity, a nonconflicted individual acting for government, will be significantly challenged on a number of fronts.

Perhaps the most profound break has come from privatizing what were traditionally governmental functions. The most frequent examples of this come in the form of businesses who perform such functions under government contracts. Yet those who contract with the government for providing these services (and sometimes goods) are usually exempt from the most rudimentary ethical standards or regulations. How can government guarantee that the public interest -- beyond mere efficiency standards -- is served?

The essence of any ethics system for the public service is that it serves to assure the public that its government is working only in the public interest. This paper will focus on the impact of the new public administration on ethics in public service. It will highlight the fundamental tensions between the reinvention movement and anticorruption systems; discussing the potential for creating government that is more “responsive and lean” while at the same time preserving public integrity. Finally, this essay will highlight the concrete issues confronting realignment and focus on some of the solutions individual countries have found.

Understanding the Problem We Are Trying to Solve

A young French nobleman, Alexis de Tocqueville, in comparing the French and American systems, needing a word to describe this newly democratized “system of government,” coined the term *bureaucracy*. One of the major purposes of bureaucracy was to minimize corruption and maximize democracy.³ It did this by dividing responsibility so that no one person could make final decisions, especially when it came to government obligations or expenditures. These new bureaucracies were designed to minimize corruption in governmental systems and were added to on a regular basis to account for every fresh scandal. It is also true that these systems were also viewed as mechanisms for greater efficiency -- something especially ironic today.

In many countries, as the executive and legislative branches struggled to cope with newly arising forms of corruption, no one was ever made responsible to oversee what had come before -- much less how new laws and orders would integrate with what had been implemented previously. The result was that system was built upon system, often with no logical integration between them, and often with contradictory requirements. The layering of integrity systems became so pervasive that bureaucracies learned to operate independently of many legislative or executive controls, often through voluminous regulations, resulting in a “priesthood” of expertise in the government department.

The impact of this process was summed up by Michael Nelson as one of the ironies of American bureaucracy: “*agencies organized to avoid evil became that much less able to do good.*”⁴ I would like to suggest that this is an observation generally true of bureaucracies in other countries as well. In trying to avoid this blockage I will illustrate how the advocates of the new public administration

have focused almost solely on gaining economic efficiencies over traditional bureaucracy and have ignored some of the more fundamental residual problems of ethics and integrity in government organization.

Ethics Systems: Compliance vs. Integrity

The literature in public administration focuses on the distinction between compliance and integrity-based systems.⁵ The recent OECD study, *Ethics in Public Service*, focused on this as a defining framework. In many ways this distinction is a straw man. Compliance-based systems are supposed to be only rule or law based with little room for individual conscience or decision. Integrity-based systems are designed to increase human autonomy through aspirational goals avoiding rule structures. Perhaps these constructs can be framed as ideal types. But, the empirical reality is that they are ends of a continuum. For that reason, a more informed discussion should look at the integration of legal, organizational and social psychological dynamics in this process.

Compliance-based rule systems at their worst degrade into a system of casuistry governed by a priesthood, often of arcane specialists. They exercise sole authority in providing authoritative interpretations of rules in more and more narrowly defined circumstances. Casuistry is not always negative, as many bioethics experts have recently noted; however, to be effective such a system must remain open for interactive communication. The problem with compliance systems is not that they promulgate rules, but that the agencies responsible for them can easily become more and more isolated from the daily processes of government.

On the other hand Integrity-based systems at their worst become systems of wishful thinking. These become general, very abstract guides of performance with no enforcement and no method for receiving advice or education. Empowerment of public officials in such a setting can be a recipe for disaster. *Empowering ethically bankrupt people simply leads to corruption more quickly.*

The question confronting us in the new public management is how can we flatten, compete, reduce, and simplify government while making it more responsive, without creating the potential for public services to degenerate into a corrupt cesspool? In a recent book Professor George Fredrickson vividly highlights these problems.

The Critique of the New Public Administration: Efficiency without Ethics

Fredrickson asserts that reinvention (one face of the new public administration) inherently leads to corruption. In an excerpt from his forthcoming book, *The Spirit of Public Administration*, he constructs a continuum with the governmental model at one end and the enterprise model at the other. He argues that the new public administration pushes government functions away from the governmental model and towards the enterprise model. This change, he says, inherently leads to corruption, as employees adopt practices that are common in business, but are considered unethical in government. In making this argument, he is right in the sense that the need for impartiality and the sense of public duty are de-emphasized in the new public administration. I disagree with Professor Frederickson, however, when he appears to claim that the new public administration inherently leads to corruption. This hard determinism seems unwarranted.

Rather, the new public administration demands the flattening and simplifying of government, the introduction of competitiveness and flexibility into existing systems. Fredrickson rightly points out

that among other things, reinventers target existing compliance-based ethics structures. These structures, as I explained earlier, accretion over the years to form a rule-driven system that to some degree ensured the public's confidence in government. Fredrickson laments the loss of these structures, expressing the fear that their loss will "increase the propensity for corruption and unethical behavior."⁶ Aside from the questionable equation of private inclination with unethical practices, this argument fails because he portrays the change as necessitating the complete elimination of any ethics system. This extreme change need not, and probably would not, be the reality for the new public administration. In flattening the organization, the question will not be which parts of the system to eliminate, but which to keep, and some parts should definitely be kept.

Having considered the limits of Fredrickson's more traditional argument, however, I must also address those who would like to ignore the negative consequences of the extremes of the new public administration. Within the framework there is an emphasis on values for administrative autonomy. This is most obviously found in the arguments about empowerment, but also found implied throughout the literature. If we empower civil servants, they will be free--or at least this is the theme of the literature. The question is *free* to do what?

Some scholars argue that employees should be freed of constraints, and when these chains fall away, a new ethic of public service will develop.⁷ A golden age of empowered "right" actors would emerge from the destruction of the rule-bound edifice of the compliance-based ethics program. Such a magical emergence of ethics seems unlikely, however. Most modern social psychological studies suggest absolutely the opposite will result.⁸ This notion of autonomy does not automatically elicit trust in government in behalf of the citizen, nor does it necessarily "free" the civil servant.

This bias toward the maximum autonomy of the civil servant, without the context of the purpose and need for integrity in government, builds upon some of the more naive concepts in public administration. Ignoring widely desperate behaviors of human beings, and the even more complex human interactions in organizations, the new public administration literature generally expects far too much from the individual. Willard Gaylin and Bruce Jennings argue that the notion of the autonomous, rational individual ignores the reality of human life:

We are not as free and self-determining as we would like to believe, and we are not as independent as we pretend to be. We must face the fact that we are not as rational as we would like to think we are. The rational roots of our conduct are pathetically overvalued. We must appreciate the power of emotions over human behavior in order to effectively institute changes in that behavior.⁹

Taking into account the inherently emotional, irrational side of human beings leads us to seek some safeguards against the potential for ethical anarchy that might result from an excessive emphasis on individual autonomy. In a continuation of the previous quote, Gaylin and Jennings propose the need for some framework, some system to avoid this anarchy. "Despite a preference in the culture of autonomy for rational persuasion and a bias against manipulation and coercion, persuasion rarely works. It is coercion on which society must depend." We must, then, have some system that serves to coerce (perhaps *motivate* would be a better word) employees into ethical behavior.

The balance between compliance and aspiration (coercion and motivation) is one of the most difficult confronting contemporary governments. Unfortunately, it is also the most ignored. The debate about these usually devolves into treating them as polar opposites. Rather, what must be done is a weighing

of the concerns of traditionalists like Fredrickson with the thrust of innovation and change within the new public administration reforms.

A hard version of Fredrickson's thesis would lead one to conclude that the reinvention movement must be stopped if we are to prevent massive corruption of government functions and officials. I do not believe it is either pragmatic or prudent to suggest reversing this tide. Rather, what should occur is an understanding of what needs to be done in realigning ethics systems to fit the new models of public administration. This realignment must occur hand in hand with these administrative reforms or governments can expect to confront entirely new variations of corruption.

I will consider below a series of critical questions which, if answered effectively by government leaders, can avoid this potential ethical chaos while preserving the most valuable aspects of the new public administration.

1. How Have Ethics Systems Been Realigned to Fit the New Government Reality?

Perhaps the greatest gap in the new public administration systems is the failure to take into account the interface necessary to integrate ethics (or integrity) structures within the new systemic design, e.g. privatizing functions, horizontal organization, outcome orientation. The three general tendencies are to: i) ignore ethics systems; ii) do away with them as so much bureaucratic flotsam; iii) or create a parallel competing system.

Ignoring ethics systems is a perilous course. It can ultimately lead to unraveling many of the most important programs that are at the base of the new public administration program.¹⁰ As an example let us take the case of a country in the Pacific Basin in which an agency decided to privatize a government function by forcing those government employees who were employed providing the service, to form a company and then be transferred to that company as employees and owners. The new firm had exclusive rights to provide the function for a few years and then the government will have the right to open the process to the most successful bidder. As a process, this appears to be a sensible, human way to privatize the process -- until you begin asking integrity issue questions. Who writes the contract? Who negotiates the contract? Who negotiates the price, facilities, materials, etc.? The most obvious answer in this case was to turn to the employees who are experts in the area. They were then "empowered" to write their own contract, and negotiate it with themselves. Apart from the obvious conflict of interest, it was also a potential violation of a criminal statute with a penalty of up to five years in prison. The agency literally forced employees to violate criminal laws. Only a last-minute compromise saved the circumstance from utter disaster.

The second approach is simply to do away with uniform systems. This is done in two ways. One is by "decentralizing" the function to the agency or sub-agency level. The other is to do away with compliance systems completely. The former method simply does not work. In one case all of the agencies of a government were free to develop their own rules. Essentially they adopted the rules exactly as they had been previously written (because the agencies were now leaner and no longer had the personnel to write those rules); however, the compliance rules remained absolutely the same. The system became even more bureaucratized because there was no longer ways to amend those rules to fit the new realities. The latter method has been frequently discussed, but I have never seen it fully implemented¹¹. The reason, I believe, is that even to the most strident advocate of aspirational goals such an approach would lead to ethical anarchy at worst and moral relativism by agency at best.

The third approach is actually the most common: Leave the old compliance “stuff” in place but create more of an aspirational superstructure to make it irrelevant. Rather than this occurring the tendency is to potentially create an institutional civil war. In one country, a program was created with an emphasis on quality circle design and aspirational goals: calling individuals back to their nationalistic pride; putting a Bible on every bureaucrat’s desk; and health programs of exercise and dance. The agency responsible for legal compliance dismissed the organization as irrelevant and is investigating individual members for violating integrity laws.

What should occur is an in-depth examination of how the new public administration systems fit into and are affected by ethics and integrity structures. The latter can be changed to fit into the governmental reality in a variety of ways. Laws should be reviewed and redundancy or needless bureaucratic elements should be eliminated. Laws and regulations should ensure that employees empowered by the new systems are not also finding themselves violating laws or standards of conduct. As one wag has commented, ethics and integrity systems are the equivalent of brakes on an automobile for organizations. Even in the most streamlined governments, one would still want the ability to slow down and even stop.

If the process of reinvention is to be more than a fad, the advocates of this new management approach must effectively engage the question of how to prevent confusing ends and means. There are *means* which drive the paradigm of the new public administration (e.g. entrepreneurship) that can, under certain circumstances, undermine the legitimacy of government. Good compliance systems should set the boundaries of these means to prevent the cure for the problem of bureaucracy from being worse than the disease.

2. Compliance Systems: Are They Part of the Problem, or Part of the Solution?

The notion of a compliance based system has somehow been viewed as antithetical to the goals of the new public administration. The argument goes something like this: You cannot empower people to do their job and at the same time have them looking over their shoulders afraid that someone will accuse them of wrongdoing. The model they use is that of business which operates unfettered except for the discipline of the market place. Therefore, the only discipline the government ought to have is the discipline of a real (or artificial) market for its services.

Such an approach misunderstands several key elements both about the dynamics of the market and the purpose of government. First, over the past century there has been a growing professionalism in the private sector due to the need to rely on individuals to live up to *specific, professional compliance standards*; e.g. accountants, architects, engineers. Second, the purpose of compliance in government is to give guidance to employees and ensure the integrity of the government in the eyes of its citizens. Admittedly an overbearing, unclear and complex compliance system can impede the effectiveness in government. However, there is nothing that would suggest that an effective compliance system cannot be somehow realigned to the realities and *needs* of the new public administration.

Critically, there must be some fundamental compliance system on which to build individual integrity. Often a code of conduct with vigorous enforcement will serve to create this foundation. Codes accomplish a variety of goals that cannot be accomplished aspirationally. Judith Lichtenberg makes a powerful argument for the critical role that codes can play in organizations.¹² Ideally, the code of conduct should be uniform, applying to everyone within the branch of government. Ideally, it would apply from the Chief Executive Officer of a country to the janitor who cleans his or her office. It should apply to military officers and cabinet officials. Additionally, enforcement should be uniform.

And if there is any variance in either the strictness of the rules or the application of penalties, the more senior an official is the more restraining should be the code, and more harsh the punishment.

There also must be at least a basic system in place to assure the consistency of standards and that they are **enforced**. The new public administration steers away from concepts like enforcement because they believe it somehow contradicts the notion of empowerment. Yet if one is not able to enforce minimal standards, what will keep government officials from corrupting the system? As simplistic a concept as economic rent seeking is, it is clear that systems that cannot enforce standards will encourage economically based behaviors that will undermine government.¹³

Upon this foundation of “minimally acceptable standards” must be built a structure of aspirational goals. These should be the ideals of public service, reaching to meet the expectations that citizens have of public officials. This type of structure can only be built within a model of leadership within the public service.

3. Do Systems Exist That Can Provide “Real-Time” Ethics Advice to Government Managers?

Aristotle reminded us never to be a judge in your own case. Even a minimal compliance/aspirational system should be led by persons charged with knowing the compliance rules and a vision of the aspirational values of the organization. This independent voice can be created through an autonomous office of ethics, or an ethics counselor. Yet superficially such an administrative system seems to contradict the philosophy of reinvention movements.

Many advocates of the new public administration uncritically assume that empowerment ought to enter into all aspects of work and this should include empowering individuals to think ethically. It assumes that individuals can be taught to reason ethically, and once taught behavior will follow. As a general goal developing ethical reasoning skills in managers is admirable, and should become part of the training curriculum for management. However, such an approach tends to ignore two pragmatic problems. First, as public servants are empowered none of the reform movements have ever advocated doing away with all compliance rules, only simplifying them. In addition, there will be broader areas of responsibility for public servants as organizations are flattened. The result is that there is a greater need for a system to provide timely advice on ethics/integrity matters for managers who will have far broader duties.

If these systems are to be effective in “empowered” organizations, they have to be more than advisory. They have to be able to give managers advice that will protect civil servants not only from criminal prosecution or administrative penalty, but that also has legitimacy in the eyes of the press. If “bad” ethics advice is given and followed, it should be the ethics officer -- not the official -- who would be held responsible. A truly empowered organization must create a system to provide this fundamental protection for their managers, or the first action that is somehow tainted with scandal will result in managerial behaviors that will re-bureaucratize the organization.

A brief word is necessary as to why these ethics offices/officers should be independent. The tendency is for any person in any organization to facilitate his or her superiors. However, the ethics officer needs to be empowered to tell the truth, which might limit the activities of those he will be counseling. In many governments there is an *Icarus Principle* for integrity officials: you can only tell the truth to lower level employees. Try telling the truth above that level and you are suddenly not the solution, but the cause of the problem. As an example, in 1996 a country in the middle east with a

very successful integrity office was beginning to make significant inroads into corruption. Unfortunately, one of the money laundering roads led directly to the Chief Executive's son. When the head of the office discussed this with him, he was immediately characterized as the "enemy"; was removed from office; and the office itself was pilloried by the state-controlled newspaper.

4. How Are Leaders in Public Service Chosen to Lead These "New" Organizations?

The comforting thing about the "old" systems of public administration is that they were so law and regulation bound, that deviations from prescribed and proscribed behavior were usually aberrations. In reality it made no difference who you chose to lead the bureaucracy because they were so limited in discretion that they could not get into much trouble. The structure of bureaucracy was inhibiting, both to innovation and unethical conduct. Interestingly, the old systems never completely inhibited either! However, the new world of public administration presents a very different challenge. How are the leaders of these organizations being selected and trained?

In effect, very little thought has gone into what leadership the new public administration will require. In many countries there has been brief attention paid to whom is actually being selected to carry out these mandates. Importantly, in countries with leadership systems like the United States, there has been little thought given to what the most effective mixture of political appointees to civil servants should be in leading major, executive change programs.¹⁴ Even senior officials whose primary emphasis is "reinvention" tend to pay scant attention to compliance and integrity systems. An official whose primary focus had been reengineering his department, when caught up in an ethics debacle, claimed that his own personal sense of integrity should be the standard to judge him. And although he was given a set of government standards of conduct to read he was far too busy to pay any attention to them. He was pressured into resigning from office, because although he was given the rules, and signed a document stating that he had read them, he did not actually review them; nor subsequently consult with ethics officials about his actions. Ultimately, he blamed the rules for his downfall never understanding his active complicity in his own destruction.

In the new world of flattened organizations, leaders must both know and understand the rules and live by them. If rule systems are in the way of accomplishing new public management goals, they must be changed not ignored. But this is not enough. Leaders must also have a sense of the aspirational fabric of the integrity system in government and be strong advocates and exemplars of the vision of government that emphasizes integrity. For example, individuals who preach honesty but cheat on vouchers are much worse than hypocrites. There are seldom "secrets" in organizations, so cheating is known quickly throughout all levels of the organization. The hypocrisy is often seen as license for others to model the behavior, and can create a geometry of corruption. A small act, illicitly using the computer for personal work, can suddenly escalate among subordinates to running a separate business using the agency computer, or "taking" the computer home for her spouse to use.

The standard of leadership should be to be "purer than Caesar's wife," both in terms of the reality and appearance of inappropriate behavior.

5. Under These New Systems How is Management to be Held Accountable?

The foundation of accountability in the new public administration is to require organizations shift from output measures to outcome measures.¹⁵ As a budget tool this can be quite a dynamic shift. As a management tool it only provides a partial solution. When applied effectively the approach allows

government to effectively evaluate a programs “ends” but pays absolutely no attention to the means. There needs to be an effective evaluation of the outcome “means” as well as “ends.” A confusion between these can lead to disastrous consequences.

In two recent studies, Steven Cohen and William Eimicke¹⁶ examine the single dimension of the impact of entrepreneurship on the integrity systems of government. For them there is a significantly mixed record in which the means notably clouded the ends. The three studies focus on the derivatives’ scandal in Orange County, California, the successful stewardship of Stephen Goldsmith in Indianapolis and the involvement of New York City mayor Rudolph Giuliani in the fight between Time-Warner and Fox Corporations control of cable television in the city. In the latter case the mayor was accused of conflict of interest because his wife was a reporter for the Fox television station in New York City.

The problem that Eimicke and Cohen identify in both essays, is that with the change from output to outcome measures there has not been a commensurate change in accountability for the integrity of how those outcomes come about. For example, Robert Citron, the County Treasurer of Orange County, California was made responsible by the Board of Supervisors for effectively investing receipts to allow a decrease in taxes and fees. The high risk investment strategy he employed led to the bankruptcy of the county and felony charges against him. This was a purely entrepreneurial “gamble” on Citron’s part, but it was devoid of any compliance to any set of standards.

The Orange County case speaks volumes in terms of the mismanagement that can occur, but in a sense it distracts us from the more simple issue of accountability. The reality of modern public service is that the only truly punishable offense is malfeasance -- violation of criminal standards. The problem of misfeasance -- personal failure -- is usually dissipated to the entire organization with no one person held responsible. Even the best civil service systems have generally failed to deal with the problems of lack of performance. As an extreme example of this, in a recent review of a series of complaints about a senior manager in the U.S., the manager wrote in response: “I agree. I am a lousy manager, but that is no crime.” And, in systems designed with bureaucratic redundancy in integrity systems, the broad interests of the government can still be protected -- even from the incompetent.

Under regimes designed through the lens of the new public administration the situation described above is an imminent integrity disaster. Because public managers will be empowered through initiatives like reinvention, they must also be made individually accountable. Failure under such a system can never be condoned as failure of the group. It is always a failure of leadership. Cohen and Eimicke take this argument a step further by pointing out that incompetence is also a violation of ethics.

There is also an ethical dimension to gross incompetence. Failure due to changed conditions or bad luck is one thing, failure due to lack of technical expertise and an appropriate level of skill to perform a task is a form of dereliction of duty. Exercising such incompetence at the public expense is a violation of public trust, and abuse of office and a breach of ethics.¹⁷

In environments that encourage entrepreneurial behavior, some scholars believe ethics systems must be realigned to deal with misfeasance as a violation of ethical standards. Whether or not this is done, the implications of not expanding ethics systems to encompass misfeasance ought to be explored.

6. What are the Necessary Transparency Systems for this Reinvented Government?

Fundamental to effective government is the perception on the part of its citizens that it is operating honestly and fairly. In contemporary society this often requires an openness on the part of government employees that appears to violate their right to privacy. Courts have generally upheld transparency programs, finding that the peoples' right to know outweighs government employees individual rights to privacy.¹⁸ Many systems are available for transparency - from public commentary periods for rule-making to clarity of procurement processes. However, the most popular recent mechanism has been financial disclosure.

In a very concrete way, proactive public financial disclosure systems, with the power to ensure that decision makers rid themselves of interests that would conflict with their public duties, are one of the easiest ways to defuse cynicism about the behavior of public officials. These systems can be compliance or integrity based. They are often simply viewed as a way to get information. In a truly "reinvented" government, financial disclosure ought to be a prophylactic to protect the public servant. In several countries, disclosure systems simply require officials to file (often in sealed envelopes) disclosures, until an ethics charge is actually brought against an individual. Such dumb (i.e., totally reactive) systems, rely on the threat of getting caught to somehow motivate individuals to right action. This is not only counter-intuitive, but it also seems to violate the very purpose of the new public administration: motivating individuals to seek innovative solutions to problems.

Disclosure systems should have independent reviews of assets and interests, providing counseling, and in some cases requiring solution. These systems should allow government employees to rid themselves of conflicts of interest in the least intrusive way possible. It should lead the public servant to have a disclosure form that should be "clean" of any ethical questions. The second part of the process is that these forms should be readily available to the public -- so that the press and public can evaluate the personal interests of the government employee with their government activity. Such a system should require filing on a regular basis. Depending on the purposes of the system some governments include all employees, or limit those required to disclose by focusing on their responsibilities or position.

The key to the prophylactic success of such programs is that resources are devoted to the process to allow those programs to be effective. Many governments have created disclosure systems as window dressing with either no intention of making those programs effective or no knowledge about the resources required. Frederick Herrmann persuasively argues that the experience in American state ethics offices suggests that they are often purposely made ineffective, especially in the area of disclosure. His three pillars of effectiveness are: independence, sufficient budgets, and the ability to enforce the law.¹⁹ For him the essential sign of the failure of an ethics office is trying to run a financial disclosure system without computers. This is asking ethics commissions to "make bricks without straw." A futile task at best.

There is an irony in the fact that the strongest, most independent systems are those that do not cover legislators. We find the weakest disclosure systems in legislatures, because we ask "the regulated to be the regulators." Dennis Thompson has done an admirable job of explaining why legislatures often fail miserably when they try to regulate their own behavior. His solution, at least for the United States, is for Congress to set up an independent office, with the power to issue advisory opinions, and enforce their rules.²⁰

In summary, transparency systems should not have enforcement as their major purpose. Rather, the primary focus should be on prevention. For such a system to work effectively, these offices (centralized or decentralized) must have the independence, budget and authority to ensure that individual ethical conflicts will not poison the governmental system. Ironically, the effectiveness of such systems might be more important in the era of reinvented government than ever before.

7. Have Private Sector Entities Been Integrated into Government Integrity Programs?

Such a question often strikes officials as outlandish. Isn't the purpose of the new public administration to take advantage of the efficiencies of the private sector? If so, why would we want to handicap them with the programs that lead to inefficiencies in the first place? Such a chain of reasoning makes several, flawed assumptions. First, if systems for providing clear, timely ethics advice are available, these programs ought to facilitate governmental responsiveness, not retard it. Second, it assumes that the purpose of government is *only* efficiency. Even within the most draconian of the new public administration theories, attention must be paid to the means as well as the ends. For instance, the mafia might be the most efficient organization for disposal of toxic waste, but their reputation would undermine any confidence that such waste disposal would be done responsibly.

As government diffuses responsibilities to the private sector, either by privatizing or contracting, it is becoming clear that at some threshold government must also hold those entities to ethical standards. There are a multitude of problems that have already occurred. The following are a brief sampling of sanitized examples.

- A large agency contracts with a private company to supervise government employees in a narrow procurement area. A subsidiary of the private company puts a bid in on several procurements for which they are responsible. The private company's supervising officials order the employees to give the contract to their company.
- An agency decides to privatize a function and helps the government employees who work in that function by allowing them to form a private company to provide this service, and guaranteeing a sole source contract for three years to give them a reasonable start. The people responsible for writing the contract and issuing it are the same people who will sign the contract.
- A city privatizes garbage collection in order to rid themselves of the corrupt public sanitation bureaucracy. A private company wins a bid for garbage collection that saves the city 30 percent of the overall costs. Within a year there are massive complaints because the private company is insisting on cash facilitation payments to ensure "prompt" garbage pickup.
- A government ministry decides to privatize all but the policy making function of their personnel office. A large, private personnel firm is hired to do all advertising, classifying, certifying and selection for job positions. The agency hires 25 summer interns. Toward the end of the summer, the agency head discovers that all of the interns are either the sons or daughters of managers of the personnel firm.

Each of these instances would not be covered by typical government ethics systems. Such systems assume that these functions will be done by public employees, and for that reason many laws, standards of conduct, and regulations simply would not apply to private sector employees doing the

same job. Interestingly, even aspirational codes of conduct would not be clearly applicable to a non-government workforce.

What must occur is an effective realignment of rules to better interface with the new reality of government structures. It is not viable for the systems created under the rubric of the new public administration to be exempt from compliance or aspirational standards. The mix of these might vary. But the reality is that government must attach accountability standards (in terms of integrity) to any nontraditional systems that they create. The difficulty of this task should not be underestimated. As Andrew Stark writes: “Concepts such as the private-public distinction and the nature of fiduciary responsibilities in government are considerably more complex than - and hence pose a raft of new questions in the realm of conceptual analysis beyond - what their purely theoretical exposition alone would imply.”²¹ His essay is “simply” trying to account for the difference between personal and government interests, and how important this distinction is to fundamental democratic values. Imagine the greater difficulty as government and private functions are mixed.

As difficult as it might be, governments will be forced to address this issue and determine effective policies and implementation strategies. This might take the form of developing either separate systems for public and private elements of government or develop a new compliance system to account for these reengineered programs.

It also might take the more subtle form of the U.S. Corporate Sentencing Guidelines. This system in effect allows a judge to discount fines in proportion to the elements of an ethics system corporations have in place. Professor Lynn Paine has demonstrated that the new guidelines could potentially reduce \$54.8 million dollars in fines to \$685,000 if a corporation met all of the elements in the sentencing guidelines.²² The economic incentives inherent in such a set of procedures have led to a burgeoning of ethics offices in large corporations.²³ Even more interesting, is that the content of these ethics programs, especially for companies that do significant work with governments, are almost a direct interface with the federal, executive branch ethics standards. The obvious limitation of such a regime is that there is very little impetus for small, private sector entities to develop such systems.

Perhaps the most far-reaching (and oldest) programs in the areas of compliance standards for the private sector comes from the Independent Commission Against Corruption (ICAC) of Hong Kong. Within this system companies are encouraged to develop compliance standards that interface with both the government and generally legislated standards. The ICAC provides free integrity audits to individuals and organizations, both those who do business with the government and those who do not. The impact of the integrity audit is to make ethical standards more uniform. The ICAC then provides follow-up services through regular auditing of the effectiveness of their programs.²⁴ Admittedly, the other aspects of the ICAC program are heavily into law enforcement and anti-corruption efforts that have the effect of “encouraging” the private sector to participate. The question of whether such a tightly regulated program would work in a more heterogeneous and geographically diverse economy is open to question.

However, there is an obvious need to provide standards for the surrogates of government if the realignment is successful. The cost of ignoring the potential problems in this area ought to be obvious. The weight of scandals will be placed on the newly, reengineered organizations. The re-bureaucratizing of these programs will be quick because there will be little appreciation for what will have worked, and only focus on the corrupt of how they got there. In government it is far too easy to “throw the baby out with the bath water.”

Conclusion

The simplistic solution of “just doing away with the rules” should not be viewed as the essence of the new public administration. As I have attempted to argue, governments should carefully assess the structures necessary to maintain the new organizational paradigms that they are creating. They must focus on essential programs that provide integrity without overly restricting flexibility. If they can successfully answer the seven questions above, I believe they can guard the reforms essential to the effectiveness of the new public administration, by protecting the integrity of those programs.

Ideally this will require thoughtful realignment of integrity systems to better fit the realities of the new organizations. It will require a careful mixture of both compliance and aspirational systems. There must be enough compliance to ward off the most base corruptions of public office. There must also be an aspirational vision of integrity in public service, and means for rewarding that behavior. It is certainly true that this “ethic” is easier to capture in an environment where all who do public service are *public* employees, i.e. work directly for the government. However, the realities of modern government dictate otherwise.

Most governments have consciously decided to embrace the new public management by shrinking the size of the public work force, privatizing functions, contracting, and eliminating the myriad of controls placed on public workers. In this environment, there must be a recognition of the potential for abuse, as well as the appearance of abuse of public office.

There must also be a fundamental understanding about the purpose of government and what its role is in civil society. In Federalist #51, Madison in the guise of Publius reminds us:

Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit. . . [ultimately] individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak, as well as themselves.

The question is what residual systems are left in place to protect the integrity of government?

The answer will constitute the “second wave” of the new public administration. The success of the reinvention movement will not only depend on its ability to measure outcomes as *ends*; it must also effectively monitor the *means* to those outcomes. A confusion between ends and means, or a lack of attention to either, will tar the entire approach with the inevitable corruption that will result. And, if this happens, the new public administration movement will be just one more arcane footnote in this history of experiments in democratic government.

NOTES

1. CRS Report for Congress, *General Management Law: A Selective Compendium*, Ronald C. Moe, Project Coordinator, Washington, DC: Library of Congress, June 13, 1997.
2. See Ronald C. Moe, "The Importance of Public Law: Public Law, Private Law, and Government Management," in Chester Newland and Phillip Cooper, eds., *Handbook of Public Law and Administration*, San Francisco: Jossey-Bass Publishers, 1997.
3. For a more in-depth discussion see Stuart C. Gilman, "Integrity in Government: Ethics and Reinvention," *The Public Manager*, Vol. 25, No. 6, Summer, 1996.
4. Michael Nelson, "A Short, Ironic History of American National Bureaucracy", *The Journal of Politics*, Vol. 44, 1982, p.763.
5. E.g., Terry Cooper, *The Responsible Administrator*; Carol Lewis, *Ethics in Public Service*; John Rohr, *Ethics for Bureaucrats*.
6. Excerpted in H. George Fredrickson, "Public Sector Model Strives to Avoid Corruption," *Public Administration Times*, 1997, 20(5): 12.
7. E.g., James P. Pinkerton, *What Comes Next: The End of Big Government -- and the New Paradigm Ahead*, N.Y.: Hyperion, 1995.
8. Lawrence Kohlberg, *The Philosophy of Moral Development, Moral Stages and the Idea of Justice*, Vol. 1., New York: HarperCollins, 1981; James R. Rest, *Development in Judging Moral Issues*, Minneapolis: University of Minnesota Press, 1979.
9. *The Perversion of Autonomy: The Proper Use of Coercion and Constraint in Liberal Society*, The Free Press, NY, 1996: p. 126.
10. The examples in this section have been sanitized to avoid any embarrassment or perceived slight. They all however are "real" and have occurred within the past five years.
11. For example, see John P. Burke, "The Ethics of Deregulation -- or the Deregulation of Ethics", in John J. DiIulio, Jr., ed., *Deregulating the Public Service: Can Government Be Improved?*, Washington, DC,: Brookings Institution, 1994.
12. Judith Lichtenberg, "What Are Codes of Ethics For?" in Margaret Coady and Sidney Bloch, eds., *Codes of Ethics and the Professions*, Melbourne: Melbourne University Press, 1996.
13. For example, see Paolo Mauro, *Why Worry About Corruption?*, Washington, DC: International Monetary Fund, 1997.

14. See Paul C. Light, *Thickening Government*, Washington, DC,: Brookings Institution, 1995.
15. In the United States this shift is clearest through the requirements of the Government Performance and Results Act (1993) and the OMB Circular(s) A-11 (1997) implementing it.
16. Steven Cohen and William Eimicke, "Is Public Entrepreneurship Ethical: A Second Look," presented at the 58th Annual Conference of the American Society for Public Administration, Philadelphia, PA, July, 1997, and Steven Cohen and William Eimicke, "Is Public Entrepreneurship Ethical?" in *Public Integrity Annual*, Lexington, KY: Council of State Governments, 1996.
17. Eimicke and Cohen, 1997, p. 25.
18. For example, see *Adrian G. Duplantier, et al. v United States*, U.S.C.A., 5th Circuit, 606 F .2d 654, November 19, 1979.
19. Frederick Herrmann, "Bricks Without Straw: The Plight of Government Ethics Agencies in the United States," *Public Integrity Annual*, Lexington, Kentucky, The Council of State Governments, 1997.
20. Dennis F. Thompson, *Ethics in Congress: From Individual to Institutional Corruption*, Washington, DC: The Brookings Institution, 1995.
21. Andrew Stark, "Beyond Quid Pro Quo: What's Wrong with Private Gain from Public Office?," *American Political Science Review*, Volume. 91, No. 1, March, 1997, p. 119.
22. Lynn Sharp Paine, "Managing For Organizational Integrity," *Harvard Business Review*, March- April, 1994, pp. 106-117.
23. The Ethics Officer's Association, housed at Bentley College in Massachusetts, is a professional association for corporate ethics officials and was formed in 1994. It already boasts a corporate membership of over 300.
24. See *An Introduction to the Independent Commission on Corruption*, Hong Kong, September, 1996 and *ICAC: 1995 Annual Report by the Commissioner of the Independent Commission Against Corruption*, Hong Kong, 1996.

ETHICAL CHALLENGES OF NEW APPROACHES TO SERVICE DELIVERY

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1. Executive Summary

From an ethical perspective, the growing enthusiasm in OECD countries for the adoption of alternative service delivery (ASD) mechanisms represents a significant challenge. At a point in time in which public trust in government is at a low ebb in many of these countries (Zussman, 1997), citizens are faced with experiments in the deconstruction of the state which can only serve to diffuse further the responsibility of elected and appointed state officials for the services provided. Often, such experiments involve the participation of private sector organizations as “partners” of the state in service “co-production” arrangements. In countries in which members of the public express more trust in the private sector than they do in state organizations, such fragmentation of the state may be welcome. By contrast, in societies, where the private sector is seen to be significantly more corrupt than the public sector, such partnership arrangements will be greeted with dismay.

The ethical dimension of this new wave of privatization has not been a well studied phenomenon. Alan Doig notes that the literature on private sector fraud, corruption, and mismanagement is far more extensive than the parallel literature on the public sector, and “may take on increasing relevance following the impact of administrative change across the public sector and the effect of new management cultures and new administrative structure for, as well as the increasing involvement of the private sector in, the design and delivery of public services.” (Doig, 1995, p.195). But this literature pays scant attention either to the non-profit (voluntary) sector or to the ethical value issues which have been the major focus of concern in the public sector (eg. political neutrality, fairness, conflict of interest, confidentiality, privacy protection, exposure of citizens to risk, accountability, etc). In the absence of much hard evidence either way, the general assumption found in the literature looking more specifically at the phenomenon of ASD is that the traditional values of the public service are continuing to be observed even though many ASD experiments operate largely outside of the rule structure and cultural framework of the traditional public service. If there is manifest concern being expressed at present about ASD ethical challenges it is most evident in the area of contracted social service delivery (Rekart, 1993, Ehrenreich, 1997).

This paper is designed to raise questions about the ethical dimension of the move to ASD. It begins by defining the ASD phenomenon so that the reader can locate the paper’s focus in the governance experimentations being conducted in his or her own jurisdiction. Because they illustrate the ethical dilemmas most starkly, my focus is primarily on service delivery mechanisms which involve government in collaborative partnerships with the private sector. I then look in some detail at the specific kinds of ethical challenges raised by the employment of ASD mechanisms with particular reference to how private sector partners relate to traditional public service values (ed: note deletion). This exploration of problems which “might” arise is - by necessity - somewhat gloomy in character. I try to lift the gloom by exploring the thesis that the value dissonance which is visible across public-

private partnerships might dissipate over time in a new synthesis of public and private sector values. Rejecting that possibility, the paper finally turns to the difficult question of building an “ethics infrastructure” for ASD agencies. It rejects such a project as premature, arguing instead for the establishment of a dialogue on the contested matter of the appropriate ethical standards for agencies on the edge of the public-private continuum.

Overall, the paper is intended to be speculative and provocative. Except for contracted social service delivery, our various governments have not yet had sufficient experience with the ASD phenomenon to allow us to state comfortable conclusions about the kind of behaviours these new state agents may display, what good behaviour would actually look like, and the degree to which the state can or should intrude into the management of these behaviours.

2. New Approaches to Service Delivery

In a recent study sponsored by KPMG and the Institute of Public Administration of Canada, ASD is enthusiastically defined as “a creative and dynamic process of public sector restructuring that improves the delivery of services to clients by sharing governance functions with individuals, community groups and other government entities” (Ford and Zussman, 1997, p.6). For advocates of ASD, the essential focus is on members of the public as clients and customers, thereby opening up for consideration the widest possible range of options for optimising service delivery.

Distinguishing ASD as a subset of the broader New Public Management concept allows us to exclude from consideration innovative options in which the service is still *exclusively* managed and delivered from *within* agencies of the responsible government. Such options include electronic delivery, single window delivery, commercialization, co-location of services and even executive (or separate service) agencies. At the other end of the spectrum, the concept of ASD is not intended to embrace the option of government getting out of public policy obligations through outright abandonment, deregulation, “downloading” to another level of government, or privatization of service delivery in which the intention of the privatization is to exclude the activity in question from the scope of government’s defined role. The widest boundaries of this paper, therefore, will enclose arrangements between one government and another government, voluntary or for-profit partner for some combination of joint policy-making, funding, production, delivery and management of a service or good to a particular constituency or the public at large (Graham and Phillips, 1997, p.264; Canadian Council for Public-Private Partnerships, 1996). Such co-production arrangements can be referred to as: alliances; partnerships; joint ventures (eg. in infrastructure construction and management); devolutions of degrees of jurisdiction or authority to other governments (including state, local and aboriginal) or community-based corporations or boards (eg. in areas such as resource management and health); self-regulation agreements in which government maintains a role; franchising (eg. postal services, vehicle emission testing); and contracting out (Langford, 1997). In practice, I will focus more narrowly on ASD arrangements involving some form of collaborative partnership between a government and organizations in the non-profit and for-profit sectors.

One crucial characteristic of these arrangements is that they all tend to “disaggregate public bureaucracies. In place of the line bureaucracy delivering any service all over the country, there is now a patchwork quilt of organizations.” (Rhodes, 1994, p.142). While a number of these arrangements are far from new (eg. contracting out), the logical extension of this development is a world that would bring joy to the hearts of Drucker, Osborne and Gaebler, and others who have recommended the shedding and sharing of government’s non-steering powers as the key to the re-

invention of public government at the end of the millennium (Drucker, 1989, Ch.6; Osborne and Gaebler, 1993). Eventually, as this scenario is played out, these powers are dispersed to such an extent that what emerges is a seamless continuum joining the public, private and non-profit sectors.

3. What Kind of Ethical Issues Are We Talking About?

ASD experiments have stimulated some observers and participants to pose ethical questions about the substantive social and economic impacts of the reforms themselves. Is it right that many ASD initiatives force the users of jointly produced services to pay fees for services which were previously fully funded by the state treasury? Is it fair that welfare recipients may now be forced under job creation partnership programs to work at low wage jobs without adequate child care support or health insurance? Similarly, is it right to force public servants to accept lower wage positions with private sector service providers or to replace them with lower paid private sector workers, volunteers, or automated benefit dispensing machines and “smart cards”? Should we accept that private sector partners in foreign development may participate in ventures which depend for their success on the exploitation of child labour? To the degree that ASD initiatives go hand-in-hand with downsizing and reductions in program spending, it will be very difficult to shake off questions about the wider morality of the policies and programs with which they are associated.

Obviously, there can be a distinctly ideological tinge to many of the substantive ethical concerns about ASD. Not only liberal or social-democratic critics give voice to such concerns. On the neo-conservative side of the ledger, questions are raised about the tendency of governments to heap policy riders on to partnership arrangements. For example, partners may be forced - as part of the contractual conditions - to adopt employment equity or labour standards as high as those established inside government. Similarly, non-profit organizations with strong roots in the community can be turned away from their traditional mandate, clients, and volunteer base by the promise of a steady flow of funds from government. In other cases, government gets private agencies to provide services that the government would be reluctant to provide directly through a ministry (eg distribute information to children about sexually transmitted diseases) (Law Reform Commission, vol. 2, 1995, p.25). For neo-conservatives, ASD can sometimes have the perverse effect of providing a government with a wider set of tools to undermine free market or community and family values.

Not entirely unreasonably, public servants and students of public management have tended to leave questions about the ethical quality of a government’s policy to others. Instead, they have focused on the establishment and justification of rules about how officials should relate to politicians, the public, public funds, other officials, and their own personal interests in the course of developing and delivering government policies. Put another way, the focus is not on what governments do, but how a good state official goes about doing it. For this reason, traditional public service codes of conduct contain statements on procedural values such as integrity, loyalty, neutrality, accountability, fairness, efficiency, and responsiveness. In this narrow context, the ethical challenge of ASD is to establish how board members and employees working in a wide variety of service delivery partner organizations should relate to the principles developed for officials in traditional public service organizations.

Just as it is difficult to draw distinct boundaries between New Public Management and ASD, it is impossible to separate entirely the ethical challenges that both phenomenon create. A public servant operating in a NPM environment with a strong emphasis on service and client will face some of the same ethical dilemmas that confront employees of ASD partner organizations. As a result, lessons

learned from observing the permeation of new values into mainstream public service may be relevant to the management of the emerging ethical issues further out on the public-private continuum, and vice-versa.

The recent OECD paper, *Ethics in the Public Service*, rightly noted that a small number of countries have begun to adapt their standards of conduct to the realities of “devolved and discretionary management” (OECD, 1996, p.56). But these adaptations are - with few exceptions - still focused on public servants in ministries and they tend to take into consideration only values such as service, innovation, efficiency and effectiveness. As responsibility for the delivery of public services moves increasingly outside of the ministry to be shared with private partners of government, the ethical *ante* is raised considerably. For this part of the public-private continuum the issue becomes the very relevance of traditional and reform-modified standards of conduct. Rather than presuming that traditional standards are being followed, I want to suggest the degree to which such standards may be ignored or characterized as irrelevant by private sector partners. We may conclude that the tensions that we see between private and public sector values in the context of internal managerialism reforms pale before the potential threats which public sector values face with ASD.

4. Does ASD Mean Better Service?

Let's first take the issue of the ethical challenges associated with ASD to the value “heartland” which ASD and NPM purport to foster. The most vaunted positive impacts of ASD are said to be the result of the prominence given to values such as service, responsiveness, reliability, economy, efficiency and effectiveness. As noted, these values have been readily assimilated into the litany of public service values and the assumption is almost always made that the adoption of ASD vehicles inevitably enhances such values.

But not everyone agrees. Rhodes argues that “(F)ragmentation not only weakens coordination, it also reduces efficiency. Fragmentation leads to functional and jurisdictional overlap, otherwise known as duplication and waste, thereby increasing inefficiency”. ASD can be more effective but at a cost. “Agencies from the public, private and voluntary sectors will compete for clients and thereby increase the takeup of service. This outcome may be welcome but it is costly on two grounds: the “inefficiencies” of duplication and paying for more people to use the service.” (Rhodes, 1994, p.147). A good illustration might be the relative efficiency of US and Canadian health care systems. Duplication and administration complexities associated with a mixed public and private health care delivery system in the U.S. have resulted in a significantly more expensive system than its coordinated and more public counterpart in Canada. Others have argued that where volunteer labour or low cost labour is substituted for paid employment, what may be described as an efficiency gain is really no more than a wealth transfer; there are no net savings as what is gained by the taxpayer is lost by the public sector employee (Smith and Lipsky, 1993, p.237). Moreover, Rehfuss claims that lower labour costs through contracting out or franchising, lead to less qualified workers and more learning on the job. The savings to government can disguise a serious decline in the quality of service provided to the citizen (Rehfuss, 1991). The focus on quality is often on process issues (staff-client ratio) or performance measures, not on actual service outcomes (Panet and Trebilcock, p.26). In many instances, the partnership arrangement merely replaces one monopoly with another or installs a private monopoly where none existed before (eg. providing Coca-Cola with the sole rights to sell soft drinks on a university campus in exchange for payments to the university). In short, there are many ways in which partnerships with the private sector may actually diminish service levels.

I don't want to belabour this issue. The point is that the ethical challenges inherent in ASD do not arise merely from tradeoffs between traditional public service values and the private sector values of government partners. There are also challenges in the potential for shortfalls between the core promise of ASD (ie better service) and the actual performance. Many readers will be familiar with reports of the cost overruns and inefficient and ineffective service associated with the privatization of service delivery. While there is a clear ethical dimension to this problem, it is obviously more commonly construed as a legal or technical issue related to the achievement of agreed-upon service standards.

5. The Fairness Tradeoff

Procedural fairness is one of the bedrock values of traditional public service. While there may be considerable debate about what it means to be fair, at the very least the public expects administrative impartiality and consistency in its dealings with bureaucracy (Kernaghan and Langford, 1990, ch.5). Particularly in the provision of social welfare and health services by partner organizations, the tussle of values can often be at the expense of fairness. Because of the sharing of decision making powers with local service provision partners, it is easy for the eligibility and funding standards for a national or state-wide program to vary from community to community (Seidle, 1997, p.97). These distinctions can also emerge in circumstances where the partner is a for-profit organization. While the government sets eligibility standards, the provider generally is responsible for determining which individuals fit in. The combination of performance standards and an emphasis on cost containment provides the incentive for for-profit providers to cream off easy clients and leave hard cases to their own devices (Osborne and Gaebler, 1989, p.155). For example, for-profit providers would find it much easier than public agencies to engage in "application dissuasion" through the imposition of stringent work requirements in a social welfare program (Ehrenreich, p.46-7). The singular focus of for-profit agencies on profit raises serious concerns about "opportunistic behaviour" (Panet and Trebilcock, 1996, p.27).

The voluntary sector is not immune to this dilemma. Non-profit organizations tend to have a culture in which charity is a strong value. Volunteers and employees, faced with circumstances in which government eligibility standards don't seem to match the needs of potential clients, may feel strong pressure to resist those standards and revert to the organization's traditional philosophy for choosing and treating clients (Rekart, p.100). The emerging trend in the United States to entrust service delivery tasks in inner-city neighbourhoods to evangelistic religious institutions ("faith-based" agencies) raises enormous questions about the mixing of proselytizing and service delivery and the impartiality of access to services (Klein, 1997). There are widely understood dangers associated with bureaucratic standardization in areas such as eligibility determination, but the strongly cherished virtue of this approach has been the increased likelihood that each citizen will at least get access to the services to which he or she is legally entitled.

This analysis could easily be extended to other possible manifestations of procedural fairness. This value has been expanded in recent years to demand fuller participation of individual members of the public or affected groups in decision making, including proactive efforts by public servants to seek out affected parties and solicit their views. With the value being attached in the ASD environment to speedy, cost-effective decision making and program delivery, it is not difficult to project the lack of enthusiasm that for-profit service providers, in particular, would have for such protracted and inefficient approaches to decision-making. Why should a private partner of government in the design and construction of a major infrastructure project enthusiastically embrace the full consultation model

that many governments have evolved over the years? It is focused on “cutting a deal”, not due process. At a more general level, it has been postulated that there is an inherently anti-democratic bias in some ASD arrangements because they lessen citizen influence on policymaking by cutting off policymakers from direct contact with service delivery and allowing corporate partners policy latitude not available to other stakeholders (Paquet, 1997, p.34; Gow, p.573-5; Langford, 1997).

6. The Ethics of Information at the Edge of Government

In recent years, transparency or openness have become much more respected values across governments of the member states of the OECD. The value shift is so pronounced in some jurisdictions that public servants must have a legally defensible reason not to provide information to the citizen. Even in jurisdictions where the value balance still favours traditional notions of confidentiality, the trend is in the direction of openness.

Some ASD arrangements (eg. devolution of authority to local or regional boards or community corporations) accent openness and transparency, providing board members and employees with opportunities to provide more information to individuals and groups most affected by their operation. In other ASD mechanisms involving partnerships with for-profit organizations, openness competes with the inclination to keep information secret from competitors and to not share information with the public unless absolutely required. Ironically, in some jurisdictions, firms in partnership arrangements with government are able to take advantage of (ed:note deletion) clauses in freedom-of-information legislation designed to protect the commercially valuable information belonging to firms doing business with government from falling into the hands of competitors. Finally, with respect to openness, it seems reasonable to speculate that breaking up government organizations into separate operating units at arms length from the ministry will create both barriers to communication between the units and incentives to distort and conceal information in circumstances where there is continuing competition for service delivery contracts with government.

Privacy protection is another facet of the ethics of information. This may be a particularly significant ethical challenge in jurisdictions where public and private sector approaches to privacy protection are different (eg. Australia, Canada, United States) and private sector activities are not covered by comprehensive privacy legislation. In such circumstances, personal data are often viewed by private sector partners as commercially convenient or even exploitable commodities. For example, one Canadian provincial government has entered into a joint venture with a private sector firm to build and run a new toll highway. Insensitive to the kind of “big brother” privacy concerns that governments face regularly, the firm wants to use transponders or cameras to record users of the facility for billing purposes. In the United States, private firms entering into partnerships with government agencies to deliver custodial or enforcement services (eg. managing prisons, collecting support payments from “deadbeat” dads, reducing welfare fraud) want to make wide use of fingerprinting and information technology designed to track individuals through geographic moves and name changes. One collection agency in Canada has even established a web site featuring “most wanted” posters for parents who owe support payments to a spouse. The willingness to use any available intrusive technique combined with a loose approach to the management of personal data is a potentially explosive combination in a partnership with government. This is especially so when private sector partners are often privy to the most intimate health, employment, criminal and credit records of citizens or ex-government employees which previously were the sole responsibility of government to safeguard (Canada, Privacy Commissioner, 1991-2,1992-3).

7. The Threat to Policital Neutrality

The bureaucratic culture and rules within the governments of industrialized nations have generally embraced the notion that public servants should observe some degree of political neutrality. This value dictates that public employees be appointed on the basis of merit, that they refrain from most forms of partisan political activity and political advocacy, that they remain anonymous at least with respect to their advice on policy, and that they loyally execute their government's policy decisions. Many of these traditional expectations may be threatened by the movement to ASD.

Taking on partners may open up new possibilities for ministerial patronage. There could be a real dilution in the merit principle in the provision of services if contractors are political appointments or if private partners (ed: note deletion) are willing to hire supporters of the politicians who provided them with service delivery responsibilities. On the other hand, if the adoption of ASD involves drawing a sharp line between the service delivery and policymaking functions of the minister and his/her advisers, then the new service delivery arrangements might lead to a reduction of political patronage in circumstances in which merit hiring was already shaky (Rhodes, 1994, p.145).

Problems with partisan activity and political advocacy have already been experienced in a number of jurisdictions. Contractual or purchase-of-service arrangements can create circumstances in which the various funded agencies become singly and cooperatively involved in lobbying activities directed at the funding government. This a particular concern where the agencies in question already had strong advocacy roles before entering into partnerships with government. The board members and employees of such organizations view advocacy and even intensely partisan activity as an integral part of their function. This problem can be further complicated when an organization (eg. in the social service or environmental area) enters into a partnership relationship with a sympathetic Government and then, after an election, finds itself locked into a continuing relationship with a Government espousing very different ideas. Where public servants would loyally bend with the prevailing policy of the government in power, politically or religiously committed private sector agencies may stand and fight. Governments often respond with funding cuts and contract cancellations.

Others have raised almost diametrically opposite concerns about the capacity of partner organizations "to speak truth to power"(Doering, 1997). A responsible public servant feels obligated to provide professional, expert advice concerning the public interest to political masters and, in most jurisdictions, is protected in so doing. But employees of partner organizations may feel more constrained about the advice they provide, especially as the date for contract renewal draws closer. The ethical challenge in this case is created by the lack of permanence in the partnership relationship.

All of these scenarios add up to a daunting situation for ministers. Instead of dealing with a substantial, permanent bureaucracy made up of loyal, professional, and anonymous public servants, a minister in the "hollowed out" state may have only a small group of advisers to help him steer a bewildering array of noisy partner agencies of uncertainty loyalty and affiliation. It is a formula for political expediency, opportunism, and confrontation (Rhodes, 1994, p.150, Goodsell, 1985, p.155) .

8. More Conflict of Interest

The prospect that both the "new" public service and the motley assortment of ASD arrangements emerging in many OECD countries will inevitably be staffed by "a new self directed, entrepreneurial employee who gets along by looking after number one" is a disquieting one (Tamas, 1995, p.615). Such employees are bound to feel less commitment and loyalty to their organizations and, therefore,

more open to consider actions which will enhance their personal interests even if they are at the expense of the wider interests of the organization and the public. Employees of a private service provider working in a competitive business environment (eg providing trade intelligence to export firms on behalf of the government) may be pressured into closer identification with one customer than another through the promise of inducements. Such employees may also be subject to intense recruitment pressures from the target firm as they become more knowledgeable (Canada, Task Force, 1996, p.49). Given the ethos and limited job security of the for-profit sector, employees of partner organizations are always going to be under more pressure than their public sector counterparts to share insider information or to seek a “soft landing” in a new job as the present one comes to an end.

Whatever undertakings about good behaviour their supervisors may have made in contracts with the state, private and public interests can get muddled in contractual relationships. Concern for the bottom line can push private sector partners to chisel away at deliverables that are hard to measure. Contract renegotiations can provide an opportunity for a private sector supplier to take advantage of the difficulties (eg. service interruptions) that government would face if it had to find a new contractor (Trebilcock, 1997). They also provide the opportunity for bid rigging, bribery, and influence peddling in the relationships between service providers and contract managers (Ehrenreich, p.51).

Conflict of interest rules for the non-profit sector have not usually been as carefully worked out as they have been in the government and commercial sectors. Potential conflict possibilities abound for board members of contract or joint venture agencies. For example, it is not uncommon for directors of a non-profit health care organization to have ties to organizations that enter into business transactions with the society or otherwise receive money from it. It is also not unusual for the executive director to be an influential voting member of the board and propose and vote on a salary raise for herself. In smaller religiously oriented organizations, it is sometimes the case that the executive director is also a paid leader of a religious organization (British Columbia, Law Reform Commission, 1995; British Columbia, Commissioner of Conflict of Interest, 1993-94, p.14-15).

I don't think that there is much doubt that the dangers that personal interests will subvert the achievement of the wider public interest are more prominent when government enters into partnerships with private sector service providers. Buying a stamp in Canada now involves running the gauntlet of an entire drug store to reach the post office franchise at the back. In the United States, private providers of electronic welfare payment machines have created systems to sell lottery tickets through the same machines. Are these private agents offering a public service, or merely providing an opportunity for shopping? Dealing with conflict of interest will be a serious challenge in an ASD world.

9. Placing the Public at Risk

In recent years, public sector agencies have become much more conscious of the ethical issues explicit in situations in which government actions (or inactions) create risks for citizens or government employees. Innumerable cases involving the release of dangerous criminals into the community, the mismanagement of hazardous wastes, the construction of unsafe infrastructure, and social or medical experimentation involving members of the public have sensitized governments to obligations related to informed consent and compensation. At the same time, mitigated only by the regulatory efforts of governments, the for-profit sector has continued to establish a sorry record of

taking chances with the lives, health and finances of citizens and the quality of their environment and then contesting liability to the highest courts.

The emergence of a new world of private sector service provision and co-operative self-regulation, therefore, can only be greeted with concern (Kernaghan, 1994, p.625). The focus of private sector partners on innovation, creativity and the bottom line, actually builds the idea of taking risks into the delivery of services and increases the possibility that mistakes will be made at the expense of the citizen. In this context, the use of a non-profit society as the form for the recent privatization of the air traffic control function in Canada was a significant architectural choice, removing the profit motive (but not the “bottom line”) from the delivery of a complex, public safety service.

Placing significant responsibility for monitoring, testing, and reporting into the hands of private sector partners under the guise of cooperative self-regulation (eg. in areas as diverse as elevator safety and drug testing) is bound to increase the moral hazard. “The relaxation of regulations encourages lax enforcement and capture of the regulators” creating more chance of catastrophe (Rhodes, 1994, p.149). The sharing of regulatory power becomes even more problematic as governments take on more complex, regulatory issues in areas such the production of hazardous products and the use of reproductive technologies.

10. Accountability is Even More Confusing

Traditional notions of accountability were in trouble before ASD began to be taken seriously. The devolution of authority within traditional ministries to organizations such as executive agencies had already raised the issue of the degree to which ministers could be held to account for the administration of programs. In addition, the service orientation of NPM had brought new force to the argument that in a customer-centred organization, public servants involved in service delivery should consider themselves primarily accountable to the citizens they serve (Aucoin, 1995, p.218). Finally, the emphasis on accountability for results had already begun to raise questions about what good performance reporting looked like.

ASD doesn't transform the nature of the accountability problem; it just makes it harder still. First, the addition of a variety of private sector partners to the portfolio headed by a minister makes that portfolio that much more devolved and complex. Such partners are, by design, provided with enormous latitude to achieve a specified outcome objective as they see fit. This allows for novel solutions but further distances the minister and his/her senior officials from questions about how these outcomes were actually achieved. “(S)heer institutional complexity obscures who is accountable to whom for what” (Rhodes 147-8). Pressure for more direct accountability of the heads of private sector partners to the legislature would seem to be an inevitable result of this further fragmentation of service delivery. It remains to be seen whether or not citizens are going to continue to demand that political leaders remain ultimately responsible for the actions of their many agents. The alternative is that heads of partner agencies take public responsibility for the actions of their organizations and accept the public profile and political vulnerability that comes with it (Hubbard, 1997, p.2-3).

Second, by virtue of the addition of private sector partners, the pressure for accountability to the customers or clients is increased. Especially in circumstances when customers are paying for more of the service directly, employees of partner organizations are often extremely receptive to the notion that their primary accountability should be “outward”. In areas which are still fully funded by the state (eg. social services and health care), initiatives have been taken to create meaningful accountability relationships between non-profit delivery agencies and consumers through community-

based boards. Devices like the Citizen's Charter in the United Kingdom require the satisfaction of citizens as consumers and "erode(s) the broader values of the public service ethos" (Rhodes, 1994, p.145). Increasingly, one of the victims of that erosion is the notion of upward accountability for employees and heads of ASD mechanisms.

In some instances, accountability for results has been given a substantial boost by ASD. Public-private infrastructure partnerships often provide an opportunity to provide sharply focused outcome based evaluations. Even in areas such as health care, solid, measurable connections can be made between intervention and results. But, in social service areas, where the majority of ASD activity takes place, performance measurement is underdeveloped and often opposed by partner agencies. Not only are appropriate outcomes difficult to specify, but agencies resist centre-inspired outcome measures which, they argue, foster competition, undermine the servicing of difficult clients, and conflict with their long-standing service priorities (Panet and Trebilcock, p.43-7). The more general disadvantage of the results-oriented approach is that it tends to downplay accountability for safety, due process, professional standards, and probity - the very issues which are the focus of this paper. The message of performance-based accountability is "tell me where you got to, but not how you did it". This is surely one of the major ethical challenges of ASD.

11. Will the Increased Involvement of the Private Sector in Service Delivery Lead to a Satisfactory Synthesis of Values?

It has been argued that certain values (eg. caring, honesty, accountability, promise-keeping, pursuit of excellence, loyalty, fairness, integrity, respect for others, and responsible citizenship) are key to the ethical success of any organization, public or private (Guy, 1990). Exploring recently expressed values of Canadian public sector organizations, Kernaghan demonstrates that public sector reform has allowed private sector values to permeate and mingle with traditional public service values (Kernaghan, 1994, p.620-22). This suggests the possibility that the blurring of the lines between the public, for-profit, and non-profit sectors may lead eventually to the emergence across the three sectors of a common and widely-endorsed set of values such as those proposed by Guy. This is an attractive thesis. It disarms those who see only danger in the apparent erosion of traditional public service values and who, therefore, demand a return to a simpler world of fully public service delivery. It also obviates the need to develop a regime of rules and enforcement devices to manage the behaviour of the board members and employees of these new colonies of state agents. If NPM and ASD will lead us towards congruence around appropriate common values (the best of both worlds), then we don't have to fret about the possibility of accepting a trade-off between more efficient, effective, and responsive service, on the one hand, and higher incidences of corruption or impropriety, on the other. There will of course continue to be ethical dilemmas, but they will not be compounded by a general confusion about which standards - private or public - are to be applied. To extrapolate a popular thesis, "history will end" with the melding of the ethical values of democratic administration, the free market and voluntarism.

Others are less sanguine about the possibility that private sector values can integrate easily with traditional public sector values. Paquet notes that for some observers, value co-existence is facilitated by isolating new service delivery vehicles from core functions of government except for the contract which joins them (Paquet, 1997; Aucoin, 1995). But co-existence is not the same as integration, and value dissonance between the two sectors would promote the possibility of contrasting approaches to ethical dilemmas. Borrowing an argument from Schumpeter, Paquet outlines a second scenario in which there is more interactive value traffic between the public and private sectors because of ASD.

In this scenario, tinkering with the technology of service delivery may lead to a new, integrated value paradigm across the public and private sectors, but it is by no means a sure thing. Finally, Paquet explores the thesis that we have blithely and wrongly assumed the possibility of mixing the best of public and private sector values (Jacobs,1992; Mintzberg, 1996)

“Individuals operating in one syndrome cannot and should not be expected to act as if they reside in the other. As a result, the misunderstandings and perpetual conflict between private entrepreneurs and state officials become reducible to a stalemate with no solution. Indeed Jane Jacobs goes so far as to state that if and when the two syndromes are mixed, ie.when there is any effort to elicit a ‘mixed’ way to institute anything, this can only produce ‘monstrous hybrids’.” (Paquet, 1997, p.39).

Mintzberg, in fact, sees four sectors, not three; the fourth being cooperatively owned organizations, controlled by their suppliers, customers, or employees. In his view, the value integration between the public and for-profit sectors may be more easily achieved than the creation of connections between either of those sectors and the voluntary and cooperative sectors. He sees no advantages and some significant disadvantages in allowing private sector values to displace the key values of the other sectors. (Mintzberg, 1996, p.83)

I am persuaded that there are ethical challenges created or accentuated by the forced marriage of the public, for-profit, cooperative, and non-profit sectors under the ASD banner which will not simply disappear in an easy integration of the values of the three sectors. These challenges may even be more daunting where the ethical standards of a public government come up against those of a partner aboriginal government in which officials will be driven by obligations of clan or family (Pocklington and Pocklington, 1994). Even if standards in both sectors were to evolve very gradually towards a widely acceptable new paradigm of mixed public and private sector values, in the interim period, ministers and appointed officials will have to deal with the ethical “shocks”, media hysteria, and public confusion that ASD experiments can and will generate. In the short run, at least, they may be pressured to measure the behaviour of their new partners against traditional public service standards. In the long run, they may have to assume responsibility for establishing standards of ethical conduct for an extensive and varied collection of public/private state agents.

12. Should governments Create an “Ethics Infrastructure” for Private Sector Partners?

Having established at least a *prima facie* case that the increasing reliance on ASD mechanisms will confront governments with ethical challenges, the obvious question is what, if anything, they should do about it. My necessarily preliminary survey suggests that, to date, governments have not taken this problem seriously. In many jurisdictions, we have married the public and private sectors together in innumerable partnership arrangements without much thought as to where and in what circumstances we should attempt to impress public sector ethical values upon our private sector partners.

While there may be no visible political commitment to tackling this issue in a comprehensive manner, this is not to suggest that there have been no initiatives or expressions of concern relevant to this issue. Task forces, study teams and standing committees on ethics created by governments in recent years have at least acknowledged the problem and, in the case of the Nolan Committee in the United Kingdom, actually made some publicly available recommendations on topic (United Kingdom, Committee on Standards in Public Life, 1994; Canada, Task Force on Values and Ethics, 1996). The legal framework has not changed perceptibly in response to the ASD movement, but, in some jurisdictions, the provisions of freedom-of-information, privacy and ombudsman legislation have

been flexible enough to allow for the extension of minimum standards in these areas to partner organizations through contracts. The Nolan Committee recommended the involvement of the Audit Commission in quango activities (United Kingdom, Committee on Standards in Public Life, 1997). Similarly, as noted, there have been instances in which the accountability of ASD mechanisms to the public has been enhanced by the use of community boards. Upward accountability for results is becoming reasonably well developed in some jurisdictions, but this, in some cases, has been at the expense of accountability for procedural matters such as fairness and conflict of interest.

Some governments are modifying system-wide public service codes of conduct to apply to the MUSH sector (Municipalities, and publicly owned and operated Universities, Schools and Hospitals) and public bodies (eg. state enterprises, arms-length regulatory agencies), but there have no sustained efforts to develop codes of conduct for the further reaches of the public-private frontier. There is no evidence that I am aware of organized professional socialization (education, training, role modelling), coordinating ethics bodies, or public involvement and scrutiny initiatives (with the exception of the use of community boards in health care and resource management partnerships) directed towards making board members or employees of partnership organizations more sensitive to public service ethical values.

The “action” option is just to get on with the construction of an ethics infrastructure for the world of partnership delivery. Extrapolating from Lord Nolan’s recommendations for quangos in the United Kingdom, a suitable central agency (eg. the cabinet office) would be given the responsibility by ministers for ensuring the transmission of some amalgam of public service and private sector values to private sector delivery partners. Guardian organizations (eg. ombudsman, auditor-general, etc.) would be provided with more direct authority over the actions of private sector partners. Each private service delivery organization - overseen by its public partner - would have to adopt a code of conduct based on the existing government-wide code. Contracts could be used by the public partner as a vehicle to lay down behavioural expectations, focusing attention on the manner in which service will be provided, political neutrality, safety protections for citizens and employees, data protection for clients and contractor proprietary information, financial probity, conflict of interest, and managerial accountability. Employees and, if relevant, board members would receive training with respect to the standards and an ethics officer would be appointed for each organization to investigate internal complaints. Arrangements that were working well could be held up as examples for other private organizations to follow.

Frankly, I doubt that any government in an OECD country is ready to take this kind of concerted action. To start with, we haven’t even begun to work out the degree to which we should expect and demand consistency of ethical behaviour between public and private organizations involved in the provision of state services. In the short run, the media and the public may demand consistency and seek to call ministers to account if they don’t find it. But in the longer run, mindlessly applying the same ethical rules of engagement to the operation of private sector partner organizations may undo many of the advantages for which we have adopted public-private partnership models in the first place. Moreover, we have not taken enough time to test the reactions of the public to the behaviours they will encounter when they seek service from relatively unregulated private sector service providers. We may find the public willing to accept the “untidiness” of a wide variety of ethical standards across the public-private continuum. Tolerance of risk-taking, procedural inequities, conflict of interest and other forms of unethical behaviour may, in fact, rise with service levels. After all, it is not as if the public already encounters a consistent standard of behaviour from public servants working in different public bureaucracies (Kernaghan, 1995, p.617; Kemp, 1993).

I am not suggesting a “no-action” option. Rather, I am recommending that instead of seeking instant answers we treat this potentially momentous transformation of the state as a serious long-term ethics project. The nature of responsible behaviour for private sector partners (and even many public servants in an NPM environment) is a “contested concept” which needs to be worked through carefully over an extended period of time (Paquet, 1997a). To reach any form of consensus, we must accept the existing pluralistic tension among public, for-profit, and non-profit value sets. Starting there, we can work through specific dilemmas that arise with a view to seeking consensus about “goodness-of-fit” of a particular standard. In discarding the search for simple rules and someone to blame, we open up to the possibility of social learning at this shifting interface between the public and private sectors. In the meantime, governments need to monitor the behaviour of private service providers closely and deal with clearly unacceptable behaviour (eg. illegal refusal of service, obvious conflicts of interest, etc.) expeditiously. While members of the public may adapt over time to public service provided with entrepreneurial style, they will be far less tolerant of any inroads into their rights as citizens.

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TOWARDS GREATER TRANSPARENCY?

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1. Executive Summary

The aim of this paper is to present ethical challenges and the significance of transparency as a means of responding to ethical challenges. The perspective is that of an observer from a country under transition.

A more accessible and open state administration along with transparent activities in the public sector develop a climate which is conducive to uncovering unethical behaviour. This is why transparency encourages ethical behaviour. It is important to ask, however, if the relationship between transparency and ethics is automatic: Do techniques meant to increase transparency always encourage ethical behaviour? Transparency is not only a tool used to encourage ethical behaviour -- it does have other functions as well.

A “Time of Changes” does not mean the same in countries with a lengthy tradition of democracy as it does in countries which are making the transition to a market economy, democracy and rule of law. The latter must make far greater effort than mature democracies in order to:

- free themselves from their old ideas of ethics in the public sector and from the conditions which have formed such ethics
- fight the threat and pathology connected with the transition process itself -- factors which are not to be found in mature democratic states

2. Information Sources -- Corruption in the Public Sector

It is impossible to precisely define the breadth of corruption in the public sector. Criminal statistics are unreliable due to the problem of the “dark number”, meaning a good, but unsubstantiated, estimate. Sociological studies reflect society's conviction that corruption exists, rather than shed light on the phenomenon itself. The corrosion of public trust which has grown out of corruption in the public sector, however, is not only determined by the real breadth of the corruption, but also by the widespread conviction that it exists, even if there is no factual proof of its existence. This conviction that corruption in the public sector is widespread is due to:

- The belief that every period of fundamental economic and axiological transformation is conducive to corruption

- Press articles. No longer censored, the press can now write freely about topics that were once forbidden. Furthermore, by giving in to the pressures that come with commercialisation, the press often dramatises alleged reports of affairs involving corruption, however, if the reports turn out to be unfounded, corrections are not always printed. Moreover, opinion polls indicate that respondents form their opinions on corruption based on information from the media rather than from their own personal experiences.
- Public opinion polls. Corruption and public opinion has been an on-going subject of surveys in Poland (March 1992, Dec. 1992, March 1994, April 1997). The results from the April '97 poll indicate that 20 per cent of the respondents personally gave a present or money during the last four years in order to arrange something or to speed up the arrangement of something (of these respondents, 45 per cent gave to arrange something in the public health care system; 14 per cent gave to administrative organs; 8 per cent gave to take care of a housing matter). Over half of those surveyed, however, believe that corruption is widespread or very widespread in the public sector, particularly in banks (78 per cent of respondents), when arranging contracts, public contracts/bids (72 per cent), acceptance of bribes in exchange for taking care of a matter (69 per cent), abuse of public funds to finance one's political party (56 per cent). Forty-five percent of respondents are convinced that corruption exists in public administration, 41 per cent believe that it is present in the judicial system, and 39 per cent believe in its presence in the police force.

When estimating the dynamic of corruption, the largest group of those surveyed (38 per cent) believe that the level of corruption amongst high-level state officials remained the same regardless of who was governing. Over the last two years the number of persons who suspect corruption among the present officials has decreased by 16 points. In addition, the number of persons surveyed who are convinced that embezzlement of public funds is widespread and the number of persons who believe that "postcommunist" officials (also referred to as "social democrats") are characterised by a particular weakness for fraud and abuse of public funds, has dropped by 16 points.

Hence, there is a lack of reliable tools by which to measure the scale of corruption in the public sector. Sources of information on this topic are, by nature, always secondary. It is important to note that the media (as an instrument which is conducive to transparency in public life) play an ambiguous role here: they are the main source creating the conviction that the public sector is corrupt, while at the same time it is hard to say how much this conviction is based in reality. This is by no means an argument against freedom of the press as an instrument of transparency, nor against transparency in and of itself. It simply goes to show how little we really know about corruption in public life.

3. Transparency as a Phenomenon and as an Instrument for Reinforcing Ethics in Public Life

Contemporary governments are going through a legitimisation crisis. A classic parliamentary democracy whose existence is legitimised by direct elections now looks for other sources of legitimisation as well. All types of instruments of participation, direct democracy, agreements and dialogue which precede the proclamation of law are examples of the legislature's search for additional legitimisation. The executive is also seeking legitimisation -- through dialogue in which he "accounts for" his plans and seeks support for his policies; by making himself more accessible to the

citizens; by increasing the transparency of his staff and office. Even the third power, the judiciary, now has to use a new style, a style more easily understood by society to justify its decisions. And because the basis of dialogue is transparency, and the search for a way to create dialogue is due to the search for additional legitimisation of power, it can be said that contemporary transparency is the key concept -- the legitimising tool -- of a modern democracy.

Transparency is understood here as being transparent to society, the public, the ruled, the governed. It is conducive to promoting ethical behaviour in public life because unethical behaviour likes to remain hidden.

Transparency in public life is, therefore, worth promoting as a legitimising factor in a contemporary democracy and at the same time a factor which creates a climate conducive to ethical behaviour in public service.

This understanding of transparency differs from the concept of transparency used in management science. Management science is not interested in increasing the transparency to *society*, but rather increasing the transparency of employees to their *supervisors* who manage a given organisational unit (an office). This is where we have heard of techniques such as various internal procedures, close supervision, whistleblowing, etc. These techniques do not serve to legitimise, but to make the system function more efficiently, to eliminate errors, for example, which are rooted in corrupt behaviour. From an ethical point of view, these techniques are questionable -- informing on others is not, as a rule, seen as ethical behaviour, regardless of the ends that it is meant to serve.

To conclude, transparency to society as a method of legitimising authority is always worthy of support and is always conducive to promoting ethical behaviour in public service. Transparency understood as various techniques employed to make public service function more efficiently by eliminating corrupt behaviour (generally speaking) does not always mean the promotion of strictly ethical behaviour. Some of these techniques may be questionable from an ethical perspective, especially those which mean to make public service employees transparent only to their supervisors.

The limit of transparency is the protection of privacy. This applies to information concerning both the governed and government officials (for example, a low-level government official might not want any personal information [i.e. last name] made available to the public), and information obtained by the authorities from the governed (for example, tax statements). There is no one, clear and common criterion by which to weigh the various personal rights.

The privacy of politicians is not protected to the same degree as privacy of the governed. Political government officials are subject to a higher degree of transparency than civil servants due to the fact that the latter are subject to stricter procedures of disciplinary and deontological responsibility. In many cases elected officials are only responsible *politically*, hence the important role of transparency in their case.

Transparency of the governed and of information obtained from them has the most strict limits because there is no legitimising role being played in this case. Here the weight should be in favour of privacy rather than transparency. The need to violate the right to privacy must be considered in proportion to the purpose of transparency in a given case.

The press and media play a key role in promoting transparency as a factor legitimising those in power. However, when speaking of the elimination of corruption, freedom of speech alone cannot be counted on to reach this goal. Due to commercialisation, often the press, along with radio and

television, are preoccupied with chasing after attention-getting stories. They are not always consistent, partly due to the fact that some journalists are not skilled, some are inexperienced, and some do not have the stamina to follow a case carefully and completely. Though the press plays a very significant role as siren, we should not get our hopes up that just because the press is no longer censored it will begin playing a greater role. It is also necessary to remember that (see points 4 & 6) media are the source (and not always a reliable source) of the belief that the scale of corruption in the public sector is greater than it truly is.

4. The Nature of Corruption in the Public Sector in a Centrally Planned Economy

When the economy was centrally planned, more or less until 1990, the standard of living was not very diverse. Even at the very top of the social hierarchy “conspicuous consumption” was not to be found. The supply of goods and services was modest, even if the potential consumer had money. Hence the common reference to “peasants' socialism” (laboured and severe). Such virtuous resistance to material desires was due to a shortage of goods and services, and taking advantage of one's wealth was considered to be “unseemly”. A system based on the planned distribution of goods and services is by nature prone to corruption (arbitrary decisions made without any set procedures and a lack of judicial control) and by nature breeds a “shadow economy”.

Before 1990, however, taking advantage of the shadow economy did not lead to widespread corruption due to the small supply of goods and services mentioned earlier. A deficit economy, characteristic of a socialist state, joined with an arbitrary style of management, led to a particular kind of corruption in the public sector: a widespread system of “connections” and “access”. The purpose of this corruption was to gain basic material goods (medicine, higher quality food, building materials, etc.). In extreme cases it meant access to an apartment or permission to buy a car. This kind of corruption was tolerated by society because the deficit economy imposed it on daily life.

5. Ethics and Corruption in Countries under Transition: Characteristics and Causes

In states that are currently under transition, tolerance of “daily corruption” clashes with the change in the type of corruption. The slogan popular today -- “get rich” -- and the goods and services offered by the market have increased incredibly, breeding temptation earlier unknown and spectacular, both in terms of size and forms of gratification. Society is “hungry for luxury”. In countries under transition this means a need for cars, apartments, appliances, furniture, electronic equipment, none of which is necessarily a luxury item by Western standards, however, of such a quality that was never before available on the market in this part of Europe. As understood by society, the definition of corruption is problematic axiologically. And when it comes to fighting corruption, there is a lack of tools and professional training.

The deficit of ethics in the public sector of the countries under transition has its own particular roots. Here are some:

- A rapid, almost instant, collapse of the value systems that had been functioning. This means a collapse of the old official value system as well as a collapse of the values which existed in opposition to the official system: the ethos of fighting the system as a goal in and of itself is appropriate when destroying an old order, though it becomes futile when the aim is to build a new system, and to build respect for government and law. The

process of creating new values and forming a new hierarchy of these values is very slow and rarely done consciously by those going through the transformation.

- The most important problem is the shadow economy, literally “*the grey zones*” into which the arm of the law cannot reach. In Poland this term is used differently than in the West. It refers to an area in which illegal or forbidden actions are conducted that is out of reach of the institutions of law enforcement and/or regulatory agencies due to their inefficiency. Whereas in the West, “the grey zone” refers to activity that is formally legal, though condemned for ethical reasons. After the systemic changes in Poland took place, the slogan “whatever is not forbidden is permitted” has become quite popular. It is used to defend actions or behaviour which are formally legal though considered to be unethical. Those who accept this slogan believe that it helps legalise and justify behaviour that is *unethical* but not *punishable* by law (if something is “permitted”, meaning “not punishable by law”, it is considered to be the same as “ethically irreproachable” behaviour). This semantic misunderstanding does not make it easier for people to understand the corruptive threat that is connected with the “grey zones” (in the meaning given this term in the West). Furthermore, it is a good example of the axiological confusion related to the perception of corruption during the transition period.
- A multi-polar relationship involving political pluralism, citizens' initiatives, NGO's, lobbies, and interest groups has started to replace the bi-polar relationship of state -- citizen. The completely different rules of behaviour in this multi-polar relationship are not widely understood and breed chaos and a sense of axiological disorientation. Furthermore, the evaluation of behaviour in the public sector therefore has no stable, ethical points of reference. There is a lack of awareness of the dangers of conflicts of interests and conflicts of roles.

Using a metaphor, up until recently there were only two roles for the actors on the public stage: that of the government and that of the governed. The number of roles on the public stage has increased. Some remain in conflict, particularly those which concern participation in public life and in economic life. Would-be actors have not noticed that there is a greater choice of roles and that deciding to play one part means that they cannot, at the same time, play another without damaging their reputation.

- The difficulties that some officials are having with understanding the existence of conflicts of interests stems from their incomprehension of the meaning of the prohibition of “collective guilt”. This prohibition has been used as a defence in situations in which “a conflict of roles” refers to behaviour or actions of immediate family members. For example, a public official’s spouse’s computer firm wins a public bid to supply government offices with computers. The press hints that this is not entirely acceptable conduct, maybe even a conflict of roles. It is not unusual to hear such a response , *It has nothing to do with me -- it's my spouse's business.*
- The lack of awareness that the corruptive nature of role fusion arises not only when (as in a welfare economy) public officials make decisions about property and the market at their own discretion, but also when someone in power who is by definition to perform a government function commercialises his department or agency. An example of this is the hiring of the police to maintain public order and safety at sporting events (i.e. large stadiums) or economic activity conducted directly by government organs (i.e. local

government embarking on income-generating ventures directly rather than via an independent business entity).

- The deep politicisation of ethical references (behaviour in the public sphere is judged in terms of good and bad depending on the political faction involved) has brought about a situation in which ethics are understood as circumstantial or relative -- as a political tool.
- The transition to a market economy gave fruit to the conviction that commercialisation and the sponsoring of the public sector are the ideal panacea for its effective functioning. Once this conviction came to life, though, it blossomed into corruption. In public opinion polls conducted in March 1994, over 50 per cent of the respondents stated that state institutions should not accept gifts/donations in the form of equipment (health services) or money from private sponsors. (Naive faith in the advantages of commercialisation led to widespread sponsoring in the period 1992-95 . This was also practised in the police force, though no longer, due to the severe corruption which resulted).

6. Difficulties Faced by Public Institutions in their Fight against Corruption

The fight against corruption in the public sector is conducted in two ways: by law and by public condemnation.

Where corruption is punishable by law, the fundamental problem is the inefficiency of the police and the judicial system. The latter is very slow, inefficient and overwhelmed by the number of cases. The courts most likely are also touched by corruption to some degree (though not to a significant degree), yet the scale is not known. Poland serves as an example here, however, this is typical of the judiciary in countries in transition.

Here are some good examples of measures taken against corruption:

- Article 412 of the Civil Code allows for the confiscation of property (or an equivalent fine) to be paid to the State Treasury in response to any act that is deemed unlawful or dishonourable. This regulation can be applied in the case of corrupt behaviour. It remains a theoretical possibility, since it has not been widely applied.
- The new Criminal Code will be effective as of 1998 which includes regulations similar to those recommended in the report.
- The new Act on Limits on the Financial Activities of Public Officials was passed by Parliament (August 1997) . It is very strict concerning the prohibition of carrying out both financial activities and public office at the same time. It also widens the sphere of information which must be divulged in financial/property reports filed by persons in the public sector. Furthermore, elected officials of local governments are prohibited from carrying out any additional functions and from accepting gifts/donations which might be considered unacceptable by the public. They are also not allowed to take advantage of their mandate to conduct any private financial activities on their own or with another person.

- The new Act on Protection of Information was passed in August 1997 the purpose of which is to adapt Polish legislation to the needs set out in Convention 108 of the Council of Europe. This is an important instrument for defining the limits of protection of privacy, meaning that the limits of transparency are defined here as well.

Legislation and the Criminal Procedural Code are slowly being revised to apply to new forms of crimes. The new Criminal Code (as of 1998) introduces new crimes such as laundering money and banking crimes. Recently, the institution of “surveillance purchases” (sting operations such as legal provocations by the police) and the possibility of testifying “incognito” have been introduced in Poland. The effects of these changes have not yet brought about visible results in the fight against corruption.

The tightening of procedures regarding public expenditures is in progress (Act on Public Contracts of 1994). However, the problem here is the system of import licenses, exemptions (duty, tax), quotas (“manually steered” economic decisions at the micro level), difficult to “tighten procedurally” and very conducive to corruption and conflicts of interests and roles.

Corruption characterises the relationship between the corrupter and the corrupted. The inefficiency of the regulatory system has brought about a situation in which the possibilities of exposure and punishment do not deter corruption. (The temptation and opportunities are great -- the chance of getting caught -- not so great). In the fifties, according to Polish law, the corrupter could avoid punishment by admitting, during the first interrogation, to offering a bribe. This had the effect of destroying any solidarity between the two alleged criminals. This practice, however, has not been conducted for over 30 years.

7. Institutional Difficulties Faced in Achieving Greater Transparency

Poor regulation by the media makes it difficult for public opinion mechanisms to act effectively. In their frequently inconsistent and superficial reports on corruption, the media tend to over-commercialise, over-politicise, and chase after sensation.

Achieving greater transparency is not easy due to the following:

- the toleration of undisclosed informal procedures such as “advice” or “adjustments” which precede or prepare formal decision-making sessions
- not enough attention paid to the division between state and party functions and activities by particular officials. In this matter officials should be exceedingly careful to soothe public opinion.
- public sector officials fail to sufficiently “account for their actions” publicly (via media)

It is relatively easy to create new institutions and regulations. It is much more difficult to ensure the competent functioning of the ones that already are in place. In the last few years, attempts have finally been made to introduce solutions that would promote transparency. These remedies function with difficulty due to the fact that they are not understood (i.e. holding an official function in both the public and private sectors is prohibited); due to the ineffective manner in which the remedies are instituted; due to the desire to manipulate the remedies in a political manner.

It is important to concentrate on strengthening the legal remedies that already exist since they are appropriate and free from political manipulation. This concerns, for example, financial disclosures submitted by Members of Parliament and high-level public officials before they began their public functions (slow compliance with this, or outright disregard for it is tolerated), a register of benefits (for the purpose of disclosing gifts, gratuities, bonuses, etc. for parliamentarians). This register is about to be activated. Slow compliance and non-compliance with obligations concerns political parties which have not accounted for their campaign expenditures and have not disclosed their sources of financing. Furthermore, the opportunities provided by law are not utilised, for example, civil law provides for cases of profit made by fraud.

The reinforcement of internal inspections should be continued (such efforts are underway in the police force -- "policing the police" -- and are being considered for the prosecuting attorneys' offices).

The recent introduction of greater access of the state financial administration to confidential banking information without court or prosecutor's approval is, however, hard to accept. The state financial administration acts selectively and opportunistically, and moreover, is not free from political pressures. This newly introduced freedom for the state financial administration is one of the conditions that Poland had to meet in order to qualify for membership in the OECD. However, the opinion of the Commission on Poland's application for membership in the European Union, referring to these same regulations, accuses Poland of violating the right to privacy ! This example indicates that even experienced international organisations which are fully aware of the international standards of transparency are having difficulty formulating a uniform position. And this, of course, does not make the situation any easier for countries in transition.

8. Remedies

It is vital that instruments which are conducive to transparency be reinforced. Transparency in and of itself needs to be strengthened as an element of democracy and as a means to create a climate not conducive to corruption.

One major advantage that transparency has over other instruments for fighting corruption which require the administrative and judicial apparatus is that, by appealing to public opinion, transparency creates an atmosphere in which corruption is condemned and discredited.

Efforts to create a politically neutral civil service are worthy of the greatest support. (A post-graduate school of public administration was opened a few years ago). For two years now efforts have been made to create a civil service, though it has come across barriers put up by (various) political factions.

Much needed is the strengthening of serious, critical media which would be free of populist sensationalism and be capable of objectively reporting on cases of conflicts of roles and interests, promoting transparency and popularising an axiological order in matters of legal and ethical responsibility for corrupt behaviour.

There is much hope to be found in the creation of ethical codes for various professions. However, the method used to prepare these codes is faulty. They are too abstract, do not refer to concrete occupational situations and are written as normative acts in the form of general clauses calling for ethical behaviour in general. A more effective approach, not yet practised in Poland, would be a non-deductive approach, meaning, an inductive approach: collecting concrete cases, examples of

unethical behaviour in a given profession or field, and only later transforming these into an ethical code for that given profession/field, avoiding abstract interpretations of the rules.

9. Conclusions and Perspectives

When seeking the means to battle corruption in the public sector it is necessary to indicate:

- changes in the economic system;
- information (education);
- consistent application of existing instruments propagating transparency and fighting corruption in the public sector.

These are the three fundamental strategic tasks.

The first task -- **changes in the economic system and in the democratic mechanisms** which lead to the elimination of the causes of corruption and which are rooted in the economic relics of the past -- lies out of reach of a purely anti-corruption strategy. The reinforcement of economic reforms does limit situations conducive to corruption (i.e. health care reform, limiting “manual steering” of the economy at the micro level). The reinforcement of democratic mechanisms, development of local governments, the realisation of the principle of state subsidiary in the new constitution leads to a widening of transparency in public life. This is necessary to stop the process of fusion of the political world with the economy, which is in fact a typical process at the beginning of a systemic transformation.

Information (education) constitutes the second task: the most urgent task seems to be making the public aware that the existing anti-corruption mechanisms, institutions and remedies actually do work and bring results. This means transparency in the fight to popularise transparency -- far too little attention has been paid here. This means encouraging the public to take advantage of the positive results which come from openness in the public sector. In this way they are themselves making transparency more effective in its battle with corruption.

For the purposes of combating “false consciousness” and lack of awareness of what the separation of roles and conflict of interests is all about in a democratic state it is necessary to popularise (media, educational activities, occupational training) good foreign role models. It is important that such popularisation does not lead to generalisations and banalities, but rather should be based on concrete examples.

In this respect three areas should be the subject of particular attention in the fight for transparency for the purposes of eliminating both real corruption and the public's assumed corruption which in fact does not exist: the police force, the judicial system and state financial officials.

The third task -- **a systematic and consistent implementation of the possibilities that already exist in the legal system**. They are more important than “improving” the existing laws and should be a priority -- “improvement” is what the establishment has been occupied with, however. The problem is that there is no tradition of developing (and activating) implementation programs such as development, co-ordination of execution and implementation on a daily basis within strategic

programs for combating negative phenomena (i.e. corruption in the public sector.) Know-how of coordinating, implementing and supervising the execution of such programs is urgently needed.

ETHICS ADMINISTRATION CONFRONTS THE “NEW PUBLIC MANAGEMENT”

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The OECD has recently and properly directed its attention to the role of ethics and conduct in what is described as the “new public management” environment increasingly being adopted by its member nations. The immediate cause for this concern is what many scholars and practitioners view as “a growing mismatch between the traditional values and system governing the behavior of public servants and the roles they are expected to fulfill in a changing public sector environment”.¹ This description of a growing mismatch is both descriptively accurate and a legitimate subject for concern.

In its 1997 Report, *Managing Government Ethics*, the Public Management Service (PUMA) of OECD goes a step further by suggesting that existing laws and values governing the behavior of governmental officials need to be revised and loosened to reflect consistency with entrepreneurial² values generally followed in the private sector:

It would be inconsistent to marry a strict centralized compliance-based ethics infrastructure with devolved results-based management systems. Recent trends in ethics management -- reducing detailed rules in favor of broad guidance (defining values, and disseminating codes of conduct) and greater transparency (whistle-blowing and requiring public servants to disclose their financial interests to uncover potential conflicts)-- suggest that countries realize this need for consistency.³

This reasonably stated portrayal of the problem and the equally reasonable suggested solution, with its emphasis on consistency between rules and expected behavior, is at once helpful but also indicative of how precarious our understanding has become of some fundamental principles of democratic governance.

The unspoken assumption in both the statement of the problem and of the solution is that the governmental and private sectors are “converging” and that this convergence is inevitable. Following from this assumption, the ethics standards and practices currently in effect for the governmental sector are considered to be outmoded, and need to be modified and loosened to accommodate the entrepreneurial and results-oriented “new public management.”

On a higher level of abstraction, however, this debate over the meaning of the “new public management” is reflective of the most critical of issues; are the governmental and the private sectors essentially distinctive, or essentially similar in character? If they are essentially distinctive in character, what is the basis of this difference? Conversely, if they are essentially similar, in what manner should these similarities be reflected in institutions and practices? More specific to the purpose of this paper, if the sectors are “converging,” as suggested in recent OECD literature, should the ethical values and requirements of the sectors also be converging? Or, does the drive for ethics convergence reflect a faulty understanding of democratic political theory generally?

The high stakes nature of this debate over the future of governmental management is reflected, in part, by the strategic use of language and definitions. Even the term “new public management” carries with it prescriptive and emotive content, as does the word “reform,” in that persons describing their proposals for change as “new” or “reform” are at a psychological and semantic advantage over their opposition, whose positions and arguments are, by implication, thus “old” or “traditional.” In our contemporary political environment it appears, paradoxically to some, that those arguing for “new” concepts or “reforms” are held to lesser standards of proof and definitional precision than those arguing or defending what is described, fairly or otherwise, as the “old” or “traditional” management practices.

This semantic maneuvering has direct relevance to the issues facing OECD and its member nations as each seeks to re-evaluate and restructure, where appropriate, their internal ethical standards and policies and the institutional arrangements to administer compliance with same. At the most elemental semantic level, for instance, it makes a difference if the relationship of the state to the individual is described as that of an officer to a citizen or that of a service provider to a customer. Additionally, it makes a difference if the highest motivating value of an organization is accountability for performance to politically elected officials, or accountability to appointive and largely autonomous enterprise managers. How one views ethics and the infrastructure of ethics administration depends in large measure on the most basic of all issues in a democratic society: to whom are officers and employees of the state accountable?

Governmental Management is Distinctive

Three fundamental and related premises have guided this analysis of the future of ethics administration:

- 1) that the governmental and private sectors remain fundamentally distinctive;
- 2) that ethical concepts and administration should reflect to a considerable degree this distinctive character; and
- 3) that the concepts of ethics policy and administration have substantial universality in application.

Democratic political theory holds as its principal proposition that the state's sovereign authority rests on the consent of the governed, which is normally manifested by legislatures when passing laws. From this proposition a number of corollary propositions follow, two of which are worth repeating in the context of this discussion. First, democratic governments use fundamental laws (e.g. Constitutions) to protect the rights and freedoms of citizens from an otherwise all-powerful state; and second, democratic governments pass laws to regulate the relationship between and among private individuals and corporate bodies. These corollary propositions have resulted, in most instances, in two streams of legal doctrine; public law and private law.

With respect to management, the distinctions between the sectors are manifest. *The distinguishing characteristic of governmental management, contrasted to private management, is that the actions of government officials must have their basis in public law, not in the pecuniary interest of private entrepreneurs and owners or in the fiduciary concerns of private managers.*

Today, nations are reassessing where and by whom functions with a public character are best performed. Assignment of functions between the sectors should not, however, be simply an economic exercise to determine and utilize the most “economical” choice, but first and foremost a

legal exercise in which the values of accountability of officers of the government are spelled out in law. The assignment process should be three-tiered. First, it should be a legal exercise to determine whether or not the activity is “inherently governmental” in character and if so, it should be assigned to the governmental sector. Second, the process should recognize that many activities, while not directly core functions of government, are nonetheless, for policy or political reasons (e.g. air traffic controllers) best assigned to the governmental sector. Finally, if the decision is that an activity is private or commercial in character, it should be fully assigned the private sector, with all that such a designation indicates. For instance, a genuinely private corporation has the private right to declare bankruptcy, a option not available to governmental bodies. This assignment process is critical, for when the sectors are blended or meshed in some fashion, this necessarily changes the fundamental lines of accountability, the managerial culture and its internal incentives, and the relationship of this activity to the citizenry.

The entrepreneurial management paradigm (another term for “new public management”) possesses its own brand of insight, to be sure, but cannot be wholly satisfactory because it fails to provide the necessary theoretical comprehensiveness to insure that the basic values of a democratic polity are met. That is, the entrepreneurial management paradigm being widely promoted generally ignores the essential character of the governmental sector, a character determined by law, not economic, sociological, or technological axioms. It is law that determines the mission, structure, financing, human resources, policies, procedures, and ultimately the incentive parameters in which managers function within governmental institutions.

Let us not forget that when we talk about government, we are not simply talking about another service provider. Certainly, governments provide services, both directly and indirectly through third parties, but service provision is not essential to the character of government. What is essential to governmental character is determined by its role as sovereign and the sovereign's interactions with citizens. The single most important characteristic that separates the governmental and private sectors involves the concept of sovereignty. For example, only the sovereign possesses the legitimate right to use coercion to enforce its will; organizations functioning in the private sector do not, or least ought not, possess such rights and immunities.

Until the mid-1980s, it was almost universally accepted that the governmental sector was managed, first and foremost, by public laws and regulations and that the public service was entrusted with the implementation of public policies passed by the legislatures. Accountability to politically responsible leadership was viewed as the highest management value. Thus, the term administrative management paradigm (model) was descriptive of how government was managed. Beginning in the mid-1980s, however, and accelerating to the present day, another management philosophy, the “new public management,” has emerged to challenge the traditional administrative management paradigm. Rather than a legal foundation, the new management philosophy accepts as its basic premise the validity of certain economic propositions and applies them to government agencies. Thus, efficiency, economy, customer satisfaction, and even, occasionally, “profit” are promoted as the critical values to be achieved in government administration. The term most often used to summarize this entrepreneurial approach to public management is “results.” In short, under the entrepreneurial (“new”) management paradigm, the governmental sector is to lose most of its distinctive character and accept to the maximum extent practicable the norms and practices of the results-oriented business community.

It is worth recognizing, however, the intellectual precariousness of using “results” as the ultimate objective and standard of governmental management success. The term “results,” like its sister term “efficiency,” is an instrumental word with little independent meaning apart from some other and

presumably higher objective and standard. Efficiency, for example, has no ethical or productive value apart from its association with some agreed upon objective. Thus, not all efficiency is good; it depends upon the ends toward which this efficiency is directed. Similarly, results as the generic objective of management are instrumental unless tied to an agreed upon higher policy objective. Some measurable results, such as decreasing the time required to process new immigrants into a country, may satisfy the results oriented management, but at the same time mitigate against the implementation of some larger national political purpose and legal interest. Viewed synthetically, results only have meaning and utility when associated with the larger purposes of the state.

The fundamental truth is that the separate distinctive character of the governmental and private sectors cannot be eliminated by fiat, scholarly legerdemain, or by encouraging managers to ignore regulations (“red tape”), in pursuit of some economic or political “result.” In the governmental sector, results, however defined, cannot displace political accountability as the highest value. The correct approach given this fundamental truth is not to ignore or otherwise weaken compliance to law, but to amend the law (not excluding the option of repealing the law altogether), to have it become part of the solution rather than part of the problem. The administrative management paradigm of management, based as it is on public law, judicial rulings and the like will continue to be the operative management paradigm for most government management irrespective of what other management paradigms are currently in vogue. The problem will be that general management laws, including ethics laws, will no longer be considered fully legitimate or subject to comprehensive applicability. The legal symmetry of political accountability reaching to the chief of government, and through the chief of government to the legislature, is rapidly becoming frayed with exceptions and compromised processes.

Beyond Decentralization to Disaggregation

Decentralization is the assignment or distribution of functions from a central body to subordinate authorities. To decentralize, however, requires first that there be centralization of organization and function. Decentralization is normally implemented through delegations of authority, delegations that may be later recalled by the central body and retained or redelegated to another authority. Decentralization through delegation may be accompanied by substantial grants of discretion to the subordinate authority, or discretion may be limited. The crucial element remains that responsibility for the performance of the function rests with the central authority and that the burden of proof for exemption from some element of the function rests with the requesting authority.

Decentralization has been the traditional approach within the governmental sector for administering a program. The entrepreneurial management paradigm tends to reject decentralization, however, as an insufficient strategy to achieve the results-oriented management they seek. Decentralization remains, in their view, essentially a law-based administrative strategy which thwarts the entrepreneurial spirit they want to inculcate in government managers. What the entrepreneurial management paradigm seeks, more implicitly than explicitly, but nonetheless vigorously, is a disaggregated public sector with multiple, largely autonomous units each competing and each seeking to maximize the productivity (results) of their organization.

The most visible form of disaggregation involves organizations. The vision of many organizations, essentially of equal rank, each with a contract between its managers and an elected official or appointive minister is currently the model finding most favor in the public management literature. Each agency or enterprise is intended to have its own, individually designed, general management

laws, (e.g. its own personnel and compensation policies and practices). Additionally, departments, agencies, and enterprises can themselves be internally disaggregated with subordinate units assigned direct authority for activities by the legislature or by ministers. Agencies and enterprises may be intentionally located at the fringes of government, outside of any remaining vertical lines of accountability. These “instrumentalities” of government are especially prevalent and attractive for use in the financial and credit fields. Often these instrumentalities are privately owned, but their debt instruments are either directly or implicitly guaranteed by the government (read: taxpayers), thus effectively privatizing the profits while socializing the losses. The line between what is governmental and what is private can be irritatingly vague and invitingly lucrative to the instrumentality's owners and management.

General Management Laws

Another form of disaggregation concerns the coverage of general management laws, a term of art referring to those cross-cutting laws regulating the activities, procedures, and administration of all agencies of government, except where exempted by category of organization or by provision in their enabling statute. The quality of general management laws is a crucial factor in maintaining the integrity and accountability of the administrative branch of government to the chief of government and ultimately to the legislature.

General management laws are intended to provide appropriate uniformity and standardization for government organizations and processes. Uniformity and standardization by themselves, however, are not the objective of general management laws. Such an objective would stultify government as “one size does not fit all.” What these laws do reflect, therefore, are the conceptual and legal agreements between the branches and between the central administrative authority and the respective agencies guiding governmental and individual behavior. In practice this means that certain doctrinal provisions reflected in legal language stand until and unless an exemption is permitted. Exemptions may be assigned by general statute to a category of agency or by administrative orders from a central management authority and these exemptions may be mandatory or discretionary.

General management laws come in various guises and may be comprehensive in coverage and impact, as is generally the case with budgetary statutes, or they may cover subjects of relatively low visibility, although low visibility is not necessarily equitable with low importance. Often the ethics laws fit this description of low visibility, but high importance. An issue of considerable moment to member OECD nations has to do with the role and impact of general management laws collectively, and uniform ethics laws specifically, to governmental agencies and enterprises, particularly the latter when they have been relegated to some “quasi” status between the governmental and private sectors. For most advocates and practitioners of the “new public management,” general management laws collectively and ethics laws specifically, are viewed as factors hampering effective management and either should be minimized in coverage or wherever possible made agency and enterprise specific.

Citizen Versus Customer

In the new public management, the “customer” replaces the “citizen” as the human element to be served by governmental institutions. But is this change in nomenclature a wise or accurate reflection of a fundamental change in the nature of the state? Is the government now essentially another large private commercial corporation concentrating on service delivery and satisfying customer needs and wishes? Or is there something else happening here?

The premise of this paper; that the governmental and private sectors are, and should remain, distinctive in character and organization, has its basis in democratic political theory, not market economic theory. It does not follow from this premise, however, that the governmental sector should or need be either intentionally large or small, or interventionist or biased against intervention. The premise of distinctive sectors is neutral with respect to where most non-core governmental functions are best assigned. It simply holds that the sectors should be kept distinctive to the maximum degree possible and their relations and interface should be based upon legally defined and agreed upon policies and instruments. This premise, by implication, is not receptive to current convergence efforts to mesh the sectors or to partnerships between governmental and private parties which involve equity relations.

When persons have dealings with agencies of government, the relationship remains that of sovereign to citizen. It is not a voluntary relationship and its parameters are legally determined. Such a relationship, however, need not be unproductive or unpleasant. Core governmental activities, such as patent awarding, necessarily involve a series of actions between an agent of the sovereign and the citizen. This is so because the awarding of patents by a government confers a legal and economic privilege upon a citizen, and presumably denies this privilege for the same patent to others. It is an act in which the legal standards and ethical requirements imposed upon the government officer are higher than is generally the case in a private sector provider-customer encounter. It is generally assumed that in the latter relationship the two parties are acting voluntarily and seeking to maximize their economic well-being. Either party may voluntarily decide to withdraw from this encounter or relationship.

Both core and non-core governmental functions can often be performed following most market principles. Returning to the patent awarding process for a moment, there is no inherent reason why the patenting process need not be user friendly, self-financing, efficient and still retain its distinctive governmental character and ethics standards. Granted, there is no competition, but most of the salutary effects of competition can be achieved by careful application of market type practices (“marketization”). A similar set of circumstances is to be found in the customs inspection and collections activities of nations.

A particular activity may be viewed by all parties involved as essentially voluntary in nature, that is one where there is a service provider and a customer. But appearances may be deceptive. In the United States, for instance, the Supreme Court recently ruled that institutions with government ownership are governmental, not private, irrespective of legislative language stipulating a private status, and being governmental in character are subject to constitutional provisions applicable to agents of the sovereign.⁴

In short, the use of the term customer as central to the implementation of the new public management is generally inappropriate. While the government agency may perform a core governmental activity in a marketized manner or even a commercial type function normally associated with the private sector, ultimately the relationship involves the interface of the state with the citizen and public law will apply. The term “customer” should not be used at all in certain circumstances, such as in transactions with the internal revenue agency, and with circumspection and qualifications in other situations, such as a transaction involving museum entry fees. The term customer is probably best left for use in the private sector.

Third Party Administration

Every OECD nation, in response to pressures for decreasing the size of its governmental workforce, has turned to variations of three alternative approaches for achieving this objective. First, nations are divesting themselves of many, if not most, of their state-owned enterprises. If the divestiture is complete to the private sector, issues surrounding public sector ethics become essentially non-relevant. Second, there has been an extraordinary push to transfer the delivery of services to third parties, usually private contractors. Finally, various types of quasi-governmental entities have been created and not included within governmental workforce statistics.

With respect to the second of these approaches, contracting for services, an intricate system of third party administration has emerged with enormous implications for public sector management, whether described as “new” or “old,” and for the administration of ethics. The line between the governmental and private sectors has been both intentionally and unintentionally blurred through use of the contracting process. Contracting for services, of course, is nearly as old as government itself and at one time or another has included the full gamut of societal activities. In the main, the contracting process has been part of a constructive and productive relationship between governmental authorities and non-governmental managers to insure that the public is well-served. This said, however, there are inherent managerial and ethical risks involved in the contracting process and the incentives created by contractual agreements.

The assignment of public functions to third parties, in this case private contractors, does not eliminate or even substantially reduce the management responsibilities of the governmental sector, it simply changes the character of this management. The contracting process is generally portrayed as a relatively simple, straightforward process in which a government agency seeks out would-be providers who submit competitive bids to provide the needed product or service at the lowest cost. For basic services and off-the-shelf products, this portrayal is largely accurate. For more sophisticated services and products, however, the contracting process is often more complex with less predictable results.

The assumption that competition and market discipline are all that is required to produce optimal performance is illusory. In real life conditions where government is contracting for intangibles such as policy analysis, research and development, and management services, often there is little or no effective competition. Governments often find themselves beholden to single contractors where it becomes in the government's interest to maintain the profitability of the contractor. Behavior modification by all parties can easily accompany a situation where the business success of a corporation is more dependent upon its ability to influence and manipulate the political system than it is in providing the best in products or services.

Governmental sector management is typically hierarchical in nature with delegations of authority from superior to subordinate officers. Delegated authority is intended to emphasize the location and persons responsible and accountable for decisions and actions. With contracting, however, the management ceases to be hierarchical, or vertical, in character and becomes horizontal with negotiations between parties replacing a command structure. Where mid-term incremental changes in course were customary and relatively easy in a vertical organizational structure, horizontal management is heavily reliant upon the quality of the initial contracting process with its emphasis on front end provisions which anticipate later problems. Mid-term corrections become more difficult because management is indirect through contracts. Also, with the contractors themselves increasingly

performing basic management roles and having direct program contact with the public, confusion as to the applicability of laws and of ethical standards increasingly arises.

A propos of the problems accompanying third-party administration of governmental activities, a recent United States Supreme Court decision addressed the question of whether an employee of a private contractor acquired the attributes of a governmental officer based on the function being performed. The suit involved a private, for profit corporation which had contracted with a state to operate its prisons. A prisoner claimed he had been abused by the prison guards and sued them in their individual capacity. The guards and their employer claimed that as employees of a government contractor they were entitled to qualified immunity as if they were employees of the government. The Court ruled that employees of for profit private corporations are not entitled to qualified immunity for their actions even if they are performing functions virtually identical to those performed by officers of the state. Qualified immunity is not determined by the function performed, but by the legal status of the personnel.⁵

What this Supreme Court decision suggests is that the convergence of the sectors is not as imminent, legally defensible, or desirable as the entrepreneurial management advocates contend. The situation is increasingly open to judicial challenge for generally the courts have ruled that governments cannot contract away their responsibilities for the actual performance of a statutorily mandated function. Third party administration of governmental functions is far from a settled field and this opens up the whole debate over the applicability of ethics laws, regulations, and codes generally associated with governmental employees to contract employees.

Ethics in the Quasi Government

While the current working assumption in most OECD countries is that functions of a commercial character ought properly be assigned to the private sector, there remain instances when, for whatever reason, entities are assigned by the legislature certain attributes normally associated with the sovereign's authority, such as access to the full faith and credit of the treasury or exemption from taxation by other governmental jurisdictions. What has emerged from this selective blending of the private and governmental sectors is a burgeoning quasi government. Here, the creators of these entities and subsequent management are able to pick and choose those attributes of the two sectors they believe will maximize the results of their endeavors and the political and fiduciary advantages to management as a class.

With respect to the proliferating use of quasi governmental entities, a twilight zone between the sectors has emerged with its own set of management and ethical problems. In this twilight zone, accountability to elected officials is intentionally subordinated to performance and results values. In these quasi governmental entities, it is often difficult to determine to whom management is accountable. Management will claim they are accountable to stockholders when this is convenient, to government agencies and regulations or to "customers" when this is advantageous. But more often than not they will assume an intentionally vague and ambiguous posture suggesting that in practice they are accountable to no one but themselves.

Frequently in the quasi governmental sector, management will define its own standards, regulations, and relations to its interest group constituency (stakeholders) as well as to its customer. Under the umbrella term, flexibility, informal rules and guidelines replace regulations. These informal rules are generally developed without public participation or adherence to due processes of law. The ethics standards applicable to most quasi governmental bodies are porous, more likely to reflect private

sector standards and practices than governmental standards. Issues having to do with recruitment, compensation, removal, and subsequent employment practices for managers may be hidden from public scrutiny, often with the invocation of “proprietary rights” most closely associated with genuine private corporations.

Quasi governmental entities can and often do become extraordinarily powerful political institutions in their own right. They typically seek to perpetuate their own existence irrespective of continuing need and circumstances. Frequently provided with special economic advantages, such as subsidized borrowing authority, quasi governmental entities become powerful monopolies (or near monopolies) able to effectively dominate not only their economic sector but their political overseers as well. They assign staff to promote their economic and political interests with political actors, especially the legislature. Generally they contract with public relations firms to burnish their images and influence executive and legislative decisions through media campaigns. They can become more powerful than the governmental institutions, including the legislature, generally intended to supervise their activities and protect the public's interest. Quasi governmental entities, following tenets of the entrepreneurial management paradigm, seek to promote their specific interests over and against the public's interest and to sustain their privileged existence apart from any continuing need for a governmentally sponsored and protected activity.⁶

Trends in Ethics Analysis

There have been two streams of literature on ethical norms and administration competing for acceptance; one emphasizing the pre-eminent role of cultural peculiarities in determining ethical standards and practices, and the second emphasizing the commonalities of shared ethics values and practices that cut across cultural boundaries. On balance, the second stream of literature has been prevailing in large measure because empirical research has supported the view that the public service in democratic nations tends to have mutual and shared values, such as professionalism and incorruptibility. While it is empirically evident that actual behavior will differ from one nation to the next and within any given nation over time, the abstract normative principles that guide the activities of the public service have tended to become more widely understood, accepted, and administratively enforced. This international dialogue over ethical principles and their implementation in the several countries, however, is both directly and indirectly challenged by what OECD among others refer to as the new public management.⁷

The new public law management largely rejects the public law basis for defining correct behavior in the public service. As previously discussed, the new public management starts from the premise that except for a very narrow band of governmental activities, the traditional concept of the public service is no longer correct or viable. The “correct” behavior of managers and employees involved in activities of a public character is best determined by market-based standards with non-legal, consensus “charters” and codes replacing legally-binding compliance standards normally associated with the governmental sector.

The importance of the global dialogue over public service ethics and the growing acceptance of universal norms and common practices obviously loses much of its relevance if the definition of what constitutes the “public service” is radically revised and narrowly applied. Those nations that have defined the public service most narrowly have many fewer public servants in their employ. There are fewer agents of the sovereign who are required to comply with laws intended specifically to protect the rights of citizens in their dealings with whom they perceive to be agents of the state.

If, as the entrepreneurial management paradigm posits, an increasingly larger portion of public services are to be delivered by private contractors and elements of the quasi government, what does this portend for public management ethics? Will the citizens find that their rights and protections are diminished by this trend toward third party administration? Will the ethics standards of the manager under the entrepreneurial paradigm be less rigorous than is currently the case for straight government managers? And what about the auxiliary ethics units such as inspectors general and ombudsman; will they have rights to intervene in the management activities of contractors and quasi governmental entities? In a sense, the question comes down to: will the new public management result in a situation where we are privatizing the governmental sector or governmentalizing the private sector? Once the clear boundary between the sectors is routinely breached, the unanticipated consequences may well create a situation where accountability becomes hopelessly confounded.

Ethics Infrastructure

In PUMA's 1997 report, *Managing Government Ethics*, an "ethics infrastructure is defined as comprising eight key elements,⁸ two of the elements being "an effective legal framework," and "an ethics co-ordinating body." "Countries emphasise different elements of this infrastructure depending on whether they manage conduct primarily through guidance and management incentives or through controls and sanctions. Although if a country has been plagued with corruption or scandals then it will probably want to emphasise punishment rather than prevention at least in the short-term".

At a general level, there is something of a misunderstanding about ethics laws, regulations and codes of conduct. It is widely assumed that once promulgated, they are largely self-executing. The fact is, however, that promulgation is merely the beginning of what has become, and will likely continue to be irrespective of "new public management" discomfort, a substantial administrative function. PUMA reports that each nation could have an ethics co-ordinating body. The need for such a body becomes evident when as part of an ethics strategy greater transparency (e.g. annual executive financial disclosure) is sought. Requiring disclosure assumes that someone is determining the details of standards to be met, that someone is reading and interpreting the responses, and that compliance is recognized and where not followed, punished. While a central body need not do all the work itself, it must supervise the transparency activities performed within agencies. The point is simply to suggest that those who believe that a transparency strategy obviates much of the need for personnel and rules that characterize the out-of-favor legal compliance system are probably in for disappointment. Few ethical policies and programs are self-executing.

The question facing PUMA today is: does the new public management (entrepreneurial management paradigm) tend to support and reinforce the proposed PUMA ethics infrastructure proposal, or does it tend to weaken and detract from the objectives sought through the infrastructure? This paper has suggested that there is a substantial dysfunction between the objectives and operations of the new public management and the objectives and operations of PUMA's ethics infrastructure.

The development by PUMA of its ethics infrastructure concept has been within the general conceptual framework of a distinctive governmental sector with a high degree of integration under an active executive head ultimately responsible to the legislature. This conceptual framework has been based on legal principles in which the process of management has generally taken precedence over results. The pre-eminence of process is the distinctive feature of the governmental sector. This being the case, the quality of general management laws, to include ethics laws and regulations, has been the measure of the quality of governance.

What the new public management seeks is to largely displace the process emphasis of the governmental sector with a results emphasis characteristic of the profit-seeking elements of the private sector. Disaggregation and competition become the watch-words, not integration and accountability. At the very least, the PUMA ethics infrastructure is out of sync with much of the agenda of the new public management which seeks to reward executives who “take risks.” Even the apparently non-controversial ethics objective of greater transparency in the annual financial reporting process for executives runs counter to the thrust of the new public management which generally favors the downgrading or elimination of central management agencies (to include central ethics management agencies) with the devolution of management authorities and responsibilities largely to the entity management itself. In short, under the new public management the ethics infrastructure being promoted by PUMA will be relevant to fewer agencies, entities, and personnel. The politics of exemption from general management laws has replaced the former managerial politics of inclusion.

While the new public management will hardly usher in an era of rampant corruption, it is prudent to recognize that it is a management paradigm at odds with basic concepts of legally accountable government.

Concluding Observations

At one level of discussion, it is important to recognize that with the triumph of free market principles over central state planning as the basic element of national and global economics, the nature of governmental functions is undergoing profound change. The transfer of service functions to the private sector either through divestment or by contract was long overdue and has been, on the whole, salutary. But there are proper limits to privatization, limits that recognize the distinctive legal character of the governmental sector. Not all activities are candidates for market behavior nor for exemptions from accountability requirements, including meeting legal requirements for ethical behavior.

With no intent to overstate the case or to impugn the motives of the advocates, it is nonetheless worth noting that the new public management has a certain anti-democratic character. At every turn, the thrust of the new public management is to downgrade the role of political leaders and institutions in the management of the “public sector.” The erosion of political accountability may not be immediately evident and its consequences may be subtle, but erosion will follow nonetheless. In many cases, of course, this is the intended if not the vocalized objective. Full privatization where all legal and fiduciary responsibilities and risks are passed to private owners is an open, democratic step. But often, the government and the private sectors are mixed in some fashion whereby private sector incentives, including risk-taking, are combined with public monies to the benefit of particular persons and groups, and especially the hybrid entity's management. And it is precisely in the realm of mixed sectors (quasi governmental) where PUMA's ethics concepts and infrastructure design are put to their greatest test.

At the outset of this paper PUMA's concern over what is viewed by many as a “growing mismatch” between the traditional values and system governing the behavior of public servants and the values and system described as the “new public management” was duly noted. In its 1997 Report, *Managing Government Ethics*, PUMA reported that to overcome this growing mismatch the several member nations respond by “reducing detailed rules in favor of broad guidance (defining values, and disseminating codes of conduct).” The assumption behind this proposal is that the governmental and private sectors are essentially alike and converging in practice and that this new reality suggests that

the norms and values of the private sector, which emphasize results, risk-taking, and managerial flexibility, should become dominant in the remaining governmental sector as well.

This paper has questioned the validity of the assumptions underlying both the so-called new public management and the convergence theory and argues instead that the rationale for maintaining the distinctive character of the governmental and private sectors remains as valid today as it has at any time in the past. Democratic political theory holds that there are two spheres of citizen activity; governmental and private, and that these two spheres properly have their own legal and ethical requirements. If, as this paper suggests, the governmental and private sectors retain their distinctive legal characters, notwithstanding arguments by entrepreneurial management advocates to the contrary, then it follows that two sets of ethics laws, codes of conduct, and norms are both necessary and desirable. Maintaining the distinctive character of the governmental and private sectors is to the benefit of both sectors.

It is worth noting at this juncture that most of the progress made in developing ethical standards and practices has been made under the “old” administrative management paradigm where the governmental and private sectors are viewed as distinctive in legal character. One of the concerns of this conference and of those most involved in the evolving field of ethics administration is that the entrepreneurial management paradigm subtly puts at risk much of what the ethics administration leadership believes is progress. On balance, the goal of ethics administration is responsible and accountable behavior guided by laws, codes, and norms. In a sense, process and predictability as values have precedence over results and flexibility. And here is where the subtle challenge is present because the new entrepreneurial management paradigm supports results and flexibility as values, values running counter to the thrust of ethics policy and administration of the past twenty years.

The search for a relatively simple ethics administrative structure to implement a relatively simple guidance-oriented ethics program is likely to prove unrewarding. The reason for this sobering conclusion is that global economic forces combined with higher expectations by peoples of all nations regarding the ethical behavior of governmental, multi-national corporate, and domestic corporate officers necessarily leads to the conclusion that ethics management will become more, not less compliance oriented. There will be more guidance and prevention tools developed and employed to be sure, but the underlying basis for ethical behavior in the governmental sector will nonetheless remain public law.

While it might be pleasant to envision a day when the ethics administrative management system could be eliminated altogether, and with it the attendant burdensome political accountability standards, this is not going to happen. First, political accountability remains the fundamental tenet of democratic political theory and practice. Second, government will never be just another business firm. Finally, sin and avarice will always be with us.

NOTES

1. OECD, *Ethics in the Public Service: Current Issues and Practice*, Paris, 1996, p. 5.
2. The term entrepreneurial in this context refers to a management paradigm proposed by the United States Executive Office of the President, National Performance Review in its report *From Red Tape to Results: Creating Government That Works Better and Costs Less* (Washington: US Govt. Print. Off. 1993), discussed in Ronald C. Moe and Robert S. Gilmour, "Rediscovering Principles of Public Administration: The Neglected Foundation of Public Law," *Public Administration Review*, 55 (March/April 1995), p.p. 135-146.
3. OECD, *Managing Government Ethics*, Paris, 1997, p. 4.
4. The US Supreme Court in a 1995 case faced the issue of distinguishing between a governmental and private corporation. The National Railway Passenger Corporation (AMTRAK) established by Congress, was sued by Michael Lebron for rejecting on political grounds an advertising sign he had contracted with them to display. Lebron claimed that his First Amendment right to free speech had been abridged by AMTRAK because it was a government corporation. AMTRAK argued that its legislation provides that it "will not be an agency or establishment of the United States Government" and thus it was private and not subject to Constitutional provisions governing freedom of speech. The Court decided that while Congress can determine AMTRAK's governmental status for purposes within Congress's control (e.g. whether to make AMTRAK exempt from ethics laws), Congress cannot make the final determination of AMTRAK's status as a government entity for purposes of determining the Constitutional rights of citizens affected by its actions. To do so, in the Court's view, would mean that the government could evade its most solemn Constitutional obligations by simply resorting to the corporate form of organization. By implication, the Court was also saying that the status of an institution, whether governmental or private, is determined by its fundamental legal character, not by the function it performs. *Lebron v. National Railroad Passenger Corporation* (513 U.S. 374 (1995)).
5. *Richardson v. McKnight*, 65 U.S. Law Week, 4579 (June 23, 1997).
6. Alan Dean, Ronald C. Moe, Harold Seidman, and Thomas Stanton, "Government-Sponsored Enterprises," in *Making Reform Work*, Washington, National Academy of Public Administration, 1997.
7. Stuart C. Gilman and Carol W. Lewis, "Public Service Ethics: A Global Dialogue," *Public Administration Review*, 56(November/December 1996): 517-24.
8. PUMA's concept of an "Ethics Infrastructure" consists of some eight key elements: (1) political commitment (politicians should say ethics are important, set an example, and support good conduct with adequate resources); (2) an effective legal framework (laws and regulations which set standards of behaviour and enforce them); (3) efficient accountability mechanisms (administrative procedures, audits, agency performance evaluations, consultation and oversight mechanisms); (4) workable codes of conduct (statement of values, roles, responsibilities, obligations, restrictions); (5) professional socialisation mechanisms (education and training); (6) supportive public service conditions (fair and equitable treatment, appropriate

pay and security); (7) an ethics co-ordinating body; and (8) an active civic society (including a probing media) to act as watchdog over government activities.

ETHICAL CHALLENGES IN A TIME OF CHANGE -- GERMANY

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Summary: What's the challenge?

A basic truism of coping theory is that environmental pressure leads to the mobilisation of routines. Men under stress fall back to behavioural patterns they are most familiar with. Organisations under stress fall back to their very basic standard operating procedures. Under such circumstances, sober evaluation of the appropriateness of responses is the last thing one may expect. What is meant as a response to external challenges may turn out to be nothing but structural inertia.

What this paper tries to illustrate is that the predominant perception of challenges connected to the globalisation of economies and the resulting adaptive pressure on national public sectors might be misleading. According to the predominant perception economic globalisation requires modernisation of the public sector. The wave of a “new public management” and a growing commercialisation of public services is being perceived as a resulting effect. With respect to ethics, the tension between traditional values of public administration such as incorruptibility and the new values of managerialism may appear to be the crucial challenge. According to this view, the risk of corruption and similar malfeasance represent the core challenge.

This paper argues that, when it comes to ethics, the fight against corruption is a standardised behavioural routine rather than an appropriate response to the challenges of globalisation and administrative modernisation. The fight against corruption belongs to the very core of the identity of modern bureaucracy. It does not come as a surprise that nation states facing the challenges of globalisation (i.e. de-nationalisation) fall back to mental routines rooted in the formative years of their more or less successful history. After all, those states have been formed by waging war against each other. Waging war meant raising and administering money. Raising and administering money required non-corrupt personnel. In Europe at least, non-corrupt civil servants, military effectiveness and political success of nation states were intrinsically interconnected

In most of the modern nation states, thus, the “ethics infrastructure” of the civil service still today is based on the idea of incorruptibility. However, this did not prevent all of those modern states from unethical behaviour, including war crimes and mass murder. Germany is the most striking example. Its modern bureaucracy, not only did not prevent but, effectively implemented the administrative steps leading to mass murder during the holocaust. Corruption, though, remained a punishable offence even in the death camps.

The question raised here is to what extent the fight against corruption as a standardised behavioural pattern of modern bureaucracy may deflect the attention from more serious challenges in times of change. One of the most serious challenges resulting from globalisation is de-nationalisation and

intercultural tensions due to migration. For example, member states of the European Union are losing control over rights traditionally connected to citizenship. On the other hand they try to maintain even stricter control over citizenship connected rights vis-à-vis non-EU immigrants. The challenge to public service is to maintain a homogeneously high level of ethical standards in terms of human rights and decency vis-à-vis all kinds of clientele regardless of national or ethnic origin.

This paper discusses the German example.

Section 1 focuses on the emergence of ethically relevant routines of administrative behaviour. It is devoted to the most important developments of state modernisation in Germany since the 18th century and their effects on the ethical infrastructure of the public service in the 20th century. This section also illustrates that standards of incorruptibility and the state of law did not prevent German bureaucracy becoming involved in massive crimes in recent history.

Section 2 discusses the advantages and disadvantages of the ethical infrastructure of the German public service in dealing with new challenges, using two examples: the fight against corruption and asylum policy. It is emphasised that standardised behavioural patterns of German bureaucracy make the fight against corruption a major issue while maintaining a homogeneously high level of ethical standards vis-à-vis all kinds of clientele regardless of national or ethnic origin remains a 'blind spot' of the public agenda and, presumably, public administration as well.

Section 3 analyses the general political dynamics of ethics in the public sector and the problem of ethical responsibility. Ethics, it is stated, is not a static element of a given public sector. Rather, the mobilisation of ethical values is dependent on the actual combination of institutional, interest-conditioned and communication-driven factors. Ethical leadership in the public sector, thus, requires intellectual control over values and both cognitive and structural constraints. It has to be based not only on the awareness of ethical values as such but also on the awareness of institutional, interest-conditioned and communication driven risk factors that might endanger the maintenance of those values.

1. The development of the modern state in Germany and the formation of an ethics infrastructure

Characteristic of the history of the modern state in Germany is the sharp contrast between the continuity of the public administration and the discontinuity of the political regime. The changes of regime in 1918, 1933 and 1945 left the public administration to a large extent untouched. The single exception to this rule was the collapse of the GDR and German reunification in 1989-90, when together with the democratic political system of the West a new public administration was introduced in East Germany, intended to function according to the principles of professionalism and the rule of law.

Continuity of the public administration and discontinuity of the political regime is no coincidence. The public administration at least facilitated the maintenance of public order in times of serious crises, or even made it possible. This fact is firmly entrenched in the collective memory of the German people and perhaps explains why Germans adhere strictly to certain principles characteristic of the public administration even though these principles are in a sense an obstacle to the modernisation of the public administration. One example is the life-long job security (Berufsbeamtentum) of the civil service.

The continuity of the history of the public administration in Germany is however on the whole marked by considerable elasticity, which it must have had to have survived the past 200 years without any abrupt changes in the basic structures. This elasticity was the structural result of consistent pressure to reach political compromises.

1.1 The formation of the basic structures of the German public service from the 17th century to the Weimar Republic

As in all countries which were becoming modern states with a standing army in the 16th and 17th centuries, the most important conflict in the German principalities was that between the princes and the landed aristocracy. The reason for the dispute was the princes' right to raise taxes from the nobles' subjects for the maintenance of the standing army. An exemplary resolution of this conflict was achieved in the 17th century in Brandenburg, where the Elector was granted the right to raise taxes, but in return the noble was responsible for the public administration and the administration of justice in his local territory. In addition the aristocracy provided the officer corps in the prince's army. The Elector's public administration was there to collect taxes and manage the prince's properties, both virtually exclusively, with the aim of providing resources for the standing army.

Through the guarantee of self-government for the landed nobility there developed a duality of state institutions and decentralised autonomous units which were only loosely connected with the central state authority. This combination of central and decentralised elements (*state government and self-government*) is still characteristic of German public administration today, and its an important component of the structural elasticity mentioned above.

The senior officials of the prince's central public administration could obviously not come from among the nobility who provided the officer corps and managed his estates, but had to come from the bourgeoisie. However so long as the bourgeoisie had no civil rights and were not politically integrated, it was clearly risky to leave affairs of state in their hands. While in England and France this problem was solved through revolution, the German solution consisted of a combination of granting privileges and enforcing discipline: on the one hand the guarantee of permanent employment, on the other the duty of strict loyalty to the ruling prince.

On this basis, at the turn of the 18th to the 19th century - first in Bavaria and Austria, then gradually in the other German states - the civil service with life-long job security (*Berufsbeamtentum*) was introduced. It was no longer possible to inherit or buy a post. Administration became a profession. This modernisation effect consisted in the notable increase in predictability and effectiveness. In short, the professionalism of the public administration, at the same time as safeguarding their function, made it a more reliable instrument of government for the prince. It was the nucleus of the modern bureaucracy as Max Weber later described it.

At that time however, civil servants were only a small group at the summit of the public administration, which otherwise consisted of clerks who were hired when required. By training, the civil servants were without exception lawyers. Their legal training was however completed by long preparatory service, which at this time had a strong economic component, as an important part of the work was the administration of the prince's estates.

The ethics infrastructure at this time, i.e. at the beginning of the 19th century, corresponded to the requirements of modernisation. It consisted essentially of two principles: incorruptibility and loyalty to the prince. It is important to point out that these values were thoroughly incompatible with the

direct interests of the bourgeois civil servants. These civil servants belonged neither to the land-owning nor to the ruling classes and yet had to act in the interest of precisely these classes. Although not rich, they had to manage princely estates without enriching themselves. Although excluded from political power themselves, they had to defend the power of the prince. The weak incentives on the interest side were compensated by strong incentives on the values side. The idea of the permanent civil service became an ideology, its principles a symbol of the state and the violation of the principles the symbol of the endangering of public order.

This ethics infrastructure was modified in the 19th century by two developments: first by the formation of what the Germans call the *Rechtsstaat* - the "state of law" - and second by the enormous extension of the range of activities of the public administration in the fields of social and technical services.

The environment of the public administration changed dramatically in the 19th century. This was true of the society, the economy and politics. A civil society developed, in which the exclusion of the bourgeoisie from political involvement became ever more difficult to justify. The challenge for the *Ancien Régime* of the ruling princes was how to grant rights to the bourgeoisie without endangering their own rule. In addition, reliable framework conditions had to be created for the economic activity of this bourgeoisie. And the machinery of state was becoming ever more extensive and therefore required an abstract control mechanism which would work independently of the individual instructions of the prince and his senior officials.

All these factors favoured the consolidation of the *Law* as the central medium for the activity of the state. However restricted the rights of the subjects might be, the *rule of law* at least made the state's action free of arbitrariness. The state under the rule of law also made the growing public administration manageable for those governing the state, who until 1918 in Germany were still exclusively members of the higher nobility.

If we are to make a reasonable judgement of the effects of this development on the ethics infrastructure of the public administration it is useful to compare the German *Rechtsstaat* with of the Anglo-Saxon *rule of law*. The principle of the *rule of law* carries the rider *and not of men*. *Rule of law* means the uncompromising primacy of the law, so that nobody, and certainly not the holder of the political power, "is above the law". What characterised the German *Rechtsstaat* in the 19th century however was precisely the compromise between the power of the prince and the abstract power of the law. The loyalty of the civil servants was unquestionably to the prince, not to the law. It was purely fictitiously assumed that the will of the prince and the will of the law always coincided. To make the prince himself subject to the law was utterly unthinkable from this point of view. Sovereignty was unquestionably in the hands of the prince, and the unconditional respect of this sovereignty was until 1918 a central component of the professional code of ethics of the civil servant. The ethic of applying the law without any arbitrariness was thus satisfied, and in the case of conflict weakened, by the ethic of serving the holder of the political power. This was how the 18th century public administration, predating the state of law was assured of continuity.

Of even greater importance for the practical action of the public administration was the fact that under the concept of the state of law its ethics infrastructure was not rooted in society. This was the virtually inevitable result of the postponed political modernisation that prevented a republican democracy from being constituted until 1919, after Germany's defeat in the First World War. The loyalty of a society that had for so long remained excluded from the conduct of affairs of state was ensured from the last third of the 19th century by two factors: first by an even stronger ideology,

which idealised the state, its ruler and its symbols, the clearest expression of which was found in the everyday militarism of the Empire (Wehler 1995:1109-1151); second by the performance of the urban infrastructures and social insurance, which developed from the 1870s and made life bearable for the working population in the towns. Since the 19th century it has therefore been the tradition in Germany for the basis for political stability - apart from the loyalty of the civil servants - to depend more on the financial and service provision of the public administration and the social insurance system than on the participation of the people in public affairs (Bauer 1993). In addition, the Germans are burdened with the trauma of the first democracy, the Weimar Republic, having collapsed in 1933 in a great depression with over six million unemployed. This resulted after 1945 in efforts to perfect the welfare state, which was again based on extraordinarily complicated financing structures.

Under these circumstances the practical side of the state of law, the application of the law in justice and public administration, remained virtually exclusively a matter for experts, namely the lawyers. Germany, like France, knew no trial by jury or case law, but unlike France did not have the centuries-old republican tradition. In the ministries the lawyers were the authors of the law that they and subordinate officials later had to apply.

This domination of the experts was also a reflex of the decentralised organisational structures of the public administration however. In Prussia, which extended for over 1,000 kilometres from west to east, it was also a response to the enormous heterogeneity of the social and economic conditions in the different parts of the state. The legal rules according to which the public administration had to act under these circumstances therefore had to be neither too specialised and nor too rigid if they were to remain workable at the decentralised levels. This law therefore worked where necessary with *indefinite legal concepts, general clauses and room for discretion*. If a certain minimum of uniformity and consistency in the action of the public administration was nevertheless to be ensured, then there was all the more dependence on professional legal personnel. The American *spoils system* as it existed up to the *progressivist era* (before 1914) (Skowronek 1982), for example, would have been completely unable to work with this form of public administration. The disadvantage was the relative independence of the public administration vis-à-vis the society. It is well known too that there is in Germany no system of *elected officials*. "Public administration" is considered to be a matter for experts and is not perceived as something that is part of the concerns of the citizen himself. Accordingly there is in Germany no *common sense idea* about what constitutes *good government*. As regards the inner working of the public administration, then "good public administration" in Germany is still to this day defined by lawyers. "Good public administration" in the eyes of the lawyers is *state of law* public administration, and state of law public administration is a public administration that applies the law as the lawyers correctly define it. "Good public administration" is thus not necessarily connected with the everyday ethic of the citizen. The idea that the public administration should act according to the rule of fair play as understood in everyday terms by the citizen, the idea of *due process*, thus plays a subordinate roll.

In Germany since the 19th century we have thus had a public administration professionally run by lawyers according to the guiding principles of laws drafted and interpreted by themselves in relative autonomy and strict loyalty to the political leadership of the state. This has its good and bad points.

The good points are connected with the decentralised nature of the organisational structures, the flexibility of the administrative law and the professionalism of the civil servants. This was the basis for the elasticity of the German public service, thanks to which it was able to ensure the continued existence of the state despite many changes in the political regime. Unlike the French public administration under the Ancien Régime as described by de Tocqueville (1856), the state in Germany

was less vulnerable, because a revolution aimed at the centre of the state would have been of less use to the revolutionaries in view of the decentralised nature of the public administration and the distribution of political power over several levels. These more or less decentralised levels were also viable in themselves, and the more so the more decentralised they were, as shown by the example of local authorities. The German public administration was used to this and its civil servants were trained to apply the law within certain limits independently and without specific instructions, and even to create it themselves in the form of regulations. This ability stood the public administration in good stead as soon as a political leadership which produced law and gave instructions no longer existed. By and large the German public administration therefore carried on working undisturbed during the revolution of 1918/19, the domestic political crises of 1932/33 and even after the complete military and political collapse of 1945. The public administration was therefore in the eyes of the general public a factor for calm and stability in times of dire uncertainty.

The public administration functioned not only in times of change however, but also under different political regimes, whether they were monarchical, democratic or dictatorial (see Brecht 1966, Morstein-Marx 1941). This was encouraged by the ethic of the obedience to the leadership of the state. For the elasticity of this ethic however, the respect of the second fundamental value, the preservation of the state of law, was of considerable importance. The new democratic leadership of 1919 and the National Socialist leadership of 1933 were not greeted enthusiastically by the administrative elite (though we can have no illusions about the fact that the conservative ministerial bureaucracy had less problems with change of regime of 1933 than with that of 1919; cf. Brecht 1966, 1968). But both new regimes, even Hitler's, were accepted by the public administration, so long as they did not touch the formal order of the state and hence the foundation of their everyday ability to function, namely the *state of law*. Even Hitler hastened to give his seizure and exercise of power the appearance of conformity with the *state of law*.

1.2 A historic trauma: ethics and public administration in the National Socialist period (1933-1945)

This brings us to the dark side of the ethical infrastructure of the German public administration. The criminal acts of the Nazi-Regime were smoothly performed by the public administration. Many qualities of the German public service, its specific modernity and effectiveness, even made the enormous extent of these crimes possible (Adler 1972, Baumann 1989). For those who certainly did not commit the murders themselves, but untiringly kept the administrative infrastructure going for the mass murders - in particular the mass murder of the European Jews - the German language has even coined a special word: "Schreibtischtäter" - desk culprits. Here it should be noted that the role of the public administration in the preparation and implementation of the mass murders was not limited to the specific apparatus of the Gestapo and SS for example (cf. Kempner 1996, Zimmermann 1995). Resident registration offices registered the Jewish population, ensured their removal to designated districts and revoked their German citizenship; tax offices confiscated and used Jewish property; railway administrations put together deportation trains and worked out the timetables for the trains going to the extermination camps. What is more, the regulations which governed discrimination, isolation, expropriation, deprivation of citizenship, deportation and the use of plundered Jewish property (Walk 1996) were all, in accordance with German tradition, drafted by the public administration itself.

The specific importance of the public administration for the mass murders during the Second World War has still not been satisfactorily researched (Seibel, to be published in 1998). But an important

reason for the effectiveness with which the public administration committed crimes as a routine procedure, must obviously be seen in the *moral indifference* of the civil servants. Admittedly it was made easy for civil servants to avoid confrontation with the consequences of their acts. The use of bland language and the remoteness of the places where the actual murders took place helped here, but as far as the persecution of the Jews was concerned, there was of course also an anti-Semitic ideology. But these civil servants could have known what the consequences of their actions were for those concerned, if they had *wanted* to know. And so without this knowledge they proceeded to restrict civil and human rights, round up people, strip them of citizenship and assign them to deportation trains.

The moral indifference of the German civil servants was not simply a concomitant of the Holocaust, but an important precondition for it. This moral indifference was an indirect consequence of the specific ethics infrastructure of the German public service, as it had developed since the 18th century. A public administration in which the judgement of “good” and “correct” was a matter for experts and hence relatively divorced from social *common sense* and everyday ethics, in which the highest values were the strict application of laws and regulations and loyalty to the leadership of the state. Such a public administration was not well equipped for standing up against crimes, so long as these crimes corresponded to the will of the leadership of the state, were split up into a multitude of individual administrative measures *and* the arrangement of the individual measures was clothed in the form of orders and regulations. In its own eyes this public administration had not for example lost its ethical basis or suspended it. Precisely the higher civil servants, the majority of whom had already served the Weimar Republic and the Empire, frequently saw themselves in the role of defenders of *state of law* against the “radicals” in the Nazi-Party (Mommsen 1966, Rebutisch 1989) and they energetically defended the ethical principles of the public administration, when these coincided with the official scale of values of the leadership of the state. This was true in particular with the combating of corruption, which was rife precisely in the Gestapo and the SS, but was also tracked down and punished there (Pohl 1997, Weinert 1993). Thus in the public administration the illusion could be maintained, as Weinert (1993) puts it, of remaining “clean” during the war, even when deeply implicated in the crimes of the regime.

2. Ethics and public administration today: the examples of the fight against corruption and the change in asylum policy

Part of the continuity that characterises the public administration as opposed to the political regimes in Germany is the continuity of its ethics infrastructure. In the *common sense* of the political public in Germany “*state of law*” is the quintessence of the opposite of both German dictatorships, the Nazi dictatorship of 1933 to 1945 and communist one in East Germany from 1945 to 1989. In the positive self-description of the present political order in Germany, the concept of “state of law” characteristically plays a much greater role than the concept of “democracy”. The fact that this concept stems from pre-democratic times fades into the background - and the fact that under Nazi rule it was *also* an instrument for the ethical corruption of civil servants is of course forgotten too.

In the German public service the judgement of “good” and “correct” is still today a matter for experts, i.e. lawyers, and hence relatively divorced from social *common sense* and everyday ethics. Still today the concept of the *state of law* and the *special obligation of loyalty* of civil servants vis-à-vis the leadership of the state are the most important components of the ethics infrastructure of the public administration. This can even today still lead to the moral indifference of the public administration, if situational factors favour this. These situational factors can be grouped according to three

dimensions: interests, institutions and communication. On the basis of the given ethics infrastructure, these dimensions combine, and whether the result of this combination will be defensible or indefensible from the ethical standpoint cannot be predicted without taking into account the concrete circumstances.

In what follows, two examples are discussed, in which the combination of interests, institutions and communication has led to different results with respect to the ethical defensibility of the public administration's action.

2.1 *The fight against corruption*

In Germany corruption not only in the narrower sense (i.e. the bribing of officials) but also the misuse of public positions in general became a subject for the media and gradually also for domestic policy in the 1990s. In the 1980s there had been a whole series of major scandals in Germany, of which the biggest was the party donations scandal, which is associated with the name of the Flick Group. In addition there were many bribery scandals, large and small (Seibel 1997). The Flick scandal was the biggest challenge to the political system in the old Federal Republic, since almost all political parties were implicated, and seriously undermined the public trust in the government, its elected official and the party system.

At the beginning of the 1990s there was a wave of political scandals, all to do with the acceptance of more or less minor gifts or hospitality by politicians.

In addition to these cases of *political* corruption there have since the 1980s been many cases of *administrative* corruption, which attracted attention throughout the country. The main fields involved were the public procurement system and the construction department. The interest of the media in corruption in the administrative field increased. In addition to the traditional *advocacy* organisations such as the *taxpayers' association* a branch of the international Non-Governmental Organisation "Transparency International", whose aim is to combat corruption world-wide, was set up in Germany. Since the beginning of the 1990s the fight against corruption has been a major focus of the action taken by the federal and Land authorities to combat crime. Since 1994 the German Federal Criminal Investigation Agency in Wiesbaden has published a "Situation report on corruption", based on the retrospective compilation of data from the Land criminal Investigation Agencies (which hence does not contain up-to-date data). The federal government and the Länder are making considerable efforts to quantify the extent of corruption. The police criminal statistics published annually by the Federal Ministry for the Interior are still subject to considerable uncertainty however.

Germany is co-operating in both the operational fight against corruption and the co-ordination of legislation with European Union member states. This is part of the co-operation in the fields of justice and internal affairs, known as the "third pillar" of the EU. Also included in the "third pillar" is co-operation in the field of asylum policy, controls for nationals of third countries, the combating of international fraud and terrorism, drug trafficking and other serious international crime. The fight against crime in Germany is thus embedded in an international context, which is focused on combating international organised crime.

In 1997 the German government introduced a whole series of measures to combat corruption, among them a package of measures introduced by the Federal Ministries of the Interior and Justice to combat corruption, guidelines issued the Ministry of the Interior on the prevention of corruption, and the Act on combating corruption (*Gesetz zur Bekämpfung der Korruption*) of 19th August 1997. In the

package of measures to combat corruption and the guidelines on preventing corruption the government refers to the fields of public administration particularly prone to corruption (the award of contracts, in particular for building projects; the granting of concessions, authorisations and permits; fixing and collection of charges; granting of public funds and subsidies) and recommends a number of preventive measures and sanctions: separation of the planning, award and settlement of public contracts; risk analyses of areas of work prone to corruption; the setting up of a central contact point for matters concerned with corruption for officials and citizens; rotation of staff; the drafting of a code of conduct against susceptibility to corruption; systematic punishment of cases of corruption; the setting up of a central register of corruption). The Act on combating corruption of 19th August 1997 partly imposes harsher punishments for previously existing corruption offences, and partly defines new corruption offences, above all in connection with the acceptance of gifts and other favours from clients of the authorities, and to prevent so-called submission agreements in the award of public contracts. The possibility of obtaining tax relief on bribes paid abroad, which existed up to 1997, was eliminated.

There is no doubt that the fight against corruption in Germany has been significantly stepped up in the past two or three years. Parallel developments to those described above for the federal level are also to be seen at Land and municipal level according to the Federal Ministry of the Interior. That these measures are also successful can also be concluded indirectly from certain statistical data. The corruption statistics, which have only been kept since 1994, show considerable fluctuations for the years 1995 and 1996. In 1995 all corruption offences as defined under the criminal code significantly *decreased* as against 1994 (acceptance of favours by 17,2 per cent, corruptibility by 3,9 per cent, granting favours by 22,7 per cent, bribery by 12,6 per cent). Conversely in 1996, there was a dramatic *increase* as compared with 1995 (acceptance of favours up 156,7 per cent, corruptibility up 56,6 per cent, granting of favours up 216 per cent, bribery up 15,1 per cent). The federal Ministry and the Criminal Investigation Agency attribute the extreme fluctuations to the stepping up of the fight against corruption and the resulting increased sensitivity of the authorities to corruption offences. The figures for 1996 contained a few big complex cases of corruption, so that for 1997 also a statistical decline in corruption offences cannot be excluded.

2.2 *Asylum policy*

As from the mid 1980s, and to an even greater extent after the end of the Cold War in 1989, the German government was faced with great challenges in the framing of its border regime. On the one hand there was a sharp increase in the number of immigrants from the southern and south-eastern periphery of the EU and also people with German forefathers from Romania and certain regions of the Soviet Union. On the other hand Germany, or the (West German) FRG as it then was, had the most liberal immigration rules of all EEC countries, i.e. the unconditional constitutional guarantee of a provisional right of residence with no visa requirement provided that the entrants claimed political persecution in their country of origin and applied for asylum on the basis of Article 16 of the Constitution, the Basic Law. People with German forefathers, so-called *ethnic Germans*, had an unrestricted right of entry and entitlement to immediate conferral of German nationality. In addition, asylum seekers were entitled to support under the federal law on social welfare, which included meeting the cost of accommodation. In the 1980s there was a sharp increase in both the number of asylum seekers and the number of ethnic German immigrants, a development that continued unabated until the early 1990s. The number of ethnic Germans was considerably greater than the number of asylum seekers, and at the beginning of the 1990s it was about double.

The terms of the right of asylum had already become a major political issue before the German reunification of 1990. Within the government, it was the Christian Democrats, i.e. the CDU and CSU, who were calling for a drastic restriction of the right of asylum including an amendment to the constitutional right of Article 16 in order to bring the sharply rising immigration under control. The Christian Democrats argued that the great majority of the immigrants who applied for asylum had come to Germany for economic reasons, not because of political persecution. This argument was supported by the evidence: the very small proportion of asylum seekers whose applications were finally accepted, which ranged from 5 to 8 per cent. A restrictive amendment to the constitutional asylum provisions encountered strong opposition however, not only from the opposition parties (SPD and Greens), but also from the coalition partner of the Union Parties, the FDP. The opponents of a tightening of the right of asylum argued not only on the basis of the normative weight of the Constitution (Article 16 of the Basic Law belongs to the catalogue of basic rights which through a further Article, 19 III, are protected against changes in their fundamental content) and also on the basis of the historical background of the formerly generous asylum regulations, namely the fact that during the Nazi dictatorship many people in Germany and in the areas occupied by Germany in the Second World War survived only because asylum was granted to them in other countries.

This domestic conflict was further complicated by the evolution of European Co-operation on the matter. Since the 1970s Germany had been integrated in the intergovernmental co-operation system of the EEC countries in the field of border regulation, though this was focused on the co-ordination of policing tasks ("Terrorism, Radicalism, Extremism, Violence International", known as the TREVI Group). Parallel to this co-operation in the TREVI Group, a limited number of member states started the „Schengen“ initiative in 1985 which, together with the second Schengen Agreement of 1990, laid the foundation for a European border regime. The German government, and above all the Christian Democrats, in a sense made use of this new European context as from the mid 1980s by connecting the problem of immigration with the problem of fighting crime with the elimination of border controls within the EEC in the framework of the Schengen Agreements (Lavenex 1995). Vis-à-vis their own coalition partner the Liberals, the Christian Democrats could use the argument of the need for a harmonisation of the right of asylum on the basis of the Schengen Agreement of 1985 and the Single European Act of 1986, i.e. as part of the progress of Europeanisation. In fact the German right of asylum was at this time the most liberal among the EEC member countries.

The right of asylum in Germany after 1945 was linked with the recent experience of dictatorship in the home country and empirically with the admission of political refugees from the Soviet Bloc countries, i.e. with the idea of protecting the immigrant. Now the right of asylum was coupled with the problems of law and order and hence with the protection of state and society in the home country. In the 1990s, the Christian Democrats in Germany combined both aspects together, in that they used the wave of right-wing extremist violence against foreigners as an additional argument to stress the need for a change in the right of asylum. Furthermore, those who took a stance against a change in the exceptionally liberal right of asylum in Germany could appear to be "Eurosceptics", which at that time - at least in Germany - still amounted to a political stigma.

In this way the Christian Democrats finally succeeded in neutralising the Liberals' opposition to a tightening of the right of asylum and forcing the Social Democrats onto the defensive. The rising hostility to foreigners at the beginning of the 1990s, which since 1991 has resulted in the open use of violence, with several dozen deaths, had support precisely in the working class circles that traditionally voted for the SPD. In addition, the SPD could not permit itself to appear indecisive in the field of law and order. And finally the constantly growing influx of asylum seekers was creating problems, above all for the municipal and Land governments. The great majority of these however

were in SPD hands. For all these reasons there was finally no really resolute SPD opposition to the Christian Democrat asylum policy, and in August 1992 the SPD gave up their opposition on principle to any restriction of the right of asylum. In December 1992 a compromise was reached between the SPD, Union Parties and FDP, which permitted the required two-thirds majority in the Bundestag for a change in the Constitution, which was made in May 1993.

The kernel of the new right of asylum has since then been the so-called “third country clause” and the concept of “secure states of origin”. This means that asylum cannot be applied for by a person who enters Germany from a state of the European Community or from one of a legally prescribed list of countries which are Parties to the European Convention on Human Rights and the Geneva Refugee Convention of 1951. In addition, further states can be prescribed by a law, countries in which “because of the legal situation, application of the law and all general political conditions it seems guaranteed that neither political persecution nor inhuman or humiliating punishment or treatment takes place”. Applications from these “safe countries of origin“ are processed in accelerated procedures.

A special authority is responsible for the asylum procedure, the Federal Office for the Recognition of Foreign Refugees (Bundesamt für die Anerkennung ausländischer Flüchtlinge), in Zirndorf (Bavaria). Asylum seekers whose application has not yet been decided upon have no freedom of domicile, but have to stay in special hostels. They cannot be granted a work permit either. Foreigners whose application for asylum is refused or who for other reasons have no permission to stay may be placed in what is known as “detention prior to deportation” if the authorities think there is a danger that they might go underground. For asylum seekers who arrive in Germany by air a special procedure has been set up, the “Airport Procedure”: asylum seekers are detained in the airport area in quasi-extraterritorial zones until the authorities decide on the validity of their application and allow them to enter the territory and to access the formal asylum procedure. A special law, the Asylum Seekers Benefits Act (Asylbewerberleistungsgesetz) of 30th June 1993, governs the monetary payments and other provision for asylum seekers, including medical care. Under this Act the essential needs in terms of food, clothing, health and hygiene, etc. are basically only given in kind, not in cash. This law has been significantly tightened in a reform of 1 June 1997 which extends the period of limited public support from one to three years for all categories of refugees and asylum seekers living in the territory. For the first twelve months of the stay in Germany the law excludes the treatment of chronic diseases and handicaps by the local social welfare offices. The differentiation of chronic and acute diseases is left to the doctors, and in case of doubt the social welfare offices have to call in the public health department. On the basis of the Asylum Seekers Benefits Act local authorities can issue food vouchers and designate the shops in which these vouchers can be used.

The amendment of the Constitution article concerned with asylum in 1993 and the associated new laws obviously meant a dramatic change in German asylum policy. First, the individual right of asylum was replaced by a collective regulation on entitlement to asylum, based on the classification of secure countries of origin. Second, regardless of the true country of origin it was now no longer possible to make an application for asylum once the entry was made from one of Germany’s neighbouring states, because these countries were all considered “secure” in the sense of the new regulations. Thus an application for asylum could de jure only still be made after arrival by air, unless the entry was made illegally. In fact the number of asylum seekers in Germany fell equally dramatically: dropping from 438,000 in 1992 to 323,000 in 1993, 127,000 in 1994, 128,000 in 1995, and to 116,000 in 1996.

With the so-called asylum compromise of December 1992 and the revision of the regulations of 1993 the issue of asylum policy in Germany lost much of its controversiality in the domestic political arena. The Federal Constitutional Court confirmed all the essential content of the new regulations in 1996. The asylum problem was handed over to administrative routine. However, non-governmental organisations such as Amnesty International and Pro-Asyl are continually referring to the ethically dubious side of administrative practice. The NGOs' criticism is concentrated above all on the treatment of asylum seekers during the period in which their application has not yet been decided and on the deportation procedure once an application has been turned down.

One of the criticisms is that when judging the situation in an asylum seeker's country of origin the German authorities are satisfied with the information given by dictatorships and hence give more credence to the statements of possible persecutors than those of their possible victims (Pro-Asyl 1995:23, 1996:13). The responsible authority, the Federal Office for the Recognition of Foreign Refugees, is said to examine the applications hastily and without due care. The staff representatives of a Branch of the Federal Office complains that the Federal Ministry of the Interior and the management of the Federal Office exerted great pressure on the staff to question the asylum seekers only briefly and to give brief reasons for their decisions and thus increase the number of cases dealt with per official at the expense of the quality of the work (Pro-Asyl 1996:23). The Office of the United Nations High Commissioner for Refugees (UNHCR) and the Petitions Committee of the Bundestag criticised in the case of a Kurdish asylum seeker the fact that the investigation by the Federal Office for the Recognition of Foreign Refugees had been superficial and the Office, according to the Bundestag Committee, "dealt all too carelessly with the fate, the physical integrity and the life of a human being" (Pro-Asyl 1995:24).

Another point of criticism concerns the application of the safe third country rule at the border. According to UNHCR and related NGOs, the border guards do not take into account the needs of asylum seekers when returning them to the country they have come from and offer no procedural safeguards. In particular, the asylum seekers are not informed of the reasons for their rejection and receive no instruction concerning the possibility of applying for asylum in the third country. Moreover, the readmitting authorities of the third country are equally not informed of the fact that the person had applied for asylum and that his or her claim has not been examined on substantive grounds. As a consequence, most rejected asylum seekers find it very difficult to lodge an application in the „safe“ third country and risk to be returned to a state where they might be subject to serious human rights violations (UNHCR 1994 and 1995, ECRE and Amnesty International 1995).

Particularly criticised are the living conditions in the asylum seekers' hostels and in detention awaiting deportation. The hostels and cells are overcrowded, the treatment of the asylum seekers sometimes inhuman. The cramped conditions and physical pressure led to acts of violence between asylum seekers, which were sometimes accepted by those in charge of the facilities, sometimes stopped by brutal means (Pro-Asyl 1995:17, 19, 27; 1996:26; 1997:15). Rejected asylum seekers were charged for accommodation and transport, as a rule several thousand D-Mark (Pro-Asyl 1995:20). In the Airport Procedure - in which the proportion of accepted asylum seekers is exceptionally high, at over 90 per cent - the Kirchliche Sozialdienst (church social service) complains that the asylum seekers are isolated from the outside world and that there is a high tendency to suicide (Pro-Asyl 1996:25). In fact, the legal fiction of „extraterritorial zones“ makes it very difficult for lawyers and for NGOs to access the asylum seekers who have no choice but wait for the administrative decision on their authorisation to enter German territory. The Asylum Seekers Benefits Act with its restrictive provisions concerning the use of medical services makes the actual medical care unpredictable and leads in practice to great hardship. The NGO Pro-Asyl reports on a

case in which a local authority in the Hildesheim district allowed only an amalgam filling instead of the repair of broken dentures (Pro-Asyl 1996:30). In particular, the chronic consequences of war wounds, flight and torture, not infrequent among asylum seekers, can scarcely be treated because of the provisions of the Asylum Seekers Benefits Act (Pro-Asyl 1995:25).

3. The political dynamic of ethics in the public sector and the problem of ethical responsibility

Comparing the case of the fight against corruption with that of asylum policy reveals on the one hand typical elements of the ethics infrastructure of the German public administration, and on the other hand also the role of intervening factors, such as the influence of interest groups, institutional procedures and, above all, political communication.

Resolute action is to be seen in the fight against corruption in Germany. This pattern of behaviour corresponds to the German public service tradition, which has its roots precisely in the prevention of bribery and the misuse of public office for personal enrichment. Combating corruption is thoroughly compatible with the values of the permanent civil service. There is also no indication that this ethic could be seriously endangered by the wave of managerialism which has swept over the German public administration. The German public administration could perhaps even be a model example of the fact that a fair amount of flexibility in the fields of organisation and management is not necessarily detrimental to the ethical standard of incorruptibility.

The case of asylum policy on the other hand is striking because of the strictness with which the public administration put into practice the dramatic about turn in German asylum policy, with all its bureaucratic ramifications. This reversal from having one of the most liberal to one of the most restrictive asylum regimes in Europe was associated however with a radical shift in ethical premises. The words "asylum" and "asylum seeker" became devalued in Germany's public speech within a few years from being a positive definition of (West) Germany's willingness to help the victims of political persecution, as a sign of a kind of historical compensation for the crimes of the Nazi period, to being a synonym for the burdening of the native population by uncontrolled immigration and an influx of foreign criminality. This pattern of behaviour, it would appear, thus corresponds to a German public service tradition, namely the tradition of the *state of law* and hence the effective application of laws, if these are legitimised by the will of the leadership of the state.

This picture is too simple, however, in that it does not capture the actual dynamic of the events or the real role that the ethical infrastructure of the public administration played in them. How, for example, is the total disproportion between the consequences of the bribery scandals of the 1980s and those of the 1990s to be explained? In the Flick scandal, high ranking party leaders were involved, but none of these politicians suffered any lasting damage. In the 1990s on the other hand, Ministers fell because of relative trivialities. It is not plausible to assume that an ethics infrastructure rooted in tradition was in force the one time but not the other. Here, as in the about turn in German asylum policy, additional factors must have influenced the actual effectiveness of the ethical principles.

What differentiates the mini-scandals of the 1990s from the mega-scandal of the Flick affair is above all the way in which the party system was involved and the role of party rivalry. In the Flick affair *all* Parties were concerned (except the newly-founded Greens). Nowhere other than in Italy is the party system such a constituent part of the political system as in Germany. This scandal thus hit at the very marrow of the Republic and therefore had to be brought under control at all costs. The cartel of those most affected finally achieved this.

All parties were also affected by the mini-scandals of the 1990s, but not all at the same time. Therefore each case could be taken individually by the rival parties not affected and used to make political capital. Not until 1992, when criticism by the media and the appearance of other critical publications (e.g. by Arnim 1991, Scheuch/Scheuch 1992) intensified and no lesser personage than the President, Richard von Weizsäcker, in the midst of the new series of scandals in summer 1992 roundly criticised the state of affairs in parties and the state, did there threaten to be a loss of credibility for the party system and the political class as such. No doubt public awareness was by this time more sensitive to political and administrative corruption. Since similar scandals and also a similar change in awareness had occurred in many European countries had (Della Porta/Mény 1997, Mény 1997) it is not surprising that combating corruption became a major focus of the co-operation of EU states in the fields of justice and internal affairs. But precisely through this, combating corruption had developed a dynamic of its own, that was no longer causally related with the traditional ethics infrastructure of the German public service. The particular nature of this dynamic also became clear from the erratic course of the minor scandals of the 1990s: whether a politician had to step down or not was virtually completely unpredictable, in any event it was not dependent on the seriousness of the “offence”.

The ethical infrastructure with which polity and public administration in a country are endowed, clearly offers only a *latent* reference system for the evaluation of ethically dubious acts. In both polity and public administration people’s actions are subject to the double logic of standards and goals, ethics and interests. Whether ethical standards become *manifest* and to what extent this influences public and internal administrative discourse, clearly also depends on the mobilisation of *interests*. In public discourse the interests of politicians and journalists are relevant. Their interests are directed at how they can obtain support - votes, attention - from the public, and *for this reason* the latent ethical reference system of the public is of importance to them.

Whether capital can be made from the reference system of the public in the interest of politicians and journalists (for example through a scandal), will again be mainly determined by the *institutional* order of polity and Verwaltung and by the *communication* between politicians and journalists and the public. As we have seen, the party system and party rivalry were of decisive importance for the way in which public discourse on corruption in (West) Germany developed. But also the interests of the actors on the three levels of government - Federal, Länder and municipalities - had an effect. When illicitly deriving personal advantage from public office became an issue in public discourse, official opinion on all levels of government was used to support the fight against corruption. This provided at the same time also a certain relief for the higher levels of the polity, who could demonstrate their own resolution in combating serious irregularities in the state.

In communication between politicians, journalists and the public it is a matter of how the acts of politicians and civil servants are assessed with respect to the public’s latent ethical standards. Politicians endeavour to present all their acts and omissions, or have them presented, in such a way that they coincide with the public’s ethical standards. This happens regardless of whether the initiative comes from the shaping of public opinion or from the politicians themselves.

Asylum policy in Germany is a perfect example of the great importance of such communication processes. The German Christian Democrats achieved the about turn in asylum policy which they had long been striving for through the clever exploitation of the public’s ethical reference system. They managed to replace the positive connotation of “asylum” in public opinion by a negative one. The association of “asylum” with positive values such as willingness to help and solidarity was ousted by association with negative values such as the illegitimate exploitation of willingness to help

and crime. At the same time, the reference to the idea of European integration gathered normative support and was finally confirmed as a major legitimating argument in the ruling of the Constitutional Court of 1996 on the constitutionality of the asylum reforms.

This alone would probably not have sufficed for an about turn in asylum policy if it had not been possible to mobilise interests in favour of such a change too. The interests of the public itself were appealed to by reference to the burden placed on the labour market and of the social service system by asylum seekers and by “foreign criminality”. But it was above all the interests of the Länder and municipalities that played a role in the asylum policy about turn striven for by the Christian Democrats. Land governments and local authorities bore the greater part of the burden of the inflows of foreigners, and they were mainly controlled by the SPD, which was in opposition at the federal level. In a combination of public opinion forming and mobilisation of Land and municipal interests, the resistance of the opposition SPD in the Bundestag could be paralysed. So here again the institutional factor came into play.

The ethics infrastructure of the public administration first played a role again when it came to putting the reversal in asylum policy into administrative practice. Worthy of note is above all the strictness with which the public administration completed the implementation of the new laws to the disadvantage of asylum seekers after a very short adjustment period. This can be attributed in the first place, as already explained, to the German *state of law* tradition. However, the rigidity with which, according to the reports of the NGOs, the new laws disadvantaging of asylum seekers were applied by the public administration was also probably fed by the continuation of the influencing of the climate of opinion that had prepared the about turn in asylum policy.

If there is no linear relationship between the ethics infrastructure of the public administration and the actual ethical quality of its actions, then the way in which the institutional latitude, the interests present and the communication possibilities are exploited is of central importance for ethically relevant measures. *Personal ethical responsibility* is located right here. It is not institutions, interests and communication alone that determine political and administrative acts, but also the degree of ethical attachment of those who have responsibility and a certain room for manoeuvre in decision making, i.e. the political and administrative elites. For the ethical quality of their decisions it is important whether they are immune to what Max Weber called *Gesinnungsethik*: immune to the mere “having an ethical conviction”, without regard to the actual effects that this conviction may have under the given circumstances. Decisive here is an appropriate *Verantwortungsethik* (responsibility ethic) (Weber) of the political and administrative elites: the capacity to apply ethical standards under all possible circumstances, even against institutional pressures, influential interests or a particular climate of opinion. Precisely this quality is what is meant by the difficult to translate concept of a *leadership ethic*.

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INTEGRATING ETHICS INTO DEMOCRATIC GOVERNANCE

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Executive summary

It is increasingly common for OECD countries to adopt a “core values” approach to public sector ethics, replacing the old world of extensive and cumbersome regulation of prescribed forms of conduct with a new world of principles-based declarations of “core values” expected of public servants. But one of the main challenges to the reliance on “core values” is debate and uncertainty over the political character of public sector ethics. The Australian public service commissioner has recently made a refreshing contribution to this old debate (Shergold, 1997). He has argued that the distinctive competence of public sector managers is not simply their personal probity or ethical integrity, since these valuable qualities are just as much in demand in successful private organisations where misplaced private interest can get in the way of wider corporate goals. Private organisations are as much in need of public trust and credibility as are public organisations.

The really distinctive quality of public sector managers derives from their special political task and official responsibility to act “in the public interest”. Thus the distinctive qualities expected of public service decision-making and official conduct reflect what has traditionally been called “the merit system” originally designed to cultivate an ethos of merits-based consideration of decisions and conduct supportive of the public interest. Officials are expected to conduct themselves strictly according to standards which can survive the closest public scrutiny by those political, administrative and judicial bodies responsible for ensuring that public administrators resist undue private interests in favour of the wider public interest. This responsibility of public officials to advise on and protect the public interest highlights a distinctive political competence which might prove difficult to capture in the emerging world of “core values”.

Further, this practical recognition of the political responsibilities of public officials reflects a larger theoretical argument about inherent differences between private and public sector values and organisational ethics. One of the most pressing challenges today is how to restate this argument so that it “adds value” to the political argument over the strengths and weaknesses of the emerging “contract state”, where a considerable part of the business of government is performed by non-government organisations with no official obligation to advise on the merits of competing policy claims on the public purse (Kirkpatrick and Lucio, 1996; Greenway, 1995; Posner and Schmitt, 1996; Finn, 1992, p.255).

A common feature of many experiments with the “contract state” has been the emergence of considerable community debate over the relationship between administrative ethics and public accountability in systems of democratic governance. At the cutting edge of ethics are those who manage or supervise public services delivered by contractors (Foster and Plowden, 1996, pp.100-1 & 120-5). At its most general, ethics demands of us that we become *answerable* for our conduct:

prepared for and capable of giving an account of ourselves, should the need arise. The key term in ethics is *responsibility*, which refers to two related activities (Kernathan and Langford, 1990). First, being authorised or entrusted with a set of discretionary *responsibilities for* some range of activities (e.g. health or employment services delivered either by public servants or external contractors). Second, being ready to explain and justify that discretionary office of trust before those whom one is *responsible to* (e.g. to political authorities empowered to direct public funds to health or employment services, or to clients of such services, or to various types of performance auditors within the executive and legislative branches of government).

Concepts of merits-based decision making are at the heart of administrative ethics. Ethics is certainly about individual choice, but in the case of ethics in the public sector the choice is not a purely *personal* one, but is an *official* one subject to external scrutiny of its merits. That is, administrative ethics is about the merits of choices made in our role or office as professional public servants, however humble our particular station might be. Ethics emerges primarily in relation to uncertainty over what types of conduct or choice our professional role might require of us. For convenience, I put to one side the rare and extreme circumstances where one's personal conscience does and should speak out against illegal or corrupt forms of unprofessional conduct by colleagues and especially supervisors. The main point is that there will be many instances where our professional role or office requires us to follow a course of action which differs from the one most preferred according to our personal view of the matter. But, putting it crudely, we are not paid to act out our personal agenda, but to act as agents of the public, with a duty to act in accordance with the best interests of the wider community as reasonably determined by duly-constituted authority.

Ethics arises precisely because legitimate duties conflict. There can be contradictions among the duly-constituted authorities. The primary ethics question for public servants is not: "what is my *personal preference* as to this or that course of action?". Rather it is: "what is my duty or responsibility as a public official in relation to this or that course of action?" This is no easy matter as there are plenty of occasions for genuine uncertainty over what course of action is indeed most appropriate, and over conflicts of competing official responsibilities. The basic test of public or professional ethics is not that of satisfying one's personal conscience, but of acting in such a way as to be able to justify the public trust placed in one, as assessed by some legitimate reviewer of official conduct: be that a minister, or a court, or a review tribunal, or an ombudsman, or a parliamentary committee; or even as assessed by the media in their capacity as testers of public information.

Democratic theory rightly accords prominence to the external and public justification of official conduct (March and Olsen, 1995; Gauss, 1996). Seen in this light, administrative ethics can not be divorced from public accountability. A basic test of public sector ethics is the extent to which officials can satisfactorily justify their conduct and official performance before appropriate accountability agencies. And a basic test of a public service "ethics infrastructure" is the extent to which officials are being trained in the complementary relationship between ethics and accountability. Declarations of "core values" can have an important role to play in an "ethics infrastructure" as the basis of a community contract between the inner world of responsible officials and the external world of accountability agents. But such a community contract will be unproductive if the "core values" simply declare the exclusive interests of either the inner world of the bureaucracy or the external world of the agencies of review and accountability.

Democratic governance

OECD members have already been warned about relying on any “set of simple formula solutions” for what really is “a set of complex dilemmas” facing the governance of nations. A classic example is the challenge facing public managers about how best to use their discretionary authority to balance “the needs of individual clients with those of the overall public good, maintaining integrity, confidentiality, neutrality” (PUMA 1996a, 10, 24). Given all the decentralisation and devolution which has swept the western world, the OECD recognises that effective or sustainable managerial discretion will require “a solid ethical framework” to protect public servants “against possible risk and conflict of interest pressures, and thus to protect the public at large”. Included in that public dimension is the legitimate public interest in being reassured through evidence that government operations are true to merit, and are not being brought down by inappropriate private interests associated with the typical breaches of merit -such as nepotism, cronyism and associated forms of unmerited private access to public facilities.

OECD members are recognising that the ethic of accountability requires greater rather than less support and attention. Reforms have “brought ethical issues to the fore” with a renewed search for “openness and transparency” in government operations (PUMA 1996a, 25, 43). OECD members are still searching for “the appropriate balance between autonomy and accountability” which still needs to be “tested and refined” and not simply, or simple-mindedly, implemented according to some blue print. As the OECD has warned, once we move away from central prescription of official conduct, the ethic of accountability becomes *more* rather than *less* important. Contrary to the view of many ardent managerialists, the OECD foresees that over the next few years “accountability mechanisms will be an increasingly important factor in defining to whom and for what public servants are accountable” (PUMA 1996b, 21, 23, 34).

Yet another recent OECD report notes how important it is that public officials “remain aware that they are responsible to the public to ensure that public services are not jeopardised or needlessly subject to increased costs through risky management” (PUMA 1996c, 27). However, this OECD report goes on to observe that managers are more positive about such changes than are line staff; and further to advise that no countries really “felt that they had adequately come to terms with issues of delineating and enforcing accountability for shifting responsibilities”. Indeed, measures for “ensuring accountability” remain as “one of the key issues” facing the international pursuit of reformed public administration (PUMA 1996c, 27, 31).

Just as the language of devolution and deregulation tends to derive from the reform agenda of central bureaucratic agencies, so too much of the language of public sector ethics derives from the administrative centre. As with earlier phases of managerial reform, the emerging ethics movement is part of a strategic policy response designed to push the pace of modernisation and to “*make* the managers manage”. For our purposes, it is important to recognise that ethics has emerged as one of the preoccupations of the central agencies of state, for whom the establishment of an ethics regime (or “ethics infrastructure”) for the public sector ranks as one of most important of the “new strategic capacities at the centre” identified by the *Governance in Transition* team (PUMA, 1995, pp. 8, 15-16).

Thus the renewed interest in ethics as an instrument of governance can be seen as yet another example of “the new institutionalism” within contemporary social science which has devoted considerable attention to the topic of institutional design. The exemplary proponents of such an orientation are March and Olsen with their important distinction between two contrasting

administrative logics: the conventional “logic of consequences” which evaluates public management simply by reference to its results, and their preferred alternative, the “logic of appropriateness”. I think that this is an important distinction for democratic governance because there are norms of due process appropriate to effective democracy which can form the basis of administrative ethics. March and Olsen's account of the ethical importance of the logic of appropriateness shows that it is supportive of public sector ethics because it asks us to evaluate conduct by reference not only to the quality of the results but, just as importantly, to the qualities of the processes appropriate to the public office in question (March and Olsen, 1995, pp. 30-2 & 154-6).

This reference to the place of administrative ethics in March and Olsen's theory of democratic governance illustrates the broadly political character of public sector ethics. The category of “appropriateness” derives from political determinations of the social worth of various norms of due process. Public sector officials operate within a political environment where society has a reasonable expectation that public officials will not allow the pursuit of ends (either those of public policy or private interest) to bypass adherence to socially appropriate means. Yet it is very rare for declarations of “core values” to specify the operational content of such norms of due process. Thus it comes as no surprise that among the chief challenges facing public sector ethics are:

- satisfactory resolution of the political debate over the nature of administrative ethics;
- and arriving at an adequate balance of service-wide “core values” as against agency-specific roles responsibilities;
- determining the continuing relevance of traditional forms of accountability; and
- devising more effective means of integrating ethics into administrative decision-making.

The following sections treat each of these challenges in turn.

The political debate over administrative ethics

Administrative ethics should be seen as a subset of political ethics, in at least three important senses.

Public administration is a function of the state with its own constitutional role and related sets of responsibilities, and this constitutional dimension is itself a topic of political discussion and debate. This discussion is usually quite muted, but it can rise to fever pitch when charges of “politicisation” are levelled at political parties which appear to be at odds with traditional constitutional conventions of an impartial bureaucracy; or again when charges of “unelected rulers” are directed at bureaucratic agencies which appear to be at odds with the policy directions of the duly-elected government of the day.

Second, the practical reach of administrative ethics is conditioned by the character of the political ethics of the political assembly and the political executive. There are limits to what can be expected of public administrators on the ethics front: our idealistic desire for reform of public sector ethics has to accept the realistic limits of what is politically feasible. At some point, it is important to inquire into the sources of ethical conduct of ministers who direct the administrative system and of other elected politicians who call to public account officials as well as ministers. Few studies of administrative ethics explore the relationship between the ethics of officials and the equally important ethics of ministers and elected politicians.

Third, both administrative and political ethics are further conditioned by the underlying national political culture. This last dimension refers to the basic political regime which forms a nation's sense

of political identity, including the increasingly interdependent “globalisation” of local, national and international political identities. One model of the analysis of political regime and national administrative cultures is that provided by the American authority on public sector ethics, John Rohr, in his comparative analysis of French and United States systems of governance (Rohr, 1995).

Each of these three levels of political ethics illustrates an important component of what I term “the ethics of representation”. Public sector ethics properly understood focuses on the appropriate working relationship between bureaucrats and elected politicians against the wider political background of the national (and increasingly international) regime. It is misleading to focus solely on the conduct of public servants or that of the increasingly prominent delegated service contractors, because the ethical responsibilities of such officials must be seen as one of a number of political components which are closely inter-related in their practical operations.

Within democratic regimes, officials and elected politicians are expected to share an ethical orientation associated with notions of representativeness: the bureaucracy displaying a commitment to represent administrative and procedural values conducive to fair and open consideration of “the public interest”; and elected politicians displaying a commitment to represent policy and expenditure priorities consistent with the electorate's declared will. Both forms of the ethic of representation have the potential to contribute to the larger representation of national political identity through social development and strategies of nation-building.

Two models of ethics

The practical operation of ethics regimes in systems of democratic governance varies greatly according to the meaning attributed to ethics. Among the many possibilities are two models which I will call the *professional model* and the *political model*. The professional model is illustrated by the traditional British-derived orientation where unethical conduct is taken as a lapse of character. Here the ethics strategy is basically one of professionalism, with bureaucratic attention to the cultivation of appropriate norms of professional conduct so that officials know what is expected of them by their professional peers. The traditional world of police ethics is a case in point, where the cultivation of “good character” has long been known to have a vital place in responsible policing. In the alternative political model, evident for example in United States-derived systems, unethical conduct is taken as a form of corruption and as serious breach of the political standards expected of public officials. It is very likely that contemporary systems of democratic governance will have to combine elements of these two professional and political models of ethics, and develop complementary strategies targeting both the promotion of character and the prohibition of corruption.

Under the professional model, public sector ethics refers to the sphere of unregulated discretionary conduct expected of professional public servants. In this view, public sector ethics is not well suited to legal regulation but is more appropriately dealt with through internal public service guidelines and directions, including those relating to the selection and development of public servants. In this orientation, ethics is fundamentally a matter of sound judgement and trustworthy discretion, with the best protection against irresponsible official conduct being a culture of “generalist” administrative professionalism with an appropriate professional ethic modelled by senior officials. Ethics is thus seen as a matter of professional honour involving discretionary judgement when exercising individual choice from a range of available options. In this version, administrative discipline as distinct from the criminal law is the usual sanction for unethical conduct (Whetnall, 1995; New Zealand, 1995; Greenway, 1995).

Under the political model, public sector ethics is seen as another new sphere of legal regulation, attracting an expanding shelf of “ethics laws”. In this orientation to ethics, “ethics violations” are offences liable to be committed by public officials who put private benefit ahead of public duty. An effective ethics regime requires a dedicated ethics agency with a mandate to police, in the broadest sense of that term, “ethics violations”. Thus understood, ethical conduct is an essential part of the rule of law, where breaches of ethics are understood as breaches of the criminal law. In this version, unethical conduct faces the sanction of the criminal law. One consequence is that whatever is not prohibited by the law tends to be regarded as ethical. As a result, the tendency is steadily to increase the burden of ethics regulations, plugging new loopholes as soon as they are discovered (Gilman, 1995; Clark, 1996; Stark, 1997).

These two ethics models suggest a wide range of possibilities in the composition of an “ethics infrastructure”. The former approach relies on the honour of the administrative system and the ability of senior officials, especially those managing the central agencies of state, to use their managerial prerogatives to maintain a culture of constraint against unethical conduct. The latter approach is one of legal regulation by an independent agency which relies on a range of accountability mechanisms to support whatever core values might be proclaimed as appropriate. One conclusion is that systems of democratic governance would be wise not to rely solely on either approach, but to combine and blend them according to whatever considerations are most relevant to national circumstances.

Core values and the ethics of agency

We should begin with an important contrast between government and community expectations of ethics. This is the contrast between the increasing bureaucratic and political confidence in the capacity of public managers to act ethically, and the remarkably widespread decline in public confidence in the capacity of government generally. The two developments are closely related. Political and bureaucratic reformers see their explicit turn to ethics as a policy response to the public fear that governments generally are retreating from traditional standards of personal probity and systemic accountability. It is an open question whether reformed administrative ethics can realign the rising bureaucratic confidence in the system's capacity to manage itself responsibly and the falling public confidence in government generally (Finn, 1992, p.252; Gilman, 1995, p.1; Meny, 1996, Clark, 1996, p.62).

Looking at the international trends in ethical governance, I fear that political demands for a “one-size-fits-all” declaration or codification of public sector values will fail on two counts, one relating to ethics and one relating to accountability. First, it will do an injustice to administrative ethics by trying to market all public service (or even public sector) ethics as a uniform “product”. This homogenisation is misplaced because there is a wide range of complementary ethical “products” which vary according to the specific charter of the public agency in question and according to the type of public office being performed. I use the term “the ethics of agency” to acknowledge that much (but not of course all) of the substance of administrative ethics varies according to responsibilities of office conferred by law and policy on the many different government offices and officers (Uhr, 1994). Public sector ethics requires a combination of a lean set of central declarations of “core values” and a wide range of agency-specific identifications of official roles and responsibilities. In my view, a key term is “office”, because so much of the substance of public sector ethics concerns the ethics of office with “values” and, more importantly, responsibilities which vary depending on the role.

My term “the ethics of agency” refers especially to the situation of the official whose duty it is to act as an agent or trustee of that demanding principal, the public. The “ethics of agency” label is doubly useful in that the term also calls to mind our role, not just as public servants, but as employees in a specific agency, which itself has specific public obligations to which we help give effect. Aligning these sets of responsibilities can be tricky. One tempting way out is to overlay them with a superior set of “discipline-professional” responsibilities, with an overarching code of ethics for specialists of this or that discipline, as in the case of engineers, lawyers or social workers. My ethics of agency approach tends to downplay the “discipline-professional” codes and promote the “service-professional” codes, identifying us as specific institutional agents rather than as a family of sub-professionals.

The concept of “ethics of agency” refers to two levels of public service responsibility and professionalism. First and most generally, as an agent of the public with duties and obligations toward the public; and second and more specifically, as an agency employee, with duties and obligations flowing from the specific mission of the institution in question. The concept of “ethics of agency” refers to two levels of public service responsibility and professionalism: generally, as an agent of the public with duties and obligations toward the public; and more specifically, as an agency employee, with duties and obligations flowing from the specific mission of the institution in question.

Second, the same type of political demands will also do an injustice to public accountability by raising our hopes that many of the traditional forms of external review of bureaucratic performance (e.g. parliamentary scrutiny; audit review; ombudsman's investigation; administrative appeals tribunals and so on) can be replaced by a new and, to me at least, risky investment in ethical motivation based on a bland and colourless “whole-of-government” identification of core administrative ethics. Public accountability requires its own combination of (i)†internal “values” about the public purpose being served by different agencies, and (ii)†external “valuations” or “verifications” of the real public impacts of agency performance as determined by any number of other public agencies of accountability established to help maintain responsibility within the public sector. To say the very least, effective democratic governance demands that the community have at their disposal access to as many instruments of accountability as are necessary to restore community confidence in government. Declarations of “core values” are a necessary but insufficient part of that armoury of accountability.

Some assistance might come from seeing both ethics and accountability as complementary aspects of desirable democratic “regimes of responsibility”. The tendency is to see separate “regimes of ethics” concerned with appropriate values and professional conduct, from “regimes of accountability” concerned with the verification of due compliance with externally imposed standards of appropriate conduct. Both are in fact essential under contemporary circumstances. Accountability appears today as unduly negative, especially in the form of external review of bureaucratic performance. But is it important to acknowledge that, whatever its other merits in promoting personal integrity in government, the positive declaration of appropriate values of public service professionalism alone can not be expected to win the war against administrative irresponsibility.

Positive charters of “core values” should not be relied on to do the work of or replace the traditional function of theories and practices of “public trust” and “public interest” which inform the best practices of public accountability. The negative reputation of accountability derives from the inherently negative function of external tests of the ways in which persons in offices of “public trust” are in fact serving the “public interest”. According to Australia's great authority on public trust, external review of the “trustworthiness” of public officials was never designed to test official

compliance with some overarching sense of the substantive ethical content of the “public interest” (Finn 1992, 254; cf. Finn 1993). Rather, the task was to establish a forum of justification for public officials to explain their conduct in office, and especially to justify that their management of their public interest responsibilities was not adversely affected by inappropriately partial (i.e., private or personal) interests. In other words, tests of “public trust” or “public interest” were essentially negative tests designed to rule out their opposites, i.e. untrustworthy conduct as evidenced by partial consideration of the interests in question.

By way of contrast, many contemporary ethics regimes ambitiously presume that officials will be able to refer to a declaration of “core values” to prove that their conduct substantively complies with “the public interest”. I think this is a mistake. At its best, the traditional approach recognised that “the public interest” had no stable substantive content, given that public needs and priorities change according to circumstance. But this inherent variability in substantive content was traditionally understood to highlight the importance of greater stability in administrative norms of due process. In this way, “public interest tests” are best understood not as tests of compliance in the bureaucratic application of abstract “core values” but instead as tests of the merits and fairness of concrete decision processes in specific circumstances. An important aim of this type of test or external review of administrative merits is to establish what “public interest” protections might be in place to screen out procedural imperfections reflecting partial or inappropriately personal considerations. Reliance simply on a statement of “core values” can never replace such accountability mechanisms. Public sector ethics therefore requires both statements of values and instruments of validation, to which I now turn.

Rethinking the ethics of accountability

Prominent among the institutions of governance facing renewal are many of the traditional checks and balances of accountability originally established to combat administrative fraud, waste and mismanagement. Traditional forms of accountability are being reassessed to see whether their effectiveness is as good as many had presumed or supposed. Most forms of accountability have traditionally involved external review of past performance and served an audit or “verification” function, with accountability agents checking the extent of compliance with due standards of care in administrative processes. The current bias against central controls which add insufficient or no value to the policy and administrative process has shifted the locus of accountability from the political centre to outlying managerial agencies. The expectation now is that public sector managers will accept the call for greater authority and exercise greater discretionary responsibility, on the explicit condition that they will own up to new burdens of accountability for their administrative performance.

Where does ethics enter this picture of reformed public management? To oversimplify for the sake of emphasis: ethics is a new and refined version of accountability which switches the management of administrative responsibility from the *external review of past performance* to the *internal preview of future performance*. This oversimplification contains at least this truth: accountability and ethics can both function as instruments to promote administrative responsibility and to protect against administrative irresponsibility. Each instrument has a distinctive focus. Traditional accountability is an instrument of compliance and control, judging performance against the letter of the law. Contemporary public sector ethics is an instrument of motivation and morale, judging performance against the spirit (or motivating values) of the law. Accountability regimes are more effective than are ethics codes in combating fraud and corruption. Ethics codes are more effective than

accountability regimes in reinforcing administrative professionalism. Both have important roles to play in maintaining democratic governance.

An early warning about accountability

The changing nature of public accountability is itself one of the main challenges to those responsible for a “core values” approach to public sector ethics. The changing nature of public organisations means that many public services are now being “hived off” and delegated to external contractors. Compared with core public service advisers, these “non-core” service providers will have fewer incentives to adhere to the spirit (e.g. through management training in the ethics of providing public services) as well as the letter of any proclaimed set of “core values”. On this new front of government activity, fears about the potential for corruption displace the hopes raised by the reliance on “core values” evident in the core public service. Fears about the responsible management of these outsourced public services strengthen new moves to reshape the protections of public accountability for such “third party” organisations. This is a common feature of many OECD systems of governance, but one of the best illustration of the tensions it can create is the original warnings associated with the British version of the contract state (Kirkpatrick and Lucio, 1995).

This is nowhere better exemplified than in the political debate surrounding the famous accountability annex included in the Efficiency Unit's 1988 managerial manifesto, *Improving Management in Government: Next Steps* (Jenkins & al., 1988). This influential report mapped out the path by which new commercial agencies for public service delivery could be hived off from ministerial policy advising units. The product of an advisory group to government, it rightly recognised that enhanced “responsibility for performance” within government meant relieving ministers of their operational and accountability “overload”. It argued that ministers should appropriately retain “responsible for policy”; but in a more fully managerial environment, senior officials should then begin to appreciate that they themselves are “directly responsible for operational matters” (Jenkins, 1988, para. 23). Indeed, the managerial revolution towards “individual responsibility for performance” will not eventuate if ministerial control and accountability “is there as a ready-made excuse” shielding line managers against the full effect of public scrutiny of their performance and organisational results (Jenkins, 1988, para. 2).

Now that all agency “officers” are to become “managers” in fact as well as name, they have to take on the responsibilities of management formerly only associated with the designated “accounting officers” nominated by Treasury for dealing with the parliamentary public accounts committee. Managerial executives must be accountable to parliament “as to the manner in which their delegated authority had been used and their functions discharged” (Jenkins, 1988, para.3). This a strategy for placing “clear pressure” on the executive “to strive for good value” (Jenkins, 1988, para.7). Thus, in the name of efficiency and enterprise, one of the leading reform bodies advising executive government made the clear case for a new accountability regime with greater rather less parliamentary and audit review of the operations and performance of public services (cf. Flynn, Gray and Jenkins, 1990, pp.172-176).

The British tension over accountability has never erupted into open wrangling over parliament's right to substitute parliamentary government for the executive conveniences of ministerial responsibility. Even the boldest of the modern House of Commons' select committees respects the conventions of ministerial responsibility. The differences which do exist between committees and government -- over how much accountability ministers may delegate to the new species of “agency” head -- suggest

that agency accountability can be complicated by the lingering rights of ministers to exercise their traditional function of speaking on behalf of those officials who spend taxpayers' money on their behalf and at their general direction. British developments have shaken but not displaced the traditional doctrine of public administration that policy can be separated from administration, that policy is sovereign and is the responsibility solely of ministers, and that the accountability of bureau heads can be confined to their responsibilities for managerial "operations", to use the favoured term.

But the emerging "agency" framework has certainly created tensions over the competing responsibilities of agency heads in charge of "operations" and their departmental chiefs or "permanent heads", who remain responsible for policy, if only to ministers. The Next Steps program presumes that agency heads will be accountable to external audit bodies and parliamentary committees in their own right - a presumption not universally shared by core civil servants, who can see the potential risks of too many accountability bridges being constructed across that moat separating the spenders of public expenditure from parliament as the legal authority for securing taxation revenue.

The general lesson suggested by this case study is that at the heart of many contemporary governance systems is a dispute over policy and operational responsibilities. This dispute takes the form of a debate over the balance of public accountability to be shared by traditional political authorities and emerging managerial institutions. But the root of the problem is political and community uncertainty over the reach of responsibility appropriate to different public institutions. Anxiety over accountability tells a deeper story about unresolved community expectations over shifting responsibilities for "owning up" for the quality of policy outcomes. There is little prospect that a declaration of "core values" will have its full effect right across the public sector. In the absence of a resolution of such community expectations, it is very likely that the continuing struggle over accountability will take even greater prominence. The call for greater accountability acts as an understandable and prudent response to the increasing risk of corruption, as taxpayers' money is contracted out further and further from the core of government operations.

Redefining the ethics of accountability

Despite the prominence of the accountability theme across the many forms of modern representative government, very few frameworks exist for the comparative analysis of issues of accountability. Comparative political studies have traditionally had little to say on the range of types of accountability regimes encountered within the modern democratic systems of government (but see for example, Finer, 1970; Macridis, 1987, p.11-13 & 58-66). Political theory, for its part, has tended to leave examination of the forms of accountability to the province of the constitutional lawyer, preferring instead to focus on the grander theme of democratic responsibilities in government.

Normanton is one of the few truly great students of comparative accountability. He concedes that in the balance between accountability and autonomy, each nation "must strike its own balance". Each nation should be "receptive of foreign example, although wary". Despite this apology for the lack of a "natural or permanent point of balance", Normanton argued that historically both the UK and the US tended to be out of balance, but in different ways: the UK tending to favour bureaucratic autonomy, the US much greater public accountability. But what constitutes the standard for such assessments? (Normanton, 1966, p. 409; and Normanton, 1971, p. 313.

Surprisingly, but perhaps realistically, the Normanton standard is subtly protective of bureaucratic discretion and almost biased in favour of professional administration as a form of rule. The "due

balance” standard has something to do with protecting official responsibility from becoming, on the one hand, either blatantly bureaucratic and officious or, on the other hand, meekly responsive (Normanton, 1966, p. 407-426. To the extent that an independent and professional audit office models the general need for intermediary bodies, successful accountability requires professional accounting standards -- and not simply in the narrow sense of financial accounting.

Not surprisingly, Normanton is known as an energetic advocate of offices of external audit independent of the executive government (Normanton, 1966, Chs. 12 and 13. Indeed, his case represents the easy temptation facing accountability agents, which is to treat the whole process of responsible decision-making as amenable to an institutional solution, or even a technical institute of “professional” auditors and program evaluators. Normanton’s early warning about an alleged “crisis of accountability” is based on a fair estimate of the probability that accountability reporting tends to become formalistic and ineffective. Yet his preferred solution of a professionally armed corps of “shock troops of public accountability” invading and arresting “unvarnished” information is misplaced (Normanton, 1966, p. 409).

Again, US parallels are close at hand. Mosher has provided a detailed practical examination of the attributes of accountability, in which access to independently-audited information relating to the public account is the crucial prerequisite for effective accountability (Mosher, 1990, pp. 233-238; Rosen, 1982, pp. 64-65 & 141-144). But where Mosher, for instance, accepts the untidiness of politics, Normanton tends to retreat from politics with disdain for its “theoretical dogma” about the importance of political parties, through which norms of partiality get entrenched into the system of governance (Normanton, 1966, p.410).

A sounder approach is to view accountability and responsibility as complementary rather than synonymous concepts. If accountability is an obligation to explain, then responsibility is an opportunity to exploit, or more properly a licence to practice -- in the case of career public officials, policy administration. Given the tendency to treat these two terms as equivalents, it is important to try to distinguish them in order better to target examinations of accountability practices. The responsible official is the one authorised to act, but only on conditions of accountability established by the original “author” or authoriser of the policy, formally the legislature. Accountability relates to policy justification and public explanation; responsibility relates more directly to policy implementation -- to the inner operation of offices of responsibility (note G.E. Caiden, in Jabbra and Dwivedi, 1988, pp.24-26). A focus on accountability might be necessary but it is admittedly insufficient as an instrument for measuring all the qualities of government. Responsibility in official decision making is essential to good government, and might well be of more importance over the long run than mechanisms of accountability in generating worthwhile policy developments. Certainly, studies of bureaucratic responsibility focus on more philosophical issues of social and political justice than do most studies of bureaucratic accountability (Cooper, 1990).

For all that, responsibility is still somehow derivative: an accountability regime defines the boundaries within which official responsibilities are acted out. Practices of accountability maintain the core institutions of government so that the different responsibilities of office can be entrusted to appropriately appointed individuals. Responsibility is a conditional freedom from direct control or micromanagement; the relevant condition is that responsible officials are liable or accountable to community representatives for the standards of their official conduct. The demands of accountability remind officials of the duties of public trust which underpin discretionary powers and responsibilities.

Accountability constrains and fetters official discretion, while responsibility releases discretion. Accountability is about compliance with authority, whereas responsibility is about empowerment and independence. Accountability is the negative end of the same band in which responsibility is at the positive end. If accountability is about minimising misgovernment, responsibility is about maximising good government. Both are vital features of duly constituted government.

Putting the “public” back in

The prominence of the qualifying term “public” before accountability suggests that the burden to explain and justify official behaviour should appropriately be carried out before the elected representatives of the public, and on the public record.

Strictly speaking, practices of *public* accountability concern the relationship between officials and the representative assembly, and focus on the officials' compliance with the standards of public trust which, under democratic theory, the legislative body is meant to represent and maintain. Thus understood, the public financial accountability of officialdom is the basic core on to which have been added other forms of political, but not necessarily *public* accountability. These other forms of accountability include that owed to ministers, as well as the many forms of legal and managerial accountability which now feature so prominently in the accountability literature (Jabbara and Dwivedi, 1988, pp.5-7; Thynne and Goldring, 1987, pp.1-10).

The central arena of accountability is the political assembly, which exists to provide the community with a *public* accounting of public officials. The original constitutional drive for public accountability arose from parliamentary concern over the responsible use of public offices. The political assembly is the filtering institution between community and government, and public accountability is at base a filtering exercise in which parliament “audits” (literally, listens to) the accounts given publicly by responsible ministers and officials of the use of public offices and funds.

The grand and unfashionable rhetoric of parliamentary *control* of government and administration expresses this conviction well: “to control” being used in the special auditing sense of “to verify”. The parliamentary control process was intended to be one of verification as distinct from command or direction, or any of the other common misunderstandings of parliamentary government. Verification suggests quality assurance and “compliance with accepted standards” of public trust (Jabbara and Dwivedi, 1988, p. 5; Day and Klein, 1987, pp. 8-10)

Effective accountability can not be reduced to periodic reporting, because the process requires more than selective and discretionary provision of the officials' version of events; to be truly effective it also requires that the officials respond, explain and justify in an open examination of their record, and not simply provide a report. The open examination should be preceded, wherever possible, by an impartial investigation or audit, to provide accountability agents with their own independent evaluation of performance, either financial or policy. But finally it is a matter for the accountability agents, and not their technical auditors, to interpret and apply the appropriate community standards.

Both bureaux and the political assembly benefit from the work of a third force which facilitates the process by safeguarding the appropriate standards and thereby providing a kind of grammar or syntax of accountability, so that both the major parties can communicate effectively. Such mediating bodies instruct rather than replace the community standards of public trust that the legislative body purports to represent. The relevant consideration is that it was the political assembly which demanded the formation of a public account in order to provide for better *systems* of public management; and this

can be seen as a key accountability qualification on the delegation of executive power. Public accountability essentially concerns the open justification, or verification, before parliament of the discretionary use of public funds, the expenditure of which requires parliamentary authority.

6. Reintegrating merit into administrative ethics

Historically, one of the earliest attempts to install a service-wide professional ethic into government administration is the much-cited but rarely read Northcote-Trevelyan report of 1853 which paved the way for the introduction of “the merit principle” (the phrase originates with this report) as the foundation of the United Kingdom's national system of civil service administration (as reprinted in Fulton, 1968, pp. 108-119). My intention is not to quote slabs of morality from that report but, perhaps surprisingly, to draw attention to what that report's authors saw as the unethical tendencies which, in the absence of merit mechanisms, are likely to recur in and dominate public administration. The relevance for today is not so much in the traditional institutions of merit as in the original intention that merit should form the foundation of administrative ethics (Uhr, 1996).

Whereas we take quiet pride in our established system of merit protections, the original view of Northcote-Trevelyan was that merit would be abused, like every other principle of government before it. Public services would proclaim their adherence to “the merit principle” but deviate away from what the service establishment would term “(so called) merit” (Fulton, 1968, p. 116). The test case is public employment and the way the service treats its own people. The report argued that the grain of ethics in public organisations would always run in non-merit directions, with a constant temptation to select officers not on merit but according to “personal or political considerations” (i.e. favouritism) in promoting persons “of very slender ability... over the heads of public servants of long standing and undoubted merit”. Times have changed, but the temptations recur. It is still the case that an officer who “fails to please his immediate superior... is probably condemned to obscurity for his whole life” (Fulton, 1968, pp. 116-7).

The formal espousal of the merit principle is not enough to make merit the basic operational value. For their part, ministers are still too busy to know anything directly of the merits of officers down the line; and chief administrators still often “fail to perceive... the valuable qualities” of their staff. To use the Northcote-Trevelyan examples: an officer who is “timid and hesitating” might be “passed over as dull”, and by-passed for promotion by one who is “by no means the real superior in worth” but has “more address in recommending himself”. For instance, the chief officer “might have taken a particular fancy to some young man on his first entrance into the department”, thereafter giving him “special opportunities of advancing” (Fulton, 1968, pp.110).

The contemporary adoption of codes and charters of values can be seen as renovations of this longstanding interest in the ethics of merit as a foundation for public service. One of the greatest challenges facing continued devolution is to devise suitable means for reviewing the organisational management of agency heads to ensure that they continue to do justice to the evolving agenda of merit in public employment and public decision-making (Uhr, 1996). For example, the New Zealand experiment with the relative autonomy of public agencies is worth close examination. The task would be to discover any lessons about the capacity of governments to balance systemic interests in cohesive standards (of many facets of performance, including ethics) against separate agency interests in diminished central controls.

An Australian example

A classic Australian contribution to ethical public management appears in the report of the Coombs royal commission, whose report of 1976 charted the course of the Australian voyage of the so-called “new managerialism” (Coombs, 1976). The Australian story of managerial modernisation is not all home-grown, and one can see many influences in Coombs of an earlier British report, the 1967 report of the Fulton commission, famous for launching the concept “accountable management”, which itself reflected the influence of a Canadian commission of inquiry, that of Glassco in 1963, which launched that memorable phrase “let the managers manage”.

What is distinctive about Coombs is that, unlike these other foreign commissions in whose steps it followed, ethics is placed prominently at the head of the agenda for reformed public management. Whereas the other distinguished commissions investigated the machinery of public service management, Coombs is distinctively Australian in making administrative ethics the basic prerequisite of managerial reform. And the reason for this is that Coombs saw its task as renovating the merit system, which had by that time begun to wear out its credibility by becoming a shield for the public service establishment to hide behind in excluding genuine equality of opportunity.

The core meaning of merit derives from its historical origins as a reaction to threats of political patronage, which are now less common than might be threats of administrative favouritism. But even in countries like Australia with many legal protections against patronage and favouritism, public organisations tend to hide behind the merit principle to justify practices against that very principle. Coombs presented three typical practices which offend against the merit principle (Coombs, 1976, pp. 170-194). They are unethical practices of exclusion which tend to return again and again unless action is taken to develop an alternative ethos open to argument and action on the merits. These unethical practices include those which:

- a) restrict eligibility in areas of public employment, so that there is no real search for eligible candidates from non-traditional backgrounds;
- b) “personalise” rather than “objectify” selection tests, so that you tend to “get in” if you “fit in” with the dominant group's characteristics; and
- c) introduce what Coombs called “significant discrimination and injustice” against out-of-favour groups, especially through undue emphasis on “formal qualifications” at the expense of relevant experience.

Coombs knew that merit was contained in the public service legislation in those provisions for open and competitive entry: especially those impartial procedures designed to determine eligibility according to relative ability, which had been an original feature of Australian public service legislation. But do public service agencies really comply? And what happens to individuals who think that they have been denied consideration on merit? Coombs recommended a number of institutional protections, including the establishment of employee rights to review of employment decisions.

But the most radical and influential recommendation was on ethics training. Indeed, the very first recommendation of the Coombs royal commission was a recommendation that the central personnel agency take responsibility for a new strategy of ethics training (Coombs, 1976, pp. 25-27). The details of this recommendation are less relevant to us today than is the underlying logic. The argument was that a regime of “accountable management”, with substantial devolution of operational

authority to program managers, would become little more than a bureaucratic formality unless managers were prepared for their new responsibilities. External accountability is an important safeguard against irresponsible conduct, but accountability alone will not cultivate responsible conduct. Managers have to be trained for positions of responsibility. The system can not simply let the managers manage, but must help them to manage responsibly. This is not just a matter of using one's own initiative, but of incorporating the professional ethic of public service - at the heart of which is a commitment to merit-based decision-making (Uhr, 1996).

Ethics training as Coombs understood it means above all developing an awareness of the contemporary meaning of merit as the defining feature of public service decision-making: merit in staff selection and promotion; merit in government contracting with business and service providers; and merit in decisions affecting individual clients and the public. Training requires more than learning about codes of practice or conduct, however important they might be in focusing attention on the minimum conditions of acceptable conduct. The historical legacy of this first approach is not so much the publication of codes, as the "whole-of-government" commitment to management development - in which merit acts as the core principle. The words are still there in recent Australian statements, but merit is now made to fit in beneath "responsiveness to governments" as the threshold key public service value.

Conclusions about institutional design

Discussion of ethics lends itself to the dangers of hypocrisy, where word and deed go off in different directions. One safeguard is to keep one's ambition in check. When considering schemes for ethical improvement, it is prudent to target the average case of ordinary capacity, rather than the deviant cases of wilful non-conformity. Codes and declarations of "core values" and their associated training packages will have little effect on those individuals intent on a course of corruption. The purpose of an ethics strategy is not to eliminate fraud and corruption but to reinforce the moral centre of the vast majority of public officials who can respond to effective messages about what constitutes proper conduct. Codes reflect political judgements about the community values and expectations of those in public office. Thus they provide an important focal point for the community itself, reminding it about the values it can reasonably expect of those who manage its public affairs.

A subtle combination of the inner checks of professional norms and the outer checks of public accountability will suffice for the vast majority of public servants. For a small minority, the call of professional honour might itself be sufficient to generate exemplary conduct; for another small minority, the fear of criminal law might be sufficient to generate at least the appearance of compliance with official standards. The message for the rest is one of reassurance, with the lesson that it makes good sense (for them and their community) to treat their official positions as public trusts deserving the highest standards of personal integrity and social responsibility.

Whatever the content of a plan to improve ethical performance, there are important lessons available from international research on institutional design (see Goodin, 1992 and especially 1996). That body of research proves that institutional design is at its most effective when the intention is to design institution-making processes rather than preconceived institutions capable of delivering a particular service or product. That is, experience shows that reformers will be most effective when they try to devise rules and processes that can themselves generate flexible solutions appropriate to changing circumstances. The secret of institutional design is to devise robust mechanisms which are themselves capable of "institutionalising" rules and norms for appropriate conduct. Thus the task of

institutional redesign and renewal is to enliven the capacity of future decision makers to make responsible choices. Our task today is not to presume that we know all the answers for tomorrow; our task is best done if we can establish mechanisms capable of bringing together or to “institutionalise” the most relevant set of decision makers to regulate ethics in the public sector.

Finally, I note that one of the most basic lessons is that plans for institutional reform should be tested against a range of criteria rather than one aim or a small number of fervent hopes. The literature on institutional design suggests that such criteria include the following general considerations of effectiveness: the extent to which the intended program of action is:

- a) capable of revision and variation as it unfolds and is not fixed and inflexible;
- b) robust enough to survive the inevitable alterations of political environment and policy commitment;
- c) based on adequate motivational complexity rather than some narrow presumption about individual and group compliance with the intended program;
- d) grounded in publicity, so that all involved can be seen to contribute to the real outcome which it generates, including the possibility of little or no improvement.

On its own, such a specification of relevant rules of thumb will not get us very far. But when used as a springboard for further reflection and analysis, these summary rules can give us the confidence we need to make useful progress in promoting public sector ethics.

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