



## Supporting Inclusive Resource Development (SIRD) East Africa

### TRAINING PROGRAM 2019 – TRANSPARENCY AND ACCOUNTABILITY



THE CANADIAN  
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LAW SOCIETY OF KENYA



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UGANDA LAW SOCIETY

# Agenda – Transparency and Accountability

## Aiyaz Alibhai

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1. Background – A Global Phenomenon and Question of Ethics
2. Impact of Corruption on Women
3. Corruption and Poverty
4. Addressing Foreign Corruption Practices
5. Conclusion and Reflections
6. Case Discussions



# Statement On The Adoption By The General Assembly Of The United Nations Convention Against Corruption

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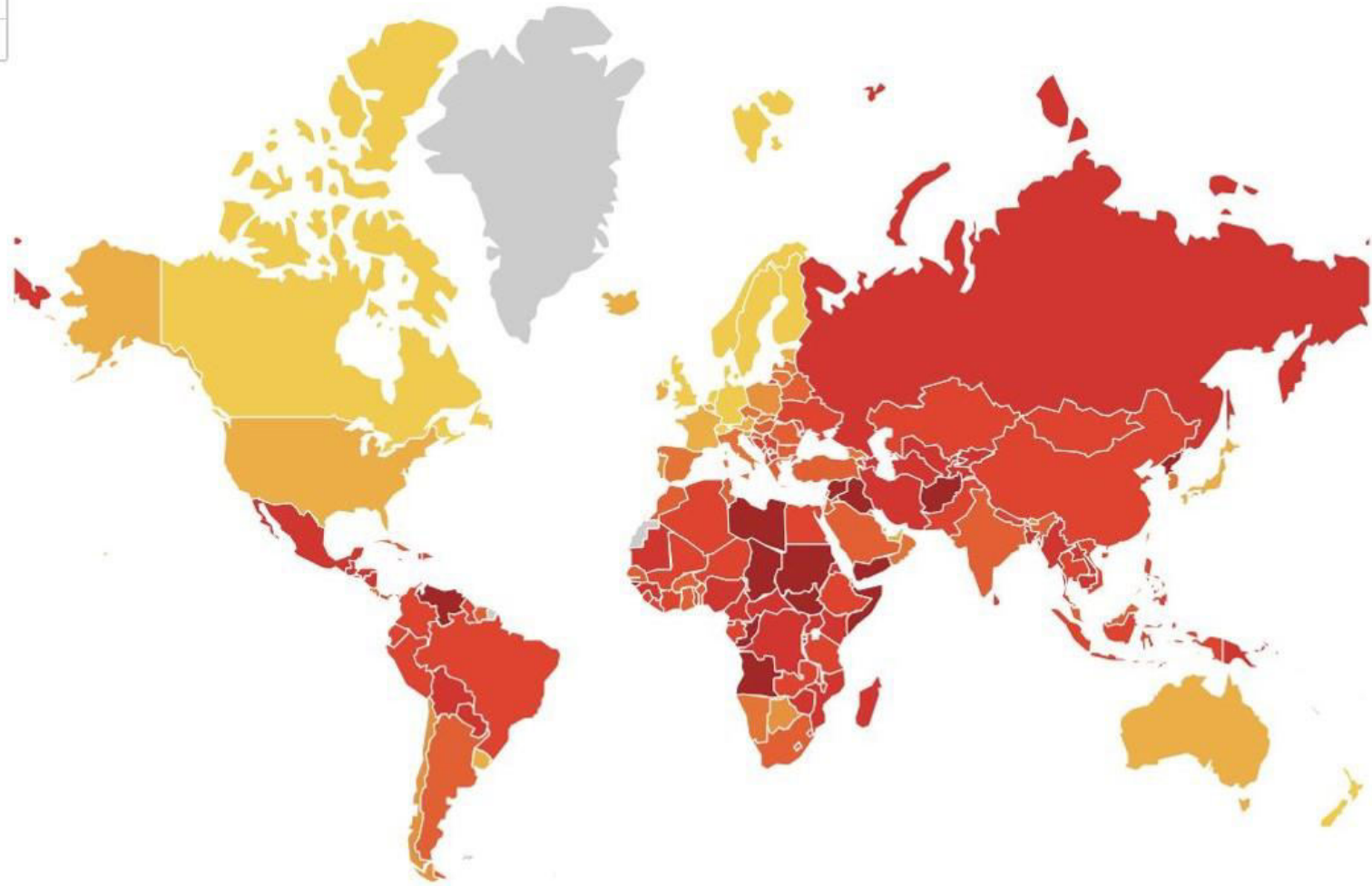
“Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life, and allows organized crime, terrorism and other threats to human security to flourish.

This evil phenomenon is found in all countries big and small, rich and poor but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid. Corruption is a key element in economic under-performance, and a major obstacle to poverty alleviation and development.”

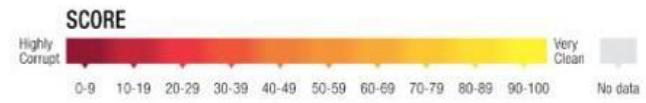
U.N. Secretary-General Kofi Annan,  
New York, 31 October 2003

<https://www.unodc.org/unodc/en/treaties/CAC/background/secretary-general-speech.html>

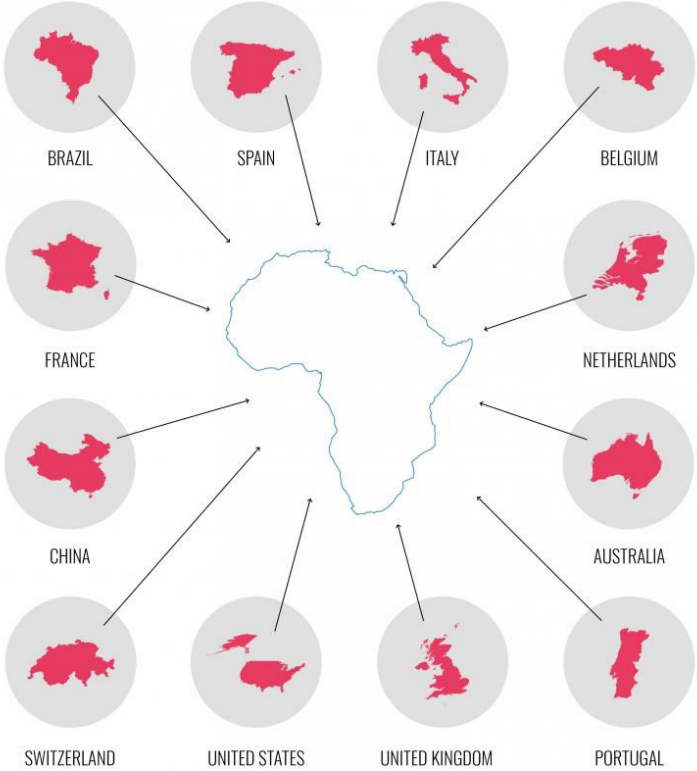




[Embed this map](#)



# Enabling Corruption by Foreign Countries



A sample of countries with companies implicated in foreign bribery in Africa  
(source: *Exporting Corruption, 2018*)



How many bribes are paid each year?

More than \$1 trillion is paid globally in bribes each year

*(source: World Bank Institute)*

That means 1 out of every 30 dollars of GDP in the world is being paid in bribes, and some of the worst affected are the poorer countries.



# Who is paying the bribes?

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**POOR**

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**36%**



**RICH**

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**19%**



Africans who pay bribes for basic services are **twice as likely to be the poorest than the richest.**



Where does bribery happen?

Bribery affects all countries - some of the larger scandals recently have taken place not in the developing world but in developed countries.

'Corruption is everywhere; it's in the south, the north, east and west, and the public and private sectors. So the question is: how do you cut through and make real change.'

*George Kell, Executive Director, UN Global Compact, June 2009*





# Key Definitions

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- “Corruption”
  - “Abuse of entrusted power for illicit gain”.
- “Supply-Side Corruption”
  - “The act of offering an illicit payment or undue advantage”.
- “Demand-Side Corruption”
  - “The acceptance or solicitation of such a payment or advantage”.



# Types of Corruption

Type of Corruption	Definition	Group of Terms
Bribery	Payment (in money or kind) that is given or taken in a corrupt relationship	Kickbacks, gratuities, "commercial arrangements, baksheesh, sweeteners, pay-offs, speed- or grease money
Embezzlement	Theft of resources by people who are put to administer it	Straddling, official theft
Fraud	Economic crime that involves some kind of trickery, swindle or deceit	Involvement in illegal trade networks, counterfeit, racketing, forgery, smuggling
Extortion	Money and other resources extracted by the use of coercion, violence or the threats to use force	Blackmail, protection or security money, informal taxation, sextortion (sexual extortion)
Favouritism	Mechanism of power abuse implying 'privatisation' and a highly biased distribution of state resources.	Cronyism, nepotism, clientelism, bias, patronage



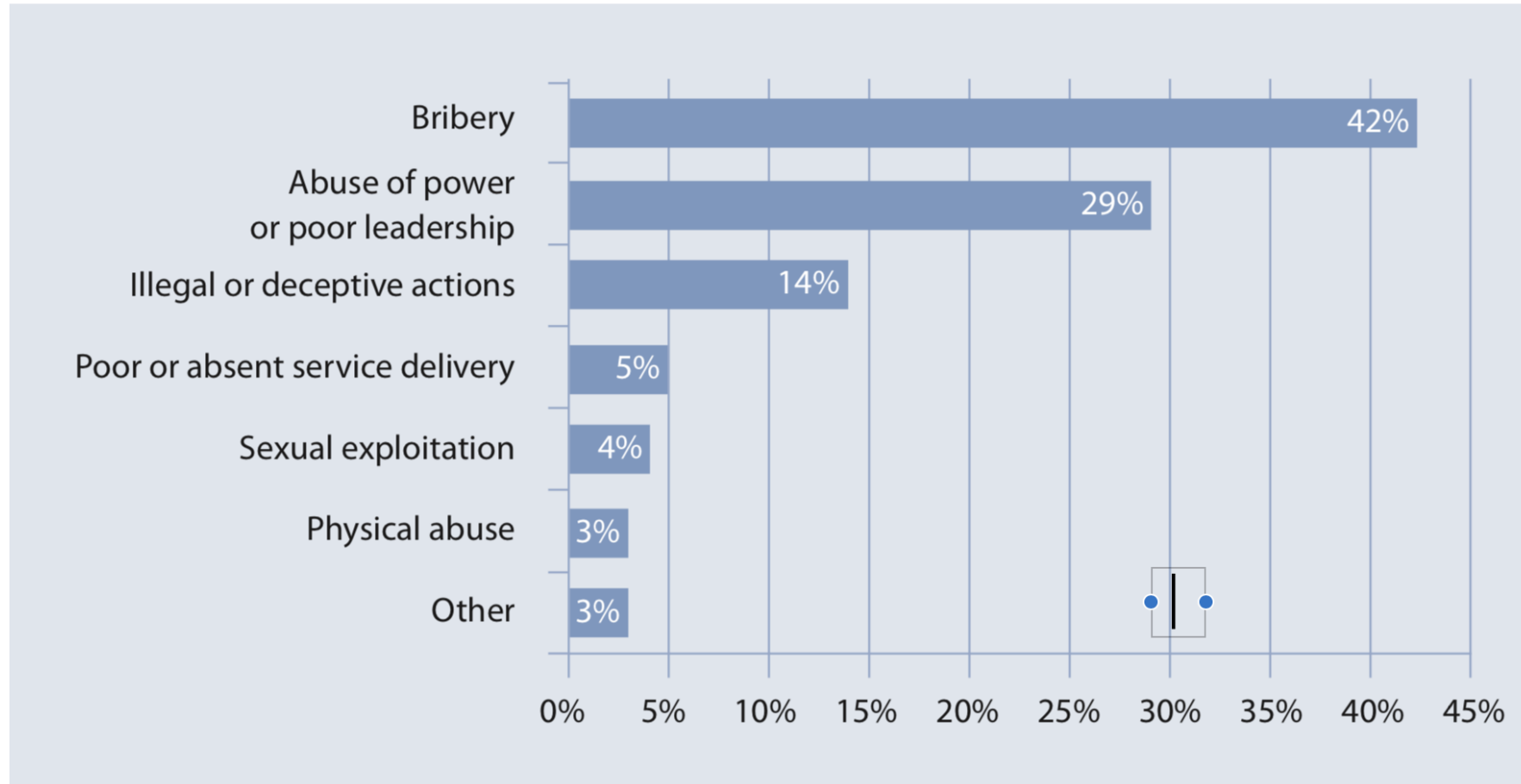
# Impact of Corruption on Women

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- **Grassroots women’s understanding of corruption is broader** than the standard definition of corruption as the “misuse of entrusted power for private gain.”
- **Corruption covers a wide range of exploitative practices**, such as physical abuse, sexual favours, and both the giving and taking of bribes – all of which are perceived as strongly linked to non-delivery of services and poor leadership.
- The **non-delivery of public services** was seen by grassroots women as a cause, consequence and intrinsic component of **corrupt practices**.



# Grassroots Women's Definition of Corruption



# Corruption and Poverty

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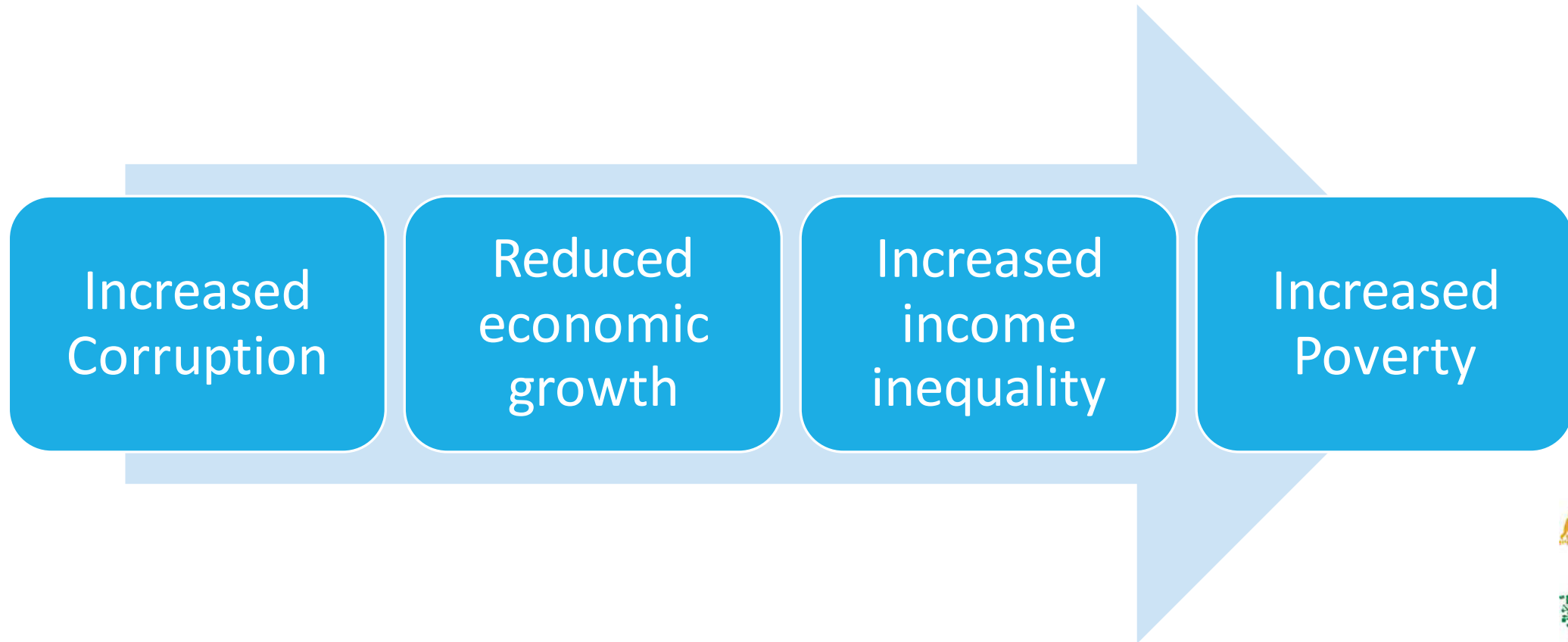
- Corruption in the public sector is often viewed as exacerbating conditions of poverty in countries already struggling with the strains of economic growth and democratic transition.
- Countries experiencing chronic poverty are seen as natural breeding grounds for systemic corruption due to social and income inequalities and perverse economic incentives.

*Corruption and Poverty: A Review of Recent Literature,*  
Chetwynd et al. (2003)



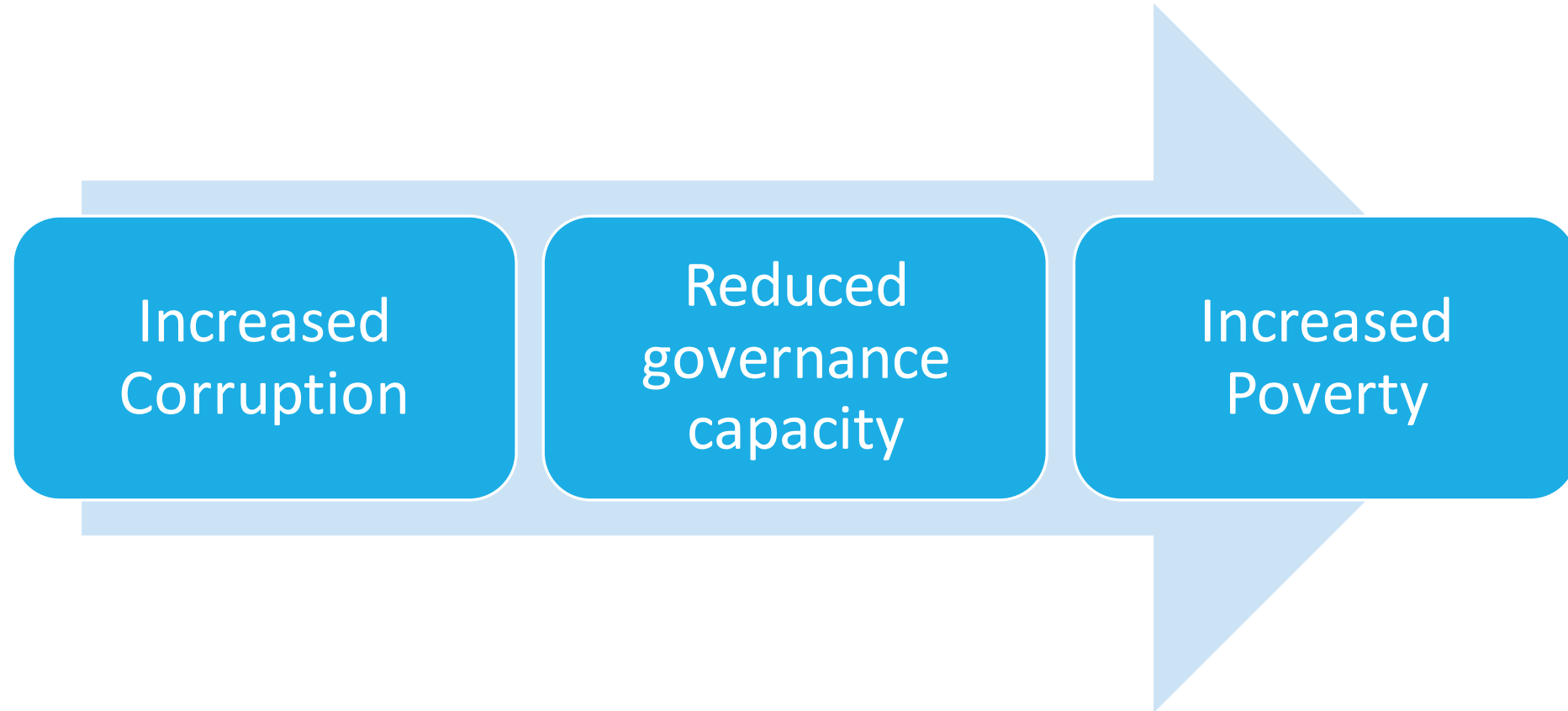
# Economic Model of Corruption

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# Governance Model of Corruption

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# Governance – A Definition

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- “The traditions and institutions by which authority in a country is exercised.
- This includes:
  - (1) the **process** by which governments are selected, monitored and replaced,
  - (2) the **capacity of the government** to effectively formulate and implement sound policies, and
  - (3) the **respect of citizens** and the state for the institutions that govern economic and social interactions among them.”





# Corruption Effect on Governance

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- Corruption Degrades Governance
- Impaired Governance Increases Poverty
- Reduced Public Trust in Government Increases Vulnerability of the Poor



# Anti-Corruption Policies

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- Aggressive approaches to anti-corruption may destroy goodwill and loyalty of citizens.
- Three Approaches:
  1. Accept the presence of cultural norms and channel them into less destructive paths
  2. Bypass cultural norms by subsisting institutions that require other skills and values
  3. Transform cultural norms



# Eight Potential Areas of Reform

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1. Simple Transparency is Necessary
2. External Oversight of Governmental Activity is Essential
3. Transparent and Competitive Processes for Large Procurement
4. State should enforce Bribery Laws Against Major Offenders
5. Creation of Effective Complaint Process to Report Bribes
6. Reform and Improve Government Function
7. Improved Working Conditions for Judiciary and Civil Servants
8. Reform Electoral Law as needed





# Anti-Bribery Provisions

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- **Prohibited Payments:** It is unlawful to pay or offer to pay “anything of value” to a “foreign official” to influence official action or to secure any improper business advantage in order to obtain or retain business.
- **5 elements:**
  - **Who:** Applies to any issuer, officer, director, employee or agent of such issuer
  - **Payment:** Cannot offer, pay or promise to give “anything of value”
  - **Corrupt Intent:** The payer must have a corrupt intent and the payment must be intended to induce misuse of an official position
  - **Recipient:** To any foreign official or political party
  - **Business Purpose Test:** To influence official action or to secure any improper advantage in order to “obtain or retain business”



# FCPA – Criminal Penalties

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- Corporations and other business entities:
  - For each violation of the anti-bribery provisions – up to \$2 million fine.
  - For each violation of the accounting provisions – up to \$25 million fine.
- Individuals including officers, directors, stockholders, and agents of companies:
  - For each violation of the anti-bribery provisions – up to \$250,000 fine and 5 years
  - For each violation of the accounting provisions – up to \$5 Million fine and 20 years
  - Fines imposed on individuals may not be paid by their employer or principal
- Alternative Fines Act
  - Up to twice the benefit obtained by the defendant by making the corrupt payment





# United Nations Convention against Corruption (“UNCAC”)

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- The UNCAC is the only legally binding universal anti-corruption instrument covering many different forms of corruption.
- The Convention covers 5 main areas:
  - preventive measures
  - criminalization and law enforcement
  - international cooperation
  - asset recovery
  - technical assistance and information exchange.





# OECD Convention on Combatting Bribery

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- Negotiations begun in 1988 with the Organization for Economic Co-operation and Development (OECD) led to the *Convention on Combatting Bribery of Foreign Officials for International Business Transactions (Anti-Bribery Convention)*, in force February 15, 1999.
- The 34 OECD member countries are: Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States.
- The Anti-Bribery Convention has also been signed by 8 non-OECD members: Argentina, Brazil, Bulgaria, Colombia, Costa Rica, Peru, Russia and South Africa.



# OECD Key Principles

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- **Bribery** - The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties, including monetary sanctions.
- **Accounting** - Each Party shall provide effective, proportionate and dissuasive civil, administrative or criminal penalties for such omissions and falsifications in respect of the books, records, accounts and financial statements of such companies.
- **Jurisdiction** - Each country shall establish jurisdiction over bribery of foreign public official and its nationals for offences committed abroad.
- **Irrelevant Considerations** - Enforcement shall not be influence by considerations of “national economic interest”.
- **Mutual Legal Assistance** – Each Party to provide to the fullest extent possible. Bribery to be an extraditable offence.
- **Ongoing Monitoring and Follow-up.** Accountability to Members.



# Canada – Corruption of Foreign Public Official Act (CFPOA)

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- Proclaimed in force February 14, 1999
- Created in response to the OAS and OECD treaties
- Generally follows the FCPA, with some exceptions
- Far fewer prosecutions than the US, so less guidance from the Court



# CFPOA - Bribery

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3 (1) **Every person** commits an offence who, in order to **obtain or retain an advantage** in the **course of business**, directly or indirectly gives, offers or agrees **to give or offer a loan**, reward, advantage or benefit of any kind to a **foreign public official** or to any person for the benefit of a foreign public official

(a) **as consideration for an act or omission** by the official in connection with the performance of the official's duties or functions; or

(b) to induce the official to use his or her position **to influence any acts or decisions** of the foreign state or public international organization for which the official performs duties or functions.

## Punishment

(2) Every person who contravenes subsection (1) is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years.



# CFPOA - Accounting

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**4 (1)** Every person commits an offence who, for the purpose of bribing a foreign public official in order to obtain or retain an advantage in the course of business or for the purpose of hiding that bribery,

**(a)** establishes or maintains accounts which do not appear in any of the books and records that they are required to keep in accordance with applicable accounting and auditing standards;

**(b)** makes transactions that are not recorded in those books and records or that are inadequately identified in them;

**(c)** records non-existent expenditures in those books and records;

**(d)** enters liabilities with incorrect identification of their object in those books and records;

**(e)** knowingly uses false documents; or

**(f)** intentionally destroys accounting books and records earlier than permitted by law.

## Punishment

**(2)** Every person who contravenes subsection (1) is guilty of an indictable offence and liable to **imprisonment for a term of not more than 14 years.**



# CFPOA - Court Jurisdiction

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5 (1) Every person who **commits an act or omission outside Canada** that, if committed in Canada, would constitute an offence under section 3 or 4 — or a conspiracy to commit, an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence under that section — **is deemed to have committed that act or omission in Canada** if the person is

(a) a Canadian citizen;

(b) a permanent resident as defined in subsection 2(1) of the [Immigration and Refugee Protection Act](#) who, after the commission of the act or omission, is present in Canada; or

(c) a public body, corporation, society, company, firm or partnership that is incorporated, formed or otherwise organized under the laws of Canada or a province.



# Remediation / Deferred Prosecution Agreements – Criminal Code

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## S. 715.3(1)

***remediation agreement*** means an agreement, between an organization accused of having committed an offence and a prosecutor, to stay any proceedings related to that offence if the organization complies with the terms of the agreement.

## Purpose

**715.31** The purpose of this Part is to establish a remediation agreement regime that is applicable to organizations alleged to have committed an offence and that has the following objectives:

- (a) to **denounce an organization's wrongdoing** and the harm that the wrongdoing has caused to victims or to the community;
- (b) to **hold the organization accountable** for its wrongdoing through effective, proportionate and dissuasive penalties;
- (c) to contribute to **respect for the law** by imposing an obligation on the organization to put in **place corrective measures** and promote a compliance culture;
- (d) to encourage **voluntary disclosure** of the wrongdoing;
- (e) to **provide reparations** for harm done to victims or to the community; and
- (f) to **reduce the negative consequences** of the wrongdoing for persons — employees, customers, pensioners and others — who did not engage in the wrongdoing, while holding responsible those individuals who did engage in that wrongdoing.



# DPA - Conditions

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- **715.32 (1)** The prosecutor may enter into negotiations for a remediation agreement with an organization alleged to have committed an offence if the following conditions are met:
- **(a) the prosecutor is of the opinion** that there is a reasonable prospect of conviction with respect to the offence;
- **(b) the prosecutor is of the opinion** that the act or omission that forms the basis of the offence did not cause and was not likely to have caused serious bodily harm or death, or injury to national defence or national security, and was not committed for the benefit of, at the direction of, or in association with, a criminal organization or terrorist group;
- **(c) the prosecutor is of the opinion** that negotiating the agreement is in the public interest and appropriate in the circumstances; and
- **(d)** the Attorney General has consented to the negotiation of the agreement.





# DPA – Factors to Consider

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- (2)** For the purposes of paragraph (1)(c), the prosecutor must consider the following factors:
- (a)** the circumstances in which the act or omission that forms the basis of the offence was brought to the attention of investigative authorities;
  - (b)** the nature and gravity of the act or omission and its impact on any victim;
  - (c)** the degree of involvement of senior officers of the organization in the act or omission;
  - (d)** whether the organization has taken disciplinary action, including termination of employment, against any person who was involved in the act or omission;
  - (e)** whether the organization has made reparations or taken other measures to remedy the harm caused by the act or omission and to prevent the commission of similar acts or omissions;
  - (f)** whether the organization has identified or expressed a willingness to identify any person involved in wrongdoing related to the act or omission;
  - (g)** whether the organization — or any of its representatives — was convicted of an offence or sanctioned by a regulatory body, or whether it entered into a previous remediation agreement or other settlement, in Canada or elsewhere, for similar acts or omissions;
  - (h)** whether the organization — or any of its representatives — is alleged to have committed any other offences, including those not listed in the schedule to this Part; and
  - (i)** any other factor that the prosecutor considers relevant



# DPA – Factors to Consider

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  - (d)** whether the organization has taken disciplinary action, including termination of employment, against any person who was involved in the act or omission;
  - (e)** whether the organization has made reparations or taken other measures to remedy the harm caused by the act or omission and to prevent the commission of similar acts or omissions;
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  - (i)** any other factor that the prosecutor considers relevant



# DPA - Factors not to consider

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- “(3) Despite paragraph (2)(i), if the organization is alleged to have committed an offence under section 3 or 4 of the *Corruption of Foreign Public Officials Act*,

**the prosecutor must not consider the national economic interest, the potential effect on relations with a state other than Canada or the identity of the organization or individual involved.**



# Integrity Regimes

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In 2015, Canada introduced a regime to ensure the government does business only with ethical suppliers in Canada and abroad.

Integrity regime sets up rules for debarment (disqualification) from public procurement.

Mandatory ineligibility to do business with the government for between 5 to 10 years for conviction for offences in Canada under CFPOIA, fraud and conspiracy (Scheduled List).

Discretionary Ineligibility for conviction for offences outside Canada similar to offences under Scheduled List.

*Ineligibility and Suspension Policy (Canada)*

<https://www.tpsgc-pwgsc.gc.ca/ci-if/guide-eng.html#s1a>

U.S. has a broad debarment legislation contained in Executive order 12549

<https://www.epa.gov/grants/suspension-and-debarment-regulations>



# Conclusion and Reflections – Corruption not only an Economic Issue.

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- Merely estimating the leakage of funds in different sectors and the amount of bribes that women have to pay in these sectors will not correctly estimate the differential impact that corruption has on poor women.
- Corruption measures need to capture women's loss of well-being stemming from the disproportionate loss of income due to bribe payments and unavailability of publicly provided services.



# Conclusion and Reflections – Gender Equality Can Reduce Corruption

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- Corruption tends to be lower in countries with a greater share of women occupying political positions.
- Promoting women's participation in the labour force as well as in political and public life is likely to reduce corruption.
- Corruption is higher in countries where social institutions deprive women of their freedom to participate in social and public life.
- Supporting women's participation in public life should be pursued and promoted as an essential right and not as an anti-corruption imperative or strategy.



# Case Discussions

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# *R. v. Karigar* (2013)

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- **First conviction of an individual under *CFPOA*.**
- Accused was a Canadian acting on behalf of a Canadian company while in India.
- The actual financial element of the offence (i.e., approval or funding of the bribe) did not occur in Canada.
- The substantial link seems to be that the accused was a Canadian citizen working for a Canadian company.





# *Chowdhury v HMQ (2014)*

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- The accused was a citizen and resident of Bangladesh acting as an agent for a Canadian corporation, SNC-Lavalin.
- In his capacity as agent for SNC-Lavalin he allegedly facilitated the offer of bribes to foreign officials in Bangladesh to secure for SNC-Lavalin an engineering contract for the Padma Bridge proposal.
- Court held that jurisdiction over an accused is distinct from jurisdiction over an offence.
- **No jurisdiction over the accused person because the accused had not ever been in Canada. He was not a Canadian citizen.**
- Accused was a citizen of Bangladesh and his actions in relation to this alleged offence were all undertaken within Bangladesh.



# *R. v. Niko Resources Ltd. (2011) – Facts*

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- In May 2005, Niko Bangladesh provided the use of a vehicle costing ... \$190,984.00 to Mosharraf Hossain, the Bangladeshi State Minister for Energy and Mineral Resources, in order to influence the Minister in dealings with Niko Bangladesh within the context of ongoing business dealings.
- Niko Canada paid the travel and accommodation expenses for Minister Hossain to travel from Bangladesh to Calgary to attend an exposition, and onward to New York and Chicago to visit his family.
- Niko Canada paid the travel costs of approximately \$5,000.
- **Niko pled guilty** to violating section 3(1) (b) of the *CFPOA*.



# Niko Resources – Court Order

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- On June 24, 2011, Mr. Justice Scott Brooker accepted the plea agreement of the prosecutor and Niko. In sentencing, he called the Niko bribery an embarrassment to all Canadians. Justice Brooker ordered the company to:
  - pay a fine of \$9.5 million;
  - be on probation for three years;
  - report to the RCMP regularly,
  - review its anti-corruption and ethics policies annually, and
  - audit its compliance with Canada’s anti-bribery legislation.



# Voluntary Disclosures – Contrast Cases

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## GRIFFITH ENERGY INTERNATIONAL

- Griffiths **voluntarily disclosed** bribes in Chad
- Bribe was \$2 million
- Fined \$10.35 million
- Internal investigation cost \$5 million
- Savings to RCMP a significant amount of money.
- Implemented a robust anti-corruption policy after the initial investigation revealed bribery.

## NIKO RESOURCES

- Niko **did not voluntarily disclose**.
- Bribe was \$200,000
- Fined \$9.5 million
- No internal investigation.
- RCMP investigation cost approximately \$1 million
- Niko Resources did not implement anti-corruption policy.
- Court ordered probation for 3 years and required implementation of an anti-corruption compliance program as a condition of probation.

# *SNC-Lavalin Group Inc. v. Canada* (DPP) (2019)

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- SNC faces charges of fraud and corruption in connection with nearly \$48 million in payments made to Libyan government officials between 2001 and 2011.
- If convicted, SNC could be ineligible for government contracts for a 10 years.
- SNC challenged DPP's decision not to provide a DPA.
- Court dismissed application.
- Court ruled that **prosecutorial discretion** is not subject to judicial review, except for an use of process. (case under appeal).



## *Disclosure and National Economic Interests* *Serious Fraud Office v. Rolls-Royce PLC (UK. Q.B., 2017)*

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*“Rolls-Royce was required to be paid £497,252,645 (comprising disgorgement of profits of £258,170,000 and a financial penalty of £239,082,645) plus interest. Rolls-Royce are also reimbursing the SFO’s costs in full (c£13m).*

*“I have no difficulty in accepting that these features demonstrate that **a criminal conviction against Rolls-Royce would have a very substantial impact on the company, which, in turn, would have wider effects for the UK defence industry and persons who were not connected to the criminal conduct, including Rolls-Royce employees, and pensioners, and those in its supply chain.***

*None of these factors is determinative of my decision in relation to this DPA; indeed, **the national economic interest is irrelevant.***



# *Disclosure and National Economic Interests*

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Neither is my decision founded on the proposition that a company in the position of Rolls-Royce is immune from prosecution: it is not. **It is not because of who or what Rolls-Royce is that is relevant** but, rather, the countervailing factors that I have to weigh in the balance when considering the public interest and the interests of justice.

As I have made clear before, and repeat, **a company that commits serious crimes must expect to be prosecuted and if convicted dealt with severely** and, absent sufficient countervailing factors, cannot expect to have an application for approval of a DPA accepted.”

- *Serious Fraud Office v. Rolls-Royce PLC* (UK. Q.B., 17 Jan. 2017)

