

Contents

<i>About the author</i>	xiii
<i>Preface</i>	xiv
<i>List of abbreviations</i>	xvii
<i>Table of cases</i>	xix
<i>Table of statutes</i>	xxv
1. Setting the scene: law and persuasion	1
1.1 Introduction	1
1.2 The main arguments	2
1.3 The arrangement of the book	4
1.4 The organization and scope of the book	7
2. Law and governance in Africa: supporting integrity and combating corruption	9
2.1 One white crystal covered 'Bad Tour' glove and other Michael Jackson memorabilia	9
2.2 The African context	12
2.3 What constitutes 'corruption'?	13
2.3.1 Seeking a 'definition'	13
2.3.2 Why is combating 'corruption' and supporting good governance so vital?	15
2.3.3 Why get involved in bad governance and corruption?	16
2.4 What constitutes 'good governance'?	20
2.5 Developing laws in support of good governance	22
2.5.1 The transnational initiatives	22
2.5.2 The national initiatives	26
2.6 The 'political will' and good governance	28
2.7 Changing times: changing attitudes	33
3. Preventive measures: maintaining integrity in the public service	34
Introduction: The Chiluba case	34
Section I: Maintaining and enhancing integrity in public life: developing codes of conduct for public officials	37

3.1	Why a code of conduct?	37
3.2	What should a code of conduct contain?	38
3.2.1	Asset and income declaration mechanisms	39
3.2.2	Provisions designed to prevent conflict of interests	46
3.2.3	Provisions for education and training	52
3.2.4	Reporting corruption and misuse of public office: providing a safe alternative to silence	53
3.2.5	Right to administrative justice	57
3.2.6	Sanctions	58
	Section II: Parliament, parliamentarians and elections	58
3.1	Financing of election campaigns: the constitutional right to equality and access to the political system	59
3.1.1	The provision of state funding for candidates and political parties and the enhancing of multi-party democracy	60
3.1.2	Overseeing the political financing/electoral system: the role of electoral commissions	62
3.1.3	Seeking transparency in the funding of candidates and political parties: a Tanzanian case study	63
3.1.4	Restricting payments to voters by candidates for political office	64
3.1.5	Election malpractice and electoral petitions	65
3.2	Addressing the financial demands of family and constituents	68
	Section III: Maintaining and enhancing integrity in public sector finances	71
3.1	Protecting the role of the supreme audit authority	71
3.2	Fiscal transparency and the role of the legislature	73
3.3	Constitutional oversight bodies in support of good governance and integrity	75
3.4	Role of civil society and the media	75
4.	When things go wrong: addressing integrity problems in the public service	77
	Introduction: When things go wrong	77
	Section I: Constitutions and immunities	78
4.1	Immunities in the national setting	78
4.1.1	Presidential immunity during tenure of office	78
4.1.2	The position upon leaving office	81

4.1.3	Immunities enjoyed by other public officials and the presidential power of pardon	82
4.2	Immunities in an international setting	85
	Section II: Parliamentarians, corruption and parliamentary privilege	87
	Section III: Combating the misuse/abuse of public office	89
4.1	The offence of misuse of public office	89
4.1.1	The scope of the offence	90
4.1.2	The burden of proof	93
4.1.3	The ‘seriousness’ of the conduct	93
4.1.4	Overview	94
4.2	Civil remedies: the tort of misfeasance in a public office	94
5.	Constitutions, constitutional rights and combating corruption: exploring the links	104
	Introduction	104
	Section I: Constitutions and good governance in Africa	105
5.1	The pre-1990 position	105
5.2	The post-1990 constitutions	107
	Section II: Linking constitutional rights and corruption	109
5.1	Making the connection	109
5.2	Using the connection	110
5.2.1	‘Personalizing’ the approach	110
5.2.2	Utilizing the constitution to enforce the rights of victims of corruption	111
	Section III: Utilizing constitutional oversight bodies	115
5.1	‘Public institutions that promote and support democracy and constitutional order’	115
5.2	The role of constitutional oversight bodies	117
	Section IV: Resolving tensions between the enjoyment of constitutional rights and the development of anti-corruption strategies	121
5.1	Right to a fair trial	121
5.1.1	Right to a fair trial versus the duty to protect witnesses	122

5.1.2	The presumption of innocence and privilege against self-incrimination versus 'reversing' the burden of proof	129
5.1.3	Right to a fair trial and special investigative techniques	138
5.2	Right to privacy	138
5.2.1	Right to privacy versus the use of special investigative techniques	138
5.2.2	The right to privacy versus the right to information	142
5.2.3	Right to privacy versus asset and income declarations	145
5.3	Right to property versus recovery of the proceeds of corruption	145
	Overview	145
6.	Investigating and prosecuting corruption-related offences: challenges and realities	147
	Introduction	147
	Section I: Investigating corruption-related offences and evidence gathering	148
6.1	Evidence gathering: special investigative techniques	148
6.2	Evidence gathering: obtaining access to documents and witnesses	149
6.3	Evidence gathering: obtaining information and evidence located abroad	150
	Section II: Prosecuting corruption	151
6.1	Capturing the political will	151
6.2	The exercise of prosecutorial discretion	152
6.2.1	Protecting prosecutorial independence	152
6.2.2	The discretion to prosecute	156
6.2.3	The role of the Attorney General	158
6.2.4	Enhancing and supporting the integrity and accountability of prosecutors	160
	Section III: Corruption and related offences	161
6.1	The offences	161
6.1.1	The range of offences	161
6.1.2	Selecting the offence(s)	165
6.2	Proving corruption: reviewing the rules of evidence	167

6.2.1	Proof and truth	167
6.2.2	The hearsay rule in Lesotho: a case study	167
6.2.3	Modernizing the rules of evidence	171
6.3	Sanctions	173
	Section IV: Doing deals	174
7.	National anti-corruption bodies: a key good governance requirement?	176
	Introduction	176
7.1	A separate anti-corruption commission?	177
7.1.1	The anti-corruption convention provisions	177
7.1.2	The response of African states	178
7.2	The mandate of ACCs	180
7.2.1	Corruption prevention/integrity function	180
7.2.2	An investigation and prosecution function	183
7.2.3	Asset recovery	190
7.3	The building blocks	190
7.3.1	The challenges	190
7.4	Towards an independent and effective Anti-Corruption Body (ACB)?	191
	Overview	200
8.	Judges: independence, integrity and accountability	202
	Introduction	202
	Section I: Judicial independence and integrity	203
8.1	The anti-corruption convention requirements	203
8.2	The challenges	203
8.3	The basis of judicial independence	205
8.3.1	Institutional autonomy	206
8.3.2	Administrative and financial autonomy	215
	Section II: Maintaining judicial accountability	218
8.1	Setting the standards	218
8.2	Judicial codes of conduct/ethics	220
8.3	Disciplinary and removal proceedings	221
8.4	Removing judges: the Kenyan experience	224
	Section III: Anti-corruption courts?	227
	Overview	230

9. Combating corruption: ‘persuasion’ and the private sector	232
Section I: Maintaining and enhancing integrity in the private sector: a national and transnational challenge	232
Section II: Gentle ‘persuasion’: developing standard setting in the private sector	236
9.1 ‘Persuading’ the private sector to develop and implement integrity and compliance mechanisms	236
9.1.1 Global initiatives	237
9.1.2 Sector-specific initiatives: the Extractive Industries Transparency Initiative (EITI)	239
9.2 Gentle persuasion: the economic argument	243
9.3 Overview	244
Section III: ‘Forceful persuasion’	245
9.1 Forceful persuasion 1: prosecuting the offending companies and their senior officials in the ‘victim’ state: the Lesotho Highlands Water Project cases	245
9.1.1 The background to the project	245
9.1.2 The preliminary issues	247
9.1.3 The prosecution of Acres International: a case study	251
9.1.4 The need for the political will to prosecute bribery	253
9.2 Forceful persuasion 2: tackling the supply side and the OECD anti-bribery convention	254
9.2.1 The development of the OECD anti-bribery convention	254
9.2.2 The OECD anti-bribery convention in practice	256
9.2.3 UNCAC and the fight against the bribery of foreign public officials	257
9.2.4 Overview	258
9.3 The use of civil remedies	258
Section IV: ‘Persuasive threats’	259
9.1 Doing ‘deals’ with the corporate sector	259
9.2 Using the threat of debarment	262
9.2.1 The basic principles	262
9.2.2 Towards an effective debarment system	264
9.2.3 MDBs and cross debarment	267
9.2.4 Overview	267
Section V: So what is in it for African states?	268

10. Preventing the looting of state assets: combating corruption-related money laundering	274
Introduction	274
Section I: Laundering the proceeds of corruption	275
10.1 Some basic principles	275
10.2 Corruption and money laundering: making the connection	278
10.3 The ‘special advantages’: PEPs and the ‘seven fundamental controls over money laundering’	279
Section II: Combating the laundering of the proceeds of corruption in the African context	282
10.1 Responding to the challenges: the role of the Financial Action Task Force	283
10.2 Combating money laundering in Africa	285
10.2.1 The three FATF-style African regional bodies	285
10.2.2 Standard setting: the FATF Recommendations in the African context	287
10.2.3 African states and the mutual evaluation process	293
10.2.4 Ghana and Nigeria: two case studies	295
10.2.5 A ‘success’ story: the Ibori case	297
10.3 Conclusions	298
11. Preventing public officials from enjoying their proceeds of corruption	300
Introduction: The Alamiyeseigha case	300
Section I: Investigating corruption-related offences with a transnational element: developing effective international cooperation mechanisms	301
11.1 Background	301
11.2 Mutual assistance: informal requests	302
11.3 Mutual Legal Assistance (MLA)	303
11.3.1 What is MLA and when is it required?	303
11.3.2 The legal basis for the request	304
11.3.3 Jurisdiction	306
11.3.4 How is the request made? The role of the central authority	307
11.3.5 Challenges for African states in maintaining an effective MLA system	309
11.4 Overview	316

Section II: Taking away the profit: recovering the proceeds of corruption	317
11.1 The basics of asset recovery	317
11.2 Conviction-based asset forfeiture	318
11.3 Non-conviction-based Asset Forfeiture (NCBAF)	319
11.3.1 The basics	319
11.3.2 Constitutional issues	320
11.3.3 The Obiang case	322
11.4 How can African ‘victim’ states benefit? Recovering looted assets	323
11.5 Civil law actions	325
11.5.1 Bringing a civil action in a foreign jurisdiction: the Chiluba case	325
11.5.2 Civil actions in the domestic setting	328
11.6 Overview	329
12. Laws, political will and the art of persuasion	330
The end of the beginning?	330
12.1 The legal dimension	330
12.1.1 The national constitution	331
12.1.2 Laws and regulations	332
12.1.3 The transnational dimension	333
12.1.4 Laws designed to take away the profit from corruption	333
12.2 The political dimension	334
12.3 The art of persuasion	335
12.3.1 Moral persuasion	335
12.3.2 Gentle persuasion	336
12.3.3 Forceful persuasion	337
12.3.4 Persuasive threats: dealing with the ‘deny everything’ approach	340
12.3.5 Persuasive accountability	342
12.4 A final thought	345
<i>Bibliography</i>	346
<i>Index</i>	359