## Contents

*About the author*  
xiii  
*Preface*  
xiv  
*List of abbreviations*  
xvii  
*Table of cases*  
xix  
*Table of statutes*  
xxxv  

1. Setting the scene: law and persuasion  
   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  
   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  
   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
## Contents

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 The presumption of innocence and privilege against self-incrimination versus ‘reversing’ the burden of proof 129

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
Combating corruption


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

Introduction 274

Section I: Laundering the proceeds of corruption
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
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

Introduction: The Alamieyeseigha 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
Combating corruption

Section II: Taking away the profit: recovering the proceeds of corruption

11.1 The basics of asset recovery
11.2 Conviction-based asset forfeiture
11.3 Non-conviction-based Asset Forfeiture (NCBAF)
  11.3.1 The basics
  11.3.2 Constitutional issues
  11.3.3 The Obiang case
11.4 How can African ‘victim’ states benefit? Recovering looted assets
11.5 Civil law actions
  11.5.1 Bringing a civil action in a foreign jurisdiction: the Chiluba case
  11.5.2 Civil actions in the domestic setting
11.6 Overview

12. Laws, political will and the art of persuasion
   The end of the beginning?
   12.1 The legal dimension
     12.1.1 The national constitution
     12.1.2 Laws and regulations
     12.1.3 The transnational dimension
     12.1.4 Laws designed to take away the profit from corruption
   12.2 The political dimension
   12.3 The art of persuasion
     12.3.1 Moral persuasion
     12.3.2 Gentle persuasion
     12.3.3 Forceful persuasion
     12.3.4 Persuasive threats: dealing with the ‘deny everything’ approach
     12.3.5 Persuasive accountability
   12.4 A final thought

Bibliography
Index