

Speech by Abel Fleitas Ortiz de Rozas (2005)

I would like to give my warm thanks to the British Council for inviting us to this seminar and for giving us an opportunity to discuss a subject of such a great importance to all our countries.

Albert Einstein once said: “the formulation of a problem is more important than its solution”.

To achieve knowledge it is necessary to realize the question involved. This is what Piaget called “la prise de conscience”.

I will try to formulate some problems to help us find the solutions.

One great challenge is to avoid the risk of turning this seminar into just a theoretical exchange of bright ideas without putting them into action which would lead to an effective change in the fight against corruption.

When the position of Head of the Anticorruption Office was offered to me, I remembered the Sisyphus Myth and my first fear was to suffer the same dreadful fate of that mythological character: ceaselessly rolling a rock to the top of a mountain, from where the stone would fall back, and being forced to try rolling the rock uphill again, but not making any progress.

Yet, and despite difficulties involved, I accepted because I have had a concern about transparency ever since I assumed my position as an academic person and as a member of the executive, legislative and judicial branches of government.

How can we approach to the problem of “corruption” and “transparency” ?

This matter may be seen through different perspectives: perception, personal and social conscience, reality, laws, and the entities of application.

- Perception: Sometimes, the perception, the feeling about corruption, differs from reality. Why? The corruption perception of social actors may vary for circumstances not related to this subject.

It is interesting to remark that Argentina, in the first assessment of Transparency International in '95, ranked at an average score (5 out of a clean score of 10), and since then its score has been lower year after year: it came down to 3 in '98, rose in 2000, and came down again in 2003... Similar results appeared in a recent report made by a department of the World Bank.

The issue is that, between 1989 and 1995 (the first period of Menem's Presidency) a great number of corruption scandals were made public, including one disclosed by the Ambassador of the U.S.. All these acts of corruption were committed by *big fish*, people who were close to the then president. The political power did not want to launch an investigation and manipulated justice so as to exonerate or cover up those responsible for the corrupt act.

However, at that time the index of social perception of corruption was not serious, and we can associate this with a political fact: in the year '95 an election for president took place and President Menem handily won, despite all the facts I have mentioned before.

At that time in Argentina public opinion did not conceive the problem of corruption as a priority, and this is the reason why it had no effect neither on the presidential election of '95 nor on the analysis carried out by Transparency International and the World Bank.

It was a moment of relative (and apparent) welfare, and we can ask ourselves if those circumstances may weaken the ethic of conscience.

This situation changed after '97, since the topic of corruption became an item of the public agenda and acquired considerable importance in the elections of '99 and in subsequent elections as well.

Now Justice has improved, and many investigaciones are being carried out. However, the corruption perception remains lower than ten years before.

- > Another perspective is that of the citizens' conscience, which involves not only their concern about corruption but also their commitment toward transparency.

We find an ambiguity in all this: on the one hand, in recent years the problem of corruption has become one of the primary concerns of citizens. But on the other, those citizens have not adopted such a strict attitude towards their own compliance to the rule of law.

A survey recently conducted by a private University in Buenos Aires over a certain number of university students showed that a significant percentage (40 %) of them accept that they would commit a corrupt act if they had the certainty that the act will remain unpunished.

This fact is serious and should be taken into account, for corruption is a problem which is not exclusive to the public sector, to the officials, magistrates or representatives.

Corruption is a problem which also has foundations in our society.

- > We may also ask ourselves how corruption or transparency is in reality, that is to say, the real behaviour of officials, the conduct of social actors, compliance with the law and the application or not of the penalties when appropriate.

In this respect, we may consider the legal instruments, and also their application by the entities in charge of prevention, control and sanction.

Corruption exists in all societies, and the possibility of committing a corrupt act exists in every person.

The question, regarding society as a whole, is which is the degree of corruption and which is the social, political and legal reaction of such society toward corruption.

This is precisely what differentiates the most transparent countries from those which are not.

The problem of making a research on such reality, is how to measure transparency and corruption within the public sector:

Should we measure them by analysing the statistics of accusations, claims, criminal proceedings and judgements? Or by studying the differences existing between real costs and price paid for public works and services?

By surveys conducted on each citizen's experience on acts of corruption?

There are some indicators about all this but they are not sufficient for in most cases research made on corruption refers to perception rather than reality

The reality of corruption may also be seen through the permanent structural perspective, or through what we may call a superlative, high level, big fish crimes.

> Structural corruption has a long history in Argentina.

In the nineteenth century poem, the Martín Fierro, there are several verses dedicated to tell how different intermediaries and officials kept for themselves the provisions bound for soldiers who were members of the militia in the border.

Successive fraudulent acts were committed since the very beginning of the process for the acquisition of provisions with the complicity of suppliers and public officials...

and the last verse reads (in the popular language of Martin Fierro): "y sufren tanto boca y hacen tanta estacione / que casi no hay racione

cuando llegan al soldao” which means “so much bites they suffer, so many stops they make, that in the end no portions get to the soldier”.

This description of how resources are lost in the middle of the way in a particular case, constitutes an image that we may widely extend to the contemporary time to understand the damage caused to the government’s social policies and public works when a drainage of resources corrode them.

A statistical analysis that we carried out taking into account the investigations initiated and the data gathered in the Anticorruption Office, showed that a considerable percentage of corruption cases come from a middle level of the administration. This is what we call a director level or equivalent to a general director or national director.

In the superior levels there are fewer cases but the amounts involved are higher.

Indeed, as I have already said, most scandalous cases occurred in the 90s, time when a “culture of corruption” was settled in different areas within the political and social world.

By this I mean the existence of one set of rules which is proclaimed but another different set of rules which is applied in practice, involving the way in which the economic and political actors operate. I could dwell on anecdotes about this but I won’t since we are short of time.

- Another perspective to analyse transparency and corruption is through the quality of the legal system.

Obviously, well drafted laws are necessary but they are not sufficient to prevent and combat corruption.

Within the constitutional frame, some instruments appeared as a consequence of the reform of ‘94: the new section 36 sets forth the basis of the Public Ethics Act, passed by the National Congress in 1999.

New controlling entities were created and others renewed, despite the fact that, as it often occurs in my country, from the letter of the law to reality there is a long way, and it takes time for the institutions to build an effective profile in the prevention and fight against corruption.

The Argentina ratified the Inter-American Treaty against Corruption, and ratification of the United Nations Treaty is still pending; both of them are effective instruments to combat corruption in court.

The Penal Code prescribes types of crimes which can be of special use such as the crime of Illegal Enrichment, by which a public official is compelled to justify the cause of net worth enrichment obtained during his office.

And within the Administrative Law frame, experts are constantly working to improve the public bidding system. We should recognize that whenever a new system is established to obtain greater transparency, new forms of tricks appear to cheat on such system.

We therefore need to work on those factors which discourage the commission of a crime:

in the first place, the own moral conscience of officials, businessmen and citizens.

In the second place, a possible social disapproval of corrupt acts, which has already become increasingly accentuated at the present time.

Besides, the ultimate resource whenever the own conscience or social disapproval does not work is the punishment set forth by the criminal law.

However, the fact that such punishment may appear in the law is not sufficient, its application is what really matters. The term application refers to the possibility of setting the case for trial and the entering of a judgment to determine the case.

In my country this still does not work properly, and for a great part of the population, temporary imprisonment pending trial is the only “punishment” known, because in the majority of the big important cases a final judgment, and the subsequent imprisonment of the offender, is not issued.

This distortion of the public image does not constitute a responsibility of the people but of the Justice.

The Anticorruption Office was created in December 1999, at a time in which the system of control and the Judiciary had deteriorated due to the deliberate policy of the outgoing government.

In these five years of existence, the Anticorruption Office has been developing two lines, two fundamental areas of work: the area of transparency policy and the area of investigations.

The transparency policy area is maybe not well known by the public, but nevertheless has great importance.

It involves:

- Reception and supervision of sworn asset statements.
- Analysis and determination of cases involving conflict of interests and incompatibilities of officials.
- Drafting of projects on legislative reforms, such as a reform on the legislation related to reserved funds as we are now working on.
- Counseling provided to areas of the administration to prevent corrupt acts in a public bidding process, etc. etc. This task can be fulfilled thanks to a list drawn up by the investigations area which sets out all the most possible and common tricks which can be done during a public bidding creating the appearance of lawful acts and thus defrauding the basic content of competitiveness, economy, transparency, etc.

- Collaboration to other jurisdictions such as the one we provide through the Provinces Plan or through the agreement recently executed with the City of Buenos Aires with the purpose of taking part in the supervision of municipality controlling area, area with a dark and poor past, poor in terms of transparency.

The investigations area has achieved huge successes in a great number of investigations conducted throughout all these years, in 70 cases we act as the accusing party, and there are more than 300 cases being investigated by our Office and involving public officials from all levels and governments.

This is what we can remark as positive in terms of level of work and intensity, considering that this is a relatively small office.

Difficulties faced:

- The first difficulty we have to face is the problem of a reduced structure. There are 25 investigators who have to focus on the most serious or important cases .
- The technical support resources are limited. Usually, these kind of offences call for experts' opinions, and generally the possibility of having well-paid experts tends to put the accusing party in an unfavourable position compared to the defendant's.

We are now accusing former public officials of having misappropriated millions of dollars, and these former public officials can afford to hire not only the services of the best law firms but also the best experts with all kind of resources. This is a fight which is strong in conviction but poor in resources.

- And, naturally this also establishes the difference between theory and practice: some experts on criminal law say that "the AO should not have the power to formulate accusations since that could put the defendant in a position of disadvantage. The defendant, alone,

would have to face various prosecutors....” A person who believes this is not aware of all the difficulties involved in the investigation of corruption.

The defendant’s club of the accused of corruption has a strong financial position and a powerful defence, and, in some cases, a good relationship with the judges. We are working really hard on the existent disparity between the accusing party and the defendant.

- We have proposed ourselves to have some of our seventy cases prosecuted and determined this year. I believe this is a commitment undertaken toward our duties and toward the public opinion.
- I would say that Society, the citizenship has a relative commitment regarding this subject. What do I call relative? People react angrily when acts of corruption are disclosed and they claim for punishment to the offenders. However, not so many are willingly to provide collaboration thorough submission of claims, information... in this respect, I regrettably have heard complaints for alleged acts of corruption, these complaints are made in a low voice and come from people who do not want to collaborate in the conducting of an investigation and the punishment of the wrongdoer.

And worst of all, some years ago I heard attorneys complaining for a bribe not because they considered that the bribe was wrong but because they thought the bribe was too high. Regarding this topic we also have to be conscious about the importance of people’s participation and their collaboration in the fight against corruption.

To conclude, an expert said that to fight corruption it is necessary to make systematic reforms, facilitate control and investigations and to fry some big fish. In my opinion we need all this.

We are working on systematic reforms, together with other controlling entities and to deepen and facilitate investigations, and also on catching and frying some big fish, who offer resistance... .

I believe there has been a improvement despite so many difficulties, the entities have improved in the prevention, investigation and sanction compared to 5 or 10 years ago.

But this is a task which never ends; you reach a certain height, but there are always further steps on the ladder leading to the next height and we have to be conscious that this is a ladder that needs to be climbed continually.

The important thing is that we are moving and we are going thorough levels surpassing one more step in this fight.

Thank you.