

7. Integrity in English and French public contracts: Changing administrative cultures?

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I. LAW AND ADMINISTRATIVE CULTURES IN ENGLAND AND FRANCE

Public contracts contribute to ca. 15 per cent of French and English GDP,¹ which make them fertile ground for diverting taxpayers' money away from the common good. When awarding a public contract, a public authority relies on the work of staff to prepare decisions and on elected representatives acting in procurement bid commissions to select bidders. Then the contract has to be performed: goods and services must be delivered and prices paid for these goods and services. In theory, public money has to be spent on goods and services in a way that best contributes to the public good. Normally, competition and equality between the bidders and transparency in the contract award are means to ensure that the chosen bid is the one most able to fulfil this aim. However, corruption may disturb this process: staff may disclose bids to competitors or give more information to some bidders; the award process and selection criteria may be tweaked in a way favorable to one bidder; interpretation in decision-making may be directed towards carrying out

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¹ http://www.oecd-ilibrary.org/sites/gov_glance-2011en/09/01/index.html?contentType=/ns/StatisticalPublication,/ns/Chapter&itemId=/content/chapter/gov_glance-2011-46-en&containerItemId=/content/serial/22214399&accessItemIds=&mimeType=text/html.

bidders' interests instead of the public good; contract performance may intentionally be poorly monitored. Reasons for these courses of action may lie in direct or indirect benefits that staff or elected representatives or their family members obtain, such as securing a better-paid commercial position in the future, pleasing influential friends or funding their future electoral campaigns. In these forms, or related versions,² corruption in relation to public contracts is a common problem. Administrative cultures, though, bring differences across legal systems. They encompass techniques, institutions and processes which transform general policies into concrete actions on a day-to-day basis. They also give rise to specific forms of corruption as well as to different ways in which corruption is tackled. Yet administrative cultures are not fixed and are changing, albeit slowly.

Traditionally, English and French approaches to corruption have differed particularly in their use of criminal law and ethics (especially codes of practice).³ English law relies more on an ethical framework to set standards and rarely on criminal law for sanction, although audit mechanisms provide alternatives to sanction. The French have predominantly relied on criminal law to set standards and as a sanction, while administrative law has played a supporting role in policing contractual practice. These differences regarding techniques for addressing corruption tie in with three differences between English and French administrative cultures: the organization of local–central relationships, the relationships between the public and private spheres, and the interplay between norms and factual situation.  Over the last decennia, England has developed into a strongly centralized state with nearly no overlap between central and local representatives and one where local government depends heavily on central funding. French local government is heavily fragmented with more than 36 000 local entities and local politicians holding multiple mandates at various institutional levels, in such a way that informal decision-making runs in parallel to official decision-making processes. Furthermore, England does not delineate strongly between public and private interests and mostly relies on private law to organize the relationships between public and private entities. In contrast, French administrative culture is characterized by a strong distinction between public and private interests and between public and private law. Finally, England makes, overall, serious attempts to implement ethical standards

² For a typology of corruption: OECD, *Bribery in Public Procurement – Methods, Actors and Counter-measures*, 2007, 74–97.

³ J Bell, 'English Law and French Law – Not So Different?' [1995] CLP 63, 90–95.

and legal norms in practice and to achieve their genuine integration by the people carrying out administrative duties. France relies more on the symbolic power of rules and sanctions, with few means to implement these standards and rules.

English and French administrative cultures have thus evolved from two different starting points. However, both England and France currently have to comply with the same European and OECD obligations and have had to deal with scandals following extreme situations of corruption. Both administrative cultures have hence gradually changed. However, there is an inherent resistance to changes in both administrative cultures: the gap between integrity as standards of behavior and practice still needs to be bridged. Therefore, this chapter suggests that changing administrative culture is a herculean task, where any little help – including that from the law – is needed. Provided it is built adequately into the administrative culture, the law may help to clarify the distinction between public and private interests and facilitate processes for changing administrative cultures.

This chapter identifies the components of English and French administrative cultures related to corruption in public contracts (section II). It then moves on to analyze how spontaneous changes have been processed in both cultures from the 1990s onwards (section III) and how the two systems have resisted European and international pressures (section IV). Based on this comparative analysis of corruption in public contracts in England and France, the chapter concludes with the potential contributions of the law to developing high standards of conduct within administrative cultures (section V).

II. DISTINGUISHING BETWEEN INTERNATIONAL AND LOCAL PUBLIC CONTRACTS

As a way to give direction to otherwise chaotic techniques, institutions and processes, administrative culture develops from the interactions between the administration and the public interest. In this respect, public contracts play a distinctive role as they offer unique opportunities for, on the one hand, public functions and collective interests and, on the other hand, private advantages and profit, to interplay. France developed an entire conceptual framework for public contracts from the early 20th century on, while England has no such systematic approach to public contracts. Therefore, ‘public contracts’ are used here in a broad sense encompassing contracts between public and private entities whereby private entities provide public authorities with goods, works or services

for their own or the community's use. They can be purely domestic or signed with foreign public authorities. Both England and France have used private corporations to carry out their international agendas. The United Kingdom relied on incorporated companies to develop its colonies,⁴ which found echoes in the BAE-Al Yamamah case, as will be discussed below.⁵ France fostered a dense network of privileged relationships based on privatized corporations (once state-owned) in French-speaking Africa.⁶ Elf, for instance, set up to secure the French strategic priority of energy autonomy, was also used to provide funding for French political parties,⁷ leading to a major corruption scandal in the 1990s.⁸ However, the administrative organizations of English and French local-central relationships are structurally different and follow inverse evolutions: from a central state to decentralization in France; from local self-government to centralization in England. This explains the differences in corruption in local politics between England and France.

English local government has enjoyed mostly fragmented powers, only recently extended to encompass the pursuit of economic, social and environmental wellbeing.⁹ Up to World War I, local government had been able to develop extended local service provision but, after World War II, their powers shrank in the face of nationalizations (eg energy, hospitals, national assistance etc). Reforms in the 1970s limited local tax resources and made local government overly dependent on policies framed at the central level.¹⁰ Up to the time the UK joined the EU, no specific legal rules existed for the procurement of public contracts. When the Poulson scandal broke out in 1972, it was revealed that Poulson had been bribing a range of officials in return for contracts for his architectural practice. No violation of any procurement procedure was invoked, only the *Public Bodies Corrupt Practices Act 1889* and the *Prevention of Corruption Act*

⁴ A Adonis, 'The UK: Civic Virtue Put to the Test' in D Della Ponta and Y Mény (eds), *Democracy and Corruption in Europe* (Pinter 1997) 103, 106.

⁵ See below, section IV.

⁶ JF Médard, 'France-Africa: Within the Family' in D Della Ponta and Y Mény (eds), *Democracy and Corruption in Europe* (Pinter 1997) 22–34.

⁷ JF Médard, 'Les paradoxes de la corruption institutionnalisée' (2006) 13:4 *Revue internationale de politique comparée* 697, 708.

⁸ J Garrigues, *Les scandales de la République – De Panama à l'affaire Elf* (Robert Laffont 2004).

⁹ Local Government Act 2000 s 2.

¹⁰ M Loughlin, *Legality and Locality* –  *Role of Law in Central-Local Government Relations* (Clarendon 1996) 97–98.

1906 were used.¹¹ Despite a range of problems regarding this framework,¹² no major legal changes were implemented. Yet in the 1980s the use of contracts and competition by local government became a common way for local government to tender the services they needed. Local spending was constrained by standards of regularity and *value for money* (shorthand for economy, efficacy and efficiency). Although the modalities of central control have evolved over the last thirty years, the Treasury remains strongly in control of local spending.¹³ In this context, corruption in national politics has not featured prominently in public contracts but has in a range of other behaviors, such as claiming parliamentary expenses for personal benefit.

Against this English backdrop of relying on increasingly strong central control over local finance and competition to award public contracts, France presents three differences: instrumental, institutional and functional. First, public contracts have been a means for political parties to secure funding for their electoral campaigns. In the 1970s, the Socialist Party especially became aware of the need to mobilize financial resources if it wanted to provide a President of the French Republic.¹⁴ Firms which wished to bid for public contracts had then to become involved in a complicated system of fake invoicing by consultancy in parallel to public contracts. This system led to the major 'Urba' scandal at the end of the 1980s.¹⁵ Secondly, a process of decentralization started from 1982 onwards. This resulted in a new institutional design, with multiple layers of powers which were perceived as confusing and ineffective. Therefore,

a whole culture of accommodation and rule-bending has come to being. [...] [I]t enables administrative paralysis to be avoided. But it also enables the conviction to grow that the norm exists to be violated or circumvented

¹¹ For the details of this scandal and the political implications at national level: see J Tribe, 'The Poulson Affair: Corruption and the Role of Bankruptcy Law Public Examinations in the Early 1970s' (2010) 21:3 KLJ 495–528.

¹² Highlighted in the inquiries following the Poulson scandal: Lord Salmon, *Royal Commission on Standards of Conduct in Public Life* (Cmnd 6524, 1976).

¹³ S Bailey, *Cross on Principles of Local Government Law* (3rd edn, Sweet & Maxwell 2004) chap 9.

¹⁴ J Evans, 'Political Corruption in France' in M Bull and J Newell (eds), *Corruption in Contemporary Politics* (Palgrave 2003) 79, 81–82.

¹⁵ Y Mény, 'France: The End of the Republican Ethic?' in D Della Porta and Y Mény (eds), *Democracy and Corruption in Europe* (Pinter 1997) 7, 13.

whenever it is convenient; sometimes to further desirable ends, yet frequently for less worthy reasons.¹⁶

As a consequence of this system, a third French feature has to be mentioned: the *cumul des mandats*. This feature allowed one representative to hold multiple offices, at local, departmental and central levels. These numerous posts increased local representatives' influence and put them in a position to act as personal go-betweens across various levels of powers outside the legal processes of decision-making. They oiled the administrative and political machinery. Yet time constraints and over-commitment meant that these many roles could not be performed well or else they resulted in a blurring of the lines between different functions. Therefore a 1986 reform attempted to limit the *cumul des mandats* to two mandates.¹⁷ However it only applied to expressly regulated positions, leaving the *cumul* widely practiced where it was not forbidden. This administrative context and its circumstances shape what administrative actors perceive as problematic practices.¹⁸

Against this different background to the use of public contracts, English and French administrative cultures developed different focuses to address corruption and conflicts of interest. England did not single out corruption or conflicts of interest in public contracts as deserving special treatment, but France organized a fully-fledged regime especially tailored to tackle corruption in public contracts, distinct from the repression of other corrupt practices.

III. SPONTANEOUS ANTIDOTES: DOMESTIC NORMS AND INSTITUTIONS

Over the years the English and French administrative cultures have defined whether and how corrupt practices develop in the field of public contracts. In the early 1990s, England and France reacted to scandals involving corruption and conflicts of interest.¹⁹ However, they adopted different strategies. While England chose a soft law and self-regulatory

¹⁶ Ibid 17.

¹⁷ Evans above (n 14) 86. For examples of current limitations see: electoral code art. LO 137ff.

¹⁸ H Rayner, 'Corruption in France: Structural and Contextual Conditions' in D Tänzler, K Maras and A Giannakopoulos (eds), *Social Construction of Corruption in Europe* (Ashgate 2012) 107.

¹⁹ J Bell, 'Legal Means for Eliminating Corruption in the Public Service' (2007) 11:3 Electronic Journal of Comparative Law.

approach, criminal law was heavily and symbolically relied on in France. England focused its efforts on conflicts of interest in public decision-making at all levels of power; France focused on corruption in local public contracts. Yet the two countries highlight the fact that the normative framework is more nuanced and that institutions, their very existence and their real powers, play a tremendous role in breathing life into otherwise empty ideals.

III.1 England: Looking beyond the Ethical Framework

When political scandals emerged in England in the 1990s,²⁰ the reaction was to set up the Nolan Commission.²¹ This commission identified seven principles for standards in public life (selflessness, integrity, objectivity, accountability, openness, honesty, leadership) which apply to all holders of public office: elected representatives, civil servants or staff in local government.²² The Nolan recommendations were promptly implemented.²³ Conflicts of interest were considered to be an internal matter to the administration and self-regulation was the privileged way forward.²⁴ Officials were to register and disclose their interests. A number of commissions were then set up to issue a code of conduct and monitor its implementation. A ministerial code²⁵ and a civil service code²⁶ were published. At the local level, a model for the code of conduct was issued.²⁷ Although the whole system applied to all decision-making, the question of public contracts was given no particular attention. The only exception to this was the formulation of objectivity as a principle for standards in public life, where the award of contracts was especially included.²⁸ This ethical framework applies to all holders of public offices, elected representatives or not. It explains how English administrative

²⁰ For the context: see D Oliver, 'Standards of Conduct in Public Life – What Standards?' [1995] PL 497.

²¹ A Doig, 'Political Corruption in the United Kingdom' in M Bull and J Newell (eds), above (n 14) 178, 186.

²² Committee on Standards in Public Life, *First Report*, 1995 (Cm 2850-1). See Cecily Rose's contribution to this book.

²³ Oliver above (n 20) 499–501.

²⁴ Currently: Cabinet Office, *Ministerial code*, 2010.

²⁵ Currently: *Civil service code*, 2010.

²⁶ Now with a legal basis: Constitutional Reform and Governance Act 2010, s 5.

²⁷ Local Authorities (Model Code of Conduct) Order 2007.

²⁸ Objectivity is defined in relation to 'carrying out public business, including making public appointments, awarding contracts, or recommending

culture depends on the political environment in which it evolves. However, the above does not give a full picture of the regulation of conflicts of interest in England. At least three points need further explanation in order to clarify the relationships between criminal law and ethics.

First, criminal law has been minimized under this ethical approach. However, it has always existed in the background and has been enforced.²⁹ A criminal offence of misconduct in public office exists and, despite begging legal questions of predictability, is enforced.³⁰ Furthermore, criminal sentences have been secured against public officials. For instance, civil servants in the Ministry of Defence have been sentenced to suspended imprisonment and confiscation orders on the grounds that they had shown favor in the tendering of CCTV contracts.³¹ Criminal law exists and is enforced in England, even if it may be reserved for most serious cases. The main feature of English administrative culture may then be not so much the absence or presence of criminal law but the interpretation given to criminal offences in their overall context.

Secondly, next to these soft law and hard law approaches, one of self-regulation and one of criminal sentencing, a third approach has developed in England, showing the interactions between the judiciary and auditing when dealing with troubling practices related to public contracts. In this respect, the Porter scandal needs mentioning. During the 1980s, the Westminster Council, the leader of its council, Dame Shirley Porter, and a couple of its councilors implemented a policy of selling council houses to electors, based on the belief that home-owners would be more likely to vote for their party. Public decisions were overridden by party political gains: their future re-election.³² The investigations were carried out by an independent auditor and did not constitute criminal prosecutions.³³ The scandal did not give rise to criminal sentences but to the payment of damages to the local council by the leader of the council and her colleagues.³⁴ Often invoked to illustrate English administrative culture in relation to corruption in local affairs, this case indicates clearly

individuals for rewards and benefits, holders of public office should make choices on merit'.

²⁹ Eg: Donnygate: <http://www.guardian.co.uk/society/2002/mar/13/uknews>.

³⁰ S Parsons, 'Misconduct in a Public Office – Should It Still Be Prosecuted?' [2012] *Journal of Criminal Law* 179.

³¹ <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/sentencing-in-northern-ireland-contracts-corruption.aspx>.

³² I Leigh, *Law, Politics and Local Democracy* (OUP 2000) 124–27.

³³ Bell above (n 3) 93.

³⁴ *Porter v Magill* [2001] UKHL 67.

the high importance of audit procedures in investigating possible fraud in the system. This crucial role played by audit mechanisms brings the current proposal to abolish the Audit Commission by 2015 into question.³⁵ While auditing has helped to detect possible corruption, even resulting in reparation if not criminal sanction, the current changes in local auditing would need to maintain such articulation between ethics and deterrence.

Thirdly, the ethical framework has been subject to recent changes, most notably with the abolition of the Standards Board for England.³⁶ The reasoning behind this move was that the system hinging on the board was ineffective because it was too easy for citizens to challenge councillors' conduct, which undermined local democracy. Therefore the appropriate way forward was to leave local authorities free to issue their own codes, on the one hand, and, on the other hand, to make it '*a criminal offence for councillors to deliberately withhold or misrepresent a financial interest*'.³⁷ Therefore, identifying proper conduct is left to local guidance and individual judgment in the hope that the prospect of criminal charges will work as an efficient deterrent. This rebalancing illustrates English administrative culture at two levels: first, criminal law is **most often used** in these matters; secondly, increased personal responsibility under the patronage of the central government exercising its most extreme coercive powers is designed into the system. Therefore this system strongly depends on the effectiveness of criminal justice in this respect. This move does not seem to have taken into account the fact that local government is currently brought into uncharted territory regarding how local services should be delivered and the increased involvement by charities in the delivery of local public services. Central guidance mapping out the possible conflicts of interest between charities and local government might have been welcomed. Supposedly taken to restore citizens' faith in local democracy, recent changes in the framework of local authorities' spending and contractual relationships possibly herald deep internal transformations of English political and administrative culture: the distance between the individual councilor and central government is now mostly framed by local standards and criminal law, with limited national guidelines and changing audit procedures. Overall,

³⁵ Draft Local Audit Bill (2012 Cm 8393).

³⁶ Local Government Act 2000 s 57 and schedule 4. Powers to abolish it: Localism Act 2011 schedule 4 part 2.

³⁷ CLG, *A Plain English Guide to the Localism Act*, 2011, 5. [my italics]

English administrative culture aspires to focus on implementing ‘standards’, defined through ethical guidelines and framed by criminal law or individual conscience rather than by a rule-based system.³⁸

III.2 France: from Criminal Law to Ethics?

France has followed a radically different symbolic approach to corruption in local politics. In the 1980s, a string of scandals was uncovered and Parliament decided on general amnesties for representatives involved in corruption, acknowledging thereby the extent of corrupt or borderline practices.³⁹ However these statutes met with unusual uproar from citizens.⁴⁰ In reaction, representatives sought to demonstrate their good will in tackling corruption and passed two rigorous statutes, in 1991 and most crucially in 1993. This later statute, known as the ‘Loi Sapin’,⁴¹ aimed primarily to moralize public life.⁴² It sets out three structural elements for a French administrative culture of anti-corruption: first, a distinction between public procurement and delegation; secondly, dedicated public authorities; and thirdly, specific criminal offences. The *Loi Sapin* also highlights the limits of French administrative culture, which relies on symbolism to address corruption in local public contracts. Changes, such as the recent Sauvé report, have thus been attempted, although they repeatedly meet with resistance.

The first pillar of the *Loi Sapin* consecrates a new category of public contracts: the delegation of public service (*délégation de service public*),⁴³ which was supposed to bring together many of the various contracts passed by public authorities, most notably service concessions (*concession de service*). The *Loi Sapin* establishes a distinction between

³⁸ Cf PASC, *Ethics and Standards: The Regulation of Conduct in Public Life* (2006–2007 HC 121-I) summary.

³⁹ Loi (nr 88-828) 20 July 1988 *portant amnistie* art. 2, 5 and loi (nr 90-55) 15 January 1990 *sur le financement des partis politiques et des campagnes électorales* art. 19.

⁴⁰ G Drouot, ‘Le financement des campagnes électorales et les activités politiques: les nouvelles règles du jeu. La loi du 15 janvier 1990 et la loi organique du 11 mai 1990’ [1990] D 125.

⁴¹ Loi (nr 93-122) 29 January 1993 *relative à la prévention de la corruption et à la transparence de la vie économique et des procédures publiques*.

⁴² JC Douence and P Terneyre, ‘Marchés publics et délégations de service public: Nouvelles modifications législatives’ [1995] RfDA 971.

⁴³ JC Douence, ‘Les contrats de délégations de service public’ [1993] RfDA 936; G Marcou, ‘La notion de délégation de service public après la loi du 29 janvier 1993’ [1994] RfDA 691.

public procurement, which needs to follow all requirements following on from the implementation of EU directives on public procurement,⁴⁴ and delegations, where more flexibility is allowed. In public procurement, the public authority awarding the contract pays a price to the private entity delivering the goods or services. In the delegation of public service, the public authority delegates the management of the public service to a private entity,⁴⁵ whose earnings depend on the profits generated by the public service.⁴⁶ Therefore, users of the service, and not the public authority, pay the private entity in charge of the public service. Concessions, as the predecessor of delegations, were previously supposed to feature a high level of confidence between the public authority and private contractors, resulting in a blurring of public and private interests, common good and private profits. The *Loi Sapin* was supposed to reframe these relationships towards more transparency and to prevent corruption from arising too endemically in delegation. Subject to subtle case law regarding the origin of the monies exchanged for services,⁴⁷ this carefully drawn balance between public procurement and delegation is central to the award of French public contracts, allowing the reining in of extreme practices while maintaining autonomy for local authorities.

The second pillar of the *Loi Sapin* pertains to the commissions it entrusts with its implementation: the *Mission interministérielle d'enquête sur les marchés* (MIEM) and the *Service central de lutte contre la corruption* (SCLC). First, the *MIEM*,⁴⁸ set up in 1991,⁴⁹ has extended powers to investigate the regularity and impartiality with which public

⁴⁴ Currently: Directive 2004/18 of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] JO L134/114.

⁴⁵ To keep it simple here. Public bodies may also carry out public services under a delegation.

⁴⁶ Currently: art. 28 *Loi Sapin* as modified by *Loi* (nr 2001-1168) 11 December 2001, art. 3; art. L 1411 Code général des collectivités territoriales.

⁴⁷ L Richer, *Droit des contrats administratifs* (7th edn, LGDJ 2010) paras 1066ff.

⁴⁸ http://www.minefi.gouv.fr/mission_marches/role.htm; JP Gohon, 'Le délit de favoritisme' [1994] AJDA 109; G Pancrazi and M Radenac, (2005) fasc 210 JCCMP, *Mission interministérielle d'enquête sur les marchés et les conventions de délégation de service public (MIEM)*.

⁴⁹ *Loi* (nr 91-3) 3 January 1991 relative à la transparence et à la régularité des procédures de marchés et soumettant la passation de certains contrats à des règles de publicité et de mise en concurrence art. 1er.

procurement and delegations of public service are awarded and performed. However, the *MIEM* became inactive between 2003 and 2005.⁵⁰ Secondly, the *SCLC*⁵¹ exercises missions such as the centralization of information regarding corruption, supporting the judiciary in their investigations, advising administrative authorities, training to prevent and detect corruption, involvement in French international actions, and carrying out awareness-raising campaigns in private firms. However, the *SCLC* was originally intended to exercise wider powers. On the one hand, parliamentary debates transformed the power to gather information on its own initiative into the power to centralize information gathered by other bodies, therefore making the *SCLC* dependent on other organizations' diligence.⁵² On the other hand, the *SCLC* was also supposed to be granted powers in relation to the investigation, hearing and transmission of documents. The *Constitutional Council* (*Conseil Constitutionnel*) judged, however, that such powers would be unconstitutional:⁵³ as the *SCLC* was supposed to be an administrative body and not a judge it could not be granted such judicial powers. Although the *SCLC* minimizes this curtailing of powers,⁵⁴ its powers, although useful, are mostly symbolic.⁵⁵ For sanctions to work concretely as a deterrent they should not only exist on paper. Individuals also need to perceive the risks of being caught.⁵⁶ If there are few administrative structures in charge of monitoring problematic behavior, or if they have only reduced powers or limited human resources, the seriousness of the probability of detection decreases sharply, resulting in the criminal offences being mostly symbolic.

The third pillar of the *Loi Sapin* relates to its criminal part. Two offences especially targeted corruption in public contracts: *prise illégale*

⁵⁰ J Benoit, 'Responsabilité pénale des élus: Favoritisme et prise illégale d'intérêt' *Encyclopédie Collectivités Locales*, folio 12090-1/47; C Prebissy-Schnall, 'Corruption dans la commande publique, V. Instruments de la détection de la corruption' (2009) fasc 35 JCCMP para 84; Richer above (n 47) para 403.

⁵¹ *Loi Sapin* art. 1er – 4.

⁵² G Drouot, 'La loi n 93-122 du 29 janvier 1993 relative à la prévention de la corruption et à la transparence de la vie économique et des procédures publiques' [1993] D 153.

⁵³ Décision n 92-316 DC, 20 January 1993, *Loi relative à la prévention de la corruption et à la transparence de la vie économique et des procédures publiques*.

⁵⁴ J-P Bueb and A Maillé, 'Le Service central de prévention de la corruption' (2006) 57 *Contrats Publics* 52.

⁵⁵ P Lascoumes, *Une démocratie corrompible – arrangements, favoritisme et conflits d'intérêts* (La République des idées, Seuil 2011) 99.

⁵⁶ J Lager, 'Overcoming Cultures of Compliance to Reduce Corruption and Achieve Ethics in Government' (2009–10) 41 *McGeorge L Rev* 63, 71.

d'intérêt (illegal taking of benefit, currently article 432-12 of the Criminal code (*Code pénal*)) and *favoritisme* (favoritism, article 432-14 of the Criminal code). In its current form, article 432-12 of the Criminal code makes it a criminal offence for a person exercising public authority, a public mandate or a public mission to have (in)directly any interest in an undertaking while s/he takes public decisions related to this undertaking. Although article 432-12 of the Criminal code refers to 'undertaking', and not especially contracts, it is actually often applied to public procurement and other public contracts awarded by local authorities.⁵⁷ A *prise illégale d'intérêt* occurs, for instance, when members of a commission in charge of procurement have interests that conflict with some bidders.⁵⁸ Article 432-14 criminalizes an even wider range of people exercising public authority, a public mandate or a public mission when they (attempt to) provide an advantage to a third party in breaching public procurement rules.⁵⁹ The *Cour de Cassation* has developed an extensive approach to these two criminal offences. For instance, the *Cour de Cassation* interprets the legal text in such a way that a mere violation of the public procurement rules leads to the offence of *favoritisme* being committed.⁵⁹ With this extensive interpretation, the *Cour de Cassation* may be seeking to affirm high standards symbolically, and trying to eradicate any situations where doubt may arise regarding the interests involved in the decision-making about what the general interest should be. This symbolic reaffirmation of a requirement for impartiality could be seen as very important because first line institutions like the *MIEM* and the *SCPC*, which should assess this impartiality, are not fulfilling this role. However, the *Cour de Cassation*'s case law is mitigated by the pragmatic implementation of the Criminal code by the prosecuting authorities⁶⁰ and by pragmatic balancing of the sanctions applied (always suspended sentences, for instance, for *prise illégale d'intérêt*,⁶¹ or discretion used to mitigate ineligibility⁶²). This even strengthens the symbolism of the *Cour*

⁵⁷ Benoit above (n 50) 23.

⁵⁸ For illustrations: Cass crim 21 June 2000 nr 99-86.871, [2000-IV] JCP 2411, Gross; Cass crim 3 May 2001, nr 00-82.880 **Ponzo**, [2001-IR] D 2876, [2001-IV] JCP 2216; Cass crim, 9 February 2005, nr 03-85.697, *Procureur de Bastia*, [2005] AJDA 854; Cass crim. 19 November 2003, nr 02-87.336 *Patrick M, Guy M and Gérard M*, [2004-somm comm] D 2753, G Roujou de Boubée; [2004-I] JCP 157, chron Maron, Robert et Véron.

⁵⁹ Benoit above (n 50) 71.

⁶⁰ Ibid 62.

⁶¹ Ibid 41.

⁶² Ibid 43-44.

de Cassation's efforts and challenges the effectiveness of legal norms in such a way that citizens may become cynical and not inclined to value highly either the legal system or the standards that officials are supposed to apply.

This extension of criminal offences to deal with corruption and conflicts of interest in public contracts leads to inconsistency with administrative law. For instance, local authorities may take an overly cautious approach and reject a bid for fear of committing an offence, while the *Conseil d'Etat*, France's highest administrative court, may judge that such a rejection actually prevented a bidder from having free access to procurement.⁶³ In another instance, the *Cour de Cassation* applied article 432-12 to members of a local council who were involved in decisions related to subventions awarded to local associations they were chairing as representatives of the local council.⁶⁴ This kind of double function may actually contribute to good administration as a local council needs to know how the associations it funds work.⁶⁵ Here, institutional design needs to be revisited to ensure that relationships between local governments and their local associations rely on appropriate procedures, including for instance reporting techniques (such as the transmission of deliberations, accounts, approbation of specific acts etc.). By contrast, criminal sentences for individual councilors are not appropriate procedures for engineering such administrative reforms. Here again a strong symbol is wasted with no concrete efforts being made to resolve the real issue.

However, administrative law is also evolving to address criminal law's rigor: it seeks to develop impartiality as a more comprehensive principle. The existence of an act taken on the basis of a *prise illégale d'intérêt* or *favoritisme* does indeed need to be addressed. The sentencing of the physical authors does not lead to the act being expunged from the legal order. A traditional basis for making void an administrative act has been a soft form of power abuse (*détournement de pouvoirs*) but this is scarcely accepted by the *Conseil d'Etat*.⁶⁶ Therefore impartiality seems to have become the new principle applied to decisions,⁶⁷ to public bodies

⁶³ CE, 9 May 2012, nr 355.756.

⁶⁴ Cass crim 22 October 2008, nr 08-82.068, *Janine* [2008] AJDA 2144 obs MC de Montecler.

⁶⁵ Benoit above (n 50) 18.

⁶⁶ P Cassia, 'Conflit d'intérêts et passation des contrats de la commande publique' [2012] AJDA 1040.

⁶⁷ V Degoffe, 'L'impartialité de la décision administrative' [1998] RfDA 711. **Rapport de la commission de réflexion pour la prévention des conflits**

making public decisions,⁶⁸ to the members of such a public body,⁶⁹ and to the overall process of decision-making.⁷⁰ However, the lack of specific delimitation of the concept gives the impression that all actors involved in the decision-making process, the decision and the procedure need to be neutral, as if all private and personal interests could ever fully be set aside. This highly demanding requirement may not pass the test of concrete circumstances. Yet it does highlight the ideals that French administrative culture seeks to pursue.

Against this background in which symbolism is prominent, corruption and other conflicts of interest have continued to mar public life. In 2010, a new wave of problems surfaced, leading to the Sauvé Commission being set up especially to tackle conflicts of interest in public life. According the Sauvé report, the individual consciences of public actors cannot be left alone in dealing with conflicts of interest and need to be embedded in a collective culture supporting ethics in public life.⁷¹ A minimal statute needs to frame the relevant ethics. This statute would need to define the notion, reaffirm key values, specify a number of techniques and set up a special agency. The report defines a conflict of interest as interference between a public mission and a private interest and narrows its scope in specifying that the private interest needs to be of *'such a nature and intensity that it can reasonably be considered to be of such a nature that it will influence the independent, impartial and objective exercising of public functions'*.⁷² The report then emphasizes the symbolic need to proclaim in one single legal text fundamental principles of public action such as impartiality, integrity, objectivity and probity.⁷³ Impartiality is especially echoed in legal scholarship as being

d'intérêts dans la vie publique, 26 January 2011 (Sauvé report) pp 45–47 found that the principle of impartiality relates more strongly to the legality of the public decision than to the agents' behavior.

⁶⁸ B Quiriny, 'Actualité du principe général d'impartialité administrative' [2006] Rev.dr.pub. 375; E Mittard, 'L'impartialité administrative' [1999] AJDA 478.

⁶⁹ Quiriny above (n 68); Degoffe above (n 67).

⁷⁰ Mittard above (n 68).

⁷¹ Sauvé report, part III.VI and esp pp 12 and 95; JM Sauvé, 'Conflits d'intérêts et déontologie dans le secteur public' [2012] AJDA 861.

⁷² Sauvé report, p 19 and proposal nr 1, p 114 (my translation).

⁷³ Sauvé report, proposal nr 2; Sauvé above (n 71). Comp with the Nolan principles, section III.1 above.

the prominent justification for regulating conflicts of interest.⁷⁴ Techniques of ethical regulation, such as interest disclosure and whistleblowing, also need to be statutorily enshrined. Finally, the report calls for the setting-up of a single agency, stronger than the difficult-to-identify fragmented sectoral authorities.⁷⁵ The report focuses on the problems arising from article 432-12 of the Criminal code,⁷⁶ but only touches upon public contracts without highlighting possible specificities as a tool for governing.⁷⁷ It is not clear whether the Commission considers that conflicts of interest would apply equally to public contracts or whether the regime under article 432-14 of the Criminal code is deemed appropriate.

The contents and implementation of the report illustrate the structural features of French administrative culture. Regarding its contents, the report emphasizes the role of the statute in giving a strong anchor to the overall system. It looks carefully for definitions, proclaims principles such as impartiality, and favors a central agency gathering together a range of existing authorities supported by a network of experts embedded in the various public authorities subject to the new ethical framework.⁷⁸ The implementation of this report has met with resistance, though. First, the government bills did not make any progress.⁷⁹ Secondly, bills have been proposed focused on increased transparency in the interests held by officials.⁸⁰ Parliamentary discussions revealed strong doubts related to the potential benefits of transparency in improving public trust and questioned the addition of a new agency to an already complex institutional

⁷⁴ Eg: CL Vier, 'La notion de conflit d'intérêt' [2012] AJDA 869; J Moret-Bailly and D Truchet, 'Actualité et enjeux' [2012] AJDA 865; JB Auby, 'Conflits d'intérêts et droit administratif' (2010) étude 24 Dr.adm. para 34.

⁷⁵ Sauvé above (n 71).

⁷⁶ Sauvé report, pp 30–40, proposal 12, p 116.

⁷⁷ Eg: Sauvé report 17 or 22.

⁷⁸ Sauvé report, 91–92.

⁷⁹ AN, *Projet de loi relatif à la déontologie et à la prévention des conflits d'intérêts dans la vie publique* (nr 3704, 27 July 2011); Sén, *Projet de loi relatif à la déontologie et à la prévention des conflits d'intérêts dans la vie publique* (2011–2012 nr 517, 4 May 2012).

⁸⁰ AN, *Proposition de loi organique relative à la transparence de la vie publique et à la prévention des conflits d'intérêts* (nr 3838, 18 October 2011); AN, *Proposition de loi relative à la transparence de la vie publique et à la prévention des conflits d'intérêts* (nr 3866, 19 October 2011).

landscape.⁸¹ Thirdly, the issue of conflicts of interest has been tackled from the perspective of local representatives. The problem of the *cumul des mandats* has been discussed as a separate issue related to a wider reform of ethics in public life. A report to the President of the French Republic suggested reforming the system in a phased way: after a transition period in which an increased number of functions could not be joined, more extensive limitations would follow.⁸² Gradual balancing of citizens' demands and political acceptance was advised. Another report submitted to the Senate acknowledges that the *cumul des mandats* is central to French political culture.⁸³ It, however, mostly recommends an updating of the functions, which cannot be exercised cumulatively without proposing a general principle to guide conflicts of interest.

Therefore, the impact of the Sauvé report thus remains limited as of July 2012: a new commission has been set up with a wider mandate to identify principles of ethics in public life. Its report focuses again on the need to define principles preventing conflicts from arising, to identify ethical duties and practices and to set up an agency for ethics in public life.⁸⁴ The report awaits further implementation. However, small steps may point to changes. For instance, recent guidelines on public procurement encourage public authorities to issue codes of conduct.⁸⁵

French administrative culture seeks to neutralize interference between public and private interests by creating either criminal offences or administrative principles. The general interest is supposed to be the outcome of rigorously impartial authorities, officials and procedures. The means to this end are, however, difficult to achieve. Besides the fact that public authorities lack the powers to implement this ideal, this would also require not only tackling corruption and conflicts of interest in public contracts but also revisiting the overall French institutional design. By contrast, English administrative culture accepts interplay between public and private interests, although solutions need to be devised for regulating

⁸¹ AN, *Rapport sur la proposition de loi organique et la proposition de loi relatives à la transparence de la vie publique et à la prévention des conflits d'intérêts* (nr 3997 and 3998, 23 November 2011) discussion générale.

⁸² JP Giran, *Rapport au Président de la République – 42 propositions pour améliorer le fonctionnement de la démocratie locale*, 2012, proposals 21–23.

⁸³ Sén, *Rapport d'information sur le cumul des mandats* (2011–2012, nr 365, 14 February 2012) 5.

⁸⁴ Commission de rénovation et de déontologie de la vie publique, *Pour un renouveau démocratique*, 2012, partie II, chap 3.

⁸⁵ Circulaire du 14 février 2012 relative au Guide de bonnes pratiques en matière de marchés publics, conclusions point 3.

this interplay. It seems to retreat from preventive and controlling measures to give more autonomy to local councils and local councilors under the general umbrella of criminal law. Both England and France have also adapted their cultures under the pressure of external factors. Entrenched specificities highlight English and French administrative cultural differences even further when it comes to the integrity of public contracts influenced by international and European law.

IV. RESISTANCE TO EXTERNAL DRIVERS

Corruption in public contracts is embedded in local and domestic settings as well as in international relations. While in England, as in France, scandals have resulted in normative and institutional frameworks bearing the marks of their respective administrative cultures, international and European initiatives have also triggered changes. Besides the EU directives on public procurement, the OECD Anti-Bribery Convention⁸⁶ has led to changes and resistance in both England and France in ways highlighting the institutional and cultural soft spots of each country. The OECD Convention is peculiar for its monitoring mechanism, the OECD Working Group on Anti-Bribery, which reviews the implementation of the Convention in successive phases. During its assessments, the working group may take into account the domestic integration of other OECD instruments;⁸⁷ for instance, the principles of integrity in public procurement⁸⁸ or the typology it has developed regarding bribery in public procurement.⁸⁹

The current English system of fighting against corruption and its implication for public contracts needs to be explained against the backdrop of the high-profile BAE-Al Yamamah case. The key ingredients of English administrative culture can thus be highlighted: limited interest in criminal law, resistance to external pressures and institutional fragility.

In 1985, the UK government signed a major arms contract with Saudi Arabia, under which BAE was the main contractor. The Serious Fraud

⁸⁶ Convention on combating bribery of foreign public officials in international business transactions, adopted on 21 November 1997 (United Kingdom: ratification on 14 December 1998; entry into force on 15 February 1999; France: ratification on 31 July 2000; entry into force on 29 September 2000).

⁸⁷ OECD Working Group on Bribery, *Annual Report 2009*, p 11.

⁸⁸ OECD, *Principles for Integrity in Public Procurement*, 2009.

⁸⁹ OECD, *Bribery in Public Procurement – Methods, Actors and Counter-Measures*, 2007.

Office (SFO) director launched an investigation into the conclusion of these contracts in 2004. However, the SFO director decided to discontinue the investigation on the grounds of safeguarding national and international security in 2006. Two civil society groups challenged this decision. The Queen's Bench Divisional Court, the administrative division of the High Court, decided that the SFO had exercised its discretion unlawfully but the House of Lords found it was a lawful exercise of discretion.⁹⁰ This case explains the slow implementation by the UK of the OECD Anti-Bribery Convention. Attempts to reform bribery law were shelved because of the political sensitivity of the BAE case.⁹¹ Only when the case had been brought to an end did the reform of bribery become possible. The BAE case brings to light three main features of the English system: first, the framework developed by the UK *Bribery Act* 2010; secondly, its complementarity with public procurement; thirdly, the strategy followed by the SFO.

Incorporating the OECD Anti-Bribery Convention into the UK, the *Bribery Act* 2010⁹² is the first major feature of the English system. It provides for four offences: active corruption, passive corruption, corruption of a foreign official, and corruption by a corporation or another legal entity directly or indirectly due to weak anti-corruption internal procedures. Two main elements show pragmatism. First, the *Bribery Act* 2010 focuses on the concept of inducing or rewarding another to act 'improperly' or requesting or receiving an advantage from doing so.⁹³ To assess whether an act is improper, a test '*of what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned*' is applied.⁹⁴ Therefore the system hinges upon standards of behavior as applicable under a given context,

⁹⁰ *R. (on the application of Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60.

⁹¹  Law Commission, *Legislating the Criminal Code: Corruption* (Law Com no 248, Cm 2370, 1998); Law Commission, *Reforming Bribery* (Law Com no 313, 2008 HC 928); OECD, *United Kingdom: Phase 2bis: Report on the Application of the Convention on Combatting Bribery of Foreign Officials in International Business Transactions and the 1997 Recommendation on Combatting Bribery in International Business Transactions*, 2008 For a detail of the various stages, see C Nicholls and others, *Corruption and Misuse of Public Office* (2nd edn, OUP 2011) 53-67; C Rose, 'The UK Bribery Act 2010 and Accompanying Guidance: Belated Implementation of the OECD Anti-Bribery Convention' [2012] ICLQ 485.

⁹² Entry in force 1 July 2011.

⁹³ Nicholls and others above (n 91) para 1.03.

⁹⁴ Bribery Act 2010 s (5)(1).

which is far from being an objective yardstick or automatic sentence.⁹⁵ Secondly, the *Bribery Act* has a broad scope of application, as only a tenuous link with the UK is required for an individual to fall under it.⁹⁶ To mitigate this extensive jurisdiction, the *Bribery Act* provides for adequate procedures to be developed in corporate bodies so that they can bring a defence in cases of investigations for bribery. The Minister of Justice's guidance details these adequate procedures allowing a defence to be invoked. Its case studies are most relevant to public contracts with foreign countries.⁹⁷ Very much in keeping with the OECD guidance itself,⁹⁸ the guidelines emphasize the need to embed a different culture into business organizations.⁹⁹ Part of this change of culture may be demonstrated by individual organizations self-referring when they discover corruption in their businesses.¹⁰⁰ The guidelines also leave space for pragmatism: they accept that enterprises may have different resources and that no procedure could ever fully prevent corruption. They also advocate a risk-based approach, taking into account the individual circumstances of commercial organizations and leaving scope for prosecutorial discretion.¹⁰¹

The second main feature of the English system is the potential complementarity between criminal law and public procurement law. The *Public Contracts Regulations* 2006¹⁰² implementing the EU procurement directive¹⁰³ in England provides for 'debarment', a specific basis for rejecting bidders in cases where they have been convicted of corruption.

⁹⁵ Compare with the situation for French *favoritisme* and *prise illégale d'intérêt*, above, section III.2.

⁹⁶ For a comparison with the even more extensive American system: J Warin, C Falconer and M Diamant, 'The British Are Coming!: Britain Changes Its Law on Foreign Bribery and Joins the International Fight against Corruption' (2010–2011) 46 *Tex Int'l L J* 1, 15–16; B Breslin, D Ezickson and J Kocoras, 'Legislative Comment – Bribery Act 2010: Raising the Bar above the US Foreign Corrupt Practices Act' (2010) *Company Lawyer* 362.

⁹⁷ See Cecily Rose's contribution to this book.

⁹⁸ Rose above (n 91) 496–97.

⁹⁹ MoJ, *The Bribery Act 2010 – Guidance about Procedures which Relevant Commercial Organisations Can Put into Place to Prevent Persons Associated with Them from Bribing* (section 9 of the *Bribery Act* 2010), 2011, p 21.

¹⁰⁰ *Ibid* para 12.

¹⁰¹ *Ibid* para 49–51.

¹⁰² SI 2006/5, reg 23.

¹⁰³ Directive 2004/18 of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] JO L134/114, art. 45.

The exclusion is mandatory, with no discretion for any public authority involved in the award of public contracts being allowed. The philosophy behind this bears on the decision-making of corporations: the threat of being automatically excluded from the market with governments across the EU could sufficiently deter corporations from taking such a high commercial risk. Currently, the EU is looking into fine-tuning debarment and developing ‘self-cleaning’ or ‘*measures taken by the interested economic operator to remedy a negative situation affecting his/her eligibility*’.¹⁰⁴ The English government does not have a specific statutory provision to frame self-cleaning, even though this procedure gets more attention in political¹⁰⁵ and scholarly¹⁰⁶ circles. These steps, however limited they still are, may well, in conjunction with the ‘adequate procedures’ of section 7 of the *Bribery Act* 2010, lead to concrete changes in organizational cultures, both at home and abroad.¹⁰⁷

The third main feature of the English system is the role played by the SFO director, who featured prominently in the *Corner House* case discussing the BAE-Al Yamamah scandal. His office is involved in the policing and enforcement of cases related to major fraud.¹⁰⁸ The SFO is affected by the current English government’s drive to reduce agencies. However, its specificity as an agency dealing with very complex economic crimes has so far kept it outside the restructuring of the National Crime Agency. However, this context of reorganization drives the agenda of the institution: it needs to develop a strategy to justify its own existence and its budget and, if possible, it needs to secure good success stories. The SFO has thus sought to achieve convictions under the

¹⁰⁴ European Commission, *Green Paper on the Modernisation of EU Public Procurement Policy – Towards a More Efficient European Procurement Market* COM(2011) 15 final p 52.

¹⁰⁵ United Kingdom response to the European Commission Green Paper on the modernisation of EU public procurement policy (COM(2011) 15 final) p 21.

¹⁰⁶ S Arrowsmith, HJ Priess and P Friton, ‘Self-cleaning as a Defence to Exclusions for Misconduct: An Emerging Concept in EC Public Procurement Law?’ [2009] PPLR 257.

¹⁰⁷ For instance, French legal scholarship gave due attention to the *Bribery Act* 2010, considering how it might affect French multinationals (see E Daoud and A André, ‘La responsabilité pénale des entreprises transnationales françaises: fiction ou réalité juridique’ [2012] AJ Pénal 15).

¹⁰⁸ Criminal Justice Act 1987. Bribery Act 2010 s (10) (1) puts the Director of Public Prosecutions, the Director of the Serious Fraud Office and the Director of Revenue and Customs Prosecutions in charge of proceedings under the act. See Lacey, Wells and Quick, *Reconstructing Criminal Law – Texts and Materials* (CUP 2010) 463–66.

Bribery Act 2010.¹⁰⁹ Furthermore, it succeeded recently in securing sentences for corruption in international contracts.¹¹⁰

This also means that while the UK had, for a long time, been one of the least compliant state members of the OECD Anti-Bribery Convention,¹¹¹ it now appears to have developed another approach to this convention through legislation with a wide scope of application, the principles that its guidance has set for adequate procedures, and through being a country where effective implementation of the convention seems to have genuinely started. However, one year of applying the *Bribery Act* is not enough to draw any definitive conclusions and to pinpoint desirable improvements.

In contrast, France has been through a different process of change under international and European pressures. The OECD Anti-Bribery Convention has been easily accepted in principle, although some of its implications met with caution. The EU public procurement directives and their current reforms are, however, receiving entrenched opposition.

The OECD Anti-Bribery Convention was incorporated in France in 2000¹¹² and further statutory adjustments carried out in 2007.¹¹³ A chapter of the Criminal code was rewritten:¹¹⁴ for instance, the offence of corruption was broadened in terms of international bribery. Yet the OECD maintains pressure on France to adapt its corruption law. First, France's enforcement rate is minimal: only two convictions and two acquittals up to 2010,¹¹⁵ with two new sentences by 2011.¹¹⁶ Therefore, to gain positive reporting from the OECD, the French Department of Justice issued guidelines encouraging increased prosecutions in 2012.¹¹⁷

¹⁰⁹ Eg *R. v Patel (Munir Yakub)* [2012] EWCA Crim 1243.

¹¹⁰ <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/four-guilty-in-70-million-contracts-corruption-case.aspx>; <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/prison-terms-for-corruption-in-oil-and-gas-contracts-.aspx>.

¹¹¹ Rose above (n 91) 487.

¹¹² *Loi* (nr 2000-595) 30 June 2000 *modifiant le code pénal et le code de procédure pénale relative à la lutte contre la corruption*.

¹¹³ *Loi* (nr 2007-1598) 13 November 2007 *relative à la lutte contre la corruption*.

¹¹⁴ Chapter V title III book IV.

¹¹⁵ OECD Working Group on Bribery, *Annual Report 2010*, p 17.

¹¹⁶ OECD Working Group on Bribery, *Annual Report 2011*, p 14.

¹¹⁷ Circulaire du 9 février 2012 relative à l'évaluation de la France par l'OCDE en 2012, présentant de nouvelles dispositions pénales en matière de corruption internationale, et rappelant des orientations de politique pénale; S Scemla and A du Chastel, 'L'évaluation de la France par le Groupe de travail de

Secondly, technical issues have been highlighted. Only the public prosecutor may bring an action; victims are excluded from bringing civil actions in corruption cases.¹¹⁸ This position has been nuanced in the Karachi case:¹¹⁹ the families of the victims of the Karachi attacks were allowed as *parties civiles* (plaintiffs claiming damages). However, the specific nature of the case, where physical injuries were invoked and linked to corruption allegations, may not provide for a general change in the law. Thirdly, whistleblowing, which is promoted by the OECD Working Group on Bribery,¹²⁰ faces strong opposition in France as being foreign to its traditions and culture.¹²¹ The opposition to whistleblowing is anchored in the belief that such a system would lead to abuse, and therefore personal conscience should not be entrusted with enforcing standards of integrity/conduct. This point echoes a fundamental distrust of human nature bitterly learnt from World War II memories. The past seems to prevent the integration of a new element which would potentially be a constitutive part of the internalization of integrity within organizational culture.¹²²

While OECD incorporation faces only mild issues, inescapable in any incorporation of an international instrument, the French position towards EU public procurement directives also begs questions at a technical level and probably thornier ones at the level of principles. At the technical level, the European Commission suggested new mechanisms for preventing conflicts of interest and fighting corruption, excluding unsound

l'OECD risque d'entraîner un renforcement de la répression en matière de corruption' (5 July 2012) nr 27 JCP Entreprise et Affaires act 428.

¹¹⁸ C Cutajar, 'Le droit à réparation des victimes de la corruption: Plaidoyer pour la reconnaissance d'un statut des victimes de la corruption' [2008] D 1081.

¹¹⁹ Cass Crim, 4 April 2012, nr 11-81.124, note H Matsopoulou, 'Affaire Karachi: Recevabilité des constitutions de partie civile pour corruption et abus de biens sociaux' [2012] Rev soc 445.

¹²⁰ OECD Working Group on Bribery, *Annual Report 2011*, p 32.

¹²¹ J-P Bueb and A Maillé, 'Le Service central de prévention de la corruption' (2006) 57 Contrats Publics 53; O Tomescu-Hatto and others 'Les réactions sociales à la corruption: Divulgarion et système répressif' in P Lascoumes (ed), *Favoritisme et corruption à la française – Petits arrangements avec la probité* (SciencesPo Les Presses 2010) 219, 240.

¹²² Contra, a dissident perspective: V Rebeyrol, 'La réception du "whistle-blowing" par le droit français' (14 June 2012) nr 24 JCP Entreprise et Affaires 1386.

bidders and avoiding unfair advantages.¹²³ The French Senate stressed that the French legal framework was already highly comprehensive.¹²⁴ It implied that no revision should be carried out in France, despite the Sauvé recommendations issued only a few months earlier suggesting that the French framework needed development. At the level of principles, the Europe Union would like to submit service concessions to more stringent award procedures more akin to the ones applicable to work concessions, which are a lighter version of those with which public procurement has to comply. France opposes this reform. Three items illustrate its categorical approach to the European proposals. Firstly, the Senate attempts to limit the notion of conflicts of interest as much as possible.¹²⁵ Secondly, the Senate rejects the European proposal to create domestic monitoring bodies in charge of recording corruption and conflicts of interest and investigating related claims from individuals and firms. These bodies were dismissed, most notably as not fitting within the French administrative landscape because of their hybrid administrative-judicial natures.¹²⁶ Yet they could have become strong enforcers of any regulation of conflicts of interest. The *MIEM* story highlights the destiny of such bodies in France.¹²⁷ Thirdly, the Senate took a defensive and categorical stance on the classification of public contracts under public procurement or delegation/concession, a most revealing aspect of French administrative culture. As section III.2 mentioned, this distinction is part of the French approach to corruption in public contracts and aims to promote transparency in the award of public contracts. However, the EU has been trying to make the system more uniform so as to avoid loopholes.¹²⁸

¹²³ European Commission, *Green Paper on the Modernisation of EU Public Procurement Policy – Towards a More Efficient European Procurement Market* COM(2011) 15 final pp 48–53.

¹²⁴ Sén, *Résolution européenne relative au Livre vert sur les marchés publics* (2010–2011 nr 128, 2 June 2011).

¹²⁵ Sén, *Résolution européenne sur les propositions de directive ‘marchés publics’ et ‘concessions de services’* (2011–2012 nr 112, 13 March 2012).

¹²⁶ Sén, *Proposition de résolution européenne sur les propositions de directive ‘marchés publics’ et ‘concessions de services’* (2011–2012 nr 381, 16 February 2012).

¹²⁷ See above section III.2.

¹²⁸ Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, *Fighting Corruption in Europe*, COM(2011) 308 final 6 June 2011, para 4.2; and a triple proposal: Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts 20 December 2011 COM(2011) 897 final art.21; Proposal for a Directive of the European Parliament and of the Council on public

France has expressed strong defiance in the face of threatening changes, warning against disturbing the balance reached by the *Loi Sapin*.¹²⁹ Furthermore, the application of public procurement regulations to concessions would rigidify the system, leading to increased costs for public authorities.¹³⁰ This seems to be pure speculation as no impact assessment is invoked. Finally, the Senate also strongly regrets the choices the European Commission has made regarding concessions, especially despite French 'strong reservations'.¹³¹

Therefore the French position regarding the EU proposals needs to be watched carefully once the European proposals become definitive. Resistance to changes or symbolic adaptation are likely before more fundamental changes to French administrative culture occur. As for English administrative culture, changes in French administrative culture are driven by external factors but are only gradually woven into administrative practice. Various layers of resistance, including categorical rejection, political hindrance, institutional fragility, patchy implementation and low enforcement, make the realization of EU and OECD standards slow and laborious. The law is only one of the ingredients in the effective institutionalization of an administrative culture of integrity.

V. LAW: FACILITATING INTEGRITY IN ADMINISTRATIVE CULTURES?

Law and administration interplay in facilitating as well as in regulating corruption. Administrative culture may be used to explore transformations in webs and logics across techniques, institutions and processes, linking legal norms and standards to their implementation. Administrative culture slowly changes as the legal framework and the techniques, institutions and processes in administration are adapted. Central to the moving of administrative culture towards integrity is the process of converting standards into concrete decisions and the need for public

procurement 20 December 2011 COM(2011) 896 final art.36; Proposal for a Directive of the European Parliament and of the Council on public procurement on procurement by entities operating in the water, energy, transport and postal services sectors 20 December 2011 COM(2011) 895 final).

¹²⁹ Sén, *Résolution européenne sur les concessions de service public* (2010–2011 nr 96, 14 April 2011) last sentence.

¹³⁰ Sén, *Rapport sur les propositions de directives marchés publics et concessions de services* (2011–2012 nr 465, 6 March 2012) 21–22.

¹³¹ Ibid p 3.

actors to internalize integrity in their decision-making. The law could be facilitative of these transformations. Relying on the law in this way requires three steps: first, understanding the role of the law within administrative culture; secondly, understanding how the law shapes the relationships within which administrative cultures develop; thirdly, using the law over time, as facilitating processes for change towards integrity, taking into account lessons from the past or abroad.

First, law needs to be integrated in administrative culture in a way suitable for the relevant administration if the law is to be used for embedding integrity within that administration. The traditional roles of the law in relation to administrative culture differ from one legal system to another and need to be taken into account before the law is relied on for implementing changes. England uses the law instrumentally, as a deterrence technique or to nudge actors towards changes. Institutions such as the SFO tend to enforce criminal norms in England, although more systematic research on this enforcement, its consistency and the effectiveness of criminal law is required. Relating to the nudging use of the law, official statements connect either criminal law or procurement law to cultural changes in organizations, but a more detailed articulation of adequate procedures and self-cleaning still needs to be worked out. France, in contrast, seems to have developed a legal culture which is highly detached from the administration that the law is supposed to regulate. Symbolism is prominent in how the law is interpreted and implemented, with administrative bodies enjoying limited powers. Therefore, comparative research invites us to look for techniques and processes that allow the law to adjust to administrative reality and the administration to follow legal developments. Comparative research helps us to suggest that more informal tools would be in line with English administrative culture and more formal tools with French administrative culture. Yet the consequences of a gradual embedding of the law within administrative reality may entail very different consequences for the fostering of a culture of integrity, depending on the law's effectiveness in responding to public officials' needs and the common good.

Secondly, law is part of the institutional design within which administrative cultures develop: indeed it delineates the interplays between public and private spheres. Legal changes may be needed to adapt this delineation to the needs of a modern administration relying heavily on private actors to carry out public missions for the common good. In France, all attention is devoted to isolating the general interest from any influence from private interests, as widely understood. This separation is epitomized by criminal offences that the *Cour de Cassation* has interpreted extensively but mostly symbolically. The adverse consequences of

this approach are noticeable when local councils reject bidders too hastily because they fear conflicts of interest, or when the institutional design leads to functional conflicts of interest without providing mitigating measures, as section III.2 showed. In England, the distinction between public and private interests is not so rigorous. Yet some situations need to be regulated for the specific risks they cause to arise, and need to conform to ethical frameworks following the Nolan principles. Currently, more scope is given to local practice and individual officials to decide what they deem to be the proper conduct of their office, with remote reliance on criminal law in extreme cases. Therefore, the distinction between public and private spheres needs to take into account how the law frames the interfaces between central and local government. Relying on this provisional conclusion, further research could firstly investigate if and how France deals with a potential fragmentation of the public interest when it seeks to exclude all situations of apparent conflicts from its institutional design. Secondly, it could consider if and how England develops techniques to ensure a minimum level of uniformity across local government through means other than the law (eg through professional standards and requirements applicable to specific office holders or national training programs). This would help to clarify risks, develop strategies and understand what legal changes may be required so that the institutional design ensures a distinction between the public and private spheres that best fits an administrative culture of integrity as understood in either country.

Finally, the comparison between English and French administrative cultures highlights the potential contribution of the law in establishing processes of changes in administrative cultures. Many factors come together to bear on changes in administrative cultures. Changes, such as the role of lawyers in the administration, techniques of administrative or financial control over public authorities and their spending, and processes of accountability, to name a few, all impact on embedding a culture of integrity in administration. They possibly have a conflicting influence and blur the overall understanding of how an administrative culture may be transformed into a culture of integrity. Such transformation is not a linear development. Changes also come across hesitations and resistance. If both England and France seem to react to scandals as they arise, no trace could be found of lessons learnt from past investigations. Although corruption and conflicts of interest have been recurring in their modern forms for two centuries, few official efforts seemed to have been made to analyze patterns of interactions between legal, ethical and social norms, institutions, administrative requirements and contextual incentives over this period. Yet reflecting on these interplays may help to formulate key

principles related to institutional design more clearly and to embed ethics through legal norms. In this respect, the law may set a framework in which reflective practice and systemic assessment of recurring weaknesses are integrated in the institutional design, connecting an awareness of the values of integrity to their concrete implementation in the minds of individual actors. If individual commitments to integrity and factual implementation are indeed outside the law's reach, the law may facilitate these transformations. To do so, it would need to remain in line with administrative cultures while moving them forward, to address both public/private and local/central institutional design and learn lessons from the past and abroad. The best mix is yet to be found!