A PANOPTIC STUDY OF CORRUPTION

By Abdul Gofur

The English criminal law of 'corruption'[1] is a partnership of common law and statutory offences. They are united insofar as they both view corruption as a violation of the duty of loyalty which exists between an 'agent' and her 'principal'. This model, more commonly known as 'the duty model', underpins the English criminal law of corruption. It rests on the belief that corruption (in its many guises) is objectionable because it causes an agent to act contrary to the interests of her principal. This is the fundamental harm in corruption according to the duty model.

Detractors of the duty model have advanced a number of alternatives. The first, which we can label 'the market model', argues that corruption is objectionable because it undermines the proper operation of governments and regulated markets. The second suggests that the essence of corruption is influencing a person to exercise a function improperly in return for an advantage (the influence model).

The need for a coherent model of corruption can be supported by reference to the number of different definitions of corruption which are in circulation. Although policymakers worldwide agree that the causes and effects of corruption need to be addressed, they are unable to agree on a definition of the problem. A coherent model (or models) of corruption would pave the way for a uniform definition of corruption.

This article argues that the duty model is defective and is therefore unable to furnish a satisfactory account of corruption. The article also examines the merits of the market model and the influence model and considers whether they are viable alternatives.

THE ENGLISH LAW OF CORRUPTION

The law consists of the common law and at least 18 different statutory provisions.[2] Many of the statutory

provisions were hasty responses to contemporary scandals. For example, the Prevention of Corruption Act 1916 was passed in the wake of scandals regarding the clothing department of the War Office which involved the taking of bribes by viewers and inspectors of merchandise.[3]

It is beyond the scope of this article to present an in-depth analysis of the common law or a clause-by-clause examination of the statutory provisions. For our purposes, it is sufficient to present a sketch of the common law and the main criminal statutes before moving on to consider the different models of corruption.

(1) The Common Law

The common law criminalises corruption under the guise of bribery. Opinions differ as to whether bribery at common law is a general offence or whether the common law is comprised of a number of distinct offences of bribery. For example, bribery of a privy councillor,[4] bribery of a coroner,[5] bribery of jurors (embracery),[6] and bribery of a police constable.[7] To add to the confusion, there are also a number of overlapping common law offences such as misconduct in a public office. However, notwithstanding this uncertainty, a good starting point is *Russell on Crime:*[8]

> *'Bribery is the receiving or offering* [of] *any undue reward by or to any person whatsoever, in a public office, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity.'*

It will be apparent from this definition that the common law is only concerned with those who exercise public rather than private functions. It therefore excludes corruption in the private sector.

(2) The Statutory Provisions

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[1] The word 'corruption' is an umbrella term which encapsulates a wide array of conduct such as bribery, nepotism, cronyism, patronage, and match-fixing.

[2] (1) Sale of Offices Act 1551; (2) Simony Act 1588 ss 1, 4, 5, 7, 9; (3) Sale of Offices Act 1809; (4) Harbours, Docks, and Piers Clauses Act 1847 s 55; (5) Public Bodies Corrupt Practices Act 1889; (6) Prevention of Corruption Act 1906; (7) Prevention of Corruption Act 1916; (8) Honours

(Prevention of Abuses) Act 1925; (9) Licensing Act 1964 s 178; (10) Local Government Act 1972 s 117(2); (11) Rehabilitation of Offenders Act 1974 s 9(4); (12) Customs and Excise Management Act 1979 s 15; (13) Representation of the People Act 1983 ss 107, 109, 111-115; (14) Insolvency Act 1986 s 164; (15) Coroners Act 1988 s 3(5); (16) Anti-terrorism, Crime and Security Act 2001; (17) International Criminal Court Act 2001 sch 9 art 70(1)(f); (18) European Parliamentary Elections Regulations 2004.

[3] Phil Fennell and Philip A Thomas, 'Corruption in England and Wales: An Historical Analysis' (1983) 11 International Journal of the Sociology of Law 167, 174.

[4] *R v Vaughan* (1796) 4 Burr 2494.

[5] *R v Harrison* (1800) 1 East PC 382.

[6] *Pomfriet v Brownsal* (1600) Cro Eliz 736.

[7] *R v Richardson* 111 Cent Crim Ct Sess Pap 612.

[8] JW Cecil Turner (ed), *Russell on Crime* (12th edn Stevens & Sons, London 1964) 381.

The substantive statutory offences are contained in four statutes: (1) the Public Bodies Corrupt Practices Act 1889 (the 1889 Act); (2) the Prevention of Corruption Act 1906 (the 1906 Act); (3) the Prevention of Corruption Act 1916 (the 1916 Act), and; (4) the Anti-terrorism, Crime and Security Act 2001 (the 2001 Act).

The 1889 Act deals with corruption in local government and other public bodies (but not in government departments or the Crown).[9] Like the common law, it does not account for corruption in the private sector. Section 1(1) covers the beneficiary of a bribe, whilst s 1(2), which is in almost identical terms, covers the converse case of the giver or offeror of a corrupt transaction.

The gap in the 1889 Act is plugged by the 1906 Act which applies to all agents whether in the private sector or the public sector. There is an overlap with the 1889 Act in that the 1906 Act covers agents employed by public authorities. However, it goes further than the 1889 Act in that it also covers agents serving under the Crown.

The 1916 Act creates no new offences. It increases the maximum sentence for bribery to seven years,[10] broadens the definition of 'public body', and introduces the presumption of corruption in certain cases.[11]

The 2001 Act contains a motley collection of provisions only some of which relate to corruption. These were designed to honour the UK's obligations under the OECD Convention.[12] It gives the English courts extra-territorial jurisdiction for acts of corruption committed abroad by UK nationals and companies. The 2001 Act extends beyond the remit of the OECD Convention by prohibiting the corruption of both foreign public officials and those in the foreign private sector.

The statutory offences focus on those who act 'corruptly'. The meaning of this word has perplexed our judges over the years. This is evident from the conflicting case law in the area. The leading case on the matter does little to dispel the confusion. In *Cooper v Slade*,[13] the House of Lords held that 'corruption' does not mean dishonesty but *'purposely doing an act which the law forbids as intending to corrupt'*. This somewhat circuitous construction arguably renders the term redundant.[14]

THREE MODELS OF CORRUPTION

(1) The Duty Model

We have already mentioned that the common law and statutory provisions are underpinned by the duty model. The Law Commission articulated the duty model in its Paper and we can borrow from its analysis here.[15]

Taking bribery as the paradigm form of corruption, the duty model in its simplest form requires three parties:

(a) The donor of a bribe (the briber).

(b) The agent of the principal and recipient of the bribe (the agent).

(c) The principal of the agent (the principal).

Their relationship with one another can be described by the interplay between their respective interests:

(a) The briber and principal both act in self-interest, and their interests potentially conflict with each other.

(b) The agent is not entitled to act in self-interest but is under a duty to act in the interests of her principal.

(c) By bribing the agent, the briber (acting in self-interest) induces the agent to breach the duty owed by her to her principal, by appealing to her self-interest.

In essence, the purpose of a bribe by the briber is to cause the agent to act contrary to the interests of her principal and in the interests of the briber. The paradigm set out above casts the briber as the wrongdoer: but for the briber, the agent would have discharged her duty on behalf of her principal. A variant of this transaction sees the agent as the initiator: the agent offers to breach the duty to her principal, to the advantage of the briber, in exchange for a bribe

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[9] *R v Natji* [2002] EWCA Crim 271.

[10] The maximum penalty was previously two years' hard labour under both the 1889 Act and the 1906 Act. The 1916 Act increased the sentence under the 1906 Act to seven years but left the 1889 Act unchanged. This disparity in sentencing was removed by the Criminal Justice Act 1988 s 47.

[11] Section 2 of the 1916 Act states that any inducement paid to or received by an employee of the Crown or a public body from a person or agent holding or seeking to obtain a contract from the Crown or public body is deemed to be corrupt unless the contrary is proved.

[12] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (adopted 21 December 1997, entered into force 15 February 1999, Cm 3994).

[13] (1857) 6 HL Cas 746.

[14] Home Office, 'Bribery: Reform of the Prevention of Corruption Acts and SFO Powers in Cases of Bribery of Foreign Officials: A Consultation Paper' (2005) 25.

[15] Law Commission, 'Legislating the Criminal Code: Corruption' (Law Com Paper No 145, 1997) [1.12]-[1.15].

from the briber. Given the consensual nature of bribery, the moral reprehensibility of the briber and the agent in both the paradigm and the variant circumstance is fairly evenly balanced. The two situations are distinguished only by which of the parties has instigated the corrupt transaction.

According to the duty model then, corruption is objectionable because it induces an agent to breach the duty of loyalty that she owes to her principal. In this scenario, the 'victim' of the offence is the principal. This rather superficial explanation fails to account for the massive international concern with corruption. As Professor Peter Alldridge argues, the international interest with corruption is not based on the breach of a simple duty of trust. Rather, it is based on the deleterious effects of corruption on the proper functioning of governments and economies. [16] By delineating the harm in this way, the duty model encounters a number of problems.

First, in the absence of a predefined relationship, there is nothing on which it can bite. This is not just an idle academic observation, it poses a serious problem. For example, the duty model fails to criminalise principal-to-principal bribery (e.g. where the head or board of a private company bribes the head or board of another private company not to tender for a particular contract). The Home Office has denied that there are activities which fall outside of the agent-principal relationship and which are morally reprehensible enough to be criminalised but which do not fall within the ambit of other statutes. In respect of principal-to-principal bribery, the Home Office argued that such conduct constituted an offence of bid-rigging under the Enterprise Act 2002 s 188(2)(f). [17] Accordingly, there was no need to extend the criminal law of corruption.

But the fact that principal-to-principal bribery is not captured by the duty model does not imply the absence of corruption. It simply suggests that the duty model is not equipped to deal with the many different types of corruption. A closer inspection of the mechanics of principal-to-principal bribery supports this idea. The duty model cannot account for principal-to-principal bribery because in this transaction, the principal 'forgives' herself in her capacity as principal for corrupt acts committed in her capacity as agent. In this transaction, she is both the 'victim' and the offender. The concept of 'forgiveness', though circuitous, is preferable to 'consent' because an individual cannot 'consent' to her own actions as her actions are usually willed (even though the results may not be). This arguably holds true even in cases of

coercion e.g. a person forced to act at gunpoint completes the required act even though she is forced to do so. So her actions are willed but the results are not. Perhaps the only exception would be automatism. For sake of clarity, we must point out that this loophole is only applicable to the private sector as those in the public sector are answerable to the public.

Second, if the principal is the 'victim' in a corrupt transaction, it follows (and the Home Office agree) that where an agent acts with the consent of her principal (whether an individual or a board) there is no offence.[18] After all, consent of the victim is usually, subject to some exceptions such as death and grievous bodily harm, a complete defence to any harm caused by an offender. But although consent excuses the agent from punishment, it does not negative the existence of corruption. As with principal-to-principal bribery, consent is only applicable in the private sector. Those in the public sector act on behalf of the public and are therefore unable to obtain consent for their corrupt actions.

The ability of the principal to 'consent' to corruption creates a huge lacuna which has the potential to undermine the criminal law. Essentially, any private sector company can authorise its agents to engage in corrupt conduct (in the private sector only) to further its interests. Such conduct may be executed both domestically and internationally. In this scenario, the English criminal law of corruption becomes a paper tiger. It also presents us with some unfortunate consequences. It means that criminal prosecutions can only be brought where the conduct also contravenes some other statute; which defeats the purpose of having a criminal law against corruption. It also means that UK is in breach of its obligations under art 21 of UN Convention Against Corruption[19] as it has failed to properly legislate against corruption in the private sector.

Given the huge influence which private companies wield, it would be folly to underestimate the scope for exploitation. On the home front, private companies are essentially at liberty to engage in corrupt conduct to further their interests. In the international arena, some private companies may even factor in the cost of being fined in a foreign jurisdiction against the anticipated benefits of engaging in corruption in that jurisdiction.

[16] Joint Committee on the Draft Corruption Bill, 'Draft Corruption Bill: Report and Evidence' (HL (2002-03) Paper 157, HC (2002-03) 705) 81-82.

[17] Home Office, 'Draft Corruption Bill: the Government Reply to the Report from the Joint Committee on the Draft Corruption Bill' (Cm 6086, 2003) 6.

[18] Home Office (n 14) 6.

[19] United Nations Convention Against Corruption (adopted 31 October 2003, entered into force 14 December 2005, Cm 6854)
<http://www.official-documents.co.uk/document/cm68/6854/6854.pdf> accessed 9 October 2006.

(2) The Market Model

Professor Alldridge has suggested an interesting alternative to the duty model.[20] His proposal, the market model, is based on the proper operation of governments and regulated markets. On this account, bribery is not the corruption of a relationship but of a market.

The market model's beauty lies in its simplicity. It states that corruption is any conduct which undermines the proper functioning of a market. The word 'market' is used in two distinct but overlapping senses. In the first instance, it describes attempts to operate a market where it is not an appropriate allocative mechanism. For example, attempts to buy or sell the proper functioning of government (e.g. as in the recent 'cash-for-honours' scandal). Second, it refers to a legitimate market which has rules governing allocation (competition). In this case, corruption is said to distort the proper functioning of that market, with the result that the benefits of competition are denied to both the end-user and competitors.

The question of whether a given activity harms the proper operation of a market is determined by reference to the rules of that market. These rules or 'minimum standards' are to be found in a variety of sources such as European law, statutes, statutory instruments, prerogative powers, and self-regulatory initiatives. So for example, principal-to-principal bribery is corrupt because it impedes fair competition (harm to the proper functioning of a market) and constitutes bid-rigging under the Enterprise Act 2002 s 188(2)(f) (breach of a minimum standard).

The market model has a number of advantages over the duty model. We can summarise these briefly. First, it does not depend on the existence of a predefined relationship. This means that it is applicable to all individuals (except the Sovereign) regardless of their office or sector (i.e. private or public sector). Second, the 'victim' is now society at large. The upshot of this is that it is no longer possible for a principal to 'forgive' or 'consent' to acts of corruption.

Although the market resolves the problems encountered by the duty model, it creates some new ones. It will be apparent from our exposition that it is a hostage to pre-existing minimum standards. This parasitic trait causes a number of difficulties.

First, the market model's ability to counter corruption is only as effective as the clearest minimum standard. In cases where a statute is unclear, it may not be possible to bring proceedings for corruption. Moreover, where there are no minimum standards, no prosecution can be brought. Given the great variety of corrupt conduct, there are likely to be cases where conduct which ought to be proscribed, cannot be prosecuted due to a lack of minimum standards.

Second, the market model gives the force of law to self-regulatory initiatives. This is highly undesirable because it elevates undemocratic initiatives and places them on a level footing with legitimate minimum standards such as statutes. So for example, the Wolfsberg Standards,[21] which were created by a number of leading banks to counter such issues as money laundering, would be treated as minimum standards. In fact, it is arguable that internal codes of conduct would also fall to be regarded as minimum standards. For example, HSBC[22] places great value on its reputation. Its internal policy documents state that its employees are not to engage in any form of bribery whatsoever. Nor are they to accept any gifts except those of trivial value. Under the market model, if an HSBC employee were to accept a bribe, she would be regarded as having engaged in conduct which has the effect of undermining a legitimate market, but on the basis that she has breached the minimum standards set by HSBC (and not statutes). This also paves the way for inconsistency. An employee at a different organisation may not be prosecuted for the same conduct if the activity in question is not prohibited by that organisation's internal policy.

Third, the fixation with minimum standards leads to a curious situation where there is no substantive law of corruption. Instead, any type of conduct, including conduct which is not commonly regarded as being corrupt, would amount to corruption. So for instance, money laundering, insider dealing, and even theft, would fall within the ambit of the market model as being acts of corruption.

The market model suffers from these unfortunate problems because it misidentifies the fundamental harm in corruption. It assumes that every act of corruption will result in harm to governments and economies. Whilst there is no denying that widespread corruption is likely to be harmful to both, the link between a single act of corruption and harm to governments and economies is tenuous. A one-off act of corruption is unlikely to have anything more than a negligible impact, if any, on the proper operation of governments and economies.

(3) The Influence Model

Transparency International UK (TI) recently drafted a corruption Bill[23] (the TI Bill). This was introduced in

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[20] Joint Committee on the Draft Corruption Bill (n 16) 80-84.

[21] The Wolfsberg Group is an association of twelve global banks which aims to develop financial services industry standards for Know-Your-Customer, Anti-Money Laundering and Counter Terrorist Financing policies. <http://www.wolfsberg-principles.com/standards.html> accessed 19 September 2006.

[22] Hong Kong and Shanghai Banking Corporation.

[23] Corruption Bill (2005-6 HC-185)

the House of Commons on 23 May 2006 by Mr Hugh Bailey MP under the Ten Minute Rule. Mr Bailey explained that the TI Bill defined corruption *'in the way that most people think of corruption and bribery'*.[24]

According to the influence model, corruption occurs when a corrupt actor influences a person to exercise a function improperly in return for an advantage. This approach focuses on influencing the performance of duties rather than causing duties to be breached.[25] At its heart, the influence model views the fundamental harm in corruption as the improper conduct which results from influencing a person to engage in corruption.

The TI Bill approaches the criminalisation of corruption in a novel way. It superimposes a requirement of influencing an actor to act improperly over a number of different offences including an offence directed specifically at agents and principals.

This approach has the advantage of resolving some of the concerns of the duty model. It effectively counters active bribery i.e. where either a principal or an agent with the consent of her principal offers a bribe or an advantage. Such bargains are clearly attempts to influence an actor to act improperly. Over the market model, the influence model does not rely upon the existence of minimum standards and is therefore free of the problems which attach to that model.

However, despite its initial simplicity, the influence model does not provide a complete solution. As utilised in the TI Bill, it does not *fully* account for passive bribery. For example, an agent who accepts a bribe with the consent of his principal cannot be said to have acted *improperly*. In this view, the principal also escapes liability as 'improper' conduct is determined by reference to the vague notion of duty. It is difficult to see what duty the principal has breached especially if her consent has resulted in a profit for her company. The only party who would be caught in this scenario would be the briber. But given the equal moral reprehensibility of the parties, it seems illogical that one should escape punishment where the other is held liable.

Second, the reference to 'improper' conduct creates further difficulties similar to the rocks encountered by the market model. That is, knowing whether a duty has been breached in any given situation. The TI Bill explains that 'improperly' means *'... breach of any duty, whether express or implied, and whether of a public or private nature, including any duty to act in good faith or impartially.'* But it is evident from this description

that establishing the existence of a duty is not an easy task.

Third, by focusing on the influencing of conduct, the influence model captures conduct which is generally regarded as innocent e.g. corporate hospitality. The purpose of such activities are obviously to influence conduct but this is generally regarded as an acceptable business practice. Of course, there may be instances when bribery is dressed up as corporate hospitality but this is the exception rather than the general rule. So for example, barristers' chambers routinely entertain solicitors' firms, often at considerable cost, so as to foster relations and thereby ensure future instructions. According to the influence model, this would constitute an intention to *influence* and would therefore amount to corruption.

Lastly, the influence model's reference to the transfer of an advantage means that it is unable to account for (some) acts of nepotism. For example, a university admissions officer who offers a place to an unwitting relative commits no offence as no advantage has been solicited or received by her. For the same reason, the influence model is unable to account for 'noble cause' corruption. That is, where a police constable exceeds her authority and powers to achieve legitimate aims e.g. fabricating evidence to help convict a suspect she believes to be guilty.[26]

CONCLUSION

Policymakers at both national and international level are becoming increasingly concerned with the causes and effects of corruption, and how to combat the phenomenon.[27] But as we have seen, although corruption is universally condemned, there is no consensus on a theory of the phenomenon. Our three models each suffer from various defects. It is suggested that this is because they make incoherent attempts to explain different types of conduct, which fall under the umbrella of corruption, without fully understanding what is objectionable about each activity. Each model can be better understood if a distinction is made between the harm that they seek to prevent.

Let us make a distinction between 'primary harm' and 'derivative harm'.[28] The term 'primary harm'

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will be used to loosely describe the direct result of a wrongful act or omission. So for example, in the case of criminal damage, the 'primary harm' would be damage or destruction of property. Clearly this is not the not the only consequence of such conduct. We have excluded the indirect consequences of damage or destruction e.g. depreciation to the value of the property, financial hardship in repairing or replacing the property, inability to use the property, etc. By 'secondary harm', we will refer loosely to the indirect result of a wrongful act or omission. So staying with our example of criminal damage, the 'secondary harm' would be the indirect consequences already mentioned e.g. depreciation to the value of property, etc.

Applying this distinction to our three models, we can see that the duty model focuses exclusively on a type of primary harm: breach of duty. But as we have shown, breach of duty cannot be the essence of corruption because it clearly fails to account for the situation where a principal 'forgives' or 'consents' to acts of corruption. Moving on to the market model, we can see that its focus lies at the opposite end of the spectrum. It is concerned only with the derivative harm which flows from corruption. That is, the long-term damage to the governments and economies. But in doing so, it fails to acknowledge that every instance of corruption also gives rise to primary harm. Lastly, the influence model also focuses on a type of primary harm: influencing conduct. Whilst this is an attractive idea, it clearly casts its net too wide by capturing ordinary business practices.

The interconnectedness between primary and derivative harm suggests that if the latter is to be effectively combated, attempts need to be made to address the former. Further research into this area is clearly needed but it may be that the fundamental harm in corruption cannot be explained by a single model. But is it necessary to articulate the fundamental harm before defining 'corruption' in anti-corruption instruments?

The Home Office would answer no.[29] But as Professor Andrew Ashworth argues, to criminalise a given type of conduct is to declare that it should not be done. Such a course of action requires clear justification by reference to concepts such as wrongdoing, harm, and culpability.[30] Once this is done, consideration be given as to how the elements of an

offence might be structured so as to effectively capture the harm caused by that conduct.[31]

Another concern, as Professor William Twining points out, is that there are notorious puzzles about the concepts and vocabularies involved in discourse relating to corruption; both in regard to analysis of the problem and in framing suitable anti-corruption measures. Although there seems to be near-universal condemnation of certain kinds of behaviour, what is considered corrupt varies according to economic, political and cultural conditions and tradition.[32] It is suggested that these variations or disagreements can, to a large extent, be overcome by exploring and articulating the fundamental harm in corruption. In sum, articulation of the fundamental harm will:

(a) Allow for a better understanding of the common characteristics which permeate the array of conduct which typically falls under the umbrella of corruption. Consideration can then be given to whether these different types of conduct should even be classified together and whether a given type of conduct ought to attract a different penalty (whether civil or criminal).

(b) Facilitate the formulation of a model (or models) of corruption which is elastic enough to cover these different types of conduct.

(c) Ensure that both national and multilateral efforts to counter corruption are not undermined by uncertainty over how to formulate anti-corruption offences.

(d) Drive the analysis for proportionality in sentencing different types of corrupt conduct.

(e) Provide for the development of appropriate rules of evidence and procedure to assist in the prosecution of corruption.

'derivative crimes' (e.g. non-compliance with court orders); Joel Feinberg, *Harm to Others* (The Moral Limits of the Criminal Law, Oxford University Press, New York 1984) 19-21.
[29] In reply to my comments on a Consultation Paper (n 14), the Home Office replied that it is not *'necessarily helpful in formulating offences to focus on the nature of the harm that you seek to prevent'*; Statement by Paul Stephenson, Home Office (Personal correspondence 2 February 2006).
[30] Andrew Ashworth, *Principles of Criminal Law* (5th edn Oxford University Press, Oxford 2006) 22.

[31] Peter Alldridge, 'Reforming the Criminal Law of Corruption' (2001) 11 Criminal Law Forum 287, 289.
[32] William Twining, 'Have Concepts, Will Travel: Analytical Jurisprudence in a Global Context' (2005) 1 (1) International Journal of Law in Context 5, 9.

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