Introduction

This collection of essays from scholars around the world seeks to set the law of bribery in its proper contexts, an especially important task following the enactment of the UK's Bribery Act 2010 ('the 2010 Act'). In their separate ways, most of the contributors seek to shift the primary focus away from what has hitherto been a perfectly understandable preoccupation with the implications of the coming into force of the 2010 Act for UK businesses. The preoccupation has been with questions such as: will it still be acceptable to take an important client to see a sports game?; is it lawful to give a present to spouses or partners at corporate functions (or to invite them to such functions at all[1])?; what can a multinational firm do to ensure that it has adequate systems in place to prevent bribery when the way it does business varies so greatly across the globe?; what should a firm do when asked for an 'administration fee' by a hospital overseas in order to ensure that its employees receive treatment if they fall sick? These are all questions of great importance in practice, although they are not new. They have always been difficult questions to answer – sometimes legally, sometimes morally, and sometimes both. The 2010 Act has widely been understood to invite reconsideration of a long-standing willingness on the part of investigators and prosecutors to treat such situations as inappropriate for investigation, or even for guidance on prosecutions.[2] In that respect, though, little is likely to change, even though it is widely accepted that, for example, the impact of sustaining a culture of 'small' bribes on the ethics and politics of vulnerable states is ultimately a

[1] As far as inviting foreign public officials to such events is concerned, the OECD has expressed the view that such behaviour is 'high risk', namely, likely to be corrupting: see OECD, *United Kingdom: Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United Kingdom* (Paris: OECD, March 2012).

[2] The OECD clearly still detects a residual unwillingness in UK public authorities to subject such matters to serious scrutiny: see OECD, *Phase 3 Report*.

damaging one.[3] In 2010, the pervasive requirement for such bribes to be paid in Afghanistan for any kind of public service meant that Afghans – many of whom already live far from comfortable lives – were said to be paying US$2.5 billion (a quarter of the country's GDP) in bribes.[4] The changing role of the prosecutor in bribery cases is a subject central to the final section of these essays.

What, then, do these essays more broadly bring into focus? To answer this question, we must consider what makes bribery an unusual or even unique crime.

In important respects, a critical analysis of bribery will share many of the important concerns that preoccupy scholars and practitioners who think and write about crimes more commonly featured on the criminal lawyer's menu. As in the case of fraud, for example, there is a proper focus on one or more of the concepts employed to define the offence ('breach of an expectation', say, in the case of bribery; 'dishonesty', perhaps, in the case of fraud), and on the overlap between the offence in question and other offences in English law (such as misconduct in a public office, an offence now on the Law Commission's reform agenda). There is also interest in the policy underlying the way in which statutory provisions have been fashioned to take the place of older legislation or the common law, in the defences available (if any), and in the territorial scope of the new policy and law. Even on this familiar territory, though, key issues must be addressed that are far from those commonly encountered in an analysis of serious criminal offences. A disputed theme running through the chapters in Part I, for example, is the issue of whether, and to what extent, bribery law should have an application beyond that of attempts to corrupt 'public officials'. Many jurisdictions focus mainly – and some solely – on the public sector, however defined, and public sector bribery is usually understood to be both different and in some sense more serious than bribery in the private sector. By contrast, the 2010 Act draws no distinction between private and public sectors. It concentrates instead on the nature of the function someone was performing when offered, when accepting, or when asking

[3] TRACE International, *The High Cost of Small Bribes* (London: TRACE, 2003). The policy of the Serious Fraud Office is not to prosecute for small bribes (such as 'facilitation payments'), if a company has a commitment to eliminate such payments over time. The OECD has questioned the efficacy of such policy, in the absence of guidance on what it means, in concrete terms, for a company to be seen to deliver on its commitment: see OECD, *Phase 3 Report*.

[4] www.spiegel.de/international/world/0,1518,672828,00.html.

for an advantage of some kind. Loosely speaking, the issue is, did that function – whether arising in the public or the private sector – involve some commitment to impartiality, to a relationship of trust, or to acting in good faith, such that it would be improper to accept or ask for the advantage given that the person in question was performing such a function? In a way, this kind of radical approach makes bribery more like other criminal offences, the vast majority of which do not draw distinctions between those acting in a public or private sector capacity. In taking this approach, though, the question is whether something of moral significance – in terms of 'labelling' – is lost if public sector wrongdoing (supposing that such a notion can be adequately defined, in a world where public and private sector provision is increasingly merged) is not singled out for separate treatment, as under the law that the 2010 Act replaced? A final issue relates to the moral significance of the bribe. Is the bribe evidence of corruption (which might, with appropriate controls, be furnished in other ways), or is it an essential element of the corruption, so that performing equivalent acts absent the bribe is not corrupt at all? English law has never had crimes of nepotism, gratuitous but corrupt doing of favours or the asynchronous exchange of favours. The modern emphasis upon the single large international contract can distract attention from these common and insidious types of corruption.

One of the underlying themes of this book is the way in which an appraisal of bribery law requires scholars and practitioners to embrace a new set of law and policy issues, to revise their assumptions about the criminal process, and to concern themselves much more than is commonly the case in seeking to understand the substantive law with the available punitive and non-punitive sanctions and remedies (although specialists on corporate liability have had to come to terms with these issues for many years).[5]

For example, while it has been possible for many years to punish public officials for committing crimes overseas, as if those crimes had been committed within the jurisdiction,[6] the singling out of bribery of a foreign public official as a specific offence in the 2010 Act, whatever the status – public or private – of the accused, adds a new dimension to bribery as an offence. It is an unusual example of a criminal statute treating the public interest in the integrity of officialdom in a *different*

[5] Although, of course, the mandatory life sentence for murder continues to over-shadow analysis of the scope of that crime.
[6] See the Criminal Jurisdiction Act 1802, s. 1.

jurisdiction as a matter of concern so serious as to justify criminalisation of those connected to *this* jurisdiction who seek to undermine that integrity. This brings out an important difference between the ways in which the creation of a criminal law can be justified. Some writers have taken a distinctly 'inward-looking' view of that justification. For example, C. K. Allen wrote that behaviour is criminalised because, 'it consists in wrongdoing which *directly* and in serious degree threatens the security or well-being of society';[7] but, although it may do in some circumstances, bribery of a foreign public official committed overseas by a UK company is in principle unlikely to pose that kind of threat. Perhaps more promisingly, Antony Duff has recently argued that criminal wrongs are public wrongs because, 'they are the proper concern of all citizens in virtue of their shared membership of the polity. The sanctions [the criminal law] imposes on offenders … express the polity's condemnation of the offender's conduct as wrong'.[8] While there are problems with it (which cannot be gone into here), this looks, at first glance, to be a more promising line of argument in this context. Any sophisticated set of moral principles in accordance with which condemnatory judgments about citizens *qua* citizens are made includes 'outward-looking' principles. These are principles to which citizens should adhere when outside – or when dealing with those outside – their 'polity'. So, for example, sexual abuse by UK citizens of non-UK children overseas is just as much within the condemnatory legal scope of the polity (on Duff's view), as the occurrence of such abuse within the United Kingdom.[9] However, the criminalisation of bribery of foreign public officials may expose a tension in Duff's thesis.

Unlike the commission of sexual offences against children overseas, which is an offence only if the conduct in question would also be an offence in England and Wales,[10] the discrete offence of bribery of a foreign public official is a non-dependent offence in its own right. It does not depend on the conduct in question also being an offence covered by the law applicable in a domestic context; and properly so. For there would be just as sound a reason – preventing harm in

[7] C. K. Allen, *Legal Duties and Other Essays in Jurisprudence* (Oxford: Clarendon Press, 1931), pp. 233–4 (added emphasis).
[8] R. A. Duff, 'Perversions and Subversions of the Criminal Law', in R. A. Duff, L. Farmer, S. E. Marshall, M. Renzo and V. Tadros (eds), *The Boundaries of the Criminal Law* (Oxford: Hart, 2010), pp. 88–9.
[9] Sexual Offences Act 2003, s. 72.
[10] Sexual Offences Act 2003, s. 72(1)(b).

foreign states[11] – to condemn as criminal bribery committed through improperly influencing public officials overseas,[12] even if, for whatever reason, similar conduct in relation to a domestic official was not criminalised, but treated merely as a civil wrong. Thus understood, criminalising bribery of foreign public officials would have something in common with, say, making it a crime for UK companies to bury toxic waste in overseas lands or seabeds, whether or not the latter is also an offence in the United Kingdom.[13] The justification for criminalisation in such instances does not turn, in a way that it does in many other cases, on whether the conduct in question is also a crime in the home jurisdiction. Why does this point raise an issue in relation to Duff's thesis?

It is perfectly plausible to suppose that UK citizens do not view bribery of foreign public officials, especially when such bribery is an accepted custom and practice in the foreign jurisdiction in question, as a matter, to use Duff's words, for, 'the polity's condemnation of the offender's conduct as wrong'. Yet it could still be right to criminalise such bribery on the grounds that, in his words, it is, 'the proper concern of all citizens in virtue of their shared membership of the polity'. Criminal law theorists have yet to come to terms with an emerging, cross-cutting European and global set of moral norms that play an indispensable part in the criminalisation agenda for all states opting into transnational governance systems based on a subset of these norms. In some – perhaps many – instances, ordinary members of the 'polity', whom the governments opting-in represent, are indifferent or even hostile to compliance with those norms (and *a fortiori* resentful of the use of the criminal law to secure compliance). So, the legitimacy of a government's decision to criminalise breaches of the norms depends on the legitimacy of a legislature's claim to exercise a right to decide for itself (even in the face of an indifferent or hostile public) what a society's commitments are to be 'in virtue of shared membership of the polity', and hence to incorporate international norms into the range of issues said to be, in Duff's words, 'the proper

[11] On the nature of remote harm in bribery cases, see J. Horder, 'Bribery as a Form of Criminal Wrongdoing', *Law Quarterly Review*, 127 (2010), 37–54.
[12] 2010 Act, s. 6.
[13] For the sake of argument, suppose that the unauthorised burying of toxic waste is a matter for civil recovery in the United Kingdom, but that this approach would be ineffective in relation to such conduct when engaged in overseas, and so the criminal offence is confined in its application to conduct overseas.

concern of all citizens'. The 'outward-facing' character of key elements of bribery law is addressed in Part II of this volume.

Seeking a rationale for bribery offences in general, and in particular for the territorial scope of the offence is, however, only one side of the coin. The history of the last thirty-five years of the law of bribery in the United Kingdom indicates something about the role of human agency and human mistakes in legal historiography. None of the developments outlined in the book would have occurred, however, had 'events' not conspired to bring bribery to the top of the political agenda. Had it not been for Lockheed and the other matters that gave rise to the Foreign Corrupt Practices Act (FCPA) 1977, and had it not been for the adoption by the OECD of the principles in the FCPA in the Paris Convention, the Bribery Act 2010 would not have happened. Had it not been for the attacks on the United States in September 2001, the UK Government would not have put in place the stop-gap provisions in sections 108–110 of the Anti-terrorism, Crime and Security Act 2001, and the reform would have turned out very differently. Had the 2003 Draft Bill not been written so as to retain the principal–agent nexus in the offence from the previous legislation, and had it had provisions that dealt better with the issues of parliamentary privilege that arose, then the 2003 Draft Bill might have been taken forward and become law in 2004. Had the 2009 Draft Bill not been introduced into Parliament by means of the Draft Bill procedure (which, by that stage was an unnecessary delay) it would have become the 2009 Act. Although it generated a great deal of concern at the time, it is by no means clear that the legislation was speeded up by the furore over the decision to end the Al-Yamamah enquiry. The UK Government was late in complying with its obligations, but more by inadvertence than any conscious desire to prevaricate.

In short, the interest in bribery law that has arisen in the United Kingdom and elsewhere over recent years has been a consequence not only of the reappraisal of the rationale of the offence, but also of political and economic pressures, usually of an international nature, arising in one way or another from the influence of globalisation on markets. Of these types of pressure, two are most noteworthy. First, there is that exerted as a consequence of investment by relatively wealthy nations in international development. The underpinning idea had always been one of enlightened self-interest. Investment overseas would create economies that would be better able to trade with the investor nations. The old theory, stemming from some American

economists in the 1960s, was that if bribery was what was necessary to engage in any economic activity with a given jurisdiction, then so be it. This has now been displaced by the rather obvious consideration that if large amounts of the money, paid in taxes in wealthy nations and designated for aid, are in fact to be spent on 'white elephant' projects (building dams where there is no river, unnecessarily sophisticated air traffic control systems or whatever else), or are to furnish retirement income for deposed despots, then the objective is not being achieved. This line of pressure will differentiate the public from the private sector. The further argument is frequently made that corruption (broadly understood, so as to include, but not to be restricted to, bribery) operates as a disincentive to inward investment in developing economies. The evidence on this is at best equivocal, but if the claim is correct, then this is a further reason for giving greater attention to enhanced enforcement between jurisdictions.

Secondly, there is the more general fair competition consideration that if international companies are competing for business in a jurisdiction whose own domestic system is unable to deal adequately with bribery, then controls should be imposed where they *can* be effective. This is the basis of the OECD Convention. Thirdly, there are some supra- and intranational organisations that assert jurisdiction over the sources of the money they administer. The European Union is one such.

It is no real surprise that the first, and at the time of writing, the only, prosecution to have been brought under the 2010 Act was for a quotidian piece of local government corruption – a clerk at a Magistrates' Court fixing speeding tickets for money. Nor is it a surprise that the behaviour in question came to public notice, not because of diligent and well-resourced policing, but because of a newspaper 'sting'.[14] Nonetheless, there have been successful prosecutions under the previous law for offences that would now be charged under section 6 of the 2010 Act,[15] even against corporations.[16]

[14] *R.* v. *Munir Patel*, unreported, 18 November 2011, available at: www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/munir-patel-sentencing-remarks.pdf.
[15] *R.* v. *Tumukunde & Tobiasen*, unreported, 2008, available at: www.business.timesonline.co.uk/tol/business/law/article4832416.ece; *R.* v. *Dougall* [2011] 1 Cr App R (S) 37; *R.* v. *Messent* [2011] EWCA Crim 644.
[16] *R.* v. *Mabey & Johnson Ltd* [2011] UKSC 9; *R.* v. *Innospec Ltd* [2010] EW Misc 7.

The chapters in Part III deal with the question of enforcement. It was, until the late 1990s, unusual for there to be more than a dozen bribery prosecutions per annum in the United Kingdom, and until 2008 there had been none for bribery of officials abroad. There were few investigations, and alternative charges (conspiracy to defraud) were available and frequently easier to prove. There were no special incentives, financial or reputational, either to investigate or to prosecute. The instantiation of the OECD Convention changed all this, because it requires not only 'paper' compliance, but also that the sanctions be 'effective'. Site visits deal with the signatory nations' prosecution record and the United Kingdom had been subject to increasingly pointed criticism in respect of its investigation and prosecution record. The repeated visits and the reports have directed attention to the enforcement record in respect of this specific offence and the effect of this publicity has been to spur action.

Following the 2011 site visit to the United Kingdom, a Report was published in 2012.[17] While it was nothing like that which arose from the highly condemnatory 2008 site visit, significant concerns were still expressed. In particular, the OECD commented adversely upon the increased use of civil recovery, because of the dangers to transparency of the sorts of agreement that can be reached, and the visit took place at a time of uncertainty as to the future of the Serious Fraud Office and its directorship.

The international efforts to suppress bribery, of which the OECD Convention is currently the most important, put in issue the relationship between criminal justice enforcement and other means of dealing with wrongdoers. The trend in recent years in many areas has been to approach crimes like bribery from a standpoint rather different from the traditional one of *ex post facto* investigation by the police, prosecution by prosecutors and punishment by courts. As with many areas of financial crime, prosecution is no longer regarded as the only plausible enforcement mechanism, and policing no longer the only means of securing compliance. In the last twenty years financial services regulation has been imposed under the aegis of the (soon to be abolished) Financial Services Authority. Leverage has also been put in place by enlisting corporates to police, and, if appropriate, to report themselves. These kinds of development invoke regulation and corporate

[17] OECD, *Phase 3 Report*.

governance, including training and internal systems, as the alternatives or supplements to the stark use of the criminal sanction. They are to be welcomed. In this sense, the Bribery Act 2010 is only a part of the huge shift in the approach to bribery law that has taken place over the past twenty years. The importance of bribery and controls upon it, from many quarters, can only increase.

In the production of this book we have benefited enormously from the assistance of Aleksandra Jordanoska.

Unless otherwise indicated, we have tried to ensure that statements of law are correct as at 1 July 2012.

Jeremy Horder and Peter Alldridge

PART I

Bribery law: between public wrongdoing and private advantage-taking

1

Reformulating bribery: a legal critique of the Bribery Act 2010

BOB SULLIVAN

Introduction

The Bribery Act 2010[1] is an important step forward for the United Kingdom[2] in terms of the legal response to corruption that takes the form of offering or taking bribes. An effective codification of the law of bribery has been achieved. The new substantive law of bribery in its entirety comprises just four offences. There are the two core offences of bribing another person[3] and being bribed.[4] Additionally, there is an offence of bribing a foreign public official;[5] and an offence, confined to 'commercial organisations', of failing to prevent bribery.[6] All previous statutory and common law offences relating to bribery are abolished.[7] Aside from the bribing a foreign public official offence, there are no longer any differences in legal terms between proscribing bribery in the private sector or in the public sector. In particular, there are no presumptions of corrupt conduct in the case of public officials.[8] For of all four offences, the burden of proof for all elements of the offence lies with the prosecution.

So, a new start, following a long and difficult gestation.[9] For the two core offences of bribing and being bribed, there seems no radical

[1] Chapter 23. [2] The Act applies to England, Scotland, Northern Ireland and Wales.
[3] Section 1. [4] Section 2. [5] Section 6. [6] Section 7.
[7] Schedule 2. The principal statutes repealed are the Prevention of Corruption Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916. Also abolished is the common law offence of offering undue rewards to public officials.
[8] As was the case under the Prevention of Corruption Act 1916, s. 2.
[9] In brief summary, the reform process was initiated by the publication of Law Commission, 'Legislating the Criminal Code: Corruption', Law Com. CP No. 145, 1997, followed by a final report, then another consultation paper, another final report, various interventions by the Home Office, the Ministry of Justice, several parliamentary select committee reports, and parliamentary debates along the way. The Act finally received the Royal Assent in April 2010, but there followed a delay until July 2011 before the Act was commenced.

extension of the previous law relating to bribery offences save for the possibility that when R[10] extorts some payment or other advantage from P[11] it may be easier under the new law to convict P of a bribery offence. What has changed significantly is the way in which the new offences are drafted. There is no longer the reliance on the evaluative terms 'corrupt' or 'corruptly'. Instead, the new legislation identifies by description situations where financial or other forms of advantage should not be offered or taken. In other words the two new, core offences describe for the purposes of the criminal law what bribery is, confining the role of the jury to finding the facts that constitute the offence and establishing the culpability for the new offences by applying to the facts the less morally freighted concepts of intent, knowledge and belief. While inevitably certain interpretive uncertainties arise when the specifics of these offences are scrutinised, undoubtedly the two core offences capture very well the essence of bribery. Under the terms of the Act, at the core of bribery are inducements or rewards to persons with public or private responsibilities to perform those responsibilities improperly either by acts or omissions done in bad faith, or with partiality, or in breach of trust.[12]

There is just one reservation, alluded to above, about the potential coverage of the offence concerned with, among other things, the payment of a financial or other advantage.[13] Sometimes P, when making a payment to R, will have yielded to the extortionate demands of R, rather than acting corruptly in his own right. Although any criminal liability incurred by R for accepting this payment[14] is well grounded in ethical terms, the same does not necessarily apply for the payment made by P, a victim of extortion. Before UK bribery legislation had extraterritorial

The principal cause of the delay between assent and commencement was concerns raised by commercial interests as to the adverse effect the Act would have on corporate promotional activities and effectiveness in the export trade. Although the Coalition government did not make any changes to the Act despite some intensive lobbying, it published official guidance on the legislation, which included advice on points of interpretation.

[10] Used in the Act to denote the recipient of a financial or other advantage.

[11] Used in the Act to denote the payer of a financial or other advantage.

[12] The core offences should consistently capture conduct that deserves punishment and that is also harmful to the economy and the well-being of public institutions. For an informed discussion of differing rationales for the creation of bribery/corruption offences, see P. Alldridge, 'Reforming Bribery: Law Commission Consultation Paper 185 (1) Bribery Reform and the Law Commission – Again', *Criminal Law Review*, 9 (2008), 671–89, at 674–7 and citations.

[13] Bribery Act 2010, s. 1.

[14] Bribery Act 2010, s. 2.