What is wrong with bribery and how, if at all, should we deal with it?

From Deuteronomy to Shakespeare's play 'Measure for Measure', bribery has been condemned for the past millennia. Yet, it has been used by many of the world’s biggest companies including the East India Company and Walmart and embroiled leading figures like former South Korean President Lee Myung-Bak. However, bribery is wrong as it subverts equality, damages trust and distorts decision making, while often leading to greater business costs and in some cases regional instability. Bribery is the 'offering...or receiving of any item of value as a means of influencing the actions of an individual holding a public or legal duty',¹ and in 2017 an estimated $2 trillion,² was spent for this 'influence'. Yet, despite our societal consensus on the problematic implications of bribery, it is still incredibly difficult to deal with. As the early bribery trials of Francis Bacon and Robert Clive showed, proving bribery is time consuming, costly and somewhat futile in removing it as a practice. Nonetheless the substantial damage which bribery causes means that it must be dealt with through stringent enforcement of global anti-bribery legislation which couples punitive justice through fines and individual prosecutions with restorative justice to try and counteract the damage caused by bribery.

Bribery undermines efficiency as it 'blinds those who can see',³ by distorting judgement. This can be seen with the former Greek Defence Minister Akis Tsochatzopoulos's decision to spend $4 billion dollars on a class of experimental nuclear submarine produced by Ferrostaal,⁴ following a bribe of €60 million.⁵ The case has shown how Greece's huge increase in arms expenditure from $7 billion in 1996 to $9 billion in 2000,⁶ was partially driven by the system of corporate bribery. In the Ferrostaal case, bribes added 7% to the original price of the submarine.⁷ Thus the corruption of the Greek government caused military equipment to be bought, with questionable benefit, at the cost of the Greek

¹ Wex Legal Dictionary
² IMF Staff Discussion Note, 2016, pp 5 para 1
³ Exodus 23:8, New International Version
⁴ Montero 2018 pp156 para 3
⁵ Montero 2018 pp157 para 2
⁶ Montero 2018 pp156 para 2
⁷ Montero 2018 pp158 para 3
taxpayer all at an inflated price. That a condition of the International Monetary Fund and European Union bailout of Greece was immediate reform to its anti-corruption strategy, is indicative of how bribery had undermined efficiency in the running of the state and contributed to Greece’s crippling debt. Similarly in Africa, the cycle of kickbacks is so grossly inefficient that the African Union estimated that 25% of the GDP of African States is lost to corruption each year. Bribery is so problematic as it increases costs and undermines fact-driven decision making.

Bribery deeply impacts upon public trust in police, the judiciary and politicians. When prominent leaders like Brazil’s former president Lula da Silva are convicted of taking bribes from companies like Petrobras, then it damages their citizens’ trust. This fundamentally undermines belief in the democratic system and therefore elected representatives. In the first century BC, Cicero summed up society’s reaction to bribery when he condemned Verres for taking ‘money for judgement’ as ‘wicked’. This anger at the duplicitous nature of bribery can still be seen today with the hundreds of thousands involved in the anti-government demonstrations which rocked Brazil in the wake of the Petrobras bribery scandal. This duplicity by bribed politicians, who are ostensibly serving the electorate while actually serving their own greed can substantially impact upon the social contract between the electorate and their representatives. The problem can also be seen in Mexico where the former President Enrique Pena Nieto has been accused of receiving a $100 million bribe from the leader of the Sinola Cartel Joaquin ‘El Chapo’ Guzman. The bribe was allegedly given at a time when Nieto was deploying the army to fight the ‘war on drugs’. Accusations such as this erode citizens’ confidence and trust.

Bribery also puts into circulation unaccountable money that can end up funding terror. A prime example of this was the Siemens Corporation paying a total of $5.3 million in bribes

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8 Montero 2018 pp166
9 OECD 2014 pp 3
10 Sabados 2018 para 1, 3
11 In Verrem pp 2 (Noonan 1984 p51)
12 Watts 2016 para 3, 6, 8
13 Associated Press 2019 para 4
14 Associated Press 2017 para 7
to government officials, including Bangladesh’s Minister of Telecommunications Aminul Haque, to be awarded a $75 million contract for a national telecommunications project in Bangladesh.\(^\text{15}\) The CEO of Siemens Bangladesh referred to the bribes as putting 'fuel on the fire' (in terms of company growth),\(^\text{16}\) but the fire they were inadvertently fuelling was one of extreme religious terror. Haque financed the Jamaat-ul-Mujahideen (JMB),\(^\text{17}\) an Islamic terrorist group that in a single day in August 2005 detonated 500 bombs across the country.\(^\text{18}\) Although it is hard to draw a direct link between the bribery and the attacks, it is indisputable that Siemens’ bribe money went to someone who financed extremely violent terrorism. This is not an isolated incident as the Iraq Food for Oil scandal shows us. 2,253 companies paid bribes of $1.8 billion,\(^\text{19}\) giving Saddam Hussein an additional revenue stream, which was otherwise unavailable to him due to UN sanctions, to train 1,200 intelligence officers and to produce IEDS.\(^\text{20}\) A member of the US Treasury testified that 'it is likely that some of these funds…fuel the Iraqi insurgency'.\(^\text{21}\) Not only did these bribes help fund an insurgency that has fought a war resulting in 400,000 casualties,\(^\text{22}\) and destabilised Iraq, but they also have potentially provided the 'start up capital for the ISIS group',\(^\text{23}\) which has been responsible for some of the deadliest and most coordinated terrorist attacks, such as the Paris Attacks of November 2015. When a bribe is made by companies like Siemens the money has to go somewhere, and this unaccountable money can lead to great violence and instability.

It is unquestionable that we must address the global scourge of bribery for the reasons outlined above. Yet it is precisely the global nature of this problem which makes it so hard to deal with. Despite a broad range of international legislation dealing with bribery, from the regional specific African Union Convention on Preventing and Combating Corruption to the global United Nations Convention Against Corruption, there is still a dearth of

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\(^\text{15}\) Montero 2018 pp176 para 3  
\(^\text{16}\) Montero 2018 pp177 para 3  
\(^\text{17}\) Ali 2007 para 1, 2  
\(^\text{18}\) Bhattacharjee 2018 para 3  
\(^\text{19}\) The Economist 2008 para 2  
\(^\text{20}\) Montero 2018 pp 53 para 3  
\(^\text{21}\) Juan Zarate, Treasury’s assistant secretary for Terrorist Financing and Financial Crimes, testimony on the impact of the bribery network  
\(^\text{22}\) Hagopian A, Flaxman AD, Takaro TK, et al. 2013  
\(^\text{23}\) Charles Duefler Interview (Montero 2018 pp59 para 2)
countries actively enforcing anti-bribery legislation. Currently only seven countries actively police bribery, and they are all signatories of the OECD Convention on Combating Bribery of Foreign Public officials in International Business Transactions. That only seven countries actively police bribery is deeply problematic as it means that nation states are not taking responsibility for bribery taking place within their country. Anti-bribery legislation can be highly successful as multinational corporations are less likely to engage in bribery in countries where such legislation is in force. Yet 33 countries, which make up 52% of world exports, still have limited or no enforcement against foreign bribery. This includes major countries like China and India. Therefore there must be a push globally for countries to fulfil their international legal obligations and introduce similar legislation to the highly stringent UK Bribery Act, as having a legal means of restricting bribery is the first step to tackling it.

Anti-bribery legislation is key to tackling bribery, yet the legislation in itself is not enough. There must be a concerted effort to enforce the legislation through investigations and then prosecutions. Despite the UK Bribery Act being the 'toughest in the world', a House of Lords Committee questioned why the number of prosecutions is so low, and the same problem can also be seen in America. Following the failure of a number of high profile cases, including the Bistrong Sting case, the Department of Justice (DOJ) has moved to secure fines from companies instead of securing convictions of individuals who are engaged in bribery. 77% of DOJ corporate enforcement cases since 2006 have not resulted in charges against company employees. Instead the default US prosecution policy is to reach corporate settlements. This is a problematic way of redressing the cost and implications of bribery, as bribery fines just become part of the cost of doing business and the Deferred Prosecution Agreements (DPAs) prevent any reputational damage to the company. Perhaps most crucially nothing is done to deal with the culture of bribery within companies. Although the DOJ wants to avoid embarrassing defeats in

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24 Kavakeb 2018 para 3
25 Jensen and Malesky 2018 Abstract
26 Transparency International Secretariat 2018 para 7
27 Belch 2010, Abstract
28 House of Lords Committee on the 2010 Bribery Act
29 Rubenfield 2017
30 Koehler 2018 para 13
court, if there is a weight of evidence then individuals must be prosecuted. It is fundamentally unequal for white collar crime to be treated differently. No other group breaking the law would be allowed the option to enter DPAs, let alone three like Pfizer did between 2002 and 2007 on the promise that they would reform.\textsuperscript{31} A policy of prosecuting the individuals responsible and then ensuring compliance to anti-bribery legislation must be globally implemented if the culture of bribery is to be stopped by the law. Punitive justice through prison sentences for individuals and fines for companies leading to corporate reputational damage, act as a disincentive to engage in bribery and mean that bribery fines will no longer merely be an operating cost. There must also be a focus on reducing punishment for self-reporting, as this can help to challenge the culture of silence which surrounds bribery and encourages greater transparency.

The fines which are imposed on companies need to account for the impact which their bribes have had on the country that the company was operating in. Restorative justice can help to undo some of the damage which has been done through those illegal practices.\textsuperscript{32} The current issuing of fines put the focus of anti-bribery prosecutions on the impact of bribery on corporate competition so bribery seemingly becomes a market transgression. Although this is true, there must also be a public and transparent focus on the wider consequences of the bribery and how it has harmed people and communities. At the very least this must be a public admission as to the impact of the bribe by the company. This will help companies to view bribery as being too costly in terms of reputational damage. Following this, the fines should be used to fund community projects that address the harm caused by the bribery as a form of compensation. If this form of restorative justice was to be implemented it would result in the punitive justice of fines being put to a positive use.

The term ‘white collar crime' removes bribery from what it really is, an instrument of inequality which subverts democracy, the rule of law, ethical business practice and can go on to fund illegal violent activity. The impact of bribes is really on people and until the law removes the idea that it is ‘victimless', we can never really tackle the huge problem that is bribery. The implementation of a legislative framework, similar to the UK Bribery Act 2010, to be enforced through punitive justice with large fines for companies and

\textsuperscript{31} Montero 2018 pp 249 para 3

\textsuperscript{32} Montero 2018 pp 235
prosecution of the responsible individuals, coupled with compensatory schemes for those effected, could impact upon global bribery. With such a legal initiative, bribery would no longer be viewed as a cost of doing business as the impact will be too great upon companies and individuals. In a world where this legal framework was actively enforced by nations, bribery would then be seen for what it is: damaging for society, development and equality.

2,000 words (not including title, name and bibliography)

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