Legal Responses to Corruption

Query:

1. "What would be the implications of promoting asymmetric punishment in anti-corruption laws with particular emphasis on i) punishing the bribe giver only, ii) increasing the risk of corrupt deals being entered into by the bribe-taker since he/she runs no risk of punishment, iii) encouraging bribe-takers to give information on corrupt deals and iv) enhancing prevention?
We observe that bribe takers and bribe givers both usually face punishment if caught. An asymmetric punishment could send a strong message and thereby encourage information on corrupt deals from the taker's side - who would not be punished."

2. "How is the burden of proof regulated in UNCAC and other conventions?
We observe that UNCAC Article 20 'illicit enrichment' could be used for reversing the burden of proof. Most national laws do not forsee such a provision and hence, this Article and others may become obsolete in their practical application."

Purpose:

"My agency is wondering whether asymmetric punishment could encourage bribe takers to reveal more information about corrupt transactions since they would not be in danger of punishment.

In addition, we are concerned that UNCAC Article 20 on "illicit enrichment" could be practically useless since its application depends on a reversal of the burden of proof required in most jurisdictions."

Content:

- Part 1 deals with the first question relating to asymmetric punishment.
- Part 2 deals with implications of UNCAC Article 20.
- Part 3 gives details of further reading.

We have received two questions concerning legal responses to corruption. We shall deal with both of them in this U4 Expert Response. The U4 Helpdesk consulted with lawyers who specialise in corruption cases and solicited the views of actors who have knowledge of these legal issues.

The first question concerns the suggestion of **promoting asymmetric punishment** which means punishing bribe-givers/payers only and not bribe-takers.

The second question concerns the implications of UNCAC Article 20 (“illicit enrichment” article) on the **burden of proof**.

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Part 1: Asymmetric Punishment

There are countries whose laws are already asymmetric in that they penalise, exclusively or to a greater extent, the bribe-giver/payer, rather than the bribe-taker. There was even an element of this in the UK government's failed attempt to reform anti-corruption laws in the UK in 2003/4. The implications of so doing, however, are problematic. There are always two parties to a bribe. In any given situation, one party may be more passive than the other; but it is by no means the case that the bribe-giver/payer is more active. There are certainly situations in which a bribe-giver/payer is subject to extortion amounting almost to coercion. It is as much a mistake to assume that all bribe-takers/payers are more worthy of punishment, as to assume that all bribe-takers are. Neither can exist without the other, and it important that they are treated in the same way by the law.

It is also important not to underestimate the impact of a clear and vigorous law that is impartial between giver and taker. The existence of such a law empowers the more reluctant of the two to resist the other. In a hypothetical situation where an aggressive contractor wants to secure a government contract corruptly, and the law penalises only the contractor as payer of the bribe, he can exert even more pressure on the weak official by pointing to the fact that he has nothing to lose (and everything to gain) by taking the bribe. Encouragement of whistle-blowing is a very important element in the fight against corruption. Most of the investigations that take place are the result of someone coming forward. Laws that punish the bribe-taker may assist in encouraging a whistle-blower to come forward rather than risking taking the bribe and incurring punishment as a result.

Moreover, nothing encourages corruption more than a climate of impunity, in which colleagues of a bribe-taker can see that the receipt of bribes incurs no penalty. Why should they not dig their snouts into the collective trough?

Therefore, in answer to the specific points raised in question 1:

(1) A law punishing only the bribe payer is both asymmetric and counter-productive.
(2) It will encourage the making of corrupt deals, because at least one party can act corruptly without risk of punishment.
(3) It will not encourage whistle-blowers to come forward. Their best incentive to disclose corruption is the fear that non-disclosure will aggravate the punishment they face. A sympathetic whistle-blower policy that encourages transparency, and imposes severe punishment on those failing to disclose, will be effective.
(4) Clear, tough and enforced laws are one of the best forms of prevention possible. The ideal situation in any country is that the laws are tough, and never invoked because everyone understands how tough they are and will not risk breaking them.

Part 2: Illicit Enrichment and Burden of Proof

The burden of proof continues to be a difficult issue in criminal law enforcement in the area of illicit enrichment. It can be very difficult for law-enforcers to collect all the necessary evidence to prove that riches have been illicitly gained and thus to secure convictions. The offence is unacceptable under some national laws due to concerns about undermining the due process of law and violating human rights. In some countries it is considered inconsistent with Constitutional provisions. However, it exists or has been introduced into many other national laws and is provided for not only in UNCAC but also in the African Union Convention (“subject to the provisions of their domestic law”) and the OAS Convention (“subject to its Constitution and the fundamental principles of its legal system”). Countries in Africa (for example Benin and in Asia (for example Malaysia) use this approach. The importance of including it in the Convention is that countries prosecuting such an offence can expect mutual legal assistance from other countries, within certain limits.

Some argue that corruption is no different from other aspects of criminal law, and there requires no change in the normal burden on the prosecution: to establish the offence 'beyond a reasonable doubt'. In the UK 100 years ago, the British parliament considered that this imposed too high a threshold, at least in relation to an offence of corruption committed by a public official, and the law was changed so that the prosecution had only to establish (beyond reasonable doubt) that the accused official had received a payment which had no other explanation than that it was corrupt. The prosecution still had to establish the actions of both bribe-giver and -taker; but there was a presumption that, having established the receipt of a payment, the prosecution did not

have to prove corrupt intent. More recently, doubts as to whether this aspect of the law might infringe the UK's obligations under the European Convention on Human Rights gave rise to proposals to remove the presumption; but it remains part of UK law.

The question is not so much one of burden of proof; but of the appropriate evidence to establish the offence. If you define the offence of taking bribes based on receipt of a payment (coupled with the other elements), and not on proving the corrupt intention of what is in the head of the bribe-taker, there should be no question of infringing the accused's right to a fair trial.

This touches on the further element raised in the question: whether laws should penalise a political party for having unexplained riches. Many countries now insist that their politicians and senior public servants make full disclosure of their assets, with penal implications if they fail to make such disclosure. Such laws can certainly be justified, even in the absence of establishing where such funds came from, and whether they were paid as bribes for corrupt acts.

Part 3: Further reading

A just-published book addresses the concerns of these questions. It is written from the perspective of UK law but takes into account international anti-corruption legal obligations. We attach two relevant extracts from this book and provide a reference should you wish to read further:
C. Nicholls, T. Daniel, M. Polaine and J. Hatchard ‘Corruption and Misuse of Public Office’ (Oxford University Press; 2006).