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Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Master of Law (LL.M.), specialisation in Criminal Justice, in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of LL.M. dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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*'Achieving good governance and overcoming the practices of profligacy and corruption inherited from the apartheid government and its economy are the two most important challenges facing South Africa. Corruption has burgeoned in both the public and private sector since the transition and is the factor which most preoccupies those who express concerns about South Africa's future.'*¹

I. Introduction

The crime of corruption has plagued human societies since the earliest forms of social order evolved. The fact that even the Code of Hammurabi (2100 BC) and the Bible refer to this phenomenon (Deuteronomy 10:17; 16:19)² and that already the Roman Consul Crassus had corrupted the Roman building industry³ shows that this crime can truly be described as the second oldest business of the world.

Although corruption is thus indeed not a new phenomenon, national governments, non-government-organisations, the mass media, citizens and the United Nations have turned their attention only in recent years to this problem. Induced by a huge number of recently emerged corruption-scandals worldwide,⁴ public awareness has increased that corruption is not a rare crime committed by a few 'black sheep', but on the contrary, an almost ubiquitous and far more widespread threat for any society than it was assumed in the past. The German prosecutor Schauensteiner states in this regard: 'Wherever you look for corruption, you will find it'⁵. However, conducting empirical research on the topic of corruption is extremely difficult and profound knowledge of the extent of corruption is still very limited due to the clandestine conduct of the perpetrators and a probably huge percentage of undetected-crimes.⁶

¹ Lala Camerer (ed) *Costly Crimes: Commercial Crime and Corruption in South Africa*, (ISS Monograph, 1997) 31, 38.

² Jonathan Burchell and John Milton *Principles of Criminal Law*, 3ed (Cape Town: Juta, 2005) 890.

³ Renate Verjahns 'Bestechungsdelikte' available at <http://www.strafrecht.de/de/bereiche/bestechungsdelikte.php> (accessed 14.8.2005).

⁴ See for a worldwide overview Transparency International 'Global Corruption Report 2005' available at www.globalcorruptionreport.org (accessed 14.8.2005).

⁵ See Wolfgang Schauensteiner 'Korruption in Deutschland – Das Ende der Tabuisierung' in Mark Pieth and Peter Eigen (eds) *Korruption im internationalen Geschäftsverkehr* (Neuwied and Kriftel, 1999) 131 at 131.

⁶ An empiric survey of corruption in South Africa is from Transparency International 'Country Study Report 2005, Final Draft' available at http://www.transparency.org/activities/nat_integ_systems/dnld/draft_s_africa_18.03.05.pdf (accessed 14.8.2005). A detailed empiric study of corruption in Germany is from Britta Bannenberg *Korruption und ihre strafrechtliche Kontrolle. Eine kriminologisch-strafrechtliche Analyse* (BKA-Forschungsreihe: Neuwied, Kriftel, 2002).

This state of affairs has furthermore promoted the insight that the causes for the large extent of corruption are less likely a mere misconduct by individuals, but a structural failure of the law, the prosecution authorities, the control mechanisms of civil society and a lack of properly implemented corporate governance. Although these findings might first of all be startling, they provide at the same time an effective remedy, because these structural conditions can be changed by politics and the civil society in order to reduce the spread of corruption. The reason why the spread of corrupt activities depends to a larger extent on external, social conditions – most of all the risk of detection – than for instance the amount of violent crimes is that these offences are often committed with the purpose of economic profit, e.g. to obtain a contract or a permission. The perpetrators therefore rationally balance the assumed profit with the risk and the consequences of their possible detection and thus can be influenced in their decisions by the criminal law.

The realisation of the so far underestimated spread and harm of corruption as well as the need for structural changes have induced countries all over the world as well as the United Nations in recent years to take various measures, particularly in the field of criminal law against corruption.⁷ While, for instance, Germany has passed the *Korruptionsbekämpfungsgesetz* (Combating Corruption Act) in 1997, South Africa has implemented the Prevention and Combating of Corrupt Activities Act No. 12 of 2004⁸ on 27 April 2004, which repealed the Corruption Act 94 of 1992. This Act contains a number of ‘unbundled’⁹ offences in respect of various corrupt activities and its volume indicates that it might at the same time extend the scope of the criminal liability. As additional measures the Act orders the establishment of a Register for Tender Defaulters and imposes a duty to report corrupt transactions on certain persons with authority in entities of the public or private sector. Furthermore, it contains a presumption in respect of the link between the bribe and the corruptly influenced decision and grants the National Director of Public Prosecutions to investigate an individual, if he or she possesses ‘unexplained wealth’ that might be the result of corrupt activities.

The PCCAA deserves mainly for three reasons a detailed evaluation, which will be the topic of the present dissertation. Firstly, the serious threat of corruption requires effective legal countermeasures and thus the efficiency of the PCCAA is of great importance for the fight

⁷ See eg the United Nations Convention against corruption adopted by the General Assembly of the United Nations on 31 October 2003.

⁸ Following abbreviated as PCCAA.

⁹ For an explanation of this legislative technique see the Preamble of the PCCAA and below pp 37 ff.

against corruption in South Africa. Secondly, the PCCAA is a ‘drastic and draconic deviation from the status quo’¹⁰ and as its offences relate to almost any sphere of life, the exact scope of the criminal liability imposed by the Act is of great importance for any citizen of South Africa. The offences of the PCCAA therefore deserve careful evaluation, particularly whether they cover unintentionally legitimate, non-corrupt conduct. Finally, a comprehensive evaluation of the PCCAA is called for, because the amount of literature and comments on this rather new piece of legislation is still rather small.

In order to serve this purpose, first of all an in-depth analysis of the actual phenomenon of corruption and its universal structure *without regard to the positive law* is required upfront. As corruption is a much more complex and amorphous crime than for instance murder, robbery or theft, the efficiency of legislative measures against corruption can thus only be evaluated properly, if one has defined this phenomenon precisely at first. One German scholar has pointed out with regard to this general problem: ‘The legislature needs to know the reality; otherwise it could neither determine how it should be, nor judge whether it can indeed be changed in accordance with its objective.’¹¹ Another scholar stressed with specific reference to the fight against corruption, that ‘reasonable and long-sighted criminal policy needs a definition of the nature of corruption and its main elements as its yardstick’.¹² In a similar manner, the Public Service Anti-Corruption Strategy of South Africa emphasises that ‘in order to develop a Public Service Anti-Corruption Strategy it is important to understand the various forms in which corruption manifests itself [...]’.¹³

Consequently, the present dissertation will firstly focus on analysing the universal structure and essential elements of the actual phenomenon of corruption (II.). On this basis it will following be examined, which specific problems arise from this structure in respect of legislation that aims at combating corruption (III.). Against this background the PCCAA will then be evaluated and commented (IV.). For this purpose also the offences against corruption as stipulated by the German Strafgesetzbuch (Penal code)¹⁴ will be taken into a comparative consideration.

¹⁰ D Lambrechts ‘The Prevention and Combating of Corrupt Activities Act as an investigative instrument pertaining to bribery and corruption’ (2004) 17 *Acta Criminologica* 106 at 117.

¹¹ Ernst von Beling *Methodik der Gesetzgebung, insbesondere der Strafgesetzgebung. Zugleich ein Beitrag zur Würdigung des Strafgesetzbuchentwurfs von 1919* (Berlin, 1922) 1.

¹² Klaus Volk ‘Die Merkmale der Korruption und die Fehler bei ihrer Bekämpfung’ in Karl Heinz Gössel and Otto Triffterer (eds) *Gedächtnisschrift für Heinz Zipf* (Heidelberg, 1999) 419 at 419.

¹³ Public Service Anti-Corruption Strategy (Department of Public Service and Administration, January 2002) 7.

¹⁴ Following referred to as StGB.

II. An analysis of the actual structure of corruption

As aforementioned, any evaluation of legislative measures against corruption requires a clear idea of the phenomenon of corruption as its target upfront. This is the more important, because also in science there exists no common definition of corruption at present, but there are various approaches from a legal, economic, philosophical and sociological point of view.¹⁵ Besides, the phenomenon of corruption is indeed a very widespread, heterogeneous and amorphous topic and its Latin origin ‘*corrumpere*’, which means ‘to break’ or ‘to break down’, does not really give an answer to the question, what corruption actually is. In a similar manner Professor Snyman has pointed out that it does not help much for the understanding of the phenomenon of corruption but instead brings one to the nebulous zone of morality, if one tries to trace the meaning of the word ‘corrupt’ in dictionaries, as a court once did and ascertained that it means, *inter alia*, ‘sleg, bedorwe...rotten, depraved, wicked, ... [and] moral deterioration’.¹⁶

Furthermore, different people will have distinct approaches to define corruption, particularly as in the reporting of the mass media very often also quite unlike crimes like breach of trust, embezzlement, fraud and sometimes even any abuse of power – especially if committed by mighty people like for instance dictators – are named as ‘corruption’. To put it another way: ‘Understanding the dimensions of corruption entails also understanding what corruption is not. Corruption is often described interchangeably with maladministration, incapacity and inefficiency, especially because public resources are being used. The deficiency of approaching corruption in this manner is that corruption becomes indefinable and thus impossible to address. Though corruption seems easily identifiable, it is of paramount importance to establish a workable legal definition of corruption, in order to maximise preventative and combating efforts [...]’.¹⁷

In order to find a sharp-edged definition of corruption it is in my opinion inevitable and quite useful to examine the basic elements of any form of corruption. To serve this purpose, first some examples of corruption in various spheres of live will be illustrated briefly (1.) and, following, it will be analysed, which essential, common elements can be abstracted from these cases (2.).

¹⁵ An overview of various definitions gives Constanze Bauer ‘Administrative Corruption in Central Government’ Paper presented at the International CRIMSA/IASA Conference *Crime and Justice in the Nineties* (University of South Africa 3-5 July 1996) at 2 f.

¹⁶ CR Snyman *Criminal Law* 4ed (Durban: Butterworths, 2002) 381.

¹⁷ Public Service Anti-Corruption Strategy (note 13) 8.

1. Examples for corruption in various spheres of life

Corruption exists within any sphere of life in modern states, economies and societies and the following examples refer to these main spheres in the public as well as the private sector.

a) Corruption within the public sector

Corruption within the public sector is often regarded as the ‘classic’ form of corruption and the predominant part of attention of the media is directed to report this kind of corruption.

aa) Corruption within the executive

Corruption within the executive ranges from a low-profile-level, where public officials in the administration are bribed by ordinary citizens with comparatively small amounts of money to high-profile-cases where members of the government are bribed by worldwide operating concerns with millions of rands.

Corruption within the administration is widespread and in the majority of the cases the bribe payer acts to gain a material advantage, eg any kinds of permissions, like building permits, driving licences¹⁸, permissions for the erection of plants as well as licences to exploit mineral resources. There are also media reports about bribes being paid to Roadworthy Inspectors in South Africa’s Roadworthy Test Centres by drivers to obtain the Roadworthy Certificate for non-roadworthy cars.¹⁹ In this particular case even the anti-corruption unit that was subsequently mandated by the Gauteng traffic inspectorate to investigate allegations against the alleged corrupt inspectors was suspected to be taking bribes from them in exchange for turning a blind eye on their corrupt behaviour. Another purpose of bribing administration employees can be the avoidance of various disadvantages as in the case of bribes being paid by drunken drivers to police officers in order to circumvent fines.

On a high-profile-level, corruption concerns predominantly government-decisions on a national or provincial level regarding the allocation of contracts, like arms or other military products and all kinds of infrastructural projects. Especially major projects like waste disposal or purification plants, airports and big dams are very often affected by corruption and many realised projects later turned out as oversized or even completely useless judged from an objective, economical perspective. One such example in southern Africa is the 3.7 billion \$ Lesotho Highlands Water Project, which was designed to transfer water from the

¹⁸ See for a real case in South Africa in this regard Gill Gifford ‘Anti-corruption unit busted’ *The Star* 30 July 2004 at 1.

¹⁹ Ibid.

Maluti Mountains to Gauteng, through a network of dams.²⁰ Several construction and engineering companies from all over the world have been found guilty of bribing the project's chief and other officials in order to obtain and inflate contracts. Another example for alleged high-profile-corruption within the government is the so-called 'arms-deal' in South Africa. In this scandal the financial adviser of the Vice-President was convicted for having a generally corrupt relationship with the latter and suspected of having solicited a bribe from European arms manufacturers in respect of the allocation of a multi-billion-rand arms procurement contract.²¹

bb) Corruption within the legislative

As legislative decisions often affect the commercial interests of various parties and as the way in which a certain decision is made can be of great material value, such decisions are likely to be influenced by bribes given to members of parliament or political parties. This is often done by professional lobbyists, who try to influence laws on behalf of big companies, like e.g. the pharmaceutical industry, which often attempts to avoid or manipulate reforms in the health sector that threaten to cut their profits. An actual case of bribery within the legislative happened in Germany in the 1980's, when the German entrepreneur Flick bribed politicians and political parties in order to induce a tax law, the later so-called 'lex Flick', which was supposed to allow him the sale of his enterprise without paying the usual amount of taxes. In South Africa the so-called 'travelscam' emerged recently, where a number of Members of Parliament defrauded the parliamentary travel-budget of several millions of rand through collusion with travel agents.²²

cc) Corruption within the judiciary

Corruption also occurs within the judiciary, for instance, a party in a civil law suit might try to influence the outcome of the case by bribing the judge or an accused might try to bribe the judge in order to avoid a conviction or at least mitigate the punishment. Furthermore, it is reported that some liquidators make special donations to the staff of the Master's Office designed to influence the appointment of liquidators.²³ However, it must be assumed that in

²⁰ See Jocelyn Newmarch 'Sequel to Corruption in Lesotho' *This Day* 27 July 2004 at 13.

²¹ See for an overview of the 'arms-deal' Transparency International 'Country Study Report 2005' (note 6) at 17 f.

²² See for an overview of the 'travelscam' Transparency International 'Country Study Report 2005' (note 6) at 37 ff.

²³ <http://www.pmg.org.za/docs/2003/appendices/RESANALYSIS.htm> (sub 7.6.3) (accessed 23. March 2005).

most countries only few judges will accept such an offer, because their legal education and professional integrity will probably keep many of them from doing so.²⁴

b) Corruption within the private sector

*'The extent of corruption has become endemic in business. In world terms cases such as the Enron scandal represents but the tip of a large iceberg. Such cases are quintessential examples of the failure of political and economic oversight, which may have been deliberately weakened by collusion between audit firms, banks and the media. Many investors were defrauded as a result and workers, usually the most vulnerable, were deprived of their hard earned pension to the detriment of their families and dependents.'*²⁵

Indeed, the predominant part of attention of the media and civil society is directed to the 'classic' corruption in the public sector, while corruption wholly within the private sector is likewise very widespread and harmful and probably the most underestimated form of corruption. The most frequent purpose of corruption within the private sector is that one of several competitors pays a bribe to an employee of a company in order to obtain a contract from the latter or in order to influence the conditions of an already awarded contract to his advantage. Obviously, corruption within the private sector in order to obtain or manipulate contracts is quite similar to many cases of corruption in the public sector and only differs in that the customer is a private company instead of the state and in that the bribee is an employee instead of a public official.²⁶ Such bribes, commonly called 'kick-backs',²⁷ in the economy, are very common and are supposed to affect a high percentage of business conducted between companies.

Although most of the contracts affected by corruption concern either any kinds of goods or immaterial commercial services, there are also several cases, where companies, particularly credit-unworthy companies, have bribed bank-employees in order to obtain loans. The actual loss in such cases is potentially huge, because often the full loan will be a write-off for the bank. Furthermore, whole economies can be at risk of a collapse like the so-called 'Asia-crisis' has demonstrated in 1997, which was predominantly caused by a high level of

²⁴ <http://www.pmg.org.za/docs/2003/appendices/RESANALYSIS.htm> (sub 7.6.8); Transparency International 'Country Study Report 2005' (note 6) at 50 ('court system relatively untainted by corruption in the eyes of many South Africans').

²⁵ Geraldine J. Fraser-Moleketi, Minister for the Public Service and Administration, Opening Statement at the Signing Ceremony of the United Nations Convention against Corruption on 9 December 2003 available at <http://www.dpsa.gov.za/documents/speeches/openign%20statement03.pdf> (accessed 15 August 2005).

²⁶ See the example on pp. 12 ff.

²⁷ See for an explanation of this term below p 13.

corruption within the financial sector.²⁸ The China Banking Regulatory Commission has recently uncovered several corruption schemes worth R195 million. In one case the head of a firm bribed bank officials in order to obtain loans for his firm and caused an actual loss of almost R100 million.²⁹ Following, various examples for corruption within the private sector will be explained.

aa) Corruption within the health sector

Another example of corruption within the private sector is the health sector, which is highly affected by corruption. It is estimated, that in South Africa 10 percent of the R11 billion welfare budget is absorbed by corruption, fraud, theft and inefficiency.³⁰ Very common in this sector are bribes paid by pharmaceutical companies to doctors with the purpose to make them prescribe their drugs to their patients.³¹ For instance, a worldwide pharmaceutical company was recently accused to be paying bribes worth altogether 228 million US-\$ to doctors in Italy as a counter-performance for the prescription of their products.³² These business methods are expected to be a part of a worldwide equal pattern.

bb) Corruption within the media

Bribery of journalists is also a dangerous form of corruption for any society. Big companies, for instance, frequently pay journalists of news-magazines for the delivery of manuscripts for the speeches of their representatives. It is also reported that banks regularly pay 'consulting fees' to key-journalists.³³ Consequently, these journalists will probably never report in a critical manner about the company and their managers in the future.³⁴ The American company 'Enron', which broke down recently because of a huge amount of fraud and corruption committed by top-managers, also paid two journalists about 100.000 US-\$ for 'consulting'. These journalists have then allegedly tried to cover the criminal activities in

²⁸ Peter Eigen 'Theoretische, wirtschaftliche und ethische Gesichtspunkte – Einleitung'. in Mark Pieth and Peter Eigen (eds) *Korruption im internationalen Geschäftsverkehr* (Neuwied and Kriftel, 1999) 11 at 12 f; Fritz Heimann and Carel Mohn 'Die Rolle der Privatwirtschaft bei der Bekämpfung der internationalen Korruption' in Mark Pieth and Peter Eigen (cited previously) 530 at 534; Thomas Pletscher 'Wie halten wir unser Haus sauber?' – Bekämpfung der Korruption aus Sicht der Wirtschaft in Mark Pieth and Peter Eigen (cited previously) 275 at 278.

²⁹ 'Chinese banking watchdog uncovers massive fraud' *Cape Times* 5 August 2004 at 21.

³⁰ 'R1-billion a year tip-off' *Sunday Tribune* 30 June 1996 at 2.

³¹ See for real examples and the criminal liability of doctors in Germany Oliver Pragal 'Das Pharma-„Marketing“ um die niedergelassenen Kassenärzte: "Beauftragtenbestechung" gemäß § 299 StGB!' (2005) *Neue Zeitschrift für Strafrecht* 3 at 133 ff.

³² 'Thousands of Doctors named in Glaxo scandal' *The Independent* 28 May 2004.

³³ Wolfgang Hetzer 'Korruption. Legalisierung oder Bekämpfung?' (2004) *Kriminalpolitik* at 86 ff.

³⁴ Hans Leyendecker 'Korruption und Journalismus' in Netzwerk Recherche (ed) *Korruption: Schatten der demokratischen Gesellschaft. Fakten – Trends – Gegenstrategien* (Wiesbaden, 2002) 29 at 30; Hans Leyendecker *Die Korruptionsfalle* (Reinbek, 2003) 152.

newspaper articles as their counter-performance.³⁵ In other cases travel-journalists have been bribed with free flights and hotel-rooms by travel companies in order to induce enthusiastic reports about their products.³⁶ In quite similar cases journalists of motorists-magazines have been 'invited' to holidays, flight and first-class-hotel included, by car manufacturers in order to influence the results of their tests.³⁷ It has also been reported about journalists of gourmet-guides, that some of them run wine-wholesales and only give the tested restaurants good marks, if they buy wine at their stores.³⁸ Furthermore, there are hundreds of lists available in the internet containing companies that give discounts to journalists.³⁹ These forms of corruption are not a criminal offence in a number of countries, eg in Germany.

cc) Corruption within sports

There are also numerous examples for corruption within sports. In most of these cases the bribe's purpose was 'match-fixing', like it was in the German 'Bundesliga-Skandal', where soccer players have been bribed in order to perform badly in decisive matches, or as it happened in several other cases all over the world in cricket or soccer leagues.⁴⁰ While bribing athletes is not a criminal offence in a number of countries, eg in Germany, it is punishable for example in South Africa⁴¹ and the US-States New York and California.⁴²

2. The universal elements of corruption

In order to understand the general structure of all forms of corruption and as a prerequisite for the evaluation of the PCCAA, it will be analysed following, which universal elements can be abstracted from these cases illustrated previously. To serve this purpose it is necessary to direct one's attention to the legal and economic relations between the persons involved in corrupt activities and to their conduct.

a) The 'principal-agent-relationship'

³⁵ See Transparency International 'Global Corruption Report 2003' at 52 available at [http://www.globalcorruptionreport.org/download/gcr2003/06_Medias_role_\(Peters\).pdf](http://www.globalcorruptionreport.org/download/gcr2003/06_Medias_role_(Peters).pdf)

³⁶ Ibid.

³⁷ See Hans Leyendecker *Die Korruptionsfalle* 153.

³⁸ 'Im Auftrag des guten Geschmacks' *Süddeutsche Zeitung* 22 November 2003 at 3.

³⁹ Leyendecker *Die Korruptionsfalle* (note 34) at 155.

⁴⁰ 'Speed issues corruption alert' *BBC News* 12 May 2002 available at <http://news.bbc.co.uk/sport2/hi/cricket/3021877.stm> (accessed on 15.8.2005).

⁴¹ See section 15 of the PCCAA and in detail below p. 56.

⁴² Dieter Dölling 'Empfehlen sich Änderungen des Straf- und Strafprozessrechts, um der Gefahr von Korruption in Staat, Wirtschaft und Gesellschaft wirksam zu begegnen?' Gutachten C für den 61. Deutschen Juristentag (München, 1996) C 1, 92.

Initially, it is of highest importance to realise that since the emergence of any kind of social and economic order our societies are characterised by the delegation of various tasks by individuals or entities to agents. This relationship is described as ‘principal-agency-relationship’ in economic sciences and is the object of the so called ‘agency-theory’.⁴³ Subsequently it will be explained why a ‘principal-agency-relationship’ is an essential requirement for any kind of corruption and why the ‘agency-theory’ is of central meaning for a proper comprehension of the phenomenon ‘corruption’.

Starting point of this theory is the fact that any sphere of life in modern societies, particularly politics, the public administration and the economy, depend on the delegation of various tasks from a principal to an agent. This division of labour is thus a basic requirement for the functioning of our societies on the whole and brings about a substantial increase of efficiency.

In any democracy, for instance, the citizens vote for politicians and give them a mandate to organise the general public interests on their behalf as their representatives. The other way around, also the state as a juristic person can only execute the law by its public officials. With regard to the economy it is obvious, that companies as well do not operate as one-person-entities, but often employ thousands of employees from top-managers to ordinary workers. This means, particularly for juristic persons like stock companies, that there is a separation of ownership (the stock-holders) and management (the managers and other employees). Obviously, the advantage of this delegation of tasks is a considerable increase of efficiency, because the huge number of stock-holders would practically never be able to conduct the great variety of the company’s daily business, for instance the negotiation and closure of contracts with suppliers.

However, this increase of efficiency requires as a core-element of the ‘principal-agent-relationship’ that the principal authorises his agent with *discretion* in order to allow him to conduct the affairs of the principal with various ‘opponents’ independently. As a consequence of the agent’s discretion, the principal is not able to supervise the agent’s conduct at any time. For instance, the owner of a company cannot keep his authorised

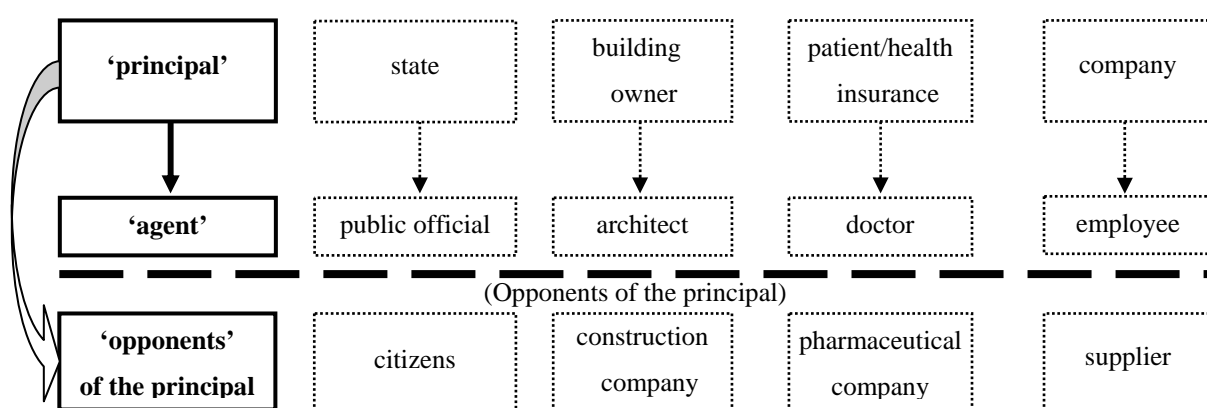
⁴³ Michael A Spence and Richard J Zeckhauser ‘Insurance, Information and Individual Action’ (1971) *The American Economic Review* 61 at 380 ff; Stephen A Ross ‘The Economic Theory of Agency: The Principal’s Problem’ (1973) *American Economic Review* at 134 ff; Michael C Jensen and William H Meckling ‘Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure’ (1976) *Journal of Financial Economics* at 305 ff.

signatory, purchase agents and judiciary under constant surveillance. Another property of the ‘principal-agent-relationship’ therefore is that *information is distributed asymmetrically* between the principal and the agent due to the agent’s discretion and independence. The principal can thus not infer from the result of the agent’s conduct whether the agent has acted loyally, because this result is influenced by a number of other factors. If, for instance, a purchase agent of a company negotiates and closes a sales contract with a supplier to disadvantageous conditions for his principal, he might either been bribed by the supplier or simply been defeated by the supplier’s skills of negotiation or his superior position in the market.

It is therefore important to realise that representation of the principal’s affairs can easily be harmed by various kinds of disloyal conduct by the agent, so-called ‘agency-problems’⁴⁴. Such ‘agency-problems’ can arise from the agent’s laziness, a criminal breach of trust, fraud, theft, embezzlement or, particularly, corruption.

The following sketch illustrates examples for various relations between principals, their agents and the principal’s opponents in certain spheres of life where corruption might occur. The arrow between the principal and the agent represents the power of agency.

sketch 1:



In absence of a ‘principal-agent-relationship’ corruption simply cannot occur, because a person who makes a decision concerning solely his own affairs will make rational and responsible decisions. As such a person will also be affected personally by the negative

⁴⁴ This term was first used by Ross (note 43) at 134.

consequences of his decision he will naturally not be willing to deviate from a reasonable decision for a bribe.

It must therefore be emphasised that the existence of a ‘principal-agent-relationship’ is of central meaning and a basic requirement for any kinds of corruption.⁴⁵ In a quite similar way Professor Snyman refers to the agency-theory, even if he does not expressly use these economic terms, as his abbreviated definition of corruption regarding the Corruption Act 94 of 1992 stipulates that the bribee must be someone ‘[...] upon whom some power has been conferred or who has been charged with some duty [...]’.⁴⁶ Finally, various demands and proposals made during the drafting of the PCCAA ‘to broaden the scope to cover all *agents* [emphasis by the author]’ confirm, at least by implication, that the legislature as well regarded a ‘principal-agent-relationship’ as an essential requirement for corruption.⁴⁷ Accordingly, section 1(i) of the PCCAA defines agent as ‘*any authorised representative who acts on behalf of his or her principal and includes a director, officer, employee or other person authorised to act on behalf of his or her principal, and “agency” has a corresponding meaning*’.

b) The relationship between the briber and the bribee and their conduct

In order to understand the basic structure of any corrupt activity it is furthermore crucial to have a close look at the relationship between the agent (the bribee) and the principal’s ‘opponent’ (the briber) and their factual conduct, because these are the actual reference points for the criminal law. Based on the aforementioned findings on the ‘principal-agent-relationship’ it will be shown following that corruption is a specific ‘agency-conflict’ and it will be analysed in detail how this phenomenon functions by the illustration of an example of corruption within the economy.

In this fictional example, a big car manufacturer needs 8000 gearboxes per month for his production of cars at a total price of R120.000.000. As a stock company and juristic person this car manufacturer is, naturally, not able to conclude contracts with suppliers without its managers or purchase agents. Consequently, the purchase agent of the car manufacturer has,

⁴⁵ Andrew W Goudie and David Stasavage *Corruption: the Issues* (Paris, 1997) at 4.

⁴⁶ CR Snyman (note 16) 376.

⁴⁷ Adv L J Roberts, Director of Public Prosecutions, Eastern Cape, Suggestions made during the Explanatory Memorandum of the Prevention of Corruption Bill (2 April 2002) available at <http://www.pmg.org.za/docs/2002/appendices/020422memo.htm> (accessed 20.3.2005); Briefing of the Security and Constitutional Affairs Select Committee 29 January 2004 available at <http://www.pmg.org.za/viewminute.php?id=3834> (accessed on 14.5.2005).

by virtue of his contract of employment, to look for the best and cheapest supplier and negotiate the conditions of this contract to the best result for his principal.

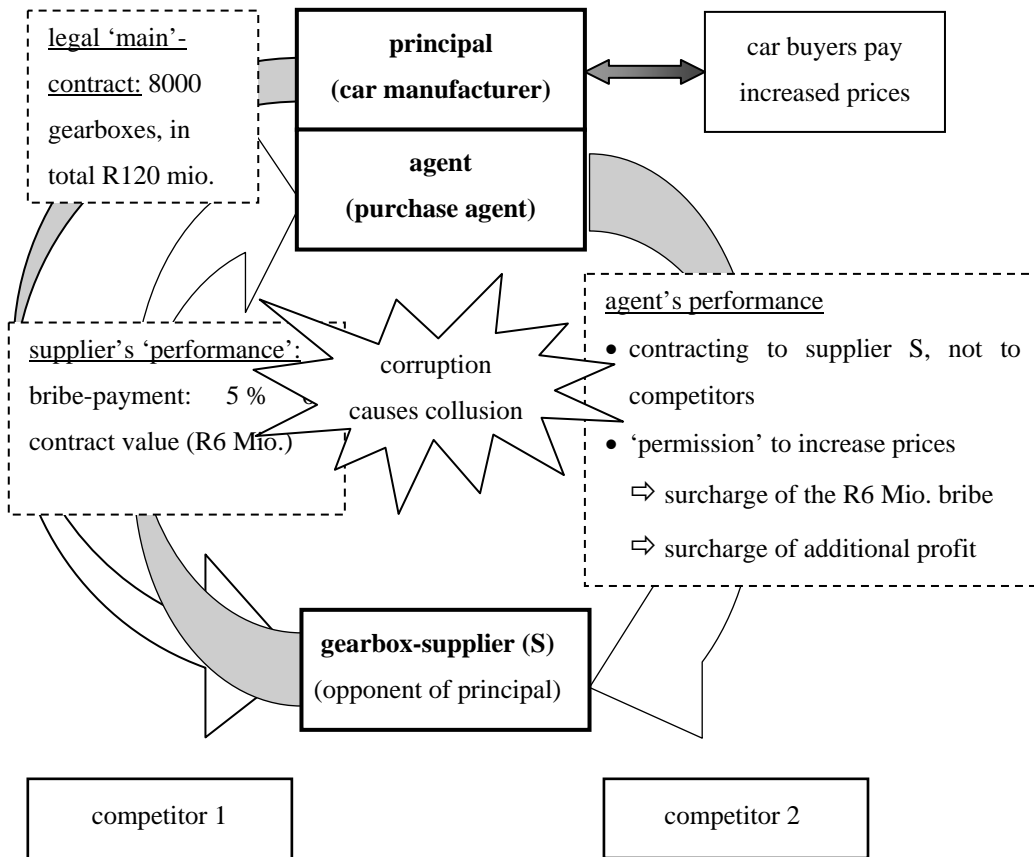
However, this ideal procedure can be undermined, if the purchase agent and a certain supplier (S) agree to collude against the car manufacturer. Originally, the purchase agent might have approached the supplier as he might have realised that his discretion is extremely valuable for the number of competing suppliers, because their turnover, profit and sometimes even their economical existence depend on the decision, who is awarded the contract. However, the agent's discretion is at the same time actually worthless for him, because the manner he uses his discretion does not bring any benefits to him. Consequently, the agent might get the idea to use his discretion in order to increase his income by soliciting a bribe from one of the suppliers. However, a representative of the supplier can naturally also take the initiative and approach the agent first.

The secret agreement proposed by either the agent or the supplier, typically stipulates that the supplier gives a percentage of the contract value to the agent, in the example given say 5% or R6.000.000. The agent's counter-performance is at first to conclude the contract on behalf of his principal with the bribing supplier instead of another competitor. Furthermore, it is quite common that the agent allows the supplier additionally to inflate the invoice for the delivered goods or services. This makes it not only possible for the supplier to re-finance the bribe paid to the agent, but in addition to obtain an extra-profit as well that would be out of reach in a legally-negotiated contract with a loyal agent. The fact that finally the principal pays the agent's bribe by the increased contract value explains, why bribes paid in order to obtain a contract are also called 'kick-backs'. This term is apparently derived from soccer and describes that that the supplier 'kicks' a part of the value of the awarded contract back to an agent within the sphere of the client (the principal).⁴⁸

The following sketch illustrates the aforementioned principle of corruption. It must be emphasised that corruption in the public sector differs by no means from this principle. On the contrary, a corruption case like the South African 'arms-deal' functions equally, as the state is the principal and the members of government and parliament are its agents.

⁴⁸ Thomas Rönnau "kick-backs": Provisionsvereinbarungen als strafbare Untreue. Eine kritische Bestandsaufnahme' in Hans Joachim Hirsch, Jürgen Wolter and Uwe Brauns (eds) *Festschrift für Günter Kohlmann zum 70. Geburtstag* (Köln, 2003) 239 at 240.

sketch 2:

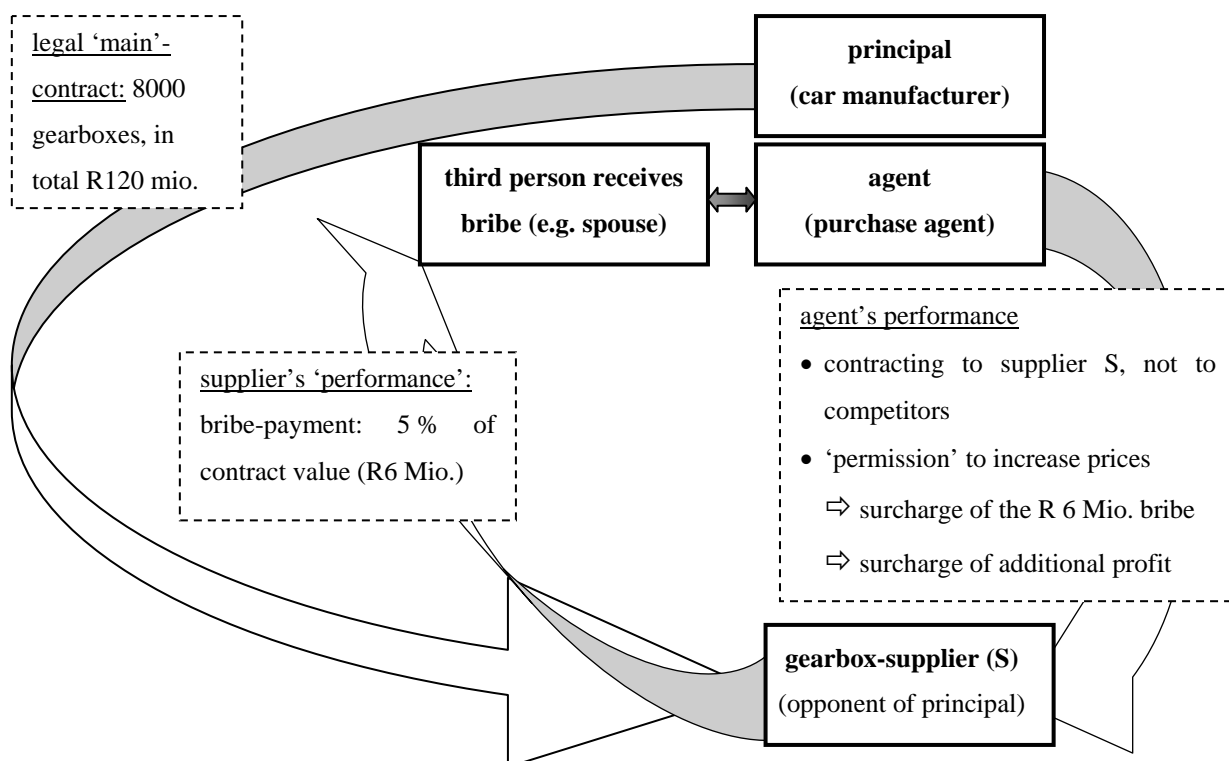


It is of greatest importance to distinguish between the legal main-contract between the supplier and his client (the principal) that is affected by corruption on the one hand and the immediate corrupt agreement to collude between the agent and a representative of the supplier on the other hand.

Furthermore, one must bear in mind with regard to the required scope of offences against corrupt activities that this sketch only describes the very basic structure of corruption. Firstly, it neglects the fact that the briber and the agent frequently agree that the bribe shall not be given directly to the agent, but to another person, for instance a member of the agent's family, a company or a trust, in order to disguise the offence. Naturally, this camouflage shall not lead to an exclusion of criminal liability as the agent has agreed in the 'exchange-contract' with the briber to decide in an unduly influenced manner and,

furthermore, the bribe will eventually often still be beneficial for the agent indirectly. The following sketch illustrates this configuration.

sketch 3:



Sketches 2 and 3 furthermore ignore that middlemen are often used by bribe-payers as intermediary between him and the bribee, particularly in high-profile cases of corruption.⁴⁹ The use of middlemen is for several reasons so established that even a profession of professional go-betweens has emerged in this regard.⁵⁰ Firstly, their knowledge of the habits how to pave the way for a corrupt agreement and approach the right decision-maker is often invaluable. Secondly, a bribing company can practically circumvent the prohibitions to write-off the bribe as operating expenditure, which have been implemented in many countries, because the bribe is included in the fee paid to the middlemen and often declared as 'commission' for business-arrangements. Most of all, the middlemen is often used as a 'fall guy' in case of a detection of the offence, because both parties can refer to their supposed ignorance of the middlemen's conduct and claim that he was solely instructed to

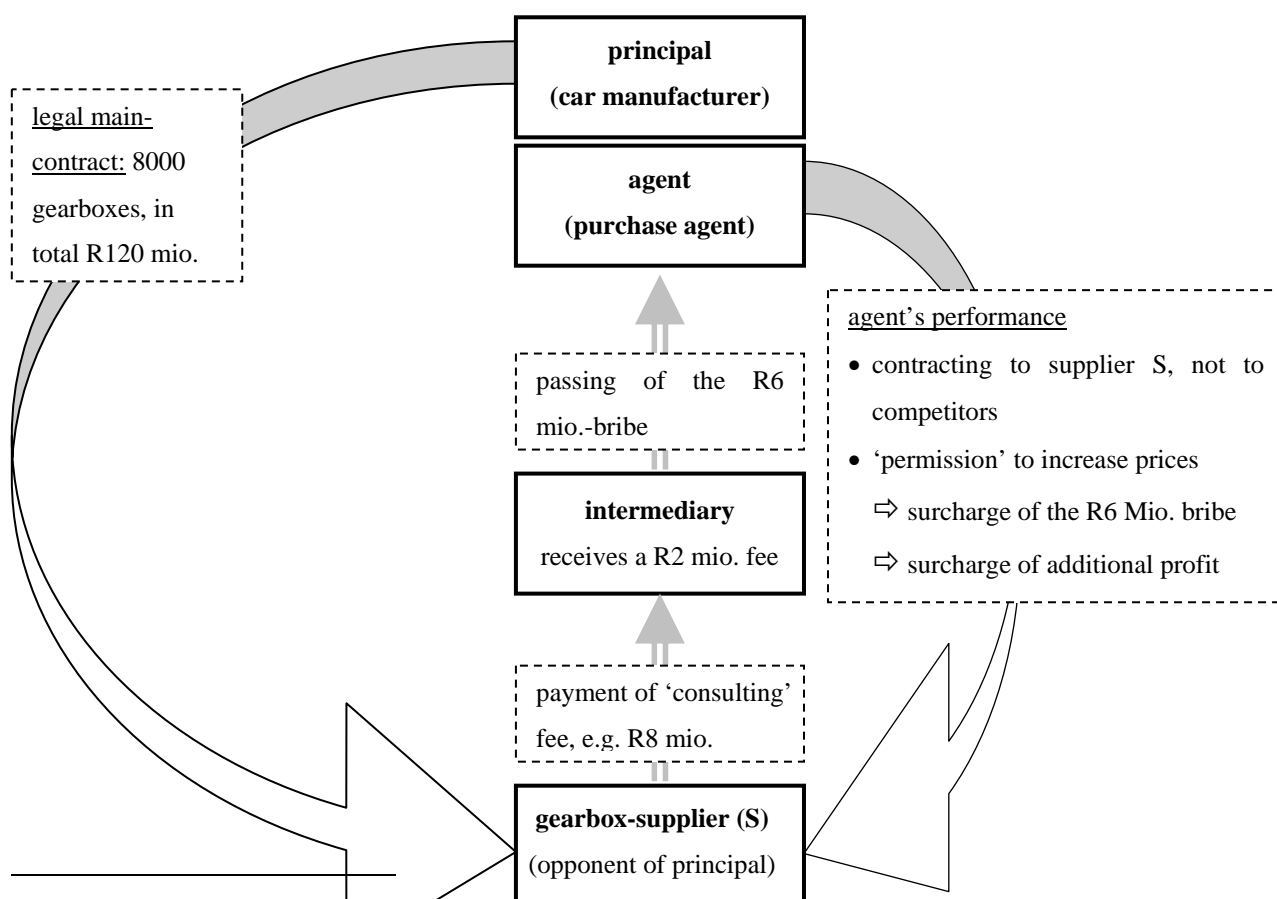
⁴⁹ See for a more detailed analysis of the role of middlemen Johann Graf Lambsdorff 'Korruption als mühseliges Geschäft – eine Transaktionskostenanalyse' in Mark Pieth and Peter Eigen (eds) *Korruption im internationalen Geschäftsverkehr* (Neuwied and Kriftel, 1999) 56 at 62 ff; see regarding the technical challenges for the criminal law below p. 29.

⁵⁰ 'Der Schmierer – Ein bisschen Bares, schon läuft der Laden' *Frankfurter Rundschau* 5 December 2003, available at <http://www.tebiko.de/t/s/schmierer> (accessed on 10.8.2005).

mediate legally between both parties. The former Chief Executive Officer of Elf-Aquitaine, who was accused in relation to one of the biggest corruption scandals in Europe, stated in this regard: ‘If someone uses an intermediary, he does so exclusively, because he does not really want to know what he is doing.’⁵¹

Middlemen are predominantly mandated by the briber, because the decision-maker does not have a comparable need to search for the right ‘partner’ and, furthermore, it is a specific need of bribing companies to use the intermediary in order to camouflage the bribe as operating expenditure for consulting fees. However, an intermediary can sometimes also occur within the sphere of the bribee. The outcome of the so-called ‘Schaik-Trial’ in Durban, for instance, has shown that Schaik was apparently a middleman between former Vice-President Jacob Zuma and European arms companies in the ‘arms-deal’-corruption case.⁵² The following sketch illustrates the typical use of intermediaries by the briber.

sketch 4:



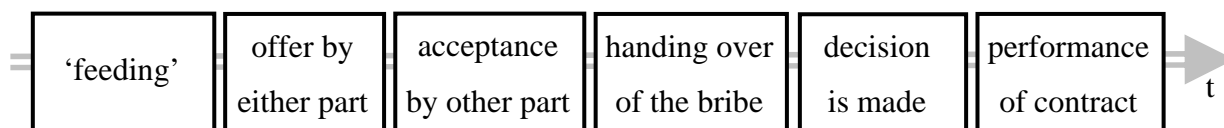
⁵¹ ‘Agents pocketed millions in German oil-deal, Elf trial’ *AFP-news* 30 April 2003 available at <http://forums.transnationale.org/viewtopic.php?t=1823> (accessed 10.7.2005).

⁵² See *S v Schabir Shaik & 11 others*, p 6551 (‘We have no doubt that [...] this document reports the conclusion on an agreement reached by Shaik and Thetard that Thomson would pay Jacob Zuma R500 000 a year [...] in order to secure the two benefits for Thomson, namely that he would provide a present protection from the corvette acquisition investigation and hereafter help in securing Government contracts in the future.’).

With regard to the required scope of the criminal law one must further consider that the perpetration of corruption often, unlike offence like murder, theft or robbery, develops over certain stages. Basically, any corrupt activity starts with an offer to conclude a corrupt agreement either by the agent or a representative of the ‘opponent’, which is possibly followed by its acceptance by the other part. Subsequently, the bribe is either performed first or the corruptly influenced decision is made, e.g. a contract is awarded. Eventually, the transaction in question is carried out.⁵³

However, one must furthermore pay due consideration to the preceding practice of the so-called ‘feeding’, a term that is derived from fishing and describes within this context the required preparations for a successful catch. With regard to corruption ‘feeding’ describes a typical practice during the contacting-phase between the briber and the bribee before a concrete offer to act corruptly is made by either side. During this stage the person seeking influence often gives various gratifications to the decision-maker *without* any reference to any decision to be influenced as counter-performance.⁵⁴ The purpose of this practice is on one hand to ‘test’ the willingness of the decision-maker to make a corruptly influenced decision at a later stage and to build up trust in order to reduce the risk of denunciation. On the other hand the ‘feeder’ even gains means to coerce the recipient in the case that the latter is reluctant to make an influenced decision, because he can threaten him with a report to his principal.⁵⁵ The following sketch illustrates the typical development of a corrupt relationship.

sketch 5:



3. A proposal to define corruption from a juristic-economic point of view

Corruption is a crime that is seldom perpetrated spontaneously, but, on the contrary, most perpetrators balance the prospective profit carefully against the possible risks. Particularly, if corruption is committed systematically by companies in order to promote their business, it

⁵³ See regarding the challenges for the criminal law in this respect below pp 22 ff.

⁵⁴ See regarding the challenges for the criminal law to cover the so-called ‘feeding’, pp 25 ff.

⁵⁵ See for the possibility of coercion of the receiver below p 26.

becomes obvious that such forms of ‘white-collar’-criminality should not only be analysed from a legal, but also from an economic point of view. Such an economic analysis is, in my opinion, for several reasons of invaluable benefit for a sharp definition of corruption.

If one looks at the corrupt agreement between the agent and the ‘opponent’ of his principal, it must be considered that economic sciences regard this agreement simply as the conclusion of an *illegal exchange contract* between the briber and the bribee.⁵⁶ However, this definition can only provide a working basis and needs further concretisation as it is still too vague. Further information on the essence of corruption can be obtained through an analysis of the obligations to be performed by both parties in the framework of this exchange contract, although it must be emphasised that most legal systems naturally regard such collusive agreements as ineffective. In this respect, the primary obligation to be performed by the bribee is to ‘sell’ his discretion to manage the affairs of his principal for the benefit of the briber. To put it another way, the briber simply ‘buys’ the agent’s decision, eg to win the contract and be allowed to inflate the invoice. The bribe-payer’s counter-performance is naturally to pay the bribe, which can be any kind of material or immaterial benefit. As both parties, the briber and the bribee, are acting within this exchange, it is in my opinion misleading to distinguish between ‘active’ corruption (by the briber) and ‘passive’ corruption (by the bribee), although this distinction is customary.⁵⁷

With regard to the definition of corruption it is crucial to integrate these obligations to be performed, particularly the bribee’s obligation to ‘sell’ his discretion, into the definition, because otherwise it would likewise cover other illegal exchanges like drug or arms trafficking. However, corruption differs significantly from such offences in that one of the *principal obligations* of the exchange-contract between the briber and the briber is that the former ‘sells’ a decision or discretion respectively.

Finally, it must be emphasised that the illegality of this exchange is an essential element of this definition, because it is an inherent element of human nature and the base of any

⁵⁶ See Schubert in Heinz-Bernd Wabnitz and Thomas Janovsky *Handbuch des Wirtschafts- und Steuerstrafrechts* (eds). 2ed. (München, 2004) 10. Kapitel Rn 2; Silvio Borner and Christophe Schwyzer, ‘Die Bekämpfung der Bestechung im Lichte der Neuen Politischen Ökonomie’ in Mark Pieth and Peter Eigen (eds) *Korruption im internationalen Geschäftsverkehr* (Neuwied and Kriftel, 1999) 17 at 24; Klaus Volk (note 12) 419 at 421; Günther Heine ‘Korruptionsbekämpfung im Geschäftsverkehr durch Strafrecht? Internationale Entwicklungen und nationale Befunde.’ (2002) *Zeitschrift des Bernischen Juristenvereins* Band 138 (Heft 9) 533 at 544 ff.

⁵⁷ See CR Snyman (note 16) 376.

economy to exchange goods and services. In a quite similar manner Professor Burchell points out that ‘the concept of corruption as the giving and receiving of rewards is complicated by the fact that the giving of gifts in appreciation of services rendered (‘reciprocities’) is a normal and acceptable practice in society. The difficulty of separating legitimate reciprocity from a corrupt bribe renders the application of the law not always a simple manner.’⁵⁸ Professor Snyman emphasises in a similar manner that the term ‘corruptly’ used by the Corruption Act 94 of 1992 must be interpreted to refer to the requirement of unlawfulness [...].⁵⁹ Without the restriction to *illegal* or *unlawful* exchanges, the definition of corruption would therefore also cover the huge majority of legal exchanges within the economy and thus be not only much too broad, but even completely useless.

It can therefore be concluded that corruption is from a juristic-economic point of view basically an illegal or rule-breaking exchange of a delegated decision for any material or immaterial benefit (the bribe) between an agent and a third party (the briber).

III. Technical challenges for laws combating corruption

Against the background of the actual structure of corruption as analysed previously, the specific legislative challenges for the establishment of offences against corruption will be analysed subsequently. The abstract discussion of these challenges up front will subsequently be of great use for the purpose of evaluating the merits and flaws of the offences as stipulated by the PCCAA.

1. The ‘fixing’ of the illegality of the corrupt exchange

Considering that corruption is basically an *illegal exchange* of a bribe against a certain decision of an agent, it becomes quite clear in view of the vast number of goods and services exchanged legally within any economy that the statutory ‘fixing’ of the illegality of the exchanges to be punished is the biggest challenge for the criminal law.⁶⁰ This means that any offence against corruption must be able to distinguish corrupt activities from legal exchanges.

a) The sources of applicable law

The fixing of the illegality requires in the first place a choice between various sources of law that can be applied. If, for instance, the mayor of a city awards a contract to build a new

⁵⁸ Jonathan Burchell and John Milton (note 2) 889.

⁵⁹ CR Snyman (note 16) 381.

⁶⁰ See detailed Günther Heine (note 56) 533 at 544; Klaus Volk (note 12) 419 at 421, 425.

public building to a construction company that has previously bribed him, the illegality of his conduct can theoretically be judged from the point of view of: (1) the public law, (2) the civil service law, (3) the civil law and, finally, (4) the constitution. With regard to this example it might be relatively clear that the public law and the civil service law are more special and therefore decisive. However, there are spheres of life where either the choice between various sources of law might be far from clear or where no statutory rules exist at all.

Such problems arise for several reasons particularly with regard to corruption in the private sector. Firstly, the exchange of goods and services is a basic principle of any economy and thus the variety of concluded exchanges is overwhelming and difficult to grasp. Secondly, egoism, profit-seeking and even greed are legitimate to a much broader extent within the economy, than in politics and administration. Thirdly, the rules concerning the private sector are generally less precise and less detailed than the civil service law that applies to public officials. Professor Snyman points out in this regard: ‘It is, however, often difficult to distinguish between corruption in the private sector and certain normal and accepted business practices such as business lunches and the use of lodges at sports stadiums (to which a company invites other people – often representatives of other companies).’⁶¹ In a similar sense respondents in the trade union, media and prosecutors asked in a Business Survey on Corruption said that ‘a clear understanding of what constitutes corruption is complicated by the fact that what is acceptable and commonplace in business can be viewed as unacceptable when taxpayer’s money is involved’.⁶² Parliamentarians expressed a similar belief and emphasised that the mandate of the private sector is different to the mandate of the public sector. Private sector companies may offer prospective clients business trips in order to curry favour and to clinch a deal; however, it is considered unacceptable for public officials to be ‘courted’ in this way.⁶³ Nevertheless, particularly the latter statement is somewhat sweeping and incorrect as it does not distinguish, whether ‘the client’ is, for instance, a self-employed entrepreneur or an agent of the client.

But most of all, the fixing of the illegality of the exchange is very difficult in the private sector, because there are two completely different sources of law that apply to the agent’s behaviour: the agent’s employment contract as ‘interior rules’ or the law on competition as

⁶¹ CR Snyman (note 16) 381.

⁶² See Business Survey on Corruption (note 24) sub 7.6.1.

⁶³ Ibid.

‘exterior rules’.⁶⁴ The choice between one of these sources of law is fundamental in respect of offences against corruption within the private sector, because the criminal liability of the agent and the briber depends on this choice in the case that the principal authorises the corrupt behaviour of his agent. Although such cases are naturally rather seldom, one such case was judged by the German Reichsgericht, where a dealer of sparkling wine bribed the waiters (the agent) of a restaurant with authorisation of its owner (the principal) in order to make the waiters ‘recommend’ the dealer’s sparkling wine instead of other brands to the guests.⁶⁵

If the ‘interior’ rules were held decisive, as they are in respect of the crime of breach of trust, the agent would not be liable, because in view of the principal’s authorisation there would be no violation of duties deriving from his employment contract. However, the commercial interests of the dealer’s competitors and the consumers were harmed nevertheless. If instead the law on competition as ‘exterior’ rules were held decisive, the agent would be liable, because an infringement of the law on competition does not depend on a breach of the agent’s employment contract. The German federal court decided that the principal’s authorisation is irrelevant, because the principal is not allowed to dispose of the interests of competitors and consumers.⁶⁶

Consequently, it can be inferred from this state of affairs that it is generally much more difficult to assess a certain conduct as corrupt and to draft offences concerning this with regard to the private sector, than it is with regard to conduct in the public sector. With regard to corruption within the private sector the decisive challenge is, like in the whole penal law concerning business offences, to distinguish between corruption and business practice that can better be described as ‘crafty’ or ‘rough’ in nature but not illegal. Professor Heine pointed out in respect of this problem: ‘The statutory fixing of the illegality of the exchange is the symptomatic dilemma of corruption in the private sector’⁶⁷. However, it can basically be said that it is in any case illicit corrupt conduct, if an ‘opponent’ of a principal bribes an agent in order to influence the agent’s discretion regarding the handling of the principal’s affairs for his benefit.

⁶⁴ See Klaus Volk (note 12) 419 at 422, 426 f; similar Günther Heine (note 56) 533 at 547.

⁶⁵ RGSt (Entscheidungen des Reichsgerichts in Strafsachen) 48, 291-305.

⁶⁶ RGSt 48, 291 (293).

⁶⁷ See Günther Heine (note 56) 533 at 545.

b) The reference point of the illegality-verdict

Apart from the question of the source of the applicable law, the verdict of the illegality of the exchange in question also has various possible reference points in respect of the actual conduct. These reference points are: (1) the reception of the gratification in itself, (2) the abuse of discretion by the agent with regard to his corruptly influenced decision or (3) the link between the gratification and the agent's decision in the sense of an illicit *quid pro quo*.

With regard to corruption in the public sector one must consider at first that in most countries of the world any public official that takes a gratification besides his official salary, which does not exclusively has a private link, violates public service law. Furthermore, the public official infringes public law, if he takes inappropriate criterions into consideration for a decision instead of the public weal, eg if he awards a contract to a non-competitive bidder solely because the latter gives him a bribe. Consequently, in respect of the public sector, the link between the bribe and the decision as its counter-performance only strengthens the verdict that the public official acted corruptly, but is not essential in order to establish the illegality of the conduct.

So far as corruption in the private sector is concerned, one must consider that private persons are as a matter of principle not restricted in making donations to each other and thus the reception of a gratification can hardly be judged as illegal in itself. Furthermore, there are no statutory laws that regulate the manner in which an agent of a private person or a company has to use his discretion. Thus, with regard to corruption in the private sector the verdict of the illegality of the conduct depends to a much greater extent on the inappropriate link between the gratification and the influenced decision. This state of affairs also explains why the so-called 'feeding', ie gratifications given during the contacting-phase without any reference to a certain decision to be influenced, is much harder to combat by the criminal law within the private sector than it is in the public sector.⁶⁸

2. The criminalisation of 'material' attempts as 'formal' completed offences

It was already mentioned that any corrupt activity extends over various stages and that the criminal law can, in theory, establish a liability at various moments during this process: (1) the possibly stage of 'feeding', (2) the initial offer by one part, (3) its acceptance, (4) the

⁶⁸ See below p 27.

performance of the bribe and (5) the making of the influenced decision, and, finally, (6) the carrying out of the transaction in question.⁶⁹

Most legal systems impose the full criminal liability of a completed offence already when an unilateral offer to act corruptly is made either by the briber or the bribee, regardless of its later acceptance and regardless, if the bribe was indeed given later and if the particular decision was indeed made subsequently. For instance, the Corruption Act 94 of 1992 of South Africa criminalised by virtue of its section 1(1)(a) and (b) the ‘offer’ by the briber or respectively the ‘attempt to obtain’ any benefit by the bribee. Professor Snyman rightly comments on this section that ‘to make an offer is tantamount to attempting to commit this form of corruption, and for this reason a person who has made an offer cannot allege that she should be convicted merely of an attempt to commit the crime in this form, as opposed to the completed crime.’⁷⁰ It is therefore unlikely that a person could be guilty of only attempting to commit this form of the crime and a conviction of attempt is only possible, if eg a posted offer to bribe is intercepted in the post.⁷¹ Similarly, section 2(3) of the PCCAA as well as § 299 (which relate to employees in the private sector) and §§ 331-334 of the StGB (which relate to public officials) also penalise mere offers of and demands for bribes.⁷²

Following, it will be analysed, why the law equates completed corrupt activities with mere unilateral offers instead of punishing the latter as a mere attempt that deserves a mitigation of punishment. At first sight one might indeed judge a unilateral offer, particularly if the other party has rejected it, as a mere attempt of corruption, because no exchange of a bribe against a decision is made. Furthermore, there is in absence of a completed transaction no immediate harm done.

However, one must consider in this respect that it can be distinguished whether an offence is completed either in a formal or in a material sense. An offence is formally completed, if its elements of crime are completely fulfilled, while it is only materially completed, if the actual harm that it tries to prevent is actually done.⁷³ Ordinarily, these events almost coincide, e.g. regarding the crime of murder. However, there are particular offences that

⁶⁹ See above pp 17 f (sketch 5).

⁷⁰ CR Snyman (note 16) 379.

⁷¹ CR Snyman (note 16) 379 (sub footnote 15).

⁷² See Appendix p 68.

⁷³ Johannes Wessels and Werner Beulke *Strafrecht - Allgemeiner Teil* 33ed (Heidelberg, 2003) 201.

have such an early formal completion that this conduct is nevertheless just a material attempt, because the specific harm that the offence intends to prevent is not yet done.⁷⁴

Under German criminal law, for instance, theft is already formally completed when the thief appropriates the object with the intention to keep it, eg when a shoplifter has put a package of cigarettes in his pocket.⁷⁵ However, the owner will only suffer a material loss and the offence will thus only be materially completed, if the shoplifter indeed leaves the shop with the stolen property and manages to deprive the owner of his property for a substantial amount of time.⁷⁶ Furthermore, the offence of forgery is already completed as soon as the forged document is *made* with the intention to use it subsequently, but any harm can only happen when it is indeed *used* in legal relations, which is not required eg by the German law.⁷⁷ Such offences are called ‘offences with incongruent *mens rea*’ (Delikte mit überschießender Innentendenz⁷⁸) in the German criminal law, because their *mens rea* contains more elements (e.g. the intention to *use* the forged document) than their *actus reus* (which merely requires the *production* of the document). The rationale behind such offences basically is that certain material attempts, eg the mere production of a forged document, are so dangerous and harmful that the law must treat those already as formally completed offences.⁷⁹ This legislative technique furthermore aims to exclude the possibility of a renunciation and the facultative mitigation of punishment, which applies for attempts.⁸⁰

In order to understand the underlying rationale for the advanced criminal liability of offences combating corruption one must carefully consider the harmful effects of corruption on society. At first one must bear in mind that corruption is *materially* only completed, if the briber and the bribee both *agree* to their exchange-contract, the bribed agent has made the influenced decision and the transaction in question between the principal and the bribee is concluded. On the contrary, if both parts have only agreed to act corruptly or if either even has declined to bribe or to be bribed one would *ordinarily* only speak of an attempt, because no *immediate* harm is caused yet. With regard to the bilateral agreements, one might still argue that the abstract likelihood that the agreed transaction will indeed be carried out subsequently justifies the penalisation of such conduct. However, this argument is not valid

⁷⁴ Günther Jakobs *Strafrecht - Allgemeiner Teil* 2ed (Berlin, New York, 1991) 706.

⁷⁵ Johannes Wessels and Thomas Hillenkamp *Strafrecht - Besonderer Teil/2* 24ed (Heidelberg, 2001) 39.

⁷⁶ *Ibid.*

⁷⁷ Johannes Wessels and Michael Hettinger *Strafrecht - Besonderer Teil/1* 27ed (Heidelberg, 2003) 218.

⁷⁸ Johannes Wessels and Werner Beulke (note 73) 77.

⁷⁹ See Günther Jakobs (note 74) 280.

⁸⁰ *Ibid.*

in the latter case, because there is no possibility of any immediate harm at all, if the other part refuses the offer, eg if the ‘attempt’ of a drunken driver to bribe a policeman fails because the latter appears to be incorruptible.

Consequently, there must be another justification for the penalisation of such material attempts as formal completed offences. This justification indeed exists in the shape of the so-called ‘spiral-effect’.⁸¹ This term describes the specific effect that a single offence of corruption seldom remains an isolated act in society, because if one individual tries to gain advantages through corruption, others soon will develop *mistrust* regarding the proper functioning of the whole system. Thus, they will reckon to suffer disadvantages if they continue to refrain from corruption and sooner or later also try to compensate them by furthering their interest by corrupting. Consequently, soon a system of widespread and structural rooted corruption will emerge where nothing works without bribes and where it is very difficult to combat corruption. It is crucial to comprehend that this ‘spiral-effect’ does not only occur, if a corrupt activity is materially completed, but likewise takes effect, if the other part refuses to bribe or to be bribed. The reason is that any offer to bribe already shows the general willingness of the certain perpetrator to act corruptly and thus competitors can never be sure whether the briber has eventually managed to bribe the certain agent. Therefore even the mere possibility of gossip about a failed (material) ‘attempt’ of corruption destroys the trust of competitors in the lawful functioning of the system and triggers the ‘spiral-effect’. Thus, it is justified to penalise already a failed offer to act corruptly with the full might of the law, even if it is rejected, because any mistrust by competitors causes the ‘spiral-effect’ and induces them to bribe as well.

3. The criminalisation of the contacting-phase

Another major challenge for the criminal law is the due penalisation of the contacting-phase of corrupt activities, the so-called ‘feeding’.⁸² Corruption, particularly its organised and high-profile appearances, seldom happen spontaneously without any prior preparation and contact between the briber and the bribee in order to pave the way. Only low-profile forms of corruption usually occur without a contacting-phase and these forms are at the same time often highly risky, e.g. the attempt by a drunken driver to bribe a policeman.

⁸¹ See for a detailed analysis of this phenomenon Manfred Teufel *Insolvenzkriminalität – Wirtschaftskriminalität* (PhD, Lübeck, 1981) 55; Klaus Tiedemann *Wirtschaftsstrafrecht und Wirtschaftskriminalität. Teil I* (Reinbek 1976) 25 f; Gunther Arzt and Ulrich Weber *Strafrecht - Besonderer Teil* (Bielefeld, 2000) § 19 Rn 15.

⁸² See above pp 17 ff.

The reason for the frequent use of ‘feeding’ becomes apparent if one considers the situation of a perpetrator who aims at bribing a certain agent. This perpetrator is then facing the dilemma of either taking the chance of being reported to the prosecuting authorities by a possibly incorruptible agent or refraining from his plan. Obviously, the sales chief of an arms manufacturer cannot abruptly enter the (Vice-) President’s office carrying a briefcase brimming with money as the counter-performance for the awarding of an arms-contract. However, there is a possibility that offers him a solution to minimise this risk. In the example given the sales chief might at first contact the (Vice-) President during a harmless appointment without making any reference to arms procurement projects. They might go sailing or playing golf together under any pretext and the sales-chief might invite the (Vice-) President to an expensive dinner. Subsequently, the sales-chief might offer him his yacht or luxury holiday flat for a holiday with his wife *without* demanding and expecting any counter-performance. At a later stage the sales chief might try to discover the (Vice-) President’s ‘weak points’, eg if he lives beyond his means. Only then, after a certain level of faith has developed, the sales chief might offer the minister to ‘help’ him, for instance, by paying off his loans, if the (Vice-) President’s will promote the procurement of arms from his company.

At that stage the ‘fed’ agent will often be willing to accept this offer without any further pressure, because he probably got used to his lifestyle and the financial support. However, if the certain agent still has scruples to comply, he can also be compelled to do so through a threat of disclosure, because the mere fact that he has received valuable benefits by an arms company will already constitute a disciplinary offence, cause a scandal and might force him to resign, *regardless* that no decision was unduely influenced so far. The ‘feeder’ can furthermore indeed carry out such a threat of disclosure credibly, because its consequences are generally less severe for him.⁸³ Consequently, the practice of ‘feeding’ is very dangerous, because it is often an important interim-step in respect of the development of corrupt relationships. Furthermore, ‘feeding’ destroys the trust of honest competitors and citizens in the constitutional state and the market economy and therefore contributes to an overall culture of corruption.

The reasons, why the practice of ‘feeding’ is a challenge for the criminal law, appear if one considers that the nature of corruption is, as aforementioned, an illegal *exchange* of any

⁸³ See detailed for the possibility of coercion Johann Graf Lambsdorff (note 49) 56 at 76.

gratification for an agent's decision, or at least an unilateral offer or a bilateral agreement to carry out such an exchange in the future.⁸⁴ Obviously, gratifications that are only given to an agent in order to build up trust and to pave the way for a future offence of corruption do not meet the requirements of this definition as they lack any reference to a counter-performance by the agent. Consequently, the criminal law cannot tie the verdict of illegality of the conduct to an illicit link between a gratification and the agent's decision as no decision is referred to at all.⁸⁵

For the same reasons and against the background of the explanations given earlier on 'material' and 'formal' attempts⁸⁶ it must be emphasised that the practice of 'feeding' cannot be judged as an attempt of an offence of corruption, eg the failed 'attempt' of a drunken driver to bribe a policeman to avoid a fine. Firstly, the *actus reus* of 'feeding' does not contain the expressive or at least implied demand for an unduly influenced decision as counter-performance for the gratification. Secondly, also the *mens rea* solely refers to the offered or given gratification, but naturally does not contain any reference to an unduly influenced decision as well. On the contrary, e.g. section 3 (general offence of corruption) of the PCCAA requires at least that '[...] the accused's aim was [...] to influence another [...]'.⁸⁷

As neither the *actus reus* nor the *mens rea* of 'feeding' refer to any decision of the agent to be influenced, the criminal law can consequently only refer to the illegality of the *gratification itself*, which makes the verdict of illegality much harder to pass than in respect of an illicit *quid quo pro* between a gratification and a certain decision. Although most public service and public laws generally prohibit any substantial gratifications to public officials, some perpetrators might defend themselves by arguing that they are old friends and thus cannot be prohibited from making each other donations or help each other in a financial crisis. With regard to public officials judges might still be able to reject such statements in many cases as incredible, because the integrity of the public service justifies a zero-tolerance approach.

However, with regard to agents within the private sector the due criminalisation of 'feeding' is more complicated, because egoism, profit-seeking and even greed is admissible to a

⁸⁴ See above pp 17 ff.

⁸⁵ See above p 22.

⁸⁶ See above p 22.

⁸⁷ See Jonathan Burchell and John Milton (note 2) 893.

greater extent than it is in the public sector. Although some principals might have restricted the reception of gratifications by their agents contractually, there are no general statutory rules existing. Particularly in established business relations businessmen often become friends and often make each other presents on certain occasions. For these reasons, the verdict of illegality is much harder to pass than in the public sector. This state of affairs might explain why §§ 331 and 333 of the German StGB criminalise ‘feeding’ exclusively with regard to public officials.⁸⁸

However, it must be considered that such presents between businessmen are only harmless, if the recipient is acting in a self-employed capacity as a *principal*, eg as the owner of a company, because he will never make a disadvantageous decision in order to get a bribe as he would harm his own interests.⁸⁹ If a business-partner gives a benefit to an *agent* of his client, the concrete risk arises that the agent secretly shifts the sides and starts to collude with the supplier to the disadvantage of his principal.

In theory, there are two legislative methods to design offences in order combat ‘feeding’ without criminalising legitimate presents or assistance among friends. One possibility might be to restrict the criminal liability of gratifications explicitly to cases, where there is a reasonable risk that the gratification offered or given to the agent will influence his discretion in the future to the disadvantage of his principal or society. Although this criterion might on the one hand be the right one from a material point of view, because it perfectly combats the typical danger of ‘feeding’, it will on the other hand cause unacceptable vagueness.

One should therefore give preference to a formal criterion that links the verdict of illegality to the interior relation between the agent and his principal. Such an offence should impose criminal liability on the ‘feeder’ as well as the agent, if the principal has not authorised the gratification given to his agent by the ‘feeder’. Consequently, authorised and thus legitimate donations between agents and business-partners of their principals are admissible, but secretly made gratifications will constitute an offence. For instance, section 10 of South Africa’s PCCAA, which establishes an offence of unauthorised gratifications in respect of public as well as private employees, has chosen this approach.⁹⁰

⁸⁸ See Appendix, p 68.

⁸⁹ See above p 11.

⁹⁰ See below p 51.

4. The avoidance of undesirable loopholes

It was already mentioned that only the basic structure of corruption is an illegal exchange between the briber and the bribee, but especially non-spontaneous, organised forms of corruption often deviate from this structure in that the bribe is not given directly to the bribee but to a third person and in that intermediaries are involved.⁹¹ The criminal law therefore must consider these practices in order to avoid loopholes.

a) Bribes given to third persons

In order to camouflage corruption, the briber and the bribee frequently agree that the briber should perform the bribe to a third person, for instance, to the agent's spouse or to a consulting company of the agent, which is often founded exclusively in order to camouflage bribes.⁹² Each offence that aims to combat corruption efficiently must therefore be designed in a manner that includes such conduct in order to avoid loopholes. In this regard it must be emphasised that it is not advisable for the criminal law to require that the bribee must at least benefit indirectly from the bribe given to the third person. The reason is that although the bribee will indeed often receive the bribe finally or benefit in another way, 'altruistic' forms of bribery, where the agent does not benefit personally at all, might sometimes also occur. The corrupt agent might, for instance, demand that the benefit should be given to a family member, e.g. he might demand a car or scholarship for his son. Additionally, the state then had to prove that the bribe has indirectly reached the bribee, or at least that this was intended, which might not always be a simple matter.

Consequently, the particular offences should simply stipulate that the bribe must be demanded or received by the agent for the benefit of himself or for the benefit of a third person or offered or given respectively by the briber in a corresponding manner.

b) The use of intermediaries

As already mentioned, bribe-payers often use intermediaries in order to benefit from their contacts and knowledge and, most of all, in order to delegate the risks of the offence due to the fact that they can blame the intermediary as a 'fall-guy' in the case of detection.⁹³ Consequently, there is a substantial practical need to criminalise corruption perpetrated with the use of intermediaries and the law should punish the briber, the intermediary and the bribee equally. Any offence aiming to combat corruption efficiently must therefore be

⁹¹ See above pp 14 f (sketch 3), 15 f (sketch 4).

⁹² See above pp 14 (sketch 3).

⁹³ See above p 15 f (sketch 4).

formulated in a manner that includes bribes being paid directly *and* indirectly by *any person*, so that bribes being paid by the briber personally as well as such paid by an intermediary on his behalf are included.

5. The *mens rea*: a major obstacle for the prosecution of corruption?

According to the rule in law *actus non facit reum, nisi mens sit rea* (the act is not wrongful unless the mind is guilty), it is a firmly established principle of criminal justice that there must be fault or *mens rea* on the part of the accused in order to be held criminally liable.⁹⁴ As strict liability is an exceptional, and arguably questionable, form of liability, that traditionally only applied to ‘regulatory’ or ‘public welfare offences’, the usual form of liability in statutory offences is intention.⁹⁵

With regard to offences combating corruption the required *mens rea* naturally depends on the formulation of the particular offence in question. However, there are also general challenges concerning the designing offences in respect of their *mens rea*, which should be considered by the legislature. The major challenge in this regard arises from the fact that the *actus reus* of most offences combating corruption is already completed at the early stage of a mere ‘material attempt’, for instance, when a bribe is offered to an agent and rejected by the latter.⁹⁶ Furthermore, bribes often do not consist of money, but are instead, particularly so far as organised, high-profile forms of corruption are concerned, often camouflaged as consulting fees or similar benefits, which are *seemingly* adequate in a social sense. For these reasons, the concrete *actus reus* of offences combating corruption does not always appear likewise harmful and blameworthy at first sight as the *actus reus* of other offences, e.g. theft, robbery, embezzlement or breach of trust. Consequently, the justification of the criminalisation of such conduct depends to a larger extent on the *mens rea*, ie on the idea of the perpetrator to link a benefit offered to or demanded by the agent with a corruptly influenced decision to be made by the agent. The aim of the agent and the briber to collude to the disadvantage of his principal and society on the whole represents the real harmful and blameworthy conduct, although it must not necessarily be performed.

The aforementioned state of affairs implies that the adequate form of *dolus* for offences combating corruption might be *dolus directus*.⁹⁷ This intention then referred on the one hand

⁹⁴ Jonathan Burchell and John Milton (note 2) 455.

⁹⁵ Jonathan Burchell and John Milton (note 2) 499.

⁹⁶ See above pp 17 (sketch 5), 22.

⁹⁷ See generally in respect of *dolus directus* Jonathan Burchell and John Milton (note 2) 461.

to the *actus reus* of the perpetrator, i.e. the offering, demanding, etc. of a bribe and, on the other hand, *without equivalent within the actus reus*, to his aim to induce (briber) or respectively perform (bribee) an unduly influenced decision. Section 1(1) of the Corruption Act 94 of 1992, for instance, required ‘the intention to influence the person upon whom such power has been conferred’. Consequently, the *mens rea* of such offences contains more elements than the *actus reus*, which is an example for a legislative technique called ‘offences with incongruent *mens rea*’ (Delikte mit überschießender Innentendenz) in the German criminal law.⁹⁸ In accordance with this view, Professor Snyman commented on the Corruption Act 94 of 1992 that it were a crime of ‘double intention’, which, firstly, relates to the giving (briber) or receiving (bribee) of the bribe and, secondly, to the intention to influence the bribee in a certain way in the future (briber) or to commit or omit to do any act in relation to such powers or duty (bribee).⁹⁹ Obviously, the second reference point of the intention will often be very hard to prove, because, firstly, it has no already completed equivalent in the *actus reus* and, secondly, perpetrators might state that they never indeed intended to perform (bribee) or induce (briber) a corruptly influenced decision.

However, there is an alternative to this concept of ‘double intention’ and the construction of ‘offences with incongruent *mens rea*’, which is able to solve this evidentiary problem adequately.¹⁰⁰ Starting point of this concept is the fact that corruption is basically an illegal exchange contract between the briber and the bribee,¹⁰¹ which is thus, like the conclusion of any treaty in the civil law, based on declarations of intention. With regard to the structure of declarations of intention it must be borne in mind that any such declaration persists of an expressively or tacitly uttered *objective part* and a corresponding intention to act and the intention to state something of legal consequence as its *subjective part*.¹⁰² It is crucial for the following alternative construction of the *actus reus* and *mens rea* of corruption to take into consideration that the extent of the obligations under any contract result from the *objective part* of the declaration of intention, even if it is implied and therefore requires interpretation. This declaration is furthermore already effective if the declaring person has the intention to act and the intention to state something of legal consequence. However, the intention underlying a transaction, which contains the intention to indeed conclude and perform the

⁹⁸ See above p 24.

⁹⁹ See CR Snyman (note 16) 382, 385.

¹⁰⁰ See detailed Oliver Pragal *Die Korruption innerhalb des privaten Sektors und ihre strafrechtliche Kontrolle durch § 299 StGB* (PhD, Bucerius Law-School, Hamburg 2005 [in print]) pp 232 ff.

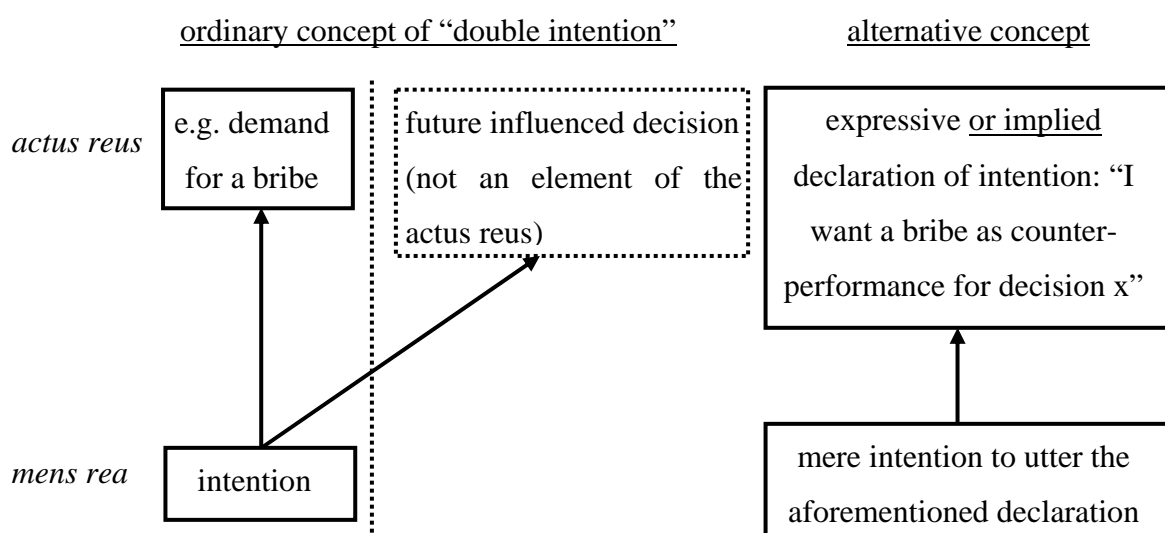
¹⁰¹ See detailed above pp 17 ff.

¹⁰² Helmut Heinrichs in *Palandt Kommentar zum Bürgerlichen Gesetzbuch* 64ed (München, 2005) Einf v § 116 Rn 1 ff.

concrete transaction in question is not required for the declaration of intention to be effective.¹⁰³

Consequently, with regard to corruption *already the actus reus* (eg the offering, demanding, agreeing to give or receive and the giving or receiving of a bribe) contains the expressive or tacit declaration of intention by the briber, the bribee or both to conclude an illegal exchange contract of a bribe for a decision. Thus, the *mens rea* only requires the intention to utter the aforementioned declaration of intention comparable with the intention to act and the intention of stating something of legal consequence in the civil law. However, according to this concept, the *mens rea* does not additionally require the intention to indeed perform (bribee) or induce (briber) a certain corruptly influenced decision in the sense of an offence with ‘incongruent *mens rea*’¹⁰⁴ or a ‘double intention’¹⁰⁵, which might be comparable to the intention underlying a transaction in the civil law. Instead, the *mens rea* solely relates to the *actus reus*, ie to the expressive or implied offer of or demand for a bribe as counter-performance for a certain decision of the agent. This link might impliedly even be made by the blinking of an eye. The following sketch juxtaposes these two concepts to design the *mens rea*.

sketch 6:



¹⁰³ Helmut Heinrichs (note 102) Einf v § 116 Rn 17.

¹⁰⁴ See above pp 24, 31.

¹⁰⁵ See CR Snyman (note 16) 382, 385.

This comprehension of the relation between the *actus reus* and the *mens rea* has the advantage that it eases the burden of proof for the state without establishing presumptions¹⁰⁶ and it excludes the defence of mental reservation, eg the plea that the perpetrator in accepting or offering the benefit did not in fact intend to perform or induce a corrupt decision at a later stage.¹⁰⁷ An accused could otherwise, for instance, successfully defend his conduct by pleading that he only offered or demanded a bribe in order to ‘test’ the other person’s integrity and, if necessary, would have reported him to the police. In accordance with this view Professor Snyman points out in respect of the Corruption Act 94 of 1992 that such appearance shall not constitute a valid defence.¹⁰⁸ However, this view is not consistent with the requirement of a ‘double intention’ regarding (1) the giving or receiving of a bribe and (2) the undue interference with the decision, which, according to Professor Snyman, also requires intention with regard to the performance of any act or omission by the agent.¹⁰⁹

The proposal to comprehend the relation of the *actus reus* and *mens rea* of corruption in accordance with the objective and subjective parts of declarations of intention in the civil law should, in view of the aforementioned advantages, therefore be given preference for the purpose of the interpretation of the ruling law and the design of new laws.

IV. An evaluation of the Prevention and Combating of Corrupt Activities Act

Against the background of the findings on the actual structure of corruption and the challenges arising from this structure for the criminal law, the PCCAA will now be analysed and commented in depth. Firstly, the historical background of the PCCAA will be described briefly. Secondly, general aspects of the Act will be assessed. Thirdly, it will be evaluated how the PCCAA copes with the aforementioned general technical challenges for laws against corruption.¹¹⁰ Fourthly, each individual offence as well as certain miscellaneous provisions of the Act will be commented. Finally, various shortcomings of the PCCAA will be mentioned.

1. The historical background of the PCCAA

Corruption was already penalised by the Roman law with regard to public officials and subsequently found its way from there via the Roman-Dutch law into South African law in

¹⁰⁶ See eg section 24 of the PCCAA that, basically, allows the inference that a benefit was the counter-performance for corrupt behaviour, if the benefit cannot be linked to a legal purpose. See detailed below pp 60 ff.

¹⁰⁷ See in this regard *Van der Westhuizen* 1974 4 SA 61 (C) 63B.

¹⁰⁸ CR Snyman (note 16) 385.

¹⁰⁹ CR Snyman (note 16) 382, 385.

¹¹⁰ See above pp 19 ff.

the form of the common-law crime of bribery.¹¹¹ However, this common-law crime of bribery could only be committed by or in respect of public officials but did not criminalise corruption in the field of private commercial relations, possibly because in a simple agrarian economy corrupt practices were viewed as part and parcel of the hazards of the market place.¹¹² Only when in the early 20th century industry rose and stock companies emerged in which the public invested the bribery sanction was extended to cover corruption within commercial relations through the Prevention of Corruption Act 4 of 1918.¹¹³ This Act was subsequently repealed and replaced by the Prevention of Corruption Act 6 of 1958. During this period common-law bribery and the statutory law existed side by side and supplemented each other.¹¹⁴

However, in 1992 the common-law offence of bribery was repealed – the only instance of a repeal of a common-law crime by the South African Legislature – by section 4 of the Corruption Act 94 of 1992, which replaced the former with a statutory provision intended to penalise corruption in a much wider sense.¹¹⁵ A couple of years after the Corruption Act of 1992 was promulgated, several role-players responded to an invitation from the Minister of Justice and Constitutional Development to provide comment on the practical implementation of the Corruption Act and identified several shortcomings. They criticised first of all that the Act was not user-friendly and that it is aimed at two persons, namely the payer and the receiver of the bribe, but does not cover the “go-between”.¹¹⁶ Various proposals were also received relating to the amendment of the Act, which included: (1) the common-law crime of bribery should be reinstated and extended to include corruption in the private sector, (2) the crime of corruption should be broadened to cover all agents, public or private, (3) the Act should apply extraterritorially in order to cover any gifts given or received outside our borders and, finally (4) the Act should create a crime when public officials are used or manipulated to commit irregularities.¹¹⁷

As a result, the Minister of Justice and Constitutional Development introduced the Prevention of Corruption Bill in Parliament on 25 April 2002, which aims to give effect to

¹¹¹ Jonathan Burchell and John Milton (note 2) 890; D Lambrechts (note 10) at 106.

¹¹² Jonathan Burchell and John Milton (note 2) 890.

¹¹³ Ibid.

¹¹⁴ D Lambrechts (note 10) at 106.

¹¹⁵ Jonathan Burchell and John Milton (note 2) 891.

¹¹⁶ See Parliamentary Monitoring Group ‘Combating Corruption in South Africa’ sub 2.2 Legislative Reform, <http://www.pmg.org.za/docs/2004/appendices/040825combating.htm> (accessed 10.8.2005).

¹¹⁷ Ibid.

the recommendations that emanated from a total review of the Corruption Act of 1992. The underlying concept is to create a comprehensive Prevention of Corruption Bill rather than to amend the present Act on a piece-meal basis.¹¹⁸ Additionally, the new anti-corruption legislation was designed to give effect to the obligations of South Africa as a party to the United Nations Convention against Corruption adopted by the General Assembly on 31 October 2003.¹¹⁹ The Act must also be seen in the broader legislative context of the Prevention of Organised Crime Act No. 121 of 1998 and the Financial Intelligence Centre Act No. 38 of 2001, which likewise aim at combating typical forms of ‘white-collar’-crimes.

The Prevention of Corruption Bill was finally enacted and came into force on 27 April of 2004 as the PCCAA. The Act follows the trend of the so-called ‘unbundling’ in modern international legislation and apparently reinstates the common-law crime of bribery as it repealed the Corruption Act 94 of 1992, which itself had repealed the common-law crime of bribery. These two aspects will subsequently be discussed more in depth.

2. General aspects of the PCCAA

Following, various general aspects of the PCCAA, particularly the reinstatement of the common-law crime of bribery, the structure of the Act and its strategy of ‘unbundling’ and the common structure of the individual offences will be dealt with.

a) The reinstatement of the common law offence of bribery

As aforementioned the PCCAA repealed the Corruption Act 94 of 1992, which then had repealed the common-law crime of bribery. Although the PCCAA does not contain a specific reinstatement of bribery, the logical inference is that the repeal of an Act that repealed the common-law must reinstate the common-law crime of bribery.¹²⁰

However, Lambrechts points out that sections 12(2)(a) of the Interpretation Act 33 of 1957 provides: ‘Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not revive anything not in force or existing at the time at which the repeal takes effect [...]’. Lambrechts further emphasises that the PCCAA does not contain any indication that the common-law crime of bribery has been revived and claims that, on the contrary,

¹¹⁸ Ibid.

¹¹⁹ Jonathan Burchell and John Milton (note 2) 892.

¹²⁰ Jonathan Burchell and John Milton (note 2) 891.

section 10 of the PCCAA was in essence a replacement of the common-law crime of bribery, which had, in effect, usurped the latter.¹²¹

These arguments must be rejected, because Lambrechts overlooks that section 12(2)(a) of the Interpretation Act 33 of 1957 does not require that the ‘contrary intention’ of the legislature must be explicitly appear in the wording of the Act in question. With regard to the PCCAA it must be emphasised that the intention of the legislature to revive the common-law crime of bribery was unequivocal. This follows from section 22 of the Prevention of Corruption Bill¹²² which clearly stipulates that ‘*the common law crime of bribery [...] is hereby reinstated*’. Additionally, numerous statements made during the legislation process indicate the same intention.¹²³ Subsequently, it will be analysed whether the reinstated common-law offence of bribery fits into the broader system of the PCCAA.

b) An overview of the structure of the PCCAA

The PCCAA is a piece of legislation that is indeed ‘awesome in its extent’¹²⁴. While the now repealed Corruption Act of 1992 consisted of only five sections, the new Act consists of 37 rather explicit sections, which is indeed ‘a clear indication that the intention of the legislature was to increase its scope’¹²⁵. The German StGB has, in comparison, only seven sections concerning corruption in the public (§§ 108b, 108e, 331-334 StGB) as well as in the private sector (§ 299 StGB).¹²⁶

The PCCAA is subdivided in seven chapters. While the first chapter merely contains definitions and interpretations, the second chapter clearly is the heart of the Act as it contains a general offence of corruption (section 3) and several specific, ‘unbundled’

¹²¹ D Lambrechts (note 10) at 106 f.

¹²² Published in Government Gazette No. 23336 on 18 April 2002.

¹²³ See meeting of the Security and Constitutional Affairs Select Committee on 11 February 2004, voting on the Prevention and Combating of Corrupt Activities Bill available at <http://www.pmg.org.za/viewminute.php?id=3869> (accessed 23 March 2005); Summary of the Public Service Anti-Corruption Strategy, <http://www.pmg.org.za/docs/2003/appendices/SAGOVT.htm> (accessed 23 March 2005); Meeting of the Justice and Constitutional Development Portfolio Committee on 24 November 2003 available at <http://www.pmg.org.za/viewminute.php?id=3484> (accessed 23 March 2005); Parliamentary Monitoring Group ‘Combating Corruption in South Africa’ (note 116); Explanatory Memorandum: Prevention of Corruption Bill, Recommendations by the Director of Public Prosecutions: Witwatersrand Local Division available at <http://www.pmg.org.za/docs/2002/appendices/020422memo.htm> (accessed 10 August 2005); Statement by G Nel, Department of Justice and Constitutional Development available at <http://www.pmg.org.za/viewminute.php?id=3834> (accessed 10 August 2005); Institute for Security Studies ‘Programme of the Anti-Corruption Strategies Seminar on 29-30 November 2004 in Pretoria’ at 2.

¹²⁴ Lisa Swaine ‘Corruption: potentially terrifying Consequences’ (2005) 5 *Without Prejudice* 22 at 22.

¹²⁵ D Lambrechts (note 10) at 107.

¹²⁶ See Appendix, p 68.

offences (sections 4-19). Sections 4-9 relate to *specific persons* (public officers, foreign public officials, agents, members of the legislative authority, judicial officers and members of the prosecution authority), section 10 relates to *unauthorised gratifications* and sections 11-16 relates to *specific matters* (witnesses, contracts, auctions, sporting events and gambling games and games of chance). Furthermore, section 17-19 (part 5) constitutes miscellaneous offences relating to public officers holding interests in business relations of the public body, unacceptable conduct relating to witnesses and the obstruction of investigations.

Chapter three gives the National Director of Public Prosecutions the competence to investigate a person and his property if that person maintains a disproportional standard of living or possesses disproportional ('unexplained') wealth. Chapter four, above all, establishes a presumption that basically allows the inference that a benefit given to another was the counter-performance for corrupt behaviour, if it cannot be linked to any legal purpose. The penalties for the offences and the establishment of a register for convicted persons and their enterprises are laid down in chapter five and six. Finally, chapter seven rules miscellaneous matters, above all it imposes a duty to report corrupt transactions on certain persons with authority, who can even be held criminally liable for violations and establishes extraterritorial jurisdiction under certain conditions.

c) **The strategy of 'unbundling'**

The PCCAA 'unbundles' the crime of corruption by creating a broad all-encompassing offence of corruption and criminalising specific corrupt activities in various spheres of life.¹²⁷ The strategy of 'unbundling' generally deserves approval, because it allows designing specific offences in accordance with the practical needs of corrupt conduct in various spheres of life. Particularly, it is possible to fix the illegality of the exchange between the briber and the bribee much more precisely than a general offence would allow.¹²⁸

However, the realisation of this strategy by the PCCAA deserves some critique. At first, the creation of a general offence of corruption in addition to specific offences is highly problematic, because such an offence runs the risk of being critically vague and its application depends to an undue extent on the discretion of the judge. In this regard a

¹²⁷ Lisa Swaine (note 124) at 22.

¹²⁸ See with regard to the challenge of fixing the illegality of the exchange pp 19 ff.

German scholar pointed out: ‘The attempt to formulate a general offence combating offence is hopeless: such an offence would merely protect the public morality’¹²⁹ Such a ‘catch all-offence’¹³⁰ also runs the risk of closing *intended* gaps of the specific offences. Furthermore, the PCCAA transforms the strategy of ‘unbundling’ only half-heartedly as a number of specific offences, namely sections 4(2), 5(2), 7(2), 8(2), 9(2), include the general and rather vague definition of corrupt behaviour as stipulated by section 3(i)-(iv).¹³¹ As this allows convicting a person ‘through the back door’ by recourse to the general definition of corrupt behaviour within the context of a specific offence, even if the perpetrator has not violated any specific duties, the PCCAA’s strategy of ‘unbundling’ is thwarted.

Furthermore, the systematic relation among the specific offences appears to be not fully consistent, because certain offences relating to specific persons and matters partially overlap, which is not desirable, because it complicates the application of the Act. At first, the reinstatement of the common-law crime of bribery appears to be superfluous in view of the specific offences, the ‘catch-all’-offence of section 3 and section 10 (unauthorised gratifications), which ‘has, in effect, usurped the common law crime of bribery’¹³². As these statutory offences of the PCCAA already cover any imaginable form of corruption, there is no need for the reinstatement of the common-law crime of bribery.

Furthermore, it is far from clear, why there is any need for the general offence of corruption as stipulated by section 3 in addition to section 6, which covers *all agents* and thus likewise provides a general offence of corruption. Consequently, sections 3, 4, 6, 10, 12, 13 of the PCCAA on the one hand overlap partially with each other and on the other hand overlap with the common-law crime of bribery. If, for instance, the mayor of a city is bribed by a construction company in order to promote a contract to the latter, the common-law crime of bribery as well as section 3, 4, 6 (any ‘public official’ is also an ‘agent’ of the state) and section 12 of the PCCAA would be fulfilled. This impacts negatively on the user-friendliness of the PCCAA and shows that the Act has pushed the generally laudable strategy of ‘unbundling’ too far.

¹²⁹ See Klaus Volk ‘Diskussionsbeitrag’ in Deutscher Juristentag (ed) *Verhandlungen des 61. Deutschen Juristentages. Karlsruhe 1996. Band II/2. Sitzungsberichte – Diskussion und Beschlussfassung* (München, 1996) L 105 at 105 f.

¹³⁰ Maryann Middleton ‘No Escape from the Imperative to blow the Whistle’ (2004) 4 *Without Prejudice* 21 at 21.

¹³¹ See for a detailed analysis of this definition below pp 39 ff.

¹³² D Lambrechts (note 10) at 107.

d) The common structure of the offences

The majority of the offences as stipulated by Chapter 2 of the PCCAA (namely sections 3, 4, 6, 7, 8, 9, 12, 15, 16) share a common structure, which rules in its subsections (a) the conduct of the bribee and in its subsections (b) the conduct of the briber with regard to the bribe, ie the demanding, accepting, offering, giving etc. of gratifications. The wording continues as follows:

*“in order to act, personally or by influencing another person so to act, in a manner —
(aa) that amounts to the illegal [...] exercise, carrying out or performance of any powers, duties or functions [...]”*

This legislative approach is not recommendable, because the equivocal conjunction ‘*in order to*’ gives the impression that subsection (aa) either exclusively relates to the previous subsection (b), which refers to the briber, or that it relates to subsection (a), which refers to the bribee *and* likewise subsection (b). However, against the background that corruption basically means that a decision or certain behaviour of an agent is ‘bought’,¹³³ both interpretations do not make sense, because the “*illegal exercise [...] of any powers, duties or functions*” can consequently solely refer to the (targeted or promised) behaviour *of the bribed agent* (to subsection (a)).

This legislative approach thus fails to choose a precise, unequivocal formulation of the law, which is particularly important in the field of criminal law. This aim can easily be reached by splitting the offences in two subsections that relate separately to the bribee and the briber as the Corruption Act 94 of 1992 and the German StGB do.¹³⁴

3. The dealing of the PCCAA with the technical challenges for laws combating corruption

Next it will be examined how the PCCAA deals with the above mentioned technical challenges for laws combating corruption.¹³⁵

a) The approach of the PCCAA to fix the illegality of the corrupt exchange

In order to comprehend the approach of the PCCAA to fix the illegality of the corrupt exchange the recurring formulation used in most of its offences, which is ‘more or less a

¹³³ See above pp 17 ff.

¹³⁴ See for instance section 1 of the Corruption Act 94 of 1992 and §§ 299, 331-335 StGB (Appendix, p. 68).

¹³⁵ See above pp 17 ff.

repetition of section 1 of the now repealed Corruption Act 94 of 1992¹³⁶ and which describes the bribee's counter-performance, is of central meaning. This formulation reads as follows:

'[...] in order to act, personally or by influencing another person so to act, in a manner —

(i) that amounts to the—

(aa) illegal, dishonest, unauthorised, incomplete, or biased; or

(bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

(ii) that amounts to—

(aa) the abuse of a position of authority;

(bb) a breach of trust; or

(cc) the violation of a legal duty or a set of rules;

(iii) designed to achieve an unjustified result; or

(iv) that amounts to any other unauthorised or improper inducement to do or not do anything,

is guilty of the offence of corruption.'

At first, it must be emphasised that the initial phrase '*in order to*' makes clear that the subsequently described behaviour of the bribee must only be part of the offer, demand or agreement of the briber, bribee or both respectively, but it is not required to be performed indeed.¹³⁷

With regard to the first subsection (b)(i) it must be said that its reference to '*the exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation*' generally deserves approval as it practically includes any principal-agent-relation that might be affected by corruption. It also refers to any applicable source of law as it includes the violation of 'exterior' ('*constitutional*' and '*statutory*') as well as 'interior' ('*contractual*') rules in order to fix the illegality of the exchange,¹³⁸ because it refers, *inter alia*, to statutory and contractual obligations. However, this formulation also deserves critique, because many

¹³⁶ D Lambrechts (note 10) at 110.

¹³⁷ See further section 25(a), (b) of the PCCAA, which explicitly rule out defences regarding this matter.

¹³⁸ See above pp 19 ff.

constitutional, statutory, contractual or other legal obligations do not deal in any sense with the delegation of tasks and authority from a principal to an agent. The *'illegal, dishonest, unauthorised, incomplete, or biased'* exercise, etc. of such *'power', 'duty', 'function'* or *'obligation'* as stipulated by subsection (b)(i)(aa) also overlaps perfectly with *'the violation of a legal duty or a set of rules'* as stipulated by subsection (b)(ii)(cc).

Furthermore, both formulations are problematic and too broad, because they fail to restrict the violation of the duty to principal-agent-conflicts. It is, for instance, also a statutory obligation or duty under road traffic regulations not to exceed the maximum passenger capacity of cars. Consequently, a hitchhiker who persuades the driver of an already fully occupied car to give him a lift by offering him to pay a share of the fuel would be liable for corruption, because this represents a *'gratification'* given with the aim to make the driver *'violate a legal duty'*. Against the background that the nature of corruption is a special principal-agent-conflict¹³⁹ and in view of the fact that the said driver is exclusively responsible to himself, this result appears to be highly doubtful and such an offence is, in view of the existing liability for the violation of road traffic violations, also superfluous.

Subsection (b)(i)(bb) deserves, on the contrary, unreserved approval, because it requires that the information or the material which is *'misused'* or *'sold'* must be acquired *'in the course of'* the aforementioned powers, duties, functions or duties. The same applies to subsection (b)(ii)(aa) provided that one interprets *'position of authority'* in the sense that it relates to agents who possess a power of authority granted by their principals. Subsection (b)(ii)(bb) impliedly requires such a duty of loyalty to a principal, but appears to be a superfluous offence, because breach of trust and respectively incitement to the latter is already a criminal offence.

Subsection (b)(iii), which describes the manner in which the bribee is supposed to act as *'designed to achieve an unjustified result'*, is also problematic. At first, the formulation *'unjustified result'* is critically vague and grants any judge an undue discretion, which allows punishing not only illegal, but also mere immoral behaviour. For instance, a guest of a restaurant who gives a tip to the waiter while he waits to be seated in order to get a certain table, which is already reserved, would be liable to corruption in terms of section 3(b)(iii) and 6(b)(ii) of the PCCA. Although the waiter is acting as an agent of the owner of the

¹³⁹ See above pp 9 ff.

restaurant and this case is in principle similar to serious and punishable forms of corruption, it appears doubtful whether such conduct indeed represents criminal behaviour.

Finally, subsection (b)(iv) appears to be completely failed as it constitutes an offence, if ‘*any person [the bribee] accepts [...] any gratification from any other person in order to act, personally or by influencing another person so to act, in a manner that amounts to any other unauthorised or improper inducement to do or not do anything*’. As the behaviour of *the bribee* must amount to an ‘*unauthorised or improper inducement*’, this means, logically, that *a third person* must be induced by the bribee ‘*to do or not do to anything*’, which does not make much sense. However, it appears that this was not the intention of the legislature, but is instead a result of the structure of the offences, which do not rule the criminalised conduct separately for the briber and the bribee.¹⁴⁰ It is in any cases remarkable that only the ‘*inducement*’, but not the actual behaviour of the third person is required to be ‘*unauthorised*’ or ‘*improper*’, but that on the contrary, any behaviour or omission is sufficient.

Altogether, it is a merit of the PCCAA that it refers to different sources of law (‘*constitutional, statutory, contractual or any other legal obligations*’) and that it tries to specify the corrupt behaviour of the bribee. In comparison, §§ 332, 334 of the German StGB, which relate to corrupt activities of public officials, only stipulate that the public official must violate an official duty.¹⁴¹ However, it is a major flaw of the PCCAA that it fails to restrict the circle of duties in question to such duties, which derive from the relationship between the agent and his principal. Furthermore, terms like, for instance, ‘*unjustified result*’ are critically vague as they extend corruption beyond illegal exchanges to mere contraventions of the public moral.

In comparison, the definition of ‘corruptly’ as stipulated by section 1(iv) of the Prevention of Corruption Bill was significantly shorter and more precise:

“*corruptly*” means in contravention of or against the spirit of any law, provision, rule, procedure, process, system, policy, practice, directive, order or any other term or condition pertaining to—

(a) *any employment relationship;*

¹⁴⁰ See above p 39.

¹⁴¹ See Appendix, p 68.

- (b) any sporting event;
- (c) any agreement; or
- (d) the performance of any function in whatever capacity.’

b) The approach of the PCCAA to criminalise ‘material attempts’

The approach of the PCCAA to criminalise ‘material attempts’ as ‘formal’ completed offences¹⁴² deserves unreserved approval. The PCCAA covers not only bilateral agreements between the briber and the bribee to commit an offence of corruption and the factual giving or receiving of a bribe, but furthermore, by virtue of the interpretations stipulated in section 2(3)(a), *inter alia*, the demanding of a bribe and offering of a bribe respectively. In comparison, §§ 299, 331-334 StGB similarly cover the demanding (*fordern*), agreeing to receive (*versprechen lassen*) or receiving (*annehmen*) of a bribe by the bribee or the offering (*anbieten*), promising (*versprechen*) or giving (*gewähren*) of a bribe by the briber respectively.

c) The approach of the PCCAA to criminalise the contacting-phase

Any offence of the PCCAA requires some sort of counter-performance by the bribee and thus there is no offence that immediately aims at combating the practice of ‘feeding’, where the agent performs no counter-performance at all. However, section 10 of the PCCAA relates to unauthorised gratifications given to parties to an employment relationship and eases the requirements concerning the counter-performance of the bribee. As the approach of section 10 to combat ‘feeding’ also concerns its exact scope, this matter will be dealt with comprehensively below.¹⁴³

d) The approach of the PCCAA to avoid undesirable loopholes

The PCCAA deals convincingly with the practice that bribes are often given to third persons in order to camouflage corrupt activities,¹⁴⁴ because any of its offences contains the wording ‘*whether for the benefit of himself or herself [the bribee] or for the benefit of another person [e.g. a spouse]*’ or ‘*whether for the benefit of that person [the bribee] or another person [e.g. a spouse]*’ respectively. This formulation almost completely equates to the wording of the offences as stipulated by the German StGB, which also cover bribes that are demanded, agreed or given for the benefit of the briber or for the benefit of a third person.¹⁴⁵

¹⁴² See above pp 22 ff.

¹⁴³ See below pp 51 ff.

¹⁴⁴ See above pp 14(sketch 3), 29.

¹⁴⁵ See Appendix, p 68.

The PCCAA further deals comprehensively with the frequent use of intermediaries¹⁴⁶ as any of its offences includes gratifications received from ‘any person’ in respect of the bribee, which includes such received from a middleman. In respect of the briber the PCCAA further covers gratifications given ‘whether for the benefit of that person [the bribee] or another person, in order to act, personally or by influencing another person so to act [...]’, which includes bribes given to the bribee via an intermediary.

e) The approach of the PCCAA to tackle problems regarding the *mens rea*

While the general definition of corruption as stipulated by the Corruption Act 94 of 1992 made specific reference to intention, section 3 as well as the specific offences of the PCCAA do not specifically refer to intention but instead use the words ‘in order to act’.¹⁴⁷ As these words ordinarily mean ‘with a view to’ or ‘for the purpose of’, this wording implies indeed *dolus directus* to induce (briber) or perform (bribee) a corruptly influenced decision.¹⁴⁸

Furthermore, the PCCAA follows the concept of ‘double intention’ or ‘incongruent *mens rea*’¹⁴⁹, which means that the intention must relate (1) to the giving or receiving of the gratification and (2) to a future corruptly influenced decision. This follows by an *argumentum e contrario* from the existence of section 25(b), which expressively excludes the defence that the bribee accepted the gratification without intending to perform the act in relation to which the gratification was given. If the PCCAA followed the alternative legislative concept, which does not require a ‘double intention’, there would be no need for the provision of section 25(b), because this legal consequence would already result from general rules due to a lack of ‘double intention’ or ‘incongruent *mens rea*’, for instance, if a perpetrator credibly pleaded that he merely wanted to ‘test’ the other part.¹⁵⁰

The PCCAA thus fails to give preference to the alternative legislative approach in respect of the structure of the *actus reus* and *mens rea*, which is based on the fact, that corruption is the conclusion, or at least the attempt respectively, of an illegal exchange contract between the briber and the bribee.¹⁵¹ The *actus reus* and *mens rea* should therefore instead be designed in accordance with the objective and subjective parts of declarations of intention in the civil law, in order to bring about a relaxation of proof and in order to rule out the defence of

¹⁴⁶ See above pp 15 (sketch 4), 29.

¹⁴⁷ Jonathan Burchell and John Milton (note 2) 893.

¹⁴⁸ Ibid.

¹⁴⁹ See above pp 22 ff, 31 ff.

¹⁵⁰ See above p 33.

¹⁵¹ See above pp 39 ff.

mental reservation.¹⁵² Furthermore, this concept also fits better with the factual conduct of corruption, because the proposed or agreed link between the bribe and the particular decision is, logically, even if it is only uttered impliedly, an element of the *actus reus*.

4. An evaluation of the offences and miscellaneous provisions of the PCCAA

The following evaluation of the PCCAA will firstly focus on commenting on its most important offences within a comparative consideration of the approach of the German StGB. Afterwards, miscellaneous provisions of the PCCAA, for instance the duty to report corrupt activities, will be dealt with.

a) An evaluation of the offences of the PCCAA

Following, the general offence of corruption (section 3), the offences relating to specific persons (sections 4-9), the offence relating to unauthorised gratifications (section 10), the offences relating to specific matters (sections 11-16) and the miscellaneous offences of the Act (sections 17-19) will be evaluated. The restriction of the evaluation to these offences appeared in view of the great extent of the PCCAA inevitable and at the same time appropriate, because the aforementioned offences of the Act have the greatest practical relevance.

aa) Section 3: general offence of corruption

It was already mentioned that the establishment of a general offence of corruption is very problematic. Firstly, such an offence indeed runs the risk of ‘merely protecting the public morality’¹⁵³. Secondly, in respect of the PCCAA, a general offence of corruption might close *intended* gaps of its specific offences ‘through the back door’.¹⁵⁴

With regard to the corrupt behaviour of the bribee, which is stipulated by subsections (i)-(iii), it can be referred to the explanations made above to a large extent as most of the specific offences have this formulation in common.¹⁵⁵ This formulation is partially critically vague and too broad, particularly because section 3 does not require a principle-agent-relation. It must be emphasised that the Justice and Constitutional Development Portfolio Committee also raised concerns in this respect, because the Chair considered that subsection (b)(i) ‘should be restricted as it is very widely formulated and could thus be

¹⁵² See above pp 31 ff.

¹⁵³ See Klaus Volk ‘Referat’ in Deutscher Juristentag (ed) *Verhandlungen des 61. Deutschen Juristentages. Karlsruhe 1996. Band II/1 (Sitzungsberichte – Referate und Beschlüsse* (München, 1996) L 35 at L 50; Klaus Volk (note 129) at L 105 f.

¹⁵⁴ See above p 37.

¹⁵⁵ See above pp 39 ff

interpreted to include every relation instead of only those of a statutory or contractual nature'.¹⁵⁶ The questionable result is, for instance, that any person that receives a benefit for the perpetration of an offence (eg an ordered murder) is not only liable for this offence, but liable for corruption in terms of section 3 of the PCCAA as well.

bb)Section 4: corrupt activities relating to public officers

Section 4 of the PCCAA is of great practical relevance as it covers corrupt activities relating to public officers, which include, by reference to section 1(xxiii), practically any person within the public service. This offence criminalises the demand for, receiving of or agreement to receive a bribe by a public officer as well as equivalent conduct of the briber in respect of certain behaviour of the former. Section 4 then describes the corrupt behaviour of the public officer by repeating the wording of section 3 (i)-(iv), which is regrettable, because the reference to this broad and rather vague definition thwarts the attempt to specify this definition through 'unbundling'.¹⁵⁷ Furthermore, subsection (2) specifies this behaviour in respect of the peculiarities of the public service, including, *inter alia*, the 'voting at any meeting of a public body' and 'the aiding assisting or favouring any particular person in the transaction of any business with a public body'.

These concretisations deserve almost unreserved approval as they guarantee the meeting of the constitutional requirements of clarity and definiteness regarding criminal offences. However, section 4 (2)(b) criminalises the mere '*performing [...] of any official functions*' against a gratification. This appears to be unsystematic as it is the only reference of section 4 to *completely legal conduct* of the public officer. It must be emphasised that there can be no doubt that any link between a gratification given to a public officer in respect of the performance of his duties threatens the integrity of the public service and thus should be punished. Nevertheless, there is a substantial difference between the legal and illegal performance of such duties, which should be considered by a statutory mitigation of the sentence. The German StGB, for instance, pays due consideration to this circumstance in that it differentiates between bribes given in respect of the legal performance of official duties (§§ 331, 333 StGB, so-called 'Vorteilsannahme' [acceptance of benefits] and 'Vorteilsgewährung' [granting of benefits]) and a violation of duties (§§ 332, 334 StGB, so-

¹⁵⁶ See Deliberations of the Justice and Constitutional Development Portfolio Committee on 18 November 2003 available at <http://www.pmg.org.za/viewminute/php.?id=3458> (accessed 5 August 2005).

¹⁵⁷ See above pp 37, 39 ff, 45.

called ‘Bestechlichkeit’ [corruptibility] and ‘Bestechung’ [corruption]) as an aggravating circumstance.¹⁵⁸

cc) Section 5: corrupt activities relating to foreign public officers

Section 5, which criminalises bribing of foreign public officers, gives effect to the obligations of South Africa deriving from the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions adopted by South Africa at the OECD on 21 November 1997.¹⁵⁹ Although the establishment of this offence is certainly useful, it is puzzling, why it specifies the corrupt behaviour of the public official deviating from section 4(2) and why it exclusively criminalises the briber. This restriction is incomprehensible as section 35 establishes extraterritorial jurisdiction under certain conditions and thus generally allows convicting foreign citizens. However, a reason for a differentiation between foreign public officers and foreign citizens is not apparent.

dd) Section 6: corrupt activities relating to agents

Section 6 criminalises corrupt activities relating to agents and thus covers, by reference to section 1(i), the bribing of ‘*any authorised representative who acts on behalf of his or her principal and includes a director, officer, employee or other person authorised to act on behalf of his or her principal, and “agency” has a corresponding meaning*’. With regard to the corruptly influenced behaviour of the agent, section 6 corresponds to the general offence of corruption as stipulated by section 3. The critique made in respect of section 3 and 4 therefore likewise applies to section 6.¹⁶⁰

With regard to the circle of qualified perpetrators some aspects of section 6 deserve critique. With regard to the briber it is first of all puzzling, why section 6 not only covers ‘*any person*’ (subsection (b)(ii)), but furthermore includes ‘*any agent*’ (subsection (a)(ii)), because ‘*any person*’ logically includes ‘*any agent*’. Although the criminalisation of agents as bribe-payers deserves unreserved approval as companies often delegate bribing to certain employees or external intermediaries, section 6(a)(ii) is alongside subsection (b)(ii) superfluous.

With regard to the bribee even more serious concerns must be expressed concerning the qualified perpetrators, because section 6(a)(ii) and (b)(i) criminalise bribes given by an

¹⁵⁸ See Appendix, p 68.

¹⁵⁹ See Deliberations of the Justice and Constitutional Development Portfolio Committee (note 156).

¹⁶⁰ See above pp 45 f

agent to *'any other person'*. At first, it is puzzling, why section 6 then does not likewise cover bribes given *by* any person to any person, because whether or not the briber is an agent does not matter in respect of the injustice. However, more important is that section 6, like section 3, therefore extends the liability for 'corruption' beyond principal-agent-conflicts.¹⁶¹ If the hitchhiker in the example given above¹⁶² who 'bribes' a driver in order to get a lift in an already fully occupied car were an agent (eg an employee), section 6(a)(ii) and (b)(i) would likewise be fulfilled.

Finally, section 6 must be criticised, because it does not fit into the systematic of the PCCAA. As section 6 refers to *all agents*, which includes public officers as well as managers and employees in the private sector, it is actually the 'real', general offence of corruption and should therefore replace section 3. However, the arguments against such a 'catch-all'-offence alongside several specific offences, ie the closing of intended gaps, equally apply in respect of section 6.

ee) Section 7: corrupt activities relating to members of legislative authority

Corruption in relation to members of the legislative authority is also a widespread phenomenon,¹⁶³ and it thus deserves approval that section 7 is specifically designed to tackle this problem. In order to serve this purpose, section 7 on the one hand integrates the common description of corrupt behaviour as stipulated by section 3 (i)-(iv), and on the other hand enumerates in subsection (2) certain conduct of the bribee as counter-performance for the bribe, which is specifically designed in respect of members of the legislative authority. This conduct includes:

(a) absenting himself or herself from;

(b) voting at any meeting of;

(c) aiding or assisting in procuring or preventing the passing of any vote in;

(d) exerting any improper influence over the decision making of any person performing his or her functions as a member of; or

(e) influencing in any way, the election, designation or appointment of any functionary to be elected, designated or appointed by;

¹⁶¹ See above pp 40 ff.

¹⁶² See above p 41.

¹⁶³ See above p 6.

the legislative authority of which he or she is a member or of any committee or joint committee of that legislative authority.

The scope of section 7 deserves unreserved approval, because it properly covers typical forms of corruption that affect the proper functioning of the legislative, particularly through so-called ‘lobbying’. Section 7 has the merit that it extends the liability beyond the mere buying of votes in a final voting on a law in parliament, to ‘*committees or joint committees of that legislative authority*’. The practical importance of this extension cannot be overestimated, because the major target for lobbyism is already the drafting of new laws in parliamentary committees. The reason, why lobby-groups predominantly aim at this early stage of the legislation-process is that only at this stage they either are able to influence the exact shape of the law or even prevent the law from being proceeded to parliament at all.

On the contrary, § 108e StGB (‘Abgeordnetenbestechung’ [bribing of Members of Parliament]) of the German StGB solely criminalises the bribing of delegates of the European Parliament or any parliament of the German federation or a province *in respect of their voting in parliament* but fails to relate to parliamentary committees and thus shows a serious loophole.¹⁶⁴

ff) Section 8: corrupt activities relating to judicial officers

As mentioned above corruption can naturally also affect the judiciary¹⁶⁵ and consequently the criminal law has a duty to tackle this phenomenon. Section 8 of the PCCAA covers corrupt activities relating to judicial officers, which includes, by reference to section 1(xi) practically any judge and adjudicator. Section 8 describes the corrupt behaviour of the judicial officer on the one hand in accordance with the general definition of section 3(i)-(iv) and on the other hand as specified by section 8(2). Thus, section 8 of the PCCAA also suffers from the common disadvantage of most of its specific offences in that the general definition of their subsections (i)-(iv) levels the sharp outline of their subsection (2). Section 8(2) reads as follows:

Without derogating from the generality of section 2(4), “to act” in subsection (1) includes—
(a) performing or not adequately performing a judicial function;

¹⁶⁴ See Appendix, p 68.

¹⁶⁵ See above p 6.

- (b) *making decisions affecting life, freedoms, rights, duties, obligations and property of persons;*
- (c) *delaying, hindering or preventing the performance of a judicial function;*
- (d) *aiding, assisting or favouring an particular person in conducting judicial proceedings or judicial functions;*
- (e) *showing any favour or disfavour to any person in the performance of a judicial function;*
or
- (f) *exerting any improper influence over the decision making of any person, including another judicial officer or a member of the prosecuting authority, performing his or her official functions.*

This enumeration covers comprehensively any form of corrupt activity that might occur in respect of judicial officers. However, section 8(2)(a) and (b) also criminalise the mere ‘performing [...] of a judicial function’ or ‘making of decisions affecting life [...] of other persons’ respectively, which includes *completely lawful conduct*. Thus section 8(2) (like section 4(2)) equates completely legal conduct with the illegal conduct as described in the remaining subsections instead of stipulating a statutory mitigation of punishment.¹⁶⁶

gg) Section 9: corrupt activities relating to members of the prosecuting authority

As section 9, which relates to members of the prosecuting authority, is quite similarly designed like section 8, it presents basically the same preferences and weaknesses as the latter. On the one hand section 9(2) deals convincingly with specific forms of corrupt behaviour relating to members of the prosecuting authority, for instance the delaying of a prosecutorial function (section 9(2)(b)). On the other hand section 9(1) also integrates the general description of corrupt behaviour as stipulated by section 3 and its subsection (2)(a) also equates the *legal* performing of prosecutorial functions with the *illegal* performance of such duties. Finally, one must consider that section 24(2) provides a useful presumption regarding the *mens rea*. If for example a prosecutor is charged with an offence involving the acceptance of a gratification arising from the arrest of any person for an alleged offence, it is not necessary to prove that the accused believed that the alleged offence had been committed.¹⁶⁷

¹⁶⁶ See above p 46.

¹⁶⁷ See in respect of the presumptions also below p 60.

hh)Section 10: unauthorised gratification by or to party in an employment relationship

The offence of receiving or offering unauthorised gratifications of section 10 is an offence *sui generi* in comparison to the other offences of the act, which is already indicated by the fact that it is situated separately in part 3 of the PCCAA. Section 10 relates to any person who is party to an employment relationship, which includes, by reference to section 1(xvii), ‘any person who in any manner assists in carrying on or conducting the business of an employer’. The broadness of this definition thus includes employees in the public as well as in the private sector.¹⁶⁸

Section 10 describes the counter-performance of the bribee as ‘doing any act in relation to the exercise, carrying out or performance of that party’s powers, duties or functions within the scope of that party’s employment relationship’. It is quite remarkable that this conduct is not required to be illegal and, furthermore, the definition ‘any act’ is extremely broad. Consequently, the injustice of this offence predominantly depends on the fact that the gratification is ‘unauthorised’.

At first sight, one may assume that the shift to the illegality of the gratification itself indicates that section 10 combats the practice of ‘feeding’.¹⁶⁹ However, the requirement that the employee must ‘do any act’ does not match the practice of ‘feeding’ as the latter lacks any reference to a certain decision or behaviour of the agent, but solely aims at testing the agent’s general willingness and building up trust.¹⁷⁰ Section 10 of the PCCAA therefore presents a serious loophole, if a gratification is given, but no behaviour of the employee is demanded or performed. This conduct can also not be punished as attempt or conspiracy to commit corruption, because it lacks a corresponding *mens rea* of the feeder in this regard at this stage. The wording of section 10 should thus *de lege ferenda* be modified in order to cover the mere receiving or offering of unauthorised gratifications without any counter-performance. However, it deserves approval that section 10 refers to the authorisation of the gratification, because this criterion is best suited to fix the injustice of ‘feeding’.¹⁷¹ §§ 331, 333 of the German StGB cover such unauthorised gratifications relating to public officers, because these offences do not require any concrete official act; however, unauthorised

¹⁶⁸ D Lambrechts (note 10) at 110 agrees on this fact (‘[...] the offence created by section 10 also applies to persons who are party to an employment relationship in the private sector.’).

¹⁶⁹ See above pp 17 (sketch 5), 22, 25 ff.

¹⁷⁰ See above pp 17, 22.

¹⁷¹ See above p 28.

gratifications in respect of employees in the private sector are unpunished under German criminal law.¹⁷²

ii) Section 11: corrupt activities relating to witnesses and evidential material during certain proceedings

Section 11, which criminalises certain corrupt activities relating to witnesses, presents some peculiarities. Firstly, it deviates from the common structure of the offences commented so far as its subsections (1) and (2) refer separately to the bribee, i.e. the witness (subsection 1), and the briber (subsection 2). This approach must be welcomed as it allows a precise and unequivocal formulation of the law.¹⁷³ However, it is puzzling that the scope of the criminal liability of the witness and the briber is not congruent, because only subsection 2(a) criminalises the *'influence, delay or prevent the testimony of that person or another person as a witness [...]*' while subsection 1 does not contain this variant. An objective reason for this differentiation is not apparent.

With regard to the scope of the corruptly influenced behaviour of the witness section 11 covers any imaginable behaviour which might obstruct the justice system, for instance, any influence regarding the testimony of witnesses, the withholding of testimony, records, documents, police dockets or other relevant objects, the altering or destruction of such evidence or evading legal process summoning that person to appear as a witness. Furthermore, section 11 is flanked by section 18, which criminalises undue influence on witnesses by intimidation or physical force.¹⁷⁴

jj) Section 12: corrupt activities relating to contracts

Section 12 is of great practical importance as a substantial part of corruption in the public as well as in the private sector relates to the promotion and execution of contracts in that public officers or employees of companies are rewarded for influencing the award of contract by receiving as a 'kick-back', a percentage of the contract price.¹⁷⁵ However, one must consider that in absence of a principal-agent-relationship, corruption logically cannot occur in respect of the promotion of contracts *through the owner* of a close company. Consequently, § 299 of

¹⁷² See Appendix, p 68.

¹⁷³ See above p 39.

¹⁷⁴ See below p 58.

¹⁷⁵ See above p 7 ff.; Jonathan Burchell and John Milton (note 2) 889.

the German StGB, which covers corruption relating to contracts in the private sector, exclusively criminalises bribes given to employees and excludes owners of companies.¹⁷⁶

Against this background it is puzzling, why section 12(1)(a) extends the scope of this offence to *'any person, who, directly or indirectly accepts [...] any gratification [...] in order to improperly influence [inter alia] the promotion of any contract with a private organisation'* and why section 12(1)(b) does so correspondingly in respect of the briber. As the definition of *'gratification'* according to section 1(ix)(j) includes *'discounts, commissions, rebates, bonus, deduction or percentage'*, it would for instance constitute corruption in terms of section 12, if one supplier persuades the owner of a close company to offer a contract to him instead of another supplier by giving a substantial discount. As such conduct is completely legal and represents a legitimate business practice, a restriction of section 12 to *'agents'* or *'employees'* is recommendable.

Furthermore, the *'blanket clause'*-requirement that this conduct must be *'improperly'*, is critically vague in order to exclude such legitimate competition from corrupt activities reliably and it seems that the legislature did not realise that concerning corruption in the private it is crucial to decide whether *'interior'* or *'exterior'* rules, ie contractual rules or the law on competition, shall be relevant.¹⁷⁷ As a result of the vagueness of the definition *'improperly'*, Section 12(1)(b)(i)(aa) would for instance be fulfilled, if the wife of an employee convinced her husband to feign ill and stay away from work by inviting him to an expensive dinner. This invitation represents *'a gratification'* given for the purpose to *'improperly influence the execution of any contract with a private organisation'*, because her husband should breach his contractual duty to go to work. However, it is indeed questionable whether this conduct is criminal.

Another remarkable aspect of section 12 is that its subsection (1)(a) describes the behaviour of the bribee as *'accepting [...] any gratification from any other person, whether for the benefit of himself or herself or for the benefit of that other person or of another person'*. However, the reference to *'that other person'* makes no sense within the context of subsection (1)(a), because it can logically only refer to the previously mentioned *giver* of the

¹⁷⁶ Klaus Tiedemann in Burkhard Jähnke, Heinrich Wilhelm Laufhütte and Walter Odersky (eds) *Leipziger Kommentar zum Strafgesetzbuch* 11ed (Berlin New, York, 2002) § 299 Rn 13.

¹⁷⁷ See above pp 19 ff.

gratification, ie the briber, who can logically not directly benefit from the bribe. This formulation thus appears to be a mistake of the legislature.

However, it is an advantage of section 12 in comparison to § 299 of the German StGB, which criminalises corruption in relation to contracts in the private sector, that it covers also rewards for having acted corruptly in the past. The German law on the other hand presents a serious loophole, because it requires a relation of ‘*do ut des*’ between a bribe and a *future* ‘improper favouritism’.¹⁷⁸

kk)Section 13: corrupt activities relating to procuring and withdrawal of tenders

As contracts, particularly such with a substantial contract value, are usually awarded through tender-proceedings, these proceedings are naturally often a target for improper influence. However, one must distinguish between ‘vertical’ forms of improper influence between a tenderer and a decision-maker of the customer, which amount to ordinary forms of corruption, and ‘horizontal’ cartel-agreements between several tenderers.

Section 12 of the PCAA basically covers three different types of illicit conduct relating to tenders. Subsection (1)(a)(i) and (2)(a)(i) criminalise any influence aiming at the decision-maker of the tenderee by the receiving (subsection 1) or giving (subsection 2) of a gratification in order to influence the award of a tender. Consequently, section 12 is in respect of such ‘vertical’ corrupt activities a speciality of section 12, which relates to contracts and deserves unreserved approval.

Subsection (1)(a)(ii) criminalises typical ‘horizontal’ agreements between tenderers, particularly so-called ‘protective-offers’. Typically, several or even all tenderers agree on which of them shall receive the contract and often also agree on ‘compensation payments’ for the remaining tenderers. In order to secure that the fixed tenderer indeed receives the contract, the remaining tenderers typically make tenders, so-called ‘protective-offers’, which exceed the price offered by the fixed tenderer substantially. Subsection (1)(a)(ii) criminalises such agreements adequately with regard to tenderers who receive such ‘compensation payments’. However, section 13 presents a serious loophole, because such ‘protective offers’ are sometimes also made without any immediate reward as a ‘favour’ or just in the mere hope to be fixed by the cartel as the winner of another tender in the future.

¹⁷⁸ See Wolfgang Dannecker in Ulrich Neumann, Ingeborg Puppe and Wolfgang Schild (eds) *Nomos Kommentar zum Strafgesetzbuch* 1ed (Baden-Baden, 2003) § 299 Rn 36.

Such conduct can furthermore not be punished as conspiracy to corrupt in the future as the required *mens rea* will in many cases not be present already. Section 13 therefore should be re-designed in accordance with § 298 ('Submissionsabsprachen' [illicit agreements relating to tenders]) of the German StGB, which criminalises mere agreements between tenderers that aim to make the tenderee accept a particular tender. Furthermore, it is unintelligible, why section 13(1)(a)(ii) criminalises such conduct in respect of the bribed tenderer, but fails to criminalise the briber correspondingly.

Finally, sections 13(1)(a)(iii) and (2)(b)(i)(ii) criminalise the receiving or giving of gratifications in respect of the withdrawal of tenders, which also represents a common form of manipulation. However, section 13 fails to criminalise gratifications given as counter-performance for a complete renunciation by a competitor of making a tender.

II) Section 14: corrupt activities relating to auctions

Section 14 criminalises various corrupt activities relating to auctions, particularly gratifications in respect of favouring or prejudging a specific person in the course of the bidding process through the auctioneer (section 14(1)(a) and (2)(b)) as well as refraining from bidding at an auction or participating in a manner in order to get a specific offer for the article or to sell the article at a specific amount or to sell the article at a specific amount or to sell the article to a specific bidder (section 14(1)(b); (2)(a) and (c)).

The structure of section 14 is not easy to comprehend at first sight. Section 14(1)(a) covers auctioneers who receive gratifications from any other person in order to favour or prejudice a specific person in the course of the bidding process or as a reward for acting so and subsection (2)(b) covers '*any person*' who gives a gratification for this purpose correspondingly.

While the aforementioned subsections cover corruption in respect of the auctioneer as the bribee, subsections 14(1)(b) and 14(2)(a) correspondingly criminalise gratifications given from auctioneers to participants of the bidding process in order to influence that person to refrain from bidding or participate in a manner so as to get a specific offer for the article or to sell the article at a specific amount or to sell the article to a specific bidder.

Furthermore, section 14(2)(a) also corresponds to subsection (2)(c), which basically extends section 14(1)(b) to *any person* who gives a gratification to a participant of the bidding

process in order to influence that person to refrain from bidding or participate in a manner so as to get a specific offer for the article or to sell the article at a specific amount or to sell the article at a specific amount or to sell the article to a specific bidder.

Section 14 thus covers ‘vertical’ manipulations between the auctioneer and bidders as well as ‘horizontal’ manipulations between participants. Although section 14 is carefully drafted and all these manipulations might in theory occur, one may wonder at first sight, if there is a sufficient practical need to establish a criminal offence, particularly in view of the usual transparency of auctions on the one hand and the ‘ultima-ratio’-function of the criminal law on the other hand. Especially the bribing of participants of an auction *by the auctioneer* seems to be a highly unlikely scenario, because there is no apparent interest of the latter.

However, a substantial practical need does indeed exist with regard to internet online-auctions as these auctions lack transparency and are vulnerable to several manipulations. For instance the seller of an object might ask friends to participate in the bidding process in order to increase the price. Furthermore, the seller might ask one of his friends to buy the object on his behalf and return it to him secretly, if it does not achieve a satisfying price.

mm) Section 15: corrupt activities relating to sporting events

Within sports the practice of so-called ‘match-fixing’ is quite common in that persons betting on the result of sporting events bribe officials and players to influence the outcome of the contest.¹⁷⁹ As sporting events for many years have been a multi-million-rand business, there is a substantial practical need for a corresponding criminal offence.

Section 15 of the PCCAA makes it an offence to accept (subsection (a)) or give (subsection (b)) respectively gratifications from any other person in return for (subsection (i)) or as a reward for (subsection (ii)) engaging in any act which constitutes a threat to or undermines the integrity of any sporting event¹⁸⁰, including, in any way, influencing the run of the play or the outcome of a sporting event or not reporting such activity to the competent sporting body or the nearest police station. Furthermore, section 15(c) criminalises the carrying into effect any scheme which constitutes a threat to or undermines the integrity of any sporting

¹⁷⁹ See above p 9; Jonathan Burchell and John Milton (note 2) 889.

¹⁸⁰ ‘Sporting event’ is defined in section 1(xxv) of the PCCAA as ‘any event or contest in any sport, between individuals or teams, or in which animals competes, and which is usually attended by the public and is governed by rules which include the constitution, rules or code of conduct of any sporting body which stages any sporting event or of any regulatory body under whose constitution, rules or code of conduct the sporting event is conducted.’

event, including, in any way, influencing the run of the play or the outcome of a sporting event.

Section 15 deserves unreserved approval as it covers appropriately typical practices like ‘match-fixing’ through bribes given to sportsmen or referees by bookmakers or opponent teams in return for or as a reward for underperforming. Furthermore, section 15(c) criminalises other illicit agreements, particularly ‘horizontal’ agreements between certain teams designed to influence the outcome of sporting events without bribes being paid. On the contrary, the German StGB does unfortunately not cover corruption in relation to sporting events at all.

nn) Section 16: corrupt activities relating to gambling games or games of chance

Section 16 of the PCCAA is designed, like section 15, to criminalise exactly the same forms of manipulations in respect of gambling games or games of chance.¹⁸¹ In practice, such manipulations might for instance occur between gamblers and employees of casinos in that they collude to the disadvantage of the casino and share the profits of unjustified winnings.

oo) Section 17: corrupt activities relating to acquisition of private interest in contract, agreement or investment of public body

Section 17(1) of the PCCAA aims at preventing any public officer from acquiring or holding a private interest in any contract, agreement or investment emanating from or connected with the public body in which he or she is employed or which is made on account of that public body. Due to the absence of a two-person-relationship between a briber and a bribee section 17(1) therefore does not criminalise corruption in the actual sense, but covers a similar and also quite common form of conflict of interest. However, the scope of section 17(1) is subjected to certain exceptions as stipulated by subsection (2). According to subsection (2), subsection (1) does not apply, if the public officer is a shareholder of a listed company, if his conditions of employment do not prohibit him or her from acquiring or holding such interest and, in the case of a tender process, if this process was independent. The German StGB, on the contrary, contains no comparable offence in respect of such conflicts of interest.

¹⁸¹ According to section 1(vii) of the PCCAA ‘*gambling game*’ means ‘*any gambling game as defined in section 1 of the National Gambling Act, 1996 (Act No. 33 of 1996)*’, while ‘*games of chance*’ include ‘*a lottery, lotto, numbers game, scratch game, sweepstake or sports pool*’.

pp) Section 18: unacceptable conduct relating to witnesses

Section 18 of the PCCAA criminalises, like section 11, certain conduct that might obstruct the justice system, for instance, any influence regarding the testimony of witnesses, the withholding of testimony, records, documents, police dockets or other relevant objects, the altering or destruction of such evidence or evading legal process summoning that person to appear as a witness. However, unlike section 11, which criminalises corrupt influence on witnesses, section 18 covers the intimidation, the use of physical force, the improper persuasion and coercion of witnesses and certain other persons. Although such conduct naturally occurs and unequivocally represents criminal behaviour, it is obvious that it has nothing to do with corruption, which is the voluntary exchange of a decision against a gratification between an agent and a third person.¹⁸² Furthermore, the practical need to establish an offence like section 18 appears doubtful as such practices will often be punishable as subornation of perjury, physical injury, unlawful compulsion or menace.

qq) Section 19: intentional interference with, hindering or obstruction of investigation of offence

As corrupt activities are often committed in the course of complicated and lengthy business transactions, their proof depends to a great extent on documents and electronic pieces of evidence, like E-mails and computer hard drives. Section 19 of the PCCAA pays due consideration to this fact, because it criminalises the destruction, altering, mutilation or falsifying of such evidence, if committed with the intent to conceal an offence of sections 3-18 of the PCCAA or in order to hinder or obstruct a law enforcement body in its investigation of any such offence. Section 19 therefore represents a useful additional measure of the PCCAA in order to guarantee the prosecution and in order to protect civil claims, eg by the principal of a corrupt employee or by honest competitors.

b) Important miscellaneous provisions of the PCCAA

Hereafter, important miscellaneous provisions of the PCCAA, particularly the competence to investigate persons and property relating to corrupt activities (sections 22-23), the presumptions (section 24), endorsements on the Register for Tender Defaulters (sections 28-33) and the duty to report transactions (section 34) will be evaluated.

aa) Section 22-23: the competence to investigate ‘unexplained wealth’

¹⁸² See above pp 17 ff.

Section 22 of the PCCAA provides for an investigation procedure in terms of Chapter 5 of the National Prosecuting Authority Act 32 of 1998, which is normally reserved for use by the Scorpions only, in respect of property that may have been used in the commission or for the purpose of or in connection with the commission of an offence under the PCCAA or in respect of property that may have facilitated the commission of such an offence, or enabled any person or entity to commit such offence.¹⁸³

Section 23 of the PCCAA provides for the application by the National Director of Public Prosecutions, and the issuing of an investigation direction by a judge in respect of the possession of property disproportionate to a person's present or past known sources of income or assets ('unexplained wealth'). Furthermore, section 23(7) stipulates that any person who obstructs or hinders the prosecution or refuses or fails to give any information or explanation when required to do so in terms of subsection (4) is guilty of an offence. Consequently, section 23(7) might infringe the freedom from self incrimination and the right to remain silent.

On the one hand these provisions are a very effective tool to combat corruption, because 'unexplained wealth' is often the only visible trace of corruption. On the other hand one must consider that these rather extensive provisions also represent serious intrusions into civil rights. Lambrechts even goes so far to call these provisions 'draconic', 'open for abuses' and 'lending themselves to a witch-hunt, that may well create a situation similar to the pre-1994 dispensation where there was a communist behind every bush, or the post-1994 dispensation where there was a racist behind every bush, ie now there is a corrupter behind every bush'.¹⁸⁴

Nevertheless, at least the competence to investigate appears to be constitutional and justified by the difficult and important task to prosecute corrupt activities. The legislature has paid due consideration to the requirements of the constitution in this respect, which is, *inter alia*, also indicated by the fact that clause 19 of the Prevention of Corruption Bill originally even contained an *offence* of unexplained wealth, which was at first amended drastically and later cancelled completely due to constitutional concerns.¹⁸⁵

¹⁸³ D Lambrechts (note 10) at 112.

¹⁸⁴ D Lambrechts (note 10) at 113.

¹⁸⁵ See Explanatory Memorandum: Prevention of Corruption Bill (note 123) sub 3.21.1; the famous former French Prosecutor Eva Joly, who has investigated the spectacular European 'Elf-scandal', has made a similar proposal to create an offence of 'illegal enrichment', which should be completed, if a person's

bb)Section 24: the presumptions

Section 24(1) of the PCCAA establishes a presumption regarding the link between the gratification and the corruptly influenced behaviour as defined by section 24(1)(aa)-(dd), which is a repetition of section 3(i)-(iv). Although this link represents the core of the criminality of any corrupt activity, it is in absence of a ‘smoking gun’¹⁸⁶ indeed often difficult to prove.¹⁸⁷ Therefore, it would indeed be extremely difficult for the prosecution to secure a conviction for corruption under the PCCAA, particularly if *dolus directus* were required for corruption liability under the Act.¹⁸⁸

In view of these difficulties, the presumption of section 24(1) basically allows under certain conditions the inference from that a gratification was accepted, agreed, demanded (subsection (a)) or given, agreed or offered (subsection (a)), that it represented the counter-performance in respect of certain corrupt behaviour as stipulated by section 24(1)(aa)-(dd).

The application of the presumption firstly requires a material link between the two persons as stipulated by subsection (1)(b)(i)-(iii), eg in that the receiver of the gratification was serving as an official in a public body from which the giver or his intermediary (subsection iii) sought to obtain a contract. Secondly, the State must show that despite having taken reasonable steps, it was not able with reasonable certainty to link the acceptance of or agreement or offer to accept or the giving or agreement to give or offer to give the gratification to any lawful authority or excuse on the part of the person charged, and in the absence of evidence to the contrary which raises reasonable doubt, is sufficient evidence that the person charged accepted or agreed or offered to accept such gratification from that person or gave or agreed or offered to give such gratification to that person in order to act, in a manner as stipulated in subsection (aa)-(dd).

The presumption of section 24(1) applies to sections 3-9 and section 21 of the PCCAA and is in essence an inference or a presumption of *mens rea*, including knowledge of unlawfulness, which is rebuttable by the accused on adducing evidence sufficient to create a reasonable doubt in his or her favour.¹⁸⁹ Furthermore, one must consider that section 24(1) is likewise a presumption of *actus reus*, because the link between the gratification and the

standard of living exceeds his official income by more than 1 Mio \$, see Eva Joly *Im Auge des Zyklons* (München, 2003) 257.

¹⁸⁶ Carol Paton ‘Presumption joins the Dots’, (2003) 173 *Financial Mail* at 47.

¹⁸⁷ See above pp 30 ff.

¹⁸⁸ See Jonathan Burchell and John Milton (note 2) 893.

¹⁸⁹ See Jonathan Burchell and John Milton (note 2) 894.

corruptly influenced behaviour is also contained in the *objective*, expressively or tacitly uttered part of the respective declaration of intention.¹⁹⁰

Although section 117(2) of the Firearms Control Act No. 60 of 2000 contains a similar presumption and some scholars assume that section 24(1) of the PCCAA will be held constitutional by the Constitutional Court, it appears to be at least problematic and on the edge of an inadmissible reverse onus. Although it does not technically disturb the burden of proof on the State, it exempts the State from proving the link between the gratification and the corrupt behaviour, which is the core-element of corruption, and shifts the risk on the perpetrator, if the conduct in question cannot be clarified. In addition, this might likewise constitute an indirect infringement of the right to remain silent.

In addition to section 24(1), section 24(2) of the PCCAA establishes, in effect, a presumption in respect of public officers whose duties include the detection, investigation, prosecution and punishment of offenders, which irrebuttably presumes their knowledge of unlawfulness regarding acceptance of gratifications in respect of certain violations of their professional duties.¹⁹¹ In view of the comprehensive legal knowledge of these professionals, this presumption must be welcomed despite its strict liability aspect.

cc) Section 28-33: the Endorsements on the Register for Tender Defaulters

In terms of section 28(1) of the PCCAA a court may, in respect of an accused found guilty of an offence contemplated in section 12 or 13, in addition to imposing any other sentence, issue an order in terms of which the particulars of the convicted person or enterprise must be endorsed on the Register, including enterprises, partners, managers and directors involved in the commission of the offence. Furthermore, the National Treasury may or must, as the case may be, where the Register has been endorsed, pursuant to section 28(3) impose certain restrictions in respect of the persons or enterprises so endorsed. These restrictions include the termination of an agreement, the determination of a period between 5 and 10 years, for which the endorsement must remain on the Register and the disqualification of the offender relating to future tenders and contracts. Finally, section 32 stipulates that the Register shall be open to the public.

¹⁹⁰ See above pp 31 ff, 44 f.

¹⁹¹ See Jonathan Burchell and John Milton (note 2) 894.

The Register for Tender Defaulters is a useful preventive tool as it increases the potential costs of corruption and thus creates an economic incentive to refrain from corruption, which is more effective than the deterrence by the criminal law. Furthermore, it also helps affirming the business practices of honest competitors.

dd)Section 34: the duty to report transactions

A peculiarity of corruption is that ‘from the first contact between briber and bribee till the disguising of the offence everything happens secretly; in comparison to other crimes there are no visible traces of violence, no broken doors and no victim that reports the crime to the police’.¹⁹² As the number of undetected crimes is probably huge, the detection of corrupt activities consequently depends to a large extent on hints by ‘insiders’.

Section 34 pays as the ‘most onerous part of the Act’¹⁹³ due consideration to this fact as it imposes a duty to report knowledge or suspicion in respect of the commission of offences as stipulated in Part 1, 2, 3, 4 (sections 1-16) or sections 20 or 21 (in so far as they relate to the aforementioned offences) of the PCCAA as well as the offence of theft, fraud, extortion, forgery or uttering a forged document involving an amount of R100 000 or more on certain persons with authority. Pursuant to section 34(4) these persons include the Director-General, municipality manager, public officers in the Senior Management Service of a public body, any head, rector or principal of a tertiary institution, managers, secretaries or directors of companies, executive managers of banks or other financial institutions, partners in a partnership, chief executive officers and persons responsible for the overall management and control of the business of an employer. According to sections 34(2), 37(2) of the PCCAA failure to comply with this duty is a criminal offence since the 31 July of 2004.

Although the establishment of this offence is a very effective tool to combat corruption and thus generally deserves approval, there are some details of section 34, which deserve critique. Firstly, it seems doubtful to impose a duty to report even in the case that the person merely ‘*ought to know*’ that an offence was committed, because this person does consequently not even know his duty to report. In effect, the criminal law then punishes the mere negligent failure to realise that an offence was committed.¹⁹⁴ Secondly, the restriction to the amount of R100 000 is equivocal, because it might either refer to the bribe or to the

¹⁹² Eva Joly ‘Es war unglaublich’ *Der Spiegel* No 14/2002 at 92, 94.

¹⁹³ Lisa Swaine (note 124) at 22.

¹⁹⁴ See section 2(2) of the PCCAA.

actual damage, which is often hard to assess and can exceed the amount of the gratification several times. Furthermore, it is unintelligible why section 34(4) does not include auditors as they can play a key-role in detecting corruption in companies. This aspect was discussed during the legislation process but then was not considered in the final draft of the Act.¹⁹⁵ Furthermore, one might consider to extend the duty to report to low-profile persons, provided that a sufficient protection of these whistleblowers is guaranteed, because low-profile persons also often have knowledge of corrupt activities, although public policy consideration might oppose this idea.

However, some scholars are of the opinion that already the present form of section 34 does not provide sufficient protection for whistleblowers against unfair dismissal or discrimination and thus might endanger its acceptability in respect of the Constitution. Swaine, for instance, emphasises that the PCCAA ‘affords no protection to those subject to that duty and, unlike FICA, those holding authority are not indemnified from criminal or civil action as a result of their compliance, in good faith, with their reporting obligation, which might ultimately hinder its effectiveness’.¹⁹⁶ In this respect the review of the Protected Disclosure Act No. 26 of 2000 by the Law Commission, which will release its report to Parliament before year end, will be of great relevance.

5. Shortcomings of the PCCAA

Although the PCCAA is a rather voluminous and detailed piece of legislation, it presents various shortcomings.

a) Lack of an offence relating to violations of ‘cooling-off’ periods

It is a common phenomenon that public officers start to work for companies in the private sector immediately after leaving office, whose business activities are closely related to the responsibility of the former public officer. This represents a serious conflict of interest comparable to section 17 of the PCCAA, because many public officers possess privileged information and in anticipating their exit they might bend government policies to suit their own needs. Although the PCCAA fails to establish criminal liability in this respect, the Public Service is now considering appropriate regulations after the lack of a ‘cooling-off’ period was identified by the Public Service and Administration Committee as an important

¹⁹⁵ See statement by Ms Chohan-Khota, Meeting of the Justice and Constitutional Development Portfolio Committee on 24 November 2003 (note 123).

¹⁹⁶ Lisa Swaine (note 124) 22 at 23.

gap of the Public Service Anti-Corruption Strategy.¹⁹⁷ Nevertheless, a regulation within the PCCAA would have been the preferable solution in view of the factual connection of such behaviour to corruption and in view of the intention of the PCCAA to deal with corruption comprehensively.

b) Lack of a specific offence relating to journalists

As the PCCAA criminalises a great variety of corrupt activities relating to specific persons and matters rather detailed, it is astonishing that it completely fails to address corruption relating to journalists.¹⁹⁸ Although it seems possible to convict journalists in terms of section 3, if they, for instance, accept gratifications in order to secretly promote products (e.g. cars) in seemingly editorial articles, this seems in view of the vagueness of section 3 not desirable and a contradiction of the Preamble of the PCCAA, which holds it '*desirable to unbundle the crime of corruption*'.

c) Lack of regulations in respect of civil liability

Corruption can cause serious harm to the principal of the corruptible agent, honest competitors and society on the whole. The principal suffers on the one hand a loss, because the bribe is, in effect, paid through a surcharge on the contract value. On the other hand the damage caused by the award of contracts to uncompetitive bidders and the often substantial inflation of the prices for the briber's purpose of maximising his profits. Furthermore, honest competitors lose their 'expectancy' to sell their goods under the conditions of the market economy.

In view of these damages it is a shortcoming of the PCCAA that it fails to establish rules in respect of the injured parties, particularly as the litigation of such claims provides several difficulties. For instance, a civil litigant who claims such losses bears the onus of proof in terms of the common law and, furthermore, the common law does not provide a general enrichment claim.¹⁹⁹ This state of affairs raises complicated questions for a reform of the civil law, particularly in respect of presumptions in favour of certain plaintiffs, which cannot be dealt with comprehensively within this context. However, the need to address this issue is indeed 'as strong, if not stronger, as the criminal aspect'.²⁰⁰

¹⁹⁷ See Meeting of the Public Service and Administration Committee on 12 November 2004, available at <http://www.pmg.org.za/viewminute.php?id=48877> (accessed 15 July 2005).

¹⁹⁸ See regarding factual examples of this form of corruption above p 8.

¹⁹⁹ Statement of Adv Theron, Meeting of the Justice and Constitutional Development Portfolio Committee on 31 July 2002, <http://www.pmg.org.za/viewminute.php?id=1916> (accessed 15 July 2005).

²⁰⁰ Ibid.

V. Conclusion

A central weak point of the PCCAA is that it fails to consider appropriately that reasonable and long-sighted criminal policy needs a clear definition of the nature of corruption and its main elements as its yardstick. In this respect it is quite useful to bear in mind that economic science comprehends corruption as a special ‘principal-agent conflict’ in the form of an *illegal exchange* of a bribe against a decision of the agent between the latter and an ‘opponent’ of his principal.²⁰¹

As a result of this failure, for instance, sections 3 and 6 (a)(ii), (b)(i) extend the criminal liability partially beyond ‘principal-agent conflicts’, because the bribee can be ‘*any person*’ and thus any incitement given to another person as incitement to commit any offence amounts to corruption. For instance, a hitchhiker who persuades the driver of an already fully occupied car to give him a lift by offering him to pay a share of the fuel, would be liable for corruption in terms of section 3 as he gives a ‘*gratification*’ to the driver in order to make him ‘*violate a legal duty*’.²⁰²

Furthermore, the PCCAA fails to restrict the duties violated by the bribee to such deriving from the particular ‘principal-agent-relationship’. Consequently, sections 4 or 6 respectively would likewise be fulfilled in the aforementioned example, if the driver were a public officer or a private employee regardless that he was acting off-duty and for a completely private purpose.²⁰³ Finally, the PCCAA extends its liability beyond *illegal* to *mere immoral* exchanges as the recurring definition of corrupt behaviour of the bribee in section 3(iii) includes, *inter alia*, such that is ‘*designed to achieve an unjustified result*’. This vague definition grants any judge an undue discretion and allows, for instance, convicting the guest of a restaurant who gives a tip to the waiter in order to get a certain, already reserved table in terms of section 6.²⁰⁴ The PCCAA thus runs the risk of likewise criminalising business practices that are ‘crafty’ or ‘rough’ in nature but legal, because terms like ‘*unjustified result*’ or ‘*improper*’ render the scope of its offences too broad and too amorphous.

The strategy of ‘unbundling’ is a laudable legislative approach, because it generally allows on the one hand designing specific offences in accordance with the peculiarities of specific

²⁰¹ See above p 17.

²⁰² See above p 41.

²⁰³ See above pp 46, 47.

²⁰⁴ See above p 39.

forms of corruption and on the other hand meeting the constitutional requirements of clarity and definiteness to the largest possible extent. In this respect it is a great merit of the PCCAA to include corruption wholly within the private sector, which was previously underestimated for a long time. However, the concrete realisation of the strategy of ‘unbundling’ is half-hearted and thwarted by the general definition of corrupt behaviour in section 3, which, furthermore, recurs equally within the specific offences besides their specific definitions, because *intended* gaps of the specific offences are closed ‘through the back door’.²⁰⁵

In view of the general and the specific offences, particularly section 3, 6 and 10, it is further unintelligible, why there is any additional need to reinstate the common-law offence of bribery as this causes uncertainty whether public officials shall be convicted either for violating the common law or the PCCAA.²⁰⁶ Furthermore, a couple of offences overlap with each other. For instance, the bribing of employees in order to win contracts fulfils section 12, section 6 and section 3. These overlaps negatively impact on the user-friendliness of the PCCAA, because it will often be unclear which offence should be applied, and show that the Act has pushed the generally laudable approach of unbundling’ too far.²⁰⁷

It is a strong point that the PCCAA criminalises the use of intermediaries by including gratifications given ‘directly or indirectly’ and that it likewise punishes gratifications given for the benefit of third persons as well as ‘material attempts, ie unilateral, failed offers.’²⁰⁸ However, the Act presents a serious loophole regarding the contacting-phase between the briber and the bribee, the so-called ‘feeding’, where gratifications are given *without any reference* to a certain decision solely to test the agent and to build up trust²⁰⁹. While §§ 331, 333 of the German StGB cover such gratifications relating to public officers,²¹⁰ section 10 of the PCCAA requires that the gratification must be given ‘*in respect of that party doing any act in relation to the exercise, carrying out or performance of that party’s powers, duties or functions [...]*’. As the ‘feeder’ indeed often does not intend to link the

²⁰⁵ See above p 37.

²⁰⁶ See above p 38.

²⁰⁷ See above p 38.

²⁰⁸ See above pp 43, 43.

²⁰⁹ See above pp 17, 25.

²¹⁰ See Appendix, p 68.

gratification to any behaviour of the agent at that stage, the practice of ‘feeding’ is not a punishable offence under the PCCAA.²¹¹

Unlike the German StGB, the PCCAA possesses a number of effective, but partially rather harsh and problematic additional measures. While the Register for Tender Defaulters deserves unreserved approval,²¹² the presumption of section 24 appears to be at least on the edge of an inadmissible reverse onus and might in addition indirectly infringe the right to remain silent²¹³. The duty to report corruption involving R100 000 or more, which is imposed by section 34 on certain persons with authority is also a very useful tool, because the number of undetected crimes is probably huge and hints by ‘insiders’ are the most important source of information. However, the acceptability of this duty is problematic as it depends to a large extent on effective protection for whistleblowers from unfair dismissal, etc.²¹⁴ Finally, the competence of the NDPP to investigate persons or property, if a person possesses disproportionate, ‘unexplained wealth’ and the establishment of a criminal offence of obstructing such investigation or refusing to give information is another very effective measure, because ‘unexplained wealth’ is often the only trace of corruption.²¹⁵

Shortcomings of the Act are that it fails to rule civil liability for the benefit of the principal and honest competitors including a relaxation of proof and lacks to criminalise violations of ‘cooling-off’-period in respect of public officers as well as corruption relating to journalists and auditors.²¹⁶ However, the currently discussed Public Service Regulations and the new Auditors Act might bring some relief in this respect.

On the whole, the PCCAA deserves despite some weak points approval as an effective and determined measure to combat the serious threat of corruption, although its awesome extent and complicated formulations might impact negatively on its user-friendliness. Furthermore, the broad and partial vague extent of the established criminal liability in addition to its rather harsh additional tools might weaken the public acceptance of the PCCAA and provide perpetrators with the defence that they are victims of a ‘drastic and draconic’²¹⁷ overreaction by the legislature. In this respect less would thus indeed have been more.

²¹¹ See above p 51.

²¹² See above p 61.

²¹³ See above p 60.

²¹⁴ See above p 62.

²¹⁵ See above p 58.

²¹⁶ See above pp 63 ff.

²¹⁷ See D Lambrechts (note 10) at 117.

VI. Appendix: the offences relating to corruption of the German StGB

The German StGB contains seven offences relating to corruption of voters, members of parliament, employees and commissioners of companies and public officers.

§ 108b (corruption of voters)

(1) Any person who offers, promises to give or gives any benefit to another person in order to induce him to refrain from voting or from voting in a certain manner will be punished with imprisonment up to two years or a fine.

(2) Any person who demands, accepts to receive or receives a benefit in order to refrain from voting or from voting in a certain manner will be punished with imprisonment up to two years or a fine.

§ 108e (corruption of members of parliament)

(1) Any person who undertakes to buy or sell a vote in respect of a poll or a voting of the European Parliament or any parliament of the German federation or a province will be punished with imprisonment up to five years or a fine.

(2) Apart from convicting a person for a contravention of subsection 1, a court may deprive this person of his active and passive voting rights.

§ 299 StGB (corruption relating to employees)

(I) Any employee or commissioner of a company, who demands, accepts to receive or receives a benefit for the benefit of himself or a third person as a counter-performance for improperly favouring another in respect of the sale or purchase of goods or commercial services will be punished with a fine or imprisonment up to five years.

(II) Any person, who offers, promises to give or gives any benefit to an employee or commissioner of a company for the benefit of himself or a third person as a counter-performance for improperly favouring him or another person in respect of the sale or purchase of goods or commercial services will be punished with a fine or imprisonment up to five years.

§ 331 (acceptance of undue benefits by public officers)

(1) Any public officer who demands, accepts to receive or receives a benefit in respect of his official position for the benefit of himself or a third person will be punished with a fine or imprisonment up to three years.

(2) Any judge or arbitrator who demands, accepts to receive or receives a benefit for the benefit of himself or a third person in respect of the performance or omission of a judicial act in the past or in the future will be punished with a fine or imprisonment up to five years. Attempt is likewise punishable.

(3) Subsection is not applicable, if the perpetrator has received or accepted to receive a benefit, which he has not demanded on his own initiative, if the competent public authority has authorised the acceptance of the benefit in advance or following to an immediate report by the public officer.

§ 332 (corruptibility of public officers)

(1) Any public officer who demands, accepts to receive or receives a benefit for the benefit of himself or a third person as a counter-performance for performing or omitting an official act in the past or in the future by violating his official duties will be punished with imprisonment from six months up to five years. If mitigating circumstances apply, the punishment is imprisonment up to three years or a fine. Attempt is likewise punishable.

(2) Any judge or arbitrator who demands, accepts to receive or receives a benefit for the benefit of himself or a third person as a counter-performance for performing or omitting a judicial act in the past or in the future by violating his judicial duties will be punished with imprisonment from one to ten years. If mitigating circumstances apply, the punishment is imprisonment from six months up to five years. Attempt is likewise punishable.

(3) If the perpetrator demands, accepts to receive or receives the benefit in respect of a future act or omission, subsections (1) and (2) already apply, if he was willing to

1. violate his duties, or
2. consider the benefit in respect of the use of his discretion.

§ 333 (granting of undue benefits to public officers)

(1) Any person who offers, promises to give or gives any benefit to a public officer or to a soldier of the federal armed forces for the benefit of himself or a third person in respect of his official position will be punished with a fine or imprisonment up to three years.

(2) Any person who offers, promises to give or gives any benefit to a judge or arbitrator for the benefit of himself or a third person in respect of the performance or omission of a judicial act in the past or in the future will be punished with a fine or imprisonment up to five years. Attempt is likewise punishable.

(3) Subsection is not applicable, if the competent public authority has authorised the acceptance of the benefit in advance or following to an immediate report by the public officer.

§ 334 (corruption of public officers)

(1) Any person who offers, promises to give or gives any benefit to a public officer or to a soldier of the federal armed forces for the benefit of himself or a third person as a counter-performance for performing or omitting an official act in the past or in the future by violating his official duties will be punished with imprisonment from three months up to five years. If mitigating circumstances apply, the punishment is imprisonment up to two years or a fine. Attempt is likewise punishable.

(2) Any person who offers, promises to give or gives any benefit to a judge or arbitrator for the benefit of himself or a third person as a counter-performance for

1. having performed or omitted a judicial act in the past under a violation of his judicial duties, or
2. performing or omitting a judicial act in the future under a violation of his judicial duties.

(3) If the perpetrator offers, promises to give or gives the benefit in respect of a future act or omission, subsections (1) and (2) already apply, if he was willing to

1. violate his duties, or
2. consider the benefit in respect of the use of his discretion.

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