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Hard responses to corruption: Penal standards and the repression of corruption in Britain, France and Portugal

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Abstract. Despite its difficulties and inconsistencies in framing those practices and conducts recently unveiled by the press and judicial investigations which have caused considerable public discontent, the penal definition of corruption still highlights an interesting conceptual diversity across space and time that should not be overlooked. Most official discussions about and references to corruption and its volume are still framed within these hard parameters. It is, therefore, important to look at the intricacies of corruption as a crime in order to understand the virtues and failures of national repressive efforts. While crime statistics are of limited use for its measurement, they can nevertheless help to interpret the way corruption has been treated through repressive instruments cross-nationally over a period of time. The aim of this paper is to assess the dynamics of the various processes of setting and revising penal standards to the conduct of office holders and the results observable from the application of corruption and related offences across countries with different legal traditions.

1. Introduction

The establishment of penal parameters to prosecution is a product of the perceived need by State authorities to delimit the phenomenon. Despite its difficulties and inconsistencies in framing what is and what is not acceptable behaviour in public life,[1] the penal definition of corruption still highlights an interesting conceptual diversity across different legal systems and in time that should not be overlooked. If penal parameters have been less central to recent studies and academic debates on the nature and consequences of corruption, most official discussions about and references to corruption and its volume are still framed within these hard parameters.[2]

The scope of application of corruption as a crime, in terms of the manifestations condemned, the actors and spheres of activity addressed, is susceptible to different interpretations by national penal codes and laws and always revisited in time. Penal offences and the repressive instruments for their application are meant to address justice within a given jurisdiction and to avoid a moral over-stretching of the concept of corruption that could simply mean the labelling of any improper behaviour/practice as corrupt.

However, the need to codify corrupt behaviours and practices has not been felt with the same intensity in all countries. Moreover, the revision of penal offences has always been a slow and negotiated process given the rigidity of definitional parameters and the belief that these have to frame deviant behaviours in the long term. When a new offence is introduced, it is meant not only to address severely present pervasive manifestations, but also to have a long lasting repressive effect, even if, as experience teach us, the validity of penal definitions has always been jeopardised by the emergence of new issues of public concern not proscribed by the hard parameters in place.

The aim of this paper is to assess the intricacies that are often associated with setting penal standards to the conduct of office holders in public life and how these standards have been applied and what results obtained across three countries with different legal traditions – civil *versus* common law.

2. Scandal and the definition of corrupt behaviours

The first and most salient element of the process of setting penal standards to conduct in public life is the introduction or revision of penal applications of corruption and related crimes has a reaction *a posteriori* to practices and behaviours that have increasingly caused grievance and protest in society. Only those practices and behaviours which have been condemned by both political elites and the mass public – *black* corruption to paraphrase Heidenheimer[3] – tend to attract the attention of penal reformers.

France is notorious for having its penal instruments revisited by law and their applicability clarified through decisions of the *Cour de cassation* following the disclosure of a new scandal. The abuse of office for personal benefit (*prises illégales d'intérêt*) is exemplary of this tendency to act repressively *a posteriori*. Although references to this offence can be traced back to Roman law, it was only with the Penal Code of 1810 that public officials were prohibited from entering any dealing concerning the trading of food products. In the context of hunger and social deprivation that followed the Revolution of 1789 such a measure had strong popular appeal, while helping to legitimise political elites as just and fair guardians of the principle of equality invoked. Today, the offence has been given a broader interpretation, but judging from the number of convictions passed in a court of law this repressive instrument has been clearly unsuccessful in attempting to curtail the promiscuity between public/elective and private interests.

Traffic of influence was also introduced to the French penal code following the disclosure of a major political scandal, "*l'affaire de vente des décorations et des fonctions*" which shocked the Third Republic and that, in many aspects, resembled the recent "sales of honours" case unveiled in Britain. The

introduction of this offence took place in a climate of public protest and anti-parliamentary feelings. The allegation that the son-in-law of the President Jules Grévy, Wilson MP, was using his influential position to sell decorations led to the dismissal from office of the former and to the prosecution of the latter. The inability of the *Court d'appeal* of Paris to incriminate Mr Wilson for corruption and his subsequent absolution, with considerable public resentment, led to the drafting and implementation of traffic of influence into the French penal system (*Loi du 4 juillet 1889*). The present penal code has condensed corruption and traffic of influence into a single article,[4] given the similarity of means and mechanisms evidenced by both offences, but the applications covered under this new offence have little co-relation with today's manifestations of that illicit behaviour:

> Si le trafic d'influence se limitait au domaine des décorations, médailles, distinctions, places, fonctions et emplois, il n'y aurait pas de rapprochement à opérer avec la profession de "lobbyiste" qui conjugue généralement deux moyens d'action: l'apport, aux autorités publiques, d'informations directement issues des milieux professionnels de la "veille" du processus législatif pour tenter d'influer sur celui-ci.[5]

Another offence emblematic of the French scandal-penalisation strategy is the crime of *favouritism*, introduced to the 1993 penal code in order to address the insufficiencies of the abuse of public office and its prerogatives for third parties' advantage. In practice, however, and also judging from the official crime statistics available, this offence has proved an illusory repressive instrument to deal with the series of occult "commissions" which were being paid by companies to parties so as to guarantee privileged access to public contracts.

The offence of improper use of company goods or money for ends contrary to its market success or to favour another company where the wrongdoer detains a direct or indirect interest (hereafter *abus de biens sociaux*) was created by decree-law in 1935 following the *Staviski affair*. The offence was reintroduced under the *Loi 66-537* of 24 July (*sur les sociétés inscrits au code du commerce*) as an important instrument to fight *white collar* crime, but it would later evolve and assume an application that was not foreseen at the time of its creation. This point will be further developed later on.

In Portugal, the Decree-Law 371/83 was a *post-facto* attempt to deal with party patronage and corruption related scandals that took place in the public sector during the early period of democratic consolidation (1974–1986). The political class sought to resolve what had become a systemic problem by repressive means. The penal offence of corruption was enlarged on two fronts: the concept of public official was broadened to address a series of appointed

and managerial offices in the public sector; and the acceptance/demand of non-patrimonial advantages was equally sanctioned, but its applicability was still illusory.[6] Alas, the 1983 reform did not embrace the indiscriminate use of public money and assets for political purposes or the unregulated acceptance of private donations by parties themselves. Elective officials were deliberately left untouched and it was stipulated that their offences in office would be regulated separately through special law. It took almost four years to extend penal offences to elective officials.

On 15 March 1995, the Decree-Law 48/95 introducing *influence trafficking* into the Portuguese penal code was a late-in-the-day attempt to address growing allegations of promiscuity between the public and private spheres, which had become sensitive with the (re)emergence of large economic (and interest) groups and the major market regulatory and privatisation processes initiated in the mid-1980s. Despite suspicions that the promiscuity between public and private interests had become so extensive as to threaten the values underpinning an impartial State, judging from the results registered hitherto[7] one could be led to conclude, ironically, that once penalised, traffic of influence seems to have ceased to exist. Unfortunately, there is a wide gap between setting penal offences and making their applicability viable and effective.

Although the setting or revision of corruption offences as a reaction to scandals is more common to civil than common law legal systems, Britain too had its major penal instruments passed as part of a short-term effort to moralise public life (from the Victorian era to the first quarter of the 20th century). The adverse social and economic conditions felt in the aftermath of the Crimean war (1853–6) forced the British political class to act severely against punctual corruption scandals mainly in the local and national administration, but also, to a more limited extent, in the private sector.

The 1889 Public Bodies Corrupt Practices Act was enacted following revelations of widespread malpractice evidenced before the Law Commission involving the Metropolitan Board of Works (MBW), a local government body elected from the Parishes and Districts of London to execute and coordinate metropolitan public works.[8] Although the 1889 Act constituted an important statutory instrument against widespread practices of corruption, by April 1892 it was clear to the Home Office how limited its application was. In that year, in two separate cases involving Crown agents, the courts failed to charge them on corruption because they were not "public officers" within the meaning given by the Act.

The Prevention of Corruption Act 1906 came as a reaction to the prevalent practice of taking secret and illicit commissions at the London Chamber of Commerce. After a two-year investigation by the Secret Committee of the London Chamber of Commerce on widespread practices of insider trading, a

final report was published in 1898 highlighting the need to extend the scope of corruption to include misconduct in the private sector. The recommendations made in the 1898 Report were, nonetheless, a conservative compromise with tradition to offset any positive impulse for reform. According to Fennel and Thomas, "the government clearly did not want to open the 'floodgates of prosecution' in such a way that too many potentially embarrassing cases might receive a hearing in the courts".[9]

After unsuccessful attempts to ban any type of illicit secret commissions paid in both the public and private sectors, the 1906 Act finally passed in parliament. The scope of corruption was enlarged from "any member, officer, or servant of a public body" to include any public/private "agent". The 1906 Act was the product of a carefully worded and negotiated revision of the criminal provisions for corruption involving both the government and the business community affected (mainly the new liberal professions). The ill-defined term "corruptly" introduced by the 1889 Act was kept but interpreted restrictively in order to avoid the *presumption of corruption* (which was finally introduced by virtue of the 1916 Act, s.2 post). The limited scope of criminal provisions adopted were the product of a "compromise" between the political class and the business community to protect the growing lobbying industry from interference by the courts.

A new Prevention of Corruption Act was introduced in 1916 in the wake of a series of wartime scandals regarding the Clothing Department of the War Office, which involved the bribing of merchandise inspectors (often by foreigner contractors). Financial impropriety at the public's expense was treated expeditiously and severely given the context of war and general impoverishment. The statute passed in parliament as an emergency measure. The enforcement procedures of previous acts were equally reinforced to guarantee due and fast justice.

The advantage of reacting vigorously to scandal by introducing or revising penal instruments available, especially in a context of political, social and/or economic crisis is that it can have a considerable symbolic effect to the incumbent. It helps to (re)legitimise public and political institutions, while stamping down public protest and discontent. However, the shortcoming of this strategy is that penal norms tend to be set or revised in a way as to render them obsolete even before their actual application is sought.

3. Codified *versus* non-codified penal treatment of corruption: Balancing consistency and flexibility

Another important feature of the process of setting penal standards in public life is the way and the degree in which countries have codified (or not) corrupt

behaviours. At this stage, it is essential to distinguish between two different legal traditions – civil *versus* common law. Whereas in the first case, rules to the exercise of public and elective office are laid down in a positive/abstract, logical hierarchical manner aiming to regulate "possible situations", in common law countries rules and interpretations are developed through concrete judge/court decisions. These two legal traditions are important to the extent that they frame a certain course of action as well as attitudes of office holders in relation to the legal/formal rules governing public life. The common law system tends to be more flexible when new situations arise, developing soft/informal or self-regulatory solutions to the problem and adjusting the applicability of existing criminal laws to the new challenges rather than passing new ones. The tendency of civil law countries, such as Portugal and France, is to throw law at ethics problems and to treat penal provisions in a positivist manner thus tending to fall into "legal minimalism". That is, the denominations clearly proscribed by the wording of the offence are considered corruption, whereas those which are not penalised are regarded as entitlement. The singularity and codified nature of penal provisions is likelier to lead to unsystematic and selective repressive responses.

The tendency to codify corrupt behaviours, that is, to compile a list of manifestations falling under the definitional parameters set by an offence was already a major characteristic of the French revolutionary penal code of 1791. The trend has continued during the penal revisions of 1801, 1808 and 1810 right through until today.[10] While some crimes were inherited from Roman Law (e.g. corruption, concussion, embezzlement) or resulted from the need to condense dispersed *ordonnances* into single offences in the penal code,[11] others were introduced as a reaction to pervasive practices and behaviours increasingly contested in society. The tendency to codify corrupt behaviours is also a major characteristic of the Portuguese penal system. Most corruption-related offences derive from Roman penal law and the *Ordenações Filipinas*, but the first major attempt to provide an integrated penal codification dates from the second half of the 19th century.[12] The crime of corruption has undergone major definitional changes since its codification in 1886, some introduced by decisions of the Supreme Court of Justice over its application, whose action was more cumbersome than clarifying,[13] others resulting from successive legislative interventions on penal matters.[14]

Unlike France and Portugal, where there was a gradual codification of corruption as crime, Britain does not have a single code where the instances that can be addressed by this offence have been positively and systematically typified. Corruption is dealt with by special crime legislation which has remained flexible hitherto, but at the same time complex and at times inconsistent. Although the core of British anti-corruption laws remains the Public

Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Acts 1906 and 1916, the crime is also regulated through a number of overlapping common law offences and statutes.[15] Contrary to the French and Portuguese penal traditions, which have systematically codified corrupt manifestations, some become distinguishable only during prosecution (e.g. the separation of passive and active corruption), Britain has been less concerned about differences in form and pays more attention to the way corruption is treated in court proceedings.

3.1. *From minimal hard parameters to extended interpretations*

The codification of corruption and similar crimes as a means to differentiate situations in terms of procedure, enforcement and sanctioning inevitably leads to a myriad of situations that are left untouched due to the inability of typifying all forms of corrupt behaviour. Let us look, for instance, at the crime of influence trafficking as set by the French penal code. *Influence* has to be exercised upon an authority or administrative body, thus excluding the myriad of flexible forms of organisation between the public/elective and private spheres, whilst the element of "*décision favorable*" simply renders the offence inappropriate to address the lobbying activity. Such limitation does not account for illicit advantages drawn by pressing decision-makers to omit addressing a certain policy issue or regulatory loophole. The lack of State intervention or regulation in certain areas of activity can sometimes be bliss to market actors. The way the offence was constructed does not also allow for the condemnation of unsuccessful tentative undue influence.

One of the main obstacles in making the Portuguese penal offence of corruption applicable to elective officials has been the need to prove the existence of pact, that is, the causality between the advantage offered, paid or promised and the licit or illicit decision granted or rewarded. This difficulty was evidenced during the *Fax de Macau affair*, when a German constructor (*Weidleplan*) claimed to have paid the governor of Macau 606,000DM in order to obtain a favourable decision concerning the tendering process of the new airport. The payment was allegedly made following a series of contacts between the company's representative and senior representatives of the mass media holding closely associated with the financial services of the Socialist Party (*Emaudio*) – and of which Mr Melancia was a shareholder – who acted as intermediaries in this process. The decision taken by the Supreme Court of Justice on the Melancia case highlighted the difficulties in applying the crime of corruption to elective officials. The *active* actors to the transaction were convicted separately for corruption, while the *passive* actor, Mr Melancia, was absolved on the grounds that he had not known in advance that the money allegedly offered had a corrupt intent. The Court decision did not

came as shock, since it was one amongst several abortive attempts of the magistracy to intervene in the political sphere since the introduction of the 1987 criminal provisions. It gave further strength to the popular suspicion of a double-standard application of justice in Portugal.

Another example of the precariousness of excessive codification and a positivist interpretation of those penal parameters is illustrated by the Portuguese crimes of *prevaricação* (prevarication), *participação económica em negócio* (illicit participation in business) and *influence trafficking*. The first two offences introduced by the Law 34/87 were a cosmetic attempt to curb *a posteriori* practices of favouritism and the abuse of office in contracting out and tendering processes mainly at the local level. These new offences addressed the symptoms, but failed to understand the stimuli and opportunity structures that led elective officials to act and decide illicitly or profit from their privileged position in office. The prevarication of decision-making processes with the intent of benefiting a third party and/or the abuse of public prerogatives for personal benefit takes place in a context where the *moral costs*[16] imposed on local elective officials are minimal. Local populations tolerate these manifestations in so far as their leaders show "work accomplished", while local clienteles are simply concerned with being rewarded for the financial support given to the candidate during elections. Despite these adverse cultural conditions to the effective application of penal parameters – if we conceive that the effectiveness of penal instruments is largely dependent upon the way they are appropriated and demanded from members of society – the definitional parameters set on these offences also rendered them inapplicable from the outset. Only illicit decisions (*contra direito*) were addressed, which means that in so far as there is no objective and proven distortion of a decision-process, the financial impropriety of elective officials goes unpunished.

The same precarious codification was evidenced during the introduction of the crime of *influence trafficking* to the Portuguese penal system. The way the new offence was framed[17] presented major handicaps to its effective application. The decision to codify influence trafficking as "a crime against the State of Law" instead of revising Law 34/87 or, more appropriately, Chapter IV of the Penal Code, so to make its provisions applicable to both elective and public officials was not innocuous. Treating the crime of influence trafficking separately from that of corruption only increased the probability of complicating prosecution procedures and creating discrepant jurisprudence to two offences that in practice share most definitional and operational elements. Moreover, influence trafficking only considered "relevant patrimonial advantages" in contrast with the jurisprudence established by the 1983 revision of the penal definition of corruption, in which the offer, acceptance

or promise of "non-patrimonial advantages" was equally condemned. Its application was restricted to cases in which influence was proven rather than considering also those situations where intent to influence existed. Similar to the crime of prevarication, its applicability depended on whether an "illicit decision" was granted and not simply "a favourable decision", licit or illicit. This inevitably excluded political lobbying and consulting activities, which have assumed an increased relevance in the decision-making processes despite having remained overall unregulated and widely tolerated in society.[18] The new offence addressed only those who sold their privileged position to influence decision-makers, but failed to address the *active* agent who attempted to buy undue influence, thus jeopardising any positive repressive outcome this offence might have sought.

The more the crime of corruption is treated differently from other related manifestations, the higher the risk of failing to address grey situations and, consequently, the more rigid and static the legal condemnation of corruption in comparison to public expectations and standards. There is often a thin dividing line between the definition of one offence and another. Different offences may share similar illicit mechanisms of transaction (e.g. influence trafficking and corruption). This is not to say that some codification is not desirable. If there were no basic frameworks for the penal treatment of corruption, the risk would also be that of transforming prosecution into an Inquisition Court where arbitrariness and terror reign. But excessive codification is also undesirable. It may deprive magistrates from applying the offence to newer situations by reducing their capacity of judgement in relation to evidence presented before the courts.

In Britain, the statutory definition is a minimal base of understanding through which the Attorney-General primarily and the courts consequently, ought to guide their interpretations about the case in question. Most legal terms used by these Acts are exempt of a proper definition or subject to various court interpretations. Case law has been crucial in constructing their application. The jurisprudence created by court proceedings and verdicts will inevitably open the door to new and extended interpretations of the parameters of the offence in such a way that would not be easily contemplated under the Portuguese and French penal traditions. However, the discretion granted to British magistrates has constituted, in some instances, an important obstacle to prosecution. The Attorney-General's faculty to make the prosecution of corruption uniform can translate itself into a moral filter through which cases are carefully treated and selected and often subject to political pressure.[19] The Attorney-General has too often ensured that the word "corruptly" was applied "sensibly", i.e. restrictedly, by judges. Despite justified criticisms about the British criminal law on corruption being anachronistic –

for instance, it does not yet cover corruption by MPs – the lack of a comprehensive and consistent typology of manifestations has offered a more flexible penal framework to the magistracy in prosecuting corruption.

4. The double-standard application of penal measures in public life: The selective treatment of politicians

Another major and contested feature of the process of setting penal standards to corruption is the selective treatment of elective officials vis-à-vis public officials, even if the problem tends to be more procedural than definitional. Unlike the French case, the Portuguese penal code proscribes corruption under the Chapter entitled "Crimes committed during the exercise of public functions" meaning that its application is restricted to *public officials* only. Penal provisions to elective officials are addressed exclusively by special criminal law and this has led to a double-standard application of penal instruments in public life (more severe on public than on elective officials).

When the Law 34/87 was introduced to the Portuguese penal system it was meant to create parity between public and elective officials in terms of the repressive instruments available to curb corruption. As well as adapting those offences specified under the penal code (such as corruption, embezzlement, illicit participation in business), the legislative document introduced new offences perceived as being *specific* to elective office, for example, *prevarication of decision-making processes* or *the infringement of budget execution rules*. In practice, however, Law 34/87 remained a "lion without teeth". The majority of penal offences applicable to elective officials lacked concrete and adequate mechanisms to ensure its effective application and compliance. The repressive action developed by these offences has been minimal to none, thus creating climates of impunity and public discredit on justice.

Creating differentiated prosecution arrangements for elective and public officials is not the main problem at stake, but rather the way these are set up in order to ensure parity of treatment before the law. In Britain, for instance, the standing anti-corruption legislation deals exclusively with public agents and similar offices, but this does not necessarily mean that national elective officials are not sanctioned for financial impropriety in office. MPs respond to the Law of Parliament on matters of financial impropriety in office, even if specific provisions on corruption/bribery by MPs are still unclear. The point is that whereas Britain has developed and strengthened other institutional means to sanction elective officials, Portuguese and French elective officials are prosecuted in the courts of law like any normal citizen, but the penal standards applied to them by special criminal law are substantially different to those applicable to public officials.

This is not to say that certain self-regulatory systems have always been more efficient than the courts in guaranteeing high standards of conduct by elective officials. Self-regulatory systems may be considered as indicative of a higher understanding and appropriateness of ethical standards underpinning the democratic political and administrative system and the State of Law, but they are equally at risk when a climate of lassitude towards "small infringements" of collective principles installs. In recent years, the British public opinion has in fact expressed great concern about the deficiencies of the standing self-regulation system in sanctioning alleged misconduct by national elective officials and have indicated a clear support for more codified rules with external oversight and disciplining by the courts. A survey conducted by MORI in 1995 indicated that, against the political class' belief that the system of self-regulation worked well, 76% of citizens believed it could be "improved quite a lot" and/or it needed "a great deal of improvement". The public's demand for reform went beyond traditional recommendations framed within the "sovereignty of parliament". The instruments favoured by public opinion highlighted a clear hostile attitude towards the "club of etiquette" proudly defended by the political class. Another opinion poll by MORI issued in 1995 showed that 38% of citizens believed rules should be made law, with an independent commission and civil courts overseeing MPs' conduct, followed by 29% who preferred breaches to be treated as offences investigated by the police and punished by the criminal courts against 19% who believed the existing rules should be tightened up and enforced by MPs, without involving the police, courts or any outside body.

Recent proposals to create a comprehensive British criminal law of corruption have partially moved into that direction by addressing the need to clarify existing statutory provisions (i.e. clarify what is meant by "corruptly") and the need to broaden the offence's scope of application. These initiatives have attempted to include members of both Houses of parliament (and those who attempt to bribe them) within the scope of statutory provisions, following an earlier recommendation by the Committee on Standards in Public Life.[20] As a result, in December 1996, the Conservative government produced a white paper on the *Clarification of the Law Relating to the Bribery of Members of Parliament*. This was followed by a less symbolic and more technical report by the Law Commission entitled *Legislating the Criminal Code: Corruption*,[21] which envisaged the introduction of a common law offence of bribery and the substitution of the old statutory offences of corruption by a modern statute. One year later, the Joint Committee on Parliamentary Privilege, chaired by Lord Nicholls, reinstated these principles of penal reform and added other major procedural innovations in light of the difficulties raised by Neil Hamilton's case.[22] But the recommendations made resulted in a com-

promise between reform and tradition; in other words, a balance between the need to open the system of self-regulation to outside public allegations about the probity of MPs, while maintaining the House of Commons' sovereignty to judge upon those claims.[23] These recommendations have been recently debated and constitute one of the major themes addressed by the *Sixth Report* of the Committee on Standards in Public Life, but no substantive changes have yet taken place.[24]

4.1. *Stretching penal offences to compensate static codification and definitional "pseudonuances": The case of "abus de biens sociaux"*

It is not inevitable that the magistracies of civil law countries will always refrain to go beyond the penal parameters set by law when prosecuting elective officials. Some crimes can and have been used by magistrates to fill in lacunae and insufficiencies of the penal treatment of corruption in the political sphere. For example, the crime of *abus de biens sociaux* has increasingly been used by French magistrates (*juges d'instruction*) as a repressive tool against corruption, in particular that associated with party financing, following the handicap to prosecution created by the 1990 *Loi d'amnestie*.[25]

The most contested and determinant element which led magistrates to use this offence to successfully combat corruption was its flexible prescription rule, in operation since 1967:[26] *three years counting from the moment the magistracy was able to determine with precision the infraction incurred* were allowed to start the proceedings.[27] The rigidity of prescription rules for the crimes of corruption and traffic of influence, *three years counting from the act of offering/giving or soliciting/accepting an advantage* constituted the major technical obstacle to prosecution, adding to the effects of the 1990 amnesty. Since magistrates found it difficult to prove the pact of corruption in such short period of time, which, in most cases, remained occult and protected by a degree of *omertà* between parties to the illicit exchange, the crime tended to prescribe in the courts due to lack of evidence.

The various "*pseudonuances*" arising from the prosecution of corruption were overcome by the scope of application of *abus de biens sociaux*. In a decision of 22 April 1992, the *Cour de cassation* stipulated that all company expenditure made without a licit purpose constituted *abus des biens sociaux*.[28] The legal (and moral) ground for the application of the offence to cases of corruption, in particular "commissions" paid to local politicians and illicit party financing, was launched. The court decision to condemn Michel Noir, Mayor of Lyon, for infractions committed between 1983 and 1989 (*Noir-Bottom affair*) was the first of a series of cases that illustrated the prominence *abus de biens sociaux* had assumed in the fight against corrup-

tion. It also highlighted the emerging tensions between the political sphere and the magistracy.

Despite having a softer sanctioning regime,[29] this *white collar* offence offered magistrates a better legal ground to address the illegality surrounding party financing and to pressure the political class to adopt serious control measures by sanctioning the offer-side of those corrupt exchanges (i.e. companies and businessmen). The importance acquired by this offence in the fight against corruption raised fervent debates about its alleged "conceptual stretching" and led to various legislative initiatives aimed at delimiting its scope of application and prescription rules. For some politicians, *abus de biens sociaux* had become an "*attrape-tout*" offence, abused by magistrates as a means of addressing cases of financial impropriety in the political sphere which ought to be dealt by the existing penal provisions on corruption and influence trafficking. Others held that the offence was in most cases related to these two crimes and illicit party financing, but had the advantage of being framed in such a way as to allow magistrates to effectively administer justice. The *imprescriptibilité* invoked by the centre-right proposals of Mazeaud (RPR), de Roux (UDF) and Marini (RPR), which was not at all corroborated by the *Cour de cassation*'s jurisprudence on the matter,[30] was another major issue of contention. The core of these legislative proposals was to restrict *abus de biens sociaux* to the same rigid prescription rules applying to other offences, while increasing the time scope of prescription for the crimes of corruption and influence trafficking to six years. Addressing one of element of flexibility, that is, prescription rules without reviewing the nature of the offence was indicative of the lack of conviction on reform. Making magistrates opt for corruption and influence trafficking without changing the nature of these offences with regard to the proving of an illicit pact between the parties involved was an illusive attempt to curb corruption by repressive means. Moreover, the attempt to revise *abus de biens sociaux* was immediately interpreted by sectors of French public opinion as a new "*loi du pardon*". Fearing negative electoral repercussions, the reformers abandoned their legislative ambitions and placed their hopes with the new jurisprudence created by the *Cour de cassation*.

The *Cour de cassation* had attempted on various occasions to clarify the scope of application, but the jurisprudence created by its decisions was unclear and incoherent. The offence has always been easy to invoke when a situation of individual impropriety is identified, but it became more difficult to ascertain when the abuse of company goods and money (*crédit de la société*) was made without a personal rationale or intent. For Mazeaud and some of his acolytes, in a period of high unemployment, the company's initiative to pay illicit commissions in order to guarantee market survival and/or success

was *justifiable* in so far as it was the only means to maintain the number of employees and ensure dividends to shareholders. This *whitening* of *abus de biens sociaux* constituted the normative background for the court's new jurisprudence that maintained the flexible rules of prescription in operation while radically changing the nature of the offence.

The first normative intervention came in 1996. An *arrêt* of 11 January 1996 contested the jurisprudence that since 1992 had condemned the use of company goods and money to pay illicit commissions as a means of guaranteeing public contracts or financing illicitly party activities. According to the court's new reading, *not every illicit act* relating to the management of company assets and money was necessarily *abus de biens sociaux*.[31] The decision concerned a company that had created slush funds used at a certain point for illicit payments. The Court decided that 25 per cent of those funds used to pay unknown employees were illicit but acceptable, whereas the remaining 75 per cent were presumed to be used for personal benefit and hence constitutive of *abus des biens sociaux*. But this was only because company managers were unable to justify the existence of these funds in line with the company's interests. According to the *Cour de cassation*, the only objective and righteous criterion to apply the offence seemed to be the moral consequence of the illicit action taken. Had the managers of that company justified themselves by claiming that those 75 per cent were used to pay commissions in order to guarantee public contracts in the company's interests no grounds for *abus des biens sociaux* would have been found.

A second intervention came in 1997 with the *Kis-Bottom affair*. M. Serge Crasnianski, the director of *Kis*, had illicitly paid Pierre Bottom to intercede close to the minister of *Commerce extérieur* in order to avoid his company having to pay back to the State (*Trésor public*) a previously contracted export benefit that had not been totally used. The *Cour de cassation* decided that M. Crasnianski had not committed *abus de biens sociaux* in so far as the illicit payment made did not result, at any time, in a financial loss to the company.[32]

In principle, the decisions of 1996 and 1997 were an attempt to curtail the conceptual stretching which the offence has experienced, in recent years, in regard to cases of corruption and illicit party financing. In practice, the new jurisprudence created by these two decisions represented a drawing back from the original guiding principle set in 1935, that is, to protect employees and shareholders from predatory practices and/or financial impropriety of their bosses. Both decisions have promoted a culture of illegality amongst top company officials and increased the likelihood that they engage in practices that may endanger the company's financial equilibrium in the long term and consequently put at risk the employees' and shareholders' interests. In an environment where internal accountability of top managers, directors and

owners to their shareholders is almost non-existent (especially in the cases of medium-size firms acting at the local/regional level) weakening external accountability was a clear invitation to widespread illegality. While repressive instruments in the fight against corruption were increasingly focusing on the demand-side of corruption, the supply-side was allowed to freely create the means and mechanisms necessary to celebrate a corruption pact with an elective/public official or political party.[33]

5. Interpreting the evolution of crime statistics on corruption and related crimes

The dynamics of the processes of setting and revising penal standards to elective officials take us to the last point of this paper, that of interpreting the evolution of crime statistics on corruption and related crimes across the three countries in question.

While it is feasible to assess how the crime of corruption has evolved across the three countries from the 1980s to the 1990s by looking at the statistical data available,[34] it is not possible however to measure "How much corruption there is in a given country?" and/or "How corrupt is country A compared to country B?".

When confronting statistical figures without paying due attention to the existing definitional particularities,[35] comparison (even if by juxtaposition) runs the risk of becoming tautological, not to say unsound. The degree in which judicial action is more or less framed within the rigidity of penal standards will affect the extent in which crime statistics are more or less representative of those grey practices/behaviours falling in the borderline of legality.

Moreover, crime statistics display only those manifestations and that much of corruption which was brought before daylight and successfully prosecuted in a court of law, thus not necessarily illustrative of its overall occurrence and extent in society. Detection, let alone prosecution or conviction, of corruption can be extraordinarily difficult given the complex and obscure nature of these illicit exchanges.

There is also a time gap between the occurrence of manifestations and their prosecution and/or conviction, which will be inevitable reflected in the way crime statistics are presented. The prosecution of corruption is not an easy or expeditious process either and tends to become more complex when the offender is a political figure. Condemnation can last for months from the opening of judicial proceedings to the actual trial and conviction, given the difficulty of gathering and interpreting evidence and the possibility of court appeals postponing the case's conclusion.

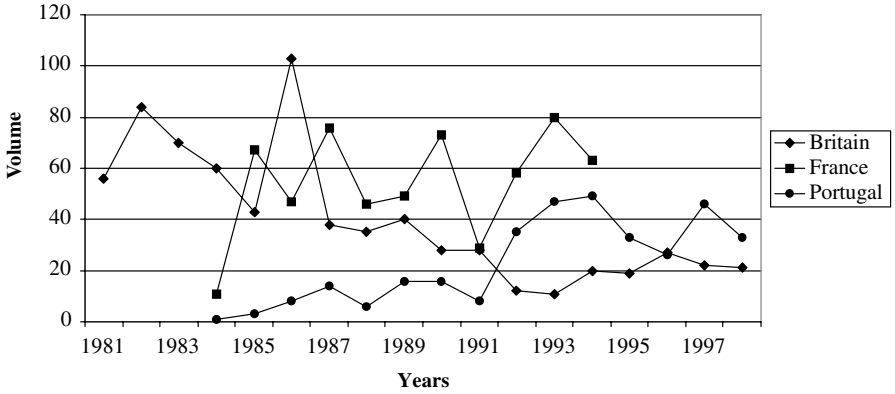

Figure 1. The crime of corruption: Convictions. Displays the number of convictions passed in the courts of law strictly for the crime of corruption (passive and active where applicable). *Britain*: Public Bodies Corrupt Practices Act 1889 s1 (1)(2); Prevention of Corruption Act 1906 s1. *France*: arts. 433-11, 433-1 and 433-2 on corruption and traffic of influence. Portugal: arts. 372, 373, 374 on corruption.

Crime statistics may tell more about the efficiency and efficacy of the judicial sphere in defining, uncovering and prosecuting acts of corruption than the volume of manifestations in a particular political or administrative system. As Mény put it, "La répression a toujours cela de paradoxal que plus on l'accentue et plus on fait apparaître l'augmentation des délits!".[36] A country that displays high figures on corruption may not necessarily be indicative of being "more corrupt", but more efficient in curbing its occurrence in society. Therefore, any attempt at measuring the volume of corruption by looking at crime statistics would require a more precise assessment of other variables, such as the expediency of court administrative procedures, the efficiency of investigative mechanisms, the degree of independence of the judiciary from executive influence, and rules of prescription.

Notwithstanding these empirical considerations, it is still possible to make tentative explanations about the way the three countries in question have addressed repressively corruption over the past two decades by looking at the evolution of statistical figures available.

The volume of convictions passed strictly on the crime of corruption (Figure 1) does not support *tout court* the widespread perception of an increase in corruption, despite the continuous explosion of political corruption scandals in recent years. Whereas Portugal has registered an overall increase in the number of convictions from the mid-1980s to the mid-1990s (with punctual declines registered in 1988, 1991 and 1994–96), there is no similar steady rise for the cases of Britain and France. During the 1980s, the British average volume of convictions on corruption was not substantially different from that

observed in France, whereas Portugal showed much lower values. Since 1987, the volume of convictions in Britain declined dramatically to almost four times less than the values registered during the early 1980s, even if since 1993 figures have increased slightly. In the case of France, the number of convictions on corruption has fluctuated constantly with an average level of 50 per year approximately. This reinforces the premise that legal/formal and social/cultural standards defining corrupt behaviours/practices in public life are not always concomitant.

It is equally interesting to notice that the major peak levels registered for each of the three countries coincide with unstable political conditions caused by a party change in government, a highly contested general election, the intensification of corruption in the public debate and its politicisation at the parliamentary level.

In France, the peak levels registered in 1985 and 1987 preceded a party/coalition change in government, whereas the increased number of convictions felt between 1988–90 coincide with a period of intense media coverage of corruption scandals. By the late 1980s, the press had uncovered a series of scandals concerning mainly illicit financing by the Socialist party, to mention two of the most important: "*l'affaire Carrefour du Développement*" and "*l'affaire Urba-Gracco*". The "flagrant contrast between the moralising rhetoric of the Socialist Party and its leader on the one hand, and its covert practices on the other"[37] caused public opinion scandal and gave a new impetus to judicial investigations and prosecution. Despite growing levels of public condemnation of corruption by the early 1990s, the period between 1990 and 1992 is marked by a considerable decline in the number of convictions partly as a consequence of a negative response by magistrates to the situation of impunity created by the 1990 amnesty. However, the political sphere's deliberate attempt to restrict the scope of corruption and the inadequacy of the offence when applied to political actors did not prevent the magistracy from resorting to a more flexible and successful offence to address the illegality surrounding party financing, i.e. *abus de biens sociaux*. This explains why the *aggregate volume for corruption* (i.e. number of convictions on corruption and related crimes) is dramatically higher than for the cases of Portugal and Britain (Figure 2).

The high values of convictions registered in Britain during the 1980s must be understood as part of an explicit governmental effort to sanction the abuse of office during the major public sector and local government reforms that took place in the earlier years of *Thatcherism*.[38] The correlation between the number of cases prosecuted and convicted helps to illustrate the incumbent's predisposition to act vigorously against corruption. Generally, the number of prosecutions tends to be higher than that of convictions and their correlation

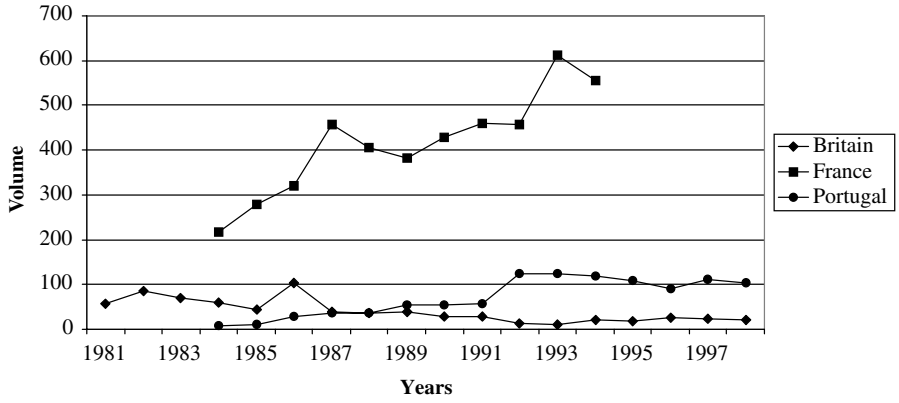

Figure 2. The aggregate volume of corruption. The *aggregate volume of corruption* is the total sum of convictions enacted for corruption and related crimes for each country. In the case of Britain, the data regards only England and Wales for the period between 1981–1998. The values were obtained through the number of defendants convicted at all courts for the following offences: Public Bodies Corrupt Practices Act 1889 s1 (1)(2); Prevention of Corruption Act 1906 s1. Corruption proscribed under the Representation of the Peoples Act s113-115 does not affect the overall volume, since no figures were registered for this type of offence during the period concerned. In the case of France, the figures result from the combination of corruption and related crimes proscribed under different codes and laws for the period 1984–94: *Code Pénal* – arts. 433-11, 433-1 and 433-2 on corruption and influence trafficking, art. 434-9 on the corruption of Magistrates, art 432-10 on concussion, art. 432-15 and 432-16 on peculate; *Code Électoral* – arts. L.106 and L.108 on electoral corruption; *Code du Travail* – art. L.152-6 *corruption de préposé*; and arts. 425 4 and 437 3 of the Law of 24 July 1966 on *the abus de biens sociaux*. In the case of Portugal, the data concerns the number of convictions passed in First Instance courts of law for the following Penal Code offences: traffic of influence (art. 334); combined electoral corruption/fraud (arts. 336 to 343); and combined crimes committed during the exercise of public functions (which includes arts. 372, 373, 374 on corruption; arts. 375 and 376 on peculate/embezzlement; arts. 378 to 382 on the abuse of authority, art 379 on concussion; and other related crimes, such as, art. 377 on the *participação económica em negócio*, i.e. abuse of public office). The aggregate volume regards the period between 1984 to 1998.

positive. In the case of Britain, however, this correlation was negative for most of the 1980s (Figure 3). The values registered for convictions were higher and registered major peak levels during this period (e.g. 1982 and 1986), while the volume of prosecutions was declining steadily.

Making crime figures soar can have an important legitimising effect on the incumbent. The abnormal increase in the number of convictions for corruption in the public sector registered during this period helped to justify the reigning ideology of "leaner public sector, better public sector" and redirect public's attention to "money waste" in the public sector. Corruption represented a cost to the public purse and the country's public order that the

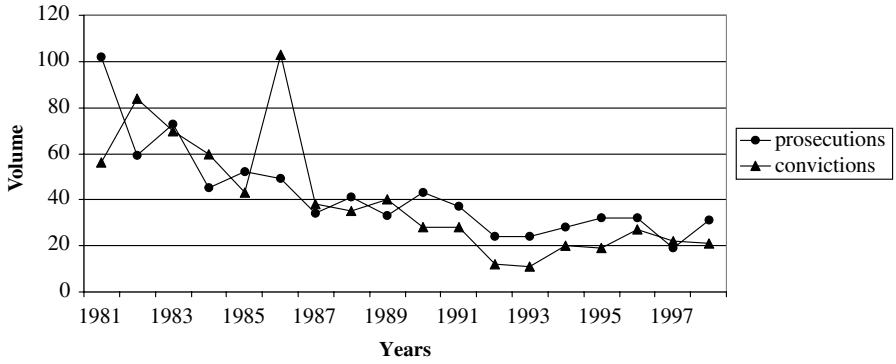

Figure 3. The aggregate volume of convictions and prosecutions compared, England and Wales, 1981–1998. Compare the number of prosecutions and convictions enacted for the aggregate volume of corruption (as specified in Figure 2) for the cases of Britain (England and Wales) and Portugal respectively. There is no data available on the number of prosecutions (*procès intentés*) for the case of France. The reason is that such detailed information preceding the conviction of offenders (the volume of criminal cases registered in different jurisdictions, the mode of treating the crime of corruption by different magistrates, etc. . .) is only available at each single jurisdiction. The collection of such information would require an assessment of all penal dossiers treated by the 181 French courts for the past 17 years, hence it could only be obtained at a disproportionate cost.

ruling Conservatives thought they would resolve by "rolling back the State". The battle against corruption in local authorities, *quangos*, and the public service was one amongst various facets of the image of strength and righteousness which Mrs Thatcher's leadership aimed to portray.[39] The peak levels on convictions registered in 1982 and 1986 preceded the general elections of 1983 and 1987 and were fundamental to the consolidation of this rhetorical puritanism.[40]

If the repressive action of the 1980s played an important role in strengthening the Conservatives' majority in power, by the early 1990s the small rise in the number of convictions felt from 1992 to 1996 took place against their decline in power and a bad scoring in the economy. The Conservative's performance in office was increasingly contested not only in material/efficacy terms but also in relation to the series of allegations of sleaze involving its MPs and members of government systematically revealed and covered by the press. Two reports produced by the Audit Commission in 1993 and 1994[41] indicated an overall increase in corruption and fraud in the public sector, while official criminal figures indicated a steep decline since 1987, registering the lowest values in 1993–94. Any official report, news or debate indicating that the volume of corruption was growing in the public sector, in spite of or as a result of the governmental reforms in course had a utility return negative to the party's image. Moreover, the forms of corruption which were then raising

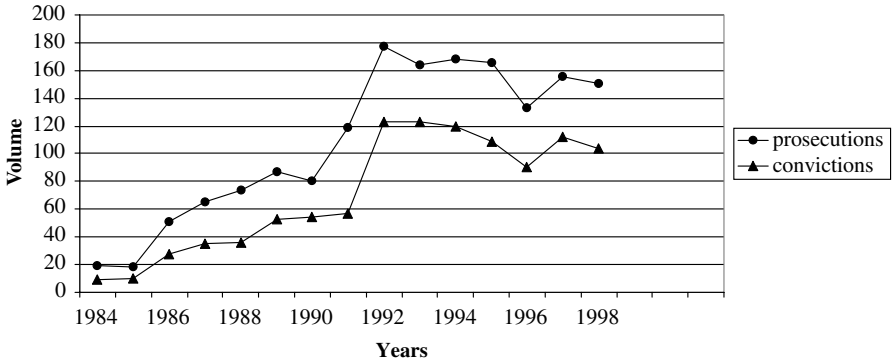

Figure 4. The aggregate volume of convictions and prosecutions compared, Portugal, 1984–1998. Compare the number of prosecutions and convictions enacted for the aggregate volume of corruption (as specified in Figure 2) for the cases of Britain (England and Wales) and Portugal respectively. There is no data available on the number of prosecutions (*procès intentés*) for the case of France. The reason is that such detailed information preceding the conviction of offenders (the volume of criminal cases registered in different jurisdictions, the mode of treating the crime of corruption by different magistrates, etc. . .) is only available at each single jurisdiction. The collection of such information would require an assessment of all penal dossiers treated by the 181 French courts for the past 17 years, hence it could only be obtained at a disproportionate cost.

public concern had less to do with the performance of the Civil Service and more with the decline in ethical standards in parliament and ministerial office. The Conservative majority had lost any moral high ground they could take advantage from engaging into a (re)legitimising repressive action as they had done during the 1980s, since most media allegations on financial impropriety in political life touched mainly their own MPs and members of government.

In the case of Portugal, the correlation between the volume of prosecutions and convictions was positive throughout the 1980s and 1990s (Figure 4), but the aggregate of corruption has remained low in comparison to the cases of Britain and France. One possible explanation could be simply that there is less corruption in Portugal compared to these countries. A more credible explanation, however, would stress the tendency of Portuguese magistrates to cling to legal minimalism and their conservatism in treating corruption, especially those forms taking place in the political sphere. Governments have never created appropriate conditions for magistrates to act more vigorously against corruption, even if they have regularly made explicit to the public their intentions to stiffen repressive action.

During the *Bloco Central* years (1983–85), the repression of corruption in the public sector and local administration was a top priority for Portuguese governmental authorities, leading to the creation of a High Authority Against Corruption (*Alta Autoridade Contra a Corrupção* – AACC) and the revision

of penal provisions on corruption. This governmental clean-up initiative did not produce a substantial increase in the number of prosecutions and convictions, although the annual reports published by the AACC indicated an increase in the number of "serious" instances reported until its dissolution in 1992.[42] Corruption continued to be a sporadic offence with very few political figures convicted hitherto.

The increased repressive action witnessed in Portugal since the early 1990s is due to a series of factors: the increased importance of corruption in the public debate, which meant that governmental authorities had to show fast and effective action; the accumulative experience and increased efficacy of judicial investigative bodies (such as the judicial police); the attempt of some magistrates to risk their safe but slow career progression by a less guaranteed but fast ascendancy based on media projected protagonism. However, these growing figures must be read carefully. In a country where the number of convictions on corruption have been lower than those on calumnious denounce, it raises serious doubts as to what kind of repressive action is intended. Moreover, given the overall low volume of convictions on corruption and the regular number of amnesties granted and cases prescribed in the courts, the intensification of the fight against corruption since the early 1990s may look satisfactory, but is not necessarily efficient.[43]

6. Conclusion

In as much corruption offences are perceived as an imperfect and partial representation of the pervasive manifestations in a given society,[44] these still offer a fundamental yardstick through which countries judge a particular conduct in office corrupt or not corrupt. For that reason, it is important to understand the dynamics of the processes of setting and revising penal standards to corruption in public life.

The creation and codification of corruption offences is never an innocuous process. The way they are defined and classified in a penal system can have important consequences to its effective application. The context of penal reforms is also an important factor to the success or failure of repressive action. When penal norms are set or revised as part of a governmental reaction to scandal(s), there is a risk that these become "lions without teeth". The symbolic effect that the incumbent can obtain from passing yet another criminal law against corruption often supersedes any conviction to set clear and appropriate enforcement procedures to the new offences created. Penal offences and the sanctions they impose will only act as a credible deterrent where they are kept in pace with the growing complexity of corrupt exchanges and effectively and regularly enforced.[45]

The diversity of results observed cross-nationally regarding the repressive actions taken by the three countries in question does not result only from different traditions in setting and codifying criminal offences, but from the ways in which magistracies and governmental authorities have resorted to, interpreted and effectively applied those penal instruments. The difficulty in harmonising judicial criminal processes and administrative and political procedure as different methods of imposing legal obligations to office holders and disciplining wrongdoers may raise climates of impunity and public dissatisfaction with the way justice is administered. Regardless of whether public officials are sanctioned by an administrative court or a civil court; regardless of whether elective officials are disciplined by a self-regulatory system or prosecuted in a normal court of law; regardless of whether criminal offences to elective officials are set together with those to public officials under the penal code or dealt with separately under special criminal law; it is essential that the various processes are based on the same guiding principles in order to make the repressive response to misconduct in public life credible before the public eye and its deterrent effect long lasting.

Although common law countries tend to be less legal positivist and rigid than civil law countries in applying penal offences, it is not said that the latter have their hands tight by the minimal wording of penal parameters and their duty to observe strict judicial procedures and guarantees. The tendency of some magistrates to cling to the hard parameters set by law and the inconsistencies which derive from that definition depends little on the legal tradition from which they belong. In order that magistrates acquire an active and independent role in the fight against corruption is it necessary that they interpret the penal norm not as an end in itself, but as a minimal standard open to further qualification. If legal revisionism proves difficult to obtain through court decisions, magistrates still have another trump in their sleeves which they have rarely resorted to: they can have an important and expert input during penal reforms. By highlighting the deficiencies and pseudonuances raised by the application of corruption and related offences, magistrates are in grade to put pressure on policy-makers and legislators to revise certain precepts in view of a more effective application and enforcement of penal standards.

The degree in which countries have resorted to repressive approaches over the last two decades has varied substantially, however, there is a general understanding that these cannot provide on their own a sufficient deterrent to corruption and related crimes. Repressive strategies are often reactions to excess and scandal, and thus have little proactive impact in restoring levels of trust in the State of Law. This explains why countries have increasingly

complemented stricter law enforcement and repressive strategies with more preventive action against corruption in public life.[46]

Acknowledgement

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Notes

1. One major transformation of today's corruption is the widening value discrepancy between the manifestations as depicted by penal laws and in the psychosocial mentality of members of society and between the practices of political elites and the standards of conduct expected by the mass public. Although penal definitions of corruption are often taken as the ultimate classification of corrupt or non-corrupt conduct in public life, these parameters have time after time proved insufficient to frame the reality and complexity of corruption. Further to penal standards imposed to the conduct of office holders, social and cultural standards, or perceptions of what is or is not corruption are equally important for its definition and condemnation in society (See Gardiner, J., "Defining corruption", *Corruption and Reform* 1992 (7:2), 115–116; Jos, P., "Empirical Corruption Research: Beside the (Moral) Point?", *Journal of Public Administration Research and Theory* 1993 (3:3 J-Part), 359–375; Kjellberg, F., "Corruption as an analytical problem: some notes on research in public corruption", *Indian Journal of Administrative Science* 1992 (3:1–2), 195–221).
2. OECD, *No Longer Business as Usual: Fighting Bribery and Corruption* (Paris: OECD, 2000).
3. Heidenheimer, A., "Perspectives on the Perception of Corruption", in Heidenheimer, A. et al. (eds.), *Political Corruption: A Handbook* (New Brunswick: Transaction Publishers, 1989) pp. 160–163.
4. This tendency for a condensed offence was already evident during the penal revision of 1943.
5. Service Central de Prévention de la Corruption, *Rapport Annuel 93/94* (Paris: Direction des Journaux Officiels, 1994) p. 23.
6. Alta Autoridade Contra a Corrupção, *Relatório 1984–86* (Lisboa: AACC, 1986) pp. 6–9.
7. By 1998, there had been only one case of influence trafficking sentenced in a first instance court of law.
8. In 1887, the MBW appointed a Select Committee to inquire into allegations of corruption in the sale of land. In March 1888, a Royal Commission was established, which reported that the Board had frequently failed to invite competition for the sale and lease of premises amongst other illegalities in the public works and inspections sector. (See Fennel, P. and P. Thomas, "Corruption in England and Wales: An Historical Analysis", *International Journal of the Sociology of Law* 1983 (11), 178).
9. Fennel, P. and P. Thomas, Ibid., 185.
10. Lascoumes, P. et al., *Au nom de l'ordre. Une histoire politique du code pénal* (Paris: Hachette, 1989).

11. The complexity of the crime of corruption in France does not derive solely from its codification in response to scandal, but also from the fact that the penal code is not the only instrument proscribing this illicit behaviour and sanctioning wrongdoers (See Alt and Luc, *La Lutte Contre la Corruption* (Paris: PUF, 1997) p. 58). There are a series of other corruption offences proscribed by special criminal legislation or included in other codes. In recent years, the codification of corruption has also become more complex by the introduction of laws relating to the functioning of the political system, such as party financing regulation. Law 92-1336 of 16 December 1992, which finally led to the introduction of a new version of the Penal Code in 1994, brought a clearer codification of the crime of corruption and related crimes. The basic definitional elements previously stipulated under *Ordonnance* 45-191 of 8 February were left untouched but two major changes were introduced: the crime of corruption was divided into active and passive instances, similar to foreign penal codes, and private sector corruption was now treated as a separate offence.
12. Art. 318° *Código Penal 1852* later "Peita, suborno e corrupção", *art. 318° ss., Código Penal 1886.*
13. Costa, A., "Sobre o crime de corrupção – Breve retrospectiva histórica", *Boletim da Faculdade de Direito de Coimbra* 1987, 32–39.
14. The first major legislative intervention came with the 1982 revision of the penal code (Decree-Law 371/83). More recently, the various European and international initiatives to penalise bribery in international business transactions and the continuous exposure of corruption/impropriety scandals involving leading politicians gave a new impetus to the reform of penal instruments. The new *Proposta de Lei 91/VIII* of 21 June 2001, which is still under consideration is meant to review corruption and influence trafficking in four vectors: to extend the scope of application of influence trafficking to active actors (i.e. those who wish to buy influence) and to those situations in which a "licit decision" is sought; to harmonise the treatment given to corruption by the penal code and that by the Law 34/87 in order to overcome some of the *pseudonuances* of corruption raised during its application to elective officials. For instance, the difficulty to prove the causality between money and the intention to reward and the fact that the decision granted may take place before or after the payment of an illicit inducement; to adapt criminal provisions on corruption to include bribery of EU officials; and to penalise private sector corruption.
15. There are at least eight statutes providing a legal basis for corruption, some of which precede the Victorian era. These complementary statutes include: the Sale of Offices Act 1551 (and its revised version of 1809); the Honours (Prevention of Abuses) Act 1925; Licensing Act 1964, s178; Criminal Law Act 1967, s5; Local Government Act 1972, s117(2); Customs and Excise Management Act 1979, s15 and the Representation of the People Act 1983, ss107, 109 and 111-115; even if reference can be made to previous legal documents (such as the Sale of Offices Act 1551 and its revisited version of 1809).
16. Pizzorno, A., "Introduzione: La corruzione nel sistema politico", preface to D. Della Porta, *Lo scambio occulto* (Bologna: il Mulino, 1992) pp. 13–74.
17. The final text adopted by the centre-right Social Democrat majority (Law 35/94 of 15 September) was stricter than the earlier proposals presented in parliament by their Socialist counterparts. *See Projecto de lei 594/VI*, DAR, VI (1994–1995), II Série-A, 51, Saturday 17 June 1995. *Reunião Plenária de 12 de Maio de 1995*, DAR, VI (1994–1995), I Série, 76, Saturday 13 May 1995, 2463–2474.
18. The fact that the majority of people assume there are no lobbying and consulting firms in Portugal – something that is questionable given the unregulated character of this sector of activity – does not mean that illicit lobbying does not take place. The use of the popular

term *pulling strings* is not restricted only to private interactions with local government and bureaucracy.

19. According to Woodhouse, the Attorney General is an elected MP whose awkward constitutional position is designed "to serve two masters, the government and the law, and thus to combine the role of a politician with that of a lawyer. As a result, he is sometimes expected to exhibit partisanship and to pursue the government's interest and at other times to be independent, impartial, upholding the public interest' [Woodhouse, D., "The Attorney General", *Parliamentary Affairs* 1997 (50/2), 97). To learn more about the Attorney-General's discretion to widen or limit the scope of prosecution and improper political pressure exercised upon his/hers prosecution decisions, see Wade, E. and A. Bradley, *Constitutional and Administrative Law* (London: Longman, 1993) pp. 402–403]. Since the Poulson Affair, a considerable number of politicians and magistrates have expressed the view "that it is time to seriously consider transforming the office of Attorney General to that of a non-political appointment, in which the holder would be a public servant rather than a politician who is a member of the government" [Edwards, J., *The Attorney General, Politics and the Public Interest* (London: Sweet & Maxwell, 1984) p. 61). For further reading on proposals for constitutional reform on the role of the Attorney-General, see, for example, Edwards, J., Ibid, 58–104].

20. In its first report, the Committee, at the time chaired by Lord Nolan, recommended the Government of the day to take steps to clarify the bribery provisions regulating MPs in light of the evidence collected and debated by the 1976 Salmon Report following the "Poulson affair" [Committee on Standards in Public Life, *First Report*, Vol. 1, Cm 2850-I, (London: HMSO, 1995) p. 9].

21. The Law Commission, *Legislating the Criminal Code: Corruption*, Law Com No 248, HC 524, Session 97/98, 2 March 1998.

22. Committee on Standards in Public Life, *Reinforcing Standards – Review of the First Report of the Committee on Standards in Public Life*, Sixth Report, Vol. 1, Cm 4557-I, (London: The Stationery Office, 2000), pp. 20–21.

23. Amongst other recommendations it was suggested that the legislation should guarantee that evidence of *any* offence or *allegation* falling under the scope of the new consolidated offence of bribery *to be admissible* notwithstanding the sovereignty of parliament and the principles of freedom of speech and parliamentary immunity stated under article 9 of the Bill of Rights. The unveiling of an alleged criminal conduct by an MP could be made by complaint to the Parliamentary Commissioner for Standards – *open complaint system* – who is entitled to screen those made with a malicious or frivolous intent. The Committee on Standards and Privileges could then resort to external instruments, such as the police, for further investigation. The House of Commons remained, nonetheless, sovereign in relation to the setting of the disciplinary tribunal, the court proceedings and the sanction to apply, even if the tribunal should be governed by procedures that satisfy the "minimum standards of fairness".

24. The government of the day has stated that it 'intends to legislate as soon as Parliamentary time allows' [*The Government's Response to the Sixth Report from the Committee on Standards in Public Life*, Cm 4817, July 2000].

25. Law 90-55 on party and election financing that granted an amnesty to cases of corruption related to party financing which took place prior to 15 June 1989.

26. *Cass. crim., 7 décembre 1967, BC, n° 321* (see also *Cass. crim., 13 février 1989, BC, n° 69*).

27. Accordingly, prescription started 'au jour où le délit est apparu et a pu être constaté dans des conditions permettant l'exercise de l'action publique' (*Cass. crim., 7 décembre 1967, BC, n° 321*).
28. 'l'usage des biens d'une société est nécessairement abusif lorsqu'il est fait dans un but illicit" (*Cass. crim., 22 avril 1992, BC, n° 169*).
29. Ten years of imprisonment for corruption against five years for *abus de biens sociaux*, which in most cases is in fact solved by fines.
30. The chronology of decisions taken by the *Cour de cassation* on *abus de biens sociaux* since 1967 shows that the prescription rule was not after all *imprescriptible* and that most cases were dealt with within an average period of 4 years (*Le Nouvel Economiste*, 1072, 31 January 1997).
31. *Cass. crim., 11 janvier 1996, PA, 3 avril 1996*.
32. *Cass. crim., 6 février 1997*.
33. "Ce qui revient à dire – et de nombreux chefs d'entreprise le clament – qu'il est dans l'intérêt de l'entreprise de financer des commissions pour obtenir des marchés ou de faire des cadeaux petits ou grands afin de se concilier les faveurs d'une collectivité publique" (Thoraval, A., 'La réforme qui cache l'amnistie', *Libération* 11 September 1996, 10).
34. For the case of **Britain**, the data has been collected by the Home Office Court Proceedings Database [*CCJU (RDS)*] and regards the number of defendants who have passed through both magistrates' courts and the Crown Court within England and Wales on the offence for which the defendant has been proceeded against. The criminal cases dealt regard only offences under s.1(1)(2) of the Public Bodies Corrupt Practices Act 1889, s.1 of the Prevention of Corruption Act 1906 and s.113 to 115 combined "Bribery, Treating and Undue Influence" under the Representation of the Peoples Act 1983. The data is subdivided into the number of prosecutions made for the period between 1981 to 1998 and the number of convictions reached (the figures for conviction include persons proceeded against in earlier years or for other offences). For the case of **Portugal**, the data was collected by the former *Cabinete de Estudos e Planeamento do Ministério da Justiça* (*GEPMJ*) and concerns all cases (*processos crime*) concluded under the Courts of First Instance (*Tribunais Judiciais de 1ª Instância*) for the following types of crime: Crimes Against the Realisation of the State of Law – traffic of influence; Electoral Crimes (combined); Crimes Against the Realisation of Justice – false evidence, declaration, testimony, expertise, interpretation or translation, calumnious denounce, other crimes against the realisation of justice (combined); Crimes Committed During the Exercise of Public Functions – corruption (combined), peculate (combined), abuse of authority (combined), other crimes committed during the exercise of public functions (combined). The information gathered for each type is subdivided into the number of prosecutions (*arguidos*) made for the period between 1986 to 1996, the number of those convicted (*condenados*) and the number of those not-convicted (*não condenados*). The latter includes those *absolved* (including cases *lacking material evidence*), those granted *amnesty* and those cases in which *the crime had prescribed*. For the case of **France**, the data has been collected from two official sources: the *Bureau des études – Sous-direction du droit pénal général et international – Direction des affaires criminelles et des grâces du Ministère de la Justice* for the period between 1984 to 1994 and the *Service Central de Prévention de la Corruption* (*SCPC*) for the years 1994–98. The data concerns only the number of convictions (*condamnations prononcés en matière de manquements au devoir de probité*) registered in the *casier judiciaire*. Detailed information about the number of prosecutions (*procès intentés*) or cases archived due to the lack of evidence, amnesty or which have prescribed in relation to the convictions passed is not available.

35. As already mentioned, countries have a different legal basis for the crime of corruption, let alone differences concerning the efficacy of national judicial systems in interpreting and prosecuting these crimes. For example, the French penal definition of corruption includes violations of laws on party financing and addresses elective officials, something that the British and Portuguese jurisprudence on corruption does not embrace. The British and Portuguese penal definitions of corruption focus essentially on the bribery of public officials. In the case of Britain, MPs' financial conduct is regulated under the Law of Parliament, which means that the various sleaze scandals uncovered during the past decade do not figure in the crime statistics presented. In Portugal, corruption involving elective officials is treated by special criminal legislation. Because the French penal code treats corruption and traffic of influence together, the crime statistics for this violation would be higher than those found in Portugal where both crimes are treated separately.
36. Mény, Y., *La Corruption de la République*, (Paris: Fayard, 1992) p. 209.
37. Mény, Y., "Corruption French Style" in Little and Posada-Carbó (eds.), *Political Corruption in Europe and Latin America* (London: MacMillan Press, 1996) p. 161.
38. According to Kavanagh, the term *Thatcherism* is used in three different contexts:
    - to denominate the British "monetarism" of the 1980s and the "New Right" conception of the state, economy and society – based on tax cuts, massive privatisation, reduced public expenditure, and cuts on "loss-making" welfare provisions and public services – that would have echoes in other western democracies;
    - to express a "no-nosense" and "moralising"/rhetoric style of leadership;
    - and to refer to "a set of policies designed to produce a strong state and a government strong enough to resist the selfish claims of pressure groups *via* law and order, traditional moral values, a stable currency, and a free economy" (Kavanagh, D., *Thatcherism and British Politics: The End of Consensus?* (Oxford: OUP, 1987) pp. 9–17).
39. The battle against local government and public sector malpractice and corruption, expressive of the last two characteristics of Mrs Thatcher's leadership, helped to legitimise the major cuts in public services, the centralisation of power and the setting of stringent ceilings to local government expenditure. The major guidelines of this symbolic campaign against local government corruption were in fact announced by the Centre for Policy Studies, Mrs Thatcher favourite think tank (of which she had previously been President): "The recent debate on the very important issues of abolition of the GLC and the Metropolitan Counties, and rate capping, has diverted attention away from a more fundamental debate about the integrity of local government" [Goodson-Wickes, C., *The New Corruption* (London: Centre for Policy Studies, 1984)]. Mrs Thatcher's government tried to conquer public support for its radical local government reforms by booing and reprimanding "badly behaved local authorities" (obviously those which opposed or did not conform to the government's plans) See also, Doig, A., "Continuing Cause for Concern? Probity in Local Government", *Local Government Studies* September 1995 (21:1), 99–114.
40. Although *dissatisfaction* with democracy is a broader judgement unlikely to be shaped only or primarily by the way corruption is handled and prosecuted, a repressive approach to control can have an impact on perceptions about the way democracy works (*Eurobarometer* scores). In the case of Britain, a positive correlation (= 0.66) was found between the *number of convictions* passed in the courts of law in England and Wales and the number of people who felt *very satisfied* with the way democracy worked. In other words, the high scores on levels of satisfaction increased (and decreased) proportionally to the repression of corruption in the courts of law. The correlation holds true for those citizens who are

likely to express more extreme opinions about governmental performance, but not for the universe of perceptions about the way democracy works in Britain.

41. The Audit Commission, *Protecting the Public Purse – Probity in the Public Sector: Combating Fraud and Corruption in Local Government* (London: HMSO, 1993); The Audit Commission, *Protecting the Public Purse 2: Ensuring Probity in the NHS* (London: HMSO, 1994).
42. Alta Autoridade Contra a Corrupção, *Relatório Final* (Lisboa: AACC, 1993).
43. According to the *Observatório Permanente da Justiça*, more than 56,000 crime prosecutions (*processos-crime*) prescribed in the courts during the 1990s, increasing from 3,125 in 1990 to 11,342 in 1999 (*Público*, 22 March 2002). During the period 1984–98, the total number of cases on corruption and related crimes *not convicted* was 452 – almost half of those convicted 1,063 – of which 402 cases were absolved due to the lack of evidence collected, 10 were granted an amnesty and 40 prescribed in the courts.
44. "Autant les cas les plus grossiers d'échange sont faciles à saisir et à réprimer, autant la sophistication croissante des échanges sociaux ne permet guère l'application d'une règle, qui risquerait d'instaurer la suspicion généralisée à l'égard de quasiment toute relation sociale. [. . .] L'apparente assurance et solidité de la norme n'est, appliquée au social, qu'une fugace illusion" (Mény, Y., op. cit., (1992), 208–209).
45. PUMA/OECD, "Ethics in the Public Service: Current Issues and Practice", *PUMA Occasional Papers*, 1996 (14), 32.
46. Whereas repression focuses only on the reduction of corruption as strictly defined by penal standards, corruption control is public (and private) policy aimed at curbing the incidence and scope of corruption (more broadly defined) by reducing the likelihood of these legally and socially condemned practices/behaviours taking place in society. As well as targeting individual misconduct, corruption control also addresses the opportunity structures conducive to such deviant behaviour.