

# UNMASKING THE PHENOMENON OF CORRUPTION: PERSPECTIVES FROM LEGAL THEORY

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## 1 INTRODUCTION

Corruption has existed since time immemorial.<sup>2</sup> Although there was initial disagreement among commentators on the undesirability of corruption, with some strongly arguing in favour of corruption,<sup>3</sup> it is today generally recognised that corruption is bad and that it needs to be contained if humanity is to move forward.<sup>4</sup> However, disagreement still abounds on its meaning.<sup>5</sup> This disagreement has ranged from the criteria to be used in determining corrupt conduct to the

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<sup>2</sup> For example, in 350 B.C Aristotle suggested in *The Politics*: “To protect the treasury from being defrauded, let all money be issued openly in front of the whole city, and let copies of the accounts be deposited in various wards.” Plato also talked about bribery in the *The Laws* when he said that “The servants of the nation are to render their services without taking of presents....” E Hamilton & H Cains (eds) *Plato The Laws* (1961) New York: Pantheon book at 12 section d. See also JT Noonan *Bribes* (1984) 13-14 (tracing the concept of bribery to the Middle East and finding out that in Mesopotamia and Egypt: “from the fifteenth century B.C. on, there has been a concept that could be rendered in English as ‘bribe’, of a gift that perverts judgment”); P Bardhan “Corruption and Development: A Review of Issues” (1997) XXXV *Journal of Economic Literature* 1320 at 1320 (pointing out that “While corruption has always been with us, it has had variegated incidence in different times at different places with varying degrees of damaging consequences”).

<sup>3</sup> Several authors were of the view that some corruption might actually be good to society. Pointing to East Asia, which continued to register economic growth despite increased cases of corruption, some argued that corruption facilitated economic growth and investment. See G Myrdal *Asian Drama: An Inquiry into the Poverty of Nations* Vol II (1968) 951-955. Others associated corruption with the process of modernisation citing the experience of Western societies - which had manifested peak levels of corruption as they experienced socio-political development - to support their argument that every modernising state was susceptible to corruption. Some more considered corruption to be redistributive as it allowed those of more modest means in the public sector to subsidize their salaries from the bribes of the wealthy individuals and corporations in the private sector. See P Perry *Political Corruption and Political Geography* (1997) 38. Still others contended that corruption was just but a harmless way of showing gratitude for deeds done, a practice that had existed in many societies since time immemorial. See J Kimand & JB Kim “Cultural Differences in the Crusade Against International Bribery: Rice-Cake Expenses in Korea and the Foreign Corrupt Practices Act,” (1997) 6 *Pacific Rim Law & Policy Journal* 549 at 561. Some even encouraged the perpetuation of corruption scandals arguing that such scandals were necessary for the standardization of societal norms. See M Gluckman *Custom and Conflict in Africa* (1955) 135. Yet others maintained that corruption was good for the integration of nations as it provided the means for ruling elites to persuade or co-opt fractious political, ethnic, or religious groups. See S Huntingdon *Political Order in Changing Societies* (1968) 59.

<sup>4</sup> This change of attitude can be attributed to a number of factors including: (1) the increasing evidence of the detrimental effects of corruption; (2) the 1997/98 financial collapse that brought the former economic power houses of the East Asia and former Soviet bloc, touted as models of corruption at its best, to their knees; (3) End of cold war; (4) Globalisation; (5) Donor fatigue; (6) Growth of democracy; (7) Market liberalisation; and (8) internationalisation of anti-corruption norms. For further discussion, see generally M Naim “The Corruption Eruption” (1995) 2(2) *Brown Journal of World Affairs* 245.

<sup>5</sup> See M Johnston “Fighting systemic corruption: Social foundations for institutional Reform” In M Robinson (ed) *Corruption and Development* (1998) 85 at 89 (pointing out that there remains considerable confusion over what exactly “corruption” means).

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actual content of corruption definition. The criteria debate has pitted those who see law as the best criteria for determining standards of behaviour against those who view morality as the better criteria. But even among those who are for morality there is an internal schism separating those who favour universal morals from those who favour relative morals.<sup>6</sup> On the other hand, the debate on the content of corruption definition has seen division emerging not only on whether the definition should cover both the public and private related corruption<sup>7</sup> but also on whether the list of corrupt acts should be closed to specific acts or should be left open ended.<sup>8</sup>

This disagreement on the criteria and content of corruption can be attributed to the complex and multifaceted nature of corruption which makes it take on various forms and functions in different contexts.<sup>9</sup> As Marquette pointedly laments, “no matter how many times it is prodded, poked at or pulled apart, more questions than answers seem to arise from the literature.”<sup>10</sup> Because of this difficulty in identifying the true nature of corruption some commentators, like Ulrich Von Alemann, have advised against a search for a universally true and correct definition arguing that such a definition is unattainable and can only act as a guiding star.<sup>11</sup> Others, like Oskar Kurer,

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<sup>6</sup> See, for example, EC Banfield *The Moral Basis of a Backward Society* (1958); JPO de Sardan “A moral economy of corruption in Africa?” (1999) 37(1) *The Journal of Modern African Studies* 25 at 25 (pointing out that the concept is often stigmatized as amoral or moral). Peter Euben makes us understand that it can also mean degenerative change. He writes that corruption connotes moral decay, infection, and ultimately a loss of integrity and identity: “A people degenerates when it sinks to a lower standard of behaviour than the generations which preceded it”. JP Euben “Corruption” in T Ball *et al* (eds) *Political innovation and conceptual change* (1989) 220 at 221-222. For a similar view, see also J Harrington *The Commonwealth of Oceana and A System of Politics* (1992) 60-61.

<sup>7</sup> The World Bank, for example, defines corruption as “the abuse of public office for private gain.” World Bank *Helping Countries Control Corruption: The Role of the World Bank* (1997) 8. The African Development Bank, on the other hand, sees corruption as encompassing not only abuse of public office but also of private office and defines it as “the abuse of public or private office for personal gain.” See African Development Bank “Anticorruption Policy: Harmonized Definition of Corrupt and Fraudulent Practices” available at <http://www.adb.org/Documents/Policies/Anticorruption/definitions-update.pdf> (accessed 4/2/2010). Transparency International eschews this public-private dichotomy and simply defines it as the abuse of entrusted power for personal gain. T International *Global Corruption Report* (2003).

<sup>8</sup> For example, United Nation Convention Against Corruption (UNCAC) provides for a comprehensive definition of corruption covering different forms such as bribery, embezzlement, influence peddling, fraud, illicit enrichment and diversion of public property (See UNCAC chapter III) while the European Union Corruption Convention emphasizes only the bribery form of corruption (See EU Corruption Convention, art 2).

<sup>9</sup> On the complexity of corruption, see generally MK Khan “A Typology of Corrupt Transactions in Developing Countries” (1996) 27(2) *Institute of Development Studies Bulletin* 12.

<sup>10</sup> H Marquette “Corruption Eruption: Development and the International Community” (1999) 20(6) *Third World Quarterly* 1215 at 1215.

<sup>11</sup> See U Von Alemann “The Unknown Depths of Political Theory: The Case for A Multidimensional Concept of Corruption” (2004) 42 *Crime, Law & Social Change* 25 at 26 (“Maybe such a definition is like the Holy Grail, i.e. something unattainable that can only be a kind of guiding star”).

have contended that this disagreement on the definition of corruption is healthy as “far from hampering the research effort, the lack of a unified definition has positively stimulated it.”<sup>12</sup>

It is this article’s contention, however, that the disagreement on the definition of corruption if unresolved could result in a confusing state of affairs where varied definitions of corruption exist side by side in uneasy competition. Such varied definitions of corruption if allowed to persist could discourage or slow down the effort to eradicate corruption as there would be no agreement on which corruption to fight.<sup>13</sup> To avoid such a result, it is imperative, therefore, that the different perspectives on corruption are examined and their commonalities exposed with a view to reconciling their differences. This article specifically seeks to do that. It discusses the various theoretical perspectives on and dimensions of corruption with a view to differentiating with clarity and delimiting the terrain of operation of corruption. The aim is to unravel the idea behind corruption and the element(s) that makes an act condemnable as corruption.

The starting point for such an endeavour would be to state the problem, well encapsulated by James C Scott as: “Corruption, we would all agree, involves a deviation from certain standards of behaviour. The first question which arises is, what criteria shall we use to establish those standards?”<sup>14</sup> The second question would be, which standards of behaviour should these be? In this context, the article argues that corruption should be understood as an illegal (not merely immoral) act that arises from the abuse of public (not private) entrusted authority and which benefit private (not public) interest. These various dimensions and perspectives of corruption are clarified, differentiated and justified in detail in the following sections.

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<sup>12</sup> O Kurer “Corruption: An Alternative Approach to Its Definition and Measurement” (2005) 53 *Political Studies* 222 at 227.

<sup>13</sup> The fight against corruption has become an integral part of the international community’s development agenda. This has seen the crafting of a number of anti-corruption conventions including United Nations Convention against Corruption G.A. Res. 58/4 (Oct. 31, 2003) (UNCAC); African Union Convention on Preventing and Combating Corruption done at Maputo, 11 July 2003, 43 I.L.M. 1(AU Convention); Council of Europe Civil Law Convention on Corruption done at Strasbourg, 4 November 1999, (entered into force 1 November 2003), E.T.S. 174 (COE Civil Convention); Council of Europe Criminal Law Convention on Corruption done at Strasbourg, 27 January 1999, (entered into force 1 July 2002), E.T.S. 173 (COE Criminal Convention); Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, done at Paris, 17 December 1997 (entered into force 15 February 1999), OECD/DAFFE/IME/BR(97)16/FINAL; 37 I.L.M. 1 (OECD Convention); Inter-American Convention Against Corruption done at Caracas, 29 March 1996, 35 I.L.M. 724 (entered into force 6 March 1997) (OAS Convention).

<sup>14</sup> JC Scott, *Comparative political corruption* (1972) 3.

## 2 CORRUPTION AS AN ILLEGAL (NOT MERELY IMMORAL) ACT

The debate on the relationship between law and morality is not new. It forms a central part of legal philosophy and has for a long time pitted the “positivists” against the “naturalists” with the “historicists” coming late in the day to join in the fray.<sup>15</sup> The positivists, on the one hand, view law as being independent from morality and insist on law as the criteria for the standard of behaviour. The naturalists, on the other hand, view law and morality as being intertwined and insist on a universal morality as the criteria for the standard of behaviour. The historicists, on their part, while agreeing with the naturalists on the connection between law and morality, insists that morality as a criteria must take into account the historical and cultural specificity of each society. But what do these criteria mean in practice and which criterion or criteria should one adopt when defining corruption?

### 2.1 The legal criterion

The legal criterion of standard of behaviour is usually attributed to the positive law school of thought. The positivists contend that the ultimate source of law is the will of the lawmaker as expressed in operational law and not some abstract morality as espoused by the naturalists. They argue that one must first establish what law is before it can legitimately be asked what the law ought to be or how it came to be what it is.<sup>16</sup> In other words, to the positivists the problem of norm setting is determined with reference to the legal rules provided by statutes and court decisions. Thus, to positivists, the standard of behaviour is what is formally enunciated as such by the lawmakers.<sup>17</sup>

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<sup>15</sup> The positivists are the proponents of the positive law school of thought. The naturalists support the natural law school of thought. The historicists espouse the historical law theory.

<sup>16</sup> See J Austin *The Province of Jurisprudence Determined* (1995) 157 explaining this legal positivism thus: “The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation.”

<sup>17</sup> Some positivists have adopted an extreme conceptualism whereby a legal norm is only considered legal if a sovereign lawmaker is identified. For analysis of this school, of which Kelsen's theory is an example (H Kelsen *General Theory of Law and State* (1945)), see E Bodenheimer *Jurisprudence: The Philosophy and Method of Law* (1974) 91-109. At the other extreme end of the positive theory are the adherents of the Critical Legal Studies movement who view legal rules as rationalizations of officials' behaviour, the source of which is found in economic, political, and other non-legal factors. For an exposition of this school, see JA Standen “Note, Critical Legal Studies as an Anti-Positivist Phenomenon” (1986) 72 *Virginia Law Review* 983.

To a legal positivist, therefore, corruption would be connected to any behaviour that violates some formal standard or rule of behaviour set down by a political system for its officials and citizens. This positivist perspective to corruption can be equated to what some commentators have called the legal approach to corruption.<sup>18</sup> This definition says, if an act is prohibited by formal laws, it is corrupt; if it is not prohibited, it is not corrupt even if it is injurious or unethical. For example, behaviour was judged by James Bryce to be either permissible or corrupt depending on the criteria established by legislators and judges:

“Corruption may be taken to include those modes of employing money to attain private ends by political means which are *criminal* or at least *illegal*, because they induce persons charged with a public duty to transgress that duty and misuse the functions assigned to them (emphasis added).”<sup>19</sup>

One advantage of using law as the criterion for corruption is that the resultant definition of corruption is clear and can easily be operationalised as government officials and ordinary citizens can be expected to access and understand the requirements and prohibitions spelled out in statutes.<sup>20</sup> A second advantage is that even if the legal definition is not perfect or if new corrupt issues arise in the future, the lawmaker can easily amend the laws to deal with these problems.

The legal criterion, however, suffers from a number of shortcomings. One flaw is that it assumes that all that is legal is not corrupt and that all that is illegal is corrupt. However, this is not necessarily true. As Jackson *et al* aptly points out:

“Worse still, using law as the standard of corruption supports the assertion that everything that is not legal is permitted. The legal foundation of political corruption is simultaneously too narrow and too broad, excluding too much (the unethical but legal) and including too much (the illegal but not unethical).”<sup>21</sup>

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<sup>18</sup> Scott calls this approach, the legal approach. See JC Scott, *Comparative political corruption* (1972) 3-5. See also AJ Heidenheimer *Political Corruption: Readings in Comparative Analysis* (1970) 3-5 (calling this definition “Public office centred” definition).

<sup>19</sup> J Bryce *Modern Democracies* (1921) 477- 478.

<sup>20</sup> This is not always the case though as statutory drafting often lends itself to varied interpretations. Still the fact that it is written in statutory books makes it accessible for verification.

<sup>21</sup> M Jackson *et al* “Sovereign Eyes: Legislators’ Perception of Corruption” (1994) 32(1) *Journal of Commonwealth and Comparative Politics* 54 at 55-56.

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The second defect is that the definition depends on the idea that legal frameworks are somewhat neutral, objective and non-political and that, therefore, what the lawmaker wills in the law should be taken as the true representation of the good of society. Research, however, shows that laws regulating political and bureaucratic conduct are not neutral and often depend on the prevailing assumptions and beliefs about the nature of politics and the character of public office.<sup>22</sup> In some cases these laws are actually a product of a trade-off among the politically powerful who can determine and declare a conduct to be improper or proper for reasons not necessarily in tandem with the interest of the general public.<sup>23</sup> James Scott captures this concern thus:

“Our conception of corruption does not cover political systems that are, in Aristotelian terms, ‘corrupt’ in that they systematically serve the interests of special groups or sectors. A given regime may be biased or repressive; it may consistently favour the interests, say, of the aristocracy, big business, a single ethnic group, or a single region while it represses other demands [...]”<sup>24</sup>

A further shortcoming of the legal approach is that when the impugned conduct allegedly transgresses a legal norm or standard, such as customary law, which is not tied to a specific statute or court ruling, this definition of corruption becomes less useful in differentiating acceptable and unacceptable behaviour in society.<sup>25</sup>

### 2.2 The objective moral criterion

To overcome some of the shortcomings of the positivist approach, a second way of identifying the required standard of behavior would be to resort to natural law. Natural law theory holds the view that man-made law, as well as individual choices, can and should be determined using

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<sup>22</sup> See, for example, L Beck “Senegal's Enlarged Presidential Majority: Deepening Democracy or Detour?” in R Joseph (ed) *State, Conflict, and Democracy in Africa* (1999) 197 (Discussing the public perception on the reported case of LONASE scandal involving the skimming off of large sums of money from the Senegalese lottery and how the perceptions are influenced by the nature of politics at play).

<sup>23</sup> For an exposition on the politics of law making, see, for example, D Kairys (ed) *The politics of law: A progressive critique* (1998).

<sup>24</sup> JC Scott, *Comparative Political Corruption* (1972) 5. See also O Kurer “Corruption: an alternative approach to its definition and measurement” (2005) 53(1) *Political studies* 222 at 222 (pointing out that the definition “fails to cover cases where legislation itself is corrupt (for example, ‘legislative corruption’ such as the indiscriminate enrichment of legislators), and it is inapplicable in pre-modern settings”).

<sup>25</sup> See J Gardiner, “Defining Corruption” in AJ Heidenheimer & M Johnston (eds) *Political Corruption: Concepts and Contexts* 3 ed (2002) 25.

objective moral standards.<sup>26</sup> As HLA Hart explains, the classical theory of natural law is the view "that there are certain principles of human conduct, awaiting discovery by human reason, with which man-made law must conform if it is to be valid".<sup>27</sup> In other words, to the naturalist, in order to determine what the standard of behaviour is, the inquiry must not stop at examining what the rules that have been accepted says but must go further and refer to the objective standards of morality.<sup>28</sup> It is only the rules that conform to this objective standard of morality that deserves to be accepted as law (standard of behaviour).

To a naturalist, therefore, corruption would be viewed as an act that goes against human nature, against human morality. This definition says: if an act is harmful to the general human good (morality), it is corrupt even if it is legal; if it is beneficial to the public good, it is not corrupt even if it violates the law. For example, Thomas Aquinas, one of the proponents of natural-law theory, argued that "law is primarily an ordination for the general good, commands to do particular deeds are laws only when ordered to that general good."<sup>29</sup> In his view, while actions "are certainly individual [...] those individual actions have a relationship to the general good [...]".<sup>30</sup> Thus, individual actions that go against this general good should be condemned and punished.<sup>31</sup> As Larry A Dimatteo concludes in his review of the history of natural law theory:

"As a member of such a community, one's actions, contractual or otherwise, must never be detrimental to that community. Taking advantage of another community member would be considered such a detriment. On strict theological grounds, this detriment would be considered a sin against God. Therefore, Aristotelian and Thomistic virtue held that the obtainment of wealth was not a good in itself. It was a means to self- sufficiency

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<sup>26</sup> For a discussion on natural law theory, see, for example, R Dworkin "The Model of Rules" (1967) 35 *University of Chicago Law Review* 14.

<sup>27</sup> HLA Hart *The Concept of Law* (2012) 182.

<sup>28</sup> See P Soper "Some Natural Confusions about Natural Law" (1992) 90 (8) *Michigan Law Review* 2393 at 2398 (noting that a natural law theory is "a theory of law that insists that one determine what law is, not just by a factual inquiry into the conventions that have been accepted, but also by reference to minimum standards of morality").

<sup>29</sup> See T Aquinas *Selected Philosophical Writings* (1993) 413 ("Actions are certainly individual, but those individual actions have a relationship to the general good").

<sup>30</sup> T Aquinas *Selected Philosophical Writings* (1993) 413.

<sup>31</sup> This position is supported by Lon Fuller in his book *The Morality of Law* (1969) 5-6.

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which was a precursor of happiness. However, one could only obtain happiness through wealth if it was obtained honourably.<sup>32</sup>

Proponents of this school emphasise the classical view of public good in which officials are unselfish and treat everyone equally and with fairness.<sup>33</sup> Thus, an act that is selfish, unequal in treatment and/or is unfair in process and result can be said to be corrupt.<sup>34</sup> These principles of natural law are usually fronted as universal, neutral and unbounded by time.<sup>35</sup>

However, to be sure, the naturalists are not unanimously agreed on how morality or public good is to be determined. To those of the Judeo-Christian legal tradition, such as St. Augustine and St. Aquinas, the arbiter of this moral law was to be the ecclesiastical authority.<sup>36</sup> To some, like Fuller and Finnis, the decision is to be made by a skilful practitioner, or skilful practitioners basing their analysis on the facts of each instance of law-making.<sup>37</sup> To others, like John Locke, natural law is the “decree of the divine will” rather than a mere “dictate of reason” and can, therefore, only be revealed to a select few by God.<sup>38</sup> However, the dominant position within the natural law tradition appears to be that moral truths are to be derived from truths about human nature as viewed by the whole society (failing which, by the majority in the society).<sup>39</sup> The basis of this position is that since natural law is discoverable from the universe through human reason, and since all human beings are endowed with reason, it should only follow that these laws of nature are universal and discoverable to all human beings in whatever station of life they

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<sup>32</sup> LA Dimatteo “The History of Natural Law Theory: Transforming Embedded Influences into a Fuller Understanding of Modern Contract Law” (1999) 60 *The University of Pittsburgh Law Review*. 839 at 848.

<sup>33</sup> For a discussion, see J Rawls *A Theory of Justice* (1971) particularly 11-18, 114-117.

<sup>34</sup> See R Dworkin *Taking Rights Seriously* (1977) (giving examples to illustrate how natural law principles aim at the fairness of the outcome).

<sup>35</sup> See, for example, LL Wenreb *Natural Law and Justice* (1987) 1-2 (discussing the connections between nature, law, and morality in classical natural law theory).

<sup>36</sup> See JH Berman, “The Religious Foundations of Western Law” (1975) 24 *Catholic University Law Review* 490 at 498 (pointing out that “[t]here was also a claim of moral superiority by the ecclesiastical authority, coupled with demands for changes in the secular law to conform to moral standards set by the clergy.”). See also WW Bassett “Canon Law and the Common Law” (1978) 29 *Hastings Law Journal* 1383 at 1407 (pointing out that “[b]y the middle of the fourteenth century the principles and the theories of the canonists virtually permeated society”).

<sup>37</sup> See, for example, J Finnis *Natural Law and Natural Rights* (1980) 33-36 (responding to the “is/ought” challenge).

<sup>38</sup> See J Locke *Essays on the Law of Nature* (1958) 474-475 (defining divine law as law that “which God has set to the actions of men, and whether promulgated to them by the light of nature, or the voice of revelation”).

<sup>39</sup> See RP George *In Defence of Natural Law* (1999) (summarizing the dispute). See also J Locke *Two Treatise of Government* (1967) Second Treatise, section 98 (arguing, though in a political context, that unanimous consent is “next impossible ever to be had” and that the only alternative is majoritarianism).



maybe.<sup>40</sup> Thus, according to the dominant view, what is moral, or what is good, is what the people say it is, and since it is based on human nature, what is moral in New York, should be moral in Paris, Beijing, Sydney or Lagos.<sup>41</sup> Jean-Jacques Rousseau pointed out this universality of morality when he said:

“Thus there is, at the bottom of *all souls*, an innate principle of justice and of moral *truth* (which is) *prior to all national prejudices, to all maxims of education*. This principle is the involuntary rule by which, despite *our own maxims*, we judge our actions, and those of others, as good or bad; and it is to this principle that I give the name conscience (emphasis added).”<sup>42</sup>

This natural-law school view of corruption as a breach of the general human good (as determined by public opinion) can be equated to what some authors have called “public interest” or “public opinion” criteria for corrupt conduct.<sup>43</sup> The “public interest” school views corruption as a violation of public interest.<sup>44</sup> The “public opinion” school, on the other hand, tries to define corruption according to how people in a nation view it. According to this school, an act is said to be corrupt when the weight of public opinion perceives it so.<sup>45</sup> Thus, a natural-law theory perspective, in a way, combines these two perspectives in its approach to the conception of corruption.

One advantage of the natural-law perspective is that, because it is based on universal moral principles, it can be used as an acceptable framework for a cross-cultural study or analysis of

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<sup>40</sup> See, for example, YR Simon *The Tradition of Natural Law: A Philosopher's Reflection* (1965) 41-66; LL Wenreb *Natural Law and Justice* (1987) 1-2 (discussing the connections between nature, law, and morality in classical natural law theory).

<sup>41</sup> But see Oliver Wendell Holmes in “Natural Law” (1919) 32 *Harvard Law Review* 40 (arguing that one’s reason is often tampered by one’s earlier environment and experience, which is not uniform).

<sup>42</sup> JJ Rousseau “Lettres Morales” in JJ Rousseau *Ouvres Completes de Jean-Jacques Rousseau* vol 4 (1969) 1111.

<sup>43</sup> JC Scott, *Comparative Political Corruption* (1972) 3.

<sup>44</sup> A classic example of a public interest definition available in literature is that of Carl Friedrich, quoted in AJ Heidenheimer *et al* (eds) *Political Corruption: A Handbook* (1989) 10; and in M Philip “Defining Political Corruption” (1997) XLV *Political Studies* 436 at 440:

“The pattern of corruption can be said to exist whenever a power holder who is charged with doing certain things i.e., who is a responsible functionary or officeholder, is by monetary or other rewards not legally provided for, induced to take actions which favour whoever provides the rewards and thereby *does damage to the public and its interest* (emphasis added).”

<sup>45</sup> For a discussion, see M Jackson *et al* “Sovereign Eyes: Legislators’ Perception of Corruption” (1994) 32(1) *Journal of Commonwealth and Comparative Politics* 54 at 54-67.

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corruption.<sup>46</sup> The second advantage is that since it represents the general understanding of corruption by the citizens in a country, it can provide a basis for effective anti-corruption strategy. This is because it is easier to enlist and foster public support in the fight against corruption when citizen values correspond to the statutory definition of corruption. Citizens are also more likely to police themselves when faced with compromising situations since the conception of corruption would be in line with their own internal beliefs. At the global level, such a universalistic approach to corruption provides a ready standardised and acceptable frame for engendering a global action against corruption.

Still, the natural-law theory approach is not without limitations. One major limitation is that a concept as broad as “morality” or “public good” upon which behaviour is based, while it might be innate in human nature, is not an easy concept to identify.<sup>47</sup> It is inevitably broad and ambiguous, and will rarely give one answer that everyone accepts.<sup>48</sup> A second challenge is that it is usually difficult to demarcate the boundary between the opinion of public and that of the political elite.<sup>49</sup> What is taken to be public opinion in many societies is oftentimes the opinion of the elites.<sup>50</sup> It is also not a given that all citizens in a country have the capacity to reason and identify governing ethical norms.<sup>51</sup> And even if they all do, one’s reason, as noted by Oliver W. Holmes, is often tampered by one’s earlier environment and experience, which is often not uniform.<sup>52</sup> Furthermore, research carried out on public opinions show that attitudes and beliefs

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<sup>46</sup> But see Mari-Liis Liiv *The Causes of Administrative Corruption: Hypothesis for Central and Eastern Europe* (2004) 9 (arguing that “[t]he weakness of the moralistic approach derives from negative connotations – wrong judgments and cultural relativism that may accompany international comparisons”).

<sup>47</sup> See, for example, S Anderson “Corruption in Sweden: Exploring Danger Zones and Change” (2004) available at <http://www.diva-portal.org/smash/get/diva2:142008/FULLTEXT01.pdf> (accessed 20/10/2012) 28 (claim that according to the public interest-centred definitions, illegal actions can be justified if they promote the common interest).

<sup>48</sup> See, for example, R Williams *Political Corruption in Africa* (1987) 11 (pointing out the difficulty and arguing that corruption, like “obscenity is more readily condemned than defined or explained”).

<sup>49</sup> See AJ Heidenheimer *Political Corruption: Readings in Comparative Analysis* (1970) (In his view the corruptness of political acts is determined by the interaction between the judgment of a particular act by the public and by political elites or public officials. He points to the existence of a scale or dimension of corruption that can be used to classify political behaviours according to their degree of corruptness from “black” to “gray” to “white”).

<sup>50</sup> See, for example, M Johnston *Political Corruption and Public Policy in America* (1982) 7 (pointing out that there are, after all, many publics and they rarely agree on anything of importance).

<sup>51</sup> See, for example, J Locke “The reasonableness of Christianity” in J Locke *The Works of John Locke* vol 7 (1824) 140 at 142 (arguing that “human reason unassisted” can “fail men in its great and proper business of morality”).

<sup>52</sup> See OW Holmes “Natural rights” (1919) 32 *Harvard Law Review* 40 at 41, concluding that:

are not static and can and do change with time.<sup>53</sup> This possibility of fluctuation in opinion with time raises doubt about the immutability and universality of morality as espoused by the naturalists.

### 2.3 The subjective moral criterion

To overcome the challenge occasioned by the possibility of fluctuation in opinion about the required standard of behaviour, one way would be to view corrupt conduct from a relativist perspective. The relative moral criterion is usually attributed to the historical law school of thought. The historical law theory sprung up as a response to the inability of the natural law theory to accept the relativity of morals and as an attempt to recognise customary law that had been left out by the positivists.<sup>54</sup> The theory advocates for a relativist approach to the conception of law arguing that the ultimate source of law is the character, the culture, and the historical traditions of a society.<sup>55</sup> It holds that law is determined by the “custom” and “popular belief” of a specific people and not by “the arbitrary will of the legislature”.<sup>56</sup> Unlike the positive school, the historical law school concentrates more on the rules of customary law than the rules of statutory law and, unlike the natural school, it is more concerned with those specific moral principles that correspond to the social life, the beliefs and the values of a given people or a given community rather than with universal moral principles. Thus to the historicists, the criteria for determining the standard of behaviour is the popular belief and custom of the society in which the law is to apply.<sup>57</sup>

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“The jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted by them and their neighbours as something that must be accepted by all men everywhere.”

<sup>53</sup> See H Erskine “Polls: corruption in government” (1973) 37(4) *The Public Opinion Quarterly* 1.

<sup>54</sup> The historical school of thought, just like its characteristic, was founded in response to a historical event – the 1814 drafting of a code of laws for the states that made up the German confederation (before Germany was established as a unified state). It is usually traced back to the writings of the German jurist, Friedrich Karl von Savigny who opposed the idea of such a cross-cutting code of laws, which did not take into account the historical peculiarities of the individual states making up the German confederation. See FV Savigny *Of the Vocation of Our Age for Legislation and Jurisprudence* (1831). See also A Bickel *The Morality of Consent* (1975).

<sup>55</sup> For an exposition and critique of the historical school of jurisprudence, see J Stone *The Province and Function of Law: Law as Logic, Justice, and Social Control: A Study in Jurisprudence* (1950) 419-48.

<sup>56</sup> Law, wrote Savigny, “is developed first by custom and by popular belief, then by juristic activity--everywhere, therefore, by internal, silently operating powers, not by the arbitrary will of a legislator”. See FV Savigny *Of the Vocation of our Age for Legislation and Jurisprudence* (1831) 30.

<sup>57</sup> HJ Bermant “Toward an Integrative Jurisprudence: Politics, Morality, History” (1998) 76(4) *California Law Review* 779 at 788-794. See also OW Holmes *The Common Law* (1963) 1 (pointing out that “the life of the law has not been logic: it has been experience”).

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Understood in this sense, therefore, from the historical law perspective, corruption would be viewed as a concept in comparative, historical research. This definition says: if an act is harmful to the good of a specific society, it is corrupt even if it is legal in the eye of another group of people; if it is beneficial to a people of a particular society, it is not corrupt even if it violates the good of another society or another generation within the same society.<sup>58</sup> In other words, from a historicist's perspective, corruption should be viewed as a relative concept and not as a universal one. In this regard, Michael Johnston has aptly pointed out that:

“We never will devise a definition of corruption as a category of behaviour that will travel well to all such places or times – or even, realistically, to most of them. Moreover, such approaches will often tell us little about the development or significance of corruption in real societies. I propose that in such instances we study, not a category of behaviour, but rather the issue or idea of corruption, and the social and political processes through which it acquires its meaning and significance. I regard corruption as a ‘politically contested concept’, and suggest that comparative analysis can fruitfully focus upon what I call role-defining conflicts.”<sup>59</sup>

This need for a relativist approach to conceptualisation of corruption springs from a number of considerations: First, is the recognition that the social, political and economic structures of countries differ. For example, some of the tasks that are performed by government officials in countries with socialist systems are performed by private individuals in the private sector of the capitalist societies, and in these two situations different standards apply.<sup>60</sup> Second, is the understanding that the attitude of a people to corruption is often influenced by their historical experience.<sup>61</sup> For instance, in former colonies where the European legal system was

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<sup>58</sup> An example of definition that fits this bill is that proposed by A Sajo “From Corruption to Extortion: Conceptualization of Post-Communist Corruption” (2003) 40 *Crime, Law and Social Change* 171 at 176 (“While a concept of corruption may serve goals of intellectual clarity and categorisation, “real corruption” is a *social construct* that results from official definitions ... and anti-corruption practices”).

<sup>59</sup> M Johnston *Comparing Corruption: Conflicts, Standards and Development* a paper presented at the XVI World Congress of the International Political Science Association, Berlin, 1994 available at <http://www.nobribes.org/Documents/ipsaconf.doc> (accessed 20/12/2012).

<sup>60</sup> James Scott, for example, notes that a nation where almost everyone is a government employee can't easily be compared with one where most people work for private corporations. JC Scott *Comparative Political Corruption* (1972) 5.

<sup>61</sup> Ronald Wraith and Edgar Simpkins, for instance, point out that “an act is presumably only corrupt if society condemns it as such, and if the doer is afflicted with a sense of guilt when he does it: *neither of these apply to a*

superimposed on the traditional system, the prevalent attitude is that practices that were customary in the traditional set up only became corrupt when colonial values were introduced.<sup>62</sup> Third, there is difference in opinion about what the scope of corruption should be. There are countries that believe that corruption should be limited to bribery, while others believe that the concept should be broadened to cover other acts such as embezzlement, fraud, favouritism, election dishonesty and bid rigging.<sup>63</sup> And even among those who accept that corruption should cover bribery, there are some who believe that customarily recognised acts such as “gift giving” or “grease payments” should be left out of the definition.<sup>64</sup>

Yet, despite its apparent usefulness in identifying the type of activities understood as immoral in a particular polity, the use of local norms and judgments as a basis for discussing moral concepts such as corruption poses a number of related problems. First, by endorsing conceptual relativism, the theory creates an obstacle to any attempt at cross-cultural analysis of moral concepts. Second, by limiting the discussion of moral concepts to time-bound sensitivities of individual polities, it impinges upon a search for a universal and immutable sense of morality and by extension corruption. Third, the idea of relative national ideals and community values, if unchecked, can be hijacked by crafty individuals to justify political arbitrariness or moral depravity. For example, in the context of Africa, it is sometimes said that the use of public position to assist members of one’s family or next of kin is a valid expression of the extended family system that has existed in many Africa communities. Or that bribery is a harmless way of showing gratitude for deeds done, a practice that had existed in many Africa societies since time immemorial.<sup>65</sup> However, as

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*great deal of African nepotism* (emphasis added).” R Wraith & E Simpkins *Corruption in Developing Countries* (1963) 35.

<sup>62</sup> As a senior official of a Pacific nation said at the Third International Anti-Corruption Conference in Hong Kong, “we did not have corruption in my nation until the British legal system was brought in: The British introduced us to the concept of corruption! See Independent Commission Against Corruption Hong Kong *Third International Anti-Corruption Conference, 1987, Hong Kong -- Conference Report* (1987).

<sup>63</sup> Compare the definition of corruption in the South Africa’s Prevention and Combating of Corrupt Activities Act of 2004 and Kenya’s Anti-Corruption and Economic Crimes Act of 2003.

<sup>64</sup> See, for example, the US Foreign Corrupt Practices Act of 1977 s 78dd-1(b), 78dd-2(b) (exempting the payment of grease money from the ambit of foreign bribery).

<sup>65</sup> For a discussion of the African perspective, see, for example, JPO de Sardan “A Moral Economy of Corruption in Africa?” (1999) 37(1) *The Journal of Modern African Studies* 25; C Akani (ed) *Corruption in Nigeria: The Niger Delta Experience*, (2002); A Nwankwo “*Political Economy of Corruption in Nigeria*” in C Akani (ed) *Corruption in Nigeria: The Niger Delta Experience*, (2002) 9; E Ekeke *Class and State in Nigeria* (1986); T Falola and J Ihonvbere (eds) *Nigeria and the International Capitalist System* (1988);.

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the Economic Commission for Africa rightly points out, these explanations are but mere justifications of what are evidently corrupt conducts.<sup>66</sup>

### 2.4 Why legal criterion should be preferred

The three criteria discussed leave us with a set of contradictory descriptions of standard of behaviour and by extension the phenomenon of corruption, all of which, as highlighted, have major disadvantages. The option that remains is either to accept a state of affairs with multiple definitions or to try to pick up the strengths of each approach and cobble up a hybrid definition. The first option will leave us with different approaches in uneasy competition. For instance, historical law approaches, which rely on ascertaining locally what is perceived to be good or moral, will have the disadvantage of being relativistic, different in time and from society to society. Natural-law approaches that define concepts according to universal moral principles will meet the criticism of being culturally insensitive and of imposing a particular moral understanding of behaviour on the world.<sup>67</sup> On the other hand, in an increasingly globalising world, it is only a well-defined objective criterion of behaviour that can permit international comparisons and engender globalised action against harmful behaviour such as corruption.

Given these irreconcilable differences, the alternative approach would be to integrate the three classical schools of thought into a common functional focus.<sup>68</sup> This approach is not new and has been advocated by the integrative law theorists. The integrative law theory, which is usually traced to Jerome Hall,<sup>69</sup> is based on the understanding that each of the competing schools of law has identified some useful dimension of law, which would be lost if only one of the schools is

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<sup>66</sup> Economic Commission for Africa “Assessing the Efficiency and Impact of National Anti-Corruption Institutions in Africa” (2010) (“One problem with cultural explanations for corruption is that they easily become justifications”)

<sup>67</sup> For example, when examining why, according to British standards, colonial Burma was so “corrupt” JS Furnivall concluded that in many cases the Burmese were simply following their customary norms of correct conduct. JS Furnivall *Colonial Policy and Practice: A Comparative Study of Burma and Netherlands India* (1948).

<sup>68</sup> But see O Kurer “Corruption: An Alternative Approach to Its Definition and Measurement” (2005) 53 *Political Studies* 222 at 227 (pointing out that “far from hampering the research effort, the lack of a unified definition has positively stimulated it”).

<sup>69</sup> The theory was first espoused by Hall in his 1947 article “Integrative Jurisprudence” in P Sayre *Interpretations of modern legal philosophies: essays in honour of Roscoe Pound* (1947) 313. He called this legal philosophy that combines the three classical schools (legal positivism, natural-law theory, and the historical school) integrative jurisprudence.

used as a source of reference.<sup>70</sup> It thus advocates for the mutual reinforcement of the three schools of jurisprudence while recognising their separate individual importance.<sup>71</sup> It provides that for this mutual reinforcement to be made possible, a broader definition in law than that which is usually adopted by each of the schools and which captures the particular virtues of each school must be given.<sup>72</sup> A definition of corruption based on this approach would thus have to embrace the virtues of all the three legal schools of thought for it to meet the criteria of the integrationists. Such a definition would most probably capture the aspect of formal duties and norms from the positivist perspective and the violation of public good as viewed by both the naturalists and historicists.<sup>73</sup>

The article agrees with the integrationists that each of the three substantive legal schools of thoughts has isolated some important perspective of law that would be lost if one aligns itself exclusively with any one of the schools. It, however, contends that if lawmakers are truly representative of the people, then their conception of corruption as enacted in statutes would most probably also be in tandem with the predominant opinion of members of the society which they spring from.<sup>74</sup> As jurist Dicey correctly pointed out, a representative legislature, to ensure its own political survival, would not ordinarily legislate against the wishes of the people or against “the sentiment prevailing among the distinct majority of the citizens of a given country”.<sup>75</sup> In other words, one can safely argue that a positivist approach to corruption does not really contradict a historicist or a naturalist understanding of corruption. Indeed, legal definitions

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<sup>70</sup> J Hall *Foundations of jurisprudence* (1973) chap 6; J Hall *Studies in jurisprudence and criminal theory* (1958) 37-47; J Hall, “From Legal Theory to Integrative Jurisprudence” (1964) 33 *University of Cincinnati Law Review* 153. See also E Bodenheimer “Seventy-Five Years of Evolution in Legal Philosophy” (1978) 23 *American Journal of Jurisprudence* 181 at 204-05 (Writing of “The Need for an Integrative Jurisprudence” citing Jerome Hall).

<sup>71</sup> See HJ Bermant “Toward an Integrative Jurisprudence: Politics, Morality, History” (1998) 76(4) *California Law Review* 779 at 80.

<sup>72</sup> See J Hall, “Integrative Jurisprudence” in PL Sayre (ed) *Interpretations of modern legal philosophies: essays in honour of Roscoe Pound* (1947) 313 (combining positivism and natural-law theory with a sociological jurisprudence and defining law as a type of social action, a process in which rules and values and facts coalesce and are actualized).

<sup>73</sup> See HJ Bermant “Toward an Integrative Jurisprudence: Politics, Morality, History” (1998) 76(4) *California Law Review* 779 at 787.

<sup>74</sup> See K Adrian “Democracy and Despotism: Bipolarism Renewed? (The Comparative Survey of Freedom: 1996” (1996) 1 *Freedom Review* 27 (noting that growing democratisation has meant the emergence of vibrant civil society and free press with the power to hold leaders accountable).

<sup>75</sup> AV Dicey *Lecture on the relation between law and public opinion in England during the Nineteenth Century* (1905) 55 quoted in PP Craig “Dicey: Unitary, Self-Correcting Democracy and Public Law” (1990) 106 *Law Quarterly Review* 105 at 111.

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in most, if not all countries, also usually contribute to the public good and breaking them is condemned by the public.<sup>76</sup> Thus, an act declared illegal by the formal laws would most probably also be immoral in the sense of being injurious to public good/morality as understood by both the naturalists and historicists.

On the other hand, not all immoral acts usually find themselves into formal laws. There are many conducts, which, though considered immoral by popular belief or opinion, fail to meet the threshold of illegality and are therefore excluded from the province of law.<sup>77</sup> This could be because they are private and harmless to the common good or because their potential harm to the common good is considered to be at a tolerable level not warranting intervention of the law.<sup>78</sup> The latter acts of immorality that do not meet the threshold of illegality, it is contended, should not be included in the definition of corruption. The reason for this limitation as aptly explained by Thomas Hobbes is that:

“The desires and other passions of men are in themselves no sin. No more are the actions that proceed from those passions, *till they know a law that forbids them; which till laws be made they cannot know; nor can any law be made, till they (society) have agreed upon the person (sovereign) that shall make it.*”<sup>79</sup>

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<sup>76</sup> See, for example, M Jackson “The political consequences of corruption: a reassessment” (1986) 18(4) *Comparative politics* 459 at 460 arguing that:

“A more stable and precise standard is the law or formal regulations. Laws change, but, unless we seek a single ultimate standard, this is an advantage, not a problem: contrasts or changes in laws allow us to compare the political processes and value conflicts involved in setting rules of behaviour.”

<sup>77</sup> This point was ably demonstrated by Lord Devlin and Jurist Hart in their debate on the Wolfenden Committee’s report on homosexuality and prostitution (JPK Lovibond “The Report of the Departmental Committee on Homosexual Offences and Prostitution” (1957) 2 (5045) *British Medical Journal* 639). See generally P Devlin *The Enforcement of Morals* (1959) (providing the guideline for the relationship of law and morality as: (1) Privacy should be respected; (2) Law should only intervene when society won’t tolerate certain behaviour; (3) Law should be a minimum standard not a maximum standard); HLA Hart *Law, Liberty and Morality* (1963) (While disagreeing with Devlin on the standard for determining morality (he argues that the standard should be “best” not “popular” opinion), however, similarly holds that law should not apply in all aspects of social life). See also G Dworkin “Lord Devlin and the Enforcement of Morals” (1966) 75(6) *The Yale Law Journal* 986 (introducing the concept of liberty into the debate and arguing that if a behaviour is a basic liberty (such as sex) this should not be illegalized unless they cause harm to the public).

<sup>78</sup> See the guidelines provided by Devlin in P Devlin *The Enforcement of Morals* (1959) See also T Aquinas *Summa Theologica* (Fathers of the English Dominican Province translation 1947) Q 96 Art 2 Obj 3 holding that:

“human laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained.”

<sup>79</sup> W Molesworth (ed) *The English Works of Thomas Hobbes of Malmesbury* (1839-45) 114 (emphasis added).



Thus, to the extent that an immoral act is made corrupt by formal law, it should be recognised in a corruption definition. But to the extent that an immoral act does not meet the threshold of illegality, it should be excluded from the ambit of a corruption definition. It is in this light that the argument for the limitation of the concept of corruption to illegal and not *merely* immoral act is to be understood.

### **3 THE ILLEGALITY IS IN THE ABUSE OF PUBLIC ENTRUSTED OFFICE/AUTHORITY FOR PRIVATE BENEFIT**

Having identified illegality as the standard for identifying corrupt conduct, the second question that arises is which illegal acts are corrupt or, put another way, which corrupt acts ought to be illegal. To answer the first form of the question would require one to take a positivist's review of the law to find out what the legal definition of corruption actually is. On the other hand, to answer the second form of the question would require one to engage in a naturalist's (universalist) or a historicist's (relativist) inquiry into the popular moral opinion or belief of what a legal definition of corruption ought to be. However, if one is to take the position, as this article does, that the lawmaker's will as expressed in the formal laws is usually not in conflict with the prevailing moral position in society, then an inquiry into the legal definition provided in the formal laws would in most cases be enough to answer both the "is" and the "ought" in the two forms of the question. However, this assumption must also take into account the fact that there are political systems which are corrupt in that they serve the interests of special groups or sectors and not that of the public.<sup>80</sup> As a caution, therefore, in addition to reviewing formal laws it is also important to review the prevailing popular opinion as expressed in research findings to confirm whether the definition as "is" complies with the definition as "ought" to be.

An examination of the different conventions and legislations reveal that there is no adequate one-line definition of corruption. Many of the laws recognise the multi-faceted nature of corruption and, therefore, instead of adopting an omnibus definition, separate and define its different forms. These forms of corruption include bribery, breach of trust, embezzlement, misappropriation of public funds, failure to follow procurement and financial procedures, illicit enrichment, trading

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<sup>80</sup> See I Currie & J de Waal *The Bill of Rights Handbook* 5ed (2005) 3 (giving the example of the racial South African Parliament, which under the 1909 Union Constitution "could write and rewrite the law, alter the basic structure of the state and invade human rights without constraints").

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in influence, favouritism and dishonesty in use of public property. The emerging thread from the various definitions, however, is that they involve some form of misuse of authority or resources entrusted by the public for private gain. For example, the South African Prevention and Combating of Corrupt Activities Act of 2004 (PCCAA), while singling out the bribery form of corruption, nevertheless defines it as occurring when one party gives to or receives from another party anything of value with the purpose of influencing them to abuse their power.<sup>81</sup> Similarly, the United States Foreign Corrupt Practices Act of 1977 (FCPA), from which the international legal understanding of corruption is usually traced,<sup>82</sup> though focusing on the corrupt practice of foreign bribery, defines it as the paying, offering to pay, or promising to pay foreign government officials to influence any official act, induce officials to act or fail to act in violation of their lawful duty, or induce officials to use their influence with government to obtain business.<sup>83</sup> Likewise, the Anti-Corruption and Economic Crimes Act of 2003 of Kenya (ACECA), defines corruption as any of several defined offences including the fraudulent/unlawful acquisition, mortgage, charge or disposal of public property, failure to pay taxes, fees, levies and charges, fraudulent payments out of public revenue, breach of financial or procurement procedures and engaging in unplanned public projects.<sup>84</sup>

A similar understanding of corruption as abuse of authority, office and resources for private benefit is also evident in international conventions. For example, the United Nations Convention against Corruption, which is the global instrument against corruption, conceptualises corruption broadly as including bribery, embezzlement, misappropriation or other diversion of property by a public official, trading in influence, abuse of functions, illicit enrichment, concealment of illicit wealth and obstruction of justice.<sup>85</sup> The definition holds to account both public and private sector actors and applies in both domestic and foreign context.<sup>86</sup> In this regard, it criminalises bribery of

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<sup>81</sup> Prevention and Combating of Corrupt Activities Act (PCCAA), s 3.

<sup>82</sup> Professor Peter Schroth, for example, notes that “any discussion of international measures against corruption and bribery must begin with the United States.” PW Schroth “National and International Constitutional Law Aspects of African Treaties and Laws Against Corruption” (2003) 13 *Transnational Law & Contemporary Problems* 83 at 87.

<sup>83</sup> FCPA, s 78dd-1(a), 78dd-2(a) & 78dd-3(a).

<sup>84</sup> ACECA, s 39-47.

<sup>85</sup> UNCAC chap III.

<sup>86</sup> UNCAC arts 21 and 22.

not only foreign public officials, but also of national public officials and officials of public international organisations.<sup>87</sup>

Similarly, the African Union Convention on Preventing and Combating Corruption, which is the regional anti-corruption instrument for the African continent, conceptualises corruption broadly to cover active and passive bribery, influence peddling, illicit enrichment, diversion of public property for private use, concealment of proceeds derived from corrupt acts, and conspiracy to commit corruption.<sup>88</sup> Likewise, the Inter-American Convention Against Corruption requires states parties to criminalise solicitation, acceptance, offer, or delivery of improper payments, illicit use of a position of public entrusted authority for the official's own benefit, fraudulent use or concealment of property derived from that position of authority and participation in any of these acts as accomplice, collaborator or conspirator.<sup>89</sup> The same conception of corruption as abuse of public entrusted authority is also evident in both the Criminal and Civil Conventions on Corruption of the Council of Europe<sup>90</sup> and the European Union's Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States.<sup>91</sup>

Indeed, while there is a difference in emphasis on the forms of corruption,<sup>92</sup> the common thread in the different legal definitions is that corruption involves the abuse of authority, office or resources entrusted by the public for private benefit. This illegal thread of corruption as abuse of

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<sup>87</sup> UNCAC arts 15 and 16.

<sup>88</sup> AU Convention art 4.

<sup>89</sup> OAS Convention art VI & VII.

<sup>90</sup> See COE Criminal Convention arts 5,6,9,11,12 & 13 (criminalising a list of specific forms of corruption, the majority of which are limited to active and passive bribery. Trading in influence and laundering the proceeds of crime are also covered, but extortion, embezzlement, insider trading and nepotism are not. Apart from domestic corruption, the Convention also deals with a range of transnational cases such as bribery of foreign public officials and members of foreign public assemblies). See also COE Civil Convention art 2 (defining corruption as "requesting, offering, giving or accepting directly or indirectly a bribe or any other undue advantage or the prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof").

<sup>91</sup> EU Corruption Convention art 2.

<sup>92</sup> For example, UNCAC provides for a comprehensive definition of corruption covering different forms such as bribery, embezzlement, influence peddling, fraud, illicit enrichment and diversion of public property (See UNCAC chapter III) while the EU Corruption Convention emphasizes only the bribery form of corruption (See EU Corruption Convention, art 2). Similarly, while the Kenyan Anti-Corruption legislation has embraced the comprehensive conception of corruption (Anti-Corruption and Economic Crimes Act of 2003 (ACECA), s 2, 39-47), the South African Anti-Corruption Legislation only covers bribery Prevention and Combating of Corrupt Activities Act of 2004 (PCCAA), s 3.

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public entrusted authority for private benefit is also evident in the writing of many scholars and in the opinion of practitioners in the field of corruption. For example, in his research among elites in emerging economies Daniel Kaufman found empirical support for relying on this definition as a workable definition for corruption.<sup>93</sup> Similarly, in her literature review for the Asian Foundation, Amanda Morgan found many recent academic studies and international organisations opting for this definition in their analysis of corruption.<sup>94</sup> The World Bank has also carried a review of anti-corruption literature and found a preponderant conception of corruption as abuse of public entrusted authority for private gain.<sup>95</sup>

This understanding of corruption as the abuse of authority, office or resources entrusted by the public for private benefit is broad and open ended enough to cover the limitless manifestations of corruption such as bribery, embezzlement, favouritism, bid rigging and fraud. The definition is also tenably integrative of the legal and moral criterion of behaviour as it embraces the aspect of formal duties and norms from the positivist perspective through the concept of public trust; and the aspect of the violation of the public good as viewed by both the naturalists and historicists through the concept of abuse of public entrusted authority. In addition, the definition embraces the essential conflict between public good and private interest in corruption as viewed by both the naturalists and historicists through the economic concept of private gain.<sup>96</sup> In this way, corruption becomes a multidimensional concept that has legal, social, political, economic and

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<sup>93</sup> D Kaufmann *Perceptions about Corruption among Elites in Emerging Economies* (1997).

<sup>94</sup> See AL Morgan *Corruption: Causes, Consequences, and Policy Implications: A Literature Review* (1998) 9-10.

<sup>95</sup> World Bank *Helping Countries Combat Corruption: The Role of the World Bank* (1997). The World Bank, for example, defines corruption as “the abuse of public office for private gain.” World Bank *Helping Countries Control Corruption: The Role of the World Bank* (1997) 8. The African Development Bank, on the other hand, sees corruption as encompassing not only abuse of public office but also of private office and defines it as “the abuse of public or private office for personal gain.” See African Development Bank “Anticorruption Policy: Harmonized Definition of Corrupt and Fraudulent Practices” available at <http://www.adb.org/Documents/Policies/Anticorruption/definitions-update.pdf> (accessed 4/2/2010). Transparency International eschews this public-private dichotomy and simply defines it as “the abuse of entrusted power for personal gain”. Transparency International *Global Corruption Report* (2003). See also See S Rose-Ackerman “The Political Economy of Corruption” in KA Elliot (ed) *Corruption and the Global Economy* (1997) 31 at 31 (pointing out that corruption also occurs where public officials have a direct responsibility for the provision of a public service or application of specific regulations to the private sector).

<sup>96</sup> Private gain here is viewed broadly as including gain to family members, close friends or close associates. The gain also need not be monetary in nature. It could include expensive gifts like jewellery to wife, training in exclusive sites and promotions.

ethical connotations.<sup>97</sup> The definition can, thus, be said to capture the multifaceted nature of corruption.<sup>98</sup>

### 3.1 Meaning of public entrusted authority

Conception of corruption as abuse of public entrusted authority for private benefit, though predominant, is, however, not universally supported. A major criticism that is usually levelled against a conception of corruption as abuse of public authority, office or resources for private gain is that it leaves out private corruption, particularly corruption in the private sector. The argument goes that by restricting corruption to abuse of “public office” or “public authority” or “public resources” the definition ignores corruption that takes place in the private sector.<sup>99</sup>

Such criticism can, however, only be valid if by “public” is meant “government” so that the definition turns into abuse of “government office” or “government authority” or “government resources”. Otherwise, if by “public office”, “public authority” or “public resources” is meant an office, authority or resources entrusted by the public then the criticism loses its sting. This is because most, if not all, of the offices, authority or resources in the private sector are also entrusted by the public or a section of the public and, therefore, their abuse falls within this broad definition of corruption.<sup>100</sup>

What the definition does not cover, and rightly so, is the abuse of private authority, which private individuals entrust to themselves, such as the case where a sole proprietor misuses the funds of his business for personal benefit. In this case, while there is abuse leading to loss of fund, there would be no wrongdoing warranting legal sanction because the capital was the sole proprietor’s to begin with. The case would be different if the person, for private benefit, abuses the authority or resources formally entrusted to him or her by another person, a group of people, a partnership,

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<sup>97</sup> Brinkerhoff, for example, sees corruption as “subsuming a wide variety of illegal, illicit, irregular, and/or unprincipled activities and behaviours”. DW Brinkerhoff “Assessing political will for anti-corruption efforts: an analytic framework” (2000) 20(3) *Public administration and development* 239 at 241.

<sup>98</sup> On the complexity of corruption, see generally MK Khan “A Typology of Corrupt Transactions in Developing Countries” (1996) 27(2) *Institute of Development Studies Bulletin* 12.

<sup>99</sup> S Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform* (1999) 187–88.

<sup>100</sup> The private sector is made up of sole proprietorships, partnerships, companies, or associations whose shareholders are members of the public. Therefore people working in these private institutions are acting under entrusted authority by a section of the public. Any abuse of such authority would, tenably, fall within the definition of corruption.

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a company or an association. In all these latter cases the public, or more accurately, a section of the public, is involved and going by the functional definition of corruption the person would have abused authority or resources entrusted by the public for private benefit. The public here must, therefore, be construed broadly to include the whole public or a section of it.

This broad understanding of the “public office/authority/resources” is necessary for three related reasons. Firstly, in many countries the private sector is increasingly overgrowing the government sector in size.<sup>101</sup> Secondly, the line between the government and private sectors is being blurred by privatisation of government functions, outsourcing, and public listing of private companies in the share market.<sup>102</sup> Third, the huge economic muscle of multinational corporations and the consequent impact they are having on the lives of members of the public means that they cannot be excluded from an international anticorruption strategy.<sup>103</sup> Another unrelated but equally important reason is that with the increasing devolution of government functions to local levels, government offices are increasingly affecting only a section of the public. This latter reality further justifies the need to broaden the definition of public office so as to capture offices formed by or affecting only a section of the public. Thus, viewed from this broad perspective, an office or authority that has been created by the public or a section of it, be it in the public or private sector, would fall within the definition of public office/authority and if a person entrusted with that office/authority abuses its functions for private benefit such abuse would amount to corruption.

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<sup>101</sup> See, for example, D MacGregor “Jobs in the Public and Private Sectors: Presenting data (updated to June 2000) on jobs in the public and private sectors” (2001) Economic Trends, Working Paper No. 571 available at <http://www.statistics.gov.uk/cci/article.asp?id=88> (accessed 1/11 2011) (pointing out that in the UK, 82 per cent of all workforce jobs were in the private sector in 2000); Y Yao “The Size of China’s Private Sector” (1999) *China Update* 1 at 2 (pointing out to an increasing influence of the private sector in China – for example the private sector accounted for 34.3 per cent of national industrial output by 1997, compared to 2 per cent in 1985).

<sup>102</sup> Privatization, apart from transferring public-oriented services to the private sector, also creates opportunities for corruption during the process of transfer and after. See P Heywood “Political Corruption: Problems and Perspectives” (1997) 45 *Political Studies* 417 at 429 (arguing that due to economic liberalisation and new political management reforms, the borderline between private and public spheres have blurred). See also Transparency International Press Release, ‘TI calls for the UN Anti-Corruption Convention to Deter Bribery of Corporate Officials and Criminalize Private Sector Corruption’, 11 March 2003, available at [http://www.transparency.org/pressreleases\\_archive/2003/2003.03.11.un\\_convention.html](http://www.transparency.org/pressreleases_archive/2003/2003.03.11.un_convention.html) (accessed 1/1/2012)

<sup>103</sup> On the economic muscle of multinational corporations, see UNCTAD *World Investment Report 2002* (2002) 90 available at <http://r0.unctad.org/wir/pdfs/fullWIR02/pp85-114.pdf> (accessed 30/10/2011).

### 3 2 The nature of abuse

The kinds of abuse that would amount to corruption, as seen from the discussed legal instruments,<sup>104</sup> are varied and, therefore, difficult to circumscribe, nor, it is submitted, should they be. One common denominator of these forms of abuse, however, is that they involve the use of public entrusted authority for the purpose for which it was not intended. This common denominator derives from the ordinary dictionary meaning of abuse, which is, misuse or use for an unintended purpose.<sup>105</sup> Thus, abuse of public entrusted authority would entail the use of authority for the purpose for which it was not intended. This abuse can take many forms, including demanding bribes before offering an otherwise free public service, embezzlement, diverting public resources for personal use, nepotism or cronyism in recruitment to public offices, acting for one's own benefit in carrying out official functions, fraudulent dealings, or taking advantage of information that one only has access to as a public official. The World Bank, for example, has taken "abuse of public office for private gain" as its minimal working definition and dissected it by identifying specific abuses:

"Public office is abused for private gain when an official accepts, solicits, or extorts a bribe. It is also abused when private agents actively offer bribes to circumvent public policies and processes for competitive advantage and profit. Public office can also be abused for personal benefit even if no bribery occurs, through patronage and nepotism, the theft of state assets, or the diversion of state revenues."<sup>106</sup>

The abuse is, however, not limited to those initiated by the holder of public office/authority but also include those initiated by private individuals. So that it also amounts to corruption if private individuals offer bribes to influence decisions of officials entrusted with public authority/office in their favour so as to, for example, pay lower taxes, win a contract, get employed or promoted, get something done quickly, or avoid a fine or penalty. As the World Bank rightly notes, public office "is also abused when private agents actively offer bribes to circumvent public policies and processes for competitive advantage and profit."<sup>107</sup>

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<sup>104</sup> Section 1.3 above.

<sup>105</sup> See Oxford Dictionaries available at <http://oxforddictionaries.com/definition/english/abuse> (accessed on 3/9/2011) defining abuse as "use (something) to bad effect or for a bad purpose; misuse".

<sup>106</sup> World Bank *Helping Countries Combat Corruption: The Role of the World Bank* (1997) 8-9.

<sup>107</sup> World Bank *Helping Countries Combat Corruption: The Role of the World Bank* (1997) 8.

### 3 3 The intention of abuse is to benefit private not public interest

It is usually not easy to identify the reasons that motivate people to act in a certain way especially given the conflation and complexity of individual dispositions. Indeed countering corruption would be very easy if the motivations were easily identifiable and uncontroversial. “Then it would be enough to carry out structural diagnosis, detect inadequate relations and banish corruption.”<sup>108</sup> But such a task is not easy as one has to take into account a great diversity in human motivation and modes of action and move beyond approaches that embrace a “single behavioural logic.”<sup>109</sup> Furthermore, one has to contend with the “situational imperatives” and the “social processes” that shape a person’s inclination.<sup>110</sup> Still, despite this seemingly insurmountable challenge, the search for behavioural motivations has remained a perennial endeavour preoccupying the thoughts of scholars for many years.<sup>111</sup>

Within the context of corruption, it is generally recognised that corruption is not a crime of passion, or an accidental happenstance, but a crime of calculated gain.<sup>112</sup> This calculation involves a conscious or sub-conscious weighing of the expected benefits of engaging in corruption and the expected costs in the form of the consequences of being detected.<sup>113</sup> Corruption is predicted to occur if the gain from corruption outweighs the cost of being caught. As Van Klaveren aptly noted:

“A corrupt civil servant regards his public office as a business, the income of which he will seek to maximise. The office then becomes a “maximising unit”. The size of his

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<sup>108</sup> R Espejo *et al* “Auditing as the Dissolution of Corruption” (2001) 14(2) *Systemic Practice and Action Research* 139 at 144.

<sup>109</sup> JP Olsen “Citizens, Public Administration and the Search for Theoretical Foundations” (2004) 37(2) *Political Science & Politics* 69 at 75.

<sup>110</sup> JQ Wilson *Bureaucracy: What Government Agencies Do and Why They Do It* (1989) 34.

<sup>111</sup> See for example, PE Crewson “Public Service Motivation: Building Empirical Evidence of Incidence and Effect” (1997) 7 *Journal of Public Administration Research and Theory* 499; DD Wittmer “Serving the People or Serving for Pay: Reward Preferences among Government, Hybrid Sector, and Business Managers” (1991) 14 *Public Productivity and Management Review* 369.

<sup>112</sup> See R Klitgaard *et al* *Corrupt Cities: A Practical Guide to Cure and Prevention* (2000) The World Bank Institute and Institute for Contemporary Studies, Washington at 28 (noting that “Corruption is a crime of calculation, not passion”).

<sup>113</sup> R Klitgaard *Tropical Gangsters* (1990) 90 (“it is reasonable to posit that an official undertakes a corrupt action when in his judgments, it’s likely benefits outweigh its likely costs”). Compare with the tax evasion model where the same calculations take place. See M Allingham and A Sandmo “Income Tax Evasion: A Theoretical Analysis” (1972) 1 *Journal of Public Economics* 323.



income depends upon the market situation and his talents for funding the point of maximal gain on the public's demand curve."<sup>114</sup>

A person, thus, engages in the abuse of public entrusted authority because of the personal gain that he calculates to reap from it.<sup>115</sup> Because of this reason private gain is generally considered an integral part in the conception of corruption. But should all abuses of public entrusted authority for private gain be regarded as corruption? The answer to this question requires one to appreciate the factors that motivate individuals to resort to corruption as a means of achieving private gain.

Studies reveal that, while the motivational factors for human behaviour are many,<sup>116</sup> those that drive the calculation in corruption can, however, be distilled into two: the internal factor of greed and the external factor of need.<sup>117</sup> Legal philosophers have similarly identified these two as the main drivers of corrupt conduct. On his account of human psychology, Thomas Hobbes, for example, points out that man's action is motivated by self-preservation. In chapter two of *The*

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<sup>114</sup> See J Van Klaveren "The Concept of Corruption" in AJ Heidenheimer *Political corruption: Readings in comparative analysis* (1978) 26, 38-40, quoted in AJ Heidenheimer *et al Political Corruption: A Handbook* (1989) 9. See also M Qizilbash "Corruption and Human Development: A Conceptual Discussion" (2001) 29(3) *Oxford Development Studies* 265 at 267-268 (noting that the civil servant is "an income-maximizing monopolist, who uses his monopoly position to exploit the public"). Viewed from a principal-agent perspective, the agent or civil servant is said to be corrupt when he sacrifices the interest of the principal or public to his or her own pecuniary advantage. R Klitgaard *Controlling Corruption* (1988) 24:

"This approach defines corruption in terms of the divergence between the principal's or public's interests and those of the agent or civil servant: corruption occurs when an agent betrays the principal's interest in pursuit of her (sic) own."<sup>114</sup>

<sup>115</sup> See further GS Becker "Crime and Punishment: An Economic Approach" (1968) 76 *Journal of Political Economy* 169.

<sup>116</sup> For example, when asked to rank what is most important to them, 60% of public employees surveyed by Houston chose "meaningful work," 18% chose "chances for promotion," 12% chose "job security," and 11% put "high income" at the top of their list. DJ Houston "Public service motivation: A multi-variate test (2000) 10 *Journal of Public Administration Research and Theory* 713.

<sup>117</sup> See V Tanzi *Corruption around the world - causes, consequences, scope, and cures* (1998) (concluding that "One can speculate that there may be corruption due to greed and corruption due to need"). Holmes also cites human weakness as another human motivation for corruption. He gives the example of those who, because of human weakness, find it difficult to reject offers from a person of a "generous" nature or those who accepts gifts because they know they have been particularly helpful to someone (that is they feel that a reward is not inappropriate), or those who genuinely do not want to offend or embarrass a grateful supplicant. Fear is also mentioned as a motivation for corruption. It is argued that in a hierarchical situation, for example, a subordinate may fear the consequences of not acting in a similar way to his/her corrupt superior. See L Holmes *The End of Communist Power: Anti-Corruption Campaign and Legitimation Crisis* (1993) 170. However, all these examples given by Holmes point to human weakness and fear as more of a justification for engaging in corruption than a motivation for the same. In any case these external factors that "force" people to be weak can safely fall under the need factor.

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*Citizen* he urges that the whole breach of the laws of nature “consists in the false reasoning or rather folly of those who see not those duties they are necessarily to perform towards others in order to *their own conservation* (emphasis added).”<sup>118</sup> John Locke, on his part, is more nuanced, arguing that man has the capacity for reason and good judgment and that he is always motivated to do what is right.<sup>119</sup> At the same time, he acknowledges man’s perennial temptations to take advantage of others and to develop “disproportionate desires” for worldly goods and power, to the neglect of virtue.<sup>120</sup> Jean-Jacques Rousseau’s own view is that humans are motivated by both self-preservation and by natural concern for others, dispositions that can manifest themselves in a variety of ways.<sup>121</sup>

Indeed greed, which John Locke calls “disproportionate desires”, has been recognised as a predominant factor in the motivation for corruption.<sup>122</sup> This is because it makes people selfish and insatiably hungry for status and comfort which their lawful income cannot match.<sup>123</sup> Because of greed people become blind to the misery their corruption causes others and justifies it simply because they gain from it.<sup>124</sup> It makes people trade their personal integrity and virtues in

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<sup>118</sup> T Hobbes *De Cive (The Citizen)* (1949) 32n. See also L Stephen *Hobbes* (1904) 208-209 (concluding that Hobbes’ real theory is that “Men act for their own preservation as stones fall by gravitation”); JW Gough *The Social Contract: A Critical Study of Its Development* 2 ed (1957) 111 (Pointing out that the reasons why men obey the sovereign is for self preservation: “Their ruling motive is desire for protection – for the preservation of their lives”). But see M Oakeshott *Leviathan* (1957) Lviii - Lxi (pointing out that while selfishness is common in Hobbes, Hobbes is making a more fundamental point not exclusively related to self-preservation).

<sup>119</sup> J Locke *Second treatise of government* (1980) 9.

<sup>120</sup> J Locke *Second treatise of government* (1980) chap 4.

<sup>121</sup> For Rousseau “the human race would have perished long ago if its preservation had depended only on the reasoning of its members.” In his view, our disposition to do what is good for oneself without harming others is a “natural sentiment,” and “it is in this natural sentiment, rather than in subtle arguments, that we must seek the cause of the repugnance every man would feel in doing evil, even independently of the maxims of education”. JJ Rousseau *The Social Contract* (1786) 108.

<sup>122</sup> See, for example, R Wraith and E Simpkins *Corruption in Developing Countries* (1963) 40 (Pointing out that love for ostentation is a major contributor of corruption in African Societies); J Thornton “Confiscating Criminal Assets: the New Deterrent” (1990) 2 *Current Issues Criminal Justice* 72 (concluding that “the motivation for such crime is greed and the aim is profit”); TM Ocran *Law in Aid of Development: Issues in Legal Theory, Institution Building, and Economic Development in Africa* (1978) 119, fn 10 (listing greed as a cause of corruption in West Africa); D Treisman “The causes of corruption: a cross-national study” (2000) 76 *Journal of Public Economics* 399, 399-457; E Colombatto “Why Is Corruption Tolerated?” (2003) 16(4) *Review of Austrian Economics* 363, 363-79.

<sup>123</sup> See JS Nye “Corruption and political development: A cost-benefit analysis” (1967) *American Political Science Review* 61 at 416 (identifying corruption as behaviour that “deviates from the formal duties of a public role (elective or appointive) because of private-regarding (personal, close family, private clique) wealth or status gains”).

<sup>124</sup> See SH Alatas *The sociology of corruption: the nature, function, causes, and prevention of corruption* (1980) 77 (quoting the 14<sup>th</sup> century writing of Abdul Rahman Ibn Khaldun that “the root cause of corruption” was “the passion for luxurious living with the ruling group. It was to meet the expenditure on luxury that the ruling group resorted to corrupt dealing”).

exchange for the trappings of wealth. In the case of public officials greed comes in to motivate them to abuse their authority, embezzle or misappropriate entrusted public funds, or demand bribes from members of the public so as to finance their “disproportionate desires” for lavish lifestyles and worldly power.<sup>125</sup> For the private citizen, greed leads them to offer bribes so as to avoid or jump to the front of a bureaucratic queue, or avoid lawful obligation or penalty, or get a benefit that he or she is otherwise not entitled to.<sup>126</sup> And since greed feeds on itself, the more benefit these people gain, the greedier they become for more. As Hobbes aptly noted:

“So that in the first place, I put for a general inclination of all mankind, a perpetual and restless desire of power after power that ceaseth only in death. And the cause of this, is not always that a man hopes for a more intensive delight, than he has already attained to; or that he cannot be content with a moderate power; *but because he cannot assure the power and means to live well, which he hath present, without the acquisition of more.*”<sup>127</sup>

While greed “pushes” an individual to selfishly seek beyond their basic requirement, the need-factor, what Hobbes and Rousseau calls self-preservation, forces an individual to satisfy basic requirements for survival. It is caused mainly by the systemic deficiencies in a society’s institutions, laws, economics, culture and politics.<sup>128</sup> For example, where institutions have ceased, or take long to function, citizens may be “forced” to resort to bribes because it is the fastest way, or actually the only way by which they can access the service that they are otherwise freely entitled to.<sup>129</sup> Similarly, where a country’s politics is unregulated or is unstable, politicians may find that they have to resort to bribery and cheating to get elected or to maintain their

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<sup>125</sup> See RC Tilman “Emergence of Black-Market Bureaucracy: Administration, Development, and Corruption in the New States” in MU Ekpo (ed) *Bureaucratic Corruption in Sub-Saharan Africa: Toward a Search for Causes and Consequences* (1979) 352 (quoting Brahman Prime Minister of Chandragupta list of “at least forty ways” of embezzling money from government).

<sup>126</sup> See, for example, SH Alatas *The sociology of corruption: the nature, function, causes, and prevention of corruption* (1980) 9 (giving examples of bribery in ancient China).

<sup>127</sup> W Molesworth *The English Works of Thomas Hobbes of Malmesbury* (1839-45) 85 ((emphasis added)). See also Plato *Republic* (2000) VI, 1 (“For our lusts are set over our thoughts like cruel mistresses, ordering and compelling us to do outlandish things”).

<sup>128</sup> For a discussion see C Van Rijckeghem & B Weder “Corruption and the Rate of Temptation: Do Low Wages in the Civil Service Cause Corruption?” (1997) International Monetary Fund Working Paper Working Paper No. 97/73 available at [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=882353](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=882353) (accessed 20/11/2011).

<sup>129</sup> See MU Ekpo “Gift-giving and Bureaucratic Corruption in Nigeria” in Ekpo (Ed) *Bureaucratic Corruption in Sub-Saharan Africa: Toward a Search for Causes and Consequences* (1979).

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political positions.<sup>130</sup> The same logic applies where the economy cannot afford workers' basic needs, or where poverty is pervasive to the point that people cannot make ends meet. In these instances, individuals may be tempted to resort to corrupt ways of earning money or accessing resources in order to cushion themselves or their families from the debilitating effects of a non-functioning economy.<sup>131</sup> Likewise, where one's culture requires, for example, dependence and loyalty to one's group, individuals may be "forced" to misuse their position in favour of the group so as to secure their sense of belonging.<sup>132</sup>

Some might argue that because need based corruption is externally driven it should be considered a lesser corruption than greed based corruption. However, this argument should not be allowed to hold sway. This is because there is enough evidence showing that there are many people who would be in similar dire situations caused by external need but still remain honest, hardworking, impartial and trustworthy.<sup>133</sup> Indeed these deficiencies in societal structures that force people to resort to underhand tactics are not aimed at specific individuals but affect the public in common. Those who react to them by taking unlawful advantage of the opportunities granted by their public positions for private benefit should not therefore escape culpability on the

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<sup>130</sup> The concept of "status strain" introduced by Lipset and Raab can explain how people behave when they fear losing their status. This fear of status decline is caused when those who are socially well-established feel threatened. In politically unstable countries, the anxiety and fear from the "status strain" will put pressure on the people to do anything possible in order to protect their social status and property including engaging in corrupt conduct. SM Lipset & E Raab *The politics of unreason: the right-wing extremism in America* (1970).

<sup>131</sup> See C Van Rijckeghem & B Weder "Corruption and the Rate of Temptation: Do Low Wages in the Civil Service Cause Corruption?" (1997) International Monetary Fund Working Paper Working Paper No. 97/73 available at [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=882353](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=882353) (accessed 20/11/2011).

<sup>132</sup> As Carvajal aptly notes, close relationships have corruption-engendering effects as "networks need friends in influential positions in order to manoeuvre payoffs, to attain suitable regulations accordance with one's interests, and to buy protection". R Carvajal "Large Scale Corruption: Definition, Causes, and Cures (1999) 12(4) *Systemic Practice and Action Research* 335 at 343. According to L Holmes *The End of Communist Power: Anti-Corruption Campaign and Legitimation Crisis* (1993) 165:

"The power of both peer pressure and peer-comparison can be great, for instance in the words of one artist "when the best of people take bribes, isn't it the fool who doesn't?" In other words if individuals see others around them benefiting from corruption, they may well choose to indulge too."

<sup>133</sup> See, for example, C Van Rijckeghem & B Weder "Corruption and the Rate of Temptation: Do Low Wages in the Civil Service Cause Corruption?" (1997) International Monetary Fund Working Paper Working Paper No. 97/73 available at [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=882353](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=882353) (accessed 20/11/2011) (according to their empirical study based on public sector wage data of 31 developing countries, the raising of the level of salary would not lead to lower corruption in the short run, though an active wage policy is still necessary in the fight against corruption). See also K Abbink "Fair Salaries and Moral Cost of Corruption" (2000) University of Bonn Economic Discussion Papers No 1 (concluding that high relative salaries do not lead to less corruption); Compare with RK Goel & MA Nelson "Corruption and Government Size: A disaggregated Analysis (1998) 97 *Public Choice* 107.

basis of need.<sup>134</sup> When the social conditions are dire men must learn to live honestly within those conditions as they seek ways to improve or rectify the situation for all. Otherwise, necessity can become a pretence under which “every enormity is attempted to be justified”.<sup>135</sup> As Rousseau correctly pointed out in *Emile*:

“So it is the fewness of his needs, the narrow limits within which he can compare himself with others that makes a man really good; *what makes him really bad is a multiplicity of needs and dependence on the opinions of others* (emphasis added).”<sup>136</sup>

Thus, both greed and need based corruption are equally culpable. They both elevate private interest over public good. This elevation of private interest over public interest is what makes corruption condemnable in many societies and accounts for why private gain is considered an essential element in the definition of corruption.<sup>137</sup> It must, therefore, be shown to exist for an abuse of public entrusted authority to amount to corruption. Mere abuse of public entrusted authority would not do. This is because there are circumstances where an abuse of public entrusted authority would be justified for serving the common good and not private interest. For example, in cases of an emergency a public official may be forced to divert funds or public property from its intended purpose in order to save public lives. In these kinds of cases, the element of private gain would be lacking to make the act corrupt.

Still, one has to be careful before setting a fast and rigid rule that all acts that seem to serve the common good are non-corrupt. This is because private interest comes in various shades and shapes and is not limited to monetary gain or to the individual interest of the public official but extends to other non-monetary benefits and to benefits accruing to the family, friends and close associates of the suspected official.<sup>138</sup> Indeed the benefit to the public could well be incidental to the main objective of benefitting private interests. For example, a holder of public office may opt

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<sup>134</sup> See JJ Rousseau “Lettres Morales” in H Gouhier *Ouvres Completes de Jean Jacques Rousseau* vol 4 (1969) 1106 (noting that “the whole morality of human life is the intention of man”).

<sup>135</sup> See W Paley *The principles of moral and political philosophy* (1786) 121 (“but necessity is pretended; the name under which every enormity is attempted to be justified”).

<sup>136</sup> Rousseau, *Emile: Or, On Education* (1762) 209.

<sup>137</sup> See V Tanzi *Corruption around the world - causes, consequences, scope, and cures* (1998).

<sup>138</sup> Private gain here is viewed broadly as including gain to family members, close friends or close associates. The gain also need not be monetary in nature. It could include expensive gifts like jewellery to wife, training in exclusive sites and promotions.

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for single sourcing in procuring public goods and services instead of the more rigorous process of open tendering ostensibly to save the public money while the real reason is to rig the process in favour of a specific supplier who is his or her close associate or friend. Each case should, therefore, be determined on its own facts. The point that needs to be stressed, though, is that the intention to benefit private interest is an essential element in the conception of corruption.

### **4 WHY PRIVATE GAIN AT THE EXPENSE OF PUBLIC GOOD IS AT THE CORE OF CORRUPTION DEFINITION: A SOCIAL CONTRACT THEORY EXPLANATION**

As understood in the above description, corruption, in a sense, is the elevation of self-interest over public good. It is rooted in the selfish idea that the goal of holding public entrusted office or authority is to channel as much of the public cake as possible to one's self, family, tribe or friends, with little regard to the need of the trustees (the public). This essence of corruption goes to the very root of why corruption is condemned in many societies.<sup>139</sup> It breaches the very premise of the social contract, which requires persons entrusted with public authority, resources, or office to utilise the authority, resources, or office for the benefit of the public and not to convert public goods, services, benefits and advantages to private hands, without lawful or moral justification.<sup>140</sup> As one commentator aptly observed:

“Under any theory of government, the wealth of a nation is traditionally placed under the guardianship of its elected and appointed officials. Implicit in the acceptance of a public appointment is a commitment by the political leadership to hold and manage the nation's wealth and resources in trust for the people. In their role as a trustee, the public servant is subject to the constraints imposed by the fiduciary relationship he enjoys with the public he serves. A fiduciary is under a duty to refrain from administering the trust in a manner that advances his personal interests at the expense of the beneficiaries and to use

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<sup>139</sup> See V Tanzi *Corruption around the world - causes, consequences, scope, and cures* (1998).

<sup>140</sup> See, for example, E Burke “Reflections on the Revolution in France” in E Burke *The work of the right honorable Edmund Burke* (1871) 359 (pointing out that “society is, indeed, a contract”). But see JS Mill *On liberty* (1975) 70 (“[s]ociety is not founded on a contract, and... no good purpose is answered by inventing a contract in order to deduce social obligations from it”).

reasonable care and skill to preserve the trust property. Officials who engage in illicit enrichment (a form of corruption) violate this public trust.”<sup>141</sup>

The idea of the social contract has been used since the 17<sup>th</sup> century to explain the legitimacy of human authorities and still remain a popular doctrine today.<sup>142</sup> It is usually traced back to the classical writings of Thomas Hobbes,<sup>143</sup> John Locke<sup>144</sup> and Jean-Jacques Rousseau,<sup>145</sup> though Sophists<sup>146</sup> and earlier philosophers like Plato<sup>147</sup> and Aristotle<sup>148</sup> had also touched on it.<sup>149</sup> The theory views human authorities as established by convention with their subjects for specific tasks and that their legitimacy depends upon fulfilment of these tasks.<sup>150</sup> The theory begins by unravelling the condition of man in the hypothetical “State of Nature”, that is, the natural state of man before creation of civil society. In this state, life is described as “solitary, poor, nasty, short and brutish”<sup>151</sup> as men are forced to compete for limited resources in an environment full of distrust and lacking in an externally enforceable rule of competition.<sup>152</sup> Life is uncertain and

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<sup>141</sup> N Kofele-Kale “Presumed Guilty: Balancing Competing Rights and Interests in Combating Economic Crimes” (2006) 40 *International Lawyer* 909 at 942.

<sup>142</sup> See, for example, P Riley *Will and Political Legitimacy: a critical exposition of social contract theory in Hobbes, Lock, Rousseau, Kant and Hegel* (1982) 1 (pointing out that “political legitimacy, political authority and political obligations are derived from the consent of those who create a government and who operate it”).

<sup>143</sup> T Hobbes *Leviathan* (1994).

<sup>144</sup> J Locke *Second treatise of government* (1980).

<sup>145</sup> JJ Rousseau *The social contract and the first and second discourses* (2002).

<sup>146</sup> Sophists were travelling teachers in ancient Greece who specialized in the use of philosophy to teach virtues and excellence to their students who were mainly made up of the nobility. On details of Sophist thoughts, see J de Romilly *The Great Sophists in Periclean Athens* (1992) (Pointing out that Sophists in fifth-century (B.C.) Athens had inferred from the difference in lifestyle and custom among the communities living in the Mediterranean world that social arrangements were not products of nature, but of convention or contract).

<sup>147</sup> For example, in earlier Platonic dialogue, *Crito*, Socrates adopts a social contract argument to tell Crito why he must remain in prison and accept the death penalty. He argues that because the Laws of Athens has served him during his life out of prison, he is consequently obligated to obey the Laws. See Plato *Five Dialogues* (1981).

<sup>148</sup> See Aristotle *On generation and corruption* (2004).

<sup>149</sup> For a historical account of social contract theory see DG Ritchie “Contribution to the History of the Social Contract Theory” in DG Ritchie (ed) *Darwin and Hegel: and Other Philosophical Essays* (1893) 196.

<sup>150</sup> While there is controversy on how voluntarism and contract theory arose, what is certain is that ideas of the “good” state espoused by the early Christian leaning theorists eventually gave way to ideas of the “legitimate” state, which was taken to rest on will of the people. Today, social contract theory is understood to hold that social arrangements are products of agreements not of nature. For a discussion of the origin of legitimate state and social contract theory, see, for example, A Black “The juristic origins of social contract theory” (1993) 14(1) *History of Political Thought* 57.

<sup>151</sup> T Hobbes *Leviathan* (1994) 100.

<sup>152</sup> Even though, as John Locke points out, nature has provided enough for everybody and despite the fact that natural man is controlled in his actions by natural morality discoverable to human reason, given that this morality is not externally enforced, the self-interest of man can and do often take over thereby creating a state of anxiety in the State of Nature. For a fuller reading of Locke's argument, see T Pogge (2ed) *World Poverty and Human Rights*

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insecure in this environment because survival is dependent on the strength and fitness of each individual and the goodwill of the adversary.<sup>153</sup> Yet this individual strength is not a guarantee for survival as even the strongest man can be killed “in their sleep” or by a combined force of the weaker members.<sup>154</sup> Nor can the goodwill of the adversary be relied on as it is always subject to the self-interest of its holder.<sup>155</sup>

It is this unpredictability of life in the State of Nature that motivates natural men to make deals with one another and create a sovereign with powers to oversee the peaceful enjoyment of their individual rights.<sup>156</sup> To ensure their escape from the unpredictable State of Nature, social contract theories hold that rational individuals will agree to let go of their unregulated freedom in the State of Nature in exchange for the predictability and security of a civil society governed by enforceable common law.<sup>157</sup> As Michael Keeley aptly notes:

“But, since some persons may not always act with good will, and since even those who do may be biased toward their own cause in judging violations of the moral law, people may derive additional benefit by agreeing to positive laws and responsible judges to enforce them.”<sup>158</sup>

The social contract is made up of two parts: first, natural men “collectively and reciprocally” agree to waive the rights they had against one another in the State of Nature;<sup>159</sup> and second, they agree to endow some one person or assembly of persons with the authority and power to ensure

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(2008) chap 4. See also T Hobbes *Leviathan* (1994) (characterizing the natural condition of humankind as a mutually unprofitable state of war of every person against every other person).

<sup>153</sup> J Locke *Second treatise of government* (1980) para 5.

<sup>154</sup> C Friend “Social contract theory” *Internet Encyclopaedia of Philosophy* available at <http://www.iep.utm.edu/soc-cont/> (accessed 12/1/2012).

<sup>155</sup> J Locke *Second treatise of government* (1980) chaps II & III.

<sup>156</sup> But see generally P Riley *Will and Political Legitimacy: a critical exposition of social contract theory in Hobbes, Lock, Rousseau, Kant and Hegel* (1982) (arguing that the bedrock of social contract is voluntary consent and not on any other basis such as necessity, custom, convenience, theocracy, divine right, the natural superiority of one’s betters, or psychological compulsion).

<sup>157</sup> Two of the rights forfeited upon entering society are the right to do whatever is required for self-preservation and the right to punish violators of crimes committed in the state of nature. See T Hobbes *Leviathan* (1994) 158-59; see also E Burke “Reflections on the Revolution in France” in E Burke *The work of the right honourable Edmund Burke* (1871) 309 (a fundamental rule of civilized society is “that no man should be judge in his own cause”). But see Montesquieu’s story of the Troglodytes to the import that savage men make no compacts or agreements and do not attach importance to promises. CLB de Montesquieu “The Parable of the Troglodytes” in CLB de Montesquieu *Persian Letters* (1721).

<sup>158</sup> M Keeley “Continuing the social contract tradition” (1995) 5(2) *Business Ethics Quarterly* 241 at 243.

<sup>159</sup> Hobbes defines contract as “[t]he mutual transferring of Right”. T Hobbes *Leviathan* (1994) 68.



that the waiver in the first contract is not breached (is enforced).<sup>160</sup> In other words, the social contract requires that natural men must not only agree to live in community with each other under shared laws, but also to create an authority (sovereign) to enforce the social contract and the laws that constitute it.<sup>161</sup> In this way society becomes possible because, whereas in the State of Nature there was no authority to control the actions of individuals, now there is a conventionally created civil sovereign that can overawe men to cooperate.<sup>162</sup>

To ensure that the sovereign is able to function, the individuals voluntarily surrender to the sovereign person or assembly of persons the authority necessary to enforce the first contract.<sup>163</sup> These include the power to make laws, judge and mete out punishment for breaches of the contract.<sup>164</sup> The individuals also agree to give the sovereign control over communal resources to protect and use in the execution of its functions.<sup>165</sup> In addition, the individuals agree to abide by the decisions of the sovereign and where necessary to assist in effecting the same.<sup>166</sup> On its part, the sovereign must ensure that it protects and secures the individual members of the society and their common interest in an impartial and just manner and that the resources entrusted in its care are used for the common good.<sup>167</sup>

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<sup>160</sup> See T Hobbes *Leviathan* (1994) 89 (“[b]efore the names of just and unjust can have place there must be some coercive power to compel men equally to the performance of their covenants”). For criticism of Hobbes, see C Pateman *The problem of political obligation: A critical analysis of liberal theory* (1979) 53 (arguing that for Hobbes the “bonds of civil life rest on the sword, not on the individual’s social capacities”).

<sup>161</sup> For Locke, there must be no question about asserting the “right to punish” those who violate moral standards of conduct—principally property rights—but this right is given to a “commonwealth” rather than to a “Leviathan.” J Locke *Second treatise of government* (1980) 65-66.

<sup>162</sup> See T Hobbes *Leviathan* (1994) 82 (noting that the motive for a contract, a mutual transference of rights to a sovereign, is “the security of man’s person, in his life and in the means of so preserving his life as not to be weary of it”).

<sup>163</sup> Hobbes formulates the covenant by which the sovereign is instituted in these words: “I Authorise and give up my Right of Governing my selfe, to this Man, or to this Assembly of men, on this condition, that thou give up thy Right to him, and Authorise all his Actions in like manner.” T Hobbes *Leviathan* (1994) 87.

<sup>164</sup> According to Locke, men gain three things in the civil society which they lacked in the State of Nature: laws, judges to adjudicate laws, and the executive power necessary to enforce these laws. J Locke *Second treatise of government* (1980) para 97.

<sup>165</sup> For Locke, protection of property, including their property in their own bodies, is the primary motivation of the social contract. J Locke *Second treatise of government* (1980), para 124.

<sup>166</sup> Although Hobbes insists that “all men equally, are by Nature Free”, yet he treats authorization as limiting that freedom. T Hobbes *Leviathan* (1994) 111. He distinguishes two ways in which such a limitation might arise, either “from the expresse words, I Authorise all his Actions” by which the subject places himself under the sovereign, or “from the Intention of him [the subject] that submitteth himself to his [the sovereign’s] Power, (which Intention is to be understood by the End for which he so submitteth . . .)”. And this end, Hobbes goes on to say, is “the Peace of the Subjects within themselves, and their Defence against a common Enemy.” T Hobbes *Leviathan* (1994) 111.

<sup>167</sup> As Rousseau urges, it is only on the “basis of this common interest that society must be governed”. JJ Rousseau *The social contract and the first and second discourses* (2002) 25. According to Hobbes, the motive for a contract is

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The social contract does not, however, divest the individuals of all their rights nor does it give the sovereign power to control all aspects of the individual life. There remains with the individuals a residual right that allows them to pursue their natural self-interests - interests that do not breach the common interest – without the interference of the sovereign.<sup>168</sup> For example, with regard to property, Locke argued that the system of natural liberty leaves the fruits of nature to man in common, but the fruits of labour to the individual worker:

“[T]hough the Earth, and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to but himself. . . . Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his Property.”<sup>169</sup>

In this way, Man comes “to have a property in several parts of which God gave to Mankind in common, and that without any express Compact of all the Commoners.”<sup>170</sup> Thus, under the social contract, only those private acts that affect other individuals’ or the communal well-being are to be subjected to common law and to the sovereign’s supervision.<sup>171</sup> Otherwise, the individual retains the freedom to pursue his or her individual interests unfettered by the sovereign will. As Rousseau aptly pointed out:

“It is apparent from this that the sovereign power, albeit entirely sacred, and entirely inviolable, does not and cannot exceed the limits of the general conventions, *and that every man can fully dispose of the part of his goods and freedom that has been left to him by these conventions* (emphasis added).”<sup>172</sup>

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“the security of man’s person, in his life and in the means of so preserving his life as not to be weary of it”. T Hobbes *Leviathan* (1994) chap 14 at 82. See also J Locke *Second treatise of government* (1980) para 97.

<sup>168</sup> For a discussion of the place of individual right in civil society, see, for example, AS Brett *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought* (2003).

<sup>169</sup> J Locke *Second treatise of government* (1980) 328.

<sup>170</sup> J Locke *Second treatise of government* (1980) 327-328.

<sup>171</sup> But see J Tully *A discourse on property: John Locke and his Adversaries* (1980). He attributes to Locke the remarkable conclusion that property in political society is a creation of that society and that when man enters into the political society, “[a]ll the possessions a man has in the state of nature...become the possessions of the community” so that “the distribution of property is now conventional”. Thus according to Tully’s interpretation of Locke, a man in civil society has no other property entitlements than those which are given to him by the communal laws. J Tully *A discourse on property: John Locke and his Adversaries* (1980) 98, 164 & 165.

<sup>172</sup> JJ Rousseau *The Social Contract* (1786) 63.

This traditional notion of social contract was meant to explain the creation of civil societies and the legitimacy of government authority.<sup>173</sup> However, since Immanuel Kant used the term as an Idea for social formation,<sup>174</sup> the theory has also been used to explain the formation of social entities at both macro and micro state levels.<sup>175</sup> Understood in this sense, therefore, whenever two or more people or groups of people come together and voluntarily agree among themselves to share the burdens of life and the side-benefit that emerges from the collective synergy the basis of a social contract is formed.<sup>176</sup> When this grouping appoints, appoints or elects a representative person or an assembly of persons to look after their collective interest, such a person or persons is expected to act impartially and in the common interest of the group.

However, when the representative(s) breaches this public trust for their own private benefit or when individual members of the society bribe the representative(s) in order to get preferential treatment then the social system becomes corrupted.<sup>177</sup> As Rousseau aptly noted “if you would have the general will (common interest) accomplished, bring all particular wills (private interests) into conformity with it”; in other words, “as virtue is nothing more than the conformity of the particular wills with the general will, establish the reign of virtue.”<sup>178</sup> The corollary is that where the pursuit of common interest is replaced by the glory of selfish interest, the reign of virtue loses to that of corruption.<sup>179</sup> Indeed, the orthodox understanding of corruption since

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<sup>173</sup> See generally P Riley *Will and Political Legitimacy: a critical exposition of social contract theory in Hobbes, Lock, Rousseau, Kant and Hegel* (1982).

<sup>174</sup> For a full translation of Kant’s entire work, see I Kant *The Conflict of the Faculties* (1979). Kant talks of the Idea of the Social Contract, that “the act through which a people constitutes itself a state, or to speak more properly the *Idea of such an act*, in terms of which alone its legitimacy can be conceived, is the original contract by which all the people surrender their outward freedom in order to resume it at once as *members of a common entity*... (emphasis added). I Kant *The Conflict of the Faculties* (1979) 186.

<sup>175</sup> For this approach, see, for example, T Donaldson & TW Dunfee, "Integrative Social Contracts Theory: A Communitarian Conception of Economic Ethics" (1995) 11(61) *Economics and Philosophy* 85. See also M Rosenfeld “Contract and Justice: The Relation between Classical Contract Law and Social Contract Theory” (1985) 70 *Iowa Law Review* 769 863 (pointing to “the twofold nature of the Social Contract as *Contract of Association and Contract of Government*” (emphasis added)).

<sup>176</sup> See generally IR MacNeil *The new social contract: An inquiry into modern contractual relations* (1980).

<sup>177</sup> R Braibanti “Reflection on Bureaucratic corruption” (1962) 40(4) *Public administration* 357 at 365 (pointing out that bureaucratic norms are meant to ensure, after all, precisely this – that “decisions be made without regard to personal interest and group pressure”).

<sup>178</sup> JJ Rousseau “Economie politique” in JJ Rousseau *The Social Contract and Discourses* (1950) 302-310.

<sup>179</sup> See, for example, DH Lowenstein “Political Bribery and the Intermediate Theory of Politics” (1985) 32 *UCLA Law Review* 784 at 786, 833 (pointing out that a related conception of corruption arises from political philosophy and trusteeship theory: the idea that public officials must privilege the public interest rather than either political considerations or private gain).

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Aristotle's writing in *On generation and corruption*,<sup>180</sup> the one put forth in particular by Machiavelli in his *Il Principe*,<sup>181</sup> is that of corruption as a decline or decay of the capacity of the citizens and officials of a state (and it may now be added, of any other social formation) to subordinate the pursuit of private interests to the demands of the common good.<sup>182</sup> It is in this sense that the explanation of corruption as an abuse of public entrusted authority for private benefit is (or ought to be) understood.

### 5 CONCLUSION

This article has attempted to demarcate the contours of corruption. It concludes that while the legal criterion for determining standard of behaviour has certain limitations it is a better criterion than the moral criterion for determining acts that amount to corruption. The reason for this is three-fold. First, moral criterion is usually too wide and ambiguous on concepts as it depends on public opinions which are never uniform or static. Second, popular opinions on concepts are usually just that: opinions and would not ordinarily have any force on the behaviour of people until they are backed by the law. Third, legal standard of behaviour are often also a reflection of the prevailing morals in society as the lawmakers who enact them do spring from the same society. Thus, while the moral debate on standard of behaviour is important in determining the kind of standards that should guide the behaviour in any society, only those morals or conducts that have been distilled into law, it is contended, should determine the standard of corruption.

It is also concluded that the standard of corrupt behaviour should not be overly circumscribed given the multifaceted nature of corruption. Indeed there are many identified acts of corruption, which if a rigid definition of corruption is adopted would most probably be left out. Thus, definitions such as that of South African PCCAA, which conceives the standard of corrupt behaviour as bribery are too limiting as they leave out other forms of corruption such as embezzlement, fraud, trading in influence and favouritism. In this connection, the comprehensive

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<sup>180</sup> Aristotle *On generation and corruption* (2004).

<sup>181</sup> N Machiavelli *The Prince (Italian: Il Principe)* (1532).

<sup>182</sup> For a discussion on Aristotle's views, see J Barnes *The Complete Works of Aristotle: Volume One* (1984). In a passage in *Politics*, Aristotle, for example, says:

“There are three kinds of constitution, or an equal number of deviations, or, as it were, corruptions of these three kinds .... The deviation or corruption of kingship is tyranny. Both kingship and tyranny are forms of government by a single person, but the tyrant studies his own advantage ... the king looks to that of his subjects.”

Quoted in AJ Heidenheimer *et al Political Corruption: A Handbook* (1989) 3.

standard of corrupt behaviour that captures the various manifestations of corruption (including bribery) is that of abuse of public entrusted authority/office/resources for private gain. This standard is not novel and seems to be the main thread running through the various international and national anti-corruption laws' conception of corruption.<sup>183</sup> Indeed even the South African PCCAA, which only singles out the bribery form of corruption, also defines bribery as the giving or receiving of anything of value with the purpose of influencing the abuse of public entrusted power. The definition of corruption behaviour as the abuse of authority, office or resources entrusted by the public for private benefit is thus broad and open ended enough to cover the limitless manifestations of corruption such as bribery, embezzlement, favouritism, bid rigging and fraud. The public nature of the definition derives from the fact that the purpose of law as evincible from the contractual basis of society is not to restrict the freedoms of individual members of the society but to create an atmosphere where everybody can realise their full potential by regulating only those conducts that affect the common good of society. Those individual acts that have no bearing on this common good are accordingly excluded from the ambit of the law. Thus, the public related definition of corruption is more in tandem with the social contract regime than one that tries to also capture private corruption, which does not affect the common good.

It is further concluded that an essential component of corrupt behaviour is its elevation of private interest over public good. This elevation of private interest over public good is what makes corruption condemnable in many societies<sup>184</sup> and can be derived from the social contract's view that the legitimacy of social formations (government and private) is determined by their objective to realise common good.<sup>185</sup> Indeed, as illustrated,<sup>186</sup> there are circumstances where abuse of public entrusted authority would be justified for serving the common good and not private interest. Thus, private gain (in any of its various manifestations) or intention to benefit private interest should be shown to exist for an act to amount to corruption. Mere abuse of public entrusted authority without private gain or intention to benefit private interest would not suffice to make an act corrupt.

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<sup>183</sup> See the analysis in s 3 above

<sup>184</sup> See V Tanzi *Corruption around the world - causes, consequences, scope, and cures* (1998).

<sup>185</sup> As Rousseau urges, it is only on the "basis of this common interest that society must be governed". JJ Rousseau *The social contract and the first and second discourses* (2002) 25.

<sup>186</sup> See ss 3.3 above.