



THELODT
LAW OFFICES

Bribery in International Transactions – The Case against the Libertarian Argument¹

By Deji Toyé

Why bribe? This question would itself be rhetorical if the rhetorics of some libertarian economists who theorise in support of bribery has not become so decided in recent years. One would consider the ethical, if not the legal basis, for the prohibition of bribery to be settled in the light of its near invariable treatment in the criminal statutes of most modern states. If the study of ethical scholars is anything to go by, such consensus is conscious and confirms a trend. For example, John T. Noonan, a leading scholar on the subject, states that bribery is only one in the species of material gains hitherto perceived in traditional societies as exploitative of the vulnerability of others. While only a few societies still frown at many of the other species of such gains, say usury (Islamic societies where the concept of Ribah has little distinction between interest-bearing loans and extortion, being one such society), the reverse has been the fate of bribery. Most modern states have only gone ahead to elaborate on the crime of bribery, taking the pain to define its province, chart its different ramifications and punish it accordingly.

¹ This essay was first published under the title 'Why Bribe?' by the Trace Institute, Annapolis, MD in the US as part of the winning entries for the 2007 Essay Contest. See <https://www.traceinternational.org/news/pdf/TRACESummer07.pdf>



The modern consensus on bribery would therefore appear to be a beneficiary of thinking across centuries, cultures and experiences. For example, Michael Quinion, a lexicographer and etymologist, says that the word ‘bribery’ was first used in the English language to appropriate the idea of extortion or “demanding money with menaces.” Then, in the sixteenth century, it moved on to cover inducement as well. This simple evolution is not inexplicable. While the first sense addresses the vice of public officers who demand gifts in exchange for a guarantee of favourable outcome of judicial, quasi-judicial or administrative processes, thus corrupting the system, the latter sense addresses the mischief of applicants and petitioners who take the initiative themselves, with a similar view and to a similar end. The example of the English Language and Jurisprudence has significance for our understanding of the current universal consensus which not only punishes the taker, or extortionist, but also the giver, or inducer, of bribe.

If feudal societies in which dispensation of justice was something of a bounty of kings and the noble, knew enough to protect the system, then modern societies should know even more. Firstly, modern societies operate more delicate, if sophisticated, systems with powers, authorities and influences located in different institutions, sectors and levels, all held together by overarching institutions into which the critical mass amongst members of the society conceptually invest faith. Such institutions include those through which the government implements its policies, such as the civil service, those through which security and law are enforced, such as the police, and those through which disputes are settled, crimes punished and wrongs amended, such as the courts. Then, with the collapse of the



feudal system also came the freedom of the economic life of the society from political ownership or control through vassal patronage system. Free market and invariably competition are the order of the day. All these require that institutions which make up such complicated systems are strengthened against corrupting and potentially disruptive influences.

That most modern states criminalize bribery in their statute books is a manifestation of the consensus against bribery. This has even been taken further with the drafting, by 1997, and coming into force, in 1999, of the Convention on the Combating Bribery of Foreign Public Officials in International Business Transactions, an initiative of the Organisation for Economic Cooperation and Development (OECD). In the Convention, OECD restates belief that bribery, in international business transactions, “raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions.” By the Convention, therefore, member states agree to criminalize bribery of foreign officials in international business transactions engaged in by businesses over which they have jurisdiction and render expenses incurred as a result of such bribery as non-tax-deductible among other things. OECD’s member states are responsible for more than 80% of world export and thus responsible for majority of bribe-giving in international transactions.

As a face of the new anti-graft environment, the work of a voluntary organization such as Transparency International has also become important in recent years. Its *Corruption Perception Index (CPI)* and *Bribe Payers Index (BPI)* which measure



bribery from the giving and receiving ends respectively have become quite influential.

Why ask “why bribe?”

In the light of the above restatement of the modern consensus on bribery, the stirrings of the new proponents of bribery-as-a-virtue should interest us. These libertarian economic philosophers consider bribery as valuable oil on the wheel of commerce and free market economy. These philosophers have their shrine in the Alabama, US-based Ludwig von Mises Institute.

In its simple form, the main gist of this school of thought is that over-regulated business environments stand in the way of free market and bribe-giving is the next best option to minimum or little government as a means of competing in such environments. However, Francois Melese, a scholar of this school also identified what he called Business-to-Business (B2B) bribery in his article, ‘*The Problem of Corruption*’ published in a June 2002 edition of *The Free Market*, a publication of the Mises Institute. In the article, Melese argues that B2B bribery, in its benign form, facilitates communication and helps the bonding process in businesses but that, in its negative form, it may become deleterious, even leading to bankruptcy.

Whatever the result, Melese does not believe government intervention through criminalization is the panacea to bribery, be it manifested in its B2B or Business-to-Government (B2G) form. Rather, and this is representative of this school of thought, governments and institutions whose functionaries receive bribes should



deal with the issue through transparency and, in the case of governments, minimizing regulations. They also believe bribe expenses should be tax-deductible as legitimate business costs.

However, the limitation of the libertarian theory as a universal paradigm can be quickly noticed in fine distinctions which they often need to draw in order to ground their points. For example, they try to distinguish between punishment of bribery within the domestic setting (which they are mostly silent about) and in international business transactions (in this case, transactions between companies from free market environments carrying on businesses in more regulated economies). This is because their arguments in recent years have been targeted at the OECD Convention referred to above and the role of the US in instigating it.

Naturally, they also distinguish between bribe-giving and bribe-taking, painting companies which give bribes to foreign public officials as helpless, whilst imposing the burden of rectifying the situation on the government represented by the receiving official. This argument throws us back to the era, referred to above, when a bribe-taker was regarded as a culpable extortionist but the giver not regarded as a possible colluding inducer.

Besides the faults already identified in the points of the libertarians, one must also point to the fact that free market, especially within the international context, can only be one of the values, and not the only value, to uphold. Tactics which undermine truly free competition, transparency and the sovereignty of foreign



states do not appear consistent with the idea of globalization and should certainly not necessarily be displaced by the ideal of free market economy.

Can bribes be avoided?

It has been argued that bribes are an inexorable feature of business transactions in certain economies (read as, 'third world or East European economies'). Pierre Lemieux, in his article, '*In Defence of Bribery*', posted on the website of the Mises Institute in August, 2005 pushes this kind of argument when he states: "In many countries, the underground economy could not survive without bribes. It is often impossible, or very costly, for an individual or a company to escape restrictions and prohibitions, and to do business, without bribing state officials."

It is therefore, in the view of these theorists, the bounden duty of businesses to vault over such restrictions using the pole of bribery. For them, there are no moral dilemmas to distract bribe-givers under such circumstances since everything boils down to a simple matter of profit and loss. Llewellyn H. Rockwell, in his article, '*The Right to Bribe*,' asks with an ostensible hint of scandal: "Paying the full price for permits to the government is seen as decent and honest, whereas private bribes are considered seedy. But Why?" Indeed, to Rockwell, any business operating in such restrictive environment should be able to cherry-pick its way through the black-market mixed bazaar of compliance through legit payments and evasion through bribery.



It should not be surprising that an answer to the question, “can bribes be avoided?” cannot be satisfactorily gathered from the bleak pictures painted by the libertarians. This is because their arguments are mostly premised on the limited choices which they have given to themselves. Lemieux, in his above-referred article, rendered the choices as follows: (1) a situation of limited government which has little privileges to offer and thus, obviating bribery (what he calls the best situation); (2) a situation of maximum government whose officials are averse to bribe, except at very high cost (which he calls the worst situation); and (3) the second-best best situation where officials of maximum governments can be easily bribed to facilitate business.

Yet the reality of our globalised world suggests that there could be a fourth option. Our world is made up of various shades of nations administered by diverse shapes and sizes of governments, yet bound in common desires for advancement of peace and spread of material prosperity. Such prosperity can only be realized with the creation of overall material surplus which enhances the wellbeing of the generality of humanity. If these desires are accepted as superior to narrow interests of specific business concerns or even states, then this compels us to seek a new approach to the way we perceive businesses and their reason d’être.

Although revenue loss is not always a necessary outcome of refusal to give bribe, let us assume for a moment that this is the repercussion in most of the cases. Is loss of business on grounds of upholding social values and generally-accepted ethics



conceptually inconsistent with the goal of a business? The libertarians appear to suggest that the bottom-line is the sole reason d'être of business and thus any ethical decision which reduces the bottom-line assaults the essence of the business. This argument is however inconsistent with overall theory of economic libertarianism which holds up free market as a value worth protecting by all means. For example, whilst it may do well for the bottom-line of a particular business to monopolise, by all means, a particular market, the libertarians appear to say that such a business ought to give up this certain benefit for the overall surplus to be created by a competitive market.

Besides, such themes as 'the Corporate Social Responsibility of Business,' 'Best/Sound Practices,' 'Stakeholder (rather than Shareholder) Value' and 'Good Corporate Governance' are now regarded as vital to the overall survival of a business on a long term basis. Although Milton Friedman, in his 1970 article, '*The Social Responsibility of Business is to increase its Profit*' canvasses the bottom-line position, but he does qualify this by subjecting it to the need for conformity with the law and ethical customs of the society. Also, Lord Griffiths, in his 1999 lecture, '*The Corporation as a Moral Community*,' agreed that corporations may function without moral standards, but may not survive as "a significant player in the industry."

Who Cares?

In spite of the currency of the above-mentioned ethical buzzwords in modern management think and the activities of, say OECD and Transparency



International, it is not certain that businesses and their managers offer significant resistance to the allure of bribery. This is especially so when operating in economies in which there is some incentive to pay bribe or which have the least developed institutions for dealing with the vice.

The Transparency International's *BPI*, 2006 shows that most of the companies covered are less likely to give bribes in OECD countries than in the so-called Low Income countries (The BPI ranks 30 of the leading exporting countries "according to the propensity of firms with headquarters within their borders to bribe when operating abroad"). Although this survey shows that Indian and Chinese companies, amongst other newly industrializing (and therefore exporting) countries, top the chat of bribe-givers, companies from the countries of the OECD show a similar pattern of leaving their straight manners at home while going to developing countries to do business.

We Should Care

The libertarians have told us that it is in the nature of free market to sort itself out against many challenges. They only plead that we do not distract or obstruct it in the way it is sorting itself out against the bulwark of regulations, restrictions and prohibitions erected by maximum governments. Bribery, they tell us, is just one way free market is freeing itself of such restrictions. Very well. Only that the rest of us think values which have been known to sustain free market in its developed environments should not be trampled underfoot in order to open the door to it elsewhere. Also, it is important not to encourage illegal or unethical practices



THELODT
LAW OFFICES

elsewhere as, in a manner of speaking, it may constitute threat to ethics and law everywhere.

There appears to be only one consensus therefore, cutting across libertarians and other rooters for free market economy and its advance in the world. This is that low income and emerging economies should be assisted to reduce government and rather strengthen institutions which guarantee transparency. Only this way will both the end of those who campaign against bribery and those who campaign against business restrictions, or both, be served.