

Corruption - A Swedish Problem?

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“Mr. Markurell, at another, more suitable and more official occasion I shall forward to you the school’s, my own and the whole community’s grateful thanks for a donation, which, due to its splendid generosity, is quite unique in the history of the Wadköping school. However, taking into consideration the name that the donor has kindly suggested for the donation, I want to propose, or even insist upon, that either the presentation of the donation shall be postponed until some point in time after today’s matriculation exam, or that the question of the foundation’s name shall be left open for a discussion. I hope that Mr. Markurell will agree to my proposal. I would be an idiot if I did, answered Mr. Markurell. What would be the use of it then?”¹

1 Introduction

From an idyllic, small-town Swedish community where the inn-keeper Markurell shamelessly attempts to buy his son Johan a matriculation exam, to the pyramid savings schemes in Albania that have left a great part of the Albanian population destitute and caused the state of emergency and chaos in the whole country - such diversified forms can the phenomenon of corruption take. To capture this phenomenon in its whole expanse in a journal article is obviously an impossible task; my intention is therefore much more modest: it is to analyze the phenomenon of corruption as it appears, and as it is perceived in today’s society, and investigate the question of whether such an analysis can provide a basis for the re-examination of the Swedish juridical regulation system in this area.

The word “corruption” is not used in Swedish statutory regulations, but many signs indicate that this term may be introduced relatively soon into these texts. Intensive work concerning issues designated by the term “corruption” is being currently performed by various international organs, such as the UN, the European Council, the OECD, the ICC and, last but not least, the EU.

From the EU perspective corruption is possible at several levels. Officials within the organization can take undue advantage of their position. A bigger problem yet is constituted in the fact that the responsible authorities in a Member State may turn a blind eye to irregularities, or submit their own misrepresentations,

¹ Bergman, H., *Markurells i Wadköping* (1919).

so that the Member State will receive too big a share of the EU funds. In relation to the EU the governments of the Member States have a position similar to that of a national authority vis-à-vis its national government.

In order to be able to take in hand the enormous losses of the EU funds, methods that would induce the Member States to take responsibility for what is happening there must be worked out. It should be possible to “punish” inadequate supervision by way of deductions from future subsidies. Commissioner Liikanen, responsible for budgetary matters, initiated in 1995 a programme, SEM 2000, concerning this very issue (SEM - Sound and Efficient Financial Management). In April 1996, the Swedish Government appointed a delegation working under the Ministry of Finance that will be responsible for the correct use of the EU subsidies.²

The role of the European Court of Auditors as a controlling body is central. The Court defines the risky zones and performs specific audits. A special organ, UCLAF (Unité de Co-ordination de la Lutte Anti-Fraude) is directly involved in the combating of crime in cooperation with the Member States.

In addition to this, harmonization and tightening up of national laws is necessary. In July 1995 the Member States signed a Convention for the protection of the European Communities’ financial interests, the so called Convention on Fraud.³ In September 1996 the Council adopted a Protocol to the Convention on Fraud, imposing certain responsibilities on the Member States as regards the combating of corruption.⁴ The terms *passive corruption* and *active corruption* are translated in the Swedish version as “mutbrott” and “bestickning” respectively, and are defined as:

“any deliberate action of an official, in order to directly or through a third party request or receive advantages of any kind whatsoever, for himself or for a third party, or accept promises of such an advantage, in order to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties in a way which damages or is likely to damage the European Communities’ financial interests”

and

“any deliberate action of whosoever to promise or give, directly or through a third party, an advantage of any kind whatsoever to an official for himself or for a third party to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties in a way which damages or is likely to damage the European Communities’ financial interests”.

“Official” shall mean any “Community official” (in the broad sense of the term) or “national official”, where “official” shall be understood by reference to the terms “official” or “public officer” as defined in the national law of a given state.

² EU-Bedrägeridelegationen, Fi 1996:04, p. 129, of the Regeringens Skrivelse 1996/97:103 Series.

³ Council Act 95/C 316/03 of 26 July 1995 on Drawing up a Convention on the Protection of the European Communities’ Financial Interests; EGT no. C 316 of 27 November 1995, p. 48.

⁴ Council Act 96/C313/01 on Drawing up of a Protocol to the Convention on the Protection of the European Communities’ Financial Interests, EGT no. C 313 of 23 October 1996, p.1.

Within the EU work continued with a view to working out a general convention on corruption, without any link to the EU's finances. In the report presented by the European Parliament in December 1995,⁵ constituting the starting point of the convention work, corruption is defined as:

“any behaviour entailing that persons performing public or private tasks fail to fulfil their duties, due to the fact that they have received or been directly or indirectly offered economic or other kinds of advantages.”

This is a narrow definition in certain aspects and corresponds to only part of the area covered by the Swedish Penal Code's regulations concerning active and passive corruption (Chapter 20, section 2, and Chapter 17 section 7 respectively). The so called active corruption, i.e. the action of a bribe giver, is embraced only indirectly. In addition, the definition presupposes, in contrast to Swedish law, that the bribe has had an effect. On the other hand, similarly to what is provided in Swedish law, the definition includes corruption in both public and private spheres of activity. This is not the case, however, in the national laws of a number of EU countries.

Towards the end of May 1997 a convention act was signed. However, this act covers only crimes of bribery within the public sphere including EU officials. Swedish law must now be altered to a certain extent in consideration of this act. The provisions concerning bribery must be expanded to cover bribes which are addressed to a third party. Such bribes occur in one of the situations discussed below, namely that of contributions to political parties.

The Swedish membership in the European Union is bound to lead to a confrontation between the Swedish understanding and regulation of corruption and that of the rest of Europe. This is why it may be interesting to take a closer look at the way things are in one of the South European countries that shows pronounced differences in comparison with ours as regards culture and other aspects. I have chosen Spain, because Italy with its mafia tradition anchored in the feudal heritage appears to be too unorthodox. My knowledge of Spanish, defective as it is, but useful all the same, had also something to do with my selection. A relatively long visit to Madrid in the winter of 1996, where I had, among other things, the opportunity of studying the Spanish Supreme Court's (*Tribunal Supremo*) handling of some of the more conspicuous cases of corruption, provides the background to the following comments on corruption and laws controlling it.

Firstly, an attempt is made to systematize the practices that can be subsumed under the concept of corruption, more or less broadly understood. Even though this task may seem a bit odd from the perspective of Swedish penal law, it is not new or unusual. Already the Chinese statesman and philosopher Konfucius (551 - 479 B.C.) pointed out that it was important to elucidate the concept. He maintained that corruption had to be “called by the name”, and that phenomena, such as nepotism, should be embraced by it.

Two problem areas are particularly focused on, both of them containing aspects of corruption and sharing certain features. The one is *financing of political parties*, and the other *lobbying*. A number of EU States have laws regulating the right of

⁵ A4-314/95.

political parties to accept subsidies from organisations and private persons. The same applies in the USA. The subsidy for the Democratic Party's campaign became, after all, a hot election issue in the presidential campaign of 1996, and it may be interesting to acquaint oneself with the ongoing discussion in the legal science concerning the constitutionality of these restrictions and regulations. It seems clear that eventually Sweden will also have to introduce legislation in this area.

Lobbying did not lead to the introduction of any specific legislative measures in our country until quite recently, and even then entailing only indirect consequences for the lobbyists. The phenomenon attracted much attention in a case against a Moderate Party member of the Swedish Riksdag, charged with accepting bribes for having offered certain services to various companies during his term in Parliament (RH 1995:99).⁶ A few years ago, despite a lot of opposition certain regularization of lobby activities as well as rules concerning registration of Parliamentary members' and civil servants' economic status were introduced in the EU in order to create *transparency* and counteract corruption. The latter propelled the passing of new legislation even in Sweden. From 1 September 1996 the Act concerning Registration of Undertakings and Economic Interests (SFS 1996:810)⁷ has been applicable to members of the Swedish Riksdag - and of the European Parliament.

Below follows a discussion about the forces behind corruption and its consequences. In the closing section some views *de lege ferenda* are presented, starting from the way in which corruption is treated in Swedish penal law. In my opinion, Sweden is in need of a more well-defined and differently constructed penal protection system in order to be able to provide strong protection against corruption also as regards the European and the global perspective.

2 Corruption - What is it?

The word 'corruption' comes from the Latin word *corrumpere*, which means 'to destroy', 'dishonour', but also 'to lead astray', and 'offer a bribe'. The adjective *corruptus* means 'distorted', 'bribed' and (about, for example, a thought) 'perverted', 'warped' or 'tasteless'. The Swedish Academy's Dictionary attaches the same meaning to the Swedish words 'korrumpera' and 'korrupt'. In addition, the Academy's Dictionary quotes the meanings 'demoralize' and 'morally wicked' respectively.⁸ The verb refers thus to the active practice of corruption, whereas the adjective describes those who let themselves become corrupt.⁹ Conceptually, both active corruption (offering bribes) and passive corruption (accepting bribes) fall under the general term of corruption.

When talking about corruption the emphasis is, however, frequently placed on the "passive" side of corruption, where the focus is on the fact that certain persons

⁶ RH = Cases of the Appeal Courts.

⁷ SFS = The Swedish Code of Statutes.

⁸ *Ordbok över svenska språket*, issued by the Swedish Academy. Volume 14. KED-Kralla, Lund, 1937.

⁹ In Article 423 of the Spanish Penal Code that came into force in 1996 the behaviour of a person who offers bribes is described in the following way: "corrompieren o intentaren a corrompar a las autoridades o funcionarios publicos".

let themselves be bribed, or become improperly influenced in some other way. Thus far, the definition of corruption, as it is used in the European Union's convention work, corresponds to the general use of the term in the Swedish language.

Semantically, the term provides no basis for restricting its scope of reference to public activities or the public sector. On the other hand, it provides no foundation for claiming that corruption should embrace also private activities or apply to the private sector. The fact that the focus is placed on public officials and elected representatives when using the term 'corruption' in everyday language is, however, quite understandable. In Sweden, the term 'corruption' can also be identified in descriptions of trade union 'bigwigs' and representatives of other organizations, misusing the organization's funds. In contrast, private employees who are prevailed upon through bribery to disregard their own employer's interests are usually not characterized as 'corrupt'.

A closer look at the phenomena that are regarded as corruption in the public sector does not make the picture clear-cut and unambiguous. In general language use the words 'corruption' and 'corrupt' are applied to a much wider category of public activities than the taking and offering of bribes (or preparatory stages to such activities). A politician or a government official of high rank is characterized as corrupt not only if he requests a bribe, receives a promise of a bribe or accepts a bribe or another economic benefit in exchange for a service that he has the power to provide (or in exchange for refraining from doing that which it is his duty to do). A County Governor or a Director General who gets rich by double invoicing of expenses, or who misappropriates public funds in any other way will also be labelled as corrupt. One speaks of corruption in government or county administration when tax payers' money is used for private purposes; it may have to do with paying with credit cards issued by the government of a regional authority for visits to a porno club, or with 'business trips' that are, in reality, pure pleasure-trips.

Consequently, it is not necessary that there be an external 'buyer' of services (or someone attempting to purchase them) from the politician or the public official. Even unfair appropriation of public funds on one's own initiative is a manifestation of what is considered by the general public as corruption. Here it is primarily actions that are classified in Swedish penal law as embezzlement, unlawful disposal and breach of faith committed by an agent on his principal that are referred to.

Furthermore, the concept of corruption embraces also such phenomena as partiality towards friends, favouritism and nepotism. This includes actions where the benefactor does not gain any economic profit personally, or even a promise of such, but where he nonetheless uses his position in order to benefit a certain person (natural or juridical) for his own good. This can depend on family ties, friendship or a desire to establish a relationship for future benefit, but there can also be indirect economic incentives, such as, for example, returning favours.

In the Swedish Penal Code this kind of incentive has received particular attention as regards the situation in which a debtor who has become insolvent favours a creditor at the cost of other creditors - an offence that can be classified as

favouritism to creditors.¹⁰ Under Chapter 11, section 7, second paragraph of the Swedish Penal Code, in a case like this the recipient of the benefit, i.e. the creditor, may also be convicted if “he made use of improper threat or improper promise of a benefit or advantage or acted in collusion with the offender”. An example of punishable acts of collusion is giving a promise of future employment.¹¹ The debtor is induced to put his own interests before those of another creditor or creditors. This is also a situation which is referred to as bribery in common parlance. The notion of corruption embraces thus in its widest sense even those actions that affect adversely persons other than employers and contractors.

Corruption can thus denote a wide area of undesirable behaviour. Giving it a blanket heading of “Misuse of the Position of Power” would allow us to systematize the phenomenon of corruption in the following way:

1. Involvement of two parties, including the preparatory stage
 - 1.1 Passive corruption - Active corruption
 - 1.2 Other kinds of favouritism
2. Involvement of one party
 - 2.1 Fraudulent gain
 - 2.2 Other types of the abuse of power

What would the issues of systematics be if we wanted to limit ourselves to activities in the public sector? This is, after all, the legal situation in many of the EU states.

It seems to be possible to make three different divisions in this situation. Firstly, corruption can be restricted to activities conducted in the institutions falling under the auspices of public law: public authorities and administration, national, county and municipal boards, ministries, parliament, etc. Another division would be by defining the way in which the activity is financed, letting the notion of corruption refer to all publicly financed activities. The third possibility is to look at the character of a given activity. Certain spheres of activities could be distinguished as having the character of ‘public’ activities, independently of their form, i.e. of whether they were organised from the point of view of public law or private law.

In the times of privatization of previously publicly owned enterprises it may not seem very suitable to draw the line with regard to the application of penal law in such a way that it should follow the demarcation line between private and public activities. Today, even issues of basic importance to the public may be handled within the private sector, for example, supply of electricity, communications, etc. Even less excusable would be limiting oneself to activities falling within the sphere of public law. Corporatization of public agencies would mean that protection under penal law would no longer apply to their activities.

The exact demarcation type most suitable and best fitted to its purpose will depend, naturally, on the goals that the intended regularization is supposed to achieve - whether it be sanctioned by penal law or in some other way. In the final section containing a discussion *de lege ferenda* I shall be arguing that the fact that

¹⁰ The Swedish Penal Code, Chapter 11, Section 4.

¹¹ SOU 1940:20, p. 141. (SOU - Statens Offentliga Utredningar = the Official Report Series of the Legislative and Investigations Commissions).

tax payers' money and other public funds are handled in an improper way gives the issue a special character, which should be reflected in penal law regulations.

If the notion of corruption is restricted to general, or, alternatively, public activities, then further restrictions can be, naturally, introduced. It is usual that the notion is reserved for relationships between two parties. It should then be a question of *mutual advantage*, with all that it entails with regard to factual obstacles to discovery and the institution of legal proceedings.¹² A much wider definition of corruption has been introduced, however, into the current international work against corruption. The definition focuses on acts performed by a certain category of representatives of the public, namely, 'politicians'. The Greek professor of penal law, Dionysios Spinellis, expounded on this special type of systematicity at a round-table conference at the XVth International Congress of Penal Law in 1994, as well as in a report for an OECD symposium in March 1995.¹³

Spinellis distinguishes a certain category of crime that he calls *top hat criminality*. These are crimes committed by 'politicians in office'. *Politicians* are meant here to be persons that "are actively engaged in the struggle for government power and hold office, in order to carry on or settle conflicts concerning the common good and the interests of groups". (p. 18).

In Spinellis's opinion there is good reason to distinguish crimes committed by such a group of high status, just as there is good reason to draw attention to economic crime, the so called *white-collar crime*, so prevalent in today's Europe. In both cases very powerful groups are concerned, who enjoy the respect of society and who can misuse their power.

Spinellis specifies four sub-groups of 'politicians' crimes' (these must be distinguished from *political crime* - a notion that is used in legislation concerning extradition):

- 1 Crimes against the basic rules of the political game (ballot rigging, political espionage, high treason).
- 2 Crimes against human rights (political assassination, torture, unlawful detention, confiscation of property).
- 3 Economic scandals (embezzlement of public funds, bribery, insider trading)
- 4 Other crimes connected with activities for which politicians are responsible (scandals concerning contaminated blood in France and Japan)

Doubtlessly, there is good reason to see corruption in the sphere of public activities also in this wide spectrum of crimes. This becomes particularly interesting if one perceives a threat to democracy as the very basis for the combating of corruption - a view which I shall try to justify below.

Of the four categories of politicians' crimes the majority are covered by the notion of corruption in the way it is used in everyday language. A politician that stages or participates in ballot rigging is considered to be corrupt, as much as a

¹² See, e.g., Alatas, S.H., *The Sociology of Corruption*. Singapore 1968; and Rennstich, K., *Korruption. Eine Herausforderung für Gesellschaft und Kirche*. Stuttgart 1990.

¹³ Epp, H. (ed.), *Crime by Government*. Association Internationale de Droit Pénal, Toulouse, 1995, p. 17 ff.

minister who, owing to party-political or economic reasons, allows that blood banks which have not been sufficiently tested are used for blood transfusions.

Ballot rigging that consists in buying votes in one way or another is definitely embraced by the general notion of corruption. Corruption in the form of buying votes has been successfully used by politicians at all times. In strict Prussia, Bismarck organized what he called ‘Reptilienfonds’ which were used for buying German kings to make them vote for the foundation of a German empire under Wilhelm I. The money came from reparations for war damages paid by the countries that were defeated in 1866. The most important ‘purchase’ concerned Ludwig II of Bavaria.¹⁴

In Germany today *Wählerbestechung* constitutes a special crime (section 108 of Strafgesetzbuch). In 1985 Bundesgerichtshof¹⁵ convicted a mayor of corruption in a case in which the mayor procured votes from a town district during a re-election by issuing a building permit for the construction of a sports establishment, despite the fact that it was not part of his ordinary duties. In the grounds for the decision the boundary between election promises and improper activity at election was discussed. Two members of the board of the sports association in question were considered guilty of corruption, but not the remaining inhabitants of the district. Under BGH a certain personal involvement was considered necessary, but not a voter’s gaining an immediate *Vorteil* in exchange for his vote. Chapter 17, section 8, first paragraph of the Swedish Penal Code distinguishes the crime of *improper activity at election* that can consist in buying votes. Third paragraph of the same section discusses its other side, i.e. *accepting an illicit reward for voting*. These provisions are subsidiary in relation to provisions concerning active and passive corruption.

In Finland a classic case of corruption concerning a cabinet minister took place a couple of years ago. At the time when Kauko Juhantalo from the Center Party was appointed Minister of Industry and Commerce in 1991, he had private financial interests in a company whose total amount of debt was about 30 million marks, of which the majority was owed to one bank, SCAB. In connection with investigating the country’s possibilities to intervene on behalf of a large, state-owned industrial group of companies that was in financial difficulties, which also meant a threat to SCAB, Juhantalo made an offer to the bank’s management to work for and speed up the selling of the industrial group if he and his company could get a loan of several million marks in return. The Finnish Riksrätt convicted Juhantalo on 29 October 1993 of receiving a bribe and neglecting official duty, sentencing him to one-year’s imprisonment (suspended sentence). At the time of the sentence Juhantalo was a member of the Finnish Parliament, from which he was removed due to his tarnished reputation. Two years later he was re-elected, however, supported by a large number of personal votes.¹⁶

‘Politicians’ crimes’ belong certainly to the central area of the notion of corruption. They have to do with the misuse of public authority and power, or with undemocratic methods of procuring such power. Money plays a decisive role in

¹⁴ Rennstich, loc. cit., p. 84 f.

¹⁵ 1 StR 316/85; see, Geerds, F., *Juristische Rundschau*, 1986, p. 252 ff.

¹⁶ *The Annual Report for 1994 of the Finnish Parliamentary Commissioner for the Judiciary and the Civil Administration*. Helsinki, 1994, p. 46, ff.

this context. It can be the question of using one's position of power for private gain, but also of financing one's own or one's own party's political activities. When contributions are received in exchange for services, we can say that political power is for sale; when it is gained in exchange for money or other values, democracy has been put out of the running right from the start.

Political activities are very costly. Obviously, there is a dilemma here containing also aspects of penal law.

3 Corruption and Party Financing

During the last few decades a number of European countries have experienced scandals that had to do with financing of political parties. One of the earlier ones was the *Flick affair* in West Germany. Already back in 1967 West Germany introduced an obligation for political parties to report once a year on their income. In 1987 two leading members of the FDP (the West German Liberal Party) and a businessman were sentenced for tax evasion. The businessman was employed as the general manager of the Flick concern which owned a large number of industries. The accusations had to do with attempts to bribe two Ministers of Finance so that Flick's owner could avoid tax liability on large sums of money, and with continued attempts to bribe a large number of politicians and government officials. Charges of bribery were dropped, however. The verdict was also much milder than the one demanded by the prosecutor.

The Flick group of companies gave large contributions to several of the political parties. In addition, various politicians received expensive personal gifts: the CSU's leader Franz Josef Strauss received for his sixtieth birthday a silver statuette of a horse worth 60 000 DEM, and the SPD's leader Helmut Schmidt got a silver candlestick worth 17 000 DEM. Flick wanted to obtain tax exemption for the sale of the company's stock of Mercedes Benz to Deutsche Bank for 2 billion DEM - a goal which was successfully reached. The court declared that it was difficult to find another explanation for the decision on Flick's tax waiver except for the simultaneously presented gift to the Liberal Party, which functioned as a means of bringing pressure on the decision-makers.

A close examination of the Flick affair performed by a special committee revealed that the president of the West German Bundestag, Rainer Barzel, had received large sums of money from Flick through the company's lawyers, amounting to approximately 1.7 million DEM. Many considered Barzel's stepping down in favour of Helmut Kohl as being due to these exposures. Afterwards, it came to light, however, that Kohl himself had received at least 350 000 DEM from Flick. Kohl claimed that the money had gone to the CDU and not to him personally. Willy Brandt was faced with a suspicion of perjury, which deflected to a certain degree the public attention from Kohl's involvement. Kohl's standpoint was that the laws governing party finance were unclear, that this was not his responsibility, and that a general amnesty should be called, followed by new legislation to make a fresh start.

On 1 January 1984 a new law was introduced under which companies were allowed to donate tax-free up to 0.2% of their turnover to political parties. However, a verdict issued on 14 July 1986 by the Constitutional Court in Karlsruhe

ruled that the law was in conflict with the citizens' right to equal participation in the political decision-making process. The Court set the sum of 100 000 DEM as the maximum annual donation sum for both companies and private persons.¹⁷ Under the then applicable German law, the Flick affair constituted thus an instance of unlawful purchase of political influence. It was also seen, however, as a proof of the strength of German democracy that was able to handle such a disagreeable political scandal.¹⁸

In 1994 new legislation was introduced regulating the German system of political party financing.¹⁹ Following detailed provisions concerning party financing by the state, it has been established that parties may receive donations, except for a number of carefully listed exceptions. To these belong, for example, foreign donations exceeding 1 000 DEM, donations that have been arranged through an intermediary and donations "die erkennbar in Erwartung eines bestimmten wirtschaftlichen oder politischen Vorteils gewährt werden."

If the amount of the donation money to a party exceeds 20 000 DEM during one calendar year, details about the donors and the amount of the donation shall be stated in the financial report which shall be published by the parties. Neglect in this respect leads to the withdrawal of party financing, with a sum equivalent to twice the withheld amount.

The right to make tax reductions for donations to political parties has also been regulated. A private individual may make reductions with up to 6 000 DEM per year.

Belgium has also had its scandal connected with political party financing, the so called *Agusta affair*. Belgium's Minister of Defence signed an order to purchase helicopters from the industrial company Agusta in 1988, despite the fact that better offers had come from both Germany and France. For this a 'provision' equivalent to 1.8 million dollars was paid to the socialist government then in power. An investigation started in 1991 when the former Deputy Prime Minister André Cools was found murdered. This murder, which remains unsolved, was linked up with both the Agusta affair and the later uncovered paedophilic scandal.

The money was supposed to have come from the Italian Socialist Party ruled by Craxi. Willy Claes, then Economics Minister and later on NATO's General Secretary, was strongly involved. The affair led in the autumn of 1995 to Claes's indictment in court and a hasty retreat from the political life.

The election in Spain in 1996 was marked by a number of political scandals. The most serious was doubtlessly the one concerning the fight against the terrorist organisation ETA, known under the name of 'the dirty war' (*la guerra sucia*). The Prime Minister Felipe Gonzalez, the leader of the Socialist Party (PSOE), which had been in power since 1982, was charged with a connection to the anti-terrorist liberation groups GAL, that had been torturing and murdering suspected ETA members since the 1980s. Of the thirty or so people that had been murdered, several of them had no connection whatsoever with the terrorist activities of the Basques.

¹⁷ See, *Neue Juristische Wochenschrift*, 1986, p. 2487.

¹⁸ See, Glees, A. *The Flick affair: a hint of corruption in the Bonn Republic. Corruption and Reform*. An International Journal, no. 2/1987, p. 111 ff.

¹⁹ *Gesetz über die politische Parteien*. Bundesgesetzblatt, Jahrgang 1994, p. 150.

In March 1996, simultaneously with the parliamentary election, examination of this affair was taking place in the highest court of Spain, *Tribunal Supremo*. A document from 1983 acted as an important piece of evidence. The document recommended formation of the so called ‘death patrols’ as part of the struggle against the terrorists. The former Minister of the Interior, José Barrionuevo, was charged with having acted as the leader of these groups and with crimes committed in that connection, among others with misappropriation of public funds. A number of highly posted police officers, among them the former chief of government security, were also indicted. Before the election, the Socialist Party’s nomination of Barrionuevo to a seat in Parliament gave rise to a lot of sharp criticism. The surprisingly successful election results for the Socialist Party (considering the extensive criticism directed against it), secured Barrionuevo’s position as a Member of Parliament.

The common denominator for these scandals was corruption. About a week before the election in March 1996 (on 21 February), the Spanish daily *El Mundo* counted up about thirty corruption scandals in which politicians and highly-posted public officials were involved. Money lost in those affairs amounted altogether to 837 432 million pesetas - the amount that would be sufficient to cover the minimum salaries for Spain’s 2 400 000 unemployed for six months.

One of the affairs that attracted the strongest public attention had to do with financing of a political party. This affair, the so called ‘Filesa case’,²⁰ makes an interesting starting point for a discussion on the financing of political parties and corruption, but it is also interesting for the reason that it has shaken the very grounds of the Spanish judicial system. In addition, the case has a certain link with Sweden - a fact that has not received much attention at home.

It was on 28 May 1991 that *El Mundo* uncovered the fact that companies belonging to the ruling Socialist Party PSOE had received hundreds of millions of pesetas from large companies, and used them to cover their election costs. This figure was then made more precise, coming down to 1 200 million pesetas, which is equivalent to approximately 65 million Swedish crowns. The source of the information was a former chief accountant in one of the companies, Carlos van Schouwen, who was able to provide full documentation supporting his statement.

The whole affair had to do with a network of companies whose primary task was to act as intermediaries for donations to PSOE, avoiding in this way the law regulating since 1987 the financing of political parties in Spain.²¹

José Maria Sala, at the time the Party Secretary and later on a Senator (member of *Cortés*, the First Chamber of the Spanish Parliament), together with Carlos Navarro Gomez, Member of Parliament for Barcelona and the next highest official responsible for the Party’s finances, bought in 1987 a losing concern in Barcelona, Time Export S.A. The next year, two other companies were set up: Milesa S.A. and Filesa S.A. Milesa became the parent company of Filesa, and Filesa became in its turn the owner of Time Export. Two persons, Alberto Flores Valencia and Luis Oliveró Capellades, acted as dummy owners.

²⁰ See, Tribunal Supremo, Sala Segunda, Causa especial 880/91.

²¹ See: *Ley Orgánica 3/1987, sobre Financiación de los Partidos Políticos* and an amendment in April the same year in *Ley Orgánica 5/1985 de régimen electoral general*.

The only real business activity conducted by the companies was purchasing containers from Romania, which were then sold or leased out. This accounted for a fraction of the turnover which amounted in 1989 to 618 million pesetas for Filesa and 182 million pesetas for Time Export. Otherwise, the companies were employed in transferring funds from a large number of companies and organisations in various ways, most frequently by fictitious invoices sent from Filesa or one of the two other companies. Among the givers could be found Banco Español, as well as foreign companies, one of which had been coupled with a corruption case in France. Another company was the German Siemens whose donation may be linked with a contract to build a high-speed railway between Madrid and Sevilla. Other companies included ABB Energía S.A. (later ASEA Brown Boveri S.A.), which paid 112 million pesetas.

La Agencia Tributaria, the Tax Authority, performed an investigation resulting in an extensive auditor's report, *informe*, dated 20 March 1993. On the basis of the above the Tax Authority reported the matter through *El Excmo Sr Fiscal*. Another report was made by *El Excmo Sr Abogado del Estado*, holding a position equivalent to that of Attorney-General in Sweden. Yet another report was delivered by two private persons, and one by *Partido Popular*, the largest opposition party. Due to the high positions of the parties, the case was to be handled by special procedure, directly in the *Tribunal Supremo*. A member of the Penal Law Section, *Sala Segunda*, Enrique Bacigalupo, acting in his capacity of investigating judge (*magistrado instructor*) performed an investigation which resulted in a bill of indictment, *auto*, dated 22 December 1995, against the four above-mentioned persons and three other persons. A much larger number of persons had been listed in the indictment reports that also contained a large number of indictable offenses.

Bacigalupo goes through the charges one by one, considering, on the one hand, the legal position, and, on the other, the situation from the point of view of evidence. He finds in a large number of cases that the stated action is not covered by the law, and in other cases, that no evidence could be brought forward.

He states furthermore that supplying a political party with funds over and above the limits set by the law does not constitute a crime in itself: such an offence shall not be tried under penal law but in an administrative way. As mentioned above, in 1987 a law was introduced in Spain, limiting donations to political parties to a certain sum per annum from each separate donor. Breaking the law does not involve any penal sanctions, but only administrative penalties. Bacigalupo points out that in this aspect Spain differs from many other EU countries, and refers specifically to Italy.²²

The various indictment reports list such classes of crimes as crime against property, crime of falsification, tax fraud, misuse of office, violation of professional

²²In Italy financing of political parties is regulated by an act from 1974, no. 195, and a supplementary act from 1981, no. 659. There, restrictions on the amount of donations from the State to political parties and organizations that have brought a certain number of votes are given. Public institutions, including public companies, may not make any kind of donations to political parties, groups or organizations. A donation from other companies presupposes a positive decision obtained from an authorized organ of a company in question and clear specification of the expense in the accounting. Through legislation in 1993 (during Berlusconi's term of government) penal sanctions have been done away with, having been replaced with administrative penalties.

secrecy and violation of the Act on General Elections. Several of these charges are rejected in the bill of indictment with reference to the fact that under the new Spanish Penal Code which took effect in July 1996 the actions to which they refer do not fall under criminal law. New, more lenient laws shall apply in accordance with the general principle concerning the applicability of penal law. Under the new act, forgery of commercial documents, e.g. invoices, is not an indictable offence if it has the character of 'ideological forgery', i.e. if it represents an act which is classified in Swedish law as false certification. Similarly, tax fraud has also been partly decriminalized since the time when the above-mentioned acts were committed, namely, as far as regards the sums that evaded taxation amounting to less than 15 million pesetas. In other cases it is the question of administrative penalties only. A penal regulation concerning setting up of unlawful companies is found inappropriate with regard to the fact that the companies were not set up for a criminal purpose, but in order to finance a political party - an act which may be forbidden if it exceeds certain limits, but which is certainly not an indictable offence.

Further, Bacigalupo states that under Spanish law criminal liability does not apply to juridical persons or to a collective of persons. Liability must attach to a specific person or persons, and not to a political party, for example, a party committee or a company's management. With regard to the persons in public office identified in the indictment reports Bacigalupo declares that the acts which they are alleged to have committed cannot be seen as performed while discharging their official duties or assignments, which is why it can never be the question of the misuse of office. Neither can donors be charged with bribery, or representatives of the party receiving the donation for accepting a bribe (*cohecho*).

The decision on indictment that was taken by the *Sala Segunda* in an *auto* dated 20 December 1996 concerns six out of the seven persons listed in Bacigalupo's bill, adding twenty more. It indicates tax fraud (undeclared income in the companies' tax returns, unmotivated reductions made by the donors), fictitious invoicing and other irregularities in the Companies' accounting that are classified as crimes of falsification or accounting crimes. It also includes several cases of embezzlement of public funds and *tráfico de influencias*.

The main proceedings in *Tribunal Supremo, Sala Segunda*, were expected to begin in the summer of 1997, the donation from ABB Energía then also coming up for trial. The donations made by the company are so well documented and so large that they were included among the charges of tax fraud against the receivers already in Bacigalupo's bill of indictment. Later charges were brought up also against the director of ABB's Spanish branch.

The Filesa case has obvious party-political implications. The second largest party in Spain, *Partido Popular* (PP), has also been the object of suspicion and accusations of unlawful financing. In the *Naseira* case, so called after the name of one of the suspected PP's politicians, the discovery was made in connection with the tapping of the phone belonging to a brother of one of the politicians. The decision to tap his phone had been made by the chief police inspector, and was based on an unfounded claim concerning suspected narcotics crimes. *Tribunal Supremo* decided that the tapes containing tapped conversations, together with the

transcripts thereof, were not to be used as evidence, since they had been acquired contrary to the law, and that they should therefore be destroyed.²³

The highest representatives of the judicial system have been under a great deal of political pressure. Bacigalupo writes in his *auto* (p. 4, f.):

“Naturalmente que sobre estos hechos cabe también un juicio moral o un juicio político. Sin embargo, la Constitución no confiere a ningún Juez el derecho a emitir juicios morales o políticos sobre las conductas de los ciudadanos y no es lo más adecuado al sentido de las instituciones ampararse en la potestad jurisdiccional para extralimitarse en la expresión de los mismos, aun cuando la separación entre el derecho y la moral no sea tan rígida como postulan algunos juristas. En todo caso: las razones que pudieran fundamentar un juicio de carácter moral no autorizan a los jueces a crear el derecho que no ha creado el Parlamento.”

Bacigalupo speaks about drawing the line between the political and the judiciary power, maintaining that courts cannot take upon themselves the role of a legislator on moral grounds. But he also points out that one cannot draw a strict distinction between law and morality in the way in which some jurists claim that it is possible.

The above statement must be considered against the background of the occurrences preceding the appointment of Bacigalupo as the examining magistrate in the Filesa case. This assignment was given, to begin with, to another person,²⁴ i.e., Spain's most prominent professor of penal law at the time, Marino Barbero Santos, from Complutense University in Madrid, who acted as a judge at *Sala Segunda del Tribunal Supremo*. Barbero Santos worked for over three-and-a-half years with the case. In January 1995 he was ready to apply for the Parliament's permission to start preliminary hearings against one of the top leaders of the Socialist Party, Alfonso Guerra, concerning violation of the Act on General Elections. The newspapers devoted a lot of attention to the case. In many places voices were raised, claiming that Felipe Gonzales himself was involved, causing him to publicly declare that he had had nothing to do with the money for his party's election campaigns.

Barbero Santos demanded the support of the Minister of Finance to submit a petition to the Congress. The Minister's answer did not present a clear point of view, and attention was called to the fact that one problem with issuing a verdict was the fact that only a person who has personally carried out an act, i.e. falsified the records, can be charged with a crime against the Act on General Elections.

On 28 February 1995 Barbero Santos's petition requesting the Parliament's permission to start preliminary hearings against Alfonso Guerra was rejected. It has been said that a petition of this kind has never been rejected before.²⁵ Since Guerra could not be made the object of preliminary hearings, it was also impossible to investigate other members of the PSOE's executive body. Barbero Santos continued his work by surveying Filesa's foreign business transactions performed in Lichtenstein and Switzerland in order to see if money had been laundered there. When a high politician from Estremadura, Juan Carlos Rodríguez Ibarra, compared

²³ Sala Segunda, *Auto*, Causa Especial 610/90.

²⁴ On 7 November 1991.

²⁵ Herrera-Durán, *El Saquéo de España*, Madrid 1996, p. 278.

Barbero Santos's behaviour with that of ETA's -an attempt to influence election results "without having to pass through the ballot-box" - the latter approached Spain's highest judicial body, *Consejo General del Poder Judicial*, requesting that measures be taken against Ibarra. Since his request was not granted, he handed in his resignation.²⁶

The handling of the Filesa case has seriously shaken the people's confidence in the Spanish judicial system and its highest organ *Consejo General del Poder Judicial*. The latter consists of 21 members elected by *Cortes*, and thus also by the political parties. This is the organ that makes appointments to the highest judicial offices in Spain. The same procedure exists in certain other European countries, which can be of interest for the discussion conducted in Sweden, concerning the judges' independence, especially those presiding in the Supreme Court and the Swedish Supreme Administrative Court.

Certain occurrences noted in connection with the election of a number of new members to *Sala Segunda del Tribunal Supremo* in March 1996 certainly give a reason to wonder if the Spanish procedure is worth following. Judge Luis Pascual Estevill, himself a member of *Consejo General*, was charged with tax fraud. When new members of *Tribunal Supremo* were to be appointed, who would participate, among other things, in the trial of the charges against Estevill, the latter refused to relinquish his right to vote. The question of his disqualification had thus to be decided by vote. The members voted in a way which clearly reflected the political interests that they were serving. One member reported that Estevill tried to bribe him by offering to arrange employment for his son. The affair made a big splash in the newspapers and television. It is clear that the Spanish judiciary experiences great difficulties in being able to make a stand against corruption deeply rooted in Spanish society.

In the USA the 1996 elections were held to the accompaniment of words such as *soft money*, *access buying* and *special interests*. The biggest danger for President Bill Clinton on his way to re-election consisted in the reactions to the exposure of contributions made to the Democratic Party. A whole deal of these contributions were held to have come from foreign citizens domiciled abroad. Such contributions are forbidden under the law. Obviously, however, the American public did not become sufficiently upset by these exposures, and President Clinton's position remained intact. On the other hand, the exposures could have contributed to the fact that the Republicans strengthened their position of power in the Congress.

Already back in 1907 laws started being introduced, which, taken together, laid a foundation for the Corrupt Practices Act from 1925.²⁷ Until 1971 nobody, either a person or an institution, had been convicted, however, of unlawful contributions. Shortly before the Watergate affair the same year, the Congress adopted the Federal Election Campaign Act.²⁸ The Federal Election Commission acts as the supervising authority. The Commission must be notified by the parties about the amount of money they have received and the donor's name.

²⁶ In a conversation between the author of this article and Barbero Santos in March 1996, the latter explained that he had never spoken publicly about the matter after that time, and that even now he was not prepared to do so.

²⁷ 18 U.S. 610.

²⁸ Public Law 92-225, Stat. 3, 1971.

The regulations were tightened up after Watergate, and now nobody may give more than 1000 US dollars per candidate and campaign. A private person may contribute additionally with 5000 dollars to one or more Political Action Committees (PAC). These may offer in their turn limited direct contributions to candidates that they support. They may also advertise in the press and on television for the benefit of their candidate, but they may not urge people expressly to vote for him or her. Instead, comparisons between the own candidate and his opponent within a given district are made. In addition to this, the parties may accept unlimited sums to be used for the coverage of their general costs and for such expenses as campaigns for vote registration, for example. It is this money that is referred to as *soft money* - perhaps the most controversial category of contributions. One reason why the exposures during the election campaign of 1996 did not provoke stronger reactions may be the fact that the US Supreme Court had questioned the fact whether the right to give financial contributions to politicians and political parties should really be restricted. In the Court's view this may constitute "unconstitutional denial of free speech", which would be in conflict with The First Amendment.

During the last hectic weeks of the election campaign, the well-known professor of law, Ronald Dworkin, came with a long and remarkable contribution in the form of an article printed in *The New York Review of Books*²⁹ In this article, appearing under the heading *The Curse of American Politics*, he characterizes the economic influence on American politics as the greatest threat against the citizens' freedom of speech. The Supreme Court's judgement in the decisive case *Buckley v. Valeo* from 1976³⁰ is in Dworkin's opinion 'a mistake'.³¹

"The decision did not declare a valuable principle that we should hesitate to circumvent. On the contrary, it misunderstood not only what free speech really is but what it really means for free people to govern themselves."

Dworkin declares that big companies do not give contributions for either altruistic or political reasons - they often give contributions to both parties - but in order to gain influence on political decisions, or at least to ensure: " 'special access' to high officials to put the case for their interests". He mentions a large number of contributions from various companies, declaring that³²: "The appearance of corruption is inevitable and its reality, at least in many cases, almost as certain."

Political parties have been receiving state support in Sweden for a long time now.³³ Even municipalities and county councils may give party support.³⁴ No provisions concerning contributions from private companies, organisations or private persons exist in Sweden. The question of whether Sweden should introduce such rules has not arisen in the Swedish political debate as yet. On the other hand,

²⁹ 17 Oct. 1996.

³⁰ 424 U.S.1, 1976.

³¹ p. 24.

³² p. 19.

³³ The Act on State Support for Political Parties, SFS 1972:625

³⁴ Chapter 2, sections 9-10 of the Local Government Act, SFS 1991:900

contributions from the Swedish Confederation of Trade Unions (LO)³⁵ to the Social Democratic Party have been both discussed and criticised. For example, on 15 September 1996 under *Brännpunkt* (Focal Point) in the daily *Svenska Dagbladet* the Moderate Party's Secretary, Gunnar Hökmark, drew attention to the LO's role in the negotiations concerning changes in labour law, and the LO's intention expressed in this connection to withdraw its support for the Social Democratic Party. Even the Moderate Party Leader, Carl Bildt, has questioned the action of LO, and wondered whether acting this way might not constitute the case of bribery. The question is how long it will take before the relationship between these and other contributions to political parties and the principles of democracy becomes the object of Swedish legislation.

Should one, and can one, make a difference between financial support to political campaigns and economic promotion of political decision makers? Where does the border line go between permissible influence on and unlawful bribery of political decision makers? It may seem self-evident that in a democratic society political power must not be "bought". In practice, however, especially in times of strong emphasis on market economy and free competition, the boundary may seem hazy. This is the background of the regulations that have been lately introduced in different contexts, concerning rendering of accounts and restrictions on individual politicians' assignments and assets. The primary aim has obviously been to draw attention to and avoid situations in which lawful disqualification can be applied. This type of regulation must also be seen, however, in the light of increased lobbying and the risk of law violations connected with it.

4 Corruption and Lobbying

Today, members of the Swedish government must report to a public register the names of any earlier, ongoing or future contractors or employers.³⁶ Even earlier on it was agreed that they should not administer their own securities.

As mentioned earlier, undertakings and financial interests of the MPs are registered in accordance with the act that came into force on 1 September 1996 (1996:810). Proprietary interests in companies and commercial property, profitable activities on the side of the parliamentary membership, board assignments in a company as well as public assignments shall be reported. Discussing the proposal for the above-mentioned act, the Parliament's Standing Committee on the Constitution stated that gifts having any link with the parliamentary assignment should be considered as a rule to be bribes, and that they must never be accepted. Under the original proposal, gifts which were worth more than 1500 SEK had to be reported. Such a regulation could create a wrong impression among the members who might think that it was permissible to accept smaller gifts.³⁷

The Swedish regulations came as a result of a decision taken by the EU, stipulating that the members of the European Parliament should make their gifts and benefits publicly known. It had been difficult to come to that decision. In

³⁵ Short for 'Landsorganisation' (the Swedish Confederation of Trade Unions)

³⁶ Report 1996/97:56, "Conflicts of Interests of Cabinet Ministers".

³⁷ 1995/96, KU:13.

January 1996 a proposal on the matter was considered, but the members could not reach an agreement and come to a decision. The Members of the European Parliament were even previously required to submit detailed information concerning their professional career and other paid assignments. The conditions in the European Parliament have been described to vary quite a lot. Some members promote their own interests so hard that they are looked upon as lobbyists themselves. Others have assistants that are paid by companies, or special interests, and it has been said that certain members get their trips and hotel rooms paid by these contributors. Offers of trips before important decisions, etc., have also been mentioned.³⁸

In July the same year the proposal was up for consideration again in a revised form, and was accepted this time by a large majority³⁹. The regulations are formulated in a general way, leaving to each Member State the decision concerning the particulars of the account submitted to public insight. At this point in time few of the Member States had regulations concerning this matter. As mentioned earlier, Sweden introduced such regulations after that date. These regulations apply even to Swedish members of the European Parliament.

As regards the lobbyists, the EU has made use of a plea for self-revision. In December 1992 the European Commission issued a bulletin in which it appealed to the lobby organisations to develop a code of conduct. The Commission wishes to safeguard in this way the balance between openness and the necessary control. The Commission has specified, however, the contents of the above-mentioned code of conduct. Among other things it is stated that one shall neither employ nor give assignments to civil servants working for the Commission, nor entice them with promises in order to get information.⁴⁰ A code of conduct was formulated in September 1994 for the signature of the lobby organisations, and it is revised each year. In July 1996 the European Parliament adopted regulations concerning personal pass cards containing information about the assignee and regarding open registration of lobbyists.⁴¹

It is commonly known that lobby organisations in Brussels are both numerous and strong. The Commission counted up to approximately 3000 organisations with 10 000 employees in 1993.⁴² Before long, any specific interests will have their own lobby group; the most influential lobby groups represent large groups of companies or organisations in all the member states. In reality, the lobbyists' position is so strong that they control to a considerable degree activities of the politicians and public officials.

In Sweden we do not have the same kind of publicly accountable lobby activities as in the USA. We do not have, for example, a direct equivalent of the lobby companies existing there, whose primary business concept is influencing decision makers at various levels. An example of such a company is *the Cassidy Group* in Washington. The highest level of the company works directly vis-à-vis

³⁸ Swedish daily, Dagens Nyheter, 17 July 1996.

³⁹ A4-0177/96.

⁴⁰ OJ 93/C63/02.

⁴¹ A4-0200/96.

⁴² OJ 93/C63/02.

the political decision makers; the level below contains a section which focuses on the media; the level below that contains a section dealing with market research. Additionally, the company has a section which produces the so called ‘grass roots’ which market research studies might have failed to identify. These are known in popular parlance as ‘Astroturf’, i.e. artificially made lawns.

The situation in Sweden is presently in the process of change. The lobby activities of trade and industry observed before the EU election were very intensive. Another example is the campaign conducted by the Federation of Swedish Industries and by various individual industries which are highly dependent on the use of electric power to preserve the nuclear power stations. During the spring of 1997 it was brought to attention that a certain consulting firm had been supplying Members of Parliament with reports and press cuttings concerning taxable benefits in the form of cars, which was done on behalf of the Swedish State Railways. A particularly interesting aspect of the case is the fact that lobbying of Parliament Members was carried out by a government agency.

To completely exclude the possibility of bribery in the context of lobbying would be just wishful thinking, even though we do not have a reason to assume that we are on the way to have what the Americans claim to have, namely ‘the best politicians that money can buy’. Even so, it is important to be aware of the risks connected with increasing lobby activities. In Sweden responsibility for active and passive corruption embraces also the relationship between an elected politician and a lobbyist. As late as in 1994 Germany introduced criminal liability for *Abgeordnetenbestechung* (§ 108 e StGB). Already the Bill to StGB, E 1962, contained such a provision, but it met with a lot of opposition and did not go through. After that it was frequently emphasized that the situation in which there was no possibility of prosecuting an elected politician for his accepting a bribe constituted a legal loophole. The new penal regulation applies to all legislative bodies, at the *Gemeinden, Länder, Bundes and EU* levels.

5 Reasons for and Effects of Corruption

The battle against corruption is conducted at many levels around the world. A number of international conferences have been held within the frame of the United Nations (IACC). The seventh in the row was held in October 1996 in Beijing. A Non-Governmental Organization (NGO), *Transparency International*, with headquarters in Berlin and chapters in a great number of countries, functions as a *clearing house* for information on corruption. Its magazine ranks countries in accordance with the frequency of the occurrence of corruption. This is also done on the Internet. In 1994 the OECD issued a recommendation in connection with this topic to the Member States. A working group was set up, including Swedish participants, which proposed a revised version that was adopted in May 1997. The European Union’s efforts to come to grips with corruption within its own organization and with regard to the different Member States have been mentioned before.

Even though the main responsibility must attach in principle to those who exercise official power, irrespective of where the initiative to corruption comes from in a given case, it is certainly important to counteract ‘active’ corruption. A

lot has been written about the use of bribes by companies in the West when dealing with the Third World countries. The governments of the Third World countries are easy targets for such business methods. A countless number of exposures have been made during the past few decades: in country after country representatives of large companies, and, even worse, of public authorities and even governments, have been accused of having bribed their way to important foreign contracts.

In a book that has met with a lot of attention, George Moody-Stuart, who has long personal experience from the sugar industry, stretching from countries in the Caribbean region all the way to Eastern Africa, describes the way in which corruption functions in trade relationships between the North and the South.⁴³ He starts from a definition provided by the ‘Encyclopedia of Social Sciences’ from 1931⁴⁴ in which corruption is defined as the abuse of power for the attainment of personal advantages. On the basis of this definition he has coined the term *La Gran Corrupción*, which is defined as the abuse of power by heads of states, ministers and higher public officials in order to attain personal economic advantages. The corruption which is so prevalent among the lower civil-servants in the Third World countries is not unimportant, but it falls outside Moody-Stuart’s model.

Trading between the West and the Third World countries gives endless possibilities of corruption - possibilities which are exploited, sometimes at several levels, all the way up to the highest political level of the purchasing country. The market forces are unable to purge corruption and make the trading more sound in any remarkable degree: there are too many incentives for gaining personal advantages and too many factors which are impossible to control. The losers in the corruption context are usually the people in the purchasing country that will get fewer goods of lower quality at a higher price, and aid organisations of different kinds that are frequently the ones that finance the business deals. In the long run, however, it is the Third World in its entirety that becomes the real victim, due to the fact that corruption hampers and counteracts development.

The relative strength of the industrial countries acting as sellers and the Third World countries’ governments and authorities acting as purchasers is obviously rather uneven. This is why in cases of this kind there is good reason to claim that the main responsibility for counteracting corruption should rest with the active party, i.e. the industrial countries.

How then can one persuade or influence the representatives of trade and industry to refrain from the use of corruptive business practices in the increasingly competitive climate of today? Stricter control will only get us thus far. It is therefore important that organisations such as the ICC (the International Chamber of Commerce) continue working with recommendations, such as “ICC Rules of Conduct to Combat Extortion and Bribery” (latest revision in 1996). Efforts are also being made to actively influence trade and industry by demonstrating the long-term, self-destructing consequences of corruption.

The Nobel Prize winner in economics Douglas C. North discusses in his work “Institutions, Institutional Change and Economic Performance” (Cambridge, 1990) the importance of strong legal institutions for the economic success of the industrial

⁴³ *La Gran Corrupción*. Madrid, 1994.

⁴⁴ Senturia, J.J., Corruption, political.

countries. It is the institutional framework - things like precisely specified contracts concerning ownership, bankruptcy legislation and decentralized decision making - that has created conditions for free competition and well-functioning trade and industry. Corruption is prejudicial to the possibilities of political stability and economic progress, because it undermines this institutional framework. The state of things in the countries of Eastern Europe after the fall of socialism should serve as a sufficiently clear reminder of this for the company leaders in the West. In these countries the difficulties in conducting business activities caused by the lack of well-functioning legal and administrative infrastructure are obvious.

Widespread corruption can be seen as a kind of commercial *harakiri*: the use of corrupt business methods in trade and industry constitutes a threat to the legal institutions forming the basis thereof. It is as if one was trying to saw off the branch of a tree that one was sitting on. The short-term profit gained for one's own company becomes a long-term loss for all.

The fact that corruption, in the broad sense of the word, has been exposed in such proportions in recent years even in Sweden can be explained perhaps by reference to the economic crisis which has proved to be so profound that it may be taken as a sign of considerable changes in the whole of the social system. 'The Swedish Model' which meant, among other things, the community of underlying values in society belongs now clearly to history. It is a fact which has been proved on many occasions that corruption thrives in countries in which old forms and values are questioned and which finally come to be replaced by other forms and values. In the meantime a vacuum is created in which corruption can spread like cancer.⁴⁵

In a society with weak institutions that which constitutes the essence of corruption in two-party relationships is facilitated: one party obtains a hold on the other party, being able thereafter to freely use the acquired position of power. Hitler understood the importance of letting his functionaries get rich by abusing the system in order to be able to control them later on, and make them spy on each other. He is believed to have said⁴⁶: "Jeder ist in der Macht eines jeden anderen, und niemand ist mehr sein eigener Herr. Das ist das erwünschte Resultat der Losung: 'Bereichen euch'!"

If the parallel to Nazi Germany seems exaggerated, there is at least reason to point out the importance of corruption in today's organized crime. Weak administration opens up possibilities for organized crime: anything from home-distilling to drug trafficking. You buy silence, and after that you have a free hand to conduct your business on a large scale, without being afraid of any disturbing interventions of the authorities. Swedish policemen and prosecutors with experience from international fight against crime have given witness of difficulties experienced when trying to take legal measures with regard to crimes such as terrorism and sexual commerce with women and children in countries where corruption is widespread. The international fight against organized crime presupposes therefore also a successful outcome of the combat against corruption.

⁴⁵ Rennstich, p. 20.

⁴⁶ See, Brunner, Ch., *Korruption und Kontrolle*, 1981, p. 73.

In February 1997 the Swedish Attorney-General submitted a report concerning stronger protection against irregularities in public administration. In the directives for this assignment attention was drawn to the risk of corruption contained in the fact that certain public officials come into contact in their work with organized crime or crime where the involved possess strong economic resources. In his report the Attorney-General considers the question of whether alongside with internal control within an authority there is a need for a special routine at the central level for identification and analysis of risks connected with 'infiltration'. It is suggested that the duty to report side-line occupations should be expanded to embrace, in addition to persons in managerial positions, also certain other high officials and employees in such occupations in which demands for the integrity and neutrality of the public administration office in question are particularly evident, or where there are considerable risks for the appearance of irregularities. The Attorney-General points out that a special problem arises when someone close to the employee conducts business in an area that touches upon the authority's sphere of activities.

In a social climate in which solidarity is looked down upon, and the only leading star is one's own success, it is easy for corruption to gain a foothold. The attitude stipulating that anything can be bought for money leads to ruthless misuse of contacts and more or less open bribe attempts. Counteracting these tendencies by trying to mould public opinion is certainly not an easy task.

The role of the mass media should be especially noticed in this context. It is a two-fold role. On the one hand journalists play an important role in the exposure of corruption. Many 'affairs' have been uncovered by investigative reporters. These reporters have thus made important social contributions, demonstrating the importance of free media. At the same time, the media have such power today that this in itself invites corruption. The famous words used by Lord Acton apply even to journalists⁴⁷: "Power corrupts, and absolute power corrupts absolutely."

Muck-racking has become a business today, so that one must count with the possibility that journalists are bought, or that they do business on their own on what they write or do not write. At a meeting on 7 March 1996 between the author of this article and Hermann Tertsch, the then manager of the editorial division of the Spanish daily *El País*, the latter said that in some Spanish daily newspapers not a line was written without money having changed hands, and that frequently there was money behind that which was *not* written. Nothing indicates similar tendencies in the Swedish media, but one should not close one's eyes to the possibilities of appearance of such tendencies and the fact that our special constitutional protection of the media will make them hard to combat.

The importance of offering to public officials sufficiently high salaries in order to prevent them from being tempted by corruption is frequently mentioned. In situations where the representative of the public really does not get acceptable remuneration for his work in the form of a salary, accepting bribes may seem as a kind of 'crime out of necessity'. Generally speaking, corruption cannot be explained in this way, however. Too many extremely well-paid officials, including some in Sweden, have showed themselves prepared to abuse their position for their own profit.

⁴⁷ These words were used for the first time in a letter to Creighton on 5 April 1887, being later reproduced by Lasswell, H. D. in *Power, Corruption and Rectitude*, New Jersey, 1963.

6 Corruption and Swedish Law

Sweden is rightly considered to have gone far as regards legislation against bribery. It is often claimed that Code Napoléon from 1810 is to be considered the first regulation concerning corruption in Europe, but some of Sweden's provincial laws from much earlier periods contained such provisions. These referred, however, only to judges, county sheriffs and bailiffs. In the Penal Code of 1864 criminal liability for bribery was extended to apply to all higher government officials. A hundred years or so later, in 1978, the laws were extended to embrace all employees and the majority of contractors in the private sector.

The Swedish regulation of passive and active corruption may thus be considered as quite strict in several respects. At the same time it is, in my view, too mild and sometimes too 'tame'. Contributions to political parties and lobbying have not drawn any particular attention. Most importantly, however, bunching up corruption in the public and private spheres under joint regulation has taken away some of the seriousness of the former.

Penal law regulation should be clear and well thought-out, and, in order to function preventively, it must be in conformity with the general perception of justice. This perception should not have changed since the time when Gunnar Myrdahl gave the following definition of corruption in his book "Asian Drama. An Inquiry into the Poverty of Nations".⁴⁸ "...improper or selfish exercise of power and influence attached to a public office or to the special position one occupies in public life."

The Swedish legislation on corruption is sometimes held up as a model in the international work against corruption. One of the intentions in my study has been to examine whether the Swedish solutions have any prospects of being imitated in other European countries. My conclusion is that it would be both unjustified and futile to try to export a system that has been based on our country's special focus on labour law relations. The Swedish solution does not need to be seen as a symbol of a particularly strict view of corruption in general. Instead, it can be an example of a typically Swedish attitude when trying to justify one evil by another ("Why pick on me? Others are just as bad!")

Efforts to combat corruption should focus instead on the abuse of power in the sphere of public activities - *dishonesty in the use of official power and public funds*. Criminal liability should aim at those in power. Even if the initiative is taken by another person offering a bribe, it is the public official in power who should primarily be blamed if he or she gives in to the temptation. Persons using or trying to use corrupt methods in order to obtain something from the public sector should certainly be punished for this. Perhaps a better method than the one used in Swedish law, where active corruption (offering a bribe) is classified as a separate offence, would be to punish the person in question in his capacity of instigator or accomplice or for conspiracy. Such liability does not presuppose that it will be possible to sentence the perpetrator.

If a private employee or contractor requests or accepts a bribe, his action is directed against his or her principal and represents a breach of trust against him.

⁴⁸ Vol. II, New York, 1968, p 937.

Other types of breaches of trust in such relationships constitute *breach of faith committed by an agent on his principal*. Responsibility for passive corruption (accepting a bribe) constitutes in such cases *lex specialis* in relation to the crime of breach of faith. This special regulation is, in my opinion, quite unwarranted as regards the private sphere of business activities. The crime of breach of faith may be re-formulated in such a way as to embrace all the forms of corruption to which criminal liability applies. Legislation concerning unfair marketing (the Swedish Marketing Act, 1995:450) supplements criminal liability under penal law. In this way the Swedish regulation in this area would become similar to that existing in the majority of the European countries, which would mean a well-motivated step towards harmonisation with European penal law in general.

Delimitation of activities that need to be regulated separately as instances of passive corruption (with liability for active corruption attached to it) will thus be made. The decisive factor is contained here in the question of whether public funds are involved in the conduct of such activities. Functions of national, regional and local governments require particular protection, since representatives of these functions exercise their decision-making power on the basis of the democratic system. It is the unique aspect of the misuse of public funds that distinguishes corruption in these functions from a private employee's acceptance of a bribe.

Various other activities are financed wholly or partially by contributions from public funds. However, from the moment when a private nursing home, for example, receives such a subsidy, the money loses the character of public funds. Misuse of such funds should be prosecuted as a crime against the principal, i.e. the nursing home, or, if the crime has been committed through misleading, as fraud against the state, municipality, etc. Such proceedings do not include abuse of public power.

As regards accepting bribes in the sphere of public activities, one should discuss the way in which this crime should be related to other types of crimes in the public sector. Today, passive corruption is handled in Chapter 20 of the Penal Code (despite the fact that it embraces even employees of the private sector), together with misuse of office and breach of professional secrecy. A proposal which may be interesting in the context of the above discussion has been submitted by the Attorney-General in the above-mentioned report "Better protection against irregularities in public administration", where the following is stated (p. 13):

"Regulations concerning misuse of office refer to incorrect measures applied in the exercise of authority, i.e. when the public authority makes a decision entailing legal consequences for individuals. An action where a public employee uses public funds in a different way than they were supposed to be used, by, for example, getting himself credit to cover his personal living expenses, does not involve, as a rule, any exercise of authority. The employee can therefore not be prosecuted for misuse of office. Certain acts that involve misuse of public funds can be prosecuted on the basis of the provisions of the Swedish Penal Code, referring to embezzlement and other breaches of trust. There are, however, acts in the sphere of public activity where the present-day regulations have shown themselves to be insufficient. In my opinion one should therefore consider introduction into the Penal Code of a special penal regulation that would take care of mismanagement of public funds. Such a regulation could serve as a complement to the regulations concerning misuse of office. A penal regulation of this kind should be designed in

such a way as to cover also cases in which the public official has been careless or grossly careless while handling public funds.”

The Attorney-General recommends that the need for the regulation by penal law of cases concerning mismanagement of public funds should be looked at more closely.

As Professor Spinellis has emphasized by his classification of ‘top-hat criminality’, bribe-taking by politicians constitutes one of many forms of the abuse of power. A number of these forms are included in the general concept of corruption. This fact may perhaps form the basis of a new kind of systematics in which misuse of public authority will provide the primary grounds for classification. Failing to make the law reflect this particular danger to democracy can hardly benefit the struggle against the growing social threat represented by corruption.