The Crime of Bribery in Ibero-America: A comparative synopsis

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Abstract 1

This research presents a comparative overview of some Ibero-American legislation regarding bribery of public officials as a crime. The analysis of six criminal codes from the sample group of countries provides some evidence of structural differences within the laws dealing with this particular crime, which show they do not have a unitary approach to bribery, but does reveal some common trends, such as the progressive abandonment of the bilateral conception of the crime, the existence of bribery in the case of simply receiving presents, the extension of who can be considered as a participant in the crime of bribery with aggravating circumstances and, finally, the various possibilities with regard to the material object.

I. Introduction

This comparative study aims to examine the crime of bribery in the criminal codes of Argentina, Brazil, Colombia, Chile, the Federal District of Mexico and Peru. 2

The delimitation of the matter to be examined requires some clarifications. To begin with, the term bribery is used here in the precise technical meaning of the corruption of public officials while performing their duties. It is also the name of the crime in the various criminal codes reviewed, except for the Brazilian Code where its use of the Portuguese language has resulted in, similar to other Romane languages, the use of the word corruption.[1] This text avoids the use of corruption due to the variety of meanings it has in moral philosophy, political theory, criminology and 3

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1 *Corrupção*, as in Italian *corruzione* and in French *corruption*. The etymology comes from Latin (*corruptio, corruptionis*), less pure in the action of bribe, which comes from Vulgar Latin *confectare*.

even in criminal law. All these meanings are broader than bribery, which does not contain all the forms of abuse or distortion in the public administration, or those treated as equivalent thereto. This decision is also based on the doctrine of the Latin American countries to limit, for the sake of clarity from a conceptual perspective, the phenomenon of corruption to its historical paradigm, bribery.[2]

4 As such, bribery of individuals in ministerial posts and those performing other government functions within the six above-cited States will be addressed. Although in the past few years these States have passed legislation dealing with the bribery of foreign public officials[3], this demeanour is not related to the legal interest protected (*bien jurídico*) of actual bribery and, possibly, neither to any other aspect of national interest.[4] For that same reason, electoral fraud is not included herein: it also protects a different legal interest. I do include other manifestations of political bribery committed by or through parliamentarians in regulatory processes that take place in the legislative assemblies. They affect the same legal interest of ordinary bribery

2 Cf. Luis Rodríguez Collao and María Magdalena Ossandón Widow, *Delitos contra la función pública* (2nd edn., Editorial Jurídica de Chile, 2008), 23 and 24; Manuel Abanto Vásquez, *Los delitos contra la Administración pública en el Código penal peruano* (2nd edn, Palestra Editores, 2003) 409.

3 The Argentinian Criminal Code, Article 258 bis (introduced by Law No. 25.188, of 1 November 1999); the Brazilian Criminal Code, Articles 337 B, C and D, introduced by Law No. 10.647, of 11 June 2002); the Colombian Criminal Code, Article 433 (modified by Law No. 1.474, of 2011, and Law No. 1.778, of 2016); the Chilean Criminal Code, Articles 251 bis and 251 ter (originally, Articles 250 bis A and 250 bis B, introduced by Law No. 18.829, of 8 October 2002, upon which Laws Nos. 20.341, of 22 April 2009, and 21.121 of 20 November 2018); the Mexican Criminal Code, Article 222 bis (introduced by Decree of 17 May 1999, then reformed by Decree of 12 March 2015), and finally, the Peruvian Criminal Code, Articles 393-A and 397-A (introduced by Laws Nos. 29.316, of 14 January 2009, and 29.703 of 10 June 2011, which was subsequently modified in 2013 and 2016).

4 Going deep into the empirical background of the legal aspects mentioned in the previous footnote would be a very useful exercise to draw lessons from the prevalence of foreign interests in the criminal policy of the Ibero-American States. It is said that the bribery of foreign officials would offend the good faith, regularity and transparency, albeit briefly, of the normal development of international economic relations. Cfr., among others, Luiz Regis Prado, *Curso de Direito penal brasileiro* (4th edn., Editora Revista dos Tribunais, 2006) 164. However, the issue requires a further but less formalistic and naïve examination, one that perceives in the acclaimed international bribery, a means to protect local companies from foreign-State actors with effective monopoly power as these are the only entities selling certain products (military, pharmaceutical, etc.), or capable of undertaking certain projects (building of large-scale public works, providing highly complex technical assistance, etc.).

and it is accordingly punishable under Ibero-American legislation under the broad concept of public service and servant.[5]

The six criminal codes here posed a challenge from the perspective of 5
undertaking a comparative analysis, even one as relatively limited as that outlined below. The codes were prepared in different periods of history and based on different sources. According to the research conducted by Rivacoba and Rivacoba,[6] the Chilean Code was written a relatively long time ago (1875) and its now-dated concept of bribery recalls, with some variations, the Spanish legal perspective of 1848–1850. The codes from Argentina (1921), Brazil (1940)[7] and Federal Mexico (1931) are more modern, although their primary sources in dealing with bribery vary, being based on the Italian, Italian-Swiss and, primarily, the Spanish approaches respectively[8]. In brief, among the other fairly recent codes, those of Colombia (2000) and Peru (1991) were deemed to have value for this study because of their date rather than the content of their stipulations regarding bribery. These two codes are based on the vernacular texts of 1936 (Colombia) and 1924 (Peru), respectively, and both draw heavily on the Italian-Swiss codification of criminal law.[9]

Furthermore, the relevant provisions have remained largely unaltered 6
throughout decades. Indeed, in the case of Chile's 1875 code, the provisions remained unaltered until there were significant modifications in the 1990s,

5 With regard to political bribery in general, cf. José Luis Guzmán Dalbora, *Colectánea criminal*, (Editorial B. de F., 2017) 163–202.

6 Manuel de Rivacoba y Rivacoba, "El Derecho penal en América Latina a finales del siglo XX", in Journal *Direito e Cidadania* (2000–2001) 37–39.

7 Idem, 49–50, situates it among recent texts, for the complete reform of its General Part in 1984.

8 The sources of the Argentinian code is addressed by Sebastián Soler, *Derecho penal argentino* (4th edn., Tipográfica Editora Argentina, 1988) 122 and 209; the intricate sources of the Mexican code are dealt with by Luis Jiménez de Asúa, *Tratado de Derecho penal* (2nd edn., Losada, 1956) 1171–1774, and Manuel Vidaurre Arechiga, *Hacia un Código penal único sustantivo nacional* (Porrúa, 2014). Regarding the particular influence of the 1893 Swiss project and the 1930 Italian code on these and other Ibero-American legislation, cf. Raúl Zaffaroni Eugenio, *Los Códigos penales de Latinoamérica* (Supreme Court of Justice of the Mexican Nation and ILANUD, 2000) 83–90.

9 Categorical, *Abanto Vásquez* (n 2), 423, and Fernando Velásquez Velásquez, "El delito de cohecho y sus manifestaciones", in Fernando Velásquez Velásquez and Renato Vargas Losano, *Problemas actuales del Derecho penal* (Universidad Sergio Arboleda, 2016) 209.

which is an ongoing process.[10] The eagerness for legal reform in much of Ibero-America may be attributed to multiple factors, among which the increasing role of international law has surely had great influence as has the region's current ruling elite's wish to wipe away the impression of their predecessors' corrupt practices had caused the general population, which has been endemic in these countries for centuries.[11]

II. Classification of crimes

7 The six criminal codes examined set forth stipulations regarding both bribery involving a public official and that of a private person. Three codes still relate them to the bilateral conception of the offence which will be explained below.

8 The Argentinian, Brazilian and Colombian texts still use these bilateral concepts. In fact, these countries have retained their original legal understanding of the passive and active forms of bribery as respectively referring to the bribing of an official and the bribing of a private person. In Brazil, the terminology is set forth by the code uses this exact phrasing (Art. 317,

10 The oldest known dates from 1982 in México. Cf. Mariano Jiménez Huerta, *Derecho penal mexicano* (6th edn., Porrúa, 2000) 358. The most recent one is Chilean, the work of the aforementioned Law No. 21.121 of 20 November 2018.

11 Unfortunately, historical and sociological studies on corruption, as well as teaching on this matter beyond the weak legal aspects of bribery, although improved in recent years, have not been embraced to the same degree in the six countries. However, particularly recommendable are Sérgio Habib, *Brasil. Quinhentos anos de corrupção* (Sérgio Antonio Fabris, 1994) and Stephen Morris, *Corrupción política en el México contemporáneo* (Siglo XXI Editores, 1992). See, also, José du Puit, "Corrupción en el Perú. Breve reseña histórica", in *Anuario de Derecho penal* (1995); José Sánchez González, *La corrupción administrativa en México (*Instituto de Administración Pública del Estado de México, 2012); Jorge Malem Seña, *La corrupción. Aspectos éticos, económicos, políticos y jurídicos* (Gedisa, 2002) and Hugo Quiroga, "El Estado faccioso en la Argentina. Corrupción de principios, corrupción de las instituciones", in *Araucaria. Revista Iberoamericana de Filosofía, Política, Humanidades y Relaciones Internacionales* (2018); Vivian Newman Pont and María Paula Ángel Arango, *Sobre la corrupción en Colombia: Marco conceptual, diagnóstico y propuestas de política* (Dejusticia, 2017) and Mauricio García Villegas and Javier Revelo, *Estado alterado. Clientelismo, mafias y debilidad institucional en Colombia* (Dejusticia, 2010); finally, Patricio Orellana Vargas, *Chile, un caso de corrupción oculta*, in *Revista de Sociología* (2007).

passive bribery, and Art. 333, active bribery)[12], whereas in Argentina and Colombia, the national codes reserve such terms for use in connection with the crimes classified in Articles 256 and 258 of the Argentinian code and Articles 405, 406, and 407 of the Colombian code. It is worth noting, however, that only the origin of the bilateral approach, which stems from the involvement of a private person rather than from the completion of the crime when an official commits or omits the action requested of them, remains in these codes (Argentina, Colombia). Nonetheless, it supports the thesis of bilaterality which holds that an official is only deemed to participate if he or she accepts an illegal offer from a private person.[13] Conversely, that official would only engage in atypical conduct by simply accepting a request from a private person, reservation expressed of the responsibility of the former as the perpetrator of the crime of concussion[14]. Furthermore, and arguably more importantly, the doctrinal interpretation entails that passive and active bribery account for different charges, with perpetrations technically independent from one another, as we shall see in more detail with regard to participation in the respective offence.[15]

The Peruvian code seeks to find the middle ground between the remains 9
of bilaterality and the reciprocal autonomy of bribery offences. It is argued here that it erroneously classifies the crime of an official as passive bribery, even though that official is also liable if he or she requests the economic benefit (Art. 393), which are subsequently detailed in a tiresome list of *propio* and *impropio*, generic and specific forms (Arts. 394, 395, 395-A, 395-B,

12 Nonetheless, and in flagrant contradiction to its headline, Article 317 adds to the typical acts of receiving and accepting bribes, that of requesting a bribe, which is active, as Cesar Roberto Bitencourt argues in *Tratado de Direito penal* (Saraiva, 2007) 79. Cf. also Fragoso, *Lições de Direito penal* (1st edn. Forense, 1989).

13 *Bitencourt* (n 12) 84 and 90, states that passive bribery would have an 'indispensable residual bilaterality', at least in the actions of receiving and accepting a bribe, depending on who is offering or promising. Active bribery, in turn, is a unilateral crime, as the official does not necessarily have to accept the bribe to punish the private person offering it, as observed in the Colombian code by Jaime Lombana Villalba, *La tipificación del tráfico de influencias y del cohecho en España y en Colombia como forma de prevención de la función pública*, doctoral thesis from Universidad de León (Spain, 2013), 486.

14 Cf. *Creus, Delitos contra la Administración pública* (Astrea, 1981) 286; *Velásquez Velásquez* (n 9) 213.

15 On the other hand, a characteristic of bilaterality was that in the past the private person accounted for as an accomplice of bribery. Cf. José María Rodríguez Devesa, "Cohecho", in *Nueva Enciclopedia Jurídica* (1952) 358–359, and Francesco Antolisei, *Manuale di Diritto penale*. Parte speciale (9th edn, Luigi Conti, 1986) 787–788.

and 396). However, bribery involving a private person is termed as active as this person only offers, gives or promises an advantage, generically, when the other party is an ordinary official (Art. 397-A), and specifically when the other party is a magistrate or a policeman (Arts. 398-A and 398-B).

10 The technical independence of both concepts has been secured in the Chilean and Mexican codes by grace of the fact that both the official and the private person are culpable for requesting, accepting or receiving the material object of the crime. Indeed, the Mexican code draws a very clear distinction in the first two paragraphs of its Article 222, with the first one focused on an official requesting or receiving a benefit, while the second deals with a private person giving, promising or delivering it, yet providing for a separate paragraph for the federal legislators. The Chilean code has followed a much more analytical approach and is heavily based on cases, as such, it contains three extensive provisions dealing with bribery of an official (Arts. 248, 248 bis and 249) and one article with five extensively detailed and somewhat verbose paragraphs addressing bribery involving a private person (Art. 250).

11 In some of the countries analysed here, bribery involving an official is divided into either *propio* or *impropio* by the law or is classified as such by criminal lawyers. In the history of criminal law, what has generally been considered the 'genuine' type of bribery is its proper (*propia*) form, which consists of the commission of an action not subject to remuneration and which is related to the post of an official.[16] For this reason, in Chile, the venal execution of administrative irregularities or the perpetration of actual public crimes, which is significantly removed from the pure classification of crime, is called bribery in its improper (*impropia*) form.[17] Conversely, the Colombian and Peruvian codes state that *propio* is the type of bribery where an incentive is offered to incite the commission or omission of an act that infringes upon an official's functional duties, while *impropio* entails the barratry of administrative actions.[18] This is, in fact, an idea of Spanish origin which is not always supported by Argentinian, Brazilian and Mexican legal doctrine as their codes describe, in single provisions, the payment for actions that comply or do not comply with an official

16 Cf. Francesco Carrara *Programa de Derecho criminal* (Temis, 1961) 94.

17 Cf. Guillermo Oliver Calderón, "Aproximación al delito de cohecho", in *Revista de Estudios de la Justicia* (2004) 89–91.

18 Cf. Francisco Ferreira, *Delitos contra la Administración pública* (3rd edn., Temis, 1995) 95.

duty.[19] An instance of bribery in which the bribe incentivises illicit actions may incur an equal or higher sanction than bribery incentivising criminal conduct other than bribery. The Brazilian, Colombian, Peruvian and Chilean codes have opted for the former while the Argentinian and Mexican codes have opted for the latter. This is an important issue considering the rights to be protected, as will be explained in the following section. For the time being, it suffices to highlight that the Chilean code prioritises the *impropio* bribery, that which points to the commission of other crimes when in the performance of duties, for example, illegal appointments, prevarication, embezzlement, fraud, incompatible negotiations (giving priority to private over public interests), dishonesty in the custody of documents and violations regarding classified information. The severity of the rule of a combination of a series of related criminal acts different from bribery (Art. 249, second subparagraph, and, for subornation of the private person, Art. 250, final subparagraph) has no equivalent in the other five codes, not even in those classifying bribery-prevarication as an aggravated form of the crime. A part of the Chilean doctrine supports the apparent meeting of criminal laws (*concursus delictorum* in the form of an apparent concours or merger), with the prevalence of bribery or other crimes, depending on the relative severity of their sanctions; it is less convincing to recognise an ideal or true concours in these cases.[20]

The other forms of the offence deal with aggravated bribery by taking 12
into account the capacity in which the offender acts and the precise act committed. This is classed as bribery-prevarication in the codes of Peru (Arts. 395 and 398) and Argentina (Arts. 257 and 257), only entails the bribery of police and judicial personnel in Peru (Arts. 395-A, 395-B, 396 and 398-A) and corruption of officials from State controlling bodies (Art. 33 of Colombian Act No. 1.474, of 2012, which includes a specific aggravation of the sanctions stipulated in Articles 405 and 406 of the Colombian

19 Articles 256 of the Argentinian code, 317 of the Brazilian Code, and 222 of the Mexican Code. On the first one, Edgardo Donna, *Derecho penal.* (Rubinzal-Culzoni, 1995) 222; on the second one, Prado (n 4), 381. The first section of Article 222 of the Mexican code distinguishes between just and unjust actions. Cf. *Jiménez Huerta* (n 10) 424.

20 Cf. *Abanto Vásquez* (n 2) 455, and *Velásquez Velásquez* (n 9) 226, *Creus* (n 14) 288 and 301, *Fragoso* (n 12) 442. For an English explanation of this theory of concours common in civil law jurisdictions see Ambos, *Treatise on International Criminal Law. Volume 2: Crimes and Sentencing*, OUP 2nd ed 2022, pp. 292 ff.

code).[21] Interestingly, the accessory penalty of interdiction is imposed upon an official as a possible participant in active bribery who, understanding the special intentional harmful conduct of the authority, uses his/her position to perpetrate an offence (Art. 258, last part, of the Argentinian Code).[22]

13 As specific mitigations, it is worth mentioning that an official in Brazil commits, omits or delays an action associated with his or her duties by 'granting the request of or being influenced by another' (Art. 317, § 2°)[23] while in Chile, a fine is the only penalty imposed upon a briber who acted in favour of his or her spouse or soon-to-be relative accused in a criminal case (Art. 250 bis). Accepting gifts and bribery in regards to the position, according to the Argentinian and Chilean criminal codes (Arts. 259 Argentina and, respectively, 248, first subparagraph, and 250 Chile), may be considered as an autonomous offence (*delictum sui generis*) or, diametrically opposed, as a basic or simple mode of comission. This leads inevitably to the issue of the legal right.

*III. Protected Legal Interests (*bienes jurídicos*)*

14 In the six countries reviewed there are similar opinions as to the generic nature of the legal interests protected, namely the integrity of public administration. This commonality is present both in the various codes that include it under such a legal interest (Argentina, Brazil, Colombia and Peru), as well as in those using the generic name 'acts of corruption' (Mexico) or the subjective description of 'crimes committed by public officials in the exercise of their duties' (Chile).

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21 In Chile, in November 2018, a specific aggravation was added to sanction officials elected to their posts by popular vote, those holding a confidential position, in high public direction, individuals engaged in legal, jurisdictional and military duties as well as for any public official committing bribery in the appointment of positions or functions, procurement procedures, contract or concession, granting of permits for economic activities and their control (Art. 251 quinquies).

22 To *Donna* (n 19), 246, the involvement of the official would turn the crime into a special *impropio* one.

23 A rather inventive hypothesis of the vertical structure of a society in which practices of old 'coronelism' persist. That is why the Imperial Code of 1830 foresaw it with the name of subornation, a term still used in the common situation of officials that do not accept a bribe but compromise his or her integrity when acting in an official capacity to further the needs of friends or influential individuals, 'which is a real plague among us'. *Fragoso* (n 12), 443; Cf., also, *Noronha* (n 7) 350.

As to the aspect of public administration that would be affected by bribery, a part of the doctrine of the region considers it in the internal operation of the public entities, with a plethora of regulatory complements that draw heavily on laws previously passed in Spain, mainly regarding the exercise of impartiality and objectivity in performing official duties.[24] Some authors believe that bribery violates the requirements of the legally established relationships that exist between public authorities and private persons. Based on Spanish doctrine, bribery infringes on both the internal and external relationships of public authorities and thus violated the integrity of service provided by the public official.[25] In Brazilian doctrine, on the contrary, a conception of the legal interest of the criminalization of bribery predominates, under which it is the administration of justice that is harmed. However, this just relates to probity in the performance of official duties[26]. The present analysis could not identify any local experiences of combining provisions about bribery with conceptualist ideas, such as the misrepresentation of political will or of social psychology, such as aspects that entail the trust of the community, in the public bureaucracy.[27] 15

Even though Latin American criminal law is not unique when identifying the specific object to be protected in the proper operations of a State, their virtue is to have noticed the doctrinal difficulties to relate bribery to this aspect of public administration which is made up of a web of regulations that are no longer legally protected interests. The complexity of dealing with a public official receiving a payment for committing an action in the performance of the duties may, arguably, leave the impartiality of the decisions untouched and, in general, the regular articulation of the public 16

24 The impartiality in the performance of administrative activities is defended by, among others, *Rodríguez Collao* and *Ossandón Widow* (n 2), 330, Yván Montoya Vivanco, *Manual sobre delitos contra la Administración pública* (Pontificia Universidad Católica del Perú, 2015) 97 and *Abanto Vásquez* (n 2) 421–422.

25 The first one, in *Oliver Calderón* (n 17) 95; the second one, in *Velásquez Velásquez* (n 9) 212–213.

26 Cfr. *Fragoso* (n 12), 436, and *Prado* (n 4), 377. In Colombia, Erleans de Jesús Peña Ossa, *Delitos contra la Administración pública* (Ediciones Jurídicas Gustavo Ibáñez, 1995), 29, and, in Mexico, *Jiménez Huerta* (n 10), 424.

27 A summary of the German debate regarding these two standpoints, in Fritz Loos, 'Del «bien jurídico» en los delitos de cohecho', in Kai Ambos and Hennig Radtke, *Estudios filosófico-jurídicos y penales del Prof. Dr. Fritz Loos* (2008) 143–162. Cf. also Urs Kindhäuser, 'Presupuestos de la corrupción punible en el Estado, la economía y la sociedad. Los delitos de corrupción en el Código penal alemán', in *Política Criminal* (2007) 9–10.

entities too.[28] However, if the former was not unknown to Hispanic experts, other considerations taken from the legislative development of this offense, deserve particular attention. In fact, the more bribery has become separated from the old bilateral structure, the more the dissociation of the specific legal interest concerning the legality or illegality of ministerial conduct becomes evident and where the *propia* and *impropia* forms take second place teleologically. This is the inevitable consequence of considering the crime completed with the mere request or acceptance of the bribe, regardless of whether this request or acceptance was within the exercise of an official act. It is worth noting, however, that this finding is relative. The issue was first investigated by Enrico Pessina, rightly remembered by Francisco Ferreira.[29] This is a very important matter because by classifying the criminal conduct as two different offences on the basis of the charges, both the actual or even alleged illegal agreement between an official and a private person loses its meaning. This is confirmed by the explicit criminalization of the subsequent act of bribery in Chile (Arts. 248 and 248 bis) and Peru (Arts. 303 and 394), as well as by the material object, which no longer has to be of an economic nature.

17 Furthermore, certain types of bribery, some of them new, others not so much, criminalize cases in which the obtainment of the bribes took place without any connection with the acts of the official. This is the case of the second paragraph of Article 496 of the Colombian code, which simply requires that the private person is interested in a matter which is being heard by an employee. Because of this, criminal lawyers refer to this bribery as apparent (*cohecho aparente*). The Argentinian and Chilean codes are more precise. Article 259 of the former, which dates back to 1891 and was last amended in 1964, sanctions both the acceptance and offering of bribes 'in consideration of the work of the public official'. According to Argentinian doctrine, this form of bribery is not an offence concerning the activities of officials *per se*, but undermines the integrity and unbiased performance of affected officials.[30] Furthermore, an amendment to Article 248 of the Chilean Code in November 2018 introduced sanctions for public officials who 'by virtue of his/her position' request or accept a benefit from the *extraneus* (i.e. the person not being a public official). A causal link between

28 *Oliver Calderón* (n 17) 94.
29 *Ferreira* (n 18) 84.
30 *Buompadre* (n 22) 509. See also Jorge Marín, *Derecho penal* (2nd edn. Hammurabi, 2008) 794.

a bribe and some act or simple administrative action is not required here. The legally protected interest seems to connect to the integrity of a public official. It is deemed fundamentally damaged by the simple acceptance of gifts. The traditional *propio* and *impropio* bribery arise as aggravating forms.

Some authors resist treating these cases as bribery forms that do not require an unlawful exchange of favours. They treat it as a case of bribery *propia* form, but in which public official, instead of receiving a bribe by virtue of his or her position, receives an emolument or promise for *future reward*.[31] However, construing the law in this manner seems incompatible with the text of the statutes and misses sights of the fact, that the unlawful agreement lost its central nature in the definition of bribery.[32] Today, bribery revolves around the autonomy of the public administration, one of the assumptions of which is preserving the integrity of officials that commit bribery. It is worth noting that this aspect of a public authority does not imply mistaking a legal requirement with simple morality.[33] An institutional issue is at stake here that is worth repeating, namely, the autonomy of public functions via the determination of a State to immunise its organs against non-republican interests by way of a subsystem of sanctions that punish the most serious breaches of institutional integrity.[34] 18

31 In Chile recently, Gonzalo García Palominos, "Incompatibilidad del financiamiento ilegal de la actividad parlamentaria con el delito de cohecho (Arts. 248 and ff. Chilean Criminal Code, CP)", in *Política Criminal* (2019), 137 y 161.

32 In Germany, Bernd Schünemann insists in said character, "Die Unrechtsvereinbarung als Kern der Bestechungsdelikte nach dem KorrBekG", in Danneker G, Langer W, Ranft O, Schmitz R and Brammsen J (eds), *Festschrift für Harro Otto zum 70. Geburtstag am 1. April 2007* (Carl Heymanns Verlag, 2007) 786–796. On the contrary, Héctor Hernández Basualto confirms a clear enucleation trend of the agreement in the Comparative Law, "La inconveniente exigencia de un acto funcionario determinado como contraprestación en el delito de cohecho", in *Revista de Ciencias Penales* (2006) 23–26.

33 Although honesty may also be considered a virtuous *value*, according to *Scheler's* classification (2001), 168. Eighteenth-century ethics, from Kant's perspective, still involved *duties* of virtue, some of which, particularly those involving third parties, may be mistaken for the legal duties. This issue is clarified by axiological ethics in which the values of virtue cannot be mistaken for values of legal interests.

34 Integrity here is understood as a collective value, inherent to the qualified subject only inasmuch as they are members or representatives of a class, group, profession or hierarchy, according to Max Scheler, *Ética* (3rd edn. Caparrós Editores, 2011) 170–171. Also, in contemporary philosophy, these integrity systems are theorised in their institutional manifestations rather than as a matter of personal ethics. See Neumas

19 This being the case, any form of bribery involving an official is a crime producing a violation or harm (*delito de lesion*), whether an emolument is requested or given, the effect is the same in that it endangers or prevents the proper operation of public services by the official that intends to acquiesce to the illegal offer. Analysing this issue from the private person's point of view, the legal interest may also be challenged, although not from an integrity perspective as this has an institutional requirement. The duty of private persons in this context is purely negative respecting the autonomy of the public official which should only be paid by the State. The specific danger is in the attempted bribery, however, if a private person accepts a venal offer from an official, the former's acquiescence shall strengthen the harm perpetrated.[35]

IV. Offender and material object

20 The special crime of bribery in public affairs has a perpetrator, namely a public official, employee or civil servant, with the specific title varying according to the terminology adopted by the constitutional and administrative laws of the respective country.

21 Beyond semantic variation, these terms have a greater scope than that associated with the administrative meaning of the concept of public official. The six codes considered here include a definition of public official based on the theory of the performance of duties, which largely exceeds the narrow theory of employee hiring, child of the public administrations of the economic liberalism of the 19th century. The Argentinian code, a paradigm of the grammar economy and containing a convincing concept, defines as officials or employees as all those who accidentally or permanently participate in the performance of public duties, whether by popular election or appointment of the relevant authority (Art. 77).[36] Then, in a

Miller "Corruption" (2018) *The Stanford Encyclopedia of Philosophy* <https://plato.stanford.edu/archives/win2018/entries/corruption/ >: last accessed 25 November 2019.

35 That we insist on it resides in the independence of public functions. The authoritarian version of this thought shall state that the private person does not respect the power of the State. Thus, Karl Binding, *Lehrbuch des gemeinen deutschen Strafrechts*. Besonderer Teil, (Keip Verlag, 1902–1905) 706 and 717.

36 The terms public employee and official are, after all, synonyms. The same is considered in Brazil (Art. 327) and Chile (Art. 260). Cf. *Creus* (n 14) 5–6, *Fragoso* (n 12) 404, and *Rodríguez Collao and Ossandón Widow* (n 2) 122.

public authority, strictly speaking, the concept includes those who perform duties in concentrated and deconcentrated, centralised and decentralised entities, city halls, public companies and all sorts of services of collective interest, either at a state, regional, provincial or communal level (or federal, in the case of federal countries). In the case of State-owned enterprises, its legal nature as private companies or public entities is deemed irrelevant: all fall under the scope of bribery.[37] Additionally, the conception of public official linked to the fulfilment of public stems from International Law (Art. 1º of the Inter-American Convention against Corruption). Based on this, the Supreme Court of Peru has held that the employees of semi-private companies are public officials.[38]

Conversely, given that the concept of what constitutes an official is consistent within the broad area of public administration covered by the six codes, there is no serious doubt that judges and other employees of judicial entities are officials, as well as members of collegiate political bodies (deputies, senators, regional, provincial or municipal councillors, etc.). As such, all of the aforementioned are regarded as punishable under anti-bribery laws if they negotiate with proposed regulations, management decisions, opinions or votes regarding matters pertaining to their official functions.[39] Furthermore, some of the codes consider that an agent may commit bribery even before he or she undertakes his or her service, or when they are temporarily out of duty due to vacations, sick leave and the like.[40] Except for the aforementioned, the criminal act establishes the moment (accepting or soliciting a bribe) in which the agent has to have the required legal capacity, regardless if he or she later loses it due to cessation of a given role, resignation or dismissal. 22

37 This is expressly stated by Article 425, number 3, of the Code of Peru. On the other hand, Article 327, § 1°, of the Brazilian Code compares the civil service with those who hold office, posts or functions in parastatal entities, even with workers of companies contracted to carry out activities of the Administration.

38 A summary of the decision, which dates back from 2002, is available in José Caro John, *Summa penal* (2nd edn, Nomos & Thesis, 2017) 758–760. The Brazilian Code makes it irrelevant to resort to the International Law unnecessary because it directly mentions State and private sector partnerships (Art. 327, § 3).

39 There is a widespread disagreement on this point in Ibero-American doctrines. Cfr., among others, *Abanto Vásquez* (n 2), 441 and 475, incidentally referring to the punishability of politicians who frequently change their opinions, a depravation of Peruvian political parties since the infamous tyranny of Alberto Kenya Fujimori; *Pérez* (n 31) 194, and *Peña Ossa* (n 26) 35–36.

40 Article 317, first subparagraph, of the Brazilian code. Cfr. *Prado* (n 4), 378–379. This criminal anticipation is not accepted in the other five countries considered here.

23 The material object of bribery is a cross-linking angle of different sources of the six codes and, in some cases, expresses the attempt of legislators not to proceed too far from the current understanding of what forms bribery takes, which are too many in Ibero-America. They are money, bribe or promise in Argentina (Art. 256), money, benefit or promise in Mexico (Art. 222), undue advantage or promise of benefit in Brazil (Art. 317), money, profit or promise of compensation in Colombia (Art. 405), economic benefit or that of another nature in Chile (Art. 248) and, finally, donation, promise or any other advantage or benefit in Peru (Art. 393). Albeit the Argentinian code is especially careful with the wording used to describe the various concepts, active bribery escapes this accuracy as the object of the action is limited to bribes, in flagrant contradiction to the crime of the official. Furthermore, the case-by-case approach of the Peruvian code, which is clearly a response to achieve perceived perfectionism whereby nothing escapes the grip of criminal justice, has resulted in intemperance when inserting nouns into laws that have little in common.

24 In general, a bribe is understood as an object, service or provision that yields a tangible or intangible benefit. In those countries where "bribe" is defined in connection to profit or advantage, the prevailing interpretation does not limit the size of a bribe to values of economic significance.[41] This can directly be inferred from the text of the statute in Chile, but is controversial regarding the Argentinian text. In any case, in Argentina, those in favour of a broad definition of bribery argue there is a meritorious teleological reason for extending the idea of profit or value beyond economic gains, namely, if the legal interest most infringed by a bribe is the integrity of the public administration, so it should not make a difference that in order to infringe it, by compromising the autonomy of public authorities when officials are tempted with other than economic gifts[42], irrespective of if these gifts are financial, sexual, social or political in nature.[43]

25 As in Europe, Ibero-American doctrines have had to face some issues stemming from the material object as a result of either the nature of the illicit action or its justification. The *munuscula* involve a problem regarding

41 In Brazil, *Fragoso* (n 12) 438–439; in Colombia, *Ferreira* (n 18) 74 and 92; in Peru, *Montoya Vivanco* (n 24) 103.

42 Cf. Enrique Ramos Mejía, *El delito de concusión* (Depalma, 1963) 81–82.

43 In societies characterised by a rigid social stratification, with a reduced ascending mobility, granting conditions to the official so they are accepted in a higher class entails an economic meaning, even impossible to calculate.

actus reus. Prevailing thought throughout the region is currently reluctant to classify as bribes or illegal benefits the minor gifts occasionally given to public officials, particularly when they encourage and support socio-cultural customs and traditional celebrations, especially in rural areas. This approach interprets the material object in a restrictive manner, relating it to the types of crimes but adding considerations taken from the subject matter of judging what is unlawful.[44] By way of example, Article 251 sexies of the Chilean code regulates this as it stipulates that accepting, giving or offering donations of low economic value authorised by tradition, as expressions of courtesy and good education,[45] is not a crime. This 'harmless bribery', according to Velásquez Velásquez, should not be mistaken for simulated (apparent) bribery as the first form is meaningless in terms of the law, integrity, official duties and so forth, the second form is not. The 'harmless bribe' is of limited legal interest if the token gift given is a simple expression of gratitude for a service and was given without any expectation of receiving further or future favour. Conversely, an actual bribe is related to the execution or future execution of an undertaking by an official acting in his or her official capacity which the bribe surreptitiously encourages. In simulated bribery, there may or may not be a social custom involved, however, its importance eludes it from the principle of insignificant harm (*insignificancia, bagatela*) and directly places it in the classification of a criminal wrong. Ibero-American doctrines have deemed that setting a monetary limit would be impractical beyond which the official should reject possible gifts from private persons. Moreover, there is a doctrinal criterion

44 Cf. *Abanto Vásquez* (n 2) 436, who deems bribery as the gift not authorised by tradition or courtesy. The Argentinian tradition is more severe regarding the *munusculum*, which criminal lawyers observe with distrust, in view of the frequency with which takes place in society. Cf. *Buompadre* (n 22) 480.

45 This accounts for an age-old thought preserved by a passage by Ulpian in an imperial epistle of Severus and Antoninus, according to which the *xenia* or usual little gifts of courtesy or hospitality are not forbidden donations for the magistrate (*nec xenia producenda sunt ad munerum qualitatem*), idea argued in the Greek proverb which in Latin is said *neque omnia, neque quovis tempore, neque ad omnibus* (not all of them, not at any time, and from all of them), for which reason not accepting gifts from anyone would be inhuman, however, rather vile to receive them in every occasion and extremely greedy to accept all of them (*nam valde inhumanum est ad neminem accipere, sed passim vilissimum est, et omnia avarissimum*). Cf. Nicola Demetrio Luisi, "Considerazioni sulla determinatezza normativa della legislazione romana in materia di «crimen repetundarum»", in Gabriele Fornasari and Nicola Demetrio Luisi, *La corruzione: profili storici, attuali, europei e sovranazionali*, (Cedam, 2003) 169.

that can help to provide guidance regarding the criminality involved in a given case, namely, the proportional relationship between the value, material or otherwise, of the gift and the economic expectation of the act of service.[46]

26 Finally, benefits resulting from protocol or official events are not unlawful. Since these kinds of benefits respond to not only social but also legally regulated etiquette reasons, there is also the legal duty of receiving them, but only on behalf of and for the acquis of the State. Interestingly, Article 251 sexies of the Chilean code effectively deals with this issue without setting a limit regarding the maximum value of the gift,[47] which is correct because they do not constitute *xenia*.

V. Participation

27 Strictly speaking, participation in a bribe, that is complicity in or instigation thereof, is extremely interesting and subject to hard doctrinal treatment in Ibero-American criminal law.

28 From criminological research we know that corruption offences involve a number of private persons. This is a consequence of the oligarchic structures common to many public authorities in Ibero-American countries. This results in various administrative functions performed by a group of people, generally drawn from the same social class, who move from the private to the public sector, but often without truly leaving the former and maintaining all of his or her personal connections. Therefore, it is common that a single bribe can entail widespread corruption, with those who are employed in higher levels of the government, the judiciary and legislature, together with the official actually being bribed and the briber, among others, all ending up embroiled in the scheme.

29 However, technically, the bribery of an official is a special *propio* crime rather than being classed as a common crime and its unique nature does

46 In this respect, *Abanto Vásquez* (n 2) 436. *Donna* (n 19) 219, and Prado (n 4) 381.

47 In the official and, above all, diplomatic protocol, some old norms governing socially polite behaviour still remain and have been converted into legal-institutional regulations, as is the case with military salutes. Cf. Rudolf Stammler, *Tratado de Filosofía del Derecho* (2nd edn., Reus, 1930) 104–105. As a matter of fact, the regulations of institutional protocol are a matter of public order, therefore, there is no room for interpretation by officials. Cf. Dolores del Mar Sánchez González, "Protocolo y Derecho: juridicidad del protocolo", in *Revista Estudios Institucionales* (2018) 223.

not allow the law to let the actions of private persons go unpunished. In earlier times, when the bilateral configuration of the crime was the prevailing approach, the briber was punished as an accomplice of the official under a special law rather than according to the general provisions of the relevant criminal code. The need to establish a special offense for the private person (so called "soborno") was deemed necessary because of the so called "extraneus" problem,[48] This is a problem of the general part of Ibero-American criminal law. Traditionally, it has been understood that an offense that requires a specific condition from the perpetrator (i.e. being a public official) cannot be applied to a person that does possess this condition. They cannot be punished by this offense, even as accomplices or accessories. To avoid this "extraneus problem", modern codes include a specific provision sanctioning the briber. But the *extraneus* issue was not eliminated with this. The parallelism of bribery crimes still imposes a major challenge for the prosecution of the private person appearing as an accomplice. I address this issue briefly below.

In an attempt to address this issue, the codes of Argentina, Brazil, Co- 30
lombia, Mexico and Peru all state that an official commits a crime whether he or she acts directly or indirectly, on their own behalf or on behalf of a third party. This second subject is unanimously considered as an accomplice of the bribery of the employee, punishable if the regulations regarding the accessorial character of the participation permit it.[49] The same conclusion was reached in Peru before the express appointment of the intermediary (i.e. the person acting between the public official and the bribing private person), while in Chile the issue is much more difficult to solve because the code, which does not name the intermediary, does not include a punitive measure for the *extraneus* of a special *propio* crime.[50]

However, irrespective of the detail and code in question, there is no 31
doubt that the participation of the *extraneus* constitutes an act of bribery, or attempt thereof, of a private person.

48 The paradigm of which can be seen in Article 250 of the Chilean Criminal Code, since it was drafted before the reform of 1999.

49 Cf. *Velásquez Velásquez* (n 9) 210–211, *Soler* (n 8) 209, *Jiménez Huerta* (n 10) 425.

50 In Peru, cf. *Montoya Vivanco* (n 24) 102–103, and *Abanto Vásquez* (n 2) 427. In Chile, *Rodríguez Collao and Ossandón Widow* (n 2) 127–130.

VI. Conclusions

32 Beyond the different sources and variety of criminal classifications, we cannot deny that the six codes reviewed here have undergone an intense reform process regarding bribery during the last few years.

33 Therefore, even though the various Ibero-American criminal codes are far from taking a unitary approach to this matter, this does not indicate that shared political-criminal efforts in this regard are not present in the background. However, it remains an unfortunate fact that the six codes are undermined by the persistent weakness of their respective punitive apparatus, hampering their efforts to effectively criminalise and efficiently address this phenomenon.

34 This weakness is due, in part, to the largely unnoticed defects in the reforms where more than a few of them were implemented in a reactive environment and for demagogic purposes. There are also reform gaps that were deliberately left. For example, it seems that there was never any intention to introduce a method to trace and tackle corruption at its source, a problem that stems from Ibero-American approaches to the allocation of economic and political power coupled with social structures that made possible and maintain the situation. Criminological research done in this area, although not particularly abundant, leaves no doubt that corruption, especially when widespread, both highlights existing and promulgates further social exploitation, naturally leading to the erosion of ethics within State organs.

35 Although paradoxical, these conditions account for the disparity of bribe-related punishments, the awards granted to whistle-blowers and the differences in the definition of the offences. The same conditions of moral decline account for the functional equivalents of sentences and are a further manifestation of corrupt practices as the compensation provided for giving information and permission for the so-called *lobby*, 'legal' metaphor to express the manipulation of public interests by powerful private actors.

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