Mental Element of Bribery under Nigerian and Us (Federal) Anti-Bribery Laws: an Overview

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Abstract: Academic reviews have highlighted the problem of lack of clarity with Nigerian anti-bribery laws. It is important for the criminal law to clearly state the mental element of bribery. This would communicate to citizens, lawyers and judges what is wrong with bribery. It would also provide a yardstick to distinguish between the socio-cultural practice of gift-giving and bribery. This article analyses the mental element of bribery in Nigeria and federal anti-bribery laws in United States of America. The analysis is undertaken with a view to drawing useful insight to propose reform of Nigerian anti-bribery laws. The article finds that American laws better clarifies the wrongful mental conduct that transforms gift-giving into bribery. Unlike Nigerian statutes that uses the undefined word "corruptly" to capture the mental element of bribery, American statutes while using the word "corruptly" further captures the mental element of bribery in terms of intention to use a bribe to influence official action. The American approach if adopted by the legislature to reform Nigerian anti-bribery laws would provide better guidance to the courts, lawyers and laymen in understanding why the law criminalises bribery. It would also provide a platform to distinguish between gift-giving and bribery.

Keywords: bribery; mental element; gratuity; gift-giving

1. Introduction

There is global recognition that bribery is morally and legally wrong. Transactions that give rise to bribery are often similar to the socio-cultural practice of showing appreciation through gift-giving. Gifts are traditional forms of expressing appreciation in Nigeria (Azenabor, 2007, p. 23). Bribery and gift-giving involve an exchange of benefit between two or more persons. This makes it imperative to differentiate between the two and clearly articulate the underlying mental element which determines when gift-giving transforms into bribery.

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Corruption is a national problem in Nigeria (Osipitan & Oyewo, 1997, p. 257). Bribery is one of the major manifestations of corruption in Nigeria (Iarossi & Clarke, 2011, p. xi). Several anti-bribery laws have been enacted to address the problem. These laws provide punishment of imprisonment for bribery. The imposition of punishment is designed to achieve several objectives including deterrence, rehabilitation, and the educative function (Okonkwo, 1992, p. 37). The law can provide meaningful guidance and deter crime if the wrongfulness of the conduct is captured by the mental elements of the offence. Thus, the attainment of the educative objective of anti-bribery laws will depend largely on the extent to which the laws clearly communicate the wrongfulness in bribery and make the "people come to see that it is wrong" (Okonkwo, 1992, p. 37). Clarity would also make the work of prosecutors and judges involved in trying cases of bribery less complicated.

It is against this background that this article examines the definition of the mental element of bribery under anti-bribery laws in Nigeria. The physical element of bribery is usually defined simply in terms of giving or receiving money or any other benefit or advantage in official transactions. The problematic aspect of bribery is determining with clarity the prohibited state of mind. In other words what makes the giving or receiving of money or any other benefit unconscionable in the eyes of the law as to constitute bribery?

The first part of the paper is the introduction. The second part examines the mental element of bribery under anti-bribery laws in Nigeria. The third part examines the mental element of bribery under Federal anti-bribery laws in the United States of America (US) with a view to exploring whether useful insights can be gained to strengthen anti-bribery laws in Nigeria. Federal anti-bribery laws in the US have been chosen because of the similarity between the provisions of anti-bribery statutes in US and Nigeria The fourth part identify insight from US Federal anti-bribery laws that can be utilised as basis to strengthen the definition of bribery in Nigeria. Part five is the conclusion of the article.

2. Mental Element of Bribery in Nigeria

This part examines the mental element of bribery under the Criminal Code, the Corrupt Practices and Other Related Offences Act (Cap. C3 laws of the Federation of Nigeria 2010 hereafter " ICPC Act"), the Lagos Law and the Penal Code.

2.1. Criminal Code, ICPC Act and Lagos Law

Sections 98, 98A and 98B of the Criminal Code Schedule to the Criminal Code Act[1] prohibit bribery involving public officers and section 494 prohibits corrupt acceptance of gifts by agents. Section 98 covers the demand side of the offence involving a public official. Section 98A covers the supply side where any person offers a bribe to a public official. Section 98B covers any person soliciting or demanding a bribe on account of any action of public officers.

The *actus reus* of the demand side of bribery is constituted when a public officers: "*asks for, receives or obtains any property or benefit of any kind for himself or any other person;*"[2] or "*agrees or attempts to receive or obtain any property or benefit of any kind for himself or any other person.*"[3]

The *actus reus* of the supply side of bribery is constituted when any person: "*gives, confers or procures any property or benefit of any kind to, or for a public official…or to, on or for other person;"*[4] *or promises or offers to give or confer or to procure or attempt to procure any property or benefit of any kind to, on or for a public official or to, on or for any person.*"[5]

The physical element of the demand side of bribery can be summed up in the words "asking for or receiving a benefit," while that of the supply side can be summed as "giving or promising a benefit." The mental element of the demand side of bribery is "corruptly" asking for or receiving a benefit on account of:

- anything already done or omitted, or any favour or disfavor already shown to any person, by the public officer in the discharge of official duties or in relation to any matter connected with the functions, affairs or business of a Government department, public body or other organisation or institution in which the officer is serving;[6]
- anything to be afterwards done or omitted, or any favour or disfavor to be afterwards shown to any person, by a public officer in the discharge of official duties.[7]

[1]Laws of the Federation of Nigeria 2010, Cap C38.
[2]S. 98(1)(a).
[3]S. 98(1)(b).
[4]S. 98A(1)(a).
[5]S. 98A(2) (b).
[6]S. 98(1)(a)(b)(i).
[7]S. 98(1)(a)(b)(ii).

The mental element of the supply side of bribery is "corruptly" giving or promising a benefit on account of any act, omission, favour or disfavor on the part of the public official as is mentioned in section 98(1)(i) or (ii).

A critical component of the mental element of bribery in the provisions outlined above is that the "asking for or receiving a benefit" or "giving or promising a benefit" must be done "corruptly." In other words, the mental element of bribery is not complete if the benefit was conferred on account of the objects specified in sub-paragraphs (i) and (ii) above without proving that it was done "corruptly." If the meaning of "corruptly" is so central to the mental element of the offence, one wonders why it is not defined in the Criminal Code. This is a major flaw in the Code because "corruptly" is not a word of art or a word which has acquired any settled meaning.

An attempt was made by Bairamian J to explain the meaning of "corruptly" in *Biobaku v Police*.[1] His lordship rejected a suggestion that "corruptly" means improperly. His lordship explained the essence of "corruptly" as follows: "*The notion behind s. 98 is this in my view: an officer in the public service is expected to carry out his duties honestly and impartially, and this he cannot do if he is affected by considerations of benefit for himself or another person; and the mischief aimed at in s. 98 is the receiving or the offering of some benefits as a reward or inducement to sway or deflect the officer from the honest and impartial discharge of his duties- in other words as a bribe for corruption or its price*."[2]

The attempt to ascribe a meaning to the term "corruptly" by Bairamian J is commendable because, beyond the vague term "corruptly" he sought to articulate the policy underlying the criminalisation of receipt of benefit by a public officer in relation to his official duties. A bribe according to Bairamian J's formulation is criminalised because of its tendency to cause a public officer not to meet up to the standard of honesty and impartiality required in the discharge of his duties. Bairamian J's effort has been described as "more descriptive than definitive or conceptual," and the legal definition of bribery as "archaic and pedestrian." (Owasanoye, 2001, pp. 591 and 592). The provisions of the Criminal Code have also been described as "far from clear," (Okonkwo, 1992, p. 355) complex and "difficult for both prosecutors and judges alike to interpret and apply." (Akinseye-George, 2000, p. 47)

[1] (1951) 20 NLR 30.
[2] Ibid,p. 31.

The writer submits that what constitutes "corruptly" should be clearly set out in any law prohibiting bribery. The criminal law should clearly set out the conduct that it seeks to prohibit. The writer agrees with the view that: "…*offence of bribery must be expressed as simply and as clearly as possible so that it can readily be understood by people (and by their legal advisers) concerned about whether their conduct is lawful*."[1]

The enactment of the ICPC Act in 2000 to specifically deal with the problem of corruption provided a unique opportunity to improve on the provisions of the Criminal Code and set out clearly the mental element of bribery. The ICPC Act has been described as the most comprehensively drafted and well-crafted piece of anti-corruption legislation in the history of Nigeria.(Ocheje, 2001, pp. 177 and 179). While the writer share the view that the Act is the most comprehensive, the writer disagree with the view that it is a well-crafted piece of legislation. The ICPC Act does not clearly specify the mental element of bribery offences. The ICPC Act, still retained the antiquated word "corruptly" in the definition of bribery. The mental element of the main bribery offences in sections 8 and 9 is denoted by the word "corruptly," The only change made to the provisions of section 98 and 98A of the Criminal Code by sections 8 and 9 of the ICPC Act is to replace the phrase "Any public official" with the phrase "Any person." The ICPC Act did not make any improvement clearly specifying the mental element of bribery.

The Criminal Law of Lagos State (Law No. 11 of 2011 hereafter "Lagos Law") improved on the provisions of the Criminal Code on bribery by deleting the word "corruptly" from the definition of bribery.[2] The Lagos Law however does not contain any provisions clearly specifying the mental element in the offence of bribery. While the deletion of the word 'corruptly' is commendable, the Lagos Law does not go far enough because it still leaves undefined the mental element in the offence of bribery. Furthermore, the draftsman of the Lagos Law did not make any significant effort to simplify the definition of bribery. The definition of the offence in section 63 of the Lagos Law is still substantially similar to section 98 of the Criminal Code.

Another important issue in relation to the offence of bribery under the Criminal Code is the provision of section 99 which sought to draw a distinction between bribery and what under US Federal anti-bribery law is the offence of illegal

[1]United Kingdom Law Commission, Consultation Paper, "Reforming Bribery: A Consultation Paper" CP 185, p. 8, para. 1.29.
[2]Ss. 63 and 64.

gratuity. Section 99 provides that: "*Any person who, being employed in the public service, takes or accepts fromany person, for the performance of his duty as such officer, any reward beyond his proper pay and emoluments, or any promise of such reward, is guilty of a felony and is liable to imprisonment for three years.*"

The import of section 99 came up for interpretation in *R* v *Ijeoma.*[1] The defendant was charged under sections 98(1) and 99 of the Criminal Code. The evidence established that the defendant, an Acting Assistant Superintendent of Policed demanded and received some money from the complainant before releasing the police extract report of an accident in which the complainant's motor vehicle was involved. It was established that it was the duty of the defendant as a Superior Police Officer to approve the release of the report. The court held that since the defendant received the money for the purpose of carrying out his duty and not for the purpose of any corrupt or improper act in the actual discharge of his duty, he could only be guilty under section 99 and not under section 98. In essence, the section established an offence similar to the offence of illegal gratuity under US Federal anti-bribery law (discussed in paragraph 3.1). The offence under section 99 and illegal gratuity is perceived as a lesser offence because there is no intent on the part of the public officer to improperly perform his duties. It also follows that there is no intent on the part of the giver to improperly influence the public officer to perform his duties otherwise the giver would also have been liable under section 98. Perceived in this manner the distinction theoretically appears well founded and justifies a punishment of imprisonment for three years compared to seven years under section 98.

The big question however is whether there is any policy consideration that supports the retention of that distinction. The reason why the law prohibits gifts to public officers in the first place is the gift's potential to influence the public officer in the performance of his official duty. Without the making of a gift the potential harm is avoided. The effect of paying or rewarding a public officer for his official duty is equally as damaging as when the gift was made initially with the intention to influence the officer. The perception of any observer with information that the officer received a reward for the performance of his duty would probably be that he was influenced in the discharge of his duty. Influence and the perception of influence as a result of a reward for official action beyond proper pay and emoluments therefore deserves equal treatment and punishment. Having regard to

[1](1960) WRNLR 130.

the preceding policy consideration, the writer submits that the provision of section 99 which creates the offence known as illegal gratuity in US should no longer be part of the provisions of the Criminal Code. The writer notes that there is no replica of section 99 of the Criminal Code in the ICPC Act. It is also important to note that section 115 of the Penal Code does not distinguish between bribery and illegal gratuity.

2.2. Penal Code

Section 115 of the Penal Code criminalises public officers taking gratification in respect of official acts. The physical element of the offence is accepting, obtaining or agreeing to accept or attempting to obtain "from any person for himself or for any other person, any gratification whether pecuniary or otherwise, other than lawful remuneration." The mental element of the offence is that the gratification is the motive or reward for:

a) doing or forbearing to do any official act;
b) showing or forbearing to show in the exercise of his official functions favour or disfavor to any person;
c) rendering or attempting to render any service or disservice to any person with any department of the public service or with any public servant.[1]

Before examining the scope of the three sub-paragraphs, the meaning of "motive" or "reward" will be examined. In *State* v *Iornyagh*[2]the court shed some light on the application and meaning of some aspect of section 115. The court quoted with approval the meaning of "reward" and "motive" as stated by Ratanlal thus: "*The term 'reward' is manifestly intended to apply to a 'past service.' What is forbidden generally is the receiving of any gratification "as a motive "to do "or reward" for having done any such thing as is described in the definition*." (p. 407).

The court also quoted with approval Gledhill explanation of the meaning of "motive" and "reward" as follows: "*Motive implies that the gratification is given in anticipation of favour to be shown subsequently, 'reward' that it is given in consideration of a favour already bestowed but the bribe must be given in consideration of some official act*." (p. 407).

[1]Penal Code, s. 115(a)(b)(c).
[2](1979) 3 LRN 403.

The first leg of the mental element of the offence under section 115 is "doing or forbearing to do any official act." Holden J held in *Queen* v.*Bokkos*[1] that the gist of the offence is a public servant taking gratification other than legal remuneration in respect of an official act. The court added that it is not material to enquire what effect, if any, the bribe had on the mind of the receiver. Any payment "for doing ……any official act" under section 115(a) qualifies as bribery. In this respect the Penal Code does not draw any distinction between bribery which is designed to influence official conduct and gratuity which is merely a reward for performing official action. The liability of the public officer in section 115(a) attaches once there is proof that gratification is the motive or reward for doing or forbearing to do any official act.

The second part of the first leg of the mental under section 115 (a) covers "…forbearing to do any official act." Where the official receives gratification as a motive or reward for not performing an official act an offence is committed. In *Queen* v. *Bokkos* the defendant (a bandsman in the Police force) who received money from a suspect as a motive for refraining from arresting and prosecuting a confessed thief was convicted under section 115. In the words of the court, what the defendant "forbore to do, namely arrest a confessed thief, was an official act." (p. 485).

The second leg of the mental element of bribery under the Penal Code is the defendant's receipt of gratification as a motive or reward "for showing or forbearing to show in the exercise of his official functions favour or disfavor to any person."

The other part of the second leg which prohibits "forbearing to show … disfavor" is problematic. In *State* v *Iornyagh* (1979, 3 LRN 403).the court held that forbearance as an element of the offence refers to a situation where the accused takes gratification with the purpose of preventing or stopping a thing being done or omitted which ought to be done or omitted in the capacity of an official action. In this context it would appear absurd to say that the official forebore to show favour, because an official is not supposed to show favour in the discharge of official duty. Similarly, it is also absurd to suggest that an official forbeore to show disfavor. An official in not employed to show disfavor in the performance of official duty. It is not therefore surprising that it was held in *State* v *Iornyagh* that on the facts of the case "forbearing to show… favour" is inapposite and illogical. The accused a

[1](1963) All NLR 482.

public servant, was charged with accepting gratification as a reward for " forbearing to show in the exercise of your official functions favour," contrary to section 115 of the Penal Code, in respect of N10 alleged to have been handed to him in anticipation of a favour.

The problem associated with the use of the words "forbearing to show… favour" could have been solved if the provisions of section 115(b) had replicated the wordings of Section 116(b) of the Penal Code. Section 116 covers any person who accepts or attempts to obtain gratification from any person as a motive or reward for inducing by corrupt or illegal means any public servant –

a. to do or forbear to do any official act;
b. in the exercise of the official functions of such public servant to show favour or disfavour to any person;
c. to render or attempt to render any service or disservice to any person with any department of the public service or with any public servant as such.

The above provisions is not directed at a public servant but any person who seeks to induce a public servant to do something by corrupt or illegal means (Richardson, 1987, p. 95). The mental element of the offence under section 116 is similar to section 115 save that section 116(b) avoided the use of "forebearing" in relation to favour or disfavor. The metal element in section 116(b) is showing favour or disfavour. A public officer is expected to perform his official duties having regard to any laid down polices and rules governing the exercise of the functions of his office. Any favour or disfavour induced by gratification is a breach of duty. It is significant to note that although the word "corrupt" is used in section 116, an alternative phrase "illegal means" is provided as substitute. The word "illegal means" used as an alternative to "corrupt" could suggest that the word is meant to mean "improperly." Besides the word "corrupt" does not play a cardinal role in construing the mental element of the provisions unlike the position under the Criminal Code.

The third leg of the mental element of the offences under section 115(c) is that the public officer must have received gratification as a motive or reward for rendering or attempting to render any service or disservice to any person with any department of the public service or with any public servant. This provision appears wider than section 115(a). This provision would cover a public servant who obtains gratification to assist another person to process a claim or application for approval pending before a government department other than the department where the

public officer is ordinarily employed. It would also cover a public servant who accepts gratification to induce another public servant to take an action detrimental to the interest of any person who has an official matter pending before any department of the public service or with any public servant. This provision also focuses on the gratification received by the public officer, without clearly expressing what is wrong with the receipt or why the receipt is criminalised.

3. Mental Element of Bribery under US Federal Anti-Bribery Law

Federal US statutes criminalising bribery directly[1]are section 201 of 18 U.S.C., (Bribery and Gratuity), section 78dd of 15 U.S.C. (Foreign Corrupt Practices Act) and section 666 of 18 U.S.C. (Federal Program Bribery).

3.1 Bribery and Gratuity

Active bribery by a public official is an offence under section 201(b)(1) of 18 U.S.C. The offence is defined as follows: "*Whoever - directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent to:*

- *to influence any official act;*
- *to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States;*
- *to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official*."

The offence of passive bribery by a public official is defined in section 201(b)(2) as follows: "*Whoever-being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:* ***(A)****being influenced in the performance of any official act;* ***(B)****being*

[1]There are other statutes which punishes other conducts which are not defined as bribery but which have been interpreted by the courts in a way to cover conducts often identified as bribery. The statutes are section 1951 of 18 U.S.C. (Hobbs Act) and sections 1341, 1343 and 1346 of 18 U.S.C., (Honest Services or Intangible Rights Fraud).

influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or ***(C)****being induced to do or omit to do any act in violation of the official duty of such official or person*."

The elements of the offence are: (i) a public official; (ii) a corrupt intent; (iii) something of value accruing to the benefit of the public official; (iv) a relationship between the valuable article and the official act; and (v) an intent to influence or be influenced (Welch, 1989, p. 1358). The aspect of the statute that relates to the mental element of bribery is elements numbers (ii) and (iv). The word "corruptly" is not defined in the statute.

The courts have adopted two approaches to construing the mental element of bribery. One approach is to construe the word "corruptly" in conjunction with the requirement of intent to influence or be influenced. In *United States* v. *Zacher*[1] the court held that the evil sought to be prevented by the deterrent effect of section 201(b) of 18 U.S.C. is the aftermath suffered by the public when an official is corrupted and thereby perfidiously fails to perform his public service and duty. Similarly, the court held in *United States* v. *Rooney*[2] that a fundamental component of a "corrupt" act is "breach of some official duty owed to the government or the public at large."[3] The court went on to explain the essence of bribery as an attempt to influence another to disregard his duty while continuing to appear devoted to it or to repay trust with disloyalty. The court stated further that: "It is an obvious violation of duty and public trust for a public officer or some other person responsible for parcelling out public benefits to accept or demand a personal benefit intending to be improperly influenced in one's official duties." (p. 853)

The court introduced the perspective that the influence exerted or sought to be exerted must be "improper". This perspective is also echoed in the US Senate Report on the FCPA. The Report defined the word "corruptly" as connoting "evil motive or purpose, an intent to wrongfully influence the recipient. It does not require that the act be fully consummated, or succeed in producing the desired outcome."[4]

[1]586 F.2d 912, 915 (2d Cir.1978).
[2]37 F.3d 847 (2nd Cir. 1994).
[3]*Ibid*, at p. 852. The Court was interpreting the word "corruptly" used in section 666 of 18U.S.C. which prohibits bribery involving programs funded by the US Federal Government containing provisions similar to section 201 of 18 USC.
[4]S. Rep. No. 95 -114 at p. 10 (1977).

The second approach is to construe the requirement of intent to influence or be influenced as if the element of "corruptly" is subsumed therein. In *United States v. Traitz*[1] the court held that the statute required that the alleged briber offer the bribe with a "corrupt" intent" to influence official conduct. This according to the court requires the government to show that the money was knowingly offered to an official with intent and expectation that, in exchange for the money, some act of a public official would be influenced. A similar approach was adopted by the court in *United States* v *Donathan*[2] when the court held that the "defendant acted corruptly; that is, with the intent of being influenced in her testimony" under section 201(b)(4) requiring that a witness act "corruptly." In *United States v Sun-Diamond Growers of California*[3]the US Supreme Court defined the mental element of bribery under the statute as follows: "*Bribery requires intent "to influence" an official act or "to be influenced" in an official act, while illegal gratuity requires only that the gratuity be given or accepted "for or because of" an official act. In other words, for bribery there must be a quid pro quo— a specific intent to give or receive something of value in exchange for an official act*."[4]

The requirement of *quid pro quo* need not be explicit. It may be implicit where the official accepted payments or other consideration with the implied understanding that he would perform or not perform an act in his official capacity.[5]

In construing the bribery provisions the Supreme Court construed the meaning of the word "corruptly" in relation to the requirement of intent to influence or be influenced.[6] It appears therefore that rather than seeking to construe the meaning of "corruptly" the courts have used the provisions of the statute relating to the intent to influence or be influenced to fill whatever gap might have been left in the law by the failure of the legislature to define the term "corruptly." This approach is supported by Klein who argues that 'corrupt intent' is the intent to receive a specific benefit in return for a payment. (Klein, 1999, p. 128)

Another aspect of section 201 of 18 U.S.C. that has created some problems is found in the provision of the law relating to illegal gratuity. Section 201(c) creates

[1]871 F.2d 368 (3dCir. 1989).
[2]65 F.3d 537, 540 (6th Cir. 1995).
[3]526 U.S. 398, (1999).
[4]Justice Scalia, *Ibid*, at p.1406.
[5]*United States* v *Kemp* 500 F. 3d 257 (3d Cir. 2007).
[6]In *United States* v. *Ozcelik*527 F.3d 88 (3d Cir. 2008) the court identified the corrupt purposes under section 201(b)(2) in terms of the purposes set forth in subsections (A) through (C).

the offence of illegal gratuity as follows: "Whoever - otherwise than as provided by law for the proper discharge of official duty:

a. directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official;"[1]
b. being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person."[2]

The problem with the provisions on illegal gratuity and bribery arises from the fact that the elements of the two offences are similar. The only difference relates to the fact that there is no requirement of "corruptly" and the intent to influence or be influenced. Illegal gratuity is giving anything of value to a federal public official for or because of an official act (Welling, 2013, p. 404). In *United States* v *Sun-Diamond Growers of California* the Supreme Court noted a distinguishing feature of illegal gratuity as follows: "*An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken*."[3]

While bribery requires that there must be intent to influence an official or that the official intends to be influenced, illegal gratuity only involves a reward for some future act that the public official will take or for past act already taken. It may be easier to draw a distinction between bribery and illegal gratuity where the bribe is given as a reward after the performance of the official act. In relation to future acts of the public official, the Supreme Court held in *Sun-Diamond Growers of California* that a forward-looking gratuity is a gift to a public official for a future act that the public official may already have determined to take. The Supreme Court held that to establish a violation of section 201(c)(1)(A) the Government must prove a link between a thing of value conferred upon a federal official and a specific "official act" for or because of which it was given. The court rejected Government's contention that section 201(c)(1)(A) is satisfied merely by a showing that respondent gave Secretary Espy a gratuity because of his official position. The

[1] S. 201(c)(1)(A).
[2] S. 201(c)(1)(B).
[3] 526 U.S. 398, (1999), p. 404.

statute's insistence upon an "official act,"' the court noted seems pregnant with the requirement that some particular official act be identified and proved. The court reasoned that the Government's alternative reading would produce peculiar results, criminalising, *e.g.*, token gifts to the President based on his official position and not linked to any identifiable act.

The effort by the Supreme Court to draw a distinction between bribery and illegal gratuity is commendable and would probably work well in most situations. There are however, some problems arising from the Supreme Court's decision. The first is in relation to forward looking gratuity. Where is the dividing line between forwarding looking gratuity and bribery? Where a gift is given to a public official in contemplation of a future official act and there is a link between a thing of value conferred upon a federal official and a specific "official act" as required by the court, it becomes almost impossible to distinguish between this act and bribery. The problem is caused by the provisions of the statute. Illegal gratuities under the statue covers "any official act performed or to be performed". If the statute had covered only "official act performed" the task of drawing a distinction between bribery and illegal gratuity would have been easier. The Court should be commended however for working within the statute to limit forwarding looking gratuity to a future act that the public official "may already have determined to take". "Notwithstanding the efforts of the court to limit forward looking gratuity as fore stated, the writer agrees with the view that the precise scope of forward looking gratuity and the distinction between such a gratuity and a bribe remain somewhat murky even after the decision in *Sun-Diamond* (Klein, 1999, p. 132)." Consequently, it has been suggested that forward looking gratuity should be removed from the law and status based theory of liability that would allow liability for illegal gratuity to attach where a gift is given or received because of the officials position be inserted into the law. (Welling, 2013, p. 462)

3.2 Federal Program Bribery

Section 666 of 18 U.S.C. (Federal Program Bribery) extends the scope of federal bribery law beyond federal officials and witnesses to any program receiving benefits in excess of $10,000 under a Federal Program. The offence as defined in section 666(a)(1) (B) can be committed by a person being an agent of an organization, or of a state, local or Indian tribal Government or any agency who: "*corruptly solicits or demands for the benefit of any person, or accepts or agrees to*

accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more."

Section 666(a)(2) governs the supply side of the federal program bribery and it makes it an offence for a person being an agent of an organization, or of a state, local or Indian tribal Government or any agency who: "*corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more*."

The definition of the offence is similar to the offence of bribery under section 201 of 18 U.S.C. Section 666 uses the word "corruptly" and also includes provision requiring that the bribe must be intended to influence or reward an agent of an organization, or of a state, local or Indian tribal Government or any agency. A literal reading of the provisions would suggest that it requires that the prosecution must establish a *quid quo pro* as in section 201 of 18 U.S.C. An examination of decided cases has however revealed a split between federal circuit courts requiring that the statute requires *quid quo pro* and those holding that it does not (Olen, 2012, pp .229-261). While the Second, Fourth and Eight Circuits have held that *quid quo pro* is required,[1] the Sixth, Seventh, and Eleventh Circuits have held that *quid quo pro* is not required under the statute.[2] The writer agrees with Olen's submission that court's must give effect to the plain language of section 666 and require that the prosecution must establish a *quid quo pro.* This is because the language of section 666 requires that there should be "connection" between the thing of value, intention to be influenced or rewarded and "any business, transaction, or series of transactions of such organization, government, or agency."

The provisions of section 666 of 18 U.S.C. is similar to section 201 of 18 U.S.C. in terms of using the word "corruptly" and intent to influence official action as the mental element of bribery.

[1]*United States* v *Ford*, 435 F. 3d 204, 213 (2d Cir. 2006); *United States* v *Jennings* 160 F.3d 1006, 1021 (4th Cir. 1998); *United States* v *Redzic*, 627 F.3d 683, 692 (8th Cir. 2010).
[2]*United States* v. *Abbey*, 560 F.3d 513, 520 (6th Cir. 2009); *United States* v. *Agostino*, 132 F.3d 1183, 1190 (7th Cir. 1997); and *United States* v. *Gee*, 432 F.3d 713, 714 (7th Cir. 2005).

3.3. Foreign Corrupt Practices Act

Section 78dd of 15 U.S.C. (Foreign Corrupt Practices Act hereafter "FCPA") provides for three anti-bribery offences with respect to any issuer,[1] any domestic concern,[2] and foreign nationals or businesses.[3] The bribery offences are committed when anything of value is "corruptly" given or offered to a foreign official or foreign political party or official with the intent to:

a. influence official decision or induce the foreign official or official of foreign political party to do or omit to do any act in violation of the lawful duty of such official; or secure an improper advantage; or
b. induce the foreign official or official of foreign political party to use his influence with a foreign government or instrumentality to affect or influence any act or decision of the foreign government or instrumentality.

Due to the similarity between the offences under section 78dd of 15 U.S.C. and section 201(b) of 18 U.S.C. it was held in *StichtingTerBehartiging van de Belangen Van Quadaandeelhounders in Het Kapital Van Saybolt International B.V. v Schreiber*[4]that Congress intended to incorporate within the FCPA the elements of the crime of bribery, which in essence is an "attempt to influence another to disregard his duty while continuing to appear devoted to it or to repay trust with disloyalty." (pp. 182-183)

In addition to using the nebulous word "corruptly" in the definition of the offence, the statute further introduced the exception of routine governmental action into the law which has the potential of blurring the distinction between what is a bribe and what is not a bribe. An amendment to the Act in 1988 exempts any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.[5] It is difficult in practice to separate facilitation payment from bribe. This is because "it blurs the distinction between legal and illegal payments" (Koch, 2005, p. 380). It is also likely that there is bound to be "*inherent difficulties in determining when a payment …crosses the line from defendable minor payment to an actual bribe*." (Wilder & Ahrens, 2001, p. 583)

[1]15 U.S.C s. 78dd-1(a).
[2] 15 U.S.C. s. 78dd-2(a).
[3] 15 U.S.C. s. 78dd-3(a).
[4] 327 F. 3d 173 (2nd Cir 2003).
[5]S. 78dd-1 (b).

4. Any Insights from US Anti-Bribery Laws?

The examination of US Federal anti-bribery laws reveals that the undefined word "corruptly" also feature in the statutory definition of bribery. There is however a significant difference with respect to the use of the word "corruptly" in the legal definition of the mental element of bribery between Nigerian statutes and US statutes. In section 201(b)(1) of 18 U.S.C., section 666 of 18 U.S.C. and section 78dd of 15 U.S.C. the use of the word "corruptly" is combined with another critical component of the mental element: viz intention to influence official conduct. The intent to influence official act was amplified to require a *quid quo pro.* As noted in the discussion of the decided cases, the courts have placed greater reliance on the mental element of intending to influence official action as the wrongful mental conduct in bribery. This approach and the phraseology of the mental element provisions in the US statutes is preferable to the convoluted wordings of the Nigerian statutes. The harm in bribery which the mental element of the offence should capture is the intention to use a gift or benefit to influence official conduct. A public official or any other employee should discharge official duty faithfully with regard to lay down rules and policies and should not be influenced in the discharge of official duty by considerations of personal benefit.

The intention to use of a gift or benefit to influence official action is at the core of the offence of bribery. It will be easier to prove an intent to influence official action than an intent to prove that a gift or benefit is conferred on account of any favour or disfavour shown to any person as required by the section 98 of the Criminal Code or "showing or forbearing to show in the exercise of … official functions favour or disfavour" (section 115 of the Penal Code). The proof of intent to influence official action is a matter of fact which the court can infer from the evidence. While a gift of an inexpensive souvenir may not lead to an inference to use it to influence official conduct, the gift of an expensive Rolex wrist watch may lead to such inference. Re-phrasing the provisions of Nigerian anti-bribery statute in terms of the use of gift or benefit to influence official action simplifies the mental element of bribery. The simplification will provide better guidance to the courts, lawyers and laymen on the mental element of bribery and the distinction between a bribe and a gift.

5. Conclusion

An attempt has been made in the article to examine the mental element of bribery under Nigerian anti-bribery statutes and US Federal anti-bribery laws. The examination of Nigerian statutes reveal the lack of clarity in the mental element of bribery and other problems associated with distinguishing between a bribe and gratuity. While the Penal Code avoids using the undefined word corruptly in the main offence of bribery under section 115, other problems associated with the mental element of bribery under the Penal Code were identified. The approach of defining the mental element of bribery under US statutes in terms of using a gift or benefit to influence official conduct provides in the writer's view a good platform to reform anti-bribery statutes in Nigeria.

6. References

Akinseye-George, Y. (2000). *Legal System, Corruption and Governance in Nigeria*. Lagos: New Century Law Publishers Ltd, p. 47.

Azenabor, G. (2007). *Corruption in Nigeria: Perspectives and Strategies for Effective Control*. University of Lagos, Faculty of Arts, Monograph Series, Lagos p. 23.

Iarossi, G. & Clarke, G. (eds). (2011) *Nigeria 2011: An Assessment of the Investment Climate in 26 States*, Washington: World Bank, p. xi.

Klein, C.B. (1999). What Exactly Is an Unlawful Gratuity After United States v. Sun-Diamond Growers? *George Washington Law Review,*vol. 68, p. 128.

Koch, R. (2005). The Foreign Corrupt Practices Act: It's time to cut back the grease and add some guidance. *Boston College International and Comparative Law Review*, vol. 28, p. 380.

Ocheje, P. (2001). Law and Social Change: A Socio-Legal Analysis of Nigeria's Corrupt Practicesand Other Related Offences Act 2000. *Journal of African Law,*vol. 45, pp. 177 and 179.

Okonkwo, C. (ed). (1992). *Okonkwo & Naish:Criminal Law in Nigeria.* Abuja: Spectrum Books Limited.

Olen, J. W. (2012). The Devil's in the Intent: Does 18 U.S.C. Section 666 Require Proof of *Quid-Pro-Quo* Intent. *Southwestern Law Review,* vol. 42, pp. 229-261.

Osipitan, T. &Oyewo, O. (1997). Legal and Institutional Framework for Combating Corruption in Nigeria in E.O. Akanki (ed). *Unilag Readings in Law*. Lagos, Faculty of Law, University of Lagos p. 257.

Owasanoye, B. (2001). Corruption: The Enemy Within in Ayua&Guobadia, (eds), (2001). *Political Reform and Economic Recovery in Nigeria*. Lagos, Nigerian Institute of Advanced Legal Studies, pp. 591 and 592.

Richardson, S. (1987). *Notes on the Penal Code Law*. 4th ed., Zaria: Ahmadu Bello University Press, p. 95.

Welch, W.M. (1989). The Federal Bribery Statute and Special Interest Campaign Contributions. *The Journal of Criminal Law and Criminology*, vol. 79, p. 1358.

Welling, S.N. (2013). Reviving the Federal Crime of Gratuities. *Arizona Law Review,* vol. 55, p. 422.

Wilder, M. and Ahrens, M. (2001). Australia's Implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions Commentary. *Melbourne Journal of International Law,* vol. 2, p. 583.