DIFFERENT RESPONSES TO JUDICIAL CORRUPTION: THE SOUTH AFRICAN COMMON LAW

Philip Thomas*

1 Introduction

Today the independence of the judiciary is generally regarded as one of the cornerstones of democracy. However, a judge's position varies considerably in different jurisdictions, oscillating from near civil servant to godlike status and as a rule, there is strong resistance to attempts to change this. The independence of the judiciary has lately become a talking point in South Africa once again but this article addresses the other side of that coin, namely the extreme security of tenure of judges, which may create an impression of a lack of accountability. Such security may cause a judge to yield to the temptations of corruption.

Although modern legislation has installed various safety mechanisms in this regard, it may be opportune to trace how the archetypes of our legal system and thinking dealt with the judge who yielded to temptation.

2 Roman law

From the Twelve Tables to Justinian, Roman law countered judicial corruption with legislation. Aulus Gellius[1] tells us that Table 9 3 of the Twelve Tables punished with death a judge who had accepted money to make a certain decision.[2] Gelius's mouthpiece, the jurist Sextus Caecilius, asks the philosopher Favorinus whether he is of the opinion that the perfidy of a judge who sells his oath contrary to all human and divine law,

1 Latin grammarian and antiquarian, AD 125-180.

2 *Noctes Atticae* 20 1 7: "Dure autem scriptum esse in istis legibus (XII tab.) quid existimari potest? nisi duram esse legem putas, quae iudicem arbitrumve iure datum, qui ob rem dicendam pecuniam accepisse convictus est, capite poenitur?"

* Research Fellow, University of Pretoria, Professor Emeritus of Roman Law, University of Pretoria.

Fundamina 17 (2) 2011 ISSN: Print 1021-545X

does not deserve the death penalty.[3] Both Cicero[4] and Asconius[5] refer to the case of Tubulus, who in 142 BC during his praetorship presided over a *quaestio de sicariis*, at that time probably a special jury court[6] which dealt with knifemen or gangsters. Tubulus had so blatantly accepted money to return a specific verdict that the following year the tribune of the people, Publius Scaevola, had the matter investigated in another *quaestio*, a special court established by the senate, presided over by the consul Gnaeus Servilius Caepio. Tubulus did not defend himself since the facts were common knowledge, and immediately went into exile. He subsequently committed suicide in prison.[7]

A system of permanent jury courts that Sulla established during his dictatorship in 82/81 BC defined the development of Roman criminal law.[8] Statutes[9] established the courts, the crimes, the procedure[10] and the penalties and all major offences fitted

3 *Noctes Atticae* 20 1 8: "Dic enim, quaeso, dic, vir sapientiae studiosissime, an aut iudicis illius perfidiam contra omnia iura divina atque humana iusiurandum suum pecunia vendentis ... non dignum esse capitis poena existumes?" Plescia "Judicial accountability and immunity in Roman law" 2001 (45-1) *The American J of Legal History* 59 suggests that this section of the Twelve Tables referred to capital cases only and was a reflection of the *talio* principle.

4 Marcus Tullius Cicero (106-43 BC), Roman statesman, philosopher, orator.

5 Quintus Asconius Pedianus (9 BC – AD 76), Roman grammarian and historian, who wrote commentaries on five of Cicero's orations.

6 D'Ippolito & Lucrezi *Profilo storico istituzionale di diritto romano* (2007) 277: "È probabile, poi, che si tratasse di una corte non permanente, ma istituita solo per uno o più casi specifici." For references to the literature on this matter, see Robinson *The Criminal Law of Ancient Rome* (1995) 42, 126 n 13. Mommsen *Römisches Strafrecht* (1899) at 197 also considered it to have been a special court.

7 Cicero *De finibus malorum et bonorum* II 54: "an tu me de L. Tubulo putas dicere? qui cum praetor quaestionem inter sicarios exercuisset, ita aperte cepit pecunias ob rem iudicandam, ut anno proximo P. Scaevola tribunus plebis ferret ad plebem vellentne de ea re quaeri. quo plebiscito decreta a senatu est consuli quaestio Cn. Caepioni. profectus in exilium Tubulus statim nec respondere ausus; erat enim res aperta."; Asconius *Orationum Ciceronis quinque enarratio* II Pro M Scauro 23 [§ 5]: "*Si, me hercule, iudices, pro L. Tubulo dicerem quem unum ex omni memoria sceleratissimum et audacissimum fuisse accepimus, tamen non timerem, venenum hospiti aut convivae si diceretur cenanti ab illo datum cui neque heres neque iratus fuisset.* L. hic Tubulus praetorius fuit aetate patrum Ciceronis. Is propter multa flagitia cum de exsilio arcessitus esset ut in carcere necaretur, venenum bibit"; Mommsen (n 6) 197 n 2.

8 D'Ippolito & Lucrezi (n 6) 277f; Robinson (n 6) 1ff.

9 The lex Repetundarum of the *tabula Bembina* (generally but erroneously called the lex Acilia) predates Sulla's dictatorship and established the only pre-Sullan standing jury court, which survived his reorganisation: D'Ippolito & Lucrezi (n 6) 277. The Sullan statutes are the lex Cornelia de falsis, the lex Cornelia de sicariis et veneficiis, the lex Cornelia de iniuriis, the lex Cornelia de maiestate, the lex Cornelia de repetundis, the lex Cornelia de peculatu and the lex Cornelia de ambitu. It is not impossible that in the last of these statutes Sulla created a court to deal with electoral corruption, but his statute was soon replaced by the lex Calpurnia of 67 BC against *ambitus*, prohibiting forms of political canvassing. *Cf* Dionysius Godefridus van der Keessel (1738-1816, professor of law at Leiden) *Praelectiones in libros XLVII et XLVIII Digestorum exhibentes jurisprudentiam criminalem ad usum fori Batavi applicatam (duce Cornelio van Eck) et in novum Codicem Criminalem, 1809* (ed Beinart & Van Warmelo) Vol 4 (1976) 1604ff; Wallinga "*Ambitus* in the Roman Republic" 1994 *Revue Internationale des Droits de l'Antiquité* 411-442.

10 Robinson (n 6) 3-11; D'Ippolito & Lucrezi (n 6) 279ff; for the *cognitiones*, see 298ff.

within the framework of the *quaestiones perpetuae*.[11] Thus we find judicial corruption criminalised by the lex Cornelia de sicariis et veneficiis and the lex Cornelia de falsis and later by the lex Iulia repetundarum.[12]

From Cicero we learn that corruption was nevertheless rampant. His opening statement in *In Verrem* depicts a situation where justice is freely sold. In the Sullan system, six of the praetors as well as *quaesitores*[13] presided over the permanent jury courts, and the term *iudex* related to both the president and members of the jury.[14] Sulla had doubled the size of the senate and reintroduced the provision that jurors were to be chosen from the senate.[15] However, the senatorial courts were discredited to such an extent[16] that in 70 BC the lex Aurelia provided that the jury was to be chosen from the three orders of senators, equestrians and *tribuni aerarii* and fixed the size of the jury at seventy-five.[17] In this context, before the passing of the lex Aurelia, Cicero opens his prosecution of Verres by pointing out that it is widely believed that the wealthy will not be convicted by the courts of the day and that Verres is declaring openly that he will be acquitted on account of his wealth.[18]

11 D'Ippolito & Lucrezi (n 6) 278. For the *cognitiones*, see 305ff; Mommsen (n 6) 193, 201ff; Robinson (n 6) 1-14.

12 The quasi-delictual action against the *iudex qui litem suam fecit* may or may not have been available, but remains outside the scope of this article. *Cf* Birks "A new argument for a narrow view of litem suam facere" 1984 (52) *Tijdschrift voor rechtsgeschiedenis* 373; Plescia (n 3) 59 is of the opinion that Cicero *De finibus* II 54 is authority for the existence of the lex De pecunia ob rem iudicandam of 142 BC, that *pro Cluentio* LV 151 proves the existence of a lex Sempronia ne quis iudicio circumvenitur of 123 BC and that *pro Rabirio Postumo* VII 16 shows that the lex Livia si quis ob rem iudicandam pecuniam cepisse of 91 BC also dealt with judicial corruption. The more traditional view that the statute of around 123 BC was the lex Repetundarum, commonly called the lex Acilia, setting up the only pre-Sullan *quaestio perpetua*, is preferred; *cf* Robinson (n 6) 2, 81, 105 n 13, 144f n 84.

13 *Cf* Mommsen (n 6) 187 n 3, 208. Masi Doria *Quaesitor urnam movet* (2007) 3-34.

14 Robinson (n 6) 4; Mommsen (n 6) 209, 209 nn 2 and 4.

15 Robinson (n 6) 4; Mommsen (n 6) 210.

16 Cicero *Divinatio in Q Caecilium* III: "Judiciorum levitate ordo quoque alius ad res judicandas postulatur; judicum culpa et dedecore etiam censorium nomen, quod asperius antea populo videri solebat, id nunc poscitur, id jam populate atque plausibile factum est. In hac libidine hominum nocentissimorum, in populi romani quotidiana querimonia, judiciorum infamia, totius ordinis offensione, quum hoc unum his tot incommodis remedium esse arbitrare, ut homines idonei atque integri causam reipublicae legumque susciperent."

17 D'Ippolito & Lucrezi (n 6) 281f; Robinson (n 6) 4.

18 *In Verrem* I: "Inveteravit enim jam opinio perniciosa reipublicae, vobisque periculosa, quae non modo Romae, sed et apud exteras nationes omnium sermone percrebruit, his judiciis, quae nunc sint, pecuniosum hominem, quamvis sit nocens, neminem posse damnari. Nunc, in ipso discrimine ordinis judiciorumque vestrorum, quum sint parati, qui concionibus et legibus hanc invidiam senatus inflammare conentur, reus in judicium adductus est C. Verres, homo vita atque factis, omnium jam opinione, damnatus, pecuniae magnitudine, sua spe ac praedictione, absolutus ... (u)sque eo senatoria judicia perdita profligataque esse arbitratur, ut hoc palam dictitet, non sine causa se cupidum pecuniae fuisse, quoniam tantum in pecunia praesidium experiatur esse; sese (id quod difficillimum fuerit) tempus ipsam emisse judicii sui, quo cetera facilius emere posset."

2 1 Lex Cornelia de sicariis et veneficiis

As indicated, bribery was punishable under three different statutes. First, Marcian mentions in *D* 48 8 1 1[19] that a magistrate or judge president of a standing court,[20] who accepted money to convict the defendant in a capital case,[21] was punished under the lex Cornelia de sicariis et veneficiis. The punishment is described in *D* 48 8 3 5[22] as deportation to an island and forfeiture of all property. During the empire *humiliores* were subject to a more severe punishment, namely the death penalty in the form of being thrown to the beasts.[23] The title on punishments[24] deals with corrupt jurors and *D* 48 19 38 10[25] provides that they were either removed from the court, sent into exile or relegated for a certain time.

2 2 Lex Iulia repetundarum

Judicial bribery was again addressed in the lex Iulia repetundarum.[26] According to *D* 48 11 3[27] anyone accepting money for giving or not giving a judgement or issuing a decree

19 *Marcianus libro quatro decimo institutionum*: "Praeterea tenetur ... quive magistratus iudexve quaestionis ob capitalem causam pecuniam acceperit ut publica lege reus fieret."

20 "Magistrate" refers to the praetor allocated to the standing court; when a court was sitting without a praetor a *iudex quaestionis* was president. *Cf supra* nn 13 and 14. Van der Keessel (n 9) 971 held that only the judge president was punishable. This opinion was shared by Mommsen (n 6) 633; Robinson (n 6) 42 holds that both judge president and jurors fell under the statute; *cf*, however, her opinion at 44. *Pauli sententiae* V 23 11 speaks of *iudex* without further qualification.

21 Van der Keessel (n 9) 971 was of the view that having been bribed to cause a person to be placed on the roll of accused in a capital case fulfilled the requirements of this lex Cornelia. *Pauli sententiae* V 23 11 widens the scope by stating that a judge who had accepted money in respect of a person's life or fortune, will be punished.

22 *Marcianus libro quatro decimo institutionum*: "Legis Corneliae de sicariis et veneficiis poena insulae deportatio est et omnium bonorum ademptio. sed solent hodie capite puniri, nisi honestiore loco positi fuerint, ut poenam legis sustineant: humiliores enim solent vel bestiis subici, altiores vero deportantur in insulam." *Cf*, however, *Pauli sententiae* V 23 11 in which the penalty for all corrupt judges is deportation and forfeiture.

23 It is, however, difficult to envisage *humiliores* being judge president of a standing court.

24 *D* 48 19 *De poenis*.

25 *Paulus libro quinto sententiarum*: "Iudices pedanei si pecunia corrupti dicantur, plerumque a praeside aut curia summoventur aut in exilium mittuntur aut ad tempus relegantur." *Cf*, however, *Pauli sententiae* V 23 11: "Iudex, qui in caput fortunasque hominis pecuniam acceperit, in insulam bonis ademptis deportatur." The *iudex pedaneus*, a private person to whom the governor delegated criminal jurisdiction in the *cognitio* procedure, has been compared to a jury member of a *quaestio perpetua* by Mommsen (n 6) 713 n 2 as the *quaestiones* disappeared during the early third century. The *Corpus iuris civilis* texts dealing with corrupt judges apply *grosso modo* to the *cognitiones*, in which the *pedaneus*, a lower level burocrat, played a secondary role that could be compared to that of an earlier jury member: Santalucia *Diritto e processo penale nell'antica Roma* (1998) 272.

26 The lex Iulia of 59 BC was a major restatement of the statutes dealing with extortion, ie the lex Calpurnia of 149 BC, the lex Repetundarum of the *tabula Bembina* of 123 BC, the lex Servilia caepionis of 106 BC, the lex Servilia glauciae of 104 BC and the lex Cornelia de repetundis of 81 BC: D'Ippolito & Lucrezi (n 6) 276, 284f; Mommsen (n 6) 708f; Robinson (n 6) 81; Santalucia (n 25) 108f, 111ff.

27 *Macer libro primo publicorum*: "Lege Iulia repetundarum tenetur, qui, cum aliquam potestatem haberet, pecunia ob iudicandum vel non iudicandum decernendumve acceperit." *Cf* also *D* 48 11

was punishable for extortion. Although at first blush it would appear that this statute deals with the bribing of judges in non-capital cases, *D* 48 11 7 3[28] brings bribery for the (judicial) killing of a man within the ambit of the statute: it provides a harsher penalty, namely capital punishment, which is, however, immediately reduced to the apparently unusual sentence of deportation to an island.[29] Otherwise, the offenders were punished by exile.[30] An additional refinement was that the staff or retinue of a judge was also held accountable for extortion when money had been accepted in a case.[31]

2 3 Lex Cornelia de falsis

Of special interest is the fact that persons corrupting a judge were also held accountable in terms of criminal law as Marcian declares in *D* 48 10 1 2[32]: both direct and indirect corrupters were punishable under the lex Cornelia de falsis. In principle the same penalty of deportation and confiscation of all property also applied to them,[33] but Paul mentions in his commentary on the *senatusconsultum Turpillianum*[34] that corrupters usually received the lighter penalty of temporary relegation without confiscation of property.[35]

2 4 Imperial legislation

Nevertheless, bribery remained a problem and the emperors sought other solutions. Antonine decreed in AD 212 that a party who gave money to the judge or an opponent

1*pr*. Mommsen (n 6) 710ff sets out how, during the republic, only those members of a jury who were senators were criminally liable; attempts in 74 and 64 BC to make provisions on judicial corruption applicable to all members of the jury were unsuccessful.

28 *Macer libro primo iudiciorum publicorum*: "quid enim, si ob hominem necandum pecuniam acceperint?"

29 *D* 48 11 7 3: "capite plecti debent vel certe in insulam deportari, ut plerique puniti sunt." See Mommsen (n 6) 708f and 727ff for the original punishment, a claim for reimbursement and subsequent variations during the republic and early empire.

30 *D* 48 11 7 3; also *D* 48 19 38 10; *Pauli sententiae* V 28; Mommsen (n 6) 713 n 2; Robinson (n 6) 82.

31 *D* 48 11 5 *Macer libro primo publicorum*: "In comites quoque iudicum ex hac lege iudicium datur." See also *D* 48 11 1*pr*. *Cf* Mommsen (n 6) 712 where he refers to a fruitless attempt to have a similar measure introduced during 55 BC; see also 712 n 3.

32 *Marcianus libro quatro decimo institutionum*: "[p]oena legis Corneliae (de falsis) adficitur. et qui iudicem corruperit corrumpendumve curaverit."

33 *D* 48 10 1 13: "Poena falsi vel quasi falsi deportatio est et omnium bonorum publicatio."

34 *D* 48 10 21, *Paulus libro singulari ad senatus consultum Turpillianum*: "[p]oena falsi coercetur … is adiungitur et is qui iudicem corrumpit. sed remissius puniri solent, ut ad tempus relegentur nec bona illis auferantur." *Cf*, however, *Pauli sententiae* V 23 2.

35 Robinson (n 6) 124 n 188 holds that this must be a scribal error, since corrupting a judge can hardly have been regarded as a relatively minor offence.

in criminal, civil or fiscal proceedings, lost the case.[36] Ulpian refers to this statute in *D* 36 1 3[37] and explains that this enactment aimed to eliminate sordid extortions and did not apply to the settling of a case. It did apply if something other than money was offered.[38] In AD 285 Diocletian and Maximian held it to be settled law that a purchased decision given by a bribed judge was void.[39] Constantine held in AD 319 that a corrupt judge would be punished with *infamia* as well as liability for the financial implications of his deeds.[40] In AD 382 judges were subjected to the threat that the penalties for their offences would be imposed upon their heirs.[41] During the following year judges in civil cases who were at the same time vendors of justice were reminded of the penalties provided by the law.[42] In AD 386 the public was exhorted to bring accusations against corrupt judges.[43] Finally, Justinian enacted *Novella* 124 *De Litigantibus* in terms of which a litigant was obliged to take an oath in the presence of the judge that he had not given or promised anything to the judge and would not do so in future, either in person or through

36 *C* 7 49, *De poena iudicis, qui male iudicavit, vel eius, qui iudicem vel adversarium corrumpere curavit* (1 Imp Antoninus A ad Gaudium, 212): "Constitit in quacumque causa sive privata sive publica sive fiscali, ut, cuicumque data fuerit pecunia, vel iudici vel adversario, amittat actionem is, qui diffidentia iustae sententiae in pecunia corruptela spem negotii reposuerit."

37 *Ulpianus libro decimo ad edictum*: "Sed et constitutio imperatoris nostri, quae scripta est ad Cassium Sabinum, prohibuit iudici vel adversario in publicis vel privatis vel fiscalibus causis pecuniam dare, et ex hac causa litem perire iussit. ... sed sordidis concussionibus." See also *D* 12 5 2, *Ulpianus liber vicensimo sexto ad edictum*: "sed si dedi, ut secundum me in bona causa pronuntiaret, est quidem relatum condictioni locum esse: sed hic quoque crimen contrahit (iudicem enim corrumpere videtur) et non ita pridem imperator noster constituit litem eum perdere."

38 *D* 3 6 1 4: "Pecuniam autem accepisse dicemus etiam si aliquid pro pecunia accepimus."

39 *C* 7 64 7 (Impp Diocletianus et Maximianus AA Nicagorae, 285): "Venales sententiae, quae in mercedem a corruptis iudicibus proferuntur, et citra interpositae provocationis auxilium iam pridem a divis principibus infirmas esse decretum est."

40 *C* 7 49 2 (Imp Constantinus A ad Felicem praesidem Corsicae, 319): "De eo, qui pretio depravatus aut gratia perperam iudicaverit, ei vindicta quem laeserit non solum existimationis dispendiis, sed etiam litis discrimine praebeatur."

41 *C* 9 27 2 (Impp Gratianus Valentinianus et Theodosius AAA Floro pp, 382): "Sciant iudices super admissis propriis aut a se aut ab heredibus suis poenam esse repetendam."

42 *C* 9 27 3 (Idem AAA Marcellino, 383): "Omnes cognitores et iudices a pecuniis atque patrimoniis manus abstineant neque alienum iurgium putent suam praedam. etenim privatarum quoque litium cognitor idemque mercator statutam legibus cogetur subire iacturam."

43 *C* 9 27 4 (Idem AAA et Arcadius A edictum ad provinciales, 386): "Iubemus hortamur, ut, si quis forte honoratorum decurionum possessorum, postremo etiam colonorum aut cuiuslibet ordinis a iudice fuerit aliqua ratione concussus, si quis scit venalem de iure fuisse sententiam, si quis poenam vel pretio remissam vel vitio cupiditatis ingestam, si quis postremo quacumque de causa improbum iudicem potuerit approbare, is vel administrante eo vel post administrationem depositam in publicum prodeat, crimen deferat, delatum approbet, cum probaverit, et victoriam reportaturus et gloriam."

an intermediary.[44] The party refusing to do so would lose the case;[45] a party stating that he had given or promised something would not lose the case if the bribed judge was convicted, but he was penalised if he could not prove his allegations.[46] A judge convicted of having accepted a bribe in a civil case was sentenced to pay three times what he had received or double what was promised and was removed from office.[47] In a criminal case the corrupt judge's property was confiscated and he was exiled: the punishment was based on the argument that by accepting the bribe he had shifted the corrupter's crime onto himself.[48]

3 English common law

Although Magna Charta[49] provided that "nulli vendemus, nulli negabimus, aut differemus rectum vel justiciam" (to no one will we sell, to no one deny or delay right or justice),

44 *Nov* 124, *De Litigantibus* (Idem Augustus Petro pp) *Praefatio: Praesentem legem proferimus, ut et iudicum integritas appareat neve litigantes per largitionem leges circumscribere valeant*. C 1: " Iubemus igitur, quotiescumque apud quoslibet iudices vel lites incohantur vel appellationes examinantur, prae omnibus principales litigantium personas, aut illos ad quos in medio negotium forte migraverit, praesentia iudicum tangentes sancta evangelia iurare, quia nihil penitus iudicibus [aut] patronicii causa ipsis vel alii cuicumque personae pro hac causa quolibet modo dederunt aut promiserunt aut postea dabunt vel per se vel per aliam quamcumque mediam personam, exceptis his quae propriis advocatis pro patrocinio praestant aliisque personis, quae nostrae leges dari disposuerunt."

45 *Nov* 124 c I: "Illo videlicet generaliter observando, ut si quis litigantium absens aut praesens huiusmodi iusiurandum praebere noluerit, et hoc manifestetur iudici, per sententiam eius actor quidem casum actionis, reus autem condemnationem sustineat."

46 *Nov* 124 c II: "Si quis autem ex litigatoribus dixerit dedisse alicui aut promisisse, et personam declaraverit et hoc probaverit, ipse quidem in eventu litis veniam mereatur ... Si vero datum aut promissum litigator probare nequiverit, iuret persona quae datum aut promissum dicitur suscepisse, quia neque per se neque per aliam personam aut accepit aut promissionem habuit, et hoc praebito sacramento ipse quidem liber sit, litigator autem, qui non potuit ostendere, in pecuniariis quidem causis aestimationem litis a comite privatarum exigatur, lite quippe eventum proprium sustinente, in criminalibus autem confiscationem suarum rerum sustineat, et causa apud competentes iudices secundum legum ordinem terminetut."

47 *Nov* 124 c II: "[q]ui vero accepit aut promissionem suscepit aut ei probatur, si quidem pecuniaria sit causa, quod quidem datur triplum, quod vero promittitur duplum a comite privatarum exigatur, et dignitatem seu singulum quod habet in utro casu amittat."

48 *Nov* 124 c II: "Si autem criminalis sit accusatio, confiscationem propriae substantiae patiatur et mittatur in exilium, qui propter acceptionem alienum crimen in se transponi festinavit ... Si autem a litigatore manifestata persoan memoratum refutaverit iusiurandum, tam in criminalibus quam in pecuniariis causis memoratis subiaceat poenis."

49 1216 (9 Hen III c 40) and 1297 (25 Edw I c 29). The original charter was sealed by King John in 1215, but he appealed to the pope who revoked the charter and excommunicated the barons. However, during 1216 the charter was reissued with considerable modifications by the regent of the young Henry III; in 1217 further changes were made and a third reissue took place in 1225. Magna Charta was confirmed by Edward I in 1297. The manuscripts of the original charter were written continuously, but later numbering of the clauses was generally accepted. The *nulli vendemus* clause was c 40 in the original charter of 1215 and c 29 in the 1225 version, which was confirmed by Edward. The text of one of the four surviving originals may be found in C Bémont *Chartes des libertés anglaises* (Paris, 1892) 26-39.

English common law developed through cases and the search for precedent brings us to AD 1621 and the unlikely person of Francis Bacon. Bacon lived at the intersection of natural science and English law and remains universally admired as the father of the new natural sciences. Less is said about his career in law, which culminated in the Chancellorship and was abruptly ended by impeachment. The literature devoted to Bacon is immense but is to some extent dominated by the 1837 essay by Macaulay[50] on Bacon, *Cobbett's State Trials*[51] and Spedding's fourteen volumes.[52]

3 1 Francis Bacon Lord Verulam, Viscount St Albans

Bacon was born in 1561 of the second marriage of Sir Nicholas Bacon, the Lord Keeper of the Seal.[53] He studied at Trinity College, Cambridge and Gray's Inn, and was a Member of Parliament from 1584 onwards. In 1604 Bacon was appointed King's Counsel to James I, Solicitor-General in 1607, Attorney-General in 1613, member of the Privy Council in 1616, Lord Keeper in 1617 and Lord Chancellor in 1618.[54]

By now Bacon's contribution to science has been both belittled and exaggerated. Some hold Bacon to have been of no consequence because he ignored mathematics.[55]

See also *www.fordam.edu/Halsall/source/magnacarta.txt* (10 Oct 2011) and *http://freemasonry.bcy.ca/texts/magnacarta.txt* (10 Oct 2011).

50 Thomas Babington Macaulay (1800-1859), Liberal Party M P, member of the Supreme Council of India, Secretary for War, contributor of critical and historical essays to the *Edinburgh Review*. Macaulay "Lord Bacon" in *Critical and Historical Essays* (1877) 349-418.

51 *Cobbett's Complete Collection of State Trials and Proceedings for High Treason and other Crimes and Misdemeanors from the Earliest Period to the Present Time* Vol 2 (London, 1809) ch 115, 1087-1120: "Proceedings in Parliament against Francis Bacon Lord Verulam, Viscount St. Albans, Lord Chancellor of England, upon an Impeachment for Bribery and Corruption in the Execution of his Office: And also against Dr. Theophilus Field, Bishop of Llandaff, &c. 18 & 19 James, A.D. 1620. [1 Commons' Journals, 554. 3 Lords's Journals, 53. 1 Cobb. Parl. Hist. 1208.]" Note that the date given differs from the date cited today, namely 1621. This is because in England until 1752 the new year began on 25 Mar, the day of the Annunciation of Mary. This changed when the British Calendar Act, 1750 (24 Geo II c 23), introduced the Gregorian calendar during 1751, 1752 and 1753. The year 1751 had only 282 days and 1752 began on 1 Jan.

52 J Spedding *The Works, the Letters and the Life of Francis Bacon* (London, 1858-1874). More recent, more manageable, though less scholarly is Bowen *Francis Bacon the Temper of a Man* (1993). Fuller *Sir Francis Bacon A Biography* (1981) contains useful factual information, but is severely flawed. There is no substantial proof of speculations that Bacon was the illegitimate son of Queen Elizabeth or the author of Shakespeare's works. See, eg, Balestra "Introduction" in Bowen at xiv on Dodd's work *Francis Bacon's Personal Life-Story* (1987). Zagorin *Francis Bacon* (1999) is both excellent and scholarly.

53 The Great Seal of England. Originally the King entrusted the Seal to the Chancellor. When for various reasons the Seal was left in somone else's custody, this person became Lord Keeper of the Seal, as was the case with Bacon's father. An Act of Elizabeth 1562-1563 (5 Eliz c 18) defined the status of the Lord Keeper, who often became Lord Chancellor, as happened to Bacon. See Bowen (n 52) 23, 29, 33ff, 46ff, 52f, 55.

54 Macaulay (n 50) 351, 354ff, 371, 376; Bowen (n 52) 33ff, 46ff, 52f, 55, 101, 118, 130, 140, 151ff; Fuller (n 52) 48, 140, 195, 226ff, 261ff; Zagorin (n 52) 5, 17, 21.

55 See, eg, Dijksterhuis (1892-1965, Dutch mathematician and historian of science) *The Mechanization of the World Picture* (1961) 396-402 and Thorndike *History of Magic and Experimental Science*

But to negate or diminish Bacon's influence is as ridiculous as to claim that he invented modern science.[56] It is commonly accepted that empiricism and the inductive method are as old as Man, but Bacon's contribution is the development of a new philosophy of science, within which induction was recognised as a scientific method. Bacon not only questioned the philosophical underpinnings of natural science as derived from Aristotle[57] and developed by Scholasticism, but rejected the route chosen by the humanists, namely to return to the sources. Instead he developed a new philosophy of science, the essence of which was set out in his famous letter to his uncle William Cecil Burghley[58] and further developed in *The Proficience and Advancement of Learning*,[59] *Novum organon*[60] and *New Atlantis*.[61] Bacon's insistence that the object of scientific knowledge is to be useful to mankind makes him the first utilitarian and his importance is confirmed by the reception of his ideas.[62]

3 1 1 Bacon's law career

On the death of his father in 1579, young Bacon took up residence at Gray's Inn in order to read law.[63] As Macaulay quips, it was not difficult for the obviously talented Bacon to hold his own in the legal profession. Although he was originally thwarted in his career by the Cecils, Bacon's networking overcame their adverse nepotism during James's reign and his law career is said to have reached its climax with his chancellorship.

The Lord Chancellor dealt only with private-law cases and was competent in matters of conscience.[64] He sat as a single judge and his court had its own inquisitorial

(1958) 63-89.

56 Whewell *Philosophy of the Inductive Sciences* (London, 1840) called Bacon the supreme legislator of the modern republic of science and the hero of the revolution in scientific method. Balestra (n 52) xxf refers to Urbach *Francis Bacon's Philosophy of Science* (1987) in interpreting Bacon's contribution to scientific method in the context of Popper and Kuhn.

57 *Novum organon* contains Bacon's critique on Aristotle and sets out a programme for the inductive method. For detailed information, see Varvis "Humanism and the scientific revolution: Bacon's rejection of Aristotle" 1983 (14-1) *Comitatus: A J of Medieval and Renaissance Studies* 59-78.

58 Warhaft (ed) *Francis Bacon: A Selection of his Works* (1982) 460f; Bowen (n 52) 64ff; Balestra (n 52) xif.

59 Published in 1605: Macaulay (n 50) 398; Bowen (n 52) 102ff, 210.

60 Published in 1620: Macaulay (n 50) 371, 380, 407ff, 416f; Bowen (n 52) 167, 171, 215, 217.

61 Written in 1624, published posthumously in 1627: Macaulay (n 50) 415f; Bowen (n 52) 167ff, 228; Price (ed) *Francis Bacon's New Atlantis New Interdisciplinary Essays* (2002) 1ff.

62 Macaulay (n 50) 392: "Two words form the key of the Baconian doctrine, Utility and Progress"; see also 403f; Bowen (n 52) 11f. Kuhn "Mathematical versus experimental traditions in the development of physical science" 1976 *J of Interdisciplinary History* 1-31.

63 At the four Inns of Court, Lincoln's Inn, Gray's Inn, Middle Temple and Inner Temple, the practice of the common law was learned. Roman law could be studied at Oxford and Cambridge. Chancery was until the days of Thomas More held by clerics.

64 Baker *An Introduction to English Legal History* (1990) 118, 122f; Curzon *English Legal History* (1979) 97; Jackson *The Machinery of Justice in England* (1967) 6; Lévy-Ullmann *The English Legal Tradition; Its Sources and History* (tr Mitchell 1935) 275, 287ff, 307ff; *Potter's Historical Introduction to English Law and its Institutions* (1962) 577ff.

procedure.[65] During the sixteenth century the ecclesiastical chancellors had been replaced by common-law lawyers and equity had developed into a separate legal system.[66] From its inception, equity evoked strong criticism and opposition, which during Bacon's chancellorship came from Coke.[67]

3 1 2 Impeachment

When in 1621 King James was forced by financial considerations to convene parliament, a committee of the lower house was appointed to enquire into abuses in the courts of justice.[68] Two petitions were addressed to the House of Commons[69] by the aspiring corrupters Awbrey and Egerton, who said that when their cases came before the Lord Chancellor, they had been advised to present him with a sum of money.[70] However, their presents did not have the desired effect, which made them complain to parliament. The committee reported that they were satisfied that at the time of giving those gifts the donors did indeed have suits before the Lord Chancellor.[71] The Commons ordered the complaints of Awbrey and Egerton against the Lord Chancellor to be formulated and referred to the Lords.[72] Immediately, another petition against the Lord Chancellor was read concerning his taking money from Lady Wharton and a committee was appointed,[73]

65 Jackson (n 64) 19: "The emergence of the Chancery Court in the fifteenth century introduced the ideas of the inquisitorial system, for the Chancellor adopted the canon law theory of a trial." See, too, Baker (n 64) 119f; Curzon (n 64) 106f; Lévy-Ullmann (n 64) 304ff; Potter (n 64) 579ff. For a description of the Chancery, its origin, staff, administrative work and judicial activities, see Baker (n 64) 114-121. See also Curzon (n 64) 104ff; Lévy-Ullmann (n 64) 289ff.

66 Jackson (n 64) 7: "The old idea of 'conscience' slowly suffered an eclipse … equity ceased to be a fluid thing and became a set of rules." See, too, Baker (n 64) 122ff; Potter (n 64) 584ff; Blackstone *Commentaries on the Laws of England* (repr of the 1783 ed) Bk 3 ch 27 429-436; Potter (n 64) 595ff.

67 Bowen (n 52) 6, 48f, 90ff, 133ff, 186ff; Curzon (n 64) 110f; Lévy-Ullmann (n 64) 339ff; Potter (n 64) 585.

68 Macaulay (n 50) 382; Bowen (n 52) 181ff; Cobbett (n 51) 1087: "Proceedings in the House of Commons, March 15, 1620. Sir Robert Phillips reports from the Committee appointed to enquire into Abuses in the Courts of Justice."

69 Cobbett (n 51) 1087-1120. The parliamentary proceedings are also found in *Journals of the House of Commons* Vol 1 (1802) 554ff and *Journals of the House of Lords* Vol 3 (1767-1830) 51ff, available at *www.british-history.ac.uk* (10 Oct 2011).

70 Cobbett (n 51) 1088f; Bowen (n 52) 183ff; Fuller (n 52) 282.

71 Cobbett (n 51) 1090: "March 17. *Sir Robert Phillips* made Report from the Committee of the Abuses in the Courts of Justice: "We met on Thursday in the afternoon; the principal thing wherein I desired to be satisfied was, whether at the time of giving those Gifts to the Lord Chancellor there were any suit depending before him. In Awbrey's Case it appeared plainly there was." At 1091 is reported how Egerton's case was referred from the Star Chamber to the Lord Chancellor.

72 Cobbett (n 51) 1094: The King proposed a break for Easter and the creation of a commission of six members of the higher house and twelve of the lower house to examine the complaints against the Lord Chancellor on oath. Sir Edward Coke said: "We should take heed that the Commission do not hinder the manner of our parliamentary proceedings."

73 *Ibid*: "March 20. Whereupon there was a Petition of one Montacute, Wood, &c. against the Lord Chancellor for taking 300l of the lady Wharton, and making orders, &c. which was read. Churchill and Keeling were said to be Witnesses and a committee was appointed to examine them."

which unearthed many instances of corruption by the Lord Chancellor as well as his *modus operandi*, namely interlocutory orders.[74] The Commons ordered the case of Lady Wharton and the information derived from the witness Churchill to be sent to the Lords.[75] At this point Lord Bacon wrote a letter to the House of Lords in which he claimed to be ill and "not far from heaven" and asked for his case to be heard without prejudice. He requested that he be given a convenient time and be allowed to except to, and cross-examine the witnesses.[76] Subsequently the Commons sent to the House of Lords their further complaint against the Lord Chancellor, namely the acceptance of bribes in the cases of *Wharton v Wood*, *Hall v Holman* and *Smithwick v Welsh*.[77] The Lords appointed a select committee to examine witnesses to the Lord Chancellor's bribery and corruption. It collected a list of nineteen such instances.[78] The Lord Chancellor then sent a submission to the Lords saying how glad he was that "hereafter the greatness of a judge or magistrate shall be no sanctuary or protection of guiltiness; that after this example judges will fly from any thing that is in the likeness of corruption as from a serpent".[79] His only justification he borrowed from Job: "I have not hid my sin."[80] Bacon appealed to the mercy of the Lords and asked that his penitent submission be his sentence, the loss of the Seal his punishment and that any further sentence be spared.[81] The Lords forced him to make a specific confession to every point charged.[82] In response, Bacon sent an itemised confession of most of the twenty-eight charges and asked for mercy. He apologised and claimed in extenuation that the majority of the cases were almost two years old, that his estate was mean and poor and that he was in debt.[83]

The House agreed to request the King to sequester the Seal, which he did. The High Court found the Lord Chancellor guilty of the crimes and corruption and adjudged a fine of 40 000 pounds; imprisonment in the Tower at the King's pleasure; permanent incapacity to hold an office in the state; a lifelong ban from parliament and banning from the verge of the court.[84]

74 *Idem* 1096: "In this and other causes, my lord would decree part; and when he wanted more money he would send for more, and then decree another part. In most causes my lord's servants have undertaken one side or another; insomuch as it was usual for counsel, when their clients came unto them, to ask what friend they had at York-house."

75 *Idem* 1097ff: "Proceedings in the House of Lords."

76 *Idem* 1099f: "Lord Bacon's Letter to the House of Lords."

77 *Idem* 1100: "Father complaints against the Lord Chancellor."

78 *Idem* 1101f: Bowen (n 52) 193f.

79 Cobbett (n 51) 1102: "The Lord Chancellor's Submission. May it please your lordships; I shall humbly crave at your lordships hands a benign interpretation of that, which I shall now write; for words, that come from wasted spirits, and an oppressed mind, are more safe in being deposited in a noble construction, than in being circled with any reserved caution." See, too, Bowen (n 52) 195f.

80 Ch 31 v 53.

81 Cobbett (n 51) 1104; Bowen (n 52) 197f; Fuller (n 52) 286.

82 Cobbett (n 51) 1105; Macaulay (n 50) 383; Fuller (n 52) 286.

83 Cobbett (n 51) 1105-1111: "Thee Humble Confession and Submission of Me the Lord Chancellor."

84 *Idem* 1112f: "Judgement given against the Lord Chancellor." At 1113: "[T]his High Court doth adjudge: 'That the lord viscount St. Albans, Lord Chancellor of England, shall undergo a fine and ransom of 40.000l. - That he shall be imprisoned in the Tower during the King's pleasure. – That he

Bacon did not pay the fine, stayed a few days in the Tower, was three years later granted a full and entire pardon by King James and was summoned to, but did not sit in the first parliament called by Charles I.[85]

4 Analysis and conclusion

From the Twelve Tables to Justinian, Roman law dealt with the corrupt judge; the original harsh penalty was brought into line with more modern views, and the emperors tried various new solutions. Little distinction was drawn between judges in civil, criminal or fiscal cases or between a presiding judge of a standing criminal court and members of the jury, or the judges of the imperial *cognitiones*. However, the fact that judicial corruption was addressed in various statutes shows the many dimensions and the tenacity of this type of corruption. It is necessary to emphasise that a judge's corrupter was also penalised. Although this is ethically correct, it should be kept in mind that this solution makes detection of corruption more difficult.

The difference in procedures dealing with judicial corruption in the two jurisdictions may be explained by the different positions of judges in Roman law and English law. The Roman judge was, as explained by Cicero in his *pro Cluentio*,[86] a well-respected layman chosen by the parties, as also happened with some minor variation in the standing jury courts for criminal offences; the main change during the empire was that private persons were replaced by imperial bureaucrats.[87] The English judge was a professional lawyer appointed by the King. Moreover, the Lord Chancellor was the dispenser of the King's conscience, and the highest judge, against whose orders and decrees no appeal was possible. Thus the only way to seek redress against him was to petition the House of Commons, which could initiate a criminal trial in which the Lords assembled in the High Court of Parliament acted as judges, which process became known as impeachment.

shall for ever be uncapable of any office, place, or employment, in the state or commonwealth. – That he shall never sit in parliament, nor come within the verge of the Court. – This is the Judgment and Resolution of this High Court.'"

85 *Idem* 1114: "King James readily granted him a full and entire pardon of his whole sentence. Notwithstanding his pardon, he was never again summoned to parliament in this reign, but he was summoned to the first parliament called by Charles I. See 2 Cobb. Parl. Hist. p. 38." See, too, Macaulay (n 50) 390.

86 C 43: "Neminem voluerunt maiores nostri non modo de existimatione cuiusquam, sed ne pecuniaria quidem de re minima esse iudicem, nisi qui inter adversarios convenisset." Thus, during most of its history the office of the Roman judge was held by laymen, temporarily appointed for a particular case.

87 Robinson (n 6) 4ff. Although the *quaestiones perpetuae* were replaced by the *cognitiones* during the early empire, the main change in respect of the judiciary was that private persons were replaced by imperial bureaucrats. Only during the twelfth and thirteenth centuries did the office of the judge become professionalised. *Cf* Schrage "Women do not sit as Judges, or do they? The office of Judge in Vincentius Bellovacensis' *Speculum*" 2010 (16-1) *Fundamina* (*editio specialis*: *Libellus ad Thomasium. Essays in Roman Law, Roman-Dutch Law and Legal History*) 378, 378 nn 5 and 6.

During the discussions in the House of Commons the question whether the petitioners were competent witnesses was raised.[88] Sir Edward Coke's opinion that "[y]ou will make Bribery to be unpunished if he that carrieth the Bribe shall not be a witness. In this one witness is sufficient: he that accuseth himself by accusing another, is more than three witnesses"[89] won the day.

The apologists for Bacon, who vary from conspiracy theorists to denialists,[90] may be disregarded since Bacon freely confessed. However, the persistent attempts to vindicate Bacon's chancellorship are undoubtedly founded on his undeniable genius in the field of natural science. The Jekyll and Hyde aspect of Bacon's public persona may profitably be considered in some other debate. Logic dictates that if the same person acted differently in two different areas of human activity this may be ascribed to the essential differences between these two domains. Thus the case of Bacon may contribute to the academic debate on the fundamental differences between natural science and law, and the question whether law is a science or an art. Bacon's sad fate shows that natural science is governed by forces other than those that govern legal science; that utilitarianism is valuable in natural science, but that law should be value-driven, not result-driven.

Law is not mere science and technique, but an expression of values. It is therefore necessary to look back in history at the origins of those values and to reflect on their continued relevance in a changing world. This leaves one final question: Why was the common law of bribery explicitly repealed by the Corruption Act in 1992,[91] which statute was quickly replaced by the Prevention and Combating of Corrupt Activities Act?[92] These statutes penalise corruption in the widest sense and in all forms and brought to an end in South Africa the special attention given by both Roman and common law to the corrupt judge.

88 Cobbett (n 51) 1092: "Sir Edward Sackville. This honourable lord stands but yet suspected, and I hold not those gentlemen that have testified against him competent witnesses. 1. Because they speak to discharge themselves. 2. Because if he be guilty, they were those that tempted him." At 1093: "Sir Edward Coke. But some object that these men are culpable; and therefore no competent witnesses. I answer, They came not to accuse, but were interrogated." At 1096: "Mr. Mewtys. Touching the persons that inform, I would intreat this honourable house to consider that Keeling is a common sollicitor (to say no more of him); Churchill a guilty Register by his own confession: I know that fear of punishment, and hope of lessening it, may make them say much, yea more than is true."

89 *Idem* 1093.

90 A few examples suffice: Basil Montagu, Esq *The Works of Francis Bacon, Lord Chancellor of England* 16 vols (London, 1825-1834). Vol 8 provided the occasion for Macaulay's essay on Bacon. At 350, Macaulay states: "But the fanaticism of the devout worshipper of genius is proof against all evidence and all argument. The character of his idol is matter of faith; and the province of faith is not to be invaded by reason." More recent works of the same ilk are Dodd *The Martyrdom of Francis Bacon* (nd) and Mathews *Francis Bacon: The History of a Character Assassination* (1996).

91 Act 94 of 1992.

92 Act 12 of 2004.

Abstract

The corruption of judges is traced in Roman law and the English common law. The search for precedent brings us to the person of Francis Bacon, universally admired as the father of the new natural sciences. His career in law culminated in the chancellorship and was ended by impeachment. As a scientist Bacon questioned the philosophical underpinnings of natural science of his time and developed a new philosophy of science. Bacon was a utilitarian and his importance is found in the reception of his ideas. His law career ended with his removal from office on the grounds of his having accepted bribes, which he freely confessed. The inconsistency in Bacon's behaviour in these two branches of science deserves attention.