The Prospects for Anti-corruption Law: Optimists versus Skeptics

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The recent emphasis placed on anti-corruption laws as means of combatting corruption in low and middle-income countries reflects a great deal of optimism about the ability of law to effect social change. The more general literature on law and development suggests several reasons for skepticism on this front: the risk that legal institutions will be captured by powerful interests; the possibility that law plays only a limited role as a means of social control; and, in the case of transnational law, the limited power, will, knowledge, and legitimacy of foreign actors. This essay examines the extent to which these concerns provide grounds for skepticism about the potential efficacy of anti-corruption law.

Introduction

Contemporary anti-corruption programs have a strong legal flavor. Tremendous amounts of effort have been invested in creating international legal instruments that bind states and international organizations to take various steps to combat corruption. In many cases those steps require further legal action such as, the creation of new organizations, changes in the structure of existing organizations, enactment and enforcement of prohibitions and disclosure requirements, or changes in the terms of contracts.

These initiatives reflect remarkable optimism about the potential of law to effect positive social change. They presume that legal institutions can be used instrumentally to combat corrupt practices. Some of these initiatives also embody faith in the power of legal institutions that operate across national boundaries. The most innovative new approaches go beyond treaties and international organizations and try to recruit foreign courts, prosecutors, regulators and plaintiffs into the project of combatting local corruption, hopefully in a way that complements local efforts.

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Experiences in other contexts, however, suggest grounds for skepticism about whether anti-corruption law can live up to these hopes. In the general literature on law and development, skeptics about the efficacy of legal reforms raise several recurring concerns:[1]

- Law is epiphenomenal; legal norms and outcomes are ultimately shaped by more fundamental economic, political or cultural forces.
- Law does not have a significant impact on behavior in comparison to other forms of social control.
- Foreign actors lack the knowledge, capacity and legitimacy to craft legal interventions that promote development.

Each of these arguments provides grounds for skepticism about the efficacy of anti-corruption law. Taken together they imply that: domestic rather than foreign actors will play the most direct and critical roles in reducing or mitigating the effects of corruption; domestic actors will not necessarily rely on legal mechanisms to achieve their goals; and they will not be able to rely on law without also effecting fundamental economic, political or cultural changes in their societies. The skeptical view also implies that progress in combatting corruption cannot be measured simply by examining legal instruments or even the activities of legal officials, especially at the international level.

This article will examine and contrast optimistic and skeptical views of the prospects of anti-corruption law. The focus is on low and middle-income countries, which appear to experience distinct forms of corruption from high-income countries. The analysis is particularly relevant to middle income countries since in many low-income countries it is clear that resource limitations present binding constraints on the state's ability to mount legal responses to corruption. The chapter begins by describing the problem: What is corruption and why do people believe it is such an impediment to development? The next section outlines the consensus view on the appropriate form of anti-corruption law. The following sections set out, in turn, optimistic and skeptical views of the role that anti-corruption law can play in combatting corruption.

[1] David Trubek and Mark Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis of Law and Development Studies in the United States', in: 1974 *Wisconsin Law Review* (1974), p. 1062; Kevin Davis and Michael Trebilcock, 'The Relationship between Law and Development: Optimists versus Skeptics', in: 56 *American Journal of Comparative Law* (2008), p. 895.

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The Problem of Corruption

Corruption is conventionally defined as the abuse of public power for private benefit. Those abuses can take several forms. Perhaps the most notorious form is bribery, misuse of public office in exchange for a benefit from another party. Another important form of corruption is embezzlement, i.e., misappropriation of public assets. Nepotism and conflicts of interest are the other main forms of corruption.

Sometimes corruption is transnational in scope. For instance, bribes might be paid by foreign actors, as in cases where a foreign enterprise pays a bribe to a public official to obtain a benefit such as a contract, a concession or an exemption from customs duties. Alternatively, corruptly-procured assets might be transferred overseas or a corrupt local actor might physically move to a foreign jurisdiction.

There is now a consensus that corruption, broadly defined, is an impediment to development.[2] Cross-country evidence suggests that societies in which levels of corruption are perceived to be high tend to have lower rates of economic growth. There are several plausible reasons why corruption might retard development. First and foremost, corruption, by definition, involves deviations from official public policy. In many cases the deviations will be detrimental to public welfare. The public suffers when unqualified drivers obtain drivers' licenses, when mobile telephone contracts are awarded to firms that offer inferior technology, when unqualified nephews become public officials, or when firms pay bribes in order to be permitted to continue polluting. Second, some forms of corruption lead to unpredictable official behavior and consequently discourage investment. Third, large-scale corruption transfers wealth from the state to public officials, often at the expense of much poorer people who would otherwise have benefitted from public expenditures. These transfers are objectionable in terms of distributive justice. Over time they may also have undesirable economic effects. The prospect of enrichment through public office creates incentives to fight for public appointments. The resources invested in those fights usually could be put to better use. There is also no guarantee that the people who win such battles will be the ones who are most committed to and capable of serving the public. Fourth, corruption undermines the legitimacy of public institutions. This might in turn diminish the population's willingness to cooperate with the state, in a variety of contexts.

Nonetheless, describing in a summary fashion the consensus that corruption poses a significant problem masks the fact that different countries experience the problem quite differently. This variation has been a major theme of Michael Johnston's writing about corruption. His research identifies four different 'syndromes'

[2] See generally Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform* 1999.

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of corruption, three of which are prevalent in low and middle-income countries.[3] These syndromes can be distinguished by both the types of actors involved in corruption and their relative power.

The first syndrome, 'Elite Cartel' corruption, is 'centralized, organized and relatively predictable.'[4] It involves relatively stable elites comprising top politicians, business figures, bureaucrats, military and ethnic leaders. The state is reasonably effective, in the sense that courts and other state agencies are capable of enforcing their decisions, but does not necessarily serve broad public interests. Johnston associates this type of corruption with middle-income countries such as Argentina, Botswana, Brazil, Chile, Paraguay, South Africa and Zambia, as well as high-income countries such as Italy and Korea.[5]

Johnston labels his second syndrome 'Oligarchs and Clans.' In these settings, the participants in corrupt activities are not members of stable elites. Instead they include a variety of public officials and private actors, including some who obtain wealth and power through violence or participation in illicit activities. Public officials do not necessarily wield significant power, meaning that their decisions can be ignored by powerful private actors, and disputes are sometimes resolved through violence. Johnston associates countries such as Bangladesh, Colombia, India, Jamaica, Mexico, Pakistan, the Philippines and Russia with this syndrome.

Johnston's third syndrome is that of 'Official Moguls.' This dynamic involves powerful public officials who face little competition from other actors and so can engage in corruption with impunity. This often involves large-scale misappropriation of resources using the power of the state. Sometimes there is only one Official Mogul in the country. In other cases there are several Official Moguls, all operating independently and without constraint. Johnston cites China, as well as Indonesia during and following the Suharto years, as paradigmatic examples of Official Mogul corruption. Other examples include Algeria, Cameroon, Egypt, Gabon, Jordan, Morocco, Nigeria, Syria and Tunisia.

Johnson's fourth syndrome is labeled 'Influence Markets.' In this syndrome moneyed private interests purchase access to a wide range of powerful public officials predominantly through legal means such as campaign contributions. This syndrome can co-exist with varying degrees of political competition. Influence Markets are characteristic of high-income countries such as Germany, Japan and the United States, which tend to experience relatively low levels of other forms of corruption.

Johnston groups countries as victims of the same syndrome even when it seems clear that some members of the group exhibit more severe symptoms than others.

[3] Michael Johnston, *Syndromes of Corruption: Wealth, Power and Democracy* 2005.
[4] Johnston, *Syndromes of Corruption*, p. 90.
[5] Johnston, *Syndromes of Corruption*, p. 222.

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Botswana, for instance, is characterized as being governed by an elite cartel because although it is formally a multi-party democracy it has been dominated by a single party since independence. To be sure, allegations of corruption have been leveled at government ministers from time to time and members of the government often have significant interests in commercial enterprises. Yet at the same time, Botswana is perceived as the least corrupt country in sub-Africa and among the least corrupt countries in the world.[6]

As Johnston points out, each of these syndromes presents different kinds of obstacles to economic and political development. For instance, the experience of countries such as Botswana and Korea suggests that Elite Cartel corruption is not a fatal impediment to economic growth. Both those countries have state governments that have proven capable of pursuing public policies that have generated sustained development. The Oligarchs and Clans form of corruption, by contrast, seems likely to induce frequent and unpredictable deviations from official public policy. Meanwhile, Official Moguls corruption, at least in its centralized form, may lead to very predictable public policy but also to large-scale redistribution of wealth to high-level officials.

These syndromes also seem likely to vary in terms of their susceptibility to legal interventions. In Elite Cartels cases there are public officials capable of effectively enforcing anti-corruption norms, whereas this is less likely in countries afflicted by Oligarchs and Clans or Official Moguls corruption. Influence Markets pose still different problems because they often involve legal behavior. Consequently, effective legal responses to Influence Markets involve formulation of new anti-corruption norms rather than enforcement of existing norms. The discussion that follows will focus on the other three syndromes.

The Global Model for Anti-corruption Law

The beginning of the 21st century marked global convergence on a single model for states' anti-corruption laws. That model is embodied the United Nations Convention against Corruption (UNCAC),[7] which was adopted in 2003 and came into force in December 2005. Although there are other international treaties dealing with corruption, none are as comprehensive as UNCAC.[8]

[6] Norad Evaluation Department, *Contextual Choices in Fighting Corruption: Lessons Learned* Report 4/2011 – Study, p. 64; Johnston, *Syndromes of Corruption*, pp. 115-117.

[7] United Nations Convention against Corruption, 2349 UNTS 41, in force 14 December 2005.

[8] See: African Union Convention on Preventing and Combating Corruption, July 11, 2003, 43 ILM 5 (2004); Council of Europe, Criminal Law Convention on Corruption, Strasbourg, 27 January 1999; Council of Europe, Civil Law Convention on Corruption, Strasbourg, 4 November 1999; and, Inter-American Convention Against Corruption, March 29, 1996, 35 ILM 724 (1996).

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UNCAC requires states to take various steps to prevent and sanction corruption on the part of their own public officials. The recommended forms of prevention include transparency in public administration, codes of conduct for civil servants and requirements that public procurement processes be open, competitive and accountable. The Convention also contains somewhat more specific requirements to criminalize bribery, embezzlement, abuse of power and laundering of the proceeds of corruption (Articles 15, 17- 23) and to treat corruption as a factor in civil proceedings such as proceedings to annul or rescind contracts. At the institutional level, a notable feature of the Convention is that it encourages states to adopt independent anti-corruption bodies (Articles 6, 36).

UNCAC also encourages states to assist in efforts to control bribery of foreign public officials and officials of international organizations. The key provision here is Article 16, which encourages states to make bribery of foreign public officials a criminal offence. An entire chapter (IV)is devoted to encouraging states to cooperate in proceedings involving other states, through extradition, prisoner transfers, mutual legal assistance, joint investigations etc. Another chapter (V) contains innovative provisions requiring parties to co-operate in both the recovery of assets that qualify as either proceeds or instruments of corruption and in the collection of compensatory damages for harm caused by such corruption. In these respects UNCAC builds on a foundation laid by the US Foreign Corrupt Practices Act (FCPA)[9] and, later, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[10] The FCPA, enacted in 1977, prohibits bribery of foreign public officials and requires all sorts of payments to be accounted for properly. The OECD Convention, concluded in 1997, requires its signatories to enact prohibitions comparable to those found in the FCPA and to cooperate in international proceedings.

International financial institutions' anti-corruption policies also represent an important component of the global anti-corruption regime. Those policies focus on ensuring that the proceeds of grants or loans are not used for corrupt purposes. The policies include detailed procurement codes and procedures for cancelling agreements with firms or governments found to have engaged in improper activity and disqualifying guilty firms from receiving further funds. International financial institutions, in concert with other actors, have pressed developing coun-

[9] *Foreign Corrupt Practices Act of 1977*, Pub. L. No. 95-213, § 102,91 Stat. 1494, codified as amended at 15 USC §§ 78m(b), (d)(1), (g)-(h), 78dd-1, 78dd-2, 78dd-3, 78ff; amended by Foreign Corrupt Practices Act Amendment of 1988 (part of Omnibus Trade and Competitiveness Act of 1988), Pub. L. 100-418, 102 Stat. 1107, 1415 (1988), and International Anti-Bribery and Fair Competition Act of 1998, Pub. L. 105-366, 112 Stat. 3302 (1998).

[10] Organization for Economic Cooperation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 21 November 1997, 37 ILM 4 (1998).

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tries to adopt international norms concerning government procurement,[11] including those set out in instruments such as the UNCITRAL Model Law on Procurement of Goods, Construction and Services[12] and the World Trade Organization's Agreement on Government Procurement.[13] Many of those norms are clearly designed to prevent corruption. For instance, the Agreement on Government Procurement generally requires open competitive bidding; acceptance of the lowest qualified tender; the establishment of procedures for bringing challenges to the procurement process before an independent tribunal and abandonment of discrimination in favor of local suppliers.

Optimistic Claims

Optimistic assessments of anti-corruption law share the view that concerted legal action, by both domestic and foreign actors, can make a meaningful contribution to reducing the problem of corruption. There is little concrete evidence to support this belief, but it is sustained by a combination of anecdotes and theoretical analysis.

As far as anecdotes are concerned, the story of Hong Kong's anti-corruption reforms serves as something of a founding myth for the optimistic view of anti-corruption law. In 1973 corruption was, by all accounts, rampant in Hong Kong. The police force was especially notorious, with syndicates of police officers banding together to extort payments from both legal and illegal enterprises. In the middle of that year, however, a senior police officer named Peter Godber fled to Britain while under investigation for having amassed large amounts of unexplained wealth. The ensuing outcry led to the creation of a new anti-corruption agency, the Independent Commission Against Corruption (ICAC). The ICAC was independent of the police force and reported directly to the Governor. The ICAC adopted a three-pronged approach to anti-corruption efforts, but the initial priority was enforcement of criminal prohibitions, beginning with a concerted effort to prosecute members of the police syndicates. The other two prongs were public education and the prevention of corruption through consultation with legislative drafters and government departments. The impact of the ICAC was dramatic. Immediately after its establishment, the number corruption incidents reported

[11] Christopher McCrudden and Stuart G. Gross, 'WTO Government Procurement Rules and the Local Dynamics of Procurement Policies: A Malaysian Case Study', in: 17 *European Journal of International Law* (2006), p. 151.

[12] United Nations Commission on International Trade Law, UNCITRAL Model Law on Procurement of Goods, Construction and Services, 15 June 1994.

[13] Agreement on Government Procurement, 15 April 1994,WTO Agreement, in force 1 January, 1996.

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more than doubled.[14] As for the police syndicates, by mid-1977 the head of the ICAC reported to the Governor that 'no major syndicates were known to exist'.[15] Survey data suggests that 'by the mid-1980's (or late 1980s, at worst) corruption in government was no longer a routine practice.'[16]

The Hong Kong ICAC story has two noteworthy transnational aspects. First, in 1974 Hong Kong was a British colony and its Governor, Murray MacLehose, was a Scottish career diplomat appointed by the Queen. MacLehose was the prime mover behind the creation of the ICAC, and, although he was the chief executive of the colony, he also undoubtedly qualified as a foreign actor. Second, the most high-profile anti-corruption case handled by the ICAC in its early years was the prosecution of Peter Godber, who was extradited from England in 1975. This prosecution clearly would not have been possible without the assistance of the UK police and courts.

The ICAC case is exemplary because it shows the multifaceted role that law might play in response to corruption. The case teaches that law has the potential not only to influence the incidence of corrupt activity but also to shape beliefs about corruption—that is, beliefs about what counts as corrupt activity, about the prevalence of such activity, and about the extent to which it ought to be condemned.

When it comes to influencing the incidence of corruption, law, first, defines *opportunities* for corruption by assigning power among public officials and defining the appropriate ways of exercising that power. Second, legal sanctions create *incentives*. Imprisonment, fines, awards of damages, asset forfeiture, avoidance of contracts, debarment – laws that impose these sanctions for engaging in corrupt activity create incentives to avoid it. Third, law provides a source of *moral instruction*. Many people are influenced in part by a desire to do the right thing. Laws, including both legislation and rulings issued in the course of adjudicating individual cases, delineate the boundaries between acceptable and unacceptable behavior. Fourth, legal norms can require disclosure, and thus legal processes can be sources of *information*. Fifth and finally, the ICAC case demonstrates the potential benefits of foreign involvement in both lawmaking and law enforcement.

The ICAC's preventive efforts exemplify the ways in which institutional design, including through legal reform, can limit opportunities for officials to engage in corruption. For example, when Hong Kong legalized off-track betting it instantly eliminated the need for payoffs to the police and thereby reduced opportunities for police corruption. On a larger scale, Chile's success in controlling corruption has been attributed in part to constitutional reforms that expanded the budgetary

[14] Melanie Manion, *Corruption by Design: Building Clean Government in Mainland China and Hong Kong* 2004, pp. 35-36.

[15] Quoted in Manion, *Corruption by Design*, p. 40.

[16] Manion, *Corruption by Design*, p. 72.

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authority of the Executive and limited Congress' ability to enact legislation designed to benefit specific constituencies.[17] Finally, Brazil's *ficha limpa* ('clean record') legislation illustrates yet another way in which law can define opportunities for corruption. That legislation, passed in May 2010, bars people who are convicted of violations of electoral statutes or crimes involving the use of public funds from running for public office.[18]

The most familiar effect of law, however, is the creation of incentives. Hong Kong's crackdown on police corruption was presumed to be effective in large part because it led to a dramatic increase in the probability of punishment and a corresponding decline in incentives to engage in corruption. Singapore's legal system is also known for creating high-powered incentives to refrain from corruption.

Hong Kong's experience is also consistent with the idea that law serves as a source of moral instruction. The ICAC's investments in educational programs were premised on the idea that simply explaining the concept of corruption to the public would discourage misconduct and encourage reporting. When the ICAC was created there was an unusually strong need for this kind of instruction. Many residents of Hong Kong in 1973 were migrants from mainland China who actually did not know what the law demanded of police officers and other public officials. The combination of the education program and efforts to publicize prosecutions served to change popular perceptions of what is appropriate conduct.[19]

The Hong Kong experience also illustrates law's informational role. Legal proceedings can disseminate information about who-took-what, who-paid-how-much-to-whom, or who-was-friends-with-whom. Most legal proceedings require such information to meet a fairly high standard of proof, meaning that it tends to be fairly reliable. These kinds of information not only shape beliefs about the prevalence of corruption, but can also trigger various sorts of non-legal sanctions against the people whose misbehavior has been disclosed. More recently, lawmakers have begun to adopt substantive norms that require transparency in government and disclosure of public officials' income and assets.

Finally, the story of the ICAC provides historical support for the idea that foreign actors might play key roles in both motivating reforms to domestic anti-corruption laws and combating transnational corruption. The plausibility of this claim rests on the idea that local law enforcement institutions confront two significant obstacles in cases of transnational corruption.[20] First, much of the evidence

[17] Norad Evaluation Department, *Contextual Choices in Fighting Corruption*.

[18] The Economist, 'Brazil's Congress Cleaning Up: A campaign against corruption', 10 July 2010, p. 36.

[19] Manion, *Corruption by Design*, pp. 31, 46.

[20] See generally Kevin Davis, 'Does the Globalization of Anti-Corruption Law Help Developing Countries?', in Julio Faundez and Celine Tan (eds.), *International Economic Law, Globalization and Developing Countries* 2010, p. 283.

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of wrongdoing will be located overseas. Obtaining that evidence will require navigating a foreign legal system, and will typically demand a great deal of time and expensive legal expertise. Second, it is difficult for local institutions to impose meaningful sanctions on actors who engage in transnational corruption – including foreign bribe-payers, foreign institutions that help launder proceeds of corruption and the corrupt officials themselves – if the relevant individuals and assets are located in foreign jurisdictions. Foreign institutions can help to overcome both of these obstacles by criminalizing the bribery of foreign public officials and the laundering of the proceedings of corruption; providing mutual legal assistance; helping to recover stolen assets; extraditing fugitives and refusing to enforce corruptly-procured contracts. At the margins, fear of punishment by foreign actors diminishes the incentives for public officials and their potential accomplices to engage in corruption. Condemnation by foreign institutions might also play a role in shifting attitudes toward corruption, forcing both officials and the general public to re-examine beliefs about what should and should not be tolerated. Finally, information generated by foreign legal institutions can be used by local law enforcement agencies and the media, thus serving as a catalyst for domestic law enforcement.

It is often implicitly assumed that foreign institutions will be less vulnerable to political capture than local institutions. This assumption seems reasonable to the extent that the institutions in question have in fact proven to be relatively immune to corruption in dealing with purely local cases. This assumption is less obviously valid, however, when the relevant foreign institutions are located in a country that is itself struggling with corruption. For instance, given the amount of foreign investment undertaken by Chinese companies, vigorous enforcement of China's prohibitions on bribery of foreign public officials might have a significant impact on overall levels of transnational bribery. But it is an open question whether China's anti-corruption institutions can be relied on for effective enforcement. Even in these situations, however, it may be sensible to have faith in foreign institutions. Physical and social distance may limit opportunities for corrupt officials and foreign law enforcement officials to form the kinds of personal relationships that help to sustain corrupt relationships.

As an aside, the arguments in favor of relying on foreign actors to hold public officials accountable for corruption parallel the arguments in favor of using foreign or international tribunals to hold officials accountable for human rights abuses.[21] In each situation, the argument is that foreign intervention is required to overcome impunity. Increasing acceptance of these kinds of foreign intervention in the hu-

[21] See generally Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* 2011.

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man rights context might very well smooth acceptance of foreign anti-corruption interventions.

Skepticism about Anti-Corruption Law: An Overview

Anyone versed in the literature on law and development is intimately familiar with objections to the optimistic assertion that law plays a significant causal role in achieving social change. In their landmark critique, David Trubek and Marc Galanter associated this kind of optimism with a model they called 'liberal legalism.' In a now-famous passage, they summed up the limitations of the liberal legalism model in the following terms:

> Empirically, the model assumes social and political pluralism, while in most of the Third World we find social stratification and class cleavage juxtaposed with authoritarian or totalitarian political systems. The model assumes that state institutions are the primary locus of social control, while in much of the Third World the grip of tribe, clan, and local community is far stronger than that of the nation-state. The model assumes that rules both reflect the interests of the vast majority of citizens and are normally internalized by them, while in many developing countries rules are imposed on the many by the few and are frequently honored more in the breach than in the observance. The model assumes that courts are central actors in social control, and that they are relatively autonomous from political, tribal, religious, or class interests. Yet in many nations courts are neither very independent nor very important.[22]

This set of ideas is consistent with a well-established tradition in the political science literature of treating corruption as a symptom of overall economic and political underdevelopment rather than of defective institutional design. Treisman defends this viewpoint on empirical grounds.[23] His statistical analysis finds that levels of perceived corruption for the period of 1996 through 1998 were explained mainly by the following factors: national income, whether the country was a former British colony, the percentage of Protestants in the population, whether the country had been a democracy continuously since 1960, openness to trade (although the effect was small), and whether the country was a unitary (as opposed to federal) state. Most of these factors are immune to the influence to short-term policies. Thus he concludes that, 'Controlling for predetermined factors that themselves influence the choice of policies, policy decisions themselves either have little significant impact on corruption or else work painfully slowly.'[24]

[22] Trubek and Galanter, 'Scholars in Self-Estrangement', at pp. 1075-1076.

[23] Daniel Treisman, 'The Causes of Corruption: A Cross-National Study', in: 76 *Journal of Public Economics* (2000), p. 399.

[24] Treisman, 'The Causes of Corruption', at p. 441.

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The Risk of Capture

One of Trubek and Galanter's central complaints was that 'in many developing countries rules are imposed on the many by the few… .'[25] The concern here is that legal institutions will be captured by actors who represent narrow interests and will be used in ways that are incompatible with the common good.

Johnston's typology suggests three different ways in which powerful actors might be able to capture anti-corruption institutions and influence their orientation. In Official Moguls countries, officials at the top of the hierarchy are so thoroughly dominant that they and their cronies can engage in corruption with impunity. If the institutions are used at all, they are used only against enemies of the moguls. In Oligarch and Clans countries, anti-corruption institutions are not independently effective but can be used by powerful interests as effective weapons against members of other weaker factions. Thus, vulnerability to anti-corruption institutions depends upon a constantly shifting balance of power. By contrast, in Elite Cartel countries, anti-corruption institutions can be used effectively against most members of society other than members in good standing with the elite group.

There are two main ways in which this kind of external influence over anti-corruption institutions might impair their performance. First, they might be aimed at people who are not corrupt. In cases where the targets are truly innocent this kind of mis-targeting leads to obvious injustice. It also diminishes incentives to behave honestly; if people expect to be sanctioned whether they are honest or corrupt, then the incentive to be honest is diminished. Going beyond purely incentive-based arguments, this kind of injustice seems likely to undermine the moral authority and credibility of the legal system as a whole. A system that permits the innocent to be persecuted is unlikely to be regarded as a source of either moral instruction or reliable information. Finally, targeting people who are honest is a waste of public resources.

A second possibility is that capture of anti-corruption institutions will allow people who actually are corrupt to escape sanctions. People who enjoy impunity obviously have no incentive to avoid corruption. A system captured in this fashion may also struggle to retain its moral authority.

Suspicions have periodically been raised about anti-corruption institutions being used to pursue political vendettas. For instance, Larmour describes how, in December 2006,the leader of a military coup in Fijitried to use an anti-corruption campaign to disable political opponents and shore up his legitimacy without presenting clear evidence of corruption on the part of many of the targeted indi-

[25] Trubek and Galanter, 'Scholars in Self-Estrangement', at p. 1080.

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viduals.[26] Similarly, Krastev reports that in post-communist Eastern Europe, allegations of corruption slung at one another by political opponents have led both politicians and the public to obsess about corruption to the exclusion of other important policy considerations.[27] De Weaver argues that a Chinese anti-corruption campaign launched in or around 2003 was motivated in part by a desire 'to remove people loyal to former party chairman Jiang Zemin.'[28] Going further back in time, in a study focused on the Middle East and North Africa, Gillespie and Okruhlik identified many examples of ineffective anti-corruption campaigns that were either empty public relations exercises or designed primarily to target political opponents.[29]

There are also many examples of middle income countries in which corrupt officials appear to enjoy impunity. For example, according to US State Department reports, in Brazil and India, 'officials frequently engaged in corrupt practices with impunity.'[30] In these kinds of middle income countries, the problem typically is not that legal institutions are completely impotent. In fact, the State Department also reports examples of officials in these countries being accused of corruption and subjected to real legal sanctions, such as seizure of assets and dismissal from public office. Rather, the problem is that sanctions are not imposed consistently. This often stems from the judiciary being susceptible to bribery or political influence.

Alternatives to Law as a Form of Social Control

Optimists assume that a society's laws have meaningful effects on the behavior of its members. Trubek and Galanter's critique challenged this assumption as well. One of their central complaints was that 'The [liberal legal] model assumes that state institutions are the primary locus of social control, while in much of the Third World the grip of tribe, clan, and local community is far stronger than that of the nation-state.'[31] Over thirty years after this critique was published, there

[26] Peter Larmour, 'Populist Anti-Corruption and Military Coups: The Clean-Up Campaign in Fiji 2006-07', in Luís de Sousa et al. (eds.), *Governments, NGOs and Anti-Corruption: The New Integrity Warriors* 2009, p. 120.

[27] Ivan Krastev, *Shifting Obsessions: Three Essays on the Politics of Anti-Corruption* 2004. See also Daniel Smilov, 'Anti-Corruption Bodies as Discourse-Controlling Instruments: Experiences from South-East Europe', in de Sousa et al. (eds.), *Governments, NGOs and Anti-Corruption*, p. 85.

[28] Mark A. De Weaver, 'Hidden Motives in Anti-Corruption Campaign', *Asia Times Online* 29 October 2005, available online at <www.atimes.com/atimes/China_Business/GJ29Cb05.html>.

[29] Kate Gillespie and Gwenn Okruhlik, 'The Political Dimensions of Corruption Cleanups: A Framework for Analysis', in: 24 *Comparative Politics* (1991), p. 77.

[30] US Department of State, *Country Reports on Human Rights Practices for 2011* 2011.

[31] Trubek and Galanter, 'Scholars in Self-Estrangement', at pp. 1075-1076.

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remain many countries in which it still makes sense to ask whether legal institutions really are the primary locus of control over political corruption.

The answer to this question varies from country to country. In some countries, the legal system is an important means of social control. In other words, whether they are independent or not, legal institutions impose sanctions for corrupt behavior that can reasonably be expected to limit authority, deter misconduct, provide moral guidance and generate reliable information.

The People's Republic of China, however, presents a very different situation. There, control over public officials is vested almost entirely in the Chinese Communist Party (CCP) as opposed to the formal legal system. According to Fu Hualing:

> While the legal reform in China since the late 1970s may have witnessed the reemergence of a legal system which is functioning and effective in civil and commercial matters, the CCP is in direct control over matters of political significance, especially those concerning the direct interest of the Party, including corruption perpetrated by its members.[32]

The CCP has its own mechanisms for investigating and disciplining Party officials. There are also specialized legal anti-corruption investigative teams in the Procuracy. Although the CCP's investigators sometimes conduct joint investigations with their legal counterparts, the CCP has superior jurisdiction. This means that Party officials can halt proceedings by the legal authorities.

At the same time, the mere fact that the CCP's anti-corruption mechanisms are political rather than legal does not necessarily mean they are ineffective. The CCP has repeatedly emphasized its commitment to fighting corruption and does from time to time authorize the prosecution of Party members of the highest rank. On the other hand, although severe sanctions have been imposed in a few cases, punishments are generally lenient.

Countries that are more democratic than China sometimes rely on elections – another kind of political mechanism – as alternatives to legal controls over corruption. Take, for example, Argentina. Argentina's legal system is widely viewed as ineffectual at combatting corruption. One of the most high-profile failures involved a contract to produce national identity cards. The contract was awarded in 1998. In December 2008 Siemens, a German multinational company, admitted to US and German authorities that its Argentine subsidiary had paid bribes of approximately USD100 million to obtain and retain the contract. Allegations of the bribes began circulating in Argentina almost as soon as the contract was

[32] Hualing Fu, 'The Upward and Downward Spiral of China's Anti-Corruption Enforcement', University of Hong Kong Faculty of Law Research Paper No. 2011/014 (2011), available online at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1883348&>.

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awarded and were substantiated by Siemens' admissions to the US and German authorities. Nevertheless, fourteen years later not one person had been indicted by the Argentine authorities. Yet at least in this case, focusing exclusively on the absence of, or at least delay in, legal accountability would be misleading. Argentine voters were swift to punish the government that awarded the contract at the ballot box. In December 1999 voters threw the incumbent government out of power, and the successor government promptly cancelled the Siemens contract.[33]

Internalized moral norms are important methods of social control that serve as alternatives to legal norms. Some people are simply more inclined to be honest than others. This may explain why purges of corrupt agencies are sometimes effective. For example, in 2004 the newly elected government of Georgia implemented its anti-corruption platform by firing and replacing all of the members of the notoriously corrupt traffic police. Corruption declined dramatically.[34]

Moral norms do not necessarily evolve independently of legal institutions. To the extent that legal norms serve as forms of moral instruction they influence prevailing moral norms. Typically this kind of instruction is a byproduct of the more conventional activities of legal institutions, but sometimes it is quite deliberate. For example, since early in its history Hong Kong's ICAC has offered public education programs – including an extensive program aimed at school-aged children – designed to inculcate values that inhibit participation in corrupt activities and to encourage reporting.[35]

The Limits of Foreign Intervention

A third commonly cited lesson of the law and development movement is that legal reforms driven primarily by foreign actors have limited chances of success, at least not without significant input from, consultation with and participation from local actors. One reason for this is that foreign actors may lack the *inclination* to follow through on initial commitments and make sustained investments in solving another country's problems. This is a particular concern when the other country is a middle-income country and thus not a strong candidate for international redistribution. A second concern is that foreign actors acting alone often lack the *power* to have meaningful influence over the behavior of local actors. A third concern is lack of *knowledge*. Foreign actors may be inclined to prescribe reforms drawn from global templates, even though when it comes to legal institutions one size does not necessarily fit all. The current wisdom is that context

[33] Kevin Davis, Guillermo Jorge and Maira Machado, 'Transnational Anti-Corruption Law in Action: Evidence from Argentina and Brazil' (2012) (unpublished).

[34] Norad Evaluation Department, *Contextual Choices in Fighting Corruption*, at p. 68.

[35] Manion, *Corruption by Design*, pp. 43-48.

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matters and legal institutions have to be tailored to fit the needs of the societies in which they operate. But this kind of tailoring requires local knowledge that foreign actors may not possess. A fourth concern is that foreign actors may lack *legitimacy*. Sometimes local solutions are preferred and are viewed as more legitimate simply because they are local.

In the anti-corruption context, foreign actors are involved in both the design and enforcement of legal norms. First, as we have already seen, low and middle-income countries are under pressure to adopt anti-corruption laws based on the global template set out in UNCAC. Quantitative assessments of their impact support the skeptical view of externally-driven interventions. Ratification of UNCAC is not correlated with declines in perceived levels of corruption, nor is the creation of a specialized anti-corruption commission.[36] Meanwhile, the jury is still out on the effects of transnational law enforcement. The coming into force of UNCAC coincided with a very visible increase in the level of enforcement of laws against foreign bribery, particularly on the part of the United States. There have also been some successful efforts to recover stolen assets shipped overseas by officials in developing countries and even a few successful prosecutions of officials who have moved overseas. There is some evidence that laws against foreign bribery deter investment in relatively corrupt countries – which is a mixed blessing – and the actions against corrupt officials have no doubt had salutary effects. There is, however, no hard evidence linking any of these initiatives to amelioration of corruption in low or middle-income countries.[37]

There are several possible explanations for these findings. Lack of inclination may be one. This kind of law enforcement activity is expensive; even for the wealthiest countries economic self-interest weighs against devoting scarce resources to solving other countries' problems. Current data suggest that many countries exert very little real effort on enforcement. The 2010 Annual of Report of the OECD Working Group on Bribery shows that of 38 parties to the OECD Convention, only 13 imposed any sanctions for foreign bribery between the date the Convention came into force in 1999 and the end of 2010. According to Transparency International, only a handful of even those countries could be described as having actively enforced their legislation.[38]

There are also clear limits on the power of foreign actors to influence the course of events in any given country. Unlike in the case of colonial Hong Kong, sovereignty generally prevents foreign actors from directly changing domestic law. Foreign actors have more power to effect change through enforcement actions aimed at transnational corruption, although even in those cases cooperation from

[36] Norad Evaluation Department, *Contextual Choices in Fighting Corruption*.
[37] Davis, 'Globalization of Anti-Corruption Law'.
[38] OECD Working Group on Bribery, *2010 Annual Report* 2011.

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local institutions is often helpful. Yet there are limits to how much any given country's corruption problem is inherently transnational. Transnational corruption is likely to be a serious problem in countries whose wealth is derived primarily from exports of extractive resources and whose economies and financial systems are too small to hold large amounts of corruptly-procured assets locally. In those countries, it makes sense to consider foreign law a potent and important means of controlling corruption. But that is simply not the case in countries with more diversified economies and where it is practicable to hold corruptly-procured wealth in domestic assets. In other words, it may be conceivable for foreign institutions to play a substantial role in combatting corruption in Angola, but not in, say, Brazil. Yet even in the Angolas of this world, the costs of initiating transnational proceedings might be prohibitive for all but the biggest cases.

Another concern is lack of knowledge. The UNCAC approach to corruption control may be optimal, or may not be. Perhaps independent anti-corruption agencies are good for Hong Kong but elsewhere competition among less 'independent' law enforcement agencies is preferable. Perhaps prosecuting firms that pay bribes causes more harm than good by deterring investment in precisely those countries that are already struggling to control corruption. Or perhaps in an age in which communication technology provides broad swathes of the population with access to almost limitless information, transparency in government will be sufficient to check corruption without the need to resort to criminal prosecutions. Either way, without good information about local circumstance, it is quite possible that deploying global best practices in anti-corruption law will do some countries more harm than good.

Finally, there is the question of legitimacy. This is likely to become a particular concern if it becomes more common for foreign states to bring legal actions against individual public officials. At some point questions will be asked about whether such proceedings are legitimate, in much the same way that these questions are being asked about the idea of using foreign or international tribunals to prosecute individual public officials for human rights violations.

Conclusion

Despite recent trends there are sound theoretical reasons to be uncertain – neither optimistic nor skeptical – about the extent to which anti-corruption law can be used instrumentally to mitigate the effects of corruption in low or middle income countries. In this sense anti-corruption law is no different from other forms oflaw and their relation to development. Law is generally a powerful means of social control, but its significance and amenability to manipulation vary from place to place and from time to time. It is particularly difficult to generalize about the

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extent to which foreign actors can use legal tools for instrumental purposes. Under these circumstances, the trend towards convergence on a single global model of anti-corruption law seems misguided. A more fruitful approach might be to build a global regime that encourages ongoing search for anti-corruption laws that represent the best responses to the problems facing particular societies at particular points in time.

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