Two Faces of the Law: A Realistic Approach to the Role of Law in Corruptive Settings

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Problematic Aspects of Corruption Research

The Definitional Problem

As far back as 1987, Mark Philp had concluded that no one had ever devised a universal “one-line” definition of corruption;\(^1\) eleven years later nothing much had changed.\(^2\) The need for such a generally accepted “one-line” definition was so pressing that even if the feat seemed improbable, it had to be undertaken. The unifying definitions were promulgated by two influential institutions: the World Bank and Transparency International. Corruption was defined by the former as “the abuse of public office for private gain” and the latter as “the abuse of entrusted power for private gain”.\(^3\) Public and private institutions around the world have generally been willing to use these definitions because they are easy to apply; yet academia has accepted them only with mixed feelings.

From a theoretical point of view, both the first definition (explicitly) and the second (implicitly) are based on concepts which blur the real complexity of corruptive practices. Michael Johnston’s comments are eloquent: “Not only can it be difficult to agree on the meaning of ‘abuse’; it may also be far from clear what constitutes a public role or resource, or a private benefit.”\(^4\) The notions of “public” and “private” are among the most elusive social concepts that vary considerably depending on cultural, economic, political, etc. factors. “Private

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\(^2\) Johnston, op.cit. note 1, 332.


\(^4\) Johnston, op.cit. note 1, 325.
gain” actually elicits some public effect because it affects the interests not only of selected individuals but, also, the groups to which they belong, and even the majority of the population. For instance, in a totalitarian society, people tend to embezzle from the state, i.e., the property of the anonymous “others”. From the point of view of the totalitarian state, such people make unallowable private gains; from the point of view of the people themselves, these gains are a part of their wellbeing and belief of how to prepare for the future.

In short, these concise definitions presuppose undisputed practical boundaries between “public” and “private”, “office” and “individual activity”, “public gain” and “private gain”, “use” and “abuse”—all of them problematic areas even in societies with perfunctory corruption problems. For instance, the rising “government-like” duties of private institutions in most developed countries—especially in the United States—blur the these boundaries to an extent which requires a paradigmatic shift towards the concept of “private governance as public policy”.5

Further, corruption subtly merges into practices such as lobbying, the pressure of special interest groups, the implementation of partisan public policies, etc. And it depends on one’s viewpoint as to whether or not these formally legitimate practices can be interpreted as a particular “abuse of public office for private gain”.

Finally, corruptive intentions can creep into the very law-making process and result in laws benevolent to corruption. If this happens, public officials could favor selected groups/individuals without any sense of legal abuse of “entrusted power”. In such an eroded public context, the only normative landmark is justice, which transcends the rule of law6 and tests its “moral correctness” or “acceptability”.7

### The Research Background

Provisionally, corruption studies can be divided into two types: (i) tactical (short-term, more incrementally oriented); and (ii) strategic (long-term, more fundamentally oriented). The efforts of corruption studies to better meet the immediate needs of public policies gradually tend to reduce emphasis on research into strategic goals in favor of tactical ones. This helps to explain why the debate over the definition of corruption has faded away after the 1990s and why some fundamental factors have been disregarded or gone unnoticed. One of these factors is the corruptive potential of law although one should add, here, that it has not gone totally unnoticed by social thinkers. For instance, Werlin introduced the term “secondary corruption” in his 1994 work to describe partisan behavior

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