THINKING ABOUT CORRUPTION

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Abstract

In this article, corruption is analyzed as behaviour of officials who implement the law but do not treat the law as exclusionary reasons for decision-making. It is proposed that in order to understand such a failure of law, the conditions should be examined in which law is successful. Philosophical literature as well as empirical studies seem to consider that legal orders are only successful if they are either based on morality or on coercion. Both considerations also play an important role in empirical research that seeks to find remedies either in moral education or in sanctions and incentives. This article proposes a third explanation for the success of a legal order, wherein law is not seen as a restriction of freedom and power, but rather extending and transforming the competence and rights of power to officials and citizens. Therefore, both may be inclined to maintaining the legal order to which they owe their competencies. This thought experiment, in turn, generates two theoretical hypotheses that should be tested by empirical research: the first is that a legal order should confer powers to a wider range of participants to maximize stability and long-term self-interest; the second is that powers, licences, and rights should be granted liberally to avoid the situation of corrupting power due to its scarcity.

Keywords: *Corruption, Compliance, Stability, Officials, Competences.*

MERENUNGKAN KORUPSI

Intisari

Dalam artikel ini, korupsi dilihat sebagai perilaku pejabat yang menerapkan hukum tetapi tidak memperlakukan hukum sebagai alasan pengecualian dalam mengambil keputusan. Untuk memahami kegagalan hukum, hukum harus dianalisis saat sedang berhasil. Studi secara filosofis maupun empiris beranggapan bahwa perintah hukum hanya akan berhasil jika didasarkan pada moralitas atau paksaan. Kedua anggapan tersebut penting dalam mencari solusi baik dalam pendidikan atau sanksi dan insentif. Artikel ini menawarkan penjelasan ketiga untuk keberhasilan tatanan hukum, di mana hukum tidak dilihat sebagai pembatasan kebebasan dan kekuasaan. Namun, hukum memperluas dan memberi transformasi terhadap kompetensi dan hak-hak kekuasaan pada pejabat dan warga negara. Oleh karena itu, keduanya cenderung mempertahankan tatanan hukum yang menjadi tanggung jawab mereka. Hal ini, pada gilirannya, menghasilkan dua hipotesis teoretis yang harus diuji: pertama, tatanan hukum harus memberikan kekuasaan kepada peserta yang lebih luas untuk memaksimalkan stabilitas dan kepentingan pribadi jangka panjang; dan kekuasaan, lisensi, dan hak-hak harus diberikan secara bebas kepada kelangkaan kekuasaan untuk menghindari kekuasaan yang korup.

Kata Kunci: *Korupsi, Kepatuhan, Stabilitas, Aparat Penegak Hukum, Kompetensi.*

A. Corruption by Means of Law

Corruption is a widespread phenomenon that surfaces in different guises in different contexts. There is an abundance of empirical studies[1] that investigate these many forms, analysing the different social and political contexts that give rise to corrupt behaviour and the factors that increase or decrease the occurrence of corrupt behaviour. Regular surveys and monitors[2] measure the level of corruption in different countries, using different parameters and criteria as if they are unproblematic measuring sticks.

In comparison to the abundant empirical literature philosophical analyses are scarce and remain largely confined to attempts to define and conceptualize corruption.[3] This seems to be a difficult task. It is hard to detect a common core in the different forms of corruption and even harder to draw the demarcation line between what is considered corrupt behaviour and behaviour that is seen as perfectly innocent and legitimate. Do we consider the formation of cartels in the Dutch construction industry as corruption or

1 Adriaan Bedner, "Judicial Corruption: Some Consequences, Causes and Remedies" (Conference Paper, 2002 Symposium ter Gelegenheid Van Het Afscheid J. Van Olden als Directeur Van Het CILC, Leiden, December 2002.) https://hdl.handle.net/1887/18272; Adriaan Bedner, "Outside Influences on Administrative Court Performance" in *Administrative Courts in Indonesia* (The Hague: Kluwer Law International, 2001); Martin Böhmer, "An Oresteia for Argentina: Between Fraternity and the Rule of Law" in James Boyd White and H Powell (eds), *Law and Democracy in the Empire of Force* (Michigan: University of Michigan Press 2009); Deval Desai, Deborah Isser, and Michael Woolcock, "Fragile and Conflict Affected States: Lessons for Enhancing the Capacity of Development Agencies" *Hague Journal on the Rule of Law* 4, Special Issue 1 (March 2012): 54-75. https://doi.org/10.1017/S1876404512000048; J Faundez, "Legal Reform in Developing Countries", n.n. http://elj.warwick.ac.uk/global/issue/2000-1/faundez.html; John D. Hillebrand, "Review of Folded Lies: Bribery, Crusades, and Reforms by W. Michael Reisman" *Contemporary Sociology* 10, No. 1 (Jan, 1981): 101-2; Daniel Kaufmann, "Myths and Realities of Governance and Corruption" *Myths and Realities of Governance and Corruption* No. 8089. Published in: Global Competitiveness Report 2005-06 (Oct, 2005); Larissa Adler Lomnitz, «Informal Exchange Networks in Formal Systems: A Theoretical Model» *American Anthropologist*: *New Series* 90, No. 1 (1988), 90; Jon ST Quah, "Combating Police Corruption in Five Asian Countries: A Comparative Analysis" *Asian Education and Development Studies* 9, No. 2 (2019): 197; Jon ST Quah, "Leadership and Culture in Combating Corruption: A Comparative Analysis" *Public Administration and Policy* 25, No. 2 (2022), 193; W Michael Reisman, *Folded Lies: Bribery, Crusades, and Reforms* (New York: Free Press 1979) (https://archive.org/details/foldedliesbriber0000reis/page/n5/mode/2up).

2 Transparency International. "About." Transparency.org, April 16, 2024. ttps://www.transparency.org/en/about; "Corruption Perceptions Index Rank | Indicator Profile | Prosperity Data360," n.d. https://prosperitydata360.worldbank.org/en/indicator/TI+CPI+Rank.; OECD - Public Integrity Indicators. "OECD - Public Integrity Indicators," n.d. https://oecd-public-integrity-indicators.org/. /

3 A good overview is provided by Seumas Miller, "Corruption" in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta and Uri Nodelman (Stanford: Metaphysics Research Lab, Stanford University, 2023).

as a normal practice of reciprocal give and take?[4] Is there any difference between bribing politicians and financing their election campaigns?[5] Do we only speak of corruption if officials abuse their public role for private gain? Or do we extend the definition of corruption to also cover bribery of private persons? Should we confine a definition of corruption to violations of the law, or should we extend the definition to cover cases that make use of the law and even strictly abide by its rules?

In order to find our way in this intricate network of fine distinctions more conceptual analysis is needed. This article will offer a modest contribution to a philosophical analysis of corruption that goes beyond a mere definition of corruption. It is emphatically not to be read as an empirical analysis. Although, obviously philosophy should to some extent be empirically informed, the statements in this article should not be read as empirical findings but as a thought experiment that can be regarded as a proposal to formulate theoretical hypotheses that might guide further empirical study.

In this article, I will limit my analysis of corruption to only those cases in which officials make use of their official positions for personal gains. In such cases, the law is violated by means of the law itself. There are many examples of such behaviour, but in order to guide the reader's intuition and imagination, it may be good to refer to the example mentioned by Breman, who in his sociological analysis of poverty in India, refers to the Indian inspector of labour conditions who was appointed to see to it that employers complied with the new minimum wage regulations. The official did his job, and whenever he came across instances of non-compliance he told the employers that they could avoid a fine, if they would only give him a percentage of the fine.[6] I will use this example as paradigmatic for the type of corruption I would like to analyse. Interestingly, the law is obliged here in two senses: in the first place because employers who did not conform to the law were sanctioned (be it to a lesser degree than legally prescribed); and in the second place also the policy objective unbeknownst by the law (to ensure a minimum income

4 Marc Hertogh, "Crime and Custom in the Dutch Construction Industry," *Legisprudence* 4, No. 3 (2010): 307.

5 Mark Philp, "Defining Political Corruption," *Political Studies* 45, No. 3 (1997): 436.

6 Jan Breman, *The Poverty Regime in Village India: Half a Century of Work and Life at the Bottom of the Rural Economy in South Gujarat* (Oxford: Oxford University Press, 2007).

for employees) also seems to be served if the percentage demanded by the official is high enough to deter employers from extorting their employees. In both senses we can say that the law is successful: in guiding the behaviour of norm-addresses and in reaching the policy objective. Yet, we might still feel that the behaviour of such officials is unlawful. But in what respect can we say so?

In this article I will first (in section B) conceptualize corruption as the failure of law to provide for exclusionary reasons for decision-making and criticise the assumption that law is mainly seen as a restriction of power. In section 3 a thought experiment is conducted in order to show that the conferral of powers to officials may make a legal order more stable; in section 4 a similar argument is developed with respect to the free provision of rights and powers to citizens. In section 5 and 6 possible remedies against corruption are suggested: section 5 argues in favour of including participants in the legal order, section 6 argues in favour of a liberal allocation of rights and competences. Section 7 concludes.

B. Law as a Second Order Reason

The Indian inspector is paradigmatic of a wide range of corrupt behaviour in which the corrupt official makes use of the law. This raises the question: if corruption is conducted *by means* of the law[7], where is the dividing line between using and abusing the law?

In order to answer this question, we may make use of the theory of Joseph Raz who analysed the different ways in which rules can function as reasons for action and decision-making.[8] Raz distinguishes between two types of reasons, first of all, the so-called first-order reasons which directly relate to the actions and decisions to be taken. For instance, If I have to choose between visiting my sick mother, working in the office, or going shopping, I can weigh the pros and cons as first-order reasons. The situation changes when a second-order reason enters the balance of reasons. Second-order reasons tell you whether first-order reasons should be included or excluded.

7 Lomnitz, "Informal Exchange Networks."

8 Joseph Raz, *Practical Reason and Norms* (Princeton: Princeton Press, 1990); Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979), n.

Examples of second-order reasons are promises, agreements, or rules. If I have promised my mother to come, the promise overrides the other options in the sense that the promise excludes further balancing of the first-order reasons. The fact that I have promised indicates that the promise is already the result of my balancing first-order reasons; I am therefore not allowed to balance them a second time. Another such exclusionary reason is the rule that I should be at the office from 9-5. The fact that it happens to be raining or that I feel more enthusiastic about shopping (both first-order reasons) are not allowed to play a role. The authority of law, according to Raz, lies in the fact that decision-makers are guided by second-order reasons that tell us which first-order reasons should be allowed to enter into our balancing or excluded from consideration.

Applied to our inspector, we might say that for him the law only plays a part as a first-order reason but not as a second-order reason. The legal rule concerning minimum wage is obeyed, but it is not a second-order reason for action for the inspector. It is just a convenient way of lining his own pockets. The law simply did not function here as an exclusionary reason, which overrides other concerns such as profitability. If the official decides to impose the fine, the fine is not given for failure to comply with the labour law, but for the employer's failure to bribe the inspector.

Most cases of corruption can be understood in such terms, although not all of them. Bedner, analysing Indonesian courts,[9] mentions the example of judges who first decide a case by weighing the legal arguments and then accept the bribe from the party that they thought advanced the best legal arguments and would win the case. Although these judges certainly act illegally by violating the rule that prohibits judges from accepting bribes we cannot say that these judges are failing to consider the law as a reason for their decisions. They did decide the case on legal grounds and the law was therefore for them an important and even overriding reason for action. This is why Bedner did not include this behaviour in his definition of corruption.

Nevertheless, we might consider such judges to be corrupt because they have only a partial view of rules as reasons for action. Unlike the Indian inspector, these Indonesian judges do consider rules as exclusionary reasons for their decisions. However, they failed to consider their work with its

9 Bedner, "Judicial Corruption: Some Consequences, Causes and Remedies," 14.

attendant powers as being circumscribed and defined by rules. In this respect both the inspector and the judge can be said to be corrupt: they both see their jobs as their personal property and source of income rather than as formal offices with competencies that are generated *and* bound by rules.

We can now formulate our tentative concept of corruption. It comprises decisions and actions of public officials who

1. Do not take the rules that they are supposed to administer as exclusionary reasons for action and/or
2. Do not take the rules on the basis of which they execute their office as exclusionary reasons for action.

This definition, however, does not inform us on the question of when and under which conditions officials will consider the law as a second-order reason for action. In fact, the definition may only add to our confusion. Why would officials consider rules of law as exclusionary reasons in the first place? Under which conditions do officials prioritize the rules surrounding their office over their private reasons? These questions concern what we might call third-order reasons: the reasons to treat some reasons as second-order reasons.

Two types of answers usually present themselves, both of which are supported by a long and respectable philosophical tradition. The first answer is that people (should) feel a moral duty to obey the law.[10] The second is that people are coerced into obedience.[11] Both answers have found their way into empirical research as well: in order to combat corruption. moral education is recommended,[12] or a shift in financial rewards and sanctions (for instance in terms of loss of reputation or elections)[13].

Both morality and coercion are seen as necessary *additions* to law. Underlying both traditions is the view that law should be *supplemented* either by morality or by coercion in order to provide relevant reasons for action that

10 An overview can be found in Kent Greenawalt, "The Natural Duty to Obey the Law," *Michigan Law Review* 84, No. 1 (1985).

11 An attempt to rehabilitate John Austin's theory is provided by Frederick Schauer, *The Force of Law* (Harvard: Harvard University Press, 2015).

12 Olga Yurievna Adams, "Institutional Approach to Anticorruption Efforts in Taiwan, Hong Kong and Mainland China: Improving the Norms, Strengthening the Ethics," *Contemporary Chinese Political Economy and Strategic Relations: An International Journal* 3, No. 1 (April/May 2017): 247.

13 Ernie Ko, "Scandals and Reforms: Combating Police Corruption in Taiwan," *Asian Education and Development Studies* 9, No. 2 (2020): 183; Dafydd Fell, "Political and Media Liberalization and Political Corruption in Taiwan," *The China Quarterly* 184 (2005), 875.

are considered more important than private concerns. Apparently, no serious theory contemplates the possibility that law by itself might induce people to take the law seriously as a set of second-order reasons, even if these would not be supported by morality or accompanied by coercive force. This is a curious omission, and I think that it is due to the fact that the dominant assumption in the philosophy of law (both in the natural law tradition and legal positivism) is that law‘s function is to *restrain* and curb power. Not only the power of the government, but also the freedom and power of the citizens is assumed to be restrained by law. The dominant questions are: how can we make sure that governments uphold the rule of law *even though* they know that their political goals and interests are hindered by law? How can we induce officials as well as private citizens to act in accordance with the law and *against* their self-interest? How is it possible that ‘law makes us do things we do not want to”? [14] To this question, the additional help of morality and coercion is invoked.

C. Powers to Officials

Obviously, moral education as well as incentives and sanctions should not be dismissed as irrelevant remedies against corruption. It is, however, worthwhile to question the underlying assumption that these remedies are indispensable for law to work as a relevant reason for action. Why do we cling to the view that law restrains power? An argument can be made for the opposite effect of law: law does not restrain but increases power and freedom.

The first and most obvious way in which law can increase people’s powers is by those rules that H.L.A. Hart called “secondary”.[15] These secondary rules are more than just dos and don’ts issued to citizens. They are rules about rules: they stipulate how law can be recognized as valid law, how it can be changed, and how and by whom they should be applied. While primary rules are addressed to citizens, secondary rules are addressed to legal officials and enable the legal system to function smoothly. Secondary rules are power conferring. They do not prohibit actions but make them possible. Hart pointed out that without such secondary rules, society will suffer from

14 Schauer, *The Force of Law*.

15 HLA Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), chapter V. See also the discussion at p. 37 where Hart discusses the possibility of law without sanctions.

uncertainty about what counts as law, from an inability to adapt itself to changing circumstances and from inefficiency because disputes will linger on forever.

I would add to this that Hart's secondary rules not only help to make the law more efficient and more certain. They also allow the law to sustain itself, and even to expand and to replicate. A small thought experiment may serve as an argument. Consider the very simple situation of a monarch or tribal leader who has gained his position through success in war. In order to impose his will on his followers, such a leader may rely on coercion and force but repeated use of such means costs money and energy. Instability is endemic. As soon as opponents gain more weapons they will seize the opportunity to dethrone the leader (and they will do so the more they have been the victims of his power).

It is easier for the leader to rely on moral support. Such cooperation can be secured if his followers agree with his rule or with his worldview and moral convictions. However, such moral support is no less volatile than coercion. Agreement on such matters is not always possible and if it is, it is usually limited in scope. Any attempt to widen the circle of adherents beyond those who share the particular morality of a tribe or country, risks ending in disagreement. So, both coercion and morality have difficulty in supporting a normative order that has some stability and continuity in time, and that is capable of extending itself beyond the confines of immediate group members. They are necessarily limited in time as well as in scope.

This problem can be solved by the creation of a class of officials who have the power to make and change the rules. At first sight, one might think that such a transfer of power from the leader to the officials might diminish his power. But power is not like a cake that is divided and eaten. Unlike cake, power does not diminish but *increases* as soon as it is shared. As soon as the monarch trusts his clerks to administer the realm he does not merely give away his power and right to rule, but he confers this power by binding it to conditions. The officials have the power to make and change rules *on the condition* that they conform to the rules attached to their office. If they don't, the rules they make are simply not valid. That means that they can only exercise their powers effectively to the extent that they conform to the

rules attached to their offices, (which, in such a simple order, means that they conform to the wishes of the monarch). This is the first way in which law helps monarchs to effectively increase their power. Instead of relying on one's force or on one's persuasive powers a whole class of officials is created who act in the monarch's name and interests.

The second way in which law increases such a leader's power is that these officials really have something to lose if their leader's position is undermined. If the power of the monarch crumbles, officials risk losing their own. To the extent that officials want to *remain* legally competent and enjoy the powers and rights they would otherwise not enjoy at all, they have an interest in the continuity of his reign. The power of the monarch is therefore not diminished but multiplied by the officials who depend on the monarch and, more importantly, act according to his rules.

This little thought experiment suggests therefore that by imposing conditions on the exercise of powers these powers are increased both in time and in scope. In time, since officials know that they will only remain in charge of their office as long as they will remain loyal to the conditions that were imposed on them. In scope, because the benefits of obtaining these powers will attract more people who will have an interest in enjoying similar powers and who are therefore probably willing to conform to the conditions that are attached to such powers.

One may object to this imaginary sketch that it is not necessary to confer powers on officials by means of rules. As was long-standing practice, monarchs may also seek to assure themselves of loyal officials by *giving* them the titles that belong to their office, either as a reward for past services or in the hope of future allegiance. However, it is not farfetched to assume that such bribery is less stable than appointment by means of rules since it makes loyalty dependent on the resources of the monarch. Moreover, bribing the officials sends the signal that the office comes 'cheap': As is well documented in the literature on exchange theory[16] buyers inevitably lower their status.

For my purpose here it is important to see that the introduction of

16 Aafke Komter, *The Gift: An Interdisciplinary Perspective* (Amsterdam: Amsterdam University Press, 1996); Ibid; Lomnitz, "Informal Exchange Networks in Formal Systems: A Theoretical Model"; Mark Granovetter, "The Social Construction of Corruption" in *On Capitalism*, ed. Victor Nee and Richard Swedberg (Stanford: Stanford University Press, 2007).

secondary rules not merely restrain power. Indeed, the officials who exercise their powers can only do so on the conditions that are attached to their office. But still, we cannot conclude from this that their power is curbed. The simple truth is that without such constraints they could not enjoy this power in the first place. Moreover, it is not only the recipients of these powers who benefit but the power of the monarch is also increased by distributing it among a number of officials.[17]

D. Powers to Citizens

As I indicated above, the story above is a thought experiment and not a description of a historical development. The purpose of this thought experiment is to make room for the conceptual possibility that legal orders are not necessarily based on *either* morality *or* coercion. Instead, a plausible story can be told in which the creation of rights, immunities, and competencies bring about a normative order that is supported by its participants because they have a (self-regarding) *interest* in its maintenance both vertically in time and horizontally in scope.

Let us now extend our thought experiment and think about a legal order that may contain rules that not only confer powers on officials but *also on citizens*. The very term "citizen" can be understood as a reference to the possession of legal powers, immunities, rights, duties and competencies. In a functioning legal order, citizens do not only lead a physical existence but are also represented as *legal persons*. And as such they are a little bit like officials. Citizens who marry or make contracts thereby act and change legal reality: they have legal agency. Again, it is important to note that such legal agency does not merely restrict freedom. Without such legal agency, it is simply not possible to marry, sell, buy, take out a mortgage, or set up a business.

Domingo de Soto[18] eloquently pointed out the disastrous effects of a normative order in which people are deprived of legal agency. If it is difficult

17 The argument is elaborated in Pauline Westerman, "Evolution by Replication of Deontic Units" in *Research Handbook on Legal Evolution*, ed. Wojciech Załuski, Sacha Bourgeois-Gironde and Adam Dyrda (Cheltenham: Edward Elgar Publishing 2024); Pauline Westerman, "Weaving the Threads of a European Legal Order," *European Papers - A Journal on Law and Integration* 8, No. 3 (2024): 1301.

18 Hernando De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000).

or impossible to take out a loan or mortgage or to give a legal existence to one's enterprise, this may lead to economic decline. He pointed out that poverty is not a lack of physical goods but a lack of formal and legal representation of such things *as property*. Without such a representation money is condemned to remain what he called "dead capital"; it cannot grow as long as it cannot be used as an investment. In economies, where access to the legal world is limited or blocked, for instance, by excessive bureaucracy, trade is necessarily confined to those whom one knows and can trust and can therefore only flourish in local contexts. The lack of formal and legal representation hinders long-distance trade with unknown partners.[19]

The pitiful state of people who are not formally represented as legally competent agents can be witnessed in the case of illegal immigrants who, in some countries are even denied access to hospitals because they are not represented on paper. They have no legal personality, which is the same as saying that although they clearly live, they have no *valid* existence. As such they cannot be protected from harassment, violence, and disease; their rights are not protected by law and others don't have the duty to respect them. Without formal recognition as a legal person, life is indeed "nasty, brutish and short" as Hobbes famously wrote.

It is reasonable to assume then that citizens have an interest in participating in the legal order. If they are excluded from the network of legal relations, they lack legal existence which curtails their agency. Their power to set up business, to be heard in court, and even to leave their property to their descendants is dependent on the position that is assigned to them by the legal order.

It should be noted that not only citizens profit from being endowed with legal agency. Here again, the benefit is reciprocal: the legal order also gains in stability from the fact that power is distributed among a large number of agents. In fact, the same mechanism as the one depicted above with the fictional monarch can be expected to apply here again. The more people who benefit from the rights and powers conferred by the legal order, the more they

19 Yugank Goyal and Pauline Westerman, "A Short Note on the Validity of Rules Guiding Informal Markets" in *Legal Validity and Soft Law*, Vol. 122, ed. Pauline Westerman and others (New York: Springer International Publishing, 2018).

will be interested in the continued existence of that very legal order and the more they will be willing to comply with the conditions that are essential to their enjoyment of those rights. Non-compliance will not only involve the risk of sanctions, as is the case of any coercive order. It will also ultimately lead to the demise of the order that provides them with what makes life worth living.

The sheer quantity of participants in such a normative order brings about another effect. The more participants who conform, the more other participants can count on their behaviour. Even those who are complete strangers to each other will be able to trust each other and interact with each other, because they know that they are acting under the same rules and conditions and therefore they know what to expect from one another. A network of stabilised reciprocal expectations will emerge. The wider the circle of participants, the more stable the legal order will become. [20]

The emergence and growth of legal orders can be understood as a self-reinforcing process. In this respect legal orders are not so different from social media platforms such as Facebook which are also dependent on the number of members. The more people who are connected to a particular platform, the more attractive it is to become a member as well because of the increased opportunities to meet and talk to other people outside one's own immediate circle of friends. In both legal orders and social media attractiveness leads to inclusiveness which in turn leads to attractiveness and so on.

E. The Importance of Inclusion

The comparison with social media platforms guides us to a possible understanding of why law is actually followed even if it goes against other considerations and short-term private interests. But it also suggests a possible explanation for the *failures* of law as well as an understanding of the dynamics of corruption. These failures can only be understood if we take into account that legal systems rarely enjoy a monopoly. Usually, they compete with other normative orders, maybe not full-fledged 'legal' ones but orders that are equally capable of conferring rights, duties, immunities, and other such deontic entities. In many normative orders, such deontic entities are bundled

20 Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (Oxford: Oxford University Press, 2013).

into roles.

For instance, in matrilineal kinship systems[21] the term "uncle" is not only a term for one's father's brother but denotes a role consisting of a bundle of rights and duties. Uncles have the right as well as the duty to marry the widow if their brother has died, they have the obligation to take care of the education of their nephews, and they also have a say about the dowry of their niece. All these are rights and duties that together make up the uncle's agency. Like legal competencies these powers do not merely restrict; they make actions possible which would not be possible without such powers. An uncle who neglects these duties loses his esteem[22] as well as *agency*: the ability to influence affairs.

The discussion in legal theory has so much focused on the perennial question of how to *distinguish* law from these other "non-legal" systems and orders that the existence of these orders *as possible rivals* of the legal order has not been sufficiently analysed. Yet, many so-called `failed states'[23] have not failed as such but have failed *in their competition* with these rivals, such as customary law or tribal and religious orders.[24] The rules of the legal systems in such failed states are not considered exclusionary reasons because they collude with exclusionary reasons that are derived from other normative orders.

Usually, people participate in multiple normative orders. The legal official is also and simultaneously a father, neighbour and the chairman of the football club. If we take this fact as a starting point for a theoretical reflection on corruption it is not so far-fetched to think that he will feel more inclined to adapt his behaviour to that order which he *thinks* might be the most advantageous: i.e. might give him the best possibilities of gaining esteem and agency in the long run. The Indian inspector with which I started this

21 Kathrine Starkweather and Monica Keith, "One Piece of the Matrilineal Puzzle: The Socioecology of Maternal Uncle Investment" *Philosophical Transactions of the Royal Society B: Biological Sciences* 374, No. 1780 (2019), https://doi.org/10.1098/rstb.2018.0071.

22 Geoffrey Brennan and Philip Pettit, "The Hidden Economy of Esteem," *Economics and Philosophy* 16, No. 1 (April 2000): 77.

23 Daron Acemoglu and James A Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (London: Profile Books, 2012).

24 Lomnitz pointed out that these rivals often run parallel, as is the case in a formal legal hierarchy which parallels the hierarchy of informal patron-client relations. See Lomnitz, "Informal Exchange Networks."

article, is lining his own pockets but it would be a mischaracterization to label this as `mere' self-interest. It is probably his interest as a member of *other* normative systems that guides his behaviour. He may be the *pater familias* of an extended family whose life and prosperity depend on his ingenuity. The responsibilities, promises, agreements he has made in that capacity are for him second-order reasons that trump other considerations. Moreover, to abandon this duty could deprive him of his status in that order. No wonder that the rules of the official system become less important; they become at best one of the many first-order reasons.

In most cases the choice between the different normative orders is not so difficult. Legal orders, by virtue of their size alone, are usually preferable to informal localized orders, because the rights that are provided by such others extend over more participants and connects one to a great many people that would otherwise be out of reach. In fact, that is why the inspector actually carries out his job. He would simply have no access to these employers without the legal system.[25]

However, the fact that a percentage of the fines are pocketed by the inspector, thus securing his position in the rival order of the extended family, may indicate that he does not perceive the formal legal order as a *stable* source of income and power. Further empirical analysis is obviously needed but we can hypothesize that the inspector cannot count on the state to reward him for his compliance with promotion –or increased powers- in the future. The inspector may therefore be wise to enrich himself as quickly as possible. This does not bring him only material and short-term benefits but also long-term immaterial benefits, namely (non-legal) power which rests on the much more secure basis of the network of (extended) family and friends, that he will be able to bind by virtue of his generosity. In this case it would be more advantageous to act as a generous uncle and to establish an informal position, which is more secure than the unpredictable and insecure power he will receive in return for obeying a distant and weak state.

If this hypothesis would be empirically supported, we might draw some important lessons. In the first place we might gain a better diagnosis

25 Ibid.

of the problems of corruption. The problem with corrupt behaviour is not so much that it is 'immoral'. In fact, it is not so immoral if the inspector's sick niece can be helped. The problem of his behaviour is that it undermines the credibility of the legal system from which his powers derive. By failing to abide by the conditions on which his formal powers rest, the inspector turns enforcement of the rules into an arbitrary affair and undermines the stability of the legal order. Different inspectors with different loyalties and different needs may require different percentages or may even fail to enforce the rules at all. Rights may not be given freely but in return for payment which implies that people cannot *rely* on them and cannot appeal to the court. This will surely reduce the attractiveness of the legal order and people will turn to other -potentially more stable- normative orders to secure rights and powers, even if they are more `local' and less inclusive. Again, a self-reinforcing dynamic seems plausible: allegiance to one's own community will from now on be perceived as more important than the rule-bound powers and duties towards distant strangers.

The realization that the formal legal order is one among many and that there is ongoing competition between normative orders both horizontally (number of participants) and vertically in time (continuity/stability) has some implications for the remedies against corruption. It is often said that raising salaries would help. But it may be more effective to convince officials that they can count on their current sources of power and income in the future as well. This can only be done by instilling confidence in the stability of the formal legal order.

But this is the most difficult task of all. Indeed, the corruption of the individual inspector signals to others that he appears to have little faith in the formal legal order as a sustainable order, thereby undermining the credibility of the system as a stable order. Others will therefore be tempted to copy his behaviour. Corruption is contagious because it reinforces instability, while instability breeds more corruption. Again, this is a self-reinforcing mechanism.

F. The Importance of a Liberal Allocation of Rights and Competences

As I hypothesized in section B the legal order could be strengthened

by inclusion. By including a large number of participants, its attractiveness to newcomers is increased and the importance of competitive orders may be reduced. As I indicated above, this does not only imply the inclusion of physical persons of flesh and blood but also the inclusion of such people *as legal persons* with sufficient legal capacity. This insight gives room for a second hypothesis: namely that the powers, rights, immunities, etc. themselves should also be distributed liberally in order for the legal order to become stable and even expand.

Rights and powers, but also licences, certificates, registers, and all forms of legal recognition are not like material benefits. Unlike cakes which diminish in size if they are distributed to a large amount of people, rights can in principle be given generously to all. They don't dwindle in size or importance. On the contrary. If all citizens are given the right to set up a business, buy insurance or get a driving licence if they play by the rules, there is no need for citizens to bribe officials.

Legal systems that grant such rights only to the elite, or that exclude certain ethnic groups or classes from legal representation, tend to be prone to corruption. De Soto, mentioned above, has calculated for different countries how many years of bureaucracy one has to endure in order to set up an officially registered business. The more difficulties they encounter, the more people revert to informal arrangements; their shops, vans, and land remain unregistered. They may acquire certain rights under unofficial or customary law, but these rights often remain local and limited in scope.

In many European societies, such alternatives to the formal legal system are much less readily available, and the legal system enjoys a (near) monopoly. But notice how this is done! Not by making its benefits (powers, recognition, certificates, etc.) very scarce, as in bureaucratic countries, where they are given only to the lucky few or to paying citizens. But by efficiently providing these licences and rights to all citizens. This makes it unnecessary for citizens to opt for informal arrangements. They will choose the official and safer, more stable way. In this way, rival or informal sources of power will be further undermined, and state power will increase. This is why it could be a dangerous policy to deny citizenship to immigrants; because they cannot do without these benefits, they may establish alternative normative orders or

strengthen existing ones, thereby undermining the monopoly enjoyed by the state. Not the monopoly of force, but the monopoly of power distribution.

It would therefore be interesting and highly relevant to test the hypothesis that the stability of a normative order is based on the degree to which it succeeds in distributing power. It is likely that the more people enjoy rights and powers, and the more people expect to be granted such powers, the more people will have an interest in the maintenance and development of such a legal order, and the more people will orient themselves towards the rules that organise the distribution of powers. This in turn will increase the power and scope of the legal order, making it a more attractive alternative to many informal smaller networks based on personal reputation and informal forms of leadership, which necessarily remain a local affair. It is more than likely that the more a legal order succeeds in binding together people who are strangers to each other, the more power it will wield and multiply.

To test such a hypothesis, however, we need to bear in mind that the success of a normative order is determined not so much by its actual performance as by the extent to which people *believe* it will be stable and provide future benefits. The rapid collapse of regimes, even when they still have a strong army or police force, seems to point in this direction. The reason they collapse is that people no longer believe that these regimes will provide future benefits, nor that they will be able to guarantee existing powers and rights. The situation is similar to a stock market crash. Once officials no longer believe in the stability of the legal order, they will prioritise short-term interests over compliance, which in turn signals to others that the order is about to crumble. And as people begin to defect, the effectiveness of the legal order will decline even further. An example of such a rapid collapse is the regime change in Afghanistan with the victory of the Taliban.

G. Conclusion

In this article, I tried to develop a theoretical framework by means of which corruption can be analysed, researched, and understood. Corruption is not to be understood as a mere violation of the law. Rather, it should be analysed as the failure of the law to provide exclusionary reasons for legal

decision-making. Rules that apply to the case at hand as well as rules that pertain to the legal office may be followed occasionally by the corrupt official, but do not function as reasons that trump other reasons and considerations.

Such failures can only be understood once we have an understanding of the opposite: the conditions in which legal rules successfully guide the behaviour of officials and do provide exclusionary reasons for their actions and decisions. In the philosophy of law, two main factors for such a success are highlighted. A successful legal order is regarded as either resting on morality or as being based on coercion. What these two options have in common is that law is regarded as a device that curbs freedoms and restrains powers.

Consequently, corruption is analysed either as a lack of morality or as the failure of the law to exercise sufficient coercive power. Both assumptions play an important role in empirical studies of corruption.

In this article, I suggested a third possible pillar to account for law's success in providing reasons for action. That third pillar consists of long-term self-interest on the part of officials and citizens and starts from the assumption that by law men's powers are increased and multiplied instead of restrained. By means of a thought experiment a plausible story can be told in which officials and citizens weigh their chances of gaining and maintaining powers by law. If they think it is likely that a legal order can grant them powers and that such rights and powers can also be secured in the long run, they have a reason to treat the rules of such orders as exclusionary reasons for action. If they lack such a conviction they will exploit the legal order for short-term gain and try to achieve a more stable status in one or the many rivalling normative orders.

To the extent that this thought experiment is supported by empirical evidence, two further hypotheses can be developed about the remedies for corruption. First, we can hypothesise that in order to combat corruption, there should be a liberal distribution of rights, powers, and responsibilities. If licences and certificates, but also voting rights and passports, are granted on condition that people comply with certain conditions and rules, such rules will be reinforced. If they are not accessible, or only accessible to a limited extent, they become a commodity for which people have to pay.

Second, these powers should be made available to a wide range of

participants. Failed states tend to be those in which political power is reserved for an elite or a particular ethnic group, to the exclusion of others. Inclusiveness, on the other hand, prevents the emergence of alternative orders that could become formidable rivals in the long run. Moreover, the more people are attracted, the more credible the promise of such an order becomes, enabling and facilitating links with other participants.

Third, and probably most importantly, in order to be successful in guiding people's behaviour, normative systems should be *perceived* as being stable in the long run. Acquired rights should not be withdrawn, powers should be secure. Secure prospects of future benefits make a normative system more attractive than anything else.[26]

Obviously, all these statements should be corroborated by empirical research. This contribution only serves to carve a niche for such research. As long as the law is seen as either resting on moral foundations or as organised coercion, as long as the law is seen as restraining rather than creating and increasing powers, corruption remains an elusive phenomenon.

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