Crime Law Soc Change (2018) 70:293–298
https://doi.org/10.1007/s10611-017-9738-7

Introduction

Annika Engelbert[1] · **Ina Kubbe**[2]

Published online: 3 November 2017

It is undisputed that law is an indispensable element of the fight against corruption as it defines the boundaries of interaction among potentially corrupt individuals, networks, or organizations, and provides remedies in case these rules are breached. Law determines what is allowed and what is not; this implies, in return, that unethical acts cannot be legally labelled as corrupt as long as they are not prohibited by law. From a legal point of view, it is therefore a matter of special importance to define, test, and adapt formal rules in relation to their intended outcome [1–3]. Rational choice, most prominently in Becker's groundbreaking work on crime and punishment [4], leads us to the assumption that the normative character of law will ultimately help to combat corruption. Becker's approach considers criminal behavior as a positive cost-benefit analysis of expected gains, i.e. the output of the criminal activity, and expected costs, i.e. the potential punishment for the criminal activity. According to the theory, a rational actor would opt for criminal – thus, corrupt – behavior once the expected benefits exceed the expected costs.[1]

Since the initiation of governance-focused development programs in the 1990s, international assistance programs are based on the credo that strong institutions associated with legal systems that uphold the rule of law, efficient bureaucracies, and low levels of corruption are crucial for increasing the welfare of people ([6], p. 955; [3], p.

[1]Political Economy corruption research is largely based on Becker's conception of crime and punishment, e.g. Klitgaard's [5] distinguished corruption formula: Corruption = Bribe – Moral Costs – (Probability of Detection * Penalty) > Salary + Moral Satisfaction.

✉ Annika Engelbert
annika.engelbert@rub.de

Ina Kubbe
inakubbe@post.tau.ac.il

[1] Law Faculty, Ruhr University Bochum, Universitätsstr. 150, 44801 Bochum, Germany

[2] Department of Political Science, Faculty of Social Sciences, Tel Aviv University, Ramat Aviv, 6997801 Tel Aviv, Israel

183). Accordingly, the United Nations General Assembly in its Declaration of the High-Level Meeting on the Rule of Law at the National and International Levels states:

> We are convinced of the negative impact of corruption, which obstructs economic growth and development, erodes public confidence, legitimacy and transparency and hinders the making of fair and effective laws, as well as their administration, enforcement and adjudication, and therefore stress the importance of the rule of law as an essential element in addressing and preventing corruption, including by strengthening cooperation among States concerning criminal matters.[2]

Despite a multitude of institutional reforms and good governance policy priorities over the last two decades in countries that are most affected by corruption, the rationalistic-legalistic approach to combatting corruption has not been proven successful. In light of recent indications of persistent and, in some contexts, worsening corruption trends,[3] the efficacy of these efforts has been called into question by scholars and practitioners, some of whom have termed it a policy failure. The critique targeting blueprint legal transplants, one-size-fits-all solutions, and the negligence of local contexts cannot be dismissed and should serve as a basis for a fundamental paradigm shift in corruption research and innovative anti-corruption approaches. Scholars and practitioners criticize one (undesirable) aspect of law; that is, the oversimplification of a solution to an intricate problem. It leaves untouched, however, the importance of the rule of law that remains a basic principle of the international community.

Recognizing the crucial significance of the rule of law, this Special Issue argues that legal norms matter indeed as an instrument in the fight against corruption. An instrumentalist perspective on law as a driver for socioeconomic development allows us to assess the regulatory function of legal rules and their actual impact on social change, as well as their interplay with other – formal and informal – norms. Legal norm setting, contesting, and reshaping is complex and happens on different levels. The Special Issue is therefore divided into two parts: The first part takes a closer look at international anti-corruption norms, their emergence and transformation. Corruption as a global phenomenon that occurs beyond national jurisdictions requires the establishment of a set of international anti-corruption norms that provide a framework for transnational cooperation and prosecution – a norm-building process heavily influenced by the interests of governments and international organizations alike. Elitza Katzarova, Stoyan Panov, and Bertram Lang discuss political struggles over "whose norms matter": How is international anti-corruption legislation established, contested, and reshaped? Besides international anti-corruption regulatory frameworks playing an invaluable role in our globalized world, national legislation remains crucial for implementing global standards and, in absence of powerful international enforcement mechanisms, prosecution of corruption cases. The second part of the Special Issue therefore focuses on three case studies from China, Nigeria and Indonesia. They illustrate how formal and informal (anti-)-corruption norms compete in national contexts, how legal norms are implemented, and

[2] para25, UNGA Res. A/RES/67/1of September 24, [7].

[3] Particularly where the pioneering anti-corruption strategies of the 1990s were first implemented in Eastern European states. For instance, Hungary's score on corruption has gradually worsened over the past decade, and Poland continues to face a deeply entrenched problem of corruption and scores the worst in this category of all categories evaluated by Freedom House's *Nations in Transit* [8, 9].

how the executive as well as the legislative need to align the 'law in books' and the 'law in action'. Taking into account local particularities and the need for individual solutions, all articles in this Special Issue share nonetheless a common understanding of legal norms: they are not set in stone, but dynamic; they are not in an island position, but interacting and competing with other, often informal rules; and they are not self-sufficient, but a means to an end, namely an instrument to reduce corruption and foster social welfare.

By applying a constructivist approach, the first contribution by *Elitza Katzarova* shows how the social construction of a global corruption problem, its trajectory, and its interpretation by different international actors can explain the international anti-corruption norm cascade between 1996 and 2003. This phenomenon is commonly explained by risen public awareness - through an increased publication of corruption scandals, the emergence of perception-based corruption indices, and the appearance of anti-corruption NGOs - a wide acceptance of democratic values due to end of the Cold War, and a paradigm shift towards New Institutional Economics. This article argues, however, that the launch of several international anti-corruption laws within a relatively short time span originates in competing concepts of corruption among groups of state actors and in different strategic venues, starting two decades prior to the actual norm cascade. The study sets out to explain how an analytical shift from the study of norms, grounded in International Relations, to the social construction of problems in a sociologist tradition can shed light on the power relations that underlie international anti-corruption norms. In a first step, the article demonstrates how corruption as a global issue was debated on the level of problem definition: One perspective dominated by North America defined corruption as "bribery", where corruption was globally understood as a transnational trade-off between individual actors. Developing countries, represented mainly by Chile in the United Nations, promoted a rather radical critique of the global economic system by conceptualizing corruption as "corporate influence" over politics. In a second step, it illustrates the actors' strategic choice of a venue that is most promising for serving their interests in the diffusion of anti-corruption talks between international organizations in the 1990s.

Moving from the historical origins of the international strategies to address corruption in the early 1970s, *Stoyan Panov* focuses on the cutting-edge component of international anti-corruption regulation today: asset freezing and forfeiture. In an era of globalization, including the rapid advancement of the digital age, moving and hiding assets extracted from corrupt deals has become a waltz. Internationally, asset recovery has gained recognition in the United Nations Convention against Corruption (UNCAC; Articles 31 and 54(1)), following strong advocacy of the African states. Other attempts to strengthen asset freezing and recovery include the Stolen Asset Recovery Initiative that supports, in partnership with the World Bank and UNODC, international efforts to end safe havens for corrupt funds. In his article, Stoyan Panov illustrates that the mechanism of preventive non-conviction-based seizure and confiscation of assets is an intricate interplay of criminal and civil law norms that are meant to impact grand and political public corruption. He analyzes in how far civil or administrative law preventive measures can complement criminal law approaches by making detailed references to Italian anti-Mafia law, Georgian administrative confiscation law, and international Conventions and recommendations. By having a closer look

at decisions of the European Court of Human Rights, he discusses how human rights standards can be maintained while applying a progressive approach to preventive confiscation. Furthermore, he assesses to what degree these tools may have a normative impact and eliminate the need for criminal conviction: Preventive mechanisms seek to "immunize" the lawful economy from a "contamination" by the ill-procured assets through corruption. They focus on measuring the likelihood to engage in corruption in the future and on the transformation of illegal gains into social projects.

Bertram Lang takes up the recent turn in international anti-corruption norm developments towards asset recovery. His article analyzes the growing impact of an increasingly powerful China on the evolution of international anti-corruption norms, in particular the role of the ruling Chinese Communist Party. While China's formal-legal anti-corruption system has been receptive to international socialization, the state's internal efforts to contribute to international norm-making are defined by the Party's top-level leadership, which promotes a different set of anti-corruption norms: individual moral responsibility, repression instead of institutional change, and adherence to party discipline. China's international focus is on bilateral law enforcement to prosecute officials at home, such as extradition and asset recovery, but the Party also forms alliances with other authoritarian governments to reduce the role of civil society actors in international forums. Thus, the author argues that tensions arising in the international anti-corruption arena between China and Western powers about problem definition and solution finding are not grounded in Chinese cultural norms, as emphatically supported by many researchers, including Tony Lee in this Special Issue, but in political choices made by the Chinese Communist Party. China's new role as a norm-maker and not merely norm-taker is an important feature in the new "Post-Western" international anti-corruption arena that has developed from previously Western-dominated global discourses described in Elitza Katzarova's article.

Opposing Bertram Lang's argument that the Chinese anti-corruption regime is not culturally but politically steered, *Tony Lee* argues that using a legal approach to fight the cultural roots of corruption is unlikely to be effective. By analyzing the Eight-point Regulation, one of President Xi Jinping's anti-corruption campaigns, the study shows that the efficacy of the specific form norm is limited. In fact, the regulation is not able to restrict the culture of gift giving, which is a common practice for the Chinese to establish *guanxi* (social connection) for corruption. Based on the findings, the contribution proposes complementary measures to curb corruption in addition to legal approaches.

The question on how formal norms can be effective despite the existence of contradicting social norms is also the main keynote of the next article. *Paul Ocheje* provides insights into the history of political corruption in Nigeria and an impressive example for why legal anti-corruption norms fail when other norms governing human behavior come into play. The author argues that in the Nigerian context, factors constraining the full anti-corruption potential of laws are not necessarily to be found within the statutory frameworks, but within the larger political, institutional, and societal context of deeply entrenched corruption. Although a regulatory anti-corruption framework exists, legal norms that contradict informal norms are severely limited in their effectiveness according to the principle of law and intrinsic motivation [10]. Ocheje retraces the historical evolution (and persistence) of elite kleptocracy in Nigeria from independence 1960 until today; a long corruption tradition that has

trickled down to the poor parts of the society as social norms. Strikingly, recent institutional anti-corruption reforms that are considered most successful of the last decades have been rejected by the population under the slogan "bring back corruption". Despite all factual disadvantages, corruption is perceived as an accepted social behavior and a means to generate income for the poor. Paul Ocheje's analysis reflects new theoretical underpinnings in corruption research that go beyond classical rational choice approaches. Most prominently, collective action theory sheds light on why setting and changing legal anti-corruption norms is a particularly delicate undertaking. While all members of society are aware of the fact that, due to the absence of negative externalities, group benefits were greater in a corruption-free environment, individuals continue being corrupt because they must assume that others will continue free-riding. The decision of the individual of whether or not to be corrupt depends on the behavior of others [11–13]. In order to create trust that everyone refrains from corruption, credible institutions, for instance anti-corruption regulations and law enforcement bodies, are needed. Yet, the establishment of these institutions is a collective action problem of the second order: rules meant to curb corruption are not implementable because they reduce short-term benefits from corruption [14, 15]. Thus, corruption and law are interlinked on two levels: On the one hand, regulatory frameworks carry a normative dimension by seeking to reduce corruption and are hence considered a strong anti-corruption tool. On the other hand, the state, and in particular the independence of the judiciary, may be manipulated in order to annul the establishment and the enforcement of legal norms. Thus, the rule of law is constantly threatened by the phenomenon it actually seeks to eradicate, and the role of law in curbing corruption is of paramount importance.

The last article of this Special Issue by *Richo Andi Wibowo* reminds us of the importance of codifying corruption carefully. Despite many attempts to define corruption, there is no precise judicial term for it. Instead, penal codes typically list statutory offenses that are considered to be particular manifestations of corruption [16, 17]. The article on Indonesian anti-corruption legislation and jurisprudence shows how elements of crime that define corruption in very broad terms, such as 'harming state finances' in the Indonesian Anti-Corruption Act, can actually have adverse effects on the anti-corruption potential of laws. Initially, the very broad concept of corruption implemented in Indonesian law was meant to allow for easier conviction of corrupt individuals by lowering the standard of evidence required to prove criminal liability. However, the wording of the law has raised legal uncertainty and led to a misinterpretation of negligence and imperfection in public tendering as corruption. Despite Constitutional Court's rulings that restrict the interpretation of these stipulations, law enforcement agencies have been unwilling to adhere to the decisions. By analyzing several exemplary cases, the article endorses the Constitutional Court rulings, finds explanations for the deviant decisions issued by law enforcement organs, and may serve as a warning notice for other jurisdictions that are currently developing similar regulatory frameworks.

References

1. Gardiner, J. (2002). Defining corruption. In A. J. Heidenheimer & M. Johnston (Eds.), *Political corruption: Concepts & contexts* (pp. 25–40). New Brunswick: Transaction Publishers.

2. Heidenheimer, A. J. (2002). Introduction to part I. In A. J. Heidenheimer & M. Johnston (Eds.), *Political corruption: Concepts & contexts* (pp. 3–14). New Brunswick: Transaction Publishers.
3. Mbaku, J. M. (2007). *Corruption in Africa: Causes, consequences, and cleanups*. Lanham: Lexington Books.
4. Becker, G. (1968). Crime and punishment: An economic approach. *Journal of Political Economy, 76*(2), 169–217.
5. Klitgaard, R. E. (1988). *Controlling corruption*. Berkeley: University of California Press.
6. Manzetti, L., & Wilson, C. J. (2007). Why do corrupt governments maintain public support? *Comparative Political Studies, 40*(8), 949–970.
7. UN General Assembly Res.(2012) A/RES/67/1of September 24, 2012. http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/67/1. Accessed 24 Aug 2017.
8. Freedom House. (2015a). Nations in transit 2015. *Hungary.* https://freedomhouse.org/report/nations-transit/2015/hungary. Accessed 24 Aug 2017.
9. Freedom House. (2015b). Nations in transit 2015. *Poland.* https://freedomhouse.org/report/nations-transit/2015/poland. Accessed 24 Aug 2017.
10. Baurmann, M. (2005). Korruption, Recht und Moral. In U. von Alemann (Ed.), *Dimensionen politischer Korruption: Beiträge zum Stand der internationalen Forschung* (pp. 164–182). Wiesbaden: VS Verlag für Sozialwissenschaften.
11. Andvig, J. C., Fjeldstad, O.-H., Amundsen, I., Sissener, T., & Søreide, T. (2000). *Research on corruption. A policy oriented survey*. Bergen: Chr. Michelsen Institute & Norwegian Institute of International Affairs.
12. Bardhan, P. (1997). Corruption and development: A review of issues. *Journal of Economic Literature, 35*(3), 1320–1346.
13. Persson, A., Rothstein, B., & Teorell, J. (2013). Why anticorruption reforms fail. Systemic corruption as a collective action problem. *Governance, 26*(3), 449–471.
14. Grimes, M. (2013). The contingencies of societal accountability: Examining the link between civil society and good government. *Studies in Comparative International Development, 48*(4), 380–402.
15. Rothstein, B. (2011). Anti-corruption: The indirect 'big bang' approach. *Review of International Political Economy, 18*(2), 228–250.
16. Androulakis, I. N. (2007). *Die Globalisierung der Korruptionsbekämpfung: Eine Untersuchung zur Entstehung, zum Inhalt und zu den Auswirkungen des internationalen Korruptionsstrafrechts unter Berücksichtigung der sozialökonomischen Hintergründe*. Baden-Baden: Nomos.
17. Transparency International. (2006). *Handbook for curbing corruption in public procurement*. Berlin: Transparency International.