



2007

Rethinking Corruption: An Introduction to a Symposium and a Few Additional Thoughts

Franklin A. Gevurtz

Pacific McGeorge School of Law

Follow this and additional works at: <https://scholarlycommons.pacific.edu/facultyarticles>



Part of the [Rule of Law Commons](#)

Recommended Citation

20 Pac. McGeorge Global Bus. & Dev. L.J. 237

This Article is brought to you for free and open access by the McGeorge School of Law Faculty Scholarship at Scholarly Commons. It has been accepted for inclusion in McGeorge School of Law Scholarly Articles by an authorized administrator of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

Rethinking Corruption: An Introduction to a Symposium and a Few Additional Thoughts

*Franklin A. Gevurtz**

On October 27, 2006, the Pacific McGeorge Center for Global Business and Development conducted a symposium entitled “Rethinking Corruption: An Interdisciplinary Look at a Fundamental Problem.” The decision of the Center to conduct a symposium on the topic of corruption is easy to understand, and, indeed, was probably inevitable. Corruption is, and has long been, an important fact of life facing global business.¹ More significantly, corruption is generally regarded to be a key impediment to global economic development.²

Still, one might ask, why have a symposium to “rethink” corruption? Is not the important policy topic “combating corruption”? Or, for a narrower, more practice-oriented audience, perhaps the appropriate topic should be “compliance with anti-corruption laws”. The reason for our choice is that topics of combating corruption and compliance with anti-corruption laws, worthwhile as they are, represent ground well plowed. Indeed, there is a veritable industry of mega conferences and lectures—perhaps suggesting the potential for corrupting influences to find their way into anticorruption activities—devoted to these topics.³ Overlooked in the conferences and lectures dealing with the nitty gritty of combating corruption and compliance with anti-corruption laws, however, can be certain fundamental questions: What is corruption? Why is corruption harmful? What are the implications of globalization on corruption? It is to explore these more fundamental questions that we decided to have a symposium to rethink corruption.

I. DEFINING CORRUPTION

The first couple papers in this symposium explore the question of what is corruption. At first glance, one may be tempted to forgo such scholarly sources, and simply consult the dictionary. Webster’s Unabridged Dictionary defines corruption as “the act or state of corrupting or being corrupt . . .”, and, in turn, defines corrupt as “guilty of dishonest practices, as bribery; without integrity; crooked”⁴

* Distinguished Professor and Scholar, University of the Pacific, McGeorge School of Law, and Director, Pacific McGeorge Center for Global Business and Development.

1. *E.g.*, TRANSPARENCY INTERNATIONAL, CORRUPTION PERCEPTION INDEX (2005) [hereinafter TI PERCEPTION INDEX]; TRANSPARENCY INTERNATIONAL, BRIBE PAYERS INDEX ANALYSIS REPORT (2006).

2. *E.g.*, TI PERCEPTION INDEX at 2-3.

3. *E.g.*, 12 International Anti-Corruption Conference at Guatemala City, Guatemala (Nov. 15, 2006), available at <http://www.12iacc.org/index.php>.

4. WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE (1989).

The inclusion of bribes within the definition of corruption is obvious and, had the definition stopped there, then defining corruption would not pose so difficult a task. The essence of bribery is giving something of value to an official or agent in exchange for the official or agent exercising his or her authority in a manner favorable to the party giving the payment.⁵ Of course, application of this definition often entails difficult line-drawing questions to separate gifts, campaign contributions and similar items of value that are not bribes because there presumably was no quid pro quo agreed for their receipt.⁶ Yet, such line drawing and proof problems are the stuff of all legal terms, and the resulting factual and legal difficulties entailed in separating illegal bribes from other payments does not make the term bribery conceptually more difficult than many other legal terms.

The problem is that the definition of corruption, as set forth above, goes beyond bribery, and encompasses other dishonest acts. The appropriateness of such an expanded definition was illustrated in the symposium's keynote address, delivered by Salam Fayyad, former Finance Minister for the Palestinian Authority. We were extremely pleased to hear from Dr. Fayyad, as Dr. Fayyad had achieved an internationally favorable reputation for his efforts to reduce the toll of corruption in a regime much criticized as corrupt.⁷ Significantly, bribery was not the central problem faced by Dr. Fayyad in his efforts to curb corruption within the Palestinian Authority. Rather, he explained that the predominant corruption problem he faced was the misuse of funds.

Yet, once we untether corruption from the narrow example of bribery, it may become difficult to say precisely what one means by corruption. Surely not every dishonest act equals corruption; otherwise, the term becomes so broad that it loses any independent meaning. Moreover, history demonstrates the mischief embodied in the use of the term corruption as simply an epithet to toss at undesirable conduct. Specifically, if we look to common usage, rather than the dictionary, for a definition of corruption, the cynic might conclude that the definition of corruption is conduct engaged in by the speaker's political opponents. Indeed, when used by radical revolutionaries, "corruption" seems to refer to conduct engaged in by everyone else in society. The opening papers in this symposium seek to do better.

In the first paper in this symposium, Professors Franklin Zimring and David Johnson undertake a comparative discussion of corruption. A central goal of Professor Zimring's and Johnson's paper is to replace fuzzy thinking and fuzzy definitions that plague discussions of corruption with more a precise definition. The definition they propose is "the illegal use of power for personal gain." Encompassed within this definition are lines drawn by the authors to answer a

5. E.g., *United States v. Brewster*, 506 F.2d 62, 71-72 (D.C. Cir. 1974).

6. E.g., *JSG Trading v. U.S. Dept. of Agriculture*, 176 F.3d 536 (D.C. Cir. 1999).

7. E.g., Greg Myre, *Palestinian Prosecutor Cites Progress Against Corruption*, NY TIMES, Mar. 9, 2006.

number of questions: Should corruption be limited to acts seeking personal gain? What about acts seeking power? What about unintentional acts?

The most controversial line drawn by Professors Zimring and Johnson—certainly it was at the symposium—comes, however, at the very beginning of their definition: “the *illegal* use of power for personal gain”. This creates the result, in the example provided by Professors Zimring and Johnson, that a Middle Eastern potentate, who builds a lavish personal palace with state funds, would not be acting corruptly if this was legal under his nation’s laws because all property of the state is considered property of the monarch, while an African dictator would be acting corruptly by building the same sort of palace with state funds if the laws of the dictator’s nation did not condone this action. The irony of this approach is that an offense, which Professors Zimring and Johnson characterize as being about the abuse of power, ends up not applying to conduct by those powerful enough to make up the rules for their own personal benefit.

Janet Dine also grapples with the meaning of corruption, but without the claim of being able to come up with an overarching definition. Professor Dine largely focuses on the public private distinction drawn in some definitions of corruption. Specifically, Professor Dine notes a tendency in the literature to concentrate on the acceptance of bribes, or other misconduct, by public officials when defining or measuring corruption, and a reluctance to consider the payment of bribes, or other misconduct, by private parties, including corporate officials, when defining or measuring corruption. The identification of corruption with acts of public, rather than private officials often comes as part of a normative agenda: If corruption is a problem with government, the facile answer is less government. Yet, as Professor Dine points out, the identification of corruption with acts of government officials, rather than private parties, under this view is a matter of sly definition, rather than proof of a different degree of honesty. Indeed, this may all be part of a disingenuous (if not corrupt) effort to influence the public against regulation that would ensure those with private power use their power consistently with the public interest.

As one who has spent most of my academic career dealing with corporate law, I appreciate Professor Dine’s focus on corruption in the private, and particularly the corporate, sector. On the other hand, it may present even further problems of defining corruption. If a CEO lies to the company’s shareholders, as in Enron, this is dishonest, but is it corruption? If a board of directors picked by the CEO awards the CEO a compensation package worth tens of millions of dollars, there is personal gain, but is it dishonest or corrupt? To repeat the example discussed by Professor Dine, if those in charge of a corporation take advantage of the laws of a nation that wishes to serve as a tax haven, in order to reduce the taxes that the company will pay to nations in which it actually conducts business, by what criteria is this corruption?

Perhaps one might respond to the difficulty of defining corruption by asking why it matters. If the purpose of the inquiry is to identify prohibited conduct, then, in fact, the controversial beginning of Professors Zimring and Johnson’s

definition, “the *illegal* use of power”, becomes tautological. Yet, this presupposes that one is trying to define a legal term in a criminal code—in which event, overarching, rather than statute specific definitions may have limited utility. So why else does one care if the Middle East potentate’s building of a lavish palace is corruption? The answer is to make a political judgment, for instance, in recent years, for the purpose of creating a “corruption index” against which to tie aid to a developing nation,⁸ or, historically, for delegitimizing “corrupt” persons or institutions and thereby justifying changes in either. Just because this is ultimately a political judgment, however, does not mean it should be an unprincipled one under which corruption always ends up meaning that which is done by those of a different party, tribe or ideology. Hence, the search for an overarching definition of corruption is a worthwhile endeavor, even if it is a remarkably difficult one.

II. HARMS OF CORRUPTION

One cannot rethink corruption without examining the assumption that corruption stifles economic development. At the symposium, Jun Qian, Professor of Finance at Boston College, presented a paper co-authored with Franklin Allen, Professor of Finance at the University of Pennsylvania’s Wharton School, which examined the apparent paradox that China and India, two of the countries with the highest recent rates of economic growth, are also two of the countries rated as having high degrees of corruption. A version of this paper intended for an audience with a focus on law, rather than finance, will appear in a future edition of this Journal. For present purposes, what is interesting to note from Professors Allen’s and Qian’s findings is that the relationships between corruption and economic development may be much more nuanced than often supposed. Professors Allen and Qian suggest that these relationships may depend, among other factors, upon the extent to which corrupt government officials face competition from other officials, since such competition might limit how much money corrupt officials can extract through bribes, and might force corrupt officials to provide services in exchange for the bribes.

Welby Leaman, in his paper, also focuses on competition—but in a very different way that is far less sanguine about the impact of corruption. Mr. Leaman identifies collusion between various elites in society as a critical danger, not only to economic development—as each group protects its economic interests at the expense of the economy as a whole—but also to the long-range legitimacy of democratic institutions. Notice, incidentally, that Mr. Leaman’s paper illustrates the overlap between how one identifies the harms of corruption

8. See Editorial, *Corruption? Ho-Hum*, WALL ST. J., Sept. 25, 2006 at A14 (on file with author); see also Editorial, *Relative Corruption*, WALL ST. J., Dec. 9, 2005, at A11, available at <http://online.wsj.com/article/SB113409543784618070-search.html?KEYWORDS=%22Carnegie%2BMellon%22&COLLECTI ON=wsjje/6month>.

and how one might define what is corrupt. Most of what Mr. Leaman discusses would not fit within the categories of bribery, or even traditionally dishonest conduct, but rather represents what many see simply as interest group politics. Mr. Leaman also points out the dangers of actions to maintain power, even if not for personal gain.

Michael Keating's paper provides a sobering counterpoint to those who minimize the impact of corruption, except perhaps insofar as they worry about collusion interfering with free market competition. Mr. Keating's sad examples of the impact of petty corruption on the disparately poor of Malawi remind us not to rethink corruption without a full appreciation for the very real and concrete human consequences of the activity.

III. CORRUPTION AND GLOBALIZATION

Corruption is global issue, not simply by virtue of being a worldwide phenomenon, but also by raising multi-jurisdictional issues. This is because the corrupt act often might occur in a different jurisdiction from one in which a party, who either benefited or was hurt by the act, resides. For example, a German heavy machinery company might gain a contract in Greece through bribery, with a United States company being the losing bidder.⁹ The possible involvement of a number of different jurisdictions raises both definitional and enforcement issues.

The fact that different nations may have differing definitions of corruption provokes the definitional discussions in the Zimring, Johnson and Dine papers. Underlying Professors Zimring's and Johnson's definition of corruption appears to be a normative view that each jurisdiction should be able to define for itself what is and what is not corrupt. By contrast, Professor Dine's example of a nation which adopts laws designed to turn itself into a tax haven at the expense of other nations' tax administration shows how corrupt actions in one nation can create negative externalities in other nations, thereby suggesting that nations facing such negative externalities ought to be able to define corrupt conduct occurring outside their borders.¹⁰

At first glance, the ability of a jurisdiction outside of where the corruption occurs to enforce a prohibition on corruption would seem to have enforcement advantages. After all, corruption can act as a cancer, which eats away at the ability of the corrupted government to enforce anti-corruption laws. Having uncorrupted outsiders—ala "The Untouchables"—come in and clean up the corruption is a romanticized solution. Professor Leslie Jacobs' and Benjamin Wagner's paper provides a cautionary note on this vision, by suggesting that anti-

9. See, e.g., David Crawford & Mike Esterl, *Inside Bribery Probe of Siemens*, WALL ST. J., Dec. 28, 2007, at A4, available at http://online.wsj.com/public/article_print/SB119879170772353601.html.

10. E.g., Franklin A. Gevurtz, *Using the Antitrust Laws to Combat Overseas Bribery by Foreign Companies: A Step to Even the Odds in International Trade*, 27 Va. J. Int'l. L. 211 (1987).

corruption activities may not ultimately succeed if not internalized in the local governmental unit.

IV. CONCLUSION

Of course, no single symposium can entirely rethink corruption. We hope these papers advance an ongoing process of examining a topic critical to global business and development.

A number of people deserve thanks for contributing this undertaking. I was joined by my colleagues, Omar Dajani, Michael Malloy and Sabine Schlemmer-Schulte, in lining up speakers and moderating panels. Clemence George ensured that we had a smoothly running symposium befitting the quality of the intellectual exchange.