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ON VIOLENCE, MONEY, POWER AND CULTURE: REVIEWING THE INTERNATIONALIST LEGACY

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POLITICAL CORRUPTION IN MARKET DEMOCRACIES

The panel was convened at 2 p.m., Saturday, March 27, by its Chair, Joel R. Paul,* who introduced the panelists: Helen E. Hartnell, Golden Gate University School of Law; John K.M. Ohnesorge, Harvard Law School; and Claire Moore Dickerson, St. John’s University School of Law.

Despite the very general title of the panel, all three papers in fact focused on a common phenomenon: the anticorruption rhetoric and initiatives currently emanating from the Organization for Economic Co-operation and Development (OECD), from international financial institutions such as the International Monetary Fund (IMF) and the World Bank, from national governments and from private-sector organizations. Without disparaging the stated aim of these various initiatives—the reduction of corruption—all three panelists sought to examine aspects of this phenomenon from a scholarly distance, examining theoretical premises, unstated assumptions and institutional alternatives.

SUMMARY OF REMARKS BY HELEN E. HARTNELL**

Professor Hartnell spoke first, examining the anticorruption movement in light of her extensive experience in post-Cold War Central and Eastern Europe (CEE). In her view, the current focus on corruption is largely a consequence of globalization in general, and the fall of the Berlin Wall and the implosion of the Soviet empire in particular. Tying anticorruption initiatives to the broader international focus on “governance,” Professor Hartnell argued that corruption is the “dragon that the rule-of-law knight seeks to slay, the bugaboo of Western suppliers of expertise to CEE countries in transition towards liberal democracy and market economy.” But as Western anticorruption rhetoric and initiatives meet CEE realities—social, political, economic and historical—tensions arise that suggest the need for greater self-awareness among anticorruption activists.

One source of tension is differing social perceptions of corruption—of what constitutes a corrupt act. Corruption is a universal and pervasive phenomenon, yet it is also to some extent a socially constructed category. This requires that scholars examine their own biases as they discuss the nature, sources and consequences of corruption, including their own reasons for being concerned with corruption abroad. Professor András Sajó of Hungary has gone so far as to assert that “[w]ere it not for the drumbeat of external criticism, corruption would not be construed as an acute social problem, at least not in East Central Europe.”1 Anticorruption campaigns inevitably take on different social meaning depending upon context, so that in Bulgaria at the turn of the twentieth century, anticorruption rhetoric was associated with conservative attempts to preserve traditional morality and community, while more recently anticorruption rhetoric has been used by Communists to attack reformers such as Mikhail Gorbachev. And while Western commentators tend to attribute corruption in CEE to the withdrawal of state controls after 1989, in reality the roots of corruption in the societies of that region are deeply embedded in their social structures. Bribery is often the rule rather than the exception, supported by a tradition of popular mistrust of government and a related phenomenon of “clientilistic” social relations.

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A second source of friction is a perceived hypocrisy on the part of two main sources of anticorruption activism, multinational corporations (MNCs) and the IMF. The MNCs have participated in corrupt dealings throughout their history, and in the past what attention was paid to corruption internationally often focused directly on the MNCs as purveyors rather than as victims. The rhetorical tables have now been turned to a great extent, so that the focus is now on corruption as a governance failure requiring changes in state behavior rather than MNC behavior. To the extent that the MNCs join such efforts, in a sense to portray themselves as victims of corruption, this is seen as blatantly hypocritical. Claims of hypocrisy have also been raised against the IMF on the basis of its stance vis-à-vis newly independent courts in CEE. The charge is basically that the IMF says it wants independent courts, claiming that they are necessary for economic growth and combating corruption, yet the IMF also wants these independent courts to adopt its view of what the law should be, particularly in the definition and protection of property rights and in economic governance. This ambivalent position, which directly challenges the coherence of the “rule of law” programs of the IMF and other economic development institutions, is best exemplified by the IMF’s approach to the Hungarian Constitutional Court decision invalidating the government’s austerity budget (the “Bokros package”) for 1995. IMF officials reportedly telephoned Constitutional Court justices to urge them to change their votes, a measure dramatically out of touch with any accepted notion of the “rule of law.”

A third source of friction is the different political uses to which anticorruption rhetoric is put. For Western economic reformers advocating privatization of CEE industries, corruption is seen as a threat to that entirely admirable project, while for many in CEE privatization is itself a prime source and engine of corruption. Violent criminal organizations, condemned by East and West alike, have clearly capitalized on the opportunities created by poorly administered CEE privatizations. In the current context, Eastern Europeans often view corruption as a product of market reforms rather than as the main obstacle to successful transition.

**Summary of Remarks by John K.M. Ohnesorge**

Mr. Ohnesorge identified problems with the dominant theoretical approach of the anticorruption movement, which he identifies as being in the “rational choice” tradition. This approach, which seeks to apply to politics and political institutions the rational actor model of human behavior employed in microeconomics, seems to lead its practitioners inexorably toward advocacy of the “night watchman state” as the primary solution to the problem of corruption.

One example of this approach in action is a definition of corruption proposed by the IMF: corruption as “noncompliance with the principle of the arm’s-length relationship, which states that personal or family relationships ought not to play a role in economic decisions by private economic agents or by government officials.” Compliance with this principle is said to be “essential for the efficient functioning of markets.” The “arms-length” principle could, of course, be achieved even between an activist state and its citizenry, but the “rational choice” tradition’s overwhelming concern with rent-seeking behavior and its distrust of bureaucracy seems to lead instead to an anticorruption agenda focusing mainly on deregulation, privatization and a general withdrawal of the state from the market. The anticorruption agenda thusmeshes nicely with the free-market, noninterventionist economic agenda advocated by the same international institutions.
Recognizing that one may well find some version of the “night watchman state” an attractive normative vision for society, Mr. Ohnesorge nonetheless argued that there are problems with this approach to corruption. First, the multilateral financial institutions are generally limited by their charters to economic support and reform activities; while positing a clear line between the economic and political spheres is obviously problematic, the “rational choice” approach obliterates any such line. Every aspect of a political/legal system, from the organization of the bureaucracy down to the details of inheritance law, has economic implications, yet such a level of interference in national legal systems by the international financial institutions seems unsustainable. One of the IMF’s prolific writers on corruption cites rent control as a case in which states have been “the main violator[s] of property rights,” and while rent control laws surely have economic effects, an international organization attempting to quash national rent control laws would be playing essentially the role of the U.S. Lochner Court.

Based on his experience in East Asia, where corruption of various kinds existed during decades of remarkable economic growth, and where corruption and economic governance were intimately intertwined, Mr. Ohnesorge argued for a more empirically grounded approach to the relationship between corruption and economic growth, one that would try to identify different types of corruption, then determine which are truly detrimental to economic performance, which are basically neutral, and which may even be beneficial under particular political arrangements. Certain industrial-policy practices from East Asia, such as targeted lending to certain industries or the screening of foreign investment projects, are probably incompatible with the notion of government strictly bound within a system of rules. Yet such government interventions cannot be ruled out simply on the basis of an anticorruption agenda, since they have been implemented by certain East Asian and other bureaucracies without leading to economically unsustainable levels of corruption. A more appropriate anticorruption agenda would involve learning the internal techniques and processes of successful bureaucracies, then sharing this information with today’s developing economies.

**Summary of Remarks by Claire Moore Dickerson**

Professor Dickerson broached the issue of institutional competency in the anticorruption movement, in particular of whether the World Trade Organisation (WTO), with its focus on trade liberalization, is well-suited to playing a leading role. Professor Dickerson’s conclusion is that the WTO and the trade liberalization project are not good platforms for the anticorruption agenda.

Professor Dickerson began her discussion by laying out her theoretical approach to corruption in the international sphere. She defined corruption as the bribery of a public official, and focused in particular on bribery by the Multi-National Corporations (MNCs). She argued that corruption, thus defined, violates a norm of good faith in international commerce, the existence of which she located in the *lex mercatoria* tradition, and in specific treaty norms such as Article 7(1) of the UN Convention on Contracts for the International Sale of Goods. Norms are susceptible to being undermined by defection, particularly where defectors act in a concerted manner. Thus, she couched her support for the anticorruption movement in terms of protecting the existing good faith norm.

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3 Lochner v. New York, 198 U.S. 45 (1905) (Federal Supreme Court invalidating U.S. Constitution to strike down state regulations on industry).
Current antibribery initiatives such as the 1997 OECD Anti-Bribery Convention can be traced directly to the U.S. Foreign Corrupt Practices Act (FCPA) of 1977 and the effect it had on the competitiveness of U.S. MNCs. Professor Dickerson argued that the FCPA, which prohibits U.S. entities from making certain kinds of corrupt payments abroad, disadvantaged U.S. MNCs when competing abroad, but because it was politically impossible to advocate repeal of the FCPA, the obvious solution was to try to convince other nations to enact similar laws, thus leveling the playing field. Professor Dickerson argued that this has produced a ‘cartel for the good’ that should further the good faith norm against bribery much more effectively than the unilateral U.S. action under the FCPA. There are problems with this approach, however, since cartels are inherently unstable and must be policed from above. The resulting top-down approach to bribery focuses entirely on the MNCs and their supervision by home governments, while ignoring the impact on the communities affected by the existence or elimination of bribery by the MNCs. Yet these effects are potentially important, and a failure to take them into account may create other harms affecting the fabric of the affected communities. Corruption is to some extent culturally defined, and if the nonrelativist approach of the OECD adversely affects local communities, it may serve to undermine the good faith norm.

As an example of a less universalist, more nuanced approach to international protection of the good faith norm, Professor Dickerson cited the movement for basic labor standards in developing country MNC factories. Consumers in the developed world, the International Labour Organization (ILO) and nongovernmental organizations (NGOs) in developing countries have all contributed to a set of constraints on the labor practices of the MNCs that are more sensitive to local conditions, yet avoid cultural relativist paralysis.

But in looking for analogues in the antibribery agenda, Professor Dickerson concluded that there really is no counterpart to those champions of better labor practices. The literature to date points primarily to free trade advocates as the potential source of extralegal constraints on bribery, yet free trade advocates condemn bribery for leading to allocation-related inefficiencies, not for the harm it does to local populations and for its undermining of the good faith norm. The closest analogue to the NGOs might be organizations such as Transparency International, but although such organizations sometimes speak in moral tones, their primary concern also seems to be to preserve liberal trade. As for a functional equivalent to the ILO, the antibribery literature points to the WTO, but again because bribes can distort trade flows.

In conclusion, Professor Dickerson called for an approach to corruption that does not itself undermine the good faith norm, led by an international body focused solely on the problem of corruption and informed by the concerns of the communities that have been corruption’s victims.

John Ohnesorge
Reporter