Corruption of the Institutional System: Remedies

Marco D'Alberti

Abstract The usual way of conceiving corruption refers to individual behavior, such as the payment of bribes to public officers in order to obtain benefits (which could be called the `subjective' side of corruption). This is an indispensable but insufficient approach to understand and overcome corruption. It is also essential to cope with the "objective" side of corruption, which is represented by the degeneration of the institutional system and its rules. This chapter analyses some cases of "objective" corruption of the institutional system and tries to indicate possible remedies, particularly with regard to simplifying legislation, reducing administrative procedures and discretionary powers, enhancing public controls, improving transparency in public procurement. Putting in act these remedies against "objective" corruption can help reducing the incentives and occasions of "subjective" corruption.

1 The "Subjective" Approach

The relationship between corruption and the institutional system is a complex issue which can be understood only through a multidisciplinary approach. This is the reason why economists, legal scholars and political scientists have paid much attention to this topic in recent years. And this is the reason why I have proposed, together with Professor Luigi Paganetto, a national research on Corruption and Public Administration, which has been approved and funded by the Ministry of Education, University and Research and is carried out by various departments of Law, Economics and Political Science.

A premise is necessary. The usual way of conceiving corruption refers to individual behavior: particularly to the payment of bribes to public officers in order to obtain benefits. This is what one might call "subjective" corruption, the corruption of persons.

M. D'Alberti (✉)
Faculty of Law, Sapienza University of Rome, P.Le Aldo Moro 5, 00185 Rome, Italy
e-mail: marco.dalberti@cancrinipiselli.com

L. Paganetto (ed.), *Achieving Dynamism in an Anaemic Europe*,
DOI 10.1007/978-3-319-14099-5_14

As a consequence of this conception, the main approach in fighting corruption is based on a "subjective" perspective as well. The main remedies consist of preventive and repressive measures such as: penal sanctions against individuals who pay and accept bribes; codes of conduct for public officials; initiatives aimed at enhancing ethics in the public sector; plans and programs to identify the main risks of bribery in public administration and to indicate possible solutions.

This is an indispensable but, at the same time, insufficient approach. Corrupt behaviors of individuals must be sanctioned and "rotten apples" must be punished, but it is necessary to explore the underlying "objective" conditions that create corrupt incentives. In other terms, policy must address the "objective" corruption of the institutional system: otherwise, it will not produce long lasting effects (Rose-Ackerman 2006, p. xiv ff., xxxvii ff.).

2 The "Objective" Approach

In fact, the original meaning of corruption, as provided for by dictionaries, has to do with an "objective" perspective. "To corrupt" comes from the Latin verb "*corrumpere*" which stands for "to deteriorate", "to disrupt", "to degenerate". All these expressions, in classical literature, are primarily referred to things, such as waters or metals: "*aquarum fontes corrumpere*", says Sallust ("to corrupt water sources"). And "*corruptissima respublica*" ("highly corrupted polity"), in Tacitus and Seneca, refers to the corruption of institutions and rules.

The "objective" meaning of corruption comes before the personal and "subjective" aspect of corruption.

"Objective" corruption, if applied to public institutions, refers to the degeneration of the institutional system and its rules. Here lies the crucial side of corruption.

Sound institutions are capable of favoring economic and social prosperity even though affected by episodes of personal corruption. This is very well shown by Bernard Mandeville in his 18th century *Fable of the Bees* (Mandeville 1989), a clear metaphor of England, where, notwithstanding cases of personal corruption, a sound institutional system supported the industrial revolution and the economic growth. On the contrary, if institutions degenerate, prosperity is fettered and personal corruption is enhanced.

3 "Objective" Corruption to be Removed

There are many cases of "objective" corruption affecting institutions and rules. They are dangerous incentives for "subjective" corruption and should be removed. The following cases are worth considering.

3.1 Excessive and Inaccessible Legislation

It has been often stressed that many legal systems are burdened by too many statutes and regulations.[1] In addition, these statutes and regulations are often unclear: therefore, the ways of their implementation are unpredictable. Empirical evidence and economic theory underline a link between bad regulation and corruption. This emerges, for instance, if two indicators are combined: the World Bank Index on "Doing Business" and the "Corruption Perceptions" Index from Transparency International.[2] The countries that are ranked as the most corrupt ones, according to the "Corruption Perceptions" Index, are in many cases the ones that highly suffer from bad regulation under the Doing Business indicator.

Several remedies to contrast excessive and bad regulation have been put in place. For instance, the programs on "better regulation" adopted by the European Union (EU) and the Organization for Economic Cooperation and Development (OECD) have brought about useful results.[3] However, these programs have not always been implemented by the States. International and supranational remedies, such as those adopted by EU and OECD, must be flanked by national measures aimed at effectively transposing and adapting them in the various countries.

Moreover, national measures can also been independent of supranational constraints or directives. A good example of a substantial national remedy against bad legislation and regulation is the English Law Commission. Established in 1965 as a statutory independent body,[4] the Commission is composed of five full time commissioners: the Chairman is a judge from the Higher Courts of Justice, appointed up to 3 years; the other members are judges, or barristers, or academics, appointed up to 5 years. Twenty members of the Government Legal Service and a number of research assistants give support to the research and overall activity. As to its functions, the Commission reviews legislation that is unduly complicated, obsolete or unfair, and makes recommendations to the Government for reform of the legislation through, for instance, codification, consolidation of statutes, statute law repeals. Recommendations can be accompanied by draft bills. It is telling that thousands of statutes have been repealed since the establishment of the Commission, based on its proposals.[5]

The *Law Commission Act 2009* has aimed at even improving the rate at which the Commission's recommendations for reform are implemented by the

[1] On the negative effects of excessive and inaccessible legislation, see (Bingham 2011, p. 37 ff).

[2] The last available indexes are, respectively: World Bank Group, D*oing Business. Measuring Business Regulations*, 2014; Transparency International, *Corruption Perceptions Index*, 2014.

[3] Among the many initiatives, see: the program of the European Commission named "REFIT" (*Regulatory Fitness and Performance programme*), which aims at making EU law simpler and reducing regulatory costs, thus contributing to a clear, stable and predictable regulatory framework; for an effective synthesis of OECD efforts aimed at regulatory reform, see *Recommendation of the Council on Regulatory Policy and Governance*, 2012.

[4] Law Commission Act, 1965.

[5] The most recent Program of the Commission for the next 3 years is contained in Law Commission, *The Work of the Law Commission. Incorporating the Twelfth Programme*, October 2014.

Government. The Commission's model has been already adopted, even if in different ways, in some countries such as India and New Zealand: its further diffusion would be highly relevant.

3.2 Cumbersome Administrative Procedures and Broad Discretionary Power

Heavy administrative proceedings and large discretion are a substantial factor for civil servants' distorted behavior. Empirical evidence concerning Europe and Central Asia shows that too many and complex administrative barriers to market entry lead to higher corruption: for instance, authorizations or licenses to start an economic activity. The excessive scope of administrative discretion has been considered as an important factor of corruption in Europe (see Mény 1992). With regard to African countries, empirical studies underline that "vague and lax" regulations, which enlarge administrative discretion, increase the level of corruption. Where a regulation is lax, numerous and diverse solutions can be put in act for implementing it: the interested person or entity may have an incentive in paying a bribe to a public officer in order to obtain the most favorable solution (Graf Lambsdorff 2006, p. 7 ff).

As far as the possible remedies are concerned, there have been many attempts to streamline administrative procedures in various legal systems. However, the actual outcomes have been often weak. More than reducing administrative burdens on a case by case basis, general criteria and tools for reduction are needed. An important means, in this direction, is certainly the progressive reduction of authorization regimes, that has been achieved in EU law and also in US law. Decreasing administrative discretion is an objective which needs more attention. In fact, if in some economic sectors, such as banking, energy, telecommunications, administrative discretionary powers have been reduced, in many other areas, such as urban planning and the welfare sector, administrative discretion is still far from being attenuated, and a lot remains to be done.[6]

3.3 Ineffective Public Controls

Public controls can be an antidote to, but also an occasion of, corruption. For instance, in several countries controls and inspections are based on a case by case empirical approach. Some of them are characterized by the utmost strictness; some others, on the contrary, are particularly weak and feeble. It would be wise to put in place more homogeneous criteria. One relevant means to reach this result would be to at least reduce the fragmentation of police forces and to aim at unifying them as much

[6]On the reduction of discretionary power in various economic sectors, see (D'Alberti 2008, p. 99 ff).

as possible. Besides, coordination between police forces and other public administrations is a positive instrument. In addition, forms of cooperation between administrative agencies, the police and the judiciary can be highly useful, as in the case of money laundering, where effective and efficient controls have been and are put in act.

3.4 Public Contracts

There has always been a substantial connection between public contracts and corruption, particularly in the sector of public works. Over time national legislations and also EU law and international law have established provisions aimed at reinforcing the guarantees of publicity, transparency and non-discrimination of the procedures for the award of the contracts. But this has not been sufficient to overcome corrupt behaviors.

First of all, legislation on public contracts is often cumbersome and unclear. Public administrations, undertakings and the judiciary suffer from continuous uncertainties in implementing primary and subordinated norms concerning the awarding and the execution of public contracts in the field of public works, services and supplies. As has been said above, uncertainty in legislation and in its implementation is an incentive for corruption. Simplification of the legislative and regulatory framework is crucial.

Secondly, exceptions to tender procedures which the statutes provide for in case of emergency or urgency have been too widely applied. This has provoked events of collusion between public administration and undertakings, and serious cases of bribery.[7] Exceptions to tender procedures must be kept within a reasonable scope and have to be subject to an adequate reason giving obligation.

Thirdly, it has quite often happened that public controls on the execution of the contracts have been weak or inefficient. Sometimes, procedures for the award of the contract can be streamlined; exceptions to tender proceedings—as has been said—can be reasonably applied in case of urgency or emergency. As to controls on the execution of contracts and sub-contracts, a simplification is possible, but they cannot be cut off and should be efficient. There are plenty of cases where the absence or weakness of controls has caused dysfunctions and corrupt behaviors.

4 Other Cases of "Objective" Corruption to be Overcome

Weak or absent competition allows undertakings to behave unfairly with regard to new comers and consumers: an anticompetitive context is often characterized by high levels of corruption. A sound competition law is needed. It requests a good

[7]See on this point (Barbieri and Giavazzi 2014).

combination of antitrust enforcement and competition advocacy. The former punishes undertakings' infringements while the latter is aimed at promoting pro-competitive regulation: both are necessary tools against corruption.[8]

Feeble transparency in the public sector, in terms of difficult access to documents and public data, is an incentive for corrupt behavior. The British and American *Freedom of Information Acts* are certainly good models for other legal systems to enhance transparency in public policy and administration.[9] Continental European countries have weaker rules on this point.

Many cases of corruption have occurred in regional and local institutions. For instance, in continental Europe France and Italy have often suffered from cases of local corruption. Decentralization is a good tool for enhancing subnational democracy, but some proportionate limits are necessary. Some constitutional and statutory guarantees for the central government to intervene in cases of bias or failures of local authorities are needed.

5 Conclusion

Corrupt human beings will always exist and their illicit behavior must be seriously punished: the "subjective" corruption has to be vigorously contrasted. But the incentives for illicit behaviors can be dramatically reduced if the "objective" corruption, the corruption of the institutional system, is removed or attenuated.

References

Barbieri, G., and F. Giavazzi. 2014. *Corruzione a norma di legge*. Milano, Rizzoli: La lobby delle grandi opere che affonda l'Italia.

Bingham, T. 2011. *The rule of law*. London: Penguin.

D'Alberti, M. 2008. *Poteri pubblici, mercati e globalizzazione*. Bologna, Il Mulino.

Graf Lambsdorff, J. 2006. Causes and consequences of corruption: What do we know from a cross-section of countries. In *International handbook on the economics of corruption*, ed. S. Rose-Ackerman. Cheltenham: Edward Elgar.

Mandeville, B. 1989. *Fable of the bees: or, private vices, publick benefits (1724)*. London: Penguin.

Mény, Y. 1992. *La corruption de la République*. Paris: Fayard.

Rose-Ackerman, S. 2006. Introduction and overview. In *International handbook on the economics of corruption*, ed. S. Rose-Ackerman. Cheltenham: Edward Elgar.

[8]It is telling that the last OECD Global Forum on Competition (Paris, 27–28 February 2014) has been devoted to the theme "Fighting Corruption and Promoting Competition" and discussed how anti-competitive behavior and corruption interact in different ways: inter alia, in public procurement, or through regulation restricting business licensing and entry to market.

[9]US *Freedom of Information Act*, 1967; UK *Freedom of Information Act*, 2000.