

# 1 The global anti-corruption framework

## Lights, shadows and prospects

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### Where were we?

Our previous book *Corruption in the Global Era* (Pasculli and Ryder, 2019a) aimed at improving our understanding of the global causes, means, forms of perpetration and effects of corruption through an interdisciplinary dialogue between academics and practitioners, taking advantage also of the partnership between the Financial Crime Research Network (FCRN) at the University of the West of England and the Global Integrity Research Network (GIRN) at the Centre for Financial and Corporate Integrity (CFCI) of Coventry University. This volume complements those studies by focusing on global and local regulatory responses to corruption. It is not a handbook or a commentary, but a research book aimed at advancing the still limited assessment of the effectiveness of anti-corruption laws (cf. Isenring, Chapter 14) and enriching the scarce British literature on corruption and financial crime (cf. Ryder, 2018a: p. 247). Many of the authors are practitioners and the approach is still interdisciplinary: different fields of the law (criminal law, tax law, European law, corporate law, competition law), as well as issues in ethics, criminology, restorative justice, governance and political philosophy are covered. The perspective is international and comparative. The book explores not only international regulations but also their implementation in different countries, such as the United Kingdom (UK), the United States (US), Italy, Switzerland, Luxembourg, and Nigeria.

This chapter brings together the findings of this book and formulates recommendations for future policies and research. One of its purposes is precisely to coordinate such findings with those of our previous research. Therefore, remands to our own works are not self-congratulatory, but necessary to avoid reiterating arguments and references already expressed elsewhere. In the first section, we will outline the sources of the current global anti-corruption framework and their limits. In the second section, we will illustrate the shortcomings of negative anti-corruption measures, while in the third we will analyse positive measures. In the fourth section, we will articulate some recommendations. Finally, we will draw our conclusions.

### The global anti-corruption framework and its sources

National and international anti-corruption laws and agencies are not yet integrated into a proper global system. Some distinctive common features concerning both the sources and the contents of such laws and agencies allow us to define them as a global anti-corruption framework (cf. Harris, 2018).

To cope with the *transnationality* of corrupt practices (Pasculli and Ryder, 2019b: pp. 7-10), the global anti-corruption framework largely relies on the mechanisms of *harmonisation* and *cooperation*. Many international and regional conventions<sup>1</sup>, now largely harmonised and

<sup>1</sup> Notably, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions adopted by the Negotiating Conference on 21 November 1997; the African Union Convention on Preventing and Combating Corruption adopted by the Heads of State and Government of the African Union on 12 July 2003; the Arab Anti-Corruption Convention adopted by the League of Arab States on 21 December 2010;

superseded by the United Nations (UN) Convention against Corruption (UNCAC),<sup>2</sup> and soft law instruments oblige or encourage member states to adopt increasingly uniform anti-corruption measures (cf. Di Bitonto and Galluccio Mezio, Chapter 2, in this book; Provolo, Chapter 4; Bradshaw, Chapter 8; Lui and Turksen, Chapter 9; Lui and Turksen, Chapter 10). The *transversality* of transnational corruption (Pasculli and Ryder, 2019b: p. 10) suggests to include within the anti-corruption framework also instruments that, while not directly related to corruption, regulate sectors exposed to corrupt practices or forms of criminality connected to corruption offences, such as the OECD Common Reporting Standard (OECD, 2018: see Blanco and Arjona Sanchez, Chapter 11), the OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters<sup>3</sup> (MacLennan, Chapter 12), the EU Parliament Resolutions on Corporate Social Responsibility<sup>4</sup> and the EU Directive on the disclosure of non-financial informations<sup>5</sup> (Petrassi, Chapter 13).

Leaving the ultimate implementation of anti-corruption measures to nation-states, through the mechanisms of harmonisation and cooperation, does not allow to appropriately address the truly global causes and forms of manifestation of corruption. International anti-corruption instruments are often too generic to have a real impact (Di Bitonto and Galluccio Mezio, Chapter 2). For example, the vagueness of the UNCAC's provisions on whistle-blowing<sup>6</sup> allows states like Switzerland to refrain from implementing adequate regulatory protections (Lui and Turksen, Chapter 9). The fragmentariness and multiplication of anti-corruption instruments hinder interpretation and implementation (Di Bitonto and Galluccio Mezio, Chapter 2). Moreover, different states fulfil obligations of harmonisation and cooperation differently. Some states may lack resources and capacity, as it happens in many developing economies, such as Nigeria (cf. Lui and Apampa, Chapter 10). Others may lack the political will to implement anti-corruption measures that frustrate national interests (or those of governing elites). The reluctance of Switzerland and Luxemburg to accept international standards on tax transparency and whistle-blowing is an example (Blanco and Arjona Sanchez, Chapter 11; Lui and Turksen, Chapter 9). Some states may even refuse to become a party to an international instrument or they might withdraw from it, with an impact on anti-corruption – as in the case of Brexit (cf. Pasculli, 2019a and 2019b).

## Negative measures

The contents of the global anti-corruption framework can be divided into *negative* and *positive* measures (cf. Pasculli, 2012). *Negative measures* aim to prevent and respond to corruption by

the Inter-American Convention against Corruption adopted by the Organization of American States on 29 March 1996; the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the EU Adopted by the Council of the European Union on 26 May 1997 [1997] OJ C195/1; the Council of Europe Criminal Law Convention and Civil Law Convention on Corruption, respectively adopted by the Committee of Ministers on 27 January 1999 (ETS No. 173) and on 4 November 1999 (ETS No. 174).

<sup>2</sup> Adopted with General Assembly resolution 58/4 of 31 October 2003.

<sup>3</sup> Developed jointly by the OECD and the Council of Europe in 1988 and amended by a new Protocol in 2010. Available at: <https://dx.doi.org/10.1787/9789264115606-en> [Accessed 17th August 2019].

<sup>4</sup> European Parliament resolution of 6 February 2013 on corporate social responsibility: accountable, transparent and responsible business behaviour and sustainable growth (2012/2098(INI)) [2016] OJ C24/28 and European Parliament resolution of 6 February 2013 on Corporate Social Responsibility: promoting society's interests and a route to sustainable and inclusive recovery (2012/2097(INI)) [2016] OJ C24/33.

<sup>5</sup> Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups Text with EEA relevance [2014] OJ L330/1.

<sup>6</sup> Article 33.

restricting the rights and liberties of individuals and entities (e.g. criminal law and international sanctions). *Positive measures* aim to resolve the causes of corruption by promoting values of integrity through a range of initiatives to support individuals and organisations in the fair and lawful pursuit of their rights and interests and in the development of virtuous practices (e.g. codes of conduct, corporate social responsibility, education, training and information). The studies in this book reveal that the anti-corruption framework is unbalanced towards negative measures and that these are ineffective and insufficient. Negative measures can have, at best, retributive or deterrent effects, but they can never resolve the cultural, socio-psychological and political causes of corruption, as identified in our previous studies (Pasculli and Ryder, 2019a and 2019b; Pasculli, 2019b).

### *Criminal law: the escape from punishment*

As a social phenomenon, corruption goes beyond criminal conduct and covers also illegal or merely unethical behaviours (cf. Topal, Chapter 15; Pasculli and Ryder, 2019b; Ellis and Whyte, 2016; Whyte, 2015; Beetham, 2015), such as, for instance, tax avoidance (cf. Blanco and Arjona Sanchez, Chapter 11 and MacLennan, Chapter 12). Nevertheless, as international conventions define corruption as a set of criminal offences,<sup>7</sup> criminal law occupies a prominent place in anti-corruption (cf. Di Bitonto and Mezio, Chapter 2; Johnson, Chapter 3; Provolo, Chapter 4).

The findings of our studies confirm that traditional national criminal justice is incapable to both retribute and prevent transnational corruption. First, criminal law and justice remain essentially local. Definitions of corruption offences vary from state to state and even internally the complexity of corrupt behaviours may mislead prosecutors in identifying the most appropriate offence (Johnson, Chapter 3). Territorial jurisdictional limits make the investigation of transnational crime and the apprehension and prosecution of transnational offenders very difficult (cf. Fouladvand, Chapter 5 and Di Bitonto and Galluccio Mezio, Chapter 2). Second, corruption is committed in such secrecy that it is often very hard for state authorities to even detect it unless whistle-blowers or companies report misconduct (Lui and Apampa, Chapter 10; Lui and Turksen, Chapter 9). Third, many corruption offences are committed or orchestrated by corporations. The obligation set by UNCAC<sup>8</sup> to establish the liability of legal persons for corruption offences helped overcome the anachronistic principle *societas delinquere et puniri non potest* (Di Bitonto and Galluccio Mezio, Chapter 2; Provolo, Chapter 4), but the prosecution of corporations is still hindered by ‘almost insurmountable’ difficulties (Fouladvand, Chapter 5), such as impervious evidence-gathering; ineffective sentencing or social collateral damages; the risk of relocation of companies with consequent loss of employment and tax revenues (see Fouladvand and Palmer, Chapters 5 and 6). Deferred prosecution agreements (DPAs) adopted by states such as the US, the UK, Australia, Canada and Argentina to respond to such difficulties and improve corporate compliance and minimise future crime risks (Fouladvand, Chapter 5; Palmer, Chapter 6, McStravick, Chapter 7) are still highly problematic (cf. Grasso, 2016: p. 396; Ryder, 2018a: p. 250). DPAs can become a way for corporations to ‘buy their way out of prosecution’ (Fouladvand, Chapter 5), thus frustrating justice (cf. Palmer, Chapter 6), retribution and deterrence (Ryder, 2018a: p. 262). The risk is that DPAs turn into an easy institutionalised escape from punishment. Such an escape becomes absolute when the abdication to corporate prosecution is not compensated by the prosecution of individual offenders (employees, managers or executives). National authorities are often

<sup>7</sup> Cf. UNCAC, articles 15 to 25.

<sup>8</sup> Article 26.

incapable or reluctant to prosecute the executives responsible for financial crimes (Fouladvand, Chapter 5; Ryder, 2018a), not only because of the shortcomings of national criminal justice (Palmer, Chapter 6), but also because dubious political considerations, well exemplified by the full pardon granted by the US President Donald Trump to Conrad Black (Fouladvand, Chapter 5).

### *Sanctions: the escape from criminal law*

An almost opposite reaction to the ineffectiveness of national criminal justice is the imposition of restrictive sanctions – such as asset freeze or travel bans – on targeted individuals or organisations involved in transnational grand corruption (Pasculli, 2019a: p. 218; Bradshaw, Chapter 8). Sanctions are imposed by international organisations such as the UN (Pasculli, 2012) or the WTO (cf. Manacorda and Grasso, 2018; Grasso, 2019a) and by states, either in implementation of international obligations or autonomously (Bradshaw, Chapter 8; cf. also Smith and Dawson, 2018). Despite their contents are analogous to criminal sentences, sanctions do not comply with principles and safeguards of criminal law and justice, international human rights law, and the rule of law (cf. Bradshaw, Chapter 8; Pasculli, 2019a: p. 219). They can become, therefore, a shortcut to ‘punish’ transnational offenders when gathering evidence and bringing them to trial would be impossible or to pre-emptively neutralise individuals deemed to be somehow dangerous (*amplius*, Pasculli, 2012). The escape from the constraints of criminal law, however, is not a guarantee of effectiveness (cf. Ryder, 2018b and 2015; Pasculli, 2015): research suggests not only that sanctions have a minimal deterrent effect, but also that they can unintentionally increase corruption (Biersteker et al., 2013; Kamali et al., 2016).

### **Positive measures: the limits of responsabilisation**

The international anti-corruption framework does promote the harmonisation of various positive measures. The UNCAC dedicates an entire chapter<sup>9</sup> to a broad range of policies to promote the principles of the rule of law, societal participation, proper management of public affairs and property, integrity, transparency and accountability.<sup>10</sup> The EU has also become more proactive in obliging member states to adopt measures to prevent corruption and financial crimes (cf. Ryder, 2012, pp. 32-35; Petrassi, Chapter 13). As a result, many states – such as, for instance, Italy (Provolo, Chapter 4) – have started adopting positive measures.

The positive prevention of corruption (and financial crime in general: Ryder et al., 2014) largely relies on the ‘responsibilisation’ of corporations and non-state organisations through the imposition of duties to control corruption risks (Fouladvand, Chapter 5). These even include the duty to prevent bribery (Fouladvand, Chapter 5, with regard to the UK) or other criminal offences (cf. Di Bitonto and Galluccio Mezio, Chapter 2, with regard to Italy). Codes of conducts<sup>11</sup> are one of the most popular positive measures adopted by private firms (cf. Isenring, Chapter 14) and national institutions (cf. Provolo, Chapter 4; Petrassi, Chapter 13; Lui and Apampa, Chapter 10). A distinctive feature of the positive anti-corruption model is the role attributed to *information* as a means to promote integrity. The need to increase corporate

<sup>9</sup> Chapter II, ‘Preventive Measures’, which acts as a counterpoint to Chapter III, ‘Criminalization and Law Enforcement’.

<sup>10</sup> Article 5.

<sup>11</sup> Articles 8 and 12(2)(a).

transparency is causing an expansion of business reporting obligations beyond mere financial reporting. The best example is the European Directive 2014/95/EU, which requires large public-interest companies to release a non-financial statement containing information on their development, performance, position and the impact of their activity on environmental, social and employee matters, human rights and corruption (cf. Petrassi, Chapter 13). Information is also crucial to prevent tax avoidance and evasion. International instruments such as bilateral agreements, the OECD Common Reporting Standard (OECD, 2018) and the OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters set obligations on tax information exchange (Blanco and Arjona Sanchez, Chapter 11; MacLennan, Chapter 12). Another important issue regarding information is whistle-blowing. The UNCAC<sup>12</sup> requires state parties to ‘consider’ adopting measures to protect whistle-blowers and the European Parliament has recently adopted a legislative resolution on the proposal for a detailed directive on whistle-blowing<sup>13</sup>.

Unfortunately, corporate compliance with corruption control duties is still limited, as demonstrated by Isenring’s empirical findings (Chapter 14). This might depend either on the lack of sufficiently stringent legal obligations or on ineffective enforcement due to inadequate sanctions and controls (an example of which is the above-mentioned shortcomings of national criminal justice). Moreover, corporate responsabilisation is not enough. While it can help remove motivations and opportunities of corruption (so-called *proximate* causes: Pasculli, forthcoming 2020), an intervention on the deepest socio-economic causes of corruption (so-called *remote* causes: *ibid.*) is also required. With many such causes rooted in global developments (Ryder and Pasculli, 2019b), it might be difficult, if not impossible for individual states to intervene effectively. Even serious national efforts can be undermined by countervailing global financial, regulatory, commercial trends initiated by multinational corporations and media.

## Looking forward: critique and recommendations

The global anti-corruption framework suffers from the same paradox of any other international regulation against global crime: despite the causes and forms of manifestation of such crime depend on global developments, there are no truly global institutions capable of controlling them. Instead, the ultimate implementation of anti-corruption measures is still left to nation-states, through the mechanisms of harmonisation and cooperation. But states are physiologically unable to punish corporations and individuals and resolve the global causes of corruption. The ideal solution would be the establishment of a global system of crime prevention and criminal justice with its own enforcement and prevention agencies. Unfortunately, the jealous preservation of the axiom of national sovereignty, recently exasperated by rampant nationalism and populism, prevents this from being a viable solution in the short term. Nevertheless, the globalisation of law and justice does not have to (and cannot) happen by suddenly stripping unwilling states of their sovereignty and imposing global institutions on them. In fact, such globalisation is *already* happening through the slow but inexorable evolution of familiar devices, such as harmonisation, cooperation, and soft-law (cf. Twining, 2009; Walker, 2014 and 2017; Ziccardi Capaldo, 2016). In the short term, it is

<sup>12</sup> Article 33.

<sup>13</sup> European Parliament legislative resolution of 16 April 2019 on the proposal for a directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law (COM[2018]0218 – C8-0159/2018 – 2018/0106[COD]). P8\_TA-PROV(2019)0366 Protection of persons reporting on breaches of Union law \*\*\*I. Available at: [http://www.europarl.europa.eu/doceo/document/TA-8-2019-0366\\_EN.html](http://www.europarl.europa.eu/doceo/document/TA-8-2019-0366_EN.html) [Accessed 21st August 2019].

necessary to facilitate and coordinate such evolution to achieve, in the long term, the transformation of international law into a proper global system of law and justice.

### *Strengthening harmonisation, cooperation and judicial globalisation*

The studies in this book prove that, despite their limits, harmonisation and cooperation are producing significant regulatory changes worldwide. However, a substantial rationalisation and systematisation of international anti-corruption sources and agencies should be carried out urgently, to avoid duplications and ambiguities. Obligations of harmonisation and cooperation, especially concerning positive measures, should be more extensive and precise. A reform of the UNCAC is advisable. Better and more comprehensive mechanisms to monitor and enforce the national implementation of international anti-corruption law must be in place. International organisations should promote any initiative – from conferences to visiting and exchange programmes – to facilitate the global circulation of judicial practices (so-called ‘judicial globalisation’: Slaughter, 2000 and 2004: pp. 66-103; Flaherty, 2006; Pasculli, 2012: pp. 156-158).

### *Towards a globally harmonised system of positive prevention*

Current positive measures mostly address the *proximate* causes of corruption but neglect *remote* ones. Amongst these, anomie plays a central role (Durkheim, 1897; Passas, 2000; Pasculli and Ryder, 2019b). Corruption is rooted in the unrestrained desires for financial gain, social status and material success nurtured by neoliberal discourses, which states systematically fail either to control or to satisfy by providing legitimate means to achieve them. This creates socio-psychological strains that encourage individuals to engage in corrupt behaviours to pursue their private gain (cf. Pasculli and Ryder, 2019b: pp. 15-16; Pasculli, 2019b). In the lack of a ‘global government’ to address such issues directly, various initiatives can be adopted at international and national levels. The harmonisation of positive measures initiated by the UNCAC must continue and expand, so as to address also the remote causes of corruption relying on ongoing research which should be specifically commissioned by international organisations. More effort should be made to remove inequality within and between states and to understand and intervene on the links between corruption and economic development, human rights, democratisation and citizen empowerment. It is also necessary to curb unrealistic expectations determined by excessive cultural stress on materialistic goals. This requires a profound international reflection on and harmonisation of the ethical values upon which the globalising law should be founded. The gradual ‘ethicalisation’ of the EU law (Frischhut, 2019), also fostered by the work of the European Group on Ethics in Science and New Technologies (Frischhut and Pirs, Chapter 16), might provide a model for analogous processes at a global level. States and international institutions should actively promote alternative cultural goals of self-achievement based on the ultimate, fundamental value of the human person, such as human rights and liberties and the values that are instrumental to protect them, such as integrity, transparency, accountability, legality, solidarity, sustainability, inclusivity etc. This should be achieved primarily through education, training, and information campaigns. In this respect, traditional ethical training might be not enough. Building on previous research (Topal, 2017; Pasculli, 2019a), Topal (Chapter 15) suggests installing moral learning processes within governmental organisations (but the suggestion could be expanded to corporate entities) to improve the way individuals cope with ethical dissonances and prevent self-justifications which can lead to the normalisation of corrupt practices (Topal, Chapter 15; Pasculli and Ryder,

2019b: p. 14). It is also worth exploring the effectiveness of positive sanctions (Pasculli, 2019a: p. 225) to reward lawful behaviour and promote ethical values, rather than merely protecting them. Financial rewards can be problematic as they might nurture anomie strains, but there are many valid alternatives, such as individual or organisational accolades in recognition of honest practice, whitelists of virtuous companies (cf. Grasso, 2019b), and scoring mechanisms to assess the integrity of employees for appraisal and promotion.

### *Reforming criminal law and international sanctions*

Until a global criminal justice system will emerge, it is essential to restore the certainty of punishment. A better international harmonisation of rules and principles of prosecution and sentencing of corporations and individuals responsible for corporate crimes is required (cf. Di Bitonto and Galluccio Mezio, Chapter 2). International law should orient prosecutorial discretion in cases of serious financial crimes to prevent impunity motivated by personal or political convenience and provide common criteria for resorting to DPAs and guidance on their possible contents so as to maximise their restorative and responsabilising effects (cf. McStravick, Chapter 7). An international reflection on sentencing is also required to prevent convictions from becoming purely symbolic statements with no substantial impact on the offenders, be their corporations or individuals. International law should also define the relationship between criminal punishment of corporations and regulatory/administrative sanctions to avoid unfair duplication of penalties (*ne bis in idem*).

International sanctions should be used as a *temporary, emergency* and *last resort* measure to avoid military intervention and prevent imminent conflicts or gross human right violations (which might well include forms of global criminality). They should always comply with the basic safeguards of fundamental individual rights and liberties – according to the principles stated by the European Court of Justice in the famous Kadi cases.<sup>14</sup> In any case, their employment against global crime should be acknowledged as a *transitional* measure until a global system of criminal justice is established, and should never become an excuse for states to neglect the duty to improve their criminal justice systems (cf. Bradshaw, Chapter 8) or to cooperate with other countries in criminal matters.

## **Conclusions**

The study of corruption as a global crime and the assessment of the current global anti-corruption framework reveal that radical paradigm shifts are required. It is necessary to rethink corruption as a phenomenon that goes beyond mere criminality and is rooted in developments that go well beyond the individual and the state. It is necessary to rethink criminal law. National criminal justice is ineffective, punishment is insufficient. Research and broad social interventions, harmonised and coordinated at an international level, are required to promote the cultural and societal conditions for integrity and legality. It is necessary to rethink the current structures of politics and power (cf. MacLennan, Chapter 12) and, particularly, the dogma of national sovereignty and, as a consequence, the role and discretion of nation-states in the fight against global corruption. But most of all it is necessary to rethink the values upon which we are founding our globalising societies.

<sup>14</sup> Joined cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-06351 and the joined cases C-584/10 P, C-593/10 P and C-595/10 P *European Commission and Others v Yassin Abdullah Kadi* [2013] ECLI:EU:C:2013:518.

More generally, the study of global corruption reveals how antiquated and dysfunctional the traditional paradigms of law and power can be in dealing with global issues, even beyond corruption. Fresh new approaches, based on scientific evidence and research, are necessary to reshape old legal categories and frameworks into the tools of the slow, quiet but inexorable globalisation of criminal law and justice. Researchers from all over the world can play a major role in this. And they should.

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