

# 1. Introduction

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The term ‘corruption’ means ‘impairment of integrity, virtue, or moral principle,’ according to *Merriam-Webster’s Dictionary*,<sup>1</sup> and comes from the Latin *com*, meaning ‘with, together,’ and *rumpere*, meaning ‘to break.’ It is often used to mean that something is rotten, in a depraved state, unsound, putrefied. Today, the word is associated with the illegitimate use of authority for personal gain, most commonly pertaining to the authority administered by government institutions. Corrupt individuals entrusted with protecting and promoting social values breach their duties and sell government decisions that should not be for sale. In general, those who demand and buy the decisions through bribery are equally culpable. Widespread corruption undermines the basis for state authority and the foundations for development. Such far-reaching consequences make corruption a serious form of crime.

How fit is the criminal justice system to deal with the challenge of corruption? This book approaches that question by exploring the nature and impact of corruption, examining current criminal law responses, analyzing the obstacles to more effective control of corruption, and suggesting ways of overcoming those obstacles. Written for practitioners, policymakers, and scholars, this book draws on both conceptual insights and empirical evidence to help understand why and where corruption thrives and what might be done to combat it more strategically.

Corruption as both a concept to be analyzed and a practical problem to be tackled has attracted the attention of scholars from many fields, especially law, economics, anthropology, and political science. Members of these disciplines have had much to say about corruption, but less to say to one another. This book is intended to stimulate scholarly dialogue, if not between all four disciplines, then at least between law and economics. Their lack of appreciation of the other disciplines’ reasoning denies legal scholars and economists the opportunity to make use of interpretive tools that could yield a richer understanding of the problem that both disciplines strive to unravel but neither adequately understands.

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<sup>1</sup> Merriam-Webster: <http://www.merriam-webster.com/dictionary/corruption> (retrieved 5 August 2015).

Most economists, for instance, continue to pay far too little attention to the moral dimension of corruption, blinkered by their view of corrupt officials as profoundly rational actors. For their part, many legal scholars remain reluctant to embrace economic solutions – on settlements, leniency, corporate criminal liability, and more – that could help curb the scourge of corruption. If economists and legal scholars are more open to borrowing ideas and insights from one another, they will be better placed to provide policymakers with anticorruption strategies that work far more efficiently.

## 1.1 THE SCOPE OF THIS BOOK

This book began life as a study of criminal law responses to the problem of corruption. The study took an economic perspective, yet was conducted in a Nordic law faculty where I was frequently reminded of legal principles and values. Setting out with a notion of criminal justice systems as penalty-imposing entities, I came to realize that there are in fact multiple objectives associated with these institutions, and that if basic state-society foundations are recognized, criminal justice systems may function as catalysts for norm-shaping processes in their societies.

What constitutes an efficient criminal law response and sanctioning in corruption cases, however, must be investigated from several angles, and if insights are to have practical implications, it helps if experts of both law and economy understand and recognize the same conclusions and strive to understand each other's concepts. But then, as one often discovers in cross-disciplinary environments, even a seemingly precise word such as 'corruption' encompasses too many meanings and is subject to such disparate analytical approaches to permit mutual understanding. Despite sharing a common technical language because of similarities in law enforcement approaches across countries, a legal scholar and an economist may well come to very different conclusions about the nature and implementation of strategic solutions to corruption. By distilling down real world complexities, as well as sophisticated economic analyses and legal arguments, it might be easier to see where legal scholars and economists agree and where they disagree.

The book contributes to the ongoing international debate about what we do and should do to control corruption – a debate in which numerous researchers, government decision-makers, and policy advisers participate, each contributing a different set of perspectives, arguments, examples, and opinions. One of the arguments that this book brings to the debate is that criminal justice systems play a decisive role for the performance of

integrity mechanisms in a society, and that this role is too often ignored or misunderstood by those who promote good governance more generally. Anticorruption refers to a whole lot of initiatives beyond the scope of criminal law, initiatives that in different ways raise the level of integrity in a society, in the sense of promoting adherence to moral and ethical codes, preventing the theft of common resources, and reducing unfair decision-making. The criminal justice system should not replace other critically important governance integrity mechanisms; instead, it is the backbone that secures their performance. For a criminal justice system to play this role, its laws and sanctions must be supported by the society of which it is a part. The more embedded this system is in society, the less repressive it has to be and the fewer the resources that have to be spent on law enforcement. The system will not be seen as legitimate unless it convincingly contributes to preventing crime, operates with fair procedures, and allocates its resources cost-efficiently. Given these aims, I argue, law enforcement can benefit substantially from an economic understanding of efficiency, which refers to a state where resources are allocated depending on what has the best effect in society while avoiding waste. The challenge is to determine how trade-offs can be made between core legal principles and pragmatic solutions without sacrificing the former or undercutting the latter.

In terms of practical proposals for law enforcement improvements, I argue that there is still much to gain from harmonized legal definitions, especially of criminal negligence. Responsibility should be extended to include those who benefit indirectly from corruption or condone the facts even if they are in a position to react against the crime. Private sector players, which depend on society's recognition of a legal framework within which profits can be made, should not be allowed to do business unless they provide the most essential information necessary for efficient law enforcement and have basic corporate compliance systems in place. Current law enforcement challenges, combined with a weaker position of states vis-à-vis powerful multinational corporations, can only be met if corporate liability rules are enforced, recognizing the substantial differences between the regulation of organizations involved in crime and the regulation of criminally liable individuals. The principles of duty-based sanctions regimes, which increasingly guide the criminal justice regulation of corporate crime in the private sector, should be used in the regulation of state institutions as well, albeit with a different set of sanctions than those used for the private sector. When it comes to processing cases of corporate liability, I argue that negotiated settlements enhance the prosecutor's flexibility and that all countries should formally introduce such settlements into their law enforcement systems, yet there

are challenging trade-offs that must be understood and addressed. When it comes to criminal sanctions, I discuss principles for ‘*efficient* sanctions’ – a phrase that implies that sanctions should not be more repressive than they need to be, although determining need is difficult in this context. I also argue that debarment of suppliers for public contracts should be taken out of the hands of the government agencies that manage public procurement and added to the arsenal of sanctions that can be imposed by the criminal law system. In addition, I emphasize that many activities – such as lobbying and crony capitalism – occupy a gray zone of corruption and are difficult to investigate and prosecute from a criminal law perspective. Efficient strategies, therefore, require coordination between a variety of law enforcement institutions that observe the problem from different perspectives, including tax authorities, competition authorities, and organized crime units.

The book is organized into two parts. The problem of corruption, its consequences, and practical law enforcement difficulties are presented in part 1. The practical value of principles and conceptual solutions depend of course on how they match the characteristics of the problem. This is a difficulty when it comes to corruption because it is not only a multi-faceted problem; there is also huge variation across countries in the problem’s extent, and its underlying causes are difficult to determine. Part 2 discusses solutions. With their methodological tools for assessing challenges in society and theoretical frameworks for analyzing efficiency, economists offer illuminating perspectives on the problem of corruption and ideas about efficient law enforcement. These conceptual solutions encounter difficulties in implementation, mostly due to an apparent reluctance among legal scholars to reassess their principles and traditional solutions in light of the law enforcement benefits that pragmatic anticorruption approaches can yield.

This introductory chapter sets the stage for the rest of the book by describing and defining key concepts, terms, and relationships. The following section, section 2, introduces corruption as a concept and a complex phenomenon that takes different forms. Section 3 comments on different academic understandings of the corruption phenomenon, and highlights distinctive approaches in law and economics that are especially relevant for arguments presented in this book. Section 4 explains what I understand by *anticorruption strategies* and *integrity systems*, while section 5 provides a brief overview of criminal law responses to corruption, and points at the difficulty of defining *efficiency* in a criminal law context. These introductory clarifications, standpoints, and perspectives are built upon throughout the book.

## 1.2 CORRUPTION: A MANY-HEADED MONSTER

### 1.2.1 The Law Enforcement Difficulty

We know quite a lot about the mechanisms of corruption and the various forms it can take, but that does not necessarily mean that we are well equipped to deter, detect, police, and prosecute it. The obstacles preventing effective law enforcement are numerous and often daunting.

While this book addresses corruption at all levels of governance, the problems involving the higher levels of governance are the most challenging. I will not keep referring to Latin terms, but the much cited proverb from ancient Greece, *corruptio optimi pessima* – which means ‘the corruption of the best is the worst’ – seems to indicate that this fact has been understood for as long as there have been governments.<sup>2</sup>

Corruption at elevated political levels is typically as hard to combat as it is destructive of a government’s legitimacy and even of a country’s internal stability. When citizens see their deceitful leaders acting with impunity and thwarting constitutional checks and balances, the resulting anger and frustration can generate sympathy and recruits for guerrilla groups and rebellions. The Arab Spring that started in December 2010 in Tunisia and Algeria, for instance, was fueled in part by popular anger at regimes that were not only autocratic but also corrupt.<sup>3</sup> What was pushing people over the edge, according to Sarah Chayes (2015:70) ‘wasn’t just poverty or misfortune in general – it was poverty in combination with acute injustice: the visible, daily contrast between ordinary people’s privations and the ostentatious display of lavish wealth corruptly siphoned off by ruling cliques from what was broadly understood to be public resources.’ Furthermore, as Louise Shelley (2014) explains, political corruption is one of the reasons why terrorist groups and crime syndicates from Chechnya to the Middle East to Brazil manage to recruit followers prepared to undertake operations that could cost them their lives.

This readiness to take up arms reflects a widespread sense of powerlessness among ordinary citizens who know corruption is not confined to a handful of national leaders, but permeates domestic elites and is tolerated or even encouraged by powerful international actors. High-level

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<sup>2</sup> Merriam-Webster: <http://www.merriam-webster.com/dictionary/corruptio%20optimi%20pessima> (retrieved on 5 August 2015). According to Hume and Beauchamp (2007:141), the phrase may have its origin in Aristotle’s *Nichomachean Ethics*.

<sup>3</sup> Nucifora, Churchill and Rijkers (2015).

corruption, such as the systematic demands for bribes associated with Indonesia's Suharto regime; the large-scale 'grabbing' in Kenya by Presidents Kenyatta, arap Moi, and Kibaki; and the strategic manipulation of state institutions by President Fujimori in Peru, cannot take place unless the central players in a regime have a powerful group of followers. Domestic corporate elites also hold a huge part of the responsibility in such cases, because they have accepted political corruption in return for favorable industry regulation and the willingness of law enforcement officials to turn a blind eye to corporate misdeeds. For their part, many foreign corporations have gladly paid bribes to avoid competitive pressures and secure inflated contract payments.

Corruption at political levels is hard to combat through law enforcement systems, in part because it can take place without the formal involvement of government representatives or elected political leaders, and therefore, it is difficult to hold them criminally liable. Informally, representatives of the executive may allow their family members or their allies to occupy a position from where they can control entry into a market, the allocation of subsidies, or other framework conditions. They can use this control to manipulate the market in exchange for bribes, yet their activities are largely hidden from the view of law enforcers, especially enforcers from other countries. Bribe transactions are difficult to verify, especially when masquerading as apparently reasonable consultancy payments or smuggled within legitimate deals. The recipient may bank the bribes in secret bank accounts, accept them and keep them in the form of cash, or competently launder them. Criminal law investigators often have a difficult, if not impossible, job to identify illegal parts of apparently legal operations and separate those who should be held liable from those who are most likely honest. On top of these difficulties, investigators may not know for certain whom in their own ranks they can trust. Corrupt networks may cut across politics, state administration, and the private sector, and in some cases obstacles to investigation and prosecution come from inside the prosecuting authorities.

The more a society suffers because of corruption, the more visible the international community's shortcomings typically are in terms of providing the kind of assistance or bringing to bear the kind of pressure that might have helped the society follow a less corrupt and a more development-friendly path. Pressures and sanctions imposed by foreign or international bodies are not impotent, but they are much less powerful than effective law enforcement within the country where the corruption occurs. A court case in the United States or northwestern Europe involving firms involved in bribery in, say, Libya, will not solve Libya's corruption problems, even if it raises the risks faced by multinational

corporations that conduct business in those countries. The problem of corruption cannot be solved outside the societies where it occurs, but unquestionably, it provides a helping hand if international players involved in the crime are held liable abroad.<sup>4</sup>

As Transparency International has pointed out, the risks of political corruption are not confined to poor and middle-income countries. Many of the 427 foreign bribery cases reported by the Organisation for Economic Co-operation and Development (OECD) (2014) involve corruption in countries scoring high on the United Nations Human Development Index. In the most developed societies, some forms of undue influence might go unnoticed due to their unclear legal status or because law enforcers simply do not search for corruption in their countries' government institutions. But there are good reasons to keep an eye on close ties between politicians and firms, among them the lure of protectionist policies, subsidies, and market-share enhancing mergers, all of which high-ranking government representatives might control. A case that helped dispel the naïvety that until recently blinded many Europeans was the French Elf Aquitaine case, associated with what is now Total – an oil company with a network of allies in French politics.<sup>5</sup> The oil producer, which had obtained lucrative contracts by greasing the palms of the leaders of African natural resource-rich economies, was used by its executives as a private bank account for buying political favors, mistresses, fine art, apartments, and other luxuries. The case, described by *The Guardian* (on 12 November 2007) as 'the biggest fraud inquiry in Europe since the Second World War,' was investigated under the leadership of magistrate Eva Joly. Not only did she encounter substantial resistance from leaders of several French state institutions, she also received death threats and had to be protected by security guards during the whole criminal justice process (Joly, 2003).

The global financial crisis that started in 2007 when the US housing bubble burst, which in turn had been created by the irresponsible supply of mortgages, is another reminder of how corporate cronyism can challenge any democracy. Weak government regulation allowed or encouraged questionable trading practices, compensation structures that encouraged short-term deal flow over long-term value creation, and a lack of adequate capital holdings from banks and insurance companies to back the financial commitments they were making. Despite the huge

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<sup>4</sup> For a taxonomy of 'international players' and their role in causing and curbing corruption, see discussions in Rose-Ackerman and Carrington (2013).

<sup>5</sup> The oil producer *Elf Aquitaine* was partly privatized in 1994, merged into *TotalFinaElf* in 2000, and since 2003 it has been operating under the name *Total*.

losses sustained by national economies, major financial organizations, and millions of families, hardly any business leaders were held criminally liable for creating the conditions that precipitated the global economic crisis, and suspicions grew that their influential friends in government had protected them from prosecution.<sup>6</sup> In recent years, it has become evident that weaknesses in the most developed countries' financial regulation harm economic development across the globe. Cases have emerged in which the largest banks in Europe and the United States were involved in money laundering, collaboration with the Mafia, tax evasion, helping clients break UN imposed sanctions, and negligence when it comes to reporting other forms of highly suspect transactions. Evidently, financial secrecy and tax avoidance are no longer concerns associated primarily with Caribbean islands.<sup>7</sup> The LuxLeaks scandal, which broke in December 2014 with the disclosure of a large number of secret tax agreements in Luxembourg, leaves no doubt that multinational corporations – such as Pepsi, IKEA, AIG, Coach, Deutsche Bank, and around 330 others in this case – exploit the lack of financial regulatory coordination for highly unethical tax planning and for hiding whatever transactions they may have reason to hide.<sup>8</sup>

Criminal justice systems are important components in the fight against corruption. But whether they are the most important institutions is difficult to say. Peter Eigen, the founding father of Transparency International, once told me that 'criminal law is the least interesting [topic] you can study if you want to control corruption!'<sup>9</sup> His point was to emphasize the importance of a holistic approach, where a broad set of integrity mechanisms are put in place and the government is adequately controlled with checks and balances. Eigen has also underscored the need

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<sup>6</sup> See McCarty, Poole, and Rosenthal (2013) and Cargill (2014).

<sup>7</sup> Banks found to have been involved in one or several of these offenses include KPMG, ABN AMRO Bank, Citigroup, Barclays, Bank of America, Riggs Bank, UBS, HSBC, the Royal Bank of Scotland, and the Bank of New York, among others. For a useful introduction to the problem of financial secrecy, see Shaxson (2011), NOU (2009) and the websites of civil society organizations working for financial transparency, including Tax Justice Network, Global Financial Integrity, Global Witness and Publish What You Pay.

<sup>8</sup> The confidential tax agreements were identified through investigative journalism by ICIJ, The International Consortium of Investigative Journalists, see <http://www.icij.org/> – in particular on LuxLeaks: <http://www.icij.org/project/luxembourg-leaks>.

<sup>9</sup> Conversation with the author in Trondheim, Norway, on 7 February 2015. See Eigen (2003) for an account of how he established Transparency International and his views on how to control corruption.

to confront corruption from many angles with the involvement of various types of actors, including civil society, the private sector, and government institutions.

A holistic approach is indeed essential, but it does not render the criminal justice system irrelevant. To the contrary, the corruption-controlling effect of a holistic approach will rely largely on the presence of a criminal justice system. A spectrum of mechanisms can enhance integrity in various institutions, but criminal justice institutions form the bedrock upon which a government's efforts to control harmful acts must be based. Unless the criminal justice system functions well, other integrity systems may fail to function as intended.

But what, exactly, does it mean for the criminal justice systems to 'function well?' The detection of and reaction against corruption can assume many forms, serve different objectives, and be coordinated in various ways with other anticorruption forces in a society. In addition, the criminal justice system's rigid institutional structures can make it difficult to imagine alternative ways of approaching and controlling crime. These systems are replete with principles established to protect legal values, many of which operate on the basis of case law that stretches back hundreds of years, and they are usually not environments in which reformist perspectives are strongly encouraged. Furthermore, corruption poses challenges of a sort that many current systems are not designed to handle. Most criminal justice systems are developed to tackle simpler forms of crime, in which one or more individuals are responsible for a clearly defined crime and are identified through investigation, their guilt is clearly established in court, and they cannot escape clear-cut sanctions such as fines or incarceration imposed by a judge. Complex cases of corruption present much sterner challenges. A network of allies, often spread across multiple jurisdictions, may have a variety of ambiguous, shadowy responsibilities for the crime. It might be clear that they draw benefits from the corruption, and yet it may be extremely difficult to hold them criminally liable. The crime may be hidden in complex organizations or behind informal power structures that trump formal government hierarchies. What should the criminal justice response be when corruption undermines government institutions, subverts legal systems, and, as it happens in some countries, threatens the very existence of the state?

From a pragmatic point of view it is clear that we cannot allow corruption to destroy societies simply because the problem does not fit with the organization and design of our criminal justice systems and jurisdictions. Thus, we should determine what constitutes an efficient criminal law response, and then adjust our systems accordingly. From a

more conservative perspective, however, there are obvious risks associated with a departure from the procedures associated with a predictable well-developed and value-based criminal justice system. When challenged with new forms of crime, ad hoc modifications are tempting. The problem is that there will always be new forms of crime – as society develops, whereas the qualities associated with a stable system – well embedded in society and based on long traditions – could be exactly what we need to stand against new forms of crime. While a narrow approach to the problem would make it easier to find solutions, it is necessary to take into account this duality if we want to develop coherent strategies for more efficient criminal justice responses to corruption and other complex forms of crime.

### 1.2.2 The Concept of Corruption and Corrupt Acts

Before we can determine the role the criminal justice system should play in the fight against corruption, we first need a clear notion of the corruption phenomenon. Without clarifying what needs to be combated, we cannot hope to prevail. Corrupt players will easily navigate around law enforcement measures, while governments may be able to look as though they are tackling the problem while in reality getting nowhere. A nuanced typology of corruption's diverse forms, combined with knowledge about its extent, is necessary to craft a targeted response and to evaluate how anticorruption measures work in practice.

Corruption is difficult to place within a legal definition. The 'corruption' refers to depravity and grave immorality, and how one pretends to be loyal while betraying the institution one represents and the values one is supposed to protect. In her book about the concept, Laura Underkuffler (2014) describes corruption as a 'dispositional concept,' meaning that it may refer to a state of mind rather than to an act. The word 'corrupt' is often used to describe what a person has become or the absence of integrity in an institution, and as such, the problem is difficult to regulate through criminal law. In addition, if we take 'corruption' to refer to 'something rotten,' we need to have some idea of the required extent of the rottenness for an act to qualify as 'corrupt.' The everyday greed with which most of us struggle, including propensities to exploit positions, circumstances, and even friends for personal gain of some sort, is not necessarily sufficient to qualify as corruption. The misuse of authority and influence must be of a certain scale. This is why legal definitions often refer to *undue* influence, as if the word 'undue' is clarifying. Apparently, *some* influence peddling is fine, but at a certain level, it is simply not acceptable. That level will depend on a society's ideals, moral

standards, experiences, and cultural norms, and is plainly a matter of perspective. Enforcing a law against corruption therefore requires a principle for drawing the line between the acceptable and the unacceptable.

Such a principle must be associated with the protection of the integrity that is necessary for state structures to function. State administration involves the application of a complex set of norms. Bureaucracy implies delegation of authority. Their efficient performance requires space for discretionary judgment. The performance of the state therefore depends on each representative's loyalty to government objectives, which are usually seen as steps toward further development of society as a whole. Corruption is a departure from this premise. Corrupt decision-makers offer choices that deviate from the formal aims of the institutions they represent. The corrupt decision-maker's 'costs' associated with such choices are compensated for by personal benefits of various sorts, usually in the form of monetary bribes but sometimes involving changes in status, position, or power, or some uncertain benefits to be acquired in the future. Given this compensational aspect, it makes sense to think of corruption as a *trade in decisions that should not be for sale*. Those who are willing to provide decision-makers with benefits, directly or in terms of some subtle support, expect something in return. They would not provide a decision-maker with those benefits unless they can obtain (or increase their chances of obtaining) something that would otherwise be unobtainable or at least harder to obtain. The compensation for the moral costs and risks associated with the self-serving decisions, breach of public duties, and deceit of common values is a *price*, often a negotiable price.<sup>10</sup> To categorize an act as corruption, it is therefore useful to search for the element of a bargain around decisions that should not be traded, including failed negotiations to reach such a bargain.

The identification of what appears to be a corrupt bargain is not sufficient for placing criminal liability, but it is a useful way to distinguish cases that call for further investigation from those where the term 'corruption' is less applicable, despite some apparently unfair allocation of benefits.

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<sup>10</sup> Political theft of state revenues on a grand scale is often described as 'corruption,' which fits well with the notion of 'something rotten.' Given the importance of a nuanced approach, however, I refer to such acts as 'theft.' Nonetheless, as many cases show, the theft rarely goes on without some clear-cut corruption as well, and thus, grand-scale theft is associated with political corruption.

### 1.2.3 Forms of Corruption

Its indistinct content has led the term ‘corruption’ to be used to encompass a range of acts, allocations, and bargains. In addition to the word ‘corruption,’ the facets of the problem most frequently referred to in this book are ‘extortion,’ ‘bribery,’ ‘collusion,’ and ‘negligence.’

In this book, *extortion* (or *extortive corruption*) refers to situations in which an individual or firm is exposed to pressure to pay a bribe. Typically, this pressure takes the form of a government representative demanding a bribe in exchange for a decision regarding a service, license, or approval otherwise offered free of charge or at low cost. ‘Extortion’ can also refer to the act of demanding a bribe in exchange for the ‘opportunity’ to avoid an undeserved disadvantage, such as paying a fine, even if no offense has been committed. In these cases, it should be noted, the bargaining powers between those negotiating a corrupt deal are asymmetrically allocated, which means one side of the deal feel pressed to be involved.<sup>11</sup>

*Bribery* is the offer or transfer of bribes, and is thus more act-specific than the more character-describing ‘corruption.’ Bribery is often associated with the attempt to influence a government decision.<sup>12</sup> Cases of bribery often involve a middleman, or in other forms, a third party. From a legal perspective, where the aim might be to determine liability, the question of bribery will often depend on who knew or should have known what. From an economic perspective, from which the question is why players make what choices, the question is rather what transactions were made in exchange for what and to whose benefit.

*Collusion* (or *collusive corruption*) refers to collaboration for the joint benefit of the collaborators at the expense of society. A bribe is offered and willingly transferred to facilitate a service, alter a decision, or

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<sup>11</sup> Normally we think of the extorting player as the one holding a government position. There are also cases, however, where a civil servant, a judge or politician is exposed to extortion from clients. Facing the demands from a mafia organization, for example, the ‘bribe’ can take the form of ‘absence of violence’ and result in a biased decision that might be difficult to distinguish from the circumstance where these decision-makers accept or by extortion demand a monetary bribe.

<sup>12</sup> In this book, however, I do not use the terms ‘active’ and ‘passive’ bribery or corruption. These terms are often applied in the legal literature (including in legal definitions), with ‘active’ denoting the one who pays a bribe, while the recipient is referred to as ‘passive.’ I consider these concepts misleading, because the ‘passive’ is often the most active and, in my view, the one who most clearly, or actively, violates his or her duties.

influence a government strategy (for example, on taxation or protectionist policies). A business leader might negotiate industry regulation as an exchange of benefits with a minister. A school manager might collaborate with a government oversight representative to embezzle funds allocated for education. Collusive corruption is subtle and often inhabits a gray zone, where it may be hidden behind campaign finance or compensated board positions. At its simplest, it may involve a naïve willingness among high-ranking officials or politicians to support their good friends. In contrast to ‘extortion,’ ‘collusive corruption’ refers to a genuine agreement between those involved, both or all of whom benefit from the crime. The bargaining powers between those involved in the deal are now allocated more symmetrically, which means, both parties can influence the contents of the deal and none is forced to take part.

*Negligence* is rarely used in the corruption literature but is indeed relevant. A well-established concept in criminal law, ‘negligence’ holds that a person can be held criminally liable for the failure to foresee an avoidable danger and so allow it to manifest. The degree of assumed culpability is denoted with overlapping terms: ‘negligence,’ ‘gross negligence,’ and ‘recklessness.’ The most serious form is recklessness, usually described as a ‘malfeasance,’ where a defendant knowingly exposes another to the risk of injury. When it comes to criminal negligence, the ‘crime’ is the absence of foresight as to the prohibited consequences. Even though the failure to act responsibly may have caused enormous damage, and even though the accused was aware of the risks, there may have been no criminal intent, and therefore no culpability. In corruption contexts, negligence can be associated with business leaders who fail to take sufficient precautions to prevent their firm’s involvement in corruption, or public sector managers who skip control and compliance checks on services and investments. Knowledge of corruption risks should lead to caution, and responsible players should be expected to make the necessary enquiries. Negligence is a form of criminal culpability, yet the criminal justice response is weaker compared to crimes committed with intent. In Norway, for example, driving at high speed on ice in the middle of the night implies a risk of being held criminally liable for unintentional murder if a pedestrian is hit and killed by the car. However, even if no one is hit, the act may also result in a penalty, though with a far milder sanction – typically an administrative fine. A pertinent question is whether the decision to operate in the world’s most corruption-prone societies should add to the risk of being held liable for criminal negligence, even for operations that are common in countries where corruption problems are relatively rare.

A term that could easily be associated with criminal negligence is ‘corruption-fueling activities,’ which refers to transfers made to governments or state institutions despite a clear risk of corruption and without the necessary external controls on spending of the transferred amounts. The label is relevant for some development loans or aid transfers, as well as for transfers made by the private sector – for example, in relation to the privatization of state-owned entities or the taxes paid in connection with production and export of nonrenewable natural resources. The negligence in these cases will rarely, if ever, lead to criminal liability, although the negligence is closely associated with the causes of corruption.

Like ‘corruption-fueling activities,’ a number of terms are associated with corruption, although the acts that they describe are not only legal but also legitimate. ‘Lobbyism,’ for example, refers to acts of attempting to influence decisions made by officials in the government, especially the legislature, without concern for the consequences for other groups in society if the desired decisions are taken. When combined with payments to political parties, such influence is called ‘campaign finance’ and moves a step closer to the acquisition of decisions ‘that should not be for sale,’ especially when the payer’s identity is kept confidential and voters left unable to judge the potential impact on political decisions. Although it is a democratic right for citizens to influence government decisions, these acts are often associated with corruption and are sometimes used as a cover for corrupt transactions. ‘Capital flight’ and ‘tax avoidance’ are associated with complex cases of corruption as well as grand-scale theft. The players involved are usually powerful, typically with a row of well-paid lawyers who help them find legal loopholes, create cover operations that make illegal transactions appear legal, and defend those acts in court, if necessary.

Some other terms associated with corruption are ‘crony capitalism,’ ‘embezzlement,’ ‘kleptocracy,’ ‘state capture,’ ‘regulatory capture,’ ‘facilitation payments,’ ‘tender-corruption,’ ‘queue-corruption,’ ‘kickbacks,’ ‘patronage,’ and ‘rent-seeking.’<sup>13</sup> Several of these concepts and practices are explained later in the book. When the legal status of specific acts cannot be confirmed, I sometimes avoid using the word ‘corruption,’ and instead use the term ‘grabbing,’ referring to the act of acquiring more benefits than one is entitled to while imposing costs on other members of society.<sup>14</sup>

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<sup>13</sup> These terms are listed with definitions in Søreide (2014:2).

<sup>14</sup> In the edited volume *Corruption, Grabbing, and Development* this was a recurrent solution for authors referring to the details of corruption cases that had not been brought to court, see Søreide and Williams (2014).

Eventually, the connection between entrenched corruption and government dysfunctions makes it relevant to address the question of ‘government legitimacy’ and which acts or institutions are ‘legitimate.’ In this book, ‘*not* legitimate’ can be understood as regimes or government institutions that allow political theft and bureaucratic corruption to go on at the expense of the supply of basic state services and law enforcement. *Legitimacy* thus is not used with reference to a country’s specific constitutional stipulations, but rather to conditions that are commonly associated with well-functioning state-society relationships.

### 1.3 COMPETING UNDERSTANDINGS OF THE PROBLEM

As the abundant terminology demonstrates, corruption is a many-sided phenomenon. At its core, corruption is trade in decisions that should not be for sale. But the mechanisms at play, who achieves what, and the consequences for society all depend on the decision in question, the allocation of bargaining power between those involved, and the counterfactuals (that is, what would have been the case if the corruption had not taken place). Endeavors to understand the problem lead to layers of explanatory factors. The individuals involved are part of organizations, institutions that have their own unique histories, cultures, and other qualities, and that, to varying extents, reflect the histories and cultures of the wider economic sectors and the countries to which they belong. Those involved in corruption are subject to various forms of pressures, expectations, regulations, and risks, the latter including not only the formal and informal consequences if caught in the crime, but also sometimes the consequences associated with deciding *not* to exploit the opportunities for corruption.

#### 1.3.1 Corruption in Social Science

Not surprisingly, given the complex set of factors that must be assessed in order to understand corruption, a variety of analytical perspectives have been brought to bear on the phenomenon. As noted earlier, the disciplines most represented in the academic literature on corruption are anthropology, political science, economics, and law, while sociology has contributed importantly on crime more generally. There are few clear boundaries between these disciplines. They overlap because researchers use one another’s concepts and methodologies and draw on some of the same insights from history, psychology, sociology, and philosophy. Some

features found in explanations of corruption are nonetheless associated with the different disciplines.

*Anthropology* offers theories on how framework conditions and history shape cultural norms and individual assessments of right and wrong. Anthropologists have sometimes been criticized for being too understanding of corruption, as if such transactions can be forgiven simply by noting the presence of exogenous forces, such as an international expansion of capital or a restructuring of the state driven by foreign pressures and elite interests. Even so, many of the authors in this field see corruption as a serious obstacle to development that cannot be excused by norms and culture. What they seem to agree on, according to Sandy Robertson (2006), is that corruption must be understood as a by-product of the formal rules that seek to separate individuals from the offices they hold. Despite the obvious need for state administration, and for government representatives who act as neutrally as they can, the required institutional frameworks are constructs that regulate power and privileges on a grand scale. When judgments are heavily affected by the personal interests of the individuals involved, it is easier from a criminal law perspective to blame the individuals rather than the institutions – even if the institutions have been designed on premises accepted only by a minority of the society.<sup>15</sup>

*Sociology* approaches crime with the view to explaining the social context in which behaviors are committed. An individual's deviance from formal laws or accepted norms develops as the result of such factors as group pressures, life experiences, network of contacts, social class, opportunities in life, and familiarity with crime. While sociologists have contributed importantly to explain crime, their imprint in theories on corruption and strategies against the problem is less evident. It was nevertheless the sociologist Edwin H. Sutherland who coined the term 'white-collar crime' – as 'crime committed by a person of respectability and high social status in the course of his occupation.'<sup>16</sup> Sutherland (1945) emphasized the importance of *not excluding* crime committed by business leaders and the wealthy from crime definitions, and thus contributed importantly to generating support for criminal law regulation of corruption and other forms of business related crime. His arguments

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<sup>15</sup> What Robertson (2006) also underscores is the discipline's methodological advantages in studying organizations as constructs – for example, how corporations can be a construct for allocating wealth to a group of individuals at the cost of others.

<sup>16</sup> Laid out in speech on 27 December 1939 to the American Sociological Association, titled *The White Collar Criminal*.

significantly influenced sociologists' understanding of crime, but as Michael L. Benson and Sally S. Simpson (2015:71–73) point out, the discipline has reached no clear consensus on theoretical approaches to explaining white-collar crime, including corruption.

*Political scientists* seek to explain corruption as the result of the mechanics of a larger governance system, including functional weaknesses in constitutional checks and balances and various power games. The discipline describes the formal and informal institutions and practices that shape a country's distribution of power and resources, and is a constant reminder that corruption must be seen in light of the state's position in society – that is, in light of the extent to which the social contract between citizens and state is well-formulated and respected. A corruption problem will have different solutions when rooted in a weak state – where informal loyalty to decision-makers and family matters more than formal institutions and rules – compared to a de facto dictatorship with authoritarian control of all parts of society. Bo Rothstein (2011) and Alina Mungiu-Pippidi (2015) describe how anticorruption successes are the result of how a society manages to provoke multiple forces against the problem, and claim that it cannot be fully understood by investigating individual choices.

*Legal scholars* approach corruption by studying legal systems and the ways in which rules can help regulate acts of corruption and the reactions against the problem. A central question for legal scholars is how to balance individuals' right to be protected from state controls, interventions, and various state-imposed burdens (such as reporting requirements and restrictions on roles and ownership) against the need to give the law enforcement system the tools it needs to respond to corruption and protect society against its consequences. The legal literature also explores numerous associated issues, including legal definitions of corruption, whether corruption should be regulated by criminal law or administrative law, who should be held responsible for corruption in a given setting, which sanctions they deserve, and how to enforce anticorruption regulations and harmonize them with other rules, institutional structures, and legal systems.

*Economists* consider decisions, including acts of corruption, as the result of rational individual cost-benefit assessments. Choices are assumed to be optimized according to the personal preferences of agents (meaning members of society) and information available to agents about the likely outcome of alternative options. Corruption is predicted if the individual's net benefit of committing such crime exceeds the perceived benefits associated with honest alternatives. Economic analysis of legal responses and the justice system forms a separate field of research known

as ‘law and economics’ and is conducted primarily by economists yet often commented on by legal scholars. The analytical endeavors of most relevance to the discussions in this book seek to explain how individuals and corporations can be *incentivized* to comply with the law and report incidents of corruption. The economic discipline also offers principles for the allocation of scarce law enforcement resources, criteria for maintaining well-functioning checks and balances, and proposals on how to organize state bureaucracy so as to mitigate corruption.<sup>17</sup>

### **1.3.2 Law and Economics**

The ‘law and economics’ term easily gives an impression of harmony between the two disciplines, or at least of a sturdy bridge between them over which scholars can ferry complementary contributions to the fight against corruption. In the law and economics academic discourse, however, harmony can be hard to find and bridges, where they exist, can seem fairly unstable. In Europe especially, but also in the United States, economists and legal scholars frequently disagree on the validity and practical value of different theories. No single view can be categorically associated with either discipline, but each discipline is associated with a certain criticism of the other. Many legal scholars frown on economists’ reputation for ignoring legal principles and moral aspects, which are the points of departure for most legal analysis. And whereas the legal discipline stresses the importance of procedures, especially in criminal law (where much attention is devoted to questions such as: ‘Are the offender’s rights protected?’), economists are far more outcome-oriented (and ask questions such as: ‘What are the consequences of this sanction or procedure for society at large?’). This difference explains why economists are typically interested in the deterrent effect of sanctions (that is, ‘To what extent will harsher punishment prevent crime in the future?’), whereas legal scholars are more likely to embrace a more retributivist perspective (that is, ‘Punishment is desirable in response to crime irrespective of its consequences’).<sup>18</sup> The distance between the disciplines is further widened by their use of different methodologies. Economists apply abstract mathematical analyses based on what outsiders often consider to be oversimplified assumptions about reality, while the legal discipline searches for answers in philosophy, ethics, and former court cases.

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<sup>17</sup> Chapter 4 provides a review of important results in this literature.

<sup>18</sup> Alon Harel (2014) explains in simple words the differences between retributivist views and classic economics.

A more fundamental difference relates to how the different disciplines tend to understand criminal acts. The classic law and economics literature (that is, economic theories of law enforcement) explains the extent of corruption in society as the aggregated result of rational choices given trade-offs between honest and illegal gains and the risk of being detected and the consequences thereof. Conceptually, deciding whether or not to commit a corrupt act is not too different from deciding whether to buy a product or a service based on its price; the decision depends on the size of the values at stake. Despite the fact that corruption is to a large extent the result of some moral judgment, classic economics has offered little room for assessing it as such. The law and economics literature accepts that rational agents can have a high moral cost for committing such crime, but the moral aspect is considered a one-dimensional characteristic, as just one among several costs in an act-consequentialist structure of reasoning. The explanatory value of classic law and economics theory is reduced to pointing out trade-offs considered by agents with sufficiently 'low moral costs'; the theory tells us little about the variety and relative weight of factors behind agents' moral judgments, or where those judgments come from.

The law and economics literature has generated a slew of policy recommendations that have had a significant influence on legal systems, especially in the United States, where collaboration across law and economics is common in universities. In Europe, however, there is a notable resistance to accepting such policy recommendations, which are considered too pragmatic for the protection of justice and fairness – values that are expected to have indirect impacts on moral development in society.

The divides between the two disciplines, while real, are not unbridgeable, however. Indeed, intrepid scholars have been trying to build bridges for several decades. Within law, there are those who support the classic economic understanding of law enforcement – the defining statement of this school of thought being Gary Becker's (1968) cost-benefit analysis – and among both economists and legal scholars there are skeptics who recognize weaknesses in this approach. The skeptics' main problem with the classic economic approach primarily boils down to its normative implications, especially for legal sanctions. The theory postulates that individual decision-making can be regulated by adjustments to the risk of detection and the repression level, as if the choice to commit crime can be controlled primarily by imposing higher risks (that is, higher costs) on an individual. The main purpose of criminal sanctions, therefore, is considered to be their impact on *potential* offenders, others than the offender who is subject to sanctions. Implicitly, in the case of corruption,

the theory reduces the criminal justice system to an institution whose job it is to maintain a level of threats adequate to deter those who might otherwise be tempted to accept or offer bribes. A central question posed in this book – which may help to bring the disciplines together – is whether this threat-based strategy is a reliable strategy for promoting principled decision-making and for developing the moral caliber of members of society. Could it be that in our eagerness to regulate we might have drawn too ambitious normative conclusions from our very simple descriptive models of crime?

The choice of committing crime, corruption included, obviously depends on a complex set of factors; it cannot easily be ‘regulated.’ The integrity that keeps decision-makers from exploiting opportunities for corruption may well be the result of a mixture of rule-consequentialism, nonconsequentialist reasoning, and group rationality – if at all the result of predictable rational judgment. For many individuals, involvement in corruption is simply not an option; in their everyday life, they do not assess the trade-offs related to various crimes, such as robbing the local bank, murdering their mother-in-law, or exploiting opportunities to reap corrupt benefits. Such a stand against corruption is too important to be treated analytically as a one-dimensional cost-variable that follows exogenously from individuals’ expected ranking of personal preferences. Economists are now starting to accept that an individual’s subjective space for acting is more limited by his or her moral barriers than has often been assumed in the past.<sup>19</sup> Where these moral barriers come from is relevant for the development of efficient anticorruption solutions. As neither economists nor legal scholars have a complete answer, this is a uniting challenge – regarding which each discipline has to look beyond its traditional approaches.

#### 1.4 ANTICORRUPTION APPROACHES AND INTEGRITY SYSTEMS

However we understand the mechanisms of corruption, there is broad consensus that governments need to keep in place barriers against it. There will always be a mix of motivations behind the decisions made by high-ranking government officials and politicians, ranging from the most selfless and benevolent ambitions to a thirst for power and personal

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<sup>19</sup> This concern is not only addressed by economists. See, for example, Rose and Heywood (2013), who note a dearth of studies of integrity in the political science literature.

enrichment. Corruption leads to benefits for narrow groups at the expense of society as a whole, and the temptation of accepting just some of these benefits is the reason why this problem is widespread.<sup>20</sup> Despite a proclaimed commitment to anticorruption, some governments restrict markets to benefit a few, offer subsidies or tax cuts for those who can manage well without them, deviate from regulatory principles, or let their allies take over state-owned entities. Regardless of their readiness to sign anticorruption conventions, some governments condone or even contribute to financial secrecy, permitting powerful individuals and firms to use structures designed to hide corruption, evade taxes, and avoid responsibility for other forms of crime. For these different reasons, all countries need to have solid *integrity systems* in place to control procedures, assess the results of government decisions, and observe inefficiencies in state administration.

#### 1.4.1 Detection and Prevention Beyond Criminal Law

Non-criminal strategies against corruption include a broad range of formal and informal measures, and their effect depends on the dynamics and coordination between them, as well as institutional competencies and independence. Most countries across the world have similar formal integrity systems, although their performance varies greatly. Some structures within these systems are intended to disclose rule violation, while others have primarily preventive effects.<sup>21</sup>

Examples of integrity mechanisms intended to *prevent* corruption are the various impartiality requirements commonly applied in state administration as well as access-to-information laws, both of which are expected to reduce the inclination for biased decision-making. Conflict-of-interest regulation is highly relevant for avoiding corrupt decisions, yet different countries define it differently in accordance with their own views on discretion, their own problems with corruption, and the structures they already have in place to prevent biased decision-making.<sup>22</sup>

At the political level, the most important disciplinary effect comes from democratic elections that abide by rules designed to ensure that the

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<sup>20</sup> All such biases are not a result of corruption; they can be motivated by political power games, revolving-door career ambitions, or short-sighted populist campaigns.

<sup>21</sup> Because the risk of being detected is preventive, the distinction between disclosure and prevention may appear artificial, but in light of the function of integrity mechanisms, it makes sense to categorize them along these lines.

<sup>22</sup> For discussion, see Rose-Ackerman (2014).

process is free and fair. Hearing procedures are commonly employed when high-profile decisions are about to be made, so that highly skewed proposals can be rejected or amended before the decisions are made. Many countries have a public lobby register, ownership rules, and registration of ownership interests.<sup>23</sup> In addition, regulatory agencies – such as those that regulate utilities and exercise financial control – are often placed at arm's length from their respective government departments with the aim of preventing corrupt or populist officials from overruling their regulatory decisions.<sup>24</sup> To prevent corruption in markets as well as the manipulation of sector regulation and control, there are competition law, procurement rules, and employer liability rules. As part of procurement law, suppliers (firms and individuals) can be debarred from participation in future tenders if they have been involved in corruption. Disqualification for professional activities is an option in criminal law as well, albeit one rarely applied. The fact that corruption is also criminalized is expected, over the long term, to affect norms in society and raise the risks associated with corrupt acts.

State-organized integrity mechanisms intended to *disclose* corruption include various monitoring and investigation efforts as part of the law enforcement system, auditing requirements, taxation, measures to protect and reward whistle-blowers, lenient criminal law treatment upon self-reporting, and various transparency mechanisms. Other institutions in place to react on observed acts of corruption include financial intelligence units, public procurement units, competition authorities, and even foreign embassies (the latter being especially relevant in cases of cross-border bribery), although a 2014 OECD review of investigated bribery cases concluded that these four categories of institutions are notably deficient in fulfilling their anticorruption responsibilities (OECD, 2014:33). At the political level, a national audit institution usually oversees the government's administration of the state, including the details of its spending and the extent to which value for state money is secured. The role of these institutions has been steadily enforced in many developing countries, especially since the early 2000s, making high-level corruption more difficult to conduct unnoticed.<sup>25</sup> Outside the formal state

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<sup>23</sup> For a comparative perspective on the status regarding such rules and registers, see OECD (2014).

<sup>24</sup> For a brief introduction to the problem and relevant literature on power hunts and corruption in the regulation of utilities, see Benitez, Estache, and Søreide (2010).

<sup>25</sup> The strengthened position of national audit institutions came well to impression in a comparative study of fraud in state administration conducted in

structures, other institutions such as the press and watchdogs are key players in promoting integrity. They disclose corruption and inspire formal systems to react to it, yet their role depends on the extent to which they enjoy access to information and the right to free speech.

### 1.4.2 Evaluation of Integrity Systems

The performance of integrity systems is subject to frequent evaluation and public debate in most countries, and some countries collaborate to secure independent evaluation of how the systems work. Internationally, the most comprehensive collaboration for such evaluation is the *Group of States against Corruption* (GRECO), an initiative from 1999 established by the Council of Europe.<sup>26</sup> GRECO assesses each member state's anticorruption mechanisms and presents a public report that describes their strengths and weaknesses. Upon the release of the reports, governments are given a deadline to make the required institutional adjustments. The extent to which the revealed weaknesses are acted on varies, but at least these reports make it more difficult for governments to ignore the need for sturdy integrity structures.

No less important are the assessments conducted by civil society organizations, which often reveal severe weaknesses in countries' integrity systems. Examples of such work are the National Integrity Studies (NIS) conducted by *Transparency International* chapters around the globe. Their summary of findings in Europe pointed at severe weaknesses in the barriers against political corruption. *Global Integrity*, another civil society organization, reports on a large number of integrity mechanisms for countries all over the globe, while the *World Justice Project* presents cross-country statistics on how well legal systems function, including the risks of corruption. *Reporters Without Borders* publishes a yearly index that ranks countries according to civil society's and media's opportunity to act as watchdogs. Reporters Without Borders also keeps track of the number of journalists killed because of their job.

The problem is that many corrupt decision-makers whose activities have been detected and exposed by integrity structures are likely to continue their involvement in crime unless the revealed corruption leads to hard-hitting consequences for them. Sadly, many of them will have

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Tanzania, Malawi, and Ethiopia, a study where I was involved myself, see Søreide, Skage and Tostensen (2012).

<sup>26</sup> For an introduction to the Council of Europe, see: <http://www.coe.int/en/web/about-us/who-we-are>, and for information about GRECO, see [http://www.coe.int/t/dghl/monitoring/greco/general/3.%20What%20is%20GRECO\\_en.asp](http://www.coe.int/t/dghl/monitoring/greco/general/3.%20What%20is%20GRECO_en.asp).

reason to believe that critical voices will often abate, while investors, voters, and development partners are all pleased if integrity mechanisms are formally introduced, even though they are toothless in practice.<sup>27</sup> Some law enforcement initiatives run the risk of becoming *façades* behind which decision-makers can grab even more than before, while silencing critics who want to see the anticorruption laws enforced.<sup>28</sup> Integrity systems are therefore a necessary but insufficient barrier to corruption. Non-criminal measures can more easily be manipulated, ignored, or overruled, which is why a country also needs a system that holds those involved in corruption responsible for their crimes, whatever their position in the government hierarchy and however well connected they are to powerful private sector players. This system is the criminal justice system.

## 1.5 CRIMINAL JUSTICE RESPONSE

A country's criminal justice system is expected to distinguish between acts that are acceptable to society and those that are unambiguously objectionable, and then to sanction acts categorized as crime. By enforcing its criminal law, the state protects citizens not only from other citizens' crime, but also from excessive use of power by state institutions. What is the role of these functions in the context of corruption? This section clarifies what is meant by 'criminal law regulation' as this is much applied later in the book.

### 1.5.1 Crime and Criminal Law Regulation

References to the 'criminal justice system' usually mean criminal law and the institutional structure for enforcing this law. The term 'criminal law' denotes both the processes of developing laws (for example, drafting and revising a law, conducting some form of consultation on the proposed law's merits, approving the law by the constitutionally defined legislative institution, and publishing the law) and the resulting legislation. The institutional structure for criminal law enforcement includes police forces, prosecutorial units, courts, prisons, and correctional services. The

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<sup>27</sup> Frequent failure to enforce laws against corruption led the international anticorruption watchdog, Transparency International, to choose strategies against impunity as one of their main focus areas.

<sup>28</sup> The concept of 'good governance façades' (for grabbing), studied by Moene and Søreide (2015), will be further addressed in Chapter 6.

enforcement process that takes place in this system, 'the criminal justice value chain,' typically includes the following steps:

- (1) having a case disclosed or suspicion reported;
- (2) conducting an investigation by collecting evidence and hearing testimonies from the accused and witnesses;
- (3) charging the perpetrator or settling the case by some (formal or informal) plea bargaining;
- (4) holding a trial at which the evidence is weighed up by a jury or judge (not if the case is solved outside of court);
- (5) determining the nature and extent of the criminal justice reaction (for example, a fine, imprisonment, victim compensation); and, eventually,
- (6) returning the offender to society and/or seeking to reduce the likelihood of a repeat offense.

Across countries there are huge similarities in which acts are considered to be crimes, and thus subject to criminal justice rules and institutions. One of the reasons why there still are differences is the fact that there are alternative legal approaches for the regulation of undesired acts in society. Tort law, for example, seeks to ensure that individuals and firms are held responsible for the damage they cause. Tort law is also intended to deter individuals and firms from causing damage in the first place, just as criminal law is expected to have a preventive effect.<sup>29</sup> Administrative law serves the purpose of correcting behavior, and administrative fines are reactions against insufficient compliance with the law.<sup>30</sup> Criminal law is different because it provides the legal basis for a sharper reaction against acts that are totally unacceptable, and therefore, the standard of proof is generally higher than for other offenses. Criminal law regulation, with the use of imprisonment as a possible sanction, is reserved for the most serious forms of undesired acts, and, compared to other areas of law, such regulation conveys a clearer message about what is intolerable. In the case of criminally defined acts, an absolute standard holds: we will not allow *some* corruption, *some* assault, or *some* money laundering, because these acts are considered damaging no matter what the extent.

The acts categorized as crime are usually of a sort that society as a whole is thought to have an interest in preventing, irrespective of the victims' identities. Criminal acts will often cause outrage followed by

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<sup>29</sup> See Arlen (2013) for economic analyses and perspectives on tort law.

<sup>30</sup> For a collection of corruption-relevant articles on administrative law, see Rose-Ackerman and Lindseth (2010).

demands for retribution. The problems associated with vengeful victims (or their families and friends) mistaking the offender's identity and escalating violence have resulted in special procedures for criminal law. The government is normally responsible for overseeing and financing criminal law enforcement, controlling investigation and prosecution, ensuring careful assessment of the offender's liability, and making sure that sanctions are determined by impartial judges and set within agreed-upon limits.<sup>31</sup> Too harsh a reaction would be cruel and brutalize society, while a failure to react would fail to deter crime, deviate from a sense of fairness, and encourage private retribution.

Its obligations to uphold justice and offer protection make the criminal justice system something more than a penalty-imposing unit. Its responsibilities in defining, controlling, and sanctioning crime give the system the capacity to influence citizens' principled judgments. When the system functions well, it has the potential of catalyzing the development of norms, which affect the *moral cost* of committing corruption and other forms of crime. Although the broad range of integrity mechanisms mentioned above also contribute to the process of raising the moral cost of crime, it is the criminal justice system that makes the definitive judgment of an act, and by reacting when crime is disclosed, it upholds the other integrity mechanisms.

### 1.5.2 Corruption as Crime

Most countries in the world regulate corruption as crime, as defined by their criminal law. While acts of corruption have been found damaging and punishable as long as there have been government structures, only very recently have we seen international collaboration on what to include in the criminal justice definition of crime. Upon a process that started in the 1970s with non-binding international government agreements, The United Nations Convention against Corruption (UNCAC), signed in 2003, and (by the end of 2014) implemented by some 170 countries, blazed a trail toward legal harmonization that in turn opened the door for expanded collaboration on investigation, prosecution, and asset recovery.<sup>32</sup> Another, earlier milestone was erected by the OECD. The OECD Anti-Bribery Convention was signed in 1997, entered into force in 1999, and was followed by a comprehensive process of evaluating the

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<sup>31</sup> Bowles, Faure, and Garoupa (2008) explain economic perspectives on the scope of criminal law and criminal sanctions.

<sup>32</sup> As of November 2014, there were 173 signatory parties, including 170 UN member states, the Cook Islands, the State of Palestine, and the European Union.

law enforcement performance and progress by each signatory state.<sup>33</sup> As these conventions have been signed by countries and implemented in their law enforcement systems, the rules regulating corruption have on many points become more harmonized.

The two conventions emerged out of a process kick-started by the United States, with its Foreign Corrupt Practices Act (FCPA) of 1977 (amended in 1988). The OECD convention was developed in large part because of pressure from the United States, which found that the FCPA was inefficient and damaging to the US export industry as long as other countries did not abide by similar regulations. The work of the OECD was slow in the beginning, not least because corruption in foreign jurisdictions was tacitly accepted by many European leaders, despite the fact that such acts were forbidden in the countries where they occurred. Indeed, several European countries offered tax deductions for bribes paid abroad, regardless of domestic criminal law regulations. The signing of the conventions signified a step away from a political climate in which actions that could undermine foreign societies' criminal law regulation were largely tolerated (as if bank robbery was perfectly acceptable as long as it happened in another country). After fifteen years of pressure from the United States, the OECD introduced its Anti-Bribery Recommendation of 1994,<sup>34</sup> which was the first OECD instrument that urged member governments to take steps against foreign bribery. That document served as an important starting point for further legal developments in this arena, with the Council of Europe and the then newly established Transparency International adding their weight to the push for further action. Other important instruments for the regulation of corruption as crime include the 1996 Inter-American Convention against Corruption of the Organization of American States, the 1996 EU Protocol to the Convention on the Protection of the European Communities' Financial Interests, the 1997 EU Convention on the Fight against Corruption, the Council of Europe's 1999 Criminal Law Convention and 1999 Civil Law Convention, and the 2003 African Union Convention on Preventing and Combating Corruption.

The international collaboration behind these different conventions has established an invaluable platform for enforcement of anticorruption law both within national jurisdictions and across borders. In practice, however, as will be described in Chapter 3, many obstacles still obstruct the

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<sup>33</sup> The full official name is *The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*.

<sup>34</sup> Formally, 'Revised Recommendation of the Council on Combating Bribery in International Business Transactions' (OECD, C(97)123/FINAL).

implementation and efficient enforcement of these conventions. Simply to fill the many loopholes of the OECD convention, for example, the member governments had to agree on a set of additional recommendations, the 2009 Anti-Bribery Recommendation.<sup>35</sup> Acts of corruption are still regulated differently by the European Union, the Council of Europe Convention, the UNCAC, and the OECD convention, and when it comes to implementation at the national level, many countries appear to have *created* loopholes for corruption when they have adapted the conventions to their own criminal law and criminal justice system. As Radha Ivory (2014:13–17) explains, the last fifteen years' anticorruption treaties are 'suppression conventions' – as they 'encourage and oblige their signatories to take steps to criminalize transnational criminal conduct' and 'envisage that crime will be investigated, tried, and punished under domestic law, typically through collaboration between states in criminal matters' (Radha, 2014:14).<sup>36</sup>

The international collaboration toward harmonized criminal law regulation of corruption breaks with the notion of a criminal law that develops as part of the society it regulates. From a pragmatic perspective, this is not a problem if only the contents of the laws can be justified. Full international harmonization cannot be expected, however, because institutional structures and constitutional principles differ across countries. For leaders who wish to keep opportunities for corruption, despite the pressure for reform, such differences legitimize a call for recognition of a country's culture and norms – then sometimes used to disguise or justify a lenient political attitude on corruption.<sup>37</sup> Examples of areas where law enforcement is impeded by inadequate criminal law regulation include the specific definition of the criminal act, the description of players to be held responsible for corrupt acts, the regulation of corporate criminal liability, the statutes of limitations, a lack of whistle-blower protection laws, and commitments on the mutual assistance necessary for providing evidence during investigations.

Criminal sanctions for corruption usually take the form of monetary fines and imprisonment. The repression level varies significantly across countries. In some countries, a low repression level is associated with a

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<sup>35</sup> This is a formal agreement made by the OECD Working Group on Bribery. For details, see the OECD website: <http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/oecdantibriberyrecommendation2009.htm>.

<sup>36</sup> Radha (2014) provides a comprehensive review of international treaties and international soft law norms on corruption, and addresses specifically the legal basis for asset recovery and the protection of property under this legislation.

<sup>37</sup> This claim is substantiated in Chapter 3.

generally lenient attitude to corruption, while in others, such as the Nordic countries, a relatively low repression level is the result of a criminal law tradition with limited faith in the efficacy of hard reactions. The United States, however, applies particularly severe sanctions, which it defends with reference to their expected deterrent effects. In China, where the government has felt it necessary to take a clear stand against corruption, the most extreme cases of bribery can be punished with the death penalty. Across countries, government representatives who accept bribes are generally sanctioned more severely than the private individuals who offer bribes, and where private-private corruption is criminalized, sanctions on such acts are generally milder than for corruption in state administration and government.

## 1.6 EFFICIENT CRIMINAL JUSTICE RESPONSE

Substantial progress has been achieved in anticorruption over the past two to three decades, especially if considering law-related activities. Despite the problem of political corruption, governments across the world increasingly enforce their integrity systems and express commitment in numerous initiatives intended to improve law enforcement. In November 2014, for instance, the G20 leaders agreed to recognize the damage caused by corruption, as well as loosely formulated anti-corruption commitments.<sup>38</sup> In parallel with government efforts, researchers, civil society actors, and policy analysts are working to measure and explain the corruption problem. What all committed players seem to agree on is that corruption should be targeted *efficiently*. But how, exactly, to define ‘efficient’ in this context is not so clear.<sup>39</sup>

The complex set of factors that determine corruption in a society is one reason for this lack of definitional clarity. Even if we keep the discussion

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<sup>38</sup> See Chapter 2 for details.

<sup>39</sup> According to the dictionary Merriam-Webster, ‘efficiency’ means ‘the ability to do something or produce something without wasting materials, time, or energy’ while ‘effectiveness’ refers to ‘producing a result that is wanted: having an intended effect’ (<http://www.merriam-webster.com/>). In terms of ‘doing the right thing’ and the question of strategic law enforcement responses to corruption, I prefer the term ‘efficiency’ – as describing the best allocation of resources, given well-defined goals, while avoiding waste. System efficiency will take all important goals into account, and not merely sub-goals, like the number of cases or the speed with which cases are processed. The obvious problem with the word is its lack of accuracy when goals that we want to reach ‘efficiently’ are inadequately defined.

of definitions to terms used within the criminal justice system, it is still difficult to say precisely what the word 'efficient' means. The criminal justice system's role in controlling crime defies exact measurement; the system evolves as part of a society and a larger system of government, making it difficult to identify causal connections between the system's different components and the extent of corruption. Furthermore, aside from the problems of disentangling complex organic systems, it is difficult from a conceptual perspective to establish what constitutes efficient criminal justice response to corruption. Should we gauge efficiency by a rise in the number of corruption cases solved and offenders punished? If so, should we count the 'important' corruption cases differently than the less important cases, and if so, how should we determine level of importance? Should efficiency depend on the relationship between the perceived extent of corruption in a society and the number of cases processed?<sup>40</sup> If this relationship is difficult to establish, then perhaps 'efficiency' could refer to the impact of criminal law enforcement on the integrity in decision-making or the value for money in public spending? But the answer is no, because such features are determined by a number of factors. And so, the discussion can go on and on, heading in numerous directions simultaneously but never reaching a conclusive destination. In policy debates, we refer to 'criminal justice efficiency' as if it is a common goal, but once we try to be precise about what this means in relation to corruption, a hazy fog clouds our conversation.

Legal scholars have tended to associate the word 'efficiency' with some specific quantifiable effect: the number of cases, for example, or the speed of reaction. And in the literature, they have often reminded policymakers that efficiency should be balanced against other important concerns, such as fairness and a legitimate criminal law process. For economists, 'efficiency' means to optimize strategies to attain a certain objective, given available resources and constraints. As such, efficiency means to achieve 'a desired reduction in crime using a minimum of resources and given other constraints.' If fairness is deemed to be relevant to this understanding of efficiency, it is incorporated in the optimization of policy strategies. Different aims can either be given different weights (that is, ranked) when defining an overall objective, or a strategy toward one overall objective (for example, reduced crime) can be subject to other

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<sup>40</sup> If so, what should the interpretation be of the ten times more citizens in United States prisons compared to Europe? See International Centre for Prison Studies – <http://www.prisonstudies.org/highest-to-lowest/prison-population-total>.

aims, which are then treated as absolute constraints (for example, due process). These features of the economic approach make the methodology applicable for identifying optimal – or ‘efficient’ – solutions.

Even so, this is no more than the application of a technique whose results depend on the elements put into it. The approach itself tells us little about *the concept of efficiency* in criminal law, because, with reference to this economic understanding of efficiency, the ‘desired reduction in crime’ can in fact be understood in many different ways and is also subject to political views. The definition’s reference to a ‘minimum of resources’ glosses over or invites political trade-offs between short-term and long-term costs, as well as direct and indirect effects; savings in the short run may imply more problems later. Moreover, the phrase ‘given constraints’ requires some level of agreement in society on what are considered more or less absolute constraints in terms of, for example, acceptable sanctions or the use of state revenues. To what extent is the protection of human rights considered a law enforcement constraint, for example? Traditionally, economic analyses of law enforcement have concentrated on very narrow objectives, especially the direct deterrent effect on marginal offenders, and have only recently started to consider the importance of various indirect consequences. When it comes to corruption, meaning that *something is rotten* in the governance of a society, these indirect consequences of the criminal justice system may matter the most.