doi:10.1017/aju.2019.56

INTRODUCTION TO THE SYMPOSIUM ON NEW DIRECTIONS IN ANTICORRUPTION LAW

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Not so long ago, anticorruption law was viewed as aspirational or even naïve. In the last two decades, however, anticorruption law has become a major area of legal innovation at the national and international levels. Not only are there laws on the books, but government enforcement has also increased, particularly against corporations acting outside the enforcing government's territory. The U.S. Foreign Corrupt Practices Act (FCPA), the UK Bribery Act, and other national laws provide significant penalties for private actors who bribe foreign governments to gain or retain business. These laws, which aim to reduce corruption by targeting the supply of bribes, now regularly grab headlines, with corporations paying fines in the hundreds of millions of dollars.

This symposium seeks to explore the new directions in anticorruption law, which extend beyond major exporting states' use of corporate liability to fight extraterritorial corruption. It examines how anticorruption measures have developed outside of Western capitals and begins to evaluate the effects of these policies across a broad spectrum of institutions and legal fields: from tax policy to arbitration, and from international development banks to human rights courts. The essays discuss some of the challenges of expanding anticorruption law to new fora and set out an agenda for how anticorruption law should be expanded and refined.

The symposium also highlights how intertwined national and international law are in the anticorruption field. While the United States was the early mover in foreign anticorruption law in enacting the FCPA, the United States only weakly enforced that law until there was greater international support for antibribery norms and transnational cooperation. Today, the major international anticorruption treaties, including the UN Convention Against Corruption, the Organisation for Economic Co-Operation and Development Anti-Bribery Convention, and the Inter-American Convention Against Corruption, inform the content and implementation of national laws. One of the common strands in all of the essays is how international and transnational legal reforms are shaping and reshaping anticorruption measures at all levels of governance, and even reshaping our ideas of what acts should be considered corrupt. Together the essays provide an illustration of how wide-ranging and diverse the new paths in anticorruption law are.

It is a sign of our times that, of the six essays, half focus on developments in Latin America. Over the past decade, practically all the governments in that region have been tainted by corruption scandals. The investigation of the Odebrecht scandal alone has embroiled nine presidents and a host of other high-ranking public officials in Latin American governments. In Peru, every living former president is currently either in prison or in a desperate legal battle for his freedom, with the exception of Alán García, who chose suicide over prosecution. One question that emerges is the role that recent reforms to domestic anticorruption laws—inspired by international anticorruption treaties—have played in the revelation and prosecution of these crimes. In his essay, Guillermo Jorge,

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Global Adjunct Professor at NYU Law School in Buenos Aires and a partner at Bruchou, Fernández Madero and Lombardi, paints a positive picture.[1] Prosecutions such as the Odebrecht cases and the Notebook Scandal in Argentina use a new arsenal of legal tools drawn from international standards. Jorge argues that they are allowing investigators to move quickly and to shake up family conglomerates, the main type of corporation subject to investigation in Latin America, in new ways. Prosecutors are also making headway against structural corruption in the construction of public works, although these advances come with steep economic costs and, at times, negative political repercussions.

Michelle Sanchez-Badin, a professor at Fundacion Getulio Vargas Law School, and Arthur Sanchez-Badin, a Brazilian attorney, have a more critical take on the recently reformed anticorruption regime.[2] Focusing their gaze exclusively on Brazil, they argue that new tools such as protections for whistleblowers and collaboration agreements have suffered from haphazard implementation as different institutions compete for control, undermining the regime's effectiveness. Similarly, it has been difficult to coordinate across jurisdictions on transnational aspects of the cases, including the setting, timing, and collection of reparations. In their view, the Car Wash case is losing its stature as a pivotal moment in Brazilian politics as different national and subnational authorities undercut each other and compete for control. One might add that the recent revelations of corrupt dealings by Brazilian judges and prosecutors in the Car Wash case have further muddied its social and political meaning.

The spate of corruption scandals convulsing Latin American politics has also drawn the notice of the regional human rights system. Created by the Organization of American States, the Inter-American Human Rights System (IAS) traditionally focused on state abuses, such as forced disappearance and extrajudicial killings. It became known for pushing states to prosecute for past abuses, and, in this way, became deeply involved in the reform of judicial systems. Jimena Reyes argues that it is now time for the Inter-American Court and Commission to address corruption.[3] Drawing on the IAS's doctrine of state responsibility for preventing human rights violations, she offers an innovative reading of the American Convention that would allow these organs to pressure states to be more proactive in their engagement with corruption. Other human rights organs could follow this direction as well.

Writing about the experience of African developing states, James Gathii argues for a different type of reform.[4] He argues that the current definition of corruption in international treaties reflects the concerns of the Washington Consensus era, with its primary focus on the activity of public officials. Gathii argues for expanding the definition to include illicit financial flows. This change would bring the corrupt actions of multinational corporations, including misreporting income and otherwise avoiding taxes, under the jurisdiction of anticorruption regimes. African tax activists are already bringing these issues of transparency to public awareness. Gathii's move illustrates how anticorruption treaty law could be rewritten to aid in this effort.

Lucinda Low, a former President of the American Society of International Law and a partner at Steptoe & Johnson, turns our attention to the challenges corruption presents for arbitral tribunals.[5] The acceptance of corruption as a public policy issue at both the international and transnational levels, she writes, means that arbitral tribunals increasingly must grapple with allegations of corruption in the cases before them. Low argues against the current "all-or-nothing approach," by which arbitral tribunals may simply dismiss all claims in transactions found

[1] Guillermo Jorge, *The Impact of Corporate Liability on Corruption in Latin America*, 113 AJIL UNBOUND 320 (2019).

[2] Michelle R. Sanchez-Badin & Arthur Sanchez-Badin, *Anticorruption in Brazil: From International Legal Order to Disorder*, 113 AJIL UNBOUND 326 (2019).

[3] Jimena Reyes, *State Capture Through Corruption: Can Human Rights Help?*, 113 AJIL UNBOUND 331 (2019).

[4] James Thuo Gathii, *Recharacterizing Corruption to Encompass Illicit Financial Flows*, 113 AJIL UNBOUND 336 (2019).

[5] Lucinda A. Low, *Dealing with Allegations of Corruption in International Arbitration*, 113 AJIL UNBOUND 341 (2019).

https://doi.org/10.1017/aju.2019.56 Published online by Cambridge University Press

to be tainted by corruption. Tribunals should adopt a more nuanced approach based on proportionality, she argues, while noting that evolving treaty provisions will also impact how investor-state cases develop.

Whether rewriting laws—be it to redefine corruption, broaden enforcement mechanisms, or reshape bilateral investment treaties—actually matters on the ground is another question, however. Emilie Hafner-Burton and Christina Schneider, both of UC San Diego, analyze global historical data to discern whether and in what circumstances international organizations' (IOs) anticorruption mandates have an impact on levels of corruption. They find that, overall, they do not seem to have an impact when the IO's membership is comprised of mostly corrupt states.[6] In such cases, states seem content to write anticorruption measures into law and leave them in place without taking accompanying steps to enforce them. While there are some exceptions, the lesson seems to be that anticorruption mandates, on their own, are unable to have a strong impact in those settings where they are most needed.

Taken together, the symposium essays bring to light a new set of developments, innovations, and challenges in anticorruption law. The essays will be useful to policy-makers and scholars alike as they look to and beyond the use of corporate liability to fight extraterritorial corruption.

[6] Emilie M. Hafner-Burton & Christina J. Schneider, *Donor Rules or Donors Rule? International Institutions and Political Corruption*, 113 AJIL UNBOUND 346 (2019).

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