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Book Review

Between Impunity and Imperialism: The Regulation of Transnational Bribery

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Abstract: *The Regulation of Transnational Bribery* by Kevin E. Davis, strips out the universal character of illegitimate payments used to bribe public officials of foreign countries in the milieu of international business which has been known for years. The manuscript deals with various definitions of bribery as a transaction in which an official misuse his or her office "as a result of considerations of personal gain, which need not be monetary". The book highlights the current debate about prohibiting transnational bribery. Such a debate is not about the practicality or desirability of the United States' FCPA, which at one time was the only law in the world that efficiently banned transnational bribery.

Keywords: international bribery; corruption; kickbacks; corporate liability

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Between Impunity and Imperialism: The Regulation of Transnational Bribery by Kevin E. Davis strips out the universal character of illegitimate payments to bribe public officials of foreign countries in the milieu of international business which has been known for years. However, such acts are implicitly permitted if an indefinite arrangement that the explosion of this form of corruption intimidates the suitable functioning of democratic societies, institutions, and market economies, leads to severe misallocations of assets, and endangers relations among countries. Until the second half of the twentieth century, embargoes on the corruption of public employees were restricted to a country's own officials and not to officers of other countries or international organizations.

The book discusses the problem of when individuals pay kickbacks to foreign public officials. When this occurs, how should the law act? This question has been discussed ever since the enactment of the U.S. Foreign Corrupt Practices Act of 1977, and some of the crucial arguments can be tracked back to Cicero in the last years of the Roman Republic and Edmund Burke in late eighteenth-century England. Recently, the U.S. and other OECD members have joined forces to make anti-bribery statutes one of the most important sources of liability for firms and people who operate across borders. The contemporary regime is premised on the notion that transnational bribery is a major problem which customarily merits a robust legal response. The shape of that reaction can be summed up in the phrase "every little bit helps", which practically means that: proscriptions on bribery should capture a comprehensive range of conduct; enforcement should target as extensive a range of actors as possible; punishments should be as stiff as possible; and as many agencies as possible should be involved in the enforcement process. An essential challenge to the OECD paradigm (labelled here as the "anti-imperialist critique") acknowledges that transnational bribery is a serious dilemma but queries the conventional responses. This book uses a series of high-profile cases to demonstrate crucial elements of transnational bribery law in action and examines the law through the lenses of both the OECD model and the anti-imperialist critique. It eventually endorses a uniquely inclusive and experimentalist attitude towards transnational bribery law.

In 1977, as a result of the Watergate scandal in the United States and a sequence of exposures linked with that period, the U.S. Congress adopted the Foreign Corrupt Practices Act ("FCPA"), as bribes and kickbacks were common in international commerce

and trade. For several years, it made the United States the only country to apply and dynamically enforce actions and measures to prohibit its citizens, nationals, businesses and, in some circumstances, foreign corporations that enter its capital markets, from inducing for corrupting foreign officials. These restrictions are no longer limited to the United States.

Finally, a conjunction of factors has led to a sequence of global creations which are established on the FCPA to forbid inadequate enticements to foreign officials regarding business transactions. Over the past thirty years, a number of international agreements have been negotiated and entered into force. In turn, these have led most developed countries to adopt and implement domestic laws eradicating inappropriate enticements towards foreign officials. Gradually, less developed countries are executing similar preventions as these initiatives have become more worldwide in their scope of applicability. In fact, these initiatives are not only limited to governments but also extend to international institutions, NGOs, and corporate governance techniques.

In addition, the manuscript describes the legal regime that controls transnational bribery, pinpoints, and describes the rationales that have driven its evolution, and recommends directions for reform. The comprehensive argument is that the current regime exemplifies a set of principles, theories, and practices considered the "OECD paradigm". A key argument is that transnational bribery is a major problem which merits a robust legal response, especially given the complexity of identifying cases of bribery. The shape of the proper response can be summed up as, "every little bit helps". Practically speaking, this means that: injunctions should capture a broad variety of behavior; enforcement should target as broad a scope of actors as possible; sanctions should be as harsh as possible; and as many enforcement agencies as possible should be engaged in the implementation process. The OECD model adopts two unified propositions: that transnational bribery is a problem which demands a uniform response, and that transnational bribery is a grave matter. However, the model rejects that suitable legal responses must be consistent. This book investigates both the OECD theory and the anti-imperialist criticism, and offers a detailed analysis of their consequences for the major elements of transnational bribery legislation. It concludes by indicating that the competing perspectives can be reconciled by moving toward a more comprehensive and experimentalist regime which adapts reasonable disagreements about monitoring design and is fashioned with due attention towards the interests (and benefits) of all concerned parties.

Conduct encompassing illicit payments to foreign officials cannot be disregarded. Furthermore, an individual or entity involved in international business limits compliance to the applications and to the FCPA scope. In this regard, it is worth mentioning that international developments are definite to remain in order to enlarge the range and scope of the proscriptions of payments to foreign servants. They will also have the additional effect of significantly expanding U.S. enforcement officials' capacity to protect evidence from abroad. "What appears to be *shortcuts* or clever responses to these evolving international norms are dangerous, and overtime, will be *counterproductive*".

Therefore, in dealing with a client on issues concerning the FCPA and the new international efforts, a serious effort to comply is essential. Whether normal or juristic, an individual is most likely to evade potential violations and diminish the risk of investigation by executing (through due diligence) and fully enforcing a sensibly planned operative compliance program.

The manuscript deals with the various definition of bribery as a transaction in which an official misuses his or her office "as a result of considerations of personal gain, which need not be monetary". Additionally, the author pointed out how the United States laws define bribery (in a general context) as the giving "of anything of value to any public official . . . with intent to influence any official act" or to cause the official "to do any act in violation of the lawful duty of such official or person" (Deming [2010] 2011). In the same vein, proscription of transnational bribery has also been accomplished through specific statutory measures. A theoretical statute would first set out the restrictions of the conduct it anticipates regulating (Deming [2010] 2011). The law would state that it applies only to

its citizens or residents (or their agents, officers, or employees) and that it controls only the conferral of benefits on a foreign official to cause that official to misuse his or her office. Within the pan-cultural concept of bribery, however, specific laws may vary (Koehler 2012).

The book highlights the debate about prohibiting transnational bribery. First, such a debate is not about the practicality or desirability of the United States' FCPA, which at one time was the only law in the world that efficiently banned transnational bribery (Salbu 1999). The FCPA is one legislative example that could effectuate a proscription, but the prohibition per se, not the legislation, is at issue. Second, the issue is not whether criminalization is the only required action. Effective policing of transnational bribery will entail various strategies, ranging from transparent decision-making in host countries to voluntary codes of corporate conduct (Deming [2010] 2011).

The Organization for Economic Cooperation and Development (OECD) promulgated, at the close of 1997, a treaty requiring its members to take specific actions regarding transnational bribery (Yingling 2013). The agreement requires: (a) signatories to criminalize the bribery of foreign government officials; (b) the penalties for such bribes must be proportionate to the penalties for domestic bribery with the assistance of one another in the investigation of bribery; and (c) allowing the extradition of bribe givers. Notably, Philip Oldenburg divides the benefits conferred on bribe-givers into two groups, according-to-rule benefits and against-the-rules benefits (Henning 2001). According-to-rule benefits are benefits that the bribe-giver should have conventional pursuant to the rules; the bribe-taker takes action that he or she should have taken regardless. The abuse of office happens when the bribe-taker acts on behalf of the bribe-giver's request, by the requests of others, or when the bribe-taker declines to use his or her office in the absence of extralegal expenditures. Common examples comprise matters such as routine government approvals or the provision of basic government services. Bribes paid in order to obtain these benefits are often referred to as "facilitating payments" (Henning 2001).

The book further discusses the problem of "facilitation payments", which is complicated to understand from the comparative anti-corruption and bribery legislation perspective. In many countries, including Egypt, it is a normal and customary business practice to make expenses or gifts of a small amount to low-ranking government officials in order to facilitate or expedite a routine action or process. Egyptian penal law contains no provisions covering this sort of payment, leaving room for considerable doubt. Generally speaking, facilitation payments are "a form of bribery made for the purpose of expediting or facilitating the performance by a public official of a routine governmental action, and not to obtain or retain business or any other improper advantage" (Yingling and Arafa 2014). Although there are regulations governing facilitation payments and illegal acts such as accepting gifts and hospitality offered to civil servants, and penalties are imposed on persons transgressing these regulations, they are not effective in practice. Traditions and conventions developed over the past decades have firmly established and recognized this practice. The practice is illegal in most countries. The Egyptian government started to debate a new anti-corruption law specifying a sub-section within the bribery law to include facilitation payments, following the U.S.'s FCPA model. It must provide guidance on what is and is not permissible, emphasizing "How to evaluate what is acceptable?" by considering the guidance of what is never acceptable, what is usually permissible, and under which circumstances the evaluation criteria should apply from the legal point of view.

In the same vein, the book articulated that concept of a "gift" and what it means to be is acceptable as a gift. Professor Salbu states that "never before in [U.S.] history has the practice of gift-giving come under such stringent scrutiny" (Salbu 1999). He then infers that persons in the United States draw no distinction between gifts and bribes. Of course, this is not true. John Noonan, a well-known U.S. scholar and jurist, writes expressively of the distinction between a gift and a bribe, noting that a gift "is given in a context created by personal relations to convey a personal feeling" and concluding that a gift-giver "does not give by way of compensation or by way of purchase" (Salbu 1999). Nor are U.S. courts unable to distinguish between gifts, which may represent "vague expectation of

future benefits", and bribes given "in return for some act of official grace". Moreover, gift-giving has not disappeared from either the United States' general or corporate culture. Corporate gift giving definitely remains a vibrant part of U.S. business life. The inference that persons in the United States do not understand gifts as "a form of common courtesy or a component of expected relational etiquette" or that the U.S.'s "cultural lens" cannot distinguish between gifts and inducements is unsupportable (Salbu 1999).

Professor Davis also expounded on how transnational bribery causes economic and social damages. In this respect, Paolo Mauro's statistical study of the correlation between corruption and private investment found that corruption lowers private investment, thereby decreasing economic growth (Mauro 1997). "The negative association between corruption and investment, as well as growth, is significant, both in a statistical and in an economic sense". In a later study, Mauro finds that an assessable reduction in the level of corruption in a country would increase its investment to gross domestic product ratio by almost 4% and the annual growth of its gross domestic product per capita by almost 0.5%. Bribery has other explicit economic effects. Large-scale bribery twists relative prices by causing an extreme amount of money to flow into the government without producing any corresponding output by the government and lowers the tax base by allowing potential taxpayers to bribe away tax requirements (Mauro 1997).

Not only does bribery distort economies and hamper administrative systems, but it also destroys societal structures. The myth that bribery is acceptable in some cultures finds no empirical support. In contrast, the empirical work consistently validates that even persons who live in polities overwhelmed by prevalent bribery regard bribery as objectionable. Every major religion or school of moral thought, including Buddhism, Christianity, Islam, Judaism, Hinduism, among others, expressly condemns bribery. Bribes have to be paid secretly everywhere, and executives getting kickbacks must resign in dishonor if the bribe violates the moral standards of the South and the East, just as it does in the West. Granted, the accurate restrictions of what establishes a bribe may diverge. However, the concept of bribery is unanimously condemned.

Placing the responsibility for regulating transnational bribery in recently shaped institutions is not likely to be operative. Many of these new institutions take the form of government agencies and administrations that, as likely targets for bribes, would be asked to police themselves. Even under ideal conditions, self-policing is a difficult job. These institutions are new, inexperienced, and susceptible, making the task of self-policing even more difficult. The weakness of some host country institutions aggravates another trouble inherent in combating the transnational bribery, namely the fact that the authorization of a bribe may occur thousands of miles away from the receipt of a bribe. Embryonic, inexperienced government agencies cannot be anticipated to locate, investigate, and extradite bribe authorizers situated far beyond their borders. This reason only influences in favor of multilateral efforts to forbid transnational bribery.

Also, as a globalized, transnational phenomenon, transnational bribery must be approached through various organizations and policies. Voluntary corporate codes of conduct have value in controlling endemic transnational corruption. However, by themselves, such codes are not sufficient and simply complement the criminalization of transnational bribery. These codes are advantageous when the host country's laws provide little guidance concerning the facilitation of acts contrary to the laws or moral standards of the home country (Henning 2001).

To conclude, despite being 300 pages long, the book was easy to read as the importance of the subject and Davis's clear, robust writing style keeps one reading. He uses an economic perspective to show that the world is becoming smaller (Arafa 2013). It is now conceivable to enter into economic relations with little regard to national borders. Legislation, however, still cuts through political demarcations. When considering the prestige and viability of a policy choice, this incoherence must be recognized. The benefits of transnational economic relations must also be noted, emphasizing the severe harm caused by transnational bribery (Arafa 2013). One is stimulated, and the other limited, to the extent possible. There are

several tools available to do both, but one of the most effective is the criminalization of transnational bribery by the home country. The home country need not rewrite and revise the laws of bribery for every country in which its citizens conduct business. A law that sets out the limits of bribery and then criminalizes any conduct within those boundaries that is also forbidden by the host country will be both clear and effective. Such a law is far more active than merely leaving prohibition in the hands of the host country or the hands of transnational corporations. In conjunction, globalization and fragmentation produce an uneven terrain in which to make and implement policy choices. Nevertheless, until feasible institutions come into place that substitute national laws regarding commercial transactions, local laws that affect both ends of transnational transactions, such as laws that forbid transnational bribery, will be the most desirable policy choices. Thus, reading this book will equip attorneys, policy and decision-makers, practitioners, and academics to treat such contentions with the skepticism they deserve.

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References

Arafa, Mohamed. 2013. *Towards a New Anti-Corruption Law in Egypt after Mubarak: A Comparative Study between the United States Foreign Corrupt Practices Act, Egyptian Anti-Bribery Law, and Islamic Law*. Saarbrücken: Lambert Academic Publishing.

Deming, Staurt. 2011. *Foreign Corrupt Practices Act and the New International Norms*. Chicago: American Bar Association. First published 2010.

Henning, Peter J. 2001. Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law. *Arizona Journal of Internataional and Comparative Law* 18: 739–42.

Koehler, Mike. 2012. The Story of the Foreign Corrupt Practices Act. *Ohio State Law Journal* 73: 971–80.

Mauro, Paolo. 1997. *Why Worry about Corruption?* Washington: International Monetary Fund.

Salbu, Steven R. 1999. Are Extraterritorial Restrictions on Bribery a Viable and Desirable International Policy Goal under the Global Conditions of the Late Twentieth Century? *Yale Journal of International Law* 24: 223.

Yingling, M. Patrick. 2013. Conventional and Unconventional Corruption. *Duquesne Law Review* 51: 265–73.

Yingling, M. Patrick, and Mohamed A. Arafa. 2014. After the Revolution: Egypt's Changing Forms of Corruption. *University of Baltimore Journal of International Law* 2: 23.