

LAW AS THE LAST SHELTER OF CORRUPTION: Comparative Analysis of Bulgarian and American Law

1. Background

Malcolm Jack called the eighteenth century debate about the relationship between material progress and moral decline the “great corruption debate” (Jack, 1978: 119). Two centuries later this classic moral view on corruption has been totally displaced. During the 1960s Nye observed that corruption is endemic in all governments even though “it has received remarkably little attention from students of government” (Nye, 1967: 417). Immediately following these observations the Modern “great corruption debate” began, mobilizing key resources from the social sciences, the media, and both national and international public and private institutions. The author’s calculations show that between the early 1980’s and early 1990’s academic publications on corruption decupled. A host of definitions of corruption subsequently filled up this politically viable research field.

However different these definitions may be, all of them include some understanding of public office, public duty, legitimate power, and lawful action. Each of these elements presupposes and represents the valid legal rules/norms. This makes it impossible to define corruption without the explicit or implicit presence of law except for the cases where the religious or moral norms are themselves laws. The law as a legal norm, however, can play different roles in corruption research:

(1) The “narrow legal approach” has less innovative potential for it conceptualizes the law as a trustworthy barrier between the public and private sectors, i.e. a norm inaccessible to corruption. Respectively the actions which deviate from or break the laws for private gains are qualified as corruptive;

(2) Kaufmann challenges this concept by placing the emphasis on those forms of corruption “that may not be strictly illegal, such as undue influence on public policy ... by a few powerful interests” (Kaufmann 2004: 83);

(3) The project at hand goes further by treating law as a boundary shaped by a permanent struggle between public and private interests. This approach reveals the relativity and the internal limits of corruption: (a) if a small legal barrier between the public and private sectors exists, corruption becomes senseless because the private interests are not met with resistance by the official authority. At this point corruption is reduced to what Key called “autocorruption” (1989: 41-2); (b) if a large legal barrier between the public and private sectors exists, corruption becomes senseless because of its very high moral price. In the first case there are not enough legal barriers to require the corruption of officers. In the second case the overwhelming legal barriers render private persons unable to corrupt the officers. Therefore corruption is most likely to appear in the zone where the legal barriers are significant in size but ineffective in quality.

When political participation and official institutions combine in a way that begins to yield “oligarchs and clans” (Johnston, 2005) the law starts legitimizing the very actions which damage the public interests in favor of selected private interests. The symptoms of such a tendency are present in Bulgaria (see for instance the Law on Public Procurement). This situation strongly contrasts with the situation in the USA, described by Johnston as “influence markets” (ibid.). Hence, a comparative analysis between both cases could specify how the law protects corruption in Bulgaria and how the law resists corruption in the USA.

2. Objectives

2.1. Research questions

The proposed research aims to explore in comparative perspective the corruptive potential of the Bulgarian and American laws currently in use. In order to make this task feasible within the fellowship's conditions the project is limited to the following two **research questions**:

- (1) Are there opportunities for discretion in both countries afforded by the legal provisions which regulate the flow of money between public and private sectors?
- (2) What is acknowledged as evidence in the Bulgarian and American criminal codes?

The first question scrutinizes the probability for corruptive deeds to remain undetected by the law. The second question scrutinizes the probability for detected corruptive deeds to remain unpunished by the law. Hence both questions complement each other and give a representative idea about the level of corruptive intentions in the very law-making process.

In answering the first question the project is limited to the regulation of public procurement consisting of (a) ordering of works, (b) purchasing of goods, and (c) purchasing of services by the official authorities. In this frame, the analysis aims to produce evidence for the assessment of **regulatory discretion**.

(1) The main object of analysis in **Bulgaria**, due to the centralization of power and legal norms, is the *Law on Public Procurement*. This legal singularity affords room for the analysis of other acts which regulate public-private economic relations after 1989 such as the *Law on Privatization* and the *Law on Public Concessions*.

(2) The regulation of public procurement in the **USA** is divided between many acts at the federal and state levels. This makes an overall analysis highly unfeasible. That is why the project focuses on: (a) selected acts from “*All Legislation Relating to Procurement*” and “*Topical Areas*” as defined by the Office of Federal Procurement Policy (OFPP); (b) selected titles of the United States Code: Title 40 (*Public Buildings, Property, and Works* - Chapters 3, 6, 10, and 12), Title 41 (*Public Contracts* – Chapters 4 and 7), and Title 43 (*Public Lands* – Chapter 35); (c) selected documents of the OFPP - *Circulars, Guides, Memoranda, Policy Letters, and Reports*.

In answering the second question the research will analyze and compare the range of evidence and the conditions of their use provided by the criminal codes of both countries. On this basis the level of **sentencing discretion** will be assessed.

(1) In **Bulgaria** this research will concentrate on the *Criminal Code* as the main source of argumentation in the lawsuit and sentencing;

(2) In the **USA** this research task is much more complicated. Though the federal criminal code underlies all state codes, the latter sharply differ from one another. Therefore the analysis is limited to the respective provisions of:

- the present *Federal Criminal Code* which, however, “is too unsystematic and incomplete in theory and too irrelevant in practice to function as a national code” (Robinson and Dubber, 2006: 1);

- the *Model Penal Code* (including the supplements that are not yet incorporated), which both summarizes and encourages similarities among the states' criminal codes. It is not accidental that the Model Penal Code has largely been quoted as an operating code in the practice of American courts;

- the criminal codes of the states of *New York* and *California*. These are emblematic state level codes because of (a) the particular importance of both states in the USA and (b) the fact that the first code has been reformed under the influence of the Model Penal Code, while the second one has not.

- the *Federal Sentencing Guidelines Manuals* of the United States Sentencing Commission.

2. 2. *Hypotheses*

This project is based on the *hypothesis* that both regulatory and sentencing discretion in Bulgaria, as contrasted with the USA, have reached levels which suggest that corruption already seeks and finds the asylum of the law itself. This hypothesis is suggested by the revelations of recent political scandals and by the way these problems are being addressed in Bulgaria.

2. 3. *Methodology*

This research will gather all necessary evidence by using *qualitative content analysis* on the above mentioned legal documents. The analysis will be focused on two major oppositions:

(1) *May vs. Shall*

In regard to the regulation of public procurement, the research will locate and scrutinize the textual context of the words/expressions that indicate *regulatory discretion*. The main line of demarcation is expressed in the law by two opposite verbs: *May* and *Shall*. If the actions of the public institutions/officers provided by a law are predominantly articulated through the verb *May*, this will be treated as an indicator of the discretionary potential of the very law, including some gaps in the regulation of public procurement, in the listing of offenses etc. If these actions are predominantly articulated through the verb *Shall*, this will be treated as a lack of such discretionary potential. In the latter case discretion is still possible, but only by breaking the legal rules, i.e. as a question of personal choice, which falls out of the scope of this research.

(2) *Evidence vs. Discretion*

By comparing the nature, diversity and conditionality of evidence in both criminal codes, the research will locate and scrutinize the level of *sentencing discretion*.

The analyses and interpretations of the results risk remaining incomplete without a widely pursued *library research* on the relevant publications in Bulgaria and the USA. This is especially important given the complex character of American law in general and the nature of the domains concerned.

3. *Significance*

(1) During the last two decades the problem of corruption has become increasingly prominent within the social sciences and is today recognized as an international area of interest. The proposed comparative analysis of the discretionary potential of Bulgarian and American laws is aimed to contribute towards the development of a larger concept of corruption which would denounce the legal asylum of corruption and make the measures aimed at tackling corruption more effective.

(2) A survey of the Sofia Center for the Study of Democracy reveals that Bulgarians identify corruption as the country's worst problem (Pashev, Dyulgerov, and Kaschiev 2007: 21). To a certain degree this is due to the fact that some corruptive actions visibly enlarged after gaining legitimacy by the law. The two cases under scrutiny are indicative of this tendency:

(i) Between 2004 and 2006 Bulgarian Law on Public Procurement underwent 7 amendments which multiplied its discretionary potential. These changes closely followed the sharp rise in the magnitude of public procurement.

(ii) The present Bulgarian Criminal Code was adopted in 1968 under the influence of the Soviet Criminal Code and does not meet the requirements of the contemporary Bulgarian society. This is one of the reasons the chief Bulgarian prosecutor argued that the most dangerous type of corruption is within the judiciary.

(3) As the OFPP states: “The federal government spends approximately \$350 billion annually for a wide range of goods and services to meet mission needs.” Therefore, if the study manages to specify zones of larger discretionary potential in the legislation relating to procurement, this would produce important financial results. Regarding the Criminal Code, this research suits the current American practice “to limit sentencing discretion” (Robinson and Dubber, 2006: 17).

(4) This comparative analysis will result in a *complex of indicators* aimed at specifying the discretionary potential of the law in general.

(5) If I receive a Fulbright fellowship, I will develop a new view on corruption based on the interpretation of the public (legal, political, moral, and religious) norm as both a barrier to and prerequisite for corruption. Personally, this will help me to (i) further develop my lectures on *Anatomy of Corruption* for the students in Political Science and Public Administration from the Sofia University and New Bulgarian University and (ii) eventually to receive a full professorship at the Department of Political Science at the Sofia University.

4. Evaluation and Dissemination

Given the academic and political relevance of the project and my lasting interest in corruption research, the fellowship will result in a manuscript ready for publication in English and Bulgarian. Because of the interdisciplinary nature of the research project this work is expected to find an international readership among the specialists within political science, public administration, law, sociology, political anthropology, and public sphere theory. The debate on the discretionary potential of law itself cannot, however, remain within the limits of academia. The final goal is to improve the very process of law making and law administering.