Special Issue
Ethical Challenges of Corrupt Practices

Dark Sides of Anti-Corruption Law: A Typology and Recent Developments in German Anti-Bribery Legislation

By Sebastian Wolf[*]

Abstract

This Article takes a preliminary look at some distinct, unintended effects of anti-bribery law. In an exemplary and exploratory way, it intends to examine structural socio-legal problems and dilemmas of designing and implementing legislation against corruption. Firstly, it outlines four ideal types of legal norms that are meant to combat corruption but display significant negative features. Secondly, the typology is briefly applied to selected recent developments in German federal anti-bribery legislation. The Article concludes, *inter alia*, that the design, implementation, and interpretation of anti-corruption law is full of functional, legal, political, and moral pitfalls.

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A. Introduction

Since the early 1990s, the international anti-corruption boom[1] has resulted in a myriad of publications, numerous legal norms at various levels of government, and countless practical measures.[2] Not surprisingly, most activities in this area assume a net benefit when anti-corruption law is used. With few exceptions, corruption is invariably considered bad or condemnable.[3] Therefore, many scholars and policymakers usually work to reduce sectoral or organizational levels of corruption by introducing, strengthening, or expanding anti-corruption instruments. As Steven Sampson put it, "*We need to study how anti-corruption has been making us feel so good over the past decade*."[4] Problem-oriented analyses still hardly deal with anti-corruption as a potential and specific source of undesired phenomena in economy, politics, and society.

Nevertheless, there is a small but growing body of literature diverging from the above-mentioned mainstream path of research. It deals with—allegedly—negative aspects and effects of the fight against corruption. Some authors, for example, have argued that transnational anti-corruption law tends to be imperialistic[5] and that many anti-corruption policies are based on neo-liberal or Western ideology[6] despite their pretended politically neutral good governance rhetoric.[7] Under certain circumstances, specific anti-corruption

[1] Sebastian Wolf & Diana Schmidt-Pfister, *Between Corruption, Integration, and Culture: The Politics of International Anti-Corruption*, *in* INTERNATIONAL ANTI-CORRUPTION REGIMES IN EUROPE. BETWEEN CORRUPTION, INTEGRATION, AND CULTURE 13 (Sebastian Wolf & Diana Schmidt-Pfister eds., 2010).

[2] For comprehensive overviews including comparative analyses regarding German anti-corruption law, see*, e.g.*, IOANNIS N. ANDROULAKIS, DIE GLOBALISIERUNG DER KORRUPTIONSBEKÄMPFUNG. EINE UNTERSUCHUNG ZUR ENTSTEHUNG, ZUM INHALT UND ZU DEN AUSWIRKUNGEN DES INTERNATIONALEN KORRUPTIONSSTRAFRECHTS UNTER BERÜCKSICHTIGUNG SOZIALÖKONOMISCHER HINTERGRÜNDE (2007); ANNA-CATHARINA MARSCH, STRUKTUREN DER INTERNATIONALEN KORRUPTIONSBEKÄMPFUNG: WIE WIRKSAM SIND INTERNATIONALE ABKOMMEN? (2010); SIMONE NAGEL, ENTWICKLUNG UND EFFEKTIVITÄT INTERNATIONALER MAßNAHMEN ZUR KORRUPTIONSBEKÄMPFUNG (2007).

[3] SEBASTIAN WOLF, KORRUPTION, ANTIKORRUPTIONSPOLITIK UND ÖFFENTLICHE VERWALTUNG: EINFÜHRUNG UND EUROPAPOLITISCHE BEZÜGE 24 (2014).

[4] Steven Sampson, *The Anti-Corruption Industry: From Movement to Institution*, 11 GLOBAL CRIME 261, 278 (2010). The original quote is in italics.

[5] Steven R. Salbu, *Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village*, 24 YALE J. INT'L L. 223 (1999); Bernd Schünemann, *Das Strafrecht im Zeichen der Globalisierung*, 150 GOLTDAMMERS ARCHIV FÜR STRAFRECHT 299 (2003); Thomas Weigend, *Internationale Korruptionsbekämpfung – Lösung ohne Problem?*, *in* FESTSCHRIFT FÜR GÜNTHER JAKOBS 747 (Michael Pawlik & Rainer Zaczyk eds., 2007).

[6] Barry Hindess, *International Anti-Corruption as a Programme of Normalization*, *in* GOVERNMENTS, NGOS AND ANTI-CORRUPTION: THE NEW INTEGRITY WARRIORS 19 (Luís de Sousa, Peter Larmour & Barry Hindess eds., 2009).

[7] Ivan Krastev, *Die Obsession mit Transparenz: Der Washington-Konsens zur Korruption*, *in* VOM IMPERIALISMUS ZUM EMPIRE: NICHT-WESTLICHE PERSPEKTIVEN AUF GLOBALISIERUNG 137, 159 (Shalini Randeria & Andreas Eckert eds., 2009).

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measures can negatively impact on democratic development and stability.[8] Moreover, several critics see an expanding self-referential anti-corruption industry[9]—particularly consisting of non-governmental organizations, consultants, agencies, and scholars—and question, *inter alia*, its growing consumption of resources, quantification of corruption, and decontextualization of corrupt behavior.[10] Inspired by these studies and their alternative views on the field of anti-corruption,[11] this Article takes a preliminary look at some distinct, unintended effects of anti-bribery law. Unlike many studies by legal scholars in this field, it will deliberately not address simple gaps or minor inconsistencies in criminal law provisions. Rather, this explorative Article intends to examine structural socio-legal problems and dilemmas of designing and implementing legislation against corruption.

Section B outlines four ideal types of legal norms that are meant to combat corruption but display significant negative features. It should be emphasized right from the start that this compilation is non-exhaustive and primarily focuses on criminal law. The Article shall serve as a contribution to a broader interdisciplinary discussion on dilemmas and dysfunctionalities of anti-corruption law.[12] Section C briefly applies the typology to selected recent developments in German federal anti-bribery legislation. However, this Article does not aim to thoroughly analyze the new law on bribery involving parliamentarians and the brand-new law on combating corruption.[13] Mainly a conceptual contribution, this Article rather intends to illustrate, in an exemplary and exploratory way, how the typology might be applied—and potentially revised—in future legal and policy analyses. Against this background, the concluding section shortly discusses, *inter alia*, the apparent narrowing of policy makers' discretion over anti-bribery legislation. With regard to the overall topic of this German Law Journal special issue, it can be argued that the design, implementation, and interpretation of anti-corruption law is full of functional, legal, political, and moral pitfalls.

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[8] Staffan Andersson & Paul M. Heywood, *Anti-Corruption as a Risk to Democracy: On the Unintended Consequences of International Anti-Corruption Campaigns*, *in* GOVERNMENTS, NGOS AND ANTI-CORRUPTION: THE NEW INTEGRITY WARRIORS, *supra* note 6, at 33.

[9] Sampson, *supra* note 4; Bryane Michael & Donald Bowser, *The Evolution of the Anti-Corruption Industry in the Third Wave of Anti-Corruption Work*, *in* INTERNATIONAL ANTI-CORRUPTION REGIMES IN EUROPE: BETWEEN CORRUPTION, INTEGRATION, AND CULTURE, *supra* note 1, at 161; Luís de Sousa, *TI in Search of a Constituency: The Institutionalization and Franchising of the Global Anti-Corruption Doctrine*, *in* GOVERNMENTS, NGOS AND ANTI-CORRUPTION. THE NEW INTEGRITY WARRIORS, *supra* note 6, at 186.

[10] Krastev, *supra* note 7.

[11] This does not mean that the author shares all opinions of all above-mentioned works. As to the contributions cited in footnote 5, he particularly does not agree with their thinking in rather nationalistic or parochial terms.

[12] *See* Weigend, *supra* note 5; Wolf, *supra* note 3, at 131–33; Daniel K. Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 VA. J. INT'L L. 665 (2004).

[13] See *infra* Section C.

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B. A Typology of Partly Dysfunctional Anti-Corruption Law

The conceptual framework of this explorative Article consists of four ideal types of structurally problematic legal norms. On the one hand, these legal norms are able to combat certain corrupt acts, at least to some degree. On the other hand, they are partly dysfunctional because they show diverging adverse characteristics beyond minor technical shortcomings. A common negative effect is decreased levels of trust in politics.[14] Following Max Weber's well-known approach, this typology constructs, by drawing on selected existing phenomena, pure and clear-cut types that can be used, *inter alia*, for comparative purposes.[15] Overall, the typology's main focus is on positive criminal law, but one ideal type principally addresses implementation because it depends on the application of anti-corruption provisions. In reality, the ideal types outlined in the following table and paragraphs do not exclude each other. Real anti-bribery norms may feature several—partial—aspects of different pure types.[16]

Table 1: A Typology of Partly Dysfunctional Anti-Corruption Law

Ideal type	***Anti-corruption as…***	***Negative effects***
(1) Over-criminalized Anti-Corruption Law	disproportionate punishment and crime prevention	Lacking proportionality, limited anti-corruption effectiveness
(2) Collateral Damage-Causing Anti-Corruption Law	inappropriate, ill-designed cross-sectoral policy	Significant undesirable side effects on socially adequate behavior
(3) Symbolic Anti-Corruption Law	deliberately ineffective measure	Window dressing, factitious anti-corruption
(4) Perverted Anti-Corruption Law	an arbitrary instrument of an oppressive regime	Selective, self-interested, abusive law enforcement

Source: Compiled by the author.

[14] *See* Andersson & Heywood, *supra* note 8, at 33. For a comprehensive overview on the topic of trust in politics, see TRUST AND GOVERNANCE (Valerie Braithwaite & Margaret Levi eds., 1998).

[15] MAX WEBER, WIRTSCHAFT UND GESELLSCHAFT. GRUNDRISS DER VERSTEHENDEN SOZIOLOGIE 124 (5th ed. 1980).

[16] See *id.*

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For the purposes of this typology, over-criminalized anti-corruption law has the following meaning: A deviant act justifiably categorized or criminalized as corrupt behavior is penalized with a disproportionately severe penalty.[17] Admittedly, it is often highly controversial and dependent on the specific context whether a certain punishment is adequate, i.e. fits the crime.[18] While the conceptual framework developed in this section shall not be diluted by questions of empirical ambiguity, the following section reveals that its categories are obviously open to interpretation in the application process. Despite the shortcomings of over-criminalization, lawmakers have good intentions to combat corruption. However, these good intentions are tainted by the selection of excessive means. The inadequacy and disproportionality of over-criminalized anti-corruption law may interfere with fundamental rights and freedoms or, more generally, the rule of law. Moreover, too draconic penalties can hamper the fight against crime because they might be difficult to enforce[19] and repentant offenders could be discouraged to confess their wrongdoings.

Anti-corruption law which creates collateral damage within the meaning of the typology effectively criminalizes a specific corrupt behavior. As in the case of ideal type (1), it shall be assumed that the legislature uses good faith to construct penalties for the deviant conduct in question. The chosen instrument, however, is partly dysfunctional because the legislation is too broad.[20] It negatively and unintentionally impacts on adjacent—but functionally and morally different—areas and policies. As a consequence, socially accepted conduct and perhaps even desirable behavior is unjustifiably criminalized as corruption.[21] It may be difficult for those within the proximity of a collateral damage-causing anti-corruption law to anticipate—and to accept—that their activities are illegal. Such imprecise legal norms are questionable under the rule of law.[22] The structural problem this kind of criminal law provisions presents can also be described as "overbreadth: rules that . . . authorize sanctioning of conduct beyond what generated the demand to regulate."[23]

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[17] On a certain tendency of anti-corruption policy to over-criminalization, see Weigend, *supra* note 5, at 752; Martin Killias, *Korruption: Vive La Repression!—Oder was sonst? Zur Blindheit der Kriminalpolitik für Ursachen und Nuancen*, *in* FESTSCHRIFT FÜR HANS JOACHIM SCHNEIDER 239 (Hans-Dieter Schwind, Edwin Kube & Hans-Heiner Kühne eds., 1998).

[18] An example is the long-lasting debate on the alleged over-criminalization of the possession and consumption of cannabis in Germany. See Kai Ambos, *Kiffen – bitte erst mit 18*, SÜDDEUTSCHE ZEITUNG 2 (Mar. 11, 2015).

[19] *See* Wolf, *supra* note 3, at 69. This Article does not deal with other potential excessive means that might be used in the fight against corruption, for example dragnet investigation and interception.

[20] Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491 (2008).

[21] Wolf, *supra* note 3, at 69.

[22] On the necessity of clarity and definiteness, see *infra* Section C.

[23] Buell, *supra* note 20, at 1563.

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Symbolic anti-corruption law, as understood and defined in this Article, is a rather ineffective means to deter corruption. The lawmaker deliberately designed it to only cover a very limited number of all the relevant acts that the society considers as corrupt behavior.[24] Gaps or inconsistencies in anti-corruption legislation do not exist because a benevolent legislature lacks resources, e.g. empirical insights, technical expertise, time etc. Though the government or the parliamentary majority intends, knows, or at least assumes the limited functionality of the legal provisions in question, it claims that these provisions help to achieve the (official) regulatory objectives. Thus, in contrast to ideal types (1) and (2), the lawmaker, here, has a hidden or questionable agenda—e.g., to exclude certain actors from liability and prosecution.[25] In this type, the structural problem is not too far-reaching criminal law with unintended side effects but factitious anti-corruption or window dressing with delegitimizing effects on the political system. While ideal type (2) is characterized by unintended over-breadth, the systemic weakness of symbolic anti-corruption law is intended under-breadth.

In the typology outlined in this Article, perverted anti-corruption law has the following meaning: Criminal law provisions are misused for particularistic purposes by the authorities.[26] The relevant positive law could be—and may have been—used to effectively combat corrupt behavior. However, it is strategically applied as a political tool to achieve self-interested ends. Apparently, this selective practice of rule enforcement is hardly compatible with the rule of law. It is more likely to exist under an authoritarian regime than in a functioning constitutional democracy. Law enforcement authorities can, for example, instrumentalize anti-corruption norms to silence the opposition or political enemies.[27] Obviously, this ideal type is distinct from the above-mentioned types because it includes effective anti-corruption provisions, as types (1) and (2) do, but not as part of an altruistic criminal policy. The government publicly states, as in the case of ideal type (3), that its anti-corruption measures serve public objectives.[28] In contrast to type (3), the government, here, does not confine itself to enact toothless regulation: It actively abuses the anti-corruption law through its application. Therefore, perverted anti-bribery law can be seen as a corrupted anti-corruption measure.

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[24] *See* Hans Herbert von Arnim, *Der gekaufte Abgeordnete – Nebeneinkünfte und Korruptionsproblematik*, 25 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 249, 252 (2006); Thomas Fischer, *Dieses Gesetz ist ein Witz!*, DIE ZEIT, 26 June 2014, at 8.

[25] Von Arnim, *supra* note 24, at 254; Fischer, *supra* note 24.

[26] Andersson & Heywood, *supra* note 8, at 34.

[27] *Id.* at 48–49.

[28] *See* Hindess, *supra* note 6, at 120.

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C. The Typology and Recent Developments in German Anti-Bribery Legislation

As outlined in the introduction, this section will apply the typology of partly dysfunctional anti-corruption law to two current reforms in German federal anti-bribery legislation: the rather new criminal law on bribery of parliamentarians[29] and the brand-new law on combating corruption which deals, *inter alia*, with bribery in the private sector and transnational bribery.[30] This Article deliberately eschews comprehensive policy or legal analyses of these recent developments.[31] In an exploratory way, it intends to illuminate the usefulness and applicability of the conceptual framework developed in the previous section. Both legislative reforms emerge from international anti-corruption provisions. This comes as no surprise because international anti-corruption regimes have shaped German anti-bribery law since the late 1990s.[32] In the following paragraphs, it is discussed whether and how the four ideal types apply to the selected sectoral anti-corruption laws before and after the respective legislative reform.

For many years, scholars have critically discussed the offense of active and passive bribery involving parliamentarians in German criminal law.[33] The offense already faced criticism when it was (re)introduced in 1994 as Sect. 108e of the *Strafgesetzbuch* (StGB; Penal Code).[34] After the adoption of the United Nations Convention Against Corruption (UNCAC) in 2003,[35] it was evident that German law did not comply with the Convention's mandatory

[29] *Achtundvierzigstes Strafrechtsänderungsgesetz – Erweiterung des Straftatbestandes der Abgeordnetenbestechung* [48th Law Amending the Penal Code – Extension of the Criminal Offense of Bribery of Members of Parliament], Apr. 29, 2014, BUNDESGESETZBLATT [BGBL.] I at 410. The amendment entered into force as of 1 September 2014.

[30] *Gesetz zur Bekämpfung der Korruption* [Law on Combating Corruption], Nov. 25, 2015, BGBL. I at 2025. The amendment entered into force as of 26 November 2015.

[31] Moreover, the author will not deal with another current reform proposal concerning bribery of resident physicians since that sectoral issue and the draft law are not relevant for the paper's main argumentation. For a brief and critical review of the Federal Government's bill (DRUCKSACHE 18/6446), see Rainer Hüper, *Maas legt Gesetzentwurf gegen Korruption im Gesundheitswesen vor*, 20 TRANSPARENCY DEUTSCHLAND SCHEINWERFER 13 (2015).

[32] *See* Androulakis, *supra* note 2; Marsch, *supra* note 2; Nagel, *supra* note 2.

[33] For an overview, *see, e.g.*, Manfred Ernst Möhrenschlager, *Die Struktur des Straftatbestandes der Abgeordnetenbestechung auf dem Prüfstand: Historisches und Künftiges*, *in* FESTSCHRIFT FÜR ULRICH WEBER 217 (Bernd Heinrich, Eric Hilgendorf, Wolfgang Mitsch & Detlev Sternberg-Lieben eds., 2004). This paragraph on bribery of Members of Parliament is partly based on Sebastian Wolf, *Political Corruption as a Regulatory Problem in Germany*, 14 GERMAN L.J. 1627 (2013).

[34] Jan. 22, 1994, BGBL. I at 3322. For a much-cited early critique, see Stephan Barton, *Der Tatbestand der Abgeordnetenbestechung (§ 108e StGB)*, 47 NEUE JURISTISCHE WOCHENSCHRIFT 1098 (1994).

[35] United Nations Convention Against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41, http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.

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provisions on bribery of parliamentarians.[36] Because the *Bundestag* (lower house of the German Federal Parliament) could not agree to reform that criminal offense,[37] Germany was unable to ratify the UNCAC for more than ten years. Due to the law's significant shortcomings[38] and the parliament's inactivity, many legal scholars saw Section 108e StGB only as symbolic anti-corruption law.[39] In contrast, several politicians and a minority of scholars who opposed a reform argued, *inter alia*, that a stricter criminal offense would violate clarity and definiteness requirements of the constitution, and would unnecessarily criminalize legitimate and socially adequate parliamentarian behavior.[40] From their perspective, the draft laws submitted by the oppositional parties—such as during the last legislative period[41]—would have amounted to collateral damage-causing anti-corruption law. Finally, the *Bundestag* adopted a reform of Section 108e StGB that paved the way for Germany's ratification of UNCAC in 2014.[42] Many observers appreciate the new legislation.[43] Some scholars, however, argue that the new law also contains deliberate loopholes, ambiguities, and exceptions that will thwart the fight against parliamentary corruption.[44] In their view, the new Section 108e StGB is, too, symbolic anti-bribery law.

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[36] To name just one of the most cited references, see Anne van Aaken, *Genügt das deutsche Recht den Anforderungen an die VN-Konvention gegen Korruption? Eine rechtsvergleichende Studie zur politischen Korruption unter besonderer Berücksichtigung der Rechtslage in Deutschland*, 65 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 425, 430 (2005).

[37] Sebastian Wolf, *Parlamentarische Blockade bei der Korruptionsbekämpfung? Zur verschleppten Neuregelung des Straftatbestandes der Abgeordnetenbestechung*, 39 ZEITSCHRIFT FÜR PARLAMENTSFRAGEN 493 (2008).

[38] For some illustrative examples of bribery not covered by the current Section 108e StGB, *see* Elisa Hoven, *Die Strafbarkeit der Abgeordnetenbestechung: Wege und Ziele einer Reform des § 108e* StGB, 8 ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK 33, 35 (2013).

[39] von Arnim, *supra* note 24, at 252; Fischer, *supra* note 24. For several other references, see Hoven, *supra* note 38, at 39.

[40] Wolf, *supra* note 33, at 1635.

[41] *See* Hoven, *supra* note 38, at 40–44; Wolfgang Jäckle, *Abgeordnetenkorruption und Strafrecht—Eine unendliche Geschichte?*, 45 ZEITSCHRIFT FÜR RECHTSPOLITIK 97 (2012); Sebastian Wolf, *Regulierungsproblem Abgeordnetenbestechung: eine Analyse neuerer Entwicklungen*, 6 CORP. COMPLIANCE ZEITSCHRIFT 99 (2013).

[42] *Gesetz zu dem Übereinkommen der Vereinten Nationen vom 31. Oktober 2003 gegen Korruption* [Law on the United Nations Convention Against Corruption adopted on 31 October 2003], Oct. 31, 2014, BGBL. II at 762.

[43] Sebastian Wolf, *Internationale Korruptionsbekämpfung: Zur Weiterentwicklung des UN-Übereinkommens gegen Korruption*, 63 VEREINTE NATIONEN 79, 80 (2015).

[44] Fischer, *supra* note 24; Wolfgang Jäckle, *Sturzgeburt—"Hauruck"-Gesetzgebung bei der Mandatsträgerbestechung*, 47 ZEITSCHRIFT FÜR RECHTSPOLITIK 121 (2014).

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In German criminal law, bribery offenses in commercial practice—Section 299 StGB—were primarily derived from the competition model (*Wettbewerbsmodell*);[45] however, this regulatory approach does not comply with several international anti-corruption provisions, particularly the EU Framework Decision on combating corruption in the private sector.[46] The Framework Decision—and also relevant but legally non-binding provisions of UNCAC and the Council of Europe's Criminal Law Convention on Corruption[47]—prescribe the principal-agent model (*Geschäftsherrenmodell)*.[48] In 2007, the Federal Government (*Bundesregierung*) submitted a draft anti-corruption law that included a reform of Section 299 StGB. It suggested to add the *Geschäftsherrenmodell* to the bribery offenses in commercial practice and thus combine both approaches.[49] Several practitioners and scholars strongly criticized the bill. They argued, *inter alia*, that the proposed new Section 299 StGB was unnecessary, violated the requirement of clarity and definiteness, vaguely and contradictorily overlapped with the offense of embezzlement and abuse of trust—Section 266 StGB—and was a negative mixture of two different regulatory models.[50] It was also criticized that the suggested offense would unjustifiably criminalize minor misdemeanors that could be sufficiently dealt with by means of labor law and civil law.[51] This draft law was not adopted by the *Bundestag*—probably because the parliamentarians were unable to agree on a complementary reform of Sect. 108e StGB in the respective legislative period–and therefore lapsed.[52] In 2015, however, the *Bundesregierung*

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[45] Joachim Vogel, *Wirtschaftskorruption und Strafrecht—Ein Beitrag zu Regelungsmodellen im Wirtschaftsstrafrecht*, *in* FESTSCHRIFT FÜR ULRICH WEBER, 395, 404 (Bernd Heinrich, Eric Hilgendorf, Wolfgang Mitsch & Detlev Sternberg-Lieben eds., 2004).

[46] Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, 2003 O.J. (L 192).

[47] Criminal Law Convention On Corruption, Jan. 27, 1999, C.E.T.S. No. 173, http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007f3f5.

[48] Sebastian Wolf, *Ein hybrides Regelungsmodell zur strafrechtlichen Bekämpfung von Wirtschaftskorruption? Zur ausstehenden Reform von § 299 StGB*, 7 CORP. COMPLIANCE ZEITSCHRIFT 29, 31–32 (2014).

[49] Sebastian Wolf, *Modernization of the German Anti-Corruption Criminal Law: The Next Steps*, 8 GERMAN L.J. 295, 301 (2007).

[50] See*, e.g.*, Matthias Braasch, *Kriminologische und strafrechtliche Aspekte der Bestechlichkeit und Bestechung im geschäftlichen Verkehr (§ 299 StGB)*, *in* KORRUPTION: FORSCHUNGSSTAND, PRÄVENTION, PROBLEME 234, 259 (Thomas Kliche & Stephanie Thiel eds., 2011); Holger Niehaus, *Strafrechtliche Folgen der "Bestechung" im vermeintlichen Unternehmensinteresse*, *in* DER KORRUPTIONSFALL SIEMENS. ANALYSEN UND PRAXISNAHE FOLGERUNGEN DES WISSENSCHAFTLICHEN ARBEITSKREISES VON TRANSPARENCY INTERNATIONAL DEUTSCHLAND 21, 43 (Peter Graeff, Karenina Schröder & Sebastian Wolf eds., 2009); Thomas Rönnau & Tine Golombek, *Die Aufnahme des "Geschäftsherrenmodells" in den Tatbestand des § 299—ein Systembruch im deutschen StGB*, 40 ZEITSCHRIFT FÜR RECHTSPOLITIK 193 (2007).

[51] Rönnau & Golombek, *supra* note 50, at 194.

[52] Wolf, *supra* note 48, at 33.

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submitted a new bill that proposed an identical reform of Section 299 StGB.[53] From the point of view of the cited critics, the Federal Government once again tried to enact inconsistent and over-criminalized anti-corruption law on the private sector.[54]

D. Concluding Remarks

Inspired by critical studies that analyze the structural and neglected dark sides of anti-corruption, this mainly conceptual Article at the intersection of law and politics developed a typology of partly dysfunctional anti-corruption law. It consists of four ideal types: (1) Over-criminalized anti-corruption law, (2) collateral damage-causing anti-corruption law, (3) symbolic anti-corruption law, and (4) perverted anti-corruption law. An exploratory analysis of two recent developments in German federal anti-bribery legislation shows that the critique of several scholars can be categorized using the typology. Bribery offenses in commercial practice did not comply with EU law and international anti-corruption conventions for a long time, but critics argued that the Federal Government's reform proposals would establish, *inter alia*, over-criminalized anti-corruption law in the private sector. Some observers see both old and new criminal offenses for bribery of members of parliament as symbolic anti-corruption law. For others, the new legislation can be considered as collateral damage-causing anti-corruption law. Does this mean that the ideal types outlined in this paper are arbitrary and blurry? First, anti-bribery provisions, as all legal norms, can have multiple interpretations. Second, the last-mentioned view regarding the new law on bribery of members of parliament clearly is a rather unconvincing minority opinion.[55] Third, using this minority opinion as an example, opponents of certain stronger anti-corruption measures or legislative reforms might tend to discredit them as partly dysfunctional by referring to the effects of the ideal types discussed in this paper.

During recent decades, there have not been any serious accusations of perverted anti-corruption law—as understood and defined in this paper—in Germany. This is not surprising because this type is more likely to exist in authoritarian political systems and in transitioning countries.[56] Looking forward, the applicability and usefulness of the conceptual framework developed in this article still have to be tested on the basis of more

[53] Wolf, *supra* note 43, at 83.

[54] *See, e.g.*, Reinhard Grindel, Member of Parliament at the First Reading of the Draft Law, Mar. 26, 2015, 97th meeting of the *Bundestag*, STENOGRAFISCHER BERICHT, at 9307. Remarkably, the *Bundestag's* Committee on Legal Affairs and Consumer Protection has significantly amended the bill (see DRUCKSACHE 18/6389). Nevertheless, an attenuated *Geschäftsherrenmodell* is still part of the recently adopted law; see *supra* note 30.

[55] For further persuasive reasoning, see, *e.g.*, Fischer, *supra* note 24; Hoven, *supra* note 38; Jäckle, *supra* note 44.

[56] On China and Vietnam, see Andersson & Heywood, *supra* note 8, at 43–49. On Fiji, see generally Larmour, *supra* note 28. On Taiwan and South Korea, see Christian Göbel, *Warriors in Chains. Institutional legacies and Anti-Corruption Programmes in Taiwan and South Korea*, *in* GOVERNMENTS, NGOS AND ANTI-CORRUPTION: THE NEW INTEGRITY WARRIORS 102 (Luís de Sousa, Peter Larmour & Barry Hindess eds., 2009).

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cases. Maybe the typology will be refined in the future. Nevertheless, it already seems to add value to critical and systematic analyses of anti-corruption measures.

This Article does not intend to question the fight against corruption. Corruption is harmful and anti-bribery law should be a cornerstone of anti-corruption policies. Still, it often is not easy to distinguish between acceptable behavior and conduct that clearly should be criminalized. Moreover, even if society and parliament overwhelmingly agree in this respect, designing appropriate anti-corruption law is difficult and probably becomes more delicate and demanding against the backdrop of increasing regulative complexity. After roughly two decades of multi-faceted transnational anti-corruption activities, corruption persists to some degree and both the potential and the actual impacts of regulatory frameworks might be limited—albeit frequently not exhausted.[57] When legislatures from anywhere in the world battle corruption, they are confronted with high, often rising, and sometimes even exaggerated expectations. Media reports, nongovernmental awareness-raising campaigns, and international anti-corruption regimes urge lawmakers to enact and enforce strong and deterrent criminal law. This may lead to disproportionate regulation and unintended side effects[58] (see ideal types (1) and (2)). If authorities mix anti-corruption with self-interest, even hypocritical and abusive measures may emerge (see types (3) and (4)).

In addition, anti-corruption law risks to be

> caught in a "regulatory trilemma": If the law is strong enough to change the culture of the regulated organization,[59] it risks crushing the organization's capacity to maintain robust, independent norms of virtuous behavior [cf. type (2)]; if the law is too weak, it has no effect [cf. type (3)]; if the rules are 'just right', chances are we are seeing agency capture [cf. type (4)].[60]

Against this background, sometimes deliberate legislative inactivity might seem preferable because this strategy prevents legislation with adverse effects. Moreover, no one wishes politicians and officials, driven to act on corruption, to do things just for the sake of doing things; however, a legal vacuum tends to be disadvantageous, especially for the poor and

[57] *See* Wolf & Schmidt-Pfister, *supra* note 1, at 15–16.

[58] *See* Weigend, *supra* note 5, at 752.

[59] This citation refers to "organization" since it stems from a text on governance; see, *infra* note 60. Nevertheless, the argumentation also applies to natural persons.

[60] Scott Burris, Michael Kempa & Clifford Shearing, *Changes in Governance: A Cross-Disciplinary Review of Current Scholarship,* 41 AKRON L. REV. 1, 40 (2008). Square brackets added by the author.

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weak. Apart from type (4), partly dysfunctional anti-corruption law–that perhaps can be improved to some extent or at some stage–is likely to be more effective than no respective regulation at all.[61] In summary, there is strong evidence that not only corruption but also anti-corruption may imply ethical dilemmas. The design, implementation, and interpretation of anti-corruption law is full of functional, legal, political, and moral pitfalls as well as promising avenues for future interdisciplinary research.

[61] *See* Buell, *supra* note 20, at 1563–64. This crucial aspect seems to be neglected at least by some of the critical scholars cited in section A. See sources cited, *supra* Part A.

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