Kevin E. Davis, **Between Impunity and Imperialism: The Regulation of Transnational Bribery,** Oxford University Press, New York 2019, 332 pages, 61.00 GBP, ISBN 9780190070809.

Between Impunity and Imperialism: The Regulation of Transnational Bribery is an excellent addition to the now voluminous academic literature on corruption.[1] Kevin Davis' book straddles between broader questions about what an effective system would be to combat corruption, and narrower (and somewhat doctrinal) questions about how corruption is defined and sanctioned by particular legal instruments. This unique combination makes the book valuable for academics, legal professionals, policymakers, experts, and novices alike.

The motivation for the book is the rise of transnational regulation of corruption in the last thirty years. The signing of the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions in 1997 sparked many countries to adopt their own version of the Foreign Corruption Practices Act (FCPA), enacted in the United States in 1977. The OECD Convention was followed by the United Nations Convention against Corruption in 2003, and multiple regional initiatives and programmes. Davis shows that this "body of law that regulates corrupt actions or events, including those that transcend national boundaries" (p. 3) has been largely focused on one aspect of the phenomenon, bribery. Thus, while acknowledging that corruption, as an umbrella term, encompasses a wide range of conduct (e.g. embezzlement), Davis justifiably focuses the book on the "anti-bribery regime". More specifically, Davis' analysis is centered around "the OECD paradigm", a term he coined to describe the current anti-bribery regime's assumption that "every little bit helps", i.e. "anything foreign legal institutions can do to help combat transnational bribery is likely to be worthwhile: they should prohibit a broader range of conduct, target more actors, impose more severe sanctions, and get more and more agencies involved in enforcement" (p. 5).

As the title of the book suggests, the current anti-bribery regime faces charges of imperialism, but without an anti-bribery system there is the risk of impunity. Davis' premise is that this is not an unresolvable dilemma, as no one currently argues that a corrupt society is preferable to a non-corrupt one. Thus, the charge of imperialism should not raise a question of whether we should combat corruption, but how to do so. As Davis puts it "[r]ather than questioning whether bribery is a problem, perhaps we should question whether the OECD paradigm has embraced the right response" (p. 10).

Davis then proceeds to unpack how we are currently fighting corruption, pointing to the need to look at *what* conduct is prohibited, *who* is held liable and *how* the law is enforced.

1 For a list that illustrates how extensive the literature is, see *Matthew C. Stephenson*, Bibliography on Corruption and Anticorruption, August 2021. Available at https://scholar.harvard.edu/files/mstephenson/files/stephenson_corruption_bibliography_aug_2021.pdf (last accessed on 13 September 2021).

He does not propose that there is a right or wrong way of answering these questions. Quite the contrary, the book provides a unique and very illuminating overview of the different answers one may find in different jurisdictions and their respective rationales and merits. For instance, in Chapter 6, entitled "What is Bribery?" Davis provides a description of "paradigmatic bribery" and the rationale for regulating it. Then, he carefully walks the readers through the different constitutive legal elements of "paradigmatic bribery" to ask if legal regulation should go beyond it. Should laws and regulations require intentionality (i.e. proof that the perpetrator intended to provide something of value to a public official in exchange for an improper advantage)? Should they require a completed transaction, or is it enough to have a mere promise or agreement to pay? How broad should the definition of "something of value" be: could it include gratifications and services, especially those that do not have an obvious pecuniary value? Should regulations require a *quid pro quo,* i.e. proof that something was given in exchange for the bribe, or should any kind of benefit granted to a public official (such as gifts) be regulated? For each of these questions, Davis provides a detailed analysis of the answers provided by different legal instruments domestically and internationally (e.g. the OECD Convention and the UN Convention are very similar in how they require quid pro quo, but differ in their definition of public official) and the advantages and disadvantages of each.

Chapter 7 continues this exploration of the "what" question by asking what are the advantages and disadvantages of broader provisions that go beyond bribery, such as fraud and accounting practices. There are clear trade-offs involved in each of these choices: while the design of some rules leads to overreach (risk of innocent people being caught), others lead to underreach (risk of guilty people not being sanctioned). Turning to the "who" question, Chapter 8 discusses liability of corporations and corporate groups and their complex relationship with individual liability. While providing a unique map of these defining legal issues regarding regulation of transnational bribery, and the multitude of answers adopted by different legal regimes, Davis masterfully articulates the reasons why one may favour or resist each of these options. As a result, collectively, these chapters illustrate that "reasonable people can disagree about the design of anti-bribery law" (p. 176), challenging the universalistic aspirations of the OECD paradigm.

As for the "how" question, Chapter 9 explores substantive and procedural rules of enforcement in a transnational context, where multiple jurisdictions may simultaneously be pursuing investigations and prosecutions; Chapter 10 turns to nationality, territoriality and other criteria to define jurisdiction. In each of these chapters, Davis not only shows that there is no correct way of regulating the phenomenon, but that there is an additional complication: different enforcement strategies may pursue different outcomes, such as punishment, prevention, or deterrence. Each of these outcomes requires a distinct law enforcement strategy. And in the unlikely event that all enforcement agencies and officials embrace a single outcome (e.g. deterrence, as emphasized by the OECD paradigm), Davis shows that the relationship between enforcement strategies and outcomes is largely context dependent, challenging the harmonizing aspirations of the OECD paradigm. At the end of

Chapter 10, the reader should be fully convinced that there are numerous and reasonable disagreements in defining what is corruption, determining who gets punished, and deciding how to enforce the law.

In Chapter 11, Davis turns to the question of what to do with these disagreements. On the one hand, different legal provisions may simply reflect disagreements about the impact of the interventions ("factual" and "counterfactual disagreements"). These can be resolved with more information. On the other hand, some of these disagreements are deeper, as they reflect differences in values or principles guiding the design of law and policy. These, Davis argues, perhaps should be tolerated (p. 241). Such disagreements happen when there is no certainty as to whether one approach is universally valid, and there is no credible way of claiming that one solution should prevail over another. (p. 242). Davis believes that the current anti-bribery regime, governed by the OECD paradigm, could be improved on both fronts. First, the current regime could be doing more to tackle factual and counter-factual disagreements. Second, the regime should be more tolerant of value disagreements: a one-size-fits-all model of combatting corruption, such as the one proposed by the OECD Paradigm, has no space for these disagreements.

In Chapter 5, Davis offers a map of different criteria for evaluating anti-corruption law and policy which will be the basis of the value disagreements described later in Chapter 10. While effectiveness is certainly a core concern of the anti-bribery regime, the existing legal instruments in the transnational bribery regime, especially the UN convention, also point to efficiency, due process, legitimacy, and fairness as guiding principles. As Davis shows, there are significant trade-offs between these criteria. More importantly, balancing these principles and determining their relative weight, is not something that can be subjected to a universal formula, contrary to what the OECD paradigm seems to assume.

What is the solution? Davis argues that the hallmark of a successful transnational regime cannot depend on specific rules and norms. Rather, "the Anti-Bribery regime is likely to be successful if it collects and distributes information about both problems and solutions, tolerates diversity in contexts where there is uncertainty about appropriate interventions, and resolves disagreements using processes that are both informed and inclusive." (p. 244). These traits, Davis argues, fit the description of what the literature has labelled "global experimentalist governance".

As Davis explains at the end of Chapter 4, global experimentalist governance is an approach to address transnational problems that encompasses five key steps:

- "'Initial reflection and discussion with a broadly shared perception of a common problem' resulting in;
- 'Articulation of a framework understanding with open ended goals';
- Implementation of broadly framed goals is left to 'actors who have knowledge of local conditions and considerable discretion to adapt the framework norms to their particular contexts';
- 'Continuous feedback' from local contexts, with outcomes subject to peer review; and

- Periodic and routine re-evaluation, and where appropriate, revision of goals and practices in light of the results of the peer review and the shared purposes." (p. 55)

The problem is that the current anti-bribery regime falls short of meeting each one of these requirements due to: the absence of a consensus on the goal of combatting corruption, lack of capacity to adapt to different contexts, and disregard for the trade-offs involved in enforcement efforts. Addressing these, Davis argues, would go a long way in responding to charges of imperialism against the transnational bribery regime. And global experimentalist governance can help.

The proposal seems very interesting but is largely underdeveloped in the book. In the few pages devoted to it, Davis presents the concept in very broad brushes. The brevity is perhaps understandable given that providing a fully articulated solution is beyond the scope of a book designed to critique the existing regime. Yet the reference to it leaves the reader wondering if Davis' future work will spell out his solution with the same level of detail and careful analysis that he devoted to the description and critique of the current regime.

More specifically, in the conclusion, after making the distinction between factual, counterfactual and value disagreements, and indicating that the latter should be tolerated, Davis points to the fact that not all value disagreements are equal. In fact, there are objections that are designed to undermine the regime and perpetuate impunity. These go to the heart of the anti-corruption enterprise, and discard the basic premise of the entire analysis, i.e. that corruption is a problem and should be combatted. Davis calls these "bad faith disagreements" and argues that they should be eliminated from the system. (P. 242) Only "good faith disagreements" should be tolerated.

Davis' point seems, at first glance, rather sensible. If local institutions are resisting enforcement in a self-interested way to protect their own corrupt elites, foreign institutions may be justified in enforcing their extraterritorial laws and imposing their norms and values abroad. Those who embrace the premise that corruption is a problem are inclined to agree with that. Yet, there are at least three problems with this claim.

First, inspired by the way in which Davis masterfully articulates the multitude of ways in which bribery may be defined, one could question what exactly he means by "good faith". Baptists and Bootleggers, for example, jointly opposed the sale of alcohol on Sundays in the United States but did so for entirely different reasons.[2] While the Baptists offered a religiously based resistance to the sale, the Bootleggers were driven by commercial interests. This scenario suggests that parochial interests, rather than a concern with the public good, may be the reason why interest groups may support particular reforms.[3] In this case, were the Baptists offering good faith support? Were bootleggers offering bad faith support? What distinguishes the two?

2 *Bruce Yandle*, Bootleggers and Baptists: The Education of a Regulatory Economist, Regulation v. 3 (1983), pp. 12-16.

3 *Bruce Yandle* and *Stuart Buck*, Bootleggers, Baptists, and the Global Warming Battle, Harvard Environmental Law Review v. 26 (2002), pp. 177-229.

Second, even if we can clearly define what is good or bad faith resistance, how will the anti-bribery system deal with situations in which they are linked? Baptists and Bootleggers is an example of an alliance between improbably bedfellows. As I have explored with Marta Machado, such an improbable alliance is also illustrated by the Car Wash (*Lava Jato*) scandal in Brazil.[4] While corrupt politicians were trying to boycott the investigation, they found improbable allies in members of the legal community (legal scholars, lawyers and some judges) who argued that the investigation and prosecution was adopting practices that violated the Brazilian constitution and rule of law principles. When good and bad faith resisters become bedfellows, should the anti-bribery regime tolerate the disagreement or not?

Third, Davis' proposal not to tolerate "bad faith disagreement" requires a governance system to manage disagreement over values. This is where the analogy with global experimentalist governance proves to be of limited use. While the use of this approach to manage factual disagreements seems feasible, the idea of using experimentalist governance to manage value disagreements appears elusive. Davis proposes meaningful engagement with local authorities, opportunities for them to manifest their concerns, and proper consideration of the interest of all affected parties. While these procedural guarantees may allow for more voices than the system has today, it is still unclear who will determine whether the disagreement should be tolerated or not and how they will do so.

Perhaps Davis has answers to all these questions, but they are not currently explained in the book. This only reinforces my earlier point: this is a beautifully written and masterfully articulated critique of the current anti-bribery regime, and it leaves readers wanting more. A detailed proposal to effectively address these problems would be the perfect encore to this most valuable contribution to the literature.

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4 *Mariana Mota Prado* and *Marta R. de Assis Machado,* Using Criminal Law to Fight Corruption: The Potential, Risks and Limitations of Operation Car Wash (Lava Jato), American Journal of Comparative Law (forthcoming).