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MACRO-CORRUPTION AND INSTITUTIONAL CO-OPTATION

THE “LAVA JATO” CRIMINAL NETWORK

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MACRO-CORRUPTION AND INSTITUTIONAL CO-OPTATION: THE
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Disclaimer

The facts and analysis presented herein are sustained in files and documents of the Brazilian Public Ministry related to the “Lava Jato” illicit/criminal network and sub-networks analyzed, and sometimes not on definitive judicial decisions. This means that when final sentences are promulgated, modifying the information previously accepted by the first judicial instances, the result and the analysis presented in this book will also change.

In the case of the names mentioned, quoted or referenced, who are accused –with the exception of those specifically mentioned, quoted or referenced in the text as definitively condemned–, the presumption of innocence, in observance of individual rights is always preserved. The judicial truth is the jurisdiction of the courts, which by law will decide whether the defendants are innocent or guilty¹.

It is clarified that *belonging to, participating in, being connected to, or appearing on* the network analyzed herein does not imply having committed any criminal act or being engaged in any criminal enterprise, although the network, as a whole, has an illicit character. It is always possible to *belong, participate, be connected, or appear in* the network as an agent promoting interests that are socially and institutionally beneficial, or as a result of coercion, among other reasons unrelated to criminal acts committed by the agent.

¹ Based on: Francesco Forgione (2010). Mafia export. Cómo la Ndrangheta, la Cosa Nostra y la Camorra han colonizado el mundo. Anagrama. Crónicas. Barcelona, págs. 11–12.

Introduction

“Lava Jato” is an on-going Federal Police investigation executed for dismantling corruption and money laundering schemes that initially involved Petrobras, the Brazilian State-managed oil company. From 2014 to mid-2017, this operation developed 41 phases of investigation involving private and State companies, high-ranking officials, politicians, business related persons, *doleiros*, and drug traffickers, among other types of agents from 12 countries.

Since the initial complaint sustained by Hermes Freitas Magnus, who owned the Brazilian company “Dunel”, along with Maria Teodora Silva, the investigations began, which allowed identifying four criminal groups led by the currency exchange operators Carlos Habib Chater, Alberto Youssef, Nelma Mitsue Penasso Kodama and Raul Henrique Srouf. These four criminal structures operated between 2005 and 2014 to obtain millionaire contracts with Petrobras and other State companies through bribe payments to company officials and to politicians with power to appoint those officials. The bribes were so massive, that a complex scheme of money laundering and even trafficking was established to handle the movements of money through several layers of real and façade companies, and through the financial system of various countries.

Considering the amount and diversity of people, companies, financial systems, institutions and countries involved, almost anyone would acknowledge today that the “Lava Jato” operation revealed a massive network of

corruption and institutional co-optation. One of the purposes of this book is to analyze and understand, for the first time, the detailed dimensions and scope of that massiveness. As it will be discussed, the result of this analysis revealed a massive structure of corruption, institutional co-optation and money laundering in which around 900 social agents, including individuals and companies, established almost 2,700 interactions, and number of agents and interactions keeps growing as the Brazilian authorities reveal more information.

This analysis is based on records and documents published by the Brazilian judicial system until June of 2017. In a sense, this analysis is about “translating” the judicial truth that the *Ministério Público Federal* revealed, into a single model that can be visualized and analyzed. However, the investigations and prosecutions conducted in Brazil were obviously fragmented, which means that gathering and analyzing all the 150 sources consulted herein, to elaborate and understand the entire network, required a specific protocols and numerous hours of data collection and analysis. At the end, more than 250 Brazilian and foreign companies, 170 individuals specifically related to businesses, and 100 public officials were identified, and that information today relies on a centralized database with the detailed information of each one of those intervening agents.

Considering the massiveness of the identified network and its key sub-networks, their structural impacts on the economic, social and political systems in Brazil, and their engagement on corruption structures across Latin America and on money laundering worldwide, the concept of “macro-corruption” is introduced herein to describe the scope of this phenomenon.

Although bribery was also used to articulate this macro-network, the traditional concept of corruption is insufficient for understanding the dimension and implications of this structure: “Lava Jato” is not just another scandal of corruption in which large amounts of public resources (billions of dollars) were unlawfully re-oriented and appropriated by few powerful individuals; it is a massive and transnational network of corruption that manipulated Brazilian institutions to satisfy few powerful people and their exclusive interests. Therefore, “Lava Jato” is herein conceived and conceptualized as a network of macro-corruption and institutional co-optation; an intricate and perverse system planned and established by politicians, high-ranking public officers and business people to divert and launder large amounts of public resources.

On the other hand, it is necessary to stress that although in modern criminal law the term “crime” does not have a simple and universally accepted definition, for the purpose of this book crime will be understood as an act that is harmful not only for an individual but also for a society and the State. Criminal acts are forbidden and punishable by law. A criminal offense, therefore, is a category created and defined by the criminal law in each. Similarly, an illicit act is committed by someone who knows that the act is prescribed as disallowed by law, but under different circumstances, the same act could be legal. For example, if a group of individuals imports a legal commodity, that action only becomes illicit when specific prescribed procedures are not fulfilled. This means that some actions oscillate in a thin line between a licit and an illicit character; a licit action becomes illicit if certain specifications are not fulfilled or if the consequences of the action are harmful. Bearing this in mind, the “Lava Jato” network is referred herein

as illicit/criminal, because some specific actions that will be discussed, cannot be defined as crimes by default, but acquire an illicit character when analyzed in the context of the entire network.

This book has ten chapters. After this introduction, the first chapter discusses how the concept of basic corruption does not explain the complexity of complex corrupt structures such “Lava Jato”; therefore, the concepts of systemic macro-corruption and institutional co-optation are proposed. The second chapter presents some relevant approaches to understand corruption in Brazil, discussing certain recent cases. The third chapter introduces key methodological concepts and describes the basic characteristics of the “Lava Jato” network and its main sub-networks. The fourth chapter is an in-depth analysis of the structure, discussing its most important social agents and interactions established by those agents.

The four following chapters include a detailed analysis of systematic amendments to public contracts, simulation of private contracts, illicit electoral funding and millionaire bribes paid to articulate four main illicit sub-networks of “Lava Jato”. The analysis begins in the fifth chapter with the “Petrobras” sub-network, discussing the main interactions that Petrobras officials, private operators and political parties established to articulate the core of corruption that later reproduced across Latin America. Then, the sixth, seventh and eighth chapters analyze the “Eletrobras – Eletronuclear”, the “Sergio Cabral”, and the “JB” sub-networks. Each sub-network, although focused on specific activities share the similar *modus operandi*: agreements between public servants and political parties to appoint in officials who favored specific companies in tendering processes, on a permanent basis.

A reader who is not concerned on understanding the operative details of the “Lava Jato” network but on its overall structure as well as on its institutional effects, can go directly from the fifth to the ninth chapters. However, public prosecutors, judges, lawyers and scholars interested on understanding the details of these illicit sub-structures will find informative insights about the specific illicit activities that sustained the network.

The ninth chapter synthesizes the concepts of institutional cooptation and macro-corruption according to the evidence presented in the previous chapters. The tenth analyzes the conceptual, methodological and technological reforms required to confront complex networks such as “Lava Jato”.

Although some people could assume that the judicial investigations and prosecutions carried out in Brazil are enough for confronting macro-corruption and institutional co-optation, the truth is that the required structural and societal reforms and transformations have not yet happened. For instance, in the near future powerful groups will continue using political parties in most of Latin America, as a tool to promote exclusive, egoistic and even illicit powerful interests, leading to a deep reconfiguration of social institutions and, in the end, to consolidate an unacceptable ineffectiveness of the Rule of Law.

Additionally, institutional mechanisms for transnational investigation and prosecution of macro-corruption do not exist yet; adoption and application of multilateral conventions is the international procedure used today but their scope and effectiveness is far from the required ones. In the meantime, the few local prosecutors and judges who

try to confront the phenomenon constantly face legislative, procedural, methodological and technological limitations.

“Lava Jato” is the most complex transnational network of macro-corruption known and investigated to date, but unfortunately it will not be the last one. As the global society keeps evolving toward dynamics of permanent and massive connectivity and fast change, illicit and criminal networks will increase their global scope and, therefore, their levels of resilience. In order to face the radical transformation of culture, societal transformations must be implemented and legislations and judicial systems worldwide must be adjusted and reinterpreted to answer the complex challenges ahead.

Chapter 1. About Corruption

A Preliminary Note

People have often thought that as a rule, criminal or illicit groups –from sporadic gangs to organized criminal structures– confront the State. However, research carried out during recent years shows that the history of relationships between the State and illicit groups is not always of confrontation but on the contrary, of collaboration for mutual benefit.² Indeed, sometimes illicit and criminal groups infiltrate and co-opt specific State institutions to achieve their unlawful and illegitimate interests. Even more, some government officials, businesspersons, and politicians in many cases establish agreements and lasting relationships with illicit groups, taking advantage of their power to obtain selfish and illicit benefits that negatively affect public interests. These alliances can be observed even at the highest decision-making levels, affecting the structure and the operation of public and private institutions. Bearing this in mind, the following pages are an analysis of the sophisticated alliances between hundreds of private and public agents, across the lawful and unlawful sectors of society, established for the purpose of wrongfully

2 Garay Salamanca, L. J., Salcedo-Albarán, E., & De León Beltrán, I. (2010). *Illicit Networks Reconfiguring States: Social Network Analysis of Colombian and Mexican Cases*. Bogotá: Método Foundation.

appropriating the public budget of Brazil, in a massive and unprecedented way.

The Concept of Corruption

The concept of corruption is used to refer various negative social situations, from institutional vacuums to criminal offenses. In its most basic meaning, corruption is often interpreted as “*the misuse of public office for private gain*”³ or the abuse of public functions to obtain private and exclusive benefits.⁴ Traditional analysis on corruption has focused on how bribery practices allow interactions between public and private agents; in fact, bribery has been interpreted as the main procedure used to establish agreements between public and private agents who obtain benefits by breaking specific laws and norms.

Unfortunately, this definition is misleading in practical terms, since it does not specify when the use of power for private purposes may be interpreted as an “abuse”.⁵ This definition also implies a dichotomy between the public/impersonal and private/personal spheres and reinforces the idea of keeping them separate, which is often difficult to enforce in practice, as it has been observed in different political contexts. According to the anthropologist Elizabeth Harrison, this dichotomy derives from a Weberian notion that understands bureaucratic organizations as inherently rational-legal; a dichotomy that has its roots in the general rationalist paradigm adopted since Descartes. Nonetheless,

3 Rose-Ackerman, S. (1999). *Corruption and Government: Causes, Consequences and Reforms*. New York: Cambridge University Press.

4 World Bank. (1997). *Helping Countries Combat Corruption: The Role of The World Bank*. Washington: World Bank.

5 Dávid-Barrett, E., & Philip, M. (2015). *Realism About Political Corruption*. *Annual Review of Political Science*, 387–402.

for Weber, this was an ideal type that cannot be found empirically in real practice.⁶

Recent literature addresses the link between corruption and formal and operative elements of democracy, such as electoral rules and processes, or the model and level of decentralization.⁷ In this context, during the 1990s, political scientist Dennis Thompson proposed the term “institutional corruption” as a necessary step in the process to overcome the individualistic and casual approach dominating the traditional analysis on corruption. Thompson focuses on the impact of corruption on various political processes and institutions. According to the author, an individual advantage is acceptable as long as it contributes to promote competition in the democratic process; otherwise, if it undermines and damages the political process, it cannot be tolerated. In conclusion, the impact of an action is much more important than its intention.⁸

Lawrence Lessig brings a more recent approach to the conceptualization of corruption. According to this author, “institutional corruption” should not be understood as a moral issue about what is good or bad, but as a systemic and strategic influence on institutions that is usually legal and perceived as ethical, even though it compromises the effectiveness of those institutions by diverting them from their fundamental purposes, therefore affecting the public confidence on the institutions’ reliability. Likewise, Lessig proposes the need to distinguish between the ordinary meaning of corruption –which he associates with bribery–,

6 Harrison, E. (2007). *Corruption. Development in Practice*, 672–678.

7 Bagashka, T. (2014) Unpacking Corruption: The Effect of Veto Players on State Capture and Bureaucratic Corruption. *Political Research Quarterly*, 67(1), 165–180.

8 Dávid-Barrett, E., & Philip, M. (2015). *Realism About Political Corruption. Annual Review of Political Science*, 387–402.

from the activities that effectively undermine the legitimacy and effectiveness of institutions. It should be noted that Lessig's concept of "corrupt action" strongly depends on the purposes of a given institution.⁹

According to Lessig's proposal, the intentions of the subject who commits the act of corruption are also important. Considering that he interprets the systemic and strategic character of the act as a fundamental component of institutional corruption, the individual or group who commits such an act must be aware of and must intend to distort and undermine the institution's purposes.¹⁰

Concentrating their attention on the actor's intentions, Danila Serra and Leonard Wantchekon propose another definition for corruption: breaking the rules "behind closed doors" for illicit and private advantage.¹¹ However, secrecy is not a condition fulfilled in all cases of corruption, since often corruption involves public knowledge. This may happen whenever breaking a specific norm is culturally accepted.

To identify the practices of corruption it is important to distinguish between grand corruption and petty corruption. Petty corruption is associated with "street operations" and, therefore, involves more modest amounts of money, as these transactions are typical of low and middle-ranking government officials. On the other hand, according to Martínez García, grand corruption refers to practices perpetrated and reproduced by heads of state, ministers

9 Lessig, L. (2013). "Institutional Corruption" defined. *Law Med*, 2-4.

10 Dávid-Barrett, E., & Philip, M. (2015). *Realism About Political Corruption*. *Annual Review of Political Science*, 387-402.

11 Serra, D., & Wantchekon, L. (2012). *New Advances in Experimental Research on Corruption*. Bingley: Emerald Group

and officials in positions of political and administrative power; practices that usually involve large sums of money.¹² Each of these modalities occurs in central, regional or local government levels.¹³

Furthermore, Gervais Rufyikiri explains that grand corruption is executed through (i) intentional irregularities in public contracting, (ii) tax evasion through the manipulation of the value of taxable assets, (iii) the use of fake receipts, (iv) falsified certificates on the origin and identification of imported goods, and (v) abusive tax exemptions.¹⁴ The people responsible, as previously mentioned, are usually politicians and high-ranking officials that accept or demand bribes to implement and cover up irregular procedures. Additionally, businessmen who offer bribes to obtain irregular preferential treatment.

In practice, corruption through the process of public contracts is one of the most used but less sanctioned, since there are realized inter-personal and group negotiations, informal in most cases, and do not fully comply the established rules and standardized processes. According to Rufyikiri corruption through public contracts begins during the preparation phase of a bidding, when it is often designed to fit a specific company, eliminating the competition before the tender even begins. In this process, a portion of the benefits generated by the contracts is distributed among various government officials and, to hide it, several

12 Martínez García, D. (2014). *La Corrupción y su efecto retroalimentativo: Una de las mayores amenazas a la democracia*. *Letras Jurídicas* (29), 107–118.

13 Villoria, M., Van Ryzin, G., & Lavena, C. (2013). Social consequences of government corruption: A study of institutional disaffection in Spain. *Public Administration Review* (73).

14 Rufyikiri, G. (2016). *Grand Corruption in Burundi: a collective action problem which poses major challenges for governance reforms*. Institute of Development Policy (IOB).

mechanisms of concealment and money laundering are put into motion.¹⁵

Based on these type of activities, the phenomenon of grand corruption is not specific to a certain country or government. For instance, Sonny Shiu-Hing Lo elaborated a comparative case between two locations: Hong-Kong and Macao. In both cases, the author argued that the individual greed of some officials led to the creation of a grand corruption scheme so powerful that neutralized anti-corruption commissions and the scrutiny of mass media. The proceedings that resulted from these operations, were often possible due to the tight personal connections between government officials and business elites.¹⁶

In other places explored by Rufyikiri, such as Burundi, in Central Africa, it was found that corruption is “rampant and systemic”, counteracting almost completely the institutional actions against corruption. In this country, as expected, corruption frustrated good practices of governance and ultimately led to the complete instability of the system, turning it into the world’s poorest nation.¹⁷ In this same sense, Hazel Gray argues that in the case of Tanzania, the grand corruption structure involved high-ranked politicians and government officials, domestic and multinational firms in a series of illegal activities that included bribes, embezzlement of public funds and the payment of political favors.¹⁸

¹⁵ Ibid.

¹⁶ Shiu Hing Lo, S. (2017). *Comparative grand corruption and protection pacts among elites: the cases of Ao Man Long in Macao and Hui Si-Yan in Hong Kong*. *Asian Journal of Political Science*, 25(2), 234–251.

¹⁷ Rufyikiri, G. (2016). *Grand Corruption in Burundi: a collective action problem which poses major challenges for governance reforms*. Institute of Development Policy (IOB).

¹⁸ Gray, H. S. (2015). *The political economy of grand corruption in Tanzania*. *African Affairs*, 114(456), 282–403.

Recent Theoretical Approaches to Corruption

State Capture

A recent theoretical approach to corruption and criminality has been developed to understand key contemporary characteristics of the phenomena. It has been proposed a concept defining a specific form of high-scale corruption traditionally referred as State Capture (StC) in countries characterized by severe institutional failures or weakness. Traditional State Capture (StC), which can be understood as an ulterior form of casual and basic corruption, is defined as the intervention of individuals, groups or lawful firms and organizations in the drafting of laws, decrees, regulations, and public policies, in order to obtain long-lasting economic benefits.¹⁹

The following basic features of traditional StC are often identified: (i) It is the action of lawful groups, (ii) rationalized by economic motivation and looking for economic benefits or advantages, (iii) it happens mainly through bribery at domestic and transnational levels and (iv) it is executed especially over the legislative and administrative branches

19 Hellman, J. S., Jones, G., & Kaufmann, D. (2000). "Seize the State, Seize the Day" State Capture, Corruption, and Influence in Transition. The World Bank.
Hellman, J., & Kaufmann, D. (2001). *Confronting the Challenge of State Capture in Transition Economies. Finance & Development*, 38(4).
Kaufmann, D., Kraay, A., & Mastruzzi, M. (2010). "The Worldwide Governance Indicators: Methodology and Analytical Issues". World Bank Policy Research Working Paper No. 5430.

at the national level.²⁰ However, a much more complex type of high-scale corruption can be observed, as discussed in the following chapters.

After analyzing StC situations in States where the Rule of Law is in process of consolidation, it has been found a more advanced and complex type of State or institutional capture in which (i) lawful and also unlawful groups intervene – and not only lawful social agents such as firms–; (ii) not only economic benefits but also judicial and political, and even of social legitimacy are sought; (iii) coercion and political agreements complement and even substitute bribery, and (iv) the sphere of influence happens in different branches and levels of the public administration.²¹

In traditional StC processes, no matter its complexity, a key characteristic is that interactions among social agents are usually established in one direction: from lawful – illicit or criminal– agents who operate outside the State, towards lawful agents who operate inside the State; this characteristic coincides with the literal sense of “Capture” as a process carried out by external social agents.²²

20 Garay Salamanca, L. J., Salcedo-Albarán, E., & De León Beltrán, I. (2010). *Illicit Networks Reconfiguring States: Social Network Analysis of Colombian and Mexican Cases*. Bogotá: Metodo Foundation; Garay Salamanca, L. J., & Salcedo-Albarán, E. (2012). *Narcotráfico, corrupción y Estados*. Bogotá: Debate; & Garay Salamanca, L. J., & Salcedo-Albarán, E. (2015). *Drug Trafficking, Corruption and States: How Illicit Networks Shaped Institutions in Colombia, Guatemala and México*. iUniverse

21 Garay Salamanca, L. J., Salcedo-Albarán, E., & De León Beltrán, I. (2010). *Illicit Networks Reconfiguring States: Social Network Analysis of Colombian and Mexican Cases*. Bogotá: Metodo Foundation.

22 Garay Salamanca, L. J., Salcedo-Albarán, E., & De León Beltrán, I. (2009). *From State Capture towards the Co-opted State Reconfiguration: An Analytical Synthesis*. MÉTODO.

Garay Salamanca, L. J., Salcedo-Albarán, E., & De León Beltrán, I. (2010). *Illicit Networks Reconfiguring States: Social Network Analysis of Colombian and Mexican Cases*. Bogotá: Metodo Foundation

Co-opted State Reconfiguration

Under the same conceptual framework of reference, it has been proposed a category that represents a more advanced and complex form of State and institutional co-optation, in which agents establish agreements in a bi-directional way throughout mechanisms complementing and even substituting traditional bribery. This advanced and complex stage of institutional capture and co-optation has been referenced by Garay *et al.* as Co-opted State Reconfiguration (CStR), which is characterized by deeper and long-lasting impacts on democratic institutions than the ones observed in traditional StC.²³

Coopted State Reconfiguration has been defined as: “The action of legal and illegal organizations which through illegitimate practices, modify the political and economic regime, from within the State and private sector, to influence systematically on the formulation, modification, interpretation and application of the rules of the game and public policies, in order to obtain sustainable benefits and validate their interest socially, politically and legally, although those interest do not obey the guiding interest of social welfare”.²⁴

Among its main characteristics, CStR consists of the establishment of bi-directional agreements between agents operating inside the State –such as public officers– at different ranking levels and branches of public

²³ Ibid.

²⁴ Garay Salamanca, L. J & Salcedo Albarán, E. (2016). *Macro-criminalidad: Complejidad y Resiliencia de las Redes Criminales*. Bloomington: iUniverse. Page 9.
Garay Salamanca, L. J., Salcedo-Albarán, E., & De León Beltrán, I. (2010). *Illicit Networks Reconfiguring States: Social Network Analysis of Colombian and Mexican Cases*. Bogotá: Método Foundation

administration, and social agents operating outside the State, being lawful or unlawful; the latter complement or even supplants bribery in order to obtain selfish benefits and advantages not only of economic nature but also of political and social legitimacy kind, with long-lasting perverse impacts on those institutions involved.²⁵

Co-opted State Reconfiguration relates to the instrumental capture of institutions that are critical for the entire social system –such as political parties, civic organizations, media, among others– to reproduce and legitimate unlawful procedures and egoistic benefits and advantages, sacrificing social long-lasting purposes and interests.²⁶

Institutional Co-optation

In spite that the original categories refer to State capture and co-optation, as a result of further empirical analyses and researches it has been verified that these processes not only happen in public institutions but also in private ones. For this reason, the categories of capture and co-optation also apply not only to the State, in the sense of public administration, but also to other public and private institutions broadly denominated herein as Co-opted Institutional Reconfiguration (CItR) –or briefly, “Institutional Co-optation”. The case analyzed in this book illustrates this type of public and private Institutional Co-optation.

25 Garay Salamanca, L. J., & Salcedo-Albarán, E. (2015). *Drug Trafficking, Corruption and States: How Illicit Networks Shaped Institutions in Colombia, Guatemala and México*. iUniverse

26 Garay Salamanca, L. J., & Salcedo-Albarán, E. (2012). *Narcotráfico, corrupción y Estados*. Bogotá: Debate.

Garay Salamanca, L. J., & Salcedo-Albarán, E. (2015). *Drug Trafficking, Corruption and States: How Illicit Networks Shaped Institutions in Colombia, Guatemala and México*. iUniverse.

In fact, “State Capture”, “Coopted State Reconfiguration” and “Coopted Institutional Reconfiguration” are social scenarios in which public and private lawful agents, such as candidates, public officials and businessmen establish agreements and co-opt not only lawful agents but also unlawful agents –such as drug traffickers–, and vice versa, which results in a coordination of mutual interests.

Most of the agents involved in a scheme of Institutional Co-optation can be defined as *grey*. To understand what a grey agent is, it is useful to acknowledge that each node has an institutional and an organizational role; those roles are defined as “functional/institutional” and “functional/organizational” because they consist of a set of “functions” that each agent executes.

The “functional/institutional role of an agent is defined with reference to any action aiming to the promotion or obstruction of some formal or informal institutions, either lawful or unlawful. Those formal and informal institutions can be socially beneficial or socially perverse; therefore, the functional/institutional role can be morally and socially evaluated according to the social benefits generated”.²⁷ On the other hand, the “functional/organizational” role refers to the social group in which the agent operates.

Therefore, the analysis of the functional/organizational and functional/institutional roles allows differentiating between a strictly lawful agent (*bright*), a strictly unlawful agent (*dark*) or an undefined agent (*grey*), as follows:

27 Garay Salamanca, L. J. & Salcedo-Albarán, E. (2012). *Narcotráfico, corrupción y Estados*. Bogotá: Debate. p. 49.

- A lawful agent (*bright*) is the one who belongs to a lawful organization and plays a lawful functional/institutional role.

- An unlawful agent (*dark*) is the one who belongs to an unlawful organization and plays an unlawful functional/institutional role, obstructing and promoting non-compliance with lawful institutions.

- An undefined agent (*grey*) is the one whose exercised functions do not fall under either previous situation. A basic example of an undefined, or *grey* agent, is a traffic officer who obstructs compliance with traffic laws while belonging to a lawful organization. As expected, a more dramatic case of a grey agent is observed when a high-rank official, such as a legislator or a president, favors illicit groups.

Systemic Macro-Corruption and Institutional Co-optation: A New Form of Corruption

Conceptualization

Given the amount and diversity of individuals and companies involved, and the amount and diversity of interactions established, a case of “Systemic Macro-Corruption” such as the one herein analyzed is a macro-criminal system, as it has been previously defined.²⁸ Additionally, given its systematic and increasingly trans-national dimensions “Systemic Macro-Corruption” could also be assimilated

²⁸ Garay Salamanca, L. J & Salcedo Albarán, E. (2016). *Macro-criminalidad: Complejidad y Resiliencia de las Redes Criminales*. Bloomington: iUniverse.

to the so-called “Grand Corruption”, a concept that unfortunately has not been duly defined. In any case, this phenomenon consists of the active participation of various powerful –public and private– social agents and institutions, at various scales and territories through innovative procedures, agreements, and mechanisms.

The situation of macro-corruption herein analyzed transcends the usual textbook concept that refers to situations between two corrupt individual agents (persons) through bribery, to obtain selfish and unjustifiable economic benefits. Even traditional definitions of systemic corruption seem to lack the transnational scope observed in the “Lava Jato” case.

Therefore, a macro-corruption process characterizes by the planned and coordinated participation of several agents that can be (i) public or private, (ii) individual or organizations such as private companies or corporations, (iii) lawful, unlawful or grey, for executing (iv) various actions, activities, relationships, or agreements. Additionally, macro-corruption usually requires (v) manipulation of norms and procedures, such as public contracting processes, (vi) money laundering through domestic and trans-national financial operations, which imposes obstacles to track them by local/national authorities, (vii) the establishment of façade enterprises and financial offshore funds, not only to obtain short-term profits but more important, (viii) to co-opt institutions and to reproduce stable relationships with, among others, political parties and their leaders by financing electoral campaigns, therefore co-opting not only high-ranking public officers but key public institutions.

It is different to “capture” or “coopt” a single high-rank official than capturing and co-opting a high-rank institution; the later generates permanent selfish benefits for those involved and results of sophisticated forms of corruption beyond a single bribe.

Given the trans-national complexity of the case analyzed, it is required to propose a new heuristic approach to understand its systemic and multi-level functioning as a comprehensive system of agents, purposes, actions, institutions, and territories, among other intervening components. In this sense, it is important to overcome the classic case-to-case epistemological approach through a systemic approach according to the real complex nature of the macro-corruption and institutional co-optation phenomenon. For this reason, as it is discussed in the final chapter, traditional legal codes and anti-corruption measures, civil and penal, should be drastically superseded.

As the reader will note in the following chapters, the “Lava Jato” network of corruption is a representative example of a kind of institutional co-optation and systemic macro-corruption phenomenon.

Main Consequences of Systemic Macro-Corruption and Institutional Cooptation

As it can be expected, as more advanced and complex is the macro-corruption and institutional co-optation process in terms of (i) the spread of institutions, and licit and illicit activities and markets affected, (ii) the variety and number of powerful agents involved including companies and individuals such as businesspersons, politicians and

high-ranking officials, (iii) the diversity of types of social relationships –political, entrepreneurial, bureaucratic, institutional, etc.–, (iv) the amplitude of scope, means and purposes, and (v) the degree of operative transnationalization, among other factors, *ceteris paribus*, more systemic, deeper, perverse and perdurable its multiple impacts on the political, economic and societal regime will be. Once the process reaches certain level of development, it will probably alter severely basic institutional foundations, not only of the rule of law but also of the capitalist market regime and the democratic system itself.

In its extreme, “Macro-corruption” and “Institutional Co-optation” contribute to advance towards a kleptocratic corporative system governed by selfish and egoistic interests, against the long-lasting societal interests, of powerful colluded capitalists and politicians, or political parties. Due to the co-optation of key institutions, these colluded agents reproduce instrumental markets that are not ruled by free competition among individual economic agents but by imposition based on the relative political and economic power of agents who are members of the dominant corporative system –public contracting is perhaps the most known type of an instrumental market. These agents will operate through several means, from various types of corruption to coercion and intimidation.

Since the colluded powerful agents of the dominant corporative system need to guarantee an effective and sustainable representation and reproduction of their mutual political and economic interests at determinant key public institutions –such as the Presidency or the Congress, among others–, they require to capture and co-opt the electoral process by empowering allied politicians and

political parties in the electoral contest through mechanisms such as financing political campaigns and political parties. In extreme cases, these agents utilize intimidation and violence.

Complementary, in order to auto-protect the system by increasing its resilience, it has to advance in the process of co-optation of key State institutions such as the judiciary; otherwise, the corporative system would remain vulnerable –even more vulnerable, *ceteris paribus*, as greater the effectiveness of the judicial apparatus– depending on the enforcement of the law, in spite of the severe conceptual and practical limitations of traditional penal and civil codes that are still prevalent in most countries. Some insights are detailed in the final Chapter.

One of the main characteristics of this kind of systems is its relative resilience –greater as deeper the institutional co-optation and as more powerful the corporate and political collusion–, which reflects on the obstacles to reverse the process to an original or alternative situation of institutional legitimate consolidation. Consequently, it is necessary to adopt structural social transformations and to apply decisive reforms in several areas of the political, economic, social and cultural spheres, in order to avoid reaching advanced stages of macro-corruption and Institutional Co-optation. In Chapter 10 a few of many required reforms are discussed.

As can be deduced from chapters 5 to 8, the “Lava Jato” structure is a case of a relatively advanced kleptocratic corporative system, but not up to such stage in which some instances of key institutions as the judicial have been successfully co-opted to favor lasting interests of this illicit

network of macro-corruption and institutional co-optation in Brazil.

On the other hand, there should be stressed some of the most important consequences of a relative advanced institutional co-optation of the State by powerful selfish private interests –especially if it is under a kleptocratic corporative system: for instance, the fact that it tends to “ (...) decompose the society and the markets, (...) political parties, social classes and ideological adscriptions,”²⁹ promoting double ideological, social and political adscriptions, and consequently fragmenting and weakening the political system.

In fact, the advancement of this process in favor of powerful private groups has long-lasting fundamental impacts on the functioning of a democratic system and a market regime, by reproducing values and behaviors against: (i) the civic culture and the moral capacities of the citizens, (ii) the preeminence of the public sphere and the public interests over egoistic and excluding private interests, and (iii) the consolidation of an equitable and competitive market and a democratic order in their economic, political and social instances.

Then, the Rule of Law and the citizens’ fidelity to the State are affected strengthening the instrumental individualism and weakening the State through its capture or institutional co-optation, at stages beyond the

29 Sapelli, G. (1998). *Cleptocracia. El “mecanismo” de la corrupción entre política y economía*. Ed. Losada S. A. Buenos Aires.

basic phenomenon of “clientelism”.³⁰ Simultaneously, it reproduces a tendency to concentrate economic and political power and opportunities, and to aggravate the level of poverty and income inequality, in the opposite direction required for the construction and deepening of a real democracy and a pure competitive market system. Furthermore, it contributes to the empowerment and reproduction of illegality phenomena such as macro-corruption, degrading the prevalence and due observance of the rule of law and the legitimation of the State.

Consequently, given that some markets are therefore regulated not by free competition between economic agents but by coercion and imposition to favor some powerful private interests, therefore breaking the principles of equity, confidence and reciprocity, there is a tendency to create “inequitable instrumental markets” rather than “equitable free-competitive markets”, favoring the preeminence of irregular, illicit and criminal practices in the functioning of markets, and as a consequence breaking the basis of the expected free-market regime³¹, as a sample of some comprehensive societal and structural transformations reproduced by the kind of social phenomenon like the macro-corruption and institutional co-optation under reference.

30 Garay Salamanca, L. J. (1999). *Construcción de una nueva sociedad*. Tercer Mundo Editores-Cambio. Bogotá, and Garay Salamanca, L. J. (2014). “Sobre la problemática de la propiedad y el uso de la tierra en un contexto de usufructo del poder y la violencia como en Colombia. A propósito de algunas perspectivas clásicas de economía política”. Bogotá, agosto (recently published, March 2018, as Working Paper by Vortex Foundation).

31 Garay Salamanca, L. J. (1999). *Construcción de una nueva sociedad*. Tercer Mundo Editores-Cambio. Bogotá, and Garay Salamanca, L. J. (2014). “Sobre la problemática de la propiedad y el uso de la tierra en un contexto de usufructo del poder y la violencia como en Colombia. A propósito de algunas perspectivas clásicas de economía política”. Bogotá, agosto (recently published, March 2018, as Working Paper by Vortex Foundation).

