

Organization, Management and Crime –
Organisation, Management und Kriminalität

RESEARCH

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Political Corruption and Organizational Crime

The Grey Fringes of Democracy
and the Private Economy



Springer VS

Organization, Management and Crime — Organisation, Management und Kriminalität

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Subrata Mitra
Editors

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the Private Economy

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Preface

Many contemporary democracies in the West, just as in transitional societies in Asia, Africa and South America, are marked by the rise of populist movements. Many of these movements have taken a position against dominant interests while others have emerged as ‘anti-corruption’ initiatives. Non-compliance with the norms in public life which these movements highlight, is a prime subject of inquiry for organizational sociology. While practices such as corporate wrongdoing, the use of illegal campaign finances, coercive methods, hate speech or outright use of violence have attracted global opprobrium, the organizations’ and actors’ rationality that lead to these practices, have not been subject to systematic investigation. Analysis of these grey fringes of democracy and transactions in the market, with special attention to context, structure and agency, forms the main theme of this book.

This volume emerged from an international conference on “Illegal Party Financing in Comparative Perspective: The Role of Regulation and Self-Regulation”, held in September 2019, at Heidelberg University. The conference papers that were subject to intensive discussion during and after the conference, and some further contributions on ‘useful illegality’, have vastly enriched the volume. The chapters, stretching across the North-South divide, cover the disciplines of Sociology, Political Science, Law, Criminology and South and South-East Asian area studies.

The initial impetus for the conference came from a consortium of colleagues from the University of Heidelberg, consisting of Prof. Dr. Markus Pohlmann, Max-Weber-Institut für Soziologie, Prof. Dr. Gerhard Dannecker, Juristisches Seminar, Dr. Elizangela Valarini, Max-Weber-Institut für Soziologie, Prof. Dr. Aurel Croissant, Institut für Politikwissenschaften, Prof. Dr. Reimut Zohlnhöfer, Institut für Politikwissenschaften and Professor em. Subrata Mitra Ph.D.

(Rochester), South Asia Institute. We are grateful to the Max-Weber-Institute for Sociology of Heidelberg University for the administrative infrastructure, and general institutional support. Our special thanks go to all the speakers at the conference, and authors of this book, who contributed to a broader understanding of illegal financing of political parties and electoral campaigns as well as to other forms of illegality. Many colleagues contributed to the onerous process that all international conferences—like ours—involve, and the subsequent preparation of the volume for publication. We are particularly grateful to Dr. Kristina Höly, Laura Sophie Hauck, Maria Eugenia Trombini, Mario H. Jorge Jr., Yuanyuan Liu, Nicolás Jaramillo, Jan Peter Hoffman and Ragna Heyne for their most valuable and much appreciated assistance.

We dedicate this book to the German Research Foundation (DFG), for their support through the research project on “Organizational Crime and Systemic Corruption in Brazil” and the Field of Focus IV: Self-Regulation and Regulation, of the Heidelberg University, with our deep appreciation.

Heidelberg
December 2020

Elizangela Valarini
Markus Pohlmann
Subrata Mitra

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Organisational Wrongdoing in Cross-National Perspective: Culture, Context and Comparative Theory

Subrata Mitra, Elizangela Valarini, and Markus Pohlmann

Introduction

People—entrepreneurs, corporate managers, candidates in intensely contested elections or for that matter, ordinary folks filling in their tax returns—go through fleeting moments of indecision about whether to comply with the norms of transaction or not, in their everyday lives. These momentary indecisions are part of our ‘conditioned reflex’ as members of society, citizens, buyers, sellers and consumers who make up the political process and the market. Fortuitously, most people, most of the time, choose to comply with the norms of orderly transaction, and in consequence, hold the potential threat of anarchy at bay.¹ As for persons who are

¹ Sigmund Freud describes the allure of noncompliance and the man-made mechanisms of self-policing as part of the human condition in his late writing. “The tension between the stern super-ego and the [sexual gratification-seeking] ego that is subject to it what we call a ‘sense of guilt’: this manifests itself as a need for punishment. In this way civilization overcomes the dangerous aggressivity of the individual, by weakening him, disarming him and setting up an internal authority to watch over him, like a garrison in a conquered town.” (Freud, 2014, p. 88).

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routinely non-compliant, the agents of law and order try to keep a close watch on them, in their effort to hold order-wrecking tendencies in check. There is, nonetheless, beyond the hordes of the compliant, and the less numerous non-compliant persons, a third category of the ‘partially compliant’ who shuttle between the two poles of compliance and noncompliance. The grey fringes of democracy and the market, made up of the partially compliant, are of special interest to us in this book.

The presence of the partially compliant is universal, though in quantum and significance their numbers and activities vary widely across countries of the Global North and the Global South. Despite differences in the levels of economic growth, social indicators of development, institutional complexity and stringency of regulation, countries as far apart as Brazil and India, or European and South-East Asian states, all have their grey fringes in the normal process of market transactions and politics. These phenomenon of electoral irregularities, dubious relationship between private and public sectors, questionable role of the justice system and financial scandals, will come in for close analysis in the chapters that follow in this book. The events and developments that they analyze feature in reports in global and national media and those of regulatory agencies. From an ethical point of view, acts such as criminalization of politics or attempts by dominant interests to subvert democratic representation through illegal campaign financing and other form from deviance deserve to be exposed by all means. However, from a sociological point of view, one needs to probe deeper into the dynamic that leads to such non-compliance with the law in the first place.

This is the main objective of this book. It focuses on the subject of corporate wrongdoing and illegality, dealing particularly with party and electoral financing, corporate wrongdoing and institutional means for regulation. It aims not to highlight non-compliant or partially compliant behavior that does not meet the moral criterion of liberal democracy, but to show-case the *duality of political agency*—one face of which represents the tendency of actors to chase after their own goals, and to try to win at any cost, and take resort to the locally available means to win the race—and the other face which is turned towards regulatory institutions. The choices actors make may be sometimes individually ‘rational’ in the sense that they are strategically calculated to enhance their interests. However, what is individually rational might turn out to be sub-optimal at the collective level. While the behavior of individual actors and groups is understandable in terms of the sociology of elections and rational choice theory, seen through the prism of systems analysis, one can see the perverse consequence of individual preferences that surface as social choice at the aggregate level. In a political system when the standard practice for actors is to engage in action that is not legal, and as

such, non-compliant, this might lead to collapse of the system, and spell doom for democratic politics and orderly operation of market transactions.

Compliance in Political Transactions

Issues of compliance with electoral laws, and the norms that sustain orderly political and economic transactions have emerged as a common problem in embattled democracies across the North-South divide. If we take a step back and postpone our immediate moral reaction to illegal transactions for a moment, we shall see that such non-compliance does not have merely dysfunctional effects of systematically distorting and undermining political and economic life, but it can have also functional aspects. Let us assume that we live in a country where the state is not prepared to cover the costs of running the democracy. To go to the polls when voting is not mandatory, the poor voters need selective incentives that cover the cost of electoral participation in terms of lost income, which can solve the problem of collective action, at least partially. At the same time, the candidates need enough money to reach the voters. If the state does not cover the costs of exercising the right to vote, and to stand for office, a system would be created in which only the richest people could stand for election. However, if campaign cash comes into play on a larger scale, the situation changes. Even not so rich candidates can then reach voters and even poor voters can go to the polls in order to exercise their choice among competing candidates. In order to prevent the functional effects from outweighing the dysfunctional effects, the first step is to clarify the distinction between standard campaign practices as the distribution of gifts, and electoral fraud. The one, does not necessary imply the other.

The second thing we have to do is clarify the question: Where does the campaign cash—often alluded to broadly as ‘black money’—come from? If we assume that the ‘black money’—so called because it is usually not accounted for—comes from different sources and is accompanied by expectations to do something for the interests of the potential voters, this can be part of the political business. If illegal campaign financing is related to donations, e.g. of big business, expecting the elected candidate to return the favor by passing legislations or to make executive decisions for the particular benefit of donors after the elections, it is clearly illegal. But if the funds are used to promote the election of candidates from the same region, for a candidate who promises to act in favor of the respective constituency, such campaign financing would be in the interest of the principal, though its provenance might be illegal. Also ‘election gifts’ and ‘black money’, as shown before, can be in the very interest of the constituency. Even if it

confuses the moral compass for many of us, electoral democracies like India, for example, show that there are functional effects of illegal campaign financing in addition to the dysfunctional side, which stabilize the democratic system, which many transitional democracies have failed to achieve.

Whether we like it or not, or, whether we demonize it or not, deviations from the rules do not always have to be subversive for the functioning of the system, but can also sustain it and add resilience to it. In the real world, partial compliance is not only often useful, but might also be necessary to keep a system running. In many democracies, the 'truth' is in-between, for partial compliance is part of the everyday life in a functioning democracy. Besides the subversive exploitation of the system, there are many forms of illegality that are useful for the system, which stabilize it and gain informal recognition in the gray area of its operations. Where the red line lies, most citizens know without much thought. But the shadow of criminal, dictatorial or destructive exploitation of the system makes it difficult for us sometimes to consider this gray area of partial compliance in terms of their rational and functional character. But democracy is a system that works even when most of its roles are filled with small sinners. Conversely, no system works only with saints.

Under the pressure of the exigencies of everyday life, in politics as in other transactions, actors sometimes make choices that are ambiguous in terms of their legality. Such 'useful illegality' which belongs to the grey fringes of democratic politics, just as in market transactions, has serious implications for rule of law and liberal democratic politics. However, while practices such as the use of campaign finances which are of doubtful legality, coercive methods, hate speech or outright use of violence have attracted global opprobrium, the agency and actors' rationality that leads to these practices, has not been subject to systematic analysis from the point of view of 'partial compliance' and functional wrongdoing.²

The causal chain, particularly, the link between individual choice, electoral campaigns and party finances thus holds a great interest for disciplines ranging from organizational sociology, criminology, studies of corruption, financing and regulation of party competition, elections and campaigns, and laws governing electoral behavior and party finance in terms of accountability and compliance. Party and campaign finance touch on a more general phenomenon. An orderly political life pre-supposes the existence of norms and norm compliance. The legitimacy of norms and their binding character depend on the free articulation and

² Pohlmann et al. (2020) provides important insights into the process of organizational wrongdoing and indicates the theoretical and methodological issues that sociological research in this field involves.

fair aggregation of preferences of voters in conformity with norms embedded in institutions. Elections and political parties function as conduits that help articulate the preferences of voters, and aggregates individual preferences into a 'social choice' that emerges from the election in the form of a mandate. Legitimacy of the mandate springs from the 'free, fair and representative character' of the electoral process. These in turn surface as new laws, institutions and policies of the state. Noncompliance, thus, lowers legitimacy. This makes the case for regulatory agencies, to monitor political and corporate transactions, a compelling necessity.

Compliance in Corporate Transactions and Regulatory Agencies

Non-compliant or partially compliant behaviors with formal rules are not only a phenomenon of the political sphere, but such attitudes exist within other organizations as well. The collective (mis-)behavior of organizational members are guided by legitimized unwritten rules and norms inside the organization. The deviance of rules in an organizational context is pointed by Luhmann (1964 [1995]) as a prerequisite for the functionality of organizations. However, he does not suggest that all forms of deviance from formal rules are unlawful. By using deviant practices, unwritten rules are emerging and these begin to provide orientation for the collective behavior. Some of these unwritten rules would develop and remain in the legal gray area of the collective activities, while others would become illegal.

Deviance of rules (non-compliant practices) and partial compliant behavior (deviance of rules that stay in the legal gray area of organizational activities) can be explained in the literature in different forms. From an organizational perspective, the collective practices have been explained as result of institutional and organizational settings—"good barrels"—that provide right incentives and penalties to flag corrupt behaviors. In that sense, the collective wrongdoing would be a result of "bad barrels" (Ashforth et al., 2008, p. 672 f.). Furthermore, empirical studies about bribe-givers show that they are mostly high-ranking, well-educated, and well-paid managers, corporate executives and professionals (Pohlmann et al., 2016; Valarini & Pohlmann, 2019). They accept high personal risks for the benefit of the organization, without being primarily interested in their own benefits. Non-compliance could be understood in most of the examined cases as useful for an organization (Pohlmann et al., 2016). According to Niklas Luhmann (1964 [1995]), "useful illegality" (ibid., p. 304) can be understood as a behavior that violates the terms of membership; however it is considered as useful in terms of the purpose of the organization. Empirical studies point useful illegality as a possible

explanation for high-profile cases of structural corruption, organizational crime as well manipulation of lists for transplant of organs (Klinkhammer, 2013; Pohlmann & Höly, 2017; Pohlmann, 2018). This definition can also be used to explain other kinds of behaviors which exist in a gray area of legal systems. The use of illegitimate or illegal means attempt to pursue socially legitimate organizational purposes and goals that are compliant with the formal rules and law.

From this perspective, legal regulations would not be sufficient to prevent and counter organizational deviant practices, because the understanding of the collective wrongdoing could be gained primarily through the self-regulation of the social actors by the interplay between legal rules and illegal practices. The rule violations occur repeatedly and are compliant with the purpose of the organization. Thus, they are oriented towards unwritten rules and collective interpretations patterns, and action rules established and legitimized inside the organization. The informal rules would justify and normalize the deviant orientation in the group (Brief et al., 2001; Campbell & Göritz, 2014; Palmer, 2012; Pinto et al., 2008; Vaughan, 1999).

While non-compliant and partially compliant matters seems to be a global phenomenon in the last decades, the South American Continent, particularly Brazil, has attracted wide attention. Not only in terms of corruption scandals which have involved large enterprises and high-ranked politicians, but also because there were a lot of changes in the institutional setting regarding to the anticorruption matters. In Brazil as well as in many other countries, the global diffusion of regulatory agencies took place since the 1990s (Braithwaite, 2008). Institutional changes in terms to ratify and internalize the international anticorruption legislation in domestic legislation seemed to encompass many international agreements regarding anticorruption issues. This leads to reforms and changes of national legislation, particularly at the organizational and functional level of bodies that belong the justice system, for example, creation of new bodies of control and specialized courts.

Structure of the Volume

The essays brought together in this volume offer a window into various forms of non-compliant and partially compliant action that actors in the political, juridical as well as in the corporate fields engage in. Sometimes, and under specific conditions, such activities shade off into criminality. To fend off such acts of deviance from the norm, regulatory norms and institutions emerged first in Europe and subsequently spread world-wide through colonization and commerce. As one might

expect, partial compliance would be greater in the places where these norms and appropriate institutional arrangements were slow to reach, or, where these constraints on human behaviour gained legitimacy in a long-drawn-out process. Keeping this in mind, we start our analysis of political corruption and organizational crime in Asia, followed by South America. It is interesting to note that such deviant behaviour takes place in Europe—taken up in the third section of the book—as well. This goes to show that the temptation to deviate from the norm is universal. The fact that its manifestation in partial compliance varies greatly from one context to another can be understood in terms of differences in constraints on such behaviour, such as different levels of cultural legitimacy and acceptance of deviance, credibility of sanctions, and structural and functional usefulness of partial deviance and the pace of endogenous evolution of regulatory norms and regulatory bodies, and their diffusion through binding laws and contracts. In the epilogue, we gather the knowledge gained through the country studies in the form of an agenda for future research.

We begin our analyses with political corruption, electoral processes and political financing in several East and South Asian countries. The role of campaign financing in sustaining electoral democracy in India will be discussed by *Subrata Mitra* and *Markus Pohlmann*. The main assumption that underpins democratic theory, they assert, is that votes are neither bought nor coerced. In this context, the case of India is interesting. Despite regular, frequent, free and effective elections, illegal campaign-financing and crime-politician nexus have become an integral part of the electoral process. This co-existence of a vibrant, resilient democracy and illegal campaign financing in India is puzzling. Based on their analysis of the Indian case, the authors provide a general explanation for the co-existence of these two normatively discordant elements. Combining the concept of ‘useful illegality’ of Niklas Luhmann and James Coleman’s principal-agent theory, the authors cast electoral choice as a rational process whereby candidates and voters are able to communicate, and rationally transact the game of popular elections. Campaign cash in India has become a catalyst of social churning, and the consequent transformation of a hierarchical society into a competitive democracy. Thus, what might come across as illegal campaign and party financing, is not just a deviance from normative and legal rules. It might actually be functional, as an incentive for initiating and subsequently sustaining a vibrant democracy in a post-colonial state where electoral participation is not compulsory and which began its electoral journey with great social inequality, poverty and illiteracy.

The analysis of the electoral processes in India will be continued by *K. C. Suri* with a focus on the interplay between democracy, electoral process and campaign expenditure. While parties spend huge amounts on general publicity, mega rallies,

and media management, most of the expenditure at the constituency level is met by candidates from their own funds. As election campaign expenditure incurred by candidates and parties continue to spiral, parties prefer to field candidates who are wealthy and fund their own campaign. Money cannot win an election, but without money it is difficult to get a party 'ticket'—an Indian concept—which means authorization to stand as a candidate on behalf of a political party, and conduct an effective election campaign which has become highly expensive. As a result, people belong to a new class of businessman-turned-politicians are entering politics in large numbers and professional politicians are increasingly looking for avenues to accumulate wealth as a means to sustain themselves in politics. There is a growing concern that this flood of money in elections undermines the foundations and functioning of a democratic polity. However, barring a few studies, we do not have adequate understanding of why candidates spend huge amounts of money on winning an election in a constituency. Understanding candidates' constituency campaign expenditure enables us to see the complex political reality of India's democratic politics. It would tell us the merits as well as limitations of the grand narratives of ethnic politics, criminalization, political corruption and clientelism. Contrary to the dominant view that India's electoral landscape has become a hotbed of corruption, criminality and clientelism, Suri provides a grounded view of an evolving democracy in changing India.

Concerning political finance regimes, political corruption and party system in Southeast Asia *Aurel Croissant* examines how systems of political finance differ in the region, and how forms of political finance influence the institutionalization of political party systems in Southeast Asia. With regard to the first question, the author identifies two modes of political finance and its regulations in the region. The first one is a *laissez-faire* model of political financing under electoral authoritarianism, whose regulations are designed to bolster the dominant position of ruling parties. The second model is one of oligarchized party financing combined with public subsidies, and a flawed regulatory framework. With regard to the issue of party and party system institutionalization, his study tentatively concludes that there is reason to assume that two causal mechanism connect democracy and party finance regimes in Southeast Asia. First, smart political finance regulation can be a sharp tool for combating political corruption, which has positive effect on the democratic qualities of a political system. Second, 'good' party finance regulation can contribute to political party institutionalization, which can contribute to a stronger democracy, but also a more resilient autocracy.

The second part of the book concerns the analysis of political corruption, electoral financing and organizational wrongdoing in three South American countries: Brazil, Argentina and Colombia. Illegal party and electoral financing in Brazil is

the starting point of *Elizangela Valarini's* analysis of the corrupt relationship between political and economic sectors. Illegal electoral financial is only one of the outcomes of the interaction between both sectors. Based on empirical data from the 'Car Wash Operation', the author attempts to analyse the denominated corrupt practices in a hermeneutic perspective through the reconstruction of 'collective mindsets', accessed by the participants in the analysis of corruption cases. The results show that the corrupt relationship is based on essential elements of daily interaction based on trust, personal proximity and loyalty. The interaction has been understood from the perspective of the participants as necessary to develop the Brazilian economy and a strong group of corporations to promote national industry. The collective mindsets are rooted in the institutionalized cognitive and normative elements that compose the "collective pattern" in Brazilian context for these groups.

Analyzing the fight against criminal corruption in Brazil, *Fabiana Alves Rodrigues* presents the recent Brazilian scenario took the debate on controlling criminal corruption to another level, notably after the impressive results produced by 'Lava Jato' (Car Wash) Operation, in her chapter. This most massive Brazilian anti-corruption operation radiated its effects to several arenas, from the intensification of society's polarization to relevant implications on the political scene. This chapter presents an analytical framework of the leading institutional factors that provide gateways for the Judiciary's interference in the electoral competition through the criminal control of political corruption, which involves court autonomy, rules of competence, subjectivity in applying laws, and deficiencies in checks and balance mechanisms. The framework was developed in light of the analysis of the criminal justice system's strategic behavior in 144 actions of the 'Lava Jato Operation' that started in the Federal Court. It focuses on the institutional factors that allow the criminal process potential use as a tool to influence the electoral arena, through gray zones of doubtful legality or by behaviors that find intricate control mechanisms.

Nicolás Jaramillo presents "Balancing representation and political financing: the regulation of competing legal and illegal organizations and resources in Colombia" in his chapter, based on an analysis of regulations in political financing. It is a topic that has a bearing not only on economic resources but party organization and electoral mobilization as well. The chapter starts with a brief theoretical discussion, followed by a discussion of the Colombian political context, and by the debates of Congress, directed to pass the Law 1475/2011, with its special emphasis on political financing. The case of Colombia shows how traditional organization of candidates facilitate the entrance of illegal money into campaigns. The bill, finally approved by the Colombian legislature, has been

studied in order to analyze how legal modifications and innovations may be explained, with reference to the autonomy of politicians over the strengthening of parties, which appears to be a special feature of the Colombian case.

With regard to the dysfunctional justice in Argentina, *Friederike Elias* and *Sebastián Pereyra* argue in their chapter, that corruption trials in Argentina take decades and often end in the statute of limitations. This chapter is based on qualitative interviews with Argentinean judges, prosecutors, lawyers, non-governmental organizations, representatives of the state and journalists who were interviewed as experts in the field of corruption trials. Within the framework of a qualitative content analysis, the authors seek to identify which central institutions play a role in the process and which problems and possible solutions are taken into account by the actors. Finally, the results are viewed from a neo-institutionalist perspective in order to show the importance of organizational processes in the protraction of the trials and thus to view possible reforms in a new light.

In their chapter “Money, politics, and the judicialization of electoral processes in Brazil: A political science approach”, *Wagner Pralon Mancuso*, *Vanessa Elias de Oliveira* and *Bruno Wilhelm Speak* deal with the judicialization of electoral processes in Brazil, resulting from the relationship between money and politics in the period between 2010 and 2018. Four topics received their special attention: (a) abuse of economic power in elections; (b) corruption or fraud; (c) illegal fundraising or expenditure of electoral resources; and (d) donations above the legal limit. After discussing the concept of judicialization of electoral process, they compare the relative importance of the four issues above as catalysts for electoral judicialization and explored the elements that affect the distribution of these litigations over the analyzed period. They also address factors that may trigger a phenomenon of interest (such as the type of election held; the legal topic in question; the change in electoral rules; the behavior of public and political actors; and administrative matters of the electoral courts), and discuss strategies to explore these factors in future research.

Maria Eugenia Trombini in the chapter “Misuse of public office for organizational gain? Brazilian political parties in corruption scandals” examines how political corruption is often defined as the misuse of public office to advance personal gain. Solutions are often reflections of the view that corrupt practices can be avoided if the principal-agent problem is solved. Yet in Brazil, the attainment of collective goals seems to be significant for understanding rule-deviation inside and across political parties. By examining the participation of members of the political parties in acts that were investigated and prosecuted at two recent scandals, the Mensalão and the Petrolão, she tests the theoretical model of organizational corruption hypothesis at this particular type of organization indispensable

for a democratic system. Using official records from the criminal and administrative investigations concerning the Workers' Party (PT) and the Progressive Party (PP) as evidence, behavior in pursuit of self-interested goals has been found to be underrated in regards to goals of the party. This was true for members of the party's bureaucracy and for mandate holders, with partisan elites playing a central role in the decision-making process. Instead of intentionally making unethical decisions motivated by greed, individuals break rules to collect money for electoral campaigns or to secure their place in the coalition in what appears to be a reaction to overly rigid regulation too costly to comply with.

In his chapter *Mario H. Jorge Jr.* analyses the ethical dilemma faced by lawyers. Lawyers perform a varied number of activities, some of which go beyond their clients' interests and affect the democratic rule of law as a whole. They are bound by legality and codes of conduct, but do not always comply with the ethical standards set for their professional class. Their behavior can be seen as enabling wrongdoing, since they are in the position to prevent misconduct from taking place. In more complex cases, due to what some may consider an ethical dilemma, weighing in conflicting interests, it is hard to grasp how regulation and self-regulation can achieve compliance. In other cases, the wrongdoing constitutes illegal conduct in the form of facilitating corruption and money laundering, protecting assets which can later be reinserted in the economy as illicit campaign funds. A brief analysis of the involvement of lawyers in Brazil's Car Wash Operation and Mensalão Scandal provides an overview of how they interact with executives and politically exposed persons in that particular context, while international examples highlight the universality of the problem.

In the third section, we continue our analysis of partial compliance with European cases, including party financing and related corruption scandals in Germany and France. *Jens Ivo Engels* analyzed two party financing scandals in Germany's history: The Flick affair in the 1980s and the *CDU-Spendenaffäre* (the donation issue of the Christian Democratic Union) of 1999/2000. Both left their marks on public debates showing that the financial conduct of political parties had been illegal over decades. During the Flick scandal, the first calls for "transparency" related to the German party financing came up. The second affair led to the loss of public reputation on the part of the former chancellor Helmut Kohl. The two scandals are representative of a broader process of loss of legitimacy of the party system. They contributed to the emergence of a fundamentally critical perception of the political elites. The process of party financing in Germany is critically discussed by *Hans Herbert von Arnim*. While the parties in Parliament decide on their own financing, effective controls are needed to prevent an excess

of state money being given away in this fashion, and discrimination against potential political rivals. But the parties also regulate the structure of these controls and seek to defuse them in various ways. The result is often compromised regulations and abusive practices. Party financing thus proves to be a central application of the fundamental question of the party state: Who controls the controllers?

From a perspective of the jurisprudence, *Kristina Peters* explains that fight against corruption has been a very popular topic in German criminal law since the 1990s. The discussion is hardly ever related to parliaments, but almost exclusively concerns bribery in business dealings and among public officials. When it comes to elected representatives, there is a complex tension between a broad political freedom of action and the integrity required specifically by article 38 of the German constitution. How German criminal law tries to strike a balance between these conflicting notions will be demonstrated in this chapter, with focus on the most important offence in relation to political corruption in Germany: The bribery of elected representatives, regulated in Section 108e of the German Criminal Code. She illustrates that such behaviour does indeed occur in Germany and demonstrates that the new law—Implemented in 2014—has the potential to sufficiently establish adequate criminal liability. Nevertheless, Peters shows, the provision is in part insufficient, and is in need of reform.

Éric Phélippeau analysed the role of financing in French political life by using data published by the National commission for campaign and political finance (CNCCFP)—the administrative authority responsible since 1990—for ensuring compliance with the rules governing the financing of French political life since 1988. The first impression generated by the data is rather that rules are known and respected by the political elites, which creates the impression of a rather smooth political life. To investigate further into these initial impressions, several obstacles to understanding must be removed. Once this is done, electoral campaigns and French political organizations would appear for what they really are, that is, quite similar to those that characterize most major liberal democracies, comprising the rules governing their financial aspects which had been produced by the tailor-made political elites, the ability of those they concern to use and circumvent them, and institutions responsible for enforcing them like toothless tigers. This chapter aims to provide food for thought from these different angles.

The epilogue, “Non-compliance, organizational deviance and useful illegality: Towards a unified agenda of research” sums up the lessons learnt from our case studies, under three rubrics. The first explains how partial compliance is universal. Cross-national analysis shows that it happens both in the Global South as well as in old, established democracies of the North, as one can find in European societies. Partial compliance, in this sense, is integral to the political process and

market transactions. Secondly, the existence of partial compliance, though functional but still lowering the legitimacy of the system as a whole, can act as an incentive for the system to change its norms. Partial compliance and organizational deviance thus emerge as catalysts of institutional evolution. In the third place, partial compliance, emerging from the tension between 'local knowledge' and 'global norms', can become the basis of the hermeneutic of 'wrongdoing' and provide insights into the deeper layers of political culture in which the normative, cognitive and behavioral dimensions of compliance are ensconced.

Conclusion

The essays brought together in this volume provide insights into a number of issues relating to compliance, individual and corporate wrongdoing, efforts at regulation and useful illegality that sometimes underpins choices by people. They show how candidates and their campaign managers function, parties and politicians are made accountable, how, when and with which consequences fixers and crime-entrepreneurs step into help out leaders and whether campaigns and the electoral process are free, fair, uncorrupt, and efficient. The study of campaign financing also raises the deeper issue of norms and modalities of electoral choice. Can cash buy votes? In other words, does reality conform to the ideal type of democracy where issues and ideas are the main basis of electoral choice, and, where money plays only a marginal role?

The book which emerged from a conference intended to engage with the field of party competition, electoral campaigns and the logic of voting, has acquired greater diversity with the addition of new areas and themes. It approaches actors, agencies and processes through a wider range of concepts that take on board agency-driven attempts at bending the rules of transaction in order to win. Even as one morally disproves of useful illegality, one still needs to develop adequate empathy in order *to understand its use as the actors do*, explain how the sum of individual choices can lead to the lowering of collective welfare and seek to dissect the loopholes in the system that admit such usage.

Illegal party and campaign financing and corporate wrongdoing contradict two basic principles of democracy and the market, namely rule of law, equal opportunity for citizens to influence electoral choice and compliance with norms of orderly market transactions. Thanks to the participation of specialists in party and campaign financing; democracy transition, consolidation and deepening; and sociology of organizations, organizational deviance, corruption and useful illegality; the volume has been able to generate new comparative knowledge, and policy

analysis based on ‘best practices’ that can contribute to reform aimed at bringing agencies and practices connected to useful illegality, back into the academic study of compliance.

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Part I
Political financing in Asia



Making Elections Work: Campaign Cash, Marketisation of Votes and Social Negotiation in India

Subrata Mitra and Markus Pohlmann

Introduction

Free, fair and orderly elections, and significant popular participation are the *sine qua non* of a robust democracy. And votes which are neither ‘bought’ nor coerced, are vital for legitimacy of the democratic process. At the first sight, Indian democracy appears to deviate from this norm. The country has had regular, generally free and fair elections, over past seven decades, conducted and closely supervised by the independent Election Commission of India. These elections are not a mere ritual. Power changes hands in India through elections and not military coups. However, allegations of crime-politician nexus, presence of ‘black money’ and use of campaign-cash of dubious provenance and often, well-over the legal limits, have become a regular feature of the electoral process. This co-existence of two discordant facts—a vibrant, resilient democracy and campaign-cash—is puzzling.

India is not a peripheral case. It is a large country with an open political system. With its huge electorate of 910.5 million, of which well over 60% take part in elections, India is considered to be the biggest democracy of the world. How,

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then, does one explain the resilience of this electoral democracy with a continental stretch, but whose regularity and efficacy is underpinned with a soupçon of illegal campaign cash and other forms of wrongdoing?

We draw on sociological theory in order to explain the cause and consequences of non-compliant campaign financing in India's elections. Our aim is to explore the question whether 'illegal' campaign financing acts as a proxy variable to compensate for the absence of factors such as party organisation, membership fees, guaranteed state funding and relatively stable social bases of parties which form the core of electoral competition in Western liberal democracies. The chapter explores campaign-financing by drawing on two classical sociological perspectives, respectively, from Niklas Luhmann (1964, 2000) and James Coleman (1992), and rational choice theory of Downs (1957), with empirical evidence drawn from ethnographic studies of electoral competition in India (Bjorkman, 2014; Michelutti, 2007; Mitra, 1979). We draw on Niklas Luhmann's concept of 'useful illegality' to show how material incentives might actually have contributed to the enhancement of participation in general elections. James Coleman's principal-agent theory helps us show how the principal (the electorate) selects candidates as agents when they are convinced of their capacity to deliver the benefits they expect. We combine these ideas to cast electoral choice as a rational process whereby candidates and voters are able to communicate, and rationally transact, the game of popular elections.

The juxtaposition of general theory and the Indian context based on ethnographic studies reveals new dimensions of democratic deepening in post-colonial states, ensconced in transitional societies. What might come across as 'illegal' campaign financing is not just a deviance from normative and legal rules. It might actually be functional, as an individual incentive for initiating and subsequently sustaining a vibrant democracy in a context where electoral participation is not compulsory and great social inequality, poverty and illiteracy mark the electorate. By unpacking the actual use of electoral cash, we show how money, rather than 'buying votes' actually becomes the basis of political transactions, social negotiation, turning a hierarchical society upside down, and eventually, of the 'vernacularization' of imported norms of electoral democracy. Finally, systematic non-compliance, which could undermine the legitimacy of lawful governance and lead to the creation of electoral mafias, is kept within check in India, thanks to the proclivity of the political system to generate its self-correction through the evolution of new, innovative norms of transparency, control and verification, through the creation of new institutions. (Jha, 2020)

Instead of attributing the deviant character of Indian democracy to India's alterity,¹ we take a structural approach which treats the strategic use of cash in India's electoral campaigns as a multiplier of electoral participation. We make a distinction among normative, functional, and legal dimensions of campaign financing, and explain why illegal campaign financing is a concomitant of democracies in transitional societies. We continue this exploration with the role of electoral regulatory institutions and the complex relationship of democracy and useful illegality. Far from actually justifying illegal electoral financing, the article draws on the knowledge gained from this analysis to develop policy recommendations that might phase illegal campaign funding off competitive elections

The Indian Context: Puzzling Resilience of a 'Flawed' Democracy

Alone among large post-colonial states, India has been able to sustain an electoral democracy over the past seventy years since independence from British colonial rule in 1947 and general elections with universal adult franchise began in 1951–1952. Although many scandals emerged during the last two decades, Indian democracy continues to be remarkably stable. Strict regulations of political finances in India have made parts of electoral donations illegal. However, the need for money in order to attract the attention of the voters is constantly on the rise. Electoral democracy is deeply rooted in India, with 554 million voters queuing up at over 900,000 stations to cast their ballots in 2014 to determine the fortunes of 8,250 candidates representing 464 political parties. Over thirty-one national and regional parties, 2044 registered unrecognized parties and more than 8,000 candidates contested for the 543 Lok Sabha (lower house) seats in the 2014 parliamentary elections in India. (Mitra, 2017) But all is not well with the vibrant and resilient democracy of India.

Campaign finances are critical and crucial resources to win a seat. Indian democracy—labelled 'flawed'² by international ranking agencies—is marked by illegal practices such as hate speech, coercion, threat of and resort to violence

¹ See Inden (1986) for a comprehensive criticism of Indian 'culture' as an explanation of the country's exceptionalism.

² See the *Economist Democracy Index 2015: Democracy in an age of anxiety* which classifies India as a flawed democracy. The country dropped by ten points in the most recent Economist democracy index. "India's overall score fell from 7.23 in 2018 to 6.9 in 2019," the *Economist Democracy Index* reported. <https://qz.com/india/1789129/india-drops-in-the-economist-democracy-ranking-over-kashmir-caaf/>.