

Global Private International Law

Adjudication without Frontiers

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5. CONCLUSION

This commentary has tried to assess the *Samsung v. Apple* case by questioning the traditional narrative of how IP law works. The question is not simply how states recognise IP rights but rather how the recognition of IP rights relates to the changing nature of the relationship between the firm and the state. The IP dispute between Apple and Samsung reflects how IP law insufficiently describes the battle not only between these two firms, but that between two models of firms: the travelling corporation and the traditional corporatist firm. Whether corporatist firms will continue to thrive in a world dominated by travelling corporations remains to be seen. It may be that states with strong links to specific firms continue to develop their power, while others wither as travelling corporations avoid liability for public goods in their home states. For all these firms, intellectual property figures prominently in firm development, success, and ultimately in the allocation of resources among states and firms.

10.3 GLOBAL CORRUPTION AND ECONOMIC POWER

Calixto Salomão Filho and Vitor Henrique Pinto Ido

1. INTRODUCTION

As a global phenomenon, corruption is neither isolated nor exclusive to certain countries and/or cultures. For some, corruption is an unavoidable burden most commonly seen in the 'Global South', a feature of extractivist and patrimonialist elites who harm the quality of national institutions and the path of development.⁴¹ For others, corruption is a natural part of human relations as a whole and a consequence of never-ending individual's utilitarian aspirations, somehow regardless of geography and history. Be it one or the other, law struggles to properly address corruption.

This is due to its multiple forms, leading to a seemingly 'impossible' regulation, in a way every legal effort sounds irrelevant. On one hand, corruption is attached to local and personal private interests, making it hardly controllable by conventional public policies and institutions. On the other hand, economic power has an intrinsic transnational dimension, which only turns such debate into a much more complex legal issue, as national states, per se, cannot control corruption. All in all, as definitions, regulatory dilemmas, and cost-benefit analyses are all unclear, corruption seems a problem not solvable by law at all.

Taking a step back, a critical reflection on corruption requires a discussion on what is and should be the role of law in its regulation, especially in (re)designing structures and avoiding the consequences of the concentration of both political and economic power.⁴²

⁴¹ Susan Rose-Ackerman and Bonnie J. Palifka, *Corruption and Government: Causes, Consequences, and Reform* 2nd edn (Cambridge, Cambridge University Press 2016).

⁴² Calixto Salomão Filho, *A Legal Theory of Economic Power – Implications for Social and Economic Development* (Cheltenham, Edward Elgar 2011).

This implies more than the creation of incentives and compensation mechanisms, but the development of truly structural measures against corruption. It also makes critical empirical descriptions important to materialise the conditions under which corruption ultimately happens. More than that. Through this lens, it is possible to see the shortcoming of the aforementioned institutional approach to corruption. Much more than a product of institutional underdevelopment, corruption should be seen as a consequence of global economic structures and its variations across different regions (Global South, Global North) – which are themselves a consequence of the particular ways these structures have been established and nowadays operate in each of these regions.⁴³

Bearing this in mind, this article compares three landmark cases: i) the Petrobras oil scandal in Brazil, ii) The Siemens bribery system, and iii) Samsung's influence in South Korea's political arena. These major cases highlight some of the main elements of how corruption tends to take place, and allow further considerations on the possible role of legal strategies to address it. The selection of examples coming from different parts of the world has the ultimate purpose of analysing differences and similarities of a phenomenon happening everywhere. However, as we seek to argue, corruption practices are intertwined with the degree of economic power's concentration, and a (global) law approach aiming to establish an adequate regulatory framework needs to take this structural element into account.

2. PETROBRAS OIL SCANDAL

Petrobras is Brazil's biggest company and was founded in 1953 as part of a strong developmentalist policy. It is one of the world's largest oil companies, working on several parts of oil's supply chain and a leading player in deep water oil extraction.⁴⁴ From a corporate law point of view, Petrobras is currently a public-private corporation (*'sociedade de economia mista'*), being the Union of Brazil its controller shareholder, but having its remaining shares in the hands of private individuals/companies. It has also several subsidiaries and international branches, being listed at New York Stock Exchange, as well as Brazil's B3. It had legal monopoly in Brazil on all oil industries until 1997, when a constitutional amendment allowed for its flexibilisation and the entrance of new economic players.⁴⁵

On 17 March 2014, 17 people, including then directors of Petrobras, were arrested for corruption charges involving the company. The Brazilian Federal Police investigation was named 'Lava Jato' (Operation Car Wash). Throughout 2015 and 2016, various other politicians and businessmen were also arrested, many of whom eventually

⁴³ Deepak Nayyar, *Catch-Up – Developing Countries in the Global Economy* (Oxford, Oxford University Press 2013).

⁴⁴ Petrobras, 'Our History – Travel time in 50 years and know Petrobras' (2017) <<http://www.petrobras.com/en/about-us/our-history/our-history.htm>> accessed 20 October 2017.

⁴⁵ *Ibid.*

negotiated plea bargain.⁴⁶ Petrobras' board members and directors, as well as many prominent political characters, have been formally accused. Some were deemed guilty for corruption-related crimes. Critics argued the plea bargaining system, inspired by common law systems, actually created incentives for corruption, as several plaintiffs simply found a way out of punishment. Critics also pointed out the politically oriented focus of the operation, with a bias against left-wing parties, which was actually made clear by some judges' statements. Those in favour of Car Wash highlighted how much elites (including some relevant businessmen) were 'for the first time ever' being sent to trials in Brazil. Regardless of the point of view, Operation Car Wash led to unprecedented years of still on-going investigations and trials in the country. It is Brazilian Federal Police' largest investigation in its history.⁴⁷

As a whole, the corruption involved, among others, bribery of politicians and company employees in order to benefit private companies in large contract bids and to the appointment of certain directors inside Petrobras. Several private actors, especially those related to civil construction, have directly participated in the scheme, in some cases their controlling shareholders and some of their directors have also been charged with corruption.

Politically, despite the media's focus on the then ruling party Partido dos Trabalhadores (PT – Workers Party), the Petrobras scandal actually dealt with most of the existing political parties with representation in Brazilian Congress, including Mr. Aécio Neves, an opposition member from the Partido da Social Democracia Brasileira (PSDB – Party of Brazilian Social Democracy).

Operation Car Wash has been also consistently remembered for its similarities to 1990s Italy's Mani Pulite operation – including its arguably questionable aftermath: the political rise of Berlusconi to power.⁴⁸ Through media coverage, Operation Car Wash took central attention of Brazil's public sphere and somehow created its very own central characters. The first is a federal judge, Mr. Sergio Moro, criticised by many as be overly political, and praised by others for the same reasons. The other side of the investigation is focused on Mr. Luiz Inácio Lula da Silva, Brazil's former president and the first worker to run the country in its history, now accused of corruption charges involving political choices to Petrobras' board and personal benefits, such as a beach apartment and a pedal boat (although until now no charges have been demonstrated).⁴⁹

As the 'commodity boom' of the late 2000s vanquished, Brazil's economy, once praised as one of the most stable and promising emerging markets in the 21st century, eventually ended up being caught in a huge economic and political turmoil. In this context, Operation Car Wash and corruption were ubiquitous in all political discussions,

⁴⁶ 'Cronologia da Operação Lava-Jato' (*El País*, 18 April 2017). <https://brasil.elpais.com/brasil/2017/04/12/politica/1492018492_100094.html> accessed 20 October 2017.

⁴⁷ Ministério Público Federal, Caso Lava-Jato (2017). <<http://www.mpf.mp.br/para-o-cidadao/caso-lava-jato/entenda-o-caso>> accessed 20 October 2017.

⁴⁸ Luiza Bandeira, 'Operação que inspirou Lava-Jato foi fracasso e criou corruptos mais sofisticados, diz pesquisador' *BBC Brasil* (17 March 2016) <http://www.bbc.com/portuguese/noticias/2016/03/160316_lavajato_dois_anos_entrevista_lab> accessed 19 October 2017.

⁴⁹ Jonathan Watts, 'Operation Car Wash: Is this the biggest corruption scandal in history?' *The Guardian* (1 June 2017) <<https://www.theguardian.com/world/2017/jun/01/brazil-operation-car-wash-is-this-the-biggest-corruption-scandal-in-history>> accessed 19 October 2017.

a main theme for the big manifestations occurred during that year.⁵⁰ Amid tensions, President Mrs. Dilma Rousseff, the first and only female ruler of the Federal Republic of Brazil, was ultimately impeached in 2015 under accusations of ‘fiscal pedaling’ (*pedaladas fiscais*), i.e., artificially making up national accounting results. Its critics argue with good reason that Mrs. Rousseff’s impeachment was actually a coup d’état, and that her accusations were only the excuse found to undemocratically take her out of power. Since then, her Vice President, Mr. Michel Temer, became the president of Brazil to unprecedented popularity rates as low as 3 per cent. Despite his own (and more serious) accusations of corruption, Mr. Temer has not been impeached – he has in fact been judged by Brazilian Congress, composed in its majority by his allies.

The legal and economic consequences are particularly relevant as Petrobras is not only the country’s biggest company, but also part of a strategic sector for the Brazilian economy, being one of the few sectors not fully privatised during the 1990s and 2000s. Operation Car Wash may still lead to several changes in corporate structure. Apart from new corporate governance mechanisms and a renewed attempt to recreate its corporate image,⁵¹ arguments for the privatisation of Petrobras reappeared. One must take into account how those against turning it into a privately-owned firm controlled by international shareholders (as the authors of this essay) refer not only to Brazil’s own corporate history of strong state participation, but do have in mind real and in fact justified concerns about national economy and foreign ‘dependency’ (a long and ongoing debate⁵²).

Moreover, the losses in investment ratings and market value were enormous, and had an impact on not only Petrobras’ brand and reputation, but for its various stakeholders – not only minority shareholders. This all led to various shareholder legal claims and arbitration procedures in Brazil and abroad, such as New York, with still unfinished results. The impacts of outsourced litigation and shareholder primacy interpretations in corporate law⁵³ are still unclear, but might be detrimental to Petrobras’ finances. As an important argument for these claims, corruption has been argued as a breach of fiduciary duties by the company itself and by the State of Brazil (its controlling shareholder) towards its shareholders.

In Peru, former president Alejandro Toledo was arrested in February 2017 due to Petrobras’ corruption-related practices.⁵⁴ For similar reasons, two Mossack Fonseca

⁵⁰ ‘Brazil’s Fall’ *The Economist* (2 Jan 2016) <<https://www.economist.com/news/leaders/21684779-disaster-looms-latin-americas-biggest-economy-brazils-fall>> accessed 19 October 2017.

⁵¹ Daniel Silveira, ‘Petrobrás aposta em nova campanha para “resgatar reputação” após Lava Jato’ *G1* (8 November 2017) <<https://g1.globo.com/economia/midia-e-marketing/noticia/petrobras-aposta-em-nova-campanha-publicitaria-para-melhorar-reputacao-de-sua-marca.ghtml>> accessed 8 November 2017.

⁵² Celso Furtado, *Desenvolvimento e Subdesenvolvimento* (Fundo de Cultura, 1961).

⁵³ Peer Zumbansen and Cynthia A. Williams, *The Embedded Firm – Corporate Governance, Labor and Finance Capitalism* (Cambridge, Cambridge University Press 2011); Lynn Stout, *The Shareholder Value Myth* [2011] Paper 771.

⁵⁴ ‘Ex-presidente do Peru tem prisão decretada: Lava-Jato avança no exterior e põe governos da América Latina sob suspeita’ *BBC Brasil* (10 Feb 2017) <<http://www.bbc.com/portuguese/brasil-38907251>> accessed 8 November 2017.

lawyers, a law firm in Panama, have also been sent to jail.⁵⁵ These examples highlight some of the consequences that go far beyond Brazilian legal system and society. In another dimension, the federal antitrust agency Cade (Conselho Administrativo de Defesa Econômica), which had in its history vetoed corporate mergers only on very few cases, started to change its policy to impede in some cases the concentration of economic power. Many have understood this as a sign of response to the events in Petrobras.⁵⁶ It is unclear by now if it is a durable change or just a transitory political response.

Generally speaking, this case makes explicit the ties between political and economic power and its various consequences. Despite the fact most of media attention in Brazil has exclusively focused on the individual morality of the politicians involved, it is actually deeply intertwined with the power of major companies contracting with Petrobras (an oligopoly of constructing companies) and Petrobras itself. The case could hardly be explained and legally debated in purely political science, corporate law or criminal law terms. Its roots are structural: they are also profoundly linked to the way monopolistic and oligopolistic structures developed in Brazil. Furthermore, it is linked to how the use or abuse of economic or market power is embedded in their rationale.⁵⁷ Under these lenses, the corruption scandal was another instance in both the abuse of economic power (the private constructing companies oligopoly – the corruptors) and the capture of an also monopolised entrepreneurial state (represented by Petrobras – the corrupted). In this sense, it seems absolutely in line with the structures that have been established during and survived the colonial monopolistic system of exploitation established for centuries in those regions.⁵⁸

3. SIEMENS BRIBERY SYSTEM

In 2005, Siemens AG, one of Germany's biggest and most well-known corporate groups, was accused of bribery activities in several parts of the world over the course of decades. They included, among others, officials for the Athens Olympic Games in 2004, Israeli officials for the construction of a power plant, and some others to win a bid in Argentina for the making of national identity cards.⁵⁹ Names as diverse as

⁵⁵ 'Sócios da Mossack Fonseca são detidos no Panamá por investigações relacionadas com a Lava Jato' *GI* (10 Feb 2017) <<https://g1.globo.com/mundo/noticia/socios-da-mossack-fonseca-detidos-no-panama-por-investigacoes-relacionadas-com-a-lava-jato.ghtml>> accessed 8 November 2017.

⁵⁶ Leticia Toledo, 'Veto à fusão entre Kroton e Estácio revela transformação no Cade' *Exame* (13 Jul 2017) <<https://exame.abril.com.br/revista-exame/o-tribunal-diz-nao/>> accessed 8 November 2017.

⁵⁷ Calixto Salomão Filho, *Teoria Crítico-Estruturalista do Direito Comercial* (Madrid, Marcial Pons 2015).

⁵⁸ Calixto Salomão Filho, *Monopolies and Underdevelopment – From Colonial Past to Global Reality* (Cheltenham, Edward Elgar 2015).

⁵⁹ Siri Schubert and T. Christian Miller, 'At Siemens, bribery was just a line item' *New York Times* (20 Dec 2008) <<http://www.nytimes.com/2008/12/21/business/worldbusiness/21siemens.html>> accessed 8 November 2017.

Saddam Hussein were pointed out, and there was an annual budget specific to bribery of (also) corrupt foreign governments. Up until then, this was considered the biggest private corruption scandal in the world's history.

Its corruption practices are better described as a whole corruption system, as it was actually fully institutionalised. As most of the practices themselves occurred out of German territory – yet from decisions taken and approved in Germany – this transnational scheme would even get deductions under German tax law, as bribes were registered as 'business expenses.'⁶⁰ Despite the fact German State was not directly involved in the facts, it has been criticised for the excessive openness and lack of accountability regarding foreign activities of German companies, despite important changes in 1999, when foreign corruption was finally criminalised in the country.

Even though this scandal was by no means the first in the Global North's contemporary history, the degree and extent of the bribes undertaken by Siemens AG were remarkable. They had become a fully corporate policy to expand markets and either sustain or gain its presence and power abroad. The government officials involved were both democratic and autocratic, left-wing and right-wing, aligned or not to Germany, large and small, and with quite different living standards. It seems the distance between the ones taking corporate decisions in German offices and the countries affected were partly responsible for such detachment, similar to how moral values tend to erode when market relations become denser and larger.⁶¹ Many of the employees felt they were simply following orders or securing local jobs of a company that, undoubtedly, hires thousands of people with major economic benefits. However, taking such events as purely individual decisions would be completely inaccurate, as there were clear economic benefits (in violation of competition standards) rising out of corruption. This was thus a whole structural scheme promoted, and authorised, in its turn, by corporate structure.

Siemens AG has actually had a much longer history of bribery, tracing back to at least January 1914 in Japan, in a scandal involving naval contracts.⁶² Siemens was obviously not a bad apple among pristine and fair companies, but effectively took such practices to a whole new level. The extension of the scandal is also in part responsible for its widespread reaction, as it managed to harm virtually every side of the narrative, be it European or not, lower or high-ranking, liberal or conservative.

In 2008, Siemens had been fined US\$1.6 billion for bribery, the largest in modern corporate history. It was charged under the USA's Foreign Corrupt Practices Act, as the company also traded its shares on the New York Stock Exchange, but also in several different jurisdictions through different claims. The biggest legal suit was the one in Greece, related to the 2004 Olympics. Following the scandal, German law and institutions have been further amended to create better control of transnational practices of corruption, and to avoid new cases, since they had consequences far beyond the corporate brand itself.⁶³

⁶⁰ Ibid.

⁶¹ Armin Falk and Nora Szech, 'Morals and Markets' *Science* (10 May 2013) 340 707, 711.

⁶² Richard Sims, *Japanese Political History Since the Meiji Restoration 1868-2000* (Basingstoke, Palgrave Macmillan 2001).

⁶³ Schubert and Miller (n 60).

However, the more serious consequences were in corporate governance and structure. Internationally, more than 80% of the top level, 70% of middle, and 40% of lower executives of Siemens were replaced,⁶⁴ and a rather robust full-time compliance team has been created. The creation and almost complete change in internal practices were brought about by a highly specialised international team.⁶⁵ Peter Löscher, then Merck CEO, was hired to lead the structural reforms, and, according to his own view, this was a unique opportunity to promote such drastic changes.

The company redesign was actually much needed after the huge negative impact on the brand and the company, rather than a moral decision. Investors were displeased as much as shareholders, but also the German government, the OCDE and the European Commission. Similar and somehow equivalent changes have been since then undertaken, for instance, by Royal Dutch Shell after the Kiobel scandal in Nigeria, one of the most prominent cases in business and human rights.⁶⁶ In fact, it would be no exaggeration to try to hold Siemens AG accountable for indirect human rights violations under the current international framework.

This case highlights the opportunity to promote structural changes in times of major crises, even though results are always unclear and context-dependent. It is always easier, and less bureaucratic, to perform reforms in companies than in public institutions, as much as it's more efficient to create changes in corporate structure than to pretend general international norms will work by themselves. However, Siemens AG has never been in an empty void, and its case should not be taken as an exclusively private matter. Again here the structural explanations seem relevant. The existence of a huge multinational willing to expand its market power internationally and willing to abuse its economic power through bribes specially in the Global South is consistent with a view of a continuous metropolitan monopolistic enterprise. The help provided by the state includes the – to say the least – curious legal authorisation until 1999 to deduce bribes paid in foreign countries as expenses. The 'state-business colonial monopolistic structures'⁶⁷ seems also here to survive in a transformed way. The fact that Germany is not perceived as a corrupt country but that it allowed such a widespread system of corruption abroad is a relevant counterfactual to institutional explanations of this case. It seems to strengthen the case for structural explanations of corruption.

⁶⁴ Peter Löscher, 'The CEO of Siemens on Using a Scandal to Drive Change' *Harvard Business Review* (Nov 2012) <<https://hbr.org/2012/11/the-ceo-of-siemens-on-using-a-scandal-to-drive-change>> accessed 8 November 2017.

⁶⁵ Siemens AG, 'Responsible Behavior – Compliance at Siemens' (2017) <<https://www.siemens.com/content/dam/internet/siemens-com/global/company/sustainability/downloads/responsible-business-behavior-compliance-at-siemens.pdf>> accessed 11 November 2017.

⁶⁶ John Ruggie, *Just Business – Multinational Corporations and Human Rights* (London, W. W. Norton & Company, 2013).

⁶⁷ Salomão Filho (n 58).

4. SAMSUNG AND GOVERNMENT RELATIONS

Samsung Group is South Korea's largest and most powerful business group. Founded in 1938 by Lee Byung-chul, it eventually emerged to become one of the world's leading firms in electronics and also other industries. It accounts for around 15% of the country's GDP, and, as a joke puts it, one can be born in a Samsung hospital, go to a Samsung school, use Samsung house-ware, have a Samsung phone, until you die in another Samsung hospital.⁶⁸

In 2016, then President Mrs. Park Geun-Hye, the first female president in East Asia, was impeached following a controversy over its ties to Mrs. Choi Soon-Sil, her personal advisor and, to some, her spiritual leader.⁶⁹ Mrs. Park is the daughter of former dictator Mr. Park Chung-Hee, who is deemed responsible for South Korea's very 'economic miracle'. A self-proclaimed conservative candidate, Mrs. Park's had as one of the campaign's strongest mottos her alleged distance from patrimonialistic relations as she is a single independent woman, who had thus 'no one' to benefit. Albeit gender inequality issues obviously arise from this narrative, it served as a way to place her as a possible exception to the already long list of investigated and sanctioned South Korean presidents since the 1980s. The 18 charges against her, which included taking or soliciting bribes worth 59.2 billion won (US\$52 million), would prove this thesis wrong.

During the development of the case, the strong relation between Mrs. Park and Mrs. Choi was expanded to include other important links, specially the one of Mr. Lee Jae-Yong, Samsung's heir and de facto CEO. In the most controversial allegation, Mr. Lee would have given or promised to Mrs. Park, in the benefit of Mrs. Choi, the amount of 43.3 billion won (US\$38.3 million) to guarantee a corporate merger in 2015.⁷⁰ The money was ultimately destined to two private non-profit associations led by Mrs. Choi, then resident of Germany, but for unclear purposes.

On 31 March 2017, Mrs. Park was arrested, being later convicted for corruption-related practices that included bribery, abuse of power, traffic of influence, and leaking of government secrets. Dozens of other politicians and businessmen from South Korea's biggest groups (chaebols), such as Lotte, SK, Hanwha and Hanjin, have been also investigated and/or convicted. Mrs. Park later publicly apologised for the incidents and was said to deeply regret her own conduct. Mrs. Choi denied the accusations, and was later sentenced to three years of imprisonment. Mr. Lee was arrested and convicted to five years in prison for corruption charges.

Most of the media follow-up focused on either the personal ties between the two women or the 'uniqueness' of the case, as Mrs. Choi has been depicted as a 'religious

⁶⁸ Zahra Ullah, 'How Samsung dominates South Korea's economy' *CNN* (17 Feb 2017) <<http://money.cnn.com/2017/02/17/technology/samsung-south-korea-daily-life/index.html>> accessed 11 November 2017.

⁶⁹ 'South Korea's Presidential Scandal' *BBC* (25 Aug 2017) <<http://www.bbc.com/news/world-asia-37971085>> accessed 11 November 2017.

⁷⁰ Justin McCurry, 'Former South Korean president Park Geun-hye on trial for corruption' *The Guardian* (23 May 2017) <<https://www.theguardian.com/world/2017/may/23/former-south-korean-president-park-geun-hye-on-trial-for-corruption>> accessed 11 November 2017.

cult leader'. She is herself the daughter of Mr. Choi Tae-Min, the founder of a religious group, and who was also personal advisor to Mrs. Park's father. These aspects of the case were an entry point to analyses based on South Korea's specific social relations, including the role of Christianity, Confucianism and Buddhism, as well as intense group and social pressure towards individuals. In other words, individual morals or culture as main explanations for the scandal.

Some have also consistently argued for such proximity between market and State as a trait of South Korea's society, in the sense that competition has actually never been the paradigm that oriented its own variety of capitalism,⁷¹ similar to post-War developmentalist Japan⁷² and China, among others. This argument is important. If understood as a specific set of socio-economic, as well as historical and political structures, and not as a peculiar situation of an Asian country or culture, this case allows for serious considerations about the entanglement between law, corruption and economic power.⁷³

As to the consequences of the case, South Korea's economy was not directly hit by the scandal, nor were the profits of Samsung, which remained largely intact. Many have criticised the relatively short punishments of both Mrs. Park, Mrs. Choi and Mr. Lee, as some had even expected life in prison sentences.⁷⁴ No corporate restructuring processes happened so far, apart from the temporary dismissal of Mr. Lee from Samsung Group's positions. Samsung has in fact experienced a hard crisis following its Galaxy Note 7 recall, which both damaged the company's confidence and its financial turnover for a few years, but few remembered the corruption scandal. Even still, it experienced its biggest operating profit ever in 2017's third quarter. Corruption seems to have affected Samsung's brand to a much lesser degree than it has Petrobras' or Siemens', an aspect yet to be comprehended. Either way, in its big corporate reorganisation, Samsung will for the first time have separate chairman and CEO positions, a typical – and praised – corporate governance move.⁷⁵

In the political arena, centre-left and former human rights lawyer Mr. Moon Jae-in was elected on 9 May 2017. This scenario was completely unexpected until the scandal.⁷⁶ In June, Mr. Moon appointed Mr. Kim Sang-Jo as chief of South Korea's

⁷¹ Kaoru Sugihara, 'The East Asian path of economic development. A long-term perspective' in Giovanni Arrighi, Takeshi Hamashita and Mark Selden (eds) *The Resurgence of East Asia. 500, 150 and 50 year perspectives* (Abingdon, Routledge 2003).

⁷² Chalmers Johnson, 'The Developmental State: Odyssey of a Concept' in Meredith Woo-Cumings (ed.) *The Developmental State* (Ithaca NY, Cornell University Press 1999).

⁷³ In fact, it is also relevant to understand the liberalization process that South Korea's economy went through in the 1990s, which has changed the transnational dynamics of capital flows in the country. See Jong-Il You, 'The Long and Winding Road to Liberalization: The South Korean Experience' in Lance Taylor (ed.) *External Liberalization in Asia, Post-Socialist Europe, and Brazil* (Oxford, Oxford University Press 2006).

⁷⁴ Hansoo Choi, 'Samsung, Lee Jae-yong's Conviction, and How Business in South Korea Is Changing' *Harvard Business Review* (29 Sep 2017) <<https://hbr.org/2017/09/samsung-lee-jae-yongs-conviction-and-how-business-in-south-korea-is-changing>> accessed 11 November 2017.

⁷⁵ Saheli Roy Choudhury, 'Samsung just completely shook up its leadership' *CNBC* (31 Oct 2017) <<https://www.cnbc.com/2017/10/30/samsung-electronics-search-for-new-ceo.html>> accessed 11 November 2017.

⁷⁶ McCurry (n 70).

Fair Trade Commission, the antitrust organ. Mr. Kim is a well-known scholar who has long fought against chaebol's economic and political power, nicknamed 'chaebol sniper' by some. The move has been seen as a clear statement by South Korea's new government concerning the ties between market and State. However, as of now, the effective impacts of such change in the 'fight against chaebol dominance and monopoly' are still quite unclear at best.⁷⁷

Again here the scandal and its real life consequence seem in line with the structural explanation. As in the case of Brazil the close relationship of State-private monopolies reveals itself in the bribery system established. However, differently from Brazil, the fact that the company involved is all private is also in line with the general Asiatic colonial tradition of monopolistic structures, basically private with State support since colonial times,⁷⁸ but also with South Korea's more recent tradition of oligopolistic structures based on private chaebols.⁷⁹

5. CONCENTRATION OF ECONOMIC POWER AND GLOBAL CORRUPTION: A LEGAL FRAMEWORK

Among different historical and sociological explanations of capitalism and market societies, Germany, South Korea and Brazil are placed in quite different theoretical schemes.⁸⁰ Germany has been analysed as a specific capitalist model based on its co-management system, conceived after the direct participation of employees in the conduction of corporate activities.⁸¹ The harmonious ties between labour and capital would be specific to a German variety, and a big reason for its social and economic success. Siemens would be a fruit of this process.

South Korea, in its turn, modelled after the Japanese developmentalist experience, was based on a strong state control, major educational and Research & Development (R&D) investments, and the development of huge chaebols such as Samsung. The Korean variety of capitalism, based on a great articulation between market and state, would explain the huge economic success of post-war South Korea's economic miracle.⁸² This and the former cases, of course, largely benefited from (highly politically biased) American financial aid as well.⁸³

⁷⁷ Hyo-sik Lee, 'FTC chief urges chaebol to institute "self-reform"' *Korea Times* (1 Sep 2017) <http://www.koreatimes.co.kr/www/biz/2017/09/367_235731.html> accessed 11 November 2017.

⁷⁸ For the structural pattern set by the 'East Indian Company' type of colonisation in South East Asia see Salomão Filho (n 58).

⁷⁹ Alice Amsden, *The rise of the rest – Challenges to the West from late-industrializing economies* (Oxford, Oxford University Press 2001).

⁸⁰ Peter A. Hall and David Soskice, *Varieties of Capitalism. The Institutional Foundations of Comparative Advantage* (Oxford, Oxford University Press 2001).

⁸¹ Michel Albert, *Capitalisme contre Capitalisme* (Paris, Seuil 2001).

⁸² Sugihara (n 71).

⁸³ Giovanni Arrighi, *The Long Twentieth Century: Money, Power and the Origins of our Times* (New York, Verso 2010).

Finally, Brazil, after the creation of Petrobras, would become part of 'the Rest' that eventually rose in the 1960s through developmentalist policies and heavy industrialisation.⁸⁴ It became one of the biggest economies in the world and has been considered a main new global player, despite its levels of inequality. How could it be possible, for such different countries, to give rise to such grand corruption scandals, similar at least in terms of scale?

The comparison of what happened in Siemens, Petrobras and Samsung cannot be oversimplified. Would it be an (exclusive) matter of culture or variety of capitalism (VoC), ascetic German ethos or institutions would not have allowed such a broad bribery system to be created in the first place, even or especially under private realm. It clearly did, though. The somewhat 'odd Asian' interpersonal practices highlighted in South Korea, or its embedded market-society-state relationship through chaebol conglomerates, would suffice to explain the events that ultimately led to Park's impeachment and Lee's arrest, but they don't. After all, this was neither the only nor the first case. Brazilian cultural informality and alleged lack of separation between public and private (sometimes summarised as '*jeitinho*', or 'little way out') could serve as a shortcut explanation to Petrobras' corruption scheme, but is opposed by empirical analyses of how effectively corrupt the country really is,⁸⁵ and takes the highly concentrated political and economic structures for granted, as if they were natural and immutable.

Actually, as discussed in the previous paragraphs, the best explanation for all cases seems to be structural – and not institutional or cultural, and even less individual. The source of corruption scandals is in the economic market power of its respective actor and to the degree of capture of government officials they are capable of. Its different manifestations also vary according to the historical environment of each region since colonial times. This is not all. Also the respective responses to the scandal can be seen under structural lenses.

The fact that Brazil seems more willing through its judiciary to put in check a big part of its political elite, shows the bigger involvement between State officials and abuse of monopolistic position, but highlights at the same time its urgent need to do away with these practices. Additionally, the fact that no relevant regulatory or corporate law interventions have been made in the companies involved demonstrates the continuing power of such economic structures. The same can be said about South Korea. The difference here seems to lie again in the fact that the corporate structure involved is private and therefore the involvement of the political arena is reduced to certain (albeit very relevant) individuals.

Finally, in the case of Germany, the measures taken, of corporate nature, have to do with the private character of the structure involved (Siemens) and the small relevance to the State involved (Germany) of the acts practised, all in foreign countries. Again here,

⁸⁴ Amsden (n 79).

⁸⁵ As Transparency International has recently reported, Brazil is not among the most corrupt countries in the world, and it is the country with the highest percentage of persons who feel 'ordinary people could make a difference [in corruption]' (83%). See Transparency International, *Global Corruption Barometer: Citizens' Voices from Around the World* (14 Nov 2017) <https://www.transparency.org/_view/publication/8064> accessed 15 Nov 2017.

as previously noted, this seems completely in line with the economic structures involved and their historical path dependencies that can be traced back to the behaviour of metropolises in colonial and postcolonial times.

6. CONCLUSION

Samsung Group controls around 15% of South Korea's GDP; Siemens is one of the leading conglomerates and brands in Germany; Petrobras is Brazil's biggest company. Their degree of internationalisation, technical expertise and R&D in their own fields place them among the most important multinational companies in the world. Reducing their own financial success to corruption practices would be demeaning. Nonetheless, ignoring their role in the global economy dynamic, especially in order to stabilise and guarantee profits to the benefit of private interests, would be equally wrong.

As we have shown, the relation between corruption and power (both political and economic) is strong: sometimes, power leads to corruption – either for direct private interests, either to avoid others from having power, and sometimes, corruption fosters power. In different ways, this was at stake in all three cases, thus the need to address power in order to fight corruption.

Addressing corruption in a global perspective urges jurists to treat it as a phenomenon magnified by the structural concentration of economic and political power in a world-system context. Therefore, it should not be conceived as a 'cultural' or '(i)mmoral' set of practices, allegedly typical only to non-developed nations. This is even more relevant to the extent which the whole world is inheriting characteristics of the Global South: inequality, poverty, violence and oppression are definitely not exclusive traits of certain countries, but rather global issues. The experienced life of a South Chicagoan may not be that much different, in broader terms, to that of a person living in Kibera, Rocinha or Dharavi.⁸⁶ In fact, inequality has been consistently rising on a global scale,⁸⁷ and the world's most unequal place is actually, by a huge margin, the world itself, and not one single country.⁸⁸ Under global capitalism, thus, corruption becomes a consequence and reproduction of old concentrating economic and political structures.

Transnational transparency practices, new corporate liability for extraterritorial activities and compliance programmes are different attempts to investigate and sanction corruption practices around the world. The evidence from the Petrobras, Siemens and Samsung cases highlight to what extent, and how, corruption may take place at the very 'core' of different economic activities, and generate a discussion on who should be held accountable. Despite its different characteristics, more or less transnationalised and more or less related to private and/or public agents, they all benefit from the lack of accountability rendered possible by their monopoly or quasi-monopoly status. Either a

⁸⁶ Mike Davis, *Planet of Slums* (New York, Verso 2006); Salomão Filho (n 58).

⁸⁷ Thomas Piketty, *Capital au XXe siècle* (Paris, Seuil 2013).

⁸⁸ Branko Milanovic, *Global Inequality – A New Approach for the Age of Globalization* (Cambridge MA, Harvard University Press 2017).

trait of current global capitalism or a never-ending characteristic of economic operations, corruption drains both knowledge and material resources that could be used elsewhere for better social and economic results.

Accordingly, 'fighting corruption' requires jurists to unpack the broader contexts of how, where and when corruption actually occurs. In this case, the 'why' question is actually less relevant, and tends to lead regulators, politicians and general public to an inefficient and moralist 'naming and shaming' policy. If contextualisation does not take place, 'compliance' measures will be ineffective at best, and cynical at worst. Therefore, in order to address corruption, the need for real structural legal measures against political and economic power is clear.

It all shows that 'compliance', just as corporate governance, cannot be reduced to a formal legal commitment to norms of transparency and adjustment of conduct. The shareholder primacy epitomised by most of current corporate law makes corruption seem a deviation from the norm, but when economic activity is reduced to become an entirely abstract entity working for the profit of a few shareholders, corruption may actually be the norm. In this case, transfer of corporate control of companies involved in corruption, new or reregulation of sectors involved in corruption scandals and new transnational liability regimes may be better-suited answers.

Finally, the construction of a global corruption framework is not an exclusive task of international institutions, either of national governments or private actions. It is rather a complex interaction, to be put forward by mutual development between several different actors, public and private, large and small, jurists and non-jurists. The recurrent danger, whatever the measures taken, is to simply reproduce the old structures of political and economic power on softer terms, allowing for new forms of legal transplants and 'magical solutions' to be implemented without prior notice or consent of those involved and directly affected by the drains of resources – not surprisingly, workers, peasants, indigenous peoples always at the forefront. This would be simply a continuation of how law has mistakenly understood the role of economic structures for a long time. The risk is clear: allowing equal or more corruption practices, despite the increase of formal accountability. Law has not yet internalised structural issues and concerns, but urgently needs to do so.