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THE FOCAL POWER OF ANTICORRUPTION LAW

Insights from Italian State-Building

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ABSTRACT

Until recently, it has been taken for granted that laws play an important role in the fight against corruption. However, a recent debate casts doubt on the influence of laws to curb corruption in societies with systemic corruption, i.e. where such laws are most needed. Without a strong rule of law, an efficient bureaucracy, and trustworthy and legitimate politicians, legislation with sanctions will have a limited effect on changing behavior. Rather, given corruption as a collective action problem, it is the empirical and normative expectations of others' behavior that impedes societies from breaking the vicious cycle. Against this backdrop, this essay asks: what is the role of laws in the fight against systemic corruption? Through a comparative historical analysis of the North-South gap of corruption in Italy since the national unification in 1861, this study finds that the role of law in societies with systemic corruption is to generate focal points for coordinating desirable behavior. However, as the case of Italy reveals, a credible commitment by the state needs to be in place in order for laws to manifest its focal power. In other words, the state can use the law to signal an alternative to the corrupt equilibrium, but if the state lacks credibility, the signal is not likely to be received as desired. Thus, for exploring the role of formal laws in anticorruption, this essay raises the important interaction between legal content, actors, institutions, and contextual circumstances.

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Introduction

The aim of this study is to explore the role of formal laws in the fight against corruption.¹ Principal-agent theory, which has been the dominant theory to explain the prevalence of corruption, has advocated for preventing measures of punishment, monitoring, and sanctions. Instead of locating its root cause, corruption is argued to be controlled by incentives. However, a competing comprehension of corruption as a collective action dilemma raises doubts on the role of the incentive structures emphasized in principal-agent theory.

More precisely, the collective action framework criticizes the assumption that systemically corrupt contexts have ‘principled principals’. This is the case since, in such settings, even if a majority condemns corruption, either morally or socially, it is irrational not to play by the rules as everyone else does it. More penalties will not change corrupt activities, and such societies are stuck in social traps wherein low interpersonal and institutional trust dominate (Rothstein 2005). In turn, the scholarship on regulation of corruption has reached a point where it is uncertain what we need laws for. Several contributions have pointed on the limited power of laws to incentivize ‘good’ behavior, that international transplantation of law does not work, and, not least, that there is no ‘principled principal’ to guard the anticorruption efforts (cf. Persson et al. 2013). In addition, most countries have adopted the United Nations Convention Against Corruption (UNCAC), which contains numerous concrete policy reforms countries ought to undertake to effectively combat corruption. But, as measured by the Global Integrity Report (GIR), the effects of possessing ‘the right’ legislations appear to be small or non-existent. For example, Uganda is ranked as one of the most corrupt countries in the world, but scores, according to GIR, 98 out of 100, where 100 equals perfect anticorruption legislation (Rothstein & Persson 2015: 241). Against this, there are both empirical and theoretical reasons to question the power of laws to curb systemic corruption. A preliminary conjecture is that laws indeed have limited powers in corrupt societies, but that scholars and policymakers often simplify the power

¹ The concept of law bears several meanings. Herbert Hart (1961) claims that laws are humanly devised rules based on its social practices and not necessarily moral convictions. These can then be divided into primary and secondary rules, where the first connotes laws that imply legal obligations and consequences when disobeyed, and the other signifies rules that legitimizes and strengthen the primary rules through three different mechanisms (rules of recognition; rules of change; and rules of adjudication). In this respect, laws denote governmental social control. But as Lon Fuller (1969: 106) argues, “the enterprise of subjecting human conduct to the governance of rules” is not merely a governmental business. Families, conventions, norms, and so forth, can have the same function as government laws. Lawrence Friedman and Grant Hayden (2016) summarizes laws into four categories: formal and public (e.g. a constitution), informal and public (e.g. the “real” speed limits), formal and private (e.g. grievance procedures), and informal and private (e.g. rules within a family). In this study, the use of “formal law” or “legislation” refers to the first category.

spectrum of laws. Legal compliance is not merely determined by *deterrence* and *legitimacy*, but also by *expression*, and my aim is to explore the role of the latter form of law in the fight against corruption.

The research question guiding this study is: *what is the role, if any, of formal laws in the fight against systemic corruption?*, which is an open-ended question, contributing to the scholarship of interactions between formal and informal institutions (cf. Helmke & Levitsky 2004). The first sub-question is to explore whether formal laws play *any* role, and the second, *if so, how?*

I find that laws play a role in anticorruption, namely to provide a focal point for the desired behavior. In other words, an alternative to the corrupt equilibrium. However, in my empirical examination of Italy, I find that the focal power of law is dependent on the level of state credibility. Thus, the study of anticorruption law ought to move beyond merely the *content* of law and take into account interactions with actors, informal institutions and contextual circumstances. Such an analysis is well-suited for the case of Italy. Despite being under the same formal institutions for 150 years, the South is remarkably more corrupt than the North. By tracing the trajectory of the discrepancy, I find that the national unification of 1861 is the root factor to why the South is disproportionately corrupt, and it explains why Northerners and Southerners respond differently to the same legislation (Bigoni et al. 2018).

According to the literature, laws can serve both as incentive structures and as norm-generating institutions for how people will form their behavior (McAdams 2000a, 2015; Carbonara 2017; Sen 2006; Brennan et al. 2013; Sunstein 1996, Posner 1998, 2000; Hardin 2001). I develop a theoretical framework of legal compliance, emphasizing the *expressive* function of law as in contrast to *deterrence* and *legitimacy* theories. Deterrence theory assumes that actor A convinces actor B to conform based on a credible threat, while legitimacy theory assumes A's conformity to be based on his perception of the legitimacy in B's inclination. Expressive theory, instead, holds that law influences behavior by what it expresses. Based on institutional theory, corruption is the equilibrium of an informal institution, reinforced through time and space, and thus difficult to change. Still, as individuals constantly seek order and social belonging (Fukuyama 2011, 2014; Colombo & Steinmo 2015), they often need to reconsider their alternatives to which norms they should embrace. Individuals coordinate themselves in accordance with focal points (Schelling 1960). Laws are by definition universal (for the population of interest) and have the power to express its message, and thus guide people to coordinate desired behavior according to the law. Instead of fearing legal sanctions, individuals will change behavior and maximize its outcomes in accordance to what others are likely to do.

My results imply that the role of formal laws in the fight against corruption is to provide a focal point of behavior and work as a sustaining factor (Rustow 1970). After two decades of fascism, Italy was traumatized, destructed and lacked social order. A new national constitution was established in 1947 which set the path of the new Republic. The constitution had a focal power in the North but less in the South, mostly because of the low levels of state credibility in the latter. During this period, and on the aggregate level of Italy, corruption fell from 0.5 to a record-low 0.2 on a 0-1 scale. This level persisted for over 30 years (Coppedge et al. 2018).² Decades later, anticorruption law reforms with emphasis on monitoring corruption were implemented and its effects remain to be seen, but given the institutionalized corruption in all of Italy, one should not be too optimistic. Moreover, the genesis of Italy [1861], where the historical traditions of feudalism versus pre-modern state experience steered its development, was the fundamental factor for the North-South gap of the level of corruption. The new state, annexed by force and centralized from Turin, failed to credibly commit in the South, and at the same time, implemented market-liberal reforms in the South which brought new actors to the arena. In turn, corruption became *part* of the institutional culture in the North, and a *replacement* for the institutional culture in the South.

One implication of the study is the important function of state credibility, commonly known as ‘credible commitments’ (North & Weingast 1989). For reducing the disproportionate levels of corruption in the South, the state needs to be the credible enforcer of property institutions. In other words, it needs to throw competing social organizations, e.g. the mafia, out (cf. Migdal 2001). Moreover, I find that history matters and that easy legal solutions will not work to curb corruption. Instead, the role of law is to signal an alternative to the corrupt equilibrium. This happened in the North but never in the South and the explanation lies not only in the legal formulation, but also in the perceived credibility of the state.

The remainder of the study is organized as follows. I first discuss the literature on anticorruption laws. Thereafter, I construct and apply the theoretical framework on the case of Italy. I conclude with suggestions for future research.

² I use V-Dem's *Public corruption index*.

Previous Research

A significant scholarship in the field of anticorruption argues that systemic corruption can be fought by design. For example, Daron Acemoglu et al. (2003: 113) argue that Botswana was able to create ‘good governance’ because it “possessed the right institutions and got good policies in place”. Other recipes for good government have been to improve technology (Kim 2014), internet and social media (World Bank 2017: 79), to introduce and deepen democratic institutions (Johnston 2013), to raise public sector wages (Tanzi 1998), or by auditing corrupt politicians (Shah 2007) to name a few. Such reforms nonetheless disregard the potential resistance in systemically corrupt settings. Such settings might improve technology and its use of the internet and social media, but as Raymond Fisman and Miriam Golden (2017: 250) writes, “technological fixes require ongoing human oversight and vigilance to ensure that no one sabotages their operation, or simply presses the “off” button”. Introducing a successful democracy by design is arguably as difficult as curbing corruption, and the relation between a young democracy and good government is non-linear and opens for new forms of clientelism (Bäck and Hadenius 2008; Persson and Rothstein 2017). The role of incentives is complex, but economic incentives are hardly the only ones guiding human behavior; scholars have for example underlined the roles of esteem (Brennan and Pettit 2002), identity (Akerlof and Kranton 2005), emotions (Balafoutas 2011), morality (Matthews 1981), and social preferences (Saygili and Kucuksenel 2018). Lastly, just as Matthew Winters and Rebecca Weitz-Shapiro (2013: 431) write, it is precisely in corrupt settings that we would not expect trustworthy transparency mechanisms. In such settings, it is against the logic of the political elites to establish auditing institutions, and citizens and journalists refrain from it because of fear of repercussions.

Legal reforms are among the most common anticorruption suggestions. Robert Klitgaard (2015) holds that indeed the whole institutional culture must change for anticorruption to flourish. Other advocacies regard anticorruption agencies, investigative capacities, and strong law enforcement (Choi 2009; Fombad 1999). Melanie Manion (2004) argues that laws can curb corruption by its ability to effectively investigate large scale corruption, which however has been proved wrong in, *inter alia*, Nigeria (Suberu 2009: 277) because of the corrupt political class, and in Ethiopia (Tamyalew 2010: 39) because of lacking human capacity to carry out that law. Nevertheless, the most ambitious recommendation comes from the World Bank in their factsheet “Writing an Effective Anticorruption Law” (2001). They argue, somewhat paradoxically, that countries first need to deter corruption but that

law enforcement measures are not the first or necessarily the preferred method of defense [against corruption]. An informed citizenry, a government imbued with a service ethic, and other measures can be more effective in combating corruption. But achieving those objectives take time, while enacting an anticorruption law is a relatively speedy, inexpensive way to start addressing the problem (World Bank 2001: 57)

Such half-hearted reform packages have, most presumably, limited potentials to reduce corruption. The deterrence approach to anticorruption is to a large extent grounded on the ideas of Susan Rose-Ackerman (1978) and Robert Klitgaard (1988), building on principal-agent assumptions which was popularized in the early 1970s to understand how to improve firms' payoffs (Spence and Zeckhauser 1971). The gist is that incentives work to reduce moral hazard between the principal and the agent and the agent will conform to the rules or tasks given and preferred by the principal. This approach has since then been the dominant approach to explain corruption, and in turn, it insinuates that the ideal of anticorruption is just a mathematical formula away.

Some scholars argue for exogenous remedies against corruption (Davis 2010; Davis et al. 2015). Foreign countries can impel corrupt countries to follow certain policies in order to continue cooperation. Examples are the Foreign Corrupt Practices Act (FCPA) and the United Nations Convention Against Corruption. The suggested approach is to deter corruption, and these reforms will, the argument goes, spread around the world as globalization means more shared markets, and thus more shared criminal law (Rose-Ackerman and Carrington 2013; Salbu 2001; Spalding 2012; Karhunen and Ledyaeva 2012). This brings one problem, namely that such reforms will probably hinder countries from adopting a broad and genuine legislation to truly cope with the socio-institutional and contextual issues of corruption. Moreover, internationally formulated corruption laws are not likely to work where corruption is praxis unless less corrupt countries, typically situated in the industrialized part of the world, show a strong *moral* position of anticorruption. Lastly, a recent paper has tested whether the most common legislation (anticorruption toolkit by the UNCAC) work to reduce corruption, and if this varies contextually. Their finding is that some of the anticorruption tools only work where a strong rule of law already exists, while some other tools are completely insignificant in the fight against corruption (Mungiu-Pippidi and Dadašov 2017). Against that backdrop, one should be rather skeptic of the power of laws to curb systemic corruption (Davis 2012).

Against the skeptical implications above, an alternative scholarship argues that laws are not merely punishment, and that their power to transform states and societies can thus not only be evaluated on

the basis on their ability to generate deterrence. For example, Anges Batory (2012) reviews 20 years of anticorruption legislation in Hungary and concludes that incentives entail non-compliance. Rather than increasing penalties, legislation should be better communicated, and the targets – such as civil servants – should be actively informed by the government, media, and other civil society organizations. Anticorruption laws fail because they are not communicated and thus not effectively implemented (Michael 2010). Moreover, Keith Thompson (2013) has argued for better whistleblowing legislation and indirect anticorruption norms through education.

In their anthropological study, Monique Nuijten and Gerhard Anders (2007) adopt a critical position to formal laws in systemically corrupt settings, as they are inevitably captured by elite interests, and instead argue for the power of social norms. In accordance with Slavoj Žižek (1996), they argue that corruption survives because the cost of violating the unwritten rules are much higher than violating the written rules. In his comparative study of anticorruption in Malaysia and Singapore, Philip Nichols (2012) finds that people internalize corruption laws to different degrees, which suggests that the ‘psychic costs’ of acting corrupt differs between contexts. As predicted by theory, the author finds that Singapore, the less corrupt country, has significantly higher ‘psychic costs’ of acting corrupt.

Raymond Fisman and Edward Miguel (2007) have in a nuanced model on compliance with New York’s parking rules among foreign diplomats highlighted some serious caveats in formal legislation. These diplomats had diplomatic immunity to any legal sanctions for parking violations, and their finding is rather striking: the greater the corruption in a diplomat’s home country, the greater the parking violations. It suggests that the more corruption, the less legal compliance. A standard explanation would be that such countries lack legitimacy and hence refrain from conforming to the law. However, another theoretical framework underlines yet another function of the law, namely its interaction with social norms.

Norm change means changing the equilibrium, and changing the equilibrium means solving a coordination problem of ensuring that people believe that others will conform to the new norm. Some argue that laws can express values and work as a horizontal social contract (e.g. McAdams 2015; Hardin 2001). In other words, a law has the power to express the value that a society has or *should have*, and could potentially work as a generator for individuals’ assumptions that others will also adhere to the value. However, new values often conflict with old values, and it goes without saying that introducing a new value is not always a painless arrangement.

A growing field of legal research examines the interaction between formal laws and social norms, but has not quite entered the wider social science domain, and especially not in the study of anticorruption laws.³ Hence, bearing in mind the severe limitations of law in corrupt settings, a gap in the literature exists in the nature and function of law in such contexts. Leading from that, my intension is to explore what, if any, role laws play reducing systemic corruption.

Toward a New Perspective of Anticorruption Laws

The Nature of Corruption

Persson et al. (2013) argue that anticorruption efforts generally fail because they mischaracterize the nature of systemic corruption. The principal agent approach, as described above, emphasizes that rational calculations of transaction costs causes corruption, and that on top of the hierarchy stands a principal whose rational self-interest is assumed to coincide with a public non-corrupt character. Arguably, the assumption that principals are not motivated by the same forces or incentives as agents is not plausible. In the end, there is no institution working for the public without self-interest and we should not expect either monitoring or punishments be able to root out systemic corruption. Against that backdrop, citizens, police officers, ministers, heads of states, and so forth, will partake in corrupt activities because they expect others to do so. This ‘collective action’ view is radically different from the principal-agent framework of corruption. The mechanism – the expectance of others behavior – is central in the rational choice doctrine of collective action (Ostrom 1998), but what lies behind this expectance of others and can it change?

From the collective action view, corruption is an informal institution; it is not legitimized in any legal framework around the world but remain a ‘second level of order’ (Ostrom 1998). The level of corruption is an equilibrium where people act according to beliefs of others, even though they morally reject it. In addition, most actors in the ‘game’ knows that it would be beneficial if the equilibrium was changed to a state of non-corruption, but breaking the equilibrium without support from others is risky and could lead to non-legal sanctions such as alienation, shame, and to not being accepted in the ‘game’ (which could connote all economic activity of a society). As argued by Anna Persson et al. (2012), any rational individual will continue to choose corrupt alternative before non-corrupt ones as

³ For an exception, see *Crime, Law and Social Change*, 2018, 70(3), edited by Annika Engelbert and Ina Kubbe.

they avoid being a ‘sucker’, i.e. the only one not playing by the rules. In addition, once an equilibrium is established, it will be reinforced by several mechanisms, such as legitimization, imitation, and internalization. An institution will receive ‘feedback effects’ and be highly path dependent (Pierson 2000a).

As an illustration, Guido Tabellini (2010) demonstrates that European regions that had high constraints on executives during the pre-modern world (from 16th century and forward) have more quality of government today. The accountability practices created more social trust, which then became path dependent and partly explain current levels of corruption. In other words, once the equilibrium of corruption is created, it receives feedback effects and is dependent to the initial genesis (Posner 1996; Mahoney and Sanchirico 2000; Benabou and Tirole 2011; Sunstein 1996).

How institutions change is disputed. One central idea is that critical junctures are both the creating force of the institution as well as the mechanism of change (cf. Mahoney 2000; Capoccia and Keleman 2007). Another theory suggests that institutions change endogenously in an incremental manner. For example, Pierson (2000b, 2004) argue that institutions change slowly but incrementally through cumulative causes, threshold effects, and causal change, that does not correspond to the equilibrium of the initial phase of the institution’s formation. In addition, James Mahoney and Kathleen Thelen (2009) argue that a power-distributional approach can explain change in all three strands of institutionalism (cf. Hall and Taylor 1996). They claim that change may happen when issues of rule interpretation occurs and actors need to implement existing conventions in new ways. Similarly, North et al. (2009) argue that a transition from ‘limited’ to ‘open access order’ requires certain ‘doorstep conditions: the rule of law, perpetual existing organizations, and political control over the military. Arguably, these institutions are themselves complicated and hard to achieve, but the theoretical idea contributes by underlining the pluralism of doorstep conditions institutions need for change, an idea which concords with Bo Rothstein’s (2011) indirect ‘big bang’ approach to anticorruption.

Leading from this, breaking the equilibrium can either take a very long time, postulate critical junctures, or require several indirect reforms and new rule interpretations. Taking the latter proposition into account, changing the equilibrium means solving a coordination problem of ensuring that people believe others will conform to the new rule or norm. Some argue that coordination is solved top-down by so-called ‘norm entrepreneurs’ (Ellickson 2001) or ‘political entrepreneurs’ (Scheider and Teske 1992). Leading figures ‘foresee’ the future and introduce and convince others that they will benefit by conforming to a new norm. Others have argued for a proliferation of social norms in

different groups, which results with an equilibrium of polarized and opposite social norms (Carbonara et al. 2008).

Why Laws can Reduce Corruption

Since Max Weber, there are two strands of theories of the origin of legal legitimacy. One emphasizes procedural sources, which holds that people obey the law if they perceive institutions to treat them fairly (Tyler 1990, 1997, 2006). The second underlines substantial causes, arguing that legitimacy is determined by the consistency with people's moral intuitions (Darley 2001; Nadler 2005; Colquitt et al. 2001). The other side of the story is deterrence theory, which underscores that people rationally calculate the consequences of their actions, and by making legal disobedience costlier, people will obey the law. Collective action theory casts serious doubt on this latter form (as discussed above) and legitimacy theory is fruitful but presupposes either high moral standards or high institutional trust, where at least the latter is almost by definition low in systemically corrupt contexts. What rather needs to change is the norm of suspicion of others' corrupt behavior.

Hence, legislation has multiple effects. For example, the deregulation of a previously drug-classified substance removes legal sanctions from using it, it legitimizes the use of it, and it sends a signal – an expressive focal point – and the social meaning of using it will change. The behavioral change laws can bring forth may change habits and social meanings (Kahan 1997; Lessig 1995, 1996). The habit of wearing a seat belt while driving is created after some other mechanism convinces one to wear a seat belt. Similarly, as McAdams (2015) argue, when law permitted dueling, most men accepted it because refusing 'meant' being 'a coward'. A new law thus provides new reasons for changing behavior and hence ambiguates the existing social meaning of the institution.

Eventually, the new legislation can generate social norms of what is expectant of other members of the society. An oft-cited example is the regulation of smoking in bars, which has generated new social norms of the 'right' behavior (Nadler 2017). Brennan et al. (2013: 112) also confirm the norm-generating effect of laws. Large-scale collective action dilemmas such as recycling and drunk driving are examples how laws can foster non-formal norms. Even more evident are the norm-generating effects of coordination laws, for example traffic codes. Regardless whether we drive on the left or right side of the road, the law sets the rule which fosters the non-formal norm. Another illustrative example is the implementation of the first child corporal punishment law in the world, which arose in Sweden in 1966. Since child punishment occurs behind closed doors and thus would be difficult to detect and deter, individuals are not assumed to comply because fear of legal sanctions. In the 1960s, a

majority of Swedish parents (approximately 90%) had punished their children, and 55% of them were positive to corporal punishment. The corresponding numbers for the 2000s is 10% (Modig 2009). The law, by its expressive function, contributed to a change of norms of the appropriate behavior. The legal reform was likely not the *only* cause to the behavioral change, but it was an important focal point for coordination.

There is generally an over-emphasis on the idea that strategic calculations dictate human actions. Information asymmetries, ‘false preferences’, heuristics, persuasion, rhetorics, and so forth, are factors suggesting that humans are not always strategic in making choices. Instead, the reason why people follow the law and socially reinforces it is because they have a preference of having order (Elster 1989). Fukuyama’s groundbreaking works (2011, 2014) suggest that social order has been a key factor for all societies in human history. Traffic codes, conventions, and norms are merely means of maintaining order and reducing risks of chaos. To reach order, humans have adhered to two strategies. First, humans want social belonging; they want to fit in a group by sharing attributes, values, and norms. Second, humans seek to understand, which highlights communication, language, and symbols as crucial attributes for building complex societies (Colombo and Steinmo 2015). Humans are following ‘logics of consequences’ but also ‘logics of appropriateness’ – they act and form behavior based on what they feel is appropriate to the social context. This appropriateness is calculated by the observance of others’ behavior (March and Olsen 1989).

Hence, why corruption persists in so many societies despite years of anticorruption efforts can from this standpoint be understood as a consequence of that people fear disorder. Corruption is the system of how things work in the everyday lives of the members. According to Eric Posner (1998, 2000), the members reinforces the institution by sending signals about the person’s character, which the receiver then relies heavily on in his formation whether to engage in cooperative behavior or not. As John Rawls (1971) argued, if the rules of institutions are public, those that engage in the institutions knows the limits of which one can expect others to behave. A law is a common ground for establishing reciprocal expectations.

The expressive theory accords heavily with the contributions of Thomas Schelling (1960), who developed the concept of ‘focal points’ in game theoretic models, referring to the idea that if individuals share an interest of coordination, they engage in a behavior that is mutually salient – the focal point. The view that laws can supply focal points is advocated by several scholars (e.g. Hardin 2001; McAd-

ams 1997, 2000a, 2000b, 2015; Hadfield and Weingast 2012; Cooter 1998). Formal laws are by definition universal and can work as a coordinating social contract among citizens within the boundaries of the state. Even though institutions may be perceived illegitimate, it is a general contract which individuals can lean on in the formation of behavior to ensure social order and future coordination.

How Laws can Reduce Corruption

Moving from motivations to mechanisms of compliance, there are at least four criteria for the law to change behavior: (i) it must refer to a coordination problem; (ii) it must be sufficiently clear; (iii) it must be sufficiently public; and (iv) there are no stronger, competing focal points. If the law addresses mere conflict without elements of coordination, focal points are not expected to change the equilibrium. The second and third points are crucial for changing the behavior. Without the knowledge of the legislation, we cannot expect any expressive function from it. The fourth point is the core of the problem of corruption. An inert norm continues to make salient the behavior of corruption. Therefore, corruption must be framed as a coordination game, the legislation must be clear and public, and it must overcome the focal power of the current norm.

Consider the international system-of-states. International treaties ensure and coordinate expectations and behaviors of countries, i.e. focal solutions to the avoidance of war and conflict. Certainly, a potential threat of war can be seen as a sanction, but is a non-legal sanction. Conformity then is reinforced by the states themselves without the fear of legal sanctions. The same is true for all coordination situations. Beyond legal sanctions lie other sanctions such as shame and isolation, and individuals will conform to the institution by rationally avoiding such sanctions. When institutions – such as a formal law – are displaced, the status quo is dislodged and individuals need to seek to behave within the limits of the displaced institution. Institutions can also be layered, referring to the amendment of existing rules, which changes behavior. These amendments can be small and not produce new focal points, but as several layers are added to an institution, the coordination might change (cf. Mahoney and Thelen 2009).

The focal point theory explains a distinctive part of legal compliance. However, it may also work in conjunction with other parts of the law. In fact, a legal pluralism with deterrence, legitimacy, and expression is likely to be the most effective way of compliance. A country like Sweden that has a strong legal legitimacy can use all three mechanisms to influence the desired behavior. A systemically corrupt country lacks at least the second form, legitimacy. There, the expressive effect of law can

function as a potential generator of legitimacy. It coordinates individuals to a way which, if it becomes focal and changes the equilibrium, can create compliance perceived as legitimate, not only rational.

Absolutely crucial for the expressive function of law to work is that individuals bounded by the law have knowledge of it, which is often not the case (Ellickson 1986). Regardless of whether it is the deterrence, legitimacy, or expressive function of law, individuals will not comply with an unknown law. If individuals know the law exist but misunderstand the content, they will comply with what they think the law entails, not what it is. Therefore, all theories on legal compliance necessitate legal knowledge. Spreading legal information might thus be an important suggestion for policymakers to coordinate behavior and hence reduce corruption.

The North-South Gap of Italian (Anti-)Corruption

The North and the South of Italy have shared the same formal institutions since 1861 but the differences in levels of corruption and other socio-economic indicators we see today imply, what Stein Rokkan called, a “whole nation’s bias” (Charron et al. 2016: 92). This divergence has been an emblematic puzzle for social scientists (e.g. Banfield 1958; Putnam et al. 1993). Since the unification of 1861, the northern regions have outperformed the southern regions in a number of areas, such as higher GDP, lower unemployment rates, lower child mortality rate (Bigoni et al. 2016), and most significant for this study, lower levels of corruption (Charron et al. 2013). Moreover, a recent experimental study on the roots of the North-South divide finds that people from the North have higher trust and contribute more to the polity. People respond differently to identical incentives, which supports the role of preferences, expectations, and social norms in generating successful cooperation. They underline that the origin of the cooperative gap may lay in the expectations of others behavior. In this line of thought, people would cooperate more if their cooperative counterpart is expected to do the same (Bigoni et al. 2016). A follow-up experiment attempts to explain more thoroughly why Southerners have a lower ability to cooperate. They find that Northerners and Southerners share the same pro-social preferences but differ in beliefs about others cooperative behavior, and in the level of social risk aversion. In other words, the findings reject the famous proposition by Banfield (1958), that at the heart of the problem lies a preference asymmetry. What matters are the beliefs about others behavior and the level of risk aversion (Bigoni et al. 2018).

To make sense of this long-lived development, this study employs a comparative historical analysis (CHA) (Cf. Thelen & Mahoney 2015). The study of history brings several advantages to especially large-scale and complex phenomena, such as democratization or state transformation, because of its focus on processes, timing, sequencing, context, actors, and institutions. This multidimensionality helps ease problems with reversed causality and endogeneity, which are the two main critiques against cross-sectional designs (Capoccia & Ziblatt 2010: 933). To understand the mechanisms behind successive developments of countries breaking with corruption, it is reasonable to expect that such definite equilibrium was created by several episodes of institutional change. Giovanni Capoccia and Daniel Ziblatt (2010) proposes in their influential paper on the role of history in European democratization five different but interrelated ways to examine history. First, drawing on the works of Paul Pierson (2000b, 2004), history reveals causality. Taking into account the interactions of actors and institutions during formative moments, several historical factors creates the causality of interest. Second, the process of state transformation is not expected to happen within one regime. On the contrary, it is the outcome of several institutional developments at different times, which themselves are emerging for various reasons. Hence, one must look wider than to the specific historical event to understand the mechanisms behind the development. Third, since the emergence of multiple institutions at different times, one must look at episodes of institutional change. Questions such as what happened in a specific episode, who were the key actors, why did they act as they did, etc., must be asked. Fourth, CHA takes into account not only one structural factor as a driver of the institutional development, but multiple ones, which affect the motivations and actions of the actors involved in the episode. Fifth, studying the long-run historical development of phenomena casts light on the chain of big and small events throughout a long period of time and that can have substantial significance for the final outcome variable.

Historical institutionalism assumes that several institutions in time and space affect the outcome of interest, making the static analysis hard to achieve (Lieberman 2001: 1016). CHA must involve a segmentation of the historical process into periods, which shed light on certain events, changes, or turning points as more ‘important’ than others for explaining the process. A critical question for the CHA is to decide which periods deserve attention, i.e. determining which events that are more important (Ibid.: 1017). Without doubt, this implication is a cause of criticism – the author simply has the power to control what events in history to account for based on his or her convictions. According to such logic, the theoretical and empirical insights gained from historical studies are biased (Lustick

1996). However, quantitative ‘mainstream’ studies have the same implications – the choice of variables, be that actors, contexts, or institutions, are always to a various level, arbitrary. A transparent approach of the alleged historical narrative makes the claims more replicable.

I take use of a mixed strategy of studying episodes proposed by Evan Lieberman (2001), an approach consisting of four strategies which work both in isolation and, more favorably, combined. The first strategy is to trace the institutional origin and compare both periods prior to and subsequent to the origin of the institution of interest, secondly, I trace the development of the institution to shed light on turning points and critical junctures. Due to the limited scope of this study, I do not employ the third approach – the effects from exogenous shocks, e.g. wars or natural disasters – and only a limited discussion on the fourth approach, concerning rival explanations.

Pre-Unification Convergence

The pre-unitary Italy was a collection of several states with very different institutions. As traced by Robert Putnam et al. (1993), northern city states developed complex bureaucracies such as the *Podestà* and *Sindacato* and developed strong horizontal ties among the citizenry during the Middle Ages. Meanwhile in the South, a feudal system of governance dominated which strengthened the submission to rulers and thus emphasized vertical ties. The origin of the North-South division is disputed; some argue that it took shape already in the late Middle Ages (Abulafia 1977), others believe the Italian unification was the formative moment (Daniele & Malanima 2011: 7). Despite experience of different governance structures, the economic development was roughly the same at the time of unification (Ibid.: 94).

Massimo d’Azeglio, a leading figure of the national unification and who famously declared that “we have made Italy, now we must make Italians”, wrote a letter to his wife just before his death in 1866, saying “if only you knew the vastness of cheaters and exploiters which is spread in Italy, you’d tremble” (Turone 1992: v, my translation). In the 1870s, Italy was governed by the left party under the leadership of Agostino Depretis, who for the first time initiated a reform program of a Weberian rationalization of the government, and who the English historian Denis Smith (1969: 171) has called one of the most important and respectable personalities in the story of modern Italy. However, he did not manage to vitalize such reforms because of his more important aim of consolidate political power, which forced him to mediate with the opposition and drop the reform package. Furthermore, people were asked to ratify the unification with regulatory plebiscites which were definitely ambiguous, and with the words of Tommasi di Lampedusa, “the opportunists’ cunning emerged” (Turone

1992: 4). The aim to modernize Italy during the period witness of a culture of widespread non-modernity and, most presumably, widespread corruption. In addition, several corruption scandals occurred during the coming decades throughout Italy, most notably the *Banca Romana* scandal which forced the Prime Minister Giolitti to resign from office in 1893 (Ibid.: 31). Altogether, the corruption divergence which is evident in the Italian regions today did not exist during the time of unification (cf. Vannucci 2012). This is furthermore evident in the recently published historical data from the Varieties of Democracy (V-Dem) Project, which ascribe Piedmont to have slightly higher level of public corruption than the Two Sicilies from 1789 to 1860. Although variation exists, it is not a North-South divide as the one we see today (Coppedge et al. 2018).

In 1861, Piedmontese⁴ rulers managed to unify six different states on the Italian peninsula into one national entity, except for the Papal state which did not merge into the country until 1870. The event was a consequence of several factors. First, the northern states (Piedmont, Modena, Parma, Lombardy, Tuscany) developed already in the early 19th century a ‘modern’ commercial-minded production, inspired by the Napoleonic leadership in France. Piedmont, the richest and largest northern Kingdom of the time, was led by enlightened political actors in Giuseppe Garibaldi and Camillo di Cavour who managed to mobilize a substantial social base in support of a new commercial-based modernization on the whole peninsula, a territory that shared several national identifications such as the Italian language (although with great variation), religion, and earlier Roman rule. At the same time, the southern part of Italy⁵ lacked a corresponding temptation to commercialization and market unification, which frustrated the rulers and its nationalist alliances of the North to create a unified country and indeed a unified market. In other words, the South was resistant to the unification while the North was impulsive.

The resistance of the South could very well stop the nationalists in the North – its population was three times larger than the Piedmontese, it had a massive military, and a bureaucracy twice as big as the Piedmontese counterpart (Ziblatt 2006: 77). Despite that, Piedmont succeeded in their attempt to unify Italy – but it did not happen without resistance. Under the military leadership of Garibaldi, Piedmont annexed the southern Kingdom in 1860 and initiated for unification. This process was planned to be negotiated but ended up by conquest, largely because, as argued by Ziblatt, of Garibaldi himself. His aspirations of conquering Sicily and Naples forced Cavour to send more troops to the

⁴ ‘Piedmont’ refers henceforth to Kingdom of Sardinia, Savoy-Sardinia and Kingdom of Piedmont.

⁵ The pre-unity connotation of ‘Southern Italy’ refers to Kingdom of the Two Sicilies

area, which forced the Bourbons⁶ to flee the country. Why Piedmont could achieve such a conquest is explained by its relatively developed financial and administrative capacity, by nationalist conviction, and by Garibaldi's surprisingly coercive implementation of the annexation. In addition, anti-feudalism rebellions were recurrent in the South during the whole century, not least during the 'year of revolutions' [1848] when a wave of several revolutions emerged in European states. The consequence of unifying Italy by *conquest* was the emergence of a centralized state. As Cavour did not need to negotiate on the matter of decentralization, he rejected the proposition of federalism and instead instituted central rule from Turin, the capital of Piedmont and thereafter the capital of Italy.

Post-Unification Divergence

Throwing out the *ancien régime*, and a culture of feudalism, together with market-liberal reforms, created political instability in the region and paved the way for criminal gangs (Gambetta 1996, Dimico et al. 2017). The end of feudalism is a pivotal factor for the high levels of corruption in the South. This is mainly because the system of feudalism is founded on personal relations – the vassals, i.e. the citizens, were allowed to use and the elite-owned land for production and gain protection by exchange of some sort of service to the elites, the so-called lords. The culture of feudalism thus emphasized coordination between lords and vassals, underlining some sort of interpersonal contract, while the bureaucratic structure of the northern regions emphasized the role of institutional trust. When the South then was anchored into the new non-feudal unitary Italy, the citizens needed to strengthen its trust to the state. Unfortunately, the new and North-centralized Italy failed, or had not sufficient willpower, to assume effective political government in the South which hindered the citizenry to build the institutional trust. The birth of the big Mafia organizations of the South⁷, was heavily an effect of the failed presence of the Italian state – when the state fails to provide government and basic public goods, other actors will acknowledge the gap and fill it (Lupo 2004). In other words, the genesis of Italy was the fundamental factor for the systemic corruption, where the historical traditions steered its development. In the North, corruption became *part* of the institutional structure, while in the South, it became a *replacement* for the institutional structure.

A year before being brutally killed by the Mafia, the anti-Mafia judge Giovanni Falcone proclaimed that “the Mafia is, essentially, nothing but the expression of a need for order, for the control of a

⁶ The House of Bourbon ruled in Naples and Sicily from 1734 and in the Kingdom of the two Sicilies from 1816-1860.

⁷ *Camorra*, *Ndrangheta*, *Sacra Corona Unita*, and *Cosa Nostra*.

state” (Bandiera 2003: 218). The Mafia did what the state could not: provide protection and enforcement of property rights. In effect, the state lacked an initial credible commitment by the citizenry, at the expense of the neo-feudal Mafia system, a system of ‘stationary bandits’ (cf. Olson 1993). With a limited government, the Mafia could settle and become a stationary bandit who allows the economic activity in the polity to a certain degree, as it expects to remain the protector of the property for a long-term period. The Mafia thus has an incentive to take some governmental function to ensure future payoffs. Inversely, the Italian government had a comparative disadvantage to securing private property, which made it a non-credible actor. Hence, the process of creating credible commitments in England after the Glorious Revolution described by North and Weingast (1989) is inapplicable to the case of the Italian South. In addition, during formative moments of state-building, the level of initial trust between citizens and elites and levels of state capacity can have long-lasting effects on institutional trust (Rothstein 2000). By reputation and ‘collective memory’ transmitted through generations, citizens form their expectations and strategies of behavior. It is unlikely that the South has a positive collective memory of the early state-building, and accordingly, the expectations of others and strategies of agents are presumed to be negative for solving collective action dilemmas.

The presence of the Mafia and a low presence of the state reinforced the feudal institutions of patronage and a low-trust culture towards formal institutions. In such a system, actors always fear the risk of being cheated upon since the state – which in this context is the legitimate actor of coercive power – cannot guarantee security and upholding basic services. The new institutional set-up by the Mafia has then been reinforced by increasing returns (Pierson 2000a). This path dependent institutional culture has become the existing equilibrium, the social order which the people lean on to coordinate their behavior. Needless to say, it is certainly sub-optimal, but having order is more desirable than living under disorder. Therefore, people conform to the new order by communicating with a mutual language – in this case by signaling low-level beliefs of others behavior – and by following the logics of appropriateness. At the same time, the continuously strengthened institutions generate norms of anti-state compliance.

1861-1946: The Liberal Era, Wars, Fascism, and Birth of the Republic

During the subsequent decades, the gap between the North and South widened. The ‘Southern Question’, as popularized by Antonio Gramsci and other left-wing members of the time, was a fact. Inspired by liberal economists, the Italian rulers opened the economy and made it one of the most free-trade countries in the world (Felice 2013). The production was diversified – in the North, especially

the 'industrial triangle' of Piedmont, Liguria, and Lombardy produced capital intensive goods, while the South placed its production in agriculture, especially olives, citrus fruits, and grapes. Economic divergence at this time was, despite the mafia-controlled regions of the South, mild. The reason was that millions of Italians emigrated to foreign countries and sent home remittances or returned with capital which was used for investing in land and production.

The socio-economic regional divergence continued to grow during the Great War (1915-1918). Just after the war, Italy democratized, but the new regime faced severe turmoil and social disorder throughout the country, in the countryside and cities alike. People from all political alliances blamed the democratic system for setting the country in chaos, which forced the Italian king to encourage the fascist leader Benito Mussolini to form a government. By charismatic and authoritarian leadership, many believed Mussolini and his party would improve the lives of the Italians, but reality proved the opposite. According to Berman (2017: 33), the fascist regime was far more violent and destructive than the non-democratic regime which preceded it in the beginning of the century. The fascists, however, had its roots in the old regime. It was a closed and elite organization steeped with backroom deals and institutionalized corruption. Thus, the fascists grew from a crisis of legitimacy. Furthermore, the regime's disinterest of implementing necessary reforms hindering the unequal development of wealth in the country was a catalyst for both reinforcing anti-state compliance and illegitimizing the regime, especially among Southerners.

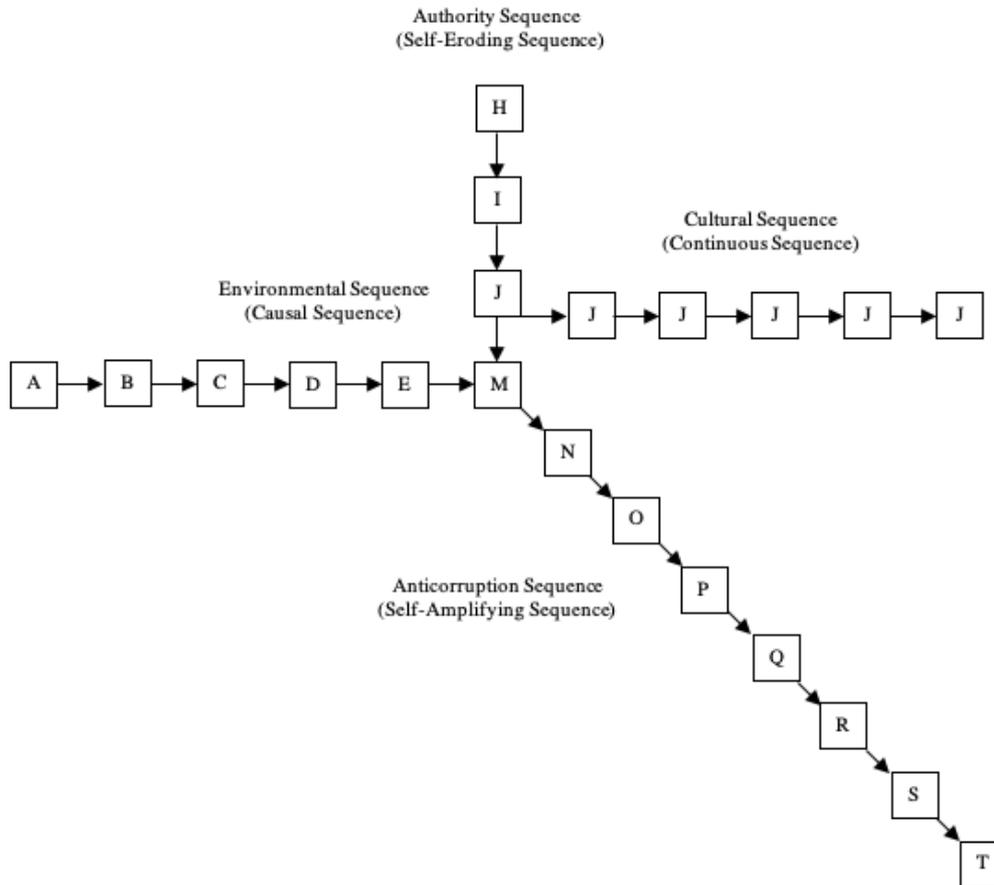
The birth of the new Republic marked an end of monarchy, illiberal democracy, two great wars, and a two decade-long fascist regime. What the Italians needed, as explicitly and strongly emphasized by the reformers, was a clear and just constitution. The constitution of 1947 is, I argue, the first anticorruption law, as it meticulously describes how the country is governed, i.e. the procedural law governing the country.

In the post-war period, Italy was devastated, poor, destructed, and with a confused self-image caused by the long fascist regime. There was a great need for all citizens to restore social order, coordination, and cooperation. The new constitution was the focal point for how the new Italy would be governed. The civil and political rights, the role of the president, the parliament, the craftsmanship of law, and so forth, would now be written down with clarity, in order to restore the country left in devastation. According to Marta Cartabia, Vice President of the Constitutional Court in Italy, the story of the Italian constitution is one of success, despite unfavorable preconditions. The fascist regime had committed crimes *through* the law rather than *despite* the law for twenty years, making citizens and lawyers

suspicious to the legal institution in the after-war era. Despite that, the Constitution quickly became one of the most important authorities in the Italian institutional framework, winning the utmost respect from all other government branches (Cartabria 2016: 41). The constitution, which reformed the government fundamentally and abolished the monarchy, was elected on 22 December 1947 with 453 votes against 62. The Italian Republic was born in the aftermath of war with a strong majoritarian consensus to transform the state. The new charter consisted of 139 articles and four categories: fundamental principles, rights and duties of citizens, organization of the Republic, and transitory and final provisions. The constitution makes very clear that Italy is a modern, liberal democracy with broad civic and political rights. The third part – the organization of the republic – is very clear on how the country is to be governed, emphasizing the importance of meritocracy, professionalism, and impartiality in all branches of government. Notable for the regional governance, however, is that regions have very little administrative and political role in Italy. The central state which was founded almost 90 years earlier in some sense ‘by mistake’, continued to be the governance system for the coming era, until the notorious regional reforms of the 1970s (Putnam et al. 1993).

The coming decades – *la ricostruzione* [the reconstruction era] – was characterized by an astonishing socio-economic development – at least in the North. The constitution marked an important turning point in rebuilding the country, and worked as a coordination scheme for how to collectively pursue the restoration. The problem, however, is that the low credibility of the Italian state in the South gave Southerners little reason to coordinate their behavior in accordance to the new constitution. The low interest in the South, the negative economic development, and the persistence of the Mafia institutions instead abstained Southerners to believe in the state inventions. This is, of course, to some extent a simplification. The Italian state is, also among many Southerners, the legitimate ruler and it is reasonable to suspect that some form their behavior according to this. In turn, while the constitution worked as a focal point of behavior in the North, it failed to do so in the South. The reason is a clear reference to history and the institutions already put in place during the unification. I argue that the expressive power in how the government is steered reinforced the relative cooperative successes, which itself is an effect of beliefs of others, in the North as in contrast to the South. The Northerners did not possess higher moral standards than their counterpart, the state was merely more credible, which affected them to conform to the procedural norms written down in the constitution. Figure 1 and Figure 2 illustrate this development.

Figure 1 **Anticorruption sequence in the North**

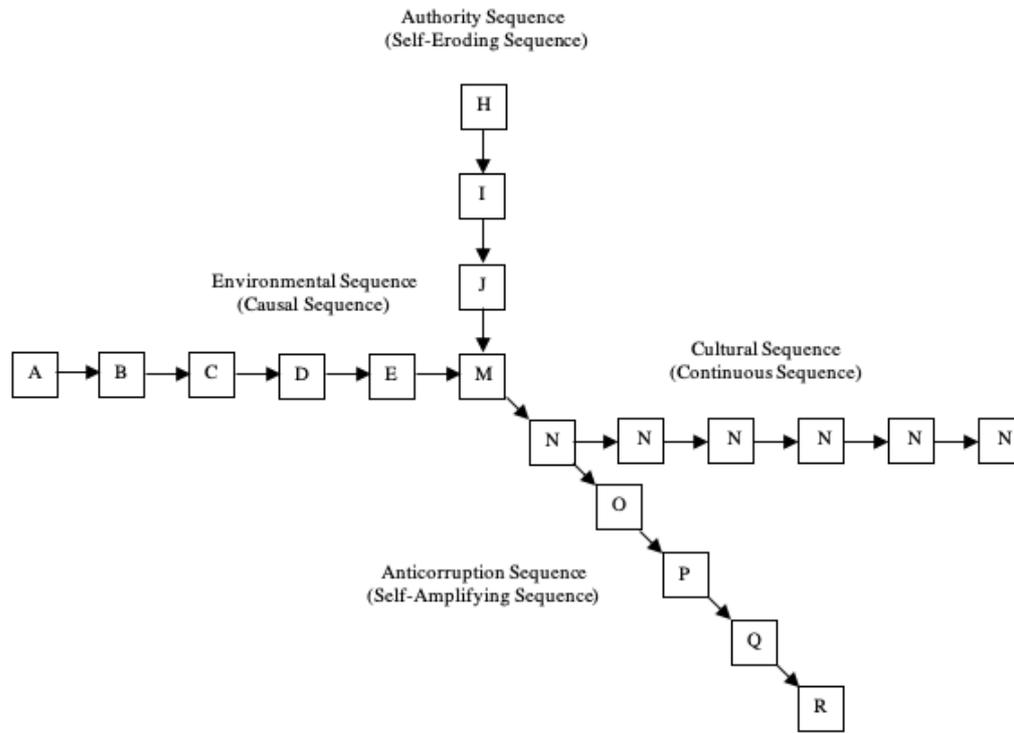


A: A system of city-states constantly at the threat of war.
 B: Pre-modern bureaucracies, partly participatory decision-making and rotating governance structures.
 C: Commerce and modern capitalism is born.
 D: Humanism, the renaissance, and the discovery of the New World.
 E: Wars during the 15th and 16th centuries resulted in conquest by France, Spain, and Austria

H: Historical experience with state institutions and political participation.
 I: State capacity and social capital, strong horizontal ties.
 J: The state is the credible and legitimate enforcer.

M: North unifies Italy by force.
 N: Centralized Italian state, central seat is Turin.
 O: Corruption becomes part of the state, which has a limited capacity to reach in the south.
 P: Liberal reforms, Italy became one of the most free-trade countries in the World.
 Q: A broken post-war Italy, new constitution made with emphasis on impartial government.
 R: The new Italian republic is born and North is highly progressive for the next decades.
 S: A major corruption scandal leads to a crisis of legitimacy. A new political landscape is born.
 T: Corruption persist to be a serious problem in all of Italy, but new anticorruption laws are implemented.

Figure 2 **Anticorruption sequence in the South**



- A: Became a Greek colony, new powerful cities were born, e.g. *Napoli* (“New city”).
- B: From 11- to 13- century, it was conquered and ruled by several kingdoms, e.g. Greece, Lombardy, and the Islamic Caliphate.
- C: Institutes a constitution and forms a centralized state 1231. Led to war and the partition of the kingdom into *Kingdom of the two Sicilies*.
- D: After centuries of wars, the kingdom fell under the rule of House of Bourbon, who opposed the new liberal doctrines and endeavors of Napoleon Bonaparte.
- E: After conflict with Bonaparte and his new liberal-minded allies in the North of Italy, the House of Bourbon regain legitimate power by the Congress of Vienna in 1815.
- H: Feudalism (formally) until 1807.
- I: Several rebellions against the *ancient régime*, not least revolutions in 1848.
- J: The resolution of feudalism and the intensity of rebellions leads to conflicts over land ownership.
- M: South Italy is annexed by force, and the Kingdom of Italy is born.
- N: The new Italy has a limited capacity to rule in the South, but who liberalizes the already conflict-laden property institutions. This paves the way for Mafia-ruled extractive institutions, and the Italian state fails to credibly commit to the Southerners.
- O: Economic growth becomes much slower in South. Prime minister Giolitti conceded the existence of many places in the South where the law does not operate at all.
- P: The Mafia and the fascist regime melted together. However, after the war, the South was highly damaged. The new constitution of the new Republic (1947) did not have focal power over the coordination of Southerners future behavior. This fails because of lack of credible commitment from the Italian state.
- Q: Socio-economic ‘backwardness’ dominates the coming decades, until this very day.
- R: New Italian anticorruption legislation is implemented, but are hardly going to be effective in the South.

Conclusion

If anticorruption laws are expected to have either little, none, or even harmful, effects, what is the purpose of having them? Arguably, anticorruption laws must be categorized in two fields. The first category regards the framework suggested by the UNCAC (2004: iii), which “introduces a comprehensive set of standards, measures and rules that all countries can apply in order to strengthen their legal and regulatory regimes to fight corruption”. It regards the establishment and implementation of effective monitoring institutions such as anticorruption agencies and ombudsmen. In countries with low levels of corruption, such laws can very well serve the purpose, but its potential to reduce corruption in systemically corrupt societies is very limited. The second category concerns another spectrum of law: its expressive effect. Signaling a position can be much more powerful than attempting to monitor or punishing behavior. This type may encapsulate a focal power which can be an important pillar for coordination. The need for social order, for the logics of appropriateness, for social belonging and for social understanding, will affect people to seek coordination. The role of law, then, is to find an expressive function and focal points, which will guide people into the desired behavior. Since the law is one of the most fundamental pillars in societies, it bears much potential. Therefore, in systemically corrupt contexts, the role of law in the fight against corruption is not only to criminalize it. Conversely, its role is to signal the *opposite* of corruption: a *credible* alternative to the current equilibrium. A general model for how to reach this focal power is however beyond the scope of this study, but is a theme suggested for further research.

To explore the role of law empirically, I have reviewed the historical trajectory of anticorruption in the North and South of Italy. The findings show that history plays a dominant role in the development. However, it is not history *per se* that determines the development, but its interaction with institutions and actors. When Italy unified, the conditions were very different in the North and South. Feudalism in the South and pre-modern state institutions in the North paved the way for different responses to the critical juncture. The North’s annexation of the South forced the *ancient régime* away, which led to a centralized monarchy based in the North. Market-liberal reformists freed the already disputed land ownership in the South, together with a lacking capability of property enforcement, led to two factors: (1) the rise of the mafia, and (2) the lack of credible commitments by the state. These two institutions have then become path dependent and, in my view, explains why the South is disproportionately corrupt.

The Italian constitution of 1947 was very awaited. Two decades of fascist rule and two wars left Italy traumatized. The *ricostruzione* era modernized the country, abolished the monarchy and founded the First Republic. The period (1945-1950) was certainly a formative moment, a moment when people sought social order and new forms of coordination. The constitution certainly played a part for this – but mainly in the North. This is explained by the institution created in the unification of Italy. The low credible commitment in the South and persisted mafia institutions formed a skeptical apprehension of the new republic. In other words, the constitution was focal in the North but not in the South.

Italy is, as Diego Gambetta (2018) writes, disproportionately corrupt, but it is not my mission here to explore why this is. What this study has explored is why the South is so much more corrupt than the North despite being under the same laws for over 150 years. In my opinion, the anticorruption fight in Italy (and elsewhere) must be reframed and not considered a problem that can be solved by increased punishments and monitoring. Instead, the state must be a credible actor and meaningfully take action against all other ‘stationary bandits’. If we want people to break the law of corruption and start following the law of anticorruption, we must make sure it is a credible alternative. And since institutions shape peoples’ beliefs and risk-aversion, there is no single formula for this, but the perception of the *signaler* rather than the *content* of laws can be more decisive for compliance.

The findings call for future research projects. First, more comparative studies on how constitutions, or other laws *not* emphasizing monitoring, can have a focal power of anticorruption. By broadening the contextual scope, we gain more evidence of the potential importance of laws in reducing corruption. Second, the link between credible commitments and levels of corruption should be further examined. Third, micro-mechanisms of how, when, and why individuals seek coordination of (anti-)corruption should be studied. Lastly, studies on (anti-)corruption should examine other, competing focal points. When the law fails to become focal, what does?

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