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THE ROLE OF ANTI-CORRUPTION LAWS IN THE FIGHT AGAINST ASTROTURFING: A PURSUIT OF TRANSPARENCY AND LEGITIMACY

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Abstract

Astroturfing is the practice of hiding a vested sponsorship of an idea or a claim behind the veneer of grassroots supporters. The first incidents of astroturfing date back to the early 1900s, but the advances of instant communication and social networking have arguably enhanced its effects on the political arena and on relevant social issues nowadays. The current scholarship on anti-corruption laws has seldom touched upon the subject of astroturfing. The analysis of this relationship and of its merits is the scope of this paper. We find that certain corporate actions concealed by astroturfing might violate the public integrity that is key to modern republican democracies around the world.

The opinions expressed and arguments employed herein are solely those of the authors and do not necessarily reflect the official views of the OECD or of its member countries.

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1. Introduction

Corruption occurs when something breaks within itself. If a government is corrupt, that government has been plagued by internal decay (TEACHOUT, 2009, p. 347): typical examples would include an agent of the Internal Revenue Service taking bribes to turn a blind eye to a case of tax evasion and a senator agreeing to shelve a report that would damage the reputation of one of its supporters, among many others. Those examples and their deleterious effects are the sources of current anti-corruption legislation and policy in major democracies around the world. Anti-corruption laws in jurisdictions like France and Brazil have been lauded as innovations in the fight against corrupt agencies and their practices, for the benefit of societies and the upkeep of democratic legitimacy in general.

The question that motivated this paper has to do with the boundaries of those anti-corruption laws. Regardless of their terminology, could anti-corruption laws apply to a practice that corrupts not a specific government institution, but a principle of Public Administration? Consider this example. Company ABC, a large producer and seller of soft drinks in State X, funds a non-profit organization to incentivize its consumers to protest a new “soda tax” proposed by the government authorities of State X. Company ABC never appears in any of the ads run by its non-profit organization, and neither the ads, nor the website of this non-profit organization make any reference to funding received by corporations engaged in the business of producing and selling soft drinks (the ads only show “concerned citizens” arguing that the government should not interfere with their “right to choose”). Now, one could argue that this practice *corrupts* the public discourse of State X’s residents, the very source of State X’s *public integrity*. Should that form of corruption be targeted by anti-corruption laws?

What we described in the previous paragraph is a practice called *astroturfing*. The term is an American neologism coined by Lloyd Bentsen in 1985, and it refers to campaigns initiated by concealed groups with the intent to promote an idea or a cause falsely associated with grassroots movements (MILLER, 2009, pp. 45/46). Though astroturfing is not limited to the concealment of corporate special interests, episodes of astroturfing carried out by corporations have been reported in several jurisdictions around the world, the most prominent cases being those reported in the United States. Consider the case of the Coalition for Medicare Choices, an organization founded and funded by America’s Health Insurance Plans (AHIP) that in 2013 aired TV ads urging senior citizens to contact their Congress representatives and ask them to prevent a reduction of 2.3% in federal payments to Medicare Advantage plans (LIEBERMAN, 2013). Consider also the emergence of “paid protesters” from companies like Crowds on Demand, which service clients wishing to convince otherwise disinterested people of the “relevance” of a particular cause (FRIEND, 2018). In the corporate world, those are practices not commonly viewed as subject to anti-corruption laws, and our argument in this paper is that they should be.

In Chapter 2, we address a core principle of anti-corruption policies found in select jurisdictions around the world, namely *public integrity*, and how that principle presents itself in its facets of *transparency* and *legitimacy*. In Chapter 3, we detail our three arguments in favor of an interpretation of anti-corruption laws as instruments against astroturfing. Finally, in Chapter 4, we comment on possible implications of our position for anti-corruption policy today.

2. A core principle of anti-corruption policies worldwide: public integrity

Any attempt to round up the principles (even the main principles) of anti-corruption policies around the world would be futile. Just like incidents of corruption differ from place to place, so do legal discussions designed to produce an antidote against those specific incidents. In addition, the legal systems in which anti-corruption policies have blossomed are each vested with their own unique cultural features, features that are central to comparative legal studies, but that prevent us from listing principles universally applicable to anti-corruption policies everywhere.

In this chapter, our objective is to address a core principle used to support anti-corruption policies in select jurisdictions around the world, namely *public integrity*. We also discuss how this principle presents itself to lawmakers and interested parties in its facets of *transparency* and *legitimacy*, which might be used to allow existing anti-corruption legislation to apply to “non-typical” corruption cases, provided those cases are properly identifiable as cases of corruption.

2.1 A definition of public integrity as a principle

The very nature of anti-corruption laws is to help protect public integrity, or the integrity of public institutions or public “goods” that are relevant for society. This pursuit is inherently republican: republican societies are built around the preservation of certain public institutions or goods, and those institutions or goods are the main pillars of their continued existence.¹ As described in the Introduction, a corrupt government is broken within itself, and the pursuit for public integrity is designed to either rebuild that government or to prevent it from becoming corrupt again.

The principle of public integrity can therefore be defined as the guiding force of laws designed to protect the fundamental values of public institutions. This goes beyond J. Patrick Dobel’s famous contribution on the integrity in the public service, which he described as abiding by “authorized standards and procedures” with accountability (1990, p. 356), because it refers to a legal system designed to ensure those authorized standards and procedures are carried out. It is a principle of anti-corruption policy that fosters the “consistent alignment of, and adherence to, shared ethical values, principles and norms for upholding and prioritizing the public interest over private interests in the public sector.” (OECD, 2017, p. 03)

2.2 Transparency and public integrity

Our reference to transparency in anti-corruption law and policy stems from the principle of public integrity. If the republican ideal is to have a functioning society based around matters of public interest, and if those matters need to be looked after because of a pursuit of public integrity, the more optimal instrument to achieve that goal is transparency (it ensures that stakeholders are informed about the actions of government and about their status in society, thus allowing them to function in society to

¹ This is Cicero’s definition of *re publica*, or “public thing” in Latin. “The republic [or commonwealth] is the wealth or common interest of the people. Every assemblage of men however, gathered together without an object, is not the people, but only an assemblage of the multitude associated by common consent, for reciprocal rights, and reciprocal usefulness.” (CICERO, 2017, b. I, c. XXV)

protect public integrity). Of course, this predates anti-corruption concerns, because it is first and foremost a feature of the democratic nature of modern republican institutions: think of the transparency of the public budget, the transparency of parliamentary procedures, and, more importantly, the transparency of the legal system itself (the publication of laws, ordinances, rulings, instructions and other legislative documents).²

Because transparency is derived from a concern for public integrity, it is also featured in major anti-corruption laws around the world. One example would be the Foreign Corrupt Practices Act (FCPA) of the United States; some of its key provisions are either textually or systematically linked to a duty of transparency (e.g., § 78m(a), § 78m(b), § 78ff(b) and §78ff(c)), and a couple of FCPA-relevant cases involving political donations (specifically, *In re Schering Plough* and *United States v. Titan*) are centered on transparency, or lack thereof (TARUN, 2010, pp. 133-135). Another example would be the Brazilian Clean Companies (CCA), enacted in 2013, which includes a provision stating that anti-corruption penalties will take into account internal reporting and transparency standards implemented by targeted legal entities to comply with the CCA (specifically, Article 7th, item VIII, of Law 12,846/2013). Those examples show that transparency is very much at the heart of anti-corruption policy, in the sense that it enables public officials and other parties to access information about corrupt practices in a timely and more precise fashion. This will be relevant for our comments about astroturfing in Chapter 3.

2.3 Legitimacy and public integrity

The link between public integrity and legitimacy is less evident than the link with transparency. Transparency may be viewed as a tool used by anti-corruption policy to promote public integrity, but one would find it difficult to turn even the ideal of public legitimacy, or the legitimacy of public office, into a “tool” of anti-corruption policy. Our claim here instead is that legitimacy is a reason why public integrity is an important goal of anti-corruption policy. If we go back to the republican roots of public integrity, we will find that democratic processes are based on the premise that elected officials will execute the mandates they have been given by the people and for the pursuit of specific public policies (i.e., the electorate of a particular jurisdiction will care about the upkeep of public integrity because it supports the execution of public policies they voted for, which in turn vests those elected officials with legitimacy).³

As a facet of public integrity, legitimacy is a concern of modern anti-corruption laws because it supports the continued existence of democratic States. The Brazilian CCA, for instance, prohibits legal entities from using “any individual or legal entity to conceal or disguise their real interests, or the identity of the beneficiaries of any acts performed,” if those practices offend (i) “the national public estate”, (ii) the principles of public administration, or (iii) the international commitments undertaken by Brazil (pursuant

² The more modern conception of “transparency” defines the trend of opening the administration and its structure to the outside world, and its scope is wider than the scope attributed to “publicity” in the sense that modern administrative powers in republican democracies have *ex ante* adopted transparent policies towards their constituencies, whereas “publicity” would imply an active stance of administrative authorities to “make public” documents and procedures that would be otherwise qualified as “private”. (TABORDA, 2002, p. 257)

³ This notion of legitimacy of republican governments is closely aligned to the definition of “republic” by Thomas Jefferson. In his letter to Samuel Kercheval, in 1816, Jefferson wrote that “Governments are republican only in proportion as they embody the will of their people, and execute it.”

to Article 5th, item III, of Law 12,846/2013). The CCA contains that provision because its drafters intended to reduce or eliminate corrupt practices in Brazil, and the reason behind their intention was of course public integrity; however, a more thorough investigation into that reason will reveal a concern for the legitimacy of public office, or the trust of the electorate that public officials are not being captured by oligarchical interests from Brazil or abroad. That underlying concern will also be relevant for our analysis in Chapter 3 below.

3. Three arguments for using anti-corruption laws against astroturfing

As briefly explained in the Introduction of this paper, astroturfing is the practice of concealed groups (e.g., corporate, political or otherwise) of creating campaigns with the intent to promote an idea or a cause falsely associated with grassroots movements. Though this practice might be viewed as primarily a regulatory, antitrust or consumerist issue from a legal standpoint, it begins to affect public integrity when it produces tangible results in public discourse. The fabricated interest of a constituency to oppose a bill, or favor a tax break, for example, may push legislators to act in a manner they would not otherwise act if that interest had not manifested itself. What complicates this issue even further is that *skillful* astroturfing will not present itself to the public as completely outlandish; unaware of the corporate interests behind it, voters will often agree with the biased and selective claims made by an ad featuring “concerned citizens”, such as the ones opposing the so-called “soda tax” in the astroturf campaign sponsored by the organization Americans against Food Taxes (HUEHNERGARTH, 2012).

We believe anti-corruption laws should apply to prevent cases of astroturfing. True, the typical astroturfing case will not involve the bribery of a public official, but it will subvert public integrity by a lack of transparency and by a threat to the legitimacy of public office. The three arguments that support this claim are the following:

- (i) Astroturfing may not represent corruption via the bribery of public officials, but it represents a corruption of public discourse, by creating an atmosphere of misinformation similar to the environment of “fake news” reported in the last Presidential Elections in the United States (ALCOTT; GENTZKOW, 2017). This atmosphere violates the public estate, composed by public assets, institutional structures, and core public values, chief among them the solidity of democratic processes.
- (ii) When directed to the formation of public policy, astroturfing violates a key principle of Public Administration, namely public integrity. It violates the *transparency* facet of public integrity (given that it manifests the intentions of individual or corporate actors through false “grassroots” movements) and it may disturb the *legitimacy* that justifies concerns for public integrity in the first place (particularly if it motivates voters to act in a way they would not otherwise act if they had not been “persuaded” by its efforts).
- (iii) Finally, astroturfing offends international commitments undertaken by most modern democracies. We refer not only to Article 1st, § 1st, of the OECD Anti-Bribery Convention, but also to the American Convention of Human Rights, which, in its Article 13, § 1st, requires signatory parties

to ensure rights for the pursuit of “information and ideas of all kinds.” Its Article 23, § 1st, requires them to guarantee for their citizens the right to participate in government and public affairs. Those two obligations alone should support the inclusion of astroturfing in the list of actions sanctioned by anti-corruption policy, if not by the textual provisions of current anti-corruption laws.

Those three arguments may not enable the specific terms of existing anti-corruption laws around the world to apply to astroturfing, but they are helpful to establish that anti-corruption policy in modern republican democracies should apply to astroturfing cases. The degree to which existing legislation may encompass astroturfing seems to vary in our view. On one hand, anti-corruption laws such as those in Mexico (PARTIDA; ROSALES, 2018; ROBINSON, 2013, pp. 84-91), though inspired by the same principle outlined in Chapter 1, do not seem broad enough to extend sanctions for typical corruption cases to the subtler, more nuanced cases of astroturfing. However, anti-corruption laws such as those in Ireland and Brazil do seem broad enough to encompass astroturfing. In the case of Ireland, Part 2, 9.1, of the Criminal Justice Corruption Offences Act (CJCOA) lists “creating or using a false document” as a “corruption offence”,⁴ and it defines “document” as a term that includes visual images in 9.2(d).⁵ As mentioned above, the Brazilian statute is an outlier in the sense that it defines as a corrupt practice an act that violates, among others, the “principles of public administration” (and, importantly, the “international commitments undertaken by Brazil,” which include the American Convention of Human Rights). Since one of those principles is the principle of public integrity, given that astroturfing may represent a violation of that public integrity, one could astroturfing as being a corrupt practice sanctioned by the current Brazilian CCA.

Finally, we should explore why those three arguments for the application of anti-corruption laws to astroturfing are necessary at all (i.e., why one should pursue an anti-corruption tool to address the effects of astroturfing for society or government). A concern that some might have in reading those arguments is that astroturfing is not a phenomenon within the field of “corruption” *per se*. This position is not without merit – one could argue that cases of astroturfing should primarily be dealt with by antitrust laws (PENG, 2016, pp. 554-556) or by consumer protection laws (LEISER, 2016). The issue, however, is that those laws do not directly address the effects of astroturfing on *public integrity*. Antitrust laws will deal – broadly speaking – with the market impact of astroturfing, whereas consumer protection laws will prevent that consumers are misled by astroturfing campaigns into buying a particular product (or not buying a competitor’s product), for example. Anticorruption laws, on the other hand, have less to do with market impacts or consumer protection and are more concerned with public integrity. To put it differently, anticorruption laws should apply to those astroturfing campaigns that induce persons in society to act in a manner they would not otherwise act because of a carefully crafted ad, article, tweet, post or YouTube video they saw. In the current era of fast technological development and even faster means of connection with people worldwide, the adverse results of astroturfing can reach not only the

⁴ Pursuant to the Irish statute, “A person who, either directly or indirectly, by himself or herself or with another person, corruptly creates or uses a document, that the person knows or believes to contain a statement which is false or misleading in a material particular, with the intention of inducing another person to do an act in relation to his or her office, employment, position or business to the prejudice of the last-mentioned person or another person shall be guilty of an offence.”

⁵ “In this section, (...) document includes (...) a film, disc, tape or other mechanical or electronic device in which visual images are embodied so as to be capable, with or without the aid of some other mechanical or electronic equipment, of being reproduced from the film, disc, tape or other device, (...)”

people of a specific jurisdiction, but people everywhere, who will serve as the promoters of “astroturf content” in different corners of the globe. That risk is entirely in the field of anti-corruption policy, which is why the three arguments we listed in this Chapter are relevant for the debate of applying anti-corruption laws to curb the effects of astroturfing.

4. Implications for anti-corruption law and policy today

The purpose of this Chapter is to explore the possible implications of our proposition (that astroturfing should be targeted by anti-corruption laws) for anti-corruption law and policy today. We live in times of *fake news* (CARVALHO, 2017, pp. 01-05) and mass usage of social media by people everywhere, a practice that has reduced the scope of influence of traditional news outlets over “audiences” in both Western and Eastern jurisdictions. This is a fertile environment for the operation of astroturfing agents, or individuals and corporations interested in using astroturfing for the furtherance of their own goals. As indicated in the last paragraph of Chapter 3 above, those goals might involve the participation of people from one place or multiple places, depending on their scope.

Not all incidents of astroturfing will incentivize voters to “join” a movement they would otherwise *oppose*. Take the Brazilian case of the astroturf campaign called “*Eu Sou da Lapa*” (translated from Portuguese, “I am from Lapa”). Klabin Segall was a construction company that wanted to launch a new real estate development zone around Lapa, in the city of Rio de Janeiro. Lapa has been a region traditionally associated to an active nightlife, so a PR firm hired by Klabin Segall created a campaign with the title “*Eu Sou da Lapa*” designed to promote the region as a residence-friendly area (PINHEIRO, 2016, pp. 06/07). One could argue that, in that case, though motivated by the desire of Klabin Segall to sell real estate to potential buyers, the astroturfing campaign only tapped into the already existent desire of local residents to support the increase of residential buildings in what had always been a place for pubs and bars in Rio de Janeiro. In addition to that, the end result of the campaign was the sale of apartments to interested buyers, which goes to show that even if those buyers had been unduly harmed by believing that Lapa was turning into a residence-friendly area overnight, that problem would be only within the scope of consumer protection laws, not anti-corruption laws (at least not from the perspective of a threat to *public integrity*).

There are, however, possible astroturfing scenarios that would directly influence the design and even the enforcement of public policies. Consider, for example, a purported “grassroots movement” aimed at incentivizing people to write to their legislators and ask them for more lenient gun control laws. There are many ways of creating that movement using Twitter bots, fake Facebook or YouTube user accounts, and carefully crafted TV ads, which would go a long way in convincing voters of the “urgency” and “relevance” of allowing gun manufacturers (the secret funders of the “grassroots movement” in this first scenario) to sell more guns. Alternatively, consider an astroturf campaign favoring more lenient abortion laws (funded by organizations that benefit financially from offering abortions worldwide), or one that promotes a stricter control of generic, non-branded medications (funded by wealthy pharmaceutical companies). All those astroturfing campaigns tap into existing fears and opinions of voters, but the problems with them, of course, are (i) giving the impression that they represent a majority of people

holding similar views (which may or may not be accurate), and, most importantly, (ii) not disclosing to the public that they are backed by parties that would benefit financially or politically from the decisions made by their target audience.

The legal implications of proposing that *those astroturfing cases* are subject to anti-corruption law and policy are far-reaching and complex. As commented in Chapter 3, this does not seem to be an option for jurisdictions that limit their anti-corruption laws to countering bribery or typical cases of active and passive corruption of public officials. However, for countries that have adopted Clean Companies Acts, whether in name and in substance, like Brazil, or only in substance, like Ireland, that seems to be a possibility in current terms. Applying anti-corruption laws to astroturfing agents, however, is less trivial than it seems. First of all, domestic authorities need to identify the specific link between the astroturfing campaign and the consequences for public integrity – it is not immediately clear that an astroturfing campaign can, in and of itself, cause astroturfing agents to be subject to sanctions if its effects have not yet led voters to effect changes on public policy via their elected representatives. Second, a question could arise as to whether the identification of astroturfing agents in limited spaces and platforms is sufficient to prevent them from being subject to anti-corruption laws applied to astroturfing (e.g., if there is some identification, but it is not immediately visible to the audience, can that practice be appropriately labelled as astroturfing?). Finally, if the idea of anti-corruption laws is to prevent or punish corrupt practices from both private and public agents, is it fair to consider a sanction against astroturfing that bars a corporate agent from marketing their products or services in specific media for a period of time? Would that be an excessive penalty, or would that depend on the extent of the “damage” caused by their astroturfing campaign? Consider again one of the astroturfing campaigns mentioned earlier in this Chapter, the one funded by gun manufacturers – would the penalty in that case vary depending on whether more lenient gun laws were effectively put in place, and whether those laws contributed to an increase in murder victims in a particular city, state or country? Because cases of astroturfing are not typically found in anti-corruption studies, the answers to those questions will rely on the individual application of anti-corruption law and policy by interested jurisdictions around the world.

5. Conclusion

As we stated in Introduction, astroturfing refers to campaigns initiated by concealed groups with the intent to promote an idea or a cause falsely associated with grassroots movements. However, as shown in Chapters 3 and 4 above, it becomes a practice relevant for anti-corruption laws when it refers to “business entities [that] gain access to [lawmakers] through front groups that obscure the identity of the profit-seeking enterprise that is really the relevant actor.” (DURKEE, 2017, p. 229). Those entities, which we have referred to in this paper as “astroturfing agents,” may very well subvert a key principle of Public Administration, namely *public integrity*, not only by means of a lack of transparency, but by an attack to the legitimacy of modern republican democracies themselves. Our interest with this paper was to show that there are strong arguments in favor of applying anti-corruption law and policy to address the harmful effects of astroturfing worldwide, and that those arguments are necessary to implement anti-corruption tools in a field that has been so far dominated by the studies of antitrust and consumer protection. We

believe that the implementation of those tools will help bridge a gap in the legal protection of public integrity that is currently being exploited by those astroturfing agents, with deleterious consequences for the design of public policy and the regular exercise of democratic functions everywhere.

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