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## **Corruption in unlikely places: the case of Denmark seen through Luhmann's system theory**

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### **Abstract**

Corruption, defined as the “misuse of public position for private gain”, represents an act of deviance from official duties in the interest of self-enrichment. Denmark is ranked as one of the least corrupt countries in the world. Danish court records, however, show that corruption cases have appeared in the 21st century. Using Luhmann's systems theory and Foucault's method of genealogy, this article asks how this has happened. I argue that understanding corruption in Denmark may go back to changes in public administration ideas and practices since the 1990. New Public Management reform has increased the complexity in public administration where meaning horizons of communication related to different functional systems – especially the sub-systems of law and economy – clashes. I theorise and illustrate using court cases how the coexistence of different codes creates an environment for public employees that in some circumstances – however still rare – result in corruption.

### **Key words**

Corruption; system theory; genealogy; public administration reform; Denmark

### **Resumen**

La corrupción, definida como el “uso indebido de un cargo público en beneficio propio”, representa un acto de desviación de los deberes oficiales en aras del enriquecimiento propio. Dinamarca es uno de los países menos corruptos del mundo. Sin embargo, los registros de los tribunales daneses muestran que en el siglo XXI han

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aparecido casos de corrupción. Utilizando la teoría de sistemas de Luhmann y el método de genealogía de Foucault, este artículo se pregunta cómo ha sucedido esto. Sostengo que la comprensión de la corrupción en Dinamarca puede remontarse a los cambios en las ideas y prácticas de la administración pública desde 1990. La reforma de la Nueva Gestión Pública ha aumentado la complejidad en la administración pública, donde chocan los horizontes de significado de la comunicación relacionados con diferentes sistemas funcionales, especialmente los subsistemas de la ley y la economía. Teorizo e ilustro mediante casos judiciales cómo la coexistencia de diferentes códigos crea un entorno para los empleados públicos que en algunas circunstancias –aunque todavía raras– desemboca en corrupción.

### **Palabras clave**

Corrupción; teoría de sistemas; genealogía; reforma de la administración pública; Dinamarca

## Table of contents

1. Introduction .....	1275
2. Corruption, systems theory's principle of differentiations, and public administration.....	1276
2.1. Corruption – a Luhmannian perspective .....	1277
2.2. How Denmark became Denmark.....	1279
2.3. Public administration reform and corruption – a linkage between different functional sub-systems.....	1280
2.4. Public administration reform and corruption .....	1281
3. Method.....	1285
4. Empirical illustrations .....	1287
4.1. Corruption – a view from the legal system.....	1288
4.2. Corruption – the accused's justifications.....	1289
5. Concluding reflections.....	1290
References.....	1291
References to court cases in chronologic order .....	1294

## 1. Introduction

Corruption is a deviation from duty and expectations. It occurs when a public employee misuses power entrusted to them by violating the impartiality principle of public administration to achieve a private gain (Kurer 2005, 230). Just as it takes two to tango, corruption occurs in a voluntary relation between two parts (Graeff 2010). But in contrast to other criminal offences, corruption is a crime not easily uncovered because both parts of the social relation are made better off. While corruption harms society at large in terms of welfare loss and mistrust in democracy and the authorities (Treisman 2000), and is a tax on less well-off individuals and groups (Holmberg and Rothstein 2011), corruption rarely harms concrete individuals creating a collective action problem where it is not rational for anybody to expose the wrongdoing (Ostrom 1998). In this article, I take a Luhmannian systems theory perspective on corruption and thereby go beyond the assumption that individual behaviour is guided by rational choice calculations or trapped in collective action dilemmas by asking not *why* but *how* individuals become vulnerable to corruption in public administration.

Luhmann does not explicitly refer to corruption as a social phenomenon, which is one reason why it is interesting to work with corruption from this perspective. Petra Hiller explores corruption from a systems theory perspective, contending that corruption is observed when the meaning horizons of communication from different functional contexts are linked, and when these linkages are judged to be morally wrong (Hiller 2010, 81). Hiller finds that the use of personal networks in public organisations, which has increased following the development of liberal and neo-corporatist states, represents a linkage technique that breaks down functional differentiation and increases the risk and/or opportunity for corruption. Empirically, Hiller's reflection focuses on political corruption and does not address the issue of administrative corruption. Building on insights from Hiller, I explore how public administration reforms are paths to understanding the development of corruption in countries that have long been perceived as almost corruption-free zones. In the theory section, I argue that new public management reforms introduced worldwide in the 1990s as a complementary management idea to traditional Weberian command-and-control system created competing communication horizons that question the boundary between acceptable and not acceptable gift-taking and -giving.

Corruption is theoretically defined as a deviation from expected behaviour for private gain. However, the concrete understanding of corrupt behaviour is not uniformly agreed upon. What is corruption and deviant behaviour to some may be not only acceptable but even expected by others (de Sousa and Moriconi 2013). Social or cultural expectations of corrupt behaviour appear more often in countries going through societal transformations, for example from a traditional to a modern society (Huntington 1968) or from Soviet socialism to capitalism (Karklins 2002).

To illustrate my claim regarding competing communication horizons, I choose Denmark as the case. Denmark is, according to Transparency International's surveys, perceived to be almost corruption-free.<sup>1</sup> By studying corruption in a low-corruption country, the aim is to show how changed ideas about public administration may make a difference to

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<sup>1</sup> See Transparency International: <https://www.transparency.org/en/cpi/2023>

how public employees understand corrupt versus non-corrupt behaviour. The Danish case is studied through court cases. Corruption is covered under criminal laws articles 144 and 122, which criminalise direct and indirect bribery. While court cases dealing with corruption had been almost non-existent since the Second World War, cases began to appear in court roughly 15 years ago. The simultaneous change in public administration ideas through NPM reforms and an increase in corruption cases brought before the courts makes it possible to see *how* ideas may contribute to a change in behaviour. The argument is built upon an analysis of, first, the court's arguments through the distinction legal/illegal, and second, the accused's justifications of the facts through references to norms and communication based on the economic system's distinction between pay/non-pay and efficient/inefficient.

The aim of this article is to contribute to a better understanding of *how* corrupt behaviour occurs. This is done by looking at corruption in light of Luhmann's systems theory and by using Foucault's method of genealogy which attempts to reveal the blocks of historical knowledge which are present but disguised (Foucault 1980, 82). As such, genealogy attempts to emancipate historical knowledge from the coercive power of the existing order which in low corrupt countries consist of a general belief that corruption does not occur. Unfolding corruption through court cases in the cultural context of low-corruption countries may through its historic genealogy reveal its contingent and contestable character. The research question is: How might public administration reforms challenge a non-corrupt public administration?

The paper is structured in four sections. The first section discusses the concept of corruption in public administration. Using Luhmann's principle of distinction, it argues that administrative reforms have challenged administrative practices and thereby increased the risk of corrupt behaviour. The second section outlines Foucault's method of genealogy and discusses the value of least likely cases. The third section gives empirical illustrations using court decisions as second-order observations as well and first-order observations justifying accusations of corruption in self-defence. The fourth section summarises up in a discussion about how this tack on understanding of corruption may contribute to the debate about efficient anti-corruption measures.

## **2. Corruption, systems theory's principle of differentiations, and public administration**

The history of corruption demonstrates a common contempt of persons who use their position to achieve undue personal favours and benefits. Although there is a statistical correlation between low corruption and Protestantism (Treisman 2000), corruption is condemned by every religion in the world (Osborne 1997). This does not mean that everyone agrees about what corruption is; it is often a case of "you know it when you see it". This implies that there are many grey areas in which corruption is accepted and even expected (de Souza and Moriconi 2013). This section starts by discussing the concept of corruption, giving an overview of different theoretical and empirical perspectives on corruption research. Then follows my argument that corruption understood in terms of functional systems differentiation and clashes of binary codes within organisations contributes to understanding how public administration reforms challenge a non-corrupt public administration.

### 2.1. Corruption – a Luhmannian perspective

The word “corruption” comes from the Latin *corrumpere*, meaning to destroy, damage, or infect. That is, when someone is corrupted, for example an employee in an organisation, the organisation’s order is destroyed becomes a mutation of what it is meant to be. The scholarly definition of corruption dates to Joseph S. Nye (1967). He stated that corruption is “behaviour which deviates from the formal duties of a public role because of private-regarding (personal, close family, private clique) pecuniary or status gains” (Nye 1967, 417). Looking more closely at the concept, the core to understanding corruption is the notion of two persons exchanging a gift. Marcel Mauss’ anthropological studies of pre-modern societies suggest that exchanging gifts creates a social bond between two parties, as well as an obligation of reciprocity (Mauss 1925/2016). Mauss’ studies contend that “there is no such thing as a free gift”, implying that reciprocity is a universal norm connected to gift-giving. Thus, also in modern society when a public employee is offered a gift the gift-giver expects to receive a favour in return. This favour may be something that the gift-giver is not entitled to, but could also be a matter of receiving, for example, a permit or surgery ahead of time (popularly speaking, jumping the queue). In both cases, the public employee’s favouritism breaks with the norm of the public administration’s impartiality and equal treatment of citizens.

The question is why public employees choose to accept bribes and bend their decisions toward private interests. Traditionally the causes of corruption – why public employees choose to accept bribes and bend their decisions – are traditionally seen as either (a lack of) personal moral standards or with customs layered in local culture. The last decades of corruption research, however, has turned the question into one of how structures and institutions create extraordinary temptations to accept bribes and bend the rules (Caiden and Caiden 1977, 302). In the following, I deal with the two approaches in turn.

The issue of morality is – when it comes to corruption – not trivial. Corruption research demonstrates that the negative consequences of corruption for governments and communities are plentiful. At a global and structural level, statistics show that high levels of corruption are related to, inter alia, low growth, low trust, weak institutions, poverty, and inequality (Treisman 2000, Serritzlew *et al.* 2014). Moreover, corruption distorts policy decisions in favour of capital-intensive spending, and diverts resources from social and developmental priorities (Bardhan 1997, Holmberg and Rothstein 2011). From a normative point of view, these negative consequences make corruption morally wrong.

In contrast to studies demonstrating the negative consequences of corruption, other studies point at corruption’s positive effect. To reiterate a quote oft cited: “In terms of economic growth, the only thing worse than a society with a rigid, overcentralized, dishonest bureaucracy is one with a rigid, overcentralized, honest bureaucracy” (Huntington 1968, 386). The argument is that it is not morally wrong to accept a bribe and bend the rules when it enhances economic growth, an argument also referred to as “the helping hand”-thesis. In line with this argument, corruption may be accepted if citizens find that public employees or politicians granting someone preferential treatment are “bringing home the bacon”, that is when the local economy also benefits (Kunicova and Rose-Ackermann 2005, de Sousa and Moriconi 2013). However, even if bending rules and accepting corruption may be a key to adjusting rules and standards

to individual needs and hence making more effective decisions, the overall negative effect remains, when public employees take their share, less revenue is collected, and more money is paid for goods and services than needed.

The institutional approach to causes of corruption goes back to Weber's work on bureaucratic organisations (Weber 1968). Weber viewed public administrations as bureaucratic organisations whose actions are based on rational or legal authority, and which are thereby able to fulfil the ends that they were set up to achieve. Weber implicitly assumed a link between rationality and hierarchy in the sense that authorities within the organisation issue commands that will lead to fulfilling the organisation's goals and that these commands are loyally executed by the lower ranks in the organisation.

Luhmann argues that Weber's hierarchical model of bureaucratic organisations is challenged by a mismatch between formal rules and informal practices as observed in empirical findings (Luhmann 1982, 46). Moreover, Weber's command-and-control model has been challenged by the principal-agent perspective, in which asymmetrical information provides the subordinate agent with greater knowledge of organisational practices and a direct, personal relation with the organisation's clients. Adding to this, Brans and Rossbach (1997, 419f) points to Luhmann's observation that Weber overlooks that public employees rarely have one single controller. That is, the principal in the principal-agent model may consist of several "principals" and thus more than one perspective on how the agent's behaviour is esteemed. Corruption occurs when the agent uses these insights for personal gain at the expense of organisational goals (Klitgaard 1988, Karklins 2002, Graeff 2010).

Elaborating on the institutional perspective, Robert Klitgaard suggests that corruption can be seen as a formula in which corruption equals the degree of the agent's monopoly over decisions plus the degree of discretion the agent has in making decisions minus the degree of control (Klitgaard 1988, 75). First, control and discretion over decision-making are essential elements which constitute the asymmetrical relation between superior and subordinate employees. Second, control and lack thereof originate either directly from the organisational structure or work indirectly through the agent's own moral commitment to following organisational goals as well as general ethical codes of conduct related to principles of impartiality and equal treatment. This way, the above-mentioned importance of morality is reintroduced into the institutional approach (see also Ostrom 1998). The impact of ethics as an indirect control mechanism is also substantiated by Paternoster and Simpson (1996), who find that a person's moral code is an obstacle for committing corporate crime. However, when corruption is basically seen in the rational choice perspective, deviation from the norm of impartiality prevails because effective control mechanisms do not exist (Graeff 2010).

In the beginning of the 2010s, attention to the failure of anti-corruption policies challenged the principal-agent model, arguing that emphasising the principal's ability to control the agent fails to acknowledge that in many countries and organisations, no one is willing to act as the "principal" and effectively control the agent (Persson *et al.* 2013). The unwillingness to act as the moral principal may be explained if corruption is viewed from a collective action perspective. In this perspective, a corruption-free society is a common good which is to the benefit of all individuals in society. As a non-exclusive

good from which everybody will benefit, corruption is a first-order collective problem in the face of which it is individually rational to act corruptly. At the same time, as noted above, corruption also activates a second-order collective problem because it is not rational for anybody to invest energy or resources to control and combat corruption (Ostrom 1998). In this way, corruption becomes a vicious circle in which there are no incentives to refrain from taking a bribe because everybody else takes them, and because bribe-taking is a shared expectation (Bates 1988, Rothstein 2011).

## 2.2. *How Denmark became Denmark*

Principal-agent theory tends to end with organisations trapped in a situation where corruption is the norm of appropriate behaviour shared among both high- and low-ranking employees. If this is the case, it is a puzzle that, according to Transparency International's corruption perception survey (various years), some countries experience less corruption than others. In other words, how have some countries succeeded in combating corrupt behaviour?

The separation of public coffers and the private purse in the 17<sup>th</sup> century is thought to have played a strong role in how the Danish bureaucracy coped with corruption (Jensen 2013, Mungiu-Pippidi 2015). Historically, this implied that in managing the crown administration, the king replaced the traditional aristocracy with a new group of bourgeois bureaucrats. This new group of non-noble civil servants was sworn in directly by the king. Historically the distinction public/private is important, pointing to private-regarding cultures as a justification for self-enrichment and a pathway to corruption. In 1676, Danish law criminalised giving and accepting any form of gifts by persons entrusted with a position by the Danish king. Making self-enrichment – corruption – a criminal offence for civil servants presumably had a discouraging effect on civil servants, who were economically dependent on the income from their position. These higher moral standards were disrupted through the social and moral changes following the era of Enlightenment, where moral judgement became essentially contestable, despite being spoken of *as if* impersonal standards offered a rational solution to moral disagreement (MacIntyre 1981/2010; x).

On the other hand, corruption in the public administration, did not disappear. Jensen (2013) identifies three pathologies in the early state administration. First, the public coffers and the private wallet were not separated in practice. Second, public servants did not have secure and fixed salaries, nor did they work full-time for the state. This meant that they depended on extra earnings, and private gifts were an obvious source. Finally, public servants were not subject to systematic control and oversight, so accepting gifts was not especially risky.

During the 19<sup>th</sup> century, the situation in public administration changed. In 1821, a formal education in law was made mandatory for those serving in the public administration. This step enhanced the moral and ethical commitment to the universal enforcement of law, using the distinction of the legal subsystem as the code in public administration. Jobs and promotions in the public administration were increasingly granted based on professional merit, and once hired, civil servants had a secure position. Their salaries were also reasonable. At the same time, more control and oversight were introduced, and if caught, the sanctions included imprisonment. Aside from increasing



the risk of getting caught, there was now more at stake in choosing to accept a bribe, both in terms of losing one's job and income and in facing social stigma and loss of self-esteem as a result of violating the norms imparted through formal education. Thus, historically the distinction public/private is also important. This said that the importance of meritocracy and thereby a higher moral standard for public employees is essential for minimising corruption. Furthermore, this claim is substantiated in research on modern public administration, finding meritocracy to be the most important factor correlated with low corruption (Dahlström *et al.* 2011).

Based on historical research on Swedish public administration, Bo Rothstein (2011) argues that the introduction of several significant reforms in the Swedish public administration within a relatively short period of time managed to create a "big bang" and thus became a norm game changer. Rothstein speculates that a similar process of extensive and comprehensive reforms only occurs if a country faces an extreme external threat or is hit by considerable economic transformations. The idea is that corruption is only overcome if institutions are designed such that everybody trusts that everybody else is refraining from accepting bribes and thereby enriching themselves. The collective problem perspective directs the focus towards cultural and normative expectations as the driving force behind corruption and away from the focus on institutions. However, the cultural as well as the institutional perspective both assume that individual behaviour is based on rational choices that can be calculated according to costs and benefits. In the following, I suggest that taking a systems theory perspective on corruption allows us to go beyond these assumptions and look into how behaviour is situated in a concrete culture of communication.

### *2.3. Public administration reform and corruption – a linkage between different functional sub-systems*

Luhmann's theory of social systems reduces the complexity of society through concepts of functional sub-system, autopoiesis, differentiation through binary codes, and structural coupling. First, the division of society in functional sub-systems implies that each sub-system fulfils its own unique function that cannot be fulfilled by any other sub-system. Second, autopoiesis implies that each sub-system is operationally closed, meaning that "everything that is used as a unit by the system is produced as a unit by the system itself" (Luhmann 1990, 3). Third, each sub-system differentiates against other sub-systems through their specific binary code for communication. For example, and as mentioned above, the system of law uses the code legal/illegal while the economic system uses the code have/have not – or pay/ no pay used in this article. Fourth, although each sub-system is operationally closed it is open to its environment and thus to disturbances made by other sub-systems. Being both closed and open, functional sub-systems collaborate through structural coupling in which systems involved in a relationship take the existence of the other system for granted and can thus concentrate on its own tasks (Brans and Rossbach 1997, 426).

Hiller (2010) digs into the substance of corruption and argues that corruption is an observation that includes a societal and an organisational level. At the societal level, communication is structured according to specific codes associated with different functional systems, for example law (legal/illegal), politics (authority/no authority), and

economics (have/have not or pay/no pay). Paying attention to the above-mentioned principal-agent theory, I add a code of obedience/disobedience to the layer of public administration codes. The organisational level differs from the level of society. Organisations consist of people, groups, and networks, and are thus capable of linking different meaning contexts. As Hiller writes,

When such linkages of different meaning structures occur, then the logic of functional differentiation founders at the level of organisations. (...) it thus becomes evident that the logic of the functional system to which an organisation is ascribed is being corrupted at the organisational level by another value. (Hiller 2010, 81)

This observation of linkages is a “first observation”, bearing with it neither positive nor negative connotations. This implies a second step: for an act to be an act of corruption, it requires that the structural linkages are evaluated and labelled as acceptable or unacceptable in societal communication. This point is especially important when it comes to corruption, as corrupt behaviour can be esteemed differently according to different functional systems. Writing about ecological economics and perspectives for sustainability, Roth and Valentinov (2020) argue that different social subsystems have different views of their environment and thus employ different observational perspectives on sustainability risks. Transferred to the issue of corruption, different observational perspectives may result in the same act being perceived as corrupt by some and not by others.

Laursen *et al.* point out that using systems theory shapes our understanding of “how the same can be different” (2022, p. 1656). The basis of observation and communication is that the act of gift-giving and -taking occurs without normative assumptions or moral statements about whether it is good or bad, but rather in light of how it is observed and how the observation is communicated in terms of deviance. Public administrations are all similar in the sense that they deal with issues that are public as opposed to private, but at the same time they are different with respect to the concrete issues they deal with – for example health policy or environmental policy – as well as in terms of the tasks they perform, for example policing or being in charge of purchasing. These dual functions of public administrations create a potential code clash. First, a public employee may face a dilemma in deciding between following formal legal procedures and public administrative ethics of treating all cases equally versus giving preferential treatment to some and thereby enhancing organisational goal achievement in terms of measurable outcome. This dilemma is not hypothetical. As such, the situation does not reflect corruption narrowly defined as a relation between bribe-giver and -taker. Rather the dilemma creates a slope along which ethical judgement may drift and opens a Pandora’s box with regard to corruption. My argument is that looking into possible code clashes in public administration is a way to understand how corruption may occur in low-corruption cultures.

#### *2.4. Public administration reform and corruption*

In the following, I elaborate on the claim that modern public administration follows a complex system which uses distinctions related to binary codes associated with several functional systems. In public administrations, Luhmann distinguishes between conditional programmes based on the codes legal/illegal and goal programmes, which have more in common with the political system’s codes of authority/no authority in

terms of the definition of what is right or wrong (Brans and Rossbach 1997, 423–424). The complexity of public administrations may be understood according to Luhmann's description of code clashes and operative couplings. Code clashes describe a situation in which an observer perceives an overlap of binary codes, while operative couplings describe a situation in which different codes coexist at the moment of an operation, thereafter to part (Luhmann 2004, 72). Corruption occurs in situations when different binary codes either overlap as such or if they operatively couple in a given situation. In activating two different programmes – conditional and goal-orientated programmes – an act may be corrupt in the sense that it deviates from legal acts, but it may simultaneously fulfil political goals and thus not be a deviation. Deciding whether an act deviates from formal duties has become even more complex since the advent of new public management and new public governance reforms.

NPM reforms became the new craze in the 1990s, when a neo-liberal ideology swept the world. NPM addresses the management of public administration and does not distinguish between conditional and goal programs. In Denmark as well as in many other countries, Australia and New Zealand became raw models for public administrative reforms following the NPM model (Nunberg 2000). The basic idea was that management models and organisational structures from the private sector were transferable to public organisations. The expectation was an increase in cost effectiveness and productivity in a public sector which was seen as inefficient (Christensen and Lægreid 2001). NPM reforms communicated a change in public administrative narratives. Instead of centring on uniform and equal public provision of services – the basic tradition in the Scandinavian welfare model – NPM advocated plurality, with private provision of services and a focus on individualisation (Siltala 2013, 472).

The NPM model implied that performance targets were established in advance and that these targets constituted the main evaluation criteria for the day-to-day work carried out by public employees, for example indicators such as hospital waiting lists, school exam results, or crime clearance rates (Siltala 2013). These indicators set the criteria for resource allocations and for individual rewards in terms of additional performance pay. NPM also had an impact on recruitment patterns, and temporary employment became more common, in contrast to secure lifelong positions. In general, and using the principal-agent perspective described above, NPM emphasised results more than procedures, advocating that principals could steer agents through contracts defined by a fixed, predetermined output.

Translating the NPM model into systems theory, NPM embraces the logics which are fundamental to the economy as a functional subsystem. It communicates an orientation towards economic codes making a link between the distinction pay/no pay and efficient/inefficient. To the public employee this implies that in addition to legal/illegal, it becomes legitimate to increase their individual income if acting efficiently for example by using pay-for-performance schemes. This change implied that public service efficiency and thus the distribution of individual economic incentives was distributed according to measurable outcomes. Experimental research has shown that the introduction of NPM models, especially when concerning payment, has a negative impact on public employees' motivation to act in the interest of public service (Bellé 2015). Economic rewards are detrimental to their intended purpose – that is, to make

employees more efficient in reaching the organisation's goal – because employees perceive the rewards as a control mechanism, which offends their intrinsic motivation to perform (Ostrom 2000).

Later public administration reforms introduced the new public governance (NPG) perspective. NPG was an answer to the quest for more inclusive democracy, arguing that decisions had to be made by those directly influenced by them. I turn later to the pitfalls of NPG.

Figure 1 illustrates the clash between binary codes active in public administrations' decision-making on two dimensions. The first dimension is access – that is, who and how many people are supposed to be included when public employees make decisions. The second dimension is legitimate interests – that is, which interest should public employees serve.

TABLE 1

Access	Open – MAJORITY/MINORITY	Restricted – IN/OUT
Legitimate interests		
Private interest	<b>II THE MARKET</b>  Profit/loss Efficient/inefficient	<b>III PUBLIC OPINION</b>  Member/non-member (for example, interest organisations, private providers of public services)
Public interest	<b>I THE STATE</b> Equality, objectivity  Legal/illegal (Formal procedure/informal procedure)	<b>IV CLOSED, EMOTIONAL            COMMUNITIES</b>  Family/not-family

**Table 1. Access and legitimate interests in public administration.**  
 (Source: Elaborated from Rothstein and Teorell 2008, 175.)

Quadrant I – the combination of open access and the public interest as the legitimate one – characterises the state. The state public administration is not supposed to discriminate between citizens, and in performing its public duty the administration is expected to act according to the public interest as formulated through law. It largely follows Weberian traditions and places public administration as a subsystem to administrative law, restricting or supporting behaviour (Luhmann 2004, 151). Corruption in this subsystem is conceptualised as a deviation from public-regarding and open justifications or, following Kurer, corruption essentially occurs when a public employee violates the impartiality principle of public administration to achieve a private gain (Kurer 2005, 230).

Quadrant II – the combination of open access and private interest – characterises the market as we know it in competitive liberal market economies. NPM builds on these ideas, as described above. Like corruption in public administration, corruption in private organisations is defined as misdirection of organisational resources for personal benefit

at the cost of the company (Pinto *et al.* 2008). Conventional thinking contends that corruption cannot be substantiated in market economies because market competition builds on the principle of self-enrichment, gain and loss. This may be the case if the private entity of the market consists of small firms. This, however, is not the case when the private entities become huge organisations, which is the norm. Moreover, free market competition is believed to be a sufficient mechanism for penalising inefficient company behaviour.

Corruption in the private sector is a type of deviant behaviour that conflicts with norms related to market competition; that is, the principle of open access and the pursuit of legitimate private interests. The principle of open access, for example, is jeopardised when an employee grants one supplier preferential access to sell its product to his company in exchange for kickbacks. In this example, personal gain comes with the risk that the company buys goods at a higher price, rather than from more competitive suppliers (Argandoña 2003). The legitimate private interest in the private sector is also jeopardised in this case because the relevant interest is not that of the private employee, but that of the private company – the company owners or shareholders. Research shows that corrupt acts in the private sector are often justified and rationalised through arguments that no harm has been done to the company or that it is common business practice (Rabl and Kühlmann 2009). This corruption justification was confirmed in a study comparing Danish and Estonian private companies (Johannsen *et al.* 2016).

Quadrant III – the combination where the public administration acknowledges private interest as a legitimate interest and combines it with restricted access to decision-making – resembles the ideas of new public governance. NPG developed with the aim of enhancing flexibility and responsiveness to citizens (see for example Behn 1998, Bryer 2007). NPG refers to Günter Teubner's reflexive law and Habermasian deliberation and has developed as a new way of linking citizens' interests and public administration decision-making. The combination may also reflect the concept of citizen co-production.

With respect to corruption risk, the problem is that access is restricted. When stakeholders are invited into the operating room of public decision-making, it opens a Pandora's box of exchanges of favours between private contractors and public employees. The Swedish National Anti-Corruption Unit, for instance, has reported such cases (Andersson and Erlingsson 2012, 39 ff). The Danish court cases used as illustrations for this study, however, do not directly illustrate this logic.

Finally, Quadrant IV combines restricted access with public-oriented legitimate interests. This includes cases in which public employees' decisions are oriented towards the public interest, but where they choose among members of a closed emotional community of friends and family. The concept of a closed family network introduces the distinction between family and not-family. Nepotism – that is, favouring one's friends and relatives when placing an order or filling a job vacancy – is considered wrong in public administration. The reason can be illustrated by contrasting the logic of public administration with that of the private sector, where nepotism is largely accepted (Osborne 1997, 33). In general, nepotism comes with the risk that the best person available for the job is not chosen. Thus, granting favours to friends and relatives is a way public employees use public resources for personal need. In the private sector, the situation is different because ownership rights make one free to choose whom to employ

in their own company. The difference is that in the private sector, failure or shirking will be met with strong disapproval by the family, while in the public sector if your job depends on “who you know” or “what you pay” as a bribe, then the consequences of laziness or incompetence are less likely to be sanctioned. Note, however, that in some instances private companies may also view nepotism as wrong, as the distance between the economic owners and company decision makers resembles the situation in the public sector, bearing with it the same risk of choosing a less capable person for a position.

Nepotism is closely linked to corruption, although the private gain that a public employee receives is not material. Hiring and promoting relatives and friends is linked to family and friendship expectations. In this sense, interests are narrower than the state’s public and general interest. To the public employee, however, the legitimate interest is diverted towards his community instead of the public. Thus, interests are not completely self-regarding, but other-regarding, giving advantage to one’s emotional community.

Corruption as a deviation from the binary code legal/illegal due to irritations from the market – profit and efficiency/loss and inefficiency (NPM) – and from group interest – privileged/not privileged treatment of ingroup members (NPG and nepotism) – is a communication about the meaning of public administration. I now turn to the methodology.

### 3. Method

The question I ask is *how* public employees become vulnerable to corruption. To answer the question, the previous section outlined a systems theoretical approach to corruption. In this section, I turn to Foucault’s method of genealogy and relate this to Luhmann’s systems theory. Next, I outline the research technique, featuring Denmark as a least likely case. Finally, I discuss the data I use for the analysis.

Foucault’s method of genealogy opposes the search for causal origins of social phenomena. This method stands in contrast to the standard ontological conceptualisation of corruption as an act that “is” or that has a specific cause, either in individual morality or in a context where structures and institutions provide an individual with extraordinary temptations to act corruptly (for example Rothstein 2001, Persson *et al.* 2013, Serritzlew *et al.* 2014, Mungiu-Pippidi 2015). Genealogy reveals the blocks of historical knowledge which are disguised in the present theoretical, unitary, formal, and scientific discourse (Foucault 1980, 82 and 85). Foucault argues that genealogical knowledge gives attention to “local, discontinuous, disqualified, illegitimate knowledge against the claims of a unitary body of theory which would filter, hierarchise and order them in the name of some true knowledge and some arbitrary idea of what constitutes a science and its objects” (Foucault 1980, 83). Foucault further claims that the concern of genealogy is to reveal the effects of the power that is linked to an institution and the functioning of an organised scientific discourse in modern society. Thus, looking at *how* public employees become vulnerable to corruption from the angle of a genealogical method is an attempt to go beyond the scholarly understanding of the concept and disentangle how corruption appears in non-corrupt cultures.

The research technique used corresponds with a *least likely case selection technique*. A least likely case selection poses that if a given phenomenon is theoretically and empirically

unlikely to be observed, and the phenomenon nevertheless is observed, it throws light on aspects of the phenomenon that conventional knowledge cannot explain, and suggests that conventional knowledge should therefore be revised to better understand the phenomenon. Corruption research utilises the narrative of “Getting to Denmark”, invoking an almost mythological country, free from corruption and blessed by prosperity equally distributed among well-informed and democratic citizens (Mungiu-Pippidi 2015, 70f). On the one hand, Denmark enjoys characteristics which statistically go hand in hand with low corruption, such as a long historical period of democracy, high trust, and high growth with low dependency on natural resources (Treisman 2000). On the other hand, Denmark and the other Nordic countries have very large public sectors, interventionist governments, and large bureaucracies which enjoy wide discretionary powers over many kinds of regulations – in other words, countries whose public administrations, according to Klitgaard (1988), possess characteristics which theoretically enhance corrupt behaviour. As a least likely case, Denmark is thus suitable for a discussion of how corrupt behaviour occurs in a culture where it is not supposed to happen.

The Danish public administration is also a case where reforms following NPM and NPG have been widespread since the 1990s. Foucault’s genealogy is strongly attached to the method of archaeology, which, according to Garland (2014, 369), is a method that reveals historically distinct layers, each exhibiting its own structured pattern of statements – its own order of discourse – which constitute the present. It is accordingly well suited for uncovering how corruption has been reinvented through gradual changes in the public administration discourse. The archaeological method has structuralist overtones and stresses discontinuity. Its development into genealogy, however, makes the method more concerned with using historical research to “disturb contemporary conceptions and help bring about change” (Garland 2014, 371). Thus, while *archaeology* wants to show structural order, structural differences, and their discontinuities, *genealogy* seeks to show “descent” and “emergence” and how the contingencies of these processes continue to shape the present. Genealogy thereby takes a pronounced critical view on contemporary practices and institutions, making it suitable for going beyond causality to look at how public administration ideas, embodied in evolving administrative reforms, may challenge the binary code of the functional system of law which traditionally dominated public administration.

I now turn to the question of data. I use data from Danish court cases dealing with corruption. Collecting the data, I searched in domstol.dk and Karnov.com for the post-Second World War period. My reliance on court cases implies one limitation and a warning. First, using Danish court cases limits my research to the influence of *new public management*, because there are no Danish court cases involving corruption in the form expected from the introduction of *new public governance* ideas in the public sector. That new public governance ideas come with similar changes in communication, however, is substantiated in the Swedish case referred to in the theory section. Second, the use of court cases in corruption research comes with the warning that they reveal only the tip of the iceberg, and that this method measures the effectiveness of the investigative system rather than the frequency of corruption. It is also argued that the increase in court cases is only a sign of greater attention to corruption. Both concerns are valid. However, I am not interested in the frequency of corruption, but instead aim to uncover local and

hidden knowledge about corruption. Theoretically I ask whether the change in public administration discourses which took place in the 1990s and 2000s increased the risk of corruption. My argument is that each reform has its own distinctive structure in Foucault's term, an "episteme" that governs how public administrators think, how statements are made, and how discourse is formed, and that these different layers construct a world view that constitutes the risk that individuals may accept bribes. The aim is to demonstrate that changes in public administration discourse contribute to understanding *how* public administration employees have become more susceptible to temptations for self-enrichment provided by bribe-givers. Concretely, Foucault's method of genealogy is a customised methodology designed to address a theoretically defined problem from a strategic angle of inquiry (Garland 2014, 366).

In the theory section, I argue in accordance with Hiller that corruption occurs when binary codes from different functional systems are linked and when the act is deemed to be improper. I find court cases to be suitable data. First, court cases reveal how and whether an act is deemed illegal or not, which is the first criterion of corruption. Second, the defence reveals how the act is seen from a different perspective. Thus, court cases offer an opportunity to grasp both sides of a communication situation. Moreover, the fact that the cases include both convictions and acquittals make them useful for investigating how courts and the accused make distinctions between different codes and when and whether codes are linked in the arguments.

#### 4. Empirical illustrations

As argued above, the Danish history of corruption shows that Denmark managed to cope with corruption in the 17<sup>th</sup> century. With a reasonably honest bureaucratic public administration in place, the development of the welfare state in Denmark created new challenges. Based on the principle of universalism, the Danish welfare state meant an increase in citizens' rights and the state's responsibilities as well as intensive legal regulation. This combination of rights, obligations, and regulations increased opportunities for self-enrichment, recalling Klitgaard's equation that along with control, corruption is a function of the public employee's monopoly and discretion over decision-making.

Turning to Denmark today, court cases begin to appear in the 21<sup>st</sup> century. The two earliest cases took place in 1951 and were closely linked to the specific post-war context (UfR 1951.1020H and U.1951.1018/2H). I do also find a few cases of attempt to bribe police officers, but these cases also fall out the interest of this article (U.1975.671/1Ø; U.2007.1680/2 Ø TfK2007.420; TfK2017.76/2). The oldest case dealing with corruption is from 1983. This case, involving two public employees, is closely connected to the conviction of the mayor of Aalborg, Marius Andersen, who accepted bribes (UfR 1983.990 H). Between 1983 and 2000, I find two court cases dealing with corruption. In the first case the court found that taking a bribe was excusable due to lack of knowledge (UfR 1985.270 Ø S-3191-17) while the other case concerned a foreign citizen and was unrelated to the Danish public administration (S-165-18).

After 2016, court cases dealing with corruption in the Danish public administration begin to appear. In 2017, Danish courts dealt with five different cases related to corruption, frequently involving more than one incident. Since 2019, corruption cases



have appeared at least once each year. To reiterate, my thesis is that public administration reforms since the 1990s have challenged the legal subsystem's code of legal/illegal with the economic subsystem's code of pay/no pay and efficient/inefficient. My claim is that the reforms have created a clash or linkage between binary codes belonging to different functional systems. The time lag between public administration reforms and corruption cases appearing in court may be explainable by the length of investigation. For example, part of the so called *Atea case*, which was settled in 2017 (U.2017.1989 ØLD; Tfk 2017.546), refers to actions which took place between 2010 and 2012, indicating that if public administration reform has made a difference, it set in gradually and began earlier than the 2017 cases.

In the following empirical assessment, I focus on two cases, using other cases as complementary material. The first is the *Atea case*. This case included public employees in Region Zealand and *Atea*, a private provider of IT technology. The case includes two issues: a "shadow account" at *Atea* which public employees could use for private purposes, and free IT equipment. This case ended with prison sentences. The second highlighted case ended inconclusively. In 2017, two police officers received free accommodation in Kenya and Zanzibar from a person whom they had previously investigated in a case of human trafficking. The person investigated in that case was not penalised. The case against the two police officers was closed due to insufficient facts.

I start out using court decisions as a second-order observation on corruption cases. Second-order observations reveal moral communications assigning esteem/disesteem through defining the distinction between legal and illegal. I then look at corruption as a first-order observation; that is, from the perspective of individuals accused of corruption in court cases. The first-order perspective touches upon corruption as an act of communication where participants trust each other according to the legitimacy of the set of codes belonging to the economic subsystem, where giving and accepting gifts is legal and legitimate. Thus, if the public employee legitimates taking gifts with reference to business practices, I interpret the act as following the code pay/non-pay, both of which are legal in the functional sub-system of economy.

#### *4.1. Corruption – a view from the legal system*

The court's point of departure is the law. In Denmark, both the giving and the receiving of bribes are criminalised. In the two cases under analysis, it is clear and unsurprising that the court communicates through the code legal/illegal.

The fact that a gift is exchanged from one person to another is not sufficient to state that a bribe has taken place. The court uses three distinctions. The first distinction is whether there has been a transfer of a gift or other favours between a public employee and a private entity/person. The mere fact of something being transferred is not sufficient to judge whether it is an act of corruption. It is also relevant whether the gift transferred has a substantial value to the recipient and accordingly qualifies as something requiring reciprocity. The second distinction concerns the public employee's job position. The question is whether he has decision-making authority and thus could grant a favour to the gift-giving party. The third distinction concerns the gift giver and whether or not the gift was given with the intent of being granted favourable treatment. If, for example, the gift was given after a decision was taken or after a successful surgery, it may not be a

gift intended to influence a decision. On the other hand, if the gift were offered prior to the event, it may constitute a case of corruption. In addition, another case from 2017 shows that intention to circumvent decisions must be proved if gift-giving and -receiving are to be judged as corruption (TfK 2018.187).

The Atea case (U.2017.1989Ø, TfK 2017.546) consists of two separate elements. First, the accused public employees received free IT equipment, and second, the private business opened a “shadow account” to which payments were made for orders which were to be executed later. Using the first two distinctions, the court states that in the case of Atea the public employees illegally received free IT equipment of a reasonably high value, and that they were in a position where they had the power to influence their organisation’s policy with respect to where to buy IT equipment. On the other hand, the court’s verdict emphasised that a bribe is a bribe even if it is relatively small in terms of value. The court did, however, graduate the sentences with a view to the value of the gift. The court also found sufficient proof that the “shadow account” functioned as a hidden bribe to the public employees. The court argued again that the employees had decision-making power over the organisation’s purchasing policy, but also that the ‘shadow account’ was used by public employees to fund activities unrelated to their jobs, such as holiday trips and tickets to sports games.

In the case involving the two police officers (U.2019.2086, TfK2019.728/1), the court also uses the distinction legal/illegal and finds that it is a case of receiving a gift contradicting internal police rule. However, the court also found no sufficient evidence that the free accommodation in Kenya and Zanzibar was a case of bribery. The main reason was that the relationship between the police officers and the gift-giver had turned into a personal friendship following a case where the police officers had investigated the gift-giver in a case on human trafficking. That is, the police officers were no longer in a decision-making position that would allow them to grant preferential treatment to the gift-giver.

The verdicts from the two court cases illustrate that the court does adhere to the codes of the legal subsystem. This is not surprising and supports the subordination of public administration under the functional system of law. To substantiate my thesis that public employees are subjects of code clashes, I therefore switch perspectives and examine how the accused defend their acts as not corrupt.

#### *4.2. Corruption – the accused’s justifications*

In the Atea case, the accused justified their behaviour in two ways. First, the accused argued that they acted according to normal and acceptable business practices. More specifically, they argued that it was normal to receive and test IT equipment before purchasing it. This is very likely normal practice in private business. Moreover, having been tested – that is, used – the IT equipment did not have any value to the company, and it became meaningless for the employees to return it. The court’s verdict, however, emphasises that testing is one thing; keeping the equipment and passing it over to third parties is another. Even if the equipment no longer had value to the business partner, it did to the public employee and to those persons to whom it was passed along. Through this process the test equipment became an asset, thereby acquiring a value that may create an expectation of reciprocity. The situation with the “shadow accounts” was more difficult to explain, but the accused referred to “normal” practice within the office; that

is, a culture in which it was the norm to receive a kind of “bonus” after having made a special effort to fulfil organisational goals. This justification leans into NPM ideas that economic incentives make public employees more efficient, and when the “shadow accounts” were seen in this light and thus not as bribes in exchange for which the provider of the account expected favourable decisions, using the account became “natural” and not a deviation from any norms. Using fictive invoices for diverting funds from private suppliers to public employees was also sentenced in a case related to the Danish defence ministry (SS 3594/2022).

Individuals accused of corruption often justify their acts by referring to internal norms of gift-giving and -receiving in their organisation. In the case of the police officers who received free holidays in Kenya and Zanzibar, the tradition of inviting friends and guests to stay at the resort was key in the defence’s argument for acquittal. One of the accused argued that he accepted the offer of a free stay because he understood that it was a norm within African tourism startups to invite guests, a justification the prosecution could not disprove. The court accordingly closed the case due to insufficient proof.

## 5. Concluding reflections

Examining Danish court cases since the Second World War, it is striking that there has been an increase in corruption-related cases since 2000. Denmark is famous for being perceived as one of the least corrupt countries in the world. Denmark is also a mature democracy with a universal and generous welfare state. The increase in corruption cases is thus a puzzle. How can it be that corruption has appeared in Danish courtrooms in recent years?

The thesis is that public administration reforms since the 1990s focusing on economic incentives and network collaboration have challenged the traditional Weberian distinction between legal and illegal associated with the legal system. This study focuses on how economic incentives introduced through *new public management reforms* may have diverted public employees’ own judgement from legal/illegal towards values based on pay/no pay and efficient/inefficient, the basic distinctions within the economic system. The challenge appears when accepted practice between private firms transfers to the public administration.

Luhmann’s systems theory and the way that distinctions are used to communicate the function of a subsystem cast new light on the understanding of corruption. It does not tell us why corruption occurs or how institutions could be designed to decrease the temptation to engage in a corrupt deal. Rather, it offers a step towards understanding how public employees’ world views shape their distinctions of what is appropriate. When Denmark historically became a low-corruption country, it was because public organisations were integrated into the functional subsystem of law based on the binary code legal/illegal. This is still the case when I look at how the court communicates about corruption. It is not, however, the obvious case when I look at how public employees accused of corruption argue about their cases. They justify their behaviour through the communication codes of the economic system and its specific norms.

The fact remains that court cases with reference to corruption are far from common in Denmark. In other words, we may only be seeing the tip of the iceberg. This may also be a sign, however, that the Danish public administration ethos is permeated by the

functional code of legal/illegal as a professional norm. This relates to a 2004 debate among public administration scholars (von Marvic and Reichard 2003). It was stressed that in mature democracies where Weberian ethics and rule of law are well established, the risk of corruption is negligible. The increase in corruption cases in a low-corruption country such as Denmark, however, bears with it a warning, especially because the accused use justifications which would be accepted within the economic system. This fact argues for enhanced attention on legality and ethical codes of conduct within the public sector as a barrier against corrupt behaviour.

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