

## Liberal Democratic Institutions and the Damages of Political Corruption

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Résumé de l'article

Cet article contribue au débat portant sur l'identification des cas de corruption politique en esquisant une théorie *libérale* originale de la corruption institutionnelle. Il définit la corruption institutionnelle comme le fait, pour les personnes occupant certaines positions institutionnelles qui sont cruciales pour la mise en oeuvre des règles publiques, de dévier du rôle qui leur a été confié pour leur profit personnel. Afin d'illustrer le tort que les comportements corrompus causent aux institutions démocratiques libérales, l'article étudie le cas des professionnels de la santé qui abusent de leur droit de faire valoir l'objection de conscience pour ne pas pratiquer d'actes associés à l'interruption de grossesse. Il montre que les invocations de la clause de conscience peuvent être utilisées de façon instrumentale pour saper des règles établies démocratiquement et exercent ainsi une influence privée excessive sur la mise en oeuvre de ces règles. En ce sens, d'un point de vue démocratique libéral, la corruption institutionnelle est problématique parce qu'elle malmène des idéaux libéraux fondamentaux tels que l'impartialité des institutions publiques et l'égalité politique des citoyens.



# LIBERAL DEMOCRATIC INSTITUTIONS AND THE DAMAGES OF POLITICAL CORRUPTION<sup>1</sup>

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## ABSTRACT:

This article contributes to the debate concerning the identification of politically relevant cases of corruption in a democracy by sketching the basic traits of an original *liberal* theory of institutional corruption. We define this form of corruption as a deviation with respect to the role entrusted to people occupying certain institutional positions, which are crucial for the implementation of public rules, for private gain. In order to illustrate the damages that corrupt behaviour makes to liberal democratic institutions, we discuss the case of health care professionals' abuse of their right to conscientious objection to abortion services. We show that the conscience clause can be instrumentally abused to sabotage democratically established public rules and thus exert undue private influence on their implementation. In this sense, from a liberal democratic perspective, institutional corruption is problematic because it is disruptive of such fundamental liberal ideals as the impartiality of public institutions and citizens' political equality.

## RÉSUMÉ :

Cet article contribue au débat portant sur l'identification des cas de corruption politique en esquissant une théorie *libérale* originale de la corruption institutionnelle. Il définit la corruption institutionnelle comme le fait, pour les personnes occupant certaines positions institutionnelles qui sont cruciales pour la mise en œuvre des règles publiques, de dévier du rôle qui leur a été confié pour leur profit personnel. Afin d'illustrer le tort que les comportements corrompus causent aux institutions démocratiques libérales, l'article étudie le cas des professionnels de la santé qui abusent de leur droit de faire valoir l'objection de conscience pour ne pas pratiquer d'actes associés à l'interruption de grossesse. Il montre que les invocations de la clause de conscience peuvent être utilisées de façon instrumentale pour saper des règles établies démocratiquement et exercent ainsi une influence privée excessive sur la mise en œuvre de ces règles. En ce sens, d'un point de vue démocratique libéral, la corruption institutionnelle est problématique parce qu'elle malmène des idéaux libéraux fondamentaux tels que l'impartialité des institutions publiques et l'égalité politique des citoyens.

## INTRODUCTION

Political corruption is generally understood as the abuse of entrusted public power for private benefit (see, for example, Amudsen and Fjeldstad, 2000; Kolstad, 2012). However, each component of this definition has been widely debated: does abuse necessarily involve unlawful behaviour? Are relevant power positions only attached to public offices, or do they also concern such providers of public services as hospitals and schools? Is private benefit limited to material advantages, or does it include the enhancement of someone's status or political influence?

The answers to these questions, we submit, depend on the conception of society one defends in particular as regards the function of the public order. Traditionally, political corruption has been regarded as destructive of a particular kind of public order, be it oligarchy, monarchy, or republic, and as a disease of the political function (Friedrich, 2007, p. 15). Obviously what counts, say, as an abuse of public power where there is no rule of law is different from what counts as such an abuse under a constitutional regime. Moreover, it is clear that in different political systems there are different expectations concerning the way in which those entrusted with public power should behave.

This said, our argument does not boil down to the rather uncontroversial claim that what counts as political corruption may vary from context to context. Rather, we argue that the definition of political corruption *necessarily* varies across different normative conceptions of the public order, whether it is, for example, a liberal or a communitarian one. From these conceptions we derive the normative standards necessary for the identification of the legitimate conditions for the exercise of entrusted public power, attached to different institutional roles, from which political corruption constitutes a deviation. In this sense, we identify *institutional corruption* (rather than corruption as a personal vice, or the corruption of social relations) as the most politically problematic form of corruption.

Against this backdrop, in the first section, we outline a liberal conception of institutional corruption fit for making sense of abuses of public power within the liberal democratic public order. Corrupt behaviour occurs when people entrusted with public power bend public rules to their personal advantage and to the detriment of the public. From a liberal perspective, this form of corruption is politically problematic because it is disruptive of such fundamental liberal ideals as the impartiality of public institutions and citizens' political equality. In the second section, we analyse in detail—by means of an illustrative case—the damages that corrupt behaviour makes to liberal democratic institutions. To this end, we discuss the case of health care professionals' abuse of their right to conscientious objection to abortion services in some Western countries, particularly in Italy. We show that appeals to the conscience clause are often made so as to exert undue private influence on the provision of a public service, which comes at a great cost for the liberal democratic order. We conclude, in the third section, with some general remarks on the effects of political corruption on lib-

eral democratic institutions. In so doing, we contribute to the debate concerning the identification of politically relevant cases of corruption in a democracy by sketching the basic traits of an original liberal theory of institutional corruption.

## **POLITICAL CORRUPTION IN THE LIBERAL DEMOCRATIC ORDER**

### **Democratic function of the rules, impartiality, and political equality**

The first element of political corruption that deserves discussion concerns the juxtaposition of public and private interests. Notice that, throughout the paper, we use the attributes ‘personal’ and ‘private’ interchangeably to qualify partisan interests and kinds of benefit/advantage furthered by corrupt behaviour, as opposed or juxtaposed to the public ones that public rules are meant to protect. Political corruption occurs when partisan interests, so conceived, are advanced at the expense of the public.

From a liberal perspective, the public order and its constitutive institutions are designed and justified because they secure an impartial system of cooperation between free and equal persons for their mutual advantage (Rawls, 1971). The familiar liberal story begins with the conflict between the holders of different conceptions of the good committed to the pursuit of their (divergent) private interests. To contain and possibly to resolve such conflicts, the liberal political solution consists in a set of impartial rules, whose impartial application constitutes an impartial scheme governing the joint pursuit of individuals’ private interests.

Republicans, such as Michael Sandel, have rejected liberalism exactly on the basis of this familiar story. Liberals do not understand the public order as the collective pursuit of the common good, but as a set of impartial rules within the limits of which each can pursue her own goals. So liberalism, Sandel argues, tends to produce individuals who jealously guard their freedom to live as they choose against the demands of the state and society (Sandel, 1998). In this way, the public order remains open to strategic manipulation by those acting within it, especially if the pursuit of private interests is not disciplined by such civic virtues as transparency, accountability, and honesty. For republicans, corruption is a vice that distracts citizens from the common good and has to be counteracted by upholding the republican virtues (Brennan and Pettit, 2003).

Liberals, on the other hand, have reasons to be concerned with political corruption exactly because, unlike republicans, they are sceptic about the possibility of agreeing on a common good. Liberals believe that public rules should be designed so as to be impartial towards the plurality of conceptions of the good, and related interests, pursued by citizens in society. Corrupt behaviour, we argue, upsets impartiality.<sup>2</sup>

For liberals, the exercise of public power is justified as a limit to the arbitrary power of individuals and in order to secure cooperation among free and equal persons, who endorse a plurality of conceptions of the good, on terms they all

can accept (Rawls, 1996, p. 171). When a public rule is supported by the judgment of free and equal persons, it is authoritative over them, and the rationality of the rule is reconciled with individual freedom. In this specific sense, no citizen can conceive of herself as a moral tyrant but has to recognise that others are equally morally authoritative in defining the rules of the public order, which constrain the pursuit of their individual aims.

Most theorists agree that such a reasonable agreement on public rules cannot reach beyond a rather limited set of basic principles, or, to say it with Rawls, a core of ‘constitutional essentials’, which establishes citizens’ basic rights and liberties, as well as the general structure of government and of the political process (Rawls, 1996, p. 137, 227). Yet life in society requires also far more specific rules to govern specific aspects of the public order and settle the specific disputes that may emerge within its boundaries. In keeping with the idea that persons are free and equal and no authority can be imposed upon them, if not their mutual authority, democratic decision-making procedures are normally regarded by liberals as the privileged way through which citizens can jointly govern their life in society. Although citizens cannot be said to endorse each specific democratically enacted provision, the democratic political process is nevertheless authoritative because it displays public equal regard for, and impartiality towards, everyone’s interests. Citizens can thus regard themselves as having an equal voice in the processes leading to the rules that are enacted in their name and by which they are bound (Christiano, 2008). In this sense, the democratic decision-making process offers an impartial scheme through which citizens, as political equals, share the authority to make publicly binding decisions on the public rules that govern the pursuit of their private interests vis-à-vis specific issues in society.

The distinctive liberal rationale of public rules is their capacity to *arbitrate impartially* between citizens’ plural conceptions of the good and related interests. However, it is not enough that public rules be *conceived* as impartial; it is also necessary that their impartiality reflects in their *application*. Some must be entrusted with the power to implement public rules and make them operative. This public task is itself expected to be carried out in a way that respects impartiality.

In this framework, we can place under the heading of political corruption those cases in which those who are entrusted with the *public power* to implement public rules do in fact *bend such rules* in a partial manner for *the sake of obtaining some personal advantage* to the *detriment* of others. This is wrong because it contravenes the very liberal idea of the public order, and contradicts the very purpose for which it is established (and public power is, relatedly, distributed). As it undermines the impartiality of public rules, corrupt behaviour brings back to the public scene those conflicts that public rules are designed to resolve (see Philp, 2007, p. 54). What is more, corrupt behaviour generates a further conflict between the public interest in maintaining the impartiality of the public order, and of its constitutive rules, and the private interests of those who abuse their power to bend those rules to their own advantage.

On this basis, we can distinguish between the lawful pursuit of private interests within the latitude allowed by the public order and the impartial application of its constitutive rules, and the corrupt pursuit of private interests, which is that done by bending public rules to someone's own advantage and to the detriment of others. However, not every violation of public rules is an instance of political corruption. As we argue in the next section, there are particular institutional roles that are crucial for preserving the impartiality of the public order that, in virtue of the public power entrusted to them, are amenable to this form of corruption.

### Relevant institutional actors

As suggested, not only public rules should be designed in an impartial manner; they should maintain their character of impartiality also in their implementation. So impartiality is both the criterion for the design of public rules and a characteristic of the institutions that are necessary for the implementation of those rules. These institutions can be understood as a system of organisations that 'consists of an embodied (occupied by human persons) structure of differentiated roles' (Miller, 2007). These roles are defined in terms of tasks and are attached to rule-bound public positions. For the sake of brevity, we refer to the occupants of these positions as 'institutional actors'. Relevant institutional actors do not include only civil servants, members of parliament, the army, the police, but also teachers and health care professionals are an example of the categories of people who find themselves in a crucial position with respect to the implementation of public rules. The access, for instance, to health care and education services is disciplined by public institutions. Also in cases in which the provision of such services is delegated to some private (or semi-private) organisation, certain public rules hold and define at least in part the powers and duties of institutional actors. For example, in many countries, even in private schools the national curriculum sets the standards of teaching.

A cluster of *secondary rules* describes the duties and the entrusted power attached to each institutional role designed for the implementation of public (primary) rules. Open violations of secondary rules are unlawful. Customs officers are expected to comply with security protocols, and school teachers are expected to teach the national curriculum. Despite this, it is recognised that a measure of discretion in how exactly they would attend to their tasks is inevitable. For each institutional role, secondary rules describe, among other things, the areas in which discretion can be lawfully exerted. Discretion is not afforded simply to those who, by the very nature of their job, are required to exercise their capacity of judgement, such as judges. Most institutional roles allow for a certain degree of discretion; customs inspectors, for example, have the discretion to ask any questions they consider necessary whenever suspicion arises. Also, there is a high degree of social confidence that institutional actors not only will comply with secondary rules, but that in the exercise of their functions they will keep up with the *spirit* of the (primary) public rules which they are entrusted with the power to implement.



So conceived, the power entrusted by the body of citizens to institutional actors is of a very particular sort (see Kurer, 2005, p. 230; Kolstadt, 2012, p. 248). As seen, they are entrusted with the power to apply public rules and they enjoy a significant degree of discretion in relation to it. The main risk related to such a particular position consists in allowing institutional actors some significant margin for altering, circumventing, or—at any rate—misusing the rules so as to produce effects beneficial to themselves (to the detriment of others); they are in this sense amenable to political corruption. Institutional actors are thus in a position to gain privately from the corrupt implementation of public rules, a position that is not open to the generality of citizens (in contrast with the requirement of citizens' equality).

To specify, from the liberal perspective we have outlined, abuses of public power may consist either in a violation of the secondary rules for the exercise of such a power, or in the misuse of the discretion with which institutional roles are endowed; in both of these senses, political corruption involves unlawful behaviour. Additionally, there may be corrupt behaviour that is not necessarily unlawful, but nevertheless illegitimate insofar as implementing it *violates the spirit* of the (primary) rule. The customs officer who decides that, say, travellers with a long beard are suspicious—and therefore should be subject to an especially meticulous inspection merely on that ground—exercises his function in a way that, albeit not obviously unlawful, contradicts the spirit of the rules of security he is expected to implement. The officer's behaviour would count as corrupt—besides being obviously inappropriate as discriminatory (Philp, 1997 p. 452)—in those cases in which it is not guided by actual reasons of security but, say, by the prospect of gaining the reputation of being efficient and rigorous among his colleagues or, more straightforwardly, of damaging a specific group to the benefit of another to which the officer himself is affiliated. What makes cases of this sort instances of political corruption is, therefore, the presence of a partisan hidden agenda that the institutional actor advances surreptitiously at the expense of the public. This feature distinguishes these cases from those of civil disobedience (overt, unlawful acts whose reformist agenda is by no means hidden) and ordinary exercises of administrative discretion (that are not part of any either overt or covert agenda, nor do they necessarily imply any harm to the public).

Notice that the characterisation of corruption we have offered pertains to public institutions, and to the roles and functions attached to them. This is not to deny the importance of corruption as a private vice, nor to disregard the negative material consequences it normally has for society. However, from our analysis it emerges that the most worrying aspect of political corruption from a liberal democratic perspective is the way it damages institutions as regards their function in maintaining impartiality and political equality. Therefore, we can conclude that, because of the conception of the public order that they hold, it is *institutional corruption* that liberal democrats should be primarily concerned with.

One element of our definition of political corruption remains to be analysed: what counts as a private benefit? We turn to this question in the next section.

## Private benefit

Some authors have defined corruption as involving a tangible financial benefit or a transfer of goods or services (Rose-Ackerman, 1975). Yet, others have noted that corruption may involve the deviation from generally accepted norms for no discernible financial benefit. Private benefit can derive from giving preference to members of a specific ethnicity, religion, or tribe, for example, in exchange for an improvement in social status or esteem. To illustrate, the head of an administrative unit may select for job candidates who do not fulfil the position requirements in exchange for their unconditional support. Surely, benefits of this kind may be more difficult to pin down than more obvious material gains: ‘The benefits of a corrupt activity may be intangible, long-term, or widely dispersed’ and can be either the result of action or of inaction (Johnston, 2005, p. 11). However, given our conceptual framework, the implementation of public rules is obviously undermined not only by corrupt behaviour aimed at material gains, but also by the other sorts of private benefit mentioned above.

Although we recognise that, practically, it may be difficult to distinguish between corrupt and non-corrupt behaviour in many cases—and that there are cases of corruption that are more serious than others in terms of the institutional damage that they cause—we suggest that by analysing together the relevant public rules, the institutional character of the position involved, and the private benefits that are sought in competition with the rules, it is possible to identify cases of institutional corruption without adopting too narrow a definition, which may lead to neglect some of the features that make this form of corruption an important perversion of the liberal democratic order.

In sum, we suggest that the necessary and sufficient condition for a case to be identified as an instance of institutional corruption is that it presents the following three elements: (i) the bending of public rules (ii) for the sake of private benefit and to the detriment of others (iii) perpetrated by someone who occupies an institutional position, either in violation of the secondary rules governing the exercise of the power associated with that position, or by misusing the discretion attached to that position, or by acting in ways contrary to the spirit of the rules to implement.

## **ABUSES OF CONSCIENTIOUS OBJECTION IN THE HEALTH CARE SECTOR AND INSTITUTIONAL CORRUPTION**

The contribution of the present section to the sketch of a liberal theory of institutional corruption consists in the analysis of behavioural patterns that, although not necessarily unlawful, surreptitiously undermine the health of a liberal democratic system by putting some professional categories in the position to exercise undue private influence on the provision of a public service. In particular, we concentrate on the case of health care professionals who abuse the power entrusted to their institutional role—notably as regards the protection of their right to freedom of conscience—to undercut the implementation of the public rules governing the access to a health care service to their own personal bene-



fit. Such a corrupt behaviour is easily observable in those countries in which it involves a large number of actors, typically organised in groups. This does not entail that institutional corruption is a form of collective wrong that does not imply individual responsibility. The point here is a practical one; the actual institutional damage produced increases with the increase of the number of individuals who act in a corrupt manner and as an effect of their being organised in a group.

Although this kind of behaviour is generally considered morally questionable on various grounds, it is usually not regarded as problematic *qua* a case of corruption. We want to suggest, instead, that this *is* in fact a politically problematic case of corruption of which liberal democrats should be particularly wary. The reason why we have chosen this case, rather than more apparent forms of corruption such as bribery and rent-seeking, is that the absence of obvious *material damages* for society helps us to focus on the *institutional damages* brought about by corruption. The case thus aims at illustrating that, in the light of our liberal theory, political corruption comes at a great cost to the impartiality of public institutions and the political equality of citizens.

An illustration is provided by the case of Italian gynaecologists' statutory right to conscientious objection to abortion. Abortion is a treatment that women have been legally entitled to receive from the national health service, the *Servizio Sanitario Nazionale*—SSN, since 1978 (law no. 194/78) and whose current regulation was endorsed by the 68% of Italians through a referendum in 1986. As in many other countries, including the US, widespread conscientious objection results in abortion's becoming unavailable in some areas. Evidence suggests that in many Italian regions, the conscience clause is exercised instrumentally to promote pro-life positions, despite the pro-choice orientation of the current legislation. This is made possible because of the relative influence of Catholic groups in the health care sector, where being an objector becomes a way to be identified as a 'pro-life' and thus be favoured to 'pro-choice' throughout one's own career. Doctors' interest in promoting their careers, coupled with the influence enjoyed by pro-life groups in the health sector, incentivises the exercise of the conscience clause and gives rise to corrupt exchanges. The ensuing scenario provides an illustration of an instance of a corrupt behaviour through which personal benefits are sought—through the abuse of the power entrusted to institutional actors—in competition with a public rule.

### The conscience clause in the health care sector and its exercise

As seen in section 1, the rationale of the liberal public order is the constitution of an impartial framework within which individuals may pursue their different conceptions of the good, on a baseline of equality, and the conflicts possibly emerging between them can be settled. We have also seen that while most liberal theorists believe that reasonable agreement among free and equal citizens can be reached on the fundamental rules for the society's basic structure, disputes are there to remain as regards the public regulation of specific controversial

issues. The regulation of such issues is typically left to the democratic decision-making process through impartial procedures treating all citizens as political equals.

Facing particularly controversial issues in need of a shared regulation, liberal democrats have often resorted to conscientious exemptions as an instrument to reconcile the will of the majority, expressed through the decision-making process, and the dissenting claims of some minority outvoted during decision making. One such kind of issues concerns health care provisions. *Vis-à-vis* a democratic decision to make a certain health care service publicly available and the refusal by some health care professionals to participate in the provision of such a service *qua* contrary to their moral convictions, a conscience clause is inserted in many health care regulations to reconcile the professionals' interest in preserving their moral integrity and the public interest in having access to a legally sanctioned service (see Sulmasy, 2008; Wicclair, 2011).

A prominent example is the regulation of abortion services both across Europe and the United States.<sup>3</sup> In particular, the law 194/78, regulating the access to abortion services in Italy, can be presented, within this general framework, as an instance of accommodation of the disagreement between pro-life and pro-choice positions, which is especially interesting given the Italian socio-cultural context (with the influence of the Catholic Church particularly evident on this kind of issues) and the public nature of the health care sector (some health care services, including abortions, are provided by the SSN or clinics that have a contract with it).

According to this law, women can ask for an abortion within the first ninety days of pregnancy by appealing to the protection of their physical and/or psychological health. Physicians are expected to assess the patients' conditions and to advise them on all available alternatives; however, the final decision rests with the woman. The physician's assessment of the woman's health conditions becomes more central when an abortion is sought after the first ninety days of pregnancy. In these cases, access to abortion is subordinated to the condition that the continuation of pregnancy and/or the delivery may endanger the mother's life and when the foetus is affected by certain pathological conditions.

Art. 9 of the law provides for a conscience clause to which physicians, nurses, anaesthetists, and obstetricians can appeal to refuse to participate or assist in the abortion procedure. The clause does not apply to either pre- or post-abortion care, nor can it be exercised in those cases in which a woman's life is in danger. The exemption applies to individual professionals; public health care institutions, as well as those with a SSN contract, must ensure that the service is provided, if necessary by resorting to staff mobility.<sup>4</sup> Regional authorities are responsible for monitoring the implementation of the law. In this way, the law implicitly recognises that a tension may arise between the exercise of the conscience clause and the efficient access to abortions. Therefore, secondary rules

are established to govern the way in which professionals should operate to make abortions accessible despite their conscientious objection (for example, they cannot refuse to refer their patients to non-objectors).

The story of the implementation of the abortion regulation and the conscience clause in Italy, across Europe, and in the US is far from rosy. Appeals to the conscience clause have become so frequent that the access to the service is jeopardised in certain areas. The Council of Europe has recently expressed its concern for the increasing difficulties women encounter to have effective access to abortion, because of the high conscientious objection rate, and urged that Member States take action to ensure that the service is actually available (Council of Europe Resolution 1763 (2010)).<sup>5</sup> Besides the massive appeal to the conscience clause, health care professionals have been repeatedly reported to refuse to refer patients to non-objectors; to fail to disclose their objection timely and provide patients with information on all options open to them; and to refuse to provide post-abortion care either in cases of emergency or when no other colleague is available (see McCafferty, 2012, p. 8-9).

According to the 2012 Ministry of Health *Report on the implementation of the law concerning the social protection of maternity and induced termination of pregnancy (law 194/78)*, in most Italian regions the proportion of physicians who have appealed to the conscience clause is well above 50% and figures are most critical in central and southern Italy where, in some regions, the proportion of objectors is as high as 90%. Following the presentation of the data by the Minister of Health, a broad discussion started in the Italian parliament during which all political forces converged to urge that resort to the conscience clause be monitored and more effectively regulated. Even the Italian Bioethics Committee, in a recent opinion statement largely in favour of the preservation of the conscience clause, has recognised the risk that organised minorities may abuse such a right to sabotage the abortion regulation (Comitato Nazionale di Bioetica, 2012, p. 7).<sup>6</sup>

The case of Italy is not an isolated one. In the US—as of July 2013—forty-six states allow individual health care providers to refuse to participate in abortion services; forty-three states allow health care institutions to refuse to perform abortions, sixteen of which limit refusal to private or religious institutions (see Guttmacher Institute, 2013). On the basis of these provisions and of their extensive use, the situation is such that 87% of US counties have no abortion provider (see Waxman, 2006).

The massive appeal to the conscience clause undermines the implementation of the abortion regulation by making access to abortion services vary according to such contingent factors as geographical location; as a consequence the number of illegal abortions has risen (with obvious risks for women's life and health) and many women seek to obtain the service abroad (thus making access to abortion subordinated to the financial conditions of those seeking it—see Lalli, 2011 and 2013a; Malter, 2007; McCafferty, 2012).

Although all such abuses may raise morally relevant issues of justice, as argued at the end of section 1, they can go under the heading of institutional corruption, and, as such, have a specific political relevance, if and only if they feature the following three elements: (i) the bending of public rules (ii) for the sake of private benefit and to the detriment of others (iii) perpetrated by someone who occupies an institutional position, either in violation of the secondary rules governing the exercise of the power associated with that position, or by misusing the discretion attached to that position, or by acting in ways contrary to the spirit of the rules to implement. The discussion that follows is aimed to bring out these aspects and show how the abuses in the exercise of the conscience clause count as a particularly insidious case of corruption, with important institutional and, hence, political consequences.

### The public institutional role of health care professionals

As Bernard Dickens notes, ‘physicians enjoy the power of a legal monopoly over the provision of medical services’ (Dickens, 2009, p. 726) both in the private and, notably, public sector. The category of physicians is thus entrusted with a special power to implement the rules governing health care services. Most relevantly for our illustrative case, health care professionals who work in public hospitals (or in clinics with a SSN contract) occupy the unique position of being entrusted with the public power to implement the abortion regulation; this places them in an institutional position very similar to that of such public officials as judges and bureaucrats.

Although health care professionals are expected to use their power to implement the rules governing abortion services in a way that reflects the impartiality of such rules, some significant risk of partiality emerges on consideration of the leeway for *discretion* concerning their professional judgment of the patients’ conditions. Notably, this judgement is legally required as a filter to make abortion services accessible to women seeking to interrupt their pregnancy past the first trimester. The discretion associated with this specific professional role makes it possible, for example, that an anti-abortion physician underestimates the actual risks that pregnancy may cause to a woman’s health, and that would justify an abortion, in order to save the foetus’s life. Such discretion can be easily *misused* to the extent that the woman’s conditions are underestimated purposely with a view to limiting the access to abortion services beyond the standards set by law.

What is more, the risk of partiality is heightened on consideration of health care professionals’ right to avail themselves of a conscience clause. This allows them to refuse to perform those services the provision of which clashes with the professionals’ conscience-based beliefs. Notice that the specific way in which the conscience clause has been inserted in the abortion regulation, both in Italy and the US, makes the decision to resort to it rather costless. Health care professionals’ motivations to avail themselves of the conscience clause are not vetted; a simple declaration to the relevant authority is enough. Moreover, the strength of the professionals’ motivations to refuse to participate in abortion services is

not even tested indirectly by asking them to carry out some alternative service to compensate for the exemption they enjoy and unload their non-objecting colleagues that must stand in for them. This state of affairs creates strong incentives for health care professionals to avail themselves of the conscience clause and it makes, as a consequence, the implementation of the abortion regulation—so far as it falls under their responsibility—exposed to a high degree of unpredictability (see Meyers and Woods, 1996, p. 117-118). The risk of partiality that emerges out of this situation derives from possible abuses of the conscience clause either in *violation of the secondary rules* governing its exercise or by action *contrary to the spirit of the law*, such as when the objectors act on reasons other than conscience.

More precisely, it seems useful to distinguish between four different kinds of usage that health care professionals may make of the conscience clause that may disrupt the implementation of the abortion regulation:

- 1) legitimate and lawful use for proper reasons of moral integrity by individual professionals that—if widespread—has the unintended, effect to make abortion services more difficult to access;
- 2) illegitimate but lawful use by health care professionals with pro-life convictions that is collectively planned with a view to undermining the implementation of the abortion regulation;<sup>7</sup>
- 3) illegitimate but lawful use for reasons other than moral conviction, notably opportunistic considerations (e.g. to enhance one's own career prospects—see below);
- 4) illegitimate and unlawful use either by professional categories that are not covered by the conscience clause (e.g. hospital administrative personnel) or for services excluded by the law (e.g. referral, post-abortion care).

We would like to suggest that what is problematic, from the perspective adopted in this paper, is not the general impact that the lawful exercise of the conscience clause has on women's rights and health as a side-effect, or an unintended consequence, of the legitimate exercise of the professionals' own rights and prerogatives (although this is a problem in its own right—see case no. 1). What raises distinctively interesting problems of corruption of the liberal democratic order are abuses of entrusted public power intentionally perpetrated by health care professionals, either in violation of the secondary rules governing the exercise of such a power (case no. 4) or in contradiction with the spirit of the abortion regulation (cases no. 2 and 3), that bend public rules to their own benefit. We shall elaborate on this point in the remainder of the section.

### The abuse of the conscience clause as a source of private benefit

Health care professionals' abuse of their position is lamentable given the relation of trust between them and their patients, who are subordinated to them, in a condition of need and distress, by virtue of the professionals' epistemic author-



ity. A crucial requirement of professional codes of conduct is that health care providers operate in the interest of the patient and certainly not their own. These secondary rules are clear in stating the limit and the spirit in which the discretionary power entrusted to health care professionals must be exercised. Against this background, abuses of the discretion afforded, for example, to physicians in evaluating the patient's conditions appear particularly serious. But this is not the main aspect of the story we would like to emphasise.

As seen, health care professionals working in the public sector are entrusted with the public power to implement the rules governing health care services provided by the state. Health care professionals are, therefore, in an institutionally relevant position amenable to the abuse of such a power either through the violation of the secondary rules that apply to their role, which, for example, establish that the exercise of the conscience clause does not exempt one from the duty of referral to non-objectors, or by action contravening the spirit of the abortion regulation, which is unmistakably pro-choice and does not recognise, for instance, the refusal to provide abortion services for reasons other than conscience. Seen under this light, occurrences such as those we have described in section 2.1 qualify as instances of institutional corruption insofar as they consist in an abuse of entrusted public power for private benefit, which undermines the implementation of (democratically enacted) public rules to the personal benefit of (a class of) health care professionals. What exactly does such a benefit amount to?

For once, insofar as the Italian case is concerned, the dominant position of Catholic groups in the health care sector makes the exercise of the conscience clause an indirect way for a health care professional to be identified as a pro-life and thus boost their career.<sup>8</sup> As a consequence the exercise of the conscience clause is not only made possible but, in fact, incentivised. Widespread conscientious objection undermines the pro-choice democratically enacted regulation to the benefit of a subset of health care professionals in a direction that runs explicitly counter the spirit of the rule.

More precisely, the abuse of the conscience clause may undermine the implementation of the abortion regulation by making the service unavailable and extremely distressful to access. Women's difficulty in having access to abortion is not, in such circumstances, a regrettable side-effect of medical staff's legitimate and lawful exercise of a right of theirs (case no. 1 above); it is, rather, an intended effect of the abuse of such a right (which may be perpetrated either through lawful or unlawful action, see respectively cases no. 2/3 and 4 above). This state of affairs is extremely penalising of women's opportunities to terminate their pregnancy. In order to pursue their interest, women are left little choice but either exit the boundaries of the rule and seek abortion illegally or go abroad.

This brings back to the scene the conflict between pro-life and pro-choice conceptions of the good (which the abortion regulation was intended to settle) and reveals a conflict between health care professionals' partisan interests and those of the public in receiving a legally sanctioned health care service. Health care



professionals' behaviour undermines the implementation of the public regulation of a sanctioned health care service and, in so doing, it has severe repercussions on the impartial functioning of those public institutions that cater for the protection of such an important good as health. Moreover, this state of affairs constitutes a violation of the political equality of citizens because, in virtue of their partial behaviour, some health care professionals abuse the power entrusted to them and exert it to bend public rules in such a way that allows them to exercise political influence to an extent that is foreclosed to others (case no. 2).<sup>9</sup> This collective action aimed at undercutting the implementation of the abortion regulation is particularly worthy of attention as it leads to the creation of a powerful pro-life majority in the health care sector despite its being a minority in society, which has proved on many occasions to be largely pro-choice.

That this should be treated as a politically relevant case of corruption is one of the most important implications of our argument, as counterintuitive as it may seem at first sight. While the public regulation of abortion services protects health care professionals' freedom of conscience, it establishes that the interests of those who oppose abortion should give way to those of women who seek to interrupt their pregnancy. Pro-life health care professionals' behaviour is corrupt insofar as it exceeds the latitude of freedom of conscience. Health care professionals make use of the public power entrusted to their institutional role to impose their anti-abortion interests in society, to the detriment of those of 'pro-choicers'. As mentioned, a widely debated feature of political corruption concerns the issue of whether the personal benefit that is sought through abuses of public power must take the form of a material kind of gain or it can also consist in some kind of political advantage. In the case at hand, the political advantage gained by anti-abortion health care professionals at the expenses of a public service consists in their exercise of an unwarranted extended influence on the implementation of public rules. Unlike actions of civil disobedience, that take the form of an open contestation of the abortion regulation, this kind of abusive action surreptitiously undermines the implementation of the abortion regulation by sidestepping the democratic decision-making process.

Moreover, it has been suggested that many physicians decide to avail themselves of the conscience clause not to protect their moral integrity, but for opportunistic reasons (case no.3 above). Given the vast majority of objectors in most public hospitals, the pressure to conform is presumably very high and so are the incentives to exercise the conscience clause to favour one's own career both directly (by complying with the anti-abortion orientation of the health care institution's management) and indirectly (by refusing to perform abortions, objectors are freed from a rather debased operation—that is entirely left on the non-objectors' shoulders who end up doing that and only that—and can therefore invest time and resources to carry out research activities and more qualifying operations). As a consequence, physicians who are prepared to perform abortions tend to be overworked, to operate in isolation, and to be kept at a distance by their colleagues (see Cavicchi, 2013; Lalli, 2010).

This state of affairs has been recently brought to the attention of the Council of Europe by one of the major Italian Unions, the CGIL, that has filed a complaint (No. 91/2013) to the European Committee of Social Rights denouncing that the ineffective implementation of the conscience clause is causing serious violations of the workers' rights of those health care professionals who decide not to object, who are often victims of mobbing and experience negative repercussions on their salaries and career prospects. It is apparent, as matter of fact, that the other side of the coin of the discrimination suffered by non-objectors, are the (unwarranted) advantages enjoyed by objectors (in terms of a lighter workload, a wider array of activities to perform, as well as—on some occasions—faster careers). Such a situation creates very powerful incentives for health care professionals to appeal to the conscience clause, even when they have no moral objection to it, thus significantly upsetting the abortion regulation.

That availing oneself of the conscience clause is personally advantageous for health care professionals is suggested also by anecdotic evidence that certain physicians, who exercise the conscience clause at their public workplace, are in fact available to perform abortions—upon payment—at their own private practice (Lalli, 2010, p. 155). This is not just an Italian peculiarity. Croatia is mentioned in the McCafferty Report as a country in which physicians have been reported to refuse to participate in abortion services instrumentally for their own private gain (McCafferty, 2012, p. 7).

In sum, it seems that there are three senses in which health care professionals may gain private benefit by abusing the public power they are entrusted to implement the abortion regulation: (I) to boost their careers, both directly and indirectly; (II) to undermine by collective action the implementation of the abortion regulation thus tipping the balance of political influence in favour of their pro-life position; and (III) to promote the business of their private practices by pushing women to seek abortion outside the public health care sector. While (I) and (III) produce *material* benefits for institutional actors through the abuse of entrusted public power and, in this sense, they are standard cases of political corruption, (II) offers an interesting illustration of a less obvious form of corruption, which causes *institutional* damages and entails *political* advantages, that—as suggested in section 1 and as we shall argue further in section 3—is no less insidious for the liberal democratic order.

### **INSTITUTIONAL CORRUPTION AND THE SURREPTITIOUS EROSION OF LIBERAL DEMOCRATIC RULES**

Against the backdrop outlined in the previous sections, we now seek to clarify the sense in which even well intended rules may produce skewed patterns of private influence in politics, to the extent that some minority may come in the position to force, by surreptitious and strategic behaviour, certain rules in directions that have been explicitly rejected by democratic decisions, but that are favourable to the interests of the members of the minority. We argue that these behavioural patterns are not only unduly partial to some citizens to the detriment of others, but that they are also corruptive of the very idea of a liberal democratic public order.

Recall the three main elements of the theoretical framework in section 1: (A) a liberal democratic society is justified because it provides an impartial framework—capable of leading to collectively binding decisions in circumstances of conflict between citizens’ divergent conceptions of the good—grounded in impartial rules that structure a scheme of social cooperation for the mutual benefit of those who participate in it; (B) political corruption is defined as the abuse of entrusted public power for private benefit; (C) within a liberal democratic society, political corruption manifests itself in the form of institutional corruption whenever institutional actors abuse the public power with which they are entrusted thus upsetting public rules for their private benefit. From these premises it follows that *institutional corruption* is a serious political problem in a liberal democracy because it undermines the impartiality of the scheme of social cooperation and citizens’ political equality by affording some more opportunities to exercise political influence than others for the promotion of their partisan interests.

As seen in section 2, our proposed conceptual and normative framework is capable of capturing the political relevance of corruption by emphasising an institutional dimension that has often been overlooked in the literature. The case of health care professionals’ abusive exercise of the conscience clause illustrates an insidious instance of institutional corruption that is problematic not only because of the material benefits it can generate for those who resort to it, notably in terms of career benefits. Most importantly, the case presents an instance of institutional corruption whereby those who hold anti-abortion positions, despite being a minority in society, have managed to create a majority in the health care sector and, as a consequence, to undermine the implementation of the abortion regulation in a direction favourable to the political promotion of their partisan position. The covert nature of this action makes it an act of sabotage of a democratic decision to the unwarranted benefit of a minority—that places itself outside the rules of the democratic game and beyond public accountability—and, as such, it constitutes a serious disruption of the impartiality of public institutions and the political equality of citizens.

Moreover, this discussion allows us to appreciate better how classical instances of political corruption, such as bribery and rent-seeking, are not problematic simply because they tend to create extra-costs and impoverish society (in fact it has been observed that corruption may in some contexts be economically efficient, see Méon and Weill, 2010). Irrespective of its economic consequences, the corrupt exchange involved, for example, in bribery puts some private citizens in a position to exercise undue influence on an institutional actor, with the aim of advancing their private interests against democratically established rules. Thus bribery places both the corrupted and the corruptor outside and above the impartial scheme of social cooperation originally designed to give all citizens’ interests equal consideration.

In conclusion, the surreptitious political influence made possible through institutional corruption places certain citizens in an asymmetric, dominant position

with respect to the others and, therefore, undermines their relation as political equals that is presupposed by a liberal democracy. Such a deterioration of political relations is not only problematic because of its possible practical impact on the efficacy of democratic decisions. It is problematic in itself as it undermines the very liberal democratic rationale for the public order and the moral acceptability of the terms and conditions of social cooperation.

## NOTES

- <sup>1</sup> We are grateful to Sune Lægaard, Federico Zuolo, and an anonymous reviewer for written comments on an earlier draft.
- <sup>2</sup> The idea that corruption is a violation of impartial rules has been developed in Kurer, 2005. However, whilst Kurer conceptualises corruption in general, our focus is on the notion of impartiality in a liberal democratic context in order to characterise *institutional* corruption. The concept of impartiality that we use is much more specific than the one used by Kurer.
- <sup>3</sup> Conscience clauses are present also in the recent US health care reform, the Patient Protection and Affordable Care Act (Public Law No. III-148).
- <sup>4</sup> This marks a significant point of difference with respect to the US regulation of conscientious objection where forty-four states allow health care institutions to refuse to provide abortion services.
- <sup>5</sup> According to the McCafferty report, in many Council of Europe Member States, conscientious objection is either unregulated (this is the case in Andorra, Latvia, Malta, Montenegro, Sweden, and FYROM) or its regulation is inadequately implemented (this is the case of Italy and of such other countries where the influence of the Catholic Church is pervasive as Poland and Slovakia)—see McCafferty, 2012, p. 6.
- <sup>6</sup> In response to this situation, the Council of Europe has admitted the complaint (No. 87/2012) filed by the NGO International Planned Parenthood Federation European Network, with the aid of the Laiga—Free Italian Association of Gynaecologists for the Implementation of the law 194, against Italy for the excessively high rate of conscientious objectors in public health care.
- <sup>7</sup> Its lawful connotation draws this kind of action clearly apart from cases of civil disobedience (despite the apparent identity of aims).
- <sup>8</sup> Many directors of the gynaecology division in important Italian public hospitals (e.g. the Gemelli polyclinic and the St. Andrea hospital in Rome) are objectors themselves and actively engaged in pro-life campaigns—see Lalli, 2010, p. 79.
- <sup>9</sup> The promotion of pro-life positions against the pro-choice spirit of the abortion regulation through the (ab)use of the conscience clause is furthered by the widespread conscientious objection rate in University hospitals, such as the St. Andrea in Rome, where abortion techniques are no longer taught as the whole structure refuses to implement the law 194/78 (see Lalli, 2013b).

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