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Lobbying and Corruption: comparative legal analysis of two notions

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Abstract

The present paper presents the key issues of lobbying with pointing on similarities and dissimilarities in comparison to corruption. We discussed lobbying that is directed to public officials since lobbying is a broader concept that implies different impacts on the public sphere, such as „mounting grass roots campaigns”, „talking with the people from the press and the media” etc. After introduction which explains some general features of corruption and lobbying, a brief comparative view of two notions was imposed emphasizing the fact that there are many similarities between them that could jeopardize the process of lobbying as an instrument of participatory democracy. It was stated that lobbying is still not recognize as legitimate and necessary in democracy. However, recognizing the importance of lobbying in modern democratic societies should lead to the regulating lobbying in an adequate manner in trying to obtain a wider confirmation. It means that every single lobbying regulation needs to ensure: transparency of the process; useful definition of terms especially of lobbying, lobbyist and lobbied person; accountability for violation of the lobbying and all the other relevant norms. With this lobbying could be the real alternative for the traditional participatory democracy. Contrary, lobbying is considered to be a significant generator of political corruption and other financial crimes, unless it is not properly regulated from the normative point of view

Keywords: *lobbying, corruption, participatory democracy, interest groups.*

I. Introduction

In general public opinion, lobbying is perceived as an activity with questionable legal and legitimate base. This is mostly the result of the absence of a clear idea of what lobbying means from a legal standpoint and what kind of influence exercised on integrity and trust in public institutions and officials. Hence it is not surprising the existence of diametrically opposing views on lobbying, especially in the context of the (anti) corruptive potential. Lobbying is for one, just a euphemism for abuse material and other resources and the realization of privileged private interests, while for others, it is part of human nature embodied in the desire to represent their interests in front of everyone², as well as an integral and constitutive element of any democratic process.

In the academic discourse, lobbying is most often associated with corruption, primarily as a way of its manifestations, while on the other hand, when it is regulated by law, lobbying is treated as an important anti-corruption instrument. However, it is crucial

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² B. Kaščelan, *Uloga i mesto Zakona o lobiranju u političkom sistemu Srbije* in *Srpska politička misao* br. 17 vol 29, Beograd, 2010, p. 144.

to take into consideration the fact that the lobbying activities, mostly in the doctrine of the western world, are considered to be a significant mechanism of participatory democracy. In that sense, lobbying means an integral part of a democratic society since it allows proactive citizens and their participation in the political life of the community.

However, one should be careful in arguing that lobbying is an undisputed democratic instrument. As some authors state, lobbying has not always been accepted practice in democratic systems because it was considered that directly undermines the rule of law. Moreover, the fact is that in the XIX century lobbying was prescribed as a crime in some federal country in USA³. Exercising influence on the process of political decision-making out of determined legal and constitutional framework, was considered dangerous and unnecessary parallelism that breaks down the principle of the rule of law. Regardless of idealistic and utopian attitude of representative democracy, lobbying has been imposed as a social reality due to the crisis of representative and participatory democracy.

Although lobbying in its semantic sense undoubtedly involves the exercise of influence on decision-making process that is traditionally in the focus of sociological, legal and economic studies of this phenomenon, academic researchers should pay attention on the approach to the centers of political or legislative and executive power⁴. This because lobbying today includes highly sophisticated activity, ie. a collection of various intellectual skills, social capital and material resources that are not available to any interest group, regardless of the public interest and the general objective which the group aims to reach. Access to decision-making power centers does not mean automatically the exercise of influence on it, but it is certainly the first stage of lobbying activities to which it is not easy to reach.

The influence of different media and other social constructs contributed to the creation of so-called. „The myth of lobbying”⁵ that most often causes negative connotations in public opinion and associated lobbying with corruption and illegal influence on authorities.

II. Corruption – notion and main features

The etymology of the word corruption comes from the Latin word which indicates bribery, payoffs, moral spoilage and putrefaction, decomposition⁶. As stated by Vito Tanzi, who is one of the profound authors in the field of studying corruption, it could be regard as a deliberate violation of the principle of impartiality in decision-making process in order to acquire personal benefit⁷. Daniel Treisman points out that corruption is acquiring the private, personal and material benefits by misusing of public authority⁸. This definition is at the academic level, considered as the most

³ S. Barić, A. Anciger, *Pravna regulacija položaja lobista u Sjedinjenim Američkim Državama* in Zbornik Pravnog fakulteta sveučilišta u Rijeci br. 2 vol 39, p. 899.

⁴ P. Bouwen, *Corporate lobbying in the European Union: the logic of access* in Journal of European Public Policy 9:3, 2002, p. 366.

⁵ K. Joos, *Lobbying in the new Europe – Successful representation of interests after the Treaty of Lisbon*, John Wiley and Sons, Minesota, US., 2011, p. 15.

⁶ I. Šipka, M. Klajn, *Veliki rečnik stranih reči i izraza*, Novi sad, 2007., p. 664.

⁷ V. Tanzi, *Corruption Around the World in IMF Staff Papers* Vol. 45, No 4, 1998., p. 7.

⁸ D. Treisman, *The causes of corruption: a cross-national study* in Journal of Public Economics, p. 2000., 76.

accepted definition of corruption, taking into account that it actually reflects the very essence of the notion⁹.

However, the overall development of society influenced the reshaping of corruption forms. Thus, there are a number of partial definitions depending on the segment of social life through which prism the corruption seeks to be identify and explain. In light of this, corruption can be viewed from an economic, political, legal, cultural, social or human rights perspective. Furthermore, depending on the the level of social danger which generates, corruption could be classified as a big, medium or small¹⁰ and in a similar context some authors are preferring to talk about the existence of white, gray and black corruption, again depending on the caused harm. The most distinctive division is making a difference between *administrative* and *political corruption*¹¹. In the first case it is a corruptive influence linked to the implementation of existing laws, rules and regulations, while the essence of corrupt captured state is unlawful influence in terms of making a strategy platform for important decisions of national interest. Political corruption means corruptive relation between centers of economic power and politicians who are in high government positions and it is rightly considered as a powerful weapon of „economic interest” regardless of whether it comes from legal or illegal business. On the other hand, in the broadest sense, administrative corruption includes lower echelon of public employees. However, it is not always possible to make a clear distinction between these two dominant manifestation of corruption, which in practice usually interfere, but it is important, from a methodological point of view, to bear in mind certain features of these two ways of manifestation of corruption, mostly because they usually imply different conditions and causes.

Corruption is most often equated with bribery of civil servants and public office holders. This is the position that is widely accepted at the normative level. In the United Nations Convention against Corruption – UNCAC 2005 (Merida Convention) bribery of public officials was determined as a mandatory crime and many countries have implemented such concept in their criminal legislation. Bribery was divided into active and passive what has to be considered as a positive solution since without that, there is only a criminal offense of taking bribes that excludes legal basis for the prosecution of those who offer bribes.

The development of scientific research and thoughts on the concept of corruption for many years dealt only with corruption in the public sector, limiting its scope only to it. UNCAC as well as many other international institutions (World Bank, Transparency International etc.) however inaugurate the notion of corruption in the private sector as an important social phenomenon. The explanation of this should be sought primarily in the post Cold War dominance of the neoliberal and capitalism model that values private property more than the public or state property. Regardless of this, it can not be concluded that the decision making process completely transferred to the private sector, if we take into account that public authorities are still making rules and regulations that needs to be respected in private sector.

⁹ Robert Klitgaard has further developed this definition, giving a certain amount of ethical volume when said that corruption is unlawful act of the public officials, putting not only the personal interest above interest of people and citizens who elected them, but the ideals that sworn to serve.

¹⁰ Ćirić J. et al., *Korupcija: problemi i prevazilaženje problema*, Udruženje javnih tužilaca i zamenika javnih tužilaca Srbije, Beograd, 2010., p. 8.

¹¹ Popović D, Ilić-Popov G., *Poreska struktura i korupcija in Anali Pravnog fakulteta u Beogradu*, (Vasiljević M. ur.), LXII, 1, 2014. Beograd, p. 6.

Corruption is necessary to be distinguished from the category of „abuse of power” for the first time mentioned in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power in 1985 which was subsequently adopted by the UN General Assembly. Abuse of power can be defined as the abuse of public authority by the person to whom it is assigned what is the most obvious feature of corruption, but the concept of the „abuse of power” is a broader concept than corruption. Abuse of power as a criminological category, does not imply individual violations of the laws or individual excesses, but a flagrant and systematic violation of human rights, which is reflected through an open abuse of state imperium¹². It would be wrong to argue that corruption is not a systemic phenomenon, but it is mostly limited to the narrow economic sphere of influence. On the other hand, abuse of power usually has a political connotation and a political goal, so this includes torture, killing and intimidation of political opponents, violation of the electoral process, genocide, ethnocide, unlawful expropriation etc.¹³ and this is perhaps the crucial distinction between two terms.

Corruption appears to be a kind of „business offer” made to public authorities. Therefore, corruption is able to provide a sphere of interest for both sides of corrupt relationships, making them interested to extend such a relation in confidence. Because of this, it is extremely difficult to detect and even harder to get to any kind of evidence that could be used in court proceedings. This „business offer” is most often the result of a system of relations and Roust Kaliyev hence rightly notes that corruption is not only taking and giving bribes that harms the public sphere¹⁴. Indeed, it is a systemic activity conducted by the state authorities and corruptors.

There is a notable number of theorists who consider corruption as a positive phenomenon primarily for the economic and political aspects. For example, Samuel Huntington states that corruption, through various business arrangements, means benefits to the groups that would otherwise have been marginalized and alienated from society, comparing its social functionality with the implementation of reforms¹⁵.

An interesting observation on corruption as an effective remedy for reducing tax evasion gave Dilip Mookherjee. He points out that the possibility of taking bribes by tax inspectors strongly motivates them to detect taxpayers who resort to evasion. Mookherjee argues that tax evasion would consequently become a less attractive way for violation of tax laws¹⁶. „Corruption paradox” could also be found in the example of China, which is characterized by a high level of corruption, but also a high level of economic growth and investment. It is similar with Hong Kong and Singapore, which are experiencing considerable economic success and have high indices of corruption and high rates of convictions for corruption offenses, at the same time. Furthermore, it is stated that corruption can be a successful arm in dealing with bureaucracy and it is mentioned that corruption could humanize the relationship between citizens and public officials¹⁷. However, all the mentioned effects of the so-called „Useful corruption” can be

¹² Đ. Ignjatović, *Kriminalitet države, Kaznena reakcija u Srbiji V deo* (Ignjatović Đ. pr.), Beograd, 2015., p. 27

¹³ M. O'Brien, M. Yar, *Criminology – Key Concepts*, London, 2008., p. 159.

¹⁴ R. Kaliyev, *Russia's Organized Crime: A Typology, part I*, Euroasia Insight, 2002., p. 1.

¹⁵ S. Huntington, *Political Order in Changing Societies*, Yale University Press, New Haven, CT, 1968., p. 64.

¹⁶ D. Popović, G. Ilić-Popov, *op. cit.*, Poreska struktura i korupcija, p. 9.

¹⁷ W.A. Clark, *Soviet Official Corruption under Perestroika: A Balance Sheet*, in *Current Politics and Economics of Russia* vol. 2, no. 3, 1991., p. 209.

achieved by introducing lobbying in the legal system in the proper manner respecting the principles of the rule of law.

However, a number of studies have determined the specific correlation between corruption and negative social consequences. For example, a study group from Harvard found that increasing the level of corruption to one point leads to a reduction of foreign direct investment to 16 percent. Previously established evaluation scale of corruption points from 1 to 10. Vito Tanzi says that research has come to a result that countries with a greater presence of corrupt relationships, *ceteris paribus*, have a smaller share of collected tax revenues in GDP¹⁸. Finally, according to one relevant research, increasing corruption for only one percent leads to a reduction in economic growth for 0.72 percent¹⁹.

III. Lobbying – notion and main features

Lobbying is an activity that people take unconsciously in many situations and in everyday life takes place at all levels. However, such kind of lobbying is not the subject of this work, nor is it in the focus of a legal regulation. The need for a definition of lobbying and then its adequate regulation at the normative level, primarily exists when it is carried out by professional lobbyists who possess the necessary intellectual, material and social resources, when they lobbied the representatives of public authorities and when the aim of lobbying may affect the public interest.

In particular, lobbying is an activity that aims to influence the legislative and executive authorities²⁰. The citizens in accordance with the proclaimed freedom of speech and political activism are seeking to directly or indirectly achieve their political demands usually by trying to influence the process of public policy making. For that reason, collective action is necessary realized by joining in different forms of groups and organizations in order to propagate the common interests of its members. Traditionally, political organizations are considered to be such organization formed for creating, advocating, and then, if they come to power, implementing public policy in accordance with previously adopted principles and set agenda²¹. However, the crisis of political parties contributed to the mutual expulsion of political parties and their leadership from the citizens-voters. Many theoreticians of political science find that the way out of the crisis that participatory democracy has embarked, could be the returning political parties to the citizens, what will make them more open to civic activism and political pluralism, by developing new forms of activism and participation in the making political decisions process²². Lobbying is just one of those forms that provide „new democracy”. It is a basic tenet of democratic rights that those affected by policies have the chance to be heard²³.

¹⁸ V. Tanzi, H.R. Davoodi, *Corruption, Growth, and Public Finances*, Working Paper 182, International Monetary Fund, Washington, D.C., 2000., p. 473.

¹⁹ H. Mo, *Corruption and economic Growth in Journal of Comparative Economics*, vol. 29 no. 1, 2001., p. 74.

²⁰ L. Zetter, *Lobbying The Art of Political Persuasion*, Hampshire, 2008, p. 3.

²¹ A. Stevanović, *Finansiranje političkih subjekata: koruptivni potencijal i značaj adekvatnog zakonskog regulisanja in Finansijski kriminalitet* (Kostić, Stevanović ur.), Zrenjanin, 2018., p. 335.

²² G. Marković, *Uticaj političkih stranaka na razvoj političke participacije*, in *Anali Pravnog fakulteta u Beogradu* br. 2, p. 110.

²³ A. Polk, *Lobbying: Private Interests and Public Conduct*, Journal for Institutional Comparisons, Spring, 2011, p. 3.

However, the problem is that the services of lobbyists are not available to everyone, and there would be absolutely no grounds to expect that lobbying as „communication channel” in which citizens interact with public authorities would not be able to include every single particular interest. On the contrary, forming a new „lobbying elite” or those privileged who can afford professional advocacy for their own interests, could be expected. Thus, lobbying should be understood as a more efficient technique (compared to traditional organizations such as political parties) providing the particular interests of the entities that possess the greatest economic power.

Broadly, the lobbyinig process is a communication process in which lobbyists seek to persuade legislative and executive authorities to protect one particular interest by insert it into the legal norm. One of the major lessons that has been drawn so far from lobbying practise is the diversity and complexity of *modus operandi* which make reliable generalizations very difficult²⁴.

IV. Relationship between Lobbying and Corruption – a general remarks

Lobbying and corruption are important features of many societies and political systems. Before we get into detailed elaboration of relationship between lobbying and corruption it would be of great benefit to take into account an illustrative statement that talking to someone in order to achieve something is not illegal, but on the other hand, giving money for the same thing is illegal²⁵.

Some authors are arguing that there are no dissimilarities between two notion and if any, they are unimportant²⁶. On the other hand, it has to be underlined that lobbying and corruption should not be identified as the same process, but the fact is that lobbying obtains main features of corruption due to its nature. Some academic research show that lobbying is more likely in democratic countries, where the media and other relevant entities are independent and where the overall political process is more democratic at all²⁷. Contrary to that, political instability has a positive effect on corruption. There is also evidence that federal or decentralised states favour lobbying over corruption. In general, lobbying seems to be more effective than corruption in pure parliamentary and presidential systems²⁸.

Some authors note the difference between lobbying and corruption based upon the fact where influence is being sought. According to them, lobbying is a rent-seeking activity aimed at rule makers whereas corruption is a rent-seeking activity aimed at rule enforcers²⁹. Previous practice showed that such determination has a limited cognitive effect. Firstly, the corruption could be directed towards rule enforcers (administrative corruption) as well as to the rule makers.

Hence, it would be quite better to separate lobbying from corruption only because of the fact that lobbying process should be based on legally prescribed procedure and

²⁴ P. Bouwen, *Corporate lobbying in the European Union: the logic of access*, in *Journal of European Public Policy* 9:3, 2002., p. 365.

²⁵ S. Barić, A. Acinger, *Pravna regulacija položaja lobista u Sjedinjenim Američkim Državama*, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, vol. 39, br. 2, 2018, p. 900.

²⁶ G. Grossman, E. Helpman, *Protection for Sale*, *American Economic Review* 84, 1994, p. 845.

²⁷ N. Campos, F. Giovannoni, *Lobbying, Corruption and Political Influence*, *Public Choice* 131(1), 2007., p. 19.

²⁸ F. Giovannoni, *Lobbying versus Corruption*, CESifo DICE Report, *Journal for Institutional Comparisons*, Spring, 2011, p. 12.

²⁹ *Ibidem*

transparency. If it is done in this way, it would indeed have the potential to overcome all the troubles of participatory democracy and include a greater number of citizens in social dialogue. If these conditions are not fulfilled, lobbying and corruption come to a point of overlap and then we can really conclude that there are no significant differences between them.

Furthermore, lobbying should involve advocacy for a certain collective interest, while corruption, on the contrary, always strives to provide a narrow private interest of corruptors. It does not mean that behind the proclaimed collective interest one can not hide the narrow and private interest of a few. That is why it is important to make the lobbying process transparent with clear goals, ie to know *who, whom and for what* In the lobbying process. Open and transparent institutions followed by free media could possibly enhance the decision-making process and strengthen the reliability of the political system. However, among many others, there is still an unresolved issue of inherent asymmetry of interest representation³⁰. Such problems must be solved with the adoption of the systemic norms that regulate different areas of social life

In the both cases of lobbying and corruption, it comes to efforts to influence the legislative and executive branch of government. However, in contrast to the corruption that implies a direct unlawful financial or other material benefit, lobbying should be based on explaining why some particular interest may positively affect public interest, in accordance with the moral and legal principles that does not distort the rules of competition in the market, fiscal policy, security issue etc.

Conflict of interest is basis of corruption³¹ and as we previously explained in the paper, the existence of a particular conflict of interest is a common place also when it comes to the lobbying activities. Accordingly, decision-makers who are targets of every lobbying process are generally in a position to decide on the public interest issue. First of all public interest should be determined by taking a clear stance towards concrete proposals that lobbyists make before it, opt for a more favorable solution, and ultimately making a decision with a general validity, supported by most of the social and economic groups in a particular society.

According to one theoretical model of public interest determination offered by Richard Stewart, it is necessary to have a government that is equally open to all stakeholders when deciding on a specific issue is at question³². This certainly does not mean allowing an open and undue pressure on public authorities, as Jody Freeman warned in his paper when he says that although the concept of public interest is not easily comprehensively and precisely defined, it is nevertheless imperative to neutralize every kind of pressure from those representing their narrow and generally lucrative interests³³. One of the most serious problem facing the concept of legitimate and legal lobbying is that many relevant socio-economic factors (stakeholders) do not have access to public decision makers, and hence have no real possibility to express their own views and arguments on certain issues. In such circumstances, it is quite expected that those who have the necessary resources for lobbying will adjust their interests and will aim their influence on the government officials in order to adopt measures that would allow them a privileged position in the business market etc.

³⁰ A. Polk, *op cit*, p. 5.

³¹ S. Rao, H. Marquette, *Corruption indicators in Performance Assessment Frameworks for Budget Support in Anti-Corruption Resource Centre*, Norway, 2012, p. 12.

³² R. Stewart, *The Reformation of American Administrative Law*, 88 HARV.L. REV. 1975., p. 1796.

³³ J. Freeman, *The private Role in Public Governance*, 75 N.Y.U. L. REV. 2000., p. 550.

From the legal stand of point, lobbying is defined as an aleatory activity, from the perspective of the one who orders lobbying. This means that in a contract that a professional lobbyist signs with a lobbying contractor, he can not foresee a fee for lobbying services depending on the outcome of lobbying. Instead of this, according to comparative legislation lobbying must be contracted in a fixed amount. Hence, it should not be a surprise when many stakeholders who have sufficient resources, in line with business pragmatism, are rather choosing corruptive ways to „convince” public authorities in decision making process³⁴.

The enormous impact on whether a particular interest will be represented in a corrupt or legal manner has both the integrity of public officials, the institutions they represent, and the trust of citizens in them. According to *Exchange theory*, developed by sociologists in the 1960s³⁵, the relationship between private and public entities could be defined as the series of information and resources exchanging. The potential benefit that a government has from „exchanging” with private (civil) entities can be multiple, without direct and unlawful benefit derived exclusively by an official such as the case in corruption. Namely, often when it comes to discussing a narrowly professional issue, legislators hire experts (university professors, researchers, consultants...) who can act as lobbyists of a particular interest. Lobbyists can also receive other important information such as the state of public opinion in relation to some political measure and topic, the feasibility of a particular project, etc. It is important to point out the attitude of executive and legislative authorities towards large corporations employing a few thousand or tens of thousands of people. The adoption of measures relating to the business of such economic entities without consulting the representatives of their interests could jeopardize the socio-economic order of the state.

Regulation of lobbying can make a distinction in relation to corruption, but only when this regulation means: 1) *clear and functional definition of lobbying, i.e. all the activities under this term are implied*; 2) *transparency of lobbying activities*; 3) *clear determination of who is a lobbyist and who is a lobbied person and under what conditions the process has to be conducted*; 4) *introducing a clear and adequate system of liability for violations of regulations governing lobbying*.

The Organisation for Economic Co-operation and Development addressed the question of transparency and integrity in the lobbying process within the Recommendation with Principles for Transparency and Integrity in Lobbying as guidance to decision-makers. The Recommendation points out that the following questions must be answered in order to regulate lobbying in line with principles of the rule of law³⁶:

1. Do all stakeholders have fair and equitable access to the development and implementation of public policies?
2. Do rules and guidelines on lobbying respect the socio-political and administrative context?
3. Are the rules and guidelines on lobbying consistent with the wider policy and regulatory frameworks?

³⁴ There is a tendency to shift the center of lobbying activities from engaged professional lobbyists to the strategy of direct addressing to institutions.

³⁵ S. Levine, P. White, *Exchange as a conceptual framework for the study of interorganizational relationships*, in *Administrative Science Quarterly*, 1961, p. 585.

³⁶ CleanGovBiz, *Lobbying: Influencing Decision Making with Transparency and Integrity*, OECD, 2012, p. 3.

4. Are the terms „lobbying” and „lobbyist” clearly defined in the rules and guidelines on lobbying?
5. Is sufficient information on lobbying activities publicly available?
6. Can lobbying activities be scrutinised by stakeholders?
7. Are there clear rules and guidelines of conduct for public officials on how to engage with lobbyists?
8. Do lobbyists comply with standards of professionalism and transparency?
9. Is there a coherent spectrum of strategies and practices to ensure compliance with rules on lobbying?
10. Is the functioning of rules and guidelines on lobbying periodically reviewed to ensure compliance?

V. Conclusion

Lobbying is a practice that has become increasingly widespread today. Nevertheless, currently only a small number of countries have any regulation of lobbying³⁷. It has to be mentioned that defining lobbyists is always fraught with difficulties due to different views on decision making process in society. In such circumstances, lobbying often comes to a point of overlapping with corruption, since we have already indicated that two rather similar concepts distinguish the legal basis and regulation, as well as the transparency of the whole process. When undertaken with transparency lobbying is a legitimate communication channel for interest groups to be heard and to be involved in the deliberative process of law making. If the lobbying is not based on a legal norms and transparency, we can no longer talk about lobbying but about corruption. Hence, it should be concluded that lobbying and corruption are not the same terms. Lobbying is an activity that aims to influence the legislative and executive authorities in order to ensure that as many interests as possible are heard and that they are taken into account in the process of making public decisions. In light of this, lobbying becomes a kind of functional supplement of democratic process. This definition of lobbying aims to point out the difference in relation to corruption.

However, lobbying potentially can produce significant problems for society. For example, forming a new „lobbying elite” of those privileged who can afford professional advocacy for their own interests, could be expected problem. In addition, lobbying is in some way parallelism in making public decisions with capacity to undermine the foundations of the state functioning. To conclude, lobbying could be a favorable instrument in the crisis of democracy, but only if it is based on the rule of law, transparency. Otherwise, it will become legalized corruption.

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³⁷ *Ibidem*.

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