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GLOBAL NORTH VS GLOBAL SOUTH: OVERCOMING THE LIMITS OF THE TRANS-NATIONALIZATION OF ANTI-CORRUPTION LAWS

Juanita CEESAY[1]

INTRODUCTION

Corruption is an age old phenomena which permeates throughout all works of life. Within the sphere of politics, business and daily social activities, issues involving bribery, fraud, extortion, nepotism, money laundering, and the like, occur on a regular basis. In this regard, current trends involving global governance have found it necessary to adopt anti-corruption laws in order to curb the perpetration of corrupt practices on a transnational level. Furthermore, as anticorruption laws multiply in the global north, these extraterritorial laws are meant to be complied with by all actors including those in the global south. However, the fight against corruption might not be as effective if the standard setters of anti-corruption legislations originate from only one corner of the globe. Accordingly, this article seeks to examine the issue of corruption and global governance trends used in combatting this societal pariah. Second, is an overview of standard setting instruments that serve as the mainstream approach to tackling corruption. Also, is the use of a case study in assessing the practical implications of anti-corruption laws when applied on the ground. Third, is the introduction of perspectives from the global south in dealing with the issue of corruption. In particular, the examining of the role of informal norms and their use by actors as a deterrent and enforcement mechanisms in tackling the issue of corruption.

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PART ONE

In North America, one of the biggest scandals of the last decade was the collapse of the energy company Enron.[2] This once revered organization lost its respectability when it was discovered that the company operated under a web of deceit involving fraud and rent-seeking activities.[3] Likewise, in South America, one of the biggest scandals of the past decade involved the Petrobras corruption case in Brazil, which saw political actors as high up as the President, implicated in corrupt proceedings.[4] In Asia, the Republic of South Korea also suffered from a corruption scandal in which "a South Korean court jailed former President Park Geun-hye in April 2018, over a scandal that exposed webs of corruption between political leaders and the country's conglomerates".[5] In essence, what these various scenarios point to is that corruption is a pervasive global problem which reflects things that do not change quickly. For example, problems such as bribery, fraud, kickbacks, nepotism, money laundering, and collusion, among others are all deep-seated issues which wreak havoc on societies the world over. In this regard, the causes of corruption are open to vast interpretation depending on one's school of thoughts. Some scholars attribute its occurrence in relation to; the richness of a country; the degree of openness of economies; the religious orientation; the quality of legal systems; the level of human capital; the freedom of the press; and democratic processes.[6] Others see corruption as simply an outcome based on the reflection of a country's legal, economic, cultural and political institutions.[7]

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[2] The Fall of Enron in the early 2000s not only bankrupted a major New York Stock Exchange (NYSE) listed corporation and brought down one of the « Big Five » accounting firms, but also marked a major shift in the value of corporate governance in general. The scandal 's fallout spanned over ten years, resulting in the criminal indictments and convictions of Enron's corporate officers and its accounting firm, Arthur Anderson and the introduction of the Sarbanes-Oxley Act 2002. See, Primbs, Michael and Wang, Clara, 'Notable Governance Failures : Enron, Siemens and Beyond' (2016). Comparative Corporate Governance and Financial Regulation. Paper 3.

[3] Ibid

[4] See, Sérgio Moro, Fernandes. "Preventing Systemic Corruption in Brazil" Daedalus, Volume 147, Issue 3, Summer 2018, p.157-168.

[5] See, Hyung-Jin, Kim. "South Korea Ex Leader gets 15 years for Corruption", Associated Press, October 5, 2018.

[6] See Svensson, Jakob. Eight Questions about Corruption, Journal of Economic Perspectives – Volume 19, No.3, 2005 pp.19-42.

[7] See Djankov, Simeon, Edward Glaeser, Rafael La Porta, Florencio Lopez-De Silanes and Andrei Shleifer. « The New Comparative Economics » Journal of Comparative Economics, 31 :4. pp.519-619, 2003.

Despite the varied interpretations on the cause and effects of corruption, the global regime has made the combatting of this problem, a cornerstone on the internationalization of what are considered global governance best practices.[8] In particular, the last decade has given rise to the emergence of anti-corruption legislations by actors such as states and government institutions in addressing the fight over corruption. In the U.S., the Foreign Corrupt Practices Act (FCPA) emerged.[9] In the U.K was the establishment of the UK Anti-Bribery Act 2010.[10] Likewise in France was the enactment of the country's own anti-bribery legislation, referred to as Loi Sapin II.[11] The aim of these laws is to prohibit companies and their individual officers from

[8] See, Wang, Hongying and James N. Rosenau. « Transparency International and Corruption as an Issue of Global Governance ». Global Governance, vol.7, no.1, 2001, pp.25-49.

[9] In the United States, the governing law against bribery and corruption is the Foreign Corrupt Practices Act of 1977 (FCPA); "which was enacted for the purpose of making it unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business. Specifically, the anti-bribery provisions of the FCPA prohibit the willful use of the mails or any means of instrumentality of interstate commerce corruptly in furtherance of any offer, payment, promise to pay, or authorization of the payment of money or anything of value to any person, while knowing that all or a portion of such money or thing of value will be offered, given or promised, directly or indirectly, to a foreign official to influence the foreign official in his or her official capacity, induce the foreign official to do or omit to do an act in violation of his or her lawful duty, or to secure any improper advantage in order to assist in obtaining or retaining business for or with, or directing business to, any person. The FCPA – contains two main components: the anti-bribery provisions, which prohibit payments to foreign officials to obtain or retain business, and the accounting provisions that require issuers to make and keep accurate books and records and to maintain an adequate system of internal accounting controls. The accounting provisions also prohibit individuals and businesses from knowingly falsifying books and records or knowingly failing to implement internal controls. (15 U.S.C. § 78m) Persons and entities subject to the FCPA include "domestic concerns", which are U.S. persons and businesses.(15 U.S.C. § 78dd-2) "Issuers", which are U.S. foreign public companies listed on U.S. stock exchanges or which are required to file periodic reports with the SEC, also are subject to the FCPA. (15 U.S.C. § 78dd-1) In addition, certain foreign persons and businesses acting while in the territory of the United States may be subject to the FCPA". ((15 U.S.C. § 78dd-3). Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission. A Resource Guide to the U.S. Foreign Corrupt Practices Act, November 14, 2012. www.justice.gov/criminal/fraud/fcpa and www.sec.gov/spotlight/fcpa.shtml

[10] In the United Kingdom, the Bribery Act 2010 is the governing law in the fight against bribery and corruption. "The Act contains two general offences covering the offering, promising, or giving of a bribe (active bribery), and the requesting, agreeing to receive, or accepting of a bribe (passive bribery) at sections 1 and 2 respectively. It also sets out two further offences which specifically address commercial bribery. Section 6 of the Act creates an offense relating to bribery of a foreign public official in order to obtain or retain business advantage in the conduct of business, and section 7 creates a new form of corporate liability for failing to prevent bribery on behalf of a commercial organization." The Ministry of Justice. The Bribery Act 2010, Guidance about procedures which relevant commercial organizations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010) March, 2011. www.justice.gov.uk/guidance/bribery.htm

[11] In France, the Transparency, Fight against Corruption and Economic Modernization Act (Sapin II) is the governing law in the fight against bribery and corruption which was adopted in December 2016. "The Sapin II Act constitutes a major shift in French anti-corruption law to the best international standards through five main changes: it extends the extraterritorial reach of French anti-corruption laws (I), creates a new anti-corruption body replacing the former anti-corruption body with extended powers (II), introduces an

influencing foreign officials with any personal payments or rewards.[12] Some argue though, that it is also a way of inducing foreign investors into reducing their investment in high corruption risk countries corruption countries.[13] Nevertheless, the nature of particularly the FCPA, the UK Anti-Bribery Act and the Loi Sapin II, make these three legislations the most transnational, as their influence extends to companies within their home jurisdictions as well as abroad.[14]

Not to be outdone, non-governmental institutions which consider themselves to be the gatekeepers of the global governance regime are also engaged in the fight against corruption around the world. It is for this reason, organizations such as the OECD have put in place their own version of anti-corruption legislation in tackling corruption. In particular, is the OECD Anti-Bribery Convention which establishes legally binding standards to criminalise bribery of foreign public officials in international business transactions. Countries party to the OECD Antibribery Convention are the 35 OECD countries and 7 non-OECD countries, Argentina, Brazil, Bulgaria, Colombia, Latvia, Russia and South Africa.[15] Thus, what this demonstrates is that certain states and non-governmental institutions, have solidified a set of anti-bribery laws which then serve as the global standard in tackling the issue of corruption. Moreover, is the point that these laws unanimously originate from countries and institutions in the global north.

The importance of this fact is in recognition that other countries as well have their own variations of anti-bribery legislations. For example, in Brazil, there is the Brazilian Clean Companies Act which makes companies and individuals liable for bribing public officials.[16] Likewise, in Singapore, which is considered as one of the least corrupt countries, there is the Prevention of Corrupt Act. The Cap 241 as it is often referred to, which is a general prohibition on giving, promising or offering, or soliciting, or accepting or agreeing to receive a gratification in either the public or private sector. Both the demand (recipient), and supply (the giver) sides

obligation to implement anti-corruption corporate compliance programs (III), improves protection for whistle-blowers (IV), and implements a system of deferred prosecution agreements (V). www.legifrance.gouv.fr

[12] Refer to the aims of The FCPA via justice.gov

[13] Blundell-Wignall, A and C. Roulet. Foreign Direct Investment, Corruption and the OECD Anti-bribery Convention, Working Papers on International Investment, 2017/01, OECD Publishing, Paris.

[14] For instance a non-US company which trades on the US stock market is subject to requirements of the FCPA.

[15] Blundell-Wignall, A and C. Roulet, Supra note 7 at 19.

[16] See Richard, Michelle, Brazil's Landmark Anti-corruption Law, 20 Law and Bus. Rev. Am.141 (2014).

of bribery, as well as the intermediaries arranging the same are caught by the PCA.[17] Yet, despite the existence of these anti-bribery laws, which are notably non-western, it can be argued that their utility and implementation are overshadowed by similar anti-corruption legislations hailing from the global north. However, this in itself is not problematic. The cause for reflection emerges only in reference to the legitimacy of the anti-bribery legislations from the global north which subsequently become the global standards in dealing with the issue of corruption. In other words, if anti-corruption legislations hailing from other parts of the globe, particularly from the global south are to be side-lined or at best, left as second-hand alternatives, it is essential that the legitimacy and applicability of anti-bribery legislations from the global north be examined when they are implemented in practice.

PART TWO

As in every other domain, the global governance regime has the same actors involved, i.e. western lead institutions and states.[18] Therefore, with regards to corruption, the handling of this issue is no different. However, what is most at stake involves the manhandling of certain global issues and the thought that so too could be the result of anti-bribery legislations if left predominantly in the hands of the same actors. Numerous scholars have pointed to the case of CSR for example, which as the author R. Shamir calls it, has become a site where counterhegemonic pressures and hegemonic counter-pressures begin to assume a more or less definitive structure, with "authorized" agents who occupy certain "recognized" positions from which they assert "what is at stake" and from which they try to control the definition and scope of the very notion of "responsibility".[19] In other words, there is a danger that like the current predicament within the field of CSR, legislations pertaining to anti-bribery could also be

[17] Ing Loong Yang and Tina Wang, Global Legal Insights on Bribery and Corruption in Singapore, Latham & Watkins, First Edition, 2016.

[18] Global Governance according to the authors is the « complex of formal and informal institutions, mechanisms, relationships and processes between and among states, markets, citizens and organizations – both intergovernmental and non-governmental- through which collective interests are articulated, rights rights and obligations are established and differences negotiated. Thus within this milieu are the actors themselves which originate globally but the substantive contexts are nevertheless accounted for by traditional players. Refer to Klaus Dingwerth and Philip Pattberg, Actors, Arenas, and issues in Global Governance, In book : Global Governance, Palgrave Macmillan Publishing, pp.41-65.

[19] Ronen Shamir, Corporate Social Responsibility : A Case of Hegemony and Counter-Hegemony. In, Boaventura de Sousa Santos and Cesar A. Rodriguez-Garavito, Law and Globalization from Below, Cambridge University Press, 2006, pp.92-117.

hijacked by certain global actors tasked with defining the fundamentals of anti-bribery laws, which in turn have global ramifications.

Thus, in acting as standard setters for the field of anti-bribery legislations, actors such as particular nation states and legislation making nongovernmental institutions might run into certain risks. In particular, in engendering "creative compliance"; meaning the risk that those subjected to the standard setting rules will follow them to the letter but find ways to evade their spirit and thus undermine the objectives of the regime.[20] This perspective perhaps sheds light on the difficulties which anti-bribery legislations currently face in their implementation. This perspective perhaps sheds light on the difficulties which anti-bribery legislations currently face in their implementation. For example, an illustration of the challenges faced by current anti-bribery laws is the case of the U.S. vs Fredric Cilins. The facts of this case are as follows:

"In 2005, a foreign mining conglomerate (the "Mining Company") sought the help of the wife of a high-ranking Guinean government official to obtain rights to mine iron ore in the Simandou region of Guinea (the "Simandou Concession"). The Simandou Concession was held by another company, and its projected worth was billions of dollars. Between 2007 and 2010, the official's wife signed contracts with the Mining Company and related companies. In those contracts, the Mining Company and others promised to pay the official's wife, and she promised to help the Mining Company obtain the Simandou Concession. The contracts stipulated that $2 million was to be transferred to the official's wife's company and an additional sum was to be "distributed among persons of good will who may have contributed to facilitating the granting of" the valuable mining rights. The mining company and its affiliates also agreed to give 5 percent of its ownership of particular mining areas in Guinea to the official's wife.

In 2012, the Guinean government initiated an investigation into the alleged bribery scheme involving the Simandou Concession. The FBI followed suit in January 2013, and by March 2013, the official's wife was working as a cooperating witness. Through March and April 2013, the official's wife had several telephone calls and in person meetings with Frederic Cilins, who had some unmentioned connection with the Mining Company. In these calls and meetings and in other meetings going back over a year, Cilins attempted to get the official's wife to destroy documents that appeared to connect him and his associates with the bribery scheme, and also

[20] Colin Scott, Standard Setting in Regulatory Regimes, In Robert Baldwin, Martin Cave, and Martin Lodge, The Oxford Handbook of Regulation, Oxford University Press, 2010, pp.104-119.

sought to induce the official's wife to sign an affidavit containing numerous false statements regarding matters under investigation.

On April 25, 2013, the DOJ filed a five count Indictment in the Southern District of New York against Cilins alleging witness tampering, obstruction of a criminal investigation, and destruction of documents. A Superseding Indictment filed on February 18, 2014, added an additional count of conspiracy to obstruct justice. On March 10, 2014, Cilins entered into a Plea Agreement with the DOJ. Under the terms of the agreement, Cilins agreed to plead guilty to a one count criminal information for obstructing a criminal investigation (a Superseding Information was filed concurrently). On July 29, 2014, the court sentenced Cilins to 24 months in prison to be followed by 3 years of supervised release and ordered Cilins to pay a fine of $75,000 plus a mandatory assessment of $100. In a separate judgment, Cilins forfeited $20,000 already in FBI custody."[21]

As the evidence demonstrates, the acquiring of the mining rights to this project were obtained via corrupt means which induced charges of violating the foreign corrupt practices act (FCPA) against the defendant. However, more importantly, the Simandou case illustrates the violation by entities of formal rules meant to fight against bribery and corruption. In other words, despite the presence of stringent anti-bribery and corruption laws on a global scale, these actors are not deterred from engaging in devious practices. On the one hand formal laws such as anti-bribery and corruption laws are lauded for their capacity to go after perpetrators of crimes. However, the other side to the argument is in recognizing that just because these laws are punitive does not necessarily align with having more clout as a deterring mechanism. The reason being, as is exemplified in the Simandou case is that actors willfully break ethical codes of conduct while doing business in Africa. Moreover, with the knowledge that acts of corruption perpetrated on the Continent are considered illegal in the home countries where these firms originate. Thus, in light of the uncertainty of current anti-bribery laws it is perhaps justified in looking to other regions of the world in examining unorthodox approaches used in understanding and dealing with corruption.

[21] United States of America v. Frederic Cilins (2013) Case No. 13-cr-00315, New York, United States Department of Justice (http://fcpa.stanford.edu/enforcement-action.html?id=469 (Last Accessed: June 3, 2020)

PART THREE

If the orthodox understanding of corruption is that it is an outcome which reflects a country's legal, economic, cultural and political institutions[22] – then it is justified in thinking that dealing with corruption also involves local processes which are a reflection of the institutions, politics, economies and culture of a country. The argument so far is that the current trans-nationalization of anti-corruption laws from mostly the global north fail to consider the externalities on the ground which might hinder or reinforce the notion that corruption has negative consequences. In the case of China for example; the legal regime subscribes to the concept of the rule of law as "a deep stable state of a societal game, in which it becomes the first best response of actors to align their behavior with publicly articulated norms".[23] In other words, formal institutions matter for development as they are the vessels through which a society administers the rule of law. However, the absence of institutions that support the rule of law would turn a society into disarray as they are needed for the conducting of market exchanges, securing property rights, and to enforce contractual agreements. Thus, what the Chinese model shows is that in addition to the traditional formalist structures, of equal value are complimentary legal norms which also engender the rule of law by providing alternative modes of coordination, including the mix of interpersonal trust and clan-based relational contracting, which is associated in the Chinese context with the practice of "guanxi".[24]

As such, the presence of informal institutions which can generate a basis for inter-personal or inter-organizational trust in business contacting, is recognized as being an important component of society. According to author Douglass North, "too little is known about the evolution of informal institutions or of their mode of operation, but very much of the same point can be made about formal institutions also"[25] Accordingly, in an environment that lacks autonomous legal institutions like China in the 1970s, gave rise to the alternate legal regime Guanxi; which is based on informal rules and norms. In this context, informal institutions are therefore understood as "those which do not rely on the state to enforce contracts, and may be expected

[22] Blundell-Wignall, A and C. Roulet Supra note 12 at 24.

[23] Aoki, M. (2015) "How Policies Change: A strategic perspective of China-Japan Historical comparison. Journal of Comparative Economics, forthcoming. Chen, D., and Deakin, S, (2015) "On heaven's lathe: rule of law, state, and economic development. Law and Development Review, 8:123-145.

[24] Ibid at 2.

[25] North, Douglass. (1990). Institutional Change and Economic Performance (Cambridge: Cambridge University Press).

to work well in contexts where trading takes place among a small group of actors who know each other and deal on a repeated basis."[26] Additionally, in a world of small-numbers bargaining, there are strong incentives not to cheat as this risks exclusion from the group. In this regard, the system of Guanxi shows that formal law instruments like anti-bribery laws are not the only tools with the power to keep a society in check from engaging in disingenuous acts. There remains to be explored the effects of existing societal codes of conduct which can also serve as a deterrence or can be punitive in dealing with an issue like corruption.

Furthermore, if one is to look at the societal codes of conduct from countries in the global south. Another noteworthy example of informal norms used in combatting issues like corruption is the use of social stigma. Specifically, an intrinsic value of informal norms is its effectiveness in pursuing justice outside of the formal judiciary process. In general, "informal norms are sets of rules and guidelines by which individuals respect and enforce the rights and responsibilities of other individuals in situations that do not give rise to formal legal protection".[27] As such, in the pursuance of justice, the informal regime is known to rely on the use of 'social stigma' as an enforcement mechanism in resolving disputes among members of a community. For instance, "a vendor who is a member of a community is unlikely to risk his reputation by failing to perform his obligation under a contract. The result would be a loss of respect and a subsequent lack of business. Of course, this stigmatization would have little effect if the contract is with a nonmember of the community. But in the instance of a vendor interested in maintaining his reputation, the risk of lost business provides an adequate informal mechanism to restrict his actions". Moreover, this shows that within a given society, community members have a vested interest in maintaining their reputation in fear of the repudiation that comes along with social stigmatization. Thus, given the evidence on the effectiveness of social stigma in dealing with issues such as dispute resolution, environmental accountability, among others – it can be inferred that if this same norm is used for combatting corruption it perhaps might lead to the same positive results.

In conclusion, what informal norms like guanxi and social stigma show is that other complimentary systems of dealing with corruption which originate from the global south should also be considered by the global regime when coming up with laws and policies in fighting

[26] Ibid

[27] Kevin Fandl. The Role of Informal Legal Institutions in Economic Development, Fordham International Law Journal, Volume 32, Issue 1, 2008, pg. 10

corruption. It is justified that current laws transcend the jurisdictions for which they were originally meant. However, in order for these laws to become truly global in their theoretical and practical form, it is imperative that there be other perspectives which are of equal value despite being unorthodox. Moreover, doing so would also enhance the success of current anti-corruption laws in terms of being more relatable to the local contexts of the jurisdictions which they are meant to serve.