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Stavros Katsios

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About the Author:

The author Stavros Katsios is Associate Professor of International Economic Relations and International Economic Crime, director of GeoLab and Vice Rector for Economic Management and Development at the Ionian University in Corfu, Greece. He holds an MA in European Studies from Saarland University, Germany. His Dr Thesis is on money laundering and its effects on the financial system.

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director@geolabinstitute.org | GeoLab Institute, Ionian University, Tsirigoti Square, GR-49100 Corfu, GREECE

CORRUPTION AS A CHALLENGE TO SOVEREIGNTY

STAVROS KATSIOS

*Associate Professor, Ionian University
Director of GeoLab Institute
Corfu, GREECE
skatsios@ionio.gr*

The basic things expected by our people of their political and economic systems are simple. They are: equality of opportunity for youth and for others. Jobs for those who can work. Security for those who need it. The ending of special privilege for the few. The preservation of civil liberties for all. The enjoyment of the fruits of scientific progress in a wider and constantly rising standard of living. These are the simple, basic things that must never be lost sight of in the turmoil and unbelievable complexity of our modern world. The inner and abiding straight of our economic and political systems is dependent upon the degree to which they fulfill these expectations.

Franklin D. Roosevelt in his "four freedoms" speech, 1941

1. Introduction

Sovereignty has traditionally been seen as a term carrying internal meaning and universal appliance. To what extent is such a view still valid has been a matter of furious academic debate focused mainly on the question about the nature of the contemporary world and of the kind of its components. Accordingly, it remains highly controversial to what extent does the state have the potential to defend its role as the steam engine of political authority and power in a multilayered world. The relationship between sovereignty and globalization is at the core of the debate. The ideas that are shaping modern world rely mainly on the divisibility and openness of sovereignty rather than conforming with traditional norms of the term such as discreteness and indivisibility. Thus sovereignty although retaining its importance to understanding modern world is increasingly becoming part of a diversified global governance toolkit linked to crisis management.

Corruption is commonly believed to have evolved from a pure domestic problem to a global challenge to democracy, free market and human rights. Beyond any doubt corruption affects and is being affected by political institutions on national and international level. Indeed the ability to fight corruption and the degree of prevalence of corruption has often evolved to a pivotal criterion for the evaluation of the democratic, transparent and open character of every national regime and an assessment tool of the rule of law in each country. Political accountability and the provision of public goods, democracies, parliamentary systems, political stability, and freedom of press are all associated with the ability to combat and reduce corruption. The determinants of corruption – in particular related to good governance and rule of law – are critical to the contemporary

concept of sovereignty.

In that sense, contrary to the traditional de-jure sovereignty the basic notion of de-facto state sovereignty in terms of providing for its people and acting responsible in the international arena can be seen as a prerequisite for the capability to underpin democratic states and market-based economies by blocking political instability and exclusion from a participation in global wealth. The fact that many states are not capable of providing the most basic public goods for their citizens and in particular to maintain basic order and good governance, distorts daily life, provides a breeding ground for criminal acts and threatens global stability. Such states suffer from a sovereignty deficit between the goods desired and the systemic reality of corruption and disorder. Globalization of national economies requires a process of co-production of rules involving the state, firms, and citizens to produce rules that are compatible with international regimes and comprehensive across boundaries. In that framework contradicting the 19th century concept of being the power above law, sovereignty could be conceived, according to the 1923 decision of the Permanent Court of International Justice¹ as the liberty of state within the limits of international law e.g. "sovereignty as liberty". States failing these purposes pose a main challenge being at the heart of a worldwide systemic crisis; as such challenges cannot be solved by the states on their own they create a demand for international regulatory regimes.

2. Evolution of Sovereignty to a Governance Standard

Regarding nation-states, technological developments, modern transportation and telecommunications pose tremendous challenges to the regulation of their economies. In their desperate effort to maintain their privileges on national levels, certain groups are claiming certain forms of "sovereignty", undermining the same international institutions, which could have contributed to the solution of purely domestic problems by functioning properly. The interference of various hazards especially in form of denial to comply or projecting impossible to overcome strict technical or bureaucratic prerequisites waives every possible positive outcome international regulation dynamics could have had to domestic affairs. The traditional perception of state jurisdictions does not seem to reflect the current needs for regulation in a globalised world².

In the beginning of the 21st century the world is still dominated by national states and the global economic, financial and currency system has as the international state system, as common parameter power³ and sovereignty. Sovereignty does not represent any more what it used to and the transformation of its characteristics is the result of the rise of new actors; beyond the pressure of the governments of the great powers, sovereignty faces constant change under the pressure of international organizations, global financial institutions, fund managers and from all those who have access to credit. The analysis of the developments in the sovereignty domain has led to a revision of the notion and in particular to the revision of their results⁴. Since international organizations

¹ S.S. *Wimbledon*, 1923 PCIJ (ser. A) No. 1 at 15

² JACKSON H. J., *Sovereignty Modern: A New Approach to an Outdated Concept*, American Journal of International Law 97, 2003, pp. 782-802.

³ SCHOENBAUM T., *International Relations*, Cambridge, University Press, 2006, p. 43.

⁴ CHAYES A. - CHAYES HANDLER A., *The New Sovereignty: Compliance with International Regulatory*

posses “structural power”, defining the terms of the flow and supervision for the financial and trade transactions, a gradual retreat of the sphere of state influence in the day-to-day life of the citizens is being detected, a development connected with the disability of national governments to ensure some of the basic functions (domain réservé) for which it has been conceived: territorial defense, rule of law, security of the citizens, financing the economy, effective institutional framework for the basic market functions (buyers-sellers, creditors-indebted, owners-leaseholders). But since the nation state provides the necessary political framework for the function of political economy, this retreat does by no means define its extinction. It rather signalizes the gradual involvement of the state to “secondary” fields of government activity ensuring the enhancement of its effectiveness. Balancing of state power to that of international actors is primarily expressed through the developing notion of state responsibility for complying with international regimes such as regimes for combating corruption, for protecting human rights and for designating standards as the tool for the fight against global threats. The level of the retreat of the state from the traditional domain reserve varies from country to country. The great economic powers’ policy remains firm to their interests in supporting international organizations and regimes only under the condition that they are consistent if not identified to their national interests; that could explain the rare phenomenon of concession of decisive powers to bodies and officials of international organizations. Indeed the global context today places the dynamics of state formation within the context of global organizations and networks, as well as regional systems and networks.

The increased interest in economic crime and especially corruption is relevant to the economic crisis; as corruption distorts the set of rules regulating the allocation of public resources by officials for financial or political gain, it has seized to be viewed as a pure moral issue becoming a tool in the fight for transparency, good governance and social justice. Decision makers are beginning to grasp that state failure must be reversed. Humanitarian crises such as illegal migration and poverty, literacy and environmental problems have their root in the failure of states to provide basic goods and essential opportunities for their citizens. Governance deficit translated to sovereignty deficit indicate states as the weak link in the global effort to fight the expanding networks of transnational organized criminality -engaged in drugs, arms and trafficking-, to erase terrorist clusters and to eradicate poverty. Beyond that, effective states -that is the states actually performing the functions that accredit them as sovereign- are the necessary condition for maintaining market stability and foster growth. They pose the core of the problem and the only comprehensive solution to current challenges. The need for a smart-state-building project is more evident than ever; building the most effective form of organization of the polity we will create the necessary space to free and fair flows of information, people and money.

Governance entails an orderly process for arriving at and implementing decisions regarding collective goods. But in critical countries, the missing element is a process for connecting citizens’ voices to government and making government accountable to citizens for its decisions. Instead, the prevailing elements are disorder and an almost total disjunction between rulers and ruled. What is needed is not a new idea of sovereignty in theory, but an analysis of the necessary functions of the state in relation to the people, such that, empirically speaking, the missing element we described begins to take formation. The true

legitimacy of the sovereign government, which arises from the empowering of the populace, is not a matter of an “ought”; it is a matter of an “is”⁵. How can this constantly growing deficit be serviced and to what extent should we redefine the sovereign states measuring functionality and success? Maintaining a stable international system premised upon states can only be done by reassuring their capability to fulfill a range of domestic and international duties and responsibilities. Domestically there is a need of transforming assumed legitimacy and representation to a legitimate authority of taxing, spending and providing security to the citizens by justifiable options and means. That will generate a proper functioning of the state apparatus and the civil service, with continuous public accountability. On the other hand membership to the international system gives national governments a range of rights—namely to enter into treaties, to borrow money from public and private institutions against the sovereign guarantee, to regulate their borders, to represent their country abroad, and to participate in the governance of international regime of organizations. The concept of noninterference in internal affairs, together with the sovereign guarantee, has given governments carte blanche with regard to the assets of their countries at will. There is little or no accountability. As might be expected, arbitrary power is abused: Financial resources are squandered or diverted, natural resources are wasted through corruption, and profits are mismanaged. a sad testimony to both the failure of public authority and the state’s weak institutional structures. The deficit between de jure and de facto notions of sovereignty lies at the heart of the worldwide predicament of nations⁶. The background of the debate is the evolving notion from “sovereignty as liberty”⁷ and “sovereign equality”⁸ to “sovereignty as governance” enabling the just integration of national states and markets to globalization maintaining their equality among themselves.

3. Talking about Corruption

There is little dispute on the definition of corruption as the abuse of public roles or resources for private benefit and enrichment. Contrary to political corruption which is defined as the violation of the formal rules governing the allocation of public resources by public officials in response to offers of financial gains or political support⁹, according to the definition of Bardhan¹⁰ economic corruption is the use of public office for private gains where an official entrusted with carrying out a task by the public engages in some sort of private enrichment which is difficult to monitor by the public.

In an international aspect the notion that corruption poses an imminent threat to economic development is based on the axiom of the essentiality of foreign

⁵ GHANI ASH. - LONGHART CL., *“The creeping Sovereignty Gap” in Fixing Failed States*, Oxford University Press, 2008, p. 22.

⁶ GHANI ASH.- LONGHART CL., *op. cit.*, p. 23

⁷ *Ibid*, S.S. Wimbledon

⁸ INT. COMMITTEE ON INTERVENTION AND STATE SOVEREIGNTY, *The Responsibility to Protect* (2001), <http://responsibilitytoprotect.org/ICISS%20Report.pdf>

⁹ NYE, J.S., *“Corruption and Political Development: a cost-benefit analysis”*, *American Political Science Review* 61, No 2, 1967; ROBINSON M. (ed), *Corruption and Development: An Introduction*, Routledge, London 2004.

¹⁰ BARDHAN, P., *“Corruption and Development: a review of issues”*, *Journal of Economic Literature*, 35 No 3, 1997 pp. 1320-1346.

investment in national growth. Further, corruption is closely connected to governance, political stability, democratization and modernization, regarding as the key to economic prosperity the incorporation and expansion of western political values, as stated in the 1997-1998 reports of World Bank, OECD and IMF. Corruption is subsequently attributed to authoritative or at least centralized regimes. Although in the literature there are defined more than one forms (e.g. individual, instrumental, societal) of corruption the main focus concerns the so called "systemic" corruption as this form affects institutions and influences individual behavior at all levels of political and socio-economic system¹¹; this systemic corruption is the generator of political and economic imbalances such as low political competition and low and uneven economic growth¹². Such a systemic corruption can be conceptualized as excluding citizens from the stakeholders of the development and the future of the country since they are disenfranchised and they don't aspire any improvement in the future. As long as corruption is endemic the economic development is still minimal and offers limited chances for the citizens to survive. Only the proper functioning of the state apparatus and the civil service with full and public accountability can reverse this tendency. A creation of a clean government and the curbing of corruption can be achieved by instigating integrity at the top and by expanding new standards throughout the governmental system. Establishing clean governance a country becomes a credible partner both for labor and investors, leading to new economic and social partnerships as well as reliable infrastructure providing an efficient environment for the business community. As empirical evidence suggest, the type of political regime is an important determinant of the relation between corruption and economic growth. The fact that the effects of corruption are not independent of other political and institutional elements is important by itself as it suggests that corruption might not be an inherent evil of developing economies but the consequence of other government policies, or socio-political circumstances; and thus, that public policies designed to eliminate corruption alone might not be optimal for growth¹³.

The anti-corruption campaign is actually about trust; trust for the rules and their enforcement and their implementation. Distrust in the enforcement of formal rules leads to the creation of a set of parallel rules that in turn constitute the actual norms of the society. In contrast, distrust in the enforcement of formal rules increasingly leads to a universe of parallel rules that constitute the actual norms of society. Institutions are the "rules of the game," which structure and incentivize behavior. In practice, these rules remain imperfect, and, regardless of a country's degree of development, there is never a perfect fit between the formal rules (which exist on paper and in the statute books) and informal ones (which people follow on a daily basis). Trust in a system, however, is dependent on the degree of fit between these formal and informal rules; by necessity a series of "rules" defines the "game." They determine the resources, the boundaries between legitimate and illegitimate actions, the processes through which players can join the game, incentives for playing by the rules, and sanctions for violations. For any game to be played repeatedly there must be a process for closure—a mechanism for binding decision-making on whether the participants

¹¹ JOHNSTON M., *"The Search for Definition: the vitality of politics and the issues of corruption"*, International Social Science Journal, 1996, 149.

¹² ROBINSON M. (ed) *op. cit.*,

¹³ MENDEZ F., FACUNDO SEPULVEDA, *"Corruption, growth and political regimes: Cross country evidence"*, European Journal of Political Economy, 22, 2006, pp. 82–98.

have played and won by the rules. Criminalization of the economy, informal judicial processes for property and other disputes, patron-client relationships as vehicles of entry to government service, and illegal natural resource concessions and licenses for imports or exports are all symptomatic of this dynamic. Tax avoidance becomes the norm, public land and property are expropriated by officials, the state becomes predatory, rulers perceive themselves to be above the law, and violence becomes the key mechanism for change. The poor lose hope and trust in the system, and their time horizons become very short as they focus on survival. Talent is diverted from the acquisition of skills and capabilities that would normally be the source of collective prosperity¹⁴.

4. Global Governance and the Threat of Corruption

As stated by the OECD “corrupt practices hamper the development of international trade by distorting competition, raising transaction costs, compromising the operation of free and open markets, and distorting the allocation of resources at the internal level. Corruption is a disincentive to investment: investors shun countries where it is endemic. Finally, corrupt practices in connection with development assistance cast discredit on the efforts being made and provide justification for drastic cuts in aid budgets in donor countries. These views expressed also in the academic literature are successfully summed up by the term of “the disincentive effects of corruption”¹⁵. The coexistence of corruption with non-democratic or/and non-competitive economic regimes restricts accessibility of foreign capital to national markets; it is therefore perceived as a source of economic risk. Additionally corruption practices are directly categorized to economic barriers due to assumption that they cause additional and variable costs within the financial transactions; a transactional barrier¹⁶. Thus, beyond the key issues of the corruption debate such as national development and social justice, the prime causes of concern and awareness are the threat that corruption poses to the establishment of a free and efficient world economy.

Indeed globalization has generally intensified competition, which has had very positive consequences for consumers – but it also had negative repercussions on credit institutions that were beaten by direct competitors or by indirect competition of other economic and financial sectors. As most observers argue, it is evident that, as far as the morality of corporate economic and financial activity is concerned, there have been in the context of globalization highly ignominious examples of misconduct – even criminal activity. Globalization will continue to bring new issues to bear, and compliance is something all institutions try to balance; thinking about maintaining integrity across the payments chain can sometimes prove as a titanic effort. Banking regulations are converging, but the convergence has been more a result of necessity than a result of design; that speaks also for the quality of compliance to such international regulatory regimes. Based on the paradigm of the Anti-Corruption legal regime the focus of

¹⁴ GHANI ASH. - LONGHART CL., *“The ten functions of the state”* in *Fixing Failed States*, Oxford University Press, 2008, p. 127.

¹⁵ GOUDIE, A. W. - STASAVAGE, D., *A Framework for the Analysis of Corruption*, Crime, Law and Social Change, 29, 1998, p. 143.

¹⁶ SUTTON R.H., *“Controlling Corruption through Collective Means: Advocating the Inter-American Convention Against Corruption”*, *Fordham International Law Journal*, 20, 1997, pp. 1427-1478.

this study is primarily upon what determines the quality of compliance with international standards and the sustainability of poor quality implementation despite the apparently considerable pressure from multilateral institutions and capital markets to adopt and implement international standards. The emergency of economic and financial globalization has not been accompanied by an intense ethical discussion, regarding responsibility and commitments in an environment of deregulation, risks and opportunities. The international Anti-Corruption legal regime consists particularly within the context of the OECD Paris Agreement, entered into force on 15 February 1999, framed by similar initiatives undertaken by the Organization of American States (OAS) with its Inter-American Convention against Corruption, the United Nations, the European Union and the World Trade Organization (WTO). Beyond framing anti-corruption (anti-bribery) legislation in terms of a fight, for transparency, efficiency and stability of the global markets the Convention is based on the US anti-corruption initiative of 1977, the Foreign Corrupt Practices Act (FCPA).

5. A New Functional Sovereignty

The Anti-Corruption legal regime is thus embodying an ethical pillar of the vision on globalization and as the mechanism of both liberalization and control, clearly stated in the 1997 OECD policy statement on the needed policy framework called "New Global Age". Such a debate questions fundamental issues of what used to consist the notion of state sovereignty: "In the rapidly changing and globalizing world economy, there will be an even greater need for international cooperation so as to realize a "New Global Age", and the role of the multilateral system will become even more important. And countries are increasingly confronted with a common set of policy problems, on which common solutions through identification of best practices and multilateral surveillance can be effective."¹⁷ Hence, in contemporary global governance-structures "sovereignty" can be interpreted as a form of "charisma". Every state has a claim on it as long as or in the form as the others conceive it and accept it for each state. A self-proclamation on sovereignty has little to do with the actual country's profile and its position in the international stage.

Adaptation of strict Anti-Corruption practices is seen as a core issue in order to respond to the challenges to global governance and to "streamline" the global governance "system." It is therefore connected to the four main challenges to global governance: "Leadership ("Who is the leader?"); Efficiency ("naysayers" can block decisions); Coherence ("Each international organization focuses on a limited number of issues"); and Legitimacy ("togetherness" weakens significantly as distance to power systems grows)." This means, however, creating a new, "triangle" system of global governance offering leadership, legitimacy, and efficiency; a "triangle of coherence": On one side of the triangle lies today the G20, replacing the former G8 and providing political leadership, policy direction and coherence. The second side of the triangle is the United Nations, which provides a framework for global legitimacy through accountability. On the third side lie member-driven international organizations providing expertise and specialized inputs be they rules, policies or programs." It is being asserted that "institutional machinery" alone, however, is insufficient to build a successful global governance

¹⁷ OECD (Organization for Economic Co-operation and Development), *Towards a New Global Age: Challenges and Opportunities*, Paris, 1997, p. 37

system. As integration processes were made successful by the coming together of shared values and a common goal, it is being suggested that a platform of common international social and economic values, evidenced by a "declaration of global rights and responsibilities," is also required. Of course, what is left out is that "common values," like "human rights," is a vague and evolving term. The process of reaching an agreement on such "values" would be subject to gross political manipulation, thus undermining any claims of legitimacy. A successful global governance system also requires strong leadership, which arguably is lacking at the national level. As this deficit is viewed as "the most pressing issue global governance is facing today" the solution offered is to localize global problems making these more palatable to citizens in order to reinforce the sentiment of togetherness" exemplified by the set of common values mentioned above¹⁸.

The new imperative implies the need to correspond to a minimum level of regulatory initiatives, which transcend national economic, social and political structures in the global anti-corruption fight. Such a compliance to global standards is regarded as the main criterion for a country to participate in the global economic system and the certification of sovereign power in contrast to sovereign risk; the risk of spill-over when the country lacks rule of law, organized crime, economic crime and even environmental crime. The new responsibility of complying with the "Global (public) Interest" sets the standard for a new notion of "state responsibility"¹⁹ as the core of the "new functional sovereignty" able to serve the international community.²⁰ In that framework "responsibility" should not be understood as a legal term empowering other states to enforce actions beyond international law but rather a term referring to the responsibility to "practice (good) governance" in accordance to international rules, norms and standards, allowing in case of failure the application of remedies in the form of limitations or restrictions for the state's participation to the global economic system. Under an economic perspective the most crucial parameters of good governance remain those maintaining effective market structures, reducing state activities to sectors which can guarantee cheaper and better services and goods and ensuring economic and human development. Although the strategy may differ from country to country it is certain that the "good governance practices" characterize every successful state without acknowledging good governance as a "luxury"²¹. Thus the effectiveness of anti-corruption institutions and policies remain critical for securing the sovereignty governance.

As the last public debt crisis has proved, the reputation –if not the existence- of a state depends on its adherence to its legal obligations, from public borrowing to protection of property and to human rights conventions, and it is the imposition of legal limits on power paired with what we call collective power that increases

¹⁸ LAMY PASCAL, speech of the Director-General of the World Trade Organization, at Oxford University (08.03.2012); http://www.globalgovernancewatch.org/spotlight_on_sovereignty/lamy-calls-foreuropeaninspired-global-governance

¹⁹ On state responsibility, CRAWFORD J., *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, 2002, p. 84

²⁰ CHAYES A. - CHAYES HANDLER A., *The new sovereignty: compliance with international regulatory agreements*, 1995, p. 27

²¹ KAUFMANN D. - KRAAY A., "Growth without Governance", *Economia* 3 (1), 2002, pp. 169–229, at <http://www.worldbank.org/wbi/governance/pubs/growthgov.htm>

a state's legitimacy. Power that is limited by rules and enjoys the consent and participation of multiple stakeholders becomes stable. That was indeed the core of the notion of the nation state: a moral entity created around a shared purpose and governed under the rule of (public) law. The key demand around the world is for inclusion in the globalizing economy in equality, so that future generations will enjoy better lives. While the goal of a "sovereignty strategy" is the creation and maintenance of state institutions that fulfill certain core governance functions, in each country some dimensions of sovereignty are likely to be more critical than others to establishing the state's legitimacy and effectiveness.