Freedom from Corruption as a Human Right

By
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Since the so-called "corruption eruption" – the sudden proliferation of anti-corruption scholarship, international instruments, and enforcement initiatives that followed the Cold War – scholars and activists have widely recognized the close connection between corruption and human rights. Still contested, though, is the precise nature of that connection. Most commentators see corruption as a means of violating already recognized rights, such as the right to due process or fair representation. But this article argues that it is both conceptually coherent, and practically important, to frame corruption as an independent, free-standing rights violation; that is, to recognize freedom from corruption as itself a human right.

Recognizing this right might have two distinct kinds of benefits. One would be a conceptual reframing – that intellectually and rhetorically we come to understand corruption as an inherent rights violation. Another would be to identify a legally enforceable right, which might entail access to new forums, procedures, and remedies. This article focuses entirely on the former. It argues that reframing corruption as not just merely a means by which other rights are violated, but as a free-standing rights violation, would both help to generate worldwide political will for meaningful reform, and focus existing enforcement initiatives on the real victims of corruption – the citizens whose governments are corrupt.

This conceptual reframing already occurred, albeit in nascent form, under former US President Barack Obama. A 2010 National Security Strategy white paper announced the policy position that "pervasive corruption" is itself a violation of "basic human rights." The white paper enumerated various initiatives to protect this right, such as promoting transparency and accountability to government budgets and expenditures; making the assets of public official publicly available; institutionalizing transparent practices in international aid flows, international banking and

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tax policy; and more carefully scrutinizing private sector engagement around natural resources.[2]

But a right to be free from systemic official corruption is not merely the construct of a western, or even Anglo-American, intellectual tradition. To the contrary, a brief review of the very intellectual traditions that have pushed back the hardest against rights talk – East Asian Confucianism, and Islamic Jurisprudence – both recognize corruption as the violation of the most basic principles of government.

Accordingly, this paper lends intellectual support to the claim that corruption is properly understood as a free-standing rights violation, and that asserting it as a global human right would advance the cause of coordinated international anti-corruption enforcement. It explains why the reframing matters, and provides an illustrative example of one prominent area of anti-corruption enforcement badly in need of a rights-based focus. It then briefly describes the forces that drove the anti-corruption moment in which we now live, as well as the now-prevalent understanding of the relationship between human rights and corruption. It then surveys diverse intellectual traditions – Anglo-American, Confucian, and Islamic – to show that freedom from corruption is indeed a principle of government recognized cross-culturally, and as such is among the most basic and credible claims to a universal right one might make.

Why a Free-Standing Human Right?

Reframing corruption as a human right has three principal benefits above and beyond any enforceable right it may create.

First, acknowledging a universal human right to be free from corruption effectively counters the most oft-heard objection to international anti-corruption initiatives: that corruption is cultural. A human right by definition is "a universal moral right, something which all [persons], everywhere, at all times ought to have, something of which no one may be deprived without a grave affront to justice, something which is owing to every human being simply because [s]he is human."[3] Rights exist irrespective of whether any particular government, set of contemporary cultural practices, or even prevailing public opinion acknowledges them.

The effort to change public opinion may not be exactly what many westerners think. Though it is too often, and too easily, said that corruption is in some parts of the world "cultural," that may be a misstatement. No culture teaches that corruption in its purest (if that is indeed the right word) form is good. Other than perhaps the beneficiaries of corruption, virtually no

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[2] NATIONAL SECURITY STRATEGY, WHITE HOUSE (2010), p. 38, available at http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf [hereinafter Obama Report].

[3] Cranston, 1973, p. 36, quoted in Renteln at 47.

one believes that a suitcase full of cash, privately given to an official in exchange for a benefit to which the payor is not legally entitled, is a good thing, such that we should not deter even if we could. The debates about culture and corruption concern the margins of bribery -- gift-giving, nepotism, etc. -- not about whether unadulterated corruption is good.

But there are many communities that have resigned themselves to bribery as necessary or, worse yet, inevitable – something that is inherent in human sociality, and unchangeable. This is the cultural norm that must be overcome. In years of teaching anti-corruption policy across the developing world it has come to seem to this author that many in the world view official corruption – and here please excuse the unsavory metaphor -- as something like using the restroom. It is dirty, disease-ridden, and unpleasant, but absolutely inherent in human life. Though it can be confined to private spaces, it is absolutely unavoidable, and the nothing that we could somehow reduce or eliminate from human society is fanciful and ridiculous. If we are to effect change, we must persuade people that corruption is not inherent in human society. We may never succeed in eliminating corruption, any more than we may succeed in eliminating murder or assault. But we can reduce it tremendously. And each citizen is entitled to a government that takes reasonable measures to do so. This is the thought that a rights framework can help elicit.

The second benefit of reframing corruption as a free-standing rights violation concerns the impact on existing enforcement initiatives. For example, among the most active areas of anti-corruption enforcement today concerns foreign bribery. As the below sections will further describe, enforcement agencies today treat bribery principally as a problem of corporate governance. The remedies primarily concern legally-mandated reforms within the offending corporation. The criminal penalties, though often quite substantially, are merely collected and deposited in the treasury of the offending company's government; when US companies are penalized for bribing abroad, that money is deposited in the US Treasury. But the principal victims of foreign bribery are the citizens whose governments are corrupt, and they benefit only indirectly from corporate governance improvements. A rights-based framework can redirect our enforcement initiatives toward improving the conditions in which bribery's victims live.

Finally, deeming corruption a rights violation gives these initiatives greater normative weight, heightening their importance in public policy discussions. Rights violations have long been understood as more egregious, and a higher enforcement priority, than torts or even crimes. Rights violations are "more resistant to trade-offs,"[4] or, as the prominent legal philosopher Ronald Dworkin famously said, rights are "trumps."[5] We may not all agree that corruption truly is a trump – one might imagine

[4] Griffin.
[5] Dworkin.

circumstances in which corruption might be tolerated in the name of a greater good, or where rigid anti-corruption enforcement does more harm than good. But corruption should be regarded as a first-order harm, a violation of the most basic principles of government, and a rights framework may reorient our thinking in this way.

The integration of human rights and anti-corruption frameworks is only now occurring. Though the human rights discourse became central to public discourse in the years following World War II, corruption became front and center about half a century later. As the next section explains, it was the end of another war – the Cold War – that gave rise to the modern global focus on deterring corruption.

The Corruption Eruption

The economist Moises Naim coined this catchy moniker in 1995 to describe that decade's extraordinary surge in attention among lawmakers, commentators, and citizens to the problem of public corruption.[6] This so-called eruption occurred along several dimensions, and was due to a variety of cultural, legal, and economic changes that in large part emanated from the Cold War's collapse.

Societies that to varying degrees had historically tolerated corruption were suddenly protesting, forcing high-profile resignations and impeachments around the world. These occurred both in countries with relatively strong rule-of-law traditions, such as Great Britain, France, and the U.S., as well as countries still seeking to build such traditions like Venezuela. The eruption even spilled over into Brazil, with the impeachment of President Fernando Collor de Mello, who claimed to be a "cacador de marajas" (hunter of overpaid bureaucrats).

So too did anti-corruption scholarship explode during this time. After the foundational work of political scientists Joseph Nye and Samuel Huntington in the 1960s, economist Susan Rose-Ackerman in the 1970s, Robert Klitgaard in the 1980s, in the 1990s the interdisciplinary study of corruption began to produce innumerable articles.[7]

Perhaps most importantly, the 1990s and first few years of the 2000s yielded a series of international anti-corruption conventions that provide the foundation for anti-corruption initiatives to this day. These include: the highly influential NGO Transparency International (1993); the Inter-American Convention Against Corruption (1996); the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997); Europe's Group of States Against Corruption (1999) with its Criminal Law Convention (2002) and Civil Law Convention (2003);

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[6] Moises Naim, *The Corruption Eruption*, BROWN JOURNAL OF WORLD AFFAIRS (1995) available at http://carnegieendowment.org/1995/06/01/corruption-eruption/.

[7] For a modern bibliography of anti-corruption scholarship, see the *Global Anti-Corruption Blog*.

The United Nations Convention Against Corruption (2002); African Union Convention on Preventing and Combating Corruption (2003); the Asia Pacific Economic Cooperation Course of Action on Fighting Corruption and Ensuring Transparency (2004); and others.[8]

But if the world had been talking about corruption as far back as the 1960s, why did the full "eruption" occur in the 1990s?

The first and most obvious reason was the collapse of the Soviet Union and the rapid transition to free markets and elected government. With the end of communism as a formidable global force (Chinese communism, of course, is not communism by any meaningful definition of the world) came a diminished sense of our resignation to the inevitability of corruption. This occurred both among citizens, whose expectations changed, and among states and international organizations that no longer needed to tolerate corrupt dictators to further Cold War goals. As Naim explained, "secrecy and Orwellian manipulation of the truth – those cornerstones of authoritarian and totalitarian rule – have become increasingly difficult to maintain"[9] in the face of ever-expanding liberalization. This connection between centralized authority and corruption has long been recognized, and most famously articulated by the Harvard professor Robert Klitgaard. He wrote that corruption depends on three variables: the monopoly on the supply of a good or service; the government's discretion (D) in allocating that good or service, but which can be checked by the officials' accountability (A) for such allocations, creating a memorable equation: C=M+D-A.[10] Where the government monopoly is weakened, corruption is expected to decrease.

So too did liberalization bring an increase in international trade, and with it, increased expectations concerning the business environments of other countries. As major companies increasingly invested overseas, the degree of corruption became of paramount concern. The governments of developed countries become interested in how their companies were behaving overseas, and began enforcing prohibitions on foreign bribery. As one set of commentators put it, "In the integrated economy, there is no somewhere else."[11] With global interdependence came an expectation of sameness, and of fairness.

Finally, liberalization brought with it much higher scrutiny of government and business conduct from the mass media. This occurred both because countries became more open and the press had greater freedom, but also because technological developments made possible the rapid spread of information. Media conglomerates emerged, satellite broadcasts became

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[8] Patrick Glynn, Stephen J. Kobrin, and Moises Naim, *The Globalization of Corruption,* Institute for International Economics, available at http://www.petersoninstitute.org/publications/chapters_preview/12/1iie2334.pdf.

[9] Id.

[10] ROBERT E. KLITGAARD, CONTROLLING CORRUPTION (1987).

[11] Glen, et al, supra note ___ at 13.

commonplace, and the internet continued the trend of drawing people into more regular interaction.[12] So too have some observed that the culture of journalism changed in this era, becoming increasingly aggressive and doing more probing investigative reporting.[13]

Following this eruption in scholarship and both international and national law came a focus on enforcement. Though this focus on enforcement concerned various forms of corruption – money laundering, embezzlement, tax evasion, etc. – plainly among the most impactful and controversial has been international bribery. And anti-bribery enforcement illustrates the need for a new rights framework.

The Discourse of White-Collar Crime

Perhaps the posterchild for anti-bribery enforcement is the German engineering firm Siemens, which in 2008 paid a combined penalty of roughly $1.5 billion U.S. for bribery across the developing world. Siemens' systematic bribery in multiple sectors across the developing world violated an assortment of widely-recognized human rights. But the government's filings are remarkably silent on the issue of overseas impact. These filings are instead written in what we might call the discourse of white-collar crime.

Siemens, a Germany-based manufacturer of industrial and consumer products,[14] is the quintessential multinational corporation. After World War II had destroyed much of its business,[15] Siemens began building a multinational operation that now consists of over 1800 legal entities with 400,000 employees in 190 countries.[16] In 2001 it listed American Depository Shares on the New York Stock Exchange, thus becoming an "issuer" for purposes of the FCPA and triggering its jurisdiction.[17] Siemens may now regret that decision; it ultimately paid a total of $1.6 billion U.S. in fines, penalties, and disgorgement of profits, the largest settlement in FCPA history.[18] The SEC alleged that between 2001 and 2007 the conglomerate made at least 4200 payments, totaling over $1.4 billion, to bribe government officials around the world in return for business.[19]

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[12] Naim, supra note ___.

[13] Id.

[14] Siemens builds including locomotives, traffic control systems, and electrical power plants, as well as building control systems, medical equipment and electrical components. *See* SEC complaint at 3, U.S. Securities and Exchange Commission ("SEC") v. Siemens Aktiengesellschaft (D.D.C. 2008) (No. 08 Civ. 02167) [hereinafter "SEC Complaint"].

[15] SEC complaint, *supra* note 78, at 8-9.

[16] *Id.* at 3.

[17] *Id.* at 4.

[18] Press Release, Department of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines, (December 15, 2008), *available at* http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html

[19] SEC complaint, *supra* note 78, at 2.

As the government's pleadings described in detail, Siemens' bribery scheme would corrupt various sectors of society in numerous countries. In infrastructure, arguably the most critical sector to a developing country's growth, Siemens and its subsidiaries paid Chinese officials $22 million to fraudulently obtain contracts for rail construction[20] and $25 million to construct high-voltage transmission lines;[21] $17 million in Venezuela for more railway contracts;[22] $800,000 for the construction of traffic control systems in Russia;[23] $20 million in Israel for contracts to build and service power plants;[24] $2.6 million in connection with refinery projects in Mexico;[25] $5 million for a contract to install mobile telephone services in Bangladesh;"[26] and $12 million in connection with telecommunications in projects in Nigeria, where Siemens' bribery practices were allegedly "long-standing and systematic.[27] In the health care sector, Siemens paid $14 million in connection with the sale of medical equipment to state-owned hospitals;[28] $55 million in connection with the sales of medical equipment in Russia, routed through Dubai;[29] in Vietnam, a Siemens representative picked up an envelope with $183,000 left by a Hong Kong businessman in a Singapore hotel, flew to the Hanoi airport to pass on to another Siemens representative, and used it to bribe the Vietnamese Ministry of Health.[30]

But perhaps most egregious from a foreign policy perspective was Siemens' role in corrupting the U.N. Oil for Food Program. The program was designed to alleviate the suffering of Iraqi citizens caused by the economic sanctions imposed against the Hussein regime following the Gulf War.[31] The Hussein regime soon adopted a policy, enforced across the Iraqi ministries, to require suppliers to pay a ten percent kickback on each contract. Foreign suppliers were instructed to inflate their bids and purchase orders by ten percent, thus allowing the suppliers to collect the money from the UN escrow account and then redirect it to Hussein's officials. The suppliers thus became middle-men, transferring money from the sale of crude oil back into the hands of the officials, and thereby directly undermining the UN-imposed

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[20] *Id.* at 16-17.
[21] *Id.* at 18.
[22] *Id.* at 28-29.
[23] *Id.* at 25-26.
[24] *Id.* at 17-18.
[25] *Id.* at 26.
[26] *Id.* at 19.
[27] *Id.* at 29.
[28] *Id.* at 23.
[29] *Id.* at 27.
[30] *Id.* at 22-23.
[31] Under the program, Iraq could sell its oil and deposit the proceeds in a UN-managed escrow account. Funds in the account would thus be used for the limited purpose of purchasing food, medicine, and infrastructure supplies. *See, e.g.,* Susan A. Notar, *The Oil-For-Food Program and the Need for Oversight Entities to Monitor UN Sanctions Regimes*, 101 AM. SOC'Y INT'L L. PROC. 163 (2007).

sanctions regime and perpetuating Hussein's rule. Former Federal Reserve Chairman Paul Volcker would ultimately be asked to lead an independent UN-commissioned committee, and found that the Hussein regime had collected $1.7 billion in bribes.[32] Operating through French, Turkish, and Middle East subsidiaries, Siemens paid kickbacks to the Hussein regime of approximately $1.7 million. These bribes allowed the conglomerate to fraudulently obtain contracts that would yield approximately $38 million in profits.[33]

Siemens' bribes across the developing world thus variously compromised the right to medical care, to equality of access to public services, to self-determination, to political representation, and ultimately to the basic rule of law. But despite these manifest human rights implications, the way in which the SEC and DOJ ultimately characterized Siemens' misconduct made for a sharp and telling contrast. The settlement documents noted that Siemens created payment schemes that the "company's inadequate internal controls allowed to flourish." Siemens used numerous "slush funds" and "off-books accounts maintained at unconsolidated entities." Indeed, the "tone at the top" at Siemens was "inconsistent with an effective FCPA compliance program" and "created a corporate culture in which bribery was tolerated and even rewarded at the highest levels of the company."[34] The SEC's press release quoted an associate director of the Enforcement Division to say, "The day is past when multi-national corporations could regard illicit payments to foreign officials as simply another cost of doing business."[35] Similarly, the SEC's litigation release notes that Siemens' Managing Board "was ineffective in implementing controls" and in meeting the "U.S. regulatory requirements that Siemens was subject to following its . . . listing on the New York Stock Exchange."[36] It further explained that "false invoices and payment documentation was created to make payments to business consultants under false [] agreements" and that "illicit payments were falsely recorded as expenses for management fees, consulting fees, supply contracts . . . and commissions."[37] The DOJ ultimately proclaimed that its enforcement efforts would "level the business playing field, making it . . . fair to those who seek to participate in it."[38]

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[32] Paul A. Volcker, Independent Inquiry Committee into the United Nations Oil-for-Food Programme, *Manipulation of the Oil-for-Food Programme by the Iraqi Regime* (Oct. 27, 2005), http://www.iic-offp.org/documents/IIC%20Final%20Report%2027Oct2005.pdf

[33] SEC complaint, *supra* note 78, at 29-31.

[34] Press Release, Securities and Exchange Commission, SEC Charges Siemens AG for Engaging in Worldwide Bribery (Dec. 15, 2008), *available at* http://www.sec.gov/news/press/2008/2008-294.htm

[35] *Id.*

[36] Litigation Release 20829, *Securities and Exchange Commission v. Siemens Aktiengesellschaft (D.D.C.)*, SEC.GOV (Dec. 15, 2008), http://www.sec.gov/litigation/litreleases/2008/lr20829.htm

[37] *Id.*

[38] DOJ press release, *supra* note 82.

This is the discourse of white-collar crime enforcement, not of human rights. The difference, and its inherent shortcomings, are apparent in two ways. First, the SEC and DOJ documents make virtually no mention of the damage done to these communities. Besides cursory uses of terms like "corruption," the legal claims are resolved without any evident regard for the resulting human rights abuses in Iraq, China, Russia, Venezuela, Vietnam, and the other countries encompassed by Siemens' bribery scheme.

This article posits that reframing corruption as a rights violation can refocus our attention on bribery's overseas impact. But to do so, we must move beyond the current, prevailing view of corruption as a means of violating other rights, but not an independent, free-standing right.

The Prevailing View: Corruption as a Means of Violating Other Rights

The broader international community has hesitated to embrace the right to be free from corruption. Rather, the major international instruments as well as academic and civil society commentators, generally regard corruption as merely a means of violating other, already-recognized rights. The leading anti-corruption NGO, Transparency International, teamed with the International Council on Human Rights Policy to write a white paper aptly entitled, "Corruption and Human Rights: Making the Connection."[39] Though they acknowledge that "the cycle of corruption facilitates, perpetuates and institutionalizes human rights violations," they expressly decline to embrace corruption as a direct rights violation.[40] Electing instead to take "a different approach,"[41] they frame corruption as a means of violating other rights.[42] They conclude that anti-corruption programs might therefore incorporate "human rights principles and methods,"[43] but corruption does not inherently constitute a rights violation.

This approach – corruption as a means by which other rights are violated – also pervades the academic commentary. Even those scholars mounting the most rigorous defense of corruption as a rights violation ultimately fall back to the means framework. Rather than forging a new human right, they will more diligently catalogue the myriad rights that corruption compromises: civil and political rights such as equality, non-discrimination, fair trial, or political participation; or the economic, social,

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[39] International Council on Human Rights Policy and Transparency International, *Corruption and Human Rights: Making the Connection*, at vi, *available at http://www.ichrp.org/files/reports/40/131_web.pdf.*

[40] *Id.* at 3.

[41] *Id.* at 3.

[42] *Id.* at 27. *See also*, Andreanna M. Truelove, Note, *Oil, Diamonds, and Sunlight: Fostering Human Rights through Transparency in Revenues from Natural Resources*, 35 GEO. J. INT'L L. 207 (2003) ("Government corruption provides both an incentive and a means for human rights violations.").

[43] *Id.* at 3.

and cultural rights such as the rights to food, adequate housing, education, or health.[44] But this approach falls well short of establishing freedom from corruption as an inherent right.

Other commentators have gone even further, suggesting that rights talk is actually an unwelcome addition to the discussion that will only cause confusion, if not harm. They see the human rights approach to corruption as inherent in a "domineering narrative" about "the relationship between key international institutions and developing countries" that "supports a particular economic account of development and, as such, cannot be understood as neutral."[45] To this perspective, the language of human rights does not re-focus our attention on improving the plight of corruption's victims; to the contrary, rights talk will only perpetuate their victimization.

This dichotomy between corruption and human rights is generally reinforced by the major international instruments: the anti-corruption conventions do not frame corruption as a rights violation, and the human rights instruments do not even mention corruption. The principal international anti-corruption instrument, the United Nations Convention Against Corruption, enumerates diverse forms of corruption such as bribery, embezzlement, trading in influence, and others. But the document only makes passing references to various discrete human rights, and generally in reference to the collateral impact of anti-corruption enforcement measures on other rights.[46] The document generally avoids taking a position on the relationship between corruption itself (as opposed to anti-corruption measures) and human rights. This pattern is likewise observed in The Organization of Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[47]

Certain regional anti-corruption instruments more directly engage corruption's impact on human rights, but where they do, they again frame

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[44] Martine Boersma, Corruption: a Violation of Human Rights and a Crime Under International Law?. See also Kofele-Kale, who argues that combating corruption will "better enable a country to guarantee the economic and social rights of its inhabitants" and to "enable individuals to know their rights, to claim them, to realize and to enjoy them and the human dignity they promise." *Id.* at 165. *See also Declaration on the Right to Development*, G.A. Res. 41/128, U.N. GAOR, 41st Sess., Supp. No. 53, at 186, U.N. Doc. A/41/53 (1986).

[45] Morag Goodwin and Kate Rose-Sender, "Linking corruption and Human Rights: an Unwelcome Addition to the Development Discourse" in Martine Boersma and Hans Nelen (eds.), Corruption & Human Rights: Interdisciplinary Perspectives, at page 222.

[46] The document does make various brief reference to discrete rights, including the right to exchange information in relation to the participation of civil-society in anti-corruption measures (article 13); property ownership rights in relation to money laundering (article 23), the return and disposal of stolen assets (article 57); protecting the defendant's due process rights during a corruption-related prosecution (article 30 and 32) or extradition (article 44); and ownership rights over frozen assets (article 31); other rights acquired by third parties (articles 34 and 55);

[47] Articles 1 and 3.

corruption as a means by which rights are violated. Europe's Group of States Against Corruption (GRECO)'s Criminal Law Convention on Corruption, and its separate Civil Law Convention on Corruption, contain identical language: "corruption threatens the rule of law, democracy, and human rights."[48] A similar approach appears in the African Union's Convention on Preventing and Combating Corruption (2003).[49] The Inter-American Convention Against Corruption and the Asia Pacific Economic Co-operation (APEC) Course of Action on Fighting Corruption and Ensuring Transparency, by contrast, makes no mention of human rights at all.

So too do the human rights instruments fail to mention corruption. In the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights, the word "corruption" does not even appear, nor does freedom from corruption by any other name. This is likewise true of the European Convention for the Protection of Human Rights, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, and the African Charter of Human and Peoples' Rights. But these documents were all ratified prior to the so-called "corruption eruption,"[50] a period beginning in the 1990s when the problem of corruption rose to prominence in global policy discussions.

Framing Corruption as a Direct Violation of Fundamental Human Rights

Though the international instruments lend scant support, legal philosophers have long acknowledged that the international instruments are but one of several bases for making a rights argument.[51] Two others hold great promise.

First, and historically the most foundational, is natural law, particularly the writings of John Locke. Though Locke did not use the term corruption, the concern with protecting citizens from the abuse of public office pervaded his rights theory. Indeed, a close reading reveals that the well-known Lockean right to liberty is actually but another name for the right to be free of corruption.

Locke argues that we can understand the purpose of government by first reflecting on what the human condition is or would be in its absence, a condition he called the state of nature. In the state of nature, we are all free and equal, enjoying our natural right to liberty. However, owing to this absolute freedom and equality, we lack a neutral third party with the authority to resolve disputes. We are therefore each left to enforce the "law of

[48] Preamble
[49] cite
[50] cite
[51] Renteln at 9. She also refers to other bases, including "divine authority" and "intuition," which this paper will not engage.

nature" in our own cases. Predictably, this system breaks down, as "self-love will make men partial to themselves and their friends."[52] Humankind thus needs a government, a "common measure to decide all controversies"[53] that will remedy "those evils which necessarily follow from men being judges in their own cases."[54] The administration of justice is tainted or, if you will, corrupted, by self-interest.

What Locke calls "civil society" is thus formed by creating a government that is "bound to govern by established standing laws, promulgated and known by the people." Such a government does not compromise our natural liberty; to the contrary, it guarantees it: "For in all the states of created beings, capable of laws, where there is no law there is no freedom. For liberty is to be free from restraint and violence from others, which cannot be where there is no law." Liberty, by definition, is "to have a standing rule to live by, common to every one of that society, and made by the legislative power . . . not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man."[55] That is, our natural right to liberty can only exist where government exists and its officers do not abuse their public office for private gain, where they do not act corruptly. Where officers do so act, citizens "have no such decisive power to appeal to, [and] they are still in the state of Nature."[56] Corruption thus voids the social contract, destroys civil society, violates our right to liberty, and returns society to a state of nature. Indeed, when Locke defines tyranny as "making use of the power any one has in his hands not for the good of those who are under it, but for his own private, separate advantage,"[57] he is describing what we today call corruption.

The conviction that our natural right to liberty can only exist in the absence of corruption was a dominant intellectual influence at the American founding. The Declaration of Independence's promise of "life, liberty, and the pursuit of happiness" is derived directly from Locke's writings. Indeed, corruption was discussed at the Constitutional Convention more often than factions, violence, or instability; Madison recorded the term fifty-four times.[58] Historian Bernard Bailyn observed that the very "heart of the revolutionary movement" was the "fear of a comprehensive conspiracy against liberty . . . nourished in corruption."[59] Legal scholar Zephyr Teachout thus finds that the

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[52] *Id.* at 13.
[53] *Id.* at 70.
[54] *Id.* at 13.
[55] *Id.* at 72.
[56] *Id.* at 50.
[57] *Id.* at 108. *See also id.* at 109 ("Wherever law ends, tyranny begins, if the law be transgressed to another's harm.").
[58] Note 50.
[59] Note 19. Similarly, George Mason said at the Convention, "If we do not provide against corruption, our government will soon be at an end." (Note 17).

Constitution "carries within it an anti-corruption principle, much like the separation-of-powers principle, or federalism."[60]

However, a distinctly Anglo-American intellectual tradition cannot provide the sole basis for a universal human right. Locke's theory of natural rights, and the broader western framework that rests upon it, is widely criticized for growing out of and reinforcing a uniquely western worldview. Nowhere has that criticism been more pronounced than in East Asia, from which the "Asian values" critique of western liberalism originates. That critique holds that western ideas of rights fail to recognize distinctly Asian values, which emphasize family and community over the individual, value social harmony over personal freedom, and value a much higher level of deference to political leaders and institutions.[61]

Though Lockean thought may well be susceptible to this critique, natural law is not the only alternative basis for identifying the existence of a human right. Another is cross-cultural research that discovers fundamental values shared by all cultures, or "cross-cultural universals."[62] Though the term "rights" may not appear in other languages or intellectual traditions, those traditions of political thought may contain their functional equivalent[63] – fundamental principles of governance that "trump" other policy considerations, the violation of which is a "grave affront to justice."

There may be no better place to start than that eminently non-western political philosopher most closely associated with Asian values: Confucius. Though an ancient figure, modern China is seeing a revival of Confucianism, as the Chinese state gradually distances itself from Marxism.[64] China's proudly ancient intellectual traditions (and more modern Marxist legacy) would both seem to situate the country well outside the western liberal paradigm. However, there is no value more fundamental to Confucian ideals of good government than the absence of corruption.

The pervasiveness of corruption in 6th century B.C. China was among the chief sources of Confucius' political thought.[65] This state of affairs found some support in a political philosophy which taught that "virtue as a basis for the State was not practicable," that the "State was not bound by ordinary moral rules," and a state that attempted to achieve ethical ideals "would thereby only commit suicide."[66]

Writing to counter this pernicious view, Confucius taught that the first requirement of good government is "the rule of virtue." The government is thus subject to the same ethical rules that apply to individuals. The legitimate ruler does not separate ethics from politics, and the ends do not

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[60] P. 342.
[61] cite
[62] Renteln 138.
[63] Renteln 11.
[64] Bell xiiv.
[65] Hsu 24-25.
[66] Hsu 9-10.

justify the means.[67] Indeed, the government's example should be the starting point for the establishment of a harmonious and prosperous society; the ruler's virtue was to "sweep over the people and transform them just as the wind blowing over longs stalks of grass bends them as it passes."[68]

Only a person of great virtue, then, could be qualified to become the ruler, the "Son of Heaven;" without virtue, he loses his legitimacy.[69] Corruption was thus a fundamental, if not the most fundamental principle, of good government. To Confucius, there could be no legitimate government without the absence of corruption. In contemporary western parlance, the absence of corruption was a public policy trump, its presence a grave affront to justice.

Another region of the world that possesses a, proud, ancient, and eminently non-western intellectual tradition, and that has resisted the embrace of western political values, is the Islamic Middle East.[70] Islamic law is widely incorporated into civil law systems across the Middle East (and South Asia as well), and significantly frames public policy discussions.[71] But like Confucianism, traditional Islamic law holds that among the most fundamental principles of governance, and the important functions of government, is to secure the freedom from corruption.

The term "Islamic law" refers to the cumulative body of thought of numerous communities and schools, and its core is the concept of sharia.[72] Sharia means the "path to the watering place," referring to the divine will and connoting a path of discipline and virtue.[73] Based on the Qur'an as well as the traditions and teachings of Muhammad (*sunnah*), sharia teaches that humankind is "entrusted with the responsibility to establish justice and good governance."[74]

Islamic doctrine thus in the first instance seeks to cultivate self-discipline and morality, through such virtues as honesty (*sidq*), and the fulfillment of promises (*wafa bi'l-'ahd*) as well as the avoidance of lying (*khidhb*) and perfidy (*radha'il*).[75] But Islamic jurists have taught that internal accountability must be supplanted by external checks and balances. Accordingly, Muslim jurists have historically taught that law must prohibit various forms of corruption, including the acceptance of gifts, embezzlement,

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[67] Hsu 111.
[68] Pereenboom 32.
[69] Hsu 79.
[70] Though Association of Southeast Asian Nations created a subregional agreement, the Intergovernmental Commission on Human Rights, China is not a member. In the Middle East, the Arab League created the Arab Charter of Human Rights, but it has very few ratifications and no international court or active enforcement mechanism.
[71] Arafa at 183.
[72] Arafa at 185.
[73] Kamali at 14.
[74] Kamali at 14.
[75] Kamali at 29.

compromising official duties in exchange for bribes, or basing official decisions on family or tribal considerations.[76]

As one Muslim legal scholar laments, "unfortunately, Islamic standards and norms are not often appreciated by states in the Muslim world."[77] These states' failures, however, have no bearing on whether corruption is rightly understood as a rights violation or its structural equivalent. Traditional Islamic thought, much like Confucian thought, recognizes corruption as a violation of the most fundamental principles of good governance.

An Example of Rights-Oriented Anti-Corruption Enforcement

The enforcement action of 2002 that heralded the beginning of the modern enforcement era illustrates the potential of anti-bribery enforcement to focus on bribery's victims. The action concerned James Giffen, a U.S. attorney who bribed officials in Kazakhstan on behalf of U.S. oil companies. In settling the case, the United States arranged with officials in Kazakhstan and Switzerland to release the $80 million in alleged bribes from their Swiss accounts and establish a trust fund.[78] That fund now finances a Kazakh NGO called the BOTA Foundation, whose purpose is to "improve the lives of children, youth and their families suffering from poverty in Kazakhstan through investment in their health, education, and social welfare."[79]

BOTA has three specific programs funded by the recovered bribes: a conditional cash transfer program, which gives funds directly to eligible poor families to increase access to health, education, and social welfare services; a social services program, with makes grants to local and international NGOs to promote early childhood development, special needs services, and benefits to orphans and other severely disadvantaged children; and a tuition assistance program, which provides college and vocational education scholarships.[80] The fund's board of trustees includes several Kazakhstani academics and professionals, and government representatives from the U.S. and Switzerland; it does not include any Kazakhstani government officials. The Giffen case is slightly different from what this Article proposes: BOTA is funded with recovered bribes, not with criminal penalties. Still, it may be understood as setting an important, if underappreciated, precedent: the recognition that bribery's victims should, and can, be compensated through funding community organizations.

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[76] Arafa at 106.
[77] Arafa at 127.
[78] Michael Steen, *Kazakh "Oil Bribe" Millions to Go to Poor Children*, REUTERS (May 4, 2007), http://www.reuters.com/article/2007/05/04/idUSL04489030.
[79] *See* THE BOTA FOUNDATION, http://www.bota.kz/en/index.php/pages/index/1 (last visited Jan. 29, 2013).
[80] *Id.*

These projects are not specifically focused on corruption. Nonetheless, they symbolize the capacity of anti-bribery enforcement, and anti-corruption enforcement generally, to finance projects that specifically benefit corruption's victims. But any such reorientation in anti-corruption enforcement requires first acceding to the principle that enforcement should, in the first instance, benefit the victims. A rights framework can help achieve this goal.

The Next Step in an Historical Progression

Since the middle of the twentieth century, rights talk has won increasingly universal acceptance across diverse political and cultural traditions. Today, a majority of nations, including China and various Islamic countries, has signed and/or ratified the major human rights treaties. Moreover, polls suggest broad-based cross-cultural support, including in East Asia and the Middle-East, for the protection of basic human rights.[81] Though these nations did not historically speak in terms of rights, they have come to recognize the congruence of rights theory with their own fundamental principles of governance.

Despite assenting to these instruments, the implementation of certain rights remains highly contentious, eliciting principled disagreements on how to reconcile these rights with alternative, non-western views on the role of government in society. Examples of the more contentious rights might include the right to political representation, freedom of religion, or the modern right to privacy. While these rights tend to accentuate differences in worldview between east and west, the right to be free from corruption does not. In such diverse traditions as Anglo-American liberalism, East Asian Confucianism, and Middle Eastern Islamic law, freedom from corruption is deemed among the first principles of government. Indeed, of the various candidates for a universal moral principle, one that all persons have by virtue of being human, the freedom from corruption may well be the strongest and most fundamental.

[81] Survey in encyclopedia