

Freedom from Official Corruption as a Human Right

By Matthew Murray and Andrew Spalding

EXECUTIVE SUMMARY

International law does not currently regard an act of official corruption as the violation of a human right. But as recent steps by Chinese leaders, political shifts in India, the EuroMaidan in Ukraine, and the Arab Spring all reflect, an international consensus is emerging that corruption is a pervasive and pernicious social problem, structural obstacle to economic growth and threat to global security. Governments and international bodies have widely adopted principles, laws and tools for countering corruption both domestically and transnationally. Still, the anti-corruption architecture is not working as planned whether to assure effective enforcement, induce voluntary changes in official behavior, or protect the victims. In order to place anti-corruption norms upon a stronger conceptual foundation, prioritize anti-corruption enforcement as a matter of policy, and focus that enforcement on improving the lives of corruption's victims, we argue for acknowledging freedom from official corruption as a fundamental and inalienable human right.

A right to be free of official corruption finds ample support in the foundational rights theory of John Locke. So too do cross-cultural intellectual traditions - particularly Chinese Confucianism and Islamic Jurisprudence - regard freedom from corruption as a first principle of governance. Though this freedom is not yet styled as a human right, philosophy and history have produced the functional equivalent: a fundamental obligation that governments owe to every individual by virtue of being human, that trumps other policy considerations, and the violation of which is a grave affront to justice. Reframing corruption as a rights violation sends an unequivocal message to both the victims of official corruption and the perpetrators: that corruption is neither cultural nor human nature; that the state might violate that right but cannot take it away; and that the vigorous enforcement of anti-corruption measures is not only possible, but essential.



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INTRODUCTION

The global community now widely recognizes corruption involving public officials as a principal cause of human suffering and deprivation, but not as a violation of a human right. The major rights conventions, including the *United Nations Universal Declaration of Human Rights* and regional conventions adopted in Europe, the Americas, Africa and Asia, do not include freedom from “official corruption” among their enumerated rights. In addition, the prevalent international anti-corruption agreements, such as the *United Nations*

Convention Against Corruption and the *Organization for Economic Co-operation and Development Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions*, do not frame official corruption as a rights violation. Official corruption is typically understood as a means by which established human rights are violated, but not as a direct violation. Freedom from official corruption is not enshrined as a universal and inalienable right to which a person is inherently entitled. Globalization, however, has provided compelling reasons, both theoretical and utilitarian, to consider defining and recognizing freedom from official corruption as a stand-alone human right.

Official corruption² has long been treated as a transnational phenomenon that must be addressed by international bodies through treaties and cooperation by law enforcement authorities. It is a major obstacle to the spread of democracy and political freedom, balanced and sustained economic growth, and reduction of poverty across the globe. As stated by former head of the United Nations Kofi Annan in the Forward to the *United Nations Convention Against Corruption* (UNCAC):

Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish. This evil phenomenon is found in all countries—big and small, rich and poor—but it is in the developing world that its effects are most destructive.

To facilitate political freedom and economic development, both the United Nations and regional multilateral bodies have established a range of human rights. The Czech jurist Karel Vasak sees this as an evolutionary process, starting with “first-generation” civil and political rights, such as freedom of speech and religion; to “second generation” economic and social rights, such as rights to property, education, and health, and beyond.³ These bodies seek to

1 We use the term “official corruption” in this article to mean a breach of public duty by a public official for private gain. Broadly, a public official is an individual who is elected, appointed, or hired to work for a national or local government or an international organization. Official corruption occurs when a public official solicits or accepts anything of value from a physical person or business in exchange for having the performance of his/her public duties influenced. See: *United Nations Convention Against Corruption*, available at: <https://www.unodc.org/unodc/en/treaties/CAC/>, Article 2(a) and Article 15. Acts of official corruption can include “grand corruption”, “petty corruption” and/or “political corruption”. For further reference, see Transparency International’s definition of corruption at: http://www.transparency.org/whoware/organisation/faqs_on_corruption/2/#defineCorruption.

2 Hereinafter we use the terms “official corruption” and “corruption” interchangeably.

3 See Karel Vasak, *Human Rights: A Thirty-Year Struggle: the Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights*, UNESCO Courier 30:11, Paris: United Nations Educational, Scientific, and Cultural Organization, November 1977.

uphold these rights by, inter alia, requiring governments to adopt and enforce laws that prohibit corruption. They have not, however, recognized freedom from official corruption itself as a human right.

The reluctance to treat corruption as a direct rights violation stems from different sources. There is the pervasive view that corruption is an ineradicable part of “human nature,” such that no universal right can prevent its occurrence. This view invokes the theory of Thomas Hobbes that we live in a “state of nature,” in which the individual will pursue his/her desires instinctively and expediently, leading to anarchic behavior including all forms of corruption. Accordingly, we adapt to corruption as a necessary evil to help governments and economies work more efficiently. We treat it as transitory, a phenomenon that nations will correct in the course of development. Purported solutions to the problem, such as raises in civil service pay or laws requiring civil servants to disclose their income, often treat corruption as a symptom rather than a cause of social, economic, and political deprivation.

Further, many scholars, jurists and anti-corruption activists associate the corruption-and-rights discourse with a Western neo-liberal ideology of international development that can lead multilateral institutions to impose conditionality on assistance to developing countries. While they do not argue that official corruption can be countered by domestic law enforcement authorities on their own, they suggest that varying degrees of corruption can be tolerated as transitory or cultural phenomena in different regions and countries. Others presume that the primary goal of a rights argument is to invoke the jurisdiction of international human rights conventions and their associated enforcement bodies, and believe that corruption simply cannot be read into those instruments.

But globalization compels us to challenge these established assumptions and positions. The expansion of international trade, foreign direct investment, and capital flows, the increasing power of non-state actors, and the spread of social media have increased the economic costs and political risks of official corruption. It has been estimated that corruption costs more than 5% of global GDP (\$2.6 trillion) and that over \$1 trillion is paid in bribes each year.⁴ Over the past two decades, numerous presidents, prime ministers and other political leaders have been removed from office because of their roles in official corruption. National governments and political systems have suffered a loss of legitimacy. New political parties have sprung to life with the mandate of providing an alternative to systems in which corruption is endemic. Each such victory for anti-corruption demonstrates that corruption is severely weakening states, leading to social upheaval, political instability, civil war, and regional conflict.

The struggle against official corruption is akin to fighting a mutating virus. Even as there are remarkable wins, as long as we treat symptoms of the problem, cases of corruption interminably mutate and multiply. To cure the “insidious plague,” we must examine its causes from both a theoretical and utilitarian perspective. We must consider whether to define a universal right to help a person to protect his/her liberty from being suppressed through acts of corruption, both grand and petty. Further, we should consider this question in positive terms - whether to establish that the individual has a human right to honest service from public officials. Leaders from politics, civil society, academia, law and business should give these propositions deep and serious attention. Arguments that are based essentially on human nature, on cultural relativism, and/or on non-enforceability have long been used to deny basic rights such as freedom from human slavery, torture and political repression. They require our thorough scrutiny and reconsideration.

⁴ See World Economic Forum, *Clean Business is Good Business; The Business Case Against Corruption*, at <http://www.weforum.org/pdf/paci/BusinessCaseAgainstCorruption.pdf>.

In 2010, after being extorted for bribes by local police, a 26-year old fruit and vegetable vendor named Mohamed Bouazizi immolated himself in front of the Governor's office in the Tunisian town of Sidi Bouzid. Bouazizi's sacrifice of his life to protest his lack of power to counter petty corruption sparked the Arab awakening.

As global demand for economic opportunity and jobs grows, the costs and risks of official corruption have become more acute. In 2010, after being extorted for bribes by local police, a 26-year old fruit and vegetable vendor named Mohamed Bouazizi immolated himself in front of the Governor's office in the Tunisian town of Sidi Bouzid. Bouazizi's sacrifice of his life to protest his lack of power to counter petty corruption sparked the Arab awakening. As Bouazizi's act exemplifies, perhaps the highest cost of corruption today is that it deprives individuals the opportunity to start and grow a business, accumulate capital, and generate new wealth. Dozens of other individuals in Tunisia, Algeria, Morocco, Yemen, Saudi Arabia and Egypt followed Bouazizi and committed self-immolation. A lack of economic empowerment creates a core and pervasive individual insecurity that destroys societal trust in government. Civil society across the globe has intensified its demands for honest government and removed leaders from office through elections, prosecutions or civil unrest. Government leaders across the political spectrum have increasingly come to view the elimination of official corruption as a matter of national security.

Notwithstanding certain progress made by government and civil society leaders in countering official corruption, they are still on the defensive. Both the political will and imperative to eliminate corruption remain weak. Though international and domestic legal regimes explicitly prohibit corruption, states have not generally enforced applicable laws effectively. Even where

the will exists, anti-corruption laws typically place a high burden of proof on state prosecutors. Nations have yet to achieve the cooperation among law enforcement bodies required to counter corruption consistently. Too many nations enable corrupt officials and provide the means to help hide the evidence. Leaders tacitly approve many forms of bribery in the name of national security, economic development or exigent circumstances.

This article provides a jurisprudential framework, including Lockean theories, to target the fundamental causes of official corruption that have not been reachable. It examines how re-framing corruption as a rights violation has important normative and utilitarian implications, and could improve enforcement at both national and international levels. Globally, most states have signed international conventions and/or adopted domestic laws that prohibit official corruption in one form or another. The problem lies with effective enforcement. A rights paradigm can increase political will for enforcement, and refocus efforts on protecting and benefitting the actual victims of bribery, the citizens of corrupt governments.

WHY FRAME CORRUPTION AS A RIGHTS VIOLATION?

Most agree that official corruption is a wrong against the public interest. Indeed, nearly every jurisdiction in the world deems various forms of corruption a civil if not a criminal violation. But elevating corruption to the status of a human rights violation changes the way that corruption is understood and treated in important ways.

First, human rights take root in philosophy and legal theory, grow organically and spread to form a universal ethos. They transcend the political, economic and cultural circumstances often used to justify and rationalize misconduct. There are different schools of philosophical thought on how a human right is formed and comes to be commonly understood as an inalienable and fundamental right to which a person is inherently entitled. Our view is that John Locke's theory of natural law provides the foundation for a human right to be free from official corruption. Globalization makes it feasible to codify this freedom as both a public good and product of social consensus. National governments and international bodies can legitimately establish a universal rule in exchange for security and economic benefits. Further, as Mohamed Bouazizi's act of courage illustrates, a human right to be free from government extortion is a vital expression of the human will and capacity for freedom.

Second, deeming corruption a rights violation gives international and domestic laws greater normative weight, heightening their importance in public policy. 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,"⁵ or, as the prominent legal philosopher Ronald Dworkin famously said, rights are "trumps."⁶

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Third, 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."⁷ Rights exist irrespective of whether any particular government, set of contemporary cultural practices, or even prevailing public opinion acknowledges them.

Fourth, a principal goal of international anti-corruption conventions is preventative - to create higher standards of official conduct that facilitate good governance, economic growth, and national security. Likewise, legal instruments that establish human rights have been expanded to include the right to enjoy possession of one's property and to secure education and health. But, how can international law foster the conditions required to uphold good governance and protect agreed human rights? Well, these conventions all suggest that prevention of official corruption is an essential pre-condition to fulfill these goals.

5 James Griffen, *On Human Rights*, Oxford University Press (2008), quoted in *The Stanford Encyclopedia of Philosophy*, "Human Rights," section 1, available at <http://plato.stanford.edu/entries/rights-human/>.

6 Ronald Dworkin, *Taking Rights Seriously*, Harvard University Press (1978).

7 Maurice Cranston, *What are Human Rights?*, Bodley Head Publishers (1973) at 36, quoted in Alison Dundes Renteln, *International Human Rights: Universalism Versus Relativism*, Sage Publications (1990) at 47.

THE PREVAILING VIEW: CORRUPTION AS A MEANS OF VIOLATING OTHER HUMAN RIGHTS

The broader international community has hesitated to embrace a human 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 human rights. The leading non-government organization dedicated to anti-corruption, 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.”⁸ 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.⁹ Electing instead to take “a different approach,”¹⁰ they frame corruption as a means of violating other rights.¹¹ They conclude that anti-corruption programs might therefore incorporate “human rights principles and methods,”¹² 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 who mount 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, and cultural rights such as the rights to education, health, food or adequate housing.¹³ 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.”¹⁴ 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 differentiation between corruption and human rights is generally reinforced by the major international agreements: the anti-corruption conventions do not frame corruption as a rights violation, and the human rights instruments do not even mention corruption. When adopted in 2005, the principal global anti-corruption

8 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.

9 *Id.* at 3.

10 *Id.* at 3.

11 *Id.* at 27. See also, Andreanna M. Truelove, Note, *Oil, Diamonds, and Sunlight: Fostering Human Rights through Transparency in Revenues from Natural Resources*, 35 *Georgetown J. Int’l L.* 207 (2003) (“Government corruption provides both an incentive and a means for human rights violations.”).

12 International Council on Human Rights Policy and Transparency International, *supra* note 8, at 3.

13 See, e.g., Martine Boersma, *Corruption: a Violation of Human Rights and a Crime Under International Law?*, Intersentia (2012); see also Ndiva Kofele-Kale, *The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime Under International Law*, 34 *Int’l Law* at 165: 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.” 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).

14 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 222.

instrument, the *United Nations Convention Against Corruption*, went beyond previous international agreements to require signatories to criminalize not only basic forms of corruption such as bribery and embezzlement of public funds, but also trading in influence and concealment and laundering of the proceeds of corruption. The document also makes references to various discrete human rights, and highlights the collateral impact of anti-corruption enforcement measures on other rights.¹⁵ UNCAC, however, 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 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (OECD Anti-Bribery Convention).¹⁶

Certain regional anti-corruption instruments more directly engage corruption's impact on human rights, but where they do, they again frame corruption as a means by which other 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."¹⁷ A similar approach appears in the *African Union Convention on Preventing and Combating Corruption* (2003).¹⁸ 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 (UDHR)*, 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 on Human Rights (ECHR)*, 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,"¹⁹ a period beginning in the 1990s when the problem of corruption rose to prominence in global policy discussions.

This is not to say that official corruption has been misdiagnosed. The leaders who have spearheaded the global fight against official corruption have sought to attack the roots of the problem. They have adopted a holistic strategy that includes affirming the positive benefits of transparency and honesty in government; reforming laws, institutions and administrative practices; and fostering societal change through cultural and educational programs. Economists have made a strong case that the path to sustained economic growth lies in the creation of "social capital" - a level of trust between people and institutions that enables a country to organize production on a scale that engenders new wealth. There is a growing consensus that corruption is a primary cause of poor governance and economic failure, not a symptom. UNCAC acknowledges and embraces the goal of prevention through setting a higher standard for official conduct and engaging civil society as a partner.

¹⁵ UNCAC, *supra* note 1, makes various brief references 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), ownership rights over frozen assets (article 31), and "other rights acquired by third parties" (articles 34 and 55).

¹⁶ *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, available at <http://www.oecd.org/corruption/oecdantibriberyconvention.htm>, Articles 1 and 3.

¹⁷ *Council on Europe Conventions on Corruption*, available at <http://www.business-anti-corruption.com/about/about-corruption/council-of-europe-conventions-on-corruption.aspx>.

¹⁸ *African Union Convention on Preventing and Combating Corruption*, available at http://www.au.int/en/sites/default/files/AFRICAN_UNION_CONVENTION_PREVENTING_COMBATING_CORRUPTION.pdf.

¹⁹ See *Corruption Eruption*, Moisés Naím, June 1, 1995, *Brown Journal of World Affairs*, Summer 1995, available at: <http://carnegieendowment.org/1995/06/01/corruption-eruption>.

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But the international trends that have spurred globalization have provided new opportunities for public officials to demand and private individuals and businesses to offer bribes in exchange for government actions. In highly bureaucratized states making the transition from communism to capitalism, official corruption has been used as a mechanism to get factories built and major infrastructure projects completed. Even as capitalism has become more widely accepted internationally as a legitimate means to engender individual freedom and opportunity, corruption has created significant leakage in global flows of trade and investment. It leads to the transfer of assets and wealth from countries with weak governance to developed economies. Corruption is the “Achilles heel”²⁰ of capitalism and is widely exploited by certain government leaders as a means of both personal enrichment and maintaining autocratic control.

FRAMING CORRUPTION AS A DIRECT VIOLATION OF A HUMAN RIGHT

Though international conventions lend scant support, legal philosophers have long acknowledged that these instruments are but one of several bases for making a rights argument.²¹ As mentioned, four other lines of reasoning 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 official 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. Owing to this absolute freedom and equality, however, we lack a neutral third party with the authority to resolve disputes. We are therefore each left to enforce the “law of nature” in our own cases. Predictably, this system breaks down, as “self-love will make men partial to themselves and their friends.”²² Humankind thus needs a government, a “common measure to decide all controversies”²³ that will remedy “those evils which necessarily follow from men being judges in their own cases.”²⁴ The administration of justice is tainted or, if you will, corrupted, by self-interest.

20 See, e.g., Raymond Baker, *Capitalism's Achilles Heel: Dirty Money and How to Renew the Free-Market System*.

21 Renteln, *supra* note 7, at 9. Renteln also refers to other bases, including divine authority and intuition, which this paper will not engage.

22 John Locke, *The Second Treatise on Civil Government*, Prometheus Books (1986) at 13.

23 *Id.* at 70.

24 *Id.* at 13.

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.”²⁵ That is, our natural right to liberty can only exist where government exists and its officials do not abuse their public office for private gain, where they do not act corruptly. Where officials do so act, citizens “have no such decisive power to appeal to, [and] they are still in the state of Nature.”²⁶ 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,”²⁷ he is describing what we today call official 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.²⁸ Historian Bernard Bailyn observed that the very “heart of the revolutionary movement” was the “fear of a comprehensive conspiracy against liberty . . . nourished in corruption.”²⁹ Legal scholar Zephyr Teachout thus finds that the Constitution “carries within it an anti-corruption principle, much like the separation-of-powers principle, or federalism.”³⁰

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A distinctly Anglo-American intellectual tradition, however, 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.³¹

25 *Id.* at 72.

26 *Id.* at 50.

27 *Id.* at 108. See also *id.* at 109 (“Wherever law ends, tyranny begins, if the law be transgressed to another’s harm.”).

28 James Savage, “Corruption and Virtue at the Constitutional Convention,” 56 *J. Pol.* 174, 177 (1994).

29 Bernard Bailyn, *The Ideological Origins of the American Revolution*, at xiii. Similarly, George Mason said at the Convention, “If we do not provide against corruption, our government will soon be at an end.” Notes of Robert Yates (June 23, 2787), in 1 *The Records of the Federal convention of 1787*, at 391, 392 (Max Farrand ed., rev. ed. 1966) (1937).

30 Zephyr Teachout, *The Anti-Corruption Principle*, 94 *Cornell L. Rev.* 341, 342 (2009).

31 See, e.g., Amartya Sen, *Human Rights and Asian Values* in *The New Republic*, July 14 1997.

Thus, a second promising basis for identifying the existence of a human right is cross-cultural research that discovers fundamental values shared by all cultures, or “cross-cultural universals.”³² Though the term “rights” may not appear in other languages or intellectual traditions, those traditions of political thought may contain their functional equivalent³³ – fundamental principles of governance that are owed to every human being by virtue of being human and therefore 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. China’s proudly ancient intellectual traditions (and more modern Marxist legacy) would both seem to situate the country well outside the western liberal paradigm. There is, however, 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.³⁴ 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.”³⁵

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 justify the means.³⁶ 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 long stalks of grass bends them as it passes.”³⁷

Only a person of great virtue, then, could be qualified to become the ruler, the “Son of Heaven;” without virtue, he loses his legitimacy.³⁸ 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 with a proud, ancient, and eminently non-western intellectual tradition, and that has resisted the embrace of western political values, is the Islamic Middle East.³⁹ Islamic law is widely incorporated into civil law systems across the Middle East (and South Asia as well), and significantly frames public policy

32 Renteln, *supra* note 7, at 138.

33 *Id.* at 11.

34 Leonard Shihlien Hsu, *The Political Philosophy of Confucianism*, Curzon Press (1975) at 24-25.

35 *Id.* at 9-10.

36 *Id.* at 111.

37 Randall Preenboom, *China’s Long March Toward Rule of Law*, University of Cambridge Press (2002) at 32.

38 Hsu, *supra* note 34, at 79.

39 Though the Association of Southeast Asian Nations created a sub-regional 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.

discussions.⁴⁰ 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.⁴¹ Sharia means the “path to the watering place,” referring to the divine will and connoting a path of discipline and virtue.⁴² 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.”⁴³

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*).⁴⁴ But Islamic jurisprudence also taught that external checks and balances must supplant internal accountability. Law must therefore prohibit various forms of corruption, including the acceptance of gifts, embezzlement, compromising official duties in exchange for bribes, or basing official decisions on family or tribal considerations.⁴⁵

As one Muslim legal scholar laments, “unfortunately, Islamic standards and norms are not often appreciated by states in the Muslim world.”⁴⁶ 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 civil society and good governance.

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.⁴⁷ 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.

40 Mohamed A. Arafa, *Corruption and Bribery in Islamic Law: Are Islamic Ideals being Met in Practice?*, in *Annual Survey of Int'l & Comp. Law*, Vol. XVIII (2012) at 183.

41 *Id.* at 185.

42 Mohammad Hashim Kamali, *Shari'ah Law: an Introduction*, Oneworld Publications (2008) at 14.

43 *Id.* at 14.

44 *Id.* at 29.

45 Arafa, *supra* note 40, at 106.

46 *Id.* at 127.

47 See *Stanford Encyclopedia of Philosophy*, *supra* note 5, section 4.

Third, it is time to reconsider the argument that it is more constructive to promote anti-corruption as a means to protect other human rights than to create a stand-alone right. In 1948, the UDHR established a range of human rights, including civil and political rights as well as economic, social and cultural rights. This inclusive approach was based on the principle of indivisibility—that by combining the different rights, they could be more successfully upheld. It has since become widely recognized that better enforcement of one set of human rights is imperative to protect other rights and freedoms.

A freedom from corruption would have an essential role in upholding and enforcing other human rights. In societies where corruption is endemic, it can permeate every dimension of daily life—from obtaining a public education, to seeing a doctor, to obtaining a driver’s license, to starting a business, to paying taxes. Yet, international human rights instruments present the objective of good governance principally in aspirational terms. The UDHR provides that: “Everyone has the right of equal access to public service in his country”.⁴⁸ The *African Charter on Human and People’s Rights* states that every citizen has “the right of access to public property and services in strict equality of all persons before the law.”⁴⁹

Similarly, anti-corruption conventions promulgate voluntary approaches to ethics, accountability and the prevention of conflicts of interest. A general purpose of UNCAC is to develop and implement anti-corruption policies that: “promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.”⁵⁰

Unless and until freedom from official corruption is ensconced as a stand-alone human right, however, the state of governance envisioned in the UDHR, UNCAC and other human rights and anti-corruption conventions will remain elusive. A right to obtain basic public services free from official extortion is a *sine qua non* of good governance. Without such protection, it will be impracticable to enforce both fundamental civil and political rights as well as the new economic and social rights to education, health and housing.

This factor may explain why, despite controversy, the international rights regime has formed a human right to enjoy possession of one’s property. The right to private property has been at the center of epic struggles over human rights from 17th century revolutionary Europe,⁵¹ to the *U.S. Declaration of Independence* to the *Universal Declaration of Human Rights*. Though this right stems in part from western philosophy, including Locke’s right to liberty,⁵² it has increasingly been embraced as an international norm. Starting with the UDHR in 1948, a right to property has since been adopted in one form or another in the human rights agreements of the regions of Europe, Africa and the Americas. Generally, the right is not absolute and the state has a right to limit it; but, it entitles individuals to private property and provides certain protections.

The fact that international bodies have added property to the litany of human rights is instructive. It demonstrates certain will to adapt human rights law and utilize it pragmatically to protect both individual liberty and social

48 *Universal Declaration of Human Rights*, Article 21, available at <http://www.un.org/en/documents/udhr/>.

49 *African Charter on Human and People’s Rights*, Article 13, available at http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf

50 UNCAC, *supra* note 1, Article 5.

51 During the English Civil War in the mid-17th Century, a political movement known as the Levellers arose that was strongly opposed to corruption in any form in part because of a strong belief in property rights. They viewed property that an individual earned as the result of his/her labor as sacred under the Bible’s commandment “thou shall not steal”. As with Locke, the Levellers’ philosophy has since helped shape national and international debates leading to the creation of a human right to protection of property.

52 See Locke, *supra* note 22: “everyman has a property in his person; this nobody has a right to but himself. The labor of his body and the work of his hand, we may say, are properly his.”

interests. In 1952, for example, after much debate, the Council of Europe amended the European Convention on Human Rights (ECHR) to provide for the “peaceful enjoyment of one’s possessions” under Protocol 1, Article 1. The European Court of Human Rights⁵³ (ECtHR) has since adjudicated thousands of individual claims against national governments under Protocol 1, Article 1.⁵⁴ A careful reading of these cases shows citizens bringing claims against public officials for corruptly taking or expropriating private property. Further, consistent with Lockean theory, the ECtHR has interpreted “possessions” to include not only tangible property, but also intangible property – that is, something which a person can have ownership of, but has no physical substance.⁵⁵

The standard set by the ECHR invites us to consider how establishing freedom from corruption as a stand-alone right would help protect other human rights, including property rights. UNCAC has addressed this challenge indirectly by implicitly requiring that state signatories create a private right of legal action to undertake civil proceedings to recover damages from official corruption.⁵⁶ Further, UNCAC requires that states cooperate in recovering property acquired through corrupt acts and defines said property broadly to include: “assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets.”⁵⁷

Fourth, our reasoning for framing official corruption as a direct violation of a human right stems from a conviction that law should not only prevent abuses of public position for private gain, but also foster conditions in which humans can freely create, build and thrive. Let’s consider the full import of Mohamed Bouazizi’s act of self-immolation. The Peruvian economist Hernando de Soto, renowned for his work in the field of corruption and poverty, has researched Bouazizi’s life.⁵⁸ De Soto found an individual who was not a political activist. Rather, Bouazizi was “economically excluded.” He was an entrepreneur determined to accumulate capital and create security for himself and his family. On the day he killed himself, Bouazizi could not find enough cash to reclaim equipment that had been illegally confiscated by local police. He committed self-immolation in a public setting as an expression of will to be free from officially sanctioned extortion. We believe the law of human rights should be an instrument of such freedom.

THE NEXT STEP IN AN HISTORICAL AND CROSS-CULTURAL PROGRESSION: DEFINING A NEW HUMAN RIGHT

Based on legal theory, cross-cultural universals and social utility, the international community should consider creating a new human right of freedom from official corruption. We see a progression in both human rights and anti-corruption law towards the establishment of a stand-alone right. Since the *Universal Declaration of Human Rights* was adopted, history has seen the creation of a number of new human rights. Karel Vasak’s generations

53 In 1959, the Council of Europe established a special court to provide individual citizens of member states an effective remedy for violations of their human rights under the ECHR and created the European Court of Human Rights.

54 The ECHR reports that as of 1 January 2010, 14.58% of all judgments in which the ECtHR found a violation of the ECHR concerned the right to property. See: <http://echr-online.info/right-to-property-article-1-of-protocol-1-to-the-echr/introduction>.

55 This can include intellectual property, that is, objects that acquire their value from creative efforts, such as copyrights, trademarks, patents, and economic interests, such as contractual agreements and compensation claims against the state.

56 UNCAC, *supra* note 1, Article 35, Compensation for Damages, requires states to take such measures as may be necessary, in accordance with their domestic law principles, “to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.”

57 *Id.* at Article 2.

58 Hernando De Soto, “The Capitalist Cure for Terrorism”, *The Wall Street Journal*, October 10, 2014.

now include: first-generation civil and political rights (political participation); second-generation economic, social and cultural rights (subsistence); and third-generation solidarity rights (peace, clean environment).⁵⁹

Based on Locke's natural rights theory, freedom from official corruption may be most akin to the so-called "first generation" rights because it is "inalienable" and comparably "fundamental." At the same time, social, economic and utilitarian considerations are driving towards declaring this freedom as a universal right and setting new rules of enforcement. In response to these drivers, several multilateral bodies have created a "second generation" human right for the individual to enjoy possession of his/her property; and the ECtHR is developing a new international rights jurisprudence to protect property from being taken through acts of petty and grand corruption.

Natural rights theory is not the sole source of legitimacy for enshrining a new right. A range of philosophies, religions and value systems condemn the act of theft from the public that is the essence of official corruption. There is growing cross-cultural consensus around the principle that the official corruption is a plague on governance and should be criminalized.

Political, civil society and thought leaders from across the world have responded to globalization with innovative and comprehensive initiatives to address the problem of corruption domestically and transnationally. The *United Nations Convention Against Corruption* provided the foundation for a truly global anti-corruption architecture. As Secretary General Annan stated when introducing UNCAC:

The adoption of the new Convention will be a remarkable achievement. But let us be clear: it is only a beginning.... If fully enforced, this new instrument can make a real difference to the quality of life of millions of people around the world.

To date, however, UNCAC and other international laws pertinent to combatting corruption have not been fully and effectively enforced. The political will for enforcement is undermined by varying levels of tolerance for official corruption in different nations. Enforcement also requires an independent judicial branch and prosecutorial tradition that can meet a high burden of proof.

UNCAC and other international initiatives have sought to fill the "enforcement gap" by promoting voluntary steps to implement high standards of government ethics through adoption of codes of conduct. Though these efforts have marked an important and even historic step, voluntarism alone will not suffice to improve the conditions in which corruption's victims live. A strategy that relies on voluntarism is not equal to the challenges of globalization and the strains of the corruption virus that it is producing.

The question now facing the international community is how to create an anti-corruption norm that acts as a "trump." Based on a comparative ethics analysis, a majority of societies, cultures and religions hold that public officials owe an affirmative duty of honest and fair service to citizens. Global stakeholders should apply this cross-cultural consensus to create a new human right against corruption.

A new human right would help spur governments to enforce applicable anti-corruption laws, protect citizens from officially-sanctioned extortion and become a tool for all stakeholders to demand transparency and honesty from

⁵⁹ Vasak, *supra* note 3.

government. It would help assure that governments protect a range of other human rights, provide essential social services and create conditions for sustainable economic growth.

We reserve for another day the question of how a right to be free from official corruption would be defined most effectively as an enumerated and enforceable right under international law. Our goal with this paper has been to push the international community beyond reliance on political will and voluntarism to fill the enforcement gap. We have sought to lay new groundwork for recognizing official corruption as the violation of a fundamental human right and conceiving a new and more effective international legal regime.

CONCLUSION

Whether people live in advanced democracies or state-controlled polities, they share a hope and—increasingly an expectation—to lead lives freed from official corruption. This freedom is threatened by the endemic nature of corruption in certain societies and global conditions that enable it to cross borders. Our collective challenge is to consider whether and how human rights law should take the fight against transnational corruption on the offensive and act as a more effective normative guide of conduct.

We recognize the long history and complex nature of the act of bribery. The case against corruption, however, may be rigged for failure - if we cannot overcome this ingrained perception that we are wired for it. Globalization has now challenged the international community to elevate anti-corruption as a measure of an individual's freedom in a society. As Mohamed Bouazizi and countless others who have defied dangerously corrupt governments have demonstrated, individuals have a right to expect government to be honest and responsive as opposed to self-dealing and extortionate. The law of human rights should not only defend this individual right, but create the trust in government required to unleash human potential for creativity, innovation and self-realization.

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