

THE INTERNATIONAL ANTI-CORRUPTION CAMPAIGN

*David Kennedy**

Although it is late in a remarkable day, a question remains hanging in the room which I would like to address: should one, in the end, favor or oppose the campaign against "corruption" currently being waged by the assortment of institutions, policy-makers and intellectuals that styles itself "the international community?" The presentations we have heard today fall rather neatly on both sides of this question and, by my own count, the issue divides our speakers roughly in half.

At the same time, no one has said, in so many words, "I oppose the campaign to eliminate corruption." Those who support the anti-corruption campaign also hedge their support with doubts, qualifications, hesitations and cautions. I would like to speculate about the relative absence of clean statements on this issue and begin to differentiate the "cautions" advanced by campaign supporters from what I see as the case against the anti-corruption campaign.

One reason for vagueness among those who oppose the anti-corruption campaign is clear: opposition to the anti-corruption campaign might easily be construed as support for corruption. However difficult it might be to define "corruption," in polite society one must be opposed to it. Opposition to corruption, much like opposition to terrorism or genocide or weapons of mass destruction, seems to unite the international class of commentators (if not yet the practice of the international community) even in the absence of any consensual definition or prohibition. Such norms-by-exaggeration are prevalent in international law, often substituting for the absence of a workable legislative mechanism. Where the practice is *per se* reprehensible to all civilized persons, there is no need for a treaty, with all the concomitant details of drafting. Where something can be said to "shock the conscience of mankind," advocates easily find the prohibition they seek. Although it is

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widely recognized that "one person's terrorist is another's freedom fighter," one is not permitted to speak in favor of terrorism. To oppose anti-terrorism places one uneasily outside the common sense of the international community.

My guess is that something like this is going on in the debate about corruption. Although the term "corruption" is open to all sorts of interpretations, once something has been at least plausibly swept into the corruption category, the discursive balance of forces changes. Efforts to eliminate the practice are harder to oppose. This gives anti-corruption campaigners a real political and rhetorical advantage, a sort of persuasive penumbra which overhangs the force of their specific political claim about abolition of a particular practice in a particular place. Nevertheless, I *do* oppose the international campaign against corruption, although I *do not* favor corruption. Perhaps we could describe this position as anti-anti-corruption.

Of course, in all these cases – terrorism, corruption, slavery, genocide, piracy – there are well established forms for opposition to particular eradication efforts. It is easiest to oppose campaigns against terrorism or corruption for their *procedural* or *strategic* missteps. Is a court with universal jurisdiction the best procedure to tackle war crimes? Reasonable people might differ. But whether this or that slaughter was a war crime is a different sort of question. Once someone *claims* some behavior was genocidal or terroristic or a war crime, a reasonable person will not want to split hairs or deny the witness's experience by suggesting otherwise. Especially when the reasonable person wants to be seen to be neutral in an ideological conflict of interpretations about the meaning of terrorism or corruption or genocide. One can, of course, dispute the substantive assertion – contest the definition of genocide, for example – where the original claim is altogether implausible. But where it is plausible, disputing the claim will seem unduly subjective, a taking of sides. These are terms which seem meant to be rather loosely thrown about. The reasonable commentator will rather accept the claim and worry about the most effective mode of opposition: is this really the right vehicle, procedure or strategy? In this sense, we might say that for a "norm by exaggeration" the substantive persuasive overhang is larger than the procedural one.

But there is something of a procedural overhang as well. Of course one might always argue against any procedural overhang – in pursuing the terrorist or the war criminal or in battling corruption, one should not descend to the level of those one pursues, one should insist that the investigation should be transparent, respectful of civil rights, etc. International war crimes prosecutors should be particularly careful to turn

square corners. But one can also always argue that these behaviors are sufficiently reprehensible to justify extraordinary means in their suppression. It is therefore common to find opinion among those who support efforts to oppose genocide or terrorism divided between those who think a current effort at eradication may have gone too far and those who do not. A reasonable middle ground between these positions would still leave a persuasive overhang for procedural irregularities, a sort of built in margin of maneuver for campaigns of this sort.

So also with corruption. Most of the cautions advanced by supporters of the anti-corruption campaign do not dispute that corruption is an unmitigated evil. They generally do not dispute whether the range of government practices which are the target of the anti-corruption campaign are truly "corrupt." They do wonder whether the anti-corruption campaign might have gone too far, say by disrupting too much of the local economic fabric too quickly. Such particular concerns are then often "balanced" against the overwhelming clarity of the evil done by corruption (in general), compromising the public trust, economic development or whatever. This returns the debate to common ground – corruption is really a terrible thing – and leaves room for the anti-corruption campaign to incur some, if not too many, procedural costs.

Indeed, any dispute about whether an anti-corruption campaign is a good or a bad idea is easy to experience rather as a dispute about whether a particular campaign has or has not gone too far in battling a quite general evil. Since people who seem to oppose an anti-corruption effort obviously do not support corruption, it is easy to conclude that they must be opposed to some procedures or technicalities or unintended consequences of the particular campaign. Less likely, but also possible, they might feel the substantive definition of corruption has been overextended to the point that it is no longer *plausible* to claim that the practices being opposed are "corrupt." Indeed, it would be ungenerous not to understand opposition to an anti-corruption campaign in one of these ways, not to exempt one's interlocutors from the charge of favoring or not caring about corruption.

But there is a real question whether one should or should not have an anti-corruption campaign which is different from the question whether a campaign against corruption could have procedural or definitional excesses. My goal here is to explore the possibilities for opposition to the anti-corruption campaign which resist, even if unsuccessfully, being read as simply a procedural or definitional caution. Let me do this by sketching in broad terms the sorts of arguments which have been made in our symposium today against the anti-corruption campaign to explore their difference, if any, from tactical caution.

Supporters of anti-corruption efforts express, as we have heard, many reasons for caution in the endeavor. Some are atmospheric or rhetorical. Anti-corruption campaigning often mixes moral opprobrium with both economic theory (corruption stunts development) and faith in a universalist and rational rule of law. This can be a dangerous ideological mix. It might even be counterproductive for the campaign as a whole, particularly where the anti-corruption drive is organized at the center for application at the periphery. As a tactical matter, echoes of colonialism, imperialism and the like might blunt acceptance of the anti-corruption message. As a result, many anti-corruption campaigners are careful to eliminate moralizing rhetoric and stick to the more rational language of economic advantage or defense of a presumptively neutral and locally adopted rule of law.

Despite this caution, opposition to the anti-corruption campaign often seizes on what seems a stigmatizing moral tone in the campaign that makes the effort seem unfair to the periphery. I heard at least three versions of this worry in the presentations at this symposium. First, the claim that the anti-corruption campaign is the product of a double standard by the West against the rest – the normal lobbying and campaign financing practices of Washington law firms are seen as corruption when undertaken by members of leading families of Pakistan or Indonesia. Second, the anti-corruption campaign puts pressure on public practices in the Third World which are no different from the private practices of individuals and corporations in the First World. Imelda Marcos's shoes are a scandal, but Bill Gates' house is simply part of the idiosyncratic lifestyle of the rich and famous. Third, the anti-corruption campaign smacks of victim blaming – reinforcing the idea that the problems of Third World economies are the result of policies made at the national level by local elites, when the decisions of foreign capital and the workings of the broader world system are far more important. Sometimes this third criticism seems structural and influenced by dependency or world systems theory – “the West underdevelops the South” – and sometimes it focuses on the rapacious suppliers of corruption, “pushers” if you like, in the North who get weak Third World governments or private institutions addicted to debt and graft.

Although these criticisms are often advanced with great passion, to the anti-corruption campaigner they seem oddly off the mark. The activities of beltway lobbyists may be laudable or not, but if they are corrupt, they should also be opposed in the strongest terms – the point is that what the leading families in corrupt Third World situations do is different – they are corrupt in the sense that they stand outside the rule of law. One may want to redistribute the Gates fortune, one might wish for

stronger enforcement of antitrust laws, one might wonder at the profits Ross Perot made from government service contracts, but all these things are different from the corruption which is the object of the anti-corruption campaign. Indeed, efforts to equate these things seem disingenuous in their refusal to admit that corruption, actual corruption, has been part of the experience of the post-colonial state. Similarly, whatever one's theory of development (and perhaps terms of trade are declining, perhaps first world banks are responsible for the debt crisis, perhaps multinationals do "push" corrupt payments) it seems indisputable that there would be more development if local corruption could be eliminated.

Responding to these arguments about stigma requires both a definition of corruption – how exactly is the Gates fortune different from the Marcos fortune? – and a link between corruption and underdevelopment – why is it obvious that less corruption means more development even if the effects are swamped by the larger currents of declining terms of trade or destabilizing currency flows? If there are good clean answers here, then the stigmatizing concerns become simply cautions about moral overreaching. The anti-corruption campaigner should, of course, be careful to impugn only things which really are corrupt and which really are bad for development.

Before going on to see whether the distinction between corruption and the rule of law and the link between corruption and development are clean enough to transform these broad criticisms into mere cautions about overreaching, we should note that arguments about stigma might be robust even if it turned out one could define quite cleanly how Marcos and Gates were different and how corruption retards economic growth. This would be true if the bad ideological effects of the anti-corruption campaign – the delegitimation of the post-colonial state, the reinforcement of local responsibility for underdevelopment, and so forth – swamped any marginal economic gain from the effort. *This might, of course, be utterly impossible to measure – but it is the sort of thing one is likely to have an instinct about one way or the other.* Of course, one person's delegitimation is another person's just condemnation, but let us say that my own instinct is that the anti-corruption campaign is vastly more significant as an ideological tool than as a policy to reduce departures from the rule of law or advance development.

The rhetorical problem for the anti-anti-corruption advocate is that this sort of instinct does not have a very large substantive or procedural overhang. As a result, there is an argumentative imbalance here. The anti-corruption campaign benefits from the unwillingness of reasonable people to dispute plausible claims that corruption is taking place – the clear evil of the practice in general justifies at least some efforts to combat

it. But the anti-anti-corruption campaign does not benefit from a similar generosity to the instinct that the campaign seems part of a broader ideological project of neo-colonialism. There is no countervailing general consensus about the evils of neo-colonialism, but rather quite the opposite. Charges of neo-colonialism seem vague and defensive efforts to change the subject, while charges of corruption seem straightforward efforts to get to the heart of things.

Either way, however, these arguments about the stigmatizing effect of the anti-corruption campaign take us to the definition of corruption and its link to underdevelopment.

For all their doubts, anti-corruption campaigners share confidence that there is an identifiable thing called "corruption" which has bad effects on economic performance. The anti-anti-corruption position takes on these two propositions: that something called "corruption" can be identified cleanly, and that it will have bad effects on development. Let me take these two branches of the position – definitional and consequential – one at a time.

Although a simple definition of corruption would encompass economic crimes by public figures – stealing tax revenues or accepting bribes for legally mandated services – the anti-corruption campaign usually targets something broader than unprosecuted crimes by public figures. If the anti-corruption campaign targeted only criminal activities of this sort, it would be far easier to imagine that the ideological effects of the effort swamped whatever gains might be expected from its successful pursuit. For the anti-corruption campaign, corruption seems to mean either a pattern of crimes that erodes faith in a government of laws or actions by private or public actors which artificially distort prices – unreasonable finders fees, patterns of police enforcement which protect Mafia monopolies and other things of that sort. The anti-corruption campaign moves from the image of public officials stealing things or taking bribes outward to a larger set of issues which may encompass action and inaction by both governmental and non-governmental players which either "distorts" free market prices or are not equally transparent to locals and foreigners. Corruption has become a code word for "rent-seeking" – using power to extract a higher price than that which would be possible in an arms-length or freely competitive bargain – and for practices which privilege locals.

It may be that what differentiates beltway lobbying fees from the fees taken by members of a leading family in a post-colonial state for using political contacts to secure governmental contracts is that one is a crime, just as Marcos may have stolen what Gates "earned." But most anti-corruption campaigners have another distinction in mind. Even where

post-colonial elites play by the rules, the rules by which they play are too discretionary to conform to the rule of law and this discretionary margin is exercised in ways which discriminates against outside capital. It is in this sense that their economies lack "transparency," and in this sense that their legal systems depart from the rule of law.

The parallel between this way of thinking about underdeveloped or transitional economies and the rhetoric often used in the West to describe socialist law is striking. Beyond concern about human rights, when one said that state socialism lacked the rule of law, one did not mean that there was a lot of crime; nor did one mean that there was anarchy. One meant that there was too much political discretion in the application of what were often densely bureaucratic legal rules, and that this discretion was both used politically, perhaps to favor party members, and experienced in ways which were not economically rational, to distort prices and favor local suppliers. The same sorts of arguments, of course, are now routinely made about the various quasi-socialist development strategies based on import substitution which were once prevalent in the Third World and favored by the international financial community.

At this point, the anti-corruption campaign gets all mixed up with a broader program of privatization, deregulation and free trade (dismantling government subsidies and trade barriers, requiring national treatment for foreign products and enterprises). The anti-corruption campaign also begins to run parallel to a set of historic debates about the relationship between a Weberian rule of law and development. These debates, however, remain arenas of deep contestation; they have none of the certainty associated with the anti-corruption campaign. It has been famously difficult to distinguish the sort of administrative discretion which automatically indicates that a legal system does not qualify as the rule of law from the sorts of judicial and administrative discretion over standards and rule interpretation that characterize the routine practice of the rule of law. It has also been famously difficult to distinguish legal rules and government practices that distort a price from the background rules in whose shadow parties are thought to bargain. Indeed, the elites of different societies often have quite different ideas about what is a normal and what is an abnormal level of governmental discretion and presence within the economy, and the best international economic lawyers see the machinery of GATT or the WTO as designed to mitigate or interface between conceptual differences of this type rather than to enforce an international or technical consensus on the issue. Even free trade absolutists acknowledge that it is often difficult to distinguish a non-tariff barrier from a structural comparative advantage. The definition of "national treatment" has been as contested in international economic law

as "discrimination" has been domestically. Experts have settled on any number of different methods for resolving these disputed issues, but none have the stark clarity suggested by the word "corruption."

In this sense, the anti-corruption campaign transforms the politically or ideologically contestable into the technically necessary and the morally imperative. Corruption works against and reinforces an idea about the "normal" arrangement of entitlements. Disturb these and one need not weigh benefits and burdens, even if one would customarily weigh and balance in the assignment of those entitlements and in their definitions. That the arrangement of entitlements normalized in this way might be interpreted ideologically is easy to see. When the government official uses his discretionary authority to ask a foreign investor to contribute to this or that fund before approving a license to invest, that is corruption. When the investor uses his discretionary authority to invest to force a government to dismantle this or that regulation, that is expertise. When pharmaceutical companies exploit their intellectual property rights to make AIDS drugs largely unavailable in Africa while using the profits to buy sports teams, that is not corruption, but when governments tax imports to build palaces, that is corruption, and so forth.

Perhaps the most telling problem is the difficulty of differentiating some prices and transactions as "normal" and others as "distorted" by improper exercises of power when every transaction is bargained in the shadow of rules, both legal and non-legal, which are the outcome of political decision-making and which are administered and interpreted with large measures of discretion. This old American legal realist observation about the ubiquity of state action makes the idea that transactions, national or international, should be allowed to proceed undistorted by "intervention" or "rent-seeking" incoherent. There is simply no substitute for asking whether the particular intervention is a desirable one. In this sense, the anti-corruption campaign, even at its core, is an effort to stigmatize some exercises of power in the economy and to legitimate others. It seems reasonable to ask both what the campaign stigmatizes, and whether the effects of these particular exercises of power are, or are not, desirable from the perspective of both distribution and growth.

This takes us from the problem of defining corruption to the question of its effects on economic performance. If corruption could be more clearly distinguished from other forms of everyday legal and political discretion, it might be possible to speak of the social effects of corruption, the erosion of the national moral climate, and so forth. Where corruption blends more easily into other disputed forms of public and private power, effects of this sort are harder to isolate. The consequences for economic growth, however, are often presented by anti-corruption campaigners as

beyond dispute. Even this, however, returns us to the difficulties of definition. Without a clean definition, it is difficult to isolate the distortions of public or private property rights which should be opposed automatically, without reference to their distributional consequences, because distortion alone will have a negative impact on economic development. And yet, rather than a coherent core definition, we find a constellation of disconnected worries about distortions of the relationship between public and private rights. Sometimes anti-corruption campaigners are worried about the private use of public property, sometimes about the public use of private property, sometimes about illegitimate private power (the Mafia) extorting public benefits and sometimes about public power extorting private payments.

It is difficult to link such a wide variety of practices in any compelling way to economic growth. As Paul Stephan has pointed out,¹ even if we define the problem narrowly as one of theft or conversion (making it difficult to see what calling it "corruption" might add) it is still difficult to be confident that the result will be slower growth. Sometimes, as every first year property instructor is at pains to explain, it is a good idea to rearrange entitlements in this way, adverse possession being the most dramatic example.

Moreover, the links between particular legal rules and economic development are famously disputed. The old adage "if you can't take care of your own family, how can you take care of the city" often does ring true. As we heard at this Symposium, at least for more primitive, pre-modern, feudal sorts of situations (and I wonder if the same could not be said about sectors of the most modern economy), the informal economy may be more crucial than the formal economy, and efforts to rationalize it or render it transparent might be quite harmful to economic growth, at least in the short or intermediate run. In some situations, practices one might label as "corrupt" might be more efficient means of capital accumulation, mobilizing savings for local investment. It is not only the local economy which may be characterized as informal. It turns out that most international trade is not an arm's-length transaction carried on at a market price, but rather some combination of barter, internal administratively priced transactions, relational contracts between repeat players and so on. In all these situations the distributional consequences of formalization are notoriously hard to predict. Sometimes what look like corrupt local preferences might turn out to be efficient price discrimination, what look like market distorting interventions might

1. See Paul B. Stephan, *Rationality and Corruption in the Post-Socialist World*, published concurrently in this volume.

compensate for a variety of market failures. In situations of unstable equilibrium, market failure or path dependence, administrative or private discretion might be good for growth. As John Ohnesorge reminds us,² the years of greatest growth for the Asian tigers coincided with legal and administrative practices which were famously discretionary and opaque to outsiders. Finally, even if the move from a "corrupt" legal regime to a "not corrupt" regime produces a one time efficiency gain, there is no good economic theory predicting that this will lead to growth or development rather than simply to another low level equilibrium.

Consequently, anti-corruption campaigners are often cautious to admit that anti-corruption should not be taken too far, should not disrupt efficient and functional social networks or eradicate the informal economy, especially where the formal economy is characterized by large scale market failures and inefficiencies. A campaigner thinking about anti-corruption efforts in ex-socialist societies, for example, wants neither to preach nor to deny that, at least under state socialism, it was often rational or efficient to work in the informal or black economy. Similarly, in Third World contexts, an anti-corruption campaigner wants to be seen neither to impose his or her own governmental form nor to underestimate the extent to which "non-economic" modes of social organization may have been part of a functioning pre-capitalist local culture. Most anti-corruption campaigners are quick to recognize and seek to soften the disruptions of the pre-modern social order which will accompany modernization.

But these hesitations and cautions are not, in my mind, sufficient. It would be terrific to engage in detailed examination of various legal regimes and rules to determine, as best one could, what their likely impact on growth might be in particular contexts. Sometimes, no doubt, increasingly formal or transparent rules would be a good idea. Sometimes less governmental discretion, sometimes more vigorous criminal enforcement, broader distribution of supply relationships, less local preference in contracting, might all be very helpful. But sometimes we would also expect the opposite. The point of the anti-corruption campaign is to avoid assessments of this sort by suggesting that some broad category of rules and regimes is bad for development in general.

It is not surprising that anti-corruption proposals follow familiar pathways, or that they often involve exactly the rule changes which will make local economies available for foreign direct investment. The existing system for distributing licenses or offering administrative

2. See John K.M. Ohnesorge, *Ratcheting Up the Anti-Corruption Drive: Could a Look at Recent History Cure a Case of Theory-Determinism?*, published concurrently in this volume.

discretion in a developing society might be entirely predictable for local players even where it is not done in accordance with published rules, and allocating these opportunities to local players might be the best policy from the point of view of development. But these determinations are often neither favorable nor transparent to foreign investors. It may well be that in the long run it is not politically possible or economically desirable for a Third World society to do anything which does not meet with the approval of foreign direct investors, but this is a different sort of claim than the claim that without an aggressive anti-corruption campaign development will be retarded.

The anti-corruption campaign is a fascinating initiative by the international financial institutions and development policy mavens of the First World. It clearly taps into a widespread sense of illegitimacy – we must all oppose corruption. When one begins to define the object of this quite general condemnation not just morally but in terms of the rule of law, and to specify its link to retarded economic development, quite familiar difficulties emerge. Suddenly the effort to battle corruption becomes an effort to stigmatize some economic policies and some legal regimes at the expense of others precisely without analyzing their distributional or social consequences in any specific detail. It is in this sense that the anti-corruption campaign, even at its most reasonable core remains an ideological project, an effort to leverage the rhetorical advantages of a shared moral opprobrium for a series of specific legal or institutional changes without having to specify who will win and who will lose as a consequence.