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Defining the Relationship Between Corruption and Human Rights

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Abstract

The relationship between corruption and human rights is only beginning to be seriously examined. A major premise of the ongoing research argues that corruption disables a State from meeting its obligations to respect, fulfill and protect the human rights of its citizens.

This study explores two other relationships between human rights and corruption. First, by showing how individualistic and procedural rights have been used to defeat investigations and prosecutions of corruption by high level governmental officials. Second, in demonstrating how anti-corruption reforms have primarily targeted the promotion market efficiency while reducing spending in meeting basic needs and rights such as health and education inconsistently with the social and economic rights of the poor and marginalized. These findings are significant since they show that the relationship between corruption and human rights extends beyond showing corruption disables States from meeting their human rights obligations. Indeed, human rights can be used in support of or against corruption.

The thrust of the recommendations made in this study are premised on an approach to human rights that offers the maximum potential for the democratization of the Kenyan State through transformative constitutional and institutional reforms. In addition, this can be done by expanding human rights concerns to include as a central agenda the social and economic rights of the poor and marginalized as well as minority rights and safeguards.
Defining the Relationship Between Corruption and Human Rights

Introduction

The relationship between corruption and economic performance is now well understood. However, the relationship between human rights and corruption is much less well understood and is only beginning to be seriously researched.¹ This research project contributes to the ongoing efforts to understand the relationship between corruption and human rights in the Kenyan context.

A major reason why the relationship between corruption and human rights has been less well understood is because the primary impetus of the anticorruption agenda came from the World Bank in light of its mandate in development policy.² Further, as part one of this study shows, in the 1960s to the early 1970s corruption was a backburner issue in bilateral relations between developing and developed countries as well as in development policy. In fact in some circles, corruption was argued to be necessary to overcome the bureaucratic red tape in then newly independent countries. This began to change as the corrupting influence of multinational corporations became the subject of developing country action within the United Nations in the mid-1970’s. A proposed Code of Conduct for Multinational Corporations reflected these

² In fact, Peter Eigen the founder of the leading global anti-corruption non-governmental organization, Transparency International, was a manager of World Bank Manager programs in Africa and Latin America. Based on his experiences at the World Bank, he founded Transparency International to promote accountability and transparency in international development. See Peter Eigen Founder and Chair of the Board of Advisors of Transparency International, available at www.transparency.org/content/download/4651/27528
concerns. However, it was the emergence of the good governance agenda sponsored by the Bretton Woods institutions, and the World Bank in particular, from the end of the 1980’s that brought corruption to the center stage of development policy. Since then corruption began to be seen as a major impediment to the success of economic reforms.

In Part 2, I discuss at length how human rights fit into the anti-corruption agenda. It discusses the relationship between human rights and corruption not only conceptually but in the Kenya context as well. It proceeds from the premise that high levels of corruption in a society are likely to disable a State from fulfilling its duties to respect, protect and fulfill the human rights of its citizens. The part pushes that premise even further by arguing that human rights abuses among and between individuals in a society are likely to be higher in a country with high levels of corruption.

The discussion in part two confirms the foregoing premises through an extensive and contextual discussion of civil and political rights, social and economic rights as well as minority rights in the Kenyan context. For example, the part discusses the importance of freedom of expression in exposing corruption as well as the manner in which the Kenyan government and the courts have compromised the ability of a free press to report openly about corruption particularly when it involves senior governmental officials. The part also discusses a trio of recent important High Court cases, Ng’eny and Saitoti on the one hand, and Murungaru on the other. The first two cases show how the judiciary used the protections of Kenya’s Bill of Rights to shield government ministers from any prosecutions for engaging in corruption. The courts in these two
cases exhibit how the use of a merely procedural conception of human rights in the judicial system fails to confront the power relations that underlay abuse of public resources characterized by corruption. While the *Murungaru* case somewhat restored the hope that the Bill of Rights in the Kenyan constitution should not be used to defend corruption suspects, this study shows the importance of broadening human rights to include social and economic rights as well as minority rights and safeguards in the anti-corruption context. The part shows that such a broad understanding of human rights would help in significantly changing the way Kenyan law is deeply implicated in producing corruption. In fact, I show that it is precisely because of the role that law has played so far that has facilitated the kind of impunity with which every Kenyan government without exception has engaged in corruption.

While part two shows how the well heeled have used the Bill of Rights to protect themselves against investigations and prosecutions of corruption related offenses, part three shows that anti-corruption and attendant judicial reforms have been primarily designed to facilitate market reform rather than to be sensitive to the poor, marginalized and disadvantaged. I argue that these reforms have foreclosed addressing questions of inequality and injustice. As such, I argue in favor of an anti-corruption agenda that is complemented by efforts to address the problems confronted by the poor and disadvantaged as a central component of the anti-corruption agenda.

Such an approach would approximate to what Upendra Baxi has insightfully called taking suffering seriously.3 Under such an approach, institutional and constitutional reform and

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transformation of the current political arrangements that have thrived on corruption would become an integral aspect of the struggle for the protection and promotion of human rights. Used effectively, the anti-corruption agenda offers the best opportunity to transform the struggle for human rights from its primary preoccupation with civil and political rights to social and economic rights as well. That is why an effective anti-corruption agenda must be accompanied by broad-based constitutional reform to decentralize Executive power to make it more accountable to parliament, the judiciary, and to the people. This would in turn require Parliament and the Judiciary to be independent so that they could act as effective checks against the Executive. It would also require citizens to be actively involved in monitoring these institutions to ensure that they were acting consistently with a vision of the social good and not of a select few. The final part of this study summarizes these and other recommendations for reform.

Part One

The Anti-Corruption Reform Agenda: Its Genesis in Development Policy

Introduction

The contemporary consensus on the necessity of anti-corruption initiatives in development policy may be taken for granted. It may for example be presumed that anti-corruption initiatives were and have always been a central tenet of the prevailing national and international economic development agenda. This paper argues that this claim is far from true. Three specific
arguments are made in the paper to show that the contemporary consensus on anti-corruption initiatives demonstrates a remarkable departure from prior attitudes towards corruption. These claims are. First, that bribery of foreign government officials has been transformed from being regarded as a necessary cost of doing business. This virtuous view of bribery prevailed especially among some economists in the 1960’s and early 1970’s. Instead, bribery of foreign government officials is today almost universally condemned as an economic cost that retards economic growth and development. Second, this paper argues that the concerns of developing countries within the United Nations system of organizations in the 1960’s and 1970’s to enact a code of conduct for multinational corporations that would have prevented them from bribing government officials in their countries has largely but not entirely shifted to focus on government officials who take bribes. Third, that as the anti-corruption initiatives have become central to national, regional and international cooperation on development, there has been less attention paid to corruption within the private sector.

The paper is divided into three parts. Part I examines the period between 1960 and 1980. It examines three distinct influences that kept corruption at bay as a critical development policy issue. First, it examines the influence of developed country states in the 1960’s at a moment of hope for newly independent countries and a hesitation we refer to as a cultural relativism in raising the issue of corruption even which began becoming endemic in many developing countries towards the end of the 1960’s. The second influence that we trace is that of economists of the period who regarded corruption as a necessary cost of doing business in highly regulated countries. A third influence came from the work done in comparative politics that claimed that
corruption was an indicator of a necessary path towards economic and political development much like in the developed world. In part II, we examine the early origins of anti-corruption initiatives to developing country efforts to curb multinational corporation bribery within the UN; to developed country efforts to come up with a code of conduct for multinational corporations in the OECD and the U.S.’s Foreign Corrupt Practices Act of 1977. This part then proceeds to examine the World Bank’s good governance initiative as the first major reflection of an emerging international consensus on addressing corruption in developing countries particularly in sub-Saharan Africa. Finally in Part III, we examine the modern anti-corruption consensus by examining various international and regional initiatives at the inter-governmental and non-governmental level. In particular, we focus on the manner in which anti-corruption initiatives are heading towards linking human rights and constitutionalism as part and parcel of the anti-corruption campaign.

Section I: Setting the Stage for the Emergence of the Anti-Corruption Consensus: 1960-1980

Corruption as a Back-Burner Issue in Bilateral Relations: The Cultural Relativist View

In the 1960’s and in the 1970’s, corruption within African states was often ignored in development economics, western bilateral and multilateral donors and those studying Africa in the West. Yet, towards the end of the 1960’s, it was clear that widespread corruption was accompanied by an emerging trend of authoritarian, one-party and military rule, economic
decline and general political instability in many sub-Saharan African countries. One of the reasons that accounts for this lack of open acknowledgement of corruption particularly among Africa’s bilateral development partners and westerners studying Africa was that in the immediate post-colonial period were wary of openly criticizing the fledgling governments. As one Africanist L.H. Gann lamented, with Peter Duignan regarding the 1960’s: “We were basically alone in predicting that newly independent Africa might have to cope with military coups, corruption, ethnic strife and other afflictions. The great majority of Africanists, particularly in the United States, did not wish to criticize the new countries, lest they be regarded as racists.”

According to Gann and Guignan, this conciliatory attitude was to give Africans a chance and space to develop without criticism from the West. This was also an era characterized by optimism that Africa would develop much like the West without question. Hence, Samuel Huntington argued:

“In terms of economic growth, the only thing worse than a society with rigid, overcentralized, dishonest bureaucracy is one with a rigid, overcentralized, honest bureaucracy. A society which is relatively uncorrupt- a traditional society for

5 Amos Perlmutter, *The Praetorian State and the Praetorian Army*, 1 (3) COMP. POL. 382-404 (April 1969); McKeown Roberta E, *Domestic Correlates of Military Intervention in African Politics*, 3 J. POL. & MILITARY SOC., 191-206 (Fall 1975); Robert H. Jackson and Carl G. Rosberg have argued that “During the past two decades, scholars, journalists, and other observers of African affairs have noted the recurrence of such phenomena as ‘coup’, ‘plots’, clientalism,” ‘corruption’…in numerous African countries…However, as yet there has been little inclination to view such phenomena as integral elements of a distinctive political system; they are seen as merely the defects of an otherwise well-established public order” PERSONAL RULE IN BLACK AFRICA: PRINCE, AUTOCRAT, PROPHET, TRYANT 17-18 (1982).


7 Id.

8 Colin Leys, *Confronting the African Tragedy*, 204 NEW LEFT REV., 33 (March-April 1994) (noting that the “history of the previous ninety years-i.e. since 1870- seemed to justify optimism).
instance where traditional norms are still powerful- may find a certain amount of corruption a welcome lubricant easing the path to modernization.\(^9\)

Consequently, there was less criticism of corruption in this early period than perhaps there should have been. Indeed it is fair to say that two of the countervailing approaches to studying African politics and economics at the time, modernization and dependency theories similarly avoided corruption issues, perhaps in order to put a good face on the African State. According to Colin Leys:

\>[T]hese ... schools of thought tended either to have an ahistorical approach, or unrealistically short-term perspectives. Modernizers were largely uninterested in history of any kind, and imagined Africa catching up with the West in a generation or two, helped by the advantage of having western technology available to them. Dependentistas--at least in some cases-imagined some kind of alternative path of ‘autocentric’ development, following "delinking"; and some Marxists imagined Cuban or Chinese-style revolutions. Few theorists of any these persuasions expected the post-colonial states of all ideological stripes to be corrupt, rapacious, inefficient and unstable, as they have almost all been. Most saw these things as aberrations, distortions and pathologies, and often tended to

\(^9\) Samuel Huntington, Political Order in Changing Societies 69 (1968).
resort to single-factor or reductionist explanations of them. And their hopes have only too deeply disappointed.\textsuperscript{10}

There is still another reason for the reluctance of Africa’s bilateral partners today to directly confront the messy politics and economic decline of post-colonial rule – the cold war. For the United States, countries that rejected communism no matter how corrupt and dictatorial were considered its allies. For the Soviet Union, those countries that embraced communist or approaches to governance that rejected the type of market based approaches promoted by the U.S. were regarded its allies no matter their record on political and economic performance. For both the U.S. and the Soviet Union, democracy and measures such as those involved in combating corruption was not as central to their foreign policy priorities as were their ideological goals.\textsuperscript{11}

\textit{Corruption as a Necessary Cost of Business – The ‘Virtuous Bribery Story’}\textsuperscript{12}

Another factor that contributed to underplaying corruption in the 1960’s and 1970’s was a debate among economists regarding the desirability of corruption. Economists such as Nathaniel Neff argued that it was possible for corruption to be beneficial for economic growth.\textsuperscript{13} According to this school of thought, developing country governments had developed pervasive and inefficient

\textsuperscript{10}Id. at 41. See also James Gathii, \textit{Retelling Good Governance Narratives on Africa’s Economic and Political Predicaments: Continuities and Discontinuities in Legal Outcomes Between Markets and States}, 45 \textit{Vill. L. Rev.}, 971, 997-1007 (2002).


regulations. Corruption then, would help circumvent these regulations at a low cost because it would reduce uncertainty over enforcement. Hence, while the corrupt officials gets bribed, allocative efficiency is improved since the official would reward the contract at stake to the lowest cost bidder.

Other scholars argued that corruption was necessary to speed up the bureaucratic process or to mediate between political parties that could not otherwise reach agreement. On this view, the bribe giver would be better off if the payment of the bribe would result in reducing the time that would otherwise have been wasted going through circuitous bureaucratic tussles without end.\textsuperscript{14} This strand of research thus stands for the proposition that bribes are virtuous since they reduce the deadweight cost of regulatory interventions by directing scarce resources toward higher bidders.\textsuperscript{15}

However, it is equally plausible that corrupt officials may delay rather than speed up the administrative process to get more bribes.\textsuperscript{16} According to Shang-Jin Wei, the best claim that can be made to this virtuous bribery story is a very narrow one.\textsuperscript{17} Citing prior studies Shang-Jin Wei argues that even when bad regulation and official harassment are taken as exogenous, more time is spent negotiating with government officials.\textsuperscript{18} Consequently, he concludes that on average, it

\textsuperscript{14} Francis T. Liu, An Equilibrium Queuing Model of Bribery, 93 (4) J. Pol. Econ. 760-81 (1985).
\textsuperscript{15} Id.
\textsuperscript{16} Gunnar Myrdal, 2 Asian Drama (1968). Other scholars of the period who departed from the virtuous story of bribery include Anne Krueger, The Political Economy of the Rent-Seeking Society, 64 Amer. Econ. Rev. 291-303 (1974); Peter Bauer, A Dissent on Development (1976).
\textsuperscript{18} Id.
is more likely that bribery leaves society and those paying bribes worse off in general. Moreover, given that a briber may not be fully informed on the bribing capacity of competitors, in considering to offer a bribe, it may turn out under certain conditions that the lowest-cost firm could still win the contract thereby leaving the bribe payer worse off.\textsuperscript{19}

\textit{Corruption as a Necessary Path to Development – Comparative Politics}

Studies in comparative politics further buttressed the view that corruption was not as economically inimical to growth and development in the 1960’s and 1970’s. One of the most famous of these was Samuel Huntington’s 1968 book, Political Order in Changing Societies.\textsuperscript{20} In that well-known book, Huntington argued that:

“Just as the corruption produced by the expansion of political participation helps integrate new groups into the political system, so also the corruption produced by the expansion of governmental regulation may help stimulate economic development. Corruption may be one way of surmounting traditional laws or bureaucratic regulations which hamper economic development.”\textsuperscript{21}

For Huntington, corruption was important for purposes of national integration as it was for stimulating economic development. He predicated his hope on the false optimism of the future

\textsuperscript{19} Paul J. Beck and Michael W. Mahr, \textit{A Comparison of Bribery and Bidding in Thin Markets}, 20 ECON. LETTERS 1-5 (1986); Donald H.D. Lien \textit{A Note on Competitive Bribery Games}, 22 ECON. LETTERS 337-41 (1986).

\textsuperscript{20} HUNTINGTON, supra note 6.

\textsuperscript{21} Id. at 68.
of newly independent countries becoming developed as a matter of course. This optimism was buoyed by the fact that the U.S. had experienced speedy growth as a result of similar corruption in the 1870’s and 1880’s particularly at the state level with the emerging giant railroad and utility corporations. Other leading scholars such as Joseph S. Nye supported this view giving it further credibility. Even scholars from a Marxist orientation overlooked corruption premising their hopes on Africa’s future less to the history of medieval Europe than to the ‘successful’ economic planning that had turned the Soviet Union into a great power within a very short period of time.

However, while corruption may have led to the emergence of an entrepreneurial class in medieval Europe and in gilded-age era of the U.S., corruption may and did not necessarily lead to the same consequences in sub-Saharan Africa. As Pranab Bardhan argues, in developing countries, corruption feeds upon itself for a number of reasons. First, because it is beneficial for the payee and the payor. Second, because it is so entrenched that it becomes a self-fulfilling prophecy and third, because once corruption takes root in a society it is hard to eliminate or win back trust. This is a much more nuanced understanding of the persistence of corruption since it does not presume that a one-time anti-corruption campaign or a simple reversal of corrupt

22 Id. at 68-69.
26 Id. at 1330-35.
behavior will eliminate corruption. It does not also presume that corruption in societies where it is endemic is there to stay. This more nuanced understanding informs our thinking in this paper that anti-corruption measures ought to combine human rights and constitutionalism with broad public support in order to be effective.

Section II: The Embryonic Stage of the International Anti-Corruption Consensus

Developing Country Focus on Corruption Within the United Nations 1960-1990

The newly independent countries of Asia and Africa combined with Latin American and other developing countries to form a solid majority within the United Nations in the post-second world war era with a view to reforming the international political economy favourably towards them. By such an agenda, these countries hoped to, among other things, undo what they perceived to be the unfair concessions entered into by predecessor colonial regimes and re-calibrate rules of trade, finance and commerce to attain fairer and advantageous bargains and in ways that respected sovereignty over their natural resources.

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27 Id. 1334-35.
28 Id.
Controlling corrupt payments to officials in these countries by multinational corporations was a central aspect of these initiatives. At the end of the 1960’s, there was widespread evidence of big multinational corporations, including ITT, Lockheed, United Brands, Mobil, Exxon, E.R. Squibb, giving huge bribes in a variety of countries.\footnote{31} The thrust of the concerns expressed by developing countries hinged on an affirmation of their sovereignty through the aspiration to control the influence of multinational corporations within their countries. The extreme manifestation of this aspiration was prompted by the financial involvement of ITT in the plot to remove leftist Chilean President Allende and to replace him with General Pinochet who favored the interests of foreign investors such as ITT.\footnote{32}

Indeed, the 1976 Declaration of the Heads of States at the 5\textsuperscript{th} Conference of the Non-Aligned States took issue with multinational corporate corruption as ‘motivated by exploitative profits,’ exhausting third world resources while distorting these economies.\footnote{33} According to this Declaration, these practices constituted violations of these countries rights to self-determination and non-intervention.\footnote{34} Developing countries therefore combined their majorities in the United Nations to pass resolutions condemning the corrupt practices of multinational corporations.\footnote{35} In 1974, a United Nations Commission on Transnational Corporations was also established to formulate the major principles and issues involved in formulating a Code of Conduct for

\begin{thebibliography}{9}
\footnotesize

\bibitem{32} Id. at 20-21 n.3.
\bibitem{34} Id.
\bibitem{35} E.g., G.A. Res. 3514 (XXX) (December 15, 1975).
\end{thebibliography}
Multinational Corporations. The spirit behind formulating a Code of Conduct was inspired by the 1974 General Assembly resolution on the Declaration of a New International Economic Order (NIEO). The NIEO was the climatic moment for developing countries in their quest to reform the international political economy favourably towards them. Paragraph 4 of the Declaration entitled developing countries to have regulatory authority over the activities of transnational corporations. The spirit of the NIEO was reinforced by the U.N. Charter of Economic Rights and Duties of States.

Ultimately, the NIEO agenda was deadlocked at the United Nations. Western industrialized countries, particularly the U.S., rejected it. The promise of a code of conduct of multinational corporations languished in the UN throughout the 1970’s, but by the beginning of the 1980’s, changing views of the causes of lack of economic growth in developing countries overshadowed the focus on the corrupting influence of multinational corporations. Attitudes had begun to shift towards corruption within countries experiencing endemic corruption rather than on external causes of corruption and lack of growth such as the activities of transnational corporations.

\textit{Developed Country Focus on Corruption Within the OECD 1969-1990}

While developing countries used the United Nations system to pursue anti-corruption strategies, developed country governments pursued these initiatives within the Organization for Economic


\footnotesize{37} G.A. Res. 3201 (S-VI) (May 1, 1974).

\footnotesize{38} UN General Assembly 3281 (XXIX) Art. 2(2) (Dec. 12, 1974).

Development and Cooperation, (OECD), a standard setting organization of the economic cooperation between European countries and the U.S. Like United Nations General Assembly resolutions, the Declarations of the OECD are voluntary and therefore not legally enforceable.\textsuperscript{40} For example, in its 1976 Declaration on International Investment and Multinational Enterprises, the OECD encouraged multinational corporations to minimize problems in their relations in developing countries by focusing on making positive contributions in these countries.\textsuperscript{41} The guidelines specified that multinational corporations ought to refrain from paying bribes or other improper payments to public officials. They also called on these corporations not to make contributions to holders of political office or contenders for such office or to political parties.\textsuperscript{42} For purposes of enforcement, the Guidelines recommended annual publication of the financial activities of the corporations as well as complying with the national laws and policies of the host countries.\textsuperscript{43}


It was not until the U.S. congress became actively involved in the embryonic stages of the international anti-bribery movement that it began to grow teeth and credibility. Congressional attention was spurred by revelations and acknowledgements that American corporations were

\textsuperscript{40} Some scholars have however argued that voluntary codes such as the Bassel Accords are the most significant source of norms of international law today and their influence on norms and state/non-state behavior ought not to be understated. \textit{See} Anne-Marie Slaughter, \textit{A Liberal Theory of International Law}, Proceedings of the American Society of International Law Annual Meeting (2000); \textit{Governing the Global Economy Through Government Networks, in THE ROLE OF LAW IN INTERNATIONAL POLITICS} 177 (Michael Byers ed., 2000).

\textsuperscript{41} OECD, \textit{GUIDELINES FOR MULTINATIONAL ENTERPRISES} 11 (1976).

\textsuperscript{42} \textit{Id.}

\textsuperscript{43} \textit{Id. at 12}
involved in giving bribes to foreign government officials in return for procuring contracts or as sales commissions.\textsuperscript{44} Congressional attention was driven in part by the attention created on corruption by the Watergate scandal and by virtue of the fact that the payments to foreign government officials by U.S. multinational corporations were benefiting from tax exemptions enacted by Congress.\textsuperscript{45}

The high profile attention given to this issue is exemplified by the appointment of a Special Presidential Task Force headed by a member of the cabinet to study the problem in late March 1976\textsuperscript{46} and a special study issued by the Securities and Exchange Commission, (SEC), on the problem in the same year.\textsuperscript{47} In addition, several congressional hearings were held and bills on the issue proposed especially in the second Congressional session in 1976.\textsuperscript{48} The SEC Report emphasized that corrupt payments were adversely affecting public confidence in American business.\textsuperscript{49} The SEC’s recommendations focused on eliminating corrupt payments through express prohibition, penalization as well as requirements of transparent and honest internal auditing in accord with generally recognized accounting principles.\textsuperscript{50} The Presidential Task Force’s recommendations called for legislation requiring these corporations to meet disclosure

\textsuperscript{45} Kane and Butler, Improper Corporate Payments: The Second Half of Watergate, 8 LOY. U. CHIC. L. J. 1 (1976).
\textsuperscript{46} Donald H.J. Hermann, Criminal Prosecution of United States Multinational Corporations, 8 Loyola University Law Journal 485 (1977).
\textsuperscript{47} 94TH CONG., 2D SESS., REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES (submitted to the Senate Committee on Banking, Housing and Urban Affairs 1976).
\textsuperscript{48} Hermann, supra note 43, at 484-97.
\textsuperscript{49} Report of the SEC, supra note 47 at 54.
\textsuperscript{50} Id. at 491-92.
requirements only with regard to material information. Unlike the SEC, the Presidential Commission also excluded from its recommendations the criminalization of payment of foreign government officials. It was in this context, that Congress enacted the Foreign Corrupt Practices Act of 1977.

The World Bank’s Good Governance Initiative: 1989 Onward

In the 1990s, the term governance became widely accepted as “a guiding principle to advance the conceptualization of contemporary African processes.” This report inaugurated a new way of examining Africa’s economic and political problems. According to this new view, bad governance lies at the heart of poor economic and political performance in post-colonial sub-Saharan Africa. Under this view, corruption is one of the indicators of bad governance.

Under the good governance agenda, orthodox structural adjustment or macroeconomic reform and stabilization are primary objective. These reforms are aimed at increasing the productive capacities of the private sector as the engine of economic growth, or releasing market forces from the clutches of regulatory controls. Releasing market forces within this framework is premised on the protection and enforcement of the private rights of property and freedom of contract and exchange by using a system of public law. There are at least two major roles

\[\text{id. at 492.}\]
\[\text{id.}\]
assigned to public law and policy here: first, to protect private property against re-distributive interventionism and second, to enforce contracts.

An important aspect of good governance programs is their identification of orthodox macroeconomic reform as the center of the reform imperative in sub-Saharan Africa. Therefore, the good governance agenda focused on ensuring that sub-Saharan African economies lacked the institutional, political and administrative mechanisms to support orthodox macro-economic reform. Corruption has been identified as a major part of the institutional, administrative and political problems inhibiting the success of macroeconomic reform. Transparency and accountability therefore became an important part of the anti-corruption initiatives of the good governance agenda. In addition, reforms aimed at de-regulating, liberalizing and privatizing the economies of developing countries also came to be regarded as central to combating corruption.

54 WORLD BANK, GOVERNANCE AND DEVELOPMENT 4-5 (1992) (discussing World Bank’s role in addressing economic reform and nurturing political consensus for reforms). See also WORLD BANK, GOVERNANCE: THE WORLD BANK’S EXPERIENCE, vii-ix (1994) (concluding that “[g]ood governance is epitomized by predictable, open, and enlightened policy-making . . . , a bureaucracy imbued with a professional ethos; an executive arm of government accountable for its actions; and a strong civil society participating in public affairs”).

55 GOVERNANCE: THE WORLD BANK’S EXPERIENCE, supra note 51, at vii-ix (discussing accountability of economic and social dimensions of governance to produce change).

56 For a review, see Gathii, Corruption and Donor Reforms, supra note 10.
By the mid-1990’s therefore, a consensus had emerged placing corruption at the center of
development policy. Consequently, in its World Development Report in 1997, the World Bank
concluded that without an honest state, ‘sustainable development, both economic and social, is
impossible.’ Corruption had now definitively come to be seen as not only detrimental to
economic growth but also as discouraging private investment.

Even the IMF which had initially been reluctant to embrace the good governance agenda as
being too political and outside its strictly economic mandate eventually embraced it in the mid-
1990s. In September 1996, the IMF Board of Governors adopted a Declaration on Partnership
for Sustainable Global Growth which emphasized the “importance of promoting good
governance in all its aspects, including by ensuring the rule of law, improving the efficiency and
accountability of the public sector, and tackling corruption, as essential elements of a framework
within which economies can prosper.” In 1997 the IMF’s Board of Governors adopted a
guidance note, Good Governance- The IMF’s Role that sought to promote greater attention to
governance issues, by the IMF staff, management and the Executive Board. The guidance note

57 WORLD BANK, WORLD DEVELOPMENT REPORT (1997).
58 Andrei Shleifer and Robert W. Vishny, Corruption, 108 QUARTERLY J. ECON. 599-617 (1993); Vito Tanzi and
59 Alberto Alesina, Roubini Nouriel, Sule Ozler and Phillip Swagel, Political Instability and Economic Growth,
NBER WP#4173 (September 1992).
60 On this, see Joseph Gold, Political Considerations Are Prohibited By Articles of Agreement When the Fund
Requests for Use of Resources, IMF Survey 146-48 (May 9, 1983). For a critical discussion see James Gathii, Good
Governance as a Counterinsurgency Agenda to Oppositional and Transformative Social Projects in International
called for a proactive advocacy of policies promoting good governance issues within the Fund’s mandate and expertise such as “the proper management of public resources (including sales of public assets), and the development and maintenance of a transparent economic and regulatory environment conducive to public sector activity.”

In February 2001, the IMF Executive Board evaluated the experience with the 1997 Guidance Note in the (Executive Board Reviews IMF’s Experience in Governance Issues- Public Information Notice), on the basis of a staff paper, Review of the Fund’s Experience in Governance Issues. In addition to endorsing the Fund’s evolving approach in dealing with the issue of governance, the paper stressed that corruption prevention should be the centerpiece of the IMF’s governance strategy.

The World Bank has developed six aggregate indicators of the quality of governance in a country and control of corruption as measured by the extent to which public power is exercised for private gain, including both petty and grand corruption, is one of these indicators. The other indicators are voice and accountability; political stability and absence of violence; government effectiveness; regulatory quality and the rule of law. World Bank data shows that countries with vibrant democracies such as Portugal, Chile and Canada have very little corruption. By

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contrast countries with little voice and accountability like Zimbabwe tend to have more corruption.\textsuperscript{64}

Part Two

How Does Human Rights Fit into the Anti Corruption Agenda?

Introduction

Part one shows that corruption emerged as a governance concern in the Bretton Woods institutions rather than as human rights concern within the human rights bodies of the United Nations. This part therefore locates corruption within the framework of international human rights. It does so in the specific context of Kenya although the human rights issues canvassed are challenges in many similar countries. The part begins with a conceptual overview of the relationship between corruption and human rights in the Kenyan context. It focuses on issues relating to freedom of expression as it relates to anti-corruption initiatives. It discusses several judicial opinions interpreting a variety of freedom of expression issues such as press freedom and libel as they relate to corruption. The part also discusses a variety of social and economic rights as they relate to corruption in the country as well as the separation of powers issues that have hobbled the anti-corruption agenda in the country. This part demonstrates that it is really those who stand to lose most from exposure of corruption that are likely to defend and vindicate their rights in the judiciary – thus while rights are important in exposing corruption, in the Kenyan context they have often been used to override the full implementation of the anti-corruption agenda in the country. The part ends with ideas on how to transform the anti-corruption agenda using rights.
Corruption and Human Rights Conceptually and in the Kenyan Context

The protection of human rights is inversely related to the presence of corruption in a society.\textsuperscript{65} This means that high levels of corruption in a society are likely to disable a State from fulfilling its duties to respect, protect and fulfill the human rights of its citizens.\textsuperscript{66} Corruption undermines the ability of States to comply with its human rights obligations because it erodes the capacity and confidence of a State to deliver services to the public.\textsuperscript{67}

Since corruption depletes resources available for public spending, the United Nations Office of the High Commissioner for Human Rights has argued that corruption disables States from taking steps to the “maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized” in the International Covenant on Economic, Social and Cultural Rights.\textsuperscript{68} In addition, the Committee on the Rights of the Child has noted that corruption has a negative effect on the implementation of the Convention of the Rights of the Child with reference to Kenya.\textsuperscript{69}

\textsuperscript{66} There are UN Resolutions recognizing the adverse effects of corruption on human rights. \textit{See e.g., id.}
\textsuperscript{68} \textit{Id.} at ¶ 6.
Corruption does not only deplete resources available for public spending on essential public functions, “corrupt management of public resources [also] compromises the Government’s ability to deliver an array of services, including health, educational and welfare services, which are essential for the realization of economic, social and cultural rights. Further, the prevalence of corruption creates discrimination in access to public services in favour of those able to influence the authorities to act in their personal interest, including by offering bribes. The economically and politically disadvantaged suffer disproportionately from the consequences of corruption, because they are particularly dependent on public goods.”\textsuperscript{70}

In addition, in a society with high incidents of corruption as well as lack of aggressive efforts to hold those responsible accountable, one would also anticipate a high prevalence of human rights abuse at the horizontal level.\textsuperscript{71} That is to say, human rights abuses among and between individuals in a society with high levels of corruption are likely to be high. The Waki Commission reinforced the link between corruption and violence, on the one hand, and the egregious violations of human rights that have accompanied elections since 1992 in Kenya, on

\textsuperscript{70} Conference on Anti-Corruption Measures, supra note 64, at ¶ 6. In addition, the Committee on the Rights of the Child has noted that corruption has a negative effect on the implementation of the Convention of the Rights of the Child with reference to Kenya, see Concluding Observations, supra note 66, at ¶ 9.

\textsuperscript{71} While States have the primary responsibility to ensure internationally and constitutionally guaranteed rights are protected, respected and fulfilled, private actors including individuals have obligations not violate human rights. These obligations that individuals have with regard to human rights are recognized in Part I, Chapter II of the African Charter on Human and Peoples Rights which Kenya has signed and ratified. Article 27 for example provides that every “individual shall have duties towards his family and society” as well the State and other “legally recognized communities.” Article 29(4) obliges the individual to “preserve and strengthen social and national solidarity, particularly when the latter is threatened.” As such individuals who killed others and who took part in planning to cause chaos, or gave their support in aid of those that caused the violence acted inconsistently with Article 27 of the African Charter on Human and Peoples Rights.
the other hand.\textsuperscript{72} By contrast, countries where respect for human rights is high are unlikely to experience a high prevalence of corruption and the attendant. This is confirmed by rankings in the annual corruption perception index of Transparency International.

Initiatives relating to anti-corruption fall within the rubric of good governance. The good governance agenda is mutually reinforcing and overlapping with the values embodied in national and international human rights instruments. For example, anti-corruption measures aimed at achieving transparency and accountability measures\textsuperscript{73} that give individuals the right the right to expose wrongdoing simultaneously promote the realization of the right to freedom of expression. In addition, an atmosphere in which rights are generally respected, is likely to be one in which individuals are free to report incidents of corruption and therefore to enable activism against corruption. Unfortunately, in Kenya all too often whistle blowers are often lose their jobs, get killed or maimed for exposing egregious incidents of corruption.\textsuperscript{74}

\textit{Freedom of Expression}

Corruption flourishes in countries without openness in the manner in which governments and the private sector make decisions. Lack of information and secrecy about the criteria which a government uses to make budgetary allocations for health and education does not promote

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\textsuperscript{72} According to the Report of the Commission of Inquiry Into Post Election Violence, (Waki Commission), 2008, “[t]he elements of systemic and institutional deficiencies, corruption, and entrenched negative socio-political culture, have in our view, caused and promoted impunity in this country,” \textit{id.} at 444. \\
\textsuperscript{73} Examples here include rules extending protection for whistle blowers. \\
\textsuperscript{74} Ayub Savula and Cyrus Ombati, \textit{Whistleblower Shot After Exposing Scam}, E. AFR. STANDARD, May 26, 2006; Jaindi Kisero, \textit{We Must Seek Ways to Protect Whistleblowers}, DAILY NATION, Dec. 12, 2006. \\
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openness. In addition, when those allocations reveal favoritism towards some regions of a country and against others, without the opportunity and freedom to question such allocations, there is much scope for corruption to thrive. Further, corruption is likely to thrive when the criteria of awarding government contracts or selling government property are vague and undertaken without providing information about such a criteria or opening up the process of awarding those contracts or the disposal of government property to public scrutiny.

In short, ‘information in the control of public authorities is a valuable public resource’ and access to it by the public promotes transparency and accountability of these authorities. As such when citizens have access to information about how and why their government and the private sector make decisions which affect them, there is greater scope for transparency and accountability.

There is a truism about this in Kenya. Corruption thrived in Kenya especially in the 1980’s following the systematic dismantling of the rule of law and tenets of good governance in the one party era. In the 1990’s corruption thrived as significant economic reforms were implemented in the absence of legal restraints against corruption. Momentous transfers of wealth occurred in secrecy as public corporations were privatized and went into powerful and highly connected people of the Moi government. Thus when a Judicial Commission of Inquiry Into the Murder of Robert Ouko who was at the time of his murder Minister for Foreign Affairs starting revealing damning revelations of high stakes corruption among those close to President Moi, the

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government disbanded it to foreclose more revelations. In addition, when civil society groups began exposing corruption through documentation, President Daniel Arap Moi extended repression to such groups. As such, in 1995, the Moi government banned a Non-Governmental Organization, the Center for Law and Research International (Clarion), which published an early report on corruption in Kenya.

Why Freedom of Expression is Important

Effective strategies for combating corruption depend on the ability to expose corruption in the first place. Freedom of expression is an important prerequisite for encouraging a “political culture that encourages, nurtures and reinforces exposure and punishment” of corruption. Respect for freedom of expression also leads to exposure of the causes and consequences of corruption and an atmosphere within which anti-corruption strategies could be pursued. The International Covenant on Civil and Political Rights and the Constitution of Kenya guarantee the right to hold opinions and to express them without any interference. This right includes the freedom to impart, seek and to receive information and ideas of all kinds in any form or media without interference by the government or private parties.

79 Article 19 of the International Covenant on Civil and Political Rights
80 Section 79(1) of the Constitution provides, “Except with his own consent, no person shall be hindered in enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.”
While times have changed, Kenyan governments from the colonial times to the present have imposed heavy handed measures against access to information, printing, publication and distribution of information which dared expose corruption in government. Magazines such as *Nairobi Law Monthly, Society and Finance* were banned, their editors jailed and the printing presses they used raided and often destroyed.\(^81\) Even as recent in 2003, the then newly elected Kibaki government raided the printing presses of a leading newspaper after it published information critical of the government. In the same year, Attorney General Amos Wako raised by huge margins newspaper and magazine registration and bond fees which publishers of alternative newspapers, which were often unafraid to expose high level corruption, alleged was aimed at putting them out of business and stifling expression.\(^82\) Hopefully, in a decision on 3\(^{rd}\) of October, 2008 throwing out a defamation case, the High Court noted that some huge damage awards made in some cases were not founded on any clearly demonstrable basis of compensation of injury suffered and were clear departures from precedent setting directions of the Court of Appeal judgments.\(^83\)

In October 2003, the Minister in Charge of Security, Chris Murungaru, in justifying the arrest and detention for three days of a journalist and for six hours of two others, argued that journalists are not above the law and that these arrests and detention were in Kenya’s national security


interests. This statement hearkened back to the ominous and regrettable dark days of press repression under one party rule in Kenya. In the 1980’s through the 1990’s, President Moi heavily clamped on press freedom using national security as a rational for limiting press freedom. In the days of heavy repression of press freedom, challenges to repression were justified on the premise that Section 79(2) of the Constitution enables the government to limit freedom of expression in the public interest. The judiciary in turn developed jurisprudence deferential to the government’s authority to limit press freedom in the public interest and hostile to press freedom. In all these instances, the harassment, unjustified arrest and prosecution of journalists often on trumped up charges in effect led to the “infringement of the rights to freedom of opinion, expression and information.”

In addition, the judiciary was used by highly connected Kenyans in defamation suits that chilled the ability of the press to report on allegations or reports of corruption. Legislative reforms passed by the one party parliament ahead of the first multi-party elections in 1992 enhanced damage awards to those found to have been defamed further compromised the burgeoning of a lively, open and free press particularly with reference to politicians of the one party era afraid of having their corrupt misdeeds brought out in the open. While defamation has been used to

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85 In the case of George Oraro-v-Wangethi Mwangi and Nation Newspapers, High Court in Nairobi Civil Case No. 1205 of 1993 (Ole Keiwa J.), the plaintiff a lawyer was awarded Kshs1.5 million (about US$33,000). The previous highest award prior to the amendment had been one fifteenth of this amount, see P.G. Okoth, Trust Drum Communications and Nation Newspapers-v-Godwin Wanjuki Wachira, Kenya Court of Appeal at Nairobi Civil Appeal No.48 of 1977 (unreported). Cited in Gibson Kamau Kuria, "The Interpretation of the Law of the Press in Kenya," The Advocate, June 1994 at 18.

86 In respect of libel relating to offenses punishable by death under Kenyan law (such as murder and robbery with violence) the amount assessed shall not be less than Kshs one million (US$20,000) and where the libel is in
make publicity on corruption, the High court in the case of Francis Lotodo v. Star Publishers\textsuperscript{87} declined to limit the distribution of allegedly defamatory statements. The Court argued that public’s interest in free expression was more important, unless the applicant could show that there was “a substantial risk of grave injustice and the private interest in preventing the discussion outweighs the public interest.”\textsuperscript{88}

Lastly, Kenyan Courts have also compromised the ability of the press to report freely even when the issues involved were of general public interest such as corruption citing common law rules such as \textit{sub-judice} and lack of a community of interest between readers and newspapers.\textsuperscript{89} The \textit{sub-judice} rule bars newspapers from reporting on cases filed in the courts that are not yet the subject of open court proceedings.\textsuperscript{90}

Another way in which the government has limited reporting on corruption is through the use of the Official Secrets Act.\textsuperscript{91} In the recent past, the Kibaki government defended lack of transparency in military procurement contracts on the necessity of secrecy surrounding such national security related procurements. The then Minister of State charged with the national security portfolio, Chris Murungaru, defended the Kibaki government from any wrongdoing since most of them had been entered into by the previous government and the Kibaki

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\textsuperscript{87}High Court of Kenya, Civil Case No. 883 (1998) \\
\textsuperscript{88}Id. at 16. \\
\textsuperscript{89}Daily Nation-v- Mukundi and another, (1975) East African Law Reports, 311. \\
\textsuperscript{90}George Oraro-v-Wangethi Mwangi and Nation Newspapers, supra note 9. \\
\textsuperscript{91}Chapter 57 of the Laws of Kenya
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government simply inherited them.92 Regarding the Navy Ship contract which was procured while he was Minister of State in Charge of National Security, Murugaru argued prior to it being awarded to a Spanish consortium of companies, there had been a procurement process involving eight international companies notwithstanding the fact that procurement of national security items as an international practice was done through closed bidding and even single sourcing.93 Remarkably, the High Court has effectively upheld a forum of choice clause in the contract between Kenyan government and the corporation as superseding public interest in investigating allegations of corruption in the contract between the corporation and the government.94

Only rarely has the judiciary spoken in defense of press freedom as it did in the case of Cyrus Jirongo versus Nation Newspapers case.95 Here the court held that the “public at large is interested to know how public funds are being applied to a statutory corporation that administers public funds.” The allegation that public funds were being wasted made the public interest in the case more significant than the restriction on the newspaper printing the information. Similarly, in Kamlesh Pattni-v- Attorney General the High Court held that media publicity per se does not constitute a violation of the right to a fair hearing.96

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93 According to Murungaru, “I must hasten here to add that it is the practice the world over, including in the “democracy champions” that are Britain and the US, for military and security-related acquisitions to be done through closed tenders and often through single sourcing,” id.
95 High Court of Kenya at Nairobi Civil Case No. 5276 of 1992
96 Cited with approval by the High Court in Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission and Another, eKLR 2006 (High Court of Kenya Misc. Civil Application No. 54 of 2006.)
In September 1991, Denmark announced aid cuts to Kenya following a report that over US$ 40 million had been siphoned off from Danish sponsored projects through official corruption in 1990. Norway another of Kenya’s donors critical of Moi era corruption strongly protested the arrest of Koigi Wa Wamwere upon his return to Kenya in October 1991. This criticism and the then growing donor anti-corruption concerns led the Kenyan government to terminate diplomatic links with Norway. Announcing the termination, then Foreign Affairs minister Ndolo Ayah condemned Norway for giving sanctuary to Kenyan ‘criminal fugitives.’ Said Ayah: “we cannot be held ransom by anybody in terms of aid or otherwise. This country cannot be told what to do, how to do it, just because somebody happens to be giving us aid. Aid has to be given in the context of respect, friendship and good relations between countries.”

This termination of diplomatic links with Norway was also overwhelmingly endorsed in a Parliamentary resolution in the then one party Parliament.

While the NARC government of President Kibaki more than a decade later did not to cut diplomatic ties with the U.K. or the growing number of foreign embassies critical of high level official corruption, Kiraitu Murungi’s advise to these embassies to keep within the Vienna Convention on Diplomatic Relations sounds eerily similar to Ndolo Ayah telling off Norway in 1991. The Ayah/Murungi thesis that donors should not interfere with Kenya’s sovereignty by criticizing the government of suspected or existing government corruption ignores Kenya’s freely made commitments under international law because Kenya has ratified international anti-

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97 Daily Nation, October 23rd, 1990
corruption treaties. In addition, it cannot be that Kenya’s sovereignty is so fragile that it must be defended by invoking the Vienna Convention on Diplomatic Relations as Kiraitu did or by suspending diplomatic ties as the KANU government did in 1991.

More importantly, since the end of the cold war, new criteria for the recognition of governments began to emerge. A common set of prerequisites has evolved to constitute the criteria for collective non-recognition. It includes:

- Support for democracy and the rule of law, emphasizing the key role of elections in the democratic process;
- Safeguarding human rights, based on the respect for the individual and including equal treatment of ethnic minorities;
- Acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to international security and regional stability;
- Commitment to free markets in their economic programs including protecting the rights of foreign investment and guaranteeing a framework for uninhibited entry of foreign investment consistent with the requirements of the WTO and Bretton Woods institutions.

This means that a government that does not measure up to these criteria may be in danger of collective non-recognition. Notably, these criteria are also incorporated in the constitutive documents of the African Union as well in its economic agenda, the New Economic Partnership
for African Development.\textsuperscript{98} There is in fact a peer review process under the auspices of the African Union measuring on a voluntary basis a country’s adherence to policies of good governance, human rights and the rule of law. Under international law, de-recognition and non-recognition is usually a measure taken as a last resort and is usually preceded by negotiation and a variety of measures seeking to influence a state’s behavior such as suspension from certain international forums, open condemnations and sanctions.\textsuperscript{99} When it occurs, de-recognition takes a variety of forms. It could simply involve stoppage of development assistance from bilateral partners; suspension of loans from the Bretton Woods institutions until certain conditions are met; and a reluctance of international capital and business to invest in a country where the government is identified as a pariah in the international community.

In addition, non-governmental organizations such as Transparency International which monitor corruption within governments are also pushing the boundaries between ‘good’ and ‘bad’ states certainly within the bounds of market reformers especially the Bretton Woods institutions and the leading industrial countries as I explore more fully in part two. Another reason why the Kiraitu/Ayah thesis rings hollow today is that Kenya has signed onto international treaties on combating corruption. These are the \textit{United Nations Convention Against Corruption} and the \textit{African Union Convention on Preventing and Combating Corruption}. By virtue of being

\textsuperscript{98} For an analysis see James Gathii, \textit{A Critical Appraisal of the NEPAD Agenda in Light of Africa’s Place in the World Trade Regime in an Era of Market Centered Development},” 13 Transnational Law and Contemporary Problems, 179 (2003).

\textsuperscript{99} For example, in early 2002 when President Mugabe was roundly condemned by the British and the Americans for his land policies and his alleged involvement in rigging his election, a number of African states hesitated in critiquing him, see Dagi Kimani, “Why African States Won’t Condemn Mugabe,” The East African on the Web, Monday March 4, 2002; Editorial, Mugabe Deserved it, but…” Daily Nation on the Web, Thursday, March 21, 2002 (arguing that the suspension of Mugabe from the Commonwealth is highly suspicious because several leaders cannot claim to have come to office without allegations of fraud much like Mugabe).
signatories to these two treaties, Kenya has removed corruption from an issue of purely domestic concern to one that has international legal responsibilities. In fact, as the High Court noted in the *Murungaru* case, these treaties are the standards against which Kenya’s Anti-Corruption and Economic Crimes Act ‘must be measured.’

**Investigation and Prosecution of Corruption Cases**

Like in the prosecution of any criminal case, the investigation and prosecution of corruption cases implicates the due process rights of those under investigation and prosecution. Where these rights are violated, the investigation and prosecution of corruption crimes is impugned. On the other hand, there is potential for using these due process rights to defeat corruption charges and prosecution. In this section, I will discuss three examples of how well placed corruption defendants have used the Bill of Rights under the Kenyan Constitution to stop corruption prosecutions against them. At the moment, the Kenya Anti-Corruption Commission lists no less than thirty (30) constitutional petitions challenging the constitutionality of its corruption investigations, charges, search warrants and the retrieval of documentary evidence among others.

One of the most widely reported cases involving due process rights in the corruption context is *R v The Judicial Commission of Inquiry into the Goldenberg Affair, ex parte Saitoti* (hereinafter

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1. *Murungaru Case*, supra note  at 39 where the Court added: “This is because the greatest threat to the socio-economic and political substratum in the 21st Century are the quadruple evils of corruption, terrorism, drug trafficking and their attendant consequence, money laundering. Consequently all trading nations of the world at various stages of civilization and democratization have initiated and/or have passed similar legislation,” id.
2. *Misc Civil Application 102 of 2006; [2006] eKLR*
3. *Misc Civil Application 102 of 2006; [2006] eKLR*
the Saitoti decision) In this case, a three judge Constitutional Court held that a recommendation made by a Commission of Inquiry into the Goldenberg Corruption Affair, violated the applicant’s pre trial rights to a fair trial. According to the Court, the Commissioners made several remarks, errors and decisions which not only demonstrated bad faith and bias, and that violated the applicant’s “constitutional assurance that he will have a fair trial and presumption of innocence.”\textsuperscript{103} According to the Court, the Commission of Inquiry had by recommending investigation of the applicant ignored information that it had received that showed applicant’s innocence. For example, the Court noted that the Commission had ignored the information that the payments in issue in the Goldenberg Affair had been made with Parliamentary approval. As such, the Commission’s recommendation was also found to have been “indicative of bias, failure to act fairly, faithfully and impartially.”\textsuperscript{104} The Court therefore ordered the Attorney General or any person to be prohibited from filing or even prosecuting the applicant in respect of any matter relating to the Goldenberg Affair.

This was not the first time that the High Court had issued prohibitory orders against the Attorney General to prevent him from bringing charges against a corruption suspect. In 2001, the High Court had issued such an order directing the Attorney General not to bring any further charges were similar to or a variation of those brought against then powerful cabinet Minister Kipng’eno Arap Ng’eny because there had been a lengthy and unexplained 9 year delay between the time of the alleged commission of corruption offences brought against him and the initiation prosecution

\textsuperscript{103} Id. Section 77(1) of the Kenyan Constitution provides for the presumption of innocence.

\textsuperscript{104} Id.
by the Attorney General in April 2001. The Court reasoned that having left office nine or so years before, the defendant no longer had access to material to mount a defense. Notwithstanding the fact that there is no limitation period with respect to bringing charges against public officers for abuse of office under Kenyan law, the High Court held that the 9 year delay was not only ‘oppressive’ but also ‘motivated by an ulterior motive’ and as such inconsistent with Section 77(1) of the Constitution which requires a criminal defendant to be “afforded a fair hearing within a reasonable time by an independent and impartial court.”

On the face, both the Saitoti and Ng’eny decisions are very plausible. They appear to quite aptly remedy procedural injustices related to delays in bringing charges against corruption suspects. Indeed justice delayed is justice denied. However, such a reading of these decisions would be completely off the mark. Not simply because in both instances both persons against whom the charges were brought were senior government officials, but also because in both cases the Courts narrowed their inquiry merely to these otherwise important due process and natural justice rights. In addition, the Courts failed to examine the broader context against which the charges had been belatedly brought. For example, it was not until 1997 that an anti-corruption watch-dog was eventually established. For the first time, the short-lived Kenya Anti Corruption Authority brought charges against corruption suspects dealing with corruption cases that the investigation authorities in the country and the prosecuting authority in the country, (the Attorney General), had long neglected. Although the Attorney General is constitutionally empowered to require the Commissioner of Police to investigate any matter which relates to any alleged or suspected

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105 A v Attorney General & Chief Magistrates Court ex parte Kipng’eno Arap Ng’eny, Miscellaneous Civil Application No. 406 of 2001 (hereinafter Ng’eny decision)
Attorney General Amos Wako has often argued that the Commissioner of Police failed to comply with his directives to investigate certain offences. In short, a culture of impunity developed in Kenya and when a new Anticorruption authority was initiated towards the end of the 1990’s, its efforts were hobbled by claims of inordinate delays in beginning prosecutions. Further, the Saitoti and Ng’eny courts fore-grounded the alleged violations of constitutional rights while underplaying their role in buttressing the nascent efforts to build a culture of accountability. In both Saitoti and Ng’eny the Courts could have argued that the applicants had yet to show that there was any affront to the rights of the applicants since the Courts had not even had a chance to establish if the charges brought against the applicants had any substance in the first place.

If the Saitoti and Ng’eny decisions had been made to protect individuals who were being unfairly harangued by the State, they are good law. These decisions would have been particularly welcome in light of Kenya’s history of criminalization of dissent and the abuse of the criminal justice system for political purposes. Yet, nothing could be further from the possibility that these decisions had been aimed at curbing such excesses.

A major problem with these decisions is that while they are based on legally defensible conclusions, their effect was to nip in the bud nascent efforts to build institutions to prosecute corrupt offenders and to build a culture of accountability in grand corruption cases. The Courts took no account of the fact that the accused persons were both powerful members of a

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106 Section 26(4) of the Constitution
government that was itself established under a constitutional, legal and political order that validated the very excesses against which these powerful members of the government were charged with.\footnote{See James Thuo Gathii, “Popular Authorship and Constitution Making: Comparing and Contrasting the DRC and Kenya,” 49 William and Mary Law Review 1109, 1125-1134 (2008) (discussing how issues of process though important in validating the new Constitution had shut off other equally important considerations).}

Clearly in both the \textit{Saitoti} and \textit{Ng’eny} decisions, the use of the Bill of Rights was to protect powerful members of the government from an opportunity to be held accountable. That is why in addition to having a culture that encourages exposure of corruption, having law enforcement agencies that will investigate without fear or favor and a judiciary that will independently try and punish offenders is critical to the success of anti-corruption strategies.\footnote{Anyang’ Nyong’o, A Leap Into the Future: A Vision for Kenya’s Socio-Political and Economic Transformation, 2007, 91}

Besides the foregoing cases, there have been several constitutional challenges to the powers granted to the Kenya Anti-Corruption Commission. Some cases challenge the Commission’s power to ask a person suspected to have obtained wealth fraudulently to declare such wealth. In one such case, the applicant argued that these powers were unconstitutional because they eroded the right to silence, the right against self incrimination\footnote{Article 77(7) of the Constitution of Kenya provides, “No person who is tried for a criminal offence shall be compelled to give evidence at the trial.”} and the presumption of innocence\footnote{77(2)(a): “Every person who is charged with a criminal offence . . . shall be presumed to be innocent until he is proved or has pleaded guilty.” But this is qualified by paragraph 77(12)(a): “Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of . . . subsection (2) (a) to the extent that the law in question imposes upon a person charged with a criminal offence the burden of proving particular facts.”} that required one to be innocent until proved guilty.\footnote{Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission and Another, eKLR 2006 (Civil Application No. NAI 43 of 2003(46/2006)}
of these laws were challenged for giving wide discretion that threatens to undermine protected rights including the right not to have private property taken away arbitrarily.\footnote{Peter Schroth, The African Union and The New Pan-Africanism: Rushing to Organize or Timely Shift? 13 Transnat’l L. & Contemp. Probs. 83 (2003).}

\textit{Separation of Powers Issues}

In \textit{Stephen Mwai Gachiengo and Albert Muthee Kahuria v. Republic},\footnote{Gachiengo & Kahuria v. Republic, Misc. Application No. 302 of 2000 (High Court of Kenya [sitting as a Constitutional Court], 22 Dec. 2000).} the High Court held that the appointment of a Judge to head the precursor to the Kenya Anticorruption Commission, the Kenya Anti-Corruption Authority, was a violation of the constitutional requirement of separation of powers. The Court held that the power to undertake criminal prosecutions in Kenya was exclusively vested in the Attorney General and to the extent that Parliament had given the Kenya Anti Corruption Authority such prosecutorial power, was a violation of the Constitution. At the time when this decision came down, there were cases pending against a Cabinet Minister, a former Permanent Secretary and a former Town Clerk of the City of Nairobi – all powerful and connected persons at the time.\footnote{These were Kigng’eno arap Ngeny, Wilfred Kimalat and Zipporah Wandera respectively.} Soon after this case, the Authority was disbanded and the Kenya Anti Corruption Authority and the Kenya Anti-Corruption Commission was established thereafter.

The \textit{Gachiengo, Saitoti} and \textit{Ng’eny} cases all demonstrate the paradoxical nature of the relationship between human rights and corruption. While it is often assumed that the relationship
human rights can help in combating corruption, it is also true that those that stand to lose most from the exposure of corruption are also more likely to seek to defend and vindicate their rights in the judiciary. Thus human rights play a paradoxical role in relation to the fight against corruption – they help to expose corruption but also give those charged with corruption offences opportunities to defend their due process rights in the criminal justice system. In a judiciary like Kenya’s where the rules and rights are often defended as process rights, powerful individuals benefit having to defend their cases since courts are unlikely to closely scrutinize the totality of the circumstances that result in charges taking too long to reach the courts as well as because of the lack of political will that underlies a lot of half-hearted attempts to prosecute high level corruption suspects.

For example, in Ng’eny the court in prohibiting the Attorney General from bringing charges against a powerful Government Minister stated that the charges against him were flimsy while they involved losses in a public corporation amounting to over 180 million Kenyan Shillings. The Ng’eny court’s holding must also been seen as nothing more than the ability of a well-heeled defendant’s lawyers ability to legally impugn a legal order that is generally inefficient and slow – but one that is unlikely to operate favorably towards the thousands of prisoners held for years awaiting trial or an appeal while in custody.\textsuperscript{116} Seen in this broader context, the \textit{Saitoti} and \textit{Ng’eny} decisions begin to look more like a travesty of justice than otherwise. Similarly, in the \textit{Murungaru} case, the Court of Appeal ordered the Kenya Anti-Corruption Commission not to implement and enforce a notice to former powerful Minister Chris Murungaru asking him to

declare his wealth under the Anti-Corruption and Economic Crimes Act of 2003.\textsuperscript{117} In a remarkable reversal of the Ng’eny and Saitoti tradition, the High Court dismissed the Murungaru challenge on the constitutionality of the power of given to the Kenya Anti-Corruption Commission to require people reasonably suspected of corruption to provide statement and records of how they acquired their property. Unlike in Saitoti and Ng’eny in Murungaru the High Court held that these powers were constitutionally justified and necessary intrusions into the lives of those suspected of having engaged in corruption.\textsuperscript{118} This judgment differed fundamentally with that of the Court of Appeal which had initially barred the Kenya Anti Corruption Commission from implementing and enforcing a notice to have Murungaru, a former powerful Minister in the Kibaki government, disclose his wealth and its sources. The Court of Appeal had noted in its decision that it had a duty to protect everyone’s rights even if they had fallen from grace.

Perhaps most discouragingly for human rights advocates interested in rooting corruption out, the Ng’eny, Saitoti and Gachiengo cases demonstrate that Kenyan law itself is deeply implicated in producing corruption. For example, in the Saitoti case, the Court referred to the manner in which the alleged corrupt payments that resulted in the charges against Saitoti were legally mandated under a law passed by Parliament and the payments endorsed in an international agreement.

\textsuperscript{117} Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission and Another, eKLR 2006 (Civil Application No. NAI 43 of 2003(46/2006)

\textsuperscript{118} Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission and Another, eKLR 2006 (High Court of Kenya Misc. Civil Application No. 54 of 2006. In the same tradition as Murungaru is Meme v Republic and Another Misc. Criminal Application No. 493 of 2004 in which the High Court in circumstances analogous to those in Saitoti, Ngeny and Murungaru decided that a constitutional challenge to trial in the Anti-Corruption courts because he would be denied his presumption of innocence was unfounded.
between Kenya and the International Monetary Fund that the Court found Kenya was obliged to comply with under International Law!

**Impunity as A Result of Rights Based Attacks on Prosecution of Corruption Cases**

In 2003 then powerful Minister of Energy Kiraitu Murungi and a well known human rights lawyer and campaigner before he joined government, argued that it was perhaps time to draw a line in the sand and forget and forgive all corruption offenders from the past.\(^\text{119}\) In his view, it was becoming too expensive and cumbersome to investigate and prosecute those cases. Time and scarce resources were being expended to investigate cases where the trial of evidence had gone cold and where the value added in the fight against corruption was in his view seen more as retribution against President Moi and his cronies by the Kibaki government. Kiraitu was himself the subject of a corruption investigation and as such his suggestion that the fight against corruption should focus on future and not previous cases was correctly viewed as a self serving argument.

Kiraitu’s exasperation could not also be matched by the declaration of the Kibaki government to have a zero-tolerance for corruption. This exasperation about the inability of the courts to prosecute corruption cases was in a large measure frustrated by the use of constitutional

\(^{119}\) This was not the first time Kiraitu was expressing such views. See Hon. Kiraitu Murungi, “Putting the Past to Rest: The Dilemmas of Prosecution and Amnesty in the Fight Against Corruption,” Paper prepared to generate debate for Transparency International (Kenya) where he argued that “No effective anti-corruption strategy can be put in place in the present context as it would threaten those in power,” id. at page 7. This argument was made when President Moi was still in power. His argument in 2003/4r that the cost of prosecution outweighed the benefits of prosecution were made when he was a powerful Minister of Justice and Constitutional Affairs. In 2006, he resigned in the face of the Anglo-Leasing Corruption scandal in which he was implicated.
challenges of corruption investigations and prosecutions of those accused for violating their rights. While in the 1980’s the Bill of Rights of the Kenyan Constitution had been declared inoperative, in the decade beginning 2000, the judiciary rediscovered it particularly as a weapon of those who could afford well heeled lawyers to make their case. As such, rights claims that stood no chance of checking the dictatorial one party era of President Moi, experienced a resurgence as we saw above in our discussion of the Saitoti and Ng’eny cases. Gone was the deference to the government that characterized the predominant judicial temperament of the 1980s and 1990s.

While Kiraitu was getting exasperated with fighting old corruption cases, Justice Aron Ringera the Director of the Kenya Anti-Corruption Commission has recently been arguing in favor of limiting prosecution of old corruption cases on grounds that sound in the equitable doctrine of laches – this time not delay in bringing such cases as the Ng’eny case found, but on the fact that there was a limitation of bringing cases under Kenya’s corruption laws.

According to Justice Aaron Ringera, Kenya’s Limitations of Actions Act “does not allow for the recovery of such monies and property six years from the date of the commission of the offence.” Justice Ringera asserted that the Commission’s work of recovering stolen assets and monies locally and abroad was limited by this law that prohibits recovery six years after cases involving breach of trust and fraud as in the looting currently prohibited by the Economic Crimes

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120 The Standard Friday June 1, 2007 at page 1.
Act, the Anti-Corruption Act and the Penal Code. He also argued the Limitations of Actions Act does not permit pursuit of cases theft three years after a theft.

Justice Ringera’s assertions on the interpretation of the Limitations of Actions Act are challengeable on a number of valid legal basis. First, the Limitation of Actions Act has an exception. This means that the statutorily imposed limit to prosecute a corruption case or to pursue stolen monies and property are not necessarily or even strictly subject to the six year period he cited. That exception provides that the limitation period may be extended. Justice Ringera’s interpretation of Kenyan law inconsistently with the Commission’s declared objective of zero-tolerance on corruption seemed eerily similar to the jurisprudence of the High Court in the Ng’eny, Saitoti and Gachiengo cases as well as to Kiraitu’s proposal to end investigation and prosecution of corruption cases. Thus there has been a convergence in High Court cases as well as the statements of highly placed government officials that has tended to acquiesce to high level corruption.

One of the consequences of this acquiescence of high level corruption cases has been a culture of impunity. Highly placed and well connected Kenyans interpret the inability to prosecute and to hold accountable corrupt individuals in the country as a license to engage in further corruption. Clearly, anger and frustration in the public about public corruption and the manner it has

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121 The power to extend the limitation period is contemplated by the Interpretation and General Provisions Act, Chapter 2 (CAP 2) of the Laws of Kenya. Section 59 of CAP 2 provides that “Where in a written law a time is prescribed for doing an act or taking a proceeding, and power is given to a court of other authority to extend that time, then unless a contrary intention appears, the power may be exercised by the court or other authority although the application for extension is not made until after the expiration of the time prescribed.”
siphoned off public resources at the expense of certain communities was one of the underlying issues that contributed to post election violence following the 2007 elections.\textsuperscript{122} As noted above, the Waki Commission on Post Election Violence also attributed the violence to the culture of impunity in the country. An opportunity to address impunity squarely was lost early in the Kibaki administration rejected the recommendation of a task force for the establishment of a Truth and Reconciliation Commission. The broad ranging powers that the Commission would have wielded, was feared to be inconsistent with the Kibaki administration’s decision not to reopen abuses of the Moi regime.\textsuperscript{123} The most definitive evidence of the lack of commitment on the part of the Kibaki government in its self declared war on corruption was the resignation of John Githongo as Permanent Secretary in Charge of Governance and Ethics and his decision to leave the country as a result of threats on his life. Githongo’s investigations exposed how senior members of the Kibaki government had engaged in corrupt schemes of government procurement variously dubbed the Anglo-Leasing scandal. According to Githongo’s dossier, Anglo Leasing and Finance Company, a company whose incorporation could not be traced anywhere in the world, had routinely been awarded huge defense and security contracts and that well connected individuals were receiving huge kickbacks as a result.\textsuperscript{124}

\begin{itemize}
\item \textsuperscript{124} Dossier of John Githongo to His Excellency President Mwai Kibaki,
Minority Rights and Safeguards for Minority Communities

Kenya’s independence Constitution was designed to safeguard rights of minority ethnic communities in a variety of ways. First there was the regional system of government that created regional legislative assemblies and a system of distribution of resources from the central to the regions. Second, there was a Senate in addition to a House of Representatives that had representation from the regions. Most important, this system of protection of rights of minority communities was specially entrenched in the Constitution. However, these protections were quickly eroded with extensive constitutional amendments such that by the end of the 1960s, Kenya had a heavily centralized political system with a President whose powers were almost un-limitable. President Kenyatta and President Moi maintained political power by using their patronage over state resources and appointments of key representatives of various ethnic communities to government positions.125 Post independence governments put a heavy premium on having as much political power as they could and argued that this was necessary as any alternative arrangement would impede the rapid realization of national goals. In the 1980’s when privatization reduced opportunities for patronage within the government, giving land to political favorites became a major source of patronage. The attendant corruption that resulted from

irregular and illegal allocations of land was the subject of two major government appointed commissions.\textsuperscript{126}

The illegal and irregular allocation of land and the lack of effective voice in the political system by ethnic communities particularly in the Rift Valley resulted in grievances over land issues that formed a critical backdrop against which the violence that followed the 2007 elections happened. This has been particularly so for small indigenous communities like the Ogiek of the mau forest who brought suit in the High Court in 1992 for being unlawfully evicted from the Tinet forest.\textsuperscript{127}

The Ogiek claimed their eviction from their land violated their right to an ancestral home and their right to a livelihood inconsistently with their rights. The High Court dismissed their case ruling the eviction was neither discriminatory nor illegal or unconstitutional. The attitude of the High Court in this and similar cases exemplifies the government’s lack of responsiveness to claims of minority and indigenous communities. In addition, the Kenyan government abstained from supporting the adoption of the Declaration of the Rights of the Indigenous Peoples in September 2007 further indicating its unwillingness to confront the question of indigenous communities in the country.\textsuperscript{128}


\textsuperscript{127} Francis Kemai and Others v The Attorney General and Others, High Court at Nairobi Civil Case No. 238 of 1999.

\textsuperscript{128} See Office of the United Nations High Commissioner for Human Rights, The Declaration of the Rights of Indigenous Peoples, (available at http://www2.ohchr.org/english/issues/indigenous/declaration.htm) showing the Declaration was adopted with a vote of 144 countries in favor, 4 votes against and 11 abstentions on 13\textsuperscript{th} September, 2007).
One of the most contentious issues prior to the vote on the referendum on a New Proposed Constitution in Kenya was whether there ought to be a regional system of government as a safeguard against abuse of the rights of minority communities. This debate indicated the extent to which some safeguards that would give minority communities in the country some voice within the government continues to be an important way of thinking about checks on abuse of governmental power such as in the illegal and irregular allocations of land as well as in expulsions of indigenous communities from their homes. Such arrangements would also reduce the discretion and attendant corruption that has been a feature of a centralized

Social and Economic Rights and the Anti-Corruption Agenda

Social and economic rights include the rights to education, work and health. Bruno Simma and Philip Alston in emphasizing the importance of social and economic rights have argued that any approach to human rights which “finds no place for a right of access to primary health care is not flawed in terms both of the theory of human rights and of United Nations doctrine.” Indeed, the Committee on Social, Economic and Cultural Rights notes that the right to health under Article 12 (2) of the International Covenant on Economic Social and Cultural Rights “embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy

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129 See ICESCR, supra note 3 art. 13.
130 See id. at art. 6.
131 See id. at art. 12.
working conditions, and a healthy environment.”\textsuperscript{133} This definition falls in the second positive and expansive definition of the right to health which in turn implicates obligations on states to ensure “equality, equity, well-being, fairness, and justice in reforming health systems – reducing disparities, respecting difference, and eliminating inequities in health worldwide.”\textsuperscript{134}

Therefore when corruption depletes resources that would otherwise go to fund budgetary support for making access to adequate health care facilities, equipment, supplies and personnel as well as the underlying determinants of good health including access to food and housing, safe and potable water. On this view, corruption undermines the ability of governments not merely to meet peoples’ wants and needs, but rather their social and economic rights. International lawyers started advocacy for what were previously thought of as needs and wants in terms of rights in the 1970s. By substituting \textit{rights} for \textit{needs}, they sought to transform the concept of needs into a legal entitlement. For these lawyers, to assert that a particular social claim or need was a human right, was to ‘invest it emotionally and morally with an especially high degree of legitimacy.’\textsuperscript{135}

However, this novel strategy of claiming certain social claims were human rights was in the cold war context of the 1970’s met with the rebuttal that social and economic rights were not justiciable or enforceable in court. That is, social and economic rights are so vague and imprecise that they did not establish imperatives that could be enforced by a court of law in the same way

\textsuperscript{134} See the Iowa City Appeal on Advancing the Human Right to Health, Adopted 22 April 2001, The Global Assembly on Advancing the Human Right to Health convened at The University of Iowa, Iowa City, Iowa 20-22 April 2001 at page 2 of page 15.
\textsuperscript{135} Id. 135.
civil and political rights do. This vagueness, it was argued, was evidenced in the language of the International Covenant on Economic Social and Cultural Rights. For example, states are required to recognize the rights to work, health, education, to social security, an adequate standard of living, to just and favorable conditions of work and to participate in and enjoy the fruits of culture and science. By contrast rights in the International Covenant on Civil and Political Rights are declared. (emphasis added). In some cases, parties to the International Covenant on Social and Economic Rights, (ICSECR), undertake to ensure a right. This also contrasts with rights under the Civil and Political Covenant where rights are declared and ensured rather than recognized or require the state to undertake to ensure as in the Social and Economic Rights Covenant.

In addition to the lack of categorical language protecting social and economic rights, the ICESCR was also faulted for making social and economic rights subject to the principle of progressive realization rather than immediate realization as the Civil and Political Rights Covenant. A further limitation cited against the ICESCR is reference that the obligations require states to undertake steps to the maximum available resources. Through its General Comments, the Committee on Economic, Social and Cultural Rights, has clarified that the legal obligations state parties have against the backdrop of references to progressive realization and to maximum available resources. Hence, it has observed that the concept of progressive realization “should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexible device, reflecting the realities of the real world and the difficulties involved

136 Article 2 (1).
for a country in ensuring full realization of economic, social and cultural rights.”\textsuperscript{137} The reference to maximum available resources can only be invoked if a state can “demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.”\textsuperscript{138} The Committee has also concluded that the ICESCR requires every state party to ensure the satisfaction of a minimum core obligation “at the very least, minimum essential levels of each of the rights.”\textsuperscript{139}

In 1993 at United Nations Vienna Conference on Human Rights, the indivisibility and interdependence between social and economic rights, on the one hand and civil and political rights, on the other, was categorically recognized.\textsuperscript{140} There has since been an increasing commitment in the recognition of this interdependence between social and economic rights and civil and political rights.\textsuperscript{141}

The danger of exposing the impact of corruption on social and economic rights is illustrated in the following example. In May 2006, a courageous Kenyan who blew the whistle on corruption in relation to a government sponsored low cost housing scheme was shot. Luckily, the shots were not fatal.\textsuperscript{142} In this corruption case, senior government officials, politicians and their aides had

\textsuperscript{138} Id. at paragraph 10.
\textsuperscript{139} Id. at paragraph 10.
\textsuperscript{141} For a good analysis, see Craig Scott, “Reaching Beyond (Without Abandoning) the Category of ‘Economic, Social and Cultural Rights,’ ” 21 Human Rights Quarterly 633 (1999).
\textsuperscript{142} Ayub Savula and Cyprus Ombati, “Whistle Blower Shot After Exposing Scam,” The Standard, 25\textsuperscript{th} May, 2006
been irregularly allocated several housing units intended to benefit poor Kenyans living in the informal Majengo area of Nairobi.

This corruption scandal like others shows that even when the government actually gets to spend money on social programs to benefit the poor, the possibility of such projects being hijacked by well to do Kenyans is a real possibility. This and many cases demonstrate the importance of an understanding of human rights that combines both civil and political rights on the one hand, and social and economic rights on the other. The fight against corruption is at the end of the day a fight for all human rights.

Conclusions: Transforming the Anti-Corruption Agenda Using Rights

The foregoing analysis of the relationship between corruption and human rights results in two conclusions. First, that in the context of Kenya, the relationship between corruption and human rights has been ambiguous. That is to say, that the Bill of Rights has largely been used by well heeled lawyers to defend persons accused of high level corruption based on claims that their due process rights had been compromised. The fact that Kenyan courts have acquiesced to these arguments in leading cases has greatly hampered the prosecution of corrupt offenders especially those associated with high level corruption.

A second conclusion is that corruption has undermined respect for human rights in the country. The Committee on the Rights of the Child has made the connection between Kenya’s inability to
adhere to its obligations under that the Convention on the Rights of the Child and corruption in the country.

These conclusions are unsurprising given that the nature of the essential nature of the Kenyan State as well as its Constitution have remained intact and unchanged for several decades now. The Kenyan State is highly centralized in the Presidency with enormous power under the Constitution. This has resulted in a high stakes politics because the Constitution establishes a winner takes all system in which the losing political parties are excluded not only from political power but from other benefits from the State on conceding defeat. Efforts to undertake citizen driven comprehensive constitutional reforms that would have radically democratized the political and economic nature of the Kenyan State was unsuccessful for a variety of reasons in a referendum in 2005.

The foregoing sets the context within which rights based strategies in addressing corruption in the country should be thought. It for example would be naïve to simply assume that a revamped Bill of Rights would in and of itself result in more vigorous prosecutions against corruption. This part has demonstrated in large part the constitutional machinery designed to combat corruption is itself corrupted by the very nature of the corrupt State in the country. Democratizing the State by reducing the powers of the Presidency in relation to the Legislature, the Judiciary, as well as to

\footnote{For a discussion of the origins of comprehensive and citizen driven constitutional reform aimed at fundamental reform to change the political and economic structure of the country, see Willy Mutunga, Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya: 1992-1997, (1999)}

Civil Society; an independent, impartial and free judiciary that is a watchdog of the human rights of all Kenyan citizens; a Bill of Rights that guarantees civil and political rights, social and economic rights, rights of children, women, minorities as well as the disabled; and a fair land policy that is free of corruption and makes land available to all. This short list of Constitutional reforms would begin the long road of truly democratizing the Kenyan State and would be an antidote to the contemporary efforts and jurisprudence that largely acquiesces to corruption.

Human rights will continue to be important in the route to democratizing the Kenyan state like in other contexts such as South Africa. Freedom of expression for example will continue to be crucial in opening up corruption to public scrutiny. The government’s effort to fight against publicity of corruption has not been as effective as in earlier periods. Today, Kenyans have access to information from a broad ranging number of radio and television outlets unlike in the days of a single government ran radio and television station. In addition, there continues to be a vibrant mainstream and alternative press with a variety of dailies, weekly and monthly newspapers. Many of these have websites which publish most of not all the contents of their hard paper copies. In addition, Kenyans can access information about corruption in the country through internet sources from outside the country. For example, a dossier on corruption scandals in the Kibaki government was released by former Governance and Ethics Permanent Secretary John Githongo on an internet site in 2005.

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146 John Githongo was a Permanent Secretary in Charge of Governance and Ethics in the Kibaki government. The dossier contained his findings on his investigations which he submitted to the President. He resigned his position towards the end of 2005 following threats on his life by Senior members of the government who he was
While human rights will continue, the anti-corruption agenda will only be transformed when the range of human rights concerns are expanded. The Ng’eny and Saitoti decisions were individualized claims of rights violations. However, if we understand corruption more broadly as affecting the rights of many others because corruption disables the government from meeting the rights of millions of Kenyans to health, education and housing for example, then we would be addressing injustices at a much broader and generalized level. We would also be talking about social and economic rights in addition to civil and political rights. The category of human rights violations would also expand to cover women, children, minorities and the disabled. Having a broader conception of rights is justified by the finding of John Githongo that both the Moi and Kibaki governments established fictitious companies which were in turn paid billions of US Dollars for ostensible defense and security contracts. While this money enriched a few individuals and helped to finance their political incumbency, millions of Kenyans were deprived of resources that would have financed programs of public education, health, housing and water among other services.

In short, the Ng’eny and Saitoti decisions reflect not only the fact that the Kenyan Constitution protects civil and political rights to the exclusion of social and economic rights, but also that the protection of only civil and political rights would not be insufficient in and of itself to continue the full democratization of the Kenyan State. The protection of civil and political rights without investigating. Another report known as the Kroll report titled Project KTM Consolidated Report, dated 27th April, 2004 revealing a trail of corruption scandals from the Moi to the Kibaki government was also released online.
simultaneously protecting and safeguarding a minimal core of the social and economic rights of a majority of the population would be insufficient to protect the rights of all Kenyans.

Yet there is another tradition in the legal system that has given a different and perhaps more hopeful interpretation of anti-corruption statutes. In the *Murungaru* decision, the High Court shunned the *Saitoti* and *Ng’eny* decisions by declining to declare the Kenya Anti-Corruption Authority’s power to seek information from a corruption suspect unconstitutional. Instead, the High Court noted, “the massive and debilitating nature of corruption in Kenya has impoverished and continues to impoverish the great majority of Kenyan masses and leads to robbing the government of resources to build and maintain a run down infrastructure, inadequate health services and mediocre and inadequate educational facilities. It has led to spiral inflation and unemployment.”\(^{147}\)

Though this was a stunning departure from the narrowly legalistic route followed by the *Saitoti* and *Ng’eny* decisions, the need to broaden the scope of rights implicated by grand corruption remains an important agenda. In addition, this would have to be accompanied by efforts to make the President accountable. If as the Githongo dossier revealed the architects of grand corruption in the government were unconcerned that he would report their corruption scheme to the President, then grand corruption has no real check. That is why an effective battle against corruption must be accompanied by broad based constitutional reform to decentralize Executive power and to make it more accountable to Parliament, the judiciary and therefore to the People.

\(^{147}\) Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission and Another, eKLR 2006 (High Court of Kenya Misc. Civil Application No. 54 of 2006.)
Part Three

Distributional and Fairness Issues Arising from A Focus on Grand versus Petty Corruption

Introduction

This part explores how anti-corruption and judicial reform initiatives impact on the poor, marginalized and disadvantaged in African countries. I make two primary claims. First, I show that judicial reform initiatives give priority to facilitating the implementation of market reforms to ensure that investors can enforce their rights at the lowest cost and within the shortest time. By contrast, there is little or no effort to ensure access to courts, lower costs or shortening the time period, within which the poor, the marginalized and the disadvantaged can similarly enforce their rights within the judicial system. For example, large numbers of incarcerated poor go without a fair trial or even access to the judicial system to enforce their rights without benefiting from the kind of large-scale legal reform efforts made by governments to protect the rights of investors.

Second, I show that anti-corruption reforms privilege making it easier for investors to do business than to address the problems related to corruption that are faced by the poor, marginalized and disadvantaged. For example while petty corruption affects the poor disproportionately, (as when the police enforce city ordinances to shut down or demolish informal open air informal markets), it seems to get less attention from reformers in both the public and non-governmental sectors. By contrast, when there is grand corruption or theft of
public resources as when a large a foreign corporation is denied a contract for failure to pay a bribe or where they pay a bribe to get a contract ahead of more competitive bids, the outcry is bigger than with the more prevalent forms of petty corruption that affect the poor getting access to government services, enrollment in vocational and teacher training colleges supported by the state or employment in the private sector. Of course, my argument is not that grand corruption does not negatively affect the poor. Rather, my claim is that petty corruption disproportionately affects the poor and yet it is seldom the focus of attention in anticorruption reform initiatives.

In my conclusions, I show that efforts to address issues of poverty primarily through market centered reforms that foreclose addressing questions of inequality and injustice\textsuperscript{148} can be reframed to alleviate the conditions of the poor. This can be done by ensuring that addressing inequality and injustice become central goals in economic and judicial reform. A central problem with current economic and legal reform initiatives is that issues of inequality and injustice are not regarded as integral issues. These reform programs seek to indirectly deal with inequality and injustice not through public spending, but rather through the trickle down effects of private investment. Thus a fundamental problem with current approaches to addressing the broad array of challenges posed by poverty is that they discourage and discredit such public spending.\textsuperscript{149} By shunning away from traditional tax and transfer mechanisms, market based approaches to addressing issues of poverty also adversely affect women disproportionately.\textsuperscript{150}

The part proceeds as follows. First, I will discuss the emergence of corruption as a concern in economic development programs particularly those of the World Bank. I will then examine how corruption affects the poor, marginalized and disadvantaged. I will then examine how judicial reform initiatives are designed to favor the interests of investors. Finally, I will discuss how judicial and anticorruption reform projects as presently constituted do little or nothing to promote the interests of the poor, marginalized and disadvantaged. In my conclusion, I briefly outline how to ensure that anti-corruption, judicial and investment reforms can be structured to ensure market efficiency without neglecting the needs of the poor.

**Section I: The Emergence of the Anti-Corruption Agenda**

In the 1990s, the term governance became widely accepted as “a guiding principle to advance the conceptualization of contemporary African processes.”\(^{151}\) The term governance inaugurated a new way of examining Africa’s economic and political problems. According to this new view, bad governance lies at the heart of poor economic and political performance in post-colonial sub-Saharan Africa. Under this view, corruption is one of the indicators of bad governance.

Under the good governance agenda, orthodox structural adjustment or macroeconomic reform and stabilization are a primary objective. These reforms are aimed at increasing the productive capacities of the private sector as the engine of economic growth, or releasing market forces from the clutches of regulatory controls. Releasing market forces within this framework is

premised on the protection and enforcement of the private rights of property and freedom of contract and exchange by using a system of public law. There are at least two major roles assigned to public law and policy here: first, to protect private property against re-distributive interventionism and second, to enforce contracts.

An important aspect of good governance programs is their identification of orthodox macroeconomic reform as the center of the reform imperative in sub-Saharan Africa. Therefore, the good governance agenda has focused on reforming sub-Saharan African economies that lack the institutional, political and administrative mechanisms to support orthodox macro-economic reform. Corruption has been identified as a major part of the institutional, administrative and political problems inhibiting the success of macroeconomic reform. Transparency and accountability therefore became an important part of the anti-corruption initiatives of the good governance agenda. In addition, reforms aimed at de-regulating, liberalizing and privatizing the economies of developing countries also came to be regarded as central to combating corruption.

By the mid-1990’s, a consensus had emerged placing corruption at the center of development policy. Consequently, in its World Development Report in 1997, the World Bank concluded that

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152 World Bank, Governance and Development 4-5 (1992) (discussing World Bank’s role in addressing economic reform and nurturing political consensus for reforms). See also World Bank, Governance: The World Bank’s Experience, at vii-ix (1994) (concluding that “[g]ood governance is epitomized by predictable, open, and enlightened policy-making . . . , a bureaucracy imbued with a professional ethos; an executive arm of government accountable for its actions; and a strong civil society participating in public affairs”).

153 Governance: The World Banks Experience, id at vii-ix (discussing accountability of economic and social dimensions of governance to produce change).

without an honest state, ‘sustainable development, both economic and social, is impossible.’\textsuperscript{155}

Corruption had now definitively come to be seen as not only detrimental to economic growth\textsuperscript{156} but also as discouraging private investment.\textsuperscript{157}

\underline{Section II: How Corruption Affects the Poor, Marginalized and Disadvantaged}

While by the mid-1990’s corruption had become a central tenet of the good governance agenda, the primary focus of the anticorruption agenda has been to reduce its impact on private investment. Far much attention has been paid to the impact of corruption on those who suffer most from its consequences - the poor, marginalized and disadvantaged. For example, corruption is directly correlated to poor educational achievement in African countries. The poor and the disadvantaged heavily rely on the public educational system to educate their children. Education is often the surest path out of poverty. Yet the educational systems in many African countries are adversely affected by corruption. A common type of corruption in the educational system of many of these countries takes the form of bribery as a precondition to admitting students. Other types of low-level corruption include government clerks taking money for petty bureaucratic matters such as processing educational transcripts and certificates; officials taking bribes in

\textsuperscript{155} World Bank, World Development Report, 1997. The IMF has adopted a similar approach as is reflected by a guidance note adopted by the IMF Board of Governors titled in 1997 titled, \textit{Good Governance- The IMF’s Role}. In its \textit{Declaration on Partnership for Sustainable Global Growth}, of 1996 the IMF Board of Governors stressed the “importance of promoting good governance in all its aspects, including by ensuring the rule of law, improving the efficiency and accountability of the public sector, and tackling corruption, as essential elements of a framework within which economies can prosper.”


return for staff recruitment and promotion; and money changing hands at different stages of
government procurement and so on.\footnote{Dilip Parajuli, What is Driving Educational Ineffectiveness in Kenya? The Role of Economic Inefficiency, Institutional Corruption and Poverty, 2001.} There are many other examples including teachers bribing
government officials to transfer them from schools located in hardship areas where roads are
inaccessible and amenities like piped water and electricity are hard to come by. Unfortunately,
those areas are also areas hard hit by poverty as well and most in need of quality teachers.

The foregoing examples show that petty corruption imposes high costs particularly on the poor.
The poor therefore have to contend not only with inadequate service provisioning, but have to
make ‘payments’ for the delivery of even the most basic government activity, such as the issuing
of official documentation.\footnote{Id.} In many countries, applicants for a national identification card, a
driver’s licenses, building permits and other routine documents have learnt to expect a
“surcharge” from civil servants. In such cases, civil servants such as nurses, military, policemen,
guards, custom officers constantly pressure, farmers and merchants who are even poorer to come
up with bribes. A study by the Index of Economic Freedom found an increase in corruption by
low ranking officials in Algeria, Lebanon and Tunisia and claims that petty corruption rises as
real incomes fall, because “public servants attempt to compensate for the loss in purchasing
power by demanding more bribes.”\footnote{Transparency International, Global Corruption Report, 2003 (reporting that although grand corruption had fallen in the Middle East and North Africa in 2001-2, petty corruption had risen)} Petty corruption is not the primary target of anti-
corruption reforms and when it is, governments are reluctant to address the inadequate
compensation of officers which encourages this corruption to fester. This is so since petty
corruption targeted to symbolize government commitment to fighting corruption through the
prosecution of low-level officers. Thus, while big level corruption is often the focus of most anticorruption initiatives, petty corruption is often a convenient place to prosecute low-level government officials who can be easily prosecuted without fear of a major political fall-out. Petty corruption adds up to huge sums of money because as some have argued, ‘the little streams make the big rivers.’ There are estimates that global petty corruption has to date eroded $89 billion.

*Education*

A Transparency International bribery survey of over 2000 Kenyans, showed that average citizens paid $175 to obtain access to government services. Corruption therefore undercuts the provision of public services, such as health, education, transportation and local policing.\(^\text{161}\) Since the poor have fewer resources of their own, they are more likely to rely on such government services and are therefore susceptible to being disproportionately affected when these services are unavailable because of corruption or are available at a surcharge they cannot afford. Take the following further example of corruption and misallocation of resources in education. According to the Center for Governance and Development (A survey of seven years of Waste: A study of Corruption In Kenya by the Center for Governance and Development, 2001) and Controller & Auditor General reports (from 1991 to 1996), the Kenyan government lost 475 billion through corruption, negligence and wastefulness. The Education Ministry alone has wasted 33.9 billion-7.1% of total loss-in the same period, and ranks third among all the ministries behind the

President’s Office and Local Government. A majority of the losses come from un-recovered university student loans and un-surrendered institutional grants (Teacher Service Commission alone accounted from an un-surrendered amount of 10.86 billion Kenya shillings i.e. fund disbursed but no accounts to show its utilization). These un-recovered or un-surrendered amounts are usually non-recoverable. The report concluded that it could be safely assumed that much of it is already diverted to personal gain.\textsuperscript{162}

At the micro-level, the current 8-4-4 system of education in Kenya tries to cover a wide range of subjects with extensive contents, a task that is impossible to accomplish in the allotted time. This has led to out-of-school classes or “coaching” where teachers make money by providing private tuition after school hours. Private tuition has been converted into a money-minting enterprise. Teachers deliberately fail to cover the syllabus during the normal school hours and wait to teach during the extra hours to make a quick buck, reported the country’s main newspaper, \textit{The Nation}, on June 26, 2000. Of course children from poor homes can ill-afford such extra costs of tuition. In the meantime, many schools are dilapidated and ill-equipped.

\textit{Health}

The diversion of public resources, services and assets into private use reallocates resources away from essential medical services and contributes to deteriorating infrastructure that subsequently affects the health and safety of the public and in particular the poor. Widespread corruption evidenced by diversion of public resources for private use adversely affects new investment and

\textsuperscript{162} Id.
economic growth.\textsuperscript{163} Bribery and corruption also discourage new investors from countries with corruption problems.\textsuperscript{164} Petty and grand corruption in Africa has made East European countries more attractive foreign investment destinations.\textsuperscript{165} Low foreign investment in Africa greatly impacts on the poor since without the advantages of employment that may come with such investment, they may remain without potential sources of income.\textsuperscript{166}

Judicial reforms such as those promoted by the Asian Development Bank have sought to ensure that foreign investment will create employment for the poor. These reforms though primarily aimed at promoting the rule of law have resulted “in the twin goals of greater responsiveness to a market economy and increasing the social access of the poor to public goods and services”\textsuperscript{167}

Examples include projects in Vietnam, Mongolia, the South Pacific, Nepal, Philippines and Maldives. The legal and judicial reform in Pakistan for instance, which was done in conjunction with the civil society sought for the strengthening of systems of administrative justice, and the use of local language among others, which it is hoped will allow the poor and marginalised to open the door to legal remedies. Other examples include reforms aimed at implementing the land law in Cambodia which will help the poor to secure good title to land. Similar judicial reforms in Africa could do well to borrow from this experience. However, as I will show below, this has not been the case.

\textsuperscript{163} Victor E. Dike, Corruption in Nigeria: A New Paradigm for Effective Control, 2000
\textsuperscript{164} Id.
\textsuperscript{165} Id.
\textsuperscript{166} See UN website, http://www.unodoc.org/unodoc/en/corruption.html
Part III: Judicial Reform Initiatives Are Designed to Favor the Interests of Investors

Recognizing that good governance is essential for market economy, the World Bank, the Inter-American Development Bank, and the Asian Development Bank have since 1984 approved or initiated more than $500 million in loans for judicial reform projects in 26 countries. Judicial reform is part of a larger effort to make the legal systems in developing countries and transition economies more market friendly. The broader scheme includes everything from writing, or revising commercial codes, bankruptcy statutes, and company laws; through overhauling regulatory agencies; and teaching justice ministry officials how to draft legislation that fosters private investment. The specific rationale underlying these projects is to reduce transaction costs for investors. Transaction costs in the judiciary would be reduced in the following ways. Making the judicial branch independent; by insulating the selection, evaluation and disciplinary process from improper influence; and allowing judges to control their own budget; speeding the processing of cases by providing management training; computers, and other resources to judges and court personnel as well as increasing access to dispute resolution mechanisms such as creating mediation and arbitration services. These reforms would in turn reduce case backlogs, and accelerate the disposition of new disputes thus weeding out delay and controlling costs.

In this section, I will examine these reforms to strengthen the judiciary to enable investors to invest with the lowest possible number of restrictions. My purpose is to show that these reforms

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are not primarily aimed at addressing the problems of corruption faced by the poor, marginalized and disadvantaged. Rather they are aimed at promoting the interests of the investors. In my view, these reforms exacerbate the fact that judicial systems across Africa were primarily designed to meet the demands of the business class rather than to address large scale issues of poverty and social division. In fact, many governments in post colonial Africa did little or nothing to make the judicial system responsive to broad segments of their population. Reforms to strengthen judiciaries at the moment, are not primarily targeted towards making the legal system broadly accessible and affordable for all, but mostly for business interests. In engaging my analysis, I will select a few illustrative examples.

Economists have developed the hypothesis affirming the judiciary’s effect in enabling exchanges between private parties. The 16th century English philosopher Thomas Hobbes introduced the argument that without a judicial system, traders would be reluctant to enter into wealth-enhancing exchanges for fear that the bargain would not be honored. Twentieth century economists have supported this with evidence to support the argument that the absence of a judicial system results high transaction cost for those involved in business. Reformers like to give the example of Ghana as a country where the judiciary is unable to enforce contractual obligations, and businesses therefore, have to rely upon a network of traders to serve as go-betweens.169 In this context, personal relationships provide the buyer and the seller with some assurance that the goods will be delivered and payment received. Economists argue that this

169 Id.
comes with a price: the costs of doing business are subsequently increased by the creation of intermediaries.\textsuperscript{170}

A broader hypothesis posits that market performance depends upon a judicial or legal system in which contracts between private parties are enforced and the property rights of foreign and domestic investors are respected. The government in turn operates within a known framework of rules in which the judiciary occupies a unique position by holding the executive and legislative branches accountable for their decisions to ensure the credibility of the overall business and political environment so as to support economic growth.

Today, the majority of developing countries and former socialist states are receiving some type of assistance from international organizations such as UN and World Bank to undertake projects to help reform courts, prosecutors’ offices, and the other institutions that together constitute the judicial system. A significant and common objective of these projects is to ensure investors to enforce their rights at the lowest cost and within the shortest duration of time. Thus a primary aim of judicial and legal reform\textsuperscript{171} in Sierra Leone is the creation of an enabling environment for private sector investment. Proceeding from the premise that inadequacies in publicly provided judicial and legal services for private sector transactions bring about costs and risks to private investors and are thus a disincentive to private investment, the government specifically made it an objective to reduce costs to private investors in part by protecting their property rights, enforcing contracts and enhancing their ability to obtain information on legislation. In particular,

\textsuperscript{170}For a critical view of this view in the East Asian context, see John Onhesorge, “‘Ratch’eting Up the Anti-Corruption Drive,” 14 Connecticut Journal of International Law 467 (1999)
\textsuperscript{171}World Bank, Sierra Leone-Legal and Judicial Sector Assistance, 2004
its reform initiatives include the establishment of an institutional process and mechanism for legislative review and update, and the development of a core work program for revising and updating business and commercial law; improving the efficiency, and enabling cost-effective functioning of the judiciary and the Department of Judicial Affairs. The project aims at addressing the three sets of constraints that have been identified as adversely affecting the quality, timeliness and cost-effectiveness of judicial and legal services, namely inadequacy of the law, implementation of the law, and court infrastructure. The project puts as its priority the legislative reform for business and commerce, particularly to update and revise pertinent laws and regulations governing business and commerce through the joint efforts of the Law Reform Commission, Law Revision Committee and Law Reporting Council.

The Financial and Legal Management upgrading project\textsuperscript{172} introduced by the World Bank in Tanzania is another example. The Tanzanian government has undertaken to ensure that investors conduct business in the least costly manner.\textsuperscript{173} The objective of this project is to strengthen the institutional and organizational infrastructure of the new open market economy in Tanzania that has been developing since the mid-1980s under the Economic Recovery Program of the Tanzanian Government.\textsuperscript{174} The legal component of the project has two parts: (a) capacity building in key organizations such as the Judiciary and the Attorney General's Office by

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{173} Id.
\item \textsuperscript{174} Id.
\end{itemize}
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providing training, equipment and resources; and (b) undertaking a systematic policy review of the key strategic issues facing the financial sector over the medium and long-term.\textsuperscript{175}

The Justice and Integrity Project\textsuperscript{176} in Kenya is another such effort. A new government came into power in Kenya in January 2003, committed to curb corruption and develop a reform strategy that will provide a justice system that is recognized to be a key prerequisite for economic growth. To support the Kenyan government in its legal and judicial reform, an international donor group has been formed by the World Bank to finance the project.\textsuperscript{177} The objective of the Justice and Integrity Project is to improve the administration of justice and enhance the accountability, predictability, integrity and fairness of the Judiciary and other institutions in the Justice Sector in Kenya.\textsuperscript{178} The proposed project has seven main components: (a) reforming the court system by introducing simplified proceedings, improving performance and service standards for judicial staff, designing automated recordings of court proceedings, enhancing case management, introducing computerization of document management in registries; (b) developing a comprehensive judicial training program; (c) strengthening the capacity of the Ministry of Justice and Constitutional Affairs (MOJCA); (d) developing a comprehensive legal education and training program for lawyers and paralegals, including establishing a College of Law; (e) improving access to justice through a capacity building program to support the Office of the Public Defender and legal aid offices; (f) designing a program of law reform to support the

\textsuperscript{175} Id.
\textsuperscript{176} Id.
\textsuperscript{177} Id.
\textsuperscript{178} Id.
Government's strategic plan and the new Constitution; and (g) initiating a five year campaign to reduce corruption in Kenya.\textsuperscript{179}

While the foregoing examples of reform initiatives are laudable especially to the extent to which they aim at making the judiciary more fair, independent and transparent, they are biased in favor of ensuring that the interests of investors are safeguarded. The rights and issues affecting the poor and the working classes are only relevant to the extent that they are consistent with the interests of investors.

**Part IV: Anti-Corruption and Judicial Reform Initiatives Largely Ignore the Poor**

The judicial reform and anti-corruption projects initiated either by the World Bank or by governments examined in Part 2 focus mainly on facilitating market transactions, but ignore promoting good governance to alleviate poverty.\textsuperscript{180} Thus, they do not target issues of immediate concern for the poor as when those in power take public and private land for their own benefit or to benefit their cronies at the expense of the poor.\textsuperscript{181} Where judiciaries and administrative agencies are not insulated from the political process, as they are being made more responsive to the interests of the investors, income inequalities are likely to be aggravated and poverty worsened.\textsuperscript{182} After all, independent judiciaries are critical to enforcing the rights of poor and marginalized peoples.

\begin{flushleft}
\textsuperscript{179} Id.
\textsuperscript{180} Richard E. Messick, Judicial Reform and Economic Development, supra note 21.
\textsuperscript{181} Id.
\textsuperscript{182} Id.
\end{flushleft}
The poor and marginalized groups are also faced with multiple obstacles to access legal and judicial services, including denial of fair trial, due process violations, pre-trial detention, intolerable prison conditions, just to name a few.\textsuperscript{183} In Kenya for instance, Amnesty International has raised serious concerns about the right of fair trial.\textsuperscript{184} There is no legal assistance for indigent defendants in Magistrate’s Courts, particularly defendants charged with robbery or attempted robbery with violence who face a mandatory death sentence if convicted. Since legal proceedings are conducted in English defendants who are not conversant in English are unable to fully follow the proceedings. This problem is particularly acute in cases involving Kenyan Somalis in the Eastern Province. Lack of such interpretation contravenes the Constitution of Kenya which provides that everyone is entitled to have the free assistance of an interpreter paid by the state if they cannot understand the language used at trial. Convictions based on confessions are now outlawed except if made to a magistrate in open court.\textsuperscript{185}

Prison conditions in Kenya also affect the poor disproportionately. The conditions are harsh, cruel, inhuman and degrading.\textsuperscript{186} Harsh conditions including over-crowding, shortage of food, clean water and adequate medical care. These conditions result in high prison mortality rates. It is estimated that in 1995, more than 800 inmates died in the first nine months, and 75\% of the total number of such inmates were young and included single mothers with children. After

\textsuperscript{183} Legal and Judicial Reform, Observation, Experiences and Approaches of Legal Vice Presidency, available at \url{http://www4.worldbank.org/legal/publications/ljrobservations-final.pdf}.
\textsuperscript{185} See Criminal Law (Amendment) Act (Act No 5 of 2003)
\textsuperscript{186} Amnesty International, Kenya: Violations of Human Rights, supra note 42.
visiting Lang’ata Women’s Prison, a representative from a human right organization described the conditions there as follows: “[T]he prison blocs are congested, each cell holds three and more people who share a small, torn mattress and tattered, old blankets which they use to wrap themselves…Prisoners are not allowed to wear shoes or slippers, neither are they provided with anything to cover their feet and are forced to walk bare-foot on the filthy ground that not only harms their feet but also makes them sick with feet diseases and constant colds.”\textsuperscript{187}

The length of pre-trial detention is often beyond legal limit, and detainees are held for a period which exceeds the maximum period permitted by law. Police have sought to justify illegal prolonged detention on the grounds that it is necessary to enable them to carry out their investigations. Courts rarely challenge extended incarceration prior to trial. Habeas corpus actions are costly and only open to those who can afford a lawyer.\textsuperscript{188}

Inadequate time and facilities for preparation for trial are problems faced particularly by indigent defendants. When criminal cases come to trial, prosecuting authorities usually make little or no advance disclosure to defendants what prosecution evidence or witnesses will testify at trial. The practice is that the defense is shown the original hand-writt en statement of the witness time only at trial for use in cross-examination. The defense is not permitted to retain or photocopy the statement. This increases the difficulty of challenging the witness’ testimony. To compound these problems, the official court records of the proceedings and trials are often inaccurate, and

\textsuperscript{187} Id.  
\textsuperscript{188} Id.
copies of such record are usually unavailable to the defense 18 months after the termination of the proceeding, which renders the appeals almost impossible.\textsuperscript{189}

In terms of lack of judicial independence, the judiciary has shown a reluctance to review the conduct of high placed government officials even when such conduct is inimical to the interests of poor and marginalized citizens. For instance, a corrupt minister leased to a private company interested in exploring for oil substantial portions of the territory in which an indigenous community sharing a common economic life have lived, hunted, trapped and fished since time immemorial. The right of that group not to be deprived of their means of subsistence was substantially affected although Kenyan courts declined to intervene on their behalf.\textsuperscript{190} The Kenyan judiciary has also shown reluctance in issuing injunctions when the government failed to take adequate steps to protect a community from radioactive exposure.\textsuperscript{191} There are also frequent reports of large scale evictions and demolitions of informal settlements in many Africa cities including one most recently in Zimbabwe. Often the pavement and slum dwellers are evicted to enable a private entrepreneur to construct a shopping complex in the vicinity, thereby depriving poor people who had migrated to the city in search of employment and chosen to live on a pavement or informal settlement.

Corruption in the judiciary is also confirmed in Uganda’s first National Integrity Survey, conducted by the Inspectorate of Government, which found that the services where bribery is

\begin{footnotesize}
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\item Id.
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most common are the police and judiciary, with two thirds of users paying a bribe to the workers in the police and half of users paying a bribe to workers in the judiciary services.\textsuperscript{192} For nearly half of the children in primary schools, parents are paying for extra tuition and for one in ten they are making extra payments directly to the teachers. Nearly half the service workers interviewed think that gifts from private companies to public sector employees are quite all right, and nearly half think that people reporting corruption are likely to suffer for it.\textsuperscript{193} In Kenya, about half the judges were suspended from the bench following allegations of corruption.

\textbf{Conclusion}

This part has shown how anti-corruption and judicial reform initiatives impact on the poor, marginalized and disadvantaged in African countries. Anti-corruption and judicial reforms are primarily aimed at making it easier for investors to do business than to address the problems of corruption and lack of judicial independence, resources to prepare for trial and lengthy pretrial detention periods faced by the poor, marginalized and disadvantaged.

As a result, reforms to address corruption and judicial enforcement of contracts must be complemented by simultaneous efforts to address the problems confronted by the poor and the disadvantaged. In the 1980’s good governance reforms sought to address issues affecting the poor separately under the rubric of social safety nets. Since the late 1990’s, second generation

\textsuperscript{193} Id.
good governance reforms such as those anti-corruption and judicial initiatives are justified as attacking poverty by promoting market reforms that would in turn promote economic growth. Under this conception, issues facing the poor, marginalized and disadvantaged are indirectly but positively supported by judicial and anticorruption reforms to the extent that increased investment results in more employment for them. However, even assuming that anti-corruption and judicial reforms do actually achieve their objectives, these reforms in and of themselves can hardly guarantee increased investment. Social spending on infrastructure such as roads, hospitals and schools are critical to providing the kind of social capital necessary to meet the basic needs of those living in poverty while giving a helping hand to investors as recent important research now definitively shows.\(^{194}\)

Thus, by reframing issues related to social division and hierarchy in market terms, anticorruption and judicial reforms foreclose addressing questions of inequality and injustice directly through social spending. Inequality and injustice are central to social disadvantage, poverty and economic marginalization and are not simply the function of regulatory and market failure. Issues of inequality and injustice were traditionally thought as addressable through public spending rather than through the trickle down effects of private investment. Thus a fundamental problem with current approaches to addressing the broad array of challenges posed by poverty is that the current programs of economic reform dis-empower and discredit such public spending. Ultimately, the interests of the poor, marginalized and disadvantaged can best be addressed as a central part of a reform agenda that includes sensible anticorruption and judicial reforms as well.

It would seem to me though that these issues are too important to be left to official development programs. Those that care about suffering must take the bull by its horns and struggle with them as well.\textsuperscript{195}

In practical terms, the model of judicial reform pursued by the Asian Development Bank can be thought of as a counterpoint to judicial reform programs that have not shown sensitivity to the concerns of the poor. Unlike the World Bank, the Asian Development Bank has sought to promote judicial reforms that are designed not simply to attract foreign investment but to create employment for the poor as well. By consciously pursuing the goal of increasing social access of the poor to public goods and services, the Asian Development’s model of judicial reform could very well inform other reform programs that bracket out issues of justice within them or that presuppose that increased foreign investment will ultimately reach the poor. Ensuring that legal and judicial reforms also benefit the poor would require lending institutions to work with civil society groups that are committed to ensuring that these reforms could also serve to strengthen the systems of administrative justice in ways that benefit the poor and marginalized. Examples here could include reforms aimed at implementing property rights regime that help the poor to secure good title to land and that the poor understood judicial proceedings in their own languages.

\textsuperscript{195} For insightful views, see Upendra Baxi, Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India, (Revised), Upendra Baxi (ed.) Law and Poverty: Critical Essays, Bombay: Tripathi 1988. See also Mario Gomez, In the Public Interest: Essays on Public Interest Litigation and Participatory Justice, Colombo: Legal Aid Centre, University of Colombo, 1993.
Part Four

Conclusions: How to Reform Anti-Corruption Initiatives to Address Poverty and Social Division

Overview of Findings

The relationship between corruption and human rights is only beginning to be seriously examined. A major premise of the ongoing research argues that corruption disables a State from meeting its obligations to respect, fulfill and protect the human rights of its citizens.

This study has explored two other relationships between human rights and corruption. First, by showing how individualistic and procedural rights have been used to defeat investigations and prosecutions of corruption by high level governmental officials. Second, in demonstrating how anti-corruption reforms have primarily targeted the promotion market efficiency while reducing spending in meeting basic needs and rights such as health and education inconsistently with the social and economic rights of the poor and marginalized. These findings are significant since they show that the relationship between corruption and human rights extends beyond showing corruption disables States from meeting their human rights obligations. Indeed, human rights can be used in support of or against corruption.

The thrust of the recommendations made in this study are premised on an approach to human rights that offers the maximum potential for the democratization of the Kenyan State through
transformative constitutional and institutional reforms. In addition, this can be done by expanding human rights concerns to include as a central agenda the social and economic rights of the poor and marginalized as well as minority rights and safeguards.

*In the Context of Human Rights as They Relate to the Anti-Corruption Agenda*

It would be naïve to simply assume that a revamped Bill of Rights would in and of itself result in more vigorous prosecutions against corruption. An effective human rights agenda designed to combat corruption ought to be part of a larger project of democratizing the State by reducing the powers of the presidency in relation to the legislature, the judiciary, as well as to Civil Society. It would also incorporate reforms that would guarantee a truly independent, impartial and free judiciary that is a watchdog of the human rights of all Kenyan citizens; a Bill of Rights that guarantees civil and political rights as well as social and economic rights, the rights of children, women, minorities as well as those of the disabled. In addition, it would require a fair land policy that is free of corruption and makes land available to all. This short list of Constitutional reforms would begin the long road of truly democratizing the Kenyan State and would be an antidote to the contemporary efforts and jurisprudence that largely acquiesces to corruption.

Other reforms here would include the amendment of libel laws as well as decentralizing the authority of the Attorney General to prosecute and of the Commissioner of Police to investigate as more specially alluded to below in the proposal for an Office of Special Counsel.
In the Context of Judicial Reforms as They Relate to the Anti-Corruption Agenda

Earlier in this paper, we saw that anti-corruption and judicial reform initiatives have an adverse impact on the poor, marginalized and disadvantaged in African countries generally and in Kenya in particular. Anti-corruption and judicial reforms are primarily aimed at making it easier for investors to do business than to address the problems of corruption and lack of judicial independence, resources to prepare for trial and lengthy pretrial detention periods faced by the poor, marginalized and disadvantaged.

As a result, reforms to address corruption and judicial enforcement of contracts must be complemented by simultaneous efforts to address the problems confronted by the poor and the disadvantaged. In the 1980’s good governance reforms sought to address issues affecting the poor separately under the rubric of social safety nets. Since the late 1990’s, second generation good governance reforms such as those anti-corruption and judicial initiatives are justified as attacking poverty by promoting market reforms that would in turn promote economic growth. Under this conception, issues facing the poor, marginalized and disadvantaged are indirectly but positively supported by judicial and anticorruption reforms to the extent that increased investment results in more employment for them. However, even assuming that anti-corruption and judicial reforms do actually achieve their objectives, these reforms in and of themselves can hardly guarantee increased investment. Social spending on infrastructure such as roads, hospitals...
and schools are critical to providing the kind of social capital necessary to meet the basic needs of those living in poverty while giving a helping hand to investors as recent important research now definitively shows.

Thus, by reframing issues related to social division and hierarchy in market terms, anticorruption and judicial reforms foreclose addressing questions of inequality and injustice directly through social spending. Inequality and injustice are central to social disadvantage, poverty and economic marginalization and are not simply the function of regulatory and market failure. Issues of inequality and injustice were traditionally thought as addressable through public spending rather than through the trickle down effects of private investment. Thus a fundamental problem with current approaches to addressing the broad array of challenges posed by poverty is that the current programs of economic reform dis-empower and discredit such public spending. Ultimately, the interests of the poor, marginalized and disadvantaged can best be addressed as a central part of a reform agenda that includes sensible anticorruption and judicial reforms as well. It would seem to me though that these issues are too important to be left to official development programs. Those that care about suffering must take the bull by its horns and struggle with them as well.196

In practical terms, the model of judicial reform pursued by the Asian Development Bank can be thought of as a counterpoint to judicial reform programs that have not shown sensitivity to the

concerns of the poor. Unlike the World Bank, the Asian Development Bank has sought to promote judicial reforms that are designed not simply to attract foreign investment but to create employment for the poor as well. By consciously pursuing the goal of increasing social access of the poor to public goods and services, the Asian Development’s model of judicial reform could very well inform other reform programs that bracket out issues of justice within them or that presuppose that increased foreign investment will ultimately reach the poor. Ensuring that legal and judicial reforms also benefit the poor would require lending institutions to work with civil society groups that are committed to ensuring that these reforms could also serve to strengthen the systems of administrative justice in ways that benefit the poor and marginalized. Examples here could include reforms aimed at implementing property rights regime that help the poor to secure good title to land and that the poor understood judicial proceedings in their own languages.

*Office of Special Counsel*

I propose the establishment of an independent investigatory and prosecutorial office for grand corruption. Such an Office of Special Counsel would be constitutionally created and have security of tenure. It would be empowered to investigate and prosecute grand corruption among members of the cabinet and other high level officers of government.

The Kenya Anti Corruption Commission can continue in existence to investigate and prosecute all other cases of corruption. That would free the Attorney General to prosecute and
independently investigate all other categories of corruption cases particularly those that most affect ordinary Kenyans directly including those involving the Local Authority Transfer Fund as well as the Constituency Development Fund among others. These Funds are intended to have a direct and local impact on the lives of people throughout the country but they have not received nearly the kind of scrutiny for corruption that is warranted.

*Parliamentary Control of Public Finance*

Although Parliament has a constitutional duty to oversee the government’s budgetary proposals on taxation and expenditure, the thirteenth Parliament (2003-2007) like many before it rarely debated or scrutinized in the slightest budget proposals for an overwhelming number of government ministries. In effect, government ministries spent their budgets with little or no supervision or oversight by Parliament. This included over 38.4 Billion Kenya Shillings allocated to the Ministry of Finance and over 19 Billion to the Ministry of Defense. It is primarily from these two ministries that billions were paid to phantom companies in the Anglo-Leasing and related scandals of the Kibaki government. The Watchdog committees of the House, the Public Investments and Public Accounts Committee also failed to vigorously exercise their oversight functions giving ministries a free hand to spend without having to look over their shoulders. Parliament must therefore assert its traditional role of assuring effective oversight over government expenditure.

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**Individuals With Integrity**

It is often argued that discretion in the hands of bureaucrats creates room for corrupt behavior. While there is a truism in this logic, the reverse is not true – that clear and unambiguous rules create less room for corrupt behavior. Building institutions with integrity requires having individuals with integrity. The case of former Permanent Secretary for Governance and Ethics demonstrates that there are Kenyans with integrity willing and ready to serve in the government to end corruption.

Integrity will also be important not only within the anti-corruption institutions engaged in monitoring, prevention, investigation and prosecution, but in the judiciary as well. The judiciary has been rife with corruption as the Ringera report and the purge of several judges that followed showed.

**Pre-Investment Screening of Sales of Public Assets**

Parliament should pass a law requiring pre-investment screening of all sales of public assets. This means that every time public assets are up for sale, government officials responsible for approving the sale would be duty bound to require bidders to fully disclose their identities.

Thus, if a foreign or locally incorporated entity enters a bid for the disposal of public assets, its shareholders whether corporate persons or natural persons would have to be fully disclosed prior to the execution of the sale.
In the event the shareholders of the company were companies, the new law would require that at minimum the full identity of the chief executive officers of the parent company be fully disclosed. A picture of such a person would not suffice for this purpose.

Instead, a valid passport or other government issued document identifying such persons positively would be the only acceptable proof of identity.

In addition, the certificate of incorporation of the entity as well as the last two years worth of corporate returns in their country of incorporation would be a necessity. Further, all government officers approving the sale would have to sign off that they were satisfied that they ascertained the identities of any entity or person to whom a sale of public property was made.

Failure to comply with such disclosure would be a punishable offence for officials approving the sale. In fact, I would go even further and propose that if such due diligence in positively identifying buyers of public property is not made and a sale nevertheless proceeds, such failure would make the contract void and unenforceable even if payment had been made. 198

**Conclusion**

This study has extensively explored the relationship between human rights and corruption. It has concluded with a series of reforms informed by this discussion. An important upshot of

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198 This proposal is based on my essay, James Gathii, “Introduce Law to Screen Public Asset Sales,” Business Daily, Africa July 9, 2008.
this study is that conceiving the anti-corruption agenda as a human rights issue is to seek the
democratization of a country’s political, economic and social fabric to make it more attentive
and responsive to the rights of the most marginalized segments of society. After all,
corruption evidences abuse of the public trust for private gain.

The anti-corruption agenda has previously been thought of almost exclusively in economic
terms and to the extent human rights and corruption have been a focus, it has been to examine
how corruption disables states from meeting their human rights obligations. However, as this
study has demonstrated, rights have also been used to shield powerful politicians from being
investigated and prosecuted for corruption.

As such a primary recommendation made in this study is that the anti-corruption agenda is
also a struggle in transforming and democratizing a country’s social, political and economic
life by making it more attentive and responsive of the rights of the poorest and most
vulnerable. This study has began the contribution of contextually analyzing the relationship
between corruption and human rights and shown the potential for further work in this area.