

## DEFINING THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND CORRUPTION

JAMES THUO GATHII\*

### 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 Article explores two other relationships between human rights and corruption. First, it shows how individualistic and procedural rights have been used to defeat investigations and prosecutions of corruption by high-level governmental officials. Second, it demonstrates how anti-corruption reforms are inconsistent with the social and economic rights of the poor and marginalized because they have primarily targeted the promotion of market efficiency while reducing spending on basic needs and rights such as health and education. These findings are significant because they show that the relationship between corruption and human rights extends beyond demonstrating that 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 Article 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. This can be done by expanding human rights concerns to include minority rights and safeguards as well as social and economic rights of the poor and marginalized as central agendas.

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\* Associate Dean for Research and Scholarship and Governor George E. Pataki Professor of International Commercial Law, Albany Law School. This article was supported by a generous Research Sabbatical Grant by the Ford Foundation.

## 1. INTRODUCTION

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

Corruption affects human rights in a variety of ways. For example, the rights to food, water, education, health, and the ability to seek justice can be violated if a bribe is required to gain access to these basic rights.<sup>2</sup> Corruption by high-level government officials can siphon millions of dollars of the country's wealth, which in turn handicaps the government from fulfilling its duty to protect, ensure, and respect the rights guaranteed to its people. This relationship between human rights and corruption is ambiguous however; while corruption negatively affects human rights protection, human rights can help corruption to flourish.<sup>3</sup> This is because human rights and procedural rights, such as due process—the right not to have undue delay in court proceedings, and the right to a fair trial—can be used by corrupt government officials to circumvent and avoid punishment and accountability for the role they played in acquiring personal gain for themselves at the expense of the people they should be serving.

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<sup>1</sup> See generally Julio Bacio Terracino, *Corruption as a Violation of Human Rights* (Int'l Council on Human Rights Policy, Working Paper, 2008) (discussing the growing social implications of corruption and its connection to human rights violations), available at [http://www.ichrp.org/files/papers/150/131\\_terracino\\_en\\_2008.pdf](http://www.ichrp.org/files/papers/150/131_terracino_en_2008.pdf); Carlos Castresana, *Prosecution of Corruption Cases and Respect of Human Rights*, ¶ 1 (Int'l Council on Human Rights Policy, Working Paper, July 27, 2007) (stating the International Council on Human Rights Policy's desire to further explore the relationship between human rights and corruption), available at [http://www.ichrp.org/files/papers/123/131\\_-\\_Carlos\\_Castresana\\_-\\_2007.pdf](http://www.ichrp.org/files/papers/123/131_-_Carlos_Castresana_-_2007.pdf); Int'l Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* 1 (Int'l Council on Human Rights Policy, Working Paper, 2009) (discussing the increasing international efforts to address corruption and the challenges that exist in combating it), available at [http://www.ichrp.org/files/reports/40/131\\_web.pdf](http://www.ichrp.org/files/reports/40/131_web.pdf); Transparency Int'l, *Human Rights and Corruption* 2-3 (Transparency Int'l, Working Paper No. 05, 2008), available at [http://www.transparency.org/publications/publications/working\\_papers/wp\\_2008\\_0\\_23\\_human\\_rights\\_corruption](http://www.transparency.org/publications/publications/working_papers/wp_2008_0_23_human_rights_corruption) [hereinafter *Corruption and Human Rights*] (examining the common links in ideology and goals between human rights and international anti-corruption regimes).

<sup>2</sup> See Terracino, *supra* note 1 (examining the implications which corruption may have upon access to basic human rights).

<sup>3</sup> See *infra* Section 4.6. (Investigation and Prosecution of Corruption Cases).

A major reason why the relationship between corruption and human rights has been less well understood is because the primary impetus of the anti-corruption agenda came from the World Bank in light of its mandate in development policy.<sup>4</sup> Further, as Section 3 of this Article shows, from 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 some circles, corruption was argued to be necessary to overcome bureaucratic red tape in 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-1970s. A proposed code of conduct for multinational corporations reflected these concerns. However, it was the emergence of the good governance agenda sponsored by the Bretton Woods institutions, and the World Bank in particular, at the end of the 1980s that brought corruption to the center stage of development policy. Since then, corruption has been seen as a major impediment to the success of economic reforms.

In Section 3, this Article will discuss at length how human rights fit into the anti-corruption agenda. Section 3 discusses the relationship between human rights and corruption not only conceptually but in the Kenyan 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 and protect the human rights of its citizens.<sup>5</sup> Section 3 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 Section 3 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, this Section discusses

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<sup>4</sup> 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 Advisor of Transparency International, available at <http://www.transparency.org/content/download/4651/27528> (listing Peter Eigen's credentials).

<sup>5</sup> See Terracino, *supra* note 1, at 23 (discussing the effects of corruption on the health care sector in limiting patient access to healthcare).

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. Section 4 also discusses a trio of recent 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 underlie abuse of public resources characterized by corruption. While the *Murungaru* case somewhat restored hope that the Bill of Rights in the Kenyan Constitution would not be used to defend corruption suspects, this Article 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. Section 4 shows that such a broad understanding of human rights would help in significantly changing the way Kenyan law is implicated in producing corruption. In fact, it demonstrates that it is precisely 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 Section 4 shows how the well-heeled have used the Bill of Rights to protect themselves against investigations and prosecutions of corruption-related offenses, Section 4.10 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. This is problematic especially because it is these groups that stand to suffer most when their government is corrupt.<sup>6</sup> The Article argues that these reforms have foreclosed addressing questions of inequality and injustice. As such, the Article argues 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.

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<sup>6</sup> See *infra* Section 4.2. (How Corruption Affects the Poor, Marginalized, and Disadvantaged).

Such an approach would approximate what Upendra Baxi has insightfully called “taking suffering seriously.”<sup>7</sup> Under such an approach, institutional and constitutional reform and 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 focus on 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 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 rather than the interests of a select few.<sup>8</sup> Finally, it would also require an approach to anti-corruption reform that is specifically tailored to the particular country in question and not a generic “one plan works for every country approach.”<sup>9</sup> The final Section of this Article summarizes these and other recommendations for reform.

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<sup>7</sup> See Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, in *LAW AND POVERTY: CRITICAL ESSAYS* 387 (Upendra Baxi ed., 1988) (discussing the background and growing prevalence of social action litigation in India as a medium for traditionally disadvantaged and repressed groups to seek justice). See also UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* 6 (2002) (analyzing the varying images of the character of human rights); Upendra Baxi, *Voices of Suffering and the Future of Human Rights*, 8 *TRANSNAT'L L. & CONTEMP. PROBS.* 125, 129 n.11 (1998) (discussing the practice of discursivity and its role in creating a civil and political rights regime that is separate and distinct from the social, cultural, and economics rights regimes); Willy Mutunga, *Relational Contract Theory Outside National Jurisdictions* (1992) (unpublished thesis, on file with Osgoode Hall Law School) (proposing a jurisprudence of basic needs for all people).

<sup>8</sup> See WILLY MUTUNGA, *CONSTITUTION-MAKING FROM THE MIDDLE: CIVIL SOCIETY AND TRANSITION POLITICS IN KENYA, 1992-1997*, 216 (1999) (examining the Citizens Coalition for Constitutional Change in the context of the community's role in affecting political and constitutional reform in Kenya).

<sup>9</sup> See C. Raj Kumar, *Corruption Development and Good Governance: Challenges for Promoting Access to Justice in Asia*, 16 *MICH. ST. J. INT'L L.* 475, 509 (2008), for a discussion on the significance of considering the importance of both national and local variations in cultural, economical, and political factors when considering human rights. See also C. Raj Kumar, *Corruption, Human Rights, and Development: Sovereignty and State Capacity to Good Governance*, 99 *AM. SOC'Y INT'L L. PROC.* 416,

## 2. THE ANTI-CORRUPTION REFORM AGENDA: ITS GENESIS IN DEVELOPMENT POLICY

### 2.1. 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 Article argues that this claim is far from true. Three specific arguments are made in the Article to show that the contemporary consensus on anti-corruption initiatives demonstrates a remarkable departure from prior attitudes towards corruption. The first claim is 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 1960s and early 1970s. Today, bribery of foreign government officials is almost universally condemned as an economic cost that retards economic growth and development. Second, this Article argues that the concerns of developing countries within the United Nations system of organizations in the 1960s and 1970s 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. The third claim in this Article is that as the anti-corruption initiatives have become central to national, regional, and

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418 (2005) (examining criticism levied against western countries and NGO's such as the World Bank grounded in charges that their proposals are almost always the same without any special consideration given to the specifics of each country, different human rights values of that country, or to whether alternative measures would be more effective); Balakrishnan Rajagopal, *Corruption, Legitimacy, and Human Rights: The Dialectic of the Relationship*, 14 CONN. J. INT'L L. 495, 503 (1999) (discussing the problems that have arisen in countries such as Cambodia when the idea of using development to combat corruption has been put into practice); World Conference on Human Rights, Mar. 29 – Apr. 2, 1993, *Report of the Regional Meeting for Asia of the World Conference on Human Rights*, U.N. Doc. A/CONF.157/PC/59 (Apr. 7, 1993) (“[W]hile human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.”).

international cooperation on development, there has been less attention paid to corruption within the private sector.

The Article is divided into three parts. Section 3 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 states in the 1960s at a moment of hope for newly independent countries and the hesitation, based on concepts of cultural relativism, in raising the issue of corruption even as it began to become endemic in many developing countries towards the end of the 1960s. The second influence that the Article traces 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 which claimed that corruption was an indicator of a necessary path towards economic and political development much like in the developed world. In Section 4, the Article examines the early origins of anti-corruption initiatives in the efforts of developing countries to curb multinational corporation bribery within the U.N. Section 4 also examines the efforts of developed countries to come up with a code of conduct for multinational corporations in the OECD and the United State's Foreign Corrupt Practices Act of 1977. This Section 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 Section 5, the author examines the modern anti-corruption consensus by examining various international and regional initiatives at the inter-governmental and non-governmental level. In particular, I 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.

*2.2. Setting the Stage for the Emergence of the Anti-Corruption Consensus: 1960-1980*

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

In the 1960s and in the 1970s, corruption within African states was often ignored by development economics, western bilateral and multilateral donors, and those studying Africa in the West.

Yet, towards the end of the 1960s, 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.<sup>10</sup> 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 many were wary of openly criticizing the fledgling governments. As the Africanist L.H. Gann, along with Peter Duignan, lamented regarding the 1960s, "[w]e were 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."<sup>11</sup> According to Gann and Duignan, this conciliatory attitude was to give Africans a chance and space to develop without criticism from the West.<sup>12</sup> This was also an era characterized by optimism that Africa would develop much like the West without question.<sup>13</sup> Hence, Samuel Huntington argued:

In terms of economic growth, the only thing worse than a society with a rigid, overcentralized, dishonest bureaucracy is one with a rigid, overcentralized, honest bureaucracy. A

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<sup>10</sup> See ROBERT H. JACKSON & CARL G. ROSBERG, *PERSONAL RULE IN BLACK AFRICA: PRINCE, AUTOCRAT, PROPHET, TYRANT* 17-18 (1982) ("During the past two decades, scholars, journalists, and other observers of African affairs have noted the recurrence of such phenomena as 'coups', 'plots', 'clientelism,' [and] '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 more likely to be seen as merely the defects of an otherwise well-established public order.") (emphasis original). See e.g. Roberta E. McKown, *Domestic Correlates of Military Intervention in African Politics*, 3 J. POL. & MIL. SOC. 191 (1975) (examining the significance of the military coup d'état in Africa and its impact on international politics); Amos Perlmutter, *The Praetorian State and the Praetorian Army: Toward a Taxonomy of Civil-Military Relations in Developing Politics*, 1 COMP. POL. 382 (1969) (analyzing the social and political factors that contribute to the rise of modern praetorian states, where the military has the potential to dominate the nation's political system).

<sup>11</sup> L.H. Gann, *Ex Africa: An Africanist's Intellectual Autobiography*, 31 J. MOD. AFR. STUD. 477, 487 (1993).

<sup>12</sup> *Id.*

<sup>13</sup> See Colin Leys, *Confronting the African Tragedy*, 204 NEW LEFT REV. 33, 33 (1994) (noting that the "history of the previous ninety years—i.e., since 1870—seemed to justify optimism.").



society which is relatively uncorrupt—a traditional society for instance where traditional norms are still powerful — may find a certain amount of corruption a welcome lubricant easing the path to modernization.<sup>14</sup>

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 theory and dependency theory—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 resort to single-factor or reductionist explanations of them. And their hopes have only too deeply disappointed.<sup>15</sup>

There is still another reason for the reluctance of Africa’s bilateral partners today to confront directly the messy politics and economic decline of post-colonial rule—The Cold War.<sup>16</sup> For the

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<sup>14</sup> SAMUEL P. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* 69 (1968).

<sup>15</sup> Leys, *supra* note 13 at 41. See also James Gathii, *Retelling Good Governance Narratives on Africa’s Economic and Political Predicaments: Continuities and Discontinuities in Legal Outcomes Between Markets and States*, 45 *VILL. L. REV.* 971, 997–1007 (2000) (examining corruption as a limiting force on developmental economics of the African state and the modern nationalist view on reforming economic and political policies).

<sup>16</sup> See MWALIMU MATI & JOHN GITHONGO, *JUDICIAL DECISIONS AND THE FIGHT AGAINST CORRUPTION IN KENYA* 5 (2001), *reprinted in* TRANSPARENCY INTERNATIONAL

United States, countries that rejected communism no matter how corrupt and dictatorial were considered 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 United States were regarded as allies no matter their record on political and economic performance. For both the United States and the Soviet Union, democracy and measures such as those involved in combating corruption were not as central to their foreign policy priorities as were their ideological goals.<sup>17</sup>

2.2.2. *Corruption as a Necessary Cost of Business – The ‘Virtuous Bribery Story’<sup>18</sup>*

Another factor that contributed to underplaying corruption in the 1960s and 1970s 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.<sup>19</sup> According to this school of thought, developing country governments had developed pervasive and inefficient regulations. Corruption, then, would help circumvent these regulations at a low cost because it would reduce uncertainty

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- KENYA: CONTRIBUTION TO THE RULE OF LAW REPORT 2001 OF THE INTERNATIONAL COMMISSION OF JURISTS KENYA SECTION 4 (2001), available at <http://www.tkenya.org/documents/JudicialDecisions.doc> (citing how the politics of the Cold War meant that many regimes perceived as thoroughly corrupt—like Kenya’s—nevertheless did not find their legitimacy challenged seriously as a result of corruption).

<sup>17</sup> See WILLIAM I. ROBINSON, PROMOTING POLYARCHY: GLOBALIZATION, U.S. INTERVENTIONISM AND HEGEMONY 318–19 (1996) (arguing that behind the façade of supporting dictatorships to promoting “democratic” regimes, U.S. policy upholds the undemocratic status quo of Third World countries).

<sup>18</sup> See Shang-Jin Wei, *Corruption in Economic Development: Beneficial Grease, Minor Annoyance, or Major Obstacle?* 24 (World Bank Policy Research Working Paper No. 2048, 1999), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=604923](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=604923) (“While one may think of examples in which some firms/people are made better off either by paying a bribe or the opportunity to pay a bribe, the overall effect of corruption on economic development is negative.”).

<sup>19</sup> See Nathaniel H. Leff, *Economic Development Through Bureaucratic Corruption*, 8 AM. BEHAV. SCIENTIST 8, 8–14 (1964) (discussing economic efficiency virtues of corruption); see also James Gathii, *Corruption and Donor Reforms: Expanding the Promises and Possibilities of the Rule of Law as an Anti-Corruption Strategy in Kenya*, 14 CONN. J. INT’L L. 407, 425–26 (1999) (discussing how various anti-corruption initiatives that form part of the rule of law reforms that donors require of public officials in Kenya do not necessarily guarantee or entail fair or substantive outcomes).

over enforcement. Hence, while the corrupt officials get 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.<sup>20</sup> 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.<sup>21</sup>

However, it is equally plausible that corrupt officials may delay rather than speed up the administrative process to get more bribes.<sup>22</sup> According to Shang-Jin Wei, the best claim that can be made to this virtuous bribery story is a very narrow one.<sup>23</sup> 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.<sup>24</sup> Consequently, he concludes that on average, it 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

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<sup>20</sup> See Francis T. Lui, *An Equilibrium Queuing Model of Bribery*, 93 J. POL. ECON. 760, 760–762 (1985) (discussing how bribery can lead to socially optimal solutions).

<sup>21</sup> *Id.*

<sup>22</sup> See GUNNAR MYRDAL, 2 ASIAN DRAMA 951–952 (1968) (suggesting a possible perverse relationship between bureaucratic regulations and bribery); see also Anne Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AMER. ECON. REV. 291 (1974) (arguing that competitive rent-seeking, including bribery, brings additional costs to the table). See generally PETER BAUER, A DISSENT ON DEVELOPMENT (1976) (departing from the virtuous story of bribery).

<sup>23</sup> See generally Daniel Kaufmann & Shang-Jin Wei, *Does 'Grease Money' Speed Up the Wheels of Commerce* (World Bank Policy Research Working Paper No. W7093, 1999), available at <http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/grease.pdf> (suggesting that bureaucratic harassment may be endogenous, and that "firms that pay more bribes are also likely to spend more, not less, management time with bureaucrats negotiating regulations, and face higher, not lower, cost of capital").

<sup>24</sup> *Id.*

out under certain conditions that the lowest-cost firm could still win the contract thereby leaving the bribe payer worse off.<sup>25</sup>

2.2.3. *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 1960s and 1970s. One of the most famous of these was Samuel Huntington's 1968 book, *Political Order in Changing Societies*.<sup>26</sup> 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 expansion.<sup>27</sup>

For Huntington, corruption was as important for purposes of national integration as it was for stimulating economic development. He predicated his hope on the false optimism of the future of newly independent countries becoming developed as a matter of course. This optimism was buoyed by the fact that the United States had experienced speedy growth as a result of similar corruption in the 1870s and 1880s particularly at the state level with the emerging giant railroad and utility corporations.<sup>28</sup> Other leading scholars such as Joseph S. Nye<sup>29</sup> supported this view,

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<sup>25</sup> See Paul J. Beck & Michael W. Maher, *A Comparison of Bribery and Bidding in Thin Markets*, 20 *ECON. LETTERS* 1, 5 (1986) (concluding that "there is a fundamental isomorphism between bribery and competitive bidding on the supply side of the transaction"); see also Da-Hsiang Donald Lien, *A Note on Competitive Bribery Games*, 22 *ECON. LETTERS* 337 (1986) ("Within a competitive bribery game in which each player has incomplete information, we show that there exists a unique Nash equilibrium which is symmetric.").

<sup>26</sup> HUNTINGTON, *supra* note 14.

<sup>27</sup> *Id.* at 68.

<sup>28</sup> *Id.* at 68–69.

<sup>29</sup> See Joseph S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, 61 *AM. POL. SCI. REV.* 417, 419–20 (1967) (pointing out that there seem to be at least three ways in which some kinds of corruption can promote economic development: capital formation, cutting red tape, and entrepreneurship and incentives); see also C.J. FREDERICH, *THE PATHOLOGY OF POLITICS: VIOLENCE,*

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.<sup>30</sup>

However, while corruption may have led to the emergence of an entrepreneurial class in medieval Europe and in the gilded-age era of the United States, corruption did not necessarily lead to the same consequences in sub-Saharan Africa.<sup>31</sup> As Pranab Bardhan argues, in developing countries, corruption feeds upon itself for a number of reasons: first, it is beneficial for the payee and the payer; second, it is so entrenched that it becomes a self-fulfilling prophecy;<sup>32</sup> and third, once corruption takes root in a society it is hard to eliminate or win back trust.<sup>33</sup> 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 behavior will eliminate corruption.<sup>34</sup> It does not also presume that corruption in societies where it is endemic is there to stay.<sup>35</sup> This more nuanced understanding informs the claim in this Article that anti-corruption measures ought to combine human rights and constitutionalism with broad public support in order to be effective.

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BETRAYAL, CORRUPTION, SECRECY AND PROPAGANDA 171 (1972) (maintaining that where corruption can help to adapt an antiquated or obsolete political order to changing conditions, it can be said to be functional).

<sup>30</sup> See James Gathii, *Representations of Africa in Good Governance Discourse: Policing and Containing Dissidence to Neo-Liberalism*, 18 *THIRD WORLD LEGAL STUD.* 65, 81 (1999) ("Other reasons why the newly independent countries in the post-World War II era rejected free markets as an option included the export pessimism experienced in developed countries and the success of the Soviet Union which, through economic planning, despite being a relatively underdeveloped country, had become a great power in just one generation.").

<sup>31</sup> See Pranab Bardhan, *Corruption and Development: A Review of Issues*, 35 *J. ECON. LITERATURE* 1320, 1328-29 (1997) (speculating that perhaps South East Asia is an exception to this phenomenon since it has experienced enormous growth notwithstanding the presence of corruption); see also ALICE H. AMSDEN, *ASIA'S NEXT GIANT: SOUTH KOREA AND LATE INDUSTRIALIZATION* 39-40, 72-73 (1989) (discussing how South Korea dealt with corruption).

<sup>32</sup> See John Mulaa, *A Sad Case of Kenyans Condoning Corruption*, *EAST AFRICAN STANDARD*, August 5, 2007, at 26 (discussing how endemic corruption is in the Kenyan context).

<sup>33</sup> Bardhan, *supra* note 31, at 1330-35.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

### 3. THE EMBRYONIC STAGE OF THE INTERNATIONAL ANTI-CORRUPTION CONSENSUS

#### 3.1. *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-World War II era with a view to reforming the international political economy favourably towards them.<sup>36</sup> 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 recalibrate rules of trade, finance, and commerce to attain fairer and advantageous bargains in ways that respected sovereignty over their natural resources.<sup>37</sup>

Controlling corrupt payments to officials in these countries by multinational corporations was a central aspect of these initiatives. At the end of the 1960s, there was widespread evidence of big multinational corporations such as I.T.T., Lockheed, United Brands, Mobil, Exxon, and E.R. Squibb, giving huge bribes in a variety of countries.<sup>38</sup> The thrust of the concerns expressed by

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<sup>36</sup> See James Gathii, *International Law and Eurocentricity*, 9 EUR. J. INT'L L. 184, 203-05 (1996) (surveying various scholarly viewpoints on Third World countries' failed attempt to restructure international relations by establishing an equilibrium between their raw-material-producing economies and Western industrial service-oriented economies); see also James Gathii, *The Limits of the New International Rule of Law on Good Governance*, in LEGITIMATE GOVERNANCE IN AFRICA: INTERNATIONAL AND DOMESTIC LEGAL PERSPECTIVES 207, 218-31 (Edward Quashigah & Obiora Okafor eds., 1999) (discussing macro-economic reform in the new international rule of law as well as the role of public international legal scholarship in defeating a joint third world agenda and its New International Economic Order proposal).

<sup>37</sup> For an early view, see Subhash C. Jain, *Legal 'Dichotomy' of Concessions*, 9 INDIAN J. INT'L L. 512 (1969), where the author distinguishes between pre-independence and post-independence concessions and concludes that the former are voidable due to the fact that the states on which they are imposed did not actively participate in their adoption. For a later well-known view, see MOHAMMED BEDJAOU, *TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER* (1979), for a discussion on changes in international order and law, such as decolonization and the deterioration of terms of trade, which precipitated the establishment of a New International Economic Order.

<sup>38</sup> See Peter W. Schroth, *Constitutional Aspects of the Proposed African Union Convention on Preventing and Combating Corruption* 7-8 (Feb. 24, 2003) (unpublished manuscript, on file with author) [hereinafter Schroth, *Constitutional Aspects*] (noting specific cases of foreign bribery admitted by American

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 I.T.T. in the plot to remove leftist Chilean President Allende and to replace him with General Pinochet who favoured the interests of foreign investors such as I.T.T.<sup>39</sup>

Indeed, the 1976 Declaration of the Heads of States at the 5th Conference of the Non-Aligned States took issue with multinational corporate corruption as “motivated by exploitative profits” and exhausting third world resources while distorting these economies.<sup>40</sup> According to this Declaration, these practices constituted violations of these countries rights to self-determination and non-intervention.<sup>41</sup> Developing countries therefore combined their majorities in the United Nations to pass resolutions condemning the corrupt practices of multinational corporations.<sup>42</sup> 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 transnational corporations.<sup>43</sup> 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”).<sup>44</sup> The NIEO was the climactic moment for developing countries in their quest to reform the international political economy favorably towards them. Paragraph 4 of the

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corporations during the Securities and Exchange Commission’s corruption hearings in the 1970s); S.K. Verma, *International Code of Conduct for Transnational Corporations*, 20 INDIAN J. INT’L L. 20, 20–23 (1980) (focusing on payoffs made by transnational corporations in the context of the role that transnational corporations play in undermining host countries’ fiscal and monetary policies).

<sup>39</sup> Verma, *supra* note 38 at 20 n.3.

<sup>40</sup> 1976 Declaration of the Heads of States, 5th Conference of the Non-Aligned States, *Economic Declaration*, reprinted in 27 REV. INT’L AFF. 31, 35 (1976).

<sup>41</sup> *Id.*

<sup>42</sup> E.g., G.A. Res. 3514, ¶ 1, U.N. GAOR, 30th Sess. (Dec. 15, 1975) (condemning all corrupt practices by corporations that violate the laws and regulations of host countries).

<sup>43</sup> U.N. Comm’n on Transnational Corporations, Intergovernmental Working Group on the Code of Conduct, *Report on the Formulation of a Code of Conduct*, U.N. Doc. E/C.10/31 (May 4, 1977) (prepared by Sten Miklasson), reprinted in 16 I.L.M. 709 (1977).

<sup>44</sup> See G.A. Res. 3201, at 3, U.N. GAOR, 6th Sess., Supp. No. 1, U.N. Doc. A/9559 (May 1, 1974) (aiming to alleviate the imbalance between developing and developed countries and to promote economic and social progress and peace).

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.<sup>45</sup>

Ultimately, the NIEO agenda was deadlocked at the United Nations. Western industrialized countries, particularly the U.S., rejected it.<sup>46</sup> The promise of a code of conduct of multinational corporations languished in the U.N. throughout the 1970s, but by the beginning of the 1980s, changing views on 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.

### 3.2. *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 Development and Cooperation, ("OECD"), a standard setting organization of the economic cooperation between European countries and the United States. Similar to United Nations General Assembly resolutions, the Declarations of the OECD are voluntary and therefore are not legally enforceable.<sup>47</sup>

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<sup>45</sup> See G.A. Res. 3281, art. 2(2), U.N. GAOR 29th Sess. (Dec. 12, 1974) (proclaiming that each State had the right to regulate transnational corporations within its jurisdiction and to fully exercise sovereignty over its wealth, natural resources, and economic activities).

<sup>46</sup> Gathii, *International Law and Eurocentricity*, *supra* note 36.

<sup>47</sup> Some scholars have, however, argued that voluntary codes such as the Basel Accords are the most significant source of norms in international law today and their influence on norms and state/non-state behavior ought not to be understated. For more, see Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 AM. SOC'Y INT'L L. PROC. 240 (2000), for an argument that a liberal approach to international law recognizes various types of lawmaking that exist at the individual, governmental, and state levels; and see Anne-Marie Slaughter, *Governing the Global Economy Through Government Networks*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS 177 (Michael Byers ed., 2000), for a discussion on the increasing role that participation in international regulatory organizations such as the Basel Committee and the International Organisation of Securities Commissioners play in allowing States to regulate an increasingly global economy.



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 economic, social, and environmental contributions in these countries.<sup>48</sup> 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, contenders for such office, or political parties.<sup>49</sup> For purposes of enforcement, the Guidelines recommended annual publication of the financial activities of such corporations as well as compliance with the national laws and policies of the host countries.<sup>50</sup>

### 3.3. *The Foreign Corrupt Practices Act: 1977-1989*

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 involved in giving bribes to foreign government officials in return for procuring contracts or as sales commissions.<sup>51</sup> Congressional attention was driven in part by the attention created by the Watergate scandal<sup>52</sup> and by virtue of the fact that the payments to foreign government officials by U.S. multinational

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<sup>48</sup> Org. for Econ. Co-operation and Dev [OECD], *OECD Guidelines for Multinational Enterprises* 14 (2008), available at <http://oecd.org/dataoecd/561/361922428.pdf>.

<sup>49</sup> *Id.* at 21.

<sup>50</sup> *Id.* at 14-15.

<sup>51</sup> See *Repeal of Laws Aiding Multinationals Sought*, 34 CONG. Q. 1026, 1026 (1976) (indicating that as of April 23, 1976, approximately eighty-four companies had admitted to bribing foreign officials to win new contracts); Michael E. Murphy, *Payoffs to Foreign Officials: Time for More National Responsibility*, 62 A.B.A. J. 480, 480 (1976) (reporting that the Securities and Exchange Commission's investigation indicated that American companies are commonly associated with bribery and improper payments in developing countries where such practices are commonplace); Peter Nehemkis, *Business Payoffs Abroad: Rhetoric and Reality*, 18 CAL. MGMT. REV. 5, 5 (1975) (noting the types of bribes paid by top American companies operating overseas to obtain decisions from host governments that would result in favorable business conditions); Schroth, *supra* note 38, 6-7.

<sup>52</sup> Schroth, *supra* note 38, at 6-7.

corporations were benefiting from tax exemptions enacted by Congress.<sup>53</sup>

The high profile attention given to this issue is exemplified by the appointment of a Special Presidential Task Force headed by a cabinet member to study the problem in late March 1976<sup>54</sup> and a special study issued by the Securities and Exchange Commission ("SEC") on the problem.<sup>55</sup> Several congressional hearings were also held and bills on the issue were proposed in the second Congressional session of 1976.<sup>56</sup> The SEC Report emphasized that corrupt payments were adversely affecting public confidence in American business.<sup>57</sup> The SEC's recommendations focused on eliminating corrupt payments through express prohibition and penalization as well as provided requirements for transparent and honest internal auditing in accord with generally recognized accounting principles.<sup>58</sup> The Presidential Task Force's recommendations called for legislation requiring these corporations to meet disclosure requirements only with regard to material information.<sup>59</sup> Unlike the SEC, the Presidential Commission excluded from its recommendations the

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<sup>53</sup> See generally Ronald P. Kane & Samuel Butler III, *Improper Corporate Payments: The Second Half of Watergate*, 8 LOY. U. CHI. L.J. 1, 17-21 (1976) (providing an extensive history of the improper foreign payments made by Gulf Oil Corporation and United Brands).

<sup>54</sup> See Donald H.J. Hermann, *Criminal Prosecution of United States Multinational Corporations*, 8 LOY. U. CHI. L.J. 465, 485 (1977) (noting that the SEC prepared a report to study corrupt payment in general and the President Task Force prepared a report to study the specific problem of bribes to foreign officials).

<sup>55</sup> See STAFF OF S. COMM. ON BANKING, HOUSING AND URBAN AFFAIRS, 94TH CONG., REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES (Comm. Print 1976) [hereinafter SEC REPORT] (reporting the findings of the SEC study to determine the nature and extent of questionable or illegal foreign payments and the potential effect such activity will have on the U.S. economy); THE CARTER CENTER OF EMORY UNIVERSITY, PERESTROIKA WITHOUT GLASNOST IN AFRICA 1 (1989) [hereinafter THE CARTER CENTER] (discussing rising trends in innovative economic policies and how those policies provoke challenges to political regimes) (quoting Michael Lofchie who participated in the inaugural meeting at the Carter Center).

<sup>56</sup> See Hermann, *supra* note 54, at 484-97 (outlining Congressional proposals to deal with bribery and corruption).

<sup>57</sup> See SEC REPORT, *supra* note 55, at 54 (concluding that the commission found that the problem of questionable and illegal corporate payments is cause for a deep concern).

<sup>58</sup> See Hermann, *supra* note 54, at 491-92 (comparing the recommendations of the studies prepared by the SEC and the Presidential Task Force).

<sup>59</sup> *Id.* at 492.

criminalization of payment of foreign government officials.<sup>60</sup> It was in this context, that Congress enacted the Foreign Corrupt Practices Act of 1977.

### 3.4. *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 political processes."<sup>61</sup> 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 postcolonial sub-Saharan Africa. Under this view, corruption is one of the indicators of bad governance.<sup>62</sup>

Within the good governance agenda, either orthodox structural adjustment or macroeconomic reform and stabilization are the 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, the first to protect private property against re-distributive interventionism and the second to enforce contracts.

An important aspect of good governance programs is identifying orthodox macroeconomic reform as imperative to sub-Saharan Africa reform. Thus, the good governance agenda is focused on ensuring that sub-Saharan African economies lack the institutional, political, and administrative mechanisms to support orthodox macro-economic reform. Corruption has been identified

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<sup>60</sup> *Id.*

<sup>61</sup> See THE CARTER CENTER, *supra* note 55, at 1 (quoting Michael Lofchie who observed that governance better "enables us to range widely to determine precisely where effective control of African societies lies. Governance does not prejudice the locus or character of real decisional authority.").

<sup>62</sup> See DANIEL KAUFMANN ET AL., GOVERNANCE MATTERS VII: AGGREGATE AND INDIVIDUAL GOVERNANCE INDICATORS 1996–2007 7–8 (2008) (describing "control of corruption" as a measurement in "perceptions of the extent to which public power is exercised for private gain, including both petty and grand forms of corruption, as well as 'capture' of the state by elites and private interests").

as a major part of the institutional, administrative and political problems inhibiting the success of macroeconomic reform.<sup>63</sup> Transparency and accountability therefore are an important part of the anti-corruption initiatives of the good governance agenda.<sup>64</sup> Reforms aimed at de-regulating, liberalizing and privatizing the economies of developing countries have also become central to combating corruption.<sup>65</sup>

### 3.5. *An International Consensus Emerges: Anti-Corruption Initiatives as Central to Development Policy*

By the mid-1990s, a consensus emerged placing corruption at the center of development policy. Consequently, the World Bank concluded in its 1997 World Development Report that without an effective state, "sustainable development, both economic and social, is impossible."<sup>66</sup> Corruption is now seen as detrimental to both economic growth<sup>67</sup> and private investment.<sup>68</sup>

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<sup>63</sup> See WORLD BANK, GOVERNANCE AND DEVELOPMENT 4-5 (1992) (discussing World Bank's role in addressing economic reform and nurturing political consensus for reforms); WORLD BANK, GOVERNANCE: THE WORLD BANK'S EXPERIENCE, vii-ix (1994) [hereinafter GOVERNANCE: THE WORLD BANK'S EXPERIENCE] (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").

<sup>64</sup> GOVERNANCE: THE WORLD BANK'S EXPERIENCE, *supra* note 63, at vii-ix (discussing accountability of economic and social dimensions of governance to produce change).

<sup>65</sup> See Gathii, *supra* note 19, at 407 (providing an overview of anti-corruption initiatives that rule of law donors have required the Kenyan government to implement).

<sup>66</sup> WORLD BANK, WORLD DEVELOPMENT REPORT 1 (1997). See also Press Release, IMF Interim Committee, *Interim Committee Declaration on Partnership for Sustainable Global Growth* (Sept. 29, 1996) [hereinafter *Declaration on Partnership*], available at <http://www.imf.org/external/np/exr/dec.pdf>.

<sup>67</sup> See Paolo Mauro, *Corruption and Growth*, 110 Q.J. ECON. 681, 683 (1995) (finding that corruption lowers levels of private investment and economic growth); Andrei Shleifer & Robert W. Vishny, *Corruption*, 108 Q.J. ECON. 599, 611 (1993) (acknowledging that most studies suggest "existing corruption levels are detrimental to development."); Vito Tanzi & Hamid Davoodi, *Corruption, Public Investment, and Growth* (INT'L MONETARY FUND, Working Paper No. 97/139, Oct. 1997) (reviewing five channels through which corruption lowers economic growth).

<sup>68</sup> See Alberto Alesina et al., *Political Instability and Economic Growth* (Nat'l Bureau of Econ. Research, Working Paper No. 4173, 1992) (concluding that in "countries and time periods with a high propensity of government collapse, growth is significantly lower than otherwise").

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.<sup>69</sup> In September 1996, the IMF Board of Governors adopted a Declaration on Partnership for Sustainable Global Growth, which emphasized the importance of “[p]romoting good governance in all its aspects, specifying the need for 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.”<sup>70</sup> Furthermore, in 1997, the IMF’s Board of Governors adopted a guidance note, *Good Governance – The IMF’s Role*, which sought to promote greater attention to governance issues. The guidance note 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 private sector activity.”<sup>71</sup> In February 2001, the IMF Executive Board evaluated the 1997 Guidance Note in a staff paper, *Review of the Fund’s Experience in Governance Issues*.<sup>72</sup> 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.

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<sup>69</sup> See Joseph Gold, *Political Considerations Are Prohibited By Articles of Agreement When the Fund Considers Requests for Use of Resources*, 12 IMF SURVEY 146, 146–147 (1983) (commenting that because political considerations are not completely isolated from economic ones, it may be appropriate for the IMF to develop policies to help member nations achieve their social and political objectives if those objectives if the economic consequences of those objectives are consistent with IMF’s purposes); See also James Thuo Gathii, *Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law*, 5 BUFF. HUM. RTS. L. REV. 107, 147–63 (1999) (discussing the World Bank’s implementation of good-governance incentive programs).

<sup>70</sup> *Declaration on Partnership*, *supra* note 66, at 1.

<sup>71</sup> Abdoulaye Bio-Tchane, Afr. Dep’t, IMF, Speech on Governance at the Africa Development Bank Symposium on New Partnership for Africa’s Development (May 27, 2002), available at <http://www.imf.org/external/np/speeches/2002/052702a.htm>.

<sup>72</sup> See Pol’y Dev. & Rev. Dep’t., Int’l Monetary Fund, *Review of Funds Experience in Governance Issues* (2001), available at <http://www.imf.org/external/np/gov/guide/eng/index.htm> (discussing the IMF’s initiatives to promote good governance).

The World Bank has developed six aggregate indicators to evaluate the quality of governance in a country and the control of corruption. The measurement uses as an indicator the extent to which public power is exercised for private gain, including both petty and grand corruption. The other indicators are voice and accountability, political stability and the absence of violence, government effectiveness, regulatory quality, and the rule of law.<sup>73</sup> World Bank data shows that countries with vibrant democracies, such as Portugal, Chile, and Canada have very little corruption. By contrast, countries with little voice and accountability, like Zimbabwe, tend to have more corruption.<sup>74</sup>

#### 4. HOW DOES HUMAN RIGHTS FIT INTO THE ANTI-CORRUPTION AGENDA?

##### 4.1. Introduction

Section 3 showed that corruption emerged as a governance concern in the Bretton Woods institutions rather than as a human rights concern within the human rights bodies of the United Nations. This Section 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. This Section 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. It also discusses a variety of social and economic rights as they relate to corruption in the country as well

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<sup>73</sup> WORLD BANK, THE INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, A DECADE OF MEASURING THE QUALITY OF GOVERNANCE: GOVERNANCE MATTERS 2006: WORLDWIDE GOVERNANCE INDICATORS, 9-12 (2006) [hereinafter QUALITY OF GOVERNANCE]; Kaufman, *supra* note 62, at 7-8.

<sup>74</sup> See QUALITY OF GOVERNANCE, *supra* note 73, at 7 (elaborating on the link between "the idea that when citizens can demand more accountability through the ballot box, or where there is freedom of expression, of the media, and of information, governments become cleaner and less corrupt"); Melissa A. Thomas, *What Do the Worldwide Governance Indicators Measure?*, Oct., 2006, available at [http://www.cityindicators.org/Deliverables/Measuring%20Governance\\_1-2-2007-836890.pdf](http://www.cityindicators.org/Deliverables/Measuring%20Governance_1-2-2007-836890.pdf) (providing critique of what worldwide governance indicators really measure).

as the separation of powers issues that have hobbled the anti-corruption agenda in the country. This Section demonstrates that it is really those who stand to lose most from the exposure of corruption who are likely to defend and vindicate their rights in the judiciary. Thus, while rights are important in exposing corruption, in the context of Kenya, they have often been used to override the full implementation of the anti-corruption agenda in the country. The section ends with ideas on how to transform the anti-corruption agenda utilizing rights.

#### 4.2. *Corruption and Human Rights Conceptually and in the Kenyan Context*

The protection of human rights is inversely affected by the presence of corruption in a society.<sup>75</sup> 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.<sup>76</sup> Some international organizations, including the Kenya National Commission on Human Rights, have even gone so far as to consider corruption a “crime against humanity.”<sup>77</sup> This is due to the undermining effect corruption has on the ability of a state to comply with its human rights obligations—it erodes both the state’s capacity to and the public’s confidence that the state will deliver services to the public.<sup>78</sup>

Since corruption depletes resources available for public spending, the United Nations Office of the High Commissioner for Human Rights has argued that corruption prohibits a state from taking steps to maximize “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.”<sup>79</sup> Moreover, the Committee on the Rights of the Child has

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<sup>75</sup> See United Nations Convention against Corruption, G.A. Res. 58/4, U.N. Doc. A/RES/58/4 (Oct. 31, 2003) (taking the view that corruption is adversely related to the realization of human rights).

<sup>76</sup> *Id.*

<sup>77</sup> See Corruption and Human Rights, *supra* note 1, at 23.

<sup>78</sup> See Office of the High Comm’r for Human Rights and the Gov’t of Pol., U.N. Conf. on Anti-Corruption Measures, Good Governance and Human Rights, *Background Note*, ¶ 3, HR/POL/GG/SEM/2006/2 (Nov. 8-9, 2006) [hereinafter *Conference on Anti-Corruption Measures*] (acknowledging that elements of the U.N. human rights system have commented on the inability of states to comply with their obligations as a result of corruption).

<sup>79</sup> *Id.* ¶ 6.

noted that corruption has a negative effect on Kenya's implementation of the Convention of the Rights of the Child.<sup>80</sup>

Corruption not only depletes resources that might otherwise be spent on essential public functions:

[C]orrupt management of public resources 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. Also, 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.<sup>81</sup>

In addition, in a society with a high incidence of corruption as well as a lack of aggressive efforts to hold those responsible accountable, one would also anticipate a high prevalence of human rights abuse at the horizontal level.<sup>82</sup> That is to say, human rights

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<sup>80</sup> See Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Kenya*, ¶ 9, U.N. Doc. CRC/C/15/Add.160 (Nov. 7, 2001) [hereinafter *Concluding Observations*] (attributing partial responsibility for the difficulties impeding the implementation of the Convention on the Rights of the Child to the rampant corruption within Kenya). See also Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Tajikistan*, ¶ 5, U.N. Doc. CRC/C/15/Add.136 (Oct. 23, 2000) (noting the difficulties which corruption has posed to the implementation of the Convention on the Rights of the Child in Tajikistan); Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Georgia*, ¶ 18-19, U.N. Doc. CRC/C/15/Add.124 (June 28, 2000) (stating that corruption has negatively affected the ability of Georgia to allocate budgetary resources in favor of children to the level required under the Convention on the Rights of the Child); Terracino, *supra* note 1, at 12-13 (listing many of the rights of a child that may be violated due to corruption).

<sup>81</sup> *Conference on Anti-Corruption Measures*, *supra* note 78, ¶ 6; see also *Concluding Observations*, *supra* note 80, ¶ 9, for a discussion regarding the Committee on the Rights of the Child's acknowledgment that corruption has a negative effect on the implementation of the Convention of the Rights of the Child with reference to Kenya.

<sup>82</sup> 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 to violate human rights. The duties individuals have regarding human rights are recognized in Part I, Chapter II of the African Charter on Human and Peoples Rights, which Kenya has signed and ratified. See African (Banjul) Charter on Human and Peoples' Rights, pt. 1, ch.



abuses among and between individuals in a society with high levels of corruption are likely to be high.<sup>83</sup> 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 in Kenya since 1992, on the other hand.<sup>84</sup> By contrast, countries where respect for human rights is high are unlikely to experience a high prevalence of corruption. This is supported by rankings in Transparency International's annual Corruption Perception Index for 2008.<sup>85</sup>

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2, OAU Doc. CAB/LEG/67/3rev.5 (June 27, 1981), 21 I.L.M. 58. Article 27, for example, provides that every "individual shall have duties towards his family and society" as well as the State and other "legally recognized communities." *Id.* pt. 1, ch. 2, art. 27. Article 29(4) obliges the individual to "preserve and strengthen social and national solidarity, particularly when the latter is threatened." *Id.* pt. 1, ch. 2, art. 29(4). As such, individuals who killed others, who took part in planning to cause chaos, or who 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. *See Id.* pt. 1, ch. 2, art. 27 (proclaiming the obligatory duties of every individual toward society, the state, and other legally recognized communities, and requiring that the rights and freedoms of every individual be exercised with respect toward the rights of others, collective security, morality, and the common interest).

<sup>83</sup> A good Kenyan example of this is the large pyramid scheme perpetrated on Kenyans by Kenyans in 2007 in which 2.4–2.6 million shillings were invested by Kenyan people in a company promising huge returns on the investment (upwards of 300%), promises which the owners knew to be false and which they never intended to repay. *See Woman Denies Sh2.4m Pyramid Scheme Fraud*, DAILY NATION (Nairobi), June 14, 2007, at 7 and Lucas Barasa & Jeff Otieno, *Victims of Pyramid Schemes Speak Out*, DAILY NATION (Nairobi), July 4, 2007, at 4–5 for a more detailed description of such schemes. While there is no apparent government involvement, a lack of accountability and the ability to redress grievances has made it difficult for the victims to get their money back. Despite government orders not to allow money to be withdrawn, corrupt bank managers are still allowing the perpetrators to withdraw money made from the pyramid scheme.

<sup>84</sup> *See* COMMISSION OF INQUIRY ON POST ELECTION VIOLENCE, REPORT ON POST-ELECTION VIOLENCE 444 (2008) [hereinafter WAKI COMMISSION REPORT] ("[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."), available at [http://www.eastandard.net/downloads/Waki\\_Report.pdf](http://www.eastandard.net/downloads/Waki_Report.pdf). *See also* Patricia Nyhan & Helen Epstein, *Kenya's Unfinished Democracy: A Human Rights Agenda for the New Government*, HUM. RIGHTS WATCH, Dec. 2008, at 5–6, 15–16 [hereinafter *Kenya's Unfinished Democracy*] for a description of the violence and human rights violations occurring during the 1992 and 1997 Kenyan presidential elections.

<sup>85</sup> *See* Transparency Int'l, *2008 Corruption Perception Index* (2008) (assigning all countries a Corruption Perception Index score and ranking them based upon the levels of corruption within each country as they are perceived by various business people and country analysts surveyed by Transparency International).

Anti-corruption initiatives 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, the anti-corruption measures aimed at achieving transparency and accountability<sup>86</sup> that give individuals the right to expose wrongdoing simultaneously promote the realization of the right to freedom of expression. Furthermore, 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, one that enables activism against corruption. This is why the United Nations Convention against Corruption ("UNCAC") requires that states enact so-called "Whistleblower Laws" to ensure the protection of those who come forward and expose governmental corruption.<sup>87</sup> Unfortunately, whistleblowers in Kenya all too often forfeit their jobs, health, or lives for exposing egregious incidents of corruption.<sup>88</sup> Such consequences are due, in part, to the all too lenient Kenyan laws in place for the protection of whistleblowers.<sup>89</sup> The Kenya Anti-Corruption Commission ("KACC") has called for the repeal and revision of these laws because, although the harassment and/or intimidation of whistleblowers is prohibited, the law does not have any penalty or punishment in place for those who choose to break the law. Even the "KACC [has] no powers to arrest and prosecute the offenders."<sup>90</sup>

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<sup>86</sup> Examples here include rules extending protection for whistleblowers.

<sup>87</sup> See Corruption and Human Rights, *supra* note 1, at 40-41 (noting that failure to enact such laws leaves "witnesses and victims unprotected[,] encourages corrupt practices and impunity, and discourages witnesses from fulfilling a public responsibility.")

<sup>88</sup> See, e.g., Fred Mukinda, *Murder Police Squad on the Loose*, DAILY NATION (Nairobi), Feb. 25, 2009, available at <http://www.nation.co.ke/News/-/1056/534982/-/view/printVersion/-/151ym2z/-/index.html> (claiming that "Kenya's ability to protect whistle blowers is in question following the officer's shooting"); Press Release, Office of Public Communications (Kenya), Whistleblowers Security Enhanced, Apr. 20, 2007, <http://www.communication.go.ke/news.asp?id=106> (noting that whistleblowers "are sometimes threatened with either murder or violence or both, [and] risk employer retaliation that could lead to job dismissal, demotion, transfer, no promotion, and no assignment of duties").

<sup>89</sup> See Amos Kareithi, *KACC Stands up for Whistleblowers*, EAST AFRICAN STANDARD, Aug. 22, 2007, at 9 (quoting the Kenya Anti-Corruption Committee as saying that the Witness Protection Act of 2006 "is not enough to protect witnesses in graft cases.").

<sup>90</sup> *Id.*

#### 4.3. Freedom of Expression

Corruption flourishes in countries that limit public knowledge about the manner in which governments and actors in the private sector make decisions.<sup>91</sup> The United Nations Convention against Corruption has even gone so far as to outline a list of categories of information that a government should make public.<sup>92</sup> This list includes: management of public finances, hiring of public officials, public administration, and general decision-making processes in the government.<sup>93</sup> Such items are included because a lack of information about the criteria a government uses to make budgetary allocations for health and education does not promote openness. In addition, when those allocations reveal favor towards some regions of a country and disfavor toward others, without the opportunity and freedom to question such allocations, corruption has the perfect opportunity to thrive. Further, corruption is likely to thrive when the criteria for awarding government contracts or selling government property are vague and such transactions are undertaken without providing information about such criteria to the public.

In short, "information in the control of public authorities is a valuable public resource and . . . public access to such information promotes greater transparency and accountability of those public authorities."<sup>94</sup> As such, when citizens have access to information about how and why their government and private sector actors make decisions that affect them, there is greater room for transparency and accountability.

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<sup>91</sup> See Kumar, *Corruption Development*, *supra* note 9, at 491-96, for a detailed example of this phenomenon in Japanese society.

<sup>92</sup> See *Corruption and Human Rights*, *supra* note 1, at 13 (identifying various categories of information which a government should make public in order to fight corruption and ensure effective government accountability).

<sup>93</sup> *Id.*

<sup>94</sup> TRANSPARENCY INT'L, USING THE RIGHT TO INFORMATION AS AN ANTI-CORRUPTION TOOL, 5 (2006), available at <http://www.transparency.org/publications/publications/right2know> (internal citations and quotations omitted). One area in Kenya where the citizens have been grossly uninformed is in the area of voting and voters' rights. Ms. Koki Muli has said that many politicians distribute money, food items, or both in exchange for votes and the Kenyan people have never been informed that this is illegal and that these bribes should not be accepted. See Susan Anyangu, *Bribery of Voters Condemned*, EAST AFRICAN STANDARD, July 16, 2007, at 10.

The foregoing principles hold largely true in Kenya. Corruption thrived in Kenya, especially following the systematic dismantling of the rule of law and tenets of good governance during the one-party era in the 1980s. In the 1990s, corruption continued to thrive 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 fell into the hands of powerful and highly connected individuals within the Moi government. Thus, when a Judicial Commission of Inquiry into the murder of Robert Ouko—who was, at the time of his murder, the Kenyan Minister for Foreign Affairs—began revealing high-stakes corruption among those close to President Daniel arap Moi, the government disbanded the Commission in order to foreclose more revelations.<sup>95</sup> In addition, when civil society groups began exposing corruption through documentation, President Daniel Moi extended his 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 had published an early report on corruption in Kenya.

#### 4.4. *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.<sup>96</sup> Respect for freedom of expression also leads to exposure of the causes and consequences of corruption and an atmosphere within which anti-corruption

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<sup>95</sup> See Aidan Hartley, *A Political Murder*, AFR. REP., May–June 1990, at 17–20 (discussing the murder of Minister Ouko, the political climate in Kenya at the time, and the ensuing government efforts to repress dissent); Robert I. Rotberg, *U.S. Should Push Kenya's Moi Toward Genuine Reform*, CHRISTIAN SCI. MONITOR, Dec. 5, 1991, at 19 (examining President Moi's corrupt practices and his possible involvement in the death of Minister Ouko).

<sup>96</sup> ANYANG' NYONG'O, *A LEAP INTO THE FUTURE: A VISION FOR KENYA'S SOCIO-POLITICAL AND ECONOMIC TRANSFORMATION* 91 (2007); See Kumar, *Corruption Development*, *supra* note 9, at 491–96, for a discussion regarding how the Japanese context provides a striking example of this phenomenon. While Japan is one of the more developed nations in the world, it still greatly struggles to curb governmental corruption, particularly within the legislature, due in large part to the press not freely exposing corruption.

strategies can be pursued.<sup>97</sup> The International Covenant on Civil and Political Rights<sup>98</sup> and the Constitution of Kenya guarantee the right to hold opinions and to express them without any interference.<sup>99</sup> This right includes the freedom to impart, to seek and to receive information and ideas of all kinds, in any form or medium, without interference by the government or private parties.

While times have changed, Kenyan governments from colonial times to the present have imposed heavy-handed measures limiting the printing, publication and distribution of information that 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 were raided and often destroyed.<sup>100</sup> Even as recently as 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 newspaper and magazine registration and bond fees by high margins, a move publishers of alternative newspapers – who were often unafraid to expose high level corruption – alleged was aimed at putting them out of business and stifling expression.<sup>101</sup>

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<sup>97</sup> See generally Helen Darbishire, *The Rights of Access to Information in Fighting Corruption – A Human Rights Perspective* (July 28, 2007) (unpublished paper prepared for the International Council on Human Rights Policy, Review Meeting on Corruption and Human Rights) (examining how the right to information, and government efforts to protect that right, leads to the exposure and prevention of corruption), available at <http://www.ichrp.org/en/search?q=Helen+Darbishire> (follow “Right to Information as a Tool to Combat Corruption” link).

<sup>98</sup> See International Covenant on Civil and Political Rights art. 19, Mar. 23, 1976, 999 U.N.T.S. 171, 6 I.L.M. 368 (decreeing a universal right to freedom of opinion and expression).

<sup>99</sup> Section 79(1) of the Constitution provides:

Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information 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.

CONSTITUTION, Art. 79(1) (2008) (Kenya).

<sup>100</sup> See James Thuo Gathii, *Freedom of Expression Without a Free Press: An Inquiry Into a Kenyan Paradox* (1995) (unpublished LL.M. thesis, Harvard Law School) (on file with author).

<sup>101</sup> See COMMITTEE TO PROTECT JOURNALISTS, *ATTACKS ON THE PRESS 2003: KENYA* (2004), available at <http://cpj.org/2004/03/attacks-on-the-press-2003-kenya.php>

Fortunately, in a decision on October 3rd, 2008 dealing with the dismissal of a defamation case, the High Court noted that large damage awards in some defamation cases were “not founded on a clearly demonstrable basis of compensation for [the] injury suffered” and were, therefore, a clear departure from Court of Appeals’ precedent.<sup>102</sup>

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 ominously hearkened back to the regrettable, dark days of press repression under single-party rule in Kenya. In the 1980s and 1990s, President Moi used national security as a rationale to heavily restrict the press’s freedom. Such repression was justified on the premise that Section 79(2) of the Constitution, which enables the government to limit freedom of expression in the public interest.<sup>103</sup> The judiciary in turn developed jurisprudence deferential to the government’s authority to limit the press’s freedom in the public interest. In all these instances, the harassment, unjustified arrest and prosecution of journalists – often on trumped up charges – effectively led to the infringement of the rights to freedom of opinion, expression and information.<sup>104</sup>

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(reporting that Wako “raised the libel insurance bond that publishers must pay the government from 10,000 Kenyan shillings (U.S. \$130) to 1 million Kenyan shillings (U.S. \$13,200) and penalizes vendors who sell unlicensed publications. Anyone caught selling illegal publications faces six months in jail and a fine of 20,000 Kenyan shillings (U.S. \$265)”; see also *Kenya’s Unfinished Democracy*, *supra* note 84, at 17 (reporting that numerous Kenyan journalists believe that defamation laws are the greatest threat to freedom of expression because an often corrupt judiciary will set damage awards artificially high, bankrupting smaller news outlet that cannot afford the damages and thus encouraging self-censorship).

<sup>102</sup> Jillo Kadida, *Kenya: Court Throws Out Kiunjuri Case on Defamation Against “Nation”*, DAILY NATION (Nairobi), Oct. 3, 2008, available at <http://www.nation.co.ke/news/-/1056/477000/-/tkx6nh1-/index.html>.

<sup>103</sup> See CONSTITUTION, art. 79(2) (2008) (Kenya) (stating that exceptions to freedom of expression can be made when it is reasonably required for defense and public policy).

<sup>104</sup> Darbshire, *supra* note 97, at 3 (discussing the fundamental human right of access to information); see also *Kenya’s Unfinished Democracy*, *supra* note 84, at 14–15 (describing the case of several land reform advocates being arrested on trumped up murder charges in order to silence their protests of the Kenyan government’s land grabbing policies).

Highly connected Kenyans used the judiciary, through defamation suits, to chill the ability of the press to report on allegations or reports of corruption.<sup>105</sup> Legislative reforms passed by the one party parliament prior to the first multi-party elections in 1992 enhanced damage awards for those found to have been defamed further compromised the development of a lively, open and free press and particularly hampered the press's ability to expose the misdeeds of politicians of the one party era.<sup>106</sup> While defamation suits have been used to make corruption public, the High Court in *Francis Lotodo v. Star Publishers* declined to limit the distribution of allegedly defamatory statements.<sup>107</sup> The court held that the 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."<sup>108</sup> However, Kenyan courts have limited the ability of the press to freely report even when the issues involved were of general public interest, such as the common law sub-judice rule<sup>109</sup> (commonly cited by corrupt officials) and the lack of a community of interest between readers and newspapers.<sup>110</sup>

Another way in which the government has limited reporting on corruption is through the use of the so-called "Official Secrets

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<sup>105</sup> See Oraro v. Mwangi, petition 1205 of 1993 (High Ct. of Kenya at Nairobi July 6, 1993) (Elec. Kenyan L. Rep., Case Search) (awarding the plaintiff, a lawyer, 1.5 million Kenyan Shillings, roughly \$33,000 U.S. dollars). The previous highest award prior to the amendment had been one-fifteenth of this amount. See P.G. Okoth v. Wachira, appeal 48 of 1977 (Court of Appeal for Kenya) (unreported), cited in Gibson Kamau Kuria, *The Interpretation of the Law of the Press in Kenya*, THE ADVOCATE, June 1994, at 18.

<sup>106</sup> "Provided that where the libel is in respect of an offence punishable by death the amount assessed shall not be less than one million shillings [U.S. \$20,000], and where the libel is in respect of an offence punishable by imprisonment for a term of not less than three years the amount assessed shall not be less than four hundred thousand shillings [U.S. \$5000]." The Defamation Act, (2005) Cap. 36 § 16A (Kenya). These amounts are exorbitant even for the big, foreign-owned newspapers.

<sup>107</sup> Lotodo v. Star Publishers, petition 883 of 1998, (High Ct. of Kenya at Nairobi May 12, 1998) (Elec. Kenyan L. Rep., Case Search).

<sup>108</sup> *Id.* at \*3.

<sup>109</sup> The *sub-judice* rule bars newspapers from reporting on cases filed in the courts that are not yet the subject of open court proceedings. For details, please refer to George Oraro, *supra* note 103.

<sup>110</sup> See *Daily Nation v. Mukundi*, (1975) E.A.L.R. 311, 315 (Kenya).

Act.”<sup>111</sup> In the recent past, the Kibaki government defended the lack of transparency in the military’s procurement of contracts through the need for secrecy surrounding such national security matters. The then Minister of State in charge of National Security and the Provincial Administration, Chris Murungaru, defended the Kibaki government from charges of wrongdoing on the grounds that the previous government had entered into most of the contracts and that his government simply inherited them.<sup>112</sup> Regarding the Navy ship contract—procured while he was Minister of State in charge of National Security—Murungaru argued that, before it was awarded to a Spanish consortium of companies, there had been a procurement process involving eight international companies. He claimed this was done even though, among all nations, contracts for national security items are awarded through closed bidding and single sourcing methods.<sup>113</sup> Remarkably, the High Court has effectively held that the government’s interest in contractual confidentiality supersedes the public’s interest in investigating allegations of corruption in a contract between the government and a corporation.<sup>114</sup>

Only rarely has the judiciary spoken in defense of press freedom in the manner it did in *Cyrus Jirongo v. Nation Newspapers*.<sup>115</sup> In *Cyrus Jirongo*, the court observed that the “public at large has a interest in knowing how public funds are being spent by a statutory corporation that administers public funds.”<sup>116</sup> The allegation that public funds were being wasted made the public interest in the case more significant than in cases where newspapers were restricted from printing information. Similarly,

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<sup>111</sup> See The Preservation of Public Security Act, (2005) Cap. 57. (Kenya) (stating rules and regulations for the preservation of public security).

<sup>112</sup> *Murungaru Speaks Out on Graft Claims*, DAILY NATION, Feb. 8 2006, available at <http://www.nation.co.ke/magazines/-/1190/106754/-/1stujfz/-/index.html>.

<sup>113</sup> According to Murungaru, “[I]t is the practice the world over, including in the ‘democracy champions’ that are Britain and the U.S., for military and security-related acquisitions to be done through closed tenders and often through single sourcing.” *Id.*

<sup>114</sup> See *Nedermar Technology BV Ltd. v. Kenya Anti-Corruption Comm’n*, petition 290 of 2006 (High Ct. of Kenya at Nairobi Oct. 30, 2008) (Elec. Kenyan L. Rep., Case Search) (holding that the public interest is safeguarded where the Kenyan government asserts a defense of contractual confidentiality to corruption charges brought in the Hague).

<sup>115</sup> THE ARTICLE 19 FREEDOM OF EXPRESSION HANDBOOK 160–61 (Sandra Coliver ed., 1993) (discussing *Jirongo v. Nation Newspapers Ltd.*, No. 5276 (High Ct.) (Kenya) (1992)).

<sup>116</sup> *Id.*



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.<sup>117</sup>

4.5. *Freedom of Expression in the Context of Donor Criticism of Government Corruption*

In September 1991, Denmark announced aid cuts to Kenya following a report that official corruption had siphoned off over \$40 million (U.S.) from Danish-sponsored projects in 1990. Norway, another donor critical of Moi-era corruption, strongly protested the arrest of Koigi Wa Wamwere upon his return to Kenya in October 1991. The large amounts of aid flowing in from Denmark and Norway put Kenya in a high-risk situation for corruption to have a widespread impact on human rights because of the large amount of money available to the government for misuse. This risk is especially high when coupled with the fact that the government decisions in Kenya were generally not transparent or open to the general public.<sup>118</sup> Norway's criticism and growing concerns about corruption led the Kenyan government to terminate diplomatic links with Norway. Announcing the termination, then Foreign Affairs minister Ndolo Ayah condemned Norway for providing sanctuary to Kenyan "criminal fugitives." Said Ayah:

We cannot be held ransom by anybody in terms of aid or otherwise [sic]. 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.<sup>119</sup>

This termination of diplomatic ties with Norway was overwhelmingly endorsed by a Parliamentary resolution in the single-party Parliament.

While the Nation Alliance of Rainbow Coalition government of President Kibaki that ascended to power more than a decade later did not cut diplomatic ties with the U.K. or the growing number of

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<sup>117</sup> The holding was affirmed in *Christopher Ndarathi Murungaru v. Kenya Anti-Corruption Commission and Another (Murungaru II)*, petition 54 of 2006 (High Ct. of Kenya at Nairobi Dec. 1, 2006) (Elec. Kenyan L. Rep., Case Search).

<sup>118</sup> See generally *supra* Section 4.4 (Why Freedom of Expression is Important).

<sup>119</sup> See James Gathii, Center for Law and Research, Int'l Legal Political Transition Project, *The External Interest in Kenya's Impending Change* 16 (2002).

nations critical of Kenya's high-level official corruption, Kiraitu Murungi's advice that these embassies should stay within the Vienna Convention on Diplomatic Relations sounds quite similar to Ndolo Ayah's 1991 address to Norway. The Ayah-Murungi position that donors should not interfere with Kenya's sovereignty by criticizing the government of suspected or existing corruption ignores Kenya's freely ratified international, anti-corruption treaties. Further, Kenya's sovereignty cannot be 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 Kenya African National Union government did in 1991.

More importantly, since the end of the Cold War, new criteria relating to government recognition have emerged. The criteria for collective non-recognition have evolved to constitute a set of prerequisites. This set includes:

- Support for democracy and the rule of law, emphasizing the key role of elections in the democratic process.
- Safeguarding human rights, based on a 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 the uninhibited entry of foreign investments consistent with the requirements of the World Trade Organization and Bretton Woods institutions

A government that does not meet 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 its economic agenda, stated in the New Economic Partnership for African Development.<sup>120</sup> There is in fact a peer review process under the auspices of the African Union

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<sup>120</sup> For a more in-depth analysis, please refer to James Gathii, *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 *TRANSNAT'L L. & CONTEMP. PROBS.* 179 (2003).

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 are measures usually taken as a last resort. They are typically preceded by negotiation as well as an assortment of other measures seeking to influence a state’s behavior, such as suspension from certain international forums, open condemnations, and sanctions.<sup>121</sup> When it occurs, de-recognition takes a variety of forms. It may involve cessation of development assistance from bilateral partners, suspension of loans from the Bretton Woods institutions until certain conditions are met, or 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. This has certainly been seen within the bounds of market reformers, especially in the Bretton Woods institutions and the leading industrial countries, as will be explored more fully in Section 3. Another reason the Ayah- Kiraitu thesis rings hollow today is that Kenya has signed onto international treaties aimed at combating corruption. These treaties are the United Nations Convention against Corruption<sup>122</sup> and the African Union Convention on Preventing and Combating Corruption.<sup>123</sup> By virtue of being signatories to these two treaties, Kenya has transformed 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

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<sup>121</sup> For example, in early 2002 when President Mugabe was roundly condemned by the United Kingdom and the United States for his land policies and his alleged involvement in rigging his election, a number of African states hesitated to critique him. See Dagi Kimani, *Why African States Won’t Condemn Mugabe*, THE EAST AFRICAN, Mar. 4, 2002, available at <http://www.theeastafrican.co.ke/news/-/2558/239632/-/t7e2o3z/-/index.html>; Adolf Mkenda, *Why I refuse to condemn Mugabe*, PAMBAZUKA NEWS, May 7, 2009 (discussing why the West has been more critical of Mugabe than other leaders who have worse records in the areas of human rights and democracy).

<sup>122</sup> G.A. Res. 58/4, *supra* note 75.

<sup>123</sup> African Union Convention on Preventing and Combating Corruption, July 11, 2003, 43 I.L.M. 5.

standards upon which the Kenya Anti-Corruption and Economic Crimes Act must be measured."<sup>124</sup>

#### 4.6. *Investigation and Prosecution of Corruption Cases*

As 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. While the investigation and prosecution of corruption crimes is impugned where these rights are violated, there is also the potential for using these due process rights to defeat corruption charges and prosecution. In this section, the discussion centers on three examples of how well-placed corruption defendants have used the Bill of Rights under the Kenyan Constitution to stop corruption prosecutions against them.<sup>125</sup> At the moment, the Kenya Anti-Corruption Commission lists no less than thirty constitutional petitions challenging the constitutionality of its corruption proceedings, including its investigations, charges, search warrants, and the retrieval of documentary evidence.

One of the most widely reported cases involving due process rights in the corruption context is *Republic v. Judicial Comms'n of Inquiry into the Goldenberg Affair ex parte Saitoti* (hereinafter the *Saitoti* decision).<sup>126</sup> 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 pretrial rights to a fair trial. According to the Court, the Commissioners made several remarks, errors, and decisions that not only demonstrated bad faith and bias, but also violated the applicant's "constitutional assurance that he will have a fair trial

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<sup>124</sup> See *Murungaru II*, at \*43 (Elec. Kenyan L. Rep., Case Search). The Court added:

This is so 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.*

<sup>125</sup> See, e.g., *Republic v. Jud. Comm'n of Inquiry into the Goldenberg Affair ex parte George Saitoti*, petition 102 of 2006 (High Ct. of Kenya at Nairobi July 31, 2006) (finding that prosecuting Saitoti would be contrary to the Constitution of Kenya).

<sup>126</sup> *Id.*

and presumption of innocence.”<sup>127</sup> According to the Court, in recommending investigation of the applicant, the Commission of Inquiry failed to take into account information it had received that demonstrated the applicant’s innocence. For example, the Court noted the Commission had ignored information that the payments at 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” and a “failure to act fairly, faithfully and impartially.”<sup>128</sup> The Court thus prohibited the Attorney General or any other person from filing or even prosecuting the applicant for 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 a similar order directing the Attorney General not to bring any further charges that were similar to or a variation of those brought against the then powerful cabinet of Minister Kipng’eno Arap Ng’eny, because there had been a lengthy and unexplained nine-year delay between the time of the alleged commission of corruption offenses and the initiation of prosecution by the Attorney General in April 2001.<sup>129</sup> The Court reasoned that having left office nine years earlier, 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 nine-year delay was not only oppressive but also “motivated by some ulterior motive”<sup>130</sup> and therefore 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.”<sup>131</sup>

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<sup>127</sup> *Id.* at \*51 (stating that Section 77(1) of the Kenyan Constitution provides for the presumption of innocence).

<sup>128</sup> *Id.* at \*56.

<sup>129</sup> See *Republic v. Attorney Gen. ex parte Kipng’eno Arap Ng’eny* (Ng’eny Case), petition 406 of 2001 (High Ct. of Kenya at Nairobi Nov. 13, 2001) (Elec. Kenyan L. Rep., Case Search) (prohibiting the Attorney General from bringing any further charges against Ng’eny); see also *MATI & GITHONGO*, *supra* note 16, at 12-14 for a detailed discussion of the Ng’eny case.

<sup>130</sup> *MATI & GITHONGO*, *supra* note 16, at 25.

<sup>131</sup> CONSTITUTION OF KENYA, § 77(1) (1992).

On the face, both the *Saitoti* and *Ng'eny* decisions are very plausible. They appear to 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 is completely off the mark. Not simply because in both instances both persons charged were senior government officials, but also because in both cases the courts narrowed their inquiry merely to these due process and natural justice rights. This goes against nearly a century of Kenyan criminal law jurisprudence where it has always been the case that without an express statutory provision, there can be no time limitation with regards to prosecutions of criminal offenses.<sup>132</sup>

In addition, the courts failed to examine the broader context against which the charges had been belatedly brought. It was not until 1997 that an anti-corruption watchdog was eventually established. For the first time, the short-lived Kenya Anti-Corruption Authority brought charges against corruption suspects in cases that 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 offense,<sup>133</sup> Attorney General Amos Wako has often argued that the Commissioner of Police failed to comply with his directives to investigate certain offenses.<sup>134</sup> In short, a culture of impunity developed in Kenya and when a new anti-corruption authority was initiated towards the end of the 1990s, 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.<sup>135</sup> In both *Saitoti* and *Ng'eny*, the courts could have argued that the applicants had yet to show that there was any affront to their rights, since the courts had not even had a chance to establish whether the charges brought against the applicants had any substance in the first place.

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<sup>132</sup> See MATI & GITHONGO, *supra* note 16, at 12–14 (discussing time limitations with regards to criminal offenses).

<sup>133</sup> CONSTITUTION OF KENYA, § 26(4) (1992).

<sup>134</sup> See WAKI COMMISSION REPORT, *supra* note 84, at 453 (reprinting Attorney General Wako's Testimony to the Waki Commission regarding the shortcomings of Kenya's law enforcement in investigating certain types of charges).

<sup>135</sup> *Id.*

If the *Saitoti* and *Ng'eny* decisions had been made to protect individuals who were being unfairly harangued by the State, they would be good law. These decisions would have been particularly welcome in light of Kenya's history of criminalization of dissent and abuse of the criminal justice system for political purposes.<sup>136</sup> 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 establish 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 government officials operated within a constitutional, legal and political system that was created and maintained precisely to validate the very conduct for which the accused were on trial.<sup>137</sup>

Clearly in both the *Saitoti* and *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 to punish offenders are critical to the success of anti-corruption strategies.<sup>138</sup>

Not only have procedural human rights been used by those in power to defeat corruption charges, but so too have contract rights. This came to the forefront in the Anglo-Leasing Scandal. In 2005, First Mercantile Securities Corporation was the first of the Anglo-Leasing Companies to sue the Kenyan government for breach of contract for non-payment.<sup>139</sup> First Mercantile Securities Corporation brought the suit in Swiss court and the Kenyan

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<sup>136</sup> The Author believes the decisions would also be welcome in light of Kenya's history of defendants having their due process rights violated when they are forced to languish in remand prison for years while they await their day in court.

<sup>137</sup> See James Thuo Gathii, *Popular Authorship and Constitution Making: Comparing and Contrasting the DRC and Kenya*, 49 WM. & MARY L. REV. 1109, 1125-34 (2008) (discussing how issues of process, though important in validating the new Constitution, had shut off other equally important considerations).

<sup>138</sup> NYONG'O, *supra* note 96, at 78-95.

<sup>139</sup> See *KACC Stopped from Seeking True Identity of 'Anglo-Leasing' Firm*, THE EAST AFRICAN, July 30, 2007, at 1 (citing First Mercantile's claims against the Kenyan government).

Government tried to use Mutual Legal Assistance to get the particulars of the First Mercantile Securities Corporation.<sup>140</sup> This was done in an effort to get to the bottom of who had created the company, who was running the company, whether they had ties to the Kenyan Government, and who had facilitated this corrupt agreement. However, First Mercantile was able to go to court in Nairobi and prevent the Kenyan government from acquiring further information on the grounds that if the information about the company was revealed to Kenya, it would render the pending action in Switzerland 'nugatory'.<sup>141</sup> The court ruled, in effect, that the importance of contract rights trumped that of the fight against corruption and the siphoning of public money. This decision is based on legally defensible conclusions, however given the massive amounts of money stolen from the government during the Anglo-Leasing Scandal<sup>142</sup> and the difficulty the government has had getting to the bottom of it. It is unfortunate that the High Court of Nairobi put a halt to the investigation.

In another case where the Kenya Anti-Corruption Commission ("KACC") was stymied on the basis of legally defensible conclusions, a court ruled that section 31 of the Anti-Corruption and Economic Crimes Act was unconstitutional.<sup>143</sup> This section gave the KACC the power to order people to give up their passports if they are suspected of corruption or economic crime. This ruling was also supported by Keriako Tobiko, the Kenyan Director of Public Prosecutions who said that this law was "more of an instrument of oppression than an aid to the fight against corruption."<sup>144</sup>

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<sup>140</sup> *Id.*

<sup>141</sup> Jibril Adan & Judy Ogotu, *Court Stops KACC's Probe on Swiss Firm*, THE STANDARD, July 11, 2007, at 10; see also *KACC Stopped from Seeking True Identity of 'Anglo-Leasing' Firm*, *supra* note 139, at 2 (discussing background of First Merchantile's claims).

<sup>142</sup> See *KACC Stopped from Seeking True Identity of 'Anglo-Leasing' Firm*, *supra* note 139, at 2 (stating that the contract with First Mercantile Securities Corp. alone was for a total sum of \$12,716,250).

<sup>143</sup> The Anti-Corruption and Economic Crimes Act No. 03 § 31 (2003) (Kenya) ("On the *ex parte* application of the Commission, a court may issue an order requiring a person to surrender his travel documents to the Commission if (a) the person is reasonably suspected of corruption or economic crime; and (b) the corruption or economic crime concerned is being investigated.").

<sup>144</sup> Nyakundi Nyamboga, *Blow on Graft Law Deserved – DPP*, THE STANDARD (Nairobi), June 27, 2007, at 10.



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<sup>145</sup> and the presumption of innocence,<sup>146</sup> that required one to be considered innocent until proven guilty.<sup>147</sup> In another case, the forfeiture provisions of these laws were challenged for giving the KACC wide discretion that threatens to undermine protected rights, including the right not to have private property taken away arbitrarily.<sup>148</sup> More recently, an increasing number of defendants are challenging the legal status of the KACC to investigate and prosecute corruption cases. High Court Judge Nyamu barred the KACC from investigating an allegedly corrupt contract in which the government paid 3 billion Kenyan shillings.<sup>149</sup> The basis for this ruling was that the KACC was not allowed to investigate corruption cases that occurred before the anti-corruption body was created. Additionally, First Mercantile Securities and others have brought into question whether the KACC has overstepped its constitutional bounds when it investigates or prosecutes corruption cases.<sup>150</sup>

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<sup>145</sup> CONST. OF KENYA § 77(7) (2008) ("No person who is tried for a criminal offence shall be compelled to give evidence at the trial.").

<sup>146</sup> *Id.* § 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."). However, this is qualified by section 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."). *Id.* at § 77(12)(a)

<sup>147</sup> See *Murungaru II*, at \*32 (Elec. Kenyan L. Rep., Case Search) (discussing the fairness of a trial in which constitutional guarantees are not met).

<sup>148</sup> Peter Schroth, *National and International Constitutional Law Aspects of African Treaties and Laws against Corruption*, 13 *TRANSNAT'L L. & CONTEMP. PROBS.* 83, 95–103 (2003) (discussing the constitutional concerns that arise with legislation, such as the Kenya Anti-Corruption and Economic Crimes Act, that sweeps broadly in an attempt to wipe out illegal behavior).

<sup>149</sup> This contract was with a company called Nedemar Technology BV and was for the creation of Project Nexus.

<sup>150</sup> See *KACC Stopped from Seeking the Identity of 'Anglo-Leasing' Firms*, *supra* note 142, at 2 (discussing First Mercantile's claims against KACC).

#### 4.7. Separation of Powers Issues

In *Gachiengo v. Republic*,<sup>151</sup> the High Court held that the appointment of a Judge to head the precursor to the Kenya Anti-Corruption Commission, the Kenya Anti-Corruption Authority, was a violation of the constitutional requirement of separation of powers.<sup>152</sup> The court also held that the power to undertake criminal prosecutions in Kenya was exclusively vested in the Attorney General, and for Parliament to the Kenya Anti-Corruption Authority such prosecutorial power was a violation of the Constitution. When this decision came down, the cases were 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.<sup>153</sup> Soon after this case, the Authority was disbanded.<sup>154</sup> The Kenya Anti-Corruption Commission was established thereafter.

The *Gachiengo*, *Saitoti* and *Ng'eny* cases all demonstrate the paradoxical nature of the relationship between human rights and corruption. While it is often assumed that respect for human rights can help in combating corruption, it is also true that those who 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 offenses opportunities to defend their due process rights in the criminal justice system. In a judiciary like Kenya's, where rules and rights are often defended as process rights, powerful individuals benefit from having to defend their cases because courts are unlikely to closely scrutinize the totality of the circumstances that result in charges taking too long

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<sup>151</sup> *Gachiengo v. Republic*, petition 302 of 2000 (High Ct. of Kenya at Nairobi Dec. 22, 2000) (Elec. Kenyan L. Rep., Case Search) (sitting as a Constitutional Court).

<sup>152</sup> See Schroth, *supra* note 148, at 92; MATI & GITHONGO, *supra* note 16, at 4 (citing argument from *Gachiengo* case where defendants argues that it was contrary to the principle of separation of power for a judge to preside over a corporate prosecutorial body).

<sup>153</sup> These were Kig'eno arap N'geny, Wilfred Kimalat, and Zipporah Wandera respectively. See MATI & GITHONGO, *supra* note 16, at 8.

<sup>154</sup> See SCHROTH, *supra* note 148, at 92 (noting that the Kenyan government took advantage of the court's ruling in *Gachiengo*, which held it unconstitutional for a judge to hold the position of high commissioner of the anti-corruption commission, to disband the commission even though disbandment was not required by the court); MATI & GITHONGO, *supra* note 16, at 12.

to reach the courts. Defendants also benefit from the lack of political will that underlies many half-hearted attempts to prosecute high-level corruption suspects.

For example, in *Ng'eny* the court prohibited the Attorney General from bringing charges against a powerful government minister on the grounds that the charges were flimsy, even though they alleged that the Minister had caused losses to a public corporation amounting to over 180 million Kenyan Shillings. The *Ng'eny* court's holding must also be seen as an example of the ability of a well-heeled defense attorney to legally impugn a legal order that is generally inefficient and slow—a quality that benefits the wealthy but is unlikely to operate favorably towards the thousands of prisoners held for years in custody while awaiting trial or an appeal.<sup>155</sup> Seen in this broader context, the *Saitoti* and *Ng'eny* decisions begin to look more like a travesty of justice than otherwise. Similarly, in the *Murungaru* case, the Court of Appeal ordered the Kenya Anti-Corruption Commission not to implement and enforce a notice to Minister Chris Murungaru asking him to declare his wealth under the Anti-Corruption and Economic Crimes Act of 2003.<sup>156</sup> In a remarkable reversal of the *Ng'eny* and *Saitoti* tradition, the High Court dismissed the challenge made in *Murungaru* to the constitutionality of the power of given to the Kenya Anti-Corruption Commission to require people reasonably suspected of corruption to provide statements 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.<sup>157</sup> This judgment differed fundamentally from that of the Court of Appeal, which

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<sup>155</sup> MATI & GITHONGO, *supra* note 16.

<sup>156</sup> See *Murungaru v. Kenya Anti-Corruption Commission* (Murungaru I), petition 43 of 2006, at \*13 (Ct. of App. At Nairobi Mar 24, 2006) (Elec. Kenyan L. Rep., Case Search) (ordering a stay of implementation of the notice requesting Murungaru to declare his wealth pending an adjudication on the constitutionality of the note in the High Court).

<sup>157</sup> See *Murungaru II*, at \*42 (Elec. Kenyan L. Rep., Case Search) (holding that it was not a violation of Murungaru's constitutional rights to enforce a note requesting him to declare his wealth). In the same tradition as *Murungaru* is *Meme v. Republic*, (2004) 1 K.L.R. 637 (High Ct.) (Kenya). In circumstances analogous to those in *Saitoti*, *Ngeny* and *Murungaru*, the High Court in *Meme* decided that a constitutional challenge to trial in the Anti-Corruption courts was unfounded and would not deny the defendant his right to presumption of innocence. *Id.* at 691.

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-out corruption, the *Ng'eny*, *Saitoti* and *Gachiengo* cases demonstrate that Kenyan law itself is deeply implicated in producing corruption.<sup>158</sup> 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 were endorsed in an international agreement between Kenya and the International Monetary Fund that the Court found Kenya was obliged to comply with under International Law.

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

In 2003 then powerful Minister of Energy Kiraitu Murungi, who was 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.<sup>159</sup> In his view, it was becoming too expensive and cumbersome to investigate and prosecute those

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<sup>158</sup> The view that Kenyan Law has sometimes helped fuel corruption has also been taken with regard to laws and acts passed by the Executive Branch. KENYA ANTI-CORRUPTION COMM'N & ASS'N OF PROF'L SOCIETIES IN E. AFR., A REPORT OF THE JOINT WORKSHOP ON GOVERNANCE, ETHICS AND INTEGRITY AMONG PROFESSIONALS 5TH-6TH OCTOBER, 2006, 18 (2006) (observing that the proper approval process for projects is "lengthy and bureaucratic" and managed by many uncoordinated, uncontrolled regulatory boards). See also Abiya Ochola, *Some Laws Enhance Corruption – Report*, THE STANDARD (Nairobi), July 28, 2007, at 11.

<sup>159</sup> This was not the first time Kiraitu was expressing such views. See Kiraitu Murungi, *Putting the Past to Rest: The Dilemmas of Prosecution and Amnesty in the Fight Against Corruption* (unpublished paper). Here, in a paper prepared to generate debate for Transparency International (Kenya), Kiraitu argued that "[n]o effective anti-corruption strategy can be put in place in the present context as it would threaten those in power." *Id.* at 7. This argument was made when President Moi was still in power. His argument, made in 2003, was that the cost of prosecution outweighed the benefits of prosecution were made when he was a powerful Minister of Justice and Constitutional Affairs. However, in 2006, he resigned in the face of the Anglo-Leasing Corruption scandal in which he was implicated.

cases. Time and scarce resources were being expended to investigate cases where the trail of evidence had gone cold. According to Murungi, the value added in the fight against corruption was 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 large measure frustrated by the use of constitutional challenges to corruption investigations and prosecutions for violating the rights of those accused. While the Bill of Rights of the Kenyan Constitution had been declared inoperative in the 1980s, in the decade beginning in 2000, the judiciary rediscovered it particularly as a weapon of choice by those who could afford well lawyers to make their case. As such, rights claims that stood no chance of checking the dictatorial one-party era of President Moi experienced resurgence as noted above in the 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's objection grew out of his exasperation with fighting old corruption cases, Justice Aaron Ringera, the Director of the Kenya Anti-Corruption Commission, has recently argued in favor of limiting prosecution of old corruption cases on grounds similar to the equitable doctrine of laches—this time not to delay bringing cases such as those the *Ng'eny* court found unconstitutional, but on the fact that there was a limitation of bringing cases under Kenya's corruption laws.

According to Ringera, Kenya's Limitations of Actions Act does not allow for the recovery of such monies and property six years after the date of the commission of the offence.<sup>160</sup> Justice Ringera asserted that the Commission's work of recovering stolen assets and monies locally and abroad was limited by the statute of limitations in this law,, which prohibits recovery six years after cases involving breach of trust, fraud, and the looting currently prohibited by the Economic Crimes Act, the Anti-Corruption Act,

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<sup>160</sup> See *Lawyers Fault KACC's Stand on Looted Public Funds*, SUNDAY NATION (Nairobi), June 3, 2007, at 7.

and the Penal Code. He also argued that the Limitations of Actions Act does not permit the pursuit of theft cases after three years.<sup>161</sup>

Justice Ringera's assertions on the interpretation of the Limitations of Actions Act are challengeable on a number of valid legal bases. 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.<sup>162</sup> Justice Ringera's interpretation of Kenyan law inconsistently with the Commission's declared objective of zero-tolerance on corruption seemed strikingly 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 to 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 corruption and the way it has siphoned off public resources at the expense of certain communities was one of the underlying issues that contributed to post-election violence.<sup>163</sup> As noted above, the Waki Commission

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<sup>161</sup> *See id.* Whether or not this is actually the case, however, has been debated as the Law Society of Kenya disagrees with Mr. Ringera's assessment.

<sup>162</sup> The power to extend the limitation period is contemplated by the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya. Section 59 of Chapter 2 provides that:

[w]here in a written law a time is prescribed for doing an act or taking a proceeding, and power is given to a court or 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.

The Interpretation and General Provisions Act, (2007) Cap. 2 § 59. (Kenya).

<sup>163</sup> *See* KENYA NAT'L COMM'N ON HUMAN RIGHTS, ON THE BRINK OF THE PRECIPICE: A HUMAN RIGHTS ACCOUNT OF KENYA'S POST-2007 ELECTION VIOLENCE 17-25 (2008) (noting that corruption, particularly regarding land allocation has long plagued Kenyans, who had hoped to elect political leaders to tackle the problem).

on Post-Election Violence also attributed the violence to the culture of impunity in the country.<sup>164</sup> An opportunity to address impunity squarely was lost early in the Kibaki administration when it rejected the recommendation of a task force for the establishment of a Truth and Reconciliation Commission. The broad-ranging powers the Commission would have wielded were feared to be inconsistent with the Kibaki administration's decision not to reopen abuses of the Moi regime.<sup>165</sup> 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 because of threats to 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.<sup>166</sup> 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.<sup>167</sup>

#### 4.8. *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 importantly, this system of protection of rights of minority communities was specially entrenched in the

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<sup>164</sup> See WAKI COMMISSION REPORT, *supra* note 84, at 443-45.

<sup>165</sup> For the Task Force Report, see Makau Mutua, *Republic of Kenya Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission*, 10 BUFF. HUM. RTS. L. REV. 15 (2004) (recommending the creation of a Truth Commission and suggesting the matters it should investigate and the manner in which it should be organized in detail).

<sup>166</sup> See MARS GROUP KENYA, GAP REPORT NO. 2, ILLEGALLY BINDING: THE MISSING ANGLO-LEASING SCANDAL PROMISSORY NOTES 25-29 (2007) (providing a full report on the scandal, including information from John Githongo), available at [http://publications.marsgroupkenya.org/GAP\\_Report2\\_Passports/GAP2\\_Report\\_Web\\_Version.pdf](http://publications.marsgroupkenya.org/GAP_Report2_Passports/GAP2_Report_Web_Version.pdf)

<sup>167</sup> *Id.*

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.<sup>168</sup> 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.<sup>169</sup> 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 1980s, 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.<sup>170</sup>

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

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<sup>168</sup> See *Kenya's Unfinished Democracy*, *supra* note 84, at 4-5 (outlining constitutional amendments that served to increase the presidential power by outlawing all opposing political parties and giving the president the power to fire judges and civil servants).

<sup>169</sup> *Id.* at 4-5 ("the executive branch . . . wield[s] considerable control over the judicial and legislative branches of government through a system of patronage and threats"); *cf.* Y.P. GHAI & J.P.W.B. MCAUSLAN, PUBLIC LAW AND POLITICAL CHANGE IN KENYA: A STUDY OF THE LEGAL FRAMEWORK OF GOVERNMENT FROM COLONIAL TIMES TO THE PRESENT 514-16 (1970) (charging that the safeguards established by the Kenyan Constitution have been whittled down and used by ministers to maintain political support); *see generally* Y.P. Ghai, *Independence and Safeguards in Kenya*, 3 E. AFR. L.J. 177 (1967) (explaining the development and importance of provisions in the constitution to safe guard specific regional ethnic communities and their weaknesses).

<sup>170</sup> See REPORT OF THE COMMISSION OF INQUIRY INTO THE ILLEGAL/IRREGULAR ALLOCATION OF PUBLIC LAND (2004) (reporting the results of the commission to investigate corrupt allocation of public land, identify specific instances of corruption, and suggest remedies); REPORT OF THE COMMISSION OF INQUIRY INTO THE LAND LAW SYSTEM OF KENYA ON PRINCIPLES OF A NATIONAL LAND POLICY FRAMEWORK, CONSTITUTIONAL POSITION OF LAND AND NEW INSTITUTIONAL FRAMEWORK FOR LAND ADMINISTRATION (2002) (reporting the results of the commission to survey national land relations and propose a national Land Policy).



being unlawfully evicted from the Tinnet forest.<sup>171</sup> The Ogiek claimed that their eviction from their land violated their right to an ancestral home and their right to a livelihood consistent with their rights. The High Court dismissed their case, ruling that 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<sup>172</sup> in September 2007, further indicating its unwillingness to confront the question of indigenous communities in the country.

One of the most contentious issues prior to the vote on the referendum for a new proposed Constitution in Kenya was whether there ought to be a regional system of government as a safeguard against abuse of minority rights. This debate indicated the extent to which safeguards would give minority communities in the country a voice within the government. Conversations continue as to whether these regional arrangements could check governmental abuses of power such as the illegal and irregular allocations of land as well as expulsions of indigenous communities from their homes. Regional governments would also reduce the discretion and attendant corruption often associated with a centralized government.

#### *4.9. Social and Economic Rights and the Anti-Corruption Agenda*

Social and economic rights include the rights to education,<sup>173</sup> work<sup>174</sup> and health.<sup>175</sup> 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 healthcare [] is [] flawed in terms both of the theory of human rights and of United Nations

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<sup>171</sup> *Kemai v. Attorney Gen.*, Civil Case 238 of 1999 (High Ct. of Kenya at Nairobi Mar. 23, 2000) (Elec. Kenyan L. Rep., Case Search).

<sup>172</sup> Declaration of the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Oct. 2, 2007).

<sup>173</sup> International Covenant on Economic, Social and Cultural Rights [ICESCR], art. 13, Dec. 16, 1966, 993 U.N.T.S. 3.

<sup>174</sup> *Id.* art. 6.

<sup>175</sup> *Id.* art. 12.

doctrine.”<sup>176</sup> 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 (“ICESCR”):

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 working conditions, and a healthy environment.<sup>177</sup>

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.”<sup>178</sup>

However, corruption often depletes resources that would otherwise go to fund access to adequate healthcare facilities, equipment, supplies and personnel as well as to the underlying determinants of good health including food, housing and safe potable water. Thus, corruption undermines the ability of governments not merely to meet their citizens’ wants and needs, but rather their social and economic rights. In the 1970s, international lawyers began to advocate for what were previously thought of as *needs and wants* in terms of *rights*. By substituting *rights* for *needs*, they sought to transform the concept of needs into one of legal entitlement. For these lawyers, to assert that a particular social claim or need was a human right was to “vest it emotionally and morally with an especially high degree of legitimacy.”<sup>179</sup>

However, this novel strategy, developed in the Cold War context of the 1970s, was met with the rebuttal that social and

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<sup>176</sup> Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens and General Principles*, 12 AUSTL. Y.B. INT’L L. 82, 95 (1992).

<sup>177</sup> U.N. ECON. & SOC. COUNCIL [ECOSOC], COMM. ON ECON., SOCIAL, AND CULTURAL RIGHTS, *The Right to the Highest Attainable Standard of Health: 11/08/2000*, CESR Gen. Comment 14, ¶4, U.N.DOC. E/C.12/2000/4 (Aug. 11, 2000).

<sup>178</sup> The Global Assembly on Advancing the Human Right to Health, Iowa City, Iowa Apr. 20-22, 2001, *The Iowa City Appeal on Advancing the Human Right to Health*, 2 (Apr. 22, 2001).

<sup>179</sup> Richard B. Bilder, *Rethinking International Human Rights: Some Basic Questions*, 1969 WIS. L. REV. 171, 174 (1969).

economic rights were not justiciable or enforceable in court. Opponents argued that social and economic rights were vague and imprecise that they did not establish imperatives that could be enforced by a court of law in the same way that civil and political rights do. This vagueness, they argued, was evidenced in the language of the International Covenant on Economic Social and Cultural Rights ("ICESCR"). For example, states are required to *recognize* the rights to work, health, education, social security, an adequate standard of living, just and favorable conditions of work, and participation in and enjoyment of the fruits of culture and science. By contrast, in the International Covenant on Civil and Political Rights ("ICCPR"), rights are *declared*. Similarly, the ICESCR directs parties to *undertake to ensure a right*; whereas rights in the ICCPR are *declared and ensured* rather than *recognized*.

In addition to lacking concrete social and economic rights, the ICESCR failed to make social and economic rights subject to the immediate realization to which the ICCPR was subject, instead adopting a standard of progressive realization. A further limitation of the ICESCR is that it only requires states to undertake these steps to the *maximum of their available resources*.<sup>180</sup> In its General Comments, the Committee on Economic, Social and Cultural Rights, has clarified the legal obligations that 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 flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights."<sup>181</sup> 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."<sup>182</sup> The Committee has also concluded that the ICESCR requires every state party to ensure the satisfaction of a minimum core obligation of "at the very least, minimum essential levels of each of the rights."<sup>183</sup>

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<sup>180</sup> ICESCR, *supra* note 173, at art. 2(1).

<sup>181</sup> Committee on Economic, Social and Cultural Rights, *The Nature of States Parties Obligations* ¶ 9, U.N.Doc. E/1991/23 (Dec. 12, 1990).

<sup>182</sup> *Id.* ¶ 10.

<sup>183</sup> *Id.*

In 1993, the United Nations Vienna Conference on Human Rights categorically recognized the indivisibility and interdependence between social and economic rights on the one hand, and civil and political rights on the other.<sup>184</sup> Since then, there has been an increasing commitment to the recognition of the interdependence between social and economic rights and civil and political rights.<sup>185</sup>

The impact of corruption on social and economic rights is illustrated in the following example. In May 2006, a courageous Kenyan who had blown the whistle on corruption in relation to a government sponsored, low-cost housing scheme was shot. Luckily, the shots were not fatal.<sup>186</sup> In this corruption case, senior government officials, politicians and their aides had been irregularly allocated several housing units intended to benefit poor Kenyans living in the informal Majengo area of Nairobi. This corruption scandal shows that even when the government actually gets to spend money on social programs to benefit the poor, there is a real possibility of such projects being hijacked by well to do. This and many other cases demonstrate the importance of an understanding of human rights that integrates both civil and political rights and social and economic rights. The fight against corruption is, at the end of the day, a fight for all human rights.

#### 4.10. *Conclusions: Transforming the Anti-Corruption Agenda Using Rights*

Two conclusions may be drawn from this analysis of the relationship between corruption and human rights. First, in the context of Kenya, the relationship between corruption and human rights has been ambiguous. That is to say, the Bill of Rights has largely been used by well-heeled lawyers asserting due process claims to defend persons accused of high-level corruption. The fact that Kenyan courts have acquiesced to these arguments in

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<sup>184</sup> See Shadrack B.O. Gutto, *Beyond Justiciability: Challenges of Implementing/Enforcing Socio-Economic Rights in South Africa*, 4 BUFF. HUM. RTS. L. REV. 79, 87-88 (1998) (discussing the problems associated with unequal approaches to the protection of human rights based on their categorical grouping).

<sup>185</sup> See generally Craig Scott, *Reaching Beyond (Without Abandoning) the Category of 'Economic, Social and Cultural Rights*, 21 HUM. RTS. Q. 633 (1999) (providing in-depth analysis of the implications of categorical grouping of human rights).

<sup>186</sup> Ayub Savula & Cyprus Ombati, *Whistle Blower Shot After Exposing Scam*, THE STANDARD (Nairobi), May 25, 2006, at 36.

leading cases has greatly hampered the prosecution of corrupt officials, especially those associated with high-level corruption.

A second conclusion is that corruption has undermined respect for human rights within the country. For example, the Committee on the Rights of the Child has recognized a 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 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, who has 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 State benefits, upon conceding defeat. An effort 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.<sup>187</sup>

This analysis establishes for developing rights-based strategies for addressing corruption within Kenya. 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, in light of the fact that the constitutional machinery designed to combat corruption is itself corrupted. The following short list of Constitutional reforms would begin the long road to truly democratizing the Kenyan State and alleviating the effects of corruption on Kenyan jurisprudence: (1) democratize the State by reducing the powers of the Presidency in relation to the Legislature, the Judiciary, as well as to Civil Society; (2) create an independent, impartial and free judiciary that is a watchdog of the human rights of all Kenyan citizens; (3) draft a Bill of Rights that guarantees civil and political rights, social and economic rights,

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<sup>187</sup> See James Gathii, *Popular Authorship and Constitution Making: Comparing and Contrasting the DRC and Kenya*, 49 WM. & MARY L. REV. 1109, 1111 (2008) (discussing the unsuccessful Constitutional reform in 2005). 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).

rights of children, women, minorities as well as the disabled; and (4) make a fair land policy that is free of corruption and makes land available to all.

Human rights will remain important on the journey to democratizing the Kenyan state, just as they were in other contexts, such as South Africa.<sup>188</sup> Freedom of expression, for example, will continue to be crucial in exposing corruption to public scrutiny. The government's effort to cover up corruption has been less successful in recent years. Today, Kenyans have access to information from multiple radio and television outlets, unlike in the days of a single government-run radio and television station. Additionally, there continues to be a vibrant mainstream and alternative press with a variety of daily, weekly and monthly newspapers. Many of these have websites which publish most, if not all, the contents of their hardcopy papers. Furthermore, Kenyans can access information about corruption within the country through Internet sources based 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.<sup>189</sup>

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 as nationwide problem, disabling the government from meeting the millions of Kenyans' rights to health, education and housing, we can start to address injustices at a much broader and generalized level. The category of human rights violations should be expanded to cover women, children, minorities and the disabled. A broader conception of

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<sup>188</sup> See Makau Wa Mutua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63, 63 (1997) ("[T]he democratic rebirth of the South African state . . . has arguably been the most historic event in the human rights movement . . ."); see also Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. HUM. RTS. 146, 151 (1998) (arguing that South Africa has "adopted a *postliberal constitution*, one that may be read not only as open to but committed to large-scale egalitarianism social transformation").

<sup>189</sup> 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 from his position towards the end of 2005 following threats on his life by senior members of the government whom he was investigating. The *Project KTM Consolidated Report*, dated April 27th, 2004, also known as the "Kroll Report," revealing a trail of corruption scandals from the Moi to the Kibaki government was also released online.

rights is in light of the finding of John Githongo that both the Moi and Kibaki governments established fictitious companies, which were in turn paid billions of U.S. 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 at the expense of social and economic rights, but also that if this continues, the full democratization of the Kenyan State will never be realized. The protection of civil and political rights without simultaneously protecting and safeguarding a minimal core of the social and economic rights of a majority of the population is 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 ignored the *Saitoti* and *Ng'eny* decisions by holding constitutional the Kenya Anti-Corruption Authority's power to seek information from a corruption suspect. Instead, the High Court noted:

[T]he massive and debilitating cancerous nature of corruption in Kenya has impoverished and continues to impoverish the great majority of the 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.<sup>190</sup>

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 corruption remains an important agenda. Additionally, it must be accompanied by efforts to make the President accountable. If, as the Githongo dossier revealed, the architects of massive corruption schemes in the government were unconcerned that Githongo would report their corruption scheme to the President, then grand corruption has no real check. That is why an effective battle

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<sup>190</sup> *Murungaru II*, at \*82 (Elec. Kenyan L. Rep., Case Search).

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.

5. DISTRIBUTIONAL AND FAIRNESS ISSUES ARISING FROM A FOCUS ON GRAND VERSUS PETTY CORRUPTION

5.1. Introduction

This Section explores how anti-corruption and judicial reform initiatives impact 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 the incarcerated poor go without a fair trial or even access to the judicial system to enforce their rights.<sup>191</sup> On the other hand, the rights of investors are protected by the government through large-scale legal reform efforts.

Second, I show that anti-corruption reforms privilege investors, making it easier for them to do business, rather than 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 markets<sup>192</sup>—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 bribes are involved in contact bids by foreign corporations—the outcry is bigger than when petty corruption affects the poor's ability to get access to government services, enroll in vocational and teacher training colleges supported by the state or obtain employment in the private sector. Of course, my argument is not that grand

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<sup>191</sup> See *Corruption and Human Rights*, *supra* note 1, at 41-42 (discussing vulnerable groups and the right to fair trial).

<sup>192</sup> See *Kenya's Unfinished Democracy*, *supra* note 84, at 20-21.



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 anti-corruption reform initiatives.

In my conclusions, I argue that efforts to address issues of poverty primarily through market-centered reforms that foreclose addressing questions of inequality and injustice<sup>193</sup> can be reframed to alleviate the conditions of the poor, by making these central goals in economic and judicial reform. The 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 deal with inequality and injustice indirectly not through public spending, but rather through the trickle down effects of private investment.<sup>194</sup> Thus a fundamental problem with current approaches to addressing the of challenges posed by poverty is that they discourage and discredit such public spending.<sup>195</sup> By shunning traditional tax and transfer mechanisms, market-based approaches addressing issues of poverty are also disproportionately injurious to women.<sup>196</sup>

First, I will study the effects corruption has on the poor, marginalized and disadvantaged. I will next examine the ways in which judicial reform initiatives are designed to favor the interests of investors. Finally, I will show that judicial and anti-corruption 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

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<sup>193</sup> See WORLD BANK, WORLD DEVELOPMENT REPORT 2000/2001: ATTACKING POVERTY 61-72, 189-200 (2000) (discussing market reform to be more responsive to poor populations).

<sup>194</sup> See Balakrishnan Rajagopal, *Corruption, Legitimacy, and Human Rights: The Dialectic of the Relationship*, 14 CONN. J. INT'L L. 495, 503 (1999) (arguing that this is due in large part to the self-serving interests of western countries and NGOs who seek to further advance themselves through anti-corruption initiatives in developing countries).

<sup>195</sup> See James Thuo Gathii, *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 TRANSNAT'L L. & CONTEMP. PROBS. 179, 181 (2003) (criticizing the NEPAD as a capitalist vision of a market-centered development plan that does not take in to consideration the uniqueness of African nations' economic situations).

<sup>196</sup> See Kerry Rittich, *Engendering Development/Marketing Equality*, 67 ALB. L. REV. 575, 593 (2003) (explaining the need to include gender equality as a variable when creating economic development plans).

structured to provide for market efficiency without neglecting the needs of the poor.

5.2. *How Corruption Affects the Poor, Marginalized and Disadvantaged*

While corruption had become a central tenet of the good governance agenda by the mid-1990s, the primary focus of the anti-corruption agenda has been to reduce its impact on private investment. Far less 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.<sup>197</sup> The poor and the disadvantaged rely heavily 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. Corruption in the educational system of many of these countries commonly takes the form of bribery as a precondition to admitting students.<sup>198</sup> 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 return for staff recruitment and promotion; and money changing hands at different stages of government procurement.<sup>199</sup> There are also examples of teachers bribing government officials to transfer them from schools located in poor areas where roads are inaccessible and amenities like piped water and electricity are hard to come by. Unfortunately, the areas that are hit hardest by poverty, are almost those most in need of quality teachers.

It is clear that petty corruption imposes high costs on the poor, in particular. The poor have to contend not only with inadequate

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<sup>197</sup> See *Corruption and Human Rights*, *supra* note 1, at 56–57 (explaining the impact of corruption on education).

<sup>198</sup> See Terracino, *supra* note 1, at 27–31 (noting that many parents have to bribe educators or become involved in corruption in other ways to obtain education for their children).

<sup>199</sup> See Dilip Parajuli, *What is Driving Educational Ineffectiveness in Kenya? The Role of Economic Inefficiency, Institutional Corruption and Poverty* 7 (2001) (unpublished manuscript, on file with Transparency International-Kenya) (outlining these different forms of corruption); see also *Corruption and Human Rights*, *supra* note 1, at 31–58 (providing an in depth look at various types of low level corruption and how each affects the human rights of citizens in particularly the poor).

service provisioning, but also have to make “payments” for the delivery of even the most basic government activity, such as the issuing of official documentation.<sup>200</sup> In many countries, applicants for a national identification card, a driver’s licenses, building permits and other routine documents have learned to expect a “surcharge” from civil servants. In such cases, civil servants such as nurses, members of the military, policemen, guards, and custom officers constantly pressure poorer farmers and merchants 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.”<sup>201</sup>

Petty corruption is not usually the primary target of anti-corruption reforms.<sup>202</sup> Even when it is, the Kenyan government is reluctant to address the inadequate compensation of officers, encouraging this corruption to fester. Together, petty corruption constitutes the government’s entire commitment to fighting corruption and is achieved through the prosecution of only low-level officers.<sup>203</sup> Thus, while big level corruption is generally the focus of most anti-corruption initiatives, prosecution of low-level government officials engaging in petty corruption occurs more

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<sup>200</sup> See Parajuli, *supra* note 199, at 5–7 (linking inefficiencies in the educational system in Kenya with corruption); see also TRANSPARENCY INTERNATIONAL KENYA, THE KENYA BRIBERY INDEX 2008 11 (2008), available at <http://www.tkenya.org/documents/KenyaBriberyIndex08.pdf> [hereinafter KENYA BRIBERY INDEX 2008] (finding that 76% of the Kenyans surveyed had been forced to pay a bribe in the past year).

<sup>201</sup> See TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION REPORT 203–14 (2003) (reporting that although grand corruption had fallen in the Middle East and North Africa in 2001–2002, petty corruption had risen); see also UNITED NATIONS DEVELOPMENT PROGRAMME ET AL., THE IMPACT OF CORRUPTION ON THE HUMAN RIGHTS BASED APPROACH TO DEVELOPMENT 18–19 (2004) (finding that policemen in Indonesia, who are notoriously badly paid, will often arrest people for the purpose of seeking bribes and compensation from them).

<sup>202</sup> See Stephen Mburu, After Ringera, *Focus Now on Wako*, SUNDAY NATION (Nairobi), Oct. 3, 2009 (alluding to the fact that ‘big fish’ were hardly prosecuted under Ringera’s reign as Director of the Kenya Anti Corruption Authority), available at <http://www.nation.co.ke/News/politics/-/1064/667428/-/xu9jifz/-/index.html>.

<sup>203</sup> *But see* Press Release, The Kenya Anti-Corruption Commission, Press Statement On the Performance of the Kenya Anti-Corruption Commission, (Sept. 18, 2007) (defending the Kenya Anti-Corruptions Commission efforts to eradicate all forms of corruption, not just that of “small-fish”), available at <http://www.kacc.go.ke/archives/pressreleases/performance-statement.pdf>.

often because such officials can be easily prosecuted without fear of major political fallout.<sup>204</sup> Petty corruption is responsible for huge sums of money changing hands because the many rivulets of petty corruption may add up to a mighty stream of corruption. Estimates today put global petty corruption in the hundreds of billions of dollars annually.<sup>205</sup>

### 5.2.1. Education

A Transparency International bribery survey of over 2000 Kenyans showed that average citizens paid \$175 to obtain access to government services.<sup>206</sup> Corruption, therefore, undercuts the provision of public services such as healthcare, education, transportation and local policing.<sup>207</sup> 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 only available at a surcharge they

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<sup>204</sup> See, e.g., UNITED NATIONS DEVELOPMENT PROGRAMME ET AL., *supra* note 201, at 31-32 (questioning the success of the anti-corruption measures in Hong Kong because the government has only prosecuted low-level corruption and has not prosecuted any high officials since 1992).

<sup>205</sup> See Matt A. Vega, *The Sarbanes-Oxley Act and the Culture of Bribery: Expanding the scope of Private Whistleblower Suits to Overseas Employer*, 46 HARV. J. ON LEGIS. 425, 427-28 (2009) (stating that forty to sixty of the 240 to 300 billion dollars lost in corruption annually is through bribery and petty corruption); A *First Estimate of Petty Corruption*, THE FINANCIAL EXPRESS, Dec. 20, 2002, (stating that petty corruption in India is nearly 27 billion core annually), available at <http://www.financialexpress.com/news/a-first-estimate-of-petty-corruption/64987/#>; *Petty Corruption is a 45 Billion Rupee Industry in Pakistan*, South Asia News, Aug. 12, 2006 (relaying findings regarding corruption levels in Pakistan), available at <http://www.southasianews.com/NewsPrint.asp?nid=89207>. But see United Nations Development Programme, TACKLING CORRUPTION, TRANSFORMING LIVES: ACCELERATING HUMAN DEVELOPMENT IN ASIA AND THE PACIFIC 2 (2008) (stating that corruption estimates are imprecise because they're determined through public opinion's on bribery and not so much on reported instances), available at [http://hdr.undp.org/en/reports/regionalreports/asiathepacific/RHDR\\_Full%20Report\\_Tackling\\_Corruption\\_Transforming\\_Lives.pdf](http://hdr.undp.org/en/reports/regionalreports/asiathepacific/RHDR_Full%20Report_Tackling_Corruption_Transforming_Lives.pdf).

<sup>206</sup> See KENYA BRIBERY INDEX 2008, *supra* note 200, at 10. But see TRANSPARENCY INTERNATIONAL, INTEGRITY CHECK 2003: A SURVEY OF PUBLIC OPINION REGARDING INTEGRITY IN THE NARC GOVERNMENT AND THE JUDICIARY (2003) (surveying public opinion regarding the extent of corruption in government and finding that most Kenyans are warily optimistic regarding corruption in their country), available at <http://www.tkenya.org/documents/Integritycheck.ppt>.

<sup>207</sup> See *Human Rights and Corruption*, *supra* note 1, at 3 ("Corruption hinders the delivery of state services that individuals are entitled to, preventing the realisation of economic, social and cultural rights.").

cannot afford. According to the Center for Governance and Development, the Kenyan government lost Ksh 475 billion through corruption, negligence and wastefulness.<sup>208</sup> The “Education [m]inistry alone wasted Ksh 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. . . .”<sup>209</sup> A “majority of losses come from unrecovered university student loans and surrendered institutional grants.”<sup>210</sup> These unrecovered or surrendered amounts are usually non-recoverable.<sup>211</sup> The report concluded that it could be “safely assumed that much of it is already diverted to personal gain.”<sup>212</sup>

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.<sup>213</sup> “This has led to out-of-school classes or ‘coaching’ where teachers make money” by providing private tuition after school hours.<sup>214</sup> Private tuition has been converted into a “money-minting enterprise.”<sup>215</sup> 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.”<sup>216</sup> Of course, children from poor homes cannot afford such extra costs of tuition. In addition, many schools are dilapidated and ill-equipped.

### 5.2.2. *Health and Safety*

The diversion of public resources, services and assets into private use takes 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

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<sup>208</sup> Parajuli, *supra*, note 203 at 7 (citing 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, 1991–1996).

<sup>209</sup> Parajuli, *supra* note 199, at 7.

<sup>210</sup> *Id.* at 8.

<sup>211</sup> See Parajuli, *supra*, note 199 at 8 (surmising that lost loans and grant are very difficult to ever recover).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 9.

<sup>214</sup> *Id.*; See also Bacio Terracino, *supra* note 1, at 27–30 (stating that this is a problem in many developing nations struggling to reduce corruption).

<sup>215</sup> Parajuli, *supra* note 199, at 9.

<sup>216</sup> *Id.*

poor.<sup>217</sup> Poor infrastructure, storage and maintenance at health centers has led to damaged or expired drugs, resulting in either ineffective medical treatment or patients who do not have access to the drugs they need.<sup>218</sup> In Kenya, it has been reported that corruption has resulted in “quacks” being given licenses to operate clinics, resulting in deaths of patients.<sup>219</sup> Widespread corruption evidenced by diversion of public resources for private use adversely affects new investment and economic growth.<sup>220</sup> Bribery and corruption also discourage new investors from countries with corruption problems.<sup>221</sup> Petty and grand corruption in Africa has made East European countries more attractive foreign investment destinations.<sup>222</sup> Low foreign investment fails to increase employment and therefore negatively impacts the poor by depriving them of potential sources of income.<sup>223</sup>

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.”<sup>224</sup> Examples include projects in Vietnam, Mongolia, the

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<sup>217</sup> Terracino, *supra* note 1, at 27.

<sup>218</sup> See *Graft Messing up Health Services*, THE EAST AFRICAN (Nairobi), June 4, 2007, at 6 (reporting on the many difficulties Uganda has getting health care to its poor).

<sup>219</sup> Emmanuel Micah Eldoret, *Graft Reigns at Health Ministry*, THE STANDARD (Nairobi), June 27, 2007, at 8.

<sup>220</sup> Victor E. Dike, *Corruption in Nigeria: A New Paradigm for Effective Control* (2000), <http://www.africaeconomicanalysis.org/articles/gen/corruptiondikehtm.html> (“Corruption effects investment, economic growth, and government [sic] expenditure choices; it also reduces private investment.”) (internal citation omitted).

<sup>221</sup> *Id.* (noting that corruption and other inefficiencies keep investors from Nigeria).

<sup>222</sup> *Id.* (“With the recent changes in the political economy of East Europe, the attention of the business world has been turned to this area where they may reap quicker results from their investments.”) (emphasis omitted).

<sup>223</sup> See United Nations Office on Drugs and Crime, UNODC and Corruption, <http://www.unodc.org/unodc/en/corruption/index.html> (last visited Oct. 30, 2009) (reporting the negative effects of corruption on economic development and foreign investments).

<sup>224</sup> ASIAN DEVELOPMENT BANK, AN OVERVIEW OF ADB’S LAW AND POLICY REFORM ACTIVITIES IN 2001 (2001), available at [http://www.adb.org/Documents/Others/Law\\_ADB/lpr\\_2001\\_Part\\_1.pdf](http://www.adb.org/Documents/Others/Law_ADB/lpr_2001_Part_1.pdf); see generally ASIAN DEVELOPMENT BANK, REPORT AND RECOMMENDATION OF THE PRESIDENT TO THE BOARD OF DIRECTORS ON

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 to strengthen systems of administrative justice, and increase the use of local languages, which it is hoped will allow the poor and marginalized to open the door to legal remedies. 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.

5.3. *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 1994 “approved or initiated more than \$500 million in loans for judicial reform projects in 26 countries.”<sup>225</sup> “Judicial reform is part of a larger effort to make the legal systems in developing countries and transition economies more market friendly.”<sup>226</sup> The broader scheme includes “everything from writing or revising commercial codes, bankruptcy statutes, and company laws . . . [to] overhauling regulatory agencies and teaching justice ministry officials how to draft legislation that fosters private investment.”<sup>227</sup> The specific rationale underlying these projects is to reduce transaction costs for investors.<sup>228</sup> Transaction costs in the judiciary would be reduced in the following ways: making the judicial branch independent<sup>229</sup> by

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PROPOSED LOAN AND TECHNICAL ASSISTANCE TO THE ISLAMIC REPUBLIC OF PAKISTAN FOR THE ACCESS TO JUSTICE PROGRAM, available at [http://www.abd.org/documents/RRPS/PAL/rrp\\_32023.pdf](http://www.abd.org/documents/RRPS/PAL/rrp_32023.pdf) (explaining that the goals of the AJP are to “improve access to justice so as to . . . sec[ure] and sustain entitlements and thereby reduce the poor’s vulnerability . . . and create conditions conducive to pro-poor growth”).

<sup>225</sup> See Richard E. Messick, *Judicial Reform and Economic Development: A Survey of the Issues*, 14 WORLD BANK RES. OBSERVER 117, 117 (1999).

<sup>226</sup> *Id.* at 118.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 120–23 (describing the ways in which increased investment lead to economic growth, the goal of the reform).

<sup>229</sup> This is an important suggestion made by many Judicial Reform efforts including the Kwach Report. See KENYA COMMITTEE ON THE ADMINISTRATION OF JUSTICE, REPORT OF THE COMMITTEE ON THE ADMINISTRATION OF JUSTICE 10 (1998) (noting that corruption “pervet[s] the course of justice” by causing the delay of trials).

insulating the selection of the Chief Justice,<sup>230</sup> creating an evaluation and disciplinary process to prevent improper influence<sup>231</sup> and allowing judges to control their own budget,<sup>232</sup> speeding the processing of cases by providing management training, computers, and other resources to judges and court personnel,<sup>233</sup> and 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.<sup>234</sup>

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 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

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<sup>230</sup> This is, and always has been, an issue in Kenya as the President has long been responsible for the selection of the Chief Justice, which led to very unexpected and arguably unqualified appointments of Chief Justices such as Chief Justice Chunga, who, it would seem, was not selected to the position based on the merits of his resume. See JUDICIARY WATCH REPORT, ANALYSIS OF JUDICIAL REFORM IN KENYA 1998-2003 57 (Ben Sihanya & Philip Kichana eds., 2004) [hereinafter JUDICIAL REFORM IN KENYA, 1998-2003] (recounting the appointment of Chief Justice Chunga).

<sup>231</sup> This has also been an issue in Kenya in the past. There have recently been more judicial reports such as the Ringera Report which published the names of Justices who appear to be corrupt. However, even these widely approved reports have been questioned to an extent because they were created, in part, by people who were judges themselves and who therefore may have been in a position to protect themselves or others close to them. *Id.* at 61-64.

<sup>232</sup> KENYA COMMITTEE ON THE ADMINISTRATION OF JUSTICE, *supra* note 229, at 38-39.

<sup>233</sup> *Id.* at 29.

<sup>234</sup> Kenya's intention to remedy these problems can be seen in part through the implementation of some of the measures suggested to it by the Kwach Report including the reorganization of the courts to create Commercial Court, Family Court, etc. and the creation of more Magistrate's Courts in rural areas. Both of these helped to improve the speed and delivery of justice to the Kenyan people. See JUDICIARY WATCH REPORT, *supra* note 230.



the moment are not primarily targeted towards making the legal system broadly accessible and affordable for all, but mostly for business interests. In my analysis, I will select a few illustrative examples.

Economists have developed a hypothesis used to affirm the judiciary's effect in enabling exchanges between private parties. Thomas Hobbes argued that a judicial system was necessary to assure traders that their contracts would be honored.<sup>235</sup> Twentieth century economists have supported this with evidence to support the argument that the absence of a judicial system results in high transaction cost for those involved in business.<sup>236</sup> Reformers give the example of Ghana as a country in which the judiciary is unable to enforce contractual obligations and businesses therefore have to rely upon "a network of traders to serve as go-betweens."<sup>237</sup> 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 comes with a price: the costs of doing business are subsequently increased by the creation of intermediaries.<sup>238</sup>

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 thereby supporting economic growth.

Today, the majority of developing countries and former socialist states are receiving some type of assistance from international organizations such as the U.N. and the World Bank to undertake projects to help reform courts, prosecutors' offices and 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

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<sup>235</sup> See Messick, *supra*, note 225, at 120.

<sup>236</sup> *Id.* (reviewing contemporary research on Hobbes' hypothesis).

<sup>237</sup> *Id.*

<sup>238</sup> For a critical view of this view in the East Asian context, see John Onhesorge, 'Ratch'eting up the Anti-Corruption Drive: Could a Look at Recent History Cure a Case of Theory-Determinism?', 14 *CONN. J. INT'L L.* 467 (1999).

shortest duration of time. Thus, a primary aim of judicial and legal reform in Sierra Leone is the creation of an enabling environment for private sector investment.<sup>239</sup> 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.<sup>240</sup> In particular, its reform initiatives include establishing an institutional process for legislative review, developing a core work program for revising business and commercial law, and enabling the 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 of 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 introduced by the World Bank in Tanzania is another example.<sup>241</sup> The Tanzanian government has undertaken to ensure that investors conduct business in the least costly manner.<sup>242</sup> The objective of this project is "to strengthen the institutional and

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<sup>239</sup> See Minneh Kane et al., *Sierra Leone-Legal and Judicial Sector Assistance* 30 (The World Bank, Working Paper No. 32146, 2004), available at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDS/IB/2005/04/27/000090341\\_20050427151735/Rendered/PDF/321460SL0Legal010judicial0assessment.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDS/IB/2005/04/27/000090341_20050427151735/Rendered/PDF/321460SL0Legal010judicial0assessment.pdf) ("There is virtual unanimity among Sierra Leoneans that building confidence in the justice sector is an essential requirement of economic investment and growth, and hence for reviving opportunities for economic progress for Sierra Leoneans generally.").

<sup>240</sup> See JUDICIAL REFORM IN KENYA 1998-2003, *supra* note 230, at 29 (discussing how the role of the judiciary includes not only the protection of human rights, but also in the intervention in a vast number of everyday economic disputes so that a society's economy can flourish).

<sup>241</sup> LEGAL VICE PRESIDENCY, THE WORLD BANK, INITIATIVES IN LEGAL AND JUD. REFORM 83-84 (7th ed. 2004).

<sup>242</sup> *Id.*

organizational infrastructure of the new open market economy in Tanzania that ha[s] emerged since the mid-1980s under the [government's] Economic Recovery Program."<sup>243</sup> The legal component of the project has two parts: (a) building capacity in key organizations such as the Judiciary and the Attorney General's Office by 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.<sup>244</sup>

Kenya's Justice and Integrity Project is another such effort.<sup>245</sup> A new government came into power in Kenya in January 2003 that is committed to curbing corruption and developing a reform strategy that will provide a justice system that is recognized to be a key prerequisite for economic growth. The Justice and Integrity Project's objective 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."<sup>246</sup> There are seven main components to the proposed project. The first involves reforming the court system by introducing simplified proceedings, improving performance standards for judicial staff, designing automated recordings of court proceedings, enhancing case management, and introducing computerized registry document management. The remaining components entail:

[D]eveloping a comprehensive judicial training program; [I]ntrengthening the capacity of the [Ministry of Justice and Constitutional Affairs]; [I] developing a comprehensive legal education and training program for lawyers and paralegals, including establishing a College of Law; [I] improving access to justice through a capacity building program to support the Office of the Public Defender and legal aid offices ; [I]designing a program of law reform to support the Government's strategic plan and the new Constitution; and; [I] initiating a five year campaign to reduce corruption in Kenya.<sup>247</sup>

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<sup>243</sup> *Id.* at 83-84.

<sup>244</sup> *Id.* at 83

<sup>245</sup> *Id.* at 20.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 20-21.

While the foregoing examples of reform initiatives are laudable,<sup>248</sup> especially to the extent they aim to make the judiciary fairer, independent, and transparent, they are biased in favor of safeguarding the interests of investors. 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.

*5.4. Anti-Corruption and Judicial Reform Initiatives Largely Ignore the Poor.*

The judicial reform and anti-corruption projects initiated by the World Bank and governments examined in Section 3 mainly focus on facilitating market transactions but ignore promoting good governance to alleviate poverty.<sup>249</sup> Thus, they do not target issues of immediate concern for the poor such as when those in power take public and private land.<sup>250</sup> However, the lack of an independent judiciary is also likely to aggregate inequalities and worsen poverty. Where judiciaries and administrative agencies are not insulated from the political process, they are more responsive to the interests of investors, and income inequalities are likely to be aggravated. After all, independent judiciaries are critical to enforcing the rights of poor and marginalized peoples.

The poor and marginalized groups are also faced with multiple obstacles to access legal and judicial services. The denial of fair trial, due process violations, pre-trial detention, intolerable prison conditions are just a few obstacles these groups face.<sup>251</sup> In Kenya, for instance, Amnesty International has raised serious concerns about the right to a fair trial.<sup>252</sup> There is a dearth of legal services available in Magistrate Courts, especially for indigent defendants charged with robbery or attempted robbery with violence that face a mandatory death sentence if convicted. Additionally, since legal

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<sup>248</sup> Developing a comprehensive judicial training program has been an issue in Kenya in the past, as the requirements for appointment as a Judge are "bare minimum." This means that there is no emphasis on academic qualification, and a specific amount of work experience is not required for someone as long as he has been a judge in a court in Kenya in the past. See JUDICIAL REFORM IN KENYA 1998-2003, *supra* note 230, at 57-100.

<sup>249</sup> See *supra* Section 3.

<sup>250</sup> *Id.*

<sup>251</sup> LEGAL VICE PRESIDENCY, THE WORLD BANK, INITIATIVES IN LEGAL AND JUD. REFORM 43-44 (5th ed. 2002).

<sup>252</sup> Amnesty Int'l, Kenya, *Violations of Human Rights: Communications Between Amnesty Int'l and the Gov't of Kenya*, AI Index AFR 32/27/97, Sept. 1997 [hereinafter *Kenya: Violation of Human Rights*].

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 interpretation contravenes Kenya's Constitution 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. The lack of language assistance is particularly troubling because, due to congressional legislation, convictions based on confessions are only valid if made to a magistrate in open court.<sup>253</sup>

Prison conditions in Kenya also affect the poor disproportionately. The conditions are harsh, cruel, inhuman, and degrading.<sup>254</sup> The circumstances include over-crowding and shortages of food, clean water and adequate medical care. The result is high prison mortality rates. It is estimated that in 1995, more than 800 inmates died in the first nine months. Seventy-five percent of the inmates were young and included single mothers with children. The conditions in Kenyan prisons even prompted then-President Moi to say "the belief is that any prisoner who comes out of the prison alive must be lucky."<sup>255</sup> After visiting Lang'ata Women's Prison, a representative from a human rights organization described the conditions there:

The 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 thus they walk barefooted. Walking barefooted on this filthy ground not only harms their feet but also makes them sick with feet diseases and constant colds.<sup>256</sup>

The length of pre-trial detention is often beyond the legal limit, and detainees are held for periods that exceed the maximum period permitted by law. Police have sought to justify unlawfully prolonged detention on the grounds that it is necessary to enable

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<sup>253</sup> See Criminal Law (Amendment) Act, No 5 (2003), KENYA GAZETTE SUPPLEMENT NO. 64 § 99.

<sup>254</sup> Kenya: *Violation of Human Rights*, supra note 252. See generally Kenya's *Unfinished Democracy*, supra note 84, at 7.

<sup>255</sup> Kenya's *Unfinished Democracy*, supra note 84, at 12.

<sup>256</sup> Kenya: *Violation of Human Rights*, supra note 252, at 22 (emphasis omitted).

them to carry out their investigations. Courts rarely challenge extended incarceration prior to trial. Habeas corpus actions are costly and open only to those who can afford a lawyer.<sup>257</sup>

Inadequate time and facilities for trial preparation are problems faced particularly by indigent defendants. When criminal cases come to trial, prosecuting authorities usually provide little or no advance disclosure of the prosecution's evidence or which witnesses will testify at trial. The defense is usually shown the original hand-written statement of the witness at trial only in time for use in cross-examination. The defense cannot retain or photocopy the statement, making it difficult to challenge the witness' testimony. To compound these problems, the official court records of the trial proceedings are often inaccurate, and copies of such record are usually not available until 18 months after the termination of the proceeding, rendering appeals almost impossible.<sup>258</sup>

The judiciary may be reluctant to review the conduct of high-placed government officials when such conduct is inimical to the interests of poor and marginalized citizens. For instance, a corrupt minister leased substantial portions of an indigenous population's territory to a private company interested in exploring for oil. The population had lived, hunted, trapped and fished in the territory since time immemorial. The right of the group not to be deprived of their means of subsistence was substantially affected yet Kenyan courts declined to intervene on the group's behalf.<sup>259</sup> 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.<sup>260</sup> 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 of their informal settlement.

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<sup>257</sup> *Id.* at 12.

<sup>258</sup> *Id.* at 12-13.

<sup>259</sup> Nihal Janyawickrama, *Corruption: A Violation of Human Rights?*, 9 E. EUR. HUM. RTS. REV. 127, 135 (2003) (noting hypothetical examples based on actual case law or reported events in Kenya).

<sup>260</sup> *Id.*

Uganda's first National Integrity Survey, conducted by the Inspectorate of Government, also highlights judicial corruption. The survey found that bribery is most common with police and judiciary services, where two-thirds of users pay bribes to the workers in the police department and half the users pay bribes to workers in the judiciary services.<sup>261</sup> Kenya's police and traffic officers are notoriously corrupt as well. It has been estimated that the traffic cops in Nairobi receive three million Kenyan Shillings every day in bribes from people trying to avoid arrest or detention for small or even nonexistent traffic infractions.<sup>262</sup> About half the service workers interviewed think that gifts from private companies to public sector employees are acceptable, and nearly half think that people reporting corruption are likely to suffer for it.<sup>263</sup>

### 5.5. Conclusion.

Anti-corruption and judicial reform initiatives impact the poor, marginalized and disadvantaged in African countries. The initiatives are primarily aimed at making it easier for investors to do business rather than addressing the problems of corruption, lack of judicial independence, and inadequate trial-preparation resources that face the poor, marginalized, and disadvantaged.

As a result, reforms to address corruption and judicial enforcement of contracts should be complemented by simultaneous efforts to address the problems confronted by the poor and the disadvantaged. In the 1980s, good governance reforms sought to address issues affecting the poor separately under the rubric of social safety nets. Since the late 1990s, second generation good governance reforms, such as the anti-corruption and judicial initiatives, have been 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 anti-corruption reforms to the extent that increased investment results in more employment for them.

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<sup>261</sup> CIET INTERNATIONAL, UGANDA NATIONAL INTEGRITY SURVEY 1998: FINAL REPORT ii (1998), available at <http://ciet.org/en/documents/projects.library.ducs/2006223144324.pdf>.

<sup>262</sup> Gakiha Weru, *Extortion Gangs in Traffic Police Uniform*, SUNDAY DAILY NATION (Nairobi), Aug. 5, 2007, at 4.

<sup>263</sup> *Id.*

However, even assuming that anti-corruption and judicial reforms do actually achieve their objectives, these reforms can hardly guarantee increased investment. Infrastructure spending on 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 helping private investors to focus on managing services, as recent research now definitively shows.<sup>264</sup>

By reframing issues related to social division and hierarchy in market terms, anti-corruption 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 of as addressable through public spending rather than through the trickle down effects of private investment. As a consequence, a fundamental problem with the current approaches to addressing the broad array of challenges posed by poverty is that the current programs of economic reform are disempowering to, and discredit, such public spending. Ultimately, the interests of the poor and marginalized can best be addressed as a central part of a reform agenda that includes sensible anti-corruption and judicial reforms. It would seem to me that these issues are too important to be left to official development programs. Those who care about suffering must take the bull by its horns and struggle with these issues.<sup>265</sup>

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 promotes judicial reforms that are designed not only to attract foreign investment but to create employment for the

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<sup>264</sup> See INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, ENHANCING ACCESS TO HUMAN RIGHTS 60 (2004), available at [http://www.ichrp.org/files/reports/44/123\\_report\\_en.pdf](http://www.ichrp.org/files/reports/44/123_report_en.pdf) (outlining the fundamental role government plays in "underwriting" investment in social structures as services cannot be adequately funded by private actors); Ravi Kanbur & Nora Lustig, *Why is Inequality Back on the Agenda* (Cornell University Department of Agricultural, Resource, and Managerial Economics, Working Paper No. 99-14, 1999).

<sup>265</sup> See Baxi, *Taking Suffering Seriously*, *supra* note 7, at 390-93 (noting the significant shift in the Indian judicial system's effectiveness is a result of judicial populism); See also MARIO GOMEZ, IN THE PUB. INT.: ESSAYS ON PUBLIC INTEREST LITIGATION AND PARTICIPATORY JUSTICE (1993) (highlighting the use of public interest litigation to reach social political change).



poor as well. By consciously pursuing the goal of increasing social access to public goods and services, the Asian Development's model of judicial reform could serve as a framework for other reform programs that bracket out issues of justice within them or assume 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 committed to ensuring reforms also serves to strengthen the administrative justice system in ways that benefit the poor and marginalized. Example reforms could include ideas aimed at implementing a property rights regime that helps the poor to secure good title to land and understand judicial proceedings in their own language.

## 6. CONCLUSIONS: HOW TO REFORM ANTI-CORRUPTION INITIATIVES TO ADDRESS POVERTY AND SOCIAL DIVISION

### 6.1. *Overview of Findings*

The relationship between corruption and human rights is only beginning to be seriously examined. 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, it has shown how individualistic and procedural rights have been used to defeat investigations and prosecutions of corruption by high-level governmental officials. Second, it has demonstrated how anti-corruption reforms have primarily targeted the promotion of market efficiency while reducing spending for basic needs such as health and education to the detriment of the social and economic rights of the poor and marginalized. These findings are significant because they show that the relationship between corruption and human rights is more complex than simply that corruption disables States from meeting their human rights obligations. Indeed, human rights initiatives 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. This can be done by expanding human rights concerns to include

the social and economic rights of the poor and institutional safeguards for minority rights.

*6.2. In the Context of Human Rights in Relation to the Anti-Corruption Agenda.*

It would be naïve to simply assume that a revamped Bill of Rights would, by itself, result in more vigorous prosecutions against corruption. Effective human rights agendas designed to combat corruption should be part of a larger project to democratize the State by reducing the powers of the presidency in relation to the legislature, the judiciary, and civil society. Potential projects should also incorporate reforms that would: (1) guarantee a truly independent and impartial judiciary that is a human rights watchdog for all Kenyan citizens; (2) create a Bill of Rights that guarantees civil, political, social, and economic rights; and (3) protect the rights of children, women, minorities, and the disabled. Further, such projects 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 contribute to corruption.

Other reforms here would include the amending libel laws as well as decentralizing the authority of the Attorney General to prosecute and of the Commissioner of Police to investigate. This reform is discussed further in the proceeding proposal for an Office of Special Counsel.

*6.3. In the Context of Judicial Reforms as They Relate to the Anti-Corruption Agenda.*

Earlier in this Article, we saw that anti-corruption and judicial reform initiatives have an adverse impact on the poor, marginalized and disadvantaged. Anti-corruption and judicial reforms are primarily aimed at making it easier for investors to do business and are not designed to address the problems of corruption, lack of judicial independence and resources to prepare for trial, and lengthy pretrial detention periods faced by the poor, marginalized and disadvantaged.

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 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 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 would help the poor secure good title to land understood judicial proceedings in their own languages.

#### 6.4. *Office of Special Counsel*

I propose the establishment of an independent investigatory and prosecutorial office for grand corruption. An Office of Special Counsel would be constitutionally created and have the 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 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 directly affect ordinary Kenyans, including those involving the Local Authority Transfer Fund as well as the Constituency Development Fund. 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.

In addition, Kenya could establish an independent anti-corruption body similar to the ICAC, which was—and continues to be—very effective in Hong Kong.<sup>266</sup> An independent anti-

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<sup>266</sup> C. Raj Kumar, *Corruption, Development and Good Governance: Challenges for Promoting Access to Justice in Asia*, 16 MICH. ST. J. INT'L L. 477, 484-85 (2008) (highlighting the establishment of the Independent Commission Against

corruption body has proven to be more effective in combating corruption for several reasons.<sup>267</sup> First, being independent from governmental interference allows it to pursue anti-corruption matters faster and more efficiently without bureaucratic interference.<sup>268</sup> Additionally, it is likely that an independent commission will be more effective in dealing with corruption because it is less likely to contain members of the corrupt government. Finally, in Kenya, a country where corruption has become nearly ubiquitous, an independent corruption agency will help to restore the Kenyan people's faith in their government and a desire to truly fight corruption.<sup>269</sup> Further, an independent agency will give people more faith in its anti-corruption programs<sup>270</sup> because they will know that it is not a part of the Kenyan government, which has been corrupt since its inception.

#### 6.5. 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 budget proposals for an overwhelming number of government ministries.<sup>271</sup> In effect, government ministries spent their budgets with little or no oversight by Parliament. This included over 38.4 billion Kenyan 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<sup>272</sup> giving ministries a free hand to spend

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Corruption to address the problem of corruption of the Anti-corruption Office of the Police).

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 485-86.

<sup>270</sup> *Id.*

<sup>271</sup> MARS GROUP KENYA, THE CASE AGAINST THE MEMBERS OF THE 9TH PARLIAMENT: A CRITIQUE OF THE 9TH PARLIAMENT OF KENYA 2003-2007 (2007), available at [http://www.marsgroupkenya.org/publications/pubs/9th\\_parliament1.pdf](http://www.marsgroupkenya.org/publications/pubs/9th_parliament1.pdf).

<sup>272</sup> See *id.* at 19 (stating that not only have they failed to vigorously oversee the spending, but they have fallen behind schedule by at least four years making any

without accountability. Parliament must therefore assert its traditional role of assuring effective oversight over government expenditure.<sup>273</sup>

#### 6.6. *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.<sup>274</sup> 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 observation, prevention, investigation, and prosecution, but in the judiciary as well. As the Ringera report and the subsequent purge of several judges demonstrated, the judiciary has been rife with corruption.

#### 6.7. *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 (either natural persons or corporate entities) would have to be fully disclosed prior to the execution of the sale. If shareholders are businesses, the new law would at least require 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

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attempted check in the future futile since the evidence may be either lost, stale, or destroyed).

<sup>273</sup> *Id.*

<sup>274</sup> This applies to the Judiciary as well, where Kenyan Chief Justice Chesoni had been accused of gambling and of shouting government policy slogans when drunk. These acts make the public wary of the Chief Justice's judgments and question the integrity of the Justices and therefore the system itself; See JUDICIAL REFORM IN KENYA 1998-2003, *supra* note 230, at 69 (explaining the overall prevalence of corruption in the judicial system amongst judges and the lack of systemic change despite calls for change).

document positively identifying such persons 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 its country of incorporation would be necessary. Furthermore, all government officers approving the sale would have to sign off that they satisfactorily 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 offense 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.<sup>275</sup>

## 7. FINAL WORD

This study has extensively explored the relationship between human rights and corruption. It has concluded with a series of proposed reforms informed by this discussion. This study achieves one important result: it shows that by categorizing the anti-corruption agenda as a human rights issue, the democratization of a country's political, economic and social fabric makes 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. Previously, the anti-corruption agenda has been thought of almost exclusively in economic terms; 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 contention 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 begun the contextual analysis of the relationship between corruption and human rights and has shown the potential for further work in this area.

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<sup>275</sup> This proposal is based on my essay, James Gathii, *Introduce Law to Screen Public Asset Sales*, BUS. DAILY (Nairobi), July 8, 2008, <http://allafrica.com/stories/200807090324.html>.