



# Corruption and Human Rights: Positioning Judicial Activism as an Anti-corruption Strategy in Kenya

Ngira David Otieno\*

## Abstract

This article locates the conceptual foundations of corruption and human rights by examining the normative and definitional challenges of these terms. By focusing on socioeconomic rights and the principle of equality in access to public services, the paper demonstrates the implications of corruption for the realisation of human rights. It then examines how the thin and thick conceptions of the rule of law interact with corruption. The article further explores legal corruption and the mechanisms by which graft corrupts the law-making process and compromises the rule of law. At the same time, the paper studies the role of judicial activism in fighting institutionalised and legal corruption in Kenya. In conclusion, it maintains that public interest and human rights considerations should be central to the law-making and interpretation processes. To effectively deal with corruption, activist judges should pursue the ends of justice rather than the law in the case of conflict between the two.

**Keywords:** corruption; human rights; judicial activism; neopatrimonialism; rule of law

## Résumé

Cet article situe les fondements conceptuels de la corruption et des droits humains en examinant les défis normatifs et définitionnels de ces termes. En se focalisant sur les droits socio-économiques et le principe d'égalité dans l'accès aux services publics, l'article montre les implications de la corruption dans la réalisation des droits humains. Il examine ensuite comment les diverses conceptions de l'État de droit interagissent avec la corruption. En outre, l'article explore la corruption juridique et les mécanismes de corruption du processus législatif et comment elle compromet l'État de droit. En parallèle,

---

\* Regional Economic, Social and Cultural Rights Researcher, Amnesty International.  
Email: [otienongira@gmail.com](mailto:otienongira@gmail.com)

l'article étudie le rôle de l'activisme juridique dans la lutte contre la corruption institutionnalisée et légale au Kenya. En conclusion, il soutient que les considérations d'intérêt public et de droits humains devraient être au cœur des processus d'élaboration et d'interprétation des lois. Pour lutter efficacement contre la corruption, les juges militants devraient poursuivre des objectifs de justice plutôt que du droit, en cas de conflit entre les deux.

**Mots-clés** : corruption ; droits humains ; activisme judiciaire ; néo-patrimonialisme ; État de droit

## **Introduction: Defining Corruption**

Corruption as a malpractice in governance is, perhaps, as old as humanity. However, despite its presence in various socioeconomic sectors, it has been conceived of mainly as an economic issue and most research has focused on its monetary and financial implications (Kumar 2003). Very little attention has been given to its human rights import. This explains why anti-corruption programmes have been (and continue to be) spearheaded by criminal justice systems and not by human rights bodies. The few human rights actors who engage in anti-corruption programmes have focused largely on its economic and financial dimensions (Kumar 2003). This failure to (re) position corruption as a human rights issue has deprived anti-corruption programmes of the additional voice of human rights agencies, thereby denying them the reinvigorated focus that is directed to other human rights concerns. Specifically, the absence of human rights has robbed anticipation strategies of the additional political capital that comes with human rights-based advocacy.<sup>1</sup> There is, therefore, a need for scholars to reconceptualise corruption as a human rights issue as a way of reorienting research towards understanding its implications.

One of the challenges of the 'fight' against corruption is defining corruption itself. Due to its multidimensional nature, prevalence in the private and public sector and the relativity of normative behaviour (which influences what is considered acceptable in various societies), researchers have often found corruption difficult to define. The word 'corruption' traces its roots to the Latin word *corruptio*, which means 'moral decay, wicked behaviour, putridity or rottenness' (Brooks et al. 2003: 12). This understanding is, however, too general and thus of little value to the law since it basically includes all forms of disapproved or immoral behaviour. Nevertheless, although corruption is difficult to define, it is generally 'a bad thing' since it undermines economic performance, weakens democratic institutions and the rule of law, disrupts social order and destroys public trust (Quina 2008).

The Organisation for Economic Co-operation and Development (OECD) defines corruption as the active or passive misuse of power by public officials (elected or appointed) for private, financial or other benefits (OECD 2013). This definition is also inadequate because it assumes that corruption takes place in the public sector only, yet research continually shows its prevalence in the private sector, too. Such a conceptual error exists, too, in the United National Development Programme (UNDP) definition of corruption: '[T]he misuse of public power, office or authority for private benefit – through bribery, extortion, influence peddling, nepotism, fraud, speed money or embezzlement' (UNDP 2004). By listing only a few acts of corruption and limiting it to the public sector, the UNDP fails to appreciate the multifaceted and systemic nature of corruption. Yet a similar limitation exists in the World Bank definition of corruption: the 'use of public office for private gain' (World Bank 1997). Transparency International gives a slightly more elaborate definition, referring to corruption as 'the abuse of entrusted power for private gain'.<sup>2</sup> This definition is broader because it captures corruption in the private and public sectors. However, it appears vague because situations of power such as that between a parent and child may involve abuses that would not necessarily be considered as corruption.

Sociologists generally embrace a broader conception of corruption. According to Deborah Hellman, corruption is a derivative concept that denotes a disease or dysfunction in an institution (Hellman 2013: 10–11). To Hellman, any violation of the norms guiding the operations of an institution could be perceived as corruption. Corruption, therefore, derives its meaning from the normative standards of an institution. But this conception is overstretched because it amounts to labelling any misbehaviour in a work setting as corruption. For instance, it implies that an employee who sexually harasses a colleague is corrupt. Thus, Hellman's 'inflation' of the meaning of corruption renders it an institutional or a behavioural issue and robs it of its socioeconomic and human rights dimensions. At the same time, such a broad definition makes it impossible for the law to deal with corruption – first, because the statutory instruments that establish anti-corruption institutions are often specific to the province of these institutions, and second, because law is generally indeterminate and widening the scope of the concept would make it vague and thus in violation of the principles of legality that require law to be clear, certain and unambiguous (Tucker 1965: 270–274). A narrower conception is necessary to guide the fight against corruption and to deepen scholarship on the subject.

The Institute of International Auditors (IIA) views corruption as:

... any illegal act characterised by deceit, concealment or violation of trust and perpetrated by individuals or organisations to obtain money, property or services, to avoid payment or loss of services and to secure personal or business advantage. (Institute of International Auditors, cited in Brytting, Minogue and Morino, 2011: 5–6)

Although this definition covers corruption in the public and private sectors, describing it as an ‘illegal act’ positions it as a violation of the law – that, besides all else, an act must first be illegal before it is labelled as corruption. However, Daniel Kaufmann and Pedro Vicente, in their paper on legal corruption, demonstrate that corruption exists with or without law and that the law can even be used to promote it (Kaufmann and Vicente 2011: 198–201). Thus, even in ancient societies where formal laws did not exist or operate efficiently, acts that would be considered as equivalent to corruption were present but were highly sanctioned. This paper therefore embraces the definition advanced by The Institute of International Auditors, subject to the deletion of the word ‘illegal’.

### **What are Human Rights?**

The definitions of human rights are perhaps as varied as the number of scholars who engage in human rights discourse. For instance, some scholars view human rights as basic rights that must be guaranteed by governments to meet a minimum standard of moral legitimacy (Talbot 2013: 1030–1042). Supporters of this view argue that part of the social contract that the individual has with the government includes respect and promotion of the individual’s dignity and overall wellbeing. Any government that violates this contract (through omission or commission), while retaining its legality, loses the legitimacy to rule over the subject. This conception, which falls short of advocating for the removal of regimes that do not protect rights, is problematic because it ignores the high moral foundation of rights that locates human rights not in the state agency but within human identity (Sen, cited in St Clair 2006). Human rights emanate from a higher moral position than legal or constitutional rights and pre-date the state and the law. Thus, whereas all constitutional rights are human rights, not all human rights are constitutional rights. However, both sets of rights exist to increase the quality of human life and make it fulfilling.

Hohfeld perceives human rights as human moral claims; he insists that if one proceeds on the premise that something is one’s human right, one immediately creates the notion that there is someone with an obligation

to grant that right (Wenar 2020). In other words, all rights must be characterised by corresponding obligation. This conception, though suitable for litigation purposes, ignores the high moral content of rights, which supersedes obligation. James Nickel, a sharp critic of this view, has argued that a call for a human right does not necessarily translate into a call for a particular entity to grant it; rather, it is a call for the recognition of that right as an entitlement (Nickel 2013). Nickel's argument is premised on the idea that individuals may have rights which are not practically realisable and for which a specific duty-holder may not be identifiable, but this does not make them any less justifiable (Nickel 2013).

Jack Donnelly argues that human rights are rights that individuals have because they are human beings (Donnelly 2003). Rights, however, go beyond just the state of 'being' and stretch into the value and nature of 'beingness'. To adequately define human rights, we must first examine the key underlying principles of human rights. These are survival, dignity, equality and freedom. Based on these principles, we can define human rights as the necessities that human beings are entitled to so as to live a life of dignity, freedom and equality. These necessities are natural and can neither be given nor taken away. They can only be recognised or appreciated. Governments, therefore, exist to guarantee, protect and elevate these entitlements. Within this context, a government is obligated by domestic and international law to establish those structures that would help realise these aspects of wellbeing and improve the quality of its citizens' lives. Conversely, the state has a positive obligation to initiate programmes that would eradicate the challenges to rights realisation, such as corruption.

### ***Corruption and Socioeconomic Rights Realisation***

Socioeconomic rights realisation is one of the areas that has been undermined by corruption. Due to the centrality of socioeconomic rights in human fulfilment, they are key to the realisation of civil and political rights as well as the holistic development of the human person and dignity (Ngira 2017: 274–285). However, these rights are also the most vulnerable to corruption. This is because the guarantee of socioeconomic rights usually requires resources that have to be delivered by the principal – the state, through its agents, the street-level bureaucrats – to the citizens at the grassroots level. But, due to informational asymmetry, the state has to rely on the same bureaucrats to give feedback on the extent of the service delivery. This overreliance on street-level bureaucrats for implementation and reporting creates a monopoly of power and discretion, which leads

directly to corruption. This corruption translates into poor service delivery and the denial of government services or demands for bribes. For instance, whereas the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>3</sup> the African Charter on Human and People's Rights<sup>4</sup> and the Constitution of Kenya<sup>5</sup> guarantee access to the highest quality of health and security, corruption in hospitals and in the police service violates these rights by requiring citizens to pay bribes before accessing these services.

Rampant institutional corruption in the civil service violates article (21) (2) of the Universal Declaration of Human Rights (UDHR) and article 11 of the ICESCR. The core issue is that corruption locks out poor people or those unwilling to pay bribes for government services. Access to public services becomes a privilege that is availed to only those with resources rather than an entitlement for all citizens. Because, unlike rights, privileges can be withdrawn, corruption weakens the moral and philosophical justification for the provision of government services and negates the principle of the social contract.

Amartya Sen argues that rights are justifiable based on both a just procedure and a good outcome (Sen 1999). However, corruption not only renders the procedure of realising such rights unjust but also compromises the attainment of a good outcome. As a violation of just procedure, corruption compromises the principle of equality between persons by allocating resources based on norms that are not equally distributed. On the other hand, embezzlement of public funds meant for the delivery of socioeconomic rights negates the just outcome of rights realisation. For instance, consider the case in 2004 when Margaret Gachara was found guilty of embezzling millions of Kenyan shillings (KES) meant for HIV/AIDS management.<sup>6</sup> This action led not only to the deaths of many HIV patients who could not access the necessary medication but also to the withdrawal of donor support for the programme. Thus, by compromising the delivery of health services as illustrated above, corruption affects the dignity of the citizens whose rights to health services are violated.

Because the moral legitimacy of any government lies in its capability to guarantee the human rights of its citizens (including the right to life), corruption can be said to rob governments of their moral legitimacy. Governments are therefore obligated to fight corruption, not only because of legal requirements but also because the nature of the social contract requires them to restrain from any omission and or commission that would affect citizens' rights. Taking decisive action to prevent corruption is therefore a contractual obligation between the state and the citizen.

Scholars like Jan Isaksen have linked budgetary corruption to poor service delivery and therefore, human rights violations. He notes that budgetary corruption misallocates scarce resources and diverts them from government coffers into private hands, propagates the reduction of important expenditures for development and for social safety nets and limits funds for priority social sector spending or reallocates them to areas that benefit few people (Isaksen 2005). He observes that corruption at the implementation stage of a budget process implies that actual spending differs markedly from original expenditure plans (Isaksen 2005). At the same time, the money that is then appropriated at the implementation stage is often pre-allocated in the budgeting process so that corruption can still take place even in instances when bureaucrats work within budgets.

Human rights violations thus occur when the public receives poor health, education and extension services occasioned by low budgetary allocations or pre-planned misappropriation. At the same time, the failure to effectively involve citizens and other non-state watchdogs in the budgetary process violates the rights of citizens to participate in governance as guaranteed by domestic and international human rights law (UN 1986). This exclusion creates room for corrupt budgeting. Isaksen also notes that influential bureaucrats and politicians often determine budgetary processes and disproportionately allocate resources to their regions and ethnic groups, thereby propagating economic and regional discrimination and marginalisation (Isaksen 2005). Commenting on this reality in Kenya, the Friedrich-Ebert-Stiftung organisation observed:

Ethno-regional disparities and marginalisation have been exacerbated by the discriminatory nature in which:

- a) the cabinet membership and other senior positions in government, the public sector and parastatal bodies have been allocated;
- b) the discriminatory nature of public spending, especially the manner in which the government-financed infrastructural development and other big contracts were awarded;
- c) national resource endowments;
- d) political patronage; and,
- e) corruption, bureaucratic discretion and elite excesses.

The latter reasons have influenced the manner in which public resources have been disproportionately used to provide public services such as education and health, which have exacerbated inequalities and marginalisation. (FES 2012: 7–8)

The marginalisation that emerges from political corruption not only threatens the doctrine of distributive justice but also undermines the principle of self-determination, dignity, national unity and cohesion. In some instances, such exclusion degenerates into ethnic conflict (Agbiboa and Maiangwa 2012: 108).

Corruption affects all rights that rely on state resources in several other ways. It takes away the resources that would have otherwise been used to guarantee health, food, housing and education in society. The prosecution of corruption cases is usually long, expensive and complex and thus directly puts strain on the judiciary. And citizens often suffer the most when projects that are tainted by corruption are suspended or altogether terminated by the executive or the judiciary (Muthoni 2020; Namatsi and Gisesa 2019). For instance, a multi-billion dam project in Kenya, which was meant to provide water to the residents of Elgeyo Marakwet County, was stopped by the President following claims that it had been overpriced and bedevilled by corruption. It is currently the subject of a court case following the sacking and prosecution of the Cabinet Secretary of Finance and his Principal Secretary.<sup>7</sup> The citizens who were to access water from the dams have had to cope with continued scarcity.

Corruption also affects regulatory enforcement and compliance, therefore compromising the quality of goods and services in the market (Damania, Frederiksson and Mani 2004: 363–390). The neoliberal orientation of modern economies often means that businesses venture into the market to make a profit. In the process of doing so, they may engage in actions or inactions that compromise the wellbeing of citizens (Ibid.). Accordingly, regulatory agencies exist to ensure that businesses are aligned to the regulatory objectives of the government. The regulatory objectives of government in turn draw their validity from the constitutional and statutory obligations of the state. However, corruption interferes with this process in two ways. First, grand corruption or state capture may translate into weak regulatory frameworks that allow for the existence of industry players who engage in pollution or the sale of harmful products that violate human rights, such as harmful pesticides, or the use of harmful food substances. Second, weak enforcement of regulatory standards due to bribery may result in irregular or cosmetic inspections that give the impression that standards are being enforced.

The wide discretion enjoyed by regulators often makes them easily corruptible. Poor-quality goods and services, occasioned by this reality, are not only a violation of consumer rights under Article 46 of the Constitution but also a threat to the right to health and life. At the same time, corruption often translates into the existence of strong neo-patrimonial forces that protect



such commercial interests. In many instances, the neo-patrimonial forces in society have political interests through which they control commerce and the entire economic sector. Within this context, the consumer interests and rights of the citizen are sacrificed through the unwillingness of regulators to enforce standards due to bribery and the influence of the neo-patrimonial forces. Over time, corruption becomes so perverse in regulatory agencies that regulatory enforcement becomes the exception rather than the norm (Ibid.).<sup>8</sup>

### ***Corruption and the Principle of Equality and Non-discrimination***

One of the most fundamental principles of human rights is the doctrine of equality. Equality often requires that similar cases be treated in the same way unless there are reasons to treat them differently (Gosepath 2011). This doctrine underpins the judicial process. However, corruption interferes with this equality by tilting the scale in favour of the person who has bribed the judge to sway their decision. Due to the indeterminacy of law, both corrupt and non-corrupt judgments are usually attributed to the law. By introducing ‘impurities’ into the legal process, corruption not only creates inequality and discrimination but also corrodes the integrity of the law and legal system and contributes to the loss of public trust in the concept of law and judicial processes (Yusuf 2011: 57–83). Thus, instead of becoming an equalising factor, law becomes a means of legitimising inequality.

Such an outcome is much more destructive in common law, which relies heavily on precedence. Once a Judge of a superior court is bribed into making a ruling in favour of the briber, his or her decision becomes precedent and binding on lower courts. However, the doctrine of precedence presumes a certain level of purity of the law and integrity of the judges. Corruption, therefore, translates to precedents that are unjust to the person in the immediate case and to all those who will appear before magistrates and Judges in junior courts. The impact of corrupted judgments, especially in superior courts, could therefore outlive the Judge and the parties to the conflict and may take generations to overturn. Over time, the credibility of the judicial system suffers damages that may take a long time to undo. The UN Special Rapporteur on the Independence of Judges and Lawyers succinctly observed:

[C]orruption has direct damaging consequences in general on the functioning of state institutions, and in particular on the administration of justice. Corruption decreases public trust in justice and weakens the capacity of judicial systems to guarantee the protection of human rights, and it affects the tasks and duties of the judges, prosecutors, lawyers, and other legal professionals. (UNODC 2018)

Article three of the ICESCR asserts that all people have the right to equally enjoy every socioeconomic right enshrined in the Charter. Corruption compromises the attainment of these rights by violating the norms that guide their realisation. For instance, the norms that guide employment include merit and experience, yet corruption involves consideration of 'abnormal' factors, such as family relationships, friendship and ethnicity. Because such considerations are outside the control of some applicants, they end up disadvantaged by the corrupt recruitment process. In this way, corruption in employment allows less competent individuals to gain employment at the expense of those who merit the position, based on criteria that are unfairly allocated and thus violate the right to equal treatment (Gosepath 2011).

Consider another situation, in which a man invites only his family members to his wedding. Though familial relationship is a variable that excludes friends, work colleagues and even other members of the public, wedding invitations based on familial ties cannot be said to be corrupt acts. This is because the normative principles associated with weddings allow familial relationships to be used as a basis for invitation, unlike the norms that guide public appointments, which require the provision of equal opportunity for all potential applicants.

Corruption in the management of public resources also violates the rights of citizens to participate in the management of their resources as enshrined in Article 21 of the Universal Declaration of Human Rights (UDHR) and Article I of the International Covenant on Civil and Political Rights (ICCPR). Consider corruption in the public sector in which contractors bribe public officials to get mining contracts. Such an award is done not on the basis of public interest but in the interest of the public official carrying out the transaction. Moreover, awarding the tender to the bribe-giver violates the right of other applying contractors to equal treatment, in this way compromising the principle of equality. Supporting this line of thought, Raj Kumar argues that corruption violates human rights because it allocates resources on the basis of an unfair consideration, resulting in discrimination (Kumar 2003).

Other scholars have argued that corruption should be labelled a crime against humanity because of its negative impact on the victims' human rights. This conception perhaps mirrors Macleod's broader view of crimes against humanity (Macleod 2010: 281–302). According to Macleod a crime is against humanity if it endangers the public order of humankind, diminishes humankind and damages humankind (Ibid.). By indirectly resulting in the death of millions of patients, corruption in the health sector can be said to cause widespread damage and diminishes humankind. Though critics of this definitional expansion always cite the international criminal law

requirement of the presence of a policy element and systematic planning and execution of a crime, I take a consequentialist approach and argue that the substance of this crime lies not in the process but in the outcome. In other words, millions of deaths resulting from the corrupt practices of a few individuals should shock the human conscience just as genocide does.

One way in which a government can fulfil its part of the social contract is by strictly enforcing anti-corruption laws. As demonstrated in *The Republic v Grace Sarapay Wakhungu, John Koyi Waluke and Erad Supplies & General Contractors Limited*,<sup>9</sup> where the accused, Mrs Grace Wakhungu and John Walukwe, were sentenced to sixty-nine and sixty-seven years' imprisonment, respectively, for masterminding a maize scandal in which the government lost KES 314 million,<sup>10</sup> the law, if well enforced, can be useful in fighting corruption. Emphasis should be put on not only the imprisonment of the perpetrators but also the recovery of the stolen money as a means of realising the right that has been violated due to corruption and as a means of compensating victims.<sup>11</sup> This can be addressed by enacting strong anti-corruption legislation (in countries where they do not exist), enforcing existing laws and shielding anti-corruption agencies from neo-patrimonial and political interference. The biggest challenge, however, exists where the law itself perpetuates corruption, a situation that is discussed in the next section.

## Corruption and the Rule of Law

Addressing the UN High Level Debate on 'Human Rights at the Centre of the Global Agenda' in July 2016, Director General Irene Khan stated: '[W]ithout rule of law, human rights are paper promises and without human rights, the rule of law becomes rule by law and a system for repression ...'.<sup>12</sup> The rule of law has become one of the mainstream mechanisms through which international human rights standards are translated to the domestic level. Human rights are therefore captured in Constitutions (Bills of Rights), statutes, case law and regulations. The interpretation of these statutes, to give meaning to their content, therefore translates to the promotion of the rule of law. Though considered to be a key pillar of human rights, the rule of law is one of the most disputed concepts in sociolegal studies. According to Rawls, the rule of law is the rule of a system of rational and comprehensible rules bearing some relationship to the functions of co-ordination (Rawls 1971: 235). Rawls's conception is problematic because it provides room for the reign of unjust laws. For instance, if a law allows the President to arbitrarily allocate himself a given amount of national resources, then observing this unjust law is still part of the rule of law. This 'thin conception' of the rule of law negates the 'spirit' of the rule of law.

Though not very explicit, the rule of law should be tied to some public good. Scholars who hold this thick conception, such as Rachel Kleinfeld (2006) and Raz (1979) consider the rule of law as the presence of a predictable and efficient legal and justice system which protects human rights and observance of the law by the government and the people. Within this framework, the rule of law flows from an efficient and just legislative process to the fair and just interpretation of these laws by the judiciary and finally to the respect for the law by the citizens and government. Thus, at the centre of the law-making and interpretive processes lies the issue of human rights and justice. Supporting this view, Carothers notes that the quality of legal institutions influences the degree of respect for the rule of law (Carothers 1998, 2003). In other words, citizens are more likely to observe the law if they feel that it is legitimate. Inferentially, it can be argued that since corruption compromises the quality of legal institutions, it directly compromises the rule of law.

Human rights law considers the law to be supreme to all citizens, a principle that borrows heavily from the doctrine of equality and implies non-discrimination before the law.<sup>13</sup> Rampant corruption in the legislature corrupts the law-making process and creates unjust laws that are modelled to benefit either the parliamentarians or other parties with corrupt interests in the law. At the same time, 'legal corruption' makes a mockery of the rule of law because the very law that should be considered supreme (and probably helpful in fighting corruption) is part of the corruption system, making corruption easy to perpetuate or shielding the corrupt from prosecution.

Kaufmann and Vicente (2011: 198–201) define legal corruption as the presence and (or) enactment of legislations that perpetuate or tolerate corruption. Justice Mumbi Ngugi, in *Moses Kasaine Lenolkulal v Director of Public Prosecution*,<sup>14</sup> concurs with this view. She laments that section 62 (6) of the anti-corruption and Economic Crimes Act, 2003, promotes impunity and corruption because it allows for the suspension of public officers but shields constitutional office-bearers from suspension from office pending a corruption investigation. She explains:

It seems to me that the provisions of Section 62(6), apart from obfuscating, indeed helping to obliterate the 'political hygiene'... are contrary to the constitutional requirements of integrity in governance, are against the national values and principles of governance and the principles of leadership and integrity in Chapter Six, and undermine the prosecution of officers in the position of the applicant in this case. In so doing, they entrench corruption and impunity in the land.<sup>15</sup>

Kenya has experienced increasing legal corruption in that Parliament has been involved in making laws that perpetuate corruption and (or) shield corrupt public officers.<sup>16</sup> This is occasioned by two factors. First, a powerful neo-patrimonial system not only influences the law-making processes in Parliament but also acts as a watchdog for commercial and corruption interests (Akech 2011: 341–394). Such forces often influence political campaigns by funding political parties, thereby establishing political connections even before elections. Commenting on this reality, Akech observed:

... experience demonstrates that the legislature can also be influenced by private interests, and the making of public policy and law is often driven by strong and organised interest groups at the expense of the public interest. A need, therefore, arises to hold the legislature accountable. (Akech 2011: 352)

Second, Kenyan parliamentarians are members of the National Government Constituency Development Fund Oversight Committee, which is responsible for development projects at the constituency level.<sup>17</sup> This fund came into being in 2015 after the High Court declared that the Constituency Development Fund Act, 2003 (CDF Act) was unconstitutional because it allowed members of Parliament to take part in project implementation and parliamentary oversight, thereby violating the principle of the separation of power.<sup>18</sup> Specifically, the judges observed:

[T]he involvement of the Members of Parliament in the CDF implementation violates the core principle of separation of powers and to this extent, the CDF Act is unconstitutional ... to the extent that the Act conflates the executive and legislative functions, it obfuscates accountability mechanism envisaged under the Constitution underpinned by the doctrine of separation of powers. In that respect, the Act violates key national values and principles enunciated under Article 10 of the Constitution, to wit, good governance and accountability and we so find.<sup>19</sup>

Parliamentarians responded to this decision by recreating the Constituency Development Fund and renaming it the National Government Constituency Development Fund (NGCDF). However, this cosmetic change did not extinguish their control over the fund, and, to date, MPs still exercise a lot of control over the NGCDF. Since the court noted that the role of MPs ‘does not include involvement bodies whose functions entail co-coordinating, project approvals or actual implementation of projects as these functions are executive in nature’,<sup>20</sup> the current NGCDF can be said to violate this order (and is therefore equally unconstitutional). Because MPs perform both execution and oversight roles, they automatically entangle themselves in private sector business networks, which predisposes them to corruption.

Their watchdog roles, including through committees, are therefore compromised because many of them have significant business interests in public sector projects (including in their own constituencies), a fact which raises conflicts of interest.<sup>21</sup>

The rule of law in cases such as those cited above is thereby turned into a tool of human rights violation rather than a tool of emancipation and justice. Legal corruption compromises the integrity of the rule of law because it increases the likelihood that the law will be violated by other 'common' citizens (Appolloni and Nshombo 2014). In other words, if one's corruption is normalised either through the law or in practice, one no longer feels the impetus not to be corrupt, thereby propagating more corruption. Brytting et al. (2011) have argued that corruption easily prevails if the 'would-be-corrupt' can rationalise their corrupt deeds. Laws that legalise tax evasion by members of Parliament can thus act as a 'justification' for others to evade taxes (AfDB 2010; Muna 2011). A similar problem exists for laws that punish corruption only mildly. Justice Ngugi, in *Moses Kasaine Lenolkul v Republic*, observed:

In this case, the applicant is charged with various corruption-related offences committed within and in his capacity as Governor of Samburu County. These are serious offences, particularly given the devastation that corruption wreaks on our society and the well-being of citizens. However, and regrettably so, Parliament does not seem to treat corruption offences with the seriousness they deserve ... Parliament urgently needs to look at the provisions of Anti-corruption and Economic Crimes Act, 2013 if any inroads against corruption are to be made in this country.<sup>22</sup>

## **Justice for Sale**

As noted earlier, the legal structure of modern democracies like Kenya often confers upon the judiciary the tools and legal capacities that could fight corruption. But this does not necessarily cushion the judiciary itself from corruption. The 2019 Transparency International Corruption index ranked the Kenyan judiciary as the most corrupt institution, with 47 per cent of citizens who sought legal services reporting that they had been asked to give bribes to access legal services (Transparency International 2020). The 2021 Afrobarometer corruption perception index indicates that 86 per cent of Kenyans believe that the judiciary is corrupt (Afrobarometer 2022). Recent contradictory judgments by the judiciary in corruption cases and the suspension of several judicial officers over corruption, coupled with the withdrawal of prominent criminal cases by the Director of Public Prosecution, have only served to worsen the perception of corruption in the judiciary (*The Standard* 2022)

Rampant corruption in the Kenyan judiciary has not only undermined its capacity to effectively determine cases of corruption brought before it but has equally eroded public trust in governance. However, as suggested by Gloppen, bribery in the judiciary does not just come to the judicial officers directly. Rather, it comes through pressure by judicial superiors who are often compromised by the political establishment to undermine justice in the interest of corrupt parties (Gloppen 2014). This is further aggravated by the fear of judicial superiors that a ‘wrong’ decision in an important case could have consequences for the judiciary as a whole and for senior judicial officials. This in turn results in the corrupt allocation of cases to judges who are likely to rule in a particular manner, often to suit the interests of the political regime, or the transfer of judges who are deemed to be hostile to the political establishment. Thus, as Gloppen suggests:

Where the judicial leadership – and in particular the chief justice – is (seen to be) close to the sitting regime, this can taint the entire judiciary. Even where judicial appointments are otherwise effectively regulated in ways that place them beyond executive influence, the executive often has a much stronger say over the appointment of the chief justice and judge presidents. (Gloppen 2014)

As argued by Okoth-Ogendo, in his now famous seminal work, *Constitution without Constitutionalism: Reflections on an African Political Paradox* (1988), the presence of a constitutional framework does not necessarily constitute constitutionalism. Thus, although the Kenyan judiciary has been conferred immense power by the Constitution, including being granted functional, operational and financial independence, it continues to be a captive of internal and external corruption networks and neo-patrimonial interests. It succumbs to executive pressure and influence, increasingly fails to dispense justice to corruption cases, and directly involves judges and other judicial officers in graft. Corruption in the Kenyan judiciary has been aggravated further by investigatory and prosecutorial negligence and incompetence, factors which have jointly undermined access to justice and negated constitutional gains and the rule of law.

Despite its ranking as one of the most corrupt institutions in Kenya, the judiciary possesses the highest potential and capability to fight corruption. This is because judicial officers are generally bound by a commitment to justice, which enables them to surmount inefficient or corrupted laws. The following section explores the question of judicial activism and how it could help address corruption.



## Judicial Activism as an Anti-corruption Strategy

Charles Manga, an advocate of judicial activism, defines it as the process by which the courts adjudicate on constitutional matters not based on the black-letter law but with due consideration of public interests (Manga 2011: 1107–1108). Others have defined judicial activism as a philosophy which advocates that courts go beyond the adjudication of legal conflicts and focus on the ‘making’ of social policies that affect many more people and interests beyond the parties to a dispute. Overall, judicial activism implies that judges do not restrict themselves to the issues presented in a case but establish new rules that promote justice at individual and societal levels.

Once laws that perpetuate corruption emanate from Parliament, the burden is transferred to the judiciary to interpret the laws. It should be noted that once passed at the legislative level, very little can be done at the interpretive level because the courts are (mostly) bound by classical legal principles to interpret the law as it is, unless other concerns for public interest prevail and (or) the judge subscribes to judicial activism (Satyaranjan 2001). However, such interpretations have been subject to polemic contestation in legal theory and practice. For instance, the Hart-Fuller debate, and the realist–formalist divide in legal theory have essentially centred on this issue (Cane 2010; Tumonis 2012: 1361–1382). To avoid the attention of politicians, some judges opt to stick to the letter of the corrupted laws, on the basis that any legal amendments must come from Parliament. Others, such as the Supreme Court of Kenya, have often chosen to fence-sit on the matter of judicial activism. The court observed:

[O]ur Constitution neither endorses judicial restraint or expansive judicial activism: it simply creates the Judiciary as the institution through which the people of Kenya have bequeathed their sovereign power to exercise judicial authority and then mandates that Judiciary ... to enforce the Bill of Rights.<sup>23</sup> Notwithstanding the Supreme Court’s argument, courts stand the risk of losing moral legitimacy if they stick to the strict interpretation of unjust or corrupted laws (Akech 354–355). This is mainly because in the eyes of the citizenry, the role of the courts is to uphold justice, conceived as upholding just (good) laws. Although judges like Justice Mumbi Ngugi observe that courts should be committed to public interest and justice in corruption matters, critics note that justice is never at the centre of law formulation, hence it is unnecessary to expect the outcomes of the law always to be just, because judges are bound by rules and not by policy or public interest (Tumonis 2012: 1362–1364). Such, they argue, is the province of Parliament. But what happens if Parliament itself is corrupt or complicit in legal corruption? Judges must embrace judicial activism to



minimise the severe implications of such laws on the public. The judiciary should go beyond its role as arbiters and interpreters of law and become a public watchdog in instances where other watchdog institutions either fail to fulfil their mandate or become part and parcel of the corruption network. It must be observed that activist judges are very unpopular with legal conservatives and formalists, who see them as disruptive to the rule of law and social order (see, for example, Ornstein 2014). To them, judges must stick to the law even if that law promotes corruption and human rights violations and doing otherwise undermines the law. One such critic has referred to judicial activism as the ‘vanity of vanities’ and a ‘judicial sin’ (Allan 2015: 83–85). Faced with such criticism, the former Chief Justice of the Supreme Court of India wonders:

Can judges really escape addressing themselves to substantial questions of social justice? Can they simply say to litigants who came to them for justice and the general public that accords them power, status and respect, that they simply follow the legal text when they are aware that their actions will perpetuate inequality and injustice? Can they restrict their enquiry into law and live within the narrow confines of a narrowly defined rule of law? Does the requirement of constitutionalism not make of greater demands on the judicial function? (Baghwati 1985)

Baghwati’s argument sits at the very centre of the idea of having judges. By their very name (‘justices’) and that of their system (the ‘justice system’) judges are bound by the doctrine of justice more than they are by the doctrine of law in instances where justice and law conflict (see, for example, Campbell 2002). Ideally, the law should be commensurate with justice, but the disconnect emerges because the law-making process is undertaken by human beings with interests that sometimes may not be in line with the public interest, such as transparency and accountability. A clash between law and justice (understood as public interest, transparency and accountability) basically denotes a clash between the law-makers’ interest and justice. In such a clash, the judge is personally and professionally obligated to align himself or herself to the ends of justice, therefore, resulting in some level of judicial activism.

Judicial activism allows the judiciary to rectify the consequences that may result from legal corruption, such as the enactment of laws that shield legislators from taxation or security expenditures from any public scrutiny. Whereas advocates of the latter argue for this practice as a security measure, I hold that security considerations should not be a basis for locking out transparency and accountability measures. Public participation derives its justification from a higher moral position than security concerns. It is necessary, therefore, to strike a balance between security interests and

standards of accountability and transparency. Such a balance can be managed best by the judiciary since the executive and the legislature often have underlying personal and ideological interests in security laws and security matters in general (see Namunane 2015). Hailing ‘activist judges’, Arpita Saha postulates:

By stretching the letter of the law a little and acting according to the spirit behind it, the judiciary has intervened in cases where there is blatant misuse of discretion of executive authority or a lackadaisical attitude towards booking the corrupt and other anti-social elements in society. One of the meanings of judicial activism is that the function of the court is not merely to interpret the law but to make it by imaginatively sharing the passion of the Constitution for social justice (Saha 2008).

Through the doctrine of precedence, judges’ progressive interpretation of the law, especially in matters of governance and human rights, often go a long way to entrench the rule of law and the fight against corruption. For instance, Justice Mumbi Ngugi’s decision that required all Kenyan governors accused of corruption to step aside until their cases were concluded has become one of the most lethal instruments in the fight against corruption. The same has been upheld in at least two additional corruption cases concerning governors: *Ferdinand Ndungu Waititu Babayao & 12 others vs Republic* and *The Republic vs Mike Mbuvi Sonko*.<sup>24</sup> Advocates of judicial activism note that institutional failures in government, coupled with corruption and a dysfunctional legislature, leave the courts with the huge responsibility of not only interpreting the law but also acting as the people’s watchdog.

Judicial activism is therefore the last fallback of the citizenry in the case of institutional failure in the executive or legislature. Although judicial activism is a possible remedy for legal corruption, the practice is neither institutionalised in law nor widely practised and judges decide by themselves whether to be ‘activists or not’ (Coutinho, La Torre and Smith, 2015: 3). Entrenching the practice in law would be difficult as it most likely would be interpreted by the legislature as an onslaught on its law-making domain. The solution, therefore, lies in strengthening the judiciary beyond the level of any undue interference by the executive or legislature. This can be done by granting the judiciary full control of its budget, enhanced jurisdictional independence, allowing it to employ and control its staff, and providing a favourable working environment and remuneration.

## Conclusion

Whereas several strategies such as active media, civil society and intensive audits have been proposed as measures to curb corruption (Riley 2000, 137–153), the human rights dimension of corruption has often been ignored. The result is that victims of corruption in the public sector continue to suffer human rights violations at the hands of corrupt public officials. Corruption is indeed a violation of human rights because it violates the principles of dignity, equality and non-discrimination, which underpin the human rights doctrine. As has been demonstrated in this paper, corruption further goes against the right to access public services by preventing those who are unwilling or unable to pay bribes from accessing public services. To effectively handle corruption, a change in approach is necessary. Human rights activists should be engaged in the day-to-day operations of government to detect areas of weakness and loopholes that can be exploited by corruption cartels. To address legal corruption, it is important that the Constitution opens the door for public scrutiny of bills relating to transparency and accountability in government. Not only will this make it difficult for the legislature to manipulate a bill once in Parliament, it will also create room for an objective analysis to detect any cases of vested interest or conflict of interest in a bill, two factors that undermine the objective discussion of bills relating to governance and corruption in Parliament. Public scrutiny can be done through the involvement of civil society to provide technical expertise (Aye 2000).

In a country where the law-making and enforcement process is held captive by neo-patrimonialism and political corruption, textual reading of the law cannot produce any positive results in the war against corruption. Institutional strengthening of the judiciary and promotion of judicial activism should be encouraged to ensure that judges interpret the law based on public interest, universal human rights principles and a thicker conception of the rule of law. This is buttressed by the fact that respect for a thinly defined conception of the rule of law may actually be counterproductive to the human rights regime if the law-making process is already compromised by corruption. This is not to say that anarchy should prevail in the fight against corruption. Rather, human rights activists and lawyers should pay keen attention to the law-making process to ensure that the outcome of this process does not perpetuate corruption. Second, since the legislature and executive in the law-making process sometimes operate on the basis of underlying institutional and (or) personal interests, thereby propagating legal corruption, a more robust and activist judiciary

is necessary to align the law with public interest and/or human rights. This may require radical interpretation of the law in a way that would even be considered synonymous with law-making by the courts. Lastly, superior courts, such as the Supreme Court of Kenya, should see courts as platforms for the pursuit of justice and not simply the textual interpretation of law. Accordingly, they must be at the forefront in challenging judicial restraint on corruption matters and enhancing judicial activism.

## Notes

1. The opinions expressed in this paper do not reflect the views of Amnesty International and reflect the opinions of the author solely.
2. For the political value of rights, see Fortman (2006).
3. [www.transparency.org/en/what-is-corruption](http://www.transparency.org/en/what-is-corruption), accessed 15 June 2020.
4. Article 2.
5. Article 1.
6. Article 21.
7. *Republic vs Margaret Gachara and 2 others* (Chief Magistrates Court, Unreported).
8. *Republic vs Henry Rotich & 26 others* Criminal Case No. ACC 18, 19, 20 and 21 of 2019 cited in *Republic vs Kenya Revenue Authority & another; Director of Criminal Investigations & another (Interested Party)* Ex parte CMC DI Ravenna-Itinera JV [2020] eKLR.
9. Ibid.
10. Anti-Corruption Magistrate Court Criminal Case No. 31 of 2018 (Unreported).
11. About USD 3 million.
12. Anti-Corruption and Economic Crimes, Act, 2003 as well as The Proceeds of Crime and Anti-Money Laundering Act, 2016 provide a framework for the recovery of stolen wealth.
13. <https://www.idlo.int/fr/news/highlights/without-rule-law-human-rights-are-paper-promises>, accessed 20 July 2020.
14. See article 14 and article 2(1) of the International Covenant on Civil and Political Rights adopted and opened for signature, ratification and accession on 16 December 1966, entry into force 23 March 1976.
15. [2019] EKLR (High Court of Kenya)
16. Ibid. par 53.
17. See, for instance, section 62(6) of the Anti-corruption and Economic Crimes Act, 2003. See also Matingi F. (2006).
18. Article 53 of the National Government Constituency Development Fund, 2015.
19. *Institute of Social Accountability & another v National Assembly & 4 others* [2015] Eklr (High Court of Kenya).
20. Ibid. Par. 132.
21. Ibid. Par. 135.
22. Ibid.
23. [2019] EKLR Par. 13.

24. *Republic vs Independent Electoral and Boundaries Commission Ex parte National Super Alliance and 6 others* [2017] EKLK (Supreme Court of Kenya) par. 65.
25. [2019] EKLK (High Court of Kenya). See also *Republic vs Mike Mbuvi Sonko* (Anticorruption Magistrates Court in Nairobi – Unreported, 2020).

## References

- Africa Development Bank Group (AfDB), 2010, *Domestic Resource Mobilization for Poverty Reduction in East Africa: Kenya Case Study*, 31. [www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/Kenya%20Case%20Study\\_final.pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/Kenya%20Case%20Study_final.pdf) Accessed 15 June 2020.
- Afrobarometer, 2021, Overwhelming majority of Kenyans see corruption in the judiciary, Afrobarometer survey shows, *Afrobarometer*, 26 November. [https://www.afrobarometer.org/wp-content/uploads/2022/02/news\\_release-overwhelming\\_majority\\_of\\_kenyans\\_see\\_corruption\\_in\\_the\\_judiciary-afrobarometer-bh-25nov21.pdf](https://www.afrobarometer.org/wp-content/uploads/2022/02/news_release-overwhelming_majority_of_kenyans_see_corruption_in_the_judiciary-afrobarometer-bh-25nov21.pdf)
- Agbiboa, D., and Maiangwa, B., 2012, 'Corruption in the Underdevelopment of the Niger Delta in Nigeria', *The Journal of Pan African Studies*, Vol. 5, No. 8, p. 108. [www.jpanafrican.org/docs/vol5no8/5.8Corruption.pdf](http://www.jpanafrican.org/docs/vol5no8/5.8Corruption.pdf). Accessed 15 May 2020.
- Akech, M., 2011, 'Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?' *Indiana Journal of Global Legal Studies*, Vol. 18, No. 1., pp. 341–394.
- Allan J., 2015, 'The Activist Judge – Vanity of Vanities', in La Torre, M. ed., *An Interdisciplinary Approach to the American and European Experiences*, Cham: Springer, pp. 83–85.
- Appolloni, A., and Nshombo, J.-M., 2014, 'Public Procurement and Corruption in Africa: A Literature Review', in Decarolis, F. and Frey, M. eds, *Public Procurement's Place in the World. Central Issues in Contemporary Economic Theory and Policy*, London: Palgrave Macmillan.
- Ayee, J., 2000, 'Ghana: The Continuing Search for Cures in the Fight Against Corruption', in Hope, R. and Chikulo, B. eds, *Corruption and Development in Africa*, Cham: Springer, p. 186.
- Baghwati P., 1985, 'Judicial Activism and Public Interest Litigation in India', *Columbia Journal of Transnational Law*, Vol. 23, pp. 561–564.
- Brooks, G., Walsh, D., Lewis, C., and Kim, H. eds., 2003, *Preventing Corruption: Investigation, Enforcement and Management*, London: Palgrave Macmillan, p. 12.
- Brytting, T., Minogue, R., and Morino, V., 2011, *The Anatomy of Fraud and Corruption: Organizational Causes and Remedies*, Aldershot: Gower Publishers, pp. 5–6.
- Campbell T., 2002, 'Judicial Activism – Justice or Treason?' Working Paper Number 17, Centre for Applied Philosophy and Ethics, University of Melbourne. [apo.org.au/sites/default/files/resource-files/2002-09/apo-nid2646.pdf](http://apo.org.au/sites/default/files/resource-files/2002-09/apo-nid2646.pdf). Accessed 14 June 2020.
- Cane, P., 2010, *The Hart-Fuller Debate in the Twenty-First Century*, Camden: Bloomsbury Publishing.

- Carothers, T., 1998, 'The Rule of Law Revival', *Foreign Affairs*, Vol. 77, No. 2, pp. 95–106. <https://doi.org/10.2307/20048791>.
- Carothers, T., 2003, *Promoting the Rule of Law Abroad – The problem of knowledge*, Washington DC: Carnegie Endowment for International Peace.
- Coutinho, L. Pereira, La Torre, M., and Smith, S. D., 2015, Between Nightmare and Noble Dream: Judicial Activism and Legal Theory in Vanities, in La Torre, M. ed., *An Interdisciplinary Approach to the American and European Experiences*, Cham: Springer, p. 3.
- Damania, R., Fredriksson, P. G., and Mani, M., 2004, 'The Persistence of Corruption and Regulatory Compliance Failures: Theory and Evidence', *Public Choice*, Vol. 121, pp. 363–390.
- Donnelly, J., 2003, *Universal human rights in theory and practice*, Ithaca, NY: Cornell University Press, p. 10.
- Fortman, G., 2006, 'Poverty as a failure of entitlement: Do rights-based approaches make sense?' in Williams, L. ed., *International Poverty Law: An Emerging Discourse*. London: Zed Books, p. 36.
- Friedrich-Ebert-Stiftung, 2012, *Regional Disparities and Marginalisation in Kenya*. Nairobi: Elite Press, pp. 7–8.
- Gosepath, S., 2011, Equality, in Zalta, E. ed., *The Stanford Encyclopedia of Philosophy*, <https://plato.stanford.edu/archives/spr2011/entries/equality/>.
- Hellmann, D., 2012, Defining Corruption and Constitutionalizing Democracy, *Michigan Law Review*, Vol. 111, pp. 9–11. [ssrn.com/abstract=2021188](https://ssrn.com/abstract=2021188). Accessed 16 June 2020.
- Isaksen, J., 2005, *The budget process and corruption*. U4, Issue 3. <https://www.cmi.no/publications/file/2559-the-budget-process-and-corruption.pdf> Accessed 12 June 2022.
- Kaufmann, D., and Vicente, P., 2011, Legal Corruption, *Economics & Politics*, Vol. 23, No. 2, pp. 198–201.
- Kleinfeld, R., 2006, Competing definition of the Rule of Law, in Carothers, T. ed., *Promoting the Rule of Law Abroad: In Search of Knowledge*, Washington DC: Carnegie Endowment for International Peace.
- Kumar, R., 2003, 'Corruption and Human rights: Promoting Transparency in Governance and the Fundamental Right to Corruption Free Service in India', *Colombia Journal of Asian Law*, Vol. 17, No. 1 <https://journals.library.columbia.edu/index.php/cjal/article/view/3219>. Accessed 14 June 2022.
- Macleod, C., 2010, 'Towards a Philosophical Account of Crimes Against Humanity', *European Journal of International Law*, Vol. 21, No. 21, pp. 281–302.
- Manga, C., 2011, 'Constitutional Reforms and Constitutionalism in Africa: Reflections on some current challenges and Future Prospects', *Buffalo Law Review*, Vol. 59, pp. 1007–1108.
- Matiangi, F., 2006, 'Case Study on the Role of Parliament in the Fight against Corruption: The Case of the Kenyan Parliament', in Stapenhurst, R., Johnston, N. and Pelizzo, eds, *The role of parliaments in curbing corruption*, Washington DC: World Bank, pp. 69–70.

- Muna, W., 2011, 'MPs given 30 days to pay tax or face forced recovery', *Business Daily, Politics and Policy*, 5 August. [www.businessdailyafrica.com/MPs-given-30-days-to-pay--tax-or-face-forced-recovery/-/539546/1213746/-/aut7o6/-/index.html](http://www.businessdailyafrica.com/MPs-given-30-days-to-pay--tax-or-face-forced-recovery/-/539546/1213746/-/aut7o6/-/index.html). Accessed 20 July 2020.
- Muthoni, K., 2020, 'Legal battles haunt Uhuru's multi-billion legacy projects', *The Standard*, 21 July.
- Namatsi, J., and Gisesa, N., 2019, 'Uhuru cancels Kimwarer dam project, approves Aror after probe', *Daily Nation*, 18 September.
- Namunane, B., 2015, 'New Bill Seeks to Shield how KDF spends Budget Billions', *Daily Nation*, 1 August <http://www.nation.co.ke/news/shield-military-spending-from-public/-/1056/2816212/-/blcxyjz/-/index.html>. Accessed 21 March 2020.
- Ngira, D., 2017, '(Re) Positioning Socio-Economic Rights as Real Rights: A Response to Sceptics', *Mount Kenya University Law Journal*, Vol. 2, pp. 274–285.
- Nickel, J., 2013, 'Human Rights', in Zalta, E. ed. *The Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/archives/sum2013/entries/rights-human/>
- Okoth-Ogendo, H. W. O., 1988, *Constitutions without constitutionalism: reflections on an African political paradox*, New York: American Council of Learned Societies (ACLS).
- Organisation of Economic Co-operation and Development (OECD), 2008, OECD Glossary of Statistical Terms, Paris: OECD Publishing <https://doi.org/10.1787/9789264055087-en>. Accessed 15 June 2022.
- Ornstein, N., 2014, 'How Activist Judges Undermine the Constitution', *The Atlantic*, 18 September. <https://www.theatlantic.com/politics/archive/2014/09/how-activist-judges-undermine-the-constitution/380413/>. Accessed 5 June 2020.
- Quina, J., 2008, *Essays on Corruption in Sub-Saharan Africa*, PhD thesis: University of Warwick.
- Rawls, J., 1971, *A Theory of Justice*, Cambridge, MA: Harvard University Press, p. 235.
- Raz, J., 1979, *The Authority of Law: Essays on Law and Morality—The rule of Law and its virtues*, Oxford: Clarendon Press.
- Riley, S., 2000, 'Western Policies and African: The New Anti-Corruption Agend', in Hope, R. and Chikulo, B. eds, *Corruption and Development in Africa*. Cham: Springer, pp. 137–153.
- Saha, A., 2008, *Judicial Activism in India: A Necessary Evil*, <https://ssrn.com/abstract=1156979>
- Satyanarjan, S., 2001, *Judicial Activism: The Indian Experience*, *Washington University Journal of Law and Policy*, Vol. 6, 029–107.
- Sen, A., 1999, *Development as freedom*, New York: Knopf.
- St Clair, A., 2006, 'How Can Human Rights Contribute to Poverty Reduction? A philosophical Assessment of the Human Development Report', in Williams, L. ed., *International Poverty Law: An Emerging Discourse*, London: Zed Books, p. 25.
- Talbott, W., 2013, 'Consequentialism and Human Rights', *Philosophy Compass*, Vol. 8, No. 11, pp. 1030–1042.
- The Standard*, 2022, DPP has a case to answer on collapse of high-profile cases <https://www.standardmedia.co.ke/opinion/article/2001457961/dpp-has-a-case-to-answer-on-collapse-of-high-profile-cases>



- Transparency International, 2020, Kenya's Bribery Index 2019, <https://tikenya.org/wp-content/uploads/2020/12/2019-KENYA-BRIBERY-INDEX.pdf>
- Tucker, E., 1965, 'The Morality of Law', by Lon L. Fuller, *Indiana Law Journal*, Vol. 40, No. 2, pp. 270–274.
- Tumonis, V., 2012, 'Legal Realism & Judicial Decision-Making', *Jurisprudence*, Vol. 19, No. 4, pp. 1361–1382.
- United Nations Development Programme (UNDP), 2004, *Anti-corruption: Practice Note*, [https://popp.undp.org/UNDP\\_POPP\\_DOCUMENT\\_LIBRARY/Public/FRM\\_Accountability%20and%20Internal%20Controls\\_Program%20for%20Accountability%20and%20Transparency.pdf](https://popp.undp.org/UNDP_POPP_DOCUMENT_LIBRARY/Public/FRM_Accountability%20and%20Internal%20Controls_Program%20for%20Accountability%20and%20Transparency.pdf). Accessed 16 June 2020.
- United Nations Office on Drugs and Crime (UNODC), 2018, Corruption, Human Rights, and Judicial Independence, [www.unodc.org/dohadecclaration/en/news/2018/04/corruption--human-rights--and-judicial-independence.html](http://www.unodc.org/dohadecclaration/en/news/2018/04/corruption--human-rights--and-judicial-independence.html). Accessed 23 June 2020.
- Wenar, L., 2020, 'Rights', in Zalta, E. ed., *The Stanford Encyclopedia of Philosophy*, <https://plato.stanford.edu/archives/spr2020/entries/rights/>.
- World Bank, 1997, *Helping Countries Combat Corruption: The Role of the World Bank*, <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corrptn.pdf>
- Yusuf, H., 2011, 'Rule of Law and Politics of Anti-Corruption Campaigns in a Post-Authoritarian State: The Case of Nigeria', *King's Law Journal*, Vol. 22, No. 1, pp. 57–83. DOI: 10.5235/096157611794895264