

**TOWARDS A HUMAN RIGHTS BASED APPROACH TO FIGHTING  
CORRUPTION IN KENYA**

**BY**

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**G62/64151/2010**

**A THESIS SUBMITTED TO THE UNIVERSITY OF NAIROBI IN PARTIAL  
FULFILLMENT OF THE REQUIREMENT FOR THE AWARD OF THE DEGREE  
OF MASTER OF LAWS**

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**JUNE 2013**

## **DECLARATION**

This thesis is my original work and has not been presented for a degree award in any other university.

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## **DEDICATION**

I dedicate this thesis to my dear parents, Jasper and Lena Kariuki Baranya who have always believed in me.

## ACKNOWLEDGEMENT

I thank the Almighty God for this far that He has brought me.

I also sincerely thank my supervisor **Ms. Joy Asiema** and my reader **Dr. Akunga Momanyi**, both of whom have truly guided me through this journey and set aside their time to analyse my work.

Special thanks to **Prof Dr. Dr. Moni Wekesa**, for his constant encouragement and for his assistance in arranging my thoughts into a coherent sequence. **Jasper and Lena Kariuki** for their never ending moral, emotional and financial support. **Martin Gitonga and Joe Mwaniki** for pushing me to be a better role model and big sister. I finally wish to thank all my friends and my LLM classmates 2010/2011 intake for their encouragement and prayers.

God bless you all.

## **ABSTRACT**

Corruption has over the years slowly gained recognition as an economic crime of international concern. It is not only a hindrance to good governance and development but it is also one of the violators of human rights. This study notes that the anti corruption and human rights movements have been running in parallel for far too long and it would be more effective to fight corruption and preserve human rights if both movements worked together to achieve a common goal. The negative effects of corruption on human rights have been acknowledged by various international bodies such as the United Nations and the African Union. The Constitution of Kenya 2010 guarantees socio-economic rights in its text as well as laying emphasis on principles of integrity on the leadership in Kenya. Key focus is given to the right to health and the right to education based on the fact that illiteracy and diseases have been cited as some of the reasons for underdevelopment in Kenya. This study therefore addresses the effects of the corruption on the right to health and the right to education in Kenya. Under the right to health, an analysis on the effects of corruption on the number of doctors in public hospitals and the supply of medicine and medical equipment is done whereas under the right to education, the study focuses on the effects of corruption on infrastructural development in public primary schools. It argues that by applying rights based approach in the fight against corruption, the violation of human rights more specifically the right to health and education by corruption will be significantly reduced thereby ensuring that not only will corruption be significantly reduced but the right to education and health will also be enjoyed and realized. This study also analyses the effectiveness of the various international and national legal and institutional frameworks in place to address corruption specifically their roles in ensuring the enjoyment of the right to education and health in Kenya. The study proposes the use of a human rights based approach in the fight against corruption.

## LIST OF ABBREVIATIONS

ACECA	Anti- Corruption and Economic Crimes Act
ACHPR	African Court on Human and Peoples' Rights
ANC	African National Congress
AU	African Union
AUCCPC	African Union Convention on Combating and Preventing Corruption
CAJ	Commission on Administrative Justice
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
DFID	Department for International Development
EACC	Ethics and Anti- Corruption Commission
EACCA	Ethics and Anti- Corruption Commission Act
ECHR	European Court of Human Rights
ECOWAS	Economic Community of West African States
FPE	Free Primary Education
IACHR	Inter- American Court of Human Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICPC	Independent Corrupt Practices and other offences Commission
IMF	International Monetary Fund
IOM	Organization for Migration
LDCs	Less Developed Countries
MDGs	Millennium Development Goals
NARC	National Rainbow Coalition
NHIF	National Hospital Insurance Fund
OECD	Organization for Economic Cooperation and Development
PETS	Public Expenditure Tracking Survey
PPOA	Public Procurement Oversight Authority
POEA	Public Officers Ethics Act

PPDA	Public Procurement and Disposal Act
TI	Transparency International
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNCAC	United Nation Convention Against Corruption
UNECA	United Nations Economic Commission for Africa
UNESCO	United Nations Educational, Scientific and Cultural Organization
US	United States
USAID	United States Agency for International Development
WHO	World Health Organization

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## **Kenya**

Constitution of Kenya, 2010

Anti Corruption and Economic Crimes Act, 2003

Ethics and Anti-Corruption Commission Act, 2011

Kenya National Commission on Human Rights Act, 2011

Leadership and Integrity Act, 2012

National Hospital Insurance Fund Act no 9 of 1998

Prevention of Corruption Act Chapter 65 Laws of Kenya (Repealed)

Public Officers Ethics Act, 2003

Public Procurement and Disposal Act, 2005

## **Nigeria**

Corrupt Practices and Other Offences Act 2000, Act no 5 of the Laws of the Federation of Nigeria

## **South Africa**

Prevention and Combating of Corrupt Activities Act, No. 12 of 2004

## **United Kingdom**

Auctions (Biddings Agreement) Act, 1927

Anti Terrorism, Crime and Security Act, 2001

Bribery Act, 2010

Public Bodies Corrupt Practices Act, 1889

Prevention of Corruption Act, 1906 and 1915



## **LIST OF CONVENTIONS AND INTERNATIONAL INSTRUMENTS**

African Union Convention on Human and Peoples' Rights

African Union Convention on Combating and Preventing Corruption 2003

Constitution of the World Health Organization

Convention on the Elimination of all Forms of Discrimination Against Women

Economic, Social and Cultural Committee General Comments Numbers 3, 13 of 1999 and 14 of 2000

Inter-American Convention against Corruption 1996

International Convention on Economic, Social and Cultural Rights 1966

The OECD Convention against Bribery of Foreign Officials in International Business Transactions 1999

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Esther Theuri Waruru & Another v Republic [2008] eKLR

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**‘The earth produces enough to meet every man’s need but not every man’s greed.’**

**Mahatma Gandhi (1869-1948)**

# CHAPTER ONE

## *INTRODUCTION*

### **1.0 Background to the Study**

The fight against corruption is central to the struggle for human rights. Corruption has always greased the wheels of exploitation and injustice which characterise our world. From violent ethnic cleansing to institutionalised racism, political actors have abused their entrusted powers to focus on gains for the few at great cost for the many.<sup>1</sup> For too long the anti-corruption and human rights movements have been working in parallel rather than in tandem to address the problem of corruption.<sup>2</sup>

There is no single, comprehensive, universally accepted definition of corruption. Attempts to develop such a definition encounter legal, criminological and, in many countries, political problems.<sup>3</sup>

The word ‘corruption’ is derived from the Latin word ‘*corruptus*’ meaning to break.<sup>4</sup> Its derivation emphasizes the destructive effect of corruption on the fabric of society and the fact that its popular meaning encompasses all those situations where agents and public officers **break** the confidence entrusted to them.<sup>5</sup>

The Kenya Anti Corruption and Economic Crimes Act of 2003 (ACECA) defines corruption to mean the offences of bribing agents,<sup>6</sup> secret inducements for advice,<sup>7</sup> deceiving principal,<sup>8</sup> conflict of interests,<sup>9</sup> improper benefits to trustees for appointment,<sup>10</sup> bid rigging,<sup>11</sup> abuse of

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<sup>1</sup> C de Swardt, ‘Foreword’ in *Corruption and Human Rights: Making the Connection* (Report by International Council on Human Rights Policy 2009).

<sup>2</sup> Ibid.

<sup>3</sup> United Nations Anti-Corruption Toolkit, <[http://www.unodc.org/documents/corruption/publications\\_toolkit\\_sep04.pdf](http://www.unodc.org/documents/corruption/publications_toolkit_sep04.pdf)> (accessed 20 December 2011).

<sup>4</sup> C Nicholls, T Daniel, M Polaine & J Hatchard, *Corruption and Misuse of Public Office* (Oxford University Press 2006) 1.

<sup>5</sup> Ibid.

<sup>6</sup> Anti Corruption and Economic Crimes Act (ACECA) 2003, sec 39.

<sup>7</sup> Ibid, sec 40.

<sup>8</sup> ACECA 2003, sec 41.

<sup>9</sup> Ibid, sec 42.

<sup>10</sup> ACECA 2003, sec 43

<sup>11</sup> Ibid, sec 44.

office,<sup>12</sup> dealing with suspect property,<sup>13</sup> bribery, fraud, embezzlement of public funds, breach of trust or an offence involving dishonesty with connection to any tax or in connection with the elections of persons to public office.<sup>14</sup>

In South Africa, corruption is defined generally by the Prevention and Combating of Corrupt Activities Act.<sup>15</sup> The Act lists certain conduct that would constitute the general offence of corruption. Section 3 of the Act provides that;

Any person who directly or indirectly accepts or receives [...] any gratification from another person whether for his benefit or the benefit of another person, or any person who gives or offers to give to any person any gratification for the benefit of that person or another in order to act personally or by influencing another to act in a manner that amounts to [...] the abuse of a position of authority, breach of trust or the violation of a legal duty or a set of rules, designed to achieve an unjustified result [...] is guilty of the offence of corruption.

In summary, therefore, corruption as defined by the Prevention and Combating Corrupt Activities Act, occurs when one person gives another, who accepts a benefit meant to induce him/her to abuse their power.

In Nigeria, the Corrupt Practices and Other Offences Act<sup>16</sup> defines corruption to include bribery, fraud and other related offences.<sup>17</sup>

In the United Kingdom, the term corruption is not expressly defined as well. The various legislations on corruption have all listed various acts that would constitute corruption.<sup>18</sup> It is evident therefore that most commonwealth countries do not have a definition of corruption per se. They all have a list of specific acts or conducts that would be regarded as corrupt.

When the negotiations of the United Nations Convention against Corruption (UNCAC) began in early 2002, one option under consideration was not to define corruption at all but to list specific types or acts of corruption.<sup>19</sup> UNCAC as well does not therefore define corruption.

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<sup>12</sup> ACECA 2003, sec 46.

<sup>13</sup> Ibid, sec 47.

<sup>14</sup> Anti Corruption and Economic Crimes Act 2003 (ACECA) art 2(1).

<sup>15</sup> No. 12 of 2004 < <http://www.home-affairs.gov.za/PDF/Prevention%20and%20Combating%20of%20Corrupt%20Activities%20Act-1.pdf>> accessed 27 July 2012.

<sup>16</sup> 2000, Act no 5 of the Laws of the Federation of Nigeria <<http://www.nigeria-law.org/Corrupt%20Practices%20and%20other%20Related%20Offences%20Act%202000.htm>> accessed 27 July 2012.

<sup>17</sup> Corrupt Practices and Other Offences Act 2000, sec 2.

<sup>18</sup> See Public Bodies Corrupt Practices Act 1889, Prevention of Corruption Act 1906 and 1915, Auctions (Biddings Agreement) Act 1927, Anti Terrorism, Crime and Security Act 2001 and Bribery Act 2010.

<sup>19</sup> United Nations Anti-Corruption Toolkit, < [http://www.unodc.org/documents/corruption/publications\\_toolkit\\_sep04.pdf](http://www.unodc.org/documents/corruption/publications_toolkit_sep04.pdf)> accessed 20 February 2012.



Human Rights are commonly understood as inalienable fundamental rights to which a person is inherently entitled simply because he or she is a human being.<sup>20</sup> The idea of basic rights originated from the need to protect the individual against the arbitrary use of state power.<sup>21</sup> States therefore have an obligation to protect, fulfil and respect human rights.<sup>22</sup> Although human rights are classified into various categories, international human rights law stresses that all human rights are universal, inalienable, indivisible and interrelated.<sup>23</sup> In other words neither category of rights is superior to the other. Human rights are generally categorized into three generations. This division into three generations was first proposed by Karel Vasak at the International Institute of Human Rights at Strasbourg.<sup>24</sup> First generation rights are related to liberty and refer fundamentally to civil and political rights. The second generation rights are related to equality, including economic, social and cultural rights. Third generation or 'solidarity rights' cover group and collective rights, which include, *inter alia*, the right to development, the right to peace and the right to a clean environment.<sup>25</sup> The Universal Declaration of Human Rights (UDHR) recognizes two sets of human rights: the traditional civil and political rights, as well as economic, social and cultural rights.<sup>26</sup> In transforming the Declaration's provisions into legally binding obligations, the United Nations adopted two separate international covenants which, taken together, constitute the bedrock of the international normative regime for human rights.<sup>27</sup>

The Constitution of Kenya covers in its bill of rights both civil and political rights as well as economic, social and cultural rights.<sup>28</sup> The state ought to take legislative, policy and other measures including setting of standards to achieve the progressive realization of the economic, social and cultural rights guaranteed under Article 43 of the constitution.<sup>29</sup> Corruption can negatively impact the achievement of economic, social and cultural rights.

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<sup>20</sup> Icelandic Human Rights Centre, 'The Concepts of Human Rights: An Introduction' <<http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/humanrightscconceptsideasandfora/theconceptsofhumanrightsanintroduction/definitionsandclassifications/>> accessed 4 December 2012.

<sup>21</sup> Ibid

<sup>22</sup> General Comment no. 3 of the Committee on Economic, Social and Cultural Rights.

<sup>23</sup> See n20.

<sup>24</sup> Ibid.

<sup>25</sup> See Icelandic Human Rights Centre, (n20).

<sup>26</sup> H Steiner, P Alston & R Goodman, *International Human Rights in Context: Law, Policies & Morals* (3<sup>rd</sup> Ed., 2008)263.

<sup>27</sup> Ibid.

<sup>28</sup> Constitution of Kenya, 2010, Chapter Four.

<sup>29</sup> Ibid, Art 21(2).

For example the embezzlement of public revenue results in a reduction in the spending on education, healthcare or housing.<sup>30</sup> The wide-ranging duties accepted by states under the International Covenant on Economic, Social and Cultural Rights (ICESCR) regarding the provision of services tend to generate large public service contracts that create prime opportunities for corruption.<sup>31</sup> The language used in the ICESCR is to the effect that all state parties ought to take necessary steps and measures to ensure the progressive realization of economic, social cultural rights.<sup>32</sup> Corruption can therefore lead to the violation of economic and social rights when the state fails to make maximum use of its resources.

All human beings in society are born equal with inherent rights.<sup>33</sup> However corruption has been a leading cause of inequalities in society, infringing on basic human rights. Philosophers have traditionally divided rights into two categories namely positive and negative.<sup>34</sup> If a citizen has a right to freedom of speech, for example, then the state has a duty of non-interference. This negative right allegedly imposes no burden or costly duty upon the state. On the other hand, the standard view of the positive right holds that welfare rights require extensive governmental action. Opponents of positive rights might argue, for example, that providing a food stamp program would involve a costly and bureaucratic network. The right to food thus appears to be an expensive right. However, the maintenance of civil and political rights depends on the existence of police, courts, and a plethora of other institutions that may require state funding as well.<sup>35</sup>

Human rights not only create entitlements for rights-holders, but they also create duties for States. States are required to ensure the fulfilment of human rights by acting in a way that enables rights-holders to enjoy the rights to which they are entitled. Human rights require that actions - of a legislative, administrative, policy or programme nature - are considered in light

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<sup>30</sup> C Rose, 'The Application of Human Rights Law to Private Sector Complicity in Governmental Corruption' (2011) 24 *Leiden Journal of International Law* 715-740 <<http://journals.cambridge.org>> accessed 21 June 2012.

<sup>31</sup> See Rose, (n30).

<sup>32</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, art 2 (1) provides that each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

<sup>33</sup> M D A Freeman, *Lloyd's Introduction to Jurisprudence* (7<sup>th</sup> edn., Sweet & Maxwell 2001) 113.[...] John Locke states that all humans [...] have reason and are equal. As such they confront each other in a state of nature. God's requirement for all men in a state of nature is that they live according to the law of nature.

<sup>34</sup> A D Renteln, 'The Concept of Human Rights' (1988) *Anthropos* 343-364 <<http://www.jstor.org/stable/40463371>> accessed 21 June 2012.

<sup>35</sup> *Ibid.*

of the obligations inherent in human rights. Actions which violate or fail to support the realization of human rights contravene human rights obligations. A rights-based approach assumes the creation of an enabling environment in which human rights can be enjoyed. A rights-based approach also promises an environment which can prevent the many conflicts based on poverty, discrimination and exclusion.<sup>36</sup>

Corruption is a vice that was until a decade or two ago an acknowledged fact of life and little was talked about it.<sup>37</sup> Some responded to the problem with pragmatic acceptance, seeing bribery as a different way of doing business, a way to bypass the bureaucratic red tape and to outdo business rivals.<sup>38</sup> Cases of corruption can equally be traced in biblical accounts such as the story of Ahab and Naboth's vineyard in 1<sup>st</sup> Kings 21<sup>39</sup>. Verse 15-16 provides;

As soon as Jezebel heard that Naboth had been stoned to death she said to Ahab, "Get up and take possession of the vineyard of Naboth the Jezreelite that he refused to sell you. He is no longer alive but dead." When Ahab heard that Naboth was dead, he got up and went down to take possession on Naboth's vineyard.

Now it is beginning to be accepted that corruption is not a private matter between corrupted and corruptor, but something that may distort and degrade whole economies and cultures.<sup>40</sup> There has been a growing concern about corruption globally as well as nationally as demonstrated by the development of a number of instruments and documents in response to it.<sup>41</sup> Some UN bodies have also concluded that where corruption is widespread, states cannot comply with their human rights obligations.<sup>42</sup>

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<sup>36</sup> S Goonesekere, 'A Rights Based Approach to Realizing Gender Equity'

<<http://www.un.org/womenwatch/daw/news/savitri.htm>> accessed 17 February 2012.

<sup>37</sup> B Evans, 'The Cost of Corruption' discussion paper on corruption, development and the poor (Tearfund).

<sup>38</sup> Ibid.

<sup>39</sup> Holy Bible, New International Version (International Bible Society 1973) 379.

<sup>40</sup> See (Evans) n37.

<sup>41</sup> See United Nations Convention against Corruption (UNCAC) 2005, African Union Convention on Preventing and Combating Corruption (AUCPCC) 2003, Inter-American Convention against Corruption 1996, The OECD Convention against Bribery of Foreign Officials in International Business Transactions 1999, UN International Code of Conduct for Public Officials 1996, Resolution (97) 24 on the Twenty Guiding Principles for the Fight Against Corruption, The Constitution of Kenya 2010, The Anti Corruption and Economic Crimes Act(ACECA) 2003, Public Officers Ethics Act (POEA) 2003, Public Procurement and Disposal Act (PPDA) 2005, Witness Protection Act, 2006 etc.

<sup>42</sup> See comments of the Committee on Economic Social Cultural Rights on Tajikistan's state report 2006 to the effect that "The committee notes with concern that despite the efforts taken by the State party, corruption and nepotism continue to be widespread preventing the equal enjoyment of economic social and cultural rights" para 13 <<http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.TJK.CO.1.pdf>> accessed 5 July 2012; and by the Committee on the Rights of the Child that it "remains concerned at the negative impact corruption may have on the allocation of already limited resources to effectively improve the promotion and protection of children's rights, including their right to education and health" CRC/C/COG/CO/1 para 14.

Corruption in Africa also bears some roots in colonialism. The experience of colonialism led the African masses to view colonial state institutions as forces of usurpation of African resources. It generated the mentality that the state, and all the material resources at its disposal, belonged to 'another', and it was in this context that systemic corruption began.<sup>43</sup> When colonialism ended, African leaders stepped into the shoes of the departed foreign rulers, inheriting the institutions of alienation, and often behaving in ways not too dissimilar from their colonial masters. It soon became apparent that, in essence, the change from a colonial administration to an African one was merely a change of guard, as the new leaders rapidly began to misuse and misappropriate public assets.<sup>44</sup> Consequently, to the wider masses, the state did not shed its image as a force apart, but continued to display exclusive features of a colonial type, as the new leaders entrenched a culture of fraud and public embezzlement. The culture of corruption also took hold in the civil service and within parastatals of many post-independent countries, where nepotism was rife in appointments, with those in authority employing their kith and kin as well as people hailing from their villages. So wide-spread was the culture of patronage and clientelism that the values of transparency and accountability had no place in the evolving political situation. In all these acts of nepotism involving employment, state resources were being expended to achieve narrow tribal and private interests.<sup>45</sup>

Corruption may be linked directly to a violation of a right when a corrupt act is used deliberately to deny access to a certain right for example when a judge is bribed to make a decision that favours the corrupt party, this affects the impartiality of the judge and the right to a fair hearing<sup>46</sup> is infringed upon and the rule of law equally undermined. Other examples include where a state (through public officials), misuse and misappropriate funds allocated for healthcare or education in the state, thereby infringing on the right to health or on the right to education. A public official is defined in the United Nations Convention against Corruption (UNCAC)<sup>47</sup> as;

any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary,

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<sup>43</sup> M H Khalil Timamy, 'African Leaders and Corruption' (2005) 32, 104 *Review of African Political Economy* 383-393.

<sup>44</sup> *Ibid.*

<sup>45</sup> See Khalil Timamy (n 43).

<sup>46</sup> Constitution of Kenya 2010, art 50 (1) provides that every person has a right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or, if appropriate another independent or impartial tribunal or body.

<sup>47</sup> UNCAC 2005, art 2(a).

whether paid or unpaid, irrespective of that person's seniority; or any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party; or any other person defined as a "public official" in the domestic law of a State Party [...]

In Kenya, The Public Officer Ethics Act of 2003 defines a public officer to mean;

Any officer, employee or member, including an unpaid, part-time or temporary officer, employee or member, of any of the following—(a) the Government or any department, service or undertaking of the Government; (b) the National Assembly or the Parliamentary Service; (c) a local authority; (d) any corporation, council, board, committee or other body which has power to act under and for the purposes of any written law relating to local government, public health or undertakings of public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law;(e) a co-operative society established under the Co-operative Societies Act; (f) a public university; (g) any other body prescribed by regulation for the purposes of this paragraph.<sup>48</sup>

Corrupt public officials therefore not only raise integrity questions but also hinder the public from benefiting from public service entitled to them.

The United Nations Convention Against Corruption (UNCAC) which was adopted in 2003 and entered into force in 2005 is the first international legal instrument to address corruption as a universal problem. In its foreword, Kofi Annan, (then secretary general to the UN) acknowledged that corruption was indeed a problem that leads to the violation of human rights. He states that;

Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish. This evil phenomenon is found in all countries—big and small, rich and poor—but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment. Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development.<sup>49</sup>

Corruption is mainly regarded as a major hindrance to economic development in any given nation.<sup>50</sup> Corruption takes various forms that vary from one society to another. In Africa, the

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<sup>48</sup> Public Officer Ethics Act 2003, sec 2.

<sup>49</sup> K A Annan, Foreword to the United Nations Convention against Corruption 2005.

<sup>50</sup> United Nations Anti-Corruption Toolkit, <

[http://www.unodc.org/documents/corruption/publications\\_toolkit\\_sep04.pdf](http://www.unodc.org/documents/corruption/publications_toolkit_sep04.pdf)> (accessed 20 June 2012) provides

most common forms of corruption are petty corruption, grand corruption and systemic corruption.<sup>51</sup> With petty corruption, a public official demands or expects 'speed money' to perform an act which he or she is ordinarily required by law to perform. Grand corruption occurs when a high level public or state officer who formulates government policy or is in a decision making position, demands a payment for exercising the extensive arbitrary powers vested in him or her.<sup>52</sup> Systemic corruption occurs where corruption is found in every fibre of society as to deem it a way of life in that society. The causes of corruption across the world are vast and varied, with the list ever growing. These causes may be categorized into several broad categories such as economic, social, political and institutional.<sup>53</sup> This categorization is however not exhaustive.

The fact that corruption also violates human rights has not in the past been highlighted as the focus has mainly been on the effect of corruption on the economic development of any nation. However, it should be noted that development encompasses all aspects of a society, economic, political, social and cultural.<sup>54</sup> Access to healthcare, education, adequate housing, water, the availability of food, access to social security all contribute to the development of a nation. Further at the meeting of the G8 countries in Gleneagles in July 2005, it was stated that the Millennium Development Goals (MDGs) cannot be achieved, particularly the eradication of poverty and disease, unless the developing countries rid themselves of corrupt regimes and establish effective strategies to combat corruption.<sup>55</sup>

The preamble to the African Union Convention on Preventing and Combating Corruption (AUCPCC) 2003 provides the basis for this regional legal instrument on corruption. It acknowledges that corruption undermines accountability and transparency in the management of public affairs as well as socio-economic development on the continent. Under

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that corruption not only distorts economic decision-making, it also deters investment, undermines competitiveness and, ultimately, weakens economic growth. [...] there is evidence that the social, legal, political and economic aspects of development are all linked, and that corruption in any one sector impedes development in them all.

<sup>51</sup> F Simbiri-Jaoko, 'The Role of National Human Rights Institutions in the Fight against Corruption in Africa' (Stakeholder's Conference on Corruption and Human Rights, Gaborone, March 2011) 33.

<sup>52</sup> Ibid.

<sup>53</sup> P L O Lumumba, 'Corruption as an Impediment to the Full Enjoyment of Human Rights in Africa: Effective Fight against the Menace' (Stakeholder's Conference on Corruption and Human Rights, Gaborone, March 2011) pp 20.

<sup>54</sup> A Sen, *Development as a Freedom* Chapter 2, 'The Ends and Means of Development' (Anchor Books 1999) and D Trubek & S Alvaro (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press 2006) 8 state that [...] development means more than economic growth and must be redefined to include "human freedom".

<sup>55</sup> C Nicholls, T Daniel, M Polaine & J Hatchard, *Corruption and Misuse of Public Office* (Oxford University Press 2006) 10.

development in Africa has on numerous occasions been blamed on corruption and on the culture of impunity in the continent.<sup>56</sup>

Nigeria is one of the most vibrant markets in Africa, with an entrepreneurial business culture and recent reforms in the banking sector that have won international plaudits. Foreign investment historically has been dominated by oil and gas, but has broadened substantially in recent years into finance, private equity, power, telecoms, consumer products and mining.<sup>57</sup> However, despite Nigeria's size, and the energy and talents of its people, it has failed to achieve its full potential. The reasons include poor leadership, poor infrastructure and a history of high levels of corruption. The Nigerian market has long been notorious for graft, partly as a result of the country's reputation as the world leader in financial crime, but also because of the systematic abuse of its oil wealth over several decades by the political class. As a result, many leading investors that might otherwise have flocked to the country have stayed away.<sup>58</sup>

In the case of Zaire (now the Democratic Republic of Congo), officials at all levels, from the office of the president on down, engaged in various forms of looting.<sup>59</sup> Shortly after coming to power in 1965, President Mobutu (then president of Zaire) "privatized" a third of the national budget by transferring it out of the hands of the Ministry of Finance and placing under his direct control.' At the same time, he began forcing the state-owned copper conglomerate Gecamines to hand over part of its revenues from mineral exports, often siphoning off a quarter of its gross receipts.' Other monies came straight from the central bank, with Mobutu reportedly diverting between United States (US) \$50 million and \$70 million a year from the Bank of Zaire to private accounts in Switzerland and elsewhere in Europe. The former president also transferred funds out of the Banque du Kinshasa, of which he was a principal owner.<sup>60</sup>

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<sup>56</sup> P Wolfowitz, 'Tackle African Corruption' (2005) <

[http://www.africanprogress.net/worldbank\\_corruption\\_africa.htm](http://www.africanprogress.net/worldbank_corruption_africa.htm)> accessed 24 July 2012. The world bank president remarks on corruption in Africa stating as follows; [...] There is a real chance now that the poorest countries in Africa can turn the corner, that Africa can become a continent of hope...The responsibility to deal with corruption is not just something for the African government and the African people...The developed countries have a huge responsibility as well. They have the responsibility to help the poor countries in Africa recover some of the assets that have been taken from them and deposited in banks in developed nations.

<sup>57</sup> K Gosztonyi, A Taylor and J Bray, 'Facing up to Corruption in Nigeria' (Control Risks 2009) 3.

<sup>58</sup> Ibid.

<sup>59</sup> A Wedeman, 'Looters, Rent-Scrapers, and Dividend-Collectors: Corruption and Growth in Zaire, South Korea, and the Philippines' (1997) 31(4) *The Journal of Developing Areas* 457-478 <

<http://www.jstor.org/stable/4192713>> accessed 21 June 2012.

<sup>60</sup> Ibid.



In Kenya, it has been stated that every year, corruption and mismanagement of public funds robbed Kenyans of over Kshs 270 billion, which money is enough to fund free primary and secondary education in Kenya for 18 years. This money can also cater for the budget for the ministry of education (139 billion) Roads (67 billion), Medical Services (32 billion), Public Health (16 billion) and energy (19 billion).<sup>61</sup> The amount is also enough to buy anti- HIV, tuberculosis and malaria drugs for a decade. With such shocking statistics, it is quite evident how corruption violates human rights, specifically economic and social rights. When funds that ought to be allocated for education or healthcare are misappropriated, the realization of the right to health and the right to education guaranteed in human rights instruments<sup>62</sup> as well as in the constitution of Kenya, 2010<sup>63</sup> is equally affected.

There have been allegations that corruption in developing countries has led to the purchase of sub-standard medical equipment and purchase of counterfeit medication. Obtaining medicine that reaches a standard of safety and quality is a necessary part of health care.<sup>64</sup> In Kenya, in the National Hospital Insurance Fund (NHIF) corruption saga that unfolded in 2012, it was alleged that there was an irregular allocation of funds by NHIF to Clinix and Meridian Medical Centres.<sup>65</sup> There have been further allegations that funds allocated to facilitate free primary education in Kenya have been misappropriated therefore negating the achievement of the right to education for primary school going children in Kenya. The infrastructure in

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<sup>61</sup> D Onchami and J Njiraini, 'Shs 270 Billion: That's What We Lose to Graft Yearly' The Standard (Nairobi 3 December 2010) <<http://www.standardmedia.co.ke/?id=2000023860&catid=4&a=1&articleID=2000023860>> accessed 20 June 2012. Statistics released by Permanent Secretary to the Ministry of Finance, P S Kinyua to a parliamentary committee in 2010.

<sup>62</sup> International Covenant on Economic, Social and Cultural Rights 1966, art 12(1); 'The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' and art 13(1) 'The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.' Universal Declaration on Human Rights (UDHR) 1948, art 25.

<sup>63</sup> Constitution of Kenya 2010, art 43 (1) (a) and (f); Every person has a right to the highest attainable standard of health, which include the right to health care services, including reproductive health care [...], right to education.

<sup>64</sup> L Christian et als, 'The problem of substandard medicine in Developing Countries' (2012) <<https://www.lafollette.wisc.edu/publications/workshops/2012/medicines.pdf>> accessed 5 July 2012.

<sup>65</sup> C Karongo, 'Kenya: MPs demand Firm's Disclosure in NHIF Saga' Capital FM (10 May 2012) <<http://allafrica.com/stories/201205101196.html>> accessed 5 July 2012.



public primary schools in Kenya is equally wanting. This study sets out to interrogate the effects of such corrupt practices on the right to health and education.

Corruption and poor governance are both a cause of poverty and a barrier to overcoming it. Where transparency and accountability mechanisms are weak or lacking, the needs of the poor are marginalized and funds intended for basic service sectors such as education, health and water are at a risk of being lost, misused or misallocated.<sup>66</sup> Corruption has over the years received global recognition thereby in essence rendering it a crime of international concern. However despite having international, regional and municipal legal instruments in place to curb the economic crime of corruption,<sup>67</sup> it stills remains a great concern for many countries around the world, especially developing nations like Kenya.

## **1.2 Statement of the Problem**

Corruption contributes to the violation of human rights in various fields. Corruption negatively affects the realization of the right to health and right to education in Kenya. The right to health and the right to education are economic, social and cultural rights guaranteed under the Constitution of Kenya. A violation of these rights can therefore be termed as unconstitutional and unlawful.

Corruption is still a huge problem in Kenya despite the enactment of numerous anti-corruption laws and the application of various anti- corruption approaches in the fight against corruption. This study proposes to investigate the effects of corruption on the realization of the right to health and the right to education in Kenya. The underlying problem that informs this study is that corruption has now become a violator of fundamental rights of the citizens inter alia the right to health and the right to education. There is thus a need to create a nexus between corruption and human rights through an introduction of a human rights based approach in the fight against corruption in Kenya.

## **1.3 Objectives**

### **General Objective**

This study aims to explore the adequacy or otherwise of the human rights based approach to fighting corruption in Kenya with a view of suggesting additional control measures that can minimize the effects of corruption on the realization of fundamental human rights.

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<sup>66</sup> Transparency International Cameroon, 'Mapping Transparency and Integrity Deficits in Primary Education in Cameroon' (2011) <[http://www.un.org/en/ecosoc/newfunct/pdf/luxembourg\\_tisda\\_cameroun\\_en\\_web.pdf](http://www.un.org/en/ecosoc/newfunct/pdf/luxembourg_tisda_cameroun_en_web.pdf)> accessed 5 July 2012.

<sup>67</sup> See n41.

## **Specific Objectives**

- 1) To critically examine the effects of corruption on the right to health and education in Kenya with a view to offering alternatives to addressing corruption in the education and health sector.
- 2) To assess the adequacy of the existing legal and institutional framework addressing corruption in Kenya
- 3) To recommend the use of a human rights based approach to fighting corruption in Kenya

## **1.4 Research Questions**

This study addresses the following research questions;

- 1) Is the human rights based approach an effective approach to addressing corruption in Kenya?
- 2) Does corruption affect the realization of the right to health and education in Kenya?
- 3) Will a collaborative initiative between anti corruption agencies and human rights agencies aid in reducing the negative effects of corruption on human rights in Kenya?

## **1.5 Hypotheses**

The following hypotheses are drawn;

- a. The human rights based approach is an effective approach to addressing corruption in Kenya.
- b. Corruption hinders the achievement of the right to health and education in Kenya.
- c. A collaborative initiative between anti corruption agencies and human rights agencies will aid in reducing the negative effects of corruption on the realization of human rights in Kenya

## **1.6 Significance of the Study**

This study intends to benefit policy makers in government, health sector, education sector as well as other researchers in the same field. The findings of this study will be used to put in place mechanisms that will address corruption from a human rights perspective. The expected end product of this study is a significant contribution to the reduction of corruption in Kenya.

## **1.7 Justification of the Study**

This study intends to fill the gap in the existing literature on corruption with the inclusion of the rights based approach to fighting corruption. The study takes note of the fact that the human rights legal regime and the anti- corruption legal regime have been running in parallel. It is now an acknowledged fact that corruption does lead to the violation of human rights<sup>68</sup> thereby existing corruption laws ought to include a human rights perspective to addressing corruption in their core text. The study explores the human rights based approach to fighting corruption as an effective approach to addressing corruption. Various approaches used in anti-corruption strategies such as the economic approach, the legal and enforcement approach, the institutional framework approach among others have not been effective thus far as corruption persists as a problem in Kenya. This study argues that the reason the various anti- corruption approaches and strategies have not been successful in eradicating corruption is mainly because they have not been applied in collaboration. Applying a legal framework approach, an institutional framework approach and a rights based approach simultaneously would go a long way in significantly reducing corruption.

This study is equally justified by the fact that corruption leads to the violation of human rights directly or indirectly and as such there is a dire need to approach the problem of corruption from a human rights perspective. Corruption is cited as one of the hindrances to development in Kenya. Fundamental human rights ranging from the right to life to the right to a clean environment all contribute to the development of any nation. Sessional Paper no 10 of 1965 cited poverty, disease and illiteracy as one of the leading causes of under development in Kenya. The fight against diseases can be equated to the realization of the right to health whereas the fight against illiteracy can be equated to the realization of the right to education. Corruption directly and indirectly affects the realization of these two fundamental economic, social and cultural rights. Creating a link between corruption and a violation of these rights will create new legal avenues for addressing corruption.

## **1.8 Theoretical Framework**

This study is mainly guided by the rights based approach theory. However the study also acknowledges other existing theoretical approaches that have been applied to fight corruption and makes a case for the inclusion of the rights based approach theory. The study is also guided by the sociological school of legal thought. Corruption as a crime cannot be dealt with

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<sup>68</sup> C de Swardt, 'Foreword' in *Corruption and Human Rights: Making the Connection* (Report by International Council on Human Rights Policy 2009).

in isolation. Since it affects the fibres of society, it is only prudent to address it in the context of society. Sociological jurists such as Roscoe Pound, tend to be sceptical of the rules presented in textbooks and are more concerned to see what really happens, 'the law in action'.<sup>69</sup> The legal framework addressing corruption is just but one step in the fight of corruption. It is ineffective if applied as the only tool of eradicating corruption. There is need to link legislation to the various social institutions. If the law is a tool of social change and exists primarily to restore social order, then one cannot evade linking the law with the society in order to achieve effective results. Human rights fall in the domain of the individual as well as a duty placed upon the state and to some extent society to respect, protect and promote these rights. Corruption infringes on various human rights and by introducing a human rights based approach to handling corruption, perhaps these rights shall be protected.

The traditional approach to fighting corruption has been the legal and enforcement approach. This framework consists of the criminal law system and punishment is meted out for individuals found guilty of corruption. In Kenya, the Anti Corruption and Economic Crimes Act (ACECA) contains several punitive measures for persons found guilty of corruption. The challenge with applying the legal and enforcement approach is that it requires a specific environment to flourish. This approach requires an ideal financial, administrative, political and legal framework in place to make anti corruption agencies such as the Ethics and Anti Corruption Commission, in Kenya work. Many developing countries such as Kenya struggle to achieve these conditions. Despite this, the legal and enforcement approach to corruption is still an effective means of curbing corruption. The United Nations Convention Against corruption (UNCAC) as well as the ACECA list acts of corruption that should be investigated and punished as crimes both in the public and private sector in the case of the former. This in essence brings on board the judiciary in the fight against corruption. As much as corruption touches on the ethics and code of conduct of those involved, it is worthwhile to echo the words of Oliver Wendell Holmes, one of the proponents of legal realism, who argues that as law and morals are different, the law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. The practice of it, in spite of popular jests tends to make good citizens and good men.<sup>70</sup> In Kenya, the prosecution of suspects of corruption has not been without its own share of challenges. The Ethics and Anti Corruption Commission formerly Kenya Anti Corruption Commission lacks any

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<sup>69</sup> M D A Freeman, *Lloyd's Introduction to Jurisprudence* (7<sup>th</sup> ed. Sweet & Maxwell 2001) 661

<sup>70</sup> G C Christie & P H Martin, *Jurisprudence Text and Readings on the Philosophy of Law* (2<sup>nd</sup> ed. West Publishing Co. 1995) 807

prosecutorial powers and for a long time the commission has been labelled as a toothless bulldog. Part II of the ACECA provides for appointment of special magistrates. These magistrates have exclusive jurisdiction to try offences specified in the Act.<sup>71</sup> The special magistrates are obliged, as far as is practicable, to hold the trial of an offence under the Act on a day-to-day basis until completion.

The economic approach to corruption focuses on incentives and disincentives that influence public officials' behavior and their propensity to accept bribes or abuse their position.<sup>72</sup> This approach focuses on the economic rationale behind corrupt practices and models the corrupt employee as a rational actor who decides whether to engage in corrupt activities by balancing the potential benefits against the potential costs and consequences. Much anti-corruption work modeled by this approach focuses on public sector management issues that alter the incentives, penalties and possibilities of detection for certain actions.<sup>73</sup> However, this approach though effective only looks at instances of corruption in a very limited setting.

The anthropological approach argues that the common definition of corruption assumes that there is always a clear division between the public and private sphere.<sup>74</sup> This definition, which is based on Weber's ideal type of bureaucracy, is not always applicable to non-Western contexts. From an anthropological point of view, this definition is too restrictive as it does not fully capture how people in a particular context determine what is a corrupt practice and what is not. What is seen as corruption varies from one context to another.<sup>75</sup>

As a concept, the rights based approach ensures the meaningful and systematic inclusion of the most vulnerable in society. A rights based approach to development is a framework that integrates the norms, principles, standards and goals of the international human rights system into the plans and processes of development.<sup>76</sup> The fulfilment and achievement of human rights, both civil and political rights as well economic social and cultural rights, has a great impact on the development of any nation. The rights based approach suggests an integrated

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<sup>71</sup> ACECA, s 4(1)

<sup>72</sup> F Hutchinson, 'A Review of Donor Agency Approaches to Anti Corruption' (Asia Pacific School of Economics and Government, The Australian National University 2005) <<http://anchorage-net.org/content/documents/pdp05-3.pdf>> accessed 4 December 2012.

<sup>73</sup> Ibid

<sup>74</sup> Ibid

<sup>75</sup> See Hutchinson (n68).

<sup>76</sup> J Kirkemann & T Martin, 'Applying a Rights Based Approach-An Inspirational Guide for Civil Society' (The Danish Institute for Human Rights 2007) <<http://www.humanrights.dk/files/pdf/Publikationer/applying%20a%20rights%20based%20approach.pdf>> accessed 5 July 2012.

view of sustenance (economic and social rights) and freedoms (civil and political rights) as complementary; each one is necessary for the full realization of the other.<sup>77</sup> For example, if all the citizens in a nation can access healthcare and education and their right to vote and right to freedom of expression upheld, then poverty is significantly reduced on the one hand and the citizens equally participate in their governance on the other hand thus achieving development. Corruption is thus a major hindrance to development as well.

Connecting acts of corruption to violations of human rights also creates new possibilities for action, especially if, acts of corruption can be challenged using the different national, regional and international mechanisms that exist to monitor compliance with human rights. In the last sixty years, following the adoption of the Universal Declaration of Human Rights (UDHR) in 1948, many mechanisms have been created to hold states and individuals accountable for human rights violations. In addition to judicial accountability, parliamentary reporting plays an important role in many countries, while monitoring by civil society has become more extensive. Intergovernmental institutions have also developed, and the main UN mechanisms are now supported by regional mechanisms such as the European Court of Human Rights (ECHR), the African Court on Human and Peoples' Rights (ACHPR) and the Inter-American Court of Human Rights (IACHR). The evolution of national human rights institutions is equally significant.<sup>78</sup>

When acts of corruption are linked to violations of human rights, all these institutions could act to force accountability and so create disincentives for corruption. While they do not replace traditional anti-corruption mechanisms – primarily the criminal law – they can give cases prominence, may force a state to take preventive action, or may deter corrupt officials from misusing their powers.<sup>79</sup> They can therefore both raise awareness and have a deterrent effect. Taking a human rights approach is about empowering groups that are exposed to particular risks. The human rights framework emphasises explicitly that vulnerable and disadvantaged groups must be protected from abuse. It does so by applying cross-cutting principles – in particular principles that focus on non-discrimination, participation and accountability – that have the effect of empowering people who are disadvantaged. Human rights law requires states to take these principles seriously. Populations should not be

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<sup>77</sup> C N Musembi, 'Towards an Actor- Oriented Perspective to Human Rights' IDS Working paper 169 (International Development Studies 2002).

<sup>78</sup> C de Swardt, 'Corruption and Human Rights: Making the Connection' (Report by International Council on Human Rights Policy 2009).

<sup>79</sup> Ibid.

consulted in a superficial manner, for example; they should be allowed and encouraged to participate actively in efforts to fight corruption. A human rights perspective requires policy-makers to ask how the design or implementation of anti-corruption programmes will affect people who are marginalised or impoverished, subject to social discrimination, or disadvantaged in other ways. Adhering to human rights principles implies identifying and overcoming obstacles (such as language differences, cultural beliefs, racism and gender discrimination) that make such people vulnerable to corruption. While there seems to be agreement that corruption has specific impacts on vulnerable and disadvantaged groups, the incorporation of vulnerability and gender in the design of anti-corruption programmes is still limited and exceptional. Making fuller use of human rights would help to strengthen these dimensions of policy. The principle of non discrimination can be particularly useful as a guide to attain this objective.<sup>80</sup>

The rights-based approach to development encourages a redefinition of the nature of the problem and the aims of the development enterprise into claims, duties, and mechanisms that can promote respect and adjudicate the violation of rights. Typically, this brings about a 'root cause' approach, focusing primarily on matters of state policy and discrimination. The move from needs to rights, and from charity to duties, also implies an increased focus on accountability. Indeed, at the heart of any rights-based approach to development are concerns with mechanisms of accountability, for this is precisely what distinguishes charity from claims.<sup>81</sup>

The rights based approach to development aspires to root the practice of development within the ethical framework of rights. Rights based approach articulates key principles that would make development 'rights-based.'<sup>82</sup> Finally the rights based approach advocates for equality and non discrimination, participation and inclusion, accountability and respect for the rule of law and accepting the universality and indivisibility of human rights, principles which are essential in the fight against corruption.

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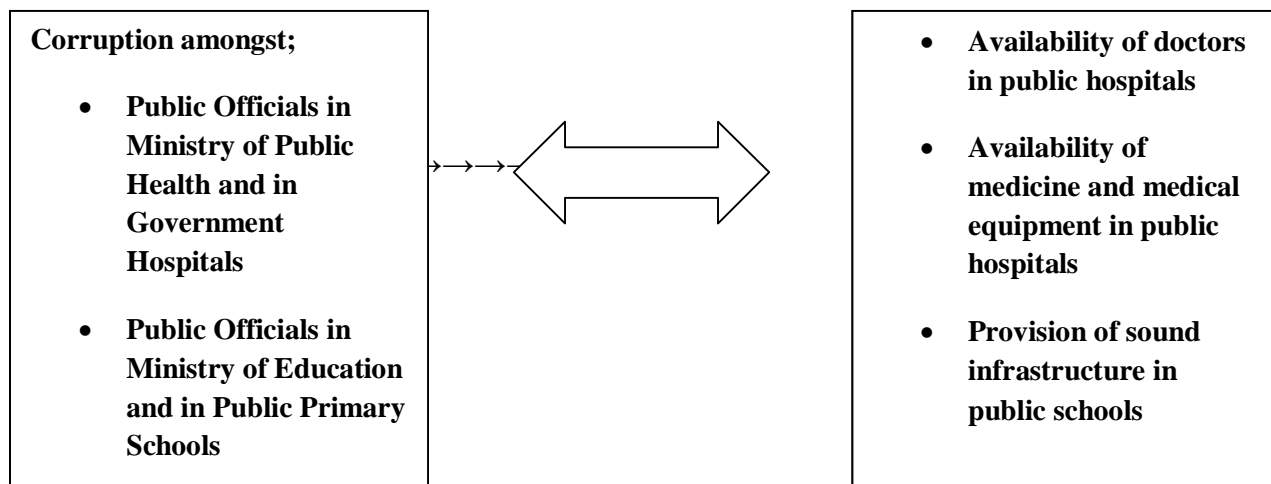
<sup>80</sup> See (C de Swardt) n74.

<sup>81</sup>P Uvin 'From the Right to Development to the Rights Based Approach' (2007) 17 *Development in Practice* 597-606 <<http://www.jstor.org/stable/25548258>> accessed 21 June 2012.

<sup>82</sup> UN Office of the High Commissioner for Human Rights, Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies <<http://www.ohchr.org/english/issues/poverty>> accessed 20 June 2012.

## 1.9 Conceptual Framework

This study conceptualizes that corruption affects the realization of the right to health and right to education in Kenya. Corruption in government directly and indirectly affects the distribution of resources meant for the health and education sector in Kenya.



### Independent Variable

### Dependent Variable

This study conceptualizes that corruption amongst public officials in the ministry of public health and in government hospitals affects the availability of medicine and medical equipment as well as the availability of doctors in public hospitals. Corruption amongst public officials in the ministry of education and in public schools also affects the provision of sound infrastructure in public primary schools thereby negating the achievement of the right to education.

This study focuses on the definition of corruption as behaviour by a public servant, whether elected or appointed, which involves a deviation from his or her formal duties because of reasons of personal gain to himself or herself or to other private persons with whom the public servant is associated.<sup>83</sup> Corruption requires two or more parties to a transaction, at least one of whom holds a position of public trust and/or exercises a public role, and another or others who act in a private capacity.

‘Human rights’ are conceptualized in this study as fundamental entitlements to all human beings by virtue of being human beings. Human rights are universal, inalienable, inherent, indivisible and interrelated.

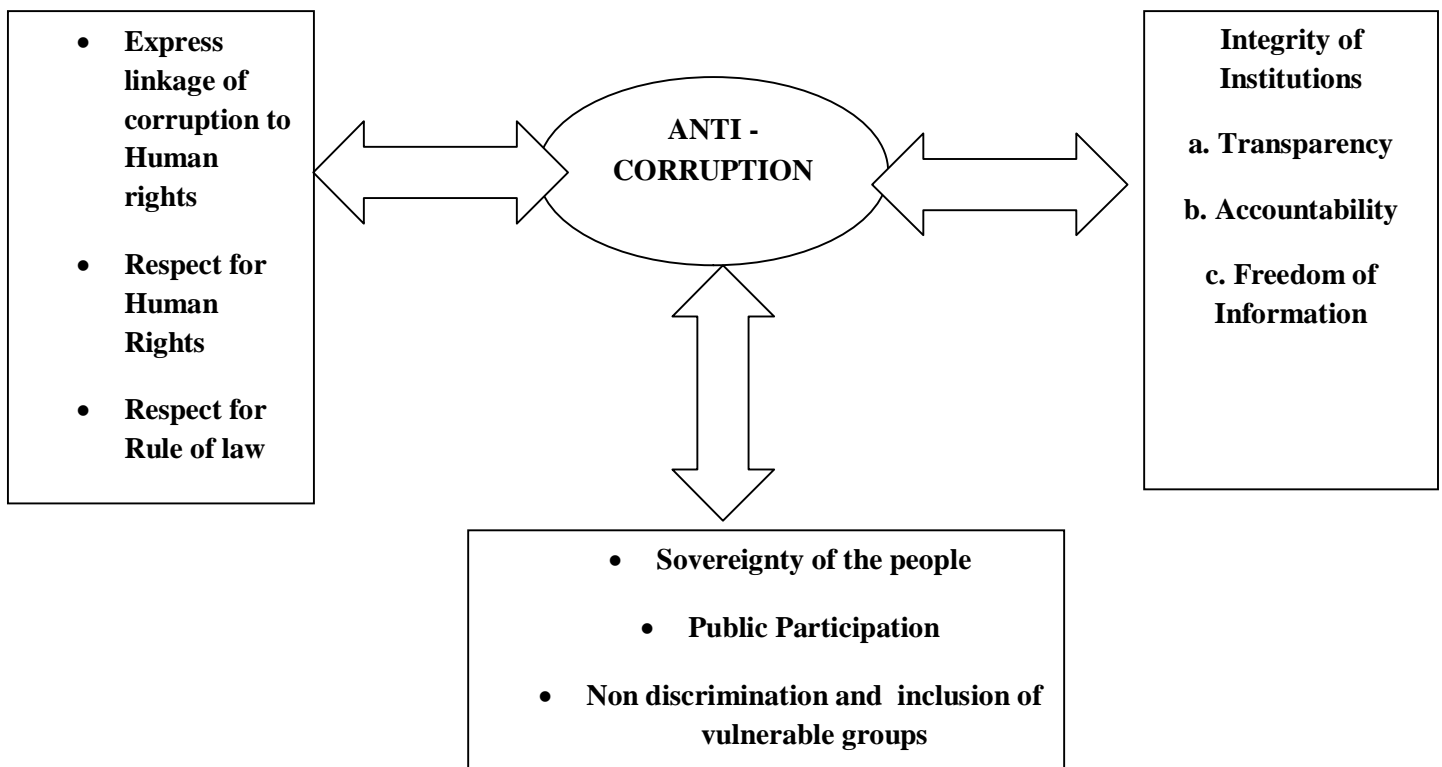
<sup>83</sup> J Lapalombara, ‘Structural and Institutional Aspects of Corruption’ (1994) 61(2) Social Research <<http://www.jstor.org/stable/40971035>> accessed 21 June 2012.



‘Violation of a human right’ means that the enjoyment and/ or achievement of that right is made impossible. Corruption as a violator of a human right can be twofold. It can be a direct violation for example bribing a Judge to decide a case in ones favour is a direct violation of the right to a fair hearing. It can also be an indirect violation, for example, embezzlement of public funds allocated for the construction of sanitation facilities in public primary schools would lead to the lack of the sanitation facilities which would eventually lead to the violation of the right to education. One of the key components to the right to education is a functioning educational system with adequate infrastructure in place. Lack of sanitation facilities in public primary schools would therefore render the environment not conducive for learning.

‘A human rights based approach’ to fighting corruption entails a root cause analysis of corruption, highlighting the importance of human rights law principles of participation in decision making, non discrimination and inclusion of vulnerable groups, transparency and accountability in decision making and the respect for human rights and the rule of law.

The study thus conceptualizes a rights based approach to fighting corruption as follows;



**Express linkage of corruption to human rights** –Corruption can directly affect rights at a macro level and a micro, local level. For example, the Indonesia case studies reveal that poor people are expected to pay bribes to teachers to obtain reports, for school uniforms, and for

scholarships affecting their right to education. In Sri Lanka, where healthcare is free, patients in line for heart surgery are reportedly required to pay a bribe to hospital staff to bring them up in the line for surgery. In these cases, corruption directly impacts upon the poor people's rights to education and health.<sup>84</sup>

**Empowerment** – Empowerment of the poor and vulnerable is an integral part of human rights based approach. Corruption exposes the poor people's powerlessness vis-à-vis duty bearers where a combination of a lack of information and knowledge plus a strongly felt dependence on the providers of services usually prevents the poor from voicing their concerns. The poor and disadvantaged need to be empowered through awareness of corrupt practices, their rights and entitlements that corruption is taking away, as well as where and who they can contact to report instances of corruption, without fear of reprisals, and with quick and effective results.<sup>85</sup>

**Participation** - Rights based approaches require a high degree of participation, including from communities, civil society, minorities, indigenous peoples, women and disadvantaged groups. According to the UN Declaration on the Right to Development, such participation must be active, free and meaningful so that mere formal or ceremonial contacts with beneficiaries are not sufficient.<sup>86</sup>

**Non-discrimination and attention to vulnerable groups** – In the fight against corruption, the poor must be considered as the principal actors of development. They can no longer be seen as passive recipients; they are strategic partners rather than target groups.

**Accountability** – Rights based approaches focus on raising levels of accountability in the development process by identifying claim holders (and their entitlements) and corresponding duty holders (and their obligations). In this regard, they look both at the positive obligations of duty holders (to protect, promote and provide) and at their negative obligations (to abstain from violations). Where duty bearers are corrupt, they work against both positive and negative obligations. Improving integrity, or developing and implementing strategies for the prevention or control of corruption, is therefore an integral part of ensuring accountability.<sup>87</sup>

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<sup>84</sup> T Pilapitiya, 'The Impact of Corruption on the Human Rights Based Approach to Development' (United Nations Development Programme- Oslo Governance Centre 2004). [http://www.albacteria.ma/xmlui/bitstream/handle/123456789/30538/0284The\\_Impact\\_of\\_Corruption\\_on\\_the\\_Human\\_Rights\\_Based\\_Approach\\_to\\_Development\(2005\)r.pdf?sequence=1](http://www.albacteria.ma/xmlui/bitstream/handle/123456789/30538/0284The_Impact_of_Corruption_on_the_Human_Rights_Based_Approach_to_Development(2005)r.pdf?sequence=1) accessed 4 December 2012.

<sup>85</sup> Ibid.

<sup>86</sup> See Pilapitiya (n80).

<sup>87</sup> Ibid.

## 1.10 Literature Review

Corruption is one of the most serious problems Kenya faces. It has undermined the most important institutions and tarnished the reputation of Kenyan leaders.<sup>88</sup> Further, corruption in both the health and education sector undermines the development of any nation. In the year 2012, the Kenya National Assembly Budget Committee proposed a reduction by 4 percent of all “current grants to government agencies” with the exception of those under Ministry of Health, Ministry of Education, Ministry of Roads, Ministry of Energy and Ministry of Regional Development Authorities.<sup>89</sup> The committee realizes the importance of healthcare and education to the development of the nation.

### 1.10.1 Effects of corruption on the right to health

**Taryn Vian (2005)**<sup>90</sup> notes that due to the size and complexity of hospitals, there is a high possibility of the occurrence of many types of corruption. Economists have pointed out, corruption is a ‘crime of calculation’ and is more likely to occur where budgets are large and ‘rents’ or possibilities for people to gain from decisions made by officials are high. Hospitals meet these criteria for vulnerability. Globally, hospitals account for 30–50 per cent of total health sector spending (public and private). The author points out that money leaks from hospitals, through opaque procurement of equipment and supplies, ghost employees, exaggerated construction costs and inflated hospital price tags. Ultimately it is the patient that suffers either because they are asked to pay bribes for treatment that ought to be free or because treatment decisions are based on financial motivation rather than medical need. Vian’s article is mainly focused on corruption in hospitals and how the same affects the supply of medical equipment. However this study will also highlight the role of the state in corruption in public hospitals which either directly or indirectly affects the number of doctors. This study will also find out the effects of corruption on the infrastructure in public primary schools.

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<sup>88</sup> J Githongo, ‘Keynote Address: The Relationship between Ethics and Business Management’ in D Lutz & P Mimi, *Shareholder Value and Common Good* (Strathmore University Press 2004)25.

<sup>89</sup> National Assembly, ‘The Budget Committee Report on the Estimates of Revenue and Expenditure for 2012/2013’ (Tenth Parliament, Fourth Session)  
<[http://www.parliament.go.ke/index.php?option=com\\_content&view=article&id=257:budget-commitee-report-on-estimates-of-revenue-and-expenditure-for-2012-13&catid=31:breaking-news&Itemid=46](http://www.parliament.go.ke/index.php?option=com_content&view=article&id=257:budget-commitee-report-on-estimates-of-revenue-and-expenditure-for-2012-13&catid=31:breaking-news&Itemid=46)> accessed 3 August 2012.

<sup>90</sup> T Vian, ‘Corruption in Hospital Administration’ (2005) *Corruption and Health*  
<[http://www.bu.edu/actforhealth/actforhealth04/Part%201\\_3\\_corruption%20in%20hospitals.pdf](http://www.bu.edu/actforhealth/actforhealth04/Part%201_3_corruption%20in%20hospitals.pdf)> accessed 24 July 2012.

**Siri Gloppen (2008)**<sup>91</sup> argues that litigation is an effective strategy to hold government's accountable for implementing the right to health. She opines that a person or institution entrusted with power and resources normally has an obligation to be accountable - that is, an obligation to justify that the power and resources are used in accordance with the rules and the interests of the owners - or face penalties. Transparency, answerability (the obligation to provide answers and justify actions), and controllability (the potential application of sanctions if the performance or justifications are found lacking) are fundamental elements of accountability relations. Governments' accountability for the right to health stems from the understanding that they hold power in trust on behalf of the people and that their mandate includes an obligation to respect, protect and fulfill the right to health. Failure to act in accordance with these obligations may, in a democracy, result in electorates replacing their governments. Elections are the ultimate democratic accountability mechanism, but are weak in the sense that they are infrequent - usually every four or five years - and are "blunt," that is, because a multitude of issues are involved simultaneously, it is difficult to interpret the signals from the electorate with regard to a specific policy area, such as health. She offers a framework for exploring litigation as a strategy to advance the right to health by holding governments accountable to human rights norms. This study supports her arguments and notes that in as much as economic and social rights have recently been entrenched in the constitution of Kenya 2010; there has been little litigation on the same in the Kenyan courts. This study takes note of the fact that many of the corruption scandals in both the education and health sectors have not ended up in a court of law for litigation. The courts are an instrumental organ in protecting fundamental rights of the citizens and aiding in the fight against corruption. This study will further make a case for litigation as one of the means through which the government can be held accountable with regard to the realization of not only the right to health but also the realization of the right to education.

**Bernard Ntahiraja and Nestor Nkurunziza (2011)**<sup>92</sup> embark on a study of analysing the position of Burundian law as regards the social role of the state. They narrow down their study to analysing the justiciability of the right to health in Burundi. They note that economic, social and cultural rights such as the right to health are frequently presented as generating positive obligations for the state. The state has the obligation to allocate resources

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<sup>91</sup> S Gloppen, 'Litigation as a Strategy to Hold Governments Accountable for Implementing the Right to Health' (2008) 10(2) Health and Human Rights 21-36 <[http:// www.jstor.org/stable/20460101](http://www.jstor.org/stable/20460101)> accessed 21 June 2012.

<sup>92</sup> B Ntahiraja & N Nkurunziza, 'The State and Social Rights of her Citizens: The Right to Health in Burundi' in H Hammann & S Makoroka (eds), *Konrad Adenauer Stiftung African Law Study Library* (Vol 7, Rule of Law Program for Sub-Saharan Africa 2011) 18-41.

for the realization of these rights. This role of the state in light to economic, social and cultural rights is founded in the various international, regional and national legal instruments which states ratify thereby becoming state parties with obligations to fulfil. The authors note with concern that as at December 2005, Burundi had 201 doctors, physicians and specialists included. This represented a ratio of one doctor per 47,678 inhabitants, a ratio that does not meet the World Health Organization (WHO) standard of one doctor per 10,000 inhabitants. The authors further note that although they lacked the statistics showing the number of doctors who had left to practice in countries in the sub region, there was no doubt that they had been leaving in large numbers. The exodus of doctors is a widespread problem throughout Africa and according to WHO, approximately 20,000 African doctors and nurses leave the continent each year mainly for Organization for Economic Cooperation and Development (OECD) countries. In conclusion, the authors opine that effective recognition and realization of social rights is not a luxury but a necessity to ensure the legitimacy of the rule of law. They note with concern that the implementation of the right to health remains insufficient in Burundi as the health sector does not receive enough resources. Ntahiraja and Nkurunziza argue that one of the reasons there is shortage of medical personnel and drugs in the health sector in Burundi is inadequate state resources. This study argues that corruption affects the utilization of both adequate and inadequate resources thereby negatively affecting the number of doctors as well as the supply of medical equipment. The problem of insufficient medical personnel and inadequate medication and medical equipment cannot entirely be placed on inadequate resources but misappropriation of the same resources as well.

### **1.10.3 Effects of Corruption on Right to Education**

**Eric Berger (2003)**<sup>93</sup> analyses the right to education under the South African Constitution. He commends the South African Constitution for epitomizing a new breed of modern constitutions, enshrining socio economic rights such as the right to education rather than only "negative" liberties. However, despite the Constitution's progressive values, many South African schools remain inadequate. He argues that, given the opportunity, the South African Constitutional Court should hold the current educational system unconstitutional as applied to the worst schools. He argues that constitutional text, purpose, and precedent, indeed, mandate this outcome. He adds that vindicating the constitutional right to education will help South Africa attain other social and economic goals. The author opines that in keeping with its

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<sup>93</sup> E Berger, 'The Right to Education under the South African Constitution' (2003) 103 Columbia Law Review 614-661 <<http://www.jstor.org/stable/1123719>> accessed 21 June 2012.

other socio-economic rights cases, the court must carefully craft its decision so as not to offend separation of powers principles. The court must thus provide the legislature enough flexibility to consider budgetary and other constraints while ultimately protecting education's vital role in a healthy democracy. The Kenyan Constitution has borrowed a leaf from the South African Constitution in the sense of enshrining the socio economic rights in its text. This study differs from Berger's article in the sense that it seeks to interrogate the effects of corruption not only on the right to education but on the right to health as well. Corruption could indeed be one of the leading causes to the violation of these socio economic rights and as such needs to be urgently addressed to avoid making a mockery of the Constitution of Kenya 2010.

**United Nations Educational, Scientific and Cultural Organization (UNESCO 2005)**<sup>94</sup> carried out an assessment on the effectiveness of the Free Primary Education (FPE) Program in Kenya. The study was carried out in 162 primary schools. It covered nine sampled districts in five provinces. Amongst its various findings, the study established that due to large pupil influx, schools were facing a serious teacher shortage. Most classes were too large to be handled by a single teacher. On average, the teacher-pupil ratio in most schools was 1:50. This has a lot of implications on teaching and learning. The teachers were not able to give individual attention to the learners, especially to the slow ones, and this made it difficult for schools to offer quality education. Similarly the study revealed that there was concern that the procurement procedures were cumbersome and time consuming. Finally it was noted that although the FPE funds were used to make repairs, most schools assessed in the study did not have adequate classrooms to accommodate the large numbers of pupils enrolled under FPE. The classrooms were generally congested and there was hardly space for movement. The classrooms were in poor condition. Lighting is poor as many classrooms depend only on sunlight. This assessment report by UNESCO demonstrates the serious challenges faced in implementing the FPE program in Kenya. One of the aims of the FPE funds is to improve infrastructural development in public primary schools. The UNESCO report notes that one of the challenges of implementing the FPE program is the lack of knowledge of the program by the stakeholders namely the students, parents and the community at large. This study will argue that corruption has also affected the successful implementation of the FPE program. This in turn has negated the infrastructural development in public primary schools.

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<sup>94</sup> UNESCO 'Challenges of Implementing Free Primary Education in Kenya' Assessment Report (2005) <<http://unesdoc.unesco.org/images/0015/001516/151654eo.pdf>> accessed 2 August 2012.

**Transparency International (2011)**<sup>95</sup> in its report on corruption in the education sector in Vietnam notes that corruption issues seem to be of special concern for Vietnamese authorities. This is mainly because education has always been highly valued in Vietnamese society and culture, and because the Vietnamese education system has shown concrete achievements in recent decades. Issues of corruption in the education sector echo strongly in Vietnam, where literacy rates have risen significantly since the 1950s, thanks to successive campaigns of ‘mass education’. Accordingly, despite a limited state budget, Vietnamese authorities allocate a considerable portion of the national budget to the education and training sector, which currently accounts for approximately 20 per cent of the budget and is its largest expenditure item. The report points out that challenges related to lack of transparency and corruption in the education sector include leakages in state budget funds allocated to education, waste in the production and procurement of textbooks, bribe-paying related to admittance to favoured schools and awarding academic grades, extra-classes to cover the official curriculum and ‘secure’ good marks in school, and extra teaching and extra learning, which have become quite controversial issues and are seen by the public as serious problems. The report further reveals that some of the causes of corruption in the education sector include weak institutional accountability, lack of transparency, poor pay for teachers, limited public participation, insufficient legal systems among others. Most of these causes of corruption in the education sector are also common in Kenya thus contributing to the violation of the right to education. The lack of transparency and the limited public participation in the disbursement and expenditure of the FPE funds have left a loophole that is subject to abuse and misappropriation.

#### **1.10.4 Effects of Corruption on Social Economic Rights and governance**

**Sam Agere (2000)**<sup>96</sup> links corruption to good governance and argues that corruption is a governance problem. Corruption is a sign of bad governance in any state. He recommends that respect for the rule of law as well as an independent judiciary will adequately address the problem of corruption. For the rule of law to be effective it demands the creation of honest law enforcement agencies that effectively carry out court decisions and a court administration that ensures that cases are dealt with expeditiously. He also adds that the three institutions that promote good governance and in essence curb corruption are an effective state, a productive private sector and a vibrant civil society. The author opines that anti corruption

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<sup>95</sup> Transparency International ‘Forms and Effects of Corruption on the Education Sector in Vietnam’ (2011).

<sup>96</sup> S Agere, *Promoting Good Governance, Principles, Practices and Perspectives* (Commonwealth Secretariat 2000).

programmes are likely to be effective when built on the foundation of popular empowerment, nationally owned and designed to meet national circumstances. This study will argue that corruption is not only a governance problem as purported by Agere but a human rights problem as well. This study therefore intends to explore further the relationship between corruption and human rights. This study shall equally establish that aside from the three institutions listed by Agere, every individual also has a role to play in the fight against corruption.

**Alice Osebe Ondieki (2005)**<sup>97</sup> in her master's thesis analyses the legal and institutional framework addressing corruption in Kenya. She argues that the legal framework addressing corruption is inadequate as it contains loopholes that impair the fight against corruption in Kenya. The main weakness of the United Nations Convention Against Corruption (UNCAC) is that it lacks provisions on monitoring and evaluation mechanisms on incidences of corruption and how to proceed in future. Alice points out that many provisions of UNCAC are non mandatory thereby creating risk of failure to develop common standards. For example there is lack of mandatory requirement of national jurisdiction, very limited coverage of officials of international organizations and lack of whistle blower protection laws. This study argues that the legal framework addressing corruption in Kenya is adequate. Emphasis should therefore shift from the enactment of more anti-corruption laws and focus on implementing already existing anti- corruption laws.

**Judy Thongori (2007)**<sup>98</sup> introduces the gender aspect of corruption and argues that corruption is one of the causes of gender discrimination in society. She argues that since historically women have been marginalized and make up the majority of the poor and lack access to resources and opportunities critical for the support of their livelihood, they are more vulnerable to corruption than men. She points out that the unravelling cases of corruption reported in the local press namely the Goldenberg and Anglo Leasing scandals did not involve women. In conclusion she recommends among other things that gender concerns should be mainstreamed in the anti corruption measures, plans and strategies. Mainstreaming gender into policy areas means that one assesses the implications for men and women any planned actions thereby ensuring that women's as well as men's concerns and experiences are reflected in the design, implementation, monitoring and evaluation policies and

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<sup>97</sup> A O Ondieki, 'A Critical Analysis of the Legal and Institutional Framework in the Fight against Corruption in Kenya' (LLM Thesis, University of Nairobi 2005).

<sup>98</sup> J Thongori, 'The Gender Aspect of Corruption' in T Ojienda (ed), *Anti Corruption and Good Governance in East Africa:Laying Foundations for Reform* (LawAfrica 2007) 87-93.



programmes so that men and women benefit equally. This study is investigating the effects of corruption on the realization of the right to health and right to education in Kenya. Corruption does not only infringe on the right to health and education but it also severely affects the vulnerable in society with regard to the achievement of these economic, social cultural rights.

**Annie Mumbi (2008)**<sup>99</sup> in her article does a comparative analysis of the constitutional protection of socio economic rights in Kenya and South Africa. She notes that the South African constitutional court has been more pro-active in protecting socio- economic rights. She further notes that courts can protect socio-economic rights in two ways. First through their law making powers of interpreting legislation and developing the rules of common law, and second by adjudicating constitutional and other challenges to state measures that are intended to advance those rights. In Kenya, she further notes, there have only been a few reported cases relating to socio economic rights. The author opines that the level of the realization of socio-economic rights in any country is indirectly influenced by the level of its economic development. She argues that this is mainly because these rights have an important social and economic dimensions as most of them reflect specific areas of basic needs or delivery of particular goods and services. The author generalizes the socio economic rights and discusses the decided cases in the South African Constitutional court notably the *Soobramoney*<sup>100</sup> case on the right to health and the *Grootbroom*<sup>101</sup> case on the right to housing. This study focuses on the effects of corruption on the realization of the right to health and the right to education. Since it is established that socio economic rights such as the right to health and education are justiciable, this study seeks to argue that corruption cases that have infringed on the socio-economic rights such as the right to health and the right to education ought to be litigated in light of that violation.

**Gladys Mirugi- Mukundi (2008)**<sup>102</sup> explores the rule of law as the solution to the challenge of corruption in Kenya. She notes with concern that corruption results in grave violations of social economic rights, condemns people to extreme levels of poverty and often leads to social unrest. She argues that upholding the rule of law would usher in a suitable environment

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<sup>99</sup> A M Mumbi, 'Constitutional Protection of Socio Economic Rights in Kenya and South Africa: A Comparative Analysis' in J Osogo Ambani (ed), *Judiciary Watch Report Readings on the Rule of Law in Africa* (The Kenya Section of International Commission of Jurists 2008) 157- 184.

<sup>100</sup> *Soobramoney v Minister of Health, Kwazulu Natal 1998 (1) SA 765 (CC)*.

<sup>101</sup> *Government of the Republic of South Africa v Grootbroom 2001(1) SA 46 (CC)*.

<sup>102</sup> G M Mukundi, 'Exploring the Rule of Law as a Solution to the Challenge of Corruption in Kenya' in J Osogo Ambani (ed), *Judiciary Watch Report Readings on the Rule of Law in Africa* (The Kenya Section of International Commission of Jurists 2008)49-126.

to curb corruption. She further explores the contention that although the rule of law is a casualty of corruption, it can also be a significant factor in reducing opportunities for corruption. The author further expounds that rule of law has two functions, namely limiting government's arbitrariness and abuse of power and making the government more rational and in its policies more intelligent. Her article covers the various facets of corruption ie political, economic and administrative. She also reviews the domestic as well as international legal and institutional framework on corruption. She concludes by stating that an effective strategy against corruption must begin with a demonstration of political will and publicly supported leadership for the rule of law and against impunity. Without this, she further notes, government statements to reform public service, strengthen transparency and accountability and reinvent the relationship between government and private sector industry will remain rhetoric. Respecting the rule of law is one of the requirements in a rights based approach and will help curb corruption. This study seeks to add that including other requirements of rights based approach in anti corruption strategies such as equality, non discrimination, accountability participation and inclusion, will also go a long way in curbing corruption in Kenya.

**Migai Aketch (2011)**<sup>103</sup> examines how governmental power is exercised in Kenya and analyzes the potential of the new constitution 2010 to enhance government accountability. His article is motivated by a concern that democratization initiatives have not been adequately concerned with regulation of the exercise of power within the three branches of government. The first part of his article examines the limitations of representative democracy and the need for the establishment of institutions for the day-to-day accountability of government. The second part explores how power is exercised within the three branches of government in Kenya using illustrations of abuse of power and corruption. He equally analyzes the provisions of the new constitution dealing with the branches of government and concludes with observations on the need to democratize the statutory order to facilitate the realization of the new constitution, and suggests administrative law reform as being critical to this endeavour. While addressing corruption and the culture of impunity in the three arms of government is indeed commendable, addressing corruption in others institutions such as private sector, media and civil society as well will lead to the eradication of corruption in the

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<sup>103</sup> M Akech, 'Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?' (2011) 18 *Indiana Journal of Global Legal Studies* 341-394  
<<http://muse.jhu.edu/journals/gls/summary/v018/18.1.akech.html>> accessed 4 July 2012.

society. It is an established fact that corruption hinders development and is one of the symptoms of bad governance. A rights based approach to addressing corruption in both the health and education sector could help curb this problem. Human rights in most countries receive constitutional protection in the bill of rights indicating their importance in society. Linking the violation of socio economic rights with corruption will not only aid in the protection of these rights but in the curbing of corruption as well.

### **1.11 Research Methodology**

The study shall be based on both primary and secondary sources of data. Primary sources of data shall include the various international, regional and national legal instruments addressing corruption for example the UN Convention against Corruption (UNCAC) 2005, African Union Convention on Preventing and Combating Corruption (AUCPCC) 2003, Anti Corruption and Economic Crimes Act 2003, The Public Officers Ethics Act 2003, The Ethics and Anti-Corruption Commission Act 2011, The Constitution of Kenya 2010. Data shall also be collected from relevant case law. The secondary sources of data shall include; reports by international, regional and nongovernmental organizations on corruption, legislation and policy documents from Kenya and other jurisdictions that have successfully implemented sound key infrastructure, text books and journals, newspaper articles.

The research shall to a large extent be a desk survey. My key library sources are The University of Nairobi School of law Library, The Mount Kenya University Library and The Kenya National Library Service. Content analysis will be used to break down the collected data. This will then be organized along the selected thematic areas of the study.

### **1.12 Limitations of the Study**

This study is limited by time. Due to the limited time available to carry out this research, the scope of coverage shall not be extensive. This study shall not address the effects of corruption on all the existing human rights. The scope of this study is limited to addressing the effects of corruption on the right to health and the right to education in Kenya. The choice of the right to health and the right to education is informed by the fact that since independence, poverty, disease and illiteracy have been cited as some of the leading causes of under development in Kenya.

### **1.13 Chapter Breakdown**

#### **Chapter One**

This chapter introduces the research study. It discusses the background to the problem, the objectives of the study, the statement of the problem and its hypotheses, the justification of the study, theoretical framework, conceptual framework, literature review, limitations of the study and methodology used in the study.

## **Chapter Two**

This chapter discusses the effects of corruption on the right to health in Kenya. It specifically addresses the effects of corruption on the availability of a functioning health care system. The chapter examines the effects of corruption on number of doctors (personnel) in public hospitals and on the supply of medicine and medical equipment. This chapter covers the history and nature of corruption and the right to health and also analyses the constitutionality of the right to health in Kenya.

## **Chapter Three**

This chapter addresses corruption and its effects on the right to education in Kenya. It analyses the effects of corruption on infrastructural development in public primary schools. It also seeks to analyse the constitutionality of the right to education

## **Chapter Four**

This chapter addresses the gaps in the international and national legal framework and weaknesses in the institutional framework addressing corruption in Kenya. It demonstrates how these weaknesses are a hindrance to the enjoyment of the right to health and the right to education.

## **Chapter Five**

This chapter makes a case for a human rights based approach to addressing corruption in Kenya. It analyses the weaknesses in other approaches to fighting corruption and argues that a human rights based approach is an effective approach to fighting corruption in Kenya

## **Chapter Six**

This chapter concludes the study and makes several recommendations.

## CHAPTER TWO

### ***EFFECTS OF CORRUPTION ON THE RIGHT TO HEALTH IN KENYA***

#### **2.0 Introduction**

This Chapter seeks to interrogate the effects of corruption on the right to health in Kenya. It further analyses the legality of the right to health in Kenya. The right to health is a fundamental economic, social & cultural right that is guaranteed under article 43 (1) (a) of the Constitution of Kenya. Further, Kenya is a signatory to various international and regional legal instruments that guarantee the right to health.<sup>1</sup> As such the state is under an obligation to ensure the realization of the right to health for the citizens of Kenya.

An International Monetary Fund (IMF) study across 71 countries showed that countries with high incidences of corruption have higher infant mortality rates. Health systems are particularly susceptible to corruption because uncertainty, asymmetry of information and the large number of actors create systematic opportunities for corruption and hinder transparency and accountability.<sup>2</sup> Kenyatta National Hospital reportedly lost over US \$12 million (Kshs 960 Million) to procurement fraud between 1999 and 2002. Problems cited by the press included failure to control quality of purchases (obsolete items substituted for the modern equipment described in the bid, or fewer supplies delivered than contracted) and hidden charges or construction overruns not included in the original procurement contract, as well as non-competitive bidding processes resulting in higher prices.<sup>3</sup>

#### **2.1 Historical Background**

In the last fifty years the principle of universality has become central to the interpretation of human rights law. The recognition and protection of fundamental rights had already to some extent been codified before Second World War, albeit primarily in national law, and especially in national constitutions. It was, however, only after the Second World War that

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<sup>1</sup> See for example The Universal Declaration on Human Rights (UDHR) 1948, The International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, The African Charter on Human and People's Rights, The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) 1981 etc

<sup>2</sup> Ibid.

<sup>3</sup> T Vian, 'Corruption in Hospital Administration' (2005) *Corruption and Health* 48  
<[http://www.bu.edu/actforhealth/actforhealth04/Part%201\\_3\\_corruption%20in%20hospitals.pdf](http://www.bu.edu/actforhealth/actforhealth04/Part%201_3_corruption%20in%20hospitals.pdf)> accessed 24 July 2012.

politicians and civil society alike came to realize that national schemes for the protection of human rights did not suffice.<sup>4</sup> Since then, human rights have found their way into a wide range of regional and global treaties. In earlier times, whenever human rights violations were openly condemned by third states, the authorities concerned countered with references to ‘unacceptable interference in internal affairs’. In more recent years, this argument has lost ground when human rights are at stake. The Second World War constituted a turning point in the way the international community regards its responsibility for the protection of and respect for human rights. The long-standing principle of state sovereignty *vis-à-vis* one’s nationals has in the course of the years been eroded.<sup>5</sup>

The entry into force of the UN Charter on 24 October 1945 marked the formal recognition of human rights as a universal principle, and compliance with human rights was mentioned in the Preamble and in Articles 55 and 56 as a principle to be upheld by all states. In 1948, it was followed by the adoption of the Universal Declaration of Human Rights (UDHR), and in 1966 by the International Convention on Economic, Social and Cultural Rights (ICESCR) and the International Convention on Civil Political Rights (ICCPR).

Human rights activism has, historically, been centred around civil and political rights while economic, social and cultural rights have generally been viewed as aspirations. Partly arising from this, advocacy on corruption as a human rights issue has not found prominence among human rights organisations despite its many negative effects.<sup>6</sup>

## 2.2 Corruption and Right to Health

Corruption in the health sector can be a matter of life and death, especially for poor people in developing countries. In China, an estimated 192,000 people died of fake drugs in 2001.<sup>7</sup> An International Monetary Fund (IMF) study across 71 countries showed that countries with high incidences of corruption have higher infant mortality rates. Health systems are particularly susceptible to corruption because uncertainty, asymmetry of information and the large number of actors create systematic opportunities for corruption and hinder transparency and

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<sup>4</sup> KNHCR, ‘The Human Rights Dimension of Corruption’ <<http://www.knchr.org/Portals/0/Reports/Human%20Rights%20Dimensions%20of%20Corruption.pdf>> accessed 4 December 2012.

<sup>5</sup> Ibid.

<sup>6</sup> See KNHCR (n4).

<sup>7</sup> DFID, ‘Addressing Corruption in the Health Sector’ (Department for International Development 2010) <<http://www.dfid.gov.uk/Documents/publications1/How-to-Note-corruption-health.pdf>> accessed 24 July 2012.

accountability.<sup>8</sup> Kenyatta National Hospital reportedly lost over US \$12 million (Kshs 960 Million) to procurement fraud between 1999 and 2002. Problems cited by the press included failure to control quality of purchases (obsolete items substituted for the modern equipment described in the bid, or fewer supplies delivered than contracted) and hidden charges or construction overruns not included in the original procurement contract, as well as non-competitive bidding processes resulting in higher prices.<sup>9</sup>

In order to understand the effects of corruption on the right to health and education in Kenya, it is pertinent to address the role of the state with regard to the achievement and realization of human rights. It is now commonly understood that states have three levels of obligation in relation to human rights: the obligations “to respect”, “to protect” and “to fulfil”.<sup>10</sup>

**The obligation to respect** requires the state to refrain from any measure that may deprive individuals of the enjoyment of their rights or their ability to satisfy those rights by their efforts. This type of obligation is often associated with civil and political rights (e.g. refraining from committing torture) but it applies to economic, social and cultural rights too. With regard to the right to adequate housing, for example, states have a duty to refrain from forced or arbitrary eviction.<sup>11</sup>

**The obligation to protect** requires the state to prevent violations of human rights by third parties. The obligation to protect is normally taken to be a central function of states, which have to prevent irreparable harm from being inflicted upon members of society. This requires states;

- a) to prevent violations of rights by individuals or other non-state actors;
- b) to avoid and eliminate incentives to violate rights by third parties; and
- c) to provide access to legal remedies when violations have occurred, in order to prevent further deprivations.<sup>12</sup>

Non-compliance with this level of obligation may be a vital determinant of state responsibility in corruption cases. By failing to act, states may infringe rights. If they do not

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<sup>8</sup> Ibid.

<sup>9</sup> T Vian, ‘Corruption in Hospital Administration’ (2005) *Corruption and Health* 48 <[http://www.bu.edu/actforhealth/actforhealth04/Part%201\\_3\\_corruption%20in%20hospitals.pdf](http://www.bu.edu/actforhealth/actforhealth04/Part%201_3_corruption%20in%20hospitals.pdf)> accessed 24 July 2012.

<sup>10</sup> C de Swardt, *Corruption and Human Rights: Making the Connection* (Report by International Council on Human Rights Policy 2009) 25. See also The Economic, Social and Cultural Committee General Comment no. 14 of 2000 para 33 and Constitution of Kenya 2010, art 21(1).

<sup>11</sup> Ibid.

<sup>12</sup> See Swardt (n10) at 27.

criminalise particular practices or fail to enforce certain criminal provisions, for example, they may not prevent, suppress or punish forms of corruption that cause or lead to violations of rights. The obligation to protect may also provide the link required to show that corrupt behaviour by a private actor triggers state responsibility. Although it might be difficult to establish, a state might be held responsible for violating a right, for example, if it failed to enact appropriate legislation to prevent or punish corruption committed by private corporations. Or a state might be judged negligent if employers breached labour laws (minimum wage requirements, health and safety regulations) and systematically bribed government labour inspectors to overlook this behaviour.<sup>13</sup>

**The obligation to fulfil** requires the state to take measures to ensure that people under its jurisdiction can satisfy basic needs that they cannot secure by their own efforts. Although this is the key state obligation in relation to economic, social and cultural rights, the duty to fulfil also arises in respect to civil and political rights.<sup>14</sup> It is clear, for instance, that enforcing the prohibition of torture (which requires states to investigate and prosecute perpetrators, pass laws to punish them and take preventive measures such as police training), or providing the rights to a fair trial (which requires investment in courts and judges), to free and fair elections, and to legal assistance, all require considerable costs and investments.

A violation of a human right therefore occurs when a state's acts, or failure to act, do not conform with that state's obligation to respect, protect or fulfil recognised human rights of persons under its jurisdiction.<sup>15</sup>

The importance of the health sector in economic growth and reduction of poverty is reflected in the Millennium Development Goals (MDGs). Three out of the eight goals refer directly to health. One additional goal refers to access to affordable drugs in developing countries. To ensure universal and equitable access to quality health services, governments must earmark a sufficient share of the public revenues for healthcare. As per the Abuja Declaration of 2001, countries were to earmark 15% of the national budget for the health sector but Kenya is yet to meet this target.<sup>16</sup> Kenya is a signatory of the Abuja declaration that requires that at least

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<sup>13</sup> Ibid.

<sup>14</sup> See Swardt (n10) at 28.

<sup>15</sup> Ibid.

<sup>16</sup> Transparency International-Kenya, 'The Kenya Health Sector Integrity Study Report' (2011) 6.



**15%** of the national budget be allocated for health services yet only about **6%** has been allocated to the health sector in the fiscal year 2012/2013.<sup>17</sup>

Corruption in the health sector also has a direct negative effect on the access to and quality of healthcare. As resources are drained from health budgets through embezzlement and procurement fraud, less funding is available to pay salaries and fund operations and maintenance, leading to de-motivated staff and low morale among health workers, lower quality of care, poor supplies and working environment, and reduced service availability and utilisation.<sup>18</sup>

### **2.3 The Right to Health**

The term ‘health’ has been defined as a state of complete physical, mental and social well being, not merely the absence of disease or infirmity.<sup>19</sup> The preamble to the constitution of the World Health Organization (WHO) further provides that the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition. The right to health is affirmed in Article 25(1) of the Universal Declaration of Human Rights (UDHR) 1948 which provides generally as follows;

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

More specifically the right to health is guaranteed in Article 12 of the International Convention on Economic, Social and Cultural Rights (ICESCR) which provides that;

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

- (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
- (b) The improvement of all aspects of environmental and industrial hygiene;

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<sup>17</sup> National Assembly, ‘The Budget Committee Report on the Estimates of Revenue and Expenditure for 2012/2013’ (Tenth Parliament, Fourth Session)  
<[http://www.parliament.go.ke/index.php?option=com\\_content&view=article&id=257:budget-commitee-report-on-estimates-of-revenue-and-expenditure-for-2012-13&catid=31:breaking-news&Itemid=46](http://www.parliament.go.ke/index.php?option=com_content&view=article&id=257:budget-commitee-report-on-estimates-of-revenue-and-expenditure-for-2012-13&catid=31:breaking-news&Itemid=46)> accessed 3 August 2012.

<sup>18</sup> Transparency International-Kenya (n16) at 7.

<sup>19</sup> Constitution of the World Health Organization  
<[http://www.who.int/governance/eb/who\\_constitution\\_en.pdf](http://www.who.int/governance/eb/who_constitution_en.pdf)> accessed 26 July 2012.

- (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

The right to health is also recognized in other various international and regional legal instruments. For example Articles 11(1) (f) and 12 of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) 1981, Article 24 of the Convention on the Rights of the Child 1989 and Article 16 of the African Charter on Human and People's Rights 1981.

Article 43 (1) (a) of the Kenyan Constitution 2010 also recognizes the right to health. It provides inter alia;

Every person has the right to the highest attainable standard of health, which includes the right to health care services including reproductive health care.

Article 43 (2) further provides that a person shall not be denied emergency medical treatment.

The right to health just as other economic, social and cultural rights can be progressively realized.<sup>20</sup> States are required to take legislative, policy and other measures to ensure the progressive realization of economic, social and cultural rights. This obligation on the state to fulfil raises the question of justiciability of economic, social and cultural rights. The courts play a fundamental role in the protection of fundamental rights and freedoms and therefore by extension help curb corrupt acts that infringe on such rights. Since economic social and cultural rights such as the right to health are realized progressively according to the available state resources, it is paramount for the courts to interrogate the allocation and use of state resources aimed at ensuring the widest possible enjoyment of rights.

South African and Indian courts have been proactive in holding the state accountable in the realization of economic, social and cultural rights. In South Africa, the constitutional court attempted to address the issue of emergency medical treatment in the case of *Soobramoney v Minister for Health (Kwazulu Natal)*.<sup>21</sup> In this case, the claimant suffered from chronic renal failure and was in dire need of renal dialysis in order to stay alive. When the claimant ran out of personal funds to pay private providers, he sought treatment in a state-funded hospital in Durban. The hospital denied Soobramoney treatment because his general physical condition

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<sup>20</sup> See ICESCR 1966, art 2(1) and Constitution of Kenya 2010, art 21(2).

<sup>21</sup> (CCT32/97) [1997] ZACC 17 < <http://www.saflii.org/za/cases/ZACC/1997/17.html> > accessed 1 August 2012.

did not qualify him for treatment under the criteria used by the hospital to determine eligibility for such treatment. The applicant, suffering from a terminal illness and in need of renal dialysis to prolong his life, filed a constitutional application seeking an order for the hospital to provide him with access to dialysis treatment. The court found out that the applicant's case was not an 'emergency' in the sense of sudden catastrophe but was an 'ongoing state of affairs'. The applicant's case fell under article 27(1) and (2) of the South African Constitution for the provision of non-emergency treatment. This was however pegged to the availability of state resources. In this case it was held that since the state funded hospital had limited resources, the court could not interfere with decisions made in good faith by political organs and medical authorities as to how to allocate budgets and pick on priorities.

This was the first case in the South African court dealing with the constitutional right to health in light of scarce state resources. The court emphasized on the need for reasonable decisions by state organs. This in essence means that should it appear to the court that the state has the resources but has misappropriated the said resources the onus of proof would be upon the state to prove otherwise failure to which the court would order the state to fulfil its obligations. Litigation therefore would to a large extent hold a state accountable with regard to the realization of the right to health and would in essence help to curb corruption.

Economic, social and cultural rights in India on the other hand have been defined through judicial interpretation of the right to life.<sup>22</sup> In the case of *Olga Tellis v Bombay Municipal Council*<sup>23</sup> the judgement by the court expanded the right to life guaranteed under article 21 of the constitution to include the 'right to a livelihood' which in this case translated into the right to be allowed to remain on the pavement.<sup>24</sup>

In its general comment number 14 of 2000, the Economic, Social and Cultural Committee (hereinafter referred to as 'The Committee') expounds on the meaning of the right to health as provided in article 12 of the ICESCR.<sup>25</sup> The committee in its definition of the right to health does not adopt the definition set out in the preamble of the constitution of the World Health Organization, but takes the approach that the right to health embraces a wide range of socio-

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<sup>22</sup> V Shivani, 'Justiciability of Economic Social and Cultural Rights (2005)' <[http://www.ichrp.org/files/papers/96/108 - Justiciability of Economic Social and Cultural Rights - Relevant Case Law Verma Shivani 2005 background.pdf](http://www.ichrp.org/files/papers/96/108_-_Justiciability_of_Economic_Social_and_Cultural_Rights_-_Relevant_Case_Law_Verma_Shivani_2005_background.pdf)> accessed 1 August 2012.

<sup>23</sup> 1985 3 SCC 545.

<sup>24</sup> See Shivani (n22).

<sup>25</sup> Economic, Social and Cultural Committee, General Comment No. 14 of 2000, <<http://www.unhcr.ch/tbs/doc.nsf/%28symbol%29/E.C.12.2000.4.En>> accessed 25 July 2012

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>26</sup> Further the committee notes that the right to health must be understood as a right to the enjoyment to a number of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health.<sup>27</sup>

This in essence outlines the role of the state in the realization of the right to health. If the state fails to allocate adequate resources either due to lack of funds or due to the embezzlement of allocated funds by public officials to enable the provision of facilities goods and services, then the right to health is infringed upon.

The precise application of the right to health will depend on the conditions prevailing in a particular State. The committee highlights the key components to achieving the right to health.<sup>28</sup>

**a. Availability of functioning public health and health-care facilities, goods and services**

The precise nature of the facilities, goods and services will vary depending on numerous factors, including the State party's developmental level. They will include, however, the underlying determinants of health, such as safe and potable drinking water and adequate sanitation facilities, hospitals, clinics and other health-related//buildings, trained medical and professional personnel receiving domestically competitive salaries, and essential drugs. Corruption will therefore be a major hindrance to the availability of functioning public health and health care facilities.

**b. Accessibility of health facilities, goods and services**

Health facilities, goods and services have to be accessible to everyone without discrimination. Accessibility has four overlapping dimensions i.e. non discrimination, physical accessibility, economic accessibility and information accessibility. Under non-discrimination, health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of

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<sup>26</sup> Economic, Social and Cultural Committee, General Comment No. 14 of 2000, para 4  
<<http://www.unhcr.ch/tbs/doc.nsf/%28symbol%29/E.C.12.2000.4.En>> accessed 25 July 2012.

<sup>27</sup> Ibid para 9.

<sup>28</sup> General Comment no. 14 of 2000, para 12.

the prohibited grounds. Physical accessibility connotes that health facilities, goods and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups, such as ethnic minorities and indigenous populations, women, children, adolescents, older persons, persons with disabilities and persons with HIV/AIDS. Physical accessibility also implies that medical services and underlying determinants of health, such as safe and potable water and adequate sanitation facilities, are within safe physical reach, including in rural areas. It also further includes adequate access to buildings for persons with disabilities.

Economic accessibility or affordability on the other hand means that health facilities, goods and services must be affordable for all. Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households. Finally information accessibility includes the right to seek, receive and impart information and ideas concerning health issues. However, accessibility of information should not impair the right to have personal health data treated with confidentiality.

#### **c. Acceptability**

All health facilities, goods and services must be respectful of medical ethics and culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements, as well as being designed to respect confidentiality and improve the health status of those concerned.

#### **d. Quality**

Health facilities, goods and services must also be scientifically and medically appropriate and of good quality. This requires skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation.

The Committee in their extensive analysis of the right to health as provided under article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), fail to mention the adverse effects of corruption on the right to health. In paragraphs 54 and 55 of general comment no. 14, there is some emphasis on participation of the citizens, transparency

and accountability in the implementation of national health policies. Corruption which in essence negates the principles of transparency and accountability is thus a great hindrance to the implementation of the national health policies at the national level. Corruption is also one of the key contributors of discrimination. The vulnerable in society stand at a disadvantage when corruption is rooted in the health care system of any nation.

#### **2.4 Effects of corruption on the number of doctors in public hospitals**

Some of the key components of the right to health include the availability of functioning public health and health-care facilities, goods and services and the quality of health services must equally be medically appropriate.<sup>29</sup> A functioning public health care facility must have adequate skilled medical personnel who receive adequate remuneration.

The healthcare personnel crisis in developing countries is largely the result of several decades of under investment in the health sector and of sectoral reforms designed to limit government recruitment and salaries.<sup>30</sup> The crisis is further compounded by the increasing emigration of healthcare professionals from their native countries. According to the International Labour Office, 77 million people—over twice the number as in 1975—currently live and work outside their country of origin. The growing number of emigrants is having a significant impact on the less developed countries (LDCs) because it often means the departure of their best-trained citizens. Although healthcare professionals do not account for the greatest proportion of qualified emigrants, the departure of nurses, doctors, psychologists, laboratory technicians and pharmacists nonetheless represents a real threat for the health systems of developing countries.<sup>31</sup>

This exodus of healthcare workers is most significant on the African continent. According to the United Nations Economic Commission for Africa (UNECA) and the International Organization for Migration (IOM), 20,000 Africans have emigrated each year to high-income countries since 1990.<sup>32</sup> In Zambia, Zimbabwe and Ghana, over 50% of recently graduated medical students have either already emigrated or are making arrangements to do so. According to Kenya's Health Department, only 10% of the 6000 doctors trained in public hospitals stay on to practice in their country. Health workers are also greatly discouraged by

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<sup>29</sup> Economic, Social and Cultural Committee, General Comment No. 14 of 2000

<sup>30</sup> Interagency Coalition on AIDS and Development, 'The Emigration of HealthCare Professionals to High Income' (Ottawa 2006).

<sup>31</sup> Ibid.

<sup>32</sup> See Interagency Coalition on AIDS and Development (n30).

poor working conditions, obsolete equipment, the lack of professional development opportunities, and the absence of security measures. Furthermore, conditions are sometimes exacerbated by corruption and nepotism dashing any hope of personal advancement within the system. Corruption in the health care sector will lead to embezzlement and misappropriation of funds set aside for the payment of doctors. Further due to corruption the working conditions in the public health system are not favourable and many doctors either opt to migrate to private sector where the working conditions are more preferable or leave the country. In Kenya, medical doctors undertaking their post graduate studies and working at public hospitals receive minimal if any, payment for their services. This lack of financial security can expose them to corruption in a bid to make ends meet. In a worst case scenario, many health workers are forced to leave their homeland as a result of the collapse of the country's constitutional state, as was the case in Zimbabwe.<sup>33</sup> In South Africa, the public health care system is characterised by rundown buildings, missing medication and widespread corruption.<sup>34</sup> This widespread corruption in the public health system has to some extent been caused by a situation of doctors and community health care workers who have been unpaid in months.<sup>35</sup>

In the year 2010, Kenya had 1,700 doctors in public hospitals.<sup>36</sup> Corruption in hospital administration has a direct negative effect on access and quality of patient care.<sup>37</sup> As resources are drained from hospital budgets through embezzlement and procurement fraud, less funding is available to pay salaries and fund operations. This in turn leads to demotivated staff and greater absenteeism as medical personnel seek private income from outside jobs, again lowering access and decreasing quality of services.<sup>38</sup> Financial arrangements between hospitals and doctors intended to increase hospitals' and doctors' profits can lead to waste of public money, or medical decisions that are not in the patients' best interests.

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<sup>33</sup> Ibid.

<sup>34</sup> P A Sidley, 'South Africa's Shattered Health Care Dream' Aljazeera (18 July 2012) <<http://www.aljazeera.com/indepth/opinion/2012/06/201265112355558115.html>> accessed 12 September 2012.

<sup>35</sup> Ibid.

<sup>36</sup> P A Nyong'o, 'Press Statement on Public Hospitals in Kenya' (2010) <[http://www.medical.go.ke/index.php?option=com\\_content&view=article&id=84:press-statement-on-public-hospitals-in-kenya-&catid=42:press-statements&Itemid=90](http://www.medical.go.ke/index.php?option=com_content&view=article&id=84:press-statement-on-public-hospitals-in-kenya-&catid=42:press-statements&Itemid=90)> accessed 24 July 2012.

<sup>37</sup> T Vian, 'Corruption in Hospital Administration' (2005) *Corruption and Health* 49.

<sup>38</sup> Ibid.

In March 2012, Kenyan doctors took to the streets demanding the immediate deployment of 700 graduate medics to hospitals.<sup>39</sup> The country has a shortage of 37,000 doctors with a doctor to patient ratio of one doctor for every 17,000 patients.<sup>40</sup> This is below the recommended World Health Organization ratio of one doctor for every 1,000 patients. About 200 doctors and 600 nurses exit the public health service annually mainly due to poor remuneration and working environment.<sup>41</sup> A total of 32 per cent of health professionals interviewed in Peru thought absenteeism was common or very common among hospital staff, while in Venezuela respondents reported that doctors and head nurses were absent during 30–37 per cent of contracted hours.<sup>42</sup> Absenteeism has been linked to low salaries and dual-job holding, which some consider a ‘coping mechanism’ rather than corruption. Many doctors are also active in the private sector, driven in part by the inadequate compensation available in the public sector. Corruption therefore might not be the sole cause of the huge turnover of doctors in public hospital in Kenya but it is still one of the causes nevertheless.

The National Health Insurance Fund (NHIF) corruption saga left many Kenyans puzzled by the extent to which corruption is embedded in the Kenyan society. The first phase of funds released by the NHIF allegedly went to non-existent hospitals and the existent hospitals that received the funds such as the Meridian Hospital were still not adequately equipped. Further the 2012/2013 budget allocated an additional Kshs 12.3 billion to provide access to quality health care totalling the amount to Kshs. 85 billion.<sup>43</sup> The minister of finance in his statement acknowledged that the health sector still faced the challenge of inadequate infrastructure, qualified personnel and medicine. Part of the allocated resources would be channelled to facilitate the employment of 5,200 health workers, 715 of whom are doctors.<sup>44</sup> This signifies that there is a shortage of doctors in Kenyan public hospitals, a phenomena greatly attributed to poor pay. If the allocated Kshs. 85 billion meant to ensure provision of quality health care is utilized appropriately, poor pay will slowly be eradicated as one of the reasons why the number of doctors is significantly reducing in public hospitals.

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<sup>39</sup> C Karongo ‘Doctors Demand Deployment of Extra Staff’ Capital News (Nairobi, 27 March 2012) <<http://www.capitalfm.co.ke/news/2012/03/doctors-demand-deployment-of-extra-staff/>> accessed 25 July 2012.

<sup>40</sup> Ibid; Comments by Kenya Medical Practitioners, Pharmacists and Dentists Union Secretary General, Boniface Chitayi.

<sup>41</sup> Human Resources for Health; Country Profile of Kenya <[http://www.who.int/nha/country/ken/kenya\\_nha\\_2009-2010.pdf](http://www.who.int/nha/country/ken/kenya_nha_2009-2010.pdf)> accessed 10 August 2012.

<sup>42</sup> See Vian (n37).

<sup>43</sup> R N Githae, ‘Budget Statement for Fiscal Year 2012/2013 (1<sup>st</sup> July- 30th June) 14 June 2012 <<http://www.statehousekenya.go.ke/publications/14-06-2012-13-BudgetSpeech-Distribution%20Final%20MF.pdf>> accessed 1 August 2012.

<sup>44</sup> Ibid at 13.



To reduce the issue of absenteeism, institutional controls must be introduced to increase detection, including personnel supervision, performance measurement systems, and community participation in hospital management. Researchers noted that while control mechanisms can help, ‘one size’ doesn’t fit all.<sup>45</sup> The success of strategies to reduce absenteeism in public facilities will also depend on pay differentials between the public and private sectors, and whether there are barriers to entry into the private sector. Larger reforms to civil service policies and public human resource management systems may be needed, such as shifting from civil service appointments to contractual payment for time and services rendered. If an employee does not perform, the contract would not be renewed. This also permits one to pay a higher hourly rate for hours actually worked.<sup>46</sup> There is also need to review doctors’ salaries as well as to improve the working conditions of doctors and other health care providers in public hospitals in Kenya, both urban and rural. Without competitive salaries, the problem of emigration of doctors, absenteeism and constant strikes over low pay and poor working conditions will persist. Applying the rights based approach principle of participation of the public in decision making; high ranking officials in the ministry of public health as well as those in the treasury could carry out focus group discussions with health care providers.

## **2.5 Effect of corruption on supply of medicine and medical equipment**

Procurement fraud is a large risk in hospitals, as virtually all capital spending involves procurement, and medicines and supplies are often the next largest recurrent expenditure item after salaries. Procurement agents may seek bribes or kickbacks from supply companies, or contractors may engage in collusion or offer bribes to hospital officials in order to win contracts.<sup>47</sup>

Substandard medicines also pose a serious public health risk, especially in the developing world. Produced by licensed manufacturers, these medicines are the product of poor manufacturing practices or improper storage or distribution practices that result in deterioration in the quality of the medicines.<sup>48</sup>

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<sup>45</sup> See Vian (n37).

<sup>46</sup> Ibid.

<sup>47</sup> See Vian (n37).

<sup>48</sup> L Christian et als, ‘The problem of substandard medicine in Developing Countries’ (2012) <<https://www.lafollette.wisc.edu/publications/workshops/2012/medicines.pdf>> accessed 5 July 2012.

Kenya receives large amounts of donor aid for health initiatives and has high infection levels of HIV/AIDS, tuberculosis, and malaria. As a business climate, Kenya suffers from corruption, counterfeit products, and a high cost of doing business. The main bodies of health policy in Kenya are the Ministry of Medical Services and the Ministry of Public Health and Sanitation. According to the Kenya Health Services Assessment by the Health Systems 20/20 cooperative agreement with the U.S. Agency for International Development (USAID), this split in ministries was politically motivated and has caused duplication, confusion, and competition for funding and resources. With regard to pharmaceuticals and medicine, the Ministry of Medical Services is responsible for “regulatory bodies for pharmacy and medicine,” and the Ministry of Public Health and Sanitation is responsible for “health inspection” and “government pharmacists”.<sup>49</sup>

Corruption in the pharmaceutical industry may have a corrosive influence on the drugs and medical equipment market.<sup>50</sup> The relationship between drug companies and doctors is very vulnerable to corruption. Doctors may be offered a commission for prescribing a particular drug or a drug from a particular company. Because this practice is illegal in most countries, companies may employ underhand methods to disguise such kickbacks. In the United States for example, approximately US\$ 16 Million is used annually by pharmaceutical, device and biotechnology industries on marketing to physicians.<sup>51</sup>

## **2.6 The legality of the Right to Health in Kenya**

In light of the above analysis on the effects of corruption on the personnel in public hospitals (number of doctors in public hospitals) as well as on the supply of medicine and medical equipment, it is evident that corruption negatively affects the realization of the right to health. The right to health is not only an economic, social and cultural right but also a constitutional right in Kenya and though it ought to be progressively realized, failure to address hindrances to the realization of the right to health is a failure by the state. Corruption can be regarded as one such hindrance. Much of the literature on economic social cultural rights focuses on the feasibility of recognizing them as legal or even constitutional, rights, and of making them justiciable.<sup>52</sup> Rights only have meaning if it is possible to enforce them. The courts in Kenya

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<sup>49</sup> Ibid.

<sup>50</sup> Transparency International, ‘Corruption in the Pharmaceutical Industry’ (2006) <[http://archive.transparency.org/global\\_priorities/other\\_thematic\\_issues/health/pharmaceutical\\_industry](http://archive.transparency.org/global_priorities/other_thematic_issues/health/pharmaceutical_industry)> accessed 1 August 2012.

<sup>51</sup> Ibid.

<sup>52</sup> H Steiner, P Alston & R Goodman, *International Human Rights in Context: Law, Policies & Morals* (3<sup>rd</sup> Ed. 2008).

have yet to enforce the social, economic and cultural rights provided under Article 43 of the Constitution.

Further, the National Hospital Insurance Fund Act no 9 of 1998 provides for transparency and accountability in the use of the funds<sup>53</sup> which legally links anti corruption measures in this piece of health legislation.

## 2.7 Conclusion

Generally, three types of State obligations can be identified when it comes to supervising the health sector in order to prevent and to combat corrupt acts. States are under a duty to regulate i.e. the adoption of legislation to ensure that the actors in the health sector, whether public or private in character, refrain from health sector corruption, Monitor i.e. the adoption of monitoring mechanisms aimed at supervising or regulating the behaviour of the actors in the health sector in such a way that health sector corruption may be detected and provide redress i.e. the creation of possibilities to complain about failure or malpractice by the actors in the health sector.<sup>54</sup>

The practice of representative democracy in which the citizenry delegate their sovereignty to popularly elected representatives, who in turn delegate their authority to bureaucrats—does not always ensure that governmental power is only used for its intended purposes, namely the protection of the rights of citizens and the pursuit of the public good. This is because the people who govern are not always accountable to the governed.<sup>55</sup> Accountability may be defined as “a social relationship in which an actor feels an obligation to explain and to justify his or her conduct to some significant other.” This definition implies a relationship in which “some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met”.<sup>56</sup> Doctors in public hospitals ought

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<sup>53</sup> S34 provides that all moneys in the Fund which are not immediately required to be applied for the purposes of this Act shall be invested in such investment in a reputable bank, being an investment in which trust funds, or part thereof, are authorised by law to be invested or in the procurement and acquisition of essential medical equipment for provision to hospitals, on such terms and conditions as the Board may, from time to time, prescribe. S37 provides that the Board shall cause to be kept all proper books and records of accounts of the income, expenditure, assets and liabilities of the Fund and within a period of three months after the end of each financial year, the Board shall submit to the Auditor-General (Corporations) or to an auditor appointed under subsection (3) of this section, the accounts of the Board

<sup>54</sup> B Toebe, ‘The Impact of Acts of Corruption on the Enjoyment of the Right to Health’ Research Paper for the International Council on Human Rights Policy (Scotland 2007) 13.

<sup>55</sup> M Akech, ‘Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?’ (2011) 18 *Indiana Journal of Global Legal Studies* 341-394

<<http://muse.jhu.edu/journals/gls/summary/v018/18.1.akech.html>> accessed 4 July 2012.

<sup>56</sup> *Ibid.*

to be accountable to the patients and the procurement procedures used in the purchase of medical equipment in public hospital should be under public scrutiny. To increase transparency in procurement of medicines, hospitals can channel decision-making through expert pharmacy and therapeutic committees, or procurement committees. The committee structure helps to balance the influence of clinicians with strong personal interests. Pooled procurement decisions for groups of hospitals may help to increase competition and dissipate power of individual physicians. Some countries, like Albania, have moved to centralise hospital procurement as a way to reduce opportunities for corruption. Chile's centralised health procurement agency, CENABAST, has prevented collusion and lowered prices by introducing computerised, auction-style bidding.<sup>57</sup>

The next chapter analyses the effects of corruption on the right to education in Kenya. This chapter inter-alia attempts to create a nexus between corruption in infrastructural development in public primary schools and the realization of the right to education. The legal issues raised in the next chapter are derived from an analysis of some existing education laws in Kenya to analyse their effectiveness in addressing corruption in the education sector.

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<sup>57</sup> See Vian (n37).

## CHAPTER THREE

### ***EFFECTS OF CORRUPTION ON THE RIGHT TO EDUCATION IN KENYA***

#### **3.0 Introduction**

This Chapter seeks to interrogate the effects of corruption on the right to education in Kenya. It also interrogates the legality of the right to education in Kenya. The right to education is a fundamental economic, social & cultural right that is guaranteed under article 43 (1) (f) of the Constitution of Kenya.

Education is fundamental to a well-functioning democracy. Thomas Jefferson well articulated the connection between education and democracy, arguing that to render democratic governments safe, the people's minds must be improved to a certain degree and that therefore "an amendment of the Virginia constitution must here come in aid of the public education".<sup>1</sup>

#### **3.1 Historical Background**

It is now generally agreed that human rights have the status of international law.<sup>2</sup> Although they lack an enforcement mechanism, they provide a strong normative standard for the way states ought to treat their own citizens. The failure of a government of a state to provide for its citizens' basic rights might be taken as a reason for considering it illegitimate.<sup>3</sup> The concept of human rights enunciated in the Universal Declaration on Human Rights (UDHR) reflects modern human thought about the nature of justice. Human rights have been removed from their earlier connection with 'natural rights' which are given by God. Rights in pre-modern Christian Europe were defined not by one's social relations with the state or society, but by one's relationship to God.<sup>4</sup> After the adoption of the Universal Declaration on Human Rights in 1948, the next step was to translate the rights it recognized into binding treaties. The process took from 1949-1966. The delay was due to a variety of reasons including the cold war, the developing US opposition to the principle of international human rights treaties and the scope and complexity of the proposed obligation.<sup>5</sup> By 1955, the main lines of what

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<sup>1</sup> E Berger, 'The Right to Education under the South African Constitution' (2003) 103 Columbia Law Review 614-661 <<http://www.jstor.org/stable/1123719>> accessed 21 June 2012.

<sup>2</sup> R E Howard, *Human Rights and the Search for Community* (Westview Press 1995)12.

<sup>3</sup> Ibid.

<sup>4</sup> See Howard (n2)12.

<sup>5</sup> H Steiner, P Alston & R Goodman, *International Human Rights in Context: Law, Policies & Morals* (3<sup>rd</sup> Ed. 2008)271.

was to become the International Covenant on Economic, Social and Cultural Rights (ICESCR) were agreed.

The importance of education to the development of a nation was noted in Kenya in 1966 in Sessional Paper no. 10 of 1966 where illiteracy was considered as one of the leading causes of underdevelopment in Kenya. And yet, despite their generally acknowledged importance, schools frequently fail to receive the resources necessary to improve. Corruption in education directly threatens the integrity and accountability of the entire society by bringing scepticism and doubt about the fairness of social success. This is especially true for academic fraud, as academic performance is an important tool for selecting leaders. In other words, corruption in education deteriorates young generations' values of integrity and social justice by demonstrating that corruption and fraud can easily buy academic diploma, then promotions and advancements, and careers.<sup>6</sup>

According to the International Institute for Educational Planning, corruption in education sector currently exists in two forms.<sup>7</sup> Firstly through major corruption involving officials who hold strategic positions in the education management apparatus, especially those involved in allocating and distributing education budgets and secondly through petty corruption involving individuals with limited influence or power, especially those directly involved in service delivery (primarily teachers).

Forms of corruption in the education sector manifest themselves in the procurement of textbooks, school equipment and supplies; kickbacks; bribery; close relationships and falsification of school enrolment. Some of the effects of corruption in the education sector is that children lose opportunities to attend school due to corruption in the enrolment process; the high burden of illegal school fees for families leads to high dropout rates; corruption in management, selection and recruitment of teachers leads to lower teaching quality and corruption in procuring educational equipment and supplies leads to shortages of classrooms, teaching equipment and supplies and textbooks.<sup>8</sup> In Kenya, the implementation of the Free Primary Education (FPE) programme has been faced with numerous challenges. One of the major challenges to this programme geared to ensuring that all Kenyan children receive free primary education is corruption and misappropriation of the FPE funds by Ministry of

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<sup>6</sup> Transparency International 'Forms and Effects of Corruption on the Education Sector in Vietnam' (2011).

<sup>7</sup> Ibid.

<sup>8</sup> See Transparency International (n6).

Education officials as well as primary school head teachers. The FPE funds are also geared towards infrastructural development in public primary schools.

### **3.2 The Right to Education**

The right to education is guaranteed in Article 26 of the Universal Declaration on Human Rights (UDHR) as follows;

Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.

The right is further guaranteed in Article 13 of the International Convention on Economic, Social and Cultural Rights (ICESCR). Article 13(3) and (4) provide the basis for the establishment of private institutions.<sup>9</sup> Article 13(1) provides as follows;

The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

Article 43 (1) (f) of the constitution of Kenya, 2010 provides that every person has a right to education. Further emphasis of this right is made in Article 53 (1) (b) which provides that every child has the right to free and compulsory basic education.

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<sup>9</sup> ICESCR 1966, art 13(3) and (4) provide as follows; The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

The Economic, Social and Cultural Committee in its General Comment Number 13 of 1999<sup>10</sup> further expounded the meaning of the right to education as provided under article 13 of the ICESCR. In paragraph 6, the committee lists the essential features of the right to education to include availability, accessibility, acceptability and adaptability.

Availability simply means that there is need to have functional educational facilities and programmes available in sufficient quantities. All institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials while some will also require facilities such as a library, computer facilities and information technology.<sup>11</sup>

On accessibility, educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party. Accessibility has three overlapping dimensions. The first dimension is non-discrimination which provides that education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds. The second dimension on physical accessibility emphasizes that education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g. a neighbourhood school) or via modern technology (e.g. access to a "distance learning" programme). Finally economic accessibility on the other hand means that education has to be affordable to all. This dimension of accessibility is subject to the differential wording of article 13 (2) in relation to primary, secondary and higher education: whereas primary education shall be available "free to all", States parties are required to progressively introduce free secondary and higher education.<sup>12</sup>

With regard to acceptability, the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents.<sup>13</sup>

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<sup>10</sup> Economic Social & Cultural Committee general comment number 13 of 1999  
<<http://www.unhcr.ch/tbs/doc.nsf/0/ae1a0b126d068e868025683c003c8b3b?Opendocument> > accessed 1 August 2012.

<sup>11</sup> Economic Social & Cultural Committee General comment no. 13 of 1999, para 6(a).

<sup>12</sup> Ibid at para 6(b).

<sup>13</sup> n10 at para 6(c).



Finally with adaptability education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.<sup>14</sup>

In ensuring that the right to education is realized the best interests of the student shall be a primary consideration. Similarly just as with the right to health and other human rights, the state has the obligation to protect, respect and fulfil the right to education as provided in article 13 (2).<sup>15</sup> With regard to this, the committee gives the example that a state must respect the availability of education by not closing private schools; protect the accessibility of education by ensuring that third parties, including parents and employers, to not stop girls from going to school; fulfil (facilitate) the acceptability of education by taking positive measures to ensure that education is culturally appropriate for minorities and indigenous peoples, and of good quality for all; fulfil (provide) the adaptability of education by designing and providing resources for curricula which reflect the contemporary needs of students in a changing world; and fulfil (provide) the availability of education by actively developing a system of schools, including building classrooms, delivering programmes, providing teaching materials, training teachers and paying them domestically competitive salaries.<sup>16</sup>

Free primary education not only needs to be easily accessible but it also needs to have quality. In its general comment number 11, the economic, social and cultural committee expounds on the meaning of compulsory and free primary education. In paragraph 6 the committee points out that the term ‘compulsory’ highlights the fact that neither parents, nor guardians, nor the state are entitled to treat as optional the decision as whether the child should have access to primary education. The education offered must be adequate in quality, relevant to the child and must promote the realization of the child’s other rights. On the issue of free of charge

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<sup>14</sup> n10 at para 6 (d).

<sup>15</sup> ICESCR 1966, art 13(2) states as follows; The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right, Primary education shall be compulsory and available free to all; Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education; Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education; Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education; and the development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

<sup>16</sup> n10 para 50.

primary education, the committee points out that fees imposed by the government, local authorities or the school and other direct costs constitute disincentives to the enjoyment of the right to education.

The importance of the realization of the right to education to development is equally captured in the Millennium Development Goals as well as in Kenya's Vision 2030. The second goal of the Millennium Development Goals is to achieve universal primary education by 2015.<sup>17</sup> Kenya on the other hand through its vision 2030 aspires to provide globally competitive quality education, training and research to her citizens for development and enhanced individual well-being. The overall goal for 2012 is to reduce illiteracy by increasing access to education, improving the transition rate from primary to secondary schools, and raising the quality and relevance of education. Other goals include the integration of all special needs education into learning and training institutions, achieving an 80% adult literacy rate, increasing the school enrolment rate to 95% and increasing the transition rates to technical institutions and universities from 3% to 8% by 2012.<sup>18</sup>

From the year 2007 to 2010 the Transparency International (TI) movement conducted research on accountability and transparency in the management of education, and on public awareness and understanding of corruption in education in certain countries in Africa, Eastern Europe and Asia.<sup>19</sup> The findings and results show that some of the forms of corruption that exist around the world include;

**a. Collection of illegal, extra school fees/charges**

Many schools collected illegal, extra school fees in order to compensate for budget deficits. In other words, parents are forced to pay fees when the service is supposed to be free, or pay more than the official cost. In some African countries, despite an exemption of school fees at the primary education level, as many as 44 per cent of parents of primary school children said they still had to pay extra amounts.

**b. Embezzlement and misappropriation of budgets allocated for education**

In most countries surveyed, the education sector is centrally administered by the state. Although the level of corruption in the field of education management is low, leakages of financial resources caused by corruption are considerable simply because resources and funds

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<sup>17</sup> Millennium Development Goals, <<http://www.undp.org/content/undp/en/home/mdgoverview.html>> accessed 1 August 2012.

<sup>18</sup> Kenya Vision 2030, Government of the Republic of Kenya (2007).

<sup>19</sup> Transparency International 'Forms and Effects of Corruption on the Education Sector in Vietnam' (2011).

allocated to education can be huge (often 20-30 per cent of national budgets). Moreover, decentralisation of financial management to local authorities increases corruption risks, especially when this is not accompanied by effective control mechanisms. Actual cases show that the more people and levels that participate in education budget management, the more opportunities and risks there are for malfeasance and corruption. Forms of corruption include leakage in the construction of school buildings; procurement of textbooks, school equipment and supplies; kickbacks; bribery; close relationships and falsification of school enrolment.

#### **c. Fraud in academic performance**

At the upper secondary education level, fraud in academic performance, and buying and selling academic marks/scores and academic degrees can occur, particularly in southern Europe and Russia. For example, the amount of bribes paid in order for students to be admitted to Russian universities was estimated at US \$1 billion (Approximately Kshs. 84 Billion) in 2003. Corruption in academic performance occurs when students or parents bribe teachers in order to obtain good academic marks/scores, or to teachers by taking extra lessons in order to please them or to cover curricula that teachers do not cover in regular classes. Other forms of corruption such as selling exam papers or students taking exams for other students are reportedly common practice in China and Bosnia.<sup>20</sup>

### **3.3 Effects of Corruption on Infrastructural development in Public Primary Schools**

The term 'infrastructure' is used to refer to basic facilities and services needed for the functioning of a community or society. The basic facilities required in a school among other things include functional classrooms, sanitation facilities, clean drinking water and qualified and trained teachers receiving domestically competitive salaries.

The introduction of the Free Primary Education (FPE) programme in Kenya in 2003 by the National Rainbow Coalition (NARC) government was a noble idea that perhaps required clear cut policies on its implementation laid down before its introduction to primary schools in Kenya. The FPE programme has since its inception faced numerous challenges because the government was unprepared for the policy which was started on a short notice. Some of the challenges that the FPE programme faces include increased student population; shortage of teachers; lack of clear guidelines on admission, hence, the entry of overage children; lack of consultation with key stakeholders such as teachers and parents; delay in disbursement of

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<sup>20</sup> Ibid.

funds; and expanded roles for head teachers.<sup>21</sup> Further the unclear guidelines on the implementation of the FPE programme have created a fertile ground for the breeding of corruption. Reports in the local dailies indicate that Treasury had begun paying back the donor money stolen from the FPE program.<sup>22</sup> In July 2011, the Department for International Development (DFID) received KShs14 million and at the end of October 2011, another KShs164 million. The Canadians expect a refund of KShs52 million. The refunded cash will be re-allocated to non-governmental organizations (NGOs) to continue the goal of aiding FPE. According to DFID spokesperson Rose Brown, “It is right for the UK government to be fully reimbursed for our share of funds that have been stolen as we have an obligation to our taxpayers to ensure that their money is used for the intended purpose”. DFID has already bought and distributed through NGOs, 2.6 million textbooks for more than 320,000 school children in Kenyan slums.<sup>23</sup>

The 2010 Kenya Education Sector Integrity Study Report revealed that with regard to education financing and management, two key findings are worth highlighting; the first finding was the widespread mismanagement and general non-accountability in the sector. This coupled with over-centralization of decision-making and the exclusion of important stakeholders has made the governance situation in the education sector dire. The second finding was the infrastructural development projects in secondary and primary schools are shrouded in secrecy. Often, the implementation of major projects, for example the computer for schools project, and the installation of fire and the laboratory equipment projects, has flouted procurement procedures. Therefore, such processes are open to abuse and exacerbate the integrity risks.<sup>24</sup>

An assessment carried out by UNESCO (2005) in collaboration with Kenya’s Ministry of Education, Science and Technology about the FPE programme in Kenya revealed that out of the 162 primary schools involved in the survey, classrooms in many schools were mud-walled and iron-roofed. Further the schools that had permanent classrooms did not have window panes or shutters and doors. Only a few schools had permanent classrooms with lockable doors. In many cases, only upper classes were in good shape with chalkboards.

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<sup>21</sup> UNESCO ‘Challenges of Implementing Free Primary Education in Kenya’ Assessment Report (2005) <<http://unesdoc.unesco.org/images/0015/001516/151654eo.pdf>> accessed 2 August 2012.

<sup>22</sup> B Muiruri, Daily Nation (Nairobi 1 November 2011).

<sup>23</sup> J Odero, ‘Donors Demand Refund of FPE Money’ <http://kenyastockholm.com/2011/12/29/fpe-fraud-kibakis-legacy-of-corruption-part-4-final/> accessed 1 August 2012.

<sup>24</sup> Kenya Education Sector Integrity Study Report 2010.

Overall, most schools did not have adequate classrooms to accommodate the large numbers of pupils enrolled under FPE programme. The classrooms were generally congested and there was hardly space for movement. The classrooms were in poor condition. They depended on sunlight for lighting. Pupils had difficulty reading from the chalkboard when there was no sunlight especially in the morning and evenings or when it was cloudy and rainy.<sup>25</sup>

The Kenya National Assembly Public Accounts Committee report for the fiscal year 2004/2005 indicated that Kshs.774,905,466.30/= of the national budget was unsupported. The committee was deeply concerned at the absence of clear policy guidelines or clear systems put in place for the documentation of donor funded projects. A further Kshs.4.9 Million was granted to fifteen primary schools in Rift Valley province, through the provincial director of education. At the time the public accounts committee was publishing its report, no expenditure returns had been made available for audit review and therefore it was not possible to confirm the propriety of the grant. Generally the public accounts committee noted with concern the inordinate delay in availing documents to auditors and recommended that officers who failed to avail documents at the time of audit ought to be disciplined.<sup>26</sup>

The auditor general's report for the fiscal year 2009/2010 indicates that as in previous years, weak and inadequate maintenance of accounting records was observed in the fiscal year 2009/2010 in the various ministries and departments.<sup>27</sup> For instance various ledgers against which the financial statements had been drawn were found to be incomplete or not up to date as at 30 June 2010. In other instances, routine below-the-line accounts were not analysed to indicate what they represented. Further, material book-keeping errors were also detected in various records, and as a result, some of the expenditure for the year was excluded from the financial statements. During 2009/2010, a number of Ministries and Departments exercised weak or inadequate controls in the management of imprests, consequent upon which substantial balances of such imprests were recorded as outstanding as at 30 June 2010. The ministry of Education recorded the highest outstanding amount of imprests at Kshs.76, 708, 420.45/=. Such money could easily have been utilized in infrastructural development in the

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<sup>25</sup> UNESCO 'Challenges of Implementing Free Primary Education in Kenya' Assessment Report (2005) <<http://unesdoc.unesco.org/images/0015/001516/151654eo.pdf>> accessed 2 August 2012.

<sup>26</sup> National Assembly, 'Report of the Public Accounts Committee on the Government of Kenya Accounts for the year 2004-2005' (Tenth Parliament Third Session Kenya).

<sup>27</sup> A S M Gatumbu, 'Summary of the Report of the Auditor General on the Appropriation Accounts, other Public Accounts and the Accounts of the Funds of the Republic of Kenya for the Year ended 30 June 2010' (2011 Kenya).

public primary schools. The use of a large percentage of the FPE funds to cover imposts for public officials is a misappropriation of the said funds which are primarily meant to ensure that free primary education is possible for all primary school going children in Kenya.

In South Africa, given the difficulties facing many schools and the government's reluctance to provide the funding to address them, their facilities and achievement rates are poor. Even after the African National Congress (ANC) government came to power, black education remained vastly inferior to white education, despite the fact that educational equity became a basic principle of the budget strategy.<sup>28</sup> The poorest schools also lack the facilities enjoyed by wealthier communities. As recently as 2000, over 35% of all school buildings were in "weak to very weak" condition and the buildings needing the most repairs were concentrated in poor, predominantly black, areas. Approximately one-half of the rural Northern Province's 1.9 million students to have no water within walking distance of their schools. Seventy-nine percent had no toilets and eighty percent had no telephones. Forty-one percent of Northern Province homeland schools needed major repairs. Urban black township schools, which continue to fail as wealthy blacks move out of townships or arrange for their children to commute to predominantly white schools, fared no better, tending to be badly overcrowded and also lacking electricity and telephones. In the Western Cape, by way of contrast, 90% of schools had telephones, and only 1% required major repairs.<sup>29</sup>

In Uganda, a public expenditure tracking survey (PETS) to gauge the extent to which public resources actually filtered down to the schools showed that in the mid-1990s, the average school received only around 20 percent of central government spending on the program.<sup>30</sup> Most schools received nothing and the bulk of the grants were captured by local government officials (and politicians) in charge of disbursing the grant to the schools. The data also revealed large variations in grants received across schools. Contrary to the findings of the benefit incidence analysis, data on actual public spending reaching the schools showed schools in poorer communities to suffer significantly more from capture.<sup>31</sup> The government initiated a newspaper campaign in response to the problems identified in the first PETS. As an anticorruption program it differs from the standard package. Traditionally, anticorruption

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<sup>28</sup> E Berger, 'The Right to Education under the South African Constitution' (2003) 103 Columbia Law Review 614-661 <<http://www.jstor.org/stable/1123719>> accessed 21 June 2012.

<sup>29</sup> See (Berger) n28.

<sup>30</sup> R Reinikka & J Svensson, 'Fighting Corruption to Improve Schooling: Evidence from a Newspaper Campaign in Uganda' <<http://people.bu.edu/dilipm/ec722/papers/svenssonjeea04.pdf>> accessed 3 August 2012.

<sup>31</sup> Ibid.

programs target corruption in service delivery primarily through capacity building of the legal and financial institutions - judiciary, police, and financial auditors – in charge of enforcing accountability in the public sector. This is a top-down approach where some government agencies are assigned to monitor and control others. The problem is that in many poor countries the legal and financial institutions are weak and among the most corrupt. More resources to these agencies may therefore not be the best solution. For these reasons, the government decided to take the bottom-up route of citizen enforcement and began to publish data on monthly transfers of capitation grants to districts in the national newspapers and their local language editions.<sup>32</sup>

One of the most important elements of good governance is an effective mechanism to handle complaints and denunciations by victims of corruption. Research by Transparency International in Sri Lanka, however, showed that 78 per cent of parents, 62 per cent teachers and 45 per cent of education officials did not complain about being corruption victims.<sup>33</sup> This illustrates that, in many cases, most people decide to do nothing to fight corruption. The rights of citizens are not exercised to tackle incidents of corruption, and victims of corruption seem to be cautious and frightened. There are many reasons why people choose not to denounce corrupt acts, including a lack of awareness of complaint mechanisms, ineffective complaint mechanisms and the fear of retribution.<sup>34</sup> A low number of complaints and denunciations clearly illustrate reluctance by society and a lack of confidence in state governance mechanisms. It also provides a pretext for policy-makers and civil servants, including teachers, to continue to be a part of the corruption phenomenon and remain passive in dealing with corruption.<sup>35</sup>

From the above statistics, it is quite evident how corruption negatively affects the infrastructural development in primary schools. This in turn violates the right to education. The challenges in implementing the FPE programme in Kenya have not only resulted in diluting the quality of education received but have also affected infrastructural development in primary schools. The misuse and mismanagement of FPE programme grants has reduced foreign investors' confidence in the country. The FPE programme should therefore be implemented within the broader Education for All (EFA) framework, which provides for a holistic approach to education. The government should provide clear policy guidelines on how parents and communities could provide

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<sup>32</sup> See Reinikka & Svensson (n30).

<sup>33</sup> Transparency International 'Forms and Effects of Corruption on the Education Sector in Vietnam' (2011).

<sup>34</sup> Ibid.

<sup>35</sup> See Transparency International (n 33).

physical facilities like classrooms, toilets, desks and water tanks. Emphasis must be made that no child should be locked out of school because of the parent's failure to participate in the development activities. Part of the constituency development funds should be used to put up classrooms and toilets or rehabilitate facilities in schools to provide pupils with a conducive learning environment. Communities should be encouraged to raise funds to provide buildings and other physical facilities to schools.

The government should revise the criteria for disbursing funds with a view to giving more money to schools in hardship areas and also consider giving allocations for joint exams. Additional funds should be allocated for needy schools to enable them put up physical facilities since parents no longer pay building fees. Further, the FPE funds should be sent to schools on time preferably during holidays so that the head teachers and the communities can plan and purchase the books and other teaching and learning equipment on time. Flexibility should be allowed in the use of funds on the condition that parents, communities and school committees agree on what they want to be supported. Involving the parents and the communities in the decision making process of how FPE funds ought to be utilized will not only curb the chances of corruption but will equally incorporate a rights based approach to curbing corruption in the management of FPE funds. The participation and inclusion of the community will also go a long way in making the head teachers accountable in their use of these funds.

The Organization for Economic Cooperation and Development (OECD) principles of corporate governance build on four core standards; fairness, transparency, accountability and responsibility.<sup>36</sup> The principle of accountability implies a legal duty on the part of the directors to the company and its shareholders. As elected representatives of the shareholders, directors are usually held to be in a fiduciary relationship to the shareholders and to the company and have duties of loyalty and care that require them to avoid self interest in their decisions and to act diligently and on a fully informed basis. The principle of transparency on the other hand requires timely and accurate disclosure on all material matters regarding the corporation, including the financial situation, performance, ownership and governance of the company. In the same spirit, the principle of transparency and accountability ought to be demonstrated in the handling of the FPE funds. This will ensure that the funds set aside for infrastructural development in public primary schools are actually utilized for that purpose. A

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<sup>36</sup> A M E Mendoza & C T Toralba, 'Beyond Wealth Maximisation and Profit Maximization' in D Lutz & P Mimbi, *Shareholder Value and Common Good* (Strathmore University Press 2004) 120-121.



Public Expenditure Track Survey (PETS) conducted on an annual basis and findings published in the Kenya Gazette for the public to access will in essence ensure that funds allocated for infrastructural development are utilized as thus.

### **3.4 The legality of the Right to Education in Kenya**

The right to education is enshrined in the constitution of Kenya 2010. The enforcement and justiciability of this right thus becomes a legal concern. When the right to education is violated as a result of a corrupt act, this violation not only hinders the realization of the said right but equally makes a mockery of the constitutional provision guaranteeing the realization of that right.

Article 17(1) of the African Charter on Human and People's rights provides that every individual shall have the right to education. This provision amongst others was cited as violated in the Community Court of Justice of the Economic Community of West African State in the case of *SERAP*.<sup>37</sup> In this case an international court for the very first time recognized the citizens' legal right to education. The plaintiffs in this case i.e. the Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) alleged a violation of the right to quality education for the citizens of the Federal Republic of Nigeria, the right to dignity, the right of people to their wealth and natural resources and to their economic and social development as guaranteed under articles 1, 2, 17, 21 and 22 of the African Charter on Human and People's Rights which Nigeria is a signatory. In addressing the question whether the right to education was a legal entitlement of the citizens', the court held that the right to education can be enforced before the court. It therefore dismissed all objections brought by the federal government through the Universal Basic Education Commission to the effect that education is 'a mere directive policy of the government and not a legal entitlement of the citizens'.

This suit followed a petition by SERAP to the Independent Corrupt Practices and other Related Offences Commission (ICPC) which led to the discovery by the ICPC of massive corruption and mismanagement of the Universal Basic Education Commission funds.<sup>38</sup> The investigation also resulted in the recovery of stolen N 3.4billion (approximately Kenya

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<sup>37</sup> *SERAP v Federal Republic of Nigeria and Universal Basic Education Commission* ECW/CCJ/APP/08/08 <<http://www.right-to-education.org/node/717>> accessed 1 August 2012.

<sup>38</sup> Amnesty Report 'ECOWAS court says Nigerians have a Legal Right to Education' (2009) <<http://reliefweb.int/report/nigeria/ecowas-court%C2%A0says-nigerians-have-legal-right-education>> accessed 1 August 2012.

Shillings (Kshs.) 1.9 Billion) meant to improve the quality of education and access to education of every Nigerian child. This proactive approach by both international and national courts to the realization of fundamental human rights goes a long way to creating a legal environment where the rule of law is respected and the doctrine of separation of powers is at play.

The Basic Education Bill of 2012 in its text provides for various measures to ensure transparency and accountability in the use of public funds in schools in Kenya. Should this legislation become law, it will be a step forward in the collaborative initiative between anti corruption measures and respect for fundamental human rights such as the right to education.

### **3.5 Conclusion**

The rights based approach advocates for equality and non discrimination. Further the Constitution of Kenya 2010 protects the rights of persons with disabilities.<sup>39</sup> In light of this, the government should thus provide the infrastructure for the children with special needs. This can be done through expanding existing schools offering special needs education to accommodate more pupils as well as making school buildings accessible to those with physical disabilities as well. Further teachers should be trained on ways of handling children with physical disabilities and parents and communities should be sensitised so that they can take their disabled children to school.

The next chapter analyses the strengths and weaknesses of existing anti corruption legislation and institutions with the aim of making a case for a collaborative initiative between the anti-corruption regime and human rights regime.

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<sup>39</sup> Constitution of Kenya 2010, arts 27, 54, 97(1)(c), 98(1)(d), 100 etc.

## CHAPTER FOUR

### ***LEGAL AND INSTITUTIONAL FRAMEWORK ADDRESSING CORRUPTION IN KENYA***

#### **4.0 Introduction**

In the 2011 Corruption Perceptions Index by Transparency International, Kenya was ranked 154 out of 183 countries.<sup>1</sup> This is a drop from 2010 when Kenya was ranked 146 out of 180 countries.<sup>2</sup> This in essence means that between 2010 and 2011 the rate of corruption in the country increased. In the absence of effective regulation, law often aids the abuse of power and corruption. In other words, “in the absence of fear of penalty or sanctions, there is nothing to deter [those who wield power from] fraudulently enriching themselves” and violating the law.<sup>3</sup> Government actors often disregard the prescriptions of law, especially where they view legal requirements as hindering the attainment of short-term political objectives or other ends. Because law is dispensed with whenever it becomes convenient to do so, a culture of impunity emerges where law ceases to be authoritative.<sup>4</sup>

Abuse of power and corruption are no longer solely attributable to the Executive alone. There are widespread and credible allegations that the Legislature and the Judiciary are also abusing their powers and engaging in, or facilitating, corruption. These allegations have led to questions about the ability and legitimacy of these branches to hold the executive to account. For example, there is a perception that legislators are no less corrupt than the executive actors they purport to hold accountable. Further, the legislature’s ability to function as a watchdog is compromised because some of its key committees are headed by legislators who have been implicated in corruption scandals. There are also concerns that legislators are influenced by special interests and may not be credible guardians of the public interest. The judiciary is equally culpable. Due to allegations of abuse of power and corruption, significant segments of the citizenry perceive the judiciary as having lost its legitimacy as a dispute resolution

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<sup>1</sup> Corruption Perceptions Index 2011 < <http://cpi.transparency.org/cpi2011/> > accessed 4 May 2012.

<sup>2</sup> Corruption Perceptions Index 2010.

<sup>3</sup> M Akech, ‘Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?’ (2011) 18 *Indiana Journal of Global Legal Studies* 341-394 <<http://muse.jhu.edu/journals/gls/summary/v018/18.1.akech.html>> accessed 4 July 2012.

<sup>4</sup> *Ibid.*

forum.<sup>5</sup> This chapter discusses the International and national legal framework addressing corruption and points out the need for anti- corruption legislation to address human rights. An analysis of the institutional framework governing corruption is also done in a bid to show how various institutions can aid in the fight against corruption especially in the health and education sector.

## **4.1 International and Regional Legal Framework on Corruption**

Kenya signified its commitment in the fight against corruption by becoming the first country in the world to ratify the UN Convention Against Corruption (UNCAC) in December 2003 in Merida, Mexico. This was after becoming a signatory to the AU Convention on Preventing and Combating Corruption (AUCPCC) in 2003. Kenya later ratified the AUCPCC in 2007.

### **4.1.1 UN Convention Against Corruption (UNCAC)**

The UNCAC is the first universal legally binding instrument on corruption. It covers five main areas: prevention, criminalization and law enforcement measures, international cooperation, asset recovery, and technical assistance and information exchange. It includes both mandatory and non-mandatory provisions. The main purposes of this Convention are:

- a) to promote and strengthen measures to prevent and combat corruption more efficiently and effectively;
- b) to promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery;
- c) to promote integrity, accountability and proper management of public affairs and public property.<sup>6</sup>

Over the course of its eight chapters and seventy-one articles, the convention sets forth in detail a variety of measures states are obligated to take to strengthen international efforts to fight corruption of public officials, whether in the form of bribery, embezzlement, money laundering, or related acts.<sup>7</sup> In chapter 2 (Articles 5 to 14), the convention sets forth a series of preventive measures that states must undertake, including the adoption of anti-corruption policies and practices, and the use of a body (or bodies) to ensure implementation of those policies and practices. Chapter 3 of the convention (Articles 15 to 42) requires parties to

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<sup>5</sup> See Akech (n3).

<sup>6</sup> UNCAC, art 1.

<sup>7</sup> American Society of International Law, 'Adoption of UN Convention against Corruption' (2004) 98, 1 The American Journal of International Law, 182-184 <<http://www.jstor.org/stable/3139275>> accessed 21 July 2012.

criminalize embezzlement, money laundering, and the bribing of their own and foreign government officials in relation to the conduct of international business. The chapter also calls upon parties to "consider adopting" laws to establish other acts as criminal offenses, including trading in influence, abuse of functions, illicit enrichment, and bribery in the private sector. The chapter contains a series of articles on measures for promoting adherence to such criminal laws—for example, measures for freezing and confiscating the proceeds of a crime, overcoming bank secrecy laws, and cooperation among law enforcement authorities of the parties. Chapter 4 (Articles 43 to 50) is devoted to international cooperation, and addresses issues such as extradition and procedures for mutual legal assistance. Chapter 5 (Articles 51 to 59) on asset recovery establishes a system whereby assets recovered in one jurisdiction can be returned to the beneficial owners located in another. Chapter 6 (Articles 60 to 62) addresses technical assistance and information exchange. Chapter 7 (Articles 63 to 64) creates a conference of the states parties (which will meet regularly) and a permanent secretariat that are responsible for following up on the implementation of the convention. Chapter 8 (Articles 65 to 71) contains final provisions.<sup>8</sup>

In voting to adopt the convention, the U.S. permanent representative to the United Nations stated:

Ten years ago, bribes were still tax deductible in some countries and no international anti-corruption treaties existed. Today's resolution is therefore a milestone achievement in the global effort to ensure transparency, fairness and justice in public affairs. This is vital not only to the rule of law, but to the fundamental confidence citizens must have for representative government and private enterprise to succeed. Corruption and democracy are incompatible; corruption and economic prosperity are incompatible; and corruption and equal opportunity are incompatible.<sup>9</sup>

Kofi Annan in the preamble to the UNCAC recognizes that corruption is an insidious plague that undermines the rule of law and leads to the violation of human rights. However despite this acknowledgement in the preamble of this international covenant, its core text does not offer any solutions on how to handle corruption after it has violated fundamental human rights. It is worthwhile to note that the core purpose of the UNCAC illustrates some core characteristics of a rights based approach, notably accountability and proper management of public affairs and property.

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<sup>8</sup> Ibid.

<sup>9</sup> See American Society of International Law (n7).

#### **4.1.2. African Union Convention on Combating and Preventing Corruption (AUCCPC)**

The preamble of AUCCPC provides for the basis of the convention. The member states of the African Union (AU) concerned about the negative effects of corruption and impunity on the political, economic, social and cultural stability of African States and its devastating effects on the economic and social development of the African peoples, acknowledging that corruption undermines accountability and transparency in the management of public affairs as well as socio-economic development on the continent and recognizing the need to address the root causes of corruption on the continent adopted the AUCCPC at the 2<sup>nd</sup> Ordinary session of the Assembly of the Union at Maputo in July 2003. The Convention entered into force in 2006 and to date 31 states have ratified the convention.<sup>10</sup>

The AUCCPC acknowledges that the culture of impunity is quite rampant in Africa and there is thus a need to address the same at a regional level. Unlike the ECOWAS community court of justice that has passed a favourable ruling on a socio economic right, the African Court on human and people's rights is yet to try a corruption case that has lead to the direct infringement of human rights.

#### **4.2 National Legal Framework on Corruption**

Kenya has numerous laws on corruption, national and international as well as regional. The Prevention of Corruption Act<sup>11</sup> was the first anti corruption legislation to be enacted in Kenya. It was enacted in 1956 and repealed in 2003. The Prevention of Corruption Act was later amended in 1997 to provide for the Kenya Anti-Corruption Authority (KACA), the first Government anti-corruption agency established by law.

In 2000, the High Court, in *Stephen Mwai Gachiengo & Another v Republic*<sup>12</sup>, ruled that KACA undermined the powers of the Attorney General (AG) and Commissioner of Police. The High Court held that the statutory provisions establishing KACA were in conflict with the Constitution. As such, KACA was disbanded.<sup>13</sup> In this case, Stephen Mwai Gachiengo had been charged with 9 counts of abuse of office and the second appellant had been charged with 4 counts of abuse of office. When the matter came up for hearing before the Senior Resident Magistrate, Counsel for the appellants raised a preliminary objection on a point of law and the matter was referred to the High Court as a Constitutional reference. The issues

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<sup>10</sup> AU Advisory Board on Corruption Strategic Plan 2011-2015

<sup>11</sup> Prevention of Corruption Act Chapter 65 Laws of Kenya.

<sup>12</sup> [2000] eKLR.

<sup>13</sup> --'Corruption in Kenya' <<http://softkenya.com/law/corruption-in-kenya-2/>> accessed 13 May 2012 .

for determination before the high court were whether it was unconstitutional and contrary to the principle of separation of powers for Kenya Anti Corruption Authority (KACA) to be headed by a High Court Judge, Whether such leadership compromised the accused right to a fair trial before an impartial court, Whether the Attorney General's Consent to the prosecution was valid under the constitution and whether the provisions establishing the Kenya Anti Corruption Authority were in conflict with the constitution. The court held that the provisions in the Prevention of Corruption Act establishing KACA were unconstitutional and in conflict with the spirit and provisions of the constitution, specifically section 26 that clearly placed prosecutorial powers in the Attorney General and not KACA. Further the court agreed with the submissions of the appellants' counsel that it was contrary to the principle of separation of powers for KACA to be headed by a High Court Judge.<sup>14</sup>

#### **4.2.1. The Constitution of Kenya, 2010**

For the very first time in the history of Kenya, leadership and integrity principles have been enshrined in the text of the Constitution. This goes to show that despite having existing legislation on corruption before the passing of the constitution, corruption remains a grave problem in Kenya. Corruption is regarded as such an intricate problem as to require constitutional protection. Chapter six of the constitution covers leadership and integrity. It provides the guiding principles of leadership and integrity<sup>15</sup> to include selection on the basis of personal integrity, competence and suitability or free and fair elections. It also provides for objectivity and impartiality in decision making and ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices, selfless service, accountability to the public and discipline and commitment in service to the people. In summary, the principles of leadership and integrity laid out in the constitution call for individuals with integrity.

The concept of individuals with integrity is not a new concept. It similarly has roots in the biblical story of Moses in the book of Exodus. Jethro advises Moses to;

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<sup>14</sup> Justice Aaron Riingera was at that time the Director of Kenya Anti Corruption Authority as well as serving as a High Court Judge at the same time. Further, Section 10 of the Prevention of Corruption Act mandated the Director of the Kenya Anti Corruption Authority to cause a police officer to investigate any bank account, share account or purchase account. This was contrary to Section 26 (4) of the Constitution (now repealed) that gave the same mandate to the Attorney General.

<sup>15</sup> Constitution of Kenya 2010, art 73(2).

[...] Select capable men from all the people. Men who fear God, trustworthy men who hate dishonest gain and appoint them as officials over thousands, hundreds, fifties and tens. Have them serve as judges for the people at all times [...]<sup>16</sup>.

Individuals with integrity not only make the best leaders but ensure that a nation develops and there is zero tolerance for corrupt practices.

The constitution provides that parliament ought to enact legislation to establish an independent Ethics and Anti Corruption Commission (EACC)<sup>17</sup> for purposes of ensuring compliance with and enforcement of the provisions of chapter six of the constitution. The constitutional principles laid out in chapter six are ideally to be applied in all leadership positions in society. The constitution however lays emphasis on state and public officers. Any individual with an interest in any leadership position for public interest must comply with the principles laid out in chapter six. The constitution has therefore laid a solid foundation for existing and subsequent legislation on corruption.

The Leadership and Integrity Act 2012 enacted pursuant to Article 80 (c) of the Constitution of Kenya 2010 is a positive step in the fight against corruption. The Kenyan court has been proactive in the constitution implementation process as well as in breathing life into the newly enacted Leadership and Integrity Act 2012. On Thursday, 21<sup>st</sup> September 2012, the High Court issued a ruling which in essence annulled the appointment of Mr. Mumo Matemu, the appointed chairman of the Ethics and Anti Corruption Commission (EACC).<sup>18</sup> The court was of the opinion that Mr. Matemu did not meet the integrity test set out in the Constitution and in the Leadership and Integrity Act, 2012. The court further held that both the executive and the legislature had failed to take into account the integrity issues raised about Mr. Matemu while he was working at the Agricultural Finance Corporation as a legal officer. This ruling by the High Court besides creating judicial precedent on similar cases pertaining to integrity in future has also asserted the role of the court as a check and balance of both the executive and the legislature. The doctrine of separation of power illustrated in the Mumo Matemu case will go a long way in ensuring that neither arm of government will arbitrarily abuse their power leading to the appointment of individuals without integrity into public service.

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<sup>16</sup> Holy Bible New International Version at Exodus 18:21-22.

<sup>17</sup> Constitution of Kenya 2010, art 79.

<sup>18</sup> I Lucheli, 'Court Annuls Mumo Matemu Appointment' The Digital Standard (Thursday 21 September 2012) <[http://www.standardmedia.co.ke/?articleID=2000066555&story\\_title=court-annuls-mumo-matemu-appointment](http://www.standardmedia.co.ke/?articleID=2000066555&story_title=court-annuls-mumo-matemu-appointment)> accessed 22 September 2012. See also *Trusted Society of Human Rights Alliance v AG and 2 others [2012] eKLR*.



One of the principles of a rights based approach is public participation. Article 47 of constitution 2010 provides, “[e]very person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.” It further provides that every person has “the right to be given written reasons where his or her right or fundamental freedom has been or is likely to be adversely affected by administrative action.” The new constitution imposes a duty on Parliament to enact a law giving effect to these rights. This right to fair administrative action may enhance the participation of the citizenry in, and the accountability of, the exercise of power. First, it can enhance the rights and expectations of citizens in governmental processes, who would then be in a better position to demand responsive administrative action. Second, it can enhance the accountability of public officers, who are likely to perform better because they know that their actions are being scrutinized by the citizenry. But the citizenry can only take advantage of the values, principles, and mechanisms established by the new constitution if they are sufficiently empowered. In this respect, legal empowerment initiatives are crucial. Such initiatives would include legal literacy training, increased availability of legal assistance, and public interest litigation.

In particular, the capacities of disadvantaged and vulnerable groups must be enhanced by the State and nongovernmental organizations so that they can make better use of the democratic spaces created by the new constitution.

#### **4.2.2 The Anti Corruption and Economic Crimes Act, 2003**

The Anti Corruption and Economic Crimes Act (ACECA) was enacted in 2003 and repealed the Prevention of Corruption Act. It also established the Kenya Anti Corruption Commission (KACC) which has since been disbanded and replaced by the Ethics and Anti- Corruption Commission (EACC). The object of ACECA as stated in its preamble is to provide for the prevention, investigation and punishment of corruption, economic crime and related offences. In 2004, a National Anti-corruption Steering Committee was established to complement KACC in the fight against corruption.

The Anti Corruption and Economic Crimes Act (ACECA) establishes special magistrates to adjudicate corruption cases. The Ethics and Anti- Corruption Act 2011 repeals part III of ACECA that established the advisory board. ACECA in its list of offences fails to capture the violation of human rights. Despite the fact that it has been established that corruption does infringe on fundamental human rights. Conventional human rights instruments such as the International Convention on Economic, Social and Cultural Rights (ICESCR) are not punitive

in nature. This would explain why some violators of human rights especially socio economic rights, get away with the violations.

### **4.2.3. The Public Officers Ethics Act, 2003**

The Public Officers Ethics Act (POEA) was enacted in 2003 alongside ACECA. Its main purpose is to advance the ethics of public officers by providing for a code of conduct and ethics for public officers and requiring financial declarations from certain public officers.

POEA advances the ethics of public officers by providing a code of conduct and ethics, which imposes on public officers a duty of professionalism and prohibits activities such as improper enrichment, conflicts of interest, acting for foreigners, political partisanship, nepotism, and sexual harassment.<sup>19</sup>

One of the challenges in the POEA is that the Act does not apply to conduct of private officers and as such it fails to recognize the possibility of corruption in the private sector. A huge lacunae lies when partnerships between the public and private sector are at play. Further Section 41 of the Act is subject to abuse by senior public officers and in essence deters whistle blowers from exposing corrupt dealings in the public service. The section inter alia provides as follows;

A person who, without lawful excuse, divulges information acquired in the course of acting under this Act is guilty of an offence and is liable, on conviction, to a fine not exceeding five million shillings or to imprisonment for a term not exceeding five years or to both.

### **4.2.4 The Ethics and Anti- Corruption Commission Act, 2011**

The Ethics and Anti-Corruption Commission Act (EACCA) was enacted in 2011 pursuant to article 79 of the Constitution. It establishes the Ethics and Anti Corruption Commission (EACC). Section 37 of EACCA amends section 2 of the ACECA that established Kenya Anti Corruption Commission (KACC) to read as follows;

“Commission” means the Independent Ethics and Anti- Corruption Commission established under section 3 of the Ethics and Anti-Corruption Commission Act 2011, pursuant to Article 79 of the Constitution.

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<sup>19</sup> Public Officers Ethics Act (POEA) ss 16-21.

Parliament disbanded KACC on 24<sup>th</sup> August 2011 in line with the requirements for change as stipulated in the new Constitutional dispensation. The implementation of the EACCA commenced on a rocky start. There were problems pertaining to the appointment of the chairman of the commission and his two deputies. The nomination process followed the provisions of the EACCA but when the names of those nominated were presented in parliament in December 2011, there was a huge controversy and debate in parliament. A section of parliament approved the nominations of Mumo Matemu as chairman and Jane Onsongo and Irene Keino as his deputies while another section of parliament rejected the appointment. The members of parliament particularly clashed over the committee's argument that the three nominees appeared to lack "passion in anti-graft war". They accused each other of abetting tribalism, corruption and engaging in a witch-hunt as they traded accusations over the three whom the committee also said failed to show "sufficient interest" when they appeared before it for re-evaluation.<sup>20</sup> The issue of the appointment of the chairman of the commission was then shelved and the day to day running of the EACC proceeded without a chairman and his two deputies for four months. This was in contravention with the provisions of the EACCA<sup>21</sup> that clearly provides for the composition of the EACC and in essence one can argue that the EACC was running unconstitutionally. The Chairman of the EACC Mumo Matemu was finally appointed on 10<sup>th</sup> May 2012. His appointment came in amidst a corruption scandal involving the state's medical fund, NHIF. However, the chairman to the commission and his two deputies were yet to be sworn into office despite the appointments as there are two pending cases in court against Mumo Matemu.<sup>22</sup> On 21<sup>st</sup> September 2012, the High Court in *Trusted Society of Human Rights Alliance v AG and 2 others* ruled that Mr. Mumo Matemu's appointment as chairman of EACC ought to be nullified with immediate effect as he did not pass the integrity test set out in the Constitution as well as in the leadership and integrity Act 2012.

The EACCA provides for the vetting of staff to ensure that only individuals with integrity are serving in the commission. However if the integrity of the chairman of the commission is at question then this negates the very purpose and objective of the commission. The EACC since its creation in 2011 has been facing numerous internal challenges especially with regard to the leadership of the commission. A weak anti- corruption institution with no prosecutorial

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<sup>20</sup> D Ochami, 'Showdown in House over Graft Nominees' The Standard (Nairobi, 15 December 2011) <<http://www.kacc.go.ke/media.ASP?ID=363>> accessed 4 June 2012.

<sup>21</sup> S. 4, The Commission shall consist of a chairperson and two other members appointed in accordance with the provisions of the constitution and this Act.

<sup>22</sup> N Musau, 'Matemu Writes to CJ over Withdrawal of Suit' The Star (17 July 2012) <<http://www.the-star.co.ke/national/national/85206-matemu-case-withdrawn>> accessed 17 September 2012.

power is a major setback in the fight against corruption as well as in the protection of the right to health and education from corruption.

#### **4.2.5 Public Procurement & Disposal Act, 2005**

The Public Procurement & Disposal Act (PPDA) was enacted in 2005 as part of the public sector reforms initiated by the National Rainbow Coalition (NARC) government. The Act governs all aspects of procurement and disposal of unserviceable goods in the public sector. It seeks to enhance efficiency, transparency and accountability in the process. The Act brings public procurement entities (including educational institutions) under the ambit of the Public Procurement Oversight Authority (PPOA) and outlines the various procedures to be adhered to. Corruption and conflict of interest are among the unethical practices prohibited in the Act. If applied to the letter, the Act has the potential for improving procurement within the health and education sector.

#### **4.2.6 Freedom of Information Bill 2012**

Access to information is a key element in the fight against corruption. The Constitution of Kenya 2010 for the first time introduces under Article 35 the right of access to information. The Freedom of Information Bill 2012 is thus an important piece of legislation in the fight against corruption that ought to be expeditiously passed as law. Its key mandate is the establishment of the Kenya Freedom of Information Commission, to provide for access to information in the possession of public authorities and to provide for proactive publication and dissemination of information. Freedom of information will be particularly important in combating corruption, which has traditionally thrived in secrecy and obscurity. There is need to make governments more open to scrutiny in order to deter and contain corruption. Citizens must have the right to receive information on functions and decisions of Government that are not a matter of national security. Availability of information on Government finance, procurement and contracting is extremely important.

### **4.3 Institutional Framework of Fighting Corruption**

#### **4.3.1. Ethics and Anti Corruption Commission**

The EACC is the main institution empowered to fight corruption. As such, the integrity of this institution must not be questionable. For effectiveness in the fight against corruption, EACC must have integrity. It also ought to be independent from influence by any branch of

government. The politics involved in the appointment of the chairman of this institution therefore tarnish the very essence of integrity of the institutions.

The powers of the EACC are enshrined in the Constitution 2010 and Section 13 of the EACCA. Section 13 provides as follows;

The Commission shall have all powers generally necessary for the execution of its functions under the Constitution, this Act, and any other written law [...] The Commission shall have the power to educate and create awareness on any matter within the Commission's mandate; undertake preventive measures against unethical and corrupt practices; conduct investigations on its own initiative or on a complaint made by any person, and conduct mediation, conciliation and negotiation.

KACC did not have prosecutorial powers over corruption issues and this was a bone of contention in the enactment of EACC. Section 13(2) (d) of the Ethics and Anti-Corruption Bill 2011 provided the commission with prosecutorial powers. It stated as follows;

Without prejudice to the generality of subsection (1), the Commission will have the powers to [...] prosecute any matters within its mandate [...]

However when the said bill was passed into law after receiving presidential assent on 29<sup>th</sup> August 2011, Section 13(2) (d) of the bill had been amended and included in subsection (c) to read;

Without prejudice to the generality of subsection (1), the Commission will have the powers to [...] conduct investigations on its own initiative or on a complaint made by any person.

Generally all prosecutorial powers have been placed in the office of the Director of Public Prosecutions<sup>23</sup>. However the removal of prosecutorial powers from the EACC has weakened the powers of the commission rendering it a 'toothless bulldog'.

#### **4.3.2. The Judiciary**

A major factor that has the potential to instil both public and private sector confidence in a country's institutions is the operation of the rule of law. The rule of law is an essential factor for the effective functioning of the society and the economy. If the rule of law is respected in a country, the popular notion of separation of powers is put into practice and a predictable legal environment with an objective, reliable and independent judiciary will be in operation.<sup>24</sup>

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<sup>23</sup> Constitution of Kenya 2010, art 157(6).

<sup>24</sup> S Agere, *Promoting Good Governance, Principles, Practices & Perspectives* (Commonwealth Secretariat 2000) 95.

The rule of law ensures that all institutions of the nation are subjected to the laws of the country strict code of conduct, accountability and transparent procedures. If the independence of the judiciary is guaranteed the community as a whole lives under the realization that in the event of a dispute or wrongful action emanating from whichever quarter, there will be a course of redress. If the laws of the country are disregarded or flouted with impunity especially by those in authority, it creates a state of uncertainty and near anarchy.<sup>25</sup>

The judiciary plays a major role in combating corruption. As the arm of government with the mandate to adjudicate over matters, it is paramount that the institution not only maintains independence but also exudes confidence in the public, transparency, accountability and integrity. The vetting of judges and magistrates' pursuant to the Vetting of Judges and Magistrates Act 2011 is a step forward to ensuring composition of judicial officials who have integrity and have complied with the provisions of Chapter Six of the Constitution of Kenya.

In order to enhance the accountability and legitimacy of the judiciary, many countries have established judicial councils or commissions. While the specific role that judicial councils play tends to vary from country to country, they often provide mechanisms for circumscribing the exercise of judicial power. Typically, judicial councils have the following powers over judicial officers and paralegal staff: appointment; determining complaints, discipline, and removal; and managing, evaluating, and monitoring performance. These powers often facilitate effective regulation of the exercise of judicial power.<sup>26</sup>

The Kenyan Judiciary through its Judiciary Transformative Framework wishes to expand the office of the ombudsperson to receive and deal with public complaints.<sup>27</sup> An internet-based and SMS code complaints system has been developed and will be rolled out during the framework period. A public feedback mechanism will also be established to harness public opinion and views on the Judiciary's performance. The Judiciary while addressing corruption cases has been faced with challenges such as the lack of any whistle blower protection laws in place which has the danger of having witnesses to corruption intimidated by accused persons and lack of sufficient evidence leading to the release of corruption suspects.<sup>28</sup>

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<sup>25</sup> Ibid.

<sup>26</sup> See Akech (n3) at 354.

<sup>27</sup> Judiciary Transformative Framework 2012-2016, <[http://csis.org/files/attachments/120907\\_JudiciaryTransformationFramework.pdf](http://csis.org/files/attachments/120907_JudiciaryTransformationFramework.pdf)> accessed 15 September 2012.

<sup>28</sup> See for example the case of the suspects in the Anglo Leasing Scandal; Wahome Thuku, 'Anglo Leasing Scandal Suspects Set Free After Seven Years' The Standard (2 March 2012) <

Further it is worth noting with concern that the Kenyan Anti Corruption Courts have not been proactive in linking the violation of human rights with corruption. In *Esther Theuri Waruru & Another v Republic*<sup>29</sup> the court found the two accused persons guilty of the offence of receiving a bribe. In that case, the accused persons were public health officers working at the City Council of Nairobi as health inspectors. They demanded a bribe from Sarah Wangui Kariuki who worked at Kush Furniture Ltd. so as not to charge her with a violation of a notice. The accused persons had noted that the premises had certain areas that did not comply with the City Council of Nairobi by-laws such as worn out floors, leakages on the floor and the workers were to be provided with milk. In its judgment, the court failed to link that corrupt act of public officials with the violation of a human right namely the right to a clean and healthy environment as well as the right to be free from hunger. The anti corruption courts failed in their judgment to grab the opportunity to create judicial precedent aimed at protecting human rights that have been violated or have the potential of being violated by acts of corruption.

#### **4.3.3. Commission on Administrative Justice**

In Kenya, the public complaints committee was established in 2007 with the sole mandate of receiving public complaints against public officials in ministries, parastatals, statutory bodies and other public institutions. It was rebranded in 2011 pursuant to the Commission on Administrative Justice Act (CAJA) 2011, as the Commission on Administrative Justice (CAJ).

In accordance with section 30 of CAJA, the jurisdiction of the Commission to investigate does not extend to; proceedings or a decision of cabinet, criminal offences, matters pending before a court of law or a judicial tribunal, the commencement or conduct of criminal or civil proceedings, the grant of honours or awards by the President, matters relating to the relation between the state and any foreign state and any matter that for the time being is under investigation by any other person or commission.

This in essence means that the CAJ or the Kenyan Ombudsman lacks the jurisdiction to investigate corruption matters alongside the EACC. Given the commission's role to ensure an effective public administration in Kenya, express authority to have an anti-corruption mandate would go a long way in mitigating corruption in Kenya.

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<http://www.standardmedia.co.ke/?id=2000053207&cid=159&articleID=2000053207>> accessed 16 September 2012.

<sup>29</sup> (2008) eKLR.

The ombudsman is a public sector institution, preferably established by the legislative branch of government to supervise the administrative activities of the executive branch.<sup>30</sup> The ombudsman receives and investigates impartially complaints from the public concerning the conduct of government administration. A definition often given of the classical ombudsman is as follows;

An office provided for by the constitution or by action of the legislature or parliament and headed by an independent high level official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies officials and employees or who acts on his own motion and who has the power to investigate, recommend corrective actions and issue reports.<sup>31</sup>

Growing numbers of classical ombudsmen in developed and developing states are being given additional duties such as overseeing freedom of information, privacy and /or whistle blower protection laws in places such as Ireland, some Australian states and some Canadian provinces. Hybrid institutions have been created when ombudsman offices have been given a corruption fighting mandate.<sup>32</sup> While there are several types of horizontal accountability bodies that are established to combat corruption including the courts and the Anti-corruption commissions, some countries have not created a specific institution for the purpose and instead have endowed their ombudsman with additional anti-corruption mandate. The anti-corruption and leadership code ombudsmen have differing powers in the fight against corruption for example, the Ugandan Inspectorate of Government can prosecute wrongdoers, the Public Protector of South Africa has classical ombudsman powers and the ombudsmen in Saint Lucia and Trinidad and Tobago can only investigate general conditions surrounding corruption.<sup>33</sup>

#### **4.3.4. Public Service Commission**

The Public Service Commission established under Article 233 of the Constitution 2010 is empowered, among other functions, to appoint persons to hold and act in public offices. It is thus their duty to ensure that there is proper geographical and tribal representation in the public service.

Max Weber developed a detailed structural and theoretical framework of bureaucracy.<sup>34</sup> He also developed the argument that bureaucracy is rational, predictable, efficient and fair.<sup>35</sup> His

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<sup>30</sup> L C Reif, *The Ombudsman, Good Governance and the International Human Rights System* (Martinus Nijhoff Publishers 2004) 1.

<sup>31</sup> *Ibid* at 2.

<sup>32</sup> See Reif (n30) at 9.

<sup>33</sup> *Ibid* at 10.

<sup>34</sup> B Sihanya, 'The Presidency and Public Authority in Kenya's New Constitutional Order' (2<sup>nd</sup> Draft 2011) 5.



argument is that if civil servants are trained they are likely to be more effective and when management follows established rules, there is certainty in the public administration system.

The primary development goal for any country is to achieve broad-based, sustainable improvement in the standards of the quality of life for its citizens. The public service and in particular the civil service plays an indispensable role in the effective delivery of public services that are key to the functioning of a state economy. When the delivery of services is constrained or becomes ineffective, it affects the quality of life of the people and nation's development process.<sup>36</sup> There is also need to rationalize remuneration of public servants since one of the major contributors to bureaucratic corruption has been the poor pay of civil servants.<sup>37</sup>

Berhanu Mengistu and Elizabeth Vogel in their paper emphasize the need for bureaucratic neutrality.<sup>38</sup> They argue that as governments change to accommodate reforms, civil service systems must also change to implement them. Ideally, bureaucratic values guide these changes. Bureaucratic neutrality simply means that civil servants are selected on the basis of competence rather than political allegiance. This type of bureaucracy is necessary for the development of any country as it promotes accountability, transparency and professional bureaucracy and in this way, corruption is minimized. The nature of a country's legal foundation-the constitution- determines whether there will be national values and open civic engagement that eventually lead to a reform of the civil service.

Although public servants are agents of the government, they owe a higher duty to the public to observe the rule of law. As Lorne Sossin has argued, the "rule of law doctrine imposes a public trust obligation on public servants to ensure that the rule of law is respected and that government directions which are inconsistent with the rule of law are not followed." Should public servants choose to become whistle blowers in the process of performing this duty, they ought to be given sufficient legal protection.<sup>39</sup>

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<sup>35</sup> Ibid.

<sup>36</sup> M Kobia and M Nura, 'The Kenyan Experience with Performance Contracting' (28<sup>th</sup> African Association for Public Administration and Management Conference, Arusha 2006).

<sup>37</sup> R H Kempe, 'The New Public Management: Context and Practice in Africa'(2001) International Public Management Journal 4.

<sup>38</sup> B Mengistu and E Vogel, 'Bureaucratic Neutrality among Competing Bureaucratic Values in an Ethnic Federalism: The Case of Ethiopia' (2006) Public Administration Review.

<sup>39</sup> See Akech (n3) at 351.

The Public Service Commission is thus deeply involved in the recruitment process of civil servants who are public officers. If the Public Service Commission abides by the principles set out in the Constitution of Kenya 2010<sup>40</sup> and strictly apply the integrity principles set out in Article 73(2) of the Constitution, then the civil service shall not only be constituted by the most qualified individuals but also individuals with integrity. The constitution envisages a public service that makes efficient, effective and economic use of resources. Public officers in the Ministry of Education as well as the heads of primary schools should therefore make efficient use of the Free Primary Education (FPE) funds for the infrastructure in public primary schools to be developed. Similarly, in the health sector, administrative organs should be accountable for their administrative decisions. This ought to be seen in the procurement process of both medicine and medical equipment.

#### **4.3.5. The Media**

For anti-corruption agencies to be successful in their work the media may possibly be their greatest ally.<sup>41</sup> The media plays a huge role in exposing corruption. In many countries, anti-corruption agencies face an uphill battle. They are created simply to meet international standards or for governments to demonstrate their “commitment” to combat corruption.<sup>42</sup> Given their mandate, anti-corruption agencies don’t rank high in the popularity contest among their public institution peers. With little political backing and limited resources, anti-corruption agencies often find themselves lone champions for reform, fighting for their own survival instead of fighting corruption. If these agencies are to survive and thrive, they need to generate widespread public support for themselves and their work.<sup>43</sup> The media has a definite role to play in changing society’s attitudes. Both the electronic and print media must eulogize honesty and integrity. They must also encourage all members of the public to consider themselves equal participants in the war against corruption.<sup>44</sup>

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<sup>40</sup> Constitution of Kenya, 2010, art 232 provides that the guiding principles of public service include high standards of professional ethics, efficient, prompt and economic use of resources, responsive, prompt, effective, impartial and equitable provision of services, involvement of the people in the process of policy making, accountability for administrative acts, transparency and provision to the public of timely and accurate information, fair competition and merit as the basis of appointments and promotions, representation of Kenya’s diverse communities and affording adequate and equal opportunities for appointment, training and advancement at all levels of the public service.

<sup>41</sup> F Nagano, ‘Friend or Foe? Media’s Role in Anti-Corruption Work’ (2009) <<http://blogs.worldbank.org/publicsphere/node/5208>> (accessed 13 June 2012).

<sup>42</sup> Ibid.

<sup>43</sup> See Nagano (n41).

<sup>44</sup> I M Sehgal, ‘Media and Combating Corruption’ (2002) <<http://www.defencejournal.com/2002/august/media.htm>> (accessed 13 June 2012).

The role of the media as a key watchdog in the fight against corruption is premised on the right of freedom of the media captured in the Kenyan Constitution 2010<sup>45</sup> as follows;

Freedom and independence of electronic, print and all other types of media is guaranteed [...] The State shall not exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium [...]

In recent years, the Kenyan media has proved pivotal in providing relevant information to members of the public and the international community.<sup>46</sup> In the past decade alone, the Kenyan media has revealed some major corruption scandals that have seriously affected Kenya's economy. In the year 2003 for example soon after the new government took over, the 'Goldenberg Affair' became the subject of a judicial commission of inquiry that unearthed the involvement of wealthy private citizens and highly ranking public officials.<sup>47</sup> The scandal cost the government over Kshs. 60 billion as a result of irregular foreign exchange claims and dubious export compensation awards to the company, Goldenberg International, based on fictitious gold and jewellery exports.<sup>48</sup> In 2004, the media once again unravelled the 'Anglo- Leasing Scandal'. This scandal involved an array of contracts with non-existent entities for various fictitious security-related projects.<sup>49</sup> This scandal unravelled how corruption in the Ministry of Lands as well as with top government officials had cost Kenyans their public land. After seven years of trial, three Anglo-leasing suspects were set free after the trial court ruled that they had no case to answer.<sup>50</sup>

The year 2009 was a busy year, as the media revealed at least four major corruption scandals. In January 2009, when a food shortage was peaking in Kenya, Kenyans and the international community as a whole woke up to news of a scam relating to maize imports—the "Maize Scandal."<sup>51</sup> Following the 'Maize Scandal a few months later was the 'Triton Oil Scandal',<sup>52</sup>

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<sup>45</sup> Constitution of Kenya 2010, art 34.

<sup>46</sup> J Forole Jarso, 'The Media and the Anti Corruption Crusade in Kenya: Weighing the Achievements, Challenges and Prospects' (2010) 26 American University International Law Review 33-88

<sup>47</sup> See Africa Centre for Organ Governance (AFRICOG), 'All That Glitters; An Appraisal of the Goldenberg Report' <[http://www.africog.org/sites/default/files/Goldenberg\\_Report%2029\\_03\\_2011.pdf](http://www.africog.org/sites/default/files/Goldenberg_Report%2029_03_2011.pdf)> accessed 16 September 2012.

<sup>48</sup> See R Otieno, 'Goldenberg Affair Still a Mystery Decades Later' The Standard (11 September 2012) <[http://www.standardmedia.co.ke/?articleID=2000065911&story\\_title=-Goldenberg-scandal-still-a-mystery-decades-later](http://www.standardmedia.co.ke/?articleID=2000065911&story_title=-Goldenberg-scandal-still-a-mystery-decades-later)> accessed 16 September 2012.

<sup>49</sup> See (Forole Jarso) n238.

<sup>50</sup> See Wahome Thuku, 'Anglo Leasing Scandal Suspects Set Free After Seven Years' The Standard (2 March 2012) <<http://www.standardmedia.co.ke/?id=2000053207&cid=159&articleID=2000053207>> accessed 16 September 2012.

<sup>51</sup> See PWC Report on Maize Scandal 2008, <[http://www.marsgroupkenya.org/documents/index.php?option=com\\_docman&task=cat\\_view&gid=37&Itemid=2](http://www.marsgroupkenya.org/documents/index.php?option=com_docman&task=cat_view&gid=37&Itemid=2)> accessed 16 September 2012.

which involved the unauthorized release of oil by the Kenya Pipeline Company (KPC) without the knowledge of its financiers.<sup>53</sup> In November 2009, the Kenyan media widely publicized another scandal on high-ranking Ministry of Education officials' misappropriation of funds meant for the donor-funded Free Primary Education ("FPE") program.<sup>54</sup> Toward the end of January 2010, Kenyans awoke to the news that public officials at the Nairobi City Council and the parent Ministry of Local Government had conspired to steal public funds by overpaying for a parcel of land on the outskirts of Nairobi. The deal allegedly led to the loss of Kshs. 260 million.<sup>55</sup> In the year 2012, the media once again exposed the National Health Insurance Fund (NHIF) corruption scandal that affected the country's health insurance scheme.<sup>56</sup> The media can thus be termed as a whistle blower to corruption.

#### **4.3.6 Kenya National Human Rights and Equality Commission**

The Kenya National Commission on Human Rights Act 2011 establishes the Kenya National Commission on Human Rights (KNCHR) whose key mandate is to promote and protect human rights. Given the multi-faceted nature of corruption, it is paramount for the KNCHR to collaborate with EACC in the fight against corruption. The collaborative mandate of the commission is derived or implied under section 8 (h) and (i) of the Kenya National Commission on Human Rights Act which provides for the functions of Commission. It inter alia states that the commission shall work with the National Gender and Equality Commission and Commission on Administrative Justice to ensure efficiency, effectiveness and complementarity and to establish mechanisms for referrals and collaboration and perform other such functions as the commission may consider necessary for the promotion and protection of human rights.

#### **4.4 Conclusion**

Applying a rights based approach to the workings of the EACC will also in essence ensure that the respect of human rights becomes a primary objective of the commission alongside its

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<sup>52</sup> See Triton Oil Scandal Report, <<http://www.scribd.com/doc/26046750/Triton-Oil-Scandal-Report>> accessed 16 September 2012.

<sup>53</sup> See Forole Jarso (n46).

<sup>54</sup> See –'Corruption Steals Money from Kenyan Children' (22 December 2009) <<http://www.voanews.com/content/corruption-steals-school-money-from-kenyan-children--79862732/416602.html>> accessed 16 September 2012.

<sup>55</sup> See D Ochami, 'Kibaki Suspends PS, 12 others over Shs. 260 Million Cemetery Scandal' The Standard (9 March 2010) <<http://www.standardmedia.co.ke/?articleID=2000005184&pageNo=1>> accessed 16 September 2012.

<sup>56</sup> A Ndegwa, 'NHIF the Other Side of the Story' The Standard (Nairobi 6 June 2012) <[http://www.standardmedia.co.ke/?articleID=2000059400&story\\_title=NHIF:-The-other-side-of-the-story](http://www.standardmedia.co.ke/?articleID=2000059400&story_title=NHIF:-The-other-side-of-the-story)> (accessed 13 June 2012).

fight against corruption. By interlinking human rights in the anti corruption programmes, there is a higher efficiency rate of reducing corruption as a vice in society.

The next chapter discusses the various theoretical approaches to fighting corruption and makes a case for the human rights based approach.

## CHAPTER FIVE

### ***TOWARDS A HUMAN RIGHTS BASED APPROACH TO FIGHTING CORRUPTION IN KENYA***

#### **5.0 Introduction**

This chapter seeks to analyze the human rights approach to fighting corruption. Effective anti-corruption strategies need to be tailored to the social environment in which corruption occurs and therefore, it is difficult to advocate for a single universal strategy to fight corruption. However, the human rights based approach is a standard goal for any country and an effort will be made in this chapter to make a case for a human rights based approach to fighting corruption and for a flexible strategy to combat corruption within the universal principles of human rights based approach. This chapter shall also briefly address the weaknesses of other theoretical approaches to fighting corruption.

#### **5.1 Theoretical Approaches to Fighting Corruption**

Corruption is a multi-faceted crime. It is a legal, political, economic, social, governance and moral problem in the society and as such can be addressed from various dimensions. This nature of corruption to affect various spheres of society has not only led to the development of various approaches to address it but it also calls for a collaborative initiative amongst the various institutions both in the public as well as private sector in the fight against corruption. Thus, much anti-corruption work inspired by this framework has focused on public sector management issues that alter the incentives, penalties, and possibilities of detection for particular actions. However, this approach, while having merit, only looks at instances of corruption in a very defined setting.<sup>1</sup>

Variants of 'New Institutionalism' are yet another approach for analyzing corruption. This approach looks at how institutions shape and influence events and enables a more complete understanding of the context within which public officials work. It also broadens the scope of enquiry to include individuals and groups outside the public sector, and in turn seeks to understand how they perceive and react to different forms of corruption. Rational choice institutionalism incorporates economic concepts in its analysis of how institutions shape an

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<sup>1</sup> F Hutchinson, 'A Review of Donor Agency Approaches to Anti Corruption' (Asia Pacific School of Economics and Government, The Australian National University 2005) <<http://anchorage-net.org/content/documents/pdp05-3.pdf>> accessed 4 December 2012.

‘individual’s calculations for engaging in socially optimal or suboptimal behavior’.<sup>2</sup> Historical institutionalism uses a similar framework, but rather than assuming the individual’s analysis of costs and benefits is ‘rational and self-interested’, argues that the individual’s perception of what is desirable and ‘rational’ is also shaped by the institutional context. Both of these perspectives have been influential in encouraging aid agencies to go beyond working exclusively with government agencies to enforce existing legislation to looking at other issues such as education and prevention in the wider community.<sup>3</sup>

The anthropological approach argues that the common definition of corruption assumes that there is always a clear division between the public and private sphere. However, this definition, which is based on Weber’s ideal type of bureaucracy, is not always applicable to non-western contexts. From an anthropological point of view, this definition is too restrictive as it does not fully capture how people in a particular context determine what is a corrupt practice and what is not. What is seen as corruption varies from one context to another. Given such variations, explorations of how the actors themselves evaluate social practices are required. Anthropology has an array of ‘methodological tools and analytical approaches’ geared to discerning individual perspectives of a given phenomenon. Through embedding analysis of phenomena like corruption in their wider social contexts, anthropological approaches are better able to understand what constitutes corruption in a particular context and what social structures act to perpetuate it.<sup>4</sup>

The economic approach to corruption focuses on incentives and disincentives that influence public officials’ behaviour and their propensity to accept bribes or abuse their position. In essence, they look at the economic rationale behind corrupt practices and model the corrupt employee as a rational actor who decides whether to engage in corrupt activity by balancing the potential benefits against potential costs and consequences.<sup>5</sup>

The traditional approach to fighting corruption has been the legal and enforcement approach. This framework consists of the criminal law system and punishment is meted out for individuals found guilty of corruption. In Kenya, the Anti Corruption and Economic Crimes

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<sup>2</sup> Ibid.

<sup>3</sup> See Hutchinson (n1).

<sup>4</sup> Ibid.

<sup>5</sup> F Hutchinson, ‘A Review of Donor Agency Approaches to Anti Corruption’ (Asia Pacific School of Economics and Government, The Australian National University 2005) <<http://anchorage-net.org/content/documents/pdp05-3.pdf>> accessed 4 December 2012.

Act (ACECA)<sup>6</sup> contains several punitive measures for persons found guilty of corruption. The challenge with applying the legal and enforcement approach is that it requires a specific environment to flourish. This approach requires an ideal financial, administrative, political and legal framework in place to make anti corruption agencies such as the Ethics and Anti Corruption Commission, in Kenya work. Many developing countries struggle to achieve these conditions.<sup>7</sup>

## 5.2 The Human Rights Based Approach to Fighting Corruption

The rights based approach to fighting corruption on the other hand addresses corruption from a human rights perspective. Corruption affects the poor disproportionately, due to their powerlessness to change the status quo and inability to pay bribes, creating inequalities that violate their human rights. The human rights based approach with its main elements of express linkages to rights, accountability, empowerment, participation and inclusion of disadvantaged groups has been developed specifically to address these inequalities and to ensure that the poor and disadvantaged are also equal partners in development.<sup>8</sup> However, if corruption creates fundamental inequalities in the poor's access to justice and to development services, the results envisaged by the human rights based approach cannot be achieved. The United Nations Convention Against Corruption (UNCAC)<sup>9</sup> explicitly imposes certain requirements on member states to fight corruption, through involvement of duty bearers and claim holders.<sup>10</sup> Therefore, for the human rights based approach discourse that is now based on UN conventions for civil, political, economic and social rights, the anti-corruption convention can be added as the guideline for fighting corruption. In this way, member states will have a point of reference to measure individual countries' performances.<sup>11</sup>

Under the rights based approach, normative protection of rights plays a key role. Firstly, the constitution of a country promotes and guarantees the fundamental rights of all the citizens. The government of a country also signs international treaties, and the parliament passes laws. In addition, in some countries there are provisions for the application of customary law in certain instances. The rights based approach requires that all these constitutional provisions,

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<sup>6</sup> The Anti Corruption and Economic Crimes Act, 2003.

<sup>7</sup> See Hutchinson (n5)

<sup>8</sup> T Pilapitiya, 'The Impact of Corruption on the Human Rights Based Approach to Development' (United Nations Development Programme- Oslo Governance Centre 2004).  
[http://www.albacteria.ma/xmlui/bitstream/handle/123456789/30538/0284The\\_Impact\\_of\\_Corruption\\_on\\_the\\_Human\\_Rights\\_Based\\_Approach\\_to\\_Development\(2005\)r.pdf?sequence=1](http://www.albacteria.ma/xmlui/bitstream/handle/123456789/30538/0284The_Impact_of_Corruption_on_the_Human_Rights_Based_Approach_to_Development(2005)r.pdf?sequence=1) accessed 4 December 2012

<sup>9</sup> United Nations Convention Against Corruption (UNCAC) 2005, art 5 and 43.

<sup>10</sup> See Pilapitiya (n8).

<sup>11</sup> Ibid.



treaties, laws, and regulations must universally protect human rights, especially of disadvantaged people. However, if a government is corrupt in the design and application of these laws, it can be harmful to the interests of disadvantaged groups.<sup>12</sup> In 2004, the United Nations agreed that human rights must be mainstreamed into all its programmes and defined the three main points of human rights based approach<sup>13</sup>

- a) All programmes of development co-operation, policies and technical assistance should further realization of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments
- b) Human rights standards contained in, and principles derived from, the UDHR and other human rights instruments guide all development cooperation and programming in all sectors and in all phases of the programming process;
- c) Development cooperation contributes to the development of the capacities of duty bearers to meet their obligations and/or of rights holders to claim their rights.

The human rights based approach literature does not explicitly consider corruption, and corruption literature does not discuss its impact on the human rights based approach. If the duty bearers (public officials) are corrupt, none of the three points listed above can be achieved. If the duty bearers in the justice sector are corrupt, this is even more serious, as the justice sector is tasked with upholding and protecting the rights of the rights holders. Whether corruption is need based (as in the case of poorly paid low level officials who need the bribe to pay for food or schooling) or greed based (as in more highly paid officials who don't need the bribe to survive), this will have the effect of making human rights based approach redundant.<sup>14</sup>

The human rights based approach also calls for leaders and public officials with individual integrity. Individual integrity relates to the traditional understanding of integrity as honesty; appropriate behaviour ('doing the right thing' according to the norms and rules); or, consistency between words and actions. Individuals do not respond as automatons to the institutional incentives they face. Individual agency matters and leaders sometimes emerge

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<sup>12</sup> See Pilapitiya (n7).

<sup>13</sup> Ibid.

<sup>14</sup> See n7

who have transformative effects (for good or bad).<sup>15</sup> Individual integrity calls for a zero tolerance policy to corruption in Kenya with a strict adherence to the rule of law. The culture of impunity in Kenya has to end. Any person whose integrity is brought into question ought to be investigated and if found guilty, convicted and sentenced. There is need to have leaders with the political goodwill to deal with corruption. The zero tolerance approach irrespective of one's standing in society has helped in curbing corruption in Singapore.<sup>16</sup> Individual integrity should also be present in all citizens of the state and should not only be restricted to public officials and political leaders. There is thus need to sensitize the citizens on the effects of corruption and emphasis should be on the role that each citizen can play to end corruption. The fight against corruption should not be left to a selected few but should involve the entire nation. There is thus need to involve the public in this fight.

There is no single, universally agreed rights based approach, although there may be an emerging consensus on the basic constituent elements as being express linkages to rights, accountability, empowerment, participation, and non-discrimination and attention to vulnerable groups. By applying the core principles of the human rights based approach such as non discrimination, inclusion of the vulnerable, respect of human rights, transparency and accountability to the anti corruption regime, several outcomes can be expected. The first outcome would be increased awareness among citizens about corruption and its effects, and the ability of the citizens to act as a group against corruption. This outcome is targeted at the claim holders and can have immediate impact in the short term. In the medium and long term, the effectiveness and the outcome can spread and improve as claim holders will become increasingly empowered. The outcome will have two intended outputs: partnerships between duty bearers (the state and public officials) and claim holders (the citizens) to combat corruption; and a strong media regularly reporting on corruption issues. The second outcome to support the human rights based approach would be strong political commitment to reduce corruption and non-interference in proceedings. This outcome targets duty bearers at the highest level, for example the legislators. The final outcome would be improved laws and procedure to detect, investigate and adjudicate cases of corruption.

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<sup>15</sup> E Grebe & M Woermann 'Institutions of Integrity and the Integrity of Institutions: Integrity and ethics in the politics of developmental leadership' (Developmental Leadership Program 2011)

<sup>16</sup> --, 'Singapore Regulator Investigates Football Officials' <<http://www.bbc.co.uk/news/business-22023454>> (Accessed 16 April 2013).

The human rights based approach can strengthen citizens to demand their rights. It can also help train public officials to perform their duties. The demand and supply situation can therefore make public officials more professional in carrying out their duties, and the citizens stronger in demanding the services due to them. At a local level, this would have a greater rate of success than at the national level, where relationships are more impersonal. For the rights based approach to be effective in fighting corruption at the national level, political goodwill will be of paramount importance. Local level partnerships, a vibrant civil society, and a strengthened media are also necessary in this fight.

### **5.3 Conclusion**

From a practical point of view, anti- corruption strategies are likely to be less effective where the rot of corruption has already reached the prosecutor's office, the executive, the judiciary and in some cases anti corruption commissions. A human rights based approach represents a direct and potentially effective way in which to empower ordinary individuals to demand transparency, accountability and responsibility from elected representatives and public officials.<sup>17</sup> The adoption of a human rights approach to problems of corruption has an important educative effect that invites mass media coverage and NGO action and public awareness raising through media campaigns and outreaches in schools. By highlighting the links between corruption and denial of human rights, corrupt practices are exposed as a direct attack on good governance practices and hence, on human rights at all levels and not merely a criminal law matter.<sup>18</sup>

Finally, particularly in less developed countries, corruption siphons public funds into private bank accounts impairing economic, political and social development. Funds intended for development including building and maintenance of public hospitals, schools and other essential services suffer indirectly as a result. There is thus a clear connection between widespread and systematic corruption and the squandering of natural resources which could have been used to strengthen economic and social development and to improve the enjoyment of human rights which calls for corruption to be understood and addressed from the broader perspective of human rights based analysis and not just a criminal law analysis.

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<sup>17</sup> I Bottigliero & L Sunga, 'In Depth Studies on the Linkages between Anti- Corruption and Human Rights for the United Nations Development Program (Sweden, 2007).

<sup>18</sup> Ibid.

The next chapter concludes the study and makes several recommendations that would aid in the fight against corruption.

# CHAPTER SIX

## ***CONCLUSION AND RECOMMENDATIONS***

### **6.0 Introduction**

This study has highlighted the effects of corruption on the realization of the right to health and education in Kenya. It specifically addresses the effects of corruption on the number of doctors in public hospitals, the supply of medication and medical equipment and the effects of corruption on infrastructural development in public primary schools. Throughout the study it has been evident that the principles of transparency and accountability are key elements in the fight against corruption.

### **6.1 Conclusion**

The following conclusions have been made from this study;

Systemic corruption bears some roots in colonialism. Corruption is now deeply entrenched in most institutions in Kenya thereby making the fight against corruption seem like an uphill and monumental task. Corruption has robbed Kenyans over Kshs. 270 billion annually, money which is sufficient to fund the FPE and free secondary education programme for 18 years.

Access to healthcare, education, housing, water, food etc all contribute to development. However corruption has mainly been linked as a hindrance to economic development and a sign of bad governance. Violations of socio economic rights such as right to health and education due to corruption equally hinder the attainment of economic development. Further the Human Rights legal regime and Anti- Corruption legal regime have been running in parallel for far too long.

Poor pay and poor working conditions of doctors in public hospitals has lead either to their emigration or to dual job holdings (working in both public and private practice) Procurement fraud has led to the purchase of substandard medicine and supply of medical equipment that is below the recommended standards

The embezzlement and misappropriation of the FPE funds and the budget allocated to education has led to the under development of infrastructure in public primary schools which has led to the violation of the right to education.

## 6.2 Recommendations

In light of the above, this study therefore makes the following recommendations;

- a. The Ethics and Anti Corruption Commission (EACC) as the main anti corruption body in Kenya needs to have the mandate to prosecute corruption offences. There is also need for this institution to work closely with the media, civil society, the judiciary as well as the Public Service Commission and the Commission on Administrative Justice.
- b. The Freedom of Information Bill 2012 needs to be passed into law. This new law will go a long way into ensuring that citizens' right to access information as guaranteed under Article 35 of the Constitution of Kenya is upheld.
- c. Transparency and Accountability in procurement processes will aid in curbing corruption. All public officers who make decisions should be severally and jointly liable for their decisions and actions while in office. Further, these decisions ought to be based on laws, policies and plans. Ministries should endeavour to post on their websites all information on contracts, names of contractors, decisions of the procurement appeals board, bidders and tender outcomes and contractors' performance.
- d. Public officials who submit reports late for auditing and poorly manage public records should be severely penalized to emphasize the seriousness of these offences. There is need to identify and penalize persons contributing to malpractices in records management.
- e. Annual public expenditure tracking (PET) surveys can be conducted in all government ministries to help curb instances of corruption. The information gathered from this survey should be published in the gazette making it accessible to members of the public and creating a culture of transparency.
- f. The use of human rights implementation mechanisms such as human rights enforcement institutions in anti corruption strategies will aid in combating corruption more effectively. When acts of corruption are linked to violation of human rights, there are various human rights institutions that could act to force accountability and hence create disincentives for corruption. Accepting the universality and indivisibility of human rights and ensuring equality and non discrimination in society are some of

the key elements of a rights based approach. Expanding the jurisdiction of human rights enforcement institutions such as the national courts as well as regional courts such as the African Court on Human and Peoples rights would indeed go a long way in curbing corruption. Human rights enforcement mechanisms have been very vigilant in guarding human rights and perhaps this zeal could be shared by anti- corruption institutions. A partnership of both anti- corruption institutions and human rights enforcement institutions is indeed necessary.

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