

# **CORRUPTION AND HUMAN RIGHTS: THE ROLE OF JUDICIAL ACTIVISM IN THE 'FIGHT' AGAINST CORRUPTION.**

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Abstract

*This paper locates the philosophical foundations of corruption and human rights by examining normative and definitional challenges. It then explores the human rights implication of corruption and examines how judicial activism can be useful in fighting institutionalised and legal corruption. By focusing on the principle of equality in access to public services, the first part of the paper demonstrates the implications of corruption on the realization of human rights. The second part of the paper examines issues of legal corruption and mechanisms by which graft corrupts the law making process and compromises the rule of law. In discussing the implication of corruption on the rule of law, the article maintains that public interest and human rights considerations should be central to the law making and interpretation processes.*

## **Introduction: Defining Corruption and Human Rights**

Corruption as a malpractice in governance is perhaps as old as the human race. However despite its presence in various socio-economic sectors, it has mainly been conceived as an economic issue and most research has focused on its monetary and financial implications<sup>2</sup>. Very little attention has been given to its human right implications. This explains why anti-corruption programs have been (and continue to be) spearheaded by National anti-corruption agencies or criminal justice systems and not by human rights bodies. The few human rights actors who engage in anti-corruption programmes have not been any better as they have equally focused on its economic and financial dimensions<sup>3</sup>. This failure to (re)position corruption as a human rights issue has deprived anti-corruption programs of the additional voice from human rights agencies, therefore denying it the re-invigorated focus that is directed to other human rights concerns. There is therefore an urgent need for scholars and

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<sup>2</sup> For a detailed discussion on this view see Kumar Raj (2003) Corruption and Human rights: Promoting Transparency in Governance and the Fundamental Right to Corruption Free Service in India. Col.J.Asian L. 17 (31)

<sup>3</sup> Ibid

researchers to examine the human rights implication of corruption as a way of developing a comprehensive approach towards its control.

One of the challenges facing the fight against corruption is actually defining corruption itself. Due to its multidimensional nature, prevalence in both private and public sectors and the relativity of normative behaviour (which influences what is considered as acceptable in various societies), defining corruption has often proved to be difficult for researchers<sup>4</sup> Quina argues that although corruption is difficult to define, it is ‘generally a bad thing’ since it undermines economic performance, weakens democratic institutions and the rule of law, disrupts social order and destroys public trust.<sup>5</sup> Though she manages to demonstrate the underlying implications of corruption, her description fails to appreciate the broad nature of corruption as it focuses on corruption in the public sector. The OECD defines corruption as the active or passive misuse of power by public officials (elected or appointed) for private, financial or other benefits.<sup>6</sup> This definition is equally inadequate because it assumes that corruption only takes place in the public sector, yet research continually shows the prevalence of the vice in the private sector.<sup>7</sup>

The institute of international auditors (IIA), however, views corruption as

‘any illegal act characterised by deceit, concealment or violation of trust and perpetrated by individuals or organizations to obtain money, property or services, to avoid payment or loss of services and to secure personal or business advantage.’<sup>8</sup>

Whereas this definition covers corruption both in the public and private sectors, its conception of corruption as an ‘illegal act’ positions the vice as a violation of the law: That besides all other features, an act must first be illegal before it is labelled as corruption. However, Daniel Kaufmann and Pedro Vicente, in their paper on legal corruption, demonstrate that corruption exists with or without law, and that the law can even be used to promote it.<sup>9</sup> Thus, even in ancient societies where formal laws didn’t exist or operate

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<sup>4</sup> Dumas, L. J., Wedel, J. R., & Callman, G. (2010). *Confronting corruption, building accountability: Lessons from the world of international development advising*. New York: Palgrave Macmillan. p 5

<sup>5</sup> See Quina J. (2008) Essays on Corruption in Sub-Saharan Africa, Phd Thesis, University of Warwick

<sup>6</sup> Organization of Economic Cooperation and Development(2007) OECD Glossary of Statistical Terms Accessed from <http://stats.oecd.org/glossary/download.asp>, on 20/04/2013 p 151

<sup>7</sup> See Dumas supra note 4 at 21

<sup>8</sup> See Institute of International Auditors cited in Tomas B., Richard M. And Veronica M.(2011)The anatomy of fraud and corruption : organizational causes and remedies ,Burlington:Gower publishers. Pp 5 and 6

<sup>9</sup>Kauffman D., & Vicente, P. C. (2011). Legal Corruption. *Economics & Politics*, 23(2), 195-219. doi:10.1111/j.1468-0343.2010.00377.x p 198-201

efficiently, acts that would be considered as being equivalent to corruption were present but were highly sanctioned.<sup>10</sup> On the other hand, Sociologists embrace a broader conception of corruption. According to Deborah Hellman, corruption is a derivative concept that denotes a ‘‘disease’’ or dysfunction in an institution.<sup>11</sup> For Hellman, any violation of the norms guiding the operations of an institution could be perceived as corruption. Corruption, therefore, derives its meaning from the normative standards of an institution<sup>12</sup> This conception is however overstretched because it amounts to labelling any misbehaviour in a work setting as corruption. For instance, it implies that an employee who sexually harasses a colleague is corrupt! Whereas sexual harassment at work place is a crime and violates national laws and organizational norms, it doesn’t amount to corruption. The ‘inflation’ of the meaning of corruption as advocated for by Hellman renders it as an institutional or behavioural issue and robs it of its socio-economic and human rights dimensions. A more narrow conception of corruption is necessary so as to guide the fight against corruption and to deepen scholarship on the subject. This paper will therefore embrace the definition advanced by The Institute of International Auditors (subject to deletion of the word ‘‘illegal’’)<sup>13</sup> .

### **What is ‘Human Rights’**

The definitions of human rights are perhaps as varied as the number of scholars who engage in human rights discourse. On one hand there are those who view human rights as basic rights that must be guaranteed by governments in order to meet a minimum standard of moral legitimacy.<sup>14</sup> Supporters of this view argue that part of the social contract that the individual has with the government include respect for the individual’s autonomy. Any government that violates this contract, whereas retaining legal legitimacy, loses the moral legitimacy to rule over the individual. This conception, that falls short of advocating for the removal of authoritarian regimes, is problematic because it ignores the high moral foundation of rights

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<sup>10</sup> Ibid

<sup>11</sup> Hellman D. (2012) Defining Corruption and Constitutionalizing Democracy. *Public Law and Legal Theory Research Paper Series 2012-59* p 9-11 Retrieved from <http://ssrn.com/abstract=2021188> accessed on 15/11/2013

<sup>12</sup> Ibid pp 9-11

<sup>13</sup> See Institute of International Auditors, supra note 8

<sup>14</sup> Talbott, William(2011). The Consequentialist Project for Human Rights. In , *Human Rights and Human Well-Being*. . Retrieved 7 Mar. 2013, from <http://0-www.oxfordscholarship.com.pugwash.lib.warwick.ac.uk/view/10.1093/acprof:oso/9780195173482.001.0001/acprof-9780195173482-chapter-1>

that locate human rights not in the state agency but within human identity.<sup>15</sup> Human rights emanate from a higher moral position than legal or constitutional rights and pre-date both the state and the law. Thus, whereas all constitutional rights are human rights, not all human rights are constitutional rights.<sup>16</sup> The ‘statist’ conception of rights advanced by Talbott has also been at the centre of feminist criticism. Feminists argue that because the dominant human rights language focuses on the relationship between the individual and the state, and perceives the state as the protector and (or) violator of an individual’s rights, it ignores the rights violations that take place in the private sphere, especially at the family level.<sup>17</sup>

Baxi perceives human rights as human moral claims; he insists that if one proceeds on the premise that something is his human right, he immediately creates a notion of there being someone with an obligation to grant that right.<sup>18</sup> In other words all rights must be characterised by corresponding obligation. This conception, though suitable for advocacy purposes, ignores the high moral content of rights which supersedes obligation. James Nickel, a sharp critic of this view, has argued that a call for a human right doesn’t necessarily translate into a call for a particular entity to grant it; rather, it is a call for the recognition of rights as an entitlement.<sup>19</sup> Nickel’s argument is that individuals may have rights which are not practically realizable and for which a specific duty holder may not be identifiable, but, this doesn’t make them any less justifiable.<sup>20</sup>

The most problematic conception of rights is perhaps that advanced by Jack Donnelly. According to Donnelly, human rights are rights that individuals have because they are human beings.<sup>21</sup> However, a general look at persons that possess these rights indicate a huge flaw in Donnelly’s conception. For instance, there are rights that adults have, such as the right to marry, that children may not have, yet children are still human beings. Similarly, mentally incapacitated individuals often have their freedom of movement curtailed, yet they are still human beings. Rights, therefore, go beyond just the state of ‘being’ and stretch into the

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<sup>15</sup> Amartya Sen, cited in Clair Asuncion (2006). *How Can Human Rights Contribute to Poverty Reduction? A Philosophical Assessment of the Human Development Report, 2000* in Williams Lucy (ed) *International Poverty Law: An Emerging Discourse*. London, Zed Books p 25

<sup>16</sup> Ibid

<sup>17</sup> See Archard, D. (1993). *Children: Rights and childhood*. London: Routledge. P 70

<sup>18</sup> See Baxi Upenda (August, 2012) *Re-Thinking Human Rights: Preliminary Reflections Concerning Human Rights thoughts and Folkways*. Unpublished

<sup>19</sup> Nickel, James, "Human Rights", *The Stanford Encyclopedia of Philosophy* (Summer 2013 Edition), Edward N. Zalta (ed.), forthcoming URL = <<http://plato.stanford.edu/archives/sum2013/entries/rights-human/>>

<sup>20</sup> Ibid

<sup>21</sup> Donnelly, J. (2003). *Universal human rights in theory and practice*. Ithaca: Cornell University Press. p10

value and nature of 'beingness' . To adequately define human rights, we must first examine the key underlying principles of human rights. These are survival, dignity, equality, and freedom.<sup>22</sup> Based on these principles, we can define human rights as the necessities that human beings are entitled to so as to live a life of dignity, freedom and equality. These necessities are natural and can neither be given nor can they be taken away. They can only be recognized or appreciated.

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

Article 3 of the Covenant on Socio-Economic Rights asserts that all people have the right to equally enjoy every socio-economic right enshrined in the charter. These include rights to health, employment and education among others. Corruption compromises the attainment of these rights by violating the norms that guide their realization. For instance, the norms that guides employment include merit and experience, yet corruption involves consideration of abnormal'' means such as family relationship, friendship and ethnicity. Because such considerations are outside the control of some applicants, they end up disadvantaged by the corrupt recruitment process. In this way, corruption in employment allows less competent individual to gain employment at the expense of those who merit the position based on criteria that is unfairly allocated thus violating the right to equal treatment.<sup>23</sup> Consider another situation in which one invites only his family members to his wedding. Though familial relationship is a variable that excludes friends, work colleagues and even other members of the public, wedding invitations based on familial ties cannot be said to be corrupt acts. This is because the normative principles associated with weddings allow familial relationships to be used as a basis for invitation unlike the norms that guide public appointments which require provision of equal opportunity for all potential applicants. Corruption in the management of public resources also violates the rights of citizens to participate in the management of their resources as enshrined in article 21 of Universal Declaration of Human Rights (UDHR) and Article 1 of the Covenant on Civil and Political Rights (CCPR).<sup>24</sup> Consider corruption in the

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<sup>22</sup> ignatieff, M., & Gutmann, A. (2001). *Human rights as politics and idolatry*. Princeton, N.J: Princeton University Press. Pp162-165

<sup>23</sup> See Hellman Supra note 11 at 9

<sup>24</sup> Article 21 of Universal Declaration on Human Rights States(1)Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

See also Article 1(1)of the Covenant on Civil and Political Rights which states: All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.(2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-

public sector in which contractors bribe public officials to get mining contracts. Such an award is done not on the basis of public interest but in the interest of the public official carrying out the transaction. Moreover, awarding the tender to the bribe giver violates the right of other applying contractors to equal treatment therefore compromising the principle of equality.. Supporting this line of thought Raj Kumar argues that corruption violates human rights because it allocates resources on the basis of an unfair consideration, resulting in discrimination.<sup>25</sup>

Rampant institutional corruption in the civil service violates Article (21)(2) of the Universal Declaration of Human rights and Article 11 of the Covenant on Socio-economic Rights (CSER).<sup>26</sup> The core issue is that corruption locks out poor people or those unwilling to pay bribes for government services. Access to public services becomes a privilege that is only availed to those with resources rather than an entitlement for all citizens.<sup>27</sup> Because unlike rights, privileges can be withdrawn, corruption weakens the moral and philosophical justification for provision of government services and negates the principle of social contract.

Amatya Sen argues that rights are justifiable based on both a just procedure and good outcome<sup>28</sup> However ,corruption not only renders the procedure of realizing such rights as unjust but also compromises the attainment of good outcomes. As a violation of just procedure, corruption compromises the principle of equality by allocating resources based on norms that are not equally distributed. On the other hand, embezzlement of public funds meant for delivery of socio-economic rights negates the just outcome of rights realization. For instance, consider a case in 2004 when Margaret Gachara was found guilty of embezzling

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operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

<sup>25</sup> See Kumar,note 2 at 3.

<sup>26</sup> Article 21(2) reads: Everyone has the right of equal access to public service in his country .Article 11 (1)of the Covenant on Socio-Economic Rights States: The States Parties to present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the international co-operation based on free consent.

<sup>27</sup> Young K. (2012).Constituting Economic and Social Rights.Oxford,Oxford University Press.

<sup>28</sup> See Sen Amatya cited in Young Katharine (2012).Constituting Economic and Social Rights.Oxford,Oxford University Press.ee also Sen, Amatya. (1999). *Development as freedom*. New York, Knopf

millions of shillings meant for HIV/AIDS management.<sup>29</sup> This action led not only to the deaths of many HIV patients who couldn't access the necessary medication but also to the withdrawal of donor support to the program<sup>30</sup> Because the moral legitimacy of any government lies in its capability to guarantee human rights of its citizens (including right to life) corruption can be said to rob governments of the moral legitimacy<sup>31</sup>. Governments are therefore obligated to fight corruption, not only because of legal requirements but also because the nature of social contract requires it to restrain from any omission and or commission that would affect the citizen's rights. Taking decisive action to prevent corruption is therefore a contractual obligation s that is situated in the social contract.

Other scholars have argued that corruption should be labelled as a crime against humanity because of its negative impact on the victims. This conception perhaps mirrors Macleod's broader conception of crimes against humanity. According to Macleod a crime is against humanity if it endangers the public order of humankind, diminishes humankind and damages humankind'.<sup>32</sup> By indirectly resulting in the death of millions of patients, corruption in the health sector can be said to cause widespread damage and diminishes humankind. Though critics of this definitional expansion always cite the ICC requirement of the presence of a policy element and a systematic planning and execution of a crime, I would take a consequentialist approach and argue that the substance of this crime lies not in the process but in the outcome. In other words, millions of deaths resulting from the corrupt practices of a few individuals should shock the human conscience just like genocide. Central to the doctrine of human rights lie the principle of dignity .By compromising the delivery of health services as illustrated above, corruption affects the dignity of the citizens whose rights to health services are violated.

One way in which a government can fulfil its part of the social contract is by strictly enforcing anti-corruption laws. As demonstrated in the Republic Vs Gachara in which the accused was sentenced to one year in prison for Obtaining Ksh. 27 million by false pretence from the National Aids control Council, the law, if well enforced, can be useful in fighting

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<sup>29</sup> See IRIN (2003).Kenya:Corruption Allegation Plague AIDS Body Accessed from <http://www.irinnews.org/report/35976/kenya-corruption-allegations-plague-aids-body> on 23/11/2013 See also Republic VS Gachara, 2004

<sup>30</sup> Ibid

<sup>31</sup> See Talbott supra note 14

<sup>32</sup> Macleod, C. (2010). Towards a Philosophical Account of Crimes Against Humanity. *European Journal Of International Law*, 21(2), 281

corruption. Emphasis should not only be put on imprisonment of the perpetrators but also on recovery of the stolen money as a means of realizing the right that has been violated due to corruption and compensating victims. This can be addressed by enacting strong anti-corruption legislations (where they don't exist) and shielding anti-corruption agencies from political processes. The biggest challenge however exists where the law itself perpetuates corruption, a situation that is later discussed in the next section.

### **Rule of Law Legal Corruption & Judicial Activism**

Though considered as one of the fundamental pillars of human rights,<sup>33</sup> the rule of law is one of the most disputed concepts in socio-legal studies. According to Rawls, the rule of law is the rule of a system of rational and comprehensible rules bearing some relationship to the functions of co-ordination.<sup>34</sup> Rawls's conception is problematic because it provides room for the reign of unjust laws. For instance, if a law allows the president to arbitrarily allocate himself a given amount of national resources, then observing this law is still part of the rule of law. This negates the 'spirit' of the rule of law. Though not very explicit, the rule of law should be tied to some public good. Scholars who hold this position, such as Rachel Kleinfeld and Raz consider the rule of law as being the presence of a predictable and efficient legal and justice system, protection of human rights as well as observance of the law by both the government and the people<sup>35</sup> Within this framework, the rule of law flows from an efficient and just legislative process to the fair and just interpretation of these laws by the judiciary and finally to the respect for the law (and the courts interpretation of the law) by the citizens. Thus at the centre of the law making and interpretative processes lie the issue of human rights and justice. Hailing this view, Carrother notes that the quality of legal institutions influences the degree of respect for the rule of law.<sup>36</sup> In other words citizens are more likely to observe the law if they feel that it is legitimate. Inferentially, it can be argued

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<sup>33</sup> Article 26 of the CCPR reads: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. See also article 7 of the UDHR, "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

<sup>34</sup> See Rawls J. (1971) *A theory of Justice*, Cambridge, MA: Belknap Press p 235

<sup>35</sup> Rachel Kleinfeld (2006) *Competing definition of the Rule of Law*, in Thomas Carrother, (ed) *Promoting the Rule of Law: In search Knowledge*, Carnegie Endowment for International Peace. See also Raz Joseph (1979) *The Authority of Law: Essays on Law and Morality* "The rule of Law and its virtues" Oxford, Clarendon Press..

<sup>36</sup> Carrother Thomas (2003) *Promoting the Rule of Law Abroad-The problem of knowledge* (Washington: Carnegie Endowment for International Peace, Working Paper-Rule of Law Series-No 34) see also Carrother Thomas (1998) "The rule of Law Revival (1998) 77 Foreign Affairs

that since corruption compromises the quality of legal institutions, it indirectly compromises the rule of law. Human rights doctrines consider the law to be supreme to all citizens, a principle that borrows heavily from the principle of equality and implies non-discrimination before the law.<sup>37</sup> Rampant corruption in the legislature corrupts the law making process and creates unjust laws that are modelled to either benefit the parliamentarians or other parties with interests in the law. At the same time, ‘legal corruption’ makes a mockery of the rule of law because the very law that should be considered supreme (and probably useful in fighting corruption) is either part of the corruption system, makes corruption easy to perpetuate or shields the corrupt from prosecution<sup>38</sup>. Kauffman and Vicente define legal corruption as the presence and (or) the enactment of legislations that perpetuate corruption.<sup>39</sup> Kenya has particularly experienced an increasing level of legal corruption where parliament has been involved in the making of laws that perpetuate corruption and (or) shield corrupt public officers<sup>40</sup>. The rule of law therefore is turned into a tool of human rights violation rather than a tool of emancipation and justice. Legal corruption compromise the rule of law because it increases the likelihood that the law will actually be violated by other ‘common’ citizens. Thomas Richard and Veronica have argued that, corruption easily prevails if the ‘would-be-corrupt’ can rationalize their corrupt deeds.<sup>41</sup> Laws that legalize Tax evasion by Members of Parliament (as is the case in Kenya) can thus acts as a ‘justification’ for others to evade taxes.<sup>42</sup> To uphold the legitimacy of parliament and promote adherence to the rule of law, it is necessary that parliamentarians factor in public interest in the legislative process and avoid ‘corrupting the law’ and law making process.

Once laws that perpetuate corruption emanate from parliament, the burden is transferred to judiciary that has to interpret the laws. It should be noted that once passed at the legislative

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<sup>37</sup> See UN Covenant on Civil and Political Rights

<sup>38</sup> See Kauffman and Vicente Supra note 9 at 198-201

<sup>39</sup> Ibid

<sup>40</sup> See Gatimu S.(22,May,2015) Finding better ways of fighting corruption in ,*Institute of Security Studies*, Accessed from

<https://www.issafrica.org/iss-today/finding-better-ways-to-fight-corruption>, see Also Matiangi F(2006 ) in Tapenhurst, R., Johnston, N., & Pelizzo, R. (eds). *The role of parliament in curbing corruption*. Washington, D.C: World Bank

<sup>41</sup> Thomas B., Richard M. And Veronica M.(2011)*The anatomy of fraud and corruption : organizational causes and remedies* ,Burlington: Gower publishers. Pp 49-52

<sup>42</sup> Muna Wahome(August 5<sup>th</sup>,2011) MPs given 30 days to pay tax or face forced recovery,Business Daily:Politics and Policy ,accessed from <http://www.businessdailyafrica.com/MPs-given-30-days-to-pay--tax-or-face-forced-recovery/-/539546/1213746/-/aut7o6/-/index.html> on 04/08/2015 see also Africa Development Bank(2010) *Domestic Resource Mobilization for Poverty Reduction in East Africa:Kenya Case Study* accessed from [http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/Kenya%20Case%20Study\\_final.pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/Kenya%20Case%20Study_final.pdf)

level, very little can be done at the interpretative level because the courts are bound by classical legal principles to interpret the law as it is, unless other concerns for public interest prevail.<sup>43</sup> However, it is also important to point out that the courts stand the risk of losing moral legitimacy if they stick to the strict interpretation of unjust (corrupted) laws.<sup>44</sup> This is mainly because, in the eyes of the citizenry, the role of the courts is to uphold justice, conceived as upholding just (good laws). However, critics of this viewpoint note that justice is never at the centre of law formulation, hence it is unnecessary to expect the outcomes of the law to be always just.<sup>45</sup>

Nevertheless I argue that although the law formulation process is characterised by many vested interests that may result in unjust laws, judicial activism can be used to remedy the implication of such laws for the public. Judiciary, should go beyond its role as arbiters and interpreters of law into acting as public watchdog where other watchdog institutions either fail to fulfil their mandate or become part and parcel of the corruption network. Charles Manga an advocate of judicial activism, defines it as the process by which the courts adjudicate on constitutional matters not based on the black letter law but with due consideration of public interests<sup>46</sup>. Others have defined it as a philosophy advocating that courts go beyond adjudication of legal conflicts and focus on the ‘making’ of social policies that affect many more people and interests beyond the parties to a dispute<sup>47</sup> Although such judges are often labelled as ‘activist judges’ and veered upon, their progressive interpretation of the law, especially in matters of governance and human rights, often go along way in entrenching the rule of law.<sup>48</sup> Overall, Judicial activism implies that judges do not restrict themselves to the issues presented in a case but establish new rules that promote justice at both individual and societal level. Advocates of judicial activism note that institutional failures in government, coupled with corruption and a dysfunctional legislature, leaves the courts with the huge responsibility of not only interpreting the law but also acting as the people’s watchdog. However, critics of judicial activism have argued that it amounts to impunity by the courts because they extend their power beyond their traditional role of

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<sup>43</sup>Arpita Saha (2008) Judicial Activism in India:A necessary evil Available at SSRN: <http://ssrn.com/abstract=1156979> or <http://dx.doi.org/10.2139/ssrn.1156979>

<sup>44</sup> Ibid

<sup>45</sup> Jayasurya, Gautam (2010), Indian Judiciary: From Activism to Restraint. Available at SSRN: <http://ssrn.com/abstract=1601843> or <http://dx.doi.org/10.2139/ssrn.1601843>

<sup>46</sup> Manga Charles(2011)Constitutional Reforms and Constitutionalism in Africa:Reflections on some current challenges and Future Prospects.59 Buffalo Law Review (1007)

<sup>47</sup> Ibid p 33

<sup>48</sup> Ibid

interpreting the law into the domain of the executive and the legislature.<sup>49</sup> Faced with this criticism, the Chief Justice of the Supreme Court of India wonders:

‘Can judges really escape addressing themselves to substantial questions of social justice? ...Can they simply follow the legal text when they are aware that their actions will perpetuate inequality and injustice...?’<sup>50</sup>

As the arbiter between the government and the governed, judicial activism allows the judiciary to rectify the consequences that may result from legal corruption such as enactment of laws shielding legislators from taxation or those shielding security expenditures from any public scrutiny. Whereas advocates of the latter position this rampant practice as a security measure, I hold that the security considerations should not be a basis for locking out transparency and accountability measures. Public participation derives its justification from a higher moral positioning than security concerns. It is therefore necessary to strike a balance between security interest and standards of accountability and transparency. Such a balance can best be drawn by the judiciary since both the executive and the judiciary often have underlying personal and ideological interests in security laws<sup>51</sup>. Hailing ‘activist judges’, Arpita Saha Postulates

‘By stretching the letter of the law a little and acting according to the spirit behind it, the judiciary has intervened in cases where there is blatant misuse of discretion of executive authority or a lackadaisical attitude towards booking the corrupt and other anti-social elements in society. One of the meanings of judicial activism is that the function of the court is not merely to interpret the law but to make it by imaginatively sharing the passion of the Constitution for social justice<sup>52</sup>’

Judicial activism is therefore the last fallback of the citizenry in case of institutional failure either in the executive or legislature. However its noteworthy that although judicial activism is a possible remedy for legal corruption, the practice is neither institutionalised in law nor widely practised and judges decide by themselves whether to be ‘activists or not’. Entrenching the practice in law would equally be difficult as it would most likely be interpreted by the legislature as an onslaught on its law making domain. The solution

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<sup>49</sup> Ibid

<sup>50</sup> May, L., & Brown, J. (2010). *Philosophy of law: Classic and contemporary readings*. Chichester, U.K: Wiley-Blackwell. P 1 see also Manga note 46 at 17

<sup>51</sup> See Namunane Benard(,August,1, 2015) New Bill Seeks to Shield how KDF spends Budget Billions, Daily Nation, Accessed from <http://www.nation.co.ke/news/shield-military-spending-from-public/-/1056/2816212/-/blexyjz/-/index.html>

<sup>52</sup> See Saha Supra note 43 at 1

therefore lies in strengthening the judiciary beyond the level of any undue interference by either the executive or Legislature. This can be done by granting the judiciary full control of its budget, allowing its to employ and control its staff as well as in providing a favourable working environment and remuneration.

### Conclusion

Whereas several strategies such as active media, civil society, and intensive audits have been proposed as measures to curb corruption,<sup>53</sup> the human rights dimension of corruption has often been ignored. The result is that victims of corruption in the public sector continue to suffer immense human rights violations at the hands of public officials. Corruption is indeed a violation of human rights because it violates the principle of equality and non-discrimination, which underpin the human rights doctrine. As has been demonstrated in this paper, corruption further goes against the right to access of public services by preventing those who are unwilling or unable to pay bribes from accessing public services. To effectively handle corruption, a change in approach is necessary. Human rights activists should be engaged in the day-to-day operations of government so as to detect areas of weakness and loopholes that can be exploited by corruption cartels. To address legal corruption, it is important that the constitution opens the door for public scrutiny of bills relating to transparency and accountability in government.<sup>54</sup> This will not only make it difficult for the legislature to manipulate the bill once in parliament, but will also create room for an objective analysis to detect any cases of vested interest or conflict of interest in the bill, two factors that undermine the objective discussion of bills relating to governance and corruption in parliament. Public scrutiny can be done through the involvement of civil society to provide technical expertise.<sup>55</sup>

Institutional strengthening of the judiciary and promotion of judicial activism should also be encouraged to ensure that judges interpret the law based on public interest and universal human rights principles.<sup>56</sup> A mere promotion of the rule of law may not successfully curb

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<sup>53</sup> Riley P.(1999).Western Policies and African :The New Anti-Corruption Agenda in Ronald Hope and Bornwell C. Chikulo . *Corruption and Development in Africa* . Retrieved from <http://O-www.palgraveconnect.com.pugwash.lib.warwick.ac.uk/pc/doi/finder/10.1057/9780333982440> p153

<sup>54</sup> Ibid at 154

<sup>55</sup> Ibid at 54

<sup>56</sup> Ayee J.R.(1999)Ghana: the Continuing Search for Cures in the Fight Against Corruption in Ronald Hope and Bornwell C. Chikulo . *Corruption and Development in Africa* . Retrieved from <http://O-www.palgraveconnect.com.pugwash.lib.warwick.ac.uk/pc/doi/finder/10.1057/9780333982440> p186

corruption if the vice is entrenched in the legislative process. In fact 'respect to the rule of law' may actually be counterproductive to the human rights regime if the law making process is compromised by corruption .This is not to say that anarchy should prevail in the fight against corruption: Rather, human rights activists and lawyers should pay keen attention to the law making process to ensure that the outcome of this process doesn't perpetuate corruption. Secondly since the legislature and executive (that are active participants in the law making process) sometimes operate on the basis of underlying institutional and or personal interests, therefore propagating 'legal corruption, a more robust judiciary is necessary to align the law with public interest and/or human right, which may require radical interpretation of the law in a way that would even be considered as synonymous with law making by the courts.

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