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**Working Paper**

## Corruption and social rights accountability

IEE Working Papers, No. 213

**Provided in Cooperation with:**

Institute of Development Research and Development Policy (IEE), Ruhr University Bochum

*Suggested Citation:* Engelbert, Annika; Kaltenborn, Markus (2019) : Corruption and social rights accountability, IEE Working Papers, No. 213, ISBN 978-3-927276-99-4, Ruhr-Universität Bochum, Institut für Entwicklungsforschung und Entwicklungspolitik (IEE), Bochum

This Version is available at:

<https://hdl.handle.net/10419/202093>

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**Annika Engelbert und  
Markus Kaltenborn**

Corruption and Social Rights Accountability

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Institut für  
Entwicklungsforschung und  
Entwicklungspolitik

Institute of  
Development Research and  
Development Policy

**WORKING PAPER**

VOLUME | 213      BOCHUM 2019

**IEE WORKING PAPERS**

**Volume 213**

Annika Engelbert und Markus Kaltenborn

**CORRUPTION AND SOCIAL RIGHTS ACCOUNTABILITY**

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Herausgeber:

© Institut für Entwicklungsforschung und Entwicklungspolitik  
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[www.development-research.org](http://www.development-research.org)

ISSN 0934-6058

ISBN 978-3-927276-99-4

## **Abstract**

Transnational criminal law treaties traditionally dominate the international anti-corruption regime; yet, corruption has not considerably decreased since their coming into force. It therefore seems appropriate to broaden the legal perspective: Corruption as a threat to welfare, safety, and physical integrity of the individual can be conceptualized as a human rights violation. This paper argues that it is possible indeed to establish causal links between the misallocation of public funds, including budget distortions and underfunding of anti-corruption institutions, and a structural infringement of social human rights. We present several human rights instruments suitable to combat corruption with regard to social rights realization. In particular, we assess the capacity of public interest litigation, as well as related contextual legal and political conditions for the case of Kenya. With its new Bill of Rights, Kenya has great potential to spearhead a progressive impact litigation strategy targeting corruption-induced social rights infringements.



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# I. INTRODUCTION

Transnational criminal law treaties, targeting corruption as an economic crime, traditionally dominate the international anti-corruption regime.<sup>1</sup> Yet, evidence suggests that corruption has not considerably decreased since the coming into force of these treaties; thus, criminal law proceedings only have globally not proved to be successful. Therefore, it seems appropriate to broaden the legal perspective: Corruption as a threat to welfare, safety, and physical integrity of the individual, instead of the narrower economic crime approach, shifts the focus to the question whether corruption can be conceptualized as an infringement of human rights, especially in developing countries where everyday corruption prevails.<sup>2</sup>

At the same time, the theoretical discourse in corruption research has been subject to a paradigm shift. The previously unchallenged principal-agent framework has turned out to be very convincing in explaining factors that promote corruption, but less so for identifying solutions to the problem in systems that lack a "principled principal"<sup>3</sup>; that is, benevolent state representatives. To a large extent, institutional reforms have not performed as expected. Considering these findings, corruption research has lately focused on alternative approaches that propose new solutions. Scholars have convincingly argued that corruption is rather a collective action problem and requires fundamentally different remedies than those deduced from a principal-agent thinking, such as turning the focus from state institutions onto the role of CSOs as integrity-bearer.<sup>4</sup>

Taking both research trends into account - the failure of international criminal law to reduce corruption globally and the shortcomings of corruption theories grounded in Political Economy, this paper argues that certain human rights instruments have significant potential to combat corruption and its devastating effect on social aspects of people's life, such as health, education, housing, and social protection. We focus our research on structural infringements of social rights due to corruption and the respective legal remedies. Structural infringements include squandering of government resources and misallocation of public funds, as well as underfunding – and thereby incapacitating – institutions mandated to investigate and prosecute

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1 The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1999; the Organization of American States Inter-American Convention Against Corruption of 1997; the Convention on the Protection of the European Communities' financial interests of 1995 and its Protocols; the Convention on the fight against Corruption involving officials of the European Communities or officials of Member States of the EU of 2005; the Council of Europe Criminal Law Convention on Corruption of 2002; the Council of Europe Civil Law Convention on Corruption of 2003; the African Union Convention on Preventing and Combating Corruption of 2006; the United Nations Convention against Corruption of 2005; and the United Nations Convention Against Transnational Organized Crime of 2003.

2 Lately, legal scholars have become increasingly interested in the human rights/corruption nexus. See e.g. Peters 2018 and replies by Davis 2019 and Peirone 2019; the Working Papers series and other publications (2009, 2010) by the International Council on Human Rights Policy; Boersma & Nelen 2010; Olanyian 2016.

3 Persson et al 2013: 450.

4 E.g. Johnston 2014; Persson et al. 2013; Mungiu-Pippidi 2013.

corruption. By diverting public funds and abstaining from effective prosecution of corruption offences, states do not deploy the maximum of their available resources towards the realization of human rights as required by the International Covenant on Economic, Social and Cultural Rights (ICESCR). This is particularly damaging for social rights, most notably the right to health, the right to education, the right to social security, and the right to housing, as the implementation of these rights requires states to invest in a relatively costly infrastructure such as health care facilities, drugs, schools, qualified personnel, social assistance programs, social insurance schemes, or social housing. Corruption withdraws public funds that are absolutely essential for the realization of social rights.

We argue that it is possible indeed to establish causal links between budgetary distortions due to corruption and a structural infringement of social rights; in other words, to make these human rights violations justiciable. To this end, we refer to reports, resolutions, and interpretation guidelines of the UN Treaty- and Charter-based bodies as well as decisions of national and regional courts of justice. In particular, we will explore the potential of public interest litigation (PIL) strategies targeting corruption-induced social rights infringements, and assess the potential of PIL for the case of Kenya. We will show how PIL may be an avenue to break the collective action dilemma and help to realize social rights also in highly corrupt countries. Our normative approach is meant to supplement recent research on the topic that has left specific legal remedies largely unexplored.<sup>5</sup>

The paper sets out to recap distinctions made between various corruption-induced human rights violations and to position structurally impaired social rights within this framework. The subsequent section investigates how corruption can be conceptualized and remedied in international law, followed by an analysis of corruption as a subject of national human rights proceedings with a special focus on PIL.

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<sup>5</sup> Cf. Davis 2019.

## II. A MULTI-DIMENSIONAL CLASSIFICATION SCHEME OF CORRUPTION AS A HUMAN RIGHTS VIOLATION

From a legal perspective, it is beyond controversy that the phenomenon of corruption and human rights are connected in various ways. First, certain civil and political rights are essential to fight corruption effectively and sustainably. For instance, freedom of expression or access to information are prerequisites for citizens or the media to report corruption.<sup>6</sup> Second, anti-corruption measures may violate human rights. One example is the right to property that may be infringed when a state orders asset confiscation or recovery.<sup>7</sup> Third, the academic community discusses the question whether the human right to a corruption-free society exists.<sup>8</sup> In this paper, we will concentrate on the fourth dimension of the corruption/human rights nexus: the violation of human rights through corruption. Human rights researchers have proposed several categories of violations related to corruption that will be presented in the following.

Magdalena Sepúlveda Carmona and Julio Bacio-Terracino (2010) distinguish between direct, indirect, and remote violations. A direct violation, according to the classification scheme, occurs when (a) a corrupt transaction is deliberately executed in order to violate a human right, e.g. bribing a judge affects the right to a fair trial; or (b) when the violation was foreseeable and public officials did not act in accordance with due diligence; or (c) when access to a human right is prevented, e.g. bribing medical staff to receive a treatment infringes the right to health. A human right is indirectly violated when either corruption is a necessary condition for this violation, in other words, when a corrupt act constitutes “an essential factor contributing in a chain of events that eventually leads to a violation of a right.”<sup>9</sup>, or when corruption is covered by public officials. As an example for the former, one may think of human trafficking (which violates many rights affecting the physical and mental integrity of women and children in particular) that can only take place because of corrupt public officials who issue false identity documents and refrain from properly controlling borders. The latter case concerns, for instance, whistleblowers or investigative journalists trying to make corruption public, but who are discriminated, threatened, injured, imprisoned or killed for their intentions. Their human rights are violated through the acts of dismissal, harassment, assault, etc., which would not have taken place without corruption. The third category of remote violations describes cases where corruption is one out of several causes for human rights infringements. Vote buying leads to false

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6 Koechlin & Sepúlveda Carmona 2009: 327–328; cf. Gathii 2009: 150.

7 International Council on Human Rights Policy und Transparency International 2010: 63–68, Panov 2018.

8 Kofele-Kale 2000; Kumar 2008; Murray & Spalding 2015; Rothstein & Varraich 2017: 69.

9 Sepúlveda Carmona & Bacio-Terracino 2010: 29.

election results followed by social unrest and human rights violations, such as the freedom of assembly or the right to life. Yet, violent protests are not the direct consequence of corruption, they may have happened for other – additional or alternative – reasons. Remote human rights violations through corruption are most difficult to ascertain due to causality problems. A causal link can only be established where the legal breach and the damage are proximal and the consequences were foreseeable (as a usual course of events or a natural and normal consequence).<sup>10</sup>

In addition to the distinction between direct, indirect, and remote violations, the UN Human Rights Council in its final report of the Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights (A/HRC/28/73) of 2015, para. 20, classifies corruption as a human rights violation according to the specific impact this violation causes and who is affected by it. The scheme discerns individual negative impact, collective negative impact, and general negative impact. A corrupt act may have a direct or indirect impact on the human right of an individual, by either deliberately executing a violation or denying access to a right through corruption as exemplified above. A collective negative impact affects specific groups, mostly marginalized or vulnerable persons. For instance, toxic waste dumping tolerated by corrupt public officials may violate the right to health of the population living in the specific area. Corruption in cash transfer mechanisms for social assistance will violate the right to social protection, especially of poor people. Lastly, a general negative impact affects the society as a whole. The Human Rights Council elaborates that, besides the detrimental effect of corruption on democracy and the rule of law, corruption distorts the allocation of public funds. Corruption reduces financial and economic resources available for the progressive realization of economic, social and cultural rights of the entire population and, thereby, undermines states' obligations under Art 2 ICESCR.<sup>11</sup>

While the Human Rights Council focuses on the victims of human rights violation and Sepúlveda Carmona and Bacio-Terracino on the proximity of corruption and human rights violations or, in other words, the causality, Anne Peters (2018) also distinguishes between different wrongdoers. Human rights violations can either be attributed to individual persons, that is, corrupt civil servants, or the general anti-corruption policy of the state as a legal entity in international law.<sup>12</sup>

As explained in the introduction, our research centers on structural infringements, that is, cases where it is debatable whether a human rights violation is caused indirectly or only remotely by corruption, where the whole population – usually to a different degree – is affected by the violation, and where governments are to be

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10 Peters 2018: 1268-69.

11 See below.

12 Peters 2018: 1259.

held accountable for the violation. We will argue in this paper that indeed, there is leeway for progressive case law to make social rights justiciable, even if their violation is remotely caused by corruption. Accordingly, we conceptualize corruption in a broader way than jurisdictions do when listing statutory offenses in their penal codes that are considered to be particular manifestations of corruption.<sup>13</sup> Instead, we focus on the consequence emanating from corruption, namely the lack of resources that ultimately prevents the realization of social human rights.

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13 Typically, these criminal acts encompass bribery, embezzlement, extortion, or non-disclosure of conflicts of interest, while other types of corruption like favoritism, nepotism, the use of informal networks, or clientelism are often not prohibited by law (see Engelbert 2017).

### III. CORRUPTION AS HUMAN RIGHTS VIOLATION IN INTERNATIONAL LAW

#### 1. States' obligations

A criminal act qualifies as a “violation” only when a legal obligation is breached that makes the act unlawful.<sup>14</sup> In human rights law, a violation takes place when a state fails to perform one or several of its obligations to respect, to protect and to fulfil as substantiated in the General Comments.<sup>15</sup> The obligation to respect requires states not to violate human rights, that is, a negative imperative to refrain from infringements. A state shall not violate the right to housing by executing forced evictions or the right to health by banning certain groups from access to healthcare, for example. The obligation to protect pledges States to safeguard human rights against third parties, that is, to prevent violations committed by third parties, disincentivize such violations, and provide legal remedies for these violations.<sup>16</sup> The Committee on Economic, Social and Cultural Rights' (CESCR) General Comment No. 24 on State Obligations under the ICESCR in the Context of Business Activities of 2017, para 18, elucidates:

„States would violate their duty to protect Covenant rights, for instance, by failing to prevent or to counter conduct by businesses that leads to such rights being abused, or that has the foreseeable effect of leading to such rights being abused, for instance through lowering the criteria for approving new medicines [...]. *Such violations are facilitated where insufficient safeguards exist to address corruption of public officials or private-to-private corruption, or where, as a result of corruption of judges, human rights abuses are left unremedied.*” (emphases added)

Thus, human rights law requires states to implement effective anti-corruption policies, prosecute corruption, and take special measures against corruption in the judiciary. Corruption is not considered the direct cause of human rights violations, but a contributing factor that allows for such violations. The third obligation to fulfil calls for positive action by states to actively facilitate, provide and promote human rights.<sup>17</sup> This obligation is essential to the realization of social rights, as it obligates states to set up and maintain the necessary infrastructure for healthcare, education, housing, etc. As any state activity, these investments are prone to corruption and often suffer from a misallocation of public funds. While it is less attractive for corrupt states to invest in labor-intensive areas such as education or

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14 Cf. Sepúlveda Carmona & Bacio-Terracino 2010: 28, Peters 2018: 1258.

15 General Comments are issued by the UN Treaty-based bodies and seek to interpret human rights provisions and sector-specific topics.

16 Sepúlveda Carmona & Bacio-Terracino 2010: 27.

17 CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) of 2000.

health, they are eager to support capital-intensive, but socially unproductive projects that guarantee more opportunities for rent seeking and higher returns in bribe, e.g. large infrastructure projects and defense procurement. In sum, the states' obligations to protect and to fulfil appear to be crucial for structural infringements of social rights due to corruption.

Art 2(1) ICESCR states the fundamental obligations of state parties that define how the realization of economic, social and cultural rights shall be achieved: States are committed to take steps to the maximum of their available resources to achieve progressively the full realization of these rights by all appropriate means. Each of the four components of this clause is relevant for social rights structurally impaired by corruption. First, a state is required to take steps against corruption as a (potential) obstacle to the enjoyment of social rights, that is, to apply anti-corruption measures. Second, a state shall deploy the maximum available resources to the fulfillment of economic, social and cultural rights. Yet, corruption significantly reduces available resources, either directly by siphoning funds or shifting budgets towards activities that offer higher returns in bribes, or indirectly by lowering financial credibility and eligibility for donors' programs and, thereby, reducing external resources like foreign direct investment and official development assistance.<sup>18</sup> The General Comment No. 19 on public budgeting for the realization of children's rights (art. 4) of 2016, para. 34, amplifies what is meant by "the maximum extent of their available resources" in Art 4 of the Convention on the Rights of the Child:

"Corruption and mismanagement of public resources in State revenue mobilization, allocation and spending represents a failure by the State to comply with its obligation to use the maximum of available resources. The Committee underlines the importance of States parties allocating resources to prevent and eliminate any corruption affecting children's rights, in accordance with the United Nations Convention against Corruption."

Third, progressive realization means that priority must be given to achieve full enjoyment of social rights over time. Corruption that leads to structural infringements of social rights contradicts the principle of progressive realization as personal enrichment is prioritized over social development. Fourth, appropriate means to realize social rights are affected by corruption as the profiteers put all efforts in maintaining the status quo and favoring a few instead of systemic changes for the benefit of all. If anti-corruption mechanisms are applied at all, they are probably not effective, but rather used as window dressing. In sum, we can deduce a states' obligation to keep budget allocation for social rights free of corruption, as well as an obligation to take measures against a corruption-induced structural infringement of social rights.

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<sup>18</sup> Cf. Peters 2018: 1263-64.

## 2. Monitoring mechanisms and human rights litigation in international law

The implementation of the ICESCR by the states parties is monitored by the UN Treaty- and Charter-based bodies. Universal Periodic Reviews<sup>19</sup> and monitoring reports of the CESCR and the Committee on the Rights of the Child consider corruption as a hindrance or obstacle to the enjoyment of economic, social and cultural rights. The reports address the fact that corruption negatively affects the composition of budgets and, indirectly by doing so, infringes social rights. They deplore the ineffective use of resources that can be traced back to corruption<sup>20</sup>, frequent misallocation of public funds<sup>21</sup>, and a lack of measures to combat corruption<sup>22</sup>. They also explicitly mention that corruption prevents states from mobilizing their maximum available resources as required by the ICESCR.<sup>23</sup> Accordingly, resolutions of the UN Human Rights Council mention the adverse, negative, or detrimental impact of corruption on human rights. They commonly deplore the

“detrimental impact of widespread corruption on human rights through both the weakening of institutions and the erosion of public trust in government, as well as through the impairment of the ability of Governments to fulfil all their human rights obligations”

and reiterate

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19 Universal Periodic Reviews to Ukraine (A/HRC/37/16, 2018, Portugal, para 116.124), South Africa (A/HRC/36/16, 2017, Norway, para 139.131), Yemen (A/HRC/12/13, 2009, Canada, Recommendation No. 71, para. 91) and Nigeria (A/HRC/11/2, 2009, Turkey and Cuba, Recommendation No. 24, para. 103).

20 CESCR report on Uzbekistan (E/C.12/UZB/CO/2, 2014), CRC reports on Uzbekistan (CRC/C/UZB/CO/3-4, 2013), Azerbaijan (CRC/C/AZE/CO/3-4, 2012), Philippines (CRC/C/PHL/CO/3-4, 2009), Bulgaria (CRC/C/BGR/CO/2, 2008), Afghanistan (CRC/C/AFG/CO/1, 2011), Sri Lanka (CRC/C/LKA/CO/3-4, 2010), Nigeria (CRC/C/NGA/CO/3-4, 2010).

21 CESCR reports on Libanon (E/C.12/LBN/CO/2, 2016), Sudan (E/C.12/SDN/CO/2, 2015), Indonesia (E/C.12/IDN/CO/1, 2014), Congo (E/C.12/COG/CO/1, 2013), Romania (E/C.12/ROU/CO/3-5, 2014), Mauretania (E/C.12/MRT/CO/1, 2012), CRC reports on Kenya (CRC/C/KEN/CO/3-5, 2016), Mozambique (CRC/C/ZMB/CO/2-4, 2016), Zimbabwe (CRC/C/ZWE/CO/2, 2016), Peru (CRC/C/PER/CO/4-5, 2016), Eritrea (CRC/C/ERI/CO/4, 2015), Mexico (CRC/C/MEX/CO/4-5, 2015), Guinea (CRC/C/GIN/CO/2, 2013), Venezuela (CRC/C/VEN/CO/3-5, 2014), Liberia (CRC/C/LBR/CO/2-4, 2012), Albania (CRC/C/ALB/CO/2-4, 2012), Vietnam (CRC/C/VNM/CO/3-4, 2012), Algeria (CRC/C/DZA/CO/3-4, 2012), Myanmar (CRC/C/MMR/CO/3-4, 2012), Togo (CRC/C/TGO/CO/3-4, 2012), Thailand (CRC/C/THA/CO/3-4, 2012), Syria (CRC/C/SYR/CO/3-4, 2012), Cambodia (CRC/C/KHM/CO/2, 2011), Mongolia (CRC/C/MNG/CO/3-4, 2010), Burkina Faso (CRC/C/BFA/CO/3-4, 2010), Bangladesh (CRC/C/BGD/CO/4, 2009), Niger (CRC/C/NER/CO/2, 2009), Sierra Leone (CRC/C/SLE/CO/2, 2008).

22 CESCR report on Kenya (E/C.12/KEN/CO/2-5, 2016), Sri Lanka (E/C.12/LKA/CO/2-4, 2010), CRC reports on Zimbabwe (CRC/C/ZWE/CO/2, 2016), Uzbekistan (CRC/C/UZB/CO/3-4, 2013), Azerbaijan (CRC/C/AZE/CO/3-4, 2012).

23 CESCR reports on Liechtenstein (E/C.12/LIE/CO/2-3, 2017), Nepal (E/C.12/NPL/CO/3, 2014), Egypt (E/C.12/EGY/CO/2-4, 2013).

“that the fight against corruption at all levels plays an important role in the promotion and protection of human rights and in the process of creating an environment conducive to their full enjoyment”.<sup>24</sup>

In a few cases, the UN language is even more straightforward and links corruption to human rights violations. The Universal Periodic Review to El Salvador, conducted by the Holy See, in para. 105.37 recommends to

“[k]eep striving to eradicate unchecked criminality, corruption and gang activity, which produce devastating human rights violations [...]”.

The CESCR report on Indonesia (E/C.12/IDN/CO/1, 2014, para 9)

“expresses concern that corruption, which permeates all levels of the State party’s administration, (a) reduces the resources available for the promotion of economic, social and cultural rights; (b) has led to violations of human rights in several sectors, including in the extractive industry; and (c) denies redress to victims who face corruption in the judiciary (art. 2.1).”

In a publication by the Office of the High Commissioner on Human Rights of 2017, the UN states that

“[i]f a donor government continues to provide aid knowing that the recipient government is failing to meet its human rights obligations as a result of corruption, it may be complicit in human rights violations.”<sup>25</sup>

Thus, we can conclude that the UN Treaty- and Charter-based bodies do recognize the possibility that corruption – directly or indirectly – violates human rights.<sup>26</sup> However, the monitoring bodies reluctantly use the word “violation” as it is perceived to be an unnecessary terminological restriction when assessing the entire corruption/human rights nexus. The Human Rights Council in its final report of the Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights (A/HRC/28/73) of 2015, para. 21, explicates that

“[f]or the purposes of the present report, it is of minor importance whether a single act of corruption leads to a violation of human rights in a strictly judicial sense. The meaning of the term ‘negative impact on human rights’ is much broader than ‘violation of human rights’. While a court dealing with possible violations of human rights has to consider whether a specific human right has been violated, measures against corruption can take into account different types of negative impact from corruption.”

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24 A/HRC/RES/7/11, A/HRC/RES/19/20, A/HRC/RES/25/8, A/HRC/RES/31/4, A/HRC/RES/37/6, see also A/RES/69/199, A/HRC/RES/23/9, A/HRC/RES/35/25.

25 Office of the United Nations High Commissioner on Human Rights 2017: 63.

26 The wording applied by the European Parliament in its resolution of 13 September 2017 on corruption and human rights in third countries (2017/2028(INI)) is much more explicit. In para. E, the Parliament states that “in many countries corruption not only constitutes a significant systemic obstacle to [...] all civil, political, economic, social and cultural human rights, but may also cause many human rights violations” and that “corruption is one of the most neglected causes of human rights violations”.

Indeed, the Treaty- and Charter-based bodies are mandated to monitor and address, but not adjudicate on human rights infringements. The very few international law cases on the matter have not yet borne precedents establishing a link between corruption-induced budget misallocation and social rights violations. Most prominently, the ECOWAS Community Court of Justice in 2010 has ruled that a diversion of funds negatively affects the operation of the basic education sector, but that a single corrupt act does not constitute a sufficient condition for a violation of the right to education. In *SERAP vs. Federal Republic of Nigeria and Universal Basic Education Commission*, the court held that “embezzling stealing or even mismanagement of funds meant for the education sector [...] does not amount to a denial of the right to education” because “[t]here must be a clear linkage between the acts of corruption and a denial of the right to education.” According to the court, the state of Nigeria had met its obligation to fulfill by establishing and financing institutions in charge of basic education.<sup>27</sup>

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<sup>27</sup> *SERAP v. Nigeria*, Judgment, ECW/CCJ/APP/12/07; ECW/CCJ/JUD/07/10 (ECOWAS, Nov. 30, 2010); see also Isokpan & Durojaye 2018.

## IV. CORRUPTION AS A SUBJECT OF SOCIAL RIGHTS ACCOUNTABILITY AT THE NATIONAL LEVEL

### 1. The role of constitutional courts in establishing a link between human rights and corruption

As the examples we have given show, the link between human rights and corruption has so far been addressed primarily at the international level. However, it will have to be noted that international institutions have been reluctant to establish a direct causal link between a corruption-related shortfall in state budget revenues and a lack of resources to implement social rights. The path via the national constitutional courts may promise more success. In some countries of the Global South, the courts have in recent years begun to define their competences very broadly with regard to the interpretation of social rights and to shape the national legal and socio-political development progressively by means of remarkable judgments.<sup>28</sup> In this context, Daniel Bonilla Maldonado (2013) speaks very aptly of the "activist" role played by these courts in terms of social rights accountability. Well-known examples include the South African and Indian judiciary: it is thanks to the Indian Supreme Court that the distinction made in the constitution between justiciable fundamental rights (Section III) and non-justiciable Directive Principles of State Policy (Section IV), which also include the rights to work, education and unemployment benefits (Article 41) and the rights to health and food (Article 47), has now largely been overcome in practice.<sup>29</sup> So for quite some time now, the Indian population has also been able to take social rights to court. In South Africa, most notably the decisions of the Constitutional Court with regard to the right to health, the right to social security, and the right to housing have gained prominence because they provided pioneering guidelines for various social policy areas.<sup>30</sup> A similarly progressive – one could also say "creative" – approach has also been adopted by some Latin American courts.<sup>31</sup>

The central question here, too, as to whether a link can be established between human rights and corruption, could provide an opportunity for some constitutional courts to consolidate or even strengthen their position in relation to the government. Corruption is one of the main causes worldwide of the state's lack of revenue and – as a result – its inability to provide the population with the necessary social services. In many countries, this connection is so obvious that

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28 In recent years the influence of the courts (that are in the first place the Constitutional or Supreme Courts) on social policy decisions in countries of the Global South has been subject to extensive research, see e.g. Coomans 2006; Gargarella et al. 2006; Langford 2008; Gauri and Brinks 2008; Yamin and Gloppen 2011; Bonilla Maldonado 2013; Rodríguez Garavito & Rodríguez-Franco 2015.

29 Kothari 2007: 174.

30 See e.g. Minister of Health and others v. Treatment Action Campaign and others of 5.7.2002, Case CCT 8/02, 2002 (10 BCLR 1033 (CC); Government of the Republic of South Africa and others v. Irene Grootboom and others of 4.10.2000, Case CCT 11/00, 2001 (1) SA 46 (CC).

31 Rodríguez-Garavito 2014.

judges may be willing to respond to lawsuits that address the relationship between corruption-related state revenue shortfalls and the lack of implementation of social rights. In doing so, they would by no means have to be deterred by the fact that in international documents and decisions, the causal connection is rarely and not really clearly addressed. How the constitutional courts interpret social rights guaranteed in the respective constitution and what significance they accord them in the control of the government's social and educational policy is left to their autonomous decision. The General Comments and recommendations of the CESCR and the decisions and opinions of other international institutions have to be taken into account by the judges, but they are not a binding standard for them when interpreting the constitution.<sup>32</sup> This applies a fortiori when a constitutional court, in interpreting a social right specified in the constitution, wants to go beyond the standard of interpretation, which international institutions consider to be decisive when it comes to concretizing a corresponding human right under international law.

## **2. Public interest litigation as a strategic instrument to control state anti-corruption measures**

But what are the conditions under which a constitutional court can decisively influence the anti-corruption policy in the country? If it wants to make the structural violation of social rights the starting point of its jurisprudence in this respect, then a decisive condition might be, first of all, that socio-political tasks are mentioned not merely as a constitutional objective, directive, or guiding principle of state policy, but that certain social rights are sufficiently concretely defined in the constitution as justiciable legal positions. This is the case in many countries around the world.

In addition, however, a number of other conditions must be met. In her research on the transformative power of courts, Siri Gloppen (2006) has shown that the social rights litigation process and success of such law suits depend on four main factors:<sup>33</sup> (1) the extent to which people whose rights are violated are able to voice their claims in a court, (2) the court's responsiveness to these claims (which means that the court is willing to recognize the claim as a legitimate matter for a legal decision), (3) the judges' capability to give legal effect to the claims that are voiced, and (4) the political authorities' compliance with the judgement (both directly and in terms of subsequent legislation and policies). For each of these stages, one can identify a number of conditioning factors which influence the courts' transformation performance (such as the litigants' resources to articulate their claims and mobilize legal aid, practical and cultural barriers to access to the courts, the legal culture and the structure of the legal system, the social rights sensitization and the social background of the judges, and – last but not least – at

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32 For a detailed analysis of the soft law character of CESCR General Comments see Bodig 2016: 72 et seq.

33 Gloppen 2006: 42.

the compliance stage, the political culture [legalism, balance of power, political will] and the implementation capacity, primarily in terms of economic and administrative resources).<sup>34</sup>

Not all of these factors can be discussed in detail in the following, as they vary significantly from country to country. However, it seems worthwhile to take a closer look at the first criterion, because it allows some general statements about the chances of success of such constitutional court proceedings. The fact that people are able to claim their rights in court presupposes, first of all, that they are at all aware of the violation of the law. Especially in the case of social rights which are structurally impaired by corruption, this is by no means a matter of course. Many people will be aware that corruption prevails in their country and may have been confronted with such incidents themselves. Often, however, they will not be aware that shortcomings in the fight against corruption have a direct negative impact on the state budget and, thus, also – at least indirectly – lead to impairments in the granting of social benefits. And even those who recognize this correlation will have difficulties in making it the subject of a plausible, well-founded human rights lawsuit. After all, it is quite a demanding task to clarify the complex connection between corruption and the structural impairment of social rights on the basis of reliable facts and figures so precisely that a court sees this as a basis for assuming a violation of rights. Such a task can typically be taken on by non-governmental organisations that are well-positioned in terms of their expertise and personnel, rather than by individuals. NGOs are often connected to other relevant organizations, as well as with researchers and journalists, through their national and international networks, so that it is easier for them than for individuals to collect the statistical data and facts about the relevant policy processes necessary for such action. In addition, they usually have sufficient expertise to prepare these materials in such a way that they could be accepted by a court as plausible evidence for a human rights complaint. And above all, a lawsuit filed by an NGO on behalf of a larger group of victims (possibly even with nationwide validity) has a much greater political weight than a series of lawsuits by individual victims - not least because the media would generally pay more attention to such a court case.

The procedural instrument available to NGOs to file such claims is called public interest litigation (PIL). In many jurisdictions, the authority to challenge a state measure in court is not limited to those persons who can claim that their own rights have been violated by that measure. Rather, associations and interest groups are also granted the right to assert the rights of other persons or rights of the general public in court. Such an extension of the right to bring actions is often limited to only a few selected areas of law. In Germany, for example, which follows a rather strict concept of individual legal protection, the so-called ‘Verbandsklage’ (group action), has only been permitted for certain proceedings under environmental and animal protection law and in disability law; moreover it plays an important role in consumer protection. French and British law open up greater scope for the prosecution of non-subjective interests. In both legal systems, the courts pursue a relatively liberal line in relation to the admissibility requirement of ‘standing’

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34 Ibid.; see in this context also Andreassen 2014.

(‘locus standi’) respectively ‘intérêt à agir’. The greatest political influence, however, PIL has achieved in the US where it experienced a boom in the 1960s when not only private donation organizations, but also state subsidies made it possible to file such lawsuits to protect underprivileged persons and minorities.<sup>35</sup>

In the Global South, PIL has become more widely known especially in South Africa<sup>36</sup> and India<sup>37</sup>. The National Food Security Act 2013 in India, for instance, which forms the main legislative basis for the provision of basic food entitlements for children, pregnant women, and poor households in the country, can be traced back to the famous Right to Food-case which the Supreme Court decided in 2001.<sup>38</sup> The People's Union for Civil Liberties (PUCL) had filed a lawsuit, taking up the initiative of a citizens' movement, the Right to Food Campaign. In a similar form, popular complaints have also been successful in the areas of education and environmental protection, as well as in the health sector. In South Africa, the successful complaint of the Treatment Action Campaign (TAC) should be mentioned in this context.<sup>39</sup> In 2002, the organisation was able to obtain a ruling from the South African Constitutional Court condemning the country's government to provide antiretroviral drugs for mothers at the birth of their children in order to protect their health. In addition, South African courts have also passed numerous rulings on housing law, refugee law and environmental law, which were made possible through the use of PIL.

### **3. Kenya as an example of (potentially) successful PIL with regards to social human rights**

The model of India and South Africa is now followed by many other countries in the Global South. An interesting example for our topic is Kenya: In recent years, many PIL processes have been successfully carried out in this country.<sup>40</sup> At the same time, Kenya is a country that despite some progress in the fight against corruption still has a high level of corruption. In Transparency International's Corruption Perceptions Index, which analyzes the perceived corruption in politics and administration on the basis of various expert surveys, the country only ranks 144 out of a total of 180 countries.<sup>41</sup> The question therefore arises as to whether PIL in Kenya could also be a suitable instrument for combating corruption.

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35 See generally on PIL in the United States Aron 1989; Cummings & Rhode 2009.

36 Cote & Van Garderen 2011; Dugard & Langford 2011; Brickhill 2018.

37 Craig & Deshpande 1989; Bhuwania 2017.

38 People's Union of Civil Liberties (PUCL) v. Union of India & Others WP (Civil) No. 196/2001; see also Kothari 2007: 176.

39 See supra, note 30.

40 Oloka-Onyango 2017: 106.

41 <https://www.transparency.org/news/feature/cpi2018-subsaharan-africa-regional-analysis>.

In the last decade, the trends regarding absence of corruption in government branches as well as in both the public sector and the private sector have been positive; there was, however, a slight worsening of anti-corruption measures; see Mo Ibrahim Foundation 2018: 96.

The Kenyan constitution, which was substantially redesigned in 2010, is one of the most ambitious constitutions on the continent in terms of human rights protection.<sup>42</sup> A major step forward compared to the old constitution is the fact that the social rights listed in Art. 43 (the rights to health, the right to housing, to food, to water and sanitation, to social security, and to education) are now explicitly designed as justiciable rights.<sup>43</sup> Art. 21 (2) obliges the state

„to take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.“

The Kenyan constitution is thus in line with international law, because – as already stated (see *supra* III.1.) – Art 2(1) ICESCR only requires the contracting states to implement social rights progressively. However, Kenya, like most other countries in the world, is still a long way from achieving this goal. Only a few years ago, the CESCR made it clear in its Concluding observations on the combined second to fifth periodic reports of Kenya.<sup>44</sup> The UN experts have identified shortcomings in the implementation of the ICESCR and the corresponding constitutional guarantees with regard to most social rights: The main problems are the „limited coverage of cash transfer programmes, leaving more than half of people eligible for the programmes unsupported“ and the fact that the „coverage of the National Social Security Fund and the National Health Insurance Fund is very low and excludes most workers in the informal economy“<sup>45</sup>; moreover, „the high percentage of people living under the poverty line and the failure of the State party to significantly reduce the poverty rate“<sup>46</sup>, „the prevalence of chronic malnutrition and the high level of stunting, particularly among children and those living in arid and semi-arid areas“<sup>47</sup>, the „lack of effective measures to provide social housing for low-income families, at the large proportion of the population living in informal settlements in poor living conditions with limited access to basic services, including water and sanitation, health care and education“<sup>48</sup>, and „the inadequate budget allocation to the health sector ... and the significant share of out-of-pocket payments in health expenditure, which limit access to health for disadvantaged and marginalized persons“<sup>49</sup>. Last but not least, the CESCR also critically points out „that the State party has not dedicated sufficient resources to financing school

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42 Glinz 2011; cf. also Orago 2015: 42; Oloka-Onyango 2017: 181 et seq. – According to a survey conducted by Amnesty International Kenya, almost 70% of Kenyans feel that the human rights situation in the country has improved since 2010; however, 67% of respondents also state that “high levels of wealth inequality ... undermine a core constitutional promise contained in the Kenyan Bill of Rights”; see Amnesty International Kenya 2018: 4.

43 In the constitution-making process the inclusion of justiciable social rights was taken for granted; see Odongo & Musila 2016: 345.

44 CESCR, UN Doc. E/C.12/KEN/CO of 6 April 2016.

45 Ibid. para. 35.

46 Ibid. para. 41.

47 Ibid. para. 43.

48 Ibid. para. 45.

49 Ibid. para. 51.

facilities and qualified teachers, and to ensuring effective enjoyment of the right to free primary education for all“.<sup>50</sup>

This worrying record of the social rights situation in Kenya shows that massive deficits exist mainly in those policy areas where the state would have to invest significantly more financial resources than it does so far. It is an obvious assumption that these resources are lacking not least because the government does too little to combat corruption in the country. If this is indeed the case – but this would first have to be confirmed by a detailed investigation of the consequences of corruption in the country – then a court could also conclude that the government has not made sufficient efforts to provide the maximum available resources to implement the social rights in question. The consequence would be that judges would have to determine a violation of these rights and, if necessary, could order measures to change this unconstitutional situation.

However, in order for such questions to be the subject of a legal review in a court case, it would first be necessary to find someone who appeals to the courts with a corresponding complaint and whose suit is then admitted. With regard to cases of structural human rights violations, this can constitute a major obstacle to such litigation – unless (as already shown above, see *supra* IV.2.) actions can also be brought in the public interest. This is the case in Kenya: A remarkable novelty in the new constitution is that the procedural requirements that must be observed when Kenyans invoke their human rights before the country’s judiciary are now very plaintiff-friendly. Art. 22 of the Constitution expressly states that not only

„persons acting in their own interest are allowed to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.“

Rather, according to Art. 22 (2), this right may also be exercised by

„a) a person acting on behalf of another person who cannot act in their own name; b) a person acting as a member of, or in the interest of, a group or class of persons; c) a person acting in the public interest; or d) an association acting in the interest of one or more of its members.“

In addition, Art. 22 (3) of the Constitution requires that

„(t)he Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that a) the rights of standing provided for in clause (2) are fully facilitated; b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation; c) no fee may be charged for commencing the proceedings; and d) the court ... shall not be unreasonably restricted by procedural technicalities; ...“.

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50 Ibid. para. 57.

These constitutional provisions therefore provide an exceptionally favourable framework for filing PIL actions.<sup>51</sup> Admittedly, this does not remove all barriers to successful litigation. One problem frequently encountered in connection with human rights lawsuits is, for example, the financing of such proceedings.<sup>52</sup> Even if no court costs have to be paid, the preparation of a lawsuit – which is often very laborious – and also the representation of the plaintiff NGO by suitable lawyers can still be quite costly. Moreover, it might not be easy to find well qualified lawyers who are already familiar with the special requirements of the PIL-proceedings.<sup>53</sup>

But even if the lawsuit can be filed and is successful, its implementation often causes difficulties. In principle, structural interdicts (or supervisory orders) which allow the courts to monitor compliance with their orders over a specific period of time are also available to the judges in Kenyan law.<sup>54</sup> But it is by no means always guaranteed that the government will accept a court decision that forces it to take far-reaching social or fiscal measures.<sup>55</sup> Therefore, for a PIL to ultimately succeed, it is not only necessary to carefully prepare the complaint, but also to make a prudent decision by the judges that takes into account the legitimate interests of the government. As a consequence, it is not always advisable to impose very concrete measures, which the government might then regard as an inadmissible encroachment on its executive core competencies. Under certain circumstances, it may be more helpful to simply point out the unconstitutionality of the existing legal situation in general and to recommend to the government various options as to how a constitutional situation can be created. When it comes to allocating financial resources to the various policy areas covered by individual social rights, the courts are already constitutionally required to be cautious about government decisions. Art. 20 (5 c) of the Kenyan constitution stipulates that

„(i)n applying any right under Article 43, if the State claims that it does not have the resources to implement the right, ... the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.“

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51 Cf. in this context also the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, <http://kenyalaw.org/kl/index.php?id=3396>. For a comparison of the rules on locus standi in the old and the new Kenyan Constitution see Lumumba & Franceschi 2014: 139.

52 Oloka-Onyango 2017: 276; KPTJ et al. 2014: 32.

53 Oloka-Onyango 2017: 274.

54 See e.g. Republic v Cabinet Secretary, Ministry of Agriculture, Livestock & Fisheries & 4 others Ex Parte Council of County Governors & another [2017] eKLR, para. 140 et seq.; Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR, Civil Appeal 218 of 2014, para. 112 (according to this decision, structural interdicts can only be used for “crafting appropriate relief on a case by case basis”, not as a substitute for a legislative instrument); see also generally Orago 2015: 75.

55 See also KPTJ et al. 2014: 9 et seq.; for a comparative law overview of decisions on budgetary questions of social rights implementation see Williams 2015.

However, this does not mean that court cases in which state budget policy is the subject of discussion are without any prospect of success from the outset. Art. 20 also requires that

„if the State claims that it does not have the resources to implement the right, ... it is the responsibility of the State to show that the resources are not available“ (Art. 20 [5a]).

This provision – which explicitly allows the courts to scrutinize the state’s budgetary allocation in order to determine the inadequacy of resources that are made available for the implementation of a specific right<sup>56</sup> – could provide potential plaintiffs with a line of argument to make the issue of the lack of anti-corruption the subject of a lawsuit. For if the state has to prove that the resources are not available to it, then this obligation probably also includes that the state must justify *why* it lacks these resources. The Constitutional Court could decide on the basis of an appropriate PIL (e.g. a NGO complaint about insufficient financial resources for the Kenyan education sector or about poor health care) and urge the government to provide detailed coverage of its anti-corruption policy. And if this policy has obvious shortcomings, the judges would have the opportunity to remind the government that it is their duty to remedy these deficiencies. In addition, they could suggest several options to the government as to what action should be taken to prevent the state from losing financial resources due to structural deficiencies in the fight against corruption.

Of course, if such a judgement should ever be reached, the question arises as to whether the government will respect it - in other words, whether it will take up the judges' proposals and actually act more effectively against corruption. The pressure on the government, which to a considerable extent emanates from the media effectiveness of such a constitutional court decision, is likely to be great. And certainly this effect would be more significant than public pressure triggered by the recommendations of the CESCR or other international human rights bodies.

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56 Lumumba & Franceschi 2014: 133. Art. 20 (5a) can be regarded as a provision which illustrates particularly clearly the transformative character of the Kenyan Constitution; see Odongo & Musila 2016: 347.

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