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Corruption and Donor Reforms: Expanding the Promises and Possibilities of the Rule of Law as an Anti-Corruption Strategy in Kenya

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CORRUPTION AND DONOR REFORMS: EXPANDING THE PROMISES AND POSSIBILITIES OF THE RULE OF LAW AS AN ANTI-CORRUPTION STRATEGY IN KENYA

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[The] legal process cannot be treated by any serious movement for social change as a mere sham, but rather that it must be taken seriously as an enormously important aspect of social life and an arena of social struggle.[1]

[The] rule of law undoubtedly restraints power, but it also prevents power's benevolent exercise . . .[2]

I. INTRODUCTION

In this paper, I explore various anti-corruption initiatives that form part of the rule of law reforms donors have required the Kenyan government to implement. Rule of law reforms primarily aim at instituting fair or impersonal procedures that limit open ended official

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1. Karl Klare, *Law-Making As Praxis*, 40 TELOS 133 (1979).

2. Morton Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 565-66 (1977) (book review).

discretion. The goal of these rule of law reforms is in part to put in place effective mechanisms to hold public officials accountable for abuse of office. My argument is that although rule of law reforms are significant for reducing opportunities for abuse of public office, these do not necessarily guarantee or entail fair or substantive outcomes. This is because the nature of corruption in the country is in large measure a reflection of the disproportionate inequalities of wealth and power. Grand scale corruption and looting in particular take place within a fairly complex network of individuals and groups with access to enormous wealth, power and influence in both the public and private sector. Dealing with corruption as a matter of procedural fairness is insufficient in this context. Any approach to dealing with corruption requires a commitment to redressing the disproportionate access to power, wealth and influence that makes corruption possible in the first place. The Goldenberg scandal and the case of the Anti-Corruption Authority discussed below demonstrate the inadequacy of using procedural safeguards to deal with a case of grand corruption and looting.

Rule of law reforms that target official conduct with a view to ensuring its procedural legitimacy, especially where grand corruption and looting are involved simultaneously, implicate questions of substantive justice. Substantive justice in turn implicates deep issues of the distribution of access to political power, wealth and influence. This presumes the dismantling of structures of oppression and exploitation, and the decentralization of power at all levels: international, national, regional and personal. Dealing with corruption requires a framework that does not separate the state and the society from the economy. Procedural fairness focuses too much on the state and society apart from the economy and the attendant questions of substantive justice. In short, reforms addressed at corruption need to simultaneously examine issues of both procedural and substantive fairness. The examples I draw from Kenya demonstrate this concern.

II. BACKGROUND

On 30th June 1997, the International Monetary Fund (IMF) suspended its enhanced structural adjustment facility (ESAF) program to Kenya. The IMF cited poor governance and corruption in the public sector as one of the reasons for suspending its lending program. It required the Kenyan government to speed up the prosecution of government officials involved in a major corruption scandal in the country, and to set up an independent anti-corruption agency among other reforms before its lending program could be resumed. Western donor focus on corruption in Kenya in the

1990s began among the Nordic countries. Finland and Norway initiated a campaign in the Nordic countries to stop project funding in Kenya because of official corruption. In early 1990, Sweden froze its aid to Kenya after a report revealed massive financial mismanagement and underhanded dealings by Kenyan government officials in a water training institute funded by the Swedish International Development Agency.[3] In 1991, the Danish government protested the failure of the government to address rampant corruption and reduced its assistance to Kenya, with the condition that its previous levels of assistance would resume only after the government initiated prosecutions of those involved in the same multi-million dollar corruption scandal that led to the suspension of IMF assistance in July 1997.[4] In 1993, the Danish government almost withdrew its seventeen year development assistance program following the misappropriation of about $340 million U.S. dollars.[5]

The donor campaign to address corruption was preceded by an emerging practice to condition development assistance and lending programs to the adoption of structural adjustment programs, reforms to curb corruption, improvement in respect for human rights, and the adoption of multiparty politics. In 1991, Kenya adopted a multiparty political system, partly as a result of donor conditionality, but largely as a result of pressure from within Kenya for the democratization of governance.[6]

The reforms prescribed by the International Monetary Fund and the World Bank to curb corruption include reducing incentives for corrupt behavior, by introducing competition in the delivery of public services (or de-monopolization of service provisions by the state); deregulation, privatization and liberalization of the economy with a view to facilitating the competitive allocation of resources in the market place as opposed to relying on "open-ended" exercise of official discretion; simplification and clarification of rules to guide decision making; adoption of precise, as

3. *See Denmark Freezes Aid to Kenya,* DAILY NATION, Sept. 14, 1991, at 1.

4. *See* THE ANATOMY OF CORRUPTION IN KENYA 62 (Kivutha Kibwana et al. eds., 1996).

5. *See id.* at 41.

6. In October 1990, for example, the United States Congress introduced conditionality clauses to aid to Kenya, referred to as the "Economic Support Fund," and the "Foreign Military Financing Program". These clauses provided that new financing of assistance to Kenya could only be released to Kenya if the U.S. President certified and reported to Congress that the government of Kenya was taking steps to: "charge and try or release prisoners, including any persons detained for political reasons; cease any physical abuse or mistreatment of prisoners; restore independence of the judiciary and freedom of the press." THE NAIROBI LAW MONTHLY, No. 27, Nov. 1990, at 7. In November 1991, the United States joined other bilateral and multilateral donors to Kenya (the Paris Club) in suspending assistance to Kenya until the country adopted economic, political and social reforms required by the donors. Among them, political pluralism and transparency and accountability in decision making with a view to curbing the misuse of public funds.

opposed to open-ended, rules which are presumed to facilitate the open-ended discretion that is associated with rent seeking;[7] replacing administrative mechanisms with market mechanisms to reduce opportunities for abuse of public office for private gain and putting in place effective mechanisms to hold public officials accountable; public sector reforms to professionalize accounting, auditing and establishing other mechanisms of transparency and accountability; and respect for civil and political rights, which would result in opening up the political process to public participation and the public sector to public scrutiny and criticism.[8] The assumption is that these rules, market mechanisms and institutions would guarantee a basis for arms-length or impersonal principles in the conduct of public affairs. Such principles would also check the potential abuse of office, especially the use of public office to undermine private ownership of property and, as such, the neutral allocative powers of the market. These reforms would also introduce market-based solutions that are superior to personal bonds or relationships that command individual loyalty, such as those of family, clan, kinship, or ethnicity at the expense of the common good. To maintain this distance or arms-length principle, the World Bank has also proposed that one way of reducing corruption in a country would be to prefer foreign firms with no close ties in the country over local companies when awarding contracts for services.[9]

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7. Lon Fuller identifies eight procedural requirements for a just rule of law: the existence of general rules; promulgation; prospectively; clarity; consistency; the defense of impossibility; constancy through time; and congruence between official action and general rules. *See* LON FULLER, THE MORALITY OF LAW 33-91 (1964). The absence of any of these elements results in something less than a legal system. *See id.* There is a remarkable correspondence between Fuller's assertion that unclear laws are associated with evil, on the one hand, and the Bretton Woods prescription that clear laws and regulations that are fairly and easily enforced by an independent judiciary and anti-corruption units with the investigative and prosecutorial power are an antidote to corruption, on the other. *See* WORLD BANK, HELPING COUNTRIES COMBAT CORRUPTION: THE ROLE OF THE WORLD BANK 43-44 (1998). This advice was repeated by Robert Rubin, U.S. Secretary of the Treasury, on a visit in Kenya. *See* Mbatau Wa Ngai, *Corruption and Sacred Cows*, DAILY NATION (July 19, 1998) <http://www.nationaudio.com/News/DailyNation/1998/190798/Comment/Comment1.html>. *See also* SHIVJI, *infra* note 32 and accompanying text.

8. *See* WORLD BANK, GOVERNANCE AND DEVELOPMENT 16-18 (1992); WORLD BANK, GOVERNANCE: THE WORLD BANK'S EXPERIENCE 12-22 (1994). According to the World Bank, corruption is on the increase in sub-Saharan Africa because of the concentration of power and resources in government "without countervailing measures to ensure public accountability or political consensus . . . [T]he proliferation of administrative regulations . . . has encouraged corruption and set the individual against the system." WORLD BANK, SUB-SAHARAN AFRICA: FROM CRISIS TO SUSTAINABLE GROWTH 22 (1989). For a trenchant critique of corruption in sub-Saharan African states, see GEORGE B.N. AYITTEY, AFRICA IN CHAOS (1998). Another similar critique is found in JEAN-FRANÇOIS BAYART, THE STATE IN AFRICA: THE POLITICS OF THE BELLY (1993). For a critical perspective of these trenchant critiques, see Colin Leys, *Confronting the African Tragedy*, NEW LEFT REV., Mar.-Apr. 1994, at 33.

9. *See* World Bank, *Reducing Corruption*, POL'Y & RES. BULL., Sept. 1997, at 3.

Kenya thus became one of the first countries where Western bilateral and multilateral donors tried out some of these anti-corruption strategies. Several reasons at the time made Kenya a particularly attractive choice for donors to try out policies conditioning their assistance to the adoption of anti-corruption reforms and improved respect for human rights. Many donors saw in Kenya a profile of a model country with a high likelihood for the success of these reforms. Since independence in 1963, Kenya has been a relatively peaceful country in a continent engulfed in civil war, military rule, drought, economic collapse and political authoritarianism. In fact, when the policy of tying U.S. development assistance to human rights was initially debated in the 1990s, economically liberal but politically conservative lobby groups such as the Heritage Foundation opposed conditioning U.S. assistance to human rights observance. They did so because Kenya had not only remained a faithful Western ally during the Cold War, but had also retained a relatively liberal political system and a free market economy.[10] However, although a darling of the West during the Cold War, by the mid-1990s bilateral donors and the Bretton Woods institutions had already targeted Kenya with conditionality clauses requiring the adoption of policies to address corruption, improve respect for civil and political rights and the adoption of structural adjustment economic reforms.[11]

In December 1992, Kenya held national assembly and presidential multi-party elections following the formal repeal of one party rule in the Kenyan parliament in November 1991. Although the election results were contested by the opposition parties, the result was to give a new lease of life to the government of President Daniel Arap Moi and the Kenya African National Union (KANU), the ruling party since Kenya's independence in 1963. The KANU government's thirty year legacy of post colonial rule, and a split within opposition politics, were not insignificant factors in President Moi's victory in the presidential election as well. President Moi's government was reelected once again in December 1997 in another multiparty election.

Today, multilateral and bilateral donors express disappointment with Kenya's inability to serve as a good test case for linking aid to good

10. *See Aid is Not to be a Weapon*, WKLY. REV., May 25, 1990, at 20. As Herman Cohen argued in August 1990, although the United States was considering tying its development assistance to human rights, this would only apply in "extreme" cases such as Somalia and Sudan. *See* Emman Omari, *Cohen Praises Saitoti Review Committee*, DAILY NATION, Aug. 4, 1990, at 1.

11. *See* Helen Watson Winternitz, *The Darling of Africa Goes Courting Disaster - Behind Kenya's Beauty Lurks the Ugly Face of Corruption*, THE AGE, Dec. 29, 1997; Michael Wrong, *Kenya's Economy, Hit By Sleaze, Debt and El Nino is Caught in a Destructive Spiral*, FIN. TIMES, Apr. 22, 1998, at 5.

governance reforms. Notwithstanding donor conditionality, corruption continues to be one of the most severe problems afflicting the country.[12]

Corruption in Kenya can be divided into three major categories based on the scale of illicit monetary value involved: petty corruption, grand corruption and looting. Petty corruption involves payment of small amounts of money and gifts to junior or mid-level public officials in return for services that do not require payment, or to avoid prosecution of petty crime. The Kenyan police force has notoriety for demands for bribes. Grand corruption involves payments of large amounts of money to senior government officials as a precondition to performing a public duty, such as awarding a multi-million dollar contract or for a favorable review of tenders. It could also involve receiving a bribe in return for exempting goods from payment of tax. Grand corruption may also involve fixed sums of money or a certain quantum of money payable without negotiation as part of the total cost or liability for a service, good or other charge. Although grand corruption takes many forms, there are two very common ones in Kenya: first, through closed tendering, which shields the award of enormous amounts of taxpayer money to select companies that may not necessarily offer the lowest bid; and second, through the diversion of state corporation surplus funds to groups of selected financial institutions without parliamentary and other mandatory statutory approvals. Such arrangements may be endorsed by senior government officials and in some cases have become an accepted practice, sometimes unacknowledged but widely known among those giving and receiving such payments. In such cases, public officials then presumably share the illicit payments or give them up to their superiors.[13] Looting involves payments made by the government to individuals or corporations of monies for goods and services that are never delivered. This type of corruption occurs as a result of the heavy concentration of political power in the Presidency and those around the Presidency whose approval usually overrides and, as such, immunizes looting from accountability mechanisms.[14]

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12. Some critics have, however, argued that the donors, and the IMF in particular, have treated Kenya very stringently relative to other countries, such as Zimbabwe, that have the same type of problems. These observers note that Kenya is under particular pressure to cut government spending and produce a balanced budget more severely than in other countries. *See* Paul Redfern, *IMF Team May Re-Institute SAPS*, DAILY NATION (Sept. 21, 1998) <http://www.nationaudio.com/News/DailyNation/1998/220998/News/News18.html>.

13. *See* CENTER FOR GOVERNANCE AND DEVELOPMENT, (CGD) CGD BILLS DIGEST, Sept., 1996, at 1-6. The World Bank defines corruption as "the abuse of public office for private gain." WORLD BANK, *supra* note 7, at 8.

14. *See* INSTITUTE FOR ECONOMIC AFFAIRS, (NAIROBI), OUR PROBLEMS, OUR SOLUTIONS: AN ECONOMIC AND PUBLIC POLICY AGENDA FOR KENYA 47-48 (1998).

III. THE RULE OF LAW: ITS PROMISES AND LIMITS AS AN ANTIDOTE TO CORRUPTION

A central tenet of the rule of law is safeguarding individual liberty and property rights from the arbitrary power of the state. To be seen as an effective bulwark against arbitrary interference with personal or property rights, the administration of the law must demonstrate independence from manipulation in the interests of a few, as in cases of corruption. In fact, for law to be regarded as just and fair, it must be seen to apply fairly and equally to everyone. There is a presumption that everyone is equal before the law.[15]

The rule of law on this view is legitimate and ethical, where the impersonal rules, laws and principles are internalized not only in the conduct of public office, but also in society at large. And only after acquiring such widespread legitimacy are laws, rules and principles more than self-serving tools of the wealthy and politically powerful in a society. Only where the rule of law has acquired such legitimacy historically were the wealthy and politically powerful then able to use it to impose their view of the good life on the wider society.[16] In this sense, the rule of law is not the handmaiden of the interests of the wealthy and politically powerful in an instrumental sense, but rather an ideology whose hegemony over the poor and lower classes is attained through its ability to stand above manipulation by the wealthy and powerful.[17] The poor and politically

15. These basic features of the rule of law differ in the British, United States and German traditions. A.V. Dicey, for example, based his conception on the rule of law and championed the role of courts, as opposed to the determination of controversies by deductive reasoning from fixed principles. He defines the rule of law as comprised of three elements: laws are established in advance so that violations of law are clearly discernable and governmental arbitrariness is prevented; all persons are equal before the law; and no special significance is attached to constitutional law. *See* A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 187-96 (9th ed. 1952). Dicey argues that this concept of the rule of law comprises the fundamental principles and supremacy of English constitutional law. German and United States scholars argue that the third element of Dicey's concept of the rule of law does not serve the same purpose since, unlike in England, rights are not thought of as being derived from natural law as opposed to a written constitution. In the United States, the concept of the rule of law is defined as government under law or government by laws. For an overview, see generally David S. Caudill, *The Rechtsstaat: Magic Wall or Material Necessity*, 4 HOUS. J. INT'L L. 169 (1982).

16. In addition to presenting itself as a neutral ideology that stands above parochial interests and as a neutral arbiter of disputes, the rule of law is also underpinned by its ability to accommodate demands for minimal subsistence levels of existence for all in society. For a refutation of this view of the neutrality of the rule of law, see NICOS POULANTZAS, POLITICAL POWER AND SOCIAL CLASSES (1973). For a defense of the rule of law as an antidote to communism, see Matin Krygier, *Marxism and the Rule of Law: Reflections After the Collapse of Marxism*, 15 L. & SOC. INQUIRY 633 (1990).

17. Rather than adopt an instrumental view of law (where law is seen as an instrument of the ruling classes), Antonio Gramsci developed the concept of hegemony to explain how ruling classes obtained the 'active consent' of lower classes through non-coercive means. In Gramsci's formulation of hegemony, the state is no longer viewed as an organ of class coercion, but rather as a cohesive factor with economic, ideological and political functions. One of these functions is the exercise of

disorganized classes thus concede to the obligatory nature of the rule of law since it has met this crucial test of its effectiveness, standing above gross manipulation. On this view, the rule of law is not imposed upon them through fraud or coercion, nor do the wealthy and powerful only use it to further their own interests. The legitimacy of the rule of law is reinforced by its portrayal as an uncontroversial, neutral and as such a fair framework for the resolution of disputes in society.[18] This view of the rule of law corresponds to the liberal view that society is held together by rules. The legitimacy of these rules then rests on the societal knowledge of the laws, since in liberal theory they provide a neutral, as opposed to an arbitrary, basis for preferring one person's advantage over another.[19]

In a very real sense therefore, the rule of law presents the hope of containing abuse of power where the wealthy and rich abstain from using the law in their interests at the expense of everyone else, and where those in power can be held accountable for such manipulations through established mechanisms of redress. Yet, the rule of law should not be looked upon too reverentially and apologetically.[20] Here are a few reasons why.

A. *Alienation From Structural and Institutional Relations* [21]

The rule of law is predicated on the view that justice is constituted by formal equality. It presumes that all persons are notionally equal before

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moral and intellectual leadership aiming at winning the 'active consent' of the dominated. It is through society-wide popularization of beliefs and attitudes, such as that about the impartiality of law, that reinforces and legitimates the status quo as natural and inevitable. *See* ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS (Quintin Hoare & Geoffrey Nowell Smith trans., 1971).

18. *See* Robert W. Gordon, *New Developments in Legal Theory*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 411, 417-29 (David Kairys ed., 1982).

19. *See* ROBERTO UNGER, KNOWLEDGE AND POLITICS 66 (1975). Unger observes that although liberal theory presupposes there would be a neutral basis for determining one person's advantage over another (in the interest of avoiding antagonism and in the interest of collaboration), liberalism still posits the subjectivity of values that make the formulation of such a standard possible. *See id.* at 152.

20. *See* Horwitz, *supra* note 2, at 565-66; Otto Kirchheimer, *The Reichststaat as Magic Wall*, *in* THE CRITICAL SPIRIT: ESSAYS IN HONOR OF HERBERT MARCUSE 287 (Kurt Wolf & Barrington Moore eds., 1967).

21. This observation applies to liberal legalism in so far as liberal legalism adopts formalistic analysis that alienate law from its social context. It applies to critical legal theory in so far as it overstates the role of mystification within liberal legalism while simultaneously ignoring history and context. For example, Kimberlé Williams Crenshaw argues that the critique of the mystification of liberal legalism by critical legal theorists fails to present a realistic picture of racial domination in the United States since it fail to take into account history and context seriously. She thus emphasizes that critical race theorists should guard against overstating the role of legal consciousness over that of legal coercion and racist oppression. My critique of the rule of law reforms of the donors in dealing with corruption are indebted to these insights. *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in AntiDiscrimination Law*, 101 HARV. L. REV. 1331, 1356-57 (1988).

the law.[22] Formal equality is a central tenet of liberal legalism in general. In real life, however, inequalities of wealth and power are the norm rather than the exception. If equality then is merely formal, the rule of law places inequalities in the real world beyond the scope of law's vision.[23] The rule of law, therefore, is concerned with discrete instances of abuse of public office, not with democratizing the structural and institutional relations upon which these abuses are dependent. It is also concerned with the accompanying disproportionate accumulation of wealth and power in the hands of a few. The rule of law abstracts issues of justice from the structural and institutional relations upon which conceptions of justice are ultimately predicated. Discussions of abuse of power need to focus not only on the formal principles of distributing power in society, but also on the nature and origins of these power relations.[24] In addition, by proceeding from abstract principles, the rule of law derives its principles of justice independent of historical conditions. A substantive vision of the rule of law would therefore be committed to a vision of justice that is based on examining the structural, historical and institutional relations within which the distribution of society's benefits and burdens is dependent, rather than from formal principles alone.[25] While principles such as formal equality are important insofar as they lay a principled basis for restraining the arbitrary exercise and abuse of power, they do not tell us about equality of relations of power and their historical specificity.

22. John Rawls similarly argues in favor of formal equality in his understanding of the rule of law and justice. Rawls proposes two basic principles for "assigning basic rights and duties and for determining what they take to be the proper distribution of the benefits and burdens of social cooperation:" first, "*equality in the assignment of basic rights and duties*," and second, "that social and economic inequalities . . . are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society." JOHN RAWLS, A THEORY OF JUSTICE 4, 14-15 (1971).

23. John Rawls' A THEORY OF JUSTICE similarly has the effect of endorsing preexisting distribution of wealth and property. He argues that individuals will only assent to a society's distribution of wealth and property where basic fair treatment is guaranteed for each individual. For Rawls, if people were ignorant of those things, it prejudiced them directly or indirectly in their own favor. *See id.* It is this position that Rawls calls the original position. Individuals concede to this original position in a veil of ignorance based on a social contract necessary because its principles of justice as the basis for the allocation of benefits and burdens in society is the best alternative in a world that would otherwise be worse off with any alternative principles. Rawls theory of justice is neutral on the fundamental arrangements of society. *See id.* at 3-21.

24. Rawls' conception of the rule of law is based upon procedural justice, or the rational exercise of authority. In his view, the rule of law is constituted by the "regular and impartial in this sense fair, administration of law." *Id.* at 235. For Rawls, procedural and substantive justice are all wrapped up in one because, when they are just, public rules become the "basis for legitimate expectations." *Id.* Rawls argues that insofar as the rule of law "guarantee only the impartial and regular administration of rules . . . they are incompatible with injustice." *Id.* at 236.

25. Rawls bases his conception of justice on "the way in which the major institutions distribute fundamental rights and duties." *Id.* at 7. Utilitarians, by contrast, base their conception of justice on the proper distribution (e.g. the greatest good for the greatest number) of non-material goods.

Power is easily disguised in formal or procedural conceptions of law. Distributional justice is best understood within the structural and institutional relations within which distribution occurs.[26] Laws that are facially neutral and universal could very well have grossly unequal consequences or disparate impacts on minorities or less privileged groups in society. This impact may very well occur, even if it was unintended, since the conception of justice under the rule of law is independent of the structural, institutional and historical forces in society. This implies that to avoid such unequal outcomes, facially neutral laws in addition must acknowledge the differential access to power and wealth in society, as well as the underlying institutional, historical and structural circumstances.[27]

B. Alienation From Substantive Normative Principles/ Substantive Justice

Liberals and conservatives define the rule of law primarily in terms of procedural fairness. This understanding emphasizes that the significance of the rule of law lies in providing ruling and dominated classes an opportunity to check the abuse of power. However, this view of the rule of law is inconsistent with investing it with a substantive vision.[28] Purely procedural or formal beginnings for the rule of law cannot form a sufficient basis of substantive normative principles.[29] In fact, at the height of the Nazi state's effectiveness,[30] Nazi law was found illegitimate not for

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26. Karl Marx similarly criticized classical economists for focusing their theoretical inquiries towards patterns of distribution as opposed to their foundation in relations and patterns of distribution. *See* 3 KARL MARX, CAPITAL 877-84 (1967); KARL MARX, INTRODUCTION TO THE CRITIQUE OF POLITICAL ECONOMY 200-04 (1970).

27. *See* Richard Abel, *Capitalism and the Rule of Law: Precondition or Contradiction?,* 15 LAW & SOC. INQUIRY 685, 694-95 (1990). By contrast, Lon Fuller argues that there is a deep affinity between procedural and substantive justice. *See* FULLER, *supra* note 7. In his view, governmental respect for the rule of law is consistent with the "substantive or external morality of the law." Lon Fuller, *A Reply to Professors Cohen and Dworkin*, 10 VILL. L. REV. 655, 661-65 (1965). For Professor Fuller, although procedural regularity may be ethically neutral towards substantive ends, it is a prerequisite for a 'meaningful' appraisal of the substantive justice of law. FULLER, *supra* note 7, at 157.

28. *See* Horwitz, *supra* note 2, at 566.

29. *See* Iris M. Young, *Toward A Critical Theory of Justice*, 7 SOC. THEORY & PRAC. 295 (1981). Similarly, H.L.A. Hart acknowledges that a legal system that lacks a notion of substantive justice is "unfortunately compatible with very great inequity." H.L.A. HART, THE CONCEPT OF LAW 202 (1961).

30. Wolfgang Friedman argues that the rule of law is applicable to any legal system, "regardless of ideology, whether totalitarian or democratic." WOLFGANG FRIEDMAN, LEGAL THEORY 18 (1967). Members of the Frankfurt School also made this argument. *See, e.g.*, Herz & Hula, *Otto Kirchheimer: An Introduction to His Life and Work*, *in* POLITICS, LAW AND SOCIAL CHANGE: SELECTED ESSAYS OF OTTO KIRCHHEIMER, at ix-xxxviii (Frederic S. Burin & Kurt L. Shell eds., 1969); Otto Kirchheimer,

its content, but rather for failure to follow the procedural norms of notice and individual adjudication.[31] Similarly, the procedural or formal requirements of the rule of law were met in Apartheid South Africa as they were in authoritarian one-party states in Africa.[32] The rule of law cannot be evaluated in isolation of its basic constituent values. Only where the rule of law embodies values to guide society in its decision-making is it substantive or just.[33] The formalism of the rule of law gives up adopting a "concrete plan of social organization" by adopting "procedures for making laws and settling disputes" instead.[34]

The Legal Order of National Socialism, in POLITICS, LAW AND SOCIAL CHANGE SELECTED ESSAYS OF OTTO KIRCHHEIMER 88-109 (Frederic S. Burin and Kurt L. Shell eds., 1969).

31. *See* FULLER, *supra* note 7. According to Fuller, the central goal of law was to subject human conduct to the governance of rules. Since this is the central goal of law, Fuller's notion of law seems to have no regard to the content of the law, or to other purposes the law serves such as administering justice or facilitating commerce. *See id.* at 164. Fuller develops eight elements that constitute what he terms the inner morality of law. For Fuller, the elements that constitute the inner morality of the law are the means through which a modern legal system becomes coherent and clear. *See id.* at 104. Hence, the inner morality is what makes law possible. The eight elements that constitute this morality are: that rules must be general; made known or available to the affected party (promulgation); prospective not retroactive; clear and understandable; free from contradictions; and they should not require what is impossible, be frequently changed; and there should be a congruence between the law and official action. *See id.* at 46-91. In Fuller's view, these principles are *internal* since they are not derived from principles of justice or other "external" moral principles relating to the law's substantive aims or content, but rather are reached by considering what is necessary for the purpose of guiding human conduct by rules. These principles are therefore independent of the law's substantive aims. The upshot of Fuller's argument then seems to be that clear rules are compatible with good aims, or that there is a necessary compatibility between government according to the principles of legality and good aims. In other words, unclear rules on Fuller's understanding are compatible with wicked ends. For a critique of Fuller, see H.L.A. Hart, *Lon Fuller, The Morality of Law*, 78 HARV. L. REV. 1281, 1281-96 (1965) (book review) (arguing that Fuller's concept of the internal morality of law confuses conceptions of morality and efficacy, since the meaning he attributes to morality are confined to means rather than ends. The assumption underlying Fuller's emphasis on the importance of the internal morality of law seems to be that where laws have been promulgated following the elements of the internal morality of the law, inequitous substantive ends are unlikely to be pursued).

32. Issa Shivji criticizes the International Commission of Jurists during the cold war for adopting a rather biased view of favor of sub-Saharan African countries allied to the West to the effect that one party rule was not only democratic but consistent with having the rule of law. *See* ISSA SHIVJI, THE CONCEPT OF HUMAN RIGHTS IN AFRICA (1991).

33. Roberto Unger argues that liberalism offers no coherent understanding of the relationship between rules and values in society, without which an adequate view of society is possible. *See* UNGER, *supra* note 19, at 114.

34. *See* UNGER, *supra* note 19, at 156. Fuller identifies his conception of the inner morality of law as a procedural version of natural law. *Id.* Its superiority over substantive notions of law arise, in Fuller's view, because a preoccupation with whether proper ends can be achieved through legal rules (as among positivists) assumes that the inner morality of law is obvious. In other words, Fuller argues that positivists such as H.L.A. Hart ignored the fact that a minimum adherence to legal morality is essential for the practical efficacy of law. In Fuller's view, the practical efficacy of law seems to be solely dependent on the consistency of the law with his concept of internal morality. In other words, it seems that a law fulfils these preconditions notwithstanding that its content could be considered unjust or even evil. *See* HART, *supra* note 29, at 202. It should be noted that part of Fuller's project in his book on the morality of law was to suggest that positivists understated or misunderstood the relationship between law and morals/value by emphasizing what the law is (for example by upholding

By refraining from making any substantive commitments, the rule of law also separates means from ends. Indeed, struggles to end grand corruption and looting in a developing country have both procedural and substantive implications. Struggles against grand corruption and looting in an economy involve much more than the regular and impartial administration of public rules.[35] Although these struggles involve procedural implications, since they constitute abuse of public office, they also involve substantive implications since grand corruption and looting are reflections of the distribution of political and economic power in society. In other words, the rule of law need not separate its concern for official commitment to the procedural integrity of the legal process from the institutional and structural constraints within which corruption takes place.[36]

C. *Law/Politics Distinction*

Liberal and conservative notions of the rule of law proceed from the assumption that law and politics are separate. Law is not political, but determinate and neutral, and is, as such, an antidote to the arbitrary and open ended nature of politics. This separation of law from politics presumes social interests precede or are prior to law, as if law does not play any constitutive role in these interests.[37] The very exercise of judicial discretion or administrative application of a rule or law involves a constitution of the very social interests that law is presumably separated from. Law is also ideological insofar as it constructs and is constructed by these social interests and relations. As such, law is not an apolitical mediation of interests in society. The objective of the rule of law in liberal legalism is mainly one of process. Unsurprisingly, the rule of law may be,

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the view that the law is what the law making authority determines it to be), as opposed to what it ought to be. However, that point is beyond the scope of my discussion here, which focuses on the procedural nature of various versions of the rule of law – positivist, natural and liberal that are embraced in anti-corruption rhetoric.

35. This is the definition of the rule of law adopted by Rawls. *See* RAWLS, *supra* note 22, at 235. However, Rawls observes that adherence to this procedural definition of the rule of law determines the integrity of the judicial process, which in turn promotes the stability of social cooperation. *See id.* at 239-40.

36. Horwitz notes that "by promoting procedural justice" the rule of law "enable the shrewd, the calculating, and the wealthy to manipulate its form to their advantage." Horwitz argues that it is the role of critical legal thought to "unmask the role of law in buttressing class domination, to unmask its pretensions to fairness, whenever, as if often or even usually the case, law serves to perpetuate injustice, and above all to combat the illusion that legal solutions alone can be found to the social and political problems of class society." Horwitz, *supra* note 2, at 566.

37. Friedrich Hayek, for example, argues that "if the actions of the state are to be predictable, *they must be determined by rules fixed independently of the concrete circumstances which can be neither foreseen nor taken into account beforehand . . . .*" FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 75-76 (1944) (emphasis added).

and is in fact, regarded as impartial and therefore legitimate in societies where there is unequal distribution of wealth and power. By providing a recourse to the fair resolution of disputes, the rule of law may be regarded as impartial where there are no systemic instances of gross manipulation in favor of the ruling classes. The rule of law constitutes inequality through its preference for safeguarding procedural regularity at the expense of a bolder commitment to shared social values or by falling short of embodying a result oriented interpretation of the rule of law. In addition, the focus on procedural regularity as a test of legitimacy where the state is impartial potentially excludes alternative institutions premised on ideas of solidarity.[38] In essence, this view of the rule of law centered on the idea of a neutral state is just one of a number of alternative choices among several alternative visions of the rule of law. The rule of law does not have a singular or necessary organizing principle.[39] In short, the very presence of competing conceptions of the rule of law demonstrates that a preference of one or the other meaning reflects its ideological nature. This possibility of investing legal forms with alternative meanings, and as such different outcomes, challenges the liberal notion of law as an apolitical and neutral mechanism for the mediation of social conflict.[40]

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38. *See* Mark Tushnet, *Truth, Justice and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307 (1979).

39. Some authors propose that it is easier to gain public legitimacy for procedural as opposed to substantive rules of law. Social agreement can only be attained on clear procedures such as the procedural aspects of the rule of law. J.R. Lucas, for example, argues that matters of substantive justice, unlike procedural justice, cannot form an antecedent agreement or formal law that would cover all cases without ambiguity. *See* J.R. LUCAS, THE PRINCIPLES OF POLITICS 106 (1966).

40. Duncan Kennedy notes that the institutional or procedural definition of the rule of law (which he defines as the presence of legal restraints on what private parties can do to each other; what the executive officers can do to private parties; independence of judicial enforcement of these restraints from the executive, the legislature and political parties; and judicial fidelity to relevant legal materials in determining disputes) is a "good thing, by comparison with the arrangement that has prevailed in modern capitalist, fascist, or communist regimes without meaningful separation of governmental powers, or without meaningful separation between governmental and political party power, or without an effective norm of interpretive fidelity in judging." DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATIONS 13-14 (1977). However, Kennedy makes significant additional reservations regarding the value of the rule of law to society. In his view, there are two reasons why the rule of law is "not an absolute value." First, it is an instrumental thing and as such it does not imply a foundational notion of some kind. Its value depends on a context of other modern Western Liberal institutions, so it doesn't make sense to prescribe it for another kind of a society without knowing a lot about it. It sometimes has to be compromised with ideas like emergency, national security, or just "substantial justice." Second, the institution has had and still has, not as a matter of its internal logic, but as a matter of its contingent evolution in Western society and culture, a serious downside. "In all the Western systems, the discourse that judges, legal authorities, and political theorists use to legitimate the application of state power denies (suppresses mystifies, distorts, conceals, evades) two key phenomena: (a) the degree to which settled rules (whether contained in a code or in common law) structure public and private life so as to empower groups at the expense of others, and in general function to reproduce the system of hierarchy that characterize the society in question; (b) the degree to which the systems of legal rules contains gaps, conflicts, and ambiguities that get resolved by judges pursuing conscious, half-conscious, or unconscious ideological projects with respect to these

D. Atomization of Human Relations and Professionalization of the Role of Law

Thinking of the rule of law as an antidote to corruption or injustice could also be faulted for ratifying and legitimizing "an adversarial, competitive and atomistic conception of human relations."[41] A liberal view of the rule of law is based on individualism rather than a set of shared values. Yet, a substantive understanding of the rule of law would preferably proceed from shared values.[42] In several African societies where bonds of social obligation are strong and culture and tradition continue to provide sources of norms that are solidaristic and communal, the rule of law is only one of a range of alternative sources of norms. In Kenya, the legacies of colonialism and post colonialism give credence to the use of law instrumentally to entrench relations of domination and subordination. Here as in other societies similarly situated, law faces a critical test of legitimacy: it must not only be seen as fair, but it must also be experienced as a relevant means of advancing the interests of these societies. For this reason the co-existence of community-based models of informal justice with the formal mechanisms of the rule of law would be considered an important step forward in empowering local movements to legitimately challenge abuse of public office. Informal mechanisms of informal justice would also tip the balance slightly away from the professionalized legal process where the technicalities of procedure and abstract analytical modes alienates and disempowers those who cannot participate within it effectively.

E. The Small Effective State and the Demise of the Welfare State Under Market Reform

The rule of law in the structural adjustment programs is associated with a small effective state. The idea of a small effective state embodied in structural adjustment programs is a stigmatization of the welfare state and economic regulation to protect domestic industries from international competition as adopted by modernizing nationalists in post-colonial Africa. The instrumental use of a positivist conception of the rule of law

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issues of hierarchy." *Id.* at 14. Kennedy, however, cautions that these "alleged defects of the rule of law as practiced in the West are not . . . inherent in the proceduralist/institutitional definition" of the rule of law. *Id.*

41. Horwitz, *supra* note 2, at 566.

42. It has been noted that shared values surpasses "the others in the richness of its implications." UNGER, *supra* note 19, at 100. In Unger's view, such shared values need not have the expectation of stability or any greater justification than the sum of the individual choices that they represent. *Id.* at 102.

is part of the agenda to reduce the role of the state in the economy within the non-negotiable market reform programs of structural adjustment. In these programs, state regulation of the economy is considered incompatible with the rule of law. The rise of this conception of the rule of law traces its intellectual inspiration in part to the resurgence of neo-classical economics as the basis of macro-economic policies in the 1970s. This resurgence was given impetus by the politically conservative era of Thatcherism and Reaganism in the 1980s. Thatcherism and Reaganism associated state regulation of the economy with the failure of (big government or the welfare state) state allocation of resources. This conservative ideology also became a primary rationale for explaining the failure of economic development in sub-Saharan Africa in the work of neo-classical economists and the Bretton Woods institutions.[43]

Structural adjustment programs therefore adopt the Hayekan proposition that the rule of law disintegrates as a result of massive governmental intervention. In Hayek's view, the rule of law is incompatible with the welfare state.[44] This proposition is based on the view that the government should remain distributively neutral since individuals best determine how to allocate resources by their decisions in the market place.[45] State planning or regulation of the economy, by contrast, restricts individual freedom by "altering the means which people may use in the pursuit of aims."[46] In this view, state planning also

43. The Bretton Woods good governance agenda is predicated on the Hayekian theorem that "by giving the government unlimited powers, the most arbitrary rule can be made legal; and in this way a democracy may set up the most complete despotism imaginable." HAYEK, *supra* note 37, at 82-83. Hayek argues that Hitler Germany was as despotic for this reason. *See id.* at 77-79.

44. Friedrich Hayek argues this proposition in his chapter titled, *Planning and the Rule of Law*. HAYEK, *supra* note 37, at 72-87. Hayek also argues that state planning is a form of economic control consistent with totalitarianism. *See id.* at 88-100. In a later book, Hayek argues that there is no reason why modern governments should not provide for the indigent, unfortunate and disabled and have concern for questions of health and education. The test for the provision of these services in Hayek's view seems to be that they are agreeable as long as they increase the general growth of wealth. *See* F.A. HAYEK, THE CONSTITUTION OF LIBERTY 257-58 (1960). This view, however, falls short of the ideas promoted by social democrats.

45. Hayek asserts that individuals should be allowed within defined limits to follow their own preferences rather than somebody else's. *See* HAYEK, *supra* note 37, at 48-50. Furthermore, where individuals "are allowed to use their knowledge for their purposes, restrained only by rules of just conduct of universal application, it is likely to produce for them the best conditions for achieving their aims; and... such a system is likely to be achieved and maintained only if all authority, including that of the majority of the people, is limited in the exercise of coercive power by general principles to which the community has committed itself." 1 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY, RULES AND ORDER at 55 (1973).

46. HAYEK, *supra* note 37, at 73. Hayek notes that although "every law restricts individual freedom to some extent by altering the means which people may use in the pursuit of their aims, under the Rule of Law the government is prevented from stultifying individual efforts by *ad hoc* actions." *Id.* Hayek therefore emphasizes the possibility of governmental interference with individual choices in the pursuit of their aims is the "evil" that the Rule of Law is designed to guarantee against. His

undermines the rule of law ideal of legal equality law, since planning inevitably involves *ad hoc* determinations that favor some over others.[47] To prevent these outcomes, the proper role of the small effective state should be to create and safeguard a "permanent framework of laws within which the productive activity is guided by individual decisions."[48] The rule of law is therefore defended through advocacy of a small state since it is presumed that the nature of the welfare state inevitably grants policy minded officialdom too much discretion to execute the promises of the policies of the welfare state. Such open-ended discretion undermines the certainty and predictability necessary for the efficacy of the rule of law since it gives officialdom too much discretion on the ends or purposes to which available resources should be put to.

For many sub-Saharan African governments the role of the state was associated with an alternative idea, that the rule of law was important for providing effective protection of functional freedoms in addition to safeguarding the procedural integrity of the legal process and the formal equality of individuals.[49] Dealing with the inequalities produced by colonial governance through programs such as Africanization required licensing and employment policies that favored indigenization of the public and private sectors. That implied a departure from the rule of law ideal of formal equality and a small state to the extent that it embodied a certain vision of the use to which resources would be used. For a number of post-colonial leaders functional freedom also meant giving citizens a minimum ability in terms of their social and economic ability to enable them to enjoy their civil and political rights.

Underlying the rule of law's conception of a re-distributively neutral state where individuals determine the ends to which to put available resources is a commitment to a formal or positivist conception of the role of law in society. According to this underlying idea, the role of law is procedural according to which the government's conduct is assessed

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conception of the rule of law seems to accommodate the fact that no law is distributively equal, although its overriding concern is to reduce the greater danger of open ended discretion in government officials who may use it to undermine individual ability to make choices about desirable ends.

47. For accounts theoretically grounding distributive justice in liberal democratic thought, see NORBERTO BOBBIO, THE FUTURE OF DEMOCRACY: A DEFENSE OF THE RULES OF THE GAME (Roger Griffin trans., 1987); NORBERTO BOBBIO, WHICH SOCIALISM? MARXISM, SOCIALISM AND DEMOCRACY (Roger Griffin trans., 1987). Joseph Raz argues that the rule of law is only one of the virtues of law and that "[s]acrificing too many social goals on the altar of the rule of law may make the law barren and empty." JOSEPH RAZ, THE AUTHORITY OF LAW 229 (1979).

48. HAYEK, *supra* note 37, at 73.

49. This conception of the rule of law is adopted by Otto Kirchheimer *in The Rechtsstaat as Magic Wall, in* THE CRITICAL SPIRIT: ESSAYS IN HONOR OF HERBERT MARCUSE 423 (Kurt Wolf & Barrington Moore eds., 1967). *See also* Harry W. Jones, *The Rule of Law and the Welfare State, in* ESSAYS ON JURISPRUDENCE FROM THE COLUMBIA LAW REVIEW 400-13 (1963).

according to deduction from predetermined rules or principles as opposed to predetermined ends. This conception of the rule of law contrasts with a policy oriented conception of the role of law according to which the effectiveness in achieving specific goals is more important than adherence to redistributively neutral procedural principles. A substantive meaning of the rule of law embraces the view that law could incorporate public policy goals in the interest of society, such as welfare objectives in public education, housing or health programs. This conception of the rule of law differs from that embraced within structural adjustment lending, which places primary emphasis on the incompatibility between formal equality and freedom from government intervention in the private sphere, especially in the market place, on the one hand, and governmental intervention in support of public welfare which necessitates intervention with both formal equality and within the private sphere or market place, on the other hand.

In Europe and the United States, Hayek's advocacy for a small state and his view of the incompatibility between the rule of law and the welfare state was challenged as a political interpretation that falsely presumed that socialism and democracy were incompatible. Hayek's critics argued that his view of the rule of law presented a rather false choice: that since the values of the rule of law would be undermined by a commitment to the welfare state, this may require sacrificing the goals associated with the welfare state.[50] Especially during the Cold War, the rule of law was argued by critics of this Hayekan proposition as actually existing in both socialist and capitalist democracies of the West. In the view of such critics, it was socialist dictatorships rather than socialist democracies that bore little likeness not only to the rule of law, but also to capitalist democracies.[51] After the end of the cold war, however, the criticism of socialist dictatorships seems to have been extended to socialist democracies and the authoritarian governance of modernizing nationalists in Asia and Africa as well. The end of history thesis of Western academics and institutions held that the end of the cold war signified that the World had come to the endpoint of ideological evolution as capitalist democracy "spread" throughout the world, confirming it as the "final form

50. Among those who found Hayek's thesis as presenting a false choice between the rule of law and the welfare state include: Hans Kelsen, *Foundations of Democracy*, 66 ETHICS 1, 75-86 (1955); W. FRIEDMANN, LAW AND SOCIAL CHANGE IN CONTEMPORARY BRITAIN 288-98 (1951); Roscoe Pound, *The Rule of Law and the Modern Social Welfare State*, 7 VAND. L. REV. 1 (1953). For Hayek's critique of social justice, see 1 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY, RULES AND ORDERS 35-54 (1974); 2 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY, THE MIRAGE OF SOCIAL JUSTICE 62-100 (1976).

51. *See* Harry W. Jones, *The Rule of Law and the Welfare State in* ESSAYS ON JURISPRUDENCE FROM THE COLUMBIA LAW REVIEW 404-06 (1963).

of human government."[52] On this view, all countries around the world were converging on a set of 'best available practices' which guaranteed the best guarantees to political and economic freedom.[53] Unsurprisingly, these practices variously referred to as the Washington Consensus, Structural Adjustment and so on, embody the Hayekan proposition of a small effective state. In sub-Saharan Africa, economic failure has been attributed to the role of the state in the economy. In effect, just as Hayek had proposed, the effect of state intervention in the economy was to undermine the possibility of economic growth.[54] The resurgence of neo-classical economics gave greater legitimacy to this assessment of African economies. Donor imposed economic reforms are based on the ostensible assumption that a small state will guarantee economic and political liberty and bring to an end the tragic era modernizing nationalism.

F. Market Failure and the New Development Economics

While the resurgence of neo-classical economics and conservative political thought insist that the state should stay out of the economy, a *new* school in development economics recommends that state involvement in the economy is necessary to make up for situations of market failure situations in developing economies. Although the new development economists differ from neo-classical arguments that frown upon any state involvement in the economy, they nevertheless emphasize that constraints such as the cost of information and transaction costs, externalities, monopolies and the nature of incomplete markets that characterize rural economies, imply a potential corrective role, as opposed to the economically inefficient role, for the government.[55] The new development economists are therefore careful to argue that their recommendations for corrective state involvement in the economy should not be read as an endorsement of the policies that have characterized post-colonial African

52. *See* Francis Fukuyama, *Are We at the End of History?*, FORTUNE, Jan. 15, 1990, at 75.

53. Roberto Unger restates the convergence thesis and critiques it for its necessitarian assumptions. *See* ROBERTO UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 8-10 (1996). Unger similarly observes that the convergence thesis is a "throw back to the characteristic conception of nineteenth century [American] legal science: that a free society has a definite, predetermined legal institutional form . . . a market economy . . . [In which] political interventions . . . deserve skeptical resistance because they are likely to be costly, self defeating and subversive of freedom." *Id.* at 24.

54. Some of the leading assessments of African economies on this view include: BELA BALASSA, STUDIES IN TRADE LIBERALIZATION (1967); PETER BAUER, A DISSENT ON DEVELOPMENT (1976); PETER BAUER, REALITY AND RHETORIC (1984); PETER BAUER, WEST AFRICAN TRADE (1963); DEPAAK LAL, THE POVERTY OF DEVELOPMENT ECONOMICS (1984); IAN LITTLE, ECONOMIC DEVELOPMENT (1982); ANNE O. KRUEGER, DEVELOPMENT WITH TRADE (1988).

55. *See* ROBERT BATES, MARKETS AND STATES IN TROPICAL AFRICA: THE POLITICAL BASIS OF AGRICULTURAL POLICIES (1981); ROBERT BATES, ESSAYS IN THE POLITICAL ECONOMY OF RURAL AFRICA (1983); Joseph Stiglitz, *The New Development Economics*, 14 WORLD DEV. 257-65 (1986).

economic governance. The new development economists emphasize that improper government intervention in the marketplace, for reasons other than those concerning market failure, has resulted in establishment of institutions such as marketing boards which produce low quality and high priced goods and services resulting in the misallocation of resources and in the creation of opportunities for corruption and rent seeking.

The distrust of government involvement in the economy in sub-Saharan African is pervasive. African governments have been portrayed as irremedially corrupt and market-distorting. However, the neo-classical skepticism of African governance is acute. It precludes any space for state intervention in the market place. This is a worry for the democrat who believes that restraints from interventions in the marketplace are an endorsement of the status quo.

G. Liberalization and Corruption

The IMF and World Bank rule of law programs are premised on the view that liberalization would not only deny officialdom discretion, but would result in the reliance on markets, as opposed to states, in the allocation of resources. In this view, free markets, unlike states, are neutral since they provide a framework within which people can freely choose between different substantive ends. This anti-corruption strategy in favor of liberalization of the economy tends to be overinclusive to the extent to which it views substantive ends, such as governmental regulation of the economy for welfare purposes as an aberration of the economic freedom promised by markets. In effect, this anti-corruption strategy represents markets as an antidote to the failed economic governance of the post-colonial state. By contrast, in the late 1960s and early 1970s, economists such as Nathaniel Leff argued that if delays arise from pre-existing regulations and rules, then corruption would serve an important purpose of circumventing them.[56] According to this view, corruption improves social welfare since it avoids cumbersome regulatory controls and also provides a rewards system for badly paid bureaucrats. Corruption was thus seen as necessary to break down the bureaucratic and legal restrictions by creating new rights that gave bureaucrats the power to enable new entrants into the market. Similarly, in the same period, political development scholars held the view that during periods of economic expansion in developing societies, an amount of corruption was desirable. This form of corruption was defined as 'functional corruption' since it was justified as a necessary departure from ethical ideals and

56. *See* Nathaniel H. Leff, *Economic Development Through Bureaucratic Corruption*, *in* AMERICAN BEHAVIORAL SCIENTIST 8-14 (1964).

barriers that stem from rules and rigid laws that hinder, as opposed to facilitate, economic growth.[57]

Today, the association of corruption with economic growth has been largely abandoned. The Darwinist assumptions underlying the thesis that corruption in developing countries would facilitate an escape from the bureaucratic red tape associated with regulatory controls in these countries economies has been abandoned. Instead, liberalization or rolling back the state is today regarded within the World Bank and IMF as a primary solution to corruption. Liberalization is associated with competitive allocation of goods and services and, as such, with the elimination of governmental controls on the economy that make corrupt behavior on the part of bureaucrats possible. However, in countries like China and Latin America, where authoritarian regimes maintained strict controls on corruption, liberalization has been shown to have been accompanied by an increase in corruption. This evidence questions the assumption underlying the liberalization agenda to the effect that liberalizing constraints on competition would reduce the scope of official discretion and therefore opportunities for corruption. Rather than reducing corruption, recent research evidence on liberalization in South Korea and China shows how liberalization redefined corrupt relationships away from those initiated and controlled by state actors to those initiated and controlled by private actors. In other words, liberalization in those contexts succeeded in privatizing, not reducing, corruption. Liberalization displaces corruption from the state to the market place. Consequently, in countries like China and South Korea, mere change in the procedural regime made things worse because they destroyed pre-existing constraints without providing an alternative set.[58] Even in sub-Saharan Africa, rather than reducing opportunities for corruption, economic liberalization has accelerated the process of economic and political decay of sub-Saharan African states by

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57. According to Samuel Huntington,

> corruption may be one way of surmounting traditional laws or bureaucratic regulations which hamper economic expansion. In the United States, during the 1870s and 1880s, corruption of state legislatures and city councils by railroad, utility, and industrial corporations undoubtedly speeded the growth of the American economy . . . A society which is relatively uncorrupt - a traditional society for instance where traditional norms are still powerful - may find a certain amount of corruption a welcome lubricant easing the path to modernization. A developed traditional society may be improved - or at least modernized-by a little corruption.

SAMUEL HUNTINGTON, POLITICAL ORDER IN CHANGING SOCIETIES 68-69 (1968). Another related view in this period that acquiesced to corruption held that corruption merely involved a transfer of resources without serious welfare consequences. Gunnar Mydral argued against this view since, if corruption was allowed to pass on the assumption it involved no serious welfare consequences, it would give government officials a chance in generating bureaucratic hurdles to demand bribes. *See* GUNNAR MYDRAL, ASIAN DRAMA: AN INQUIRY INTO THE POVERTY OF NATIONS II (1968).

58. *See* GORDON WHITE, RIDING THE TIGER: THE POLITICS OF ECONOMIC REFORM IN POST MAO CHINA (1993).

undermining their regulatory capacities and their political credibility.[59] In Kenya in particular, the liberalization of the economy through the removal of discretionary controls on grants on licences or leases, waiver of duties, levies, cancellation of import licences and the approval of orders of government supplies has not resulted in the reduction of corruption. On the contrary, evidence suggests that corruption in Kenya is on the increase.[60]

IV. THE GOLDENBERG SCANDAL - AN EXAMPLE OF ABUSE OF POWER AS THE 'LIVED EXPERIENCE' OF KENYANS[61]

> "if law is evidently partial and unjust, then it will mask nothing, legitimize nothing, contribute nothing to any class hegemony. The essential precondition for the effectiveness of law, in its function as ideology, is that it cannot seem to be so without upholding its own logic and criteria of equity; indeed, on occasion, by actually being just."[62]

> "While the powerful of any ideological stripe will prefer a system of free bargaining among procedural equals, this should never satisfy the weak."[63]

A. *Background*

The Goldenberg corruption scandal illustrates the level of grand corruption and looting of public resources in the highest offices of the Kenyan government. This scandal involved extensive abuse of an export compensation scheme by senior government officials, including former Vice President George Saitoti. The export compensation scheme is an

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59. *See* Barbara Harriss-White & Gordon White, *Corruption, Liberalization and Democracy: Editorial Introduction*, 27 IDS BULL. 1, 4 (1996).

60. *See Toothless? Mr. Harun Mwau's Anti-Corruption Authority Comes Under Fire*, WKLY. REV. (May 15, 1998) <http://www.africaonline.co.ke/weeklyreview/980515/cover1.html>; Sougata Mukherjee, *Open Markets Spawn Corruption*, BUS. NEWS OF DAYTON (Sept. 22, 1997) <http://www.amcity.com/dayton/stories/092297/story6.html>.

61. Critical race theorists in the United States guard against the skepticism of the indeterminacy critique of rights for people of color. In their view, the "lived experiences" of people of color and as such rights held a "transformative value in the context of racial subordination that transcended the narrower question of whether reliance on rights alone could bring about any determinate results." *Introduction, in* CRITICAL RACE THEORY: THE KEY WRITING THAT FORMED THE MOVEMENT xxiii (Kimberlé Crenshaw et al. eds., 1996).

62. E.P.THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 263 (1975).

63. David Kennedy, *How Nations Behave (2d ed.) by Louis Henkin*, 21 HARV. INT'L L.J. 301 (1980) (book review).

incentive scheme for local exporters. It is designed to encourage exports. It acts as an incentive to exporters by compensating them up to a certain percentage of their customs costs.[64]

In the Goldenberg scandal, Kenyan businessman Kamlesh Pattni chairman of a local company known as Goldenberg International, is alleged to have conspired with the Commissioner of Mines and Geology, and the Vice President and Minister of Finance at the time, Professor George Saitoti to receive illegal payments of export compensation of gold and diamonds, contrary to the provisions of the *Local Manufacturers (Export Compensation) Act.*[65] As part of the arrangement between Goldenberg International and the Minister of Finance, Goldenberg International was granted the sole licence to export gold and diamonds from Kenya contrary to the *Monopolies Act of the Laws of Kenya.* The grant of the license was conditional on Goldenberg International earning the Kenyan government 50 million U.S. dollars (the equivalent of Kshs 1.8 billion) annually. The Vice President and Minister of Finance approved export compensation in favor of Goldenberg International at the rate of 35%, 15% above the limit set under the *Local Manufacturers (Export Compensation) Act.* When the Commissioner of Customs and Excise Department declined to pay Goldenberg International the excess payments of 15% after consulting the Attorney General, the Minister of Finance, who was also the Vice President at the time, ordered that the extra 15% would be paid directly to Goldenberg International from the Treasury an *ex gratia* payment. Although all these transactions were approved at the highest levels in the respective government ministries, they were executed by ministry officials who seldom question their superiors, even when superior orders involve illegalities and breach of regular procedures like those involved in this case. All these concessions were given to a company that was barely four months old and had no prior experience in the gold and diamond export business.

64. *See* Local Manufacturers (Export Compensation) Act, ch. 482 of the Laws of Kenya (revised 1998).

65. In 1987, a few years prior to the grant of this license that pushed all other dealers in gold and diamonds out of the small market, the Commissioner of Geology and Mines had recommended the need for government subsidies of gold exports since this would result in earning foreign exchange to the government. The Commissioner of Mines at the time had advised the government that since exports of gold had a potential of earning the Kenyan economy more than 276 million Kenya pounds, it was a strategic industry that the government should vigorously support and protect. This proposal was shelved after some discussions until Goldenberg International came along in 1990. In its letter to the Minister of Finance requesting exclusive export rights of gold and diamonds, Goldenberg International argued that an exclusive license would help curb smuggling of gold and diamonds and the consequent loss of foreign exchange to the country. Having a monopoly over these exports, Goldenberg International argued, would make it easier for the Central Bank of Kenya to monitor the gold and diamond trade through its remittances of foreign exchange. *See* Sarah Elderkin, *Pattni's Bold Conspiracy to Rake in 'Free Billions,'* DAILY NATION, July 30, 1993, at 4.

Over a period of over two years, Goldenberg International was then paid over 4,213,000 U.S. dollars (paid as *ex gratia* payments to circumvent the 15% upper limit) as export compensation above the legal limit of 15%. In addition, it was not apparent whether Goldenberg International had exported all the gold and diamonds that they claimed to have exported. It was also not clear that even if there had been such exports, they had originated from or been processed in Kenya, since the country does not have any deposits of diamonds and has only very small deposits of alluvial gold. Eligibility for export compensation requires the import value of goods not to exceed 70% of the ex-factory value of the goods. There was a further irregularity that gave credence to the fact that Goldenberg International had not obtained some of its gold from Kenya before exporting it. Goldenberg International made imports of gold into the country without payment of import duty and value added tax in 1991 amounting to a total of 523,260 Kenyan pounds (about 174,420 U.S. dollars) in 1991.[66]

Clearly, the Goldenberg scandal involved a complex network of government ministries and departments working together, and with Goldenberg International to siphon enormous amounts of money from the government in export compensation payments, to avoid payment of import duties and to maintain a monopoly status in the gold and diamond industry. The involvement of the Vice President appeared to give a stamp of legitimacy to the irregularities. In addition, it was not entirely clear what amounts of gold and diamonds were actually exported out of the country and if the amounts involved corresponded to the export compensation paid. In fact, an important aspect of the Goldenberg scandal was that in some cases no exports were actually made. Instead export forms were filed and compensation was claimed for exports that were never exported. Egregious anomalies in the export compensation claim process were frequent. For example, the forms were false since no exports had been made, and they were not usually accompanied by a report from the Commissioner of Mines and Geology. That commissioner is charged with the responsibility of inspecting all mineral exports, valuing them and sealing them prior to export. The Commissioner of Mines and Geology issued licenses for gold and diamond trading while acting as the Director of External Trade for export licenses. The Customs Department stamp appeared on the export forms certifying the exports had left the country even when none had actually left.[67] Another major irregularity was the

66. *See Government of Kenya, Report of the Controller and Auditor General, 1992-1993, in* THE ANATOMY OF CORRUPTION IN KENYA 92-93 (Kivutha Kibwana et al. eds., 1996).

67. *See* Sarah Elderkin, *Goldenberg: How the Irregularities Started*, DAILY NATION, July 31, 1993, at 4.

fact that there was no correspondence between the export earnings reported in the export forms and the money received by the Central Bank from Goldenberg International. This was because Goldenberg International was not receiving any payments for its exports since they did not exist. Instead Goldenberg International was buying foreign currency in the domestic market to cover itself with the Central Bank. One employee of the Central Bank of Kenya, who raised the discrepancy in the Goldenberg papers as well as the illegality of possessing foreign exchange in the domestic market when it was illegal to do so, among other problems, was ignored by senior Central Bank staff.[68]

B. The Response of the Parliamentary Accounts Committee - Regularizing the Scandal

In 1992 when the Goldenberg scandal became public, a member of parliament tabled documents in parliament showing that the companies to which Goldenberg International was allegedly exporting its gold and diamonds did not exist. Other documents also showed the Goldenberg had received Kshs 1.14 billion that had never been exported. Parliament was adjourned for a three week period after the Minister read what many members in parliament thought was an unconvincing defense of the Vice President and Goldenberg International. After the three week recess, an attempt to introduce a motion to censure the Vice President was preempted through a technical maneuver. The minister of finance introduced the 1990-1991 Controller and Auditor-General report which discussed the details of the Goldenberg scandal. Under parliamentary rules, the matter could only be discussed in the Parliamentary Accounts Committee and not in the full house.[69] This was only the first time that the public accounts committee was used as a refuge to keep discussions of the Goldenberg scandal away from public limelight.[70] In April 1994, when the

68. *See* Sarah Elderkin, *Queries on Pattni's Note to CBK Over Gold Deals*, DAILY NATION, Aug. 2, 1993, at 4; Sarah Elderkin, *How the Lone Voice of Dissent at Central Bank was Silenced*, DAILY NATION, Aug. 3, 1993, at 4; Sarah Elderkin, *How Pattni Over-Valued the Price of Diamonds, Jewelry*, DAILY NATION, Aug. 4, 1993, at 4. Among other irregularities that Goldenberg International was involved in was the receipt of a Kshs 185 million as pre-shipment finance (money paid to exporters to assist them prior to their being paid by their customers after which they would refund the money back to the Central Bank). Goldenberg International invested this money in buying foreign exchange certificates issued by the government in the early 1990s, which was directly related to the drop in value of the Kenya shilling. *See* Sarah Elderkin, *How the "System Helped Pattni To Rip Off the Country" Economy*, DAILY NATION, Aug. 5, 1993, at 4.

69. *See id.*

70. In 1992, Goldenberg International urgently sought and was granted the license to operate a bank and to retain its fictitious earnings in foreign exchange to ensure that it kept its irregular financial dealings secret. *See* Sarah Elderkin, *New Scams are Organised to 'Clean up' Dirty Money*, DAILY NATION, Aug. 6, 1993, at 4.

Public Accounts Committee handed its report to full house, a motion seeking to refer it back to the committee so that it could deliberate the Goldenberg issue further was defeated by a majority in the house.[71] In May 1994, the chairman of the Public Accounts Committee, Kijana Wamalwa, moved a motion to close the debate on the Goldenberg scandal after presenting the whole house the Public Accounts Committee report. He argued that there had been nothing irregular or illegal in Goldenberg's operations, but it was the majority ruling party membership in parliament that stopped the debate over protests by most opposition members of parliament.[72]

When the Goldenberg issue arose again in the Public Accounts Committee the following year, its members became deadlocked over how to proceed. While its four opposition members voted to recover the amount of 12,639,014 Kenyan pounds (about 4,213,000 U.S. dollars) irregularly paid to Goldenberg International, its four ruling party members sought to regularize the payment arguing that parliament had in fact approved export compensation to Goldenberg and therefore the payments to it were legal. The committee was also deadlocked on whether to investigate the circumstances surrounding the claim, approval and payment of an amount of 61,338,437 Kenyan pounds (about 20,446,000 U.S. dollars) as the 20% statutory compensation Goldenberg International received. The only point of agreement between the opposition and the ruling party members was an investigation of whether Goldenberg International paid the foreign exchange it earned for its exports to the government.[73] Eventually, the leader of the opposition at the time, Kijana Wamalwa, and the chairman of the Committee entered into a secret deal in which he voted with the government side in the Parliamentary Accounts Committee to regularize the illegal payments to Goldenberg International. Kijana Wamalwa is reported to have received a monetary payment from Goldenberg International for voting in its favor.[74]

The regularization of the illegal payments made to Goldenberg International by the Public Accounts Committee was based on the ostensible reason that the appropriate procedures had been followed and that parliament had approved appropriations to pay for Goldenberg's

71. *See* Emman Omari et al, *Motion on Goldenberg Defeated*, DAILY NATION, Apr. 29, 1994, at 20.

72. *See Debate on Public Accounts Closed*, DAILY NATION, May 4, 1994.

73. For proceedings before the committee, see *Goldenberg: How PAC Went About the Probe*, DAILY NATION, Apr. 14, 1995; *Pattni Meets PAC On Deals*, DAILY NATION, Apr. 17, 1995, at 22.

74. *See* Emman Omari, *Goldenberg: The Tough Questions For Wamalwa*, DAILY NATION, Apr. 1, 1995, at 6; *I've More On Goldenberg, Wamalwa Tells Critics*, DAILY NATION, Apr. 4, 1995, at 1; *Goldenberg: V-P, Kibaki Disagree*, DAILY NATION, Apr. 28, 1995, at 1; Muthui Mwai, *Probe PAC Bribe Claims, Urge MPs*, DAILY NATION, May 1995, at 1.

export compensation payments. Yet, like the illegal payments made to Goldenberg International in export compensation, regularizing these payments was tainted with illegality. Although the Public Accounts Committee was acting perfectly within its powers, it gave legal imprimatur to an illegality. By arguing that the amounts paid to Goldenberg International had already received parliamentary approval in the budget appropriations process and were therefore legal, the Public Accounts Committee report of 1995 was simply endorsing one irregular act with another. In addition, the Committee noted that the government followed the appropriate procedures for granting Goldenberg International the amounts of Export Compensation it received. In other words, as long as the process was regular and in accordance with the laid down procedures, then the transactions met approval. Consequently, the Committee recommended that Goldenberg International be 'expeditiously' paid all the money it was owed prior to the abolition of the export compensation scheme in 1993, an amount exceeding Kshs 2.1 billion.[75] When the Committee reported to the whole house, the ruling party moved to have this particularly embarrassing proposal to refund Goldenberg International so much money omitted from the list of recommendations. This was undoubtedly an effort in damage control.

To understand this parliamentary compromise that let Goldenberg International go scot free after receiving illegal payments from the Kenyan government requires an appreciation of the dynamics of power. The ruling party representatives in the Public Accounts Committee defended the conduct of Goldenberg International and various government officials. They therefore acted to protect high government officials from any wrongdoing. By letting Goldenberg International go scot free, the Public Accounts Committee was acting as an extension of the corrupt system they ought to have been overseeing. While it may be farfetched to say these ruling party members of the Public Accounts Committee had specific instructions to oppose any opposition attempt to require Goldenberg International to refund the illegal monies paid to it, their opposition to holding Goldenberg International accountable was perfectly consistent with their disproportionate access to power within the political system.

75. *See* Muthui Mwai & Sylvia Mudasia, *No Way, Govt Tells Goldenberg,* DAILY NATION, Apr. 12, 1995, at 1; THE ANATOMY OF CORRUPTION, *supra* note 4, at 215-16.

C. *The Response of the Attorney General - Containing the Criminal Process*

Holding Goldenberg International and these senior government officials responsible for their role in robbing the country of enormous amounts of money in general proved very difficult. When the scandal first became public knowledge, the Attorney General declined to initiate criminal prosecutions, citing incompleteness of investigations and lack of evidence to put those involved on trial, notwithstanding the fact that the Attorney General has discretion to charge suspects on holding charges pending completion of investigations. This procedure of charging suspects with holding charges prior to completion of investigations is in part intended to ensure the integrity of the investigations by precluding the possibility of evidence tampering. This is all the more significant in cases involving high officials of government. It was not until pressure from the public, the opposition in parliament, the Law Society of Kenya, and donors and international groups embarrassing the government that the Attorney General acknowledged investigations were being conducted with a view to considering the possibility of prosecuting some suspects.

After the Attorney General failed to initiate proceedings in four years, in December 1994 the Law Society of Kenya filed a complaint in court seeking to be allowed to privately prosecute six individuals involved in the scandal.[76] The Law Society of Kenya argued that the Attorney General had abdicated his constitutional responsibility of accounting to the public what steps he had taken to investigate or prosecute those involved in the Goldenberg case.

After being allowed to participate in the case *amicus curiae*, the Attorney General proceeded to object to granting the Law Society leave to prosecute the case. He cited several alternative grounds for objecting to the prosecution. First, the Attorney General argued that the Law Society had no *locus standi* under its constituent statute, the Law Society of Kenya Act, and under the constitution to apply for and be granted the right to institute private prosecutions. In support of this objection, the Attorney General argued that the Law Society of Kenya (LSK) had not "personally" suffered or established any material damage sufficient to give the LSK an interest to institute the proceedings.

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76. *See* Private Prosecution Case No. 1 of 1994 in the Chief Magistrates' Court at Nairobi. The accused in the case were the former Permanent Secretary in the Ministry of Finance, Charles Mbindiyo, the Commissioner of Mines and Geology, Collins Owayo, the Commissioner of Customs, A.K. Cheruiyot, the former Governor of the Central Bank, Eric Kotut and Kamlesh Pattni, the chairman of Goldenberg International. Section 88 of the Criminal Procedure Code gives courts power to grant permission to persons applying to privately prosecute any person, but leaves the discretion to the court to allow or disallow the application.

The Attorney General argued that the LSK could not prosecute the case on behalf of itself since the Law Society of Kenya Act did not empower it to bring such an application. In bringing the private prosecution the Attorney General argued that the LSK had acted *ultra vires*.[77] The Attorney General also argued that under section 26(3) of the Constitution, only the Attorney General had the power to prosecute in the interest of the public. It was argued that he was the most suitable person to determine what is not in the public interest. In addition, counsel for the accused argued that the charges filed in court were defective and that there was already another suit instituted by the Attorney General in respect to the same subject matter. The court upheld these objections and dismissed the LSK's private prosecution case.

Curiously, however, judicial interpretation of the power of private prosecution in Kenya is ambiguous. The court in this case relied on the interpretation that favored the view that only the Attorney General could prosecute criminal suits in the public interest. However, the High Court has also ruled that private prosecutions to safeguard the public interest are permissible where the Attorney General had declined, neglected or refused to initiate a private prosecution within a reasonable time.

One of the immediate outcomes of the LSK's prosecution case was that the Attorney General publicly directed the Commissioner of Police to investigate the Goldenberg scandal and report back to him, by May of 1995.[78] The Attorney General eventually initiated his own prosecution case against the Chairman of Goldenberg International, Kamlesh Pattni, the then Permanent Secretary of the Treasury Wilfred Karuga Koinange, the then Deputy Governor of the Central Bank of Kenya, and the then-former Chief Dealer, Michael Wanjihia Onesmus. They were charged with theft of 5.8 billion Kenya shillings (about 97 million U.S. dollars) from the Paymaster General between September 1991 and October 1993 and attempting to fraudulently obtain another 2.1 billion Kenya shillings (about 35 million U.S. dollars). In March 1995, one opposition politician,

77. In a previous suit brought by pro-government, rule of law-minded lawyers within the Law Society of Kenya, the High Court granted injunctive relief restraining the Society's ruling council from vigorously campaigning for the restoration of multi-party democracy in Kenya and an end to state repression. The High Court later convicted the entire council of the Society of contempt of court for continuing their advocacy for multipartyism and democracy in the country. The basis of the High Court's order granting injunctive relief against the council was that the council had acted *ultra vires* to the objectives of the Law Society of Kenya Act. In the view of the High Court and like minded lawyers in the Law Society, it was not one of the functions of the Law Society of Kenya to be involved in politics. The lead plaintiff in this case Aaron Ringera is now a judge of the High Court of Kenya. *See* Gitonga Ringera v. Muite, Civil Case No. 1330, High Court of Kenya at Nairobi (1991). *See also* Gibson Kamau Kuria, *Continued Harassment of Human Rights Lawyers in Kenya*, 1 J. HUM. RTS. L. & PRAC. 171-72 (1991).

78. *See* Emman Omari et al., *A-G Order On Pattni Deal*, DAILY NATION, Apr. 12, 1995, at 16.

Raila Odinga, brought another private prosecution case against those involved in the Goldenberg scandal. One major difference between this suit and the others was that one of the accused persons was Professor George Saitoti, then Vice President and Minister of Finance. However, the Attorney General promptly stopped the prosecution of the case, citing his powers under the constitution as the sole guardian of the public interest. The Chief Magistrates Court in Nairobi proceeded to terminate the private prosecution case in an unusually expeditious manner. At the time of terminating the suit, lawyers for Raila Odinga, who had instituted the proceedings, were unrepresented. An attempt to restore the suit was unsuccessful. The basis for restoration of the suit was that the Attorney General had moved to expeditiously stop a prosecution case even before it had commenced. Raila's lawyers argued that it was abuse of process for the Attorney General and the court to stop a prosecution that had not already commenced. The court declined this application for restoration arguing that the Attorney General had already seized the matter and was proceeding to prosecute those involved. The speed with which the prosecution proceeded in this case raised eyebrows that the court and the Attorney General were protecting the Vice President from the 'embarrassment' of criminal prosecution.[79]

D. The IMF Interventions: From Anti-Corruption Squad to Anti-Corruption Authority

The IMF's suspension of its enhanced structural adjustment facility on July 31, 1997, was in part the result of the slow pace in the prosecution of those involved in the Goldenberg scandal and in the implementation of anti-corruption measures. The suspension was also related to improper, slow or delayed implementation of structural adjustment conditionalities on privatization of loss-making government corporations and a reduction of government spending. The IMF also urged the government to proceed with the privatization of the energy sector. Among the other economic reforms that the Kenyan government has implemented under various donor conditionalities include removal of import and export controls and an the export compensation scheme, which was the avenue through which the Goldenberg scandal was facilitated. It is remarkable how corruption therefore became a primary focal point for donors for the justification of the liberalization and deregulation of the Kenyan economy in the early 1990s. In fact, as a response to the suspension of the enhanced structural adjustment facility on July 31, 1997, the government drastically reduced

79. Under the Kenyan Constitution, only the President is exempt from prosecutions of any nature while in office. *See* KENYA CONST. §§ 1, 2 *reprinted in* 27 KENYA GAZETTE SUPP. 10, Apr. 18, 1969.

its spending levels, in part by freezing scheduled income raises. The government's attempt to balance the budget, particularly under the stringent conditions of the IMF, led to a national strike by teachers in the country whose scheduled pay raise was repeatedly denied.[80]

As a condition for the resumption of the enhanced structural adjustment facility, the IMF required the government to speed up the prosecution of the Goldenberg case, set up an independent anti-corruption agency and guaranteed the independence of the Kenya Revenue Authority, which is charged with revenue collection. The condition requiring the establishment of an independent anti-corruption authority required disbanding or redefining the role of the anti-corruption squad established by the government to deal with corruption in November 1993. The anti-corruption squad was appointed by President Moi to assist in the anti-corruption effort in both the government and the private sector. The implementation of this mandate was subject to the direction of the Attorney General. Its powers included conducting criminal investigations into corruption in the government and to advise the government and government owned corporations on ways to prevent corruption.

The IMF condition requiring formation of an independent Anti-Corruption Authority required amending the Prevention of Corruption Act,[81] with a view to replacing the Anti-Corruption Squad with an Independent Anti-Corruption Authority with security of tenure for its members. In December 1997 parliament amended the Prevention of Corruption Act,[82] replacing the Anti-Corruption Squad with the Anti-Corruption Authority. The chief executive of the new Anti-Corruption Authority would be a Director, unlike the Anti-Corruption Squad which operated under the direction of the Attorney General. The Director and Assistant Directors would all be appointed by the President, each holding office for renewable terms of four years with a two term limit. The Director and Assistant Directors are also granted security of tenure by the requirement that their removal be subject to hearings before a tribunal to determine and recommend to the President if there are any grounds for their removal on grounds of incapacity or incompetence. A shortcoming with this requirement is that the tribunal is also appointed by the President in addition to the fact there is no requirement to make its

80. *See* Michael Wrong, *Kenyan Spending Must Be Cut to Curb Mushrooming Deficit*, FIN. TIMES, Apr. 8, 1998, at 6. *See also Tough Budget Raises Hopes for IMF Loan Talks*, DAILY NATION (June 16, 1998) <http://www.nationaudio.com/News/DailyNation/1998/160698/Features/SE15.html>.

81. *See* The Prevention of Corruption Act, ch. 65 of the Laws of Kenya, (revised 1998).

82. *See* The Prevention of Corruption Act, ch. 65 of the Laws of Kenya, (as amended Kenya Gazette Supplement, Acts, 1997, Nov. 7, 1997, at 884).

recommendations to the President public.[83] These shortcomings led the IMF and the World Bank to set new conditions for the resumption of Kenya's enhanced structural adjustment facility. In June 1998 the Minister of Finance wrote to the Attorney General asking him to draw up regulations conforming to the new conditions. The new conditions required procedures making the appointment of the Directors of the Anti-Corruption Authority subject to three conditions: first, that in making the appointments, the President shall consult with respected members of the civil society such as officials of the Law Society or bar association and the chairperson of the local Chapter of the International Commission of Jurists and heads of non-governmental organizations interested in clean government such as Transparency International, present or retired deans of law faculties, and the head of the local chamber of commerce; second, that those people recommended for the position of Director in consultation with the bodies and people above, shall then be consulted with a view to establishing their willingness to serve as Directors; third, that those interested in serving as Directors shall then be interviewed and also investigated by the Criminal Investigation Department.[84] The government conceded to these donor demands by amending the Prevention of Corruption Act through rules published in a late August 1998 publication of the Kenya Gazatte's Government Legal Notices Periodical.[85] Under the new regulations, the qualifications of a Director of the Anti-Corruption Authority were defined as people of outstanding honesty and integrity knowledgeable or experienced in law, financial matters, accountancy, and fraud investigations. Rather than appointing the Director of the Anti-Corruption directly like before, the President will receive recommendations from an Advisory Board to the Authority consisting of at least seven members appointed by the President.[86]

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83. *See* The Prevention of Corruption Act, ch. 65 of the Laws of Kenya, §§ 11(B)(1) et seq. (as amended Kenya Gazette Supplement, Acts, 1997, Nov. 7, 1997, at 884.) The act establishes the position of the Director and Assistant Director; section 11B (1) establishes the Anti-Corruption Authority; section 11B (2A) provides the term of office the Director and Assistant Director may hold office; section 11(H) and the proviso under section 11F for the security of tenure of the Director and Assistant Directors; section 2I provides that upon referring the question of the competence of a Director, the President may suspend the Director from the functions of the office until the tribunal makes its recommendations to the President. Such a suspension may be revoked if the tribunal recommends that the Director should not be removed.

84. *See A Strange Demand by Major Donors*, DAILY NATION (June 3, 1998) <http://www.nationaudio.com/News/DailyNation/1998/030698/comment/comment2.html>.

85. *See* KENYA GAZETTE SUPP. NO. 47, Aug. 28, 1998, at 884.

86. *See* The Prevention of Corruption Act, ch. 65 of the Laws of Kenya, revised 1998 § 11B(12). The Act requires that the seven members be knowledgeable or experienced in law, monetary and financial matters, accountancy and fraud investigation. In addition, the Anti-Corruption Authority would, following the amendment, have a person no less than the rank of an under-secretary second it from the Public Service Commission. Members of the Anti-Corruption Authority board would be

Although Harun Mwau was not appointed under the terms of the amended law, his appointment as Director of the Anti-Corruption Authority in December 1997 was considered to indicate the government's commitment to root out corruption in the government. In addition, Harun Mwau was widely considered independent-minded in the public. During the repressive reign of one party rule, Harun Mwau was denied a passport to travel abroad. He challenged this as an infringement of his freedom of movement in court and within the ruling party hierarchy. The case was quite unprecedented at a time when challenging the ruling party and the government often resulted in further harassment from the state. With the adoption of multiparty rule in 1991, Harun Mwau formed the Party of Independent Candidates of Kenya (PICK) and ran for presidency in 1992. Mwau filed unsuccessful election petitions challenging President Moi's nomination and election in the 1992 elections. However, prior to his appointment as the Director of the Kenya Anti-Corruption Authority, Mwau withdrew his candidacy for the presidential elections in December 1997. Upon his withdrawal from the presidential race, Mwau then asked his supporters to vote for President Moi.[87]

While the general public widely acclaimed Harun Mwau's appointment, powerful politicians and business leaders criticized his appointment, citing his inexperience and involvement in shady business dealings as suggestive of his inability and incompetence to head the Anti-Corruption Authority. Between January and May 1998, there was great public skepticism about the ability of the Anti-Corruption Authority to investigate and prosecute high government officials involved in corruption.[88] A number of administrative problems plagued the ability of the Authority to function effectively within the first few months of its operations. First, although its Director requested police investigators, prosecutors and basic administrative support with a budget upon his appointment in December 1997, it was not until May 1998 that the government finally assigned relevant officers to the Authority. The

disqualified from office if of unsound mind, adjudged bankrupt, or have been convicted of an offence involving fraud or dishonesty. *See Changes in Merit to Fight Graft*, DAILY NATION (Sept. 8, 1998) <http://www.nationaudio.com/News/DailyNation/1998/080998/News/News8.html>.

87. *See Kenya Appoints Head of Anti-Corruption Body*, BBC NEWS ONLINE (Dec. 5, 1997) <http://news1.bbc.co.uk/low/english/world/africa/newsid_36000/36880.stm>.

88. *See, e.g., Toothless? Mr. Harun Mwau's Anti-Corruption Authority Comes Underfire*, WKLY. REV. (May 15, 1998) <http://www.africaonline.co.ke/weeklyreview/980515/cover1.html>. In this cover story of this largely pro-government weekly, the Governor of the Central Bank of Kenya is reported to have remarked that the Anti-Corruption Authority had not done much since its formation. According to the cover story, "[w]hen the next mission of the International Monetary Fund (IMF) visits Kenya, they will probably insist on being given a scorecard of the achievements of the Anti-Corruption Authority to determine whether or not it had made an impact in [sic] the fight against corruption." *Id.*

Authority's budget also was approved only in April 1998.[89] These delays can be read as a reflection of the government's initial hesitancy to establish an independent anti-corruption agency which could potentially restrict corruption.[90] However, granted the skepticism surrounding the Authority's ability to perform its duties and the government's initial demonstration of insufficient political will, in June 1998 Director Harun Mwau pledged to fearlessly investigate and prosecute powerful public officials involved in corruption but thought of as "untouchable" or as "sacred cows."[91] As one commentary noted, it was in part the forceful personality and the personal "drive" of Harun Mwau that played a major role in the Authority's ability to secure offices, staff and a budget in a record time of five months.[92] Paradoxically, a few months later this personality was cited as a major reason for relieving him of his duties as the Authority's Director. I discuss this further below.

Following his pledge to fearlessly fight corruption, the Anti-Corruption Authority under Harun Mwau soon gained a notoriety for fearless investigation. City Hall was one of the Anti-Corruption Authority's first stops. City Hall is widely believed to be corrupt in view of the poor state of roads, uncollected refuse and the failure of major services in the city, notwithstanding the enormous amounts of revenue City Hall generates to provide these services. After conducting its investigations, the Anti-Corruption Authority arrested an elected councillor and senior officials of the Nairobi City Council over unaccounted money totaling several million Kenya shillings.[93]

Next, the Anti-Corruption Authority conducted investigations in the Kenya Revenue Authority. The investigations involved allegations of

89. This is given credence by an answer given by an Assistant Minister in the Office of the President to a question in parliament. Asked about the terms and conditions of service of the Anti-Corruption Authority's Director, Mr. Jimmy Nuru Angwenyi, an Assistant Minster in the Office of the President, defended the Anti-Corruption Authority as a professional body. However, he confirmed that its Director was only paid a honorarium since the government did not set up terms and conditions of service when it was set up in December 1997. *See Anti-Graft Unit Defended*, DAILY NATION (July 10, 1998) <http://www.nationaudio.com/News/DailyNation/1998/100798/Pull_Out6.html>.

90. *See id.*

91. In one such pledge Harun Mwau told journalists that the authority was not "a creature of anybody, not even the President . . . . If I'm stopped from investigating anybody, I'll resign. When I was chosen to head this authority, I was not looking for a job. I am not a tool of anybody. We [authority] are committed to justice for all . . . I am not a beggar and don't seek alms. I'm [sic] will not be intimidated." *Mwau's Anti-Graft Pledge*, DAILY NATION (June 28, 1998) <http://www.nationaudio.com/News/DailyNation/1998/280698/News16.html>.

92. *See Toothless: Mr. Harun Mwau's Anti-Corruption Authority Comes Under Fire*, WKLY. REV. (May 15, 1998) <http://www.africaonline.co.ke/weeklyreview/980515/cover1.html>.

93. *See Anti-Graft team Probes City Council*, DAILY NATION (June 11, 1998) <http://www.nationaudio.com/News/DailyNation/1998/110698/News20.html>. *See also Three on Graft Charges*, DAILY NATION, (June 24, 1998) <http://www.nationaudio.com/News/DailyNation/1998/240698/News/News221.html>.

collusion between high officials in the Kenya Revenue Authority and importers of sugar and wheat. The importers, highly placed government officials, allegedly connected with the Minister for Finance, Simeon Nyachae, were suspected to have illegally been exempted from payment of import duty on large amounts of sugar imported into the country. In addition to the failure to remit foreign exchange, the sugar importers were also driving the sugar industry to a grinding halt in the country through the large exports of sugar and wheat into the country.[94] The Anti-Corruption Authority investigated these officers activities in June 1998 and concluded that it had gathered sufficient evidence to commence a criminal case against them. The Authority then applied for arrest warrants and commenced criminal prosecutions in an unprecedented short space of time. Among the high government officials arrested and charged by the Authority were the Commissioner General of the Kenya Revenue Authority, its Financial Secretary and Director of Fiscal and Monetary Affairs. The charges against these officers were for defrauding the government of over 230 million Kenyan shillings in unpaid import duties.[95] Events, however, turned against this tide of momentum to fight high level corruption. The powerful Minster of Finance, Simeon Nyachae,

94. In 1996, President Moi sacked one of his cabinet Ministers (Dalmas Otieno) after he spoke out against sugar imports that were hurting his sugar growing constituents. In a recent conference on corruption in the Kenyan sugar industry, the General Manager of one sugar growing company (Mumias Out Growing Company), Ms. Oddah Nafula, stated that sugar milling in the country was being suppressed with a view to enabling rich businessmen to continue importing sugar into the country. In her presentation, she stated that the crushing (milling) capacity of the sugar factories in the country stood at 480,000 tonnes, while the production capacity actually stood at 780,000 tonnes which resulted in losses of over 300,000 tonnes. The conference participants recommended that the government should take measures to protect the industry, especially with a view to discouraging dumping of sugar into the market. *See 300,000 tonnes of Cane Lost - Official*, DAILY NATION (Nov. 6, 1998) <http://www.nationaudio.com/News/DailyNation/1998/061198/News/News7.html>. On Sept. 11, 1998, President Moi acknowledged that the importation of cheap sugar into the country "was hurting the economy." *Moi: End Graft or Face Arrest*, DAILY NATION (Sept. 12, 1998) <http://www.nationaudio.com/News/DailyNation/1998/120998/News.News6.html>. He announced that the government had increased tax on imported sugar to discourage "corrupt businessmen" from importing it. *Id.* In addition, he stated that the Kenya Bureau of Standards would be involved in verification of all imported products. *See also* Manoah Esipisu, *Corrupt Kenyan Traders Replace Sugar With Sand*, INDIAN EXPRESS (Sept. 8, 1998) <http://www.expressindia.com/fe/daily/19980908/2515174.html>; Gova Ondego, *Desperation in the Sugar Belt*, DAILY NATION (Sept. 20, 1998) <http://www.nationaudio.com/News/DailyNation/1998/200998/Comment/Special_Report11.html>. Note also case involving an allegation that an Assistant Minister in Moi's government stole over 160,000 bags of sugar (from a godown in Mombasa that was destined to the Democratic Republic of Congo) and evaded paying duty of more than 74 million Kenyan shillings . *See* Francis Thoya, *Minister Denies Stealing Sugar*, DAILY NATION, Sept. 23, 1998; *Sugar Charges Altered*, DAILY NATION, Oct. 7, 1998) <http://www.nationaudio.com/News/DailyNation/1998/230998/News/News11.html> (charge was altered to reflect amount of sugar stolen to have been 138,075 and the amount of tax evaded to have been Kenya shillings 85 million); Patrick Mayoyo & Francis Thoya, *MP's Store Raided for Sugar*, DAILY NATION (Oct. 8, 1998).

95. *See Mwau Team Arrest Top Treasury Men*, DAILY NATION (July 24, 1998) <http://www.nationaudio.com/News/DailyNation/1998/240798/News/News16.html>.

was particularly angry with the Anti-Corruption Authority for arresting and charging officers the Kenya Revenue Authority officers, who fell within his ministerial jurisdiction in the Treasury. According to the Minister, the Anti-Corruption Authority had arrested the Kenya Revenue Authority officers without evidence that there had been any wrongdoing.[96] The Minister of Finance seemed to move from the presumption that the Anti-Corruption Authority would work well with the Treasury and the Central Bank, which had direct contact with the donors. The arrest of Treasury officials was considered to be in violation of this implicit understanding. This was particularly upsetting in this case since the four Treasury officials arrested on corruption charges by the Anti-Corruption Authority had been recruited by the Central Bank to "inject professionalism in the running of the Treasury on the recommendation of the IMF."[97] This notwithstanding, the Minister caused an uproar in parliament when he read a statement criticizing the arrest of the officers. The Minister claimed that the Anti-Corruption Authority was intimidating the officers of the Kenyan Revenue Authority whose ability to perform the important functions of revenue collection was in effect adversely affected. He asked parliament to set up a select committee to investigate whether the Kenyan Revenue Authority officials were involved in the charges that the Kenyan Revenue Authority had brought against them.[98]

On Friday, July 24 1998, however, the Attorney General entered a *nolle prosequi* in the cases against the officers of the Kenyan Revenue Authority citing the Anti-Corruption Authority's lack of jurisdiction to bring criminal proceedings without seeking the directions and consent of the Attorney General, as required under the Anti-Corruption Act. The Attorney General's office also argued that the cases needed further and fuller investigation, implying the Authority had rushed to court. It is noteworthy, although no direct connection may be presumed, that the Kenyan Anti-Corruption Authority had only a week before the termination of the cases by the Attorney General, detained four government officials from the Attorney General's office to help them in investigations concerning a conspiracy to defraud the government of money.[99] There was

96. *See* Nation Team, *Its Nyachae or Me, Says Mwau*, DAILY NATION (July 29, 1998) <http://www.nationaudio.com/News/DailyNation/1998/290798/News/News17.html>.

97. *Making Way for a New Team: The Attorney General Announces the Registration of the KACA Board*, WKLY. REV., (Nov. 27, 1998) <http://www.africaonline.co.ke/weeklyreview/981127/business2.html>. Joseph Kinyua was a former employee of the Central Bank; Samuel Chebii and John Msafiri were hired from the private sector; and Njeru Kirira had been recalled from retirement.

98. *See It's Nyachae or Me, Says Mwau*, DAILY NATION (July 29, 1998) <http://www.nationaudio.com/News/DailyNation/1998/290798/News/News17.html>.

99. *See* Stephen Muiruri, *Mwau Team Holds Officials*, DAILY NATION (July 16, 1998) <http://www.natioanaudio.com/News/DailyNation/1998/160798/News/News2.html>.

therefore a definite message to those involved in grand corruption and looting at senior governmental levels, that the Anti-Corruption Authority could strike unannounced and surprise suspects by catching them off guard. Public protest against the Attorney General's actions was fast and angry.[100]

On Wednesday July 30, 1998, barely one week after the Attorney General terminated the cases against the Kenyan Revenue Authority, President Daniel Arap Moi suspended Harun Mwau from the Directorship of the Anti-Corruption Authority. He appointed a tribunal to evaluate his performance. The Anti-Corruption Act provides that where the Director becomes incapable or incompetent of performing the functions of his/her office, the President may appoint a tribunal to inquire into the matter and report back to the President.[101] Harun Mwau's suspension was followed by another round of angry public protest. One of the inferences of the suspension that dominated public commentary was the unwillingness of the government to prosecute corruption where it involved high level government officers and politicians.[102] One of the most disappointed constituencies was that of sugarcane farmers who had placed some hope in the prosecution of the Kenyan Revenue Authority. They were involved in the corrupt importation of sugar into the country resulting in the crippling of the country's sugar growers.[103] Although the Minister of Finance Simeon Nyachae denied that he influenced the termination of the cases against the Kenya Revenue Authority officials, his statement that it was regular and was done with the approval of the cabinet conveyed a sense of distrust.

Harun Mwau unsuccessfully challenged the legality and procedures the tribunal appointed to inquire into his conduct without success.[104] One

100. *See* Comment, *Why Were the Graft Cases Terminated?*, DAILY NATION (July 26, 1998) <http://www.nationaudio.com/News/DailyNation/1998/260798/Comment/Comment0.html>; *Treasury Case: Government Criticized*, DAILY NATION (July 26, 1998) <http://www.nationaudio.com/News/DailyNation/1998/260798/News/News24.html>; *Graft: DP Accuses Government of Insincerity*, DAILY NATION (July 27, 1998) <http://www.nationaudio.com/News/DailyNation/1998/270798/News/News19.html>; *It's Wrong to Stop Mwau Effort*, DAILY NATION (July 29, 1998) <http://www.nationaudio.com/News/DailyNation/1998/290798/Letters/Letters5.html>.

101. *See* The Prevention of Corruption Act, ch. 65 of the Laws of Kenya, §§11B(2)(G)(f), and provisos thereto (2)(H)(a)(b), (2)(I).

102. *See* Comment, *Mwau Suspension Sends Wrong Signal*, DAILY NATION (July 31, 1998) <http://www.nationaudio.com/News/DailyNation/1998/310798/Comment/Comment2.html>.

103. *See Move on Mwau Angers Migori Sugarcane Farmers*, DAILY NATION (July 31, 1998) <http://www.nationaudio.com/News/DailyNation/1998/310798/News/WE3.html>.

104. Mwau, for example, challenged the fact that the judges were wearing their robes while, in fact, they were sitting in a tribunal as opposed to a court of law. In his view this was intended to intimidate him. He challenged the presence of the Attorney General as *amicus curiae* since he would have a subject of the inquiry, having terminated the cases that led to the appointment of the tribunal, among other objections. He also argued that the Attorney General was a member of the board of the Kenya Revenue Authority which raised a conflict of interest in the case. *See* Mburu Mwangi, *Mwau*

important effect the tribunal's appointment had was to transfer the subject of the investigation from the allegations the Anti-Corruption Authority was following up to the person of its Director. To demonstrate his incapacity and incompetence to head the Anti-Corruption Authority, the state called witnesses to the tribunal to demonstrate the incompetence of Director Harun Mwau through evidence showing:

- some of the cases that the Anti-Corruption Authority was investigating were the subject matter of ongoing investigations;[105]
- lack of legal and prosecutorial knowledge and expertise on the part of the Director of the Anti-Corruption Authority; that the Director and the Senior Assistant Commissioner of Police attached to the Anti-Corruption Authority did not consult lawyers during their investigations of corruption cases; that the Anti-Corruption Authority's mandate did not include offences outside the Prevention of Corruption Act although it had taken such cases to court;[106] and further that the officers from the Kenya Revenue Authority were charged under the wrong law;[107]
- the Director of the Anti-Corruption Authority had failed to consult with members of its advisory board contrary to the provisions of the Anti-Corruption Act and as such acted *ultra vires*; that the Anti-Corruption Authority was not properly constituted since it had no Deputy Director;[108]

Probe, DAILY NATION (Aug. 18, 1998) <http:www.nationaudio.com/News/DailyNation/1998/180898/News/News22.html>; Mburu Mwangi, *Tribunal Breaks Law, Says Mwau*, DAILY NATION (Aug. 27, 1998) <http://www.nationaudio.com/News/DailyNation/1998/270898/News/News20.html>; Maguta Kimemia, *Judges Overrule Mwau*, DAILY NATION (Aug. 28, 1998) <http://www.nationaudio.com.News/DailyNation/1998/280898/News/News21.html>.

105. *See Police Knew of Mwau Cases, Tribunal Told*, DAILY NATION (Aug. 29, 1998) <http://www.nationaudio.com/News/DailyNation/1998/290898/News/News14.html>; Maguta Kimemia, *37 Banking Fraud Cases Cited*, DAILY NATION (Sept. 2, 1998) <http://www.nationaudio.com/News/DailyNation/1998/020998/News/News10.html>.

106. *See* Mburu Mwangi & Maguta Kimemia, *Mwau Accuses Lawyer of Hijacking Tribunal*, DAILY NATION (Sept. 3, 1998) <http://www.nationaudio.com/News/DailyNation/1998/030998/News/News16.html>.

107. *See* Maguta Kimemia & Owino Opondo, *Mwau, Onyango Clash Over Case Files*, DAILY NATION (Sept. 15, 1998) <http:www.nationaudio.com/News/DailyNation/1998/150998/News/news21.html>. In his testimony to the tribunal, the Deputy Public Prosecutor said that he entered a *nolle prosequi* in the cases against the Kenya Revenue Authority officers for several reasons, among them being that the offences in question fell under the Penal Code (Chapter 63 of the Laws of Kenya), and that pursuant to Legal Notice 331 of 1996 he had the authority to do so in appropriate circumstances. These circumstances included the fact that the offenses involved had to do with conspiracy to defraud, disobeying statutory duties, breach of trust by persons employed in the civil service and stealing goods in transit, which did not fall under the Prevention of Corruption Act. *See id.*

108. *See* Maguta Kimemia & Mburu Mwangi, *Mwau 'Received Threats'*, DAILY NATION (Sept. 8, 1998) <http://www.nationaudio.com/News/DailyNation/1998/080998/News/News111.html>.

- the cases the Anti-Corruption Authority took before the court were null and void for failure to comply with the mandatory requirement under the Prevention of Corruption Act that all such cases needed to be referred to the Attorney General both for *directions* and *consent* to prosecute.[109]

These events began to lead to questions about the government's commitment to eliminating corruption in the country. It appeared as if the appointment of Harun Mwau to head the Anti-Corruption Authority was part of a government design to merely put up a big show of its commitment to fighting corruption to win the donor community's approval for resumption of the enhanced structural enhancement facility. In addition, as if the formation of the Kenya Anti-Corruption Authority was not enough, in early July 1998 Parliament passed a motion setting up an inter-party Select Committee to make recommendations on measures that could be taken against individuals involved in corruption and to see in what ways public property that had been illegally allocated to such individuals and corporations would be recovered.[110] In December 1998, the President ordered the Chief Justice to establish a separate bench in the judiciary to specialize in expeditiously hearing and determining corruption cases.[111] However, much skepticism remains about on the need for additional institutional apparatuses to deal with corruption while those already established lacked the full capacity, independence and resources to be fully functional or effective especially in cases involving high government officials.[112] It was the relatively junior and medium public officials involved in petty corruption who were prosecuted, while their

109. *See* Mburu Mwangi & Maguta Kimemia, *Mwau's Cases 'Were All Null'*, DAILY NATION (Sept. 16, 1998) <http://www.nationaudio.com/News/DailyNation/1998/160998/News/News7.html>; Mburu Mwangi & Maguta Kimemia, *KACA Must Seek Guidance From the AG in Its Cases-Ringera*, DAILY NATION (Sept. 23, 1998) <http://www.nationaudio.com/News/DailyNation/1998/230998/News/News_0005.html>.

110. *See House Picks Team To Probe Corruption*, DAILY NATION (July 9, 1998) <http://www.nationaudio.com/News/DailyNation/1998/090798/News/Pull_OutO.html>.

111. *See* Emman Omari, *Appoint Bench to Deal With Theft - Moi Tells C.J.*, DAILY NATION (Dec. 13, 1998) <http://www.nationaudio.com/News/DailyNation/1998/121398/News/News.6.html>.

112. There has already been public criticism that the Parliamentary Select Committee is a move in wrong direction. Rather than establish more institutions, the Daily Nation for example suggested that the government should focus on strengthening the existing institutions. *See* Comment, *Is MPs' Anti-Graft Team Necessary?*, DAILY NATION (July 10, 1998) <http://www.nationaudio.com/News/DailyNation/1998/100798/Comment/Comment2.html>. *See also*, Gitau Warigi, *House Probe on Graft an Exercise in Futility*, DAILY NATION (July 12, 1998) <http://www.nationaudio.com/News/DailyNation/1998/120798/Comment/Comment1.html>.

seniors and top level officials like the Vice President in the Goldenberg scandal got off scot free.[113]

The prosecution of high officialdom in cases such as those instituted by Harun Mwau's Anti-Corruption Authority were eventually terminated ostensibly for procedural reasons - lack of a mandate to prosecute corruption cases without the direction of the Attorney General contrary to the provisions of the Anti-Corruption Act. The termination resulted in the formation of yet another kind of an institution, this time a tribunal to inquire into the ability of Harun Mwau to serve as the Director of the Anti-Corruption Authority. Presently, the government has met IMF and World Bank demands requiring the strengthening of the independence of the Anti-Corruption Authority through an appointment process that involves consulting civil society on desirable and credible appointees who are not tainted by corruption themselves.

In all, dealing with corruption involving grand corruption and looting had therefore resulted in *ad hoc* institutional proliferation and circuitous and unending procedural tussles. In the meantime, corruption went ahead unchecked. The focus on procedural and jurisdictional issues in anti-corruption efforts demonstrates the bias of the rule of law on whether competent institutions employed adequate procedures. For the government, the judiciary, and its legal adviser, process validation was the single most important reason for terminating the private prosecution cases brought by the Law Society, Raila Odinga and the Anti-Corruption Authority against those involved in the Goldenberg scandal. This focus on process validation over the more significant demonstration that the there was no apparent manipulation of the legal process in favor of high officialdom, therefore, seemed only significant for those within the legal community. Its appeal to the general public as reflected in the press was very limited.[114] To the public, the focus on process validation to strike out anti-corruption cases was a reflection of the government using delay and escape mechanisms to preempt or co-opt anti-corruption energy against the government in the judiciary or in the general public.

113. *See* Gitau Warigi, *House Probe on Graft An Exercise in Futility*, DAILY NATION (July 12, 1998) <http://www.nationaudio.com/News/DailyNation/1998/120798/Comment/Comment1.html>.

114. *See* PERRY MILLER, THE LIFE OF THE MIND IN AMERICA (1965). Mr. Miller also makes a similar point in the American context.

E. Tribunal Recommends Mwau's Dismissal: The End of a Short Effective Anti-Corruption Era

In November 1998 the tribunal appointed to investigate the capability and competence of Harun Mwau to serve as the Director of the Anti-Corruption Authority issued its report. The three judge tribunal recommended that Harun Mwau should be sacked. While Harun Mwau's forceful personality has contributed largely to building the Anti-Corruption Authority from scratch into a formidable and independent body that the government was unwilling to staff or fund,[115] the tribunal concluded that Mr. Mwau had "too highly inflated a view of himself to work in harmony with others."[116] The tribunal found that Mwau did not think too much of the abilities of other people which made him unsuitable to head an institution that was required by law to consult closely with the Attorney General and its advisory board members.[117] The tribunal emphasized the jurisdictional failings of the Authority by its refusal to seek the directions of the Attorney General before bringing the cases against Treasury officials. They noted that as Director of the Authority, Mwau had also refused to get the advice of the Authority's advisory board. In the tribunal's view, Mwau thought its members were ignorant and did not understand their role. Furthermore, in the tribunal's view, Mwau's forceful personality did not exempt him from adherence to the law.[118] The tribunal asserted the Attorney General's exclusive constitutional powers of controlling all prosecutions in Kenya. In essence, the tribunal concluded that the powers of the Authority, being merely statutory, were subject to the constitution. Here, the constitutional powers of the Attorney General prevailed over the Anti-Corruption Authority. Mwau's personality problems were therefore finally resolved on a

115. *See Toothless: Mr. Harun Mwau's Anti-Corruption Authority Comes Under Fire*, WKLY. REV. (May 15, 1998) <http://www.africaonline.co.ke/weeklyreview/980515/cover1.html>.

116. Mutegi Njau, *Verdict on Mwau: 'Throw him Out,'* DAILY NATION (Nov. 26, 1998) <http://www.nationaudio.com/News/DailyNation/1998/261198/News/News141.html>.

117. After the tribunal submitted its report to the President, members of the Kenya Anti-Corruption Authority were reported to have resigned to enable the government to appoint a new board. *See Making Way for a New Team - The Attorney General Announces the Resignation of the KACA Board,* WKLY. REV. (Nov. 27, 1997) <http://www.africaonline.co.ke/weeklyreview/981127/business2.html>.

118. Perhaps afraid that his personality would be an issue in the tribunal's report, in his closing statement to the tribunal's hearing on October 8, 1998, Mwau argued that the tribunal had been appointed to inquire into whether or not he had properly performed the functions of his office. In Mwau's view, the tribunal had wrongly inquired into his personal competence and capability. In Mwau's view, the Prevention of Corruption Act only provided health grounds as the only reason for which the tribunal could recommend his dismissal under its inquiry into his personal competence and capability. *See* Mburu Mwangi & Maguta Kimemia, *Mwau Says Tribunal is Off Course: Probe was Meant to be Into the Office, Not the Person,* DAILY NATION (Oct. 8, 1998) <http://www.nationaudio.com/News/DailyNation/1998/081098/News/News13.html>.

jurisdictional question. Mwau's personality became the occasion for the tribunal to invoke a jurisdictional resolution of the country's corruption problems. The tribunal's recommendation was heavily criticized by opposition members of Parliament, as well as by a cross section of the press, pro-democracy and anti-corruption non-governmental organizations and citizens.[119]

The tribunal's recommendation that Harun Mwau should be dismissed reflects the governments reluctance to deal with high level corruption. This reluctance goes back a long way and has raised significant questions of the extent to which the government could go to defend high officialdom involved in corruption. In at least two cases, evidence and suspicions pointed to government involvement in the assassination of senior politicians who had a record of speaking out against high level corruption. The first of these was the 1975 murder of Josiah Mwangi Kariuki, M.P. for Nyandarua North. Kariuki critically spoke out against corruption and criticized what he often referred to as a small and powerful circle around the late President Kenyatta that had privatized Kenya's wealth to the exclusion of the ordinary Kenyan.[120] The second assassination was that of the late Minister for Foreign Affairs, Robert Ouko, who was later revealed to have opposed corruption in the awarding of multi-million dollar government tenders. He is said to have been writing a report on corruption on multi-million dollar government projects involving foreign firms at the time of his assassination in 1990. Like J.M. Kariuki's body, Ouko's body was found in the bush. Both Ouko and Kariuki had been abducted, apparently tortured and their bodies mutilated before they were assassinated. Ouko's body was also burned. Both Kariuki and Ouko were popular national politicians, especially among the lower classes. They were often identified as honest politicians in governments that were less than honest. Kariuki was murdered during Kenyatta's presidency, while Ouko was murdered during Moi's presidency. In Kariuki's case a select parliamentary committee found evidence implicating certain government officials. However, the government declined to prosecute those recommended by the select committee, sparking a constitutional crisis in Parliament. In Ouko's case, a judicial commission of inquiry was appointed to establish the circumstances surrounding the assassination of Ouko. When the evidence

119. *See MPs Rally to Suspended Anti-Corruption Boss*, DAILY NATION (Nov. 27, 1998) <http://www.nationaudio.com/News/DailyNation/1998/271198/News/News12.html>.

120. *See* D. PAL AHLUWALIA, POST-COLONIALISM AND THE POLITICS OF KENYA 70-71 (1996).

at the tribunal started revealing evidence of high level corruption, the government disbanded it.[121]

In recent months, opposition politicians, frustrated that the government showed no commitment to fighting corruption, have resorted to leading daring public demonstrations in cases involving illegal allocation of land or land grabbing as Kenyans refer to it. For example, in October 1998 in one case involving the grabbing of forest land by private developers, twelve opposition members of property burned property, worth over forty million Kenyan shillings, belonging to private developers at the forest site that was being prepared for development.[122] These extreme actions demonstrate the extent to which those opposed to high level corruption have gone to make known their opposition to corruption and illegal allocation of public land in particular. Incidentally, one positive outcome out of the destruction of property in this case was that the government and lawyers involved in the allocation of the forest to private developers were put under immense pressure to reveal the names of those whom the government had allocated the forest.[123] In an

121. The government disbanded the commission of inquiry after 240 days of session perhaps in fear of more damning revelations of high level corruption. *See* Aidan Hartley, *A Political Murder*, AFR. REP., May-June 1990, at 17. In 1994, Jonah Anguka, a senior government official was acquitted of the charge of murdering Ouko. In 1998, he published a book in exile in the United States chronicling how the government was involved in the assassination of Ouko in order to preempt revelations of high level corruption in government. *See* JONAH ANGUKA, ABSOLUTE POWER: THE OUKO MURDER MYSTERY (1998). In 1998, a British journalist, Andrew Morton, claims that Ouko was murdered by another government official as a result of a dispute over a woman with another powerful politician at the time, Hezekiah Oyugi. *See* ANDREW MORTON, MOI: THE MAKING OF AN AFRICAN STATESMAN (1998). Morton claims that Oyugi also murdered Ouko because of his (Oyugi) ambition to amass wealth and become the Kenyan president in the future. Oyugi died in mysterious circumstances while in prison prior to the completion of his trial for the murder of Ouko. For a review of the book, see Chaacha Mwita, *Moi's Biography, Re-Writing a Nation's History*, DAILY NATION (Nov. 22, 1998) <http://www.nationaudio.com/News/DailyNation/1998/221198/Features/FN3.html>. *See also* DAVID W. THROUP & CHARLES HORNSBY, MULTI-PARTY POLITICS IN KENYA: THE KENYATTA AND MOI STATES AND THE TRIUMPH OF THE SYSTEM IN THE 1992 ELECTION 58-60, 81-84 (1998). At the end of November, 1998, the government issued an eighty-five page statement denying that it had anything to do with the murder of the Robert Ouko. It also exonerated the powerful Minister, Nicholas Biwott of the allegation that he was implicated in the murder. The statement restated in detail the argument in Andrew Morton's biography of President Moi that had only been published three weeks before. *See* Michael Ondieki, *Government Breaks Its Silence on Ouko*, DAILY NATION (Nov. 28, 1998) <http://www.nationaudio.com/News/DailyNation/1998/281198/OUKO3.html>.

122. *See* Ken Opala, *Remorseless Rape of Forests: Kenyans Want These Allocations Nullified and Minister's Huge Powers Curbed*, DAILY NATION (Oct. 4, 1998); Wanja Githinji, *Struggle to Save Karura Forest Has Been Stiff But to No Avail*, DAILY NATION (Oct. 4, 1998); Jeff Otieno, *Forest Protest Ends in Flames: Property Burnt as MPs Warn of More Protests*, DAILY NATION (Oct. 8, 1998 <http://www.nationaudio.com/News/DailyNation/1998/081098/News/News7.html>; *Destruction not the Way to Find the Solution*, EAST AFRICAN STANDARD, Oct. 8, 1998.

123. *See* Eman Omari, *Karura: Katana Names Firms Only*, DAILY NATION (Nov. 13, 1998) <http://www.nationaudio.com/News/DailyNation/1998/131198/News/News21.html>; Mutegi Njau & Mburu Mwangi, *Karura Forest: Lawyer Claims He was Duped*, DAILY NATION (Nov. 19, 1998)

unprecedented action, a senior partner whose law firm was involved in executing the documents and registering the irregular allocations of forest land to developers resigned.[124] The government revealed the names of companies that had been allocated the forest land in parliament. As a result of the pressure on the government, more revelations were made involving senior government officials that had been allocated private land. Attorney General Amos Wako was one of them.[125] The success with which the press, the opposition and civil society activists have managed to put the government and high officialdom on the offensive is also unprecedented especially bearing in mind that the judiciary had issued orders restraining newspapers and magazines from publishing allegations of land grabbing. In one case, the High Court sitting at Nairobi awarded a total fine of one million Kenya shillings against *Society* magazine for publishing defamatory information alleging that the plaintiffs had been illegally allocated public land.[126] One observation that flows from these initiatives of the opposition parliamentarians, civil society groups and individuals is the extremely difficult task of fighting high level corruption in government that is to a large extent possible because of the

<http://www.nationaudio.com/News/DailyNation/1998/191198/News/News18.html>; Mwangi Mburu, *AG Told To Probe Karura Firms*, DAILY NATION (Nov. 29, 1998) <http://www.nationaudio.com/News/DailyNation/1998/291198/News/News21.html>; *British Envoy Criticizes Karura Plots Sale*, DAILY NATION (Nov. 20, 1998) <http://www.nationaudio.com/News/DailyNation/1998/201198/News/News15.html>; Mburu Mwangi, *36 Karura Files Appear at Registry*, DAILY NATION (Nov. 18, 1998) <http://www.nationaudio.com/News/DailyNation/1998/181198/News/News.html>; *Name Karura Beneficiaries, Govt. Urged*, DAILY NATION (Nov. 16, 1998) <http://www.nationaudio.com/News/DailyNation/1998/161198/News/News11.html>; Emman Omari, *MPs Urge Moi to Act on Karura Allotees' Mystery*, DAILY NATION (Nov. 15, 1998) <http://www.nationaudio.com/News/DailyNation/1998/151198/News/News22.html>.

124. *See Law Firm Boss Quits Over Karura Forest Allocations*, DAILY NATION (Nov. 20, 1998) <http://www.nationaudio.com/News/DailyNation/1998/201198/News/News24.html>.

125. *See* George Omonso, *Wako, Lotodo Get Public Research Land*, DAILY NATION (Dec. 3, 1998) <http://www.nationaudio.com/News/DailyNation/1998/031298/News/news26.html>. The Attorney General did not deny that he had been 'allocated' land that was in use for agricultural research. According to Wako, however, the land was bought rather than allocated at no fee through a company of which he was the Director. He said that the sale to the company was regular, contrary to press reports. *See* Michael Mumo, *Wako Riddle of Land Company*, DAILY NATION (Dec. 8, 1998) <http://www.nationaudio.com/News/DailyNation/1998/0812/News/News5.html>.

126. *See* Abraham Kipsang Kiptanui and others v. Society, Civil Case No. 3368 (High Court at Nairobi 1992) (unreported). In one case involving a close friend of the President who later fell out of favor with the President, in a case involving allegations of misuse of National Social Security funds, the High Court declined to issue similar injunctive relief. According to the High Court, the "public at large had a legitimate interest in knowing how public funds were being spent by statutory a corporation that administers its funds." Cyrus Jirongo and Sololo Outlets v. Nation Newspapers, Civil Case No. 5796 (High Court at Nairobi 1992) (Unreported, but extracts reproduced in International Center Against Censorship, *The Article 19 Freedom of Expression Manual, International and Comparative Law Procedures*, Aug. 1993, at 160.) For an extensive discussion of the ways in which the government controls the legal process in Kenya to preempt criticism, see James Gathii, Freedom of Expression Without A Free Press: An Inquiry Into a Kenyan Paradox (1995) (thesis submitted to the Harvard Law School in partial fulfillment of the Requirements for the Masters of Law Degree).

disproportionate access to wealth and power by a relatively small group of Kenyans.

V. CONCLUSIONS: ACCOUNTING FOR THE FAILURE OF ANTI-CORRUPTION INITIATIVES IN KENYA

> While acknowledging the difference between arbitrary and unbounded state power, on the one hand, and the checks and inhibitions on domination imposed by the rule of law on the other, we need not be blind to the retrogresive character of the institutional and cultural practice embodied in the 'rule of law ideal' ... [that is] liberal legalism. We must not confuse the concept of law with the historically specific forms that law has assumed with the rise of capitalism. On the contrary, the focus on the regressive character of the form of law in capitalist society becomes an urgent priority.[127]

> "I take it that it is not necessary nowadays to argue for the proposition that the rule of law . . . is at most necessary, and certainly not sufficient, for a free society and a social order that is just."[128]

The rule of law efforts to deal with corruption are invariably beset by problems that arise mainly from the nature of the assumptions of the rule of law ideal, understood principally as a procedural and neutral mediation device. Dealing with corruption in Kenya illustrates this difficulty quite well. Corruption is by and large a reflection of differential access to power and wealth, not just the subversion of pre-defined procedural rules. The presumption underlying the classical definition of the rule of law is that notwithstanding differences in wealth, power, sexual and other forms of oppression, we have to set up fair procedures that apply equally and, as such, justly to everyone. In this way therefore, law presumably constrains the naked exercise of public power. In the first instance, this conception of the rule of law targets or seeks to limit public or state power, rather than

127. Klare, *supra* note 1, at 134. Morton Horwitz notes that "once we show law as the product of changing social forces, it undermines the indispensable ideological premise of the legal profession." Morton Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 AM. J. LEGAL HIST. 280-81 (1973). Hence, "thinking of law as particular and contingent rather than universal or necessary - seeing jurisprudence as equivalent to scientific discovery defuses its social and political character by explaining it as a simple intellectual process or occasionally, but only occasionally to employ history in order to demonstrate that changes regarded as undesirable were illegitimate political acts of usurpation." *Id.*

128. Jeremy Waldron, *The Rule of Law in Contemporary Liberal Theory*, 1 RATIO JURIS, 93 (1980).

the private power of the market place, family and workplace which constitute some of the most significant hierarchies in society. Second, the presumption of neutrality in the rule of law does not affect the hierarchies of wealth, power, sex and race in society since the rule of law is premised on the view that the state should not impose a preferred way of life. Instead, individual freedom is argued to be sufficient to enable citizens to freely choose their preferred way of life using a 'universal' scheme of neutral and general rules that govern all groups in society impersonally.[129] Third, conceiving the rule of law as constituted in part by the formal equality of all individuals before the law and uniform application of general rules falls short of a mandate to deal with those hierarchies in society which invariably impact on the nature of governance and the basic rights of individuals.[130] Fourth, in many sub-Saharan African countries the limitation of power remains an important concern granted their history of authoritarianism and legacy. In Kenya, this objective remains important given the involvement of high government officials in grand corruption and looting which is in part exacerbated by the extraordinary powers conferred on the presidency under the constitution.[131] In addition, the current Attorney General's assertion in his maiden parliamentary speech to the effect that "no man save the President is above the law" highlights the importance of the significance of the rule of law as a check against executive power.[132] Presidential assertiveness over the judicial branch has been also been a concern in addressing high level grand corruption and looting. Although judges serve under a constitutional guarantee of security of tenure, there has been Executive interference in the judiciary's ability to protect individual rights and freedoms.[133]

However, one limitation of the liberal view of the rule of law is its presumption that the role of the state is to merely support a framework of

129. *See* Michael Sandel, *Introduction* to LIBERALISM AND ITS CRITICS 1 (Michael Sandel ed., 1996).

130. *See* ROBERTO MANGABEIRA UNGER, LAW IN MODERN SOCIETY 176-81 (1976).

131. Presidential powers under the constitution include the unchecked powers of declaring and continuing of states of emergency which result in the suspension of constitutionally protected rights; the hiring and firing of officers of government without parliamentary scrutiny; the appointment and dismissal with advice of judges of the High Court and Court of Appeal, the Attorney General, the Auditor and Controller General and members of the Public Service Commission without a concurrent power of parliamentary scrutiny of Presidential decisions; unchecked powers to prorogue and dissolve parliament.

132. Attorney General Amos Wako in his inaugural parliamentary address, Amos Wako, *The Rule of Law Will Prevail*, WKLY. REV., July 12, 1991, at 26 (text of maiden parliamentary speech, June 1991). *See also* Amos Wako, *The Rule of Law: Cornerstone of Economic Progress*, 23 BUS. LAW. 350 (1995).

133. *See* JAMES THUO GATHII, KENYA HUMAN RIGHTS COMMISSION, THE DREAM OF JUDICIAL SECURITY OF TENURE AND THE REALITY OF EXECUTIVE INVOLVEMENT IN KENYA'S JUDICIAL PROCESS (1994).

basic rights and liberties without affirming any particular social or economic goals. The assumption here is that as long as individuals have their basic rights and liberties, they can choose the type of economic or social arrangements they desire or freely choose. Critics of this conception of justice, such as communitarians, have long questioned its individualism and rights-based liberalism as well as its separation of the individual or self from "aims and attachments"[134] or any substantive commitments. Liberal conceptions of justice consider substantive commitments, such as the general welfare, as inimical to certain fundamental rights including individual autonomy which may not be subordinated to such substantive commitments. This view of society is open to differences in goals since it proceeds from an assumption of free and open inquiry. Paradoxically, the possibilities of an open and free inquiry do not necessarily imply taking any position on the distribution of wealth and power and society. Those committed to social equality are often reminded that having such "deeply held views" evidences a closed, intolerant and perhaps repressive society. To avoid such a society, it was necessary to abandon deeply held views of the good life and adopt the neutral procedures of the rule of law that are separate and apart from the social structure.

In addition, the rule of law is faulty to the extent that it presupposes that the distribution of wealth or the advantages of the well off are arbitrary from a moral point of view. The presumption of neutrality of pre-existing institutional arrangements and distribution of wealth and power in a society is as erroneous as it is ideological. The pre-existing distribution of wealth, power and their accompanying institutional arrangements cannot provide an independent standpoint of judgment apart from their specific historical and contextual background. Prescriptions for fighting justice should not be based on abstract theories of justice that claim universal truth or application irrespective of history and context.

In the case of the Goldenberg scandal, I showed that the courts gave excessive deference to the legislative mandate of the Law Society of Kenya and the constitutional authority of the Attorney General to protect the public interest, to preempt it from bringing criminal proceedings through private prosecution against those allegedly involved in the Goldenberg scandal. Similarly, the corruption cases against high government officials commenced by the Anti-Corruption Authority were stopped for failure of compliance with the requirement that the Authority should only prosecute such cases with the direction and consent of the

134. Sandel, *supra* note 129, at 5; MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); LIBERALS AND COMMUNITARIANS (Stephen Mulhall & Adam Swift eds., 1996).

Attorney General. The courts assessed the exercise of legitimate or illegitimate power by examining institutional compliance with the correct procedural and jurisdictional rules. The questions whether the legislature was democratic or whether society was rife with social and political domination were in essence defined away. In conclusion, rule of law initiatives aimed at combating corruption are concerned with procedural legitimacy which is limited to liberal institutions and processes. Though these are important, their efficacy is dependent on the "dismantling of structures of oppression and exploitation, decentralization of power and the empowerment of hitherto exploited and dominated constituencies."[135] In the Kenyan context, efforts at dealing with corruption have left the basic apparatuses of oppression and repression intact. These need to be reformed if anti-corruption initiatives are to have a fair chance of success.

135. J. Ihonvbere, *On the Threshold of Another False Start? Critical Evaluation of Pro-democracy Movements in Africa, in* E.I. UDOGO, DEMOCRACY AND DEMOCRATIZATION IN AFRICA, TOWARDS THE 21ST CENTURY 131 (1997).