



EVALUATING THE IMPACT OF CORRUPTION
(PERCEPTION) INDICATORS ON
GOVERNANCE DISCOURSES IN KENYA*

*EVALUACIÓN DEL IMPACTO DE LA
CORRUPCIÓN (LA PERCEPCIÓN) DE
LOS INDICADORES DEL DISCURSO
DE LA GOBERNANZA EN KENIA*

MIGAI AKECH**

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** Associate Professor, School of Law, University of Nairobi, Kenya. Contact: migai.akech@gmail.com

ABSTRACT

Kenya has been measuring corruption since the 2007, in the context of on-going performance contracting reforms. It has developed Corruption eradication performance indicators, and tasked the Ethics and Anti-Corruption Commission (EACC) to monitor and evaluate their implementation. This paper seeks to evaluate the impact of these approaches to measuring corruption. How are these indicators produced? How is corruption conceptualized, and what kinds of questions are asked in the surveys that inform these indicators? To what extent do these indicators reflect the “true picture” of corruption? Do these indicators contribute to decision-making on corruption in Kenya? What impact have these indicators had on the fight against corruption? By examining production and use of the corruption indicators by Transparency International-Kenya and the Government in the context of the fight against corruption and institutional reform in Kenya over the last decade, this paper seek to explore whether and how do these indicators affect the work of policy-makers, civil society, institutions, and government.

Keywords: indicator; bribery; corruption; contract; Kenya; Transparency International

RESUMEN

Kenia ha medido la corrupción desde 2007, en el marco de las actuales reformas de ejecución de la contratación. Se desarrollaron indicadores de desempeño de la erradicación de la corrupción, y se encargó a la Comisión de Ética y Lucha contra la Corrupción (EACC, por sus siglas en inglés) para monitorear y evaluar su aplicación. Este trabajo pretende evaluar el impacto de estos enfoques para medir la corrupción. ¿Cómo se construyen estos indicadores? ¿Cómo se conceptualiza la corrupción y qué tipo de preguntas se hace en las encuestas que informan estos indicadores? ¿En qué medida estos indicadores reflejan la "verdadera imagen" de la corrupción? ¿Contribuyen a la toma de decisiones sobre la corrupción en Kenia? ¿Qué impacto han tenido en la lucha contra la corrupción? Mediante el estudio de la producción y el uso de los indicadores de corrupción por parte de Transparencia Internacional-Kenia y del gobierno en el contexto de la lucha contra la corrupción y la reforma institucional en Kenia durante la última década, este trabajo pretende explorar en qué medida y cómo estos indicadores afectan el trabajo de los responsables de formular políticas, la sociedad civil, instituciones y el gobierno.

Palabras clave: *indicador; soborno; corrupción; contrato; Kenia; Transparencia Internacional*

SUMMARY

INTRODUCTION.- I. MEASURING CORRUPTION: PURPOSES, CHALLENGES OF DEFINITION AND DIFFERENCES OF PERCEPTION.- II. TRANSPARENCY INTERNATIONAL'S BRIBERY INDEX.- III. EVALUATING THE IMPACT OF THE BRIBERY INDEX.- A. *How TI-Kenya Uses the Index.*- B. *The Index and National Discourses on Corruption.*- C. *Institutional Factors and the Diagnosis and Treatment of Corruption.*- 1. Explaining Abuse of Power and Persistence of Corruption.- 2. Performance Contracting, and the Diagnosis and Eradication of Corruption.- CONCLUSION.- BIBLIOGRAPHY.

INTRODUCTION

International organizations, civil society, and governments of developed and developing countries alike have all declared war on corruption. In developing countries, corruption is seen as a major contributory factor to their failure to attain economic development. Indicators which measure corruption, or public perceptions thereof, have become a significant tool in this war. The indicators adopt various methodologies, and are used for different purposes, including raising public awareness, advocating for institutional reforms, and assessing the extent to which such reforms are being implemented.

In Kenya, the Government and Transparency International now measure corruption annually, for different purposes. Transparency International, TI, a transnational organization devoted to fighting corruption, produces (through its national chapters) an annual bribery index for each country. This index forms part of TI's efforts "to inform the fight against corruption with rigorous and objective research and analysis."¹ In Kenya, it has been producing the index since 2002. It also produces regional bribery indices. In East Africa, it has been producing these indices since 2009. TI-Kenya sees the bribery index as a survey which "captures corruption as experienced by ordinary citizens in their interaction with officials of both public and private organizations."² It is compiled from information provided by respondents "on the organizations where they have encountered bribery during the year, where they paid bribes, how much and for what."³ Respondents are also asked to assess the changes they have observed in these organizations. According

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- 1 Transparency International, *Kenya Bribery Index*, *κβι*, 3 (Transparency International Kenya, Nairobi, 2006). Available at: <http://www.tikenya.org/index.php/kenya-bribery-index#>
 - 2 Transparency International, *Kenya Bribery Index*, *κβι*, 3 (Transparency International Kenya, Nairobi, 2006). Available at: <http://www.tikenya.org/index.php/kenya-bribery-index#>
 - 3 Transparency International, *Kenya Bribery Index*, *κβι*, 3 (Transparency International Kenya, Nairobi, 2006). Available at: <http://www.tikenya.org/index.php/kenya-bribery-index#>

to TI-Kenya, both the country and regional bribery indices are tools for measuring “petty bribery,” which it sees as “a general indicator for other forms of corruption in a particular country.”⁴ The Bribery Index has a value range from 0 to 100, where the higher the value, the worse the performance. The Bribery Index seeks to influence or shape discourses on governance, given that TI sees corruption as a manifestation of bad governance. The Index should be seen in the context of TI's mission to encourage “governments to establish and implement effective laws, policies and anticorruption programs.”⁵

For its part, the Government of Kenya has been measuring corruption since the 2007/2008 financial year, in the context of on-going performance contracting reforms. It has developed *Corruption eradication* performance indicators, and tasked the Ethics and Anti-Corruption Commission (EACC) to monitor and evaluate their implementation. To enable it to perform this function, the EACC measures corruption through methods such as public perception surveys.

This paper seeks to evaluate the impact of these approaches to measuring corruption in Kenya. How are these indicators produced? How is corruption conceptualized, and what kinds of questions are asked in the surveys that inform these indicators? To what extent do these indicators reflect the “true picture” of corruption? Do these indicators contribute to decision-making on corruption in Kenya? How do these indicators affect or influence the work of policy-makers, civil society, institutions, and government? What impact have these indicators had on the fight against corruption?

The paper examines the production and use of the corruption indicators by TI-Kenya and the Government in the context of the fight against corruption and institutional reform in Kenya over the last decade. It is based on a review of literature on

4 Transparency International, *East African Bribery Index, EABI*, 1 (Transparency International Kenya, Nairobi, 2010). Available at: <http://probeinternational.org/library/wp-content/uploads/2010/10/EAST-AFRICA-BRIBERY-INDEX-2010.pdf>

5 Hongying Wang & James N. Rosenau, *Transparency International and Corruption as an Issue of Global Governance*, 7 *Global Governance*, 1, 25-49, 31 (2001).

the subject, public deliberations of the indicators in advocacy, policy and legal discourses, interviews with key informants, and analysis of the coverage of the indicators in the media. The paper makes two arguments. First, although TI-Kenya's approach to measuring corruption is useful, it is not only incomplete since it is largely concerned with bribery but has also had little impact on governmental decision-making on corruption. Although the bribery index rankings name and shame "corrupt" institutions, they neither explain the causes of corruption nor give such institutions incentives to do better, apart from removal from the index. Second, the Government's approach to measuring corruption promises to reduce public sector corruption since it is an essential component of performance contracting, which requires public institutions, and gives them much needed incentives, to undertake institutional reforms. Nevertheless, the TI-Kenya bribery index remains a useful tool for monitoring the effectiveness of governmental efforts to eradicate public sector corruption.

Part I consists of a conceptual framework. It explains why corruption is difficult to define, observe and measure. It also outlines existing approaches to measuring corruption. It then contends that any efforts to measure corruption should be informed by contextual and institutional factors, if they are to guide policymakers and activists in designing suitable anti-corruption initiatives. Part II provides a brief background of TI-Kenya and examines the production and limitations of its bribery index. Part III evaluates the impact of the bribery index, and compares it to the Government of Kenya's approach of using performance contracting to measure and eradicate corruption. Further, this part discusses contextual and institutional factors that should inform the measurement and eradication of corruption in Kenya. Last part concludes.

I. MEASURING CORRUPTION: PURPOSES, CHALLENGES OF DEFINITION AND DIFFERENCES OF PERCEPTION

International development organizations such as the World Bank see corruption as a great obstacle to development.⁶ They consider combating corruption as necessary for the realization of development. In particular, they see the establishment of good governance as an important tool for combating corruption.⁷ On the one hand, they view governance as “the traditions and institutions by which authority in a country is exercised for the common good.”⁸ On the other hand, they define corruption as “the abuse of public office for private gain.” Essentially, therefore, they see corruption as a product or consequence of the abuse of governmental power. In this context, a need arises to diagnose the causes and magnitude of corruption to facilitate the targeting of good governance reforms. The idea is that if the causes and magnitude of corruption can be measured with some accuracy, then it can be combated effectively.

However, corruption is an elusive concept, and therefore difficult to measure. Transparency International itself defines corruption as the misuse of entrusted power for private gain.⁹ Further, it distinguishes between “according to rule corruption” and “against the rule” corruption, and therefore applies the term to both legal and illegal activities.¹⁰ The former category consists of facilitation payments, where a bribe is paid to receive

6 Staffan Andersson & Paul M. Heywood, *The Politics of Perception: Use and Abuse of Transparency International's Approach to Measuring Corruption*, 57 *Political Studies* 4, 746-767, 747 (2009).

7 Staffan Andersson & Paul M. Heywood, *The Politics of Perception: Use and Abuse of Transparency International's Approach to Measuring Corruption*, 57 *Political Studies* 4, 746-767, 747 (2009).

8 Daniel Kaufmann, *Myths and Realities of Governance and Corruption*, 81-98, 82 (Munich Personal RePEc Archive, MPRA, Paper No. 8089, 2005). Available at: http://mpra.ub.uni-muenchen.de/8089/1/MPRA_paper_8089.pdf

9 Transparency International, *Frequently Asked Questions about Transparency International* (2006). Available at: http://www.transparency.org/whoware/organisation/faqs_on_transparency_international/9/

10 Transparency International, *Frequently Asked Questions about Transparency International* (2006). Available at: http://www.transparency.org/whoware/organisation/faqs_on_transparency_international/9/

preferential treatment for something that the bribe receiver is required to do by law.¹¹ Conversely, the latter category consists of bribes paid to obtain services the bribe receiver is prohibited from providing.¹² This definition has been faulted for “explicitly refer[ring] to the payment of bribes, whereas many forms of corruption may not involve any form of financial transaction.”¹³ For example, it is argued that private actors who peddle confluence with the aim of distorting public policy decisions are also engaging in corruption.¹⁴ According to Staffan Andersson and Paul Heywood, corruption should be defined more broadly as “the misuse of power in the interests of illicit gain” to embrace the idea that those who do not enjoy “entrusted” power, including private actors, are also often involved in corrupt activities.¹⁵ In their view, in order to be “meaningfully applicable,” a definition should embrace the “many different types of corruption, which vary according to the sector in which they occur (public or private; political or administrative), the actors involved (for instance, state officials, politicians, entrepreneurs and so forth), the impact they have (localized or extensive) and the degree to which they are formalized (embedded and systemic or occasional and sporadic).”¹⁶ Arguably, the United Nations Development Program's (UNDP) definition of corruption meets this test of meaningful applicability. The UNDP defines corruption as “the

11 Transparency International, *Frequently Asked Questions about Transparency International* (2006). Available at: http://www.transparency.org/whoware/organisation/faqs_on_transparency_international/9/

12 Transparency International, *Frequently Asked Questions about Transparency International* (2006). Available at: http://www.transparency.org/whoware/organisation/faqs_on_transparency_international/9/

13 Staffan Andersson & Paul M. Heywood, *The Politics of Perception: Use and Abuse of Transparency International's Approach to Measuring Corruption*, 57 *Political Studies* 4, 746-767, 748 (2009).

14 Staffan Andersson & Paul M. Heywood, *The Politics of Perception: Use and Abuse of Transparency International's Approach to Measuring Corruption*, 57 *Political Studies* 4, 746-767, 749 (2009).

15 Staffan Andersson & Paul M. Heywood, *The Politics of Perception: Use and Abuse of Transparency International's Approach to Measuring Corruption*, 57 *Political Studies* 4, 746-767, 748 (2009).

16 Staffan Andersson & Paul M. Heywood, *The Politics of Perception: Use and Abuse of Transparency International's Approach to Measuring Corruption*, 57 *Political Studies* 4, 746-767, 749 (2009).

misuse of public power, office or authority for private benefit — through bribery, extortion, influence peddling, nepotism, fraud, speed money or embezzlement.”¹⁷

Defining corruption is also difficult because it is perceived differently in different political and cultural settings.¹⁸ There is no international consensus on the meaning of corruption,¹⁹ and people do not agree on what is the uncorrupt state of affairs.²⁰ Further, people's perceptions of corruption are influenced considerably by their personal experiences and the media.²¹ In this respect, TI's perspective on corruption has been criticized for being “blind to the ground realities of a developing society, especially one in the process of rapid transition from tradition to modernity.”²² It could therefore be argued that international discourses on corruption are shaped by the views of the dominant Western liberal democracies, but which may not be very helpful in diagnosing and combating corruption in non-Western societies. As a result, the institutional reforms recommended by international agencies for combating corruption in these societies may not be suitable. For example, it has been argued that there are fewer corrupt transactions in rich countries because bureaucrats receive adequate salaries.²³ In contrast, their counterparts in poor countries are underpaid, a fact which leads to

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- 17 United Nations Development Program, UNDP, Management Development & Governance Division, *Fighting Corruption to Improve Governance*, 6 (November 13, 1998).
- 18 Staffan Andersson & Paul M. Heywood, *The Politics of Perception: Use and Abuse of Transparency International's Approach to Measuring Corruption*, 57 *Political Studies* 4, 746-767, 749 (2009).
- 19 Tina Søreide, *Is it Wrong to Rank? A Critical Assessment of Corruption Indices*, 4 (Chr. Michelsen Institute, CMI, Working Paper 2006:1, 2006). Available at: <http://www.cmi.no/pdf/?file=publications/2006/wp/wp2006-1.pdf>
- 20 Staffan Andersson & Paul M. Heywood, *The Politics of Perception: Use and Abuse of Transparency International's Approach to Measuring Corruption*, 57 *Political Studies* 4, 746-767, 750 (2009).
- 21 Faiz-ur-Rahim & Asad Zaman, *Corruption: Measuring the Unmeasurable*, 1-19, 11 (International Institute of Islamic Economics, 2008). Available at: <http://ssrn.com/abstract=1309131>
- 22 Maya Chadda, *India: Between Majesty and Modernity*, in *The Struggle against Corruption: A Comparative Study*, 109-144, 109-122 (Roberta Ann Johnson, ed., Palgrave MacMillan, New York, 2004).
- 23 Faiz-ur-Rahim & Asad Zaman, *Corruption: Measuring the Unmeasurable*, 1-19, 11 (International Institute of Islamic Economics, 2008). Available at: <http://ssrn.com/abstract=1309131>

“substantially greater exposure of [the] general public to corrupt transactions.”²⁴

Corruption is also difficult to observe since it is usually hidden.²⁵ Michael Johnston thus observes that “We know corruption exists, but direct witnesses are few; often, those with direct knowledge have an interest in keeping it secret.”²⁶ And because corruption is a clandestine phenomenon, it has been argued that it is virtually impossible to measure it with precision.²⁷ It follows from this premise that empirical attempts to measure corruption “can never be better than approximations.”²⁸ And to ensure that these approximations are as close to reality as possible, the three predominant approaches to measuring corruption are often used in combination.

The first approach measures the perception of target groups concerning corruption, and is based on the assumption that there is an association between the perception and actual corruption.²⁹ The usefulness of this approach is doubtful for two reasons. First, “factors such as media coverage of specific corruption scandals may excessively amplify popular perceptions about the overall level of corruption.”³⁰ Second, “the highly secretive nature of

24 Faiz-ur-Rahim & Asad Zaman, *Corruption: Measuring the Unmeasurable*, 1-19, 16 (International Institute of Islamic Economics, 2008). Available at: <http://ssrn.com/abstract=1309131>

25 Valts Kalnins, *Assessing Trends in Corruption and Impact of Anti-Corruption Measures*, 4 (Discussion Paper, Anti-Corruption Network for Transition Economies 6th General Meeting, 30-31 May 2005, Istanbul, Turkey). Available at: <http://www.oecd.org/corruption/acn/library/37330934.pdf>

26 Michael Johnston, *The New Corruption Rankings: Implications for Analysis and Reform*, 4 (Paper Prepared for Research Committee 24, International Political Science Association World Congress, Quebec City, Canada, August 2, 2000). Available at: <http://departments.colgate.edu/polisci/papers/mjohnston/originals/JohnstonIPSA2000.pdf>

27 Malte Gephart, *Contextualizing Conceptions of Corruption: Challenges for the International Anti-corruption Campaign*, 3-39, 18 (German Institute of Global Area Studies, Working Paper No. 115, 2009). Available at: http://repec.giga-hamburg.de/pdf/giga_09_wp115_gephart.pdf

28 Michael Johnston, *The New Corruption Rankings: Implications for Analysis and Reform*, 5 (Paper Prepared for Research Committee 24, International Political Science Association World Congress, Quebec City, Canada, August 2, 2000). Available at: <http://departments.colgate.edu/polisci/papers/mjohnston/originals/JohnstonIPSA2000.pdf>

29 Valts Kalnins, *Assessing Trends in Corruption and Impact of Anti-Corruption Measures*, 7 (Discussion Paper, Anti-Corruption Network for Transition Economies 6th General Meeting, 30-31 May 2005, Istanbul, Turkey). Available at: <http://www.oecd.org/corruption/acn/library/37330934.pdf>

30 Valts Kalnins, *Assessing Trends in Corruption and Impact of Anti-Corruption Measures*,

corrupt transactions... may contribute to the underestimation of corruption in people's perception.”³¹

The second approach asks people about their actual experiences or incidences of corruption. Under this approach, for example, researchers seek to determine whether and how often individuals solicited, offered, paid, or were compelled to pay, bribes over a given period, say one year. Again, this approach has drawbacks. For example, since corruption is usually illegal and morally objectionable, there is a possibility of deflation.³² That is, respondents may report less corruption than they experienced. Further, it is unlikely that those who view corruption experiences as mutually profitable transactions will reveal them.³³ The final approach consists of the evaluation of corruption by elites, such as businessmen (both local and international), and NGO actors. This approach has equally been faulted. For example, it is argued that the evaluations of businessmen are biased since they often offer bribes.³⁴ Second, it is said that international businessmen are often not accustomed to local customs and language, and as a result tend to use bribes to obtain quick solutions to their problems. Third, it is claimed that elite knowledge is often narrow, since it is “limited to a particular government ministry or economic sector and difficult to generalize since elites do not constitute a national probability sample.”³⁵

7 (Discussion Paper, Anti-Corruption Network for Transition Economies 6th General Meeting, 30-31 May 2005, Istanbul, Turkey). Available at: <http://www.oecd.org/corruption/acn/library/37330934.pdf>

31 Valts Kalnins, *Assessing Trends in Corruption and Impact of Anti-Corruption Measures*, 7 (Discussion Paper, Anti-Corruption Network for Transition Economies 6th General Meeting, 30-31 May 2005, Istanbul, Turkey). Available at: <http://www.oecd.org/corruption/acn/library/37330934.pdf>

32 Valts Kalnins, *Assessing Trends in Corruption and Impact of Anti-Corruption Measures*, 8 (Discussion Paper, Anti-Corruption Network for Transition Economies 6th General Meeting, 30-31 May 2005, Istanbul, Turkey). Available at: <http://www.oecd.org/corruption/acn/library/37330934.pdf>

33 Valts Kalnins, *Assessing Trends in Corruption and Impact of Anti-Corruption Measures*, 9 (Discussion Paper, Anti-Corruption Network for Transition Economies 6th General Meeting, 30-31 May 2005, Istanbul, Turkey). Available at: <http://www.oecd.org/corruption/acn/library/37330934.pdf>

34 Hungarian Gallup Institute, *Basic Methodological Aspects of Corruption Measurement: Lessons Learned from the Literature and the Pilot Study*, 1-10, 6 (1999). Available at: http://www.unodc.org/pdf/crime/corruption_hungary_rapid_assess.pdf

35 William Mishler & Richard Rose, *Seeing is Not Always Believing: Measuring Corruption*

Alina Mungiu-Pippidi has also offered a useful perspective on the diagnosis and treatment of corruption that should influence how it is measured.³⁶ She laments that although global expenditures in anticorruption have grown to approximately one hundred million dollars per year, few successes have resulted from this investment. She contends that “many anticorruption initiatives fail because they are nonpolitical in nature, while most of the corruption in developing and postcommunist countries is inherently political.”³⁷ She takes the view that while corruption in developed countries usually consists of individual cases of infringement of the norms of integrity, in developing countries it typically takes the form of “particularism,” which she defines as “a mode of social organization characterized by the regular distribution of public goods on a non-universalistic basis that mirrors the vicious distribution of power within such societies.”³⁸ She contrasts “particularism” with “universalism,” which she defines as the norm and practice of individualistic societies, where equal treatment applies to everyone regardless of the group to which one belongs.³⁹ In this type of society, individuals expect equal treatment from the state. In the former, however, their treatment depends on their status or position in society, and people do not even expect to be treated fairly by the state. She then suggests that anticorruption strategies in developing countries fail for two reasons. First, anticorruption strategies do not attack the roots of corruption in such societies, which roots are to be found in the distribution of power. Second, these strategies are “adopted and implemented in cooperation with the

Perceptions and Experiences, 7 (Paper Prepared for the Elections, Public Opinion and Parties 2008 Annual Conference, 12-14 September, 2008, University of Manchester, United Kingdom). Available at: <http://www.u.arizona.edu/~mishler/corrupt08-18-08.pdf>

36 Alina Mungiu-Pippidi, *Corruption: Diagnosis and Treatment*, 17 *Journal of Democracy*, 3, 86-99, 86 (2006). Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1557727

37 Alina Mungiu-Pippidi, *Corruption: Diagnosis and Treatment*, 17 *Journal of Democracy*, 3, 86-99, 86 (2006). Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1557727

38 Alina Mungiu-Pippidi, *Corruption: Diagnosis and Treatment*, 17 *Journal of Democracy*, 3, 86-99, 86-87 (2006). Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1557727

39 Alina Mungiu-Pippidi, *Corruption: Diagnosis and Treatment*, 17 *Journal of Democracy*, 3, 86-99, 88 (2006). Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1557727

very predators who control the government and, in some cases, the anticorruption instruments themselves.²⁴⁰

Mungiu-Pippidi's analysis is useful in understanding the practical choices that many powerless citizens of such societies face on a daily basis. For example, such citizens often offer or pay bribes in order to circumvent inequality, since “bribing an official may be the only way to secure equal treatment.”²⁴¹ In such contexts, a preoccupation with measuring petty bribery may not be a particularly useful strategy for combating corruption. Her analysis is also useful in understanding the fact that institutions such as the police and the judiciary—which in countries such as Kenya are sites where citizens report that they often encounter bribery—are directed by the guardians of a corrupt, and largely particularistic, system.⁴² From this analysis, she suggests that a proper diagnosis of corruption in any given society requires a qualitative strategy that is informed by the distribution of power. She writes:

*For each society, we must ask: Are we dealing with modern corruption, where corruption is the exception to the norm of universalism? Or are we dealing with particularism and a culture of privilege, where corruption itself is the norm? Or, as is frequently the case in the postcolonial world where the modern state was defectively implanted on a traditional society, are we dealing with a combination of the two? If so, to what extent is the government guided by universalist norms and to what extent is its main task to promote patronage and cater to specific interest groups?*²⁴³

In terms of diagnosing corruption in particularistic societies, she recommends the use of “indirect” indicators, including: persistence of widespread popular perceptions of government

40 Alina Mungiu-Pippidi, *Corruption: Diagnosis and Treatment*, 17 *Journal of Democracy*, 3, 86-99, 87 (2006). Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1557727

41 Alina Mungiu-Pippidi, *Corruption: Diagnosis and Treatment*, 17 *Journal of Democracy*, 3, 86-99, 88 (2006). Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1557727

42 Alina Mungiu-Pippidi, *Corruption: Diagnosis and Treatment*, 17 *Journal of Democracy*, 3, 86-99, 93-94 (2006). Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1557727

43 Alina Mungiu-Pippidi, *Corruption: Diagnosis and Treatment*, 17 *Journal of Democracy*, 3, 86-99, 91-92 (2006). Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1557727

corruption despite changes in government; influential jobs being held by the same individuals or groups regardless of the outcome of elections; high political migration from opposition parties to the party in government; a widespread perception that politicians are above the law; a situation in which access to resources is intermediated by oligarchic networks; and failure to take legal action against even the most notoriously corrupt members of high-status groups.⁴⁴ Such indicators should help us to understand the causes of corrupt behavior, with a view to building accountable and fair governments, and constructing societies that “embrace universalism as the supreme principle governing relations between the people and government, and among the people themselves.”⁴⁵ As Mark E. Warren has noted, this entails designing institutions that ensure that no official has monopoly control over resources, linking the power of officials to mechanisms of accountability, and minimizing room for discretionary judgment.⁴⁶

Proponents of diagnostic data and analysis on corruption and governance contend that this type of research serves useful purposes, such as awareness-raising, advocacy and policy-making.⁴⁷ In particular, they favor local or national instruments, which they claim “often provide more in-depth analysis of the phenomenon from different angles.”⁴⁸ Such instruments diagnose the extent and level of corruption across different segments of the population, institutions and sectors, with a view to identifying the causes and consequences of corruption, and tolerance towards

44 Alina Mungiu-Pippidi, *Corruption: Diagnosis and Treatment*, 17 *Journal of Democracy*, 3, 86-99, 92 (2006). Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1557727

45 Alina Mungiu-Pippidi, *Corruption: Diagnosis and Treatment*, 17 *Journal of Democracy*, 3, 86-99, 96 (2006). Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1557727

46 Mark E. Warren, *What Does Corruption Mean in a Democracy?*, 48 *American Journal of Political Science*, 2, 328-343, 330 (2004). Available at: <http://projects.iq.harvard.edu/gov2126/files/warrendemocracy.pdf>

47 Anna Hakobyan & Marie Wolkers, *Local Corruption Diagnostics and Measurement Tools in Africa, v4 Reports*, 2 (Utstein Anti-Corruption Resource Centre, 2004). Available at: http://www.eldis.org/vfile/upload/1/document/1112/U4report_local_surveys_africa.pdf

48 Anna Hakobyan & Marie Wolkers, *Local Corruption Diagnostics and Measurement Tools in Africa, v4 Reports*, 2 (Utstein Anti-Corruption Resource Centre, 2004). Available at: http://www.eldis.org/vfile/upload/1/document/1112/U4report_local_surveys_africa.pdf

corrupt practices, among others.⁴⁹ Such tools also enhance the visibility and profile of the civil society organizations that produce them, such as TI. It is also claimed that they are useful resources for governmental authorities to draw on in order to better target their policy and reform efforts.⁵⁰ As we will see in Kenya's case, however, the extent to which some of these tools influence the behavior of governmental institutions or citizens remains speculative. For example, to what extent does raising the awareness of citizens and police officers (through the publication of TI-Kenya's bribery index) contribute to combating corruption in the absence of reforms that can alter the fundamental rules of an essentially particularistic system? What choices do citizens really have when they are confronted with demands for bribes in such situations? And what choices do junior police officers really have when their seniors, who wield immense discretionary powers, prevail upon them to solicit bribes?

The foregoing challenges of defining and measuring corruption notwithstanding, the existing approaches are nevertheless useful in guiding policymakers and activists in designing anti-corruption initiatives.

II. TRANSPARENCY INTERNATIONAL'S BRIBERY INDEX

Transparency International is a transnational network devoted to fighting corruption. It was founded in Berlin in 1993 by Peter Eigen, a former World Bank executive, together with a group of like-minded individuals, including Joe Githongo, then head of a Kenyan accountancy firm, whose son John was to later head TI-Kenya.⁵¹ TI's mission is to increase government accountability

49 Anna Hakobyan & Marie Wolkers, *Local Corruption Diagnostics and Measurement Tools in Africa, v4 Reports*, 2 (Utstein Anti-Corruption Resource Centre, 2004). Available at: http://www.eldis.org/vfile/upload/1/document/1112/U4report_local_surveys_africa.pdf

50 Anna Hakobyan & Marie Wolkers, *Local Corruption Diagnostics and Measurement Tools in Africa, v4 Reports*, 2 (Utstein Anti-Corruption Resource Centre, 2004). Available at: http://www.eldis.org/vfile/upload/1/document/1112/U4report_local_surveys_africa.pdf

51 Norwegian Agency for Development Cooperation, NORAD, *Evaluation of Transparency International*, 7 (Norwegian Agency for Development Cooperation, NORAD, Oslo, 2011). Available at: http://www.norad.no/en/evaluation/news/_attachment/268518?_download

and curb both international and national corruption. It seeks to realize this mission by promoting and strengthening international and national integrity systems. At the national level, it targets reforms that minimize the discretionary power of public officials, strengthen autonomous oversight mechanisms, reduce conflicts of interest, and increase public supervision of the government.⁵² In terms of approach, TI “has eschewed investigation into particular cases, and has tended to stop short of overt confrontation with centres of power, whether in government or business.”⁵³ Instead, it has preferred “to work with organizations from the inside, with a strong focus on technical solutions to corruption problems.”⁵⁴

TI carries out its work through National Chapters, which are supported by a Secretariat based in Berlin. The Secretariat also coordinates and work of these chapters, gives them advice, leads the organization’s international agenda, and serves as a knowledge management centre.⁵⁵ According to TI, the movement, through the National Chapters, “brings together people of integrity in civil society, business and government to work as coalitions for systemic reforms.”⁵⁶ TI now has some 100 accredited National Chapters, which are supposed to be financially and institutionally independent, but are required to observe the movement's guiding principles of non-investigative work and independence from government, commercial and partisan political interests.

As far as governance is concerned, TI's ultimate decision-making body is the Annual Membership Meeting (AMM), which meets

52 Hongying Wang & James N. Rosenau, *Transparency International and Corruption as an Issue of Global Governance*, 7 *Global Governance*, 1, 25-49, 31 (2001).

53 Norwegian Agency for Development Cooperation, NORAD, *Evaluation of Transparency International*, 7 (Norwegian Agency for Development Cooperation, NORAD, Oslo, 2011). Available at: http://www.norad.no/en/evaluation/news/_attachment/268518?_download

54 Norwegian Agency for Development Cooperation, NORAD, *Evaluation of Transparency International*, 7 (Norwegian Agency for Development Cooperation, NORAD, Oslo, 2011). Available at: http://www.norad.no/en/evaluation/news/_attachment/268518?_download

55 Norwegian Agency for Development Cooperation, NORAD, *Evaluation of Transparency International*, 7 (Norwegian Agency for Development Cooperation, NORAD, Oslo, 2011). Available at: http://www.norad.no/en/evaluation/news/_attachment/268518?_download

56 Transparency International Kenya, *What is Transparency International?* Available at: <http://www.tikenya.org/index.php/about-ti/organization/history>

once a year. It consists of Official Chapter Representatives and Individual Members, the latter being “experienced anti-corruption practitioners who are judged to make a significant personal contribution to the movement at global level.”⁵⁷ The next important body is the International Board of Directors, whose members are elected by the AMM. In turn, this Board appoints the Managing Director of the Secretariat. Another important body is the Advisory Council consisting of “some 30 highly experienced individuals.”⁵⁸ This council is appointed by the Board and advises it.

TI's best known product is the Corruption Perception Index (CPI), which it has issued annually since 1995. The CPI ranks countries in terms of their degree of corruption, based on the perceptions and opinions of people working with multinational corporations and international institutions.⁵⁹ It uses country scores which range from one to ten (with ten representing the lowest levels of corruption). Because it is based on perception, the CPI is therefore not an objective measurement of corruption. In fact, TI acknowledges the limitations of the CPI's methodology, which has been widely challenged.⁶⁰ However, the annual publication of the CPI attracts wide publicity all over the world. For example, it “generates a great deal of media coverage, which brings public attention to the issue of corruption, as well as to TI itself.”⁶¹ Further, governments around the world are sensitive to their standing on the CPI.⁶² Academic researchers also use the CPI

57 Norwegian Agency for Development Cooperation, NORAD, *Evaluation of Transparency International*, 12 (Norwegian Agency for Development Cooperation, NORAD, Oslo, 2011). Available at: http://www.norad.no/en/evaluation/news/_attachment/268518?_download

58 Norwegian Agency for Development Cooperation, NORAD, *Evaluation of Transparency International*, 12 (Norwegian Agency for Development Cooperation, NORAD, Oslo, 2011). Available at: http://www.norad.no/en/evaluation/news/_attachment/268518?_download

59 Hongying Wang & James N. Rosenau, *Transparency International and Corruption as an Issue of Global Governance*, 7 *Global Governance*, 1, 25-49, 32 (2001).

60 Norwegian Agency for Development Cooperation, NORAD, *Evaluation of Transparency International*, 31 (Norwegian Agency for Development Cooperation, NORAD, Oslo, 2011). Available at: http://www.norad.no/en/evaluation/news/_attachment/268518?_download

61 Hongying Wang & James N. Rosenau, *Transparency International and Corruption as an Issue of Global Governance*, 7 *Global Governance*, 1, 25-49, 35 (2001).

62 Hongying Wang & James N. Rosenau, *Transparency International and Corruption as an Issue of Global Governance*, 7 *Global Governance*, 1, 25-49, 35 (2001).

as a basis for comparative studies.⁶³ It therefore has tremendous value as an advocacy tool.

Perhaps because of the limitations of the CPI, and the controversy it generates, TI has sought to supplement it with other indices and assessments, some of which are the initiatives of the National Chapters.

TI-Kenya's Bribery Index, KBI, should be seen against this background. Like other National Chapters, TI-Kenya—which was established in 1999—has tried to steer clear of exposing specific cases of corruption and confronting government. In one interesting episode in 2005, it prevailed upon its then executive director to resign on the basis that “she had behaved rudely to government officials and had made unsubstantiated allegations about official sleaze.”⁶⁴ However, sections of the media thought that the real reason she was fired was because some elements of the TI-Kenya Board were “too close to the ruling regime,” and were therefore uncomfortable with the vocal manner in which she had articulated corruption issues.⁶⁵ For example, this executive director had alleged that a government minister had stolen KES 750 million [approx. 8,400,000 US dollars, 6,570,000 euros] and stashed it in overseas banks. At the time, the chairman of the TI-Kenya Board was “a close friend and confidante” of the president Mwai Kibaki [the third President of Kenya, serving from December 2002 to April 2013], who had even appointed him as the Chancellor of one of the public universities. Indeed, this particular individual remains a member of TI's Advisory Council. Her successor was also fired in controversial circumstances, and was reportedly sacked for “being vocal on corruption involving some board members.”⁶⁶ Further, the current TI-Kenya Board include a former head of the public service, a member of the

63 Norwegian Agency for Development Cooperation, NORAD, *Evaluation of Transparency International*, 31 (Norwegian Agency for Development Cooperation, NORAD, Oslo, 2011). Available at: http://www.norad.no/en/evaluation/news/_attachment/268518?_download

64 William MacLean, *Leader of Kenya's Anti-Corruption Watchdog Resigns* (2005).

65 Douglas Okwach, *TI Director Forced Out of Office*.

66 *Sacking Linked to Anglo-Leasing Remarks, says Ex-TI Boss*, *East African Standard*, June 26, 2006.

Monetary Committee of the Central Bank of Kenya, and a former Permanent Secretary in the Office of the Vice President and Minister for Home Affairs. These circumstances perhaps explain why media and civil society skeptics claim that “true anti-corruption crusaders” have been removed from TI-Kenya.⁶⁷ And although it is said that TI has resolved the governance issues that have dogged the TI-Kenya Board,⁶⁸ the latter remains open to criticism on the ground that it is rather closely associated with powerful elements in government.

Nevertheless, TI-Kenya produces the bribery index KBI, a survey which captures corruption as experienced by ordinary citizens in their interactions with officials of public institutions, although a few private organizations are also included. The survey is conducted at the household level, and sampled households and respondents are picked through random sampling.⁶⁹ It uses a sampling frame based on a census of the target population, which makes it possible to make inferences about the population as a whole, taking into account margins of error.⁷⁰ Further, the survey is structured around four key experiential questions: (i) which institutions did respondents interact with in the last 12 months while seeking services; (ii) whether a bribe was expected or demanded during the interaction; (iii) whether the respondents paid a bribe and how much they paid; and (iv) whether the respondents received the services sought after paying the bribe.⁷¹ In addition, the survey now asks respondents about the

67 *Umuro Wario's Reinstatement at Kenya's Youth Fund is a Victory for Public Officers Committed to Fighting Corruption* (October 24, 2009). Available at: <http://yipe.wordpress.com/tag/ti-kenya>. Onyango Oloo, *How Transparent is Transparency International?* Available at: <http://demokrasia-kenya.blogspot.com/2005/04/how-transparent-is-transparency.html>. *Why Mwalimu Mati Was Hounded Out of TI*. Available at: <http://kumekucha.blogspot.com/2007/02/why-mwalimu-mati-was-hounded-out-of-ti.html>

68 Norwegian Agency for Development Cooperation, NORAD, *Evaluation of Transparency International*, 20 (Norwegian Agency for Development Cooperation, NORAD, Oslo, 2011). Available at: http://www.norad.no/en/evaluation/news/_attachment/268518?_download

69 Transparency International, *East African Bribery Index, EABI*, 3 (Transparency International Kenya, Nairobi, 2010). Available at: <http://probeinternational.org/library/wp-content/uploads/2010/10/EAST-AFRICA-BRIBERY-INDEX-2010.pdf>

70 Transparency International, *Kenya Urban Bribery Index, KUBI*, 2 (Transparency International Kenya, Nairobi, 2002). Available at: <http://ww2.unhabitat.org/cdrom/transparency/html/yellowp/Y007.html>

71 Transparency International, *Kenya Urban Bribery Index, KUBI*, 2 (Transparency Interna-

frequency of demands for and payment of bribes.⁷² By asking these questions, TI-Kenya hopes to capture the situation on the ground concerning corruption in particular institutions.⁷³ The services sought are categorized into: law enforcement (that is, avoiding the consequences of wrong-doing and/or harassment by the relevant authority); access to services such as medical treatment, water and electricity; business, such as obtaining contracts and expediting payments; and employment matters, such as securing jobs, promotions, transfers and training.⁷⁴

In addition to the foregoing experiential questions, the survey includes the following questions of perception: (i) why do the respondents think they did not get service even after paying a bribe; (ii) whether they were satisfied with the services they received after paying a bribe; (iii) whether they complained or reported the bribery incidences to any authority or person; (iv) why they did not report or complain about the bribery incidences; (v) how satisfied they were with the action taken after they reported the incidences; (vi) how they would describe the current state of corruption in Kenya; (vii) whether the state of corruption has increased, remained the same or decreased during the preceding year; (ix) whether the state of corruption will increase, remain the same or decrease in the next year; and (x) whether the government is doing enough to fight corruption.

The collected data is analyzed using six indicators, namely:⁷⁵

- i. **Incidence**, defined as the proportion of survey respondents who have interacted with an institution and have reported encountering bribery situations in their official dealings

tional Kenya, Nairobi, 2002). Available at: <http://ww2.unhabitat.org/cdrom/transparency/html/yellowp/Y007.html>

72 Interview with Samuel Mbithi, Executive Director, Transparency International Kenya, May 23, 2012.

73 Interview with Samuel Mbithi, Executive Director, Transparency International Kenya, May 23, 2012.

74 Transparency International, *Kenya Bribery Index*, *kbi*, 3 (Transparency International Kenya, Nairobi, 2008). Available at: http://www.transparency.org/news/pressrelease/20080716_kenya_bribery_index_kbi_2008

75 Transparency International, *Kenya Bribery Index*, *kbi*, 3-4 (Transparency International Kenya, Nairobi, 2008). Available at: http://www.transparency.org/news/pressrelease/20080716_kenya_bribery_index_kbi_2008

with it. This indicator measures “the opportunity for and propensity of officials in an organization to ask for or to accept bribes.”

- ii. **Prevalence**, defined as the proportion of survey respondents who are victims of bribery in an institution. These are the respondents who reported paying a bribe or were badly treated or not served for failing to do so. This indicator measures “the impact of bribery in an organization on the population it serves.”
- iii. **Severity**, defined as the frequency of denial of service if bribes are not paid. This indicator measures “the deleterious impact of this form of corruption on the public's ability to access that to which it is entitled.”
- iv. **Frequency**, defined as the average number of bribes paid per client. This indicator measures “the scale of the bribery activity in an organization among those who interact with it.”
- v. **Cost**, defined as the average expenditure on bribery per person. This indicator measures “the extra ‘tax burden’ that results from such practices.”
- vi. **Size**, defined as the average size of bribes paid. This indicator measures “the premium that citizens put on a particular service or cost/penalty avoided or, conversely, the value that those demanding/receiving such bribes believe their ‘services’... are worth.”

In constructing the bribery index, TI-Kenya gives each indicator equal weight. The result is an aggregate index based on these indicators, and which “has a value range from 0 to 100, where the higher the value, the worse the performance.”⁷⁶ Whereas the first three indicators (i-iii) are entered into the aggregate index as raw percentages, the other three are actual values and “are scaled by the lowest to the highest value to obtain a normalized

76 Transparency International, *Kenya Bribery Index*, *κβι*, 4 (Transparency International Kenya, Nairobi, 2008). Available at: http://www.transparency.org/news/pressrelease/20080716_kenya_bribery_index_kbi_2008

score range of 0-100.”⁷⁷ Only organizations mentioned by at least 50 respondents are ranked.⁷⁸ As **Table 1** below indicates, the Kenya Police has consistently obtained the highest aggregate score. The Judiciary, the Ministry of Lands, and Nairobi City Council have also featured several times in the top ten. All these institutions are characterized by wide discretionary powers and citizens interact with them frequently owing to the nature of their services. Although the Ministry of Education has been in the news in the recent past following a major corruption scandal, it has not featured in the top ten of the TI-Kenya rankings. Another significant institution which various commentators and the media allege is a den of corruption is Parliament (the legislature), although it has only featured once in the rankings.

TI-Kenya has drawn a number of conclusions from these indices over the years. First, bribes are on average demanded (or offered) in two out of three encounters with public officials. Second, law enforcement matters have emerged as the most corrupt, followed by regulatory functions. Third, poor people (with low income and low education) are the most vulnerable to bribery. Fourth, most bribes involve relatively small sums paid frequently. Fifth, the majority of respondents do not report bribery incidences to the relevant authorities; they prefer to pay the bribes and keep quiet. For example, the East African Bribery Index, *EABI*, for 2010 states that about 89% of the respondents did not report cases of bribery to any person in authority.⁷⁹ TI-Kenya attributes this behavior to factors such as the fear of legal culpability, avoidance of the inconveniences that involvement in court proceedings are likely to cause, and lack of faith in the

77 Transparency International, *Kenya Bribery Index*, *KBI*, 4 (Transparency International Kenya, Nairobi, 2008). Available at: http://www.transparency.org/news/pressrelease/20080716_kenya_bribery_index_kbi_2008

78 Transparency International, *Kenya Bribery Index*, *KBI*, 8 (Transparency International Kenya, Nairobi, 2008). Available at: http://www.transparency.org/news/pressrelease/20080716_kenya_bribery_index_kbi_2008

79 Transparency International, *East African Bribery Index*, *EABI*, 18 (Transparency International Kenya, Nairobi, 2010). Available at: <http://probeinternational.org/library/wp-content/uploads/2010/10/EAST-AFRICA-BRIBERY-INDEX-2010.pdf>

Table 1
Rankings of Select Organizations 2002-2010

Organization	Aggregate Score & (Rank) in KBI (2002)	Aggregate Score & (Rank) in KBI (2003)	Aggregate Score & (Rank) in KBI (2004)	Aggregate Score & (Rank) in KBI (2005)	Aggregate Score & (Rank) in KBI (2006)	Aggregate Score & (Rank) in KBI (2007)	Aggregate Score & (Rank) in KBI (2008)	Aggregate Score & (Rank) in EABI (2009)	Aggregate Score & (Rank) in EABI (2010)
Kenya Police	69.4 (1)	57.3 (1)	72.4 (1)	60.3 (1)	46.6 (1)	Not available	57 (1)	66.5 (1)	76.9 (2)
Judiciary	32.4 (11)	24 (12)	23.7 (4)	27.8 (6)	21.3 (12)	Not available	Not ranked (under 50 interactions)	54.4 (3)	70.1 (5)
Ministry of Lands	30.3 (13)	24.5 (10)	23.6 (5)	25.5 (8)	19.7 (17)	Not available	37 (3)	45.6 (5)	69.1 (6)
Nairobi City Council	33.8 (9)	26.2 (7)	27.4 (7)	21.3 (13)	Not ranked	Not available	31 (7)	42.9 (6)	84.5 (1)
Ministry of Education	25.8 (26)	14.3 (22)	12.7 (18)	14.7 (21)	20.4 (15)	Not available	25 (12)	26.4 (17)	45.9 (19)
Parliament	Not ranked	Not ranked	Not ranked	Not ranked	21.1 (13)	Not available	Not ranked	Not ranked	Not ranked

Legend: KBI: Kenya Bribery Index. EABI: East African Bribery Index. (Rank): position of organization in Bribery Index.
Source: Transparency International, Kenya Bribery Indices 2002-2010

anti-corruption systems.⁸⁰ Many of them believe that no action would be taken against corrupt officials following their reports or are afraid that they will be intimidated by the authorities.⁸¹ However, many of them are increasingly reporting incidents of corruption to the media, which TI-Kenya attributes to increased access to and ease of communication by cellular phones.⁸² Sixth, new policies, laws and regulations impact on opportunities for bribery. For example, in 2005 TI-Kenya noted a sharp escalation of the size of bribes paid to the police in rural areas following the introduction of new public service vehicle rules.⁸³ Conversely, in 2007 TI-Kenya contended that the Government's Rapid Results Initiative, RRI, and the elimination of road licences contributed to the decline of law enforcement and service-related bribes.⁸⁴ Seventh, the majority of respondents do not think that corruption is decreasing. In the East African Bribery Index for 2010, for example, TI-Kenya reports that about 90% of Kenyan respondents perceive the country as being between corrupt and extremely corrupt. Many of them believe that the Government is not taking sufficient action to combat corruption.⁸⁵

Since 2009, TI-Kenya has been producing an East African Bribery Index (EABI), which compares the levels of corruption in the East African countries of Burundi, Kenya, Rwanda, Tanzania

80 Transparency International, *Kenya Bribery Index*, *κBI*, 8 (Transparency International Kenya, Nairobi, 2006). Available at: <http://www.tikenya.org/index.php/kenya-bribery-index#>. Transparency International, *East African Bribery Index*, *EABI*, 8 (Transparency International Kenya, Nairobi, 2011). Available at: http://www.transparency.org/files/content/pressrelease/20111020_Tanzania_EABI2011_EN.pdf

81 Transparency International, *East African Bribery Index*, *EABI*, 17 (Transparency International Kenya, Nairobi, 2009). Available at: <http://www.tikenya.org/index.php/the-east-african-bribery-index>

82 Transparency International, *Kenya Bribery Index*, *κBI*, 8 (Transparency International Kenya, Nairobi, 2006). Available at: <http://www.tikenya.org/index.php/kenya-bribery-index#>

83 Transparency International, *Kenya Bribery Index*, *κBI*, 5 (Transparency International Kenya, Nairobi, 2005). Available at: <http://www.tikenya.org/index.php/kenya-bribery-index#>

84 Transparency International, *Kenya Bribery Index*, *κBI*, 8 (Transparency International Kenya, Nairobi, 2007). Available at: <http://www.tikenya.org/index.php/kenya-bribery-index#>

85 Transparency International, *East African Bribery Index*, *EABI*, 29 (Transparency International Kenya, Nairobi, 2010). Available at: <http://probeinternational.org/library/wp-content/uploads/2010/10/EAST-AFRICA-BRIBERY-INDEX-2010.pdf>

and Uganda. The EABI adopts the same methodology as the KBI, and has two objectives. First, it ranks all institutions where citizens experienced bribery in the five countries. It then uses this ranking to compare the performance of similar institutions, such as policing agencies and public utility companies. Secondly, it uses the data to compile a country ranking of corruption prevalence. That is, it aggregates the indices of the ranked organizations for each country, a figure which is then divided by the number of ranked organizations to produce a “corruption prevalence” figure for each country. It then lists and compares the corruption prevalence figures of the five countries. It should be noted that in the 2011 report, TI-Kenya uses the term “bribery prevalence” and not corruption prevalence.⁸⁶ Table 2 below shows the bribery prevalence figures for 2010 and 2011. TI-Kenya uses these figures to target institutional reform at the level of the East African Community. For example, the 2009 EABI report notes that corruption in the affected sectors contributes to deepening poverty and increasing the cost of doing business in East Africa, and calls upon the Community “to create the right environment if the member countries are to attract and retain foreign domestic investments.”⁸⁷

It is worth noting that TI-Kenya appreciates the limitations of its methodology. For example, it notes that survey responses are subject to unavoidable respondent bias since corruption is a form of stigmatizing behavior.⁸⁸ Depending on their attitudes to particular issues, respondents may therefore understate or overstate the level of activity.⁸⁹ This may explain why certain institu-

86 *East African Bribery Index 2011* defining bribery prevalence as a measure of “the likelihood that an individual will be required to pay a bribe to access services at the national level.” Transparency International, *East African Bribery Index, EABI*, 1 (Transparency International Kenya, Nairobi, 2011). Available at: http://www.transparency.org/files/content/pressrelease/20111020_Tanzania_EABI2011_EN.pdf

87 Transparency International, *East African Bribery Index, EABI*, 6 (Transparency International Kenya, Nairobi, 2010). Available at: <http://probeinternational.org/library/wp-content/uploads/2010/10/EAST-AFRICA-BRIBERY-INDEX-2010.pdf>

88 Transparency International, *Kenya Urban Bribery Index, KUBI*, 2 (Transparency International Kenya, Nairobi, 2002). Available at: <http://ww2.unhabitat.org/cdrom/transparency/html/yellowp/Y007.html>

89 Transparency International, *Kenya Urban Bribery Index, KUBI*, 2 (Transparency International Kenya, Nairobi, 2002). Available at: <http://ww2.unhabitat.org/cdrom/transparency/html/yellowp/Y007.html>

Table 2
Bribery Prevalence in East Africa 2010-2011

Country Rank	Country	Bribery prevalence 2011 (%)	Rank in 2010	Bribery prevalence 2010 (%)
1	Burundi	37.9	1	36.7
2	Uganda	33.9	2	33.0
3	Tanzania	31.6	4	28.6
4	Kenya	28.8	3	31.9
5	Rwanda	5.1	5	6.6

Source: Transparency International, *East African Bribery Index, EABI* (Transparency International Kenya, Nairobi, 2011)

tions feature prominently in the Index only in particular years. For example, the Department of Defence has tended to feature prominently during years in which there have been widespread media allegations of bribery in the recruitment of servicemen.⁹⁰ The same can be said of the legislature. Second, TI-Kenya is aware of self-selection bias, in the sense that people who have something to hide are likely to decline to respond.⁹¹ Third, the survey is not designed to capture high-level corruption, such as bribery in big public procurement projects.⁹² Fourth, TI-Kenya appreciates the fact that the “[c]omputation of any aggregate index invariably entails making subjective judgments about what to include and what not to include, what measures to use, whether or not to attach weights to individual components and if so what weights to attach.” In this respect, it admits that the decision to give each of the six indicators an equal weight “is a value judgment since some of the indicators are arguably more critical than others.”⁹³ Fifth, it acknowledges that a representative sample of the population does “not adequately capture the bribery in an organization that affects a very specific, small segment of the population, even though this may be systemic and severe.”⁹⁴ Finally, the index only encompasses institutions where citizens have experienced bribery. But critics of the index assert

90 Transparency International, *Kenya Bribery Index*, *κβι*, 5 (Transparency International Kenya, Nairobi, 2002). Available at: <http://www.tikenya.org/index.php/kenya-bribery-index#>. Transparency International, *East African Bribery Index*, *εαβι*, 18 (Transparency International Kenya, Nairobi, 2009). Available at: <http://www.tikenya.org/index.php/the-east-african-bribery-index>

91 Transparency International, *Kenya Urban Bribery Index*, *κυβι*, 2 (Transparency International Kenya, Nairobi, 2002). Available at: <http://ww2.unhabitat.org/cdrom/transparency/html/yellowp/Y007.html>

92 Transparency International, *Kenya Bribery Index*, *κβι*, 7 (Transparency International Kenya, Nairobi, 2004). Available at: <http://www.tikenya.org/index.php/kenya-bribery-index#>

93 Transparency International, *Kenya Urban Bribery Index*, *κυβι*, 3 (Transparency International Kenya, Nairobi, 2002). Available at: <http://ww2.unhabitat.org/cdrom/transparency/html/yellowp/Y007.html>

94 Transparency International, *Kenya Bribery Index*, *κβι*, 7 (Transparency International Kenya, Nairobi, 2004). Available at: <http://www.tikenya.org/index.php/kenya-bribery-index#>

that public institutions that citizens do not ordinarily interact with are probably more corrupt than the included ones.⁹⁵

III. EVALUATING THE IMPACT OF THE BRIBERY INDEX

To what extent has the Bribery Index influenced or shaped local discourses on corruption and governance? This Part first looks at how TI-Kenya itself uses the index. It then examines the index in the context of national discourses on corruption. It looks at how the index is perceived by the media, civil society and governmental institutions. It then examines the Government's approach to diagnosing and eradicating corruption in the public sector. As we shall see, the Government has incorporated a "corruption eradication" criterion in its performance contracting reforms. In implementing this criterion, it is assisted by the Ethics and Anti-Corruption Commission (EACC).

A. How TI-Kenya Uses the Index

According to TI-Kenya, the index is a useful tool insofar as it demonstrates the severity and impact of corruption.⁹⁶ In addition, it provides an indicator that can be tracked and evaluated over time, thereby enabling various actors to gauge corruption trends in organizations, especially public ones.⁹⁷ The index measures bribery which, unlike other forms of corruption, is measurable, or so TI-Kenya argues. And because bribery can be measured, TI-Kenya takes the view that the index is a useful tool for coalescing public attention on corruption. In other words, TI-Kenya sees, and uses, the index primarily as a policy advocacy tool. This explains why whenever TI-Kenya launches the index, it invites government actors, the media, civil society groups and members of the public to a meeting at which it gives

95 Interview with Senior Officer Prevention, Ethics and Anti-Corruption Commission, EACC, May 18, 2012.

96 Interview with Jackie Ochieng, Transparency International (Kenya), April 21, 2011.

97 Interview with Jackie Ochieng, Transparency International (Kenya), April 21, 2011.

a speech about the status of corruption in the country. In 2010, for example, it noted that corruption had remained a part of public practice since many of the institutions established after 2002 to promote good governance had failed to tackle it.⁹⁸ Further, TI-Kenya aims to provide “a snap-shot view of bribery and corruption levels inherent in critical public institutions so that further in-depth studies of these institutions may be undertaken and requisite reforms implemented.”⁹⁹ In this respect, TI-Kenya sees the index as an indication of weak governance structures in the ranked organizations.¹⁰⁰ The Index may therefore be a useful tool for governmental agencies such as the Kenya Anti-Corruption Commission, KACC.

According to TI-Kenya, the index has been accepted by government officials, who now refer to it quite often.¹⁰¹ The government and the donor community use it for their programming. Foreign investors seeking to set up shop in Kenya also use it as part of their due diligence.¹⁰² So do academic researchers¹⁰³ and business information websites.¹⁰⁴ Further, it assists TI-Kenya to prioritize its interventions.¹⁰⁵ For example, the Kenya Police has consistently been ranked first in the index for the last decade.

98 Transparency International, *East African Bribery Index, EABI*, 5 (Transparency International Kenya, Nairobi, 2010). Available at: <http://probeinternational.org/library/wp-content/uploads/2010/10/EAST-AFRICA-BRIBERY-INDEX-2010.pdf>

99 Transparency International, *East African Bribery Index, EABI*, 6 (Transparency International Kenya, Nairobi, 2009). Available at: <http://www.tikenya.org/index.php/the-east-african-bribery-index>

100 Interview with Jackie Ochieng, Transparency International (Kenya), April 21, 2011.

101 Interview with Samuel Mbithi, Executive Director, Transparency International Kenya, May 23, 2012.

102 Interview with Samuel Mbithi, Executive Director, Transparency International Kenya, May 23, 2012.

103 African Capacity Building Foundation, ACBF, *Institutional Frameworks for Addressing Public Sector Corruption in Africa: Mandate, Performance, Challenges and Capacity Needs*, 39 (produced for ACBF by Lynne Rienner Publishers, Boulder, Colorado, 2007). Available at: <http://www.lodpdf.net/preview/TwEtJhvEqYMjtIZ-9Stg67vpSMNdXJJvR-jv5qI47c94,/A-ACBF-CBF-STITUTIONAL-FRAMEWORKS-FOR-I-N-S-T-I.html?query=t-R-Building-and-Public-sector-C-S-I-S-R-e-p-o-Management>

Irene Ngunjiri, *Corruption and Entrepreneurship in Kenya*, 2 *Journal of Language, Technology & Entrepreneurship in Africa*, 1, 93-106, 100-104 (2010). Available at: <http://www.ajol.info/index.php/jolte/article/view/51993/40628>

104 www.business-anti-corruption.com

105 Interview with Samuel Mbithi, Executive Director, Transparency International Kenya, May 23, 2012.

TI-Kenya has now decided to work with the Kenya Police with a view to strengthening its governance systems.¹⁰⁶

As a reaction to their poor ranking in the index, organizations such as the Teachers Service Commission (TSC), the Kenya Ports Authority, the Kenya Power & Lighting Company (KPLC), the Kenya Wildlife Service, and the Kenya Commercial Bank have all approached TI to carry out integrity assessments of their governance systems.¹⁰⁷ The cases of the Kenyan Teachers Service Commission, TSC, and Kenya Power and Lighting Company, KPLC, are instructive.¹⁰⁸ Following the ranking of TSC as the second most corrupt institution in Kenya in the 2005 Kenya Bribery Index (KBI), the management of TSC approached TI-Kenya to investigate and recommend institutional reforms with a view to reducing corruption in the Commission. The investigation found that the most corrupt unit in the Commission was the Staffing Department followed by the Administration, Finance & Accounting and Internal Audit departments. The study also found that several officials were engaging in corrupt practices. The investigation further indicated that the corruption in the exercise of recruiting teachers was particularly to blame for TSC's adverse mention in the KBI. Although TSC devolved the recruitment of teachers to the district and divisional levels, it failed to establish transparency and accountability systems, thereby creating opportunities for corruption. The study also established that the TSC's integrity division, which was launched in early 2006, was encountering obstacles such as lack of financial autonomy, lack of resources, discrimination and favoritism in employment, threats of dismissal to potential whistle blowers, lack of goodwill and support from other units in the TSC and lack of proper structures for its operations. Following the investiga-

106 Interview with Samuel Mbithi, Executive Director, Transparency International Kenya, May 23, 2012.

107 Interview with Samuel Mbithi, Executive Director, Transparency International Kenya, May 23, 2012.

108 This account is drawn from Transparency International, *Corruption Trends Analysis: Tracing Corruption Trends in Kenya's Public Sector*, 15-17 (Transparency International Kenya, Nairobi, 2009).

tions, TI-Kenya made a number of recommendations, including the need to: (i) strengthen the Integrity Division by hiring personnel whose moral standing was beyond doubt and reproach; (ii) educate members of staff on corruption; (iii) ensure that guilty individuals are prosecuted; (iv) establish effective monitoring and evaluation mechanisms; and (v) computerize systems.

TI-Kenya reports that by June 2008, the Integrity Division had implemented a number of these recommendations. This led to achievements among them administration of wealth declarations for income, assets and liabilities; formation of a corruption prevention committee and corruption prevention sub-committees in all service areas; and networking and linkages with watchdog agencies, namely the Kenya Anti-Corruption Commission, KACC; the National Anti-Corruption Campaign Steering Committee, NACCSC, and TI-Kenya. Further, the division: (i) initiated systems processes and procedures for audit by KACC; (ii) instituted reporting mechanisms, including installing corruption reporting boxes at the TSC headquarters in Nairobi; (iii) undertook corruption risk assessments; and (iv) formulated a corruption prevention plan. It also punished culprits through existing administrative procedures.

In the case of KPLC, TI-Kenya carried out an integrity assessment of governance systems in 2009.¹⁰⁹ It made a number of useful findings. First, members of the Board of Directors meddled in procurement processes and participated in the making of decisions where they had conflicts of interest. The institution did not even have rules on conflict of interest. Second, although KPLC established an Ethics & Integrity Office in 2006, integrity issues remained peripheral. This office also lacked independence since it was headed by an officer who reported to the Company Secretary instead of reporting directly to the Chief Executive Officer. Third, KPLC had not established a system for the protection of whistle blowers. In order to deal with these deficiencies, TI-Kenya recommended that KPLC should conduct periodic risk

109 Transparency International, *KPLC Integrity Baseline Survey Report* (2009).

assessments in all its divisions, recruit the head of the Integrity Office competitively and enhance its independence, and reassign or redeploy key personnel in order to arrest corrupt tendencies resulting from staying too long in a certain position or division.

For organizations that are sufficiently embarrassed by appearing in the bribery index, this tool may therefore precipitate internal institutional reforms. In this respect, TI-Kenya makes the assumption that organizations are capable of reforming themselves. And it asserts that its interventions have helped institutions such as the Kenya Commercial Bank to strengthen their governance systems. It therefore takes credit for the fact that this bank no longer appears in the index.¹¹⁰ Beyond this micro-level, however, it is arguable that the index offers a limited tool for diagnosing and combating system-wide public sector corruption.

B. The Index and National Discourses on Corruption

It is difficult to say whether TI-Kenya's bribery indices influence national discourses on corruption given that the existing evidence is anecdotal. Some civil society organizations make reference to these indices in their literature and advocacy campaigns.¹¹¹ The Department of Governance and Ethics in the Office of the President, which has since been abolished, also took notice of the bribery index. It perceived the index as “a clear demonstration of the ways in which civil society can complement and contribute to government efforts to address corruption.”¹¹² In 2004, for example, it saw that year's index as a vindication of the Government's campaign against corruption.¹¹³ It also commended the organizations which registered

110 Interview with Samuel Mbithi, Executive Director, Transparency International Kenya, May 23, 2012.

111 Africa Centre for Open Governance, AFRICOG, *Five Years On: How Effective is the KACC in Kenya's Fight against Corruption?* (2009). Available at: <http://www.africog.org/reports/KACC.pdf>

112 Statement of the Permanent Secretary, Department of Governance and Ethics, Office of the President, 2 (February 24, 2004).

113 Statement of the Permanent Secretary, Department of Governance and Ethics, Office of

improvements in their rankings in the bribery index.¹¹⁴ As we shall see, the Kenya Anti-Corruption Commission (now the Ethics and Anti-Corruption Commission) also begun carrying out corruption perception surveys, and it is plausible that it was influenced by the existing approaches to measuring corruption, including TI's approaches. In addition, KACC/EACC carries out corruption risk assessments of public institutions. The indices have featured prominently in the media since their inception, and have arguably enhanced and sustained public awareness of corruption. For the most part, media reports consist of verbatim accounts of the bribery index as contained in press briefings issued by TI-Kenya. In order to determine the impact of these media reports on public perceptions of corruption, an opinion survey would be useful.

Despite the annual production and dissemination of corruption indices, however, public sector corruption (both grand and petty) seems to be on the increase. Powerful political and economic elites have hatched various schemes to embezzle public funds or otherwise defraud the public. Goldenberg, Anglo-Leasing, and the Maize scandal provide good examples of such scams. The Goldenberg scandal revolved around a deal between government officials and a businessman, in which the businessman agreed to remit \$50 million US dollars annually to the Central Bank of Kenya, CBK, on condition that the Government would give him a monopoly on gold and diamond exports from Kenya and a compensation of 35% on his exports. No such exports took place, however. Instead, the businessman exported "fictional commodities to fictional companies that paid for them in fictional foreign exchange."¹¹⁵ For its part, the Anglo Leasing scandal involved government contracts for goods and services that were paid for but never received from companies that did not

the President, 1 (February 24, 2004).

114 Statement of the Permanent Secretary, Department of Governance and Ethics, Office of the President, 1 (February 24, 2004).

115 Letitia Lawson, *The Politics of Anti-Corruption Reform in Africa*, 47 *Journal of Modern African Studies*, 1, 73-100, 80 (2009). Available at: <http://actoolkit.unprme.org/wp-content/resourcepdf/Lawson.pdf>

exist. These contracts resulted in the loss of millions of dollars. And the more recent maize scandal revolved around the sale of imported maize.¹¹⁶ Here, briefcase millers (individuals and companies with no milling premises or capacity) were awarded large quantities of maize by the Strategic Grain Reserve at a time when the country was facing a serious shortage of maize in the market. These briefcase millers subsequently sold the maize to genuine millers, making exorbitant profits in the process. This meant that the Government's goal of providing the ordinary citizen with affordable maize flour was defeated.

There is also pervasive corruption involving the irregular or illegal allocation of public land, including important natural resources such as the Mau Forest, which is an important water tower. And more recently, a corruption scandal involving the National Hospital Insurance Fund, NHIF, came to light. Such corruption has an adverse impact on the livelihoods of many citizens, and undermines environmental conservation efforts. Similarly, political and economic elites have stolen from health funds, such as those meant for the management of the HIV/AIDS pandemic. These elites then use their ill-gotten wealth to distort the political and judicial processes, thereby ensuring that they remain in power and that they are never punished for their crimes. The troubling culture of impunity that has taken root in the country can be attributed to this distorting effect of corruption.¹¹⁷

Further, corruption is no longer solely attributable to the executive. There are widespread and credible allegations that the legislature and the judiciary are also abusing their powers and engaging in, or facilitating, corruption.¹¹⁸ These allegations

116 Africa Centre for Open Governance, AFRICOG, *The Maize Scandal* (2009). Available at: <http://www.africog.org/reports/Maize%20Report.pdf>

117 Migai Akech, *Ethics of the Rule of Law: Impunity, Public Perceptions of Justice and Governance in Kenya*, in *Governance, Institutions and the Human Condition* (Elizabeth W. Gachenga, Luis G. Franceschi, Migai Akech & David W. Lutz, eds., Strathmore University & LawAfrica, Nairobi, 2009).

118 *MPs in 'Most Corrupt' League*, *Daily Nation* (Nairobi), December 10, 2005. Republic of Kenya, *Final Report of the Task Force on Judicial Reforms*, 74 (2010). Available at: <http://media.soros.org/blogs/icckenya/wp-content/uploads/2011/06/report-judicial-reforms.pdf>

have led to questions about the ability and legitimacy of these branches to hold the executive to account. For example, there is a perception that legislators are no less corrupt than the executive actors they purport to hold accountable.¹¹⁹ Further, the legislature's ability to function as a watchdog is compromised because some of its key committees are headed by legislators who have been implicated in corruption scandals. There are also concerns that legislators are influenced by special interests and may not be credible guardians of the public interest. The judiciary is equally culpable. Due to allegations of abuse of power and corruption, significant segments of the citizenry perceive the judiciary as having lost its legitimacy as a dispute resolution forum. But in the case of the Judiciary, the adoption of competitive recruitment and governance reforms promise to enhance the decisional independence of judicial officers, with the likelihood that they will be less prone to capture by corrupt elements.

At the same time, ordinary citizens are typically compelled to bribe government officials—such as police officers, local authority councilors, clerks in government ministries, and school functionaries—to obtain services that they are entitled to at little or no cost. Accordingly, life becomes quite precarious for many of those who are unable to bribe these government officials. For example, the liberties of these citizens are often under threat from police officers, who often detain them or continue to detain them as a result of their inability to pay bribes. Further, these citizens are often unable to access health care services because they have no money to pay the bribes demanded by health officials. In addition, they do not have security of tenure in many cases since their land is often grabbed by powerful political and economic elites in collusion with bureaucrats at the Ministry of Lands.

In official policy, successive governments have acknowledged the magnitude of the problem of corruption and have established

119 Njeri Rugene, *Bribery in Kenya's Parliament*, *Daily Nation* (Nairobi), May 16, 2009. Available at: <http://www.nation.co.ke/News/-/1056/599016/-/u6adu9/-/index.html>, <http://www.nation.co.ke/news/-/1056/599016/-/4uv2j0z/-/index.html>

various mechanisms to fight it, including the enactment of anti-corruption laws, one of which established the Kenya Anti-Corruption Commission.¹²⁰ In practice, however, government has been accused of not doing nearly enough to fight corruption. Those accused of corruption, especially the powerful elites, are never held to account, and continue to hold public office. The implementation of the new laws has been dismal at best. Further, the Kenya Anti-Corruption Commission, which was supposed to be the premier anti-corruption agency, failed to carry out its mandate effectively. Instead, it was embroiled in a blame game with the Attorney-General's Office as to which of the two agencies was frustrating the fight against corruption. As a result of persistent prevarication by government, many citizens have had little or no confidence in the government's commitment to fight corruption.¹²¹

A question therefore arises as to how public sector corruption can be diagnosed properly and treated. Arguably, measures of corruption would be more useful if they were part of a governmental system that rewards good performers and punishes poor ones. In such a system, corruption rankings would create

120 On the legislative front, the government has enacted a number of laws on corruption in the last decade. Kenya, *Anti-Corruption and Economic Crimes Act*, 41 *Kenya Gazette Supplement*, May 2, 2003. Available at: <http://www.refworld.org/docid/4c36fe62.html>. Kenya, *Public Officer Ethics Act*, 2003. Available at: <http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/PublicOfficerEthicsAct.pdf>. Kenya, *Public Procurement and Disposal of Assets Act*, 77 *Kenya Gazette Supplement*, October 26, 2005. Available at: http://ppoa.go.ke/downloads/The%20Act/public_procurement_and_disposal_act_2005.pdf. Kenya, *Government Financial Management Act*, 2004. Available at: <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/GovernmentFinancialManagementfinal.pdf>. Kenya, *Privatization Act*, 2005. Available at: http://www.pc.go.ke/index.php?option=com_docman&task=cat_view&gid=3&Itemid=540. Kenya, *Political Parties Act*, 2007. Available at: [http://www.kenyalaw.org/Downloads/Acts/Political%20Parties%20Act%20\(Cap.%207A\).pdf](http://www.kenyalaw.org/Downloads/Acts/Political%20Parties%20Act%20(Cap.%207A).pdf). The government has also ratified both the United Nations Convention against Corruption and the African Union Convention on Preventing and Combating Corruption. United Nations Convention against Corruption, UNCAC, United Nations, General Assembly, Doc. A/58/422, New York, October 31, 2003. Available at: https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=XVIII-14&chapter=18&lang=en. African Union Convention on Preventing and Combating Corruption, African Union, 2nd Ordinary Session of the Assembly of the Union, Maputo, July 11, 2003. Available at: http://www.au.int/en/sites/default/files/AFRICAN_UNION_CONVENTION_PREVENTING_COMBATING_CORRUPTION.pdf

121 Africa Centre for Open Governance, AFRICOG, *An Audit of the Kibaki Government's Anti-Corruption Drive 2003-2007: Shattered Dreams*, 3 (2008). Available at: <http://www.africog.org/reports/Narc%20Audit.pdf>

“integrity competition” among organizations, thereby giving them an incentive to fight corruption. This perhaps explains why the Government is now making the measurement of corruption an integral part of performance contracting reforms, which are already enhancing the effectiveness and responsiveness of public institutions, according to some accounts. For this approach to work, however, the measurement of corruption needs to be informed by an understanding of the institutional factors that explain the persistence of corruption. For example, indicators need to target the incentives of the responsible governmental actors if they are to contribute to the diagnosis and treatment of corruption. In this regard, Alina Mungiu-Pippidi's qualitative strategy of attacking the roots of corruption in societies characterized by particularism by developing indirect indicators for measuring corruption constitutes an instructive approach for countries such as Kenya. Unless we tackle the roots of corruption, for example, organizations such as the Kenya Police, which TI-Kenya considers to be “impervious to change,”¹²² will continue to take their pride of place in the Index.

C. Institutional Factors and the Diagnosis and Treatment of Corruption

1. Explaining Abuse of Power and Persistence of Corruption

I have argued elsewhere that corruption in Kenya should be attributed to institutional failure.¹²³ That is, dysfunctional or failed institutions often facilitate the abuse of governmental power, thereby creating opportunities for corruption. I have therefore attributed the prevalence of corruption to the predominance of arbitrary power, especially in the statutory (as opposed

122 Africa Centre for Open Governance, AFRICOG, *An Audit of the Kibaki Government's Anti-Corruption Drive 2003-2007: Shattered Dreams*, 13 (2008). Available at: <http://www.africog.org/reports/Narc%20Audit.pdf>

123 Migai Akech, *Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?* 18 *Indiana Journal of Global Legal Studies*, 1, 341-394 (2011). Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1838102

to constitutional) order. The Kenyan statutory order grants executive, legislative, and judicial actors broad powers without establishing effective procedural mechanisms to circumscribe their exercise. For example, the Immigration Act¹²⁴ conferred on the minister and immigration officers wide discretionary powers to consider applications for citizenship, and they were not required to give any reasons for the grant or refusal of applications. In the absence of effective regulation, law often aids the abuse of power and corruption. In other words, “in the absence of fear of penalty or sanctions, there is nothing to deter [those who wield power from] fraudulently enriching themselves” and violating the law.¹²⁵ In this scenario, government actors often disregard the prescriptions of law, especially where they view legal requirements as hindering the attainment of short-term political objectives or other ends. Because law is dispensed with whenever it is convenient, a culture of impunity emerges where law ceases to be authoritative.

Furthermore, the President, government ministers, and senior public servants often use the law to intimidate their juniors into silence or into obeying illegal commands, largely because of the absence of accountability mechanisms. Indeed, junior public servants are often unwilling accomplices to abuses of power or corruption. Moreover, until the promulgation of a new Constitution in August 2010,¹²⁶ the law did not restrict the President's ability to make decisions without consulting the cabinet or undermining the independence of the judiciary, nor did it restrict the Chief Justice's ability to compromise the decisional independence of judges, nor the ability of legislators to become hired mercenaries

124 Kenya, *Immigration Act, Chapter 170, Laws of Kenya* (repealed by the Kenya Citizenship and Immigration Act No. 12 of 2011). Available at: http://www.nairobi.diplo.de/content-blob/3356358/Daten/1788002/d_KenyanCitizenship_No12_of_2011.pdf

125 Ngozi G. Egbue, *Africa: Cultural Dimensions of Corruption and Possibilities for Change*, 12 *Journal of Social Sciences, Interdisciplinary Reflection of Contemporary Society*, 2, 83-91, 84 (2006). Available at: <http://www.krepublishers.com/02-Journals/JSS/JSS-12-0-000-000-2006-Web/JSS-12-2-083-158-2006-Abst-Text/JSS-12-2-083-158-2006-Web/JSS-12-2-083-091-2006-306-Egbue-N-G/JSS-12-2-083-091-2006-306-Egbue-N-G-Text.pdf>

126 Kenya, *Constitution*, August 2010. Available at: <https://www.kenyaembassy.com/pdfs/The%20Constitution%20of%20Kenya.pdf>

for the highest bidder. In the case of the legislature, the failure to institutionalize codes of conduct functions as a license for legislators to breach conflict of interest rules with impunity. In addition, state secrecy laws such as the Official Secrets Act¹²⁷ have ensured that the citizenry have little or no information about the activities of government. Invariably, the citizenry only learn of abuses of power and corruption long after they have occurred, by which time the damage caused is nearly irreparable. Even new laws enacted to aid the fight against corruption, such as the Public Officer Ethics Act,¹²⁸ may actually be used to strengthen the hand of power wielders, who often interpret such laws in a manner that enhances their ability to intimidate public servants. In these circumstances, I have contended that constitutional reform must be accompanied by comprehensive democratization of the legal order.

More particularly, I have suggested that institutional mechanisms that increase political accountability—for example, by encouraging punishment of corrupt individuals or reducing the informational problems related to government activities—may reduce the incidence of corruption.¹²⁹

Indeed, abuse of power is prevalent in the organizations that typically feature in the bribery index. Take the police for example. The exercise of the powers of the police is characterized by wide discretionary powers, which are prone to abuse because they are largely unregulated. In addition, internal regulations of the police force give senior officers the power to dismiss their juniors using summary procedures which have no due process mechanisms. In such circumstances, it is understandable why junior police officers often carry out the orders of their seniors, including soliciting bribes. Until the promulgation of the Consti-

127 Kenya, *Official Secrets Act, Cap. 187, Laws of Kenya*, 1968. Available at: <http://www.kenyalaw.org/8181/exist/kenyalex/actview.xql?actid=CAP:%20187>

128 Kenya, *Public Officer Ethics Act, Cap. 183, Laws of Kenya*, 2003 (2009). Available at: <http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/PublicOfficerEthicsAct.pdf>

129 Daniel Lederman, Norman Loayza & Rodrigo R. Soares, *Accountability and Corruption: Political Institutions Matter*, 1-37 (World Bank Policy Research, Working Paper No. 2708, Nov. 2001). Available at: http://www-wds.worldbank.org/servlet/WDSContentServer?WDSPIB/2001/12/17/000094946_01120404004589/Rendered/PDF/multi0page.pdf

tution of 2010, there was also no objectivity and accountability in investigations and prosecutions. As a result, the power to prosecute was often abused and exercised selectively.

In the case of the public service, Kenya is hopefully now emerging from a past in which public officers served at the pleasure of the President. Thus the President could—and often did—terminate their services at will. In this environment, public officers did what they were told by the President or government ministers, even when the instructions were illegal. As a result, they were often accomplices in corrupt activities. The courts even sanctioned the transfer of public officers from one position to another without due process.¹³⁰ In addition, public officers seeking to safeguard the public interest were easily intimidated into implementing illegal instructions, which were invariably verbal.

And in the case of the legislature, the absence of proper regulation has meant that legislators can serve on committees even though their membership would entail a conflict of interest—either because they face allegations of corruption, are allegedly allied to corruption cartels, or have commercial interests that are overseen by these committees.¹³¹ There are also allegations that legislators have taken bribes from fellow legislators and other wealthy politicians to influence the deliberations of the legislature.¹³² Such corruption facilitates impunity and hinders efforts to hold the corrupt to account.

The absence of effective accountability mechanisms has meant that government actors either fail to follow the prescriptions of law, or manipulate them. For example, the executive has selectively applied the law, with the result that the idea of “equality before the law” is greatly undermined. This failure to apply the law consistently has been pronounced in grand corruption in-

130 Republic v. The Permanent Secretary/Secretary to the Cabinet and Head of Public Service Office of the President and the Permanent Secretary, Ministry of Gender, Culture and Social Services ex parte Stanley Kamanga and the Kenya National Library Services Board, Nairobi High Court, Miscellaneous Civil Application 612 of 2004 [2006] eKLR.

131 World Bank, *Understanding the Evolving Role of the Kenya National Assembly in Economic Governance in Kenya: An Assessment of Opportunities for Building Capacity of the Tenth Parliament and Beyond*, 24 (Report No. 45924-KE, May 2008).

132 Njeri Rugene, *Bribery Rampant in Kenya's Parliament*, *Sunday Nation*, May 17, 2009.

vestigations, where conspiracies among executive agencies has encouraged inaction as the responsible agencies of government engage in turf wars that only result in the law not being applied. Such conspiracies by the Executive to undermine the rule of law do not engender public confidence in the fairness of the law as petty corruption investigations, which are invariably taken to their logical conclusion, are seen to be treated differently. A further indication that the citizenry are losing faith in the law is to be found in the increasingly common practice of deploying clientelism that is based on personal relationships with judicial officers to access the courts, instead of trusting in the capacity of the judiciary to give blind justice. Because the citizenry do not have faith in judicial procedures and processes to produce just outcomes, they are inclined to “work the system” by seeking the intervention of judicial officers so that they are given favorable treatment.

Fortunately, Kenya's Constitution of 2010 seeks to address some of the foregoing institutional factors that contribute to corruption. In particular, it establishes principles and mechanisms that can circumscribe the exercise of power. For example, it establishes “guiding principles of leadership and integrity” which include: (a) selection of public officers on the basis of personal integrity, competence and suitability; (b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favoritism, other proper motives or corrupt practices; (c) selfless service as demonstrated by honesty and the declaration of any personal interest that may conflict with public duties; and (d) accountability to the public for decisions and actions.¹³³ Further, it imposes a duty on state officers to “behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids any conflict between personal interests and public or official duties.”¹³⁴ However, these provisions of the constitution will

133 Kenya, *Constitution*, Article 73(2), August 2010. Available at: <https://www.kenyaembassy.com/pdfs/The%20Constitution%20of%20Kenya.pdf>

134 Kenya, *Constitution*, Article 75(1), August 2010. Available at: <https://www.kenyaembassy.com/pdfs/The%20Constitution%20of%20Kenya.pdf>

only make a difference if they are translated into policies and procedures that govern the day-to-day conduct of public officers.

Apart from the predominance of arbitrary power, the prevalence of corruption in Kenya can be attributed to the fact that systems and processes of public administration are often manual and inefficient, with the result that citizens often experience long delays before they receive the services they seek. In some cases, these services are denied altogether. This induces the largely helpless and desperate citizens to bribe public officers if they are to receive services in a timely manner. But it also induces public officers to not only deny citizens timely services unless they are bribed, but also to resist computerization and other initiatives that seek to speed up their administrative processes and minimize room for discretionary judgment. Further, efforts to computerize systems and processes have been resisted in some cases.

The Pensions Department of the Ministry of Finance provides an excellent illustration of this reality. It is responsible for administering the pension schemes of public officers. There have been allegations that the Pensions Department takes too long to process claims even after it has received all the necessary documents from retirees or their dependants.¹³⁵ Further, it has been alleged that claims take long to process due to deliberate loss of documents and files, and that some files cannot be traced in the Department especially when certain officers have an interest in them.¹³⁶ These officers, often in collaboration with middlemen (or “brokers”), have also been accused of exploiting retirees and their dependants by promising to fast track the processing of their benefits if they pay bribes. The KACC confirmed these allegations in an examination of systems and processes

com/pdfs/The%20Constitution%20of%20Kenya.pdf

135 Kenya Anti-Corruption Commission, KACC, *Report of the Examination into the Systems, Policies, Procedures and Practices of the Pensions Department, Ministry of Finance*, 5 (2008). Available at: <http://www.eacc.go.ke/docs/pensions-examination-report.pdf>

136 Kenya Anti-Corruption Commission, KACC, *Report of the Examination into the Systems, Policies, Procedures and Practices of the Pensions Department, Ministry of Finance*, 5 (2008). Available at: <http://www.eacc.go.ke/docs/pensions-examination-report.pdf>

that it undertook in 2008. It established that these systems and processes contribute to corruption in various ways. First, the department's operations are centralized at the Head Office in Nairobi, meaning that the majority of the pensioners and their dependants who reside upcountry have to travel to Nairobi for any service. Many of them are desperate since they often lack accommodation in Nairobi, but also do not understand the processes of the Department. They are therefore easy prey to corrupt department officers and middlemen. Second, it took the Department more than six months to process a claim on average, even when it possessed all the required documents. However, the officers had discretion to fast track claims. This created an incentive for the officers to delay processing claims unless they were bribed to fast track them. Third, the officers assessed the pension awards due without the aid of appropriate operational manuals. This unregulated exercise of discretion often led to the miscalculation of dues. In addition, the Department had no system for recording complaints reported to it, and could not therefore track the action taken on specific complaints.

This experience is replicated in other institutions. For example, in the public health care system, there have been prolonged delays spanning four to ten years in the determination of disciplinary cases involving health professionals.¹³⁷ Among other things, such delays create room for the affected professionals to pay bribes so that their cases can be considered favorably. The Ministry of Medical Systems has also issued regulations for the management of waivers and exemptions from paying fees. These guidelines require each hospital to form a committee to handle waivers and exemptions. However, the Ethics and Anti-Corruption Commission has established that some hospitals have not established these committees, and that where they have been established, they rarely meet.¹³⁸ As a result, unauthorized

137 Ethics and Anti-Corruption Commission, EACC, *Report of the Examination into the Service Delivery Systems, Policies, Procedures and Practices of Provincial and District Hospitals in Kenya*, 16 (2011).

138 Ethics and Anti-Corruption Commission, EACC, *Report of the Examination into the Service Delivery Systems, Policies, Procedures and Practices of Provincial and District Hospitals*

officers have been approving waivers and exemptions. This has presented an opportunity for corruption: those who pay bribes are granted waivers and exemptions, while deserving cases are denied such services.¹³⁹

2. Performance Contracting, and the Diagnosis and Eradication of Corruption

The diagnosis of corruption in Kenya should therefore be based on qualitative indicators that take these contextual and institutional factors into account. In this respect, the KACC developed a fairly comprehensive guide, which public institutions implementing performance contracts have been required to use to determine the levels of corruption since the 2007/2008 financial year. This guide was motivated by the inclusion of a “corruption eradication” indicator in the annual performance contracts that public institutions have been signing with the Government since 2004.¹⁴⁰ The idea was to mainstream anti-corruption prevention and detection strategies in the management systems of public institutions; the guide was supposed to help them to attain this objective.¹⁴¹ The corruption eradication indicator required the realization of the following measures: (i) formulation of an institutional anti-corruption policy; (ii) operationalizing corruption prevention and integrity committees; (iii) developing corruption prevention plans; (iv) developing a code of conduct; (v) integrity training; and (vi) conducting surveys on corruption perception.¹⁴²

in Kenya, 33 (2011).

139 Ethics and Anti-Corruption Commission, EACC, *Report of the Examination into the Service Delivery Systems, Policies, Procedures and Practices of Provincial and District Hospitals in Kenya*, 33, 35 (2011).

140 Kenya Anti-Corruption Commission, KACC, *Corruption Eradication, Indicator for Performance Contracts in Public Service: A Guide for Corruption Base Line Survey*, 2 (2008). Available at: http://www.eacc.go.ke/docs/baseline_survey_guidelines.pdf

141 Kenya Anti-Corruption Commission, KACC, *Corruption Eradication, Indicator for Performance Contracts in Public Service: A Guide for Corruption Base Line Survey*, 2 (2008). Available at: http://www.eacc.go.ke/docs/baseline_survey_guidelines.pdf

142 Kenya Anti-Corruption Commission, KACC, *Corruption Eradication, Indicator for Performance Contracts in Public Service: A Guide for Corruption Base Line Survey*, 2 (2008). Available at: http://www.eacc.go.ke/docs/baseline_survey_guidelines.pdf

The survey was supposed to monitor corruption levels in institutions over time and evaluate the impact of their corruption prevention programs. The KACC survey instrument was designed to measure levels of corruption, the magnitude of corruption, and service delivery ratings within an institution. It sought to generate information about corrupt practices, including a clear understanding of the activities and actors involved in “creating a situation of corrupt practices” and actual acts of corrupt behavior. Like the bribery index, it sought to measure the degree to which customers of an institution were subjected to direct or indirect pressure to participate in corrupt practices, for example, instances in which a customer was asked for money, gifts, or favors in order to have a service provided or problem solved. Thirdly, it sought to measure the magnitude of corruption, as reflected in customers' assessment of the spread of corruption in the institution. Finally, it sought to measure customers' expectations about the future of corruption, as reflected in their expectations about the *capacity* of the institution to curb corruption. Each public institution was required to send an analytical report of its annual survey findings to the Public Sector Reforms and Performance Contracting Department and the KACC.

The Ethics and Anti-Corruption Commission, which is established by Article 79 of the Constitution of 2010, and replaces the KACC, has embraced this approach to fighting corruption. Further, the Corruption Eradication indicator has been upgraded to a performance criterion. The Performance targets under the 2010/2011 Corruption Eradication Criterion focus on the implementation of corruption prevention plans and strategies therein to fight corruption. Further, it requires the implementation of the following activities geared towards the realization of Chapter Six of the Constitution, which establishes guiding principles of leadership and integrity: (a) integrity vetting for public officers; (b) capacity building on corruption risk assessment and management for Corruption Prevention Committee members, Heads of Departments and Integrity/Ethics officers; (c) developing or reviewing Codes of Conduct in line with Chapter

Six of the Constitution and the Public Officer Ethics Act; (d) ensuring that any public officer suspected of corrupt practices is suspended to allow room for investigation; (e) ensuring that any professional suspended by the respective professional body is suspended from public service until investigations are complete; and (f) submitting quarterly reports to the EACC. Institutions are also required to establish mechanisms and measures to address corruption related audit queries, and undertake integrity testing in collaboration with the EACC. The expectation is that the implementation of the Corruption Eradication performance indicators will enhance internal controls, based on the corruption risk assessment surveys and implementation of the corruption prevention plans.¹⁴³

The survey instrument contains much-needed qualitative indicators. On the magnitude of corruption, it asks respondents to indicate how widespread corruption is among state officials and employees—that is, whether all officials and employees, or most, or only a few are involved in corruption. Second, it asks respondents to indicate what forms or practices of corruption they encountered in the course of seeking services, and lists the practices of abuse of office, bribery, extortion, favoritism, tribalism/nepotism, misuse and misappropriation of government resources, un-procedural tendering and others. Third, it seeks to determine the motive of bribe givers, and asks whether they gave bribes voluntarily as a token, or to obtain a service, or due to too much delay in service delivery, or it was demanded. Fourth, the survey instrument seeks to determine the reasons for customer assessments of corruption levels, by asking whether they base their assessments on personal experience, or discussions with relatives and friends, or information from the institution, or information from the media, or information from the EACC, or information from politicians, or information from a place of worship, or other sources of information. Fifth, it asks them

143 Log Associates, *Evaluation of Performance Contracting*, 39 (Final Report, March 31, 2010).

to indicate whether the level of corruption has changed in the institution over the last year, and what they would attribute their answers to. Finally, the instrument seeks to determine what customers would do if they experience delays while waiting for a service, and asks whether they would, for example, offer bribes or gifts to officials, or use influential people to help them, or lodge a complaint with the top management, or report to the EACC, or do nothing and give up.

The measurement of corruption in the context of performance contracting therefore promises to reduce this vice. A performance contract is a written agreement between the Government and the head of a state agency (such as a government ministry, state corporation or local authority) that delivers services to the public in which quantifiable targets are specified for a period of one financial year (July to June) and performance measured against agreed targets.¹⁴⁴ In this contract, the Government agrees to give the state agency certain units of capacity in exchange for which the agency undertakes to provide the performance due for each unit of capacity.¹⁴⁵ The idea behind performance contracting is that “the institution of performance measurements, clarification of corporate objectives, customer orientation and an increased focus towards incremental productivity and cost reduction can lead to improvements in service delivery.”¹⁴⁶ It entails four activities, namely: (i) establishing performance targets for ministries/departments, groups or individuals in carrying out specific work assignments; (ii) performance planning, which is a process of establishing a shared understanding of what is to be achieved, and how it is to be achieved, and managing resources to

144 Sylvester Odhiambo Obong'o, *Implementation of Performance Contracting in Kenya*, 10 *International Public Management Review*, 2, 66-84, 73 (2009). Available at: [http://www1.imp.unisg.ch/org/idt/ipmr.nsf/0/6a227866b8946fd5c1257671002b3c8a/\\$FILE/Obong'o_IPMR_Volume%2010_Issue%202.pdf](http://www1.imp.unisg.ch/org/idt/ipmr.nsf/0/6a227866b8946fd5c1257671002b3c8a/$FILE/Obong'o_IPMR_Volume%2010_Issue%202.pdf)

145 Sylvester Odhiambo Obong'o, *Implementation of Performance Contracting in Kenya*, 10 *International Public Management Review*, 2, 66-84, 73 (2009). Available at: [http://www1.imp.unisg.ch/org/idt/ipmr.nsf/0/6a227866b8946fd5c1257671002b3c8a/\\$FILE/Obong'o_IPMR_Volume%2010_Issue%202.pdf](http://www1.imp.unisg.ch/org/idt/ipmr.nsf/0/6a227866b8946fd5c1257671002b3c8a/$FILE/Obong'o_IPMR_Volume%2010_Issue%202.pdf)

146 Government of Kenya, *Economic Recovery Strategy for Wealth and Employment Creation, 2003-2007* (2003). Available at: <http://siteresources.worldbank.org/KENYAEXTN/Resources/ERS.pdf>

ensure successful implementation; (iii) performance monitoring and reporting; and (iv) performance appraisal.¹⁴⁷

The performance contracting and evaluation process works as follows.¹⁴⁸ First, an institution is required to prepare a strategic plan, which forms the basis of its performance contract with the Government. Where it does not have a strategic plan, developing one constitutes one of the commitments and responsibilities of its Permanent Secretary or other accounting officer. The idea is to obtain “specific, easily understood, attainable, measurable and time bound” strategic objectives that can form terms of the performance contract. Each contract contains a matrix which specifies the weights attached to the performance criteria. At present, there are six criteria, namely: Finance & Stewardship (20%), Service Delivery (20%), Non-Financial (15%), Operations (25%), Dynamic/Qualitative (15%), and Corruption Eradication (5%). The process of identifying performance targets occurs after the Government has completed its annual budget process and institutions have been informed about the financial resources allocated to them. The idea is to ensure that any targets established in the performance contract will be realistic and achievable within the available resources.

The second step consists of pre-negotiation consultations. At this stage, the parties perform a SWOT [Strengths, Weaknesses, Opportunities and Threats] analysis to determine the institution’s performance capacity. The aim is to ensure that the targets being established are realistic, achievable, measurable, growth oriented and benchmarked to the performance of similar institutions. Negotiations then follow. At this stage, all the issues agreed upon are included in the performance contract. It is interesting to note that the contract now include a

147 Sylvester Odhiambo Obong’o, *Implementation of Performance Contracting in Kenya*, 10 *International Public Management Review*, 2, 66-84, 72 (2009). Available at: [http://www1.imp.unisg.ch/org/idt/ipmr.nsf/0/6a227866b8946fd5c1257671002b3c8a/\\$FILE/Obong'o_IPMR_Volume%2010_Issue%202.pdf](http://www1.imp.unisg.ch/org/idt/ipmr.nsf/0/6a227866b8946fd5c1257671002b3c8a/$FILE/Obong'o_IPMR_Volume%2010_Issue%202.pdf)

148 This information is drawn from Government of Kenya, Office of the Prime Minister, Performance Contracting Department, OPM/PDC, *Report on the Evaluation of the Performance of Public Agencies for the Financial Year 2010/2011* (March, 2012).

commitment by the Government that it will ensure that public officers suspected of corrupt practices step down to allow room for investigations. Next, the draft contract is submitted to the Performance Contracting Secretariat for vetting, a process whose objective is to ensure that the contract complies with established guidelines and are linked to the institution's strategic objectives. The parties then sign the contract.

To facilitate continuous monitoring and reporting on performance, the institutions are required to submit quarterly and annual performance reports in prescribed formats to the Secretariat. Each institution is then evaluated on the basis of the contract and the annual performance report. Performance evaluation involves rating the actual achievements against the targets established at the beginning of the financial year. The resultant differences are resolved into raw scores, weighted scores, and ultimately denominated into composite scores. Evaluation occurs in two stages. First, each agency evaluates itself using an automated system. Next, the results of each agency are moderated by an ad hoc Evaluation Task Force, which consists of experts drawn from professional associations, the academy, the business community, and retired public officers. The performance of institutions is rated based on the following attributes and criteria:

The institutions are then ranked according to performance, and the good performers are rewarded at an annual public ceremony officiated by the President and/or the Prime Minister. It should be noted that the performance contracting system does not measure performance in terms of who are the best and worst performers. It is merely an indicator of improvement in the performance of the ranked institutions.¹⁴⁹

Performance contracting “has compelled government agencies to restructure extensively,” and there is “significant improvement in delivery of services.”¹⁵⁰ According to the Government,

149 Log Associates, *Evaluation of Performance Contracting*, 36-37 (Final Report, March 31, 2010).

150 Sylvester Odhiambo Obong'o, *Implementation of Performance Contracting in Kenya*,

Table 3
Attributes and criteria of performance

Attribute	Criteria
Excellent	Achievement of 30% to 100% above target
Very Good	Achievement of set target up to 129% of set target
Good	Achievement of between 70% and 99.99% of set target
Fair	Achievement of between 50% and 69.99% of set target
Poor	Achievement of between 0% and 49.99% of set target

Source: own work

performance contracting has enhanced efficiency, accountability and service delivery in public institutions.¹⁵¹ However, the performance contracting program has been criticized on various grounds. First, it is argued that it applies a standardized instrument which attaches rigid weight to evaluation criteria to a range of public institutions involved in very different operations.¹⁵² Second, the capacity of moderators and evaluators to negotiate appropriately ambitious and result-oriented targets has been doubted.¹⁵³ So has the capacity of the Secretariat to verify performance reports.¹⁵⁴ Critics also maintain that there is a need

10 *International Public Management Review*, 2, 66-84, 79 (2009). Available at: [http://www1.imp.unisg.ch/org/idt/ipmr.nsf/0/6a227866b8946fd5c1257671002b3c8a/\\$FILE/Obong'o_IPMR_Volume%2010_Issue%202.pdf](http://www1.imp.unisg.ch/org/idt/ipmr.nsf/0/6a227866b8946fd5c1257671002b3c8a/$FILE/Obong'o_IPMR_Volume%2010_Issue%202.pdf)

151 Government of Kenya, Office of the Prime Minister, Performance Contracting Department, OPM/PDC, *Report on the Evaluation of the Performance of Public Agencies for the Financial Year 2010/2011* (March, 2012).

152 Institute of Public Administration of Canada, IPAC & Africa Development Professional Group, ADP Group, *Evaluation of the Results for Kenyans Programme*, 13 (2009).

153 Institute of Public Administration of Canada, IPAC & Africa Development Professional Group, ADP Group, *Evaluation of the Results for Kenyans Programme*, 13 (2009).

154 Institute of Public Administration of Canada, IPAC & Africa Development Professional Group, ADP Group, *Evaluation of the Results for Kenyans Programme*, 13 (2009).

for clear rewards and sanctions for performance outcomes apart from publicizing the rankings.¹⁵⁵ Because of these shortcomings, it is then asserted that the rankings may not reflect the situation on the ground. For example, it has been noted that although the Ministry of Internal Security was ranked as the best performing ministry in 2007/2008, the Police Force (which falls under this ministry) was recorded by the Office of the Ombudsman as the institution against which they received the most service delivery complaints.¹⁵⁶ Indeed, government ministries consist of many departments, and the performance contracting methodology may not be particularly effective in distinguishing their performance.

Nevertheless, performance contracting can be a useful tool for ensuring transparency and accountability in the management of public institutions.¹⁵⁷ In particular, the performance contract strategy includes citizens' service delivery charters and customer satisfaction surveys, which "may lead to reduced incidences of corruption."¹⁵⁸ As we have noted, it also includes a corruption eradication criterion which is supposed to help public institutions to prevent and detect corruption. According to Sylvester Odhiambo Obong'o, who works on public sector reforms in Kenya, performance contracting can help the fight against corruption in several ways.¹⁵⁹ First, it encourages a collegial approach to management, which means that an entire organization is involved. This helps to fight corruption, which thrives where a clique runs the show and information is controlled, as happens

155 Institute of Public Administration of Canada, IPAC & Africa Development Professional Group, ADP Group, *Evaluation of the Results for Kenyans Programme*, 13 (2009).

156 Institute of Public Administration of Canada, IPAC & Africa Development Professional Group, ADP Group, *Evaluation of the Results for Kenyans Programme*, 13 (2009).

157 Sylvester Odhiambo Obong'o, *Implementation of Performance Contracting in Kenya*, 10 *International Public Management Review*, 2, 66-84, 74 (2009). Available at: [http://www1.imp.unisg.ch/org/idt/ipmr.nsf/0/6a227866b8946fd5c1257671002b3c8a/\\$FILE/Obong'o_IPMR_Volume%2010_Issue%202.pdf](http://www1.imp.unisg.ch/org/idt/ipmr.nsf/0/6a227866b8946fd5c1257671002b3c8a/$FILE/Obong'o_IPMR_Volume%2010_Issue%202.pdf)

158 Sylvester Odhiambo Obong'o, *Implementation of Performance Contracting in Kenya*, 10 *International Public Management Review*, 2, 66-84, 75 (2009). Available at: [http://www1.imp.unisg.ch/org/idt/ipmr.nsf/0/6a227866b8946fd5c1257671002b3c8a/\\$FILE/Obong'o_IPMR_Volume%2010_Issue%202.pdf](http://www1.imp.unisg.ch/org/idt/ipmr.nsf/0/6a227866b8946fd5c1257671002b3c8a/$FILE/Obong'o_IPMR_Volume%2010_Issue%202.pdf)

159 Interview with Sylvester Odhiambo Obong'o, Rapid Results Approach Coordinator, Public Service Transformation Department, Office of the Prime Minister, Government of Kenya, May 12, 2011.

in a traditional bureaucracy. Second, because it is based on the development of strategic plans, which requires the participation of all actors in an institution, it enhances transparency and forestalls situations in which resource allocation and utilization is controlled by a small clique. Finally, its performance based reward system encourages competitive merit based recruitment and promotion, for the simple reason that no institution would want to hire incompetent managers who would affect its performance adversely. To that extent, performance contracting can close the door to purely patronage based appointments, which in his view constitute the highest avenue to corruption in the public sector.

All public institutions are required to submit their quarterly performance reports to the Specialized Agencies, in addition to the Performance Contracting Secretariat. As far as the eradication of corruption is concerned, the EACC has been designated a Specialized Agency. This means that it is tasked with overseeing and evaluating the extent to which corruption is being eradicated in all public institutions.¹⁶⁰ Further, it is required to submit quarterly reports of its analysis of the extent to which these institutions are making progress in eradicating corruption.¹⁶¹

Has the performance contracting approach to fighting corruption made any difference? The personnel of the Performance Contracting Secretariat and the EACC think it has. According to a senior officer of the Secretariat, this approach is contributing positively to the fight against corruption as it is based on establishing systems that will prevent corruption.¹⁶² The idea is to ensure that each organization develops a corruption management plan. The EACC then works with the organization to ensure that it has the systems and the capacity to implement this plan. In addition, whenever the EACC receives the quarterly

160 Government of Kenya, Office of the Prime Minister, Performance Contracting Department, OPM/PDC, *Performance Contracting Guidelines*, 7th edition, 13.

161 Log Associates, *Evaluation of Performance Contracting*, 39 (Final Report, March 31, 2010).

162 Interview with Senior Performance Contracting Officer, Office of the Prime Minister, May 16, 2012.

reports on corruption eradication, it visits the institutions and tests their integrity systems with a view to establishing strengths and weaknesses. In the opinion of this officer, this approach is better than TI-Kenya's because it also targets institutions which do not have interface with the public. In addition, the systems approach is helping them to not only detect corruption, but also reduce incidences of corruption. Unlike before where incidences of corruption came to light long after they had transpired, it is in her view now becoming possible to learn about them early enough to prevent substantial damage from occurring. Further, automation of services is a key indicator in performance measurement and evaluation. In her view, automation has already contributed to the reduction of corruption in institutions such as the Immigrations Department. Another useful indicator that can reduce corruption is service delivery innovation. For example, those who want express services in public institutions should be required pay higher fees. An instance would be where one requires a passport urgently. The success of this approach is also reflected in the nation-wide customer satisfaction surveys that the Secretariat undertakes annually. For example, the 2009 survey indicated customer satisfaction levels of about 63%. Performance contracting has also enhanced agency compliance statutory obligations, for example, those relating to public procurement. This also reduces corruption. And in terms of dealing with petty corruption, the newly established Commission on the Administration of Justice (CAJ) has also been designated a Specialized Agency. In this capacity, it is responsible for certifying that all public institutions have resolved the maladministration complaints made against them. Further, the CAJ is required to submit quarterly reports of its analysis of the extent to which these institutions are making progress in resolving maladministration complaints.

For the EACC, the performance contracting approach has been attractive because it permeates all public institutions.¹⁶³ When it

163 Interview with Senior Officer Prevention, Ethics and Anti-Corruption Commission,

began measuring corruption in the context of performance contracting, the KACC (predecessor to the EACC) thought that it would be ideal if all the public institutions involved in performance contracting—which now number 471—carried out baseline surveys on corruption. The surveys ranked institutional corruption on a scale of 1 to 10, one being on the lower side and ten on the higher side. But many of these institutions did not have the capacity to carry out these surveys, and invariably outsourced this task. However, most of them hired consultants who would tell them what they wanted to hear. Thus most surveys indicated that institutional corruption oscillated between 0 and 1. The KACC was not therefore getting a true picture of the situation on the ground, and often asked the institutions to redo the surveys, a process which consumed precious time. In any case, the KACC itself had been carrying out a national corruption perception survey, an enterprise corruption survey, and a public officer corruption survey. These surveys produced results that did not tally with the institution surveys. In addition, the Commission was receiving complaints from the public about corruption in many of these institutions.

This institutional survey approach was therefore abandoned in the last annual review of performance contracting, which took place in April 2012. Instead, it is proposed that the EACC should now be tasked with carrying out the surveys of corruption in public institutions. But the EACC faces a huge capacity challenge in this regard: how can it carry out baseline surveys for 471 institutions? An option would be for the EACC to subcontract this work but establish mechanisms for managing the process. Either option would require massive resources in terms of funding and personnel.

In terms of monitoring how institutions are implementing the Corruption Eradication performance indicators, the EACC has adopted a phased approach. In phase one, it requires the institutions to establish anti-corruption structural frameworks,

EACC, May 18, 2012.

policies, code of conduct, and baselines. In phase two, it requires institutions to begin implementing their corruption prevention plans. In phase three, it requires them to establish mechanisms to address corruption-related queries raised by external auditors. Such audit queries usually arise because of internal weaknesses in organizational systems. In phase four, it requires them to build capacity by training corruption prevention committees.

Various agencies have also faulted the method of evaluating the implementation of the Corruption Eradication performance indicators. At present, the ad hoc Task Force is responsible for evaluating performance, including performance of cross-cutting issues such as corruption, automation, gender mainstreaming and public complaints. However, the Task Force does not have expertise on anti-corruption, for example. Accordingly, there is a feeling that the EACC itself should evaluate the implementation of the Corruption Eradication performance indicators. But again, the EACC faces a hurdle since it does not have the capacity to evaluate the performance of 471 institutions. One option would be to develop an interactive web-based portal with on-line feedback capability, and which would allow the EACC to track implementation.

All in all, the EACC is optimistic about the potential of the performance contracting approach to fighting corruption. However, this approach can only work if the EACC is able to closely track implementation of the indicators on a regular, say quarterly, basis. In this respect, it would be helpful if the institutions submitted electronic, and not manual, quarterly reports. Further, the capacity and resources of the EACC's Prevention Department need to be enhanced extensively. Despite the huge potential of the prevention approach to fighting corruption, the EACC devotes only about 25% of its employees to preventive work; the other 75% work in the Investigations and Legal Department.

CONCLUSION

Indicators of corruption can be useful tools for its eradication. However, much depends on what phenomena are being measured and how the measures are used. As we have seen, measures are likely to be useful if they define corruption broadly and take into account contextual and institutional factors that explain the distribution and exercise of power, and the character of bureaucratic systems. In this respect, the approach of the Government of Kenya is arguably more useful and sustainable than that of TI-Kenya. Further, unlike TI-Kenya which only undertakes integrity assessments depending on the goodwill of the leadership of institutions listed in the bribery index, the Government has the capacity to compel these institutions to implement the Corruption Eradication performance indicators. The performance contracting approach also promises to reduce corruption in public procurement by including and evaluating compliance with statutory obligations such as the Public Procurement and Disposal Act and its regulations. Another useful performance indicator that can reduce corruption is service delivery innovation, which is already making a difference in institutions such as the Immigrations Department. Chapter Six of the Constitution of 2010 has also introduced innovations that can enhance the effectiveness of performance contracting. As we have seen, the Government is now committing in the performance contracts to ensure that any public officer suspected of corrupt practices is suspended to allow room for investigation. Thus the Government, in seeking to fulfill its part of the performance contract, is beginning to take a broad approach to the question of giving its institutions the capacity they need to deliver services to the public.

Nevertheless, the TI-Kenya Bribery Index remains a useful accountability and public information tool, and can be used to monitor the extent to which the Government is eradicating corruption as part of implementing the performance contracting program. TI-Kenya could also augment the capacity that the

EACC needs to evaluate the implementation of the Corruption Eradication performance indicators.

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