

**THE IMPACT OF CORRUPTION ON GOVERNANCE: AN APPRAISAL OF THE
PRACTICE OF THE RULE OF LAW IN KENYA**

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DECLARATION

I, MIRUGI-MUKUNDI Gladys Thitu declare that this dissertation is my own work and original. Where other sources were used, references have been made appropriately. The dissertation is submitted in partial fulfilment of the requirements of the degree LLM (Human Rights and Democratisation in Africa) 2006.

Signed.....

Date.....

Supervisor: Dr Atangcho Nji Akonumbo

Signature.....

Date.....

DEDICATION

This dissertation is dedicated to my greatest mentor, friend and father Hon. Mirugi Kariuki who passed on whilst I was pursuing this programme, in a tragic plane crash in pursuit of peace and respect for human rights in North Eastern Kenya. His dreams, hopes and aspirations for human rights, peace and democracy live on.

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LIST OF ABBREVIATIONS

ACC	Anti-Corruption Commission
ACECA	Anti-Corruption and Economic Crimes Act 2003
ACPU	Anti-Corruption Police Unit
ADB	African Development Bank
AU	African Union
CCPR	International Covenant on Civil and Political Rights
CDF	Constituency Development Fund
CSO	Civil Society Organisations
ECOWAS	Economic Community of West African States
HCCC	High Court Civil Case
ICJ	International Commission of Jurists
IGG	Inspector General of Government of Uganda
KACA	Kenya Anti-Corruption Authority
KACC	Kenya Anti-Corruption Commission
KLR	Kenya Law Reports
MP	Member of Parliament
NACC	Kenya National AIDS Control Council
NARC	National Rainbow Coalition
POEA	Public Officers Ethics Act
SADC	Southern African Development Community
SIU	Special Investigating Unit South Africa
TI	Transparency International
UN	United Nations
UNCAC	United Nations Convention Against Corruption 2003
UNCHDCS	United Nations Committee Human Development and Civil Society
UNDP	United Nations Development Programme
USAID	United States Agency for International Development

CHAPTER ONE

INTRODUCTION

1.1 Background to the study

Corruption undermines the legitimacy of government, democratic values, human rights and respect for the rule of law.¹ The effects of corruption on development have left many African states grappling with what is today regarded as an international problem.² Indeed, corruption is viewed as an impediment to good governance and the rule of law in Africa.

Good governance entails accountability, transparency, enhanced public participation in decision making, strengthened public sector and civil society institutions and greater adherence to the rule of law.³ Corruption results in grave violations of socio economic rights, condemns people to extreme levels of poverty and often leads to social unrest.⁴ Curbing corruption is therefore critical to the achievement of good governance and the rule of law in many countries such as Kenya. Although most legal systems in Africa prohibit corruption, the practice is significantly different as is exhibited in this dissertation.

Some of these countries have even ratified international and regional conventions against corruption. Kenya for example, which will be the main subject of this dissertation, was the first country to sign and ratify the United Nations Convention against Corruption in December 2003. The country has also signed the African Union Convention on Preventing and Combating Corruption but has 'unreasonably' hesitated to ratify it.⁵ The two Conventions seek to promote and strengthen the development of anti-corruption mechanisms. The observance of these Conventions

1 P Anassi, *Corruption in Africa: The Kenyan experience* (2003) 13.

2 CR Kumar 'corruption and human rights: promoting transparency in governance and the fundamental right to corruption free service in India' (2003) 17 *Columbia Journal of Asian Law* 31.

3 N Kututwa, *African Anti-Corruption commitments: a review of eight NEPAD countries* (2005) 9.

4 M Kiai 'The human rights perspective on corruption.' Paper presented at the Tom Mboya symposium (2004).

5 'Kenya Yet to Ratify Africa's Anti-Corruption Convention' *East African Standard* 9 August 2006.

entails that the principles of the rule of law and good governance be upheld. However, the extent to which the standards envisaged by these conventions are adhered to, remain a mirage for most countries in Africa.

In Kenya, corruption has been a major social, political and economic stumbling block such that in 1998 corruption was said to have permeated the institutional beacon of democracy- the judiciary. Indeed, in October 2003, there was a major purge of members of the judiciary on allegations of endemic corruption.⁶ Other high-profile corruption cases in Kenya include the infamous Goldenberg scandal and recently the Anglo-Leasing scandal. The Goldenberg scandal 'involved a fictitious export compensation scheme allegedly to export gold and diamonds while the most intriguing aspect of the matter is that Kenya has little or no gold mines and diamond fields'.⁷ The Anglo leasing scandal hinges on a government tender involving amounts in excess of 90 million Kenya shillings allegedly awarded to a non-existent company. This led to the unsuccessful prosecution of six senior government officials in court.⁸ These two egregious incidences illustrate the extent corruption is entrenched within government structures and how this ultimately erodes the basic principles of good governance and the rule of law.

While this dissertation analyses the effects of corruption on good governance, particularly in Kenya, it argues that upholding the rule of law would usher in a suitable environment to curb corruption. This is premised on the fact that good governance entails a system of governance that is free of abuse of state power, and one that pays due regard to the rule of law.⁹ Since corruption erodes principles of good governance, if allowed to continue unchecked, it would result in institutionalised failure of state institutions, especially in delivery of services.¹⁰ Corruption erodes fair play causing a malfunction of systems of government and loss of institutional confidence among the general public. Undoubtedly, corruption has a debilitating

⁶ 'Kenyan courts grind to halt' *BBC news* 17 October 2003 sourced <<http://news.bbc.co.uk/2/hi/africa/3197882.stm>> (accessed 10 October 2006). The purge resulted from the presentation of a report by the Integrity and Anti-Corruption Committee of the Judiciary, documenting credible and substantial evidence of corruption, unethical conduct and other forms of misbehaviour among 152 judges of Kenya's 300 judges and magistrates.

⁷ Anassi (n 1 above) 104.

⁸ 'Anglo-Leasing six and the due process' *East Africa Standard* 16 February 2005.

⁹ Kututwa (n 3 above) 5.

¹⁰ Kututwa (n 3 above) 6.

impact on institutions ethical values and dispensation of justice. It undermines economic growth and hinders the attainment of sustainable human development. It undermines economic growth and hinders the attainment of sustainable human development. The evidence to support these contentions is overwhelming¹¹ and is surveyed in this dissertation to illustrate the effects of corruption on good governance.

1.2 Research questions

This research focuses on the following central question: Can the rule of law be used to ensure an effective system of good governance to combat corruption in Kenya?

The central question ushers more specific secondary questions:

- (i) What is the impact of corruption on good governance and the rule of law in Kenya?
- (ii) What are the implementation challenges of the current national and international laws regulating corruption in Kenya?
- (iii) Can the legal and institutional framework enhance the rule of law to combat corruption?

1.3 Objectives of the study

The main objective of this study is to investigate and illustrate how upholding the rule of law is a prerequisite to curbing corruption in Africa. The dissertation therefore seeks to investigate the nexus between the effects of corruption on good governance and the effectiveness of the rule of law as an anti-corruption strategy.

Secondly and with specific reference to Kenya as a case study, the research seeks to investigate the various facets of corruption and the role of the available mechanisms to curb the scourge. The survey is made in a bid to appreciate the extent, the failure to uphold the rule of law, in spite of the existence of some of these mechanisms, jeopardises the fight against corruption.

¹¹ Institute for Security Studies, Handbook on comparative analysis SADC Protocol against Corruption (2001) AU Convention on Preventing and Combating Corruption (2003) UN Convention against Corruption (2003) (2004) 7.

1.4 Significance of the study

Drawing experiences from Kenya among other African countries, the study explores the contention that although the rule of law is a casualty of corruption, it can also be a significant factor in reducing opportunities of corruption. The study aims to explore the potential of the rule of law in combating corruption. A comparative analysis of the facets of good governance and the rule of law as a strategy to combat corruption, and recommendations from the analysis can contribute to an anti-corruption strategy and policies in Kenya as well as other African countries.

This study is particularly significant since it seeks to explore and outline, by drawing experiences from other jurisdictions, on how upholding the rule of law can be employed to combat corruption. It is envisaged that this study will contribute to the development of African jurisprudence on this seemingly chronic issue of governance from a human rights perspective.

1.5 Literature survey

The subject of corruption has evoked considerable amount of commentary in academic literature. A number of books and articles exist on the appalling consequences of corruption, such as books edited by the Institute of Security Studies¹² and by various authors such as Rose-Ackerman.¹³ The majority of this literature however, focuses largely on the consequences of corruption on governance from a political point perspective. A book by Anassi¹⁴ for example, addresses issues of graft in the public and private sectors and details how corrupt deals are executed. However the book is tailored for civic education and does not elaborate on the rule of law as a strategy to combat corruption.

Gathii's article¹⁵ offers an illuminating account of the significance of the rule of law as an anti-corruption strategy in Kenya. However his study is limited to the use of the

¹² As above.

¹³ S Rose-Ackerman, *Corruption and government: causes, consequences and reform* (1999).

¹⁴ Anassi (n 1 above).

¹⁵ JT Gathii 'Corruption and donor reforms: expanding the promises and possibilities of the rule of law as an anti-corruption strategy in Kenya' (1999) 14 *Connecticut Journal of International Law* 407.

rule of law in donor reforms. The other significant publication is for example by the Commonwealth Secretariat¹⁶ which deals with the nature of corruption, its different dimensions and the challenges it poses to the strategies based on 'zero tolerance' for combating it at all levels.

This study is therefore unique in that apart from looking at corruption as a human rights concern and impediment to good governance; it seeks to investigate how the rule of law can be applied to address the scourge. Admittedly, the dearth of information on this particular area provides an opportunity to analyse other literature that generally discuss corruption. As such it is useful for analysis in this dissertation which seeks to make a significant contribution within the context of applying the rule of law as a strategy to combat corruption in Kenya and Africa generally.

1.6 Methodology

This study relies significantly on secondary data. This data is gathered from library such as books, articles, case law, international and domestic instruments and internet sources. Reliance is therefore made of the desktop scheme of research.

Within the broad remit of reviewing the effects on the rule of law on corruption, the dissertation focuses analytically on anti-corruption efforts in Kenya and also makes a comparative analysis with other African countries.

1.7 Conceptual framework

It is useful to have an understanding of some of the key terms that are used extensively and are at the root of this dissertation. These are primarily corruption, good governance and the rule of law. A brief definition and application of each of them is therefore made.

1.7.1 Corruption

There is no standard definition of corruption but the most common understanding entails 'an inappropriate behaviour or abuse of authority for personal gain by public

¹⁶ Commonwealth Secretariat Expert Group Report, *Fighting corruption, promoting good governance* (2001).

officials, guilty of dishonesty especially involving bribery'; 'abuse of public office for private gain'.¹⁷ Corruption is defined as 'dishonest or illegal behaviour especially by people in authority'¹⁸ Gong aptly points out that corruption is not a static notion but a dynamic one which evolves over time and differs from society to society.¹⁹ The World Bank considers 'corruption as an abuse of public authority for the purpose of acquiring personal gain'.²⁰ According to Transparency International, 'corruption is an abuse of entrusted power for personal gain'.²¹

From the international conventions framework, the United Nations Convention against Corruption does not describe precisely what constitutes corruption, However article 15(b) of the UNCAC prohibits 'the solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official acts or refrains from acting in the exercise of his or her official duties'. On the other hand, the African Union Convention on Preventing and Combating Corruption defines corruption as 'the acts and practices including related offences proscribed in this Convention'.²² Article 4 of the AU Convention further broadens the scope of the application to the proscribed acts of corruption and related offences. In terms of this provision, the benefit may be solicited or accepted by 'a public official or any other person'. It is not clear however who such 'other person' may be, since the benefit is solicited or accepted in exchange for any act or omission in the performance of 'a public function'. Although not clear, it is assumed that the intention is that 'any other person' may accept the benefit on behalf of the public official in exchange for such public official performing any act or omission in the performance of their public functions.²³

¹⁷ Anassi (n 1 above) 17.

¹⁸ Oxford advanced learner's dictionary (2000)

¹⁹ T Gong, *The politics of corruption in contemporary China: An analysis of policy outcomes* (1994).

²⁰ D Kaufmann 'Corruption, Governance and Security: Challenges for the Rich Countries and the World' World Bank Global Competitiveness Report 2004/2005 (2004).

²¹ Transparency International (TI) sourced <http://www.transparency.org/news_room/faq/corruption_faq> (accessed 25 September 2006).

²² African Union Convention on Preventing and Combating Corruption article 1.

²³ Institute for Security Studies (n 11 above).

Domestically, the Kenya Anti-Corruption and Economic Crimes Act 2003 (ACECA) depicts corruption to mean bribery, fraud, embezzlement or misappropriation of public funds, abuse of office and breach of trust. It further explicates corruption to be an offence involving dishonesty in connection with any tax, rates or levies under any written law, and relating to the election of persons to public office.²⁴

It is worthy to note that it is problematic to define corruption in terms of its consequences because corruption in Africa is woven deeply into the fabric of everyday life and therefore the definition may vary from society to society.²⁵ In sum, however, and for purposes of this dissertation corruption can be termed as an act done with intent to give some advantage or benefit or favour inconsistent with official duty and the rights of others.

1.7.2 Good governance

Governance describes the process of decision making and the process by which decisions are implemented (or not implemented).²⁶ Governance is also a process by which public institutions conduct public affairs, manage public resources, and guarantee the realisation of human rights. Good governance therefore ensures the execution of public duties and obligations in a manner essentially free from abuse and corruption, and with due regard for the rule of law.

The United Nations Development Programme states that, good governance is 'the exercise of political, economic and administrative authority to manage a nation's affairs and includes a complex array of mechanisms, processes relationships and institutions through which citizens manage their affairs involving public life'.²⁷ The United Nations Commission on Human Rights (now the UN Human Rights Council) in its resolution 2000/64²⁸ identified eight major characteristics of good governance

²⁴ Anti-Corruption and Economic Crimes Act 2003 (ACECA) section 2.

²⁵ Anassi (n 1 above) 19.

²⁶ See < www.en.wikipedia.org/wiki/Good_governance > (accessed 25 September 2006).

²⁷ United Nations Development Programme 'reconceptualising governance' Discussion paper 2 (1997).

²⁸ See <www.ohchr.org/english/issues/development/governance/index.htm> (accessed 25 September 2006).

which *inter alia* include the rule of law. It states that for the 'rule of law' to exist there should be fair legal framework that is enforced impartially. Furthermore, there should be protection of human rights and an impartial enforcement of laws. This would require an independent judiciary and an impartial and incorruptible police force.'

The World Bank also views good governance and anti-corruption as central to its poverty alleviation mission.²⁹ This dissertation adopts these concepts of good governance particularly with reference to its principles of accountability,³⁰ transparency³¹ in the elimination of corruption.

1.7.3 Rule of law

Definitions of the rule of law 'fall into two categories: those that emphasize the ends that the rule of law is intended to serve within society (such as upholding law and order, or providing predictable and efficient judgments); and those that highlight the institutional attributes believed necessary to actuate the rule of law (such as comprehensive laws, well-functioning courts, and trained law enforcement agencies)'.³² According to Dicey, rule of law means, 'the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even wide discretionary authority on the part of the government'.³³ As such, the rule of law 'has two functions: it limits government arbitrariness and power abuse, and it makes the government more rational and its policies more intelligent'.³⁴ Bo Li also notes that 'a key aspect of

²⁹ See <http://web.worldbank.org/WBSITE/EXTERNAL/WBI/EXTWBIGOVANTCOR/0,,menuPK:174054_2~pagePK:64168427~piPK:64168435~theSitePK:1740530,00.html> (accessed 25 September 2006).

³⁰ Accountability entails giving an account to another party who has a stake in what has been done.

³¹ Transparency requires regarding citizens interests as priorities to personal interest. It entails having information freely available, making the decisions by public institutions predictable. See Kututwa (n 3 above) 67.

³² See <www.en.wikipedia.org/wiki/Good_governance>(accessed 25 september2006).

³³ AV Dicey, *Introduction to the study of the law of the constitution* (1982) 120.

³⁴ B Li 'What is rule of Law?' (2000) 1 *Perspectives* Sourced <http://www.oycf.org/Perspectives/5_043000/Contents.htm> (accessed 9 October 2006).

the rule of law is 'limitation' such as, rule of law puts limits on the discretionary power of the government, including the power to changes laws.³⁵

This dissertation seeks to investigate how the rule of law can effectively be applied to curb corruption. As such, it will examine the various mechanisms in place to uphold the rule of law relative to anticorruption and how they can be employed to limit state discretionary powers and ensure government accountability and transparency.

1.8 Limitations of the study

Firstly, since the struggle to end corruption in a developing country has both procedural and substantive implications, this dissertation is only an overview and highlights the main areas but does not elaborate on aspects of the governance and the rule of law.

Secondly, given that the rule of law cannot be evaluated in isolation of its basic constituent values, this dissertation is restricted to the formalism of the rule of law such as 'procedure of making laws and settling disputes' rather than 'a concrete plan of social organisation.' The formal structures envisaged are; public service, judiciary, anti-corruption commission/agencies, and media and civil society organisations.

Thirdly, this dissertation does not dwell on the typology of corrupt behaviour but gives a general conceptual framework. Because the scope of corruption is contextual and its incidences varies greatly reflecting a country's policies, legislation and bureaucratic culture, this dissertation primarily focuses on Kenya and only uses other country studies for comparative purposes.

1.9 Overview of chapters

Chapter one introduces and sketches the questions that have prompted this study.

Chapter two identifies the legal and institutional framework to curb corruption in Kenya. It also investigates the obligations of the state on anti-corruption in Kenya. The study attempts to outline and discuss the different actions that the government of

³⁵ As above.

Kenya has taken to contain corrupt practices in the public service and in society generally.

Chapter three is an analysis of the impact of corruption on governance in Kenya. It discusses the extent which corruption has permeated in the public service and its effect on public accountability and transparency. The study also assesses the effectiveness of the different anti-corruption measures set up to combat corruption in Kenya as compared to other African countries.

Chapter four evaluates the effectiveness of the use of the rule of law to combat corruption in Kenya. It analyses the anti-corruption legal and institutional framework in comparison with other African countries to determine the factors that have lent effectiveness to anti-corruption efforts as well as countermeasures that have hindered the ability of such efforts.

Chapter five proffers the conclusion and recommendations.

CHAPTER 2

LEGAL AND INSTITUTIONAL ANTI-CORRUPTION FRAMEWORK IN KENYA

2.1 Introduction

This chapter identifies and examines Kenya's legal and institutional framework on anti-corruption measures. Its principle focus is on the initiatives introduced after December 30 2002 by the National Rainbow Coalition (NARC) government. The chapter commences by discussing the United Nations Convention Against Corruption³⁶ and the African Union Convention on Preventing and Combating Corruption³⁷ both of which Kenya is signatory. It then analyses the principal domestic legislative framework aimed at combating corruption in Kenya which are the Anti-Corruption and Economic Crimes Act 2003 (ACECA) and the Public Officers Ethics Act 2003 (POEA). It will further assess how these statutes have been interpreted and implemented through the established institutional framework that includes the Kenya Anti Corruption Commission (KACC), and the special magistrates anti corruption courts.

2.2 International legal framework

Fighting corruption internationally is a means of defending the stability of democratic institutions, the rule of law, human rights and social progress. It also provides states with international standards, procedures and methods that will help them to assess the efficacy of measures taken and facilitate the promotion of compatible efforts against corruption.³⁸ Global initiatives to fight corruption include the United Nations Convention against Corruption 2003, the United Nations Convention against Transnational Organised Crime 2003,³⁹ United Nations Declaration against

³⁶ United Nations Convention against Corruption 2003 (UNCAC) United Nations resolution 58/4 of 31 October 2003. Sourced <www.unodc.org/crime_convention_corruption.html> (accessed 25 September 2006).

³⁷ African Union Convention on Preventing and Combating Corruption 2003 (AU Convention on Corruption) Sourced <www.africa-union.org/.../Treaties_%20Conventions_%20Protocols/off_Treaties_Conventions_&_Protocols.htm> (accessed 25 September 2006).

³⁸ NJ Udombana 'Fighting corruption seriously? Africa's anti-Corruption Convention' (2003) 7 *Singapore Journal of International and Comparative Law* 447 at 456.

³⁹ United Nations Convention against Transnational Organized Crime 2003 U.N. Doc. A/45/49 (Vol. I) (2001), *not in force*.

Corruption and Bribery in the International Commercial Transactions 1996,⁴⁰ and International Code of Conduct for Public Officials.⁴¹

At the African regional level, legal instruments on corruption include the African Union Convention on Preventing and Combating Corruption 2003, Southern African Development Council (SADC) Protocol against Corruption 2001⁴² and the Economic Council of West Africa (ECOWAS) Protocol on the Fight against Corruption 2001.⁴³ These instruments are aimed at promoting and strengthening the development of mechanisms and policies that would prevent, detect, punish and eradicate corruption.

For purposes of this dissertation the focus is limited to the United Nations Convention against Corruption 2003 which Kenya has ratified and the African Union Convention on Preventing and Combating Corruption 2003 which Kenya is a signatory. The other international and sub-regional instruments are applied for comparative purposes particularly in assessing the best practices and drawing lessons from countries that have ratified them.

2.2.1 The United Nations Convention against Corruption 2003

The United Nations Convention against Corruption 2003 (UNCAC) represents the first binding global agreement on corruption that has elevated anti-corruption action to the international stage.⁴⁴ Kenya has ratified the Convention and as such is bound by it. A brief survey of the substantive provisions of the Convention is therefore important in appreciating the mechanisms envisaged by the Convention in preventing and addressing corruption, which essentially hinge on the practice of the rule of law in a bid to curb the scourge.

⁴⁰ United Nations Declaration against Corruption and Bribery in the International Commercial Transactions G.A. U.N. Doc. A/51/49 (Vol. I) (1996).

⁴¹ United Nations International Code of Conduct for Public Officials

⁴² Southern African Development Council (SADC) Protocol against Corruption 2001 sourced <<http://www.issafrika.org/cdct/index.htm>> (accessed 25 September 2006).

⁴³ Economic Council of West Africa (ECOWAS) Protocol on the Fight against Corruption 2001

⁴⁴ P Webb 'The United Nations Convention against Corruption; Global achievements or missed opportunity?' (2005) 8 *Journal of International Economic Law* 191.

In recognition of the importance of having an institutional framework to curb corruption, article 36 of the UNCAC stipulates that each state party will ensure the existence of a body or body of persons specialized in combating corruption through law enforcement. Article 36 further reiterates the need for independence and professionalism of the officers of those institutions in order to effectively address corruption, by providing that those persons or staff of such bodies should have the appropriate training and resources to carry out their tasks. In an effort to implement this provision, Kenya has established the Kenya Anti Corruption Commission, and the extent it meets the UNCAC standards, is discussed later in this chapter.

The effectiveness of law enforcement actions to combat corruption relies on information flow and established communication channels that facilitate rapid exchange of information in the conduct of inquiries.⁴⁵ UNCAC consequently requires the establishment of institutions either as preventative anti-corruption bodies or as bodies specialised in combating corruption through law enforcement. The institutions set up will prevent corruption by such means as implementing the preventative anti-corruption policies and practices.⁴⁶ In doing so, state parties shall decide on the mandates and powers of these institutions, their level of autonomy, the resources they are entitled to and rules of engagement that will guide the interaction and collaboration between the various institutions. In acknowledging the role that can be played by the disclosure of information in curbing corruption, the UNCAC article 32, elucidates that witnesses, experts and victims who give testimony concerning corruption are to be provided protection from potential retaliation or intimidation. Article 33 further requires state parties to incorporate into their domestic legal system measures to provide protection against any unjustified treatment of a whistleblower⁴⁷ to the competent authority. The laws in Kenya do not sufficiently protect whistleblowers as will be illustrated in chapter three as much as the means of encouraging disclosure of information on corruption leaves a lot to be desired.

⁴⁵ UNCAC article 49.

⁴⁶ UNCAC article 6.

⁴⁷ A whistle blower is a person who reports incidence of corruption in good faith and on reasonable grounds to the competent authorities. See <<http://en.wikipedia.org/wiki/Whistleblower>> (accessed 25 september2006).

Cooperation between national authorities⁴⁸ and the private sector⁴⁹ is encouraged in an effort to combat corruption. Mutual legal assistance between states in the investigation, prosecution and judicial proceedings⁵⁰ is to be afforded to ‘the fullest extent possible’.⁵¹ It is anticipated that, such policies and practices should promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.⁵² The Convention also underscores the independence of the judiciary and its crucial role in combating corruption by calling on state parties to take measures that strengthen the integrity of the judiciary and prosecution services.

State parties are also required to establish mechanisms to overcome obstacles that may arise out of the application of bank secrecy laws.⁵³ Each state party is obliged to regulate its financial institutions to enhance scrutiny of its operations to detect suspicious transactions⁵⁴ in an effort to establish effective financial disclosure systems.⁵⁵ State parties are also obliged to establish a financial intelligence unit responsible for receiving, analysing and disseminating information to competent authorities and report suspicious financial transactions.⁵⁶ Had such provisions been implemented in Kenya, the notorious Goldenberg scandal that saw the looting of billions of Kenya shillings through fraudulent schemes involving the country’s central bank would be unheard of.

State parties are further obliged to take measures for direct recovery of property through civil action⁵⁷ and through international cooperation in confiscation.⁵⁸ Asset

⁴⁸ UNCAC article 38.

⁴⁹ UNCAC article 39.

⁵⁰ UNCAC article 46 (1).

⁵¹ UNCAC article 46(2).

⁵² UNCAC article 5.

⁵³ UNCAC article 40.

⁵⁴ UNCAC article 52(1).

⁵⁵ UNCAC article 52 (5).

⁵⁶ UNCAC article 58.

⁵⁷ UNCAC article 53.

⁵⁸ UNCAC articles 54, 55.

recovery is a crucial issue for developing countries involving grand corruption with cases abound of national wealth being stashed abroad in foreign banks,⁵⁹ while resources are badly needed for the reconstruction of societies under new governments.⁶⁰ Assets recovery is given prominence in the UNCAC and is captured in a whole chapter⁶¹ as a fundamental principle of the Convention.⁶² A lot of Kenyan wealth is said to be stashed in foreign accounts looted during former and even during the current regime but there exists a lot of difficulty in proving such accounts and amounts given the stringent secrecy laws and practices governing banks.⁶³ The difficulty of recovering such funds and assets due to lack of cooperation from some of the countries where such funds are stashed is also a huge hurdle that can not be underestimated.

With reference to the public sector, the UNCAC champions for the recruitment and promotion of civil servants based on principles of efficiency, transparency and objectivity.⁶⁴ In the promotion of a code of conduct for public officials, public officials are required to make declarations of their investments, assets and substantial gifts from which a conflict of interest may arise.⁶⁵ Article 9 of the UNCAC provides for public procurement and management of public finances which state parties are expected to establish systems based on transparency, competition and objective criteria. As will be illustrated later in the chapter, the Kenya Public Officers Ethics Act requires disclosure of wealth of civil servants but such disclosures amount to nought given the fact that they are not publicly available.

While the UNCAC has innovative and laudable provisions, which if effectively implemented domestically would address the bane of corruption through the rule of law, the existence of claw back clauses couched in words such as 'in accordance

⁵⁹ African leaders who have been accused of banking national income in foreign banks include but not limited to former president Mobutu Sese Seko of former Zaire now DRC, former president Sani Abacha of Nigeria.

⁶⁰ Webb (n 44 above) 207.

⁶¹ UNCAC chapter V.

⁶² UNCAC article 51.

⁶³ 'State changes tune on looted billions abroad, *East African Standard*, 19 May 2005.

⁶⁴ UNCAC article 7.

⁶⁵ UNCAC article 8.

with fundamental principles of domestic law⁶⁶ and taking measures 'to the greatest extent possible within a domestic legal system'⁶⁷ choke the envisioned potential of the substantive provisions of the UNCAC. This is because states employ such discretion to limit and constrain actions of various actors to the detriment of fighting corruption.

2.2.2 The African Union Convention on Preventing and Combating Corruption 2003

The African Union Convention on Preventing and Combating Corruption 2003 (AU Anti-Corruption Convention) adopted under the auspices of the African Union sends a positive signal of improving transparency and good governance in Africa.⁶⁸ The Convention acknowledges that corruption undermines accountability and transparency in the management of public affairs as well as socio-economic development on the continent.⁶⁹ Although Kenya is only a signatory to this all important regional Convention, some of its provisions are innovative thus worth being highlighted. It is also an important regional instrument in view of the fact that Kenya may soon ratify the Convention noting that it has signed it and indeed most of its provisions reflect the UNCAC standards which Kenya is a party to.

Since the nature and impact of corruption is beyond national boundaries, it requires cooperation and mutual assistance between countries in order to be tackled effectively. In the spirit of international cooperation, state parties are obliged to collaborate with countries of origin of multi-nationals to criminalise and punish the practise of secret commissions during international trade transactions.⁷⁰ Such cooperation is geared towards fostering regional, continental and international cooperation to prevent corrupt practices in international trade transactions.⁷¹

⁶⁶ UNCAC article 23.

⁶⁷ UNCAC article 31.

⁶⁸ K Olaniyan 'The African Union Convention on Preventing and Combating Corruption: A critical appraisal' (2004) 4 *African Human Rights Law Journal* 74, 75.

⁶⁹ AU Anti-Corruption Convention preamble para 7.

⁷⁰ AU Anti-Corruption Convention Article 19(1).

⁷¹ AU Anti-Corruption Convention Article 19(2).

In light of the prevalence and plight of looted funds being stashed in other jurisdictions the AU convention echoes provisions of the UNCAC by calling on all states to take legislative measures to prevent corrupt public officials from enjoying ill-acquired assets by freezing their foreign accounts and facilitating the repatriation of stolen or illegally acquired monies to the countries of origin.⁷² This implies that state parties must cooperate and be in conformity with relevant international instruments on international cooperation on criminal matters for purposes of investigations and procedures in offences within the jurisdiction of the AU Anti-Corruption Convention.⁷³

The AU Advisory Board on Corruption is set up as a monitoring mechanism within the AU Anti-Corruption Convention.⁷⁴ Its objectives are to promote and encourage the adoption and application of anti-corruption measures on the continent as well as collect and document information on the nature and scope of corruption and related offences.⁷⁵ It is also required to advise African governments on how to deal with the scourge of corruption and consequently submit a regular report on the progress made by each state party in complying with the provisions of the AU Anti-Corruption Convention.⁷⁶

State parties are required to empower their domestic courts and other competent authorities to give valid confiscation or seizure orders of bank, financial or commercial documents with a view to implementing the AU Anti-Corruption Convention.⁷⁷ In addition, state parties are forbidden to use any information received that is protected by bank secrecy for any other purpose other than the proceedings for which such information was requested. An innovative provision is its express provision forbidding states to invoke banking secrecy to justify state parties' refusal to cooperate with regard to acts of corruption and related offences.⁷⁸ This reduces

⁷² AU Anti-Corruption Convention Article 19(3).

⁷³ AU Anti-Corruption Convention Article 19 (5).

⁷⁴ The AU Advisory Board on Corruption is set up as a monitoring mechanism of the AU Anti-Corruption Convention and it is to adopt its own rule of procedure according to AU Anti-Corruption Convention article 5(6).

⁷⁵ AU Anti-Corruption Convention article 22 (5).

⁷⁶ AU Anti-Corruption Convention article 22 (5).

⁷⁷ AU Anti-Corruption Convention article 17(1).

⁷⁸ AU Anti-Corruption Convention article 17(3).

opportunities for heads of states and other state officials to exploit the global banking system to conceal or launder the proceeds of corruption from their countries. It equally serves to reduce the attractiveness of jurisdictions that often serve as destinations for stolen money.⁷⁹The AU Anti-corruption Convention therefore seeks to reflect African realities in the fight against corruption and is particularly important in its reference to the African Charter on Human and Peoples' Rights in the fight against the scourge.

The objectives of the AU Anti-corruption Convention are to promote, facilitate and regulate cooperation among state parties to ensure effectiveness of measures and actions⁸⁰to promote socio-economic development by removing obstacles to the enjoyment of economic, social and cultural rights,⁸¹ and to establish the necessary conditions to foster transparency and accountability in the management of public affairs.⁸² This is similar to the UNCAC whose objective is to 'promote integrity, accountability and proper management of public affairs and public property.'⁸³ The AU Convention further sets out as one of its purposes, the promotion and strengthening of measures to prevent and combat corruption more efficiently and effectively⁸⁴ which is also elucidated by the UNCAC.

In conclusion the overall objectives of the AU Anti-corruption Convention are laudable, like most other treaties adopted in Africa; the major problem lies with translating these lofty objectives into reality. What is needed is a strong political will on the part of states, to address corrupt practices which, unfortunately in most instances is lacking or inadequate, as evidenced by the rampant corruption on the continent.

⁷⁹ Olaniyan (n 68 above) 84.

⁸⁰ AU Anti-Corruption Convention article 2(2).

⁸¹ AU Anti-Corruption Convention article 2(4).

⁸² AU Anti-Corruption Convention article 2(5).

⁸³ UNCAC article 1(c).

⁸⁴ UNCAC article 1(a).

2.3 Domestic legal framework

While the Government of Kenya has pursued anti-corruption programmes since the mid 1970's, the malpractice has persisted and in some cases intensified in recent years suggesting that the remedial measures have not been significantly effective.⁸⁵ The oldest law on corruption in Kenya, the Prevention of Corruption Act⁸⁶ dates back to 1956. This law has since been repealed by the Anti-Corruption and Economic Crimes Act 2003 (ACECA) which essentially seeks albeit with limited success to domesticate the UNCAC provisions.⁸⁷

Consequently, Kenya set up the Kenya Anti Corruption Commission (KACC) that became operational in May 2004. It was preceded by the troubled Kenya Anti-Corruption Authority (KACA) that was set up in 1997. The downfall of KACA was a result of legal technicalities and loopholes in the Act establishing it that resulted in its being declared null and void to the extent of its inconsistency with the Constitution.⁸⁸ Its demise led to the establishment of the Anti-Corruption Police Unit (ACPU) in 2001 based on a presidential directive. Since ACPU was essentially a police outfit, its independence and effectiveness was questionable and compromised. This led to the setting up of KACC as a changeover from the ACPU.⁸⁹

Although the formal legal framework involves the implementation of the Anti-Corruption and Economic Crimes Act 2003 (ACECA) and the Public Officer Ethics Act 2003 (POEA), there are other supplementary legislative initiatives for fighting corruption in Kenya. These include for example the Public Procurement and Disposal Act 2005 and the Public Audit Act 2003. However, for the purposes of this dissertation this subsection will mainly focus on the Anti-Corruption and Economic Crimes Act 2003 (ACECA) and the Public Officer Ethics Act 2003 (POEA).

⁸⁵ L Chweya 'The government Anti-Corruption programme, 2001-2004' in B Sihanya (ed) *Control of corruption in Kenya: legal-political dimensions 2001-2004* (2005).

⁸⁶ Prevention of Corruption Act Cap 65 Laws of Kenya.

⁸⁷ The Anti-Corruption and Economic Crimes Act no 3 of 2003 (ACECA)

⁸⁸ *Stephen Mwai Gachigo and Albert Muthee Kahuria v Republic* Kenya Law Reports (2000) LLR (HCK).

⁸⁹ ACECA sections 72, 73.

2.3.1 The Anti-Corruption and Economic Crimes Act 2003 (ACECA)

The objectives of the ACECA are to provide for the prevention, investigation, and punishment of corruption, economic crimes and related offences and for matters incidental thereto and connected therewith.⁹⁰ The Act contains a new genre of 'economic crimes' as an offence involving dishonesty under any written law providing for the maintenance or protection of public revenue.⁹¹ Compensation may be ordered by a court of law if the rightful owner is established at the time of convicting a person guilty of corrupt conduct.⁹² Bid rigging is also itemized as an offence⁹³ under the ACECA and would be utilised especially in the public procurement process. Forfeiture of unexplained wealth is also proscribed in the Act.⁹⁴ These provisions generally seem to reflect and domesticate the UNCAC and the AU Convention provisions prohibiting certain activities as acts of corruption.

However, the meaning of corruption or its ingredients under ACECA need to be reconciled with the provisions of the Penal Code since each of the components of corruption constitute a substantive offence under the Kenya Penal Code.⁹⁵ Corruption can take different criminal forms including theft and false pretences and could also amount to abuse of office. As such it would seem as if some offences provided for under the penal code are duplicated in the ACECA. Reconciliation of the meaning of corruption would ensure conflict of the laws is avoided. This was comparatively illustrated in the Ugandan case of *Ekemu and another v Uganda*,⁹⁶ where the power of the Inspector General of Government (IGG)⁹⁷ to prosecute offences other than corruption and abuse of office was challenged. Ekemu was convicted of theft in cases prosecuted by the IGG and on appeal against conviction, it

⁹⁰ Preamble Anti-Corruption and Economic Crimes Act 2003.

⁹¹ ACECA section 2.

⁹² ACECA section 54.

⁹³ ACECA section 44.

⁹⁴ ACECA section 54.

⁹⁵ Penal Code Cap 63 Laws of Kenya chapter XXVI theft, chapter XXX false pretences, chapter X abuse of office.

⁹⁶ *Ekemu and another v Uganda* Uganda CA No. 3 of 2000. As cited in Chweya (n 85 above) 156.

⁹⁷ The Uganda equivalent of KACC.

was argued that IGG did not have powers to prosecute cases of theft and therefore it had no legal power to prosecute Ekemu. Following the Ekemu ruling, the Inspectorate of Government Act 2002⁹⁸ was amended to redefine corruption as ‘ the abuse of public office for private gain and included but is not limited to embezzlement, bribery, nepotism, influence, peddling, theft of public funds or asserts fraud. While such a scenario may not arise in Kenya given that all offences in Kenya are prosecuted by a single authority; the office of the Attorney-General, it is important to eliminate any inconsistencies which could delay or even jeopardise successful prosecutions.

The ACECA establishes the special magistrates, the Kenya Anti-Corruption Commission and under it the Kenya Anti-Corruption Commission Advisory Board. Section 7 ACECA empowers KACC to investigate matters that, in its opinion raise suspicion of conduct constituting corruption or economic crimes. In prosecuting corruption offences of receiving, soliciting or offering on the basis of ACECA, custom is not an excusable defence.⁹⁹To serve as a deterrent and as a disciplinary action against persons found to be behaving in corrupt and unethical ways, they are to be disqualified and forbidden from being elected or appointed as public officers for ten years after the conviction.¹⁰⁰

In a prosecution for corruption or economic crimes, no witness is required to identify or provide information that may lead to the identity of the whistle blowers.¹⁰¹ However, despite this provision, whistle blowers are not sufficiently protected with no mention of sanctions should such information leak to the public unlike in article 33 of the UNCAC.

2.3.2 The Public Officer Ethics Act 2003 (POEA)

The core objective of POEA is to prevent corruption by the advancement of a code of ethics for public officers. Civil service reforms are key in addressing some of the causes of corruption. Underpaid, overworked and demotivated civil servants are

⁹⁸ Uganda Inspectorate of Government Act 2002

⁹⁹ ACECA section 49.

¹⁰⁰ ACECA section 64.

¹⁰¹ ACECA section 65.

breeding grounds for corruption in Africa.¹⁰²The problem of corruption is related to the issue of ethics and it is impossible to tame corruption and economic crimes without a code of ethics. Corruption tends to thrive where there are no acknowledged ethical standards to guide conduct.¹⁰³

POEA is a reflection of what African state parties have agreed upon in article 7 of the AU Anti-Corruption Convention to ensure that public officials declare their assets at the time of assumption of office, during and after their term of office. Professionalism within the public service is a key part of the general code of conduct and ethics.¹⁰⁴ Conversely, there are a wide range of prohibited behaviours by public officers such as favouritism and nepotism,¹⁰⁵soliciting or accepting gifts,¹⁰⁶and sexual harassment.¹⁰⁷Public officers are required to observe political neutrality in the performance of their duties.¹⁰⁸Public officers are required to eschew conflicts between private interests and public duty.¹⁰⁹This means that public officers should refrain from entering positions in the private sector for gainful employment or running a private business that is likely to create conflicts of interest.¹¹⁰ The rule of law is evoked by the requirement that public officers discharge their duties in accordance with the law¹¹¹and in doing so shall not violate the rights and freedoms of any person.¹¹²

POEA subjects individuals to questioning of unexplained wealth. The declaration of income and assets is emphasised.¹¹³ False or misleading information in this regard

¹⁰² Kututwa (n 3 above) 81.

¹⁰³ 'Fighting graft impossible without code of ethics' *African Herald* 11March 2001.

¹⁰⁴ POEA section 9.

¹⁰⁵ POEA section 17.

¹⁰⁶ POEA section 11.

¹⁰⁷ POEA section 21.

¹⁰⁸ POEA section 16.

¹⁰⁹ POEA section 12.

¹¹⁰ Kututwa (n 3 above) 87.

¹¹¹ POEA section 10.

¹¹² Constitution of Kenya chapter V protection of fundamental, rights and freedoms of the individual, section 70-86(bill of rights).

¹¹³ POEA section 26-34.

would attract the sanctions of the provisions of ACECA.¹¹⁴ Whilst the intention of the wealth declaration is to monitor that public officials do not use their positions for improper enrichment, such information is confidential and inaccessible to the public. It can only be acquired by the police or any other law enforcement agency, a person authorised by an order of the High Court and a personal representative of the public official whose information is provided.¹¹⁵

The importance of public disclosure of wealth declaration forms cannot be overemphasised. While in Kenya this does not happen, it is submitted that at the very least Parliament through an appropriate committee should have the power to inspect the register of declarations. This position has been captured succinctly by Transparency International which has observed that a 'register of interests which is not open to a sufficiently wide category of the public is a weak tool in installing ethics in public life. It becomes in the end a register of secrets rather than of interests'.¹¹⁶

2.4 Judicial framework

The Kenyan judiciary is comprised of four levels of courts, District Magistrates' Courts, Resident Magistrates' and Chief Magistrate's Courts, High Court which is also the Constitutional Court of first instance, and the Court of Appeal which is the highest court. There are also specialised courts granted various degrees of extended jurisdiction such as the Kadhis' (Islamic) courts, the court martial, the commercial court, the labour (industrial relations) court, the children's (family) court and recently the special anti-corruption courts.¹¹⁷

2.4.1 Special magistrates and anti-corruption courts

The special anti-corruption courts established under the Anti-Corruption and Economic Crimes Act, 2003 (ACECA) are to be presided over by a special

¹¹⁴ POEA section 32.

¹¹⁵ POEA section 30.

¹¹⁶ TI Global Corruption Report (2005).

¹¹⁷ See Government of Kenya official website: the judiciary. Sourced <<http://www.judiciary.go.ke/>> (accessed 25 September 2006).

magistrate.¹¹⁸ The innovative special anti-corruption courts are established to deal with the corruption cases as a matter of priority. By appointing specific magistrates to adjudicate corruption matters, the Judicial Service Commission¹¹⁹ is making special efforts to build the capacity of judicial officers in these courts to better handle anti-corruption cases. Section 4 of the ACECA emphasises that, 'notwithstanding anything contained in the Criminal Procedure Code or in any other law for the time being in force, the offences in this Act shall be tried by special magistrates only'. Hence in the case of *Republic v Raphael A Aligana and others*¹²⁰ the Chief Magistrate ruled that only the special magistrates' courts could adjudicate on offences under ACECA.

Recommendations to establish special courts for corruption cases have been marking the agendas of various governments including Nigeria, Morocco, Romania and special anti-corruption courts have been established in countries in South Asia.¹²¹ The establishment of special anti-corruption courts have several advantages. Special anti-corruption courts are useful and necessary to expedite decisions in corruption cases especially in a judicial system plagued with a backlog of cases. When the bulk of the system is deficient, such special courts are the only way to ensure due judicial process and prosecution of the corrupt, which is one of the essential elements in the overall fight against corruption.¹²²

Be that as it may, one of the common risks associated with the special corruption courts is that of their possible misuse for political purposes.¹²³ This is a phenomenon that has been used in Kenya where the government attempts to clamp down on its

¹¹⁸ ACECA section 3.

¹¹⁹ Constitution of Kenya section 61. The Judicial Service Commission is responsible for appointing officers of the court.

¹²⁰ *Republic v Raphael A Aligana, Samuel M Muhoro and Susan W Maina* Criminal Case no 725 of 2004 at the Chief Magistrates Courts Nairobi per Muchelule CM (unreported) as cited in Sihanya (n 85 above).

¹²¹ Namely in the Philippines, Bangladesh, Pakistan and Nepal. U4 Anti-Corruption Resource Centre 'Special courts for corruption cases' Sourced <www.u4.no/helpdesk/helpdesk/queries/query19.cfm> (accessed 25 September 2006). See also Transparency international 'Building political will to fight corruption vital in South Asia national integrity systems.' Sourced <www.transparency.org/news_room/latest_news/press_releases/2004/2004_12_23_nis_southasia> (accessed 25 September 2006)

¹²² U4 Anti-Corruption Resource Centre (n 121 above).

¹²³ U4 Anti-Corruption Resource Centre (n 121 above).

critics by accusing them of corrupt practices and through the threat of prosecutions silences them.¹²⁴

The constitutionality of the anti-corruption court and the concept of special magistrates for anti-corruption courts was challenged in the *Meme v Republic and Another case*.¹²⁵ The court was of the opinion that the anti-corruption court is a division of the magistrates' courts system lawfully established by the Chief Justice by virtue of power conferred to him by Magistrates Courts Act¹²⁶ to fight corruption in Kenya.

2.5 Institutional framework

The Kenya Anti-Corruption Commission (KACC) is the main institutional mechanism in Kenya for addressing corruption matters and has the express mandate under ACECA. Other bodies such as the Attorney-General, Ministry of Justice and Constitutional Affairs, Department of Governance and Ethics, Office of the President are also involved in anti-corruption initiatives only as incidental institutions given their general but related mandates. This section will highlight some of these incidental bodies and provide a brief of the institutional framework of KACC.

Although KACC has the requisite speciality and resources for investigating complex cases of corruption or economic crimes, there is no legal bar to other law agencies such as the police from investigating cases under the ACECA.¹²⁷ The KACC is expected to be a team player in the realm of fighting corruption. The Attorney-General for example is indispensable since he is the repository of all prosecutorial powers as the principle legal advisor to the government of Kenya.¹²⁸ Since KACC lacks powers of prosecution, the Attorney-General (A-G) is therefore instrumental to

¹²⁴ 'KNCHR boss to face graft charges' *East African Standard* 6 September 2006. The Chairperson of the Kenya National Human Rights Commission Maina Kiai has been accused and summoned to appear before the Kenya Anti Corruption Commission to answer charges of abuse of office and corruption. Analysts argue that Mr Maina Kiai is being harassed for his hard line stand and positions against the Government policies and grand corruption. See 'You're incompetent, anti-graft body told' *East Africa Standard* 26 September 2006.

¹²⁵ *Meme V Republic and another* [2004] KLR 637.

¹²⁶ Magistrates Courts Act Cap 10 Laws of Kenya section 13(2).

¹²⁷ JK Tuta 'legal framework for control of corruption' in Sihanya (n 85 above) 150.

¹²⁸ Constitution of Kenya section 26.

this endeavour. Even though the A-G chambers has set up the Anti-Corruption, Economic and Serious Frauds Prosecutions, and Assets Forfeiture section within the office of the Director of Public Prosecutions to handle all cases and conduct all prosecutions arising from ACECA initiated by the KACC,¹²⁹ successive corruption prosecutions have so far been elusive.¹³⁰

The Ministry of Justice and Constitutional Affairs has the mandate to deal with policy and political issues affecting the legal and justice sector, and also to facilitate the proper professional and technical functioning of the state law office.¹³¹ The Ministry has prioritised key areas in its anti-corruption strategy, namely the systematic address of past economic crimes through restitution and human rights abuse, promotion of public awareness and access to information with which the public can hold public officials accountable – to enhance transparency and confidence of international development partners.¹³²

The department of Governance and Ethics in the Office of the President was established in 2003¹³³ and is concerned with the coordination of broad anti-corruption programmes among all the key stakeholders in the fight against corruption.¹³⁴ The department headed by a permanent secretary in the office of the president has however been vacant since the incumbent Mr John Githongo resigned,¹³⁵ citing

¹²⁹ Tuta (n 127 above) 166.

¹³⁰ The Kenya Criminal Procedure Code makes provision for private persons to bring criminal suits but the AG still retains the power over these prosecutions at will and may terminate the cases through a motion of *nolle prosequi* at any stage of the proceedings. A case in point is *Raila Odinga v George Saitoti* on the Goldenberg case which was terminated by the AG for political reasons cited in *Republic v Judicial Commission of Inquiry into the Goldenberg Affair & 2 others Ex parte George Saitoti* [2006] eKLR; HCCC Miscellaneous Civil Application No 102 of 2006; See also K Kibwana et al *Initiatives against corruption in Kenya legal and policy interventions 1995-2001* (2001) 25.

¹³¹ Government of Kenya Ministry of Justice and Constitutional Affairs: strategic Plan, 2004 p 14.

¹³² Tuta (n 127 above) 167.

¹³³ Department of Governance and Ethics in the Office of the President established under Presidential Circular 1:2003

¹³⁴ Office of the President, Ministry of Justice and Constitutional Affairs, Office of the Attorney General, civil society and stakeholders.

¹³⁵ 'Githongo resigned abroad because he feared for his life' *East Africa Standard* 9 February 2005.

frustrations and threats from politicians close to the current ruling regime in what has become known as the Anglo leasing scandal.¹³⁶

2.5.1 The Kenya Anti Corruption Commission (KACC)

The establishment of KACC in May 2003 was another milestone in a long and bumpy road of the anti-corruption war that began in 1997 with the creation of KACA.¹³⁷ Apart from the role of investigation, KACC is also charged with duty of preventing corruption through public education and to examine practice and procedures of public bodies.¹³⁸ It is nevertheless not clear, whether KACC would have to seek consent from the management of any public body before it commences an examination of such a body. It would appear, still, that where corruption is considered rampant in a public body, KACC can act *suo moto* and carry out such examination notwithstanding the absence of prior consent.¹³⁹

KACC may also institute civil recovery proceedings against any person for the recovery of property investigated and the extent of liability for loss of or damage to any public property is established.¹⁴⁰ It was in exercise of this power that KACC sought to freeze assets belonging to one Mr. Kamlesh Pattni and his associates or companies allegedly acquired through corruption in the matter of the *Kenya Anti-Corruption Commission (KACC) v Kamlesh MD Pattni and 16 others*.¹⁴¹ Further KACC has universal jurisdiction against any Kenyan or property acquired as a result of corruption or economic crimes and also recover such property or enforce an order for compensation even if the property is outside Kenya.¹⁴²

¹³⁶ A corruption scandal in Kenya that allegedly involves a tender that was not publicly advertised for the procurement of passport printing system for the immigration department and forensic science laboratories for the Kenya police. The transaction was originally quoted at 6 million Euros from a French firm, but was awarded to a British firm, Anglo Leasing Finance, at 30 million Euros, who would have sub- contracted the same French firm to do the work. Also see <<http://www.guardian.co.uk/kenya/story/0,12689,1254928,00.html> > (accessed 9 October 2006) (n 5 above).

¹³⁷ 'A spotlight on KACC: how the controversial body has evolved' *Daily Nation* 15 January 2004.

¹³⁸ ACECA section 7.

¹³⁹ Tuta (n 127 above)156.

¹⁴⁰ ACECA section 7 (1)(h)(i) .

¹⁴¹ *Kenya Anti-Corruption Commission v Kamlesh MD Pattni and 16 others* HCCC No. 111 of 2003 (OS) at Nairobi (unreported).

¹⁴² ACECA section 7(1)(h)(ii) .

The Kenya Anti-Corruption Advisory Board is established as an unincorporated body consisting of members nominated by twelve organisations representing the interests of various stakeholders such as professionals, trade unions, religious organisations, the commercial sector and women organisations amongst others.¹⁴³ The Advisory Board has the principal function of advising the Commission generally on the exercise of its powers and the performance of its functions under the Act.¹⁴⁴ Apart from nominating persons for appointment or removal as members of KACC, it is not obvious if the Board can compel KACC to implement its advice, considering that the Commission and its directors are guaranteed independence in the performance of their functions and are only accountable to Parliament.¹⁴⁵ Such was the case as illustrated in *Titus Masila Mwangangi v Ahmed Nassir Adbullahi*¹⁴⁶ where the plaintiff sought a court order to bar the defendant in his capacity as the Chairman of the Kenya Anti-Corruption Advisory Board from recommending Justice Aaron Ringera to the National Assembly for the appointment as Director of KACC. The suit was dismissed on a technicality.

However, lack of powers to prosecute by KACC has hampered the fight against graft.¹⁴⁷ Undoubtedly, however KACC is vested with immense powers to fight all aspects of corruption in Kenya and if these statutory powers are well exercised there would be an immense improvement in the fight against corruption in Kenya.

2.6 Conclusion

The pattern in Kenya's anti-corruption drive seems to have a thread that runs through of too little too late. Although the introduction of legal and institutional framework is positive, it is the implementation of the anti-corruption measures that will carry the day. The corruption fight in Kenya seems to be stalling, beginning with the resignation of the respected anti-corruption tsar John Githongo as Permanent

¹⁴³ ACECA section 16(1).

¹⁴⁴ ACECA section 17.

¹⁴⁵ ACECA section 10.

¹⁴⁶ *Titus Masila Mwangangi v Ahmed Nassir Adbullahi* HCCC No 39 of 2004 at Nairobi (unreported).

¹⁴⁷ 'KACC lack teeth to fight graft' *Daily Nation* 7 March 2006.

Secretary, Governance and Ethics, Office of the President in February 2005.¹⁴⁸ Secondly, the POEA (2003) which while ensuring that public servants declare their wealth such declarations are however kept under lock and key and inaccessible to the public. Thirdly, the KACC relies on the Attorney –General’s office for prosecution but unfortunately the office is highly politicised to the extent that it is perceived as toothless.¹⁴⁹

Although most countries have some form of legislation to combat corruption at the domestic level, the lack of uniformity among them reduces the fight against corruption¹⁵⁰ to the political will of individual member states which in most cases is inadequate or compromised. This poses one of the greatest obstacles in the fight against corruption, since addressing the scourge becomes dependent on politicians who; in most instances have vested interests in the corrupt practices to enrich themselves. This has been one of the key bottlenecks in the fight against corruption in Kenya as evidenced by the high profile scandals and corruption allegations involving elected public officials.¹⁵¹

International Conventions against corruption certainly represent a solid framework to deal with corruption in Africa. However beyond ratification, African governments are required to establish and strengthen institutional and legal mechanisms to combat corruption. National authorities are therefore responsible of making and receiving requests for assistance and cooperation in conducting research and exchanging studies in an effort to combat corruption.¹⁵² Olaniyan proposes¹⁵³ that to give content and effect to its principles, the AU Anti-Corruption Convention should be amended in and transformed into a coherent and workable body of human rights law.

¹⁴⁸ 'PSs' exit deals a blow to policy against corruption' *East African Standard* 8 February 2005.

¹⁴⁹ See motions of *nolle prosequi* (n 130 above).

¹⁵⁰ I Carr 'Fighting corruption through the United Nations Conventions Against Corruption 2003 a global solution' (2005) 11 *International Trade Law and Regulation* 24, 25.

¹⁵¹ For example the Anglo leasing and Goldenberg scandals which involved government ministers and senior civil servants who loot public coffers for individual gain. Most of these allegations have been brought before courts of law and tribunals and despite overwhelming evidence or lack of adequate and watertight prosecutions the cases have fallen through which would be illustrative of the Governments complacency in these cases: (n 135 above).

¹⁵² AU Anti-Corruption Convention article 20.

¹⁵³ Olaniyan (n 68 above) 86.

Thus, despite the ratification of the UNCAC and signing of the AU Anti-corruption Convention, and the fact that Kenya seemingly sought their inspiration and enacted legislation and instituted formal measures to address the scourge, corruption still reigns. The next Chapter seeks to examine the impact of corruption on good governance and the rule of law in Kenya and a few comparative examples from other African jurisdictions.

CHAPTER 3

THE IMPACT OF CORRUPTION ON GOVERNANCE AND RULE OF LAW IN KENYA

3.1 Introduction

The history of the state of rule of law and democracy in Kenya is eloquently captured in the Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission in Kenya, which writes:

The political history and governance of the Kenyan state is a catalog of gross human rights violations, the arrogance of power, and the commission of mind boggling economic crimes. Constitutionalism and the rule of law, which are the central features of any political democracy that respects human rights, have been absent in Kenya's history. A democracy is defined by an executive that is accountable and freely elected, a government limited by popular will, and which the people can remove from power through the ballot. The second essential component of democracy is a vibrant and freely and fairly elected legislature in an open contest pitting various political parties against one another. Finally, in a state governed by the doctrine of separation of powers, an independent judiciary, the essential guardian of the rule of law, is the linchpin of the scheme of checks and balances through which the independence of the three arms of the state is assured. Otherwise, there is no other guarantee that the executive - the "government" - will respect the rule of law and act within established legal norms, processes, and institutions. The constitution is thus not merely hortatory but the fundamental and supreme law of the land, the real and living document that guides, defines, and permits all actions by the state. No individual or official of the state is above the law or can act in defiance of constitutional prescriptions. This is what separates democratic states from undemocratic ones. It is the difference between tyranny and freedom.¹⁵⁴

While this observation still holds true today, in most respects in Kenya, this chapter seeks to investigate the impact corruption has contributed to this state of affairs. Although corruption may be problematic to define, as earlier highlighted it is certainly not difficult to recognise when encountered up close and personal.¹⁵⁵ Corruption by its nature engenders wrong choices as it undermines democratic development inhibiting the performance of public institutions and the optimal use of resources.¹⁵⁶

¹⁵⁴ M Mutua 'Republic of Kenya Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission' (2004)10 *Buffalo Human Rights Law Review* 25.

¹⁵⁵ R H Kempe 'Corruption, ethics and development in Africa' in KR Hope 'From crisis to renewal: development policy and management in Africa -corruption, ethics and development in Africa' (2002) 5 *African social studies series* 100,101.

¹⁵⁶ J Pope 'The national integrity system' in TI source book *Confronting corruption: the elements of a national integrity system* 31.

Corruption produces negative consequences of an economic, political and administrative nature.

This chapter discusses the impact of corruption on governance in Kenya particularly since it is often seen as impeding the upholding of the principles of good governance and the rule of law. It therefore seeks to investigate and discuss the various facets of corruption leading to the break down of the rule of law and good governance in Kenya. These facets are administrative, economic and political.

3.2 The administrative facet of corruption

Public service is expected by law to be efficient and impartial and to act with integrity. The politicisation of the African public service has been an impediment to ethics, diluted professionalism and generated mediocrity.¹⁵⁷ The public service in Kenya for example has been undermined by patronage, partiality and political interference in decision making¹⁵⁸ as well as alleged irregular recruitment, appointments and promotion process. Some civil servants take as long as 10 or 15 years to be promoted. Instead, their juniors with political connections are regularly promoted. For instance 'the recruitment of officers in the police force and the Kenya Wildlife Service (KWS) is alleged to have been on basis of tribalism, nepotism and favouritism without regard for the law. The revelations of corruption in the recruitment of KWS staff led to cancellation of the exercise and suspension of the director, and the police recruitment was cancelled and repeated after some months under a lot of scrutiny'.¹⁵⁹

Irregular and Improper appointments of incompetent and unqualified people has undermined service delivery in local authorities in Kenya. For instance the Nairobi City Council, there have been claims that retired, deceased or even non-existent staff are kept on the payroll fraudulently by officials who pocket their salaries.¹⁶⁰The

¹⁵⁷ United Nations Committee Human Development and Civil Society (UNCHDCS) 'Ethics and accountability for enhanced public service delivery in Africa' Sourced <http://www.uneca.org/chdcs/second_meeting_ethics_and_accuntability.htm> (accessed 10 October 2006).

¹⁵⁸ Global Integrity 'Kenya corruption notebook' Sourced <<http://www.globalintegrity.org/2004/country.aspx?cc=ke&act=notebook>> (accessed 3 October 2006).

¹⁵⁹ 'Nullify police recruitment, says anti-graft team' *East African Standard* 14 December 2005.

¹⁶⁰ 'Headcount reveals Nairobi scam' *BBC news* 11 March 2003. Sourced <<http://news.bbc.co.uk/2/hi/Africa/2835769.stm>> (accessed 10 October 2006).

problem of 'ghost workers', imaginary employees created on the payroll by corrupt workers to pad their pay packets, is by no means confined to Kenya. In 2003, the main Zambian civil servants' union called for a crackdown on what it said were more than 20,000 ghost workers, contributing to a budget over-run of 600billion kwacha (£80m, \$132m). Similarly, the Nigerian civil service almost ground to a halt in 2003 in search for ghost workers.¹⁶¹

According to the findings of the UN Committee on Human Development and Civil Society, the declining professional standards globally are primarily intensified by gratuitous disregard for ethical practices of accountability by public managers and civil servants and ethical deficit.¹⁶² Lack of professionalism in the public service leads to frustration on the part of the few honest public servants to the extent they even emigrate. According to the Centre for Global Development there were for instance 11657 Zambian health professional emigrants in the year 2000 due to frustration with the inefficiency and lack of transparency of the state institutions.¹⁶³ Consequently the migration of doctors and nurses from Africa to rich countries¹⁶⁴ has raised fears of an African medical brain drain. The brain drain is catalysed by a pursuit for greener pastures especially when professionals are not compensated commensurate to their worth mainly as a result of corrupt practices that continuously enrich a few to the detriment of the general public.¹⁶⁵ This has serious adverse effects on the local economies with qualified professionals after garnering cost intensive training in local institutions, emigrating to developed countries without sufficient contribution to their countries.¹⁶⁶ Kenya has experienced massive brain drain particularly with regard to engineers, teachers and health professionals citing *inter alia* frustration over rampant corruption in securing government employment.

¹⁶¹ 'Kenya seeks 'ghosts' to ease budget woes' *BBC news* 18 July 2003. Sourced <<http://news.bbc.co.uk/>> (accessed 10 October 2006).

¹⁶² UNCDACS (n180 above).

¹⁶³ Centre for Global Development 'a new Database of health professional emigration from Africa Working Paper 95 Sourced <<http://www.cgdev.org/content/publications/detail/9267>> (accessed 3 October 2006).

¹⁶⁴ Nine most important destination countries include United States of America, United Kingdom, Canada Australia, Belgium, France, Portugal, Spain and South Africa.

¹⁶⁵ 'Nurse exodus leaves Kenya in crisis' *Mail & Guardian* 21 May 2006.

¹⁶⁶ 'African brain drain' *Mail & Guardian* 5 September 2006.

Although legally, civil servants should report impropriety and corruption within the service, in practice it is rarely done as the protection of the whistle blower is not guaranteed. Such is the unfortunate case of one David Munyekei who exposed the infamous Goldenberg scandal¹⁶⁷ and faced harsh, swift and far reaching consequences that culminated in his early death. Exposure of corruption in such a scenario has been marred by allegations of breach of Official Secrets Act which prevents public servants and those who come across information in the course of their public duty from revealing it. Yet whistle blowers play an essential role in democracy by exposing illegality and wrongdoing on the part of government officials. The situation is not different even in the developed countries as illustrated in the instance of John Fitzgerald,¹⁶⁸ an environmental analyst with the United States Agency for International Development (USAID) who had his employment contract terminated when he drew attention to the Chad-Cameroon oil pipeline - one of the largest such projects in the region - which lacked detailed plans for dealing with oil spills and invasive species from tanker ballast.

The judiciary which is supposed to act as the beacon of the rule of law has been marred by allegations of lack of transparency, inefficiency¹⁶⁹ and exacerbated by assertions of corruption among members of the judicial fraternity. Where a trial fails to commence within reasonable time, and a case is not concluded expeditiously, it is a course of subversion of justice, particularly, when decisions are made on the basis of corruption. The sum effect of the ramifications of delayed prosecutions is the erosion of faith in the law and the undermining of the rule of law. Indeed justice delayed is justice denied and this state of affairs also provides little or no incentive to the citizen to obey and respect the law as it is viewed as oppressive.¹⁷⁰ The interference of the court process by the political elites, parliamentary and executive branches further undermines the due process of the law. In Kenya, courts are overworked and the backlog of cases is precarious.¹⁷¹ A section of members of the

¹⁶⁷ 'Goldenberg whistleblower wants job back' *Daily Nation* 17 February 2006.

¹⁶⁸ 'Hard job of blowing the whistle gets harder' *The Christian Science Monitor* 20 January 20, 2005.

¹⁶⁹ For instance the case of *William Wambiru v Republic* Criminal Appeal Case No. 133 1987 has been pending in court for 16 years.

¹⁷⁰ International Commission of Jurists (ICJ) 'Kenya Judicial Independence corruption and reform' (2005) Sourced <http://www.icj.org/news.php3?id_article=3663&lang=en> (accessed 3 October 2006).

¹⁷¹ As above.

Kenyan judiciary has been faulted in the past with accusations of patronage that resulted in a major purge on the basis of grand graft and incompetence.¹⁷² The International Commission of Jurist (ICJ) acknowledged that ‘judicial accountability and judicial independence are essential twin pillars of a functioning justice system.’¹⁷³ Although the ‘radical surgery’ was seemingly necessary,¹⁷⁴ it however did not resolve judicial corruption. It instead reinforced the legacy of a judiciary subservient to the executive, which weakens the judiciary as the bastion of constitutionalism and the rule of law.

The rule of law is further compromised where there is lack of enforcement of court decisions by the law enforcement agencies. The Attorney-General in Kenya has been accused of misusing his powers by acting unilaterally using *nolle prosequi* on cases of public interest and outright criminal activities. Such was the case where Tom Chomondley sensationally cleared of criminal liability of murdering a game warden on his ranch¹⁷⁵ and instead a public inquest into the warden’s death was set up.¹⁷⁶ The facts that the KACC does not prosecute cases, it only investigates and the A-G prosecutes on its behalf, has left the KACC’s position undermined by allegations of impropriety of shielding prominent people in the government.¹⁷⁷ This has led to a public affront between the A-G’s office and KACC over the prosecution of top government officials allegedly involved in corrupt practices.¹⁷⁸ The tussle leaves doubt on the Kenyan citizenry on the commitment and role of the KACC in fighting corruption and could be said to be a government tactic to derail the war on corruption.¹⁷⁹

¹⁷² n 6 above.

¹⁷³ ICJ (n 170) above.

¹⁷⁴ n 6 above.

¹⁷⁵ ‘A-G defends release of Delamere grandson’ *East African Standard* 25 May 2005.

¹⁷⁶ ‘Outrage as Delamere kin shoots another man dead’ *East African Standard* 12 May 2006.

¹⁷⁷ ‘KACC is yet to net big fish in graft war’ *East African Standard* 21 May 2006. ‘Commission’s inability to produce evidence paints it in bad light’ *East African Standard* 21 May 2006.

¹⁷⁸ ‘KACC evidence is sufficient to prosecute graft cases’ *East African Standard* 20 October 2006. ‘Circus goes on as ghosts laugh all the way to bank’ *East African Standard* 20 October 2006.

¹⁷⁹ ‘Wako, Ringera clash a delaying tactic, leaders claims’ *East African Standard* 22 October 2006.

According to the 2005 Kenya Bribery Index¹⁸⁰ the police are the most corrupt agency in the Kenyan government. Corruption in the Police Force has denied many Kenyans the right to security and the upshot of this is that many Kenyans have not been able to realise their rights. In 2003, the Kenya Standing Committee on Human Rights reported that there was a tendency by errant police officers to abuse the court process by laying false or overstated charges to cover up police malpractice and that this was systematic and widespread. Examples of malpractice included arbitrary arrest, bribery and extortion, to legitimise misconduct and absolve officers and the police department of blame.¹⁸¹ The genesis of plunder of state coffers is often blamed on very low wages paid to public servants forcing them to seek funds from all sources.¹⁸² However the failures of the African governments to address salary inequalities in the public sector earnings exacerbate the situation thereby leaving the public servant vulnerable to corrupt practices.

3.3 The economic facet of corruption

Corruption is said to cost Kenya as much as \$1bn annually.¹⁸³ Theft, embezzlement of public resources and fraud by public officials reduces the availability of government funds for development-related activities.¹⁸⁴ The resultant limited finances impact negatively on the provision of essential services. Such was the case where the Kenya National AIDS Control Council (NACC) which was set up to coordinate the prevention and control of HIV/AIDS was discredited when it was discovered that senior staff had paid themselves inflated salaries and allowances, and there were irregularities in its procurement procedures.¹⁸⁵ This resulted in the withdrawal of much needed US \$15 million AIDS grant by the Global Fund to Fight HIV/AIDS, Tuberculosis and Malaria.

¹⁸⁰ TI Kenya 2005 Bribery index sourced <<http://www.tikenya.org/documents/Kenya%20Bribery%20Index%202006.pdf>> (accessed 10 October 2006).

¹⁸¹ D Woods 'Commonwealth police watch policing in East Africa' Sourced <<http://www.commonwealthpolicewatch.org/feature.htm>> (accessed 10 October 2006).

¹⁸² UNCHDCS (n 157 above).

¹⁸³ 'Corruption haunts Kenya's leader' *BBC News* 23 February 2005. Sourced <<http://news.bbc.co.uk/1/low/world/africa/4288595.stm>> (accessed 9 October 2006).

¹⁸⁴ United Nations Development Programme Anti-Corruption practice note (2004). Sourced <<http://www.undp.org/governance/practice-notes.htm>> (accessed 10 October 2006).

¹⁸⁵ 'Corruption in Kenya's National AIDS Control Council' TI global corruption report (2006)112.

In the trade sector, corruption results in capital flight and price increases at both the wholesale and retail levels. The import-export sector has particularly come under criticism on the grounds that it provides many opportunities for corrupt practices to be perpetrated. Demand for bribes is notable in the clearance of goods through customs to obtain import licences, or for exclusion of taxes and fees. The Customs and Excise Department of the Kenya Revenue Authority for instance, is associated with corruption especially where unregulated sugar imports¹⁸⁶ were allowed into the country enjoying unfair advantage over the local sugar industry leaving the competitors drained.¹⁸⁷ Corruption therefore not only robs the state the much needed revenue when tax is evaded through corrupt officials but also hampers local industries and economy.

Poor infrastructure and high corruption are major investment and privatisation bottlenecks in East Africa.¹⁸⁸ The government of Kenya admitted that it had failed to tame corruption at weighbridge stations¹⁸⁹ because the equipment are outdated thus hampering freight lorry road transport. Privatisation process with no clear guidelines can create incentives for corruption. For instance, privatisation negotiations in an effort to decentralise the management of the Kenya Ports Authority (KPA), have stalled for the last ten years¹⁹⁰ because they are fraught with corruption and political interference by interested parties opposed to its privatisation.¹⁹¹ The delays in cargo handling at the port have caused the government billions of shillings. Privatisation and investment laws in Kenya¹⁹² are not concrete and the process is exposed to opportunistic corrupt practices. Where investments and privatisation are transparent they engender competition and reduce opportunities for corruption. In Lesotho, subsidiaries of multinationals are being prosecuted for paying bribes¹⁹³ to obtain

¹⁸⁶ Sugar imports do not attract duty at the Mombasa port under the Common Markets for East and Southern Africa (COMESA).

¹⁸⁷ 'Row over sugar imports in Kenya' *East African Standard* 24 April 2005.

¹⁸⁸ 'Inadequate Infrastructure Hinders Investments in EA' *New Vision* 26 October 2006.

¹⁸⁹ 'Kenya: State Admits It's Failed to Curb Graft At Lorry Checks' *Daily Nation* 20 October 2006.

¹⁹⁰ 'Government in new move to privatise Mombasa Port' *East African Standard* 31 August 2006.

¹⁹¹ 'Port Privatisation to Stall Amid Opposition' *East African Standard* 9 October 2006.

¹⁹² 'Cry foreign investors' *East African Standard* 7 February 2005.

¹⁹³ The companies are from the United Kingdom, France, Italy, Germany, Canada, Sweden and Switzerland. See 'Lesotho fines second dam firm' 27 August, 2003 Sourced <<http://news.bbc.co.uk/2/hi/business/3185145.stm>> (accessed 10 October 2006).

contracts in the Lesotho Highlands project a huge water supply scheme. Economically, corruption substitutes competitive bribery for open competition, retards private sector development and discourages investment.

In a bid to intensify privatisation, there have been allegations of irregular allocations of public land to well-connected individuals and land-buying companies in Kenya's 'land grabbing mania'. Land grabbing which has affected public institutions such as schools, parastatals, prison department, hospitals, forests was previously used for political patronage and for election purposes.¹⁹⁴ The Kenya National Commission on Human Rights in a report detailing the human rights dimension of land grabbing in Kenya, noted that excisions of road reserves and the irregular privatization of public utility land have become part of political patronage.¹⁹⁵ It noted that most allocations were made to politically correct individuals illegally resulting in unjust enrichment of some few individuals to the detriment of the public. Assets are often undervalued and enterprises sold off below their market value¹⁹⁶ through under hand financial cuts with unscrupulous investors. The commercialisation of public utilities and social services has therefore not consolidated their provision but has rather scattered their access thus aggravating the economic circumstances of the majority of Kenyans.¹⁹⁷ Consequently, efficiency and market power imperative invoked in support of privatisation, has not resulted to the anticipated corresponding social ethics and the process has been ambiguous.

Most African governments lack the technical capacity in asset freezing and asset recovery and rely on mutual legal assistance from other countries.¹⁹⁸ Although it is desirable to pursue corrupt officials who export siphoned public resources, there are

¹⁹⁴ 'How Billions Are Lost in Grabbing of Forest Land' *Daily Nation* 25 September 2006.

¹⁹⁵ 'State House Not Safe From Land Grabbers, Says Report' *Daily Nation* 26 September 2006. See Kenya National Commission on Human Rights report 'Unjust enrichment: the making of land grabbing millionaires' Sourced <<http://www.knchr.org/documents/unjustenrichment.pdf>> (accessed 10 October 2006).

¹⁹⁶ TI national integrity system country studies Kenya report 2003 sourced <http://www.transparency.org/policy_research/nis/regional/africa_middle_east> (accessed 9 September 2006).

¹⁹⁷ 'Nairobi water firm failing on service' *Daily Nation* 19 October 2006.

¹⁹⁸ B Ige 'Abacha and the bankers: Cracking the conspiracy' *UNDOC Forum on Crime* 2(1) (2002) Sourced<<http://www.unodc.org/pdf/crime/publications/forum2vol2.pdf>> (accessed 3 October 2006).

numerous challenges involved in recovery of such assets in Africa.¹⁹⁹ Primarily, such efforts suffer from lack of political will, lack of relevant legal framework coupled with lack of political will. Although asset freezing and recovery is likely to increase transparency, accountability and deter public servants, the lack of disclosure of the contents of the declarations to the public defeats the purpose of the exercise.²⁰⁰

Public procurement or contracting is meant to buy and produce goods and services that should benefit citizens directly or indirectly. However the advent of corruption in public contracting leads to distortion of fair competition, waste of scarce resources and neglect of basic needs and services, perpetuating poverty. The value of the procurement contracts coupled with obscure procurement procedures for award of contracts, is conducive for corruption to thrive. Indeed, procurement is the main contributor to corruption in the whole world. Thus, practices such as the award of contracts or tenders on the basis of political, economic or social connections and bribery have been reported throughout the world.²⁰¹ On average, it is estimated that approximately 70% of central government expenditure in Kenya turns in one way or another into public procurement contracts.²⁰²

By the 1990s it became evident in most African countries that the high economic growth rates that technocrats had envisioned had failed as a result of the process being marred by what development strategist articulated as poor governance with burgeoning corruption.²⁰³ For instance the institutional set-up of privatisation in Kenya has been weak causing great losses to the state in the sale of public assets and enterprises. The bad privatisation policies propagated by public officers in the absence of a legal framework for privatisation means that it is difficult to exercise vigilance over the process and the public, legislature and judiciary can not

¹⁹⁹ Webb (n 44 above) 207.

²⁰⁰ UN Anti-Corruption Toolkit 2004 'Recovery and return of proceeds of corruption' 251. Sourced <http://www.unodc.org/pdf/crime/corruption/toolkit/corruption_un_anti_corruption_toolkit_sep04.pdf> (accessed 3 October 2006).

²⁰¹ TI Sourced <www.transparency.org/global_priorities/public_contracting> (accessed 3 October 2006).

²⁰² UNPAN statistics Sourced <www.unpan.org> (accessed 3 October 2006).

²⁰³ TI national integrity system country studies Kenya report 2003 (n 196 above).

adequately provide the oversight and checks required.²⁰⁴ This has largely erodes the rule of law.

3.4 The political facet of corruption

Corruption dominates political contest through the use of money and favours in politics which undermines democratic processes and the rule of law. Political corruption cause public disillusionment with democracy and its capacity to limit corruption.²⁰⁵ Corruption undermines the rule of law when it is interwoven in the political development. Its effects are reflected in the political instability of the government as its legitimacy is challenged hence compromising the process of national development. It follows therefore that in such a scenario there can be no effective long-term planning and hence the construction of democracy is threatened.²⁰⁶

Integral to the parliamentary process in Kenya is the system of parliamentary committees which have extensive legislative powers to advance the protection of the rule of law including the ability to monitor and inquire into programmes budgets, organisational structure and policies. The Parliamentary Select Committee on Anti-Corruption, and the Ethics and Integrity Committee have been established as legislative oversight mechanisms comprising members of parliament, as an additional national mechanism to promote the rule of law and curb corruption. However parliament has also been implicated in corruption. Allegations of Members of Parliament receiving bribes to debate or vote in a particular manner have been reported.²⁰⁷ This has impaired their ability to oversee the activities of the executive. According to a random public survey, an overwhelming 69 per cent of the people sampled, believe the Government has lost the war on corruption.²⁰⁸ They cite the fact that corrupt officials are still in Government and that appropriate action is not being taken to fight venality as reason for their position. This is exacerbated by the little or

²⁰⁴ n 158 above.

²⁰⁵ R Hodes Introduction – TI Global Corruption Report (2004).

²⁰⁶ Kempe (n 155 above) 115.

²⁰⁷ ‘NGOs want Cabinet dissolved to reduce corruption’ *East Africa Standard* 17 February 2005.

²⁰⁸ ‘Sack these ministers, Kenyans tell Kibaki’ *East Africa Standard* 18 February 2005.

no little or no fiscal policy such that the parliamentarians have been successful on several occasions using their power to improve their remuneration ²⁰⁹ despite meagre state resources.

Corruption in the electoral processes and the subsequent outcome of political practice results to loss of legitimacy.²¹⁰ Where public officials interfere with the integrity of the electoral process through bribery of electors to induce them to vote or to refrain from voting, it compromises on the guarantee that the vote reflects the free expression of the will of the people. Although the right to vote and to be elected at genuine elections as an aspect of public participation in public affairs is guaranteed under article 25 of the International Covenant on Civil and Political Rights (CCPR), such is compromised where corruption prevails.

The absence of a law on the regulation of political party funding is a glaring lacuna that promotes the illicit avenues by which private sector, foreign governments or even criminals exert indirect influence on public officials. Corruption in political party finance takes many forms from the use of donations for personal enrichment, to the abuse of state resources. Political parties in Kenya are not entitled to any state fund and therefore have their own discretion in raising funds. There is no requirement for the political party accounts to be published for the benefit of the public or party accounts to be audited by any independent institution.²¹¹ This has compromised elections and political party participation in most countries in Africa. This is evidenced in Kenya for example during the recent concluded by-elections occasioned by the demise of five sitting members of parliament in a plane crash.²¹² The Electoral Commission and the National Human Rights watchdog issued reports citing cases of voter importation, bribery and irregular use of state resources to influence the elections in favour of the Government backed candidates.²¹³

²⁰⁹ TI national integrity system country studies Kenya report 2003 (n 196 above).

²¹⁰ Kempe (n 155 above) 115.

²¹¹ TI national integrity system country studies Kenya report 2003 (n 196 above).

²¹² '14 killed in plane crash' *East African Standard* 10 April 2006.

²¹³ 'Minister dismisses report on abuse of state resources' *East African Standard* 17 October 2006

There have also been scandals and allegations of political party leaders in Kenya receiving bribes from corrupt individuals in return for favours and protection from investigation and scrutiny from parliamentary watchdog committees.²¹⁴ The ongoing investigations on political party funding in South Africa have revealed, among other things, that the main political parties received massive funding from Bret Kebble, a disgraced mining magnate for political favours and protection.²¹⁵ It has been suggested that political party candidates and politicians should disclose assets, income and expenditure to an independent agency. This would insulate the political process from abuse and enhance transparency in an endeavour to uphold the rule of law.

Although there is no express provision for the right to information in the Kenya Constitution, the media relies on the freedom of expression²¹⁶ as the basis of their freedom. This freedom is however not absolute but is rather qualified and subject to rights and freedom of others public interest, security and justice. In the fight against corruption, the media exposes corrupt transactions in government.²¹⁷ Consequently, although most media houses and journalists in Kenya are free to report as they wish they are mindful of charges of defamation and libel, which hinder objective reporting. It is the business of the media to serve public interest and to perpetually hammer corruption 'to comfort the afflicted and afflict the comfortable.'²¹⁸ Where public officials are unable to differentiate what is and what is not confidential information, they regard almost every information as confidential to be on the safe side. Conversely, the media is stifled of sources and only use privileged contacts thus throttle democracy.

²¹⁴ For instance a Kenyan political party then led by the late Oginga Odinga and Paul Muite was alleged to have received huge bribes from corruption prone Kamlesh Pattni. See 'Pattni how deep has his 'largesse' gone?' *Daily Nation* 17 January 1999.

²¹⁵ 'ANC looms large in Brett Kebble's Western Areas deal' Sourced <http://www.iss.co.za/dynamic/administration/file_manager/file_links/ISSUE1704.HTM?link_id=3&mlink_id=2110&link_type=12&mlink_type=13&tmpl_id=3> (accessed 16 October 2006).

²¹⁶ Constitution of Kenya section 79.

²¹⁷ Global corruption report 2003 sourced <<http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN008453.pdf>> (accessed 10 October 2006).

²¹⁸ 'Fighting graft is the business of the media' *East African Standard* 5 October 2006.

3.5 Conclusion

Corruption, like an opportunistic disease thrives on weak immune system as a result of poor governance where public accountability and integrity are seriously compromised. Buying a public official a gift or lunch in return for free government service is regarded quite normal in Africa. This is the reason why concepts of transparency, accountability and integrity are mystified and misunderstood in many African countries.²¹⁹

Kenya is perceived as one of the most corrupt countries in the world.²²⁰ Corruption accounts for the largest amounts of illegally earned wealth in the country, ahead of the illegal trade in narcotics and other forms of organised crime. For instance, it is alleged that the sum of Kenya shillings (Ksh) 600 billion held in foreign accounts by ten of Kenya's political elite is mostly the proceeds of corruption.²²¹

Lack of political goodwill, excessive bureaucracy and over-regulation, lack of protection for whistle blowers, weak enforcement and patronage networks are some of the factors that make corruption networks thrive.²²² While progress in addressing issues in the wider governance agenda has been good, the Government cannot afford to appear to be complacent in fighting corruption.²²³ It is of particular importance that there is clear and transparent follow up in areas where corruption has been clearly identified. It must be stressed that in order to re-establish Kenya's governance credentials, the Government must be seen to follow up these issues with complete impartiality, and without reference to political allegiance. Clearly the issue of corruption is very much inter-related with other issues. Its effects clearly inhibit social and economic development. Pointing to the magnitude of the problem,

²¹⁹ Anassi (n 1 above) 293.

²²⁰ The International Corruption Perception Index (CPI) is published annually by Transparency International, the leading global Anti-Corruption organisation. In 2005 Kenya was ranked 5 worst corruption country out of 158, in 2004 it was perceived to be 6 worst out of 145 countries previously in 2003 it had been ranked 6 worse corrupt county. Seemingly Kenya holds on to its position with little improvement.

²²¹ '15b recovered in war on graft says Kiraitu' *Daily Nation* 3 March 2003.

²²² 'NGOs want Cabinet dissolved to reduce corruption' *East Africa Standard* 17 February 2005.

²²³ World Bank 'Public Expenditure Management, Governance and Fiscal Transparency: Joint Statement by Development Partners at the Kenya Consultative Group Meeting' (2003) Kenya. Sourced <siteresources.worldbank.org/KENYAEXTN/Resources/p_2004-06-24> (accessed 10 October 2006).

however, does not determine solutions.²²⁴ Fighting corruption therefore invokes tackling those who offer bribes as well as those who take them. It entails taking all necessary legal and administrative measures to combat corrupt practices.

²²⁴ S Rose-Ackerman 'the challenges of poor governance and corruption' sourced <http://osp.stanford.edu/files/challenge_poor_gov.pdf> (accessed 7 October 2006).

CHAPTER 4

TOWARDS ENHANCING THE RULE OF LAW IN KENYA: THE NEED FOR STRONG ANTI-CORRUPTION INITIATIVES

4.1 Introduction

The principle of the rule of law is premised on the understanding that governmental authority and powers are legitimately exercised only in accordance with written, publicly disclosed laws adopted and enforced in accordance with established procedure.²²⁵ According to Dicey there are three principles which together establish the rule of law: ‘the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts, and the law of the constitution is a consequence of the rights of individuals as defined and enforced by the courts.’²²⁶ The written laws and principally the constitution seek to restrain state power in order to protect citizens from arbitrariness. Such restraint is guaranteed by the principle of separation of powers which ensures there are checks and balances among the three arms of government namely the executive the legislature and the judiciary.

The executive is expected to perform its functions according to the constitution and as such where there is inconsistency in its actions, the judiciary and the legislature are called upon to adjudicate and intervene. The judiciary through the courts should be independent and enforce the rule of law and rule under the law. However such independence is not absolute and officers of the courts are dictated by a code of ethics, integrity and accountability to the legislature.²²⁷

The legislature on the other hand, as a constituency of the peoples’ representatives is answerable to the citizens through the ballot box. The judiciary should also ensure the legislature is accountable to the citizenry. Therefore the strings of accountability are interlinked forming pillars that strengthen each branch of government. Such

²²⁵ Kututwa (n 1 above) 293.

²²⁶ AV Dicey *Law of the Constitution* (1959) 187.

²²⁷ Pope (n 156 above) 31.

pillars of accountability include but are not limited to a judicial system, a free and independent media, a vibrant civil society, a visible public service, and effective anti-corruption agencies.²²⁸

It is generally expected that modern governments should have a system of administration that promotes public interest and fosters accountability.²²⁹ The AU Anti-Corruption Convention prescribes that state parties shall abide by principles of accountability and transparency.²³⁰ Accountability entails efficiency and openness in state transactions that places the interests of the citizens before individual whims and goals. This calls for a reinforcement of the institutional framework and capacity with overlapping institutions of accountability. According to Diamond, the approach entails three facets namely, horizontal accountability by which some agencies of government scrutinize and check others; vertical accountability by the electorate and civil society; and external accountability in the form of vigorous international scrutiny and support.²³¹

This chapter appraises the effectiveness of the rule of law and good governance in curbing corruption generally. Using Kenya it then evaluates mechanisms that would uphold the rule of law and in effect curbing corruption. The mechanisms under review here are limited to four areas where there is public involvement namely, public service, anti-corruption agencies, the judicial system, the media and civil society organisations (CSOs). The chapter will focus on their complementary role to existing anticorruption strategies in an effort to provide a framework for those seeking to design policy on the rule of law as an anti-corruption strategy.

4.2 The national integrity system

The growing understanding of the cost of corruption has allowed African governments greater opportunities to engage in efforts to fight corruption. Although

²²⁸ Transparency International developed the concept as a framework commonly referred to as the national integrity system.

²²⁹ Pope (n 156 above) 33.

²³⁰ AU Anti-Corruption Convention article 3.

²³¹ L Diamond 'Institutions of Accountability (1999) 3 *Hoover Digest* 1999. Sourced <<http://www.hooverdigest.org/993/diamond.html>. > (accessed 7 October 2006).

there is widespread corruption globally, the measures of fighting and addressing it vary from country to country. In some countries, these measures are dependent on existing political, economic, legal, and cultural factors. However, one of the emerging and effective indicators of anti corruption efforts has been identified as the national integrity system.²³² The national integrity system concept was developed and promoted by Transparency International as a framework within which to analyse corruption in a given national context.²³³

The National Integrity System 'is the sum total of the institutions and practices within a given country that address aspects of maintaining the honesty and integrity of government and private sector institutions. Any attempt to address corruption effectively and sustainably involves a holistic approach, examining each of these institutions and practices and the various inter-relationships to determine where remedial action is required. Ad hoc reforms are unlikely to succeed'.²³⁴ The national integrity system involves a government's political and administrative arrangements that encourage integrity and where functionally applied can be used to minimise levels of corruption and mismanagement. The next sections discuss some of these institutions notably the public service, the anti corruption agencies, the judicial service, the media and civil society and their role within the principle of the rule of law to curb corruption.

4.2.1 The public service

The rule of law is amplified within the public service where government and its officials act within the ambit of their lawful authority. Public officials are expected to exercise their administrative functions justly and fairly with integrity and honesty and to deal with the affairs of the public efficiently, promptly and without bias or maladministration.²³⁵ The South African Constitution for example, requires that 'public service be provided impartially, fairly, equitably and without bias. The public service should also be accountable and transparent in the provision of efficient, economic

²³² Pope (n 156 above) xvii.

²³³ TI sourced <http://www.transparency.org/policy_research/nis> (accessed 7 October 2006).

²³⁴ TI sourced <http://www.transparency.org/publications/sourcebook/content_overview>(accessed 7 October 2006).

²³⁵ UNCAC articles 7, 8.

and effective resources'.²³⁶ In Malawi the Constitution provides that access to a good public administration is a constitutional right.²³⁷ The Malawi Constitution provides that every person shall have the right to lawful and procedural fair administrative action, which is justifiable in relation to reasons given where a person's rights, freedom, legitimate expectations or interests are affected or threatened. Giving reasons for an administrative action is desirable and should be encouraged since it promotes transparency and is an indication that such a decision is warranted. The process of judicial review of administrative actions ensures that anti-corruption efforts can have an impact on public officials of the highest levels and this elevates the rule of law within a system of governance by assuring citizens that administrative actions are enforced in a transparent and accountable manner.

The application of judicial review on the legality of administrative decisions checks that the parameters of the power and discretion conferred on public officials fosters accountability and minimises the possibility of abuse of public office. In open and democratic societies governments are accountable to the governed and where conduct of the government appears to be imperceptive, it is the right of the people to question. In the case of *Media Publishing v Attorney General of Botswana*²³⁸ the proprietor of two weekly publications the *Botswana Guardian* and *Midweek Sun*, challenged the directive (that all government ministries and departments cease to advertise with the media publishing limited) on the basis that it was unconstitutional. They argued *inter alia* that the directive violated the applicant's right to freedom of expression guaranteed in the Constitution of Botswana.²³⁹ In its judgment, the Court emphasised the importance of freedom of expression and press freedom in an open and democratic society. Consequently, the Court found that the public sector ban was unconstitutional and concluded that the government could not lawfully withdraw advertising from a newspaper as a punitive measure as this would tend to inhibit the full exercise of freedom of expression and press freedom. The Court also set the parameters for administrative discretion of the President in the case of *Botswana*

²³⁶ Constitution of South Africa section 195.

²³⁷ Constitution of Malawi section 41.

²³⁸ *Media Publishing (Pty) Ltd versus Attorney-General Botswana* high court miscellaneous application 229/2001 (unreported) as cited in BT Balule 'Manipulating media content: public sector advertising in the press in Botswana, a comment on *media publishing versus Attorney General of Botswana*' 20 (2004) *South African Journal of Human Rights* 653.

²³⁹ Constitution of Botswana section 12(1).

versus Bruwer.²⁴⁰ The Court held that where power is conferred on a public authority to act in the public interest, the use of that power for a purpose other than in the furtherance of public interest would render that act a nullity.²⁴¹ The exercise of administrative discretion is therefore subject to the supervision of the courts and would greatly ensure that corruption and related activities are checked by the courts.

To assure the maintenance of a sound public service, many countries provide for an independent public service commission (PSC) that is obliged to accustom and promote principles of good public administration in an endeavour to protect and promote the integrity of public servants. Article 7 of the AU Anti-Corruption Convention emphasises on the transparency, equity and efficiency in the management of tendering and hiring procedures in the public service. The PSC persistently calls for professionalism within the public service. However the blatant politicisation of the public service in most Africa countries has been an impediment to ethics and professionalism that has generated mediocrity and poor public service performance.²⁴² The politicisation impacts on the recruitment and retention of quality staff. In Kenya, the Public Officers Ethics Act (POEA) addresses professionalism within the public service as key to the general code of conduct and ethics.²⁴³ Public servants are required to observe political neutrality in the performance of their duties.²⁴⁴ Deeply politicised public administrations pay a heavy price of change of administration particularly where one party has remained in power for long.²⁴⁵ Political nominees are normally personally committed to the policies of their appointing administration, whereas existing public servants may not be. Hence appointments and promotions within the public service should generally be on merit and public officials should be politically non partisan.

A code of ethics should be tailored to reflect the aspirations of the public service and it should protect public servants who comply with it. Public officials need to know the basic principles and ethical standards expected to apply in their work. Codes of

²⁴⁰ *Botswana versus Bruwer* (1998) Butterworth Law Report 86, 90.

²⁴¹ Balule (n236 above) 653.

²⁴² UNCHDCS (n157 above).

²⁴³ POEA section 9.

²⁴⁴ POEA section 16.

²⁴⁵ UNCHDCS (n157 above).

ethics ought to leave a legal framework that is the basis for communication, the minimum obligatory standards, fundamental values of public service and should provide guidance principles for disciplinary action and prosecution.²⁴⁶ In order to preserve integrity within the public service, periodic disclosure and monitoring of assets, income and liabilities of public officials is engendered. The challenge that most public service commissions face is deciding the extent of public access to the declarations. In Kenya such disclosures are confidential and inaccessible to the public, although the POEA stresses on declaration of income, assets and gives details when such declarations must be made. In South Africa, the Public Service Regulation Act 2001 stipulates that high level public officials should disclose to the PSC on an annual basis their source of income, gifts and benefits and potential conflicts. However, in an effort to guard against infringing on privacy rights and concerns, certain disclosures are made openly and publicly but the actual value is only disclosed privately.²⁴⁷ Botswana provides a good practice in point in the area of public goods procurement which is all handled by the Central Tender Board (CTB) which operates under the Ministry of Finance and Development. All government procurement is subjected to tender except defence procurement because of security reasons. To ensure the rule of law is upheld CTB decisions can be reviewed in a court by an aggrieved party.²⁴⁸

It is worthy to note that most office bearers will not abstain from corruption unless it no longer appears in their interest to behave corruptly.²⁴⁹ Thus, if public officials are exposed frequently and punished severely, there is credible prospect that if they engage in corrupt activities and will lose their office, forfeit their ill gotten gains and go to prison this would in turn serve as deterrence.²⁵⁰ To voice corruption practices and raise levels of performance, there is need for an open and effective channel to protect *bona fide* but vulnerable complainants. A concrete legal framework that

²⁴⁶ As above.

²⁴⁷ TI national integrity system country studies South Africa report 2005 sourced < http://www.transparency.org/policy_research/nis/regional/africa_middle_east> (accessed 7 September 2006).

²⁴⁸ *A. V. Communications (Pty) Ltd v The Attorney-General* Botswana miscellaneous application No 18/9 (unreported) as cited in TI national integrity system country studies Botswana report 2001 sourced < http://www.transparency.org/policy_research/nis/regional/africa_middle_east> (accessed 7 September 2006).

²⁴⁹ Diamond (n 231 above).

²⁵⁰ ACECA section 64.

nurtures a culture of disclosure of corruption in the public interest is needed to perpetuate disclosure of corrupt practices within the public service. Whistle blower protection legislation strengthens the legal framework against corruption. Although there has been a proposed Witness Protection Bill 2003 in Kenya, to protect whistle blowers, the bill is yet to see the light of day. Since whistle blowers could be victimised with the potential threat of reprisal in the event of reporting, it is crucial to have in place a concise legal framework to protect whistleblowers. Citizens need to be informed that such actions will result to speedy investigations and where appropriate, prosecution and conviction.

The need to protect whistleblowers is exemplified in the South Africa Protected Disclosure Act 2000 which makes provision for whistle blowers who disclose acts of corruption or other abuses of office in public and private sector. With such legislation, the spirit of the rule of law will permeate the levels of public and private sector to promote transparency and accountability in the protection of whistleblowers. It should be understood that whistle blowing is not about informing in a negative anonymous sense. Rather it is about a concern about malpractice within an organisation.²⁵¹ Without legal protection, individuals are often too intimidated to speak out on corrupt activities which they observe at the workplace. Whistle blowing is important as an effective tool in the fight against corruption. Legislation protecting whistleblowers is a crucial corporate governance tool to promote safe accountability and responsive work environment in both public and private sector.

4.2.2 Anti-corruption agencies/commissions (ACCs)

Institutions dedicated to anti-corruption are likely to be established where corruption is perceived to be widespread, or where existing institutions cannot be adapted to develop and implement the necessary reforms, or where the existing institutions are themselves considered corrupt.²⁵² Not all countries have opted for specialised ACCs. South Africa is one example that has opted for incremental improvements to existing

²⁵¹ L Camerer 'Protecting whistle blowers in South Africa: The Protected Disclosures Act, no 26 of 2000' Occasional Paper No 47 (2001) Anti-Corruption Strategies Institute for Security Studies. Sourced <<http://www.iss.co.za/Pubs/Papers/47/Paper47.html#Anchor-41018>> (accessed 7 October 2006).

²⁵² UNDP' Institutional Arrangements to Combat Corruption: A Comparative Study' (2005). Sourced <regionalcentrebangkok.undp.or.th/practices/governance/documents/Corruption_Comparative_Study-200512.pdf> (accessed 7 October 2006).

structures for combating corruption. It has established an Anti-Corruption Coordination Committee to coordinate the work of the different agencies. The anti-corruption mandate has thus been divided between the police, the Auditor-General, the South Africa Revenue Services, the Public Service Commission and the key role lies with the National Prosecuting Agency.

While Kenya opted for a specialised ACC, the fact that KACC only investigates and the A-G prosecutes on its behalf cripples its authority to combat corruption. KACC is thus vulnerable to competing political pressures and attempts to marginalise its effectiveness. Such was the case where after length investigations and forwarding the dossier for prosecution, the A-G returned the files claiming that there was no enough evidence to prosecute.²⁵³ This has resulted in a tussle pitting KACC and the A-G, exposing the KACC director to public criticism for his inability to firmly actualise the full extent of the mandate of KACC.²⁵⁴

KACC's position as an institution dedicated to combat corruption would be enhanced if it were given powers to prosecute. Otherwise, it defeats the purpose of setting up such an institution instead of incremental improvements to the previously existing structures for combating corruption. Although there are special anti-corruption magistrates' courts, backlog of cases within the judicial system has caused undue delay in prosecution of corruption cases that have ended up into unwinding inquiries. This is an alarming signal that Kenyan leaders are not pushing the anti-corruption agenda forward, casting a shadow on their resolute over the credibility of KACC. The situation is further exacerbated by the acrimonious resignation of the former permanent secretary of governance and ethics in the office of the president²⁵⁵ and the forced exit of the executive director of Transparency International Kenya chapter a vibrant local non-governmental organisation dedicated to anti corruption campaigns for being critical of the government.²⁵⁶ The inaction on a number of corruption cases

²⁵³ 'KACC evidence is sufficient to prosecute graft cases' *East African Standard* 20 October 2006.

²⁵⁴ 'Furious Ringera Tells Attorney-General - Files Are Complete' *Daily Nation* 20 October 2006. See 'We'll not sack Ringera, Karua tells critics' *Daily Nation* 28 September 2006, 'Give KACC greater powers, says team' *East African Standard* 9 February 2005.

²⁵⁵ 'Corruption fights back and wins as sleaze czar quits' *East African Standard* 8 February 2005.

²⁵⁶ 'Corruption watchdog sacks Executive Director' *East African Standard* 25 June 2006. See 'Kenya: close to anticorruption group' 18 October 2006 sourced <www.news.bbc.co.uk> (accessed 9 October 2006).

and allegations of official attempts at cover-up in the so-called Anglo-leasing cases seriously undermines the confidence of Kenyans and that of international development partners on the prospects of the rule of law in Kenya.

On the contrary, the Botswana Directorate on Corruption and Economic Crime (DCEC) is operationally independent such that it investigates and prosecutes offenders which has complemented and strengthened the country's judicial system.²⁵⁷

4.2.3 The judicial system

An independent judicial system is central to the promotion of the rule of law because it is presumed to be neutral and fair.²⁵⁸ By scrutinizing acts of the legislative and executive branch through judicial review, the judiciary plays a key role in the balance of power in an effort to uphold the constitution. With a certain degree of judicial activism, judicial review can strengthen judicial independence, the legitimacy of the laws and courts, public trust in the judiciary and the rule of law.²⁵⁹

While corruption is certainly one of the biggest obstacles to the proper functioning of an independent judiciary, the state must at all times respect the rule of law and ensure that judges and magistrates identified in corruption scandals receive a fair hearing. By suspending the judges prior to giving them a hearing violates their rights and also diminishes the dignity of the judiciary as a whole.²⁶⁰ Such was the case in Kenya where following the outcome of an inquiry into judicial corruption, none of the judges and magistrates implicated of corrupt practices had the chance to be heard by the committee prior to the issuance of the report and eventual suspension and dismissal.²⁶¹ Although section 62 Constitution of Kenya grants judges of the superior

²⁵⁷ C M Fombad 'Curbing corruption in Africa: some lessons from Botswana's experience' (1999) 51 *International Social Science Journal* 241.

²⁵⁸ EM Uslaner 'The bulging pocket and the rule of law: corruption inequality and trust' (2005). Sourced <www.qog.pol.gu.se/conferences/november2005/papers/Uslaner.pdf> (accessed 7 October 2006).

²⁵⁹ S Elena et al 'Global best practices: Constitutional Courts, judicial independence and the rule of law' (2004) sourced <http://www.ifes.org/publication/b16a9e8de58c95b427b29472b1eca130/WhitePaper_4_FINAL.pdf> (accessed 7 October 2006).

²⁶⁰ ICJ (n 170 above).

²⁶¹ As above.

courts security of tenure, there are exceptions that refer to the removal of judges. Security of tenure is not meant to protect judges *per se*, but to protect the interest of the public in the independence and impartial exercise of judicial functions without undue interference. The notion of fair hearing entails a presumption of innocence where judges and magistrates should be removed only after they have been informed, so that they are not to be prejudiced with the outcome of the inquiry proceedings but instead be given an opportunity to be heard.

The Kenya judiciary has taken some steps to eradicate judicial corruption. It is hoped that the Judicial Service Code of Conduct and Ethics 2005²⁶² will ameliorate the levels of professionalism within the Kenyan judiciary. The most comprehensive universal standards on the independence of the justice system are set out in the United Nations Basic Principles on the Independence of the Judiciary 1985,²⁶³ the Basic Principles on the Role of Lawyers 1990,²⁶⁴ and the Guidelines on the Role of prosecutors 1990.²⁶⁵ Most of the guarantees in these three instruments are echoed in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa²⁶⁶ by the African Commission on Human & Peoples' Rights.

Equitable access to the judicial system fosters equality before the law which is a principle of the rule of law. While article 14 (1) CCPR guarantees that all persons, shall be equal before the courts and tribunals in determination of any criminal charge against them, article 14 of the AU Convention on Corruption provides for fair trial for those suspected to have committed acts of corruption. The article embodies that everyone is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. People respect and obey the law because they believe that the justice system is fair and that they have been treated fairly. When

²⁶² Judicial Service Code of Conduct and Ethics 2005.

²⁶³ UN Basic Principles on the Independence of the Judiciary 1985 U.N. Doc. A/CONF.121/22/Rev.1 at 59. Sourced <<http://www1.umn.edu/humanrts/instreet/i5bpj.htm>> (accessed 7 October 2006).

²⁶⁴ The Basic Principles on the role of lawyers 1990 U.N. Doc. A/CONF.144/28/Rev.1 at 118. Sourced <www1.umn.edu/humanrts/instreet/i3bprl.htm> (accessed 7 October 2006).

²⁶⁵ The Guidelines on the Role of prosecutors 1990 U.N. Doc. A/CONF.144/28/Rev.1 at 189. Sourced <<http://www1.umn.edu/humanrts/instreet/i4grp.htm>> (accessed 9 October 2006).

²⁶⁶ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa. Sourced <www.justiceinitiative.org/db/resource2?res_id=101409 -> (accessed 7 October 2006).

people have little faith in the fairness, there are few incentives to obey the law. Long delays in the legal system lead to inequalities in justice.

4.2.4 Media and civil society organisation (CSOs)

In the framework of good governance, media and CSOs²⁶⁷ encompass a dimension that consolidates democracy, appraises the rule of law and promotes human rights. CSOs in most African countries are actively engaged in the advocacy of public policy and social justice.²⁶⁸ CSOs and the media are central in developing and implementing national and international anti-corruption strategies. CSOs in Kenya led by Transparency International²⁶⁹ Kenya chapter have assisted to expose and tackle not only corruption but also other social economic and political ills within society.

Freedom of information includes the citizens' right to official information held by a government and entails an obligation on public organs to access information. Freedom of the press and access to information contributes to the democratisation process in Africa and to an informed public that makes informed decisions. By monitoring interaction between people in the government and the business sector, CSOs have an important role in alerting the public of misconduct thereby exposing corruption. Transparency of government decisions making process is important in the exposure of corruption just as it is equally central for effective governance. The transparency of public sector decision-making processes can be increased by lobbying on the part of CSOs.

Article 12 of the AU Anti-Corruption Convention presents civil society and the media with a legal framework to hold governments to the highest level of transparency and accountability in the management of public affairs. Article 19 further urges state parties to adopt legislative and other measures to give effect to the right to access any information that is required to assist in the fight against corruption and related offences. Although most journalists are free to report as they wish, the use of

²⁶⁷ Civil Society Organisations (CSO) is an umbrella term used to sometimes refers to non-governmental organisations, charities, non-profit companies, think-tanks, community groups grass root activities groups, development and research organisations.

²⁶⁸ n 158 above.

²⁶⁹ The civil society organisation leading the fight against corruption around the world. See <www.transparency.org>

defamation laws, defamation and libel has acted to deter the media from complete freedom. Access to information is intended to foster a culture of transparency and accountability in public and media access to information should therefore be handled responsibly.

Democracy requires the willingness by leaders and the masses to accept criticism and the recognition that the freedom of expression is inalienable. The rights of citizens to voice their beliefs must be legitimised and institutionalised, if we are to have a free society.²⁷⁰ Governments the world over, are instinctively opposed to the free flow of information to the public as a means to control the public by denying them information.²⁷¹ In Africa most governments have always viewed the media with a lot of suspicion and disquiet though there is no legitimate reason for this apathy.²⁷² The media is regularly intimidated by government and law enforcement agencies. Some governments are increasingly using financial pressure to curb media critics and undermine the independence of media outlets. For instance in April 2001, the Botswana's cabinet ordered a ban on government advertising in two newspapers, the *Botswana Guardian* and *Midweek Sun* for being too critical of the country's leadership.²⁷³ Gag over the media is a common phenomenon in most African countries especially where they expose the involvement of prominent public personalities in political and economic social ills.²⁷⁴

In Kenya, the right to information held by the Government is hard to attain and even basic information is only released after authorisation by key public officials whose hands are almost always tied by the Official Secrets Act.²⁷⁵ On the contrary, South Africa²⁷⁶ and Uganda spur confidence as they have a Freedom of Information Act. The Uganda Access to Information Act 2005 provides protection to a whistleblower

²⁷⁰ 'Narc has let down citizens in big way' *East African Standard* 23 September 2006.

²⁷¹ 'Public urged to demand free flow of information' *Daily Nation* 29 September 2006.

²⁷² Anassi (n 1 above) 321.

²⁷³ 'Swazi, Botswana government threaten papers' *Mail & Guardian* 08 May 2001. See G Graham (ed) *So is this democracy? State of the media in Southern Africa* (2001) as cited in Balule (n268 above) 653.

²⁷⁴ Anassi (n 1 above) 321.

²⁷⁵ 'Public Urged to Demand Free Flow of Information' *Daily Nation* 29 September 2006.

²⁷⁶ South Africa Promotion of Access to Information Act 2 of 2000.

by the proscription of legal, administrative or employment sanctions for the release of information on wrongdoing or serious threats to health, safety or environment done in good faith.²⁷⁷ There are exemptions such as personal privacy, confidential information and safety of persons and property. The South Africa Promotion of Access to Information Act 2000 gives voice to the constitutional requirement for an open democratic system. It ensures that public bodies cannot hide behind a veil of secrecy in order to conceal information that should be in the public domain.²⁷⁸ Independent and investigative media is vital in the reporting and bringing out the image of transparency to the citizenry. The media as part of CSOs consolidates democracy by the support of citizens' participation in development, reduces conflict and supports economic development and greater investor confidence.²⁷⁹ The media is a proven anti-corruption tool because it supports promotion of good governance, rule of law and human rights.²⁸⁰

Corruption in the media would have serious ramifications in other public and private institutions. The media should therefore be prudent and wary of corrupt practices and avoid being used as a political tool by partisan politicians. There is no contention that exposure of persons and institutions in the media for corrupt actions serve as a useful deterrent and checks for further possibility of corruption.²⁸¹ Since information is an important weapon in the world, media houses should therefore report corruption incidences without fear or favour.

CSOs are one possible organisational form that can be a channel of addressing corruption if the informal rules of civil society accept corrupt and criminal behaviour.²⁸² Because such institutions are based on attitudes, culture and social norms, they are instrumental in determining the nature of voluntary civic cooperation

²⁷⁷ Uganda Access to Information Act 6 of 2005 section 44.

²⁷⁸ TI national integrity system country studies South Africa report 2005 (n 278 above).

²⁷⁹ 'Sacking of scandal-tainted deputy demonstrates' Transparency International Berlin 14 July 2005. Sourced <http://www.transparency.org/news_room/latest_news/press_releases/2005/14_06_2005_south_afric_deputy_jacob_zuma> (accessed 9 October 2006).

²⁸⁰ Anassi (n 1 above) 227.

²⁸¹ Anassi (n 1 above) 323.

²⁸² M Kitsing 'Behind Corruption: From NGOs to the Civil Society' Sourced <<http://www.eumap.org/journal/features/2003/july/behindcorruption>> (accessed 9 October 2006).

in society and at a risk of engaging in corrupt behaviour. The key to achieving a true civil society is the advancement of the rule of law and advocacy for openness, which by creating trustworthy formal institutions, reduces people's reliance on informal criminal rules. Within this formal set of rules, CSOs should be left to compete freely and entry barriers should be kept to a minimum.²⁸³

4.3 Conclusion

At the risk of being accused of becoming a litigious society, the reporting and prosecution of corruption and economic crimes can be quite healthy and illustrative that people are more prepared to solve their problems by legal, rather than violent means. The public, judiciary, anticorruption agencies and civil society organisations have an integral role to play and led credence to public perception that the rule of law does apply when all accused persons are reprimanded and prosecuted. The respect of the rule of law must apply equally to all since it is of general application. This provides reason for confidence that the principles of equality before the law, in terms of which transgressors are brought to book whatever rank they hold in society is vital to address corruption. The media and civil society are indispensable partners for government in an effort to promote integrity and the rule of law in the fight against corruption.

²⁸³ As above.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

This dissertation has argued that the rule of law is a prerequisite and vital tool in curbing corruption. Upholding the rule of law is part of a holistic anticorruption approach that can contribute to the fight against corruption and economic crimes in Africa. Indeed, good governance calls for a responsive governmental and administrative framework where law and good governance prevails.²⁸⁴ While corruption has certainly impacted negatively upon good governance and the rule of law, it is the collapse of the rule of law and the failure to uphold its standards and tenets that has created fertile grounds for corruption. The fight against corruption therefore, must commence with the implementation of standards and principles of the rule of law.

The study has shown that corruption results in dysfunctional legal systems where to the extent governance institutions lose legitimacy. An effective strategy against corruption therefore must begin with a demonstration of political will²⁸⁵ and publicly supported leadership for the rule of law and against impunity. Without it government statements to reform public service, strengthen transparency and accountability and reinvent the relationship between government and private sector industry remains mere rhetoric. Political will is an integral catalyst in the establishment of rule-based governance²⁸⁶ and is a central component of efforts to initiate and sustain public service and judicial reform. Indeed African leaders have committed through the NEPAD African Peer Review Mechanism (APRM) to assess their performance

²⁸⁴ A Doig & S Riley 'Corruption and Anti-Corruption Strategies: Issues and Case Studies from Developing Countries' in *Corruption and Integrity Improvement Initiatives in Developing Countries* (UNDP 1998) sourced <magnet.undp.org/docs/efa/corruption/Chapter03.pdf> (accessed 7 October 2006). See (n28 above).

²⁸⁵ SJ Kpundeh 'political will in fighting corruption' UNDP *Corruption and Integrity Improvement Initiatives in Developing Countries* (New York: UNDP, 1998) Sourced <<http://magnet.undp.org/Docs/efa/corruption/Chapter06.pdf>> (accessed 7 October 2006). Political will refers to the demonstrated credible intent of political actors (elected or appointed leaders, civil society watchdogs stakeholders groups) to attack perceived causes or effects of corruption at a systematic level.

²⁸⁶ As above.

against a number of internationally agreed codes and standards.²⁸⁷ It is hoped they will rely on the UNCAC and the AU Anti Corruption Convention as some of the guiding principles in the respect for democratic principles, human rights, rule of law and good governance.

5.2 Recommendations

Upholding the rule of law as advanced in previous chapters would address most of the issues that call for concerted efforts to root corruption effectively in Africa. However, a few recommendations particularly for the case of Kenya demand reiteration. There is need for instance legislation that will protect whistleblowers and give them incentives to disclose official wrong doing that seriously harms public good. Whistleblowers laws that enforce and reward ethical behaviour complements and reinforces the work of officers responsible for enforcing ethics in government and in the private sector.²⁸⁸ The support of the Witness Protection Bill 2006 will enforce public and private accountability in Kenya.²⁸⁹ As an administrative early warning, an effective whistleblower law would probably have prevented the Goldenberg scandal from spiralling into the grotesque scandal it eventually became.

Access to public information in Kenya, needs to be guaranteed through the law. Such law should facilitate the release of unclassified information by government departments and agencies on request. It is in the public interest that the media highlight corruption and other cases of malpractice perpetrated by the public officials. Without the media, economic crimes such as the Goldenberg and Anglo-leasing would never have come to light. Without an enabling law on access to information, the media is grope in the dark at the risk of libel and defamation charges. This intimidates the media into sycophancy. An Access to Information Act would greatly enhance the rule of law in Kenya.

²⁸⁷ African Peer Review Mechanism APRM is a system introduced by the African Union where African countries participate voluntary in a peer review of structures of government in an endeavour to assist countries improve their governance. See Kututwa (n3 above) 9.

²⁸⁸ P Kichana 'Kenyan Laws cannot protect whistle blowers' (2006) 82 *Adili Newsletter* T1 – Kenya chapter.

²⁸⁹ 'Commentary' (2006) 81 *Adili Newsletter* T1 – Kenya chapter.

There is need for legislation to protect whistleblowers and encourage them to disclose official wrong doing that seriously harms public good. Whistleblowers laws that enforce and reward ethical behaviour complements and reinforces the work of officers responsible for enforcing ethics in government and in the private sector.²⁹⁰ The support of the Witness Protection Bill 2006 will enforce public and private accountability in Kenya.²⁹¹

Although Kenya has a Public Procurement and Disposal Act enacted in 2005, its effects are yet to be appreciated as it is yet to be implemented.²⁹² With the exposure of the gravity of corruption in the public procurement in the Anglo-leasing scandal, this piece of legislation is long over due. Although the entities are public institutions, it does not state certainly that all procurement records are public.²⁹³ It is imperative that the effectiveness of the entire procurement process be streamlined to enhance its transparency.

Finally, the international community can assist alleviate the root of corruption in Africa tracking down money looted by corrupt African leaders in foreign banks accounts and send it back to the country from whom was stolen. This will be a clear deterrent to the current and future leaders that they will not be allowed to benefit from the accumulation. Developed nations should also cooperate with African nations to improve financial systems requisite in detecting financial impropriety, irregularities and when funds in a bank account have been acquired illicitly.²⁹⁴

Word count: 16,603

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²⁹¹ 'Commentary' (2006) 81 *Adili Newsletter* T1 – Kenya chapter.

²⁹² 'Procurement reforms to save Government KSh30b annually' *East African Standard* 12 September 2006.

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²⁹⁴ Commission for Africa (n 324 above).

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