

**RETHINKING KENYA'S ANTI-CORRUPTION STRATEGIES: LESSONS FROM
BOTSWANA**

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DECLARATION

I, **LANDO VICTOR OKOTH OGWANG** 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) 2007.

Signed.....

Date.....

Supervisor: Dr Paulo Comoane

Signature.....

Date.....

DEDICATION

To the Almighty, for this far You have brought me. To my family, for their love and support, and to all who have made this possible.

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LIST OF ABBREVIATIONS

ACECA	Anti-Corruption and Economic Crimes Act 2003
ACHPR	African Charter on Human and Peoples' Rights
APRM	African Peer Review Mechanism
AU	African Union
CECA	Corruption and Economic Crimes Act
CPI	Corruption Perceptions Index
CRM	Country Review Mission
CSAR	Country Self Assessment Report
DCEC	Directorate on Corruption and Economic Crimes
ECOWAS	Economic Community of West African States
ERSEWC	Economic Recovery Strategy for Employment and Wealth Creation
GJLOS	Governance Justice, Law and Order Sector
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
KACA	Kenya Anti-Corruption Authority
KACC	Kenya Anti Corruption Commission
KNCHR	Kenya National Commission on Human Rights
NIS	National Integrity System
POEA	Public Officer Ethics Act
PRSP	Poverty Reduction Strategy Paper
SADC	Southern African Development Community
TI	Transparency International
UNCAC	United Nations Convention against Corruption

CHAPTER ONE

1 INTRODUCTION

1.1 Research background

Corruption is not new, nor is it unique to any particular locality, country or region.¹ On the contrary, it is a global phenomenon, with varying degrees of severity from one country to another. Corruption affects the poor disproportionately due to their powerlessness to change the status quo, and inability to pay bribes, creating inequalities that violate their human rights. It perpetuates discrimination, and contributes immensely to the violation of both civil and political rights,² and economic, social and cultural rights.³ Corruption spins a complex web in which the state quickly loses its authority and ability to govern for the common good, making it possible for critics to be silenced, for justice to be subverted, and for human rights abuses to go unpunished.⁴

Why has corruption elicited so much renewed interest in recent years? Is it that there is more corruption now, or is it that the world was hitherto not concerned? To attempt an explanation, the widespread suffering caused by wanton plunder and economic devastation has awakened the collective conscience of the international community to view corruption on the same plane as offences such as terrorism, drug trafficking and genocide, and hence act against it. Furthermore, with the end of the cold war, development partners have refused to conveniently ignore corruption in partner regimes; an ever expanding media industry in terms of press freedom and technology, has increased flow of, and access to information; the spread of democracy has facilitated candid discussion on corruption; civil society, academia and United Nations agencies have engaged in stimulating research highlighting corruption and its effects on society; globalisation has increased interaction between different peoples and amplified international awareness on the negative effects of corruption; and, the increased significance of the market economy means that the

1 See Tanzi, V 'Corruption Around the World--Causes, Consequences, Sources and Cures'.(1998) *IMF Working Paper*, Available at<<http://www.imf.org/external/pubs/ft/wp/wp9863.pdf>> (accessed on 7 May 2007).

2 For example the right to a fair trial may be violated when the judge and prosecutor are bribed in order to 'secure' a favourable outcome of a particular criminal case.

3 For instance, due to corrupt conduct by its officials, the government may purchase cheap and expired drugs, thereby undermining the realisation of the right to health.

4 See Cockroft, L 'Corruption and Human Rights- A Crucial Link' (1998) *Transparency International Working Paper*. Available at<http://www1.transparency.org/working_papers/cockcroft/cockcroft.html> (accessed on 7 May 2007).

inefficiencies and market distortions attributed to corruption have also attracted increased attention.

It goes without saying that corruption is a serious problem in Africa today. Bribery, embezzlement, nepotism and other scandals both at the political and bureaucratic level, have not only adversely contributed to the sorry state of Africa's economies, but also exacerbated the poverty that afflicts Africa's people.

Transparency International's Corruption Perceptions Index (CPI) 2007 indicates that 130 out of 179 countries surveyed score less than 5 on the index, (out of a best possible score of 10) with 74 scoring less than 3 indicating rampant corruption.⁵ Out of the countries surveyed, only 2 African states, Botswana and South Africa, scored more than 5. Botswana was the highest ranked African country at 5.4, with Somalia bringing up the rear at 1.4. Indeed, Botswana has for a long time been proffered as one of the few African countries with a relatively low incidence of corruption. Kenya, on the other hand, is representative of a great many African states given that it is fraught with a high prevalence of systemic corruption. The 2007 CPI ranked Kenya 150 out of 179 countries surveyed, with a score of 2.1 out of a possible 10.⁶ Notwithstanding the creation of an anti-corruption agency, and the adoption of legislation aimed at curbing the vice, corruption still continues unabated.

1.2 Statement of the problem

Kenya has had a long, tortuous and inauspicious flirtation with various antidotes to corruption.⁷ In 2003, after a series of false starts, parliament finally passed into law the Anti-Corruption and Economic Crimes Act, (ACECA) which established the Kenya Anti-Corruption Commission (KACC) as the principal body mandated to coordinate and implement anti-corruption efforts. A series of legislative and policy measures were also initiated to augment the work of the KACC.⁸ Nonetheless, corruption still appears to be

5 The annual Corruption Perceptions Index (CPI), first released in 1995, ranks 180 countries by their perceived levels of corruption, as determined by expert assessments and opinion surveys. The CPI 2007 is calculated using data from 14 sources originated from 12 independent institutions. All sources measure the overall extent of corruption (frequency and/or size of bribes) in the public and political sectors and all sources provide a ranking of countries, i.e. include an assessment of multiple countries. For more details see <<http://www.transparency.org/content/download/23966/358199>> (accessed on 12 October 2007).

6 See Transparency International (n 5 above); See also Freedom House, 'Countries at the Crossroads 2006' <<http://www.freedomhouse.org/template.cfm?page=139&year=0>> (accessed 7 May 2007).

7 See Mutonyi, J 'Fighting Corruption: Is Kenya on the Right Track?' (2002) *3Police, Practice and Research* 21-39.

8 These include the enactment of the Public Officer Ethics Act 2003 and the creation of specialised anti-corruption courts. In addition, President Kibaki signed into law the Procurement and Disposal bill, designed to raise standards in the government procurement process in 2005. A

prevalent in the public sector, with Kenya maintaining a dominant position in the bottom rung of the various indices developed to measure corruption. Such a state of affairs calls for an evaluation of the current anti-corruption strategies, aimed at strengthening the present system through the adoption of new foci, discarding of disused, irrelevant or ineffective systems, and building on the achievements made. It is with this in mind that this enquiry delves into the anti-corruption strategies that have thus far been adopted by Kenya, draws from the Botswana's experience in combating the vice, and postulates the reforms necessary for the effective management of corruption. Botswana's success in maintaining low levels of corruption, together with its governance record, provide in my view, a good point of reference in terms of sustainable anti-corruption mechanisms.

1.3 Objectives of the study

The main objective of this study is to isolate the loopholes in Kenya's anti-corruption machinery and explore mechanisms of sealing them. To this end, it borrows from Botswana's experience in curbing the vice. Having been thus informed, and further considering the relevance and importance of a human rights approach to curbing corruption, a set of practical and informative recommendations shall be made towards the re-orientation of laws and policy to ensure a more effective anti corruption machinery in Kenya.

1.4 Significance of the study

This study is particularly momentous as it seeks to explore and outline what lessons Kenya could derive from Botswana, in order to realign its anti-corruption strategies to enable it achieve high levels of integrity in the public service, and properly address a question of significant proportions that has dogged the country since pre-independence. It is believed that this study will positively contribute to efforts by the Kenyan government, and by other African states similarly situated, to comprehensively address the high prevalence of corruption in the continent.

Serious Crimes Unit has been established within the Department of Public Prosecution, and the government is engaged in the Governance, Justice, Law and Order Sector project, an ambitious donor-supported effort to improve transparency and governance throughout the bureaucracy. These are considered in detail in chapter 3 below.

1.5 Hypotheses

This study proceeds on the premise that the anti-corruption measures so far adopted in Kenya, have for the most part failed to adequately manage and reduce the prevalence of corruption in the public sector, and should therefore be reoriented and reinvigorated so as to achieve tangible results in terms of sustainability and effectiveness. It also posits that Botswana offers the best model in Africa for anti-corruption strategies in terms of best practices and sustainable results.

1.6 Literature survey

There exists an abundance of literature on corruption: its general causes, effects and strategies on its management. Fombad⁹ provides useful insights into Botswana's anti-corruption regime and juxtaposes this against the general state of affairs in Africa. Mathhare¹⁰ undertakes an analysis of Botswana's Directorate on Corruption and Economic Crimes (DCEC) in a bid to shed more light on its functions and propose reforms designed to increase its efficiency. A large part of writings on corruption in Kenya focuses on the situation prior to the enactment of the Anti-Corruption and Economic Crimes Act establishing the KACC, a watershed in Kenya's struggle with corruption. For example, an article by Gathii¹¹ examining the rule of law as an anti-corruption initiative in Kenya, particularly in donor driven reforms, is limited to the state of affairs prior to the creation of the KACC. Similarly, Mutonyi's work on anti-corruption in Kenya focuses on events before 2002.¹² However, more recent publications by Mirugi-Mukundi¹³ on the rule of law and its significance in fighting corruption, Chweya¹⁴ on Kenya's post independence struggle with

9 See Fombad, CM 'Curbing corruption in Africa:some lessons from Botswana's experience' (1999) *International Social Science Journal* 51.

10 Mathhare, B 'An Evaluation of the Role of the Directorate on Corruption and Economic Crime (DCEC)' (2006)Dissertation for the award of a Masters degree in Public Administration in the School of Government, Faculty of Economic and Management Sciences, University of the Western Cape.

11 Gathii, JT '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.

12 See Mutonyi (n 7 above).

13 Mirugi-Mukundi, G' The Impact of Corruption on Governance: an appraisal of the practice of the rule of law In Kenya' (2006) LL.M Dissertation , University of Pretoria. Available at< https://www.up.ac.za/dspace/bitstream/2263/1222/1/mirugi-mukundi_gt_1.pdf> (accessed 7 May2007).

14 Chweya L 'The government anti-corruption programme, 2001-2004' in Sihanya, B(ed) (2005) 'Control of corruption in Kenya: legal-political dimensions, 2001-2004,Claripress: Nairobi.

corruption and Luh¹⁵ on Kenya's asset disclosure system for public officials, shed important light on Kenya's corruption scenario.

1.7 Methodology

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

1.8 Limitations

The subject of corruption has received widespread attention from both scholars and practitioners. The scope of this study is limited to public sector corruption, and shall therefore concern itself with corruption specific legislation and policy in the countries under consideration. Additional reference shall be made to relevant international instruments and practice.

1.9 Chapter breakdown

This dissertation consists of five chapters. Chapter one introduces and contextualises the study, and highlights the basic structure that it shall adopt. Chapter two outlines the phenomenon of corruption the extent thereof, its causes and consequences, particularly its impact on human rights. It proceeds to delineate the international obligations for states in addressing corruption before delimiting the various strategies that have been adopted in the global march to manage corruption. Chapter three grapples with the legal, policy and institutional structures in place to curb corruption in Kenya. It discusses the factors that have lent effectiveness, as well as countermeasures that have hindered efforts to effectively manage corruption. Chapter four builds on the previous discussion and considers Botswana's anti-corruption framework with the object of identifying lessons that Kenya may draw from its experience in terms of legislation, policy and practice, in order to bolster and reorient its anti-corruption strategies. Chapter five consists of a review of the presentation, conclusions drawn from the study, and, recommendations to the Kenyan government on its anti-corruption regime.

¹⁵ Luh, J 'Public Officer Ethics Act: Provisions for Declarations of Income, Assets, and Liabilities. Evaluation and Recommendations' (2003) *Transparency International-Kenya/Harvard Law School*. Available at <<http://www.tikenya.org/documents/assetdeclaration.pdf>> (accessed on 2 October 2007).

CHAPTER TWO

2 UNDERSTANDING CORRUPTION

2.1 Introduction

This chapter discusses the phenomenon of corruption, its various manifestations and its consequences. It shall also demonstrate the linkages between corruption and human rights, and highlight the efforts that have been undertaken at various levels to curtail its prevalence.

2.2 Corruption: in search of a true definition

Corruption can be assigned as many meanings as the sources one is willing to consult. It has become a generic term for a variety of negative phenomena both in the public and private sector. Like beauty, corruption is elusive to define, but incredibly easy to recognise. The term corruption is derived from the Latin word *corruptus*, which literally means 'to destroy'.¹⁶ It has been variously defined as 'an illegal act that involves the abuse of a public trust or office for some private benefit',¹⁷ or 'the misuse of public office for private gain'.¹⁸ Transparency International defines corruption as 'misuse of entrusted power for private gain'¹⁹ while the World Bank considers it 'an abuse of public authority for the purpose of acquiring personal gain'.²⁰ Kaufmann refers to it as 'use of public office for private gain'.²¹ Mc Mullan's holds that a public official is corrupt:

if he accepts money or money's worth for doing something that he is under a duty to do anyway, that he is under a duty not to do, or to exercise a legitimate discretion for improper reasons.²²

16 See Ringera, A, Director of KACC. Speech delivered at the Commonwealth Lawyers Conference, Nairobi. Available at: <<http://www.kacc.go.ke/archives/speeches/COMMONWEALTH-CONFERENCE.pdf>> (accessed on 18 October 2007).

17 Fantaye, D K 'Fighting Corruption and Embezzlement in Third World Countries'(2004) 68 *Journal of Criminal Law* 171.

18 Rose-Ackerman, S 'Corruption and Democracy' (1996) 90 *American Society of International Legal Proceedings* 83.

19 See Transparency International (TI) at <http://www.transparency.org/news_room/faq/corruption_faq> (accessed 15 September 2007).

20 Kaufmann, D 'Corruption, Governance and Security: Challenges for the Rich Countries and the World' (2004)*World Bank Global Competitiveness Report 2004/2005*. Available at <http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/Kaufmann_GCR_101904_B.pdf> (accessed on 20 October 2007).

21 See Gray & Kaufmann 'Corruption and Development' (1998)World Bank Paper. Available at <<http://www.worldbank.org/fandd/english/0398/articles/020398.htm>> (accessed 15 August 2007).

22 See Mc Mullan, M 'A Theory of Corruption: Based on a Consideration of Corruption in the Public Services and Governments of British Colonies and Ex Colonies in West Africa' (1961) 9 (2) *Sociological Review* 181-201.

The United Nations Convention against Corruption (UNCAC)²³ does not provide a definition of corruption. However, an understanding of what corruption entails may be gleaned from article 15(b) which prohibits:

[t]he 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.

It proceeds to deal with specific aspects of corruption in the public and private sectors²⁴, bribery, embezzlement, trading in influence, illicit enrichment, laundering of proceeds of crime and concealment of property.²⁵

The African Union Convention on Preventing and Combating Corruption (AU Anti-Corruption Convention) defines corruption as 'the acts and practices including related offences proscribed in this Convention'.²⁶ These include the solicitation or acceptance by a public official, or the offering or granting to a public official or any other person a gift, favour, promise or advantage in exchange for the performance of public functions.²⁷

The Inter-American Convention against Corruption similarly describes acts of corruption to include the solicitation or granting of inducements to public officials in exchange for any act or omission in the performance of public duties.²⁸

Similar provisions are found in the Council of Europe's Criminal Law Convention on Corruption²⁹ and the Organisation for Economic Co-operation and Development Convention

23 United Nations Convention Against Corruption adopted December 2003 in Mexico. This treaty entered into force on 15 December 2005 available at <http://www.unodc.org/unodc/en/crime_convention_corruption.html> (accessed on 12 October 2007).

24 UNCAC articles 7 & 12.

25 UNCAC articles 15-24.

26 See article 1 of the AU Convention on Preventing and Combating Corruption. Adopted in Maputo, Mozambique on 11 July 2003; entered into force on 5 August 2006. Full text available at <<http://www.africa-union.org/root/au/Documents/Treaties/Text/Convention%20on%20Combating%20Corruption.pdf>> (accessed on 12 October 2007).

27 See article 4 of the AU Anti-Corruption Convention for an elaboration on corruption and related offences.

28 See article VI of the Inter-American Convention Against Corruption. Adopted 29 March 1996, full text available at <<http://www.oas.org/juridico/english/Treaties/b-58.html>> (accessed 2 September 2007).

29 See articles 2-14 of the Council of Europe Criminal Law Convention on Corruption. Adopted at Strasbourg in 1999 available at <<http://conventions.coe.int/Treaty/en/Treaties/Html/173.htm>> (accessed 3 September 2007).

on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention).³⁰

What emerges from the foregoing is that ‘the search for the true definition of corruption is, like the pursuit of the Holy Grail, endless, exhausting and extremely futile’³¹ Therefore, for the purposes of this dissertation, I shall adopt the definition of corruption as ‘the abuse of entrusted authority or resources for private gain.’

2.3 Forms of corruption

Corruption assumes many diverse forms which vary from one society to the next. Nonetheless, the most conspicuous, and perhaps most familiar type of corruption in Africa is the so called ‘petty corruption’, where a public official demands, or expects, ‘speed money’ for doing an act which he or she is ordinarily required by law to do, or when a bribe is paid to obtain services which the official is prohibited from providing.³² ‘Grand corruption’ occurs when a high-level bureaucrat who formulates government policy or is able to influence government decision-making, seeks, as a *quid pro quo*, payment, for exercising the extensive arbitrary powers vested in him or her³³ Another form of corruption worth mentioning is what is referred to as systemic corruption. Also called entrenched corruption, this phenomenon occurs where corruption permeates the entire society to the point of being accepted as a means of conducting everyday transactions.³⁴ The United Nations Office on

30 Article 1 of the OECD Convention provides:

1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.
2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party. The Convention entered into force on 15 February 1999. Full text available at http://www.oecd.org/document/21/0,3343,en_2649_34859_2017813_1_1_1_1,00.html (accessed 20 October 2007).

31 Williams, R J ‘The Problem of Corruption: A Conceptual and Comparative Analysis’ (1976) *PAC Bulletin*, No. 2, 41-54.

32 Sandgren, C ‘Combating Corruption: The Misunderstood Role of Law’ (2005) 13 *International Lawyer* 717.

33 An example would be a minister receiving a large bribe to assign the construction contract of a prestigious government project to a particular building company. A special category of grand corruption, known as state capture, implies that a company/individual influences the legislation of a state, institution, or the governmental policy in an entire area, for instance the environment, taxation or mining. State capture is common in small countries where a financially strong business group could influence state policy and favour its interest or stakeholders, for instance political parties. See Maria, C & Haarhuis, K ‘Promoting anti-corruption reforms: Evaluating the implementation of a World Bank anti-corruption program in seven African countries 1999-2001.’ (2005) available at <http://ics.uda.ub.rug.nl/root/Dissertations/2005/KleinHaarhuis-Promot/> accessed on 20 October 2007.

34 Heymans, C & Lipietz, B ‘Corruption and Development: Some perspectives’ (1999) 40 *Institute of Security Studies Monograph Series* 8.

Drugs and Crime (UNODC)³⁵ has come up with a comprehensive classification of the different forms of corruption that includes active and passive corruption,³⁶ bribery,³⁷ embezzlement, theft and fraud,³⁸ extortion,³⁹ abuse of discretion⁴⁰ favouritism, nepotism and clientelism,⁴¹ and, improper political contributions.⁴²

2.4 Identifying the causes

There are two powerful forces that stoke the fires of corruption: selfishness and greed. Because of selfishness, people turn a blind eye to the suffering their corruption inflicts, and rationalize it simply because they benefit from it. The more wealth they amass, the greedier they become for more. Available research reveals that the causes of corruption are diverse and depend on the different contextual environments. One sociological study views corruption as being due to a divergence of attitudes and aims of different segments of society, or between the general public and the government.⁴³ Thus there is a divergence between the attitudes and aims of members of the public who induce an official to corruption, and the aims and attitudes of society as a whole. By the same token, there exists a conflict between the attitudes and aims of a corrupt official and those of the public service. These conflicts are defined *inter alia* by reference to the laws in force, in which the official aims and attitudes are set out. Accordingly, the different levels of corruption in different countries depend on the extent to which government and society are homogenous.

Tanzi⁴⁴ notes that corruption is promoted by *inter alia*, factors that affect the demand for corrupt acts and those that affect the supply of acts of corruption. The most notable of these are existence of regulations and authorisations which give power to officials who then

35 See UNODC 'The Global Programme against Corruption: UN Anti-Corruption Toolkit (2004)' available

at <http://www.unodc.org/pdf/crime/corruption/toolkit/corruption_un_anti_corruption_toolkit_sep04.pdf> (accessed 13 September 2007).

36 Where for example active bribery refers to the offering or paying, while passive bribery refers to the receiving of the bribe.

37 This refers to the bestowing of a benefit in order to unduly influence an action or decision. The "benefit" can be virtually any inducement: money and valuables, company shares, inside information, sexual or other favours.

38 In the context of corruption, embezzlement, theft and fraud all involve the taking or conversion of money, property or valuable items by an individual who is not entitled to them but, by virtue of his or her position or employment, has access to them.

39 Extortion relies on coercion, such as the use or threat of violence or the exposure of damaging information, to induce cooperation.

40 For example, an official responsible for Government contracting may exercise the discretion to purchase goods or services from a company in which he or she holds a personal interest.

41 Generally, favouritism, nepotism and clientelism involve abuses of discretion. Such abuses, however, are governed not by the self-interest of an official but the interests of someone linked to him or her through membership of a family, political party, tribe, religious or other group.

42 A donation made with the intention or expectation that the party will, once in office, favour the interests of the donor over the interests of the public is tantamount to the payment of a bribe.

43 See Mc Mullan (n 22 above).

44 See Tanzi (n 1 above).

misuse this power, complicated taxation regimes that require intervention of tax inspectors, lack of transparency in administrative procedures, low civil service wages, low penalties for corruption and lack of sufficient institutional controls.

According to Klitgaard,⁴⁵ corruption is prevalent when 'someone has monopoly power over a good or service, has the discretion to decide whether you receive it and how much you get, and is not accountable.' He adopts a mathematical typology that corruption equals monopoly plus discretion minus accountability [$C = (M+D)-A$]. Ackerman observes that '[C]orruption levels are determined by the overall level of benefits available, the riskiness of corrupt deals and the relative bargaining power of briber and bribee.'⁴⁶

Ringera notes that the causes of corruption are economic, institutional, political or societal. The economic causes of corruption are related to pecuniary considerations, representing corruption that is need-driven as opposed to greed driven.⁴⁷ Institutional causes of corruption include monopoly and wide discretionary powers for public officers, poor accountability, lack of effective and efficient enforcement of the law, absence of institutional mechanisms to deal with corruption, existence of a weak civil society, and the absence of press freedom. Political corruption arises from the structure and functions of political institutions, and the acquisition and exercise of political power. Societal causes refer to the attitudes and practices of the community. When people are primarily motivated by personal, clan or other parochial loyalties rather than the rule of law, then conflicts of interest, cronyism and patronage reign supreme.

One common thread that runs through all attempts at identifying the causes of and factors that sustain corruption is that, they are often related to deficiencies in the structure of public administration, associated with a lack of control over, and accountability of administrative or political officials.⁴⁸

45 Klitgaard, R *Controlling Corruption*. (1988) Berkeley and Los Angeles: University of California Press.

46 See Rose-Ackerman (n18 above).

47 Whereas need driven corruption is intended to satisfy basic requirements for survival, corruption that is greed driven satisfies the desire for status and comfort which salaries cannot match.

48 Corruption, like other forms of crime, has three essential ingredients: motivation, opportunity, and the absence of a capable guardian. See Australian Institute of Criminology 'Trends and Issues in Crime and Criminal Justice' available at <http://www.aic.gov.au> (accessed on 12 September 2007).

2.5 The consequences of corruption

It is now widely acknowledged that corruption distorts markets and competition, breeds cynicism among citizens, undermines the rule of law, damages government legitimacy and erodes the legitimacy of the private sector.⁴⁹ A high level of corruption in a country reduces investment and the inflow of capital and results in a reduction in economic growth.⁵⁰ A case in point is Kenya's economy which recorded a negative growth of -0.3% by 2000- the worst performance since independence.⁵¹

It was hitherto argued that corruption can be beneficial to economic growth by stimulating capital formation, as entrepreneurs would circumvent time-consuming bureaucratic procedures.⁵² However, this theory has largely been debunked for instance by Ackerman⁵³ who argues that corruption is able to feed on itself and thereby produce higher illegal payoffs that ultimately, outweigh economic growth. The Durban Commitment to Effective Action Against Corruption⁵⁴ succinctly put the deleterious effects of corruption thus:

[Corruption] deepens poverty, it debases human rights; it degrades the environment; it derails development, including private sector development; it can drive conflict in and between nations; and it destroys confidence in democracy and the legitimacy of governments. It debases human dignity and is universally condemned by the world's major faiths.

2.6 Locating corruption within the human rights discourse: the right to a corruption free society

A large part of the prevailing discourse on corruption tends to emphasise on its economic consequences, ignoring one of its most negative effects-the impact it has on the promotion and protection of human rights. The 11th International Conference on Corruption underscored this by not only declaring that large scale corruption should be designated a crime against humanity, and that all human beings have a basic human right to live in a

49 See Heinemann, B W & Heimann, F 'The Long War Against Corruption'(2006) 85 No.3 *Foreign Affairs* 76.

50 See Sandgren (n 32 above).

51 See Kenya Country profile on <<http://www.iss.co.za/AF/profiles/Kenya/Economy.html> > (accessed on 18 October 2007).

52 See Haarhuis & Maria (n33 above).

53 See Rose-Ackerman (n.18 above).

54 See the Durban Commitment to Effective Action Against Corruption, quoted in Hess, D & Dunfee, T 'Fighting Corruption: A principled Approach; The C' Principles' (2000)33 *Cornell International Law Journal* 593.

corruption-free society, but also condemned corruption as immoral, unjust and repugnant to the ideals of humanity enshrined in the Universal Declaration of Human Rights.⁵⁵

Furthermore, it is clear that the international human rights regime obliges states to respect, protect, promote and fulfil the human rights of their people. When the government of a country fails or neglects to curb or contain corruption, it also fails to fulfil its obligation to promote and protect the fundamental human rights of its inhabitants. Similar linkages between corruption and human rights are made in the Council of Europe Civil Law Convention on Corruption which notes that:

[C]orruption represents a major threat to the rule of law, democracy and human rights, fairness and social justice, hinders economic development and endangers the proper and fair functioning of market economies.⁵⁶

The African Union Convention on Corruption and the Council of Europe's Criminal Law Convention on Corruption also contain human right references in relation to corruption.⁵⁷

To use a practical example, the right to equality is one of the fundamental human rights protected both within domestic constitutional frameworks as well as under international human rights law. The International Covenant on Civil and Political Rights (ICCPR)⁵⁸ in article 26 provides that: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law..." A public official who discriminates based on who can or cannot give bribes, is in violation of this provision. Furthermore, any government which tolerates or fails to curb such corrupt acts by its officials is complicit in the violation of the right to equality. As observed by Jayawickrama⁵⁹:

When a privilege is conferred by a [corrupt] public official on a person who is arbitrarily selected by him or her from a class or category of persons, all of whom stand in the same

55 See the findings of the 11th International Anti-Corruption Conference. Seoul, May 2003 'The Seoul Findings' available at <<http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN019160.pdf>> (accessed 12 October 2007).

56 See Preamble to the Convention. Full text available at <<http://conventions.coe.int/treaty/en/Treaties/Html/174.htm>> (accessed on 18 October 2007).

57 See Preambles to the two Conventions (n27 and 29 above).

58 Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force 23 March 1976. Full text available at <<http://www.ohchr.org/english/law/ccpr.htm>> (accessed on 18 October 2007).

59 See Jayawickrama, N 'Corruption-A Violation of Human Rights?' (1998) *Transparency International Working Paper*. Available at <http://legacy.transparency.org/working_papers/jayawickrama/jayawickrama.html> See also Eigen, P 'Corruption is a human rights issue', Paper presented at the 2004 Business and Human Rights Seminar on 9 December 2004, London. Available at <www.bhrseminar.org/2004%20Documents/Peter_Eigen_09.12.04.doc> (accessed on 12 September 2007).

relation to the privilege granted, and between whom and the person not so favoured no reasonable distinction or substantial difference can be found justifying the inclusion of one and the exclusion of the other from the privilege, there is discrimination.

Furthermore, the International Covenant on Economic Social and Cultural Rights (ICESCR)⁶⁰ obliges states to:

[t]ake steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights [defined in the covenant] by all appropriate means, including particularly the adoption of legislative measures.⁶¹

This commitment comprises both an "obligation of conduct" and an "obligation of result". The obligation of conduct is "to take steps": the obligation of result is to "achieve progressively the full realization of the rights recognized" in the covenant.⁶² Corruption runs counter to both obligations by diverting into private hands, resources meant for the realization of these rights. In this regard, empirical research by Kauffmann⁶³ shows that corruption and state capture can be highly detrimental to the attainment of economic, social and cultural rights.

Besides, Ndiva⁶⁴ posits that there exists an independent and fundamental right to a government that is free of corruption, which essentially flows from the right of a people to economic self determination as provided in article 1 of both the ICCPR and the ICESCR respectively.⁶⁵ He interprets the right to exercise sovereignty over a nation's wealth and resources to include the right of all peoples within the state to freely use, exploit and dispose

60 Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entered into force on 3 January 1976. Full text available at: <http://www.unhchr.ch/html/menu3/b/a_ceschr.htm > (accessed on 18 October 2007).

61 See ICESCR article 2.

62 See generally Committee on Economic, Social and Cultural Rights, General Comment 3, The Nature of States Parties' Obligations, (Fifth Session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991), Reprinted in Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 14 (2003).

63 See Kaufmann, D 'Human Rights and Governance: The Empirical Challenge'(2004) *World Bank Institute*. Available at <<http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/humanrights.pdf> > (accessed on 15 October 2007) He notably observes that in spite of the incipient evidence linking rule of law and corruption with human rights issues, it is noteworthy that the covenants and declarations on human rights do not include freedom from corruption.

64 Ndiva, KK 'The right to a Corruption Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime Under International Law' (2000) 34 No.1 *The International Lawyer* 149.

65 Of particular relevance is article 1(1) which provides that 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.

of their natural wealth and resources in the supreme interest of their national development. Under the African human rights system, this collective right is protected by articles 20-22 of the African Charter on Human and Peoples' Rights (ACHPR).⁶⁶ Therefore, a government that tolerates or actively engages in the corrupt transfer of ownership of national wealth to the benefit of select nationals, who occupy positions of power or influence in the society operates to deny the people, individually and collectively, their right to freely use, exploit and dispose of their natural wealth in a manner that advances their development. A further implication is that corruption violates a people's collective right to development, which has been recognised as an 'inalienable human right of every human being.'⁶⁷The facts and the decision in the SERAC⁶⁸ case are illustrative of how corruption by the Nigerian military government negatively impacted on the rights of the people of Ogoniland to *inter alia*, freely dispose of their wealth and natural resources, and to live in a satisfactory environment favourable to their development.

2.7 International obligations to combat corruption

The global commitment to stem corruption is evidenced by the plethora of corruption-specific instruments at both the international and regional level, not to mention domestic legislation and other mechanisms set up to deal with the vice. Global initiatives to fight corruption include the United Nations Convention against Corruption (UNCAC) and the United Nations Convention against Trans-national Organised Crime.⁶⁹ Efforts at the African regional and sub-regional level include the African Union Convention on Preventing and Combating Corruption, the Southern African Development Community (SADC) Protocol against Corruption,⁷⁰ and the Economic Community of West African States (ECOWAS) Protocol on the Fight against Corruption. Other regional mechanisms include the Inter-American

66 See ACHPR article 20 (right to existence and self determination), article 21(rights of peoples to wealth and natural resources) and article 22(rights of peoples to economic, social and cultural development) respectively.

67 See United Nations General Assembly Declaration on the Right to Development, Adopted as resolution 41/128 of 4 December 1986, available at <<http://www.unhchr.ch/html/menu3/b/71.htm>> (accessed 18 September 2007).

68 *Social and Economic Rights Action Centre(SERAC) and Another v. Nigeria (2001) AHRLR 60(ACHPR 2001)*This complaint concerned the consequences of environmental degradation in *Ogoniland* caused by Shell Corporation in collusion with the Nigerian government.

69 Adopted by General Assembly resolution 55/25 of 15 November 2000. It entered into force on 29 September 2003 full text available at <http://www.unodc.org/unodc/crime_cicp_convention.html> (accessed on 18 October 2007). See also the United Nations Declaration against Corruption and Bribery in the International Commercial Transactions, and the International Code of Conduct for Public Officials.

70 Text of the treaty available at <<http://www.sadc.int/english/documents/legal/protocols/corruption.php>>(accessed on 18 October 2007).

Convention against Corruption⁷¹ and the Council of Europe's Criminal and Civil Law Conventions on Corruption.⁷²

These international instruments seek to set standards in the prevention and criminalization of corruption, as well as facilitate international cooperation in effecting prosecutions and asset recovery. Preventive measures include policies, such as the establishment of anti-corruption bodies,⁷³ enhanced transparency in political party financing,⁷⁴ codes of conduct and asset disclosure schemes for public officials, and⁷⁵ transparency and accountability in public finance.⁷⁶ Specific requirements are established for the prevention of corruption in critical sectors such as the judiciary and public procurement.⁷⁷ The Conventions also call on States to actively promote the involvement of civil society in raising public awareness on corruption.⁷⁸

States parties are required to establish a wide range of acts of corruption as criminal and other offences if such acts are not already considered crimes under domestic law.⁷⁹ In addition to basic forms of corruption such as bribery and the embezzlement of public funds, other acts such as trading in influence and the concealment and laundering of the proceeds of corruption,⁸⁰ as well as those committed in support of corruption, including money-laundering and obstructing justice are criminalized.⁸¹

Due to its trans-national nature, emphasis is made on international cooperation in the prevention, investigation and the prosecution of offenders.⁸² States are obliged to render specific forms of mutual legal assistance in gathering and transferring evidence for use in

71 See (n 28 above).

72 See (n 29 above).

73 See articles 6 & 36 of the UNCAC, article 5(3) of the AU Anti-Corruption Convention and article 20 of the Council of Europe Criminal Law Convention on Corruption.

74 See UNCAC article 7(3) and article 10 of the AU Anti-Corruption Convention.

75 See UNCAC article 8 and article 7 of the AU Anti-Corruption Convention.

76 See UNCAC article 9 and article 5(4) of the AU Anti-Corruption Convention.

77 See UNCAC article 11.

78 See UNCAC article 13 and article 12 of the AU Anti-Corruption Convention.

79 See UNCAC articles 15-25, article 8 of the UN Convention Against Organised Crime and article 5(1) of the AU Anti-Corruption Convention.

80 See UNCAC articles 17 and 18.

81 See UNCAC article 25.

82 See UNCAC articles 43 and 46, article 18 of the UN Convention Against Organised Crime and article 18 of the AU Anti-Corruption Convention.

court in order to extradite offenders. They are also required to undertake measures to support the tracing, freezing, seizure and confiscation of proceeds of corruption.⁸³

2.8 Emerging strategies in combating corruption

A great number of authors have written on the phenomenon of corruption, each proposing their own magic formula for its eradication. Whereas all these efforts are laudable and are encouraged, the anti corruption movement should guard against what Williams refers to as myopia and astigmatism.⁸⁴ 'Myopia' he contends, leads to the 'iceberg complex,' which concentrates only on the small, visible and prominent part of corruption, while ignoring its scope and underlying causes. An astigmatic view of corruption is caused by a lack of coherence in approach particularly between various disciplines. Thus, whereas economists, lawyers, sociologists, administrative experts *et al* have something useful to contribute to the anti corruption movement, they may be pulling in different directions, rendering the fight against corruption nugatory. The point is that controlling corruption requires a multifaceted approach that addresses the numerous causes, components and structural issues that corruption entails. It calls for active participation and long term commitment by a variety of anti-corruption actors such as governments, civil society, media, academics, the private sector and international organisations.⁸⁵

In the same vein, Ringera⁸⁶ notes that to effectively curb corruption, there must be genuine political goodwill from the entire political landscape including the electorate; a strong legislative base that empowers the concerned bodies to investigate and prosecute corruption, and recover the proceeds of crime; a clear, complete, coherent and well coordinated strategy that encompasses effective enforcement of laws, prevention of corruption by eliminating from systems the opportunities for corruption, and educating the public about corruption and its dangers and enlisting their support in fighting the vice; adequate provision of both human and financial resources; involvement of the people as part and parcel of the strategy with an understanding from the outset that they have a personal responsibility to fight corruption themselves, for their own good and for the good of posterity, and finally, a realization that beating corruption takes time and that once corruption has been brought under control, it must be kept from escalating.

83 See UNCAC articles 51-59 and articles 12-13 of the UN Convention Against Organised Crime.

84 See Williams (n 31 above).

85 See Fantaye (n 17 above).

86 See Ringera (n 16 above).

In recognition of the need for a holistic approach to countering corruption, Transparency International developed the concept of the National Integrity System (NIS), which consists of the key institutions, laws and practices that contribute to integrity, transparency and accountability in a society. The main pillars of the NIS as developed by TI include the executive, legislature, political parties, electoral commissions, supreme audit institutions, judiciary, anti-corruption agencies, media, civil society and the private sector. An evaluation based on a diagnosis of the strengths and weaknesses of a particular integrity system can help inform anti-corruption advocacy and reform efforts.⁸⁷

2.9 Conclusion

The discussion in this chapter provided a descriptive analysis of the phenomenon of corruption whilst locating it within the human rights discourse. It concluded by positing that corruption has no single solution but requires broad-based, multifaceted and sustained approach. This lays the foundation for the next chapter that shall focus on an analysis of the anti-corruption initiatives in Kenya.

⁸⁷ For additional information on National Integrity Systems please refer to <http://www.transparency.org/policy_research/nis> (accessed on 12 October 2007).

CHAPTER THREE

3 KENYA'S INTERVENTIONS AGAINST CORRUPTION

3.1 Introduction

This chapter examines the phenomenon of corruption in the Kenyan context: it traces the country's corruption history, zooms in on the legislative, institutional and policy initiatives that Kenya has put in place to manage it, and identifies loopholes that may work against the anti-corruption crusade.

3.2 The state of corruption in Kenya

Corruption has occupied a prominent place in Kenya's political and governance discourse since the 1990s, when development partners suspended aid to the country citing massive corruption.⁸⁸ That the problem of corruption is still a pertinent issue is evidenced by the President's inaugural speech in 2003 when he observed that:

[C]orruption will now cease to be a way of life in Kenya ... there will be no sacred cows under my government. The era of "anything goes" is gone forever. Government will no longer be run on the whims of individuals.⁸⁹

Furthermore, Kenya's report under the African Peer Review Mechanism (APRM) extensively mentions corruption as one of the main impediments to good governance. The Country Self Assessment Report (CSAR) concedes that:

[C]orruption still pervades the Executive, Legislature, Judiciary and military, as well as the Civil Service. The general public perception is that corruption is endemic in Kenya, and that public confidence in government's commitment to fighting corruption has waned.⁹⁰

88 On 30th June 1997, the International Monetary Fund (IMF) suspended its enhanced structural adjustment facility (ESAF) program to Kenya. The IMF cited poor governance and corruption in the public sector as one of the reasons for suspending its lending program. It required the Kenyan government to speed up the prosecution of government officials involved in a major corruption scandal in the country, and to set up an independent anti-corruption agency among other reforms before its lending program could be resumed. See Gathii(n 11 above).

89 President Mwai Kibaki's inaugural speech to the nation on 30 December 2002 available at <<http://www.marsgroupkenya.org/pages/stories/Corruption/index.php>> (accessed on 25 September 2007).

90 See chapter 7 of the APRM Country Review Report of the Republic of Kenya, May 2006, available at <<http://www.aprmkenya.org/downloads/Kenyareport.pdf>> (accessed on 2 October 2007).

The APRM Country Review Mission (CRM) proceeds to identify corruption as one of the overarching issues that warrant urgent and decisive action because of its wider impact on the quality of governance in all areas of activity.⁹¹

Corruption is also cited in Kenya's Poverty Reduction Strategy Paper (PRSP 2003-2007) as the singular factor responsible for poor governance in the country, and a major impediment to Kenya's economic development.⁹² It notes that:

Pervasive corruption has slowed growth and deepened the poverty levels in the country. Eliminating corruption will free significant resources for investment in infrastructure and in programmes that deliver services to the poor.

Kenya's Economic Recovery Strategy for Employment and Wealth Creation (ERSEWC) notes that:

The poor management, excessive discretion in government, appointments of people of dubious characters and political interference and lack of respect for professionalism led to widespread corruption, gross abuse of public office in many government departments and incorrigible tolerance...For these reasons the solution of the current national crisis is to be found in our ability to reclaim professionalism and confidence in public officers, and guaranteeing efficiency.⁹³

The Kenya National Anti-Corruption Plan concedes that:

[C]orruption continues to pose one of the greatest challenges facing Kenya. It continues to undermine good governance and distort public policy, leading to misallocation of resources. It has contributed to slow economic growth as well as discouraged and frustrated both local and foreign investors.⁹⁴

The place of corruption as a matter of grave concern is further evidenced by the Kenya's dismal performance in the various indexes that have been developed to measure governance and corruption. A look at Transparency International's Corruption Perception

91 See Chapter 7.1 of Kenya's APRM report (n.90 above).

92 See Chapter 5, Kenya's Poverty Reduction Strategy Paper: 2003-2007, dated March 2004. Available at <<http://www.imf.org/external/pubs/ft/scr/2005/cr0511.pdf>> (accessed on 2 October 2007).

93 See Chapter 3.1 of Kenya's Economic Recovery Strategy for Employment and Wealth Creation. Available at <<http://www.ke.undp.org/ERS.pdf>> (accessed on 2 October 2007).

94 See Kenya's National Anti Corruption Plan. Available at <<http://www.kacc.go.ke/Docs/Ntional%20Anti-%20Corruption%20Plan.pdf>> (accessed on 25 September 2007).

Index (CPI) reveals that Kenya has set itself apart as one of the countries perceived to have the highest incidence of corruption, scoring an average of 2.05 since 2002.⁹⁵ The 2007 Kenya Bribery Index reveals that Kenyans encounter bribery in 54% of their interactions with both public and private institutions, up from 47% in the previous year.⁹⁶ Although it performs impressively in the 2007 Ibrahim Index of African Governance, having been ranked 15 out of 48 African states with an average score of 59.3%,⁹⁷ closer scrutiny shows that Kenya still labours under the yoke of corruption, scoring 24% on its efforts to curb public sector corruption.⁹⁸

Generally speaking, corruption in Kenya can be divided into three major categories based on the scale of illicit monetary value involved: petty corruption, grand corruption and looting. Petty corruption involves payment of small amounts of money and gifts to junior or mid-level public officials in return for services that do not require payment, or to avoid prosecution of petty crime. The Kenyan police force has notoriety for demands for bribes, having been known to set up roadblocks that also function as 'toll stations'. This form of corruption is the most visible. Grand corruption, involving senior government officials, occurs in Kenya for instance through closed tendering, which shields the award of enormous amounts of taxpayer money to select companies that may not necessarily offer the most attractive bid. Looting entails payments made by the government to individuals or corporations of monies for goods and services that are never delivered. This usually occurs as a result of the heavy concentration of political power in the Presidency and those around the Presidency whose approval usually overrides and, as such, immunizes looting from accountability mechanisms. The most notable example is the infamous Goldenberg scandal.⁹⁹

95 Full text of Corruption Perceptions Indexes from 2001-2007 can be found at

<http://www.transparency.org/policy_research/surveys_indices/cpi> (accessed on 26 September 2007).

96 See Transparency International, Kenya: Kenya Bribery Index 2007, available at <http://www.tikenya.org/documents/KBI_2007.pdf> (accessed 26 September 2007) The survey captures corruption as experienced by ordinary citizens in both public and private organizations. Respondents provide information on their experience with bribery in the last year— in which organizations they encountered bribery, where they paid bribes, how much they paid and what they paid for.

97 See Ibrahim Index of African Governance. Available at <<http://www.moibrahimfoundation.org/index/index2.asp>> (accessed on 26 September 2007) The Index is based on five categories of essential political goods: Safety and security; Rule of Law, Transparency and Corruption; Participation and Human Rights; Sustainable Economic Development; Human Development. Each country is assessed against 58 individual measures, capturing clear, objective outcomes.

98 See Ibrahim Index of African Governance- Rule of Law, Transparency and Corruption, available at <<http://www.moibrahimfoundation.org/index/single.asp?countryid=23>> (accessed 12 October 2007).

99 This involved illegal payments of export compensation of gold and diamonds, amounting to over 4,213,000 U.S. dollars over a period of over two years, to a company that was barely four months old and had no prior experience in the gold and diamond export business.

3.3 A recapitulation of Kenya's anti-corruption initiatives

The roots of corruption in Kenya can be traced to the country's history. It emerged in tandem with the systematic distortion of social cultural values that governed the African way of life. Chweya echoes Simiyu, who observes that that in the pre-colonial epoch, there existed 'laws' and 'Constitutions' in African societies in Kenya and elsewhere in Africa that outlined punishments that befell in particular political leaders for acts that included corruption and abuse of power.¹⁰⁰ The advent of colonialism brought with it a system of governance that was based on and sustained by authoritarianism, injustice, deceit and wanton plunder, thereby providing a perfect environment for the festering of corruption. Chweya further maintains that 'the entire colonial project in Kenya was in itself a single but comprehensive act of corruption' and observes that official colonial records contain numerous entries on corrupt practices perpetrated by European officials, African Chiefs and headmen.

The adoption of the Prevention of Corruption Ordinance in 1956 was a tacit recognition by the colonial administration of the prevalence of the vice at the time. This legislation was inherited and maintained at independence as the Prevention of Corruption Act which was subsequently repealed by the Anti-Corruption and Economic Crimes Act (ACECA) 2003. The attainment of independence came without a fundamental restructure of the colonial state, meaning that the corrupt institutions and practices of the colonial government passed on to the newly independent state.

In 1987, the Prevention of Corruption Act was amended to provide for the establishment of the Kenya Anti-Corruption Authority (KACA), which was subsequently declared unconstitutional by the High Court in 2000 in the case of *Gachiengo V Republic*.¹⁰¹ The Court held that the existence of KACA undermined the powers conferred on both the Attorney General and the Commissioner of Police by the Constitution, and further that the statutory provisions establishing the KACA were inconsistent with the Constitution. That sounded the death knell for KACA and the vigour through which the Prevention of Corruption Act had sought to fight corruption in Kenya.

KACA's demise led to the establishment of the Anti-Corruption Police Unit (ACPU) in 2001 based on a presidential directive. Subsequent efforts to resuscitate the fight against

¹⁰⁰ See Chweya & others(n 14 above).

¹⁰¹ *Gachiengo V Republic*. (2000) 1 EA 52(CAK); *Stephen Mwai Gachiengo and Albert Muthee Kahuria v Republic Kenya Law Reports* (2000) LLR (HCK).

corruption culminated in the enactment of the Anti-Corruption and Economic Crimes Act¹⁰² (ACECA) and the Public Officer Ethics Act (POEA).¹⁰³ The ACECA established the Kenya Anti-Corruption Commission (KACC) and repealed the Prevention of Corruption Act, whereas the POEA essentially provides a code of ethics for individuals in the public service. Upon the creation of the KACC, the ACPU was disbanded and its functions taken over by the newly created anti corruption body.¹⁰⁴

3.4 The present anti–corruption framework

The current phase of the move to curb corruption presents one of the most ambitious and progressive interventions that have been made to tackle corruption in Kenya’s history. Upon ascending to power in 2002, the Kibaki administration embarked on a number of legislative, policy and institutional reforms aimed at improving governance, service delivery and eradicating corruption. On the legislative side, other than the ACECA and POEA, the government enacted other laws including the Privatisation Act¹⁰⁵ to ensure transparent and accountable transfer of public assets; the Public Audit Act¹⁰⁶ setting up the National Audit Commission, the National Audit Office and generally streamlining the audit function of all public organizations; the Government Financial Management Act¹⁰⁷ consolidating, improving and streamlining key government financial processes previously scattered in separate codes, and the Public Procurement and Disposal Act,¹⁰⁸ which aims to make procurement of goods and services by public bodies transparent, accountable and effective. The institutional and policy changes included the formation of KACC and its Advisory board, the National Anti-Corruption Steering Committee, and sector wide reform in the Governance, Justice Law and Order Sector (GJLOS) programme. On the international plane, Kenya acceded to international obligations to fight corruption by signing and ratifying the UNCAC and the AU Anti-Corruption Convention.¹⁰⁹

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

103 Public Officer Ethics Act, No 4 of 2003, Laws of Kenya.

104 This was enacted by section 73 of the ACECA which provides that “The conduct of all ongoing operations of the anti-corruption unit of the Kenya Police Force, including all ongoing investigations, shall, on the commencement of this Act, be transferred to the Commission.”

105 Privatization Act : No. 2 of 2005, Laws of Kenya.

106 Public Audit Act : No. 12 of 2003, Laws of Kenya.

107 Government Financial Management Act : No. 5 of 2004, Laws of Kenya.

108 Public Procurement and Disposal Act. Act No. 3 of 2005, Laws of Kenya.

109 Kenya ratified the UNCAC on 9 December 2003. See <http://www.unodc.org/unodc/crime_signatures_corruption.html> It also signed the AU Anti-Corruption Convention on 17 December 2003 and ratified it on 3 February 2007. See <<http://www.africa-union.org/root/au/Documents/Treaties/Text/Convention%20on%20Combating%20Corruption.pdf>> (all accessed on 12 October 2007).

3.4.1 Legislative Framework

For the purposes of this dissertation, emphasis will be on the POEA and the ACECA, with only minor references to the other pieces of legislation that play a 'supportive role' in the anti-corruption crusade.

3.4.1.1 The Anti-Corruption and Economic Crimes Act

Being the principal anti-corruption legislation, the Act sets out to provide for 'the prevention, investigation and punishment of corruption, economic crimes and related offences.'¹¹⁰ It adopts a descriptive definition of corruption, and casts a wide net on acts constituting the offence of corruption. Under the Act, corruption means any of the offences listed or referred to under section 2(1) (a) to (g). Section 2(1) (a) states that corruption is an offence under section 39 to 44, 46 and 47 of the Act.¹¹¹ Offences listed as corruption under section 2(1) (b) to (g) of the Act include abuse of office, breach of trust, embezzlement or misappropriation of public funds, fraud, bribery and dishonesty in connection with taxation or election to public office.

With reference to economic crime, section 2 of ACECA defines it as: ' (a) an offence under section 45,¹¹² or (b) an offence involving dishonesty under any written law providing for the maintenance or protection of the public revenue.' The Act creates special magistrates courts to try corruption and economic crimes. The Kenya Anti-Corruption Commission is established under section 6 as the principle body charged with leading the fight against corruption in the country. An Advisory Board to the Commission is set up as an unincorporated body drawing membership from different segments of society including professional organisations, religious bodies and the private sector. Its principal function is to advise the Commission on the exercise of its powers and the performance of its functions under the Act. The Commission is empowered to investigate matters that, in its opinion, raise suspicion of conduct constituting corruption or economic crimes.¹¹³ The Commission and its advisory board are accountable only to Parliament. The need for a multifaceted approach to combating corruption finds expression in section 12 which empowers the KACC

110 See Preamble to the ACECA(n 102 above).

111 These provisions relate to bribery of agents, secret inducements for advice, deception of a principal by an agent, conflict of interest, breach of trust, bid rigging, abuse of office and dealing with suspect property respectively.

112 This provision forbids *inter alia* unlawful acquisition of public property, damage to public property, failure to pay taxes, fees or levies payable to any public body, fraudulent payment for sub standard or non existent goods in public procurement.

113 See ACECA section 7.

to cooperate with other government bodies, foreign governments and international organizations.

Upon successful prosecution, persons convicted of corruption or economic crimes are liable to a penalty of a fine not exceeding one million Kenya shillings, or 10 years imprisonment, or both. Furthermore, an additional monetary fine may be imposed if it is determined that the accused person received a quantifiable benefit or that their corrupt actions resulted in a quantifiable loss to a third party.¹¹⁴ A public officer who is charged with corruption shall be suspended with half pay with effect from the date of the charge. Upon conviction, the officer is suspended without pay pending the outcome of any appeals he or she may lodge, and stands dismissed if the conviction is upheld on appeal or if the time period for appealing against the conviction expires without an appeal having been lodged.¹¹⁵ As a deterrent measure, a person convicted of corruption or economic crime is disqualified from holding public office for 10 years after the conviction. The Commission is required to publish at least annually, the names of all persons so disqualified from holding public office.¹¹⁶ An attempt at protection of whistleblowers is made in section 65 which provides that no action or proceedings may be instituted against a person in respect of assistance offered, or any disclosure of information made to the Commission or an investigator in relation to any investigation relating to the commission of an economic crime or corruption. Moreover, no witness is to be compelled to identify or give information that may lead to the identification of a person who assisted or provided information to the Commission or an investigator. The Court is required to ensure the information that identifies or that might lead to the identification of a person who has given information in relation to any issue of corruption or economic crime is concealed. However, the court may suspend such protection of identity 'to ensure justice is fully done'.¹¹⁷

A defence that an act that amounts to corruption is customary practice in any business or profession is rendered unacceptable to the court.¹¹⁸ The Act shifts the onus of proving a lack of a corrupt intent on the accused by raising a presumption of corruption on any individual charged with corruption or economic crime and who is proved to have committed an act that

114 See ACECA section 48.

115 See ACECA sections 62 and 63.

116 See ACECA section 64.

117 See ACECA section 65 (5).

118 See ACECA section 49.

would constitute corruption.¹¹⁹ Any conduct by a Kenyan that takes place outside Kenya constitutes an offence if the conduct constitutes an offence under the Act if it took place in Kenya.¹²⁰

Notwithstanding its impressive provisions, the Act presents a number of flaws that could hamstring its effectiveness as an anti-corruption legislation. To begin with, the definition of 'public body' under ACECA does not include cooperative societies, which have been known to be havens of corruption and embezzlement. It is noted that section 2(1) of POEA designates an officer, employee or member of a cooperative society as a public officer. Accordingly, the placing of cooperative societies within the purview of ACECA would align it with the provisions of POEA and avoid any potential legal bottlenecks.

The Anti-Corruption and Economic Crimes Act provides in section 33(1) that no person shall disclose details of an investigation under the Act, including the identity of anyone being investigated, without the consent of the Director of KACC. Any unauthorized disclosure constitutes an offence. In addition, section 65 (1) of the ACECA protects informers but does not penalize the breach of this section, hence the need for amendment to punish intimidation or harassment of informers. KACC is unable to arrest and prosecute those who intimidate whistle-blowers. The net effect of this provision is to deprive whistle blowers of any protection even if their actions lead to successful discovery and prosecution of corrupt incidents. Without adequate legal protection, citizens will be very reluctant to give pertinent information related to corruption. The attempt to shroud investigation and prosecution of acts of corruption in secrecy undermines the anti-corruption campaign. A system of shaming and naming perpetrators of corruption, designed within the ambit of the defamation laws, is a central component in the attempt to detect and fight corruption. This secrecy generally fuels suspicion of intended selective investigation and prosecution of corruption by government agencies.

3.4.1.2 The Public Officer Ethics Act

The main object of this legislation is to "[a]dvance the ethics of public officers by providing for a Code of Conduct and Ethics and requiring financial declarations from certain public

119 See ACECA section 58.

120 See ACECA section 67.

officers.”¹²¹ It is thus intended to inculcate a culture of honesty, hard work and rejection of corruption in the public service.

According to the Act, the term “public officer” refers to any officer, employee or member, including an unpaid, part-time or temporary officer, employee or member, of any government department, national assembly, local authority, cooperative society, public university or any other body that exercises a public function pursuant to any written law.¹²² The Act designates eight responsible commissions for various categories of public officers, charged with ensuring compliance with and adherence to its provisions.¹²³ Each of these commissions is required to establish a specific code of conduct and ethics for the public officers under its authority, which must include all the requirements in the general Code of Conduct and Ethics provided for in the Act.¹²⁴ The code promotes values such as professionalism, integrity and respect for the rule of law, and explicitly forbids improper enrichment, conflict of interest, trading in influence, nepotism and sexual harassment.¹²⁵

A notable feature of the Act is the provision for the mandatory declaration of income, assets and liabilities by public officers. Section 26 requires all public officers to submit to their respective responsible commissions, declarations of income, assets and liabilities within 30 days of appointment as such, annually for the duration of their appointment, and within 30 days of ceasing to function as public officers. This extends to the officers’ spouses and dependant children. A public officer making such a declaration is obliged to ensure the declared information is correct to the best of their knowledge.¹²⁶ Once collected, the declarations of wealth remain confidential and may only be disclosed to authorized commission staff, the police or other law enforcement agency, the author of the declaration, or to any other person authorized by an order of the High Court.¹²⁷ However, the Act does not set the terms under which such an order would be granted or denied or grounds for such an application. Failure to submit declarations or the submission of false information attracts

121 See preamble to POEA.

122 See POEA section 2.

123 Section 3 of POEA provides a mechanism for determining which body is the responsible commission for a public officer and further provides in 3(10) that the responsible commission for a public officer for which no responsible commission is otherwise specified is the commission, committee or body prescribed by regulation.

124 See POEA section 5(2).

125 See generally POEA sections 7 to 25.

126 See POEA section 29.

127 See POEA section 30.

a fine not exceeding one million shillings or imprisonment for one year or both.¹²⁸ The wealth declaration exercise has been conducted for the last two years. Officers who did not comply faced among other sanctions, removal from the payroll.¹²⁹ The various responsible commissions are empowered to enforce the general code of conduct including through investigations and taking disciplinary action against errant officers.¹³⁰

One glaring flaw in the Public Officer Ethics Act is the provision that each commission keeps all asset declarations confidential. It is clear that allowing public access to officials' declarations greatly enhances the value of an asset-declaration scheme by facilitating public scrutiny of government and government officials, backing up enforcement of the declaration requirements, and promoting public confidence in the declaration system and the government. The most touted disadvantage of a public disclosure requirement is that it can compromise government employees' privacy and personal security. It is submitted that the government may adopt a hybrid scheme that minimizes the dangers disclosure may present. It could also incorporate provisions that demand public disclosure only where it is likely that the public interest in exposure outweighs the personal interest in privacy.

The POEA also fails to precisely state what information public officers must declare. This allows corrupt officers too much room to avoid declaration requirements. There is need to establish clearer guidelines that spell out what income, assets, and liabilities that must be declared. This should include all considerable income, assets, and liabilities, whether within or outside Kenya, including vested beneficial interests in trusts, high-value personal property, gifts and use of vehicles or property.¹³¹ The disclosure scheme could also go further and require public officers to declare directorships in companies and other significant external positions, affiliations, and agreements.

Furthermore, the POEA does not establish any mechanisms for review of declarations and does not require responsible commissions to include review mechanisms in their administrative procedures. Procedures for review and verification of asset declarations are critical to a disclosure scheme particularly when officials' asset disclosures are not open to

128 See POEA section 32.

129 See Karua, (EGH, MP, Minister for Justice and Constitutional Affairs, Kenya) Paper presented at The Global Forum on Fighting Corruption and Safeguarding Integrity on 2-5 April 2007 at the Sandton Convention Centre, Johannesburg, South Africa. Available at <http://www.nacf.org.za/global_forum5/presentations1/020_Karua.doc > (accessed on 2 October 2007).

130 See generally POEA sections 35-38.

131 For a general commentary on the POEA see Luh (n 15 above).

public scrutiny. Also, it is not clear whether the various responsible commissions have the capacity, resources, or independence needed for effective administration of asset-disclosure systems. Commissions should establish internal procedures for reviewing asset declarations. They should follow clear procedures that limit individual discretion to prevent inconsistent enforcement and abuse of the disclosure system for personal or political reasons.

3.4.2 Institutional and policy framework

The adoption of corruption-specific legislation saw the creation of an independent anti – corruption agency and the strengthening of other existing mechanisms in the fight against graft. These shall be considered below.

3.4.2.1 The Kenya Anti-Corruption Commission

The establishment of KACC as the principal anti corruption agency in May 2003 marked a high point in a long, convoluted road of the anti-corruption crusade that began in 1997 with the creation of KACA. The ACECA establishes the KACC as a body corporate empowered to investigate any matter that, in its opinion, raises suspicion that any conduct constituting or liable to allow or encourage corruption or economic crime is about to occur.

It also assumes an advisory, educative and restitutionary function. As an advisory body, the Commission may at the request of any person or body, offer advice and other assistance on ways of eliminating corrupt practices. The Commission bears the mandate of educating the public on the dangers of corruption and economic crimes and to enlist their support in combating corruption in the country. With reference to restitution, the Commission has powers to investigate the extent of liability for the loss or damage to any public property, and institute civil proceedings against any person for the recovery of such property or for compensation. The Commission may also apply to the Court for a preservation order, prohibiting the transfer, sale, disposal or any dealing with property acquired through corrupt means.¹³² The first schedule to the Act lays down an elaborate process of appointment and removal of the officials of the Commission, which is meant to shield the process of fighting corruption from actions of the Executive which may at times be dictated by the exigencies of political expediency. It is also designed to protect the holders of the offices from removal on

¹³² See ACECA section 55.

flimsy grounds, totally unrelated to their competence or performance of their duties in investigating corruption.

To effectively deliver its mandate, the Commission is organized into four directorates: the Directorates of Investigation and Assets Tracing;¹³³ Legal Services and Asset Recovery;¹³⁴ Research, Education, Policy and Preventive Services;¹³⁵ and the Directorate of Finance and Administration.¹³⁶ In this regard, the Commission's prevention and education programmes include conducting seminars and meetings on corruption, creation and distribution of information and education materials, and sending out anti-corruption messages through radio programmes.¹³⁷ It has also conducted an examination of systems, policies, procedures and practices of institutions such as the Department of Immigration and various local authorities.¹³⁸ The Commission has also partnered with religious bodies, government

133 This Directorate is responsible for receiving and investigating corruption reports, recommending cases for prosecution, arresting and arraigning suspects in court and liaising with the Attorney General's office to ensure effective prosecution of corruption or economic crimes. It has four departments, namely: Report and Data Centre, Forensic Investigations, Special Operations and Intelligence Production.

134 The Directorate coordinates the preparation of all statutory reports on behalf of the Commission, audits completed investigation files and forwards the reports to the Attorney General, and also undertakes litigation on behalf of the Commission. It is also responsible for investigating the extent of liability for the loss or damage to any public property and instituting civil proceedings against any person for the recovery of such property or compensation. The Directorate of Legal Services is divided into three Departments, namely, Civil Litigation, Crime Reading and Research & Documentation.

135 The Directorate's function is aimed at preventing corruption in the short, medium and long term. Its preventive strategy entails identifying weaknesses, loopholes, avenues and opportunities for corruption in public and private bodies and making recommendations on how to seal them. Its education programme seeks to create public awareness on the causes and dangers of corruption and economic crime and solicits public support in the prevention of corruption. The Directorate also partners with local, regional and international organizations in the development and implementation of collective strategies in the fight against corruption. The Directorate has three departments, namely the education department, the Partnerships, Coalitions and Interventions (Prevention) Department and the Research and Policy Department.

136 The Directorate of Finance and Administration is responsible for internal housekeeping matters and as a liaison between the Commission and other stakeholders.

137 Information from the KACC website indicates that it broadcasts 15-minute anti-corruption messages in 3 radio stations (KISSFM, Classic FM and KBC English Service). It is observed that there is need to increase the coverage of the programmes and their frequency. Moreover, there is need to also broadcast in vernacular radio stations that have sprung up and gained popularity particularly in the rural areas. See <<http://www.kacc.go.ke/default.asp?pageid=80§ion=repps>> (accessed on 12 October 2007).

138 KACC has conducted systems examination for the Nairobi City Council, Municipal Council of Mombasa, Department of Immigration, practices in the registration and licensing of motor vehicles, and the enforcement of traffic laws. See <<http://www.kacc.go.ke/default.asp?pageid=86>> (accessed on 12 October 2007).

agencies¹³⁹ and national anti-corruption agencies in Botswana, Namibia, Uganda and Tanzania.¹⁴⁰

As at June 2007, the Commission had since its inception received and processed a total of 19,310 complaints of suspected corruption and economic crimes from which a total of 3145 cases were taken up for full investigation leading to various recommendations made to the Attorney General, such as prosecution of suspects, administrative action against suspects and closure of investigation files for want of evidence. The Commission notes that a large part of the complaints it receives [80%] are outside its mandate. This has been addressed through the recent establishment of the office of Ombudsman. As at 31 August 2007, 332 complete investigation files have been forwarded to the Attorney General. By June 2007, 231 of these files [75%] recommended prosecution of suspects of which, 107 cases have been finalized through the judicial process, with a conviction rate of 30% [32 convictions].¹⁴¹

To encourage anonymous reporting of corrupt activities, the Commission has rolled out an internet based whistle blowing system that protects the identity of whistle blowers. This electronic reporting system is a break from the traditional methods of email, fax, mobile phone short message service, telephone calls and letters to KACC. This system of corruption reporting, known as Business Keeper Monitor System (BKMS) is currently accessible in the KACC website¹⁴²

On the down side, lack of prosecutorial powers by KACC has hampered the struggle against graft. Undoubtedly, however KACC is vested with immense powers to fight all aspects of corruption in Kenya which if well exercised, would realise a considerable improvement in the fight against corruption in Kenya.

139 The Commission has partnered with the Kenya Institute of Administration, the Institute of Education, Administration Police Training College, the Ministry of Education and the Kenya National Examinations Council. It also works in concert with the Supreme Council of Muslims in Kenya (SUPKEM) and the Kenya Episcopal Conference. See < <http://www.kacc.go.ke/repps.asp?article=8>> (accessed 12 October 2007).

140 KACC has been working jointly with Botswana's DCEC and Namibia's NACC. It has also signed a joint declaration with the Uganda's Inspectorate of Government and Tanzania's Bureau on Prevention and Combating Corruption envisaging the creation of an East African Anti-Corruption Association and calling for the conclusion of a Protocol on corruption under the East African Community. See <http://www.kacc.go.ke/archives/pressreleases/EAST_AFRICAN_ANTI-CORRUPTION_ASSOCIATION.pdf> (accessed 12 October 2007).

141 See Kenya Anti-Corruption Commission: Press statement on the performance of the Kenya Anti-Corruption Commission dated 18 September 2007. Available at <<http://www.kacc.go.ke/archives/pressreleases/performance-statement.pdf>> (accessed on 12 October 2007).

142 See generally < <http://www.kacc.go.ke>>.

3.4.2.2 Other anti-corruption interventions

A number of anti-corruption interventions have also been undertaken to complement the work of the anti-corruption commission. Firstly, the National Anti Corruption Campaign Steering Committee (NACCSC)¹⁴³ comprising representatives from the government, religious organisations, media, civil society, universities, women's organisations and the private sector is chiefly mandated to establish a broad based framework for a nationwide campaign against corruption that will in the long run effect fundamental changes in the attitudes of Kenyans, creating a strong anti-corruption culture.¹⁴⁴ To this end, it works in close concert with other anti-corruption and law reform bodies such as the KACC and GJLOS.

The Efficiency Monitoring Unit in the Office of the President is tasked to *inter alia*, review the existing management systems and practices in public organizations with a view to improving their effectiveness and efficiency. The unit has been keenly involved on the evaluation of the public officers' wealth declaration exercise.¹⁴⁵

The Anti-Corruption, Serious Fraud and Asset Forfeiture Unit has been set up under the State Law Office as a specialized prosecution unit to deal with corruption, serious crime, fraud and asset forfeiture.¹⁴⁶

Special Anti-Corruption Courts have been established under the Anti-Corruption and Economic Crimes Act 2003 to try cases of corruption and economic crimes.

Launched in November 2003, the Governance, Justice, Law and Order Sector Programme (GJLOS), is an ambitious governance reform programme that adopts a sector-wide approach to dealing with problems affecting the justice, law and order sector institutions. It principally seeks to create corruption-free institutions that can render effective and efficient services to the public. One of its key thematic areas deals with ethics, integrity and anti-corruption. The programme covers four key ministries and up to 32 government departments

143 The National Anti-corruption Campaign Steering Committee (NACCSC) was formally appointed through a Gazette Notice No 4124 of 28May 2004.

144 See <<http://www.naccsc.go.ke/>> (accessed 2 October 2007).

145 For more on the mandate of the Efficiency Monitoring Unit please refer to <http://www.cabinetoffice.go.ke/index.php?option=com_content&task=view&id=22&Itemid=24> (accessed on 2 October 2007).

146 See World Bank 'Reforms in Governance in Kenya :Establishing / strengthening anti-corruption institutions, creating the enabling policy/legal environment and enhancing the rule of law. available at <http://siteresources.worldbank.org/INTKENYA/Resources/governance_brief.pdf> (accessed 3 October 2007).

and agencies. It has representation from the civil society and the private sector which is represented by the Kenya Private Sector Alliance.¹⁴⁷

Other notable efforts to stem corruption can be found in:

- The reforms in the Police force to increase efficiency and integrity. The Kenya Police has been singled out as one of the most corrupt public institutions in the country. The ongoing police reforms are targeted at among other things addressing the question of corruption within the police;
- The re-launch of the Public Service Integrity Programme in 2003. Through the programme, public institutions are trained on how to create an internal culture of integrity through the assistance of Integrity Assurance Officers and Corruption Prevention Committees;
- Codes of Conduct for Cabinet Ministers calling for ethics, integrity and collective responsibility of all Cabinet ministers;
- The establishment of an Ethics and Integrity Committee to look into the extent of corruption in the Judiciary. This led to a historic, far reaching “*radical surgery*” of the Judiciary, in which, 6 out of 11 judges of the Court of Appeal, 17 out of 36 High Court judges and 82 out of 252 magistrates were suspended on allegations of corruption.
- The Parliamentary Public Accounts and Public Investment Committees are oversight bodies that call on government to account from time to time particularly on its anti-corruption efforts.

3.5 Factors militating against the war on corruption

Despite the proliferation of all these institutions, policies and sustained government rhetoric that the war against corruption is being won, there is a creeping feeling that in as much as some things have changed, much has also remained the same. This is concretized by the revelations of the President’s former anti-corruption advisor that indicate embedded corruption networks have captured elements in government, and spawned a new wave of grand corruption on a scale hitherto unimaginable.¹⁴⁸

147 See < <http://www.gjlos.go.ke/default.asp> > (accessed on 2 October 2007).

148 See Githongo, J: Former Presidential Advisor on Governance and Ethics, Kenya. Statement of events related to assorted corruption related matters. Available at <http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/09_02_06_kenya_report.pdf> (accessed on 2 October 2007).

The institutionalisation of corruption through the 'eating' culture, where politicians seek political office, and public officers seek public office with the specific motive of looting public resources, is a major hurdle. The extent of this is found in the Country Review Mission APRM Report which observes that '[d]ecades of endemic corruption has fundamentally perverted cultural values, with looters being admired as "tycoons" and honest public servants derided as failures.'¹⁴⁹A study of corruption perceptions in Kenya concluded that:

[c]orruption in the country is not simply bad, but dangerous because it is imbued with a certain impunity, which makes it appear harmless. As a consequence, high ranking officials charged with corruption related offences often appear smiling in public conveying the message that the offences they are charged with are not serious or that they do not take them seriously.¹⁵⁰

Furthermore, the corrupt elements that accumulated huge amounts of wealth in the past are now using this to fight back. Having resigned and sought asylum in the UK for fear of his safety, Kenya's former Permanent Secretary for Ethics and Governance pointed to the emergence in Kenya of:

embedded corruption networks that bring together politicians, businessmen-brokers, bureaucrats and security sector officials.....thrive in the shadows as cohesive albeit amorphous entities reshaping the economic destiny of African nations, as a result of the size and scale of their illicit transactions; transactions that can entrap entire sections of the political elite.¹⁵¹

In addition, significant loopholes in the legislative framework, coupled with an over-explosion of institutions with overlapping mandates, may contribute to an untidy and counter-productive legal environment in controlling corruption.

149 See Paragraph 7.12 of Kenya's APRM Report (n 90 above).

150 See Transparency International National Integrity Systems Country Study Report, Kenya 2003. Available at <http://www.transparency.org/policy_research/nis/regional/africa_middle_east> (accessed 12 October 2007).

151 See The East African Standard, 'Githongo speaks,' Published on 15 April 2005. Available at <<http://www.eastandard.net/archives/?mnu=details&id=18043&catid=4>> (accessed on 15 October 2007).

Most significantly, while there initially seemed to be a measure genuine political will, the campaign appears to have lost ground to the exigencies of political survival of the central faction around the president and the reassertion of the influence of corrupt cartels.¹⁵²

3.6 Conclusion

What clearly emerges from the foregoing discussion is that the problem is not the lack of laws or institutions, but their effectiveness and impact. This leads us to the next chapter that looks at the experience of Botswana in curbing corruption, and attempts to draw lessons in terms of sustainable and largely successful anti corruption strategies.

¹⁵² See Otieno, G 'The NARC's anti-corruption drive in Kenya: somewhere over the rainbow?' (2005)14(4) *African Security Review* 71 available at <http://www.iss.co.za/dynamic/administration/filemanager/file_links/ASR14EOTIENO.PDF?link id=23&slink id=1151&link type=12&slink type=23&tmpl id=3> (accessed 12 October 2007).

CHAPTER FOUR

4 BOTSWANA'S ANTI-CORRUPTION FRAMEWORK

4.1 Introduction

This chapter shall briefly outline the history of Botswana's anti-corruption efforts, before delving into the principal laws and institutions dedicated to the control of corruption. It shall subsequently proceed to measure them up against similar mechanisms set up in Kenya, and finally conclude by outlining the major points of convergence and divergence between the Kenyan and Botswana approaches to fighting corruption.

4.2 The history of corruption in Botswana

The rapid pace of Botswana's development since gaining independence in 1966 and rising from one of the twenty-five poorest countries in the world to becoming an upper-middle income economy in 1998, with a per capita GDP of 11,200 US\$ in 2006,¹⁵³ has entailed both the acquisition of considerable revenues and a rapid expansion of the public service, thereby presenting numerous opportunities for corruption.¹⁵⁴ Nonetheless, Botswana has consistently posted high scores in governance and integrity of its public institutions. With a score of 5.4 in the 2007 CP index, Botswana is a country perceived to be the least corrupt in Africa, ranking well above some European countries such as Italy or Greece.¹⁵⁵

The corruption nightmare hit Botswana in the late 1980s and early 1990s with several major corruption scandals involving senior government officials and prominent personalities.¹⁵⁶ It became increasingly obvious that corruption might become a major obstacle to the continued growth and prosperity of the Botswana economy. In response to this, three presidential commissions of enquiry were constituted to investigate the scandals that shattered Botswana's reputation as a relatively corruption free environment:

153 See < <https://www.cia.gov/library/publications/the-world-factbook/print/bc.html>> (accessed on 12 October 2007).

154 See Transparency International 'Avoiding the Resource Curse: What Can We Learn from the Case of Botswana?' available at <http://www.fes.de/fes4/publikationen/tare_161105/Eigen.pdf> (accessed on 10 October 2007).

155 With a score of 5.4 out of a possible 10, Botswana is ranked 38 out of 179 states. Italy scores 5.2 and is placed 41st, whereas Greece scores 4.6 and is ranked 56th. For additional information please refer to <http://www.transparency.org/policy_research/surveys_indices/cpi/2007> (accessed on 14 October 2007).

156 These included illegal land sales in peri-urban public land, the building of high cost houses for sale for which there were no prospective demands, and large unpaid loans by high-ranking persons from the National Development Bank that practically led to the ruination of the latter. These and a number of others were revealed through the activities of the independent media, which in most cases led to official inquiries. See Olowu B 'Combating Corruption and Economic Crime in Africa: an Evaluation of the Botswana Directorate of Corruption and Economic Crime' (1999) *International Journal of Public Sector Management*, 12 No. 7 604-614.

- The 1991 enquiry into the supply of teaching materials for primary schools which concluded that a tender worth 27,000,000 Pula was awarded fraudulently and its management was full of gross errors intended to defraud public funds;
- The 1991 enquiry into the allocation of land near Gaborone which found that officers involved in the allocation were coerced by high-ranking politicians and government officials into making corrupt and fraudulent land deals; and,
- The 1992 enquiry into the Botswana Housing Corporation (BHC) which revealed collusive tendering practices leading to the fraudulent award of tenders and conflicts of interest, where BHC Board Members received loans from construction companies.¹⁵⁷

These scandals created the rationale for a permanent agency with wide powers to tackle corruption and economic crimes. It is against this background that the Corruption and Economic Crimes Act (CECA) of 1994 was enacted to counter what was described as a 'serious matter' which required 'extraordinary measures'.¹⁵⁸

4.3 Botswana's anti-corruption mechanisms

Botswana's response to corruption chiefly revolves around the 1994 Corruption and Economic Crimes Act which also establishes the Directorate on Corruption and Economic Crimes (DCEC). It is nonetheless disappointing that Botswana has, on the international platform, failed to sign the UNCAC and the AU Anti-Corruption Convention, which offer an opportunity for states to align their anti-corruption strategies to the highest international standards and install the necessary mechanisms that would permit and facilitate mutual assistance and collaboration in the fight against corruption. It has however acceded to the SADC Protocol Against Corruption.

4.3.1 Legislative framework

The main anti-corruption statute in Botswana is the Corruption and Economic Crime Act (CECA).¹⁵⁹ Other related legislative provisions include the Botswana Penal Code,¹⁶⁰ the

157 For more information see Ebdy, J 'Overview of the Directorate on Corruption and Economic Crime in Botswana- The Botswana Experience' available at <<http://www.ipocafrika.org/database.php>> (accessed on 10 October 2007).

158 See comments of the then Vice –President , Festus Mogae quoted in C.M Fombad (n 9 above).

159 Corruption and Economic Crimes Act, No. 13 of 1994.

160 Of particular relevance are sections 98–101. For instance, section 99 proscribes the corruption of, and by a public officer in a manner similar to that of section 24 of the CECA.

Proceeds of Serious Crime Act¹⁶¹ and the Mutual Legal Assistance in Criminal Matters Act.¹⁶² With reference to public officials, the Public Service Act¹⁶³ lays out a comprehensive legislative framework on public service employment. Its key provisions relate to appointments, termination and retirements from the public service, duties of public officers, and penalties for misconduct or unsatisfactory service. The Act however fails to provide for mandatory declaration of assets. For the purposes of this dissertation, focus will be on the CECA.

4.3.1.1 The Corruption and Economic Crimes Act

This legislation seeks to provide for ‘the establishment of a Directorate on Corruption and Economic Crime, to make comprehensive provision for the prevention of corruption, and, confer power on the Directorate to investigate suspected cases of corruption and economic crime.¹⁶⁴ The Directorate is established as a public office appointed by the president ‘on such terms as he think fit’.¹⁶⁵ The Act deals with both the supply and demand elements of corruption by proscribing corruption by, or of a public officer.¹⁶⁶ It adopts the concept of ‘valuable consideration’ as a commodity exchanged for corrupt activity, and defines the concept in wide, all encompassing terms. Thus, valuable consideration means tangible and intangible assets, such as money or interest in property, ‘any office, employment or contract and any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part’ and the extension of favours.¹⁶⁷

Sections 26 and 27 are intended to pre-empt post-action reward circumstances, in which bribery may be disguised as a ‘tip’. Thus the acceptance of a bribe after doing an act raises a presumption that the person concerned was guilty of corruption before doing the act in question. The Act further proscribes corruption by agents, bribery in contracting and conflict

161 Act No.19 of 1990. This Act sets out to deprive persons convicted of serious crimes of the benefits or rewards gained from such crimes, and to deal with the problems of money laundering, and incidental matters. It defines a "serious offence" as an offence the maximum penalty for which is death, or imprisonment for not less than two years. Any person convicted of Corruption or economic crime is thus amenable to this Act by virtue of section 36 of CECA.

162 Act No. 20 of 1990. It works in tandem with the Proceeds of Serious Crime Act to facilitate international cooperation and assistance in the tracking and freezing of ill gotten wealth, including wealth acquired through corruption.

163 Act No. 13 of 1998.

164 See the Preamble to the CECA.

165 See CECA section 3.

166 See CECA section 24.

167 See CECA section 23.

of interest.¹⁶⁸ Section 33 provides that a person is guilty of the offence of cheating public revenue if as a result of cheating of his fraudulent conduct money is diverted from the revenue and thereby depriving the revenue of money to which it is entitled. Section 34 contains an 'unexplained assets' provision, which deems the failure to explain assets not commensurate with present or past known sources of income, proof of corruption. The provision applies to any person, within and outside the public sector, and entitles the Directorate to investigate such a person, if reasonably suspected of living beyond his/her known means, or possessing assets out of proportion to known sources of income. Any person who is guilty of corruption or cheating the revenue is liable upon conviction, to imprisonment for a term not exceeding 10 years or to a fine not exceeding P500.000, or to both.¹⁶⁹

Informers are offered protection under section 45 which obliges a witness not to disclose the name or address of any informer, or state any matter which might lead to his discovery. Furthermore the court is also bound by the Act to conceal or obliterate the names or identities of any informers from any court documents in so far as it is necessary to protect them.

4.3.2 Institutional Framework: the Directorate on Corruption and Economic Crime

Established by the Corruption and Economic Crime Act, The Directorate on Corruption and Economic Crime (DCEC) is a public office, headed by the presidential appointed Director, on such terms and conditions as he thinks fit. The Director is assisted by one deputy¹⁷⁰ and five Assistant Directors.

The DCEC is structured into three main operational branches dealing with corruption prevention, public education, and investigations. The corruption prevention and public education divisions are each headed by an assistant director, whereas the investigations division has three assistant directors-one each for prosecutions, investigations and intelligence & technical support. The investigations division also has a number of sub-units, including the prosecution unit, the report centre/intelligence unit and the anti-money

¹⁶⁸ Please refer to section 28-31 of the CECA.

¹⁶⁹ See CECA section 36.

¹⁷⁰ See Goredema, C 'Legislating Against Corruption in the Southern African Development Community' in U Zvekic 'Corruption & Anti-Corruption in Southern Africa: Analysis based on the results of the Regional Seminar on Anti-Corruption Investigating Strategies with particular regard to Drug Control for the SADC Member States' (2002) available at <http://www.unodc.org/pdf/southafrica/southafrica_corruption.pdf>-(accessed 29 July 2007).

laundering unit. The Directorate also has an administrative outfit responsible for general office management.¹⁷¹

The Act vests the Director with wide police powers including the power to arrest with or without warrant, search and seizure and powers to also require the production of documents, records and other necessary information in connection with an inquiry or investigation which the Director is empowered to conduct under the Act. Any person who fails to produce any such material required by the Director or wilfully provides false information or statement or misleads any officer commits an offence and is liable to a fine of 10,000 Pula.¹⁷² The DCEC does not have the responsibility for prosecution; this being constitutionally vested in the Office of the Attorney General,¹⁷³ whose consent to prosecute is an essential prerequisite to each new corruption case brought before the courts.

The KACC's programmes discussed in chapter 3 significantly mirror those of the DCEC as they operate under a similar legal framework. The most notable corruption prevention activities of the DCEC over and above conducting diagnostic studies for various organizations and government departments, has been its public education programme, in which it conducts phone-in talk shows on both radio and television, information dissemination through posters, pamphlets, newspaper advertisements, press-releases and talks and presentations to various groups. The prosecutions division has also posted impressive results with a reported conviction rate of 80% compared to KACC's 30%.¹⁷⁴

4.4 Matching up the two systems: Lessons for Kenya?

From a historical perspective, it is apparent that the two countries have had different experiences with corruption: Kenya on the one hand having laboured under the yoke of endemic corruption for decades, while Botswana on the other hand, having invested in good governance and integrity right from independence, with corruption becoming a major issue only in the 1990s. Moreover, Botswana's response to corruption was immediate, decisive

171 For a detailed examination of the DCEC's structure see Mathare (n10 above).

172 See generally CECA sections 7-11.

173 See section 51(3) of the Constitution of Botswana.

174 See Olowu (n 156 above).

and home-grown, unlike in Kenya where the move to stem corruption comes out as window dressing in order to meet donor conditionalities for the resumption of aid.¹⁷⁵

With regard to legislation, both countries have similar anti corruption laws although Kenya emerges as having a stronger legal framework with the ACECA, POEA and its international commitments under UNCAC and the AU Anti-Corruption Convention. To begin with, the CECA contains provisions that are analogous to Kenya's ACECA. For instance provisions on the protection of informers, the adoption of a 3 pronged approach to corruption (prevention, education and prosecution), the proscription of acts such as bribery, conflict of interest, bid rigging and provisions on unexplained assets, and the creation of an anti corruption body. It goes beyond the ACECA in some respects, most notable being the far reaching police powers granted to the Directorate and the criminalization of post-action reward situations. On the other hand, Kenya's ACECA creates higher standards in some instances, most prominently the legal status of the KACC as a body corporate answerable only to Parliament. A downside of the structure of Botswana's DCEC is its close association with the office of the President in terms of appointments and reporting which exposes it to potential manipulation by the Executive in addition to casting doubt on its autonomy. Provisions should be made to boost its independence including its reporting structure. Furthermore, there should be provision for security of tenure for the Director so that he/she cannot be removed through the normal public service regulations. Moreover, though the Public Service Act addresses issues that pertain to public officials, it remains silent on asset declarations.

On the whole, whereas the principal anti corruption legislation of the two jurisdictions mirror each other to a considerable extent, that is where the similarity ends. As noted earlier, despite an abundance of laws and institutions set up to curb corruption, Kenya has consistently maintained its place among the countries perceived as most corrupt, while Botswana continues to distinguish itself as an island of integrity. This leads us to the question that inspired this dissertation: what has enabled Botswana to succeed where so many other African nations have failed?

Fingers have been pointed to the country's relative linguistic homogeneity, its plentiful diamond reserves or its political culture that is inextricably linked with positive Christian

¹⁷⁵ See Otieno (n 153 above).

values carried over from teachings of the London Missionary Society.¹⁷⁶ However, this contention fails to hold water in the face of realities such as Somalia, which remains unstable despite ethnic and linguistic uniformity, DRC, Gabon and Nigeria which labour under the 'resource curse', and states such as Kenya, which are fraught with corruption despite their relatively Christian background.

The one plausible explanation for Botswana's exceptional performance is the early establishment of strong governance structures that pre-dated the discovery of diamonds. Selolwane comments that Botswana was able to avoid some of the pitfalls that led to failed nation-building in many parts of Africa because it was an extremely poor nation, whose elites recognized from the onset that they could only swim or sink together: there was no wealth to scramble over, but potential wealth to build.¹⁷⁷ A further explanation for such a positive image and relatively positive results can also be gleaned from the country's National Integrity System (NIS). A concept developed by Transparency International, the National Integrity System refers to the sum total of the laws, institutions and practices in a country that maintain accountability and integrity of public, private and civil society organisations.¹⁷⁸ These include the legislature, executive, judiciary, independent anti-corruption agencies, media and the private sector.

On reviewing Botswana's NIS,¹⁷⁹ Transparency International identified several elements that have contributed to the development of the country's relatively strong good governance. To begin with, the study observed that Botswana fully embraces democracy with a constitution that recognises separation of powers between the executive, the legislature and the judiciary, and a responsive and accountable government that promotes the rule of law. Furthermore, while on the one hand the Constitution guarantees the independence of the judiciary, the judiciary itself also exhibits independence in practice, never shirking its responsibility in reviewing executive actions in instances of suspected abuse of power. Moreover, Botswana has a media that is active and free to operate without intimidation. For that reason, the media has been instrumental in exposing and fighting corruption and abuse

176 Rotberg, R I 'Strengthening African Leadership There is another way' (2004)83 *Foreign Affairs* 14.

177 Selolwane, O D 'The Challenges of Consolidating Good Governance and Plural Politics' available at <<http://www.ossrea.net/rw/goodgover-02.htm#TopOfPage>>(accessed on 20 October 2007).

178 This holistic, systematic approach to anti-corruption is central to both the TI Source Book and the TI Anti-Corruption Handbook. See Transparency International's website for more information: <<http://www.transparency.org>>.

179 The full text of Botswana's National Integrity System study report may be downloaded from <http://www.transparency.org/policy_research/nis/regional/africa_middle_east> (accessed on 12 October 2007).

in government, and has thus helped reduce impunity and secrecy. In a nutshell, the right political and legal environment exists to fight corruption, as there is transparency at various levels of government. A good mixture of efficient public institutions combined with democratic principles and a free and active civil society have helped to protect the country from the greed and mismanagement that has beleaguered many African nations.

Conversely, a similar study of Kenya's National Integrity System¹⁸⁰ revealed a deeply flawed system right from the Constitutional framework to the various anti-corruption measures and institutions. The study observes that Kenya's Constitution favours a bloated executive with overarching and pervasive powers, facilitating the emergence and sustenance of the "big man syndrome" that fostered patronage, influence peddling and impunity. A further corollary of the wide powers of the Executive is the weakening of other institutions that form part of the National Integrity System, particularly the Legislature and the Judiciary. Other flaws identified by the study include the erosion of the doctrine of separation of powers, the claw-back phenomenon in the Constitution, legislation and policy pertaining to corruption and the legalization of an alternative power structure hitherto unrecognized at law and that has no terms of reference or mechanisms of accountability. Although the NIS study was undertaken in 2003, no far reaching changes have occurred since then, thus the observations still hold water to date.

4.5 Conclusion

This chapter sought to explore the anti corruption mechanisms in Botswana and relate them to similar initiatives that have been made in Kenya. What emerges from the discussions in this chapter is that Botswana's achievements in stemming corruption have not come as a result of some extraordinary legislative feat. On the contrary, it all boils down to the seemingly mundane notion of a government that invests in good governance, democracy, the rule of law, efficient public institutions, combined with a free and active civil society. In concluding this dissertation, the next chapter endeavours to proffer recommendations on how the Kenyan government, and indeed other African states, may take the cue from Botswana and realign their anti-corruption strategies towards sustainable results.

180 The full text of Kenya's National Integrity System Report can be found at http://www.transparency.org/policy_research/nis/regional/africa_middle_east (accessed 12 October 2007).

CHAPTER FIVE

5 CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

This dissertation sought to explore the phenomenon of corruption in both Kenya and Botswana, with the object of drawing useful lessons from the latter on how to effectively curtail the proliferation of the vice. The study also set out to reinforce the link between corruption and human rights and thus to argue for a human rights based approach to fighting corruption.

Having set out our objectives in Chapter 1, chapter 2 demonstrated that corruption and human rights are inextricably connected and concluded that a multi faceted approach presents the best strategy in curbing corruption. In chapter 3, it emerged that although Kenya currently boasts an array of anti corruption institutions and legislation, lack of sufficient political will, together with a largely uncoordinated approach, have rendered these mechanisms largely ineffective. In an effort to determine a set of best practices in the management of corruption from Botswana, chapter 4 observed that although both countries have similar anti-corruption laws, with Kenya having a relatively stronger legal basis for curbing corruption, Kenya's NIS is extremely flawed and compares poorly to Botswana's system. It concluded by observing that Botswana's success is not based on any extraordinary measures, but rather through adherence to the basic tenets of democracy, which include the concepts of good governance, transparency, and accountability. It is against this background that the present chapter seeks to proffer recommendations in particular to the government of Kenya and more generally to other African states interested in re-aligning their anti-corruption strategies.

5.2 Recommendations

Whereas the Kenyan government should be commended for the various steps it has taken in combating corruption, much still remains to be done. With corruption, the job is never done. It is in this regard, the following proposals would go a long way in strengthening its anti-corruption machinery.

5.2.1 Constitutional reform

The present Constitution adopted at independence in 1963 has been greatly disfigured by post-colonial parliamentary amendments, which have created several anomalies in the document. As noted earlier, Kenya's NIS reveals a constitutional framework that favours a strong presidency, resulting in among other things the breakdown of the doctrine of separation of powers and facilitating corrupt networks. There is hence a need for a complete constitutional restructure towards a system that moves away from the centralisation of power in the presidency. Accordingly, the stalled constitutional reform process needs to be revived and infused with a more nuanced approach, based on broad based consensus. A crucial part of the Constitutional reform process should include the entrenchment of the KACC as a Constitutional body. This would insulate that the anti-corruption body against any interference with its powers and functions as recently witnessed through Statute Law (Miscellaneous amendments) Bill, 2007.¹⁸¹ Although the President declined to assent to these proposals, it sent a message that there is a need to shield the KACC from similar attempt in the future. Moreover, to borrow a leaf from Botswana, this constitutional reform must be accompanied by the promotion of a culture of constitutionalism that embraces key concepts of democracy, good governance, transparency and accountability.

5.2.2 Legislative reform

Lack of prosecutorial powers by KACC not only undermines its authority in fighting corruption, but also exposes it to competing political pressures and attempts to marginalize its effectiveness. This is a disquieting sign that Kenyan leaders are not pushing the anti-corruption agenda forward, casting a shadow on their commitment to the work of the KACC. Efforts should therefore be made to grant KACC prosecutorial powers in harmony with the Attorney-General's constitutional mandate.

While the POEA provides for wealth declarations by public officers, it does not provide for public access to the asset declarations, fails to spell out clearly what assets, liabilities and interests public officers must declare, and, fails to provide a framework for review or inspection of asset declarations. Consequently, further legislation is needed to address these anomalies and strengthen the POEA's asset declaration scheme.

¹⁸¹ The proposed amendment sought to bar the KACC from investigating all corruption cases that occurred prior to 2003, thereby granting a blanket immunity to the perpetrators of schemes of grand corruption such as Goldenberg and Anglo Leasing scandals.

Freedom of information is a key tool in combating corruption and wrongdoing in government. Secrecy is a defining characteristic of corruption – no one boasts publicly about the bribes that they have paid or taken. Article 10 of UNCAC encourages countries to adopt measures to improve public access to information as a means to fight corruption. The A U Anti-Corruption Convention also provides that:

Each State Party shall adopt such legislative and other measures to give effect to the right of access to any information that is required to assist in the fight against corruption and related offences.¹⁸²

In Kenya, evidence shows that secrecy has been the lifeblood of corruption. Secrecy was at the heart of the Goldenberg scandal as well as the defence and security procurement in Anglo Leasing.¹⁸³ A law providing access to information and effectively according whistleblower protection would go a long way in promoting the campaign against corruption in Kenya.

5.2.3 Policy and other reform

A look at KACC's programmes reveal that it does not strongly package corruption as a human rights issue, yet it contributes significantly to the violation of both civil and political rights and economic, social and cultural rights. The ACECA empowers the KACC to liaise with other agencies and bodies in curbing corruption. In this regard, it is proposed that the KACC liaise with the Kenya National Commission on Human Rights (KNCHR) on developing programmes that would package corruption as a violation of human rights. Furthermore, the KHCHR as the principal human rights body in the country, with a national reach, should come out more strongly against corruption on a human rights platform.

Kenya's APRM report identifies poor policy and project implementation as one of the greatest challenges to Kenya's democracy. Noting with concern certain instances where the rate of implementation of government projects stands as low as 3%, the report observes that:

182 Article 9 of the A U Anti-Corruption Convention(n26 above).

183 See 'Kenya's Anglo Leasing Scandal' available at

<http://www.transparency.org/publications/newsletter/2006/april_2006/in_the_news/anglo_leasing> (accessed 20 December 2007).

Kenya is well serviced with a body of laws, programmes, commissions and agencies that could make for the best-governed democracy in Africa. However, these policies and programmes have so far been poorly implemented.¹⁸⁴

This lethargy also impacts negatively on the drive against corruption. Indeed, at one instance, the then Minister for Justice, Kiraitu Murungi, conceded that the anti-corruption campaign had ground to a halt.¹⁸⁵ A central theme that runs through this research is that Kenya has in place all the required laws, policies and institutions. All that is needed is proper implementation. There is need for a reform oriented, invigorated executive backed by a committed parliament that is keen to reverse this negative trend.

For the war on corruption to succeed in Kenya, it needs the consistent drive and determination of all stakeholders. Integrity is a culture, and as such must be embedded in every facet of society. These changes will require sustained pressure from below and leadership from above. Civil society and the media must continue to play a watchdog role to subject government to the light of intense public scrutiny.

All the above recommendations would amount to naught in the absence of a demonstration of genuine political will and transformational leadership at all levels of the political landscape, from the electorate to government. Leaders must display conviction, emphasize the importance of purpose and commitment, challenge followers with high standards, and provide encouragement and meaning for what needs to be done. Without this, government statements on reforming the public service, strengthening transparency and accountability, and doing away with corruption, remains mere rhetoric.

WORD COUNT: 17,604.

¹⁸⁴ See paragraph 7.12 of Kenya's APRM report (n 90 above).

¹⁸⁵ See Otieno (n 153 above)

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