

CRIMINAL JUSTICE SYSTEM RESPONSE TO THE PROBLEM OF CORRUPTION IN KENYA

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I. CURENT SITUATION IN FIGHTING CORRUPTION

Corruption is a major problem in Kenya which dates back to pre-independent times but gained prominence in the 1970s when smuggling of coffee from neighbouring countries and grabbing of public utility land came into public debate. It gradually permeated the entire body of institutions, and in the 1990s the President then acknowledged official corruption in the country.¹ It was for this reason that Kenya became the first country in the world to sign and ratify the United Nations Convention against Corruption (UNCAC) on 9 Dec 2003.²

Kenya was ranked 139 out of 174 worldwide with a score of 27 in the 2012 corruption perception survey conducted by Transparency International. According to the Auditor General, close to 30% of the total national revenue is lost through corruption annually; leading to disinvestment and increased poverty levels among the lower and underprivileged. It cannot be gainsaid that corruption is a major development challenge in Kenya today more than ever.

Various pre- and post-independent anti-corruption initiatives have been made to control corruption in Kenya, but impact of the said efforts is yet to be felt. As already stated, notwithstanding the many efforts made to slay the dragon of corruption in Kenya, very little (if any) progress has been achieved. So it begs the question: what is problem?

Corruption in Kenya is attributed to political patronage, weakened civil society, and lack of ability by the poor majority of Kenyans to hold their leadership to account. In fact in Kenya, for one to gain wealth, you need not be a diligent professional, but rather engage in politics, which affords you the opportunity to swindle public moneys and defend your act whenever attempts are made to hold you to account. Politicians once elected as members of parliament are the ones who develop the instruments and tools for fighting corruption. These tools include passage of enabling legislation, form institutions that fight corruption and allocate sufficient resources. This is usually done with vested interests in mind, leading to instances whereby laws are intentionally passed with loopholes that appear to aid the conspirators and perpetrators of corruption and economic crimes. For example, in the Anti-Corruption and Economic Crimes Act, 2003, some sections which criminalized failure to provide evidence and documents were repealed by the members of parliament. This made the fight against corruption greatly difficult as the enforcement agency now relied on the good will of the-would be suspects to cooperate. Worse still the parliamentarians would frequently threaten to disband the Anti-Corruption Commission (then under an Act of Parliament) whenever they were pursued for engaging in corruption.

In realization of the need to have a properly anchored body constitutionally, there was establishment of the Ethics and Anti-Corruption Commission in the 2010 Constitution. It has the mandate of fighting corruption through law enforcement and public education. It is also charged with the responsibility of developing and promoting standards and best practices in integrity and anti-corruption and oversees the enforcement of codes of ethics prescribed for public officers. The Commission is the lead agency in the fight against corruption and economic crimes. Other allied agencies include the police and revenue authorities. The structure of the Commission is such that it has five directorates which enable

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¹Kibwana et al: The Anatomy of Corruption in Kenya, 2005.

²United Nation Convention against Corruption (UNCAC),
<http://www.unodc.org/documents/treaties/UNCAC/Publications/08-50026_E.pdf>.

it to achieve its objectives. The directorates are: Legal Services, Investigations, Ethics & Leadership, Preventive Services, and Administration.

A. Legislative Framework

The laws passed to fight corruption in Kenya are:

1. The Constitution of Kenya³
 - Article 10 of the Constitution — the National Values and in particular article 10 (c); good governance, integrity, transparency and accountability.
 - Article 73; the responsibilities of leadership and the guiding principles of leadership.
 - Articles 75, 76 & 77
2. The Anti-Corruption and Economic Crimes Act (2003)–ACECA
This Act defines the corruption and economic crimes offences and the attendant penalties. Also stipulates the procedure of instituting civil recoveries for stolen public properties and the manner in which plea bargains are to be carried out.
3. The Public Officers Ethics Act (2003)
Stipulates the manner in which public officers should conduct themselves while discharging their public and private duties. Also deals with wealth declarations.
4. The Public Procurement and Disposal Act (2005)
Guides the procedure of procuring goods and services in government and violations the procedures as set out in the act are criminalized in the ACECA
5. The Penal Code
An act of parliament defining the code of criminal law, which covers the substantive criminal justice system in Kenya; including corruption and abuse of office
6. The Mutual Legal Assistance MLA (2011)
An instrument of engagement with the international community on cross border crimes pursuant to UNTOC
7. The Leadership and Integrity Act (2012)⁴
This Act gives effect to, and establishes procedures and mechanisms for, the effective administration of Chapter Six of the Constitution and for connected purposes. Criminalizes actions perceived to be avenues of corruption by leaders and defines resultant penalties.
 - Section 17–Participation in tenders
 - Section 18–Public collections
 - Section 21–Care of public property
 - Section 26–Gainful employment
 - Section 30–Falsifying documents
8. Proceeds of Crime and Anti-Money Laundering Act (2009)
This act provides for the offence of money laundering and to introduce measures for combating the offence, to provide for the identification, tracing, freezing, seizure and confiscation of the

³National Council for Law Reporting, The Constitution of Kenya 2010: Chapters Two, and Six.

⁴Kenya Law Reports, <<http://www.kenyalaw.org>>: Laws of Kenya, The Leadership and Integrity Act.

proceeds of crime, and for connected purposes.

9. The Witness Protection Act (2008)
Provides for the procedure of protection of witnesses and informants

B. Procedure for Reporting Corruption and Economic Crimes

Complaints are received and processed by the commission, so as to determine the steps to be taken which can be advisory, referral to other agencies, or taken up for investigations. The commission has 24-hour dedicated lines for public complaints and standby officers to act on the complaints received. The commission can on its own motion through the intelligence department covertly access information touching on corruption malpractices and take it up for investigation. The Commission has enlisted the support of other government agencies such as the National Intelligence Services and the Financial Reporting Centre (Financial Intelligence Unit). The National Intelligence Service is required by law to pass any suspicious covert information on corruption to the Ethics and Anti-Corruption Commission for action and information on any other form of crime to the police. The financial reporting centre passes information on any suspicious financial transaction to the Ethics and Anti-Corruption Commission for action. Such suspicious transactions could be proceeds of corruption being laundered. In such cases the commission institutes recovery proceedings. Whistle-blowers can also be a source of information to the commission, and Kenya has a functional witness/whistle-blower protection agency to guarantee safety to such informants.

Many people who come across occurrences of corruption do not report such because of fear of reprisals, or in the event they report, they feel that nothing will happen to the perpetrators because corruption is perceived as not being a serious crime. Statistics have shown that the minority of the complainants are aggrieved parties in the cases of deals gone sour or worse still people report corruption because they have interests in some positions.

C. Investigation of Corruption and Economic Crimes

Once the complaints have been received, assessed and passed for investigations, investigation teams are assembled to act on them. The complaints or information would fall under sting operations, forensic investigation, asset tracing or intelligence probe/development. Sting-operation cases emanate mainly from bribe demands and require prompt action. Forensic investigations are carried out on cases whose foundations mainly lie on documents, witnesses, bank records, data stored in personal computers, or cell phones, videotapes of security cameras and handwriting analysis. These investigations usually take a lot more time to accomplish. Asset tracing refers to location of properties acquired as a result of corrupt acts. Once such proceeds of corruption are traced, the investigation reports are passed on to legal experts for recovery and restitution. The intelligence probe involves covert investigations to fill information gaps that cannot be openly obtained. This takes the form of surveillance or general human intelligence collection. Intelligence reports prepared are passed on to investigators to backup evidence and for use in recovery proceedings.

Various challenges are faced during investigations, especially accessing electronic evidence such as data stored in personal cell phones. The information law allows the mobile telephone service providers to store communications data for up to a period of three months only. This therefore means that crucial data which is over three months old may not be accessed for evidential value. Additionally, most of the private institutions such as the banks are unwilling to divulge suspicious financial transactions because of the confidentiality relationships between the banks and their clients. However, this hurdle has been resolved by the recent formation of the Financial Reporting Centre, which is by law required to report suspect financial transactions to law enforcement agencies.

D. Crime Reading/Evidence Analysis

Once case files are ready, they are forwarded to crime readers (legal experts) for review. The evaluation of evidence is geared towards establishing the strength of the evidence against charges recommended by the investigators. All the files emanating from sting operations, forensic investigation and asset tracing are crime read. If the crime readers are satisfied with the report laid before them by the investigators, then they forward the same to the Director of Public Prosecution for legal action. In the event of civil recovery, they initiate the proceedings in court. The government through the

Commission has a plea bargaining arrangement, where suspects of corruption and economic crimes are allowed to plead guilty and surrender the proceeds of corruption in lieu of criminal prosecution.

E. Handling of Recovered Proceeds of Corruption

The anti-corruption laws guide the administration of recovered proceeds of corruption. Once recovered, such properties are surrendered to the Principal Secretary Treasury, who is the custodian of all government properties. If the said property is a fixed asset such as land, the title will be issued in respect of the Principal Secretary Treasury, and restored back to the public institution for the original intended use. If it is in form of money, the proceeds are ploughed back into the government budgetary allocations.

F. Prevention of Corruption

The Commission is also charged with the responsibility putting in place strategies to prevent corruption. It does so by examination/audit of financial, procurement systems and procedures with a view of sealing loopholes exploited by corrupt officials. However, because of the deep nature of corruption in Kenya, most institutions do not follow the recommendations to seal such loopholes. The commission also has the duty of approving codes of ethics for public institutions and enforcing the same. The challenge here is that the commission is small in numbers and cannot enforce all codes effectively. Additionally, the commission engages in public campaigns to enlist the support of the general public and encourage them to report all forms of corruption.

G. Mutual Legal Assistance

The United Nations Convention against Transnational Organized Crime (UNTOC)⁵ recognizes corruption as one of the Serious Transnational Crimes. Perpetrators of corruption and economic crimes in most cases hide and launder their proceeds away from their home country for fear of being pursued by state law enforcement agencies. This complicates the investigation and restitution of such proceeds, and therefore close cooperation between partner states becomes necessary. Between 1990 and 2005, mega scandals rocked Kenya in which the country lost substantial financial resources bringing the economy into its knees. Some of the key players in these scandals were foreigners; and to make it worse the proceeds were stashed in foreign jurisdictions. The Commission attempted to pursue the foreign evidence and trace the proceeds but hit a dead end because of lack of enabling procedure of cooperation.

Under Article 13 of UNTOC, States Parties are required to cooperate for the purposes of providing necessary evidential support and confiscation of the proceeds of corruption. The instrument for such cooperation is Mutual Legal Assistance (MLA), which is the internationally accepted practice of accessing such assistance. The hurdle has since been done away with since the MLA Act was passed by the Kenyan Parliament in 2011 and took effect immediately. The government of Kenya through its various agencies such as the Ethics and Anti-Corruption Commission now enjoys the benefits of such cooperation and has recently received assistance from the Government of Japan and several European countries.

II. PUBLIC PRIVATE SECTOR COOPERATION IN FIGHTING CORRUPTION

A. Measures to Prevent Corruption Involving the Private Sector and to Enhance Accounting and Auditing Standards

Article 12 of UNCAC⁶ requires each State Party to take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures.

⁵United Nations Conventions against Transnational Organized Crime (UNTOC)
<<http://www.unodc.org/documents/treaties/UNTOC/TOC%20Convention/TOCebook-e.pdf>>.

⁶United Nation Convention against Corruption (UNCAC),
<http://www.unodc.org/documents/treaties/UNCAC/Publications/08-50026_E.pdf>.

Experiences have revealed that major scandals are executed with help of private sector players which include but are not limited to banking institutions, lawyers, accountants, auditors, valuers, engineers and investment agents. In Kenya the legal professionals are known to be the main players in aiding the corrupt and facilitating proceeds of corruption flight by assisting the opening of foreign accounts as trustees. They usually cite lawyer-client confidentiality clause whenever pressured to disclose the transactions of their clients.

Engineers are another lot of private persons who play around with engineering designs to defraud government of huge sums of money. The accountants and auditors too can detect a malpractice and fail to report if compromised. All these professions have associations which regulate their conduct in the discharge of their duties. Kenya, by the the Law Society of Kenya Act, regulates the conduct of practicing lawyers who must be members of the Law Society of Kenya (LSK). The consequences of misconduct by errant lawyers, like conspiracy to defraud the public and other private persons, is punishable by penalties defined in the LSK act (which may include debarment) as well as the other prevailing laws. The Engineers Board of Kenya regulates the professional activities of engineers under the Engineers Act of 2012. The Institute of Certified Public Accountants regulates accountants and auditors. The Commission has partnered with these professional associations to help foster the fight against corruption. Another association that is important in the fight against corruption is the Bankers Association (umbrella body for banks) which has been assisting the commission accessing details of suspect accounts and banks which are suspected to be engaged in money laundering. It also reprimands banks engaged in money laundering activities and passes the same information to the Central Bank of Kenya, which registers and supervises all the banks. A bank which is suspected to be engaged in any malpractice including laundering proceeds of corruption risks cancellation of its banking license and therefore closure.

B. Measures to Promote Civil Society, Community-Based and Non-Governmental Organizations

The right to information given under the Constitution of Kenya 2010 has opened up all government transactions for scrutiny by any interested parties. This has enabled civil society, community-based and non-governmental organizations to play a vital role in the fight against corruption. These can mobilize the general citizenry to rise against corrupt individuals as well as whistle-blowing. Most of the mega scandals have been unearthed by these organizations. The Commission has partnered with these organizations in order to create a strong force against corruption. Transparency International (TI) Kenya Chapter is one such civil society organization which has been critical in the fight against corruption in Kenya. Through their research wing they are able to identify areas prone to corruption and pass the same information to the relevant agencies for action. The National Taxpayers Association (NTA) is a community-based organization that monitors the use of devolved funds in Kenya. Through their proactive mode of operation they have managed to pass information of suspected corrupt activities leading to pre-emptive action by anti-corruption agencies.

However, the ability of some civil society institutions to rise against corruption has in the recent past been eroded because of infiltration by moles working for the corrupt. Corruption has also eaten into their moral fabric and most of them have been compromised. Efforts are being made to strengthen them.

C. Cooperation between National Investigating and Prosecuting Authorities and Private Sector Authorities

National investigating and prosecuting agencies should first and foremost cooperate among themselves and then bring in the private sector such as financial institutions. If the investigation and prosecuting authorities do not cooperate, then the fight against corruption will be severely impaired if not lost completely. One of the greatest challenges in Kenya is the failure of these two key institutions which plays out in form of turf wars and blame game when cases are or when they become difficult to handle. There have been calls by concerned Kenyans to grant the Commission prosecutorial power which has been fiercely opposed by the Directorate of Public Prosecutions and other stakeholders in equal measure. Several cases have been lost to the advantage of the corrupt suspects. Attempts for a close working relationship between the two institutions is in the works, and recently held workshops to map out strategies for enhancing collaboration and coordination in the investigation and prosecution of corruption and economic crimes.

16TH UNAFEI UNCAC TRAINING PROGRAMME
PARTICIPANTS' PAPERS

Cooperation with financial institutions is crucial for the purposes of passing information of suspect transactions to law enforcement agencies as well as preserving evidence. Proceeds of corruption are usually concealed in financial institutions, and they have a duty to be able to report and facilitate freezing whenever required to do so by authorities including courts. According to article 39 of UNCAC, cooperation between prosecutors and law enforcement agencies on the one hand and the financial institutions on the other is supposed to break barriers brought about by bank secrecy.