

STATUS OF THE UTILIZATION OF THE PRIVATE SECTOR IN THE FIGHT AGAINST CORRUPTION IN KENYA

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I. INTRODUCTION

Corruption in Kenya, like in all other parts of the world, remains a major challenge. Studies undertaken by local and international organizations releases credible reports indicating Kenya is among the countries in the world badly affected by corruption. In response, Kenya has adopted a multi-pronged approach to the fight against corruption.

II. UNITED NATIONS CONVENTION AGAINST CORRUPTION

On 9 December 2003 when the United Nation Convention against Corruption (UNCAC) was opened for signature in Merida, Mexico, Kenya became the first country in the world to sign and simultaneously ratify UNCAC. This strengthened the fight against corruption and the country has continued to put in place measures, both within and outside the purview of UNCAC, to address and mitigate anti-corruption. Kenya undertook a gap analysis on the implementation of UNCAC and presented a report during the International Conference held in Doha, Qatar in 2010. It is also currently preparing its country report for the peer review slated for 2014.

III. THE FIGHT AGAINST CORRUPTION IN KENYA

The war against corruption in Kenya is Government driven. While fighting corruption dates back before independence in 1963, it was not until 2003 when serious efforts began. Key among these included the following:

A. Legal Reforms

- Enactment of various laws critical to the fight against corruption such as the Anti-Corruption and Economic Crimes Act, 2003, Public Officer Ethics Act, 2003; Code of Conduct for Public Servants, Public Procurement and Disposal Act , 2005 and Rules, 2006; Anti-Money Laundering Act (which created the Financial Reporting Centre)
- Establishment of anti-corruption agencies
- Appointment of Special Magistrates to try corruption cases
- Establishment of a Cabinet Committee on Anti-Corruption
- Strengthening prosecutions and undertaking reforms in the public service

To augment the above legal initiatives, the Government also embarked on a nationwide sensitization and awareness creation campaign aimed at changing the behaviour and attitudes of the people towards corruption to prevent corruption.

B. Enactment of the Constitution

Kenya promulgated a new Constitution in 2010, which has various provisions that boost the fight against corruption; key among them are the following:

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- (i) National values (art 10)
- (ii) Access to information by the public (art 35)
- (iii) Ethics and Anti-Corruption Commission (art 79)
- (iv) Independent Judiciary (art 160)
- (v) Auditor General (art 229)
- (vi) Public Service Commission (art 233)
- (vii) Police obligated to fight corruption (art 244)

C. Anti-Corruption Agencies

The Government established anti-corruption agencies and continues to support and facilitate them to implement various anti-corruption strategies and activities. The Ethics and Anti-Corruption Commission (EACC) is the national institution dedicated to deal with corruption through enforcement, prevention and education while the National Anti-Corruption Campaign Steering Committee (NACC-SC) undertakes the nationwide sensitization and awareness creation campaign. These two anti-corruption agencies (ACAs) have been granted substantial requisite autonomy to discharge their mandates. Other key organizations critical to the fight against corruption include the National Police Service, Kenya Revenue Authority, Auditor General, Director of Public Prosecutions. The following are the approaches to the fight against corruption:

1. Investigations

EACC is the body set up to enforce the law through receipt of complaints, detection, investigation and assets tracing. EACC also recommends to the Director of Public Prosecutions cases where there is sufficient evidence of wrongdoing.

2. Prevention

EACC undertakes system and procedure audits to identify loopholes, corruption risk assessment; and development of anti-corruption plans and codes of conduct for publicly funded institutions and, upon request, for private firms. It also conducts the Public Service Integrity Programme to train Integrity Assurance Officers who then spearhead the formation and facilitation of Ministerial/Departmental Corruption Prevention Committees.

3. Education

EACC discharges its education mandate through the development of the anti-corruption education curricula for primary, secondary and tertiary institutions, sponsorship of the anti-corruption category in the annual national drama festivals for schools and colleges in Kenya, establishment and sustenance of Integrity Clubs in schools and educating the public on the dangers of corruption and to foster support for EACC. It also undertakes research and corruption perception index studies.

4. Anti-Corruption Awareness Campaign

The awareness campaign mainly targets the ordinary Kenyan citizen who is on the supply side of the corruption equation. The war against corruption cannot be won without the support and active participation by the members of the public. The campaign is implemented by NACCSC in partnership with various stakeholders such as civil society, religious organizations, youth and women's groups, among others. Key interventions include multi-media anti-corruption programmes through television, radio including community radio, print media, Internet and social media; conducting capacity building and sensitization seminars, workshops, religious forums and rallies; undertaking social audits and public-reporting forums on projects and programmes funded by the tax payer.

Others are advocacy campaign programmes such as marking the UN International Anti-Corruption Day on 9th December every year and organizing national Prayer Days for religious organizations; anti-corruption music, production and distribution of Information, Education and Communication (IEC)

materials such as banners, brochures, caps, t-shirts; establishing civilian oversight committees to receive complaints and address corruption issues at the grassroots and generating credible data to inform and affirm campaign strategies and activities through research/studies on corruption.

IV. IMPLEMENTATION OF UNCAC

Kenya has been implementing the UNCAC and the following is the status of the provisions of articles 12, 13 and 39 of the convention:

A. Article 12 — Private Sector

Article 12 requires each State Party to UNCAC to take measures to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures. The following is the progress on the implementation:

1. Measures to Prevent Corruption in the Private Sector

The private sector in Kenya is well developed and the Government has made big strides in involving the sector in the fight against corruption mainly through the umbrella body Kenya Private Sector Alliance (KEPSA). Corruption in the private sector pushes up the cost of doing business and may, in the extreme deny firms business. The following measures have been implemented:

- (i) KEPSA is one of the agencies that implement the National Anti-Corruption Plan (NACP) under the Kenya Integrity Forum (KIF) through the Association of Professional Societies of Eastern Africa (APSEA) and Institute of Certified Public Accountants of Kenya (ICPAK). These professional bodies regulate the conduct of their members which is important in the fight against corruption.
- (ii) All companies listed at the Nairobi Stock Exchange (NSE) are regulated by the Capital Markets Authority (CMA) Act, Cap 485A and Regulations, 2009. They are required to publish half and full year audited reports in the local dailies as well as display them in conspicuous places.
- (iii) ACECA was amended in 2007 by deleting the words “public officer” from section 55(2) so that proceedings may be commenced against persons whether in public or private sectors.
- (iv) The Public Procurement and Disposal Act (PPDA), 2005 prohibits any person from engaging in corrupt practices in the procurement process and outlines the penalties for such offences. Specifically, private individuals are debarred from government tendering process on account of having been convicted by a court of law on a corruption case.
- (v) The Kenya Revenue Authority (KRA) introduced Electronic Tax Register (ETR) System which has substantially reduced incidences of corruption within the tax regime.
- (vi) The Centre for Corporate Governance trains private companies on proper corporate governance including development of necessary instruments.

2. Implementation Gaps

The following gaps have been experienced during implementation:

- (i) Lack of laws that expressly disallow tax deductibility of expenses that may constitute bribes
- (ii) CMA Act is limited to companies that are listed in NSE while strict enforcement of the Companies Act is weak by provision that directors may appoint nominees to take their places and can then trade with the same companies.
- (iii) The Companies Act is outdated and does not address the emerging issues such as good governance, information technology and corruption risk management, among others.

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- (iv) The provisions under ACECA do not specifically tackle corruption in the private sector.
- (v) Cooperation between law enforcement agencies and the private sector entities is weak.
- (vi) Internal audit controls are insufficient and, at times, optional. There are no structured internal corruption reporting mechanisms in the private sector.
- (vii) Enforcement of most codes of conduct lacks the backing of the law and heavily relies on the goodwill of members.
- (viii) There is ineffective monitoring of public disclosure requirements in corporate entities.
- (ix) Stakeholders awareness on existing anti-corruption measures like Codes of Conduct is still low in the private sector
- (x) Ineffective mechanism to monitor abuse of procedures regulating private entities
- (xi) There is lack of effective enforcement of the existing legislation.

3. Recommendations

- (i) More efforts should be put to curb corruption in the private sector. Such measures may include development and adoption of codes of conduct and best practices.
- (ii) Public sector anti-corruption measures, especially prevention, should be replicated in the private sector
- (iii) Criminal sanctions should be imposed against companies and their officials found to have engaged in corruption should.
- (iv) Companies should develop corruption prevention measures and internal reporting mechanisms (whistle blower system)
- (v) The Companies Act should be reviewed to incorporate provisions that will prevent corruption and reflect current best practices.
- (vi) The partnership between the Government and the private sector through the Public Private Partnership (PPP) should be strengthened and focused on fighting corruption.
- (vii) KEPSA should establish an ethics committee to mainstream ethics and integrity in the continuous professional development and enhance transparency in the private sector to limit the sector's engagement in corruption.
- (viii) The private sector should propose a regulatory mechanism to enforce ethics and integrity within its membership.
- (ix) There should be no discretion by public officers in the regulation of private entities
- (x) The relevant laws to address the problem of bribes and other acts of corruption treated as expenses; fraud and financial malpractices should be reviewed.
- (xi) Provisions for the disclosure of accounting scandals in the private sector camouflaged in different terms are introduced as is disallowing bribes treated as tax deductible expenses.

B. Article 13 — Participation of Civil Society

Each State Party is expected to take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and

groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations (CBOs), in the prevention of and the fight. Kenya has a vibrant civil society and non-governmental organizations that operate freely without undue control by the Government. They are free to organize activities, including those that are critical to the Government as well as to participate in all public events during which they can air their views.

1. Measures to Promote the Active Participation of Civil Society and Others

- (i) Civil society is one of the sectors recognized by KIF to implement the NACP
- (ii) Societies Act provides for the formation and participation of civil societies to carry out various activities including public education while the NGO Act regulates the formation of Non-Governmental Organizations (NGOs).
- (iii) Anti-corruption agencies have developed and implemented community based anti-corruption awareness programmes with the civil society targeting local communities to enlist their support in the fight.
- (iv) The Office of Public Communication (Government Spokesman) holds weekly media briefings on matters of public interest.
- (v) EACC and civil society, and academia are in the process of developing and formalizing anti-corruption curricula for schools, tertiary institutions and universities
- (vi) The Public Service Week is held annually and allows members of the public to visit and interrogate various Government Ministries/Departments stands showcasing their work.
- (vii) The Statute Law Miscellaneous (Amendments) Act, 2007 allowed the members of the public to access wealth declarations upon applying to the relevant Responsible Commission.
- (viii) Civil society, religious organizations and non-governmental organizations have representation in NACCSC which affords them opportunity to fight corruption.

2. Implementation Gaps

During the implementation of UNCAC, a number of shortcomings have been detected. These shortcoming or gaps impact negatively on the ability of the civil society and NGOs to effectively unleash their full potential to fight corruption and check the excesses and impunity of the Government. The following are some of the gaps that have been identified:

- (i) Inadequate legal framework for civil society engagement and participation in the fight against corruption in Kenya.
- (ii) The Official Secrets Act curtails the release and access of information to the public.
- (iii) There is no mechanism for accountability and transparency in the operations of the civil society.
- (iv) There is no structured platform for collaboration between the Government and civil society.
- (v) Lack of adequate funding for civil society to effectively engage in anti-corruption activities.
- (vi) There is widespread corruption within the rank and file of the civil society
- (vii) The electronic whistle blower system (website) for anonymous corruption reporting is only accessible to members of the public who have access to the internet and, therefore, ineffective.

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3. Recommendations

Arising from the shortcomings listed in (b) above, the following are suggested possible solutions which may help address those problems and ensure that the civil society, NGOs and individuals contribute to the fight against corruption in the country:

- (i) Engagement between the Government and civil society should be changed from confrontational to collaborative and cascaded to all levels of policy and decision making
- (ii) There is need to intensify the community-based anti-corruption programmes
- (iii) Funding the civil society groups, NGOs and CBOs from the exchequer should be considered. This will enable these groups effectively fight corruption both in and outside government and watch over the resources the Government spends on behalf of the public
- (iv) Civil society should address the problem of endemic corruption within ranks by embracing the tenets of transparency, accountability and integrity in all its operations and finances
- (v) The NGO Coordination Board should consider starting to publish the audited accounts of all NGOs in Kenya as the first step towards fighting corruption
- (vi) The Freedom of Information bill should be enacted to facilitate the public access information including that which touches on corruption in the public service.
- (vii) Public institutions should promote an open door policy and employ participatory methods in the conduct of their affairs so that the public is informed of decisions affecting them.

The recommendation on freedom of information, if implemented, will improve the corruption reporting system which currently stands at 42.2% as per National Corruption Perception Survey of 2011.

4. Article 39 Cooperation Between National Authorities and the Private Sector

(a) Measures Taken to Facilitate Cooperation with the Private Sector

- (i) Legislation under section 12 (1) of ACECA provides for cooperation with other bodies.
- (ii) EACC and NACCSC have, through various public education programmes, been encouraging people to report all forms of corruption.
- (iii) EACC has installed an electronic system for reporting of corruption anonymously.

(b) Implementation Gaps

- (i) Insufficient compliance with the obligations of this Article because of weak cooperation between the anti-corruption agencies.
- (ii) Campaigns and sensitization programmes do not cover all parts of the country particularly the far removed areas
- (iii) Accessibility to anti-corruption bodies by the public at the grassroots level is limited
- (iv) Inadequate access and utilization of the anonymous reporting facility due to infrastructural challenges and lack of awareness.

5. Recommendations

- (i) Develop rules of engagement between anti-corruption agencies and private sector entities.

- (ii) Expand the awareness programmes to all parts of the country and translate IEC materials into local languages. The presence of anti-corruption bodies at the grassroots should be increased.
- (iii) Undertake a campaign to enhance reporting of corruption cases.

V. ANALYSIS

The positive steps that Kenya has taken to implement UNCAC, with a measure of success, and the new Constitution provides the country with special opportunities that boost the fight. Once fully implemented, the Constitution will augment UNCAC in fighting corruption and all its manifestations. It will promote transparency and accountability in the management of public affairs and effectively reduce corruption in all sectors of the economy.

There is, however, need to develop better collaborative efforts between the public and private sectors given that the two constitute the demand and supply sides of the corruption equation. The private sector must stop shying from participating in the fight against corruption particularly in reporting corruption and it is only then that the sector will be able to increase their profits. The same can be said about the civil society, NGOs and CBOs which are expected to not only generally keep the Government on its toes but to specifically police the utilization of public funds. To this end, the sector should be encouraged to first exorcise corruption from its organizations so as to gain the moral ground to deal with corruption in the public sector.

VI. CONCLUSION

The fight against corruption in Kenya is Government driven. The Government must, of necessity, go out of its way to prompt, pursue and facilitate the participation of the private sector, and civil society in the fight against corruption. Further, it should continue to facilitate and provide leadership in the implementation of the UNCAC to achieve the desired goals, guarantee provision of resources to fight corruption and bring on board the public to actively participate in the war. Overall, Kenya has largely complied with the provision of the UNCAC articles 12, 13 and 39. There is, however, still a lot of work to be done before the fruits of the fight against corruption can be realized.

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