



**Strathmore University**  

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**Law School**

Enhancing the fight against corruption in Kenya: Making the case for conferral of prosecutorial powers on the Ethics and Anti-Corruption Commission

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By

Brian Kimari Mwaniki

076129

Prepared under the supervision of:

Prof. Patricia Kameri-Mbote

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Thank you all!

## DECLARATION

I, Brian Kimari, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....  .....

Date: ..... 28/2/2017 .....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed : .....  ..... Date : 25/4/17 .....

Prof. Patricia Kamari-Mbote

## **ABSTRACT**

The main objective of this dissertation is to prove that the EACC has been ineffective in the fight against corruption due to the absence of prosecutorial powers. It analyses the history of corruption in Kenya in order to demonstrate the factors which often frustrate the fight against corruption. It also scrutinises the legal framework of the EACC in order to establish whether it allows the EACC the authority and independence it needs to reduce corruption and economic crimes in Kenya. The dissertation then analyses the successes of the Sierra Leone Anti-Corruption Commission with regards to prosecution of corruption and proposes recommendations that the EACC should adopt in order to enhance the fight against corruption.

This dissertation shall be limited to corruption offences that have occurred within the territory of Kenya. Moreover, the dissertation shall only deal with two specific types of corruption, grand corruption and looting. It analyses the prosecution of public officials for the offences of looting and grand corruption. It shall also look at the impediments to prosecution of these corruption offences as opposed to any other criminal prosecution.

Secondary sources have been the only form of data relied upon in this dissertation. Qualitative data revealed that anti-corruption institutions in Kenya have been ineffective in the fight against corruption. This has been attributed to many factors including the fact that it lack powers of prosecution. This dissertation has found that the DPP has frustrated the successful conviction of corruption cases owing to the lack of political will to conduct prosecution.

The justification for undertaking this dissertation is that corruption causes us massive economic losses every year. This cost is unjustifiable and so it is crucial that we seek to protect our economy from these losses. The anti-corruption initiatives undertaken should be more effective for their purposes, the EACC should in this regard be empowered as is necessary to ensure efficient prosecution of graft.

The dissertation proposes that the current anti-corruption law be amended in order to confer prosecutorial powers upon the EACC.

## TABLE OF ABBREVIATIONS

<b>ACC</b>	Sierra Leone Anti-Corruption Commission
<b>ACECA</b>	Anti-Corruption and Economic Crimes Act
<b>ACPU</b>	Anti-Corruption Police Unit
<b>AG</b>	Attorney General
<b>AU</b>	African Union
<b>CPI</b>	Corruption Perception Index
<b>CS</b>	Cabinet secretary
<b>DFID</b>	Department for International Development, UK
<b>DPP</b>	Director of Public Prosecutions
<b>EACC</b>	Ethics and Anti-Corruption Commission
<b>EACC Act</b>	Ethics and Anti-Corruption Commission Act
<b>KACA</b>	Kenya Anti-Corruption Agency
<b>KACC</b>	Kenya Anti-Corruption Commission
<b>ODPP</b>	Office of the Director of Public Prosecutions
<b>POCA</b>	Prevention of Corruption Act
<b>POEA</b>	Public Officer Ethics Act
<b>TI</b>	Transparency International
<b>UN</b>	United Nations
<b>UNCAC</b>	United Nations Convention against Corruption
<b>WB</b>	World Bank



# CHAPTER 1

## Introduction

### 1.1. Chapter Introduction

This chapter provides the background to the problem and seeks to illustrate the challenge that the dissertation has undertaken to attempt to solve. This chapter introduces the research that influenced the topic of this dissertation. It presents the research problem and sets the objectives of the dissertation while delineating the scope of the study and providing. It also very importantly provides the justification for embarking on this study and provides a summary of all the chapters of this dissertation.

### 1.2. Background of the problem

Corruption is the unlawful use of official power or influence by an official of the government to either enrich himself or further his course and/or any other person at the expense of the public, in contravention of his oath of office and/or contrary to the conventions or laws that are in force.<sup>1</sup> It broadly includes actions that foster, aid and abet the improper use of or selfish exercise of power and influence attached to public offices for the acquisition of various rights and interests to the discrimination of other potential beneficiaries.<sup>2</sup>

Corruption is undoubtedly a major challenge in Kenya,<sup>3</sup> the effects including the undermining of: political stability, sustainable development, institutions, and values of democracy, ethical values and justice, preconditions of growth and equity, and the rule of law.<sup>4</sup> The Kenyan government has indeed taken up measures in attempts to stamp out the menace of corruption. These measures

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<sup>1</sup> Ekiyor H, 'Corruption in Local Government Administration: A Historical summary' as in *Local Government Administration in Nigeria: Old and New Vision*, 2009.

<sup>2</sup> Minoru O, 'A study of corruption: A paradigm for analysis', *Jachiyo journal of International Studies*, 1997. Vol. IX, No.4, 1-2.

<sup>3</sup> Exemplifying this, the World Bank temporarily banned Kenya from taking loans in 2002 because of corrupt practices by the Kenyan government.

See Finer J, 'World Bank focused on fighting corruption: Graft and Bribery, once tolerated, punished by blacklisting' *Global Policy Forum*, 4 July 2003.

<sup>4</sup> Preamble, *United Nations Convention against Corruption* (31 October 2003) UN Doc. A/58/422 (2003) 43 ILM 37.

include enactment of legislation<sup>5</sup> ratification of international conventions<sup>6</sup> and creation of agencies whose roles are or are incidental to the enforcement of anti-corruption practices.<sup>7</sup>

Despite these efforts, however, corruption cases in Kenya have been on the increase based on Transparency International's Corruption Perception Index.<sup>8</sup> The conditions for the rise of corruption include the weakness and ineffectiveness of the public institutions controlling corruption.<sup>9</sup> This in essence attributes the malaise of corruption to the legal system for not creating a legal framework that would enable the proper prosecution and punishment of corruption offences.<sup>10</sup>

The Ethics and Anti-Corruption Commission (EACC) is a public body in Kenya established in 2011<sup>11</sup> with the mandate of combating and preventing corruption and economic crime in Kenya through law enforcement, preventive measures, public education, and promotion of standards and practices of integrity, ethics, and anti-corruption.<sup>12</sup> Its powers include - educating and creating awareness; undertaking preventive measures; conducting investigations, and conflict resolution.<sup>13</sup> It has faced some challenges in fulfilling mandate, which include, among others, slow judicial

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<sup>5</sup> *Anti-corruption and Economic Crimes Act* (Act No. 3 of 2003); *Ethics and Anti-Corruption Commission Act* (Act No. 22 of 2011); *Proceeds of Crime and Anti-Money Laundering Act* (Act No. 9 of 2009); *Public Finance Management Act* (2012), *Public Officer Ethics Act* (Act No.4 2003); *Public Procurement and Disposal Act* (Act No. 33 of 2015); *Witness Protection Act*, (Act No. 16 of 2006).

<sup>6</sup> African Union Convention on Preventing and Combating Corruption (3 February 2007) 43 ILM 5; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, (20 Dec 1988). U.N. Doc. E/CONF.82/15 (1988) / 28 ILM.493 (1989); United Nations Convention against Transnational Organized Crime (15 November 2000). 40 ILM 335 (2001); United Nations Convention against Corruption (31 October 2003) UN Doc. A/58/422 (2003) 43 ILM 37.

<sup>7</sup> The Ethics and Anti-Corruption Commission (EACC), The Office of the Auditor General; The Public Complaints Standing Committee (PCSC); The Public Procurement Oversight Authority (PPOA).

<sup>8</sup> Kenya had a score of 27 in 2012, 27 in 2013, but the score increased to 25 in 2014. (A country or territory's score indicates the perceived level of public sector corruption on a scale of 0 (highly corrupt) to 100 (very clean)). See Transparency International, *Corruption perceptions index*, Berlin, Germany, Transparency International Secretariat, 2014. - <http://www.transparency.org/cpi2014/results#myAnchor1> on 11 December 2015.

<sup>9</sup> Jain A, 'Corruption: Theory, Evidence And Policy', Vol 9 *CESifo DICE Report* Issue 2, 2/2011, 5.

<sup>10</sup> Matemu M, *Annual Report for the 7th Ethics and Anti-Corruption Commission Annual General Meeting*, Ethics and Anti-Corruption Commission, 2012-2013.

<sup>11</sup> Section 3(1), *Ethics and Anti-Corruption Commission Act* (No. 22 of 2011)

<sup>12</sup> Ethics and Anti-Corruption Commission, 'About EACC'. - <http://www.eacc.go.ke/default.asp?pageid=3> on 11 June 2016.

<sup>13</sup> Section 13, *Ethics and Anti-Corruption Commission Act* (No. 22 of 2011)



process, demands of the devolved system of government, shortcomings in the policy legal framework and inadequate institutional capacity.<sup>14</sup>

The EACC was, however, not the first of its kind as a statutory body established for the purposes of fighting against corruption. The Kenya Anti-Corruption Authority (hereinafter KACA) was the forerunner of the Kenya Anti-Corruption Commission and thereafter the current Ethics and Anti-Corruption Commission (hereinafter KACC). Both of these bodies faced similar challenges to those of the EACC. The Kenya Anti-Corruption Authority (hereinafter KACA) was established in 1975. The repealed Prevention of Corruption Act conferred upon it the power “to investigate, and subject to the directions of the Attorney-General, to prosecute for offences under this Act and other offences involving corrupt transactions.”<sup>15</sup> Its power to prosecute was thus limited and subject to the approval of the Attorney-General. This prosecutorial power, however, was one of the issues that later contributed to its collapse<sup>16</sup> as it was viewed as unconstitutional due to conflict with the 1963 Constitution<sup>17</sup> which conferred only the Attorney-General the power to prosecute in the public interest.<sup>18</sup> The *Stephen Gachiego case* affirmed that the power was unconstitutional.<sup>19</sup>

The Kenya Anti-Corruption Commission (hereinafter KACC) was established in 2003 under the Anti-Corruption and Economic Crimes Act replacing the KACA.<sup>20</sup> Unlike its predecessor, the KACC had no prosecutorial powers, limited or otherwise. The ACECA, however, gave the KACC wide investigative powers<sup>21</sup>, privileges, and immunities akin to police officers.<sup>22</sup> The KACC

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<sup>14</sup> Ethics and Anti-Corruption Commission, *The fight against corruption in Kenya: Achievements, experiences, challenges and the way forward*, 29th – 30th October 2015, para 5.1-5.4.

<sup>15</sup> Section 11B (3) (c), *Prevention of Corruption Act (Act No. 33 of 1956)*. (Repealed by *Anti-corruption and Economic Crimes Act (Act No. 3 of 2003)*).

<sup>16</sup> In addition to the issue of separation of powers arising from the appointment of Justice Aaron Ringera as its director. See Anassi P, *Corruption in Africa: The Kenyan Experience*, Trafford Publishing, Bloomington, 2004, 117.

<sup>17</sup> Kibwana K, Akivaga S K, Mute L M, and Odhiambo M (eds.), *Initiatives against corruption in Kenya: Legal and Policy Interventions 1995-2001*, Claripress, Nairobi, 2001, 36.

<sup>18</sup> See also Article 26, *Constitution of Kenya (Amendment) Bill (Act No. 3 of 2001)*.

<sup>19</sup> *Stephen Mwai Gachiengo & another v Republic* [2000] eKLR, 5.

<sup>20</sup> Section 6 (1), *Anti-corruption and Economic Crimes Act (Act No. 3 of 2003)*.

<sup>21</sup> Sections 7 (1) (a) and 65, *Anti-corruption and Economic Crimes Act (Act No. 3 of 2003)*.

<sup>22</sup> Section 23 (3), *Anti-corruption and Economic Crimes Act (Act No. 3 of 2003)*.

suffered from the same inefficiencies cited by its predecessor.<sup>23</sup> The EACC replaced it after the enactment of the Constitution, 2010.<sup>24</sup>

In the current constitutional discourse, powers of prosecution are divided such that the Attorney-General has the authority to handle all offences not being criminal<sup>25</sup> whereas the Office of the Director of Public Prosecutions prosecutes criminal offences.<sup>26</sup> However, the Constitution also provides that “Parliament may enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecution.”<sup>27</sup> Parliament thus has the ability to enact legislation conferring the power to prosecute corruption cases upon the EACC.

There have been calls to have the legislature enact legislation conferring prosecutorial powers upon the EACC.<sup>28</sup> Proponents attribute the ineffective prosecution of corruption cases to the failures of the DPP with some commissioners accusing the DPP of ‘stonewalling’.<sup>29</sup> The courts have also noted bias and failure to act fairly, faithfully and impartially on the part of prosecutors.<sup>30</sup> The legal<sup>31</sup> and political system of Kenya is described by some as being geared towards the protection of accused government officials and validation of their conduct.<sup>32</sup>

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<sup>23</sup> KACC Assistant Director, Dr. Smokin Wanjala, said KACC would be more effective if it was given powers to prosecute.

See Standard team, ‘Kenya: KACC Accuses Attorney General of Frustrating Graft War’, *The Standard*, September 25<sup>th</sup> 2006. - <http://allafrica.com/stories/200609250173.html> on 13 January 2016.

See also ‘AG Fails to Act on 36 Corruption Cases’, *Daily nation*, Nov. 19, 2004. - <http://allafrica.com/stories/200411180853.html> on 13 January 2016

<sup>24</sup> Mumo Matemu, *Annual Report for the seventh Ethics and Anti-Corruption Commission Annual General Meeting*, Ethics and Anti-Corruption Commission, 2012-2013.

<sup>25</sup> Article 156, *The Constitution of Kenya* (2010).

<sup>26</sup> Article 157, *The Constitution of Kenya* (2010).

<sup>27</sup> Article 157(12), *The Constitution of Kenya* (2010).

<sup>28</sup> Gathii J, ‘Kenya’s Long Anti-Corruption Agenda: 1952-2010: Prospects and Challenges of the Ethics and Anti-Corruption Commission Under the 2010 Constitution’, 4 *Law and Development Review*, 2011, 69.

<sup>29</sup> ‘Why does Ethics and Anti-Corruption Commission probe cases that Director of Public Prosecutions dismisses casually?’ *Standard Digital*, Saturday, June 13 2015. - <http://www.standardmedia.co.ke/article/2000165509/why-does-ethics-and-anti-corruption-commission-probe-cases-that-director-of-public-prosecutions-dismisses-casually> on 10 February 2016.

<sup>30</sup> *Republic v. Judicial. Commission of Inquiry into the Goldenberg Affair ex parte George Saitoti*, [2006], High Court of Kenya at Nairobi, Petition 102 July 31, 2006, 56.

<sup>31</sup> There have been arguments that the laws themselves have fueled corruption.

See Kenya Anti-Corruption Commission & Association Of Professional Societies In East Africa, *A Report Of The Joint Workshop On Governance, Ethics And Integrity Among Professionals*, 5–6 October 2006, 18.

<sup>32</sup> Gathii J, ‘Popular Authorship and Constitution Making: Comparing and Contrasting the DRC and Kenya,’ 49 *William and Mary Law Review*, 2008, 1125–1134.



On the other hand, some argue that such conferment would be unnecessary especially because it would require a constitutional amendment, which is often a long and tedious process<sup>33</sup> and as some parliamentarians argue, the challenge in fighting corruption largely lies with the judiciary.<sup>34</sup> Others have argued on grounds of unconstitutionality and separation of powers.<sup>35</sup> Finally, some have argued that the ineffectiveness of prosecuting corruption cases is owing to the failure of commissioners to conduct full investigations satisfying the evidentiary burden.<sup>36</sup>

The lack of consensus on the subject of prosecutorial powers of the EACC has fuelled the writing of this study.

### **1.3.Statement of the Problem**

Prosecution of corruption cases has arisen as a major factor in making the fight against corruption effective. The effectiveness of the EACC in fighting corruption is heavily dependent on the prosecution of the case after the close of investigations. This study attempts to show that the absence of prosecutorial powers by the EACC makes it ineffective in the fight against corruption and specifically argues that endowing EACC with prosecutorial powers would make it more effective in the fight against corruption in Kenya. The legal framework on corruption in Kenya should therefore grant the EACC both investigative and prosecutorial powers.

### **1.4.Assumptions**

This dissertation attempts to prove the following assumptions:

1. There is need for an effective anti-corruption body in Kenya.
2. The investigative powers of the EACC are inadequate without prosecutorial powers.

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<sup>33</sup> Gathii J, 'Kenya's Long Anti-Corruption Agenda', 29.

<sup>34</sup> Mwigie K, "The UN Convention Against Corruption Implementation & Enforcement: Meeting the Challenges", Anti-Corruption Conference, Commonwealth Secretariat & Chatham House, 2006, 57.  
*See also* National Anti-Corruption Plan, *Report on the Proceedings of the National Anti-Corruption Stakeholders Conference*, Bomas of Kenya, 30 May 2006.

<sup>35</sup> Gathii J, 'Kenya's Long Anti-Corruption Agenda', 28.

<sup>36</sup> Shiundu A 'Director of Public Prosecutions Keriako Tobiko punches holes in EACC probe on Eurobond, demands answers', *Standard Digital*, 23 January 2016. -

<http://www.standardmedia.co.ke/article/2000189064/director-of-public-prosecutions-keriako-tobiko-punches-holes-in-eacc-probe-on-eurobond-demands-answers> on 17 February 2016

*See also* Kipchumba S, 'Kenya's suspended officials' fate unknown two months after corruption purge', *Standard Digital*, 31 May 2015. -

<http://www.standardmedia.co.ke/mobile/article/2000164076/kenyas-suspended-officials-fate-unknown-two-months-after-corruption-purge?pageNo=2> on 17<sup>th</sup> February 2016.

3. The EACC has been ineffective in the fight against corruption largely owing to the absence of prosecutorial powers.

### **1.5. Research Objectives**

This general aim of this study is to prove that national anti-corruption bodies are important in the fight against corruption and that their role should be enhanced to ensure effective performance of their duties.

The specific aims of the study however include:

1. To prove that the investigative powers of the EACC are inadequate in the fight against corruption.
2. To prove that prosecutorial powers would enable the EACC fight against corruption more effectively.

### **1.6. Research Questions**

This research attempts to answer the following questions:

- What does the investigative power of the EACC allow the EACC to do?
- How effective has the EACC been in the fight against corruption?
- What are the major challenges facing the EACC in the fight against corruption?
- Would the EACC be more effective if it had prosecutorial powers?

### **1.7. Literature Review**

The study has gained from the multiplicity of publications available on the subject. Though the literature used in the study may contain several themes, this review focuses only on the literature that has guided the dissertation on the subject of prosecutorial powers of anti-corruption bodies.

Kibwana, Wanjala, and Owiti (1996),<sup>37</sup> addressed the problem of corruption but primarily addresses how corruption manifests in Kenya and the importance of tackling corruption and corruption-related offences in Kenya. Having been written before the formation of anti-corruption bodies, this book had such excellent recommendations as setting up and empowering an anti-

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<sup>37</sup> Kibwana K, Wanjala S, and Owiti O (eds.), *The Anatomy of Corruption in Kenya: Legal, Political and Socio-Economic Perspectives* Claripress, Nairobi, 1996, 45, 192-193.



corruption body. Though with little explanation, it also considered that these anti-corruption bodies should be empowered to handle the prosecution of anti-corruption offences.

In Kibwana, Akivaga, Mute, and Odhiambo (2001),<sup>38</sup> the authors scrutinize the prosecutorial powers previously held by the KACA highlighting the challenge that the KACA's prosecutorial power was not independent of the Attorney-General's office. The book recommends that prosecutorial powers should be granted to anti-corruption agencies in accordance with investigations and due process. It further recommends that such powers be independent of the Attorney-General's or any other government office in order to avoid bureaucratic delays and interference.

In Anassi (2004),<sup>39</sup> the book takes a historical approach telling Kenya's story of anti-corruption. On prosecutorial powers of anti-corruption institutions, it addresses the issues and challenges facing the prosecutions by the KACA. It primarily does so through analysis of the effects of the prosecutions undertaken by the first director of the KACA, Harun Mwau, and thereafter the *Stephen Gachiengo Case* during Aaron Ringera's term as KACA director.

The UNODC (2004) posits that officials enabled to initiate or conduct criminal prosecutions or punishments often abuse their power through use of the threat of corruption as a means of extortion. This contributes to the subject of this dissertation to illustrate that the vesting of prosecutorial power on the EACC would reduce abuse of prosecutorial powers in line with the principal-agent relationship theory used herein. It further states the major disadvantages of a separate anti-corruption institution as including the lack of cooperation with the prosecution authorities.<sup>40</sup>

In Chweya, Tuta, and Akivaga (2005),<sup>41</sup> though he notes that a prosecution that leads to a conviction would be the most visible proof of commitment to anti-corruption, Tuta (2005) also argues that the prosecution of corruption cases is often very sophisticated and intricate especially due to the difficulty to attain the evidentiary burden of proof beyond reasonable doubt. As a

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<sup>38</sup> Kibwana K, Akivaga K, Mute M, and Odhiambo M (eds.), *Initiatives against corruption in Kenya: Legal and Policy Interventions 1995-2001*, Claripress, 2001.

<sup>39</sup> Anassi P, *Corruption in Africa: The Kenyan Experience*, 115- 120.

<sup>40</sup> United Nations Office on Drugs and Crime, *The Global Programme Against Corruption. UN Anti-Corruption Toolkit*, third Edition, Vienna, September 2004.

<sup>41</sup> Chweya L, Tuta J, and Akivaga K, *Control of corruption in Kenya. Legal-Political dimensions 2001-2004*, Sihanya B (ed.), Claripress, Nairobi, 2005.

solution, he recommends such powers be donated to the KACC to enable the planning and execution of anti-corruption efforts without unduly depending on other bodies.<sup>42</sup>

Gathii (2010)<sup>43</sup> has perhaps contributed most on the issues surrounding this study. He specifically said 'it would have been prudent for the drafters to affirmatively confer the prosecutorial power to the EACC in the constitution rather than making a conferral of this type merely permissible.'<sup>44</sup> Gathii goes further to argue that not conferring this power to the EACC leads to technicalities that delay and jeopardise the prosecution of anti-corruption. However, this paper does not expound on these technicalities and further it does not show how prosecution would be done better if it were done by the EACC. This study, on the other hand, intends on addressing this lacuna.

Amukowa (2013) attributes failures of the KACC to the lack of coordination with the government noting that 'KACC's success seemed to be dictated by the Attorney General's office as it decided on which cases to be prosecuted'. He further added that the limitation of the KACC's powers to investigations rather than prosecutions was the major shortcoming of the legal framework.<sup>45</sup>

Despite the existence of these and many more publications, this study still remains necessary. Unlike majority of the publications which were concerned the KACC and KACA, this study is based on the current institutional framework on anti-corruption- The EACC. Moreover, though the available material argues for prosecutorial powers for anti-corruption agencies, they do not illustrate *how* the conferral of prosecutorial power will revolutionise the fight against corruption. This study intends to fill this lacuna.

### **1.8. Demarcating the Area of Study**

The focus of this dissertation is limited to the prosecution of grand corruption and looting in the public sector, looking at corruption within government by public officials. This shall be to the exclusion of petty corruption<sup>46</sup> and corruption within the private sector.

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<sup>42</sup> Tuta J, 'Legal framework for the control of corruption', in Chweya L, Tuta J, and Akivaga K, *Control of corruption in Kenya. Legal-Political dimensions 2001-2004*, Sihanya B (ed.), Claripress, Niarobi, 2005, 211, 222, 238.

<sup>43</sup> Gathii J, 'Kenya's Long Anti-Corruption Agenda', 68-69.

<sup>44</sup> Gathii J, 'Kenya's Long Anti-Corruption Agenda', 69.

<sup>45</sup> Amukowa W, 'The Challenges of Anti-Corruption Initiatives: Reflections on Strategies of the Defunct Kenya's Anti-Corruption Commission' in *Mediterranean Journal of Social Sciences*, Vol 4, No. 2, 2013, 4, 21.

<sup>46</sup> Kibwana K *et al* (eds.), *Initiatives against corruption in Kenya*, 137, 138.



The geographical focus of this study shall be corrupt activities done in Kenya. However, this shall not limit the application of best practices and lessons learnt drawn from foreign jurisdiction in this study.

### **1.9. Justification**

The government has incurred several costs in establishing institutions to fight corruption, which have so far proven ineffective. Corruption within the public sector continues to affect the economic growth and development in Kenya. This study is justified as it proposes measures that if adopted, would increase the efficiencies of the EACC and thus reduce corruption and its effect in the community. This study is further justified because despite the existence of several works written on corruption, few publications have addressed the issue of prosecutorial powers for the EACC.

### **1.10. Chapter Breakdown**

Chapter one of this dissertation serves as the introduction. It includes essential information surrounding this study such as the research problem and objectives, assumptions, the literature review framework, and the justification of the study.

Chapter two looks provides the theoretical framework that has guided this dissertation and the specific reforms sought by this dissertation.

Chapter three looks at the overview of corruption in Kenya. It provides the working definition of corruption and the types of corruption that will be dealt with in this dissertation. The second part of this chapter then gives an overview of corruption in Kenya looking at the history of corruption in the different government regimes.

Chapter 4 will the legal and institutional framework of corruption that has existed in Kenya, with a focus on the current framework that Kenya adopts towards combating corruption. It focuses on the effectiveness or ineffectiveness of the different frameworks. It also analyses the prosecution of corruption in Kenya and points out the factors that have contributed to ineffective prosecution. It then looks analyses the law and practice of prosecution of corruption in Sierra Leone and discusses the findings from the analysis.

Finally, Chapter 5 will give the conclusions and recommendations of this study which will be arrived at after looking at best practices adopted in two different countries.

## CHAPTER 2

### Theoretical Framework and Research Methodology

#### 2.1. Chapter Introduction

This chapter details the theoretical framework behind this dissertation. It explained the theories that informed the solutions proposed against the menace of corruption. In this chapter, two theories shall be analysed in connection to corruption. These are the principal-agent relationship and the rule of law theory respectively. Before delving into the discussion on these theories, this chapter shall include a section on the causes or determinants of corruption. This is an elementary precursor to the discussion on theory. The second part of this chapter shall detail the research methodology and explain the justification for using this methodology.

##### 2.1.1. Determinants of Corruption

This section does not attempt to understand the causes of corruption. Its causes are often far-reaching and somewhat difficult to prove and are further not essential to the claims made by this dissertation. Instead, this section attempts to outline conditions that nurture or enable the survival of corruption. This will be vital in order to understand relationships that encourage corruption and in so doing enable the formulation of practical solutions which will involve among other things, the breaking-up of some of the relationships.

Klitgaard explains three factors that foster the growth of corruption. He stylizes these conditions in a formulaic manner as follows:  $C = M + D - A$ .<sup>47</sup> That is, corruption equals Monopoly plus discretionary power less Accountability. This means that corruption is fostered where one has a monopoly of power over resources and this is combined with discretion and a lack of accountability.<sup>48</sup> In this way, it is proposed that the absence of these factors would frustrate and reduce corruption, that corruption would unlikely thrive where there is no monopoly over resources, where the authorities do not have discretionary powers and where the authorities are held accountable for their actions.

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<sup>47</sup> Klitgaard R, *Controlling Corruption*, Berkley: University of California Press, Oakland, 1988, 75.

<sup>48</sup> Klitgaard R, 'International Cooperation against Corruption', in *Finance & Development*, 1998, 4. - <http://www.imf.org/external/pubs/ft/fandd/1998/03/pdf/klitgaar.pdf> on 10 October 2016.

See also Gephart M, 'Contextualizing Conceptions of Corruption: Challenges for the International Anti-corruption Campaign', in *German Institute of Global and Area Studies Working papers* No. 115, 2009, 9.



In a similar vein, Jain argues that there are three factors that must co-exist in order for corruption to flourish. These conditions are as follows: i) the authorities or agents have discretionary power; ii) there are economic rents associated with the discretionary power; and iii) public institutions controlling corruption are weak and ineffective.<sup>49</sup> In tune with Jain, this dissertation will analyse these elements and later on propose theoretical solutions to corruption and its determinants.

### **2.1.1. Discretionary power**

Jain explains these powers to include the authority to design regulations and to administer them.<sup>50</sup> These powers essentially result from regulations.<sup>51</sup> Regulations allocate powers to those whom will be charged with implementing said regulations.<sup>52</sup> Regulations allocating wider powers will thus allow more leeway for corruption, and even more leeway where the rules do not provide for effective means of monitoring behaviour by some principal.<sup>53</sup> Naturally, these powers also make it difficult to assess whether the agent has engaged in corrupt practices.

This factor provides a broad leeway for the agent to abuse these powers and enrich himself instead of performing his duties. He will remain largely unchallenged since regulations allow him sufficient discretion to make decisions and further because it would not be easily noticeable.

### **2.1.2. Economic rents**

Rent-seeking is a term used to describe situations where people engage in activities in attempts to obtain wealth transfers through the aegis of the state.<sup>54</sup> Tullock refers to it as “the manipulation of democratic [or other types of] governments to obtain special privileges under circumstances where the people injured by the privileges are hurt more than the beneficiary gains.”<sup>55</sup> Rent, thus, is the part of the payment to an owner of resources over and above that which those resources could command in any alternative use.<sup>56</sup> The essence of the rent is to stifle competition and disadvantage

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<sup>49</sup> Jain A, ‘Corruption: A Review’ 15(1) *A journal of economic surveys*, 2008, 77.

<sup>50</sup> Jain A, ‘Corruption: A Review’, 78.

<sup>51</sup> Rose-Ackerman S, *Corruption: A Study in Political Economy*, Academic Press, New York, 1978.

<sup>52</sup> Jain A, ‘Corruption: A Review’, 78.

<sup>53</sup> Bliss C and Di Tella R, ‘Does Competition kill corruption’, *Journal of political economy* Vol. 105 No.5, pages 1001-123, 1997, 1002.

<sup>54</sup> Pasour jr. E, ‘Rent seeking: Some conceptual problems and implications’, *The review of Austrian Economics*, 1983, 123.

<sup>55</sup> Tullock G, *Rent Seeking, The Shaftesbury Papers*, 2, Edward Elgar Publishers Co, 1993, 24, 51.

<sup>56</sup> Buchanan J, ‘Rent Seeking and Profit Seeking’, in Buchanan J, Tollison R, and Tullock G, (eds.), *Toward a Theory of The Rent Seeking Society*, Texas A&M University, pages 3-15, 1980, 46, 47.



competitors. It effectively creates monopoly power to the rent seeker due to the benefits obtained, which effectively serve as barriers to entry for competitors.<sup>57</sup>

Economic rents will thus directly foster corruption since those who would benefit are bound to create measures to extract those rents through bribery.<sup>58</sup> Favourable market restrictions will simply be the privilege of those who offer the best incentives. The higher the value of the rents, the greater the incentive for corruption.<sup>59</sup>

### **2.1.3. Ineffective institutions**

High levels of corruption are caused by deficient local capacity, for instance, deficient strategies and low incentives to fight corruption.<sup>60</sup> Corruption here depicts a situation where the public have reduced ability to hold public officials accountable for their actions. Corruption will more likely persist owing to failure to ensure accountability for their actions. When the institutions empowered to fight against corruption are unable or unwilling to hold officials accountable, corruption will survive.

Corruption is only a problem if it goes undetected and if sanctions are not imposed on the perpetrators.<sup>61</sup> There is a need for those who are charged with the detection or investigation of corruption to be able to sanction the offenders. Otherwise, their roles become useless. Investigating corruption is not an end in itself, the investigation should lead to prosecution, and where applicable, the prosecution should lead to punishment. Failure to punish will allow corruption to thrive.

The EACC has reported that “In effect, corruption thrives where institutional checks and accountability are lacking. More than any other factor, bad leadership, coupled with the absence of a functional reward and punishment system through which a framework of values could have

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<sup>57</sup> Tollison R, ‘Rent Seeking: a Survey’, *Kyklos*, Volume 35, pages. 575-602, 1982, 578-579, 582

‘Rent Seeking’. - <http://www.economics-agruni.yolasite.com/resources/Rent%20seeking.pdf> on 22 November 2016.

<sup>58</sup> Ades A & Di Tella R, ‘National champions and corruption: some unpleasant interventionist arithmetic’, *The Economic Journal* Volume 107, pages 1023-1048 1997, 1023-1024.

<sup>59</sup> Tullock G, ‘The welfare costs of tariffs, monopolies, and theft’. *Western Economic Journal* Volume 5, pages 224–232, 1967, 228;

Jain A, ‘Corruption: A Review’, 79-80.

<sup>60</sup> Kauffmann D, ‘Corruption: The Facts’, *Foreign Policy*, 1997, 3.

<sup>61</sup> Brandt U and Svendsen G, *The Politics of Persuasion: Should Lobbying be Regulated in the EU?*, Edward Elgar publishing, Northampton, 2009, Chapter 3, 3.3.3.

been instituted, have made possible the tragedy of corrupt enrichment and wastage of public resources.”<sup>62</sup>

Effective anti-corruption legislation and policies can thus be developed based on these three determinants. First, it should limit the powers of government officials by making them subject to monitors or auditors who they’ll have to report to. This would make it easier to detect corrupt activity. Second, the anti-corruption and competition laws of the state should stifle the creation of monopolies so as to reduce the value of economic rents attainable, thereby reducing the incidence of bribery. Finally, the state should have a strong legal framework empowering institutions established to combat corruption. These institutions should have wide powers necessary to combat corruption i.e. wide investigative and prosecutorial powers.

The theories employed in this study are based on these three determinants of corruption, with special focus on the latter determinant concerned with the creation of effective institutions. These theories favour the creation of institutions which by their design, structure, and powers will be effective in the fight against corruption.

## **2.2. Theoretical Framework**

### ***2.2.1 Rule of Law theory***

This study employs arguments on the theory of the rule of law to explain the importance of ensuring prosecution and punishment of corruption offenders. This is especially concerning corruption offences by public officers or generally people occupying high positions in government.

The rule of law argument addressed in particular herein is the theory as posed by Dicey that ‘Every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.’<sup>63</sup> This

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<sup>62</sup> Ethics and Anti-corruption Commission, *National Ethics and Corruption Survey, 2015 Report*, 2015, 2. - <http://www.eacc.go.ke/docs/National-Ethics-and-Corruption-Survey-2015-REPORT-4March2016.pdf> on 16 November 2016.

<sup>63</sup> Dicey A, *An Introduction to the study of the law of the Constitution*, Macmillan publishers, London, 1885, Part II.



then requires that government officials be held accountable and subject to ordinary prosecution and court process where in order to hold them accountable.

Smith writes that corruption undermines the rule of law.<sup>64</sup> The rent-seeking behaviour of public officials necessarily harms the public. Failure to apply the rule of law by sanctioning these officials then worsens the state of corruption since the corrupt agents will have no incentive to cease their corrupt activities.

Using this theory, this dissertation encourages effective prosecution and sanctioning as the best measures to eliminate the scourge of corruption. It further argues for the need to ensure that the institutions charged with prosecution operate without any undue influence.

### ***2.2.2. Principal-agent relationship theory***

The study focuses on the principal-agent relationship theory to pose the importance of transferring prosecution of corruption to bodies outside the formal arms of government. The theory views corruption as criminal behaviour on behalf of some agents entrusted to act on the behalf of some principal.<sup>65</sup> Lack of ‘political will’ of leaders to implement anti-corruption reforms is typically flagged as an explanation for the failure of anti-corruption efforts.<sup>66</sup> It is suggested that the principal may have little incentive to ensure effective measures to reduce corruption since he benefits from the corrupt act.<sup>67</sup>

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<sup>64</sup> Smith A, *An inquiry into the Nature and Causes of the wealth of Nations*, Modern library, New York, 2001, Chapter 5

<sup>65</sup> Rose-Ackerman S, *Corruption: A Study in Political Economy*. Academic Press, New York, 1978, 6;  
*See also* Klitgaard, R, *Controlling Corruption*, 73.

<sup>66</sup> Marquette H and Peiffer C, ‘Theoretical (Mis)understanding? Applying Principal-Agent and Collective Action Theories to the Problem of Corruption in Systemically Corrupt Countries’, as submitted to *Routledge Companion to Ethics and Public Service Organizations*, 2015, 3.

<sup>67</sup> Lambsdorff J, ‘How Corruption in Government Affects Public Welfare-A review of theories’, Center For Globalization And Europeanization Of The Economy, Discussion Paper 9, Georg-August-Universität Göttingen, 2001, 5-8.

The theory then suggests that corruption would be reduced if the incentives allowed by the institutional principal-agent structure of corruption were removed. Applying this theory, this study will argue that moving prosecution of corruption offences away from the government would remove this incentive to be ineffective in prosecution of corruption cases and thus suggest that the EACC be granted prosecutorial powers.

The principal-agent relationship assumes that the principal and agent have divergent interests such that the agent pursues interests which disadvantage the principal.<sup>68</sup> The principal in this instance is the benevolent one and the agent seeks to act for his selfish interests. Based on this, corruption occurs where the agent acts against the interests set up by the principal and colludes with third parties to promote his own benefit.<sup>69</sup> The risk that the agent will not work in the interests of the principal arises because quite often, the principal cannot perfectly monitor and control the agents.<sup>70</sup> The agent usually enjoys an informational advantage such that he has private information about some aspect of his job or his ability to do the job and thus can easily take some action, which will remain undetectable to the principal.<sup>71</sup>

Owing to the asymmetric information, the principal is unable to determine the type of agent except through the use of a supervisor.<sup>72</sup> The supervisor should in this case act in the interest of the principal and diligently discharge his duties for the principal. The addition of a new party modifies the relationship to create a principal-agent-supervisor relationship. Tirole, however, explains that the supervisor –like the agent- is a rational economic actor who is interested in maximising his desires, often wealth. This essentially shows the corruptibility of the supervisor to perform or omit performance of his role in return for increased wealth. In this regard, they can be bribed into concealing information about corrupt dealings of the agent.<sup>73</sup> Despite the risk of collusion with the

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<sup>68</sup> Ross S, 'The economic theory of agency: The principal's problem', *The American Economic Review*, Vol 63 No. 2, 1973, 134.

<sup>69</sup> Lambsdorff J, 'Corruption and rent-seeking', Volume 113, *Public Choice*, Issue 1, 2002, 97.

<sup>70</sup> Stephenson M, 'Corruption is both a "principal-agent problem" and a "collective action problem"', *The Global Anticorruption Blog*, April 9 2015. - <https://globalanticorruptionblog.com/2015/04/09/corruption-is-both-a-principal-agent-problem-and-a-collective-action-problem/> on 12 December 2016.

<sup>71</sup> Schlicht E, *Firms, Markets, and Contracts: Contributions to Neoinstitutional Economics*, 2012, 110.

<sup>72</sup> Brandt U and Svendsen G, *The Politics of Persuasion*, Chapter 3.

<sup>73</sup> Tirole, J, 'Collusion and the Theory of Organizations', in Laffont JJ, (ed.) 1 *Advances in Economic Theory*, Vol. I, 1992.

Brandt U and Svendsen G, *The Politics of Persuasion*, Chapter 3.



agent, a supervisor remains useful to the principal largely because of the possibility to monitor the behaviour or reports of both agent and supervisor as a means to detect an illegal collusion.<sup>74</sup>

The principal-supervisor-agent theory is largely applied in relation to the behaviour of employees within an organisational set-up. This dissertation puts forth the idea that the behaviour of the different actors in an organisation is, if not the same, extremely similar within a government. For the purpose of this study, the common factor identified between the two set-ups in the principal-agent-supervisor relationship is the risk of collusion between an agent and supervisor. The proximity between supervisor and agent in an organisation would also be true of a supervisor and agent in government capacity.

In a government set-up, the principal (P) would be a superior government official empowered to discharge certain functions within government. P would have an agent (A), usually a bureaucrat at his employ to whom he will delegate the task of performing said function, or some lesser role. Since information asymmetry usually exists between agent and principal curtailing P's ability to monitor the agent, the principal may opt to employ a Supervisor(S) who shall be fit to monitor, detect, audit, and report any wrong doing on the part of the agent, and perhaps even prosecute the agent.

More specific to the context of this study, P entrusts A to discharge some duty in the interest of the public service. S, on the other hand, is entrusted to ensure that A does not obtain private gain by use of this position (i.e. does not engage in corrupt activity). In some circumstances, S would be empowered not only to investigate but also to prosecute A before a court of law. S will thus be empowered to bring proceedings for corruption offences on the part of A. As discussed, the Supervisor (S) is corruptible especially when the relationship with A is close. The argument that this dissertation makes is that should S be part of the government, he would be easily corruptible. It instead proposes that S should not be part of the government as this would increase the likelihood of the incidence of corruption.

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<sup>74</sup> Balliga S, 'Monitoring and Collusion with "Soft" Information,' 15 *The Journal of Law, Economics, & Organization*, No. 2, 1999, 434.

Where S is the prosecuting authority in this regard, it should be as far from the government as it possibly can be. Corruption has been defined as the misuse of public power for private gain.<sup>75</sup> Private gain, however, does not only refer to money and other tangible assets but also refers to intangible benefits such as increased power, status, and promises of future favours.<sup>76</sup> Should S be part of government, A is more likely to offer a bribe due to the close proximity within which they work. Where S is not in government, A is unlikely to offer and S unlikely to accept if the bribe should be offered. Since S is a rational economic actor, he will also appreciate a cost-benefit analysis and reject the offer because the costs of getting caught outweigh any benefits.

Where S is an office entrusted with the role of detecting, investigating or prosecuting corruption cases of A, S would better discuss this duty without risk of collusion where S is an independent anti-corruption body. S would be unlikely to conspire with A. The use of S reduces the incentive to engage in corruption since it increases the probability of getting caught and punished.<sup>77</sup>

Applied to the specific context of Kenya, investigation and prosecution of corruption offences should be in the hands of the EACC. This would minimise opportunities for the prosecutors (S) and any government agent to collude. The current position is that the DPP is the body constitutionally responsible to prosecute corruption. This theory alleges that the prosecutors in the DPP's office are ineffective because their close proximity to government allows them to be easily be influenced by government officials. The ODPP has been reluctant in the fight against graft because of this influence. The EACC would be less likely affected by this because their role is not proximate to government officials and thus can hardly be influenced unduly.

The ideas of many authors writing on corruption in Kenya directly or indirectly support the conclusion of the principal-agent theory. Kwake *et al* for instance argue in support where they write: "Why is corruption thriving in Kenya? The answer is simple and bold: the leadership at the top, the Executive arm of the government, is either deeply involved or simply reluctant to punish

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<sup>75</sup> Rose-Ackerman S, *Corruption and Government: Causes, Consequences and Reform*, Cambridge University Press, Cambridge, 1999, 91.

<sup>76</sup> Lambsdorff JG, *The Institutional Economics of Corruption and Reform: Theory, Evidence and Policy*, Cambridge University Press, 2007, 16.

<sup>77</sup> Hanna R, Bishop S, Nadel S, Scheffler G, and Durlacher K, *The effectiveness of anti-corruption policy. What has worked, what hasn't and what we don't know: A systematic review*, Technical Report, EPPI-Centre, 2011, 2.



those who are involved for fear of rocking his government, or both.”<sup>78</sup> This displays the principal-agent problem where a supervisor has little incentive to punish the agent owing to political patronage as well as undue influence by the agent. The solution would here be the reduction of such undue influence. Using the principal-supervisor-agent theory, this dissertation argues that the best measure to reduce this influence is to confer prosecutorial power on the EACC. This conferral would reduce corruption since it would reduce the incentive of the agent to engage in corruption by increasing the probability of the agent to be caught and punished.<sup>79</sup>

### **2.3. Research Methodology**

This dissertation has relied on secondary sources as the only source of information. The dissertation has been informed by legislations, books, case law, journal articles, organization reports, opinion pieces, internet sources, newspaper articles, and other published works written on the subject of corruption. This dissertation has employed the use of all this material to provide a proper analysis of the research topic and draw arguments that have been used to extrapolate the conclusions and recommendations that this dissertation arrives at. These works have in one way or another, all contributed towards the realization of the research objectives of this dissertation. While primary research remains an important tool for research, it emerged that the information had already been covered in secondary sources. This was so much that primary research would unlikely yield any new results and would echo the secondary material. Secondary sources were sufficient for this study.

This dissertation is further guided by the principles of ethics and integrity in research. In line with anti-plagiarism rules and the ethical research policies of Strathmore University Law School, the dissertation has ensured the proper referencing and citation of all material used in this study.

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<sup>78</sup> Kwaka J, Okombo O, Muluka B & Sungura-Nyabuto B (eds.), *Challenging the Rulers: A Leadership Model for Good Governance*, East African Educational Publishers Ltd, 2011, 18.

<sup>79</sup> Hanna R, *et al*, *The effectiveness of anti-corruption policy*, 2, 7.

## CHAPTER 3

### Overview of corruption in Kenya

#### 3.1. Chapter Introduction

This chapter is divided into two sections. Section 1 gives a brief overview of corruption and corruption offences in Kenya. It begins by providing the working definition of corruption that will be used in this dissertation and thereafter details the types of corruption that will be the focus of this dissertation. The second section shall look into the history of corruption offences in Kenya since independence. The specific focus shall be on the corruption in the four different regimes since independence where the dissertation shall analyse how the different regimes have treated corruption and the prosecution of corruption.

#### 3.2. Definition of corruption

Despite the existence of multiple laws and publications on the subject, there is no definition of corruption that has yet acquired universal acceptance. The term is instead often used with a negative connotation in reference to a wide range of criminal activities. Though scholars differ on the conception of corruption,<sup>80</sup> many publications agree, though with slight variations on terminology, that the illegal action defining corruption is 'the abuse of public office for private benefit'.<sup>81</sup>

Most legislations and international conventions on corruption do not expressly define corruption. The United Nations Convention against Corruption (UNCAC) does not define corruption. According to Monica (2004), the negotiators of UNCAC considered not defining corruption at all but to list specific types or acts of corruption. Criminalization of corruption would thus cover specific offences or groups of offences that depended on what type of conduct was involved,

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<sup>80</sup> Thiankolu M, 'The Anti-Corruption and Economic Crimes Act, 2003; Has Kenya Discharged her Obligations to Her Peoples and the World?' *Kenya Law Reports*, 2006.

<sup>81</sup> Rose-Ackerman, S 'Corruption and Democracy' *90 American Society of International Legal Proceedings*, 1966, 83; Gray & Kaufmann 'Corruption and Development' (1998) World Bank Paper. -

<http://www.worldbank.org/fandd/english/0398/articles/020398.htm> on 14 September 2016.

Fantaye D 'Fighting Corruption and Embezzlement in Third World Countries' *68 Journal of Criminal Law*, 2004, 171; Kaufmann, D 'Corruption, Governance and Security: Challenges for the Rich Countries and the World' World Bank Global Competitiveness Report 2004/2005, 2004. -

[http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/Kaufmann\\_GCR\\_101904\\_B.pdf](http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/Kaufmann_GCR_101904_B.pdf) on 14 September 2016;

Thiankolu M, 'The Anti-Corruption and Economic Crimes Act, 2003', 2.



whether those implicated were public officials, whether cross-border conduct or foreign officials were involved, and if the cases related to unlawful or improper enrichment.<sup>82</sup>

An understanding of corruption may be seen from article 15(b) of UNCAC which prohibits ‘the solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official acts or refrains from acting in the exercise of his or her official duties’.<sup>83</sup> The act goes further to criminalise actions such as: bribery, embezzlement, trading in influence, illicit enrichment, laundering of proceeds of crime and concealment of property.<sup>84</sup>

Similarly, the African Union Convention on Preventing and Combating Corruption (hereinafter AU Anti-Corruption Convention) merely defines corruption as ‘the acts and practices including related offences proscribed in this Convention’.<sup>85</sup> It then prohibits ‘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’.<sup>86</sup>

Kenya’s Anti-Corruption and Economic Crimes Act (ACECA) defines corruption as meaning ‘an offence under any of the provisions of sections 39 to 44, 46 and 47, bribery, fraud, embezzlement or misappropriation of public funds, abuse of office, breach of trust; or an offence involving dishonesty- in connection with any tax, rate or impost levied under any Act; or under any written law relating to the elections of persons to public office’.<sup>87</sup> In defining corruption, the ACECA, aside from only pointing out the acts that constitute corruption, includes the various offences criminalized in the Act as part of the definition of corruption. This is a unique feature since it means that the commission of any of the offences listed in the Act will constitute corruption, thus expanding the definition of corruption. The corruption offences as per Part IV are as follows: a) Bribery involving agents, b) secret inducements for advice; c) deceiving principal; d) conflicts of

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<sup>82</sup> Monica A, ‘Networking Civil Society in Latin America’, 2004, 66.

<sup>83</sup> United Nations Convention Against Corruption adopted December 2003 in Mexico. This treaty entered into force on 15 December 2005. - [http://www.unodc.org/unodc/en/crime\\_convention\\_corruption.html](http://www.unodc.org/unodc/en/crime_convention_corruption.html) on 14 September 2016.

<sup>84</sup> Article 15-24, United Nations Convention against Corruption (31 October 2003) UN Doc. A/58/422 (2003) 43 ILM 37.

<sup>85</sup> Article 1, African Union Convention on Preventing and Combating Corruption (3 February 2007) 43 ILM 5. - <http://www.africaunion.org/root/au/Documents/Treaties/Text/Convention%20on%20Combating%20Corruption.pdf> on 14 September 2016.

<sup>86</sup> Article 4, African Union Convention on Preventing and Combating Corruption (3 February 2007) 43 ILM 5.

<sup>87</sup> Article 2, *Anti-corruption and Economic Crimes Act* (Act No. 3 of 2003).



interest; e) improper benefits to trustees for appointments; f) bid rigging; g) abuse of office and; h) dealing with suspect property.

It is argued that the absence of a clear definition of corruption in Kenya implies that anti-corruption initiatives are being directed towards something unknown and thus could be one cause for the supposed failure of these initiatives.<sup>88</sup> The thinkers of the UNCAC, on the other hand, considered that the convention should not include a definition of corruption but rather criminalizes forms of corruption.<sup>89</sup> This acts as a de-facto definition of corruption and enables states to deal with other forms of corruption that may emerge.<sup>90</sup>

The working definition of corruption in this dissertation shall include the forms of corruption in the ACECA.

### 3.3.Types of Corruption

Kibwana *et al* identify three types of corruption – Petty corruption, grand corruption, and looting.<sup>91</sup> Petty corruption involves payment of small sums of money to low level public servants in order to speed up access to public services or to avoid legal sanctions for minor infractions.<sup>92</sup>

Grand corruption is defined by Transparency International (TI) as “the abuse of high-level power that benefits the few at the expense of the many, and causes serious and widespread harm to individuals and society.”<sup>93</sup> It often involves the payment of huge sums of money by or to senior government officials and high occupying private sector members. This is often in exchange for some private gain by either party which tends to enrich them substantially. A key example of this is a kickback paid to government officials for government public works contracts.

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<sup>88</sup> Amukowa W, ‘The Challenges of Anti-Corruption Initiatives’, 482.

<sup>89</sup> United Nation Office on Drugs and Crime, *Travaux Préparatoires of the negotiation of the United Nations Convention against Corruption*, United Nations: New York, 2010, 30; United Nations General Assembly, Ad Hoc Committee for the Negotiation of a Convention against Corruption, ‘Revised draft United Nations Convention against Corruption’ A/AC.261/3/Rev.2, 2002, 6.

<sup>90</sup> Babu R, ‘The United Nations Convention against Corruption: A Critical Overview’ Available at: <http://ssrn.com/abstract=891898>

<sup>91</sup> Kibwana K *et al.* (eds.), *Initiatives against corruption in Kenya*, 137

<sup>92</sup> Githongo J, “The culture of corruption in Kenya”, Annual General Meeting of the German Development Service in Kenya, Trisan Hotel, Friday 1 December 2000, 1.

<sup>93</sup> Transparency International, ‘What Is Grand Corruption And How Can We Stop it?’ , 21 December 2016. - [http://www.transparency.org/news/feature/what\\_is\\_grand\\_corruption\\_and\\_how\\_can\\_we\\_stop\\_it](http://www.transparency.org/news/feature/what_is_grand_corruption_and_how_can_we_stop_it) on 07 September 2016.

Looting, on the other hand involves the spending of huge amounts of money by senior government officials for the delivery of services or goods that end up not being delivered. Looting usually involves politicians paying companies for fictitious projects at massive costs, which affect the entire economy.<sup>94</sup> This type of corruption occurs where there is pervasive corruption characterised by bad governance and unaccountability.

This dissertation will focus on looting and grand corruption since these types of corruption have the loudest effects on the economy. Grand corruption leads to misallocation of public resources, and affects the decision-making process substantively.<sup>95</sup> Githongo points out that looting involves figures so huge that they have quick macro-economic effects such as causing banks to collapse, causing increased inflation, and causing the decline of exchange rates.<sup>96</sup>

### **3.4. Overview of corruption in Kenya**

#### **3.4.1. Kenyatta Era (1963-1978)**

Mzee Jomo Kenyatta was Kenya's first president. He took over in 1963 from the British leadership who had been installed by the Crown during colonialism. A key feature of his rule was the continued use of colonial structures and policies. This had negative effects since these colonial structures were designed to serve the interests of the Crown and to benefit the white settlers in Kenya.<sup>97</sup> Kenyatta used 'divide and rule' policies and reward systems to consolidate power around himself and the Presidency. He created a ruling class of loyalists who were rewarded with land, money, and political positions.<sup>98</sup>

The Kenyatta era maintained the anti-corruption legislation used pre-independence, they applied the Prevention of Corruption Act and other anti-corruption clauses in other legislation, especially the Penal Code.<sup>99</sup> However, this regime used corruption as part of their survival strategy as a means to distribute political patronage and maintain coercive control.<sup>100</sup> Chweya explains that the government obstructed all attempts at anti-corruption interventions in the public service, and that

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<sup>94</sup> Kibwana K *et al* (eds.), *Initiatives against corruption in Kenya*, 137

<sup>95</sup> Byrne E, 'The Moral and Legal Development of Corruption: Nineteenth and Twentieth Century Corruption in Ireland.' PhD Thesis, University of Limerick, 2007.

<sup>96</sup> Githongo J, "The culture of corruption in Kenya", 1.

<sup>97</sup> Amutabi M, 'Beyond imperial presidency in Kenya: Interrogating the Kenyatta, Moi and Kibaki regimes and implications for democracy and development', *Kenya Studies Review* Vol. 1, No. 1, pp. 55-84, 2009, 55.

<sup>98</sup> Amutabi M, 'Beyond imperial presidency in Kenya', 59.

<sup>99</sup> Chweya L, 'The government anti-corruption programmes', in Sihanya B (ed.), *Control of Corruption in Kenya: Legal Political Dimensions, 2001-2004*, Claripress, Nairobi, 2005, 10.

<sup>100</sup> Chweya L, 'The government anti-corruption programmes', 11.



the criminal justice system was made a mockery of since the Prevention of Corruption Act and Penal Code were applied selectively against less prominent leaders and opposition leaders.<sup>101</sup>

The Kenyatta presidency was marked by the immense power held by the president. All power was centralised around his office – The president: appointed and dismissed the cabinet, civil servants, and provincial administration; determined the parliamentary calendar as a Member of Parliament himself and; determined judicial tenure.<sup>102</sup> President Kenyatta also championed a series of constitutional amendments that gave the presidency above them especially noting the amendment of article 59 of the 1963 Constitution which awarded the president powers to suspend the proceedings of or dissolve the legislature, thus giving the president control over parliament.<sup>103</sup>

A key feature in this regime was also the tribal nature of politics. The Kikuyu were dominant in both politics and business owing to the special advantages that Kenyatta created for them through his control of civil service and the legislature.<sup>104</sup> As pointed out by Amutabi, by 1978 there were 35 Kikuyu District Commissioners (DCs) out of 41 positions; 5 Kikuyu Provincial Commissioners (PCs) out of 8 positions; and 13 Kikuyu Permanent Secretaries (PSs) out of the 19 positions.<sup>105</sup> Tribalism in this regime was to ground its claws to Kenya's politics for years to come and play a major role in the continued corruption by government officials.

The centralised power of the president caused public officers to pursue and act in accordance to what they believed to be the direction or inclinations of the President rather than uphold the law. This bred corruption and immunity and negated public accountability.<sup>106</sup> Moreover, Kenyatta succeeded in ensuring a *de facto* one party rule which discouraged political competition and fostered impunity.<sup>107</sup> Criticism against the president or his agenda was greeted with hostility and was a dangerous avenue to pursue. For instance, the assassination of JM Kariuki, who was a fervent

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<sup>101</sup> Chweya L, 'The government anti-corruption programmes', 10-12.

<sup>102</sup> Nasong'o S, and Murunga G, *Prospects for democracy in Kenya*, Dakar: CODESRIA, 2007, 269

<sup>103</sup> Mutula S, Muna W, and Koma G, 'Leadership and political corruption in Kenya: Analysis of the 2010 Constitutional provisions on the presidency', *The Journal of Social, Political and Economic Studies* Volume 38, Number 3, pages 263-286, Fall 2013, 268.

<sup>104</sup> Chege M, 'Kenya: Back From the Brink?' *Journal of Democracy*. Vol. 9, No. 4, pages 125-139, 2008, 127.

<sup>105</sup> Amutabi M, 'Beyond imperial presidency in Kenya', 61.

<sup>106</sup> Bagaka O, 'Restructuring the provincial administration: An insider's view'. SID Constitution Working Paper No. 3, 2011, 3.

<sup>107</sup> Akech M, *Institutional reform in the new Constitution of Kenya*. Nairobi: International Center for Transitional Justice, 2010, 366.



critic of Kenyatta and his corrupt policies of land redistribution, under ‘suspicious circumstances’.<sup>108</sup>

The Executive (mainly the president), during this era succeeded in entrenching their control and power over all public officials in all the arms of government. This centralised power paved way for increased impunity and unchecked political power which, favoured the growth of corruption and obstructed any attempts at introducing good anti-corruption measures.<sup>109</sup>

### 3.4.2. *Moi era (1978-2002)*

Daniel arap Moi took office in August 1978 after Kenyatta’s death. Moi was an official of the KANU (Kenya African National Union) political party and had been Kenyatta’s vice president, it therefore came as no surprise that the dominant presidential powers and political patronage of his predecessors rule continued after his ascent to presidency.

Corrupt policies continued though with minor changes. Tribal politics, for instance, continued with the difference being that the Kalenjin became favourites and obtained dominance in business and politics.<sup>110</sup> By 1991, there were 45 Kalenjin DCs out of 66 available positions; 4 Kalenjin PCs out of 8 positions and; 17 Kalenjin PSs out of the 28 available positions.<sup>111</sup> This ethnic favouritism was a means to gain patronage where the Kalenjin ruling class received rewards in exchange for supporting Moi regime thus enabling him retain power.<sup>112</sup>

Moi similarly continued to centralise power around himself through championing constitutional amendments. The most notable of these amendments came in 1991 where Moi succeeded in making Kenya a *de jure* one-party state.<sup>113</sup> Political competition was stifled out and this became intensified following the 1982 attempted coup which caused the Moi regime to step up measures

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<sup>108</sup> Mutula S, Muna W, and Koma G, ‘Leadership and political corruption in Kenya’, 270.

“In an attempt to mitigate a potential revolt, Kenyatta had ordered an investigation into the murder. A list of government security officers was implicated, but none of them was ever punished.”

<sup>109</sup> For instance, the government was against Hon. Martin Shikuku’s motion to establish a Parliamentary Select Committee on Corruption arguing that the police were working on this. Even after parliament approved the motion and the committee was formed, the committee was disbanded within one month at the instigation of ministers in the committee.

See Chweya L, ‘The government anti-corruption programmes’, 12.

<sup>110</sup> Figaro J, ‘Domestic actors and liberalization: A case study of internal and external pressures in Moi’s Kenya’. *Contemporary Politics* Volume 19 Issue 3, 2013, 222.

<sup>111</sup> Amutabi M, ‘Ethnicity and Kenya’s Civil Service: A RetrospectionI, Mimeo’, Department of Development Studies, Moi University, Kenya, 1999, 8.

<sup>112</sup> Mulli L, ‘Understanding election clashes in Kenya, 1992 and 1997’, 8 *African Securities Review* Issue 4, 1999, 77.

<sup>113</sup> Barkan J. D, ‘Kenya: Assessing risks to stability’, Centre for strategic and international studies, 2011, 6

intended to suppress opposition including torture, surveillance, arbitrary detention and other forms of abuses.<sup>114</sup>

The era was characterised by what Throup termed as “formal corruption”. This refers to high level corruption in the public service.<sup>115</sup> The level of corruption increased during this regime mostly involving high government officials including government ministers and the president himself. The most notable of these is the Goldenberg scandal which involved businessman Kamlesh Pattni’s conspiracy with government officials to have his company, Goldenberg International, be awarded government contracts to export fictitious amounts of gold and diamonds from Kenya to the rest of the world, the officials would receive a percentage. The Kenyan government agreed to pay Goldenberg at the rate of 35% of its exports, which was above the 20% limit.<sup>116</sup> The Commissioner of Customs refused to pay this but then Minister of Finance, Hon. George Saitoti ordered the treasury to pay this amount. Goldenberg were paid an extra \$4.2 million in 2 years using public funds. It is estimated that the scandal cost the country more than 10% of its GDP.<sup>117</sup>

However, the oppression of political figures and media in Moi’s KANU fuelled calls for multi-partyism. This came to pass in 1992 after pressure from politicians, civil society and even religious groups.<sup>118</sup> Political competition in the multi-party era served as a useful check against high level corruption in Kenya. Nonetheless, it was no match for the political patronage and control that Moi already possessed. The Moi administration continued to engage in rampant corruption and avoided reforms that would reduce the ability for public gain. The effect was that Kenya’s economy continued to be affected where Kenya’s economic performance dwindled from per capita income of US\$271 in 1990 to US\$239 in 2002.<sup>119</sup>

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<sup>114</sup> Chege, M, ‘Kenya: Back From the Brink?’, 127-128;

Anderson D, ‘Yours in struggle for majimbo: Nationalism and party politics of decolonisation in Kenya 1954 - 64, *Journal of Contemporary History*, Vol 40 Issue 3, pages 547-564, 2005, 551.

<sup>115</sup> Throup D and Hornsby C, *Multi-party politics in Kenya: The Kenyatta and Moi states and the Triumphs of the system in the 1992 elections*, Oxford, 1992.

<sup>116</sup> Local Manufacturers (Export Compensation) Act.

<sup>117</sup> Cherotich, L, ‘Corruption and Democracy in Kenya’, University of Oxford, Undated, 3. - <https://www.scribd.com/document/168017984/Corruption-and-Democracy-in-Kenya> on 15 October 2016.

<sup>118</sup> Mutula S, Muna W, and Koma G, ‘Leadership and political corruption in Kenya’, 273.

<sup>119</sup> Francis K, Nekesa P, and Ndungu B, ‘Best practices in Constituency Development Fund (CDF)’ Nairobi: Collaborative Centre for Gender and Development, 2009, 2.



The failure of the KANU government to implement anti-corruption policies and legislation is indicative of the fact that the government gained from corruption and thus supported policies that provided opportunities for corruption.<sup>120</sup>

### **3.4.3. Kibaki Era (2002-2013)**

Mwai Kibaki became Kenya's third president in 2002. The election of Kibaki under a NARC ticket signified the end of an era, KANU had been defeated after many years. It was expected that the regime change would mean an end to corruption and the beginning of better service delivery. This was the promise that NARC had made to the people during campaigns, one of dedication to eradicate corruption.<sup>121</sup>

The beginning of Kibaki's term saw important reforms towards reduced corruption. These include: establishment of the Goldenberg inquiry<sup>122</sup>; creation of Ministry of Justice and Constitutional affairs; creation of position of PS in the office of the President in charge of Governance and ethics;<sup>123</sup> enactment of the Anti-Corruption and Economic Crimes Act and Public Officer Ethics Act. These and other reforms were important in the fight against corruption. The Goldenberg inquiry was the first sign that the new government was dedicated in the fight against corruption; the new ministry on the other hand demonstrated dedication to justice which would include pursuing and implementing measures that would bring corruption to an end; the new PS was important not only because of the function but also because the PS appointed was the former executive director of Transparency International, this showed that the government was ready to work with experts and outsiders to fight corruption. The 2 new Acts were also important steps, the government was finally making moves towards implementing credible anti-corruption measures. ACECA further established the Kenya Anti-Corruption Commission which would work specifically on anti-corruption.

The hope that was built around this regime, however, came to pass. To the disappointment of all, the strides made by the NARC regime did not make a lasting difference and the corruption malaise continued if not worsened. The measures pursued failed. First, the Goldenberg Inquiry seemed to

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<sup>120</sup> Chweya L, 'The government anti-corruption programmes', 13.

<sup>121</sup> Otieno G, 'The NARC's Anti-Corruption Drive in Kenya: Somewhere over the Rainbow?', *African Securities Review*, Vol. 14, No. 4, 2005.

<sup>122</sup> *The commission of Inquiry Act*, (Act No.2. of 2003).

<sup>123</sup> Gathii J, 'Kenya's Long Anti-Corruption Agenda', 34-35.



be in vain considering that though many government officials were mentioned, none were convicted.<sup>124</sup> Second, Githongo's position was soon vacated after he received several death threats from government officials and was forced into exile.<sup>125</sup> Third, the ACECA did not confer prosecutorial power to the KACC (and later the EACC) indicating that many parliamentarians benefitted from corruption.<sup>126</sup>

Transparency International indicated that the public perception of corruption in Kibaki's government had hardly improved since 2002.<sup>127</sup> A factor encouraging such high corruption perception may be the ethnic favouritism during the Kibaki era. The dominance of Kikuyu and other Mount Kenya Groups in politics and parastatals was felt quite heavily with 19 out of 34 PSs, and 23 out of 34 heads of parastatals being from Mount Kenya groups by 2006.<sup>128</sup> This was a divisive factor during this rule and contributed to high level corruption and impunity by the government. This ethnicised politics was also a key driver for the 2007-2008 Post-election violence which caused numerous casualties and entrenched tribal divisions and antagonism.

The high public perception of corruption can also be attributed to the cases of grand corruption implicating the NARC government. The most notable of these was the Anglo-leasing scandal. This scandal involved 18 different security-related contracts with the government which were questionable for several reasons including that: the government grossly overpaid to the tune of a sum of Kshs. 56.3 billion, some of the listed companies were non-existent, and further that none of the money was recoverable owing to the use of promissory notes.<sup>129</sup> Githongo's investigation into this scandal uncovered involvement of high level government officials including Kibaki, his vice president, the AG and the chairman of KACC amongst others.<sup>130</sup> The KACC's investigation into this affair was interfered with by the judiciary which prohibited KACC's investigation into

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<sup>124</sup> Chege, M, 'Kenya: Back From the Brink?', 129

<sup>125</sup> Glinz C, *Kenya's new Constitution*, 2010, 8.

<sup>126</sup> Gathii J, 'Kenya's Long Anti-Corruption Agenda', 36;

Namunane B, "Kenya: AG Fails to Act on 36 Corruption Cases," *All Africa*, Nov. 19, 2004.

"*Good Start, but More Needs to be Done*", *Daily Nation*, March 27, 2009;

<sup>127</sup> Transparency International, *Kenya Bribery Index*, 2007

<sup>128</sup> Amutabi M, "The Kikuyu Factor in Politics in Kenya", Paper presented at the African Studies Annual Meeting (ASA), New York: 2007.

<sup>129</sup> Mars Group Kenya, *Illegally Binding: The Missing Anglo Leasing Scandal Promissory Notes*, Report, 2007, 12-13.

<sup>130</sup> Githongo J, *Githongo Report To The President*, 2005; Wrong M, *It's our turn to eat: The story of a Kenyan whistle blower*, Harper Collins Publishers, New York, 2009, 168—170.

some of the companies said to have benefitted.<sup>131</sup> Then AG, Amos Wako also frustrated efforts by allowing the government to pay the contracts through promissory notes.<sup>132</sup>

The escalation of corrupt practices by government officials during this era best illustrates the lack of confidence in the government's ability and dedication towards fighting corruption. The measures implemented during this era, as indicated above, failed due to efforts made by government officials to frustrate any positive steps towards fighting corruption. Government-led efforts seem to lack legitimacy and are instead merely intended to create an illusion of dedication towards the fight while at the same time, being means to impede anti-corruption initiatives.

#### **3.4.4. Uhuru era (2013-2016)**

Uhuru Kenyatta took over from Kibaki in 2013. His regime was an embattled one from the beginning considering that he and his deputy president, William Ruto, were both facing crimes against humanity charges before the International Criminal Court over the 2007-2008 Post election violence at the time of their election.

As far as the fight against corruption goes, I would say that there was hope of reduced corruption during this era. This is largely owing to the promulgation of the Constitution of Kenya, 2010. This Constitution embodied fresh dedication in the fight against corruption where it contained. Article 79 provided that Parliament shall enact legislation establishing an independent Ethics and Anti-Corruption Commission. This marked the first time such anti-corruption commission was entrenched by the constitution thus ensuring more legitimacy of the EACC. Chapter 6 also addresses leadership and Integrity expected of all State and Public Officers.

The Uhuru regime has, however, had a worse record of corruption. There have been several corruption scandals by government officials only within the first 4 years of this administration.<sup>133</sup> There have been several major corruption scandals, most of them involving the government

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<sup>131</sup> Okwembah D, "Is this the End of the Anglo-Leasing Investigations?" *Daily Nation*, July 8, 2009.

<sup>132</sup> "Standard team, 'Kenya: KACC Accuses Attorney General of Frustrating Graft War' *The Standard*, 25 September 2006-< <http://allafrica.com/stories/200609250173.html>> on 10 December 2016.

<sup>133</sup> Nyakachunga V, 'DPP releases 88 high profile cases still pending', 3 March 2016. – <https://www.kenyans.co.ke/news/dpp-releases-88-high-profile-corruption-cases-still-pending> on 07 Jan 2016.



departments, government officials, or parastatals.<sup>134</sup> The most notable of these include:<sup>135</sup> the Geothermal Development Company tendering scandal (Kshs. 10 billion), Standard Gauge Railway tendering scandal (KSh314.2 billion), Anglo-leasing pay out reward (Kshs. 3 Billion), Karen Land saga (Kshs. 8 Billion), IEBC ‘Chickengate’ scandal (Kshs. 50 Million), and the National Youth Service Scandal (Kshs. 791 Million).

While decentralisation usually fosters more accountability by increasing the ability to monitor bureaucrats,<sup>136</sup> a negative trend has been seen concerning devolution in Kenya. A clear example is the NYS Scandal involving misappropriation by the Ministry of Devolution and Planning. The EACC has further reported that corruption is the major challenge affecting the counties.<sup>137</sup> Former EACC commissioner Rose Macharia reported that “devolution creates avenues that could be exploited by the corrupt to the detriment of citizens.”<sup>138</sup>

The government in this era has demonstrated even less political will to fight corruption. The EACC has been rocked by political pressure which has resulted in the resignation of two directors so far.<sup>139</sup> The rampant corruption at different levels and departments of government<sup>140</sup> has also been a key factor affecting the fight against corruption, it has resulted in hypocrisy by leaders who report graft later to be implicated in different scandals.<sup>141</sup> Anti-corruption efforts are hardly taken

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<sup>134</sup> The Real Deal, ‘The shocking list of Jubilee administration 24 months of mega corruption’, 17 March 2015. <https://deepcogitation.com/2015/03/17/the-shocking-list-of-jubilee-administration-24-months-of-mega-corruption/> on 16 November 2016.

<sup>135</sup> Ethics and Anti-Corruption Commission, Table 2: High profile corruption cases as at 16<sup>th</sup> of February 2016.- <http://www.odpp.go.ke/phocadownload/HIGH%20PROFILE%20LIST%2023022016.pdf> on 3 January 2017.

<sup>136</sup> Ndegwa S, *Decentralization in Africa: A stocktaking survey*, World Bank, 2002, 2;

Wallis JJ, and Oates WE, ‘Decentralization in the public sector: An empirical study of state and local government, in Rosen H (ed.), *Fiscal federalism quantitative studies*, University of Chicago Press, pp. 5– 32, 1988, 6-9.

<sup>137</sup> Ethics and Anti-corruption Commission, *National Ethics and Corruption Survey, 2015 Report*, 2015, 70. - <http://www.eacc.go.ke/docs/National-Ethics-and-Corruption-Survey-2015-REPORT-4March2016.pdf> on 16 November 2016

<sup>138</sup> Ringa M, ‘Corruption, major challenge facing counties’, *Daily Nation*, 23 August 2016. - <http://www.nation.co.ke/counties/mombasa/Corruption-major-challenge-facing-counties/1954178-3355410-15ndht8/> on 16 November 2016.

<sup>139</sup> Standard Team, ‘EACC boss Phillip Kinisu resigns’, *Standard Digital*, <https://www.standardmedia.co.ke/article/2000214143/eacc-boss-philip-kinisu-resigns> on 14 November 2016.

<sup>140</sup> Leftie P, ‘DPP Tobiko lays bare corruption cases’, *Daily Nation*, 27 February 2016. - <http://www.nation.co.ke/news/DPP-Tobiko-lays-bare-corruption-cases/1056-3094148-svjyhz/index.html> - on 07 Jan 2017.

<sup>141</sup> Musau N, ‘Where is the weak link in Kenya’s fight against corruption, *The Standard on Sunday*, 3 November 2016.- [http://www.ipsos.co.ke/NEWBASE\\_EXPORTS/USAID/161113\\_The%20Standard%20on%20Sunday\\_4\\_c13c2.pdf](http://www.ipsos.co.ke/NEWBASE_EXPORTS/USAID/161113_The%20Standard%20on%20Sunday_4_c13c2.pdf) on 19 November 2016.



seriously by the political elite owing to the country's poor record of convicting public officials.<sup>142</sup> This has been worsened by seemingly credible claims of corrupt practices by EACC officials.<sup>143</sup> The country continues to suffer at the hand of graft.

### **3.5. Consequences of Corruption in Kenya**

This dissertation is largely concerned with the effects of corruption on the economy. The focus on the economic costs of corruption is in order to justify the anti-corruption initiatives on an economic basis. The recommendations proposed by this study shall therefore be based solely on rational economic arguments and shall serve to reduce the costs that the economy incurs as a result of corruption and poor anti-corruption measures.

Corruption is the single greatest obstacle to economic development.<sup>144</sup> Corruption undermines economic growth where it adversely affects important determinants of economic performance such as investment, macro-financial stability, and factors of production.<sup>145</sup> Corruption further frustrates the labour market in Kenya thus causing a strain to the economy where less individuals pay taxes owing to unemployment. Relying on a World Bank report,<sup>146</sup> U.S president Barack Obama pointed out that corruption costs Kenyans 250,000 jobs every year.<sup>147</sup> PricewaterhouseCoopers (PWC) reported that 35% of Kenya's work force (4,000 employees) were ghost workers where some employees could not be identified, others had fake qualification documents, some did not exist in human resources records, and others held dubious employment letters.<sup>148</sup>

As Jain asserts, the effects of corruption are felt throughout the economy and are not merely confined to the specific corrupt transactions.<sup>149</sup> Kenya's economy has suffered overtime owing to the effects of corruption. In 2001 for instance, the economy suffered immensely owing to risk of

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<sup>142</sup> Musau N, 'Where is the weak link in Kenya's fight against corruption', 1.

<sup>143</sup> The Devolution Forum, "Press statement on the corruption scandals within the Ethics and Anti-Corruption Commission (EACC)," at Hilton Hotel, 20 March 2015.

[http://www.tisa.or.ke/images/uploads/THE\\_DEVOLUTION\\_FORUM\\_\(TDF\)\\_PRESS\\_STATEMENT\\_ON\\_THE\\_CORRUPTION\\_WRANGLES\\_WITHIN\\_THE\\_ETHICS\\_AND\\_ANTICORRUPTION\\_COMMISSION\\_\(EACC\).pdf](http://www.tisa.or.ke/images/uploads/THE_DEVOLUTION_FORUM_(TDF)_PRESS_STATEMENT_ON_THE_CORRUPTION_WRANGLES_WITHIN_THE_ETHICS_AND_ANTICORRUPTION_COMMISSION_(EACC).pdf) on 16 November 2016.

<sup>144</sup> World Bank, 2001, 201.

<sup>145</sup> International Monetary Fund, 'Corruption: Costs and Mitigating strategies', Staff Discussion Notes, May 2016 ,iii

<sup>146</sup> The World Bank, 'Kenya at work: Energising the economy and creating jobs', in *Kenya Economic Update* Edition No. 7, December 2012, ix.

<sup>147</sup> Kamau L, 'Kenyans hold key to ending corruption', *Citizen Digital*, 26 July 2015. – <https://citizentv.co.ke/news/kenyans-hold-key-to-end-corruption-says-obama-96033/> on 15 December 2016.

<sup>148</sup> Mwanzia M and Gichura G, 'Report: Council has 4,000 'ghost workers''. *The Standard*, 18.

<sup>149</sup> Jain A, 'Corruption: A Review', 72

not receiving \$300 Million in international aid built into the budget owing to sanctions placed because of the government's reluctance to combat corruption.<sup>150</sup>

The finance minister in his 2010 report to parliament pointed out that the government was losing 4 billion dollars annually as a result of corruption.<sup>151</sup> This sum was nearly a third of the 2010 national budget. In 2005, it was reported that Kenya's GDP growth reduces yearly at an average of 0.03% owing to corruption<sup>152</sup> and her per capita GDP reduces at an average of 92 US Dollars annually.<sup>153</sup> The economic growth of Kenya thus continues to dwindle as a result of rampant corruption.

In conclusion, corruption has been seen to affect several sectors of the Kenyan economy. It has led to skewed distribution of income and wealth, increased costs of doing business, discouraged local and foreign investment, poverty increase, distorted resource allocation, reduced job creation, limited economic growth, and disproportioned development.<sup>154</sup>

Effective anti-corruption efforts should thus be pursued in order to deal with corruption. An effective campaign against corruption would result in: increased public revenue, increased investor confidence, creation of more jobs, improved living standards, stable and increased economic growth, proportionate development, and poverty alleviation.

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<sup>150</sup> Mark L 'Anti-graft bill in corrupt Kenya fails in parliament, Lack of passage threatens IMF aid', *New York Times News Service*, 15 August 2001

<sup>151</sup> Mwachiro K, 'Kenya Corruption costs government dearly', *BBC News*, Nairobi, 03 December 2010. - <http://www.bbc.com/news/world-africa-11913876> on 15 December 2016.

<sup>152</sup> Dreher A and Herzfeld T, 'The Economic costs of corruption: A survey and new evidence', Working Paper 0506001, Economics Working Paper Archive, June 2005, Table 4.

<sup>153</sup> Dreher A and Herzfeld T, 'The Economic costs of corruption: A survey and new evidence', Table 5.

<sup>154</sup> Uhuru Kenyatta, "Speech during the official launch of the Ethics and Anti-corruption Commission Strategic Plan 2013-2018," at the Kenya International Conference Centre, Nairobi: 23 June 2014.



## CHAPTER 4

### Legal and Institutional Framework of Corruption in Kenya

#### 4.1. Chapter Introduction

This chapter will take on a historical approach to analysing the legal and institutional framework of anti-corruption in Kenya. It shall look at the laws dealing with corruption and its prosecution, and thereafter the institutions established under these laws to tackle corruption. This chapter is primarily focussed on analysis. It analyses the way in which prosecution of corruption has been handled in Kenya and points out the factors which have affected the efficient prosecution of corruption and economic crimes in Kenya. The second part of this paper shall analyse the prosecution of corruption in Sierra Leone. It will analyse the anti-corruption framework in Sierra Leone and the effect of its Anti-Corruption Commission (ACC) prosecutorial powers on its performance and in the fight against corruption.

#### 4.2. Framework during Kenyatta Regime (1963- 1978)

##### 4.2.1. *Prevention of Corruption Act*

Kenya inherited many of its post-independence laws from its colonial masters. Its corruption laws were similarly inherited from the British colonial government which enacted the Prevention of Corruption Act (POCA) in 1956.<sup>155</sup> This Act served as the legal framework for corruption for several years before its repeal early in the 21<sup>st</sup> century.

Though in hindsight, this Act was one of the most important initiatives against corruption as it set the ball rolling, the law hardly found any use during the remaining years of Kenya's colonial government and extending into the full term of the Kenyatta presidency (1964-1978). It seems the motive for enactment of this Act was not to remedy corruption *per se* but was merely part of the Crown's policy in each of its colonies. They enacted anti-corruption laws in each of their colonies.<sup>156</sup> There was little activity concerning the Act apart from series of amendments that sought to clarify terminology used,<sup>157</sup> and to define and modify certain offences contained in the Act.<sup>158</sup> The

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<sup>155</sup> *Prevention of Corruption Act (Act No. 33 of 1956)*.

<sup>156</sup> Tuta J, 'Evolution of anti-corruption policy and institutional framework', 66.

<sup>157</sup> Kenya, The National Assembly, Debates on the Prevention of Corruption Bill, July 20 1956

<sup>158</sup> Kenya, The National Assembly, Debates on the Prevention of Corruption (Amendment) Bill, Oct. 19, 1967



debates around the definition and terminology in the Act further made it difficult to hold people accountable for corruption offences since they protected persons who offers bribes.<sup>159</sup>

### **4.3. Framework during Moi Regime (1978-2002)**

#### **4.3.1. 1991 amendment to POCA**

In 1991, POCA was amended. This amendment created the Anti-corruption squad. This amendment came at a time when corruption had become one of the central-most issues of concern for the international community, especially the donor community.<sup>160</sup> The Moi regime then moved to make this amendment lest they lose the support of its international partners, on whom it greatly relied.

##### **4.3.1.1. Anti-Corruption Squad 1991**

The Anti-corruption squad was a special unit within the police force specially mandated to investigate corruption offences.<sup>161</sup> The unit was, however, disbanded after a short term of 3 years without much to write home about.<sup>162</sup> Tuta argues that this unit was ineffective in the fight against corruption while offering the following reasons.<sup>163</sup> One, it had few investigators who were regular police officers with little motivation. Two, its independence was since it was located at the Criminal Investigations Department (CID) offices. Three, members of the unit lacked necessary training or preparedness to tackle high-level corruption cases. Fourth, the Squad was itself accused of rampant corruption. Gathii arrives at a similar conclusion adding that the Squad officers hesitated to pursue corruption allegations against their superiors noting that the Moi regime was notorious for its corruption and patronage.<sup>164</sup>

#### **4.3.2. 1997 amendment of POCA**

In 1997, an amended was made on POCA which allowed the insertion of section 11B of POCA.<sup>165</sup> This amendment sought to establish the Kenya Anti-Corruption Authority (KACA). KACA took over the anti-corruption mandate from the Anti-Corruption Squad. KACA was different from the Anti-Corruption Squad given that it was an independent ACA separate from the government. This was a condition imposed by the International Monetary Fund in order to continue extending

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<sup>159</sup> Kenya, The National Assembly, Debates on the Prevention of Corruption Bill, July 20 1956

<sup>160</sup> Gathii J, 'Defining the Relationship between Human Rights and Corruption', 31 *University of Pennsylvania Journal of International Law*, 2009, 19-21.

<sup>161</sup> Tuta J, 'Evolution of anti-corruption policy and institutional framework', 66.

<sup>162</sup> Gathii J, 'Kenya's Long Anti-Corruption Agenda', 64.

<sup>163</sup> Tuta J, 'Evolution of anti-corruption policy and institutional framework', 66-67

<sup>164</sup> Gathii J, 'Kenya's Long Anti-Corruption Agenda', 13.

<sup>165</sup> Miscellaneous Law (Repeals and Miscellaneous Amendments) Act, No. 10 of 1997.

permission was not required for prosecution of this particular matter.<sup>173</sup> Mwau's KACA had gained traction and his performance had started to instil public confidence in the dedication against *magendo* (graft).<sup>174</sup> His removal from office indicated the lack of government will to curb corruption and KACA's lack of independence which, allowed the government to interfere with its anti-graft mandate.

#### **4.3.2.2.Reconstituted KACA, 1999**

In 1999, the KACA was reconstituted with Justice Aaron Ringera appointed its new director. Ringera was a sitting High Court Judge and a solicitor general in the AG's office.<sup>175</sup> This appointment perhaps corrected the initial 'false start' of the KACA considering that: a) Ringera was properly appointed under the 1998 rules; b) Ringera was actually qualified for the job; c) Ringera's KACA received all the necessary resources to pursue its cases. Despite all this, KACA was also disbanded shortly after.

Ringera's KACA appeared to be one of the most serious government efforts against corruption having charged 46 people by the time of its disbandment in December 2000 in addition to 115 other cases being investigated at the time.<sup>176</sup> Ringera's three-pronged approach against corruption appeared to be working. This strategy proposed "the consistent enforcement of the law against corruption; the prevention of corruption by removing the opportunities that facilitate the crime; and the education of the public and enlistment of their support in the fight against corruption."<sup>177</sup>

The judiciary returned to haunt the KACA in the High Court case of *Stephen Mwai Gachiengo and Albert Muthee Kahuria v Republic*<sup>178</sup> (*Gachiengo decision*). The court decided in favour of the applicants that: a) provisions in POCA establishing the KACA are contrary to article 26 of the constitution; b) it was contrary to the constitutional principle of separation of powers for the Head of KACA to be a sitting judge of the High Court; and c) Attorney General's consent to KACA's

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<sup>173</sup> Tuta J, 'Evolution of anti-corruption policy and institutional framework', 68.

<sup>174</sup> Kibwana K, et al, *Initiatives against corruption in Kenya*, 34.

<sup>175</sup> Tuta J, 'Evolution of anti-corruption policy and institutional framework', 69.

<sup>176</sup> Kibwana K, et al, *Initiatives against corruption in Kenya*, 35.

<sup>177</sup> Institute of Economic Affairs, *Corruption in Kenya: A Call to Action*, Bulletin, August 2000, 4.

See also Kenya Anti-Corruption Authority, *Strategic Plan 1999-2003*, 1999.

<sup>178</sup> *Stephen Mwai Gachiengo and Albert Muthee Kahuria v Republic*, High Court, Miscellaneous application No. 302 of 2000.



development aid to Kenya through the Extended Structural Adjustment Facility (ESAF).<sup>166</sup> Similar to its predecessor then, the establishment of the KACA did not necessarily demonstrate the government's will to fight corruption but purposed to please its development partners.

#### 4.3.2.1. Kenya Anti-Corruption Authority, 1997

The KACA then emerged with a more defined mandate which included: to investigate, and subject to the directions of the Attorney General, to prosecute for offences under this Act and other offences involving corrupt transactions.<sup>167</sup>

The President then appointed Harun Mwau the new director, alongside the provision for the setting up a judicial tribunal to remove the director if found to be incompetent or incapable.<sup>168</sup> This tribunal was called to task in 1998 where it found Mr. Mwau incompetent and recommended his removal. His removal may perhaps have been justified considering factors that Kibwana *et al* refer to as a 'false start'.<sup>169</sup> 'False start' refers to following. One, Mwau was appointed before publication of rules set to govern appointment of KACA director. Two, Mwau's appointment represented patronage since he dropped out of the 1997 presidential race and endorsed Moi only shortly before this appointment. Third, KACA was given very minimal resources to investigate and prosecute corruption offences. Further, KACA apparently lacked a concrete anti-corruption strategy.<sup>170</sup>

The allegation that ultimately did Mwau in, however, was that he had acted *ultra vires* by arraigning suspects in court without the AG's sanctioning.<sup>171</sup> This was specifically after KACA had brought a case concerning fraudulent imports against then powerful Finance Minister, Simeon Nyachae and three other treasury officials.<sup>172</sup> Mwau was removed despite the fact that the AG's

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<sup>166</sup> Kibwana K *et al* (eds.) *Initiatives against corruption in Kenya*, 31.

<sup>167</sup> Section 21, *Prevention of Corruption Act*, Cap 65 of the Laws of Kenya, 1956 (1997 amendment).

<sup>168</sup> Section 11B (2) (2G) (f), *Prevention of Corruption Act*, Cap 65 of the Laws of Kenya, 1956 (1997 amendment).

<sup>169</sup> Kibwana K, *et al*, *Initiatives against corruption in Kenya*, 33.

<sup>170</sup> Tuta J K, 'Evolution of anti-corruption policy and institutional framework', 68.

<sup>171</sup> Tuta J K, 'Evolution of anti-corruption policy and institutional framework', 68.

<sup>172</sup> Gathii J, 'Corruption and Donor Reforms: Expanding the Promises and Possibilities of the Rule of Law as an Anti-Corruption Strategy in Kenya', 14 *Connecticut Journal of International Law*, 51.

See also, McKinley Jr. JC, 'Kenyan who charged 4 treasury officials with graft is suspended', *The New York Times*, 31 July 1998. - <http://www.nytimes.com/1998/07/31/world/kenyan-who-charged-4-officials-with-graft-is-suspended.html> on 15 December 2016.



prosecution given as a “formality” and was not valid under the constitution.<sup>179</sup> Following this, Ringera was removed and KACA disbanded shortly afterwards.

Though Ringera may have had a ‘false start’ of his own,<sup>180</sup> interference by the government, the judiciary in particular, emerged as the major tool used to fight positive initiatives against corruption. True to this, Tuta writes that the *Gachiengo decision* was *per incuriam* (obviously wrong) citing 5 reasons which included the following.<sup>181</sup> First, article 26 presupposed existence of prosecuting authorities outside of AG’s office and thus KACA was not unconstitutional. Second, KACA was empowered by section 11B (3) of POCA to carry out prosecutions and KACA prosecutors appointed and granted prosecutorial powers by the AG in line with section 11B (3) (b) of POCA and section 85(1) of the Criminal Procedure Code (CPC). Third, the court should have applied a purposive approach to the interpretation of POCA and find parliament’s intention to eradicate corruption. They would find that KACA should be allowed to function despite the challenge of separation of powers, since it was proper for that purpose and did not infringe on anyone’s constitutional rights.

Following the *Gachiengo decision*, the AG took over all the cases under investigation by the KACA. Notably, all these cases were either dismissed or withdrawn by the courts.<sup>182</sup> The government, in a bid to please its international partners by appearing to be dedicated to the fight against corruption then made legislative attempts to revive the KACA.<sup>183</sup> A Constitutional Amendment bill was tabled in 2001<sup>184</sup> which, aimed at amending the wording of article 26 in order to find that KACA was constitutional.<sup>185</sup> The bill failed at its third reading.<sup>186</sup> Following this, the Corruption Control Bill was tabled in the same year. This bill intended to establish another institution to replace KACA – The Kenya Corruption Control Authority (KCCA).<sup>187</sup> This bill attempted to remedy some of the challenges of the KACA by taking away prosecutorial powers.<sup>188</sup>

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<sup>179</sup> *Stephen Mwai Gachiengo and Albert Muthee Kahuria v Republic*, High Court, Miscellaneous application No. 302 of 2000, 13.

<sup>180</sup> Kegoro G, ‘Justice Ringera’s appointment: Some legal questions, *The Advocate*, 2<sup>nd</sup> Quarter, 1999.

<sup>181</sup> Tuta J, ‘Evolution of anti-corruption policy and institutional framework’, 71.

<sup>182</sup> Anti-Corruption Police Unit, *Annual Report 2002*, 2002, 11.

<sup>183</sup> Gathii J, ‘Kenya’s Long Anti-Corruption Agenda’, 28.

<sup>184</sup> *Constitution of Kenya (Amendment)(No.3) Act*, 2001

<sup>185</sup> Migwe K, *KACA Bills – The Way Forward*, 1.

<sup>186</sup> Mutua M, ‘Government Shelves, Replaces Graft Bill’, *East African Standard*, 4 April 2003.

<sup>187</sup> Part 1(2), *Corruption Control Bill*, 2011.

<sup>188</sup> Gathii J, ‘Kenya’s Long Anti-Corruption Agenda’, 31.

#### **4.3.2.3. Anti-Corruption Police Unit**

The Anti-corruption police unit (ACPU) was established on 13<sup>th</sup> September 2001 headed by the senior deputy commissioner of police who would be answerable to the Director of the CID.<sup>189</sup> The ACPU was charged with the investigation of all corruption and corruption-related offences directed to them by the AG, commissioner of police (commissioner) or by their own initiative.<sup>190</sup>

ACPU along with the AG took over the investigations of the KACA.<sup>191</sup> The challenges that affected the ACPU include<sup>192</sup>: lack of independence since it's controlled by the CID director and commissioner of police; it had limited resources to fulfil its mandate; and it was also unable to prosecute cases that it investigates. It should be noted that the Commissioner and the AG attempted to bring a prosecution unit within the ACPU but this unit was quickly done away with owing to technicalities.<sup>193</sup>

The performance of the ACPU was exemplary, especially considering the circumstances above. This could be illustrated by the fact that more cases were reported to the ACPU than the KACA. ACPU had gained the trust of the community. They received and processed 2,507 cases between October 2001 and December 2002.<sup>194</sup> This may perhaps be attributed to the fact that they had access to the police intelligence networks.<sup>195</sup> The ACPU was replaced by the KACC in 2002.

#### **4.4. Framework during Kibaki Regime (2002 -2013)**

The election of President Mwai Kibaki in 2002 intensified the fight against corruption as had been a major slogan during his campaign.<sup>196</sup> Three bills were introduced in parliament in 2003 which had important implications for Kenya's fight against corruption. First, The Constitution (amendment) bill intending to create the Kenya Anti-Corruption Commission (KACC) which would have roles including: investigation, prevention, prosecution, civic litigation and public education.<sup>197</sup> Second was the Anti-Corruption and Economic Crimes Bill which contained the

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<sup>189</sup> Tuta J K, 'Evolution of anti-corruption policy and institutional framework', 77

<sup>190</sup> 'Head of anti-corruption squad appointed', *IRIN News*, 14 September 2001 - <http://www.irinnews.org/report/26763/kenya-head-anti-corruption-squad-appointed> on 15 December 2016; See Also *Daily Nation*, 14 September 2001.

<sup>191</sup> Anti-Corruption Police Unit, *Annual Report 2002*, 2002, 11.

<sup>192</sup> Gathii J, 'Kenya's Long Anti-Corruption Agenda', 32.

<sup>193</sup> Tuta J K, 'Evolution of anti-corruption policy and institutional framework', 78

<sup>194</sup> Anti-Corruption Police Unit, *Annual Report 2002*, 2002, 10.

<sup>195</sup> Anti-Corruption Police Unit, *Annual Report 2002*, 2002, 6.

<sup>196</sup> Otiemo G, 'The NARC's Anti-Corruption Drive in Kenya: Somewhere over the Rainbow?', Vol. 14 *African Security Review* No. 4, 2005. - <http://www.iss.co.za/pubs/ASR/14No4/EOtiemo.htm> on 19th December 2016

<sup>197</sup> Chapter VIII, *The Constitution (amendment) Bill*, 2003.



structure and functions of the KACC. Third, the Public Officers' Ethics bill aimed at containing provisions to ensure that all public officers act in accordance with integrity.<sup>198</sup> Unfortunately all three bills were rejected at parliament largely owing to contempt for ACAs and as a result of the *Gachiengo decision* where they thought the KACC's proposed prosecutorial power would be against the principle of separation of power.<sup>199</sup>

The government then withdrew the Constitution (amendment) bill and then redrafted the Anti-Corruption and Economic Crimes Bill and the Public Officers' Ethics bill which retained most provisions but for the removal of prosecutorial powers for KACC.<sup>200</sup> The bills were both passed on 20<sup>th</sup> April 2003 and now form the anti-corruption legal framework as the Anti-Corruption and Economic Crimes Act (ACECA)<sup>201</sup> and the Public Officers' Ethics Act (POEA).<sup>202</sup>

#### **4.4.1. Public Officer Ethics Act, 2003**

This Act advances the integrity of public officers by providing a code of conduct for public officers, and requiring certain public officers to make financial declarations for connected purposes.<sup>203</sup> This aids anti-corruption efforts in line with Justice Ringera's assertion that an enforceable code of conduct would help do away with corruption.<sup>204</sup> The Act would thus be an effort against corruption by defining the basic values, principles and set boundaries of acceptable behaviour by public officials in this country.<sup>205</sup>

The POEA sets a code of conduct to guide public servants. This is in line with global trend of doing so as under the United Nations Convention against Corruption.<sup>206</sup> Sections 8 to 31 of POEA in this regard list duties that ought to be followed by public officers.<sup>207</sup> To mention a few, it requires them to: carry out their duties efficiently and honestly<sup>208</sup>; treat others courteously and respectfully;<sup>209</sup> observe the rule of law;<sup>210</sup> refrain from using public office for personal

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<sup>198</sup> Tuta J, 'Legal Framework for control of corruption', 145.

<sup>199</sup> Tuta J, 'Legal Framework for control of corruption', 45.

<sup>200</sup> Tuta J, 'Legal Framework for control of corruption', 145.

<sup>201</sup> *Anti-corruption and economic crimes Act*, (Act No. 3 of 2003).

<sup>202</sup> *Public Officer Ethics Act* ( Act No.4 2003)

<sup>203</sup> Preamble, *Public Officer Ethics Act* (Act No.4 2003).

<sup>204</sup> Integrity and Anti-Corruption Committee, *Report on the Judiciary*, September 2003.

<sup>205</sup> The National Assembly, *Debates on the Public Officer Ethics Bill*, March 13, 2003, para 446.

<sup>206</sup> Article 8, UNCAC

<sup>207</sup> A "public officer" is defined Section 2, *Public Officer Ethics Act* (Act No.4 2003).

<sup>208</sup> Section 8, *Public Officer Ethics Act* (Act No.4 2003)

<sup>209</sup> Section 9(b), *Public Officer Ethics Act* (Act No.4 2003).

<sup>210</sup> Section 10, *Public Officer Ethics Act* (Act No.4 2003).



enrichment;<sup>211</sup> avoid conflicts of interest when discharging their duties;<sup>212</sup> to take reasonable care of property entrusted to him;<sup>213</sup> and to observe political neutrality in performing their duties.<sup>214</sup>

Specialised commissions are also envisioned in the Act which will have the role of creating codes of conduct in different subsections of public service. Section 5 provides that POEA shall apply to public officials until such a time that specialised commissions pass their own codes of conduct more relevant to their specific category of public service so long as this code of conduct is not more lenient.<sup>215</sup> Section 36 further empowers these commissions to with judicial powers allowing them to investigate and punish those who violate the codes that they create.<sup>216</sup>

Arguably the most effective provision of the POEA is section 26, which requires public officers to issue annual declaration of their wealth and the wealth of their families.<sup>217</sup> Githongo has stated that that this requirement would help identify people who accumulate wealth through illegal or unprocedural means.<sup>218</sup> The Act also explains the procedure for making the declarations including – when to make them, which information can be confidential, and when one will be required to undergo questioning owing to unexplained wealth.<sup>219</sup> The relevant commission may also demand that an officer clarify their wealth report when aspects are omitted or undisclosed.<sup>220</sup>

#### ***4.4.2. Anti-Corruption and Economic Crimes Act, 2003***

This act had the effect of repealing the Prevention of Corruption Act which had been in operation since 1956. It sought to be a robust framework against corruption providing for prevention, investigation, and punishment of corruption, economic crimes and related offences.<sup>221</sup> ACECA provides for all corruption offences and lists in detail conduct that would constitute corruption. It also provides for the penalty to be expected for such corrupt conduct. In this, ACECA created the new offence of economic crime which is defined as any act or omission by any person that results

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<sup>211</sup> Section 11, *Public Officer Ethics Act* (Act No.4 2003).

<sup>212</sup> Section 12, *Public Officer Ethics Act* (Act No.4 2003).

<sup>213</sup> Section 15, *Public Officer Ethics Act* (Act No.4 2003).

<sup>214</sup> Section 16, *Public Officer Ethics Act* (Act No.4 2003).

<sup>215</sup> Section 5, *Public Officer Ethics Act* (Act No.4 2003).

<sup>216</sup> Section 36, *Public Officer Ethics Act* (Act No.4 2003).

<sup>217</sup> Section 26, *Public Officer Ethics Act* (Act No.4 2003)..

<sup>218</sup> *East African Standard*, 17 September 2003, 4.

<sup>219</sup> Sections 26 – 34, *Public Officer Ethics Act* (Act No.4 2003).

<sup>220</sup> Section 28, *Public Officer Ethics Act* (Act No.4 2003).

<sup>221</sup> Preamble, *Anti-corruption and Economic Crimes Act* (Act No. 3 of 2003).

in loss of public property/resources.<sup>222</sup> Section 45 lists the conduct that would constitute an economic crime.

In lieu of prosecutorial power, ACECA provided for wider investigative powers for KACC (which now apply to the EACC) than were envisioned for earlier institutions like KACA. These included power to investigate: (i) conduct constituting corruption or economic crime; (ii) conduct liable to allow, encourage or cause conduct constituting corruption or economic crime.<sup>223</sup> In addition to this, the KACC as per section 6(2) also had “all the powers necessary or expedient for the performance of its functions.”<sup>224</sup> This in effect means that the list was not exhaustive and the KACC could have more powers incidental to its role. Another interesting development was that KACC investigators were granted special privileges and immunity. Section 23 provides that KACC investigators shall in the course of carrying out investigations, be given the privileges and immunities of police officers.<sup>225</sup>

The institutional framework against corruption in ACECA extended beyond the creation of the KACC. It also included the following. First, the Kenya Anti-corruption advisory board in section 16 whose functions were: advising the KACC as is its principal role,<sup>226</sup> nominating persons for KACC appointment,<sup>227</sup> nominating persons for KACC removal,<sup>228</sup> and vetting of donations KACC.<sup>229</sup> Second, ACECA empowered the Judicial Service Commission to appoint special magistrates who head anti-corruption courts<sup>230</sup> whose roles were to ensure ACECA cases are fast-tracked by only being heard by the special magistrates.<sup>231</sup> Third, the AG in line with the then

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<sup>222</sup> Section 2, *Anti-corruption and economic crimes Act*, (Act No. 3 of 2003).

Ethics and Anti-Corruption Commission, *The Anti-corruption and economic crimes Act 2003*, explained, 20. - <http://www.eacc.go.ke/Docs/IEC/ACECA2.pdf> on 4 January 2017.

<sup>223</sup> Section 65, *Anti-corruption and economic crimes Act*, (Act No. 3 of 2003).

<sup>224</sup> Section 6(2), *Anti-corruption and economic crimes Act*, (Act No. 3 of 2003).

<sup>225</sup> Section 23, *Anti-corruption and economic crimes Act*, (Act No. 3 of 2003).

<sup>226</sup> Section 17, *Anti-corruption and economic crimes Act*, (Act No. 3 of 2003).

<sup>227</sup> Section 8, *Anti-corruption and economic crimes Act*, (Act No. 3 of 2003).

<sup>228</sup> Section 19(3), *Anti-corruption and economic crimes Act*, (Act No. 3 of 2003).

<sup>229</sup> Section 13(6), *Anti-corruption and economic crimes Act*, (Act No. 3 of 2003).

<sup>230</sup> Section 3, *Anti-corruption and economic crimes Act*, (Act No. 3 of 2003).

<sup>231</sup> Section 4, *Anti-corruption and economic crimes Act*, (Act No. 3 of 2003).

See also *Republic v Raphael A Aligana, Samuel M. Muhuro, and Susan M. Maina*, Criminal Case No. 752 of 2004 at the Chief Magistrates Court. As per Muchelule CM, the court couldn't try a case under ACECA since it wasn't a Special Magistrate's Court;

Mwige also explains the rationale for using special courts, which has been done over time in several commonwealth countries. See Mwige K, “Modern Practices in prosecuting corruption cases”, a paper presented during seminar on *Implementing the Government of Kenya's Anti-Corruption Strategy*, at Aberdare Country Club, Nyeri, November 2003, 4.



Constitution<sup>232</sup>, was required by ACECA to prosecute all corruption offences and economic crimes and to submit to parliament annual reports on the number of prosecutions under ACECA done by his office.<sup>233</sup>

#### **4.4.2.1. Kenya Anti-Corruption Commission**

Established under ACECA,<sup>234</sup> the Kenya Anti-Corruption Commission became operational in 2003 and was charged with spearheading the fight against corruption. Its mandate was to detect, investigate, monitor, and prevent corruption and economic crimes, as well as public education on the negative effects of corruption.<sup>235</sup> To discharge its mandate, it employed a three-pronged approach of investigation, prevention, and public education.<sup>236</sup> The KACC was also organised into four directorates in line with its specialised roles – Investigation and asset training; Legal services and asset recovery; preventive services and; finance and administration.<sup>237</sup>

The strategies and approaches of the KACC to corruption were robust and arguably the strongest efforts against corruption that Kenya had ever seen. In fact by the end of 2009, it had investigated and recommended for prosecution 8 ministers, 4 Members of Parliament, 11 Permanent Secretaries, 65 directors and Chief Executive Officers of public institutions and 96 other senior level management officers of public bodies.<sup>238</sup> The KACC was on track to achieve even greater achievements in this regard before September 2009 when the KACC faced administrative and legal battles.

These battles were largely on the basis of appointment of the KACC director. Kenyan Anti-corruption authorities appear to have all suffered from a ‘false start’, since the issue in this regard concerned appointment of Justice Ringera as director. Former President Mwai Kibaki re-appointed Ringera for a second term in August 2009 without the consultation of the Kenya Anti-Corruption Authority Board which was then charged with this role of appointment.<sup>239</sup> What followed was a

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<sup>232</sup> Article 26, *Constitution of Kenya (Amendment) Bill (Act No. 3 of 2001)*.

<sup>233</sup> Section 37, *Anti-corruption and economic crimes Act*, No. 3 of 2003.

<sup>234</sup> Section 6, *Anti-corruption and Economic Crimes Act* (Act No. 3 of 2003).

<sup>235</sup> Kenya Anti-corruption Commission, *Annual Report 2007-2008*, 2008 1. - [http://www.eacc.go.ke/docs/Annual\\_Report\\_0708.pdf](http://www.eacc.go.ke/docs/Annual_Report_0708.pdf) on 4 January 2017.

<sup>236</sup> Kenya Anti-corruption Commission, *Annual Report 2007-2008*, 2.

<sup>237</sup> Kenya Anti-corruption Commission, *Annual Report 2007-2008*, 2.

<sup>238</sup> Nation team, ‘Ringera bows out of KACC job’, *Daily Nation*, 30 September 2009. - <http://www.nation.co.ke/news/1056-665740-jlar6rz/index.html> on 19 December 2017.

<sup>239</sup> Anami L and Wafula P, ‘Graveyard that is top job at Kenya’s Anti-Corruption Agency’, *Standard Digital*, 20 July 2016. - <https://www.standardmedia.co.ke/m/article/2000209184/graveyard-that-is-top-job-at-kenya-s-anti-corruption-agency> on 18 December 2016.



row by the public and civil society,<sup>240</sup> and a declaration by parliament that the appointment was illegal thereby sealing the fate of Ringera and his directors.<sup>241</sup> Director Smokin Wanjala was the first to resign following the outcry followed by Ringera and another director, Sichale.<sup>242</sup>

PLO Lumumba then replaced Ringera as the new director and was sworn into office in August 2010.<sup>243</sup> This position was, however, short-lived following the promulgation of the 2010 Constitution which created the Ethics and Anti-Corruption commission.<sup>244</sup> The termination of Lumumba's position came in the backdrop of strong and nearly unanimous disapproval from parliament where they fast-tracked the Ethics and Anti-Corruption Act in a bid to dethrone Lumumba and his KACC.<sup>245</sup> Kwake *et al* expressed the menacing motive behind the disbandment of KACC and the two earlier anti-corruption authorities as follows: "This is how the political class fights back each time the war on the scourge heightens."<sup>246</sup> The tempestuous history of ACAs clearly demonstrates not only unwillingness to end corruption but also malice towards those who take on the challenge.

#### **4.5. Framework since the promulgation of the Constitution (2010 - Current)**

##### **4.5.1. The Constitution, 2010 and Ethics and Anti-Corruption Commission Act**

The EACC was created pursuant to the requirement under article 79 of the 2010 Constitution requiring parliament to enact legislation to establish an independent body to ensure compliance with and enforcement of Chapter Six of the Constitution.<sup>247</sup> Parliament then enacted the Ethics and Anti-Corruption Commission Act, which came into effect on 5th September 2011.<sup>248</sup>

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<sup>240</sup> Wikileaks, 'Kenya: Amid controversy Kibaki reappoints corruption czar Ringera', 4 September 2009 - [https://wikileaks.org/plusd/cables/09NAIROBII1859\\_a.html](https://wikileaks.org/plusd/cables/09NAIROBII1859_a.html) on 18 December 2016.

<sup>241</sup> Shiundu A, Barasa L, and Ngirachu J, 'Kenya Parliament declares Ringera job illegal', *Daily Nation*, 16 September 2009. - <http://www.nation.co.ke/news/politics/-/1064/659230/-/view/printVersion/-/5vyppez/-/index.html> on 18 December 2016.

<sup>242</sup> Kariuki A, 'Ringera bows out of KACC job', *Daily Nation*, 30 September 2009. - <http://www.nation.co.ke/news/1056-665740-jlar6rz/index.html> on 18 December 2016

<sup>243</sup> Onyango J, 'KACC board picks Lumumba to lead war on corruption', *Business Daily*, 17 November 2009. - <http://www.businessdailyafrica.com/539546-813316-ogldm9/index.html> on 18 December 2016.

<sup>244</sup> Siringi S, Leftie P, and Mukinda F, 'New law kicks Lumumba out of KACC', *Daily Nation*, 29 August 2011, - <http://www.nation.co.ke/news/politics/New-law-kicks-Lumumba-out-of-KACC-/1064-1227560-svnp2ez/index.html> on 18 December 2016.

<sup>245</sup> Ohito D, 'Why MPs united against Lumumba', *Standard Digital*, 29 August 2011. - <https://www.standardmedia.co.ke/business/article/2000041754/why-mps-united-against-lumumba> on 18 December 2016

<sup>246</sup> Kwaka J, Okombo O, Muluka B & Sungura-Nyabuto B (eds.), *Challenging the Rulers: A Leadership Model for Good Governance*, East African Educational Publishers Ltd, Nairobi, 2011, 17.

<sup>247</sup> Article 79, *Constitution of Kenya* (2010).

<sup>248</sup> *The Ethics and Anti-Corruption Commission Act* (Act No. 22 of 2011)

The EACC Act mainly serves to provide for the functions and powers of the Commission, to provide for the qualifications and procedures for the appointment of the chairperson and members of the Commission, and for connected purposes.<sup>249</sup> Section 11 provides the different functions of the EACC which include: developing a code of conduct for public officials; receiving cases of breach of conduct by public officials; investigating and recommending cases of corruption to the DPP for prosecution; recommending action to be taken against those found guilty; and instituting court proceedings for the recovery of public assets and freezing of proceeds related to corruption. These functions of the EACC in the EACC Act are in addition to all powers and functions of independent commissions under Chapter 15 of the Constitution.

#### **4.5.1.1. Ethics and Anti-Corruption Commission**

The EACC is mandated to combat and prevent corruption and economic crime in Kenya through law enforcement, preventive measures, public education and promotion of standards and practices of integrity, ethics and anti-corruption.<sup>250</sup> It has four directorates namely Investigations and Asset Tracing, Legal Services and Asset Recovery, Preventive Services, Finance and Administration. The EACC also takes part in public education where to help in discharge of this function, the national anti-corruption Campaign Steering committee (NACCSC) was established by the president in 2004 to conduct public awareness and education campaigns with the aim of influencing positive attitudes to anti-corruption.<sup>251</sup>

The EACC can also be said to have had another 'false start'. Mumo Matemu, who was appointed the first chairman of the EACC, was appointed amid claims that he lacked integrity.<sup>252</sup> Moves were made to block his appointment ensuing in a dramatic legal battle that is now at Supreme Court level. He had been accused of mismanagement of public funds while serving as Chief Legal Officer

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<sup>249</sup> Preamble, *The Ethics and Anti-Corruption Commission Act*, (Act No. 22 of 2011)

<sup>250</sup> Ethics and Anti-Corruption Commission, *Annual Report 2014-2015*, 2015, 2.

<sup>251</sup> National Anti-Corruption Campaign Steering Committee, Who we are - <http://www.naccsc.go.ke/> on 07 Jan 2017.

<sup>252</sup> Obara B, 'Kenya's New Anti-Graft Tsar Comes with Baggage', *Think Africa Press*, 28 August 2013. - <https://africajournalismtheworld.com/2013/08/28/kenyas-new-anti-graft-tsar-comes-with-baggage/> on 18 December 2016.



of Agricultural Finance Corporation (AFC).<sup>253</sup> Matemu and the EACC, however, survived this hit after judgment in his favour by the Court of Appeal.<sup>254</sup>

Though not short of challenges, the EACC investigated several cases under Matemu including the Anglo-leasing case and several other cases touching on corruption by members of parliament and other government officials both at the national and county levels.<sup>255</sup> As AfriMAP says concerning EACC's battles, "It is strange that most instances of destabilisation seem to coincide with periods when the institution seems to be making progress on politically sensitive cases."<sup>256</sup> Just like his KACC predecessor Lumumba, MPs initiated process to remove Matemu and his deputies from office with allegations of gross misconduct and incompetence. Matemu was suspended and then later on resigned.<sup>257</sup>

Phillip Kinisu was then appointed EACC chairman having been appointed in November 2015. Kinisu was then forced to resign owing to conflict of interest in the high profile NYS case where his family company, Esaki Ltd was implicated. Kinisu failed to declare this conflict at the time of his appointment.<sup>258</sup> Esaki Ltd.'s implication in this scandal mounted political and public pressure for him to resign.<sup>259</sup> Former Archbishop of the Anglican Church of Kenya, Eliud Wabukala, was in December 2016 appointed the new EACC chairman.<sup>260</sup>

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<sup>253</sup> Ethics and Ant-Corruption Commission, 'EACC in the Press', 18 May 2012. - <http://www.eacc.go.ke/media.asp?id=389> on 18 December 2016.

<sup>254</sup> *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others*, Civil Application 290 of 2012, at the Court of Appeal, [2013] eKLR.

<sup>255</sup> Ethics and Anti-Corruption Commission, Table 2: High profile corruption cases as at 16<sup>th</sup> of February 2016. - <http://www.odpp.go.ke/phocadownload/HIGH%20PROFILE%20LIST%2023022016.pdf> on 3 January 2017.

Njau S, Tribunal in limbo as Matemu quits top anti-graft job', *Daily Nation*, 12 May 2015. - <http://www.nation.co.ke/news/Matemu-resigns-as-EACC-boss/1056-2714698-qub56l/index.html> on 20 December 2016.

<sup>256</sup> AfriMAP, *Effectiveness of Anti-Corruption Agencies in East Africa Kenya, Tanzania and Uganda*, Africa minds, 2015, 8.

<sup>257</sup> Omondi G and Mutai E, 'Uhuru suspends Matemu and Keino', *Business Daily*, 23 April 2015. - <http://www.businessdailyafrica.com/President-sends-Matemu-and-Keino-home/539546-2695290-8s7gsbz/index.html> on 18 December 2016.

<sup>258</sup> Standard team, 'EACC boss Kinisu resigns', *Standard Digital*, 31 August 2016. - <https://www.standardmedia.co.ke/article/2000214143/eacc-boss-philip-kinisu-resigns> on 07 January 2017.

<sup>259</sup> Simiyu O, 'Kinisu bows to pressure, resigns as EACC chairman,' *Daily Nation*, 31 August 2016. -

<sup>260</sup> Lang'at M, 'Uhuru nominates Eliud Wabukala to head EACC', *Daily Nation*, 20 December 2016. - <http://www.nation.co.ke/news/Uhuru-nominates-Wabukala-to-head-EACC/1056-3492888-je920mz/> on 07 January 2017.



#### **4.5.2. *Leadership and Integrity Act, 2012***

This legislation was enacted to give effect to, and establish procedures and mechanisms for the effective administration of Chapter Six of the Constitution which provides for the leaderships and integrity requirements of state officers. This Act empowers the EACC to: oversee and enforce its implementation; request a State organ to assist it in ensuring compliance with and enforcing Chapter Six of the Constitution and this Act; require any public entity to carry out such functions and exercise such powers as may be necessary under this Act; and make an application before a High Court judge for appropriate orders requiring the public entity to comply with requirements to assist in ensuring compliance with and enforcing Chapter 6 of the Constitution and this Act.<sup>261</sup>

### **4.6. Analysis of Law and Practice of corruption in Kenya**

#### **4.6.1. *Measuring the success of ACAs***

There are various strategies used in the fight against corruption. There have been local, national, and international strategies devised against corruption.<sup>262</sup> The establishment of ACAs is one such strategy. Article 6 of the United Nations Convention against Corruption requires that each signatory establish a body (or bodies) dedicated to the prevention of corruption.<sup>263</sup> This is one of the reasons that led to the adoption of ACCs by countries worldwide

Pope and Vogl have asserted that: “If major anticorruption initiatives are to be firmly anchored, there need to be distinct national government agencies dedicated to curbing corruption.”<sup>264</sup> ACAs are often established where corruption has assumed a systemic character and engulfs most government institutions so that an independent institution is required to fight it, using strategies that are different from the anticorruption methods established by the state.<sup>265</sup>

As is the case with every strategy, it is necessary to analyse ACAs in order to establish how effective they have been in the fight against corruption. This requires that the development of a criteria to determine the success of these ACAs. This is important in order to identify challenges and formulate appropriate solutions to solve any of these challenges found.

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<sup>261</sup> Section 4, *Leadership and Integrity Act*, Cap 162 of 2012

<sup>262</sup> Theobald, R. *Corruption, Development and Underdevelopment*, Macmillan, 1990.

<sup>263</sup> Article 6, *United Nations Convention Against Corruption*

<sup>264</sup> Pope J and Vogl F, ‘Making Anticorruption Agencies More Effective’, *Finance and Development*, June 2000, 6.

<sup>265</sup> African Capacity Building Foundation, *Institutional Frameworks for Addressing Public Sector Corruption in Africa*, Lynne Rienner Publishers, Boulder, 2007.

### Factors determining the success of ACAs<sup>266</sup>

*Establishment:* embedded in a comprehensive anti-corruption strategy, careful planning and performance measurement, realistic expectations, strong enough political backing (across class/party) to make it effective regardless of (political and personal) consequences

*Focus:* on prevention and monitoring government implementation of AC policy (vs comprehensive mandate), mainly prospective (only limited concern with past cases), case selectivity based on clear standards, emphasis on probity and reputation of public service, de-emphasize investigations and prosecutions.

*Accountability:* legal standards, judicial review, public complaints and oversight, answers to all branches of government and the public, size kept to a minimum, no donor overload, precise and comprehensive expenditure accountability.

*Independence:* placement and reporting responsibility of agency ensure independence, appointment/removal procedures for top officials ensure independence, absence of day-to-day political interference, direct role for public stakeholders, fiscal/budgetary autonomy.

*Powers:* strong research and prevention capabilities, can access documents and witnesses, can freeze assets and seize passports, can protect informants, can monitor income and assets, jurisdiction over chief of state, can propose administrative and legislative reforms.

*Staff:* well-trained -- including sufficient numbers with highly specialized skills, well-compensated, subject to integrity reviews and quick removal, strong ethic of professionalism and integrity, high morale

*Other resources:* sufficient funds, adequate facilities and assets, high-level information sharing and coordination with other government bodies.

*Complementary institutions:* adequate laws and procedures, basic features of the rule of law including functioning courts, free and active media, NGOs/public interest groups, other capable institutions such as supreme audit and central bank.

*Other exogenous conditions:* macroeconomic stability and absence of crippling distortions, corruption may be deep but is not entrenched across the whole system (i.e. some people and sectors are clean).

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<sup>266</sup> This framework was developed based on the harmonized contributions of the different authors below.

Doig A, 'Good Government and Sustainable Anti-Corruption Strategies: A Role for Independent Anti-Corruption Agencies?' *Public Administration and Development*, May 1995; Pope, J, 'The Need for, and Role of, an Independent Anti-Corruption Agency', *Transparency International*, August 1999; Camerer L, "Tackling the Multi-Headed Dragon: Evaluating prospects for a single anti-corruption agency in South Africa", 9th International Anti-Corruption Conference, 1999; Langseth P, "Anti-corruption Agencies," Experts Meeting, National Integrity Steering Committee (NISC). January 2001; Transparency International, *TI Source Book 2000*, 2000, Chapter 11: Independent Anti-Corruption Agencies.



While all these factors play a role towards ACAs achieving their mandate, this section shall specifically focus on the “powers” factor. This is because the dissertation seeks to establish that the EACC does not have sufficient powers to ensure success of its mandate of combatting corruption. This stems from the assertion of this dissertation that the investigative powers of the EACC are insufficient to combat corruption and that the EACC requires prosecutorial powers in order to successfully combat graft.

#### ***4.6.2. The EACC and Prosecution of Corruption in Kenya***

As Jain explains, corruption thrives in opportunities where the public institutions controlling corruption are weak and ineffective.<sup>267</sup> An effective anti-corruption institution would be one that successfully detects corruption and leads to sanctions being imposed against the perpetrators.<sup>268</sup> A strong anti-corruption initiative would thus be one that leads to the prosecution and eventual punishment of persons found guilty of engaging in corruption.

The most important mandate of EACC for this section is its mandate to “investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption”.<sup>269</sup> The effect of this provision is that the EACC must, after all investigations of corruption cases, submit the case to the ODPP for prosecution. The EACC has no powers to prosecute corruption cases.

The independent office of the Director of Public Prosecutions was established under the Constitution. The DPP is mandated to institute and undertake any criminal proceedings against any person by dint of article 157.<sup>270</sup> The ODPP plays a key role in fighting corruption by discharging the prosecutorial mandate that would enable perpetrators of corruption to be punished and brought to justice.

Prosecution plays a crucial role in the administration of justice.<sup>271</sup> Justice will not truly be served if parties accused of some injustice are not taken through the judicial process, this requires investigation, prosecution; judgment; and sentencing. Gathii puts it clearly -“a government’s fight

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<sup>267</sup> Jain A, ‘Corruption: A Review’, 77.

<sup>268</sup> Brandt U and Svendsen G, *The Politics of Persuasion*, Chapter 3, 3.3.3.

<sup>269</sup> Section 11, *The Ethics and Anti-Corruption Commission Act*, No. 22 of 2011.

<sup>270</sup> Article 57, *Constitution of Kenya* (2010).

<sup>271</sup> Mwene TM, *Crime and Deviance*, LawAfrica, Nairobi, 2000, chapter VIII

against corruption does not hold credibility in its own eyes and in those of the public if it does not actively prosecute and investigate instances of corruption...’’<sup>272</sup> The fight against corruption requires efficient prosecution.

The 2010 Constitution transformed the way in which prosecutions are handled in Kenya. By establishing the ODPP, the functions of the Attorney General are now confined to principal legal advisor of the government and government representative in legal proceedings.<sup>273</sup> In the previous constitutional dispensation, the AG played several roles including: member of the Judicial Service Commission; an ex-officio member of the Cabinet and National Assembly; principal legal advisor to the government and; chief prosecution officer. This was a conflict of interest of the AG’s mandate to represent the executive and his duty to prosecute on behalf of the people.<sup>274</sup>

The previous constitution further empowered the AG to continue or discontinue any prosecution commenced by any other person and at any stage of the proceedings provided that the judgment had not been delivered.<sup>275</sup> This power enabled the AG to selectively undertake prosecutions and to withdraw cases at his pleasure.<sup>276</sup> The DPP, on the other hand, may only take over proceedings with the authority from the person who instituted them, and may only discontinue proceedings with the leave of the court.<sup>277</sup>

Before the promulgation of the 2010 Constitution, the prosecuting authority, AG, was viewed to be indispensable to corruption and impunity in the government.<sup>278</sup> The AG’s office was accused of unprocedural delay<sup>279</sup> and unwillingness to prosecute corruption cases.<sup>280</sup> Commenting on the

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<sup>272</sup> Gathii J, ‘Kenya’s Long Anti-Corruption Agenda’, 30.

<sup>273</sup> Article 156, *Constitution of Kenya* (2010).

<sup>274</sup> International Bar Association, *Restoring Integrity: An assessment of the needs of the justice system in the Republic of Kenya*, February 2010, 61.

<sup>275</sup> Section 26, *Constitution of Kenya (Amendment) Bill (Act No. 3 of 2001)*.

<sup>276</sup> Waki P, *The Report of the Commission of Inquiry into Post Election Violence (CIPEV)*, 2008, 445.

<sup>277</sup> Article 157, *Constitution of Kenya* (2010).

<sup>278</sup> United Nations Human Rights Council, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Mission to Kenya*, May 26, 2009, 15-16.

<sup>279</sup> The *Kipng’eno arap Ng’eny* case was thrown out of court since the case had been delayed for longer than 9 years. See *Republic v Attorney-General & Another Ex parte Kipng’eno arap Ng’eny*. High Court Misc. Civil Application No. 406 of 2001.

<sup>280</sup> Makabila S, Key institutions hamper KACC’s war on corruption’, *Standard Digital*, 20 February 2011. - <https://www.standardmedia.co.ke/business/article/2000029605/key-institutions-hamper-kacc-s-war-on-corruption> on 05 January 2017;

Gathii J, ‘Kenya’s Long Anti-Corruption Agenda’, 58;



famous *Anglo-leasing scandal case* brought by the KACC,<sup>281</sup> Gathii writes: “the actions of the Attorney General strongly suggest that he was at least complicit in the scandal, if not actively involved in its cover up which prevented the scandal from being exposed, investigated, and its perpetrators prosecuted.”<sup>282</sup>

The independence of the ODPP gave Kenyans newfound hope that prosecution of corruption would be improved. The current DPP, Keriako Tobiko further explained improved capacity to fight graft owing to the decentralisation of ODPP’s office to all 47 counties and the establishment of the Anti-Corruption and Economic Crimes Division to deal specifically with Corruption and Economic Crimes.<sup>283</sup> The ODPP also established Guidelines for the Prosecution of Corruption and Economic Crimes (2015), and a Code of Conduct for Prosecutors (2015), to encourage objectivity in the execution of their mandate.

Notwithstanding these positive steps, very few prosecutions of corruption cases have led to successful convictions. While this cannot be entirely blamed on the ODPP, it is alleged that they have hampered the successful conviction of corruption perpetrators.<sup>284</sup> The independence of the DPP has been questioned with this media report that: “Although the law insulates DPP’s office from unnecessary interference, somehow it executes its functions under a fearful environment that’s influenced by mysterious forces. The DPP’s office seems to lack enthusiasm in prosecuting crime.”<sup>285</sup> The DPP has also come under scrutiny for unprocedural delay and what has appeared to be selective prosecution. Kegoro, for instance questioned the DPP’s move to only prosecute Roads CS Michael Kamau where the EACC had recommended prosecution of three Cabinet Secretaries – Felix Kosgey of Agriculture, Davis Chirchir of Energy (together with Nairobi

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Menya W, ‘AG, Police Faulted for Derailing Mwakwere Arrest’, *Daily Nation*, 17 August 2010. - <http://www.nation.co.ke/News/-/1056/978264/-/wbcldp/-/index.html>. on 22 December 2016.

<sup>281</sup> The KACC also lacked prosecutorial powers

<sup>282</sup> Gathii J, ‘Kenya’s Long Anti-Corruption Agenda’, 157;

*See also* Okwembah D, ‘Is this the End of Anglo-Leasing Investigations?’ *Daily Nation*, 8 July 2009.

<sup>283</sup> Office of the Department of Public Prosecutions, *Second Progress Report 2013/2014*, 2014

<sup>284</sup> Wanja M, ‘DPP ‘slowing down’ war on graft’, *Daily Nation*, 23 February 2015. <http://www.nation.co.ke/news/DPP-slowng-down-war-on-graft/-/1056/2633378/-/13ka9tc/-/index.html> – on 05 January 2017.

<sup>285</sup> Ambuka J, “DPP Keriako Tobiko must reassert his independence” *Standard Digital*, 09 October 2015. - <https://www.standardmedia.co.ke/article/2000179088/dpp-keriako-tobiko-must-reassert-his-independence> on 10 January 2017.

Senator Michael Sonko) and Michael Kamau of Roads.<sup>286</sup> Though these claims have not been substantiated, the ODPP has itself been accused of corrupt dealings.<sup>287</sup>

The EACC has not investigated a single grand corruption case that led to a successful prosecution and punishment.<sup>288</sup> The EACC points out that in the year 2014 alone, out of 68 EACC investigative reports forwarded to the ODPP, only 44 were recommended for prosecution, 7 for administrative action and 17 were recommended for closure for lack of evidence.<sup>289</sup> There is a clear lapse between the investigation and prosecution of corruption.

The DPP has attributed the challenges in prosecution to legal loopholes used to delay justice.<sup>290</sup> It claims that other challenges include: archaic and unresponsive laws, limited capacity to handle emerging crimes, and limited infrastructure.<sup>291</sup> There have been calls for reform of the prosecutions office citing the few number of prosecutors which contributes to backlog of cases and occasioning numerous adjournments and delay.<sup>292</sup>

These factors have contributed to the calls for transfer of the mandate to prosecute corruption cases from the ODPP to the EACC.<sup>293</sup> The CEO of EACC has contended that the EACC needs prosecutorial powers since there have been no measures put in place to enhance its efficiency and accountability over the prosecution of corruption and economic crime cases investigated by EACC.<sup>294</sup>

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<sup>286</sup> Kegoro G, "Frustration over the unravelling war on graft brings new focus on Tobiko", *Daily Nation*, 06 June 2015. - <http://www.nation.co.ke/news/Frustration-over-the-unravelling-war-on-graft/1056-2743022-topf9v/index.html> on 10 January 2017.

<sup>287</sup> Mososku G, "DPP Keriako Tobiko is man under siege in war on graft, MPs Claim", *Standard Digital*, 05 June 2015. - <https://www.standardmedia.co.ke/article/2000164622/dpp-keriako-tobiko-is-man-under-siege-in-war-on-graft-mps-claim> 10 Jan 2017.

<sup>288</sup> AfriMap, *Effectiveness of Anti-Corruption Agencies in East Africa Kenya, Tanzania and Uganda*, 2.

<sup>289</sup> Ethics and Anti-Corruption Commission, *Annual Report 2013/2014*, 2014, 22.

<sup>290</sup> Leftie P, "DPP Tobiko lays bare corruption cases", *Daily Nation*, 27 February 2016. - <http://www.nation.co.ke/news/DPP-Tobiko-lays-bare-corruption-cases/1056-3094148-format-xhtml-jsddc3/index.html> on 10 January 2017.

<sup>291</sup> Office of the Department of Public Prosecutions, *Second Progress Report 2013/2014*, 2014, chapter 4.

<sup>292</sup> Wambua K, "The office of the DPP needs reform," *The Star*, 08 May 2012. - <http://allafrica.com/stories/201205190407.html> on 10 January 2017

<sup>293</sup> Republic of Kenya, *Report of the Task Force on the Review of the Legal Policy and Institutional Framework for Fighting Corruption in Kenya*, 2015,

<sup>294</sup> Office of the Attorney-General and Department of Justice, *Resolutions of the High Level Segment of the Task Force on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption in Kenya*, held at the North Coast Beach Hotel, Mombasa, 26-27 June, 2015.



The decision to prosecute or not involves the exercise of discretion. This discretion must be exercised in a free and independent manner, and the prosecuting authority ought to maintain impartiality through the whole process.<sup>295</sup> The evidence suggests that the ODPP does not necessarily demonstrate these attributes. Tobiko has himself argued that there is lack of political will to fight corruption.<sup>296</sup> The fact that this lack of political will has affected prosecution of corruption means that the criminal justice system is greatly compromised.<sup>297</sup> The poor track record of dealing with corruption cases suggests that the DPP is either unable or unwilling to effectively prosecute corruption cases.

However, the ODPP is not the only body with authority to prosecute. Article 157(9) of the Constitution empowers the DPP to delegate prosecutorial powers to other entities, with general or specific instructions. This provision may be employed by the DPP to appoint some EACC legal officers as prosecutors over minor corruption and economic crime matters.<sup>298</sup> This dissertation, however, looks to the prospects of the EACC handling much more than minor matters but taking over all prosecutions of corruption and economic crimes.

Article 157(12) of the constitution provides that “Parliament may enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecution.” This means that the power to prosecute corruption must not necessarily be wielded by the ODPP but can be exercised by the EACC. This was the ruling of the High Court in *Stephen Mburu Ndiba v. EACC and DPP*<sup>299</sup> where Ngaa J interpreted Section 32 of the ACECA to mean that the Section grants EACC prosecutorial powers over corruption and economic crime matters, when read alongside Article 157 (12) of the Constitution.

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<sup>295</sup> Mwene TM, *Crime and Deviance*, LawAfrica, 2000, chapter VIII

<sup>296</sup> Marindany K, “Lack of political will to fight graft is killing Kenya, says DPP”, *The Star*, 12 December 2016. [http://www.the-star.co.ke/news/2016/12/12/lack-of-political-will-to-fight-graft-is-killing-kenya-says-dpp\\_c1471407](http://www.the-star.co.ke/news/2016/12/12/lack-of-political-will-to-fight-graft-is-killing-kenya-says-dpp_c1471407) on 10 January 2017.

<sup>297</sup> Kabaara D, “Why Kenya’s war on corruption still remains costly pipe dream,” *Business Daily*, 24 October 2016. – <http://www.businessdailyafrica.com/Opinion-and-Analysis/corruption-still-remains-costly-pipe-dream/539548-3428316-item-1-vp8nnrz/index.html> on 10 January 2017.

<sup>298</sup> Republic of Kenya, *Report of the Task Force on the Review of the Legal Policy and Institutional Framework for Fighting Corruption in Kenya*, 2015,

<sup>299</sup> *Stephen Mburu Ndiba v. Ethics and Anti-Corruption Commission and the Director of Public Prosecutions* [2015] eKLR

## **4.7. Analysis of Law and Practice in Sierra Leone**

### **4.7.1. Introduction**

Sierra Leone was specifically chosen for this study because of the commonalities it shares with Kenya. This is not only in reference to the fact that both countries are developing but also the fact that they have factors in their history that are starkly similar to Kenya's own history, especially as concerns graft, and the war against it. This dissertation finds that context is extremely important when undertaking any sort of comparative analyses between states. It is prudent that we stay away from the 'one-size-fits-all narrative' (especially with regards to proposals made to developing countries), and appreciate the contextual factors in the specific countries.

This study, therefore, does not suggest that Kenya and Sierra Leone are the same or that the same interventions will work in Kenya. Despite the similarities between the countries, there are factors unique to each country that have contributed to the successes or failures of their anti-corruption initiatives. However, there are more similarities between the two states than could be found between Kenya and states that are usually used as best practice for anti-corruption strategies i.e. Hong Kong and Singapore. This study finds that comparisons with these states may be impractical owing to the different histories and contexts. This dissertation then proposes Sierra Leone as a better alternative more suitable for Kenya's anti-corruption efforts.

### **4.7.2. Background of Sierra Leone**

At independence in 1961, Sierra Leone had a stable political economy under its first Prime Minister, Milton Margai. Milton died in 1964 and was succeeded by his brother, Albert Margai. Albert apparently introduced a corrupt system of governance to Sierra Leone which was characterised by political patronage.<sup>300</sup> Albert's term was, however, short-lived as he failed to garner sufficient votes in the 1967 elections. The 1967 elections were then disrupted by a military coup which resulted in the installation of a military regime for a brief period till a mutiny was done in 1968 and thereafter Siaka Stevens was elected president.<sup>301</sup>

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<sup>300</sup> Sesay A and Ukeje C, *Post-War Regimes and State Reconstruction in Liberia and Sierra Leone*, Codesria Book Series, 2009, 27

<sup>301</sup> Clapham C, 'Sierra Leone: The political economy of internal conflict', Working Paper 20, *Working Paper Series*, Netherlands Institute of International Relations '*clingendael*', 2003, 7.



As explained by Reno,<sup>302</sup> Siaka constructed a 'shadow state' in Sierra Leone. This description portrays an entrenched patronage system which was centred on the person of the president. Siaka consolidated all the power around himself using state resources and resources from its developing partners. He obtained power by rewarding his allies.<sup>303</sup> This led to increased corruption by the government. Patronage continued even to the lower levels of the chieftaincies and local government.<sup>304</sup> This system of patronage continued and even worsened after Joseph Momoh was elected in 1985.<sup>305</sup> The corruption experienced, including tribalism<sup>306</sup> is seen as one of the complex factors that led to the emergence of the decade- long civil war in 1991<sup>307</sup>.

Sierra Leone's poor state of affairs continued until 1996 after the election of Ahmad Tejan Kabbah. Kabbah's new government worked with the development partners to establish more reforms on governance. Corruption was a major aspect of the reforms envisioned.<sup>308</sup> He approached DFID to help him establish an anti-corruption agency which they did in the year 2000. Kabbah also played a big role leading to the end of the civil war through the negotiations and peace accords entered with rebels. He declared the civil war over in 2002.<sup>309</sup>

Despite the many reforms introduced in Kabbah's government, there was still concern that corruption remained the 'Achilles' heel' of this government. The UN Secretary-General observed that, "there is a general perception that the Government's inability to deliver basic services or respond to the needs of the population is due to corruption and mismanagement of public resources,

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<sup>302</sup> Reno W, *Corruption and State Politics in Sierra Leone*, Cambridge University Press, Cambridge, 1995.

<sup>303</sup> Thompson B, 'Sierra Leone: Reform or Relapse? Conflict and Governance Reform', *Charter House Report*, 2007, 3.

<sup>304</sup> Clapham C, 'The Politics of Failure: Clientelism, Political Instability and National Integration in Liberia and Sierra Leone', in Clapham C (ed.), *Private Patronage and Public Power: Political Clientelism and the Modern State*, London: 1982.

<sup>305</sup> Cartwright C, *Politics in Sierra Leone, 1947-67*, University of Toronto, Toronto, 1970;

Pham J-P, *Child Soldiers, Adult Interests: The Global Dimensions of the Sierra Leonean Tragedy*, Nova Science Publisher Inc., Hauppauge, 2005, 55.

<sup>306</sup> Sesay A and Ukeje C, *Post-War Regimes and State Reconstruction in Liberia and Sierra Leone*, Codesria Book Series, 2009, 29.

<sup>307</sup> Reno W, *Corruption and State Politics in Sierra Leone*, 7;

Keen D, *Conflict and Collusion in Sierra Leone*, Oxford: James Currey for International Peace Academy, 2005;

Fanthorpe R, 'On the Limits of Liberal Peace: Chiefs and Democratic Decentralization in Post-war Sierra Leone', *African Affairs*, November 2005, 1-23

<sup>308</sup> "Remarks by H.E. the President Alhaji Dr. Ahmad Tejan Kabbah on the occasion of the presentation of the annual report of the Anti-Corruption Commission", Freetown, 26 July 2002. - <http://www.sierra-leone.org/Speeches/kabbah-072602.html> on 11 January 2017.

<sup>309</sup> "Speech by the President of Sierra Leone His Excellency, Alhaji Dr. Ahmad Tejan Kabbah at the ceremony marking the conclusion of disarmament and the destruction of weapons Lungi, 18 January 2002. - <http://www.sierra-leone.org/Speeches/kabbah-011802.html> on 07 Jan 2017.

and this has become a source of tension.”<sup>310</sup> In 2007, Transparency International ranked Sierra Leone at 159 out of 180 on the Corruption Perception Index.<sup>311</sup>

#### ***4.7.3. History of Anti-Corruption initiatives in Sierra Leone***

The Anti-corruption Commission (ACC), not unlike the current EACC, initially faced major challenges in securing convictions. Established in 2000, the ACC initially embraced the three-pronged approach to combat corruption modelled from Hong Kong.<sup>312</sup> Hong Kong’s Independent Commission Against Corruption here takes on the strategy of Law enforcement, Prevention, and Education. The ACC was only mandated to design preventive strategies against corruption, promote public education, and investigate corruption cases. The ACC investigated several cases but as per the Anti-Corruption Act, all prosecutions on corruption related offences had to be authorized and carried out by the office of the Attorney General.

This led to wide criticism by the public and civil society, who argued that that the independence of the ACC was a mirage due to the fact that the actual prosecution of cases was left to an agency of the government.<sup>313</sup> The Attorney General was perceived to be unwilling to prosecute the high-level cases brought to him.<sup>314</sup> Many of the cases investigated by the ACC were not authorized for prosecution, and out of the ones where prosecutions were secured, few resulted in convictions. Further, the few convictions entered were overturned on appeal.<sup>315</sup> The perception of the ACC deteriorated further after the removal of its commissioner.<sup>316</sup> The situation further worsened when instability rocked the house of the ACC. The commissioner was removed from office in 2005. This led to a perception that the ACC lacked independence and were thus incapable of discharging their anti-corruption mandate.

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<sup>310</sup> United Nations, “First Report of the Secretary-General on the United Nations Integrated Office in Sierra Leone [UNIOSIL]”, UNSC S/2006/269, 28 April 2006, p. 3.

<sup>311</sup> Transparency International, *Corruption Perception Index 2007*, 2007. - [www.infoplease.com/world/statistics/2007-transparency-international-corruption-perceptions.html](http://www.infoplease.com/world/statistics/2007-transparency-international-corruption-perceptions.html) on 07 January 2017.

<sup>312</sup> Anti-Corruption Commission, ‘History’. - <http://www.anticorruption.gov.sl/index.php?p=58&pn=History> on 09 January 2017.

<sup>313</sup> World Bank, Anti-Corruption Commission of Sierra Leone: Capacity Development and Strategy, 2013, 3. - [https://www.acauthorities.org/sites/aca/files/casestudy/Anti\\_corruption%20Commission%20of%20Sierra%20Leone.pdf](https://www.acauthorities.org/sites/aca/files/casestudy/Anti_corruption%20Commission%20of%20Sierra%20Leone.pdf) on 10 January 2017.

<sup>314</sup> World Bank, Anti-Corruption Commission of Sierra Leone, 3

<sup>315</sup> Recanatini F, ‘Effectiveness of Anti-Corruption Authorities (ACAs): Selected Emerging Lessons’, in International Anti-Corruption Academy, *Contributions to the International Anti-Corruption Summer Academy 2011*, Kreutner M (Ed), Practice meets science. Contemporary Anti-corruption Dialogue, Vol. 1, 2012, 133.

<sup>316</sup> World Bank, Anti-Corruption Commission of Sierra Leone, 4.



Undeniably, the story of the ACC is all too similar to that of Kenya's ACAs.<sup>317</sup> The poor track record of prosecuting corruption cases, and the instability of ACC reads like the script of Kenya's very own EACC. The interesting feature of the ACC, however, is not the fact of similar challenges with the EACC but rather the change in its fate and subsequent success.

This change came after the 2007 elections where then newly elected president, Ernest Bai Koroma, set the country on a new path of reform, with promises to 'run the government like a business concern'.<sup>318</sup> Koroma set to reduce patronage, corruption and streamline his cabinet. The president sought new strategies to clamp down on the rampant corruption in his government. He welcomed assistance and advice from developing partners and welcomed them to conduct research and make their proposals. One of Sierra Leone's major developing partners then, the British Department for International Development (DFID) conducted a lot of research on governance issues Koroma's government and later submitted it.

DFID contributed in a major way towards the changed state of affairs with the luck of the ACC. In its 2002 report after review of the anti-corruption laws, it found that the major challenge affecting prosecutions was the fact that the ACC were legally required to submit the cases to the AG to prosecute.<sup>319</sup> They found that the process was affected by: lack of technicalities in evidence-taking; lack of capacity in the AG's office; shortages of judges; and deficient court management system.<sup>320</sup>

The success of the ACC is perhaps more as a result of the adoption of recommendations made by its British development partner, Department for International Development (DFID). DFID, in its 2007 report, attributed the failure of the ACC to secure a conviction to the fact that ACC could only investigate and recommend prosecution by the Attorney General. The ACC found that this provision weakened the ACC.

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<sup>317</sup> See Chapter 3 of this dissertation.

<sup>318</sup> Recanatini F, Effectiveness of Anti-Corruption Authorities (ACAs), 135.

<sup>319</sup> Department For International Development, *Sierra Leone: Governance Reconstruction and Reform*, Progress Report on Reform Programmes and British Support, 2002.

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<sup>320</sup> Thompson B, 'Sierra Leone: Reform or Relapse? Conflict and Governance Reform', 17.

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