UNIVERSITY OF NAIROBI

A RESEARCH PROJECT PAPER PRESENTED TO THE SCHOOL OF LAW OF THE UNIVERSITY OF NAIROBI IN FULFILMENT OF THE REQUIREMENT OF THE AWARD OF THE DEGREE OF MASTER OF LAWS (LL.M)

ADJUDICATION REFORMS FOR THE JUDICIARY IN FIGHTING CORRUPTION IN KENYA

BY

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G62/12674/2018

SUPERVISOR

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DECLARATION

I, **BERNARD KASAVULI ONZIRU,** do hereby declare that this thesis is my original work submitted in partial fulfillment of the Master of Laws (LL.M) at the University of Nairobi, School of Law (Parklands Campus); and has not been submitted or is not pending submission for a diploma, degree or PhD in any other university. Moreover, references made to texts, articles, papers and journals, and other pertinent materials, have been fully acknowledged.

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DEDICATION

I dedicate this research paper to all Kenyans who wish to see the successful adjudication of corruption cases in an efficient and effective manner.

ACKNOWLEDGEMENT

The long and bearing guidance from my supervisor Dr. Nancy Baraza has been immeasurable. God bless her.

To my family members who have been a pillar during many days and nights of research of this study: thank you.

To our providing Hand of God, who has led me and renewed my strength.

List of Constitution and Statutes

Constitution

Constitution of Kenya 2010, Promulgated on 27th August, 2010

Acts of Parliament

Anti-Corruption and Economic Crimes Act, Number 3 of 2003

Bribery Act, Number 47 of 2016

Criminal Procedure Code, CAP 75 Laws of Kenya

Judicial Service Act, Number 1 of 2011

Lifestyle Audit Bill, 2019

Leadership and Integrity Act, Number 19 of 2012

Public Officers Ethics Act, No. 2 of 2003

Vetting of Judges and Magistrates Act, Number 2 of 2011

List of International Instruments

United Nations Convention Against Corruption

African Union Convention on Preventing and Combatting Corruption

List of Cases

Chrysanthus Barnabus Okemo &another V Attorney General & 3 Others [2018] eKLR

Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR

Geoffrey K. Sang v Director of Public Prosecutions & 4 others [2020] eKLR

Moses Kasaine Lenolkulal v Director of Public Prosecutions [2019] eKLR

Njoya and others v Attorney General [2004] 1 KLR 232

Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae) [2019] eKLR

R v Attorney General & 3 others *ex parte* Kamleshi Pattni [2013] eKLR

Abstract

This study explores the adjudication processes by courts of law in handling corruption cases. As an outright and imminent danger facing the desired adjudication of cases, there exists the stumbling block in delays and undesired longevity of handling corruption cases. This situation ultimately affects both the constitutional expectation of fastened and efficient justice; and the legitimate expectation of effective and efficient access and execution of justice in corruption cases. Delays and inefficiency in hearing and determination of these cases ultimately affects the constitutional right to access to justice as enshrined in Article 48 of the Constitution of Kenya. In exploring options available away from this conundrum, this paper sees that the delay and longevity as a problem which has its root in the nature of the adversarial system.

This study adopts a desk based research methodology through which statutes, regulations, case law and other legal writings were analysed aimed at making a case for the incorporation of inquisitorial system elements which empowers courts of law adjudicating corruption cases. This analysis is important in formulating the desired recommendations under this study.

Finally, the study makes recommendations in four main dimensions. First are the legislation recommendations which will inform the desired enactment and amendment of laws which will design special rules of practice for courts handling corruption cases. Second are the policy recommendations which will inform and implement the enacted provisions. Third is the administrative recommendation for the day to day running and handling of corruption cases. Lastly is the research recommendation through which the study is inviting scholars to focus on this rich area.

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1.0 Introduction

> "When the chief priests had met with the elders and devised a plan, they gave the soldiers a large sum of money, telling them, "You are to say, 'His disciples came during the night and stole him away while we were asleep.' If this report gets to the governor, we will satisfy him and keep you out of trouble." (Mathew 28:12-14)

This verse from one of the synoptic gospels makes a resounding confirmation that the phenomenon of corruption is an ancient problem traceable to the cradle of mankind.

Corruption, in its nature, undermines articles 10 and 43 of the Constitution on the principles of national governance and socio-economic rights respectively.[1] This is illustrated through reports that Kenya loses billion of shillings each year to graft.[2] Fighting corruption then becomes a mandatory obligation both on the citizens and state organs. The state organs include legislative assemblies,[3] the national executive,[4] county executives, and the judiciary[5].

These state organs perform different roles in the fight against corruption. The national and county executive controls the national and county purse respectively and is characterized with a huge number of public officials as compared to other state organs.[6] The national executive in particular has the prosecution[7] and investigation[8] organs illustrated through the Office of the Director of Public Prosecutions and the police departments which investigate and prosecute corruption cases. The national legislative assembly is characterized with a duty and

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[1]Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR at paragraph 384
[2] https://www.capitalfm.co.ke/news/2019/06/anti-graft-war-could-save-kenya-8bn-annually-us-envoy-says/
[3] Parliament of Kenya, "Rules Governing Conduct of Members" Fact Sheet No. 32See also: Leadership and Integrity Act, Section 37 "Code of Conduct for Members of Parliament".
[4] Presidential Executive Order No. 6 of 2015, "Ethics and Integrity in the Public Service" March 2015
[5]The Kenyan Judicial Service Code of Conduct and Ethics 2011
[6]George W. Kanyeihamba, "Kanyeihamba's Commentaries on Law, Politics and Governance", *Law Africa* 2edn (2010) at page 130
[7] Constitution of Kenya 2010, Article 157 (6)
[8]Constitution of Kenya 2010, Article 244 (b)

legal obligation to make anti-corruption laws.[9] These laws are applied to all state officers at all levels of government. The judiciary arm oversees the adjudication of corruption cases.[10] It either acquits or convicts.[11] When convicting, the arm is supposed to pass sentences which should be both punitive and recovery in nature.[12] In convicting or acquitting, it is then concluded that the judiciary has the final say in the fight against corruption.

A historical view on the adjudication of corruption cases leaves a rather distasteful feeling. The adjudication of these cases has been delayed to periods of more than fifteen years.[13] This has mostly been displayed in the adjudication of mega corruption cases which drained the economy of the country.[14] Firstly, the Anglo-Leasing case has dragged in the halls of justice for almost twenty years without a conviction and an economic recovery of the monies embezzled. The case has been shifting between the High Court and the Magistrate Court for judicial review and trial respectively.[15] Secondly, the Goldenberg case also was characterized with transfers from the courts to judicial commissions for a period lasting twenty years.[16] The case painted a negative perception on the judicial integrity when the main suspect was acquitted through a judicial review proceeding at the High court.[17] Thirdly, the National Youth Service Scam is still pending in the courts 5 years since the prosecution was launched.

Recently, there are many cases before the courts awaiting hearing and determination. These cases involve embezzling of billions of the tax payers' money which could otherwise be used

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[9]Constitution of Kenya 2010, Article 95 (3)
See also: Anti-Corruption and Economic Crimes Act No 3 of 2003 revised edition 2016, preamble of the Act.
[10]Constitution of Kenya 2010, Article 159 (1), the judicial authority to be exercised by the courts and tribunals
[11]Anti-Corruption and Economic Crimes Act No 3 of 2003 section 5 (3).
[12] Anti-Corruption and Economic Crimes Act No 3 of 2003 section 54 and 5 (3).
[13]Office of Director of Public Prosecutions, "Annual Anti-Corruption Report 2017" recognizes delays in corruption cases due to numerous constitutional and judicial reviews.
[14] Ethics and Anti-Corruption Commission, "Corruption and Ethics Survey Report 2014" recognizes delays in service delivery in the judiciary tops at 73%.
[15] Republic v Director of Public Prosecution & another Ex Parte Chamanlal Vrajlal Kamani & 2 others [2015] eKLR
[16]Report of the Judicial Commission of Inquiry to the Goldenberg Affair 2005 by Rtd. Justice S.E.O Bosire J.A.See also: Africog,"All that Glitters? An Appraisal of the Goldenberg Report" 2006
[17] R v Attorney General & 3 Others *ex parte* Kamleshi Pattni [2013] eKLR

in the realization of the social and economic rights. These cases include: the National Youth Service II where an alleged 10 billion has been misused, [18] the National Cereals and Produce Board (NCPB) saga involving the illegal tendering of maize costing billions of shillings, the National Hospital Insurance Fund (NHIF) saga characterized with unlawful tendering by few officials, [19] and the Kenya Pipeline saga where billions of money has been lost. [20]

Ultimately, constitutional and public interests[21] in the adjudication of corruption related cases call for an expedient hearing and determination by the courts. However, the history of the adjudication of these cases brings cold chill as to whether the current cases are to suffer the same fate as the earlier ones which took over 20 years in court. The negative consequence of such a delay is reflected in the slow realization of the socio-economic rights by Kenyan citizens.

[18] https://ntv.nation.co.ke/news/2720124-4969520-10lc1y6/index.html
[19] https://www.nation.co.ke/news/Detectives-unearth-Sh50bn-scam-at-NHIF-in-fresh-twist/1056-4889948-qyyl72/index.html.
[20] https://businesstoday.co.ke/kenya-pipeline-managers-deny-sh-1-9b-corruption-charges/
[21] Constitution of Kenya 2010 Article 159 (2) (b)

1.1 Statement of the Problem

This study investigated how the efficiency of the legal framework for handling corruption cases by the judiciary can be improved.

1.2 Research Objectives

The broad objective of the study is to examine the role of the judiciary in the fight against corruption with the overall aim of making recommendations for improvement and or intervention.

The specific objectives are:

i. To discuss the philosophical foundations justifying for efficiency by the judiciary in fighting corruption in Kenya
ii. To analyze the efficiency of the legal infrastructure for the judiciary in fighting corruption in Kenya
iii. To examine the best practices in increasing efficiency of judiciary in fighting corruption in Kenya
iv. To make recommendations to enhance the efficiency of judiciary in fighting corruption in Kenya

1.3 Research Questions

In this research the following key questions are posed:

i. What are the philosophical foundations for efficiency by the judiciary in fighting corruption in Kenya?
ii. What is the efficiency of the legal infrastructure in place in Kenya for the judiciary in fighting corruption in Kenya?
iii. Which best practices can enhance efficiency of judiciary in fighting corruption in Kenya?

iv. What recommendations can enhance efficiency of judiciary in fighting corruption?

1.4 Research Hypothesis

The following hypothesis will be tested:

i. The efficiency in adjudicating corruption cases is slow paced and is likely to persist without any appropriate reforms to the judiciary

ii. If strong policies and legal frameworks are prerequisite for tackling corruption, then the current policies have not been effective in addressing the manner through which courts should apply the doctrines and principles in the adjudication processes

1.5 Justification of the Study

The findings of this study will help in law development through enacting or amending of key statutes and designing of policies which are geared at empowering the judicious role of the judiciary in fighting corruption.

The findings will be pivotal in the development of research on the appropriate judicial system for Kenya. There have been numerous literature and reports on the role of judiciary in the fight against corruption in Kenya; however, there has been scarcity of literature and research on the specific element of adjudicating of cases by judges and overly by courts. This gap needs to review on the role and impact of the adversarial system in Kenya *vis-à-vis* the success in determination of cases.

Further, there needs to be a definitive research as to whether elements of inquisitorial system can be incorporated to ensure speedy and effective determination of cases. There can be no gainsaying that change is needed. This change must then be premised on the notions of constitutional development and jurisprudential growth by the courts of law.

Finally, this research will help in informing the general public on the hurdles faced by the courts in adjudication of corruption and how the desire to access justice in anti-corruption

courts is being undermined by inefficiency through the current adversarial system of adjudication of corruption cases.

1.6 Research Methodology

This study will be guided by qualitative research as a methodological approach. The research will significantly rely on primary sources of data and secondary sources of data. Ultimately, the data will be collected from desk review.

International treaties, resolutions and declarations; and domestic legislations providing for the roles of courts in adjudication of corruption cases will be critically analysed. Further, various policies which provide in-depth understanding of the legal framework for the adjudication of corruption cases will be discussed in fulfilling the research objectives and answering this study's research questions.

Finally, the study will explore on secondary sources of data from legal journals, legal books, articles and the internet which highlight various opinions of authors as well as providing a comparative assessment of other judicial doctrines worldwide. Other sources which guide this study include media publications such as newspapers. The data will be analyzed through description and analysis.

Approach

The study will be informed through the judicial process which have been witnessed between 2000 and 2021 in handling of corruption cases. This period attracts interest because it witnessed long and sometimes overstretching litigation of corruption cases, and in specific there are some cases which have lasted the entire period. Further, this period has witnessed two developments of constitutional dispensation marking the shift from the Independent Constitution and the Constitution of Kenya, 2010. Such a shift has embedded some constitutional doctrines on the need to increase efficiency of the judicial system.

Scope of Methodology

The primary focus is on corruption offences. However, the study will stretch the discussion to constitutional petitions where corruption cases have led to the intervention of the constitutional measures such as petitions and judicial review applications. This will be done to support the problem statement and objectives of the study.

1.7 Theoretical framework

This study is informed by the following two theories: legal positivism theory of law, and the economic analysis of law.

1.7.1 Legal positivism

The needed reforms under this study will majorly necessitate the enactment of laws by the legislature to address the efficiency. The justification of such laws to be enacted must be premised under the Constitution as the basic norm. Ultimately, there will be a correlation between the legislative arm in enacting laws which are in harmony with the Constitution in fulfilling the goals of justice and public interest. The works of Hans Kelsen becomes handy in developing this correlation.

In Hans Kelsen's Pure Theory of Law [22] justifies the need to have a constitutional and statutory reform on the judicial arm of government. According to Kelsen, a legal system is comprised of a hierarchical norm which derives their power from the basic norm. Rachuonyo[23] opines that "the presupposition of the grundnorm is made clear if we consider Kelsen's exposition of the grundnorm in constitutional term". The argument is that the

[22] Christian Dahlman, "The Trinity in Kelsen's Basic Norm Unravelled" Archives for Philosophy of Law and Social Philosophy, Vol. 90, No. 2 (2004), pp. 147-162 https://www.jstor.org/stable/23680781
[23] J.O. Rachuonyo, "Kelsen's Grundnorm in modern Constitution-Making: The Kenya Case" Law and Politics in Africa, Asia and Latin America, Vol. 20, No. 4 (1987), pp. 416-430

grundnorm of Kelsen is reflected under the modern legal systems in constitutions.[24] These constitutions state who the sovereign is,[25] methods of amendments[26] and the need for conformity by the statutes.[27] The constitution is then the basic law upon which all other laws derive the breath of life and existence.[28] Modern legal positivism accommodates the rise of constitutionalism in democratic states.[29] The application of the basic norms, the constitution, and other norms, statutes, is relevant in addressing the needed reform to the structural organization of the courts when dealing with corruption cases.

Constitutionalism consequently attracts development of the law both from the structure of the constitution of Kenya 2010 to the judicial philosophy emanating from the courts.[30] Constitutionalism will thus be helpful in reflecting whether the current standards of adjudication of corruption cases are grinded unto an archaic system which promotes the "unconstitutional stagnation" of jurisprudence.[31] This theory enables this study make a case for a review of the classic adversarial system which makes courts be passive observers to a modified system which cloths the courts of law in Kenya with tokens of an inquisitorial system in fact finding and determination of cases.[32] Consequently, constitutionalism and the doctrines to development of jurisprudence shall inform chapter two of this study in discussing at a huge breadth the philosophical conceptualizations for this study.

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[24] Graham Hughes, "Validity and the Basic Norm" California Law Review, Vol. 59,(1971) https://www.jstor.org/stable/3479598
[25] Constitution of Kenya 2010, Article 1
[26] Constitution of Kenya 2010, Chapter 16
[27] Constitution of Kenya 2010, Article 2 (4)

[28] Miguel Poiares Maduro, 'The Importance of Being Called a Constitution: Constitutional Authority and the Authority of Constitutionalism' (2005) 3 Int'l J Const L 332
[29] Jeremy Waldron, 'Are Constitutional Norms Legal Norms' (2006) 75 Fordham L Rev 1697
[30] Constitution of Kenya, 2010 article 259
See Also: Felicity Nagorcka and Michael Stanton and Michael Wilson, 'Stranded between Partisanship and the Truth - A Comparative Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice' (2005) 29 Melb U L Rev 448
[31] Bertrall L II Ross, 'Administrative Constitutionalism as Popular Constitutionalism' (2019) 167 U Pa L Rev 1783
[32] Monaliza O da Silva, 'Ethical Standards, Transparency, and Corruption in Brazilian Courts' (2020) 52 NYU J Int'l L & Pol 777

1.7.2 Economic Analysis of the Law Theory

Calls for efficiency analyse the economic value of the current system in adjudicating corruption cases. The law in looking for and designing laws and policies which increases performance, should place such an analysis through the lenses of cost-benefit analysis. Ultimately, the Economic Analysis of Law as a theoretical concept enables the study view the current adjudication of corruption cases as an economic cost rather than benefit.

Economic Analysis of the Law as a theory provides the integral practical tool of 'economic effects' of a legal system,[33] or practices in Kenya in order to determine the efficiency or lack of it. Hence, display the interrelation of an economic system to the legal system.[34] As observed, corruption is an economic crime directly affecting the social-economic rights under the Constitution. Thus economic theory gives a better tool of analysing efficiency of a judicial system,[35] while providing a critique approach on the cost-benefit analysis of the current judicial system.[36]

The harsh economic reality is that the delays and stumbling blocks facing the adjudication system are costly and expensive to the general polity. The end of such a system might be ineffective to the fact finder, and delays might attract negative criticism on judicial practices and knowledge.[37] This theory would call for freedom on judges and magistrates to conduct adjudication process in a flexible manner than a rigid and traditional system, like the

[33] Richard O Zerbe Jr, 'Ethical Benefit Cost Analysis as Art and Science: Ten Rules for Benefit-Cost Analysis' (2008) 12 U Pa JL & Soc Change 73

[34] Richard H. Coase, "The Relevance of Transaction Costs in the Economic Analysis of Law" *The Origins of Law and Economics: Essays by the Founding Fathers,* Edward Elgar Publishing Limited (2005) at 199-221.

[35] Julia Shamir, 'Privatizing Enforcement: An Economic Analysis of One Environmental Provision, a Study in Private Law Enforcement and Corruption' (2014) 42 SU L Rev 1

[36] George L. Priest, "The Rise of Law and Economics: A Memoir of the Early Years" *The Origins of Law and Economics: Essays by the Founding Fathers,* Edward Elgar Publishing Limited (2005) at 350-382.

[37] Todd J Zywicki and Anthony B Sanders, 'Posner, Hayek, and the Economic Analysis of Law' (2008) 93 Iowa L Rev 559

adversarial.[38] Further, the efficiency of the adjudication system should be analysed against the constitutional and public interests of an efficient system.[39] The justifications for the reforms suggested under this study are stemmed in the constitutional provisions.

1.8 Literature Review

This study does not claim to lead the way in the authorship on the subject of corruption. The topic on the role of judiciary in the fight against corruption has been dealt with in legal and other social science writings. Accordingly, the study has been encouraged and shall be augmented by a number of writings in this area.

This literature is discussed under three themes:

i. Judicial independence and efficiency in handling of corruption cases
ii. The needed actions to judicial efficiency in handling corruption cases

1.8.1 Judicial independence and efficiency in adjudication of corruption cases

The place of judiciary cannot be gainsaid in any other way but an express and candid that the place is solemn and sacred. Classically, the place of judiciary is viewed through the Montesquieu doctrine of separation of powers. In this synthesize, the judicial role is placed at adjudicating disputes before it brought by litigants. The interplay then goes that the legislative arms create the law which prohibits corruption and prescribes a punishment. The executive arms parades as the prefect enforcing these enacted laws by the legislative arm. The judiciary arm plays the role of adjudication. Amongst the arms, the judiciary seems to be playing a role upon which it can only be invited to dine: cases brought before it. But the roles are interconnected. Craig P Ehrlich and Dae Seob Kang observe that:[40]

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[38] Gerald P O'Driscoll Jr, 'Justice, Efficiency, and the Economic Analysis of Law: A Comment on Fried' (1980) 9 J Legal Stud 355

[39] George M Cohen, 'Posnerian Jurisprudence and Economic Analysis of Law: The View from the Bench ' (1985) 133 U Pa L Rev 1117

[40] Craig P Ehrlich and Dae Seob Kang, 'Independence and Corruption in Korea' (2002) 16 Colum J Asian L 1

> "The independence of the judiciary and prosecutors is a key aspect of the rule of law. An independent prosecutor will charge in cases of official corruption, just as an independent judiciary will convict and punish."

International discussions call for efficiency under the UN convention against corruption. The efficiency needed in the judiciary handling corruption cases calls for cleansing of any judicial corruption with the adjudicating arm. This is to increase public trust and confidence in delivery of justice. Justice Nicholson observes that:[41]

> Judicial independence requires the absence of corruption from exercises of the judicial power; judicial corruption cannot be tolerated where the delivery of justice is to be respected. Yet judicial corruption permeates the exercises of judicial power in most countries of the world

This statement connotes that efficiency of the judiciary in fighting corruption should have an international look.[42] This means cooperation with other judicial systems is important in fighting corruption. The desired cooperation of judicial arms across the world rests with economic independence of judiciary, the independence of decisions made by judicial officers, and the availability of positive public perception.[43] This public perception must be clearer than Caesar's wife in rooting for judicial independence. While that might be the goal, international discussions have noted that elements of judicial corruption could delay and mar with darkness the place of judiciary in the fight against corruption.[44]

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[41] Robert D Nicholson, 'Judicial Independence and Judicial Corruption: Further Developments' (2004) 1 Yearbook of the International Commission of Jurists 303

[42] Henrique Lopes Soares, 'COMBATING CORRUPTION THROUGH EFFECTIVE CRIMINAL JUSTICE PRACTICES, INTERNATIONAL COOPERATION AND ENGAGEMENT OF CIVIL SOCIETY IN TIMOR-LESTE'

[43] Petter Langseth, Rick Stapenhurst and Jeremy Pope, 'The Role of a National Integrity System in Fighting Corruption' (1997) 23 Commonwealth Law Bulletin 499

[44] Abdul Salim Amin, 'Judicial Institutions in a Post-Conflict Society: Gaining Legitimacy through a Holistic Reform' (2015) 9 International Journal of Law and Political Sciences 2202.

Thus the efficiency in the fight against corruption must be won only when the arbiter is clean from any blemish of corruption.[45] The case would be that no effective reforms can be suggested or implemented by an institution which is corrupt.[46] The success of the effective judicial roles, then, must be the success of having judicial officers who are free from corruption. This will enable the solidification of the place of the judiciary through the application of inquisitorial practices into being fruitful.

Efficiency of judiciary in handling corruption cases could be viewed through concepts emerging from African scholars. Scholars have discussed the efficiency of judiciary through cementing the place of judiciary in the fight against corruption through analyzing different legal regimes amongst African states. Early studies opine that the place of judiciary in the fight against corruption in Africa must start with the guarantee of judicial independence. Effective judiciary would entail an environment which enhances transparency and law adhering from institutions like the investigating and ethics agencies. Thus, efficiency must also have an external support in addition to the internal reforms which study focuses on. This is clearly captured by Marong. He opines that:[47]

> Among the measures suggested are … the maintenance of judicial independence and adherence to the rule of law, reform and restructuring of African public services and improvement of their terms of service, streamlining the role of government in the economy, and transparency in government procurement and contracting procedures

However, grappling issue even at 2021 is how the African economies should guarantee this judicial independence not only from the interference from the executive but also in

[45] Gao Yifei and Lu Shiyao, 'Studies in Xi Jinping's Thoughts on Fighting Judicial Corruption' (2018) 6 China Legal Sci 3

[46] Edgardo Buscaglia, *Judicial Corruption in Developing Countries* (Hoover Press 2003).

[47] Alhaji B M Marong, 'Toward a Normative Consensus against Corruption: Legal Effects of the Principles to Combat Corruption in Africa' (2002) 30 Denv J Int'l L & Pol'y 99

facilitation of economic independence.[48] African countries like Kenya still indirectly infringe judicial independence through poor funding which cripples the ability to open new anti-corruption courts and hire judicial officers dedicated in the fight against corruption. These realities send a negative perception that the judiciary arms in Africa are weak due to the fear of political manipulations and decisional independence to make decisions. Mbaku notes that:[49]

> The judiciary in these countries is not independent enough to perform its function of fairly adjudicating cases involving bureaucratic and political corruption. In its investigation of corruption in Cameroon, the U.S. Department of State determined that "[t]he judiciary was not always free to independently investigate and prosecute corruption cases."

The presence of economic independence is essential in enabling decisional independence by judicial officers. The ill perception of a weak judicial independence would thus be diminished and eventually eradicated. Thus, judicial independence in the fight against corruption must be expressed through courage by judicial officers.[50] A situation where judicial officers are threatened and yield to threats, then political corruption prevails. However, for this to work there should be zero rate of political interference on judicial independence in Africa. This is shared by Udombana who suggests that:[51]

> This…demands that those bodies be free from undue influence, since it is difficult to fight corruption in countries where judicial institutions are weak and where the rule of law and adherence to formal rules are not rigorously observed. Only an independent

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[48] Avitus Agbor, 'Cameroon and the Corruption Conundrum: Highlighting the Need for Political Will in Combating Corruption in Cameroon' (2019) 27 Afr J Int'l & Comp L 50

[49] John Mukum Mbaku, 'Corruption and Democratic Institutions in Africa' (2018) 27 Transnat'l L & Contemp Probs 311

[50] Nsongurua J Udombana, 'Fighting Corruption Seriously - Africa's Anti-Corruption Convention' (2003) 7 Sing J Int'l & Comp L 447

[51] Nsongurua J Udombana, 'Fighting Corruption Seriously - Africa's Anti-Corruption Convention' (2003) 7 Sing J Int'l & Comp L 447

> institution will be able to curb corruption, otherwise uncertain political wills will determine the strength of the fight against the problem

Finally, judicial independence as a factor for enhancing efficiency must be institutionally stemmed. The need to have a specialized court system for adjudicating corruption cases is sublime. The commingling of roles between the general jurisdictions of criminal matters with anti-corruption cases creates inefficiency and sometime ineptness. Maphosa notes that:[52]

> In cases where courts of general jurisdiction are tainted by corruption and subordination, establishing a specialised judicial body enables a country to use more efficient selection procedures and form a staff comprised of honest and independent judges.

At the national level, different scholars and jurists have penned the need of having a strong judicial independence as central in cementing the place of judiciary in the fight against corruption. While strides have been made through the 2010 constitution, drawback from judicial corruption, direct and indirect interference from the executive still diminishes the place of judiciary in the fight against corruption.[53]

Some solutions suggested in fighting judicial corruption rests with arousing the morals and ethics among the judiciary staff in order to raise the perception for the sake of public interest and legitimate expectation from the public.[54] Any attempts, whether internal or external which undermine the perceptions of judicial independence affects the place of judiciary in solving corruption cases as a clean and unblemished arbiter and fact finder.[55]

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[52] Nkosana Maphosa, 'Specialised Anti-corruption courts: A Means of Promoting Sustainable Transformation in Africa?' (2019) 3 JACL 16

[53] John Harrington and Ambreena Manji, 'Satire and the Politics of Corruption in Kenya' (2013) 22 Soc & Legal Stud 3

[54] Felix O Okiri and Lynn Waithera Ngugi and James Opiyo Wandaya, 'Strengthening Integrity & Preventing Corruption in the Judiciary in Kenya' (2019) 10 Beijing L Rev 131

[55] Migai Akech, 'Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability' (2011) 18 Ind J Global Legal Stud 341

In conclusion, the place for judicial independence can be affected through poor funding. Recent developments in Kenya have seen indirect interference from executive and parliament curbing the budgetary allocation for the judiciary. While scholars have written much on indirect interference, there has been little literature which illuminates on the need of having an economic independence as a form of judicial independence to enable the development of jurisprudence on how corruption matters can be handled in the spirit of the Constitution of Kenya, 2010.

1.8.2 Place of judiciary in enhancing efficiency in handling corruption cases

The place of judiciary in enhancing efficiency in the fight against corruption follows the successful place judicial independence and perception in a legal system.

At the national level, the role of judiciary in the fight against corruption is both constitutional and statutory in nature. The Constitution of Kenya, 2010 provides for the independence of the judiciary and prohibits any interference with the courts or judicial officers in the exercise of their judicial function.[56] The judiciary as an independent institution plays a vital role in the application and interpretation of anti-corruption laws which lead to recovery and detention of economic crimes perpetrators.[57]

The nature of punishment passed can either deter or encourage corruption; however, they must be rational.[58] As discussed in the economic theory those who engage in corruption will always carry out the cost- benefit analysis which posits that; if the costs are high that is the likelihood of being caught and punished corruption will decrease. The Anti-corruption and Economic Crimes[59] provides for the creation of special courts and magistrates. The Chief justice is empowered to appoint the magistrates to preside over the anti-corruption courts.

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[56] Constitution of Kenya 2010 article 159.
[57] John Mukum Mbaku, 'Corruption and Democratic Institutions in Africa' (2018) 27 Transnat'l L & Contemp Probs 311
[58] Bentham, Jeremy; Theory of Legislation, London, Routledge & Kegan Paul Ltd
[59] Act No. 3 of 2003

The said courts are expected to expeditiously handle corruption cases. However, the subordinate courts have not been able to expeditiously hear the cases due to numerous applications in the High court for judicial review and constitutional references made by accused persons.[60] This scenario leads to delay in finalizing corruption cases.

At the international level, the role of judiciary has been discussed through conventions and treaties discussed above. These conventions call for a robust judiciary which is free from judicial corruption and full of judicial independence in order to create both an efficient and favorable environment for discharge of duties as provided under the domestic constitutions and laws.

1.9 Limitations of the Study

This research will be limited by the recent development of the novel Corona Virus Disease (COVID 19) pandemic which limits the access of the physical libraries under the faculty of Law University of Nairobi. Thus, there is a heavy reliance on electronic journals.

The method of data collection will also be limited to desk research as opposed to field work on grounds of time available and the cost element.

1.10 Chapter Breakdown

The study breakdown of what each of these chapters contain is as follows:

Chapter one

The introduction outlines the research project. This is necessary to provide an overview at a glance, of the essence of the research. It covers background to research, statement of the problem, objectives of the research, justification, hypothesis, research questions sought to be answered, methodology to be used, limitations of the study, theoretical framework, literature review and chapter breakdown.

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[60] Kenya Anti-Corruption Commission v Kamlesh MD Pattni [2003] eKLR

Chapter two

This chapter discusses the modern constitutional and philosophical principles which empower the role played by the judiciary in fighting corruption. It further discusses varied principles on the procedures used by the courts in determining and convicting in corruption cases.

Chapter Three

This chapter discusses the legal framework laying the basis for the role played by the judiciary in fighting corruption. This chapter discusses the international, regional and domestic framework.

Chapter Four:

This chapter discusses the best practice of an inquisitorial system as compared to an adversarial system in the fight against corruption. It will point the missing links in the judiciary in Kenya in the fight against corruption.

Chapter Five

This chapter shall be divided into two parts, the conclusion and recommendations. The conclusion shall test whether the hypothesis of the study, research objectives and research questions have been answered or otherwise.

CHAPTER TWO

2.0 PHILOSOPHICAL AND THEORETICAL FOUNDATIONS FOR THE JUDICIARY IN THE FIGHT AGAINST CORRUPTION

2.1 Introduction

This chapter of the study examines the modern legal jurisprudence laying basis for the role of judiciary in the fight against corruption in two parts: the constitutional philosophy; and the procedural philosophy. Constitutional philosophy heavily relies on constitutional and human rights arguments calling for rapid and efficient functioning of the judiciary when dealing with corruption matters. Procedural philosophy relies on academic arguments on the need to change the manner of handling of corruption cases by the courts.

These discussions are largely lined to constitutional philosophy as the guiding light to enhancing efficiency in judiciary handling corruption matters. Thus, constitutional doctrines under the Constitution of Kenya, 2010 have been juxtaposed to support the objectives of this study.

2.2 The Constitutional Philosophy

2.2.1 Introduction

The ultimate body mandated to interpret the Constitution of Kenya is the judiciary through courts of law.[61] The process of interpretation offers wide range of promoting constitutionalism jurisprudence in a democratic society like Kenya. The supreme law gives four (4) key principles in the interpretation of the Constitution.[62] Firstly, any interpretation must promote and enhance constitutional principles, values and purposes under the Constitution of Kenya, 2010.[63] Secondly, is that the interpretation must promote human

[61] CoK art, 165 (3) (d)
[62] CoK, art 259
[63] CoK, art 259 (1) (a)

rights, the respect for the rule of law, and adherence to fundamental freedoms.[64] Thirdly, the interpretation must permit the progressive development of the law, enabling the law to be progressive rather than in a stagnant valley.[65] Finally, all interpretation must enhance, foster and contribute to good governance.[66] The relevance of these principles are applicable in the fight against corruption.

2.2.2 Promotion of the Values, Purposes and Principles of the Constitution of Kenya

In fighting corruption, the courts are tasked to promote the values and principles of the Constitution.

Article 10 of the Constitution provides for the values and principles of governance. The key values of governance must be applied in the interpretation of the Constitution, enactment of laws, and national policies.[67] Key values associated with the fight against corruption include: good governance, integrity, transparency and accountability.[68] The courts must then apply these standards in making decisions in corruption cases. The rationale is that if a court establishes that the governance process of the country and its resources is done in a manner that is dishonest, and lacks accountability and transparency; then that serves as an indication of abuse of office and corruption.[69]

Good governance under Article 10 is also viewed as a crucial component in promoting patriotism. Patriotism calls for a no answer to the invitations of corruption. The Supreme Court of Kenya has stated that:[70]

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[64] CoK, art 259 (1) (b)
[65] CoK, art 259 (1) (c)
[66] CoK, art 259 (1) (d)
[67] CoK, art 10 (1) (a), (b), (c)
[68] CoK, art 10 (2) (c)
[69] Nikhil K Dutta, 'Accountability in the Generation of Governance Indicators' (2010) 22 Fla J Int'l L 401
[70] Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR

> Patriotism means the love of one's country…Integrity too means we are patriotic when we do not take bribes and commissions thereby compromising the national interests of the Motherland.

Thus, the constitutional architecture of the principles of transparency and accountability are good indicators of detecting presence or absence of corruption for all patriotic citizens and institutions. The courts should, when determining corruption cases, adhere to the principles of good governance under Article 10 of the Constitution of Kenya, 2010. These constitutional principles empower the courts to sheer off the traditional folding of arms when presiding corruption cases and actively retrospect and analyse whether accountability and transparency principles were buried during the alleged corrupt activity. However, this article does not provide the procedural methods or standards in quantifying the thresholds of transparency or accountability or integrity.

The other provision of the Constitution which complements the provisions of Article 10 is Chapter VI, and Article 232 of the Constitution of Kenya 2010 on principles of public service.[71] Article 73 provides for basic constitutional thresholds of achieving the integrity and transparency provided under Article 10. These thresholds help courts of law in determining corruption cases. The court must ask whether persons charged with corruption cases have acted honestly in execution of public duties,[72] and whether they have acted in an accountable manner in public decisions and actions.[73]

Article 80 under Chapter VI of the Constitution delegates the role of enacting procedures and mechanisms for the administration of Chapter VI. The study observes that the closer the

[71] CoK arts 73-80
[72] CoK art 73 (c) (i)
[73] CoK, art 73 (c) (ii)

Constitution comes to developing procedures of implementing Article 10 is by delegating the role to Parliament to establish procedures.

2.2.3 Human Rights in Fighting Corruption

Recent interpretations of the Constitution by courts in corruption cases are marked by an increasing jurisprudence geared at seeing corruption as an infringement of human rights. The abuse of public office results to poor making of policies which ought to aid in the realization of socio economic rights.[74] Article 43 of the Constitution of Kenya provides for the realization of highest standards of health, adequate housing, clean water, education, and social security.[75] Corruption, in plundering funds for these resources, infringes socio-economic rights. The High Court has observed that:[76]

> The applicant is an eye and ear of the public. Any act or omission resulting to or perpetuating plundering of government or public resources is a great injustice to the Kenyan citizen and in particular tax payers. Society therefore expects stringent treatment against the perpetrators so as to deter similar acts. That public interest cannot be quantified in monetary terms.

The courts are thus mandated to adopt stringent measures in fact finding which are unique in addressing corruption cases. This is due to reality that corruption is an infringement to the basic rights of the public. This is to be achieved by continual development of legal jurisprudence through judgments in order to guide the economic sanity of Kenya. Celebrated Kenyan scholar, Professor Gathii opines that:[77]

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[74]A duty bestowed under Article 73 (2) (d) of the Constitution of Kenya, 2020.

[75] Under Article 20 (5) of the Constitution of Kenya 2010, the realization of the rights under Article 43 demands allocation of resources. If these resources are plundered, wasted and looted, the citizenry stands to suffer.

[76] Ethics & Anti-Corruption Commission v Hammad Kassai & 7 others [2020] eKLR

[77] James Thuo Gathii, 'Defining the Relationship between Human Rights and Corruption' (2009) 31 U Pa J Int'l L 125: He however observes that such a relationship is ambiguous. “This is because human rights and procedural rights, such as due process can be used by corrupt government officials to circumvent and avoid

> The relationship between corruption and economic performance is now well understood. However, the relationship between human rights and corruption is much less understood and is only beginning to be seriously researched… Corruption affects human rights in a variety of ways. For example, the rights to food, water, education, health, and the ability to seek justice can be violated if a bribe is required to gain access to these basic rights.

Legal procedures should be designed which promote transparency not only in the Executive arm of government but also in the Judiciary. This is to curb the injustices associated with the administration of justice to ensure that no corrupt government official can possibly influence the judicial process. Most often, these injustices hinder the right to fair trial to the general public, who are the victims. This leads to secondary victimization.[78] Scholars Julio Bacio-Terracino and Professor Joel Ngugi explore the relationship between corruption and human rights in a polity. Terracino observes that:[79]

> Corruption is directly connected to a violation of human rights when the corrupt act is deliberately used as a means to violate the right. For example, a bribe offered to a judge per se affects the independence and impartiality of that judge, and hence the right to a fair trial is violated. In other cases, corruption directly violates a human right by preventing individuals from having access to the right.

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punishment and accountability for the role they played in acquiring personal gain for themselves at the expense of the people they should be serving."

[78] United Nations Office for Drug Control and Crime Prevention: Centre for International Crime Prevention, "Handbook on Justice for Victims on the use and application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power" (1999).

[79] Julio Bacio-Terracino, 'Lurking Corruption and Human Rights' (2010) 104 Am Soc'y Int'l L Proc 243: Professor Ngugi agrees with him by noting that corruption thwarts economic development leading to widespread poverty. This is practically seen in Kenya where regions are adversely affected by poverty in which the residents do not even access clean water.

2.2.4 Development of the Law as a Constitutional Foundation in fighting Corruption

The Constitution is like a garden which must be ploughed to increase productivity. The spirit of the Constitution must be seen as a living object which is ever growing when interpreted by the courts of law.[80] This has been remarkably evident in recent rulings on corruption, which may invite more reflection on the impact of the Constitution in corruption cases. The jurisprudence from the courts have insisted that the true spirit of the Constitution calls for the suspension of state officers who are being charged for corruption cases. As a question and reflection on development of the law as envisioned under the Constitution, Ngugi J in holding that state officers who have been charged with corruption cases ought to step aside until the matter is decided observes that:[81]

> The question then arises: after promulgating the Constitution with the national values and principles at Article 10 and the clear provisions on leadership and integrity in Chapter Six, could the people of Kenya have intended to then pass legislation that allowed state officers for whom grounds for removal from office are provided in the Constitution, to ride roughshod over the integrity required of leaders, face prosecution in court over their alleged corrupt dealings, and still continue to enjoy the trappings of office as they face corruption charges alleged to have been committed while in office and committed within the said offices?

It is evident from such rulings whose jurisprudential reasoning is backed by the spirit of the Constitution that the broadened approaches to constitutional application by the judges in

[80] Njoya and others v Attorney General [2004] 1 KLR 232 Ringera J observed that "the Constitution is the supreme law of the land; it's a living instrument with a soul and a consciousness; it embodies certain fundamental values and principles and must be construed broadly, liberally and purposely or teleological to give effect to those values and principles.'

[81] Moses Kasaine Lenolkulal v Director of Public Prosecutions [2019] eKLR

making decisions which promote progressive development of constitutional principles when dealing with corruption cases.[82]

2.2.5 Good Governance as a Foundation in fighting Corruption

The courts are invited by the Constitution to make decisions which promote good governance in the polity.[83] Kumar discusses that constitutional governance is a key component in recognizing the sacred right to corrupt free governance in a democratic society. This is achieved by the continuous treatment of constitutional governance as a fundamental right which runs across the constitutional aspiration. According to him such governance will eventually empower the judiciary in bringing the integration of 'anti-corruption discourse and human rights discourse'. He observes that:[84]

> The judiciary is best suited to continue this role, as it has attempted in the past to create greater transparency and infuse institutional autonomy and independence into investigative agencies that engage in anti-corruption work. With the recognition of this right, the judiciary is in a far better position to develop jurisprudence relating to good governance.

Such has been the case for the judiciary of Kenya: the development of jurisprudence which fosters constitutional governance through decisions. The Supreme Court has expressed itself concerning good governance through proper using of public resources. It opines that:[85]

> Bearing in mind the nature of the competing claims, against the background of the public cause, we have focused our perception on the public interest, and the concept

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[82] Jacob Eisler, 'McDonnell and Anti-Corruption's Last Stand' (2017) 50 UCD L Rev 1619
[83] C Raj Kumar, 'Corruption, Development and Good Governance: Challenges for Promoting Access to Justice in Asia ' (2008) 16 Mich St J Int'l L 475
[84] C Raj Kumar, 'Corruption, Development and Good Governance: Challenges for Promoting Access to Justice in Asia ' (2008) 16 Mich St J Int'l L 475
[85] Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR

> of good governance, that runs in tandem with the conscientious deployment of the scarce resources drawn from the public. Proper husbandry over public monetary and other resources, we take judicial notice, is a major challenge to all active institutions and processes of governance; and the Courts, by their established attribute of line-drawing, must ever have an interest in contributing to the safeguarding of such resources.

2.2.6 Limitations under the Constitution

The study observes that the Constitution has not fully and practically appreciated the cancer of corruption as it appreciated issues on environment, land and employment. While all these areas have witnessed mammoth injustices in Kenya, the Constitution only provides for creation of specialized courts for environment, land and employment. The Constitution does not provide for the creation of specialized courts in corruption matters.

2.3 Procedural Philosophy

This part discusses the philosophy underpinning the rules of procedure in hearing corruption cases. These rules of procedure affect the manner in acquisition of evidence, admission of evidence and conviction of accused persons. This reality is manifest in the Kenyan jurisprudence in the recent case of Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae) (Mwilu Case).[86]

2.3.1 Acquisition and Admission of Evidence

The constitutional standards in acquiring of evidence in prosecution of corruption cases are provided under Article 50 (4) of the Constitution of Kenya 2010. This Article provides that evidence acquired through means that violate fundamental rights must be excluded under two

[86] [2019] eKLR

main conditions. Firstly, is where such admission would render the trial unfair hence affecting the provisions of Article 25 on unlimited rights. Secondly, is where such admission would be detrimental to the ideals of justice. The jurisprudence on this matter has been stated by Odunga J where he holds that:[87]

> Suffice it to say that evidence obtained in violation of the law is only to be excluded where its admission would render the trial unfair or otherwise detrimental to the administration of justice. In my view it is not the mere fact of the manner in which the evidence is obtained that determines its admissibility and the effect on the fairness of the trial process. That is a matter that can only be determined by the trial Court if and when a determination is made that criminal proceedings be preferred against the Petitioner. It is at that stage that the Respondents will be hard put to satisfy the trial Court that there existed special circumstances that warranted the search to be carried out even in the absence of the search warrants.

The standard in determining whether the evidence obtained irregularly has infringed the rights of the accused person has been discussed in depth in the Mwilu Case. In this case the petitioner was arrested and charged at a Magistrate Court. However, before taking plea, she filled a petition at the High Court seeking to quash the decision to charge her. She alleged that the evidence obtained which informed the decision to charge her was obtained illegally contrary to the provisions of Article 50 (4) of the Constitution of Kenya. The court observed that while the duty to exclude the illegally obtained evidence lied with the trial court, the general duty to determine whether the illegally acquired evidence infringed on fundamental rights lied properly in the court's province. This is because the infringement of fundamental rights attracted a greater public policy. Upon analysis of the matter the court stated that:[88]

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[87] Geoffrey K. Sang v Director of Public Prosecutions & 4 others [2020] eKLR

[88] Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae) [2019] eKLR

> Having found, however, that the DCI illegally obtained evidence against the Petitioner by gaining access to her accounts with IBL through the use of a court order that had no bearing on her accounts and having found that the DCI thereby misrepresented facts and misused the court order, we have come to the conclusion that the prosecution against the Petitioner cannot proceed.

Proper disclosure to the courts by the investigating authorities on intended acquisition of evidence can go into a long way in diminishing the unconstitutional measures of acquisition of evidence which result into numerous delays.[89] This would enable the courts focus on the substantive merits of the case. Ultimately, this also can be cured early if the court is actively involved in investigation and collection of data. Though this involvement must strike the balance between protecting the constitutional rights of the accused and the need to gather and preserve evidence from being tampered with.

2.3.2 Conviction Standards

Scholars like Kanyeihamba[90] have held that in corruption cases strict rules as to obtaining and admission of evidence will not yield the general legitimate expectation of the public. This is because corruption cases should always apply the use of circumstantial evidence in conviction which is better achieved through testing on truthfulness of evidence rather than the process. In reality, the application of equity maxim should be considered that equity looks at the substance over the form.

Professor George Kanyeihamba invites the judiciary to be mindful on the requirement that the prosecution in corruption cases should always exhibit the direct evidence. His thoughts are that the court should be "willing to consider the possibility of convicting on adequate

[89] Alafair S Burke, 'Revisiting Prosecutorial Disclosure' (2009) 84 Ind LJ 481
[90] George W. Kanyeihamba, "Kanyeihamba's Commentaries on Law, Politics and Governance", *Law Africa* 2edn (2010)

circumstantial evidence"[91]. To him, a court which acquits on technical grounds propelled on the lack of direct evidence is in itself promoting corruption rather than fighting the immoral beast. His rationale for advocating the use of circumstantial evidence is because corruption is committed in a secrecy "manner that does not welcome observers or witnesses"[92]. He concludes on stressing that the best evidence rule in the fight against corruption is circumstantial evidence: "it is therefore only logical and practical that those who are serious in fighting corruption should utilize circumstantial evidence"[93].

2.3.3 Sentencing Standards

Scholars have held that corruption cases should attract severe punishments to deter future economic crimes. In Kenya, the judiciary has been criticized for issuing nominal sentences not commensurate with the economic crime committed.

Yuhua Wang[94] discusses the use of harsh punishments when dealing with political corruption. Wang calls for a strong and courageous judiciary which passes sentences without any fear or favour. Political corruption results from embezzling of funds by the elected leaders or through their appointed agents. Wang opines that the key source to rampant political corruption is the weakened judiciary. If the judiciary is able to convict and penalize those who receive bribes then the problem of political freedom stands to be drastically reduced. Aris, Ferraz and Finan,[95] supports the ideas that enhancement of judicial punishments and harsh fines is a key component in the judicial accountability towards corruption and minimizing political corruption.

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[91] Ibid (Kanyeihamba) at page 130
[92] Ibid (Kanyeihamba) at page 142
[93] Ibid
[94] Yuhua Wang, "Court Funding and Judicial Corruption in China" The China Journal No. 69 (2015).
[95] Eric Aris, Claudio Ferraz and Fredence Finan, "Do Government Audits Reduce Corruption? Estimating the Impacts of Exposing Corrupt Politicians" Journal of Political Economy vol 128 (2018)

The key policy document for sentencing in criminal cases is the Sentencing Policy of 2015. This policy provides the framework to be considered by judges and judicial officers in sentencing. However, a reflection as to the sentencing policy for corruption cases is ripe. This calls for a unique corruption proceeding procedure which is different from the Criminal Procedure Code which provides for procedures of crimes majorly under the Penal Code. Unique procedural standards for corruption cases stands to accord the judiciary with needed legal power to make decision not being fettered by the criminal procedures under the Criminal Procedure Code.

2.4 Conclusion

This chapter has analyzed the philosophical foundations in two dimensions: the constitutional philosophy and the procedural philosophy. Whereas there has been strides in the constitutional philosophies through decisions by the courts of law, procedural discussions on how corruptions should be held has been left to academic arguments. This then requires the design of policies by the judiciary which translates the academic discussions into practical headlights in court rooms.

CHAPTER THREE

3.0 LEGAL FRAMEWORK FOR THE FIGHT AGAINST CORRUPTION BY JUDICIARY IN KENYA

3.1 Introduction

This chapter discusses the legal framework in place to enabling the judiciary fight corruption in Kenya. For an effective analysis, the chapter divides the discussion in three key stages. The first stage discusses the legal framework at international level. This discusses the international convention ratified by Kenya, the international mutual understanding Protocols and international principles related to the role of judiciary in the fight against corruption. The second stage discusses the legal framework at the regional level within the African Union and East Africa Community. This outlines the legal infrastructure in place to empower the Kenya judiciary in fighting corruption. Finally, the discussion is premised on the national laws empowering the judiciary to fight corruption.

3.2 International Level

This part analyses the United Nations Convention Against Corruption,[96] and the Bangalore Principles on Judicial Conduct,[97] as key international instruments relevant to the fight against corruption by the Kenya judiciary.

3.2.1 United Nations Convention Against Corruption

This convention (UNCAC) was ratified in 2004 pursuant to the United Nations General Assembly Resolution 55/61 of 2000 and an international instrument for the combating of corruption in the World. The Convention provides key measures to be adopted by member states.

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[96] Signed on 9th December, 2003 and became effective on 14th December, 2005.
[97] Adopted by Judicial Group on Strengthening Judicial Integrity in 2002

3.2.1.1Judicial independence under UNCAC

Article 11 calls for the independence of judiciary as a key component in fostering integrity among the judicial officers presiding over corruption cases. The article provides:

> In accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary.

At the international level, measures to promote integrity among the judicial have been promoted through initiatives like the development of Bangalore Principles.[98] These principles provide for the code of conduct of judicial officers. The key principles include the need for impartiality,[99] the need for integrity[100] and proper propriety by judicial officers.[101] The judges and magistrates are invited to avoid bias in decision making in order to enhance public confidence.

The reality depicted in promoting public confidence is central in the Kenyan constitutional jurisprudence in two key ways. Firstly is the constitutional reality that the exercise of judicial power is derived from the people of Kenya directly.[102] Thus, the judicial officers act as agents of the public rather than the appointees of the executive as displayed in the constitutional dispensational before 2010. Judicial officers, acting as custodians, must exercise their powers in a manner that does not breach the public confidence.[103] This has a conclusion that in the fight against corruption, the judicial officers must not be corrupt.

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[98] Ibid.
[99] Ibid, value 1
[100] Ibid, value 2
[101] Ibid, value 3
[102] CoK, article 1
[103] CoK, article 159 (1)

The provisions on judicial independence and integrity of judicial officers under UNCAC are also stressed under the Judicial Code of Conduct. This code of conduct outlines in detail the Bangalore Principles under the Kenyan context. It thus provides means of promoting the integrity of the judicial arm of government and at the same time preventing any form of judicial corruption. The conduct of judges and magistrates is critical in outlining the public perception of justice being done.

3.2.1.1 Judiciary as a tool against money laundering

The nature of corruption calls for cooperation among countries. This becomes a reality when dealing with anti-money laundering corruption. Article 14 of the Convention invites global cooperation of judicial authorities to develop avenues for exchange of information regarding corruption. The article states that:

> Ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering (including, where appropriate under domestic law, judicial authorities) have the ability to cooperate and exchange information at the national and international levels within the conditions prescribed by its domestic law and, to that end, shall consider the establishment of a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential money-laundering…

Beyond the bilateral and multilateral agreements witnessed in the actions of the executive arms of governments, article 14 seems to suggest that the judiciary as an arm of government is equally entitled to enter into agreement with other jurisdictions in order to fight corruption.

This sobering reality has been reflected in Kenya through diverse cases on extradition on grounds of anti-money laundering.[104]

The cross border aspect of corruption further calls for deeper mutual legal coordination among countries. This is recognized under article 46 of UNCAC which recognizes the need for legal assistance of judicial proceedings. The practical effect enables efficient and easy execution of decrees made from other countries in domestic level of states. The consequence of this provision has resulted into the enactment of Mutual Legal Assistance Act,[105] (MLAA) in Kenya which provides a cooperation platform among countries.

The MLAA strengthens the avenues through which the judicial arm of governments can initiate needed collaboration based on mutual operations.

3.3 Regional Level

There have been legal developments which empower the judiciary in the fight against corruption in Africa. This legal infrastructure helps the governments through the judiciary arm to design mechanism to combat corruption.

3.3.1 African Union Convention on Preventing and Combating Corruption

At the African Union level, there has been the development of the African Union Convention on Preventing and Combating Corruption.[106] The key objectives of the Convention include punishing of corruption offences both at the public and private levels.[107] This places the burden on the judiciary to design processes which promote efficiency in hearing of corruption cases while also issuing sound rulings based on the mandates of law and evidence. These measures and processes being designed by entities like the judiciary must promote

[104] Chrysanthus Barnabus Okemo &another V Attorney General & 3 Others [2018] eKLR
[105] Act No 36 of 2011.
[106] Adopted on 1st July, 2003
[107] Article 2 of African Union Convention on Preventing and Combating Corruption (AUCPCC)

cooperation of African countries. This cooperation is relevantly important when dealing with money laundering cases which in most cases span beyond the geographical boundaries of state parties.

Article 15 of the AUCPCC recognizes the need for efficiency in extradition cases of corrupt individuals to countries where they are to stand trial. This process is majorly judicial in nature. This again puts judiciary at the spotlight as to whether it will be guided by the law and evidence or it stands as an agent of corruption in a polity. Further, Article 18 stresses on the need for mutual legal assistance which invite the states to provide all technical assistance in fighting and combating corruption. In Kenya, the need and importance of mutual legal assistance has been recognized through an Act of Parliament.

3.4 National Level

3.4.1 Leadership and Integrity Act

This Act is supposed to fully operationalize Chapter VI of the Constitution in a way of providing procedures and mechanisms in actualization of the Constitution.[108] Whereas, the Act provides administrative mechanisms in implementing Chapter VI and the Act,[109] it does not provide for clear judicial procedures. The only judicial procedure the Act provides is when the Commission may make an "application before a High Court judge" in seeking enforcement of the Act by a public body.[110]

The reference to a "High Court judge" provides a general and ambiguous procedure. The proper forum of the court with competent jurisdiction is not identified. In 2015, the Chief Justice issued practice directions establishing a High Court Division on Anti-corruption and

[108] CoK, art 80
[109] LIA ss 40-45
[110] LIA s 4 (5)

Economic Crimes Division in Nairobi.[111] However, despite this development, the rules of procedures and practices are not established. The Division relies on the criminal procedures. When compared with other divisions like Commercial and Tax Division which has rules of procedure under statutes like Insolvency Act; the Anti-Corruption Division is devoid of any specific rules, procedures or standards. In order for the fight against corruption to be effective, intentionally designed rules must be in place, and any attempts of relying on the Criminal Procedure Code should be greatly discouraged.

3.4.2 Anti-Corruption and Economic Crimes Act (ACECA)

This is the parent statute overseeing the prosecution of corruption cases in Kenya. It provides recognizes the place of anti-corruption courts and special magistrates who preside over such courts.[112] However, this Act does not substantively establish specialized courts such as those for employment, environment and land. This means that the Act does not have its unique rules of procedure but heavily relies on the procedure under the Criminal Procedure Code.

3.4.2.1 Court Procedures under ACECA

As observed above, ACECA recognizes the designation of anti-corruption courts, though not in its full establishment like courts determining employment matters.[113] The proceedings under ACECA are practically both of civil and criminal in nature. Whereas traditional criminal proceedings have shunned from imposing compensation upon conviction, the ACECA provides for compensation as a key component in the recovery.[114] Further, the Act encourages out of court settlement.[115] This out of court settlement must be registered in court,[116] a practice widely practiced under civil procedures. The reality is that corruption

[111] Gazette Notice Number 9123 of 2015.
[112] ACECA ss 4 and 5
[113] Ibid.
[114] ACECA part VI.
[115] ACECA s 56B
[116] ACECA s 56B (4)

cases are *sui generis* cases which are characterized by both the traditional civil and criminal proceedings. The overreliance on the criminal procedures under Criminal Procedure Code underpins the fact that the ACECA should develop unique judicial practices peculiar to corruption cases. These practices would be more effective if the law is amended to provide specialized anti-corruption courts, peculiar with their procedures which does not rely on the Criminal Procedure Code.

3.4.3 Bribery Act

The Act provides for the prevention and punishment of bribery from both public and private body. Just as ACECA, the Act does not provide for peculiar procedures for the proceedings under the Act. It heavily relies on the proceedings initiated under ACECA.

3.4.4 Vetting of Judges and Magistrate Act

This Act,[117] provided the avenue for vetting judicial officers with aim of rooting out judicial corruption and inefficiency among judges and magistrates. The application of the Act was limited to a specified period. It applies to judges or magistrates who were in office before the effective date of the promulgation of the Constitution of Kenya, 2010. It established the Judges and Magistrates Vetting Board which carried out the vetting process. In determining the suitability of a judge or magistrate, it considered complaints from the Ethics and Anti-Corruption Commission. The Board also considered elements of integrity such as a demonstrable consistent history of honesty and high moral character in professional and personal life.

Prior to the 2010 Constitution, many of the judicial reforms failed due to lack of a proper legal and administrative framework, lack of implementation, lack of government support and a proper enforcement mechanism. With the 2010 Constitution, several judicial reforms have

[117] Act No. 2 of 2011.

been successfully implemented but many have failed due to lack of a proper enforcement mechanism to ensure deterrence of individual corrupt behaviour, lack of government support and insufficient public awareness and education.

3.4.5 The Public Officers Ethics Act

This piece of legislation creates codes of conduct for all public officers compelling them to declare their wealth, and that of their spouses and children.

It is not in doubt that the noble intentions of this Act were to ensure that public officers do not use public office to enrich themselves. However, this appears not to be the case since the Act has apparent flaws being utilized by the corrupt to avoid scrutiny. For instance, the Act makes provisions that each commission keeps all asset declarations confidential. Despite an amendment in 2007 to allow access to these declarations by third parties has not improved transparency since wealth declarations continue to remain practically inaccessible to the public.

There is also a serious flaw in the provisions of the Act for failing to establish any mechanisms for review of declarations and does not impose on the relevant commissions the obligation to include any review mechanisms in their administrative procedures.

3.4.6 The Lifestyle Audit Bill

The Bill formulated in 2019 is another positive step in the desire to counter the negative effects of corruption and enhance the provisions of Article 10 of the Constitution. The preamble thereof states that it is an Act of parliament to give effect to Article 10 of the Constitution by providing for the procedure for undertaking lifestyle audit.

Although this research does not address the issue of asset recovery, it is evident that if this Bill is later enacted into law, it will foster transparency and good governance by ensuring that the lifestyle of public officers is always under scrutiny. For instance, section 12 empowers the

relevant commissions identified under section 6 of the Act to apply to the High Court for an "account freezing order" in respect to any "alleged offense" suspected to have been committed by any person under the Acts listed in section 2 thereof.

Lastly, the doctrine of deferred prosecution under Part II of the Bill amplifies the need to ensure focus is placed on recovery of the ill-gotten wealth as opposed to criminal prosecution. This process will improve efficiency in the adjudication of corruption related cases since most "account freezing orders" will culminate into preservation of evidence in custody of third parties leading to early recovery as opposed to waiting to institute criminal proceedings.

However, there is need to ensure that reference to the High Court is expanded to include Anti-Corruption Courts. This will ensure the High Court is not overburdened by numerous cases that may be commenced as a result of the implementation of the Act.

3.4.7 Judicial Code of Conduct

The Kenya Judicial Code of Conduct is a subsidiary legislation under the Judicial Service Act. This code provides standards which are in harmony with Articles 168 (1) (b) and 172 (1) (c) of the Constitution of Kenya 2010. Further, this Code provides a robust application of the Bangalore Principles of Judicial Conduct. Its application stretches beyond the judicial officers to include the staff of the judiciary.

The code also entails provisions on independence, impartiality, integrity, propriety, equality and non-discrimination, professionalism, accountability and prohibition against corrupt practices and prohibition against sexual harassment. The Code calls for the application of the law and facts in cases being determined by the judicial officers. The ideals of having a deep perception of justice being done must be evident. It further provides that a judicial officer shall exercise the judicial authority independently on the basis of the judicial officer's

assessment of the facts and in accordance with a conscientious understanding of the law. The judicial officer must be free from any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

3.5 Conclusion

This Chapter has endeavored to provide the legal foundation justifying the role played by courts of law in the fight against corruption. The study observes that there is lack of peculiar procedures and practices related to corruption cases in Kenya. This drives the general overreliance on criminal procedures under the Criminal Procedure Code. Further, the study has highlighted the need for procedures in the administration of justice which foster transparency in corruption proceedings.

Admittedly, the provisions of section 48 on penalties and 51 on liability to compensation are laudable tools under ACECA. The only apparent shortcoming in these provisions is that, they relate to penal punishment as opposed to recovery of the loss incurred as a result of the commission of the offense.

Secondly, there are indeed Specialized Anti-corruption courts in Kenya but they have failed to attain efficiency, integrity and expertise in the adjudication of corruption matters. This study argues that, this failure is attributable to the lack of recognition of these courts under the constitution as specialized courts with special recruitment procedures of its manpower.

CHAPTER IV

4.0 BEST PRACTICES FOR JUDICIARY IN THE FIGHT AGAINST CORRUPTION

4.1 Introduction

This chapter discusses the best practices for the judiciary in the fight against corruption and makes a case for an incorporation of an inquisitorial system. The best practices are derived from the analytical concepts applied in different jurisdictions have dealt with corruption cases. The best practices focus on the reforms, both institutional and jurisprudential, which court systems have adopted. Generally, the discussion will be centred on the effectiveness of an inquisitorial system over an adversarial system. In order to have an effective and flowing discussion, this chapter develops on the themes identified under the discussions in chapter two. The themes to be discussed are:

a) The best practices in the role of judiciary in the process of acquiring evidence in corruption cases;
b) The best practices in the role of judiciary in admitting evidence in corruption cases;
c) The best practices in the nature of proceedings in corruption cases; and
d) The best practices in sentencing standards in corruption cases.

4.2 Role of Judiciary in the Process of Acquiring of Evidence in Corruption Cases

Advancement of technology and the evolving of corruption vices bring challenges in investigation of corruption cases.[118] Traditionally, court orders are needed in every single search and investigation.[119] However, the reality is that it might not be efficient and effective

[118] Charles Aeng Cheng Lim, 'Information Technology and the Law of Evidence - Recent Legislative Initiatives' (1997) 9 SAcLJ 119
[119] CPC Part IV

to ever involve the courts in obtaining formal orders to conduct searches and investigation. Further, it becomes more sophisticated where corruption is conducted in an office but the funds are kept in a private bank account of a third party.[120]

4.2.1 Acquisition of evidence in an adversarial system

Acquisition of evidence in an adversarial system like Kenya has numerous and sometimes rigorous procedures to be followed.[121] The adversarial system mandates that the rights accorded to the prosecution must be balanced against the rights of the accused.[122] This is because the key tenet in the criminal justice system for the accused is the presumption of innocence. The adversarial system hence abhors and prohibits trial by ambush.

The accused person in corruption cases is entitled to be informed of all the evidence collected against him/her. This would examine the standards adhered to in the collection of the said evidence and at the same time analysing whether any constitutional breach occurred in the process of acquiring the evidence.[123]

Recent legal jurisprudence in Kenya has witnessed adjournment and constitutional petitions being filed with regard to the manner in which the corruption evidence was collected.[124] The constitutional court has affirmed that the process and the end goal in corruption cases must not infringe or threaten any constitutional rights accorded to the accused. The sad reality is that lack of transparency caused by the prosecution delays the prosecution of corruption

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[120] Laras Susanti, 'Criminal Liability of Public Officials for Illicit Enrichment: Comparing Approaches of the Use of Indirect Methods of Proof in Investigating Illicit Enrichment in Indonesia and the U.S.' (2015) 13 Indonesian J Int'l L 63

[121] Mark C Power and Francois Larocque and Darius Bosse, 'Constitutional Litigation, the Adversarial System and Some of Its Adverse Effects' (2012) 17 Rev Const Stud 1

[122] Michael H Graham, 'Application of the Rules of Evidence in Administrative Agency Formal Adversarial Adjudications: A New Approach' (1991) 1991 U Ill L Rev 353

[123] Pamela R Ferguson, 'Pleading Innocent: Implications for Adversarial Criminal Procedure' (2018) 13 J Comp L 156

[124] Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae) [2019] eKLR

cases.[125] This leads to multiple judicial reviews and constitutional petitions being filed either to object the manner through which the evidence was collected or to quash the whole prosecution.[126]

The underpinning is that lack of close court supervision in the process of acquiring evidence in an adversarial system causes multiple legal delays.[127] Courts arms are folded to witnessing the contest between the accused and prosecution through which the manner the evidence has been collected. The best practices should be analysed from the inquisitorial system.

4.2.2 The practice of acquiring evidence in an inquisitorial system

The criminal justice system practice in corruption cases under the inquisitorial system actively participate courts.[128] The system is designed in a manner that every piece of evidence sought by the prosecution is done through court orders, which are easily obtained where there is a legitimate suspicion or cause. This legitimate expectation involves where assets illegally and corruptly acquired are under a third party. This means that assets stolen can be traced to an account of a third party or rather the embezzled resources have used to acquire other assets in the name of a third party, regardless whether the third party is innocent or not.

Indonesia

The application of the inquisitorial system in Indonesia stresses on enforcement of the law in the fight against corruption and places a judge at a central figure in the confiscation of assets belonging to beneficiary third party in a corruption transaction. The “judge will decide that the evidence is confiscated for the State, the interest is to return the material loss of the State.

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[125] Taiwo Osipitan and Abiodun Odusote, 'Nigeria: Challenges of Defence Counsel in Corruption Prosecution' (2014) 2014 Acta U Danubius Jur 68

[126] Michael D Gilbert, 'Transparency and Corruption: A General Analysis' (2018) 2018 U Chi Legal F 117

[127] H Richard Uviller, 'Acquisition of Evidence for Criminal Prosecution: Some Constitutional Premises and Practices in Transition, The ' (1982) 35 Vand L Rev 501

[128] Leonard L Cavise, 'The Transition from the Inquisitorial to the Accusatorial System of Trial Procedure: Why Some Latin American Lawyers Hesitate' (2007) 3 Original L Rev 1

However, if on the other hand the judge considers the evidence to be unrelated, then it must be returned or submitted to a third party as the legal owner"[129].

The extent of a lawfully obtained search warrant should focus on a transaction in a corruption activity rather than focusing on persons. This means that embezzled billions of shillings can be traced to third parties through an application of a single search warrant as compared to numerous applications for search warrants whenever the investigation is leading to a third party. This shifts the subject of investigation and tracing to be on the embezzled resource which has been transferred to many people who wish to frustrate and defeat justice other than focusing on the holder of the said asset. Such a judicial system like the Indonesia's enhances smooth cooperation of all actors in the criminal adjudication processes devoid of many and often unnecessary adjournments and delays. Hakim, the Hon Attorney General of Indonesia opines that:[130]

> Items that can be confiscated are items of a suspect or defendant, or other parties, which in whole or in part are alleged to have been obtained from a criminal act. In a corruption case, the Police, the Attorney General or the Corruption Eradication Commission may take action to confiscate any objects or items which is strongly suspected that the objects such as land or other immovable and immovable are the result of corruption. For example, a perpetrator of a criminal act of corruption buys a piece of land as a result of corruption. The land may be in the name of a third party. Based on this allegation, the Police, the Attorney, or the Corruption Eradication Commission confiscated the land. This was done because the investigators already knew the origin or history of the land controlled by the third party. Investigators hold strong information and data if the land on behalf of a third party as result of

[129] Lukman Hakim and Muhadar and M Syukri Akub and Mustafa Bola, 'Protecting the Third Party-Owned Evidence in Corruption Cases: Analysis of Case at the Prosecution Stage' (2020) 102 JL Pol'y & Globalization 66

[130] Hakim (Protecting Third Party)

corruption. One of the modes is by making a fictitious sale and purchase between the perpetrator of corruption and the third party, as if the land belongs to a third party. By this data, the investigator has the authority to confiscate the land for the sake of proof during the prosecution stage.

The trust given to the judge in an inquisitorial system through which the focus is on the items stolen is likely to heal the question whether a search warrant obtained to examine the accounts in a suspect's account could be used to trace into how the asset was evolved and transferred to other accounts which might not belong to the accused. Such a system would be fair in confiscating the items stolen, or returning the assets to the rightful owner if no evidence of corruption is discovered.[131]

The court thus is equipped with a stronger supervisory framework of every piece of evidence collected. The consequence is that the evidence collected is rarely contested by the defence which translates into speedy prosecution and determination on the guilty or innocence of the accused.[132] There are little objections and adjournments in the preliminary stages of the case as witnessed in adversarial systems. The quality and integrity of evidence is also preserved.

The overall practice has witnessed more conviction of corrupt officials and persons in an inquisitorial system than in an adversarial system.[133]

The court system under the inquisitorial system is more equipped and effective as compared to the adversarial court system.[134] The Kenyan corruption court system, though falling under the guidance of the adversarial criminal justice system, should be designed in a manner of inquisitorial system. This calls for a detachment from the current criminal court system.

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[131] Sahuri L, 'Reversed Evidence Urgency in Case Corruption in Indonesia' (2018) 72 JL Pol'y & Globalization 59

[132] Yanrong Zhao, 'Evidence Collection in the German, American and Chinese Legal Systems: A Comparative Analysis' (2011) 6 Frontiers L China 44

[133] J Kent Roach, 'Wrongful Convictions: Adversarial and Inquisitorial Themes' (2010) 35 NCJ Int'l L & Com Reg 387ohn Foster, 'The Inquisitorial versus the Trial System' (1967) 35 Medico-Legal J 88

[134] Ray Finkelstein, 'The Adversarial System and the Search for Truth' (2011) 37 Monash U L Rev 135

The needed reforms should be in law, policy and institutional rearrangement: a system which empowers the trial courts to collect enough evidence to inform its decision.

4.3 Role of Judiciary in the Process of Admitting Evidence in Corruption Cases

The admissibility of collected evidence in most commonwealth adversarial systems is guided by a similar legal regime in form of the Evidence Act. This legal regime scrutinizes the relevance and consequently the admissibility of evidence.[135]

In an adversarial system, the court's role is to analyse the relevance and irrelevancy of the evidence to be admitted. In determining the relevance, the court explores whether the manner through which the evidence was collected undermined any lawful prescription or constitutional requirements. In most cases, the court moves to determine the evidence's relevance upon the application by the defence in disputing the evidence before the court. The court, rarely acts on its own motion.[136]

In an inquisitorial judicial system, the court is actively involved in the collection of the evidence and can move on its own motion in determining the relevance or irrelevance of the evidence being admitted.[137] Often, the court acts both as an arbitrator and fact finder to equip itself for judgment. In this system, little objections and adjournments are witnessed.

The design of anti-corruption courts in Kenya should be equipped with unique procedures on the admission of evidence which should be in tandem with the need for the courts to be actively involved in collection of evidence.[138] The rationale for this is sublime. Firstly, Kenya has witnessed the developing and upgrading of court institutions. The Constitution of Kenya, 2010 provides for the establishment of special courts for land, environment and employment

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[135] Brittany M Brown, 'Ethics, Evidence, and Eyewitness: The Role of Trial System in Evaluating Unreliable Evidence' (2014) 27 Geo J Legal Ethics 407

[136] Chuckwunweike A Ogbuabor, 'Inquisitorial and Adversarial Process in Nigeria's Criminal Justice System: The Dilemma of a Colonized State' (2015) 38 UW Austl L Rev 175

[137] J R Du Plessis, 'An Inquisitorial System in Practice - Visits to German Criminal Courts' (1988) 105 S African LJ 305

[138] David Phillips, 'The Inquisitorial Aspects of an Adversarial System' (2002) 42 Med Sci & L 98

relations disputes. These courts have been equipped with new rules away from the traditional rules of conduct in the admission of evidence. This applies to the Court of Appeal and the Supreme Court whose rules of procedure are unique to the characteristics of their composition.

Ironically, despite the fact that corruption is a moral and economic evil prevalent in Kenya, anti-corruption courts are still stuck on the archaic rules on the weight of direct evidence. This is to the contrary on an increased scholarly that circumstantial evidence is the best evidence in corruption cases.[139]

Further, there is no gainsaying in this matter that the Criminal Procedure Code dictates the running of these courts. In the current court structure, anti-corruption courts are just an offshoot of the criminal courts in which the same magistrates presiding over criminal cases oversee also the corruption cases. Somehow, a radical surgery separating the institutional sameness of the criminal and anti-corruption courts is needed. This would empower the anti-corruption courts with unique procedures and own personnel dedicated in the fight against corruption.[140] Indonesia has adopted a legal approach which minimizes on their reliance of an equivalent to our Criminal Procedure Code. Butt observes that:[141]

> The 2001 Anti-Corruption Law also provides exceptions to Indonesian evidential rules that were often thought to have made prosecuting corruption cases more difficult. Unlike the Code of Criminal Procedure (*Kitab Undang-undang Hukum Acara Pidana*, or KUHAP), the Anti-Corruption Law allows the use of 'new' types of evidence, such as electronic information, recordings and photographs, and other mediums, to be used in corruption cases (article 26A).

Thus, Kenya can adopt a legal infrastructure which relies on anti-corruption rules rather than the overall criminal law practice rules.

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[139] Nicholas A Goodling, 'Nigeria's Crisis of Corruption - Can the U.N. Global Programme Hope to Resolve the Dilemma' (2003) 36 Vand J Transnat'l L 997

[140] Simon Butt, 'Indonesia's anti-Corruption Drive and the Constitutional Court' (2009) 4 J Comp L 186

[141] Butt (Indonesia's Anti-Corruption Drive)

4.4 Role of Judiciary in the nature of proceedings in Corruption Cases

The role of the court in the manner of conduct of proceedings in corruption cases in adversarial system is diminished to a bystander arbiter in the battle between the accused and the prosecution.[142] The court moves mainly through application by the contesting parties. Courts have rarely moved by their own motions. The issues for determination are often framed by the parties subject to court's guidance. This is faulted to an inefficient adversarial system.[143]

These realities enable the pull and push between the prosecution and the defence which results into numerous adjournments and objections from the parties. This leads to the stagnation of proceedings in which the quality of evidence is often compromised.[144] Things are made worse as the supervisory and enforcement of court orders is often left to executive agencies which are marred with corruption and inefficiency. This leads to economic losses as a result of negligence of the enforcing arm and ultimately poor enforcement of judicial decisions may lead into unwarranted criticism on judiciary.[145]

The nature of conduct of proceedings in Kenya is adversarial in nature. An inquisitorial judicial system could remedy and promote the efficiency of the courts in determining corruption cases in avoid the pull and push between the prosecution and defense.[146] As noted, in an inquisitorial system, the courts will be empowered with the active roles of overseeing the collection of evidence, and consequently the admission of the evidence collected. Under this system, a trial court will be empowered to interject whenever it has formed an opinion

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[142] Daniel Epps, 'Adversarial Asymmetry in the Criminal Process' (2016) 91 NYU L Rev 762
[143] Peter W Tague, 'Faulty Adversarial Performance by Criminal Defenders in the Crown Court' (2001) 12 KCLJ 137
[144] Malcolm M Feeley and Kay Levine, 'Assaults on the Adversarial Process: Rethinking American Criminal Justice' (2001) 3 Punishment & Soc'y 537
[145] Elly Sudarti and Rahayu Sr and Dhil's Noviades, 'Justice in Connection with Law Enforcement Judge's Decision in Corruption' (2017) 58 JL Pol'y & Globalization 41
[146] Nico Steytler, 'Making South African Criminal Procedure More Inquisitorial ' (2001) 5 Law Democracy & Dev 1

that there might result inefficiency and delays over an issue under contention. Early guidance from trial court will aid in settling an issue before escalating into appeals or petitions.

The inquisitorial system would enable faster disposition of corruption cases when a judicial officer plays a key role on how the timelines of the proceedings must be conducted.[147] When compared to the adversarial system, whenever a judicial officer is seen to fast track the conduct of proceeding, numerous appeals and revision have been filed at the superior court seeking orders to quash the said proceedings. Inquisitorial nature of proceeding would mean that anti-corruption courts are guided with corruption procedures. These are designed to empower a judicial officer facilitate efficiency where parties are prone to adjournments and delays.[148]

The conduct of proceedings would entail the courts be equipped with modern court technology in recording proceedings and preserving evidence in electronic form.[149] The investment in technology would enable judicial officers focus on the substantive matters of cases rather than trying to balance between adjudicating matters and recording the proceedings on paper.

Technology would also be used to preserve the identity of whistleblowers who would seek anonymity.[150] The courts being aware of such witnesses would proceed to determine their credibility and relevance in the case to ensure that their evidence is admissible. Upon the court's satisfaction, an inquisitorial judicial system enables less or no objections as to the

[147] Abraham S Goldstein, 'Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure' (1974) 26 Stan L Rev 1009

[148] Peter Duff, 'Disclosure in Scottish Criminal Procedure: Another Step in an Inquisitorial Direction' (2007) 11 Int'l J Evidence & Proof 153

[149] Itay Ravid, 'Tweeting #Justice: Audio-Visual Coverage of Court Proceedings in a World of Shifting Technology' (2016) 35 Cardozo Arts & Ent LJ 41

[150] Daniela Lupas, 'An Introspective View of the Inquisitorial Trial' (1999) 18 Crim Just Ethics 17

status of the victim. The inquisitorial system would protect witnesses better than an adversarial system in corruption cases, and even in the general criminal justice system.[151]

An inquisitorial system would enable the court to exercise the roles of investigation to help itself informed in making decisions. Anti-corruption courts would employ their own experts should they wish to analyse the evidence collected independently. While this can still be practiced in an adversarial system, notions of bias and ill will, will come into place. The safe pathway is to have a legislated and enacted inquisitorial system and roles of the courts in corruption cases.

4.5 Role of Judiciary in sentencing in Corruption Cases

Among the key criticism on the judiciary is premised on sentencing. The public has formed an opinion that the fines imposed on corrupt offenders are little as compared to the sum of money embezzled. Hence, the judicial process is seen as a sanitizing agent against the corruption pandemic.

Different schools of thought view sentencing in contrasting angles.[152] There is to sentence through fines and forfeiture of assets commensurate with the amount stolen. Another school views imprisonment as the key deterring punishment which scares the involvement in corruption cases. Other school of thought views the imposition of fines and imprisonment as the harshest punishment which should arouse the conscious of the country against the corruption vice. This calls for courts to explore other extra juridical factors in determining the punishment to prescribe.[153]

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[151] Sharon Finegan, 'Pro Se Criminal Trials and the Merging of Inquisitorial and Adversarial Systems of Justice' (2009) 58 Cath U L Rev 445

[152] Muryanto Sr and Koesno Adi and Masruchin Ruba'i and Amiruddin, 'The Principle of Justice in the Sentencing of Corruption Offenders' (2014) 27 JL Pol'y & Globalization 57

[153] Muryanto Sr and Koesno Adi and Masruchin Ruba'i and Amiruddin, 'The Principle of Justice in the Sentencing of Corruption Offenders' (2014) 27 JL Pol'y & Globalization 57

Despite the different thoughts, it is the court which has a final determination on which punishment to prescribe.[154] However, this discretion must be exercised in harmony with the public policy and legitimate expectation that justice must be done. The needed reform is the need for the policy away from the Sentencing Policy of 2015 which addresses the economic and moral justification in sentencing the convicts.

A sentence of forfeiture and imposition of fines commensurate with the amount stolen serves the economic arguments that the stolen money ought to be recovered before any imposition of other sentences. The reform needed must prioritize full recovery of assets stolen in addition to the sentence of imprisonment.[155]

[154] Budiyanto, 'Sentencing System and Criminal Liability in Corruption Act' (2018) 78 JL Pol'y & Globalization 15

[155] Sugeng Wahyudi, 'Penal Policy on Assets Recovery on Corruption Cases in Indonesia' (2019) 4 JILS 45

CHAPTER FIVE

5.0 Conclusion and Recommendations

5.1 Conclusion

The study concludes that the role of judiciary in the fight against corruption receives the largest portion of focus from the public. Perception becomes a critical component in determining whether justice is being done or abused.

The study notes that the current judiciary is ill equipped through institutional organization and procedural of rules of practice to address the uniqueness of corruption. Institutional organization which does not specialize anti-corruption courts with unique court arrangement and structure makes the mingling of roles with normal criminal cases. Corruption being a *sui generis* criminal case ought to be handled differently from the classical criminal cases under the Penal Code.

Procedural organization looks into the manner in which court procedures are applied in corruption proceedings. The study observes that the criminal procedure rules apply in corruption cases and opines that it should not be the case. Peculiar procedures on collection of evidence, admission of evidence, conduct of proceedings, and sentencing of convicts ought to guide the anti-corruption courts.

5.2 Study Findings

The study finds that effective and efficient prosecution of corruption cases must be imbedded in a strong and reformed judiciary. The current adversarial judicial arrangement does not promote the active role in which the judiciary should be equipped in fighting corruption.

It follows that an inquisitorial judicial system would equip judiciary with stronger supervision role on how the ever disputed pieces of evidences are collected, preserved and admitted or rejected. This further dictates that the judiciary design unique rules of practice and procedure for corruption cases geared at empowering the trial courts responsibilities that the classes are speedily adjudicated.

Finally, the role of judiciary in sentencing calls for a radical surgery. The priority in sentencing for corruption cases should be economic recovery. This is achieved better through orders of forfeiture than just only imprisonment. The corruption sentencing policy is a necessity.

5.3 Recommendations

The study makes the following recommendations empowering the judiciary in the fight against corruption

5.3.1 Constitutional Recommendations

i. The Constitution of Kenya, 2010 be amended to provide the establishment of anti-corruption courts as specialized courts of equal status as the High Court of the Kenya.
ii. The Bill of Rights be amended to provide that corruption is an economic infringement of the realization and enjoyment of the human rights in Kenya.
iii. The Constitution of Kenya, 2010 to provide that the nature of the judicial legal system for anti-corruption courts would be inquisitorial in nature empowering active involvement of the judicial officer from arresting of the accused, to collection of evidence, to admission of evidence and sentencing of the convicts.

5.3.2 Legislative Amendment

i. Parliament of the Republic of Kenya enact a corruption court procedure code which outlines how anti-corruption courts will be presided with unique rules on admission of evidence.

ii. Parliament to enact a legislation which provides for the inquisitorial nature of conducting of proceedings in the anti-corruption courts to emphasize on the investigative nature of judicial officers.

5.3.3 Policy Recommendations

i. There should be sensitized a sentencing policy in corruption cases should focus on forfeiture and imposition of fines commensurate with the amount stolen serves the economic arguments that the stolen money ought to be recovered before any imposition of other sentences. The reform needed must prioritize full recovery of assets stolen in addition to the sentence of imprisonment.

ii. There should be the designing of a technology policy which would also be used to preserve the identity of whistleblowers who would seek anonymity. The courts being aware of such witnesses would proceed to determine their credibility and relevance in the case to ensure that their evidence is admissible. Upon the court's satisfaction, an inquisitorial judicial system enables less or no objections as to the status of the victim. The inquisitorial system would protect witnesses better than an adversarial system in corruption cases, and even in the general criminal justice system.

5.3.4 Administrative Recommendations

i. The Judiciary Training Institute (JTI) curriculum should be designed to train judicial officers on the changes needed to facilitate the judiciary's role in fighting corruption. Calls for an inquisitorial system in the nature of conduct of judicial proceedings must be sensitized through this programme borrowing from the best practices around the world.

ii. The Law Society of Kenya should design the training programs for advocates of the High Court of Kenya to understand the inquisitorial changes to the judicial systems in the prosecution of corruption cases in Kenya. This would heal the contests witnessed

by the defence and prosecution on the new changes to ensure speedy and efficient delivery of justice in corruption cases.

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