SLAYING THE CORRUPTION DRAGON WITH BARE HANDS: A CASE FOR GRANTING PROSECUTORIAL POWERS TO KENYA'S ETHICS AND ANTI-CORRUPTION COMMISSION

BY

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DECLARATION

I **JAMES OTIENO OLOLA**, declare that this thesis is my original work and that it has not been submitted for examination for the award of a degree at any other University.

DATED at Nairobi this 18th day of November 2011

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

DATED at Nairobi this day of 2011

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DEDICATION

To Gerald, Derrick and Prudence, my offspring.

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This paper would not have been possible without the able supervision of Mrs. Joy K. Asiema. Her insight into angles of the problem that I had not seen before, more than anything else, gave this work a touch of completeness and reality.

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However, while I acknowledge the contributions of many people for the assistance extended to me towards the completion of this thesis, I hasten to add that the responsibility for all errors of commission and/or omission that may be exhibited in this work are to be borne by me solely to the exclusion of all other persons.

James O. Olola

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ABSTRACT

The study begins by acknowledging that corruption is not a new phenomenon in Kenya. As early as 1956, The Colonial Administration saw it fit to put in place a legislative framework for fighting corruption through the enactment of the Prevention of Corruption Ordinance. The 1963 Independence Constitution continued this trend by creating a powerful office of the Attorney General (AG) who by dint of Section 26 thereof was empowered to exercise near exclusive powers of prosecution on behalf of the State. The AG's office is stated in the Constitution to be an office in the public service and as such the holder is expected at all times to act in the public interest. In this regard, Section 26(6) of the Constitution granted and guaranteed the holder of the office independence in the discharge of his/her duties.

However, notwithstanding such express declaration of independence by the Constitution, available evidence indicates that it has virtually been impossible for the AG to independently commence and complete prosecutions against individuals who are part of the government and/or who enjoy the protection of powerful people in government. Nowhere is the lack of independence and failure to act in the public interest more manifest and evident than the area of prosecution for corruption and economic crimes. Since independence in 1963, Kenya has experienced some of the most high profile, international corruption scandals in the region. These include the Goldenberg and the Anglo Leasing Finance scandals.

In late 2002, the newly elected NARC government took office on anti-corruption platform and proceeded to enact the Anti- Corruption and Economic Crimes Act, No. 3 of 2003. The Act established the Kenya Anti- Corruption Commission (KACC) with a statutory mandate of fighting corruption and economic crimes. The structure of KACC assumes a three-pronged strategy based on investigation, public education, prevention and advisory services, and civil recovery and restitution. Since its establishment however, KACC's ability to deter and combat corruption has been weak. This study attributes this

weakness to the fact that the Commission does not have prosecutorial powers on its own and can only recommend cases to the AG for prosecution.

While there are a number of variables that could play a role in explaining the perceived failures, this study finds that the absence of a specialized, in-house prosecution unit and the lack of inter-agency co-operation and coordination between the Commission and the AG's office is arguably one of them. Comparing KACC to Nigeria's Economic and Financial Crimes Commission (EFCC) which is endowed with prosecutorial powers, the study notes that while Nigeria faces even higher levels of corruption than in Kenya, the EFCC has largely managed to execute its mandate effectively and efficiently. The underpinning argument advanced in this study therefore identifies law enforcement and prosecutorial functions as a factor in achieving this success.

KEY WORDS:

Corruption; Prosecution; Anti- Corruption Commissions; Attorney General; Kenya

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ABBREVIATIONS

1.	ACECA	Anti-Corruption and Economic Crimes Act, Act No. 3 of 2003
2.	ACC	Anti- Corruption Commissions
3.	ACPU	Anti-Corruption Police Unit
4.	ANC	African National Congress
5.	AUCPCC	The African Union Convention on Preventing and Combating Corruption
6.	CPI	Corruption Perception Index
7.	DCEC	Directorate on Economic Crimes and Corruption (Botswana)
8.	DSO	Directorate of Special Operations (South Africa)
9.	E.A.	East Africa Law Report
10.	EABI	The East Africa Bribery Index
11.	EACC	Ethics and Anti- Corruption Commission (Kenya)
12.	EFCC	Economic and Financial Crimes Commission (Nigeria)
13.	eKLR	electronic Kenya Law Report
14.	ICAC	Independent Commission against Corruption (Hong Kong)
15.	JSC	Judicial Service Commission
16.	KACA	Kenya Anti-Corruption Authority
17.	KACC	Kenya Anti-Corruption Commission
18.	KANU	Kenya African National Union
19.	KLR	Kenya Law Report
20.	NARC	National Alliance Rainbow Coalition
21.	SFO	Serious Fraud Office
22.	UK	United Kingdom
23.	UN	United Nations
24.	UNCAC	United Nations Convention Against Corruption

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CHAPTER 1

INTRODUCTION

We are apprehensive that in handing this to you, we are presenting to you a dragon; it is bound to snort, jump, kick and even attack, for corruption always fights back. Your Lordship will have no option but to seize it by the horns and slay it... This is a battle we are going to fight without looking backward. We are going to mount this beast and wrestle it to the ground.[1]

1.1 Introduction

Corruption can be seen first and foremost, as the utilization of official positions or titles for personal or private gain, either on an individual or collective basis, at the expense of the public good, in violation of established rules and ethical considerations, and through the direct or indirect participation of one or more public officials whether they be politicians or bureaucrats.[2] In a sense, corruption may be seen as partisanship that challenges statesmanship. It is an act or acts undertaken with deliberate intent of deriving or extracting personal and/or private rewards against the interest of the State. Such behaviour may entail theft, the embezzlement of funds or other appropriation of State property, nepotism and/or the granting of favours to personal acquaintances, and the abuse of public authority to exact monetary benefits or other privileges.[3]

The consequences of corruption are widely acclaimed. There is for instance, a general consensus that corruption produces negative consequences of an economic, political and administrative nature. These consequences, both individually and collectively, categorically impair the process of development.

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[1] Remarks by Ringera J. (as he then was) to the Chief Justice of the Republic of Kenya during the handing in of a report by the former to the latter on corruption in the Kenyan Bench. Reported in the Daily Nation (Nairobi, issue No. 14211 of 14th September 2006) at p. 13.

[2] Kempe Ronald Hope, Sr., and Bornwell C. Chikulo, Corruption and Development in Africa, New York: St Martin's Press, 2000, 18.

[3] *Ibid.*

With approximately 50 percent of Sub-Saharan Africa living below the poverty line, the impact of corruption on the poor is particularly devastating.[4] The African Union estimates that corruption increases the cost of goods by an average of 20 percent.[5] Furthermore, it is the poor who are the most reliant on public services but the least capable of paying the prices associated with bribery and other forms of corrupt activity to attain those services. Corruption also undermines the very delivery of these public services: roads are not built, hospitals are under resourced, and schools are inadequately supplied.[6] It is no wonder that zero tolerance to corruption is normally a published government policy and the selling point of political parties.

The fight against corruption in Kenya may be dated back to pre-independence when the Prevention of Corruption Act, Cap 65 Laws of Kenya was enacted.[7] Initially, the Prevention of Corruption Act was enforced by the Police Department. However, corruption grew over the years despite the existence of the Prevention of Corruption Act. An effort was made to establish in 1993 an Anti-Corruption squad within the Criminal Investigation Department of the Police Force, but the squad was disbanded before it could make an impact in 1995. The Prevention of Corruption Act was then amended in early 1997 to provide for the establishment of the Kenya Anti-Corruption Authority (KACA).[8]

The semi-autonomous KACA which was vested with powers to prosecute corruption offences immediately established an early reputation for independence by commencing criminal proceedings against high-profile personalities. The zeal with which the

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[4] The World Bank, World Bank Updates Poverty Estimates for the Developing World, available at: *http://go.worldbank.org/C9GR27WRJ0* (accessed 28 May 2011

[5] Transparency International, G8 Summit, FAQ, 2005, available at: http://www.transparency.org/news_room/in focus/2005/g8_summit/faq.(accesed 28 May 2011).

[6] Melissa Khemani, Combating Corruption in the Commonwealth, in Commonwealth Quarterly, (Commonwealth Secretariat, 6 March 2008), available at: http://www.thecommonwealth.org/EZInformation/176102/060308combating.htm (accessed 2 October 2009).

[7] The Act was in force until 2003 when it was repealed by the Anti-Corruption and Economic Crimes Act, 2003, Section 70.

[8] The History of anti-graft fight in Kenya. Available at: http://www.kacc.go.ke/default.asp?pageid=2. Accessed on 2 October 2009.

Authority went about its work soon triggered virulent debate over the exercise and legal foundation of its prosecutorial authority.

In 2002, the High Court in the case of *Gachiengo vs Republic*[9] made a ruling that the existence of KACA undermined the powers conferred on both the Attorney General and the Commissioner of Police by the Constitution of the Republic of Kenya. In addition, the High Court further held that the statutory provisions establishing KACA, in particular Sections 10 and 11B thereof, were in conflict with the Constitution[10]. The court held that the existence of KACA undermined the respective constitutional powers and authority of the Commissioner of Police and the Attorney General to investigate and prosecute offences as conferred by the Constitution. This led to the Act being repealed.

In 2003, two legislations were enacted, the Anti-Corruption and Economic Crimes Act, No 3 of 2003 and the Public Officer Ethics Act, No 4 of 2003. The Anti-Corruption and Economic Crimes Act, established the Kenya Anti-Corruption Commission (KACC) as a body corporate, prescribed its composition and conferred powers and functions to it. While Section 7(1) of the Act empowered the Commission, inter alia, to investigate corruption and economic crimes and to institute civil proceedings for the recovery of public property, it had no prosecutorial powers. As at the time its status changed in August 2011, the Commission comprised of four Directorates namely the Directorate of Investigations and Asset Tracing, the Directorate of Legal Services, the Preventive Services Directorate and the Directorate of Finance and Administration.[11]

Kenya achieves a low score of 2.2 on the Transparency International (TI) Corruption Perception Index (CPI) conducted in 2009. The CPI ranks Kenya at 36 compared to Uganda's score of 27 and 25 for Tanzania. Kenya now ranks with Zimbabwe and Sierra

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[9] (2000) 1 EA 52.

[10] Section 3 of the 1963 Constitution provided that where any other law was inconsistent with the Constitution, the Constitution shall prevail and the other law, to the extent of the inconsistency, shall be void. Similar provisions are contained in Article 2(4) of Kenya's new Constitution promulgated on 27th August 2010.

[11] KACC Directorate Profile: Available at: http://www.kacc.go.ke/default.asp?pageid=7. Accessed on 2 October 2009.

Leone and is well below Nigeria. The East Africa Bribery Index (EABI), conducted between 16th April and 15th May 2009 by TI Kenya Chapter indicates that Kenya has the highest incidence of corruption at 45 per cent while the level of corruption in Uganda is 34 per cent. According to the index, Tanzania is the least corrupt country in East Africa with a corruption incidence of 17.8 per cent.

In this regard, it can be said that the Anti-Corruption and Economic Crimes Act failed to address the problems inherent in the Prevention of Corruption Act and which were the bone of contention in the *Gachiengo case* quoted above. The anti-corruption agency as presently constituted does not have prosecutorial powers.

Prosecuting authorities play a crucial role in the administration of justice. The decision to prosecute or not involves the exercise of discretion, and it is in the interest of justice that prosecuting authorities exercise that discretion freely, impartially and independently of any influence or interference. Prosecutions offer a concrete variable by which to judge an anti-corruption campaign's success. When called upon to account, anti-corruption agencies may provide prosecution and conviction rates to donors, investors and citizens alike as an objective gauge of their performance.

This research interrogates the question whether or not Kenya's anti-corruption agency needs prosecutorial powers in order to be more effective and efficient, and aims to make appropriate recommendations for legislative and institutional reforms.

At the very outset, it is vital to indicate that this study was basically conducted in the period beginning September 2008 and ending around July 2010. During this period, the Country took serious strides to fundamentally change its governance structures. This culminated in the promulgation of a new Constitution on 27th August 2010. Thus while the study considers the position as it were under the timelines of the 1963 Constitution, a number of events have since occurred which have merited comment and cross references between the old and the new order. One such fundamental change which is likely to have a bearing on this study is the fact that under the new Constitution, the Office of the

Attorney General is now created under Article 156 thereof. All responsibilities previously bestowed on the Attorney General with regard to criminal prosecutions have however been transferred from the AG's office to the new autonomous Office of the Director of Public Prosecutions created under Article 157 of the new Constitution.

Another major change likely to impact heavily on the fight against corruption is the introduction of a new Ethics and Anti- Corruption Commission Act.[12] The new Act has repealed Part III A of the Anti- Corruption and Economic Crimes Act which had among other things established KACC. In its place, a new body known as the Ethics and Anti-Corruption Commission (EACC) has been created.[13]

1.2 Background of the Problem

On 2nd October 2006, Justice Aaron Ringera, then Director of the Kenya Anti- Corruption Commission disclosed that the Commission had finalized investigations in some of the corruption cases revolving around a United Kingdom based firm known as Anglo Leasing and Finance Company Ltd (ALFC) and had forwarded the names of 12 prominent personalities to the Attorney General (AG) for prosecution.[14] Immediately thereafter, it emerged that the then Attorney General Mr. Amos Wako[15] had in September 2006 recorded a statement with KACC officers regarding his own role in the Anglo Leasing type contracts.[16] Mr. Wako was questioned about the legal advice he gave over some of the contracts – all of which he approved – and whether he signed any of them as the Government's principal lawyer. The revelation brought into question the AG's ability

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[12] Act No. 22 of 2011. See Kenya Gazette Supplement No. 109 of 2011 published on 5th September 2011. This was enacted in compliance with the requirement of the new Constitution which at Article 79 thereof requires the establishment of a new body to enforce compliance with the provisions of Chapter 6 of the Constitution on Leadership and Integrity.

[13] See Section 3 of the EACC Act.

[14] See David Okwembah, 'Anglo Leasing: Now Ringera asks AG to take 12 to court', *Daily Nation*, Nairobi, Tuesday, October 3, 2006, p. 1.

[15] Amos Wako was appointed Kenya's Attorney General by President Moi in June 1991. See *Amos Wako, The Rule of Law will Prevail*, The Weekly Review, July 12, 1991.

[16] See Mugo Njeru, 'Wako quizzed over 5 Anglo Leasing Cases', *Daily Nation*, Nairobi, Wednesday, October 4, 2006, p. 1; John Osoro, 'Court told Wako gave positive legal opinion on Anglo Leasing', *Kenya Times*, Wednesday, October 18, 2006, p. 5.

to impartially review the cases recommended for prosecution when he is in fact the same person who had earlier approved them.

It therefore did not come as a surprise when on 18th October 2006; the AG announced that he would not prosecute five high profile Anglo Leasing suspects for lack of sufficient evidence.[17] Citing what he termed significant evidence gaps, the AG returned the five files to KACC and demanded further investigations to be completed within 30 days, to make the cases watertight. The following day, the KACC director dismissed the grounds upon which the AG had rejected the files. Faulting the technical and legal opinion the AG had given for refusal to prosecute the prominent personalities; Justice Ringera vowed that he would not take any directions from the AG.[18] Arising from this standoff, none of the cases involved have ever been taken to court.

Similarly, in a less publicised episode which occurred in March 2007, the Kenya Anti-Corruption Commission (KACC) instituted separate charges against 7 prominent personalities at Nairobi's Makadara Law Courts. The accused persons, all of them suspected to have played some role in what is now commonly referred to as the Goldenberg Corruption Scandal, were charged under Section 26 of the Anti-Corruption and Economic Crimes Act with the failure to comply with a notice issued by the Director KACC, requiring them to provide a comprehensive list of their property and to give an account on how the same were acquired.

Two of the suspects, Messrs James Kanyotu[19] and Joseph Mbui Magari[20] immediately filed separate constitutional petitions in the High Court challenging the constitutionality of the proceedings in the subordinate court. When the Petitions simultaneously came up for hearing before Honourable Aluoch J. on 30th March 2007, the AG who was named as

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[17] See Nzau Musau, 'Wako vs Ringera: AG throws Anglo Leasing Case into Disarray', *Kenya Times*, Thursday, October 19, 2006, p. 1.

[18] See Erick Otieno, 'Legal Showdown: Ringera Rebuffs Wako's Opinion on Anglo Leasing probe,' *Kenya Times*, Friday, October 20, 2006, p. 1.

[19] Nairobi High Court Constitutional Petition No. 318 of 2007. Mr. Kanyotu subsequently passed away on 12th February 2008 before the Petition could be heard.

[20] Nairobi High Court Constitutional Petition No. 328 of 2007. The Petition has not been fixed for hearing inter partes to-date.

the Respondent, appeared through a Deputy Chief State Counsel in his office and informed the court that he was not aware of the cases instituted by KACC in the lower court. According to the AG's representative, KACC had no mandate to prosecute any case and/or to prefer any charges in court unless and until the AG had given his sanction. Since in these instances no such sanction had been given, the AG asked the court to stay the proceedings pending in the subordinate court until such a time that the AG was sufficiently briefed thereon.

In making these submissions, the AG's office relied on the provisions of Section 35 of the Anti-Corruption and Economic Crimes Act which provides thus:

> *35(1) Following an investigation the Commission shall report to the Attorney General on the results of the investigation.*
> *(2) The Commission's report shall include any recommendation the Commission may have that a person be prosecuted for corruption or economic crime.*

The above scenarios are just but an illustration of numerous situations in which the AG's office and KACC, the two government agencies then charged with the fight against graft in Kenya, constantly found themselves embroiled in side shows which betray the lack of harmony and synergy in this crucial national undertaking. It is of course true that, KACC and its successor, the Ethics and Anti-Corruption Commission (EACC) have no express prosecutorial powers.[21] However, while the AG (now DPP) has a constitutional duty to institute and undertake criminal proceedings on behalf of the Republic, it is fallacious to assume that no criminal charges can be brought to court unless and until the State Law Office is informed and/or sanctions the same[22]. Indeed, for the avoidance of any doubt, Section 32 of the Anti- Corruption and Economic Crimes Act (ACECA) expressly

[21] Perhaps in an attempt to address this ambiguity, Section 11(1)(d) of the new EACC Act requires the Commission to investigate and recommend to the DPP the *prosecution* of any acts of corruption.
[22] Article 157 of the Constitution of Kenya 2010 has since transferred these powers and functions from the AG to the newly created Office of the Director of Public Prosecutions.

provides that the Director and an investigator under the Act shall have powers to arrest any person for and charge them with an offence.

However, in spite of the clear provisions of Section 32 of ACECA aforesaid, perhaps in submission to the manner in which the AG continues to throw his weight around as depicted in the court appearance above and/or in deference to the fact that ultimately it is the AG on whose shoulders the responsibility of prosecuting the cases it investigates falls, the anti- graft body does not as a matter of practice have suspects arraigned in court prior to receiving a nod from the State Law Office except in bribe demand cases usually involving low level public officers.

KACC was established in September 2004[23] with a mandate to spearhead the fight against corruption through law enforcement, prevention and public education. Many years after its inception, there is a growing feeling among many Kenyans that the anti-graft watchdog has failed to achieve its mandate with many now viewing it as an unwelcome drain on the exchequer. In a number of surveys carried out across the country, many people take issue with KACC for its perceived failure to, as it were, prosecute the so-called "big fish"[24]. A number of public bodies such as the Kenya Revenue Authority, the Ministries of Health, Labour, Local Government, the National Social Security Fund (NSSF) and the National Health Insurance Fund (NHIF) enjoy limited prosecutorial powers donated by the AG under Section 85 of the Criminal Procedure Code (Cap 75 of the Laws of Kenya) in their respective spheres. Many ordinary Kenyans expect the anti-graft body to prosecute offenders and any perceived absence of such prosecution (and even conviction) is blamed on the Commission.

One of the fundamental changes brought about by Kenya's new Constitution is the move to change from a centralised governance system to a structure that is devolved into County governments. At Chapter 11 thereof, the new Constitution devolves governance

[23] The date of commencement of the Anti- Corruption and Economic Crimes Act, 2003 is however, 2nd May 2003.
[24] This term is ordinarily used to refer to Senior Level Government officials who are believed to be able to manipulate the criminal process. Refer to the Kenya Corruption Perception Index report, 2008.

to the County governments. The main objects of devolution as set out in Article 174 thereof include the promotion of democratic and accountable exercise of power, giving powers to the people to self-govern and to enhance their participation in the exercise of State powers in decisions that affect them. In addition, devolution is aimed at enhancing checks and balances within the concept of separation of powers. In this regard, there are elaborate provisions on the County governments including their functions, powers and how they relate with the national government.

Perhaps in an attempt to deal with the problem of corruption associated with devolved government, the fight against corruption is now entrenched in the Constitution in a symbolic and highly significant gesture of the citizenry's commitment to eradicate the vice. Chapter 6 of the Constitution provides the cornerstone for leadership and integrity in public service. Article 73(1) thereof prescribes how authority ought to be exercised by the country's leaders and clarifies that all state officer are expected to use their authority to serve the people and not to rule them. Article 73(2) sets out the guiding principles of leadership and integrity. These principles include the criteria to be applied in appointing persons to public office and for election in the case of elective positions.

More importantly, Article 79 of the Constitution provides for the establishment of an independent Ethics and Anti-Corruption Commission with the mandate to enforce the provisions of Chapter 6 of the Constitution and to prevent and combat corruption. As the implementation of the Constitution gets underway, Parliament is required to pass various pieces of legislation within certain timelines. An Act of Parliament establishing the new Ethics and Anti-Corruption Commission was in this regard required under the Constitution to be in place not later than 27th August 2011[25].

A bill drafted for this purpose proposed to give the proposed Commission, among other functions, the mandate to prosecute corruption and economic crimes without reference to any other person or authority[26]. As matters turned out however, following an acrimonious

[25] Under the Fifth Schedule of the Constitution enacted pursuant to Article 261(1) thereof.
[26] Daily Nation, May 19, 2011.

debate on the Bill in Parliament on 25th August 2011, the Legislators voted to delete the section that would have given prosecutorial powers to the new anti-graft agency[27]. As a result, the Ethics and Anti-Corruption Commission Act, published on 5th September 2011[28] has retained the old position and the new Ethics and Anti-Corruption Commission[29] established thereunder once again lacks prosecutorial powers and shall be required to submit a report of its findings on investigations to the Director of Public Prosecutions who, like the Attorney General before him, shall decide on whether or not to initiate a criminal prosecution against any suspect[30].

This study seeks to interrogate the reasons behind the failure to grant Kenya's anti-corruption agency prosecutorial powers, the effect that that failure has had on the fight against corruption and economic crimes in Kenya and whether Kenya's anti-graft agency should be given prosecutorial powers.

1.3 Statement of the Problem

KACC (and its successor the EACC) itself does not have prosecutorial powers and can only recommend cases to the Attorney General for prosecution. While there are a number of variables that could play a role in explaining the conviction rate, the absence of a specialized, in-house prosecution unit and the lack of inter-agency cooperation and coordination is arguably one of them.

Kenya's anti-corruption agency does not have prosecutorial powers and the requirement that all cases it investigates can only be prosecuted by, and upon the sanction of the Attorney General militates against its independence and hampers the war against corruption and economic crimes in Kenya. The absence of prosecutorial powers leads to unnecessary delays in commencement and disposal of cases, inconsistencies in positions taken on the evidence by various players and lack of effective control of cases in the

[27] Daily Nation, August 26, 2011.
[28] Kenya Gazette Supplement No. 109 (Act No. 22 of 2011).
[29] Established under Section 3 (1) of Act.
[30] Section 11(1) (d) of the Ethics and Anti-Corruption Commission Act, No. 22 of 2011.

course of trial. This study interrogates the question whether or not the anti-corruption agency should be bestowed with prosecutorial powers to make it more effective.

1.4 Hypotheses

1) The effective war against corruption and economic crimes in Kenya is hampered by the fact that Kenya's anti-corruption agency lacks prosecutorial powers.
2) Powers to prosecute corruption and economic crimes are not the exclusive Constitutional preserve of the Attorney General.
3) For the purpose of checks and balances, the power of investigation and prosecution of corruption and economic crimes should not be vested in the same body.
4) Lack of prosecutorial powers makes Kenya's anti-graft agency vulnerable to interference and manipulation by the Attorney General's (and/or Director of Public Prosecution's) office.

1.5 Research Objectives

a) Main Objective

To evaluate KACC's performance in the 6 years since its establishment and to assess the extent to which its lack of prosecutorial powers has hampered the fight against corruption and economic crimes in Kenya.

b) Specific Objectives

i) To evaluate the efficacy of the present arrangement whereby the anti-graft agency investigates corruption and economic crimes and then passes over the files to the Attorney General (and now DPP) for prosecution.

ii) To examine the extent to which the legal framework currently in place allows for an independent investigation and prosecution of corruption and economic crimes.

iii) To propose legal, regulatory and institutional reforms necessary to enhance the efficiency of the anti-corruption agency.

1.6 Research Questions

i) Does lack of prosecutorial powers by the anti-corruption agency hinder the fight against corruption in Kenya?

ii) Is Kenya's anti-graft agency vulnerable to interference and manipulation by the Attorney General (or DPP) due to its lack of prosecutorial powers?

iii) What are the legal, regulatory and institutional reforms required to enhance the efficiency and efficacy of the anti-corruption body?

1.7 Justification

In Kenya, the anti-corruption campaign remains a project in questionable progress. This hypothesis contrasts sharply with the fact that the three regime changes which have occurred in the country since independence have been accompanied by charges of unabated corruption, mismanagement of national resources and promises to introduce transparent governance.

The new millennium has ushered in a wave of international, regional and domestic initiatives designed to combat public corruption, curtail financial crime, and facilitate the repatriation of stolen assets. To affirm their allegiance to the movement – and to meet their international treaty obligations – African nations, Kenya included, have promulgated anti-corruption agencies charged with the task of bringing to book corrupt officials without fear or favour. Yet, the politics of corruption prosecution have spelled both peril and promise for these young institutions, raising new questions about the suitability of the strategies adopted in their anti-corruption crusades.

The reasons behind the failure of many anti-corruption institutions have been well documented through the experience of many countries. Fear of consequences that lead to loss independence and autonomy, unrealistic expectations when fighting deeply entrenched systemic corruption, lack of public involvement and sufficient accountability are some of the reasons frequently cited for the failure. These causes may well apply to Kenya's anti-corruption agency given that the flaws are largely institutional. The anti-corruption agency's independence and autonomy is largely a myth. KACC and its

successor, the EACC, must still get the concurrence of the Government before anyone can be arraigned in court and be prosecuted.

As will be demonstrated in this study, there is clear commitment from the international donor community in placing anti-corruption initiatives in their agenda. This is buttressed by the adoption of such international instruments which specifically include the need for specialised anti-corruption authorities. However, as we shall see, these instruments simply set the benchmarks for specialisation but do not give a precise, detailed guidance on how to implement such measures and what models to follow.

In the absence of such guidance, many countries including Kenya have opted to follow the Hong Kong proto-type and model their anti-corruption agencies in the context of Hong Kong's Independence Commission against Corruption (ICAC) which has highly been successful in stemming the vice in the South East Asian nation since 1974. Attempts to replicate the Hong Kong success have been made regardless of prevailing political, social and economic conditions, and the resources available to a given agency. Given the poverty levels in Africa, it can be said that all African anti-corruption agencies subsist in conditions far less propitious and with much scarcer resources and capabilities than the ICAC proto-type.

The ICAC which has experienced significant success in curbing Hong Kong's history of systemic corruption, is divided into three departments: the Operations Department which investigates violations of laws and regulations; the Corruption Prevention Department which conducts training and seminars for both public and private sectors; and the Community Relations Department, which raises awareness through various campaigns and educates the public of any changes in the laws and regulations.[31]

While the prevailing literature in the field appear to concentrate on models of anti-corruption commissions based on the Hong Kong proto-type with its three functions,

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[31] John R. Heilbrunn, *Anti- Corruption Commissions: Panacea or Real Medicine for Fighting Corruption?*, 9, (World Bank Institute, 2004).

there is an emerging view which proposes a new model that combines law enforcement with prosecutorial powers. The Nigerian Economic and Financial Crimes Commission (EFCC) is an ideal example of an institution which exercises all such powers and functions.[32]

Examining the motivations and effects of anti-corruption reforms in Kenya and Nigeria, a number of studies suggest that while Kenya's campaign has been politically and largely ineffectual, the more autonomous and activist Nigeria's EFCC has had a measure of success. Interestingly, these studies attribute the difference in the levels of efficacy of the two institutions to be largely due to the EFCC's independent prosecutorial powers.

1.8 Conceptual and Theoretical Framework

Corruption has no doubt posed a serious challenge to development in many countries and is not unique to Kenya or even the African continent.[33] Its effects are however felt more severely in developing countries. According to estimates of the African Union, African economies lose more than US $ 148 Billion a year as a result of corruption, representing roughly 25% of the continent's GDP.[34]

There has emerged a trend in the last decade for African governments to establish anti-corruption commissions – distinct, national agencies charged with combating corruption. However, the experience of African anti-corruption commissions are varied, and they often attract criticism for being ineffective and a waste of resources.[35] The rise of permanent statutory bodies mandated to prosecute corrupt officials reflects a renewed

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[32] See Establishment Act of the Economic and Financial Crimes Commission of Nigeria, available at: http://www.efcnigeria.org/index.php?option=com_content&task=view&id=12&itemid=30 accessed on 12th November 2011.

[33] Peter Langseth, Rick Stapenhurst and Jeremy Pope, *The Role of National Integrity Systems in Fighting Corruption, in Controlling Corruption*, 55 (Robert Wilhams and Allan Doig, eds.,Edward Elgar Publishing Ltd., 2000)

[34] Transparency International, *G8 Summit, FAQ*, 2005, available at: http://www.transparency.org/news_room/in_focus/2005/g8_Summit/faq (accessed on 28 May 2011).

[35] See generally: John R. Heilbrum, *Anti-Corruption Commissions*, in The Role of Parliament in Curbing Corruption (Rick Stapenhurst, Niall Johnston and Ricardo Pellizo, eds., The World Bank, 2006).

effort to harmonise and strengthen domestic programmes once marked by sporadic or anaemic performance.[36]

Reinforcing this "harmonisation" movement, the African Union Convention on Preventing and Combating Corruption[37] and the United Nations Convention against Corruption[38] both require signatories to establish specialised anti-corruption bodies. Neither of these international instruments however prescribes a specific framework for those bodies, nor requires that they prosecute offenders themselves. Instead, these instruments simply set the benchmarks for specialisation as having:[39]

- Independence and autonomy
- Specialised staff
- Sufficient resources
- Adequate powers

Accordingly, there remains a lack of precise, detailed guidance on how to implement such measures and what models to follow. In turn, governments are left with significant discretion in determining how to establish and administer these bodies. While it is proper for international agreements to allow State Parties to tailor treaty requirements to fit specificities of their domestic needs, lack of an agreed framework may also serve as a means for non-committal governments to establish weak institutions while claiming that they have met their international obligations.

In Kenya, the ACECA while allowing the anti-corruption agency to charge suapects in court, fails to explicitly provide like its predecessor that the Commission may exercise prosecutorial powers where an offence is disclosed from its investigations. In the absence of such a clear statutory provision, the assumption has been that given that the Constitution vests constitutional powers on the AG to carry out all criminal prosecutions

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[36] See Alhaji B M Marong, 'Toward normative consensus against corruption: Legal effectsof the principles to combat corruption in Africa', *Denver Journal of International Law* & Policy 30(2) (2002), 99-129, 99.
[37] Article 5(3).
[38] Article 6
[39] Organisation for Economic Co-operation and Development (OECD), Specialised Anti-Corruption Institutions: Review of Models, 20 (OECD 2008).

on behalf of the State, no prosecutions including those for corruption and economic crimes can be instituted and/or conducted without his knowledge and/or concurrence.

In my view however, while the AG (and now the DPP) has the Constitutional duty to institute and undertake criminal proceedings, it is fallacious to assume that no criminal charges can be brought to court unless and until the AG is informed and/or sanctions the same. With the large number of cases being brought to courts countrywide, such a requirement would simply be impractical.

Section 26 of the Constitution[40] which creates the office of the Attorney General does not give it exclusive power to institute or even undertake criminal proceedings. On the contrary, the Constitution clearly contemplates a situation where criminal proceedings can be instituted and undertaken by any (other) person or authority. In this regard Section 26(3) of the Constitution provides that:

> *26(3) The Attorney General shall have power in any case in which he considers it desirable so to do-*
>
> *a) ....*
>
> *b) To take over and continue any such criminal proceedings that have been instituted or undertaken by another person or authority; and*
>
> *c) To discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or another person or authority.*[41]

The purpose of this enquiry is to interrogate the above provision and to consider whether or not, in the absence of any express provision, the anti-corruption agency is one such

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[40] Following the promulgation of Kenya's new Constitution on 27th August 2010, the Office of the Attorney General is now created under Article 156 thereof. All responsibilities previously bestowed on the Attorney General with regard to criminal trials have however been transferred to the newly created Office of the Director of Public Prosecutions under Article 157.

[41] Article 157(6) of the new Constitution vests similar powers on the Director of Public Prosecutions (DPP). The DPP can however only take over the case instituted by another person if he has that other person's permission. Article 157(8) places further restrictions on the exercise of this power by providing that the DPP may not discontinue a prosecution without the permission of the Court.

authority that is envisaged under the Constitution to be capable, given its statutory mandate, of instituting and undertaking criminal proceedings.[42] The hypothesis here is that prosecution agencies that are dependent on the executive have less incentive to prosecute crimes committed by government officials and/or those who enjoy the officials' patronage.[43] Secure in the knowledge that they can get away with it on the basis of such patronage, such officials are unlikely to be deterred from committing crime. Analysed within the Separation of Powers concept, State prosecutors are usually part of the Executive and not the Judicial Branch. This implies that they do not enjoy the same degree of independence as judges and are ultimately subordinated to the Executive and hence prone to conflict of interest where the interests of the Executive are threatened.

In my view, in instances where the law considers the specific aspect of consent to be given before a prosecution commences, there are in place express statutory provisions which specifically state that no criminal proceedings can be commenced without the sanction of the AG. One reason for the selection of offences as requiring the consent of the AG is to protect members of the public from oppressive prosecution, but the basic issue in all cases is whether, in the whole of the circumstances, the public interest requires that the proceedings should be taken in a particular case.[44]

The clearest indication that the Legislature did not intend that the AG gives his nod before a suspect can be arraigned in court is discernible from a reading of the repealed Prevention of Corruption Act (Cap 65). Section 12 thereof provided that:

> *12 A prosecution for an offence under this Act shall not be instituted except by or with the written consent of the Attorney- General:*

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[42] Article 157(12) of the Constitution of Kenya, 2010, provides that Parliament may enact legislation conferring powers of prosecution on authorities other than the DPP.

[43] See generally Van Aaken, Anne, Field, Lars P.P and Voigt, Stefan, 2008, Power over Prosecutors Corrupts Politicians: Cross Country Evidence Using a New Indicator, CESifo Working Paper Series No. 2245: MACIE Discussion Paper No. 0208: U. of St. Gallen Law & Economics Working Paper No. 2008-06.

[44] See for example, *Githunguri v. Republic* (1985) KLR 91 at 99-100. Section 169 of the Penal Code (offences related to incest) and Section 143 of the Criminal Procedure Code (offences committed by foreigners within Kenya's territorial waters) expressly make it mandatory for the AG's leave to be obtained prior to instituting any prosecution.

Provided that a person charged with such an offence may be arrested, or a warrant for his arrest may be issued and executed, and he may be remanded in custody or on bail, notwithstanding that the consent of the Attorney-General to the institution of a prosecution for the offence has not been obtained, but no further or other proceedings shall be taken until that consent has been obtained.

Cap 65 was, of course, repealed by section 70 of ACECA and it is instructive that no such requirement for consent was inserted in ACECA.

In my view therefore, Section 35 of the Anti- Corruption and Economic Crimes Act does not restrict the Commission to first forward the results of an investigation to the AG before charging a suspect in court otherwise the law would have specifically said so.[45] This study sets out to demonstrate that the provisions in this section are meant for accounting purposes, that is, to enable the Commission to report to the AG on the performance of its mandate. The "results of an investigation" which the Section requires the Commission to report to the AG on, in our view, includes the laying of charges, a function clearly entrusted to the Commission by virtue of Section 32 of ACECA. Otherwise to require that all cases are reported first to the AG before any charges are laid as is the present practice leads to an absurdity which could not have been intended by the law.

Save that in Kenya, KACC had no express powers to prosecute offenders, this study contends that the Report envisaged under Section 35 of ACECA, is in our view analogous with the annual Reports required to be submitted to the Attorney General of England by both the Director of Public Prosecutions and the Director of the Serious Fraud Office.[46] The AG in that country is by law required to submit both reports to

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[45] Section 11(1)(d) of the Ethics and Anti-Corruption Commission, Act, 2011 now requires the newly created Ethics and Anti-Corrruption Commission (EACC) to investigate and recommend to the DPP the *prosecution* of any acts of corruption or violation of codes of ethics or other matter prescribed under the Act or any other law enacted pursuant to Chapter Six of the Constitution.

[46] see Halsbury's Laws of England, Vol.11, 4th Ed at 643.

Parliament and to cause the same to be published for the general information of the public, a situation which again, is in synch with section 37 of ACECA[47]. To read any other motive for the submission of the Report under section 35 of ACECA is therefore legally and factually incorrect.[48]

As we have already pointed out, a number of public bodies such as the Kenya Revenue Authority, the Ministries of Health, Labour, Local Government, the National Social Security Fund (NSSF) and the National Health Insurance Fund (NHIF) enjoy limited prosecutorial powers donated by the AG under Section 85 of the Criminal Procedure Code (Cap 75 of the Laws of Kenya) in their respective spheres. Indeed the argument normally advanced that it is unconstitutional to combine the investigative and the prosecutorial powers in one body loses any meaning when it is remembered that the Kenya Police Force which is Constitutionally empowered to carry out investigations into criminal offences in this country carries out the bulk of prosecutions all over the country due to the insufficient number of State Counsels at the AG's office.

As has been pointed out by some commentators, having prosecutors and investigators working in partnership under one body ensures the specialisation and streamlining of functions required to efficiently handle anti-corruption cases from the beginning to the end. This allows for relationships and a rapport to develop between investigators and prosecutors, something which is presently lacking in the relationship between the anti-graft commission and the State Law Office. The efficient and timely handling of cases can increase the likelihood of successful prosecutions, which in turn, reinforces the organizational structure and creates public confidence in the body.[49]

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[47] Section 37(1) of ACECA requires the Attorney General to prepare an annual report with respect to prosecutions for corruption or economic crime. He is further required under Section 37(6) to lay the said report before the National Assembly.

[48] Section 11(1)(d) of the Ethics and Anti-Corruption Commission Act, 2011 now specifically states that the Commission shall investigate and recommend to the DPP the *prosecution* of any acts of corruption.

[49] Melissa Khemani 2009, Anti- Corruption Commissions in the African State: Burying the Problem or Addressing the Issue? Available at: http://ssrn.com/abstract=1334286 (accessed on 14 November 2011).

1.9 Literature Review

This study does not claim pioneer authorship on the broad issue of corruption prosecution. It has been inspired and shall be enriched by a number of writings in the field. There are a number of decisions of courts both in Kenya and beyond whose analysis shall give dimensions to this study. The literature is categorised into books (including chapters in books and journal articles) and case law.

1.9.1 Books

Van Aaken et al[50] have hypothesised that prosecution agencies that are dependent on the executive have less incentives to prosecute crimes committed by government members which, in turn increases their incentive to commit such crimes. In order to test their hypothesis, they deemed it necessary to create an indicator measuring *de jure* as well as *de facto* independence of the prosecution agencies. The regressions show that *de facto* independence of prosecution agencies robustly reduces corruption of officials.

At the same time, Fijnaut Cyrille and Leo Hubert[51] argue that integrity of the law enforcement system appears to be a crucial element in anti- corruption strategies in developing countries.

Similarly, Van Aaken et al[52] analyse the role and status of public prosecutors within the separation of powers concept. According to their analysis, prosecutors are usually part of the executive and not the judicial branch, which implies that they do not enjoy the same degree of independence as judges and are ultimately subordinated to the directives of the Minister of Justice or the government. Conflicts of interest may hence arise if members of government can use the criminal process for their own partisan interests.

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[50] Van Aaken, Anne, Field, Lars P.P and Voigt, Stefan, 2008, 'Power over Prosecutors Corrupts Politicians: Cross Country Evidence Using a New Indicator', CESifo Working Paper Series, No.2245; MACIE Discussion Paper No. 0208; U. of St. Gallen Law & Economics Working Paper No. 2008-06

[51] Cyrille Fijnaut, Leo Huberts (eds), 'Corruption, Integrity and Law Enforcement', 3-34 © 2002 Khwer Law International, The Hague, Printed in the Netherlands.

[52] Van Aaken, Anne, Salzberger, Eli M and Voigt, Stefan, 'The Prosecution of Public Figures and Separation of Powers: Confusion within the Executive Branch – A Conceptual Framework,' Constitutional Political Economy, Vol. 15 No.3

This study will be emphasising instead that as an autonomous agency, the Kenya Anti-Corruption Commission is not subject to the direction and control of any other person or authority in the performance of its functions and is only accountable to Parliament. The requirement that it reports to the Attorney General on the results of any investigation and the failure to grant it prosecutorial powers militates against this independence, consumes enormous amounts of time in duplicity and grievously slows down the war against corruption and economic crimes in Kenya.

Wamuti Ndegwa[53] underscores the fact that the power to prosecute is a discretion reserved for the State. This discretion should be exercised within the confines of the law and in the public interest. In developing countries like Kenya where corruption is rampant one would expect the letter of the law conferring prosecutorial discretion in corruption offences to be narrowed down to absolute certainty. In other words, the law should provide for prompt and effective prosecution in every event of evidence of corruption.

Ndegwa argues that in Kenya, prosecutorial powers is a monopoly of the Attorney General. According to him, providing for these prosecutorial powers under Section 26(3) of the Constitution means that any law that may bestow prosecutorial powers on any other person shall be inconsistent to the Constitution. The Constitution does not provide any limits to the exercise of discretion by the AG in so far as prosecution is concerned. Section 26(8) of the Constitution provides that in the exercise of the functions vested in the AG by subsections (3) and (4) of section 26(8), and by sections 44 and 45, the Attorney General shall not be subject to the direction or control of any other person or authority.

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[53] Wamuti Ndegwa, N.D, Open Ended Prosecutorial Discretion in the Fight Against Corruption in 3rd World Kenya Case Study. Available at: http://www.liverpoollawsociety.org.uk/userfiles/file/Society%20News/Open%20ended%20Prosecutorial%20discretion%20in%20the%20fight%20against%20corruption.pdf. Accessed on 14 September 2009.

Ndegwa refers to the decision in *Gregory & Another vs. Republic thro' Nottingham & 2 others*[54], which correctly interpreted the section to mean that the Attorney General is the sole custodian of the state's prosecutorial powers. In *Mohanlal Karamshi Shah vs Ambalal Chholtabhai Patel & 5 others*[55], the judge held that even in private prosecutions the state is the prosecutor.

This study however contends that prosecutorial powers are not the exclusive preserve of the AG and that the exclusive, unregulated and unaccountable manner in which the AG has exercised such powers hitherto has had negative effects in the fight against corruption in Kenya. The Kenya Anti- Corruption Commission has on numerous incidents of grand corruption investigated, gathered evidence and forwarded complete files to the Attorney General for prosecution. In a number of significant instances, the AG has declined to prosecute the suspects.

The Master Training Report[56] discusses the difficulty that exists in detecting and prosecuting corruption in Kenya. The low detection rate is associated with lack of verifiable information that is received from public servants or other citizens. More particularly it is difficult to detect and prosecute corruption perpetuated by prominent politicians and wealthy businessmen, or when it involves international bribery cases that require assistance from foreign jurisdictions in collecting evidence. This is because they influence and obstruct detection and prosecution. They delay prosecution by instituting lengthy appeals and sometimes they even manage to influence the legislative bodies to amend legal provisions in their favor.

Another difficulty arises from the secret nature of corruption and, in most instances, the lack of individual victims that would come forward with information about an act of

[54] (2004) 1 KLR 573
[55] (1954) 21 EACA 236.
[56] Report on the Master Training Seminar, on Effective Prosecution of Corruption, Secretariat of the ADB-OECD Anti-Corruption Initiative for Asia-Pacific Effective Prosecution of Corruption, between 11–13 February 2003, Ghaziabad, India.

corruption and thus trigger an investigation. Most of these hindrances must be addressed at the legislative level. Yet, a number of rules, to be applied at a technical and personal level by prosecutors, may help to control and diminish the mentioned effects and render prosecution of corrupt individuals in powerful positions more successful.

The Report also proposes that cooperation between law enforcement agencies is another key to successfully collecting evidence and bringing about efficient prosecution of corruption. Legal provisions not only require following demanding procedural rules, but also assign certain steps of the procedures to different agencies. These agencies must ensure that their actions are coordinated to acquire evidence, and must seek mutual advice to ensure the admissibility of the evidence when the case is tried in court.

The Report finds that corrupters and those corrupted still benefit enormously from banking secrecy laws, the speed and number of electronic fiscal transfers, tax havens and other offshore centers, and difficulties of international cooperation in prosecution. Additional problems arise from a lack of independence of the law enforcement authorities and undue influence exercised on them, in particular by prominent politicians or wealthy businessmen. Because of the lack in many countries of legal provisions ensuring the protection of whistleblowers, the detection and prosecution rates remain low despite otherwise comprehensive legal and institutional anti-corruption frameworks.

John Mukum[57] argues that corruption is a direct consequence of poorly developed and inappropriate institutional arrangements. Most of the continent's immediate independence leaders never engaged the people in state reconstruction through democratic constitutional making so that they could compact their own institutional arrangements. Constitutional making was top-down, elite driven and opportunistic resulting in laws and institutions that were not locally-focused and did not reflect the values of the people to be governed.

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[57] John Mukum Mbaku, 'Corruption in Africa: Causes, Consequences, and Cleanups', United States: Lexington Books, 2007.

The book examines and explains corruption in Africa based on the Public Choice theory. According to the theory, corruption can be seen as attempts by individuals or groups to subvert existing rules and generate extralegal income and wealth for themselves. The theory further gives insights into the process of reconstructing and reconstituting the state through democratic constitution making.

The book highlights the causes of corruption and the impact of corruption on the African economies. Corruption remains a serious obstacle to political, social, and economic development in the continent. Corruption is also now being recognized as a civil rights issue, since it can, for example, prevent the poor from having access to life-saving and welfare-enhancing services such as health care, food, shelter, clean water and protection under the law.

The book concludes by stating that any suggestion on eliminating corruption should be implemented after the state has been successfully reconstructed and a democratic dispensation and an economic system that guarantees economic freedom has been established.

Commenting on the anti-corruption legislation in Kenya, Muthomi Thiankolu[58] struggles to provide the elusive and varying definitions of corruption and asserts that corruption is not only a problem of the developing countries but also the developed.

He analyses the provisions and objects of the Anti-Corruption and Economic Crimes Act, 2003 as stated in its preamble and the value of the Act in preventing corruption. He also analyses the various cases that opposed the establishment and jurisdiction of special

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[58] Muthomi Thiankolu, ,'Tthe Anti-Corruption and Economic Crimes Act, 2003;
Has Kenya Discharged her Obligations to Her Peoples and the World?',(2006). Available at: **http://www.kenyalaw.org/Downloads_Other/Muthomi%20Thiankolu%20-%20AntiCorruption%20And%20Economic%20Crimes%20Act%202003.pdf**. Accessed on 28 October 2009.

magistrates to try corruption cases under the Act and other matters such as the decision in *Prof. Julius Meme v. Republic & Others*[59].

He then concludes by discussing the weaknesses of the Anti-Corruption and Economic Crimes Act, 2003. For example, he states that the Act lacks many of the significant features and obligations imposed on State Parties under the United Nations Convention against Corruption (UNCAC). It does not, for instance, make sufficient provision for international cooperation and technical assistance in the prevention of and fight against corruption, yet Kenya is a signatory to UNCAC. Further, the Act does not have adequate provisions to criminalize corruption in the private sector.

Melissa Khemani[60] argues that there is a compelling case to be made for the establishment of anti-corruption commissions in African States to undertake the role of "watchdog agencies" in their national integrity systems. Khemani states that inter-agency watchdog models such as those of the United Kingdom and the United States that incorporate multiple branches and departments of government tend to operate most effectively in advanced democracies with strong governance and institutional structures and where there is a more favourable culture of inter-agency cooperation.

Given the urgency and magnitude of corruption in Kenya at present, it is our view that the establishment of a designated anti-corruption commission is a necessary step in this country's anti-corruption strategy. Public sector institutions are not as developed, and the lack of inter-agency cooperation and coordination due to rivalry and over-protection of information is a predominant feature. It would therefore be more effective and efficient to centralize and vertically integrate anti-corruption functions under one body.

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[59] High Court of Kenya (Nairobi) Miscellaneous Criminal Application No. 495 of 2003.
[60] Melissa Khemani 2009, Anti-Corrruption Commissions in the African State: Burying the Problem or Addressing the Issue? Available at: http://ssrn.com/abstract=1334286 At 21(accessed on 21 October 2011).

Commenting on the politics behind anti-corruption reform in Africa Letitia Lawson[61] points out that previous research on anti-corruption reform in Africa falls into two camps. The first explores 'best practices' and policy approaches to controlling corruption while the second focuses on the politics of anti-corruption 'reform', arguing that official anti-corruption campaigns aim to mollify donors while using corruption charges instrumentally to undermine rivals and shore up personal loyalty to the country's Chief Executive, and thus have no chance of controlling corruption.

While agreeing that the neo-patrimonial context prevalent in Africa is a very significant limiting factor in anti-corruption reform, Lawson contends that limited progress is still possible. Examining the motivations and effects of anti-corruption reforms in Kenya and Nigeria, Lawson opines that while the Kenya Anti-Corruption Commission has been politically and largely ineffectual, the more autonomous and activist, but politically "instrumentalised", Economic and Financial Crimes Commission (EFCC) of Nigeria has had a measure of success. Interestingly, she attributes this difference in the levels of efficacy of the two institutions to the EFCC's independent prosecutorial powers and 'the institutionalization strategies of its chairman'.[62]

Lawson's findings indeed confirm the author's view that anti-corruption commissions in Africa would benefit most from the "multi-purpose model" with law enforcement and prosecutorial powers. Having prosecutors and investigators working in partnership under one body ensures the specialization and streamlining of functions required to efficiently handle anti-corruption cases from the beginning to the end. It further allows for effective relationships and indeed a rapport to develop between investigators and prosecutors, something that is highly lacking in the present scenario between Kenya's anti-graft body and the Attorney General's office.

1.9.2 Case Law

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[61] Lawson, Letitia, "The Politics of Anti- Corruption Reform in Africa", *Journal of Modern African Studies*, 47, 1 (2009), pp. 73-100, Cambridge University Press, 2009.

[62] Ibid at p.89

A robust, independent and jurisprudentially purposeful judiciary is an effective tool in the democratisation process. Corruption is a mighty dragon which threatens to consume all in its wake. In a nascent democracy like Kenya's, it is a menace that must be fought decisively by all well-meaning institutions. Aware of the painfully slow judicial process in the country, many suspects of corruption have sought umbrage in the court system through the filing of numerous judicial review cases wherein they seek to stop their trial on a plethora of grounds. A number of decisions from the courts in recent times would appear to be effectively emasculating the functions of the Commission. In the recent case of *Nedermar Technology BV Limited vs The Kenya Anti-Corruption Commission and Another*[63], the High Court stopped KACC from investigating certain suspect contracts on the basis that it can not operate as an independent arm of government prying into contracts which the government, through the Attorney General has sanctioned. Dismissing KACC's quest to investigate the contract, Nyamu J. stated:

> *"the exclusion clause (which had excluded Kenyan law from being applied to the suspect contract) is valid and the Government of Kenya, the Attorney General and KACC are singly and jointly bound by it. This also includes the confidential provisions in the contract and those that relate to non disclosure due to the military nature of the project. KACC has no right to induce the breach of the confidentiality provisions by purporting to interrogate the petitioner's contractors and other agents on the ground. KACC has only a statutory mandate as defined in ACECA and this does not include supervising commercial contracts. KACC has no heritage of rights and it is part of the Executive arm of the Government. It cannot be allowed to be the forth arm of Government which operates from the clouds and which superintends all the other agencies. It does not have any such unfettered powers. KACC is bound by the public policy of Kenya which inter alia includes all laws. Where KACC purports as in this case to operate in a manner which undermines public policy, the court is entitled to restrain it. Contractual*

[63] Nairobi High Court Constitutional Petition No. 390 of 2006 (unreported); the Judgment of Nyamu J. delivered on 30th October 2008, Pp. 48-49.

obligations binding on the Government of Kenya and the Attorney General are equally binding on KACC as a Government agency." [64]

In a judgment delivered on 29th July 2011 in *Nicholas Muriuki Kangangi v. The Attorney General*[65] the Court of Appeal has stated that the Kenya Anti-Corruption Commission cannot prosecute a matter either by itself or through Police Prosecutors. Indeed the court went ahead to suggest that even where the AG has given his nod for a prosecution to commence, it is unsafe for cases arising under ACECA to be prosecuted by Police Officers. Instead, the Court recommends that the AG should exercise his powers under Section 85 of the Criminal Procedure Code[66] to specifically appoint officers to be prosecutors for purposes of the ACECA.

These cases as well as the *Gachiengo case* cited above will be employed in this study to demonstrate how judicial institutions can be an impediment to the war against corruption through decisions which can only be seen as an abdication of its responsibility in the Rule of Law arena. The courts in Kenya appear to be apprehensive in disturbing the status quo resulting in the absurdity of, as it were, appearing to be 'more executive than the executive itself'.[67]

Commenting on the emerging anti-corruption jurisprudence in Kenyan courts, Musili Wambua[68] concludes, and we agree, that our courts have given anti-corruption laws and the Constitution a literal interpretation without any regard to the spirit of the law or the 'mischief' the enactments were intended to address. Consequently, the process of bringing to justice many suspects of corruption and economic crimes as well as the recovery of public funds has been slow and difficult.

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[65] Nairobi Civil Appeal No. 331 of 2010 (unreported).
[66] Cap 75 Laws of Kenya. The section allows the AG by way of notice in the Gazette to appoint public prosecutors either generally or for specified case or class of cases.
[67] This phrase is attributed to Lord Atkin. See Lord Atkin's dissenting judgment in *Liversidge v. Anderson*, (1942) AC 206.
[68] P. Musili Wambua, EmergingJurisprudence in the Control of Irregularities, in Chweya Ludeki (ed.), *The Conduct of the Public Service in Kenya,* Clairpress, Nairobi, 2008.

1.10 Research Methodology

This study is library-based and principally, the data collection method is secondary. There has also been substantial use of the internet for purposes of gathering data on corruption prosecution in other jurisdictions.

This method of data collection is justified on grounds of the time available for data collection and the cost element, both of which are severely limited. The libraries have been key resources. The content analysis method has been used to analyse the data.

Primary data sources included government policy papers, reports, case reports, agreements, and international covenants.

Secondary data sources included text books, journals, magazines, newspapers, articles, reports from research organizations and the internet.

1.11 Chapter Breakdown

Chapter One

Introduction

This chapter comprises of the proposal, background of the problem, conceptual and theoretical framework, literature review and methodology.

Chapter Two

Understanding the Attorney General's Powers of Prosecution and the Rationale for denying KACC Such Powers.

This chapter interrogates the origin and nature of the Prosecutorial Powers conferred upon the Attorney General and reasons (if any) for the denial of the exercise of such powers by the Kenya Anti-Corruption Commission.

Chapter Three

The Quest for Prosecutorial Powers

This chapter discusses the rationale of bestowing the anti-corruption agency with prosecutorial powers. Using the experience of other jurisdictions as well as decided court cases, this Chapter illustrates how the fight against corruption has been hampered by the current institutional arrangements that require the Anti-Corruption Commission to submit the results of all its investigations to the Attorney General for prosecution. It highlights the progress Commission has made in the past 6 years of its existence and identifies the major impediments to its functions.

Chapter Four

Conclusion and recommendations

This chapter provides a conclusion and discusses recommendations on the way forward.

CHAPTER 2

THE ORIGINS, CONSTITUTIONAL POSITION AND THE EXERCISE OF PROSECUTORIAL POWERS IN THE FIGHT AGAINST CORRUPTION IN KENYA

2.1 Background

The origins of the office of the Attorney General can be traced back to England in the 13th Century and the early beginnings of the legal profession itself. The sovereign was unable to appear in person in his own courts to plead in any case affecting his interests.[1] It was therefore necessary for an attorney to plead the sovereign's case[2]. The first written record of a professional attorney appearing on behalf of the sovereign is that of Lawrence del Brok in 1243 who was noted for receiving an annual fee of 20 pounds "for suing the King's affairs of his pleas before him."[3]

In 1461, the first record of the title of "Attorney General" appeared when the King's Attorney, John Herbert was described as the "Attorney General of England" in the patent of his appointment[4]. In the same year, Herbert was summoned along with the judges, to the House of Lords to advise on legal matters[5]. The writ of attendance issued to the Attorney General and to the Justices of the King's Bench and Common Pleas stated that they were to attend the House of Lords and commanded simply that they were summoned to give advice.[6] The Attorney General's position in the House of Lords as an adviser and attendant may be seen as a reflection of the original conception of the office as that of a legal adviser to the Crown and servant of the sovereign.[7]

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[1] King, LJ, "The Attorney General, Politics and the Judiciary" (2000) 29 UWAL Rev 155, cited in McCarthy Alana, The Evolution of the Role of the Attorney General, a Paper presented at the 23rd Annual Australia and New Zealand Law and History Society Conference, Murdoch University, Western Australia (July 2004). Available at Murdoch University Electronic Journal of Law at: http://www.austlii.edu.au/au/journals/MurUEJL/2004/30.html. Accessed on 2nd October 2009.
[2] Ibid at 155
[3] Cited in Edwards, John, The Law Officers of the Crown (London: Sweet & Maxwell, 1964) 16.
[4] Ibid at 27
[5] King, supra note 1, 156.
[6] Edwards, The Law Officers of the Crown, supra note 3, 33.
[7] Ibid at 32

By the beginning of the 16th Century, it was the Attorney General who was generally consulted by the government regarding points of law and who had the conduct of important State trials[8]. The responsibilities of the Attorney General had steadily expanded to involve "...the representation of the sovereign in his courts for the protection of his rights and interests wherever that was necessary and the discharge of the sovereign's responsibilities for the prosecution of crime."[9] The Attorney General also began to assume a significant position in the House of Lords and by the 16th Century was the "...principal go-between the two Houses of Parliament, carrying bills and messages from the Lords to the Commons and drafting or amending parliamentary measures."[10]

This increasing involvement in the work of Parliament was the most noteworthy aspect of the Attorney General's expanding role.[11] Although originally called upon by the House of Lords for legal advice, the Attorney General ultimately took a place in Parliament in the House of Commons.[12] Towards the end of the 16th Century, the House of Commons began to assume an important position in the State; it became desirable for the Attorney General to be available to explain to the House of Commons the legal implications of the government's measures that came before it.[13] However, the Attorney General was attached to the House of Lords.

The question of whether the Attorney General could become a member of the House of Commons was a reflection of the constitutional struggles of the time. This issue caused a controversy in 1614 when the House of Commons objected to Sir Francis Bacon remaining in the House of Commons after his appointment as Attorney General. The issue was only resolved when the House of Commons determined that: "Mr. Attorney General Bacon remain in the House for this Parliament, but never any Attorney General to serve in the Lower House in future."[14] This incident provides one of the earliest

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[8] Holdsworth, William, Sir, A History of English Law Vol. VI (London: Sweet and Maxwell, 1937).
[9] King, supra note 1, 156.
[10] Edwards, The Law Officers of the Crown, supra note 3, 34.
[11] King, supra note 1, 156.
[12] Edwards, The Law Officers of the Crown, supra note 3, 32.
[13] Holdsworth, supra note 8, 464
[14] Cited in Edwards, The Law Officers of the Crown, supra note 3, 37

illustrations of the inherent conflict in the office of the Attorney General between politics and law.

The House of Commons viewed the Attorney General with suspicion and as a "...tool of the Crown and the Lords."[15] However, as noted, it was important for the House of Commons to have the legal advice of the Attorney General. It was not until 1670 that the problem was finally resolved when Sir Heneage Finch was permitted to retain his seat in the House of Commons after his appointment as Attorney General.[16] Originally, the Attorney General's participation in the Lower House was restricted to drafting bills and advising on legal matters.[17] The Attorney General rarely spoke in the House of Commons.[18] However, through membership of the House of Commons, the Attorney General gradually assumed political responsibilities.[19]

Ultimately, the duties and responsibilities attached to the office of the Attorney General took a more public and political character[20]. In the 1890s, the right of the Attorney General to undertake private practice was restricted and in 1893, the Law Officer's Department was created in London[21]. By the early 1900s, the energies of the Attorney General were exclusively focused on government business in the courts and Parliament.

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[15] Shawcross, H, The Rt. Hon. Sir, "The Office of the Attorney General" (1954) VII:4 Parliamentary Affairs 381 cited in McCarthy Alana, The Evolution of the Role of the Attorney General, a Paper presented at the 23rd Annual Australia and New Zealand Law and History Society Conference, Murdoch University, Western Australia (July 2004). Available at Murdoch University Electronic Journal of Law at: http://www.austlii.edu.au/au/journals/MurUEJL/2004/30.html. Accessed on 2nd October 2009.

[16] Edwards, The Law Officers of the Crown, supra note 3, 37.

[17] Heraghty, B, "Defender of the Faith? The Role of the Attorney General in Defending the High Court" (2002) 28:2 Mon LR 209 cited in McCarthy Alana, The Evolution of the Role of the Attorney General, a Paper presented at the 23rd Annual Australia and New Zealand Law and History Society Conference, Murdoch University, Western Australia (July 2004). Available at Murdoch University Electronic Journal of Law at: http://www.austlii.edu.au/au/journals/MurUEJL/2004/30.html. Accessed on 2nd October 2009.

[18] Ibid

[19] Ibid

[20] King, supra note 1, 156

[21] Edwards, The Law Officers of the Crown, supra note 3, 141.

2.2 Prosecution of Offences in Some Jurisdictions

2.2.1 England and Wales

Until the 19th Century, in England and Wales, there was no public official responsible for ensuring that crimes were prosecuted. Emphasis was placed upon the concept of individual responsibility in the administration of criminal justice and thus, the responsibility for prosecuting the perpetrators of crimes lay predominantly with, and at the discretion of private individuals. As Sanders remarks, 'victims who wished to prosecute did so by bringing an action which, in legal form, was similar to a civil action.'[22] Since the early part of the 19th Century, as the police developed and their powers increased, they progressively replaced the old system of law enforcement. As a result of evolution rather than of any deliberate decision, the police had become convenient substitutes for private prosecutors. However, no specific prosecution powers or responsibilities were conferred on the police and private prosecutions remained the model on which police prosecutions were based.[23]

The office of the Director of Public Prosecutions was created in England in 1879 and was then characterised as a 'compromise between those who wanted to retain England's unsystematic approach to prosecution and those who wanted prosecutions in general to be structured and controlled as was believed to happen in most of Europe.[24] Previously, as a result of voices against the prosecution function of the police, there had been unsuccessful attempts to introduce a system of public prosecutions. With the Prosecution

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[22] Sanders, A., 'Introduction' in Sanders (ed.) *Prosecution in Common Law Jurisdictions,* Aldershot and Brookfield, USA: Dartmouth, 1996, at p.xiii. Langbein, J. H., 'The Origins of Public Prosecution at Common Law' (1973) 27 The American Journal of Legal Histroy, 313, at p. 318 refers to the inherent fallacies of such a system: 'The obvious drawback to any system of gratuitous citizen prosecution is that it is unreliable. There will be cases where there are no aggrieved citizens who survive to prosecute, and others where the aggrieved citizens will decline to prosecute, or be inept at it.'

[23] Ibid

[24] Sanders, A., 'Prosecutions in England and Wales' in Tak, J. P. (ed.), *Tasks and Powers of the Prosecution Services in the EU Member States* Volume 1, Nijmegen: Wolf Legal Publishers, 2004, at p.xii.

of Offences Act 1879, the government avoided a radical change to the existing system and indeed gave retrospective legitimacy to the previous arrangements.[25]

During the 1980s, complaints and opposition to the system of police prosecutions increased. In 1970, the Committee of Justice had, as a result of their inquiry into the problems relating to contemporary prosecution practices, published a report in which they highlighted the danger of public perception and the quality of justice when the same police officer decides on whether to charge a suspect, selects the charge, acts as prosecutor and also takes the stand as his or her own chief witness. This report as well as the growing public concern, led to the appointment of a Royal Commission on Criminal Procedure. The Commission's report in 1981 recommended the establishment of a separate service responsible for the prosecution of all offences.[26]

Acting on the recommendations of the Commission, the British government enacted the Prosecution of Offences Act 1985, which created the Crown Prosecution Service (CPS). The CPS became operational on 1st October 1986. It was a national service headed by the Director of Public Prosecutions and formally accountable to the Attorney General. The new service had a duty to take over the conduct of all criminal prosecutions instituted by the police and to advise police forces on matters relating to criminal offences. The CPS was however not given any role concerning prosecutions brought by a series of other organisations such as the Serious Fraud Office, the Health and Safety Executive and the Environment Agency.[27]

Over the years, and following lots of criticism about the performance of the CPS, attempts were made to improve the efficacy of this unit. With the Criminal Justice Act 2003, more radical changes have been introduced which mark a significant reorientation of the English Prosecution system. Under this Act, the responsibility for charging

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[25] See Edwards, J. L., *Law Officers of the Crown: a study of the Offices of Attorney- General and Solicitor General of England with an account of the Office of the Director of Public Prosecutions of England*, London: Sweet and Maxwell, 1964.
[26] Bennion , F., 'The New Prosecution Arrangements (1) The Crown Prosecution Service' (1986) *Criminal Law Review*, 3 at pp. 3-4.
[27] Ibid

suspects and thus, initiating proceedings in all but very minor offences has been transferred from the police to the CPS.

2.2.2 Nigeria

Historically, the office of Director of Public Prosecutions occupied pre-eminent status in Commonwealth Africa. Pre and post independence Constitutions in some of these countries referred expressly to the Director of Public Prosecutions investing in that office the exclusive control over prosecutions and providing for removal only in specified circumstances and after due inquiry by a special tribunal.[28] Section 97(6) of the 1960 Independence Constitution of Nigeria provided that in the exercise of the constitutional powers granted under the section, the Director of Public Prosecutions shall not be subject to the control of any other person or authority.

Section 179 of the Nigerian Constitution as in many other former British colonies provides that –

> *The Attorney- General of the Federation shall have power –*
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> *(a) to institute and undertake criminal proceedings against any person before any court of law in Nigeria other than a court-martial, in respect of any offence created by or under any Act of the National Assembly;*
>
> *(b) to take over and continue any such criminal proceedings that may have been instituted by any other authority or person; and*
>
> *(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by him or any other authority or person.*

According to Deji Adekunle[29] the superintendence of the Attorney General is to be desired. In this sense, the concept of superintendence encompasses responsibility for the overall policies of the prosecuting authorities, including prosecution policy in general; responsibility for the overall effective and efficient administration of these authorities; a

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[28] B.O. Nwabueze, A Constitutional History of Nigeria, First edition, London, Hurst & Co (1982) p. 56

[29] Adekunle, Deji, "Independent Prosecution Systems in Nigeria; Challenges and Prospects," a Paper delivered at the African Network of Constitutional Law conference on Fostering Constitutionalism in Africa, Nairobi, April 2007, p. 8

right for the Attorney General to be consulted and informed about difficult, sensitive and high profile cases; but not in practice, responsibility for every individual prosecution decision or for the day to day running of the organisation.

When called upon to interpret the above constitutional provisions in *Olusemo v Commissioner of Police*[30] the Nigerian Supreme Court affirmed that the Nigerian police can prosecute any criminal case either through its legally qualified officers or through any counsel they may engage for the purpose.

2.3 The Exercise of Prosecutorial Powers in the Fight against Corruption in Kenya

Corruption is not a new phenomenon in Kenya. As early as 1956, the colonial government saw it fit to put in place a legislative framework for fighting corruption through the enactment of the Prevention of Corruption Ordinance.[31]Both before and after independence, the State was seen as the greatest source of wealth and power, and became the central focus of attempts to accumulate both. Ordinary people sought patrons for access to resources of the State as well as protection from its abuses; and such patrons were primarily available within ethnic communities in which they could claim membership.[32] The critical consequence of this pattern of State- society linkage was the generation of a politics of opportunistic materialism, the 'politics of the belly', that made the maintenance of patron- client networks and the conditions of successful leadership increasingly dependent on the distribution of material benefits.[33]

The failure of the post-independence KANU government to implement anti-corruption policies and legislation suggests that the government had vested interests in the malpractice. Both the Kenyatta and Moi administrations focused on distributing

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[30] [1998] 11 NWLR (Pt 548) p. 547

[31] At independence, this Ordinance became the Prevention of Corruption Act, Cap 65 of the Laws of Kenya. The Act was repealed on 2nd May 2003 by Section 70 of ACECA.

[32] Mahmoud Mamdani, Citizens and Subject: Contemporary Africa and the Legacy of Late Colonialism, Princeton: Princeton University Press, London, James Curray, 1996.

[33] Jean- Francois Bayart, "The State, the Parallel Economy and the Changing Structure of Patronage Systems," in Donald Rothchild and Naomi Chazan, eds., *The Precarious Balance: State and Society in Africa,* Boulder: Westview Press, 1988.

patronage, including allocation of opportunities to engage in corruption for gain in exchange for loyalty. Opportunities for corruption became a resource that the political regime "offered" clients in return for loyalty and political support. Corrupt officials and businessmen characteristically gave part of their ill-gotten wealth and resources to their "godfathers" – public servants, especially politicians – ostensibly as a contribution to one *harambee* (fund raising) project or another. In addition, the government irregularly allocated public resources to regime supportes, including civil servants and ultimately produced a formally sanctioned and executed kind of corruption.[34]

Following the death of President Jomo Kenyatta on 22nd August 1978, Daniel Toroitich Arap Moi took over as Kenya's second President with a declaration of total war on corruption, then commonly known as *magendo*. As it turned out however, his anti-corruption declarations were not backed by any serious enforcement measures. As a result, by the early 1980s, there were widespread complaints over corruption from the citizenry as well as investors.[35] The period between 1990 and 2000 however, witnessed a reluctant Government initiation of some anti- corruption reforms in response to pressure from internal and external forces. From the 1990s, the government set up various anti-corruption agencies with the sole mandate of fighting corruption. These agencies included the Anti-Corruption Police Squad, the Kenya Anti-Corruption Authority, the Anti- Corruption Police Unit and lately, the Kenya Anti-Corruption Commission.

The Kenyan Constitution vests the Attorney General with the power to advise the government on all legal matters, noting in broad terms that he/she shall be the principal legal adviser to the government of Kenya.[36] In this capacity, the Attorney General has the duty to give legal advice and legal services to the government on any subject; to draw, scrutinise for legal policy and soundness, all contracts, agreements and international legal undertakings in respect of which the government or one of its agencies has an interest;

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[34] Ludeki Chweya, "The Kenya Government's Anti- Corruption Programmes, 2001 – 2004," in Ben Sihanya ed., *Control of Corruption in Kenya Legal- Political Dimensions 2001- 2004*, Claripress, Nairobi, 2005.

[35] John Kithome Tuta, "Evolution of Anti- corruption Policy and Institutional Framework," in Ben Sihanya ed., *Control of Corruption in Kenya Legal- Political Dimensions 2001- 2004*, Claripress, Nairobi, 2005.

[36] Section 26(2) of the 1963 Constitution of the Republic of Kenya.

and to represent the government in courts or any other legal proceedings to which the government is a party. By making use of the word 'government' the Constitution seems to imply that the advisory role extends to the executive, the legislature and where possible, the judiciary.

2.4 The Decision Not to Prosecute

The Attorney General's office is stated to be an office in the public service.[37] As a public servant, the Attorney General is expected to act at all times in the public interest.[38] To enable the occupant to act in the public interest, the Constitution grants the holder of the office independence in the discharge of his/her duties.[39]

Wamuti Ndegwa[40] argues that the upshot of the provisions of Section 26 of the 1963 Constitution was that in Kenya, the Attorney General enjoyed an exclusive, unregulated and unaccountable discretion to enforce or not to enforce the criminal law of the land. He opines that it is generally agreed that the purpose of discretion given to public authorities such as that granted to the Attorney General is to promote the public interest. Discretion, he states, should not be used to defeat the very public interest it was intended to promote. It is therefore important to draw a line between abuse of discretion and the proper exercise thereof.

In Sharp vs Wakefield[41], Lord Halsbury had this to say about the exercise of discretion by public authorities:

> *"When it is said that something has to be done within the discretion of the authorities, that something is to be done according to the rules of reason and*

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[37] Section 26(1) of the Constitution of the Republic of Kenya.
[38] Black's Law Dictionary defines 'public interest' as 'a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary or some interest by which their legal rights or liabilities are affected'.
[39] Section 26(6) of the Constitution of Kenya.
[40] Wamuti Ndegwa,N.D., Open ended Prosecutorial Discretion in the Fight against Corruption in 3rd World Kenya Case Study. Available at: http://www.liverpoollawsociety.org.uk/userfiles/file/Society%20News/Open%20ended%20Prosecutorial%20discretion%20in%20the%20fight%20against%20corruption.pdf. Accessed on 14 September 2009.
[41] (1891) AC. 173

justice, not according to the private opinion, that as in Rookie's case, according to the law and not humour. It is to be done not arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limit to which an honest man competent to discharge his office ought to confine himself."

Accordingly, where a statute or the Constitution confers a person or an authority with prosecutorial discretion, it must be assumed that the discretion is to be exercised within the limits described by Lord Halsbury. The discretion must be used to promote and not to defeat the public interest. As we shall find out below, in many instances, it is not always clear whether the positions taken by the Attorney General are actuated by public interest considerations or not.

Notwithstanding the express declaration of independence by the Constitution, available evidence seem to indicate that it has virtually been impossible for the Attorney General to independently commence and complete prosecutions against individuals who are part of the government and/or who enjoy the protection of powerful people in government. Nowhere is the lack of independence and failure to act in the public interest more evident than the exercise of the powers of *nolle prosequi.* Due to the politicisation and abuse of these powers, many are the voices that have called for their limitation or total abolition.[42]

With approximately 50 percent of Sub-Saharan Africa living below the poverty line, the impact of corruption on the poor is particularly devastating.[43] The African Union estimates that corruption increases the cost of goods by an average of 20 percent.[44] Furthermore, it is the poor who are the most reliant on public services but the least capable of paying the prices associated with bribery and other forms of corrupt activity to attain those services. Corruption also undermines the very delivery of these public

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[42] See for instance, the Daily Nation Newspaper editorial, 'Scrap or limit AG's powers to terminate court cases,' Tuesday 31st May 2005 and G. Warigi, 'The Writing is on the Wall for AG,' *Sunday Nation*, 29 May 2005.

[43] The World Bank, World Bank Updates Poverty Estimates for the Developing World, available at: *http://go.worldbank.org/C9GR27WRJ0*

[44] Transparency International, G8 Summit, FAQ, 2005, available at: http://www.transparency.org/news_room/in_focus/2005/g8_summit/faq.

services: roads are not built, hospitals are under resourced, and schools are inadequately supplied.[45] It is no wonder that zero tolerance to corruption is normally a published government policy and the selling point of political parties.

In such circumstances, one would expect the letter of the law conferring prosecutorial discretion in corruption offences to be narrowed down to absolute certainty. Where there is sufficient evidence of corruption, the public interest will be promoted by exercising the prosecutorial discretion in favour of prosecuting the suspect. In the absence of a compelling and legitimate reason against prosecution, declining to prosecute would be frustrating the public interest and may amount to obstruction of justice.

As part of the declared war against corruption, Kenya has enacted the Anti- Corruption and Economic Crimes Act, No.3 of 2003 whose exclusive mission is to deal with corruption and economic crimes. The Act leaves serious doubt whether Parliament intended to leave prosecution of corruption to the whims of the Attorney General. The spirit and purpose thereof is succinctly set out in its preamble to be:

> *"An Act of Parliament to provide for the prevention, investigation, and punishment of corruption, economic crimes and related offences and for the matters incidental and connected therewith."*

The purpose of the Act not only expresses the objectives which Parliament intends to achieve through the Act, but also demonstrates the policy objectives behind this legislation.

The Act creates numerous offences that constitute corruption and economic crime. The introduction into the Act of the concept of economic crime[46] and forfeiture of

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[45] Melissa Khemani, Combating Corruption in the Commonwealth, in Commonwealth Quarterly, (Commonwealth Secretariat, 6 March 2008), available at: http://www.thecommonwealth.org/EZInformation/176102/060308combating.htm. Accessed on 10 February 2010.

[46] Section 2(1) and 45 ACECA. There was no such offence under Cap 65.

unexplained assets[47] appears to have been informed by the need to combat a new generation of economic crimes and to take on board global anti corruption practices.

To illustrate the dismal failures by the Attorney General to use his enormous constitutional powers and the due process of the law to fight corruption, we take a look at the manner in which the Attorney General's office has handled two major corruption scandals that have devastated this country in the last two decades. At first, we take a look at the Goldenberg corruption scandal which involved a complex network of government ministries, departments and officials siphoning enormous amounts of money from the exchequer during the last years of the Moi Regime and the manner in which the Attorney General literally shielded the culprits from prosecution.[48] Secondly, we take a look at the Anglo Leasing Scandal that took place in the first term of the Kibaki government and how the Attorney General got embroiled in the scam.[49]

2.4.1 The Goldenberg Scandal

The Goldenberg corruption scandal illustrates the level of grand corruption and looting of public resources in the highest offices of the Kenyan government. This scandal involved extensive abuse of an export compensation scheme by senior government officials. The export compensation scheme is an incentive designed to encourage exports by local manufacturers. It acts as an incentive to exporters by compensating them up to a certain percentage of their customs costs.[50]

In the scandal, Kenyan businessman and Chairman of a company known as Goldenberg International Mr. Kamlesh Pattni, is alleged to have conspired with the Commissioner of Mines and Geology Collins Owayo and the then Vice President and Minister for Finance Professor George Saitoti to receive illegal payments of export compensation of gold and

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[47] Section 55 ACECA

[48] For a detailed account of the facts leading to the Goldenberg Export Compensation payments and Cases, see Kivutha Kibwana, Smokin Wanjala, Okech- Owiti (eds.), *The Anatomy of Corruption in Kenya: Legal, Political and Socio- Economic Perspectives,* Nairobi, Claripress, 1996, at p. 89-94

[49] For a comprehensive account of this scandal, see Michela Wrong, 'It is Our Turn to Eat: The Story of a Kenyan Whistle-blower', New York: Harper, 2009.

[50] See Local Manufacturers (Export Compensation) Act, Cap 482 of the Laws of Kenya.

diamonds contrary to the provisions of the Local Manufacturers (Export Compensation) Act. As part of the arrangement between Goldenberg International and the Minister for Finance, Goldenberg International was granted the sole license to export gold and diamonds from Kenya.[51] The grant of the license was conditional on Goldenberg International earning the Kenyan government 50 million U.S dollars (then equivalent to Kshs 1.8 billion) annually. The Vice President and Minister for Finance approved export compensation in favour of the company at the rate of 35%, a figure which was 15% above the limit set under the Act. When the Commissioner of Customs and Excise declined to pay Goldenberg International the excess payment, the Minister for Finance ordered that the extra 15% would be paid directly to the company from the Treasury as *ex gratia* payment.[52]

Over a period of two years, Goldenberg International was then paid over 4,213,000 U.S dollars as export compensation above the legal limit of 15%. It was not apparent whether the company had exported all the gold and diamonds for which it claimed compensation. In addition, it was not clear that even if there had been such exports, they had originated from or been processed in Kenya. The country does not have any known deposits of diamond and has only very small deposits of alluvial gold. The fact that Goldenberg International had not obtained some of its gold from Kenya before exporting it was given credence when it came to light that the company made imports of gold into the country without payment of import duty and value added tax in 1991 amounting to a total of 523,260 Kenyan pounds in 1991.[53]

Holding Goldenberg International and the senior government officials responsible for their role in robbing the country of enormous amounts of money in general proved very difficult. When the scandal first became public knowledge, the Attorney General declined

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[51] In 1987, a few years to the grant of this license, the Commissioner of Mines and Geology had recommended the need for government subsidies of gold exports on the argument that this would result in increased foreign exchange earnings for the government. The proposal was however shelved until Goldenberg International came to the scene in 1990. See Sarah Elderkin, 'Pattni's Bold Conspiracy to Rake in 'Free Billions.' *Daily Nation*, July 30, 1993, at p. 4.

[52] Ibid.

[53] See *Government of Kenya, Report of the Controller and Auditor General*, 1992-1993, cited in THE ANATOMY OF CORRUPTION IN KENYA 92-93 (Kivutha Kibwana et al. eds., 1996).

to initiate criminal prosecutions, citing incompleteness of investigations and lack of evidence to put those involved on trial. It was not until pressure from both within and without the country came to bear on the government that the Attorney General acknowledged that investigations were being conducted with a view to considering the possibility of prosecuting some suspects.[54]

In December 1994, the Law Society of Kenya (LSK) filed a complaint in court seeking to be allowed to privately prosecute six individuals it believed were involved in the scandal.[55] The LSK argued that the Attorney General had abdicated his constitutional responsibility of accounting to the public what steps he had taken to investigate or prosecute those involved in the Goldenberg case. Upon being allowed to participate in the case as *amicus curiae,* the Attorney General proceeded to object to the LSK being granted leave to prosecute the case on a number of grounds. First, the Attorney General argued that the LSK had no *locus standi* under its constituent statute, the Law Society of Kenya Act, and under the Constitution, to apply for and be granted the right to institute private prosecutions. In bringing the private prosecution, the Attorney General argued, the LSK had acted *ultra vires*.[56] In addition, the Attorney General argued that under Section 26(3) of the Constitution, only the Attorney General had the power to prosecute in the public interest. The court upheld these objections and dismissed the private prosecution case.

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[54] Gathii James Thuo, Corruption and Donor Reforms: Expanding the Promises and Possibilities of the Rule of Law as an anti-corruption Strategy in Kenya (February, 4 2009), Connecticut Journal of International Law, Vol. 14, No. 2 1999. Available at SSRN: http://ssrn.com.abstract=1337591.

[55] See Private Prosecution Case No. 1 of 1994 filed in the Chief Magistrates' Court at Nairobi. The accused in the case were the former Permanent Secretary in the Ministry of Finance, Charles Mbindyo, the Commissioner of Mines and Geology, Collins Owayo, the Commissioner of Customs, A.K Cheruiyot, the former Governor of the Central Bank, Eric Kotut and Kamlesh Pattni.

[56] In a previous suit brought by pro-government lawyers within the LSK, the High Court granted injunctive relief restraining the LSK Council from vigorously campaigning for the restoration of multi-party democracy in Kenya and an end to State repression. The High Court later convicted the entire Council of contempt of court for continuing their advocacy for a multiparty democratic system in Kenya. In this case, it was argued that the LSK was engaging in politics, a matter which was *ultra vires* its objectives. See Gitonga Ringera v. Muite, Civil Case No. 1330, High Court of Kenya at Nairobi (1991).

Shortly after the dismissal of the case, the Attorney General publicly directed the Commissioner of Police to investigate the Goldenberg scandal.[57] Upon completion of the investigations, the Attorney General eventually initiated his own prosecution case against Pattni, the then Treasury Permanent Secretary Wilfred Karuga Koinange and former Chief Dealer at the Central Bank, Michael Wanjihia Onesmus. They were charged with the theft of Kshs 5.8 billion from the Paymaster General between September 1991 and October 1993 as well as fraudulently attempting to obtain another Kshs 2.1 billion during the same period.

In March 1995, the then opposition politician Raila Odinga brought another private prosecution case against those involved in the Goldenberg scandal. Among those he accused was Professor George Saitoti, then Vice President and Minister of Finance. The Attorney General promptly moved in and stopped the prosecution of the case, citing his powers under the Constitution. The court proceeded to terminate the prosecution.[58]

Upon taking office in late 2002, the new NARC Government largely comprising of former opposition politicians instituted a commission of inquiry to *inter alia* establish how much money was lost, how the scam was perpetrated and who was responsible. The Commission headed by Justice S.E.O Bosire heard and evaluated the evidence of a number of witnesses after which it came up with a number recommendations seeking to have certain people investigated further with a view to clearly establishing the roles they played in the loss of the public funds. Among those recommended for further investigation and prosecution were Prof. George Saitoti and a former Governor of the Central Bank of Kenya Mr. Eric Kotut.[59]

Aggrieved by the findings and recommendations of the Commission, the duo moved separately to the High Court seeking judicial review of the recommendations. In *Republic v Judicial Commission of Inquiry into the Goldenberg Affairs & 2 Others Ex Parte*

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[57] See Emman Omari et al., 'A-G Order on Pattni Deal', *Daily Nation*, April 12 1995 at p.16.
[58] See Kivutha Kibwana, Smokin Wanjala, Okech-Owiti (eds.), The Anatomy of Corruption in Kenya: Legal , Political and Socio-Economic Perspectives, Nairobi, Claripress, 1996, at p. 89- 90.
[59] Mr. Kotut served as the CBK Governor between January 1990 and July 1993.

George Saitoti[60], the Applicant sought orders *inter alia* to prohibit the Attorney General from filing and prosecuting criminal charges against him in respect of the Goldenberg Affair pursuant to the recommendations of the Commission. Saitoti complained *inter alia* that the Commission had not struck a fair balance between the general and public interest of the community and the protection of his fundamental rights. He further complained that the findings were unreasonable and actuated by bad faith.

In a rather stretched reasoning, the Court, comprising of Justices Nyamu, Wendoh and Anyara Emukule found that the payment of the 15% ex gratia compensation was made pursuant to Government policy and the Commission's findings that it was illegal constituted an error of fact and law and that in any case, Parliament had approved the same. The basis for finding that Parliament had approved the payments was a belated observation by the Parliamentary Accounts Committee to the effect that the "policy decision to grant export compensation for gold and diamond jewellery was done procedurally". The Court thus concluded that Saitoti approved in principle the payment of the additional incentive as a matter of Government policy and on recommendation of public officials. In the mind of the Court, to question the "decision" of Parliament would be to disturb the historical respect between the three arms of Government.[61]

2.4.2 The Anglo Leasing Scandal

The ability of the Attorney General to act independently is a central consideration if the office is to be expected to at all times act in the public interest. It is possible as happened in the Anglo Leasing and related contracts that a country could be committed to burdensome financial undertakings and exposed to lecherous corruption as a result of incompetent legal advice and representation.

The Anglo Leasing scandal allegedly began with a government contract with a United Kingdom based firm known as Anglo- Leasing and Finance Company Ltd (ALFC). The firm was awarded the contract at 30 million Euros to replace Kenya's passport printing

[60] (2006) eKLR
[61] Ibid at p.36

system even though the lowest bid came from a French firm that had tendered for 6 million Euros. ALFC later contracted the French firm before it was discovered that it was not a registered company and was therefore an unnecessary intermediary between the government and the French firm. The scandal as a whole involved a series of 18 high value similar type contracts mainly in the defense sector said to have cost the Kenyan taxpayer close to U.S dollars 1 billion.[62]

The contracts related to security and communication projects all of which were awarded secretly without any bidding purportedly on the grounds of State security. This was so despite the fact that some of the contracts in actual sense had very little to do with state security. In general, the contracts which invariably contained an opinion from the Attorney General certifying that all conditions antecedent thereto had been met, involved three parties; the Government as the purchaser or employer, the Supplier and a Financier. The named financier would finance the supplier as per an agreed schedule without further instructions from the Government. In effect, once the contract was entered into, the Government could not stop payment, say, on the grounds of non-performance by the supplier.

As at September 2006 when the government owned up to the existence of the scandal in Parliament[63], a number of the projects remained outstanding. Some of the controversial projects were listed as follows:

1) Prisons Telecommunications Project

This project was for the setting up of an independent communications system for the Prisons Department. The Project was valued at Kshs 1 billion. On the ground, there is nothing to show what the payment was made for as the Prison headquarters is yet to be linked to all the prisons in the country as had been envisaged in the project. It was

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[62] Mars group blog, Kenya's Anglo – Leasing Scandal: doing our part to fry the fish, July 12 2009. A report by the Controller and Auditor General dated 10th April 2006 put the total cost of the contracts at Kshs 56,333,355,450.00.

[63] See Bernard Namunane, 'Karua's List of Shame', *Daily Nation*, Nairobi, Friday, September 22, 2006.

claimed that the equipment had been imported and was lying at the Jomo Kenyatta International Airport.

2) Police Air wing Support Equipment

This was a project to refurbish the equipment at the air wing together with the purchase of helicopters. The police were supplied with Ukranian helicopters at an inflated price. Currently, all the helicopters are grounded.

3) Forensic Science Laboratory

This project was to undertake the construction of three forensic laboratories for the Criminal Investigations Department at Karura Forest in Nairobi. Although land was supplied and more than 462 million paid out, there were no drawings or any ground broken at the site. ALFC is said to have introduced excuses at every opportunity and the work has never started to-date.

4) Security vehicles purchase

A company known as Silverson Establishment was hired to procure from motor vehicle manufacturer Hyundai 500 vehicles to be supplied to the police at the cost of Kshs 6.7 billion. However, only a handful of the vehicles were delivered. In the 2004/2005 Budget, the government had factored in Kshs 300 million to pay Silverson Establishment for the 2001 project yet virtually all the vehicles had not been delivered.

5) Police Security Equipment – Addendum II and III

The two projects valued at Kshs 4.5 billion were for the supply of communications equipment to the police. Not all the equipment was delivered.

6) National Early Warning System

The project was to equip the Metrological Department with an early warning security system. However, with more than Kshs 3 billion paid, not much of the equipment is in place.

7) Broadband Network

The Kshs 1 billion project was to set up satellite services for the Postal Corporation of Kenya. The State corporation was to receive Internet and data services via Vsat.

8) Bandwidth Spectrum & Network Operations

This project was also to set up data and Internet services for Postal Corporation of Kenya in 500 outlets through out the country. The project took off but despite the government meeting its side of the bargain, only 300 outlets were set up by Universal Satspace. More than Kshs 3 billion had been paid from November 2002.

9) Police Airwing Support Project II

The Kshs 1 billion project was to supply the police with equipment. Little has been heard about the project yet the police airwing is virtually grounded.

10) Prisons Security Project II

This was to be the Second Phase of a Kshs 2.5 billion project to link all prisons through a single network. The project was never concluded and the Prisons Department still relies on the police communication network.

11) Telecommunications Network for Administration Police

The unit was also supposed to have its own communications network. Not much has been done and it also relies on police communication network.

12) Naval Ship

Kenya entered into a deal with a Spanish shipbuilder to construct a naval ship at the cost of Kshs 4 billion. Its completion date was given as July 2005 but the vessel is yet to be delivered.

13) E-cop

This Kshs 6 billion project was to set up a closed circuit television system. The project was cancelled after Kshs 500 million was quietly wired back to the country in May 2004.

14) Police Security System and Accessories

This was cancelled after the Anglo – Leasing project on laboratories and terrorist proof passports project was exposed. It was valued at Kshs 4 billion.

15) Terrorist – proof Passports project

This was increased from a Kshs 900 million project by the KANU government to a massive Kshs 2.7 billion by the NARC government. It was cancelled after its exposure by the press.

16) Project Flagstaff

This Kshs 4.5 billion project was to set up satellite services for the new National Security Intelligence Services headquarters. Although it was paid for, there are no details available about the project.

According to the list released in Parliament by the Minister for Justice and Constitutional Affairs, a number of prominent people had been recommended for investigation by the Kenya Anti- Corruption Commission over the Anglo Leasing type contracts. These included the then Vice President Moody Awori, Cabinet Minister Simeon Nyachae, eight other former cabinet ministers and twelve permanent secretaries.

2.5 The Need for Synergy

On 2nd October 2006, Justice Aaron Ringera, then Director of the Kenya Anti- Corruption Commission disclosed that the Commission had finalized investigations in some of the Anglo Leasing type contracts and had forwarded the names of 12 prominent personalities to the Attorney General for prosecution.[64] Immediately thereafter, it emerged that Attorney General Amos Wako[65] had in September 2006 recorded a statement with KACC

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[64] See David Okwembah, 'Anglo Leasing: Now Ringera asks AG to take 12 to court', *Daily Nation*, Nairobi, Tuesday, October 3, 2006, p. 1.

[65] Amos Wako was appointed Kenya's Attorney General by President Moi in June 1991. See *Amos Wako, The Rule of Law will Prevail*, The Weekly Review, July 12, 1991.

officers regarding his own role in the Anglo Leasing type contracts.[66] Mr. Wako was questioned about the legal advice he gave over some of the contracts – all of which he approved – and whether he signed any of them as the Government's principal lawyer. The revelation brought into question the Attorney General's ability to impartially review the cases recommended for prosecution when he is in fact the same person who had earlier approved them.

It therefore did not come as a surprise when on 18th October 2006; the Attorney General announced that he would not prosecute five high profile Anglo Leasing suspects for lack of sufficient evidence.[67] Citing what he termed significant evidence gaps, the Attorney General returned the five files to KACC and demanded further investigations to be completed within 30 days, to make the cases watertight. The following day, the KACC director dismissed the grounds upon which the Attorney General had rejected the files. Faulting the technical and legal opinion the Attorney General had given for refusal to prosecute the prominent personalities; Justice Ringera vowed that he would not take any directions from the Attorney General.[68] Arising from this standoff, none of the cases involved have ever been taken to court.

Similarly, in a less publicised episode which occurred in March 2007, the Kenya Anti-Corruption Commission (KACC) instituted separate charges against 7 prominent personalities at Nairobi's Makadara Law Courts. The accused persons, all of them suspected to have played some role in what is now commonly referred to as the Goldenberg Corruption Scandal, were charged under Section 26 of the Anti-Corruption and Economic Crimes Act with the failure to comply with a notice issued by the Director KACC, requiring them to provide a comprehensive list of their property and to give an account on how the same were acquired.

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[66] See Mugo Njeru, 'Wako quizzed over 5 Anglo Leasing Cases', *Daily Nation*, Nairobi, Wednesday, October 4, 2006, p. 1; John Osoro, 'Court told Wako gave positive legal opinion on Anglo Leasing', *Kenya Times*, Wednesday, October 18, 2006, p. 5.

[67] See Nzau Musau, 'Wako vs Ringera: AG throws Anglo Leasing Case into Disarray', *Kenya Times*, Thursday, October 19, 2006, p. 1.

Two of the suspects, Messrs James Kanyotu[69] and Joseph Mbui Magari[70] immediately filed separate constitutional petitions in the High Court challenging the constitutionality of the proceedings in the subordinate court. When the Petitions simultaneously came up for hearing before Honourable Aluoch J. on 30th March 2007, the AG who was named as the Respondent, appeared through a Deputy Chief State Counsel in his office and informed the court that he was not aware of the cases instituted by KACC in the lower court. According to the AG's representative, KACC had no mandate to prosecute any case and/or to prefer any charges in court unless and until the AG had given his sanction. Since in these instances no such sanction had been given, the AG asked the court to stay the proceedings pending in the subordinate court until such a time that the AG was sufficiently briefed thereon.

Frustrating as it may be, it is apparent that even where an aggrieved Kenyan might be desirous of challenging the Attorney General's decision not to prosecute in such instances, the area of judicial review remains problematic as courts traditionally have reservations concerning any interference with prosecutorial discretion[71]. Apart from the problems that any individual will face in seeking judicial review of executive decisions, the non-transparent nature of prosecutorial decisions makes review even more problematic. A major problem faced by anyone seeking to review such decisions is being able to obtain from the prosecution the reasons for the decision. While there are obvious reasons why such reasons should not be disclosed, it is not always that such decisions are made in the public interest.

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[68] See Erick Otieno, 'Legal Showdown: Ringera Rebuffs Wako's Opinion on Anglo Leasing probe,' *Kenya Times*, Friday, October 20, 2006, p. 1.

[69] Nairobi High Court Constitutional Petition No. 318 of 2007. Mr. Kanyotu subsequently passed away on 12th February 2008 before the Petition could be heard.

[70] Nairobi High Court Constitutional Petition No. 328 of 2007. The Petition has not been fixed for hearing inter partes to-date.

[71] See for instance *R v Metropolitan Police Commissioner, ex parte Blackburn* (1968) 2 QB 118.

Ian Dobinson[72] in an article appropriately titled *The Decision Not to Prosecute*[73] assesses and analyses the extent to which the public prosecutor's decisions not to prosecute should be reviewable by the courts. According to Dobinson, the decision not to prosecute is a difficult one and must be viewed in comparison to the decision to prosecute. The latter decision will of course be tested in court. Where the decision is found wanting, the court can rule that there is no case to answer. Indeed, where the prosecution is unlawful or there has been an abuse of process, the courts have allowed the review of the original decision to prosecute. This avenue, it is granted, may sometimes be inadequate given the harm caused to an individual who is tried but is subsequently acquitted.

The decision not to prosecute is however, different. According to Dobinson, virtually every legal system has a vested interest in ensuring that all such decisions are seen to be fair and just. This is because unfair and unjust decisions have significant potential to bring a justice system or institution into disrepute[74].

Ordinarily, there are two stages usually cited in determining whether or not to prosecute. The first stage involves a consideration of the evidence while the second involves a consideration of the public interest. The track record of corruption cases in Kenya as demonstrated above does not show any particular adherence to these two considerations. It may as well be that a proper analysis of both the Goldenberg and Anglo Leasing cases cited above, might demonstrate that the evidential test was not properly applied. For many, and given the public altercations between the Attorney General and the KACC Director in regard to the sufficiency of the evidence in some of these cases, the current situation where the Attorney General plays a double role as a member of the executive branch of government and that of the independent initiator of public prosecutions is unsatisfactory and prone to conflicts of interest.[75]

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[72] Associate Professor, School of Law, City University of Hong Kong.

[73] Ian Dobinson, *The Decision Not to Prosecute*, available at http://www/isrcl.org/Papers/Dobinson.pdf. Accessed on 10 February 2010.

[74] Ibid at p.2.

[75] Following the promulgation of Kenya's new Constitution on 27th August 2010, these functions have since been separated. The role of initiating public prosecutions is now left to an autonomous Director of Public Prosecutions. See Articles 156 and 157 of the Constitution.

Regardless of the protestations of the Attorney General that the decision not to prosecute in such instances were *bonafide,* his office could never overcome such negative public perceptions. Granted that this may be more perception than reality, such perceptions are however, crucial aspects of the public approval of any justice system[76]. One possible answer to this dilemma in the sphere of corruption is the creation of an independent office of public prosecutor. The other, in our view, is the creation of a distinct, national agency charged with combating and prosecuting corruption.

2.6 Some Recent Judicial Decisions on the Issue of the Attorney General's Prosecutorial Powers

For our purposes in this Paper, the controversies that surrounded the operations of the Kenya Anti-Corruption Authority (KACA)[77] is perhaps the beginning point if one were to interrogate the functions and powers of the Attorney General in matters of public prosecution. Section 11B (2I) 3 of the Prevention of Corruption Act (Cap 65) as amended provided inter alia thus:

(3) The functions of the Authority shall be -

(a) to take necessary measures for the prevention of corruption in the public, parastatal and private sectors;

(b) to investigate, ***and subject to the directions of the Attorney General, to prosecute*** *for offences under this Act and other offences involving corrupt transactions; and*

(c) .....

Upon its establishment, the mercurial and abrasive politician John Harun Mwau was appointed as KACA's first director. While the general public widely acclaimed Mwau's appointment, powerful politicians and business leaders criticised his appointment, citing his inexperience and involvement in shady business dealings as suggestive of his inability

[76] *supra* note 73 at p.10.

and incompetence to head the Anti-Corruption Authority.[78] However, following Mwau's pledge to fearlessly fight corruption, KACA soon gained notoriety for speedy and fearless investigations. It did not take long before he was accused of acting *ultra vires* his powers by arraigning suspects in court without the sanction of the Attorney General.

2.6.1 The KRA Case

The Kenya Revenue Authority (KRA) was one of KACA's first stops. The investigations at KRA involved allegations of collusion between high ranking officials in KRA and importers of sugar and wheat. The importers believed to be highly placed government officials allegedly connected to the then Minister for Finance Mr. Simeon Nyachae, were suspected to have illegally been exempted from payment of import duty on large amounts of sugar imported into the country.[79] KACA completed its investigations in June 1998 and concluded that it had gathered sufficient evidence to commence a criminal case against the KRA officers. It then applied for arrest warrants and commenced criminal prosecutions in an unprecedented short space of time. Among the high ranking government officials arrested and charged were the Commissioner General of the KRA, its Financial Secretary and the Director of Fiscal and Monetary Affairs. They were charged with defrauding the government of Kshs 230 Million in unpaid import duties.[80]

Events however, turned against this tide of momentum to fight high level graft. Mr. Simeon Nyachae under whose ministerial jurisdiction KRA fell, was particularly angry with KACA for arresting and charging the officers. According to the Minister, the KRA officers were arrested without any evidence of wrong doing and he called upon Parliament to set up a select committee to investigate whether the KRA officials were guilty of the charges brought against them.[81] As it turned out, on 24th July 1998, the

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[77] KACA came into existence on 7th November 1997 vide Act No. 10 of 1997 which amended Cap 65, inserting Section 11B

[78] Gathii James Thuo, Corruption and Donor Reforms: Expanding the Promises and Possibilities of the Rule of Law as an Anti – Corruption Strategy in Kenya (February, 4 2009), Connecticut Journal of International Law, Vol. 14, No. 2 1999. Available at SSRN: http://ssrn.com.abstract=1337591.

[79] See *300,000 Tonnes of Cane Lost – Official*, Daily Nation, November 6, 1998. See also, *Moi: End Graft or Face Arrest,* Daily Nation, September 12 1998.

[80] See *Mwau Team Arrests Top Treasury Men*, Daily Nation, July 24, 1998.

Attorney General entered a *nolle prosequi* in the cases against the officers citing KACA's lack of jurisdiction to bring criminal proceedings without seeking the directions and consent of the Attorney General as required under the Prevention of Corruption Act, Cap 65 of the Laws of Kenya. The Attorney General further argued that the cases needed further and fuller investigations, implying that KACA had rushed to court before investigations were completed.[82]

Even before the ink of his appointment had dried, and barely one week after the case against the KRA officers was terminated, a judicial tribunal[83] was set up at the behest of President Moi to probe the director for having become "incapable or incompetent of properly performing the functions of his office" and generally to consider his suitability or otherwise as the Director of KACA. The tribunal found that Mwau was unsuitable to hold the office and recommended his removal in its report issued in November 1998. Mr. Mwau was eventually removed from office. In this regard, it can be seen that the war against corruption made a false start.[84]

2.5.2 The Gachiengo Ruling

In 1999, following the removal of Mr. Mwau, a new KACA Advisory Board oversaw the engagement of Justice Aaron Gitonga Ringera, a puisne judge of the High Court who was at the time serving as Kenya's Solicitor General, as the new head of KACA. The anxiety that the establishment of KACA had generated amongst suspects of impropriety did not allow the new director much room to operate from. Subjects of KACA investigations took solace in a recalcitrant and conservative judiciary that placed all manner of impediments on the path of the investigators.

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[81] See *Its Nyachae or Me, Says Mwau*, Daily Nation July 29, 1998.
[82] See *Why Were the Graft Cases Terminated?*, Daily Nation July 26, 1998.
[83] Established under Section 11B(2)(2H) of Cap 65, The tribunal comprised of R.S.C Omollo, JA (Chairman) E. O'Kubasu and David Rimita, JJ.
[84] K. Kibwana et al (eds), Initiatives Against Corruption in Kenya: Legal and Policy Interventions 1995 – 2001, Nairobi: Claripress, October p. 33.

The anti- KACA drive climaxed in the case of *Stephen Mwai Gachiengo & Albert Muthee Kahuria v. Republic.*[85] The applicants had been investigated, charged and prosecuted by KACA officers for the offence of abuse of office contrary to Section 101(2) of the Penal Code, in Criminal Case No. 877 of 2000 at the Nairobi Chief Magistrates Court. Consent to prosecute the two had been obtained from the Attorney General as per the requirement of section 11B (2I) 3(b) of Cap 65. At their trial, the accused urged the trial magistrate to refer the case to the High Court for interpretation of the Constitution under Sections 67(1) and 84(3) of the Constitution of Kenya. The trial magistrate obliged and framed a number of issues for determination by the High Court, among them:

1)
2) Whether the Attorney General's consent to this prosecution is valid under the Constitution, and
3) Whether the provisions for establishment of KACA are in conflict with the Constitution, especially Section 26 thereof.

It was argued on behalf of the applicants that the establishment of KACA created a two-tier prosecutorial body, namely, KACA and the Attorney General. In their view, KACA could only prosecute offences under the Prevention of Corruption Act and not the Penal Code. In a ruling delivered on 22nd December 2000, the court upheld the applicants' argument and declared the very existence of KACA as unconstitutional. In the words of the court:

> *When section 11B was inserted into Chapter 65, the provisions of section 26 of the Constitution remained unamended. Under section 26 of the Constitution, the Attorney General is the principal legal adviser to the Government of Kenya. He has powers under the Constitution to institute and undertake proceedings and to take over or discontinue criminal proceedings instituted by any other person or authority...*

[85] (2000) eKLR.

...from the foregoing, it is crystal clear that section 10 and 11B of Chapter 65 are in direct conflict with section 26 of the Constitution. Whether or not KACA purports to act under the directions of the Attorney General in relation to prosecution, the exercise of powers under section 11B of Chapter 65 offends the Constitution...The powers of the Commissioner of Police (to investigate) have been curtailed by section 10 and section 3B(5) of Chapter 65. That is unconstitutional.[86]

The court went on:

We uphold the submission that the provisions in Chapter 65 establishing KACA are unconstitutional and in conflict with the spirit and provisions of the Constitution especially section 26 thereof. It is also unconstitutional and contrary to the principle of separation of powers for KACA to be headed by a High Court judge; and finally, that the sanction by the Attorney General to this prosecution is not valid under the Constitution.[87]

The *Gachiengo Ruling* was certainly erroneous for a number of reasons. First and foremost, section 26 of the Constitution presupposes the existence of other prosecuting agencies besides the Attorney General. Secondly, all KACA cases were being prosecuted under the hand and control of or upon the sanction of the Attorney General as all KACA prosecutors were themselves appointed by and *ipso jure* under the control of the Attorney General under section 85(1) of the Criminal Procedure Code (Cap 75)[88]. Moreover, the Attorney General had already sanctioned the prosecution as per the requirements of Section 11B (2I)(3)(b) of Cap 65. In addition, considering the "intention of Parliament" principle of statutory interpretation, one would have expected the court to be alive to the

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[86] Ibid at 71-72

[87] Ibid at 74

[88] See for example Gazette Notice No. 6151, dated 2nd November, 1999 in the Kenya Gazette of 5th November, 1999 under which the Attorney General, in exercise of his powers under Section 85(1) of the Criminal Procedure Code appointed seven KACA officers to be public prosecutors for cases arising under Cap 65 and all other cases involving corrupt transactions under any other written law.

intention of Parliament and the people of Kenya in enacting the Prevention of Corruption Act for purposes of combating corruption.

As it were, the *Gachiengo Ruling* set a precedent whereby perpetrators of corruption and economic crimes could escape under the protection of Constitutional interpretations. Many similar applications were consequently filed seeking similar orders whenever charges of impropriety were preferred against suspects. It was not until the judgment of another Bench of the Constitutional and Judicial Review Division of the High Court that the number of such applications reduced somewhat and the war against corruption gained some impetus.

2.5.3 The Meme Decision

In *Meme v. Republic & Another*[89] a similar objection was taken regarding an investigation and prosecution which was commenced by the Anti- Corruption Police Unit, an agency which had been created by the government to salvage the work that had been commenced by KACA before it was declared unconstitutional. The applicant also contended that the charges facing him were Penal Code offences that fell outside the ambit of the anti graft agency.

A three judge bench comprising of Rawal, Njagi and Ojwang refused to be bound or persuaded by the dictum in the *Gachiengo Ruling* and therefore dispelled the Constitutional fiction that the Attorney General enjoys a monopoly of prosecution. The court's position was that:

> *The plain meaning of Section 26(3)(b) and (c) [of the Constitution] is, in our view, that some person or authority other than the Attorney General could very well, and quite lawfully, undertake prosecutions; save that such action will always remain subject to the control of the Attorney General*

[89] [2004] 1 KLR 637

It becomes plain, as submitted by counsel and as we ourselves see it, that the Gachiengo case rested on a misconception, both in terms of construction and of principle; and with utmost respect, we would depart from the position taken by the learned judges in that case.[90]

The *Meme Case* served to correct an anomaly by rejecting the erroneous jurisprudence that had been perpetrated in the Gachiengo Ruling that prosecution was a preserve of the Attorney General. However, we still have two contradicting judgments by the Constitutional and Judicial Review Division of the High Court. Under the Rule of precedents, only judgments of the Court of Appeal are binding on the High Court and therefore although the *Meme Case* seems to have dispelled the flawed jurisprudence in the *Gachiengo Ruling*, the matter remains arguable until a binding precedent is set by the Court of Appeal on the point.

2.5.4 The Nedermar Technology Case

While the decision in the *Meme Case* is certainly welcome, a number of subsequent decisions from the courts in relation to the Anglo-leasing type of contracts in recent times would appear to be effectively emasculating the functions of the Commission. In the recent case of *Nedermar Technology BV Limited vs The Kenya Anti-Corruption Commission and Another*[91], the High Court stopped KACC from investigating the suspect contract on the basis that the Commission cannot operate as an independent arm of government prying into contracts which the government, through the Attorney General has sanctioned. Dismissing KACC's quest to investigate the contract, Nyamu J. stated:

.KACC has only a statutory mandate as defined in ACECA and this does not include supervising commercial contracts. KACC has no heritage of rights and it is part of the Executive arm of the Government. It cannot be allowed to be the forth arm of Government which operates from the clouds and which superintends all the other agencies. It does not have any such unfettered powers. KACC is

[90] Ibid at 684-5
[91] Nairobi High Court Constitutional Petition No. 390 of 2006 (unreported)

bound by the public policy of Kenya which inter alia includes all laws. Where KACC purports as in this case to operate in a manner which undermines public policy, the court is entitled to restrain it. Contractual obligations binding on the Government of Kenya and the Attorney General are equally binding on KACC as a Government agency."[92]

In other words, and without giving any reasons therefor, the Court was stating that the question of the legality of the contract, the very basis of the contract, cannot be re-opened once the Attorney General has endorsed a contract. In effect, even where public funds were found to have been paid in a contract found to be tainted by illegality, such funds were, in the view of the Court, not recoverable.

2.5.5 The Decision in the Nicholas Muriuki Kangangi Case

In the very recent case of *Nicholas Muriuki Kangangi v. The Attorney General*[93] the Court of Appeal was called upon to make a determination on the tenor and purport of Section 35 of the Anti-Corruption and Economic Crimes Act. The appellant, an interdicted Police Constable, had been charged with various offences under the Act before the Chief Magistrate's Court, Nairobi in September 2007.[94] On the very first day he appeared before the Magistrate, the appellant raised various issues under the repealed Constitution and under the Act itself and he requested the trial Magistrate to stay the case and frame a constitutional question for interpretation by the High Court. Among other things, the appellant raised the following issues:

i) That KACC had violated the law by charging him in court without the knowledge and sanction of, and prior to submitting a report to, the Attorney General as required under Section 35 of ACECA; and
ii) That the Court Prosecutor (an Inspector of Police) being "an ordinary" prosecutor lacked authority to prosecute matters before a Special Court established by dint of Section 3(1) of ACECA.

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[92] Ibid. The Judgment of Nyamu J. delivered on 30th October 2008, Pp 48-49.
[93] Nairobi Civil Appeal No. 331 of 2010 (unreported)

The Magistrate (Ms Lillian Mutende) was of the view that there was no valid constitutional issue which she could refer to the High Court for interpretation. Dissatisfied with the Magistrate's decision, the appellant moved to the High Court where again Wendoh J., dismissed his contentions. He finally moved to the Court of Appeal.

In a judgement pronounced on 29th July 2011, the Court of Appeal, after going through the provisions of Sections 35, 36 and 37 of ACECA, delivered itself thus:

> *"What clearly emerges from these provisions is that KACC must report its investigations to the Attorney General and in the report it may recommend the prosecution of a person for corruption or economic crime. The Attorney General may, in turn, either accept or reject the recommendation to prosecute and the only check on the power of the Attorney General to accept or reject KACC's recommendation to prosecute lies in the National Assembly. Where the Attorney General rejects the recommendation to prosecute, his report to the National Assembly 'shall set out succinctly the reasons for not accepting the recommendation'"*[95]

On the issue of whether or not it was right for a Police Prosecutor to prosecute the case, the Court made a rather confusing suggestion and stated:

> *"The Act sets out the procedure to be followed. That procedure cannot be circumvented by KACC asking the Kenya Police to prosecute on its behalf. There is no such provision in the Act.....As a creature of statute, (KACC) must comply with the provisions of its creator. If it fails to do so, it is acting ultra vires and any such action is null and void.*

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[94] Nairobi Anti-Corruption Court Case No. 3 of 2007; *Republic v. Nicholas Muriuki Kangangi.*
[95] Supra note 93 at P. 10t.

In view of that position, we do not think it is necessary for us to consider whether police officers can prosecute cases arising under the Act before the anti-corruption courts. Perhaps it may be safer for the Attorney General to specifically appoint officers to be prosecutors for the purposes of the Act. The Attorney General has power to do so under Section 85 of the Criminal Procedure Code. But we take no concluded view on that issue." [96]

As it were, the *Kangangi Ruling* has brought greater confusion in the realm of corruption prosecution in this country. As a general rule and, in the absence of some provision to the contrary, any private citizen can bring a criminal prosecution, whether or not he has suffered any special harm over and above other members of the public. This fact is clearly given effect in the provisions of the Criminal Procedure Code (CPC).

Under Section 89(2) of the CPC, any person who believes from a reasonable and probable cause that an offence has been committed by another person may make a complaint thereof to a magistrate. Upon receipt of such a complaint, the magistrate shall draw up and sign a formal charge containing a statement of the offence with which the accused is charged, unless the charge is signed and presented by a Police Officer [as per Section 89(4)].

The above provisions are buttressed by those of Section 19 of the Police Act, Cap 84, which provides;

"A Police Officer may lay any lawful complaint before a magistrate and may apply for a summons, warrant, search warrant or such other legal process as may lawfully be issued against such a person."

As an investigative agency, the Director of KACC or an investigator therefrom has the powers of a Police Officer and can therefore rightfully lay a complaint as envisaged under the Police Act. Section 23(3) of ACECA stipulates that:

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[96] Ibid at P. 11.

"For purposes of an investigation, the Director and an investigator shall have the powers, privileges and immunities of a police officer in addition to any other powers the Director or investigator has....."

Any doubt that the Commission has power to charge a suspect in court without necessarily consulting anyone is indeed cleared when one considers the express provisions of Section 32 of ACECA aforesaid. The section which was apparently not brought to the attention of the Court of Appeal in the *Kangangi Case*[97] provides:

"Without prejudice to the generality of Section 23(3), the Director and an investigator shall have power to arrest any person for and charge them with an offence, and to detain them for the purpose of an investigation, to the like extent as a police officer."

In light of the foregoing, it is clear that the law contemplates a situation where criminal charges can be laid by the anti-corruption agency, the police or even private citizens without the prior express sanction of the Attorney General.

Similarly, the argument that police prosecutors lack authority to prosecute cases in anti-corruption courts cannot hold water. The power to appoint Special Magistrates is bestowed upon the Chief Justice by virtue of Section 3(1) of ACECA. There is no reciprocal provision for appointment of Special Prosecutors under the Act. This is because the law recognizes that the establishment of the Anti- Corruption Courts is purely an administrative issue not meant to create a new and special class of courts distinct from any other. The Courts are established on the same principles underlying the establishment of such courts as the traffic courts throughout the country or even the High Court divisions, namely, to speed up trials. These Courts exercise the jurisdiction set out in the provisions of various statutes with regard to Magistrates Courts.

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[97] The anti-corruption Commission whose powers were being questioned in this case was neither a party to, nor was it made aware of the proceedings in the Court of Appeal before the delivery of the Judgment.

As normal magistrates' courts, there was no requirement that Prosecutors thereunder should be special in any way. As it were, these are courts of convenience for dealing with the problem of corruption; they have no special rules of evidence or procedure.

In any event, all Public Prosecutors exercise delegated powers to prosecute criminal cases from the AG. Section 85 (1) of the CPC clearly provides that the Attorney General, by notice in the Gazette, may appoint public prosecutors for Kenya or for any specified area thereof, and either generally or for any specified case or class of cases. Indeed, by the amendment brought to Section 85(2) of the CPC by Act No.5 of 2003, police prosecutors, including those of the lowest rank can now become public prosecutors provided they are appointed and gazetted as required under Section 85(1). Ever since the accused was charged, his case had been handled by competent prosecutors as by law required and this issue was therefore nothing but a red herring.

Perhaps, the only consolation in the Kangangi Case was the fact that even after upholding his contention that the charges were not brought in conformity with the Act, the Court made it clear that the termination of the earlier charges was not a bar to the reinstitution of the charges provided that the Commission 'complied' with the provisions of the Act.[98]

2.5.5 The Malawi Experience

The 1994 Malawi Constitution creates the office of Director of Public Prosecutions and provides that the Director should exercise his or her authority "independent of the direction and control of any person or authority."[99] This was clearly intended to exclude principally, political and generally, other external influences on the Director in the exercise of his or her prosecutorial discretion.[100] The Director is made directly accountable to the Legal Affairs Committee of Parliament for the exercise of his powers

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[98] See Page 12 of the Judgment.

[99] Section 101(2) of the Malawi Constitution. This provision was amended in 1997 to make the Director, in the exercise of his powers, subject to the general or special directions of the Attorney General.

[100] Mabvuto Herbert Hara, 'The Independence of Prosecuting Authorities: The Malawi Experience,' a paper presented at the African Network for Constitutional Law Conference on Fostering Constitutionalism

in general[101], and specifically, for the exercise of the power to take over and continue proceedings or discontinue proceedings.[102]

The High Court in Malawi has decided that the Attorney General has no authority to appear and conduct a criminal prosecution under the Constitution because that is the Constitutional function of the Director of Public Prosecutions.[103] The Court's view appears to be consistent with the general scheme of the Constitution whose definitions of the functions of the Attorney General and the DPP does not confer on the Attorney General any prosecutorial powers.[104]

2.6 Conclusion

It has been observed that the level of responsibility which a prosecuting agency has within any criminal justice system and the continuation of the freedom which a prosecutor must have to maintain that responsibility requires the prosecutor to be accountable for the way in which the prosecutorial discretion is exercised.[105] The prosecutor is accountable to the interested parties: the courts, the community, Parliament, victims and the accused.[106] Various mechanisms for ensuring accountability should therefore be put in place. The community, Parliament, police and victims need to understand why particular decisions have been made. The explanation of reasons for a particular decision will go along way in providing transparency in the exercise of the discretion and will overcome complaints of secrecy.

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in Africa, Nairobi April 2007, available at: *shumbachambers@sdnp.org.mw*. Accessed on 10 February 2010.

[101] Section 100(2)(a) of the Malawi Constitution.

[102] Section 99(3) of the Malawi Constitution. This provision requires the Director to give reasons to the Legal Affairs Committee of the National Assembly, within 10 days, for his exercise of the powers to take over and continue or discontinue proceedings instituted by any other person or authority.

[103] *Dr. Cassim Chilumpha vs Yusufu Matumula & Rashid Nembo*, Misc Criminal Application No. 228 of 2006 (unreported), cited in Mabvuto Herbert Hara, 'The Independence of Prosecuting Authorities: The Malawi Experience,' a paper presented at the African Network for Constitutional Law Conference on Fostering Constitutionalism in Africa, Nairobi April 2007, available at: *shumbachambers@sdnp.org.mw* at p.19

[104] Section 98 of the Malawi Constitution. Kenya's new Constitution has similar provisions at Articles 156 to 157 thereof.

[105] D Bugg, 'Accountability, Independence and Ethics in Prosecution Practice.' Available at www.cdpp.gov.au/media/speeches. Accessed on 10 February 2010

[106] Ibid.

The Constitutional responsibility of the Attorney General over law enforcement and in particular prosecution of crime has informed the supervisory role that the legislature confers on the Attorney General. Where as is currently the case in Kenya, the Attorney General is a member of the Cabinet, one may argue that at this stage conflict between and the political interest may block prosecution. The possibility of strong undue pressure on an Attorney General to exercise discretion in a way that favours the government as distinct from the public interest has informed calls for a separation of the offices of the Minister of Justice and that of an Attorney General whose involvement in politics would be minimal.

Kenya's new Constitution, promulgated on 27th August 2010, has recognised this potential conflict at Articles 156 and 157 and hence created an autonomous office of the Director of Public Prosecutions which is distinct from the Attorney General's office. The Constitution further gives Parliament the power to confer prosecutorial powers on any other authority other than the Director of Public Prosecutions, a clear indication that the exercise of this power is not the exclusive preserve of any particular office. It is our submission that Kenya's Ethics and Anti- Corruption Commission is one such authority deserving of such powers.

CHAPTER 3

SLAYING THE DRAGON WITH BARE HANDS; THE QUEST FOR PROSECUTORIAL POWERS

3.1 Introduction

It has been said that most African states are characterised by what is termed "embedded levels of corruption," involving inter-woven networks of politicians, bureaucrats, the private sector and security sectors.[1] Coupled with high poverty rates and weak democratic institutions, the effects of corruption are particularly visible in Africa. In the last decade or so, African governments have responded to both internal and external pressure to deal with corruption through the establishment of anti- corruption commissions – distinct, national agencies charged with combating corruption. The multilateral development banks, aid agencies and non- governmental organisations have all promoted the establishment of such bodies, arguing that they form an integral part of a country's "national integrity system."[2] The recent United Nations Convention against Corruption (UNCAC) also makes specific provision for their establishment.[3]

However, the experiences of African anti- corruption commissions are varied, and they often attract criticism for being ineffective and a waste of resources.[4] The question has been asked as to whether these agencies represent a genuine commitment on the part of a government in its anti- corruption strategy, or whether they are merely a façade, established simply to placate the international donor and investment community and to bury the problem altogether.[5]

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[1] John Githongo, Acceptance Speech, German Africa Award, 12 April 2005, available at: *http://www.ms.dk/sw26274.asp. Accessed on 10 February 2010.*

[2] See generally: Transparency International, NIS, available at: *http://www.transparency.org/policy_research/nis*. Accessed on 10 February 2010.

[3] See Article 6 of UNCAC which requires State parties to ensure the establishment of an independent body or bodies with specialized staff for purposes of fighting corruption.

[4] See generally: John R. Heilbrunn, Anti- Corruption Commissions, in The Role of Parliament in Curbing Corruption (Rick Stapenhurst, Niall Johnston and Ricardo Pellizo, eds., The World Bank, 2006).

[5] Melissa Khemani, 'Anti – Corruption Commissions in the African State: Burying the Problem or Addressing the Issueavailable at http://ssrn.com/abstract=1334286. Accessed on 21 October 2011.

The ACECA admittedly grants KACC autonomy whereby in the performance of its functions, the Commission and the Director thereof shall not be subject to the direction and control of any other person or authority and shall be accountable only to Parliament.[6] However, the import of the autonomy is of narrow significance to the anti- corruption struggle. The autonomy status strengthens the Commission only in the performance of its investigative functions whose findings the Act fails to compel the government to take action upon. Yet, the Act intends to "provide for the prevention, investigation and punishment of corruption, economic crime and related offences and for matters incidental thereto and related therewith."[7]

Corruption emerged as an issue of international concern in the mid- 1990s as the international community became increasingly cognizant of its crippling effects. The immediate post- Cold War period also marked a rethinking on the part of the international aid community, whereby Western government donors no longer needed to focus support on corrupt regimes for strategic purposes, and further realized that the effectiveness of aid programmes depended on fiscally responsible leaders.[8]

Anti- corruption projects currently feature in the action plans of some of the largest government aid agencies, including those of the United Kingdom, the United States, Denmark, the Netherlands, Ireland and Canada.[9] Support for such projects range from funding infrastructure and construction to providing technical assistance in domestically implementing international anti-corruption obligations to providing capacity building in the training of law enforcement and prosecutors in the handling of anti- corruption cases.

Aware of the need for specialized expertise to combat corruption, a number of the international and regional conventions make specific provisions for the establishment of

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[6] Section 10 ACECA
[7] See the Preamble to ACECA.
[8] Sahr Kpundeh and Phyllis Dininio, *Political Will in the Role of Parliament in Curbing Corruption*, 47, (Rick Stapenhurst, Nial Johnston and Ricardo Pellizo, eds., The World Bank, 2006), cited in Melissa Khemani, *Anti- Corruption Commissions in the African State: Burying the Problem or Addressing the Issue?* supra note 4.

specialized anti-corruption bodies and/or personnel. Articles 6 and 36 of the United Nations Convention against Corruption (UNCAC) provide for the establishment of preventive anti-corruption bodies and specialized authorities. Kenya was the first country to ratify this Convention when it came into force on 9th December 2003. The relevant provisions state:

Article 6

1. Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate, that prevent corruption by such means as:

(a) Implementing the policies referred to in Article 5 of this Convention and, where appropriate, overseeing and co-ordinating the implementation of those policies;

(b) Increasing and disseminating knowledge about the prevention of corruption.

2. Each State Party shall grant the body or bodies referred to in paragraph 1 of this Article, the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialized staff, as well as the training that such staff may require to carry out their functions should be provided.

Similarly, the African Union Convention on Preventing and Combating Corruption which was adopted in 2003 and came into force in 2006 makes provision for the establishment of such agencies. Article 20(5) thereof provides:

State parties are required to ensure that national authorities or agencies are specialized in combating corruption and related offences by, among others,

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[9] Ibid at P.7

ensuring that the staff are trained and motivated to effectively carry out their duties.

Arising from the above, there is clear commitment from the international donor community in placing anti-corruption initiatives on their agenda. This is buttressed by the adoption of such international instruments which specifically include the need for specialized anti-corruption authorities. However, these instruments simply set the benchmarks for specialization as having independence and autonomy; specialized staff; sufficient resources; and adequate powers.[10] There remains however, a lack of precise, detailed guidance on how to implement such measures and what models to follow. In turn, governments are left with significant discretion in determining how to establish and administer these bodies. While this is a common feature of international agreements, which allow State Parties to tailor treaty requirements to fit the specificities of their domestic needs, it may also serve as a means for non-committal governments to establish weak institutions while simultaneously claiming that they have implemented their international obligations.[11]

3.2 The National Integrity System

According to Transparency International[12], international policy responses to corruption on the institutional level have focused on a number of key institutional "pillars." These include:

- Political will of the Executive
- Administrative reforms
- Watchdog agencies
- Parliament
- The Judiciary

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[10] Organisation for Economic Co-operation and Development (OECD), Specialised Anti-Corruption Institutions: Review of Models, 20 (OECD, 2008).
[11] Melissa Khemani supra note 4 at 12.
[12] Transparency International, NIS, available at: http://www.tranparency.org/policy_research/nis. Accessed on 10 February 2010.

- Civil Society
- The media
- The private sector
- International institutions

Based on these pillars, Transparency International has developed the now widely used concept of "national integrity system". The institutions within the system are interdependent and together reduce the likelihood of corruption by providing transparency and accountability. In short, the aim of national integrity systems is to keep a check on the monopoly of power and discretion exercised by public officials and thereby, to make acts of corruption "high risk and low return".[13]

Under the national integrity system, watchdog agencies are those institutions within a government structure that are specifically charged with anti-corruption functions. The main anti-corruption functions cited in the international instruments such as UNCAC and the African Union Convention on Preventing and Combating Corruption mentioned above include investigation and prosecution, prevention; education and dissemination of information, coordination; and monitoring and research. [14] A careful reading of these provisions illustrate that the establishment of an independent anti-corruption commission is not necessarily required to meet these obligations; they are functions which can be undertaken by already existing government bodies or personnel.

The Office of the Controller and Auditor General for instance, is one of the traditional examples of existing government institutions which provide a check on the system by auditing government income and expenditure and ensuring sound fiscal management, serving as a watchdog over the financial integrity and credibility of reported information. The office of the ombudsman similarly provides a means of accountability by examining cases of neglect, delay and incompetence in the administrative duties of government, and

[13] Peter Langseth, Rick Stapenhurst, and Jeremy Pope, The Role of a National Integrity System in Fighting Corruption, in Controlling Corruption, 61 (Robert Williams and Alan Doig, eds., Edward Elgar Publishing Ltd., 2000) cited in Melissa Khemani supra note 4 at 13.
[14] OECD, supra note 9 at 21.

by examining decisions, processes and recommendations that are contrary to law, rules or regulations; that unreasonably depart from established practice and those that are arbitrary and unjust.

Watchdog anti-corruption functions may also be dispersed among a number of domestic institutions. The United Kingdom, for example, adopts a multi-agency approach in combating corruption, involving such bodies as the Serious Frauds Office, the Anti-Corruption Command of the Metropolitan Police, the Office of the Parliamentary Commissioner for Standards, the Serious Organised Crime Agency, the Crown Prosecution Service and Customs and Excise. The United States adopts a similar multi-agency approach, involving such agencies as the Office of Government Ethics, the Government Accountability Office, the Office of Management and Budget and Specialised units within the Department of Justice.[15]

Anti-corruption commissions represent the most recent form of a watchdog agency. These commissions are distinct, independent, permanent bodies generally charged with preventive, investigative and educative functions. In other words, anti-corruption commissions assume most if not all the roles of the multi-agency approach and place them under one roof. The first anti-corruption commissions were established by Singapore and Hong Kong.[16] The success of Hong Kong's Independent Commission against Corruption (ICAC) served as an impetus for a number of States to establish their own anti-corruption commissions, many of which like the Kenya Anti-Corruption Commission (KACC), are modeled after its structure.

3.3 Models of Anti- Corruption Commissions

As we have shown above, the provisions of the international instruments requiring the establishment of specialized anti-corruption bodies do not specify a blue print or a preferred model. Furthermore, States can fulfil these obligations by designating

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[15] John R. Heilbrunn, *Anti- Corruption Commissions: Panacea or Real Medicine for Fighting Corrruption?*, 9, (World Bank Institute, 2004).
[16] OECD, supra note 9 at 31.

specialized personnel within existing branches of government. The treaties have left it open for State Parties to find the most suitable institutional framework to combat corruption according to their domestic specifications.[17]

The Organization for Economic Cooperation and Development (OECD) has identified three models of anti-corruption commissions:[18]

- Multi-purpose with law enforcement powers
- Law enforcement
- Preventive, policy and coordination

The "preventive, policy and coordination" model focuses on a limited mandate of preventing corruption through research, monitoring and implementing national anti-corruption strategies, implementing codes of ethics, training officials and personnel, facilitating international cooperation, raising awareness and liaising with civil society.[19] The "law enforcement" model incorporates corruption detection and investigation and prosecution under one body, and may also undertake prevention, coordination and research roles. A number of the anti-corruption commissions in emerging European economies such as Hungary, Romania and Croatia, have assumed this model.[20]

The "multi-purpose with law enforcement" model combines corruption prevention, investigation and education functions, and is largely based on the Hong Kong's ICAC model. The ICAC which has experienced significant success in curbing Hong Kong's history of systemic corruption, is divided into three departments: the Operations Department which investigates violations of laws and regulations; the Corruption Prevention Department which conducts training and seminars for both public and private

[17] Ibid at 31.
[18] Ibid at 32.
[19] Ibid at 32.
[20] Ibid at 32.

sectors; and the Community Relations Department, which raises awareness through various campaigns and educates the public of any changes in the laws and regulations.[21]

The prevailing literature in the field also identifies models of anti-corruption commissions based on the above mentioned three functions.[22] This paper agrees with some emerging views that propose that a fourth model should also be identified: the "multi-purpose with law enforcement and prosecutorial powers" model. While the OECD notes that prosecution remains a separate, external function in the "multi-purpose with law enforcement" model,[23] it ought to be appreciated that anti-corruption commissions with investigative, preventive, educative and prosecutorial functions do exist. The Nigerian Economic and Financial Crimes Commission (EFCC) is one such example where the law grants all such powers and functions.[24] It is our argument that an anti-corruption commission based on this model may be the most effective for Kenya and many other African States.

3.4 The Case for Prosecutorial Powers

According to Melissa Khemani[25] there is a compelling case to be made for the establishment of anti-corruption commissions in African States to undertake the role of "watchdog agencies" in their national integrity systems. Khemani states that inter-agency watchdog models such as those of the United Kingdom and the United States that incorporate multiple branches and departments of government tend to operate most effectively in advanced democracies with strong governance and institutional structures and where there is a more favourable culture of inter-agency cooperation.

Given the urgency and magnitude of corruption in Kenya at present, it is our view that the establishment of a designated anti-corruption commission is a necessary step in this

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[21] Heilbrunn, supra note 14 at 3.
[22] Ibid at 136
[23] OECD, supra note 9 at 31
[24] See Establishment Act of the Economic and Financial Crimes Commission of Nigeria, available at: http://www.efcnigeria.org/index.php?option=com_content&task=view&id=12&itemid=30. Accessed on 28 October 2009.
[25] Melissa Khemani 2009, Anti-Corruption Commissions in the African State: Burying the Problem or Addressing the Issue? Supra note 4 at 21.

country's anti-corruption strategy. Public sector institutions are not as developed, and the lack of inter-agency cooperation and coordination due to rivalry and over-protection of information is a predominant feature. It would therefore be more effective and efficient to centralize and vertically integrate anti-corruption functions under one body. Allocating these functions within existing branches of government also risks dilution of the strategy, and increases the likelihood that cases will become trapped in the web of bureaucratic processes that currently feature in our governmental set up.

Furthermore, anti-corruption investigations and prosecutions require specialized knowledge which may not be held by prosecutors and investigators in the Attorney General's office or regular law enforcement. As such, the establishment of a designated anti-corruption commission ensures a level of specialization required for the effective and efficient handling of cases. Ultimately, the establishment of a distinct anti-corruption body demonstrates the government's commitment to fighting corruption on the symbolic level, which is important in gaining public support and awareness.[26] However, what is most critical is that such bodies prove to be effective in combating corruption in practice and that there is substance behind the symbolism. In this regard, it is our view that KACC and other anti-corruption commissions in Africa would benefit most from the "multi-purpose with law enforcement and prosecutorial powers" model proposed herein above.

According to Khemani,[27] having prosecutors and investigators working in partnership under one body ensures the specialization and streamlining of functions required to efficiently handle anti-corruption cases from the beginning to the end. It also allows for relationships and a rapport to develop between investigators and prosecutors, something which, as illustrated in Chapter 1, is certainly missing in the present arrangement between KACC and the Attorney General's office. The efficient handling of cases can increase the likelihood of successful prosecutions, which in turn, reinforces the organizational structure and creates public confidence in the body.

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[26] Ibid.
[27] Ibid at 23.

To illustrate how effective an anti-corruption commission structured on the "multi-purpose with law enforcement and prosecutorial powers" model can be, we in turn outline case examples of four African anti-corruption commissions which have assumed different models and have experienced varied levels of success.

3.4.1 Botswana's Directorate on Economic Crime and Corruption (DCEC)

Botswana has been widely described as an African "success story"[28] Since gaining independence in 1966, it has experienced high economic growth rates from well-managed rents of its natural resources and has regularly held multi-party elections.[29] The country has consistently featured in Transparency International's Corruption Perception Index (CPI) as the least corrupt country in Africa; in the 2008 CPI, Botswana was ranked the 36th least perceived corrupt country in the world, placing it ahead of a number of European Union Countries including the Czech Republic, Hungary, Greece, Malta, Poland and Italy.[30]

Botswana's fight against corruption began in earnest in the early 1990's, when the country faced a series of corruption scandals involving both low-level bureaucrats and senior politicians.[31] In response to what was deemed as "political complacency" towards corruption, the government enacted the Corruption and Economic Crime Act in 1994. The Act established Botswana's anti- corruption commission, the Directorate of Economic Crime and Corruption (DCEC).[32]

The DCEC is modelled after the Hong Kong's ICAC and incorporates a three-pronged approach of investigative, preventive and educative functions. The investigations division, which has extensive powers to obtain information, is further divided into three

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[28] Michael Johnston, *A Brief History of Anti- Corruption Agencies*, in The Self Restraining State: Power and Accountability in New Democracies, 223 (Andreas Schedler, Larry Diamond and Marc F. Plattner, eds, Lynne Rienner Publishers, 1999).
[29] United Nations Office of the High Commissioner for Human Rights, Good Governance Practices for the Protection of Human Rights, 60, (United Nations, 2007).
[30] Transparency International , Corruption Perception Index 2008, available at: http://www.transparency.org/policy_research/surveys_indices/cpi/2008. Accessed on 14 September 2009.
[31] Johnston, supra note 21, at 223.
[32] Ibid at 224.

sub-sections: prosecutions, investigation and intelligence and technical support.[33] The preventive division largely focuses on revising internal public procedures, public procurement practices and promoting best practices.[34] The education division focuses on public awareness campaigns through the use of television, radio and promotional magazines and posters. The DCEC has also cultivated a strong relationship with the media, acknowledging its role in not only gaining public confidence but also in exposing corruption cases.[35]

The DCEC has enjoyed considerable success in the fight against corruption. Within three years of its establishment, it dealt with 536 cases, leading to 141 prosecutions and 59 convictions. On average, the conviction rate stemming from its cases is approximately 85 percent.[36] The DCEC however, has no role in the prosecution of corruption cases; rather, its liaison office within the Investigations Division forwards evidence of corruption to the Attorney General's office.[37]

The DCEC is also a part of the regular government service, and is therefore not an entirely distinct, stand-alone anti-corruption body. While Botswana has a highly developed bureaucratic state structure, there has been criticism voiced internally about the working environment and the bureaucratic delays.[38] Furthermore, the Director of the DCEC has expressed frustration when it was found necessary for DCEC staff to assist the prosecutions on behalf of the Attorney General, asserting that it would be more appropriate to have in-house, qualified lawyers, rather than investigators who may be prone to accusation of bias, to undertake this task.[39] Accordingly, the question remains as to whether one of the most successful case examples of an African anti- corruption commission could be rendered more effective if it benefited from specialized, in-house

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[33] United Nations Office of the High Commissioner for Human Rights, supra note 22.
[34] Ibid at 61.
[35] Transparency International, National Integrity System, Country Study Report, Final Report: Botswana, 48, (Transparency International, 2007).
[36] United Nations Office of the High Commissioner for Human Rights, supra note 22 at 61.
[37] Heilbrunn, supra note 14 at 11.
[38] United Nations Office on Drugs and Crime, *The Global Programme Against Corruption: UN Anti-corruption Toolkit,* at 200, (3rd edition, September 2004).
[39] Transparency International, supra note 34.

prosecutors, characterized by the "multi-purpose law enforcement and prosecution" model.

3.4.2 South Africa's Directorate of Special Operations (DSO)

Introduced by President Thabo Mbeki in 1999, and codified by the National Prosecuting Authority Amendment Act, 2000, the aptly-dubbed 'Scorpions' were police and prosecutor in one. Charged with prosecuting 'serious criminal or unlawful conduct committed in an organised fashion',[40] the DSO adopted a multidisciplinary methodology – operating investigation, information gathering, and prosecution functions under one chain of command.[41] To this end, its staff comprised special investigators, analysts and prosecutors. Operations proceeded in two phases: an investigation phase, in which investigators worked under the guidance of an assigned prosecutor; and a prosecution phase, undertaken by the prosecutor who oversaw the investigation itself.[42]

Under the 2000 Amendment Act, the DSO was entrenched within South Africa's National Prosecuting Authority (NPA), something which may have been instrumental in foreshadowing a jurisdiction war between the DSO and the NPA as witnessed in other jurisdictions such as Kenya and Nigeria. Under the Act, the National Director of Public Prosecutions (NDPP) appointed the head of the DSO.[43] The DSO could in turn initiate investigations on its own accord,[44] or upon referral from the NDPP, and even pursue matters beyond its mandate if it encountered them during investigations.[45]

The DSO rose to international prominence in 1999 following the swift manner in which it dealt with revelations of an arms procurement scandal which implicated the upper echelons of the ruling African National Congress (ANC). [46] The DSO's investigation and

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[40] See preamble to the National Prosecuting Authority Amendment Act, 2000 (Act No. 61 of 2000).
[41] Jean Redpath, The Scorpions: analyzing the Directorate of Special Operations, Pretoria: Institute of Security Studies, 2007, 26-30.
[42] Ibid.
[43] Section 7(3)(a) of the Act.
[44] Section 28(1)(a) of the Act.
[45] Section 28(1)(b) of the Act.
[46] See Andrew Feinstein, *After the party: a personal and political journey inside the ANC*, Cape Town: Jonathan Ball, 2007.

prosecution of the matter would catapult it into the international spotlight, and near singularly define its legacy.

However, as it earned international acclaim for its arms procurement investigation, domestic critics assailed its legal framework on two interrelated grounds. First, they argued that the DSO's police powers violated the constitutional provision of 'a single police service'.[47] Second, they argued that the unit's tri-partite mandate was overboard and enabled it to operate non-prosecutorial functions 'free from constitutional checks and balances'.[48]

South Africa's Constitution provides at Section 199 that the security services of the Republic consist of a single defence force, *a single police service* and any intelligence services established in terms of the Constitution. The DSO's critics asserted that its framework breached this provision. They contended that, as the DSO initiated its own cases and employed investigators endowed with police powers, it effectively constituted a police force and infringed upon the South African Police Services (SAPS) authority.[49]

Responding to rising tension between the DSO and SAPS, then President Mbeki commissioned Judge Sisi Khampepe to analyse the 'jurisprudential soundness' of the DSO's mandate. Khampepe found 'nothing unconstitutional in the DSO sharing a mandate with the SAPS.[50] Neither, she concluded, did its exercise of police functions render it a 'police' force According to the Judge, it was evident that most regulatory authorities have the statutory powers to investigate non-compliance and violations relevant to their area of operations. This in itself, she concluded, would not qualify these regulatory structures to be 'police forces'. [51] As to the constitutionality of its tri-partite

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[47] Strengthening the fight against crime, ANC Today, 2008 8(3), available at: http://www.anc.org.za/ancdocs/anctoday/2008/at03.htm (accessed 20th September 2011).
[48] See Mo Shaik, Where have all the democrats gone? The case for dissolving the Scorpions, SA Crime Quarterly 24 (2008), 3-8, 6.
[49] Ibid.
[50] Khampepe Commission of Inquiry into the Mandate and Location of the Directorate of Special Operations, South Africa, 2006, paragraph 12.1. The Judge held inter alia, that the word "single" does not connote "exclusive". Available at http://www.info.gov.za/view/DownloadFileAction?=80441. Accessed 20th October 2011.
[51] Ibid, Paragraph 12.2.

framework, the Judge found 'no legal impediment in having a structure such as the DSO's with all the disciplines that it has falling in one ministry'.[52]

However, while the DSO was able to overcome the challenges thrown its way within the isolated realm of legal debate, in practical terms, these legal challenges provided cover for the ANC's political decision to dissolve the body. In 2008, South Africa's Parliament passed legislation effectively codifying the ANC's 2007 conference resolution to disband the DSO.[53] Its successor, the Directorate of Priority Crime Investigation (DPCI), would retain a dedicated corps of investigators and, when necessary, second prosecutors to provide assistance.[54] Yet it would fall under the command of the SAPS and prohibit 'investigative prosecutors' from participating in the subsequent prosecution of their targets.[55]

3.4.3 Nigeria's Economic and Financial Crimes Commission (EFCC)

Nigeria has faced significant levels of systemic corruption since the country gained independence from Britain 40 years ago. One of the main reasons why its fight against corruption is so challenging is the residual effects of its successive military regimes which are said to have illegally removed from the country approximately US$ 50 billion.[56] The assets of General Sani Abacha, who stole an estimated US$ 3.6 billion from the country during his dictatorship in the 1990's, continue to be traced and litigated over around the world. Nigeria has consistently been placed in bottom ranks of Transparency International's Corruption Perceptions Index, ranking 121 in 2008, 147 in 2007 and 142 in 2006.[57]

In 2003, the regime of Olusegun Obasanjo which was elected on an anti-corruption platform, established the Economic and Financial Crimes Commission (EFCC) with the

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[52] Ibid, paragraph 24.12-24.21.
[53] ANC 52nd National Conference 2007 Resolutions, paragraphs 6-10. Available at http://www.anc.org.za/an_cdocs/history/conf/conference52/resolutions.pdf Accessed 20th October 2011.
[54] South African Police Service Amendment Act, 2008 (Act 57 of 2008) Section 17.
[55] Ibid.
[56] Nigeria Seeks Big Debt Write-off, in BBC News, 29th June 2005, available at: http://news.bbc.co.uk/1/hi/business/4631627.stm
[57] Transparency International, supra note 29.

mandate to investigate and prosecute corrupt activity. Five years after its establishment, the EFCC had secured over 150 corruption-related convictions, which included senior members of government and has stopped many politicians accused of corruption from running for office.[58]

The Establishment Act (2004)[59] empowers the EFCC with educative, preventive, investigative and prosecutorial functions; it is therefore an example of a "multi-purpose law enforcement and prosecutorial" model. The Legal and Prosecution Unit of the EFCC is charged with prosecuting crimes under the Act, supporting the investigations unit by providing legal advice and assistance, conducting legal proceedings and performing other general legal duties.[60] Senior members of the EFCC have noted the significant advantage of having both these functions, in that it "enhances the commitment to pursue cases from start to finish."[61]

In truth, the EFCC represents neither Nigeria's first nor its sole existing anti-corruption body. The Corrupt Practices and Other Related Offences Act, 2000 (Corrupt Practices Act) established its precursor, the Independent Corrupt Practices Commission (ICPC), to investigate and prosecute corruption. Yet, coming on the heels of the ICPC's perceived stagnation, the EFCC has evolved into Nigeria's premier anti-corruption body – its reputation for excellence and controversy burnished by its inaugural chairman, Mallam Nuhu Ribadu, and his proclivity for prosecuting the 'big fish'.[62]

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[58] Transparency International, National Integrity Systems, Country Study Report: Nigeria, 66 (Transparency International, 2004); Nigeria Anti- Graft Tsar Promoted, in BBC News, 11th April 2007, *available at: http://news.bbc.co.uk/hi/world/africa/6544631.stm*

[59] Establishment Act of the EFCC (2004), available at: http://www.efccnigeria.org/index.php?option=com_docman&task=doc_view&gid=5

[60] Ibid., Article 13(2)

[61] Emmanuel Akomaye, Investigating and Prosecuting Corruption in Nigeria, in Proceedings of the Commonwealth Secretariat and Chatham House Anti- Corruption Conference: The UN Convention Against Corruption, Implementation and Enforcement: Meeting the Challenges, 91 (Commonwealth Secretariat and Chatham House, 2006).

[62] Oluseye Foluso Arowolo, In the shadows of the EFCC: is the ICPC still relevant? *Journal of Money Laundering Control* (2006) 9(2), 203-213. Available at http://emeraldinsight.com/1368-5201.htm. Accessed on 10th June 2010.

Critics of the EFCC's legal framework have long averred that the body's prosecutorial mandate usurps the power of the Attorney General. Article 150 of Nigeria's Constitution describes the Attorney General as the Chief Law Officer of the Federation and he is bestowed with the authority to start, stop and take over any criminal proceedings.[63] EFCC critics have claimed that Section 6 of the Establishment Act which sets forth the Commission's general duties does not comport well with the Attorney General's authority[64]. In this regard it is noteworthy that the earlier Corrupt Practices Act includes qualifying language, authorising the less effective ICPC to prosecute 'with the consent of the Attorney General,[65] a situation analogous to that existing in Kenya prior to the repeal of the Prevention of Corruption Act and the ruling in the *Gachiengo Case.*

3.4.4 Kenya's Anti- Corruption Commission (KACC)

Compared to others, Kenya occupies the unenviable position of being considered as one of the most corrupt countries in the world, ranking 147th in Transparency International's 2008 Corruption Perceptions Index (CPI).[66] As seen in Chapter 2 hereof, the country has also experienced some of the most high profile, international corruption scandals, including the Goldenberg and Anglo Leasing scandals. In late 2002, the newly elected government of Mwai Kibaki took office on an anti- Corruption platform and proceeded to enact the Anti- Corruption and Economic Crimes Act, (Act No.3 of 2003) which established the Kenya Anti- Corruption Commission (KACC).

The structure of KACC assumes a three-pronged strategy based on investigation, public education, prevention and advisory services, and civil recovery and restitution. Under its public education, prevention and advisory functions, the KACC provides public sector integrity training, examines weaknesses and corruption-facilitative loopholes in the system, and engages in public awareness campaigns through the media and the development of school curricula. Under its restitution functions, the KACC investigates

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[63] Article 174 of the Nigerian Constitution.
[64] See Chioma Gabriel, EFCC's enabling law is *ultra vires* Constitution – Ben Nwabueze [interview], *Vanguard*, 8 October 2007.
[65] Section 61(1) of the Act.

[66] Transparency International, supra note 29.

the extent of liability for loss and institutes civil proceedings. It also develops and supervises orders of restitution directly with persons who are making payments to the Government. Finally, the Investigations Directorate is responsible for receiving and investigating corruption reports, arrests and arraigns suspects in courts and recommends cases for prosecution to the Attorney General's office.

KACC's ability to deter and combat corruption has been weak. Since its establishment, it has received more than 3,700 reports of alleged corruption. In a 2007 Press Release, KACC stated that 332 complete investigations files were forwarded to the Attorney General, 231 of which recommended prosecution. Out of these, 107 cases have been finalized by the judicial process, of which only 32 convictions were secured.[67] These figures amount to a conviction rate of approximately 30 percent, and have further been criticized for not including any of the "big fish."[68]

KACC itself does not have prosecutorial powers and can only recommend cases to the Attorney General for prosecution. While there are a number of variables that could play a role in explaining the conviction rate, the absence of a specialized, in-house prosecution unit and the lack of inter-agency cooperation and coordination is arguably one of them. Furthermore, for the average man on the street, KACC has made little difference. In the 2007 Kenya Bribery Index, over 54 percent of respondents claimed to have encountered bribery in their interactions with both the public and private sectors – an increase from 47 percent in 2005.[69]

In addition to the presence of the "organizational sins" of lacking prosecutorial powers and the "governance sins" of lacking effective inter-agency cooperation, in recent years, KACC has been plagued with arguably the worst of all the sins: "political sins" and what is perceived to be the lack of genuine political commitment. In 2007, the Kenyan

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[67] Kenya Anti-Corruption Commission, *Press Statement on the Performance of the Kenya Anti- Corruption Commission*, 18th September 2007, available at: http://www.kacc.go.ke/archives/pressreleases/performance-statement.pdf p 5

[68] Kenya Graft Probes Undermined, in BBC News, 19th September 2007, available at: http://news.bbc.co.uk/1/hi/world/africa/70003165.stm

Parliament voted to amend the Anti- Corruption and Economic Crimes Act to prevent the Commission from recommending prosecution for any offences committed prior to 2003 when the Act came into place.[70] Furthermore, senior government Ministers who were associated with the Anglo Leasing scandal and were subsequently forced to step aside were soon thereafter reinstated in government.[71] With waning public confidence, slow and insignificant conviction rates, and political interference with its powers and functions, KACC is fighting an uphill battle to execute its mandate and effectively combat corruption.

3.5 Conclusion

The experience of the African anti-corruption commissions outlined hereinabove illustrates their varied levels of success in practice. This is in part due to internal factors, such as those associated with "organizational sins" as well as external factors associated with "governance and political sins." While Kenya's KACC and Botswana's DCEC largely share the same institutional structure, their levels of success are incomparable. However, Botswana is a small country, with sound democratic institutions and a well-developed bureaucratic structure. More importantly, its levels of corruption are far less pervasive than the systemic and embedded corruption in Kenya.

Nigeria however, faces even higher levels of corruption than Kenya, but the EFCC has largely managed to execute its mandate effectively and efficiently. The underpinning argument advanced in this study identifies the multi-purpose law enforcement and prosecutorial functions as a factor in achieving this success. The case example of Botswana further illustrates how even a successful anti-corruption commission would benefit from incorporating this model. All the examples illustrate across the board, the importance of genuine political commitment. However, in facing the recent undermining political interference in Nigeria, the EFCC has managed to hold its ground, arguably

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[69] Transparency International Kenya, The Kenya Bribery Index 2007, 6, (Transparency International, 2007).
[70] BBC, supra note 66.
[71] Politics Sinks Kenya's War on Graft, in BBC News, 14th September 2007, available at: http://news.bbc.co.uk/1/hi/world/africa/6993826.stm

from the leverage it obtained from its early success, which raised its international profile and gained widespread civil society and media support.

From the foregoing analysis, it is evident that Nigeria's EFCC and South Africa's DSO comprised two of the continent's most touted anti-corruption agencies. Both shared international notoriety, as much for praise abroad as for controversy at home. They hailed, however, from opposite ends of the structural spectrum. The EFCC boasts a multi-purpose mandate and structure evocative of Hong Kong's oft-replicated Independent Commission against Corruption (ICAC). Established outside the office of the Attorney General, it harbours public education duties in addition to investigation and prosecution duties. The DSO, by contrast, oversaw a narrower jurisdiction. Created as a unit within the National Prosecuting Authority, it possessed a mandate more specifically tailored to the goal of prosecution. Yet notwithstanding their differences, both heralded rare and early praise for actively prosecuting the heretofore untouchables. The only conclusion possible from their experience is that autonomous statutory bodies possessed of prosecutorial powers have much leverage and chances of success in fighting corruption as opposed to those that derive their mandate from the office of the Attorney General.

Commenting on the politics behind anti-corruption reform in Africa, Letitia Lawson[72] argues that previous research on anti-corruption reform in Africa falls into two camps. The first explores 'best practices' and policy approaches to controlling corruption while the second focuses on the politics of anti-corruption 'reform', arguing that official anti-corruption campaigns aim to mollify donors while using corruption charges instrumentally to undermine rivals and shore up personal loyalty to the country's Chief Executive, and thus have no chance of controlling corruption.

While agreeing that the neo-patrimonial context prevalent in Africa is a very significant limiting factor in anti-corruption reform, Lawson contends that limited progress is still possible. Examining the motivations and effects of anti-corruption reforms in Kenya and

[72] Lawson, Letitia, 'The Politics of Anti-Corruption Reform in Africa', Journal of Modern African Studies, 47, 1 (2009), pp. 73-100, Cambridge University Press, 2009.

Nigeria, Lawson opines that while the Kenya Anti-Corruption Commission has been politically and largely ineffectual, the more autonomous and activist, but politically "instrumentalised", Economic and Financial Crimes Commission (EFCC) of Nigeria has had a measure of success. Interestingly, she attributes this difference in the levels of efficacy of the two institutions to the EFCC's independent prosecutorial powers and 'the institutionalization strategies of its chairman'.[73]

Lawson's findings indeed confirm the author's view that anti-corruption commissions in Africa would benefit most from the "multi-purpose model" with law enforcement and prosecutorial powers. Having prosecutors and investigators working in partnership under one body ensures the specialization and streamlining of functions required to efficiently handle anti-corruption cases from the beginning to the end. It further allows for effective relationships and indeed a rapport to develop between investigators and prosecutors, something that is highly lacking in the present scenario between KACC and the Attorney General's office.

This prosecutorial function gives the EFCC much greater legal authority than that bestowed on KACC, and removes the Attorney General as a potential roadblock between the anti-corruption agency and the corrupt politicians.

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[73] Ibid at p.89

CHAPTER 4

FINDINGS AND RECOMMENDATIONS

"Law ..... is human reason, in so far as it is the (common) standard that regulates the lives of all people..... It thus must be of a character uniquely suited to the particular people for whom it has been enacted; so that it would be but by pure coincidence, if the laws of one nation were to work (normally) in another nation."[74]

4.1 Introduction

This study sought to interrogate the reasons behind the fledgling campaign against corruption in Kenya. It was observed that compared to others, Kenya occupies the unenviable position of being considered as one of the most corrupt countries in the world, ranking 147th in Transparency International's 2008 Corruption Perceptions Index (CPI).[75] As seen in Chapter 2 hereof, the country has also experienced some of the most high profile, international corruption scandals, including the Goldenberg and Anglo Leasing scandals. The observation that the country's anti-corruption campaign remains a project in questionable progress contrasts sharply with the fact that the three regimes which have ruled the country since independence in 1963 have been accompanied by charges of unabated corruption, mismanagement of national resources and frequent promises to introduce transparent governance.

In late 2002, the newly elected government of Mwai Kibaki took office on an anti-corruption platform and proceeded to enact the Anti- Corruption and Economic Crimes Act, (Act No.3 of 2003) which established the Kenya Anti- Corruption Commission (KACC). While the preamble to the Act described it as an Act of Parliament to provide for the prevention, investigation and punishment of corruption, economic crime and related offences, the anti-corruption agency created thereunder has been said to 'lack the teeth' to bite corrupt officials. In a 2007 Press Release, KACC stated that 332 complete

[74] Montesquieu in Del'Espirit des lois

[75] Transparency International , Corruption Perception Index 2008, available at: http://www.transparency.org/policy_research/surveys_indices/cpi/2008. Accessed on 14 September 2009.

investigations files had been forwarded to the Attorney General since it commence operations in September 2004, 231 of which recommended prosecution. As at the time, 107 of the cases cited had been concluded in court where only 32 convictions were secured. These figures amounted to a conviction rate of merely 30% and were further criticised for not including any of the so-called 'big fish'.

While it lasted, KACC did not have prosecutorial powers and it could only recommend cases to the Attorney General for prosecution. Article 79 of the Constitution of Kenya 2010 provides for the establishment of an independent Ethics and Anti-Corruption Commission with the mandate to enforce the provisions of Chapter 6 of the Constitution and to prevent and combat corruption. As the implementation of the Constitution got underway, Parliament was required to pass various pieces of legislation within certain timelines. An Act of Parliament establishing the new Ethics and Anti-Corruption Commission was in this regard required under the Constitution to be in place not later than 27th August 2011[76].

Considering the lack of prosecution as significant drawback to the fight against corruption, a bill drafted for this purpose proposed to give the proposed Commission, among other functions, the mandate to prosecute corruption and economic crimes without reference to any other person or authority[77]. As matters turned out however, following an acrimonious debate on the Bill in Parliament on 25th August 2011, the Legislators voted to delete the section that would have given prosecutorial powers to the new anti-graft agency[78]. As a result, the Ethics and Anti-Corruption Commission Act, published on 5th September 2011[79] has retained the old position and the new Ethics and Anti-Corruption Commission (EACC)[80] once again lacks prosecutorial powers and shall be required to submit a report of its findings on investigations to the Director of Public Prosecutions

[76] Under the Fifth Schedule of the Constitution enacted pursuant to Article 261(1) thereof.
[77] Daily Nation, May 19, 2011.
[78] Daily Nation, August 26, 2011.
[79] Kenya Gazette Supplement No. 109 (Act No. 22 of 2011).
[80] Established under Section 3 (1) of Act.

who, like the Attorney General before him, shall decide on whether or not to initiate a criminal prosecution against any suspect[81].

This study sought to interrogate the question whether or not Kenya's anti-graft agency requires prosecutorial powers in order to be more effective and efficient, and further sought to make appropriate recommendations for legislative and institutional reforms.

4.2 Findings

4.2.1 Lack of Prosecutorial Powers hampers the effective war against corruption in Kenya

This study has shown that the current legal framework provided under both the Anti-Corruption and Economic Crimes Act No. 3 of 2003 as well as under the Ethics and Anti-Corruption Commission Act, No. 22 of 2011, limit the anti-corruption commission to merely carryout investigations and to leave the prosecution of offenders to the Attorney General and/or the Director of Public Prosecutions. It has been observed that this situation is far from satisfactory. This is because, as we have seen, the State Law office may decide not to prosecute individuals even after investigations are completed and a recommendation made for their prosecution. This situation is further compounded by the fact that the two Acts of Parliament are also silent on the timeframe within which the cases forwarded to the State Law office should be prosecuted.

As we have seen in the case studies of both South Africa's Directorate of Special Operations (DSO) and Nigeria's Economic and Financial Crimes Commission (EFCC), the ability of an autonomous body to carry out its own prosecutions without seeking governmental consent or sanction is a welcome fillip that enhances the efficacy and profiles of such bodies in the war against corruption.

While it is granted that there are a number of variables that could play a role in explaining the rate of conviction of corruption suspects by courts, it is submitted that the absence of a specialised, in-house prosecution unit and the lack of inter-agency

[81] Section 11(1) (d) of the Ethics and Anti-Corruption Commission Act, No. 22 of 2011.

cooperation and coordination is arguably one of them. The absence of prosecutorial powers leads to unnecessary delays in commencement and disposal of cases, inconsistencies in positions taken on the evidence by various players and lack of effective control of cases in the course of trial.

4.2.2 Powers to Prosecute corruption and economic crimes are not the exclusive Constitutional preserve of the Attorney General/DPP.

Looking at the emerging anti-corruption jurisprudence emanating from Kenyan courts, it is clear that our courts have and continue to give anti-corruption laws and the Constitution a literal interpretation without any regard to the spirit of the law or the 'mischief' the enactments were intended to address. Save for the decision in the Meme Case, Kenyan courts appear to have concluded that the exercise of prosecutorial powers is a monopoly of the Attorney General. By tracing the history of the acquisition and exercise of prosecutorial powers by the Attorney General in Chapter 2 of this study, we have clearly shown that powers of criminal prosecution are not the exclusive preserve of the AG. Indeed it is clear that the exclusive, unregulated and unaccountable manner in which the AG has exercised such powers hitherto in Kenya had negative effects in the fight against corruption. This is more so where, as we have seen, the AG simply decides not to prosecute or simply returns the files to the anti-graft agency on the excuse that the evidence is not sufficient. In other cases, the AG would often use his constitutional power of nolle prosequi to terminate corruption charges against corruption suspects on grounds that can only be described as tenuous.

In the Report of the Bosire Commission of Inquiry into the Goldenberg Affairs[82], the Commission criticised this practice and commented in part:

> *"we have given an outlay of the manner in which the State Law Office dealt with the Goldenberg scam. We have noted that it was engaged in ostensibly selective prosecutions. There is no cogent evidence however to enable us state with any*

[82] Republic of Kenya, Report of the Judicial Commission of Inquiry into the Goldenberg Affair; Chairman Justice Bosire, 2005, 272-280.

degree of certainty whether these actions and omissions were designed or coincidental. They could have been caused through sheer negligence and inattention. They could have been an orchestrated cover up intended to aid and abet the culprits of the Goldenberg scam or to subvert the course of justice".

The cases analysed in Chapter 2 demonstrate clearly that the AG has tended to manipulate the system of justice and in a sense undermined the operations of courts of law in dispensing justice.

It is evident that the interpretation previously given to Section 26 of the repealed Constitution in such cases as Gachiengo were completely erroneous and that the correct position is that the Constitution envisages a situation where any other person or authority can commence and undertake criminal prosecutions. Article 157(12) of the Constitution of Kenya, 2010 confirms this position by giving Parliament the power to enact legislation conferring powers of prosecution on authorities other than the DPP.

4.2.3 The Power of investigation and prosecution can be vested in the same body.

One of the arguments raised against combining both investigative and prosecutorial powers is the claim that the separation ensures objectivity and avoids a situation where one body misuses its powers to oppressively bring prosecution against citizens. In our submission, such a situation can be avoided by structuring the functions of the agency in such a manner that avoids subjectivity and eliminates conflict of interest. The KACC structure which subsists to-date is such that the Directorate of Investigations and Assets Tracing carries out its investigative functions before handing over the investigations file to the Legal Services Directorate. This Directorate then carries out an independent quality evidence analysis of the file and only recommends charges where it is satisfied that an offence is disclosed.

While the prevailing literature in this field of study hold that prosecution remains a separate, external function to the anti-corruption commission model, it ought to be appreciated that anti-corruption commissions with investigative and prosecutorial

functions do exist. South Africa's DSO (during its existence prior to 2008) and Nigeria's EFCC are but two examples of such bodies. Given Kenya's situation in which public sector institutions are hardly developed and where lack of inter-agency cooperation and coordination due to rivalry and over-protection of information is a predominant feature, there is need to have both these functions in one agency to avoid the risk of dilution of strategy and focus.

The efficient and timely handling of cases can increase the likelihood of successful prosecutions, which in turn, reinforces the organizational structure and creates public confidence in the body.

4.2.4 Absence of Prosecutorial Powers makes the anti-corruption commission vulnerable to interference and manipulation by the A G/ DPP.

The current institutional framework is such that the anti-corruption commission carries out investigations, forwards the investigation files to its Legal Services Directorate which scrutinises the files and where it is satisfied that sufficient evidence of the commission of an offence exists, forwards the files to the State Law Office. As we have seen, in a number of instances, the AG would return the files citing lack of evidence or calling for further investigations. This process is not only frustrating but extremely weakens the position of the Commission as however much it is convinced it has evidence, it cannot proceed to prosecute anyone once the AG declines to do so. The process is equally duplicitous and time-wasting given that the file is prepared by qualified Advocates at the Commission who again forward it for further analysis to other Advocates at the State Law Office.

4.3 Recommendations

Arising from the study and my accumulated experience since joining the Commission on 2nd October 2006, certain measures can be proposed that might enhance the fight against corruption and economic crimes in Kenya.

First and foremost, there is need to review and enhance the anti- corruption legal framework itself. In this regard:

a) Article 79 of Kenya's new Constitution requires Parliament to enact legislation to establish an independent ethics and anti-corruption commission. This is a highly positive step as the Commission has always sought to be anchored in the Constitution to insulate it from the shenanigans of the corrupt who have time and again sought to disband it and or curtail its powers. There is therefore need to move with urgency to create the body envisaged under the Constitution and to clothe it with necessary independence and powers. Such a move will adequately deal with many of the challenges the Commission encounters in court. It will also immunize the Commission against constant threats of disbandment and give its staff a sense of employment security.

b) The new EACC Act was put up in a hurry and the amendments made to ACECA by repealing Part III A thereof has left numerous inconsistencies in the Act which would need to be addressed. For instance, while the repeal of Part IIIA appears to have abolished the position of the Director to the Commission, all the other parts of ACECA still refer to the Director as the Chief Executive of the Commission. Again, while Section 35 of ACECA requires the Commission to submit its Report following an investigation to the AG, the EACC Act now requires under Section 11(1)(d) for the same Report to be submitted to the DPP. There is therefore an urgent need to return the EACC Act to Parliament to be synchronised with other existing legislation.

c) The Commission should be granted power to prosecute the offenses it investigates. Experience has shown that in Africa, those Commissions with a combined investigative and prosecutorial mandate have succeeded better than those with only an investigative mandate. The Attorney General already does delegate his powers to prosecute to other bodies such as the Kenya Police, the Kenya Revenue Authority and many other bodies including Local Authorities.

Article 157 (12) of the Constitution now bestows on Parliament authority to enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecutions. KACC needs such powers in order to be more effective. Concerns have been raised on separation of powers and the potential for abuse by the concentration of such powers in one institution. It would therefore be necessary for Parliament to hedge in such powers with appropriate safeguards. However, given the examples of the EFCC which is successful with prosecutorial powers and Botswana's DCEC which operates without them, it is clear that the explanation for better anti-corruption performance goes beyond mere powers to prosecute. The study therefore recommends that the EACC be granted prosecutorial powers in harmony with the DPP' s constitutional mandate.

d) It is necessary to restore the special powers of investigation the Commission exercised prior to the legislative amendments of 2007 which considerably whittled down its powers. In particular, there is necessity for the Commission to ask any person reasonably suspected of corruption and their associates to provide a list of their properties and how the same were acquired. It is also necessary to restore the power to ask for information and the production of documents without first obtaining court orders and to provide that the information and documents so supplied may be used in evidence. At the moment, the Commission is deprived of the element of surprise which is so necessary in investigations and the information it gathers is almost academic as it cannot be used against suspects. The new EACC Act appears to have weakened the Commission as unlike ACECA, it is silent on whether or not the Commission may cooperate with foreign bodies in carrying out investigations and /or for purposes of mutual legal assistance (MLA).

e) The law should designate all investigative agencies established by law to be Competent Authorities for purposes of seeking and obtaining Mutual Legal Assistance and further that all the information so obtained will be admissible in evidence.

Secondly, there is need to enhance the capacity of the entire justice system. More resources, financial and human ought to be availed to the investigative agencies, the prosecutorial services and the judiciary. The legal sector should be seen as a necessary infrastructure for national growth and prosperity.

Thirdly, there is need for new legislation to strengthen and underpin the anti-corruption struggle. Laws on Anti-Money Laundering and Proceeds of Crime, Mutual Legal Assistance, Witness Protection and Freedom of Information are all a must.

The study also found that there are uncoordinated approaches, duplicity and in some cases overlaps in mandates of the institutions charged with the fight against corruption. These lead to unnecessary conflicts, confrontations and buck passing. It is therefore recommended that the Government should develop and implement a proper framework for coordination of the investigations and prosecution of corruption and economic crimes. The roles of each institution should be made clear and the anti-graft agency should be made the lead agency in spearheading corruption investigations and prosecution.

In conclusion, the most important element of any anti-corruption effort is political will. Without a clear commitment and leadership on the issue from the top, an anti-corruption commission can never be effective or gain public confidence. Lessons learnt over the last 7 years of the Commission's existence show that while a specialized anti-corruption agency can help to focus and inform the fight against corruption, it cannot replace a non-performing Attorney General, a compromised Judiciary and an endemically corrupt Police Force. The new Constitution recognizes this by anchoring the eradication of corruption and open, transparent and accountable government in the national values, principles and goals.[83]

[83] See Article 10 of the Constitution.

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