



UNIVERSITY OF NAIROBI

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INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES

BREAKING THE CYCLE OF CORRUPTION IN AFRICA: A CASE STUDY OF KENYA

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SUPERVISOR

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REQUIREMENT FOR THE AWARD OF A DEGREE IN MASTERS OF ARTS IN
DIPLOMACY**

2018

Declaration

This research is my original work and has not been presented with a degree or other award in any other university. No part of this research proposal should be reproduced without authority of the author or and University of Nairobi.

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Dedication

To my mother Anne, my brothers Ben and Wilson.

Acknowledgement

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List of Statutes

Constitution of Kenya (2010).

Ethics and Anti-Corruption Act (2011).

Proceeds of Crime and Anti Money Laundering Act (2009).

The Witness Protection Act No. 16 of 2006

The leadership and Integrity Act 2012

Bribery Act of 2016

United Nations Convention against Corruption (2004).

New Zealand Constitution Act of 1852.

Abbreviations and Acronyms

AU	African Union
ACECA	Anti-Corruption and Economic Crimes Act, No 3 of 2003
DPP	Director of Public Prosecution
EACC	Ethics and Anti-Corruption Commission
IFMIS	Integrated Financial Management Information System
KACA	Kenya Anti-Corruption Authority
KACC	Kenya Anti-Corruption Commission
KACC	Kenya Anti-Corruption Commission
NACCSC	National Anti-Corruption Campaign Steering Committee
NACP	National Anti-Corruption Plan
NCPB	National Cereals Produce Board
NYS	National Youth Service
POCAMLA	Proceeds of Crime and Money Laundering Act
POEA	Public Officer Ethics Act
UNCAC	United Nations Convention Against Corruption
SPSS	Statistical Package for Social Sciences

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Abstract

This study is about breaking the cycle of corruption in Africa, a case study of Kenya. This research used Kenya as the study object to represent Africa. Consequently, the study assessed the reasons why corruption persist despite having anti-corruption strategies, adequate legal and institutional frameworks and opportunities for fighting corruption in Kenya. The study also set out two hypotheses which assessed the ineffectiveness of the legal and institutional frameworks in breaking the cycle of corruption and looked into the political, economic and social-cultural factors that perpetuate corruption in Africa. The study was informed by the rational choice theory which attributes persistence of corruption to absence of accountability mechanisms. It utilized both quantitative and qualitative data analysis. A structured questionnaire was distributed to EACC officers through random sampling.

The research found out that political, economic and social-cultural factors perpetuate corruption. It further established that legal and institutional frameworks in place are not effective in investigation and prosecution of corruption cases. Moreover, the study identified opportunities and prospects for fighting corruption in Kenya by examining lessons that can be learnt from Botswana and New Zealand as these countries have been reported to have low corruption levels.

The research recommends promotion of independence in institutions fighting corruption, strengthening of the legal and procedural frameworks for prosecution of corruption cases and asset recovery. The study recommends integration of institutions including the judiciary, the regulatory agencies, ombudsman, public prosecutors, the media, citizen groups and other non-governmental organizations to collaborate in the fight against corruption. In addition, the research recommends positive political will and transformational leadership at all levels of political landscape to break the cycle of corruption.

Chapter One

Introduction to the Study

Background of the Study

Corruption is not new in the world. Globally, corruption affects governments and public institutions.¹ It diminishes confidence in political leadership and undermines the rule of law in a country. In addition, corruption distorts distribution of resources which affects market competition and impact investment, development and growth of a country's economy.² Research and data survey reflects Hungary as the most corrupt country in Eastern Europe.³ The former chancellor of Germany Helmut Kohl was penalized for receiving illegal campaign funding.⁴ In Italy, a report from state auditor shows that corruption has increased.⁵ In France, housing officers and businessmen have been prosecuted for taking bribes.⁶ In Australia, Wolfgang ended his career because of corruption cases.⁷

A number of scandals have shaken various countries around the world including Japan, Mexico and United States of America. Daniel Kaufman states that corruption is not a developing world problem but a global challenge.⁸ These demonstrate that corruption is global; however its effects are dominant in developing countries where resources are taken by government officials.⁹ Bayart argues that a political office in the African states is a route to personal wealth.¹⁰ It would appear that independence of African countries has not prevented corruption because the elite control the political system. In addition, corruption in African countries is due to ambiguous laws, weak structures and institutions.¹¹ Many African countries are characterized with a high level of corruption that involves interwoven

¹ Klaveren, V. The Concept of Corruption, In Heidenheimer, pp 25-28.

² Ibid.

³ Worldwide Governance Indicators and Quality of government EU regional survey data 2017.

⁴ <http://news.bbc.co.uk/2/hi/europe/8527593.stm> accessed 30 July 2018.

⁵ Ibid

⁶ Ibid.

⁷ Ibid

⁸ Ibid.

⁹ Bayart, J. (1993). The State in Africa: The Politics of the Belly, London, Longman Publisher, pp. 101.

¹⁰ Ibid.

¹¹ Rose-Ackerman, S. (2006). International Handbook on the economics of corruption, Northampton, Edward Elgar.

networks of bureaucrats, politicians, security sector and private sector. Further, African states have high poverty rates and weak institutions. In attempt to break the cycle of corruption, African States have come up with strategies to deal with corruption. However, the experiences of the mechanism used to fight corruption face criticisms for being ineffective.¹²

In Kenya, corruption manifest itself in petty and grand corruption cases. Petty corruption is where people have to pay money to obtain public services.¹³ Grand corruption is a high level scandal that is often reported in Kenyan headlines involving substantial amounts of public funds. The Goldenberg Scandal was the first major Kenyan corruption scandal in 1990s where government officials were implicated and it cost the nation over ten percent GDP. The Anglo-leasing case involved high value contracts entered into by the Government of Kenya with various parties, some of doubtful identity. The contracts related to security and communication projects and were awarded secretly without any bidding purportedly on state security notwithstanding the fact that some of those contracts had nothing to do with state security. Further, the commitment to pay the contract price was made outside the Government budgetary process and without the approval of Parliament and as a result the government lost Kshs 56.3 billion.¹⁴

Kenya has experienced numerous corruption and economic crime outrages. Since 2008, the Maize scam, Triton Oil scandal, Free Primary Education funds misappropriation, Eurobond scam, Tokyo Embassy scandal, Chicken gate, National Youth Service scandal, Ministry of Health scandal, National Cereals and Produce Board among others where billions of public funds have been misappropriated.¹⁵ It is therefore important to scrutinize the reasons why corruption still persists even after vast mechanisms have been put in place in African countries to fight it. Doing so will enable the

¹²Zwart, S.(2008).The fight against corruption, Kampala Uganda, 2008.

¹³ Gichio, D.(2014). Public Procurement in Kenya: Cash cow for the corrupt or Enabler for Public Service Delivery, Nairobi.

¹⁴Ibid.

¹⁵ Ibid.

recommendations and implementation of appropriate measures to diminish corruption levels and enhance economic development and growth.¹⁶

1.1 Statement of the Research Problem

Africa faces many challenges. It is a continent with resources and cursed with economic and political greed. Further, corruption is stated to cost as much as 5 percent of global GDP every year.¹⁷ It creates deviations in investments, undercuts political institutions, and increases inequality, poverty and is generally argued to decrease economic growth. Corruption is also a phenomenon that is adversely affected by the political decision-making class. Whether corruption is high or low, criminalized or not, it very much depends on the political will of a country.¹⁸

Kenya's image globally continues to deteriorate due to corruption hence losing the investor confidence and making development and industrialization a pipe dream. Reported levels of corruption and bureaucratic interferences have negatively affected the performance of Government institutions in Kenya. Corruption and looting is continuously been undertaken within a fairly complex network of individuals and groups with access to enormous wealth, power and influence in both the public and private sector.¹⁹ The study seeks to determine why corruption is still very persistent despite having mechanisms in place. In addition, the research will also seek to find effective mechanisms of breaking the cycle of corruption in the African states and particularly in Kenya.

¹⁶ Ibid.

¹⁷ Lambsdorff, J. (2003) How Corruption Affects Productivity, *Ryklos* Vol. 56(4), pp 459–476.

¹⁸ Ibid

¹⁹ Ibid.

1.2 Objectives of the Study

The specific objectives of the study will be:

- 1.2.1** To evaluate the adequacy of the legal and institutional framework in the effective investigation and prosecution of corruption cases in Kenya.
- 1.2.2** To examine the extent and magnitude of corruption Kenya.
- 1.2.3** To identify and propose opportunities and prospects for fighting corruption in Kenya.

1.3 Research Questions

The following questions which will guide the study include:

- 1.3.1** Is the existing legal and institutional framework adequate for effective investigation and prosecution of corruption cases?
- 1.3.2** What is the extent and magnitude of corruption in Kenya?
- 1.3.3** What are the opportunities and prospects of fighting corruption in Africa?

1.4 Hypotheses

- 1.4.1.** The legal and institutional framework is not effective in breaking the cycle of corruption.
- 1.4.2.** The political, economic and social-cultural factors perpetuate corruption in Kenya.

1.5 Literature Review

This study does not claim pioneer authorship on the broad issue of ending corruption in Africa. It has been inspired and it shall be enriched by a number of writings in the field. It will look at four thematic areas. These are: why corruption persists even after vast mechanisms have been put in place; the effectiveness of institutional and legal framework to fight corruption; the dimensions of corruption in Kenya and the opportunities which African countries can explore in combating corruption.

There is a wide range of literature that offers the causes and effects of corruption. However, there is

no much literature on why corruption persists even after implementing strategies to fight it. This is because the causes and reasons why corruption persists intertwine.²⁰

Nelson and Winter in their book “An evolutionary theory of economic change”²¹ argue that corruption is entrenched in a society. The economic, political and cultural suffering that people experience affects their behavior, which impacts the development of the corrupt behavior. They argue that for those people involved in corruption activities to survive in an evolving environment, their capabilities keep on changing in order to take up opportunities by offering new answers.²² The authors attribute the persistence of corruption on the complexity of the corrupters whose behavior cannot be predicted in the short and long term. The book is relevant to the research because it highlights the complexity of corruption and its ability to respond to any change in its environment.

Husted in his article “Globalization and Cultural Changes”²³ argues that globalization has expanded corruption. The international economic integration due to market openness has changed global structures and created new and dynamic nature of corruption. Due to the adaptive character of corruption, many countries prefer to abandon or replace the old strategies with new ones.²⁴ This article is relevant to the research because it informs the reader that globalization has made corruption persistent.

²⁰Bicchieri, C. (1995) Evolutions and Revolutions: the Dynamics of Corruption; Rationality and Society, Vol. 7, pp.201-224.

²¹Nelson, R. and Winter, S. (1982). An Evolutionary Theory of Economic Change: Cambridge: Harvard University Press, pp. 160.

²²Ibid.

²³ Husted B. (2003) Globalization and Cultural Change in international business research: Journal of International Management, Vol. 9, pp. 427-433.

²⁴Ibid.

Tirole in his article “A theory of Collective Reputations”²⁵ argues that corruption persists due to the social character of mankind. This is because corrupt individuals desire to interact with other corrupt individuals in the same society, thus creating a particular history for the corrupt system. Tirole emphasizes that corruption is persistent in certain institutions because every society presents a collective reputation which, when spontaneously formed, may modify the incentives of its people to be corrupt. Spontaneous change on ethical values of a society may cause corruption to be persistent.²⁶ According to Aidt,²⁷ history of corruption in a society is a crucial determinant of corruption persistence in presence of dynamic strategies. Thus, incentives of an individual to be corrupt are affected by others not only because of their desire to be accepted or approbation, but because the individual character is not an isolated element in society. Corruption is considered a complex phenomenon which makes it difficult to design strategies to combat it.

Sandholtz in his article “Accounting for Corruption”²⁸ argues that the persistence of corruption in a society depends on structural and cultural factors. The structural factors have widely received attention from scholars in the field of political economy who argue that the structure of opportunities and constraints are basic determinants of corruption.²⁹ However, the research is mainly interested in the cultural factors that cause persistence of corruption. Culture is defined as “a general disposition to act in a certain way in different situation”.³⁰ Thus, there is a tendency of cultural patterns to replace themselves through socialization, which leads to general expectation of continuity. There is an acceptance that cultures do change, but when it does, the change is slow even when the environment

²⁵Tirole , J. A. (1996) Theory of Collective Reputations with Applications to the Persistence of Corruption and to Firm Quality, *The Review of Economic Studies*, Vol. 63, pp.1-22

²⁶Ibid.

²⁷Aidt , S. (2003) Economic Analysis of Corruption: A Survey, *Economic Journal* Vol. 113 pp. 632–652.

²⁸Sandholtz, A. (2000) Accounting for Corruption: Economic Structure, Democracy, and Trade. *International Studies Quarterly*, Vol.44 pp. 31-50.

²⁹Rose-Ackerman, S. (1995) *Corruption and Government Causes, Consequences and Reform*, Cambridge University Press, Cambridge pp. 50.

³⁰Eckstein, H. (1988) "A culturalism theory of political change." *American Political Science Review*, Vol. 82, pp. 789-804.

changes substantially.

Guhan³¹ in his book “Corruption in India: Agenda for Action” argues that corruption is common and part of life in developing countries. This is because society has learnt to live with it and considers it as an important part of their culture. Guhan gives an account of corruption in India.³² The author argues that that public officials require that citizens pay bribes in order to receive government services or be awarded government contracts. Therefore, culture helps spread corruption and make it persistent in our society.

The literature review makes reference to Botswana and New Zealand in a comparative study. This is because the two countries serve as a good example of states that have been lauded for good governance and diminutive corruption.³³ In the study of corruption, the research will compare across different units of analysis and identify the causal mechanisms that explain the different degrees of success in fighting corruption.³⁴ The variables that the research will consider include institutional reforms and role of political leadership. By examining cross-national similarities and differences of Kenya, Botswana and New Zealand, it is possible to formulate and test rival explanation about resilience of corruption to reform efforts. Therefore, comparing the three countries will contribute to progressive accumulation of knowledge about persistence of corruption and strategies of fight it.

Breaking the cycle of corruption is inhibited by a number of factors common in all countries trying to fight the menace.³⁵ These factors include the spillover effects and lack of political leadership which factors will be discussed in details in chapter four. Therefore, the comparative study of corruption will be useful for comparing the degree of success of different states in overcoming the obstacles in fighting corruption.

³¹Ibid.

³²Ibid.

³³Ibid.

³⁴Culpepper, P. (2005) Single Country Studies and Comparative Politics” Italian Politics & Society, Vol. 60 pp. 2.

³⁵Ibid.

In Africa, there are aspects that are relevant when dealing with corruption. For example anti-corruption measures are hampered by the traditional lack of distinction between public and private interests, lack of awareness and neo-patrimonial structures.³⁶ That is why a comparative study of an African state such as Botswana is attractive to the study. Botswana and Kenya are subject to similar constraints in fighting corruption but there is diverging success in their efforts to fight corruption. The rating of Botswana in Transparency International's Corruption Perception Index ranked at position 38 out of 180 indicate that the country's anti-corruption strategies are working immeasurably compared to other African states.³⁷ Kenya is ranked position 140 out of 180 countries.³⁸ This makes Botswana an ideal comparative example.

1.6 Theoretical Framework

Theoretical framework is the structure upon which a research study is anchored and supports an existing theory. The theoretical framework presents the theory which gives insights as to why the research problem is under scrutiny.³⁹ In the study of corruption, there are several theories that offer credible theoretical framework for analysis of the issue. For purposes of this research the principle-agency theory and rational choice theory will be applied because they offer causes of corruption, an explanation as to why corruption is persistent and they give anti-corruption strategies that can be used can be used to fight it.

The principle-agency theory construes a political system with a network of principle agent association that comprises of citizens, state officials, the executives and civil servants.⁴⁰ Corruption arises when the agent who can be a junior civil servant, having an advantage over the access to critical

³⁶Ibid.

³⁷Transparency International (2007): "Corruption Perceptions Index 2016.

³⁸ Ibid

³⁹ Graeff, P. and Stebl, A. (2010) Modeling a Rational Choice Theory of Corruption: Norms as a Theoretical Feature of Corruption. Venice, ITA: Venice International pp 260

⁴⁰Shapiro, S. (2005) Agency Theory: Annual Review of Social Science, Vol. 31, pp. 263 – 284.

administrative information compared to the principle who can be a senior civil servant. The junior civil servants goes against the wishes of the senior civil servant to solicit a payoff which he or she never forwards to the principle.⁴¹ This kind of relationship is defined by how the incentives are arranged; the agent asking for payoff may be acting individually or representing the principle.⁴² This means that the position of principle or agent may change depending on a researcher's area of analysis. Proponents of the theory argue that agent's actions of receiving payoffs or bribes for personal gain may not interfere with the principal's interest.⁴³ However, the principal's inadequate access to important information may threaten his or her interests. In order to prevent this, the principle has three options that can be used to ensure that the agent executes only those assignments that may fulfill his interests. These include giving directives, incentives and persuasion to save supervision costs.⁴⁴ However, the agent may beat the principal's monitoring system or refuse to carry out principal's directive without necessarily compromising the principal's interests. The agent is better placed to take advantage over the incentives which may range from increased allowances initiated by the principals through concealing his or her actions. Therefore, if the principal is ignorant, he or she is in a vulnerable position and at the advantage of the corrupt agent. This is applicable in public institutions that have weak mechanism of ensuring effective control measures of monitoring agent conduct.⁴⁵ The principal-agent theory is only applicable in as far as explaining the causes of corruption. The reason why the theory is highlighted is to give a brief background on causes of corruption before moving to the reason why it persist. The theory fails to address the question why corruption persists and anti-corruption strategies that can be applied to deal with corruption.

According to Pardo, rational choice theory of corruption offers credible analysis of why corruption

⁴¹ Ibid.

⁴² Ibid.

⁴³ Groenendijk N, A. (1997) Principal-Agent Model of Corruption; Crime, law and Social Change, Vol. 27, pp. 203-227.

⁴⁴ Ibid.

⁴⁵ Ibid.

persists and anti-corruption strategies.⁴⁶ Rational choice theory offers an understanding of corruption, why it's persistent and it conceptualizes strategies that can be used to fight corruption. Rational choice theory is grounded on the assumption that human behavior is inherently directed at achieving conscious objectives and that the human individual is a "benefit maximize".⁴⁷

Rational choice theory attributes persistence of corruption to political economy.⁴⁸ This resonates in the African and Kenyan situation in which corruption continues to persist due to ineffective and weak political economy.⁴⁹ The rational choice theory considers corruption as persisting due to the absence of accountability mechanisms. In rational choice theory of corruption, there exists an inherent mutual benefit for the person giving the bribe and the person receiving the bribe. However, the gains of the person giving out the bribe are low compared to the person receiving the bribe.⁵⁰ This is informed by the fact that the person giving the bribe has a constitutional right to receive services from the public official. In Kenyan cases, the services maybe in healthcare, education, security and clean environment which are constitutional rights enshrined in the Constitution.⁵¹ Therefore, giving out bribes to public officials in order to access services or hasten the provision of the services is only beneficial to the public official receiving the bribe and not the citizen giving out the bribe. The culture of giving bribe has become embedded as a way of life to many Kenyans.

⁴⁶ Pardo, I. (2004) *Between Morality and the Law: Corruption, anthropology and comparative society*, Aldershot, UK: Ashgate

⁴⁷ Ibid.

⁴⁸ Gephart, M. (2009) *Contextualizing Conceptions of Corruption: Challenges for the International Anti-Corruption Campaign*. GIGA Research Program. No. 115.

⁴⁹ Ibid.

⁵⁰ Agbaje, A. (2004) *Corruption, Accountability and Good governance: Reflections on governance in Nigeria Fourth Republic 1999-2003*. *International Review of Politics and Development.*, Vol. 2, No. 2, pp. 23 - 47

⁵¹ Ibid.

Proponents of rational choice theory assume that the main actors make a decision to persistently engage in corruption on a cost benefit basis which hinges on economic realities that both actors are experiencing at the time of the encounter.⁵² Therefore, corruption is considered a crime of calculation.⁵³

Rational choice theory also offers a framework of fighting corruption.⁵⁴ Back argues that cultural factors influencing the understanding of how delegated power is to be used and how abuse of authority is to be conceptualized are based on the rational choice institutionalist conception of corruption.⁵⁵ The perception and underpinning of rational theory of corruption offers the best conceptualization of why corruption is persistent and the issues that are critical for this research. Therefore, the research adopts rational choice theory to examine why corruption is persistent and strategies of combating corruption in African and Kenya.

1.7 Justification and Significance of the Study

1.7.1 Academic Justification

Great efforts have been made by African states to come up with anti-corruption mechanisms that include legal and institutional framework. By assessing the adequacy of the existing legal and institutional framework for investigation and prosecution of corruption cases, the study will provide critical information which will prove vital to African scholars who are trying to recommends ways to fighting corruption. The research will revive scholarly interests in corruption and as a result, and motivate them to conduct further studies on the issue of corruption in Africa. In addition, the research will prove important to future researchers as the recommendations in chapter five will help them in boosting their knowledge about corruption and the effectiveness of anti-corruption strategies thus

⁵² Supra note 56.

⁵³ Ibid.

⁵⁴ Back, H. (2009) Rational Choice and Anti-Corruption Strategies. Aldershot, UK: Ashgate,

helping them carry out relevant research on corruption.

1.7.2 Policy Justification

The study will provide relevant information on various aspects of corruption including causes, mitigation strategies adopted in different jurisdictions and the impact of the mitigation strategies. This information will be important to policy makers charged with the mandate of formulating policies for fighting corruption. In addition, the research will provide critical information touching on policies which have been adopted to break the cycle of corruption and effectiveness of the legal framework. In so doing, the research will be critical to the government as it will provide an evaluation of the war on corruption in Kenya and in the larger Africa. These will help policy makers and the governments formulate better strategies to fight corruption.

In addition, civil societies may use the findings of the study to effectively interact and collaborate with the governments more effectively on matters corruption.

1.8 Research Methodology

1.8.1 Case Study

A case study in social sciences gives a clear picture of the study under investigation. The contextual analysis empower an impressive measure of detail to be assembled that would not be procured by other research traces. The data assembled is normally an extensive measure wealthier and of more conspicuous significance than can be found through other exploratory plans. Case studies tend to be conducted on phenomenal circumstances where large samples of similar partakers are unavailable. Case studies empower experimenters to adapt contemplations and make novel speculations which can be used for later testing.⁵⁶

⁵⁶ Patton, M. (2001) *Qualitative Research & Evaluation Methods*, Thousand Oaks, CA: Sage Publications pp 56.

1.8.2 Data Collection

The study used both primary and secondary data. Secondary data was collected by reviewing books, journals, newspapers on corruption in Kenya and other countries. Primary sources are the subjects of the study who have given actual data collected from the field. The instruments that were administered for data collection included questionnaires. The questionnaire offered a more practical and logical sequence of data collection within a short time and its cost effective. In addition, it was easy for the researcher to quantify the results easily using computer packages. A structured questionnaire was distributed to the EACC officers through random sampling. The study target population was 100 officers at EACC.

1.8.3 Data Analysis and Presentation

A large portion of the data gathered was broken down quantitatively into percentages and presented in charts, tables and graphs. The outcomes were additionally triangulated with secondary data. To guarantee content legitimacy, the research was planned and operationalized according to the extent and magnitude of subject under investigation.

1.9 Chapter Breakdown

Chapter one lays out the background to the study. It proceeds to identify the research problem and rolls it up into a statement of the problem. In addition, the chapter defines the scope of the study and maps out the issues that the study delves into. Chapter two looks at the dimension of corruption in Kenya which contribute to the culture of corruption. It will integrate the data collected in respect to the study the researcher is undertaking. Chapter three is dedicated to the extent and magnitude of corruption in Kenya. Additionally, it delves into the regulatory and institutional framework aimed at fighting corruption in Kenya. Chapter four focuses on comparative study of Botswana and New Zealand and examines the various mechanisms put in place to fight corruptions in these countries and draws lessons for Kenya in the fight against corruption. Finally, chapter five concludes the study by summarizing the previous chapters of the

study, presenting the findings of the study, recommending strategies on the fight against corruption in Kenya and taking a position on the research based on the findings.

Chapter Two

The Extent and Magnitude of Corruption in Kenya

Introduction

Corruption elements include political, economic, sociological and cultural aspects.⁵⁷ Incidence of persistence of corruption in Africa is systemic. There have been numerous strategies formulated to fight corruption. However, corruption keeps on evolving to defeat dedicated attempts to reforms.⁵⁸ These strategies include formulation of laws to curb corruption, training of judicial officers, empowering the civil society and improving the tender award.⁵⁹ However, there is an agreement that all these efforts have been ineffective as corruption keeps adapting and evolving to counter these measures.

A few countries in Africa that can boast of reducing corruption levels such as Botswana and Rwanda. Many African countries including Kenya continue to suffer from higher levels of corruption more than two decades ago.⁶⁰ The question is why corruption persists despite having strategies to fight it? The question can be answered through unpacking of legal, political, economic, and social cultural dimensions of corruption.

2.1 Extent of Corruption Persistence in Kenya

Since independence, Kenya has experienced some of the most infamous cases of corruption in the region as discussed earlier, which have seen billions of Kenyan shillings lost to a few Kenyans without any convictions.⁶¹ The latest resurgence of corruption scandals in Kenya have energized public discontent.

⁵⁷ Doig, A. and Robin, T. (1999) *Corruption and Democratisation*. London: Frank Cass, pp. 65

⁵⁸ Volkema R. (2004) Demographic, Cultural, and Economic Predictors of Perceived Ethicality of Negotiation Behavior: A Nine-Country Analysis, *Journal of Business Research*, Vol. 5, pp. 69-78.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Anassi, P. (2004) *Corruption in Africa: The Kenyan experience*. A handbook for Civic Education on Corruption. Victoria: Trafford, pp. 54

2.1.1 The NYS Scandals

The first NYS scandal was comprised of allegations of a massive conspiracy to defraud the NYS by various companies and their proprietors with the connivance of public officials leading to a loss of Kshs. 791,385,000/-. There was a well-orchestrated scheme to syphon money by making payments on the basis of forged documents for supply of road construction material⁶². The theft of the said Kshs. 791,385,000/- was done through a process of procurement that was not sanctioned by the Ministerial Tender Committee as required. The payment vouchers used in the transactions were processed and honoured despite the glaring discrepancies including the lack of genuine supportive documents and proper scrutiny to detect that the ultimate figures had been tampered with by adding zeros at the end of the digits⁶³.

The evidence obtained by the investigative agencies revealed that the security of the IFMIS system is impenetrable. However, the perpetrators' breach of the IFMIS system as well as the fraud in all the aspects of the illegal processing of and honoring the payments was done so intentionally, for their own use or other unauthorized purpose, yet they had a fiduciary duty to care for and protect the public funds. These actions by the suspects were tantamount to offences under the ACECA as well as the Public Finance Management Act, No. 8 of 2012⁶⁴. The scheme to pilfer the public funds was thus aided by legal persons who played different roles. The suspects were arrested and arraigned in court between August and November, 2016 but 23 of them were discharged in March 2018 for lack of evidence.

The second NYS scandal erupted in 2018 where public officials and private persons were alleged to have caused loss of Kshs 9 Billion of public funds through fictitious tender awards and dubious

⁶² EACC Investigation and Analysis Report on the findings of the NYS Scandal by Ongeru N. in 2016.

⁶³ Ibid

⁶⁴ Ibid

transactions with various legal persons from 2013.⁶⁵ Forty public servants and fourteen businessmen were under investigations by a multi-agency team for undertaking flawed procurement procedures. The cases are pending before court.

2.1.2 The NCPB Scandal

Investigations officials of the NCPB were purchasing maize from brokers and unregistered farmers who had not been vetted to supply maize. It was reported that unscrupulous businessmen were smuggling maize from a neighboring country and selling the same to the NCPB and as a result genuine farmers were denied an opportunity to sell their maize to the Cereals Board since the businessmen were given preferential treatment and delivered in large quantities⁶⁶. The NCPB officials were required to purchase maize only from registered farmers. The list of the registered farmers had circulated to the Depots and Silos. Sometimes in March 2018, the NCPB headquarters in Nairobi noticed that the maize delivery queues were not reducing and there was an outcry from farmers who were on the queues to deliver maize especially in Eldoret, Moi's Bridge, Kitale and Ziwa Depots⁶⁷. This prompted the Cabinet Secretary Ministry of Agriculture to direct that all maize deliveries be preceded by fresh vetting in Eldoret and Moi's Bridge Depots. Purchases for Nakuru were stopped because there had been reported attempts to manipulate the weighbridge. Consequently an audit of the entire exercise was conducted which revealed abnormal deliveries by certain individuals to the NCPB Depots. It emerged that few individuals who were not farmers had colluded with NCPB officials to supply maize in large quantities at the expense of genuine farmers⁶⁸.

In essence NCPB had a budget of Kshs. 15 billion and scrupulous business persons supplied maize using vetting forms indicating fake acreage of land in various sub-location thus denying genuine

⁶⁵ https://www.the-star.co.ke/news/2018/05/28/list-of-suspects-linked-to-sh9bn-nys-scandal_c1764637 (assessed on 21st November 2018)

⁶⁶ EACC Investigation and Analysis Report on the findings of the NCPB Scandal by Nechesa R. in 2018

⁶⁷ Ibid

⁶⁸ Ibid

farmers their rights.

2.1.3 The Anglo-Leasing Contracts Scandal

The Anglo-Leasing Scandal involved high value contracts entered into by the Government of Kenya with various parties, some of doubtful identity⁶⁹. The contracts related to security and communication projects which the Government of Kenya had entered into. All the contracts were awarded secretly without any bidding purportedly on the grounds of state security notwithstanding the fact that some of those contracts had nothing to do with state security⁷⁰. Moreover, the contracts involved three parties; the Government as the purchaser or employer, the supplier and a financier, who would purportedly finance the supplier as per an agreed schedule without further instructions from the Government and irrespective of performance, non-performance or mal-performance by the Supplier or Contractor. In actual fact, substantial payments would be made by the Government before delivery meaning that no financing actually took place⁷¹. Invariably, the persons behind the suppliers were the same ones behind the financiers. The purported financiers were the self-same suppliers. Additionally, the commitment to pay the contract price was made outside the Government budgetary process and without the approval of Parliament.

The major corruption scandals that threaten to erode goodwill and scare away potential investors and donors. Significantly, these fraudulent schemes explode subsequent to similar unresolved scandals. President Uhuru's first term was hit by corruption scandals and he sacked many of his cabinet members who were suspects in these corruption cases and others facing prosecution for procurement malpractices.

⁶⁹ EACC's submissions in JR Application No. 78 of 2015: R vs DPP & EACC Ex Parte Chamanlal Kamani & 2 others

⁷⁰ Ibid

⁷¹ Ibid

2.2.1 Legal Dimension

Despite the counter measures and strategies to fight corruption in Kenya, corruption still persists due to weak institutions, a conflicting legal framework and lack of an effective political leadership.⁷² The crucial institutions in breaking the cycle of corruption include the anti-corruption agency, the judiciary, DPP, a public ombudsman, the media and civil society. Some of these, such as the anti-corruption agencies, judiciary and the media, ought to be independent of the executive branch, while others are part of it. All these institutions require long-term support to become effective and must demonstrate best practice governance in their own operation.⁷³ The anti-corruption commission and the judiciary ought to be independent from the executive in order to maintain a level of independence in the conduct of their daily duties.

There is need for the institutions to function in a unified manner. Failure to work in a unified manner they may be ineffective despite functioning in well in isolation. Transparency International calls for unified approach, in state integrity system backed with a national anti-corruption policy to break the cycle of corruption.

Dependence on only a few of these institutions without the others, or on just one poses a challenge to the system that may collapse.⁷⁴ Thus, the efficiency of each institution depends on different factors including rules, power, mandate and duties as prescribed in the Constitution; independence from, transparency and accountability to stakeholders, adequate resources and ability of institutions to share relevant information and experiences with relevant stakeholders.⁷⁵ The challenges experienced in these institutions both in developed and developing nations point out that the establishment of

⁷²Kivutha, K. (1996) *The Anatomy of corruption in Kenya; Legal, Political and Socioeconomic Perspectives*. Claripress, Nairobi, pp 98

⁷³Sihanya A. (2005) *Control of Corruption in Kenya: Legal and Political Dimension 2001-2004*. Claripress, Nairobi, pp. 110

⁷⁴Ibid.

⁷⁵Robbins, P. (2000). *The Rotten Institution: Corruption in Natural Resource Management*. *Political Demography*, 19, pp 423-443.

institutions is not enough, governance is important.⁷⁶ Many of these institutions are to incorporate good governance. However, they have proved ineffective in cases where corruption persist. In nations where there is political will, there is a high success in breaking the cycle of corruption.

2.2.2 Anti-corruption Legal Framework

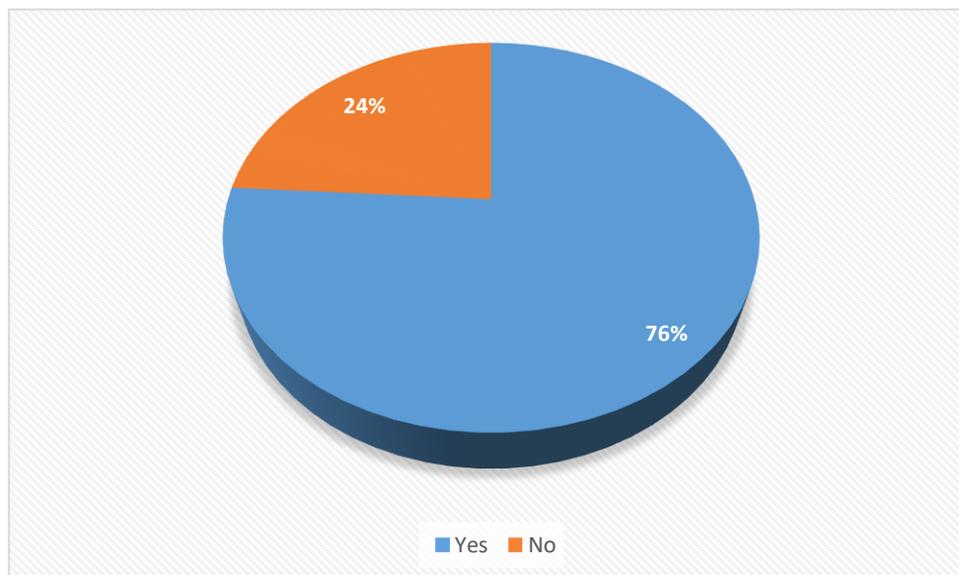
The anti-corruption regime in Kenya is in four statues namely EACCA, ACECA, POEA and Leadership and Integrity Act (LIA). There is duplication in POEA and LIA in respect to ethics and integrity issues. In both Acts, there is a responsibility upon the responsible commissions to develop codes of conduct and ensure compliance of these codes. In addition, the EACC has the responsibility of developing enforcing public officer codes of conduct. Thus resulting in jurisdictional and operative conflict when these codes are breached.⁷⁷

The respondents were asked whether the existing legal framework in Kenya is sufficient to fight corruption. 76% responded in the negative as compared to 24% who indicated yes. The Pie chart below presents data results on the sufficiency of the legal framework to fight corruption.

⁷⁶Ibid.

⁷⁷ Supra note 96 at 394

Figure 1: The sufficiency of the legal framework to fight corruption.



(Researcher, 2018)

The study has established that the statutes governing corruption matters do not prescribe all offences, thus sometime the prosecution has to apply the penal code which make corruption cases difficult to prosecute especially when there is forgery.⁷⁸ In addition, it noted that the Evidence Act poses a challenge when producing evidence before court. This is in relation to foreign evidentiary material obtained through mutual legal assistance and admissibility of the testimonies of witnesses from different jurisdiction.⁷⁹ There is therefore need to have amend the Penal Code and Evidence Act to be efficiently prosecute corruption and economic crimes cases.⁸⁰

2.2.3 Political Dimension

The greater role in government involvement in the economy relates to the political facet that encourages persistence of corruption in Africa.⁸¹ Corruption persists because of neopatrimonialism.

⁷⁸ AC056 asserted that LIA being the main statute which enforces Chapter 6 of the Constitution does not provide for sufficient offences thus undermining the provisions of this Act. The LIA amendments have never been finalized in parliament which seek to strengthen LIA.

⁷⁹ AC080 averred that the Judiciary does not appreciate the lengths EACC undertake to obtain evidence from foreign jurisdiction including copies of documentary evidence. The Evidence Act requires production of original documents in court or certified copies and requires witnesses to appear physically in court for the court process thus creating unnecessary delays in determination of the corruption cases.

⁸⁰ AC066 suggested that the amendment of laws pertaining to corruption will strengthen the anti-corruption agencies to investigate, prosecute and adjudicate the matters to enhance deterrence as well as recover corruptly acquired assets

⁸¹ Jain A. (2001). Corruption A Review, J. Econ. Surveys, Vol. 15 pp. 71–121.

This is a system where powerful government officials to attract followers called clients.⁸² Thus, patron-client relationship is an informal and complicated network politicizes the bureaucratic structure of government. In states where neopatrimonialism is practiced, competition shunned as people with good connection with the patrons have access to government resources. This is why it is common in Africa to equate a state with its ruling party as they monopolize government resources in order to protect the patron client relationship.⁸³

Neopatrimonialism encourages persistence of corruption, undermines the rule of law, and political institutions as well as contributes to loss of state resources. This is the way of life in Africa. There is no difference between public and private resources as officials' appropriate state assets.⁸⁴

The lack of administrative predictability in African states has encouraged persistence of corruption. This is because the ruling party abuses state power for private gain and in the long run the judiciary arm of government is caught up in these interests. Thus, it becomes an uphill task to challenge the government before court.⁸⁵ The political leaders are not accountable for their actions because all arms of government are under the control of the executive. The safeguards that are to keep the executive in check such as opposition, the media and non-governmental organizations are emasculated as the government has power over all resources.

The study established that 32% of the respondents indicated that they believed that political interference contribute to persistence of corruption in Kenya to a little extent. 11% of the respondents were of the opinion that they were not sure whether political influence contributed to corruption. 57% of the respondents greatly agreed that political interference contributed to persistence of corruption in Kenya. The ruling class determines who gets investigated or prosecuted when and to what extent.⁸⁶

⁸² Ibid

⁸³ Ibid

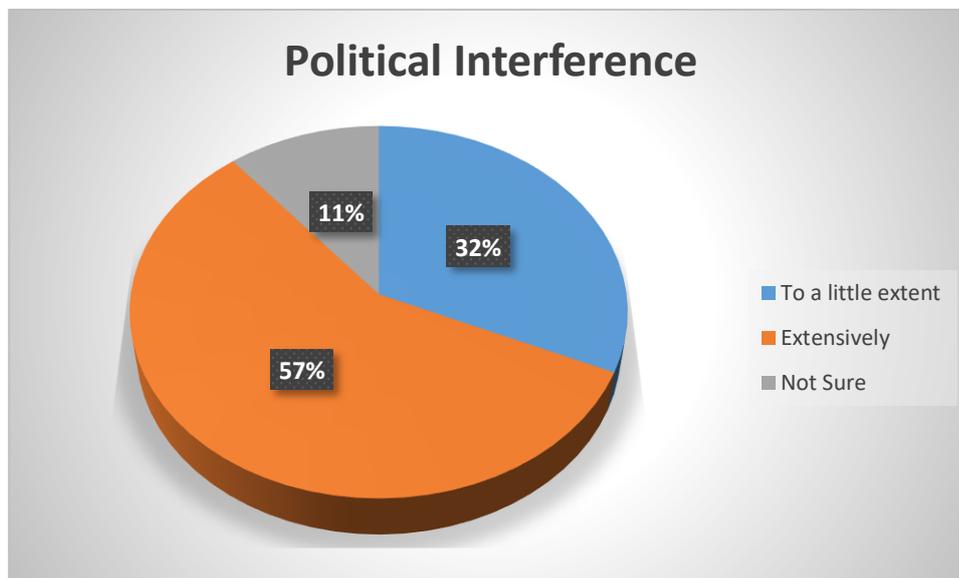
⁸⁴ Ibid.

⁸⁵ Hope, K. (2000) *Corruption and Development in Africa: Lessons from Country Case Studies*, Basingstoke, pp. 23.

⁸⁶ AC013 held that a truly independent investigative or prosecutorial authority is still a pipe dream because the ruling

The study revealed that political interference of the ruling class with EACC, DPP and the judiciary hampers the effective fight against corruption. In order to succeed in the fight against corruption, there is need for political leaders.⁸⁷ Further, the study found out that with increased corruption, the citizens lose confidence in the government and political elite.

Figure 2: Political Interference.



(Researcher, 2018)

Corruption attacks the foundation of democracy in a government by diluting the election process thus undermining the rule of law. The political elite in a corrupt state avoid check and balances and encourage persistence of because of their networks to rich families, friends and other connections.⁸⁸

2.2.4 Economic Dimension

Poverty and low wages for public officers can be attributed to the persistence of corruption. This is because poverty shortens peoples horizon and increases appeal to short-term acquisition of material

class determines how far the investigative and prosecution agencies go.

⁸⁷ AC001 recommended that politicians must not only facilitate an enabling climate of corruption intolerance by enacting laws, policies and systems, they must also provide operational support and tools.

⁸⁸ AC003 opined that public affairs should always be conducted in an open, fair and responsible manner. Opaqueness fuels corruption because it brings an atmosphere of secrecy and unaccountability.

wealth.⁸⁹ When people are faced with economic hardships they are not likely to abide by the law. Therefore, people risk being penalized to prevent any prospects of dying from hunger. The harsh economic conditions promote crime and seeking of short term gains from corruption.⁹⁰

These harsh economic circumstances are common in many African states and have also affected salaries of public officers. This is common in countries such as Kenya, Nigeria and Zambia where the value of public services officers' salaries decreased from the 1980s even after taking into account promotion and inflation.⁹¹

Despite the lack of motivation and efficiency in public service, the low wages for public officers has led to officers' loss of civic virtue and as a result they have been forced to complement their low income by taking part in corruption. The individuals extort bribes from clients or by coming up with stringent regulations that encourage offering of bribes to beat the system or regulations in place. In Singapore, the government officials amended their laws to increase the salaries of the public servants to match those of the private workers so as to reduce the bribes collected by the public officers to supplement their incomes.⁹² Regulations that affect trade customs, taxes, profitable activities such as sale of liquor and gambling are misused and encourage corruption. Therefore, corruption persists and evolves as a stimulus for inefficiency and excessive regulations.

Thirty seven respondents believed that economic factors contribute to persistence of corruption in Kenya to a little extent, five percent of the respondents were not sure and fifty eight percent extensively agreed that economic factors contribute to contribute to persistence of corruption in Kenya. The explanation elicited was that corruption is largely a function of power and discretion. It

⁸⁹ Ibid.

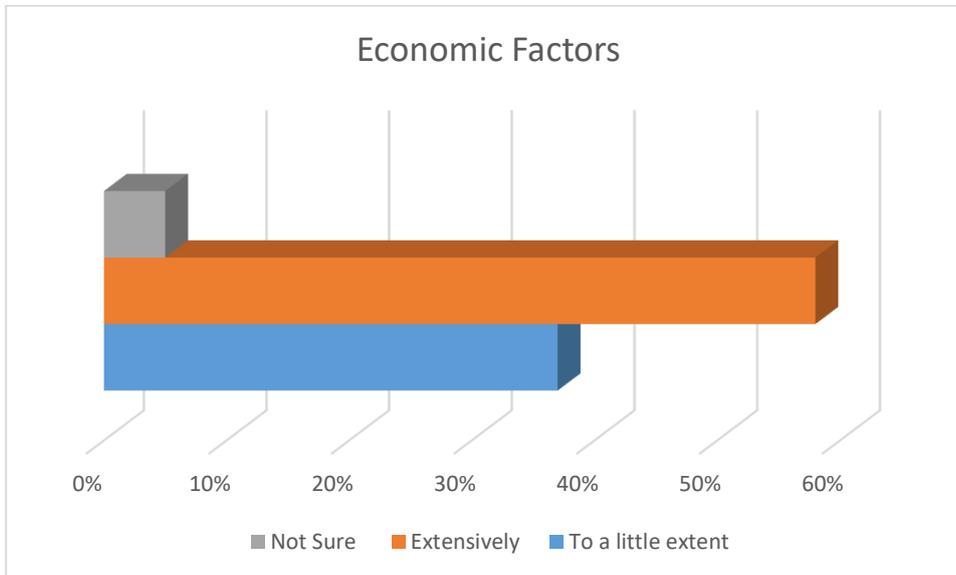
⁹⁰ Ibid

⁹¹ Ibid.

⁹² Yew, L.K. (2000). From Third World to First, The Singapore Story: 1965 - 2000 pp 169

is not need driven but greed driven.⁹³ The poor often lack the power and opportunity to engage in corruption. The bar graph below depicts these findings.

Figure 3: Economic Factors.



(Researcher, 2018)

The study discovered that corruption was the end result of pure greed on the part of the culprits thus most affecting the poor in the society by depriving them of their right to basic necessities including education, healthcare and decent homes among others.⁹⁴

The modernization of society and the state is a social cultural factor that has resulted in evolution and persistence of corruption in Africa. In the course of globalization and transformation, western influences of integrity such as equal treatment and devotion to the common good in public administration have been established in African offices including public institutions. However, these

⁹³ AC024 opined that corruption led to misallocation of resources thus caused scarce resources to be confined to a few undeserving individuals with the opportunity and wealth to acquire the resources at the expense of the poor

⁹⁴ AC082 mirrored the words of the former UN Secretary General, Ban Ki-Moon at the International Anti-Corruption Day on 9th December, 2009 when he said that it is the world's vulnerable who suffer first and worst due to theft of public money or appropriation of foreign aid to private use.

standards of integrity lack foundation in the African culture and society.⁹⁵ In the African culture, public and private interests mean one and the same thing, there is no clear cut difference. If the society cannot understand the contrast between a ruler as a private person and his leadership as a public duty, the notion of corruption becomes senseless to them. The fact that modern standards of integrity condemn traditional and long standing practices as corrupt, make it difficult for people to enforce them.⁹⁶ The lack of acceptance of the standards enable corruption to evolve and persist in the African society.⁹⁷

The culture of giving gifts is an accepted norm in the African culture. However, gift giving is presumed to be illegal and a form of corruption in western norms.⁹⁸ Thus, in the course of modernization, the custom is taking new shape. People are now transferring money in the form of gifts.⁹⁹ The continuation or preservation of the culture of gift-giving has made corruption persistent in the African culture.

Further, nepotism is another social cultural norm that has caused persistence of corruption in the African society. Nepotism may be termed as primitive loyalty which obligates one to ensure that his /her families, including relatives are granted jobs and tokens whenever one of their own obtains a position of power.¹⁰⁰ Nepotism is an old age custom in the African society. It is deeply embedded in the social fabric and considered a norm in Africa. Nepotism contributes to the persistence of the culture of corruption because job appointments, promotions and awards of government tenders are based on relationships and indebtedness to family.¹⁰¹ There lacks a dissimilarity between duty to family members and an official duty the state. These practices of nepotism make corruption persist in

⁹⁵ Agbaje, A. 1992. "Culture, Corruption and Development", Voices from Africa, Vol. 4 pp. 41.

⁹⁶ Ibid

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid.

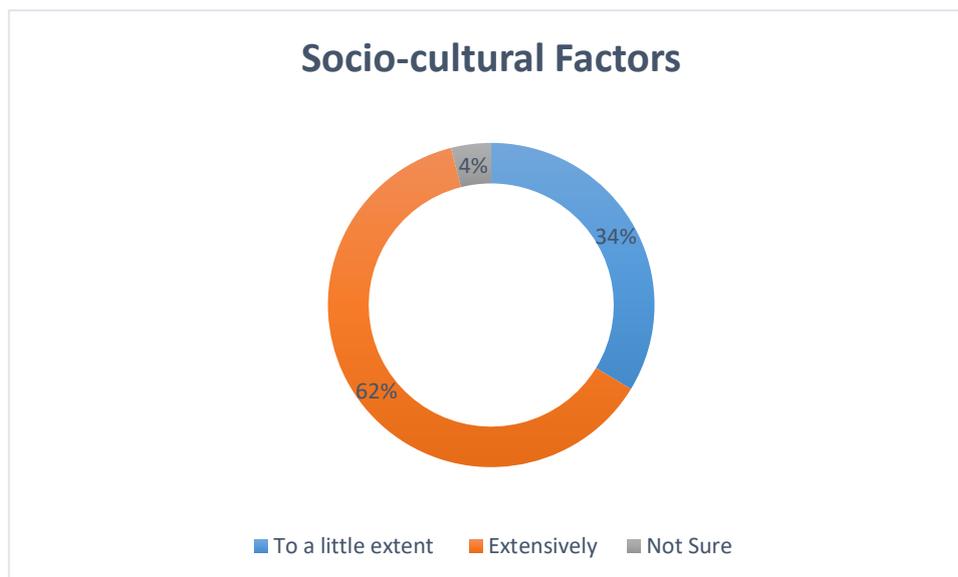
¹⁰⁰ Ibid.

¹⁰¹ Ibid.

the African society.

This study found that thirty four percent of the respondents indicated that they believed that that social-cultural factors contributed to persistence of corruption in Kenya to a little extent. Four percent of the respondents were not sure and sixty two percent indicated that they extensively agreed that that socio-cultural factors and the bureaucratic traditions contribute to persistence of corruption in Kenya. The findings are represented in the chart below.

Figure 4: Social- Cultural factors.



(Researcher, 2018)

Society accepts corruption perpetrated by our own against the state. Bureaucracy on the other hand normalizes corruption as a shrewd business.¹⁰² This means that our society has embraced corruption as a social norm, true to the words of Fredric Bastiat, a French economist who said that over the course of time a Society creates for itself a legal system that authorizes and glorifies plunder after it has become a way of life for a small number in society and ultimately converts it into a moral code.¹⁰³

¹⁰² AC059 opined that a society which disregards positive moral values and laid down procedures opens itself up to anarchy, failure and ineptitude.

¹⁰³ AC045 stated that nepotism, tribalism and favouritism on account of culture leads to denied equal opportunities for persons who are genuinely merited. The favoured enjoys public resources at the expense of others.

2.3 Forces Shaping Corruption in Kenya

2.3.1 Political leadership

The responsibility of a country's leaders, political or otherwise to formulate efficacious and tenable methods to combat corruption is mandatory for destroying the vicious cycle of corruption.¹⁰⁴

Generally, it is not easy to understand whether the political leaders are determined to curb corruption, or whether they just come up with ploys to blind its citizens and the international community including donors. The common populist measures like sanctioning of a small number of corrupt individuals or the deliberate harassment of those with unpopular views is classic example of public relations meant to pacify the citizens while concealing the masters of grand corruption.¹⁰⁵

In Kenya, individuals accused of corruption are used as scapegoats because they not in the good books of the government of the day for some reason other than corruption. The strategy of eliminating a few individuals who have fallen out of favour in the government's circles cannot break the cycle of corruption. Political leaders often prefer to intercept the manifestation of corruption and render short term solutions for political gain rather than prevent corruption and uproot the lurking factors contributing to the persistence of corruption.¹⁰⁶ This is often reflected in the government's strategy of dominance in legal enforcement and institutional measures as opposed to attempts in making efficient changes and modifying the underpinning drive for corrupt activities.¹⁰⁷ The corrupt political leaders are usually unwilling to relinquish any corrupt income, and will use the same income to bribe their way out of any punishment for their crimes.¹⁰⁸

¹⁰⁴Ibid.

¹⁰⁵ Kaufmann, D. and Vicente, P. 2011. Legal Corruption. *Economics & Politics*, Vol. 23(2), pp.195–219.

¹⁰⁶ Kaufmann, D. 2009. *Governance Matters VIII: Governance Indicators for 1996-2008*. Washington: World Bank Policy Research Working Paper, No. 4978.

¹⁰⁷ AC078 added that the political leadership should send the right message in the fight against corruption in provision of material support. Further, no one should be shielded from investigations or prosecution.

¹⁰⁸ AC069 was of the opinion that EACC should be strengthened to recover illegally acquired assets and support given to the Judiciary to facilitate recovery of these assets and enhance deterrence

In addition, perpetuation of corruption undermine powers of investigation and prosecution of corruption cases. To bring about a systemic change aimed at breaking the cycle of corruption, it is mandatory to have great political drive to formulate measures that will also target political and economic elites.¹⁰⁹ Political will to implement the law and policies against corruption is an imperative factor of the efficacy of independent institutions in fighting corruption and enforcement of the legal framework available for fighting corruption.¹¹⁰

2.3.2 The Media

Freedom of speech has demonstrated a sense of progress in breaking the cycle of corruption.¹¹¹ Social media has helped Kenyans access the information exposing corruption in various sectors of the Kenyan government. Prior to the Constitution promulgated in 2010, there were instances where citizens were not allowed to speak against corruption such as John Githongo, the whistleblower of Anglo-leasing scandals. A democratic society plays a major role in combating and eliminating corruption.

Nailing and shaming of corruption perpetrators in the media has contributed to keeping the fight against corruption atop in Kenya.¹¹² Access to public information by the citizens through media has been an effective tool in fighting corruption. The media plays a very important role in creating awareness and ensuring the Government is under control. The media also puts pressure on the government to prosecute corruption cases that have been were reported.¹¹³ Social media has incorporated the youth in the battle to eliminate corruption and continues to ensure cognizance among them on issues of accountability and good governance within the government sectors.¹¹⁴

¹⁰⁹Ibid at 158.

¹¹⁰ Chweya, T and Akiranga, S, Control of Corruption in Kenya: Legal-Political Dimensions 2001-2004, 2005, pp. 235.

¹¹¹ Supra note 33.

¹¹² Supra note 114 p. 53

¹¹³ Mutala, R. 2012. The Role of Media in Curbing Corruption in Kenya: The Case of the Nation and the Standard Media Groups

¹¹⁴ Transparency International: Targeting the Youth in the Fight Against Corruption Using Technology, posted on May, 23 2018 <https://tikenya.org/targeting-the-youth-in-the-fight-against-corruption-using-technology>

The media also acts as a deterrent measure because of the shame and ostracization that perpetrators of corruption undergo once they are charged with corruption offences. The Kenyan public court will always declare any perpetrator guilty until proven innocent. Further, as part of its mandate, the EACC can use the media to ensure cognizance about the consequences of corruption and increase public support in the battle to eliminate corruption because the media can easily reach a nation-wide coverage in civic education. The civil society has used the media to expose numerous multi-million dollar corruption scams to the public in their effort to fight against corruption and economic crimes.

2.3.3 Anti-corruption Strategies

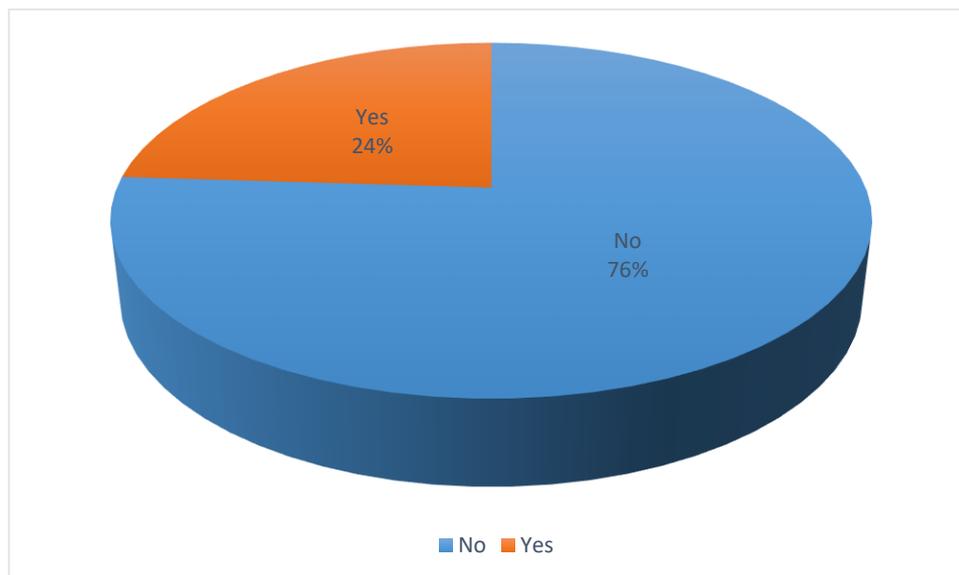
In a changing world, there are numerous factors that design the way the global community tackles the worldwide attributes of corruption. National and international public policymakers are essential forces that can participate in the critical responsibility of breaking the vicious cycle of corruption by demanding good governance.¹¹⁵ Both the national and international community can break the cycle of corruption by formulating policies that increase transparency in the private and public arenas. This can be achieved by ensuring ongoing research focuses on new remedies of corruption as well as timely and accurate information on its incidence, persistence and consequences, and the efficacy of worldwide advocacy efforts.¹¹⁶

Sufficiency of powers by EACC to effectively carry out its mandate is imperative to the fight against corruption. 76% as compared to 24% of the respondents in the study believed that EACC lacked adequate powers to effectively achieve its mandate as exemplified in the pie chart below:-

¹¹⁵ Polzer T, 'Corruption: Deconstructing the worldbank discourse' London School of Economics Press (2001).

¹¹⁶Ibid.

Figure 5: EACC Mandate to Fight Corruption.



(Researcher, 2018)

According to the respondents, EACC's lack prosecutorial powers is top on the list for reasons why EACC is underperforming when it comes to executing its mandate of breaking the cycle of corruption.¹¹⁷ The study noted that EACC has only been accorded the powers to investigate and consequently report to the DPP any corruption related matters, unfortunately it has no powers to initiate any prosecution of cases. This lack of authority to prosecute was perceived by the respondents as a significant aspect that hampers expeditious and independent determination of corruption cases.¹¹⁸ The commission ought to be restructured to promote independence, strengthen the legal and procedural frameworks for prosecution of cases and asset recovery. EACC also ought to have the independence of appointment of its own commissioners and recruiting its senior secretariat.¹¹⁹ Governments have formulated various activities meant to combat corrupt practices in form of anti-corruption strategies and policies.¹²⁰ A number of African countries have successfully invented techniques and programs which they have incorporated in their policies to aid in the fight against

¹¹⁷ AC019 recommended that EACC should be vested with prosecutorial powers enhance the fight against corruption.

¹¹⁸ AC073 stated that lack of prosecutorial powers incapacitates EACC as its mandate is limited to investigations.

¹¹⁹ AC019 opined that without this kind of independence, the mandate of EACC is eroded thus leading to institutional capture

¹²⁰ Hanson, S. 2009. Corruption in Sub-Saharan Africa, retrieved from www.thinkafricapress.com/economy/causin...accessed 6th September 2018.

graft.¹²¹ These policies range from financial strategies to legislative or public policies but have unfortunately remained inefficacious in eliminating the menace of corruption in the continent. Over the past ten years some countries within Africa have been pressurized by Western donors to implement policies that will enhance transparency and accountability in decision making and also promote sector reforms in an endeavor to fight corruption.¹²² Rwanda and Botswana have been commended as having made impressive gains in the war against graft.

The resilience of graft in African nations and the magnitude of the consequences of corruption on the socio-economic development in African governments including Kenya, have designed, formulated and enforced numerous anti-corruption schemes destined to battle the scourge of corruption in their individual countries.¹²³

2.4 Effectiveness of the EACC's Measures to fight corruption

EACC is the key institution in the war against graft in the realm of good governance. The significance of EACC is reinforced by the capacity and mandate bestowed upon it, as the custodian bureau to preserve ethics and integrity in all public institutions.¹²⁴ EACC is mandated by ACECA to conduct investigations in respect to corruption and economic crimes, recover improper benefits and proceeds of crime, gather evidence in support of prosecution of corruption cases and analyze the evidence recommending charges to the DPP. EACC also recommends the sanctioning of public officers charged with graft offences. It is also in EACC's purview to protect its informers.

The Constitution 2010 expanded the mandate of EACC to ensure compliance and enforcement of what is enshrined in the Constitution chapter 6 on leadership and integrity relating to public officers.

¹²¹Ikubaje, J. 2010. Democracy and Anti-Corruption Policies in Africa. Ibadan, University of Ibadan Press.

¹²²Ibid.

¹²³ Mauro, P, Corruption and the Composition of Government Expenditure, Journal of Public Economics, 2011, Vol. 69, pp. 263-79.

¹²⁴ TJRC Final Report, Volume IIB published 2013, pg. 399.

The commission further raises awareness on the underlying consequences of corruption while monitoring decision making in public institutions to detect corruption and secure revision methods of practices conducive to corruption.¹²⁵ Further, EACC collaborates with other agencies and cooperates internationally and regionally with foreign governments and agencies for assistance in investigations and recovery of assets. The programs implemented to break the cycle of graft involve anti-corruption strategies across a large ambit of areas that design the decision making landscape both nationally and internationally.¹²⁶

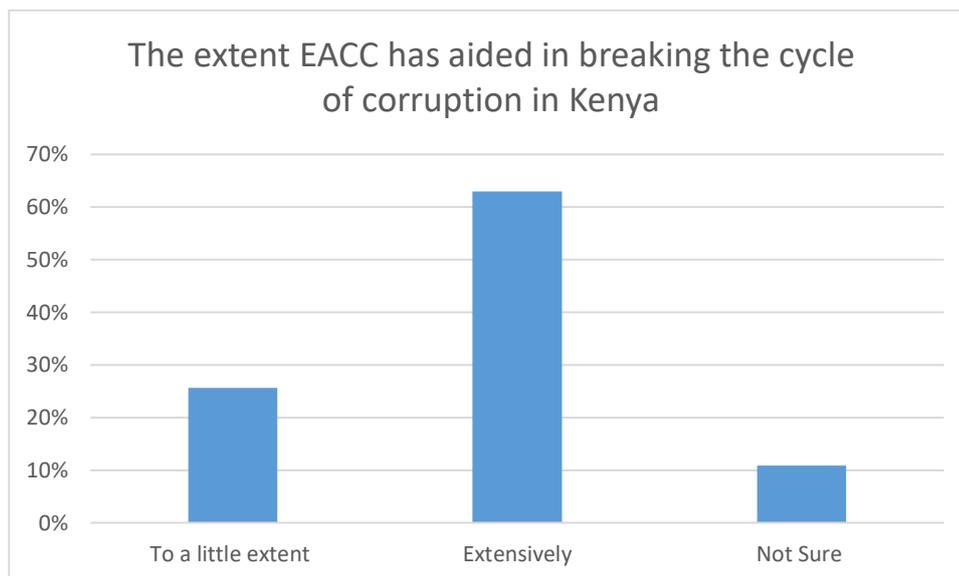
The study found that 60% of the respondents contended that EACC has extensively played an extensive role in breaking the cycle of corruption while 30% opined that EACC has done diminutive in breaking the cycle of corruption. With all the measures and strategies which EACC has applied over time, the effectiveness of these measures is still wanting. EACC, being charged with the fight against corruption has grappled with eroded independence neutered by the political class¹²⁷ therefore leading to selective investigations and prosecution. This is the main reason why EACC has been unable to successfully investigate corruption cases touching on senior public and state officers who are discharged or acquitted for lack of evidence or fail to be charged in the first instance. The figure below depicts the findings of the above discussion.

¹²⁵ Ibid at p 389.

¹²⁶ Lederman, D. 2004. Accountability and Corruption, West Chester University Press.

¹²⁷ AC022 opined that the leadership of Kenya has never been keen to sustain the fight against corruption.

Figure 6: EACC role in breaking the cycle of corruption.



(Researcher, 2018)

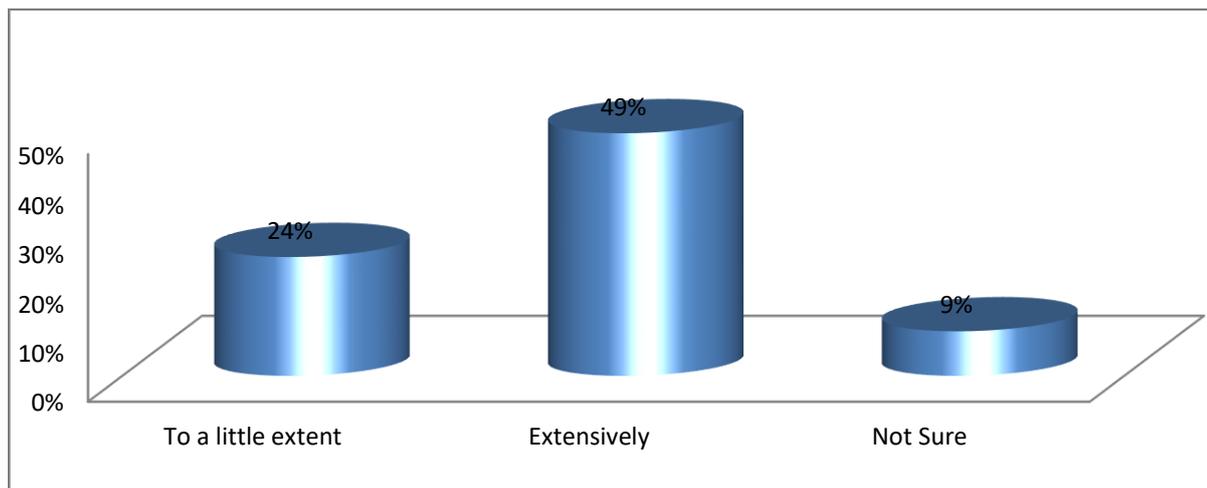
Whether robust and efficacious institutions manifest depends on the tempo with which such institutions bloom at the national and the international platform, and the extent to which they embrace good governance themselves and act to enforce checks and balances.¹²⁸ Further, the anti-corruption institution is surrounded by a collective enemy of powerful political elite who fight to ensure that EACC will never succeed.¹²⁹ All the developments made since Kenya executed and ratified UNCAC on December 9 2003 can easily be weakened by a fragile policy and legal structure which emanates from a feeble constitutional basis.

According to 49% of the respondents in the study, the lack of strong and effective institutions contribute to persistence of corruption in Kenya. On the other hand, 24% indicated that the lack of strong and effective institutions do not contribute to persistence of corruption in Kenya as follows:

¹²⁸ Ibid.

¹²⁹ Supra note 177

Figure 7: Lack of strong institutions in Kenya



(Researcher, 2018)

Further, 43% of the respondents strongly disagreed that counter measures and strategies employed in Kenya to break the cycle of corruption have been effective. On the other hand, 7% strongly agreed that counter measures and strategies that have been employed in Kenya to break the cycle of corruption have been effective. Table below represents the results that were obtained.

Table 1: Strategies employed in Kenya to break the cycle of corruption

Response	Frequency	Percentage
Not Sure	5	6%
Disagree	26	32%
Strongly Disagree	35	43%
Agree	10	12%
Strongly Agree	6	7%

(Researcher, 2018)

The Kenyan Constitution of 2010 enabled the government to formulate and institute strategies to break the cycle of corruption. However, the war on graft is far from over due to reasons that the established institutions are susceptible to corruption, weak and subject to interference from the

executive.¹³⁰ Thus, it can be said that anti-corruption strategies are not priorities of the government due to persistence of corrupting despite the vast mechanisms and strategies put in place. Further, while there are legal anti-corruption policies and institutional frameworks to fight corruption, their effectiveness in breaking the cycle of corruption is lacking as evidenced in the study.

2.5 Effectiveness of Institutions to investigate, prosecute and adjudicate upon corruption cases

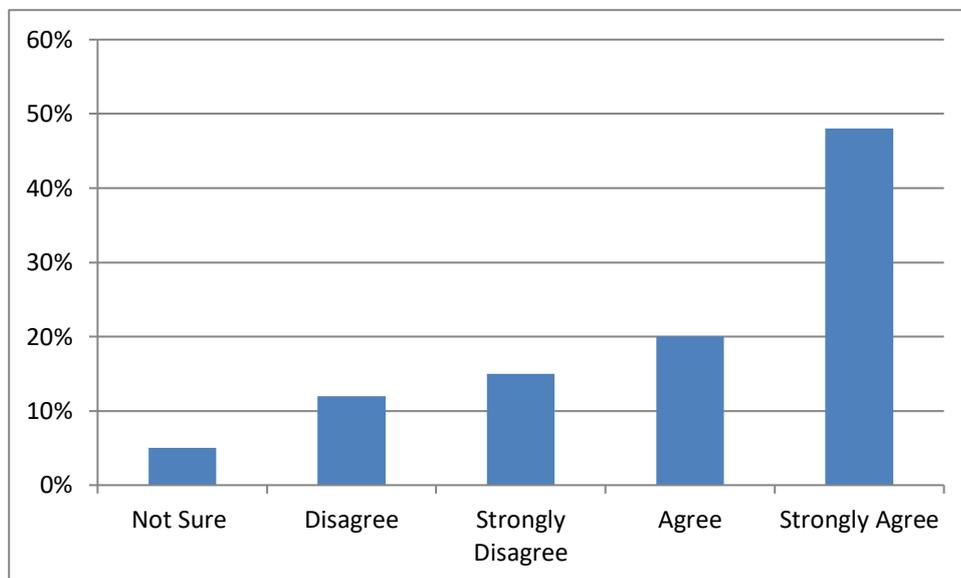
The study has established that the institutions in place to fight corruption are weak due to political unwillingness to break the vicious cycle of corruption. It has been observed that the EACC is only limited to investigate and make its recommendations on cases involving corruption to the DPP. They are however restricted when it comes to initiating prosecution. The deprivation of prosecutorial powers disables the institution as it becomes incapable of efficiently carrying out its mandate. The anti-corruption commission office in Botswana has powers to prosecute and consequently carries out its mandate efficaciously independent of other institutions. The Cabinet in 2011 published a draft to be introduced into the National Assembly with the aim of according prosecutorial powers to the EACC in the unfortunate event that the DPP failed to act on recommendations from the EACC. That provision was deleted by Parliament which argued that the said mandate has already been constitutionally accorded to the now independent office of the DPP.

The respondents were requested to indicate whether or not they thought that the lack of strong and effective institutions to investigate, prosecute and adjudicate upon cases has contributed to the persistence of corruption in Kenya. 15% of the respondents indicated that they strongly disagreed that that lack of strong and effective institutions to investigate, prosecute and adjudicate upon cases has contributed to the persistence of corruption in Kenya. 48% of the respondents stated that they very

¹³⁰ AC060 opined that if corruption is easily detected and the culprits are not dealt with decisively, then the fight against corruption will never end

much agreed that lack of strong and effective institutions to investigate, prosecute and adjudicate upon cases has contributed to the persistence of corruption in Kenya.

Figure 8: Effectiveness of Institutions to investigate, prosecute and adjudicate upon corruption cases.



(Researcher, 2018)

2.6 Counter measures on political, economic and social-cultural factors that perpetuate corruption in Africa

In most states, anti-corruption institutions play the role of investigations.¹³¹ The powers of anti-corruption commissions are different with regards to scope of mandate. Anti-corruption commissions' powers include power to investigate procurement process in government and private sector. The investigatory power is subject to approval of the prosecuting authority. Thus, many anti-corruption commissions have put in place mechanisms to assess whether or not to initiate investigations.¹³²

The behavior of political leadership of a nation play a role in fostering ideals in a society.¹³³ The

¹³¹Kibwana K. 2001. Initiatives against Corruption in Kenya. Legal and Policy Interventions 1995-2001. Nairobi: Clari press Limited.

¹³² Ibid.

¹³³ Ibid

leaders create public confidence by portraying integrity and commitment to the public. If the leaders are corrupt, they will act as role models and reinforce corruption in society.¹³⁴

The respondents were asked whether they believed that there is need to come up with counter measures and strategies that address political, economic and social-cultural factors that perpetuate corruption in Kenya.

21% of the respondents strongly disagreed that there was need to come up with counter measures and strategies that address political, economic and social-cultural factors which perpetuate corruption in Kenya while 31% of the respondents indicated that there was a great need to come up with counter measures and strategies that address political, economic and social-cultural factors that perpetuate corruption in Kenya.¹³⁵ Table below represents the results that were obtained.

Table 2: Counter measures and strategies on political, economic and social-cultural factors.

Response	Frequency	Percentage
Not Sure	2	2%
Disagree	14	17%
Strongly Disagree	17	21%
Agree	24	29%
Strongly Agree	25	31%

(Researcher, 2018)

¹³⁴Ibid.

¹³⁵ AC017 opined that political maturity is key in coming up with effective strategies of fighting corruption which can be enforceable.

The study found that the introduction of integrity and ethics in school curriculum is one of the anti-corruption strategies that need to be implemented.¹³⁶ The National Integrity Academy was established by the EACC and became operational on 18th July, 2018 and duly registered as a Technical and Vocational College from the Technical and Vocational Education and Training Authority (TVETA), a training arm of EACC. Further, respondents recommended application of rule of law. Everyone should be treated equal before the law.

2.7 Conclusion

As the effects of heavy borrowing and pervasive corruption continues to be felt, Kenyans are beginning to see the correlation between bad politics and corruption and the impact it has on their lives through hefty taxation, and poor services. Kenyans have hope that with this realization, there will present itself an opportunity to generate a new national consciousness to deal with corruption and elect leaders of integrity in the forthcoming elections. If there is a silver lining in this crisis, it will be that the public will develop a culture of zero tolerance to corruption and non-ethnic based politics. It is clear that full independence of EACC is required to fully enforce its mandate, with already set checks and balances on the acquired independence. This will be greatly affected positively by the support of the political elite and the legislature who should demonstrate the will by actions.

¹³⁶ AC053 stated that introduction of integrity and ethics in schools would be effective in instilling ethics in Kenyans at a tender age thus contributing to the eradication of corruption in the coming generations.

Chapter Three

Policy Context: Anti-Corruption Structures and Mechanisms in Kenya

Introduction

Botswana, Seychelles, Rwanda, Cape Verde and Namibia are states that have ranked well in the least corrupt African countries and it has been found that the key ingredient common in these countries is a political leadership that is consistently committed to anti-corruption.¹³⁷ The leaders of these countries go an extra mile to strictly implement and enforce compliance with the anti-corruption laws formulated in their countries.

Rose-Ackerman explains that corruption occurs where there is overlapping between private wealth and public power and this epitomizes the illegitimate use of the willingness to pay by the private individual or firm as a decision-making criterion¹³⁸. The private individual or firm pays money to a public official in anticipation for some reward and the public officials accept this payment which may induce them to take actions that are against the ethics of their office.¹³⁹

Africa, as rich as it is in natural resources, has the proceeds of sales of these natural resources mismanaged by its leaders through corrupt processes thus Africa has remained the least developed continent in the world relying on aid from the developed countries.¹⁴⁰ Further, even the foreign aid which African countries receive is mismanaged and embezzled ending up in a few people's pockets. African countries have formulated and passed anti-corruption laws with the aim of reducing and ultimately killing the corruption menace. Despite this fight for many decades, African countries still struggle against corruption. Indeed, corruption has been regenerating into diverse forms with the new technology including offshore money laundering and internet crimes, which Kenya and other African

¹³⁷APA News, Feb 22 2018 found on

<http://apanews.net/index.php/en/news/botswana-ranked-as-least-corrupt-in-africa-again> accessed 31 July 2018.

¹³⁸Supra Note 11

¹³⁹Ibid.

¹⁴⁰Transparency International, The Global Coalition against Corruption, 2016.

states have meagerly legislated on.

3.1 Legal and Institutional Framework to fight corruption

3.1.1 United Nations Convention on Corruption (UNCAC)

UNCAC is the main legal framework for fighting corruption at international level. This multilateral agreement addresses law enforcement at international level recognizing impartial investigation of corruption cases, prosecution and judicial authority in prosecution of public corruption. It also addresses public and private sector prevention of corruption.¹⁴¹ In West Africa, the network of anti-corruption institutions brings nine countries together to report on anti-corruption activities in West Africa. The anti-corruption institutions of West Africa examine how to deal effectively with corruption.

Despite the fact that Kenya has made inordinate steps in domesticating UNCAC, it still lags behind in criminalizing some actions which hinder the fight against corruption. Acts such as illegal acquirement of wealth which makes it difficult to recover acquired assets and amounts to illicit enrichment is not criminalized under the Kenyan law on corruption. EACC is only mandated to recover unexplained wealth through civil proceedings. Moreover, although recovery of unexplained wealth is legislated, EACC does not have the capacity to manage the assets preserved pending determination of the civil cases or after recovery of the assets.

¹⁴¹ United Nations Convention against Corruption (UNCAC).

3.1.2 The Constitution of Kenya

The Constitution 2010 established EACC under Article 79 thus the Kenya Anti-Corruption Commission was disbanded.¹⁴² The Institutions prior to EACC since 1956 have constantly been barred and blocked from executing their mandates by the political elites including the parliamentarians who undermine the institutional operations and hamper the achievements of the fight against corruption. Many legislations and institutions, it would argued too many, have been in place since 1956. However, corruption seems to be getting rampant in Kenya.¹⁴³ Following the global and regional trend, the Kenyan government through its constitution has adopted anti-corruption strategies and formulated a legal framework for combating corruption.

Article 79 of the Constitution of Kenya is that it does not prescribe specific functions required by EACC in the fight against corruption as provided for in the four pillars of UNCAC, that is, asset recovery, investigation, international cooperation and prevention.¹⁴⁴ The powers and functions EACC are left in the hands of parliament through legislation therefore emasculated by the political class. This blatant omission has left room for interference and ambiguity in coming up with enabling statutes in line with Article 79 of the Constitution.¹⁴⁵ Moreover, failure to outline EACC's functions under Article 248 of the Constitution, like the other independent commissions, diminishes the imperative role of EACC, diluting its powers and functions.¹⁴⁶

3.1.3 Ethics and Anti-Corruption Commission Act

EACC investigates corruption and economic crimes and recommended prosecution of cases to the DPP. It also has the mandate of recovery of corruptly acquired public property.¹⁴⁷ EACCA has

¹⁴² Section 79 of the Constitution established the EACC to enforce ethics and integrity in Kenya.

¹⁴³ Hanson, S. (2009) Corruption in Sub-Saharan Africa, retrieved from www.thinkafricapress.com/economy/causin...accessed 6th September 2018.

¹⁴⁴ Supra note 129 p. 419.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid at p 420.

¹⁴⁷ Section 11(1)(j) of EACCA.

structured EACC to have three commissioners and one secretary. The small number of commissioners presents operational challenges in conducting the affairs of the commission. This is because the EACCA empowers EACC to form committees¹⁴⁸ for effective discharge of its functions. The effect is that it is impossible for the commissioners of EACC to establish different committees to deal with distinct issues with such a small number. With five commissioners at EACC, including the chairperson and the vice chairperson, the conduct of the business of the commission may be hampered if both the chairperson and vice chairperson are absent for a meeting. A quorum of three members is not sufficient to effectively conduct the affairs of the commissions. Despite the Act allowing the commissioners to co-opt persons into membership of any committee, the co-opted members may only attend meetings to deliberate with no voting power. Therefore, decisions may stall if the lack of quorum still persists. This weakness of the act is evident because it presents an operational challenge.¹⁴⁹

The number of commissioners needs to be increased to the constitutional number of commissioners which stands at nine. Further, an increased number of staff is imperative with EACC having devolved its mandate to several counties.

3.1.4 Anti-Corruption and Economic Crimes Act, 2003

The Anti-Corruption and Economic Crimes Act, 2003 does not have obligations imposed on state parties under UNCAC. There is no provision for international cooperation in the fight against corruption. Further, in line with Article 50 of the UNCAC, there is lack of provisions in the ACECA mandating the EACC to deploy special investigations to fight corruption. Moreover, the Evidence Act has failed to provide for admissibility of evidence derived from surveillance and intelligence reports obtained in the course of investigations under this act.

¹⁴⁸ Section 14 of EACCA.

¹⁴⁹ Supra note 87.

The definition of an economic crime in this Act closely links grand corruption and an economic crime in Kenya.¹⁵⁰ These crimes inexorably involve senior and influential government officials awarding huge contracts involving billions of shillings with the assurance of getting a percentage of the contract price as commission or a gift for the award of these contracts. Therefore, this corruption is a direct product of economic crimes and the Act has legislated on these crimes and provided for penalties.

3.1.5 Bribery Act, 2016

The Bribery Act places a responsibility on private entities to put in place appropriate and adequate procedures for preventing bribery and corruption.¹⁵¹ Further, the Act provides for extra-territorial application where Kenyan companies are liable for acts of bribery or corruption committed outside Kenya. One of the salient features of this Act is to provide for protection of whistleblowers, informants and witnesses of corruption offences including bribery offences. It creates an offence that is punishable for intimidation and harassment of whistleblowers and witnesses.

3.1.6 Anti-Money Laundering Framework

Kenya has legislated on laundering the proceeds of crime within and without its jurisdiction. Corruption and economic crimes have continually become complex with the advancement of technology thus necessitating a framework to regulate money laundering of proceeds of crime. A lot of money acquired through corruption is transferred abroad in a bid to hide it and eliminate the trail of transfer.¹⁵²

¹⁵⁰ Ibid at p 350.

¹⁵¹ Section 9(1) of the Bribery Act, 2016.

¹⁵² Supra note 151.

The inadequacies of the legal framework have created regulatory gaps that can be exploited by a range of actors. Weaknesses in the legislation and enforcement mechanisms have been highlighted in a number of corruption scandals rocking the country.

3.1.7 The Leadership and Integrity Act, 2012

The Leadership and Integrity Act 2012 was enacted to ensure officers holding public office act in a manner that is moral and ethical. State officers are expected to respect national values and principles established under Article 10 of the Constitution such as national unity, respect of rule of law, social justice and equity, transparency, accountability among others.

A close study of the Act reveals that the role of EACC before a person is elected or appointed to a public or state office.¹⁵³ The only duty imposed by the Act on EACC in the vetting of candidates role is receipt of a self-declaration form for those joining public service or intending to run for an elective political position, which information may be false. Further, the law is unclear on what EACC is left to do with the self-declaration forms it receives. It does not have the power to vet any candidates and no provision either in the Constitution, EACCA or this Act empowers EACC to qualify, disqualify or vet any person seeking an appointment to a public office or election to a state position.¹⁵⁴ In addition, despite the existence of this Act and the Public Officers Ethics Act 2003, recruitment in the public service is has been influenced by nepotism and bribery as opposed to merit, and reporting of these cases to the EACC is minimal.

3.1.8 Mutual Legal Assistance Act, 2011

The Mutual Legal Assistance Act (MLAA) provides assistance to Kenyan government from foreign states in terms of investigations and prosecution of criminal cases. This Act gives Kenya the mandate to request and obtain professional assistance from other states. Prior to this Act, Kenya received and

¹⁵³ Supra note 159 at p. 424.

¹⁵⁴ Ibid.

offered legal assistance through the Harare Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth (Harare Scheme). Kenya has bilateral agreements with China, Swiss and Turkey for mutual legal assistance. This Act has enabled the investigative and prosecution institutions in Kenya to seek assistance from foreign jurisdictions on crimes which have been undertaken in Kenya and proceeds of crime are laundered abroad.

The enactment of this Act is a colossal step towards tracing and recovery of corruptly acquired assets hidden outside Kenya.¹⁵⁵ Despite this channel, the servicing of the mutual legal assistance requests is a long drag as the diplomatic channels are invoked from inception of the process. Furthermore, the assistance is dependent on the willingness of each state as well as the principle of reciprocity. States are reluctant in releasing information on their nationals or property contributing to the delay in servicing the requests.

3.1.9 The Witness Protection Act No. 16 of 2006

The Witness Protection Act provides for protection of whistleblowers against potential recrimination. The Act also provides protection for public and private employees against disciplinary action for their actions.¹⁵⁶ It lacks a complaint mechanism through which public officers can report corruption cases due to lack of sufficient and effective witness protection laws. There is no official means of protecting a whistleblower thus hindering many people from reporting corruption cases and they are not well protected from repercussions of whistle blowing. The Act has set up a Witness Protection Agency which has put in place several protective measures to witnesses who are willing to testify and give information on corrupt individuals. However, this Act fails to criminalize the intimidation of witnesses or provide any form of compensation for the injury suffered by whistle blowers.¹⁵⁷

¹⁵⁵ Ibid at p 391.

¹⁵⁶ Supra note 159.

¹⁵⁷ Supra note 169.

3.1.10 The Office of the Director of Public Prosecution

This office was established following the promulgation of the Constitution of Kenya 2010. The Office of the Director of Public Prosecutions Act, 2013 was enacted with the object of giving effect to the provisions of Articles 157 and 158 and other relevant Articles of the Constitution of Kenya. The mandate of the DPP includes instituting and undertaking prosecution of corruption matters, which EACC has investigated. Both the DPP and EACC collaborate in prosecution of corruption matters from the analysis of the investigation files, to drafting of charges and support in court processes until the matters are finalized. The Constitution provides a window which the EACC can exploit in petitioning the Parliament to confer to it prosecutorial powers pursuant to Article 157(12), which provides that Parliament may enact legislation granting prosecution powers on any other authority other than the DPP.

3.1.11 The Judiciary

The Chief Justice in 2017 created the Anti-corruption and Economic Crime Division in the High Court to ensure speedy and effective management and disposal of civil cases involving corruption and economic crimes, in addition to the special magistrates who are mandated to hear criminal cases arising from corruption. Although the ACECA establishes special magistrates courts to hear corruption matters on a daily basis as far as practicable, it has been impossible to implement the consecutive daily hearings of matters due to the numerous cases being filed. Further, the many constitutional petitions and judicial review applications filed by accused persons in the High Court contribute to the slow adjudication of corruption cases. The accused persons are additionally issued with restraining or stay orders prohibiting the criminal proceedings in the magistrates courts. The court ought to weigh public interest against individual rights when adjudicating on such applications because despite the accused persons citing a breach of their human rights, the public suffers gross violation of their basic human rights as a result of corruption.¹⁵⁸

¹⁵⁸ Supra note 169 p. 426

3.1.12 The Financial Reporting Centre

The Financial Reporting Centre is established under section 21 of POCAMLA. It is an independent body that assists in identification of the proceeds of crime and combating money laundering. The information collected is shared to investigating authorities and supervisory bodies to facilitate the administration and enforcement of the laws of Kenya.

3.1.13 The Asset Recovery Agency

The Assets Recovery Agency is also created by the POCAMLA and is mandated to recover assets of proceeds of corruption or economic crime. The Financial Reporting Centre shares the information it gathers with Asset Recovery Agency and the Ethics and Anti-Corruption Commission if they suspect that a corrupt activity is taking place. Under Article 51 of the UNCAC, the asset recovery pillar is one of the most fundamental anti-corruption objective. The Asset Recovery Agency has the mandate to freeze public assets, confiscate proceeds of corruption and crime, pursue restitution of public funds and recommend disciplinary measures.

3.2 The Independence of EACC

Under the Constitution, EACC is an independent commission, it is not subject to the control or direction of any person or authority. Previously, the Kenya Anti-Corruption Commission was accountable to Parliament therefore susceptible to interference and control. The EACCA therefore is inconsistent with the Constitution and thus there is need for an amendment to grant EACC a free hand in recruiting and supervising all its staff.

As the table below shows, the respondents were asked to indicate whether they agreed that institutional weaknesses of EACC contribute to persistence of corruption in Kenya. Seven percent of the respondents indicated that they were ‘not sure’. Sixteen percent of the respondents and eleven

percent respondents indicated they disagreed and strongly disagreed respectively that institutional weakness was a major cause of corruption in Kenya. On the contrary 38% of the respondents and 28% of the respondents indicated that they agreed and strongly agreed that institutional weaknesses of EACC contribute to persistence of corruption in Kenya.

3.3 The Institutional Weaknesses on Corruption in Kenya

Response	Frequency	Percentage
Not Sure	6	7%
Disagree	13	16%
Strongly Disagree	9	11%
Agree	31	38%
Strongly Agree	23	28%

Table 1: The Institutional Weaknesses on Corruption in Kenya

(Researcher, 2018)

The study established that Kenya has struggled to establish frameworks and policies to break the cycle of corruption.¹⁵⁹ There has been policies and legal framework in place since enactment of Prevention of Corruption Act 1956 which has since been repealed by the ACECA. In the last ten years, the country embarked on coming up with policies to break the cycle of corruption by establishing anti-corruption commission with power to investigate corruption cases.¹⁶⁰

EACC anti-corruption initiatives could be hindered by the fact that key persons who are named and under investigation are still in government. Some serve as government officials and in top positions in the public service. This state of affairs exposes these initiatives and efforts of investigating

¹⁵⁹ AC010 explained that even though Kenya has established a legal to fight corruption, there is a lot of duplication in relation to enforcement of ethics and integrity.

¹⁶⁰ Hanson, S. (2009) Corruption in Sub-Saharan Africa, retrieved from www.thinkafricapress.com/economy/causin...accessed 6th September 2018.

corruption to sabotage and resistance from within.¹⁶¹ Further, the legitimacy of these initiatives are undermined by a growing perception that it is selective and justice is only available to officials of a particular political elite. When leaders involved in corruption are still in charge of their dockets even as investigations are being undertaken, it is highly likely that these investigations will be politically manipulated. The outcry against prosecution of certain tribes and victimization of certain persons in the war against corruption has increased with ethnicization of politics.¹⁶² The political environment in the country may not be optimally favourable for the independent investigating and prosecution institutions against corruption.¹⁶³

3.4 Conclusion

It has been observed that Kenya has put in place vast mechanisms to counter corruption and economic crimes. However, corruption still persists and the Kenyan Government has failed to prosecute public officers and senior government officers who have been implicated in corruption. The study has established that EACC's independence has been hampered by its own legislation enacting it. It would seem that the legislature was intentional in subjecting EACC's Secretary to a parliamentary approval for political patronage. Further, the study reveals that Article 79 of the Constitution does not give specific mandate for the agency, specifically in respect to enforcing its mandate of fighting corruption and economic crimes. Moreover, the small number of the Commissioners of EACC hamper its operations in effectively fighting corruption.

In addition, it has been noted that despite the existence of POEA and LIA, Kenyans still elect unsuitable leaders who lack integrity during elections and the recruitment in public service is influenced by nepotism and bribery. It has been established that leaders mentioned in grand corruption

¹⁶¹ AC032 suggested that EACC should be restructured to promote independence by strengthening the legal and procedural frameworks for protection of prosecution and asset recovery and giving EACC prosecutorial powers.

¹⁶² AC078 gave the opinion that Kenya requires a level of political maturity which leads to election of persons on the basis of integrity and suitability who will have the political authority to fight corruption and not perpetuate it.

¹⁶³ Ibid.

cases still hold state and public offices even after they have been charged in a court of law. The EACCA and ACECA therefore need to be amended to conform to the Constitution in terms of membership of commissioners and appointment of the secretary. Further, the Constitution needs to expressly specify the corruption and economic crimes fighting functions of EACC to empower the institution in breaking the cycle against corruption.

Chapter Four

Challenges, Opportunities and Prospects of fighting corruption in Kenya

Introduction

As discussed in the previous chapters, there are numerous challenges experienced by Kenya in fighting corruption. Although EACC has a wide mandate to investigate corruption and economic crimes, it experiences challenges in enforcing the vast mechanisms in place to fight corruption. However, Kenya as well as other African states can take advantage of the operational potentials and opportunities in order to enhance their ability to fight corruption effectively. The case studies of Botswana and New Zealand have demonstrated that political leaders have the zeal to fight corruption.¹⁶⁴

4.1 Challenges

In Kenya, because many political leaders have been found to be behind grand corruption, there has been a lack of the political will required to break the cycle of corruption.¹⁶⁵ Even when the president cracks the whip on corruption, his close aides are still engaged in corruption conduct. The study has shown that corruption is many faceted and that economic factors in terms of financial insecurity among majority of Kenyans has contributed to perpetuating of corruption. Inflation and poor wages tempt people to continue engaging in corruption as a means of surviving harsh economic environment.

In addition, the study has shown that social-cultural factors have played a role in perpetuating corruption. For example bureaucratic traditions divide populations into classes' creating a gap between the have and have not. This give the elite leverage over the common populace. The elite are the persons who play a major role in perpetuating the culture of grand corruption in Kenya. Political

¹⁶⁴ Gregory, R. (2013) Assessing Good Governance and Corruption in New Zealand, Working Paper No. 14, pp. 23-45.

¹⁶⁵Ibid.

interference in predominant due to the fact that political elite are implicated in corruption.

In Kenya, EACC does not possess prosecutorial powers and the requirement that all cases it investigates can only be prosecuted by and upon the approval of the DPP, undermines the institution's independence and slows down the war against corruption.¹⁶⁶ It leads to unnecessary delays in commencement and disposal of cases, inconsistencies in the positions taken on the evidence by various players and lack of effective control of cases in the course of the trial. Lack of prosecutorial powers makes EACC vulnerable to interference and manipulation.¹⁶⁷ The fact that the ACECA limits EACC to investigators without powers to prosecute is a shortcoming of the Act. This is because DPP can decide not to prosecute after investigations by EACC.

Under Article 38 of the UNCAC, each contracting state has an obligation to take such measures to encourage cooperation between public officials and authorities on the one hand and its authorities responsible for investigating and prosecuting criminal offences under the Convention on the other hand.¹⁶⁸ There is no administrative or policy measures obliging public officials to assist and co-operate with EACC in Kenya, thus any assistance afforded to the EACC depends on the willingness of the public authorities.

4.2 Opportunities

Corruption remains a menace in Kenya and poses major challenges to the country's development efforts. Therefore, the fight against corruption has become more urgent and relevant. The law enforcement agencies involved in the fight against corruption can forge partnerships in a bid to develop synergies in eradication of corruption and economic crimes¹⁶⁹. An enabling environment for

¹⁶⁶ AC082 opined that erosion of EACC's independence by Parliament and state officials impedes the commission from fully executing its mandate.

¹⁶⁷ AC033 asserts that political elite are quick to interfere with EACC's investigative mandate when implicated with corruption offences and tend to arm twist the commission in dropping the investigation.

¹⁶⁸ Supra

¹⁶⁹ Kenya Anti-Corruption Commission Strategic Plan 2006-2009 pp. 21

the enforcement institutions to wage a sustained war against this menace through national and international solidarity has emerged thus giving a great opportunity to Kenya to finish corruption.¹⁷⁰ This environment includes a willingness by the Government and its partners to support and fund anti-corruption strategies and efforts which will see the EACC register visible gains in the war against corruption.

A vibrant, impartial, free and fair justice system presents an opportunity to vigorously pursue all corruption cases with a view to recovering illegally and corruptly acquired public property. This will also ensure that the guilty are punished regardless of whether they belong to the political elite or not. Corruption thrives best in a weak management system environment. Therefore, enhanced anti-corruption interventions including enforcement of leadership and integrity codes at national and county levels will go a long way in addressing systemic weaknesses in public institutions.

Civic education will heighten consciousness and abhorrence of corruption and economic crimes.¹⁷¹ An opportunity to foster public support for EACC and its efforts to fight corruption has been created by public awareness and education. This support will give the media and activists an opportunity to expose corruption when they see it and foster a partnership with EACC and law enforcement agencies. Embracing the information technology and communication in investigations by EACC will foster better and efficient investigation outcomes within a reasonably shorter time.

The strengthening of the legal and procedural frameworks for prosecution of cases and asset recovery of the Asset Recovery Agency is a great opportunity for Kenya to curb corruption. The said frameworks ought to be empowered by increasing the agencies' recovery capacity at both levels of government. The crucial institutions in the fight against corruption include the judiciary, anti-corruption commission, DPP, the media, civil society and citizens. The anti-corruption commission

¹⁷⁰ Ibid

¹⁷¹ Ibid

and the judiciary ought to be independent from the executive in order to maintain a level of independence in the conduct of their daily duties.

4.3 Prospects

The study found that the prospects of overcoming the fight against corruption are great. The resources be directed towards fighting corruption and formulating relevant policies in fighting corruption should be availed for effective enforcement of the legal and institutional frameworks.¹⁷² Access to information in procurement within public service, public participation in governance and political good will are among the opportunities that Kenya can explore in slaying corruption.

There are a few African countries where the anti-corruption commissions have the power to prosecute cases. This power to prosecute corruption cases is crucial in instances where the judicial systems have no capacity to prosecute corruption cases. Botswana and Tanzania are the countries have empowered anti-corruption commissions to prosecute cases in court.¹⁷³ In most countries, the role of prosecution is left to the director of public prosecution and is not transferred to anti-corruption commission.¹⁷⁴

In order to break the cycle of corruption, Kenya requires leaders with good ethical background as per chapter six of the Constitution. Those nations that have low levels of corruption have indicated that the common factor they all have is political leadership that is willing, efficient and committed to the welfare of their citizens rather than focused on their selfish ambitions and gains. Having the investigators and prosecutors working together in a multi-agency team creates efficiency and specialized functions. It further allows for an effective relationship and indeed a rapport between investigators and prosecutors. A prosecutorial function would give EACC greater legal authority and remove the DPP as a potential block between EACC, judiciary and corrupt politicians.¹⁷⁵ The

¹⁷² AC078 proposed that EACC should be granted more resources in the conduct of their mandate

¹⁷³ Kuris G, *Managing Corruption Risks: Botswana builds an Anti-Graft Agency*, Princeton University Press, 2013.

¹⁷⁴ Ibid

¹⁷⁵ Amukowa, W, *The challenges of Anti-Corruption Initiatives; Reflections on strategies of the defunct Kenya anti-corruption commission*, Mediterranean journal of social sciences, 2013, Vol 4 no. 2.pg.34.

prosecution play the role of administering justice before court. The decision to prosecute or not involves exercising discretion impartially and independently.¹⁷⁶

Transformational leadership at all levels of political landscape is imperative to break the cycle of corruption. The elected leaders must display conviction and commitment in the fight against corruption. Without committed leaders, the government efforts on reforms in respect to transparency and accountability will remain mere rhetoric. Committed leaders will design sustainable strategies to break cycle of corruption. Political will shall empower EACC to investigate every person including those in the highest office without any intimidation of the commission or negative political influence. EACC ought to be supported to deal with all transgressors without any exceptions or misuse of discretionary power.

The study notes that the civil society in Kenya is weak and disorganized due to obstacles created by government and lack of resources. The research prospects that the civil society should educate the general public and create awareness on factors perpetuating corruption in our society. Further, civil society, individuals and institutions should accept the state of corruption and factors perpetuating the vicious cycle in Kenya. This acceptance should be accompanied by an assumption of responsibility and integrity which will break the cycle of corruption from different vantage point. The society has a major role in exposing corruption. There is need to have government led civic education and advocacy involving other stakeholders. There is also need to have individual and societal attitude change to one that shuns unethical conduct and corruption, barring unethical leaders from public position, supporting prosecution, convictions, recovery of property acquired through corruption and advocating for improved public service delivery.

¹⁷⁶ Ibid.

4.4 Lessons from Botswana

The aim of carrying out a comparative study is to examine where Kenya may have gone wrong and lessons that can be learnt from Botswana and New Zealand in breaking the cycle of corruption. In addition, it assesses how best Kenya can fight corruption and effectively addresses some or all related challenges as it draws lessons of know-how from other states.¹⁷⁷ Data from the Corruption Index Report of 2017 indicate that Botswana is ranked as the least corrupt nation in Africa.¹⁷⁸ The development and ability to break the cycle of corruption can be attributed to adherence to democracy, respect of rule of law and human rights, strong economic policies and promotion of social justice.¹⁷⁹ Historically, both Botswana and Kenya gained independence in the 1960s. Both nations emerged from colonialism and having weak development structures.¹⁸⁰ In addition, both countries established structures and procedures for elections and governance from scratch. In following years after 1960s, Kenya degenerated rapidly to corruption and under development while Botswana succeeded and took advantage of good governance, development and cycle of stability.¹⁸¹

After independence in 1966, leaders Botswana took the opportunity to develop a system that encourage multiparty democracy and designed control measures to break the cycle of corruption. The country encouraged separation of power, freedom of the media, established office of Auditor General to ensure accountability and put in place transparent procurement procedures.¹⁸² After independence in Kenya 1963, political elite centralized power to the office of the president. President Jomo Kenyatta amassed power and worked with a few political leaders who were his loyalists. The lack of political pluralism after independence has given room for persistence of corruption over the years in Kenya, due to centralization of power in the government of the day.

¹⁷⁷ Supra Note 36

¹⁷⁸ Frimpong, K. (2001) "National Integrity Systems Country Study Report: Botswana" pp. 21.

¹⁷⁹ Holm, J. (1990) "Botswana: A Paternalistic Democracy", *Democracy in Developing Countries: Africa*, Boulder, pp. 179.

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

¹⁸² Ibid.

In addition, Botswana established democratic institutions after independence. There was a blend of traditional and modern institutions. Therefore, traditional forms of governance were adopted in the modern state after independent and principles of democracy and good governance were taken on board.¹⁸³ For example, the principle of public participation was not imposed by the west, it was always part and parcel of Botswana's traditional culture. The Botswana culture encouraged democracy of all members of the community who would meet openly to discuss matters related to development of their village. Further, the Botswana culture has always valued peace and transparency and this is an important factor that has fostered the climate of stability and slaying the dragon of corruption since independence.¹⁸⁴ In contrast, Kenya's culture has idolized corruption and vilified the honest citizens as foolish and non-ambitious.¹⁸⁵ This has made fighting corruption an uphill task for the government of Kenya and interested parties.

The government of Botswana has zero tolerance approach to fighting corruption. This is one of the reasons why the country has been able to break the cycle of corruption.¹⁸⁶ The Directorate of Corruption and Economic Crime in Botswana tackles corruption cases head on by setting up preventive mechanism and conducting risk assessment on corruption in the country. Its legal framework has tightened the noose on corruption by encouraging banks to disclose suspicious accounts. This practice has ensured transparency and culture of responsibility.¹⁸⁷

It is important to note that Botswana has had experiences of corruption cases in the 1990s. The then president set up a presidential commission to inquire and investigate politicians and civil servants who were involved in corruption.¹⁸⁸ The government setup possible strategies to ensure that

¹⁸³ Ibid.

¹⁸⁴ Kuris G. (2013) 'Managing corruption risk: Botswana builds an Anti-Graft Agency' Princeton University Press.

¹⁸⁵ Chweya, T. and Akiranga C. (2005) Control of corruption in Kenya; Legal Political Dimensions pp. 232.

¹⁸⁶ Hope, K. (2000) 'Corruption and Development in Africa; Lessons from Country Case Studies, Basingstoke.,pp. 17.

¹⁸⁷ Ibid

¹⁸⁸ Doing, A. (2005) Measuring Success in five African Anti-corruption Commissions- The cases of Ghana, Malawi, Rwanda, Botswana and Zambia, pp. 41.

corruption scandals were not repeated. Botswana adopted the three pronged strategies which included investigation, prevention and public education.¹⁸⁹ These strategies had been successful in the Hong Kong Independent Commission in fight against corruption. The said strategies adopted to resolve corruption scandals of the 1990s in Botswana amplified public awareness on corruption and contributed to institutional reforms aimed at protecting integrity and accountability of civil servants and politicians.¹⁹⁰

4.5 Lessons from New Zealand

New Zealand has also ranked highly in world governance indicators.¹⁹¹ The country has had appropriate legal framework to ensure democracy, free press, and participatory form of governance which involved public participation in 1800s.¹⁹² The development of the nation may be attribute to the ability and success of breaking the cycle of corruption in New Zealand. The national principle of egalitarianism has enabled the country to eliminate corruption. The principle is enshrined in people's life including social equality and equality before the law.¹⁹³ Egalitarianism is the doctrine that advances equality of all people in fundamental worth and social status and that all people should have the same rights and opportunities in life.¹⁹⁴

In New Zealand, there are two statutes that provide a framework to fight corruption. They include Crime Act 1961 and Secret Commission Act 1910. There is no single agency in charge of fighting corruption. The country has different agencies that tackle different aspects of corruption. The New Zealand Serious Fraud Office (SFO) and the Police are mandated to investigate and prosecute corruption cases. SFO is concerned with complex fraud cases such as economic crimes and bribery. The Directorate of SFO mandate goes beyond the New Zealand Police and include the power to issue

¹⁸⁹ Ibid

¹⁹⁰ Ibid

¹⁹¹ Ibid.

¹⁹² Ibid

¹⁹³ Gregory, R. (2013) Assessing Good Governance and Corruption in New Zealand, Working Paper No. 14, pp. 23-45

¹⁹⁴ <https://dictionary.cambridge.org/dictionary/english/egalitarian> assessed on 25/10/2018

notice requiring production of information and documents to be used for investigation and prosecution of corrupt individuals.¹⁹⁵

The reason why New Zealand has been able to break the cycle of corruption is because the fight against corruption is advanced by various independent institutions such as Office of the Ombudsman and Auditor General Auditor. In addition, the country has ensured that the agencies dealing with corruption maintain their independence in conducting their investigations and prosecution. New Zealand has ratified all relevant international anti-corruption and bribery conventions of the OECD and the United Nations. Strategies applied to fight corruption in New Zealand include actively involving leaders in anti-corruption compliance, training and capacity building, raising awareness and effective anti-corruption policies and procedures that adapt and accommodate changes to the environment in which it operates including making amendments where necessary.¹⁹⁶

A political system that encourages public participation in decision making play a role in breaking the cycle of corruption. The political openness encourages fairness in the procurement processes that create a healthy environment for competition which allows the qualified bidders to be awarded the tenders. These measures are clearly displayed in both Botswana and New Zealand. The Kenyan government has for a long time reserved award of government tenders to political cronies or persons willing to bribe for the award of the tender, thus perpetuating the culture of corruption. The political will of the leaders and especially of the legislators has lacked and continues to be insignificant in Kenya.

¹⁹⁵Daniel Z. (2017) Success in combating corruption in New Zealand, *Asian Education and Development Studies*, Vol. 6, pp. 22.

¹⁹⁶Ibid.

4.6 Conclusion

The case study of Botswana and New Zealand has demonstrated how prosecutorial powers exercised by the anti-corruption agencies increases the zeal to fight corruption. In handling both investigations and prosecution of their own cases, the anti-corruption agencies maintain professionalism in handling evidence and witnesses and the sequence of each activity culminating to a conviction of accused persons is accounted for. Further, the political openness in conducting the affairs of governance at each level of government has ensured that public officers are accountable for each decision made in both of these countries. Kenya's Constitution has expressly enumerated the national values which only exist on paper. Enforcement of these national values including public participation is a challenge both on the part of the government and the citizens who are not sensitive to the same principles and values.

In President Kenyatta's second term, Kenya has been keen in breaking the cycle of corruption. However, EACC has not been fully independent in execution of its mandate. The legislators have not heard the plea of EACC for donation of prosecutorial powers in respect to corruption cases. The comparative study of New Zealand and Botswana demonstrate the determination and resilience of leaders in breaking cycle of corruption. In Kenya, there is lack of political will due to the fact that top officials are involved in the corrupt activities. This has been highlighted from the numerous corruption cases involving officers from the government, who have not been prosecuted to date.

Chapter Five

Summary, Conclusion and Recommendations

Introduction

The purpose of the study was to assess how to break the cycle of corruption a case study of Kenya. The research was guided by three objectives: to evaluate the adequacy of the legal and institutional framework in the effective investigation and prosecution of corruption cases in Kenya, to examine the extent and magnitude of corruption Kenya, and to identify and propose opportunities and prospects for fighting corruption in Kenya. The study has proven the hypotheses by highlighting the inefficient legal and institutional framework in place to break the cycle of corruption. The study has also found that the lack of prosecutorial power by the EACC incapacitates the enforcement of its mandate of eradicating corruption. In addition, the study has revealed that corruption is propagated by political, economic and social-cultural dimensions in Kenya. The study was informed by rational choice theory which attributes persistence of corruption to absence of accountability mechanisms. The study found out that there exists an inherent mutual benefit for the person giving the bribe and the person receiving the bribe.

The respondents at EACC highlighted why corruption persist and exposed challenges which EACC faces in the fight against corruption. This chapter brings to end this study by reentering the findings and deducing the lessons that can be learnt from Botswana and New Zealand as these countries have been reported to have low corruption levels. The study also identified opportunities and prospects for fighting corruption in Kenya and will make recommendations how to improve and eventually eradicate corruption in Kenya.

5.1 Summary

Chapter two unveiled the various corruption scandals which include the Anglo-Leasing Contracts scandal, the NYS scandal and the NCPB scandal which have seen billions of Kenyan shillings lost in a few Kenyans pockets without any convictions. The chapter focused on dimensions of corruption in Kenya and unveiled the legal, political, economic and social-cultural dimensions of corruption. In addition, the study examined the forces shaping evolution of the culture of corruption and strategies adopted to fight corruption in Kenya. The study revealed that political leaders are not committed in fighting corruption. The study also established that neopatrimonialism, practiced in Kenya, encourages persistence of corruption, undermines the rule of law and contributes to loss of resources. In addition, poverty and low wages contribute to the persistence of corruption in Kenya. This is because poverty shortens individual horizon and increases appeal to fast acquisition of wealth. When people are faced with an economic hardship, they are not likely to abide by the law.

Chapter three of the research assessed the anti-corruption legal and institutional frameworks in place and the mechanisms applied to fight corruption. The study revealed that one of the challenge in breaking the cycle of corruption is lack of independence in institutions with the responsibility of fighting corruption. The study established that EACC should have a broad mandate enshrined specifically in the Constitution and should operate without unnecessary restrictions during investigations. The four pillars of the UNCAC should be prescribed in the Constitution. Therefore, the commission requires a system of check and balances in order to maintain accountability and transparency. Further, failure to domesticate the UNCAC fully in criminalizing acts like illicit enrichment and concealment of corrupt acquired property, impedes the fight against grand corruption. The insufficient number of commissioners at EACC, the study found, hinders the commission to establish different committees for effective discharge of its functions thus causing an operational

challenge at EACC. The study revealed that the lack of prosecutorial powers by EACC hampers the expeditious and independent determination of corruption cases because having being conferred with all prosecution powers, the DPP is also independent and can disagree with the recommendations of the EACC to charge and prosecute corruption culprits. Further, the conflicting definitions of integrity threshold under Chapter six of the Constitution illustrates the uncertainty and apparent bias in respect to ethical standards of persons seeking elective positions in politics and public officers seeking to hold positions in government institutions.

Chapter four focused on lessons Kenya can deduce from selected states in breaking the cycle of corruption. Botswana and New Zealand are states with zero tolerance approach to fighting corruption. This chapter also assessed the challenges, opportunities and prospects for fighting corruption. The research identified the reasons why Botswana and New Zealand have been able to break the cycle of corruption. The commissions fighting corruption in Botswana and Rwanda tackle corruption cases head on. The anti-corruption commissions have played a key role in setting up preventive mechanism and conducting risk assessments on corruption. In addition, the legal framework in place in these countries has tightened the noose on corruption by ensuring banks report any suspicious accounts. This ensured transparency and culture of responsibility from all stakeholders. Political will in both New Zealand and Botswana in the fight against corruption has made these countries achieve great milestones in breaking the cycle of corruption.

5.2 Conclusion

There has been numerous strategies formulated to fight corruption. However, it keeps on evolving to defeat dedicated attempts to reforms. The Constitution of Kenya has enabled the government to formulate and institute strategies to break the cycle of corruption, however, the fight of breaking the cycle of corruption is not over because institutions established are susceptible to corruption, weak

and subject to interference from the executive. Thus, it can be concluded that anti-corruption strategies are not priorities of the government because the Parliament and Executive are not demonstrating their genuine support for the war against graft.

Further, while there are legal anti-corruption strategies and institutional frameworks to fight corruption, their effectiveness in breaking the cycle of corruption is lacking as evidenced in the research. The research findings have established that despite having different anti-corruption strategies, the capacity to effectively enforce them are limited. This is indicative of the fact that the institutions that have been tasked with breaking the cycle of corruption are curtailed or compromised by the political elite the Executive.

Kenya can learn from Botswana and Rwanda to come up with sustainable and effective strategies to fight corruption. A zero tolerance to graft is imperative if the cycle of corruption is to be broken. Equipping EACC with prosecutorial powers was one of the main deduction that the study found in the comparative study so as to effectively fight graft.

The study concludes that perpetuation of corruption undermine powers of investigation and prosecution of corruption cases. To bring about a systemic change aimed at breaking the cycle of corruption, a great deal of political must be present and must be seen to be present.

5.3 Recommendations

Despite the counter measures and strategies to fight corruption in Kenya, corruption still persists due to weak institutions, inadequate legal framework and lack of an effective political leadership.¹⁹⁷

¹⁹⁷ Kivutha, K, *The Anatomy of Corruption in Kenya, Legal, Political and Social-economic Perspectives*, 1996, Nairobi.

5.3.1 Restructuring of EACC

The study recommends that EACC be restructured to give it independence of appointing its own chief executive office without subjection to a parliamentary process. Further, the total number of commissioners should be as provided for under Article 250 of the Constitution for operational expediency and to meet the quorum requirements which will avoid paralysis of the duties of the Commission. There is need to have more officers at EACC to be able to deal with increased workload in the counties. The restructuring coupled with support from political leaders to fight corruption will go a long way to breaking the cycle of corruption in Kenya.

5.3.2 Prosecutorial Powers

This study shows that the current legal framework provided under the Constitution, EACC Act and ACECA limit the EACC to merely carry out investigations and to leave the prosecution of offenders to the DPP. The observation made is that this situation is far from satisfactory because the DPP being an independent office has an option not to prosecute suspects after investigations are done. Further, legal framework is silent on the timeframe within which the cases forwarded to the DPP should be prosecuted¹⁹⁸ proposes the establishment of a prosecution directorate at the EACC with full prosecutorial powers. These powers under one agency will ensure the risk of dilution of strategy and focus is avoided. Further, this will increase the efficient and timely handling of cases leading to successful prosecution and creating public confidence in EACC.¹⁹⁹

There is need for the enforcement institutions to function in a unified manner in prosecution of corruption and economic crimes cases. Failure to work in a unified manner they may be ineffective despite functioning in well in isolation. Transparency International calls for unified approach, in state

¹⁹⁸ Olola, J, *Slaying the Corruption Dragon with Bare Hands: A Case Study for Granting Prosecutorial Powers to Kenya's EACC*, 2011, pg. 90.

¹⁹⁹ *Ibid* p. 93

integrity system backed with a national anti-corruption policy to promote concerted efforts in the fight against corruption in Kenya. The efficiency of each institution depends on different factors including rules, power, mandate and duties as prescribed in the Constitution; independence from, transparency and accountability to stakeholders, adequate resources and ability of institutions to share relevant information and experiences with relevant stakeholders. The research also endorses simplified procedures for the smaller corruption cases to pave way for EACC to concentrate on the big tankers of corruption in high echelons. High profile corruption cases demands more time and resources to prosecute. This will also serve to reduce the backlog of corruption cases at the Special Magistrates Courts.

5.3.3 Mandatory Voting

This study also proposes that the government should make voting at the general and primary elections compulsory. This will prohibit the use of extravagant cars and planes as well as the government resources by politicians for campaign purposes. The government also ought to cap the amounts of money to be used for campaigns at all levels of elections through stringent rules and strict enforcement mechanisms. Honest candidates need not have large sums of money to get elected. The current election situation in Kenya triggers the cycle of corruption because each winner at any level of government works to recover their costs expended during the campaign period. They also work towards accumulating funds for the next election through the corrupt system which is self-perpetuating.

5.3.4 Public Servants' Salaries

This research acclaims that the government of Kenya ought to match the public servants' salaries to be similar to officers in private sector. The Salary and Remuneration Commission should structure this in such a way that that when the private sector increases its salaries, there is an automatic increase

in the public sector as well and vice versa. This will also sieve out the unqualified public servants from the public offices as the only merited persons will be absorbed in the work force. Further, this model will reduce the corruption rate undertaken by public officers in an effort to make a decent living out of their employment because their salaries will match their private counterparts.

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