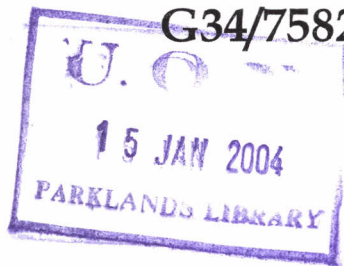


**WHITE-COLLAR**  
**AND**  
**CORPORATE CRIME IN KENYA**

**PRESENTED BY: KARWANDA EDWIN KEEGA**

**G34/7582/99**



**SUPERVISOR: MR. WILLIAM MUSYOKA**

**This research paper is submitted in partial  
fulfillment for the award of a Bachelor of Laws  
(LL.B) degree**

**University of Nairobi  
Faculty of Law  
July 2003**

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## APPRECIATION

This paper is dedicated to my family. *Mum, Dad, Adel and Tim*  
For your encouragement, immense help, and unending love.

Sincere gratitude is extended to my boys, *Jeff, Bryo, Abdul and Steve*  
For all the times when you made life in campus fun for me  
And to *Nishi*, everything goes unsaid

*Hilda*, you greatly helped me in the final completion of my work, I can  
never thank you enough

To my supervisor *Mr. William Musyoka*  
For the extremely wise and intellectual advice that was invaluable  
and indispensable

Finally and most of all to God, for enabling me reach where I am, only you knows  
where I have come from and where an headed.

## PROBLEM STATEMENT

Within the recent year, the public, Legislative committees, business executives, and others have been concerned about the causes and extent of unethical and illegal practices within the corporate world.

At the same time, there is recognition that many large corporations maintain consistently good records of ethical practices and compliance with the law that contrast sharply with the behaviour of other corporations.

The underlying reasons for the aforesaid differences present several important issues;

Why some corporations are more ethical than others.

The extent to which top corporate management sets the policies that led either to ethical or unethical behaviour or to compliance with, or violation of the law.

Whether some corporations are traditionally characterized by an ethical culture while others appear to be unethical, regardless of who is in the top management?

Whether corporate employees, particularly the middle management, should report corporate violations to the government when top management hasn't acted on them.

Whether government regulation as a whole, creates such a generally negative attitude towards government that can lead to law violation.

Whether industry self-regulation would be superior to government regulation.

The above issues, the discrepancies and loopholes in the regulatory framework of the corporate arena in Kenya, triggered my interest in pursuing a research in this field.

This research paper will focus and examine individual and organizational forms of white-collar corporate crime to enable the reader gain an understanding of the problem of definition of the various forms of business, occupational or corporate criminality and an appreciation of their importance in the context of social life of the community.

A clear-cut observation to be emphasized is the fact that the rot in Kenya's corporate system is structural and systematic. It consists of lying, cheating and stealing in a grand scale, but most offences seem depersonalized because the transactions are so complex and remote from ordinary human criminality (the matter lies deeper than individual veniality). The various financial and economic safeguards in place have been flouted. If at all, they have been implemented making a sick joke out of the exalted principle of transparency. But the rot consists of more than greed and ignorance. The evolving new forms of financing and banking, joined with the permissive culture in Kenya, produced an exotic structural nightmare in which some firms are regulated and supervised while others are not.

Although there are conflicting views on the causes of these corporate difficulties, I have set about his research by identifying the causes, which in my opinion are largely to blame for the current scenario.

This research paper seeks to identify specific white-collar corporate crimes and issues in the Kenyan corporate sector that may have contributed to the existing situation. An analysis of the corporate regulations is then undertaken to establish any deficiencies in the legal framework.

This research is prompted by one major query. If there does in fact exist a legal framework for the regulation of corporate practice and procedure in Kenya what then is the reason for the rampant crime in the corporate world in Kenya?

#### PROBLEM APPROACH.

In Chapter One, in a bid to introduce the paper and give a brief overview of the subject matter, this chapter will serve as an introductory part firstly by looking at the definition and characteristics of corporations.

I will then give an in-depth analysis of the concept of while collar corporate crime coupled the various existing instances of respective corporate crimes.



**In Chapter Two**, I analyze the existing legislative provisions and policies adopted in Kenya that are directed towards curbing instances of corporate crime.

I will then visit upon individual cases of white-collar corporate crime that have arisen within Kenya, the aim being to identify the unethical and/or illegal practices and then highlighting on the administrative or penal actions resorted to as fall backs.

**Finally, In Chapter Three**, Finally, a study shall be undertaken on the reasons/causes of the aforementioned cases with particular emphasis being directed towards shortcomings of Legislative provisions, policies and corporate administration.

I make recommendations towards a review of existing regulations pertaining to the corporation system in Kenya vis-à-vis discussed issues. The above discussion shall include a proposal of the enactment of a *sui generis* legislation, the corporate crimes Act, in addition it will be inclusive of other solutions namely the development of policy guidelines and protocols, educational campaigns incorporating public/shareholders and investor awareness just but to mention a few..

In conclusion, my contention is that the root cause of the problems revolving around while collar corporate crime in Kenya stems from reasons mentioned earlier. The key to solving this problem is to acknowledge and respect proposals, protocol and Legislation put forward.



# CHAPTER 1: THE CONCEPT OF CORPORATE CRIME

## 1.1 INTRODUCTION

The Layman has a totally different concept of what is meant by the term "person" than the concept that exists at Law. The Layman thinks only of natural persons, but the law thinks of legal persons. Legal persons are persons who are given legal personalities by the Law, but the term also includes certain artificial entities that are given fictitious legal personalities by the law.

The difference becomes clearer, when, their characteristics are juxtaposed. A corporation exists as one of these artificial entities.

"They are a continuous identity; endowed at its creation with capacity for endless duration; residing in the grantees of it and their successors, its acts being determined by the will of a majority of the existing body of its grantees or their successors at any given time, acting within the limits imposed by the constitution of their body politics, such will being signified to strangers by writing under the common seal; having a name, and under such a name a capacity for taking, holding and enjoying all kinds of property, a qualified right of disposing of its possessions, and also a capacity for taking, holding and enjoying, but inalienably, liberties, franchises exemptions and privileges; together with the rights and obligations of suing and being sued only under such name" <sup>1</sup>

"Corporation, in the America legal system, refers to an entity (usually a business) with authority under law to act as a single person, with rights to issue stock and exist indefinitely. In England, *corporation* or *body corporate*, is defined more broadly as an

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<sup>1</sup> Lord Hailsham, Halsbury's Law of England, 2<sup>nd</sup> ed. Vol. 8 (Butterworths and Co., London, 1938), pp. 4-6

entity that has legal personality, i.e., that is capable of enjoying and being subject to legal rights and duties...it is that which the civilians call *universitatem* or *collegium* constituting municipal corporations, and companies incorporated by Charter or Act of Parliament".<sup>2</sup>

Basic features of a corporation emanate from all the aforesaid and could be summarized as follows:

- i) That a corporation consists of a body of persons who collectively form one, but who have a separate existence distinct from that of the corporation itself.
- ii) That the corporation has, therefore, a legal personality of its own distinct from that of its members.
- iii) That the individual members have rights, duties and liabilities of their own apart from those of the corporation.
- iv) That the corporate body is different in that it has perpetual succession, it never dies and has a common seal by which to authenticate its acts.
- v) That since it's immortal and without a mind of its own, human persons are required to facilitate the conduct of its affairs.

As mentioned earlier, "the nature of a corporation may be shown by contrasting it, as a legal conception with the individuals in which it resides. In law, the individual

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<sup>2</sup> Stround Francis, Stround's Judicial Dictionary, 4<sup>th</sup> ed. (Sweet and Maxwell, London, 1971). pp. 55-56.

corporators, or members, of which it is composed, are something wholly different from the corporation itself, for a corporation is just a *legal persona*"<sup>3</sup>.

Lord Halsbury said...."*But short of such proof, it seems to me impossible to dispute that once a company has been legally incorporated it must be treated like any other independent person with its rights and liabilities as appropriate to itself...I cannot understand how a body corporate thus made "capable" by statute can lose its individuality...*"<sup>4</sup>

Corporations are considered under two main heads/classes – namely, corporations sole and corporations aggregate<sup>5</sup>.

### 1.1.1 Corporations sole

A corporation sole is a body politic having perpetual succession, constituted in a single person, who, in right of some office or function, has capacity to take, purchase, hold and demise (and in particular instances, under qualifications and restrictions introduced by statute, power to alien) land, tenements and hereditaments, and now, it would seem, also to take and hold personal property, to him and his successors in such office for ever, the succession being perpetual, but not always uninterruptedly continuous; that is, there may be, and mostly are, periods in the duration of a

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<sup>3</sup> *Supra*, note 1 at p.4

<sup>4</sup> *Salomon v Salomon* [1897] A.C pg. 27

<sup>5</sup> General Classification of Corporations that facilities subsequent specific identification

corporation sole, occurring irregularly, in which there is a vacancy, or no one in existence in whom the corporation resides and is visibly represented<sup>6</sup>.

They have certain powers and duties conferred upon them by statute. However, these are conferred on the office and not on the individual occupying the office<sup>7</sup>. One has to distinguish the official person from the private person. Examples include the Office of the President, Public Trustee, Archbishop, etc.

As to be seen, a corporation sole unlike a corporation aggregate has a double capacity; namely, it's corporate capacity and its natural/individual capacity so that a conveyance to a corporation sole may be in either capacity.

### 1.1.2 Corporation Aggregate

A corporation aggregate has been defined as a collection of individuals united into one body under a special denomination having perpetual succession under an artificial form, and vested by the policy of the law with the capacity of acting in several respects as an individual, particularly of taking and granting property, of contracting obligations and of suing and being sued, of enjoying privileges and immunities in common, and of exercising a variety of political rights more or less extensive

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<sup>6</sup> Supra, note, 1, at p.8

<sup>7</sup> Tudor Jackson, The Law of Kenya: An Introduction, 3<sup>rd</sup> ed. (Kenya Literature Bureau, Nairobi 1977), p.3



according to the design of its institution, or the powers conferred upon it, either at the time of its creation or at any subsequent period of its existence<sup>8</sup>.

A corporation aggregate has only one capacity, namely, its corporate capacity; so that conveyance to a corporation aggregate can only be to it in its corporate capacity”.

## 1.2 CHARACTERISTICS OF CORPORATIONS

The characteristics that attach to corporations tend to vary when it comes to public/state corporations and/or parastatals and others like companies (public or private) or other corporate aggregates other than the public corporations.

The characteristics discussed herein below are the ones that vis -a vis shed light on the concept behind this research paper<sup>9</sup>.

### 1.2.1 Characteristics of State/Public Corporations

- a) **Statutory Body:** A public corporation of the British pattern (which Kenya adopts) is established under an Act of Parliament (Legislature), i.e., it's a statutory body. An ordinary corporation or joint stock company comes into existence automatically by fulfilling certain legal requirements as provided in

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<sup>8</sup> Supra, note 1, at p.9

<sup>9</sup> They create the foundation upon which some of the corporate offences are perpetrated. The corporate executives used them to further their illegal/wrongful corporate or personal endeavors.

company law. But the Public corporation is an embodiment of an express wish on the part of the state to create a new agency<sup>10</sup>.

- b) **Insulated personally:** As a corollary to the above point, we can say that a public corporation possesses a legal personality separate not only from the persons who conduct its affairs, but also separate from the state as such. It's a child of the state, which grows into maturity as soon as it's born.
- c) **Independent governing Board:** an independent governing board administers the affairs of a public corporation. According to orthodox theory, all members of the board should be appointed by the Government (read Minister - in - charge) without any consideration of class or group interests. Specialists may be appointed but not as representatives of any sector.
- d) **Autonomous Working:** The basic ideology of public corporations rests on autonomy in its normal (often described as day-to-day) operations with a view to ensuring advantages which vis-à-vis includes, Freedom from political dictation. That is, a public corporation is expected to maximize operational efficiency. It's to be guided only by its statute or such other policy directives which are issued by the government. Apart from these considerations, it should not get entangled in the political fabric of the country<sup>11</sup>.
- e) **Self Contained finance:** Public corporations should realize financial independence. Public corporations should realize that income depends upon the benevolence of the legislature. They should be free from the inordinate delays caused by excessive Treasury control. They should also be free from the

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<sup>10</sup> In Kenya, examples include:

<sup>11</sup> It's prudent to state that a contrary position did exist in Kenya prior to the new change of Government.



Lapse system, which encourages lavish and imprudent spending towards the close of financial years.

f) **Private Law status:** The public corporation is an amphibious institution. It's a public authority in as much as it is owned by the state, and is expected to fulfill public tasks on behalf of the government and parliament. But the commercial nature of its activities, and its managerial model, generally resemble the privately owned corporation. This dual nature of the public corporation – while it is designed to achieve the best of both the worlds; gives rise to intricate legal questions e.g.:

- a) To what extent should a Public corporation be subject to taxation law?
- b) Can a public corporation be fined or penalized otherwise, in the event of violation of certain laws of the land?
- c) Is a public corporation answerable before the civil courts in all matters which affect contractual rights (damage and breach of contract)?
- d) Is a public corporation liable in torts – damage caused to a 3<sup>rd</sup> party by an action imputable to the corporation?
- e) Do price control regulations; labor law and other laws applicable to private enterprises bind a public corporation?<sup>12</sup>

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<sup>12</sup> John W. Katende & M.R. Chestenman, The Law of Business Organizations in East and Central Africa, 1<sup>st</sup> ed. (East Africa Literature Bureau, Nairobi, 1978). pp 65-70

### 1.2.2 Companies et al

Characteristics arising from the above are usually as a result of incorporation under the relevant statute like the Companies Act Chapter 486 Laws of Kenya. Some of these include; existence as a separate legal entity, ability to sue and being sued, owning and dealing with property perpetual succession and employing personnel to conduct its affairs.

### 1.3 THE ISSUE OF WHITE COLLAR CORPORATE CRIME

During the twentieth century, astounding growth have been occurring in multinational corporations. These giants produce the bulk of all manufactured products, dominate large portions of economies, employ millions of workers and exercise a major influence on consumer choices. Via their resources, they have brought enormous industrial and commercial progress to the entire western world and increasingly to the developing world.

However, along with the large corporations' greatly increased productive power, an equally significant potential for social harm and a lack of social responsibility has evolved.

There has been evidence of extensive violations of the law. These have been widely revealed in the many government investigative committees which have looked into the various corporate entities. Most of these violations have also been of public knowledge in most third world /developing countries, like Kenya.

Investigations have also revealed/exposed widespread corporate pay offs (domestic and foreign), and illegal political contributions. All these investigations have revealed the immense economic and political power of corporations.

These corporate violations have resulted in enormous economic losses to consumers and the government. (They include price fixing, false advertising chains, the marketing of unsafe products, environmental pollution, political bribery, forgery pay offs, disregard of safety regulations in manufacturing cars and parts, tax evasion, falsifying of corporate records to hide illicit practices etc). There have also been injuries (and even deaths) among citizens and employees due to laxity, negligence and/or non-compliance of regulations<sup>13</sup>.

In Kenya, contrary to a prior trend, the public has started regarding white collar and corporate crime as serious offences. The increased recognition of illegal corporate behavior has been a natural response to various identifiable social forces, and particularly to the dramatic increase in realization of the potential impact of major corporations on the Kenyan economy and need for accountability and responsibility<sup>14</sup>.

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<sup>13</sup> Marshall B. Clinard, *Corporate Ethics and Crime*. 2<sup>nd</sup> ed. (Clarendon Press, Oxford, 1983). pp. 14-16

<sup>14</sup> Evidenced by the restructuring of and new appointments to public corporations, crackdown on corruption and unethical/illegal transactions by corporations, where private or public.

Some of these forces include, for example; the effects of the recent change of government, some highly publicized corporate violations, a growing concern for the environment, the increased recognition of extensive corporate responsibility etc.

### 1.3.1 White-collar crime

The phrase “white-collar crime” was coined in 1939 during a speech given by Edwin Sutherland to the American sociological society. He defined the term as “crime committed by a person of respectability and high social status in the course of his occupation”. Although there has been some debate as to what qualifies as a white-collar crime, the term today generally encompasses a variety of non-violent crimes usually committed in commercial situations for financial gain. Many of the white-collar crimes are especially difficult to prosecute because perpetrators are sophisticated criminals who have attempted to conceal their activities through a series of complex transactions<sup>15</sup>.

Globally, there have been long traditions within which it has been recognized that the powerful and privileged commit “crimes”, loosely defined as a consequence of the character of the economic system and their special status within it.

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<sup>15</sup> <http://www.diogenesllc.com>

Some individual white-collar offenders avoid criminal prosecution because of the class bias of the courts – they are aided by the power of their class to influence the implementation and administration of the law. Thus, the crimes of the upper and lower classes differ principally in the implementation of the criminal laws that apply to them.

The bottom line may thus be drawn as such. That “upper class/white-collar crimes often operate undetected, that if detected, they may not be prosecuted, and that if prosecuted they may not be convicted<sup>16</sup>.

This is because these crimes constitute a large body of violations that aren't normally associated with such ordinary crimes. They differ in the nature of the offense and the situation in which they occur, and the penalties imposed are far more likely to be administrative and civil rather than criminal in nature, even where a criminal penalty is available.

Simply put, a broader legal coverage of white collar crime is necessary, for without it, many white collar violations cannot be regarded within the same context as ordinary crimes subject to criminal law<sup>17</sup>.

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<sup>16</sup> Gary Slapper and Steve Tombs, Corporate Crime, 1<sup>st</sup> ed. (Longman Publishers, Dorchester, 1999), p. 37-38

<sup>17</sup> Supra, note 16, at p. 35



### 1.3.2 Corporate Crime

*"Crime is an intentional act in violation of the criminal law (statutory and case law) committed without defense or excuse, and penalized by the state as a felony or misdemeanor..."<sup>18</sup>*

White-collar crime includes corporate crime.

There are many assumptions made about corporate crime, and there are several definitions, various standpoints and considerable argument over what constitutes corporate crime, both past and present. However, it would appear that from the lay person's point of view that there is still a general belief that it is "victimless crime".

Contrary to common societal misdemeanors like murder, assault, with readily defined victims, and seemingly easy to grasp issues, corporate crime cannot only prove harder to detect, but harder too to prove.

This is because it cannot only be a crime devised and perpetrated by the lone individual within the corporate structure, but also a problem inherent in, and perpetrated by, the whole corporate structure itself.

Thus, corporate crime, like white-collar crime (of which it is part) is defined as any act punishable by the state regardless of whether its punished by administrative or civil law, which it usually is, or under the criminal law.

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<sup>18</sup> Supra, note 16, at p. 35



More specifically, a corporate crime has been defined as the “conduct of a corporation or individuals acting on behalf of the corporation that is prescribed by the law”<sup>19</sup>.

This broad legal definition of corporate crime is important and necessary, since a corporation can't be jailed. Though it can be fined and its officers imprisoned. The major penalty of imprisonment provided for ordinary offenders is not available for cases involving corporations *per se*<sup>20</sup>.

Kramer's comments on the concept of corporate crime are as follows:-

*“By the concept of ‘corporate crime’, then, we wish to focus our attention on criminal acts (of omission and commission) which are the result of deliberate decision making (or culpable negligence) of those who occupy structural positions within the organization as corporate executives or managers. These decisions are organizationally based – made in accordance with the normative goals (primary corporate profit), standard operating procedures, and cultural norms of the organization –and are intended to benefit the corporation itself or at times, the individual”<sup>21</sup>.*

Corporate crime can therefore be produced by an organizations structure, its culture, its unquestioned assumptions, and its very *modus oparendi* and so on. Thus, its understanding requires a shift from a humanist to a structural problematic.

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<sup>19</sup> *Ibid.*, p.15 et seq

<sup>20</sup> It lacks human personality to enforce imprisonment

<sup>21</sup> Kramer, R. C. Corporate Criminality, 1<sup>st</sup> ed. (Sage Publications, Beverly Hills, 1984) pg 145

The pursuit of organizational goals is deeply implicated in the cause(s) of corporate crime. But it's important to realize that these goals aren't the manifestation of personal motives cast adrift from organizational moorings, neither are they disembodied acts committed in some metaphysical sense by corporations<sup>22</sup>.

### 1.3.3 From White Collar To Corporate Crime

As stated initially, white collar crime includes corporate crime<sup>23</sup>.

Edwin Sutherland defined white-collar crime in terms of persons and his work constantly vacillated between a focus upon crimes of business people and corporate crimes (so conflating the two), and in his consideration of the latter, he anthropomorphized the corporation, that is, he unthinkingly attributed human capabilities to these corporations.

Of course, there is a sense in which this is all understandable, since corporations do require human actor's in order to function, even if they are not reducible to such human agency. Indeed, those actions and omissions upon which we focus in this text do centre on human agency.

A most significant clarification would be that which distinguishes between occupational and organizational crimes as they seem as elements that can be derived from our definition of white-collar crime.

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<sup>22</sup> Ibid., p.21 et seq

<sup>23</sup> "The former is related to and incorporates the latter.

Occupational occur when individuals or groups of individuals make illegal use of their occupational position for personal advantage and victimize consumers and/or their own organizations. Organizational illegalities on the other hand, are individual or collective illegalities that are perceived as helping to achieve, or are congruent with, the organizational goals set by the dominant coalition within an organization.

We should note however that the distinction between occupational and organizational crimes can be overdrawn and may take attention away from the possible relationship between occupational crime and certain organizational features.

For one thing, we should recognize that in many organizational features, advantages may accrue to both individuals and organizations. Somewhat differently, we also need to recognize that there form produces a relatively unsupervised individual who is therefore able to engage in occupational crime; this may be a means encouraging the same or other individuals to engage in organizational crime. Individuals may also be told to achieve certain profit targets which, in the circumstances, could only be achieved by breaking the law.

By non-supervision, corporate executives may practice what has been labeled "willful blindness" concerted ignorance<sup>24</sup>.

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<sup>24</sup> Supra, note 16, at pp. 45-52

Basically, these cases being described are *criminogenic organizations* which produce both occupational and organizational crime. This means that, to understand corporate offending in this study, we may need to move outside the confines of discrete organizational entities<sup>25</sup>.

#### 1.3.4 White-Collar/Corporate Crime Terms

To facilitate a better appreciation of the concept behind this research work, we need to very briefly go over the main activities that constitute corporate crimes. They include:-

**Bribery:** It's the offer of money, goods, services, information or anything else of value, which is presented with the intent of influencing the actions, opinions, or decisions of the taker.

It's to influence unfairly (especially someone in a position of trust) by favors or gifts.

**Environmental Law violations:** Discharge of toxic substances into the air, water, or soil which poses a significant threat of harm to people, property, or the environment, including air pollution, water pollution and illegal dumping, in violation of the country's environmental law.

**Financial Fraud:** Financial Institution Fraud (FIF) involves fraud or embezzlement occurring within or against financial institutions that are insured or regulated by the government. Financial institutions are threatened by a wide array of frauds including

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<sup>25</sup> That in corporate crime, there are individual offenders who abuse their positions in as much as there are corporate/offenders. The two need be identified, noted and considered distinctly from each other.



commercial loan fraud, cheque fraud, counterfeit negotiable instruments and a variety of traditional and non-traditional FIF scams.

**Manufacturing unsafe products:** This involves the production of products or goods from whatever sector/industry that is substandard or unfit for consumer use thus creating an unsafe environment for the users.

**Government Fraud:** Fraud against the government may consist of fraud in connection with government contracting and fraud in connection with the government and/or government funded entitlement programs, including public housing, agricultural programs, defense procurement fraud, educational programs and corporate frauds. As it relates to government contracting, investigations often involve bribery in contracts or procurement, collusion among contractors, false or double billing, false certification of the quality of parts or of test results and substitution of bogus or otherwise inferior parts.

**Embezzlement:** When someone who has been entrusted with money or property appropriates it for their own use and benefit.

**Illegal/unsafe working conditions:** Subjecting employees to working under conditions/circumstances that are not conducive vis-à-vis the type of work and the environs. The conditions place the employee in a situation where she/he is vulnerable to injury or harm. This is usually in violation of existing labor laws.

**Money Laundering:** A process or series of actions through which income of illegal origin is concealed, disguised or made to appear legitimate to evade detection, prosecution, seizure and taxation. Illicit proceeds must be laundered to make it appear as though the funds were generated through some legitimate means. This

allows criminals to enjoy the “fruits” of their criminal activity without raising suspicion.

**Public corruption:** Public corruption involves breach of public trust and/or abuse of position by state, or local officials and their private sector accomplices. By broad definition, a government official, whether elected, appointed or hired, may violate state laws when he/she asks, demands, solicits, accepts, or agrees to receive anything of value in return for being influenced in the performance of their official duties.

**Tax evasion:** Fraud committed by filling false tax returns, or not filing tax returns at all.

**Healthcare fraud:** Types of fraud include kickbacks, billing for services not rendered, billing for unnecessary equipment, and billing for services performed by a lesser qualified person. The health care providers involved encompass all areas of healthcare, including hospitals, doctors, psychiatric hospitals, laboratories, nursing homes etc.

It to be noted that the above mentioned examples aren't exhaustive, others include, insurance fraud, in order trading, counterfeiting, kickbacks, Anti-trust violations, et al<sup>26</sup>.

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<sup>26</sup> Supra, note, at pp.2-4



#### 1.4 CONCLUSION:

The work of Edwin H. Sutherland did provide the impetus for basic changes in both the concept of and legal approaches to corporative offences. In legal terms, as it evident from this chapter, business and corporate offenders are “administratively segregated” from ordinary crime, not because of what they do, but because of the differences in the legal terminology.

On the whole, laws that affect corporations are fairly new and “light”, and the economic and political powers of the corporate world have been marshaled to discourage, prevent and/or frustrate the application of Criminal Law to violations of corporate laws, and thus to avoid the opprobrium of the terms “crime” and “criminal”.

Unless a more inclusive legal definition of crime is used or adopted, it is quite hard or not possible at all to consider corporate law violations within the same framework as ordinary crime.

# CHAPTER 2 CORPORATE CRIMINAL LIABILITY

## 2.0 INTRODUCTION

For the early part of its history, the corporation lay outside the Criminal Law, "it had no soul to damn and no body to kick"<sup>27</sup> If a crime was committed by the orders of a corporation, criminal proceedings for having thus instigated an offence could only be taken against the separate members in their personal capacities and not against the corporation itself.

In 1682, Lord Holt C.J is reported as having said,

*"...that a corporation is devoid not only of mind but also of body and therefore incapable of receiving the usual punishments: What? Must they hang up the common seal?"<sup>28</sup>*

The proliferation of corporations in modern times and the extent of their influence in social life have caused the criminal law to bring them within its jurisdiction. This incorporation within the criminal law has been arguably belated, careless and unsystematic but has nevertheless occurred...under the commercial development which the last few generations have witnessed, corporations have become so numerous that would have been grave public danger in continuing to permit them to enjoy (the old) immunity.<sup>29</sup>

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<sup>27</sup> Lord Thurlow in *R v. ICR Road Haulage Ltd* (1944) IK.B 552

<sup>28</sup> *R V. City of London* (1682) 8 St.Tr 1039 at 1138

<sup>29</sup> Gary Slapper and Steve Tombs, *Corporate Crime*, 1<sup>st</sup> ed. (Longman Publishers, Dorchester, 1999), Pg 27

The law has advanced significantly from the aforestated times and position. The law gradually came to recognize that corporations could be indicted for crimes. At first this process involved only recognition of corporate crime where the offence in question arose from the omission to carry out a positive duty imposed by statute, but over time, the capacity of corporations to commit crimes was acknowledged in law.<sup>30</sup> Today, as we have noted, corporations are socially ubiquitous and are regularly identified as responsible for crimes involving fraud, pollution, dishonesty, corruption and offences against health and safety. They are moreover, also being prosecuted to conviction as culprits.

The point of central importance is that corporations are now seen legally (and severally) as units capable of crime. This Chapter will look into the nature and character of corporate criminal liability coupled with the current sanctions available against corporations.

Further we shall look into the various scattered pieces of legislations that are intended to check the instances or commission of corporate crime. A study of the various cases of corporate crime committed in Kenya shall be undertaken. This will incorporate a brief examination of the actions taken as fallbacks to those crimes.

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<sup>30</sup> Ibid, p.35

### 2.1.1 Corporate Criminal Liability

Unless the terms of statute involved specifically provide to the contrary, the criminal responsibility of a company or corporation, as distinct from its offices or employees, falls to be determined by common law principles. Under original Common Law a corporation could not be convicted for any criminal offence due to confusion about the principles governing primary corporate liability.<sup>31</sup>

A principle hurdle to the imposition of primary corporate criminal liability at common law was that common law offences insisted on proof of criminal fault and the courts could not see a clear way of saying that, for example a company/corporation as opposed to any human being associated with the company, “intended something or knew” something<sup>32</sup>.

The hurdle was overcome by the opinion of Viscount Haldane in *Lennard's Carrying Co. Ltd Vs. Asiatic Petroleum Co. Ltd.*<sup>33</sup> Therein, he invented a theory of primary corporate criminal liability for offences requiring fault, which has become known as the “Identification theory” or “alter ego” theory of responsibility.

He said at 713,

...a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; Its active and directing will must consequently be sought in person of somebody who for some purposes may be called an agent, but who is

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<sup>31</sup> Mathew Gwode, Corporate Criminal Liability: The Development of Primary Liability pg 1 at </http://www.citizen.org.visted on 24/04/2003

<sup>32</sup> Ibid, p.2

<sup>33</sup> [1915] A.C pg 705

really the directing mind and will offer corporation the very ego an center of the personality of the corporation.<sup>34</sup>

The essence of what was said is that a company may be convicted directly of the commission of a crime requiring proof of fault by attributing to the company the fault of an officer, agent or employee of the company who stands in such a relation to that company that he/she may be regarded as being the company for that purpose.

A famous statement by Lord Denning for this doctrine is as follows:

“A corporation may in many ways be likened to the human body. It has a brain and nerve center that controls what it does. It also has a mind, which hold the tools and act in accordance with directions from the center. Some of the people in the corporation are mere servants and agents who are nothing more than hands to do the works and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.”<sup>35</sup>

Under the identification theory, the person who acts is not acting for the company. He or she is acting as the company. This development undermined the necessity for the development of vicarious liability (which the two need to be distinguished) under

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<sup>34</sup> *Ibid.*, pg 713

<sup>35</sup> HL Bolton (Engineering) Co. Ltd V. T.J Graham & Sons Ltd [1957] iQ.B at 172



which the person who acts does act for the company but whose acts are attributed to the company<sup>36</sup>. Vicarious liability is a form of strict liability arising from employer-employee relationship without reference to any fault of the employer<sup>37</sup>.

Basically, what the identification theory propounds is that when it comes to crimes involving blameworthiness, the criminal liability of corporations extends to cover *direct liability* for acts performed by natural persons identified with it<sup>38</sup>. A corporation can only act through individual persons. If there is an individual who has committed the actual criminal conduct required for an offence (what lawyers term the *actus reus*) with the appropriate culpable frame of mind (which lawyers terms the *mens rea* and which can be among other things, intention or recklessness) and who is sufficiently important in the corporate structure for his or her acts to be identified with the company itself, the company as well as the individual can be criminally liable<sup>39</sup>.

(Unless statutory provision creating the offence precludes this)

The liability of a corporation for an offence is, as has already been mentioned, thus additional to the liability of the individual employee.

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<sup>36</sup> In Corporate Criminal Liability, the issue of “blame” seems to be an important and contentious feature, unlike vicarious Liability which doesn’t rest on fault

<sup>37</sup> *Supra*, note 3 at p. 197

<sup>38</sup> English Common Law has developed the fiction of corporate personality – the idea that a company is a legal ‘person’ – which can sue and be sued in its own name

<sup>39</sup> *supra*, note 3 at p. 198

## 2.1.2 The Problem Of Discovering The Mind Of The Corporation

Corporate intention is found by treating the *mens rea* of certain employees of the corporation as the *mens rea* of the corporation itself. It is not every employee whose *mens rea* was also that of the company. However, the test is wide and flexible, one of mixed fact and law.<sup>40</sup>

A corporation/company has no physical existence and cannot think or act. A function has to be applied to convert the acts and thoughts of a human into those of the corporation thereby attributing personality to it. This is known as the identification principle.

A variety of criteria and phrases for determining whom in a company thinks and acts as that corporation has been suggested in the leading case of *Tesco Supermarkets Ltd V. Natrass*<sup>41</sup>. Viscount Dilhorne, thought that it would have to be someone,

*...who is in actual control of the operations of a corporation/company or of part of them and who is not responsible to another person in which he discharges his duties in the sense of being under his orders.*

In determining whom are the people representing the controlling minds of the corporation, a dictum of Lord Dennings in *H.L Bolton (Engineering) Co Ltd V. T.J Graham & Sons* was approved<sup>42</sup>.

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<sup>40</sup> supra, note 3 at p. 30

<sup>41</sup> [1972] A.C 153 at 171

<sup>42</sup> Supra, note 9

The formula stated/propounded in the above case does not include all managers since not all such persons represent the directing mind and will of the company and control what it does.

The wide and flexible test was disapproved and replaced by a far stricter one known as the "controlling officer" test. In any event it is a question of *law* whether a person is to be regarded as having acted as the corporation/company or merely as the corporation's servant or agent<sup>43</sup>. Such a narrow test has had considerable implications for prosecutors. It means in effect, that it is extremely difficult for companies to be convicted of serious crimes. It is so because the way that responsibilities are distributed through a corporate body makes it extremely unlikely that the necessary fault will ever reside entirely in a single identifiable individual<sup>44</sup>.

In his preliminary ruling in 1990 (*arising from manslaughter charges brought against P&O European Ferries for the sinking of the Herald of Free Enterprise*) Mr. Justice Turner said (P.84):

*...where a corporation, through the controlling mind of one of its agents, does an act which fulfils the prerequisites of the crime ...it as well as its controlling mind or minds, is properly indictable for that crime<sup>45</sup>.*

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<sup>43</sup> *supra*, note 15 at p.173 (per Lord Reid)

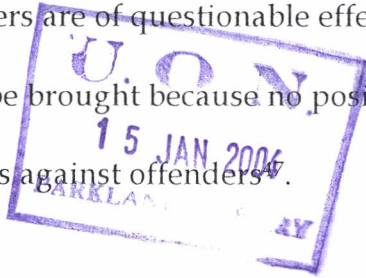
<sup>44</sup> *Supra*, note 3 at p.31

<sup>45</sup> *supra*, note 3 at p. 34

In order to establish that a corporation itself was guilty of a certain crime, it has to be proven that one of its directors was guilty of the same. When the prosecution against the senior employees collapses, the case against the corporation inevitably goes too.

### 2.1.3 Punishing Corporations

One distinct problem in the area of corporate crime is the issue of how such non-human legal personalities should be punished if they are convicted of crimes. This is not a purely penological question. If the punishments that could be imposed upon organization offenders are of questionable effectiveness<sup>46</sup>, then it may seem pointless for prosecutions to be brought because no positive outcome can possibly flow from criminal proceedings against offenders<sup>47</sup>.



The only criminal penalty that can be imposed on a corporation or organization in English Law is a fine and/or compensation order. There is not clearly established the courts should deal with body of theory of how companies and company directors convicted of criminal offences in relation to their enterprise. When a corporation fault is criminally culpable, the question arises as to most suitable sanction against a company.

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<sup>46</sup> For example, fines may be simply passed on to consumers

<sup>47</sup> *supra*, note 3 at p. 195

#### 2.1.4 Corporate Fines

A fine can be defined as “a sum of money that must be paid as a punishment for breaking a law of rule”<sup>48</sup>.

Are fines (especially heavy fines) all appropriate way to deal with corporate wrong? It can be argued for example that the burden of such fines is inappropriately borne by shareholders or, if the fine affects the company very badly, by employees who are eventually made redundant, or by consumers in the form of higher prices.

Fisse, notes that fine are inappropriate in the contest of offences committed by quasi governmental authorities as they would simply result in “some budgetary shuffling with money deducted from one arm of government passing back into general revenue”<sup>49</sup>.

He puts forth a cogent case for an improved system of fining companies. He has noted that presently, when sentencing convicted companies, magistrates and judges don't have the same detailed information of the offender as they do for individuals awaiting sentence<sup>50</sup>.

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<sup>48</sup> Longman Dictionary of Contemporary English, [Acme Press (Kenya) Ltd, Nairobi 1991] p 381

<sup>49</sup> Fisse, B and Braithwaite J., Corporate Crime & Accountability, 1<sup>st</sup> ed. (Cambridge University Press, Cambridge, 1993). P. 157

<sup>50</sup> Supra, note 3 at p. 198



In arguing for higher fines, he advocates the use of corporate enquiry reports detailing essential financial and safety information. A probation officer will be required to undertake a pre-sentencing investigation into each convicted company to help the court decide an appropriate level of fine.

The Criminal Justice Act (1991) of England<sup>51</sup> provides that Courts must enquire into the financial circumstances of the offender before fixing the amount of a fine. It has been argued that large corporations with vast profits are to be fined according to their means<sup>52</sup>. The fine has always been a problematic sanction against corporations. In recent history, there is evidence that many offenders see the penalty as a risked “addition” cost to their criminal enterprise and, if the prospective gain from crime is sufficiently high, are undeterred. If they are caught, offenders will see paying the fine simply as a form of taxation on crime.

#### **2.1.5.0 Alternative Sanctions to the Fine**

Noting that a small fine on a corporation may have no impact and a large one might simply be passed on to shareholders or consumers, causing injustice there are alternatives recognized in the American system-probation, adverse publicity, equity fines, community service, making a company lend an executive to charity for a year, direct compensatory orders and punitive injunctions.

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<sup>51</sup> The Criminal Justice Act of England, 1991

<sup>52</sup> supra, note 3 at p. 202

It is helpful to draw attention to the innovative American approach to corporate punishment, which incorporates;

### 2.1.5.1 Corporation Probation

Under such sanction, a judge can compel the senior management of a company to change how the company devises and implements safety procedures. The result of such a sanction is a highly interventionist form of regulations. It allows an exploration of the potential of rehabilitation with respect to the corporation<sup>53</sup>. (Pearce and Tombs 1997). Personal probation, conditions may be imposed by the court.

The just use of probation against a corporation in America was in 1971 in *US V. Atlantic Richfield Co.*<sup>54</sup> (ARCO) was placed on probation and ordered to develop an oil spill response programme. The sentence was used rather haphazardly until the US Sentencing Reform Act 1984 which issued guidelines which clarified the proper use of such a disposal and make probation mandatory in many instances, not just a way of ensuring that a corporation paid a fine.

The guidelines say that the court must order a term of probation in some circumstances including the following:

- (a) If necessary to ensure satisfaction of sanctions

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<sup>53</sup> Pearce F. and Tombs S., *Hazards, Law and Class: Contextualising the Regulation of Corporate Crime*. 1<sup>ST</sup> ed. (Macmillan Publishers, London. 1997). P. 79

<sup>54</sup> 465 F. 2d 58

- (b) If an organization of 50 or more employees lack an effective programme to prevent and detect law violations;
- (c) If the organizational of high level personnel participating in the offence have been convicted of a similar offence in the part five years;
- (d) If necessary to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct.

The guidelines say that there should be certain mandatory conditions of the probation, including those that say no further crimes must be committed by the company, and that it must also pay a fine or restitution or performance of community services. Regulatory agencies should be consulted in developing and monitoring probation conditions, which must include use of regulatory officials as probation officers.

The real significance of corporate probation is that as an “organization specific statutory sanction” it helps strengthen the legal foundation of corporate liability and avoids conception of company crimes as crimes committed by individuals within companies.

### **2.1.5.2 Corporate Rehabilitation**

Corporate crimes frequently arise from defective control systems, insufficient checks and balances within the organization, and poor communication systems. These failings are sometimes deliberate and made by the corporation to facilitate the

commission of offences or the avoidance of detection and sometimes the failings are inadvertent<sup>55</sup>.

Either way, it is possible for legal orders to force corporations to correct criminogenic policies and practices.

Etzioni, has also argued in favour of 'corporate rehabilitation'; He advocates rehabilitation orders against companies even where no other penalty is exacted or even if they are able to pay their fine:

*... "Imagine, for instance, a corporation that is found to have systematically neglected the safety of its consumers, it seems socially productive to put it on a five year diet of closer inspections. If it is found to have truly mended its ways, the inspectors should report that the firm has been rehabilitated and fully restore it to membership among decent and law abiding corporations."*<sup>56</sup>

### 2.1.5.3 Enforced Adverse Publicity/As a Sanction

It's sound deterrence to broadcast widely the names of corporate offenders.

Corporations and their offices are genuinely afraid of bad publicity arising from their illegitimate activities. This is devised in the form of mass media advertisements setting out the details of a corporation's criminal conduct, compulsory notification to

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<sup>55</sup> Supra, note 3 at p. 214

<sup>56</sup> Supra, note 3 at p. 216

shareholders and others by means of the annual report and even a temporary ban on advertising<sup>57</sup>.

Publicity sanctions are directed at inflicting a monetary loss and require widespread public reaction to be properly effective.

There are several objects to the use of publicity as a corporate sanction. First, Fisse notes that the case for using publicity as a deterrent measure is weak if infliction of monetary loss is the only effect desired: why not simply increase fines to such a level that the same monetary loss can be inflicted? He suggests that a much stronger case can be made out if it is sought to achieve deterrence by inducing loss of prestige or respect, provided that “prestige” and “respect” are not merely qualities which reflect financial standing<sup>58</sup>.

Secondly, although there is very limited experience of formal, court-imposed adverse publicity following convictions there has been a great deal of informal adverse publicity by the media taking their own initiative in form of news report, commentaries and documentaries.

A third objection to the publicity as sanction schemes is the sheer might of corporations like the Ford Motor Company and the culture of these gigantic corporations, cannot be meaningfully tackled by a few *ad hoc* publicity campaigns.

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<sup>57</sup> *Supra*, note 23 at p. 215

<sup>58</sup> *Supra*, note 23 at p. 219



It is to be noted that the aforementioned sanctions or penalties against corporations are either not operative in Kenya because they are not statutorily provided for, or if at all there are provided for, there is no recourse to them in seeking redress for crimes committed by the corporations.

## **2.2.0 LEGISLATION AND PROVISIONS RELATING TO CORPORATE CRIME IN KENYA**

### **2.2.1 The Penal Code (Cap 63 of Laws of Kenya)**

The Penal Code<sup>59</sup> is described as an Act of parliament to establish a code of criminal law. Contrary as to expectation, it has few provisions prescribing corporate offences and penalties, both organizational and occupational.

Section 23 deals with offences by corporations, societies, et cetera. It provides that where an offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in the control or management of the affairs or activities of such company, body corporate, society, association or body of persons should be guilty of that offence and liable to be punished accordingly, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was

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<sup>59</sup> Cap 63 Laws of Kenya

intended or about to be committed, or that he took all reasonable steps to prevent its commission<sup>60</sup>.

Section 127 provides that, a person employed in the public service who in the discharge of the duties of his office commits any fraud or breach of trust affecting the public whether such fraud or breach of trust would be criminal or not if committed against a private person, is guilty of a misdemeanor<sup>61</sup>.

With regards to Frauds & False Accounting Section 328(b) provides that,

*...Being a director, officer or member of a corporation or company does any of the following acts with intent to defraud that is to say-*

*(i) Destroy, alters, mutilate or falsifies any book, document, valuable, security or account which belongs to the corporation or company of any entry in any book document or account or is privy to any such act, or*

*(ii) Makes or is privy to making any false entry in any such book, document or account;*  
*or*

*(iii) Omits, or is privy to omitting, any material particular from such book, document or account is guilty of a felony and is liable to imprisonment for seventy years<sup>62</sup>.*

The above provision has an exception of the director who receives or possesses any property of the corporation in payment of a just debt or demand.

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<sup>60</sup> Ibid, Section 23

<sup>61</sup> Ibid, Section 127

<sup>62</sup> Ibid, Section 328(b)

Section 329 provides that;

*Any person who being a promoter, director, officer or auditor of a corporation or company either existing or intended to be formed makes, circulate or publishes an written statement or account which in any material particular, is to his knowledge false, with intent thereby to effect any of the purposes following that is to say*

*(a) To deceive or to defraud any member, shareholder or creditor or the corporation or company whether a particular person or not;*

*(b) To introduce any person whether a particular person or not to become a member of or to entrust or advance any property to the corporation or company or to enter into any security for the benefit thereof*

*Is guilty of a felony and is liable to imprisonment for seven years<sup>63</sup>.*

The above relates to false statements by officials of companies. Section 330 deals with fraudulent false accounting by clerks or servants providing that he/she shall be guilty of a felony and liable to seven years imprisonment.<sup>64</sup>

Section 331 is on false accounting by a public officer. If guilty he/she shall be guilty only of a misdemeanor<sup>65</sup>.

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<sup>63</sup> Ibid, Section 330

<sup>64</sup> Ibid, Section 330

<sup>65</sup> Ibid, Section 331

## 2.2.2 The Companies Act (CAP 486 Laws Of Kenya)

The Companies Act<sup>66</sup> (Chapter 486, Laws of Kenya) is more of a procedural legislation rather than substantive one. Its provisions largely tend to guide the promoters as to matters of forming the company and the day to day running, that is, incorporation, regulation and winding up. It does not provide the law as it stands with regards to the company or corporation, which is usually derived from common law and case law.

The only offences created by the Act which lean towards corporate crime, and only in individual capacity, are found in its provisions regarding offences antecedent to or in the course of winding up, with bearing on fraud or financial offences.

Section 319 provides that,

*If any officer or contributory of any company being wound up destroys, mutilates, alters or falsifies any books, papers or securities, or makes or is privy to the making of any false or fraudulent entry in any register, book or account or document belonging to the company, with intent to defraud or deceive any person, he shall be liable to imprisonment for a term not exceeding seven years, and shall also be liable to a fine<sup>67</sup>.*

The above relates to falsification of books.

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<sup>66</sup> Cap 486 Laws of Kenya

<sup>67</sup> Ibid, Section 319

Section 320 provides that

If any person being an officer of the company

*(a) has by false pretences or by means of any other fraud includes any person to give credit to the company'*

*(b) with intent to defraud creditors of the company, has made or caused to be made any gift or transfer or charge on, or has caused or connived at the levying of any execution against the property of the company*

*(c) with intent to defraud creditors of the company has concealed or removed any part of the property of the company service, or within two months before the date of any unsatisfied judgment or order for payment of money obtained against the company*

*he shall be liable to imprisonment for a term not exceeding two years<sup>68</sup>.*

The above related to fraud by offenders of companies, which have gone into liquidation.

Section 322 provides that,

*If in the course of winding up of a company it is shown that proper books of account were not kept by the company at any time during the period of two years immediately preceding the commencement of the winding up or the period between the incorporation of the company and the commencement of the winding up, every officer who is in default shall unless he shows that he acted honestly and that in the circumstances in*

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<sup>68</sup> Ibid, Section 320



*which the business of the company was carried on the default was excusable, be liable on conviction to imprisonment for a term not exceeding three years.<sup>69</sup>*

Above is in reference to liability where proper accounts have not been kept.

Section 327 provides that,

*Any person who gives or agrees or offers to give to any member or creditor of a company any valuable consideration with a view of securing his own appointment or nomination or to securing or preventing the appointment or nomination of some person other than himself as the company's liquidator shall be liable to a fine not exceeding two thousand shillings.<sup>70</sup>*

Above relates to corrupt inducements affecting appointment as liquidator.

It is to be noted that all the above provisions related to a company when it is in the process of being wound up and only with relation to fraud and documents falsification. The Act does not make provisions as regards offences when the company is still liquid. Further no organizational form of offence is created either.

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<sup>69</sup> *Ibid*, Section 322

<sup>70</sup> *Ibid*, Section 327

### 2.2.3 Prevention Of Corruption Act (Cap 65 Laws Of Kenya)

It is an Act<sup>71</sup> of Parliament to provide for the more effectual prevention of corruption, and for matters incidental thereto and connected therewith.

Section 3 deals with corruption in office. It provides that any person either himself or in conjunction with any other person, corruptly solicit or receive or agree to receive for himself or any other person, any gift, loan reward, consideration or advantage whatever to any person as an inducement to, or reward for, or otherwise on account of any member, officer or servant of any public body in respect of any matter or transaction actual or proposed or likely to take place, shall be guilty of a felony<sup>72</sup>.

This Section<sup>73</sup> also covers instances where a person corruptly gives, promises, or offers a gift, loan fee, reward, consideration or advantage.

Section 3(3) provides that any person who commits an offence under this section shall be liable to imprisonment for a term not exceeding seven years or to a fine not exceeding ten thousand shillings or to both such imprisonment and such fine and in addition to be ordered to pay to such body, and in such manner, as the court may direct the amount or value of any gift, loan, fee, reward, consideration or advantage received by him or any part thereof<sup>74</sup>.

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<sup>71</sup> Cap 65 Laws of Kenya

<sup>72</sup> Ibid., Section 3(a)

<sup>73</sup> Ibid., (b)

<sup>74</sup> Ibid., Section 3(3)

Section 4 provides for corrupt transactions with agents. It stipulates that if any agent corruptly accepts or obtains, or agrees to accept or attempts to obtains, gives or agrees to give or offers any gift, loan, fee, reward, consideration or advantage whatever, to any agent as an inducement or reward for doing or forbearing to do, or for having done or for borne to do any act in relation to his principal's affairs or business, or for showing disfavour to any person in relation to his principals affairs or business, shall be guilty of a felony.

One is to be liable to imprisonment for a term not exceeding seven years or to a fine not exceeding ten thousand shillings or to both such<sup>75</sup>.

Section 6 provides against public servants obtaining advantage without consideration or for a consideration which he knows to be inadequate in his dealings as a public servant, shall be guilty of a felony and liable to imprisonment for a tern not exceeding five years or to a fine not exceeding five thousand shillings or to both as such<sup>76</sup>.

Section 7 gives a test with which a presumption of corruption may be made in certain cases unless the contrary is proved.<sup>77</sup>

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<sup>75</sup> Ibid., Section 4

<sup>76</sup> Ibid., Section 6

<sup>77</sup> Ibid., Section 7

Finally, Section 12 provides that a prosecution for an offence under the Act shall not be instituted except by or with the written consent of the Attorney General or Solicitor General.<sup>78</sup>

This Act has comprehensively covered instances of corruption. However, its main faults seem to be the failure to cover the private sector as it only refers to public servants and bodies. This may be used as a loophole to escape prosecution.

#### 2.2.4 Capital Markets Authority Act (Cap 485 Laws Of Kenya)

The Act<sup>79</sup> has only one section that seeks to prevent a form of occupational corporate crime-insider trading.

“Insider trading” is a term used to devote purchases or sales of securities of a company effected by or on behalf of a person (usually a director or manager) whose relationship to the company is such that he is likely to have access to relevant material information concerning the company not known to the general public<sup>80</sup>.

Section 33 provides in essence that a person who is, or at any time in the preceding six months has been connected with that body corporate if by reason of his being or having been connected with that body corporate he is in possession of information

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<sup>78</sup> Ibid, Section 12

<sup>79</sup> Cap 485 Laws of Kenya

<sup>80</sup> Stround Francis, Stround's Judicial Dictionary, 4<sup>th</sup> ed. (Sect and Maxwell, London, 1971) p. 102

that is not generally available but, if it were, would be likely materially to affect the price of those securities<sup>81</sup>.

It provides that anyone contravening this Section shall be guilty of an offence and shall be liable if in the case of a first conviction, to a fine not exceeding one and a half million. If in the case of any subsequent conviction, to a fine not exceeding three million shillings. If the person is a director or officer of a body corporate, one million shillings or imprisonment to seven years or both<sup>82</sup>.

### 2.2.5 The Weights & Measures Act (Chapter 513, Laws Of Kenya)

It is an Act<sup>83</sup> of Parliament to amend and consolidate the law relating to the use, manufacturer and sale of weights and measures and to provide for the introduction of International Systems of Unites (IS) and for connected purposes. The Act creates offences for individual persons who could be members of the public or person acting on an individual capacity in an organization.

The various Sections creating offences only spell out the offences and their requisites but omit not their penalties.

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<sup>81</sup> Supra, note 53 at Section 33(1)

<sup>82</sup> Supra, note 53 at Section 33(2)

<sup>83</sup> Cap 513 Laws of Kenya



However, contrary to other Acts as discussed herein, it creates offences by corporations. It provides that

*“Where an offence under this Act which has been committed by a body corporate is proved to have been committed with the consent and connivance of or to be attributable to any manager, secretary or other similar officers of the body corporate or any other person who was purporting to act in any capacity, he as well as the body corporate shall be guilty of that offence and should be liable to be proceeded against and punished accordingly<sup>84</sup>.*

General penalties are found at Section 63(1) providing:

*“Any person guilty of an offence under this Act shall be liable to a fine not exceeding twenty thousand shillings or to imprisonment for a term not exceeding three years or to both<sup>85</sup>.*

### **2.3.0.0 CASE STUDIES IN KENYA**

#### **2.2.1.0 The Euro Bank Case**

Euro Bank, the over Shillings 3 billion banking disaster was a fraud from day one and Solomon Bundi Muthamia whose face has hitherto remained unknown, was the key architect of it all, setting up the bank at the beginning of 1993.

Euro Bank: A shaky financial outfit that marshaled huge deposits.

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<sup>84</sup> ibid., Section 61

<sup>85</sup> ibid., Section 63(1)

Although he had some high level personalities listed as co-shareholders and directors, the reality inside Euro Bank was that the majority of these were in fact mere paper directors inserted in the board to dupe the Central Bank of Kenya (CBK) to get past its strict regulations governing banking institutions.

Most of the listed “shareholders” in fact never paid a cent for their alleged stake in the bank. Muthamia simply would approach those he thought were strategic and offer them shareholdings at no cost to them at all. Among the banks, shareholders according to the CBK, were Bancshares 25 per cent stake (shs 18.7 million) owned by former Kenya Revenue Authority Chief John Munge, Abbey Investments owned by Solomon Muthamia, also 25 per cent, Penmath Ltd with 20 per cent (15 million) owned by Engineer Ephraim Maina Kirinyaga Construction). AFFTIFA Investments owned by Lawyer Findosh Jamal with 15 per cent (Sh. 11.3 million).

Sometimes in 1993, Muthamia and Munge had travelled to the United Kingdom to recruit an expatriate manager for their bank. They hired one Peter Barnes who however, after working with Euro Bank for hardly two years, resigned complaining that he “could not comprehend the transactions of the bank’s chairman”

Using an elaborate network of contracts in high places, Muthamia knew which state corporations had money, who to approach to get them to open their safes wide open and how to keep the funds flowing one way into the bottomless pit that Euro Bank has now been certified to have been.

Back to the moment, the question arises just how did a relatively small and potentially shaky financial institution such as Euro Bank managed to marshal such huge deposits from state corporations that ought to have known better? The answer is in political influence with Muthamia being a *savoir-faire* businessman with sharp antennae for detecting new and useful political forces.

The National Health Insurance Fund (NHIF) and the Kenya National Hospital (KNH) were both sucked in.

By the time it crashed towards the end of February 2003, Euro Bank left a financial hole of more than 3 billion of which more than Shillings 1 billion were debts (many of them non-performing) and over 1.8 billion in deposit liabilities (of which more than 65 per cent were parastatal deposits)<sup>86</sup>.

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<sup>86</sup> Euro Bank: the Inside Story at <http://www.allafrica.com>, visited on 5/5/2003

### 2.3.1.1 Action Taken

Two top officials of the collapsed Euro Bank were yesterday questioned over the controversial deposit of 256 million from the National Social Security Fund (NSSF).

The Bank's Chairman, Mr. Solomon Muthamia, and the managing director, Mr. Zachary Kamondo, recorded statements at the offices of the Anti-corruption Police Unit at Integrity Centre, Nairobi.

The Anti-Corruption police were investigating the scandal while the Central Bank of Kenya's Fraud Unit was handling Euro Banks Liquidation.

The Central Bank Of Kenya (CBK) put the nail in the coffin of the scandal –by placing Euro Bank in liquidation on Friday. The usual procedure for a bank facing liquidity problems is to place of statutory management of the CBK while a rescue package is worked out.

The fate of hundred of millions of shillings in parastatal & deposits, especially controversial KNH and NSSF ones hangs on the balance.

The above investigations have led to charges being preferred against the executives of these governmental parastatals that range from graft, abuse of office and graft<sup>87</sup>.

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<sup>87</sup> See the Daily Nation of 27<sup>th</sup> February, 2003 titled, "Euro Bank Officials Charged"

### 2.3.2.0 The Goldenberg Scandal

Although Kenya has formally been a political democracy since 1991, the Moi regime was steeped in a one-party culture of official graft, repression, and state-directed human rights violations, abominations that had become the trademark of the Nairobi government. Nothing more clearly demonstrated the governments intransigence and blatant disregard for the rule of law than what is called the Goldenberg scandal, the longest-running and most egregious case of massive high-level corruption in Kenya's history.

The outcome of the scandal, in which the public purse was defrauded of hundred of millions, if not billions, of dollars, will determine whether the Moi government sets Kenya on a solid democratic path. The facts are stunning.

Kamleshi Pattni, a businessman, devised a scheme in which he purportedly exported gold and diamonds worth hundreds of millions of dollars, although Kenya is not a producer of either mineral. Pattni then presented fictitious export compensation claims for payment y the central bank.

World Duty Free, the company that owns and runs the duty-free complexes at both the Nairobi and Mombasa international airports, was indicated in Pattni's documentation as the consignee of the exports. Nasir Ibrahim also, the Canadian owner of the company, denied that this company participated in the fraud. Ali offered evidence suggesting that Moi and his senior aides were the masterminds of the



scheme. In August of 1999 the Moi government deported Ali and placed his duty-free complexes in receivership.

The government should not be able to thwart the rule of law in normal democracy. The courts would ensure legality. But Moi's Kenya was different. Since 1992, when the scandal first became public, the government manipulated the legal system and employed extra judicial and political pressures to block the investigation and punishment of those responsible. In what looks like a protection racket or, for Moi, his vice president, and other senior officials implicated in the scandal, the attorney general stopped the private prosecution of culpable public officials by the Law Society of Kenya. In order to blunt domestic as well as World Bank and International Monetary Fund pressure, the government initiated its own halfhearted prosecution, no doubt intended to whitewash the affair.

Available evidence almost certainly suggests that the Goldenberg scandal grew out of Moi's efforts to raise money to "buy" the 1992 democratic elections, the first of their kind in Kenya. Working closely with Moi, Patti devised the export fraud and turned over the payments from the central bank to Moi who then used it to finance his reelection. Nasir Ali, the unwitting "consignee" of the fictitious gold and diamonds exports, was supposed to keep his mouth shut once the scandal became public. Failure to do so resulted in his deportation and the loss of his business, worth millions of dollars.

The Goldenberg scandal, and the inability of the Kenyan legal system to vindicate the rule of law against Moi and his ruling clique spoke volumes about the still birth of democracy and economic reforms in Kenya at the time. Already, Moi has expressed doubt about stepping down, as mandated by the constitution, after his term ends in 2002. He has hamstrung efforts to reforming the constitution and revising the country's political and legal architecture to permit genuine democracy.

In 1997, the World Bank, the International Monetary Fund, and other Western donors suspended \$500 million in aid to Kenya because of official corruption<sup>88</sup>.

### **2.3.2.1 Action taken**

The commission of inquiry, headed by two judges, will investigate the so-called Goldenberg Affair, which first came to light in 1994 and in which a Kenyan businessman and three former government officials are accused of defrauding the government of some 200 millions dollars.

The four accused, including businessman Kamlesh Pattni who headed a company known as Goldenberg International Ltd, have been on trial in connection with the alleged fraud for a decade. They are accused of stealing government funds amounting to 5.8 billion shillings (then 200 million dollars) between October 1992 and July 1993.

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<sup>88</sup> Makau Mutua; [A Scandal That Could Topple Kenya's Shaky Democracy](http://www.globalpolicy.org/nations/corrupt) at <<http://www.globalpolicy.org/nations/corrupt>, visited on 12/5/2003

In the trial, Pattni has been accused of producing phony certificates for sums of dollars brought into the country as the proceeds of gold and diamond jewelry exports even though Kenya produces very little gold and no diamonds at all.

Following the appointment of the commission, Kenya's attorney general will decide whether to continue with the long-running trial or to terminate all Goldenberg related cases that have been dragging in the courts for the past 10 years. The Commission is also expected to come up with ways of punishing those it will find guilty.

This decision was informed by a realization that these cases have been dragging through the courts for years without any apparent increase in the possibility that justice shall be done for the Kenyan people," the PPS statement said.

The commission was "expected to recommend on the prosecution or further criminal investigations against any persons who may have committed offences," the statement said.

"With this commission finally the Kenyan people will be able to close one of the most ignominious chapters in the nation's economic history", it said<sup>89</sup>.

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<sup>89</sup> See the Daily Nation of 25<sup>th</sup> February, 2003 titled, "Kibaki names team to probe Kenya's biggest financial scandal"

### 2.3.3.0 Chepkonga Charged with Graft

Mr. Samuel Chepkonga was charged with corruption a day after resigning as Communication Commission of Kenya boss.

The former CCK director-general appeared handcuffed in a Nairobi court accused of authorizing the payment of Shs. 19 million for eight generators that were never delivered to parastatal {quasi-Government organization} He allegedly committed the offence four years ago at the Kenya Posts and Telecommunications Corporation, where he was company secretary.

Mr Chepkonga allegedly abused his office when he instructed telecommunication firm's power plant manager Mr. David Washington Kamami, to approve the payment of a Sh 19,086,083.80 claim made by Ms Royline Investment Ltd. The company, it is claimed wanted to be paid for the generators when it had not delivered them. But on Friday 10, 1999, Mr Chepkonga allegedly intervened to ensure the payment was made. But the other people accused with him were not in court. They are all senior officials of the mentioned company and are required to answer charges of fraud forgery and abuse of the office<sup>90</sup>.

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<sup>90</sup> See the Daily Nation of 7<sup>th</sup> March, 2003 titled "Chepkonga charged with graft."



#### 2.3.4.0 E-Fraud: Nairobi Banks Losing \$0.5m Per year

COMPUTER FRAUD has hit the big time in Kenya with several banks and large financial institutions losing an estimated KShs 40 million (\$513,000) a year, auditors and experts in Nairobi said.

The fraud often involves top managers of organizations, bank employee's computer employees, managing directors and senior accountants who have worked for several years *in the same corporation*. In some cases, computerized payrolls are manipulated to include names of ghost workers. Elsewhere, computerized credit control systems are tampered with, especially against a month when management requests creditors and debtor's lists for policy decisions. In the baking sector, where KSh 10.8 million (\$138,000) was officially reported lost last year, the situation is said to be approaching critical levels. Although many banks have lost from fraud, most keep the matter under wraps to 'protect their corporate image, the Central Bank of Kenya (CBK) says.

The computer has provided an easy alternative to thieves. In its simplest form, defrauders credit money to accounts belonging to their friends, and the friends withdrawn it, said a CBK official involved in bank fraud investigations. The incidence of computer related fraud and e-fraud (electronic commerce fraud) escalate as the criminals become more sophisticated in their operations," warned Mr. Zahna Recovery & Forensics partner at the audit firm of KPMG Peat in Nairobi.



According to Mr. Kostja Reim, the information technology consultant at Ernst & Young, in Nairobi between 1992 and December 2000, many cases of fraud were reported a big percentage utilizing computer tools and techniques. That most investigations do not result in hard evidence because of lack of systems controls set-up to recognize computer evidence. Many of these incidents are either under wrapped or go unreported," he said<sup>91</sup>.

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<sup>91</sup> See the East African of 15<sup>th</sup> April 2002 titled, "E-Fraud: Nairobi Banks Losing \$0.5m Per Year".

# CHAPTER THREE

## 3.0 SUMMARY OF THE DISSERTATION

### 3.1 Introduction

The beginning of this dissertation at it Chapter One look at the question, who is a “Legal Person? The same was defined to include not only natural persons but also certain artificial entities, which are given fictitious legal personalities by the law, with certain rights and duties distinct from human persons. This definition thus encompasses and introduces companies and corporations.

This Chapter also looks at the general characteristics of corporations that usually attach upon incorporation. These include inter alia, separate legal personality, ability to sue and be sued, owning and dealing with property, perpetual succession, private law status, autonomous working et cetera. It goes ahead to define and discuss white-collar and corporate crime and finally, some of the crimes that constitute the aforestated.

Chapter Two looks into the criminal liability of corporations and the law governing the same tracing the jurisprudential development of corporate criminal liability.

This chapter also looks at the issue of punishing corporations by considering the various sanctions normally meted out against these entities upon their conviction.

In this Chapter, the legal framework in Kenya governing or that relates or has a bearing to corporations is looks at with emphasis on legislation involved in corporate control and or regulation.

Finally, a study of few case examples that depict instances of corporate crime coupled with a brief examination of the actions taken as fallbacks are undertaken.

Chapter Three, a conclusion of the dissertation, is a summary of the research paper from its first Chapter. It also includes the reasons identified as being behind white-collar and corporate crime in Kenya and finally, the way forward in solving this problem.

### **3.2.0 Towards Better Corporate Regulation Management and Governance**

#### **3.2.1 Identifying the Reasons Behind Corporate Crime in Kenya**

As mentioned in the introduction, this Research Paper looks into the main causes of white-collar and corporate crime in Kenya, which is fitting, before embarking on looking at the way forward towards better corporate regulation, management and governance in Kenya.

Firstly, many Chief Executives, or Corporate Heads and Senior Managers/Officers in state corporations, parastatals and public companies were appointed not meritoriously, but based on political favours. Political favours in the sense that their

appointments were some sort of reward for prior favours or works that benefit of the government of the time.

The aftermath is that due to lack of experience and/or any professional know-how, these appointees mismanaged these corporations, consequently run them down leading to the collapse of some. Those still in operation could not or cannot effectively carry out the functions for which they were formed and thus could be said to have lost substratum.

It is also interesting to note that some of the appointments were strategic in the sense that they were made so that these individuals could facilitate the “looting” of funds from the public coffers. It involved the illegal channeling of the corporations funds to unapproved or undisclosed accounts. Further while in these positions, the appointees engage in corruption related offences and other like embezzlement and abuse of office.<sup>92</sup>

Secondly, is the existence of a deficient legal framework governing corporate control and regulation. This is evidenced by the scattered pieces of legislation with provisions that attempt to curb instances of while-collar and corporate crime.

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<sup>92</sup> Former parastatal boss, Post Master General Francis Chahonyo faced charges of sourcing millions of shillings into the collapsed Euro Bank and Abuse of office during his tenure as the Chief Executive of Kenya Sugar Authority

These provisions in themselves taken as a whole are insufficient in the sense that they are few and this cover a very limited scope of offences. Their being scattered and insufficiency has resulted to difficulties in or reduced effectiveness in enforcement.

Reduced enforcement may be said to have further aggravated the existing situation whereby the Kenyan legal system is not well advanced in corporations law due to lack of case law. There is no leading judicial holding creating precedence on the various instances of corporate crime with a majority of the cases going unreported or not reaching the judicial at all.

Thirdly is the lack of adequate public policies, guidelines and educational campaigns regarding corporate crime, control, regulation, management and governance. The government has not quite adopted any comprehensive plan or course of action towards the control and directing the affairs of corporations as legal entities. The above has led to uncertainties as regards government regulation and control, which if beefed up would most definitely reduce these cases of white-collar and corporate crime.

A good percentage of the public which includes consumers and shareholders are not aware of their rights and/or remedies that are available to them upon breach as recourse.



### 3.2.2 Way Forward

The only positive step against political appointments is simple, that the appointees be replaced by others who are deserving having fulfilled the requisite qualifications necessary for appointment. The essence is that the individuals should be considered based on merit and not secondary or collateral factors, which on the longterm, serves negatively on these entities.

The above was experienced in the current government's bid to restructure the management of several state organizations, parastatals and civil service. This was intended to facilitate effective management and accountability within these institutions and the civil service. However, in the above case, a legal problem does arise in instances where appointees enjoy security of tenure, like the Attorney General, Chief Justice and some corporation heads. A legal debate ensues as to whether the government is justified in removing these individuals from office.

Internal self-Governance could also be resorted to as a device in curbing increased cases of white collar and corporate crime.

The American congress reacted to the development of white-collar and corporate crime by passing the Sarbanes-Oxley Act of 2002<sup>93</sup> which contains accounting and corporate governance reforms. The Kenya corporate system should adopt the above

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<sup>93</sup> Sarbanes-Oxley Act of 2002

approach and an Act of Parliament should be enacted to solely incorporate accounting and corporate governance principles.

Sensitivity towards corporate governance resulting in better run entities would depend largely on how current shareholder enthusiasm is channeled. It is through “internal self-governance” that shareholders gain a more influential role facilitating a healthy control, regulation and governance system.<sup>94</sup>

The principles incorporated under the American Act are: improving directors education; and, replacing ineffective directors.

- (a) Improving Director Education many Board problems associated with ignorance or incompetence might be resolved through additional training and creation of more definitive expectations for directors – in other words, creating a more professional director role.

This concept of director professionalism should not be confused with “professional directors”. The development of director professionalism is intended as an effort to equip each director with the tools to be as effective as a shareholder representative as possible. It is not to be viewed as an attempt to create a separate class of individuals who view directorship as their professional occupation.

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<sup>94</sup> Mercer Law Review, Vol. 54 (Winer, 2003) Lead Articles Edition: Lessons from a Symposium on Corporate Governance pg 794

An infrastructure to train and maintain the skills of corporate directors should be established which will incorporate director education programmes. Further, legal requirements that directors avail themselves of these opportunities need to be included too.

- (b) Replacing Ineffective Directors: Roadblocks to replacing ineffective directors range from cultural legal as well as practical. Shareholders have historically been wary about undertaking efforts to replace ineffective directors.

The state of corporations in Kenya has however created the impetus needed to overcome this reluctance. Initiatives focused around elimination of ineffective directors may also help improve the quality of corporate boards and subsequently, their control, regulation and governance.<sup>95</sup>

The other measure to combat white collar and corporate crime would be enactment of an Act of Parliament that consolidates all the crimes that are classified as corporate crimes. This would include all those discussed under this research paper.

The consolidation would facilitate better understanding of offences in terms of clarity and further, improve enforcement, which is hampered by the manner in

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<sup>95</sup> Supra note 3, at pg 794

which provisions relating to corporate offences are scattered in different legislations.

The Act would supplement other legislations like the Penal Code<sup>96</sup> which does not provide sufficiently for the wide range of existing corporate crimes. The said Act would provide for both the offences and their penalties. Using the Act, the government would take a more serious stance in combating corporate crime.

Further, there should be enhancement of criminal sanctions than as provided for in the current existing legislation and the same should be made characteristic of the proposed Act. This is deterrent measure since the existing penalties are not pragmatic in terms of attempting to avert the commission of these crimes.



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<sup>96</sup> Chapter 63, Laws of Kenya