

2011

# Kenya's Long Anti-Corruption Agenda: 1952-2010: Prospects and Challenges of the Ethics and Anti-Corruption Commission Under the 2010 Constitution

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## Recommended Citation

James T. Gathii, Kenya's Long Anti-Corruption Agenda: 1952-2010: Prospects and Challenges of the Ethics and Anti-Corruption Commission Under the 2010 Constitution, 4 L. & Dev. Rev. 182 (2011)

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**Kenya's Long Anti-Corruption Agenda - 1952-2010: Prospects and Challenges of the Ethics and Anti-Corruption Commission Under the 2010 Constitution**

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**Draft November 27, 2010**

## Table of Contents

Introduction.....	3
Part I: Initial Steps in the Fight against Corruption .....	6
A) The Passing of the <i>Prevention of Corruption Bill</i> , 1956 and the First Amendments .....	6
Part II. The Amendments of 1991 and the Establishment of an Anti-Corruption Body .....	11
A) The Amending of the Prevention of Corruption Act and Creation of the First Anti-Corruption Squads in Kenya. ....	12
B) The Establishment of the Kenya Anti-Corruption Squad and the Goldenberg Scandal which Gave Rise to its Creation.....	14
C) The Creation of the KACA, its Framework and Effectiveness in Fighting Corruption.....	16
Part III. Gachiengo Decision and the Demise of the Kenyan Anti-Corruption Authority .....	21
Part IV. Fighting Corruption in the Aftermath of the Gachiengo Decision.....	28
A) The 2002 Elections and the Rise of the NARC Party.....	33
Part V. The Enactment of the Anti-Corruption and Economic Crimes Act and Public Officer Ethics Act	35
A) The Enactment of the Anti-Corruption and Economic Crimes Act and its Framework.....	35
B) The Enactment of the Public Officer Ethics Bill .....	42
C) Supposed Defects in the Anti-Corruption and Economic Crimes Act and their effect on the Act in Practice.....	50
Part VI. The Fight against Corruption Today .....	57
A) New Constitution in Kenya.....	68
Conclusion .....	79

## **Introduction**

Kenya efforts at combating corruption date back to the colonial period. Initial efforts at addressing corruption merely focused on how best to define corrupt behavior and determining how severely to punish offenders. In this period, an anti-corruption agency was not thought necessary. Corruption was not regarded as a systemic and endemic problem, but rather as a problem that could be resolved through discrete legislative amendments.

Later efforts aimed at combating corruption embraced the idea that an anticorruption agency was a necessary component. This became clear at the apex of one party rule in the 1980's which also coincided with revelations of grand corruption. Initial anticorruption agencies were part of the police force and lacked the independence, resources and legislative mandate to undertake their tasks. The eventual establishment of the Kenyan Anti-Corruption Authority in the late 1990s with a legislative mandate was short-lived when the courts declared it unconstitutional in part because the then Constitution only conferred prosecutorial powers on the Attorney General. Thus, the rise of an anticorruption authority in the context of an authoritarian and corrupt government was met with judicial disapproval. The entire government was corrupt.

Broader efforts at fighting corruption such as the enactment of the Public Officer's Ethics Act in 2003 exemplify initiatives at promoting good governance in all its aspects – including the establishment of a cabinet level Secretary in charge of Governance and Ethics and the appointment of a former Transparency International (Kenya) Chair to the position; the requirement that public officers declare their wealth. Another significant example of the broader efforts designed to fight corruption was the effort to entrench the Kenya Anti-Corruption Commission in the Constitution. Such entrenchment, it was argued, would insulate anti-corruption investigations and prosecutions for violating other constitutional rules such as separation of powers or the presumption of innocence. Significant amendments to anti-corruption laws following the 2003 election of President Mwai Kibaki and appointment of credible anti-corruption crusaders to lead the campaign were met with further pushback from Parliament and leading politicians who hounded anticorruption crusaders like Mr. Githongo from office and repeatedly declined to pass constitutional amendments to insulate the Kenya Anti-Corruption Commission from judicial challenges for its unconstitutionality and its investigatory powers.

Grand scale corruption even after the election of a new President in 2002 who promised an end to corruption has however almost come to naught – all three branches of government were staffed with suspected corruption offenders, the country had an Attorney General unwilling to prosecute high level corruption suspects and a judiciary keenly concerned about the abuse of the procedural rights of those who were sought to be prosecuted than the broad goals of the anti-corruption agenda. Resignations of government ministers suspected to have been involved in high level corruption were followed by a return to government after investigatory commissions white-washed the scandals.

Anti-corruption efforts continue to be hobbled in the coalition government of President Mwai-Kibaki and Prime-Minister Raila Odinga that was formed in 2008. The August 2010 Constitution provides new hope – it entrenches an Ethics and Anti-Corruption Commission, and enshrines the principles of transparency, public officer ethics and accountability. The new Constitution of Kenya overwhelmingly ratified in August 2010 is the latest glimpse of hope in Kenya’s anticorruption journey. A constitutionally enshrined Ethics and Anti-Corruption Commission will replace the Kenya Anti-Corruption Commission. Looking ahead, Parliament still retains the authority to explicitly give such a Commission the authority to prosecute and one of the challenges remains whether or not Parliament will do so or if it will continue the legacy of capitalizing on lack of legal clarity about the powers of the most important anti-corruption agency in the country. This paper examines Kenya’s efforts at combating corruption in a historical context seen against the promise of the new Constitution and the lessons these efforts have for other countries.

This paper is divided into five parts. In Part I, I discuss the origins of the anti-corruption initiatives in the 1952 Prevention of Corruption Act. Part II fast forwards to 1991 when after about five decades a new flurry of legislative activity started with the creation of the first anticorruption institutions in the country. Part III analyzes the demise of the Kenyan Anti-Corruption Authority indicating push back from the judiciary as politicians in one-party authoritarian Kenya sought judicial cover against corruption charges. Part IV examines the promising rise of a new government in 2002 elected on an anticorruption platform while Part V details the extensive legislative changes that were enacted by the new government. Finally, Part VI brings the anti-corruption agenda to date by examining the continuing challenges following the enactment of a new Constitution in August 2010.

## Part I: Initial Steps in the Fight against Corruption

### A) The Passing of the *Prevention of Corruption Bill, 1956* and the First Amendments

The first piece of anti-corruption legislation passed by the Kenyan Government was the Prevention of Corruption Act in 1956.<sup>1</sup> At the time, Kenya was still a British Colony and would be for another six years. The objective of this bill was to make it nearly certain that those who engaged in corrupt practices were caught and punished.<sup>2</sup> It was thought that certainty of detection would be a better deterrent than very harsh punishments for those found to be corrupt.<sup>3</sup> The Minister for Legal Affairs, Mr. Conroy, elucidated argued that “[I]t is no good enacting Draconian laws, which impose exceptionally heavy penalties on the people for the purpose of frightening them from the commission of crime, because [it was believed] that does not work in practice.”<sup>4</sup>

Shortcomings were eventually found in the Prevention of Corruption Act. One issue arose from the language of section three of the Prevention of Corruption Bill which provided that a person would be guilty under the act if he offers a bribe “...knowing or having reasonable cause to believe that doing so may lead to the doing of an act by that other person which constitutes an

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<sup>1</sup> The Prevention of Corruption Act, (1956) Cap. 65 (repealed).

<sup>2</sup> Kenya, The National Assembly, Debates on the Prevention of Corruption Bill, July 20 1956, col. 137-38 (statement by Mr. Conroy, Minister for Legal Affairs).

<sup>3</sup> *Id.* at 137-38 (statement by Mr. Conroy, Minister for Legal Affairs).

<sup>4</sup> *Id.* (statement by Mr. Conroy, Minister for Legal Affairs).

offense under subsection (1) of this section.”<sup>5</sup> The problem with this provision was that establishing the briber’s intent in soliciting a bribe was subjective and difficult to know truthfully.<sup>6</sup> Attorney General Charles Njonjo illustrated a problem that arose from this language when he discussed a case in which the defendant was caught trying to offer a bribe to a public service member.<sup>7</sup> The defendant subsequently used the excuse that he was only offering the bribe to see if the public service member would corruptly take it. The court apparently accepted the defendant’s story at face value and the defendant was not found guilty of corruption since he never intended to actually give the bribe.<sup>8</sup>

The Prevention of Corruption Bill was amended in 1967 to address this issue of the motive behind a bribe-giver’s offer. The amended provision of the Prevention of Corruption Bill was changed to state:

“Any person who shall by himself or in conjunction with any other person, corruptly give, promise or offer any gift, loan, fee, reward, consideration or advantage whatever to any person, whether for the benefit of that person or otherwise on account of, any member officer or servant of any public body doing or forbearing to do, or having done or forborne to do, anything in respect of any matter or transaction whatsoever, actual or

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<sup>5</sup> Kenya, The National Assembly, Debates on the Prevention of Corruption (Amendment) Bill, Oct. 19, 1967, col. 942-43 (statement by Mr. Njonjo, Attorney General).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

proposed or likely to take place, in which the said public body is concerned shall be guilty of a felony.”<sup>9</sup>

The text in the amended law stated nothing about the state of mind of the bribe-giver when she offered a bribe. The Act provided that it was irrelevant whether the benefit is for that person or for any other reason, as long as a person corruptly offers a gift, loan or some other advantage to a public servant in exchange for that public servant to do or not do something. This offence was classified as a felony.<sup>10</sup>

Parliament debated at length whether the impact of holding both bribe giver and taker guilty would have on how many instances of corruption would be reported.<sup>11</sup> Mr. Wariithi argued that in the past the Prevention of Corruption Act was intended to punish corrupt public servants who received a bribe.<sup>12</sup> By contrast, the amended law would punish persons who offered the bribe.<sup>13</sup> For Mr. Wariithi, the main reason for targeting the bribe-taker was that public servants were “making a mockery of the public service”<sup>14</sup> because many of them would demand bribes in order

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<sup>9</sup> The Prevention of Corruption Act, *amended* (1967) Cap. 65 §3(2); *see also* Kenya, The National Assembly, Debates on the Prevention of Corruption (Amendment) Bill, Oct. 19, 1967, col. 952-53 (statement of Mr. Osogo, The Minister for Information and Broadcasting) (reading the relevant portion of the amended Act).

<sup>10</sup> The Prevention of Corruption Act, *amended* (1967) Cap. 65 §3(2)

<sup>11</sup> Kenya, The National Assembly, Debates on the Prevention of Corruption (Amendment) Bill, Oct. 19, 1967, col. 962-64 (statement by Mr. Wariithi)

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

to perform basic duties which the government owed its people.<sup>15</sup> Some of these duties included permits for funeral services, getting a required Kenya Identification card, and building permits.<sup>16</sup> Mr. Wariithi discussed that the absence of an anti-corruption agency meant that public officials could mainly be exposed by those who had offered them a bribe.<sup>17</sup> By punishing the bribe-giver, Mr. Waritthi argued that there would no longer be someone to blow the whistle on corrupt officials. Why would anyone go to the effort to try and “trap” a public official into accepting a bribe when, in so doing, they would be equally as guilty under the new law wondered Mr. Waritthi?<sup>18</sup> This “conspiracy of silence” would result in a decline in reported cases of corruption in Kenya.<sup>19</sup>

The proposed amendments to the Prevention of Corruption Act also sparked a debate on what exactly constitutes a “gift.”<sup>20</sup> A broad range of opinions were expressed. Mr. Shikuku suggested that a public figure should not accept any gifts regardless of whether they are a “bribe” or just a friendly gesture.<sup>21</sup> He argued that even if a gift is just given as a gesture of kindness, it may

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<sup>15</sup> *Id.*

<sup>16</sup> See James Thuo Gathii, *Defining the Relationship between Human Rights and Corruption*, 31 U. PA. J. INT’L L. 125, 182-183 (2009) [hereinafter Gathii, *Human Rights and Corruption*] (discussing how poor people in developing countries often have to pay bribes for the most fundamental of government services).

<sup>17</sup> Kenya, The National Assembly, Debates on the Prevention of Corruption (Amendment) Bill, Oct. 19, 1967, col. 962-64 (statement by Mr. Wariithi).

<sup>18</sup> *Id.*

<sup>19</sup> Hansard on *The Prevention of Corruption Act*, p. 2.

<sup>20</sup> Kenya, The National Assembly, Debates on the Prevention of Corruption (Amendment) Bill, Oct. 19, 1967, col. 962-64 (statements made by several different ministers)

<sup>21</sup> *Id.* at 945-47 (statement by Mr. Shikuku)

affect the public servant's decision-making in the future.<sup>22</sup> If that person comes to him for a favor in the future, even though that was not the purpose of the gift at the time, the public servant would have a difficult time turning him down than he would when dealing with someone who had not given him a gift in the past.<sup>23</sup> Mr. Shikuku illustrated his argument as follows. If two people applied for a loan, and one had given a gift to the public servant in the past as a courtesy, even though there was no intent to corrupt, the gift giver will have a better chance of getting the loan he needs. It is because of these unintentional consequences which may result sometime in the future that Mr. Shikuku and others supported the proposition that public servants shouldn't be allowed to accept gifts in any form.<sup>24</sup> Like the Parliamentarians in the 1950s, Mr. Shikuku was concerned about making the subjective intent of the bribe-giver irrelevant in determining their culpability.<sup>25</sup> He thought a person who gives a gift or offers a bribe can easily hide their true purpose and thus may be able to circumvent the purpose of the law in preventing corruption. Such cases are possible where the repayment of the favor would not be sought for some time after the gift is given. It is nearly impossible to say at the time one is given a gift, whether it is a goodwill gesture or something else, for which a return favor will be sought down the road.

Other members of the Kenyan Parliament felt that "gift" must be carefully defined, because gifts which are given out of gratitude and not for the purposes of corrupting public officers should be allowed. Mr. Osogo, the Minister for Information and Broadcasting, for instance, felt that the amendment was only for the purpose of punishing those who "knowingly and intentionally tr[y]

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 945-46

<sup>25</sup> *Id.*

to corrupt a public officer.”<sup>26</sup> However, no amendments defining the word “gift” were made. The word “gift” remained in §3.1 and §3.2 of the Prevention of Corruption Act without further clarification.<sup>27</sup>

## **Part II. The Amendments of 1991 and the Establishment of an Anti-Corruption Body**

Up until 1991, Kenya’s anti-corruption framework remained mostly unchanged from colonial times – a four decade period. However, from 1991 very significant changes were made to combat corruption in Kenya. This part will examine the 1991 Amendments made to the Prevention of Corruption Act and the creation of the first Anti-Corruption Squads. Part Two will discuss subsequent anti-corruption legislation put in place after revelations of grand corruption in scandals like the Goldenberg Affair. These changes resulted in the creation of the much more elaborate and sophisticated Kenya Anti-Corruption Authority (KACA) to fight corruption. Part Three will discuss the organization and structure of the Kenya Anti-Corruption Authority, how it came into being and its rocky beginnings under the leadership of John Harun Mwau. This part will then after discuss the later appointment of Aaron Ringera to lead the KACA and the body’s increasing effectiveness during this time.

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<sup>26</sup> *Id.* at 955-57 (statement by Mr. Osogo, The Minister for Information and Broadcasting).

<sup>27</sup> *See* The Prevention of Corruption Act, (1967) Cap. 65 §§3.1–3.2. Available at [http://www.marsgroupkenya.org/Reports/LawsandConventions/Kenya\\_Prevention\\_of\\_Corruption\\_Act\\_1956\\_Repealed.pdf](http://www.marsgroupkenya.org/Reports/LawsandConventions/Kenya_Prevention_of_Corruption_Act_1956_Repealed.pdf)

## **A) The Amending of the Prevention of Corruption Act and Creation of the First Anti-Corruption Squads in Kenya.**

The Anti-Corruption Squad was established in 1991 following demands by the public for action to be taken against those engaging in corruption.<sup>28</sup> At this time that anti-corruption concerns had begun to move to the forefront of the international donor community's dialogue.<sup>29</sup> Transparency International was founded in 1993,<sup>30</sup> and would prove to be an influential player in the international fight against corruption through its studies and releasing of statistics ranking countries on how rampant corruption was in their country and how successful their anti-corruption measures were proving to be in practice.

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<sup>28</sup> JOHN KITHOME TUTA, KENYA'S ANTI-CORRUPTION POLICY AND INSTITUTIONAL FRAMEWORK, CONTROL OF CORRUPTION IN KENYA, LEGAL-POLITICAL DIMENSIONS 2001-2004, 66 (Ben Sihanya ed.) (2005) [hereinafter TUTA, CONTROL OF CORRUPTION IN KENYA]

<sup>29</sup> Gathii, *Human Rights and Corruption*, *supra* note 16, at 19–21 (discussing the emergence of corruption as an emerging focus in international law only beginning to occur in 1960s – 1970s). Professor Gathii goes on to discuss several reasons for why there was such a delay by the international community in pushing for anti-corruption initiatives in developing countries. *Id.* at 12-18. Some of the reasons given for why the international community, and in particular the west ignored corruption in developing countries for so long include: (1) fear of criticizing fledgling governments, (2) optimism from western countries that Africa would develop much like they had, a period of corruption followed by a flourishing period of growth, (3) the Cold War dividing the world via political system, and thereby causing the western countries to support any democratic country, regardless of how corrupt it was, and (4) the idea of “virtuous bribery,” meaning that corruption and bribery actually aided a developing country because it allowed for the circumventing of inefficient regulations. *Id.*

<sup>30</sup> Transparency International website, available at [http://www.transparency.org/about\\_us](http://www.transparency.org/about_us).

The Anti-Corruption Squad was a special investigative unit answerable to the Criminal Investigations Department - it was part of the Kenya Police and was headed by a Senior Police Officer.<sup>31</sup> The Anti-Corruption Squad proved ineffective in its fight against corruption.<sup>32</sup> It had only a few investigators, who were paid the same as regular police officers.<sup>33</sup> Furthermore, owing to the fact that it was part of the executive branch and not an independent agency, its investigators were undoubtedly afraid to investigate cases of high level corruption or corruption within the government in general.<sup>34</sup> The government under President Moi was notoriously corrupt and relied on a system of patronage and bribery to maintain order and control.<sup>35</sup> The Anti-Corruption Squad officers were hesitant to pursue corrupt officials who were their superiors and responsible for their employment and pay. It is also worth mentioning that there were allegations that the Anti-Corruption Squad itself was corrupt.<sup>36</sup> This was not surprising since for years the Police Department has widely been considered the most corrupt sector of the government.<sup>37</sup> Even today the Kenyan public still regards the Police as among the most corrupt in government. Police often take bribes to refrain from giving out traffic tickets and arresting

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<sup>31</sup> TUTA, CONTROL OF CORRUPTION IN KENYA, *supra* note 28, at 66.

<sup>32</sup> *Id.* at 66-67.

<sup>33</sup> *Id.* at 66.

<sup>34</sup> *Id.* at 67.

<sup>35</sup> Nick Wadhams, *Kenyan President Moi's Corruption Laid Bare*, THE TELEGRAPH U.K., Sept. 1, 2007 (discussing how Moi and his two sons ran the government corruptly for their own gain).

<sup>36</sup> TUTA, CONTROL OF CORRUPTION IN KENYA, *supra* note 28, at 67.

<sup>37</sup> *Survey: Police are Most Corrupt in Kenya*, UNITED PRESS INTERNATIONAL, July 18, 2008, available at [http://www.upi.com/Top\\_News/2008/07/18/Survey-Police-are-most-corrupt-in-Kenya/UPI-86741216399685](http://www.upi.com/Top_News/2008/07/18/Survey-Police-are-most-corrupt-in-Kenya/UPI-86741216399685).

people found breaking the law.<sup>38</sup> The Anti-Corruption Squad lasted for roughly three years, and was disbanded after a fire burnt files held by the squad. At the time of its disbandment, it had made little headway in the fight against corruption.<sup>39</sup>

## **B) The Establishment of the Kenya Anti-Corruption Squad and the Goldenberg Scandal which Gave Rise to its Creation.**

Notwithstanding the failings and weaknesses inherent in Kenya's first anti-corruption institution, the Kenya Anti-Corruption Authority (KACA) was established as an investigative body to help discover and curb instances of corruption. President Moi was widely believed to have established the KACA to retain large amounts of donor aid flowing into the country through both western countries and international organizations.<sup>40</sup> Kenya had nearly lost all of its aid from the World Bank after the World Bank suspended all aid flowing into the country besides emergency and critical human development assistance because of the pervasive and endemic nature of

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<sup>38</sup> TRANSPARENCY INTERNATIONAL, EAST AFRICAN BRIBERY INDEX (2009) (stating that based on a survey of over 10,000 people, the police department of Kenya is the most corrupt institution in all of East Africa). Available at [http://www.transparency.org/news\\_room/latest\\_news/press\\_releases\\_nc/2009/2009\\_07\\_02\\_kenya\\_index](http://www.transparency.org/news_room/latest_news/press_releases_nc/2009/2009_07_02_kenya_index); see also Robyn Dixon and Nicholas Soi, *Police Corruption Rampant in Kenya Despite Attempts at Reform*, L.A. TIMES, June 13, 2004 (discussing the rampant corruption in the Kenya Police through several people's stories of bribes and imprisonment).

<sup>39</sup> TUTA, CONTROL OF CORRUPTION IN KENYA, *supra* note 28, at 67.

<sup>40</sup> Hon. Musikari Kombo, Assistant Minister, Ministry of Planning and National Development, Corruption and Economic Reforms in Kenya, at the 11<sup>th</sup> International Anti-Corruption Conference, in *Adili Transparency Int'l*, June 2003, at 3-4. [hereinafter *Corruption and Economic Reforms in Kenya*] Available at <http://www.tikenya.org/documents/Adili38.pdf>.

corruption in Kenya. KACA's establishment was therefore not an indication that the government was dedicated to fighting corruption.

As noted above, the Goldenberg scandal had led to the withdrawal of foreign aid flows to Kenya. The scandal involved a plot between a Kenyan businessman, Kamlesh Pattni and several high-level members of the Kenyan government. Mr. Pattni is alleged to have conspired with these government officials to have his company, Goldenberg International, be awarded government contracts to export fictitious amounts of gold and diamonds from Kenya to the rest of the world. In return the official would be compensated with a percentage of the money Kenya made from the sale.<sup>41</sup> Under the agreement, the Kenyan government agreed to pay Goldenberg International at the rate of 35% of its exports. This is well above the 20% set as the limit under the Local Manufacturers (Export Compensation) Act.<sup>42</sup> When the Commissioner of Customs and Excise Department declined to pay this inflated compensation, Mr. Saitoti as the Minister of Finance ordered it to be paid from the Treasury anyways.<sup>43</sup> This inflated illegal compensation percentage resulted in Goldenberg International being paid an extra \$4.2 million over the course of two years.<sup>44</sup> These monies constituted public funds that it otherwise wouldn't have had to pay, had the government contracted out for an appropriate compensation rate.

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<sup>41</sup> James Thuo Gathii, *Corruption and Donor Reforms: Expanding the Promises and Possibilities of the Rule of Law as an Anti-Corruption Strategy in Kenya*, 14 CONN. J. INT'L L. 407, 428 (1999) [hereinafter Gathii, *Corruption and Donor Reforms*].

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 429.

## **C) The Creation of the KACA, its Framework and Effectiveness in Fighting Corruption**

The KACA was created by an amendment to the Prevention of Corruption Act which added section 11B. That amendment set out KACA's mandate as being:

- a. To take necessary measures for the prevention of corruption in the public, parastatal and private sectors;
- b. To investigate, and subject to the directions of the Attorney General, to prosecute for offences under this Act and other offences involving corrupt transactions; and
- c. to advise the Government and the parastatal organizations on ways and means of preventing corruption;
- d. to inquire and investigate the extent of liability of any public officer in the loss of any public funds and institute civil proceedings against the officer and any other person involved in the transaction which resulted in the loss for the recovery of such loss;
- e. to investigate any conduct of a public officer which is connected with or conducive to corrupt practices and to make suitable recommendation thereon;
- f. to undertake such further or other investigations as may be directed by the Attorney General.<sup>45</sup>

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<sup>45</sup>See Stephen Mwai Gachiengo & Albert Muthee Kahuria v. Republic, (2000) from the Republic of Kenya in the High Court of Kenya at Nairobi, High Court Miscellaneous Application No. 302 of 2000 at page 7.

Unlike the Anti-Corruption Squad, KACA had a fairly elaborate institutional framework. The 1997 amendment had also created the Kenya Anti-Corruption Advisory Board (KAAB) whose membership was comprised of people from professional, religious, labor, and non-governmental organizations.<sup>46</sup> This body was created to advise KACA on how to go about fighting corruption. At the helm, KACA had a director and three assistant directors who were responsible for investigations, prosecutions, financing and operations. KAAB served as an advisory board to ensure the investigators were made aware of the opinions and concerns of all different sectors of the society.<sup>47</sup>

Despite being given an elaborate framework enable it to successfully carry out investigations and prosecutions and being relatively independent from the three branches of government, KACA struggled from its inception. Its first director John Harun Mwau and his staff had no well laid down plans to combat corruption. In fact, John Harun Mwau was probably not the most qualified choice to head the body to fight corruption, and he was apparently appointed to the position as head of KACA in return for dropping out of the 1997 Presidential elections.<sup>48</sup> If this is so, Mwau was appointed to office not based on merit, but instead based on Kenya's system of patronage and bribery. Perhaps Mwau's lack of qualification for the position of Director of the KACA was responsible for the fractured and incoherent approach the KACA took at first in the

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<sup>46</sup> TUTA, CONTROL OF CORRUPTION IN KENYA, *supra* note 28, at 67.

<sup>47</sup> TUTA, CONTROL OF CORRUPTION IN KENYA, *supra* note 28, at 68.

<sup>48</sup> See, Gathii, *Corruption and Donor Reforms*, *supra* note 41, at 438 ("However, prior to his appointment as the Director of the Kenya Anti-Corruption Authority, Mwau withdrew his candidacy for the presidential elections in December 1997. Upon his withdrawal from the presidential race, Mwau then asked his supporters to vote for President Moi.").

fight against corruption.<sup>49</sup> The resources given to the KACA were minimal and as such it was impeded from successfully investigating and prosecuting cases of corruption. Director Mwau had to resort to donating his private offices so that the KACA would have a base for its operations.<sup>50</sup>

John Harun Mwau and the KACA did eventually bring to court senior court officials on charges of corruption. In 1998, Kenya Revenue Authority senior officials from the Ministry of Finance, were charged in court in a case involving then powerful Cabinet Minister Simeon Nyachae.<sup>51</sup> However, Attorney General Amos Wako terminated the cases brought to court by the KACA. The Attorney General argued that the Kenya Anti-Corruption Authority had gone to court without first obtaining the AG's consent to prosecute as required by the Constitution.<sup>52</sup> The Attorney General's reasons for terminating the cases were not persuasive. The alleged offenses committed by the Finance Minister and other government officials were related to fraudulent imports.<sup>53</sup> Cases involving fraudulent imports generally were not of the type that first required the consent of the AG.<sup>54</sup>

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<sup>49</sup> See, TUTA, CONTROL OF CORRUPTION IN KENYA, *supra* note 28, at 68 (describing the initial efforts of the KACA as being “unconventional” and “unorthodox”).

<sup>50</sup> See, Gathii, *Corruption and Donor Reforms*, *supra* note 41

<sup>51</sup> Gathii, *Corruption and Donor Reforms*, *supra* note 41, at 441.

<sup>52</sup> *Id.*; see also TUTA, CONTROL OF CORRUPTION IN KENYA, *supra* note 28, at 68. .

<sup>53</sup> TUTA, CONTROL OF CORRUPTION IN KENYA, *supra* note 28, at 68.

<sup>54</sup> *Id.* (“In particular, it was alleged that Mwau had acted *ultra vires* his powers by arraigning suspects in court without the sanction of the Attorney General Amos Wako. Incidentally, the matter in issue arose from offences touching on fraudulent imports that ordinarily did not require the consent or sanction of the Attorney General before prosecution.”).

Not only did the Kenyan Executive branch remove the KACA's cases from the docket, it also went on to remove its leader as well. The President appointed a tribunal to evaluate the competence of Director Mwau not long after he and his agency brought some judicial officers and high level ministers to court on corruption charges.<sup>55</sup> The timing of this effort to investigate Mwau caused many to wonder whether this was related to the charges brought against senior officials. It is very plausible that the Director was sought to be removed for being a thorn in the side of the corrupt government.<sup>56</sup> The tribunal declared Mr. Mwau "incompetent" and the President accordingly removed him from his post as Director.<sup>57</sup>

The judiciary had once again stepped in and impeded the agency and its fight against corruption. This was rapidly becoming common happenstance and once again the judiciary had acted on questionable legal grounds. While Director Mwau's methods in leading the KACA may have

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<sup>55</sup> Gathii, *Corruption and Donor Reforms*, *supra* note 41, at 445 ("These events began to lead to questions about the government's commitment to eliminating corruption in the country. It appeared as if the appointment of Harun Mwau to head the Anti-Corruption Authority was part of a government design to merely put up a big show of its commitment to fighting corruption to win the donor community's approval for resumption of the enhanced structural enhancement facility.").

<sup>56</sup> Corruption and Economic Reforms in Kenya, *supra* note 40, at 3-4.

<sup>57</sup> Gathii, *Corruption and Donor Reform*, *supra* note 41, at 442; *see also* TUTA, CONTROL OF CORRUPTION IN KENYA, *supra* note 41, at 68; MARS GROUP KENYA, A MARS GROUP REPORT ON THE REPORT OF THE KENYA ANTI-CORRUPTION COMMISSION TO PARLIAMENT 2005-2006 ("John Harun Mwau was dismissed for incompetence following a tribunal appointed under the [Prevention of Corruption Act]."). The tribunal found that Harun Mwau had "too highly inflated a view of himself to work in harmony with others." Gathii, *Corruption and Donor Reforms*, *supra* note 41, at 446.

been questionable at first,<sup>58</sup> the Director and his agency had just started to show progress and initiative in fighting corruption when this decision to remove him was made. The government partly redeemed itself when it named Justice Aaron Ringera as Mr. Mwau's replacement. This does not, however, end the Executive from getting in the way of the anti-corruption agenda. As we shall see, Aaron Ringera was forced to resign in shame several years later.

Before his appointment to head KACA, Mr. Ringera had been a well-respected High Court Judge. As a High Court Judge, he had an extremely strong legal background unlike Mwau who had none. Notwithstanding such a promising appointee, some still suggested that this appointment was motivated by a desire to appease donors so that Kenya could retain its international aid flow. There were doubts that the government was committed to eliminating corruption.<sup>59</sup> That notwithstanding, this appointment of High Court Judge Ringera ushered in the so-called "golden age" of the KACA.<sup>60</sup> No longer were the anti-corruption plans of the agency scattered and incoherent, but instead a comprehensive strategy for investigating and prosecuting those in office found to be acting corruptly was put in place.<sup>61</sup> Using a three-pronged approach, the KACA under Mr. Ringera made steps toward building a culture of accountability and transparency in Kenya. This approach included: "[t]he consistent enforcement of the law against corruption; the prevention of corruption by removing the opportunities that facilitate the crime; and the education of the public and enlistment of their

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<sup>58</sup> See *Supra* Notes 48 – 49 and accompanying text.

<sup>59</sup> Corruption and Economic Reforms in Kenya. *supra*, note 40, at 3.

<sup>60</sup> TUTA, CONTROL OF CORRUPTION IN KENYA, *supra* note 28, at 69.

<sup>61</sup> *Id.* (describing the KACA under Ringera as "the most serious attempt the Government had hitherto made towards the eradication of corruption.").

support in the fight against corruption.”<sup>62</sup> For the first time, the KACA had offered some hope that all would not be the same any more.<sup>63</sup> However, this was not destined to last.

### **Part III. Gachiengo Decision and the Demise of the Kenyan Anti-Corruption Authority**

In 2000 the anti-corruption fight experienced another major setback from a decision handed down by a Constitutional Court. In *Stephen Mwai Gachiengo & Albert Muthee Kahuria v. Republic of Kenya* (hereinafter “Gachiengo”) a Constitutional Court held that KACA’s existence was a violation of the constitutional separation of powers and consequently found that it was unconstitutional.<sup>64</sup> In this landmark corruption prosecution case, the defense, on behalf of four persons, raised four constitutional questions regarding the KACA and the *Prevention of Corruption Act*.<sup>65</sup> First, whether it was contrary to the separation of powers for High Court Judge Ringera to also serve as director of the Kenya Anti-Corruption Authority. That Judge Ringera must, therefore, choose to be either a High Court Judge or Director of the KACA. Second, whether having a High Court Judge as Director of KACA prevents the accused from enjoying the right to a fair trial because the lower court Magistrates will be hesitant to rule against the High Court Judge who obviously felt that the accused were guilty if he had the KACA investigate and prosecute them. Third whether the Attorney General’s consent to the

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<sup>62</sup> *Corruption in Kenya: A Call to Action*, (Bulletin of the Institute of Economic Affairs), August 2000, at 4.

<sup>63</sup> TUTA, CONTROL OF CORRUPTION IN KENYA, *supra* note 28, at 69.

<sup>64</sup> See the Ruling in *Stephen Mwai Gachiengo & Albert Muthee Kahuria v. Republic* from the Republic of Kenya in the High Court of Kenya at Nairobi, High Court Miscellaneous Application No. 302 of 2000.

<sup>65</sup> *Id.* at 2.

prosecutions initiated by the KACA was valid under the constitution; and fourth whether §11(B) of The Prevention of Corruption Act, which established KACA, was in conflict with the Constitution.<sup>66</sup>

With regard to question one – whether Justice Ringera sitting as the Director of the Kenya Anti-Corruption Authority violates separation of powers – the Constitutional Court held that it was an unconstitutional breach of separation of powers to have Justice Ringera be a member of both the Executive and the Judiciary. As such he had to choose to either remain a High Court Judge or retire from the High Court and continue to direct the KACA.<sup>67</sup> The Court’s reasoning was that the judiciary should not be “subject to the dictates of either the executive or the legislature” and when Judge Ringera took his oath to head the KACA he became a part of the Executive branch also and was no longer bound by the judicial oath.<sup>68</sup> As such, the court ruled that Justice Ringera’s position as High Court Judge was being compromised.<sup>69</sup>

The court went on to hold that it is only the Attorney General who is permitted under the Constitution to prosecute.<sup>70</sup> Given the fact that the Attorney General was not controlling or

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 8-13.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* The court also held by acting as director of KACA, Judge Ringera did not prevent those accused of corruption from the right to a fair trial. *Id.* at 2-4.

<sup>70</sup> *Id.* at 5. The court held that the Attorney General’s consent to KACA prosecuting corruption-related defenses was given as a “formality” – and that this consent was not valid under the constitution. *Id.* at 7-8. Furthermore, the court held that although the Attorney General consented to these corruption prosecutions through a prior written consent,

actively overseeing KACA, as required by §26(3), §26(b), and §26(c) of the Constitution; the court declared KACA to be unconstitutional. According to the court, KACA was a corporate entity and not an agency complementary to the Attorney General and as such it could not unilaterally investigate and prosecute cases.<sup>71</sup>

The court in addition, held that §10 and §11B of *The Prevention of Corruption Act*, which created the KACA and set out guidelines for it to fight against corruption, were in direct conflict with §26 of the Constitution which gave the Attorney General his exclusive prosecutorial powers.<sup>72</sup> As such, the court held that KACA undermined the Commissioner of Police and the Attorney General because its investigatory and prosecutorial powers were infringing on the powers and rights vested to these institutions by the Constitution.<sup>73</sup>

This effect of this decision effectively terminated the KACA's existence.<sup>74</sup> The court's holding – that the Attorney General's prior consent to KACA prosecutions was not valid and that the KACA was acting unilaterally, separate from the Attorney General, and in violation of the

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in reality, the Attorney General had very little say and control over KACA, which is only answerable to its Director or the Advisory Board. *Id.* at 6.

<sup>71</sup> *Id.* at 8.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 8-9.

<sup>74</sup> MWALIMU MATI AND JOHN GITHONGO, TRANSPARENCY INTERNATIONAL, JUDICIAL DECISIONS AND THE FIGHT AGAINST CORRUPTION IN KENYA 9 (2001) (“[As a result of the Gachiengo decision the KACA was] effectively . . . declared unconstitutional and its operations halted.”).

constitution has been very widely and, in my view, correctly criticized as being incorrect.<sup>75</sup> The Attorney General himself spoke out after the decision saying that his “office was working harmoniously with KACA”<sup>76</sup> and that his ultimate control and direction over the prosecutions was never put in jeopardy by the KACA’s investigation and prosecution of corruption-related crimes.<sup>77</sup>

A major shortcoming of the *Gachiengo* decision was that the High Court did not correctly construe §26 of the Kenyan Constitution. §26 states in part:

The Attorney-General shall have power in any case in which he considers it desirable so to do: (a) to institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence alleged to have been committed by that person; (b) to take over and continue any

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<sup>75</sup> *Id.* (“True, the argument goes, Justice Ringera was not entitled to straddle in both the judiciary and KACA, but the court should have looked at the public policy good that KACA was necessary to fight corruption in a situation where even the government admitted that conventional law enforcement mechanisms and institutions are unable to do so. Furthermore, it was possible as happened in the case of Judge Heath of the SIU to make an innovative ruling that would serve to preserve separation of powers and maintain an independent anti-corruption authority.”); *see also KACA Bills – The Way Forward*, K Miwge (discussing the errors in the Judges’ reasoning and also the difficulty in solving the problem of creating an anti-corruption agency when it is widely regarded that the KACA was actually perfectly constitutional); Gathii, *Human Rights and Corruption*, *supra* note 16, at 161 (discussing how Kenyan courts have oftentimes use procedural human rights and a narrow reading of constitutional principles to protect high level government officials from charges of corruption).

<sup>76</sup> *KACA Bills – The Way Forward*, K Miwge, p. 1.

<sup>77</sup> *Id.*

such criminal proceedings that have been instituted or undertaken by another person or authority; and (c) to discontinue at any stage before judgement is delivered any such criminal proceedings instituted or undertaken by himself or another person or authority.<sup>78</sup>

The language of §26 does not exclusively reserve to the Attorney General the power to prosecute criminal cases. Further, it would be impossible for the Attorney General to be the sole person with the power to initiate criminal proceedings. For this reason, the Attorney General has extended his prosecutorial powers to other bodies such as the National Social Security Fund as well as other assistants to aid in dealing with the sheer number of cases that come before him.<sup>79</sup> In fact, the Attorney General has granted prosecutorial powers, albeit in a limited scope, to quite a few governmental bodies. These include the “Kenya Bureau of Standards, the National Health Insurance Fund and the Kenya Society for the Prevention of Cruelty against Animals.”<sup>80</sup> These bodies are all very similar to the KACA in that they have been delegated the power to initiate prosecutions within their limited scope of expertise. Their powers are all contained in a small, specialized area of litigation and this power to prosecute not only makes it possible for them to carry out their specialized task, but it also aids the Attorney General in relieving that area of litigation from his case load – one which his office would be unable to fully handle alone.

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<sup>78</sup> CONSTITUTION, Art. 26 (2001) (Kenya).

<sup>79</sup> Nyaga P.N., *Prosecution of Corruption Cases in Kenya* (July, 2001) (unpublished L.L.B. dissertation, University of Nairobi) (on file with author).

<sup>80</sup> *Id.*

It is also true that the exclusive powers vested in the Attorney General by the Constitution do not include the exclusive right to prosecute. Rather this exclusivity only applies to his right to take over, continue or terminate criminal proceedings that have already been instituted or undertaken by another person or authority.<sup>81</sup> If this is the case, then the fact that KACA was initiating its own suits, with at least apparent consent from the AG would be perfectly consistent with the provisions of the Constitution. On this view, a violation would only occur if the KACA tried to intervene and take over a suit taken by either the Attorney General or a third party citizen or organization.

Perhaps the most troubling aspect of the Gachiengo judicial decision was that once again the Judiciary had handed down a decision which gave no weight to the immense fight going on in Kenya to try and eradicate or at least minimize corruption. A government minister noted that “[t]he court displayed a shocking ignorance of the policy issues leading to the establishment of KACA.”<sup>82</sup> In fact, it was apparent that the *Gachiengo* court did not deem the amendment to *The Prevention of Corruption Act* which established the KACA to be necessary.<sup>83</sup> At this point, this anti-corruption law had been in effect for nearly fifty years and amended several times;

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<sup>81</sup> *Id.*

<sup>82</sup> TRANSPARENCY INTERNATIONAL, *BACK TO BASICS: LESSONS FROM THE FIGHT AGAINST CORRUPTION IN KENYA AND SOUTH AFRICA* (2001).

<sup>83</sup> The exact language from this case is “We were not addressed as to why the amendment (Legal Notice 10 of 1997 to the Prevention of Corruption Act which created the KACA) to S.11 of Cap.65 was necessary. In our view we found no deficiency in the Act that called for the amendment.” *Stephen Mwai Gachiengo & Albert Muthee Kahuria v. Republic* from the Republic of Kenya in the High Court of Kenya at Nairobi, High Court Miscellaneous Application No. 302 of 2000.

corruption was still rampant, and the government was trying to step up corruption and give an anti-corruption agency the teeth that the previous agency did not possess. It seemed hard to believe for many that the judicial branch was so unaware of the struggles Kenya was having in dealing with corruption that it would deem the KACA an unnecessary institution. Further, the Constitutional Court needed not have so far as to eradicate the KACA and leave Kenya without an independent anti-corruption agency.

It is argued by John Kithome Tuta in his essay “Evolution of Anti-Corruption Policy and Institutional Framework” that the Constitutional Court hearing *Gathiengo* could have easily faulted some provisions of *The Prevention of Corruption Act*, kept the Act as a whole and the KACA as viable means to fight corruption. This would have required presenting Parliament some amendment so to Corruption statute so as to bring the KACA within the parameters allowed by the Constitution.<sup>84</sup> Given the long, difficult battle against corruption in Kenya dating back nearly fifty years at that time, it would seem that this method of fine tuning the existing anti-corruption mechanics rather than tossing the baby with the bathwater.

The problems which stemmed from the questionable decision handed down by the Constitutional Court in the *Gachiengo* case were further exacerbated by the Attorney General’s decision on December 29, 2000. On that day, Attorney General, Amos Wako announced that he would respect the decision of the court and would therefore not appeal the *Gachiengo* decision.<sup>85</sup> This came as a bit of a surprise, especially given the fact that after the court handed down its ruling, the Attorney General made it a point to publically disagree with the court’s decision with

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<sup>84</sup> TUTA, CONTROL OF CORRUPTION IN KENYA, *supra* note 28, at 72.

<sup>85</sup> KACA Bills – The Way Forward, K. Mwige, p. 1.

regard to the constitutionality of his consent to KACA prosecutions and the question whether or not he controlled the KACA prosecutions.<sup>86</sup>

#### **Part IV. Fighting Corruption in the Aftermath of the Gachiengo Decision**

The demise of the Kenya Anti-Corruption Authority at the hands of the Constitutional Court was met with outrage in the international community. Since the Kenyan government relies heavily on international aid, many donors were unwilling to continue funneling aid to Kenya if the government did not show that it was dedicated to fighting and eradicating corruption. It very well may have been because of donor disapproval that the government under President Daniel Moi, which otherwise may have been happy to let the system of patronage and bribery continue, enacted further legislation to fight corruption.

One year following, several possible approaches to fill the void the agency left behind by KACA's demise were considered. Parliament proposed a Constitutional amendment which would have amended §26(3)(a) so that it would no longer be in direct conflict with §11(B) of *The Prevention of Corruption Act*. This would have laid and the constitutionality of the KACA to rest. The amendment would have entrenched the anti-corruption body in the Constitution so as to guarantee its continued existence and ensure that it would not be dismantled by a corrupt judiciary.<sup>87</sup> The Constitution of Kenya (Amendment)(No.3) Act, 2001 would have achieved that result by giving KACA the power to investigate and institute criminal proceedings

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<sup>86</sup> KACA Bills – The Way Forward, K. Mwige, p. 1; *See supra* notes 76-77 and accompanying text.

<sup>87</sup> This was finally achieved through the recently passed Constitution. *See infra*, “A New Constitution in Kenya”

to more than just the Attorney General. If it had passed, the Attorney General would no longer have the exclusive mandate to conduct criminal proceedings. As such, KACA would have been able to criminally charge someone under an anti-corruption law, as well be able to investigate and proceed with these cases without needing to have the consent of the Attorney General and without worrying about a court declaring that it overstepped its bounds by bringing a corruption-related case to trial. However, the Constitution of Kenya (Amendment)(No.3) Act, 2001 was never passed by the Kenyan Parliament and, in fact never even passed the Parliamentary vote to reach the Third Reading of it.<sup>88</sup>

One reason why Parliament accounted for non-passage of this bill was because some Members of Parliament thought that there was nothing wrong with the Constitutional Court's decision in *Gachiengo*.<sup>89</sup> In addition, the process of amending the constitution is thought to be a long, serious process and arguably should not be done unless absolutely necessary. Since, in the eyes of these Parliamentarians, the Constitution of Kenya does in fact allow for the establishment of an anti-corruption body with investigative and prosecutorial power, it was, in their view, unwise to amend the constitution when it is not actually a roadblock to KACA fighting corruption. For these Parliamentarians, it was the judiciary that was the problem in the anti-corruption agenda.<sup>90</sup>

The Constitution of Kenya (Amendment)(No.3) Act, 2001 also faced large-scale opposition in the Parliament because many members of Parliament were very opposed to the insertion of an

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<sup>88</sup> Martin Mutua, *Government Shelves, Replaces Graft Bill*, EAST AFRICAN STANDARD, Apr. 4, 2003 at 1.

<sup>89</sup> KACA Bills – The Way Forward, K. Mwige, p. 1

<sup>90</sup> KACA Bills – The Way Forward, K. Mwige, p. 1

amnesty clause for those who had engaged in corruption in the past.<sup>91</sup> Inclusion of the amnesty provision was seen as an attempt by the Moi Government to protect itself from the legal ramifications of the corrupt practices engaged in throughout the regime's history. In opposition to this, some Parliamentarians argued that a government truly dedicated to the fight against corruption must also maintain a sense of "transitional justice."<sup>92</sup> Transitional justice in this context was defined by John Githongo, the former Permanent Secretary of Governance and Ethics not as a whitewash of previous crimes, but as taking into account "that past economic crimes, especially those that have manifestly impoverished Kenyans need to be addressed in a systematic manner as part of a credible process."<sup>93</sup> In other words, a government's fight against corruption does not hold credibility in its own eyes and in those of the public if it does not actively prosecute and investigate instances of corruption which may have happened in the past.

A second avenue the government took in the aftermath of the *Gachiengo* decision to try and prevent Kenya's anti-corruption infrastructure from crumbling was a new *Corruption Control Bill*. The Corruption Control Bill was intended to establish the Kenya Corruption Control Authority (KCCA).<sup>94</sup> This bill attempted to make the KCCA answerable "only to Parliament for

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<sup>91</sup> TUTA, CONTROL OF CORRUPTION IN KENYA, *supra* note 28, at 76. This was also a contentious issue with the Kenyan public. TRANSPARENCY INTERNATIONAL, DEALING WITH THE PAST: ECONOMIC CRIMES AND THE TRANSITION 14 (2002) [hereinafter ECONOMIC CRIMES AND THE TRANSITION] *available at* <http://www.tkenya.org/documents/DealingPast.pdf>.

<sup>92</sup>Tuta, Control of Corruption in Kenya, *supra* note 28, at 99.

<sup>93</sup> *Id.*; See also ECONOMIC CRIMES AND THE TRANSITION, *supra* note 91, at 14.

<sup>94</sup> Corruption Control Bill, 2001 Part 1(2).

the performance of its functions.”<sup>95</sup> The bill was an attempt by Parliament to cure the procedural and constitutional defects discussed above with regard to the authority of the KACA to prosecute. Under the Corruption Control Bill, the KCCA would have had the power to investigate corruption cases and then the Attorney General would institute criminal proceedings via public prosecutors previously appointed to the task.<sup>96</sup> This bill was eventually passed by Parliament in 2002; however it never became law due in large part to the Presidential elections taking place that year. President Kibuki won the election and his NARC party decided not to enact the bill, but instead to alter and create a new bill.

In the interim, as the Parliament struggled to pass new bills related to anti-corruption agencies and/or constitutional amendments, the government established the Anti-Corruption Police Unit.<sup>97</sup> The ACPU inherited all the cases the now-defunct KACA had been working on.<sup>98</sup> However, similar to the former anti-corruption squad established in 1991, the Police Unit did not have sufficient resources or a structure to enable it to undertake its tasks effectively. This is especially true because of the questionable legal situation surrounding the ACPU in the wake of the judiciary’s decision in the *Gachiengo* case and Parliament’s inability to pass legislation to remedy problems in the *Prevention of Corruption Act* identified by the *Gachiengo* decision. For example, an Advisory Board was eventually set up, much like the one KACA had to help give advice to the ACPU on how to go about its job of investigating corruption cases. However, unlike the previous Advisory Board for the KACA, this Committee “was largely inactive,” in

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<sup>95</sup> Corruption Control Bill, Part II (4A)(2)

<sup>96</sup> Nyaga P.N., *supra* note 79.

<sup>97</sup> TUTA, CONTROL OF CORRUPTION IN KENYA, *supra* note 28, at 77.

<sup>98</sup> *Id.*

part because there was no legal basis for its existence.<sup>99</sup> Another problem with the ACPU was that it was less independent from the other branches than was the KACA. Again, similar to the Anti-Corruption squads, the ACPU was headed by the Commissioner of Police and was a part of the Kenyan police force and its boss would have to answer to the Director of the Criminal Investigations Department.<sup>100</sup> Nonetheless, the ACPU managed to do its job surprisingly well given its deficiencies and ties to the police force. It received more complaints than the KACA had and filed more reports than the KACA had after following up on these complaints.<sup>101</sup>

One of the bigger adverse consequences brought about by the *Gachiengo* decision is the effect it had on all the pending cases that KACA had initiated against corrupt officials. Once KACA was stripped of its legal authority for prosecuting corruption, all the cases it was investigating and planning to prosecute were handed over to the Attorney General and ACPU. However, none of these cases resulted in a conviction and all were either not prosecuted by the AG or if they were prosecuted they were dismissed by the courts.<sup>102</sup> One of the most notable of these cases was that of Kipng'eno arap Ng'eny in *Republic. v. Attorney-General & Another Ex parte Kipng'eno arap Ng'eny*.<sup>103</sup> Mr. Kipng'eno arap Ng'eny was a very powerful Cabinet Minister who was charged by the KACA with high-level or “grand” corruption.<sup>104</sup> Mr. Ng'eny had apparently been corrupt for a number of years. However, it was not until the KACA was created that attempts to hold

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 78-79.

<sup>102</sup> ACPU *Annual Report 2002*, Nairobi, 2003, p. 11.

<sup>103</sup> Nyaga P.N., *supra* note 79.

<sup>104</sup> Gathii, *Human Rights and Corruption*, *supra* note 16, at 161.

him accountable for his graft were made. The Attorney General finally initiated a prosecution against Ng'eny in 2001, after having dragged his feet on this matter for a number of years.<sup>105</sup> However, the High Court issued an order directing the Attorney General not to bring further charges against Mr. Ng'eny because of the nine year delay from the time of the corrupt acts and the commencement of the suit against him.<sup>106</sup> However, this “unexplained” delay can be accounted for by the fact that up until the establishment of KACA in 1997, there was no anti-corruption watchdog going after high-level, corrupt members of the government. The Ng'eny decision signaled the end of KACA and all of its work it had done in fighting corrupt offenders.. It was quite clear that none of the officials investigated and suspected of corruption by the KACA would be brought to justice until a new anti-corruption body was created.

### **A) The 2002 Elections and the Rise of the NARC Party**

The Presidential elections of 2002 were a very monumental event in the history of Kenya and in particular in its fight against corruption. Newly-elected President Mwai Kibaki of the National Rainbow Coalition (“NARC”) was sworn into office, finally drawing to a close the corrupt tenure of President Moi as the leader of Kenya. It also signaled the end of the dominance of the KANU party which lost the 2002 election in the face of a united opposition led by Mwai Kibaki. Corruption and the people’s desire for a government dedicated to its eradication played a large part in determining the results of the election. One of the main pillars of President Kibaki’s candidacy was his denouncement of Moi’s KANU party as corrupt and promises to the people to fight and end corruption as a way of life. To many, his election in 2002 signaled a time of hope

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

in which government reform would bring about a new way of life in Kenya.<sup>107</sup> President Kibaki carried over this anti-corruption momentum into office with him and quickly began pushing through measures to fight corruption in many different ways.

President Kibaki first created a new Ministry of Justice and Constitutional Affairs.<sup>108</sup> The purpose of this position was to coordinate the anti-corruption efforts so as to make them more effective and consistent. In the past, the efforts of the government were often sporadic and inconsistent, so much so that they caused international organizations, foreign donors, and critics of Kenya's policies in general to question the level of commitment the previous KANU party government had to actually fighting corruption.<sup>109</sup> Today, the Ministry's functions and efforts have extended to almost every area of society dealing with corruption including the political parties, elections, the Kenya School of Law, and human rights and social justice.<sup>110</sup>

Shortly after his arrival in office, President Kibaki also created the position of Permanent Secretary in the Office of the President for Governance and Ethics within his Presidential Cabinet. He appointed John Githongo, the former Executive Director of Transparency

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<sup>107</sup> Gladwell Otieno, *The NARC's Anti-Corruption Drive in Kenya: Somewhere over the Rainbow?*, Vol. 14, No. 4 AFRICAN SECURITY REVIEW (2005) available at <http://www.iss.co.za/pubs/ASR/14No4/EOtieno.htm>

<sup>108</sup> Today the branch is called the Ministry of Justice, National Cohesion, and Constitutional Affairs. [http://www.justice.go.ke/index.php?option=com\\_frontpage&Itemid=1](http://www.justice.go.ke/index.php?option=com_frontpage&Itemid=1)

<sup>109</sup> See supra, note 40 and text accompanying (discussing how corruption under the Moi administration had become so prevalent that nearly all foreign donor aid had been cut off).

<sup>110</sup> Government of Kenya: Ministry of Justice, National Cohesion, and Constitutional Affairs, [http://www.justice.go.ke/index.php?option=com\\_frontpage&Itemid=1](http://www.justice.go.ke/index.php?option=com_frontpage&Itemid=1)

International, Kenya to this post. Githongo was widely viewed as a well-regarded, trustworthy person to head this important position and he came into the office determined to wage war against the corruption that has plagued the country for so long.

## **Part V. The Enactment of the Anti-Corruption and Economic Crimes Act and Public Officer Ethics Act**

The biggest anti-corruption initiative taken by President Kibaki and his NARC party at the outset of his Presidency was the passing of the Anti-Corruption and Economic Crimes Act as well as the Public Officer Ethics Act in May 2003. Part 1 will examine the framework for the Anti-Corruption and Economic Crimes Act in depth. Part 2 will then talk about the Public Officer Ethics Act. Part 3 will discuss the shortcomings of this legislation in practice.

### **A) The Enactment of the Anti-Corruption and Economic Crimes Act and its Framework**

The Anti-Corruption and Economic Crimes Act (hereinafter “ACECA”) filled the hole left by the KACA’s demise following the Kenya Constitutional Court’s *Gachiengo* decision.<sup>111</sup> The ACECA established the Kenya Anti-Corruption Commission (hereinafter “KACC”) as the newest corruption fighting body in Kenya.<sup>112</sup> The KACC would have to face the same obstacles imposed on the KACA by the Constitutional Court’s conclusion in *Gachiengo*, namely that these anti-corruption bodies established through acts of Parliament did not have the explicit power to

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<sup>111</sup> See *Supra*, “*Gachiengo Decision and the Demise of the Kenya Anti Corruption Authority.*”

<sup>112</sup> Anti-Corruption and Economic Crimes Act, (2003) Cap. 65 § 6(1).

prosecute anti-corruption crimes under the Constitution of Kenya. The ACECA did not even suggest that the KACC would have the ability to prosecute, probably because Parliament still comprised of individuals who had benefitted immensely from corruption in the past.<sup>113</sup> Instead, the ACECA attempted several methods of ensuring the success and effectiveness of the KACC's anti-corruption efforts while stopping short of granting prosecutorial powers. For one, ACECA gave the Attorney General and the Judicial Branch little unfettered discretion by seeking to hold them accountable for any questionable decisions hindering the conviction of the corrupt and the fight against corruption in general.<sup>114</sup> For example, ACECA gave the KACC very broad powers of powers of investigation. The new law also sought to make the Attorney General accountable for his decisions on whether or not to prosecute suspects reported to him by the KACC.

As we shall see below, the extensive investigatory powers of the KACC include the ability “to investigate any matter that *in the Commission's opinion*, raises suspicion that any of the following have occurred or *are about to occur* --- (i) conduct constituting corruption or economic crime; (ii) conduct liable to allow, encourage or cause conduct constituting corruption or

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<sup>113</sup> The ACECA even defined the KACC as a “body corporate” which is the exact term used by the Constitutional Court in its Gachiengo decision to strike down the Prosecutorial Power of the KACA because it was a separate entity and not one subservient to the Attorney General. *Compare*, §6(1) of the ACECA (“The Kenya Anti-Corruption Commission is hereby established as a body corporate”) with *Stephen Mwai Gachiengo & Albert Muthee Kahuria v. Republic* from the Republic of Kenya in the High Court of Kenya at Nairobi, High Court Miscellaneous Application No. 302 of 2000 (“KACA is not a department in the Office of the Attorney General. It is a body corporate . . . . The existence of KACA undermines the power and authority of both the Attorney General and the Commissioner of police as conferred on them by the Constitution).

<sup>114</sup> For a discussion of past questionable decisions by the Court impeding the fight against corruption, *see* Gathii, *Human Rights and Corruption*, *supra* note 16, at 125.

economic crime.”<sup>115</sup> The KACC also has the power under the ACECA to investigate the conduct of any person,<sup>116</sup> branch of the government,<sup>117</sup> corporations,<sup>118</sup> and local authority,<sup>119</sup> and this list is not exhaustive. The KACC was also given “all the powers necessary or expedient for the performance of its functions,”<sup>120</sup> and in the course of carrying out investigations, investigators are given the privileges and immunities of police officers.<sup>121</sup> The KACC has the power to demand, upon reasonable suspicion, a declaration of the suspected person’s property.<sup>122</sup> The purpose for this being that should a person be found in possession of wealth far beyond what one would expect given his/her job or upbringing, this may raise suspicion of corruption. The penalty for someone who fails to comply with the KACC’s demand is subject to a fine of up to Kshs. 300,000 and/or imprisonment for up to three years.<sup>123</sup> In the same vein, the KACC is also

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<sup>115</sup> Anti-Corruption and Economic Crimes Act, (2003) Cap. 65 §7(1)(a) (emphasis added).

<sup>116</sup> *Id.* §7(1)(b)

<sup>117</sup> *Id.* §7(1)(e) (Giving the Kenya Anti-Corruption Commission the power “to examine the practices and procedures of public bodies in order to facilitate the discovery of corrupt practices.” “Public bodies” are defined in §2 of the ACECA as including “(a) the government, including Cabinet, or any department, service or undertaking of the Government; (b) the National Assembly or the Parliamentary Service.” *Id.* §2(1)

<sup>118</sup> “Public bodies” are further defined in §2 of the ACECA as including also “any corporation, council, board, committee or other body which has power to act under and for the purposes of any written law relating to local governments, public health or undertakings of public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law. *Id.*

<sup>119</sup> “Public bodies” are further defined in §2 as including “a local authority.” *Id.*

<sup>120</sup> *Id.* §6(2).

<sup>121</sup> *Id.* §23(3).

<sup>122</sup> *Id.* §26(1).

<sup>123</sup> *Id.* §26(2).

given the power to demand through notice in writing “any information or documents in the person’s possession that relate to a person suspected of corruption or economic crime.”<sup>124</sup> The KACC can submit their demand for these documents to any person, regardless of whether or not they have specifically targeted that person for possible corruption-related offenses. The same goes for requests by the KACC for records in a person’s possession under §28 of the ACECA. The penalties for both of these offenses mirror those discussed above; a fine up to Kshs. 300,000 and/or imprisonment for up to three years. Furthermore, in situations where those sequestered refuse to comply with the KACC’s demands for information, the KACC still has powers to uncover the information it may want. KACC’s investigators can obtain warrants from the courts to search for “any record, property or other thing reasonably suspected to be in or on the premises and that has not been produced by a person.”<sup>125</sup> A final investigatory power conferred on the KACC was that the KACC can submit an *ex parte* application to the court requesting that a person who is reasonably suspected of economic crime to be required to hand over their travel documents so as to prevent them from fleeing the country.<sup>126</sup> This helps the KACC in its investigations of corruption because it prevents suspects, evidence, and/or witnesses from leaving the country and avoiding the jurisdiction of both the KACC and the court if prosecutions are deemed appropriate. All of the investigative powers discussed above combine to give the KACC the ability to get to the bottom of corruption in a variety of ways.<sup>127</sup>

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<sup>124</sup> *Id.* §27(3).

<sup>125</sup> *Id.* §29(1)

<sup>126</sup> *Id.* §31(1).

<sup>127</sup> Albeit without the ability to punish those they investigate.

However, many of these powers have been challenged as being in conflict with the fundamental criminal principle of affording those who are accused the presumption of innocence until proven guilty.<sup>128</sup> The arguments made here are that KACC has the power to significantly infringe on a person's right and freedoms through a unilateral decision that the person is a corruption suspect. In fact, many of KACC's powers do not require any binding legal determinations by courts before it can exercise them. As discussed above, these rights potentially taken away include the right for corruption suspects to leave the country, the right of a person to be free from intrusion into their privacy and the right to have their assets kept free of governmental intrusion. Furthermore, the suspects can be punished either financially or through imprisonment if they fail to comply with the exercise of KACC's powers.<sup>129</sup>

The second aspect of the ACECA which is designed to make certain that the KACC doesn't become a lame duck due to its inability to initiate prosecutions is its system of annual reports it and must make to Parliament and the citizens of Kenya. The KACC is also sought to be kept accountable and transparent through §25 of the ACECA. According to this provision, if the KACC chooses not to pursue a complaint, "the Commission shall inform the complainant in writing of its decision and *of the reasons for its decision.*"<sup>130</sup> This assures the public, in theory, that the KACC will not be bribed or take into account political favors, personal relationships, or any other outside factors when determining what cases it will recommend to the Attorney General for the institution of formal legal proceedings.

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<sup>128</sup> Under Kenyan law, the Presumption of Innocence principle is found in CONSTITUTION, Art. 77 (2001) (Kenya).

<sup>129</sup> Anti-Corruption and Economic Crimes Act

<sup>130</sup> Anti-Corruption and Economic Crimes Act, (2003) Cap. 65 §25 (emphasis added).

The ACECA also sets out to bring a level of accountability and transparency to the prosecutorial decisions the Attorney General makes as well. The KACC is given the task of preparing quarterly reports which “set[] out the number of reports made to the Attorney General . . . and [these reports] shall indicate if a recommendation of the Commission to prosecute a person for corruption or economic crime was not accepted [by the Attorney General].”<sup>131</sup> In conjunction with this, the Attorney General has the responsibility of preparing his own annual reports.<sup>132</sup> The Attorney General’s reports should set out the steps he took during the course of the year,<sup>133</sup> and any recommendations made by the KACC that were not accepted. The AG must lay out “succinctly the reasons for not accepting the recommendations.”<sup>134</sup> Both of these reports, (that of the KACC and of the AG), must be submitted to the National Assembly.<sup>135</sup> Furthermore, the report of the KACC must be submitted to the Gazette for publication to the general public.<sup>136</sup> This system of reporting is based on at least two main ideas about how to bring about neutrality and accountability to the process of bringing about prosecutions for corruption. One being that, with both bodies submitting reports they will both prevent one body from misleading Parliament and the public about their role in combating corruption. Secondly, if the Attorney General continues to drag his feet with regard to bringing corruption suspects into court, there will be more concrete proof available to both the government and the public to determine whether he is indeed impeding the country’s fight against corruption. The same goes for the court system, if

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<sup>131</sup> *Id.* §§36(1)-36(2).

<sup>132</sup> *Id.* §37.

<sup>133</sup> *Id.* §37(3).

<sup>134</sup> *Id.* §37(4).

<sup>135</sup> *Id.* §36.4 & §37(6).

<sup>136</sup> *Id.* §36(5).

the courts continue to throw out corruption cases, it will be more widely known and documented exactly which part of the government is dragging its feet in addressing corruption.

The ACECA also provided for the appointment of special magistrates for hearing corruption cases.<sup>137</sup> These magistrates are responsible for the trying of “any offense punishable under [The Anti-Corruption and Economic Crimes Act]”<sup>138</sup> as well as any conspiracy to commit these activities labeled a crime under the ACECA.<sup>139</sup> Since then an anti-corruption court has been established.<sup>140</sup>

The foregoing provisions of the ACECA were all written to remedy the defects of previous anti-corruption legislation and to try and improve on and learn from the past mistakes made. The anti-corruption framework laid down by the ACECA is the most comprehensive to date. However there are still many criticisms of this framework. The next step is to look at some of the negative claims made about the ACECA and KACC at the time of their commencement and whether these alleged defects have caused problems in practice. However, before engaging in that evaluation, another important piece of legislation that also came into effect in 2003 will be discussed.

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<sup>137</sup> *Id.* §3.

<sup>138</sup> *Id.* §3(a).

<sup>139</sup> *Id.* §3(b).

<sup>140</sup> “The Anti-Corruption Court specifically handles matters dealing with graft in public and private office . . . . Anti-Corruption Courts are located across the country in areas such as Nairobi, Kiambu, Nyeri, and Kisumu. The Republic of Kenya, Judiciary, Court Structure,

[http://www.judiciary.go.ke/judiciary/index.php?option=com\\_content&view=article&id=289&Itemid=407](http://www.judiciary.go.ke/judiciary/index.php?option=com_content&view=article&id=289&Itemid=407).

## **B) The Enactment of the Public Officer Ethics Bill**

The Public Officer Ethics Bill was the first of its type in Kenya. Its purpose was different from earlier pieces of anti-corruption legislation passed by the Kenyan Parliament. The purpose of this law was “to advance the ethics of public officers by providing for a Code of Conduct and Ethics for public officers.”<sup>141</sup> This was part of the broad anti-corruption strategy the NARC government wanted to instill after President Kibaki came into power. Up until this point, anti-corruption legislation had taken the form of merely defining corrupt behavior and determining how severely to punish each type of behavior it defines as corrupt.<sup>142</sup> However, contemporary

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<sup>141</sup> Public Officer Ethics Act, (2003) Cap. 183 Preamble. Furthermore, the bill was stated as being intended to “define the basic values, principles and set boundaries of acceptable behavior[.]r by public officials in this country (Kenya). We also hope to provide a legal framework for restoring public confidence in our Civil Service.” Kenya, The National Assembly, Debates on the Public Officer Ethics Bill, March 13, 2003, col. 446 (statement by Mr. Murungi, Minister for Justice and Constitutional Affairs).

<sup>142</sup> This is the case for all the legislation discussed so far. The Prevention of Corruption Act defined the type of behavior in the civil service which would be illegal and would be punished under the act. *See supra*, “The passing of the Prevention of Corruption Bill.” The purpose of the bill was to make nearly certain that those who engage in corruption would be caught. *Id.* The same goes for the proposed Corruption Control Bill which sought to create another anti-corruption investigatory/prosecutorial body to root out those who were corrupt. *See supra* “Fighting Corruption in the Aftermath of the Gachiengo Decision.” Also, the Anti-Corruption and Economic Crimes Act, 2003 went about fighting corruption in the same manner by creating the KACC and further defining and elaborating what exactly defines corruption. *See supra* “The Enactment of the Anti-Corruption and Economic Crimes Act and its framework.”

attitudes about corruption and how to fight it had begun to shift.<sup>143</sup> The realization that for the fight against corruption to be successful, a government would have to do more than create an all-encompassing definition of corruption and a body to investigate and enforce it was gaining currency. While defining and investigating corruption are both integral parts of the fight against corruption, when they are supplemented by other reform efforts a much greater effect is possible. This is where the Public Officer Ethics Act, 2003 comes into play. By promoting professionalism and integrity in the public service through a code of conduct and model standards rather than by threat of punishment, the Public Officer Ethics Act was implemented to help curb corruption in a different way. This will in turn help the KACC fight corruption since even the greatest of investigatory bodies will not successfully uncover all cases of corruption. Some of these “supplemental” measures include educating the public on corruption and its effects.

The Public Officer Ethics Act, (POEA), created a general Code of Conduct and Ethics. This code of conduct sets out a number of provisions for the members of the public service to follow. A public officer is to “carry out his duties and ensure that the services that s/he provides are provided efficiently and honestly.”<sup>144</sup> The Public Officer Ethics Act requires very specific

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<sup>143</sup> Gathii, *supra* note 16, at 126-29. The IMF for example emphasized more than just the definition/investigation approach to fighting anti-corruption, but instead stressed “the importance of promoting good governance in *all its aspects*” including, among other things, “improving the efficiency and accountability of the public sector.” Press Release, IMF Interim Committee, Interim Committee Declaration on Partnership for Sustainable Global Growth (Sept. 29, 1996) *available at* <http://www.imf.org/external/np/exr/dec.pdf> (emphasis added).

<sup>144</sup> Public Officer Ethics Act, (2003) Cap. 183 §8.

standards to be followed including treating others with courtesy and respect;<sup>145</sup> taking no unwarranted absences;<sup>146</sup> proper hygiene and dress;<sup>147</sup> avoidance of conflicts of interest in the discharge of their duties;<sup>148</sup> refraining from using their office as a means for personal enrichment;<sup>149</sup> and following the rule of law in the discharge of their duties.<sup>150</sup> This list is not all-inclusive, the POEA lists a vast array of standards and responsibilities the public officials are expected to comply with.<sup>151</sup> This specific Code of Conduct and Ethics applies to public officials until a more specialized Commission passed through their own Code of Conduct for their relevant subsection of the Public Service.<sup>152</sup> These specialized commissions have the authority to go beyond the standards laid out in the general Code of Conduct and Ethics, however they are not allowed to create a more lenient Code.<sup>153</sup>

The commissions are given the power to investigate whether a person has violated a portion of the Code of Conduct either at its own initiative or upon receiving a complaint from a third

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<sup>145</sup> *Id.* §9(b)

<sup>146</sup> *Id.* §9(e)

<sup>147</sup> *Id.* §9(f)

<sup>148</sup> *Id.* §12.

<sup>149</sup> *Id.* §11.

<sup>150</sup> *Id.* §10.

<sup>151</sup> The full listing of duties and responsibilities spans from §§8 – 31.

<sup>152</sup> *Id.* §5(4). These specialized commissions are numerous and nearly all-encompassing. They include commissions for the National Assembly, electoral commission, controller and auditor-general, public officers, judges and magistrates, teachers, members of the armed forces, members of the National Security Intelligence Service, as well as a catch-all for public officials who don't fit within any other category. *Id.* §§3(2) – 3(11).

<sup>153</sup> *Id.* §5(2)

party.<sup>154</sup> If the relevant commission determines that a violation has occurred, it has the power to issue an appropriate punishment,<sup>155</sup> or refer the matter to another body that has the power to issue an appropriate punishment.

The POEA further requires that all Public Service Members issue an annual declaration of their wealth as well as that of their families.<sup>156</sup> The reports must also be given within thirty days of becoming a public officer<sup>157</sup> and within thirty days of ceasing to be a public officer.<sup>158</sup> The POEA delegates to the relevant commissions the power to demand a clarification of a person's wealth report if the figures are not completely disclosed or if something is omitted.<sup>159</sup> President Kibaki himself submitted a declaration of his own wealth at the beginning of his Presidency in an effort to convince all of those who work in the Kenyan government to follow suit.<sup>160</sup>

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<sup>154</sup> *Id.* §§35(1) – 35(2).

<sup>155</sup> *Id.* §36(1) (a). It is interesting to note the broad powers given to these commissions under the POEA. They are given Legislative power through their power to enact the Code of Conduct for their particular sector. *See supra* note 152 and accompanying text. While there are guidelines they must follow, even these can be added on to by the Commission or even defined further and clarified if need be under §5(2)(b) (stating that the Commission may “set out how any requirements of the specific or general Code may be satisfied”). The Commissions are also given judicial powers in that they can investigate and punish those found in violation of the Code they themselves created. Public Officer Ethics Act, (2003) Cap. 183 §36(1)(a).

<sup>156</sup> Public Officer Ethics Act, (2003) Cap. 183 §26(1)

<sup>157</sup> *Id.* §27(3)

<sup>158</sup> *Id.* §27(5),

<sup>159</sup> *Id.* §28.

<sup>160</sup> *Kenya President Declares his Wealth*, N.Y. TIMES, Sept. 30, 2003, available at

<http://www.nytimes.com/2003/09/30/world/world-briefing-africa-kenya-president-declares-his-wealth.html>

These mandatory declarations of wealth have raised another constitutional issue in relation to the right to privacy. The argument here is that a mandatory duty to disclose the assets and wealth of oneself and one's spouse and children are certainly in conflicts with the right to privacy.

However, the right to privacy is not explicitly laid out by the Constitution of Kenya, although it has been determined to be an implicit right that still warrants protection.<sup>161</sup>

Many of the issues addressed by the Public Officer Ethics Act have been recurring issues in Kenya and go as far back as the first debates over the Prevention of Corruption Act. For instance, §11(3) of the Public Officer Ethics Act declares that “[a] public officer may accept a gift given to him in his official capacity but, unless the gift is a non-monetary gift that does not exceed the value prescribed by regulation, such a gift shall be deemed to be a gift to the public officer's [organization].” Legislators were still debating this issue over whether public officials should be allowed to accept gifts from constituents or members of the general public as the law worked its way through Parliament.<sup>162</sup> As we saw earlier in this chapter, the definition of what

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<sup>161</sup> The right to privacy is applied in Kenyan law through its presence in the English Common Law. Anne Kiunuhe, *Kenya Urgently Needs Privacy Protection Laws*, BUSINESS DAILY AFRICA, August 3, 2010. Available at <http://www.businessdailyafrica.com/Opinion%20&%20Analysis/Kenya%20urgently%20needs%20privacy%20protection%20laws/-/539548/969588/-/view/printVersion/-/10esy0/-/index.html>

<sup>162</sup> See e.g., Kenya, The National Assembly, Debates on the Public Officer Ethics Bill, March 13, 2003, col. 448 (statement by Mr. Murungi, The Minister for Justice and Constitutional Affairs) (stating that gifts are “[p]re-emptive corruption” and that allowing public officers to accept these types of gifts is preparing them to be corrupt in the future when the favor is called in); see also, Kenya, The National Assembly, Debates on the Public Officer Ethics Bill, March 18, 2003, col. 493 (statement by Mr. Kipchumba) (discussing that what is a valuable gift is subjective based on a person's relative wealth).

constitutes a gift and whether public officials are allowed to accept gifts was an issue in the very first anti-corruption legislation.<sup>163</sup>

Another long-debated issue addressed by the Public Officer Ethics Act is the problem of *harambees*.<sup>164</sup> In this context, a *harambee* is a Kenyan practice of public fundraising where a public official, community leader, business person, or government representative presides over a public meeting to collect money from a community to help fund communal projects or to raise money for those in need. However, over time *harambees* became a vehicle for corruption, with political leaders using the collected communal funds for their own gain or for unacceptable purposes. Against this backdrop, members of Parliament debated at length whether the practice of *harambee* should be made illegal because although it had noble goals, it had become an institution of corruption in practice.<sup>165</sup> The issue of *harambees* had also come up previously in

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<sup>163</sup> See *supra*, notes 20-27 and accompanying text.

<sup>164</sup> Public Officer Ethics Act, §11(1) (A public officer shall not preside over a harambee, play a central role in its organization or play the role of “guest of honour.”).

<sup>165</sup> Compare, Kenya, The National Assembly, Debates on the Public Officer Ethics Bill, March 20, 2003, col. 579 (statement by Mr. Muchiri) (“It is important that we are not stopped from holding Harambees . . . Harambee is there to stay but in a properly regulated manner”) with Kenya, The National Assembly, Debates on the Public Officer Ethics Bill, March 13, 2003, col. 450 (statement by Minister of Justice and Constitutional Affairs Mr. Murungi) (comparing Kenya with other, more developed African countries such as Tanzania and Uganda where there no longer is the practice of Harambee and recommending that it is time to move towards more organized and modern endowment and charity systems rather than the old system of Harambee.)

earlier debates with regard to the intention of the gift giver in determining whether corruption was taking place.<sup>166</sup>

Another important issue with the Public Officer Ethics Act was whether the declarations of wealth required by the Act should be kept confidential or made available to the general public so as to encourage transparency in the government. This was a topic much debated while the bill was making its way through the Legislature.<sup>167</sup> Many Ministers were opposed to having the declarations of wealth made available to the public.<sup>168</sup> However, many commentators expressed

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<sup>166</sup> *Supra* text accompanying notes 22-29. This issue came up in that Harambee donations, just like other gifts, are given to politicians without any idea about whether this contribution was made with the purpose of trying to procure a return favor later on from the public or community official. Kenya, The National Assembly, Debates on the Prevention of Corruption (Amendment) Bill, Oct. 19, 1967, col. 964 (statement by Mr. Wariithi).

<sup>167</sup> *Compare*, Kenya, The National Assembly, Debates on the Public Officer Ethics Bill, March 13, 2003, col. 456 (statement by Mr. M. Kariuki) (“I believe that the purpose of making public officers accountable [through the declaration of wealth] is to ensure that members of the public are informed about what they have acquired unlawfully) *with* Kenya, The National Assembly, Debates on the Public Officer Ethics Bill, March 18, 2003, col. 494 (statement by Mr. Kipchumba) (fearing that a declaration of wealth provision which is made public will scare people out of the ministry because of fears about their privacy).

<sup>168</sup> Kenya, The National Assembly, Debates on the Public Officer Ethics Bill, March 18, 2003, col. 494 (statement by Mr. Kipchumba) (fearing that a declaration of wealth provision which is made public will scare people out of the ministry because of fears about their privacy also discussing how Kenyan society is by nature more secretive about wealth and assets); Kenya, The National Assembly, Debates on the Public Officer Ethics Bill, March 19, 2003, col. 546-47 (statement by Mr. M. Kilonzo) (fearing possible incidences resulting from the public officers’ declarations being made available to the public). *See also, Revise the Ethics Bill or We Reject it, Members Demand*, DAILY NATION, Mar. 20, 2003 (saying that members of the Parliament were concerned that declaring their wealth would leave them vulnerable to kidnappings and extortion).

the view that it was vital that the declarations be made public.<sup>169</sup> The final product of the POEA made these declarations confidential.<sup>170</sup> However, even this was not without controversy as some MPs were moving for an amendment to this section not long after its enactment.<sup>171</sup>

Another divisive issue in passing the Public Officer Ethics Act is the issue over which public service members the act applies to. Some have argued that the POEA was discriminatory because it targets only relatively higher-ranking public service members as having to declare their wealth, whereas lower level clerks and constables are not required to declare their wealth.<sup>172</sup> This does not seem to be in keeping with the general findings on corruption in Kenya. In many cases, public official corruption occurs in large part because they require bribes to get by and are unable to do so solely upon their relatively small salaries. This is often the case with teachers for example, who are not given adequate compensation without seeking supplemental income from bribes or alternative income such as from running businesses.

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<sup>169</sup> Kenneth Mwine, *Declared Assets Must be Open to Public Scrutiny*, EAST AFRICAN STANDARD, Mar. 25, 2003 (arguing that upon entering into public service, he/she becomes “a servant of the public” and therefore has the duty to report wealth).

<sup>170</sup> Public Officer Ethics Act, Section 30(1); *See also*, Njeri Rugene, *MPs Conclude Ethics Bill Amid Controversy*, DAILY NATION, Mar. 23, 2003 (“Section [30] of the Bill provides that the Commission keeps this information confidential . . .”).

<sup>171</sup> Njeri Rugene, *MPs Conclude Ethics Bill Amid Controversy*, DAILY NATION, Mar. 23, 2003 at 2 (“[h]owever, the committee on Justice and Legal Affairs chaired by Kabete MP Paul Muite has given intention to amend the two sections to provide that the confidentiality requirement be done away with.”)

<sup>172</sup> *Id.* at 1.

### **C) Supposed Defects in the Anti-Corruption and Economic Crimes Act and their effect on the Act in Practice**

The first criticism of the Anti-Corruption and Economic Crimes Act was that despite all its efforts to give the KACC real power to fight corruption, these efforts would all be insufficient without vesting in it some sort of prosecutorial power as well. This criticism goes back to the failed history of the KACA. The Attorney General's office has long dragged its feet and been unwilling to prosecute corruption cases recommended to it by the anti-corruption bodies it supposedly worked in concert with.<sup>173</sup> Because of this, it was a widely held view that without entrenching the KACC in the Constitution or legally granting it prosecutorial powers through other means, the body would eventually become a lame duck to investigate corruption cases which would inevitably die out on the desk of the Attorney General.<sup>174</sup>

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<sup>173</sup> See, Donald Deya, *Kenya Killing the East African Dream, Again*, Mars Group Kenya Blog, March 26, 2007 available at <http://blog.marsgroupkenya.org/?p=25>; see also Walter Menya, *AG, Police Faulted for Derailing Mwakwere Arrest*, DAILY NATION, Aug. 17, 2010 ("The National Cohesion and Integration Commission on Tuesday faulted AG Amos Wako's office and Matthew Iteere's police of failing to act on its recommendations to arrest Mr. Mwakwere . . . . Attorney General Amos Wako termed the allegations as false and without foundation.") available at <http://www.nation.co.ke/News/-/1056/978264/-/wbcldp/-/index.html>.

<sup>174</sup> *Good Start, but More Needs to be Done*, DAILY NATION, March 27, 2009 ("KACC is a lame duck. Although, as the PM has noted, it has conducted several graft investigations, just a few have been conclusively dealt with by the courts. The perennial problem of missing files at the courts, the delays in handling cases, questionable rulings, and unholy cartels of lawyers and judges have conspired to frustrate the rule of law."); see also Bernard Namunane, *Kenya: AG Fails to Act on 36 Corruption Cases*, AllAfrica.com, Nov. 19, 2004.

This criticism is most vivid in light of the Anglo-Leasing Scandal, possibly the most grand-scale corruption scandal ever to have taken place in Kenya under Presidents Daniel Arap Moi and Mwai Kibaki. The Anglo-Leasing Scandal involved eighteen security-related contracts the Kenyan Government entered into during both the Moi and Kibaki Presidencies.<sup>175</sup> In all, it has been estimated that the government had entered into questionable contracts in which it agreed to pay Kshs. 56.3 billion.<sup>176</sup> The contracts were questionable because the Kenyan government either grossly overpaid for the goods it requested or even because it contracted with companies that turned out to be non-existent and never delivered on the services they were paid for.<sup>177</sup> Even worse, the payments could not be revoked on the grounds that the companies did not perform their obligations because the Kenyan government issued their money in the form of irrevocable promissory notes.<sup>178</sup>

This scandal was uncovered by a senior government official, John Githongo.<sup>179</sup> He revealed in his report (“Githongo Report”) in extensive detail that some high-level government officials had perpetrated this scheme.<sup>180</sup> The government officials had used their positions in government to

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<sup>175</sup> MARS GROUP KENYA, *ILLEGALLY BINDING: THE MISSING ANGLO LEASING SCANDAL PROMISSORY NOTES* 12 (2007) [hereinafter *ILLEGALLY BINDING*].

<sup>176</sup> *Id.* at 13.

<sup>177</sup> Such as Anglo Leasing and Financing Limited, the company the scandal has been named for. *Id.*

<sup>178</sup> *Id.* at notes 39-40.

<sup>179</sup> Steve Bloomfield, *Report Reveals Scale of Corruption in Kenya*, *The Independent* U.K., Sept. 1, 2007, available at <http://www.independent.co.uk/news/world/africa/report-reveals-scale-of-corruption-in-kenya-401113.html>;

Githongo’s position was created by the NARC government upon President Kibaki’s inauguration. *See Supra* “The 2002 Election and the Rise of the NARC Party.”

<sup>180</sup> JOHN GITHONGO, *GITHONGO REPORT TO THE PRESIDENT* (2005).

enter contracts on behalf of the government with fictitious companies. These contracts were paid out by the government over a period of years and the amount spent was in the hundreds of millions of dollars. In return the government received either nothing or vastly inadequate services in relation to the amount the Kenyan government paid. Furthermore, because the contracts were generally security-related, military contracts, the scheme was even more airtight.<sup>181</sup> The government could contract out for exorbitant sums without disclosing what exactly they were getting and without any checks or balances on whether they were paying a fair price because the matters were related to national security.<sup>182</sup> Through these contracts, they embezzled enormous amounts of government money for personal gain. Githongo's report revealed many high-level officials with whom he had incriminating conversations with regarding their involvement in the scheme and their desire for him to stop investigating them.<sup>183</sup> Within the Kibaki Presidency, these high-level officials included the then Vice President Moody Awori, the Attorney General Amos Wako, the Finance Minister David Mwiriria, the Energy Minister Kiraitu Murungi, Minister for Internal Security Chirs Murungaru, head of the KACC Aaron Ringera and even the President himself Mwau Kibaki.<sup>184</sup>

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<sup>181</sup> MICHELA WRONG, *IT'S OUR TURN TO EAT: THE STORY OF A KENYAN WHISTLEBLOWER* 168—70 (2009).

<sup>182</sup> *Id.*

<sup>183</sup> *See* GITHONGO, *supra* note 180. For an in depth discussion on this *see* WRONG, *supra*\_note 181 (discussing the effect tribal allegiances have in justifying this sort of grand corruption in the minds of the ruling elite).

<sup>184</sup> *See* generally, GITHONGO, *supra* note 180. Although Githongo's report was addressed to President Kibaki and did not explicitly implicate any suspicious conversation he had with the President as it did other Ministers, the President's general statements advising Githongo to hold off on reporting these conversations along with the President's subsequent actions that seemingly implicate the President and are the reasons for many commentators strongly believing that the President is involved; *see also* WRONG, *supra* note 181.

There were great expectations that the NARC government was going to be clean and corruption-free unlike its predecessor,<sup>185</sup> however the Anglo Leasing Scandal and the report by Githongo tarnished the image of the NARC regime. It was due to this scandal that the Kenyan people and the rest of the world began to realize that the NARC government was not the answer to corruption that it had proclaimed itself to be and that the world had expected it to be. The anti-corruption platform which had vaulted Kibaki into the Presidency appeared to lack sincerity as the government has showed no commitment at all to the anti-corruption agenda. Nearly every Minister in the Kibaki Presidency was incriminated by the Githongo Report.

The investigations into the Anglo Leasing Scandal and the futile effort to bring those responsible to justice show an inherent weakness in the Kenya Anti-Corruption Commission and why it could not be effective in its fight against corruption on its own. Even though it has been granted broad investigatory powers,<sup>186</sup> the KACC did not discover any evidence of this grand corruption until Githongo made his report public. In addition, the actions of the Attorney General strongly suggest that he was at least complicit in the scandal, if not actively involved in its cover up which prevented the scandal from being exposed, investigated, and its perpetrators prosecuted.<sup>187</sup>

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<sup>185</sup> See *supra*, “The 2002 Elections and the Rise of the NARC Party”

<sup>186</sup> See *supra* notes 161-72 and accompanying text.

<sup>187</sup> These allegations have come about for a variety of reasons. (1) The contract terms the AG agreed to were very disadvantageous to his government of Kenya; (2) The AG justified the contracts by claiming he was merely acting as an assurance for investors (such as Anglo Leasing and Finances Ltd.) rather than as a protector of the Kenyan people; (3) The AG signed the notes without giving the Kenyan Parliament the chance to accept and scrutinize the contracts claiming that Parliament’s acceptance and scrutiny was not required because they were rental agreements and not a form of loan or credit. ILLEGALLY BINDING, *supra* note 175, at 38 – 40

As discussed above, without the AG working in concert with the KACC it becomes a lame duck, incapable of curbing corruption in Kenya.<sup>188</sup> Here, the Attorney General and the Judicial Branch hindered any attempts to investigate in a number of different ways.<sup>189</sup> The Attorney General allowed the government to pay for the corrupt contracts via promissory notes.<sup>190</sup> The negative effects of this were twofold. First, the government was bound to pay the contracts because the promissory notes could not be revoked, and second, this hindered the KACC's ability to find out who was behind the scheme and the fictitious companies because promissory notes can change hands numerous times as they are traded on the open market.

The judicial branch has at times rendered the KACC powerless to effectively fight corruption. In one instance the KACC was prohibited from investigating *Nedemar Technologies BV*, one of the companies that received an "Anglo-leasing" contract. The court in that case refused to allow the KACC to investigate into a contract entered into by the Attorney General before the KACC had come into being.<sup>191</sup> In another instance the KACC's investigations into *Globetel Incorporated*

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<sup>188</sup> See *supra* note 174 and accompanying text..

<sup>189</sup> "Justice Ringera laid the blame squarely on AG Amos Wako and the Judiciary, whom he accused of blocking every route KACC has taken to deal with the key players. 'The decisions from some of the courts have questioned the Commission's powers in exercise of its investigatory mandate and stopped the Commission in its tracks from continuing investigations into mega-scandals like the Anglo-[L]easing contracts.'" David Okwembah, *Is this the End of Anglo-Leasing Investigations?* DAILY NATION, July 8, 2009; see also, *KACC Accuses Attorney General of Frustrating Graft War*, THE STANDARD (stating the opinion of many within the KACC that it is a lame dog without prosecutorial power).

<sup>190</sup> ILLEGALLY BINDING, *supra* note 175, at 38. Promissory notes are by definition binding upon the party signing them and are a legal tender which can be bought and traded on the open market.

<sup>191</sup> David Okwembah, *Is this the End of the Anglo-Leasing Investigations?* DAILY NATION, July 8, 2009.

and *First Mercantile Securities Corp.* were not stymied by a court decision, but were certainly hindered.<sup>192</sup> The Kenyan court in that case ruled that the KACC could not use any information received from the mutual legal assistance of a foreign jurisdiction.<sup>193</sup>

A second criticism of the KACC is that its corruption-fighting powers were still not entrenched in the Kenyan Constitution. This was a problem that the KACA also faced during its time as the anti-corruption body.<sup>194</sup> The *Gachiengo* decision could have been prevented had the KACA been given a constitutional mandate. As we saw above, this was one of the proposed methods for reviving the KACA after *Gachiengo* stripped it of all of its powers.<sup>195</sup> While KACC has so far survived constitutional scrutiny unlike KACA, the lack of a constitutional foundation has still left doubts regarding its powers. For instance, the power of the KACA to require those suspected of wrongdoing to declare their property has been questioned for its constitutional legitimacy.<sup>196</sup> Sections twenty-six, twenty-seven, and twenty-eight of the Anti-Corruption and Economic Crimes Act all deal with this power the KACC has to require suspects to declare their property. When Dr. Christopher Ndarathi Murungaru was the subject of one of these requests by the KACC, he like many others immediately went to the court to challenge the constitutionality of the KACC's actions.<sup>197</sup> The defendant challenged the action by the KACC as being

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<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *See supra*, “*Gachiengo Decision and the Demise of the Kenyan Anti-Corruption Authority*”

<sup>195</sup> *See supra* note 87 and accompanying text.

<sup>196</sup> Anti-Corruption and Economic Crimes Act, §26(1).

<sup>197</sup> *Christopher Ndarathi Murungaru v. Kenyan Anti-Corruption Commission & another*. Misc Civ. App. 54 of 2006. *See also*, Allan N. Ngugi, Statement of the Advisory Board of the Anti-Corruption Commission with Reference to

unconstitutional because it was in violation of the presumption of innocence and in his view had shifted the burden of proof to the defendant to prove that his property wasn't illegally obtained through corrupt activities.<sup>198</sup> The defendant further argued that the provisions were in violation of his constitutional right against self-incrimination and the right to silence. Defendant Murungaru also argued that the KACC prosecution was “inhumane, demeaning, and degrading treatment in contravention of Section 74(1) of the Constitution.”<sup>199</sup> The Court found that the actions of the KACC were not in violation of the Constitution,<sup>200</sup> although, it is a perfect example of the endless litigation the KACC has had to endure in defending its rights and methods for fighting corruption.

This decision seems to depart from some of the other decisions of the Kenyan judiciary in that it seems to take into account the corruption epidemic, the long fight against corruption, and the fact that it is still widespread in Kenya. Past decisions by the Judiciary had the effect of doing away with vital anti-corruption resources on tenuous and minute procedural grounds.<sup>201</sup> The Murungaru decision seemed to recognize the importance of the KACC in the fight against

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the Powers of the Commission for Detection and Investigation of Corruption and Economic Crimes in 26, 27, and 28 of the Anti-Corruption and Economic Crimes Act 2003 (2007).

<sup>198</sup> Christopher Ndarathi Murungaru v. Kenyan Anti-Corruption Commission & another. Misc Civ. App. 54 of 2006 page 10-11.

<sup>199</sup> Christopher Ndarathi Murungaru v. Kenyan Anti-Corruption Commission & another. Misc Civ. App. 54 of 2006 page 11. Other provisions of the Constitution which Murungaru alleged were violated were 70(a), 70(c), 77(2)(a), 76(c), 77(7), 82, section 77(1) and 77(9) dealing with fair trial and fair hearing, section 82(1) and 82(2) dealing with selectively and discriminately enforcing the ACECA/

<sup>200</sup> Christopher Ndarathi Murungaru v. Kenyan Anti-Corruption Commission & another. Misc Civ. App. 54 of 2006.

<sup>201</sup> See generally, Gathii, *Human Rights and Corruption*, *supra* note 16.

corruption and therefore defended it from some of the procedural attacks which had been effective in stymieing anti-corruption efforts in the past.<sup>202</sup>

## **Part VI. The Fight against Corruption Today**

In this section I will look at more recent events, both successes and failures, in the fight against corruption and the initiatives the government is still unveiling to try and win the war against corruption in Kenya.

To try to solve the problems inherent with not having the body entrenched in the Constitution the Kenyan government drafted a Revised Harmonized Draft Constitution at the end of 2009. Under this Draft Constitution, a committee of experts proposed to firmly establish the constitutionality of the KACC by having it expressly provided for in the Constitution. The clause would have empowered the KACC to combat corruption without such judicial challenges. The Anti-Corruption Commission would have been granted powers to force the declaration of property. This would have immunized the KACC from judicial challenges.<sup>203</sup>

The Integrity Commission would still not have had prosecutorial powers under the Harmonized Draft Constitution. However, there were provisions in place to protect its investigations from being undermined by the Attorney General's powers. Under the Harmonized Draft Constitution, Chapter 12, Section 193, the Attorney General was to serve a six year term, at the end of which

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<sup>202</sup> See e.g. the Gachiengo decision, decision allowing the bribe giver to escape using alibi.

<sup>203</sup> See *supra*, note 286 and accompanying text.

he is not eligible for reappointment.<sup>204</sup> This was very likely in response to the enduring term of Amos Wako as Attorney General. Wako has served in this position since 1991, and is criticized by many for his unwillingness to prosecute corruption cases brought to his desk. An uncooperative Attorney General under such an amendment would no longer have free reign to prevent progress in the fight of corruption and justice indefinitely. However, the Revised Harmonized Draft Constitution of March 2010 dropped the Integrity Commission over objections by the Parliamentary Committee on the Constitution. The Parliamentarians, in dropping the provision, demonstrated once again their lack of commitment to removing the legal and constitutional impediments that previously frustrated the effectiveness of the anti-corruption agenda in Kenya. The Revised Harmonized Draft Constitution however made provision for an independent anti-corruption agency. It contemplated that the power of the Attorney General in conducting prosecutions was not absolute.

Another proposal to try to give the fight greater efficiency and effectiveness was the Anti-Corruption and Economic Crimes (Repeal) Act.<sup>205</sup> This proposed Act would dissolve the KACC and make it a part of the office of the Attorney General. However, this law would have been much less advantageous to the fight against corruption than the Harmonized and Revised Harmonized Draft Constitutions. After all, the anti-corruption agenda has been impeded by the

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<sup>204</sup> REVISED HARMONIZED DRAFT CONSTITUTION, C. 12, s. 193, part 4(9). “The Attorney-General shall hold office for a term of six years and shall not be eligible for re-appointment.”

<sup>205</sup> See *Kenya Anti-Corruption Commission may be Disbanded*, PAN-AFRICAN NEWS AGENCY, Oct. 3, 2009; John Ngirachu, *New Bill to Dissolve KACC Bill to Make AG’s Office One-Stop Shop for Cases on Corruption*, DAILY NATION, Oct. 15, 2009.

AG's office much more than by the KACC. The KACC has submitted numerous cases that it has investigated to the Attorney General's office that have died upon his desk. Repealing the ACECA would therefore not be much of a solution at all. Under this proposal, the AG's office, historically inept at fighting corruption, would be the sole coordinator for anti-corruption efforts. The repeal would therefore be a huge step backwards. Being independent and removed from the external, political pressure that the branches of government can apply would make it possible for the anti-corruption agenda to be more effective. Placing the corruption agency back under the supervision and control of the government would by contrast lead to the paralysis and manipulation that has frustrated the agenda so far.

Keeping the KACC impartial is especially important given the recent resignation by the head of the body, Aaron Ringera. On 30<sup>th</sup> September 2009, Ringera, the resigned from his post as anti-corruption chief. Ringera had been head of the KACC and the now-defunct KACA since 1999. His reappointment by President Kibaki in 2009 was the subject of much controversy and eventually led to Ringera's resignation. The issue with his reappointment was the manner in which it was accomplished. §(9)(3) of the Anti-Corruption and Economic Crimes Act provides that the Kenya Anti-Corruption Advisory Board (KAACB) will nominate a candidate for any vacancy in the position of Director. This nominee will need to pass a vote in the National Assembly at which point the President will appoint this person to the position.<sup>206</sup> In Ringera's reappointment, however, President Kibaki bypassed both the process of nomination by the KACCAB and the ratification of the nomination by the National Assembly and unilaterally

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<sup>206</sup> Anti-Corruption and Economic Crimes Act, §(9)(4).

retained Ringera in Office.<sup>207</sup> This move by Kibaki was controversial and for the first time, the National Assembly vetoed a Presidential order.<sup>208</sup> While some commentators admitted that Ringera was still highly qualified for the job and remained the best candidate for the job,<sup>209</sup> many felt that he had failed in his job to help reduce and (ideally) eradicate corruption in Kenya.<sup>210</sup>

Whether or not Ringera had done his job or not however is a more complicated issue than just looking at the results of the fight against corruption under his watch. The KACC had to deal with a government where all three branches tainted with corruption, an Attorney General unwilling to go after those responsible, apparent high-level cover ups of grand-scale corruption, and a public sector which has treated corruption as a way of life. Clearly Ringera had not done all he could do to rid the country of corruption. The fact that President Kibaki and his administration, as tainted with corruption as it was, valued Ringera's service and desired him to remain in office is damning in and of itself. This is a large reason why, with a new head to the KACC just beginning his term as chief in the fight against corruption, it is important that his tenure is not influenced from the start by external, corrupting pressures.

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<sup>207</sup> Roseleen Nzioka, *Ringera Resigns from KACC*, THE STANDARD, Sept. 30, 2009.

<sup>208</sup> *The Row over Aaron Ringera*, AFRICA CONFIDENTIAL, Sept. 25, 2009.

<sup>209</sup> *Justice Aaron Ringera Re-Appointment at KACC not a Surprise*, A POLITICAL KENYA IN 2010; see also text accompanying footnotes 61-63.

<sup>210</sup> Xan Rice, *Head of Kenya's Anti-Corruption Commission to Resign*, THE GUARDIAN U.K., September 30, 2009.

("Retired judge Aaron Ringera, whose £20,000 a month salary made him the top-paid civil servant, is widely viewed as having failed to tackle high-level graft and to recover hundreds of millions of pounds in looted funds.")

The new head of the KACC position –leading Nairobi lawyer Patrick Lumumba - is also especially important because of the recent regression in the fight against corruption in the past several years. One such example is the passage of two amendments to the ACECA that put a halt to much of the investigation into some of the grand scale corruption. Parliament under President Kibaki introduced two sections to the ACECA. §25(a) of the ACECA authorizes the cessation of investigations by the head of the KACC after consulting the Attorney General and Minister for Justice.<sup>211</sup> §56(b) was further inserted to allow the government not to prosecute corruption suspects who has (1) given full disclosure of material facts of past corruption by himself or others; or (2) refunded all of the money or property acquired through their past corruption.<sup>212</sup> These amnesty provisions provided valuable immunity to some key players in past instances of governmental grand corruption which had robbed the country of millions of U.S. dollars.<sup>213</sup> This is why Parliament had previously declined to pass similar legislation.<sup>214</sup>

These provisions effectively hindered investigations into past corruption within the upper echelons of government. This is seen in the recent corruption incident, the Grand Regency Scandal, which involved the repayment of funds from the Goldenberg Scandal years earlier. Mr. Pattni, one of the chief architects of Goldenberg, agreed to give the expensive Grand Regency

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<sup>211</sup> Statute Law (Miscellaneous Amendments) 2007, available at [http://www.marsgroupkenya.org/pdfs/nov\\_07/Kenya\\_gazette.pdf](http://www.marsgroupkenya.org/pdfs/nov_07/Kenya_gazette.pdf)

<sup>212</sup> *Id.*

<sup>213</sup> *See infra*, notes 216-21 and text accompanying.

<sup>214</sup> *See supra* note 91; *see also* James Thuo Gathii, *Amnesty Plan Flies in the Face of War on Grant*, BUSINESS DAILY AFRICA, Aug. 27, 2008 (discussing reasons such as the government’s reluctance to fight corruption and the possible immunization of high level government officials from prosecution to argue against amnesty provision).

Hotel he had allegedly built with Goldenberg monies over to the Kenyan government as reimbursement for his part in the scandal. This hotel was widely valued at over \$120 million, so while this was not a full reimbursement, it was a substantial victory for the government in retrieving funds it lost through grand corruption. On the other hand, the contract came with a price. Having admitted to corruption and returned some of what he stole, Mr. Pattni was now granted amnesty from future proceedings related to Goldenberg.

The Kenyan government, now with a multimillion dollar hotel in its possession sought to sell its newly acquired asset. Finance Minister Amos Kimunya, the center of the controversy, sold the property at a vastly deflated price and the Kenyan government only received \$45 million for the hotel, roughly 1/3 of its market price.<sup>215</sup> The Finance Minister also disregarded procedural safeguards for the selling of government assets and basically made this sale unilaterally. The Finance Minister did not even accept bids from private groups interested in buying the hotel before he sold it at the inadequate price.

Finance Minister Kimunya's actions led to calls for his resignation by the Attorney General Amos Wako among others. These calls were eventually answered when Kimunya resigned in July of 2008.<sup>216</sup> However, his time out of government did not last long. The President created

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<sup>215</sup> *Grand Regency Sage Displays Rot in Kenya's Elite*, THE NAIROBI CHRONICLE, June 30, 2008 available at <http://nairobichronicle.wordpress.com/2008/06/30/grand-regency-saga-displays-rot-in-kenyas-elite/>

<sup>216</sup> *Kenya's Finance Minister Resigns Over Scandal*, CNN.Com, available at <http://edition.cnn.com/2008/WORLD/africa/07/08/kenya.resign/index.html>

the Cockar Commission to investigate the incident.<sup>217</sup> The Commission eventually cleared Kimunya of any wrongdoing and stated that his public condemnation was nothing more than a witch hunt.<sup>218</sup> While this is allegedly what the report from the Commission said, it cannot be verified because President Kibaki refused to make the report public.<sup>219</sup> Consequently, Minister Kimunya was controversially reinstated to his old post.<sup>220</sup>

Mwalimu Mati, the head of the anti-corruption watchdog reporting agency Mars Group Kenya has proclaimed the government to be as corrupt as it has been in years and likens it to the notoriously corrupt period of Daniel Arap Moi's presidency.<sup>221</sup> President Kibaki's pledge upon

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<sup>217</sup> See *Outrage Over Kimunya's Reappointment*, EAST AFRICAN STANDARD, January 28, 2009 available at <http://www.marsgroupkenya.org/multimedia/?StoryID=244169&p=Bureti&page=3>; see also James Thuo Gathii, *The Case for an Independent Counsel's Office*, BUSINESS DAILY AFRICA, July 16, 2008 (discussing the poor track record Commissions of Inquiry have had in unearthing corruption and proposing that making it independent from the government would improve its performance).

<sup>218</sup> *Outrage over Kimunya's Reappointment*, EAST AFRICAN STANDARD, Jan. 28, 2009.

<sup>219</sup> *Id.* ("The President is telling Kenyans that the appointment of the Cockar Commission was merely a public relations exercise. Why did he appoint it, receive its report but decline to make its findings public only to ambush Kenyans with the reappointment of the prime suspect it was created to probe?" asked one former Minister.).

<sup>220</sup> Alphonse Shiundu, *House to Decide Kimunya Fate*, DAILY NATION, Jan. 28, 2009 available at <http://www.nation.co.ke/News/-/1056/521366/-/u1t4ih/-/index.html>; see also Edward Kisiang'ani, *Lack of Political Probity the Bane of Our Leadership*, THE STANDARD, Feb. 23, 2009 (stating that Kimunya's reappointment came against a backdrop of political disaffection) available at <http://www.standardmedia.co.ke/InsidePage.php?id=1144007232&cid=15&>.

<sup>221</sup> Andrew Cawthorne, "Kenya Corruption 'Back to Moi-era Levels,'" REUTERS, March 6, 2009. "It looks and feels like during the worst parts of the Moi government, especially from around 1990 when a feeding frenzy began." *Id.*

taking office to end corruption no longer seems to be of the utmost importance to neither he nor the rest of the government.

The President and his incumbent ministers may have even resorted to corruption to retain their hold on Kenyan politics in the 2007 Presidential elections. In a hotly contested election between President Mwai Kibaki and challenger Raila Odinga, both candidates ironically used an anti-corruption platform as a rally point for their campaign.<sup>222</sup> There was huge turnout for the election and it was easily Kenya's most participated in election to date.<sup>223</sup> When the results were unveiled Kibaki had garnered just enough votes to remain President. This is despite the fact that Odinga had led in the polls leading up to the election and was thought of as the favorite to win.<sup>224</sup> President Kibaki was alleged to have stuffed the ballot box with enough votes to retain his position as commander in chief. His opponent even came right out and stated that Kibaki should admit he cheated, concede defeat and resign.<sup>225</sup> It is also a generally accepted view in the international community that there was at least some vote rigging and corruption in the 2007 election.<sup>226</sup> In the wake of the election, Kenyans turned to violence and looted and rioted with

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<sup>222</sup> WRONG, *supra* note 181.

<sup>223</sup> In all, over 9 million votes were cast in the election. Election Results 2007, Office of Government Spokesperson, available at <http://www.communication.go.ke/elections/default.asp>.

<sup>224</sup> See *Raila's Third Win*, THE STANDARD, Oct. 23, 2007.

<sup>225</sup> Stephen Ndegwa, *Raila Calls for Vote Recount*, THE EAST AFRICAN STANDARD, December 30, 2007.

<sup>226</sup> The Chief European Observer, Alexander Graf Lambsdorff, had called the election results "flawed" and the United States Ambassador had strongly urged Kenya to perform a recount on the votes. Jeffrey Gentleman, *Disputed Vote Plunges Kenya into Bloodshed*, N.Y. TIMES, Dec. 31, 2007. The Election Commissioner Samuel Kivuitu, the Chairman of the Electoral Commission even expressed dissatisfaction with the results. WRONG, *Supra*

ethnic clashes between the Kikuyu tribe, from which most of Kibaki's government hails, and other tribes angry that they remained on the outside.<sup>227</sup> This ethnic clash in the wake of the 2007 election eventually left over a thousand Kenyans dead,<sup>228</sup> hundreds of thousands of Kenyan's displaced<sup>229</sup> and the country on the brink of Civil War.

The harm corrupt government officials caused these so-called "Internally Displaced Persons" or IDP's did not stop with the post-election violence. Corruption remained prevalent and unabated in Kenya even after the post-election violence illuminated how fed up and angry Kenyans were with their governments longstanding corruption. While the government spent "hundreds of millions of shillings to find new homes for [those displaced by the post-election violence] or to get them back to their farms," much of this money found its way into the pockets of corrupt

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note 182, at 306 ("If it was up to me, I wouldn't sign off on this' Kivuitu had privately told EU observers, showing them returning officers' forms bearing obvious signs of tampering. 'But I'm alone here, and I want to live.'").

<sup>227</sup> For a firsthand account of the post election violence, see WRONG, *supra* note 181 at 299-316; see also *Scores Dead in Kenya Poll Clashes*, BBC NEWS, December 31, 2007 available at <http://news.bbc.co.uk/2/hi/africa/7165602.stm>,

<sup>228</sup> *ICC to Probe Kenya Post-Election Violence*, CBC NEWS, April 1, 2010 available at <http://www.cbc.ca/world/story/2010/04/01/icc-kenya-investigation.html>.

<sup>229</sup> Estimates are that around 600,000 Kenyans were displaced following this violence. See WRONG, *supra* note 182 at 312 ("By mid-February . . . some 300,000 displaced Kenyans [were] living in camps and another 300,000 [were] on the move."); *ICC to Probe Kenya Post-Election Violence*, CBC NEWS, April 1, 2010 ("hundreds were killed, thousands of women were raped, and more [than] 600,000 people were forced from their homes.").

officials, rather than to those for whom it was intended.<sup>230</sup> Over twenty district and provincial officials were expected to be charged with pocketing over 100 million Kenyan shillings.<sup>231</sup> The officials were supposed to be compiling lists of persons who were displaced following the post-election violence.<sup>232</sup> However, they allegedly included fictitious names on the list and funds distributed to these non-existent people went directly into their pockets.<sup>233</sup>

Following the violence, a power sharing agreement was reached whereby Odinga was named to the new post of Prime Minister and a coalition government was formed with an equal number of ministers from Kibaki's PNU (formerly NARC) party and Odinga's ODM party.<sup>234</sup> However, it is not clear whether this coalition government has improved Kenya's governance much beyond avoiding further violence.

The coalition government has already been accused of siphoning off funds from the money allocated to aid the refugees of post-election violence. It also appears that a lot of the efforts of the new Prime Minister and civil society in exposing high level corruption have been thwarted by their compatriots in the government. For example, on February 13<sup>th</sup> 2010, PM Odinga

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<sup>230</sup> Dominic Wabala, *Fat Cats Used IDP Money to Buy Posh City Homes*, DAILY NATION, June 2, 2010 available at <http://www.nation.co.ke/News/Fat%20cats%20used%20IDP%20cash%20to%20buy%20posh%20city%20homes/-/1056/931156/-/item/0/-/12ingi8/-/index.html>.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* The government intervened with its resettlement plan dubbed "Operation Rudi Nyumbani" after the poor living conditions, rampant disease, and inclement weather in the makeshift camps were revealed. *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> Edmund Sanders, *Kenya to Build Coalition Government*, BOSTON GLOBE, February 29, 2008.

suspended two ministers so as to pave the way for investigations into maize and free primary education.<sup>235</sup> These suspensions could have also been in response to President Kibaki suspending several ministers and aides—many of which were from Odinga’s ODM party—days before for alleged corruption.<sup>236</sup> However, just days later, Kibaki blocked the suspension Odinga had made and reinstated the two ministers claiming that such a suspension was illegal because he had not been consulted first.<sup>237</sup>

This kind of political infighting within the government is surely not a good sign for the future of Kenyan government. This agreement was only brought about because of intense international pressure to stop the violence within Kenya following the election,<sup>238</sup> and it appears that the two parties, forced into working together are only out to make each other’s lives difficult. One thing is clear, this political infighting and petty bickering within the government will only serve to hurt the government’s fight against corruption and the Kenyan people the government is supposed to be helping.<sup>239</sup>

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<sup>235</sup> Reuben Olita, *Odinga Suspends Two Ministers*, NEW VISION ONLINE, February 14, 2010.

<sup>236</sup> See Jeffrey Gettleman, *Kenyan President Blocks Prime Minister’s Suspension of Two High Ranking Officials*, N.Y. TIMES, February 15, 2010 available at <http://www.nytimes.com/2010/02/15/world/africa/15kenya.html>.

<sup>237</sup> *Id.*

<sup>238</sup> See Jeffrey Gettleman, *Unity Cabinet Formed in Kenya, Ending Deadlock*, N.Y. TIMES, April 14, 2008 available at <http://www.nytimes.com/2008/04/14/world/africa/14kenya.html>.

<sup>239</sup> The corruption and infighting has already resulted in harm to the Kenyan government and its people.

Responding to the massive graft that continues to take place in Kenya, Canada has changed the focus of its investigation away from Kenya and has begun to focus on other, less corrupt countries. *‘Massive Graft’ Turns off Canadian Aid Tap*, DAILY NATION, Oct. 14, 2010.

## A) New Constitution in Kenya

On August 27, 2010 the Kenyan government ratified a new constitution.<sup>240</sup> In ratifying it, the government not only fortified its fight against corruption in the Constitution, but also gave the Kenyan people hope for a future free of government looting and pillaging.<sup>241</sup> This constitution was founded on principles of “good governance, integrity, transparency, and accountability.”<sup>242</sup>

While the current anti-corruption bodies remain in place for the time being, they will eventually give way to new bodies working under a constitutional mandate. The Ethics and Anti-Corruption Commission (EACC) will replace the KACC as the anti-corruption body in Kenya once passed by Parliament. This development alone is a huge step forward for the Kenyan government. It now has an anticorruption body constitutionally entrenched. Along with this entrenchment comes the potential for it to have the constitutionally protected power to prosecute corruption crimes. Section 156(7) states that “The powers of the Attorney-General may be exercised in person *or by subordinate officers acting in accordance with general or special instructions.*”<sup>243</sup> In the same vein, the powers of the Ethics and Anti-Corruption Commission are set as “[able to] perform any functions and exercise any powers prescribed by legislation, in

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<sup>240</sup> *Kenya President Ratifies New Constitution*, BBC News, August 27, 2010. Available at <http://www.bbc.co.uk/news/world-africa-11106558>.

<sup>241</sup> *Id.*

<sup>242</sup> CONSTITUTION, Art. 10 (2010) (Kenya).

<sup>243</sup> *Id.* Art.156(7).

addition to the functions and powers conferred by the Constitution.”<sup>244</sup> The Constitution further provides that “Parliament may enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecution.”<sup>245</sup> This means that the legislature can delegate to the EACC the power to pursue corruption suspects in the court system, rather than having to wait for the Attorney General to act on their governmental corruption reports – a wait that has been exceedingly long in the past.<sup>246</sup> However, this is not yet the reality for the EACC.

It is imperative that Parliament confer this prosecutorial power to the EACC. Because it has not been expressly conferred, any prosecution power at this point may be limited by a narrow reading of the constitution. A court that has in the past relied on technicalities to defeat corruption<sup>247</sup> may continue this legacy because the Constitution does not affirmatively confer to the Commission the right to prosecute. This possibility alone is a criticism of the new Kenyan Constitution. Given all the troubles the anticorruption commissions have had in the past trying to punish corruption through the legal system, it would have been prudent for the drafters to affirmatively confer the prosecutorial power to the EACC in the constitution rather than making a conferral of this type merely permissible.

However, while not firmly settling the issue of prosecutorial power, the Kenyan Constitution did resolve many issues with the EACC that were divisive for its predecessors.

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<sup>244</sup> *Id.* Art. 252(1) (d).

<sup>245</sup> *Id.* Art. 157(12)

<sup>246</sup> *See supra* notes 105-06 and accompanying text.

<sup>247</sup> *See generally* Gathii, *Human Rights and Corruption*, *supra* note 16 (discussing how high-level governmental officials have been able to use their procedural human rights to avoid corruption convictions in court).

The newly ratified constitution will also retract the Public Officer Ethics Act. Again, however, the principles of the Act have now been moved into the Constitution where they enjoy a protection and cemented-status that they did not previously have when set out solely via an Act of Parliament.<sup>248</sup> Chapter 13 lays out the values and principles of Public Service.<sup>249</sup> These include:

“high standards of professional ethics; efficient, effective and economic use of resources; responsive, prompt, effective, impartial and equitable provision of services; involvement of the people in the process of policy making, accountability for administrative acts; [and] transparency and provisions to the public of timely, accurate information.”<sup>250</sup>

This list is not exhaustive, as there are many other guidelines for government employees’ professional and personal behavior. Having these ‘high standards of professional ethics’<sup>251</sup> cemented in the Constitution will make them fundamental to governmental performance and help eradicate corruption or unethical behavior in government before it even begins.

In the past, the Public Officers Ethics Act not being embedded in the Constitution caused a great deal of litigation over whether the Act of Parliament was constitutional. For example, governmental officials, many of whom undoubtedly had acquired vast amounts of wealth

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<sup>248</sup> See supra text accompanying note 161 (discussing how the requirement of high level public officials that they declare their wealth was on questionable constitutional footing).

<sup>249</sup> CONSTITUTION, Chapter 13 (2010) (Kenya).

<sup>250</sup> *Id.* Art. 232(1) (a) – (e).

<sup>251</sup> *Id.* Art. 232

through corrupt activities were opposed to the POEA's mandatory declarations of wealth.<sup>252</sup>

They fought this provision by claiming that it was unconstitutional, in violation of their right to privacy and fought to have their assets safe from disclosure.<sup>253</sup> This argument is no longer viable because the provision is now fundamentally constitutional and cannot be challenged because it is expressly provided that these declarations must be made.

Similarly, the government now has a constitutionally-mandated requirement to be more transparent. Not only is it provided that transparency is important and fundamental to the government, but section 35(1) requires the mandatory publishing of certain information to the public.<sup>254</sup> The Constitution states that “[e]very citizen has the right of access to – (a) information held by the State; and (b) information held by another person and required for the exercise of any right of fundamental freedom.”<sup>255</sup> This is a vital new right given to the citizens and duty imposed on the government. In the past, many of the government contracts and affairs were kept secret and no one knew about who exactly the government had paid to do contracts and how much they had paid out. This was a core problem with the Anglo Leasing scandal.<sup>256</sup> Without a transparent government-public relationship, not only did no one know about the Anglo Leasing Scandal until millions of dollars had been irrevocably lost, but tracking down who it had gone to has been an exceedingly difficult, frustrating process. To this day, the perpetrators have not been

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<sup>252</sup> *See supra*, text and footnote accompanying note 169.

<sup>253</sup> *See supra*, text and footnote accompanying note 171.

<sup>254</sup> CONSTITUTION, Art. 35(1) (2010) (Kenya).

<sup>255</sup> *Id.* Art. 35(1)

<sup>256</sup> *See supra*, “Supposed Defects in the Anti-Corruption and Economic Crimes Act and their effect on the Act in Practice”

held responsible, largely because all of the government's actions have been shrouded in mystery because no duty to disclose information was present at the time to hold the government transparent and accountable.

Overall, by mandating through the constitution all of these provisions and aspects of good governance which had previously been paid only lip service, Kenya has taken a gigantic step towards minimizing governmental corruption. The government must now follow through and enforce the constitutional provisions of good governance that it has laid out.

The Kenyan government has already begun prosecuting high-level corruption cases more actively. The Higher Education Minister William Ruto has been charged with fraud in the amount of K.Sh 96 million.<sup>257</sup> He allegedly received the money in exchange for transferring parcels of land belonging to the Ministry of Natural Resources to the Kenya Pipeline Company.<sup>258</sup> He has been charged with three counts of abuse of office and he had his constitutional objections rejected by a constitutional court.<sup>259</sup> This is especially notable because these are cases that date back to the prior constitution; cases that were stopped by the constitutional court before Ruto and the other ministers could be held accountable for their

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<sup>257</sup> Judy Ogotu, *Ruto to Face Sh96 Million Fraud Charge*, The Standard, Oct. 15, 2010. MP Ruto allegedly received K.Sh 96 million in the fraudulent transactions, but the total amount that the government and people were defrauded is estimated to be K.Sh. 272 million. Anthony Kariuki, *Kenya Minister Suspended over Fraud Charge*, DAILY NATION, Oct. 19, 2010.

<sup>258</sup> Judy Ogotu, *Ruto to Face Sh96 Million Fraud Charge*, The Standard, Oct. 15, 2010

<sup>259</sup> *Id.*

actions.<sup>260</sup> This may have been the first showing from the Kenyan government that the days of unaccountable, corrupt ministers are over.

Days after the constitutional court held that Mr. Ruto would face the fraud charges, President Kibaki suspended the minister.<sup>261</sup> Under §62 of the Anti-Corruption and Economic Crimes Act, however, the Minister will continue to be paid half his full time salary pending resolution of the case.<sup>262</sup> This has led to calls for him to resign from the public, Justice Minister Mutula Kilonzo, and Gichugu MP Martha Karua.<sup>263</sup> Mr. Ruto has dismissed these calls for resignation and asserts that these charges are nothing more than a political ploy to get him out of office.<sup>264</sup>

MP Ruto was not the only Minister to have his actions come under increased scrutiny following the new Constitution's passage. Foreign Affairs Minister Moses Wetang'ula and Permanent Secretary Thuita Mwangi were questioned before Parliament for their role in procuring Kenya's missions abroad – procurements in which tax-payers allegedly lost millions of shillings. This scandal involved Kenyan missions in multiple countries. Property was purchased in Japan for a Kenyan embassy for K.Sh 1.75 billion when the property was later valued at a mere K.Sh 400

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<sup>260</sup> *Id.*

<sup>261</sup> Anthony Kariuki, *Kenya Minister Suspended over Fraud Charge*, DAILY NATION, October 19, 2010.

<sup>262</sup> Anti-Corruption and Economic Crimes Act, (2003) Cap. 65 §62; *see also* Anthony Kariuki, *Kenya Minister Suspended over Fraud Charge*, DAILY NATION, October 19, 2010.

<sup>263</sup> Anthony Kariuki, *Kenya Minister Suspended over Fraud Charge*, DAILY NATION, October 19, 2010.

<sup>264</sup> *Id.*

million.<sup>265</sup> This purchase was made without the proper input of other departments; departments which would have been able to make a proper evaluation of the property's value.<sup>266</sup> The embassy in Pakistan was to cost K.Sh 366 million.<sup>267</sup> However, twice the estimate was increased until the price stood at K.Sh 523.<sup>268</sup> Not only that, but the project currently stands at only 40% complete despite the increased payment and it appears that construction has halted.<sup>269</sup> Much of the money paid to buy the embassy in Egypt could not be accounted for.<sup>270</sup> There have even been discrepancies for embassies being built in Europe as well. The Kenyan embassy in Belgium was estimated to cost 3 million euros; however, an extra 850,000 euros was spent on second-hand furniture that has proven to be impractical and unnecessary.<sup>271</sup> These stories of excess and graft in the Foreign Affairs Ministry go on and on and thankfully resulted in MP Wetang'ula's resignation.<sup>272</sup> The MP blamed civil servants for these corrupt transgressions and claimed his own innocence by saying ministers deal with policy and civil servants are the ones charged with transacting business with these other nations.<sup>273</sup>

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<sup>265</sup> Lucas Barasa, *Wetang'ula Put on Defence over Embassy Deals*, DAILY NATION, Oct. 21, 2010.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> John Ngirachu, *Kenya Ministers Step Aside over Saga*, DAILY NATION, Oct. 27, 2010.

<sup>273</sup> *Id.* (“On Wednesday, the minister denied responsibility for the scandal in Parliament and instead [shifted blame](#) to civil servants in his Ministry. ‘The long and short of it is this; ministers don’t deal with transactions. We deal with what we are given; ministers only deal with policies,’ Mr Wetang’ula said”).

It is procurements such as these that were denounced in J.M. Migai Akech's article *Development Partners And Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid*.<sup>274</sup> Procurements, the "principal means for through which governments meet developmental needs" present a problem because the discretionary nature of such procurements enables the government to get away with illicitly transferring funds from the government to the private sector.<sup>275</sup> The discretion to award government contracts in developing countries continues to be used as a vehicle for political patronage.<sup>276</sup> This is especially true in developing countries where there is a huge amount of aid flowing into the countries for assistance in government reform and improvement.

In the context of Kenya, 60% of government revenue is spent on procurements. There are huge flaws in the Kenyan procurement framework, problems which are prevalent in developing countries throughout the world. These problems prevent the government from properly distributing the aid and providing the services citizens. This is in part because public officers are immunized from lawsuits against them in their personal capacity for any contracts they enter into on behalf of the government.<sup>277</sup> The system is therefore ripe for abuse. This is apparent MP Wetang'ula's resignation. He and the civil servants under him are not personally liable for the hundreds of millions of Kenyan shillings they cost the Kenyan people.

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<sup>274</sup> 37 NYU J. Int'l L. 829 (2006)

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

Secondly, Kenyan public servants are allowed to participate in private enterprises, there is therefore a huge conflict of interest when procurements are sought and there are firms bidding for it that are owned or invested in by the public servants making the decision!<sup>278</sup> In the same vein, a lack of transparency in the procurement system prevents public investigation and oversight to prevent corrupt contracts from being entered into.<sup>279</sup> Without transparency there is even less accountability in the procurement process.

The Anglo-Leasing scandal is illustrative of these problems. Public servants and ministers reaped enormous financial benefits from the Anglo-Leasing contracts. Without any services actually being provided from the procurement money, they were able to pocket a huge portion of the money the government contracted to pay out for the goods and services. Furthermore, it took a great deal of time for the scandal to be discovered. The government is still uncovering more anglo-leasing type contracts and by the time it discovered the main corrupt procurement contracts, the money had been paid and was probably irrevocably lost. This is a perfect example of how a lack of transparency in the procurement process breeds corruption.

It is true that some of these deficiencies in the procurement process have been fixed since Anglo Leasing and other instances exposed the flaws in the system. As Akech points out, the creation of the Public Procurement Complaints. Review and Appeals Board injected some oversight and

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<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

accountability into the procurement system.<sup>280</sup> However, the administrative oversight is still not strong as it could be to prevent one of the most expensive forms of graft from taking place. For example, by preventing the Board from entertaining complaints after the procurement contract has been concluded, many instances of graft have been unreviewable and therefore unsolved.<sup>281</sup> Thus, although improvements have been made and frameworks are now better suited to deal with and prevent grand corruption, it is readily apparent that merely maintaining the status quo will not be enough to prevent corruption effectively.

While the new anti-corruption framework has not been put into place, the passage of the Constitution has ushered in a new era in the fight against corruption. The government's tough stance on corruption has been made clear in public speeches as well. PM Raila Odinga called out the Kenyan government to not make corruption acceptable behavior.<sup>282</sup> Speaking at the opening of a hotel, PM Odinga stated that "We have identified corruption as a menace we have to deal with if we are to surge ahead, and we are facing it head on."<sup>283</sup> Furthermore, President Kibaki spoke about corruption after the resignation of MP Wetang'ula.<sup>284</sup> The President stated

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<sup>280</sup> *Id.* at 847; *see also Millions Saved in Bid to Curb Corrupt Tender Deals*, THE EAST AFRICAN STANDARD, July 11, 2004 (claiming that the PPCARB has saved over K.Sh 800 million by preventing corrupt procurements from taking place).

<sup>281</sup> Akech, *supra* note 274, at 850.

<sup>282</sup> Peter Leftie, *Kenya PM Talks Tough on Graft*, DAILY NATION, Nov. 4, 2010

<sup>283</sup> *Id.*

<sup>284</sup> *Kibaki Orders Wider Crackdown on Graft*, DAILY NATION, Nov. 2, 2010.

“A person who plans to misuse public funds must not be allowed to continue working in Government. We must deal with those who want to embezzle public money... we will sack such fellows. Those who want to continue working on ways to steal public money should go home and let the new crop of professionals develop the country.”<sup>285</sup>

Such statements were oftentimes made hollowly and to appease the donors and public sympathies in the past. However, here, coupled with the government’s actions in passing a new Constitution and going after corrupt ministers, the words no longer nearly ring as hollow as before. If there is one thing we have learned through this long fight against corruption, it is that anti-corruption efforts will never be truly successful absent individual and government-wide commitment to truly cease having corruption be a way of life.

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<sup>285</sup> *Id.*

## **Conclusion**

Kenya has had a long path in seeking to combat corruption. From its initial narrowly focused efforts at defining corruption to the broad-based institutional efforts it undertook as discussed in this paper. The latest turn in this journey is the August 2010 Constitution ratified overwhelmingly in a referendum. This Constitution entrenches a new Ethics and Anti-Corruption Commission and embeds within it the ethical and professional guidelines of the Public Officers Ethics Act. The government is also now constitutionally required to be based on the principles of transparency and accountability. It also requires the mandatory publishing and making public access of information held by the State – such disclosure is likely to encourage more open, transparent and accountable government. If followed, the commands of the new Constitution are therefore likely to end the secrecy that made corruption rampant and pervasive to date. A new Chairman of the Kenya Anticorruption Commission and a judicial decision from a constitutional court dismissing an application to bar the prosecution of a cabinet minister who has recently resigned may be the first signs of a new turn in Kenya's renewed efforts to combat corruption. Another cabinet minister has also resigned to pave way for investigations.

However, it is too early to tell what the future holds. Almost every turn made to combat corruption in Kenya has been suffered setbacks –because the judiciary was unsympathetic to the broader anticorruption agenda or because Parliament or the Executive branch found ways to cover-up corrupt behavior. Further, a lot of the old corrupt guard remains in the government. These challenges remain even under the new Constitution.