



UNIVERSITY *of the*
WESTERN CAPE

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THE ROLE OF CITIZENS IN THE FIGHT AGAINST CORRUPTION IN KENYA

**Mini-thesis submitted in partial fulfilment of the requirements for the Master of Laws (LLM)
in Criminal Justice**

By

EMILY WAKESHO WEGULO

Student Number: 3966122

1st Supervisor: Professor RA Koen

2nd Supervisor: Dr RD Nanima

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DECLARATION

I, **E. Wakesho Wegulo**, declare that **The Role of Citizens in the Fight against Corruption in Kenya** study is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Student: E. Wakesho Wegulo



Signature:

Date: 8 September 2022

1st Supervisor: Professor Raymond Koen

2nd Supervisor: Dr R.D. Nanima

Signature:

Date:

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DEDICATION

To the Man in the Arena,

Theodore Roosevelt,

"Citizenship In A Republic", Sorbonne, Paris, France.

23 April, 1910.

ABBREVIATIONS AND ACRONYMS

ACAC	Association of Citizens against Corruption
ACECA	Anti-Corruption and Economic Crimes Act
ACPHR	African Charter on Human and Peoples' Rights
ALAC	Advocacy and Legal Advisory Centres
APRM	African Peer Review Mechanism
APNAC	African Parliamentarians Network Against Corruption
AUCPACC	African Union Convention on Preventing and Combating Corruption
CACCOC	County Anti-Corruption Civilian Oversight Committees
CBAM	Community Based Anti-Corruption Monitors
CCAGG	Concerned Citizens of Abia for Good Governance
CPI	Corruption Perceptions Index
CVC	Citizens Vetting Committees
DCI	Directorate of Criminal Investigations
DPP	Director of Public Prosecutions
EACC	Ethics and Anti-Corruption Commission
ECOSOC	Economic and Social Council
ECOWAS	Economic Community of West African States
FCA	False Claims Act
IAU	Internal Affairs Unit
ICAC	Independent Commission against Corruption
IPCRM	Integrated Public Complaints Referral Mechanism
ICT	Information Communication and Technology

ICSID	International Centre for Settlement of Investment Disputes
KACA	Kenya Anti-Corruption Authority
KACC	Kenya Anti-Corruption Commission
KLRC	Kenya Law Reform Commission
KOT	Kenyans on Twitter
MKSS	<i>Mazdoor Kisan Shakti Sangathan</i>
NACCC	National Anti-Corruption Campaign Council
NACCSC	National Anti-Corruption Campaign Steering Committee
NEAP	National Ethics and Anti-Corruption Policy
NPS	National Police Service
OAS	Organization of American States
ODPP	Office of the Director of Public Prosecutions
PPDA	Public Procurement and Asset Disposal Act
PPRA	Public Procurement Regulatory Authority
POCA	Prevention of Corruption Act
SDG	Sustainable Development Goals
UN	United Nations
UNCAC	United Nations Convention against Corruption
UDHR	Universal Declaration of Human Rights
US	United States

KEY WORDS

Anti-Corruption

Citizens

Citizen engagement

Citizen-centric

Constitution

Corruption

Kenya

Prevention

Public Participation

ABSTRACT

Corruption in Kenya is so endemic that there is hardly any stigma attached to it. Despite the numerous institutional and legislative anti-corruption interventions, corruption still has a firm grip upon Kenya. The effects of corruption are borne mostly by ordinary citizens who lack access to basic amenities and have to negotiate corrupt conduct in the course of their daily activities.

This study presupposes that corruption does most harm to the poorest *wananchi* (citizens) and that it is necessary that they participate more meaningfully in the formulation and implementation of anti-corruption strategy. It is imperative, therefore, that the role of the citizen in fighting corruption in Kenya be examined through the lens of the existing legal framework and juxtaposed with global best practice.

This study chiefly aims to show that Kenyan citizens do and can play an important role in fighting corruption. This is done by highlighting the historical context of corruption in Kenya, its past interventions and present-day forms of citizen engagement including internet-mediated mechanisms. Further, the study analyses the anti-corruption framework in Kenya, identifies gaps in the Kenyan anti-corruption policy, institutional and legal frameworks and makes recommendations for reform.

CHAPTER ONE

BACKGROUND TO STUDY

1.1 Introduction

Corruption is a debilitating contemporary issue with an ancient provenance. In fact, the United Nations Secretary-General, Antonio Guterres, remarked on International Anti-Corruption Day (9 December) in 2018, that “corruption begets corruption”.¹ It is neither a preserve of the developing nor the transitional states.² It permeates all states in varying degrees and its effects are manifested globally.³ Kofi Annan described corruption as an “insidious plague” and an “evil phenomenon” that visits extensive damage upon societies.⁴ Wolfensohn, during his tenure as World Bank President, likened corruption to cancer in its debilitating effects.⁵

There is no universally accepted definition of corruption, which explains why the United Nations Convention against Corruption does not define it expressly. Most international and regional instruments on corruption prefer identifying a list of acts constituting corruption rather than defining the term itself.⁶ Kenya’s anti-corruption legislation takes a similar approach by delineating acts of corruption, such as bribery, embezzlement and abuse of office, rather than defining corruption *per se*.⁷

1 Guterres A (2018) “Cost of Corruption at Least 5 Per Cent of Global Gross Domestic Product, Secretary-General Says in International Day Message”, paragraph 8, see <https://bit.ly/3ywMadB> (visited 17 January 2022).

2 Guterres (2018) paragraph 1.

3 Wolfensohn JD (1996) People and Development: Annual Meetings Address by James D. Wolfensohn, President (English). paragraph 40, see <https://bit.ly/37qkueD> (visited 8 August 2021); Annan K (2003) Secretary-General lauds adoption by General Assembly of United Nations Convention against Corruption paragraph 1, see <https://www.un.org/press/en/2003/sgsm8977.doc.htm> (visited 17 January 2022); Paragraph 4 of the Preamble to United Nations Convention Against Corruption, 31 October 2003, A/58/422, available at <https://www.unodc.org/unodc/en/treaties/CAC/> (visited 22 January 2022); Kibwana K, Wanjala S & Owiti O (1996) *The Anatomy of Corruption in Kenya: Legal, Political and Socio-Economic Perspectives* at 37.

4 Annan (2003) paragraph 1 & 2.

5 Wolfensohn (1996) paragraph 38.

6 Article 1 of the AUCPCC; Article 1 of the SADC Protocol against Corruption; Article 6 of the ECOWAS Protocol on the Fight against Corruption; Article VI of the OAS Inter-American Convention against Corruption.

7 Section 2(1)(a)-(g) of ACECA.

The World Bank defines corruption as the abuse of public office for private gain.⁸ Such a definition, however, only recognises public-sector corruption. Transparency International defines corruption as the abuse of entrusted power for private gain.⁹ The Bogor Conference (2003) provided a more refined definition than Transparency International by describing corruption as the abuse of entrusted power, which denotes that corruption may be committed for a third party's benefit.¹⁰

The effects of corruption are undeniably devastating and include undermining the rule of law and democracy, which destabilises countries and affects citizens' lives and livelihoods.¹¹ Corruption also has a negative impact on socio-economic development, which has the net effect of impoverishing people and denying them essential services pertinent to human dignity.¹² Corruption further encourages crime, as an unstable country marked by lawlessness and impunity is a magnet for criminals.¹³ Ultimately, corruption in one country undermines other states within a region, which underlines the need for transnational co-operation in anti-corruption strategies.¹⁴

Regrettably corruption affects most developing nations detrimentally, with most detrimental effects being suffered by the poorest citizens.¹⁵ Such citizens often have to negotiate corrupt conduct in order to obtain essential public services.¹⁶ In fact, former World Bank President, Jim Yong Kim, in 2016 condemned corruption as "quite simply, stealing from the poor".¹⁷ This study seeks to examine whether the citizen victims of corruption can play a meaningful anti-corruption role. The role of citizens as anti-corruption agents is understood

8 See <https://bit.ly/3jDmpls> (visited 8 August 2021).

9 See <https://www.transparency.org> (visited 29 December 2021).

10 Brown AJ (2006) "What Are We Trying to Measure? Reviewing the Basics of Corruption Definition in Sampford C *et al Measuring Corruption* at 59 & 70.

11 Annan (2003) paragraph 1; Paragraph 1 of the Preamble to UNCAC; Guterres (2018) paragraph 4.

12 Annan (2003) paragraph 2; Guterres (2018) paragraph 3.

13 Paragraph 6 of the Preamble to the AUCPCC; Paragraph 2 of the Preamble to UNCAC.

14 Paragraph 4 of the Preamble to UNCAC; Paragraph 6 of the Preamble to the AUCPCC.

15 Annan (2003) paragraph 2; Muteti SM, Mbaya KB & Kariuki JN (2018) "A Study on Perception and Experiences of Corruption in the Public Service in Kenya" National Crime Research Centre (NCRC) Research Report No.12 at 1; National Ethics and Anti-Corruption Policy (NEAP), 2018 at 37.

16 Sandgren C (2005) "Combating Corruption: The Misunderstood Role of Law" 39(3) *The International Lawyer* at 718; Global Corruption Barometer (2015) at 12; EACC National Ethics and Corruption Survey (2018) at iii & 12-13.

17 Kim JY (12 May 2016) "Tackling Corruption to Create a More Just and Prosperous World" at paragraph 2, see <https://bit.ly/3yWvLPM> (visited on 18 August 2021).

best when it is appreciated that citizens comprise the public sphere in a given jurisdiction, with full rights under the constitution.¹⁸ One of the universal rights of citizens is the right to participate in government.¹⁹ In the African context, the notion of *Ubuntu*²⁰ postulates that everyone should participate in society.²¹ It is contended that this participation by citizens ought to be played out fully in the anti-corruption arena.

Combating of corruption is necessary for promoting the rule of law and for upholding the integrity and democratic values necessary for progression of a nation.²² Consequently, citizen engagement in anti-corruption strategies should be encouraged by the government, so as to formulate a formidable bottom-up approach to combating corruption.

1.2 Problem Statement

Kibwana likens the problem of corruption in Kenya to “the story of bees flying into and out of a beehive”, that is, an endless narrative.²³ Indeed, Kenya has grappled with corruption since colonial days, leading to the enactment of the Prevention of Corruption Ordinance in 1956.²⁴ Six decades later, and despite the existence of a range of anti-corruption laws and institutions, corruption persists to such an extent that President Uhuru Kenyatta was moved to remark: “In Kenya today corruption has no stigma, no social consequence.”²⁵ Such de-stigmatisation of corruption is a reflection of moral decadence in Kenyan society.²⁶ It might just be that corruption in Kenya has reached the “fatal stage”, preceding the death of a nation, which Chinua Achebe warned about in relation to corruption in Nigeria.²⁷ In fact, Kenya and Nigeria

18 Chandhoke N (1995) *State and Civil Society: Explorations in Political Theory* at 9.

19 Article 21(1) of the Universal Declaration of Human Rights; Article 13(1) of African Charter on Human and Peoples' Rights; Article 1(1) & (2) of the Constitution of Kenya.

20 Nkhata M (2011) “Towards Constitutionalism and Democratic Governance: Ubuntu and Equity as a Basis for Regulating Public Functionaries in Common Law Africa in Diedrich F (ed) *Ubuntu, Good Faith & Equity* at 90. *Ubuntu* is derived from the Zulu expression *umuntu ngumuntu ngabantu* which translates as “I am because we are”.

21 Nkhata (2011) at 91.

22 Eser A & Kubiciel M (2005) *Institutions Against Corruption: A Comparative Study of the National Anti-Corruption Strategies Reflected by GRECO's First Evaluation Round* at 18.

23 Kibwana *et al* at 222.

24 See www.eacc.go.ke (visited 18 August 2021): NEAP (2018) at 2; See Muteti *et al* at 106.

25 Speech by Kenya's President Uhuru Kenyatta (25 January 2019). See EACC National Ethics and Corruption Survey (2018) at 48 in which corruption topped the list of major challenges facing Kenya.

26 Kibwana *et al* (1996) at 191; Chweya L, Tuta JK & Kichamu-Akivaga S (2005) *Control of Corruption in Kenya: Legal-Political Dimensions 2001-2004* at 243; EACC National Ethics and Corruption Survey (2018) at 63; Muteti *et al* (2018) “at xvi.

27 Cited in Kibwana *et al* (1996) at 36; EACC National Ethics and Corruption Survey (2018) at 63.

were bedfellows in Transparency International's 2018 Corruption Perceptions Index (CPI) tying with a score of 27 (where 0 is highly corrupt and 100 is very clean).²⁸

That corruption has the country in its grip is indisputable. Indeed, in January 2019 there was a multi-sectoral national anti-corruption conference at which Kenyans were urged "to join in this sacred duty of making Kenya corruption-free".²⁹ This clarion call to Kenyans is important, as oftentimes anti-corruption efforts are left to the state, which relies largely upon criminal law.³⁰ Undoubtedly, Kenya recently has been experiencing a wave of high-profile investigations and prosecutions which is a welcome relief to a corruption-fatigued citizenry.³¹ Nevertheless, corruption persists and the Kenyan media daily remain inundated with corruption scandal headlines.³²

It thus is suggested that the time is nigh to amplify a different strategy to fight systemic corruption in Kenya, which adopts a rare bottom-up perspective and revolves around the *mwananchi* (citizen).³³ Citizens are a powerful resource for the maintenance of a nation's interests in matters of governance and democracy. In view of this, it is imperative that they are empowered and educated to engage effectively in anti-corruption strategies at the micro, meso and macro levels, in line with the aspirations declared in the Kenyan Constitution.³⁴

Accordingly, it is necessary to analyse the functionality of anti-corruption laws in Kenyan society. Such an analysis will confirm whether existing laws stimulate Kenyans to fight corruption meaningfully. A review of pertinent literature suggests that the role of ordinary

28 See <https://www.transparency.org/cpi2018> (visited 4 January 2022). See also, CPI 2020 where Kenya has a score of 31 and Nigeria scores at 25, showing a slight improvement for the former, available at <https://www.transparency.org/en/news/cpi-2020-sub-saharan-africa#> (visited 4 January 2022); NEAP (2018) at 1 decries Kenya's poor performance at corruption indices.

29 Speech by President Uhuru Kenyatta (25 January 2019).

30 Carr I (2007) "Corruption, Legal Solutions and Limits of Law" 3(4) *International Journal of Law in Context* at 230; Sandgren (2005) at 726; Klitgaard R, MacLean-Abaroa R & Lindsey HP (2000) *Corrupt Cities: A Practical Guide to Cure and Prevention* at 13.

31 Annual Report to Parliament on the State of National Security (2020) at 5. See also, Wasuna B "Big Corruption Scandal Amounts that Shocked Kenyans in 2018" *Daily Nation* 31 December 2018; Onyango P "Group to Stage Demonstrations over Runaway Corruption" *Standard Digital* 3 March 2019; and EACC, available at www.eacc.go.ke (visited 9 January 2022).

32 Kagwanja P "How Corruption is Sinking the 'Kenya Model' and Uhuru Legacy" *Daily Nation* 10 March 2019.

33 Transparency International CPI (2018) recommends that citizen engagement in the fight against corruption is crucial in both Kenya and South Africa.

34 Paragraph 5 of the Preamble to the Constitution of Kenya declares a commitment "to nurturing and protecting the well-being of the individual, the family, communities and the nation".

Kenyan citizens in anti-corruption strategies has not received adequate research attention. This study thus addresses knowledge gaps by examining efforts to engage citizens in anti-corruption strategies.

1.3 Objectives of the Study

The objectives of the study are:

- to determine the extent to which the Kenyan legal framework encourages citizens to fight corruption;
- to highlight the importance of citizen-centred anti-corruption strategies from both a theoretical and a practical perspective;
- to analyse forms of citizen-centric anti-corruption mechanisms appropriate for Kenya.

1.4 Research Questions

The primary research question is whether citizen-centred anti-corruption strategies can reduce corruption in Kenya? The two supplementary questions are:

- To what extent does the legal framework in Kenya engender citizen-centred anti-corruption strategies?³⁵
- What forms of citizen-centred anti-corruption strategies are appropriate for Kenya?

1.5 Central argument

The central argument of the study is that engaging citizens in anti-corruption programmes will significantly reduce instances of corruption. Citizens can refrain from engaging in corrupt acts, such as giving bribes for services, which contributes to reducing corruption. Furthermore, when citizens engage in anti-corruption interventions as whistleblowers or state witnesses, their engagement can lead to successful investigations and prosecutions which, in turn, will dissuade potential culprits from indulging in corrupt activities.

35 This study will use the terms “citizen-centred”, “citizen-centric” and “citizen engagement” interchangeably to denote the central position of citizens in anti-corruption strategies.

1.6. Research Methodology

The methodology undertaken was desktop research based on the review and analysis of literature, international and regional legal instruments, national legislation, and case law relevant to this study. Secondary sources include, books, journal articles, and internet sources.

1.7 Significance of the Study

This study takes a bottom-up approach to anti-corruption interventions. Accordingly, it will evaluate and suggest forms of citizen-centred anti-corruption procedures, along with possible areas for policy and legal reform, in order to contribute to the combating of corruption in Kenya. As corruption is a universal concern, this study will add its voice not only to academic research but also to the cause of the global anti-corruption community.³⁶

1.8 Literature Review

Participation of citizens in their government traditionally has been regarded as the cornerstone of democracy.³⁷ While speaking generally of citizen participation, Arnstein underscores its importance in society by asserting that “citizen participation is citizen power”.³⁸ In discussing public participation in the fight against corruption, both Stapenhurst & Kpundeh and Mtapuri favour a citizen-centred approach, since anti-corruption campaigns cannot succeed without public support.³⁹ Similarly, Serra suggests that, rather than relying on conventional top-down interventions in fighting corruption, there is a suitable substitute to be found in a bottom-up approach.⁴⁰ Côté-Freeman proposes that deliberations on corruption are capable of producing real change when held within the community in which it is taking place.⁴¹ Her position is echoed by Sandgren who acknowledges that widespread awareness of corruption by ordinary people potentially can stimulate change.⁴²

36 Paragraph 4 of the Preamble to UNCAC.

37 Arnstein SR (1969) “A Ladder of Citizen Participation” 35(4) *Journal of the American Planning Association* at 216.

38 Arnstein (1969) at 216.

39 Stapenhurst F & Kpundeh SJ (1998) “Public Participation in the Fight Against Corruption” 19(3) *Canadian Journal of Development Studies* at 491 & 501; Mtapuri O (2016) “Corruption and Citizen Participation: A Critical Analysis” 13(1) *Bangladesh e-Journal of Sociology* at 6.

40 Serra D (2012) “Combining Top-Down and Bottom-Up Accountability: Evidence from a Bribery Experiment” 28(3) *Journal of Law, Economics, & Organization* at 569.

41 Bukovansky M (2006) “The Hollowness of Anti-Corruption Discourse” 13(2) *Review of International Political Economy* at 193.

42 Sandgren (2005) at 719.

While acknowledging the efforts to amplify the role of citizens in anti-corruption, Verdenicci & Hough believe that the role of the individual citizen is exaggerated and needs re-assessment.⁴³ They argue that without support from the government, citizen engagement is limited and can lead to apathy and irrelevance on the part of the citizen.⁴⁴ It has been contended that citizen engagement in anti-corruption activities is dependent on the form of corruption.⁴⁵ Bauhr argues that citizen engagement is conditioned by what she identifies as “need corruption” and “greed corruption”.⁴⁶ She explains that need corruption involves a citizen having to be corrupt in order to obtain access to services, whilst greed corruption entails a citizen being corrupt in order to gain an undue advantage.⁴⁷ Her study further explores the essential conditions suitable for collective action against corruption.⁴⁸

As to what constitutes citizen engagement in the anti-corruption context, Chêne is of the view that it is concerned with strengthening the capacity of citizens to agitate for good governance and accountability.⁴⁹ Bajraktari describes citizen engagement as two-fold: involving citizens individually or in the form of collective action (civil society organisations included).⁵⁰ Forms of citizen engagement abound, ranging from awareness programmes on the harmful effects of corruption,⁵¹ to protests, reporting corruption or paying more for an ethical company product.⁵² Peiffer & Alvarez, however, note that such activities cost the citizen time, money and energy.⁵³ This is an important consideration, especially since the poorest citizens are the ones who suffer most from the effects of corruption.

43 Verdenicci S & Hough D (2015) “People Power and Anti-Corruption; Demystifying Citizen-Centred Approaches” 64(1) *Crime Law and Social Change* at 25.

44 Verdenicci & Hough (2015) at 23.

45 Bauhr M (2017) “Need or Greed? Conditions for Collective Action against Corruption” 30(4) *Governance: An International Journal of Policy, Administration, and Institutions* at 561.

46 Bauhr (2017) at 561.

47 Bauhr (2017) at 561.

48 Bauhr (2017) at 561.

49 Chêne M (2008) “The Impact of Strengthening Citizen Demand for Anti-Corruption Reform”, at 1, available at <https://bit.ly/37Wtg4a> (visited 19 August 2021).

50 Bajraktari E (2016) “Citizen Engagement in Public Service Delivery: The Critical Role of Public Officials”, at 4, available at www.undp.org/publicservice (visited 19 August 2021).

51 Staphenurst & Kpundeh (1998) at 501.

52 Peiffer C & Alvarez L (2015) “Who Will Be the “Principled-Principals”? Perceptions of Corruption and Willingness to Engage in Anticorruption Activism” 2(3) *Governance: An International Journal of Policy, Administration, and Institutions* at 356.

53 Peiffer & Alvarez (2015) at 356.

Technological advancements and globalisation herald new techniques for citizens in fighting corruption. In the realm of e-government, Shim & Eom discuss how “The Public Window of Peru” (an Information Communication and Technology (ICT) platform where citizens engage the government) was designed to increase transparency and government accountability in the face of corruption in the Fujimori government.⁵⁴ Cheong & Gong discuss how new media stimulate civic participation when citizens seek information and air their opinions in different ways.⁵⁵ An example of citizen engagement via technology arose when Chinese “netizens”⁵⁶ asserted their voice through their use of new media to seek information and expose corrupt government authorities.⁵⁷ Additionally, Bhatnagar postulates that e-government controls corruption and submits that ICT empowers the public to engage with government processes, enabling them to detect and report corrupt practices by government officials.⁵⁸

In analysing the anti-corruption initiatives in Kenya, Amukowa & Gunga propose an anti-corruption education model that empowers citizens to respond appropriately to corruption.⁵⁹ Citizen engagement has been found to increase public participation and access to information, which factors affect levels of corruption and ultimately lead to improved public service delivery.⁶⁰ Nevertheless, Bauhr suggests a drawback in the intricate relationship between citizens’ motives and citizen engagement in the fight against corruption.⁶¹ This means that the level of engagement will be dependent largely on apparent benefits derived by the citizens from participation.

Political will is a crucial aspect of combating corruption and, while recognising the potential of citizen engagement, Chêne and Verdenicci & Hough concur that it must be matched by a willing and capable state that accommodates citizens’ demands for

54 Shim DC & Eom TH (2008) “E-Government and Anti-Corruption: Empirical Analysis of International Data” 31(3) *International Journal of Public Administration* at 305.

55 Cheong PH & Gong J (2010) “Cyber Vigilantism, Transmedia Collective Intelligence, and Civic Participation” 3(4) *Chinese Journal of Communication* at 471-472.

56 Netizen (n): an active participant in the online community of the Internet. Definition available at <https://www.merriam-webster.com/dictionary/netizen> (visited 19 August 2021).

57 Cheong & Gong (2010) at 476.

58 Cited in Shim & Eom (2008) at 305.

59 Amukowa W & Gunga SO (2013) “The Role of Anti-Corruption Education in the Light of Aristotelian Concept of Akrasia: An Epistemic Inquiry into the Anti-corruption Initiatives in Kenya” 4(4) *Mediterranean Journal of Social Sciences* at 364.

60 Chêne (2008) at 1; Serra (2012) at 570.

61 Bauhr (2017) at 576.

accountability.⁶² The foregoing notwithstanding, political will is as important as the will of the people to fight corruption for, as Sandgren notes: “If the top is rotten the bottom will also be rotten”.⁶³ He notes further that popular acceptance of corruption can be conquered when citizens are made aware of the cost of corruption to a society.⁶⁴ Asea, in examining corruption in Uganda, posits that the prevention of corruption is not dependent only on the integrity of public financial systems but also is contingent upon the character of the people.⁶⁵

Combating corruption is no mean feat and there is no standard technique for countering the vice across different countries.⁶⁶ Sandgren identifies the single root cause of corruption as human greed which cuts across all states.⁶⁷ It is with this understanding that this study delves into an uncommon bottom-up perspective of tackling corruption in which the citizen plays a meaningful role.

As shown in this review, the role of the citizen in anti-corruption endeavours has attracted interest recently, but there is limited literature in the context of Kenya. Using Kenya as a case study, this study will contribute to the literature in respect of citizen-centric anti-corruption strategies.

1.9 Limitation of the study

This mini-thesis limited its research to citizen-centred anti-corruption strategy in Kenya. It therefore holistically focuses on how citizens have been and can be harnessed to fight corruption in Kenya by provision of an appropriate ecosystem in terms of policy, legal and institutional anti-corruption framework. Thus, this study is not limited to a particular institution or law but takes an all-inclusive approach in appraising the existing anti-corruption architecture in Kenya.

62 Chêne (2008) at 2; Verdenicci & Hough (2015) at 23.

63 Sandgren (2005) at 726.

64 Sandgren (2005) at 726.

65 Asea WB (2018) “Combating Political and Bureaucratic Corruption in Uganda: Colossal Challenges for the Church and the Citizens” 74(2) *HTS Teologiese Studies/Theological Studies* at 1.

66 Sandgren (2005) at 730.

67 Sandgren (2005) at 719.

1.10 Chapter Outlines

The following chapters make up the remainder of the mini-thesis:

Chapter Two appraises Kenya's history of corruption, and concomitant state and citizen anti-corruption interventions. Further, this chapter offers a snapshot of citizen engagement in anti-corruption strategies in Kenya and across the world. Also, internet-mediated anti-corruption efforts are considered.

Chapter Three provides an analysis of legal, institutional and policy anti-corruption frameworks with regard to citizen engagement. Such analysis will be done from an international and domestic perspective.

Chapter Four identifies weaknesses in Kenya's anti-corruption framework that may fetter citizen engagement. Further, there are citizen-centric anti-corruption strategies offered in terms of enactment of laws, anti-corruption education and more involvement of devolved government.

Chapter Five concludes the study and responds to the research questions. This chapter offers recommendations on policy, law and actions that provide a suitable environment to propel citizens to engage in anti-corruption initiatives.

CHAPTER TWO

CORRUPTION IN KENYA: A MOSAIC OF INTERVENTIONS

2.1 Introduction

In order to assess the expediency of entreating Kenyan citizens to combat corruption, the history of the vice needs to be contextualised. In addition, the various attempts which have been made at curbing venality should be appreciated as further solutions are explored.

This chapter thus provides a synopsis of the history of corruption and anti-corruption interventions in Kenya. Snapshots of citizen engagement from other countries as well as internet-mediated anti-corruption mechanisms are considered also.

2.2 History of Corruption in Kenya

Kenya's history of corruption is viewed best through the lens of its colonial past.¹ Thus, four distinct periods reflecting different government regimes are covered as follows: Pre-colonial period, Post-independence to 1978, 1978 to 2002, 2002-2013, 2013 to date.

Kenya is a former British colony, a regime characterised by dominance and subjugation having received its independence in 1963.² Official corruption is considered to have its origins in the practice of colonialists rewarding their loyalists, for instance, giving chiefs land title documents in exchange for their co-operation.³ The enactment of the Prevention of Corruption Ordinance in 1956 attests to the existence of corruption in colonial Kenya.⁴

Corruption continued into post-independent Kenya, which Chweya attributes to political patronage by the Kenya African National Union (KANU) government and the phenomenon of

1 Chweya et al at 8-9; Matiangi F (2006) "Case Study on the Role of Parliament in the Fight Against Corruption: The Case of the Kenyan Parliament" in Stapenhurst *et al The Role of Parliaments in Curbing Corruption* at 70.

2 Williams as cited in Kibwana *et al* (1996) at 124.

3 Williams as cited in Kibwana *et al* (1996) at 124 & 140; Chweya (2005) at 8-9.

4 See history of anti-corruption legislation, available at www.eacc.go.ke (visited 8 August 2021) Tuta (2005) at 65.

smuggling (*magendo*).⁵ Loughran attributes part of the public corruption in the Jomo Kenyatta administration (1963-1978) to a recommendation of the 1971 Ndegwa Commission on Public Service Structure and Remuneration which endorsed Kenyan civil servants engaging in personal businesses provided there were no conflict-of-interest situations.⁶

The Daniel Arap Moi administration (1978-2002) was riddled with corruption also, as expressed in patron-client relations cultivated and sustained by political bosses.⁷ A classic manifestation of official corruption in the Moi era was the Goldenberg Affair.⁸ The Goldenberg Affair is one of Kenya's epic economic crimes, ostensibly perpetrated by businessmen colluding with high-ranking government officials, including the then vice-president, in an export compensation scheme in which minerals were neither mined nor exported but massive public funds were looted.⁹ This scandal cost the country a minimum of Kenya Shillings 27 079 578.684 (approximately USD 239,218.89) and the debilitating effect it had on the Kenyan economy is still palpable.¹⁰

Such corruption is what partly triggered the clamour for democratic change which led to the shift from a one-party state to a multiparty state in 1991.¹¹ Kibwana *et al* observe that in that epoch, the public sector and parastatals were reported to be the most corrupt.¹² They note further that corruption had crystallised not only in the government, but also amongst ordinary Kenyans.¹³ In fact, in this period, Kenya was selected as one of five countries targeted in an anti-corruption campaign by the newly founded Transparency International.¹⁴ Kenya was also

5 Chweya (2005) at 11; Matiangi (2006) at 70.

6 Loughran G (2010) *Birth of a Nation: The Story of a Newspaper in Kenya* at 87-88; Ndegwa Commission Report (1971) at 13, 14 & 279.

7 Chweya (2005) at 13; Matiangi (2006) at 70.

8 Bosire Commission Report (2005) at 26.

9 Bosire Commission Report (2005) at 25, 69, 205, 220, 300 & 301; Gathii JT (1999) "Corruption and Donor Reforms: Expanding the Promises and Possibilities of the Rule of Law as an Anti-Corruption Strategy in Kenya" 14 *Connecticut Journal of International Law* at 428; Migai A (2011) "Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability," 18(1) *Indiana Journal of Global Legal Studies* at 360.

10 Bosire Commission Report (2005) at 262 & 301; Chweya *et al* (2005) at xiii; Matiangi (2006) at 73.

11 Chweya *et al* (2005) at 13; Githu Task Force Report (2015) at xxxi.

12 Kibwana *et al* (1996) at 51.

13 Kibwana *et al* (1996) at 79.

14 *Standard* (8 October 1993), as cited in Kibwana *et al* (1996) at 58.

amongst the top four African countries — alongside Nigeria, Liberia and South Africa — subject to capital flight.¹⁵

Against the backdrop of a society enmeshed in corruption, Mwai Kibaki ascended to the presidency in 2002 on an anti-corruption card.¹⁶ However, the Kibaki administration (2002-2013) very soon was caught up in gigantic corruption scandals, key amongst them being the Anglo-Leasing Scandals, the Maize Scandal, the Free Primary Education Scandal, the Tokyo Embassy Scandal and the Nairobi City Council Cemetery Scandal.¹⁷

Kenya's current president, Uhuru Kenyatta, took the mantle from Kibaki in 2013 and his administration (2013-2022) too has not escaped the tentacles of corruption. Key scandals in which billions of Kenya Shillings were lost include the National Youth Service (NYS) I & II Scandals and scandals involving the Kenya Pipeline Company, the National Cereals and Produce Board, the National Hospital Insurance Fund, Kenya Power and the National Lands Commission, as well as the Arror and Kimwarer Dams Scandal.¹⁸

The corruption cycle which spans the different political periods in Kenya indicates that most scandals are perpetrated by public officials on a grand scale.¹⁹ That is not to absolve the ordinary *wananchi* of corruption, as they also participate in either need or greed corruption.²⁰ In fact, in September 2021, the Anti-Corruption Court in Nairobi's Milimani Law Courts, in *ACC No.13/2016 R vs Catherine Akello Namuye (CEO) (Deceased), Bruce Odhiambo (Deceased) & Others*, convicted and fined a businessman, Mukuria Ngamau, Kenya Shillings 720.8 million (approximately USD 6,340,060.08) or in default to serve 27 years in prison for his role in

15 *Indian Ocean Newsletter ION* (16 November 1991), as cited in Kibwana *et al* (1996) at 62.

16 Chweya (2005) at 20; Matiangi (2006) at 75; Mutula *S et al* (2013) "Leadership and Political Corruption in Kenya: Analysis of the 2010 Constitutional Provisions on the Presidency 38(3) *The Journal of Social, Political and Economic Studies* at 274 & 276.

17 Githu Task Force Report (2015) at xxxii.

18 Obura F "Mega scandals hit Kenya hard in 2018- NYS" *The Standard* 25 December 2018; Wasuna (31 December 2018); see press statements, available at www.odpp.go.ke (visited 23 January 2022); See ODP's report of high-profile corruption and economic crime cases registered in court as at 9 November 2021 at 3,5,7,10, available at <https://bit.ly/3jHRW6V> (visited 22 January 2022).

19 Githu Task Force Report (2015) at xxxii.

20 EACC Report (2018) at 58.

defrauding a state corporation known as the Youth Enterprise Development Fund, Kshs. 180,894,946/= (approximately USD1,592,895.59).²¹

2.3 History of Anti-Corruption Initiatives in Kenya

Kenyan society is permeated with corruption in both its past and its present as highlighted above. This section highlights the history of state and citizen interventions in the Moi, Kibaki and Uhuru Kenyatta administrations.

2.3.1 State Interventions

The state's attempts at eradicating corruption in Kenya have been made largely through anti-corruption legislation and institutions. The first anti-corruption law was the colonial Prevention of Corruption Ordinance enacted in 1956.²² Upon independence in 1963, the law became known as the Prevention of Corruption Act (POCA).²³

The Moi era was characterised by calls for constitutional reforms, especially in the early 1990s, by politicians, civil society groups, clergy and donor communities.²⁴ Such pressure was exacerbated by the manifestation of corruption and thus there was agitation for the government to put in place anti-corruption laws, policies and institutions.²⁵ The Moi administration established the following bodies to combat corruption: the Anti-Corruption Squad, which was part of the Kenya Police (1993);²⁶ the Kenya Anti-Corruption Authority (KACA), an anti-corruption agency (1997), following an amendment to POCA;²⁷ the Parliamentary Anti-Corruption Select Committee (Kombo Committee) to study corruption and

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- 21 See ODPP Kenya's twitter handle <https://bit.ly/3iHRW6V> (visited 22 January 2022); Onsongo N "Court slaps businessman with Sh720m fine for Youth Fund looting" *Business Daily* 30 September 2021; The Youth Enterprise Development Fund is a state corporation whose strategic focus is on enterprise development to increase economic opportunities for, and participation by Kenyan Youth in nation building. The Fund provides easy and affordable financial and business development support services to youth who are keen on entrepreneurship. See <http://www.youthfund.go.ke/> (visited 22 January 2022).
- 22 See history of anti-corruption legislation, available at <https://eacc.go.ke/default/about-us/> (visited 22 January 2022); NEAP (2018) at 2.
- 23 See history of anti-corruption legislation, available at <https://eacc.go.ke/default/about-us/> (visited 22 January 2022); Tuta (2005) at 65; Githu Task Force Report (2015) at 10; NEAP (2018) at 2.
- 24 Chweya (2005) at 13; Githu Task Force Report (2015) at xxxi.
- 25 Chweya (2005) at 13; Githu Task Force Report (2015) at xxxi; NEAP (2018) at 2.
- 26 See history of anti-corruption, available at www.eacc.go.ke/about-us/ (visited 19 August 2021).
- 27 See history of anti-corruption, available at www.eacc.go.ke/about-us/ (visited 19 August 2021). See also, Chweya (2005) at 15; Githu Task Force Report (2015) at 27; NEAP (2018) at 2.

its effects in Kenya (1998);²⁸ and the Anti-Corruption Police Unit within the Criminal Investigations Department, which was created to perform KACA's functions after the latter's existence was declared unconstitutional (2001).²⁹

Some of the interventions in the Moi era were progressive, such as the Kombo Committee which generated a report known as the Kombo Report, containing a "List of Shame" (identifying prominent public figures considered to be most corrupt). The List of Shame was not acted upon as the government ensured that it was expunged.³⁰ Nonetheless, there were media leaks of its contents.³¹ The Kombo Committee thus effectively raised public awareness of corruption in high places.³² Notably, the Kombo Committee made recommendations on a draft Anti-Corruption and Economic Crimes Bill.³³

However, Moi's commitment to fighting corruption was lacklustre, as evidenced by the passivity in prosecuting the Goldenberg Affair and the use of *nolle prosequi* to avoid criminal proceedings in corruption cases.³⁴ In fact, such government inaction led the Law Society of Kenya in 1994 to pursue private prosecution of the Goldenberg Affair in *Private Prosecution No.1 of 1994 Law Society of Kenya Vs Eric Kotut, Charles Mbindyo, Collins Owayo, Dr. Wilfred Koinange, Francis Cheruiyot and Kamlesh Pattni*.³⁵ This attempt was nipped in the bud by Attorney General Amos Wako who joined himself as *amicus curiae* in the case and subsequently entered a *nolle prosequi*.³⁶ The Director of KACA, John Harun Mwau, after arresting and charging a number of senior civil servants with corruption, did not last in office for more than six months.³⁷ In fact, Mwau was suspended and later removed in 1998 by a judicial tribunal

28 Matiangi (2006) at 74. See also commentary on APNAC, available at <https://bit.ly/3slkHDP> (visited 4 January 2022).

29 See history of anti-corruption, available at www.eacc.go.ke (visited 29 December 2021); NEAP (2018) at 2.

30 Matiangi (2006) at 74.

31 Matiangi (2006) at 74.

32 Matiangi (2006) at 75.

33 See commentary on APNAC <https://bit.ly/3slkHDP> (visited 4 January 2022).

34 Kibwana *et al* (1996) at 43-45; Chweya (2015) at 15. See also Bosire Commission Report (2005) at 274.

35 Kibwana *et al* (1996) at 207-208; Chweya (2005) at 15. See also Bosire Commission Report (2005) at 274 & 278.

36 Kibwana *et al* (1996) at 207-208; Chweya (2005) at 15. See also Bosire Commission Report (2005) at 275 & 278.

37 Omari E "Nyachae's fury at staff arrests" *Daily Nation* 28 July 1998. See history of EACC, available at www.eacc.go.ke (visited 19 August 2021); Chweya (2005) at 16.

appointed by then President Moi.³⁸ Additionally, the case against the senior civil servants was terminated by the DPP, Bernard Chunga, using the *nolle prosequi* technique.³⁹

The Kibaki era ushered in a multitude of anti-corruption reforms, especially in the year 2003. Some of the key reforms in 2003 included: the Justice Ringera-led “radical surgery” on the judiciary in which judicial officers perceived to be corrupt were purged; the enactment of the Anti-Corruption and Economic Crimes Act (ACECA) and the Public Officer Ethics Act (POEA); the establishment of the Kenya Anti-Corruption Commission (KACC) and the National Anti-Corruption Campaign Steering Committee (NACCSC); the signing of the African Union Convention on Preventing and Combating Corruption (AUCPCC); and the ratification of the United Nations Convention against Corruption (UNCAC).⁴⁰

Upon the promulgation of a new constitution in 2010, there was a raft of legal reforms which affected the Kenyan anti-corruption landscape. These included the establishment of the Ethics and Anti-Corruption Commission (EACC); the Office of the Director of Public Prosecutions; the Office of the Auditor-General; the enactment of the Leadership and Integrity Act, 2012; and devolution of government.⁴¹

Additionally, Kibaki demonstrated his commitment to fighting corruption by appointing John Githongo as a Permanent Secretary for Governance and Ethics in the Office of the President and as his personal adviser on anti-corruption matters.⁴² In 2003, Kibaki also instituted a judicial commission of inquiry into the Goldenberg Affair.⁴³ However, the host of reforms during the Kibaki era were overshadowed by the corruption scandals emerging from within the ranks of his administration, such as the Anglo-Leasing Scandals.⁴⁴

38 See EACC history, <https://eacc.go.ke/default/about-us/> (visited 22 January 2022); Chweya (2005) at 68.

39 Bosire Commission Report at 275; Chweya (2005) at 16.

40 See EACC history, <https://eacc.go.ke/default/about-us/> (visited 22 January 22); Githu Task Force Report (2015) at xxxi.

41 Githu Task Force Report (2015) at xxxi.

42 Tuta (2005) at 81.

43 Bosire Commission Report (2005) at 1.

44 Waweru P “Court orders Githongo to pay Murungaru Sh27m for defamation” *Daily Nation* 2 May 2019.

President Uhuru Kenyatta has persisted in declaring war against corruption and in 2015, during his State of the Nation Address, he decried the conduct of certain state officers and public officers, and directed that they step aside to allow investigations to ensue.⁴⁵ Also in 2015, President Kenyatta directed the Attorney General to conduct and co-ordinate a review of the anti-corruption framework. Thus, there was constituted the Task Force on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption in Kenya (Githu Task Force).⁴⁶ Amongst the key anti-corruption laws to be enacted during President Kenyatta's tenure are the Bribery Act and Access to Information Act. The National Ethics and Anti-Corruption Policy of 2018 is also a key feature in comprehensively consolidating Kenya's anti-corruption architecture.⁴⁷

President Kenyatta has implemented a raft of measures to stem this vice. In June 2018, the President directed that all arms of government maintain an open and accessible public register of the procurement of public goods, works and services.⁴⁸ Further, 2018 and 2019 saw an emboldened Office of the Director of Public Prosecutions (ODPP) — led by the new Director of Public Prosecutions (DPP), Noordin Haji — charge several high-profile state officers, including the Cabinet Secretary for Treasury, with corruption offences.⁴⁹ There currently seems to be both political will and vigorous anti-corruption interventions in Kenya, especially as regards prosecutions.

45 Githu Task Force Report (2015) at xxxi.

46 Githu Task Force Report (2015) at xxxii.

47 National Ethics and Anti-Corruption Policy (2018) at xiii.

48 See Executive Order, available at <https://bit.ly/3suX15u> (visited 6 January 2022); Kenya Open Government Partnership National Action Plan III (2018) at 13.

49 See ODPP's report of high-profile corruption and economic crime cases registered in court as at 9 November 2021 at 3,5,7,10, available at <https://bit.ly/3jHRW6V> (visited 22 January 2022); Barasa L "Rotich's corruption case a first in Kenya" *Daily Nation* 24 July 2019. See also on 9 December 2019, TI Kenya awarded the DPP with the Leadership and Integrity Award for demonstrating exemplary leadership in propelling the ODPP, available at <https://bit.ly/37TRqft> (visited 4 January 2022).

2.3.2 Citizen Interventions

Post-independence citizen intervention in anti-corruption has been marked largely by action from civil society groups, the clergy, the media or elected representatives.⁵⁰ However, there have been instances also where individual citizens have fought corruption fearlessly.

An instance where an elected representative intervened in a corruption matter occurred in 1995, when a Member of Parliament (MP), Raila Odinga, instituted a private prosecution; *No. LO7 of 1995* against the vice-president, Prof George Saitoti and others, over the Goldenberg Affair.⁵¹ This action was futile as the Attorney General entered a *nolle prosequi*, thereby terminating further proceedings.⁵² Similarly, the Goldenberg Affair was exposed in parliament by two opposition MPs, Anyang Nyong'o and Paul Muite, who had received information from junior officers at the Central Bank of Kenya.⁵³

In 1991, ordinary citizens constituted themselves into an organisation called the Association of Citizens against Corruption (ACAC). This organisation sought to fight corruption exclusively through exposure and education, but was denied registration on grounds of being “against the interest, welfare and good order in Kenya”.⁵⁴ However, Kibwana *et al* attribute the public’s apathy in the 1990s to the pervasiveness of corruption.⁵⁵

Another example of how citizens engaged in anti-corruption interventions is the establishment of the Kombo Committee in 1998, which received more than 1 000 written memoranda upon inviting the public to submit oral and written evidence of corruption.⁵⁶ The 1990 assassination of Robert Ouko, the Minister of Foreign Affairs in the Moi era, is linked to the exposure of corruption within government ranks in the Kisumu Molasses Project.⁵⁷ David Munyakei stands out as a fearless example of a patriotic Kenyan citizen fighting corruption in

50 Githu Task Force Report (2015) at xxxi.

51 Kibwana *et al* (1996) at 213; Bosire Commission Report (2005) at 275 & 278.

52 Kibwana *et al* (1996) at 213; Bosire Commission Report (2005) at 275 & 278.

53 Matiangi (2006) at 73; Bosire Commission Report (2005) at 288.

54 Kibwana *et al* (1996) at 56-57 & 169-170.

55 Kibwana *et al* (1996) at 46.

56 Matiangi (2006) at 74.

57 “Kenyan Minister Murdered over Corruption, says British Detective” *AP News* 12 November 1991; Perlez J “Investigator Says Kenyan Official Was Slain to Cover Up Corruption” *The New York Times* 12 November 1991; Kibwana *et al* (1996) at 51.

the Moi era.⁵⁸ Munyakei, a clerk at Central Bank of Kenya, is recognised as being the whistleblower in the Goldenberg Affair.⁵⁹ He passed on information regarding the Goldenberg company to MPs which the media covered in 1993.⁶⁰ Munyakei subsequently was arrested for passing confidential documents to unauthorised persons and later was sacked.⁶¹

Kenya's anti-corruption czar, John Githongo, a former Transparency International Kenya Executive Director and Permanent Secretary in charge of Ethics and Governance in the Kibaki administration, has been credited with anti-corruption efforts such as exposure of the Anglo-Leasing Scandal.⁶² His contribution to anti-corruption activities was on April 2005, lauded as a good example by Transparency International.⁶³ His anti-corruption work led to his fleeing Kenya, citing death threats, and he eventually resigned from public office.⁶⁴ Most recently, a Kenyan television network, Citizen TV, aired "Mara Heist", a whistleblower's account of blatant graft amounting to millions of shillings, in Maasai Mara University, implicating the Vice-Chancellor and other employees.⁶⁵ In 2019, Transparency International Kenya conferred Integrity Awards upon the whistleblowers.⁶⁶

From the foregoing examples, it appears that citizens engage in anti-corruption interventions in terms of coalition or individual efforts. Most citizens who have fought corruption have done so by whistleblowing and reporting corruption, albeit at a cost.

58 Odhiambo T "Tragic tale of Goldenberg whistleblower" *Daily Nation* 25 July 2009.

59 Bosire Commission Report (2005) at 288.

60 Bosire Commission Report (2005) at 288.

61 Bosire Commission Report (2005) at 288.

62 Beyerle S (2011) "Civil Resistance and the Corruption-Violence Nexus" 38(2) *The Journal of Sociology & Social Welfare* at 60; Manson K "Kenya targets architects of Anglo Leasing corruption scandal" *Financial Times* 15 March 2015.

63 See "Transparency international congratulates John Githongo on receiving the German Africa Award" available at <https://bit.ly/3lTmwuW> (visited 23 January 2022).

64 Beyerle (2011) at 60; Manson (15 March 2015).

65 Mwaura W & Mwilu A "Mara Heist: How Citizen TV's Asha Mwilu, Waihiga Mwaura Landed The Exclusive" *Citizen Digital* 2 September 2019.

66 See <https://twitter.com/tikenya/status/1204097895642914819> (visited 19 August 2021).

2.4 The Need for Citizen-Centred Anti-Corruption Interventions

In his “cancer of corruption” speech, World Bank President Wolfensohn observed that worldwide, ordinary people demanded action against corruption since they had first-hand experience of its adverse effects.⁶⁷ It is necessary to enlist such first-hand experience in raising the stakes for citizen engagement in anti-corruption interventions.

President Obama, during his visit to his ancestral home of Kenya in 2015, rooted for a citizen-centred approach to combating corruption. In fact, drawing parallels with his hometown of Chicago, he reminded Kenyans of how the people grew tired of Al Capone and effected changes with support from the leaders. He advocated commitment by Kenyan leaders and citizens to change habits and culture. In addition, he recommended that “ordinary people ... stand up and say, enough is enough”.⁶⁸

The history of corruption in Kenya demonstrates that the government has been a constant factor in corruption scandals, thereby undermining the social contract with the citizenry. The efforts of citizens, meagre as it may seem, in repulsing corruption confirm that, when adequately empowered and educated and backed by the law, they too can change the anti-corruption landscape fundamentally.

As corruption permeates society — individuals, the public sector and the private sector — it is imperative that its onslaught be resisted on all fronts.⁶⁹ The attitude and the participation of the masses are thus crucial for any anti-corruption intervention.⁷⁰ In fact, according to Sandgren, “popular acceptance of corruption is a powerful ally of corruption”, which acceptance can be undermined only when people are empowered regarding the effects of corruption and how to overcome them.⁷¹ For sustained anti-corruption interventions infused with a sense of ownership, it is important to involve citizens at all levels of engagement.⁷²

67 Wolfensohn (1996) at 6; Saryazdi AH (2008) “Basic Preconditions for Anti-Corruption Strategies” 4(4) *International Studies Journal* at 32.

68 Remarks by President Obama to the Kenyan People (26 July 2015), available at <https://bit.ly/3k6AmZu> (visited 9 January 2022).

69 Eser & Kubiciel (2005) at 13.

70 Sandgren (2005) at 731; Carr (2007) at 237; UN ECOSOC (May 2019) at 38.

71 Sandgren (2005) at 726.

72 Saryazdi (2008) at 32.

Indeed, in the 14th International Anti-Corruption Conference it was remarked that “Empowered people create change...”⁷³

Citizen engagement in anti-corruption activities may be demonstrated by citizens abstaining from engaging in corrupt activities or by citizens exposing corrupt activities whenever they are perpetrated. Further, citizen engagement can take place when citizens educate one another on the dangers of corruption and spread awareness on available reporting channels. Also, citizens can foil potential corruption opportunities when they engage in participatory budgeting or become involved in social audits of government projects or conduct lifestyle audits on public officers.⁷⁴ Other anti-corruption activities include participating in protests against corruption, integrity walks and joining integrity clubs.⁷⁵ Citizen-centred anti-corruption initiatives can be pursued in physical spaces as well as on digital platforms.

Notably, the Transparency International CPI (2018) recommends that citizen engagement in the fight against corruption is crucial in both Kenya and South Africa.⁷⁶ An advantage of citizen-centred anti-corruption strategies is that they can be holistic by combining social and economic justice, which can galvanise engagement of the people.⁷⁷

2.5 Examples of Citizen Engagement in Anti-Corruption across the World

An illustration of rudimentary citizen engagement in anti-corruption interventions may be found in the 1980s Citizens’ Vetting Committees (CVCs) in Ghana, which organised ordinary citizens to expose profiteering, smuggling and other exploitative practices by traders.⁷⁸ In fact, the CVCs were empowered to conduct lifestyle audits and investigate inexplicable wealth.⁷⁹

73 See Transparency International’s remarks on the 14th IACC, available at <https://bit.ly/3jHRW6V> (visited 22 January 2022); Beyerle (2011) at 59.

74 Beyerle (2011) at 68 & 69; Klitgaard at al (2000) at 41.

75 Beyerle (2011) at 61; See also EACC integrity clubs, available at www.eacc.go.ke (visited 5 January 2022) and Transparency International-Kenya integrity walk, available at <https://bit.ly/2UwOfrr> (visited 5 January 2022).

76 See CPI 2018, available at <https://www.transparency.org/cpi2018> (visited 4 January 2022).

77 Beyerle (2011) at 72 & 73.

78 Kpundeh S & Dininio P (2006) “Political Will” In Stapenhurst R, Johnston N & Pelizzo R. (eds). *The Role of Parliament in Curbing Corruption* (2006) at 45; Agyeman-Duah B (1987) “The Politics of the P.N.D.C.” 25(4) *The Journal of Modern African Studies* at 625.

79 Ahiakpor J (1985) “The success and failure of dependency theory: The experience of Ghana’ 39(3) *International Organization* at 544.

In 2005, spurred on by suppression of protests amidst political contestation, three Egyptian women, supported by volunteers, launched Shayfeen.com (“We see you”).⁸⁰ This was a safe space to provide public education and empower people to report and fight corruption through traditional media as well as the internet.⁸¹ Tea glasses and plastic bags bearing the Shayfeen.com logo were distributed amongst citizens to create awareness of corruption during the election season in 2005.⁸² Additionally, on December 9, the UN International Anti-Corruption Day, Shayfeen.com organised an anti-corruption contest for ordinary citizens to vote for their anti-corruption heroes via short message service.⁸³ In 2007, Shayfeen.com successfully challenged the government’s action to indict it on incitement and other related charges, by proving that its activities were legal since Egypt was a signatory to UNCAC.⁸⁴ Shayfeen.com is a memorable example of citizen anti-corruption empowerment via activities such as awareness creation, whistleblowing and reporting of corruption incidents.

In India, the *Mazdoor Kisan Shakti Sangathan* (MKSS) or Workers’ and Farmers’ Power Association, formed in the 1990s, initiated citizen audits of public works to combat official corruption in Rajasthan.⁸⁵ However, MKSS members struggled to obtain access to official documents which they wished to verify against public works projects.⁸⁶ Eventually, the MKSS led a national campaign for a Right to Information law, which succeeded, and ensured that local residents could audit the government projects.⁸⁷ Citizen auditing ensures transparency of procurement processes which are a fertile ground for corrupt practices.⁸⁸ The legislation on the right to information afforded citizens access to official documents and empowered them to hold public officials accountable for public expenditure.⁸⁹ Such anti-corruption activities by

80 Beyerle S (2014) *Curtauling Corruption: People Power for Accountability and Justice* at 212; Pring C (2015) “Anti-corruption programmes for young people in conflict and post-conflict countries” Transparency International at 6, available at <https://bit.ly/37UoHXV> (visited 9 January 2022).

81 Beyerle (2014) at 212 & 213; Pring (2015) at 6.

82 Beyerle (2014) at 213.

83 Beyerle (2014) at 216.

84 Beyerle (2014) at 216.

85 Chêne (2008) at 8-9; Goetz AM & Jenkins R (2001) “Hybrid Forms of Accountability: Citizen Engagement in Institutions of Public-Sector Oversight in India” 3(3) *Public Management Review* at 365.

86 Chêne (2008) at 8-9.

87 Goetz & Jenkins (2001) at 376 & 378; Chêne (2008) at 8-9.

88 Goetz & Jenkins (2001) at 375.

89 Chêne (2008) at 8-9.

citizens detect possible corruption and also have a deterrent effect on would-be perpetrators of corruption crimes.

Concerned about the rapid decline of their roads and bridges, in 1987 citizens in Abra Province, Philippines formed the Concerned Citizens of Abra for Good Governance (CCAGG) to monitor public works programmes.⁹⁰ For instance, in inspecting road construction, the CCAGG checks for use of sub-standard materials or dodgy construction techniques or irregularities in contracting.⁹¹ Its work has been credited with the conviction of public officials on corruption charges.⁹² In fact, to underscore the crucial role played by the CCAGG's investigations, the Philippines Supreme Audit Institution partnered with it to conduct participatory audit exercises.⁹³ In 2000, the CCAGG won the Transparency International Integrity Award under the whistleblowing category.⁹⁴

Citizens bear the brunt of receiving low quality public services or none, hence they are the proper victims of corruption.⁹⁵ Their experience of being robbed of public funds that would be used for their well-being thus can galvanise citizens into meaningful anti-corruption action as demonstrated in the foregoing examples. Additionally, citizens can influence public policy and trigger new legislation. Further, when organised and backed by laws citizens can partner with government agencies to engage in anti-corruption mechanisms, such as participatory audits. Citizens across the world can prove to be formidable frontline warriors against corruption.

90 See Transparency International Integrity Award winners in 2000, available at <https://bit.ly/3pEUfLL> (visited 23 January 2022); See also Chêne (2008) at 6.

91 See Transparency International Integrity Award winners in 2000, available at <https://bit.ly/3pEUfLL> (visited 22 January 2022); Chêne (2008) at 6.

92 Chêne (2008) at 6.

93 Chêne (2008) at 6.

94 See Transparency International Integrity Award winners in 2000, available at <https://bit.ly/3pEUfLL> (visited 23 January 2022).

95 Carr (2007) at 244.

2.6 Citizen Engagement in Anti-Corruption in Kenya: A Snapshot

Matters of citizen engagement in the Kenyan anti-corruption landscape mainly fall under the ambit of the Ethics and Anti-Corruption Commission (EACC) and the National Anti-Corruption Campaign Steering Committee (NACCSC). Both bodies are charged with public education and awareness-raising about corruption.⁹⁶ Additionally, the National Police Service has police stations across the 47 counties in Kenya, which stations are a first port of call for reporting any offence.

The EACC facilitates citizen reporting of corrupt incidents by operating a head office in Nairobi and nine regional offices across the country.⁹⁷ Additionally, citizens can report corruption at any of the EACC desks at Huduma Centres (one-stop government services centres) across the country.⁹⁸ The EACC also has an anonymous whistleblowing and reporting mechanism built into its website,⁹⁹ and it has social media pages such as Twitter, Facebook and YouTube.¹⁰⁰ The EACC thus can disseminate information to citizens regarding corruption and anti-corruption through these channels. Such information can be used by citizens to engage in anti-corruption activities. The EACC is also part of a joint initiative with other sectors in a public complaints referral mechanism known as the Integrated Public Complaints Referral Mechanism (IPCRM).¹⁰¹ This mechanism facilitates citizen access to public complaints procedures electronically through websites of the partner organisations or physically by attending at Huduma Centres.¹⁰²

The EACC is cognisant of the fact that the fight against corruption cannot be won by the state alone and requires citizen efforts for its success.¹⁰³ For instance, the EACC credits

96 See EACC website, available at www.eacc.go.ke (visited 22 January 2022); See also NACCSC website, available at www.naccsc.go.ke (visited 4 January 2022).

97 See EACC regional offices, available at <https://eacc.go.ke/default/regional-offices/> (visited 22 January 2022).

98 See EACC website, www.eacc.go.ke (visited 22 January 2022). See Twitter handle for Huduma Kenya, <https://twitter.com/HudumaKenya/status/939028315062407168> (visited 26 October 2021).

99 See EACC website, available at www.eacc.go.ke (visited 26 October 2021).

100 See EACC website, available at www.eacc.go.ke (visited 26 October 2021).

101 Githu Task Force Report (2015) at 98; UNCAC Country Review Report of Kenya (2019) at 5, 34 & 56.

102 Githu Task Force Report (2015) at 98; See, for example, Kajiado County Government website, available at <https://www.kajiado.go.ke/sema-piga-ripoti-kajiado-county/> (visited 26 October 2021).

103 See, "Inclusiveness of Community Groups and Networks In The War on Graft", available at <https://bit.ly/33JuUaT> (visited 22 January 2022).

whistleblowers at the grassroots level with providing several corruption allegations reports.¹⁰⁴ Proclaiming that corruption “affects and infects everyone”, the EACC lauds the efforts of Community Based Anti-Corruption Monitors (CBAMs) in sensitising and spreading awareness about corruption at the community level.¹⁰⁵ Further, CBAMs have conducted social audits of several projects where they have identified corruption-related anomalies.¹⁰⁶ The EACC periodically monitors the effectiveness of CBAMs and encourages their efforts by disseminating to them landmark decisions in corruption cases, such as those where public money is recovered.¹⁰⁷

The NACCSC interacts particularly with citizens, as it is mandated to conduct nationwide education and awareness campaigns, in order to alter fundamentally the attitudes of Kenyans to achieve a “corruption-free Kenya”.¹⁰⁸ The NACCSC engages citizens through education and awareness drives, the use of traditional media such as radio, and through social media.¹⁰⁹ The NACCSC has a presence in 29 counties through the County Anti-Corruption Civilian Oversight Committees (CACCOCs).¹¹⁰ The CACCOCs are an anti-corruption support mechanism in the county governments, used to sensitise the public to corruption. They provide a public platform for *wananchi* to fight corruption by engaging in advocacy and awareness campaigns on corruption. Additionally, the CACCOCs receive and forward citizens’ corruption-related complaints to relevant bodies.¹¹¹ Importantly, they monitor the implementation of public projects to check for corrupt practices.¹¹²

104 See commentary on CBAM, available at <https://bit.ly/33JuUaT> (visited 23 January 2022).

105 See commentary on CBAM, available at <https://bit.ly/33JuUaT> (visited 23 January 2022). See also UNCAC Kenya Review Report (2019) at 56-57.

106 See commentary on CBAM, available at <https://bit.ly/33JuUaT> (visited 23 January 2022).

107 See commentary on CBAM, available at <https://bit.ly/33JuUaT> (visited 23 January 2022).

108 See details of NACCSC, available at www.naccsc.go.ke (visited 4 January 2022).

109 See CACCOCs advised to use social media to reach out to citizens, available at <https://bit.ly/33JuUaT> (visited 23 January 2022).

110 See NACCSC on CACCOCs, available <https://bit.ly/3jHRW6V> (visited 23 January 2022); See <https://www.eacc.go.ke> (visited 4 January 2022).

111 See information about CACCOCs, available at <https://www.naccsc.go.ke/index.php/caccocs> (visited 23 January 2022).

112 See information about CACCOCs, available at <https://www.naccsc.go.ke/index.php/caccocs> (visited 4 January 2022).

There also exist non-governmental organisations (NGOs), such as Transparency International-Kenya (TI-Kenya), which engage citizens in a myriad of anti-corruption initiatives.¹¹³ Such initiatives include the establishment of Advocacy and Legal Advisory Centres (ALACs) which empower citizens to report and receive advice on incidents of corruption.¹¹⁴

Apart from state-initiated anti-corruption interventions, some Kenyan citizens have immersed themselves in fighting corruption of their own volition. There are several cases filed in the anti-corruption courts where ordinary Kenyans have reported corruption incidents and which have led to the conviction of corrupt persons.¹¹⁵ In *Samuel Kibet Cheruiyot v Republic*, the complainant, out of frustration, reported a Kenya Power and Lighting Company official for soliciting a bribe of Kenya Shillings 10 000 (approximately USD 88.00) in order to reconnect electricity to his house. The complainant was fitted with a recording device by EACC officials, which captured the accused person soliciting a bribe. The accused person was convicted of bribery.¹¹⁶

The September 2019 “Mara Heist” whistleblower account of looting at a Kenyan university is an example of citizens directly fighting corruption. In this case, one of the whistleblowers contacted journalists who eventually did an investigative piece and aired the story on national television, sparking investigations.¹¹⁷ Kenyan artistes also have engaged in anti-corruption initiatives in a bid to raise awareness of and decry corruption in society. An example of the use of music to fight corruption is Eric Wainaina’s 2001 hit song, “*Nchi ya Kitu Kidogo*”, depicting Kenya as a country mired in petty corruption.¹¹⁸ In the song and video he sings in Kiswahili and talks about the various forms of corruption, including “tea”, a euphemism

113 See Transparency International-Kenya website, available at <https://tikenya.org> (visited 23 January 2022).

114 See ALAC, available at <https://tikenya.org> (visited 23 January 2022).

115 See matrix of concluded corruption cases with convictions in ODPP Annual Report (2020) at 69-86, available at <https://www.odpp.go.ke/downloads/> (visited 23 January 2022).

116 See reported case, available at www.kenyalaw.org (visited 4 January 2022).

117 See narrative, available at <https://bit.ly/3mhwDuv> (visited 4 January 2022); Mugambi H “Mara Heist: Expect Arrests Any Time Soon, DCI Detectives Reveal” *Citizen Digital* 3 September 2019.

118 See Eric Wainaina’s “*Nchi ya Kitu Kidogo*”, music video, available at <https://www.youtube.com/watch?v=7ZxRIYsb8ks> (visited 23 January 2022). See also commentary on UNODC website regarding Eric Wainaina’s music, available at <https://bit.ly/3jHRW6V> (visited 23 January 2022); Muli D “Eric Wainaina slams corrupt leaders in hard hitting jam” *The Standard* 26 October 2020.

for a bribe solicited by police.¹¹⁹ He condemns judicial, police and health sector corruption and tells Kenyans that a country of bribes is a country of small-minded people. In 2001, while Wainaina was singing the song at a national schools music festival, in front of the then vice-president, George Saitoti, organisers tried to stop his performance.¹²⁰

The religious sector of Kenyan society has joined in practical anti-corruption interventions. The Kenya Conference of Catholic Bishops in May 2019 issued a press statement acknowledging that corruption was a way of life in Kenya.¹²¹ Observing the monumental levels of corruption in Kenya, it classified the situation as a national disaster.¹²² The bishops subsequently called upon Kenyan citizens to fight corruption.¹²³ In fact, they called upon their laity to reject corrupt practices, premising their sentiment on Biblical references and the values of the Constitution.¹²⁴ Further, they invited the laity to append signatures to any anti-corruption initiatives when called upon to do so.¹²⁵

In October 2019, the Catholic Church took practical steps and launched a six-month anti-corruption drive, likening these steps to the Biblical David-and-Goliath story.¹²⁶ The clergy announced that corruption desks would be opened in all Catholic churches within Kenya in order to track cases reported by the public.¹²⁷ Additionally, they took pragmatic anti-corruption steps, such as barring direct cash donations by politicians to churches and only accepting cash

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- 119 See Eric Wainaina's "*Nchi ya Kitu Kidogo*", music video, available at <https://www.youtube.com/watch?v=7ZxRIYsb8ks> (visited 23 January 2021); See commentary on Eric Wainaina's music, available at <https://bit.ly/3jHRW6V> (visited 23 January 2022).
- 120 Lacey M "Nairobi Journal; A Song About Corruption Takes Kenya by Storm" *New York Times* 6 September 2001; Matheson I "Kenyans dance against graft" *BBC News* 18 September 2001.
- 121 See press statement, available at <http://www.kccb.or.ke/home/wp-content/uploads/2019/05/Bishops-Press-Statement-May-2019-1.pdf> (visited 29 December 2021).
- 122 See press statement available at <http://www.kccb.or.ke/home/wp-content/uploads/2019/05/Bishops-Press-Statement-May-2019-1.pdf> (visited 29 December 2021).
- 123 See press statement, available at <http://www.kccb.or.ke/home/wp-content/uploads/2019/05/Bishops-Press-Statement-May-2019-1.pdf> (visited 29 December 2021).
- 124 See press statement, available at <http://www.kccb.or.ke/home/wp-content/uploads/2019/05/Bishops-Press-Statement-May-2019-1.pdf> (visited 29 December 2021).
- 125 See press statement, available at <http://www.kccb.or.ke/home/wp-content/uploads/2019/05/Bishops-Press-Statement-May-2019-1.pdf> (visited 29 December 2021).
- 126 Mureithi F "Catholic Church starts drive to break Kenya's graft chain" *The East African* 6 October 2019; Ombati C "EACC lauds Catholic bishops' ban on huge cash donations in churches" *The Standard* 6 October 2019.
- 127 Mureithi (6 October 2019); Ombati (6 Oct 2019).

which had adequate paper trail.¹²⁸ They encouraged cashless donations and transparency in the handling of donations and gifts to the church and clergy.¹²⁹ The EACC hailed the move to ban huge cash donations to churches, as some politicians were channeling their ill-gotten money to religious organisations.¹³⁰

2.7 Examples of Citizen Engagement in Anti-Corruption using Technology

Transparency International, while advocating for citizen engagement in Kenya (and South Africa), recognises the crucial role played by mobile technology and social media in stimulating public dialogue around venality.¹³¹ Further, technology facilitates access to information, as demonstrated by Kenyan government officials who take to social media to engage with the public.¹³² Such access to information can lead to scrutiny of government processes or documents by citizens and, where corruption offences occur, necessary detection and disruption.

The internet is being used successfully in India by *Janaagraha*, a non-profit organisation.¹³³ One of *Janaagraha's* initiatives, IPaidABribe.com, seeks to curb corruption in India and the world through crowdsourcing.¹³⁴ This website mainly deals with everyday petty corruption which confronts citizens as they seek public services.¹³⁵ The internet-based platform views citizens as powerful change agents in their society, thus empowering them to report instances of corruption in their daily lives. IPaidABribe.com provides a space for citizens to provide data, such as the number of bribes reported, payment or non-payment of bribes and the amount of money involved.¹³⁶ The output of the reports constitutes an anti-corruption

128 Mureithi (6 October 2019); Ombati (6 Oct 2019).

129 Mureithi (6 October 2019); Ombati (6 October 2019).

130 See EACC website, available at www.eacc.go.ke (visited 4 January 2022); Ombati (6 Oct 2019).

131 See <https://www.transparency.org/cpi2018> (visited 4 January 2022); Relly JE (2012) "Examining a model of vertical accountability: A cross-national study of the influence of information access on the control of corruption" 29(3) *Government Information Quarterly* at 341.

132 See <https://www.transparency.org/cpi2018> (visited 4 January 2022). See also Twitter handle for Kenya's Cabinet Secretary for Ministry of Interior & Coordination of National Government, available at <https://bit.ly/3nChztk> (visited 4 January 2022).

133 See IPaidABribe.com website, available at www.ipaidabribe.com (visited 4 January 2022); Verdenicci & Hough (2015) at 29.

134 See <http://www.ipaidabribe.com> (visited 4 January 2022).

135 See www.ipaidabribe.com (visited 4 January 2022).

136 See www.ipaidabribe.com (visited 4 January 2022).

intervention and awareness creation.¹³⁷ The website forwards the reports to government officials and the media.

In China, *Weibo*, a major microblogging website akin to Twitter, plays an important role in fighting corruption.¹³⁸ The use of *Weibo* by Chinese citizens to fight corruption led to the 2013 conviction of a government official, Yang Dacai, popularly known as “Brother Watch”. Yang Dacai was pictured at the scene of a fatal accident grinning and wearing an expensive watch. The outrage following the initial photograph led to *Weibo* users posting various photographs of the official wearing different luxury watches, such as Bvlgari, Omega and Rolex.¹³⁹ The Chinese netizens queried how he afforded his luxury watches on his meagre salary. This internet exposure prompted a probe into his inexplicable wealth, which ultimately led to his being sentenced to 14 years’ imprisonment on unexplained wealth and bribery charges.¹⁴⁰ The use of the internet through *Weibo* became an effective way of holding public officials accountable and demanding transparency as to their sources of wealth. The “Brother Watch” episode underscores the power of citizens engaging in anti-corruption activities using technology.¹⁴¹

Twitter is a microblogging service enabling users to send messages. One of the common features of Twitter is the use of hashtags (words or phrases preceded by the symbol #).¹⁴² Hashtags are useful in setting parameters that enable Twitter users to assemble around a topic that can lead to its trending on the internet.¹⁴³ Some Kenyans are such avid users of Twitter that there is actually a name for Kenyan tweeters. They are known as KOT (Kenyans on Twitter). The KOT community is described by Ogola as a public whose conversations revolve

137 Verdenicci & Hough (2015) at 29.

138 Feng D & Wu X (2018) “Weibo interaction in the Discourse of Internet Anti-Corruption: The Case of “Brother Watch” Event, 24 *Discourse, Context & Media* at 99-100.

139 Ferry L & Eckersley P (2014) “Accountability and Transparency: A Nuanced Response to Etzioni” 75(1) *Public Adm Rev* at 11; Blanchard B & Duncan M “China’s grinning and corrupt ‘watch brother’ gets time” *Reuters* 5 September 2013.

140 Ferry & Eckersley (2014) at 11; Blanchard & Duncan (5 September 2013).

141 Ferry & Eckersley (2014) at 11.

142 Tully M & Ekdale B (2014) “Sites of Playful Engagement: Twitter Hashtags as Spaces of Leisure and Development in Kenya” (10)3 *ICTs for Leisure in Development* at 68.

143 Tully & Ekdale (2014) at 68.

around Kenya.¹⁴⁴ KOT has been known to scale up socio-political issues on Twitter, such as uniting against perceived official corruption.¹⁴⁵

In 2015, Boniface Mwangi, an activist, launched the “Knock Out Corruption” campaign.¹⁴⁶ The campaign was intended to mobilise Kenyans to fight corruption by demanding wealth declarations from public officials and by mounting pressure on said officials to fight corruption.¹⁴⁷ Alongside puppet shows and street protests (which ended up in arrests), there was an online campaign via Twitter #KnockOutCorruption which sustained anti-corruption sentiment amongst ordinary citizens by use of retweets.¹⁴⁸ Additionally, the organisers of the protest imposed boxing gloves on images of public officials, including the then Chief Justice Willy Mutunga, as a symbol of empowering them to fight corruption.¹⁴⁹ The Chief Justice promised not only to “knock out corruption” but also to disclose his wealth.¹⁵⁰ In fact, the Chief Justice retweeted his glove-wearing photographs and hashtag of the campaign on his Twitter handle, describing it as a “laudable citizen push” against corruption.¹⁵¹ Subsequently, the Chief Justice and certain public officials publicly declared their wealth.¹⁵²

Government websites are technology compliant and also have social media pages. The website of the EACC, for instance, provides for an anonymous whistleblower mechanism.¹⁵³ Additionally, the EACC is tagged in various complaints by social media users, for example KOT,

144 Ogola G (2019) “#Whatwouldmagufulido? Kenya’s digital “practices” and “individuation” as a (non)political act” 13(1) *Journal of Eastern African Studies* at 127.

145 Ogola (2019) at 127; Tully & Ekdale (2014) at 67.

146 Khalid H & Thompson TP (2019) “Conflict Prevention in Kenya: Combating Corruption through Nonviolent Action” at 7-8.

147 Khalid & Thompson (2019) at 7-8.

148 See hashtag tweets, available at https://twitter.com/hashtag/KnockOutCorruption?src=hashtag_click (visited 23 January 2022); <https://twitter.com/ntvkenya/status/672834714043043841> (visited 27 October 2021); See also <https://bit.ly/312tpTn> (visited 23 January 2022).

149 Khalid & Thompson (2019) at 8.

150 Khalid & Thompson (2019) at 9.

151 See CJ Mutunga’s tweet, available at <https://twitter.com/WMutunga/status/671668533735108608> (visited 23 January 2022).

152 Khalid & Thompson (2019) at 9; Ngechu W “CJ Willy Mutunga Declares His Wealth, Says He Is Worth Ksh 80M” *Citizen Digital* 7 April 2016.

153 See EACC website, available at www.eacc.go.ke (visited 4 January 2022).

to highlight instances of corruption. Other state websites also provide channels for reporting corruption.¹⁵⁴

From the foregoing, the expediency of technology and social media in increasing citizen engagement in anti-corruption is evident, the more so in the 21st century.

2.8 Conclusion

Kenya has a long history of cyclical corruption which manifests mostly as grand corruption across the different presidential periods. There have been various anti-corruption interventions that were state-initiated, such as legislation and institutional arrangements. Some of these interventions succeeded while others bore no fruit. The development of anti-corruption laws is the culmination of both state and citizen efforts in fighting corruption.

Citizen engagement in anti-corruption strategies requires active citizen participation in government processes and projects so that citizens can detect and disrupt corruption. Access to information and whistleblowing laws are crucial in determining the level of engagement by citizens. The role of mobile technology and the internet in anti-corruption initiatives cannot be gainsaid. Accordingly, freedom of expression is important if there is to be internet-mediated anti-corruption interventions by citizens.

Citizens engage in anti-corruption strategies as a result of frustration borne out of social and economic injustice. When empowered, citizens can form a formidable front, individually and collectively, in fighting corruption. The traditional rule-based approach of fighting corruption thus should be expanded to become more citizen-centric.

154 See Ministry of Education website, available at <http://www.education.go.ke> (visited 4 January 2022).

CHAPTER THREE

CITIZEN-CENTRED ANTI-CORRUPTION FRAMEWORK

3.1 Introduction

It has been contended that law serves people for, in its absence, anarchy rules and the “life of man is solitary, poor, nasty, brutish and short”.¹ In this regard, Atiyah views law as an instrument for the attainment of social purposes, which purposes are for the people who make and enforce it.² Such insight is important in determining whether Kenyan anti-corruption laws, especially in the context of citizen anti-corruption engagement, are “not mere theory, but living force”.³

The persistent nature of corruption in Kenya makes it imperative to explore novel anti-corruption strategies. Citizens can engage in anti-corruption initiatives when their efforts conform to existing laws, policies and institutions.⁴ This chapter analyses the existing anti-corruption legal (including international and regional instruments), institutional and policy framework to determine whether indeed they are citizen-centric.

3.2 International Legal Framework

This section discusses the international and continental responses to the scourge of corruption by analysing the United Nations Convention against Corruption and the African Union Convention on Preventing and Combating Corruption.

3.2.1 United Nations Convention against Corruption

The United Nations Convention against Corruption (UNCAC) criminalises different manifestations of corruption and, notably, has chapters dedicated to prevention and asset

1 Laird J (1968) *Hobbes* at 186.

2 Atiya PS (1983) *Law and Modern Society* at 74; Ocheje PD (2011) “When Law Fails: A Theory of Self-Enforcing Anti-Corruption Legislation in Africa” 4(3) *The Law and Development Review* at 238; KLRC (2015) at 14.

3 Jhering R (1915) *The Struggle for Law* (2ed) at 2.

4 Sandgren (2005) at 726.

recovery.⁵ Kenya was in fact the first country to sign and ratify UNCAC on 9 December 2003 in Merida, Mexico.⁶ This instrument therefore forms part of the law guiding anti-corruption strategies in Kenya, as per Article 2(6) of the Constitution of Kenya regarding treaty laws.

The United Nations Convention against Corruption advocates an extensive and multi-disciplinary approach to combating corruption.⁷ Accordingly, it encourages involvement of individuals and non-state actors.⁸ It recognises the paramount role of citizens in fighting corruption. Chapter II of UNCAC sets out preventive measures for combating corruption.⁹ It requires a state party to establish anti-corruption preventive policies which promote the participation of society, the rule of law and prudent management of public affairs and property.¹⁰ Additionally, the policies should reflect integrity, transparency and accountability.¹¹ The inclusion of participation of society in this mandatory provision demonstrates that citizens should not be mere recipients of laws and policies but also need to be at the centre of their crafting and implementation.¹²

The requirement for the establishment of anti-corruption bodies charged with preventing corruption underscores the importance which UNCAC attaches to prevention.¹³ These bodies are required to disseminate knowledge concerning the prevention of corruption. It is such knowledge that empowers citizens to prevent incidents of corruption. This provision thus favours citizen engagement.

Article 9 of UNCAC obligates states parties to ensure that their procurement systems are transparent, competitive and based on impartial decision-making. Public procurement is an area that is especially susceptible to corruption. In fact, most corruption cases involve members

5 Chapters II, III, V of UNCAC; Article 3 UNCAC.

6 Githu Task Force Report (2015) at 34 & 198; UNCAC Kenya Review Report (2019) at 2.

7 Paragraph 5 of the Preamble to UNCAC.

8 Paragraph 10 of the Preamble to UNCAC.

9 Article 5(2) & (3) of UNCAC.

10 Article 5(1) of UNCAC.

11 Article 5(1) of UNCAC.

12 KLRC (2015) at 11 & 13.

13 Article 6(1) of UNCAC.

of tender committees charged with procurement-related offences.¹⁴ Article 9 also envisages systems that will ensure public distribution of information relating to procurement procedures.¹⁵ Procurement systems are required to establish and publish, in advance, conditions for participation, including selection criteria, tendering rules and mechanisms for review and appeal.¹⁶ These obligations enable citizens not only to participate meaningfully in procurement proceedings but also to pre-empt potentially corrupt dealings.

Article 9(2) of UNCAC obligates a state party to ensure transparency and accountability in public finances, including timely reporting on revenue and expenditure, with sanctions for non-adherence.¹⁷ Kenya's Auditor-General has in the past unveiled the depth of corruption in the public sector and it is submitted that such reporting can encourage citizens to agitate for reforms and prosecution of corrupt public officials.¹⁸

Article 10 provides for public reporting to enhance transparency in public administration. Additionally, a state party is required to simplify public access to the decision-making authorities and publish, *inter alia*, periodic reports on corruption risks.¹⁹ Some public bodies, for example, post press releases or have an email feedback system for all queries on their websites.²⁰ Such actions empower the citizen with knowledge to detect and report corruption.

UNCAC provides also for private sector prevention.²¹ States parties are required to ensure that accounting and auditing standards in the private sector are enhanced, with sanctions for non-compliance. Citizens are part of the private sector and ought to fight corruption by preventing it in their dealings as well as blowing the whistle when they encounter

14 See, for example, *Republic v Henry Rotich & 2 Others* [2019] eKLR; *Republic v Lilian Mbogo Omollo & 43 others* [2018] eKLR. See ODPP high-profile corruption and economic crime cases registered as at November 2021 at 3,5,7 &10, available at <https://bit.ly/3GTv4uI> (visited 23 January 2022).

15 Article 9(1)(a) of UNCAC.

16 Article 9(1)(b) &(d) of UNCAC.

17 Article 9(2)(a)(b)(e) of UNCAC.

18 Githu Task Force Report (2015) at xviii & 8; Fick M "Kenya corruption threatens to engulf government, auditor general says" *Reuters* 14 June 2018.

19 Article 10(b)(c) of UNCAC.

20 See Kenya's Ministry of Education website, available at <http://www.education.go.ke/> (visited 23 January 2022).

21 Article 12 of UNCAC.

corrupt conduct. The private sector in Kenya is implicated in most of the mega-scandals and its members have colluded with public officials to loot the public coffers. Indeed, current high-profile cases being prosecuted by the ODPP involve the private sector as part of the axis of corruption.²² The conviction of a businessman in *ACC No.13/2016 R vs Catherine Akello Namuye (CEO) (Deceased), Bruce Odhiambo (Deceased) & Others*, by the Anti-Corruption Court in September 2021 for his role in defrauding the Youth Enterprise Development Fund of Kshs. 180,894,946/= (approximately USD1,592,895.59), using his company, attests to citizens as part of private sector, being complicit in corruption scandals.²³

Citizen engagement in anti-corruption is captured expressly in Article 13 of UNCAC, which provides for participation of society as a preventive mechanism. UNCAC imposes a hortatory obligation upon states parties to promote active participation of individuals and non-state actors in the fight against corruption.²⁴ Additionally, states parties are required to raise awareness regarding the existence, causes and magnitude of corruption.²⁵ Such awareness potentially can galvanise citizens into action. Further, UNCAC advocates participation of society in decision-making processes.²⁶ It is contended that such participation lowers the opportunity for corruption as parties are more transparent and there is demand for accountability from the citizens.

Public access to information is crucial because of the secrecy surrounding corruption.²⁷ Access to information leads to citizens spotting potentially corrupt acts and reporting them. Such a provision also has a deterrent effect on potentially corrupt individuals.²⁸ Public information exercises, such as inclusion of anti-corruption education in school curricula,

22 See press statement by DPP Noordin Haji (6 September 2019), in which he declared that directors of a company tasked with the construction of a mall for the Lake Basin Development Authority would be charged with corruption-related offences. The statement, is available at https://twitter.com/ODPP_KE (visited 4 January 2022). See also, ODPP high-profile corruption and economic crime cases registered as at November 2021 at 3,5,7 7 10, available at <https://bit.ly/3GTv4uI> (visited 23 January 2022).

23 See ODPP Kenya's twitter handle <https://bit.ly/3iHRW6V> (visited 22 January 2022); Onsongo (30 September 2021).

24 Article 13(1) of UNCAC.

25 Article 13(1) of UNCAC.

26 Article 13(1)(a) of UNCAC.

27 Article 13(1)(b) of UNCAC.

28 Saryazdi (2008) at 38.

contribute to young citizens preventing corruption.²⁹ Knowledge is power and people empowered from an early age are potent agents who can bring a change to anti-corruption narratives.³⁰

The participation of society, as expected by UNCAC, includes respecting, protecting and promoting the freedom to seek, receive, publish and disseminate information concerning corruption, subject to respecting the rights and reputations of other people.³¹ Citizens who take time to peruse wealth declarations of public officers (if accessible) can detect and report any inconsistencies in the information declared. Citizens can fight corruption if they know where to report offences. Hence UNCAC requires states parties to ensure that the public knows of and have access to the relevant anti-corruption agencies.³² Additionally, UNCAC advocates that such agencies have a mechanism for anonymous reporting of corruption.³³

Article 13 generally serves to activate citizen engagement in anti-corruption interventions. UNCAC, however, takes note that states parties are resourced differently and thus limits this clause to what a state party can afford. This, however, does not diminish the importance of citizens in fighting corruption. If they are empowered, they can become one of the best anti-corruption resources.

Chapter III of UNCAC establishes several corruption offences, including bribery, embezzlement, abuse of functions, obstruction of justice and concealment. Such criminalisation enables citizens to identify and combat corrupt acts in accordance with Kenyan law. Criminalisation also leads to prosecutions and convictions, which can be aided by citizens when they report offences and testify in cases. Ultimately, successful prosecutions can have a deterrent effect on society.

29 Article 13(1)(c) of UNCAC.

30 Bajraktari (2016) at 4.

31 Article 13(1)(d) of UNCAC.

32 See the EACC website, available at www.eacc.go.ke which displays its physical address and contact details of social media accounts, hotline numbers and email details (visited 4 January 2022).

33 Article 13(2) of UNCAC. See the EACC website at www.eacc.go.ke which has an anonymous reporting mechanism (visited 4 January 2022).

UNCAC establishes witness protection for victims, witnesses and experts.³⁴ This witness protection clause is important as it inspires confidence in citizens to come forward and report cases of corruption without fear of intimidation or reprisals. Also, victim impact statements are provided for in corruption trials.³⁵ They include possible redress for victims and can motivate citizens to report acts of corruption. This law resonates with realities of citizens who long have been victims of corruption, including those who for instance, may have lost their land through corrupt and fraudulent means.

One of the laudable features of UNCAC is asset recovery, to which Chapter V is devoted. Asset recovery is crucial for Africa, which routinely has been stripped of its assets by nefarious and avaricious leaders.³⁶ The possibilities that come with the return of assets to a country should inspire citizens to fight corruption as they will be driving an important process in the economic recovery and prosperity of their nation. Further, Article 57 provides for the return of confiscated assets to their prior legitimate owners, a good reason for an aggrieved citizen to engage personally in anti-corruption activities.

3.2.2 African Union Convention on Preventing and Combating Corruption

The African Union Convention on Preventing and Combating Corruption (AUCPACC) is the Continent's response to corruption. It recognises the impact of the nexus between corruption and impunity on the general stability of Africa.³⁷ AUCPACC also acknowledges the corrosive effect of corruption on transparent management of public affairs, as well as on socio-economic development in Africa.³⁸ Like UNCAC, AUCPACC recognises the importance of ordinary citizens in fighting corruption and identifies the importance of governments partnering with all segments of civil society, including women and youth.³⁹ Kenya is a state party to AUCPACC, having signed it in July 2003 and ratified it in February 2007.⁴⁰

34 Article 32(1) of UNCAC.

35 Article 32(5) of UNCAC.

36 Mbeki Report (2015) at 46 & 63.

37 Paragraph 6 of the Preamble to AUCPACC.

38 Paragraph 7 of the Preamble to AUCPACC.

39 Paragraph 10 of the Preamble to AUCPACC.

40 See Githu Task Force Report (2015) at 34 & 123; UNCAC Kenya Review Report (2019) at 20.

Most of the UNCAC provisions regarding criminalisation are replicated in AUCPACC and include bribery in the public and private sectors, illicit enrichment, concealment, money laundering and diversion.⁴¹ Regarding citizens participating in anti-corruption mechanisms, AUCPACC, like UNCAC, provides for whistleblower protection through legislative measures.⁴² AUCPACC also recognises that some citizens can undermine anti-corruption interventions by making false and malicious reports against innocent persons and urges states parties to put sanctions in place for such false reporting.⁴³ This clause sets a high standard for reporting and investigation of corruption and is ideal in jurisdictions that provide for relator suits.

AUCPACC underscores the importance of public education on corruption and related offences.⁴⁴ This Convention echoes UNCAC in advocating public awareness and the inculcation of ethics into anti-corruption matters via school educational programmes, the media and the like.⁴⁵ The AUCPACC obligates states parties to combat corruption by popularising the Convention through engagement with the media and civil society.⁴⁶ Further, states parties are required to create an enabling environment for the media and civil society to hold their governments accountable in the management of public affairs.⁴⁷ Finally, this Convention ensures that states parties safeguard the media's access to information in cases of corruption, as long as such access does not jeopardise investigations or the right to a fair trial.⁴⁸ AUCPACC thus regards the media and civil society as integral components of anti-corruption strategies, as both sectors interact with the citizenry at large and, by their influence, can promote the fight against corruption.

41 Articles 4 & 6 of AUCPACC; UNCAC Kenya Review Report (2019) at 20.

42 Article 5(5) of AUCPACC.

43 Article 5(7) of AUCPACC.

44 Article 5(8) of AUCPACC.

45 Article 5(8) of AUCPACC; Article 13(1)(c) of UNCAC.

46 Article 12(1) of AUCPACC.

47 Article 12(2) of AUCPACC.

48 Article 12(4) of AUCPACC.

3.3 Domestic Legal Framework

Kenya is a sovereign republic and a constitutional democracy.⁴⁹ Accordingly, all sovereign power belongs to Kenyans and ought to be exercised in accordance with the Constitution.⁵⁰ Such power is exercised by Kenyans directly or through their elected representatives at national and county levels.⁵¹ As it is the supreme law in Kenya that binds all persons, everyone is mandated to uphold the Constitution.⁵² The law, policies and institutions regarding anti-corruption thus should flow from the spirit of the Constitution of Kenya. An analysis is undertaken below of the current anti-corruption legal, institutional and policy framework that may stimulate citizen engagement in Kenya.

3.3.2 Constitution of Kenya

At the helm of anti-corruption legislation is the Constitution of Kenya.⁵³ From it flow national values and principles which underpin governance in Kenya.⁵⁴ Key amongst these values and principles are good governance, transparency and accountability. Others include national unity, devolution of power, rule of law and participation of the people.⁵⁵ The application, interpretation and enactment of laws and policies by state organs, state and public officers, and any other person thus should be guided by the national values and principles contemplated in the Constitution.⁵⁶

The Constitution protects the freedom to seek, receive or impart information or ideas, as long as the rights of others are not jeopardised.⁵⁷ Freedom of expression is essential to stimulate citizens to engage in anti-corruption activism, for example, through social media.⁵⁸ Article 35 safeguards citizens' access to information held by the state or any person. The prevalence of corruption in the public sector creates a need for citizen access to information on

49 Article 4(1) & Article 4(2) of the Constitution of Kenya.

50 Article 1(1) of the Constitution of Kenya.

51 Article 1(2) & Article 1(4)(a)(b) of the Constitution of Kenya.

52 Article 2(1) & Article 3(1) of the Constitution of Kenya.

53 EACC National Ethics and Corruption Survey (2018) at 2.

54 Article 10 of the Constitution of Kenya.

55 Article 10(2)(a) of the Constitution of Kenya.

56 Article 10(1)(a)(b)(c) of the Constitution of Kenya.

57 Article 32(1)(a) & Article 32(3) of the Constitution of Kenya.

58 Cheong & Gong (2010) at 471-472.

public affairs so that citizens may report occurrences of corruption. The Constitution stimulates citizen engagement in fighting corruption when it declares that national values and principles guide all aspects of public finance in Kenya.⁵⁹ Hence, when citizens are excluded from matters regarding public finance they can protest such exclusion and require transparency and participation to prevent or disrupt corrupt acts.

Kenya has a devolved system of governance with 47 counties.⁶⁰ The objects of devolution include promoting democratic and accountable exercise of power and empowering people to self-govern and participate in decision-making.⁶¹ Devolution thus reflects the spirit of *Ubuntu* as well as of Article 21(1) of the UDHR and Article 13(1) of the ACPHR as regards participation of citizens in their government. Regrettably, corruption has been “devolved” to the counties also and it is imperative that citizens actively engage in anti-corruption projects at the county level.⁶² The fact that citizens are required to participate in their county governments implies that they “buy-in” to fight corruption on their doorstep.

The Constitution highlights the value of integrity in the nation by dedicating Chapter Six to matters of leadership and integrity.⁶³ In fact, this chapter describes authority assigned to a state officer as a public trust that should denote respect for the people and serve the people rather than rule them.⁶⁴ Accordingly, state officers are accountable to the people for their decisions and actions, and must declare any conflict of interests between their personal and public duties.⁶⁵ If they abdicate their role, they become liable to disciplinary procedures or removal from office, with subsequent debarment from holding a state office.⁶⁶ Such high standards should encourage every citizen to aspire to be a leader who advocates integrity, and

59 Article 201 of the Constitution of Kenya.

60 Article 1(4)(a)(b) of the Constitution of Kenya.

61 Article 174(a)(c) of the Constitution of Kenya.

62 The EACC Annual Report 2017/2018 at 8-12 outlines county cases of corruption-related offences. See also Transparency International-Kenya County Governance Status Report (2016) at 33; Githu Task Force Report (2015) at 88 & 89; BBI Report (2019) at 80.

63 Chapter Six of the Constitution of Kenya spans Articles 73 to 80.

64 Article 73(1) of the Constitution of Kenya.

65 Article 73(2) & Article 75(1) of the Constitution of Kenya.

66 Article 75(2)(3) of the Constitution of Kenya.

also exhort every citizen to choose leaders who are not corrupt and, where such leaders deviate, to invoke the provisions of Chapter Six of the Constitution against them.

3.3.3 Leadership and Integrity Act, 2012

This Act operationalises Chapter Six of the Kenyan Constitution regarding the values and principles of leadership for state officers. A citizen can engage in anti-corruption by complaining against an offending state officer under section 42 and is entitled to feedback on action taken and to be accorded a hearing.⁶⁷

3.3.4 Anti-Corruption and Economic Crimes Act, 2003

The Anti-Corruption and Economic Crimes Act (ACECA) provides for the prevention, investigation and punishment of corruption, economic crime and related offences.⁶⁸ The fact that a law exists solely to deter corruption is a basis for citizens to engage in anti-corruption action. In fact, when citizens come to the knowledge that certain acts constitute corruption offences, they are empowered to report them to the anti-corruption agencies.⁶⁹ ACECA contains a list of acts which constitute corruption, such as bribery, fraud, embezzlement of public funds, breach of trust and offences involving dishonesty regarding taxes or elections.⁷⁰

ACECA provides for special courts to deal with corruption, which provision demonstrates that the judiciary can adjudicate corruption cases expeditiously and, overall, combat corruption.⁷¹ One of the sentencing outcomes in corruption cases is compensation to a rightful owner who has suffered as a result of the corrupt conduct.⁷² This clause can have a direct impact on a corruption victim who participates in anti-corruption strategies. Reporting or testifying on corruption thus places the citizen at the centre of anti-corruption mechanisms, as a driver to set anti-corruption laws in motion.⁷³

67 Section 42(5) of the Leadership and Integrity Act.

68 ACECA repealed POCA in 2003.

69 Chapter V of ACECA.

70 Section 2(1) of ACECA.

71 Part II of ACECA. See also Anti-Corruption and Economic Crimes Division established in the High Court vide Gazette Notice No.9123, available at <https://bit.ly/3qQKwCe> (visited 23 January 2022).

72 Part VI of ACECA.

73 Cotterrell R (1984) *The Sociology of Law: An Introduction* at 57.

A citizen can engage in anti-corruption by reporting public officers who have inexplicable wealth disproportionate to their known income. Wealth declarations and lifestyle audits are key tools in assisting citizens to counter illicit enrichment by public officers. Reports by vigilant citizens of suspicions of unexplained wealth may lead to investigations, which might activate section 55 of ACECA on the forfeiture of unexplained wealth.

ACECA provides for the suspension of public and state officers charged with corruption, until the conclusion of the case within twenty-four months.⁷⁴ This provision can stimulate citizens to fight corruption as it stops the suspects from perpetuating their immoral activities. In *Moses Kasaine Lenolkulal v Director of Public Prosecutions*, Justice Mumbi Ngugi enunciated thus:

In the matter before me, the Governor of a County, to whom Article 10 and Chapter Six apply is charged with the offence of abuse of office. He is charged with basically enriching himself at the expense of the people of Samburu County who elected him and whom he is expected to serve. Would it serve the public interest for him to go back to office and preside over the finances of the County that he has been charged with embezzling from? What message does it send to the citizen if their leaders are charged with serious corruption offences, and are in office the following day, overseeing the affairs of the institution? How effective will prosecution of such state officers be, when their subordinates, who are likely to be witnesses, are under the direct control of the indicted officer?⁷⁵

A citizen should not fear reprisals when disclosing information during the investigation or prosecution of a corruption case.⁷⁶ Section 65 of ACECA provides for the protection of informers from any proceeding resulting from their disclosure of information and provides for redaction of their identifying information during hearings. This provision is cognisant of the secret nature of corrupt dealings and comprehends that those who come across material information linking a suspect to a crime might be close associates or workmates who need protection.

74 Section 62 of ACECA.

75 See reported ruling on revision, available at <http://www.kenyalaw.org> (visited 5 January 2022).

76 Nsereko DDN & Kebonang Z (2005) *The SADC Protocol against Corruption: Example of the Region's Response to an International Scourge 1 University of Botswana Law Journal* at 98.

3.3.5 Bribery Act, 2016

This Act provides for the prevention, investigation and punishment of bribery. Further, it applies to the public, to public officers and to private entities and is enforced by the EACC.⁷⁷

There is an obligation imposed on public and private entities to put in place procedures for the prevention of bribery, with stiff penalties for non-adherence.⁷⁸ Such an obligation is particularly useful as it extends to the private sector, wherein many citizens engage, situating them optimally to fight bribery.

Part V of the Act provides for stiff deterrent penalties, which may stimulate citizens to report cases of bribery involving public and private entities. The barring of convicted persons from directorships and partnerships or from state and public office for ten years provides a sustained deterrent mechanism that aids anti-corruption efforts.⁷⁹

Protection by the Witness Protection Agency of a citizen who is a whistleblower or witness in bribery cases is provided for in Section 21 of the Act. Further, disclosure of information relating to informants and witnesses that results in their intimidation is an offence, attracting a fine of 1 000 000 Kenya Shillings (approximately USD 8838.00) or imprisonment of a year.⁸⁰ The Bribery Act evidently is cognisant of witness intimidation and seeks to redress it by providing for protection.

3.3.6 Public Procurement and Asset Disposal Act, 2015

The Public Procurement and Asset Disposal Act (PPDA) applies to all public entities as regards procurement planning, processing, asset management, asset disposal and contract management.⁸¹ Some of the guiding principles underpinning the PPDA include maximisation of value for money and promotion of local industry and of citizen contractors.⁸² These principles are significant, as public procurement provides an interface where the ordinary citizen does

77 Sections 3 & 4 of the Bribery Act.
78 Sections 9 & 19 of the Bribery Act.
79 Section 18 of the Bribery Act.
80 Section 21(1), (2) & (5) of the Bribery Act.
81 Section 4 of the PPDA.
82 Section 3 of the PPDA.

business with the government and opportunities abound for corruption, as evidenced by the myriad of procurement-related cases in Kenya.⁸³

Inappropriate influence on evaluations of tenders constitutes an offence and leads to disqualification of the tenderer and disciplinary action against the public officer involved.⁸⁴ This clause supports anti-corruption interventions and is dependent on whistleblowing, as corrupt practices mostly are conducted in secret.

Section 66 of the PPDA prohibits corruption-related and fraudulent practices in any procurement or asset disposal proceeding. Accordingly, a person who contravenes this provision commits an offence and is disqualified from entering a contract, and contracts entered into under such circumstances become voidable. This sentiment was voiced in the 2006 case of *World Duty Free Co Ltd v Republic of Kenya*, in which the tribunal held that the claimant could not enforce any right under a contract procured through a bribe.⁸⁵

3.3.7 Public Audit Act, 2015

This Act establishes the Office of the Auditor-General which, *inter alia*, audits activities in public entities to confirm whether public money has been applied lawfully and efficiently.⁸⁶ Section 72 of this Act establishes the public's right of access to official reports of the Auditor-General. The citizenry, therefore, can monitor public expenditure through such reports and demand accountability and action where corruption has occurred. In fact, the Office of the Auditor-General has been instrumental in forwarding most corruption cases to the EACC.⁸⁷ Thus, citizens can counter corruption by engaging with the reports of the Auditor-General and identifying potential risk areas to prevent future corruption.

83 See ODPP press statements, available at www.odpp.go.ke (visited 26 October 2021); See matrix of concluded corruption cases with convictions in ODPP Annual Report (2020) at 69-86, available at <https://www.odpp.go.ke/downloads/> (visited 23 January 2022); See ODPP's report of high-profile corruption and economic crime cases registered in court as at 2021 at 3,5,7 & 10, available at <https://bit.ly/3jHRW6V> (visited 22 January 2022); EACC National Ethics and Corruption Survey (2018) at 63.

84 Section 65 of the PPDA.

85 *ICSID Case No ARB/00/7*, available at www.italaw.com (visited 23 January 2022). See also Githu Task Force Report (2015) at 120.

86 Sections 4 & 7(b) of the Public Audit Act.

87 UNCAC Kenya Review Report (2019) at 116.

3.3.8 Access to Information Act, 2016

This Act derives its mandate from Article 35 of the Constitution of Kenya, which enshrines the right of access to information by citizens.⁸⁸ Further, it provides a structure for the pro-active disclosure of information held by public and private entities.⁸⁹ Under Section 5(2) of the Act, public entities are required to disseminate information in a local language, using the most common mode of communication in the area and with due regard for persons with disabilities. Where information related to possible corruption is required, a citizen from any part of Kenya should be able to access it in a manner that he or she understands, and appropriate action can commence. Access to information, combined with participation, has been extolled as a crucial aspect in receptiveness and quality of public services, such as in county governments.⁹⁰

Access to information is vital if citizens are to fight corruption, as evidence of unethical behaviour often is shrouded in mystery.⁹¹ Further, only informed citizens are able to engage in anti-corruption activities.⁹² Where corrupt people are aware that citizens enjoy access to vital documents, such as assets declarations, they may be demotivated to enrich themselves illicitly.

3.3.9 County Governments Act, 2012

In line with the Constitution of Kenya, one of the objects of devolution is to enhance the participation of the people in decision-making processes.⁹³

Section 88 of the County Governments Act empowers citizens to petition the county government on any matter that falls within its ambit. Section 89 imposes upon the county government the duty to respond expeditiously to citizens' petitions and challenges. Section 91 provides for the establishment of structures for citizen participation, such as information communication technology-based platforms, town hall meetings, noticeboards and citizen fora.

88 Section 3(a) of the Access to Information Act.

89 Section 3(b) of the Access to Information Act; Sandgren (2005) at 727.

90 ECOSOC (2019) at 34.

91 Kaufmann D & Dininio P (2006) "Corruption: A Key Challenge for Development." *The Role of Parliaments in Curbing Corruption*. Pelizzo R, Johnstone N, & Rick Stapenhurst R (eds) at 21. See Hough D (2013) "Corruption, Anti-Corruption and Governance" at 109.

92 Chêne (2008) at 3.

93 Article 174(c) of the Constitution of Kenya.

The foregoing provisions should enable citizens to counter corruption at the basic levels within the counties by inquiring and expecting responses from the county government.

3.3.10 Criminal Procedure Code, Chapter 75

This Act stipulates the procedure to be followed in criminal cases. Action that can be initiated by private persons includes a citizen's arrest of any person who commits a cognisable offence or is suspected of committing a felony.⁹⁴ Upon a private citizen arresting a suspect, he should surrender the suspect immediately to the custody of law enforcement authorities.⁹⁵ Thus, citizens can engage in fighting corruption by effecting citizens' arrests of suspected corrupt persons and handing them over to the police for investigation and eventual prosecution.

3.3.11 Election Offences Act, 2016

Section 9 of this Act creates the offence of offering and accepting bribes during an election period. A person who commits an offence under this section is liable upon conviction to a fine not exceeding Kenya Shillings 2 000 000 (approximately USD 17 676.00) or to imprisonment for a term not exceeding six years or to both.⁹⁶ Massive corruption in Kenya is perpetrated by leaders in public office and such a provision serves as a deterrent. Citizens can engage in anti-corruption activities during elections by refraining from accepting bribes for their votes, as corrupt voters beget corrupt leaders and cumulatively perpetuate the corruption culture.

3.3.12 Treaty Making and Ratification Act, 2012

This Act outlines the procedure for the making and ratification of treaties. Section 7(m) requires government to consider the public's views in the approval of a treaty. Additionally, Section 15 requires that citizens be notified of treaties which the government has ratified by publicising such information in at least two newspapers of nationwide circulation.⁹⁷ Further, in respect of each treaty, the relevant state department is required to ensure that there is public awareness regarding the effects and benefits of the treaty.⁹⁸ These provisions apply to Kenya's UNCAC and

94 Section 34 of the Criminal Procedure Code.

95 Section 35 of the Criminal Procedure Code.

96 Section 9(3) of the Election Offences Act.

97 Section 15(2) of the Treaty Making and Ratification Act.

98 Section 15(3) of the Treaty Making and Ratification Act.

AUCPACC legal obligations, which can become instrumental in the fight against corruption when the citizens are educated as to their contents.

3.3.13 Computer Misuse and Cybercrimes Act, 2018

This Act aims to criminalise computer misuse and cyber-related offences. One of the offences provided under Section 23, criminalises publication of false information and imposes a fine of Kenya Shillings 5 000 000 (approximately USD 44 189.13) or imprisonment of ten years or both. While such a provision is essential to protect the rights and reputations of others, citizens engaged in anti-corruption activities on digital platforms might become wary of sharing or posting information related to corrupt persons or incidents in the face of the requirement of veracity and the stiff penalties.

3.3.14 Public Participation (No 2) Bill, 2019

This Bill is currently before the National Assembly.⁹⁹ It applies to all public offices and state organs in Kenya and provides a framework for public participation as contemplated by the Constitution. Section 6 of the Bill imposes an obligation on state organs to establish effective mechanisms for public participation. This contemplated law is vital in promoting citizen engagement in anti-corruption as it will operationalise participation by citizens at all stages of decision-making at the national and county levels. Such participation can reduce instances of corruption, as transparency and accountability operate to reduce monopoly and discretion of public officials.¹⁰⁰

3.3.15 Lifestyle Audit Bill, 2019

This Bill is making its way through Parliament.¹⁰¹ There is currently no framework for conducting lifestyle audits on public officers and the Bill seeks to cure this by reference to Article 10 of the Constitution of Kenya regarding the principles and values of governance. The Bill is aimed at providing a legal framework for an investigative audit of inexplicable wealth by

99 See Bill, available at www.parliament.go.ke (visited 6 January 2022).

100 Klitgaard (1998) "International cooperation against corruption" *Finance & Development* at 4.

101 See Bill, available at www.parliament.go.ke (visited 6 January 2022).

public officers.¹⁰² It also covers offences under ACECA, the PPDA, the Bribery Act, the Leadership and Integrity Act, the Proceeds of Crime and Anti-Money Laundering Act, and the Public Finance Management Act.¹⁰³ The Kenya Revenue Authority and the EACC are amongst the bodies contemplated to undertake lifestyle audits. Also, the Bill, provides for lifestyle audit exercises to extend to the family and associates of a public officer.¹⁰⁴ Section 18 allows a member of the public to lodge a complaint regarding unexplained wealth of a public or state officer. The complaint has to be in the form of a statutory declaration and entitles the citizen to a response from the relevant body.¹⁰⁵ Where an investigating body establishes an offence, the matter is referred to the DPP.¹⁰⁶

This proposed law, coupled with access to information, can encourage vigilant citizens to satisfy themselves as to the veracity of assets declarations by public officers. Further, as public officers live amongst citizens, the latter can detect easily a lifestyle that does not reasonably match the known incomes of the former, enabling them to blow the whistle and uncover possible illicit enrichment of the officers. This Bill is particularly useful in devolution, where there is regular interaction of officers and citizens on the ground.

3.3.16 National Anti-Corruption Campaign Council Bill, 2019

The NACCC Bill provides a legal and institutional framework to the National Anti-Corruption Campaign Steering Committee (NACCSC), which currently functions by operation of a gazette notice.¹⁰⁷ Some of its purposes pertinent to citizen engagement include raising Kenyans' awareness of their individual roles as corruption fighters and mobilising them actively to participate in anti-corruption strategies.¹⁰⁸ This Bill thus spearheads and co-ordinates anti - corruption campaign strategies in both the national and county governments.¹⁰⁹ Accordingly,

102 Section 2 of the Lifestyle Audit Bill.

103 Sections 2 & 5 of the Lifestyle Audit Bill.

104 Sections 19 & 20 of the Lifestyle Audit Bill.

105 Section 18 of the Lifestyle Audit Bill.

106 Section 21 of the Lifestyle Audit Bill.

107 Gazette Notice 6707 (19 September 2014). See also gazette notice available at <https://www.naccsc.go.ke/index.php/about-us/gazettenotice> (visited 6 January 2022); Section 3 of NACCC Bill 2019.

108 Section 3(c) & (d) of the NACCC Bill, 2019.

109 Section 6 of the NACCC Bill, 2019.

anchoring the NACCSC in a legal framework ensures it effectively discharges its anti-corruption campaign mandate amongst the citizens. In fact, citizens are in dire need of public education and awareness on corruption and anti-corruption.¹¹⁰

3.4 Institutional Framework

This section analyses the role of institutions enabling citizen-centred anti-corruption engagement and include: the Presidency, Parliament, Ethics and Anti-Corruption Commission, Office of the Director of Public Prosecutions, Judiciary, National Police Service, Witness Protection Agency, Public Procurement Regulatory Authority, Commission on Administrative of Justice, Kenya Law Reform Commission (KLRC) and National Anti-Corruption Campaign Steering Committee.

3.4.1 The Presidency

The President is a symbol of national unity and thus should be at the forefront of engaging Kenyans in fighting corruption in word and in deed.¹¹¹ The President exercises executive authority as head of state and government and, therefore, is required to espouse national values and principles of governance.¹¹² It is contended that these values and principles provide the conditions required to inhibit corruption.

The functions of the President include annually reporting to the nation on the measures taken and progress achieved in realising the national values contained in the Constitution.¹¹³ Additionally, the President is required to publish in the government gazette details of such measures and progress.¹¹⁴ These functions and expectations are in line with the aspirations of citizens, as executive authority is derived from Kenyans and should be exercised in a “manner compatible with the principle of service to the people of Kenya, and for their wellbeing and benefit”.¹¹⁵

110 EACC Survey Report (2018) at 63 & 64.

111 Article 131(1)(e) of the Constitution of Kenya; Githu Task Force Report (2015) at 17.

112 Article 131(1)(a)(b) & Article 10 of the Constitution of Kenya.

113 Article 10 & Article 132(1)(c)(i) of the Constitution of Kenya.

114 Article 132(1)(c)(ii) of the Constitution of Kenya.

115 Article 129(1) & (2) of the Constitution of Kenya.

Kenyan citizens thus have a legitimate expectation of progress reports on corruption as a phenomenon which runs counter to values espoused in the Constitution. Further, citizens can fight corruption by demanding that action be taken against corrupt public officers or people. Citizens can monitor progress reports submitted by the President and determine whether to extend her or his mandate during elections. When citizens elect a person of integrity to be President, they effectively are wielding a shield against corruption.

3.4.2 Parliament

The will of Kenyans is exercised by Parliament, which derives its legislative authority from the people.¹¹⁶ The Kenyan Parliament consists of the National Assembly and Senate, each of which comprises elected representatives of the people.¹¹⁷ The National Assembly is mandated constitutionally to enact legislation, while the Senate participates in law-making for the counties.¹¹⁸

The laws establishing Parliament facilitate citizen-centric anti-corruption strategies by providing for ethical requirements in elections. This means that a basic anti-corruption step which ordinary citizens can take is to elect a leader who is not tainted by corruption or who is unencumbered by unethical conduct.¹¹⁹ Electing persons of integrity ensures that the citizens' interests are of paramount importance since, in addition to enacting laws, Parliament oversees state organs as well as national revenue and expenditure.¹²⁰ Public revenue and expenditure are at the core of corruption and ethical parliamentarians can champion citizens' concerns in this regard.

Parliament plays an important role in deliberating matters that affect Kenyans.¹²¹ Accordingly, it is required to conduct its business in an open manner that ensures public access and facilitates public participation.¹²² A vigilant citizenry can ensure that corruption is

116 Article 94(1) & (2) of the Constitution of Kenya.

117 Article 93(1) of the Constitution of Kenya.

118 Article 95(3) & Article 96 of the Constitution of Kenya.

119 Article 99(1)(b) & (2)(h) of the Constitution of Kenya.

120 Article 95(4) of the Constitution of Kenya.

121 Article 95(2) of the Constitution of Kenya; Kpundeh & Dininio (2006) at 41.

122 Article 118(1) of the Constitution of Kenya.

prevented or investigated by participating in parliamentary sittings or analysing contemplated bills or budgets. In fact, Article 119(1) of the Constitution gives citizens the right to petition Parliament to deliberate any matter within its purview, such as enacting, amending or repealing any law. The Kenyan citizenry therefore can fight corruption by participating fully in parliamentary matters to the extent allowed by the law.

Parliamentarians who are not corrupt can review the conduct of the President, Deputy President and state officers if they are found to be corrupt and can initiate the process of removing them from office.¹²³ It is contended thus that a successful anti-corruption strategy ought to revolve around the citizens, as they wield a lot of power through their elected representatives. Citizens themselves also have the right to recall leaders before their terms end.¹²⁴ The right of recall can stimulate anti-corruption sentiment by disrupting corrupt leaders and deterring potential leaders from engaging in corrupt practices.

It has been suggested that a transparent legislature is instrumental to a successful anti-corruption strategy.¹²⁵ It is submitted that the citizens from whom such legislative authority is derived play a role by bestowing immense power upon their elected representatives. Decisions to elect certain leaders thus carry consequences that will affect the trajectory of anti-corruption interventions.

3.4.3 Ethics and Anti-Corruption Commission

The Ethics and Anti-Corruption Commission Act of 2011 establishes the main anti-corruption agency in Kenya, styled the Ethics and Anti-Corruption Commission (EACC).¹²⁶ The EACC is mandated to be accessible to all Kenyans with respect to devolution.¹²⁷ It is charged with the responsibility of investigating corruption cases and recommending prosecutions to the Director of Public Prosecutions (DPP).¹²⁸ The EACC also can receive complaints against public officers.¹²⁹

123 Article 95(5)(a) of the Constitution of Kenya.

124 Article 104(1) of the Constitution of Kenya.

125 Saryazdi (2008) at 34.

126 Section 3(1) of the EACC Act; Article 79 of the Constitution of Kenya.

127 Section 3(3) of the EACC Act; Article 6(3) of the Constitution of Kenya.

128 Section 11(1)(d) & Section 13(2)(c) of the EACC Act.

129 Section 11(1)(c) of the EACC Act.

Where a complaint is received but the EACC declines to investigate or discontinues its investigation, it is required to inform and give reasons to the complainant in writing.¹³⁰ Citizens can and do engage with the EACC by lodging complaints against corrupt persons and by assisting in investigations and participating in subsequent prosecutions.¹³¹

The EACC also is mandated to ensure that the public is made aware of and educated about ethical issues and risks of corruption.¹³² Additionally, the EACC is required to enlist and marshal public support for combating corruption, but with due regard for privacy rights.¹³³ When citizens are educated regarding their role and sensitised to detect and disrupt corruption, they can lower the incidence of corruption.

Section 27 of the EACC Act requires that the EACC submit an annual report to the President and the National Assembly on all its activities, including its impact and the impediments experienced. Thereafter, this report should be published and publicised.¹³⁴ Such reports are useful for the citizens to determine the efficacy of the EACC and to examine which corrupt incidents have been investigated. Such a provision can stimulate further action by citizens when their reports or complaints are acted upon and reflected as part of the activities of the EACC.

Section 29 obligates the EACC to publish and publicise important information within its mandates that affects Kenya. This clause also provides for a citizen to request information but subject to confidentiality requirements and a reasonable fee. Vigilant citizens can engage with such information and demand or initiate action where need be.

The EACC is required, under Section 30 of the EACC Act, to publish its physical address, telephone numbers and other means of communication to the general public.¹³⁵ This has the net effect of ensuring that citizens know where to report corrupt incidents and by which means.

130 Section 25 of ACECA.

131 Sections 27 & 28 of ACECA.

132 Section 11(1)(h) & Section 13(2)(a) of the EACC Act.

133 Section 11(1)(h) of the EACC Act.

134 Section 27(4) of the EACC Act.

135 See, for example, EACC website, available at www.eacc.go.ke, which provides the contact information, including the Twitter and Facebook handles (visited 5 January 2022).

This section endorses the fact that for laws to respond to society's needs, they must be engaged with by the people.

Section 16 of ACECA provides for the establishment of a multi-sectoral advisory board to be part of the team which advises the EACC on matters of anti-corruption in Kenya. This requirement is essential as it ensures some level of representation for all segments of society in advising the EACC. Citizens thus can drive the anti-corruption agenda by contributing through their sectors.

The EACC is charged also with asset recovery, which can encourage citizens to report incidents of corruption, such as inexplicable wealth, since they know the law supports forfeiture of such corruptly acquired assets.¹³⁶

3.4.4 Office of the Director of Public Prosecutions

The Office of the Director of Public Prosecutions (ODPP) is mandated constitutionally to exercise state powers of prosecution.¹³⁷ In discharging its functions, the ODPP ought to be guided by the need to serve Kenyans and the cause of justice.¹³⁸

Pursuant to Article 157 of the Constitution, the Director of Public Prosecutions (DPP) has the power to direct investigations into any allegation of criminal conduct.¹³⁹ The ODPP receives files from the EACC and makes the decision to charge.¹⁴⁰ The ODPP is an important institution in the fight against corruption as it drives the wheels of justice insofar as ensuring that a corrupt person faces the law. In recent times, the ODPP, emboldened by a new DPP, Noordin Haji, has been at the forefront of the fight against corruption by charging high-profile public officials with corruption-related offences.¹⁴¹ Further, the ODPP has charged citizens and legal persons and

136 Section 11(1)(j) of the EACC Act; Section 55 of ACECA; *Stanley Mombo Amuti v Kenya Anti-Corruption Commission* [2019] eKLR. The Court of Appeal upheld the High Court judgment ordering Kenya Shillings 41 208 000 (approximately USD 371,243.00), being monies constituting unexplained assets of the defendant, to be forfeited to the state.

137 Article 157 of the Constitution of Kenya.

138 Section 4(e)(f) of the ODPP Act.

139 Section 5 of the ODPP Act.

140 Section 11(1)(d) of the EACC Act; Section 35 ACECA.

141 Klitgaard et al (2000) at 51 - 52 & 79-80, in discussing anti-corruption strategies in Hong Kong and Venezuela suggest that "big fish" ought to be fried to break the culture of corruption and also cynicism amongst the citizenry; See also, *Republic v Henry Rotich & Others* [2019] eKLR, in which the Cabinet

secured convictions.¹⁴² In *R v Grace Sarapay Wakhungu, John Koyi Walukhe and Erad Supplies and General Contractors Ltd ACC 31 of 2018* the three accused persons, a sitting Member of Parliament, and a legal person were convicted and sentenced to pay a total of over Kenya Shillings 2 Billion (approximately USD 17,660,044.00).¹⁴³ Successful prosecutions thus remain instrumental in inspiring confidence in citizens to report cases of corruption, blow the whistle on corruption or testify in court.¹⁴⁴ In fact, it has been stated that prosecutions are an effective strategy for combating corruption in Kenya for the time being.¹⁴⁵

ODPP also engages the citizens in anti-corruption discourse through its Facebook and Youtube programme known as ODPP Café wherein citizens participate and ask questions during its live broadcasts.¹⁴⁶ ODPP actively disseminates information to the public and engages citizens through its social media handle on Twitter.¹⁴⁷ ODPP also joins other stakeholders in anti-

Secretary for Treasury was arraigned in a corruption-related case; *Moses Kasaine Lenolkulal v Director of Public Prosecutions* [2019] eKLR, involving the Governor of Samburu County; *Republic v Lilian Mbogo Omollo & 43 others* [2018] eKLR, involving a Principal Secretary of Youth and other senior public officials; *Ferdinand Ndungu Waititu Babayao & 12 others v Republic* [2019] eKLR, in which the Governor of Kiambu County was charged with conflict of interests and other corruption offences. See ODPP's report of high-profile corruption and economic crime cases registered in court as at 2021 at 3,5,7 & 10, available at <https://bit.ly/3jHRW6V> (visited 22 January 2022). See matrix of concluded corruption cases with convictions in ODPP Annual Report (2020) at 69-86, available at <https://www.odpp.go.ke/downloads/> (visited 23 January 2022).

142 See ODPP's report of high-profile corruption and economic crime cases registered in court as at 2021 at 3, 5, 7 & 10, available at <https://bit.ly/3jHRW6V> (visited 22 January 2022). See matrix of concluded corruption cases with convictions in ODPP Annual Report (2020) at 69-86, available at <https://www.odpp.go.ke/downloads/> (visited 23 January 2022).

143 See ODPP press statement concerning the case outcome, available at <https://bit.ly/3qSMBxl> (visited 23 January 2022).

144 Sandgren (2005) at 728.

145 See Wanjala SC (2019) at 10; EACC National Ethics and Corruption Survey (2018) at 39, 47 & 53 in which most respondents favoured investigations, prosecutions and imprisonment as the most effective anti-corruption measures.

146 See ODPP Café discussion on corruption, available at https://www.youtube.com/watch?v=839nUT_3jzo (visited 23 January 2022); See ODPP Café discussion on money laundering, available at <https://www.youtube.com/watch?v=BNmoHstlPE8> (visited 23 January 2022); See ODPP Café discussion on leadership and integrity, available at <https://www.youtube.com/watch?v=34AFG6hvB9g> (visited 23 January 2022).

147 See Twitter handle of ODPP, @ODPP_KE, available at <https://bit.ly/3qTdJw9> (visited 23 January 2022).

corruption activities such as sensitisations of the public during International Anti-Corruption Day (9 December).¹⁴⁸

3.4.5 The Judiciary

The judiciary is one of the state organs which derives its authority from the people, which authority is exercised by courts and tribunals.¹⁴⁹ This institution is required to deliver justice to all in accordance with the rule of law.¹⁵⁰ The judiciary aids in the fight against corruption through specialised courts to adjudicate corruption cases, as provided under ACECA.¹⁵¹ Additionally, there is a High Court division dealing with Anti-Corruption and Economic Crimes.¹⁵² The work of these courts demonstrates the Judiciary's willingness to deal expeditiously with corruption cases when citizens engage in anti-corruption activities, such as reporting corruption offences or testifying in court.

Indeed, the courts have added their voice to the anti-corruption course by shaping jurisprudence. The decisions of the courts may have an effect as to how citizens can suitably or fully engage in anti-corruption strategies. In 2019, in the case of *Christopher Ndarathi Murungaru v John Githongo*, the court awarded the plaintiff Kshs 27 million as damages in a defamation suit regarding the Anglo-Leasing scandal, brought against the anti-corruption activist defendant.¹⁵³ Such a decision can potentially deter would-be whistleblowers especially where there is no whistle blower protection law in place. In *R v Grace Sarapay Wakhungu, John Koyi Walukhe and Erad Supplies and General Contractors Ltd ACC 31 of 2018* the three accused persons (including a sitting Member of Parliament and a legal person) were convicted of economic crimes and sentenced to pay a total of over Kenya Shillings 2 Billion (approximately

148 The Prosecutor (2020) "ODPP participates in International Anti-Corruption Events" ODPP Newsletter Issue 3 at 26.Nairobi:ODPP Kenya. See ODPP team participating in the anti-corruption caravan during the 2021 build-up events at Mombasa, available at <https://bit.ly/3tOHqR2> (visited 23 January 2022).

149 Article 159 of the Constitution of Kenya.

150 See Judiciary of Kenya website, available at <https://www.judiciary.go.ke/> (visited 23 January 2022).

151 Part II of ACECA. See also Anti-Corruption and Economic Crimes Division established in the High Court vide Gazette Notice No.9123, available at <https://bit.ly/3qQKwCe> (visited 23 January 2022).; Maraga (23 January 2017) paragraph 6; Sustaining Judiciary Transformation (SJT): A Service Delivery Agenda 2017-2021 at 42.

152 See Anti-Corruption and Economic Crimes Division established in the High Court vide Gazette Notice No.9123, available at <https://bit.ly/3qQKwCe> (visited 23 January 2022).

153 See case available at <https://bit.ly/33HB2jS> (visited 23 January 2022).

USD 17,660,044.00).¹⁵⁴ In *ACC No.13/2016 R vs Catherine Akello Namuye (CEO) (Deceased), Bruce Odhiambo (Deceased) & Others*, the Anti-Corruption Court in September 2021 convicted and fined a businessman, Mukuria Ngamau, Kenya Shillings 720.8 million (approximately USD 6,340,060.08) or in default to serve 27 years in prison for his role in defrauding the Youth Enterprise Development Fund.¹⁵⁵ The foregoing cases demonstrate the interaction of the judiciary with public sector corruption and the heavy sentences meted out.

3.4.6 National Police Service

The National Police Service (NPS) is one of Kenya's security organs charged with maintaining law and order.¹⁵⁶ One of its functions, as expressed in the Constitution, is to prevent corruption and practise transparency and accountability.¹⁵⁷ The NPS comprises the Kenya Police Service, the Administration Police Service and the Directorate of Criminal Investigations (DCI) under the command of the Inspector-General.¹⁵⁸ One of the DCI's functions is to investigate money laundering and economic crimes, for which there is an Economic Crime Unit.¹⁵⁹ The NPS thus plays a complementary role to the EACC. Section 87 of the NPS Act, Chapter 84 (*Laws of Kenya*) of 2012 provides for the establishment of an Internal Affairs Unit (IAU) tasked with investigating police misconduct arising out of complaints from members of the NPS or members of the public and recommending disciplinary action.¹⁶⁰

The NPS is crucial to citizen-centric anti-corruption strategies, as it is the first port of call for most citizens who report crime.¹⁶¹ Regrettably, the police in Kenya has been denounced as one of the most corrupt organisations in the country, which underscores the importance of the

154 ODPP Consolidated Annual Report 2017 - 2020 at 70. See ODPP Twitter thread on the case, available at <https://bit.ly/3GU4ukY> (visited 23 January 2022).

155 See ODPP Kenya's twitter handle <https://bit.ly/3iHRW6V> (visited 22 January 2022); Onsongo N "Court slaps businessman with Sh720m fine for Youth Fund looting" *Business Daily* 30 September 2021 <https://www.businessdailyafrica.com/bd/economy/court-slaps-businessman-with-sh720m-fine-for-youth-fund-looting-3568342> (visited 22 January 2022).

157 Article 243 of the Constitution of Kenya; Sections 24(b), 27(b) & 35(c) of the NPS Act.

158 Articles 244(b) & 239(c) of the Constitution of Kenya.

159 See <http://www.nationalpolice.go.ke> (visited 5 November 2019).

160 Section 35(b) of the NPS Act; See also <https://bit.ly/3mkVWMn> (visited 27 October 2021).

161 See <http://www.nationalpolice.go.ke> (visited 6 January 2022); See also Githu Task Force Report (2015) at 48.

162 Githu Task Force Report (2015) at 47.

IAU as an important mechanism in curbing police corruption.¹⁶² Citizens, therefore, can fight corruption by reporting incidents to the police and reporting corrupt acts propagated by the police.

3.4.7 Witness Protection Agency

The Witness Protection Act (WPA) establishes the Witness Protection Agency which is responsible for witness protection.¹⁶³ This Agency is crucial in the fight against corruption as it ensures that cases succeed by availing fearless witnesses who are instrumental to a corruption conviction. The fact that a citizen can rely on protection from this Agency allows whistleblowers to act with less fear of reprisals. Witness protection law reflects the realities of corruption cases which regularly involve colossal amounts of money and high-profile individuals with many interests at stake, who may seek to undermine potential whistleblowers or intimidate witnesses in court.

3.4.8 Public Procurement Regulatory Authority

Section 8 of the PPDA establishes the Public Procurement Regulatory Authority (PPRA) which is mandated to assess, monitor and review the public procurement and asset disposal system in order to ensure compliance with the national values enshrined in the Constitution.¹⁶⁴ The PPRA is central to investigating complaints made by public institutions or any person, which should activate citizens to report corrupt tendencies that might be detected in the system.¹⁶⁵ Section 41(1)(h) of the PPDA serves to advise citizens that corruption is not condoned in public procurement systems as it explicitly mandates the Appeals Review Board to debar people found guilty of corrupt or fraudulent activities from participating in procurement or asset disposal proceedings.¹⁶⁶ In fact, debarment of companies or individuals who engaged in corrupt

163 See Transparency International-Kenya (2017) at 4; EACC National Ethics and Corruption Survey (2018) at 54.

164 Section 3A(1) & Section 4 of the WPA.

165 Section 9 of the PPDA.

166 Section 35 of the PPDA.

167 See PPRA website displaying list of debarred firms and debarment period, available at <http://ppra.go.ke/debarred-firms/> (visited 23 January 2022).

practices in winning tenders has been hailed as an effective anti-corruption strategy.¹⁶⁷

3.4.9 Commission on Administrative of Justice

This constitutional commission is known also as the Office of the Ombudsman and is established under the Commission on Administrative Justice Act of 2011.¹⁶⁸ The mandate of Office of the Ombudsman covers the national and county governments. This office is responsible for confronting maladministration within the public sector. It also ensures compliance with the constitutional integrity requirements by public officers.¹⁶⁹

Citizens who are aggrieved by public officers can submit their complaints to the Office of the Ombudsman for action.¹⁷⁰ Section 41 of the Commission on Administrative Justice Act provides that, upon inquiry, the Office of the Ombudsman may refer complaints disclosing criminal offences to the ODPP. Citizens thus have an additional outlet to complain about corruption through the Office of the Ombudsman. Also, this Office oversees the implementation of the Access to Information Act of 2016, which is crucial in ensuring that the public may scrutinise public documents.¹⁷¹ Where such access is rendered impossible or difficult by a public official, the citizen has recourse by reporting the problem to the Ombudsman.

3.4.10 Kenya Law Reform Commission

The Kenya Law Reform Commission (KLRC) is responsible for reviewing all Kenyan law and recommending reforms.¹⁷² The KLRC is mandated to uphold the constitutionality of law in carrying out such review.¹⁷³ There is an obligation to inform the public of any such review or proposed review of laws.¹⁷⁴ This is a good port of entry for citizens to engage in anti-corruption,

168 Pope J (2006) "Parliament and anti-corruption legislation" in Stapenhurst R et al *The Role of Parliament in Curbing Corruption* at 66.

169 See <https://www.ombudsman.go.ke/#about-us> (visited 6 January 2022).

170 See <https://www.ombudsman.go.ke> (visited 6 January 2022).

171 Section 8 of the Commission on Administrative Justice Act.

172 See <https://www.ombudsman.go.ke> (visited 6 January 2022).

173 See <https://bit.ly/3fKD59Q> (visited 6 January 2022).

174 See <https://bit.ly/3fKD59Q> (visited 6 January 2022).

175 Section 6 of the Kenya Law Reform Commission Act No 19 of 2013.

as they can suggest reform or suggest new laws to contain the scourge of corruption.¹⁷⁵ The importance of the public being informed of pending reforms or reviews places the citizens on the legislative continuum and they can add their voices to the anti-corruption cause.

3.4.11 National Anti-Corruption Campaign Steering Committee

In a bid to give effect to the “zero-tolerance towards corruption” policy, the Kibaki administration, in 2003, launched the National Anti-Corruption Campaign Steering Committee (NACCSC).¹⁷⁶ The NACCSC is subsumed under the Office of the Attorney General and is responsible for countrywide public education and sensitisation aimed at shifting fundamentally Kenyans’ views and behaviour regarding corruption.¹⁷⁷ Further, the NACCSC is recognised in Kenya as one of the national competent authorities mandated to prevent corruption.¹⁷⁸ The NACCSC is therefore a noble idea for harnessing the energies of citizens in fighting corruption by promoting awareness and education.

3.5 Policy and Other Measures

3.5.1 National Ethics & Anti-Corruption Policy, 2018

This policy is an answer to the past lack of a coherent strategy that has been one of the hindrances to effective anti-corruption in Kenya.¹⁷⁹ The National Ethics & Anti-Corruption Policy (NEAP) aims to provide a comprehensive and co-ordinated framework for the fight against corruption.¹⁸⁰ One of the objectives of NEAP is to enhance public participation and engagement in combating corruption.¹⁸¹ This objective thus seeks to ensure the primacy of citizens in fighting corruption.

NEAP also identifies the principle of responsibility as a key to achieving zero tolerance towards corruption. Responsibility presupposes that the fight against corruption is a duty and responsibility of every Kenyan citizen and institution, since corruption effects are not

176 KLRC (2015) *A Guide to the Legislative Process in Kenya* at 20.

177 See <http://www.naccsc.go.ke> (visited 6 January 2022).

178 See <http://www.naccsc.go.ke> (visited 6 January 2022).

179 UNCAC Kenya Review Report (2019) at 55.

180 NEAP (2018) at iii & 6.

181 NEAP (2018) at xiii.

182 NEAP (2018) at 8.

discriminatory.¹⁸² This principle thus gives the citizens a pivotal role to play in anti-corruption interventions, as opposed to the usual state-driven initiatives.

One of the interventions contained in the policy statement is the deployment of social mechanisms to prevent corruption.¹⁸³ Such social mechanisms are, *inter alia*, inculcation of ethics and anti-corruption sentiment in education curricula, enhancing reporting channels for the public, and publicising corruption prevention legislation and material amongst citizens.¹⁸⁴ This policy thus employs citizens' efforts in driving the anti-corruption agenda in a comprehensive framework that can bear fruit over time.

3.5.2 Integrated Public Complaints and Referral Mechanism

The Integrated Public Complaints and Referral Mechanism (IPCRM) is a multi-sector initiative established in 2012 and includes the EACC, the NACCSC, the Office of the Ombudsman and Transparency International (TI-Kenya).¹⁸⁵ Its chief aim is to provide an efficient complaints referral, management and disposal mechanism.¹⁸⁶ The IPCRM facilitates access to public complaints procedures to a wider audience by also being accessible online across the websites of the different organisations through the "*Sema! Piga Ripoti*" (Talk! Make a Report!) reporting channel.¹⁸⁷

In the rural areas citizens can make complaints through this mechanism via the EACC desk at Huduma Centres (one stop government service centres).¹⁸⁸ The UNCAC Country Review Report (2015) on Kenya's implementation of Chapters III and IV of UNCAC cited the IPCRM as a best practice from Kenya, worthy of emulation by other countries.¹⁸⁹

183 NEAP (2018) at 8-9.

184 NEAP (2018) at 13 & 15.

185 NEAP (2018) at 13 & 15.

186 NEAP (2018) at 16.

187 Githu Task Force Report (2015) at 98; UNCAC Country Review Report of Kenya (2019) at 5, 34 & 56.

188 Githu Task Force Report (2015) at 98. See also, for example, <https://tikenya.org/> (visited 6 January 2022); See <https://bit.ly/3beGyus> (visited 6 January 2022).

189 Githu Task Force Report (2015) at 98. See also, for example, Kajiado County Government website, available at <https://bit.ly/3beGyus> (visited 6 January 2022).

190 UNCAC Country Review Report of Kenya (2015) at 8. See also Githu Task Force Report (2015) at 98.

3.5.3 Vision 2030

Vision 2030 is a long-term development blueprint for Kenya, aimed at creating a better society by the year 2030.¹⁹⁰ This vision is driven by three pillars: economic, political and social. The political pillar of Vision 2030 is “a democratic political system that is issue-based, people-centred, result-oriented and accountable to the public”.¹⁹¹

Anti-corruption strategies feature under the programme of Leadership Ethics and Integrity. The envisioned strategies include reviewing and strengthening legislative policy and institutional frameworks for ethics and integrity in Kenya; development of an anti-corruption policy and whistle blower legislation; and education and awareness on corruption and ethical issues. Citizen engagement in anti-corruption activities thus fits into the political pillar that is “people-centred” and can be enhanced by reviewing and strengthening the anti-corruption architecture in Kenya.

3.5.4 Agenda 2030

Agenda 2030 is a UN global development framework. Its key feature is the Sustainable Development Goals (SDGs), which Kenya advocates.¹⁹² Some of the key features of Goal 16 of the SDGs are developing transparent and accountable institutions; reducing corruption and bribery; developing inclusive, participatory and representative decision-making at all levels; reducing illicit financial flows (IFFs); and strengthening asset recovery processes.¹⁹³ Goal 16 of Agenda 2030 is therefore in line with Kenya’s Vision 2030 and its existing anti-corruption legal and institutional framework.¹⁹⁴

191 See <http://www.vision2030.go.ke> (visited 6 January 2022); UNCAC Country Review Report of Kenya (2019) at 3 & 23.

192 See <https://vision2030.go.ke/political-pillar/> (visited 6 January 2022).

193 See <https://sustainabledevelopment.un.org/memberstates/kenya> (visited 6 January 2022).

194 Goal 16.6; Goal 16.5; Goal 16.7; and Goal 16.4. See SDGs, available at <https://sustainabledevelopment.un.org> (visited 6 January 2022) ; CPI 2020 warns that unless corruption challenges such as bribery, are addressed, most countries in Sub-Saharan Africa risk missing their SDG targets, see <https://www.transparency.org/en/news/cpi-2020-sub-saharan-africa#> (visited 5 January 2022).

195 Second Voluntary National Review Report on the Implementation of the Sustainable Development Goals (2020) at 74 identifies high levels of corruption as a challenge in implementing Goal 16.

3.5.5 Kenya Leadership and Integrity Forum

The Kenya Leadership and Integrity Forum is a multi-sector stakeholder forum comprising the public and private sectors, civil society and religious organisations, partnering to fight corruption.¹⁹⁵ The various stakeholders thus tackle corruption by mapping out and implementing anti-corruption strategies in their respective sectors, using the Kenyan Integrity Plan as a framework.¹⁹⁶ This forum is useful as it incorporates broad segments of citizens and adds the public voice to anti-corruption interventions.

3.6 Conclusion

Kenya has an abundance of laws and institutions which support anti-corruption mechanisms. Most of these laws put a premium on the rule of law, transparency, accountability, participation of society and integrity.¹⁹⁷ This reflects the palpable ethical dimension of corruption and the need to inculcate virtues that can inhibit it.

A key consideration is that the anti-corruption laws and institutions are dependent on the citizens to engage them. From questioning decision-makers, to reporting corruption, to participating in investigations and testifying in court, the citizen is a dominant and constant factor in all matters anti-corruption. The laws also show the importance of access to information, public awareness, whistleblowing and witness protection in anti-corruption strategies. This signifies that the heart of anti-corruption lies in the bravery, resilience and integrity of citizens.

The Kenyan anti-corruption terrain is ripe for an approach which involves galvanising the bottom to unite with the top in the fight against corruption. After all, drivers of corruption are human beings, and human beings are the ones who ultimately and effectively can stop corruption.

196 See <https://eacc.go.ke/default/klif/> (visited 6 January 2022).

197 See <https://eacc.go.ke/default/klif/> (visited 6 January 2022); UNCAC Review Report (2019) at 3.

198 Articles 1(c) & 5(1) of UNCAC; Article 10(2) & Chapter Six of the Constitution of Kenya.

CHAPTER FOUR

ENHANCING CITIZEN-CENTRED ANTI-CORRUPTION ENGAGEMENT IN KENYA

4.1 Introduction

Against the backdrop of the history of corruption and the analysis of anti-corruption structures in Kenya, this chapter identifies weaknesses in legislation and institutions that may hamper citizen engagement in anti-corruption. Reforms suggested include a whistleblowing law and *qui tam* actions through false claims legislation, the incorporation of county government, and other structures which are citizen-centric. Anti-corruption education and the idea of re-socialisation are proposed as long-term contributions to the anti-corruption cause.

4.2 Factors Limiting Optimisation of Citizen Engagement

Several factors limit the optimisation of citizen engagement in terms of inadequate sanctions in law, institutional capacity and lack of proper legislative mandate for some institutions as discussed hereunder.

4.2.1 Anti-Corruption and Economic Crimes Act, 2003

Section 48(1) of ACECA (discussed in Chapter 2 and 3) stipulates, as the penalty for corruption offences, a fine not exceeding 1 million Kenya Shillings (approximately USD 8 838.00) or imprisonment not exceeding ten years or both. It has been suggested that the law should provide for just punishment and ensure that corruptly acquired benefits are not enjoyed by the offender.¹ In order for citizens to report corrupt individuals, there needs to be the assurance not only that convicted persons will be appropriately punished, but also that they will not enjoy the fruits of their crimes after such punishment. The EACC Survey Report (2018) identifies weak law enforcement and punishment as a reason for the populace's apathy in reporting corruption.²

1 Githu Task Force Report (2015) at 124.

2 EACC Survey Report (2018) at 63.

Take, for instance, in *R vs Sylvester Mwadime Mwaliko & Others* where a Permanent Secretary at the Ministry of Home Affairs was charged with abuse of office in the multi-billion shillings Anglo-Leasing Scandal. Upon conviction, he was fined Kenya Shillings 1 million (approximately USD 8 838.00) for each count of the three counts and paid a total of Kenya Shillings 3 million (approximately USD 26 513.00) for his role in facilitating the award of the questionable tender.³ In the *Rio Scandal (R v Hassan Wario Arero & 5 Others ACC No. 45 of 2018)* in which public funds meant for the Kenyan Team participating in the Rio Olympics 2016 were mismanaged, the then Cabinet Secretary for Sports Hassan Wario, was convicted. Upon sentencing in September 2021, he was fined Kenya Shillings 3.6 million (approximately USD 32 000.00) in default, a six-year jail term. He promptly paid the fine and emerged from the court flashing the victory salute.⁴

Sentences imposed upon corruption culprits ought not to be perceived as a slap on the wrist by citizens, since this presents a twin problem of deterrence and expression.⁵ Where the sentence is nominal, there will be no deterrent effect. Furthermore, the legal impression communicated to the public will be that corruption pays. It is thus imperative that, coupled with asset forfeiture, the law should provide express mandatory custodial sentences capable of deterring corruption.⁶ To this end, it is prudent to harmonise all penalties contained in anti-corruption and related laws.

ACECA does not criminalise all forms of conduct constituting corruption, as contemplated by UNCAC and AUCCPAC, such as illicit enrichment and trading in influence.⁷ Such non-criminalisation hampers deterrence against wrongdoing and impedes citizens' efforts at reporting or whistleblowing.⁸ Illicit enrichment, backed by lifestyle audits and

3 Commission on Administrative Justice (2016) at 69-70. See also Kiplang'at J "Unresolved graft scandals new regime will inherit from Kibaki's tenure after polls" *Daily Nation* 14 December 2012.

4 See Citizen TV Anchor starts news by asking "Was it justice or slap on the wrist?" available at <https://www.youtube.com/watch?v=H2gApyr-T6Q> (visited on 3 January 2022)

5 Gilchrist (2014) at 17.

6 Githu Task Force Report (2015) at 76 paragraph t & 116; Klitgaard et al (2000) at 42 while highlighting Hong Kong's success in its anti-corruption strategy discusses the importance of raising the severity of formal penalties especially when going after the "big fish".

7 Githu Task Force Report (2015) at 116 paragraph j. According to the EACC Survey Report (2019) at 47, 53 & 64: 62.8% of respondents said that corruption would decrease if corrupt people were sent to jail.

8 Githu Task Force Report (2015) at 74; APRM Country Review Report of Kenya (2017) at 169.

whistleblowing, has the potential of being a potent weapon against corruption. Crimes arising out of influence peddling are a reality, especially in procurement processes, where citizens might be driven by greed corruption.

The National Ethics and Anti-Corruption Policy, 2018 (NEAP) in recognition of these shortcomings has proposed some policy interventions which if implemented will deal with the foregoing issues. Specifically, NEAP states that the government shall amend section 48 of ACECA to provide for stiffer sentences.⁹ NEAP also seeks to criminalise all forms of corruption, economic crimes and unethical conduct recognised under international law.¹⁰

4.2.2 Ethics and Anti-Corruption Commission (EACC)

Article 6(3) of the Constitution of Kenya mandates a state organ to ensure reasonable access to its services in all parts of the country, with due regard to the nature of the service. The EACC falls under the constitutional definition of a state organ and, considering devolution and the prevalence of corruption, its presence should be felt in all 47 counties of Kenya rather than the 11 regional offices it currently has.¹¹ Corruption in the counties has reached alarming levels, which necessitates urgent anti-corruption interventions.¹² Thus, the EACC ought to have offices — just like police stations or ODPP offices — in all counties, to facilitate citizens' access to its services if corruption is to be fought meaningfully across the entire country.¹³ Such access should be facilitated particularly for vulnerable persons, including the elderly, the disabled or people with low literacy levels.¹⁴

The EACC is the repository of wealth declarations which can be made available to citizens upon request. Additionally, the Lifestyle Audit Bill of 2019 proposes that the EACC be the repository of all lifestyle audits. The Office of the Ombudsman is mandated to administer

9 NEAP (2018) at 21.

10 NEAP (2018) at 21.

11 Article 260 of the Constitution of Kenya; Githu Task Force Report (2015) at 133; See <https://eacc.go.ke/default/regional-offices/> (visited on 6 January 2022).

12 Githu Task Force Report (2015) at 133; EACC Survey Report (2019) at 2 & 16.

13 Githu Task Force Report (2015) at 24, 49 & 133; EACC Survey Report (2018) at 46 & 47. See also Article 13(2) of UNCAC.

14 Articles 54 & 57 of the Constitution of Kenya.

access to information by the public. There needs to be synchronisation of such public access, which will be enhanced greatly by the decentralisation of EACC services.

4.2.3 National Anti-Corruption Campaign Steering Committee

There are shared functions between the NACCSC and the EACC concerning public education and awareness. The Githu Task Force Report suggests a delineation, in terms of which the EACC should have the mandate in education and awareness within the public sector while the NACCSC should concentrate its efforts on the general public.¹⁵ The NACCSC currently derives its mandate from Government Gazette notice no.6707, and thus lacks the proper constitutional and legal framework to undertake its work more effectively and comprehensively.¹⁶ The NACCSC also indicates that it is under-resourced, which impedes its work remarkably.¹⁷

The EACC Survey Report (2018) notes low levels of public participation in the fight against corruption, economic crime and unethical conduct. The Report regrets that disenchantment of the citizenry with corruption causes poor public participation in county development projects which are supposed to be people-driven.¹⁸ NACCSC's domain coincides with the context of citizen engagement in anti-corruption intervention and provides a potential catalyst for marshalling and co-ordinating citizen efforts.¹⁹ The lack of proper legal grounding for NACCSC to execute its mandate necessitates urgent corrective action on the part of lawmakers if the anti-corruption cause is to be bolstered by the efforts of citizens.

4.2.4 Lack of Whistleblowing Protection Legislation

Citizens engage in anti-corruption interventions through whistleblowing while anti-corruption laws habitually refer to the protection of whistleblowers, informants and witnesses. However, there is no whistleblower protection law in Kenya, despite the existence of numerous anti-corruption laws and institutions.²⁰ According to the EACC Survey Report (2018), 73.1% of the

15 Githu Task Force Report (2015) at 128.

16 See NACCSC website, available at <https://www.naccsc.go.ke> (visited 24 January 2022).

17 NACCSC Strategic Plan 2016-2021 (2017) at 5, 7 & 12.

18 EACC Survey Report (2018) at 63.

19 EACC Survey Report (2018) at 63. See Article 13 of UNCAC.

20 Section 65 of ACECA; Section 21 of the Bribery Act. See also Transparency International–Kenya (2015) “Comprehensive Legislation on Whistleblower Protection in Kenya” *Policy Brief 1* at 2, available at <https://bit.ly/3GtdXQI> (visited 6 January 2022).

respondents did not report incidents of corruption for fear of potential harassment and reprisal, thereby underscoring the urgent need for a legal framework for whistleblower protection.²¹

Such legislation is crucial, especially in the realm of public service where citizens who are public servants might need an employee whistleblower protection mechanism.²² The dismissal from work of the 1990s Goldenberg Affair whistleblower, David Munyakei, a Central Bank of Kenya junior employee, is testament that anti-corruption interventions find anchorage in whistleblower protection laws.²³ In 2019, in the case of *Christopher Ndarathi Murungaru v John Githongo*, the court awarded the plaintiff Kenya Shillings 27 million (approximately USD 238,515.90) as damages in a defamation suit regarding the Anglo-Leasing Scandal, brought against the anti-corruption activist defendant. This suit related to the whistleblowing actions of the former Ethics and Governance Permanent Secretary, John Githongo, and exemplifies the urgent need for a whistleblower protection framework.²⁴ South Africa, for instance, provides for disclosure by employees of information relating to criminal offences through the Protected Disclosures Act 26 of 2000. Similarly, UNCAC provides for protection of persons against any unjustified treatment for reporting corruption offences.²⁵ Article 5(6) of AUCPACC provides for the adoption of measures that ensure citizens report instances of corruption without fear of reprisals. In Kenya, there is a Whistle Blowers Protection draft bill that yet is to be finalised.²⁶ As rudimentary protection, the EACC website provides for an anonymous whistleblowing system.²⁷

21 EACC Survey Report (2018) at 31; APRM Country Review Report of Kenya (2017) at 169.

22 Article 8(4) of UNCAC; Carr (2007) at 240-241. See also Transparency International (2018) at 2, where it is stated that “insider” whistleblowers, by their position, often have crucial and reliable information that is vital to bring to light, but tend to be more vulnerable and need special protection.

23 Bosire Commission Report (2005) at 288.

24 Ng’etich J “Ruling on Githongo pushes the bar on whistleblowing” *The Standard* 21 May 2019; Menya W & Misiko H “Court orders Githongo to pay Murungaru Sh27m for defamation” *Nation* 2 May 2019.

25 Article 33 of UNCAC.

26 See Office of the Attorney General and State Department of Justice press statement (14 February 2017), available at <http://www.statelaw.go.ke/anti-corruption-summit-opens-in-nairobi/> (visited 2 September 2020).

27 See <https://eacc.go.ke/default/report-corruption/> (visited 6 January 2022).

4.3 Citizen-Centric Anti-Corruption Strategies

4.3.1 Amendments to Existing Legal and Institutional Frameworks

Citizen engagement in anti-corruption strategies may be enhanced by having express provisions requiring such engagement in all Kenyan laws. ACECA, for instance, has been criticised for making anti-corruption a governmental affair to the exclusion of other participants in the anti-corruption movement.²⁸ The Githu Task Force Report recommends the integration of anti-corruption policies into the drafting of all laws.²⁹ In fact, the constitutions of some countries — for example, Bolivia — impose an express duty upon citizens to combat corruption.³⁰

With regard to deterrent mechanisms capable of encouraging citizens to report corruption or participate in anti-corruption, ACECA should be amended to have higher mandatory custodial sentences in addition to payment of fines.³¹ Deterrent sentences, such as lengthy imprisonment, should be considered mandatory punishment for corruption offences. Additionally, ACECA needs to be amended to incorporate new offences, including trading in influence and illicit enrichment.

The EACC will serve Kenyans more effectively and discharge its mandate when it is decentralised fully across the 47 counties of Kenya. Accordingly, there should be efforts for resourcing it adequately, to cater for county needs in discharging its nation-wide mandate.³²

The enactment of the National Anti-Corruption Campaign Council Bill of 2019 will contribute to a sustained anti-corruption agenda amongst citizens by providing sound legal grounding for the NACCSC's operations.³³ Such legal grounding, backed by adequate financial and human resources, should catalyse the NACCSC's work amongst the general public.³⁴ The Githu Task Force Report recommends that, in view of the culture of corruption in Kenya, a

28 Jarso (2010) at 59.

29 Githu Task Force Report (2015) at 19.

30 Article 108(8) of the Plurinational States of Bolivia Constitution of 2009 states that one of the duties of a Bolivian is “to denounce and combat every act of corruption”.

31 Annual Report to Parliament on the State of National Security (2020) at 6, states that the Government is committed to supporting legislative frameworks to provide stiffer penalties to economic and corruption-related crimes.

32 NEAP (2018) at 22 proposes enhancing support mechanisms for the public to report corruption and obtain feedback.

33 See Githu Task Force Report (2015) at 46.

34 Githu Task Force Report (2015) at 46.

sustained anti-corruption campaign is essential.³⁵ Additionally, the operations of the proposed National Anti-Corruption Campaign Council should complement EACC work by penetrating into all 47 counties. For example, NACCSC's County Anti-Corruption Civilian Oversight Committees (CACCOs) should be extended to all the county governments. In Hong Kong, for example, the Independent Commission against Corruption (ICAC), mobilized citizen engagement in anti-corruption interventions similar to CACCOs, by establishing citizen advisory committees to guide and monitor the ICAC.³⁶

4.3.2 Whistleblower Protection Law

Citizens are duty-bound to protect the well-being of one another and to act for the good of society as a whole. Indeed, the Constitution of Kenya commences with a commitment to nurture and protect the well-being of the individual, the family, communities and the nation.³⁷ Thus, whistleblowing fits into the ambit of protection of the well-being of all.

Citizens engage in anti-corruption through whistleblowing as corrupt incidents mostly take place in secrecy.³⁸ Massive funds can be saved when whistleblowers take the bold and risky step of pre-empting potential corruption scandals from escalating.³⁹ As whistleblowing is a hazardous affair, whistleblowers need protection from retaliation, ostracism, legal action and unfair treatment.⁴⁰ Freedom of expression is upheld when citizens are able to report corruption without fear of reprisal.⁴¹ Citizen engagement thus is supported by having a whistleblowing mechanism and whistleblower protection properly anchored in law.

Whistleblower protection law, as a key feature of effective anti-corruption interventions, has been advanced by both the Bosire Commission Report (Goldenberg Affair)

35 Githu Task Force Report (2015) at 47.

36 Klitgaard et al (2000) at 22.

37 Paragraph 5 of the Preamble to the Constitution of Kenya.

38 Nsereko & Kebonang (2005) at 99.

39 Transparency International (2018) "A Best Practice Guide for Whistleblowing Legislation" at 1.

40 See, for example, Section 18 of the Ghana Whistleblower Act of 2006 which provides that whistleblowers are not liable in civil or criminal proceedings unless the information disclosed was false and of malicious intent.

41 Transparency International (2018) at 1.

and the Githu Task Force Report.⁴² Similarly, Transparency International—Kenya has been at the forefront of championing a whistleblower protection law.⁴³

Unlike Kenya, Rwanda safeguards its public interest by way of legislation related to whistleblower protection.⁴⁴ Article 3 of the Rwandan whistleblower law imposes a whistleblowing obligation on every person, subject to diligent verification before disclosure. Further, Rwanda provides for rewarding whistleblowers where disclosures result in the recovery of property.⁴⁵ Article 11 of the whistleblower law provides for protection from victimisation, while Article 17 provides for punishment of a person who victimises a whistleblower.

A whistleblower protection law can provide for a reward programme to incentivise citizens to report corruption.⁴⁶ The Ghana Whistleblower Act of 2006, for example, provides for a monetary reward mechanism to the tune of ten percent where a disclosure leads to recovery of money.⁴⁷ Ghana also rewards people whose disclosure leads to arrest and convictions.⁴⁸ Other appropriate rewards may take the form of public recognition or awards (where the whistleblower is agreeable) or promotions at work.⁴⁹ In view of the advances in technology, a Kenyan whistleblower protection law should take into consideration internet-mediated anti-corruption initiatives by citizens, such as whistleblowing through social media. Such a law should augur well for freedom of expression and laws relating to cybercrime and defamation. Kenya ought to consider also the establishment of an independent specialised body to provide advice to whistleblowers, similar to the Netherlands Advice Department of the House for Whistleblowers.⁵⁰

42 Githu Task Force Report (2015) at 122; Bosire Commission Report (2005) at 288.

43 See Transparency International—Kenya (2015) at 2. See Transparency International-Kenya press statement urging against harassment of whistleblowers, available at <https://bit.ly/3KMy1zA> (visited 23 January 2022).

44 Article 1 of Law No 44 of 2017 Relating to the Protection of Whistleblowers.

45 Article 9 of Law No 44 of 2017 Relating to the Protection of Whistleblowers.

46 Transparency International (2018) at 56-57.

47 Section 24 of the Ghana Whistleblower Act of 2006.

48 Section 23 of the Ghana Whistleblower Act of 2006.

49 Transparency International (2018) at 56-57.

50 Transparency International (2018) at 61.

The UNCAC Country Review Report (2019) of Kenya recommends the prioritisation of the finalisation of the draft Whistleblower Protection Bill of 2017.⁵¹ The draft Bill provides for protective and other measures to ensure the safety and well-being of people who expose corruption scandals to law enforcement agencies.⁵²

4.3.3 False Claims Legislation

Some of the corruption scandals beleaguering Kenya relate to payment of taxpayers' money for goods and services which are never received.⁵³ Such payments are made on false claims arising out of corrupt conduct. These false claims may be exposed by private citizens acting as whistleblowers when they come across evidence of fraud and corruption. In this regard, the position of the citizen engaging in anti-corruption may be reinforced by use of *qui tam* provisions in false claims legislation.⁵⁴ *Qui tam* actions entail a private citizen (commonly known as a whistleblower) suing a person suspected of having violated the law in performance of a contract with the government.⁵⁵

The use of *qui tam* provisions is common in the United States, through its False Claims Act 31 USC §§3729–3733.⁵⁶ The False Claims Act (FCA), also known as Lincoln's Law, was enacted to curb defence contractor fraud during the Civil War.⁵⁷ The FCA allows private citizens to file *qui tam* suits on behalf of the government (also called relator suits) against those who

51 Annual Report to Parliament on the State of National Security (2020) at 6 states that the Government is committed to protection and rewarding of whistle blowers and witnesses.

52 UNCAC Kenya Review Report (2019) at 44-45. See Office of the Attorney General and State Department of Justice press statement (14 February 2017), available at <http://www.statelaw.go.ke/anti-corruption-summit-opens-in-nairobi/> (visited 2 September 2020).

53 Bosire Commission Report (2005) at 300 & 301. See also Orinde H "Photos: Woman paid Sh59m to supply 'air', family arrested in Naivasha" *Standard* 28 May 2018; ACC No.13/2016 R vs Catherine Akello Namuye (CEO) (Deceased), Bruce Odhiambo (Deceased) & Others; Republic v Lilian Mbogo Omollo & 43 others. See ODPP's report of high-profile corruption and economic crime cases registered in court as at 9 November 2021 at 7, available at <https://bit.ly/3jHRW6V> (visited 22 January 2022).

54 Githu Task Force Report (2015) at 83 & 194. The Githu Task Force Report (2015) at 84 observes that: *Qui tam* is the short form of the longer Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which loosely translates to "he who brings a case on behalf of our lord the King as well as for himself."

See Carr (2007) at 241.

55 Githu Task Force Report (2015) at 83; UNCAC Kenya Review Report (2019) at 44.

56 See US Department of Justice, Fraud Section which sets out the background of the federal statute, available at <https://www.justice.gov/civil/false-claims-act> (visited 7 January 2022)

57 See US Department of Justice, Fraud Section, available at <https://www.justice.gov/civil/false-claims-act> (visited 7 January 2022).

have defrauded the government.⁵⁸ Successful *qui tam* actions enable private citizens to receive 15% to 30% of the portion of the government's recovery.⁵⁹ Where the disclosure of the corrupt act is in the public domain, as in pending investigations or in newspapers, one cannot rely on *qui tam* provisions.⁶⁰ Additionally, the FCA provides for protection of whistleblowers from retaliatory action.⁶¹ Carr seemingly is persuaded by the success of *qui tam* actions in the US as a tool to expose corruption.⁶²

Qui tam provisions may be deployed to incentivise public participation amongst Kenyan citizens by facilitating scrutiny and oversight of public expenditure.⁶³ Such public participation ensures detection, disruption and deterrence of corrupt conduct by the citizens in public projects.⁶⁴ Citizens who thus blow the whistle on corruption would be able to rely on *qui tam* provisions to secure their own and the public's interest.⁶⁵ The probability of rewards in *qui tam* actions galvanises citizen engagement in anti-corruption.⁶⁶ This position is affirmed by Cotterrell, who considers that law should incentivise the people to use it by providing suitable remedies when they rely upon it.⁶⁷

Qui tam provisions can be applied in Kenya in corruption-prone sectors such as health, construction, procurement and revenue collection.⁶⁸ Indeed, the Kenya Revenue Authority has a reward scheme for informants in tax fraud or tax evasion cases of up to 5% of the taxes recovered or Kenya Shillings 2 million (approximately USD 17,667.84).⁶⁹ Reliance upon *qui tam* provisions in a false claims law enables the state to recover public funds while rewarding the patriotism of citizens in fighting corruption. The US courts have declared that use of the False

58 §3730(b)(1) of the US False Claims Act. See also Carr (2007) at 242; Githu Task Force Report (2015) at 83.

59 §3730(d) of the US False Claims Act.

60 §3730(e)(4)(A) of the US False Claims Act.

61 §3730(h) of the US False Claims Act.

62 Carr (2007) at 242 & 243.

63 Githu Task Force Report (2015) at 121.

64 Githu Task Force Report (2015) at 85.

65 Githu Task Force Report (2015) at 133 & 194.

66 Githu Task Force Report (2015) at 86.

67 Cotterrell R (1984) at 57.

68 Githu Task Force Report (2015) at 85.

69 See KRA website which outlines the reward scheme for reporting tax fraud, available at <https://www.kra.go.ke/en/tax-fraud/reward-scheme> (visited 7 January 2022). See also UNCAC Country Review of Kenya Report (2019) at 35.

Claims Act “protects the Treasury from monetary injury”.⁷⁰ Enabling citizens to fight corruption through operation of a false claims statute gives expression to Article 13 of UNCAC, which is concerned with the active participation of individuals outside the public sector in the fight against corruption. Further, such engagement in anti-corruption is in line with the aspirations of the Constitution of Kenya to protect the well-being of society.⁷¹

Accordingly, the Githu Task Force Report (2015) recommended the enactment of a False Claims Act with *qui tam* provisions similar to the US False Claims Act, in an attempt to curb false and fraudulent claims against the government.⁷² It further suggested adoption of *qui tam* provisions in Kenya’s anti-corruption and public procurement laws.⁷³ The recommended quantifiable share of the amount recovered was pegged at 15% to 25%.⁷⁴ Since 2017, there has been a draft False Claims Bill 2017 in the making in Kenya.⁷⁵

4.3.4 County Governments

A devolved system of government as contemplated in the Constitution of Kenya promotes public participation, which enhances transparency, accountability and probity.⁷⁶ Devolution of power and public participation are part of the national values and principles of governance in Kenya.⁷⁷ One of the objects of devolution is to enhance the participation of the people in decision-making processes.⁷⁸ Devolution thus is regarded as an anti-corruption weapon.⁷⁹

The Githu Task Force Report notes that there are inadequate anti-corruption support mechanisms at the grassroots level to propel the public to fight corruption.⁸⁰ Since corruption is prevalent in the counties, it is imperative to deploy anti-corruption strategies — currently

70 See *No. 07-40963 Grubbs v. Kanneganti, et al*, (5th Cir. 2009), available at <https://bit.ly/3lufea7> (visited 7 January 2022).

71 Paragraph 6 of the Constitution of Kenya.

72 Githu Task Force Report (2015) at 86, 121 & 194.

73 Githu Task Force Report (2015) at 86.

74 Githu Task Force Report (2015) at 194.

75 Githu Task Force Report (2015) at 86, 121 & 194; Kenya Open Government Partnership National Action Plan II July 2016–June 2018 (2016) at 10; UNCAC Kenya Review Report (2019) at 44.

76 Articles 1, 6 & 10(2)(a) of the Constitution of Kenya.

77 Article 10(2)(a) of the Constitution of Kenya.

78 Article 174(c) of the Constitution of Kenya.

79 APRM Country Review Report of Kenya (2017) at 264.

80 Githu Task Force Report (2015) at 46; NEAP (2018) 21.

confined to the national level — to the counties with the necessary modifications and innovations.⁸¹ Accordingly, it has been recommended that for the EACC to combat corruption effectively, it should be given the resources to decentralise its services to all 47 counties of Kenya.⁸²

It is proposed further that decentralisation of the EACC and the NACCSC, coupled with citizen participation in county affairs as contemplated in the County Governments Act of 2012, can enhance citizen engagement in anti-corruption initiatives in Kenya.⁸³ The examples of citizens in India and the Philippines engaging in social accountability mechanisms may be utilised in the arena of public participation and county governments.⁸⁴ Social audits, for example, may be deployed by citizens in county public projects in order to stem corruption.⁸⁵

4.3.5 Civic Education Units

Section 98 of the County Governments Act provides for civic education to promote empowerment and systemic, continual engagement of citizens and government. Such civic education aims to ensure that there exists an informed citizenry capable of actively participating in the governance of their society.⁸⁶ The objectives of civic education, as outlined in Section 99(2) of the County Governments Act, include providing an enabling environment for sustained citizen engagement in the implementation of the Constitution and heightened demand for service delivery in the counties. Another aim of civic education is to ensure the citizen knows and owns the main economic, social and political issues facing the county, as well as the county government structure and processes.⁸⁷ Ultimately, a civic education unit is contemplated for each county to implement a civic education programme in line with the Constitution.⁸⁸

81 Githu Task Force Report (2015) at 24 & 133. See also EACC Report 2017/2018 at 8 & 12.

82 Githu Task Force Report (2015) at 24.

83 Section 87 of the County Governments Act; NEAP (2018) at 35.

84 Chêne (2008) at 6 & 8-9.

85 Githu Task Force Report (2015) at 47.

86 Section 99(1) of the County Governments Act.

87 Section 99(2)(h) of the County Governments Act.

88 Section 100 of the County Governments Act.

It is submitted that the efforts of the NACCSC and the EACC may be enhanced greatly by utilising civic education units. In fact, grounding citizens in anti-corruption education and awareness empowers them to engage with their county governments and meaningfully deploy anti-corruption interventions, such as carrying out social audits and demanding transparency in fiscal matters.⁸⁹ Additionally, civic education units may be used to inculcate ethics which can generate a long-term moral dividend for society.⁹⁰

4.3.6 Citizen Fora

The Urban Areas and Cities Act of 2011 provides for citizen fora in which residents of a city, municipality or town can participate in deliberations and make proposals regarding the provision of services, budget estimates, policies, legislation and any matter of concern.⁹¹ This Act also allows for the participation of all residents of urban areas or cities, including the youth, persons with disabilities and other marginalised people.⁹² Such express inclusion of vulnerable groups is crucial in citizen engagement in anti-corruption matters.

Section 22 of the Urban Areas and Cities Act entitles citizens to engage the different levels of government on matters of concern to them. The section may be utilised by the NACCSC and the EACC in discharging their anti-corruption mandate by creating awareness and education projects. The presence of the EACC in urban areas and cities can provide channels for reporting corruption matters brought to the attention of citizen fora.

It has been suggested that there should be innovative anti-corruption strategies deployed to the counties, with the EACC and other law enforcement agencies providing technical support.⁹³ It thus is submitted that empowering and engaging citizen fora may be

89 Klitgaard et al (2000) at 87 & 88 discusses prevention of corruption by *inter alia*, disseminating rules and regulations to citizens, citizens' manuals and promoting use of citizens' evaluations.

90 Carr (2007) at 228; NEAP (2018) at 22 states that the government shall enhance civic engagement and promote participation by the public in combating corruption as a policy intervention. Such an intervention would be useful where the civic education units are operational and there is inter-agency cooperation amongst the County government, NACCSC and/or EACC.

91 Section 22 of Urban Areas and Cities Act; Klitgaard et al (2000) at 87.

92 Section 2 of the Second Schedule to the Urban Areas and Cities Act.

93 Githu Task Force Report (2015) at 133.

used effectively by the EACC and the NACCSC. Additionally, the local police service, the ODPP and the judiciary may be included in such engagements.

4.3.7 Anti-Corruption Education and Re-Socialisation

Anti-corruption education entails raising awareness of and providing instruction on corruption and how to counter it. Accordingly, it is crucial for the public to be educated deliberately on corruption, its causes, its effects, its manifestations and the available anti-corruption strategies.⁹⁴ Also, anti-corruption education facilitates the promotion of ethics and integrity amongst the citizenry. Such education thus serves to empower the citizens to play their role in fighting corruption within their social space.⁹⁵ Currently, some anti-corruption education is offered by the EACC and the NACCSC as per their legal mandates.⁹⁶

It has been recommended that public awareness and civic education regarding anti-corruption be amplified for the common *mwananchi* (citizen) actively to fight corruption.⁹⁷ Such public education may be implemented by the NACCSC with requisite assistance from the national and county governments. For instance, the administrative arm of government, through county commissioners all the way to the grassroots chiefs, can mobilise citizens to participate in *barazas* (public meetings) where anti-corruption education can be spearheaded by the NACCSC periodically and its effects measured. The NACCSC also can empower citizens in the counties through CACCOCs, by encouraging them to engage in public participation activities, such as participatory budgeting, expenditure tracking and social audits of public programmes.⁹⁸ Educating the masses on corruption pitfalls and whistleblowing mechanisms as regards public expenditure and procurement processes can sustain effective citizen engagement in anti-corruption.

94 Githu Task Force Report (2015) at 72; Carr (2007) at 244.

95 Githu Task Force Report (2015) at 72; The 2021 International Anti-Corruption Day highlighted the rights and responsibilities of everyone - including the public in tackling corruption under the theme- "**Your Right, your role: say no to corruption**", available at <https://bit.ly/33JQVX4> (visited 23 January 2022); Klitgaard et al (2000) at 23 highlight one of the key strategies of Hong Kong's ICAC's success as including educating the citizens on the harmful effects of corruption and enhancing their participation in anti-corruption interventions.

96 Section 13(2)(a) of the EACC Act. See also NACCSC Gazette Notice No 6707.

97 Githu Task Force (2015) at 73.

98 Githu Task Force Report (2015) at 73.

Anti-corruption education is crucial in the area of elections, as the stakes are high for politicians and impoverished citizens are vulnerable to financial inducements. It thus has been recommended that the NACCSC and the commission responsible for elections educate citizens on corruption and anti-corruption interventions related to electoral processes, electoral offences and campaign finance.⁹⁹ Simultaneously, the electorate should be educated on the importance of electing candidates of high integrity.¹⁰⁰

The Githu Task Force Report advocates the incorporation of anti-corruption education into the curriculum of the formal education system.¹⁰¹ While the Task Force does not state expressly that anti-corruption studies be a stand-alone subject,¹⁰² it is submitted that, in view of the endemic corruption in Kenyan society, it is expedient to have mandatory and nationally examinable anti-corruption studies from basic to tertiary levels.

Carr is of a similar opinion regarding anti-corruption education and terms it re-socialisation.¹⁰³ She finds that enhancing social awareness of corruption and its long-term effects through education can galvanise citizens against corruption as a common enemy.¹⁰⁴ Carr is aware that there are several challenges to re-socialisation, such as low literacy levels and prejudices, and cautions that the re-socialisation process will take time and effort.¹⁰⁵ However, this process is worth pursuing in that the long term effect will change fundamentally citizens' habits and practices to that of default anti-corruption as a norm.¹⁰⁶ Carr suggests also that non-state actors — such as civil society organisations, activists and the media — engage citizens by spreading messages about the ill effects of corruption and its impact on society, by exposing

99 Githu Task Force Report (2015) at 73-74.

100 Githu Task Force Report (2015) at 18; During the 2021 International Anti-Corruption Day, the Ethics and Anti-Corruption Commission Chief Executive Officer, Mr Twalib Mbarak, in his speech, urged the public to elect leaders of integrity as the country gears up for next year's General Election, available on <https://bit.ly/3tRR4Ch> (visited 23 January 2022).

101 Githu Task Force Report (2015) at 74. The Basic Education Curriculum Framework (2017) at 110 identifies integrity as one of the pertinent and contemporary social issues that should be included in the curriculum.

102 Githu Task Force Report (2015) at 74; NEAP (2018) at 21 outlines interventions such as mainstreaming integrity, ethics and anti-corruption content in education at all levels of learning.

103 Carr (2007) at 228.

104 Carr (2007) at 228, 243 & 244.

105 Carr (2007) at 244.

106 Carr (2007) at 244.

corruption and by empowering the citizenry as to the critical role it plays in curbing venality.¹⁰⁷ Such awareness might prove to be successful in the long term by evoking a sense of civic virtue amongst citizens about the consequences of their actions for themselves, their compatriots and future generations.¹⁰⁸

Carr's sentiments are echoed in the work done by the EACC and the NACSCC, especially the latter's whose mandate is to effect fundamental changes in the attitudes of Kenyans towards corruption.¹⁰⁹ The EACC also has in place Integrity Clubs in schools, which impart knowledge of integrity and anti-corruption to the youth through activities such as debates, sports, arts and culture.¹¹⁰ Some of the EACC's expected outcomes for these Integrity Clubs are attitudinal change among the youth and generational transformation that lead to reduced levels of corruption. Similarly, Transparency International–Kenya propagates anti-corruption by establishing Integrity Clubs in primary schools and engaging the pupils in activities, such as placing placards with integrity messages around the school, and by awarding integrity badges.¹¹¹ Citizens of today bequeath the future to the children, hence imparting the anti-corruption cause to them will develop and ground re-socialisation over time.

Anti-corruption education can situate citizens optimally to fight corruption by providing them with the right tools (such as knowledge of offences, reporting channels and whistleblower mechanisms) to make sustainable decisions and steer away from long-held apathy and short-cut habits that incubate corruption.

4.3.8 President of Kenya

The President is a symbol of unity in Kenya and thus should weld together Kenyans in the fight against corruption. The President provides leadership and necessary political will in anti-corruption strategies. One area in which to demonstrate zero tolerance towards corruption should be the appointment of public and state officers. It is crucial for the President to appoint

107 Carr (2007) at 245; NEAP (2018) at 21 echoes Carr by making provision for collaboration of state and non-state actors in public education, training and awareness-creation.

108 Carr (2007) at 245 & 246.

109 NACCSC Gazette Notice No 6707 paragraph 3.

110 See EACC discussion on Integrity Clubs, available at <https://bit.ly/3nREKye> (visited 23 January 2022).

111 See *Adili 143* (August/September 2013) at 8.

to public office only people who are untainted by corruption. It has been recommended that people who are under investigations or in court for corruption-related offences should not be appointed or continue to hold public office.¹¹²

Further, it is crucial for the President to emphasise anti-corruption sentiments in public pronouncements and during public holiday addresses.¹¹³ Additionally, honours conferred upon persons by the President should be reserved for deserving individuals who fulfil the requirements of Chapter Six of the Constitution of Kenya. Any honour recipients who might have compromised their integrity and engaged in corrupt behaviour ought to be stripped publicly of their awards or titles.¹¹⁴

4.4 Anti-Corruption and the Rule of Law

Aristotle postulates that “the rule of the law is preferable to that of any individual” and “if it be better for certain individuals to govern, they should be made only guardians or ministers to the law”.¹¹⁵ Dicey concurs, positing that the rule of law denotes supremacy of law and excludes arbitrariness.¹¹⁶

The Preambles to both UNCAC and AUCPACC are cognisant of the threat of corruption to the rule of law.¹¹⁷ The Constitution of Kenya regards the rule of law as an essential value in governance.¹¹⁸ Thus, the rule of law should be considered when applying or interpreting the Constitution, when enacting, applying or interpreting laws, or when making and implementing public policy decisions.

112 Githu Task Force Report (2015) at 18; NEAP (2018) at 23.

113 Githu Task Force Report (2015) at 18; See for example, President Uhuru Kenyatta when he joined Catholic faithful during the launch of the Lent season reminded Kenyans that they all had a responsibility to fight corruption, available at <https://bit.ly/3rFXgKZ> (visited 23 January 2022).

114 Section 10(c) of the National Honours Act 2013; Githu Task Force Report (2015) at 18-19.

115 Aristotle (1885) at 101-102.

116 Dicey (1931) at 179 & 198.

117 Paragraphs 1 & 7 of the Preamble to UNCAC; Paragraph 3 of the Preamble to AUCPACC.

118 Paragraph 6 of the Preamble to & Article 10(2)(a) of the Constitution of Kenya.

South Africa's Chief Justice Mogoeng identifies observance of the rule of law as a key ingredient of good governance.¹¹⁹ Kenya's Justice Wanjala finds that the war on corruption is linked inextricably to the rule of law.¹²⁰ Similarly, Hong Kong's Justice Fok is of the opinion that the eradication of the evils of corruption is dependent upon the rule of law.¹²¹

Bingham, in considering what constitutes the rule of law, identifies certain pertinent principles.¹²² One such principle is that the law must be accessible, clear and predictable.¹²³ It is, for instance, important for people to know what actions constitute an offence, hence laws criminalising certain conduct — for example, bribery — need to be written in clear language that a citizen can understand.¹²⁴ The right to information and public awareness activities enable the citizens to be knowledgeable about laws. Such access and knowledge, promote the rule of law and prevent citizens' lives from becoming "solitary, poor, nasty, brutish and short".¹²⁵

Another tenet of the rule of law is that the laws of the land should apply equally to all unless there are justifiable reasons for any differentiation.¹²⁶ Citizen trust in anti-corruption is eroded when there is a perception that the law applies differently from one person to the other. Where, for example, an influential person accused of corruption is not charged in court or receives a lenient sentence, the ordinary citizen might think that the law favours the rich and powerful, thereby encouraging apathy towards anti-corruption initiatives.¹²⁷ Take the case of a former Director at the National Aids Control Council, Dr Margaret Gachara, who was convicted of abuse of office and fraud-related charges leading to the loss of Kenya Shillings 27 million (approximately USD 238,410.59).¹²⁸ Gachara was imprisoned for one year on each of three

119 Mogoeng M (10 May 2013), available at https://www.judiciary.org.za/images/chief_justice_2013/Speech-CJ_10-May-2013_Benin.pdf (visited 7 January 2022).

120 Wanjala (19 September 2019) at 4.

121 Fok (11 May 2015) at 15.

122 Bingham (2010) at 37.

123 Bingham (2010) at 37.

124 Bingham (2010) at 38; Dicey (1931) at 183.

125 Hobbes (1968) at 186.

126 Bingham (2007) at 73; Dicey (1931) at 189.

127 Mbote & Akech (2011) at 68.

128 Commission on Administrative Justice (2016) at 69-70; Kadida J & Agutu M "Former Aids Boss Jailed for Fraud" *Daily Nation* 31 August 2004; Mbote & Akech (2011) at 68.

counts, with the sentences running concurrently.¹²⁹ After serving less than the term, Gachara was released via a Presidential pardon.¹³⁰ The Gachara case illustrates how the principle of equality before the law might be perceived as a mirage by ordinary citizens. The EACC Survey Report (2019) confirms this position when it states that:

the weak and lethargic approach to law enforcement and punishment depending on the position of suspects has demoralised the populace leading to apathy in reporting occurrences and manifestations of corruption and unethical conduct.¹³¹

Another important feature of the rule of law is providing for adequate legal protection of fundamental human rights.¹³² The Constitution of Kenya contains a Bill of Rights in Chapter Four. Article 20(1) of the Constitution records that the Bill of Rights applies to all law and binds all state organs and all persons. Article 20(2) provides for the greatest extent of enjoyment of fundamental rights and freedoms by every person. The Constitution further imposes a duty upon the state and state organs to observe, respect, uphold, promote and fulfil the rights and fundamental freedoms enshrined in the Bill of Rights.¹³³ This means that the anti-corruption framework in Kenya always should take the Bill of Rights into consideration.

Citizen engagement in anti-corruption activities thus should proceed with due observance of the Bill of Rights. The right to privacy, for instance, likely may be diminished in cases of internet-mediated anti-corruption activities by netizens and by vigilant citizens perusing assets declarations.¹³⁴ Also, freedom of expression might be limited in the case of social media anti-corruption activists being required to verify fully information that they may post, so that the rights and reputations of others are protected.¹³⁵ Article 34 of the Constitution guarantees the freedom of media, which is important as the media plays a crucial role in exposing corruption scandals by providing *wananchi* (citizens) with information regarding the

129 Kadida & Agutu (31 August 2004); Mbote & Akech (2011) at 68; Commission on Administrative Justice (2016) at 69-70.

130 Mbote & Akech (2011) at 68; Nation team "Gachara Walks to Freedom" *Daily Nation* 13 December 2004.

131 EACC Survey Report (2018) at 63.

132 Bingham (2007) at 75.

133 Article 21(1) of the Constitution of Kenya.

134 Article 31 of the Constitution of Kenya.

135 Article 33(3) of the Constitution of Kenya; Section 23 of the Computer Misuse and Cybercrimes Act, 2018.

use of public resources. Article 35 provides for access to information by citizens, which right has proved to be very useful in other countries as regards financial probity of public institutions and public officers. Article 37 relates to freedom of assembly, demonstration, picketing and petitions. This right is useful when citizens want to protest corruption, and ensures that they are not fettered in the exercise of this right so long as their activities are peaceful.

Property rights of citizens might be interfered with by the state, for instance, in asset forfeiture where third-party rights may be affected. Hence asset recovery mechanisms should be with due regard to the rule of law with regard to such property rights. Article 50(4) of the Constitution enshrines the right to a fair hearing and provides that evidence obtained in a manner that violates a person's rights and freedoms should be excluded. It thus is incumbent upon the state to obtain evidence without violating human rights, so that a case is not rendered a nullity, thereby occasioning a miscarriage of justice for the primary victims of corruption, namely, the citizens. Also, Article 50(8) allows for the exclusion of members of the public during proceedings in court, if it is necessary for the protection of witnesses — which is key especially in anti-corruption proceedings against powerful individuals.

The Kenyan Bill of Rights provides for enhanced application of rights and freedoms to persons with disabilities, the youth, marginalised people and members of society.¹³⁶ This means that more care should be taken to ensure that these categories of people participate meaningfully in the affairs of society. The Constitution of Kenya thus contains provisions instrumental to the rule of law regarding fundamental rights and freedoms which can have an impact upon the course of citizen-centred anti-corruption interventions. However, there ought to be concerted efforts to balance and guarantee basic rights and fundamental freedoms even as citizens fight corruption.

Bingham states also that “adjudicative procedures provided by the state should be fair” and that the “rule of law would seem to require no less”.¹³⁷ The Constitution of Kenya, in Article 48, provides for access to justice for all, while Article 51 sets out the requisites for ensuring the

136 Articles 54.55 & 56 of the Constitution of Kenya, 2010.

137 Bingham (2007) at 80.

right to a fair hearing. Where a criminal or civil matter arising out of anti-corruption activity is settled fairly in court, justice wins and the citizenry develops trust in public institutions such as the EACC, the ODPP and the Judiciary, and thus may become more willing to report or testify in cases knowing that there is impartiality in the corridors of justice.

From the foregoing, it is evident that anti-corruption strategies gain legitimacy when they are backed by the rule of law and are not subject to arbitrariness. In the absence of the rule of law, citizens may not fight corruption freely, which in turn is detrimental to democracy and the well-being of society. Thus, when entreating citizens to engage in anti-corruption interventions, it is prudent to observe the tenets of the rule of law, the Bill of Rights, the Constitution and other applicable laws.¹³⁸

4.5 Conclusion

There is a need for mandatory custodial sentences to punish corruption criminals and to deter would-be offenders. Such penalties will send a message to citizens that corruption does not pay and will encourage them to participate in whistleblowing and reporting activities where corrupt conduct is detected.

A whistleblower protection law is required if citizen engagement in anti-corruption is to succeed. Kenya can benefit also by enacting a False Claims Act to incentivise the real victims of corruption (citizens) to vigilant action. New legislation aside, there are existing structures — such as the devolved system of government — that can be exploited to ensure that citizens are galvanised into action. Civic education units and citizen fora in urban centres, which when well-resourced in terms of funds and staff, can be excellent spaces for citizen engagement in anti-corruption interventions.

It is also sensible to educate citizens about what constitutes corruption, their role in enabling it and its deleterious effects. Where citizens become aware of their role in the corruption continuum, they become aware of the critical part they can play in preventing and

138 Githu Task Force Report (2015) at 124; Fok (2015) at 15.

combating it. Such knowledge and action can translate into re-socialisation over time, where the citizens opt to engage in ethics and integrity as a norm.

Ultimately, anti-corruption measures and reforms are bound to be unsustainable if they are not founded upon the rule of law. It thus is necessary that where citizens are engaged in anti-corruption activities, such engagement be firmly rooted in respect for the rule of law and a desire to uphold it. It is important, therefore, for the state to educate the citizenry on the importance of the rule of law even as it marshals their support in fighting corruption.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

This study has explored the role of citizens in fighting corruption in Kenya. It also traversed the history of corruption and concomitant interventions by the state and citizens. Accordingly, the study demonstrated the need to involve citizens actively in anti-corruption programmes.

It is apparent that Kenya, over the years, consistently has experienced grand corruption, which in turn has enabled petty corruption. Such systemic corruption affecting Kenyan society has prompted a few bold citizens in the past to reject corruption outright by blowing the whistle, albeit at a cost. Present-day Kenya also has audacious citizens who engage in fighting corruption in various ways, individually, collectively or through internet-mediated anti-corruption activism. As much as these efforts are not large-scale, they nonetheless have had an impact upon the corruption landscape in Kenya. Furthermore, there remains great potential for harnessing citizen action to fight corruption in Kenya. Citizen-centric anti-corruption interventions in a few other countries were considered and it was established that citizens across the world are formidable frontline fighters against corruption.

This study also analysed the anti-corruption legal, institutional and policy framework in Kenya as regards the role of the citizenry. Kenya has an abundance of laws and institutions supporting anti-corruption mechanisms. While not expressly imposing upon citizens the duty to engage in anti-corruption interventions, most of the domestic legislation is dependent upon citizen engagement. Engagement and interaction of citizens with the laws and institutions range from abstaining from corrupt practices, through reporting corrupt conduct and whistleblowing, to testifying in court. Most of the anti-corruption laws seek to regulate the conduct of public affairs and processes, as well as criminalise corrupt conduct, while relying upon citizens to report malpractices by public officials. Laws relating to the right to information, whistleblowing, witness protection and public awareness all pertain to citizen-centric anti-corruption strategies. In addition, there exist various anti-corruption institutions, such as the

EACC and the NACCSC, charged with interacting with citizens through public education and awareness creation about corruption and anti-corruption. An institution such as the NACCSC is a good idea for engagement with the citizens through awareness creation and education against corruption.

This study has established that it is prudent to prioritise citizen engagement in anti-corruption activities since citizens are the real victims of corruption. The practicability of citizen engagement in anti-corruption strategies stems from the fact that citizens experience first-hand, the deleterious effects of corruption and they pay for it, particularly the poorer population. Such an unconscionable *status quo* may be resolved by confronting the frustrations of citizens and spurring them on to participating in the anti-corruption cause. Where policies and laws are crafted with the citizenry in mind, anti-corruption interventions become sustainable because they are infused with a sense of ownership.

It is worth bearing in mind that laws and institutions are dependent upon citizens engaging them, making them a dominant and constant factor in anti-corruption interventions. The analysis of the anti-corruption architecture in Kenya highlighted the importance of laws relating to access to information, whistleblowing and witness protection. Such laws not only indicate the robust role of citizens in utilising them but also demonstrate that the flames of anti-corruption are fanned by the audacity, resilience and virtues of citizens. In addition, it is advantageous to promote citizen-centred anti-corruption strategies as they can approach the nuances of social and economic justice holistically, which can bolster the engagement of the people.

Despite the multiplicity of anti-corruption laws, institutions and other measures aimed at slaying the dragon of corruption, it continues to rear its head. Against this backdrop, the forms of anti-corruption mechanisms most suitable for Kenya were analysed. It was proposed that one way of raising concern amongst the citizenry is through anti-corruption education and public awareness exercises. Such exercises should demonstrate to citizens the dangers, effects and costs of corruption. Over an extended period, such exercises can shift citizens' attitudes fundamentally, from complicity in corruption to anti-corruption as a norm. This idea is propagated also by Indira Carr in the context of a long-term process which she terms re-

socialisation. Additionally, anti-corruption education entails empowering citizens as regards the existing laws and institutions available for their confrontation with corruption.

Such anti-corruption education can be carried out best by the NACCSC. The civic education units can contribute too, citizen fora can become key sites of anti-corruption education and awareness programmes, and operate as reporting channels. Where the NACCSC spearheads these efforts, with co-operation from the national and county governments, anti-corruption sentiment can filter down to the *wananchi*.

Weaknesses of the existing anti-corruption framework include ineffective penalties, lack of decentralised EACC services in all the counties of Kenya, and lack of a whistleblower protection law. In response to this situation, the study proposed the imposition of mandatory custodial sentences in corruption cases and the enactment of a whistleblower protection law. Additionally, it was submitted that false claims legislation could stimulate citizens across Kenya to fight corruption. The use of *qui tam* actions in false claims legislation can prompt vigilant citizens into action, especially where there is a reward system for whistleblowing.

Ultimately, respect for the rule of law is a requisite for engaging citizens in the fight against corruption. Principles constituting the rule of law encompass respect for fundamental freedoms and rights, universal application of the law, and the requirement for law to be accessible and clear. Certainly, any mechanism aimed at encouraging citizens to engage in anti-corruption interventions should uphold the rule of law and not be susceptible to arbitrariness.

Coupled with political will on the part of the state, the will of the citizens to fight corruption is critical for a vibrant anti-corruption ecosystem in which all actors flourish and collaborate in trying to win the war on corruption — where there is a will, there is a way. Importantly, citizens can fight corruption by electing people of integrity who will not plunder the already lean public coffers and deny the ordinary *wananchi* much needed public services.

Citizen engagement in anti-corruption programmes can reduce corruption significantly. This study has established that successful anti-corruption interventions by citizens are premised on the laws and institutions that empower them. Where the available tools (policies, laws and institutions) are not citizen-friendly and citizen-centred, they will not work. Political will is

crucial in interventions that entreat the citizens to be part of the anti-corruption cause. Accordingly, co-operation between the citizenry and the state is vital in ensuring that advances are made against corruption.

This study has delved into the neglected role of ordinary people in combating corruption in Kenya. It has looked at anti-corruption interventions from the point of reference of the *mwananchi* (citizen). It has concentrated upon analysing laws, institutions and policies that are citizen-centric to illustrate how they can motivate a citizen to fight corruption. The study suggests that citizens are the last frontier in fighting corruption in Kenya. The anti-corruption cause will benefit significantly when the *mwananchi* moves from apathy to become the “the man in the arena”.¹

5.2 Recommendations

5.2.1 Stiff Penalties for Corruption Offences

This study recommends stiffer penalties for all corruption-related offences. Stiff penalties may take the form of mandatory custodial sentences, like exemplary imprisonment, which will communicate to the public that corruption is not tolerated and deter would-be perpetrators. Also, mandatory custodial sentences, accompanied by assets forfeiture laws, will deny the corrupt the chance to enjoy their ill-gotten wealth.

5.2.2 Anti-Corruption Education and Awareness Creation

Anti-corruption education and awareness-creation exercises are crucial in empowering citizens. Firstly, such knowledge enables them to appreciate the detrimental effects of corruption. Secondly, the citizens become aware of what conduct constitutes corruption, and how and where to report incidents of corruption. When citizens are empowered, they have expectations of action from the responsible anti-corruption entities.

Further, long-term anti-corruption education and awareness creation could re-socialise citizens and inculcate a sense of civic virtue, so that eventually anti-corruption becomes the norm in Kenya. For such education and awareness creation to be successful, they should be

1 Roosevelt T (23 April 1910).

amplified, co-ordinated and sustained. It thus is recommended that such anti-corruption education be led and co-ordinated by the anticipated National Anti-Corruption Campaign Council (NACCC).² Such education and awareness creation can be done in a variety of spaces, such as village *baraza* (meetings), local mass media, schools, county civic education units and citizen fora.

5.2.3 New Legislation

In view of the systemic corruption in Kenya, it is recommended that all laws should have provisions for anti-corruption policies and for citizen engagement.³ It is also prudent for the bills pending in Parliament, such as the Public Participation Bill, the NACCC Bill and the Lifestyle Audit Bill, to be enacted promptly. These are crucial laws in engaging citizens in preventing and detecting corruption.

Additionally, a whistleblower protection law is needed for successful anti-corruption strategies and is critical to safeguarding citizens' well-being. The Bosire Commission Report, the Githu Task Force Report and Transparency International–Kenya have advocated the enactment of such a statute.⁴ It is long overdue.

Citizens can be enabled to fight corruption through *qui tam* actions in false claims legislation.⁵ Such a law not only helps protect the public purse from thieving hands, but also lends a sense of ownership to the citizen who engages in anti-corruption activities that lead to recovery of looted funds.

5.2.4 From NACCSC to NACCC

The NACCSC currently is charged with creating awareness and educating the public about corruption. The enactment of the National Anti-Corruption Campaign Council Bill (2019) will provide much needed legal grounding for the NACCSC's operations. This study recommends the quick passage of the NACCC Act and endowing the NACCC with sufficient financial and human

2 See §5.2.4.

3 Githu Task Force Report (2015) at 19; NEAP (2018) at 18.

4 Bosire Commission Report (2005) at 288; Githu Task Force Report (2015) at 122. See *Adili 150* (2015) at 7-9.

5 Githu Task Force Report (2015) at 86, 121 & 194.

resources to propel its work amongst the public. It is recommended also that CACCOCs be replicated in all 47 counties to provide oversight of county government affairs. The NACCC's work will be enhanced by co-operation amongst citizens, community leaders, media, non-governmental organisations, government administrative officers, county governments, anti-corruption agencies and law enforcement agencies.

5.2.5 Non-State Actors

The main actors in citizen engagement in anti-corruption strategies are the citizens themselves. At the basic level, citizens can engage in anti-corruption activities by themselves not committing or abetting corrupt conduct. It is recommended that citizens take up active roles either individually or through coalitions or associations to demand accountability from the state. For instance, fiscal probity may be monitored through public participation in social audits of government projects. The citizens thus should take up their role as frontline corruption fighters by engaging in the affairs of the government which exists to serve them.

Other key actors that are crucial in facilitating citizen engagement in anti-corruption interventions are the components of civil society, encompassing non-governmental organisations, community-based organisations, religious organisations and the media. These non-state actors play an important role in providing the citizen with knowledge of corruption and anti-corruption and keeping the state in check. Thus, where the state might be lax in its anti-corruption interventions, civil society and the media can challenge it, while engaging citizens to demand transparency and accountability.

Accordingly, it is recommended that the state partners and co-operates with the citizens, civil society and the media in facilitating citizen engagement in anti-corruption mechanisms.

Ultimately, the will of the citizens matters. In the words of Wangari Maathai:

It's the little things citizens do. That's what will make the difference.⁶

6 See discussion by Wangari Maathai Foundation on #mylittlething, a hashtag concerning the little things that citizens can do that make a difference, available at <http://wangarimaathai.org/mylittlething/> (visited 7 January 2022); see also <https://twitter.com/wangarimaathai/status/940510797251399680> (visited 7 January 2022).

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