GRANTING OF AMNESTY IN CORRUPTION CASES: WHETHER IT WILL REDUCE THE RATE OF CORRUPTION IN KENYA.

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DECLARATION

"This dissertation is my original work and has not been presented for a Degree or any other academic award in any University or Institution of Learning".

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CHAPTER ONE

1.0 Introduction.

The chapter presents the background, problem statement, purpose, specific objectives, research Questions, corresponding hypothesis, scope and significance of the study. Amnesty means Oblivion, is a legistrative or executive act by which a state restores those who may have been guilty of an offence against it to the position of an innocent persons. It includes more than pardon, in as much as it obliterates all legal remembrance of the offence.

1.2 Backgrounds to the problems

Corruption is one of the greatest public policy problems facing Kenya .Though its magnitude and impact has not been properly measured, the result of corruption has been severe welfare loss to the public in forgone development. Corruption and its effects in developing countries have come to the forefront of development thinking. Corruption, though not a peculiarly Kenyan governance problem, Kenya is an apt example of a developing country whose moral fiber and development potential have been comprised by corruption. Corruption in a definitive context connotes the abuse of entrusted power for personal gain or for the benefit of a group to which one owes allegiance. Corruption has also been defined as abuse of public office for private gain.

Public office is abused for private gain when agents accept or offer bribes to circumvent public policies or processes for competitive advantage or profit. Public office can be abused even if no bribery occurs, through patronage and nepotism, theft of state assets or diversion of state revenues.

1.3 Statement of the problems.

The question here is which circumstances, developments or characteristics that influence form and high levels of corruption in Kenya .This is because, unless the causes of corruption are clearly identified, it would be difficult to prioritize effective anti-corruption strategies, which will address these causes in order to prevent corruption from occurring in future.

The causes of corruption are always contextual, and rooted in a country's policies. Some of the

main causes of corruption include the following;

a) **Lack of General Checks and Balances.**

Most heads of state hold moral, political and economical power over those in parliament and other bodies supposed to check the use or abuse of power. This is mainly the case where the President enjoys immense powers and has control over both the Parliament and the Judiciary. Where the President holds such powers, there is nothing to prevent him from abusing that power for private gain.

Professor Yash Ghai and McAuslan observe that the alterations to the electoral machinery, the attrition of the doctrine of collective responsibility, and the increase of the presidential power over the civil service, the judicial service are the major aims of the government. Thus, where the parliament is strangled and the judiciary is unable to uphold its integrity and independence, these two institutions are disabled to play their vanguard role as the check and balance of the executive. Corruption therefore flourishes in such circumstances.

b) Low Wages in the Civil Service.

Low wages causes systematic bureaucratic corruption, where individuals feel forced to augment their income from outside sources, if the salary differentials from promotions are low and if any salary increase would be unlikely to reflect adequately the work and the responsibility that accompany such promotion. Thus, where there is inequality of wealth and situations and salaries and wages are low compared to the prevailing standards of living, this may cause economic corruption. Employees will therefore be tempted to engage in corrupt deals to supplement their income.

The motivation to remain honest may be further weakened if senior officials and political leaders use public office for private gain, or if those who resist corruption lack protection.

c) Recycling Corruption.

This occurs when a public official who is involved in corruption scandal is moved from either one corporation to another or from one position to another. This practice tends to encourage corruption rather than deter it.

d) Weak, Vague and Ambiguous Rules of Law and Enforcement.

Law is not the only means of combating corruption but it is the principle way in a country founded on the rule of law. The point is that once enacted, the laws must be effective and applied as objectively, impartially and as humanly as possible.

In the war against corruption, the ultimate role of law must be to convert corruption from being perceived from being low risk, activity to one which is regarded as a high risk, low profit activity the law must increase the likelihood of corruption being detected and punished, and to reduce the likelihood an individual being able to profit from his or her corrupt activities.

Though Kenya had anti-corruption law even before the NARC regime, the problem had always been enforcement. Many corruption scandals were witnessed despite the existence of this law.

Where there is no will to enforce the law, corruption will consequently flourish. The Commissioners to the Goldenberg Affair noted that despite the existence of the sweeping prosecutorial powers given to the Attorney General by the constitution, the A.G chose not to prosecute those implicated. Instead of supporting prosecutions brought through private entities, the A.G would abuse his constitutional powers by coming in to scuttle those prosecutions. The first Goldenberg related case was instituted by the Law Society of Kenya, in which the AG swiftly moved to enjoin himself, and then objected to the prosecutions on the grounds that the LSK lacked locus standi . His objection was upheld.

Where there is such condoning of corruption by legal institutions that would be expected to fight corruption, then, corruption can only increase both in magnitude and wideness of the practice, not reduce. The benefit of this public-private distinction is that it is narrow in scope; it focuses on public policy making and public-private exchanges. However, the limitation of this definition approach is that it fails to take into account the neo-liberal era we are living in, where we find a variety of public functions delegated to the private sector. Therefore, it is also possible for the private sector to participate in corrupt activities.

The above limitation thus raises a need for an all inclusive definition, which will capture both public and private spheres of corruption. Broadly defined, corruption is abuse not only of public office but also private office or commercial office for private gain. It invariably involves giving something to someone in position of power, either in government or in a corporation, so that he will use or abuse his power and act in a manner favoring the giver.

The Kenya Anti-Corruption Act defines corruption to mean an offence under any of the provisions of sections 39 to 44, 46 and 47; bribery; fraud; embezzlement or misappropriation of public funds; abuse of office breach of trust or any offence involving dishonesty;

(i) in connection with any tax, rate or impost levied under any Act; or
(ii) under any written law relating to election of persons to public office.

This definition may seem wide but its advantage is that it encapsulates all possible forms of corruption that might exist, both in the public and private sectors.

Corruption is most likely to occur where public and private sectors meet, and especially where public officials have a direct responsibility for the provision of a public service or application of specific regulations or levies. Corruption then occurs when that public official receives private gain illegally for doing something which he or she is ordinarily required to do by law, or secondly, when a bribe is paid to obtain services which the official is prohibited from providing.

1.4 Issues arising from the statement of the problem

The concept of whether granting of amnesty helps in reducing the rate of corruption or whether it encourages raises several complex issue dealing with the substance and procedure in the formulation and implementation of the policy, drafting and passing of the law and commissioning.

- whether the granting of amnesty encourages corruption in Kenya or it discourages.
- whether the granting of amnesty should be enshrined in an ad hoc institution or it should be constitutionally entrenched.
- Whether there is need for a general understanding of the concept of amnesty and corruption through analysis of the definition and the historical background of the concept.

- whether the grand of amnesty to the corrupt individual will help to reduce the rate of corruption in Kenya.
- Whether there is need to recourse to the Kenyan history on corruption as far as granting amnesty is concerned.

1.5 Hypothesis

The statement of the problem and the issues raised in the study are based on the researcher's supposition that in order to secure a corruption free country the granting of amnesty to the corrupt individuals should be encouraged as it helps reduce the rate of corruption cases in the country.

1.6 Theoretical framework

The study is premised on a comparative jurisprudential theory. This is based on the fact that for the purposes of reducing the rate of corruption in Kenya a concoction of various conceptions of the rule of law and justice must be embraced. Whereas the positivistic conception of amnesty would be to trash amnesty together and to apply the law as it is or as it is written down in it's strict sense. The naturalist argue for the tempering of the law with mercy.1985

1.7 Scope and the limitation of the study

This study is limited to the concept of granting of amnesty in corruption cases. The study shall further confine itself to the debate in regard to whether it helps to reduce the rate of corruption or it encourages corruption in Kenya.

However, it is important to note that the study is not an exhaustive survey of the topic presented but focuses on viability of amnesty within the context of corruption cases in Kenya. The study will also analyses amnesty in other jurisdiction around Africa for example in South Africa.

1.8 Justification of the study

The study with the regard to the increasing cases of corruption in Kenya and the loss of revenue to a few individual. It creates a gap that needs to be filled and the granting of amnesty may be a way to help reduce the rate of corruption in Kenya. The corrupt individual has not been charged and if they are the cases are just brushed over and they are later let go and what they had taken is never recovered. The granting of amnesty will to a larger extend help reduce the rate of corruption and also help recover the property taken.

1.9 Literature review

In light of the problem sought to be addressed, the particular issue under review and the theoretical framework, the study draws from various sources of literature. It is important to note that there is no specific literature on the concept of amnesty in Kenya with regard to corruption cases.

1.10 Objectives and purpose of the study

This study aims at comprehensively analyzing the concept of amnesty in Kenya within the context of corruption cases and interrogating whether amnesty is a prescription for a corruption free country. Specific objectives include;

i. To establish whether there is a legal or policy basis for the grant or the refusal of amnesty for the corrupt individual in Kenya.
ii. To determine whether the grand or denial of amnesty should be codified in law published in a policy document and entrenchment in the constitution.
iii. To proffer recommendations for a normative legal and institutional framework.

1.11 Research Methodology

This study utilized data obtained from reports by both the national and international non-governmental organizations. These were studied in the context of their exposition of the various corruption crimes that have been committed and the recommendations on the question of granting or the denial of amnesty. A further source of data was books by international and local authors on the subject of amnesty.

These books were also analyzed for the purpose of multi-jurisdiction comparison of the application of the concept of amnesty in South Africa. A global wealth of information is also available on the internet. The internet provides soft copies of materials that would otherwise be difficult to obtain. Internet sources will constitute a broader base for the research. This is in terms of what has been written on the topic and diverse and various recommendations made. Such data will build upon the foundation of the study as well as expose gaps that the study will seek to fill. The study will be both descriptive and towards the end analytical.

1.12 Chapter Breakdown

Chapter one: Introduction

This will be the introductory part which will contain the background information, statement of the research problem, broad arguments layout, justification for the study, theoretical and conceptual framework, selected literature review, specific research questions, the research objectives, the research methodology, the hypothesis and the broad chapter breakdown of the entire study.

Chapter two: International practice on amnesty

This chapter discusses the international legal practice as enshrined in various international legal documents and the practice on amnesty in other jurisdiction.

Chapter three: Amnesty legal basis in Kenya

This chapter will try to discuss how the granting of amnesty is likely to reduce the rate of corruption in Kenya and what impact does the granting likely to create in the Kenyan legislation. Under the chapter there will be a critical analysis on the laws that are likely to govern the granting of amnesty in the country.

Chapter four: Conclusion and Recommendations

This will be the chapter that includes the conclusion and the recommendations that are available.

CHAPTER TWO

2.1 INTRODUCTION

This chapter discusses international regimes and countries where the concept of amnesty have been applied in there different jurisdiction. It tries to bring in other jurisdictions that the granting of amnesty in corruption cases has helped to reduce the rate or the rapid spread of the dangerous vice of corruption.(1)

2.2 DEFINATION OF CORRUPTION

For a person to be charged with any criminal offence, that offence must be defined and the penalty therefore prescribed. Therefore, in defining corruption seeks to fulfill the first limb of this requirement.

The Corruption Prevention Act embodies a broad definition of corruption. Corruption is defined in the **Act [84]** to include fraud, bribery, embezzlement or misappropriation of public funds, abuse of office, and breach of trust or offence involving dishonesty in connection with any tax, rate or impost levied under any Act.(2)

On the other hand, economic crime is defined as an offence under **section 45** or an offence involving dishonesty under any written law providing for the maintenance or the protection of public revenue. The offences in **section 45** include acquiring public property or benefit, to damage public property, or to fail to pay any taxes or any fees, levies or charges payable to a public body or effects or obtains any exemption, remission, reduction, or abatement from payment of any charges, taxes, fees or levies.(3)

Section 45(2) further makes it an offence for a person, whose functions concern administration, custody, maintenance, receipt or use of any part of public revenue or public property to fraudulently make payment or excessive payment from public revenues for substandard or defective goods, goods not supplied or not supplied in full or for services not rendered. It is also an offence for that public officer to fail to comply with any law or applicable procurement procedures or guidelines relating to the allocation, sale or disposal of public property, tendering contracts, and management of funds or incurring of expenditures. It is also an offence for that public officer to engage in a project without prior planning.

Muthomi notes that not all acts of corruption involve economic crime, and that economic crime need not always involve or amount to corruption, but the consequences of corruption and economic crime are identical. Like corruption, economic crime involves abuse of public office. However, unlike corruption, economic crime need not involve fraud or other improper motive on the part of the offender. Economic crime need not result in, or be aimed at, any improper gain on the part of the offender. This distinction is therefore important when it comes to trying these offences.(4)

2.3 HISTORICAL LEGAL AND INSTITUTIONAL FRAMEWORK ESTABLISHED TO FIGHT AND PREVENT CORRUPTION.

2.3.1. The Prevention of Corruption Act.

This piece of legislation was enacted by the colonial regime in 1956 and that fact itself is proof that corruption existed even before the independence. However, its application was selective. Proffesor Yash Ghai and Mc Aslan observe that during the colonial period, the law and its administration had no inherent values, but both values and form from the predilections of the dominant political and economic groups in the society.(5) The white settlers and the Indians being regarded as superior were thus unlikely to have the Act applied to them. The 1956 Act

therefore may be construed as hypocritical and self serving legislation for the selective use by the state against civilian instigated corruption but without any real intention to prevent or prohibit bribery.

After the independence, the government retained the Act which underwent several amendments over time. Section 3 of the Act prohibited corruption in office by any public officer, and any officer found to have engaged in corrupt conduct was guilty of an offence. In Kamau v Republic, it was held that for an reward or a gift to constitute corruption under section 3 of the Act, it must have been related with future conduct, not past conduct, and for the reward to amount to corruption, it must have been given knowingly and with a reason to believe that it may lead in the future, to doing of a corrupt act.(6)

Section 3 and 5 dealt with punishments, which ranged from one year imprisonment to fourteen years. Section 8 provided for recovery of assets given as gifts, and gave the principle of the agent power to recover the asset or the value thereof. Further, the prosecution or the acquittal of that agent was not a bar to the proceedings which were to be civil in nature.

2.3.2 The Kenya Anti-Corruption Authority, (KACA).

Through a 1997 amendment to Cap 65, the Kenya Anti-Corruption Authority was formed, as a body corporate, with perpetual succession, common seal, power to sue and be sued and the power to acquire and hold property. The Authority was to be headed by a director appointed by the President after approval by a tribunal appointed by the President for that purpose.

The functions of the Authority were given as inter alia, to prevent corruption in the public and private sector, investigate and prosecute corruption cases and to advise the government on ways of preventing corruption. Any of the directors could be removed upon the termination of his four year contract or upon recommendation by a tribunal appointed by the president to look into the conduct of any of the directors.(7)

2.3.3 The Penal Code (CAP 63).

The Penal Code provided for an offence known as abuse of office in section 101, and any person who being a public officer did or directed to be done, in abuse of his office, any arbitrary act prejudicial to the rights of another was guilty of misdemeanor. If the act was done for the purpose of private gain the officer was guilty of a felony and liable to a jail term of three years.

Similarly, these provisions have been repealed by the provisions of Anti-Corruption and Economic Crimes Act.(8)

2.3.4 The Anti-Corruption Court .

These were established by the then Chief Justice, Chunga CJ, in 2002.In his launching address, the Chief Justice stated that the judiciary has an important role to play towards eradication of corruption.The scope of the courts was to "handle cases of corruption firmly" but the cardinal consideration would remain efficiency, fairness, expedition and, above all, the rule of law.(9)

In the court structure, the Anti-Corruption Court was to exist under the regime of subordinate court and exercise the jurisdiction set out in the provisions of various statutes with regard to Magistrates Courts. The Chief Justice emphasized thus; ..... I do not, by these appointments, create a new class of magistrates nor confer new jurisdictions.....The rank of the magistrates appointed will remain what the Judicial Service Commission has conferred on them to date and the jurisdictions remains what is there in relevant statutes which prescribe criminal jurisdiction for magistrates.(10)
The Anti-Corruption was to hear cases that were;

i) under the Prevention of Corruption Act;
ii) some offences under the Penal Code;
iii) some offences provided for under any other legislation.

2.4. TYPES OF CORRUPTION

Corruption manifests itself in many forms which include; bribery, nepotism, extortion an Embezzlement and kickbacks.(11)

a) Bribery

Bribery requires two parties to take place; one party to give the bribe and another party to receive it in exchange for a favour or any other benefit. This is the most common type of corruption which is to be found in almost all spheres of public life. (11)

b) Nepotism.

Nepotism occurs when a person favors a relative or a personal friend, and when that happens,

this becomes an illegitimate gain.(12)

c) Embezzlement.

This is the outright theft and misappropriation of public resources of entrusted funds or property by a public official. This type of corruption is to be mainly found in the higher levels of government where the public officials, for instance ministers, have a direct access to these resources.(13)

d) Kickbacks.

A kickback is an official's share of misappropriated funds allocated from his or her organization to an organization involved in corrupt bidding.

Corruption usually exists in two typologies. This is petty corruption and grand corruption. Grand corruption involves heads of states, ministers, and other senior level government officials.It serves the interests of a narrow group of business people and politicians.(14)

On the other hand, petty corruption involves small amounts of money to facilitate routine transactions. It is the common man's version of corruption, which involves small sums paid to low level officials to "grease the wheels" or cut through the bureaucratic red tape. Example of petty corruption would include giving a bribe in order to obtain a business permit.(15)

2.5 A COMPARATIVE STUDY AND INTERNATIONAL INSTRUMENTS AGAINST CORRUPTION.

SOUTH AFRICA.

South Africa is a constitutional democracy with a population of 44.8 million people, according to an official 2001 national census. Following nearly 350 years of colonial apartheid rule, the country's first democratic elections took place on 27th April 1994. this ensured a transition from

the race-based system of oligarchic rule, in which the white minority were the primary beneficiaries to a system of democratic governance with a strong emphasis on a culture of human rights. Two further national elections considered by all parties to be free and fair, took place in 1999 and 2004.(16)

South Africa does not have a single anti-corruption agency but has instead vested a range of powers in a number of bodies such as the Public Protector, Public Service Commission and the Independent Complaints Directorate. Equally the state is served by criminal justice agencies including the South African Police Service (SAPS), National Prosecuting Authority (NPA), Directorate of Special Operations (DSO), Asset Forfeiture Unit and Special Investigations Unit (SUI). Other stakeholders are Department of Public Service and Administration (DPSA), National Intelligence Agency (NIA), South African Revenue Service (SARS), and the Cross Sectoral National Anti-Corruption Forum (NACF).(17)

Although significant strides have been made in terms of service delivery to the poor, including housing, access to clean running water, sanitation, education and social welfare grants for the poor, South Africa remains highly polarized country. There is an increasingly multiracial class, comprising a third of all the population which owns almost all the property and is social economically dominant while the other two thirds is drawn from a class that is often lives a hand to mouth existence despite being a clear majority of the electorate.(18)

A question regularly asked in the debate about the nature and the extent of corruption in South Africa is whether South Africa is fundamentally more corrupt today than it was, prior to the advent of democratic rule. This question is asked by those wishing to prove that majority of the government has been unable to stem the tide of corruption, but pointing to their inability to see

the linear nature of South African history, as the country emerged not out of a revolution, but rather, a negotiated process of change, a process which has not provided a break with past practices and institutions. Frene Ginwala, a former speaker of Parliament states the position thus; In South Africa, we inherited an intrinsically corrupt system of governance. To survive it created a legal framework that was based on and facilitated corruption. It has taken years in Parliament to introduce even the basic legal framework that would enable us to deal with corrupt bureaucrats, politicians and police. The private sector also operated in a closed society and profited by it. There were partnerships with international criminals, and the corruption that was built into the system is very difficult to overcome.(19)

White supremacy in South Africa has always been premised on notions of greed and corruption. Aside from the oppressive and racist nature of the apartheid state, and the preceding colonial administration, it could be argued that the premise on which it was built was corrupt not only in its constituent parts, but it was also an example of state technocrats meticulously designing a framework within which power and money were used almost exclusively to benefit a small racial minority.(20)

The anti-apartheid state administration and the private sector carried this baggage of practices that were contrary to the principle of transparent and accountable government. Similarly, senior public sector managers, uncompromised by allegiance to the past regime, were now required to manage an expansive state bureaucracy although they had little working with the state machinery. Matched by the parallel transformation of many functions of governance, this created a climate in which opportunistic corruption could take place.

GGG notes that part of the corruption is promoted by the prevailing entitlement mentality that informs the behavior of many black officials, and a sinister tendency to emulate some

bureaucrats of apartheid regime.(21)

2.6. EFFECTS OF CORRUPTION.

The evils of corruption and devastating negative effects of the society are well known.

The cost of opportunity lost in terms of social economic development in terms of creating national ethics of transparency and accountability, handwork and entrepreneurship cannot be overstated.

However, in as much as corruption is viewed negatively, it can also have positive effects, thus going against the grain of convention of wisdom that effects of corruption can only be negative. Following hereunder is a discussion of both the positive and negative effects of corruption.(22)

2.6.1 Positive Effects of Corruption.

The phenomenon that supports the argument that corruption can be desirable is known as the East Asian Puzzle, where a number of East Asian countries sustained high growth rates despite high levels of corruption. This is mainly because where there were weak formal legal institutions, there developed informal non-legal arrangements which through briber and rent seeking, made contracts enforceable and thus encouraged flow of private investment.

Corruption is thus desirable, provided it is kept at the minimum. The argument here is that corruption can also be used as a mechanism of enhancing efficiency. Thus, a public official who is allocating a resource short in supply may be seen as a market payment to a party who is most likely to use them efficiently.(23)

Secondly, bribes can increase economic efficiency if they allow firms to avoid overly restrictive regulations, i.e., bribes lower the costs of bad regulations to firms that bribe and assist the firms in overcoming the bureaucratic "red-tape".(24)

But this argument for enhancing efficiency has been criticized on the grounds that it assumes the market to be perfect and every entrepreneur as having equal opportunity, political connections and financial power. Where this is not the case, especially in developing countries, this argument cannot stand because of inequalities that exist.(25)

2.6.2 Negative Effects of Corruption.

Corruption's detrimental corrosive effects know no bounds, but in the developing countries,

practices recognized as corrupt exacts heavy economic costs, distorts operation of free markets, slows down economic development and destroys the ability of institutions and bureaucracies to deliver the services that the society may expect.

The effects of corruption crosscut over the economic, social and political landscape of any given society.(26)

a) Economical and Social Effects of Corruption.

As regards economical effects of corruption, Paschal B.Mihyo lays down the following as the economical impacts of corruption;

(i) Corruption Distorts Public Expenditure.

Corruption diverts funds from more efficient uses and reduces the resources available for legitimate and productive use. Corruption damages the economic life of a society and promotes unproductive investment projects not economically viable. It also contributes to a decline in standards, increases indebtness and impoverishment among the general populace.(27)

ii) It Increases the Cost of Goods and Services.

The increase in prices is borne by an already overtaxed taxpayer and the general public. Corruption also distorts the supply and demand curve. The end result is a distorted financial system.(28)

iii) Payoffs Undermine the Distributive Goals of a Development Programme.

This effect is as a result of public officials concentrating on the most profitable parts of their jobs for private gain. Services designed to benefit the needy or well qualified instead go to those with the highest willingness to pay. The end result is that high levels of payoffs in a corrupt system discourage investment and entry points of new firms.(29)

Another economic effect attributed to Paulo Mauro is that of low economic growth due to low or lack of private investment. In cases where an entrepreneur is asked for bribes before an enterprise can be started, or corrupt officials ask for shares from the proceeds of investment, corruption acts as a tax. Consequently, economic growth is reduced due to low private investments.(30)

a) Political Effects of Corruption.

The corruption of politics is bound to have far reaching effects. First, bribery and political

corruption may influence the core processes of democracy taken in procedural sense. This is because corruption may influence the access to the ballot, part competition, electoral process, mass participation and mass of legal rights required in the political process.

Secondly, both corruption and bribery may influence rule making aspects of public policy making. Policy makers may decide an issue in light on its impact on their personal finances or their power resources rather than in light of legitimate constituency interests or public good.(31)

Elections are a way of engendering and ensuring the participation of people in governance. But where there are perceptions of corruption, this may result to voter withdrawal and absenteeism if citizens who have a reason to challenge the system feel they no longer have the power to do so. Politically therefore, corruption erodes the public confidence in the whole political system and consequently the public looses interest in political affairs of their country.(32)

2.7 THE CHALLENGES THAT FACED THESE INSTITUTIONS.

It is one thing for law to seek to achieve a particular goal or principles as its overarching ambition or purpose, and it is quite another to devise a set of rules, guidelines, policies and practices capable of actually implementing that ambition in practice. The question thus turns to be what lead to the failure of these Anti-Corruption mechanisms where there existed laws formulated to fight and prevent corruption.

One of the major reasons that led to the failure of these institutions was lack of political will at the highest levels of the government to fight corruption, and secondly, lack of operational independence of these institutions. (33)

Although KACA was established with the mandate to investigate and prosecute corruption, there was no political will to combat corruption. Its lack of independence was manifested by the manner in which its first director, John Mwau, was hounded out of office after he preferred charges against senior Treasury officials. The President appointed a tribunal under **section 11B**

of applicable statute, and as expected, the tribunal recommended his removal.(34)

These laws also faced a weak enforcement mechanism. The main mechanism was through the judiciary which itself was riddled in corruption.

Secondly, the judiciary was not independent, and as such, it was always bound to enforce the will of the executive, which in most cases was not to fight corruption but protect the corrupt.(35)

The second institution empowered to enforce these laws was the State Law Office (Attorney Generals Chambers).

Section 26 of the old Constitution empowers the A.G to undertake, or to consent to all prosecutions in the country. (However under the new Constitution, this duty has been given to the Director of public prosecutions) But the manner in which the office undertook this duty regarding corruption cases has left a lot to be desired.

For instance, in relation to the Goldenberg scam, the commissioners to the Inquiry into the affair observed that the A.G engaged in ostensibly selective prosecutions. This could have been part of an orchestrated cover intended to subvert the course of justice. The commissioners further noted where the A.G's office undertook prosecutions, it proceeded with the cases in the most haphazard and lethargic fashion.

Another challenge that faced the law against corruption was constitutionalism. The Kenya Anti-Corruption Authority was held to be unconstitutional because the section that established it in Cap 65 was in direct conflict with **section 26** of the constitution which provides the A.G as the sole government legal advisor and prosecutor. While **section 11B** was inserted, section 26 of the constitution remained unamended. This created conflict between the two institutions.(36)

These inadequacies and challenges may be the factors that prompted the NARC regime to enact new legislations to fight and prevent corruption. The next chapter will thus discuss the new and

the current legal and institutional framework which was established in 2003 to fight corruption.

2.8 THE CURRENT LEGAL AND INSTITUTIONAL MECHANISMS OF COMBATING CORRUPTION: SUCCESS AND CHALLENGES.

Mwai Kibaki through a NARC Kenya(political party) ticket, was elected the president of Kenya in December 2002 after a culmination of several events. He was elected on a platform of change, on among other issues, to tackle graft and a crusade of zero tolerance on corruption.(37)

The first 12 months of NARC rule were frenetic in legislative policy. The NARC regime began to construct new anti-corruption framework in line with the pre-election manifesto of zero tolerance on corruption. Among the first steps, Kibaki re-introduced the ministry of Justice and Constitutional Affairs to spearhead and coordinate the anti-graft war and more so to facilitate the enactment of the requisite laws to execute the campaign against graft.(38)

Another reason that raised the need for anti-graft law was the international community. The Bretton Woods Institutions and other donor countries impose conditionalities upon developing countries seeking aid or grants. An anti-corruption and good governance institution is indicative of a zero tolerance policy. Further, international conventions against corruption require member states to come up with legislation to fight corruption. Therefore, the NARC administration had no choice other than to formulate legislation to tackle graft, first as fulfillment to condition for resumption of donor support, and secondly to meet its obligation under the two conventions.(39)

The government thus formulated three bills to demonstrate its commitment to waging the anti-corruption war. These were;

(i) the Constitution of Kenya (Amendment) Bill, 2003.

(ii) The Anti-Corruption and Economic Crimes Bill, 2003.

(iii) The Public Officer Ethic Bill, 2003.

However, only the latter two bills became law. The first bill was not even taken to parliament.

The purpose of this chapter is to discuss these acts, their specific provisions and the institutions they established to tackle graft. For avoidance of doubt, I will first discuss the Constitutional Bill and what it sought to introduce. Other specific Acts that provide for fighting corruption will also

be discussed.(40)

The Constitution of Kenya (Amendment) Bill, 2003.

This bill sought to introduce chapter VIIIA into the constitution, entitled "Corruption and Economic Crime" and in this chapter provisions were to be made inter alia for: interpretations; establishment of the Kenya Anti-Corruption Commission; functions of the Commission; powers exercisable against corruption and economic crime. The objects and reasons for the bill were(41) stated thus; the principle object of the Bill is to make provision in the Constitution for the establishment of the Kenya Anti-Corruption Commission and to invest the Commission with constitutional powers of investigation and prosecution of offences of corruption and economic crimes. However the bill did not see the light of the day to become law.(42)

The Anti-Corruption and Economic Crimes Act, Act no. 3 of 2003.

This Act came into force in May 2003, and provides for the prevention, investigation and punishment of corruption and economic crimes. Unlike the previous legislations that existed against corruption, this Act defines corruption and economic crimes. The Act also defines various offences regarded by the Act as corrupt and economic crimes and provides punishment for the same. Further, the Act provides for institutional mechanism for fighting corruption; special magistrates to try offences under the Act, and the Kenya Anti-Corruption Commission. I will now turn to topical headings under the Act.(43)

2.8 THE INSTITUTIONS

To be able to achieve its objectives, the Act provides for three key institutions to undertake various functions in war against graft. These institutions are; special magistrates, the Kenya Anti-Corruption Commission and the Kenya Anti- Corruption Advisory Board.

Special Magistrates.

Section 3 of the Act provides for the appointment of special magistrates, charged with the specific and exclusive function of offences punishable under the Act. The exclusivity of special magistrates overrides the provisions of the Criminal Procedure Code and all other laws.(44)

To ensure expediency of the trial process, the special magistrates are required by the Act, as far as practicable, to hold the trial of an offence under the Act on a day to day basis until completion. The existence of special magistrates has been challenged. In Meme v Republic and

Another, the applicant had been charged with two counts of abuse of office under the section 101(1) of the Penal Code before the Anti-Corruption Court which had been established by the Chief Justice. When the Anti-Corruption Act came in force, the applicant filed a constitutional reference, challenging inter alia, the constitutionality of the Anti-Corruption Court and the jurisdiction of special magistrates. It was held that the application was misconceived as the Act had no relevance to the offence with which the offence with which the applicant was charged and therefore the proper court to try the offence was the subordinate court. (45)

The Kenya Anti-Corruption Commission.

The Kenya Anti-Corruption Commission (herein after referred to as KACC) is established under section 6 of the Act as a body corporate, capable of suing and being sued, and holding and alienating movable and immovable property.

KACC is headed by a Director, assisted by four assistant directors, all of whom are recommended by the Advisory Board, approved by the National Assembly and appointed by the President.(46)

The broad function of the KACC is to investigate any matter that in its opinion raises suspicion that conduct constituting corruption or economic crime, or conduct or cause conduct constituting corruption or economic crime has occurred or about to occur.[92] KACC may examine the practices and the procedures of public bodies in order to facilitate the discovery of corrupt practices and to secure the revision of the methods of work or procedures that, in its opinion, may be conducive to corrupt practices.

Further, functions of the KACC include educating the public on the dangers of corruption and economic crime, and enlisting public support in combating corruption and economic crime.(47)

The independence of the KACC is guaranteed in section 10 of the Act. It provides that in the performance of their functions, the commission and the director shall not be subject to the discretion or control of any other person or authority, and shall be accountable only to parliament.(48)

Section 15 of the Act requires KACC to prepare an annual report, containing, inter alia the financial statements of the Commission and the activities of the Commission in that financial *year.*

The Kenya Anti-Corruption Advisory Board.

Section 16 of the Act establishes the Kenya Anti-Corruption Advisory Board, as unincorporated body with the principal function of advising the commission generally on the exercise of its powers and functions and the performance of the functions under the Act.(49)

The Board's membership is comprised of members nominated by several organizations listed in **section 16(2).** These organizations include the Law Society of Kenya, the Institute of Certified Public Accountants, the International Federation of Women Lawyers, Kenya Association of Manufacturers, the joint forum of religious organizations and the Central Organization of Trade Unions.

The Board is headed by a Chairman and assisted by a Vice-chairman, both of whom are appointed by the President. The Director of KACC is the Board's secretary.(50)

The Public Officer Ethics Act, no. 4 of 2003.

There has been growing global realization that the fight against corruption can well be worn if the conduct and ethics of public officers are legally regulated. Thus, it has been accepted that the prevalence of corruption in society can be reduced by the development of effective code regulating those who are involved not only in public life, but also in commercial institutions.(51)

It cannot be assumed that a public servant knows what standards of conduct are expected of him if he has never been told what they are.[96] Reliance on some unwritten process of absorption of standards in the working environment is haphazard and insufficient. A clear, concise and accessible written statement of the standard by which his working life is to be conducted is required.(52)

In a bid to fight corruption, and improve the conduct, ethics and financial accountability of its

public officers, the NARC government promulgated the Public Officer Ethics Act.

A public officer is defined as any officer, employee or member of government or any department of the government, parliamentary service, local authority, a corporation or a body to with authority to act on behalf of government or a public university.[99]

The fundamental part of the Act in relation to anti-corruption war is the part that deals with declarations of income, assets and liabilities.[100] Section 26(1) provides thus;

'Every public officer shall, annually and as otherwise prescribed by section 27, submit to the responsible commission for the public officer a declaration of the income, assets and liabilities of himself, his spouse or spouses and his dependents under the age of 18 years.'

Section 27 requires a person, upon assumption of public office, or on ceasing to be a public officer, within thirty days, to submit an initial or a final declaration of wealth as the case may be. **Section 30** makes information submitted to a Commission in declaration or clarification confidential, and can be held by the Commission for at least 30 years. Pursuant to **section 31**, a person who contravenes his duty to submit declaration or clarification is guilty of an offence.

Regarding enforcement, **section 35** gives the responsible Commission for the public officers to investigate to determine whether the public officer has contravened any code of conduct. If the investigation discloses a contravention of the code of conduct by the public officer, the responsible Commission can take the appropriate disciplinary action, and if it does not have the powers, refer the matter to a body with such powers. If civil or criminal proceedings should lie, then the Commission shall refer the matter to the Attorney General.

The Public Procurement and Disposal Act, no.5 of 2005.

The more advanced a society is, the more sophisticated the corruption practices are likely to be. This explains why it manifests itself in different forms, some of which have proved difficult to

pinpoint. However, one area that has always been bedeviled with corruption is that of public procurement. Across government departments, the procurement section is seen as the bedrock of corruption. Single sourcing is preferred and tenders are selected on the strength of anticipated kickbacks or friendships that exist between tenderness and the officials responsible.(53)

Due to this problem, the government promulgated the Public Procurement and Disposal Act, a product of considerable dialogue between the government, the private sector lobbies and international development partners led by the World Bank. The purpose of the Act is to establish procedures for efficient public procurement and for the disposal of unserviceable, obsolete assets and equipment by public entities.

Section 8 of the Act establishes the Public Procurement Oversight Authority as a body corporate, capable of suing and being sued in its corporate name and holding or alienating both movable and immovable property. The main function of the authority is to ensure that procurement procedures are complied with. The Authority is headed by a Director General.

s **Section 40** of the Act prohibits corrupt practice by any person, agent or employee in public procurement. Contravention of this subsection may lead to disqualification from a contract of procurement, or if a contract has already been entered to, becomes void. **Section 41** further prohibits fraudulent practice in procurement, with consequences similar to those of **section 40** if the provision is contravened.

Section 42 prohibits collusion to make any proposed price to be higher than it has always been or to have that other person refrain from submitting a tender, or to submit a tender with specified price or specified inclusion or exclusions. A person may be debarred from participating in procurement proceedings if he commits an offence under the Act, or commits an offence.

CHAPTER THREE

3.2 The Current Legal Framework for Granting Amnesty in Kenya .

The most authoritative law dealing with corruption is to be found in Anti-Corruption and Economic Crimes Act. The Act until recently embodied one form of amnesty which was for offenders who turned state witnesses. Section 5 thereof gives the Special Magistrate power tender a pardon to any person supposed to have been directly or indirectly concerned in, privy to an offence, with a view to obtaining evidence. Section 5 further provides that the condition for granting such amnesty should be making full and true disclosure of the whole circumstance within his knowledge relating to the offence and to every other person concerned whether as criminal or abettor. This pardon is subject to **Section 77(6)** of the constitution which provides that no person shall be tried for a criminal offence if he shows that he has been pardoned for that offence.(53)

However two new sections have been inserted into that act which embodies the concept of amnesty. While section 25A deals with cessation of investigations in certain circumstances, section 56B deals with settlement out of court.

Section 25A(1) provides that the commission may, in consultation with the Minister and the Attorney General, tender an undertaking in form prescribed by the Minister, not to institute or continue with investigations against any person suspected for an offence under the Act. This provision thus provides a basis of granting amnesty subject to conditions set in subsection 3. The subsection provides that such an undertaking provided above is subject to certain conditions.

These conditions are the person making a full and a true disclosure of all material facts relating to past corruption or economic crime, refunds to the commission or to the affected person, any property or money irregularly obtained with interest thereon, makes reparation to any person affected by the corrupt conduct and pays for loss of public property occasioned by his corrupt conduct.(54)

On the other hand section 56B (1) dealing with settlement out of court provides that where the Commission is mandated to institute civil proceedings or application, it shall be lawful for the Commission to issue a notice or letter of demand to the person intended to be sued, and may, in such a notice letter, inform the person about the claim against him and further inform that he could settle the claim within a specified time before filing of court proceedings.(55)

Subsection 3 thereof provides that the Commission may tender an undertaking not to institute criminal proceedings against a person who has given a full disclosure of all material facts relating to past corrupt conduct and economic crime by himself or others, has voluntarily paid, deposited or refunded all the property he acquired through corruption and economic crime and has paid for all losses occasioned by his corrupt conduct to public property.

However, these two provisions have been severely criticized. It has been argued that the new amnesty proposals purport to be informed by the government in tackling grand corruption using the existing legal regime, without acknowledging governments own responsibility for failure, and further without admitting that the government and its members to a large extent have a vested interest in the abandonment of the legal regime that entails investigation and prosecution of offenders accompanied by asset recovery.(56)

Further, the accountability in government remains weak, and the law does not at all serve as a dicentive against engaging in corrupt acts. Therefore, it is argued that the proposal will not achieve the desired effect and will leave Kenyans worse off than maintaining and accelerating the war against corruption because the lame amnesty proposal relies on voluntary disclosures by corrupt persons who logically stand to lose and have no incentive to act to their disadvantage.(57)

3.3 Conditions Precedent to Granting of Amnesty.

Amnesty is a controversial issue and must be designed and invoked carefully to avoid it misuse. Therefore granting amnesty as a mechanism of combating corruption must carry certain responsibilities such public admission of the act, identification of others involved in the offence and restoration of corruptly acquired gains.

Further, the interests of justice would not be served in cases of blanket amnesty and therefore there are certain ground rules that have to be satisfied before amnesty or indemnity can be

considered. It is in line with this that the UN Toolkit recognizes that, though broad amnesties can be declared when a new anti-corruption authority comes into being, exceptions to broad amnesty should be contemplated in cases where the crime is so offensive as to require investigation and prosecution regardless of the burdens imposed on the new anti-corruption authority.(58)

The first condition before granting amnesty is that it should involve legislative framework and be shaped on tenets of law. The express legal consequences of granting amnesty such presumption of innocence, the rule against self incrimination and other fundamental rights of an accused person must be considered. In this case, legal provisions governing amnesty ought to be complementary rather than contradictory with other mechanisms employed to fight corruption. Further, law would guard against public confusion over the purpose of such amnesty provisions, when and to whom do they apply as well as their operation. Law would thus help to guarantee that granting amnesty is not extended further than its necessary.(59)

Secondly, amnesty should be considered only after less extreme alternatives have been canvassed, since amnesty is a pro-active step to circumvent the jurisdiction of the courts. Ngcuka, Targues that amnesty must at all times be granted as last resort because of the tension between the need to ensure that all are equal before the law and that those who engage in criminal conduct are punished, and that the state is confronted with the none availability of innocent witnesses and lack of evidence.(60)

Thirdly, as a tool for fighting organized crime and corruption, the usefulness of amnesty should not be over-emphasized, such that other law enforcement strategies are over-looked.
Therefore, amnesty would be appropriate where there is selectivity in prosecuting the case. In cases of corruption, an initial self selecting factor exists in the fact that the evidence needed is lacking in many cases. Such circumstances thus give rise to the need for the state to grant amnesty to would be offenders who turns state witness and testifies frankly and honestly about co-offenders, even if the evidence incriminates them.(61)

There should also be an administrative scheme for granting amnesty,rather than the issue being

left to usual investigatory agencies. For instance, a special commission with mandate to receive and consider amnesty applications may be established. Such a commission, observes Olu Ojedokun, should be enshrined in law and be granted power to grant amnesty to individual perpetrators of corruption, and combine quasi judicial powers with investigative powers.(66)

Other important conditional ties that should be imposed would include the requirement that an opportunity be afforded to any identifiable victims to question and challenge a grant of amnesty to any corrupt offender, and that such amnesty beneficiary provide concrete benefits to the victims for instance through reparation or compensation for any loss suffered.

In addition, perpetrators of corruption to whom amnesty is granted should be prohibited from returning to public office at a later date.(67)

3.4 Advantages/Benefits of Granting Amnesty as a Mechanism of Combating Corruption in Kenya ;

The failure of the conventional methods employed in to detect and deter other forms of crimes when it comes to corruption.(68) This has called for a need to explore other mechanisms that can be used to combat the malaise of corruption, including granting conditional amnesty to perpetrators of the vice.

Granting amnesty can be an appropriate method of combating corruption in Kenya where there has been grave lack of successful prosecutions and asset recovery. In relatively new political environment in Kenya following transition from a corrupt regime, there were high public expectations with regard to corruption and prevention.(69)

Whereas the new regime engaged in frantic legislative activity of anti-corruption laws, the laws have significantly failed to achieve their objective despite the high public expectations placed on the laws. It was also not clear whether these new laws were to deal with both the past, the present and future cases of corruption.

Thus these laws faced and continue to face opposition right, left and centre and this have led to loss of vigor in application of these laws.(70)

Other mechanisms employed especially the commissions of inquiry have equally failed. An apt example is the Goldenberg Commission of Inquiry which despite consuming millions of tax payers money, no tangible proceed of corruption has been recovered from it report and have had some parts of the report expunged from it and the some of the individuals adversely mentioned therein exonerated of any wrong doing.

In light of the foregoing, it would thus be apt to consider granting amnesty to perpetrators of corruption. This would help by removing the burdens of the past corruption cases on the current laws and allow everyone to concentrate on the present and the future.(71)

Amnesty would also help a public reconciliation process, and the resulting information about past abuse may be useful for identifying weaknesses in procedure, laws and practices and therefore informing present anti-corruption reforms.
The other benefit of granting amnesty to offenders would be to help know the truth about the motives and modus operandi of offenders who commit acts of corruption. If the anti-corruption agencies know the truth about acts of corruption, it can then advise reforms on loopholes in law being manipulated, so that preventive controls and systems can be put in place, and thereby dealing comprehensively with corruption.(72)

3.5 Disadvantages of and Philosophical Issues Surrounding Amnesty in Kenya .

As earlier noted, granting amnesty is a controversial issue not only in Kenya but in other jurisdictions as well. Amnesty involves several risks including that of abuse. Where the law on granting amnesties is not clear, those in authority can collude with the offenders and get away with their economic crimes.(73)

It is posited that conditions under which amnesties are granted are of great importance in minimizing risk of abuse. There must be a clear and a transparent procedure of determining when and for whom amnesties can be invoked, as well as a commitment to revoke amnesties applied to those who commit violations against the conditions set.

But the current amnesty provisions as provided in the Anti-Corruption and Economic Crimes Act seem to be ambiguous and thus prone to abuse. Section 25A on cessation of investigations leaves it to the Minister to prescribe to the Commission and the Attorney General the form which the amnesty is to take. On the other hand, section 56B which deals with settlement out of court, leaves it up to the Commission to negotiate with a person who it intends to bring a claim against.(74)

Other than the requirement of truthful disclosure and refund of any improperly acquired benefit, the two sections do not put any other condition like barring the offender from public office or an undertaking to investigate on materiality, truth or otherwise of the information given by the offender. Therefore, there is nothing in the two provisions to prevent their abuse.

Further, these two provisions are seen to being motivated by political interest rather than wider public interest. They rely on voluntary disclosures by corrupt who logically stand to lose and have no incentive to act to their disadvantage. Thus, the provisions are seen to lack the coercive power, being motivated by a self assessment by a government that cannot successfully bring prosecutions and achieve asset recovery. The new amnesty provisions thus amount to sweeping under the carpet a massive and corrosive problem.(75)

Another problem associated with granting amnesty is that it results to impunity for all past corruption and is seen by the public as a travesty of justice, and by wrong doers as a license to continue business as usual. Amnesties are thus seen to subvert the rule of law and undermine the general rule of deterrence, and in most cases, promote public cynicism and disillusionment. However, Kadar Asmal states that those who argue that amnesty would be an affront to justice do not simply understand the nature of the negotiated revolution that we have to live through, and that we must deliberately sacrifice the formal trappings of justice, the courts and trials.(76)

From the foregoing, it is apparent that granting conditional amnesty can be used as a mechanism of combating corruption but more so to recover improper benefits and to close past cases of corruption more so where it is difficult to get evidence, granting amnesty to an offender for him to testify against his accomplices would be justified. However it is clear that the issue of granting amnesty as a mechanism of combating corruption must approached with utmost cautious.

Granting of amnesty must be selectively done, as contradistinguished from blanket amnesty, such that only those cases that it is nearly impossible to get evidence is amnesty granted.(77)

Further, amnesty must not be emphasized over other mechanisms that can be used to combat corruption. The next chapter will thus look at international instruments against corruption as well as mechanisms used in other jurisdictions particularly South Africa and China .(78)

The Prevention and Combating of Corrupt Activities Act.

The Act embodies a wide description of corruption offences. Under the general offence of corruption, a person commits an offence if he inter alia accepts, offers to accept, to give or agrees to give any other person, any gratification for the benefit of that other person to influence that person to act in a manner that amounts to illegal, dishonest, unauthorized, incomplete or biased, or misuse or selling information or material acquired in course of performance of any powers or duties arising out of constitutional, statutory, contractual or any other legal obligation that amounts to the abuse of position of authority, breach of trust or the violation of a legal duty or set of rules, designed to achieve an unjustified result.(79)

The most salient feature of South Africa 's Prevention and Combating of Corrupt Activities Act is perhaps the dichotomy it provides between the various classes of public servants and the corruption offences they may perform in their capacity including public officials, foreign public officials and members of legislative authority.

In respect to offences relating to public officials, the Act provides that other than those general offences, a public official who inadequately performs his official functions, shows favor in performance of his functions, diverts for other purposes, public resources which are entrusted in him by virtue of his position or exerts improper influence over the decision making of any person performing functions of a public body commits an offence.

Relating to foreign public officials, a foreign official who uses his position to influence any acts

or decisions of the foreign state or public international organization concerned, or obtains a contract, business or advantage in the conduct of the business of that foreign state or international organization commits an offence.(80)

In addition, a Member of Parliament or legislative authority would have committed an offence by virtue of his or her job if he absents himself from voting, aids or assists in procuring any vote or exerts improper influence on any member from performing his or her functions.(81)

Chapter three deals with investigations regarding possession of property relating to corrupt activities. Property which has been used to facilitate the commission of a corrupt offence, or is a proceed of corruption may be seized, pending conclusion of investigations. (82)

Chapter four of the Act deals presumption of corruption and defences. The relevant section provides that whenever a person is charged with an offence in the Act, proof that the person accepted or agreed or offered to accept any gratification from, or gave or agreed to give any gratification, to any other person to obtain a favor or a benefit from that other person, is sufficient evidence that the person so charged offered to give, or agreed to accept such gratification. It is immaterial whether the state/prosecution was notable with reasonable certainty, to link the acceptance or the agreement to give the gratification to any lawful authority or absence of evidence to the contrary which raises doubt.(83)

On the other hand, it is no defense that the person so charged with corruption related offences did not have the power or the opportunity to perform or not perform the act in relation to which the gratification was given or accepted, or that he gave or offered to accept the gratification without intending not to perform the act in relation with which the gratification was granted.(84)

Chapter five of the Act deals with penalties. The penalties of corruption in South Africa are quite severe, including a possible life sentence if convicted. A person who is convicted may also be required to pay five times of the gratification he received or for the benefit he received.(85)

CHAPTER FOUR

CONCLUSION

As much as amnesty can be regarded as one of the options that can be applied in order fight the corruption night mare out of Kenya and the world at large. There are issues that need to be addressed and put in our minds. One being the historical development of corruption in the country, we need to first fight with the root cause the problem i.e. how the problem started and how far it has eaten in the society, The second issue is how effective the application of amnesty is deemed to work will it work in encouragement of the practice or it will to some extend work to combat the problem.

The last but not the list issue will be who will be eligible to be granted amnesty will it be the same 'big fish' who have the money and they believe in the money and thereby can afford to corrupt the system for their own interest? All this are the questions we should ask ourselves and try to see the effectiveness of amnesty in relation to corruption. After all said and done it is the duty of every citizen to try and fight with corruption in whatever level of the society we are in. The change is within us and it all starts with our dedication and commitment.

The grand of amnesty cannot and will not totally eradicate corruption but will only reduce it; all measures must be put in place to fight corruption in Kenya.

Recommendations

As much as we can end corruption in Kenya, we have to keep in mind that corruption is a disease that we can only control it's spread by raising a generation that is willing and dedicated to fight the vice.

As a recommendation, we need to find ways in which amnesty can be applied. For example we can not apply amnesty to corrupt individuals who are likely to repeat the offence.

Amnesty can only work if the government and the private sector are willing to apply it in all given circumstances that they think it can work. They cannot forget that corruption needs to be fought by all concerned parties.

Endnotes

(1)

[2]Ibid.

[3] Edgardo Campos, ed., The Boom And Bust Of Corruption in East Asia ,(2000) available at www.ecampos.com/books accessed on November 8 2008.

[4] See for instance the launching address of Kenya Anti-Corruption Court by Chunga CJ (former), where he stated that corruption was a global issue, quoted in the judgment of Meme v R, (2004) 1 KLR, 637.

[5] Kibe Muigai, The Obstacles in Fight Against Corruption in Kenya, in Ojienda T. O, Anti-Corruption and Good Governance in East Africa : Laying Foundations for Reform,(2007) pp 134 – 190.

[6] Peter Langseth & Jeremy Pope, The Role of a National Integrity System in Fighting Corruption, (1997) Commonwealth Law Bulletin, vol.23

[7] Helping Countries Combat Corruption: The Role of the World Bank; Poverty Reduction and Economic Management Report, (1997).

[8] Ibid.

[9] John Baily, Corruption and Democratic Governance in Latin America; Issues, Types, Arenas, Perceptions and Linkages, (2006), a paper prepared for delivery at the 2006 meeting of the Latin American Association, San Juan, Puerto Rico, available at http://pda.georgetown.edu/Security/referencemate accessed on November 5 2008.

[10] Ibid.

[11]Muthomi Thiankulu, The Anti-Corruption and Economic Crimes Act, 2003; Has Kenya Discharged Her Obligation to Her Peoples and the World (2006).

[12] Ibid.

[13]Act no.3 of 2003.

[14] Supra note 6.

[15] Ibid.

[16] Political Corruption, available at http://en.wikipedia.org

[17] Ibid.

[18] Ibid.

[19] Ibid.

[20] Kamotho Waiganjo, International Conventions Against Corruption, in Ojienda T.O, Anti-Corruption and Good Governance in East Africa : Laying Foundations for Reform, (2007).

[21] Ibid.

[22] Muthomi, supra note 11.

[23] Corruption in South Africa , Results of an Expert Survey, Monograph No. 65, available at http://www.iss.co.za accessed on November 12, 2008.

[24] Supra note 7.

[25] Paschal B. Mihyo, Report on the Alumni Refresher Course for Africa, (2002); Strategies for Combating Corruption in Africa, Institute of Social Studies.

[26] The Kenyan Constitution gives the President immense powers. For instance s.23 vests the executive powers in the President, s.24 gives him the power to create or abolish any offices and appoint or dismiss the holders thereof while s.25 provides that any person who holds such office of the republic does so during the pleasure of the President.

[27] Ghai Y. P & McAuslan P.W.B, Public Law and Political Change in Kenya ; A Study of the Legal Framework of the Government from Colonial Times to the Present, (2001).

[28] According to Peter Langseth & Jeremy Pope, supra note 12, systematic bureaucratic corruption is where corruption has become an integral part of the system and the system cannot function without it.

[29] Ibid.

[30] Causes of Corruption in Zimbabwe , available at http://www.fightcorruption.zw.gov , accessed on November 8, 2008.

[31] Supra note 21. See also the Report of the JudicialCommission of Inquiry into the Goldenberg Affair, (2005), where after exposing the Goldenberg Scandal to Prof. Anyang' Nyong'o [MP], Mr. David Munyakei, then a junior employee at the Central Bank lost his job. P.211 at Para 530.

[32 Supra note 22.

[33] Kibe, supra note 5.

[34] Ibid.

[35] Ibid.

[36] Prevention of Corruption Act, CAP 65, under which Kenya Anti-Corruption Authority (KACA) had been established through a 1997 amendment. KACA was later to be declared unconstitutional on the basis that it usurped the powers of the AG and the Commissioner of Police, in as much as it purported to undertake prosecutions and carryout investigations. See Gachieongo v Republic [2000] 1 EA 52.

[37] Supra note 21, pp 287-292.

[38] Section 26 of the Constitution.

[39] LSK v Eric Kotut & 4 others, CRM case no. 1 of 1994.

[40] The Goldenberg Report, supra note 34, p 14.

[41] Ibid.

[42] Edgardo O Campos, supra note 3.

[43] These include China , Malaysia , Indonesia and South Korea , which have continuously recorded high levels of corruption and weak institutional framework

[44] Edgardo, supra note 41, at p2.

[45] Ahmed Seyf, Corruption and Development; A Study of Conflict (2001), Journal of Development in Practice, Vol II,No.5.

[46] World Bank Report, Supra note 28.

[47] Ibid.

[48] Supra note 43.

[49] Paatii Ofosu, Combating Corruption: A Comparative Review of Selected Legal Aspects of State Practice and International Initiatives, (1999), World Bank Report.

[50]Supra note 22.

[51] Paulo Mauro, Corruption: Causes, Consequences and Agenda for Further Research, available at http://www.worldbank.org/fand accessed on November 8, 2008.

[52] Ibid.

[53] Report on Political Corruption in Kenya , (2002), available at www.clarionpress.org/pdf accessed on October 28 2008.

[54] See John Baily, supra note 9. Procedural sense in this case denotes competing political parties, periodic elections and extensive participation.

[55] Ibid.

[56] Ibid.

[57] The Goldenberg Scandal is an apt example in which decisions to give the Goldenberg International Ltd., and further make 35% ex gratia payments was based not on public policy gain but private gain, more so to raise campaign funds to counter the wave of multi-partyism. See the Goldenberg Report, supra note 37.

[58] Supra note 50.

[59] Supra note 53.

[60] Cap 65, but repealed by Act No. 3 of 2003.

[61] Supra note 24, at p 124. See also Khamala C., Why Corruption Works: Kenyan Myth

Debunked in Ojienda T. O Anti-Corruption and Good Governance in East Africa: Laying Foundations For Reform (2007) p.30, where he notes that after Macharia R., betrayed Kenyatta in exchange of 2500 pounds because the colonial administration could not get any evidence directly linking Kenyatta and Mau Mau, Macharia's later confession to the bribe was rejected by the colonial government and he was instead charged with perjury.

[62] Khamala, ibid.

[63] (1981) KLR, 508.

[64] Legal Notice No. 10 of 1997.

[65] Section 11B of the Act.

[66] Section11B (3).

[67] See the judgment in Meme v Republic; supra note 4, where the Chief Justice's launching address is quoted exentensively.

[68] Coleman & Buchanan, (Ed.)In Harms Way : Essays in Honour of Joel Feinberg, (1994)

[69] According to Nihal Jayackrama, A Holistic Approach to Combating Corruption (1999), Commonwealth Bulletin, Vol.25, quoted by Kibe supra note 32, p.150, for any commission to succeed there must be political will to combat graft and the commission must have operational independence.

[70] See Kibe, ibid.

[71] See section 10 of the Prevention of Corruption Act, (repealed).

[72] Supra note 54, Para. 783 at page 297. Several cases were instituted; R v Pattni & 2 others CRM case no. 4053 of 1994, R v Job Kilach & Anr, CRM case no. 2348 of 1994 , R v Charles Mbindyo & Pattni CRM case no.1902 of 1995, R v Pattni & 4 Others CRM case no. 2208 of 1995.All these cases were either withdrawn without any reason being offered, or consolidated, resulting to delays.

[73] Gachiengo v R, supra note 33.

[74] Mwai Kibaki joined together with Kijana Wamalwa and Charity Ngilu to form National Alliance of Kenya, (NAK). Later, they were joined by LDP a splinter group of the then ruling party KANU, which had ruled the country since independence. The National Rainbow Coalition was formed and proceeded to win the elections, an event which was seen as a punishment for KANU for its corrupt past. But NARC was later to split in 2005 after the President failed to

honour the Memorandum of Understanding, and over the proposed new constitution of that year.

[75] In his inauguration speech, Kibaki stated declared that "corruption will now cease to be a way of life in Kenya" and he called upon all members of his government and public officers accustomed to corrupt practice to "know and clearly understand that there will be no sacred cows under my government.

[76] An Audit of Kibaki Anti-Corruption Drive , 2003-2007. available at

[77] Muthomi Thiankolu, supra note, notes that this Ministry has been controversial in history of Kenya . It was established after independence but abolished by the Moi regime after the 1982 abortive coup. The NARC administration re-introduced it to spearhead the anti-graft campaign, headed by Kiraitu Murungi who was later to fall from power on allegations of covering up corruption after the Anglo-Leasing scandal.

[78] Khamala C., Why Corruption Works: Kenyan Myth Debunked; See also the opinion expressed by Prof. Kivutha Kibwana, Daily Nation, 14th February, 2003, that one of the reasons of proposing maiden anti-corruption law was to fulfill one crucial condition of Bretton Woods for resuming aid.

[79] Ibid.

[80] United Nations Convention Against Corruption and the African Union Convention on Preventing and Combating Corruption both require state parties to adopt and implement preventive anti-corruption policies and practices. (Art. 5 of UNCAC).

[81] See the pre-amble to the Bill.