Deep State, Mega-Corruption and Stalled Electoral Reforms

Exposing the Governance Conundrum in Kenya

Deep State, Mega-Corruption and Stalled Electoral Reforms
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ABBREVIATIONS

AUCPC       African Union Convention on Preventing and Combating Corruption
ACECA       Anti-Corruption and Economic Crimes Act
ACPU        Anti-Corruption Police Unit
AFC         Agricultural Finance Corporation
Africog     African Centre for Open Governance
BATK        British American Tobacco-Kenya
BVR         Biometric Voter Register
CBK         Central Bank of Kenya
CCN         City Council of Nairobi
DPP         Director of Public Prosecution
EACC        Ethics and Anti-Corruption Commission
ECFA        Election Campaign Finance Act
ECK         Electoral Commission of Kenya
Exim        China Export Import Bank
FMC         First Mercantile Services
F-P-T-P     First-Past-The-Post
GDP         Gross Domestic Product
GOK         Government of Kenya
IEBC        Independent Electoral and Boundaries Commission
IFMIS       Integrated Financial Information System
IIBRC       Interim Independent Boundaries Review Commission
IIEC        Interim Independent Electoral Commission
IPPG        Inter-Parties Parliamentary Group
JLAC        Justice and Legal Affairs Committee
KACA        Kenya Anti-Corruption Authority
KACC        Kenya Anti-Corruption Commission
KANU        Kenya African National Union
KHRC        Kenya Human Rights Commission
KNHRC       Kenya National Human Rights Commission
KPC         Kenya Pipeline Company
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<tr>
<th>Abbreviation</th>
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<tr>
<td>KRA</td>
<td>Kenya Revenue Authority</td>
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<tr>
<td>LAICO</td>
<td>Libya Arab Investment Company</td>
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<td>MMP</td>
<td>Multimember Plurality</td>
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<td>MOU</td>
<td>Memorandum of Understanding</td>
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<td>NARC</td>
<td>National Rainbow Coalition</td>
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<td>NASA</td>
<td>National Super Alliance</td>
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<td>NSIS</td>
<td>National Security Intelligence Services</td>
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<td>NSSF</td>
<td>National Social Security Fund</td>
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<td>NYS</td>
<td>National Youth Service</td>
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<td>ODM</td>
<td>Orange Democratic Movement</td>
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<td>OSF</td>
<td>Open Society Foundation</td>
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<td>PCEA</td>
<td>Presbyterian Church of East Africa</td>
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<tr>
<td>PNU</td>
<td>Party of National Unity</td>
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<tr>
<td>SGR</td>
<td>Standard Gauge Railway</td>
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<td>SMP</td>
<td>Single Member Plurality Systems</td>
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<td>TCA</td>
<td>Tobacco Control Act</td>
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<td>TNA</td>
<td>The National Alliance</td>
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<td>UHDC</td>
<td>Uhuru Highway Development Company</td>
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<tr>
<td>UK</td>
<td>United Kingdom</td>
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<td>UNCAC</td>
<td>United Nation Convention against Corruption</td>
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FOREWORD

The KHRC's study on exposing the Governance Conundrum in Kenya: *Deep State, Mega-Corruption and Stalled Electoral Reforms*, focuses on creating the conceptual and historical nexus between Mega Corruptions and the failed Electoral Reforms in Kenya. It contributes majorly to lying foundation for the effective combating of corruption and efficient management of elections in Kenya.

The study seeks to manifest an in-depth understanding of the political environment within which corruption and electoral mal-governance thrive in Kenya, and un-earth the deeply entrenched elite interests and the nature of the Kenyan state. It analyzes the political foundations and operations of the Kenyan state and the linkages between such in the misuse of public resources and mismanagement of the electoral processes. In addition, it critically assess how such has been employed to thwart anti-corruption efforts and manipulate elections, resulting into the flawed political system we have in Kenya today.

The study further seeks to establish claims that grand corruption scandals are schemed to run elections in Kenya. This involved analysis of how the Independent Electoral & Boundaries Commission (IEBC) is run, and claims of pay backs and back door arrangements to make money during electioneering period. It also investigated claims of state capture of key independent anti-corruption agencies, including among others the Ethics and Anti-Corruption Commission (EACC), Office of the Director of Public Prosecution (ODPP) and the Judiciary. This involved among others an analysis of state incentives and disincentive, where both institutions and individuals are rewarded for dishonesty while punished for honesty.

In the final analysis, the study demonstrates how the existence of a deep state in Kenya fuels corruption and electoral mal-governance and recommends strategic policy interventions to secure the Kenyan state.

George Kegoro
Executive Director
Kenya Human Rights Commission (KHRC)
EXECUTIVE SUMMARY

Two of the most serious governance crisis have bedeviled Kenya over the years are corruption and stalled electoral reforms. This paper takes off from the premise that the raison d'etre that is often cited for the persistence of these two aspects of governance deficit in Kenya are merely the symptoms of a bigger and more disturbing underlying cause, namely the deep state. The paper therefore set out to examine the link between deep state, mega-corruption and stalled electoral reforms in Kenya. It is theoretically grounded on the rational choice theory (RCT), which depicts the deep state actors as rational, self-interest driven and opportunity maximizers. Based on RCT, I have developed a new theoretical and conceptual framework for understanding the deep state;

Empirically, the paper is anchored on both primary and secondary data. The former was obtained through key informant interview of informants drawn from academia, civil society and relevant government agencies. Secondary data was derived through documentary analysis. The data was analyzed qualitatively and quantitatively, and reveals that both the mega-corruption and stalled electoral reforms in Kenya are not only systemic and structural but are also glued together in a strong diametrically interdependent relationship. Moreover, the persistence of corruption and failed electoral reforms are traceable to the problem of the deep state.

The paper makes several recommendations on how to escalate the anti-corruption and electoral reform efforts in Kenya. First, there is need to make corruption expensive and less attractive by eliminating bureaucratic red tapes, addressing institutional malfeasance, injecting political good will and promoting a sense of duty, efficacy and ethics in public service delivery. There is need for stiffer penalties for corruption, compulsory recovery of corruption proceeds, naming and shaming the corrupt, and barring the corrupt from holding public or elective office for life. Secondly, there is need for thorough vetting of appointees to key governance institutions.

Thirdly, there is need to review the Witness Protection Act and strengthen the witness protection agency to protect corruption witnesses and whistleblowers. There is also need for civic education to enhance public awareness on the availability of witness protection agencies. Fourth, there is need for more stringent wealth and asset declaration measures, including publicizing the wealth declared by public officers. Private sector employees should also be required to declare wealth. Failure to declare ownership of asset should ipso facto amount to forfeiting the same asset to the
state, while concomitantly attracting penalty equivalent to the cost incurred in investigating the ownership of the undeclared asset as well as the current monetary market value of the asset. Knowing and failing to report known or suspected cases of inaccurate declaration of wealth should also be criminalized. The wealth declaration forms should also be redesigned to go beyond mere declaration of wealth to explaining how the wealth was acquired.

Fifth, there is need to a general handbook or set of sector-based handbooks on various services provided by the government detailing where to find the services; the process of getting them; the requirements; and the cost where necessary. This will enhance the public's awareness of their rights and entitlements, while also limiting the opportunities and scope for corruption. Sixth, the independence of governance institutions should be strengthened, especially those institutions dealing with prevention, investigation, prosecution and adjudication of corruption. Finally, there is need to consider a shift from the F-P-T-P to a proportional representation syste
CHAPTER ONE
INTRODUCTION

1.1 Study Background and Problem Statement

One of the major challenges that incessantly bedevil Kenya, like other emerging democracies, is the crisis of governance epitomized by high levels of corruption and failed institutional reforms. Indeed, Africa loses nearly a quarter of her Gross Domestic Product (GDP) or US $ 148 billion to corruption annually. In the case of Kenya, the Controller and Auditor-General reports that 'the Kenya government lost more than 475 billion Kenya shillings between 1991 and 1997 through corruption, neglect, wastage and a 'don't care' attitude of public officers…this translates into a loss of Kenya shillings 68 billion annually, nearly one third of the government's ordinary annual revenues' (Kibwana et al., 2001:155). Thus, 'in Kenya alone, international donors estimate that since 2002, nearly US $ 1 billion has been stolen as a result of corruption' (Ware et al., 2011:65). It should be noted that these figures only reflect detectable and hence reported corruption. The reality is that 'some types of corrupt activities (and no-one knows how many of these there are or how frequently they occur) tend to be carried out in secret with few [or no] witnesses. [Yet], that which is not witnessed cannot be reported' (Gorta, 2006: Unpaged Online Version).

Year after year, Kenya ranks poorly in terms of the levels of corruption perception as measured by the Transparency International and depicted in Figure 1.

![Figure 1 Kenya's Corruption Index (2012-2017)](image)

Data Source: Transparency International
For the six years under review, the mean corruption index was 26.8 with a standard deviation of 1.17. This implies that there were no significant changes on the corruption levels in Kenya over the years despite the numerous reforms. Yet, the perils of corruption are fairly well documented. Indeed, 'there is no doubt that corruption weakens the quality of services, places unbearable burden on the most vulnerable people, undercuts development, and hinders the eradication of poverty' (Kimemia, 2014: 158). Regrettably, 'the inability to control corruption has perpetuated a rich cohort of Kenyan predatory elites and contributed to its growth. Corruption is therefore a major impediment to faithfully implementing the constitution' (Gathii, 2016: 355). Once elite interests are secured, everything else including human rights is relegated to the back burner.

A survey conducted by the Ethics and Anti-Corruption Commission (EACC) in 2016 reveals that corruption is the third most pressing problem facing Kenyans (21.6%) after poverty (35.7%) and unemployment (29.9%). The survey further shows that 79.3% of Kenyans feel that the level of corruption in Kenya is very high as compared to 73.9% in 2015 and 67.7% in 2012. At the same time, 63.4% of Kenyans feel that corruption levels are increasing compared to 11.8% who feel that it is the same and 14% who feel that it is The other issue which also came up in the survey is whether Kenyans give bribes out of their volition or whether public service providers demand bribes as a condition for providing public service. Figure 2 shows the progression in the percentage of Kenyans who give bribes between 2006 and 2016. Notably, the two peaks in the graph (2007 and 2012) were election years. It would appear that the opportunities for giving and receiving bribes are higher during elections.

Data Source: EACC (2017b).
Besides the seemingly growing confidence of Kenyans in giving bribes, the amount of bribes being given has also been on the rise as depicted in figure 3.

Data Source: EACC, 2017b

In terms of the effects of corruption on the society, Odhiambo (2016: 19) notes: Corruption affects the entire social fabric of a nation. Economically, corruption leads to the depletion of national wealth, an increase in the cost of goods and services, and to the conversion of public wealth into private and personal property. Politically, it impedes democracy and the rule of law. Socially... the negative effects of corruption eventually widens the gap between the rich and the poor.

It is quite puzzling that despite the dangers of corruption, and the copious institutional, and legal reforms aimed at taming corruption, the vice has not just remained persistent in Kenya but seems to be worsening. This puzzle is aptly captured by Open Society Foundation (OSF) (2015: 43):

Grand corruption remains a severe challenge to governance in Kenya...despite bribery and corruption having been criminalized since 1956, with over a dozen major legislative amendments being enacted to better codify the offences, increase penalties and create new anti-corruption institutions, Kenyans are hard pressed to name a single major corruption prosecution, let alone convictions, to such notorious crimes.
The above puzzle raises the question: *Why has corruption [and electoral reform malfeasance] persisted in Kenya despite many legal and institutional reforms done over the years?* To be fair, there have been attempts to answer these questions. For instance, as Kivuva (2013: 23) notes:

Corruption persists in Kenya despite numerous initiatives to eliminate the vice. This intransigence can be attributed to poorly developed laws; institutional weakness and ineffectiveness; lack of political good will to fight impunity; a political culture that not only condones corruption but also glorifies it; and inappropriate incentive structures and other bureaucratic pathologies within the public sector.

Regarding political goodwill for instance, Kibwana et al. (2001: 158 - 159) have observed that:

A deficit of political will to resolutely fight against corruption exists in Kenya. The power elite during the twilight of Jomo Kenyatta's rule and most of Daniel Arap Moi's heavily invested in patron-clienteles corruption under the protection of the one party era in which transparency and public accountability were minimal… [Yet] no anti-corruption initiative can bear real fruit where the political establishment lacks the political will to change. Also, Kenyans themselves currently lack the political will to force the government to abandon corruption…[in fact] the spoils of corruption are routinely shared with ordinary people'

This paper proceeds from the premise that these often cited reasons for persistence of corruption in Kenya are mere manifestations of a bigger underlying cause, namely the *deep state*. In this regard, *deep state* refers to 'authoritarian, criminal and corrupt segments of the state that function in a democratic regime by exploiting and reproducing its deficiencies' (Soyler, 2015:1). It is some sort of informal institutions operating under shadows of formal governance institutions. In essence, 'deep state is a state within the state' (Shafak, 2006:58). Surprisingly, neither scholars nor practitioners grappling with the governance crisis in Kenya have explored the diametrically interdependent relationship between mega-corruption and stalled electoral reforms. Moreover, there is very scanty evidence of efforts to conceptualize the governance deficit within the context of the deep state. This paper traces the persistence of corruption and failed electoral reforms to the problem of *deep state*, and examines the link between the *deep state*, mega-corruption and stalled electoral reforms in Kenya, taking into account the human rights dimension.
1.2 Objectives of the Study

(i) To outline a theoretical and conceptual framework for understanding the deep state;

(ii) To explore whether mega corruption and stalled electoral reforms in Kenya are systemic and structural;

(iii) To explicate the Kenyan deep state together with its powerful and influential cartels and corruption networks that perpetuates corruption and perenniilly obstructs electoral reforms;

(iv) To explore the nexus between the deep state, corruption and the failed electoral reforms

(v) To offer a critique of both the electoral reforms as well as the legal and institutional frameworks for fighting corruption in Kenya; and

(vi) To make recommendations on how to escalate the anti-corruption and electoral reform efforts in Kenya, cognizant of the need for advocacy and intervention strategies for KHRC.

1.3 Study Methodology

The study was executed within the framework of longitudinal research design, which allows for a retrospection of the unholy union between the deep state, mega-corruption and failed electoral reforms in Kenya since independence. In terms of data, the study used primary and secondary data. Primary data was obtained mainly through key informant interviews. Key informants were drawn from the academia, civil the society and the government agencies. Secondary data on the other hand was obtained from several relevant publications. The study was conducted between November, 2017 and April, 2018 and a stakeholder validation workshop held on 24th May 2018. In addition, the study also undertook a meta-analysis of past research reports especially the 2006 survey undertaken by the Ethics and Anti-Corruption Commission (EACC).

1.4 The Structure of the book

The paper is organized into ten chapters. Chapter one is the introduction, which provides an outline of the study background; problem statement; research question; study objectives; and the study methodology. In Chapter two, I introduce and develop a new theoretical and conceptual framework for understanding the deep state, based on the rational choice theory. Chapter three to five focuses on various aspects of corruption in Kenya. Chapter three provides a comprehensive exposition of the concept of corruption by examining the three broad streams for conceptualizing corruption; establishing the nexus between mega-corruption and human rights violations; and outlining the behavioral, institutional and socio-cultural motivations for mega-corruption. Taking all these together, the chapter ends with a new generalized theory of corruption derived
from the rational choice theory, which depicts corruption as a function of *greed, pressure* and *opportunity*.

Chapter four provides a critical cursory review of various anti-corruption agencies in Kenya over the years and why the anti-corruption initiatives have been unsuccessful. Chapter five examines selected cases and the intrigues of mega-corruption in Kenya. Chapter six shifts attention to the question of electoral reforms in Kenya, examining the reform journey, its failures and challenges. Efforts are made in Chapter seven to conceptualize the phenomenon of deep state and trace its historical roots. Chapter eight explores the link between the deep state, corruption and electoral reform failures in Kenya. Chapter nine examines the influence of the deep state on governance institutions and processes. Chapter ten offers recommendations and in so doing sketches a civil society platform for anti-corruption and electoral malfeasance reform advocacy in Kenya.
CHAPTER TWO
THEORETICAL AND CONCEPTUAL FRAMEWORK
FOR UNDERSTANDING THE DEEP STATE

2.1 The Rational Choice Theory
This study is conceptually anchored on the foundations of the rational choice theory (RCT). The decision to adopt RCT in this study is informed by its special position in social science. Political scientists for instance, have nearly reached a consensus that 'the only theory in comparative politics today that is sufficiently powerful and general to be a serious contender for the unified theory is rational choice theory' (Wallerstein, 2001:1). This consensus is based on the theory's ability to explain virtually everything in social sciences (A singo, 2018,). Olson (1965) offered a classic version of RCT which suggest that 'individuals behave the same way in both political and economic spheres. In both cases, individual actors are rational, self-interest-driven and utility maximizers, whose decisions…are motivated by cost-benefit calculations' (A singo, 2018:70).

2.2 Rational Choice Theory and the Deep State
This study takes off from these postulates of RCT and argues that deep state actors are rational, self-interest driven, and opportunity maximizers. Thus, mega-corruptions never occur by chance, but are the premeditated outcomes of conscious decisions, meticulous planning, and calculated actions of rational actors motivated by self-interest. Corruption cartels that cause havoc to the society always grab opportunities that come their way in unbridled quest to satisfy self-interests.

Deep state actors are rational and self-interest-driven in the sense that they scarcely invest their time, money and energy on issues and activities whose costs seems to outweigh the benefits that would accrue to them personally from such investments, especially if they can scheme for other activities which promise greater benefits relative to costs. Even when they undertake apparently public interest projects, the underlying motive is never to benefit the public and improve their welfare, but rather, how to licentiously enrich themselves from such projects, especially through tendering and insider-trading. Any benefits that the public get from such projects are mere by-products of their selfish interests. Adam Smith, one of the initiators of RCT, argues that human beings operate in such a way that they always pursue only their selfish interests. However, in the process of doing so, some 'invisible hand' directs them to inadvertently serve public interest.
Thus, a good indicator of how much a government is immersed in the deep state is the extent to which it is fixated with grandiose infrastructure projects, where the opportunities for embezzling public funds through kickbacks, overpricing and diversion of resources are abound. Indeed, 'recent empirical studies have also shown that corruption distorts the allocation of resources by diverting budgetary funds towards activities where bribes and illegal commissions can be more easily made – from recurrent expenditures to capital investments for example' (Campos and Bhargava, 2007: 4). In this regard, Truex and Soreide (2011:478) points out that:

Theories of corruption incidence hold that sectors with a high degree of complexity are particularly prone to corruption because it is difficult for outsides to effectively monitor service delivery. The construction sector, characterized by hundreds of technical contracts, significant cash transfers and extensive approval and bidding process, is considered extremely vulnerable to corruption at all phases in the value chain.

Rational choice theory helps to explore the nexus between the deep state, corruption and failed electoral reforms in Kenya. The overarching hypothesis is that the incessant failure of electoral reforms in Kenya is largely an artifact of the persistence of corruption, which in turn is traceable to the deep state. At the heart of deep states lie the pro-status quo corruption networks and cartels which are products, beneficiaries and critical cogs in the wheels of corruption. These cartels often muzzle, capture, or co-opt critical anti-corruption actors and institutions, and fervently obstruct institutional changes, including electoral reforms, which can potentially undercut their interests. This is consistent with the rational choice institutional hypothesis that 'rational actors will not create institutions if the costs of doing so exceed the benefit that they subsequently provide' (Knight, 1992:43). To put it succinctly, 'the dominant rational choice theory posits that electoral reform is due to the strategic calculations of elites who chose electoral rules that suit their own ends of maximizing gains or minimizing losses' (Leyenaar and Hazan, 2012:9).

2.3 The Study Conceptual Framework
The rational choice theory described in the previous section significantly informs Figure 4 below which is a conceptual framework for the deep state, corruption and elections in Kenya.
The end game of politics and elections in Kenya is to serve the self-interest of political elites by who seek to gain access to public resources and increase opportunities for corruption. There are two avenues through which the political elites gain access to state resources – the direct political power route, and the indirect political influence route. The politicians and election candidates who seek political power through the ballot use the political power route. To achieve their selfish political interests, they manipulate the electoral process by either compromising the electoral agency or bribing voters. On the other hand, private businessmen, corruption cartels and other deep state actors who are more interested in post-election contracts, tax evasions and tenders use the political influence route. They either compromise the incumbent political elites or bankroll strong political parties and candidates during elections. After elections, deep state actors acquire political influence as rewards for their political investments on winners. The election winners accordingly grant the cartels unfettered access to the resources and corruption opportunities.
In terms of impeding democracy for example, Okiya Omtata\(^1\) observes that corruption pose an existential threat to Kenya as independent and sovereign state. Kenya risks having a government of and for the corruption cartels, rather than a government of, and for the people. The cartels will not only decide the leaders, but also which policies to pursue, and which projects to execute. The incessant corruption would render Article 1 of the Constitution superfluous since sovereignty will shift from citizens to corruption cartels. When this happens then what would matter are what cartels want, and not what the public want. Even public projects will be initiated not on the basis of the felt-needs of citizens but on the basis of where the cartels feel they can maximize their loot of public resources. In line with these observations, Gladwell Otieno\(^2\) adds that:

> It is through mega infrastructure projects that corruption is executed. The Standard Gauge Railway (SGR) was not necessary and even if there was need for it, it would have been more cost-effective to upgrade the old rail line rather than constructing a new rail line. While there is a legitimate claim that the SGR would put more cargo off the road, the greatest motivation for its conception and construction was corruption.

According to Rev. Dr. Timothy Njoya\(^3\), the problem in Kenya has never been elections *per se*, but the mental frame with which people approach elections. He notes that elections in Kenya are viewed merely as a means of acquiring political power without any governance or democratic agenda. Once political power is acquired, it is used to misallocate resources such as government contracts, and other state-mediated economic opportunities. This has effectively transformed elections in Kenya into a struggle over who will be in charge of misallocating state resources. In the circumstances, it is not surprising that the elections are often fiercely fought. He further notes that elections in Kenya have also been commercialized to the extent that, 'elections in Kenya are a serious business. No single business in the world is as lucrative as investing in elections in Kenya'. With reasonable election investment capital, one can bribe voters or party leaders, get elected, and misuse his office, powers and influence to become a billionaire within no time.

\(^1\) Okiya Omtata is a civil society activist and an acclaimed Human Rights defender in Kenya.

\(^2\) Gladwell Otieno is the Executive Director of the African Centre for Open Governance (Africog). Gladwell was interviewed on 17\(^{th}\) April 2018.

\(^3\) Rev. Dr. Timothy Njoya is a retired minister of the Presbyterian Church of East Africa (PCEA). Njoya was interviewed on 22\(^{nd}\) February 2018.
CHAPTER THREE
MEANING AND MOTIVATIONS FOR CORRUPTION IN KENYA

3.1 Conceptualizing Corruption
One can detect three broad conceptual streams within which corruption should be understood.

3.1.1 The First Conceptual Stream: Corruption Defies Definition
Scholars who subscribe to this stream locate corruption within the province of concepts that can hardly be circumscribed into concise definition. That is, 'corruption is complex, multifaceted and resist a clear definition' (Tagit and Mwenda, 2013:3). It is cogently articulated in a ruling by American Supreme Court Justice Potter Stewart. In the Jacobellis vs. Ohio Case (1964), he noted that, 'I shall not today attempt further to define the kind of [activity] I understand to be encompassed within that short-hand description [corruption]; and perhaps I could never succeed in doing so. But I know it when I see it' (Hatchand, 2014: 13). Hence, 'the image that the word “corruption” conjures in the minds of most people is one of bribery…It is easy to recognize when this type of corruption occurs – even if it is very difficult to measure' (Jain, 1998: 5).

Evidently, 'corruption is a term of disrepute, lacking conceptual precision, [and yet] without a specific definition of corruption, the analysis of corruption, and therefore anti-corruption, may be theoretically flawed and misleading' (Brata, 2014:10-11). According to Obura (2015:240),

Kenyans disagree not only on the criteria to be used in determining corruption, but also on the actual meaning of corruption…the disagreement on the criteria and definition of corruption is not however, unique to Kenya and can be attribute to the complex and multifaceted nature of corruption which makes it take on various forms and functions in different contexts.

Riding on this stream, major international anti-corruption instruments such as the United Nation Convention against Corruption (UNCAC) and the African Union Convention on Preventing and Combating Corruption (AUCPC) do not even attempt to define corruption (Nichols et al., 2011; Obura, 2015). Indeed, Kenya was the first
country to ratify the UNCAC in Mexico in December 2003. Thus, 'the Constitution and the prime anti-corruption law in Kenya, the Anti-Corruption and Economic Crimes Act (ACECA) have not come up with a unifying definition, with the latter instead merely outlining corruption's various manifestations' (Obura, 2015: 240). Section 2(1)(a) to (g) of ACECA outlines a list of crimes that constitute corruption. However, 'the list of crimes that are said to constitute corruption is not exhaustive. [Moreover], each of these components of corruption constitutes a substantive offence under the Penal Code' (Tuta, 2005:168).

There are a number of reasons why some scholars find it hard to capture corruption in a simple definition. Some argue that corruption has many dimensions and it is difficult to embrace all its dimensions in a concise phrase as a definition. It has been noted for instance that 'the term corruption can be applied to behaviors as varied as bribing government official to approve a land development application, theft of office equipment for use at home, fraudulent allocation of monies, misuse of confidential information, or police planting evidence to facilitate the conviction of a suspected offender' (Gorta, 2006: Unpaged Online Version). Hence, 'a problem for the “over-definition” of corruption is how to bring together the different forms of corruption, such as clientelism, patronage and patrimonialism, onto one analytical landscape' (Rothstein and Varraich, 2017:70). Thus, 'corruption has been defined in many different ways, each looking in some aspect…like an elephant, even though it may be difficult to describe, it is generally not difficult to recognize when observed' (Tanzi, 1998:10). The vagueness of the concept evokes the feeling that 'if corruption could be measured, it could probably be eliminated. [Nonetheless], conceptually it is not even clear what one would want to measure' (Tanzi, 1998:20).

Others contend that it is difficult to pin a definition on corruption because its boundaries are in constant flux and thus impossible to delineate. Hence, the difficulty in defining corruption is due to the fact that 'the dimensions of corruption are being changed constantly' (Benjamin, 2012: 25). Okiya Omtata concurs, noting that the nature of corruption in Kenya is rapidly changing. While most corruption initially occurred on the expenditure side, there is a significant shift to the revenue side. It is on the revenue side that there are numerous cases of collusion for tax waivers and undervaluation of goods for tax evasion purposes. After Kenya Revenue Authority (KRA) raises revenue, parliament has no capacity to scrutinize and reconcile money released from the Central
Bank of Kenya (CBK) and the actual expenditures incurred. For instance, while the law requires that all money collected by the government should be deposited in the consolidated fund and spent through appropriation bills, this was not done in the case of Standard Gauge Railway (SGR) project. The loan that financed it was never remitted to the consolidated bank. It was borrowed and spent off-shore. The only thing that came to Kenya was paper work and debt. No one knows how much kick back was received off-shore. The same applies to the Eurobond scam.

A study on corruption in Kenya led by Professor Kivutha Kibwana in the 1990s concluded that 'a search for an all-embracing and comprehensive definition [of corruption]…can hardly be rewarded by any measure of success' (Chweya, 2005:3). As a result, 'the standard of corrupt behavior should not be overly circumscribed given the multi-faceted nature of corruption. Indeed, there are many identified acts of corruption which if a rigid definition of corruption is adopted would most probably be left out' (Obura, 2015:273).

Chweya (2005) recaps frustration of those who have given up the quest to define corruption thus:

Most researchers have acknowledged the difficulty of defining corruption. The definition is difficult to formulate for three reasons. First, the range of what are presumably acts of corruption appears to be unlimited. Second, what is or is not an act of corruption differs widely in both time and space, between and among cultures as well as between historical moments within a single culture. Thirdly, exactly which social domain the concept of corruption can be appropriately applied to is not obvious. The concept can be applied either to the public service alone or to both public and private sectors…we can no longer for instance, define corruption only as “abuse of power”.

3.1.2 The Second Conceptual Stream: Corruption is better classified than defined

The second conceptual stream suggests that corruption is best understood by classifying rather than merely tying it to a simple phrase in the form of a definition. In this regard, Arnold Heidenheimer offers a contemporary political science three-fold conception of corruption, which classifies it into three categories for analytical purposes. First, there is public office-centered conception of corruption, which regards corruption as 'behavior that deviates from that expected of a public official, and that is explained in terms of the official's desire for improper personal benefit' (Holmes, 2015:9). In other words, 'a
public office-centered definition views corruption as an act of a public official who misuses delegated authority and the obligation of public office as a result of considerations of personal gain, which need not be monetary (Johnson, 2016:3). The problem with this view is that it only focuses on the demand while ignoring the supply side of corruption, yet there are cases when the supply side may be stronger than the demand side.

Secondly, there is public interest-centered view of corruption which focuses on 'the harm done to the public because of the improper self-serving behavior of public officials' (Holmes, 2015:9). Generally, 'a public interest-centered definition considers a public official to have committed a corrupt act when induced to take actions for monetary or other rewards, which does damage for the public interest' (Johnson, 2016:3). Thirdly, there is market-centered viewpoint of corruption, which regards corruption as a situation where public officials treat their positions and privileges as a business or private source of income (Holmes, 2015). According to this view, public offices are markets where public goods and services are traded among the corrupt on a willing-seller and willing-buyer the basis of. In the circumstance, simple market principles of demand and supply determine the quantity of bribe that public officers demand for the otherwise free services.

Heidenheimer developed a second typology of corruption which classifies them into black, white and grey corruption. Black corruption comprises of those activities which the majority of both the elite and the masses condemn and often demand that perpetrators should be heavily punished. White corruption includes activities which may be legally considered as corrupt but are largely tolerated by both the elite and the masses, and therefore they may not want perpetrators punished (Holmes, 2015). Finally, Grey corruption incorporates those 'activities about which elites and the general public have differing views, or about which there are significant differences of opinion including ambivalence, even within each of the two groups' (Holmes, 2015:9).

Another useful typology developed in the United States classifies corruption into grass-eating and meat-eating corruption. The former refer to situations where bribe recipients do not demand bribe in exchange for goods and services, yet they do not mind receiving it if offered by those in need of their goods and services. It is a supplier-induced corruption. Meat-eating corruption is a demand-induced corruption where officials demand varied forms of inducements as condition for providing public goods and
services (Holmes, 2015). The final classification is between extortive and transactive corruption. Under extortive corruption, corruption recipient not only demand and put pressure to be bribed, but actually set bribery terms. In contrast, transactive corruption is where the giver and the recipient of bribe mutually negotiate bribery terms (Holmes, 2015).

In their 2016 survey on corruption in Kenya, EACC asked Kenyans the reasons why they give bribes in exchange for public service, and the results have been reconfigured into figure 5 below:

Data Source: EACC, 2017b

From Figure 5, it is evident that 72.5% of the respondents who admitted to having given bribes said they did it because it was demanded from them by those from whom they needed a public service. In contrast, only a paltry 2.6% out rightly said they gave bribe out of their own volition (EACC, 2017b). It is evident from these findings that most of the corruption that occur in Kenya is demand-induced and hence Meat-eating type of corruption. Those respondents who noted that bribes are an integral component of transactions with public officers (8.7%) seem to suggest that indeed corruption is a culture in Kenya. Institutional malaise and bureaucratic red tapes as a driver of corruption is also revealed by the 28.4% who give bribes to make systems work faster.

### 3.1.3 The Third Conceptual Stream: Corruption can be defined precisely

The third conceptual stream attempts to proffer some definition of corruption. The basic and most commonly used definition has been offered by Transparency International which defines corruption as 'the misuse of entrusted power for personal gain'
(Hatchand, 2014: 13). This is the definition adopted for instance in Kenya in the Report of Parliamentary Anti-Corruption Select Committee (2000). Corruption has also been defined as 'illegal transaction where public officials and private actors exchange goods for their own enrichment at the expense of society at large' (Manzetti and Wilson, 2007: 952). The latter definition emerge from the legal view of corruption which view it as 'behavior that violates some formal standards or rule of behavior set down by a political system for its officials or citizens' (Obura, 2015:243). An act is corrupt if it violates existing laws. This contrast with the moral view which holds that an act is corrupt regardless of its legality, as long as 'it is harmful to the general human good (morality)' (Obura, 2015:246).

According to a renowned economist Robert Klitgaard, corruption is best defined by the equation:

\[ \text{Corruption} = \text{Monopoly Power} + \text{Discretion} - \text{Accountability} \]  
(Viswanathan, 2012).

However, the equation only shows necessary but not sufficient conditions for corruption to occur. There are many instances in which people have monopoly of power and immense discreional powers but still exercises those powers diligently even in the absence of clear accountability mechanisms.

### 3.2 Mega Corruption

Mega corruption on the other hand is defined as 'acts committed at a high level of government that distorts policies or the central functioning of the state, enabling elites to benefit at the expense of the public good. Transactions are usually large in scale' (Johnson, 2016: 8). It has also been equated to grand corruption which refers to the elite-level corruption such as the legislators receiving bribes to adopt policies favorable to those who have bribed them (Holmes, 2015). A good example is the tobacco industry Kenya which is alleged to have bribed legislators to prevent them from supporting anti-tobacco legislations. As Drope (2011: 162-3) observes:

The tobacco industry is economically and politically well-connected. Notably, until recently, the Kenyan government was a shareholder of BATK [British American Tobacco-Kenya] through its national pensions program, the National Social Security Fund (NSSF)…when the TCA [Tobacco Control Act] 2007 finally progressed to the second reading in the Kenyan parliament after years of failure due in large part to industry influence, BATK and Mastermind Tobacco spent Kenya Shillings 7 million to lavish MPs with a beach holiday and retreat on exclusive coastal resort in a final effort to influence the bill.
Similarly, Campos and Bhargava (2007) identifies three forms of corruption which include state capture; patronage and nepotism; and administrative corruption. According to them, state capture comprise of both the grand corruption and the political corruption. They define grand corruption as corruption that involves extraordinarily large side payments, while political corruption refer to 'favors exchanged for support, financial or otherwise, to buttress or sustain the political power of individuals or groups (such as illegal campaign contributions)' (Campos and Bhargava, 2007: 9).

I take the view that mega-corruption involves high-level political players, very huge amounts of money transacted; real or phantom private business; and serious breach of public interest. By nature therefore, 'mega-corruption thrives because of a nexus between big business, politicians and bureaucrats' (Mathur, 2014). As Okiya Omtata notes, mega-corruption largely occurs through collusion between senior civil servants who have requisite signatures, politicians with influence and businessmen who execute the scams. Thus, 'as long as government is heavily intertwined with economy, the temptation and opportunity for corruption will exist, and the only way to permanently reduce corruption is to weaken the link between politics and business' (Belasen and Toma, 2016: 9). Mega-corruption persists due to the fact that 'Kenya's political and business interests have traditionally been strongly intertwined' (Debiel and Niemann, 2007: 77).

According to Polycarp Ochillo, the distinction between petty and mega corruption should not be overstated for a number of reasons. First, even mega corruption often start as something petty, is condoned, rationalized and once accepted as a normal behavior, it mutates into something mega. Secondly, the overemphasis on mega corruption can divert attention from petty corruption, yet all forms of corruption are harmful and need to be treated as disorders in the society.

3.3 Corruption as Violation of Human Rights

Corruption violates human rights in many ways. In the first place, 'human beings have a basic human right to live in a corruption-free society' (Rothstein and Varraich, 2017:61). Corruption is therefore a pervasion of the natural human order since it promotes many forms of discrimination. Indeed, by its nature, 'a corrupt act intrinsically caries a distinction, exclusion and/or preference - effectively resulting in discrimination of an

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4 Polycarp Ochillo is a Lecturer at the School of Journalism, University of Nairobi
individual...corruption is about different forms of discrimination, and human rights are about one's right to remain free of discrimination' (Rothstein and Varraich, 2017:68). For instance, corruption in the education system denies bright children from poor and vulnerable families the right to access quality education, just as the same vice in the health sector denies patients the right to good health. Yet the right to education and health are universally recognized human rights and are expressed in Article 43 of the constitution of Kenya (2010). Consequently, corruption promotes or creates environment favorable for the continuous violation of human rights (Viswanathan, 2012). More specifically, corruption creates a scenario in which 'citizens are subjected to paying bribes or to being part of other types of corrupt acts in order to access what is lawfully their right' (Rothstein and Varraich, 2017:61).

Corruption also undermines public confidence in the state and public institutions. Properly functioning state agencies and public institutions tend to seal most of the paths to illegal rents and potentially big money, thereby limiting corruption. Obviously, those who expect to reap big from institutional malaise and the resultant disorder feel threatened and shudder at the prospects of institutional efficiency. That is why, 'those who stand to gain from illegal arrangements have strong incentives to weaken, if not dissipate, the institution' (Campos and Bhargava, 2007:14). This explains why there have been attempts at state capture of key accountability institutions in Kenya such as the judiciary, the anti-corruption agency and the office of the Auditor-General.

Captured institutions serve the selfish interest of the corruption cartels rather than public interest. One logical consequence of weakening the judiciary for instance, is the emergence of systemic judicial corruption defined as 'acts or omissions that constitute the use of public authority for the private benefit of court personnel, and result in the improper and unfair delivery of judicial decisions' (Ajay, 2012:38). For instance, there were claims of some behind-the-scene maneuvers to influence Supreme Court judges in the presidential election petition filed after August 2017 elections. Intelligence reports indicated that Chief Justice David Maraga, his Deputy Philomena Mwilu and Justice Smokin Wanjala seemed resolutely convinced to nullify the election results, while Justices Jackstone Ojwang and Njoki Ndungu wanted to dismiss the case. Justice Ibrahim Mohammed was indisposed, while Justice Isaac Lenaola's verdict was either unclear yet or his nullification verdict was already known, but he was perceived to be
easier to sway. Emissaries were then sent to persuade Lenaola to join the Ojwang-Ndungu axis, force a tie, and technically knock out the petition. Lenaola rejected the overture, remained faithful to the law and the facts, and voted in favor of the petition, leading to the first ever nullification of a presidential election in Africa (Daily Nation Digital, 2017, September 9). Had these intrigues led to the dismissal of the petition, the right of Kenyans to elect leaders freely and fairly would have been violated.

3.4 Motivations for Mega-Corruption
Although there are copious reasons why people engage in corruption, they can be reduced into roughly three broad theoretical strands - behavioral, institutional and socio-cultural motivations.

3.4.1 Behavioral Motivations for Corruption
The behavioral approach places the causes of corruption at the doorstep of individual behavior. Its underlying assumption is that 'corruption is ultimately the direct result of decisions, choices and behavior at the level of the individual…one can restructure institutions or political systems, but if individual-level motivations for corrupt behavior are not understood [and addressed], the restructuring may not be effective' (Tavits, 2010:1257). In essence, 'political institutions only prevent corruption when everyone follows the rules – which is precisely what is absent where corruption flourishes' (Fisman and Golden. 2017:20). Thus, behavior overrides institutions. In fact, institutions cannot be corrupt; it is individuals within institutions who peddle corruption.

The key behavioral predispositions that tend to trigger corruption include greed or the quest for personal gain at the expense of public good, and the penchant for shortcuts in the pursuit of personal progress and happiness (Hatchand, 2014). According to Kafaji (2014: Unpaged):

The concept of greed has several qualities: miserliness, envy, covetousness, and avarice are all the mother and matrix of greed. It is the root and consort of all other sins. Greed motivates theft, and theft is the common thread in all the trouble people face, with most of the politicians around the world. Greed is the negative articulation of natural human motivation; it is the human conundrum of our existence. Greed is our inner companion, hoarding more than one can ever use in his life time. Greed is the tendency towards selfish craving, grasping and hoarding. It is excessive desire for more than is needed or deserved, especially money, wealth, food or possessions
It is also notable that the 'high-level corruption in Africa has been driven by many factors but the two salient ones are the acquisition of personal wealth and preserving a government in power' (Tagit and Mwenda, 2013:14). There are cases when 'corruption is caused by scarcity. When things are short in supply, people in power demand consideration to ensure their regular supply or increase their costs' (Benjamin, 2012:25). In this regard, 'corruption is an abuse of power. It distorts the power relationship between people, particularly against the interests of the weaker sections of the society' (Viswanathan, 2012:3). Consequently, 'eradication of corruption requires more than passing laws that declare the activity illegal' (Jain, 1998:7). Anti-corruption reforms must seriously focus on the infusion of attitudinal changes towards anti-corruption mindsets.

### 3.4.2 Institutional Motivations for Corruption

From an institutional perspective, 'corruption is a result of more than just individual decisions. Societal institutions affect opportunities that each individual has for corruption' (Fisman and Golden. 2017:20). Hence, corruption is principally a product of institutional malfunction. For example, 'a poorly functioning legal and judicial system creates opportunities for challenging and reversing administrative process reforms' (Campos and Bhargava, 2007: 9). The incessant institutional failures in the anti-graft wars in Kenya shows that the vice is systemic, transcending the individual to the national institutional and structural edifice (Hope, 2014). There is no other label for a system where the head of anti-corruption agency, expected to lead the anti-corruption war, turns out to be the owner of a firm that engages in corrupt business with the corruption cartels in other government institutions (Daily Nation, 2016, August 29). Thus, Dr. Solomon Owuoche\(^5\) notes, 'those entrusted to fight corruption are just as corrupt as everyone else'.

In this context, 'systemic corruption means that members of the ruling elite (politicians and bureaucrats) use their authority to sustain their status and wealth by demanding for/collecting bribes systematically. As a consequence, corruption is an integral part of the public system and therefore systemic' (Meissner, 2017: 21). Evidence shows that 'corruption in Kenya has become part and parcel of the government bureaucracy, with revenue under collection, bills left pending, wasted funds, irregular payments and payments for undelivered goods and services' (IDEA, 2002:47). Citing John Githongo's\(^6\) recent comments on corruption, Gladwell Otieno notes that:

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\(^5\) Dr. Solomon Owuoche teaches Political Science at the University of Nairobi

\(^6\) John Githongo is a former Ethics and Governance Permanent Secretary in the Government of President Mwai Kibaki and a seasoned anti-corruption crusader in Kenya.
The only business that Kenya government engages in with focus, seriousness and determination is corruption. Even fighting corruption in Kenya is itself a corrupt exercise...the institutions which are supposed to fight corruption like EACC are captured by corruption networks...Corruption is integral to the functioning of the state – it is the lifeblood of the way the government functions.

With regards to the electoral institutions, it is notable noted that 'poor electoral laws (or weak enforcement of good laws) can make elections very expensive, inducing politicians to look for lucrative sources of campaign finance' (Campos and Bhargava, 2007:9). According to Gladwell Otieno, “There is so much corruption in the electoral process. Campaigns are becoming sophisticated and expensive...To get votes you have to bribe. Everybody involved in elections including politicians, IEBC officials and journalists variously engages in corruption”.

At the core of the systemic institutional malfunction is the failure to successfully prosecute the corrupt which entrenches the culture of impunity in the society. The failure to prosecute those who are corrupt is often blamed on bureaucratic redtops, institutional melancholy and lack of political good will. Indeed, 'the most important reason therefore why corruption has thrived in Africa and Kenya in particular is lack of effective legal apparatus to fight the scourge and the good will from the government elite to eradicate the menace' (Anassi, 2004:111). Moreover, the opportunity for, and benefits of corruption appear to be huge, while its cost is very low. As the Deputy Auditor-General, Mr. Gichana, observes, 'We have not made corruption to be painful'.

Yet, as Kimemia (2014:163) aptly points out:

According to rational choice theory, an employee will try to maximize his or her gain by engaging in corrupt practices if the benefits outweigh the costs, which can be a combination of being caught and losing his or her job. Rational and conscious employees engage in corrupt practices such as fraud and bribery after deliberate calculations of the cost and benefits of their actions.

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7 Mr. Gichana is Kenya’s Deputy Auditor-General. The interview with Mr. Gichana was conducted on 15th March 2018 at the Auditor-General’s Offices in Nairobi.
Against this background therefore, 'the objective of any anti-corruption strategy is to reduce opportunities for and increase the risk of involvement in corrupt behavior' (Hatchand, 2014:18). This is more so because, as Hope (2014: 494) observes for instance, the primary cause of corruption in Kenya, is therefore related to a societal state of being whereby the basic institutions that underpin and support the rule of law and good governance have been deliberately undermined or neglected to the point where they can no longer uphold the rule of law or act in the best interest of the nation.

From another institutional perspective, 'corruption is viewed as the logical outcome of the kind of politics practiced in Africa in the post-colonial period: politics of patronage; politics of extraction; politics of rent-seeking and personality rule, born of the absence of participatory governance' (Kivuva, 2013:26). In fact, Omtata notes that the root of corruption is traceable to the opaque colonial state which was designed to exploit the masses and was not accountable to “the people”. The notion of 'the people' is a later invention that has never been fully embraced by the Kenyan elite. Those who are in position to expend public resources seek to do so without transparency or accountability. He cites the Supreme Court building which he claims had some very excellent masterpiece architecture but this was messed up with under Chief Justice Evans Gicheru to have it painted so that some kickbacks could possibly be squeezed out of it.

Like Omtata, Gladwell Otieno traces the origins of corruption in Kenya to the colonial state which according to her was essentially corrupt. At independence, the new crop of African leaders wanted to be like the departing whites. Under Jomo Kenyatta, there was some modicum of restraints on corruption. Under the Moi regime, all pretenses about integrity was shed off and the scope for corruption widened. She concludes that “corruption has a long history in Kenya and has over the years become entrenched... We were corrupted by the colonial model of what it is to be successful. Successful people then owned large tracts of land and generally lived in luxury”.
3.4.3 Socio-Cultural Motivations for Corruption

From a socio-cultural standpoint, corruption is a manifestation of socially acquired mannerisms. It is largely a product of socialization and upbringing, reflecting the level of social decadence in the society. According to Mr. Gichana “corruption is a cumulative result of our past behavior which we acquire through socialization”. Similarly, Mr. Samuel Kimeu\(^8\) notes that corruption is a product of breakdown in societal value systems. It is so deeply engrained in the Kenyan society that it can be viewed as part of Kenyan culture. This is because 'corruption in Kenya permeates the entire socio-economic and political fabric of the nation. Indeed, the entire Kenyan public is encapsulated in corruption. Corruption is part of everyday life' (Kivuva, 2013: 25). Likewise, Gladwell notes that, “corruption is so deeply embedded in Kenya that it has become a culture, system, and shortcut to riches. It has the capacity to reproduce itself but the certainty of being punished for engaging in it is not very high...Kenyans value people who make quick wealth”.

The sad reality is that 'in Kenya, it is common to be asked for a bribe openly by a public official if you want to receive services in government offices or from the slow wheels of justice' (Kimemia, 2014: 162). Indeed, 'from interference with the judiciary, to bribing MPs to enact laws to defeat legislation, grand corruption has become part of business in Kenya' (Daily Nation 2017, February 7). In the circumstances, 'hard work does not seem to return its highly advertised rewards. Honesty turns out to be a vice that keeps one in the pauper ranks and if you have never bribed before, it is because you probably could not afford the price of convenience' (Standard Digital 2016, August 29). As Gichana summarizes it, “integrity is no longer a virtue in Kenya... The legal mechanism for enforcing integrity in the political class is vetting, but it is so weak”.

In support of the foregoing discussion, Solomon Owuoche observes that:

Kenyans are irredeemably corrupt to the extent that they glorify the vice. Not only do they elect corrupt leaders, but they once named a currency after the chairman of 'YK-92'- a political outfit which was an epitome of corruption in the 1992 elections. People who have never been involved in corruption or who have never had corruption-related cases are basically those who have not had the opportunity to engage in corruption, or those who have been lucky not to have been caught.

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\(^8\) Mr. Samuel Kimeu is the Executive Director of the Transparency International Kenya
Pursuing this argument further, several key informants concluded that corruption is increasingly being part of Kenya's political culture. Citing a recent EACC study, Mr. Vincent Okong'o, notes that the level of Corruption in Kenya as perceived by citizens is very high, with over 80% of the respondents stating so. This he notes has been the trend for a long time with the annual corruption perception levels oscillating around 70%. Most respondents reportedly noted that “corruption is highly entrenched culture in the society and is readily accepted by Kenyans. Many Kenyans are willing to engage in corruption if the opportunity presents itself”. In fact, in the same study, 'over 87 percent of the respondents indicated that corruption permeates all sectors of the Kenyan economy and that it is completely widespread today' (EACC, 2007b: 8).

In terms of the underlying causes of corruption, most of the key informants interviewed attribute it to greed. For instance, Okong'o notes that “corruption results from greed and pressures from the society... people are not contented with what they have...we live in society where everybody thinks they deserve to be rich regardless of how they do it”. This mentality stem from the way Kenyans are socialized, whereby success is measured in terms of the money and wealth that one has accumulated regardless of how it is acquired. People leave the private sector for public sector employment despite lower public sector wages since they expect quick gains through corruption.

According to Njoya, 'government jobs are not well paying and hence corruption is the reward system that goes with those offices'. In a sense, proceeds from corruption supplement low public sector wages. To illustrate this point, he notes that 'a Chief's salary may be lower than that of a teacher but since his position entails greater power, influence and authority [and hence exposed to more corruption venues], he is expected to be doing better in life'. Hence, public servants are expected to be well-off and to dole out corruption loot to their people. The society thus despises people with strong moral vertebrae who leave public service poor for refusing or failing to loot.

Consistent with the study's conceptual framework, Mr. Samuel Kimeu notes that even people who run for public office do so principally to maximize access and opportunity to plunder public

* Mr. Vincent Okong'o is the Director of Preventive Services at the EACC. The interview with Mr. Okong'o was done on the 9th April 2018 at the EACC offices in Nairobi.
resources. Moreover, pre-election political coalitions formed in Kenya over the years are largely built around sharing government positions among political elites. The larger the budget attached to a government office, the more attractive it is as a bargaining contrivance since it promises the prospective occupant greater opportunities for looting. Accordingly, the emerging trend is one in which people only condemn corruption when it does not touch them and condone it otherwise.

This tragedy is further exacerbated by the fact that most people sign in to corruption quite early in life at a very tender age. Accordingly, by the time the society wakes up to subject them to anti-corruption controls, they have already internalized corruption culture. From primary school, a child already knows that through corruption he can escape punishment for his/her infractions by offering inducements to school prefects in the form of small-time goodies. After school, the child notices parents bribing teachers to secure him a place in high school, which he probably does not deserve. In this case, 'the 2009 Transparency International Kenya analysis of corruption in the public sector revealed cases of parents paying bribes to ensure enrolment or good grades' (Kimeu, 2013:45). When the child graduates from high school, his parents bribe someone to get him/her a job. In between, he sees everyone around him engaging in all sorts of corruption!

In other words, 'everywhere you look - right, left, sideways, behind, and in front – an official has their hands in the public till. That is why they do not catch – and punish – each other because they are in it together' (Mutua, 2014: 15). Consequently, '[the] government cannot prosecute corrupt conduct because it too is corrupt…the Kenyan government governed heavily on marginal mis-screams like junior police officers…while, top government officials continued to embezzle funds through commissions and infamous scandals' (Wachira and Arlikarti, 2010: 263).

Taken together, the foregoing discussion provides a foundation on the basis of which I can now build a generalized theory of corruption derived from the rational choice theory. According to this theory, corruption is a function of *Greed, Pressure and Opportunity* as shown in Figure 6.
One of the fundamental premises of the rational choice theory, on which this study is based, is that human beings by nature are self-interest driven. When self-interest is stretched beyond its elastic limits, the result is an extreme version of self-interest called greed. In this regard, 'greed is the immoral insatiable lust for self-enrichment, and the sacrifice of anything and everyone in order to feed such desire. It is one of the most extreme motivators for self-interest' (Malan and Smit, 2001: 33). In fact, it has been noted that 'human greed can be attributed to defective human character and an inclination towards criminal activity' (Kimemia, 2014: 163). Moreover, 'human greed, together with the lust for power, is probably the oldest and strongest force for decays and corruption that we know of' (Malan and Smit, 2001: 33). It is notable that those who engage in corruption do not do so necessarily because they do not have enough but due to greed. Greed therefore provides a strong foundational impetus for the development of individual's proclivity towards corruption. In the Kenyan context for instance, Mr. George Morara\textsuperscript{10} deplores greed noting that it affects the common people in very many ways by undermining service delivery.

\textsuperscript{10} Mr. George Morara is the Vice Chairperson of Kenya National Commission on Human Rights (KNCHR). He made the remarks during the stakeholder validation workshop on 24\textsuperscript{th} May 2018 at the Sarova Stanley Hotel.
Apart from personal greed, an individual also faces social pressures from the society which drive him towards engagement in corruption. This pressure emanates partly from the expectations of the society. For instance, whereas income is not necessarily a direct correlate of education, the society expects that those who are well educated should be doing much better in life. Yet, there are instances where the less educated with informal jobs may seem to be doing even much better in life. This may drive the elite to embark on unbridled pursuit of wealth in order to fit into the expectations of the society, thereby predisposing them to engage in corruption. A combination of greed and societal pressure leads one to develop *corruption hardware* which makes him highly vulnerable to corruption. In fact, armed with the *corruption hardware*, what one requires to engage in corruption is the *corruption software* or the opportunity to engage in corruption.

As Gladwell Otieno observes,

> Corruption follows opportunities. If you close one opportunity, the cartels turn to others... for instance, since the 2010 Constitution closed certain opportunities, corruption in government has shifted to other areas like security contracting. Moreover, the government is now pursuing debt contracting which opens new opportunities for corruption.

On the same vein, David Kangethe\(^\text{11}\) argues that the Integrated Financial Management Information System (IFMIS) was introduced to reduce corruption opportunities arising from human behavior and premeditated errors. Sadly, corruption still persist because IFMIS has inbuilt loopholes which the corruption cartels continue to exploit. Indeed, the Auditor-General revealed in January 2017 that the Integrated Financial Information System (IFMIS) had flaws which predispose it to the risk of fraud and abuse. Kangethe adds that the fight against corruption should be holistic, targeting human greed too. He admits that human beings are greedy, but note that God equipped mankind with necessary mechanisms to regulate selfish desires and greed.

\(^{11}\) Mr. Kangethe is from the Ethics and Anti-Corruption Commission (EACC). He expressed his views during the stakeholder validation workshop on 24\(^{th}\) May 2018 at the Sarova Stanley Hotel, Nairobi.
CHAPTER FOUR  
A CRITICAL REVIEW OF ANTI-CORRUPTION AGENCIES IN KENYA

4.1 The Moi Era

Until 1997, corruption was dealt with under the Prevention of Corruption Act (Cap 65 of the Laws of Kenya which was enacted in 1965. In between, the government created anti-corruption police unit within the Criminal Investigation Department (CID) in 1993, but it was disbanded in 1995. In 1997, the Kenya Anti-Corruption Authority (KACA) was created largely in response to local and international pressure for the government to engage the right gear in the anti-corruption war, especially due to Anglo-Leasing scandal. It was the first anti-corruption agency in Kenya to be anchored in law. One of the challenges that KACA faced from inception is the perception that it had been created for wrong reasons – to placate the nervous international donors rather than to genuinely combat corruption. There is no doubt that 'KACA was created to appease the donors, who at the time had suspended the issuing of funds to the country' (Odhiambo, 2016: 15).

The first director of KACA was the former police marksman and politician, John Haron Mwau, whose stint at the helm of KACA was short and dramatic. Indubitably, 'his appointment did not inspire public confidence since it came after he had just withdrawn from the 1997 presidential race and thrown in his lot with the president' (Kibwana et al., 2001:33). His tribulations began in 1998, when he attempted to prosecute senior officials of the Kenya revenue authority including the Commissioner-General, for fraudulently failing to collect tax amounting to 230 million Kenya shillings from the wheat and sugar importers. This instantaneously put him on a collision path with the Finance Minister who defended the accused and instead questioned Mwau's ability and credibility to head KACA. The Attorney General then swiftly intervened in the altercations, took over the case, and predictably played his 'usual role' of terminating corruption-related cases. Next, the president formed a tribunal to investigate Mwau, who then opted to resign as the head of KACA in November 1998 (Anassi, 2004; OSF, 2015; Kibwana et al, 2001).

On 25th March 1999, the Solicitor-General, Justice Aaron Ringera, took over as KACA director (Anassi, 2004; OSF, 2015). Ringera's appointment faced bountiful legal challenges. The First legal challenge was mounted by his predecessor, Mwau, who argued that Ringera was a judge of the High Court, and thus his appointment violated the doctrine of separation of powers. The case was dismissed by the Court.
Secondly, the Law Society of Kenya sought to block Ringera from ascending to the helm of KACA on technicalities, by arguing that the panel which selected him was not procedurally and legally constituted. Thus, on 22nd December 2000, the Court found that KACA as constituted was unconstitutional and disbanded it (Anassi, 2004). Specifically, the High Court ruled that 'KACA undermined the powers conferred on both the Attorney General and the Commissioner of Police by the Constitution of the Republic of Kenya' (OSF, 2015:23). Due to the twists and turns, 'legal experts have argued that the root cause of KACA's ultimate demise was the appointment of Justice Ringera to its helm' (Anassi, 2004:114).

The unconstitutionality of KACA and the appointment of Ringera as its director may have been premeditated. The decision to assign KACA unconstitutional powers may have been a ploy to make it easier to disband if it ever unearthed any corruption involving state actors. The same can be said of the appointment of Ringera, who was too close to the system to effectively fight mega corruption involving the high and mighty. In any case, Tagit and Mwenda (2013: 18) note that:

Because elite corruption is an important means of consolidating the government in power, top political leaders have influenced and controlled anti-corruption bodies to prevent them exposing the corrupt ways of state elites. African political leaders have handpicked members of the anti-corruption institutions, and through corruption and manipulation, sought to ensure that they do not confront the powerful and politically connected.

On 15th August 2001, the Anti-Corruption Police Unit (ACPU) was created through an Executive Order. The immediate former deputy director of KACA, Swaleh Slim, was appointed to head it.

4.2 The Kibaki Era

Another milestone in the anti-corruption campaign came on 2nd May 2003, when Kenya Anti-Corruption Commission (KACC) was created. However, in July 2009, all KACC commissioners were forced to resign, paving way for the appointment of Dr. PLO Lumumba as the director in September 2010. Lumumba too did not stay long at the helm of the anti-corruption agency. His main undoing was the failure to incorporate the prevailing political matrix into his fight against corruption. When he took office, Kenya was under a coalition government between the Orange Democratic Movement (ODM)
and Party of National Unity (PNU). Each side sought to depict the other as more corrupt. Lumumba consciously or otherwise, entangled himself in this contest.

His decision to track corruption claims against ODM's Henry Kosgey, Charity Ngilu and James Orengo, while glossing over well-known corruption allegations against PNU's Kiraitu Murungi and Amos Kimunya created an impression that he was being used by PNU to fight ODM, thus loosing political good will from ODM. His fall became imminent when he accused a key PNU legislator, Cecile Mbarire, of attempting to bribe him with 100,000 Kenya shillings to stop corruption investigations against Broad Visions Utilities, owned by her husband, Dennis Appah. The firm was accused of receiving irregular tenders from the Ministry of Water headed by Ngilu, who has been Mbarire's close confidant despite supporting different political formations. The National Assembly unanimously voted on August 24th 2011 to disband KACC and send home its directors including Lumumba (Anassi, 2004; OSF, 2015; Standard Digital 2011 August 8).

On 29th August 2011, KACC was replaced by Ethics and Anti-Corruption Commission (EACC), which became the first anti-corruption agency recognized by and anchored in the Constitution. It is anchored on article 79 of the constitution as well as the Anti-Corruption and Economic Crimes Act of 2003 (Odhiambo, 2016; Gathii, 2016). Like its predecessor, EACC did not take off on a rollercoaster as the choice of its first director witnessed its fair share of controversies. It was contentiously approved by the National Assembly and dragged through Courts. When the names of Mumo Matemu and two others were sent to the National Assembly for vetting, the Justice and Legal Affairs Committee (JLAC) recommended that the nominees be rejected as 'they lacked the passion, initiative and the drive to lead the fight against corruption' (Franceschi et al., 2017: 97). The National Assembly shot down JLAC recommendation by a slim margin of 50 to 49 votes. Matemu's name was then sent to the President for appointment. Consequently, 'the first director of EACC that parliament sent to the president for appointment had corruption allegations against him. Appointing a person tainted with such allegations set the EACC up to fail' (Gathii, 2016: 355). On 20th September, Matemu was appointment as EACC's first director.
However, more challenges followed EACC and its director (Gathii, 2016). The appointment of Matemu was successfully challenged in the High Court by the Trusted Society of Human Rights Alliance who questioned the constitutionality of Matemu's appointment (Gathii, 2016, OSF, 2015). It argued that 'Matemu's integrity was impugned by serious allegations of misconduct in his previous career positions with the Agricultural Finance Corporation (AFC) and the Kenya Revenue Authority (KRA)' (OSF, 2005: 24). It is alleged that Matemu fraudulently wrote-off loans for a Nairobi tycoon when working at the AFC. Nonetheless, Matemu's appointment was reinstated by the Court of Appeal (Gathii, 2016). From then, 'EACC has been hampered by its continued inability to prosecute and instead has had to depend on the Director of Public Prosecution (DPP) to prosecute suspects' (Gathii, 2016: 337-338).

4.3 The Uhuru Era
Matemu's tenure at the EACC came to an end as dramatically as it had begun. It started in early 2014, when a Nairobi lawyer, Geoffrey Oriaro petitioned the National Assembly to initiate the removal of Matemu and his team from office for incompetence and violation of the constitution. The petition was submitted to JLAC which recommended their removal. The National Assembly adopted JLAC report and the president formed a tribunal to investigate them. This led Matemu to resign on May 12, 2015. It is argued that Matemu's woes began when he touched live wires – the Anglo-Leasing scandal. Nonetheless, as Mutahi Ngunyi notes, 'the fight against corruption in the country is a systemic failure…Corruption groups are actually appointed to fry the small fish. But they go into office believing they can fry the big fish. The moment they then start frying the big fish, they become the target' (Standard Digital 2015 April 25). Besides, Mr. Kimeu, notes that 'the political elite never envisaged a strong anti-corruption agency and hence the greater the harm (real or potential) that anti-corruption agencies pose to the elite, the faster they destroy it'.

The game of appointing and removing EACC directors did not end with Matemu. His successor, Philip Kinisu underwent identical motions. On August 3 2016, another Nairobi lawyer, Albert Ondieki, petitioned the National Assembly for Kinisu's removal. He argued that Kinisu had links with, and is the majority shareholder in Esaki Limited, which was trapped in the National Youth Service (NYS) scandal. He argued that Esaki received a license from the Pest Control Products Board on March 23 2015, a day before
the Ministry of Health opened the tenders, and was paid 150 million Kenya shillings within seven days (see JLAC Report on Kinisu).

The petitioner argued that 'Mr. Philip Kinisu's expression of interest and ultimate application to be appointed as a commissioner and chairman of EACC was motivated by his greatest desire to connive to rob the public by influencing investigations and decisions at the EACC in favor of Esaki Company Limited and in favor of those responsible for the irregularities at the NYS…’ (Kenya National Assembly, 2016). The National Assembly adopted the JLAC recommendations for the removal of Kinisu, who then opted to resign on August 31 2016. He was replaced by the retired Anglican Church of Kenya Archbishop, Eliud Wabukala in January 2017.

As Obura (2015:245) succinctly summarizes it:

Since the first anti-corruption legislation (the Prevention of Corruption Act) was enacted in 1956, there have been no less than five anti-corruption agencies established to spearhead the fight against corruption in Kenya. The disbandment of successive anti-corruption agencies has mainly been occasioned by political machination, especially in instances where the holders of political power have felt threatened by the independence and effectiveness of the particular agency

4.4 Why Anti-Corruption Initiatives have been Unsuccessful

It is clear from the foregoing that until NARC wrestled power from KANU in the 2002 polls, 'all exercises in combating corruption seem to lack political will and seem to be intended to please donors. Those who have stood up against corruption have been sacked, dismissed, or shuttled to inconsequential positions, or even (as some suspect) killed' (International IDEA, 2002: 47). In the Moi era, 'those who should be spearheading the fight against corruption became “speed governors” checking people intent on fighting corruption…and joined the chorus calling for a go-slow in dealing with corruption cases and investigations' (Kivuva, 2013: 38).

Consequently, 'in all the years the anti-corruption war had been waged, not a single high profile corruption case had been fully prosecuted nor a conviction secured. Many of the cases that reached the court system were dismissed, delayed or withdrawn by the Attorney General' (Kivuva, 2013: 31). Whether the Attorney-General terminates or
withdraws corruption-related cases on his own motion, as gatekeeper for corruption cartels, or on orders from above is unclear. What is clear is that the 'Attorney-General is the repository of all radical prosecutorial powers. It behooves him to prosecute all corruption and economic crimes under ACECA' (Tuta, 2005:166).

Fortunately, as Emilly Kamau\textsuperscript{12} observes, 'Article 157 of the Constitution (2010) removed the \textit{nolle prosequi} powers'. In fact, section 8 provides that 'the Director of Public Prosecutions may not discontinue a prosecution without the permission of the Court'. Section 6(b) further provides that the DPP 'may take over and continue any criminal proceedings commenced in any court (other than court martial) that have been instituted or undertaken by another person or authority, [BUT] with the permission of the person or authority'. It is hoped that this reform will bring an end the arbitrary termination of court cases as had been in the past.

The question arising is why all these initiatives have not succeeded in fighting corruption. In the words of Rev. Dr. Timothy Njoya, 'there is no corruption in Kenya. What is called corruption is an institutionalized reward system. Separation of corruption from theft is part of a design to treat the corrupt differently from thieves yet they are essentially the same'. In defining corruption, Kenyan statutes only talk of violations of the law such as fraud and misappropriation but leave out theft. Yet the line between theft and corruption is too thin to draw. For instance, is it theft or corruption, if a Governor installs County government generator in his private premises? Should such an issue be handled by the police or EACC? In short, 'We should not sanitize or christen theft as corruption'. Instead, corruption must be called by its proper name which is theft.

Similar sentiments have also been expressed by Omtata who regards corruption as an artifact of the penchant to mischaracterize crimes. He argues that mischaracterization of a crime aids and abets the same crime. He cites the example of rampant stealing of livestock, which is essentially robbery with violence, but has been mischaracterized as cattle rustling which unfortunately, is not defined in the penal code, making it difficult to legally redress. Consequently, the isolation of certain illegal activities, classifying them as corruption, and creating feeble, inept and toothless institutions like EACC to address

\textsuperscript{12} Emilly Kamau is the head of Anti-Corruption Division in the Office of the Director of Public Prosecutions (DPP). She expressed her views during the stakeholder validation workshop on 24\textsuperscript{th} May 2018 at the Sarova Stanley Hotel.
them is a decoy by the corrupt political elites to postpone and eventually evade justice. He insists that corruption as a concept is an alien invention by corrupt political elites and has no equivalent in local Kenyan dialects. Whichever way you look at it, corruption is nothing but theft. He concludes that 'if the rule of law becomes supreme, corruption is characterized as theft, and the law applied uniformly, then corruption will disappear'.

For instance, EACC is created pursuant to Article 79 of the Constitution exclusively to enforce the provisions of Chapter Six of the Constitution on leadership and integrity and has no role in redressing theft. Yet for Omtata, corruption is basically the theft of public resources, which the police are constitutionally empowered to deal with under Article 244, which also obliges them to prevent corruption. He attributes the persistence of corruption to the fact that the people in power who should fight it are deeply engrossed in it and are merely engaged in ping pong games to hoodwink the public that something is being done. He has petitioned the Court to clarify the role of EACC. Njoya and Omtata converge on the conclusion that EACC should be disbanded so that the police are sufficiently empowered to deal with corruption as they deal with other crimes.

However, Mr. Vincent Okong'o offers an equally compelling counter argument, noting that:

There is a strong justification for having a dedicated agency dealing with corruption in Kenya. It is a universal phenomenon and globally accepted model for dealing with corruption. Even the United Nation Convention against Corruption, which Kenya became the first country to ratify and domesticate, was put in place against the context of gloomy global experiences with police involvement in corruption. The challenge is not whether the agency is needed but how to tame massive interference with the commission. The focus should be on how to make EACC stronger and more independent to address corruption-related challenges...Irrelevant parameters that have nothing to do with the mandate of EACC are often used to propagate the narrative that EACC is not doing enough. EACC should be judged on the basis of how many of the cases it has investigated have been approved for prosecution by the Director of Public Prosecution (DPP). Fortunately, the DPP approves nearly 99% of such cases.

According to Mr. Okong'o, the persistence of corruption in Kenya should be blamed on factors such as the adoption of multi-agency as opposed to single agency model of fighting corruption. Under a single agency model, one institution is responsible for all-
corruption-related issues from investigations to conviction. However, under the Kenyan multi-agency model, the various tasks involved in the fight against corruption are shared by many agencies. In this case, he notes that:

*There is lack of will by various government agencies to fight corruption. Most of them have not done enough to fight corruption even within their institutions. [For instance], the legislature has not crafted good anti-corruption laws. The laws relating to leadership and integrity are hollow...The judiciary is also accused of poor interpretation of corruption laws. They are not sending strong signals. Even where sentencing has been done, it has been very lenient to offenders. The court has also stopped EACC from doing its work like investigating some cases.*

Justice Hedwig Ong'udi\(^\text{13}\) defended the judiciary against accusations of poorly interpreting anti-corruption laws and being lenient to corruption suspects. She argues that those blaming the judiciary for corruption prosecution debacles are missing the point since 'Courts do not conduct investigations but instead are limited by the quality of evidence placed before it. Even though some of the sentences for corruption suspects may seem lenient, they are still within the law. Under Section 48 of ACECA [the Anti-Corruption and Economic Crimes Act], the sentences are prescribed but without fixing a minimum sentence which is then left to the discretion of the court'.

Both Ongudi and Okong'o are partially right. The former is right in the sense that the judiciary cannot give sentences that exceed the maximum penalty prescribed by the law, while the latter is also right in the sense that the judiciary rarely stretches the penalties to the maximum allowed by law when sentencing corruption convicts. The bottom-line is that 'the penalties prescribed for breach of the provisions of ACECA are too weak and lenient to deter engagement in corruption' (Tuta. 2005:186). For instance, all the offences listed in section V of ACECA attract a maximum penalty of one million or ten years in jail. Yet, as Oketch Kendo points out, 'what, for example, can stop a public officer accused of stealing 20 million Kenya Shillings from paying a 1 million Kenya Shillings fine? He stole 20 million Kenya Shillings, risked 1 million Kenya Shillings fine, and made a profit of 19 million Kenya Shillings. If this is the case, there would be no business as profitable as corruption. Forget about image in a world where *pesa* [money] is king' (Oketch Kendo 2003, cited in Tuta, 2005:187).

\(^{13}\) Justice Hedwig Ong'udi is the Presiding Judge of the Anti-Corruption & Economic Crimes Division of the High Court of Kenya. She made her remarks during the validation workshop on 24\(^{\text{th}}\) May 2018 at Sarova Stanley Hotel, Nairobi.
There are practical examples of what Kendo is hypothesizing. For instance, in the Court File number ACC 3/2015, John Maina Mwangi and others were accused of willful failure to comply with the procurement laws, procedures and guidelines, leading to the loss of nearly 18.0 billion Kenya Shillings of public funds. Yet, upon conviction, the Court fined him 7.8 billion Kenya Shillings. In another case in ACC 1/2016, Albert Ochengo was convicted of corruptly soliciting and receiving a benefit of 60,000 Kenya Shillings contrary to section 39(3)(a) as read with section 48(1) of ACECA, but the court fined him 30,000 Kenya Shillings (EACC, 2017a). It sounds ironical though, that a Machakos-based Matatu driver who offered 2,000 Kenya Shillings bribe to a police officer attached to the National Transport and Safety Authority (NTSA) on 29th March 2018, was fined 70,000 Kenya Shillings by the Machakos Anti-Corruption Court. The Mwangi and Ochengo cases depict judicial leniency, while the driver's case was truly punitive.

On his part, Polycarp Ochillo notes that corruption persists, at least in part, because:

*The cartels involved in corruption are ahead of the pack; they act smarter, plan their schemes well and execute them with precision. Mega-corruption has incorporated professionals, innovators and even computer hackers. They have also infiltrated key and strategic areas for their operations and ensured they are manned by supportive staff. In a nutshell, corruption has become a professionalized enterprise and it is now done in a way that mere naked eyes cannot detect.*

Okiya Omtata concurs, noting that:

*The deep state is a product of the failure of professionals and is due to lack of professional ethics. Professionals like lawyers and accountants facilitate the theft. Indeed, mega-corruption does not involve breaking into public coffers. Instead, money is safely removed from the public coffers in broad day light without anybody noticing.*

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Similarly, Mr. Gichana notes that government is about the delivery of services and along the service delivery chain there is an array of professionals. For instance, from the design of a road to its completion and inception, the entire road construction chain is under professionals. Some of the problems that the office of the Auditor-General has noted in the course of its audits include serious cases of professional negligence and ignorance; involvement of professionals in unethical practices that aid corruption; invoice inflation; poor design and implementation of projects; and unsupported payment of public funds. Hence, if all professionals remained true to the dictates of professional ethics, it would be hard to execute mega-corruption.

Successful fight against corruption requires the co-operation of citizens, which in turn requires a well-informed citizenry. Citizens need to know for instance what constitutes corruption, where to report corruption, and even how to secure witness protection. Yet, According to Mr. Gichana, “people have not been empowered with information on key issues. The issues are put to the public in a way that they cannot comprehend and thus cannot take proper stands on them”. This, at least in part, explains why ordinary Kenyans often support rather than condemn the corrupt”. There is need to generate and disseminate citizen-friendly versions of Auditor-General reports. Gichana notes that such efforts have been frustrated in the past by those who allocate resources to the Auditor-General’s office because it is their corrupt deals that the reports often uncover and yet they do not want to be exposed”. In terms of witness protection, Gichana points out that “witness protection only comes in after one has been formally accepted as a witness but before then the witness is on his/her own”. This explains why the EACC survey found that only 21.9% of Kenyans are willing to report corruption to relevant government agencies (EACC, 2017b).
CHAPTER FIVE
THE CASES AND INTRIGUES OF MEGA CORRUPTION IN KENYA

5.1 The Goldenberg Corruption Scandal

It is important to note from the onset that the Goldenberg scandal is considered as a classic case of government sponsored looting of public resources in Kenya. In fact, it has been noted that 'the Goldenberg scandal is perhaps the largest case of official corruption in Sub-Saharan Africa; it was a fraudulent export compensation scheme put in place by the government, ostensibly to help earn Kenya foreign exchange through the export of gold and diamond. It turned out to be a government sanctioned scheme to siphon funds from the Central Bank of Kenya [CBK]' (Matiangi, 2006:73). Thus, scholars have pointed out that 'writing a book on corruption in Kenya without giving Goldenberg saga a special page could be a job not well done…some have called it the scum of the twenty first century [or the] grand corruption of all times' (Anassi, 2004: 202).

The scheme which lasted nearly three years from 1990 to 1993 led to the loss of between US $ 600 Million to US $ 1 billion. Indications are that 'Goldenberg was a high level conspiracy by senior officials of the Moi administration, together with local and international wheeler-dealers who ostensibly capitalized on the government's desperation for foreign exchange and the greed of Moi's cronies' (Warutere, 2005:1). The scandal began on 11th July 1990, when Goldenberg International Limited was registered as a company with Kamlesh Pattni and James Kanyottu as the proprietors. There were several curious things from the beginning. In the first instance, Kanyottu concealed his true identity as the head of the national security intelligence and merely identified himself as a farmer in the company's registration documents. Secondly, Kanyottu was also a director in both the First American Bank Limited and the Firestone East Africa (1969) Limited. These two companies were part of the business empire of Naushad Merali, who was believed to be a business proxy and associate of president Moi (Warutere, 2005).

Thirdly, barely two months after the company's registration on 8th October 1990, Pattni applied to be granted exclusive rights to export gold and diamond jewelry for an initial period of five years. In his application, Pattni argued that although Kenya has huge potentials for gold and diamond exports, the trade was controlled by smugglers. He undertook to remit at least US $50 million to CBK Kenya annually, if his company was
granted the monopoly status and assured of 35% export compensation. This is despite the fact that Kenya is not known to have diamond deposits and no due diligence was done to re-check this fact (Warutere, 2005). In reality, '[since] Kenya is not a large exporter of gold or diamonds, Pattni exported fictitious commodities to fictitious companies then paid for them in fictitious foreign exchange, after which he presented fictitious compensation claims for payment to the Central Bank of Kenya which were honored and paid' (Okoth, 2016:6). In other words, 'it is now known that no foreign currency was received arising from the scheme because there were neither Gold nor diamond exports. There were only fake companies processing fake receipts' (Kamau, October 7, 2013).

Fourth, the Ministry of Finance approved both requests with unprecedented lightning speed, just few days after application, and ahead of similar requests made earlier. An example is the Aurum Limited whose request had been pending since January 24, 1987. Finally, some of the terms of the approved contract were gross violations of the existing legal regime especially the Export Compensation Act and the Monopolies and Price Control Act. For instance, the company was granted 35% compensation, yet the maximum compensation under the Export Compensation Act was pegged at 20% (Africog, 2011; Warutere, 2005). It has since merged that 'the additional 15% was not even factored in the annual budget for export compensation but was disguised in the Ministry of Finance's budget as customs refunds' (Warutere, 2005: 4).

As Hornsby (2013:559) observes:

In return for monopoly access and preferential compensation, Goldenberg and its backers had smuggled in gold, exported phantom products, bribed officials, extracted billions for themselves and funded [Kenya African National Union] KANU's reelection campaign. Between 1991 and May 1993, it seems that Pattni effectively run the CBK.

When the fraud was uncovered through a Daily Nation Newspaper article in April 1993, the government initially refuted it through the Ministry of Finance and the Commissioner of Mines and Geology (Warutere, 2005). The whistle was actually blown by David Munyakei, a CBK clerk. Munyakei leaked the information to opposition legislators, Anyang' Nyong'o and Paul Muite, who then tabled papers in the National Assembly indicating that nearly 24 billion Kenya Shillings had been moved from the
CBK to Kamlesh Pattni's Exchange Bank (Matiangi, 2006). This is what informed the *Daily Nation* story. Of course due to poor witness protection system, Munyakei was sacked by the CBK on 29th September and has since died (GOK, 2005).

Attempts by the Law Society of Kenya to mount private prosecution against the masterminds of the Goldenberg scandal in 1994 failed. The Attorney General who was enjoined in the case as *amicus curiae* vehemently opposed the case and his line of argument was adopted and used by the presiding judge, Unitta Pamela Kidulla, to dismiss the case (Africog, 2011). The following year, an opposition legislator, Raila Odinga initiated another private prosecution of the suspects of the Goldenberg scandal. However, it was also swiftly taken over and dutifully terminated by the Attorney General (GOK, 2005). Curiously, perhaps in appreciation of 'work well done', Mrs. Kidulla was promoted on 13th September 1999, to the position of Director of Public Prosecutions (DPP) to replace Bernard Chunga, who was elevated to the position of the Chief Justice after prosecuting the Goldenberg case (Africog, 2011; GOK, 2005). This is not surprising given that 'for decades, after independence, Kenyan Courts did the bidding of the government of the day… the Courts overwhelmingly used their authority to defend and protect conservative political and economic interests, rather than to defend individual rights from state abuse' (Gathii, 2016: 342).

Evidence suggests that 'the express aim [of Goldenberg] was to finance KANU in the multiparty general elections in 1992, something confirmed by Kamlesh Pattni, one of the directors of Goldenberg international and a key operative of the scheme' (Burbidge, 2015). Pattni publicly confessed his closeness to KANU and president Moi to a Commission of inquiry, and admitted that he contributed 4 billion Kenya Shillings to KANU's campaign kitty in the 1992 elections (Africog, 2011). The Commission of inquiry into the scam concluded that 'the events subsequent to the approval of Goldenberg's application clearly showed that there was a superior force behind the application by Pattni' (GOK, 2005: 42). In a nutshell, 'the powerful connections with the state elite were the single largest factor that facilitated the transactions associated with Goldenberg' (Warutere, 2005:3). Thus, 'many observers believe that there is credible evidence that president Moi and his senior aides were involved in the Goldenberg affair and received a share of the compensation that was paid to Pattni' (Okoth, 2016:6).
The fact that Pattni had strong political connections is reflected in an incident which is alleged to have happened on the night of 22nd October 1991. On that night, Pattni arrived at the Wilson Airport at around 8.00 pm aboard a plane from Bunia in the Democratic Republic of Congo. He refused to open his suitcase for routine security checks and did not disclose the content of his suitcase. He was then shoved aside for scrutiny, and disclosed that he was carrying 2.5 kilograms of gold. Even then, he had no import documents. A search on his suitcase revealed that he was carrying 31 kilograms of gold dust. His connections were betrayed by the caliber of people he called and who reportedly came to his rescue. Those who intervened for Pattni's release include James Kanyottu (Director of Intelligence) and Noah Arap Too (head of Criminal Investigations). It will be recalled that Kanyottu 'the farmer' was Pattni's co-director in Goldenberg International Limited. Thus, in a matter of minutes, 'with phone calls and the right connections, Pattni walked out with his gold to continue with his fiddle' (Kamau, *Daily Nation* October 7, 2013).

After the elections, Pattni became irrelevant in KANU's new scheme of things. President Moi is said to have ordered the Permanent Secretary in the ministry of Finance, Dr. Wilfred Koinange, to repay Pattni’s “loans” to KANU. It is estimated that another 5.8 billion Kenya shillings of the export compensation were transferred from the consolidated fund to Goldenberg accounts. The transactions were secretly done in three tranches between April and July (Hornsby, 2013). It is apparent that 'Moi and the Kenya African National Union (KANU) party, was not only reluctant to have the scum investigated but it also interfered with the machinery of justice to shield the perpetrators of the economic crime from being prosecuted and convicted' (Warutere, 2005:1)

Soon after assuming office in 2003, President Kibaki contracted the British Kroll Associates to identify and recover stolen state resources hidden in different parts of the world. The Kroll report implicated, among others, former President Moi and his family in the Goldenberg scam. It also located various assets abroad worth about US $ 2 billion, which had fraudulently benefited from taxpayers money. A week before the report was released, Moi endorsed Kibaki for reelection, and predictably, Kibaki instantly lost interest in pursuing the report further (Mehler *et al.*, 2008).
5.2 The Anglo-Leasing Corruption Scandal

Anglo-Leasing scandal was conceived in the Ministry of Finance in 2004, and camouflaged as a government debt management policy. As it turned out, it was a multi-layered fraudulent scheme comprising of up to eighteen separate security contracts disguised as an effort to modernize Kenya's security services from 1997 to 2003. It therefore stands as a corruption bridge between the Moi and Mwai Kibaki administrations (Burbidge, 2015). Generally, 'the scandal involved many phantom entities to perpetuate fraud on the Kenyan taxpayers through non-delivery of goods and services and massive overpricing' (World Bank, 2007:68). The scam was largely undertaken without competitive bidding, or clear matrix on how costs were calculated. Besides, the Anglo-leasing scam was financed outside the government budget (World Bank, 2007).

The scandal involved fraudulent contracts for the purchase and installation of a navy ship; a new tamper-proof passport system; communication kits for security agencies; national early warning systems for meteorology; multi-channel security telecommunication system for administration police; and CID forensic laboratory. Its deep roots are traceable to the suspension of donor funding in 2001, and the cabinet meeting of 27th July, 2001 which approved the use of lease financing in the housing, transport and forensic laboratories. Though the initial tender attracted five international firms, the tender award was postponed to 2003 due to lack of funds.

On 1st August 2003, the Anglo-leasing & Finance Limited allegedly based in the United Kingdom (UK), took advantage of the government's financial quandary and approached the Office of the Vice-President and Ministry of Home Affairs with unsolicited proposal to supply and install a new immigration security and documents control system through its Paris-based French subcontractor – *Francois-Charles Oberthur Fiduciare*. The chief sales agent for Anglo-leasing was Sudha Raparelli, a sister to Deepak Kaman, and by extension a member of Kemani family which had been involved in past security supplies scandals. Deepak previously duped the government into expensively buying Mahindra Jeep vehicles for police (World Bank, 2007; Matiangi, 2006; *Daily Nation Digital*, 2013 November 10).
In fact, Nicholls et al (2011: 285) has aptly described the Anglo-Leasing scam as:

A conspiracy between high-ranking members of the government and dishonest businessmen to defraud Kenya of huge sums of money… Anglo-Leasing was the genetic description given to some eighteen contracts, two of which involved a shell company called Anglo-Leasing, most of which was entered into by the Kenyan government over a period of some two to three years… twelve of the contracts were planned during Moi's term of office and six after Kibaki came to power.

According to Nicholls et al (2011), the reason why the eighteen contracts were jointly labeled Anglo-Leasing is because they fundamentally share certain common features. First, they were all done with no regard to the existing procurement procedures. Secondly, violation of procedures in each case was justified on account of national security, lack of alternative supplier or the urgency with which the services were required. Thirdly, the terms of the contracts seems to have been dictated by the suppliers rather than being mutually negotiated. Fourth, due diligence was not done to ascertain the veracity of the contract content. Fifth, the contractors depicted themselves as operating from major commercial hubs like the United Kingdom (UK).

The whistleblower for the Anglo-Leasing scandal was John Githongo, the Permanent Secretary for Ethics and Governance. His investigations in the UK revealed that the Anglo-Leasing and Finance Limited 'did not exist nor had it ever existed in the United Kingdom' (Wachira and Sudha, 2010:263). Finally, 'all the contracts had been masterminded by two groups of expatriate Asian businessmen having longstanding relations with Kenya's political elite, and working on their behalf to enrich them' (Nicholls et al, 2011: 286). More precisely, thirteen out of the eighteen companies involved in the Anglo-Leasing scam were owned by Deepak Kaman, while the remaining five companies were owned by a Sri Lankan businessman, Annure Pereira.

Several high ranking members of the Kibaki government were implicated in the scam, including President Kibaki's Personal Secretary Alfred Getonga, Vice-President Moody Awori, Education Minister George Saitoti, and all the Mount Kenya “M” Group of Ministers - Mwiraria David (Finance), Murungaru Chris (Internal Security), Murungi Kiraitu (Justice), and Muhinga Amos Kimunya (Lands). When the scandal broke out, the government's initial reaction was to deny it.
Indeed, as Nyabiage and Anyanzwa (Standard Digital 2014, April 29) rightly observes:

At the height of the Anglo-Leasing scam in 2006, then Finance minister, David Mwiraria, one of former president Kibaki's right hand men, said there was no scandal as the Kenya Shillings one billion paid in advance for the project had been wired back to the treasury [but] he declined to name who had wired the money

Several efforts were also made to derail Anglo-Leasing probe. First, the Ethics and Governance Permanent Secretary, John Githongo, who was investigating the matter, audio-recorded Mwiraria and Murungi pleading with him to stop investigations. Secondly, an offer was allegedly made to Githongo to halt investigations so that his father's debts are cancelled. Thirdly, Mwiraria warned Githongo that a businessman, Jimmy Wanjigi, has vowed to kill him if he did not halt the probe. Fourth, on 18th June, president Kibaki is said to have implored Githongo not to forward Anglo-Leasing files to the Attorney-General or KACC (Bacheland, 2010). The ministers mentioned in the scam temporary left office but Kibaki later reinstated them ahead of 2007 elections. There are at least two possible reasons why Kibaki had to save his allies. First, he may have feared that his role and interest in the scam may be exposed. Secondly, he needed the allies for 2007 reelection. Saitoti, for example, funded Kibaki's 2002 campaign and was expected to do so in 2007. Thus, 'the reason behind those very unpopular and apparently politically irrational reappointments was that Kibaki felt he needed those allies for his re-election' (Bacheland, 2010: 195).

5.3 The Triton Oil Corruption Scandal

It is important to understand the economic environment and context within which the scandal occurred. Kenya's oil industry operates under import and trading regime based on open tendering system. The system allows interested marketers to openly compete for the importation of crude and refined oil under the aegis of the Ministry of energy. The winner of the tender then supplies oil to all the other marketers in the industry at a fixed and predetermined price. Even before the scandal proper emerged, other industry players regularly complained that Triton Petroleum Ltd was receiving undue advantage. For instance, Kennol Kobil oil alleged that Triton's oil stocks always occupied half of the common storage facility at Kipevu despite controlling only about 1% of market share. This violated the rule which required that each marketer is entitled to a storage space proportional to its market share. This not only deprived other marketers of storage space,
but was also indicative of Triton's involvement in hoarding and speculation (Africog, 2009).

Against this background, Triton Petroleum Ltd won the bid to import oil in October 2008. Like other marketers, it financed its imports through a collateral financing agreement which required Kenya Pipeline Company (KPC) to hold its oil stock as collateral on behalf of the financiers. KPC was to release oil to them only with the approval of financiers of the delivered oil batch. Rather than importing the monthly consumption stock of 80,000 metric tons, Triton Petroleum Ltd imported only 56,000 tons obviously to precipitate artificial shortage, inflate prices and offload pilled stock. Due to incessant complaints from industry actors, KPC initiated an internal audit which revealed that from November 2007 to November 2008, Triton colluded with KPC staff who supplied it with 126.4 million litres of oil worth 7.6 billion Kenya shillings, without letters of release from financiers. At the same time, international crude oil prices took a record tumble, making it impossible for Triton to profitably dispose its stocks let alone the new imports. Triton then failed to meet its obligations to the financiers, accumulated debt of 7.6 billion Kenya shillings, and was subsequently placed under receivership (Africog, 2009; Burbidge, 2015).

The architect of the Triton oil scandal was Yagnesh Devani, who was the Managing Director of Triton Petroleum Ltd. At the time, Devani was described as 'a shrewd forty three year old businessman who lives large and hobnobs with the high and mighty' (Africog, 2009: 5). Indeed, 'there is considerable evidence to suggest that Triton enjoyed good political connections which it could have exploited to receive preferential treatment at KPC' (ibid). These political links also helped it get lucrative tenders like petroleum supply contract for Kenya Power and Lightening Company during the Moi era. There are claims that 'Triton was operating a corruption conduit involving very senior people at both KPC and the Ministry of Energy' (Africog, 2009:10).

5.4 The Grand Regency Hotel Corruption Scandal

There is a sense in which the Grand Regency Hotel scandal was an extension of the Goldenberg scandal because it is centered on the Grand Regency Hotel which is believed to have been built with Goldenberg proceeds. Kamlesh Pattni, who masterminded the Goldenberg scandal, was one of the directors of Uhuru Highway Development Company (UHDC) which built the hotel. It is alleged that sometimes in the 1990s, Goldenberg International Limited of Pattni had fraudulently obtained funds from the Central Bank of Kenya (CBK) and used it to build Grand Regency hotel. As part of the settlement of the Goldenberg scandal, UHDC transferred the hotel to the CBK in
exchange for immunity on the 9th April 2008, Given that the CBK Act does not allow the CBK to own a commercial property, it sold the hotel to a group of Libyan investors known as Libya Arab Investment Company (LAICO) (Kameri-Mbote and Migai, 2011; Kamau, October 7, 2013).

The manner in which the sale of the hotel was done is what constituted the scandal. The scandal came to the limelight in June 2008 in the form of allegations that CBK had fraudulently sold the Grand Regency hotel below its market value to LAICO. It is said that the hotel was sold at 2.7 billion Kenya Shillings against previous valuations of 7 billion Kenya Shillings. To begin with, it is curious that the idea of approaching Pattni to give up the hotel to CBK, which would then sell it to LAICO emanated from top security officers!

Yet, as noted by Kamau (February 6, 2016):

The idea to sell the hotel to Libyans had been flouted by NSIS boss, Maj. General Michael Gichangi who had asked the Central Bank of Kenya to make a deal with Kamlesh Pattni and sell the Grand Regency hotel. Why it is the Director-General of the National Security Intelligence Services (NSIS) – a man who reported directly to the president – became the first person to come up with the idea of selling the hotel to Libyans was rather curious.

Relatedly, it has been argued that it is actually Kenya which approached Libya over the sale of the hotel. It all began when president Kibaki sent his nephew, Alex Mureithi, with a letter to the then Libyan president, Muamar Gadaffi. It is believed that the purpose of Mureithi's trip was to sell the Grand Regency idea to Gadaffi. Indeed, it is notable that 'the man who did the initial contact with the Gadaffi regime was the late Alex Mureithi, a burly and beaded man who liked to introduce himself as Alex Kibaki. Alex was Kibaki's nephew and was central in the organization of NARC as the party's director of elections' (Daily Nation, February 6, 2016). Curiously, it is Pattni who led a delegation of “Kenyan cultural elders” ostensibly to pay homage to Gadaffi in his wild fantancy of becoming “King of Africa”. Thus, Pattni's visit and contacts with Gadaffi was part of the build up to the sale of the hotel. Similarly, negotiations for the sale of the hotel were superintended by Amos Kimunya, who was the Finance Minister. Kimunya initially played what is fast emerging as the government's archetypal response to mega corruption scandals – “deny, deny, and deny”. He rejected the claims that he was involved in the sale of the hotel, and even went further to deny that the hotel had been sold (Kamau, October 7, 2013).
It is should be noted that the Public Procurement and Disposal Act (2005) does not envisage the involvement of cabinet ministers, except Finance Minister, in the procurement process. The Act further states explicitly that public assets shall be disposed competitively and transparently. Yet, these provisions are routinely violated with impunity. In this regard, 'it was apparent that the Minister for Finance [Amos Kimunya] may have secretly disposed of the Grand Regency Hotel, a property that belongs to the people of Kenya, in disregard of the established rules and regulations' (Kameri-Mbote and Migai, 2011: 57).

Moreover, Kameri-Mbote and Migai (2011: 58). Further notes that

The settlement agreement that set the fraudulent disposal of Grand Regency Hotel in motion was made pursuant to a non-existent provision of the Anti-Corruption and Economic Crimes Act… the settlement agreement was pursuant to section 56(b) of this Act, which supposedly empowers the Kenya Anti-Corruption Commission (KACC) to give amnesty to individuals accused of corruption. But it seems that there is no section 56(b) of the Anti-Corruption and Economic Crimes Act because parliament deleted it when it was first proposed by the Attorney General and KACC on 13th September, 2007.

There are also indications that the hotel was not properly valued prior to its sale. Moreover, the Libyan investors who acquired it were single sourced and no competitive tendering was done. After the initial government denials of the scandal, a commission of inquiry was appointed to investigate it, headed by Justice (Rtd.) Abdul Majid Cockar. Although the commission's report was never made public, it allegedly absolved Kimunya of any misconduct over the sale. On 1st July 2008, the National Assembly almost unanimously passed a no-confidence vote on Kimunya, who bowed to pressure from the legislators and resigned as Finance Minister on 8th July 2008.

Predictably, Kimunya was later reinstated by Kibaki and made minister for Transport (Kameri-Mbote and Migai, 2011). Given the chain of events and the people involved, it is unlikely that the president was completely oblivious of the on-goings. It is notable that Kibaki and Kimunya were close friends even before his ascendency to presidency. By reinstating him, Kibaki could have been doing more than just saving a friend. Indeed, 'Kimunya was chairman of the Muthaiga Golf Club in the same year that president Kibaki, the patron of the Kenya Golf Union, and also a member of the Muthaiga club, entered the State house' (Chama, 2017: 108).
CHAPTER SIX

REFLECTIONS ON ELECTORAL REFORMS IN KENYA

6.1 Conceptualizing Electoral Reforms

Electoral reform encompasses changes in the existing electoral architecture which includes the electoral system. It is noteworthy that the 'electoral systems are the cogs that keep the wheels of democracy properly functioning' (Horowitz, 1991:163). It has been defined as 'the set of laws which regulate the transformation of preferences into votes and of the votes into seats' (Baldini and Pappalardo, 2009:17). The four key aspects of electoral systems include district magnitude or 'the number of seats to be filled in an electoral district' (Siaroff, 2009:181); electoral formula which refers to the precise procedure by which votes and seats are allocated to political parties and candidates; ballot structure which refer to the number of choices available for voters for one seat; and the size of the legislature. The other issues that electoral reforms address include term limits; candidate qualification; campaign financing; boundary delimitation; the use of technology and the appointment and composition of the electoral agency (Siaroff, 2009).

Electoral reforms should seek to create an electoral system that enhances the translation of votes into seats in representative chambers; creates better avenues through which the electorate holds leaders accountable; and structures the boundaries of acceptable political discourse (Reynolds, 1999). In this regard, electoral reforms in divided societies such as Kenya should aim at setting up electoral systems which reflect the opinion of the entire electorate; is well understood by the electorate; encourage conciliatory behavior; enhances the accountability of the elected leaders to the electorate; and facilitates the stability of the government (Reynolds, 1999).

6.2 Electoral Reforms in Kenya.

The first significant electoral reforms occurred in 1988, when the incumbent single party, KANU introduced the queue-voting system. In this arrangement, voters queued behind the candidate of their choice or his designated agent, the candidate who scored at least 70 percent was declared duly elected. Where no candidate attained 70 percent of the votes, then the top two contenders were to battle it out in the second round of voting which involved secret ballot. One weakness of this system is that it compromised the secrecy...
of the ballot paper. Moreover, the system was bungled so that in some cases, candidates with shorter queues were declared winners.

In December 1991, KANU bowed to domestic and international pressure to instigate the repeal of section 2(a) of the Constitution thus transforming Kenya from a single party dictatorship to a multi-party democracy. Up to this point, elections were managed by the Supervisor of elections, who was a civil servant working under the office of the Attorney General. The Election Laws Amendments Act, 1991 abolished the position of the Supervisor of Elections and instead created the Electoral Commission of Kenya (ECK) as the new agency to oversee elections. It was further anchored in the National Assembly and Presidential Elections Act (Cap 7) of the Laws of Kenya. The reforms further enhanced the regional distribution of support and hence the legitimacy of the winner of a presidential election, who was now required to obtain more than 50% of all the votes cast and further get at least 25% of all the votes cast in at least five of Kenya's eight provinces that existed at the time (Korwa, 2000; Asingo, 2003; Aywa, 2016).

Despite 1991 reforms, the president retained powers to appoint the commission and its chairman. President Moi's choice for the first ECK chairman was Justice Zacheous Chesoni, who had been declared bankrupt by the Court on July 30th 1984 in High Court Case Number 1234 of 1984. His bankruptcy was occasioned by the failure of his Tawai Company Limited to repay a bank loan 26 million Kenya Shillings which he used to import fertilizers for Mumias Sugar only to find that the sugar millers had brought the fertilizers from elsewhere. Thereafter, he was removed from the bench. Ironically, it is president Moi who, as required by law, signed the instrument revoking his appointment to the bench following recommendations of Judicial Service Commission (JSC). At the time of his removal from the bench, JSC which heard Chesoni's removal case described his conduct as 'inconsistent with the position, dignity and judicial integrity of a Justice of these honorable Courts' (Korwa, 2000: 107; Daily Nation, September 16, 1999). It is hardly surprising that '[ECK] was at first not trusted to act impartially and competently, since its chairman and all its ten commissioners were appointed by the president, himself an incumbent and a candidate' (Away, 2016:73). Thus, in line with the rational choice theory, Moi effectively used ECK to advance personal self-interest rather than the greater good. For instance, ECK used powers to demarcate constituency boundaries to carry out gerrymandering in favor of incumbent KANU.
Evidence suggests that ECK 'entrenched gerrymandering in the 1997 boundary review, hardly tackled electoral vices head on, including infractions by its officials, and was a veritable den of corruption' (Away, 2016:73). One instance of gerrymandering is the creation of Mathioya constituency in Murang'a County out of Kangema in the hope that one of Moi's loyal lieutenants and long-serving KANU Secretary-General, Joseph Kamotho would win it. In a nutshell, most of the 'ECK [boundary] demarcations clearly ignored the demographic distribution provided for in the [constituting] Act' (Korwa, 2000:109). After serving as the ECK chairman, Chesoni was later promoted by president Moi to the high office of the Chief Justice.

After losing the 1992 elections, the opposition political parties pushed the incumbent KANU to renegotiate electoral reforms, leading to the formation of the Inter-Parties Parliamentary Group (IPPG) in 1997. Under the IPPG agreement, the opposition and the ruling party were to nominate ten and eleven members of the electoral Commission respectively. The opposition seems to have been blinded by the new prospect of appointing some of the ECK Commissioners and ignored perils of having KANU maintaining numerical advantage in ECK, which the ruling party could exploit to its advantage. Moi appointed Samuel Kivuitu as ECK chairman (Korwa, 2000; Asingo, 2003; Aywa, 2016). The IPPG reforms therefore did not yield electoral justice but instead led to the creation of an overly bloated electoral commission of twenty two commissioners.

Rather than consolidating and building on the gains made from these electoral reforms, president Kibaki significantly reversed the electoral reforms clock. Just before the 2007 elections, Kibaki single-handedly appointed new set of ECK Commissioners in total disregard of the IPPG Agreements which had allowed political parties to nominate the ECK Commissioners. It would be recalled that IPPG was a gentlemen's agreement that was not anchored in law. Yet, president Kibaki was not known to honor gentlemen's agreements, having repudiated the Memorandum of Understanding (MOU) that led to the creation of the National Rainbow Coalition (NARC) which gave him victory in the 2002 elections. Kibaki retained Kivuitu as chair of the ECK.

Kivuitu had presided over the historic 2002 elections where the opposition (NARC) snatched victory over incumbent KANU which had been in power for 39 years since independence. His team also superintend over the 2005 national constitutional
referendum which Kenyans rejected despite being backed by incumbent president Kibaki. Consequently, the confidence levels in ECK was at its highest just before the 2007 election but sunk to the lowest level ever since multiparty was introduced after bungling the 2007 elections (Aisingo, 2003; Aywa, 2016).

The violence that followed the bungled 2007 elections marked the end of ECK's golden era and the start of democratic reversals. After the 2007 elections, it became clear that 'the institutional legitimacy of the ECK and public confidence in the professional credibility of its commissioners and staff had been gravely and irreversibly impaired by the manner in which it bungled the 2007 general elections' (Aywa, 2016: 76). Against this backdrop, the National Assembly enacted the Constitution of Kenya Amendment Act No. 10 which sanctioned disbandment of ECK and its replacement with Interim Independent Electoral Commission (IIEC) in 2008. It was a two-year transitional commission created ostensibly to serve for a period of two years. The Act reduced commissioners from 21 to eleven and changed the method of appointing commissioners.

All the commissioners were to be appointed competitively from a pool of applicants from public advertisement. A Parliamentary Select Committee on the Review of the Constitution was formed to interview applicants and forward names of successful candidates to the National Assembly for vetting and appointment by the President in consultation with the Prime Minister. The Act removed boundary delimitation from the electoral agency to the Interim Independent Boundaries Review Commission (IIBRC). It was quite similar to IIEC with a chair and eight commissioners who are appointed competitively through a process that mirrors that of the IIEC (Aywa, 2016).

The Constitution of Kenya (2010) which was promulgated on 27th August 2010 replaced IIEC with the Independent Electoral and Boundaries Commission (IEBC) which combined the roles previously played by the IIEC and the IIBRC. Article 138(4) of the Constitution of Kenya (2010) require that a president-elect must obtain at least more than half of all the votes cast, and at least 25% of all the votes cast in more than half of the Kenya's 47 counties (Aywa, 2016). The other reforms include the Elections Act (2011) which merged scattered election-related laws into one statute, and the Political Parties Act (2011) which created office of Registrar of Political Parties, the Political Parties Disputes Tribunal and the Political Parties Liaison Committee (Aywa, 2016).
6.3 Reasons for the Failed Electoral Reforms in Kenya.

Just as perpetrators of corruption cannot lead the war against corruption, beneficiaries of flawed electoral process cannot engineer electoral reforms. As the Executive Director of Transparency International (Kenya), Mr. Samuel Kimeu, observes, both the ruling elite and corruption cartels always want to maintain the status quo because it has already worked for them, they understand it, and they know how to negotiate their way around it. In contrast, the electoral reforms seek to alter the status quo. Moreover, the cartels want an electoral system and environment that guarantees, with some degree of certainty, that their pre-election investments in political parties and candidates will yield dividend in terms of plum government jobs, lucrative tenders or tax evasion. In essence, cartels seek to institutionalize certainty. Yet, as Adam Pzerworski observes, democracy seeks to institutionalize uncertainty. Clearly, the interests of these cartels run parallel to the dictates of democratic reforms. As a result, the ruling elite often frustrate reforms due to the tendency for reforms to threaten their interests and those of their corrupt allies. This makes the corruption cartels the biggest hindrance to meaningful electoral reforms in Kenya.

The second problem with electoral reforms in Kenya has to do with how electoral reform agenda is often packaged. Reform initiatives are often guided by short-term miscalculations and do not pay sufficient attention to electoral system which is the greatest missing link in Kenya's electoral process. Yet, 'the electoral system is by far the most powerful lever of constitutional engineering for accommodation and harmony in severely divided societies' (Horowitz, 1991:163). Consensus is fast building among scholars that the Single Member Plurality Systems (SMP) like First-Past-The-Post (F-P-T-P) is inappropriate for Kenya. Indeed, 'in a country like Kenya where there is no national majority ethnic group, only regional majorities, the single member plurality has the effect of encouraging the emergence of ethnically and regionally concentrated parties' (Khobe, 2015: 136). Pro-reform groups in Kenya are slow in embracing this, although 'Kenya has a history of appeals for the adoption of Multimember plurality (MMP)' (Khobe, 2015: 143). F-P-T-P tends to accentuate the role of ethnicity in politics as a means of accessing resources, thus making elections a do-or-die affair. Hence, both the ruling elite and the opposition tussle for power for themselves and their allies, making the contest fierce and violent.
In this regard, Khobe (2015: 140) argues that:

The PR is the most suitable system of representation as far as fair representation of majorities and minorities is concerned... well-designed PR List system can be effective in nation-building efforts as it tends to encourage political parties to seek votes and membership across communities. It therefore provides the foundational level of inclusion needed by precariously divided societies to pull themselves out of the maelstrom of ethnic conflicts and democratic instability.

A third reason for failed electoral reforms has to do with the pro-reform groups. The pro-reform groups in Kenya seem to lack discipline and often get overexcited too quickly with minor gains even when they have opportunity to push for proper reforms. President Moi for instance realized this and always short-circuited reform efforts by using the language of change to block change. Indeed, once Moi realized that the IPPG reforms were inevitable, he smartly wrestled control of the reform process from the pro-reform movement, and steered it in his own safe direction. This enabled him to allow opposition parties to appoint some ECK commissioners, while he retained the majority control over the commission and reserved the right to appoint the ECK chairman.

Fourth, it seems that Kenyan's have been putting in place one electoral reform after the other but without reflecting on the reasons why previous reforms failed. Yet failure to learn from the past is the greatest failure in life. According to Kegoro (2015), the primary assumption underlying electoral reforms in Kenya has been the need to entrench independence, accountability and transparency in the management of the electoral process. All this while, it has been hoped that once formal electoral institutions have been reformed, then these grand reform objectives will be achieved. There have been no serious reflections on the possibility that it is the informal actors who pull electoral strings from behind the scenes. Yet in reality, Kenyan institutions perennially crumble at the weight of external pressure including pressure emanating from informal actors. In essence therefore, the role of the deep state in blocking electoral reforms has been ignored.

Finally, Rev. Dr. Timothy Njoya argues that Kenya has never had serious reforms
mere cosmetic changes. Apparently basing his arguments on Thomas Kuhn's ideas in *The Structure of Scientific Revolutions* (1962), Njoya observes that true reforms must involve a paradigmatic shift which calls for complete overhaul of the institutional edifice, societal values, mental frames and world views. It requires societal renewal where existing societal order gives way to a new order. In this regard, David Kangethe of the Ethics and Anti-Corruption Commission (EACC) argues that the fight against corruption must also focus on enhancing our value-systems. He wonders for instance, why Kenyans glorify corruption and knowingly elect corrupt leaders. Similarly, Justice Ongudi notes that 'Kenyans need to develop a spirit of contentment. This is important because for a person who is not contented, the means does not matter as long as he gets wants he want' Using the pregnancy-lactation allegory, Rev. Dr. Njoya concludes that:

*Just as you cannot lactate unless you are pregnant, so you cannot inspire or implement reforms if you did not fight for reforms [and possibly don't believe in reforms]'. The sooner Kenyans realize this, the better. Till then, Kenyans can only expect cosmetic changes...what Kenya needs now is a complete transformation of the national psyche through education.
CHAPTER SEVEN
UNDERSTANDING THE DEEP STATE

7.1 Turkish Root of the Deep State
The term *deep state* emerged out of numerous scandals that rocked Turkey in the 1990s when it became clear that 'murky co-operation between state intelligence, corrupt justices and organized crime, seemed to run the system behind the scenes' (Pierre-Filiu, 2015:1). In fact, the term *deep state* was first used by Turkey Prime Minister, Bulent Ecevit, to refer to 'a covert system of military, security, business and other interests that undermined the rise of democratic institutions in Turkey' (Taft, 2017:115). More specifically, its genesis is traceable to the *Susurluk* scandal that occurred on 3rd November 1996, hardly thirteen years after the country retraced its steps to the democratic path. The scandal involved a fatal crash involving a car carrying four seemingly odd bedfellows - a legislator, police chief, hardcore criminal and the criminal's girlfriend.

More curiously, they were dangerously armed in the car with five pistols and two silencer-fitted machine guns. Predictably, 'the *Susurluk* scandal struck the Turkish public as an electro-shock' (Pierre-Filiu, 2015:5). The public reaction was swift and dramatic as they refused to treat this as an isolated case, and demanded the truth about this shocking unholy alliance. When explanations were not forthcoming, 'millions of people turned out their lights every day at 9.00 pm in unprecedented demand for more light to be shed on the *Susurluk* scandal' (Pierre-Filiu, 2015:3). As a result, the police general resigned and from then politics in Turkey was never the same.

7.2 Conceptualizing the Deep State
Against these beginnings, the term has since gained currency even outside Turkey. According to Taft (2017:117 - 118), the term deep state can be defined as:

The unofficial system of government that arises separately from, but is closely connected to, the official system, where several key democratic institutions are captured and held [hostage] by the same private interest in order to advance its private agenda over the public interest. The captured institutions become accountable to the dominating private interest, and serving that interest becomes the standard of institutional success...When this happens, the ability of a democracy to respond to a changing world and meet the needs and aspirations of a majority of its citizens will suffer and decline.
The deep state has also been defined as a 'hybrid association of key elements of government and parts of top-level finance and industry that is effectively able to govern…with only limited reference to the consent of the governed as normally expressed through elections' (Taft, 2017: 115). Others defined it as 'a system which habitually resorts to decision-making and enforcement procedures outside as well as inside those publicly sanctioned by law and society' (Taft, 2017: 115). The deep state also refers to '[the] authoritarian, criminal and corrupt segments of the state that function in a democratic regime by exploiting and reproducing its deficiencies' (Soyler, 2015:1). In essence, it is some sort of informal institutions operating under the shadows of the formal governance institutions. That is, 'deep state is a state within the state' (Shafak, 2006:58).

7.3 The Deep State and State Capture
A key component of the deep state is state capture. A democratic institution is considered to be captured if 'its decisions, actions, or resources are consistently directed away from the public interest towards a private interest through the intentions and actions of that interest' (Taft, 2007: 108). The concept capture emerged from an observed trend where public agencies tasked to regulate industries often seemed to abdicate their mandate and instead serve the interest of those industries. An often cited example is that of the US Inter-State Commerce Commission formed to ensure that the decisions and actions of the railways companies do not harm public interest, but soon began to operate as partners of the same companies. A similar trend has also been noted in Britain where corporations routinely capture powers which are formally vested in government to advance their own interest, sometimes at the expense of public interest (Taft, 2017).

From this beginning, the scope of capture has broadened to incorporate policy making. It has since been redefined as 'the loss of independence on the part of a regulatory or policy making organ to the industry over which it has regulatory authority' (Taft, 2017:109). Some have noted that 'state capture refers to the actions of individuals, groups or firms both in the public or private sectors to influence the formulation of laws, regulations, decrees and other government policies to their own advantage' (Campos and Bhargava, 2007: 3). According to Mr. Vincent Okong'o, “State capture is defined as the act of influencing policy and legislative agenda of a government agency so as to serve private interest'. Relatedly, Taft (2017) identifies three requisites for capture to occur - public interest; institution designed to protect public interest, and a predator seeking to supplant
public with private interest. Capture occurs 'when private actors seize public institutions and legal-political processes to realize their particularistic interests of accumulating power and private wealth. For that reason, they more or less systematically abuse, sidestep, ignore or even tailor formal institutions to fit their interests' (Meissner, 2017: 15).

It is no longer debatable that 'for modern democracy to endure, its institutions must have clear boundaries; they must be substantially autonomous' (Taft, 2017: 105). Unfortunately, it is this autonomy of key democratic institutions that the deep state seeks to erode through capture. It is hardly surprising that 'deep states prefer to avoid democratic accountability and are therefore a threat to the foundations of democracy' (Taft, 2017). Yet, scholars have also noted for instance that, 'it is public corruption that has prevented Kenya from becoming a true democracy' (Mutua, 2014: 15). Taken together, these two observations imply that the deep state and public corruption have similar effects on democracy – they weaken it. Indeed, 'corruption is strongly related to state capture…' (Meissner, 2017: 21) and by extension, deep state. While corruption can occur even outside the deep state, the deep state requires both state capture and corruption to thrive.

Moreover, the turbulent nature of modern politics invariably exposes key democratic institutions to the risk of state capture. Fortunately, properly functioning democracies do have self-correcting mechanisms which ensure that when one key institution is captured, the others either pull it out or neutralize the effects of its capture to restore equilibrium. Thus, 'strong democracy heals itself and moves on' (Taft, 2017: 114). In the August 2007 general elections in Kenya for instance, the Independent Electoral and Boundaries Commission (IEBC) declared incumbent president Uhuru Kenyatta as the winner, but the Supreme Court detected anomalies and nullified the presidential elections, leading to the repeat elections. However, democracy experiences serious strains when several key democratic institutions are simultaneously captured by the State or private interests. In such circumstances, 'the ability of the system to restore democracy is impaired – this leads to the emergence of “the state within a state” or the “deep state”' (Taft, 2017: 114). In the Kenyan context, Dr. Owuoche points out that 'State capture of institutions in Kenya is total. Even the non-governmental organizations have been captured. Most of the people who used to be vocal on governance and human rights issues have gone silent. Even the church has been captured'.
Thus, the deep state is a situation where several institutions have been captured to the extent that they serve private rather than public interest. This clearly explains why the deep state tends to cut across several institutions. Hence, under deep state, institutions do not work as efficiently as they should. Not only do deep states typically seek to endure and outlast electoral cycles, but they also have their own rules and operating norms. One of the unwritten rules is that the activities of the deep state are supposed to remain covert and out of the purview of the public. Whenever these activities get to the public, those seeking to expose them are dealt with firmly. The fate of many whistle blowers in Kenya like David Munyakei attests to this. In fact, while giving evidence on Goldenberg scandal on 20th January 2004, a retired senior officer at the CBK identified simply as Wabuti explained how he was denied his terminal benefits after retirement because he disclosed to the IMF the massive fraud in the CBK involving Anglo-leasing scandal (Chweya et al, 2005).

At the same time, any endeavor to erect road blocks on the path of the corruption cartels is often nauseated against punitively. The Goldenberg hearings revealed many casualties of the antics of corruption cartels, demonstrating that 'corruption and the corrupt will not go down without a fight' (Kivuva, 2013: 48). For instance, in the Wilson Airport incidence already espoused, the senior revenue officer with the customs department, Mrs. Opondo, who ordered Kamlesh Pattni to open suitcase for security checks and refused to clear his gold delivery in 2003, was interdicted just as was the fate of the Airport Security officer on duty that night, Corporal Lagat. Similarly, the Director of Fiscal and Monetary Affairs, Kirira Njeru, testified that the head of public service Professor Philip Mbithi ordered him out of his office in February 1993 for failure to cooperate with Pattni over Goldenberg. Some public servants were out rightly prevented from performing their duties to secure safe passage for Pattni and his loot. This was the fate of Mr. Bor, a Government chemist, who was barred from examining 'gold bars' supplied by Pattni as samples, yet a Customs Officer, Mr. Edward Nambisia was called in and helplessly watched the scam unfold in his face since he had no expertise in geology and mining (Chweya et al, 2005).
CHAPTER EIGHT

THE DEEP STATE, CORRUPTION AND ELECTORAL REFORMS IN KENYA

8.1 Deep State, Corruption and Elections in Kenya

The nexus between deep state, corruption and failed electoral reforms is not hard to recognize. Studies show that countries with serious problems of corruption such as Kenya typically have weak governance institutions and hence low governance scores (Hope, 2014; Mutua, 2014; Fisman and Golden. 2017). In fact, 'by any measure, persistent corruption and bad governance go together' (Hope, 2014: 500). Conversely, 'good governance as a concept encompasses anti-corruption' (Johnson, 2016:16). In other words, 'the concept good governance is closely related to anti-corruption, as many of its defining characteristics, such as the rule of law, political accountability, transparent and accountable public administration, are also essential elements when addressing corruption' (Johnson, 2016:16).

Wachira (2016) provides an outline of what can be described as a value chain perspective of the link between the deep state, corruption and failed electoral reforms in Kenya. He notes that:

Corruption is essentially a value chain glued together and sustained by systems that defy checks and balances…on the supply side of the corruption value chain are usually government officials, elected leaders, the judiciary, lawyers, investigators and prosecutors and of late activists-for-hire. On the demand side are contractors, suppliers of goods and services, and seekers of protection and preferential and often illegal favors. In between the supply and demand sides we have strategically placed facilitators, called agents and brokers.

In essence, deep state and corruption networks usually comprise of three sets of actors – demand actors, supply actors and brokers. Most mega-corruptions occur when there is collusion between actors from each of these three sets. The cartels penetrate the legal and policy processes right from the beginning to ensure that self-serving loopholes are deliberately built into the resultant policies, laws and regulations, which they would exploit at the opportune moment. Mr. Gichana concurs, noting that 'this country [Kenya] is over-legislated but the crafting of the laws is always done with potential violators in mind and are therefore usually designed with in-built loopholes for such violators to get away". In fact, Kimeu notes that 'by the time elections are over and the winner known, key
contracts to be awarded as well as those who will get them are also known."

It is therefore not surprising that deep state networks often form before elections (Kimeu, 2017). In fact, both Vincent Okong'o and Gladwell Otieno argue that each regime change in Kenya is typically marked by a mega-corruption scam. In Okongo's words, “whenever there is change in administration, there is always a new major corruption scandal, involving very influential personalities in the new regime. Such scandals tend to be complex, with international dimension, and hence very hard to trace and recover the assets of those involved”. He adds that the timing of such corruption scandals points to the possibility that they are fund-raising mechanisms meant to recoup campaign expenses, sustain patronage, and build a war-chest for future elections.

As elections approach, corruption cartels use their quasi-statistical senses to estimate the political mood in the country in terms of which political formation is more likely to win and protect their self-interests. Cartels, being rational actors, offer financial and logistical support to boost their campaign kitty. Since no political formation ever has enough money to run campaign, whichever side is offered the help readily accept this offer. When elections look tight and it is impossible to predict the winner, cartels secretly finance both sides to spread risks and ensure that their interests will be secured regardless of the winner (Kimeu, 2017). The financial support is usually 'premised on undertakings to isolate and reward certain public projects to the financier or identified beneficiaries, and in some cases, pliant opportunities to certain positions in public service that serve to extend influence and protect vested interests' (ibid).

In other words, apart from supporting parties and candidates during elections in exchange for promises of lucrative tenders, there are those who offer huge campaign contributions in exchange for appointments to plum government jobs once elections are won. Through these “pre-paid for” appointments, the cartels hope to get direct access to resources and opportunities to recoup their political investments and make more for themselves and for future elections. During interviews, Mr. Samuel Kimeu, the Executive Director of Transparency International (Kenya) cited a case where two individuals openly boasted that they have already paid for and secured senior jobs in the subsequent government. Interestingly, although the political parties and candidates they were supporting did not form government, they still landed plum government jobs pointing to the possibility that they may have “paid for” the seats to the two major political camps. Thus, while politicians never keep their promises to citizens, they seem to keep their promises to the cartels.
In a letter to President Kibaki dated November 22nd 2005, for instance, John Githongo revealed information volunteered to him by the Finance Minister David Mwiraria that 'Anurre' Pereira was a strong supporter of the president [Kibaki] and had backed him for over ten years, and had even paid the president's medical bills incurred in London following his road accident in 2002'. Githongo's response tangentially incriminated the President in the on-going corruption schemes in many ways. First, he was apparently shocked that Pereira who was known to all and sundry as an epitome of corruption since 2003 had been Kibaki's supporter and financier over the years in his quest for presidency. Secondly, he made reference to several corruption cases which he had allegedly reported to the president personally but the latter seemed to have conveniently ignored.

It is interesting to note that the same Pereira is said to have paid school fees for two daughters of Sammy Kyungu, Helen and Angela, who were studying in the North Hampton University. It is said that on 11th July 2002, while serving as Director of the Communications Commission of Kenya, Kyungu signed a contract with Pereira's Spacenet International Company to supply and install satellite communication gadgets in all the 980 Post Offices in Kenya at a cost of US $11.7 billion Kenya shillings. In exchange for this contract award, Pereira undertook to pay school fees for Kyungu's daughters, which he is said to have honored on 24th November 2003 and later in November 2004 and January 2005. By this time Kyungu had been elevated to the position of the Permanent Secretary for Information and Communication (Daily Nation Digital 2014 May 19).

The deep state actors would not accept anything less than the victory for their client in elections since a loss mean that all their pre-election investments have gone to naught. Hence, they will do anything, including sponsoring subversion of the electoral process, in favor of allies. In this regard, Gladwell Otieno observes that:

*Control of political power is very crucial for corruption cartels and hence they would go out of their way to capture it rather than leave it to chance and the fairness of rules. In fact, corruption has driven good people out of politics and left it for the corrupt that use it to sustain the corruption cycle.*

The critical question then is: who initiates the unholy alliance between the private business, the politicians and the bureaucrats? According to Mr. Gichana, corruption is by and large designed by public bureaucrats who have the requisite inside information. It therefore begins as an inside job before outsiders such as private business and politicians
are roped into the scheme. He notes that 'the government systems and structures are such that outsiders [like private business and politicians] would find it hard to design and execute corruption deals as cartels without active involvement of the bureaucrats'. On their part, private businesses often operate on the principles of rationality and position themselves strategically in anticipation of the corruption opportunities and cartel coalition-buildings with the bureaucrats and the politicians.

These sentiments have also been echoed by Gladwell Otieno, who argues that: *Corruption cartels are networks with many faces. For outsiders to pull off a corrupt deal in government, there have to be people who know the way the system works. You cannot steal through a government contract alone. You must have to collaborate with others from within the system to succeed and this is how cartels emerge and operate as networks.*

Below is a table showing the unholy alliance between private businessmen, the politicians and the bureaucrats alleged, mentioned or suspected of involvement in selected corruption scandals.

**Table 1. Alliance between Private Business, Politicians and Bureaucrats alleged, mentioned or suspected of involvement in Various Corruption Scandals**

<table>
<thead>
<tr>
<th>Scandal</th>
<th>Some of the Actors Mentioned orSuspected of Involvement in the Scandals</th>
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<tbody>
<tr>
<td></td>
<td>Politicians</td>
</tr>
<tr>
<td><strong>Goldenberg</strong></td>
<td>- President Moi</td>
</tr>
<tr>
<td></td>
<td>- George Saitoti</td>
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<td></td>
<td>- Gideon Moi</td>
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<tr>
<td></td>
<td>- Philip Moi</td>
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<td></td>
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<tr>
<td><strong>Anglo-Leasing</strong></td>
<td>- George Saitoti</td>
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<tr>
<td></td>
<td>- David Mwiraria</td>
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<td></td>
<td>- Chris Murungaru</td>
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<td></td>
<td>- Amos Kimunya</td>
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<td></td>
<td>- Kiraitu Murungi</td>
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<tr>
<td><strong>Triton Oil</strong></td>
<td>- Kiraitu Murungi</td>
</tr>
<tr>
<td><strong>Grand Regency</strong></td>
<td>- Alex Mureithi</td>
</tr>
<tr>
<td></td>
<td>- Amos Kimunya</td>
</tr>
</tbody>
</table>

Source: Compiled by the author from various Sources.
When the cartels fail at the policy formulation process then they intervene at the implementation stage. In this case, it has been noted that the 'cartels collude with drafters of public policy and lay plans to swindle the taxpayers as it happened in the monumental Goldenberg scandal where an outsider Kamlesh Pattni pushed through an export compensation scheme at the treasury' (Daily Nation 2017, February 7). It is clearly evident from the previous sections that the government-led anti-corruption crusades are usually loaded with a plethora of loopholes at the formulation and execution stage of the anti-corruption strategies. For instance, the unconstitutional prosecutorial powers accorded to KACA and the irregular appointment of Ringera as its head in violation of the doctrine of separation of powers could easily fit into the foregoing discussion.

Similarly, when EACC Commissioners departed, several individuals and organizations including Transparency International (Kenya) advised the Commission secretariat not to put on trial any corruption suspects until new Commissioners are appointed, since doing so it is unconstitutional. Yet, EACC, acting on the advice of the Attorney General ignored the advice and took the cases to Court. The Court then acquitted all the suspects investigated by the secretariat just. It can be argued that the EACC secretariat and the Attorney General were alive to this illegality but they deviously took this path as a safe legal root to guarantee freedom for the suspects. However, in defense of EACC's decision and actions, Mr. Vincent Okong'o argues that the commission is an independent agency and a body corporate which operates as a whole. Therefore, it can prosecute cases even if some of its constituent parts such as the Commissioners are not in place. The Commission has since appealed the Court decision and hope to proceed with prosecutions.

Similar sentiments have also been expressed by Polycarp Ochillo who observes that:

*The prosecution of corruption suspects often sounds like a movie. The corrupt people tend to get away scot-free and this emboldens others to take chance. Prosecution also fail because of inability to build watertight cases with evidence of high probative value; fear of witnesses to give evidence; and general apathy in the society – people forget quickly and move on. Thus, the legal process is often used to cleanse the perpetrators of mega-corruption rather than to genuinely prosecute them.*

Once the corruption cartels have succeeded either in installing a friendly regime or in penetrating formal institutions of governance, Wachira observes that:
The corruption cycle usually begins with the annual budget estimates. This is the season when opportunistic projects and programs are devised and cost estimates loaded to provide for players in the corruption value chain. It is at the budgetary stage that players are designated and a very collusive process commenced. At this stage, as much as 30% of national budget value is already potentially lost. The procurement stage is usually a mere formality in the corruption value chain. The only time when the public comes to know about the criminal designs is when conflicts between competing cartels openly play out in tribunals, courts and the media.

Accordingly, serious efforts to fight corruption must make it extremely difficult to transform corruption schemes into projects while at the same time eliminating 'protective sideshows' once acts of corruption have been identified. For instance, it is becoming a common practice in Kenya that 'whenever a wayward public official or a culpable politician was castigated by parliament or arraigned in court with grave and proven corruption charges, the suspect politician would deny and immediately cry foul retreating to his ethnic backyard intimating that his tribe was being “finished” by the state' (Sonye, 2014:83-84). Taking the case of the NARC government's initial near victory over corruption, Wachira (2016) argues that the fight against corruption is won or lost in the first few days and weeks that a new government comes into office.

It is at the election time that new recruits into the existing corruption value chain are usually co-opted into the network. At the same time, 'it is immediately after elections that public support and expectations are at a climax. Surprise and firm action by the Executive at this early stage can produce lasting solutions' (Wachira, 2016). Delays in making decisive blows to the corruption cartels only strengthen old corruption networks to regroup. Corruption cartels in Kenya capitalized on the prolonged recuperation of president Kibaki after the pre-election accident to reassemble and continue with what they had perfected in the Moi era. This led to continuation of the Anglo-Leasing scams and from that point, the war on corruption was almost irrevocably lost.

It is already a well-established premise in institutional literature that institutional changes occur in unpredictable fashion and are shaped more by immediate circumstances rather than some past historical factors (Bunce, 2003). Indeed, as Pzerworski (1991) argues, under democracy, there is no single person with the capacity
to prevent unfavorable outcome of the institutional change or elections. This is the basis upon which Pzerworski developed the notion that democracy is 'the institutionalization of uncertainty'. However, under authoritarianism, there is one person with the capacity to prevent outcomes that do not favor him/her - the authoritarian leader. To circumvent democracy, deep state actors try to transform democratic leaders to authoritarians so that election outcomes are predictable and their interests guaranteed. Evidently, it is harder for institutional reforms to occur if they are likely to hurt the interest of the deep state actors (Pzerworski (1991).

As Leyenaar and Hazan (2012:1) explain it, under such circumstances, it is expected that:

Both logically and rationally, electoral reforms should not occur because those who are in power - and thus are in a position to change the electoral system – obtained their positions through the existing system. For them, the current system is not only a winning arrangement; it also creates vested interests.

Moreover, writing in the same context, Nyong'o (2015:93) observes that:

In Kenya, however, the military and other armed instruments of the state – is part of the power elite and has increasingly integrated itself into the ruling class through close ethnic and business connections with powerful political elites… it is inconceivable that an election whose outcome threatens this elite compact can be tolerated by the army elite; hence the presence of the military during election counting and announcement in 2007/8 as well as 2013

Kimeu (2017) argues that what we call deep state also undermine public interest in four major ways. First, it creates a scenario where projects are identified in advance and the contractor predetermined long before the formal procurement process gets underway. In the circumstances, the tendering process is largely a public relations act done as a formality with the contractor already known. It has been observed for instance that by 2013 when President Kibaki’s term came to an end, 'Wanjigi [a private businessman] was running almost all government contracting behind the scenes, not just in infrastructure but also in the security sector where mind-boggling corruption is hidden under thick layers of secrecy' (Daily Nation Digital 2017 June).
In fact, 'Wanjigi is said to be one of the businessmen who benefitted heavily from security related contracts during president Kibaki's administration' (Daily Nation Digital 2017 April 2). To maintain his privileged status in the post-2013 elections, Wanjigi is said to have brokered the formation of the political alliance between Uhuru Kenyatta's The National Alliance (TNA) and William Ruto's United Republican Party (URP) in the run up to the 2013 elections. The resultant Jubilee coalition went on to win the 2013 elections. It is argued that he later fell out with Uhuru and Ruto when they denied him his usual role of prime agent for contractors in the SGR tender even though SGR was his brainchild. It was at this point and due to feelings of betray that he switched support to National Super Alliance (NASA) (Daily Nation Digital 2017 June).

The June 2017 Daily Nation Digital further reported that:
In a clear manifestation of state capture, Mr. [Jimmy] Wanjigi conceives of projects, or participates in the conception, gets government officials to own them, then he allies with Chinese companies which can secure infrastructure funding from Chinese Policy Banks particularly China Export Import Bank (Exim) and China Development Bank. For that he acts as local agent and gets between 9 - 25% of the contract sum.

But, who is Jimmy Wanjigi to have been able to do all these things? Wanjigi has been described as 'a continental oligarch… an almost impossibly wealthy tender oligarch, whose money affords him a degree of political influence, which has turned the Kenyan political class, intelligentsia and media into mere pawns in a corrupt chess game where the Kenyan economy is plundered like a chicken' (Daily Nation Digital 2017 June). According to multiple sources, 'Wanjigi was not an ordinary fixer… shrewd but self-effacing, Wanjigi's name was known to many Kenyans but few could pick him out in a crowd. Indeed, only one picture of him could be found in the library of the country's second largest newspaper [The Standard]' (Standard Digital 2017 April 2).

As the Citizen Digital reported on 18th December 2017:

Before the raid on his palatial home by the police on October 16 [2017], many Kenyans did not know much about one of the richest men in Kenya. [Wanjigi] has been at the core of Kenyan politics for a long time before falling out with President Kenyatta over the awarding of the Kenya Shillings 327 billion Standard Gauge Railway (SGR) tender and
was even described as “the most feared oligarch” by a section of the Kenyan media. During the raid on his home, the police recovered guns including a military grade M-16 rifle. However, a multi-agency team comprising of detectives drawn from the Special Crimes Unit, the General Service Unit and Flying squad failed to arrest him despite camping at his residence for 36 hours.

If Wanjigi’s identity is puzzling, the identities of other actors in major scandals are even more baffling. For instance, one of the alleged conspirators in the NYS scandal was 31-year old former casual laborer Ben Gethi. The other suspect in the scandal was Josephine Kabura who previously worked as a hairdresser. The scandal began to take root on 19\textsuperscript{th} February 2015 when the NYS director Nelson Githinji was stripped of the authority to make payments on behalf of NYS. These powers were transferred to his deputy, Mr. Adan Harakhe. The following day, Mr. Harakhe was introduced to the treasury as the new NYS chief accounting officer. This change signaled the final steps in putting together the NYS looting scheme. By March 2015 an estimated 791 million Kenya shillings had been lost through fraudulent manipulation of IFMIS by a corruption cartel in and outside the NYS. This loot was effected through various means including multiple payments to people with the same identification card which was used to defraud NYS of about 19.4 million Kenya Shillings (\textit{Daily Nation Digital}, 2016, November 11; \textit{Standard Digital}, 2016, June 13).

In an undated article titled, ’How Kenya sold her Soul to Cartels’, Oyunga Pala paints the picture of the Kenyan corruption cartels more lucidly and in broader terms, thus:

Kenya is a country run by cartels, who operate with the audacity of mosquitoes, dictating the pace; setting everyone up for another grumpy day…The cartels are composed of mystery nobodies who seem to have a hand in everyone's misery. No one knows them but everyone in authority seems to be on their payroll. They are masters of scandals. Devising new ways to fleece the general public is what keeps them up at night. [Their] dirty work is outsourced to the small fish, the foot solders kept ignorant and expendable. They are the easy links to cut and throw to the angry mob to satiate their thirst for justice. But, their most admirable quality is that they feel nothing for criticism nor have a shred of shame in their bones. No jail cell can hold them in. No court wants to get on their wrong side. It is smarter to take the money and weather the scandal. [After all], who needs a clean reputation when you can be dirty and still smell rich?
The Second way in which the deep state undermine public interest is that in most cases, 'the cost of execution will be exaggerated, meaning that the public pays way beyond the market value' (Kimeu, 2017). The exaggeration can occur in the form of over pricing of goods and services purchased or underpricing of the goods and services sold. As already shown, over pricing of the goods and services purchased was the hallmark of the Anglo-Leasing scandal. In contrast, the Grand Regency Hotel scandal involved allegations of underpricing of the hotel. It is possible that the hotel was sold at market value and a lower sale price reported to accommodate self-interests of corruption cartels. Other underpricing cases include overvaluation of the Eldoret Airport land, where the government lost 7.3 billion Kenya shillings, and the sale of the Milling Corporation of Kenya below market value occasioning loss of public funds totaling 400 million Kenya shillings (GOK, 2000). Similarly, Lake Basin Development Authority (LBD) is said to have inflated the cost of constructing LBD Mall in 2015 to the tune of 2.5 billion Kenya shillings (EACC, 2017a).

Thirdly, the quality of workmanship tends to be compromised to enable cartels maximize returns to their political investment. The cartels typically quote standard goods and services but after winning contract end up supplying or using substandard ones so as to pocket the difference. In fact, 'when public officials procure goods and services within corrupt environments, however, obtaining the best quality for the best price is rarely a primary concern. Rather, officials may be tempted to maximize their access to bribes and kickbacks. In this way, procurement becomes the gateway to fraud and corruption' (Berkman, 2013:35). Furthermore, low quality of workmanship especially in the construction industry calls for regular repairs and hence high maintenance costs.

Finally, public accountability often sinks under the weight of the deep state since the contractors who end up being awarded tenders have already compromised those who should supervise them. Indeed, empirical evidence from Kenya show that, 'when suppliers have “connections” through tall uncles, they do not care about the quality of the supplies because they believe they have sufficient protection from the godfather and therefore no one can touch them' (Sonye, 2014:96). In some cases obsolete or dysfunctional machinery are deceitfully procured. For instance, EACC investigations revealed that in 2015, Kenya Bureau of Standards procured faulty machines for printing imports standardization stickers worth 300 million Kenya shillings (EACC, 2017a).
One can also add to these the fact that this set up leads to situations whereby some contracts are signed and even paid for by public funds, yet the intended goods and services are never delivered at all. It has already been noted that the Goldenberg rip-off involved claims that Pattni received export compensation without exporting any gold or diamond from Kenya. Similarly, the 1994/5 Public Accounts Committee report also noted that during the same financial year, a businessman Ketan Somaia was paid 240 million Kenya shillings for security gadgets that he never delivered. At the same time, the EACC investigations revealed that the county government of Tana River paid a total of 55 million Kenya shillings to a supplier during the 2015/2016 financial year for non-delivered equipment and drugs for the Hola District Hospital (EACC, 2017a).

Corruption in Kenya has become so systemic that, even politicians loathe legal and institutional reforms that limit the scope for corruption especially during elections. It is not startling that just before the 2017 elections, the Kenyan legislators inserted Article 1(a) to the Election Campaign Finance Act (ECFA) to shelve its implementation until after 2017 polls so as to freely fundraise and spend campaign funds without accountability. As the International Crisis Group (2013: 8-9) notes, this selfish behavior replicates what the legislators did in the run up to the 2013 elections:

Parliamentarians have blocked or watered down bills that could affect their reelection. They did not approve an important act on campaign finance before the Assembly’s term expired on 14th January 2013…They also passed an amended Leadership and Integrity Act on 22nd August 2012, lowering the ethnical criteria required to run for public office, and removing the requirement for candidates to declare their wealth, acknowledge pending criminal cases, and be vetted by the Ethics and Anti-Corruption Commission…in December 2012, parliamentarians also suspended enforcement of academic qualifications and integrity preconditions for candidates willing to run in the March [2013] elections.
9.1 The Deep State and Appointments to Governance Institutions

9.1.1 Overview of the Appointments

As Omtata observes, one of the mechanisms through which state capture is often executed is the manipulation of the process of appointing public officers. This is typically done to ensuring that only those who will gate-keep for the corruption cartels succeed in occupying offices that are strategic to their interests. A close look at appointments to key governance institutions in Kenya reveal a trend where, despite stringent requirements, the appointments tend to be controversial, lacking in merit and based on patronage. This often results into appointees who cannot inspire public confidence due to integrity deficits, even if the allegations against them are unproven. It is notable for instance that before the 2010 constitutional dispensation, 'successive presidents have never felt the need to consult anyone while appointing individuals to constitutional offices...as a result, important constitutional offices have been occupied by questionable characters, including declared bankrupts' (Kameri-Mbote and Migai, 2011:56).

9.1.2 The Appointment of Ndegwa Muhoro to head Directorate of Criminal Investigations

One of the interesting cases of appointment to key governance institutions was the appointment of Francis Ndegwa Muhoro as head of the Directorate of Criminal Investigations (DCI) in 2012. One keen observer has noted for instance, that 'how he [Ndegwa Muhoro] survived the years as Kenya's senior-most detective is worth a study because his woes set in even before he was appointed to take charge of the Office of Director, in the Directorate of Criminal Investigations' (Daily Nation 2016, March 20). Among those opposed to his appointment was the Independent Policing Oversight Authority (IPOA) which accused him of having integrity issues.

One of the allegations against Muhoro had to do with abuse of office in a family tussle between Ms. Jane Wanjiru Iriga and her step-daughter Ms. Ann Wambui Iriga over ownership of 400-acre coffee estate in Murang’a. The latter had accused the former of forging share transfer forms. The initial report of the Chief Documents Examiner at the Criminal Investigations Department who was also an Assistant Commissioner of Police Emanuel Kenga showed that the documents were not forged. However, Muhoro is
alleged to have intervened and had Kenga alter his facts to show that the document was forged. This was calculated to confer benefits to Ann who was a girlfriend to his close friend, Mr. Fredrick Kirubi. In the process, he is said to have engineered the transfer of three senior police officers, investigating the case. Specifically, it was alleged that a day after Kenga made his report, Mr. Kirubi visited his office together with Muhoro's personal assistant and offered him a bribe of 100,000 Kenya Shillings to change the report. Kenga after declined and two weeks later was transferred from the CID headquarters to the then Nairobi city council's department of investigations and information services (Daily Nation 2018 January, 7; Standard Digital 2013 February 1). In yet another incidence, Muhoro was accused by a Nairobi lawyer Ahmednassir Abdullahi of receiving 300-acres of land and cash in exchange for exonerating a suspect from a case. As fate would have it, Ms. Jane Wanjiru Iriga faced another charge of forged title in respect of a beach property in Kikambala. The allegations were investigated by a MR. JK Muthui. When the officer cleared her of the allegations, the officer was swiftly transferred to Bura in Tana River. At the end of his tenure, his critics disclaimed that 'under Mr. Muhoro, the DCI has been discredited for bungled investigations, collusion with suspects and suspicious disappearances and murders' (Daily Nation 2016 March, 20).

9.1.3 The Appointment of Keriako Tobiko as Director of Public Prosecutions (DPP)

A similar scenario was witnessed in the appointment of Keriako Tobiko as the Director of Public Prosecutions (DPP) in June 2011. The appointment was challenged in the High Court by a civil society group claiming that Tobiko is acutely deficient in competence, impartiality and integrity (Daily Nation 2011, June 16). Even after nearly a year, the opposition still lacked kind words for Tobiko. Indeed, debates about him found its way to the floor of the Kenya National Assembly. The Hansard Records (2012, April 25) reported the Gwasi legislator John Mbadi saying that:

I remember very well when I was objecting to the appointment of Mr. Keriako Tobiko. I suspected that this independent office was going to be misused by some politicians to further their political agenda. I have now confirmed that the vigor with which certain individuals pushed for the appointment of the Director of Public prosecutions was to help them in furthering their political agenda.
9.1.4 The Intrigues in the Appointment of IEBC Commissioners

The appointment of Wafula Chebukati as chairman of the Independent Electoral and Boundaries Commission (IEBC) is a classic example of how merit is often sacrificed at the altar of self-interest and political expediency in the selection process. Of the nine candidates who applied for the position of chairman, Chebukati is said to have been the second last with a score of 63% compared to 77% for top candidate Tukero Ole Kina. Hence, his selection occasioned so much discontent that 'the panel had a hard time explaining how or why they by-passed candidates believed to be better qualified for Chebukati, whose score, it was claimed, was the [second] lowest' (Kenya Broadcasting Corporation Online, 2017 January 3).

Besides his low scores at the interviews, Chebukati had other factors working against him. First, Chebukati comes from Trans-Nzoia County just like IEBC chief executive officer, Ezra Chiloba. Therefore, appointing him as IEBC chairman undermines the requirement for regional balance in public appointments. Secondly, his partisanship was questioned from two fronts. The opposition feared that he was close to the deputy president William Ruto, having worked with Ruto's legal advisor, Korir Sing'oei, in the same law firm. The other side viewed him as being close to the ODM Party on whose ticket he contested and lost the Saboti parliamentary seat in 2007. In fact, he only resigned from ODM shortly before applying for the position. Either way, his political impartiality was in doubt and hence unsuitable as the arbitrator in the elections.

Thirdly, Chebukati was perceived in legal circles as conservative non-reformist lawyer who even defended prime suspects in mega-corruption scandals. Indeed, he was the lawyer for the former EACC director, Philip Kinisu, in a corruption case in which the latter (through Esaki Company) is said to have received 35 million Kenya shillings of the NYS loot. In response to the allegation, Chebukati took refuge in the tired adage that representing a “thief” does not mean you are one. However, by choosing to defend an alleged perpetrator of corruption, Chebukati *ipso facto* sacrificed the pursuit of public good at the altar of personal gains. This in effect projected him as a man who is deeply engrossed in personal interest even at the expense of public interest, and who therefore cannot stand for the latter when it clashes with the former. Such a person could only be a disastrous choice to superintend a very high-stakes institution like the IEBC.
Finally, Chebukati had professional negligence tag hanging over his head for failing to diligently represent a client. His law firm, Cootow and Associates Advocates, was contracted by the City Council of Nairobi (CCN) in a suit filed against it by Salima Enterprises regarding ownership of Westlands market. It is said that Chebukati attended all court hearings and even filed a memo of appearance but did not file defense on behalf of his client. As a result, the public lost 325 million Kenya shillings which the Court ordered CCN to pay to Salima Enterprises. Chebukati brushed aside these accusations by blaming CCN for failing to furnish him with the crucial information to defend the case, despite making several requests. However, if this was true, it would have been more prudent for him to pull out of the case rather than hang on without defending his client.

The other commissioner whose integrity raised serious questions was Consolata Nkatha Maina, who is alleged to have a criminal case in which she is accused of defrauding National Museums of Kenya a sum of Kenya Shillings 280 million. Her appointment was more interesting since multiple sources indicate that she was ranked last by the interviewing panel, with a score of 55%. Yet, the top candidate for the positions of IEBC commissioners, Zephaniah Okeyo Aura who scored an impressive 80% was pompously left out. She went on to become IEBC vice-chair.

The uproar that greeted the choice of commissioners, especially Chairman Chebukati and Maina, was serious enough to force the chair of selection panel, Bernadette Musundi, to respond that:

The attention of the selection panel has been drawn to reports appearing in various media concerning some of the persons selected by the IEBC selection panel…in particular, there have been various allegations in the media concerning the suitability or otherwise of Mr. Wafula Chebukati and Ms. Consolata Maina for appointment to the positions of the chair and members of IEBC respectively… the panel wishes to state that those allegations were not brought to the attention of the IEBC selection panel by any person (Standard Digital 2017 January 4).

With Kenya boasting of one of the best trained and equipped intelligence networks in the region, it is doubtful that these shortcomings escaped the attention of the appointing authority. It is more plausible to argue that these shortcomings were known but counterbalanced by the candidate's willingness to ultimately serve the self-interests of
the appointing authority. Indeed, Incumbents seeking re-election or trying to impose preferred successors prefer that such sensitive institutions are manned with the sort of personnel whom they can manipulate to serve their self-interests.

To have a better understanding of the intrigues of the selection process, table 2 shows how IEBC selection panelists graded five of the candidates for the position of commissioners. It must be emphasized that the table includes only the candidates for which data is available.

**Table 2: Grading of Candidates by the IEBC Selection Panel.**

<table>
<thead>
<tr>
<th>Selected IEBC Candidates</th>
<th>Mary Sorobit</th>
<th>Evans Monari</th>
<th>Olga Karani</th>
<th>Tom Mbaluto</th>
<th>David Oginde</th>
<th>Bernadette Musundi</th>
<th>El-Busaidy</th>
<th>Peter Karanja</th>
<th>Mohan Lumba</th>
</tr>
</thead>
<tbody>
<tr>
<td>Shava</td>
<td>73%</td>
<td>72%</td>
<td>42%</td>
<td>67%</td>
<td>71%</td>
<td>61%</td>
<td>69%</td>
<td>67%</td>
<td>75%</td>
</tr>
<tr>
<td>Khangu</td>
<td>66%</td>
<td>57%</td>
<td>77%</td>
<td>82%</td>
<td>72%</td>
<td>75%</td>
<td>82%</td>
<td>64%</td>
<td>71%</td>
</tr>
<tr>
<td>Odede</td>
<td>75%</td>
<td>71%</td>
<td>82%</td>
<td>79%</td>
<td>79%</td>
<td>75%</td>
<td>81%</td>
<td>72%</td>
<td>83%</td>
</tr>
<tr>
<td>Taib</td>
<td>80%</td>
<td>83%</td>
<td>40%</td>
<td>72%</td>
<td>75%</td>
<td>65%</td>
<td>87%</td>
<td>64%</td>
<td>80%</td>
</tr>
<tr>
<td>Mwangangi</td>
<td>61%</td>
<td>74%</td>
<td>63%</td>
<td>85%</td>
<td>73%</td>
<td>72%</td>
<td>76%</td>
<td>57%*</td>
<td>67%*</td>
</tr>
</tbody>
</table>

Source: Author's configuration of data in *Standard Digital* 2016, December 31. Scores in asterisks are estimated.

It is evident that there was a disappointingly very low degree of agreement among the panelists regarding the suitability of the candidates. Indeed, an analysis of the data reveal a low Kendall's coefficient ($W= 0.229$; $\chi^2 = 8.25$; $\alpha = 0.083$) and an equally low Kruskal-Wallis rank sum test ($\chi^2= 11.97$; df = 8; $\alpha = 0.15$). The dissonance within the panel is partly due to the fact that it seemed to lack objectivity and autonomy as it comprised of the representatives of political parties and multiple stakeholders with very divergent views and entrenched interests in the outcome of the process. While in theory there were principles guiding the selection of candidates, in reality, the panelists seemed hell-bent to sacrifice merit at the altar of some non-merit factors. It is notable for instance, that Ali Taib was ranked first by three panelists (Sorobit, Monari and El-Busaidy), but ranked last by one panelist (Karani). Ironically, Taib got both the highest grade awarded by any panelist (87% by El-Busaidy) and the lowest grade awarded (40% by Karani).
To clarify the foregoing, I performed *Item Cluster Analysis* whose results are shown in figure 7.

The item cluster analysis reveals that the IEBC Selection panel was not an item in the sense that it was not a watertight seamless group, objectively assessing and grading the applicants. Instead, it reveals serious fissures, confusion and inconsistency among panelists regarding the suitability of the applicants for the positions of IEBC Commissioners. It is clear that there were at least three distinct streams of thinking that informed the grading of the applicants. The first axis comprise of Sorobit, Lumba, Karanja, Oginde and Busaidy ($\alpha = 0.86; \beta = 0.69$). The second axis comprise of Musundi, Karani and Mbaluto ($\alpha = 0.95; \beta = 0.91$). In the third axis is Monari, whose grading was strikingly different from the rest. Monari's grading run in opposite direction to that of the Musundi axis so that candidates who received higher scores from the Musundi axis, tended to receive lower scores from Monari. Thus, each axis seemed motivated by its own set of factors. It is possible that competing interests external to the panel contributed to this discord. In the clustering of panelists, it is clear that Musundi, Karani and Mbaluto had the strongest inter-panelist concord followed by Sorobit, Lumba and Karanja ($\alpha = 0.92; \beta = 0.87$).
With such biased selection panel, the recruitment of credible IEBC Commissioners was bound to be a mirage. In fact, given the manner in which Chebukati and his team of IEBC Commissioners came to office, it is hardly surprising that they presided over shambolic presidential elections in August 2017 which became the first presidential elections to be nullified in the whole of Africa.

9.2 Deep State and Public Accountability: The Case of the Auditor-General's Office

The Office of the Auditor-General is an independent constitutional office created under Article 229 of the Constitution of Kenya (2010). It has a direct anti-corruption mandate relating to the enforcement of public accountability. It does this through scrutiny and reporting on the accounts of all publicly funded government agencies. Yet, it is this public accountability that deep state actors often seek to undermine. Consequently therefore, the activities of the Auditor-General run contrary to the schemes of the deep state actors. The Auditor-General's office needs adequate legal, financial, administrative and professional autonomy to execute its constitutional mandate. Indeed, its legal autonomy is guaranteed by the Constitution which provides that the Auditor-General serves for a one term of eight years and can only be removed as specified in Article 251.

According to Mr. Gichana, the office also enjoys administrative and operational independence in that it can hire and fire its staff without external interference. The challenge comes in terms of financial independence since some of the institutions that it is supposed to audit include the treasury and the legislature which determine its funding levels. Moreover, the individual auditor's professional independence in undertaking the audits can be compromised by deep state actors. In fact, the office often faces budgetary constraints including budget cuts. This undercuts its effectiveness since it can neither hire enough staff nor support skill upgrading. In addition, since they undertake the audits in the premises of the agencies being audited, their success also to a very large extent depends on the good will of the same agencies. According to Ms. Milcah Ondiek, 'the office of the Auditor-General has been under serious constant attacks in executing its accountability work. For instance, there were attempts to water down its powers in the Public Audit Act but the Court nullified the proposed changes which it declared as unconstitutional'.

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15 Ms. Ondiek represented the office of the Auditor-General during the stakeholders' validation workshop on 24th May 2018 at Sarova Stanley Hotel, Nairobi.
Ms. Ondiek adds that Auditor-General's Reports take too long to be looked into by the National Assembly, yet the Auditor-General's Office has no powers to follow up on the implementation of its reports. Moreover, although the creation of county governments and a bicameral legislature widened the mandate of the Auditor-General's Office, it has largely been starved of resources. In fact, empirical evidence indicate that whenever the Auditor-General's Report exposes or seeks to expose scandals, the Office of the Auditor-General often face threats of budget cuts or removal of key officers from office despite security of tenure. Indeed, as Mr. Gichana, notes 'Whenever, Auditor's reports question legislators, they often react against the Office of the Auditor-General'. He also cites an instance where, 'the legislature enacted laws to trim powers of the Auditor-General's office only for the Courts to declare the laws unconstitutional... There were also attempts to stop the office from auditing certain aspects of the security'.

Another incident is depicted in the predicament of Auditor-General, Edward Ouko. In October 2016, the Auditor-General was following leads on Eurobond scandal. Kenya had raised nearly 2 billion Kenya shillings from the Eurobond, but there were allegations that the money was used fraudulently, with some suggesting that the money never reached Kenya. Mr. Ouko therefore intended to travel to the US to pursue the matter with the Federal Reserve Bank of New York. On October 17 2016, President Uhuru Kenyatta openly chided him over the move, arguing that it amounted to suggesting that the Governments of Kenya and the US colluded to defraud Kenya of Eurobond cash. This was a strong message to the Auditor-General that he was alone in the quest to unearth the Eurobond saga without the president's blessings or political good will behind him.

Three days later, on October 22nd 2016, EACC announced that it had completed investigation on procurement irregularities which the office of the Auditor-General is alleged to have engaged in sometimes in 2013. Specifically, the office of the Auditor-General was accused of single-sourcing audit Vault software and inflating its cost from 18 to 100 million Kenya shillings. This was an obvious act of intimidation calculated to silence the Auditor-General. In essence, he was being “reminded” that he is not cleaner than those he is pursuing for 'stealing' Eurobond money. The timing of this notice betrayed EACC's lack of independence and appeared premeditated to warn the Auditor-General of possible prosecution if he continued to pursue the Eurobond scam.
It is instructive to note that even as EACC was trailing its guns on the Auditor-General, more fraud was being planned elsewhere. On 25th October 2016, the *Business Daily* reported a scheme in which corruption cartels had hatched a plot to loot 5 billion Kenya shillings from the Ministry of Health. When the cartels realized that the scheme leaked to the *Business Daily*, they rushed and bought all the papers and ensured that by 6.30 am there was no *Business Daily* in circulation. This forced Nation Media Group to back up its website to avert possibilities of hacking, and to reprint the papers to take care of the interests of advertisers (*Business Daily*, 2016 October 26).

Despite intimidation, the Auditor-General continued with his work and on the 8th January 2017, he revealed that the Integrated Financial Information System (IFMIS) which the government was implementing had serious flaws which expose it to the risk of fraud and misuse. On February 3 2017, the Director of Public Prosecutions cleared the Auditor-General of alleged misuse of office and corruption. However, this bill of health was short-lived. On 24th February 2017, Emmanuel Mwangona, possibly acting at the behest of corruption cartels, filed a petition in the National Assembly seeking Ouko's removal from office. He accused the Auditor-General of the *audit Vault software* affair, irregular hiring of staff, and failing to submit annual reports to the National Assembly and the President. The Speaker of the National Assembly, Justin Muturi, processed the petition with unprecedented speed of lightening, and submitted it to the Finance, Trade and Planning Committee within a record four days (February 18 2017).

Immediately thereafter, a civil society activist, Okiya Omtata moved to the high court to stop National Assembly from hearing the petition against Ouko. He argued that 'over the past few months, there has been a campaign by senior members of the executive and the legislature to harass and remove [Ouko] from office. It is in the public domain that [Ouko] is a marked man for diligently performing his duties under the law' (*The Big Issue*, 2017 February 24). Justice Chacha Mwita granted Omtata's request. The National Assembly did not relent and through the speaker, threatened to move to the Court of Appeal on March 21 2017 to challenge the orders of the High Court. From this point, the Auditor General complained of political interference with his office, noting that 'the political class and the executive were not pleased with his work of exposing corruption in Kenya, culminating in a bid to oust him' (*Daily Nation*, 2017 May 8).
This was not the only instance in which the office of Auditor-General was being intimidated for exposing misuse of public funds. Way back in August 2015, the Auditor-General claimed that there were constant threats on the senior staff in his office after audit reports found that several government ministries and departments could not account for a total of 67 billion Kenya shillings for the financial year 2013/2014. The Ministry of Health reported the biggest loss of 22 billion Kenya shillings (Citizen Digital 2015 August 8). Thereafter, senior government officers were reported to be working with members of the National Assembly to impeach the Auditor-General Edward Ouko over his claims that 67 billion Kenya shillings had been lost (Standard Digital 2015 August 12). In this particular case, the executive and the legislature were more interested in defending the image of the government rather than protecting public interest and public funds.

9.3 The Deep State and the Electoral Process

9.3.1 Deep State and the Independence of IEBC

Against this backdrop, it is hardly surprising that 'some of the IEBC decisions have raised doubts regarding its independence' (Away, 2016: 97). There are many instances where IEBC's actions, individually and in collaboration with other supposedly independent institutions, betrayed it as a Commission acting in the interest of, or seeking to please, or reward corruption cartels that may have put it in office. First, IEBC ignored EACC's advice to exclude 106 political aspirants facing graft charges from contesting the 2017 elections, and went ahead to clear them to run. This was in disregard of the ruling by the High Court judge justice Mumo Matemu that 'the constitutional standards of integrity did not need to rise to the level of criminality, and unresolved questions of candidate's character would suffice to make them fail integrity test' (Okoth, 2015:276).

Secondly, a few hours after an IEBC Commissioner, Roslyn Akombe resigned from IEBC, the chairman Wafula Chebukati issued a terse statement, threatening to resign, claiming that political interference with the commission will derail repeat presidential elections which were pending. However, four days later, on October 23, 2017, he met with candidate Uhuru Kenyatta in the latter's Harambee House office ostensibly to discuss election-related issues. This was after his invitation to Kenyatta and Raila Odinga to his IEBC office was honored by the latter but snubbed by the former. Ideally, if IEBC is as independent as it should be, then it is Chebukati and not Kenyatta who should convene such meetings at the IEBC offices, and not vice versa. Moreover, it was after the meeting that he changed tune, claiming that all is now set for credible elections.
Thirdly, IEBC has been accused of being less transparent than its predecessor electoral agencies, especially the ECK. For instance, it has been noted that ‘while the ECK used to make public the results of most of its electoral exercises, the IIEC and the IEBC have been a bit opaque in this regard’ (Aywa, 2016:116). IEBC’s attempts to procure Biometric Voter Register (BVR) system revealed lack of transparency and turned out to be yet another scandal resulting in public furor. Indeed, ‘the process of acquisition of the BVR system was marred with such opacity and controversy that it seriously damaged [IEBC’s] image and disrupted its election planning’ (Aywa, 2016:118). Consequently, the Executive took over the procurement matter and entered into a government to government contract with Canada which then supplied the kits through a French firm, Safran Morpho. In essence, ‘as the BVR procurement process shows, the IEBC is also not wholly immune from the pernicious influence of corruption cartels’ (Aywa, 2016: 98).

Finally, the way IEBC handled several aspects of the repeat presidential elections of 26th October 2017 depicted its lack of independence. The initial repeat date of 17th October 2017 appears to have been set by the Jubilee government and not IEBC. On 4th September 2017, the government through the Education Cabinet Secretary Fred Matiangi requested IEBC to hold elections by that date to avoid interference with national high school examination schedule. The following day, IEBC set the election date exactly on 17th October 2017. Similarly, the inclusion of Cyrus Jirongo in the repeat poll has all the ingredients of a conspiracy. Jirongo was declared bankrupt on 9th October and his name omitted from the list of candidates gazetted by IEBC four days later. Yet, his name was in the first batch of ballot papers which arrived on 21st October. This means that Jirongo's name was illegally in the ballot papers since his bankruptcy had not been set aside. The Court was then roped in to sanitize the design by suspending his bankruptcy on 24th October - two days after printed ballot papers with his name arrived (Daily Nation 2017 October 9-24).

9.3.2 Deep State, the Judiciary and the Electoral Process

A significant change is discernible in the conduct of the Judiciary from the time it nullified the presidential elections held on October 8th 2017 to the time it validated the repeat elections held on 26th November 2017. The timid and hapless Judiciary that validated the repeat poll is a pale shadow of the independent and valiant Judiciary that nullified presidential elections for the first time in Africa. In between the nullification
and the validation, the Judiciary seems to have lost its independence and acted more as a clearing house to guarantee the re-election of the incumbent.

To forestall a case seeking to stop the repeat elections, five of the seven Supreme Court judges unprecedentedly boycotted the Court on the hearing day, which was just a day before the repeat elections. The failure to offer cogent explanations for this act of judicial sabotage opens it up to several interpretations. It is possible for instance that the evidence in favor of stopping the repeat polls was inordinately compelling, but the judges were scared out of their wits by threats from deep state actors who wanted it thrown out. This scenario may have compelled the judges to chicken out rather than making a professionally shaky ruling and put their reputations on the line.

The intimidation theory seems to rest on some solid empirical foundations. First, a day before the boycott and two days to the repeat polls, the driver/bodyguard of the Deputy Chief Justice (DCJ) was shot and fatally wounded. This was designed to, and actually succeeded in, intimidating her to the point of not showing up in Court. While explaining lack of quorum in the Court, the Chief Justice noted that 'following the events that happened last night (the shooting), the DCJ is not in a position to come to Court' (The Standard Newspaper, 26th October, 2018). Secondly, the ruling Jubilee party resorted to vilification and pressurizing the judiciary for nullifying the elections. None other than the President himself labeled the nullifying of the elections as “a judicial coup” and warned the Judiciary with a heavily overloaded phrase, “We shall revisit [the judiciary]”.

The Judicial boycott therefore, seems to be part of a synchronized design calculated to clear any hurdles which threatened to derail repeat elections. Notwithstanding the merits of the case, the refusal of the Judges to show up in the Court cannot be explained otherwise. In fact, the defense lawyer, James Orengo noted that 'lack of a quorum in the Supreme Court is not by coincidence. The gazettement of October 25 as a public holiday was part of a plot to ensure that the case will not be heard' (The Standard Newspaper, 26th October, 2018).

The inability of the Supreme Court to constitute a quorum for the repeat polls case is a serious indictment on the leadership of the Supreme Court President who is also the Chief Justice, David Maraga. It is his duty to convene the Court and whip Judges to participate in the hearing of cases as scheduled. Yet, after failing in this leadership test, Maraga was calculatingly televised live voting in the repeat polls, thus giving it a seal of
approval. Voting in the repeat elections against a background of a judicial boycott of a case against that election, and a political boycott of the election itself by the main opposition outfit, National Super Alliance (NASA), raises eyebrows on whether Maraga, and by extension the judiciary, was still sufficiently politically neutral.

Judges have also refused to excuse themselves from hearing election petitions and corruption-related cases even where they are evidently conflicted. It should be noted that 'conflict of interest is a situation in which an alien or undue interest could improperly influence the public interest activities and decisions' (Peters, 2012:28). For instance, Justice Jackstone Ojwang clearly had a visible conflict of interest in the three presidential election petitions of 2013, August 2017 and November 2017. His wife, Prof. Collette Suda sought the ODM ticket for Senator Seat in Migori County in the 2013 elections. After failing to secure the nominations, she severed links with ODM, joined Jubilee and was appointed as the Principal Secretary in the Ministry of Education in charge of Higher Education by the president. She held the position up to and including the petition time. It is humanly unlikely that Justice Jackstone Ojwang could rule in favor of ODM which 'denied' his wife nominations at the expense of Jubilee which eventually gave her a job. Accordingly, Ojwang had a visible interest in election outcomes. Ruling against Jubilee is like rendering his wife jobless. It is thus understandable that his rulings in all the petitions predictably favored Jubilee. In one case, he was among the two dissenting opinions.
10.1 While the opportunities for corruption seem to be limitlessly open, the cost of involvement in corrupt behavior is generally low in Kenya. Rarely do corruption suspects get prosecuted. In fact, the probability of mega-corruption occurring is much greater than the probability of a mega-corruption suspect being successfully prosecuted in Kenya. Therefore, there is urgent necessity to make corruption more expensive and less attractive by reducing the opportunities for it, while increasing its cost. Indeed, only 'if and when the cost of corruption far outweigh the benefits, many will be deterred and desist' (Kivuva, 2013:47). This requires elimination of bureaucratic red tape, addressing institutional malfeasance, injecting political good will and promoting a sense of duty, efficacy and ethics in public service delivery. There is also need for stiffer penalties for corruption-related cases, compulsory recovery of corruption proceeds, naming and shaming the corrupt, and barring the corrupt from holding public or elective office for the rest of their lives. As pointed out by a renowned economist Robert Shaw, 'naming and shaming is one of the best deterrents against corruption. Without some elements of shaming, many people may consider corruption and economic crime a worthy economic risk' (Tuta, 2005:185). It is thus important for EACC to periodically publish names of corruption suspects in media of wide circulation.

10.2 The vetting of candidates for appointments to the key democratic institutions in Kenya is increasingly becoming a mere public relations ritual with symbolic rather than real value. As a result, people of dubious characters and endowed with serious integrity deficit find their way into public offices, including the very offices that are directly involved in the fight against corruption. As Rev. Dr. Timothy Njoya notes, 'an examination that everyone passes is not an examination and likewise a vetting where everyone is cleared is not a vetting'. There is need to reverse this trend and insist on thorough vetting of appointees to key governance institutions including their personal friendship and business links with the interviewing or appointing authorities. When fresh evidence emerges on past inappropriate conducts of current state officers, particularly those whose offices relate to the fight against corruption, they should stand suspended till allegations against them are fully and diligently investigated and concluded. It is equally important to test the competence, integrity and objectivity of the panels that appoint public office-holders since a corrupt panel cannot be expected to select a set of clean
commissioners or public officers.

Gladwell Otieno lays bare a very important dimension that must always be taken into account in vetting. According to her, “it takes the courage of individuals and key decision-makers in the government agencies to resist the temptation to succumb to the whims of corruption cartels”. For instance, she points out that the Auditor-General, Mr. Edward Ouko, has been able to arduously hold on against intrusion into his work by corruption cartels due to his professional background which makes him highly respected in his profession. For such people, the trepidation of being sacked for exposing cartels is minimal since they would get another better job instantaneously. Furthermore, she notes that personal values are imperative. For instance, John Githongo opted to exit office because he priced dignity over quick riches. Similarly, the Chief Justice Maraga's courage to lead the Supreme Court to a historic nullification of presidential elections is largely attributed to his fidelity to the doctrines of the Seventh Day Adventists Church. She concludes that “what we need are strong shared values not necessarily more laws or institutions”.

10.3 A major reason why corrupt people seem to leave vetting rooms cleaner than they actually are is the reluctance of corruption victims and witnesses to give evidence and support corruption claims against interviewees during the vetting process. This disinclination to provide evidence is also what makes corruption cases collapse due to lack of evidence and is largely due to the fear of possible repercussions for the witnesses. Furthermore, lack of safety guarantees for potential corruption whistleblowers serve as a disincentive to those willing to expose the corrupt deals and individuals. Therefore, the Witness Protection Act should be reviewed and the witness protection agency strengthened to protect corruption witnesses and whistleblowers. There is also need for civic education to enhance public awareness on the availability of witness protection agencies. This is very critical because 'in most cases of prosecution for corruption and economic crime, most of the witnesses are usually workmates or even good friends of the accused person. Some witnesses are accomplices or argent provocateurs…' (Tuta, 2005: 226).

10.4 As it is today, the wealth declaration regime in Kenya is more of a public relation biannual ritual. There is no indication that follow ups are ever made to verify the accuracy of declarations made or to question sudden change in one's wealth status. It is simply a
self-reporting exercise without any traces of accountability. Ironically, while some people have been charged for failure to submit the wealth declaration forms in time, there are no known cases of people charged for failure to disclose part of their wealth. Moreover, the current situation cannot detect wealth held in trust by relatives or friends who are not in public service. Yet, nothing prevents public officers from registering assets from corruption proceeds in the name of relatives or friends who are not public employees. To address these loopholes, there is need for more stringent wealth and asset declaration measures, including publicizing the wealth declared by public officers. As Kegoro notes, 'public officers are trustees of a serious kind and must bear the onus of a public disclosure to foster public trust in officials entrusted with their wealth' (Tuta, 2005: 196). Private sector employees should also be required to declare wealth. Moreover, failure to declare ownership of asset should *ipso facto* amount to forfeiting the asset to the state, while concomitantly attracting penalty equivalent to the cost incurred in investigating ownership of the undeclared asset as well as the current monetary value of such asset. Knowing and failing to report known or suspected cases of inaccurate declaration of wealth should be criminalized. The wealth declaration forms should be redesigned to go beyond declaration of wealth to explaining how the wealth was acquired. This should be undertaken alongside serious lifestyle audit of all public officers and their relatives. In addition, as Justice Ongudi noted, there is need to undertake evaluation of the wealth declared by comparing current and previous wealth declarations and seeking explanations for substantial increases in wealth. Otherwise, 'the wealth declaration exercise becomes more of a register of secrets with little or no provision for meaningful scrutiny' (Tuta, 2005:196).

Indeed, in a recent interview, Mr. Halakhe Wako, the chief EACC Executive Officer¹⁶ lamented the way the wealth declaration forms are kept confidentially, noting that,

*Wealth declaration is done through the Public Officers Ethics Act, but unlike in other countries where declarations are made public, in Kenya, the declarations remain secret. Even EACC faces obstacles in accessing this data when they need it in their investigations.*

10.5 The anti-corruption legal regime needs to be screwed more tightly by criminalizing the protective sideshows by corruption suspects. In this case, I propose a strong

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¹⁶ Mr. Halakhe Wako is the EACC chief Executive Officer. He made the remarks while being interrogated by a Senate Committee on the Citizen Television on 6th June, 2018.
advocacy to review ACECA to insert a provision that 'anyone, in public or private, acting alone or with others, who willfully and consciously express support or solidarity with someone who is accused of corruption before investigations into his corruption allegations are complete, and or before the case is heard and determined by a competent court of law, commits an offence punishable under ACECA'. Private businesses convicted of corruption-related crimes should also be instantly deregistered. In light of Justice Ongudi's sentiments, Section 48 of ACECA should be amended to fix the minimum and maximum sentences for corruption to prohibitively very high penalties.

10.6 There is need to develop a general handbook or set of sector-based handbooks on various services provided by the government detailing where to find them; the process of obtaining them; the requirements; and cost where necessary. This will enhance public awareness for their rights and entitlements, while at the same time limiting opportunities and scope for corruption. There are many instances where people are deluded into offering bribes because of not being properly informed. For instances, many traffic offenders pay hefty sums of money as bribes to the traffic police than the penalties prescribed in the Traffic Act Cap 403. Alternatively, citizen awareness program series should be mounted in local media in lieu of the handbook either by civil society organizations in collaboration with development partners and agencies, or by the government.

10.7 The independence and autonomy of all governance institutions should be strengthened, especially those institutions dealing with prevention, investigation, prosecution and adjudication of corruption. This is particularly important in light of the observation that 'corruption can be minimized if institutions are transparent, public scrutiny is high, and the law and administrative process demand accountability from public officials for their actions' (Cohen et al., 2007: 34).

10.8 The electoral reform agenda should shift from short-term miscalculations and pay sufficient attention to electoral system which is the greatest missing link in Kenya's electoral process. There is need to consider a shift from the F-P-T-P to a more distributive electoral system such as the Alternative Voting System.
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