



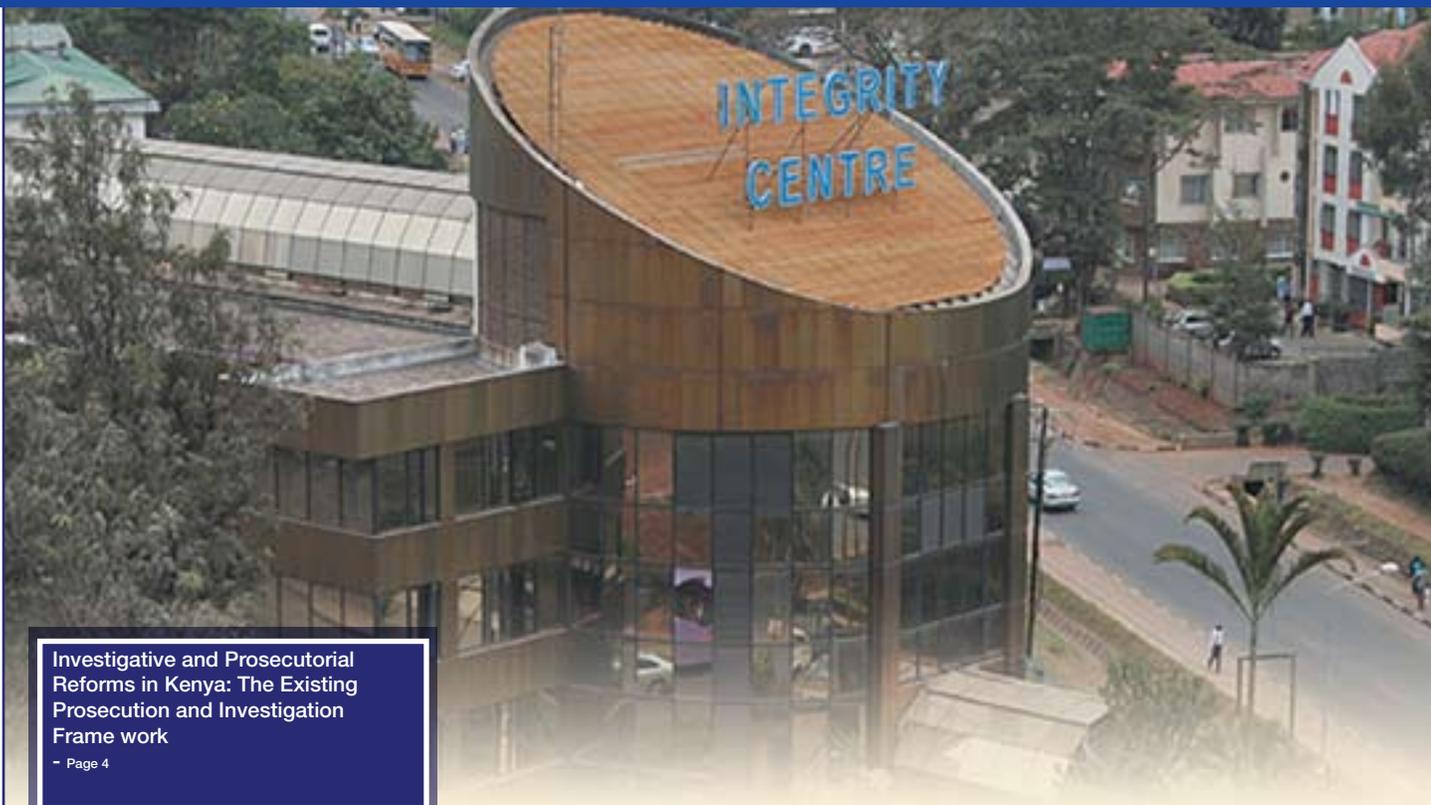
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Investigative and Prosecutorial Reforms in Kenya: The Existing Prosecution and Investigation Frame work

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Quote of the Month

Some experts do not think that the KACC is entirely hapless. The right to prosecute is the sole prerogative of the Attorney General. But in reality, the police, labour officers, immigration personnel, NSSF prosecutors and public health prosecutors carry out the prosecutorial functions in our courts day in, day out. Why not KACC?

TO GIVE OR NOT TO GIVE PROSECUTION POWERS TO KACC: Some Arguments Against

By Philip Kichana

Background

Kenya has had an anti-corruption legislation from 1956. **The Prevention of Corruption Act Cap. 65** of the Laws of Kenya, was in operation from August 1956 to May 2003.

Initially, the Prevention of Corruption Act was enforced by the Police Department in the early years. Corruption grew over the years despite the existence of the **Prevention of Corruption Act**. An effort was made to establish in 1993 an Anti-Corruption squad

within the Criminal Investigation Department of the Force, but the squad was disbanded before it could make an impact 1995. The **Prevention of Corruption Act** was amended in early 1997 to provide for the establishment of the **Kenya Anti-Corruption Authority (KACA)**.

The first Director of KACA, Mr. John Harun Mwau was appointed in December 1997. The second Director of KACA, Justice

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To give or not to give prosecution powers to KACC: Some arguments against

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Aaron Ringera was appointed in March 1999. However, the High Court in the case of **Gachiengo v. Republic** made a ruling that the existence of KACA undermined the powers conferred on both the Attorney General and the Commissioner of Police by the Constitution of the Republic of Kenya. In addition, the High Court further held that the statutory provisions establishing the KACA were in conflict with the Constitution. That spelt the death of KACA and the various efforts in the fight against corruption in Kenya.

Efforts to resuscitate the fight against corruption culminated in the enactment of two pieces of legislation in April 2003. These were; The Anti-Corruption and Economic Crimes Act, No 3 of 2003 and The Public Officer Ethics Act, No 4 of 2003.

Introduction

The **Anti-Corruption and Economic Crimes Act** (herein after referred to ACECA), establishes the Kenya Anti-Corruption Commission (KACC) as a body corporate, prescribes its composition and confers powers and functions to it.

The Act also establishes the Kenya Anti-Corruption Advisory Board, an unincorporated body comprising of persons nominated by a cross-section of stakeholders. The Advisory Board makes recommendations for a person to be appointed as a Director and Assistant Directors. It also advises the Commission generally on the exercise of its powers and performance of its functions under the Act.

The KACC has made tremendous progress within its mandate touching inter-alia on, investigations, asset tracing and recovery, prevention of corruption through identification and elimination of opportunities for corruption in systems and procedures of public bodies and public education aimed at enlisting public support.

What is frustrating the KACC?

The mandate of the Commission is limited to investigations and making recommendations

for prosecutions or otherwise. According to the KACC, a total of 498 cases have been investigated and the files forwarded to the office of the Attorney General for prosecution. Among the cases that the Commission has successfully prosecuted is the case of **Kenya Anti-Corruption Commission v. Kasala Holdings (K) Ltd.** In this case, the matter before court was an application for orders under Sec. 56 of the ACECA to prohibit the withdrawal, transfer or disposal of or other dealings with, the monies held in an account operated by the respondent. In the affidavit in support of the application, the KACC averred that the money in that account had been acquired through fraudulent means and as such the account should be frozen. The learned magistrate in this matter granted the orders sought citing that the money in the accounts had indeed been acquired using fraudulent means.

In the case of **Meme v. Republic & anor** the applicant in this matter had been charged before the Anti-corruption court. He then applied for a stay of proceedings and a reference to the Constitutional court for determination of issues presented as raising constitutional questions. He argued that the magistrates and the prosecutor at the corruption court had no constitutional or legal authority to try him. He further alleged that the principles of assumption of innocence and natural justice would not be observed.

The question before court was whether the trial process before the learned trial magistrate was contrary to the constitution and the law to warrant its (the suit) termination and set the applicant free. It was held that the term "Anti-Corruption Court" is only a label to describe a division in the magistrates' court system lawfully established by the Chief Justice by virtue of the powers conferred to him by **Sec. 13 (20)** of the MCA **Cap.** The allegation that the ACECA was unconstitutional was misconceived as the Act had no relevance to the offence with which the accused was being charged with. Further the apprehension that the applicant may be denied the presumption of innocence was unfounded.

It is not fair to say that the KACC is entirely ill-equipped to 'prosecute' persons implicated with corruption. However it is also not fair to suggest that the institution is doing its best. The successes have been over-shadowed by their inability to rein the 'big-fish'. KACC has in the past four years investigated and recommended to the AG for prosecution 8 ministers, 3 sitting MPs, 11 former and current PSs', 65 CEO's, and 96 senior level management officers public institutions. Among the notable indictments include the ones of the former director of KEMRI, Mr. David Kiprotich; the former MD of Kenya-Re, Mr. Johnson Jackson Githaka; the Director of Triton, Mr. Yagnesh Mohanlal Devani together with identified officials of KPA; The District Commissioner of Oloitoktok, George Ojwang Otieno and the District Officer of Kilibwoni in Nandi, Dorothy Nabwala Nyukuri for illegally disposing of government maize. Others of course include that of the former powerful minister of Internal Security, Hon. Christopher Murungaru who went as far as even questioning the legality of the **ACECA**; and former MP, Hon. Rueben Ndolo over allegations of misappropriation of the CDF funds of his Makadara constituency.

It has been in the public knowledge that KACC is incapacitated in terms of prosecutorial powers, a scenario that had over time put Ringera and Attorney General Amos Wako at loggerheads. Some experts however, do not think that the KACC is entirely hapless. The right to prosecute is the sole prerogative of the Attorney General. But in reality the police, labour officers, immigration personnel, NSSF prosecutors and public health prosecutors carry on the prosecutorial functions in our courts day in, day out. Why not KACC?

The role of the AG in the fight against graft

The office of the AG in Kenya has been subject to a lot of conundrum; the controversy mostly revolving around the personality of the bearer of the office. Incidentally it is the only office under the Constitution of Kenya where the bearer is vested with numerous responsibilities and conflicting roles; namely

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1. As the Public defender he is a public servant
2. Chief legal adviser to the government
3. The AG is supposed to be an independent public defendant
4. The Constitution gives him the power to require the Commissioner of police to investigate any matter relating to any offence or alleged offence.
5. Ex-officio member of the national assembly

The efficacy of one person vested with so many responsibilities remaining politically independent is akin to walking the tight rope. It needs one with an extra-ordinarily strong will to avoid the temptation of the trappings that come alongside political patronage. This office is vested with enormous powers and it could be intricate to serve every role without one of them suffering at the expense of another.

This is the reason why the immediate former director of the KACC faulted the lack of 'action' on the part of the authority vested with public prosecutions, the office of the AG. In his statement of resignation, Ringera asserted that the commission has done

its work as mandated by **Secs. 35 and 36** of the **ACECA** which provide that the commission is to prepare a report to the AG of cases investigated by the commission and give appropriate recommendations. In many instances the AG has defended himself saying that the files forwarded to him do not have the necessary evidence to prosecute.

Challenges faced by the Office of the AG in prosecution of graft cases

The attorneys working at the AG's office are poorly motivated staff. The remuneration is paltry and it is no wonder that the office does not attract the top legal minds in the country. This perhaps goes to explain why the conduct of government cases; civil and criminal is handled in a lethargic fashion. The government spends a lot of money in paying for jurists and commissions to look into the work of its employees and does little or nothing to improve on the well being of the employees. In summary, Kenya's prosecution system is bogged down by, among others, the following problems;

- a) Lack of effective direction and control of prosecutions by the Attorney General as required by the Constitution;

- b) Chronic under-staffing of the Department;
- c) Insufficient working resources in terms of equipment and literature;
- d) A poor management and reporting system of prosecution services;
- e) Lack of relevant, issue-specific training for prosecutors;
- f) A dichotomized prosecution system with dual control and reporting lines between the Attorney General and the Commissioner of Police; and
- g) Lack of institutionalized professional standards for application by all prosecutors.

The biggest impediment of this is as follows:

- a) differences between senior officials within the Department;
- b) Sacking of a reform minded Director of Public Prosecutions; the current Director of Public Prosecutions has done little to reform the office.
- c) Lack of proper guidance on procurement from state.

Conclusion

There have been proposals to anchor the KACC in the constitution and indeed this proposal has found its way into the harmonized draft constitution as the ethics and anti-corruption commission. This will fortify the standing of the commission and remove the remnants of fear that accompanies cases involving those holding high office.

The current anti-corruption commission prosecutes all civil cases initiated by its officials. It has not been shown to be overly successful-except for that contentious settlement in the Grand Regency Hotel saga-in which it is alleged some billions of shillings were recovered. Nevertheless, the KACC seems to have shot itself in the foot by entering a consent that compromised the criminal cases against some of the parties in the Regency Hotel.

Prosecution powers will not help the KACC, or indeed the proposed ethics and anti-corruption commission much. It is thorough investigations using all sorts of modern technology, mutual legal assistance and a tough judiciary that will complement the work of the office of the DPP. In this way the rate of success in prosecutions may improve. 

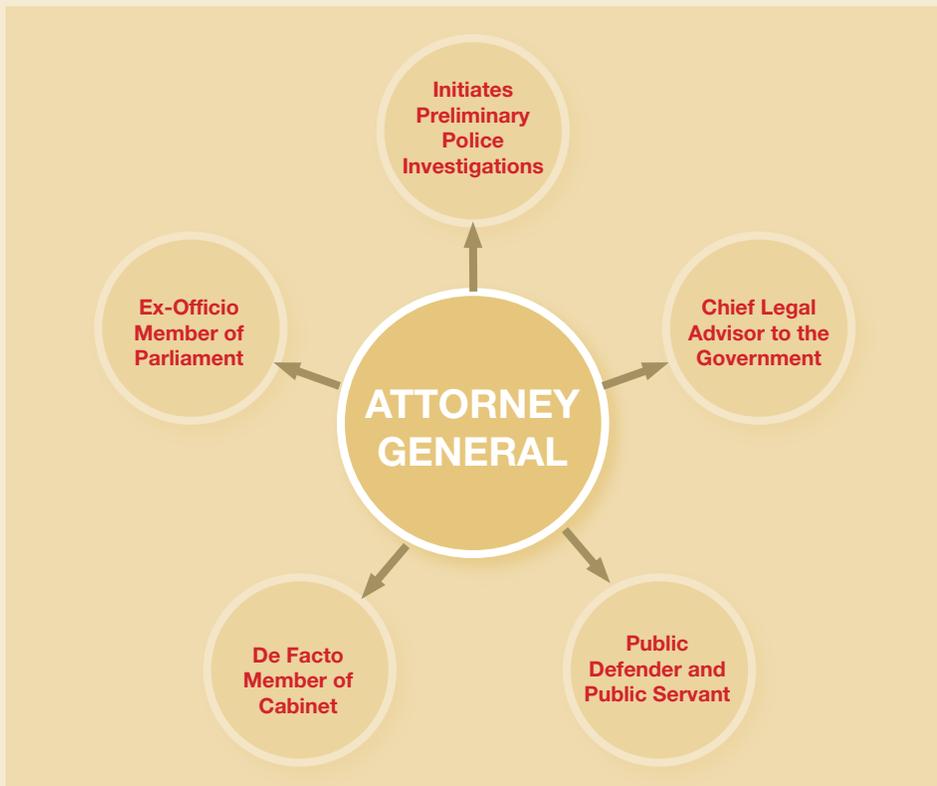


Fig. 1.1 Illustration of the multiple roles of the AG

Investigative and Prosecutorial Reforms In Kenya: The Existing Prosecution And In

By Priscilla Nyokabi

Investigation and Prosecution are two sides of the same coin and are linked together. Prosecution should be a result of good investigations as it is a threat of the prosecution that makes the law work. Without prosecution, there is a failure of the rule of law and growth of impunity.

There is an existing legal framework on investigation and prosecution in Kenya on different matters including anti-corruption. Prosecution powers for the Attorney General are provided for in section 26 of the constitution. In section 26 (3) (a) the AG has power to institute and undertake criminal proceedings in any matter he considers it desirable to do so against any person before any court except the court martial in respect of any offence alleged to have been committed. The Constitution refers to him-gender neutral language is preferable.

In section 26 (3) (b,) the AG can take over and continue any criminal proceedings instituted by another person or authority and in (c) he can take over and discontinue any criminal proceedings before judgment is delivered and proceedings undertaken by himself or any other person or authority, this is the power of *Nolle prosequi*. The questions on Nolle are the rights of victims and complainants to be heard e.g the Cholmondley case.

a

Section 26 (4) provide that the Attorney General may require the commissioner of

police to investigate any matter which, in the AG, relates to any offence or alleged offence or suspects offence and the commissioner shall comply and report to the AG upon the investigation. The power of the AG may be delegated, eg as it has been done to the police prosecutors and other officers.

Section 26 (6) provides that only power in 3 (b) and (c) above belongs to the AG in exclusion of all others, meaning other persons are empowered to institute and undertake criminal proceedings against any person before any court in respect of any offence (what we call private prosecution). Public prosecutions are those initiated by the Attorney General or those to whom he has delegated his power to like the police. The AG in exercise of power under section 26, 44 and 55 is not subject to direction or control of any person or authority. The judiciary has introduced some tests before entry of the Nolle but there is need to curb the power of the Attorney General.

Prosecutions are further regulated in the Criminal Procedure Code and it is important to note that the Prosecution Policy for the prosecutors used has been promulgated. Credit is due to the state law office for this but more need to be done especially on implementation and restoring public confidence.

Most Investigations and prosecutions are handled by the police e.g on cases related to

High Court, the police investigate and hand over files to the Attorney General's office and the Director of Public Prosecutions. The issues of concern is the manner in which the investigations are done and this has continued to raise eyebrows if the police should be mandated with this task. After the change of law to refuse confessions before the police, there has been more acquittals. The police must conduct good investigations and especially now with sophistication of related crimes. In cases like gender based violence, the police must invest in training and acquisition of physical infrastructure like forensic equipment.

At the magistrate courts, prosecutions are handled by the police prosecutors and although judiciary has set the rank of prosecutors as that of inspectors, experts are of the opinion that police prosecutors should be done away with and people trained in law should fill in to handle the prosecutions. So that mistakes as those that have been seen in the charge sheet to be avoided

Recommendations on the Investigation and prosecutorial reforms

1. Constitution review and legal reform

The new constitution would address many of the weakness in the current system. The Bomas constitution provided for the creation of three separate officer, Attorney general, Director of Public Prosecution and Public Defender with enhanced criteria for appointments similar to that of the chief justice and of judges for the other two including 15 and 10 years legal practice, moral integrity and intellectual capacity. The appointment will be by the president but on recommendation of a revamped public service commission and approval of the national assembly. The officer should serve 10 years without re-appointment thus security of tenure. 10 years may be too long may be 8 years to avoid coincing with elections but there should be no midterm process. One full term is better. The Bomas constitution draft vest prosecution on the DPP and authorizes him to require investigation be conducted by the inspector general, an office created by



Investigations Frame Work.

Necessary Reforms to Expedite Corruption Cases

the Bomas Draft to head the Kenya police service which is not given the investigation function. There are various legal reforms that should be undertaken to help Kenya fix the big prosecution problem we have always had but some administrative measures can also be adopted in the short term that would ease some of the difficulties experienced in accessing justice.

2. Director of public prosecutions

The bomas draft solved the question of removing the power of prosecution from the AG's office, so that the AG to serve as the Government legal advisor. The DPP should be delinked from the AG. Prosecution should not have political baggage; it should be a professional and independent institution. The DPP's office should be facilitated by professionals. The DPP's office should be facilitated and capacitated to deal with crime including the new sophisticated ones like cyber crime. In the short term the AG and the DPP should closely supervise and oversee the investigation conducted by the police to advise accordingly. For instance, in Gender based violence cases, the evidence is required is complicated to establish and to ensure proper trails, the police should be well instructed on the investigations. Infact for GBV offences, the AG should seek proper investigations and even return files due to insufficient evidence gathered for further investigation so that the cases that are forwarded are strong and likely to result in conviction. The DPP should have office countrywide.

3. Independent Prosecution Authority

This will prohibit monopolization of prosecuting powers in one institution. A case at hand is the south African experience where the apartheid human rights violators were scarcely prosecuted even when they did not appear before the Truth and reconciliation commission or even when the TRC recommended prosecutions.

This is an excerpt from a presentation made by Ms. Nyokabi during a public forum on investigative and prosecutorial reforms. 

There are several possible recommendations that have been fronted in an attempt to give the KACC "teeth to bite". In order to strengthen the institution, there is need for political goodwill to eliminate all forms of graft. The director of Serious Fraud Office in the UK has been quoted in sections of the UK media saying that he had dedicated resources to trace the Anglo-leasing money, but it seems the Government is reluctant to ask for the information. There seems to be a growing syndrome of apathy in the fight and a worrying trend whereby yesterdays reformists have turned into today's culprits.

As part of the broader reforms geared at improving the capacity of the KACC, certain steps and measures could be taken. These would include the following:

- a) The enactment of laws to complement the Anti Corruption and Economic Crimes Act, 2003. Certain pieces of legislation if enacted will also assist in the fight against graft, such as
 - The Legal Mutual Assistance law. This will enable the Commission to obtain assistance from foreign countries to gather evidence to assist in criminal investigation or proceedings in another country. The law should designate all investigative agencies established by law to be Competent Authorities for purposes of seeking and obtaining Mutual Legal Assistance and further that all the information so obtained will be admissible in evidence. At the moment the Commission is barred from seeking or giving Mutual Legal Assistance and thus hampering investigations. The law is pending before Parliament.
 - Another piece of legislation is the Freedom of Information law that would repeal the Official Secrecy Act to allow access to Government information. The Freedom of Information law is a crucial legislation in fighting graft and enhancing development; it is regrettable Kenya is yet to enact the law even though it is a signatory to the

UN Convention against corruption. This convention requires that every country with an anti-corruption body must put in place the Freedom of Information law. Efforts to enact this law have been frustrated by the Government since 2000.

- Other important legislations include the Proceeds of Crime and Anti-Money Laundering law which would help trace assets stashed abroad by suspects in mega scandals like Goldenberg and Anglo-leasing; and the Witness Protection Act which although is in the implementation stages and is already facing serious teething problems. This Act is only restricted to the protection of witnesses in court; perhaps what is needed to strengthen it is a Whistle Blowers Act to protect individuals in both the public and private sector.
- b) There is a real and actual problem in the office of the AG. The offices of the AG and the Minister of Justice have many overlapping roles. This has led to a collision course for the quest for justice in many graft cases, political interest getting into the way. Maybe the multiple roles under the docket of the AG can be devolved to other officers under that office. The office of the DPP can be made autonomous from that of the AG and conduct all criminal prosecutions at the behest of the state. In this way the AG is adopted as a full member of the executive without the prosecutorial powers which will be vested in the said office of the DPP. Then the Sec. 35 of ACECA can be amended to provide that the quarterly reports be made to the DPP for prosecutions.
- c) KACC to be anchored in the constitution: There is need for the commission to be anchored in the constitution with necessary independence and power. Such moves will adequately deal with many of the challenges the commission

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International News Roundup

Karzai promises to fight corruption, urges patience

WASHINGTON (Reuters) - Afghan President Hamid Karzai called for patience on Sunday if his government could not meet a 2011 deadline for assuming responsibility for Afghan security while pledging to meet demands to fight corruption in Kabul.

U.S. President Barack Obama announced last week he would send another 30,000 troops to Afghanistan but would begin bringing them home in 18 months and start handing off responsibilities to Afghan forces. "Afghanistan welcomes this new strategy, and Afghanistan will do all it can to be a good partner in it," Karzai told CNN, according to a transcript released by the network. Karzai said the Afghans would try their best to take over security of the country within the U.S. timetable. "But the international community must have also the patience with us and the realization of the realities in Afghanistan. If it takes longer, then they must be with us," he said.

Karzai said he hoped Afghans would be able to lead security operations in many areas of the country within two years.



Photo by African Press International

"By the end of five years term of -- of the current government, we plan to lead operations for the security of the Afghan people in all of Afghanistan, in the whole country. That is our objective," he said. Obama, who faces criticism from his fellow Democrats and opposition Republicans about the troop decision, put pressure on Karzai to root out corruption in his administration. The U.S. president said in a televised speech on Tuesday that the day of providing a "blank check" to Kabul were over. Karzai said he was addressing the problem, but accused some allies, which he did not name, of overemphasizing the issue.

"The issue of corruption has been politically overplayed by some of our partners in the international community," he said.

Karzai's reputation was severely damaged after a U.N.-backed inquiry found nearly a third of votes cast for him in an August 20 election were fake. He pledged in his inauguration speech to name competent and honest ministers. His cabinet is expected to be named in the coming days. "If and when at any time there is an occasion where we need to act on corruption with ministers, with officials, with anybody, we will do that," he said. Asked whether he planned to fire corrupt officials, Karzai said, "I have fired people, and I will be firing people, yes." Karzai said his country did not expect a "blank check" from the West. "So we are not used to a blank check, and we are not expecting one, but we welcome any cooperation that comes from our allies toward the stability and progress and well-being of the Afghan people," he said.

Source: <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/06/AR2009120601202.html>

CORRUPTION: City's governmental structure encourages official corruption in Croatia

ZAGREB, Nov 25 (Reuters) - Croatia took its anti-corruption campaign to schools on Wednesday as part of efforts to reduce widespread graft, a key condition of joining the European Union.

The justice ministry launched the "Anti-Corruption Class" with a lecture and a discussion at a school in the eastern city of Osijek and will hold similar classes in all secondary schools this year, the justice ministry said. Croatia hopes to wrap up EU accession talks next year and join the bloc in 2012, but Brussels has said it must first step up its fight against corruption and strengthen its judiciary. The campaign has gained momentum since Jadranka Kosor took over the conservative government, following the sudden departure of her predecessor Ivo Sanader, who unexpectedly quit in July. Since then, a former defence minister in Sanader's government was indicted for corruption, paving the way for a first anti-graft trial of a top government official. Croatia's inefficient judiciary has

meant that few trials have been completed and even fewer have led to convictions. Last week the government sacked the state highway company HAC's chiefs amid media allegations of illegal business deals.

Deputy Prime Minister Damir Polanec quit last month after a series of corruption scandals prompted calls for him to go. Also in October, police arrested several managers, including the former and current chief executives, of leading food group, Podravka. They accused them of trying to buy a majority stake in Podravka using the company's own funds.

"Corruption here is primarily the result of cultural heritage and mentality, that is why we welcome such preventive measures," said Zorislav Antun Petrovic who heads the local unit of Transparency International, an anti-corruption body. (Reporting by Zoran Radosavljevic) 

Source: Reuter News



Croatia PM, Jadranka Kosor

Necessary Reforms to Expedite Corruption Cases...

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encounters in courts. It will also minimize the commission against constant threats of disbandment and give its staff a sense of employment security.

d) KACC to be granted powers to prosecute the offence it investigates: The commission should be granted power to prosecute the offence it has investigated. Experience has shown that in Africa those commissions with a combined investigative and prosecutorial mandate have succeeded better than those with only an investigative mandate.

e) KACC to be restored with powers to demand for suspects list of properties and how acquired. It is necessary to restore the special power of investigation the commission exercises prior to the legislative amendment of 2007, which considerably watered down its power. In particular there is necessity for the commission to ask any person reasonable suspected of corruption and their associated to provide a list of their properties and how the same were acquired. It is also important to restore the power to ask for information and the production of documents without first obtaining courts orders and to provide that the information and documents so supplied may be used in evidence. At the moment the commission is deprived of the element of surprise, which is so necessary in investigation and the information it gather is almost academic as it cannot be used against suspects.

f) Fundamental rights vis-a-vis Public Interest: There is need to provide in the constitution itself that the fundamental rights and freedom of the individual are subject to the public interest of detecting and investigating crime so that passport and other travel documents can be impounded pending the conclusion of investigation. The proponents of this approach state that it is also necessary to have a specific provision barring the prohibition of an investigation by a judge or magistrate. At the moment,

the commission cannot impound travel documents and many investigations are paralyzed by prohibition orders.

g) Court orders to stay of Proceedings
To expedite trial of corruption cases, it should be provided in the constitution that once a corruption trial begins, the court will not issue orders of stay of proceedings or similar orders on any ground and that all issues of alleged violation of the constitutional rights of an accused person shall be determined by the trial court in the judgment.

h) It should also be provided in the constitution or the procedural law that all criminal trials shall be determined within a specified reasonable period, e.g three months after an accused is charged. As regards the power of asset tracing and recovery, it is necessary to cloth the anti-corruption commission with the extensive powers conferred on the proposed Asset Tracing agency in the proceeds of crime and money laundering bill, 2009

i) Overhaul of the Wealth Declaration System: The Wealth declaration system needs a complete overhaul. Its application must for the sake of effectiveness be confined to senior official of the rank of permanent secretary, MP and minister except in the case of officers employed

in extremely tempting position such as revenue collection, law enforcement and procurement of public goods and services. The declaration made should be administered by either the anti-corruption commission or another dedicated institution which will be charged with the constitutional authority to receive the declarations, analyse them, seek clarification and investigate and prosecute offences arising from it.

j) Enhancement of the capacity of the entire justice system: There is need to enhance the capacity of the entire justice system. More resource financial and human ought to be availed to the investigative agencies the prosecutorial service and the judiciary. The legal sector should be seen as a necessary infrastructure just like roads and communication for national growth and prosperity. There is also need for new legislation to strengthen and underpin the anti-corruption struggle. Law and anti-money laundering and proceeds of crime, mutual legal assistance, Witness protection and freedom of information should have strong consideration. And above all there is obvious need for strong political will to fight corruption.

This is an excerpt from a presentation made by Apollo Mboya, CEO, law Society of Kenya, during a public forum on investigative and prosecutorial reforms.





Event : Launch of The Kenya Education Integrity Study
2009

Date: 14 January 2010

Organiser: Transparency International, Kenya

Location/Address: Nairobi

Event : World Economic Forum Annual Meeting 2010

Date: 27 - 31 January 2010

Organiser: World Economic Forum

Location/Address: Davos-Klosters, Switzerland



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Transparency International, 3rd Floor, Wing D, ACK Garden House, 1st Ngong Avenue. PO Box 198-00200, City Square, Nairobi, Kenya. Tel.: 254-020-2727763/5, 0733-834659, 0722-296589; Fax: 254-020-2729530.