

LEGAL AND INSTITUTION FRAMEWORK'S CAPACITY IN COMBATING CORRUPTION

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Abstract:

This paper focuses on the assessment of the legal and institutional framework and state capacity in eliminating and controlling corrupt activities. The author intends to provide an assessment of the various remarkable legal and institution framework which were created purposely to implement adequate and appropriate legal instruments to eliminate and control corruption activities by articulating provided provisions in order to grasps what make difficulty to fight against corruption generally.

It has been cleared that, every state with the obligations of international bodies established principles in order to provide adequate and reliable instruments to make sure the issue of corruption is varnished. For instance, in Tanzania the governments made some efforts by responding to the challenges with a range of interventions aiming at strengthening the fight against corruption.² However, it is clear that traditional institutional anti-corruption reforms such as the creation of independent agencies have been rather disappointing.³

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² See also Hosea *the Southern African Forum against Corruption* (2016).

³ See Hope KE *et all* (eds) *Corruption and Development in Africa: Lesson from Country Case Study* (2000:1).

As it has been noted, corruption is an ethical problem that affects the economy of both developing and developed countries,⁴ and it was proved that corruption is a cross-cutting problem that has infiltrated all segments of the world.

Despite of being proved that states implement various initiatives legal instruments to combat corruption and each initiative has its own policies and methods for enforcement to be observed.⁵ Yet, the efforts in establishment of the effective legal framework show that the existed legal instruments including legislatives and institutional bodies are weak and inadequate. New social and legal developments are geared towards serving and curing the existing weaknesses of the current legal framework and, seemingly, the traditionally weak approach to the curbing of corruption plays a major role in contributing towards the weakness of the current legal frameworks to fight against corruption in Africa.

Serves for the article, anti-corruption institution agencies are articulated in this part as the leading legal instruments to fight against corruption in order to provide the existed provisions to see at what extent those provisions are adequate and sufficient to fight against corruption in Nigeria.

Key words: Corruption, Anti-Corruption Agencies, Corrupt Activities.

1. Introduction:

As it has been proved, corruption is not a new phenomenon is a limp in the walk of human evolution and it is old as the history of manhood and recognized; Historically, the acts of corruption has been demonstrated as the phenomenon of corruption that manifested since ancient times in

⁴ See also Otusanya *Corruption as an Obstacle to Development in Developing Countries: a Review of Literature* (2011:395).

⁵ Obasanjo O *Nigeria: From Pond of Corruption to Island of Integrity* (2003).

different cultures and societies.⁶ In order to prove as is not a new phenomenon, corruption ought to be described even in the hollies books including Quran and bible by providing some scriptures to address and prohibit human beings to indulge in bribery. Generally, the acts of corruption had been taken into attention from a moment where it was taken as the notion of non-reciprocity struggles and contrary to the norms of open handed in return which give power to the society whose are the rulers and both judges by being the recipient of offers. The issue of corruption is prescribed in various eras in order to provide its existence since then. Various authors wrote about corruption and emphases that corruption is not a new phenomenon, the primarily academic study of corruption emerged from the late 20th Century is the one which is new.⁷ Consequently, Shabir and Anwar⁸ declare the position of corrupt activities from the 16th and 18th century where the English law and English bible produce and declare norms for English empire in domestication level. That is to say, corruption was observed as the destructive matters to the country's development and that is the reason for creation of specific measures in response. It is evidently that, despite of having various and remarkable legal and institution frameworks, the context and nature of corruption indicate that the setting have not been taken into account sufficiently, measures towards the repressive approach and performance expectations of anti-corruption legislations appropriate.⁹

2. What is corruption?

Definition of corruption is the most debatable issue in literary work which induces the excitement. The word of corruption had been used and present different meanings depend to its intellectual relatively to its field. It has been proved that the word corruption is often narrow compared to the

⁶ International Conference Notes: Forms of Corruption in History and Contemporary Society, Origins, Community (CORHICS) *Paris I* 2011.

⁷ Williams R and Doing A (eds) *Controlling Corruption: The Politics of Corruption* Chapter 4 (Chatham, Edward Elgar Publishing Ltd. 2000:xi).

⁹ Schatz F "Fighting Corruption With Social Accountability: A Comparative Analysis Of Social Accountability Mechanisms' Potential To Reduce Corruption In Public Administration" 2013 *Public Administration Development Journal* 161

concept itself as used describe only the mandate of specific bodies includes the task to fight against and within a jurisdiction matter.¹⁰ To define corruption is one of the most debate in the literature and endures to excitement. Despite of various debates in defining corruption, this article decides to pick up some of the acceptable definitions in order to attribute the comprehended concept of corruption.

The word "corruption" had been used historically to present different meanings. It has been noticeable in different ways and rendered to abundant connotations by different intellectuals in relatively to their field.¹¹ Sometimes, the definition of corruption can either be conceptualised in collective or relative approach. Collective approach is the definition of corruption which entails certain common properties with the premise as a combination of properties, or defining characteristics, which make certain behaviour in all societies; while a "relativist" approach contends corrupt in one society may not be so in another and that the definition of corruption would now depend on the country and culture in question.¹²

As it has been noted, in 2001 the UN Convention against Corruption propose and initiate the consideration as the legal framework is not required to define corruption at all rather than to list specific types or acts amount to corruption.¹³ In simplifying the notion, the UN Convention against Corruption requires member states to criminalise corruption principally with specific offences or categorised groups of offences and shall depend on types of conduct involved and if implicate public officials.¹⁴

Some scholars including Kibwana¹⁵ defined as "an act of omission perpetrated by an individual or group of individuals which goes against the legitimate expectation and hence the interests of

¹⁰ Tanzi V *Corruption around the World: Causes, Consequences, Scope and Cures* (1998:576).

¹² Heywood P (ed) *Political Corruption: Problems and Perspective* (Oxford: Blackwell 1997:7).

¹³ See also Langseth P *Measuring Corruption* In C. Sampford, A. Shacklock, C. Connors, & F. Galtun (Eds.), *Measuring Corruption* Aldershot (UK: Ashgate 2006:9).

¹⁴ The UN Convention against Corruption (2002).

¹⁵ Kibwana K *Initiatives against Corruption In Kenya: Legal And Policy Interventions* (Clari Press, Nairobi, 2001:14).

society. Such acts of omission take place in all spheres of human endeavour; in government offices, corporate bodies, and private institutions”. With similar view, Riara¹⁶ says that,

corruption is often said to be immoral, unjust and repugnant to the ideals of humanity; corruption has different definitions to different people, but there is one view that is collective in society, that corruption is a wrong and immoral act; And Whoever indulges in corruptive behaviour should, without a doubt be frowned upon by society.

Klitgaard¹⁷ further says that, the boundaries of corruption are hard to define as it comes in many forms, crosses over various sectors and can range from the trivial to monumental; and he further emphasizes that corruption can involve the misuse of policy instruments, tariffs and credit, irrigation systems and housing policies, the enforcement of laws and rules regarding public safety, the observance of contracts, and the repayment of loans or of simple procedures. It can occur in the private sector in the public one, and often occurs in both simultaneously.¹⁸ Similar to Klitgaard, Leys¹⁹ states that

habitually, the word corruption referred to general context which denotes the perversion of anything from an original state of purity and is defined by moralists as to change from good to bad; to debase; to pervert.

Leys further emphasis that, cases of corruption often point to the existence of a standard of behaviour according to which the action in question breaks some rules, written or unwritten, about the proper purposes to which a public office or a public institution may be put.²⁰

For instance, Langseth²¹ urges that

¹⁶ Riara B *Grand Corruption as a Crime Against Humanity* (2014:2) available at kenyalaw.org

¹⁷ Klitgaard R *Controlling Corruption* Berkeley (University of California Press 1988).

¹⁸ Klitgaard (1998).

¹⁹ Leys C *What is the Problem with Corruption?* *Journal of Modern African Studies* (1965:216).

²⁰ Leys (1965:221)

²¹ Langseth P *United Nations Anti-Corruption Toolkit* Vienna (2003).

there is no single, comprehensive, universally accepted definition of corruption. Attempts to develop such definition consistently encounter legal, criminological and, in many countries, political problems.

In support to the above debates of what corruption is, various instruments dares to provide some of the definition which amount to corrupt activities, for instance the Transparency International has provide a widely definition of corruption as the misuse of entrusted power for private gain.²² Similarly, the World Bank report²³ defines corruption as a use of public office for private gain, the report emphases that any act committed by an official could be a corruption if the official personally benefited from that act.

The SADC Protocol against Corruption²⁴ defines corruption as "any act that includes bribery or any other behaviour in relation to persons entrusted with responsibilities in the public and private sectors that violates their duties and aimed at obtaining undue advantages of any kind for themselves or others".²⁵ On the other hand, the AU Convention on Prevention and Combating Corruption²⁶ defines corruption as the acts and practices including related offences prescribed therein; for instance, , corruption is understood as the behaviour of a person who derails another one from his/her way, customs or duties, through the promise of money, honours or security;²⁷ and the Oxford dictionary defines corruption as the dishonest or illegal behaviour especially for the people in authority, typically involving bribery.²⁸

²² TI (2014)

²³ The World Bank Report (2007).

²⁴ SADC Protocol against Corruption (2000).

²⁵ SADC Protocol against Corruption (2000) Art 1.

²⁶ AU Convention on Prevention and Combating Corruption (2003)

²⁷ International Conference Notes (2011).

²⁸ Oxford Advanced Learner's Dictionary 8th Edition International Student's Edition Oxford University Press (2010).

3. Legislations and Institution Framework

The world had engaged itself to fight against corruption and engaged anti-corruption campaign seriously from 1997. In 1997 the Organisation for Economic Cooperation Development Council issued a series of non-binding recommendations to call upon member states to establish effective measurements for prevention and combating corruption by officials of foreign transactions. The council recommend for those series of non-binding measures should be in connection with international business transactions particularly to speed up criminalisation of bribe according to the agreed fundamentals legal principles of each country.²⁹

The established Convention signifies the reasons to speedy criminalisation of bribery acts in an effective and co-ordinated manner, and in conformity with the agreed common elements set out in that recommendation and basic legal principles of each country. In the same way, Christopher³⁰ states that

the OECD Anti-Bribery Convention requires signatories to criminalize intentionally offering, promising or giving any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.³¹

On other hand, Cloots³² *et al* also provide as follows:

the aim of the Convention is to assure a functional equivalence on bribery of foreign public officials without requiring uniformity or changes in fundamental principles of a state legal system.

²⁹ Preamble of the Organisation for Economic Co-operation and Development, 1997.

³⁰ Christopher and Damned *if You Do, Damned if You Don't?* (1999:1303-04).

³¹ The OECD Anti-Bribery Convention

³² Cloots *et al* (2013:227-228)

The OECD Convention provides for various legal provisions to eliminate and controls corrupt activities which are conducted by foreign public officials under international business transactions. However, article 1 itself presents the different categories of the offences established in order to establish the magnitude of the Convention to combat corruption.

The contents above provide for sufficient evidence which indicate the extent of the OECD Convention on preventing corruption on the part of public officials through international transactions. As it has been seen, the OECD Convention gives powers to each member state to institute provisions which stipulate clearly connections between corrupt transactions and those offences shall be treated as criminal offences and the sanctions shall be effective with regards to other criminal offences, and further to that the state has a duty to add extra punishment in relation to civil and administrative sanctions to the public officials.

In 2000, United Nations adopt the Convention against Corruption and entered into force in 2003.³³ This convention, among other things constitutes an effective tool and the necessary legal framework for international cooperation in combating, inter alia, such criminal activities as money laundering, corruption. After the establishment of the United Nations Convention against Corruption (herein after referred as ' the UNCAC'), the General Assembly has been working on the prevention and eradication of corruption for a couple of decades. The UNCAC is the first transnational global Convention against corruption to be established by the United Nations, and it has been taken as the key instrument to promote social responsibility and ethical standards.³⁴ This Convention also arises in the context at which highlight the awareness of corruption as a problem of transnational significance. The establishment of this Convention is to enhance the mandate and powers to member states to eliminate and control corrupt activities through the establishment of preventive measure, establishment of the offences, and establishment of international

³³ The General Assembly (53/111 of 1998)

³⁴ See also Webb the United Nations Convention against Corruption Global Achievements or Missed Opportunity? (2005:192).

cooperation.³⁵ To emphasize its effect, the Convention provides for a provision which articulate the acts of corruption under the bribery of foreign public officials and officials of public international organisations.³⁶

With similar to the above, the African Union dares to establish the same legal framework for the same purpose and that instrument is named as the African Union Convention on Preventing and Combating Corruption.³⁷ The Convention came into force and acknowledges the accountability and transparency in the management of public affairs, and socio-economic development on the continent had been undermined which was caused by corruption.³⁸ Like other legal instruments as aforementioned above, the AU provide for the establishment of offences related to corrupt transactions. Article 4 of the AU Convention provides some of the activities that are conducted by public and private officials that amount to corrupt transactions including involvement, the solicit or acceptance of any good of monetary value either direct or indirect for the same purpose.³⁹

Despite of having various legal institution, the selected above suffice to indicate the intention therein to fight against corruption. The selected instruments modify preventive measures which are reliable and adequate to be observed once a state wants to adopt and establish the perfect legislations to fight against corruption. The following part discusses state capacity of the selected countries in order to indicate its ability and perception in the process of fighting against corruption. The United Nation adopts the convention to fight against corruption and that convention was named as the United Nation Convention against Corruption.⁴⁰ This Convention was established purposely to prohibit corrupt activities in both public and private sectors.

4. State Capacity in Combating Corruption

³⁵ See also Cloots *et al* the International Legal Framework against Corruption: Achievements and Challenges (2013:218).

³⁶ Article 16 of the UNCAC

³⁷ The African Union Convention on Preventing and Combating Corruption (2003).

³⁸ See also Sall Fighting Corruption in Africa: a Tremendous Challenge (2014).

³⁹ Article 4 of the AU Convention 2003

⁴⁰ United Nations Convention against Corruption

Given the fact that corruption was difficult to fight, various state countries manage to establish some of the legal institutions and framework to combating corruption. The government has taken into account the establishment of both preventive and enforcement measures against corruption from the initial grazing. Each state has an obligation to make sure the issue of corruption is no longer a debate when it comes to fight against it. Among other things, preventive measures, acts of corruption (offences establishment).

For instance, the United States of America established the convention as a legal framework to facilitate mutual support among Member State Parties to prevent, criminalise and investigate corrupt activities.⁴¹ Among other things, the Convention provides for the promotion and strengthens to each state party to develop its legal mechanism which will detect, punish and eradicate any acts of corruption within the society.⁴² Additionally, the convention provide for the state parties to create a system which will provide assistance mutually to each other and to guarantee effective procedures and activities to prevent, identify and penalise the acts of corruption in public affairs.⁴³ As it has been seen, the convention stipulate some of the obligations to states to prevent and combating corruption through their territories by instituting legal institutions by creating, maintaining standards of conduct for the proper functions within the society for the public functions.⁴⁴ In addition to that, the Convention emphasises for the each state party to improve their legal instruments which will control the behaviour and ethics of their public officials including the directions to the government to make sure the system guarantee the accountability of the ethical rules to prevail acts of corrupt.⁴⁵ Likewise, the convention emphasises for the standards of conduct which shall be established and make some requirements which provides for the mandates to the government officials to report to appropriate authorities' acts of corruption in the performance of public functions. Such measures should help preserve the public's confidence in the integrity of public servants and government processes.

⁴¹ Inter-American convention against corruption (1996)

⁴² See also article I of the Convention (1996)

⁴³ See also article II (1) of the Convention (1996)

⁴⁴ Art III (1) of the Convention

⁴⁵ Art III (3) of the Convention (1996)

In support to the above, the Convention order for the all state member to criminalise all acts of corruption and to restrict government officials to conduct all domestics and foreign from bribery;⁴⁶ and to enact measures to combat the illicit enrichment of government officials; the provisions on domestic bribery are aimed at both the person offering a bribe and the recipient.⁴⁷ And furtherly, the convention insists for the member states to establish legal mechanism in order to enhance and encourage even the non-governmental organisations to government to fight against corruption.⁴⁸ Further to that the Convention requires member states to delve deeply into revising the preventive measures that provide the relationship between equitable compensation and probity in public service.⁴⁹

Like USA, the United Republic of Tanzania government itself play major roles to make sure the issue of corruption is handled accordingly. Among other roles, the government revised laws, formulated new legislation and amended some legislation so as to come out with a legal and administrative framework to curb corruption. However, the government introduce various pieces of legislation including the Constitution of the United Republic of Tanzania Act,⁵⁰ the Prevention and Combating of Corruption Act,⁵¹ the Public Leadership Code of Ethics⁵², Criminal Procedure Code Act,⁵³ and the Economic and Organised Crimes Control Act,⁵⁴ in order to provide adequate and reliable legal framework to combating corrupt activities.

⁴⁶ Art III (10) of the Convention: Deterrents to the bribery of domestic and foreign government officials, such as mechanisms to ensure that publicly held companies and other types of associations maintain books and records which, in reasonable detail, accurately reflect the acquisition and disposition of assets, and have sufficient internal accounting controls to enable their officers to detect corrupt acts.

⁴⁷ Atkinson *et al* (1997-1998:247).

⁴⁸ Art III (11) of the Convention: Mechanisms to encourage participation by civil society and nongovernmental organizations in efforts to prevent corruption.

⁴⁹ Art III (12) of the Convention: The study of further preventive measures that take into account the relationship between equitable compensation and probity in public service.

⁵⁰ The Constitution of the United Republic of Tanzania, Cap 2 of 1977 (as amended from time to time).

⁵¹ Prevention and Combating of Corruption Bureau Act No. 11 of 2007

⁵² Public Leadership and Ethical Secretariat Act No. 13 of 1995.

⁵³ Criminal Procedure Code Act, No. 9 of 1985.

⁵⁴ The Economic and Organised Crime Control Act No.13 of 1984.

For instance, the Constitution of the United Republic of Tanzania itself provide for fundamental objectives and directive principles within the state policy with intent to strengthen good governance and integrity to support the strategic efforts in eliminating and controlling corrupt activities.⁵⁵ To support its initiative the Constitution emphasis for the duty and responsibility of state organs, citizens and authorities to take cognisance of and observe the applicability of the fundamental objectives and directive principles as established in the constitution.⁵⁶ As it has been noted as the Constitution is the key instrument of the government, the Constitution itself provides for mandate to create instruments to eliminate and control corruption issue of corruption in all spheres of the state including its organs.⁵⁷ In addition to that, article 143 of the Constitution grants power to the Public Audit Act⁵⁸ to eliminate corrupt activities and prevent financial malpractice among public officials which will amount to corruption.

With similar to that, in 2007 the Prevention and Combating of Corruption Bureau Act was enacted purposely to fight corruption.⁵⁹ This Act also provides for an institution and legal framework which is necessary to prevent and combat corruption by examining and advising on practices and procedures of public, parastatal and private organisations in order to facilitate the detection and/or prevention of corruption.⁶⁰

⁵⁵ Fundamental Objectives and Directive Principles of State Policy (Part II) of the Constitution of the United Republic of Tanzania, Cap 2 of 1977.

⁵⁶ S 7 of the Constitution of the United Republic of Tanzania, Cap 2 of 1977 provide that

(1) Notwithstanding the provisions of sub article (2), it shall be the duty and responsibility of the Government, all its organs and all persons or authorities exercising executive, legislative or judicial functions to take cognizance of observe and apply the provisions of this Part of this Chapter.

⁵⁷ Article 9 of the Constitution.

⁵⁸ Public Audit Act No. 11 of 2008.

⁵⁹ Prevention and Combating of Corruption Bureau Act No. 11 of 2007.

⁶⁰ Preamble, the Prevention and Combating of Corruption Bureau Act No. 11 of 2007.

Among other things, the Act establishes various offences which are related to corrupt activities as recommended by the country's strategies.⁶¹ Corrupt transactions are the first offence to be established in this Act with the purpose of indicating the contents of the actions that are referred to as matters related to corruption.⁶² The Act state that

offences of corrupt transactions includes solicit, accept or obtain any advantage as an inducement or reward or otherwise on account of an agent from any person for his or her own benefit.

Such action or an attempt thereto amounts to corrupt transactions. Those offences may also be conducted with the collaboration of more than one person who is promised and/or offered something for his or her own or another person's benefit. That person is also regarded as being corrupt.⁶³

To make emphases of the Act,⁶⁴ the Act itself establishes the Bureau as a special agency to provide for the promotion and enhancement of good governance and eradication of corruption.⁶⁵ That Bureau is known as an independent institution body⁶⁶ with four directorates. The first directorate deal with all matters related to Investigation including detecting, and prosecuting corruption offenders; the second Directorate deal with Research, Control and Statistics responsible for prevention of corruption in the public and private sectors through strengthening systems; the third Directorate handle all matters related to Community Education and involving the community in fighting corruption; and the last is the Directorate of Administration and Human Resources that supports the other three directorates by providing them with the right human and other physical and material resources.⁶⁷ As noted above, the functions of the Bureau are to take necessary

⁶¹ S. 4(1) of the Prevention and Combating of Corruption Bureau Act No. 11 of 2007.

⁶² Section 15 of the Act

⁶³ S. 15 (1) of the Act

⁶⁴ The Prevention and Combating Corruption Bureau Act, 2007.

⁶⁵ S. 5(1) of the Act.

⁶⁶ S. 5(2) of the Act.

⁶⁷ Available at www.pccb.org.tz retrieved on 1st of Sept, 2016.

measures for the prevention and combating of corruption in the public, parastatal and private sectors.⁶⁸

5. Summary:

As presented at the beginning of this article, the world engaged itself to fight against corruption from the late 1990s. The world has engaged in the objective to make sure that the effective measures are in place to elimination and control corrupt transactions and bribery to ensure that they are no longer issues to the society. Since then, many international initiatives have been introduced and most of those tried to address the global and multi-faceted challenges posed by corruption. Efforts are being made to promote comprehensive legal instruments including legislations and institution agencies in order to prevent and prohibit corrupt activities by providing rules and measures, including the adoption of necessary mechanisms to address corruption.

⁶⁸ S 7 of the Act stipulate that

the Bureau shall:

- a) examine and advise the practices and procedures of public, parastatal and private organisations, in order to facilitate the detection of corruption or prevent corruption and secure the revision of methods of work or procedure which appear to add to the efficiency and transparency of the institution concerned;
- b) enlist and foster public support in combating corrupt practices;
- c) advise public, private and parastatal bodies on ways and means of preventing corrupt practices, and on changes in methods of work or procedures of such public, private and parastatal bodies compatible with the effective performance of their duties, which the Bureau considers necessary to reduce the incidences of corrupt practices;
- d) co-operate and collaborate with international institutions, agencies or organisations in the fight against corruption;
- e) (e)investigate and, subject to the directions of the Director of Public Prosecutions, prosecute offences under this Act and other offences involving corruption; and
- f) investigate any alleged or suspected –
 - (i) offence under this Act;
 - (ii) conspiracy to commit an offence under this Act;
 - (iii) conduct of a public official which is connected to corruption.

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