

# The GLOCEPS

## Policy Paper

Research and Analysis in Public Policy, Ethics and Governance

### Determinants of effective anti-corruption strategies in Kenya

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This policy paper explores the definition of corruption, conflict of interest, institutional bureaucracy, policy implementation and evaluation, and the burden of proof as key determinants of the effectiveness of anti-corruption efforts in Kenya. It argues that policy challenges related to these determinants continue to undermine Kenya's resolve and efficiency in curbing corruption. This creates an urgent need to strengthen anti-corruption efforts in order to forestall the continued economic degradation occasioned by widespread graft. Key recommendations include easing the burden of proof on the prosecutor in providing evidence for corruption cases, and intensifying efforts in countering conflict of interest by public officers. There is also need to deepen stakeholder collaboration and multi-agency efforts to strengthen public and private institutions' adoption of anti-corruption policies.

~Executive Summary

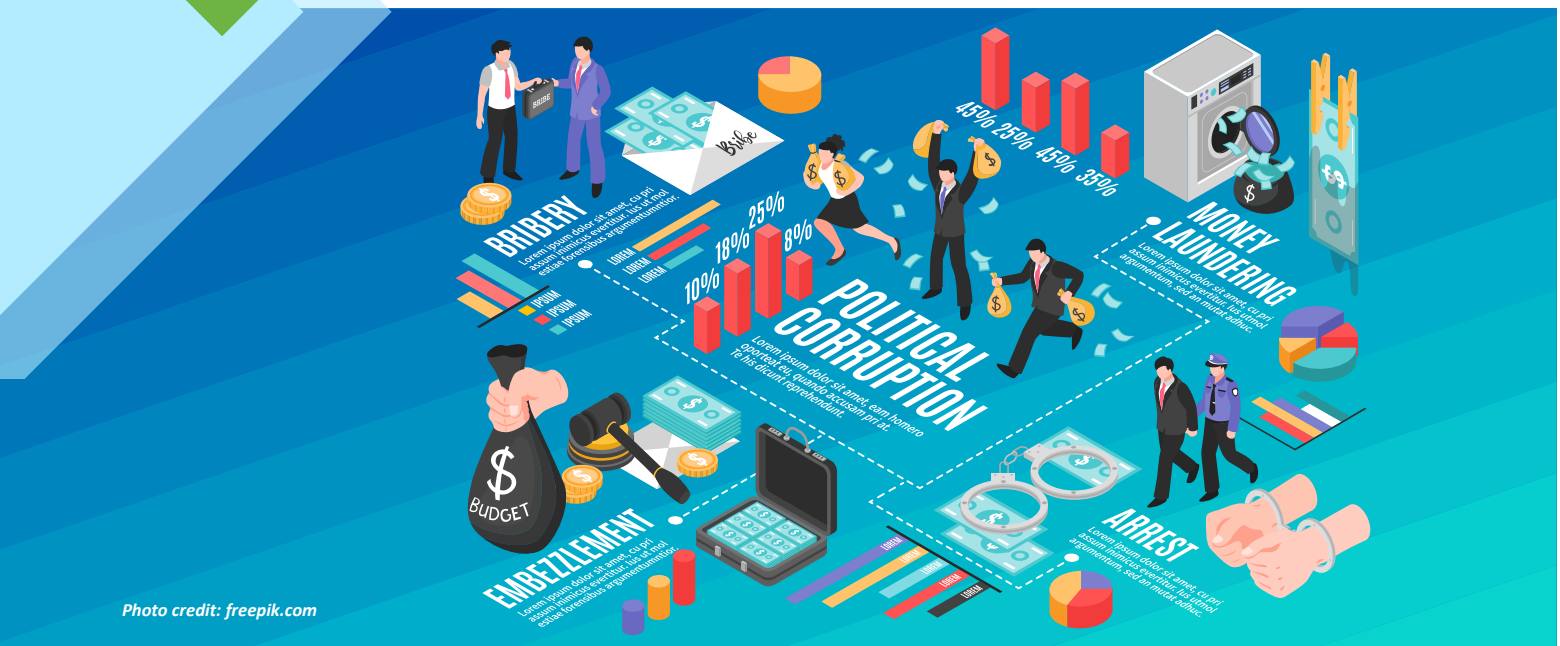


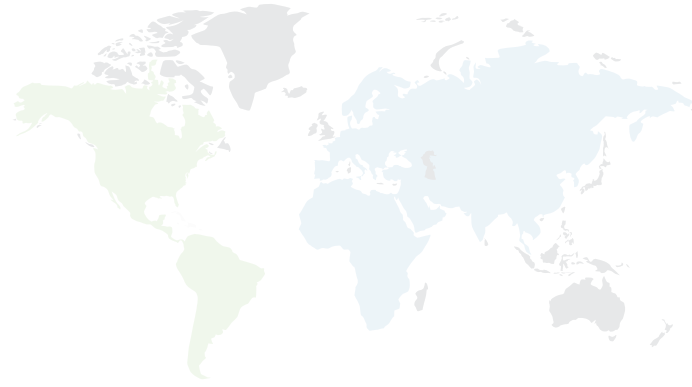
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### Introduction

Corruption in public service in Kenya remains high despite concerted anti-corruption efforts by the government. Tangible outcomes are yet to be achieved as evidence availed by the Office of the Auditor General and Ethics and Anti-Corruption Commission (EACC) reveals persistence of graft, amidst poor ethics and integrity practices in the public service. This is anchored on the continued availability of opportunity to engage in corrupt activities and the inability of existing

frameworks to effectively deter and disrupt acts of corruption. The probability of a corrupt behavior being exhibited tends to be higher when there is opportunity for abuse of power and where parties involved lack effective constraints, either normative (societal pressures, accepted rules, public opinion, external scrutiny) or legislative (enforced laws and regulations, including controls, audits, and sanctions).





## Background

The corruption problem in Kenya is systemic and extends beyond public institutions to the larger society. The vice persists primarily due to vested interests of public officers and weaknesses of governance institutions in offering effective dissuasion. Consequently, it undermines the ability of the government to equitably allocate resources thus lowering living standards of citizens and exacerbating poverty levels. Since independence, Kenya has continued to implement various anti-corruption reforms in her efforts to tighten curbing of corruption. In 2019, the Sessional Paper No. 2 of 2018, created the National Ethics and Anti-Corruption Policy to provide a comprehensive legal and institutional

framework for combatting corruption and promoting ethics and integrity. However, Global data on eradicating corruption indicates that Kenya is yet to record impressive improvement worldwide. The country continues to rank below the global average of 43% with a score of 28% and equally beneath the sub-Saharan average corruption perception index of 32%. Similarly, the World Justice Project Rule of Law Index 2020 ranks the country at position 102 among 126 least corrupt countries in the world and 18th in Africa. It is estimated that the country loses up to one third of her national budget to corruption. This underscores the need to tighten anti-corruption efforts, particularly governance.



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## Key Issues

The following key issues constitute the determinants of an effective anti-corruption campaign in Kenya.



## Re-examining the definition of corruption

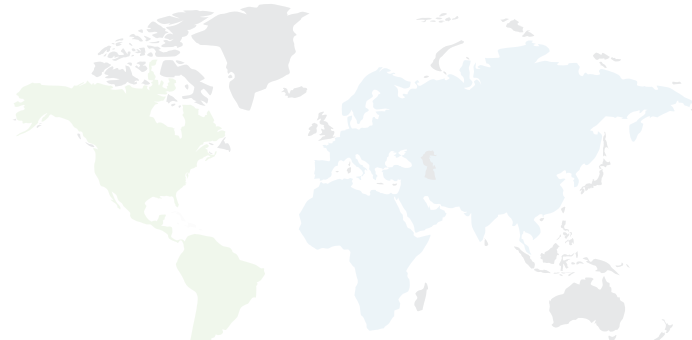
The Anti-corruption and Economic Crimes Act, and the Bribery Act, Laws of Kenya, define corruption as abuse of office, bribery, fraud, misappropriation of public funds, breach of trust, and any offense involving dishonesty. However, there are different perceptions of corruption as a vice by the general Kenyan public and this undermines the principle of collective effort in combating corruption. Many Kenyan ethnic communities still regard acts of bribery, fraud or dishonesty as heroism if the end result benefits the community.

For instance, a public officer capable of using their office powers to channel key government projects to their communities at the expense of others will always receive the greatest honor among their kinsmen for their daring corrupt deals. This "worshipping" of corruption at the

popular level dents effort to curb graft since popular moral rules have the power to shape societal behavior. Moreover, the pressure exerted on a public officer by their community's cultural norms and practices pushes public officers to engage in unethical deals to satisfy the expectations of the community because they are "one of their own".

In other cases, public servants with political interests often loot public resources and channel them to their communities to secure their current and future political ambitions. Common expressions, for instance, "Osa Vinya Mukamba" (don't be intimidated Mkamba) among the Kamba community and "shienyu ni shienyu" (ours is ours) from the Luhya nation have legitimized unethical conduct by public officers' and celebrated acts of corruption at community level





in the fight for community wellbeing. The failure of the definition of corruption to capture these popular realities by abnormarlisng cultural and popular norms often makes a mockery of the fight against graft in the country.

The African traditional culture is largely based on community sustenance, sharing and interconnectedness. The attitudes and practices have led to skewed appointments at County Public Service Boards and this has greatly been condemned by various public ethics and anti-corruption bodies. Nepotism and irregular appointments of fellow kinsmen is seen as 'community tax' rather than corruption. This is because individuals feel they have a moral obligation to contribute to support those of their cultural roots in the community. For instance, in Mandera, Garis-

sa, and Wajir Counties, resource sharing tends to favour the big clans as their numerical advantage helps to maintain a status of privilege. Entrenchment of these habits at both national and county governments waters down credibility in effective public service delivery.

Different Kenyan communities hold varied perceptions of what should be included or excluded in the definition of corruption. Among the Kikuyu, Luo, Kamba, and Luhya communities, for instance, gifts like livestock and agricultural products are seen as a sign of appreciation for a service rendered. They are interpreted as necessary facilitation to grease the wheels of public service delivery due to bottlenecks associated with public offices. Yet the law criminalizes these acts as corrupt dealings.



Photo credit: The Star





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## Countering conflict of interest

Conflict of interest by public officers exists in situations where an officers' actions or decisions made in their official capacity derives them personal benefits. Section 12 of Public Officer Ethics Act, 2003 (POEA) specifies the existence of conflict of interest in a situation where a public officer uses resources or information under his jurisdiction to achieve personal interests and goals. Reports by various oversight government agencies point out to an increasing trend in incidences of conflict of interest in public sector in Kenya despite the enactment and enforcement of several acts of parliament to address the issue.

Public sector jobs at both national and county governments have become most lucrative spaces, as they offer opportunity for personal benefits. Skewed appointments especially by the public service boards and flouting of procurement rules in awarding of public tenders so as to serve personal interests have become characteristic of public institutions. For instance, senior public officers at Kenya Medical Supplies

Authority (KEMSA) were suspended for flouting procurement rules in purchase of personal protective equipment (PPEs) valued at Kes 7.8 billion. Consequently, development partners including the International Monetary Fund (IMF) and Global Fund continue to exert pressure on Kenyan government to fast-track unravelling of the graft allegations at KEMSA. They have also demanded for strengthening of budgetary transparency and accountability in the use of public resources. Where there are weak deterrence mechanisms, public officers may end up using government facilities to do their private work at the expense of public interest.

The absence of a strong moral conviction to fight corruption is further amplified by a weak criminal justice system. The judicial process in Kenya continues to offer graft holiday to perpetrators of conflict of interest who embezzle public funds while in line of official duties. The multi-billion KEMSA scandal remains unresolved despite President Uhuru's executive order to EACC to expedite investigation into the scandal.





A number of County governors such as Okoth Obado (Migori), Moses Kasaine Lenolkulal (Samburu), and former County governors such as Mike Sonko (Nairobi), and Ferdinand Waititu (Kiambu) remain under protracted investigation within the judicial due process procedures, despite being arrested and charged with crimes of conflict of interest.

Similarly, the due process of the justice system has been unable to speedily resolve the ongoing cases of procurement of bogus electrical power transformers by the Kenya Power and Lighting Company; false medical claims paid by the National Hospital Insurance Fund and; the Arror and Kimwarer mega dam scandals paid for by the National Treasury. The situation is compounded by disproportionate cash bails and multiple court injunctions which undermine rapid and timely administration of justice to safeguard public interest and punish the criminals.

The ability of a public institution to detect and control conflicts of interest determines the extent to which its staff will use their position of influence for personal gain. Public officers with divided loyalties between private and public responsibilities lack adequate dedication to their public duties especially where deterrence measures are weak due to inability to reconcile private and public interests. The POEA legislation, however, does not provide clear guidelines on impartiality and integrity practices to be upheld by public officers to avert conflict of interest. Yet, explicit and wide-ranging codes of conduct are the foundation for sustaining high ethical standards in public sector, since they provide for disciplinary sanctions against corrupt public officers who violate the rules. Moreover, POEA fails to place emphasis on maintaining a register of conflicts of interest to enable evaluation of the levels of compliance by various commissions.



Photo credit: RehabMusik





The lack of stringent dissuasion measures emboldens public official's confidence in engaging in actions that typically breed conflict of interest. The implementation of conflict of interest deterrence measures remains crucial.

The Conflict of Interest Bill, 2019, which was touted to provide wider scope for the management and regulation of conflict of interest for public officials, continues to face implementation challenges. Whereas the bill focuses on conflict of interest, per se, it leaves out other aspects of ethics in public service such as the rule of law, integrity, and professionalism, yet they are at interplay in perpetuating the vice. More so, the enforcement and implementation of the bill is solely anchored on EACC while overlooking the role of the appointing authority for the public office involved and the role of multi-agency approach envisaged in the national anti-corruption policy. The bill fails to explicitly

specify who will oversee EACC on matters of conflict of interest.

Other international jurisdictions, for instance, have put in place disciplinary sanctions as means to enforce codes of conduct. Philippines and Pakistan have sanctions encompassing stern measures such as dismissal from office. Additionally, other countries have embraced various sanctions such as disqualifying state officials from appointment to key posts, salary increments and promotions as measures of implementing the codes of conduct. Some deterrence measures on conflict of interest regulations include conditioning public officers who are shareholders to transfer their shares into trust governance upon appointment. There are also restrictions on professional activities of former public officials for a certain period of time.



Photo Credit: VoA





## Loosening bureaucratic rigidity

The national anti-corruption policy expects institutional level coordination and collaboration to ensure effective implementation of the policy so as to attain success against corruption. However, the implementation of anti-corruption initiatives at institutional level is undermined by bureaucratic bottlenecks in mainstreaming national policy guidelines at local level in various institutions. Most public institutions lack ethics and integrity officers that can enforce integrity code. The role remains a delegated responsibility which is not given much attention. This is as a result of poor attitudes of institution's leadership towards prioritizing anti-corruption efforts within their strategic plans and allocating it adequate budget. Moreover, different institutions have

different structures and sizes and therefore not able to accommodate all structural proposals in a given anti-corruption policy guideline.

The various approaches such as executive direction to adhere to the strategy, creation of resource based incentives, and sectoral peer leadership adopted to enhance effective implementation are undermined by pursuit of institutional independence. This behavior tends to be self-centered. The rigidity of various institutions to cede their mandates to other institutions as proposed in the multi-agency framework may hamper co-ordination and collaboration among various law enforcement agencies in the fight against corruption.







## Anti-corruption policy implementation and evaluation

The fight against corruption continues to face implementation hurdles despite the establishment of the Multi-Agency Team (MAT) in November 2015. Activity report for 2019/20 shows that only four joint investigations have been carried by the MAT yet investigations and prosecution are interconnected activities. Feeble investigations normally lead to failure in prosecution. Although the ultimate goal of the framework was to enhance co-ordination and collaboration among various law enforcement agencies, institutional supremacy wars continue to undermine anti-corruption efforts. The hostility impedes collective duty to combat corruption by denting effective communication and coordination among themselves and also with the public. They instead blame each other for laxity in execution of their mandates. This largely accounts for the dismal efforts in prosecution of corruption crimes. Minimal collaborations among various anti-graft bodies to collectively understand the potential risks in corruption prevention undermines anti-corruption crusade.

Inadequate prioritization of monitoring and evaluation of anticorruption strategies in both public and private institutions normally leads to poor assessment of progress and impact. This is due to use of flawed indicators especially from institutions with weak data collection, processing and analysis capacities.

The anti-corruption enforcement agencies have been grimly undertaking institutional corruption risk assessment (CRA) according to the EACC report of activities in the financial year 2019/2020. The Report for 2019/20 shows that EACC released nine reports on CRAs from only five counties. This portrays laxity in identifying and profiling institutional corruption risk areas and implementing the recommendations on how to seal the identified corruption loopholes. It further weakens the ability to incessantly determine the effectiveness of the systems, policies, procedures and practices put in place to combat corruption. Such situation complicates implementation process since no one is accountable and no corrective measures can be taken.





## Lessening the burden of proof

The turnaround for prosecution of corruption offenders is greatly affected by the burden of proof under the Evidence Act, Laws of Kenya. The current criminal justice system as provided for in the Act demands fair and equitable treatment of the suspects. Article 50 (2) (a) of the Constitution of Kenya (2010) equally provides for a suspect to be presumed innocent until proved guilty. Yet, suppressing and preventing economic crimes require an instantaneous justice process that does not allow the individuals to enjoy their proceeds of crime and use it to their advantage as they attend court cases.

The pace at which the cases are determined helps to prevent criminals from using the proceeds to facilitate committing crimes in future or derailing the justice process through court injunctions. To ensure rapid and severe punishment for corruption offenders, the burden of proof should be of lower intensity as opposed to other criminal cases. This could involve employing a 'lesser standard of proof' other than proof beyond a reasonable doubt standard. In fact, this crime prevention model, should only

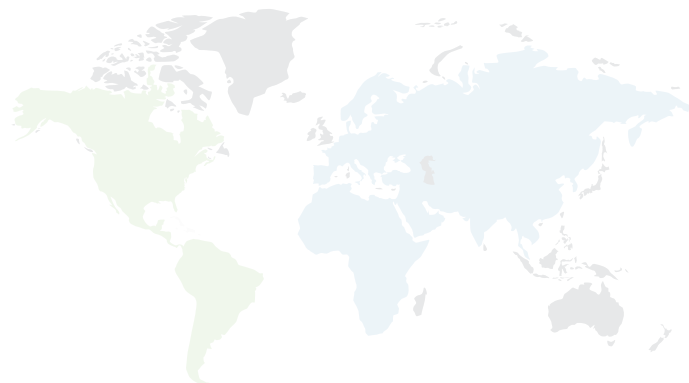
demand a preponderant degree of proof or a 'clear and convincing degree of proof that a corruption offence has been committed or conflict of interest has actually occurred. The alternative is to ease or reduce the burden of the prosecutor through legal procedures that involve some practice of reversal (easing) of burden of proof. Delays in court process creates loopholes for interference with cases and frustrates the readiness of potential witnesses to give evidence.

The adoption of the crime prevention model of criminal justice, therefore, remains effective in convicting and punishing offenders of economic crimes. The due process model, on the other hand, remains lethargic as it demands a laborious procedure in which the prosecutor has to prove beyond reasonable doubt that a suspect is guilty of the offences they are accused of, some of which are blatant. This delays the trials process for most corruption cases as some of the evidence may take too long to gather thereby extending cases beyond the society's expectations.



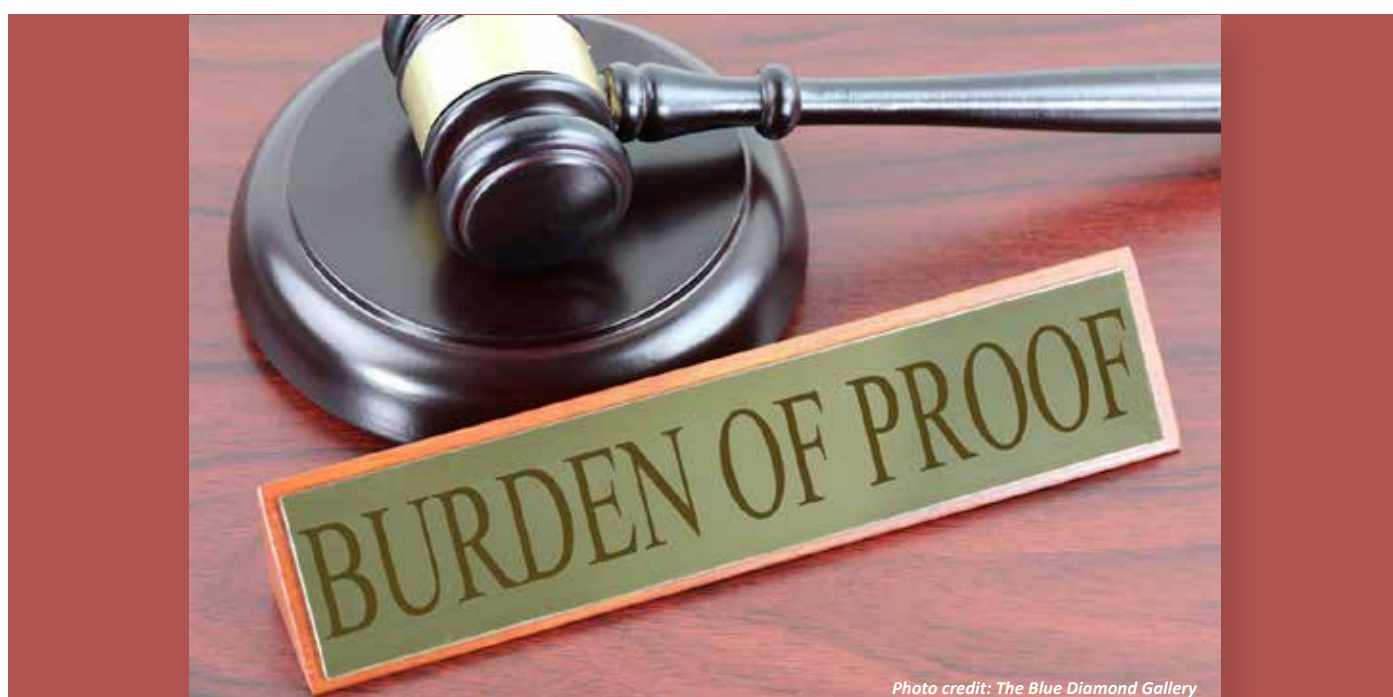
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## Conclusion

Kenya’s resolve and efficiency in curbing corruption is a function of her ability to deal with conflict of interest, institutional bureaucracy, definition of corruption, implementation of counter strategies, and the burden of proof. These factors underline the continued availability of opportunities to engage in corrupt activities and the inability of existing frameworks to detect and control acts of corruption. There is therefore an urgent need to strengthen anti-corruption efforts in order to forestall the continued economic degradation occasioned by widespread graft.



*Photo credit: The Blue Diamond Gallery*

## Recommendations

The following matrix offers various policy interventions for action.

Determinant	Immediate	Mid-term	Long-term
<b>Re-examining the definition of corruption</b>	EACC should intensify public awareness campaigns to sensitize the public on the popular and cultural norms that breed corruption in the public service.	The Parliament of Kenya should amend the definition of corruption under the Anti-corruption and Economic Crimes Act, 2016 to harmonize cross-cutting corruption activities premised on popular and varied cultural dynamics of the Kenyan society.	Review school’s curriculum materials to expand the existing definition and description of corruption to encompass popular and cultural practices that put pressure on public servants to pursue illicit enrichment for the sake of their communities.





Determinant	Immediate	Mid-term	Long-term
<p><b>Countering conflict of interest</b></p>	<p>The Parliament should;</p> <p>a) Amend the Public Officers Ethics act, 2003 to impose explicit sanctions for violating the conflict of interest code without relying on decisions on disciplinary action by the Commission.</p> <p>b) The appointing authorities of various public officers should intensify oversight roles on conflict of interest by public officers under their jurisdiction to tighten scrutiny and prohibit public officials from engaging in conflict of interest activities.</p>	<p>EACC should strengthen efforts in countering conflict of interest by public officers and appointing authorities through capacity building to encourage transparency rather than creating numerous restrictions or regulations on their activities.</p>	<p>Public and private institutions should re-engineer organizational culture change on upholding impartiality and integrity to enhance accountability of employees.</p>
<p><b>Loosening bureaucratic rigidity</b></p>	<p>a) EACC should intensify stakeholder collaboration and multi-agency efforts in assessing the extent to which various institutions are adopting the anti-corruption policy guidelines at local level.</p> <p>b) EACC should institute quarterly national multi-agency conferences on the State of Corruption in Kenya to strengthen anti-corruption efforts.</p>	<p>EACC should expand capacity building programs to enhance proficiency of various institutions in both public and private sector to mainstream anti-corruption policies at local level.</p>	<p>Establish anti-corruption departments in all public institutions to ensure compliance with the existing policies and implementation of counter-strategies.</p>





Determinant	Immediate	Mid-term	Long-term
<b>Anti-corruption policy implementation and evaluation</b>	The MAT should prioritize monitoring and evaluation of anticorruption strategies in both public and private institutions in order to enhance assessment of progress and impact of anti-corruption strategies.	The MAT should enhance co-ordination and collaboration among various law enforcement agencies to forestall institutional supremacy wars that continue to undermine anti-corruption efforts in Kenya.	Both public and private institutions should prioritize anti-corruption efforts within their strategic plans and giving it adequate budget allocation.
<b>Lessening the Burden of Proof</b>	The Parliament should amend the Evidence Act to lower the standard of proof in corruption cases from proof beyond reasonable doubt to convincing degree of proof. This will enhance prevention and the rate at which suspects are convicted and punished.	MAT should strengthen the relationship between the specialized anti-corruption courts and the specialized anticorruption agencies such as the National Police Service, EACC and Office of the Director of Public Prosecution to enhance the effectiveness of the criminal justice system.	Strengthen the capacity of the EACC, the ODPP and anti-corruption courts in investigation, prosecution and processing of corruption cases.

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