

Fixing the State's Teeth: A Radical Anti-Corruption Proposal for Kenya's Justice Sector

Written in 2022.

Author: Timothy Bryant, Advocate. Kenya has just finished its 2022 elections. The promise of change leads us to write the following.

The problem

Successive economic blueprints, from Vision 2030 onwards, have promised to carry Kenya into the ranks of upper-middle-income nations. Each has foundered on the same rock: corruption. It is now such a drain on the country's economic life that few serious investors will commit multi-million-dollar capital to Kenya unless the Government of Kenya ("GOK") is itself a partner in the project. That condition is anathema to investors schooled in the Chicago school and the free-market economics of Milton Friedman. The result is that Kenya has, unwittingly, drifted towards pariah status because of its inability to slay the corruption dragon. Transparency International's Corruption Perceptions Index for 2021 scored Kenya 30 out of 100, a figure that has barely moved in a decade.

Transparency International and other anti-corruption bodies have long maintained that unless the head of state is visibly and actively behind the drive, failure is all but guaranteed. Much ink has been spilt on thirty years of failure to move Kenya's corruption statistics. We propose a more radical solution, whose sine qua non is the participation of the Presidency.

The institutions that carry the constitutional mandate to protect citizens' lives and property, and to punish those who violate them, are (i) the Judiciary, (ii) the National Police Service and (iii) the Office of the Director of Public Prosecutions ("ODPP"). Without wishing to put lipstick on a pig, let us state it bluntly: all three have betrayed, and continue to betray, that constitutional trust in unimaginable ways. Bribed judicial officers, bribed police officers and bribed prosecutors. What a disaster. Anyone who denies this has not tried to obtain a service from these institutions lately.

It should be obvious why we target these three institutions. They are supposed to be the State's teeth in the wider fight against corruption. But if the teeth of a Simba are rotten, then surely, as we all know, the Simba will eventually starve.

What has worked elsewhere

Kenya does not need to invent the wheel. A handful of countries have broken entrenched corruption within a generation, and their experience points to a common set of ingredients.

- **Hong Kong.** In 1974, with its police force notoriously corrupt, Hong Kong created the Independent Commission Against Corruption (ICAC). Its success rested on three pillars pursued together: relentless investigation, corruption prevention (re-engineering the procedures that create opportunities for bribes), and community education. Crucially, the ICAC was given wide powers but was placed under several independent advisory and oversight committees, including one that reviews every investigation it opens or closes. Strong powers were matched by strong oversight, and the public came to trust it.

- **Singapore.** Singapore's Corrupt Practices Investigation Bureau (CPIB) reports directly to the Prime Minister's Office, giving it exactly the political cover from the top that this article argues for. That backing was combined with tough laws (including a presumption of corruption where a public officer receives an unexplained gratification), competitive public-sector pay, and a culture in which senior politicians and officials were prosecuted without fear or favour.
- **Georgia.** After the 2003 Rose Revolution, Georgia dismissed its entire traffic police force, widely regarded as the most corrupt institution in the country, and rebuilt a new patrol police from scratch: new recruits, better pay, new uniforms and vehicles, and transparent public-facing procedures. Within a few years, petty bribery of the police had become rare and public trust in the police rose dramatically. The lesson: in a thoroughly captured institution, cleaning house can work better than reforming it officer by officer.
- **Indonesia, Romania and Guatemala.** Indonesia's Corruption Eradication Commission (KPK), Romania's National Anticorruption Directorate (DNA) and Guatemala's UN-backed International Commission against Impunity (CICIG) each secured convictions of ministers, legislators, judges and senior officials that domestic institutions had never touched. Each also shows the danger: once the political class felt the heat, the KPK's powers were curtailed, the head of the DNA was removed, and the CICIG's mandate was not renewed. Any Kenyan initiative must be designed to survive the backlash.
- **Brazil.** Operation Car Wash (Lava Jato) used plea-bargained cooperation agreements and international asset tracing to expose massive graft. But Brazil's Supreme Court later annulled key convictions after finding that the trial judge had not been impartial. The lesson is sobering: shortcuts on due process ultimately hand the corrupt their freedom.

The common thread is clear. Political will from the very top is essential, but it must be channelled through institutions that are independent in their operations, ruthless in their investigations, scrupulous in their procedure and accountable to someone other than the people they investigate.

Our proposal: a Justice Sector Integrity Task Force

Our starting point is a task force of prosecutors, investigators, forensic accountants and digital-forensics specialists, with clearly delegated powers. Learning from the experience above, we would structure it as follows.

- **Legal footing.** The task force should be established on a firm legal basis, for example by the ODPP in collaboration with the Ethics and Anti-Corruption Commission (EACC) and the Directorate of Criminal Investigations, and gazetted. Article 157(10) of the Constitution provides that the DPP shall not be under the direction or control of any person or authority. The task force must therefore enjoy the President's full political backing and resources, but not take operational instructions from State House. That distinction is what protects its prosecutions from being struck down.
- **Oversight by a Triad.** Oversight should rest with a triad of State officers: the President, the DPP, and a designated liaison officer from the National Intelligence Service (NIS) seconded to the Office of the President (the "Triad"), with mandatory monthly meetings.

The Triad's role is to secure resources, remove obstacles and hold the task force to its targets, not to choose whom to prosecute. Borrowing from Hong Kong, an independent review panel of eminent persons should examine every case opened and closed, and the task force should report periodically to Parliament.

- **Vetting and secrecy.** All members should be vetted by the NIS, with the vetting officers themselves sworn to secrecy and facing immediate dismissal should their vetting prove to be the usual "Kenyan" stuff. Members should sign confidentiality undertakings under the National Intelligence Service Act, and the task force's operational base should be kept confidential for the safety of its members and witnesses.
- **Leadership and security.** The head of the task force should hold a rank equivalent to a Deputy Inspector-General of Police, and the NIS liaison officer should be of senior rank, ideally ex-military at the level of brigadier. Close protection and, where justified, armed support should be provided through the existing police framework rather than by arming civilian members.
- **Tools.** Every lawful tool for gathering forensic evidence should be made available: financial intelligence from the Financial Reporting Centre, telecommunications and banking data obtained by court order, lifestyle audits, and integrity testing (controlled "sting" operations, used by police internal-affairs units in New York and the United Kingdom) authorised and supervised by the courts.
- **A two-year mandate with hard targets.** The task force should have a two-year sunset. Its targets should be outlined plainly and enforced by the Triad. We would set the minimum ambition at bringing prosecutions against 20 judicial officers, 20 prosecutors and 40 senior police officers for corruption offences, together with the freezing and recovery of their illicit assets. Targets should measure cases investigated, charged and assets recovered, since convictions are for the courts alone, and a conviction quota would invite precisely the challenges that undid Lava Jato. If, after two years, the targets have not been met, the task force should be disbanded.

Further ideas to make it stick

A task force alone will not end corruption; it buys time and credibility. The following measures, drawn from international practice, would lock in the gains.

- **Fast-track the cases.** Strengthen the Anti-Corruption and Economic Crimes Division of the High Court and dedicated anti-corruption magistrates' courts with binding timelines for the hearing of cases, on the Ukrainian model. Justice delayed is the corrupt official's best friend.
- **Follow the money.** Make aggressive use of the non-conviction-based civil forfeiture and unexplained-assets provisions already in the Anti-Corruption and Economic Crimes Act and the Proceeds of Crime and Anti-Money Laundering Act, as the United Kingdom has sought to do with Unexplained Wealth Orders. Seizing the house and the car often deters more than a prison term.

- **Make wealth declarations public and verified.** Require judges, prosecutors and senior police officers to file electronic wealth declarations that are published and cross-checked against land, vehicle, company and bank records, as Ukraine has done.
- **Remove the cash and the discretion.** Expand e-filing and cashless payment of court fees, fines and bail; introduce body-worn cameras for traffic police; and digitise and randomise the allocation of files and cases. Every point at which an official holds discretion over a citizen in private is a point at which a bribe changes hands.
- **Protect and reward whistle-blowers.** Enact a standalone whistle-blower protection law with secure reporting channels and, as in the United States, financial rewards linked to recoveries. Most corruption cases begin with an insider.
- **Clean house where necessary.** Kenya has done this before: after the 2010 Constitution, judges and magistrates, and later police officers, were vetted for suitability. Those exercises should be revived with sharper teeth, and where a unit is beyond repair, Georgia shows it can be disbanded and rebuilt.
- **Pay properly and promote on merit.** Singapore's experience shows that decent pay, merit-based promotion and real consequences for misconduct reinforce one another. Low pay is no excuse for corruption, but it should not be an invitation to it either.
- **Use Kenya's international commitments.** Kenya was the first country to sign and ratify the UN Convention against Corruption. Its mutual legal assistance and asset-recovery provisions should be used systematically to trace and repatriate funds held abroad.

Why it is worth it

We believe that once news of the actual prosecution and imprisonment of 80 senior State officers reaches the public and the donor and investor community, the economic rewards for Kenya will exceed anything obtained through IMF lending, structural adjustment programmes and the other instruments that have kept Kenya dependent. Hong Kong and Singapore are today among the world's leading financial centres, and that is no coincidence.

Nor do we need to labour the point that the twin issues of "rotting teeth" and economic depression fall squarely within the concerns of a properly adjusted NIS. Corruption in the justice sector is a threat to national security. If the NIS does not share that view, we would recommend that a radical house-cleaning begin there without delay.

These are the general outlines of what the task force should entail. Bryant's Law Advocates LLP remains available to advise the GOK on the design and legal framework of such an initiative.